

Florida State University Law Review

Volume 37 | Issue 1

Article 2

2009

Adding Insult to No Injury: The Denial of Attorney's Fees to "Victorious" Employment Discrimination and Other Civil Rights Plaintiffs

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Recommended Citation

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FLORIDA STATE UNIVERSITY LAW REVIEW



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AND OTHER CIVIL RIGHTS PLAINTIFFS

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VOLUME 37

FALL 2009

NUMBER 1

Recommended citation: Lawrence D. Rosenthal, *Adding Insult to No Injury: The Denial of Attorney's Fees to "Victorious" Employment Discrimination and Other Civil Rights Plaintiffs*, 37 FLA. ST. U. L. REV. 49 (2009).

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CIVIL RIGHTS PLAINTIFFS

LAWRENCE D. ROSENTHAL*

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I. INTRODUCTION

Most litigants involved in lawsuits in the United States are responsible for the cost of their own attorney’s fees.¹ However, because Congress believed that certain types of claims, including employment discrimination and other civil rights claims, are important enough to encourage potential plaintiffs and their attorneys to pursue these actions, it enacted several fee-shifting statutes.² These statutes provide

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1. Donald T. Kramer, Annotation, *Factors or Conditions in Employment Discrimination Cases Said to Justify Decrease in Attorneys’ Fees Awarded Under § 706(k) of Civil Rights Act of 1964 (42 U.S.C.A. § 2000e-5(k))*, 151 A.L.R. FED. 77, 121 (1999). The rule that requires parties to pay their own attorney’s fees is known as the “American rule,” which contrasts with the way attorney’s fees are handled in England, where the losing party is responsible for both sides’ attorney’s fees. *Id.*

2. Some of these fee-shifting statutes include Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k) (2006); the Americans with Disabilities Act of 1990, 42 U.S.C. § 12205 (2006); the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 626(b) (2006); and the Civil Rights Attorney’s Fees Awards Act of 1976, 42 U.S.C. § 1988(b) (2006). The Civil Rights Attorney’s Fees Awards Act of 1976 was enacted after the Supreme Court’s decision in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), where the Court determined that a prevailing civil rights plaintiff was not entitled to an award of attorney’s fees. The statute’s purpose was to effectively overturn *Alyeska Pipeline*. *Farrar v. Hobby*, 506 U.S. 103, 118 (1992) (O’Connor, J., concurring).

that the prevailing party may recover a reasonable attorney's fee. While these statutes typically do not exclude prevailing defendants from recovering their attorney's fees, usually only prevailing plaintiffs are entitled to recover what can sometimes be a significant amount.³ However, a problem with these statutes occurs when a plaintiff is able to prove that a defendant violated his rights but is then awarded only nominal damages. In most of these cases, courts have denied these plaintiffs' requests for attorney's fees, despite the fact that they were prevailing parties.⁴ This Article will argue that the Supreme Court should revisit this issue and conclude that in employment discrimination and other civil rights cases where plaintiffs are awarded only nominal damages, such plaintiffs, as prevailing parties, should typically be awarded attorney's fees.

As noted above, most successful employment discrimination plaintiffs who recover more than nominal damages are entitled to an award of attorney's fees from their former, or sometimes current, employer.⁵ The fee-shifting statute that allows these awards depends on the employment discrimination statute under which the plaintiff prevails. For example, the Americans with Disabilities Act has its own fee-shifting provision;⁶ Title VII of the Civil Rights Act of 1964 (as amended) has its own fee-shifting provision;⁷ and the Age Dis-

3. See *infra* notes 5-9; see also *Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n*, 434 U.S. 412, 417, 421 (1978) (noting that a prevailing Title VII plaintiff is usually entitled to recover his attorney's fees but that a prevailing defendant is entitled to recover attorney's fees only when "the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith").

4. See *infra* Part III; see also *Farrar*, 506 U.S. at 115 (holding that civil rights plaintiffs who win nominal damages are prevailing parties but are usually not entitled to an award of attorney's fees).

5. Pursuant to the Civil Rights Attorney's Fees Awards Act of 1976, plaintiffs who win other types of civil rights cases, many of which this Article will discuss, are also eligible for an award of attorney's fees. Specifically, that statutory provision provides that "[i]n any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title . . . [or] title VI of the Civil Rights Act of 1964 . . . 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." 42 U.S.C. § 1988(b).

6. The fee-shifting provision for the Americans with Disabilities Act states the following: "In any action or administrative proceeding commenced pursuant to this chapter, the court or agency, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee, including litigation expenses, and costs, and the United States shall be liable for the foregoing the same as a private individual." 42 U.S.C. § 12205.

7. The fee-shifting provision for Title VII of the Civil Rights Act of 1964 states the following: "In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party . . . 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). Although the statute does not specifically state that there is a different standard for prevailing plaintiffs than there is for prevailing defendants, almost all prevailing plaintiffs who receive more than nominal damages are awarded attorney's fees under this and other fee-shifting statutes, while prevailing defendants typically do not recover fees unless the plaintiff's suit was frivolous. See *Christiansburg Garment Co.*, 434 U.S. at 417, 421 (noting that a prevailing defendant is

crimination in Employment Act also has its own fee-shifting provision.⁸ In the non-employment discrimination context, the Civil Rights Attorney's Fees Awards Act of 1976 provides that plaintiffs who prevail in other civil rights claims are entitled to recover a reasonable attorney's fee.⁹ The one common thread running through these fee-shifting statutes is that the fee must be "reasonable."¹⁰

One issue courts wrestled with prior to 1992 was whether a plaintiff who demonstrates that a defendant violated his rights but is awarded only nominal damages is entitled to recover his attorney's fees.¹¹ In its 1992 *Farrar v. Hobby* decision, the Supreme Court determined that plaintiffs who win only nominal damages—while tech-

entitled to recover attorney's fees in a Title VII case when the plaintiff's action was "frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith.")

8. The Age Discrimination in Employment Act's fee-shifting provision is found at 29 U.S.C. § 626(b), which incorporates the attorney's fees provision from the Fair Labor Standards Act, which states: "The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." 29 U.S.C. § 216(b) (2006). In this fee-shifting statute, Congress used the word "shall" rather than "may" when addressing whether courts should award attorney's fees. Also, this provision focuses its attention on prevailing plaintiffs, not prevailing parties.

9. As noted previously, the Civil Rights Attorney's Fees Awards Act of 1976 provides that "[i]n any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title . . . [or] title VI of the Civil Rights Act of 1964 . . . 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." 42 U.S.C. § 1988(b).

10. Courts are consistent in concluding that there is a two-step process used to determine what fee is "reasonable." *Jimenez v. Paw-Paw's Camper City, Inc.*, No. 00-1756 Section "N" (2), 2002 U.S. Dist. LEXIS 3248, at *53-54 (E.D. La. Feb. 22, 2002). The first step involves a determination of the "lodestar" amount. *Id.* at *53. This amount "is calculated by multiplying the number of hours reasonably expended by an appropriate hourly rate . . ." *Id.* After making this determination, the court has the authority to either increase or decrease this amount based on the twelve factors set forth by the Fifth Circuit in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). The Fifth Circuit set out the following twelve factors in *Johnson*:

- (1) the time and labor required; (2) the novelty and difficulty of the questions;
- (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to the acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the 'undesirability' of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

488 F.2d at 717-19.

11. As will be discussed in this Article, most plaintiffs who win only nominal damages rarely receive attorney's fees (if they do, those awards are usually drastically reduced). *See infra* Part III. Nonetheless, if a plaintiff fails to request these nominal damages, he might foreclose the opportunity for the court to even consider an attorney's fee award. *See Azimi v. Jordan's Meats, Inc.*, 473 F. Supp. 2d 101 (D. Me. 2007), *aff'd*, 456 F.3d 228 (1st Cir. 2006) (denying a request for attorney's fees when the plaintiff won only declaratory relief and failed to make a timely request for an award of nominal damages).

nically prevailing parties—are only *eligible* for these fee awards and will likely not be *entitled* to them.¹² Although Justice Thomas wrote the Court’s opinion in *Farrar*, Justice O’Connor’s concurring opinion has become the more influential opinion when subsequent courts have had to decide whether to award attorney’s fees to plaintiffs who have won only nominal damages.¹³

Since the *Farrar* opinion, most courts have determined that plaintiffs who receive only nominal damages are not entitled to attorney’s fees.¹⁴ In applying the three-factor test from Justice O’Connor’s opinion, courts consider: (1) the difference between the amount awarded and the amount sought; (2) the significance of the legal issue on which the plaintiff prevailed; and (3) whether the litigation accomplished a “public goal other than occupying the time and energy of counsel, court, and client.”¹⁵

Although most courts seem to disfavor an award of attorney’s fees in cases in which plaintiffs are awarded only nominal damages, this outcome undermines the goals of the fee-shifting statutes and deters individuals from attempting to enforce their rights. This Article will argue that plaintiffs who win only nominal damages should, as prevailing parties, generally be entitled to recover their attorney’s fees. The Article will explain why the three factors Justice O’Connor articulated in her concurring opinion in *Farrar* should not be used to determine whether these plaintiffs should recover their attorney’s fees. Additionally, the Article will argue that, because of the current rules used to determine the propriety of awarding attorney’s fees, victims of civil rights violations and their attorneys will be unlikely to pursue meritorious, but perhaps not lucrative, claims; employers and government officials might be less likely to vigilantly police their work environments and employees’ behavior; and plaintiffs will no longer have any incentive to act as “private attorneys general,” which the Supreme Court suggested victims of employment discrimination should do.¹⁶ As a result, the Court should revisit *Farrar* and decide that plaintiffs who demonstrate violations of their rights should be

12. 506 U.S. 103, 115 (1992).

13. See *infra* Parts III, IV, and V.

14. This is most likely because of Justice Thomas’s statement that “[w]hen a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief . . . the only reasonable fee is usually no fee at all.” *Farrar*, 506 U.S. at 115 (citation omitted). See *infra* Part III for a discussion of several of these cases where plaintiffs who were able to prove civil rights violations were not able to recover attorney’s fees.

15. *Farrar*, 506 U.S. at 120-22 (O’Connor, J., concurring).

16. See *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 415 (1975) (citing *Newman v. Piggie Park Enters.*, 390 U.S. 400 (1968)). In *Albemarle Paper Co.*, the Supreme Court noted that in the employment discrimination context, employees should act as “private attorneys general” when trying to enforce the substantive provisions of Title VII. *Id.*

entitled to recover the attorney's fees incurred as a result of pursuing these meritorious claims.

The Article will first discuss the Court's *Farrar* opinion and Justice O'Connor's concurring opinion from that case.¹⁷ Next, the Article will provide numerous examples of cases where plaintiffs who received awards of only nominal damages were denied attorney's fees or were awarded almost no attorney's fees.¹⁸ Then, the Article will examine some rare cases in which plaintiffs who won only nominal damages were successful in recovering their attorney's fees, either in whole or in significant part.¹⁹ Thereafter, the Article will discuss cases where victorious plaintiffs recovered a modest percentage of what they sought in attorney's fees.²⁰ Finally, I will argue that in order to further the purposes behind civil rights fee-shifting provisions, the Court should revisit *Farrar* and decide that prevailing parties who receive only nominal damages should usually be entitled to recover their attorney's fees, regardless of the amount of damages sought, the legal significance of the issue on which the plaintiff prevailed, or whether the litigation served some public purpose.²¹

II. THE *FARRAR V. HOBBY* OPINION

The Supreme Court addressed two issues in *Farrar*. The first issue was whether a plaintiff who secures only a nominal-damage award in a civil rights action is a prevailing party for purposes of the Civil Rights Attorney's Fees Awards Act of 1976,²² and the second was whether such a plaintiff is entitled to an award of attorney's fees.²³ While the Court determined that a nominal-damage award does render a plaintiff in such a case a prevailing party,²⁴ the Court also determined that such status does not necessarily entitle that party to an award of attorney's fees.²⁵ In fact, the Court suggested that the plaintiffs in most of these cases would *not* be entitled to an award of attorney's fees.²⁶ Although the *Farrar* facts perhaps justified Justice Thomas's and Justice O'Connor's opinions, the *Farrar* facts were so extreme and so different from the facts of most civil rights

17. *See infra* Part II.

18. *See infra* Part III.

19. *See infra* Part IV.

20. *See infra* Part V.

21. *See infra* Part VI.

22. *Farrar v. Hobby*, 506 U.S. 103, 105 (1992); 42 U.S.C. § 1988 (2006).

23. *Farrar*, 506 U.S. at 105.

24. *Id.* at 113-14.

25. *Id.* at 115-16.

26. *See id.* at 115. This contradicts the usual rule in employment discrimination cases, where prevailing employment discrimination plaintiffs are usually entitled to attorney's fees. *See Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n*, 434 U.S. 412, 417 (1978).

claims that applying the *Farrar* reasoning is inappropriate in most cases. Applying *Farrar* to other civil rights claims has, and will continue to have, many negative consequences.²⁷

Farrar was not an employment discrimination case.²⁸ Rather, *Farrar* involved two plaintiffs who sued several defendants for a total of \$17 million, alleging procedural due process violations after the State of Texas closed a school for delinquent, disabled, and disturbed teens after the death of one of its students.²⁹ The jury decided that there were, in fact, violations of one plaintiff's rights, but it also concluded that the violations were not the proximate cause of the plaintiff's injuries.³⁰ As a result of the jury's verdict, the trial court ordered that the plaintiffs take nothing on their complaint, the action be dismissed, and the parties bear their own costs.³¹ On appeal, the Fifth Circuit affirmed in part and reversed in part.³² Most relevant for purposes of this Article, the Fifth Circuit concluded that, because the jury found that one of the defendants violated the civil rights of one of the plaintiffs, a judgment against that defendant and an order granting nominal damages to the plaintiff were appropriate.³³ Both plaintiffs then sought an award of attorney's fees and costs, which the district court granted in an amount close to \$320,000.³⁴ Once again on appeal in the Fifth Circuit, the court reversed the fee award.³⁵ The court reasoned that the plaintiffs were not prevailing parties because of the limited success they achieved in receiving just one dollar after seeking \$17 million.³⁶ The Supreme Court granted certiorari.³⁷

The Court revisited three previous cases in which the issue of prevailing party status was at issue³⁸ and ultimately concluded that in order to obtain prevailing party status, "a civil rights plaintiff must obtain at least some relief on the merits of his claim. The plaintiff must obtain an enforceable judgment against the defendant from

27. Although I argue that the Court should revisit *Farrar*, another way courts can still award attorney's fees to civil rights plaintiffs who win only nominal damages is by simply distinguishing the extreme facts in *Farrar* from the facts of the cases before them.

28. 506 U.S. at 105-06.

29. *Id.*

30. *Id.* at 106.

31. *Id.* at 106-07.

32. *Id.* at 107. The opinion from the Fifth Circuit can be found at *Farrar v. Cain*, 756 F.2d 1148 (5th Cir. 1985). In its opinion, the Fifth Circuit determined that an award of nominal damages was appropriate. *Id.* at 1152.

33. *Id.*

34. *Farrar*, 506 U.S. at 107.

35. *Estate of Farrar v. Cain*, 941 F.2d 1311, 1317 (5th Cir. 1991).

36. *Id.* at 1315.

37. *Farrar v. Hobby*, 502 U.S. 1090 (1992).

38. *Farrar*, 506 U.S. at 109-10 (relying on *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782 (1989); *Rhodes v. Stewart*, 488 U.S. 1 (1988) (per curiam); and *Hewitt v. Helms*, 482 U.S. 755 (1987)).

whom fees are sought or comparable relief through a consent decree or settlement.”³⁹ The Court noted that “[w]hatever relief the plaintiff secures must directly benefit him at the time of the judgment or settlement.”⁴⁰ In wrapping up its analysis, the Court concluded that “a plaintiff ‘prevails’ when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant’s behavior in a way that directly benefits the plaintiff.”⁴¹ The Court reasoned that, because judgments for both compensatory and nominal damages affect the defendant’s behavior for the plaintiff’s benefit, a civil rights plaintiff who secures an award of only nominal damages is still a prevailing party for purposes of the Civil Rights Attorney’s Fees Awards Act of 1976.⁴² The Court therefore concluded that the Fifth Circuit was wrong when it decided that a plaintiff who recovers only nominal damages is not a prevailing party.⁴³

After deciding that the amount of the award a civil rights plaintiff wins is not the critical factor in determining whether he is a prevailing party, the Court addressed how that amount can factor into the determination of whether an award of attorney’s fees is appropriate.⁴⁴ The Court, seemingly being a bit dismissive of the importance of an individual’s civil rights, noted that in this particular case, the “litigation accomplished little beyond giving petitioners ‘the moral satisfaction of knowing that a federal court concluded that [their] rights had been violated’ in some unspecified way.”⁴⁵ The Court then noted that when the purpose of the litigation is to recover damages, and the plaintiff is unsuccessful in doing so, the primary consideration in determining the appropriate amount of fees is the difference between the amount of damages sought and the amount ultimately recovered.⁴⁶ In *Farrar*, the plaintiffs requested \$17 million in damages from several defendants yet received only one dollar from one of those defendants.⁴⁷ The Court affirmed the Fifth Circuit’s judgment regarding the denial of a fee award, holding that “[w]hen a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief, the only reasonable fee is usually no fee at all.”⁴⁸

39. *Id.* at 111 (citation omitted).

40. *Id.* (citing *Hewitt v. Helms*, 482 U.S. 755, 764 (1987)).

41. *Id.* at 111-12.

42. *Id.* at 112-13.

43. *Id.* at 113.

44. *Id.* at 113-15.

45. *Id.* at 114 (quoting *Hewitt*, 482 U.S. at 762).

46. *Id.* (citing *Riverside v. Rivera*, 477 U.S. 561, 585 (1986) (Powell, J., concurring)).

47. *Id.* at 107.

48. *Id.* at 115-16. Again, the opposite rule typically applies in the employment discrimination context when the plaintiff prevails—he is usually entitled to an attorney’s fee award. See *Christiansburg Garment Co. v. Equal Employment Opportunity Comm’n*, 434 U.S. 412, 417 (1978).

Although Justice Thomas's opinion addressed this issue in full, Justice O'Connor's concurring opinion has received the most attention in cases regarding nominal damages and attorney's fees.⁴⁹ In her opinion, Justice O'Connor first noted that "a technical victory may be so insignificant" that an award of attorney's fees is not appropriate.⁵⁰ After that observation, she found that the plaintiffs in *Farrar* "asked for a bundle and got a pittance."⁵¹ As a result, she concluded that the plaintiffs' recovery was *de minimis*.⁵² However, to make sure that courts did not interpret her words to mean that attorney's fees are never appropriate in nominal-damage cases, she recognized that not all nominal-damage awards are *de minimis* and that "[n]ominal relief does not necessarily a nominal victory make."⁵³ She also noted that not all civil rights cases involve a lot of money and that plaintiffs should not be discouraged from acting as private attorneys general in enforcing these rights.⁵⁴

She also articulated a three-factor test to use when determining whether courts should award fees in nominal-damage cases.⁵⁵ The factors Justice O'Connor set out were: (1) the difference between the damages sought and the damages awarded;⁵⁶ (2) "the significance of the legal issue on which the plaintiff claims to have prevailed";⁵⁷ and

49. See *infra* Parts III, IV, and V.

50. *Farrar*, 506 U.S. at 117 (citing *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792 (1989)).

51. *Id.* at 120.

52. *Id.* at 120-21.

53. *Id.* at 121.

54. *Id.* at 122.

55. *Id.* at 120-22.

56. *Id.* at 120-21. Justice Thomas also noted that this factor is the most important factor to evaluate when deciding what a reasonable attorney's fee would be in a case where only nominal damages are awarded. *Id.* at 114.

57. *Id.* at 121. There is a split of authority with respect to what this factor actually evaluates. Some courts interpret this factor as meaning the extent to which the plaintiff succeeded on his theory of liability. See *Phelps v. Hamilton*, 120 F.3d 1126, 1132 (10th Cir. 1997). Other courts interpret this factor as meaning the importance of the legal issue involved. See *Piper v. Oliver*, 69 F.3d 875, 877 (8th Cir. 1995). Of course, courts that follow the *Piper* line of reasoning might be combining the second and third O'Connor factors. In fact, the court in *Barber v. T.D. Williamson, Inc.* noted that the second O'Connor factor was more likely meant to evaluate the extent to which the plaintiff prevailed on his claims at trial. 254 F.3d 1223, 1231 (10th Cir. 2001). The court used Justice O'Connor's application of the second factor in *Farrar* to reach this conclusion. Specifically, the court in *Barber* noted that when addressing the second factor, Justice O'Connor wrote the following, suggesting that the second factor should evaluate the extent to which the plaintiff prevailed in his claims:

[the plaintiff] cannot be said to have achieved a true victory. Respondent was just one of six defendants and the only one not found to have engaged in a conspiracy. If recovering one dollar from the least culpable defendant and nothing from the rest legitimately can be labeled a victory—and I doubt that it can—surely it is a hollow one. [The plaintiff] may have won a point, but the game, set, and match all went to the defendants.

(3) whether the litigation served some public purpose.⁵⁸ After applying these factors to the facts before the Court, Justice O'Connor agreed that the proper fee for the plaintiff in *Farrar* was "nothing."⁵⁹

Therefore, as a result of Justice Thomas's and Justice O'Connor's opinions in *Farrar*, the Court clarified a few points. First, an award of nominal damages gives a civil rights plaintiff prevailing party status.⁶⁰ Second, in the usual case in which only nominal damages are awarded, the appropriate attorney's fee award should be no fee at all.⁶¹ Finally, when analyzing claims under various civil rights statutes, a three-factor test is appropriate to determine whether a plaintiff who recovers only nominal damages is an exception to the general rule and entitled to a full or substantial amount of the attorney's fees requested.⁶² The next Part of this Article will provide several examples of when courts followed what the *Farrar* court described as the "usual" case—a case where a plaintiff who receives only nominal damages receives either no attorney's fee award or one so insignificant that it is essentially no fee at all.

III. CASES WHERE COURTS DENIED FEES OR AWARDED *EXTREMELY* LIMITED FEES

As the Court clarified in *Farrar*, most plaintiffs who recover only nominal damages in employment discrimination and other civil rights cases will typically not be entitled to an award of attorney's fees.⁶³ Most courts follow this rule and deny fee requests to these plaintiffs who, despite being able to establish prevailing party status, are unsuccessful in convincing the court that the three O'Connor factors from *Farrar* weigh in favor of a fee award.

One case that thoroughly analyzed the O'Connor factors from *Farrar* is *Petrunich v. Sun Building Systems, Inc.*,⁶⁴ a case brought under the Age Discrimination in Employment Act of 1967 and the equivalent state antidiscrimination statute.⁶⁵ In *Petrunich*, the court granted the plaintiff's summary judgment motion on the issue of li-

Barber, 254 F.3d at 1231 (quoting *Farrar*, 506 U.S. at 121 (O'Connor, J., concurring)).

58. *Farrar*, 506 U.S. at 121-22.

59. *Id.* at 122. *Farrar* was the perfect case to limit a plaintiff's attorney's fee award. Not only did *Farrar* involve an individual's business interests rather than other, more personal interests, the plaintiff in *Farrar* sought an outrageous amount of damages and also continued the litigation for close to a decade. *Id.* at 105-09.

60. *Id.* at 105, 111-12.

61. *Id.* at 115.

62. See *infra* Parts III, IV, and V.

63. 506 U.S. at 115.

64. 625 F. Supp. 2d 199 (M.D. Pa. 2008), *vacated by consent of the parties*, No. 04-2234, 2008 U.S. Dist. LEXIS 104154 (M.D. Pa. Nov. 21, 2008).

65. The Age Discrimination in Employment Act of 1967 can be found at 29 U.S.C. §§ 621-634 (2006). The equivalent state statute under which the plaintiff brought her claim was the Pennsylvania Human Relations Act, 43 PA. STAT. ANN. §§ 951-963 (West 2008).

ability,⁶⁶ but a jury trial resulted in an award of no damages.⁶⁷ The court then granted the plaintiff a nominal-damage award in the amount of one dollar.⁶⁸

After first determining that the plaintiff was a prevailing party under the *Farrar* standard,⁶⁹ the court addressed what amount of attorney's fees, if any, was appropriate.⁷⁰ In making this determination, the court observed that under *Farrar*, when a plaintiff receives only nominal damages, the appropriate fee is "usually no fee at all."⁷¹ However, after making this statement, the court used the three O'Connor factors and first considered the difference between what the plaintiff sought and what the plaintiff received.⁷² The court noted that the plaintiff sought approximately \$150,000 in damages, yet he received only one dollar in nominal damages.⁷³ As a result of this large difference, the court concluded that the plaintiff's victory was essentially technical, or de minimis, and that this factor weighed against a fee award.⁷⁴

The court then focused on the second O'Connor factor—the significance of the legal issue on which the plaintiff prevailed.⁷⁵ After noting that the courts have disagreed on what exactly this factor evaluates,⁷⁶ the court decided that it weighed in favor of an award of attorney's fees in this particular case.⁷⁷ Specifically, the court noted that the plaintiff prevailed on four of his six claims and that the interest asserted by the plaintiff—the right to be free of discrimination—was an important one.⁷⁸ However, the court tempered this apparent victory for the plaintiff by noting that the victory on liability was mostly technical—the defendant did not respond to the plaintiff's request for

66. The court did so because the defendant failed to respond to the plaintiff's request for admissions, and the court therefore deemed the allegations true. 625 F. Supp. 2d at 202-03.

67. *Id.* at 204.

68. *Id.*

69. *Id.* at 205.

70. *Id.*

71. *Id.* at 206 (emphasis omitted) (quoting *Farrar v. Hobby*, 506 U.S. 103, 115 (1992)).

72. *Id.* at 206-07.

73. *Id.* at 207.

74. *Id.* The plaintiff tried to analogize his case to *Buss v. Quigg*, No. 01-CV-3908, 2002 U.S. Dist. LEXIS 19324, at *2, 5 (E.D. Pa. Oct. 9, 2002), *aff'd*, 91 F. App'x 759 (3d Cir. 2004) (awarding attorney's fees to a plaintiff who requested \$150,000 but won only nominal damages). *Id.* at 207 n.8. The court, however, rejected that argument. *Id.*

75. *Id.* at 207-08. As noted previously, there is a split of authority regarding how the courts evaluate this factor. Some courts evaluate the number of claims on which the plaintiff was successful, while other courts evaluate the importance of the legal issue on which the plaintiff was successful. *See supra* note 57.

76. *Id.* at 207-08.

77. *Id.* at 208.

78. *Id.* By looking at both of these issues, the court was evaluating the second O'Connor factor with respect to both the number of claims on which the plaintiff was successful and the importance of the plaintiff's claims.

admissions in a timely manner.⁷⁹ As a result, although the court concluded that the second O'Connor factor weighed in favor of an award of fees, the court did not believe that the factor carried much weight.⁸⁰

Finally, the court considered the public purpose of the litigation.⁸¹ After noting that litigation serves “a public purpose when it vindicates the rights of others, creates new precedent, deters future deprivations, and/or provokes a change in the defendant’s behavior,”⁸² the court then concluded that the plaintiff’s case did not “result in ground-breaking conclusions of law,”⁸³ nor would it have “a profound influence on the development of the law and on society.”⁸⁴ As a result of these two determinations and the fact that the plaintiff sought compensation for only his own injuries and not for those of his co-workers, the court determined that this factor weighed against an award of fees.⁸⁵ Therefore, after weighing the three O'Connor factors, the court determined that the plaintiff was not entitled to a fee award, even though he was the prevailing party.⁸⁶

Similar to the court in *Petrulich*, the court in *Zeuner v. Rare Hospitality International, Inc.*, also utilized the three O'Connor factors from *Farrar* and concluded that a victorious plaintiff was not entitled to recover attorney’s fees.⁸⁷ In *Zeuner*, the plaintiff brought suit against her former employer, alleging sexual harassment and wrongful termination based on pregnancy.⁸⁸ The jury found in favor of the plaintiff on her harassment claim but found in favor of the defendant on the wrongful discharge claim.⁸⁹ Despite prevailing on the Title VII sexual harassment claim, the court awarded only nominal damages in the amount of one dollar.⁹⁰ Because the jury found in favor of the plaintiff on one count, and because the court awarded nominal damages, the plaintiff sought an award of attorney’s fees.⁹¹

79. *Id.*

80. *Id.*

81. *Id.* at 208-09.

82. *Id.* at 209.

83. *Id.* (quoting *Pino v. Locascio*, 101 F.3d 235, 239 (2d Cir. 1996)).

84. *Id.* (quoting *Mercer v. Duke Univ.*, 401 F.3d 199, 207 (4th Cir. 2005)).

85. *Id.* The court did, however, observe that the complaint did implicate an “important interest—the right to a discrimination-free workplace . . .” *Id.*

86. *Id.* See also *McBurrows v. Mich. Dep’t of Transp.*, 159 F. App’x 638, 641 (6th Cir. 2005). In *McBurrows*, the court affirmed the trial court’s decision that no fees were appropriate when a plaintiff won nominal damages of one dollar after seeking over \$500,000 in damages in a retaliation case. *Id.*

87. 386 F. Supp. 2d 635, 638-39 (M.D.N.C. 2005).

88. *Id.* at 637.

89. *Id.*

90. *Id.*

91. *Id.*

The court first had to determine whether the plaintiff was a prevailing party. Based upon the *Farrar* opinion, the court concluded that she was the prevailing party because she was awarded an enforceable judgment against the defendant.⁹² After making this determination, the court addressed whether an attorney's fee award was warranted in this case or whether this was the typical nominal-damage case where an award of attorney's fees was inappropriate.⁹³ It reiterated several of the statements from *Farrar*, the most important of which was the Court's statement that "[w]hen the recovery of nominal damages is caused by the plaintiff's 'failure to prove an essential element of [her] claim for monetary relief, the only reasonable fee is usually no fee at all.'"⁹⁴

The court then discussed Justice O'Connor's concurring opinion and analyzed the three O'Connor factors.⁹⁵ In addressing the first issue—the amount requested by the plaintiff compared to the amount ultimately awarded to her—the court noted that the plaintiff sought close to \$2 million, plus other damages, yet she received only one dollar from the defendant.⁹⁶ The court also noted that the plaintiff focused solely on monetary relief and did not seek any injunctive relief during the proceedings.⁹⁷ In comparing the two figures (the almost \$2 million requested and the one dollar awarded), the court found that the plaintiff's award was "quite limited," and the first O'Connor factor therefore weighed in favor of denying fees.⁹⁸

The court then briefly addressed the second and third O'Connor factors and concluded that this case was the "usual nominal-damages case" in which an award of fees was not appropriate.⁹⁹ Specifically, the court first stated that "[t]he case was not legally significant" and that it was "a typical civil rights action in which [the] [p]laintiff was seeking to vindicate her personal rights."¹⁰⁰ The court then noted that the plaintiff's failure to recover any compensatory damages was based, in part, on her decision not to seek such damages.¹⁰¹ Finally, the court ended its brief discussion of the second and third O'Connor factors by concluding that the only reasonable fee was "no fee at all."¹⁰²

Another case in which a victorious civil rights plaintiff was awarded only nominal damages and denied attorney's fees was *Pouil-*

92. *Id.* at 638-39.

93. *Id.*

94. *Id.* at 638 (quoting *Farrar v. Hobby*, 506 U.S. 103, 115 (1992)).

95. *Id.* at 638-39.

96. *Id.* at 639.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

lon v. Little, a case involving an anti-abortion activist who was eventually awarded two dollars in nominal damages for his claims under the First and Fourth Amendments.¹⁰³ This case involved two trials and two visits to the Sixth Circuit. One of the issues presented in the case was whether the nominal-damage award justified an award of attorney's fees under 42 U.S.C. § 1988.¹⁰⁴ The district court determined that a fee award of just over \$35,000 was appropriate, and the defendants appealed.¹⁰⁵

Not surprisingly, the Sixth Circuit first looked at 42 U.S.C. § 1988 and *Farrar* and concluded that, even though the statute does allow for a reasonable attorney's fee for victorious civil rights plaintiffs, plaintiffs who win only nominal damages are usually not entitled to attorney's fees.¹⁰⁶ The Sixth Circuit acknowledged that the plaintiff was a prevailing party under *Farrar*, but it also found that a reasonable fee in cases where only nominal damages are awarded is usually "no fee at all."¹⁰⁷ The court found that the plaintiff's request for both compensatory and punitive damages and his decision to turn down the defendant's settlement offers demonstrated that the plaintiff was seeking money rather than vindication of his rights; as a result, this factor weighed against an award of attorney's fees.¹⁰⁸ Although the district court indicated that it believed the plaintiff most likely felt vindicated (and it therefore awarded fees), the Sixth Circuit concluded that this fact was insufficient to grant the plaintiff's attorney's fee request.¹⁰⁹ Because the degree of success is the most critical factor under the *Farrar* analysis, and because the plaintiff received only nominal damages, the Sixth Circuit rejected the lower court's analysis.¹¹⁰ Noting also that "technical vindication of one's constitutional rights alone is not enough to justify an award of attorney's fees pursuant to § 1988," the court concluded that, even though the plaintiff demonstrated a violation of his rights, he was not entitled to recover his attorney's fees for doing so.¹¹¹ And, similar to the court in *Johnson v. City of Aiken*,¹¹² the court did not address the other two O'Connor factors from *Farrar*.

103. 326 F.3d 713, 715-16 (6th Cir. 2003).

104. *Id.* at 716. The Sixth Circuit's earlier opinion can be found at *Pouillon v. City of Owosso*, 206 F.3d 711 (6th Cir. 2000).

105. *Pouillon*, 326 F.3d at 716.

106. *Id.*

107. *Id.* at 716-17.

108. *See id.* at 718.

109. *Id.* at 716-17.

110. *Id.*

111. *Id.*

112. 278 F.3d 333 (4th Cir. 2002). This case will be discussed in detail *infra* notes 133-145 and accompanying text.

Another case in which the court denied attorney's fees to plaintiffs who were able to demonstrate a violation of their rights was *Briggs v. Marshall*.¹¹³ In *Briggs*, the plaintiffs filed suit against various defendants under various theories of liability based upon allegations of wrongful arrest and detention, excessive force, and state tort law.¹¹⁴ When the case went to the jury, not all claims remained, and the jury returned a mixed verdict.¹¹⁵ For purposes of this Article, the jury's key determination was not that one of the defendants had used excessive force, but that the appropriate amount of damages was one dollar.¹¹⁶ After addressing issues regarding jury instructions and nominal damages, issues on which the court of appeals agreed with the district court,¹¹⁷ the court of appeals addressed whether attorney's fees were appropriate in this case.¹¹⁸ The district court had previously determined that attorney's fees were not appropriate.¹¹⁹

The Seventh Circuit started its attorney's fees discussion with its announcement that it would use the test articulated by Justice O'Connor in *Farrar*.¹²⁰ Like most courts that have addressed this issue, the *Briggs* court found that the most important factor under Justice O'Connor's test was the difference between the amount sought and the amount recovered.¹²¹ Noting that the plaintiffs requested \$75,000 in compensatory damages, plus punitive damages, and that the jury awarded only nominal damages, the court concluded that this factor weighed against awarding fees.¹²²

The court then considered the significance of the legal issue on which the plaintiffs prevailed.¹²³ The court found this factor the least significant of the three and interpreted it to evaluate "the extent to which the plaintiffs succeeded on their claims."¹²⁴ Although the plaintiffs prevailed on only one of many claims, the Seventh Circuit determined that the lower court acted within its discretion when it decided that this factor weighed slightly in favor of awarding fees.¹²⁵

Finally, the court looked at whether the litigation served any public purpose.¹²⁶ The court noted the most relevant point when analyzing this factor is "whether the plaintiffs established anything more

113. 93 F.3d 355, 361 (7th Cir. 1996).

114. *Id.* at 358.

115. *Id.*

116. *Id.*

117. *Id.* at 359-60.

118. *Id.* at 361.

119. *Id.* at 358.

120. *Id.* at 361.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

than that their constitutional rights were violated.”¹²⁷ Comparing this case to prior Seventh Circuit precedent on the issue,¹²⁸ the court noted that the plaintiffs “did not obtain an injunction prohibiting future violations, and they ‘did not establish that the defendants’ conduct was sufficiently reprehensible to warrant punitive damages.’”¹²⁹ As a result, and even after acknowledging that a violation of an individual’s rights is important, the court relied on *Farrar* for the proposition that, even when such a violation is demonstrated, attorney’s fees in nominal-damage cases are typically not warranted.¹³⁰ The Seventh Circuit then concluded that the lower court did not abuse its discretion in denying fees.¹³¹

In some of these nominal-damage cases, courts considered only the first O’Connor factor from *Farrar* and concluded that an attorney’s fee award was inappropriate.¹³² For example, in *Johnson v. City of Aiken*, several plaintiffs sued several defendants alleging various civil rights violations as well as a state law claim for assault.¹³³ After a jury found in favor of the plaintiffs on several counts, the Fourth Circuit reversed, leaving only two awards intact.¹³⁴ The Fourth Circuit allowed a \$50,000 award (based on the state law assault claims) to stand on appeal, and it also allowed a \$0.35 award (based on the civil rights violation claim) to stand.¹³⁵ The issue on appeal in the Fourth Circuit was whether the plaintiffs were entitled to a fee award based on their successful state law claim while being awarded only nominal damages on the civil rights claim.¹³⁶

The lower court determined that the plaintiffs were entitled to such an award, but the Fourth Circuit reversed.¹³⁷ Although the defendants conceded that these nominal damages entitled the plaintiffs to prevailing party status, they argued that the only reasonable attorney’s fee was no fee.¹³⁸ The court agreed, determining that it was inappropriate for the lower court to look at the plaintiffs’ success on the state law claims when deciding whether an award of attorney’s

127. *Id.*

128. *Id.* Specifically, the court relied on *Maul v. Constan*, 23 F.3d 143 (7th Cir. 1994).

129. *Id.* (quoting *Maul*, 23 F.3d at 147).

130. *Id.*

131. *Id.*

132. In addition to *Johnson v. City of Aiken*, 278 F.3d 333, 338 (4th Cir. 2002), which will be addressed now, the court in the previously discussed case of *Pouillon* also analyzed only the first of the three factors from Justice O’Connor’s concurring opinion in *Farrar*. *Pouillon v. Little*, 326 F.3d 713, 716-17 (6th Cir. 2003).

133. 278 F.3d at 335.

134. *Id.* at 335-36. The unpublished table decision reversing part of the judgment can be found at *Johnson v. City of Aiken*, 217 F.3d 839 (4th Cir. 2000).

135. *Johnson*, 278 F.3d at 336.

136. *Id.*

137. *Id.* at 336, 339.

138. *Id.* at 336.

fees was appropriate under the federal claims.¹³⁹ The court therefore had to evaluate the plaintiffs' success on the federal claims.¹⁴⁰ Relying on *Farrar*, the court concluded that, because the plaintiffs won only nominal damages on their federal claims, a fee award under 42 U.S.C. § 1988 would be inappropriate.¹⁴¹ The court noted that the success obtained by the plaintiffs in this case was "no greater than that had by the plaintiff in *Farrar*."¹⁴² As a result, the "success" the plaintiffs enjoyed in this case "did little more than provide them 'the moral satisfaction of knowing that a federal court concluded that [their] rights had been violated.'"¹⁴³ Accordingly, despite the fact that the plaintiffs had demonstrated that the defendants violated their rights, the court determined that the lower court abused its discretion in awarding attorney's fees.¹⁴⁴ As stated earlier, it is interesting that the court neither mentioned nor applied the second or third factors from the O'Connor concurrence in *Farrar*.¹⁴⁵

Even in cases in which plaintiffs are awarded more than nominal damages, some courts nonetheless determine that attorney's fees are inappropriate. One such case was *Leggett v. Gold International, Inc.*, where the plaintiff in a Title VII and state law sexual battery claim won a \$5000 punitive-damage award but was awarded no compensatory damages.¹⁴⁶ The issue before the court was whether the punitive-damage award was sufficient to warrant an award of attorney's fees.¹⁴⁷

The court first noted that in Title VII actions, punitive damages are recoverable, even in the absence of a compensatory-damage award.¹⁴⁸ The court then relied on *Farrar* for the proposition that such a plaintiff is a prevailing party; however, the court next focused on the fact that the degree of the plaintiff's success is the key factor when determining the reasonableness of any award of attorney's fees.¹⁴⁹ Rather than go through an extensive analysis of Justice O'Connor's three-factor *Farrar* test, the court simply observed the following: "[The plaintiff] received a small sum in punitive damages, instead of the \$3.5 million she sought in her complaint. [Her] prosecution of this action accomplished little except providing her with the moral satisfaction of having her rights vindicated in a federal court, 'in some

139. *Id.* at 337.

140. *Id.* at 338.

141. *Id.*

142. *Id.*

143. *Id.* (quoting *Farrar v. Hobby*, 506 U.S. 103, 114 (1992)).

144. *Id.* Although this was no comfort to the plaintiffs' attorneys, the Fourth Circuit did note that its decision "in no way" reflected on the excellent work the attorneys performed on behalf of their clients. *Id.* at 338 n.10.

145. *See id.* at 338-39.

146. No. CV205-137, 2007 U.S. Dist. LEXIS 9081, at *1-2 (S.D. Ga. Feb. 8, 2007).

147. *Id.* at *2.

148. *Id.* at *3.

149. *Id.* (citing *Farrar v. Hobby*, 506 U.S. 103, 109-14 (1992)).

unspecified way.’”¹⁵⁰ The court then concluded that the plaintiff’s “modest success” did not warrant an award of attorney’s fees.¹⁵¹

A case in which a Title VII plaintiff prevailed on the issue of liability but was awarded almost nothing in attorney’s fees was *Schlant v. Victor Belata Belting Co.*¹⁵² In *Schlant*, the plaintiff alleged violations of Title VII, the parallel state civil rights statute, and tort claims.¹⁵³ The jury determined that the employer had, in fact, discriminated against the plaintiff on the basis of gender, but that the plaintiff was not entitled to damages other than back pay or front pay.¹⁵⁴ The amount of these damages was just over \$800, plus pre-judgment interest.¹⁵⁵ The plaintiff sought an award of attorney’s fees and costs. The defendant, while conceding that the plaintiff was the prevailing party, argued that she was not entitled to an award of attorney’s fees because her success was *de minimis*.¹⁵⁶

After agreeing that the plaintiff was the prevailing party, the court engaged in an analysis of whether she should be entitled to an award of attorney’s fees.¹⁵⁷ The court first relied on a pre-*Farrar* case from the United States Supreme Court, *Hensley v. Eckerhart*, for the proposition that where a plaintiff

has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. This will be true even where the plaintiff’s claims were interrelated, nonfrivolous, and raised in good faith. Congress has not authorized an award of fees whenever it was reasonable for a plaintiff to bring a lawsuit or whenever conscientious counsel tried the case with devotion and skill. The most critical factor is the degree of success obtained.¹⁵⁸

The court then noted that the “fees requested . . . must be reasonable in relation to the degree of success obtained.”¹⁵⁹ After briefly referring to Justice Thomas’s opinion in *Farrar*, the court focused its attention on Justice O’Connor’s three-factor test.¹⁶⁰ The court then compared the amount the plaintiff sought in her lawsuit to the amount she was awarded.¹⁶¹ She requested over \$2.7 million, yet she

150. *Id.* at *3-4 (citation omitted) (quoting *Farrar*, 506 U.S. at 114).

151. *Id.* at *4.

152. No. 94-CV-0915E(Sc), 2001 U.S. Dist. LEXIS 16539 (W.D.N.Y. Oct. 3, 2001).

153. *Id.*

154. *Id.* at *2-3.

155. *Id.* at *3.

156. *Id.* at *3-4.

157. *Id.* at *5, 6-17.

158. *Id.* at *7 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983)).

159. *Id.*

160. *Id.* at *8-9.

161. *Id.* at *9-11.

obtained a judgment of just over \$800.¹⁶² As a result of this disparity, the court concluded, “the first of Justice O’Connor’s factors suggests that plaintiff’s recovery is *de minimis* due to the substantial difference between the judgment she sought and that which she recovered.”¹⁶³

The court then addressed the second of Justice O’Connor’s factors—the significance of the legal issue on which the plaintiff prevailed.¹⁶⁴ While the plaintiff argued that she was entitled to a full attorney’s fee award because the jury concluded that the defendant intentionally discriminated against her,¹⁶⁵ the defendant argued that this was not sufficient to justify an award of attorney’s fees.¹⁶⁶ Agreeing with the defendant, the court noted that “[t]he moral satisfaction of knowing that a jury concluded that defendant had discriminated against her does not entitle plaintiff to attorney’s fees.”¹⁶⁷ The court found that what is most important in evaluating Justice O’Connor’s second factor “is not the significance of the legal issue to [the] plaintiff personally,” but rather the “significance [of the issue] to the legal community as a whole”¹⁶⁸ Relying on Second Circuit precedent, the court noted that “the ‘vast majority of civil rights litigation does not result in ground-breaking conclusions of law, and therefore, will only be appropriate candidates for fee awards if a plaintiff recovers some significant measure of damages or other meaningful relief.’”¹⁶⁹ Because there were no such novel legal issues involved in this case, the court concluded that this factor also weighed against a fee award.¹⁷⁰

Finally, the court examined the third O’Connor factor—“whether the victory ‘accomplished some public goal other than occupying the time and energy of counsel, court, and client.’”¹⁷¹ The plaintiff argued that the lawsuit did achieve some public good—as a result of this lawsuit, several of the defendant’s other employees discussed the case and contacted the plaintiff’s attorney, advising him that they had also been victims of discrimination.¹⁷² Because none of these other claims was ever filed, the court rejected the plaintiff’s argument that the case served anyone other than the plaintiff.¹⁷³ The court

162. *Id.* at *10.

163. *Id.* at *11.

164. *Id.* at *11-13.

165. *Id.* at *11.

166. *Id.* at *4.

167. *Id.* at *12.

168. *Id.* at *12-13. This analysis seems to combine Justice O’Connor’s second and third factors.

169. *Id.* at *13 (quoting *Pino v. Locascio*, 101 F.3d 235, 239 (2d Cir. 1996)).

170. *Id.* This analysis also suggests that the court was combining Justice O’Connor’s second and third factors.

171. *Id.* (quoting *Farrar v. Hobby*, 506 U.S. 103, 121-22 (1992) (O’Connor, J., concurring)).

172. *Id.* at *13-14.

173. *Id.* at *14-15.

therefore concluded that the plaintiff's recovery was de minimis and she was entitled to little or no fees.¹⁷⁴ The court settled on a figure that represented one-third of the plaintiff's award—just under \$300.¹⁷⁵

As this Part of the Article demonstrates, several courts are using Justice O'Connor's three-factor test from *Farrar* to conclude that plaintiffs who recover only nominal damages are entitled to either no attorney's fees or very limited attorney's fees.¹⁷⁶ In all of these cases, even though plaintiffs proved that their employer or a government official violated their rights, the courts still found that attorney's fees are rarely appropriate unless the plaintiff obtains more than a de minimis victory. Although most courts have reached this conclusion, there are a few rare cases in which courts have awarded fees even though the plaintiffs won only nominal damages. The next Part of this Article addresses some of those decisions.

IV. CASES WHERE THE FEE AWARDED WAS CLOSE TO THE AWARD REQUESTED

Although the previous Part of this Article illustrated that most courts are denying attorney's fees in cases where plaintiffs recover only nominal damages, some courts are using the three O'Connor factors from *Farrar* to reach the opposite conclusion—plaintiffs who demonstrate civil rights violations are entitled to an award of attorney's fees despite the fact that they recovered only nominal damages.

For instance, in *Brandau v. Kansas*, the Tenth Circuit awarded attorney's fees to a plaintiff although she won only nominal damages.¹⁷⁷ In *Brandau*, the plaintiff sued under Title VII on the theories of hostile work environment, retaliation, and constructive discharge.¹⁷⁸ The plaintiff prevailed on her hostile environment claim, but the jury awarded her only one dollar in nominal damages.¹⁷⁹ The

174. *Id.* at *16.

175. *Id.* at *17. The plaintiff sought an award of over \$46,000. *Id.*

176. See *Benton v. Or. Student Assistance Comm'n*, 421 F.3d 901 (9th Cir. 2005) (reversing fee award of over \$370,000 in nominal-damage case after analyzing *Farrar* factors); *Boston's Children First v. City of Boston*, 395 F.3d 10, 11 (1st Cir. 2005) (denying attorney's fees to victorious nominal-damage plaintiff); *Pino v. Locascio*, 101 F.3d 235, 237, 239 (2d Cir. 1996) (reversing an attorney's fee award of over \$50,000 after the plaintiff was awarded only nominal damages); *Williams v. Town of Randolph*, 574 F. Supp. 2d 250, 252, 254 (D. Mass. 2008) (denying plaintiff's request for attorney's fees after plaintiff lost most of his claims and was awarded only nominal damages for his successful claim); *Guy v. City of San Diego*, No. 06cv0766 JM(LSP), 2008 U.S. Dist. LEXIS 38360, at *1 (S.D. Cal. May 12, 2008) (denying fees to nominal-damage plaintiff who sought over \$219,700 in damages).

177. 168 F.3d 1179 (10th Cir. 1999).

178. *Id.* at 1180.

179. *Id.* at 1181.

trial court awarded the plaintiff her attorney's fees as the prevailing party, and the defendant appealed to the Tenth Circuit.¹⁸⁰

Naturally, the Tenth Circuit started its analysis with a discussion of the *Farrar* opinion, with particular emphasis on Justice O'Connor's concurrence and Justice White's opinion in which he noted that attorney's fees can be appropriate in some cases where only nominal damages are awarded.¹⁸¹ The Tenth Circuit then analyzed whether the district court abused its discretion in applying Justice O'Connor's test.¹⁸² Beginning with the first factor, the district court noted that the plaintiff sought back pay and only \$50,000 in non-economic damages, unlike the plaintiffs in *Farrar*, who sought \$17 million in damages.¹⁸³ Also, although the jury's monetary award was minimal, "the jury's 'verdict vindicated the violation of [the plaintiff's] civil rights.'"¹⁸⁴ Finally, before addressing the second O'Connor factor, the district court distinguished the case from *Farrar* by noting that this case was not protracted, did not require multiple trips to the court of appeals, and did not carry on for close to a decade.¹⁸⁵

The district court then discussed the second O'Connor factor—the significance of the legal issue on which the plaintiff prevailed.¹⁸⁶ Agreeing with the district court's finding that the plaintiff's victory on her sexual harassment claim was significant, the Tenth Circuit determined that the second O'Connor factor also weighed in favor of a fee award, despite the fact that the plaintiff had not prevailed on her other claims.¹⁸⁷ Specifically, the district court found that the plaintiff's success was significant because it achieved at least some of her desired benefit in bringing the suit.¹⁸⁸

Finally, although the plaintiff brought suit only on her own behalf, the court agreed that the lawsuit served a public purpose.¹⁸⁹ The district court concluded that the litigation put the defendant on notice of the need to educate its employees about sexual harassment and the need to investigate those claims, and that current and future employees would benefit as a result of the plaintiff's victory.¹⁹⁰ Because the Tenth Circuit was not convinced that the lower court's analysis

180. *Id.*

181. *Id.* at 1181-82.

182. *Id.* at 1182-83.

183. *Id.* at 1182.

184. *Id.* (quoting Appellant's Appendix at 80).

185. *Id.* The Tenth Circuit also distinguished this case from *Farrar* by noting that while the plaintiffs in *Farrar* were able to obtain a judgment against only one of seven defendants, the plaintiff in this case was awarded a judgment against the only named defendant. *Id.* at n.2.

186. *Id.*

187. *See id.* at 1182-83.

188. *Id.* at 1182.

189. *Id.* at 1182-83.

190. *Id.* at 1182.

was flawed, it concluded that it was in no position to reverse the fee award.¹⁹¹ Ultimately, the Tenth Circuit agreed with the lower court and concluded that there were “no special circumstances that would render [the] award unjust” and affirmed the district court’s decision to award fees.¹⁹²

Another case in which plaintiffs recovered almost all of the fees requested was *Buss v. Quigg*, which involved plaintiffs who were eventually awarded nominal damages in a 42 U.S.C. § 1983 claim involving violations of the Fourth and Fourteenth Amendments.¹⁹³ At trial, the jury found that the defendant did violate the plaintiffs’ rights, but it failed to award even nominal damages because of an error in the jury instructions.¹⁹⁴ The United States District Court for the Eastern District of Pennsylvania first concluded that there was an error with the jury instructions and that the plaintiffs should have been awarded nominal damages pursuant to Supreme Court precedent.¹⁹⁵ The court then addressed the issue of what attorney’s fee, if any, was appropriate.¹⁹⁶ The defendant first argued, in direct conflict with the Supreme Court’s holding in *Farrar*, that the plaintiffs were not prevailing parties.¹⁹⁷ Citing *Farrar*, the court quickly rejected this argument.¹⁹⁸ The court then addressed whether the plaintiffs’ status as prevailing parties warranted a fee award.¹⁹⁹

Relying on the legislative history behind 42 U.S.C. § 1988 and Supreme Court precedent, the district court reiterated the importance of civil rights lawsuits and the need for attorneys to represent individuals whose rights have been violated.²⁰⁰ The court then addressed the *Farrar* conclusion that an award of attorney’s fees is inappropriate in most nominal-damage cases.²⁰¹ The court also noted that the majority opinion in *Farrar* gave “imperfect guidance” to lower courts and, as a result, courts have retained their discretion to award attor-

191. *Id.* at 1183. When a court of appeals reviews a district court’s decision regarding whether to award attorney’s fees, the abuse of discretion standard is appropriate. *Id.* at 1181 (citing *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 989 (10th Cir. 1996)).

192. *Id.* at 1183.

193. No. 01-CV-3908, 2002 U.S. Dist. LEXIS 19324, at *1-3 (E.D. Pa. Oct. 9, 2002), *aff’d*, 91 F. App’x 759 (3d Cir. 2004).

194. *Id.* at *6-7.

195. *Id.* Specifically, the court relied on *Carey v. Phipus*, 435 U.S. 247, 266 (1978), for the proposition that a plaintiff is entitled to nominal damages if that plaintiff demonstrates a constitutional violation. *Buss*, 2002 U.S. Dist. LEXIS 19324, at *6-7.

196. *Id.* at *9-10.

197. *Id.* at *10.

198. *Id.* at *9-10.

199. *Id.*

200. *Id.* at *10-13. The court relied on H.R. REP. NO. 94-1558 (1976) and the following Supreme Court cases: *Webb v. Board of Education*, 471 U.S. 234 (1985); *Blum v. Stenson*, 465 U.S. 886 (1984); *Hensley v. Eckerhart*, 461 U.S. 424 (1983); *Maine v. Thiboutot*, 448 U.S. 1 (1980); and *Carey v. Phipus*, 435 U.S. 247 (1978).

201. *Buss*, 2002 U.S. Dist. LEXIS 19324, at *13-14.

ney's fees to plaintiffs even when those plaintiffs win only nominal damages.²⁰² Next, the court rejected the defendant's argument that *Farrar* established a per se rule against awarding fees in nominal-damage cases.²⁰³

Similar to most courts faced with fee requests from nominal-damage plaintiffs, the district court in *Buss* then analyzed the three-factor test Justice O'Connor articulated in *Farrar*.²⁰⁴ The court first addressed the extent of the relief obtained.²⁰⁵ Although the defendant pointed to several cases in which plaintiffs sought high damage awards but received either nominal damages or a sum significantly less than that which was requested, the court distinguished those cases by noting that the plaintiffs in *Buss* sought only \$150,000 in damages.²⁰⁶ The court also noted that "it [was] plainly evident that [the] [p]laintiffs here sought vindication of their constitutional rights,"²⁰⁷ and because the jury determined that the defendant did, in fact, violate those rights, the plaintiffs "gained an authoritative determination that they rightly acted to enforce their constitutional right against unreasonable search and seizure in their home."²⁰⁸ The court therefore determined that the discrepancy in the amount awarded and the amount sought weighed in favor of a fee award.²⁰⁹

The next factor the court considered was the significance of the legal issue on which the plaintiffs prevailed.²¹⁰ The court emphasized the importance of the violation of the plaintiffs' rights in this case (unlawfully entering a home) as opposed to the importance of the violation at issue in *Farrar* (injury to a business interest), finding that the defendant's unlawful entry into the plaintiffs' home was significant.²¹¹ The court then observed that some courts interpret the second O'Connor factor to require an analysis of the theory of liability upon which a plaintiff prevailed.²¹² After noting that the plaintiffs prevailed on only one theory, the court determined that this one victory was enough for the second O'Connor factor to weigh in favor of a fee award.²¹³

202. *Id.* at *14 (citing *Norris v. Sysco Corp.*, 191 F.3d 1043, 1051 (9th Cir. 1999); *Akrabawi v. Carnes Co.*, 152 F.3d 688, 695-97 (7th Cir. 1998); *Canup v. Chipman-Union, Inc.*, 123 F.3d 1440, 1443-44 (11th Cir. 1997); and *Sheppard v. Riverview Nursing Ctr., Inc.*, 88 F.3d 1332, 1339 (4th Cir. 1996)).

203. *Id.* at *15-16.

204. *Id.* at *17.

205. *Id.* at *18.

206. *Id.* at *18-19.

207. *Id.* at *19-20.

208. *Id.* at *20-21.

209. *Id.* at *24.

210. *Id.*

211. *Id.* at *24-26.

212. *Id.* at *26.

213. *Id.* at *26-27.

Finally, the court evaluated whether the plaintiffs' victory served a public purpose.²¹⁴ The court found that the victory would "not likely cause a change in police policy or training, nor will it have potential collateral estoppel effects."²¹⁵ However, the court did note the importance of civil rights suits and the role of citizens to act as private attorneys general when their rights have been violated.²¹⁶ Concluding that the plaintiffs' victory could not be "cast in monetary terms," the court in *Buss* determined that the third O'Connor factor also weighed in favor of awarding attorney's fees.²¹⁷ The court relied on the Seventh Circuit's opinion in *Hyde v. Small* for the conclusion that a small award in a civil rights case does not, and should not, preclude an award of attorney's fees.²¹⁸ After this analysis, the court awarded the plaintiffs approximately \$35,000 in attorney's fees.²¹⁹

Another case in which a court used the O'Connor factors from *Farrar* to conclude that a plaintiff was entitled to an award of attorney's fees was *Hare v. Potter*.²²⁰ In *Hare*, the plaintiff brought a retaliatory hostile work environment claim under Title VII. Although the jury concluded that there was, in fact, a Title VII violation, it awarded the plaintiff no damages.²²¹ The United States District Court for the Eastern District of Pennsylvania granted equitable relief and ultimately concluded that, as the prevailing party, the plaintiff was entitled to an award of attorney's fees.²²² The court first observed that parties traditionally bear their own costs in litigation; however, it then noted that some statutory schemes, such as the one established under Title VII, allowed a prevailing party to recover fees from the opposing party.²²³ The court stated that the purpose behind such fee-shifting provisions is to encourage victims of discrimination "to seek judicial relief," and that "[i]f successful plaintiffs were routinely forced to bear their own attorney[s] fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts."²²⁴ However, relying on *Farrar*, the court found that a plaintiff is not entitled to prevailing party

214. *Id.* at *27.

215. *Id.*

216. *Id.*

217. *Id.* at *29.

218. *Id.* at *29-30 (citing *Hyde v. Small*, 123 F.3d 583, 585 (7th Cir. 1997)).

219. *Id.* at *40.

220. 549 F. Supp. 2d 698 (E.D. Pa. 2008).

221. *Id.* at 700.

222. *Id.*

223. *Id.* at 701.

224. *Id.* at 701-02 (second alteration in original) (quoting *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968)).

status absent an enforceable judgment.²²⁵ The court then wrestled with the issue of whether the plaintiff was, in fact, the prevailing party.²²⁶

The court acknowledged that this was a “close question,” but it ultimately decided that the plaintiff was a prevailing party.²²⁷ Relying on Third Circuit precedent, the court concluded that being forced to perform supplemental training and to post notices of the verdict altered the relationship between the parties, and that the plaintiff benefitted from this change.²²⁸ Additionally, the defendant was required to consult with the plaintiff, who no longer worked for the defendant, about various aspects of the judgment. This provided further evidence that the plaintiff was the prevailing party and thus eligible for an award of fees.²²⁹ Believing that this type of relief “altered the legal relationship between the parties and achieved some benefit sought in bringing the suit,”²³⁰ the court decided that this was “more than . . . mere ‘moral satisfaction’ from ‘a favorable statement of law.’”²³¹

The court then addressed the three-factor O’Connor test from *Farrar*.²³² Although the Third Circuit had not yet affirmatively decided that it would apply Justice O’Connor’s test, the court concluded that the Third Circuit had suggested it would follow that test if presented with the issue.²³³ In applying the first factor—the difference between the relief sought and the relief awarded—the court decided that the factor weighed in favor of the plaintiff.²³⁴ Specifically, although the plaintiff initially alleged nine claims and the jury found in favor of the plaintiff on only one, the court concluded that the plaintiff received some “tangible equitable relief.”²³⁵ The court found this sufficient to tip the scales in favor of the plaintiff on the first O’Connor factor.²³⁶

The court next addressed the second factor—the significance of the legal issue on which the plaintiff prevailed.²³⁷ Noting that different courts evaluate this factor differently, the court concluded that, under either analysis (the importance of the legal issue or the extent of the plaintiff’s success on the theories of liability), the factor

225. *Id.* at 702.

226. *Id.* at 702-06.

227. *Id.* at 702, 706.

228. *Id.* at 705. Specifically, the court relied on *Roe v. Operation Rescue*, 919 F.2d 857, 869 (3d Cir. 1990), and on *Truesdell v. Philadelphia Housing Authority*, 290 F.3d 159, 163 (3d Cir. 1998), for this conclusion.

229. *Hare*, 549 F. Supp. 2d at 704-06.

230. *Id.* at 705 (quoting *Farrar v. Hobby*, 506 U.S. 103, 112 (1992)).

231. *Id.*

232. *Id.* at 706.

233. *Id.* (citing *Buss v. Quigg*, 91 F. App’x 759, 761 (3d Cir. 2004)).

234. *See id.*

235. *Id.*

236. *Id.*

237. *Id.* at 706-07.

weighed in favor of awarding fees.²³⁸ First, the court determined that the plaintiff's victory on her retaliatory hostile work environment claim was "an important legal issue."²³⁹ Second, the court concluded that her victory was a " 'significant issue in litigation' achieving 'some of the benefit she sought in bringing suit.' "²⁴⁰ As a result of these two determinations, the court concluded that the second O'Connor factor, regardless of how the court evaluated it, weighed in favor of awarding fees.²⁴¹

Finally, the court evaluated whether the litigation served an important public purpose and concluded that it did.²⁴² Specifically, the court noted that "successful Title VII cases achieve an important public purpose."²⁴³ Noting that the Supreme Court had previously announced that "Congress intended a Title VII plaintiff to be the 'chosen instrument of Congress to vindicate a policy that Congress considered the highest priority,' "²⁴⁴ the court then noted that in this particular case, the verdict provided a benefit to the defendant's present and future employees, and that it was in the public's interest.²⁴⁵ The court also observed that this outcome could deter future retaliatory conduct.²⁴⁶ Finally, the court found that the plaintiff "prevailed on a significant issue in the case, and the litigation served an important public interest by exposing conduct in violation of Title VII."²⁴⁷ As a result, the plaintiff was entitled to a fee award.²⁴⁸

As this Part of the Article demonstrates, not all courts follow the majority view and instead award attorney's fees in cases where plaintiffs recover only nominal damages.²⁴⁹ Although some of the cases de-

238. *Id.* at 707. The court cited *Milton v. City of Des Moines*, 47 F.3d 944, 946 (8th Cir. 1995), for the proposition that this factor weighs the importance of the legal issue on which the plaintiff prevailed, and it relied on *Barber v. T.D. Williamson, Inc.*, 254 F.3d 1223, 1231 (10th Cir. 2001), for the proposition that this factor analyzes the extent of the plaintiff's success.

239. *Hare*, 549 F. Supp. 2d at 707.

240. *Id.* (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)).

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.* (quoting *Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n*, 434 U.S. 412, 418 (1978)) (internal quotation marks omitted).

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.* at 708.

249. See *Mercer v. Duke Univ.*, 401 F.3d 199 (4th Cir. 2005) (affirming a 23% reduction of attorney's fees for a nominal-damage plaintiff but still awarding close to \$350,000 in fees because of the significance of the legal issue and the public goal of the litigation); *Layman Lessons, Inc. v. City of Millersville*, 550 F. Supp. 2d 754 (M.D. Tenn. 2008) (awarding reduced fees to a nominal-damage plaintiff after concluding that (1) the plaintiff's motivation was vindication of rights; (2) the issue on which the plaintiff prevailed was significant; and (3) the case achieved a public goal); *Milwaukee Deputy Sheriffs Ass'n v. Clarke*, No. 06-C-602, 2008 U.S. Dist. LEXIS 12662 (E.D. Wis. Feb. 5, 2008) (awarding 85%

scribed in the previous Parts of this Article did not take an all-or-nothing approach, in most of those cases, the awards were either so insignificant so as to be almost meaningless or extremely close to what the plaintiff requested. The next Part of the Article will describe cases where the court granted attorney's fee awards that were at least significant enough to be meaningful to the attorneys who helped their clients obtain prevailing party status but were also not particularly close to what the plaintiffs requested.

V. CASES WHERE THE COURTS HAVE AWARDED LIMITED FEES

Instead of taking an all-or-nothing approach, some courts have determined that plaintiffs who are awarded only nominal damages are entitled to a percentage of the fees requested; however, in many of these cases, this figure is small and does not adequately compensate the plaintiff's attorney.²⁵⁰ However, the awards described in the cases discussed in this Part of the Article were at least not meaningless to the attorney and his client.

One case in which a plaintiff's request for attorney's fees was reduced because of her limited success was *Picou v. City of Jackson*, where the Fifth Circuit concluded that the district court did not abuse its discretion in reducing the award of attorney's fees by 75%.²⁵¹ In *Picou*, the plaintiff prevailed in a lawsuit involving sex discrimination and retaliation, and the jury awarded her \$400,000 in emotional distress damages.²⁵² The district court reduced this award to \$50,000 but also allowed for an attorney's fee award of \$40,000; however, the Fifth Circuit ultimately reversed the award of emotional distress damages.²⁵³ On remand, the district court awarded nominal damages and reduced the attorney's fee award to \$10,000.²⁵⁴ The district court determined that the plaintiff did, however, establish sex discrimination, "which would deter future discrimination."²⁵⁵

Relying on *Farrar*, the Fifth Circuit first noted that the appropriate fee award is usually no fee when a plaintiff recovers only nominal damages.²⁵⁶ The court then cited Fifth Circuit precedent for the proposition that, even in the absence of monetary relief, attorney's fees may be appropriate when the plaintiff achieves a goal such as deter-

of nominal-damage plaintiff's fee request after concluding that (1) money was not the primary purpose of the lawsuit; (2) the plaintiff succeeded on a significant issue; and (3) the lawsuit served a public goal).

250. See, e.g., *Schlant v. Victor Belata Belting Co.*, No. 94-CV-0915E(Sc), 2001 U.S. Dist. LEXIS 16539, at *17 (W.D.N.Y. Oct. 3, 2001) (awarding just under \$300 in fees).

251. 91 F. App'x 340, 342 (5th Cir. 2004).

252. *Id.* at 341.

253. *Id.* at 341-42.

254. *Id.* at 342.

255. *Id.*

256. *Id.*

ring unlawful behavior.²⁵⁷ The court stated that 42 U.S.C. § 1988 “is a tool that ensures the vindication of important rights, even when large sums of money are not at stake, by making attorney’s fees available under a private attorney general theory.”²⁵⁸ The court cited the district court’s conclusion that the plaintiff had “achieved a compensable goal” of establishing sex discrimination that should serve as a deterrent to her employer.²⁵⁹ The court also observed that “[t]he district court weighed [the plaintiff’s] overall degree of success, considered her lack of compensatory damages, but still found she succeeded in deterring future discrimination.”²⁶⁰ The court then concluded that a 75% reduction in the award was not an abuse of discretion.²⁶¹

Another case where a plaintiff achieved only limited success and had her attorney’s fee request reduced was *Black v. M.G.A., Inc.*²⁶² In *Black*, the plaintiff alleged violations of 42 U.S.C. § 1981 and Title VII (discrimination and retaliation), and she eventually accepted an offer of judgment for \$5000.²⁶³ After accepting the offer, the plaintiff sought attorney’s fees of over \$50,000.²⁶⁴ Because the settlement amount was small, the defendant argued that the plaintiff was entitled to either a small fee award or no fee award.²⁶⁵

The court first evaluated the number of hours expended on the case, the reasonableness of the hourly rate for the attorneys who worked on the case, and the twelve factors outlined in *Johnson*.²⁶⁶ After addressing all of the relevant factors, the court then considered whether the plaintiff’s fee request was reasonable based on *Farrar*.²⁶⁷ The court dismissed the defendant’s contention that the plaintiff’s willingness to accept the defendant’s offer of judgment was merely a “technical victory,” noting that the \$5000 judgment was more than the amount of back pay the plaintiff sought and that the amount was much greater than the amount recovered in *Farrar*.²⁶⁸ The court therefore concluded that the rule from *Farrar*—that either no fee or an extremely low fee was warranted—was inapplicable.²⁶⁹

Predictably, the court next addressed the most relevant O’Connor factor—the difference between the amount requested and the amount

257. *Id.* (citing *Hopwood v. State of Texas*, 236 F.3d 256, 278 (5th Cir. 2000)) (internal quotation marks and citations omitted).

258. *Id.* (quoting *Hopwood*, 236 F.3d at 278).

259. *Id.* at 342.

260. *Id.*

261. *Id.*

262. 51 F. Supp. 2d 1315, 1316, 1322 (M.D. Ala. 1999).

263. *Id.* at 1316.

264. *Id.*

265. *Id.*

266. *Id.* at 1316-22. *See supra* note 10.

267. *Black*, 51 F. Supp. 2d at 1322.

268. *Id.*

269. *Id.*

obtained.²⁷⁰ This case was somewhat peculiar because the plaintiff's complaint did not include a specific monetary demand.²⁷¹ As a result, the court looked at the amounts the plaintiff sought during settlement discussions.²⁷² Although acknowledging that the numbers "floated" during settlement negotiations are not always accurate indicators of the value of a claim, the court determined that, based on those figures, the plaintiff valued her claim between \$23,000 and \$60,000.²⁷³ After considering the plaintiff's argument that a \$5000 settlement was significant, and after evaluating the defendant's financial resources, the court concluded that the offer the plaintiff ultimately accepted would most likely be viewed as a nuisance settlement.²⁷⁴ As a result, the court determined that the plaintiff's success was "partial at best."²⁷⁵

The court then analyzed the next two O'Connor factors—the significance of the legal issue(s) upon which the plaintiff prevailed and whether the litigation advanced a public goal or served a public purpose.²⁷⁶ In evaluating the second factor, the court essentially concluded that, because the parties settled, the plaintiff prevailed on all of her claims.²⁷⁷ Finally, the court considered the third O'Connor factor—whether the litigation advanced some type of public goal.²⁷⁸ While the plaintiff argued that the litigation did force the employer to admit that it had not hired any African-American employees in upper management positions, the court noted that the plaintiff produced no evidence that the defendant had made any changes to its policy.²⁷⁹ As a result, the court concluded that there was no specific public gain from the plaintiff's lawsuit.²⁸⁰ Ultimately, after weighing these factors, the court deemed a fee reduction of 55% appropriate.²⁸¹ As a result, the plaintiff's request for over \$53,000 in fees was reduced to an award of just over \$13,000.²⁸²

270. *Id.* at 1323.

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.* at 1323-24.

277. *Id.* at 1323.

278. *Id.* at 1323-24.

279. *Id.*

280. *Id.* at 1324.

281. *Id.*

282. *Id.* at 1316, 1324. In determining a reasonable fee, the court did subtract some hours worked by the attorneys, and it also lowered the hourly rates for some of the attorneys. *Id.* at 1318-22. *See also* *Aynes v. Space Guard Prods., Inc.*, 201 F.R.D. 445, 452 (S.D. Ind. 2001). In *Aynes*, the court reduced the plaintiff's attorney's fee request by approximately 90% after the plaintiff accepted a small settlement. *Id.* The court used Justice O'Connor's three factors and concluded that even though (1) the plaintiff's recovery was

Another case in which a court awarded a reduced attorney's fee was *Ollis v. Hearthstone Homes, Inc.*²⁸³ In that case, the court determined that a 25% reduction was appropriate after the plaintiff, who had prevailed on his Title VII claims of religion-based discrimination and retaliation, was awarded only one dollar in nominal damages.²⁸⁴ After denying the defendant's motions for judgment notwithstanding the verdict and judgment as a matter of law, the court addressed the plaintiff's request for attorney's fees.²⁸⁵ The court noted that, according to Title VII's fee-shifting provision, a prevailing party is entitled to an award of attorney's fees.²⁸⁶ The court then relied on *Farrar* for the proposition that a plaintiff who receives only nominal damages is still a prevailing party, but the limited degree of the plaintiff's success often results in an award of no fees.²⁸⁷

Following Eighth Circuit precedent, the court concluded that an evaluation of Justice O'Connor's three-factor test from *Farrar* was appropriate.²⁸⁸ The court first noted that the plaintiff had requested approximately \$59,000, which was much less than the \$17 million involved in *Farrar*.²⁸⁹ Although conceding there was a large difference between the amount sought and the amount recovered, the court implied that, because that difference was not nearly as large as it was in *Farrar* and in another Eighth Circuit case, the first factor did not necessarily weigh against a fee award.²⁹⁰

After addressing the first O'Connor factor, the court addressed the next two factors.²⁹¹ Specifically, the court found that the issues involved in the case—religious discrimination and retaliation—were significant legal issues, and that the plaintiff and other employees should be free from this type of behavior in the workplace.²⁹² Finally, the court looked at whether the litigation served a public purpose.²⁹³ Relying on Eighth Circuit precedent, the court noted, “civil rights litigation serves an important public purpose; [a] plaintiff bringing a civil rights action does so not for himself alone but also as a private attorney general, vindicating a policy that Congress considered of the

not de minimis; (2) the second O'Connor factor favored the plaintiff; and (3) the third O'Connor factor was a “draw,” the fees should have been reduced. *Id.* at 451-52.

283. No. 8:05CV119, 2006 U.S. Dist. LEXIS 39151 (D. Neb. June 12, 2006), *aff'd*, 495 F.3d 570 (8th Cir. 2007).

284. *Id.* at *1, 22.

285. *Id.* at *4, 9, 11.

286. *Id.* at *12-13.

287. *Id.* at *13.

288. *Id.* at *13-14 (citing *Piper v. Oliver*, 69 F.3d 875, 877 (8th Cir. 1995)).

289. *Id.* at *14-15.

290. *See id.* The other case to which the court cited was *Jones v. Lockhart*, 29 F.3d 422, 424 (8th Cir. 1994), where the plaintiff was seeking over \$850,000 in damages.

291. *Ollis*, 2006 U.S. Dist. LEXIS 39151, at *15-16.

292. *Id.* at *15.

293. *Id.*

highest priority.’”²⁹⁴ After concluding that as a result of the litigation the defendant and other employers “may well review and modify their policies concerning religious discrimination,”²⁹⁵ the court determined that “an important public goal ha[d] been served.”²⁹⁶ Therefore, after evaluating the three O’Connor factors, the court found that an award of attorney’s fees was appropriate.²⁹⁷ After reviewing the hours spent, the attorneys’ hourly rates, and other factors, the court determined that the amount requested was reasonable but that, because the plaintiff’s success was “limited,” a 25% reduction was appropriate.²⁹⁸ As a result, the plaintiff was awarded 75% of his fee request.²⁹⁹

Another case in which the court substantially reduced the amount of attorney’s fees requested was *Bell v. Board of County Commissioners of Jefferson County*, where the court awarded only 10% of the plaintiff’s requested fees.³⁰⁰ The plaintiff brought a 42 U.S.C. § 1983 claim after losing his employment.³⁰¹ The plaintiff also alleged that the defendant caused harm to his name and reputation.³⁰² The jury determined that the defendant did violate the plaintiff’s Fourteenth Amendment due process rights with regard to his loss of continued employment but awarded the plaintiff no damages.³⁰³ On the claim for damage to his reputation, the jury awarded the plaintiff \$90,000, which was erased when the trial court granted the defendant’s motion to alter or amend the judgment.³⁰⁴ The plaintiff then sought an award of attorney’s fees, believing he was a prevailing party.³⁰⁵

After ultimately concluding that the plaintiff was the prevailing party, the court addressed whether an award of attorney’s fees was appropriate.³⁰⁶ Noting that these determinations are within the trial court’s discretion, the court first looked at the number of hours the plaintiff’s attorneys spent on the case and their respective hourly rates.³⁰⁷ Although the court found that the number of hours spent was reasonable, the court made slight downward adjustments to the

294. *Id.* (quoting *Jones*, 29 F.3d at 424) (alteration in original) (internal quotation marks omitted).

295. *Id.* at *15-16.

296. *Id.* at *16.

297. *Id.*

298. *Id.* at *16-22.

299. *Id.* at *22. *See also* *Certain v. Potter*, 330 F. Supp. 2d 576, 587-88 (M.D.N.C. 2004). In *Certain*, the court reduced the plaintiff’s fee request by 20% based on the limited success the plaintiff experienced on her hostile environment claim. *Id.*

300. No. 03-2148-KHV, 2005 U.S. Dist. LEXIS 2187, at *14 (D. Kan. Feb.15, 2005), *aff’d*, 451 F.3d 1097 (10th Cir. 2006).

301. *Id.* at *1-2.

302. *Id.* at *2.

303. *Id.*

304. *Id.* at *2-3.

305. *Id.* at *3.

306. *Id.* at *3-8.

307. *Id.* at *8-11.

attorneys' hourly rates.³⁰⁸ The plaintiff conceded that such a reduction in fees based on the limited success was appropriate, but he argued that only a 30% reduction was appropriate.³⁰⁹ The defendant, on the other hand, argued that the fees should be "drastically" reduced.³¹⁰ The court referenced the *Farrar* opinion and noted that "the most critical factor in determining the reasonableness of a fee award is the degree of success obtained."³¹¹ Although the court did not go through a detailed analysis of the O'Connor factors, the court did note the plaintiff's limited monetary success, the length of the litigation, and the fact that the litigation did not break any new legal ground.³¹² As a result, the court determined that a 90% reduction in the fee award was appropriate.³¹³

As this Part of the Article demonstrates, not all courts deny attorney's fee requests in cases where the plaintiffs receive only nominal, or very limited, damages.³¹⁴ Although these courts usually reduce the fees by a significant amount, they at least provide some compensation for the attorneys who successfully prove a violation of the plaintiff's rights. While providing these attorneys with such limited recovery is certainly better than denying them compensation for their "successful" efforts, not providing them with significant compensation for the time they spent proving these violations will have a negative effect on civil rights litigation. As the next Part of the Article will illustrate, courts should be more willing to grant fee requests when these requests are made by plaintiffs who are able to prove violations of their rights.

308. *Id.*

309. *Id.* at *12.

310. *Id.* at *13.

311. *Id.*

312. *Id.* at *13. The plaintiff initially sought \$1.4 million in damages, which the Tenth Circuit categorized as an "extravagant and overreaching request." *Bell v. Bd. of County Comm'rs*, 451 F.3d 1097, 1104-05 (10th Cir. 2006) (internal quotation marks omitted).

313. *Bell*, 2005 U.S. Dist. LEXIS 2187, at *14.

314. *See also* *Lowry v. Watson Chapel Sch. Dist.*, 540 F.3d 752, 765 (8th Cir. 2008) (awarding nominal-damage plaintiffs 50% of the amount of fees requested because victory was more than "merely technical," it benefitted individuals other than the plaintiffs, and the right vindicated was not easily reduced to a sum of money); *Spencer v. Wal-Mart Stores, Inc.*, 469 F.3d 311, 317-18 (3d Cir. 2006) (granting the plaintiff approximately \$39,000 in fees, which represented only 25% of the fee amount she requested); *Hyde v. Small*, No. 97-3719, 1998 U.S. App. LEXIS 2684, at *2 (7th Cir. Feb. 13, 1998) (awarding over \$11,000 in attorney's fees, which represented approximately 35% of the amount requested); *Smith v. Borough of Dunmore*, No. 3:05-CV-1343, 2008 U.S. Dist. LEXIS 80450, at *36-37 (M.D. Pa. Oct. 9, 2008) (awarding nominal-damage plaintiff \$20,000 in attorney's fees after the plaintiff requested over \$140,000); *Lee v. McCue*, No. 04-civ-6077 (CM), 2007 U.S. Dist. LEXIS 57867, at *20 (S.D.N.Y. July 25, 2007) (awarding nominal-damage plaintiff \$35,000 in attorney's fees after the plaintiff requested over \$97,000 in fees); *Aynes v. Space Guard Prods., Inc.*, 201 F.R.D. 445, 451-52 (S.D. Ind. 2001) (reducing the fee request by approximately 90% even though the court determined that (1) the plaintiff's recovery was not de minimis; (2) the second O'Connor factor favored the plaintiff; and (3) the third O'Connor factor was a "draw").

VI. WHY NOMINAL-DAMAGE PLAINTIFFS SHOULD RECOVER THEIR ATTORNEY'S FEES

In *Farrar*, the Supreme Court made clear that plaintiffs who recover only nominal damages in civil rights lawsuits should not typically recover their attorney's fees.³¹⁵ Although most cases in which only nominal damages are recovered have reached this result, some courts have awarded attorney's fees, albeit sometimes only limited fees.³¹⁶ However, as the next Sections of this Article will address, the Court should revisit *Farrar* and encourage trial courts to be more liberal when deciding whether to award attorney's fees to these prevailing parties. Courts should do so because application of the three O'Connor factors essentially guarantees that prevailing plaintiffs will rarely recover the attorney's fees required to prove a civil rights violation. Additionally, courts should become more liberal when granting attorney's fee awards in nominal-damage cases because doing so would encourage plaintiffs and their attorneys to bring these claims, even if the amount of damages is minimal; granting fees in these cases would not provide a windfall for plaintiffs' attorneys; and doing so would also further congressional intent.

The first O'Connor's factor is skewed in such a way that it will almost always preclude a fee award in nominal-damage cases, and it could cause attorneys to undervalue their clients' claims, creating conflicts of interest with their clients. The second O'Connor factor, especially when interpreted as meaning the importance of the legal issue on which the plaintiff prevails as opposed to the number of claims on which the plaintiff prevails,³¹⁷ minimizes the importance of civil rights lawsuits. Finally, the third O'Connor factor also minimizes the importance of civil rights lawsuits and sets such a high standard for what constitutes a "public purpose" that very few lawsuits will satisfy this prong of Justice O'Connor's test.

In addition to the faults with Justice O'Connor's *Farrar* test, there are other reasons courts should be more willing to award attorney's fees to civil rights plaintiffs who recover only nominal damages. First, granting fee requests in these cases will encourage more plaintiffs and attorneys to bring these suits, even when the damages involved are not excessive. Second, allowing fees in these cases will encourage individuals to follow the Supreme Court's suggestion in *Albemarle Paper Co. v. Moody* that individuals should be vigilant in

315. See *Farrar v. Hobby*, 506 U.S. 103 (1992); see also cases cited *supra* in Part III.

316. See *supra* Parts IV and V.

317. If courts analyze the second O'Connor factor by looking at the number of claims brought and the number of claims on which the plaintiff succeeded (which is implied by the way Justice O'Connor addressed this factor), I would suggest that the attorney be compensated only for the work done in furtherance of the successful claims. See *Farrar*, 506 U.S. at 121 (O'Connor, J., concurring).

pursuing civil rights violations by acting as private attorneys general.³¹⁸ Finally, and despite some admittedly sound arguments to the contrary, allowing fees in these cases will be consistent with the legislative history behind these civil rights fee-shifting provisions.³¹⁹

Therefore, as the next Sections of the Article will demonstrate, prevailing plaintiffs who successfully prove that their rights have been violated but are awarded only nominal damages should be entitled to recover the attorney's fees required to prove the defendants' unlawful conduct.

A. Problems with Justice O'Connor's First Factor

Under Justice O'Connor's three-factor test, the most important factor in determining the reasonableness of an attorney's fee award is the difference between the amount sought and the amount recovered.³²⁰ Obviously, in cases where the court awards only nominal damages, that difference will be significant. While most cases will not reach the seventeen-million-to-one ratio at issue in *Farrar*,³²¹ many cases will involve large discrepancies between the amount of a nominal-damage judgment and the amount sought in the complaint, which will almost always weigh against a fee award. Also, if courts continue to use this factor as the guiding principle in determining what constitutes a reasonable attorney's fee, plaintiffs' attorneys will stop suing for the "full value" of their claims, believing that they will be punished if they do not win large enough awards to justify the full amount of the attorney's fee request.³²² Additionally, when an attorney decides how much money he should request from a jury, he might ask for a lesser amount than what the facts of his case might warrant, knowing that the lower the figure he requests, the more likely he is to recover his fees if his client wins only nominal damages. This, of course, can create a conflict of interest between the best interests of the client and attorney.

318. 422 U.S. 405, 415 (1975).

319. See *infra* Section VI.F. Additionally, although I have not devoted a Section of the Article to this argument, another reason for allowing fees in nominal-damage cases is that by taking away a civil rights plaintiff's very powerful weapon of possibly requiring the defendant to pay the plaintiff's attorney's fees, courts might encourage unlawful behavior and/or a defendant's unwillingness to settle a claim.

320. *Farrar*, 506 U.S. at 120-21 (O'Connor, J., concurring).

321. *Id.* at 121.

322. I certainly acknowledge that plaintiffs' attorneys can sometimes intentionally inflate the value of their clients' claims in hopes of a better settlement or in hopes that the jury will award their clients less than the figure for which they ask but more than what the claim is actually worth. I am not arguing that plaintiffs' attorneys should continue this practice, and I do acknowledge that limiting fee awards based on the first O'Connor factor could have a beneficial effect on settlements and on the likelihood that plaintiffs' attorneys will be more reasonable when deciding what the real value of a claim should be.

The obvious starting point when discussing this issue is *Farrar*. There, the plaintiffs sought \$17 million and received only nominal damages.³²³ Additionally, the litigation carried on for close to a decade and involved multiple trips to the court of appeals and ultimately the Supreme Court.³²⁴ As a result, and especially because of the seventeen-million-to-one ratio of damages sought compared to the nominal damages recovered, Justice O'Connor opined that if ever there was a case to deny attorney's fees, *Farrar* was that case.³²⁵

Since *Farrar*, several courts have engaged in this type of mathematical calculation when determining a reasonable attorney's fee; however, the bottom line is clear—the less money the plaintiff requests, the more likely he is to recover attorney's fees if he is awarded only nominal damages. For example, in the previously discussed *Buss* case, the court granted most of the plaintiffs' request for fees, in part because the \$150,000 sought was significantly less than the damages requested in several other cases, including *Farrar*.³²⁶ The court distinguished this case from *Romberg v. Nichols*³²⁷ and *Washington v. Philadelphia County Court of Common Pleas*,³²⁸ where the plaintiffs sought \$2 million and over \$650,000 in damages, respectively.³²⁹ Similarly, in *Ollis*, the court allowed an award of attorney's fees to a plaintiff who had requested damages close to \$60,000 but won only nominal damages.³³⁰ The court noted that this case “pale[d] in comparison” to the facts of *Farrar*, where, once again, the court noted the seventeen-million-to-one ratio.³³¹

Brandau is another example of the court approving an attorney's fee award, partly because of the limited damages the plaintiff sought.³³² In *Brandau*, the plaintiff “sought only back pay for twenty-one months and \$50,000 in non-economic damages.”³³³ Even though the plaintiff won only nominal damages, the court distinguished the case from *Farrar* and concluded that the plaintiff's request was rea-

323. *Id.* at 106-07.

324. *See id.* at 106-09.

325. *Id.* at 116. As was noted before, *Farrar* was the perfect pro-defendant case to use to decide this issue. The plaintiffs in *Farrar* sued for an excessive amount, the litigation carried on for close to a decade, and the interest at stake was a financial one, not a personal one. *See id.* at 106-09.

326. *Buss v. Quigg*, No. 01-CV-3098, 2002 U.S. Dist. LEXIS 19324, at *19 (E.D. Pa. Oct. 9, 2002).

327. 48 F.3d 453 (9th Cir. 1994).

328. 89 F.3d 1031 (3d Cir. 1996).

329. *Romberg*, 48 F.3d at 454; *Washington*, 89 F.3d at 1043.

330. *Ollis v. Hearthstone Homes, Inc.*, No. 8:05CV119, 2006 U.S. Dist. LEXIS 39151, at *2 (D. Neb. June 12, 2006), *aff'd*, 495 F.3d 570 (8th Cir. 2007).

331. *Id.* at *14-15.

332. *Brandau v. Kansas*, 168 F.3d 1179 (10th Cir. 1999).

333. *Id.* at 1182.

sonable and did not even approach the seventeen-million-to-one ratio involved in *Farrar*.³³⁴

Petrunich was one case in which a low damages request did not result in an award of fees. In that case, the plaintiff's modest request for \$150,000 in damages did not save his claim for attorney's fees.³³⁵ Rejecting the plaintiff's reliance on another case in which plaintiffs who sought \$150,000 in damages were awarded fees, the court concluded that the plaintiff's recovery of 0.00066% of what he requested was evidence that his victory was de minimis and that he was not entitled to fees under the first O'Connor factor.³³⁶

McBurrows v. Michigan Department of Transportation is another case in which a court compared the amount sought by the plaintiff to the amount she actually received and ultimately concluded that a fee award was inappropriate.³³⁷ In *McBurrows*, the court specifically noted that the plaintiff sought over \$500,000 in damages against the defendant, yet she was awarded only nominal damages.³³⁸ As a result of this disparity, the court of appeals determined that the trial court did not abuse its discretion in denying attorney's fees to the plaintiff.³³⁹ Similarly, in *Leggett v. Gold International, Inc.*, the court also denied a Title VII plaintiff's request for attorney's fees, basing its decision primarily on the disparity between the amount the plaintiff sought in her complaint and the amount she was ultimately awarded.³⁴⁰ Although the plaintiff in *Leggett* was awarded more than nominal damages (she was awarded \$5000 in punitive damages), the court noted that this sum paled in comparison to the amount for which she asked in her complaint, \$3.5 million.³⁴¹ As a result of this disparity, the court noted that "[the plaintiff's] modest success in this

334. *Id.* The court also distinguished this case from *Farrar* because it was not nearly as protracted as *Farrar*. *Id.* Although some of the cases described in this Section did award fees to the prevailing plaintiffs, the fact remains that when courts use Justice O'Connor's first factor as the most important factor in deciding whether an award of attorney's fees is appropriate, they almost always decline to award fees to a prevailing plaintiff who is awarded only nominal damages.

335. *Petrunich v. Sun Bldg. Sys., Inc.*, 625 F. Supp. 2d 199, 207 (M.D. Pa. 2008), *vacated by consent of the parties*, No. 04-2234, 2008 U.S. Dist. LEXIS 104154 (M.D. Pa. Nov. 21, 2008). *See also* *Briggs v. Marshall*, 93 F.3d 355, 361 (7th Cir. 1996). In *Briggs*, the court weighed

the first O'Connor factor against a fee award when the plaintiff sought \$75,000 in compensatory damages, plus punitive damages, but was awarded only four dollars in nominal damages. *Id.*

336. *Petrunich*, 625 F. Supp. 2d at 207. The other case upon which the plaintiff attempted to rely was *Buss v. Quigg*, No. 01-CV-3908, 2002 U.S. Dist. LEXIS 19324 (E.D. Pa. Oct. 9, 2002).

337. 159 F. App'x 638, 641 (6th Cir. 2005).

338. *Id.*

339. *Id.*

340. No. CV205-136, 2007 U.S. Dist. LEXIS 9081, at *3-4 (S.D. Ga. Feb. 8, 2007).

341. *Id.* at *1-3.

action does not warrant an award of attorneys' fees."³⁴² Additionally, in *Spencer v. Wal-Mart Stores, Inc.*, the court granted the plaintiff only 25% of the fees she requested, mostly because the \$12,000 she was awarded after a trial was much less than the \$500,000 (plus compensatory and punitive damages) her attorney indicated the claim was worth.³⁴³ Finally, in *Bell v. Board of County Commissioners of Jefferson County*, the Tenth Circuit agreed with the district court that a 90% reduction in fees was appropriate because the plaintiff, who requested what the Tenth Circuit referred to as an "extravagant and overreaching request" of \$1.4 million, was awarded no damages.³⁴⁴

Although not all courts have reached the same conclusion with similar facts, a few points are clear regarding Justice O'Connor's first *Farrar* factor. First, the discrepancy between the amount sought and the amount awarded is the most important of the three O'Connor factors.³⁴⁵ Second, the smaller the amount of damages a plaintiff requests, the more likely he is to receive an award of attorney's fees if he recovers only nominal damages. As a result, plaintiffs' attorneys who might be risk-averse would be well advised to ask for a small damage award in the complaint and at trial, knowing that if only nominal damages are awarded, these attorneys will have a better chance of recovering fees.³⁴⁶ This, of course, creates a dilemma for attorneys. Ethical attorneys will put their clients' best interests ahead of their own and ask for the full value of their clients' claims. However, they will also be aware that if they are going to put forth the time and effort to represent a client in what could be lengthy litigation, they would like to receive fair compensation for that time and effort if the jury believes that, although the defendant violated the plaintiff's rights, the plaintiff was entitled to only nominal damages.³⁴⁷ Even

342. *Id.* at *4. The court in *Leggett* also gave a brief discussion of whether the plaintiff's lawsuit accomplished anything other than "providing her with the moral satisfaction of having her rights vindicated in a federal court." *Id.* at *3-4. See also *Zeuner v. Rare Hospitality Int'l, Inc.*, 386 F. Supp. 2d 635, 639 (M.D.N.C. 2005). In *Zeuner*, the court denied the plaintiff's request for attorney's fees in part because of the disparity between the amount she sought (in excess of \$2 million) and the nominal damages she was awarded. *Id.* See also the cases cited in Part III of this Article, where the courts denied attorney's fee requests in part because of the difference between the amount sought and the amount awarded.

343. 469 F.3d 311, 317-18 (3d Cir. 2006).

344. 451 F.3d 1097, 1100-01, 1104-05 (10th Cir. 2006) (internal quotation marks omitted). According to the trial court's opinion in *Bell*, because of an error with the jury instructions, the jury was not given the opportunity to award nominal damages. *Bell v. Bd. of County Comm'rs*, No. 03-2148-KHV, 2005 U.S. Dist. LEXIS 2187, at *7 (D. Kan. Feb. 15, 2005).

345. See *Farrar v. Hobby*, 506 U.S. 103, 120-21 (1992) (O'Connor, J., concurring).

346. Of course, the attorney who does this potentially forfeits a big award, as many of these cases are contingency-fee cases.

347. Of course, some anti-discrimination statutes place caps on damages, which reduce the amount a plaintiff can recover. See 42 U.S.C. § 1981a(b)(3) (2006). However, with caps ranging from \$50,000 to \$300,000, the difference between a figure within this range and a

Judge Posner acknowledged in his *Hyde* opinion that civil rights plaintiffs who “aim[] small” have a better chance of obtaining an attorney’s fee award than plaintiffs who ask for higher damage awards.³⁴⁸

Although the first O’Connor factor most likely serves the positive function of preventing attorneys from artificially inflating the value of their clients’ claims, it could also have the effect of attorneys intentionally undervaluing their clients’ claims in an effort to maximize the likelihood of being awarded attorney’s fees if their clients win only nominal damages. Also, because nominal-damage awards will always result in a large discrepancy between the amount sought and the amount recovered, this factor almost always weighs against an award of attorney’s fees. As a result, placing so much emphasis on this factor should be reevaluated.

B. Problems with Justice O’Connor’s Second Factor

One of the factors courts evaluate under Justice O’Connor’s three-factor test from *Farrar* is the significance of the legal theory upon which the plaintiff prevailed.³⁴⁹ While there is currently a split of authority on what exactly this factor was meant to address (the number of claims on which the plaintiff prevailed or the relative importance of the claims on which the plaintiff prevailed),³⁵⁰ courts should realize that a defendant’s violation of an individual’s civil rights is *always* important. Regardless of whether the plaintiff proves one or several of these violations, and regardless of the amount of damages a jury places on those violations, the court should not require the plaintiff (or his attorney) to bear the cost of proving that a particular defendant violated his rights.³⁵¹

If the courts interpret this second factor as meaning only whether the specific issue is an important one (which is very close to the third O’Connor factor from *Farrar*), courts should consider *all* civil rights violations important. As a result, plaintiffs who demonstrate a violation of these important rights should not be forced to bear the cost of proving such a violation, even if a court awards only nominal damages. Some courts agree and stress the importance of civil rights violations, weighing this factor in favor of granting a fee award.³⁵² One

one dollar nominal-damage award would most likely weigh against the plaintiff under the first O’Connor factor.

348. See *Hyde v. Small*, 123 F.3d 583, 585 (7th Cir. 1997).

349. *Farrar*, 506 U.S. at 121 (O’Connor, J., concurring).

350. See *supra* note 57.

351. In fact, the Supreme Court in *Christiansburg Garment Co.* noted that the purpose behind the fee-shifting statute in Title VII was to make sure that a plaintiff who demonstrated that a defendant violated the law should not have to bear the cost of proving that violation. See 434 U.S. 412, 418-19 (1978).

352. See *supra* Parts IV and V.

such case was *Buss v. Quigg*.³⁵³ When analyzing the second O'Connor factor, the court in *Buss* evaluated both the importance of the legal issue on which the plaintiffs prevailed and the extent to which the plaintiffs prevailed.³⁵⁴ Regarding the first issue, the court relied on Supreme Court precedent and noted that the protection against unlawful entry by law enforcement is an important right and a finding that such a right was violated should weigh in favor of awarding fees.³⁵⁵ Specifically, the court found that "[t]he importance accorded the protection of the home from arbitrary entry by law enforcement personnel needs little elaboration. I thus find it difficult to question the legal significance of [the] [p]laintiffs' successful claim that [one of the defendants] unlawfully entered their home on two separate occasions."³⁵⁶

Other courts have also concluded that civil rights violations are sufficient to tip the scales in favor of awarding fees. For example, in *Ollis*, the court stated the following when addressing the second O'Connor factor: "the legal issues presented in this case, discriminatory discharge based on religion and retaliation, are significant issues."³⁵⁷ [The plaintiff] and other employees have a right to be free from religious discrimination and retaliation in the workplace."³⁵⁸ Similarly, although ultimately denying the plaintiff's request for attorney's fees, the court in *Petrulich* did acknowledge the importance of the issue involved when it noted that "the right to a discrimination-free workplace is important."³⁵⁹ Also, the court in *Hare* found that the hostile work environment claim on which the plaintiff prevailed was an important issue, stating that "[v]indication of a Title VII right is significant, especially when 'compared to the injury to a business interest alleged in *Farrar*.'"³⁶⁰ Therefore, some courts rec-

353. No. 01-CV-3908, 2002 U.S. Dist. LEXIS 19324 (E.D. Pa. Oct. 9, 2002).

354. *Id.* at *24-27.

355. *Id.* at *25-26. The Supreme Court cases upon which the court relied were *Oliver v. United States*, 466 U.S. 170, 178 (1984), and *Payton v. New York*, 445 U.S. 573, 601 (1980).

356. *Id.* (citations omitted). The court then evaluated the extent of the plaintiffs' victory, and although the plaintiffs did not prevail on a majority of their claims, the court still determined that this factor weighed in favor of awarding fees. *Id.* at *26-27.

357. *Ollis v. Hearthstone Homes, Inc.*, No. 8:05CV119, 2006 U.S. Dist. LEXIS 39151, at *15 (D. Neb. June 12, 2006).

358. *Id.* Clearly, the court was using the second O'Connor factor to evaluate the importance of the legal issues involved rather than the extent to which the plaintiff succeeded on the claims.

359. *Petrulich v. Sun Bldg. Sys., Inc.*, 625 F. Supp. 2d 199, 208 (M.D. Pa. 2008), *vacated by consent of the parties*, No. 04-2234, 2008 U.S. Dist. LEXIS 104154 (M.D. Pa. Nov. 21, 2008). Even though it ultimately denied the plaintiff's request for fees, the court also looked at the extent to which the plaintiff prevailed and concluded that because the plaintiff prevailed on four of the six claims, that factor weighed in favor of a fee award. *Id.* at 208-09.

360. *Hare v. Potter*, 549 F. Supp. 2d 698, 707 (E.D. Pa. 2008) (quoting *Jones v. Lockhart*, 29 F.3d 422, 424 (8th Cir. 1994)). The court cited several other cases that emphasized the importance of vindicating civil rights. Specifically, the court cited *Hashimoto v. Dalton*, 118 F.3d 671, 678 (9th Cir. 1997) (noting that hostile work environments are serious is-

ognize that civil rights violations are significant, regardless of whether the violations result in a high damage award to a particular plaintiff. As a result, when a defendant is found to have violated one or more of these rights, the second O'Connor factor should weigh in favor of awarding fees. The court in *Otero v. Colligan* noted this when it stated that a victorious plaintiff should not "be required to bear the entire cost of battling [a defendant's] unconstitutional practice."³⁶¹

This is especially true when looking at cases involving employment discrimination. In *Oncale v. Sundowner Offshore Services, Inc.*, the Supreme Court noted that the primary "evil" Congress intended to eradicate when enacting Title VII was intentional discrimination based on certain protected characteristics.³⁶² By referring to discrimination as an "evil," the Court was certainly sending a strong message regarding the importance of preventing intentional discrimination. When juries find that a defendant has violated either this statute or another anti-discrimination statute, certainly this factor should weigh in favor of awarding fees.

As the above Section has demonstrated, the second O'Connor factor, especially when interpreted as looking at the importance of the legal issue on which the plaintiff prevailed, should weigh in favor of awarding fees even when the plaintiff is awarded only nominal damages. All civil rights violations are important, and plaintiffs who demonstrate that the defendant violated these rights should not bear the cost of proving these violations. Similarly, the attorneys who put forth the time and effort to help prove these violations should not be denied compensation for the time they spent pursuing these meritorious, although not particularly lucrative, claims.

C. Problems with Justice O'Connor's Third Factor

The final factor courts apply when utilizing Justice O'Connor's three-factor test from *Farrar* is whether the litigation accomplished a "public goal other than occupying the time and energy of counsel, court, and client."³⁶³ This factor, however, ignores the fact that most plaintiffs are typically not motivated by making sure this type of violation does not happen to others; rather, they are usually more interested in redressing a wrong that has occurred to them. Penalizing these plaintiffs simply because they were motivated by a desire to

sues); *Jones v. Lockhart*, 29 F.3d 422, 424 (8th Cir. 1994) (noting that cruel and unusual punishment was a more significant interest than the one involved in *Farrar*); and *Cabreva v. Jakobovitz*, 24 F.3d 372, 393 (2d Cir. 1994) (noting that racial discrimination in housing is an important legal issue).

361. No. 3:99cv2378 (WIG), 2006 U.S. Dist. LEXIS 44001, at *10 (D. Conn. June 28, 2006).

362. See *Oncale v. Sundowner Offshore Serv's., Inc.*, 523 U.S. 75, 78-79 (1998).

363. *Farrar v. Hobby*, 506 U.S. 103, 121-22 (1992) (O'Connor, J., concurring).

seek redress for a personal wrong rather than by the desire to advocate for the rights of others simply serves no purpose. In fact, Congress wanted individuals to act as private attorneys general and vigilantly pursue employers who violate anti-discrimination statutes.³⁶⁴ Requiring some public benefit to this type of litigation undermines this goal and decreases the likelihood that individuals and their attorneys will want to pursue these claims.

Although most courts deny attorney's fees in cases involving nominal damages, as this Article has demonstrated, some courts award fees in these cases.³⁶⁵ These courts acknowledge the importance of civil rights litigation and that denying fees in these cases would deter potential plaintiffs from filing claims.³⁶⁶ Other courts have decided to award fees under the third O'Connor factor, finding that the specific plaintiff accomplished some public, rather than solely private, benefit.³⁶⁷

Ollis was one case where the court concluded that the third O'Connor factor weighed in favor of awarding fees.³⁶⁸ The court found that the plaintiff's lawsuit did serve a public purpose, stating that a civil rights plaintiff acts as a private attorney general, promoting rights Congress considers to be of the highest importance.³⁶⁹ The court in *Ollis* also noted with respect to the specifics of that particular case, "[b]ased on the outcome of this case, [the defendant] and other employers may well review and modify their policies concerning religious discrimination; therefore, an important public goal has been served."³⁷⁰ The court therefore found both that civil rights litigation in general serves an important purpose and that the plaintiff's lawsuit in that particular case also served a broader purpose as well.³⁷¹

Using similar logic, the court in *Hill v. Royal Crown Bottling Co. of Chicago, Inc.*, analyzed the third O'Connor factor and concluded that it weighed in favor of awarding fees.³⁷² Although the court in *Hill* did not grant the plaintiff's entire request for fees, it granted a significant fee award after the plaintiff prevailed in her Title VII gender discrimina-

364. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 415 (1975); *see also Ollis v. Hearthstone Homes, Inc.*, No. 8:05CV119, 2006 U.S. Dist. LEXIS 39151, at *15 (D. Neb. June 12, 2006).

365. *See supra* Parts IV and V. In the cases described in Part IV, the fee awards were at least somewhat close to what the plaintiffs requested. In the cases described in Part V, the courts awarded only a small percentage of what the plaintiffs requested.

366. *See supra* Parts IV and V.

367. *See supra* Parts IV and V.

368. *Ollis*, 2006 U.S. Dist. LEXIS 39151, at *1, 15-16.

369. *Id.* at *15.

370. *Id.* at *15-16.

371. *See id.*

372. No. 01-T-063-S, 2003 U.S. Dist. LEXIS 9526, at *20-21 (M.D. Ala. May 13, 2003).

tion lawsuit.³⁷³ The court made several statements regarding the importance of civil rights litigation, including the following:

Success in a civil rights case “cannot be valued solely in monetary terms.” . . . When determining the degree of success obtained by a civil rights plaintiff, a court must be careful not to place “undue emphasis on the modest money damages that were found by the jury” because successful civil rights actions vindicate a public interest.³⁷⁴

Continuing to address whether that case achieved a public goal, the court noted the following:

Not only did [the plaintiff] vindicate one of her own civil rights, her suit vindicated the public’s interest in women being able to enjoy employment without facing discrimination based on their gender. As such, although [the plaintiff’s] award of attorney’s fees is greater in monetary terms than her damages award, the court finds that the fee award to be reasonable given that [the plaintiff] vindicated a civil right important both to her personally and to society as a whole.³⁷⁵

Brandau is another example of a court finding a public goal was advanced by a private litigant’s civil rights suit.³⁷⁶ In *Brandau*, the plaintiff prevailed in the lower court on her hostile environment sexual harassment claim, yet she was awarded only nominal damages.³⁷⁷ The lower court granted her fee request, and the Tenth Circuit affirmed.³⁷⁸ Although the plaintiff’s suit was purely personal, the court weighed the third O’Connor factor in favor of the plaintiff and, similarly to the courts in *Ollis* and *Hill*, noted the importance of these cases, both personally and for the public as a whole.³⁷⁹ Specifically, when deciding that the third O’Connor factor weighed in favor of a fee award, the court noted that in addition to vindicating her personal rights, the plaintiff:

put Kansas, or at least Wyandotte County, on notice that it should reform its sexual harassment policies and that it is proceeding at its peril if it declines to do so. These results—vindicating rights secured by Title VII and providing a broad constitutional benefit to other employees of Wyandotte County—are in the interests of the public and are exactly what Congress intended to encourage under Title VII.³⁸⁰

373. *Id.* at *2.

374. *Id.* at *15 (quoting *Villano v. Boynton Beach*, 254 F.3d 1302, 1305-06 (11th Cir. 2001)) (alteration in original).

375. *Id.* at *20.

376. *Brandau v. Kansas*, 168 F.3d 1179, 1182-83 (10th Cir. 1999).

377. *Id.* at 1181.

378. *Id.* at 1181, 1183.

379. *Id.* at 1182-83.

380. *Id.* at 1183.

Thus, once again, a court recognized that vindicating a civil right, even when more personal than public, should satisfy the third O'Connor factor.

The court in *Buss* also weighed the third O'Connor factor and correctly concluded that it weighed in favor of awarding fees.³⁸¹ After noting the deterrent effect the verdict would have on future police officers' conduct,³⁸² the court noted that the plaintiffs' victory was "more than . . . 'technical' or 'de minimis.'"³⁸³ Noting that many of these civil rights victories "cannot be readily cast in monetary terms," the court focused on the purpose of these civil rights fee-shifting provisions and observed that "[w]here law enforcement officers plainly violate constitutional rights, the availability of counsel should not be made to depend on the degree to which plaintiffs endure emotional harm."³⁸⁴ The court added that "[t]o so hold is to patently disregard the well-established enforcement function of § 1988."³⁸⁵ Concluding its discussion of the "public purpose" factor, the court quoted Judge Posner who, in a case involving a \$500 award for false arrest, stated:

The district court based its decision to award no fees on the small size of the verdict and the fact that the case broke no new ground in the law of police abuses. If these are sufficient grounds it means that routine police misconduct that, although unconstitutional, is neither harmful enough to support a large award of compensatory damages nor malicious enough to justify an award of punitive damages is, as a practical matter, beyond the reach of the law. It is impossible, unless there is an expectation of a fee award (and often not then), to interest a competent lawyer in bringing a suit in federal court to recover a small amount of damages unless the plaintiff is a rich person willing to finance the suit out of his own pocket rather than by means of a contingent-fee contract, the normal way in which tort suits are financed in this country. Yet the cumulative effect of petty violations of the Constitution arising out of the interactions between the police (and other public officers) and the citizenry on the values protected by the Constitution may not be petty, and if this is right then the mere fact that a suit does not result in a large award of damages or the breaking of new constitutional ground is not a good ground for refusing to award any attorneys' fees.³⁸⁶

Finally, the court in *Hare* determined that the third O'Connor factor can weigh in favor of a fee award when a plaintiff files a Title VII

381. *Buss v. Quigg*, No. 01-CV-3908, 2002 U.S. Dist. LEXIS 19324, at *27-29 (E.D. Pa. Oct. 9, 2002).

382. *Id.* at *27-28.

383. *Id.* at *31.

384. *Id.* at *29.

385. *Id.*

386. *Id.* at *29-30 (quoting *Hyde v. Small*, 123 F.3d 583, 585 (7th Cir. 1997)).

lawsuit and is awarded only nominal damages.³⁸⁷ In fact, the *Hare* court used strong language when noting that civil rights lawsuits, even those that are brought only by one person, can serve a public goal. Specifically, the court noted that “successful Title VII cases achieve an important public purpose.”³⁸⁸ The court then looked at Congressional intent and noted that “Congress intended a Title VII plaintiff to be the ‘chosen instrument of Congress to vindicate a policy that Congress considered the highest priority.’”³⁸⁹ After noting that the plaintiff’s victory required the employer to post a notice of the plaintiff’s victory and to provide additional training to its employees, the court observed that the verdict “vindicated [the plaintiff], provided a benefit to the [defendant’s] current and future employees, and was in the public’s interest.”³⁹⁰ The court then noted that the result in this case might also “deter and prevent future” Title VII violations.³⁹¹ As a result, the court determined that the third O’Connor factor weighed in favor of a fee award.³⁹²

Although some opinions such as the ones described above determined that private lawsuits can, in fact, provide a public good, not all courts agree with that conclusion.³⁹³ For example, in *Petrunich*, where the plaintiff lost his request for attorney’s fees in an ADEA claim, the court weighed the final O’Connor factor against the plaintiff.³⁹⁴ The court took a much more narrow view of this factor and noted that a case only “accomplishes a public purpose when it vindicates the rights of others, creates new precedent, deters future depri-

387. *Hare v. Potter*, 549 F. Supp. 2d 698, 707-08 (E.D. Pa. 2008).

388. *Id.* at 707. The court in *Barber v. T.D. Williamson, Inc.*, 254 F.3d 1223, 1232 (10th Cir. 2001), gave a broad definition of how a case can accomplish a public goal. Specifically, the court noted that “a public goal is accomplished if the plaintiff’s victory encourages attorneys to represent civil rights litigants, affirms an important right, puts the defendant on notice that it needs to improve, and/or provokes a change in the defendant’s conduct.” The court also noted the importance of civil rights litigation when it cited several opinions emphasizing that these lawsuits do further a public goal. *Id.* The court in *Barber* cited the following cases for this broad interpretation of what constitutes a “public purpose” in civil rights litigation: *O’Connor v. Huard*, 117 F.3d 12, 18 (1st Cir. 1997); *Muhammad v. Lockhart*, 104 F.3d 1069, 1070 (8th Cir. 1997); *Piper v. Oliver*, 69 F.3d 875, 877 (8th Cir. 1995); *Wilcox v. Reno*, 42 F.3d 550, 555 (9th Cir. 1994); *Jones v. Lockhart*, 29 F.3d 422, 424 (8th Cir. 1994); *Cartwright v. Stamper*, 7 F.3d 106, 110-11 (7th Cir. 1993); and *Lucas v. Guyton*, 901 F. Supp. 1047, 1055 (D.S.C. 1995).

389. *Hare*, 549 F. Supp. 2d at 707 (citing *Christiansburg Garment Co., v. Equal Employment Opportunity Comm’n*, 434 U.S. 412, 418 (1978)).

390. *Id.*

391. *Id.*

392. *Id.* at 707-08. *See also Barber*, 254 F.3d at 1232 (finding that a public goal is served “if the plaintiff’s victory encourages attorneys to represent civil rights litigants, affirms an important right, puts the defendant on notice that it needs to improve, and/or provokes a change in the defendant’s conduct”).

393. In addition to the cases cited here, *see supra* Part III.

394. *Petrunich v. Sun Bldg. Sys., Inc.*, 625 F. Supp. 2d 199, 201-02, 208-09 (M.D. Pa. 2008), *vacated by consent of the parties*, No. 04-2234, 2008 U.S. Dist. LEXIS 104154 (M.D. Pa. Nov. 21, 2008).

vations, and/or provokes a change in the defendant's behavior."³⁹⁵ Of course, most civil rights cases typically do not accomplish these goals,³⁹⁶ and as a result, this factor would, according to the *Petrunich* court's reasoning, almost never weigh in favor of finding that a fee award is appropriate in a nominal-damage case.³⁹⁷ Applying this standard to the facts before it, the *Petrunich* court noted:

Here, [the plaintiff]'s litigation did not advance a public purpose. His complaint asserted age discrimination claims that did not "result in ground-breaking conclusions of law" and will not "have a profound influence on the development of the law and on society." . . . His complaint implicated an important interest—the right to a discrimination-free workplace—but [the plaintiff] sought to redress his own injuries without regard to other similarly situated employees. For instance, the complaint contained no allegations of a pattern or practice of age-based discrimination, nor a request for broad-based equitable relief. Because [the plaintiff]'s lawsuit failed to advance a public purpose, this factor weighs against a fee award.³⁹⁸

Thus, unlike the courts in *Ollis*, *Hare*, *Brandau*, and *Hill*, the court in *Petrunich* focused on authority suggesting that unless the litigation establishes a ground-breaking rule of law, vindicates others' rights, deters future deprivations, or provokes a change in the defendant's behavior, the third O'Connor factor should weigh against an award of fees.³⁹⁹ This opinion, especially as it relates to cases brought by and on behalf of only one person, directly conflicts with the goal of

395. *Id.* at 209 (citing *Mercer v. Duke Univ.*, 401 F.3d 199, 207-08 (4th Cir. 2005); *Barber*, 254 F.3d at 1232; *Pino v. Locascio*, 101 F.3d 235, 239 (2d Cir. 1996); and *Maul v. Constan*, 23 F.3d 143, 146 (7th Cir. 1994)).

396. The Second Circuit made this observation in *Pino*, 101 F.3d at 239, where the court noted that "[t]he vast majority of civil rights litigation does not result in ground-breaking conclusions of law, and therefore, will only be appropriate candidates for fee awards if a plaintiff recovers some significant measure of damages or other meaningful relief."

397. I acknowledge that for the previous few pages of this Article, I cited cases where the court found that the third O'Connor factor weighed in favor of awarding fees, which seems to contradict my argument that this factor will usually weigh against an award of attorney's fees. However, although I have emphasized cases where the court did conclude that the third factor weighed in favor of awarding fees, most courts take the limited view as described in *Petrunich*—unless the lawsuit "vindicates the rights of others, creates new precedent, deters future deprivations, and/or provokes a change in the defendant's behavior," it does not serve a public purpose. 625 F. Supp. 2d at 208-09. *See supra* Part III.

398. *Id.* at 209 (quoting *Mercer v. Duke Univ.*, 401 F.3d 199, 207 (4th Cir. 2006); *Pino*, 101 F.3d at 239). *But see* *Otero v. Colligan*, No. 3:99cv2378 (WIG), 2006 U.S. Dist. LEXIS 44001, at *13-14 (D. Conn. June 28, 2006). In *Otero*, the court appeared to use a heightened standard and did award fees after concluding that an individual's 42 U.S.C. § 1983 claim satisfied the third factor in the O'Connor test because it presented novel legal issues and benefited other individuals. *Id.*

399. 625 F. Supp. 2d at 209.

encouraging individuals to sue those whom they believe have violated their rights.⁴⁰⁰

As argued above, the third O'Connor factor should always weigh in favor of awarding fees. Most victims of civil rights violations, along with most plaintiffs in general, bring lawsuits because *they* have been injured, not because they wish to establish new law or benefit the public as a whole. Civil rights plaintiffs should not be punished for doing so, and by not weighing the third O'Connor factor in favor of a plaintiff who wins only nominal damages, courts are penalizing individuals for wanting to vindicate their civil rights.

D. Awarding Fees Will Not Provide a Windfall for Attorneys

One argument advanced by the *Farrar* court for denying attorney's fees to plaintiffs who are not awarded significant monetary damages is that awarding these fees would provide a windfall for the attorneys.⁴⁰¹ Post-*Farrar*, other courts have also found this windfall argument persuasive. For example, the court in *Spencer v. Wal-Mart Stores, Inc.* relied on *Farrar's* "windfall" argument and concluded that the plaintiff was not entitled to an award of attorney's fees despite being able to demonstrate a violation of the ADA.⁴⁰² This reasoning, however, fails to take into account the fact that these cases are usually labor intensive, yet do not always result in high monetary awards to the plaintiffs.⁴⁰³ As a result, attorneys who devote hours of work to successfully demonstrate violations of their clients' rights should not be penalized for their efforts. If that occurs, it is likely that fewer attorneys will accept these cases, leaving these potential plaintiffs without representation or the ability to pursue meritorious claims.

Several of the opinions discussed in this Article demonstrate just how labor-intensive these civil rights cases can be. Awarding fees to attorneys who have devoted their time and effort proving civil rights violations would certainly not result in a windfall. The cases set out in the footnote below document the number of hours these attorneys sacrificed pursuing the vindication of their clients' civil rights, rather than using that time to work on other cases for which they could have been receiving payment.⁴⁰⁴ These cases clearly demonstrate that

400. See *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 415 (1975).

401. *Farrar v. Hobby*, 506 U.S. 103, 115 (1992) (quoting *Riverside v. Rivera*, 477 U.S. 561, 580 (1986)).

402. No. 03-104-KAJ, 2005 U.S. Dist. LEXIS 4373, at *1, 15 (D. Del. Mar. 11, 2005).

403. See *infra* note 404 regarding the number of hours that can be involved in litigating these claims. See also *Hyde v. Small*, 123 F.3d 583, 585 (7th Cir. 1997). In *Hyde*, Judge Posner acknowledged that civil rights cases do not always involve large amounts of money.

404. *Coutin v. Young & Rubicam Puerto Rico*, 124 F.3d 331, 336 (1st Cir. 1997) (documenting almost 300 hours pursuing a plaintiff's employment discrimination claim); Bjorn-

it takes a lot of time to prove violations of their clients' rights, and plaintiffs and their attorneys should not bear the cost of demonstrating a violation of law.

As this Section of the Article demonstrates, the "windfall" argument should not cause courts to disallow attorney's fees in cases where only nominal damages are awarded. Attorneys who pursue these claims invest hundreds of hours in proving violations of law,⁴⁰⁵ and they should not be punished because a jury determined the plaintiff did not deserve more than nominal damages.

E. Denying Fees Will Discourage Individuals From Seeking Redress For Civil Rights Violations

In addition to the fallacy of the "windfall" argument, another reason courts should award attorney's fees to plaintiffs who recover only nominal damages is to encourage these individuals and their attorneys to bring these lawsuits. Although the Equal Employment Opportunity Commission can file suit on behalf of plaintiffs in employment discrimination lawsuits,⁴⁰⁶ most employment discrimination and other civil rights lawsuits are brought by individuals on their own behalf. In fact, the Supreme Court noted that Congress intended individuals to pursue these claims vigorously and to act as private attorneys general in an attempt to encourage individuals to stop discrimination within the workplace.⁴⁰⁷ However, if plaintiffs' attorneys are going to be denied fees for the time and effort involved in proving civil rights violations, these individuals will be less likely to serve

son v. Dave Smith Motors/Frontier Leasing & Sales, 578 F. Supp. 2d 1269, 1286 (D. Idaho 2008) (documenting over 560 hours pursuing a plaintiff's employment discrimination claim); Loesch v. City of Philadelphia, No. 05-cv-0578, 2008 U.S. Dist. LEXIS 48757, at *12 (E.D. Pa. June 25, 2008) (documenting over 700 hours pursuing a plaintiff's employment discrimination claim); Granville v. City of Portland, No. 02-1016-HA, 2006 U.S. Dist. LEXIS 75245, at *3 (D. Or. Oct. 16, 2006) (documenting over 620 hours pursuing plaintiffs' employment discrimination claims); Bell v. Bd. of County Comm'rs, No. 03-2148-KHV, 2005 U.S. Dist. LEXIS 2187, at *8 (D. Kan. Feb. 15, 2005) (documenting approximately 1000 hours pursuing a plaintiff's First Amendment and Fourteenth Amendment claims); Albertson v. Winner Auto., No. 01-116 KAJ, 2004 U.S. Dist. LEXIS 21859, at *22 (D. Del. Oct. 27, 2004) (documenting close to 270 hours pursuing a plaintiff's employment discrimination claim); Hill v. Royal Crown Bottling Co., No. 01-T-063-S, 2003 U.S. Dist. LEXIS 9526, at *3-4 (M.D. Ala. May 13, 2003) (documenting over 300 hours pursuing a plaintiff's employment discrimination claim); Jimenez v. Paw-Paw's Camper City, Inc., No. 00-1756 Section "N" (2), 2002 U.S. Dist. LEXIS 3248, at *65 (E.D. La. Feb. 22, 2002) (documenting over 490 hours pursuing a plaintiff's employment discrimination claim); Black v. M.G.A., Inc., 51 F. Supp. 2d 1315, 1317 (M.D. Ala. 1999) (documenting almost 300 hours pursuing a plaintiff's employment discrimination claim); Bailey v. Runyon, 50 F. Supp. 2d 891, 894 (D. Minn. 1999), *aff'd*, 220 F.3d 879 (8th Cir. 2000) (documenting over 425 hours pursuing a plaintiff's employment discrimination claim).

405. See cases cited *supra* note 404.

406. 42 U.S.C. § 2000e-5(f)(1) (2006) (providing the Equal Employment Opportunity Commission with authority to bring suit on behalf of aggrieved individuals).

407. Albemarle Paper Co. v. Moody, 422 U.S. 405, 415 (1975).

this vital role. This will essentially allow employers and government officials to go unchecked with respect to their behavior.

Several courts, including the Supreme Court in *Farrar*, have acknowledged this private attorney general theory in enforcing civil rights claims. For example, in her concurring opinion in *Farrar*, Justice O'Connor specifically noted that 42 U.S.C. § 1988 "ensures the vindication of important rights, even when large sums of money are not at stake, by making attorney's fees available under a private attorney general theory."⁴⁰⁸ Several other courts since *Farrar* have also acknowledged the private attorney general theory, with some of these courts allowing fees, and some of them not providing for these fees. For example, the court in *Buss* recognized the private attorney general theory and ultimately awarded attorney's fees to the plaintiffs.⁴⁰⁹ Additionally, the court in *Ollis* noted that a civil rights plaintiff acting as a private attorney general promotes rights Congress considers to be of the highest importance.⁴¹⁰ Similarly, the court in *Picou* also cited Justice O'Connor's statements regarding the purpose of the civil rights fee-shifting statute, 42 U.S.C. § 1988, and the private attorney general theory.⁴¹¹

Thus, even when large sums of money are not at stake—which is often the case with civil rights cases—at least some courts agree that individuals should be encouraged to pursue these claims under the private attorney general theory; however, if courts disallow attorney's fees for plaintiffs who are able to prove a defendant's wrongdoing but are awarded only nominal damages, individuals and their potential attorneys will be less likely to pursue these claims.⁴¹² Courts that deny attorney's fees to these plaintiffs are doing the exact opposite of what these fee-shifting statutes were intended to accomplish—encouraging individual plaintiffs to pursue claims against defendants who violate their rights.⁴¹³ As a result, the Court should revisit *Farrar* and determine that attorney's fee awards are appropriate when a plaintiff can demonstrate a civil rights violation regardless of the amount of damages he is awarded.

408. *Farrar v. Hobby*, 506 U.S. 103, 122 (1992) (O'Connor, J., concurring).

409. *Buss v. Quigg*, No. 01-CV-3908, 2002 U.S. Dist. LEXIS 19324, at *27, 40 (E.D. Pa. Oct. 9, 2002).

410. *Ollis v. Hearthstone Homes, Inc.*, No. 8:05CV119, 2006 U.S. Dist. LEXIS 39151, at *15 (D. Neb. June 12, 2006).

411. *Picou v. City of Jackson*, 91 F. App'x 340, 342 (5th Cir. 2004) (quoting *Hopwood*, 236 F.3d at 278).

412. See also *Hyde v. Small*, 123 F.3d 583, 585 (7th Cir. 1997).

413. See, e.g., *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 415 (1975) (noting the great public interest in having individuals act as "private attorneys general").

F. Allowing Attorney's Fees Will Further Congressional Intent

By granting attorney's fees in nominal-damage cases, courts would further Congress's goal of encouraging victims of civil rights violations to pursue their claims. Following this reasoning, some courts have awarded fees in these nominal-damage cases.⁴¹⁴

One case that addressed the legislative history behind 42 U.S.C. § 1988 was the previously discussed case of *Buss v. Quigg*.⁴¹⁵ In addressing whether attorney's fees were warranted, the court considered the legislative history behind 42 U.S.C. § 1988 and observed that in enacting this fee-shifting statute, Congress "sought to narrow the disparity in legal representation and resources between opposing parties in civil rights cases, particularly where . . . the defendant is a public official 'with substantial resources available to [him] through funds in the common treasury, including the taxes paid by the plaintiffs themselves.'" ⁴¹⁶ In citing Supreme Court precedent addressing the relevant legislative history, the court in *Buss* also noted that "[i]n enacting § 1988, Congress determined that 'the public as a whole has an interest in the vindication of the rights conferred by the statutes enumerated in § 1988, over and above the value of a civil rights remedy to a particular plaintiff.'" ⁴¹⁷ In order to achieve this goal, "Congress sought to make fees available both to properly compensate plaintiffs' attorneys and to serve a private enforcement function."⁴¹⁸

In addition to quoting the Senate Report on this issue, the court in *Buss* also quoted the House Report, which noted the following:

[w]hile damages are theoretically available under the statutes covered by [§ 1988], it should be observed that, in some cases, immunity doctrines and special defenses, available only to public officials, preclude or severely limit the damage remedy. Consequently, awarding counsel fees to prevailing plaintiffs in such litigation is particularly important and necessary if Federal civil and constitutional rights are to be adequately protected.⁴¹⁹

Thus, at least according to *Buss*, attorney's fee awards can be appropriate in cases where only nominal damages are awarded.⁴²⁰

Another case that addressed the purpose behind these fee-shifting statutes was *Hare v. Potter*.⁴²¹ In that case, the court noted that the purpose behind fee-shifting statutes is to encourage victims of dis-

414. See *supra* Parts IV and V.

415. No. 01-CV-3908, 2002 U.S. Dist. LEXIS 19324 (E.D. Pa. Oct. 9, 2002).

416. *Id.* at *10-11 (quoting H.R. REP. No. 94-1558, at 7 (1976)) (alteration in original).

417. *Id.* at *11 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 444 n.4 (1983)).

418. *Id.*

419. *Id.* at *12 n.8 (quoting H.R. REP. No. 94-1558, at 8) (alteration in original).

420. *Id.* at *2.

421. 549 F. Supp. 2d 698 (E.D. Pa. 2008).

crimination to “seek judicial relief,” and “[i]f successful plaintiffs were routinely forced to bear their own attorney[’s] fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts.”⁴²² Finally, the court in *Otero v. Colligan* made the keen observation that “[a]ttorney’s fees are authorized by § 1988 for prevailing civil rights plaintiffs in order ‘to encourage the bringing of meritorious civil rights claims which might otherwise be abandoned because of the financial imperatives surrounding the hiring of competent counsel.’”⁴²³ These statements clearly demonstrate congressional desire to encourage civil rights lawsuits.

Although Justice O’Connor expressed her opinion that denying fees in nominal-damage cases was consistent with the history behind 42 U.S.C. § 1988, she relied partially on the fact that Congress made these awards discretionary rather than mandatory.⁴²⁴ While Justice O’Connor’s use of this fact is reasonable, another possibility for giving courts the discretion to award fees was to prevent prevailing *defendants* from seeking attorney’s fees.⁴²⁵ Although Justice O’Connor’s other points regarding legislative history are certainly well-taken, she still ignores the fact that the factors she articulated in *Farrar* will (1) almost always result in no fee award, or a significantly reduced fee award, because of the large difference between the amount usually sought in civil rights lawsuits and the usual nominal-damage award; (2) diminish the importance of civil rights violations; and (3) ignore the fact that most civil rights plaintiffs file suit for the purpose of redressing individual wrongs rather than to “vindicate[] the rights of others, create[] new legal precedent, deter[] future deprivations, and/or provoke[] a change in the defendant’s behavior.”⁴²⁶

Therefore, although there is some legislative history to support the denial of attorney’s fees in cases in which plaintiffs are awarded only nominal damages,⁴²⁷ the overall purpose behind these fee-shifting statutes is frustrated when these prevailing parties are not entitled to recover their attorney’s fees. The purpose of these statutes is to encourage victims of civil rights violations to pursue these

422. *Id.* at 701-02 (quoting *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968)).

423. No. 3:99cv2378 (WIG), 2006 U.S. Dist. LEXIS 44001, at *10 (D. Conn. June 28, 2006) (quoting *Kerr v. Quinn*, 692 F.2d 875, 877 (2d Cir. 1982)).

424. *Farrar v. Hobby*, 506 U.S. 103, 119 (1992) (O’Connor, J., concurring).

425. As was noted earlier, pursuant to the Supreme Court’s decision in *Christiansburg Garment Co.*, while prevailing plaintiffs are typically entitled to a fee award, prevailing defendants are entitled to those awards only in very limited circumstances. 434 U.S. 412, 417, 421 (1978).

426. *Petrunich v. Sun Bldg. Sys., Inc.*, 625 F. Supp. 2d 199, 209 (M.D. Pa. 2008), *vacated by consent of the parties*, No. 04-2234, 2008 U.S. Dist. LEXIS 104154 (M.D. Pa. Nov. 21, 2008).

427. *Farrar*, 506 U.S. at 118-21 (O’Connor, J., concurring).

claims, even when the amount of money at stake is not excessive.⁴²⁸ By denying fees in these cases, the courts will discourage individuals and their attorneys from bringing potentially meritorious lawsuits, which is the exact opposite of what Congress wanted when it enacted these various fee-shifting statutes. As the court in *Otero* properly noted, “[d]eterring meritorious lawsuits . . . because they offer a small likelihood of a significant money judgment presents as grave a danger to our legal system as frivolous litigation.”⁴²⁹ As a result, the Court should rethink its position in *Farrar*.

VII. CONCLUSION

While the Court’s decision in *Farrar* clarified that plaintiffs who win nominal damages are prevailing parties for purposes of the fee-shifting provisions in various civil rights statutes, the Court’s opinion and Justice O’Connor’s three-factor test from her concurring opinion make it unlikely that these plaintiffs will recover their attorney’s fees despite the fact they are able to prove a defendant violated their rights.

The first O’Connor factor, and the most important one, is the difference between the amount sought and the amount recovered, and it will almost always weigh against an award of fees. This is because most nominal-damage awards are, by definition, extremely small, while civil rights plaintiffs typically request a substantial amount of damages. As a result, a one-dollar award will almost always cause a large disparity between the amount sought by the plaintiff and the amount awarded by the court.

The second O’Connor factor, and the one many courts consider the least important, is the significance of the legal issue upon which the plaintiff prevailed. While some courts look at this factor as evaluating the *importance* of the legal issue on which the plaintiff prevailed (which is similar to the third O’Connor factor), other courts look at the number of claims on which the plaintiff succeeded. This Article has argued that *all* civil rights claims are important, and as a result, a plaintiff who can establish a violation of his rights should be entitled to a fee award, despite being awarded only nominal damages.⁴³⁰

Finally, the third factor from Justice O’Connor’s opinion in *Farrar* evaluates whether the litigation served some public good, or whether it merely wasted the court’s and counsel’s time. While Justice

428. See *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 415 (1975).

429. *Otero v. Colligan*, No. 3:99cv2378 (WIG), 2006 U.S. Dist. LEXIS 44001, at *10-11 (D. Conn. June 28, 2006) (quoting *Koopman v. Water Dist. No. 1*, 41 F.3d 1417, 1421 (10th Cir. 1994)).

430. As I noted earlier, if courts want to analyze this factor by looking at the number of successful claims and the number of unsuccessful claims, I do not oppose awarding fees associated only with the successful claims.

O'Connor and some courts seem to dismiss the importance of civil rights violations, courts should realize *all* civil rights suits in which a plaintiff proves a civil rights violation do more than waste time, even if a plaintiff is awarded only nominal damages.

As is clear from the previous analysis of the O'Connor factors from *Farrar*, the Court should revisit *Farrar* and decide that even in cases where only nominal damages are awarded, plaintiffs should typically be entitled to recover their attorney's fees.⁴³¹ In addition to the flaws inherent in Justice O'Connor's three-factor test, there are several reasons for changing the status quo. (1) Failing to award attorney's fees in nominal-damage cases will deter plaintiffs and their attorneys from bringing meritorious, yet perhaps not particularly lucrative, lawsuits; (2) using Justice O'Connor's three-factor test could cause attorneys to undervalue their clients' claims and perhaps create conflicts of interest when attorneys must decide the amount of damages to request from a jury; (3) granting attorney's fees in nominal-damage cases will not create a windfall for attorneys who are able to prove civil rights violations; and (4) denying attorney's fees in nominal-damage cases will frustrate congressional intent behind the fee-shifting provisions in various civil rights statutes.

Therefore, in order to encourage individuals to enforce their rights, the Court should revisit the portion of the *Farrar* opinion that addresses the propriety of attorney's fee awards in nominal-damage cases and conclude that there should be a presumption in favor of awarding fees to a victorious plaintiff's attorney once the plaintiff establishes himself as a prevailing party. This will encourage victims of civil rights violations to bring these claims, and it will allow them to retain competent counsel to help them pursue those who violate these important rights.

431. Although I have not yet raised this possibility, perhaps the presumption in favor of an attorney's fee award should prevail unless the defendant can demonstrate that the lawsuit was brought for a frivolous purpose and not in order to seek redress for a wrong.

