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TITLE VII—ATTORNEYS' FEES FOR PREVAILING AT THE STATE ADMINISTRATIVE LEVEL—TO FEE OR NOT TO FEE? *Carey v. New York Gaslight Club, Inc.*, 598 F.2d 1253 (2d Cir. 1979)

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TITLE VII—ATTORNEYS' FEES FOR PREVAILING AT THE STATE ADMINISTRATIVE LEVEL—TO FEE OR NOT TO FEE? *Carey v. New York Gaslight Club, Inc.*, 598 F.2d 1253 (2d Cir.), *cert. granted*, 100 S. Ct. 204 (1979).

In 1974 Cidni Carey applied for employment as a waitress at the New York Gaslight Club, a restaurant in New York City. She was not hired. Believing she was illegally denied employment because of her race, she filed a complaint with the Equal Employment Opportunity Commission (hereinafter EEOC).¹ Her complaint was referred to the New York State Division of Human Rights,² where at the division's request, Carey filed a complaint with it.³

The Division of Human Rights determined that it had jurisdiction in the matter and ruled that there was probable cause that the New York Gaslight Club had committed employment discrimination. Conciliation attempts between the Gaslight Club and Carey failed. The State Division of Human Rights held a public hearing on Carey's case in January 1976. It subsequently ruled in August 1976, that the New York Gaslight Club committed employment discrimination and ordered that Carey be offered a position with the restaurant as a waitress. In addition, backpay was awarded. The Club's subsequent appeals to vacate the division's order failed.⁴

1. Ms. Carey filed her complaint with the New York office of the Equal Employment Opportunity Commission (EEOC).

2. 42 U.S.C. § 2000e-5(c) (1976). *See, e.g.*, *EEOC v. Union Bank*, 408 F.2d 867 (9th Cir. 1969) where the court held that deferral to an authorized state agency was required under title VII. Deferral is required despite the fact that the agency does not have comparable relief power to the EEOC. *Crosslin v. Mountain States Tel. and Tel. Co.*, 422 F.2d 1028 (9th Cir. 1970), *vacated on other grounds*, 400 U.S. 1004 (1971). If the agency is incapable of performance no deferral is required. *General Ins. Co. of America v. EEOC*, 491 F.2d 133 (9th Cir. 1974).

See also EEOC Regulations and Guidelines, 29 C.F.R. § 1601.74 (1978) (lists appropriate deferral agencies including the New York Division of Human Rights).

3. *Carey v. New York Gaslight Club, Inc.*, 598 F.2d 1253, 1255 (2d Cir.), *cert. granted*, 100 S.Ct. 204 (1979).

4. The Gaslight Club appealed . . . to the New York State Human Rights Appeal Board, which affirmed the finding of discrimination and order for relief. This decision was also affirmed by the Appellate Division of the New York Supreme Court. 59 App. Div. 2d 852, 399 N.Y.S.2d 158 (1977). The New York Court of Appeals subsequently denied leave to appeal in February, 1978. 43 N.Y.2d 648, 403 N.Y.S.2d 1026, 374 N.E.2d 630 (1978). 598 F.2d at 1255, *cert. granted*, 100 S. Ct. 204 (1979).

During the administrative hearings, Carey's position was represented by private and public counsel. Carey had retained private counsel from the National Association for the Advancement of Colored People.⁵ In addition, the New York State Division of Human Rights supplied counsel as mandated by New York statute. New York's Human Rights Law provides:

[T]he case in support of the complaint shall be presented by one of the attorneys or agents of the division [of Human Rights] and, at the option of the complainant by his attorney. With the consent of the division, the case in support of the complainant may be presented solely by his attorney.⁶

The fact that Carey had joint counsel at her hearing and at subsequent appeals would be of major concern to the courts.⁷

Prior to final disposition of the state proceedings, Carey received a Right to Sue letter⁸ from the EEOC in July 1977. This letter is issued by the EEOC after having had jurisdiction over a case for at least 180 days. It is granted irrespective of the particular stage of the complaint. In Carey's instance, the EEOC, while maintaining jurisdiction, had not acted on the complaint other than to defer it to the appropriate state agency. Therefore, the issuance of the Right to Sue letter was appropriate.

Carey sued in federal district court for the award of attorney's fees based on her success at the state administrative level. The district court denied her request. It reasoned that since Carey was represented by a state attorney and since the state claim was still pending at the time the federal suit was initiated, the awarding of fees would be inappropriate.⁹ She appealed.

In *Carey v. New York Gaslight Club, Inc.*,¹⁰ a case of first impression, the U.S. Court of Appeals for the Second Circuit had to

5. *Id.* n. 1. See 598 F.2d at 1259 n. 9, 1260 n. 1, 1261 n. 2 (discussing counsel's effectiveness).

See notes 31-35 & 54 *infra* and accompanying text (distinguishing between representation of Ms. Carey and Ms. Carey's complaint).

6. N.Y. EXEC. LAW § 297(4)(a) (McKinney 1972) (Human Rights).

7. *Carey v. New York Gaslight Club, Inc.*, 598 F.2d 1253, 1260, *cert. granted*, 100 S. Ct. 204 (1979) (Mulligan, J., dissenting).

8. If the EEOC does not conciliate a complaint or take action against an alleged title VII violation, the Commission will issue the complainant a "Notice of Right to Sue Letter." The complainant may then file an action in federal district court. The action must be filed within 90 days. 42 U.S.C. § 2000e-5(f)(1) (1976).

9. *Carey v. New York Gaslight Club, Inc.*, 458 F. Supp. 79, 80-81 (S.D.N.Y. 1978), 598 F.2d 1253, 1255-56, *cert. granted*, 100 S. Ct. 204 (1979).

10. 598 F.2d 1253, *cert. granted*, 100 S. Ct. 204 (1979).

resolve whether Title VII of the Civil Rights Act of 1964¹¹ authorizes the awarding of attorneys' fees to a non-federal employee who prevails in a discrimination suit at the state administrative level or whether the discrimination issue must be litigated in the federal courts prior to any such award.

Title VII provides for the awarding of attorneys' fees¹² at the court's discretion.¹³ It states that the fee may be awarded to a prevailing party in any action or proceeding under title VII.¹⁴ The term "proceeding" has been defined in prior cases to include administrative proceedings.¹⁵ Thus, the court of appeals had to consider whether to extend the fee awards authorized by title VII to prevailing parties at the state administrative level. In analyzing

11. 42 U.S.C. § 2000e (1976). Title VII was amended in 1972 to include previously excluded federal employees.

12. *Id.* § 2000e-5(k).

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

Id.

13. The discretionary awarding of attorneys' fees has been read broadly by the courts. *See* *Christianburg Garment Co. v. EEOC*, 434 U.S. 412 (1978). *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968). *Newman* arose under Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-3(b) (1976), however, its attorney's fee provisions are so similar to those of title VII that the standard for the award has been held to be synonymous. *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975). *See also* note 20 *infra*.

14. *See* note 12 *supra*.

15. 598 F.2d at 1257-59; *accord*, *Noble v. Claytor*, 448 F. Supp. 1242 (D.D.C. 1978); *Smith v. Califano*, 446 F. Supp. 530 (D.D.C. 1978); *McMullen v. Warner*, 416 F. Supp. 1163 (D.D.C. 1976); *see* *Fischer v. Adams*, 572 F.2d 406 (1st Cir. 1978), *Parker v. Califano*, 561 F.2d 320 (D.C. Cir. 1977); *Foster v. Boorstin*, 561 F.2d 340 (D.C. Cir. 1977). *See also* Note, *Civil Rights—Title VII—Recovery of Attorney's Fees for Services Rendered in Connection with Administrative Proceedings*, 24 WAYNE L. REV. 1409 (1978).

The concern over the definition of "proceeding" stems, in part, from the United States Supreme Court decision in *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975). The court held that one exception to the "American rule" of requiring a litigant to pay for his or her own attorneys' fees exists when a statute expressly authorizes the payment of such fees. *Id.*

It would have been difficult for the *Carey* court to consider an award of attorneys' fees without a precedent which defined "proceeding." The question of the definition of proceeding will unlikely be pursued by the government in the near future. The United States Court of Appeals for the First Circuit stated, "[W]e hold and the government now concedes that the District Court does have discretion to grant fees to a prevailing party for work done at the administrative, as well as the court level. . . ." *Fischer v. Adams*, 572 F.2d 406, 409 (1st Cir. 1978) (footnotes omitted).

this question, the court relied on the scope of title VII, its legislative history,¹⁶ and public policy considerations.

The court held that attorneys' fees may be awarded to successful title VII complainants who prevail at the state administrative level prior to any federal court action even if the complainants are not federal employees. This holding is the last step in a string of cases¹⁷ which broadened the opportunity for plaintiffs to be awarded attorneys' fees when prevailing in a title VII action at the administrative level. The court extended title VII's attorneys' fees recovery concept at the administrative level to prevailing non-federal employees at the state level, rather than limiting recovery to prevailing federal employees.¹⁸

The court stated that title VII's purpose was to "effectuate the congressional policy against . . . discrimination."¹⁹ The attorneys' fees provision was designed to increase the effectiveness of the Act by recompensing successful private actions.²⁰ The natural extension

16. The legislative history for title VII is less than complete. See *Parker v. Califano*, 561 F.2d 320, 333-39 (D.C. Cir. 1977) (excerpts of the legislative history relevant to the attorneys' fees provision of title VII). See also *Falcon, Award of Attorney's Fees in Civil Rights and Constitutional Litigation*, 7 B.C. INDUS. & COM. L. REV. 431 (1966).

17. See note 13 & 15 *supra*.

18. In *Fischer v. Adams*, 572 F.2d 406 (1st Cir. 1978), a female federal employee filed a sex discrimination suit against her employer, the National Highway Traffic Safety Administration. After prevailing on appeal to the Civil Service Commission, she brought an action for attorneys' fees. *Parker v. Califano*, 561 F.2d 320 (D.C. Cir. 1977), involved the awarding of attorneys' fees after a complainant was successful in charging she had been discriminated against by the Office of Education of the Department of Health, Education and Welfare because of her race and sex. In a companion case, *Foster v. Boorstin*, 561 F.2d 340 (D.C. Cir. 1977), a black male who was successful in his claim of race discrimination against the Library of Congress was awarded attorneys' fees.

The extension of attorneys' fees awards to federal employees in administrative proceedings was due, in part, to the fact that they were required to proceed through a complex set of administrative procedures prior to being allowed to sue in the federal district court. See 42 U.S.C. § 2000e-16(b)(c) (1976).

19. 598 F.2d at 1256. Title VII is designed to eliminate employment discrimination directed toward any individual because of "race, color, religion, sex or national origin." 42 U.S.C. § 2000e (1976).

20. The *Carey* court cites *Mid-Hudson Legal Servs., Inc. v. G & U, Inc.*, 578 F.2d 34 (2d Cir. 1978), as the basis for its rationale that the attorneys' fee awards statute should be read "broadly to achieve its remedial purpose." 598 F.2d at 1256. In footnote, the court explains that there are parallel uses of the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988, applied in *Mid-Hudson* and title VII's attorney's fee award, 42 U.S.C. § 2000e-5(k) (1976). See also note 13 *supra* (similar comparison drawn between title II, 42 U.S.C. § 2000a-3(b) (1976) and title VII). 598 F.2d at 1256 n.4.

of this reasoning led the court to approve the awarding of attorneys' fees for deferred title VII successes at the state level. The rationale was threefold, in both state and federal administrative proceedings: An attorney would be present;²¹ denying the attorney's fee award would result in an increase in federal litigation;²² and, developing a complete administrative record at both levels was necessary.²³ The rationale was based on the similar interrelationship between federal and state administrative procedure.²⁴ Title VII mandates deferral of complaints to the state.²⁵ Also, title VII includes in its attorneys' fees provision broad language which includes awarding fees for work performed at the administrative

21. Federal employees must act as their own attorneys general since both the Attorney General and the EEOC is barred from representing them. 42 U.S.C. § 2000e-16 (1976). See *Parker v. Califano*, 561 F.2d 320, 331 (D.C. Cir. 1979).

22. 598 F.2d at 1259.

23. *Id.* The majority dismissed quickly, and the minority did not discuss, the cases cited by the appellees, *New York Gaslight Inc.*, in which they attempted to convince the court that title VII fee awards were applicable only if the complainant prevailed at court. Appellees relied on *Pearson v. Western Elec. Co.*, 542 F.2d 1150 (10th Cir. 1976) and *Williams v. General Foods Corp.*, 492 F.2d 399 (7th Cir. 1974). 598 F.2d at 1260. In *Pearson*, an arbitrary agreement resulted in the reinstatement of a black male after he was dismissed for racially discriminatory reasons. 542 F.2d at 1153. He brought an action in federal district court to recover attorneys' fees for prevailing at the "administrative level." *Id.* The United States Court of Appeals for the Tenth Circuit refused to award the fees. *Id.* Citing *Williams* and *Schaeffer v. San Diego Yellow Cabs, Inc.*, 462 F.2d 1002 (9th Cir. 1972), the court held: "Congress by the use of those words [prevailing party] in Title VII declared a legislative intent to limit the discretionary award of attorney's fees to the party who succeeded in a court action." 542 F.2d at 1153 (emphasis added).

In *Williams*, the United States Court of Appeals for the Seventh Circuit reasoned that: "[T]he use in Title VII of language identical to that found in the Federal Rules of Civil Procedure [54(d)] clearly indicates a legislative intent to limit a discretionary award of fees to those parties who are successful in court." 492 F.2d at 408.

The *Carey* court distinguished the two cases by noting that neither party prevailed in an administrative proceeding "undertaken pursuant to the requirements of Title VII." 598 F.2d at 1260. "To the extent that the language of these cases limits recovery of attorney's fees under Title VII to parties who succeed in a court, it is inconsistent with the reasoning of the cases we have cited in the area and we decline to adopt that limitation." *Id.* (Smith, J.).

Two factors about the *Carey* court's dismissal of the appellee's cases are interesting. First, Judge Mulligan in his dissent did not support or cite the appellee's cases. It is apparent that the word "proceeding" has taken on the definition of administrative proceedings. See note 20 *supra*. Second, neither of the appellee's cited cases deal with an administrative proceeding under title VII. Therefore, it is unlikely that a conflict will arise between the circuits as to the definition of proceedings. There is enough judicial flexibility in the last factor to preclude the conflict since there was no "eye-ball to eye-ball" confrontation.

24. 598 F.2d at 1258.

25. See note 2 *supra*.

level.²⁶ Furthermore, the policy behind the awarding of attorneys' fees should be applicable to federal and non-federal complainants.

While concurring with the majority that title VII mandates referral from the EEOC to the state agency,²⁷ Judge Mulligan in his dissent emphasized that the discriminatory practice violated New York law.²⁸ Since New York law mandates that a state counsel be afforded, there was no necessity to pay for private counsel. Furthermore, Carey did not prevail under a federal title VII proceeding,²⁹ thus, no title VII award was warranted. In addition, Judge Mulligan disagreed with the majority's assertion that denial of attorneys' fees awards for prevailing at the state level may encourage needless federal litigation.³⁰

In addressing his initial point, Judge Mulligan reasoned that since New York did not have a statute for attorneys' fees, but did have a statutory mechanism for providing a complainant with an attorney, there was no necessity to pay for private counsel.³¹ Judge Mulligan buttressed his position by noting that the complainant did not seek exclusive counsel as was authorized by the statute.³² He asserted that the district court did not err in denying the attorney's fee award since there was dual representation throughout the entire administrative and appeal process.³³ Thus, there was no legitimate need for a private attorney general.

The majority, however, distinguished the representation of a complaint on behalf of Carey as enunciated in the New York statute,³⁴ from representation of the complainant herself. The majority reasoned that when the division represents a complaint on behalf of a client, it is defending a specific cause, such as sex discrimination. It is acting in a prosecutor's role against the defendant's violation, not in an advocacy role on behalf of the individual complainant. The court reasoned that there may be instances in which the position of the division's representative with regard to the complaint may be at variance with the complainant's position. In addi-

26. See note 11 *supra*.

27. 598 F.2d at 1260-64 (Mulligan, J., dissenting).

28. *Id.* at 1260. The discrimination violated N.Y. EXEC. LAW § 15 (McKinney 1972) (Human Rights).

29. 598 F.2d at 1262.

30. *Id.* at 1263.

31. *Id.* at 1261.

32. *Id.* at 1261 (citing N.Y. EXEC. LAW § 297(4)(a) (McKinney 1972) (Human Rights)).

33. 598 F.2d at 1261-62.

34. See note 6 *supra* and accompanying text.

tion, division representation is available to the complainant only at the public hearing stage. Prior to that period, no division representative is available for either the complaint or the complainant, and subsequently, in any appeal, representation is only available to advocate the decision of the division or the appeal board. They concluded that there was a necessity for the complainant to retain private counsel.³⁵

Judge Mulligan's second concern, however, is ostensibly more persuasive. Since the complainant did not prevail under a title VII proceeding, no title VII award should be granted. He supports his point by referring to the congressional intent of title VII that the federal courts not act as a "fee dispensing agency" for success at the state administrative level.³⁶ Furthermore, Judge Mulligan contends that if there is a need for such an award at the state level, as the majority suggests,³⁷ it should be implemented through legislative action, not judicial design.³⁸

In its petition for certiorari, the New York Gaslight Club elaborates on Judge Mulligan's position. Citing *Batiste v. Furnco Con-*

35. 598 F.2d at 1258-59. Both majority and minority opinions indicated that in the Carey representation there were no divergent interests created because of the complaint/complainant distinction. In addition, both opinions indicated that on a practical basis, in this case, both public and private counsel adequately represented the needs of the complainant. The issue of dual representation does not appear to be as much a stumbling block as to the extension of the attorneys' fees award provision to state administrative proceedings as it is to the circumstances under which the awards should be made. The majority prefaces much of its argument on a hypothetical "if it happened" logic with regard to a distinction in actual representation between the complaint and the complainant. *Id.* The dissent, on the other hand, notes that since it did not happen in this case there is no necessity to award attorneys' fees. Presumably the dissent would be more receptive to the awarding of such fees if there were a divergence in representation. Obviously, if such were the case, it would be easier to justify the private counsel as a private attorney general. *Id.* at 1261.

The dissent's point is well taken, but in light of the public policy issues presented by the majority, it is not persuasive enough to disallow the awarding of attorneys' fees. Perhaps this case was not the ideal case in which to take the last step with regard to the awarding of attorneys' fees under title VII.

36. 598 F.2d at 1261. Judge Mulligan stated, "[s]uch a course only promotes the federal litigation which Congress intended to bypass. Had the Congress intended this unusual result—the awarding by federal courts of attorney's fees not incurred in the federal framework—it could and surely would have explicitly so provided." *Id.* It appears that Judge Mulligan is perfectly comfortable with extending the award of attorneys' fees to administrative proceedings, thereby eliminating his opposition to the definition accorded "proceedings," but is unwilling to move outside the federal framework. *See* note 20 *supra*. Although he does not say so, he seems reluctant to go beyond the factual patterns in which a federal employee is involved.

37. 598 F.2d at 1258.

38. *Id.* at 1262.

struction Corp.,³⁹ the petitioner claimed that any awarding of counsel fees must be made by a federal court based on an independent review of the issues, not on reliance of a state administrative finding. Petitioner stated: "[T]he Court of Appeals for the . . . [Seventh] Circuit held that *res judicata* is inapplicable to claims under the equal employment opportunities title. . . . In order to award counsel fees to the prevailing party, the Circuit Court must make its own determination based upon all of the pertinent evidence, resulting in new findings."⁴⁰ In *Batiste* a group of bricklayers charged the Furnco Construction Corporation with racially discriminatory employment practices. The Illinois Fair Employment Practices Commission ordered the Furnco Construction Company to cease its unfair labor practice, to hire the bricklayers on the next available Illinois job, and to compensate the bricklayers for lost wages.⁴¹ Prior to the Commission's findings, the EEOC issued the plaintiffs a Right to Sue letter. The plaintiffs brought an action in district court for injunctive relief, backpay, and attorneys' fees. The district court granted the plaintiff's motion for summary judgment based upon the completed findings of the Illinois Fair Employment Practices Commission. Instead of granting the total relief requested, however, it awarded only the plaintiffs' attorney's fee. Both plaintiffs and defendant appealed. Plaintiffs claimed that once summary judgment was granted, the court should have granted the full range of relief requested. The defendant claimed that the plaintiffs were not entitled to summary judgment because the "doctrines of election of remedies, *res judicata* and full faith and credit, bar plaintiffs from bringing their action to federal court after the F.E.P.C. adjudicated plaintiffs' claims."⁴² It appears that the petitioner's reliance on *Batiste* is misplaced as is Judge Mulligan's extensively narrow reading of the attorney's fee award provision of title VII.

Both the majority and minority cite the United States Supreme Court decision of *Alexander v. Gardner-Denver Co.*⁴³ In *Alexander*, the Court held that an employee could pursue remedies under both a collective bargaining grievance arbitration clause and title VII with the federal court considering the employee's

39. 503 F.2d 447 (7th Cir. 1973), *cert. denied*, 420 U.S. 928 (1975).

40. Petitioner's petition for certiorari at 6, *New York Gaslight Club, Inc. v. Carey*, 100 S. Ct. 204 (1979).

41. 503 F.2d at 449.

42. *Id.*

43. 415 U.S. 36 (1974).

claim de novo.⁴⁴ The *Alexander* Court stated that title VII was a supplement to, not a replacement of, other discrimination laws.⁴⁵ The *Carey* majority, however, reasons that title VII requires deference to state mechanisms for resolving discrimination complaints and that attorneys' fees can be awarded in "any action or proceeding under [title VII] . . . [because] the language of the statute is broad enough to encompass awards . . . for work done in connection with administrative proceedings following referral to a state agency by EEOC."⁴⁶

This reasoning is supported in *Alexander*, in which the Supreme Court stated that a complainant has independent causes of action for alleged discriminatory actions.⁴⁷ In *Voutsis v. Union Carbide Corp.*,⁴⁸ the U.S. Court of Appeals for the Second Circuit held that a complainant did not foreclose federal action under title VII when an election to pursue state remedies was made and even though a vague settlement is reached in state proceedings.⁴⁹ The decision held that where state machinery is inadequate to eliminate discrimination, then resorting to a federal remedy is appropriate. "The federal remedy is independent and cumulative . . . and it facilitates *comprehensive* relief."⁵⁰ Thus, the appropriate extension of the aforementioned holdings is to allow *Carey* an independent cause of action to recover attorneys' fees under title VII even though the substantive discrimination issue was resolved at

44. *Id.* at 59-60.

45. The majority cites *Alexander*, regarding the intent of title VII to assure nondiscrimination in employment and the integrated role played by state agencies. 598 F.2d at 1257. The dissent cites *Alexander* in its acknowledgement to defer to state agencies in order to settle disputes at that level prior to litigation in the federal courts. *Id.* at 1260.

46. 598 F.2d at 1257. (footnote omitted).

47. [T]he legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes. The clear inference is that Title VII was designed to supplement rather than supplant, existing laws and institutions relating to employment discrimination.

415 U.S. at 48-49 (footnotes omitted).

48. 452 F.2d 889 (2d. Cir. 1971). *Voutsis* was used by the majority to acknowledge the referral of an EEOC complaint to a state agency and to acknowledge the concurrent jurisdiction exercised over that complaint by the state regulatory agency and the EEOC. 598 F.2d at 1257. It was not used, however, to further the cause of the majority's opinion.

For further cases on the election of remedies and title VII see, *e.g.*, *Johnson v. REA Express*, 421 U.S. 454 (1975) and *Cooper v. Phillip Morris, Inc.*, 464 F.2d 9 (6th Cir. 1972).

49. 452 F.2d at 892-93.

50. *Id.* at 893 (emphasis added).

the state level under state law. To do otherwise would be to deny the supplemental and comprehensive focus of the Civil Rights Act.⁵¹

As the *Batiste* court notes, *res judicata* is no bar to litigation in federal courts.⁵² Therefore, the petitioner's and Judge Mulligan's concerns seem to be divided into a two pronged question. The first question is whether the federal courts would award attorneys' fees in a title VII action for prevailing at the state administrative level. Based upon the preceeding discussions, it appears that title VII, when read broadly and in conjunction with its legislative purpose, will allow for such an award to be made. Secondly, however, is the issue raised in *Batiste*. Must a federal court make a *de novo* determination as to discriminatory practices prior to the awarding of attorneys' fees for prevailing at the state level? If the only issue to be resolved at the federal level is the fee issue, the federal court need not conduct a *de novo* review. In *Batiste*, the plaintiffs were asking the court to grant a good deal more than attorneys' fees. They were requesting injunctive relief and backpay. Under these circumstances, the U.S. Court of Appeals for the Seventh Circuit was correct in its ruling that, "while a defendant can be required to defend again, it cannot be forced to accept the prior findings, and the federal court must conduct its own inquiry."⁵³ In *Carey*, the issue was exclusively limited to attorneys' fees. When such a narrow issue is present, it is appropriate for the federal court to

51. In *Voutsis*, the court stated:

The "harsh" and "technical" procedural rule of election of remedies . . . is not applicable to a Title VII civil rights plaintiff, because the purposes underlying enactment of that Title were clearly based on the congressional recognition that ". . . state and local FEPC laws vary widely in effectiveness. In many areas effective enforcement is hampered by inadequate legislation, inadequate procedures, or an inadequate budget. Big interstate industry cannot effectively be handled by the States." The system of remedies is a complementary one, with the federal remedy designed to be available after the state remedy has been tried without producing speedy results.

Id. at 894 (footnotes omitted). Taking the *Voutsis* rationale to its logical conclusion, where title VII provides a remedy which is not provided by the state, there should be no reason why the complainant should not avail himself or herself of the complete set of remedial opportunities available.

52. Compare the Second Circuit's determination of the *res judicata* issue with regard to an action under 42 U.S.C. § 1981 (1970) in *Mitchell v. NBC*, 553 F.2d 265 (2d Cir. 1977). See Note, *State Agencies, State Courts, Res Judicata, and Section 1981: Mitchell v. National Broadcasting Co.*, 553 F.2d 265 (2d Cir. 1977), 10 CONN. L. REV. 967 (1978).

53. 503 F.2d at 451.

read the title VII attorney's fee provision broadly. In so doing, a de novo review is not required.

While it may be incumbent upon the New York legislature to designate whether it wishes to award attorneys' fees to complainants who file solely and exclusively with its Human Rights agency, it does not appear to be so important to a complainant who files concomitantly with the state agency and EEOC. Prevailing at the state level will not preclude an award of attorneys' fees by the federal court provided that it is the only remedy sought and that *Carey* is affirmed. This does not preclude a plaintiff from re-litigating the entire discrimination issue at the federal level in order to avail himself or herself of the full range of title VII remedies which may not have been awarded at the state level.

If the awarding of fees is appropriate for prevailing at the state level, however, it requires a re-examination of Judge Mulligan's dissenting view that the attorneys' fees should not be awarded because of the availability of state counsel.⁵⁴ Citing his decision in *Mid-Hudson Legal Services, Inc. v. G & U, Inc.*,⁵⁵ Judge Mulligan reiterates his support of the private attorneys general concept.⁵⁶ He does not apply it in *Carey*, however, because New York statutes do not allow for such an award and because he does not view the counsel for complainant as being representative of the class which should be characterized as private attorneys general. In essence, Judge Mulligan is asserting that the awarding of attorney's fees to *Carey's* counsel would not be within the spectrum of situations wherein such an award would be "just," thereby falling outside the congressional intent of the Act.⁵⁷ Attorney's fee awards, however, are rarely denied on the basis of being unjust.⁵⁸ The dissent's argument is unpersuasive. Because of the concurrent jurisdiction of the EEOC and the state agency, and because of the nonexclusivity of various actions, it does not seem as if the lack of

54. See notes 31 & 32 *supra*.

55. 578 F.2d 34 (2d Cir. 1978).

56. 598 F.2d at 1261.

57. Judge Mulligan directs the reader to the Supreme Court's decision in *Newman v. Piggie Park Enterprises, Inc.*, 598 F.2d at 1262. The pertinent part of that cited opinion states, "[i]t follows that one who succeeds . . . should ordinarily recover an attorneys' fee unless special circumstances would render such an award unjust." *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968).

58. See, e.g., *Rosenfeld v. Southern Pac. Co.*, 519 F.2d 527 (9th Cir. 1975); *Lea v. Cone Mills Corp.*, 438 F.2d 86 (4th Cir. 1971); *Miller v. Amusement Enterprise, Inc.*, 426 F.2d 534 (5th Cir. 1970).

statutory authorization for attorneys' fees at the state level should preclude their being awarded at the federal level. Nor does it appear that using state counsel precludes using private counsel and the subsequent awarding of attorneys' fees.⁵⁹

In his dissent, Judge Mulligan also disagrees that failure to award attorneys' fees at the state level will result in increased federal litigation. Using a public policy rationale, the majority cited *Smith v. Califano*⁶⁰ to support its contention that failure to allow recovery could make the administrative proceeding merely pro forma in nature.⁶¹ The *Smith* decision allowed a federal employee to recover attorneys' fees from the federal district court after prevailing on his discrimination complaint at the federal administrative level.⁶² In addition, the majority argued that it was critically important to establish a comprehensive administrative record during the administrative proceeding, and without such an award, attorneys may be reluctant to develop as complete a record as possible.⁶³

Judge Mulligan distinguishes the cases cited by the majority⁶⁴ with no mention of *Smith*. In the process, he develops his point successfully. If attorneys' fees are to be awarded only at the federal level, there will be no reduction in the amount of litigation. Prevailing parties at the state level must still litigate at the federal level. Second, he contends, it would be unethical for an attorney not to represent his or her client zealously at the state administrative level in expectation of a fee award at the federal level where

59. Following this decision the state of New York may wish to re-examine its statute in order to determine the cost-effectiveness of dual counsel. See note 33 *supra*. This position does not yield to the dissent the consideration that the distinction between a complaint and complainant is "nebulous." 598 F.2d at 1262. Nor does it presuppose that two heads are not better than one. If, however, the complainant chooses to be represented by a private counsel, and if the counsel will be awarded attorneys' fees for prevailing at the state level, then the intent of title VII seems to be accomplished without the necessity for dual counsels. Of course, in instances where the state has an overriding concern regarding the outcome of a particular complaint, it may wish to exercise an option to participate.

60. 446 F. Supp. 530 (D.D.C. 1978).

61. [A] party who knew he could recover all fees once he got to court but would recover none if he prevailed at the administrative level would rush to court . . . rather than wait for a final agency decision. . . . Thus, the administrative proceeding [required by title VII] might be relegated to a pro forma exhaustion step decreasing the likelihood that claims could be resolved without resorting to the courts.

598 F.2d at 1259 (quoting *Smith v. Califano*, 446 F. Supp. at 534).

62. 446 F. Supp. at 534.

63. 598 F.2d at 1259-60.

64. See note 11 *supra*.

full representation would be provided. Judge Mulligan seems to be indicating that such action by an attorney would be grounds for denying any attorneys' fees.⁶⁵ Judge Mulligan's arguments are persuasive. He is, however, primarily addressing ethical concerns, and success on this issue is not enough to prevail overall. The hypothesized result of increased or decreased litigation and complete or incomplete administrative records is not enough to warrant overruling the majority's opinion. In addition, federal action will be minimal because the substantive discriminatory issues will not have to be relitigated. If *Carey* is adopted, the attorneys' fees will be the only issue to be resolved.

As Judge Oakes of the U.S. Court of Appeals for the Second Circuit has commented about the United States Supreme Court decision *Alyeska Pipeline Service Co. v. Wilderness Society*,⁶⁶ it "merely altered the parameters of litigation over attorneys' fees: it did not end controversy."⁶⁷ In some respects, *Carey* has fallen within those parameters. It may sit on the outside parameter teetering because of the complaint-complainant distinction and the fact that some state laws do not go as far as federal law in the awarding of attorneys' fees. Yet, it seems to be the next step, or the last step, in the attorneys' fees issue under title VII. To paraphrase Judge Oakes, it will not end the controversy, just alter its dimension slightly.

The U.S. Court of Appeals for the Second Circuit has taken the congressional intent for the awarding of attorneys' fees to its logical conclusion. Prevailing at the state administrative level under title VII after deferral by the EEOC will not preclude the awarding of attorneys' fees. The inextricable relationship between the EEOC and state administrative agencies makes the remedies cumulatively available. Perhaps the majority in *Carey* is correct in its presumption that a decrease in federal litigation will occur, but not because of resolution at the state level. Perhaps a cost-benefit analysis will encourage employers to resolve complaints even before the state proceeding. It does not matter how discriminatory practices are eliminated as long as they are eliminated. When righteous morality does not accomplish this objective, the threat of having to pay attorneys' fees may provide the needed impetus.

Leslie A. Williamson, Jr.

65. See notes 48 & 49 *supra*.

66. 421 U.S. 240 (1975).

67. Oakes, *Introduction: A Brief Glance at Attorneys' Fees after Alyeska*, 2 W. NEW ENG. L. REV. 169 (1979).