ASYMMETRIC FEES AWARDS IN CIVIL RIGHTS LITIGATION: A CRITICAL REEVALUATION

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Fee-shifting provisions are integral components of several major civil rights statutes in New Jersey and under federal civil rights laws as well, such as the Civil Rights Act of 1964. The possibility that a plaintiff who is at least partially successful in litigation will gain the power to compel its adversary to pay its counsel fees is often an important factor for all parties in gauging whether a settlement in lieu of a trial would be realistic. It may also play a significant role in determining when to initiate settlement negotiations and what kind of proposals to put forth.

Although courts did not allow costs under the common law, English courts have for centuries possessed statutory discretion to do so and have regularly allowed costs, including counsel fees, to a prevailing party.[2] In contrast, the dominant approach to fees in the United States, dubbed the American Rule, requires each litigant to bear its own attorneys' fees.[3] New Jersey's approach typifies that of many other American jurisdictions in disfavoring counsel fee awards unless authorized by statute, court rule, or contract.[4]

As the New Jersey Supreme Court has observed, however, the "American Rule is not a sacred creed" and "[f]ee-shifting statutes, court rules, and case law are now a commonplace part of our civil justice system's efforts to promote equity, deter wrongful conduct, and encourage lawyers to undertake cases that further the public interest."[5] Over the past several decades, state and federal statutes and court rules endowing trial courts with the discretionary authority or the duty to award fees have proliferated to a degree that threatens to eclipse the dominance of the American Rule. By 1985, Congress

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[2] Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975).

[3] *See id.*; Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 415 (1978); Perdue v. Kenny A., 559 U.S. 542, 550 (2010) ("[t]he general rule in our legal system is that each party must pay its own attorney's fees and expenses[.]") (citing Hensley v. Eckerhart, 461 U.S. 424, 429 (1983)); Van Horn v. City of Trenton, 80 N.J. 528, 538 (1979); Pressler & Verniero, *Current N.J. Court Rules*, cmt. 4.4.5 on R. 1:10-3 (2016) (noting that New Jersey still follows American rule).

[4] *See* Makwana v. Medco Health Servs., Inc., No. 14-7096, 2017 WL 3741002, at *7 (D.N.J. Aug. 29, 2017); Belfer v. Merling, 322 N.J. Super. 124, 141 (N.J. Super. Ct. App. Div. 1999).

[5] In re Estate of Folcher, 224 N.J. 496, 516 (2016) (Albin, J., dissenting).

had enacted over 100 federal fee-shifting statutes.[6] By 2008, the Congressional Research Service had identified over 330 federal statutes authorizing awards of attorneys' fees.[7] Under New Jersey law, over 201 provisions authorize or mandate an award of a reasonable counsel fee to the attorney for the prevailing party.[8] Sources of law for attorneys' fees encompass both court rules[9] and statutes.[10]

Underscoring the importance of a fee award is the fact that it need not bear a direct relationship to the fact finder's underlying award to the claimant on the merits and thus may constitute a major component of liability for the defendant in prolonged or complex litigation. Though the plaintiff's recovery of damages is one relevant factor in determining the reasonableness of a counsel fee award, the fee award need not necessarily be proportional to the recovery.[11] Under New Jersey and federal precedent, the initial step to determine the lodestar, or reasonable fee, is the most important: the number of hours reasonably expended on the litigation is multiplied by a reasonable hourly rate.[12] A court may adjust the lodestar to reflect the attorney's risk of nonpayment and the level of success in the litigation.[13] Yet even under state and federal civil rights

[6] Rendine v. Pantzer, 141 N.J. 292, 322 (1995) (citing Pa. v. Del. Valley Citizens' Council for Clean Air, 478 U.S. 546, 562 (1986)). *See also* Burlington v. Dague, 505 U.S. 557, 562 (1992) (discussing examples of federal fee-shifting laws).

[7] *See* HENRY COHEN, CONG. RSCH. SERV., R94-970, AWARDS OF ATTORNEYS' FEES BY FEDERAL COURTS AND FEDERAL AGENCIES 64-114 (2008).

[8] *See* N.J. Ct. R. 4:42-9(a)(1)-(7) (listing types of actions in which fees are allowable, including family actions, out of a fund in court, in probate actions, in actions for mortgage foreclosure or tax certificate, disputes over insurance liability, as otherwise provided by the New Jersey court rules and in all cases where attorneys' fees are permitted by statute). *See also* N.J. Ct. R. 2:11-4 (noting the New Jersey Appellate Division and New Jersey Supreme Court are authorized to award fees in all actions in which an award is permitted by N.J. Ct. R. 4:42-9(a), except appeals arising out of mortgage or tax certificate foreclosures; in workers' compensation proceedings; and in any action as a sanction for violating of the rules for prosecution of appeals).

[9] *See, e.g.*, McKeown-Brand v. Trump Castle Hotel & Casino, 132 N.J. 546, 554-555 (1993) (noting court rules permit fees for, *inter alia*, requiring a party to move to strike questions or to compel answers to interrogatories because of frivolous actions or dilatory conduct, failure to comply with order directing medical examination, abuses of discovery procedures, making bad faith factual allegations in a motion for summary judgment and in specific circumstances when a party refuses to settle).

[10] *Id*. at 557 (citing, *inter alia*, award of treble damages to compensate a victim of consumer fraud for economic loss and to prevent unconscionable commercial practices under N.J. STAT. ANN. § 56:8-19 (West 2014) and in action to enforce environmental regulations against state or local agency under N.J. STAT. ANN. § 2A:35A-10 (West 2020)).

[11] City of Riverside v. Rivera, 477 U.S. 561, 574 (1986) (upholding counsel fee award under 42 U.S.C. § 1988 to plaintiff of $245,456.25 for civil rights violation, a sum approximately seven times greater than the jury's award of $33,350 in compensatory and punitive damages). *See also* Rendine v. Pantzer, 141 N.J. 292, 336 (1995) (concurring with plurality opinion in *City of Riverside*).

[12] Rode v. Dellarciprete, 892 F.2d 1177, 1183 (3d Cir. 1990) (citing Hensley v. Eckerhart, 461 U.S. 424 (1983)); *Rendine*, 141 N.J. at 335.

[13] *Rendine*, 141 N.J. at 336-37. Federal courts utilize the same general principles as New Jersey courts to calculate a reasonable attorneys' fee for prevailing plaintiffs in statutory fee matters. *See* Failla v. City of Passaic, 146 F.3d 149, 160 n.15 (3d Cir. 1998); *Rode*, 892 F.2d at 1183.

statutes that authorize fee-shifting, awards to defendants remain the exception rather than the rule.

Assessing the asymmetry between adverse parties in civil rights litigation, in the context of fee applications through the largely overlooked perspective of the defendant's burden of proof, yields insights into the fairness and logic of fee awards. Part I provides a primer on the variations in the legal standards for evaluation of a defendant's application for counsel fees under several significant New Jersey civil rights statutes and their federal counterparts. Part II explores the rationales the courts have articulated for applying different standards to plaintiffs and defendants who seek to recoup their counsel fees and evaluates the extent to which these standards remain valid.

This article posits that the prevailing approach to attorneys' fees — under which awards for defendants are appropriate only in extraordinary or extreme circumstances — rests upon increasingly archaic assumptions concerning legal practice and the significance of fee awards in encouraging private citizens to seek vindication of civil rights violations in a judicial forum. The fee recovery is not as important as it arguably once was in inducing competent plaintiffs' counsels to undertake legal representation in civil rights disputes, which casts doubt on the principal public policy rationale for fee-shifting statutes themselves.[14] For example, plaintiffs are now better able to maintain complex or prolonged litigation as a result of changes in ethics rules that enable attorneys to undertake matters on credit or through litigation funding.[15] Additionally, technological advances in discovery and other essential legal processes increasingly allow firms with limited resources to operate more efficiently, thereby significantly neutralizing any resource advantages large defense firms may possess.[16] The prevailing judicial orientation toward fee-shifting also disregards the influence of powerful societal trends, which have heightened sensitivity to the existence and harm of discriminatory practices and provide a powerful independent incentive for counsel to undertake representation in civil rights matters.[17]

While the issue of whether a plaintiff should pay an adversary's fees — and if so, the amount of the award — is necessarily fact-sensitive, some modifications in the law of

[14] *See* Robert V. Percival & Geoffrey P. Miller, *The Role of Attorney Fee Shifting in Public Interest Litigation*, 47 L. & CONTEMP. PROBS. 233, 239 (1984).
[15] *See* Eliezer Helfgott & Scott Smith, *Recent Rulings and Regulations Equals Recognition: Progress in the Litigation Finance Industry*, THE SECURED LENDER (2017), https://www.blankrome.com/publications/recent-rulings-and-regulations-equals-recognition-progress-litigation-finance-industry.
[16] *See* Jeffrey Wolff, *4 Ways eDiscovery Technology Can Make Your Firm More Successful*, ZYLAB BLOG (Jun. 4, 2019, 9:00 AM), https://www.zylab.com/en/blog/successful-in-house-ediscovery-for-small-mid-size-law-firms.
[17] *See* Deborah J. La Fetra, *Fee Awards Turned Upside Down: A Threat to Public-Interest Litigation*, GOLDWATER INST. (Mar. 26, 2019), https://goldwaterinstitute.org/fee-awards-turned-upside-down/.

fee awards may be useful to help strike the proper balance between effectuating the legislative intent of encouraging litigants to have their day in court while simultaneously discouraging those who would abuse the judicial process by raising meritless claims. This article therefore proposes a standard to reduce some of the inconsistency, confusion and flaws in the framework widely used to evaluate applications for attorneys' fee awards.

I. THE STATUTORY LANDSCAPE

One of the most important civil rights statutes under New Jersey law is the Conscientious Employee Protection Act ("CEPA"), N.J.S.A. 34:19-1, *et seq.* CEPA provides significant statutory protection for whistleblowers in the workplace and is designed to "encourage employees to report illegal or unethical workplace activities and to discourage public and private sector employers from engaging in such conduct."[18] The statute accomplishes those objectives by providing "broad protections against employer retaliation for workers whose whistle-blowing actions benefit the health, safety and welfare of the public."[19]

For example, CEPA bars an employer from retaliating against an employee who "discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer" that the employee reasonably believes violates a law, rule or regulation.[20] The statute also protects an employee who merely objects to, or refuses to, participate in an employer's activity that the employee reasonably believes violates a law, rule or clear mandate of public policy concerning public health, safety or welfare or the protection of the environment.[21] A court must award a prevailing employee all appropriate relief, including the payment of reasonable attorneys' fees and costs of the action.[22]

CEPA permits a court to award reasonable fees and costs to a prevailing employer by way of motion only if it determines that the plaintiff instituted the action "without basis in law or in fact."[23] Therefore, in order to recover fees under CEPA, an employer must not only prevail in the underlying action, but must additionally show that the employee's claims were not founded in law or in fact.

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[18] Zappasodi v. State Dep't of Corr., 335 N.J. Super. 83, 89 (N.J. Super Ct. App. Div. 2000). *See also* Abbamont v. Piscataway Twp. Bd. of Educ., 138 N.J. 405, 417 (1994) (announcing that the purpose of CEPA is to protect employees from retaliation for unmasking corrupt, illegal, fraudulent or harmful activity by their employers).

[19] Spence-Parker v. Del. River & Bay Auth., 656 F. Supp. 2d 488, 503 (D.N.J. 2009) (quoting Feldman v. Hunterdon Radiological Assocs., 187 N.J. 228, 239 (2006)) (internal quotations omitted).

[20] N.J. STAT. ANN. § 34:19-3(a) (West 2016).

[21] N.J. STAT. ANN. § 34:19-3(c) (West 2016).

[22] N.J. STAT. ANN. § 34:19-5(e) (West 2015).

[23] N.J. STAT. ANN. § 34:19-6 (West 2013). *See* Buccinna v. Micheletti, 311 N.J. Super. 557, 562 (1998).

The Supreme Court of New Jersey interpreted N.J.S.A. 34:19-6 to permit trial courts to award fees to defendants only in a "narrow band" of cases."[24] As the Appellate Division subsequently clarified, "there is a broad spectrum in the quality of proofs that fall between a claim that is not 'viable' and one that is 'without basis in law or in fact.'"[25] An employee cannot be assessed attorneys' fees, however, if the employee, "after exercising reasonable and diligent efforts after filing a suit," determines that the employer would not be found liable and files a voluntary dismissal within a reasonable time.[26]

The operation of CEPA's counsel fee provision is well-illustrated in *Lombardi v. Morris County Sheriff's Department*. In that matter, the plaintiff withdrew his claim upon receiving the defendants' brief that raised the defense that the plaintiff did not state a claim upon which relief could be granted because the action was prohibited under the statute's one-year limitations period.[27] For that reason, the trial court denied the defendants' subsequent motion for attorneys' fees and costs. The court reasoned that the plaintiff substantively complied with CEPA's exoneration provision because it withdrew the claim shortly after it determined that the defendant could not be found liable for damages.[28]

A claim cannot supply the basis for counsel fees to a defendant merely because the plaintiff failed to satisfy all of the requisite proofs. Rather, to meet the standard, "there must be either no legal authority to support the claim or the absence of a factual basis for the claim."[29] For example, the District Court for the District of New Jersey rejected a defendant's motion for fees in an action brought under CEPA despite the fact that the jury did not find that the plaintiff had established a causal connection between the plaintiff's whistle-blowing activities and her termination.[30] However, the plaintiff established the remaining elements of her *prima facie* case, including that she reasonably believed that her employer's conduct was unlawful, she engaged in protected activity, and the employer took adverse action against her.[31]

[24] Best v. C&M Door, Inc., 200 N.J. 348, 358 (2009) (quoting N.J. STAT. ANN. § 34:19-6 (West 2020)).
[25] Noren v. Heartland Payment Sys., Inc., 448 N.J. Super. 486, 498 (N.J. Super. Ct. App. Div. 2017), *reconsideration denied*, 449 N.J. Super. 193 (N.J. Super. Ct. App. Div. 2017), *certif. granted*, 230 N.J. 499 (2017).
[26] N.J. STAT. ANN. § 34:19-6 (West 2013).
[27] Lombardi v. Morris Cnty. Sheriff's Dep't, No. 04-6418DRD, 2005 WL 1241970, at *5 n.1 (D.N.J. May 24, 2005).
[28] *Id.* (quoting N.J. STAT. ANN. § 34:19-6 (West 2013)).
[29] Marrin v. Cap. Health Sys., Inc., No. 14-2558(FLW)(LHG), 2017 WL 3086370, at *5 (D.N.J. July 20, 2017) (likening standard for award of employer's counsel fees under CEPA to standard for filing of frivolous pleading under R. 1:4-8); *cf.* Buccinna v. Micheletti, 311 N.J. Super. 557, 562 (1998) (noting that the standard under N.J. STAT. ANN. § 34:19-6 is similar to the standard embodied in New Jersey Frivolous Litigation Statute, N.J. STAT. ANN. § 15:59.1).
[30] Davitt v. Open MRI of Warren, No. 03-4861 (AET), 2007 WL 1041002, at *1 (D.N.J. Apr. 4, 2007).
[31] *Id.*

Despite the stringent standards applicable to a defendant under CEPA, a federal court found that an employer was entitled to fees where the plaintiff was unable to identify any legal basis underpinning her claim. In that instance the plaintiff, a lab technician, admitted in her deposition that she did not believe her employer violated a particular law or policy encompassed under CEPA but rather merely disagreed with the employer's procedures and assumed it must have violated a regulatory or legal provision.[32]

In the absence of another basis for fees, such as Federal Rule of Civil Procedure Rule 11 or New Jersey Court Rule 1:4-8, an award under CEPA applies only to the employee rather than the employee's counsel. The rationale for this conclusion is because under the plain language of the fee provision a trial court has discretion to award fees and costs to an employer "if the court determines that an action brought by an *employee* under [CEPA] was without basis in law or in fact."[33]

The New Jersey Law Against Discrimination (the "LAD") constitutes another important component in the state's statutory design to ensure civil rights protections. The "overarching goal" of the LAD reflects the state's strong public policy to eradicate societal discrimination, including discrimination in the terms and conditions of employment.[34] Like CEPA, the LAD attempts to "overcome the victimization of employees and to protect those who are especially vulnerable in the workplace from the improper or unlawful exercise of authority by employers."[35] The New Jersey Legislature chose to accomplish those goals by prohibiting employers from subjecting employees or job applicants to differential treatment based on their race, creed, color, national origin, nationality, ancestry, age, sex (including pregnancy), marital status, domestic partnership or civil union status, affectional or sexual orientation, gender identity or expression, atypical hereditary cellular or blood trait, genetic information, liability for military service, mental or physical disability, including AIDS and HIV related illnesses and handicaps.[36] The LAD also prohibits workplace harassment on the basis of sex, race, national origin or any other protected characteristic under the statute.[37]

An employer that prevails in a case brought under the LAD may in theory recover its

[32] *See Marrin*, 2017 WL 3086370, at *5.
[33] N.J. STAT. ANN. § 34:19-6 (West 2013) (emphasis added)(alterations in original). *See also* Robles v. U.S. Env't. Universal Servs., Inc., No. 09-2377 (SDW)(MCA), 2012 WL 1033040, at *3 (D.N.J. March 26, 2012) (granting defendant's motion for fees and costs in CEPA action where plaintiffs allegations of wrongful discharge were without basis in law or fact while declining to hold plaintiffs' counsel jointly and severally liable for the award; joint liability usually appropriate only when sanctions are imposed under Rule 11).
[34] Bergen Com. Bank v. Sisler, 157 N.J. 188, 199 (1999). *See* Garnes v. Passaic Cnty., 437 N.J. Super. 520, 564 (N.J. Super Ct. App. Div. 2014).
[35] Cedeno v. Montclair State Univ., 163 N.J. 473, 478 (2000) (internal quotations omitted).
[36] N.J. STAT. ANN. § 10:5-4.1 (West 2018); N.J. STAT. ANN. § 10:5-12 (West 2013).
[37] N.J. STAT. ANN. § 10:5-12 (West 2013).

legal fees, but to do so it must show that the plaintiff brought the action in bad faith.[38] Despite this ostensibly straightforward standard, courts that have had occasion to consider employers' fee applications under the LAD have struggled to define its contours. In *Veneziano v. Long Island Pipe Fabrication*, the Federal District Court for the District of New Jersey described the relevant standard as "not simply bad judgment or negligence," but rather conduct that "implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; it is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with furtive design or ill will."[39] The Appellate Division, in contrast, interpreted the statute as requiring a showing of "a reckless disregard or purposeful obliviousness of the known facts."[40] The court favored this standard as one that "more fully achieves the legislative objective of 'eliminat[ing] [sic] the possible chilling effect on civil rights plaintiffs, who may decide not to pursue a meritorious suit for fear of suffering a fee award, and the goal of deterring plaintiffs from filing frivolous claims.'"[41] Bad faith does not require a showing of purposeful wrongdoing on the part of the plaintiff in filing the claim, but a plaintiff's inability to put forth sufficient proof to reach trial does not lead inexorably to a finding of bad faith.[42]

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[38] N.J. STAT. ANN. § 10:5-27.1 (West 2015).

[39] Veneziano v. Long Island Pipe Fabrications, 238 F. Supp. 2d 683, 692 (D.N.J. 2002), *aff'd*, 79 Fed. Appx. 506 (3d Cir. 2003) (quoting BLACK'S LAW DICTIONARY (6th ed. 1990)). The court in *Veneziano* imposed fees against the plaintiff's attorney personally rather than the client under 28 U.S.C. §1927, which provides that "[a]ny attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." *Id.* at 693. This statute requires a showing of willful bad faith by the attorney through, *e.g.*, a showing that the attorney advanced meritless claims, the attorney knew or should have known that they were without merit and the motive for filing the suit was for an improper purpose, such as harassment. *Id.* at 694 (citing In re Prudential Ins. Co. America Sales Practice Litigation Agent Actions, 278 F.3d 175, 188 (3d Cir. 2002)). *See also* Baker Indus. v. Cerberus, Ltd., 764 F.2d 204, 208 (3d Cir. 1985) (explaining that bad faith is a precondition for fees and may be shown through counsel's intentional advancement of a baseless contention that is made for an ulterior purpose, such as harassment or delay). The court in *Veneziano* appears to have found significant that plaintiff, who suffered from a terminal illness, was unable to pay an award of fees and had relied throughout the litigation on the advice of counsel "whose advice turned out to be wanting." *Veneziano*, 238 F. Supp. 2d at 692. The Third Circuit declined to reach the merits of the trial court's decision on appeal because the plaintiff lacked standing to appeal sanctions imposed solely against its counsel. *Veneziano*, 79 Fed. Appx. at 511-12 (citing Bartels v. Sports Arena Emps. Local, 137, 838 F.2d 101, 104 (3d Cir. 1988)).

[40] Patterson v. Cannon, No. A-2152-08T1, 2010 WL 3419229, at *15 (N.J. Super. Ct. App. Div. Aug. 24, 2010) (quoting N.J. Title Ins. Co. v. Caputo, 398 N.J. 159, 166-67 (N.J. Super. Ct. App. Div. 2000), *certif. denied*, 195 N.J. 420 (2008)); Michael v. Robert Wood Johnson Univ. Hosp., 398 N.J. Super. 159, 165-166 (N.J. Super Ct. App. Div. 2008), *certif. denied*, 195 N.J. 420 (2008).

[41] *Michael*, 398 N.J. Super. at 166 (quoting *Veneziano*, 238 F. Supp. 2d at 689).

[42] Hennigan v. Merck & Co., No. L–1054–07, 2016 WL 5400479, at *8 (N.J. Super. Ct. App. Div. Sept. 28, 2016), *certif. denied*, 228 N.J. 449 (2016).

The Supreme Court of New Jersey has found that a plaintiff bringing suit under the LAD, who files and pursues a claim without any basis in law, does in fact meet the LAD's definition of "bad faith."[43] Therefore, a plaintiff who files a claim under the LAD without basis in law or fact may be subject to a fee award.

For example, in *Hennigan*, the Appellate Division affirmed the Law Division's decision, whereby fees were imposed on a plaintiff who brought suit under the LAD against his former employer for terminating him.[44] There, the plaintiff advanced a theory of reverse gender discrimination under the LAD and also alleged that the employer violated public policy.[45] Plaintiff was terminated after the employer conducted two investigations into allegations that plaintiff pursued a relationship with a co-worker after the co-worker requested that he leave her alone.[46] Significantly, plaintiff admitted that he had violated the terms of a warning memorandum and therefore the employer's workplace harassment policy.[47] On these uncontroverted facts, the Law Division granted the employer's motion for summary judgment on all of the claims, concluding that they were factually baseless and that the plaintiff commenced the action in bad faith.[48] Following entry of summary judgment, the employer moved to recoup its counsel fees and costs under the LAD's fee-shifting provision[49] and the New Jersey Frivolous Litigation Statute, N.J.S.A. 2A:15-59.1. The Court granted the motion solely as to the LAD claim based on the fact that plaintiff admitted he was aware that he would face discipline if he continued to contact his coworker and that he raised the claim with a "reckless disregard or purposeful obliviousness of the known facts."[50]

In affirming the trial court's award of reasonable attorneys' fees to the employer, the Appellate Division in its opinion in *Hennigan* found no abuse of the trial court's discretion.[51] In so holding, the court found that the trial court correctly concluded that plaintiff raised no facts to support his claim of reverse gender discrimination and that plaintiff's termination was due solely to his refusal to abide by the request of his co-worker to stay away from her, a fact he himself had acknowledged.[52] The trial court was also influenced by the plaintiff's pallid response to the employer's dispositive motion. It noted in that regard that the plaintiff's brief in opposition to the summary

[43] Best v. C&M Door, Inc., 200 N.J. 348, 358 n.3 (2009). The court's holding left open the possibility that other scenarios might also satisfy the standard of bad faith, but it provided few hints of what those circumstances might be. *See id.*
[44] *Hennigan*, 2016 WL 5400479, at *1.
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id.* at *8 (citing N.J. STAT. ANN. § 10:5-27.1 (West 2013)).
[50] *Id.*
[51] *Id.* at *9.
[52] *Id.*

judgment motion included "merely a single page in support of his LAD claim, consisting of a run-on sentence, devoid of any citations to the record evidence, and unencumbered by case citation establishing any of such an LAD claim."[53]

An action is not necessarily brought in bad faith under N.J.S.A. 10:5-27.1, however, even when it is frivolous or ultimately proves groundless.[54] For example, in *Mandel v. UBS/PaineWebber, Inc.*, the Appellate Division upheld the trial court's denial of fees in an action where brokers sued a brokerage firm's managers for constructive discharge, disparate treatment, and hostile work environment.[55] Although the plaintiff relied only on office gossip for the claims of sexual harassment, the reviewing court found that the trial court properly concluded that the lack of sufficient evidence did not equate to a finding of bad faith.[56] Moreover, unlike an award of fees under New Jersey's Frivolous Litigation Statute, an award of fees under N.J.S.A. 10:5-27.1 is not dependent on whether the plaintiff commences or continues the action solely for the purpose of harassment, delay or malicious injury.[57]

In interpreting the LAD's fee-shifting provision in *Failla v. City of Passaic*, the Third Circuit noted that the losing party's ability to pay is irrelevant.[58] The plaintiff in *Failla* was a police captain who alleged that a municipality and its police department violated the LAD when they transferred him to a night shift, thereby aggravating his preexisting back injury.[59] Plaintiff's theory was that day-shift work would have constituted a reasonable accommodation to address his medical needs and that his employers failed to provide it.[60] The jury found that the plaintiff was handicapped within the meaning of the LAD and that the defendants were liable for failing to provide a reasonable accommodation for his medical condition.[61] The trial court denied the defendants' motion for judgment as a matter of law and their alternative motion for a new trial, and awarded the plaintiff compensatory damages and attorneys' fees. [62]

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[53] *Id.* at *8 (internal quotations omitted).
[54] *See, e.g.*, Brown v. Fairleigh Dickinson Univ., 560 F. Supp. 391, 406 (D.N.J. 1983) (declining to award defendant counsel fees where court concluded that plaintiff's LAD claim was frivolous but not raised in bad faith); Patterson v. Cannon, No. L–1054–07, 2010 WL 3419229, at *15 (N.J. Super Ct. App. Div. Aug. 24, 2019) (reversing trial court's award of fees to defendant under LAD and remanding for further determination of whether claim was filed in bad faith).
[55] Mandel v. UBS/PaineWebber, Inc., 373 N.J. Super 55, 83-84 (N.J. Super. Ct. App. Div. 2004).
[56] *Id.*
[57] *See Patterson*, 2010 WL 3419229, at *15.
[58] *See* Failla v. City of Passaic, 146 F.3d 149, 160-61 (3d Cir. 1998).
[59] *Id.* at 152.
[60] *Id.*
[61] *Id.*
[62] *Id.* at 160. In view of the LAD's broad remedial purpose, it is unclear whether the Third Circuit would have considered the financial situation of the plaintiff irrelevant if the employer rather than the employee had sought fees under the LAD's fee-shifting provision.

On appeal, the Third Circuit rejected appellant's argument that the trial court improperly regarded them merely as a "deep pocket" and affirmed the trial court's award of fees, observing that the text of N.J. § 10:5-27.1 providing for attorneys' fees to a prevailing party does not include any reference to the losing party's ability to pay and that the appellants offered no legal authority for their position.[63] Accordingly, it concluded that the trial court had not committed an abuse of its discretion in awarding fees to the plaintiff because the mere fact that the appellant was a public entity did not relieve it of its obligation to pay fees when it was found liable for unlawful discrimination.[64]

In considering the propriety of a request for fees from a defendant rather than a plaintiff in a LAD case, *Michael v. Robert Wood Johnson Univ. Hosp.*, the Appellate Division ostensibly parted with the Third Circuit's holding and reasoning in *Failla*, concluding that, even where the court determines a fee award to the defendant is appropriate, the plaintiff's ability to pay is a proper component in calculating a reasonable sum.[65] In *Michael*, the plaintiff sued her employer and one of her managers, alleging, in part, age discrimination and a hostile work environment under the LAD.[66] The trial court awarded the defendant counsel fees on several occasions due to the plaintiff's failure to comply with her discovery obligations.[67] The trial court later granted summary judgment to the employer on all claims, and the Appellate Division affirmed.[68] Following the affirmance, the employer moved successfully before the trial court to recoup its counsel fees on the basis of three factors: (i) the plaintiff brought her LAD action in bad faith, (ii) she failed to establish her *prima facie* case, resulting in dismissal of the claim prior to trial and (iii) the defendants provided her the relief she sought before she commenced the litigation.[69]

The Appellate Division reversed the trial court's award of fees, finding that the trial court's failure to consider the plaintiff's financial circumstances in evaluating a fee application conflicted with state public policy since it "could … deter[] a fearful plaintiff from presenting a valid claim."[70] It reasoned that, although the LAD entitles a prevailing party to its reasonable fees, it does not require a defendant to be made whole for the expenses incurred in retaining counsel.[71] The court expressly distinguished *Failla* on its

[63] *Id.* at 161.
[64] *Id.* (citing Robb v. Ridgewood Bd. of Educ., 635 A.2d 586 (N.J. Ch. 1993)) (upholding an award of fees against a local school board).
[65] Michael v. Robert Wood Johnson Univ. Hosp., 398 N.J. Super. 159, 167 (N.J. Super. Ct. App. Div. 2008).
[66] *Id.* at 161-62.
[67] *Id.*
[68] *Id.* at 162.
[69] *Id.* at 164.
[70] Id. at 167.
[71] *Id.* ("In our judgment, the ability of a party to pay an award of counsel fees is inherent in the concept of analyzing what is a reasonable fee." (citing Brown v. Fairleigh Dickinson Univ., 560 F. Supp. 391, 414 (D.N.J. 1983)).

facts, observing that the plaintiff there sought counsel fees against a public entity.[72] Moreover, it found that the trial court improperly applied the *Veneziano* standard of bad faith appropriate for evaluation of fee applications under the New Jersey Frivolous Litigation Act, N.J.S.A. 2A:15-59.1.[73] Thus, the court remanded for a determination of whether the plaintiff had brought the action in bad faith under the standard enunciated in *Caputo*, which requires a finding that the plaintiff acted with reckless disregard or purposeful obliviousness of the known facts.[74] This standard, the appellate court concluded, struck the proper balance between "eliminat[ing] the possible chilling effect on civil rights plaintiffs . . . and the goal of deterring frivolous filings."[75] It also directed the trial court on remand to explore the extent to which the plaintiff persisted in the suit based on her own beliefs or desires or whether she relied, fully or partially, on her counsel.[76]

Another state civil rights statute expressly modeled on § 1983, the New Jersey Civil Rights Act ("NJCRA"), also permits a court to award a prevailing party its reasonable fees and costs.[77] The NJCRA was designed to provide a remedy for the violation of substantive rights found in the New Jersey Constitution and state laws.[78] While a defendant may theoretically seek fees under N.J.S.A.10:6-2(f), the paucity of case law on this issue renders a fee request problematic and would, at a minimum, require a defendant to establish that it incurred fees in the course of disposing of frivolous claims.[79] Since New Jersey courts have frequently looked to § 1983 jurisprudence in resolving ambiguities under the NJCRA,[80] it is likely that a New Jersey state court would look to the federal standard in evaluating a defendant's fee application.

Ranking in importance with CEPA and the LAD in the legislative landscape is the New Jersey Tort Claims Act (the "TCA"), enacted in 1972 as the Legislature's response to court opinions that weakened the traditional presumption of sovereign immunity.[81] The TCA is not intended to vindicate the civil rights of New Jersey citizens. Rather, the TCA is a comprehensive statute that "seeks to provide compensation to tort victims without

[72] *Id.*
[73] *See id.* at 165-66.
[74] *See id.* at 166-67.
[75] *Id.* at 166 (citing Veneziano v. Long Island Pipe Fabrication & Supply Corp., 238 F. Supp. 2d 683, 689 (D.N.J. 2002)) (internal quotations omitted).
[76] *Id*. at 167-68.
[77] N.J. STAT. ANN. § 10:6-2(f).
[78] Tumpson v. Farina, 218 N.J. 450, 474 (2014).
[79] *See* Cole v. Town of Morristown, No. 2:10-cv-4706 (WJM), 2014 WL 3778838, at *4 (D.N.J. July 31, 2014), *aff'd* 627 Fed. Appx. 102 (3d Cir. 2015).
[80] *See, e.g.*, Endl v. N.J., 5 F. Supp. 3d 689, 697 (D.N.J. 2014).
[81] Luchejko v. City of Hoboken, 414 N.J. Super. 302, 315 (N.J. Super. Ct. App. Div. 2010), *aff'd*, 207 N.J. 191 (2011) (citing Manna v. State, 129 N.J 341, 346 (1992)). *See also* Beauchamp v. Amedio, 164 N.J. 111, 115 (2000) (stating that the overall purpose of the Act was to reestablish doctrine of immunity of public entities while coherently ameliorating its harsh results).

unduly interfering with governmental functions and without imposing an excessive burden on taxpayers."[82] Except under specific circumstances, a public entity is not liable for an injury under the TCA, whether the "injury arises out of an act or omission of the public entity or a public employee or any other person."[83] Nonetheless, because the TCA describes the circumstances under which public entities or their employees may be liable in tort, and cases brought under the TCA typically involve issues pertaining to the actions of public employees, it is commonly invoked in conjunction with civil rights claims.

Unlike CEPA or the LAD, the TCA makes no express provision for fees for a public sector defendant. Rather, the TCA endows a court with discretion to award reasonable attorneys' fees, costs ordinarily allowable in the private sector and expert witness fees not exceeding $100 to a "successful claimant" in an action brought against a public entity or public employee.[84] The purpose of this fee provision is to reimburse a plaintiff fully for the economic loss arising out of the tortious conduct of a public employer.[85] However, the plain language of N.J.S.A. 59:9-5 appears to preclude a public employer from seeking fees in defense of tortious claims under the TCA.[86]

In addition to the comprehensive statutory schemes set forth in CEPA and the LAD, a defendant may seek its reasonable fees under the New Jersey Frivolous Litigation Statute,[87] which potentially apply in state court litigation of any type. The New Jersey Frivolous Litigation Statute authorizes a fee award and costs to a prevailing defendant if the court finds that "a complaint, counterclaim, cross-claim or defense of the non-prevailing person was frivolous."[88] In order to determine whether the non-prevailing party's filings were frivolous, the court must determine whether the party raised them in bad faith, *i.e.*, "solely for the purpose of harassment, delay or malicious injury[.]"[89] Fees are also appropriate where the non-prevailing party "knew or should have known, that the complaint, counterclaim, cross-claim or defense was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law."[90] A claim is "frivolous" or "groundless" in the context of the Frivolous Litigation Statute where "no rational argument can be advanced in its support, when it is not supported by any credible evidence, when a reasonable

[82] Greenway Dev. Co., Inc. v. Borough of Paramus, 163 N.J. 546, 552 (2000).
[83] N.J. STAT. ANN. § 59:2-1(a) (West 2015).
[84] N.J. STAT. ANN. § 59:9-5 (West 2013).
[85] *See* Yakal-Kremski v. Denville Twp. Bd. of Educ., 329 N.J. Super. 567, 575 (N.J. Super. Ct. App. Div. 2000).
[86] N.J. STAT. ANN. § 59:9-5 (West 2013).
[87] N.J. STAT. ANN. § 2A:15-59.1 (West 2013).
[88] N.J. STAT. ANN. § 2A:15-59.1a (West 2013).
[89] N.J. STAT. ANN. § 2A:15-59.1(b)(1) (West 2013). *See* McKeown-Brand v. Trump Castle Hotel & Casino, 132 N.J. 546, 561 (1993).
[90] N.J. STAT. ANN. § 2A:15-59.1(b)(2) (West 2013).

person could not have expected its success, or when it is completely untenable."[91] The party seeking fees under the authority of this statute bears the burden of proof to show that the non-prevailing party acted in bad faith.[92] The statute is generally understood to incorporate due process protections to the non-prevailing party by requiring adequate notice of the fee application and an opportunity for the court to conduct a hearing before fees may be imposed under it.[93]

As under Title VII, dismissal of the action does not constitute *per se* evidence that a plaintiff pursued the claim in bad faith under the Frivolous Litigation Statute.[94] Moreover, courts strictly interpret the statute and award sanctions only in exceptional circumstances.[95]

Since fees are not appropriate for ill-founded, misguided, or unsubstantiated claims, defendants ordinarily cannot look to the Frivolous Litigation Statute for relief.[96] Nonetheless, total fabrication of an affirmative claim is one circumstance in which an award of fees to the defendant is appropriate. For example, in *Weed v. Casie Enterprise*, the plaintiff sued to recover damages for an environmental remediation resulting from a gas spill allegedly caused by the defendant's negligent removal of a gas storage tank from the plaintiff's property.[97] The court instructed the jury on the basis of contradictory testimony at trial, specifically, that one of the parties was lying.[98] After the defendant obtained a verdict in its favor, the trial court granted its motion for fees and costs under CEPA's fee-shifting provision based on the record, which was "replete and overwhelming" that the plaintiff fabricated his story and acted with malicious intent to injure the defendant by trying to impose the cost of environmental remediation upon it when plaintiff knew the defendant was not responsible for any contamination.[99] In

[91] Belfer v. Merling, 322 N.J. Super. 124, 144 (N.J. Super. Ct. App. Div. 1999) (citing Fagas v. Scott, 251 N.J. Super. 169, 189 (Law Div. 1991)).
[92] *See* N.J. STAT. ANN. § 2A:15-59.1(c) (West 2013).
[93] *See McKeown-Brand*, 132 N.J. at 559 (citing *Fagas*, 251 N.J. Super. at 221).
[94] Hyman v. Melnichenko, No. A-3431-15T2, 2017 WL 2854442, at *4 (N.J. Super. Ct. App. Div. July 5, 2017) (citing Ferolito v. Park Hill Ass'n, Inc., 408 N.J. Super. 401, 408 (N.J. Super. Ct. App. Div. 2009), *certif. denied*, 200 N.J. 502 (2009)).
[95] *Id*. (citing DeBrango v. Summit Bancorp, 328 N.J. Super. 219, 226 (N.J. Super. Ct. App. Div. 2000).
[96] *See, e.g.*, *Belfer*, 322 N.J. Super. at 144-45 (stating that false allegations of fact will not justify fee award unless made in bad faith, for purpose of harassment, delay or malicious injury; in addition, when plaintiff's conduct "bespeaks an honest attempt to press a perceived, though ill-founded and perhaps misguided, claim, he or she should not be found to have acted in bad faith.") (citing *McKeown-Brand*, 132 N.J. at 563); Mandel v. UBS/PaineWebber, Inc., 373 N.J. Super 55, 83-84 (N.J. Super. Ct. App. Div. 2004).
[97] Weed v. Casie Enter., 279 N.J. Super. 517, 521 (N.J. Super. Ct. App. Div. 1994).
[98] *Id*. at 527.
[99] *See id.* at 531-34. However, even false allegations of fact cannot support a fee award, unless the defendant can satisfy the court that plaintiff asserted them in bad faith and for the purpose of harassment, delay or malicious injury. DiMaggio v. Novartis Pharms. Corp., No. L–2301–05, 2010 WL 4621881, at *4 (N.J. Super. Ct. App. Div. Nov. 15, 2010) (reversing and remanding denial of defendant's motion for fees in CEPA action where trial court did not consider or failed to state its findings with regard to whether

affirming that decision, the trial court evaluated the motion under N.J.S.A. 15-59.1b and found substantial credible evidence in the record to support it.

The different analyses that characterize major civil rights statutes under New Jersey law find their parallels in their federal counterparts. Like the LAD and CEPA, federal statutes such as Title VII, § 1983, and the Americans with Disability Act as Amended ("ADAA") endow district courts with discretionary authority to award fees to defendants as prevailing parties.[100] In practice, however, federal courts disfavor awards of counsel fees to defendants on the view that such awards tend to run counter to the goal of effective enforcement of the civil rights laws.[101] Defendants "need no encouragement to defend actions against themselves," and awarding fees to a defendant does not, in the view of those courts, advance any recognized policy goal.[102] In addition, awarding defense fees purportedly subverts the goal of effective enforcement of federal civil rights law by creating a climate that would prevent "all but the strongest cases from being brought" and "inhibiting earnest advocacy on undecided issues."[103]

In view of these policy concerns, the courts apply different standards to a prevailing plaintiff and a prevailing defendant in federal civil rights litigation. While a plaintiff ordinarily recovers fees unless special circumstances would render the award unjust, the threshold for a fee award to a defendant is significantly higher. Under *Christiansburg Garment Co.*, fees to a prevailing defendant under §706(k) of Title VII[104] (and by extension §1983 and the ADAA) are appropriate only where the court in its discretion finds that the plaintiff's suit was frivolous, unreasonable or without foundation, even if not brought in subjective bad faith, or that the plaintiff persisted with the litigation even after its frivolous nature became apparent.[105] This standard requires more than a factual

plaintiff's suit was based on false allegations of fact and was maintained in bad faith).

[100] 42 U.S.C. § 2000e-5(k); 42 U.S.C. § 1988(b); 42 U.S.C. § 12205; 42 U.S.C. § 12117; *see also* Hughes v. Rowe, 449 U.S. 5, 14-15 (1980) (articulating standard for awarding counsel fees against plaintiffs in actions under § 1988).

[101] *See, e.g.*, Loomis-Price v. Lone Star Coll. Sys., No. H-17-766, 2017 WL 6886690, at *1-2 (S.D. Tex. Dec. 26, 2017), *recommendation adopted*, 2018 WL 357329 (S.D. Tex. Jan. 10, 2018) (denying fees to defendant where plaintiff amended complaint by withdrawing time-barred state discrimination claim in response to motion to dismiss; while plaintiff could have been more diligent in determining that limitations period had run before including claim in lawsuit, defendant did not raise defense in pre-motion conference with opposing counsel prior to filing its motion.)

[102] Tuthill v. Consol. Rail Corp., No. A. 96–6868, 1998 WL 321245, at *3 (E.D. Pa. June 18, 1998) (quoting Equal Emp. Opportunity v. L.B. Foster Co., 123 F.3d 746, 750 (3d Cir. 1997), *cert. denied*, 522 U.S. 1147 (1998)).

[103] Kutska v. Cal. State Coll., 564 F.2d 108, 110 (3d Cir. 1977).

[104] 42 U.S.C. § 2000e-5(k).

[105] *See* Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978); Veneziano v. Long Island Pipe Fabrications, 238 F. Supp. 2d 683, 690 (D.N.J. 2002); Hyman v. Melnichenko, No. A-3431-15&2, 2017 WL 2854442, at * 4 (N.J. Super. Ct. App. Div. July 5, 2017); *see also* Rezem Family Assocs., LP v. Borough of Millstone, 423 N.J. Super. 103, 123 (N.J. Super. Ct. App. Div. 2011), *certif. denied*, 208 N.J. 366 (2011) (applying the *Christiansburg* standard and affirming denial of fees to municipal defendants

examination of the allegations and the evidence presented in their support, but also an evaluation of the allegations and proof in the light of the controlling principles of substantive law.[106]

The standard for defendants' awards under the Age Discrimination in Employment Act (ADEA) differs from §706(k) and other federal civil rights laws because the ADEA incorporates the fee provisions of the Fair Labor Standards Act (FLSA).[107] While the FLSA does not expressly permit an award to a defendant, every circuit that has considered the issue has authorized fee awards under the FLSA to defendants under the "bad faith" common law exception to the American rule.[108] This exception emanates from the court's "inherent authority to award fees when a party litigates 'in bad faith, vexatiously, wantonly, or for oppressive purposes'" and requires a showing that the attorney was "guilty of misconduct, by instituting or . . . maintaining an action, motivated by subjective bad faith."[109] Implicit in the context of bad faith is "some indication of an intentional advancement of a baseless contention that is made for an ulterior purpose, i.e., harassment or delay."[110]

In contrast, a meritless suit as intended in *Christiansburg* means "groundless or without foundation, rather than simply that the plaintiff has ultimately lost his case," and to label an action 'vexatious' "in no way implies that the plaintiff's subjective bad faith is a necessary prerequisite to a fee award against him."[111] "Frivolous" means "[l]acking a

because some of plaintiff's counts were stronger than others and where trial court determined dismissal was appropriate only upon careful review of controlling law).

[106] *See* Nardoni v. City of New York, No. 17 Civ. 2695, 2019 WL 542349, at *8 (S.D.N.Y. Feb. 12, 2019), *recommendation adopted*, 2019 WL 952333 (S.D.N.Y. Feb. 27, 2019) (quoting LeBlanc-Sternberg v. Fletcher, 143 F.3d 765, 770 (2d Cir. 1998)).

[107] 29 U.S.C. § 626(b) (cross-referencing 29 U.S.C. § 216(b)).

[108] Blasi v. Pen Argyl Area Sch. Dist., No. 12-2810, 2014 WL 4662477, at *5 (E.D. Pa. Sept. 19, 2014) (citing Cesaro v. Thompson Pub. Grp., 20 F. Supp. 2d 725, 726 (D.N.J. 1998) (citing precedent from First, Fourth, Sixth, Eighth and Eleventh Circuits). In *Cesaro*, the court observed that unlike Title VII, the ADEA contains no provision permitting the prevailing party to recover attorneys' fees, while the FLSA provides only that a reasonable attorneys' fee must be paid by a defendant to a successful plaintiff. In the absence of an express provision in the ADEA or the FLSA allowing a court to award fees to a prevailing party, the court may rely upon its inherent authority to assess fees against a party for acting in bad faith. *Cesaro*, 20 F. Supp. 2d at 727 (citing 29 US.C. §626(b) and 29 U.S.C. §216(b) and quoting in part Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 258-59 (1975)).

[109] Jones v. Smith-McKenney Co., Inc., No. 3:05-CV-62-JMH, 2006 WL 1206368, at *3 (E.D. Ky. April 28, 2006) (quoting Big Yank Corp. v. Liberty Mut. Fire Ins. Co., 125 F.3d 308, 313 (6th Cir. 1997) and Smith v. Detroit Fed'n of Teachers Local 231, 829 F.2d 1370, 1375 (6th Cir. 1987)).

[110] E.E.O.C. v. BE&K Eng'g Co., 562 F. Supp. 2d 641, 646 (D. Del. 2008) (quoting Ford v. Temple Hosp., 790 F.2d 342, 347 (3d Cir. 1986)).

[111] Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978).

legal basis or legal merit; not serious; nor reasonably purposeful."[112] "Unreasonable" means "[n]ot guided by reason; irrational or capricious."[113]

The U.S. Supreme Court directed the lower courts to "resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation."[114] In determining whether the action is frivolous, courts must consider as "guiding factors" "(1) whether the plaintiff established a *prima facie* case; (2) whether the defendant offered to settle; and (3) whether the court dismissed the claim before trial."[115] In addition, a plaintiff's claim may meet the requisite standard if the claim is barred by state sovereign immunity or if the claim is moot. In *Fox v. Vice*, the U.S. Supreme Court determined that where a plaintiff brings claims that are frivolous and others that are not, the defendant is entitled to recover only those fees incurred by the frivolous claims.[116]

Evidence of bad faith bolsters a defendant's argument for an award of counsel fees, although the focus of the test is whether the underlying claim is meritless.[117] Bad faith consists of either "an ulterior motive, or misconduct such as knowingly using perjured testimony, citing as binding authority overruled or non-binding cases, or otherwise misrepresenting facts or law to the court."[118] These considerations are not conclusive, however, and each case must be considered on its own facts in the exercise of the trial court's discretion. The court may also consider other facts including the public interest

[112] Advocs. for Individuals with Disabilities, LLC v. MidFirst Bank, No. CV-16-01969-PHX-NWV, 2018 WL 3545291, at *4 (D. Ariz. July 24, 2018) (internal quotations omitted).
[113] *Id*.
[114] *Christiansburg*, 434 U.S. at 421-22. For an application of this principle, see Kohler v. Bed Bath & Beyond of Cal., LLC, 780 F.3d 1260, 1267 (9th Cir. 2015) (reversing award of attorneys' fees to defendant where trial court dismissed eight of plaintiff's 10 claims under ADAA and related theories of liability).
[115] Blasi v. Pen Argyl Area Sch. Dist., No. 12-2810, 2014 WL 4662477, at *3 (E.D. Pa. Sept. 19, 2014); Rezem Family Assocs., LP v. Borough of Millstone, 423 N.J. Super. 103, 123 (citing *L.B. Foster Co.*, 123 F.3d at 751).
[116] Fox v. Vice, 563 U.S. 826, 837-38 (2011). For example, the District Court for the Southern District of Mississippi denied defendants' motion for fees in defense of claims of sexual harassment and discrimination under Title VII and Mississippi law. In *Canaski*, the court determined that there was some doubt as to whether the plaintiffs had actually pled claims under Title VII against the movants. Canaski v. Mid Miss. Properties, Inc., No. 1:15CV344-HSO-JCG, 2017 WL 4531690, *8 (S.D. Miss. May 17, 2017). Even if they had, the court was unable to determine what discrete expenses, if any the defendants incurred solely in defense of the frivolous or unreasonable federal claims. *Id*. In addition, the activities for which the defendants sought compensation involved both unsuccessful federal claims and successful state law claims against two defendants. *Id*.
[117] *Christiansburg*, 434 U.S. at 421; Rounseville v. Zahl, 13 F.3d 625, 632 (2d Cir. 1994).
[118] Hicks v. Arthur, 891 F. Supp. 213 (E.D. Pa. 1995); Chalfy v. Turoff, 804 F.2d 20, 23 (2d Cir. 1986); Ford v. Temple Hosp., 790 F.2d 342, 347 (3d Cir. 1986); Johnson v. Res. for Human Dev., 888 F. Supp. 689, 692 (E.D. Pa. 1995).

in encouraging particular suits, the conduct of the parties, and economic considerations such as the ability of a party to comply with a fee award.[119]

In *CRST Van Expedited, Inc. v. EEOC*,[120] the U.S. Supreme Court resolved a split among the federal circuits as to whether a defendant may recover attorneys' fees when the claims at issue are dismissed for reasons that do not require a ruling on the merits, determining that such a ruling is not necessary in order for the defendant to claim fees as a prevailing party.[121] First, the Court found that common sense conflicts with the notion that a defendant cannot prevail unless the underlying matter is resolved on its merits.[122] The Court reasoned that parties come to court with different objectives. A defendant seeks to preserve the status quo in the parties' legal relationship, whereas a plaintiff seeks to effectuate a material alteration in that relationship.[123] Thus, a defendant that succeeds in maintaining the status quo may be viewed as the prevailing party. Second, the Court found no evidence that Congress intended to restrict fee awards to defendants only when they prevail on the merits.[124]

Beyond the federal and state statutes, a defendant may apply for fees under general provisions of the Rules Governing the Courts of the State of New Jersey ("New Jersey court rules") and the Federal Rules of Civil Procedure. In federal proceedings, an attorney or unrepresented party may be subject to sanctions by filing any document for an improper purpose, asserting legal arguments including claims and defenses that are not warranted by existing law, asserting facts that do not have evidentiary support or will unlikely have evidentiary support after a reasonable opportunity for further investigation and for making denials of factual contentions that are neither warranted on the evidence nor reasonably based on belief.[125] Once litigation commences in federal court, the court

[119] *Blasi*, 2014 WL 4662477, at *4 ("because the plaintiff is unemployed, is the father of seven children, and is supported financially by his wife, an award of fees would serve to do little other than overly burden an already encumbered family, to the benefit of the defendant who is better situated to bear the costs of litigation").
[120] CRST Van Expedited, Inc. v. EEOC, 136 S.Ct. 1642 (2016).
[121] *Id*. at 1651-54; *see generally* Gallow v. Davis, No. 5:16-cv-00266-HGD, 2016 WL 3439908 (N.D. Ala. June 23, 2016).
[122] *CRST Van Expedited, Inc.*, 136 S.Ct. at 1651.
[123] *Id*.
[124] *Id.* at 1651-52; "It would make little sense if Congress' policy of 'sparing defendants from the cost of litigation' . . . depended on the distinction between merits-based and non-merits-based frivolity." *Id*. at 1652 (quoting Fox v. Vice, 563 U.S. 826, 840 (2011).
[125] Rule 11 specifies that by filing a pleading, written motion or other paper, a party certifies upon knowledge, information, and belief, formed after an inquiry reasonable under the circumstances that (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law; (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) the

may require counsel who "multiplies the proceedings . . . unreasonably and vexatiously" to satisfy the excess costs, expenses, and attorneys' fees reasonably incurred by the adversary themselves.[126]

The New Jersey court rules similarly endow trial courts with the discretion to award attorneys' fees against counsel or a *pro se* litigant in order to deter frivolous claims or defenses.[127] Courts also have the discretion to award fees to any party to an action that files a motion for litigant relief[128] based on a violation of a court order or judgment.[129] As a supplement to the power provided expressly by the court rules, a state trial court retains inherent authority to award fees against any party for fraud on the court or contempt of court.[130] Moreover, where the parties entered into an employment agreement, the agreement is subject to standard contract principles.[131] If the contract so provides, a prevailing party may recoup its fees and costs.[132]

II. REEVALUATING THE STANDARDS FOR FEE AWARDS

Although different standards apply in evaluating counsel fee awards based on the underlying statute at issue, one recurrent theme among them is the restraint that federal and state courts have displayed towards awards of counsel fees to defendants. This circumstance gives rise to two questions: whether judicial restraint is grounded in public policy or some other rationale and whether that orientation remains valid.

Certainly, restraint in awarding counsel fees to defendants is not based on a plain reading of the text of some of the most significant statutory fee provisions. Section 706(k) of

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denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information. FED. R. CIV. P. 11(b)(1)-(4) & (c).

[126] 28 U.S.C. § 1927.

[127] Under the New Jersey court rules, the signature of counsel or a *pro se* party constitutes certification that the signatory has read the pleading written motion or other paper and that it is not being presented for any improper purpose, including to harass, cause unnecessary delay or needless increase the cost of litigation; that the claims, defenses and other legal contentions are warranted by existing law or by a non-frivolous argument to extend, modify or reverse existing law or the establishment of new law; and that the factual allegations have evidentiary support or are either likely to have evidentiary support or that they will be withdrawn or corrected if a reasonable opportunity for further investigation or discovery indicates insufficient evidentiary support. *See* N.J. Ct. R. 1:4-8.

[128] N.J. Ct. R. 1:10-3.

[129] Pressler & Verniero, *Current N.J. Court Rules*, cmts. 4.4.1 & 4.4.5 on R. 1:10-3 ("this rule provision allowing for attorney's fees recognizes that as a matter of fundamental fairness, a party who willfully fails to comply with an order or judgment entitling his adversary to litigant's rights is properly chargeable with his adversary's enforcement expenses").

[130] *See* Triffin v. Automatic Data Processing, Inc., 411 N.J. Super. 292, 314 (N.J. Super. Ct. App. Div. 2010).

[131] Litton Indus., Inc. v. IMO Indus., Inc., 200 N.J. 372, 385 (2009).

[132] *Id.*

Title VII provides that the court, in its discretion, may award a prevailing party[133] reasonable fees as part of the costs of the action.[134] As such, Section 706(k) nominally imposes no greater burden on one kind of civil rights litigant over another.[135] In fact, the defendant in *Christiansburg* unsuccessfully argued that courts should apply Section 706(k) equally and award counsel fees to the prevailing party unless special circumstances render the award unjust.[136]

The majority in *Christiansburg* determined that the permissive and discretionary language of §706(k), "does not even invite, let alone require, such a mechanical construction."[137] Instead, the Court observed that, while Title VII's fee-shifting provision provides no indication of the circumstances under which a party should receive fees, a "moment's reflection" demonstrated that plaintiffs and defendants are subject to very different equitable considerations.[138] The Court then articulated the disparate legislative policies related to plaintiffs and defendants in a civil rights action.[139] A plaintiff is Congress' chosen instrument to vindicate anti-discrimination policy and, where successful, a plaintiff should receive compensation against a violator of federal law.[140] The Court concluded that an entirely different set of equitable considerations applies to defendants.[141] In reaching its conclusion, the Court considered §706(k)'s legislative history and determined that Congress intended to "'make it easier for a plaintiff of limited means to bring meritorious suit'"[142] while at the same time deterring baseless suits.[143] The Court canvassed the legislative history of Title VII to interpret its language in view of the policies Congress intended to effectuate.

The United States Supreme Court has consistently upheld the approach the *Christiansburg* Court took in its 1978 opinion, reflecting the Court's practice of interpreting federal fee-shifting provisions in general consistently.[144] For example, in *Fox*

[133] Prevailing party language excepts the U.S. Equal Employment Opportunity Commission ("EEOC") and the U.S. government.
[134] 42 U.S.C. § 2000e-5(k) (2009).
[135] Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 417-18 (1978).
[136] *Id*.
[137] *Id.* at 418. Section 706(k) states that "[i]n any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the [Equal Employment Opportunity] Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person." 42 U.S.C. § 2000e-5(k) (2009).
[138] *Christiansburg*, 434 U.S. at 418.
[139] *Id.*
[140] *Id*.
[141] *Id*. at 419.
[142] *Id*. at 420 n. 14 (quoting Remarks of Senator Humphrey, 110 CONG. REC. 12724 (1964)).
[143] *Id*. at 420 n. 16 (quoting Remarks of Senator Pastore, *id*., at 14214)).
[144] Buckhannon Bd. & Care Home, Inc. v. W. Va Dep't of Health & Human Res., 532 U.S. 598, 624 n.1 (2001).

v. Vice, the Court explained that Congress authorized courts to award fees to plaintiffs, thus deviating from the American Rule, for the purposes of "compensate[ing] for the costs of redressing civil rights violations."[145] As such, a court may award a plaintiff fees for all work relating to "redressing [the] civil rights violations" even if "'the plaintiff failed to prevail on every contention raised.'"[146] By contrast, in enacting 42 U.S.C. § 1988, Congress allowed courts to award fees to defendants, thereby "removing the burden associated with fending off frivolous claims."[147] In *City of Riverside v. Rivera*, the Court found that Congress did not intend to limit plaintiffs' attorneys' fees to a proportion of the underlying damages award because "Congress expressly recognized that a plaintiff who obtains relief in a civil rights lawsuit 'does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest importance.'"[148]

Notwithstanding the foregoing, in settling upon a parsimonious standard for evaluating defendants' fee applications, the majority in *Christiansburg* disregarded a fundamental principle of statutory construction providing that a court confronted with a statute that is plain on its face should not need to resort to the statute's legislative history in its application.[149] The Court has relied upon the plain meaning rule as a tool of statutory interpretation in a variety of contexts,[150] including in its analysis of other sections of Title VII.[151] Therefore, the result in *Christiansburg* is problematic because it is difficult to reconcile with a coherent judicial philosophy of statutory interpretation. Since the text of §706(k) is unambiguous, the majority's effort to divine congressional intent in *Christiansburg* seemed a superfluous exercise.

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[145] Fox v. Vice, 563 U.S. 826, 832-33 (2011).
[146] *Id*. at 836 n.3 (quoting Hensley v. Eckerhart, 461 U.S. 424, 435 (1983)).
[147] *Id*. at 836 n.3.
[148] City of Riverside v. Rivera, 477 U.S. 561, 576 (1986) (citing H.R. REP. NO. 94-1558, at 2 (1976)).
[149] *See* Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 419-21 (1978).
[150] For example, this rule is an integral part in the procedure the Court established for determining the degree of judicial deference owed to an agency's interpretation of a federal statute. Judicial deference is "appropriate only where 'Congress has not directly addressed the precise question at issue' through the statutory text." Nat'l Ass'n of Home Builders v. Defs. of Wildlife, 551 U.S. 644, 665 (2007) (quoting Chevron U.S.A., Inc. v. NRDC, 467 US. 837, 843 (1984)). Statutory analysis ends if a court determines that Congress unambiguously expressed its intent. *Id*. Only where a statute is silent or ambiguous on the issue for decision is it necessary to determine whether the agency's construction of the provision at issue is reasonable or a permissible construction. *Id*.
[151] In *American Tobacco Co. v. Patterson, 456 U.S. 63, 75 (1982)*, the Court considered whether §703(h) of the Title VII, which permits employers to alter the terms and conditions of employment under a *bona fide* seniority or merit system, applied to seniority systems adopted after Title VII's effective date. *Id.* The Court determined that §703(h) was not limited to seniority systems adopted before that time. *Id*. at 77. In reaching this result, the majority opined that "[g]oing behind the plain language of a statute in search of a possibly contrary congressional intent is 'a step to be taken cautiously' even under the best of circumstances." *Id*. at 75 (quoting Piper v. Chris-Craft Indus., 430 U.S. 1 (1977)).

Assuming, *arguendo*, that the Court properly resorted to legislative history to ascertain the scope of §706(k), it did little to offer further direction.[152] Rather, the Court characterized §706(k)'s legislative debates as "sparse[,]" and revealing "little more than the barest outlines of a proper accommodation of the competing considerations[.]"[153] Notably, the Court identified factors which themselves evidenced congressional intent based on the Court's view of the legislation as a whole.[154] Indeed, the Court noted that the only specific reference to the statute in legislative debates suggested that the fee provision was intended to make it easier for plaintiffs with limited financial resources to bring meritorious suits.[155] The Court's analysis of the legislative history section §706(k) was even more attenuated because it relied heavily on Senate floor discussions of 42 U.S.C. § 2000a-3(b): the counsel fees provision of Section II of the Civil Rights of 1964 that contains language identical to §706(k).[156]

Nonetheless, as a result of federal precedent beginning with *Christiansburg* as well as the influence of federal case law on state court interpretations of fee-shifting statutes (many of which are modeled upon federal civil rights law), many courts impose a standard in evaluating defendants' counsel applications in civil rights action that is so rigorous as to bar fees in all but exceptional circumstances.[157] The widespread adoption

[152] *See Christiansburg*, 434 U.S. at 420.
[153] *Id*.
[154] *Id.*
[155] *Christiansburg*, 434 U.S. at 420 n.14 (referencing remarks of Senator Hubert Humphrey, 110 CONG. REC. 12724 (1964)).
[156] *Id*. at 420 nn. 15-17 (referencing remarks of Senators Frank Lausche, 110 CONG. REC. 13668 (1964), John Pastore, 110 CONG. REC. 14214 (1964), and Hubert Humphrey, 110 CONG. REC. 6534 (1964)). Title II of the Civil Rights Act of 1964 prohibits discriminatory practices on the basis of race, color, religion or national origin in places of public accommodation. 42 U.S.C. § 2000a-1.The counsel fee provision for Title II provides that "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, and the United States shall be liable for costs the same as a private party." 42 U.S.C. §2000a-3(b).
[157] *See, e.g.*, Summers v. A. Teichert & Son, 127 F.3d 1150 (9th Cir. 1997) (denying counsel fees but affirming grant of summary judgment for employer in which plaintiff truck driver failed to establish triable issue of fact in an ADA suit that employer failed to offer him reasonable accommodation for his disability; employer did not require plaintiff to drive water truck that allegedly caused him pain and allowed him to resume driving flatbed truck that he claimed did not cause him physical problems); Nardoni v. City of N.Y., No. 17 Civ. 2695 (GHW) (GWG), 2019 WL 542349, at *7 (S.D.N.Y. Feb. 12, 2019) (observing that U.S. Supreme Court has discouraged awards of attorneys' fees where defendant is prevailing party under §1988(b) but has determined it is proper measure for prevailing plaintiff) (quoting Pruitt v. Carney, 54 F. Supp. 2d 169, 171 (E.D.N.Y. 1999)); Thomas v. Crush Enters., Inc., No. CIV-16-773-3, 2017 WL 10379221, at *3 (W.D. Okla. Nov. 14, 2017) (denying defense motion for fees under and §1988 and observing that "[t]he standard for awarding attorney fees to prevailing defendants 'is a difficult standard to meet, to the point that rarely will a case be sufficiently frivolous to justify imposing attorney fees on the plaintiff[]'") (citing Mitchell v. City of Moore, 218 F.3d 1190, 1203 (10th Cir. 2000); Taylor v. Beckett, No. 2:13-cv-02199-APG-VCF, 2017 WL 33677091, at *2 (D. Nev. Jan. 3, 2017) (reducing prevailing defendants' counsel fees in §1983 action from $90,000 computed under lodestar method to $6,000 due to concern that "a substantial fee award [under §1988] may deter others from seeking to vindicate the

of the *Christiansburg* standard in state courts and its binding authority in the federal courts across a range of civil rights statutes invites examination of whether the Court's analysis was sound and whether it is due for revision, or at least modification.

At the state level, the argument in support of applying different standards to plaintiffs and defendants in the context of fee applications is rooted in the New Jersey State Legislature's decision to empower private attorneys to act as private enforcers of the law to advance the civil rights of the state's citizenry.[158] In a statement that accompanied the legislation introducing amendments to the New Jersey Law Against Discrimination (NJLAD), the legislation's sponsors noted that the NJLAD "follows the federal practice in encouraging the use of the judicial process to redress civil rights violations" by allowing the award of attorneys' fees to prevailing parties.[159] The legislature elected to rely principally upon the private bar as its vehicle to enforce the provisions of the NJLAD and other civil rights laws to complement the efforts by public agencies, such as the New Jersey Division on Civil Rights, to remediate or eliminate civil rights violations.[160]

From this perspective, application of a stringent standard in evaluating plaintiffs' fee applications could deter individuals with significant civil rights claims from pursuing their statutory rights in the courts by diminishing their ability to attract effective legal representation.[161] In *Coleman v. Fiore Bros., Inc.*, which considered whether attorneys' fees could be waived in settlement discussions under the fee-shifting provision of the New Jersey Consumer Fraud Act, the New Jersey Supreme Court looked to the sponsor statement of the Civil Rights Attorney's Fee Awards Act of 1976, 42 U.S.C. §1988,

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violation of their constitutional rights and may undermine the 'lofty goals of the Civil Rights Act'"(quoting Thomas v. City of Tacoma, 410 F.3d 644, 651 (9th Cir. 2005)); Cooksey v. Rechtigal, 456 F. Supp. 2d 890, 893 (E.D. Mich. 2006)(denying counsel fees to prevailing defendant under §1988 and noting that an "award of counsel fees is appropriate in a civil rights action only in extraordinary circumstances . . .") (quoting Goldstein v. Costco Wholesale Corp., 337. F. Supp. 2d 771, 774 (E.D. Va. 2004)).

[158] *See Hearing on S. 3101 Before the Senate Law, Public Safety and Defense* Committee, 1979 Leg., 189th Sess. 1 (N.J. 1979) (statement of Senators Wynona Lipman and Frank Herbert). *See also* Statement of the Office of the Governor (Feb. 8, 1980) (noting that amendments bring New Jersey statutes into compliance with federal law, including providing opportunity for prevailing party to obtain its reasonable attorneys' fees).

[159] *Id.*

[160] S.694, 2020 Leg., 219th Sess. (N.J. 2020).

[161] Balducci v. Cige, 456 N.J. Super. 219, 236 (N.J. Super. Ct. App. Div. 2018) (noting that private attorneys advance public interest through private enforcement of statutory rights that government alone cannot enforce) (quoting Pinto v. Spectrum Chems. & Lab. Prods., 200 N.J. 580, 593 (2010)); Zehl v. City of Elizabeth Bd. of Educ., 426 N.J. Super. 129, 136 (N.J. Super. Ct. App. Div. 2012) (remedial provisions of LAD were designed attract counsel to vindicate important statutory rights). In contrast with the LAD, the legislative history of CEPA sheds no light on the Legislature's rationale for including a provision allowing attorneys' fees to an employer. The Sponsor Statement to the original bill states only that "[w]ith certain exceptions, a court may order reasonable attorney's fees and court costs to an employer if an employee brings an action under this act which has no basis in law or in fact." S. 1105., ch. 105 (N.J. 1986).

which expressed concern about unequal access to the courts in vindicating congressional policies and enforcing the law.[162] The Civil Rights Attorney's Fee Awards Act of 1976 sponsor articulated that encouraging adequate representation rests largely upon private citizens who must go to court to prove a violation of the law, stating:

> But without the availability of counsel fees, these rights exist only on paper. Private citizens must be given not only the rights to go to court, but also the legal resources. If the citizen does not have the resources, his day in court is denied him; the congressional policy which he seeks to assert and vindicate goes unvindicated; and the entire Nation, not just the individual citizen, suffers.[163]

New Jersey's policy similarly recognizes that the purpose of fee awards is to ensure effective access to the judicial process for impecunious civil rights complainants so that they may hire counsel to represent them.[164]

The federal cases emphasize the importance of fulfilling this same policy objective in carrying out Congress' intent, leading to the conclusion that shifting fees to an unsuccessful plaintiff is warranted only in extraordinary or extreme circumstances.[165]

In *Hensley v. Eckerhart*, the U.S. Supreme Court stated that Congress intended 42 U.S.C. § 1988 to ensure that victims of civil rights violations would have "effective access to the judicial process."[166] The Court echoed this sentiment in *Evans v. Jeff D.*, in which the majority noted that "it is undoubtedly true that Congress expects fee shifting to attract competent counsel to represent citizens deprived of their civil rights."[167] Courts have occasionally cited other reasons to explain discrepancies in the treatment of fee

[162] Coleman v. Fiore Bros., Inc., 113 N.J. 594, 597 (1989).
[163] *Id.* (quoting 122 CONG. REC. 33,313 (1976) (statement of Sen. John Tunney).
[164] *Id*. This same policy choice underlies the restrictive interpretation of the New Jersey Frivolous Litigation Act, N.J.S.A. 2A:15-59.1. The Appellate Division noted that the balance is struck in favor of plaintiffs "in recognition of the principle that citizens should have ready access to all branches of government, including the judiciary." Belfer v. Merling, 322 N.J. Super. 124, 144 (N.J. Super. Ct. App. Div. 1999) (citing Rosenblum v. Borough of Closter, 285 N.J. Super. 230, 239 (N.J. Super. Ct. App. Div. 1995), *certif. denied*, 146 N.J. 70 (1996)). The Appellate Division in *Belfer* further noted that the statute should not be allowed to be a counterbalance to the American rule even where the litigation is of "'marginal merit.'" *Id* (quoting Venner v. Allstate, 306 N.J. Super. 106, 113 (N.J. Super. Ct. App. Div. 1997)).
[165] *See, e.g.*, Tonti v. Petropoulous, 656 F.2d. 212, 219 (6th Cir. 1981) (stating "[w]hile the purpose of a plaintiff's fee award is to encourage the vindication of the policies of the civil rights statutes through private attorneys general, the award of fees to a prevailing defendant is intended only to prevent the extreme case . . . ." (citation omitted).
[166] Hensley v. Eckerhart, 461 U.S. 424, 429 (1983) (internal citations omitted). 42 U.S.C. § 1988(b) provides in pertinent part that in actions brought under § 1981, § 1981a, § 1982, § 1983, § 1985, and § 1986 a court has discretion to allow the prevailing party, other than the United States, a reasonable attorneys' fee as part of the costs of the action.
[167] Evans v. Jeff D., 475 U.S. 717, 731 (1986). The Supreme Court of New Jersey, in its opinion in *Coleman* emphasized this aspect of federal jurisprudence as well. *Coleman*, 113 N.J. at 597.

applications. While grounded in public policy at times, these justifications tend to focus on the societal benefits of maintaining respect for the rule of law and improving the self-esteem of victims of civil rights violations, rather than the independent value of promoting litigants' access to the courts.[168]

Denying a defendant its reasonable counsel fees appears to be a sensible approach in a case where the plaintiff is relatively unsophisticated concerning the legal process and the steps necessary to obtain proof to establish a *prima facie* case, or where a plaintiff lacks the financial resources to proceed to trial. Under these circumstances, there is no malicious or malevolent intent to initiate or prolong meritless litigation; the plaintiff's failure to prevail at trial is often the result of indigency.[169] For example, in *Hughes v. Rowe*, a prisoner filed a *pro se* complaint under § 1983, alleging that prison authorities had segregated him for violating prison regulations without a hearing.[170] The District Court dismissed the complaint and ordered the prisoner to pay the state attorney general's office its counsel fees under § 1988 for representing the state.[171] The appellate court affirmed, finding that the complaint was properly dismissed.[172] The U.S. Supreme Court reversed on the merits and overturned the fee award as well, emphasizing that the requirement to show that the plaintiff's suit was frivolous, unreasonable and groundless applied with "special force in actions initiated by uncounseled prisoners," and that an unrepresented litigant should not be punished for failure to "recognize subtle factual or legal deficiencies in his claims."[173]

Nonetheless, applying differing standards to litigants offends the notion, deeply

[168] *Evans*, 475 U.S. at 731 (asserting, without citation, that fee-shifting statutes are designed not only to promote judicial access but to promote respect for the underlying law and to deter potential violators of such laws). As the Ninth Circuit observed, "[e]ven when unsuccessful, [civil rights] suits provide an important outlet for resolving grievances in an orderly manner and achieving non-violent resolutions of highly controversial, and often inflammatory, disputes. Guaranteeing individuals an opportunity to be heard in court instead of leaving them only with self-help as the means of remedying perceived injustices creates respect for law and ameliorates the injury that individuals feel when they believe that they have been wronged because society views them as inferior. Our system of awarding attorney's fees in civil rights cases is in large part dedicated 'to encouraging individuals injured by . . . discrimination to seek judicial relief.'" Harris v. Maricopa Cnty. Super. Ct., 631 F.3d 963, 971 (9th Cir. 2011) (citing Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968)). *See also* Rice v. Morehouse, Case No. 1:13-CV-441-BLW, 2018 WL 5793846, at *1 (D. Idaho Nov. 5, 2018) (stating value of civil rights laws to resolve grievances in orderly manner where plaintiff alleged police officers used excessive force in his arrest and denying defendants' post-trial motion for counsel fees where defendants succeeded in dismissing suit at close of evidence at trial; court noted absence of exceptional circumstances necessary to support award of fees).
[169] Hughes v. Rowe, 449 U.S. 5, 8 (1980).
[170] *Id*.
[171] *Id.* at 9.
[172] *Id.*
[173] *Id.* at 15.

embedded in American jurisprudence, that parties are equal under the law.[174] Differential treatment also invites, and perhaps even encourages, abuse of the legal system. An unduly liberal standard of evaluating plaintiffs' fee applications conflicts with the principle that "no litigant can be allowed to abuse federal courts or opposing litigants with impunity."[175]

Beyond the confines of *pro se* litigation, moreover, it is far from clear that construing fee-shifting provisions to inure predominantly to the benefit of complainants continues to be essential in furthering the legislative goal of inducing competent counsel to undertake representation in civil rights matters.[176] Many federal and state civil rights laws were enacted decades ago, when it was more difficult for a litigant to retain adequate counsel to undertake untested civil rights legislation. Specifically, Congress enacted 42 U.S.C. §1988 in 1976[177] and (§706(k)) in 1964.[178] The New Jersey Legislature implemented LAD's fee provision in 1979[179], while its counterpart under CEPA came into force in 1986.[180]

Federal and state legislators also could not have reasonably anticipated the extraordinary social and cultural ferment that has reverberated throughout American society in recent years. Perhaps at no juncture in the past several decades has the public been more acutely conscious of the importance of civil rights in the workplace and beyond. In addition to

[174] The legislative history of the attorneys' fee provision of Title II of the Civil Rights Act of 1964, which as the Court noted in *Christiansburg* is nearly identical to § 706(k), suggests that Congress was as much concerned with insulating defendants from frivolous lawsuits as it was to facilitate plaintiffs' access to the courts: for example, Senator John Pastore, speaking in favor of the provision, remarked that its purpose is "to discourage frivolous suits. Here the court within its discretion is given power to order payment of attorney's fees to the prevailing party. First of all, it is within the discretion of the court. It is not favoritism toward one party as against the other." 110 CONG. REC. 14214 (1964) (remarks of Sen. Pastore).

[175] Blue v. U.S. Dep't of Army, 914 F.2d 525, 534 (4th Cir. 1990). As the Fourth Circuit observed, moreover, "[i]t would be an irony if the concept of equality under the law, so fundamental to the goal of civil rights, were underwritten with exceptions for Title VII litigants from the legal rules that apply to others. The authority which federal courts possess, an authority often summoned to the side of racial justice, is an authority built upon respect for judicial process. That authority cannot, in the long run, be effectively invoked on behalf of civil rights enforcement if civil rights litigants could themselves disregard it with impunity." *Id.* at 535.

[176] Of course, the very existence of fee-shifting provisions in the civil rights laws may in itself have deterrent value in some cases. It is clear, however, that Congress did not have any such preventive effect in mind when it enacted the Fee Act of 1976, 42 U.S.C. §1988; Evans v. Jeff, 475 U.S. 717, 745 n.1 (1986), (Brennan, J., dissenting); The legislative history of 42 U.S.C. § 2000e-5(k) is similarly devoid of any such congressional intent.

[177] Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, § 2 (1976).

[178] Civil Rights Act of 1964, Pub. L. No. 88-352, §706 (1964).

[179] N.J. STAT. ANN. § 10:5-27.1 (West 2015).

[180] N.J. STAT. ANN. § 34:19-6 (West 2013).

the publicity that often attends significant jury verdicts,[181] demands for fair treatment in the workplace have markedly increased.[182] The elimination of harassment and discrimination in the workplace and in broader civil society has in fact emerged as a central theme of activists who seek to secure and build upon the legislative achievements of the progressive civil rights movement. The #MeToo campaign and the constellation of groups aligned with it are part of this movement.[183] Numerous protests against mistreatment in the workplace on the basis of gender have greatly increased public awareness of the rights of workers. This publicity has prompted an ongoing national discourse on gender discrimination that is likely to continue for the foreseeable future, as well as on the human toll of failing to remediate hostile workplace environments and a culture of retaliation.

The resultant upheaval has led to the dismissal of numerous public figures across a range of industries and occupations.[184] Jurors are undoubtedly sensitized to the emotional and financial harm that harassment and discrimination create. Thus, the empirical assumption that fee-shifting serves as an essential inducement to attract counsel to undertake civil rights cases as private attorneys generally has become increasingly

[181] *See, e.g.*, Megan Twohey and Jodi Kantor, *With Weinstein Conviction, Jury Delivers a Verdict on #MeToo*, N.Y. TIMES (Feb. 24, 2020), https://www.nytimes.com/2020/02/24/us/harvey-weinstein-verdict-metoo.html.

[182] Allen Smith, *EEOC Harassment Charges Reflect #MeToo's Relevance*, SHRM (Jan. 24, 2020), https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/eeoc-harassment-charges-metoo.aspx.

[183] Gurvinder Gill and Imran Rahman Jones, *Me Too Founder Tarana Burke: Movement is not over*, BBC NEWS (Jul. 9, 2020), https://www.bbc.com/news/newsbeat-53269751.

[184] *See, e.g.*, Katrin Bennhold, *Another Side of #MeToo: Male Managers Fearful of Mentoring Women*, N.Y. TIMES (Jan. 27, 2019), https://www.nytimes.com/2019/01/27/world/europe/metoo-backlash-gender-equality-davos-men.html (noting that the #MeToo movement has empowered women to speak up about harassment in the workplace, forced companies to take the issue more seriously and resulted in over 200 prominent men losing their jobs with nearly half of them succeeded by women); *See also* Riley Griffin, Hannah Recht, & Jeff Green, *#MeToo: One Year Later*, BLOOMBERG (Oct. 5, 2018), https://www.bloomberg.com/graphics/2018-me-too-anniversary/ (citing at least 425 prominent people across industries who have been publicly accused of sexual misconduct and noting that hundreds of alleged malefactors have been fired, resigned or faced other professional consequences); Monica Anderson & Skye Toor, *How Social Media Users Have Discussed Sexual Harassment Since #MeToo Went Viral*, PEW RSCH. CTR. (Oct. 11, 2018), https://www.pewresearch.org/fact-tank/2018/10/11/how-social-media-users-have-discussed-sexual-harassment-since-metoo-went-viral/ (stating that #MeToo hashtag on Twitter has been used more than 19 million times between October 15, 2017 and September 30, 2018, an average of 55,319 uses of the hashtag per day according to a study of publicly available English-language tweets). Demands for gender equity in the workplace have manifested themselves in other ways, including laws in a growing number of jurisdictions prohibiting employers from inquiring at job interviews into candidates' salary history in an effort to eliminate or reduce the gap in wages between men and women. As of August 7, 2020, nineteen states have enacted restrictions on inquiries into salary history; *Salary History Bans*, HRDIVE (Aug. 7, 2020), https://www.hrdive.com/news/salary-history-ban-states-list/516662/. Several major cities and counties have passed such legislation as well, including San Francisco, Chicago, Louisville, New Orleans, Kansas City, New York City, Philadelphia and Pittsburgh; *Id.*

questionable.

The analysis originating in *Christiansburg* fails to account for the role that such societal change exercises in influencing the rate of civil rights filings, a motivating factor that is likely far more powerful than the possibility of recouping counsel fees.[185] In October 2018, the EEOC reported that sexual harassment charges increased more than 12% from the agency's 2017 fiscal year, a trend that coincides with the #MeToo movement.[186] The increase in sexual harassment charges translates into more than 7,500 new cases alleging sexual harassment over the prior year and the first increase in sexual harassment cases reported by the EEOC in eight years.[187] In an effort to determine the enforceability of a retainer agreement for representation in a LAD case, the New Jersey Appellate Division recognized the broad range of choice that consumers of legal services have at their disposal in civil rights matters, providing that:

> There is no dearth of competent, civic-minded attorneys willing to litigate LAD and other statutory fee-shifting cases under fee agreements that do not include an hourly component. The number of such cases litigated in our trial courts and reported in the case law evidence this, as does – at least as to numbers – advertising on television and radio, in telephone books and newspapers, and on billboards and other media.[188]

A judicial result may sometimes be productively understood as driven by unarticulated policy concerns or assumptions. Specific assumptions appear to have significantly contributed to the judicial gloss on *Christiansburg* and related precedent on the neutral text of §706(k) of Title VII and §1988. The language in *Christiansburg* suggests that policy considerations supporting the award of fees to a prevailing plaintiff are inapplicable to a prevailing defendant.[189]

More specifically, the courts' reticence in awarding counsel fees to defendants and the

[185] Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978).
[186] U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC RELEASES PRELIMINARY FY 2018 SEXUAL HARASSMENT DATA, (Oct. 4, 2018), https://www.eeoc.gov/eeoc/newsroom/release/10-4-18.cfm.
[187] Jena McGregor, *The #MeToo Effect: Sexual Harassment Charges with the EEOC Rose for the First Time in Years*, WASH. POST (Oct. 5, 2018), https://www.washingtonpost.com/business/2018/10/05/metoo-effect-sex-harassment-charges-with-eeoc-rose-first-time-years/?utm_term=.a3ddb63d37e9. This statistic likely does not capture the full increase in sexual harassment charges since some complainants file with state anti-discrimination agencies or raise their complaints only through an internal complaint resolution process provided by their employer. *Id.*
[188] Balducci v. Cige, 456 N.J. Super. 219, 236-37 (N.J. Super. Ct. App. Div. 2018). Indeed, so large is the market for attorneys willing to undertake civil rights matters on a contingency basis that the Appellate Division held in *Balducci* that an attorney whose retainer in a LAD case includes an hourly rate component has an ethical duty to explain to the client that other competent counsel are likely willing to undertake the same representation without a fee and might also be willing to advance the client's costs. *Id.* at 237, 242.
[189] *Christiansburg*, 434 U.S. at 418-19.

attendant notion that fees should generally be reserved for a prevailing plaintiff may reflect a tacit view of the resources available to an employer. Typically, it is presumed that the employer possesses superior financial and technological capabilities that endow it with a significant litigation advantage.[190] These factors, however, are not particularly relevant in a civil rights suit with simple or particularly egregious facts because such cases are likely to settle relatively quickly.

Even in complex civil rights matters, it is increasingly doubtful whether the plaintiffs' bar still requires fee-shifting provisions as an incentive to ensure prospective litigants' effective access to the judicial process. In part, technological innovations that have increased the efficiency and capabilities of attorneys suggest that the *Christiansburg* standard rests on antiquated notions concerning the relative resources of civil rights plaintiffs and defendants.[191] Counsel have tools at their disposal that Congress could not have reasonably anticipated when it enacted §706(k) and §1988. These tools have helped "level the playing field" considerably by increasing counsels' efficiency. For example, relatively inexpensive and sophisticated software programs and services now enable counsel to analyze large amounts of texts, e-mails and other data, significantly eroding or eliminating the resource advantage that large firms or corporations may have once possessed.

Besides the strong impact of technological innovation upon litigation processes, plaintiffs with limited financial resources increasingly have access to resources designed to help improve their access to legal services.[192] For example, although state ethics rules often fail to incorporate or acknowledge modern business practices, many jurisdictions now allow attorneys to accept payment based on credit due to the widespread acceptance of credit cards in commercial transactions beyond the narrow confines of the attorney-client relationship.[193] These developments undermine a central premise of

[190] *Id*. at 412.
[191] *Id*.
[192] Catherine R. Albiston and Laura Beth Nielsen, *The Procedural Attack on Civil Rights: the Empirical Reality of* Buckhannon *for the Private Attorney General*, 54 UCLA LAW REVIEW 5, 3 (2006).
[193] *See, e.g.*, Dist. of Columbia Bar, Ethics Op. 348 ("[C]redit cards are recognized as useful in facilitating the ability of many persons to obtain legal services at the time the services are needed and to pay for those services on a schedule that comports with their budgets."); Louisiana State Bar Ass'n, Op. 12-RPCC-019 (2012), at *8 ("[A] lawyer may ethically accept credit cards for payment of reasonably earned fees and/or in situations where money is advanced by the client for fees to be earned or for costs, provided that the lawyer has reviewed the 'merchant agreement' or contract with the credit card vendor, nothing therein requires the lawyer to violate any of state rule of professional conduct. Furthermore, the lawyer should explain to the client any requirements contained in the agreement that may affect client confidentiality and obtain the client's informed consent with respect to any necessary disclosures and/or the treatment of transaction fees."); N.Y. State Bar Ass'n, Comm. on Prof'l Ethics Op. 1112 (2017)("A lawyer may accept credit card payments of legal fees so long as: (i) the amount of the fee is reasonable; (ii) the lawyer complies with the duty to protect the confidentiality of client information; (iii) the lawyer does not allow the credit card company to compromise the lawyer's independent professional judgment on behalf of the client; (iv)

Christiansburg that contingent fees are essential to achieve expression of the civil rights laws.[194]

Litigation funding has emerged as another significant method of facilitating access to legal representation in matters ranging from personal injury disputes to major class actions.[195] In a typical scenario, a litigation finance company provides a cash advance to cover the cost of part or all of a lawsuit or arbitration in exchange for a proportion or percentage of any resultant judgment or settlement.[196] Third-party litigation financing is particularly attractive for plaintiff-side or affirmative claims because the metrics in calculating a return are clearer than in funding defense-side litigation.[197] Funding firms generally make loans on a nonrecourse basis, *i.e.*, "the repayment of the advance is contingent on the plaintiff's recovery, either through a settlement or judgment."[198] In addition, the plaintiff's repayment amount depends on the sums borrowed, the duration of the litigation, and a predetermined fee schedule, instead of the amount itself.[199] The litigation funding model has spread to all kinds of suits, including employment discrimination matters,[200] and approximately half of all U.S. jurisdictions presently permit parties to enter into funding agreements.[201]

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the lawyer notifies the client before the charges are billed to the credit card and offers the client the opportunity to question any billing errors; and (v) in the event of any dispute regarding the lawyer's fee, the lawyer attempts to resolve all disputes amicably and promptly and, if applicable, complies with the [state's] fee dispute resolution program."); Ill. State Bar Ass'n Advisory Op. 14-01 (2014)(Illinois Rules of Professional Conduct do not prohibit a lawyer from accepting a client's payment for legal services through a credit card, rather than a more traditional form of payment such as cash or check, so long as the fee to be collected is reasonable; lawyer is obligated to review and obtain a thorough understanding of the agreement he or she must sign with credit card companies in order to accept credit card payments to ensure conformity with rules of professional conduct).

[194] *Christiansburg*, 434 U.S. at 412.

[195] Elisha E. Weiner, *Price and Privilege*, 35 L.A. LAWYER 20, 21 (April 2012); Stephen C. Yeazall, *Re-Financing Civil Litigation*, 51 DEPAUL L. REV. 183, 204 (2001).

[196] *Id*. Yeazall describes one business model in which an investment firm acts as a "bank for lawsuits" by making contingent loans directly to plaintiffs and sometimes to their counsel based on its independent assessment of the case, *id*. at 204. Repayment is typically contingent on the success of the suit, and the resultant access to capital helps plaintiffs resist premature settlement offers or those that do not adequately reflect the likelihood of success on the merits. *Id*. Plaintiff's counsel can also use such a contingent loan to delve more deeply into the case than would otherwise have been possible, enabling the plaintiff to engage more easily in extensive discovery, utilize experts for analysis and conduct wide document discovery. *Id*.

[197] Aaron Katz & Steven Schoenfeld, *Third Party Litigation Financing In the US*, PRACTICAL L., Practice Note 5-518-1314 (2019)("[T]he market for litigation funding in the U.S. and U.K. is estimated to exceed $1 billion.").

[198] Nicholas Dietsch, *Litigation Financing in the U.S., U.K., and Australia: How the Industry Has Evolved in Three Countries*, 38 N. KY. L. REV. 687, 688 (2011).

[199] *Id.*

[200] *Id.* at 693 (observing that litigation funding agreements have also been applied to personal injury, patent and copyright infringement matters).

[201] David Lat, *The Evolving Regulatory Landscape for Litigation Finance*, ABOVE THE LAW (June 8, 2018), https://abovethelaw.com/2018/06/the-evolving-regulatory-landscape-for-litigation-finance/.

The American Bar Association (the "ABA") has determined that attorneys' use of fee financing companies or brokers is ethically permissible.[202] The ABA envisions situations whereby clients may be unable to afford lawyers' flat fee at the beginning of the representation, except through financing the fee through a loan from a third-party.[203] The ABA also anticipates situations whereby clients may wish to finance the lawyers' fee rather than pay a lump sum or may need to apply for a loan from a traditional financial institution or through a finance company.[204] Attorneys are obligated to, *inter alia*, explain the fee arrangement to the client to the extent reasonably necessary to permit the client to make an informed decision about the representation[205] and to ensure that a finance company, broker or bank does not seek to direct or regulate the lawyer's professional judgment in undertaking the representation.[206] The ABA also ethically permits a lawyer to associate with a financial brokerage company that helps connect a client with an organization that will finance counsel fees.[207]

The Supreme Court of the United States invoked an additional rationale in support of the asymmetrical treatment of fee awards in *Hughes v. Rowe* when it opined that the possibility a plaintiff could face a fee award would add to litigation uncertainties.[208] Besides the fact that this consideration is entirely unmoored from any analysis of congressional intent, reliance on this "uncertainty principle" to justify disparate approaches to fee awards does not adequately reflect the realities of law practice. Civil rights proceedings are characteristically fraught with unknown variables that can render case valuations difficult. At inception, the course the litigation will take is opaque, largely because of the limited information available to plaintiff's counsel, even where counsel conducts responsible due diligence in researching the facts and applicable law prior to filing the initial pleadings.

The prevailing approach to fee awards also reflects dubious assumptions about the decision-making process in which rational counsel should engage to advance or maximize economic gain. An attorney's initial determination whether to undertake representation is often based upon the potential client's allegations and perceptions of the facts, as well as any available documentation the prospective client can produce to support their allegations. An attorney who takes a case on contingency — a common practice in civil rights litigation — and with only limited knowledge of the relevant facts must decide, shortly after interviewing the prospective client, whether other facts beneficial to the case may emerge later in discovery. If the circumstances are such that

[202] ABA Comm. on Ethics & Pro. Resp., Formal Op. 484 (2018).
[203] *Id.*
[204] *Id.*
[205] *See* MODEL RULES OF PRO. CONDUCT r. 1.4(b) (AM. BAR ASS'N 1983).
[206] *See* MODEL RULES OF PRO. CONDUCT r. 5.4(c) (AM. BAR. ASS'N, 1983).
[207] ABA Comm. on Ethics & Pro. Resp., Formal Op. 484 (2018).
[208] Hughes v. Rowe, 449 U.S. 5, 15 (1980).

counsel, in initially evaluating a potential client's case, concludes that the individual would be unlikely to be able to establish the requisite elements of the *prima facie* case, counsel would be understandably reticent to undertake the representation because of the significant possibility that the defendant will defeat the claims on a motion to dismiss or a motion for summary judgment. The fact that litigation backlogs and motion practice often require litigants to wait a year or longer to reach trial, and that a party aggrieved by the outcome at trial may consume another year in an appeal, adds to the risk of loss. A rational economic actor seeking to minimize risk and earn a reasonable return on a potentially substantial investment of resources should attempt to evaluate the likelihood of success on the merits or the prospects for eventual settlement as early as possible, not determine in the first instance whether it will be possible to obtain fees from the defendant.

While the availability of fee-shifting for one or more potential claims may help persuade an attorney to undertake representation in a matter where the prospects for success are dubious yet not vanishingly small, in most cases the issue of recovering fees should be secondary to evaluating the case on its ultimate merits because failure to succeed on the underlying claims poses an opportunity cost that increases with the anticipated complexity and duration of the litigation. A plaintiff's counsel has a strong incentive to back cases that will settle, preferably relatively early in the life of the proceeding, or where counsel believes the finder of fact will vindicate the client by way of motion or that the client will receive a favorable jury verdict. Because counsel must evaluate at the outset the likelihood of an acceptable settlement or of prevailing on the merits and conversely the opportunity cost to counsel's practice should the case later meet with failure, it is not clear whether the possibility that the adversary could recoup some or all of its fees actually increases the uncertainties a plaintiff's counsel typically encounters in determining whether to undertake representation.

Counsel's perception of the likelihood of surviving an early dispositive motion may actually be a far more important consideration in the calculus of whether to represent a prospective client than the eventual possibility of obtaining fees. For example, retaliation claims under Title VII are often difficult to eliminate on a motion to dismiss because they require fact-intensive discovery into the reasons for an employer's adverse action to determine whether the adverse action occurred because the plaintiff engaged in protected activity. Under many anti-retaliation laws, moreover, a whistleblower who alleges retaliation does not need to establish that the underlying illegal conduct actually occurred. Under New Jersey's Conscientious Employee Protection Act, a whistleblower is protected if he or she either discloses, threatens to disclose, objects to or refuses to participate in an employer's activity, policy or practice that the employee reasonably believes is in violation of a law, rule or regulation promulgated pursuant to law or that is fraudulent or criminal. [209] Similarly, CEPA prohibits an employer from taking retaliatory

[209] N.J. REV. STAT. § 34:19-3(a)(1) (2016).; § 34:19-3(c)(1) (2016).

action against an employee who objects or refuses to participate in "any activity, policy or practice which the employee reasonably believes … is incompatible with a clear mandate of public policy concerning the public health, safety or welfare or protection of the environment."[210] Therefore, it is not the plaintiff's burden to show that the employer violated the law, rule, regulation or other authority the plaintiff relies upon, but only to demonstrate that he or she reasonably believed that a violation occurred.[211] While the employee's belief must be objectively reasonable,[212] the court makes the threshold determination whether the employer's allegedly unlawful activity underpinning the claim is closely related to a statute, regulation, rule, or public policy that the court or the plaintiff can identify.[213] If the court finds that the plaintiff meets that burden, the jury then considers whether the plaintiff held the belief and, if so, whether the belief was objectively reasonable.[214] In view of CEPA's broad remedial purpose to "protect and encourage employees to report illegal or unethical workplace activities and to discourage public and private sector employers from engaging in such conduct[,]" courts liberally construe its purpose to effectuate these important societal goals.[215]

Thus, where doubt exists, trial courts generally find that an employer's allegedly unlawful conduct is tied to a law, rule or regulation for purposes of determining whether a claim can survive a dispositive motion for failure to articulate a clear basis for the claim. In addition, while New Jersey courts have placed limitations on the scope of CEPA's public policy prong,[216] including requiring the claimant to identify a source of law or other authority that constitutes an expression of policy and that sets a governing standard for the defendant employer's conduct,[217] showing that the policy at least partly benefits the public and that the policy at issue is not "vague, controversial, unsettled [or] otherwise problematic[,]"[218] the concept of public policy is still elastic and considerably ill-defined. Applying an expansive definition of public policy, New Jersey state courts have found the term to encompass the rules of conduct for a professional body,[219] a

[210] N.J. REV. STAT. § 34:19-3(c)(3) (2016).
[211] Hitesman v. Bridgeway, 218 N.J. 8, 29 (2014); Dzwonar v. McDevitt, 177 N.J. 451, 462 (2003).
[212] Mehlman v. Mobil Oil Corp., 153 N.J. 163, 193-94 (1998).
[213] *Id.*
[214] *Id.* at 194.
[215] *Dzwonar*, 177 N.J. at 461 (quoting Abbamont v. Piscataway Twp. Bd. of Educ., 138 N.J. 405, 431 (1994)).
[216] CEPA protects an employee who "[o]bjects to, or refuses to participate in any activity, policy or practice which the employee reasonably believes[] . . . is incompatible with a clear mandate of public policy concerning the public health, safety or welfare or protection of the environment." N.J. REV. STAT. § 34:19-3(c)(3) (2016).
[217] Hitesman v. Bridgeway, 218 N.J. 8, 33 (2014).
[218] *Mehlman*, 153 N.J. at 181 (1998) (quoting MacDougall v. Weichert, 144 N.J. 380, 391–92 (1996)); *Dzwonar*, 177 N.J. at 469.
[219] Trzaska v. L'Oreal USA, Inc., 865 F.3d 155 (3d Cir. 2017) (CEPA claim was maintainable where employer allegedly required plaintiff, one of employer's in-house patent attorneys, to violate the professional rules of the U.S. Patent and Trademark Office and the Rules of Professional Conduct in the

requirement to sign an arbitration agreement[220] and internal complaints based on employer policies.[221] The broad and amorphous scope of CEPA's public policy cause of action constitutes another reason retaliation claims often advance beyond the initial stages of discovery.[222]

CEPA's broadly worded text, the New Jersey Supreme Court's directive that CEPA claims should be liberally construed in view of the remedial nature of the statute as well as the fact-sensitive nature of most retaliation actions, render CEPA claims difficult to dismiss without full discovery. The relative ease with which a litigant who maintains a retaliation claim to surmount a dispositive motion at the early stages of litigation is in itself a strong inducement for counsel to undertake representation. These factors, which also apply to retaliation claims under federal civil rights law, likely helps account for the fact that EEOC charges under Title VII, the ADEA, the ADAA and other laws within the agency's purview that included allegations of retaliation rose from 16,394 to 32,023 from 1997 to 2019, an increase of 48.8%.[223] During that same period, EEOC charges involving retaliation as a proportion of all charges climbed from 20.3% to 38%.[224] Yet during the same period, total charges (*i.e.*, charges of all types the EEOC tracks) climbed only modestly from 80,680 in 1997 to 84,254 in 2017, an increase of 4.24%. Given that §706(k) has authorized district courts to award fees to plaintiffs under Title VII for over 40 years, any inference that the lure of attorneys' fees has been the major driver behind the increase in retaliation claims is particularly weak.

Nor did *Christiansburg* consider that plaintiffs' counsel has always had means of reducing the risk of non-payment in litigation matters. For example, a plaintiff's attorney can accept some payment independent of the outcome of the litigation[225] or offset the risk of nonpayment in a contingency case by structuring a retainer agreement to provide

jurisdictions in which he was licensed by requiring him to meet patent filing quota that required him to disregard whether filings were made in good faith).

[220] Ackerman v. The Money Store, 321 N.J. Super. 308 (Law Div. 1998).

[221] *See, e.g.*, Estate of Roach v. TRW, Inc., 164 N.J. 598 (2000) (internal complaint about fraudulent activity of a coworker); Higgins v. Pascack Valley Hosp., 158 N.J. 404 (1999) (internal complaint that improper forms were filed and that a co-worker mishandled a patient's medication).

[222] *Hitesman*, 218 N.J. at 33.

[223] U.S. EQUAL EMP. OPPORTUNITY COMM'N, CHARGE STATISTICS (CHARGES FILED WITH EEOC) FY 1997 THROUGH FY 2019.

[224] *Id.*

[225] Blakey v. Cont'l Airlines, Inc., 2 F. Supp. 2d 598, 608 (D.N.J. 1998) (citing *Rendine*, 141 N.J. at 339). New Jersey Disciplinary Rule of Professional Conduct 1.5(a), however, requires the attorneys' fee to be reasonable. Reasonableness depends on a variety of factors, including the time and labor required to perform the representation, the novelty and difficulty of the questions involved, the skill required to perform legal services properly, the likelihood that undertaking the representation will prevent the attorney from pursuing other matters, the fee customarily charged in the locality for similar legal services, the amount involved and the results obtained, the time limits the client imposes or the circumstances of the case, the nature and length of the attorney's professional relationship with the client and the experience, reputation and ability of the lawyer performing the service. *Id.*

for a substantial fee independent of any sums the attorney receives through court order, subject to applicable state ethics rules governing the reasonableness of fees.[226] More broadly, counsel can adjust its mix of business by increasing the percentage of matters performed at an hourly or flat rate, thereby ensuring a revenue stream that increases the ability to undertake other matters that pose a greater risk of loss.

Christiansburg also inadequately analyzed the policy considerations that apply to plaintiffs and defendants by viewing them as completely separate and unrelated rather than considering the holistic consequences of maintaining a liberal standard for plaintiffs on the litigation process. There are, of course, undeniable differences in the interests of a plaintiff and a defendant in a representative system of justice. "When a plaintiff succeeds in remedying a civil rights violation . . . he serves 'as a private attorney general' vindicating a policy that Congress considered of the highest priority.'"[227] In contrast, a prevailing defendant "'does not appear before the court cloaked in a mantle of public interest' because generally, no substantial public policy is furthered by a successful defense against a charge of discrimination."[228] As discussed, the U.S. Supreme Court in *Hughes v. Rowe* rejected the notion that a plaintiff's lack of success in the underlying litigation should automatically trigger liability for the adversary's counsel fees because it would "substantially add to the risks inhering in most litigation and would undercut the efforts of Congress to promote the vigorous enforcement of the provisions of Title VII."[229]

Yet while many courts emphasize the importance of providing victims of civil rights violations access to the resources necessary to vindicate their statutory rights, those opinions typically focus only upon the immediate and parochial interests of the parties. This perspective, however, overlooks or minimizes the societal values that a more even-handed approach to counsel fees would serve. The ability of civil rights complainants to commence suits without effectively bearing the risk of paying counsel fees inherently increases the likelihood that cases will reach trial that, while perhaps not patently frivolous, will be based on deficient pleadings or highly tentative facts. The multiplicity

[226] *Blakey*, 2 F. Supp. 2d at 609.

[227] Fox v. Vice, 563 U.S. 826 (2011). *See also* Evans v. Jeff D., 475 U.S. 717, 751-52 (1986) (Brennan, J., dissenting), reh'g denied, ("Congress' primary purpose [in enacting the Civil Rights Attorneys' Fee Awards Act of 1976, 42 U.S.C. §1988] was to enable 'private attorneys general' to protect the public interest by creating economic incentives for lawyers to represent them" and improve enforcement of civil rights violations. Therefore, a plaintiff is ordinarily entitled to recover an attorneys' fee from the defendant as the party "whose conduct created the need for legal action." *Fox*, 563 U.S. at 833 (citing *Christiansburg*, 434 U.S. at 416)).

[228] Blasi v. Pen Argyl Area Sch. Dist., No. 12-2810, 2014 WL 4662477, at *3 (E.D. Pa. Sept. 19, 2014) (citing U.S. Steel Corp. v. United States, 519 F. 2d 359, 364 (3d Cir. 1975)).

[229] *Hughes*, 449 U.S., at 15 ("[a]n unrepresented litigant should not be punished for his failure to recognize subtle factual or legal deficiencies in his claims"). *See Christiansburg*, 434 U.S. at 418 ("[c]oncerned about the potential chilling effect on section 1983 plaintiffs . . . we are hesitant to award attorney's fees to victorious defendants in section 1983 actions.").

of marginal cases contributes to burgeoning dockets that tax the limited resources of the courts. In this respect, the *Christiansburg* analysis is not only antiquated but notably myopic in its assessment of the range of interests at stake in construing fee-shifting statutes. The purpose of an award of fees to a defendant is not to punish the plaintiff in a retributive manner nor merely to enable a party to recoup expenses it should in fairness have not been required to expend but in part to deter a plaintiff from engaging in further meritless litigation or "kitchen sink" pleading that requires a commensurately sweeping response from its adversary. [230] The concept of deterrence in this context extends beyond the immediate plaintiff by sending a clear signal to other litigants who might seek to raise meritless claims or who persist in prosecuting them long after their meritless nature is apparent.

Applying a more relaxed standard to defendants' fee applications would also contribute meaningfully to the incentive for all parties to consider settlement carefully before engaging in significant discovery that drives up expenses and reduces the prospects for eventual settlement. Advantages may even accrue to the plaintiffs' bar by providing a significant economic incentive for counsel to screen out matters after initial consultations that pose marginal facts or otherwise present a low probability of success at trial.

Cases such as *Hughes v. Rowe* understandably reject a scenario in which a plaintiff's failure to prevail at trial would automatically trigger fee-shifting to the full extent of the adversary's counsel fees, particularly where the plaintiff proceeds *pro se*.[231] An inflexible rule would clearly work an injustice in a case in which a plaintiff had a valid basis for commencing suit but nevertheless failed to defeat the adversary's dispositive motion or could not carry the burden of proof at trial. Nor would such a rule comport with the broad remedial purposes of the civil rights laws where a *pro se* plaintiff does not prevail due to a misguided failure to apprehend complex or subtle legal concepts or because the plaintiff is unfamiliar with his or her fundamental responsibilities in the

[230] *Tonti*, 656 F. 2d. at 219-21 (stating that function of fee awards is largely equitable in nature, and court may limit award against plaintiff to extent necessary to deter it and simultaneously prevent windfall to defendant).

[231] *Hughes*, 449 U.S. at 15. The result in *Hughes* was likely influenced by the fact that the petitioner was an unrepresented prisoner who raised claims under §1983 against prison personnel for, *inter alia*, violating due process by failing to hold a disciplinary hearing until two days after he was placed him in a segregation cell for drinking alcohol in violation of prison regulations. The petitioner contended that it was unnecessary to segregate him case because his offense did not involve violence and no emergency conditions were present that justified disregarding his due process rights. Id. at 11. The Court stated that the *Christiansburg* standard "appl[ies] with special force in actions initiated by uncounseled prisoners[]" and that "attorney's fees should rarely be awarded against such plaintiffs." *Id*. at 15. This view, however, ignores the value of deterring a *pro se* litigant who, though he or she may lack a sophisticated understanding of legal principles, clearly knows that the claims have no factual basis or persists in litigating claims that are unequivocally barred by *res judicata* or collateral estoppel.

discovery phase of litigation.[232] Yet in other contexts, the equities involved in determining counsel fees may warrant a different kind of response. A court should not be reluctant to sanction even a *pro se* where it was obvious at the commencement of the litigation that no facts supported the claim under applicable law, or where a litigant persists in re-litigating a cause of action that a trial court dismissed as meritless.[233]

The policy considerations that originally impelled adoption of an asymmetrical approach to litigants' fee applications are not as powerful as they once were, undercutting the widely shared judicial sentiment that attorneys' fee awards against plaintiffs are unfounded in all but the clearest cases. Even so, there are still valid reasons for a comparatively more indulgent treatment of plaintiffs' fee applications. While it is true that the ostensibly neutral language of §706(k) of Title VII and other similarly worded fee-shifting statutes renders the reasoning of *Christiansburg* questionable, as Justice Thomas remarked in his concurrence in *Evans*, it would nonetheless constitute judicial abdication to ignore Congress' intent, echoed in the legislative debates culminating in the enactment of Title VII, to vindicate constitutional and statutory rights and eradicate discrimination.[234] Any methodology of attorneys' fees awards that fails to take account of those overarching purposes ignores the judiciary's vital task in responsibly interpreting the law.[235]

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[232] For example, in Leon v. Wynn Law Vegas, LLC, no. 2:16-cv-01623, 2018 WL 6112968 (D. Nev. Nov. 2, 2018), plaintiff *pro se* failed to respond to the defendant's discovery demands or prosecute his claims of discrimination on the basis of race, national origin, disability as well as retaliation and discrimination under state law. *Id*. at 1. The district court granted the defendant's motion to dismiss the claims, in which the plaintiff alleged that he was terminated, and subsequently sought attorneys' fees in excess of $60,000. Noting that "[t]he Christiansburg standard is applied with particular strictness where the plaintiff proceeds pro se[,]" the court declined to award fees in the absence of a finding that the action was frivolous, unreasonable or groundless. *Id*. at 2 (citing Miller v. L.A. Cty. Bd. of Educ., 827 F.2d 617, 620 (9th Cir. 1987)). In addition, there was no evidence that that the plaintiff understood that his claims lacked merit and were therefore frivolous. *Id*. Another factor militating against fees was defendant's decision to refrain from moving for an order compelling the plaintiff to comply with his discovery obligations before it successfully moved to dismiss the action. While not essential, the absence of a discovery motion rendered uncertain whether the *pro se* plaintiff truly understood that his failure to respond to discovery had jeopardized his case. *Id*. at 3.

[233] *Id.* at *4 (cautioning *pro se* that further litigation would not insulate him from an award of fees despite his marginal financial condition, particularly if he engages in bad faith conduct) (citing Kulas v. Arizona, 156 Fed. Appx. 29 (9th Cir. Nov. 28, 2005)).

[234] As Justice Brennan observed in *Evans*, Congress enacted the Fees Act in order to overrule the court's decision in *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975)*, which abrogated the equitable power of federal courts to award fees to a party for serving the public interest, reestablishing a "regime under which attorney's fees were awarded as a means of securing enforcement of civil rights laws by ensuring that lawyers would be willing to take civil rights cases." *Evans*, 475 U.S. at 748 (Brennan, J., dissenting) (noting testimony at congressional hearings that *Alyeska* had caused hardships to civil rights litigants because attorneys refused to take cases and hampered the ability of legal aid organizations to bring suits). The legislative history manifests this purpose with "monotonous clarity." *Id.*

[235] "It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" Food and Drug Admin. v. Brown

Among other relevant considerations is the judiciary's interest in maintaining its traditional role as an important forum for the vindication of previously unrecognized legal rights.[236] Plaintiffs might never have successfully litigated matters that eventually led to landmark civil rights decisions such as *Regents of Univ. of California v. Bakke*[237] and *Griggs v. Duke Power Co.*[238] if the perceived threat of sanctions were so great that it effectively deterred them from exercising their right to judicial access.

The question becomes, then, how to preserve those goals while discouraging costly, meritless and wasteful litigation or litigation brought in bad faith. A legal standard should be sufficiently clear so that it is susceptible to consistent application by trial courts. It should, at the same time, remain faithful to, or at least consistent with, the legislative intent that gave rise to the statute to which the standard will be applied. Beyond those principles, an effective judicial standard should be crafted with consideration for its potential repercussions for the effective operation of the judicial system and the efficient allocation of judicial resources.

In this respect, the *Christiansburg* standard not only reflects questionable assumptions about the realities of legal practice but has also created significant difficulties in its application. Some courts have observed that the meaning of "without foundation" is problematic at best and "begets the very post hoc reasoning the Supreme Court warned against"[239] that "'it is important that a district court resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation.'"[240] In addition, courts often conflate the terms "frivolous," "unreasonable," or without "foundation"

& Williamson Tobacco Corp., 529 U.S. 120, 133 (2000) (quoting Davis v. Mich. Dep't. of Treasury, 489 U.S. 803, 809 (1989)).

[236] *See, e.g.*, Blue v. U.S. Dep't of Army, 914 F.2d 525, 34-35 (4th Cir. 1990), *cert. denied*, 499 U.S. 959 (1991) (stating "Congress had a momentous purpose in mind when it enacted Title VII, which was nothing less than the eradication of discrimination in employment throughout society. We are unwilling to witness the evisceration of this purpose through sanctions awarded in a manner that leaves a lasting reluctance on the part of plaintiffs to vindicate the legal rights which Congress gave them."). Motivated by this concern, the Fourth Circuit suggested that usually the most effective means for a district court to resolve a frivolous Title VII case is to dismiss it on the merits and to impose sanctions only as a last resort. *Id.* at 535. The Fourth Circuit did, however, opine that sanctions would be appropriate where a litigant persists in pressing the lawsuit despite the emergence of evidence that the case is no longer viable. *Id.* A plaintiff in a civil rights matter is not free, merely because he or she establishes a *prima facie* case of discrimination, to disregard unfolding evidence clearly reflecting that the employer had a legitimate business justification for taking adverse action. *Id.* at 537.

[237] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

[238] Griggs v. Duke Power Co., 401 U.S. 424 (1971).

[239] Advocs. for Individuals with Disabilities, LLC v. MidFirst Bank, No. CV-16-01969-PHX-NVW, 2018 WL 3545291, at *4 (D. Ariz. Jul. 24, 2018).

[240] *Id* (quoting *Christiansburg*, 431 U.S. at 421-22)).

synonymously, creating one confusing general standard.[241] There is also a significant lack of consistency in the factors that courts have identified in determining whether a claim is frivolous.[242]

Some courts have also misread *Christiansburg*, finding that it required a claimant to commence or pursue litigation in subjective bad faith as a prerequisite to the imposition of fees.[243] In fact, *Christiansburg* held that while the presence of subjective bad faith on the part of a plaintiff supports a fee award, the absence of subjective bad faith does not necessarily bar one.[244] In other words, a plaintiff who brings or continues to litigate a claim in subjective bad faith provides a sufficient but not necessary basis for an award of fees to the plaintiff's adversary.[245]

Clearly, Congress could not have intended trial courts to evaluate fee applications by defendants raised by way of §706(k) and §1988 under the common law standard of subjective bad faith because it would render the need for statutory authorization superfluous. Yet while the *Christiansburg* standard properly incorporates an objective requirement, this aspect of the ruling is too often overlooked in the judicial opinions.

III. **CONCLUSION**

A standard that arguably provides greater clarity and simplicity would endow a court with discretion to impose fees against a plaintiff who brings suit or persists in litigation

[241] Watson v. Cnty. of Yavapai, 240 F. Supp. 3d 996, 999-1000 (D. Ariz. 2017).

[242] Arnold v. Burger King Corp., 719 F.2d 63, 66 (4th Cir. 1983) (noting that factors courts have identified in determining whether action is frivolous include filing duplicitous motions, knowingly joining wrong defendant, continuing to prosecute in face of numerous indicators of meritless claim, evidence of previous racial slurs and disparate treatment and religious slurs combined with recurring encounters with same supervisor).

[243] *Watson*, 240 F. Supp. 3d at 1000. *See also* Silver v. KCA, Inc., 586 F.2d 138, 143 (9th Cir. 1978) (citing Van Hoomisen v. Xerox Corp., 503 F.2d 1131, 1133 (9th Cir. 1974)) (declaring factors to be considered in determining whether to award fees to prevailing defendant include good faith of the plaintiff in bringing action or appeal and ability of prevailing defendant to pay its own way; appellate court denied fees for appellate work in employment discrimination action brought under Title VII based on trial court's finding that plaintiff acted in good faith); Jones v. E. Okla. Radiation Therapy Assocs., LLC, no. 16-CV-150-JED-TLW, 2017 WL 2953676, at *3 (N.D. Okla. July 10, 2017) (denying defendant's motion for fees in action alleging race discrimination in violation of Title VIII and 42 U.S.C. §1981 in part because plaintiff may have had a good faith belief that she was entitled to equitable tolling of the limitations period under Title VII despite having no factual basis for that argument, where plaintiff voluntarily dismissed initial pleadings in state court and plaintiff waited long after 90-day period in which to file claim in federal court following receipt of right-to-sue letter from the EEOC).

[244] *Christiansburg*, 434 U.S. at 421.

[245] *Id.* at 422 ("if a plaintiff is found to have brought or continued such a claim in *bad faith*, there will be an even stronger basis for charging him with the attorney's fees incurred by the defense.") (emphasis added).

without an objective basis in law and fact.[246] *Christiansburg* admonishes that courts should avoid imposing fees upon a plaintiff merely for failure to prevail in the underlying litigation,[247] a position that remains valid. However, an approach modeled on the absence of law and fact is comparatively clearer when preserving a reasonable balance between promoting the congressional policies of affording civil rights litigants' ready access to the courthouse and discouraging frivolous or baseless suits. Such a standard would minimize the temptation to engage in the very *post hoc* rationalization *Christiansburg* cautioned against and would less likely lead courts astray in requiring subjective bad faith as a prerequisite to the imposition fees rather than as merely one element that may reinforce the justification for a fee award. It would also preserve the ability of trial courts to exercise their sound discretion in determining whether to impose fees upon a party based on a complete review of the entire record.[248]

Several other reforms would improve the operation of the civil rights laws. First, there is a strong argument that the mere fact that a plaintiff is represented by counsel should be irrelevant in the calculus of whether to award fees to opposing counsel. Implicit in the goal of inducing counsel to undertake representation is to ensure that the plaintiff receives zealous but ethical advocacy and representation by an attorney knowledgeable in the underlying law. A fee award against a represented party who files a claim improperly or who persists in litigation well after it becomes apparent that the claim cannot survive does not impair the congressional goal of ensuring that the claim is litigated and does not dissuade prospective civil rights complainants from bringing meritorious claims.[249] As the Second Circuit observed, an attorney is the client's agent

[246] This standard is now ostensibly applicable to retaliation claims under CEPA, N.J. STAT. ANN. § 34:19-6 (West 2013), though absent is any judicial interpretation of the statute that restrains plaintiffs' counsel from advancing truly marginal cases.

[247] *Christiansburg*, 434 U.S. at 419.

[248] Trial courts are guided by equitable considerations even under the U.S. Supreme Court's current jurisprudence. *See, e.g.*, Hensley v. Eckerhart, 461 U.S. 424, 437 (1983).

[249] The Eleventh Circuit, in *Durrett v. Jenkins Brickyard, Inc., 678 F.2d 911, 916 (11th Cir. 1982)*, held that whether counsel was responsible for filing or continuing a suit that is frivolous, groundless or unreasonable should play no role in the court's decision whether to assess counsel fees. The Eleventh Circuit, concurring with the Second Circuit in *Prate v. Freedman, 583 F.2d 42, 48 (2d Cir. 1978)*, reasoned that it would not be inequitable to burden the client with the adversary's fees. First, in virtually all actions without legal basis, and in many without factual basis, the attorney is the first to recognize the legal inadequacy of the case. Similarly, when a plaintiff continues to litigate after it becomes clear that his claim is frivolous, unreasonable, or groundless, it will usually be the plaintiff's counsel who, "through discovery or attention to the developing case law," should first recognize the necessity to terminate the litigation. Second, the salutary purposes of §706(k) of Title VII would be diluted if plaintiffs could deflect responsibility upon their counsel. *Id.* Third, where counsel bears primary responsibility for losing the case because of its legal or factual inadequacy, the plaintiff may seek recovery through a malpractice action. *Id.* The Eleventh Circuit determined that a contrary rule would disserve the purpose of §706(k) of Title VII to protect employers from meritless and burdensome litigation. *See also* Stokes v. City of Visalia, No 17-cv-01350, 2018 WL 4030732, at *6 (E.D. Cal. Aug. 21, 2018) (awarding defendant municipality its reasonable fees in §1983 action where reasonable attorney should have been aware at time of filing action

and representative and retains ultimate authority over the conduct of litigation.[250] In cases where the attorney is primarily culpable for the conduct that gives rise to an award of fees, the client may resort to a malpractice action to recover sums lost as a result of the attorney's negligence or malfeasance.[251] A court also has discretion to hold counsel personally responsible for the decision to file unmeritorious claims.[252]

Second, federal law could benefit by incorporating state law innovations, such as a "safe harbor" provision that allows a plaintiff to escape exposure to fees by voluntarily withdrawing claims once it is apparent based on emergent discovery or applicable law that they are no longer viable. The inclusion of a tempering provision in §1988 or section §706(k) would not only preserve judicial resources by encouraging counsel to terminate frivolous cases, but also alleviates concerns that plaintiffs may be deprived of their constitutional and statutory rights of judiciary access.

Third, equitable considerations that guide the discretion of a trial court in the determination whether to award fees suggest that a plaintiff's financial resources may be a relevant consideration in assessing the amount of an award.[253] Considering a plaintiff's financial condition as one factor in determining the amount of an award may help maintain the necessary balance between advancing Congress' goal of ensuring a forum

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that cause of action was foreclosed by *res judicata* due to duplicative state court action and that relief could only be obtained by filing appeal in state rather than federal court).

[250] Prate v. Freedman, 583 F.2d 42, 48 (2d Cir. 1978) (dismissing argument that fee award would impose unjust penalty on client because petitioner voluntarily chose his attorney as his representative in action and cannot avoid consequences of attorney's acts or omissions, consistent with system of representative litigation).

[251] Mattco Forge, Inc. v. Arthur Young & Co., 52 Cal. App. 4th 820, 833 (1977).

[252] Some courts expressly consider the plaintiff's financial considerations as part of a broader analysis that considers which party is better situated to absorb fees. Blasi v. Pen Argyl Area Sch. Dist., No. 12-2810, 2014 WL 4662477, at *4 (Sept. 19, 2014). For example, in *Blasi*, defendant school district sought fees following the district court's dismissal of plaintiff's complaint for failing to establish a *prima facie* case under Title VII and the ADEA. *Id* at *9. Plaintiff represented, however, that he had been unemployed for the past 10 years, had no assets of his own and depended on his spouse to support him and their seven children. *Id.* Due to this alleged indigence, the court declined to award fees since it did not perceive an award would have any deterrent effect under the circumstances. *Id.* It reasoned that "an award of fees would serve to do little other than overly burden an already encumbered family, to the benefit of the defendant who is better situated to bear the costs of litigation." *Id.* In addition, the court expressed concern that awarding fees to the defendant may discourage other similarly financially situated litigants from advancing meritorious claims. *Id.* Even so, however, the court "strongly advised" plaintiff to refrain from filing future frivolous lawsuits since the interest in compensating defendant for fees and costs in defending against a meritless case will eventually outweigh the value of promoting vigorous enforcement of Title VII. *Id.*

[253] *Id.* at 11 (holding that in no case may a district court refuse altogether to award attorneys' fees to a prevailing defendant in a Title VII action because of the plaintiff's financial condition and requiring that a fee be assessed that will serve the deterrent purpose of the statute).

for civil rights disputes and deterring frivolous actions.[254] Lack of significant financial resources, however, should not itself render a plaintiff immune from a fee-shifting award. Even a nominal award of fees against an errant but impoverished litigant serves the principle of deterrence.

Fourth, courts should consider as another relevant factor the difficulty of the legal issues posed, including the extent to which the plaintiff raised novel issues. There is often a qualitative difference between a case that is clearly frivolous on the facts or the law and a case in which a party seeks to extend, test or modify existing law, or where a party seeks to establish a new principle of law. [255]

Fifth, in cases where parties are represented by counsel, federal courts could make more use of Rule 11 and state courts of R. 1:4-8 to punish counsel for frivolous filings and deter others from similar conduct. As discussed *supra*, counsel play a critical role in a representative adversarial system and should be held responsible for litigation decisions that warrant the imposition of fees. In a case that is dismissed for a complete lack of legal merit or because the lawsuit was not reasonably purposeful, it is equitable to expose the non-prevailing party's attorney to the risk of sanctions.

A corollary issue from the perspective of state law is the extent to which the patchwork of judicial standards for evaluating defendants' fee applications needs reevaluation. As the overview of state law in Section I renders apparent, New Jersey civil rights law governing fee awards incorporates disparate formulations that are vague and unspecific and have resulted in conflicting judicial interpretations. Unlike the federal civil rights laws, which at least benefit from consistent interpretation by the U.S. Supreme Court, the lack of uniformity in state law fee-shifting standards tends to inject unnecessary uncertainty into a litigation process that is already complex and frequently prolonged. The current patchwork of formulations that guide trial courts in deciding whether and

[254] *See* Durrett v. Jenkins Brickyard, Inc., 678 F.2d 911, 917 (11th Cir. 1982) (noting that a district court awarding fees to a prevailing Title VII defendant should consider, as a limiting factor, the plaintiff's financial resources because "equitable considerations appropriately guide the determination of fee awards authorized by federal statute, and the financial resources of the paying party are one such equitable consideration) (citing Faraci v. Hickey-Freeman Co., 607 F.2d 1025, 1028 (2d Cir. 1979)); Adkins v. Briggs & Stratton Corp., 159 F.3d 306, 307-08 (7th Cir. 1998) (court is free in ADAA matter to weigh equitable considerations, including employee's ability to pay, and to award nominal fee or even no fee if, for acceptable reasons, it deems appropriate to do so).

[255] The Ninth Circuit gave weight to this circumstance in *Kohler*, 780 F.3d at 1267, in which it reversed the fee award to a defendant where the plaintiff, a disabled customer, did not prevail on the majority of his claims under the ADA and state law that the defendant store operator owned, leased or operated a shopping center and that it unlawfully created architectural barriers in a restroom that impeded his movements. The circuit court noted that the claims regarding maneuvering space and the liability of a tenant for common areas were not clearly resolved by its prior case law and the plaintiff was entitled to bring the suit to resolve those issues. It reasoned that "[t]he law grows with clarity for benefit of the public through such actions even if they are not successful." *Id.*

how to exercise their discretion to award counsel fees to defendants has the potential to generate inconsistent decisions based on similar facts, increasing the likelihood that the Appellate Division will need to devote its scarce resources to correct legal errors. Moreover, no sound or compelling public policy is advanced in requiring a court to apply a standard in assessing a defendant's fee application that differs depending upon the precise statutory basis for the action. A consistent legislative approach to civil rights law would inject greater certainty into the litigation process.

Unlike the federal courts, no New Jersey court has yet had occasion to consider whether levying counsel fees against a plaintiff is appropriate in the situation in which a plaintiff brings claims that are meritorious or at least raised in good faith and others that are frivolous. Also undetermined is whether it is necessary for a defendant to secure a favorable ruling on the merits in order to claim fees as a prevailing party. The development of the law of counsel fees in New Jersey would benefit from clarification by the New Jersey Legislature on these issues.

Striking the proper balance between the important goal of allowing victims of civil rights violations to seek legal redress while deterring frivolous suits does not require a draconian and inflexible approach to fee awards, but neither should it be based on the antiquated and unrealistic premises that the *Christiansburg* standard incorporates. Far from undermining the civil rights laws, a standard that encourages a more even-handed approach to fee awards would better reflect the realities of legal practice and changing social and cultural norms. *Christiansburg* should be replaced by a standard that is both clearer and preserves the discretion of a trial court to consider objectively all the facts of a case in determining whether it would be just to impose fees upon an unsuccessful plaintiff. Far from undermining the legislative intent of the civil rights laws to enable civil rights complainants to secure their day in court, a judicious and calibrated departure from the traditional interpretation of fee-shifting statutes would better serve the goals of civil rights legislation, the judicial process and society.