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Civil Rights—*EEOC v. Christiansburg Garment Co.*: Extension of the Newman "Private Attorney General" Doctrine to Title VII Litigation

The federal district courts are vested with the discretionary power to award attorneys’ fees to prevailing parties in suits under Title VII of the Civil Rights Act of 1964 by section 706(k) of that title. By prescribing the conditions under which a section 706(k) award is available to prevailing Title VII defendants, the federal courts have constructed a system of economic incentives directly affecting the methods by which the Congressional policies underlying Title VII are implemented. In constructing this system of incentives, the courts have made a series of value judgments about which of the policies underlying Title VII should be accorded the greatest weight. The United States Court of Appeals for the Fourth Circuit, emphasizing the need to encourage private enforcement through the courts, held in *Equal Employment Opportunity Commission v. Christiansburg Garment Co.*, that a prevailing defendant in a Title VII suit may recover his attorneys’ fees only upon a showing that the suit was brought in bad faith.

On February 1, 1968, Rosa C. Helm, a black employee of the Christiansburg Garment Company (Christiansburg or the Company), was laid off from her job. In May 1968, she filed a charge with the Equal Employment Opportunity Commission (EEOC or the Commission) alleging a discriminatory motive for the one-month layoff. The EEOC investigated the charge, advised Christiansburg that it had found reasonable cause to believe a violation had occurred and attempted to obtain the Company’s voluntary compliance in correcting the violation. Upon Christiansburg’s refusal to enter into a conciliation agreement with the EEOC, the Commission issued Mrs. Helm a letter informing her of her right to bring a civil suit against the company to compel compliance with Title VII and recover back pay. Mrs. Helm did not exercise this right.

The EEOC filed suit in federal district court against Christiansburg on January 25, 1974. The district court subsequently granted the Company

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4. *Id.* at 952.
5. EEOC v. Christiansburg Garment Co., 376 F. Supp. 1067 (W.D. Va. 1974). On March 24, 1972, an amendment to Title VII was passed empowering the EEOC to sue *eo nomine* to secure compliance with that title. This power was “applicable with respect to
summary judgment. Thereafter, Christiansburg filed a petition for award of attorneys' fees pursuant to section 706(k). The trial court denied the petition on the ground that the suit represented a good faith effort by the Commission to discharge its statutory duties.

On appeal, the Fourth Circuit upheld the denial of the petition. Writing for a two to one majority, Judge Field rejected "reasonableness" as the appropriate standard for attorneys' fees awards to prevailing Title VII defendants in favor of a standard of "good faith." Recognizing that prevailing Title VII plaintiffs are ordinarily awarded attorney's fees, the court stressed that the public policy considerations supporting liberal awards to plaintiffs are absent in the case of prevailing defendants.

The Christiansburg holding is the most recent development in fee-shifting doctrine in public interest litigation, an area of the law that has spawned inconsistent results and rationales in the federal courts. These inconsistencies are due in large part to confusion over the limits of the "private attorney general" doctrine espoused by the United States Supreme Court in Newman v. Piggie Park Enterprises, Inc. In Newman, the Court

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6. The trial court held that the new enforcement power was not meant to be "completely retroactive" to the effective date of the original Act of 1964. 376 F. Supp. at 1074. Rather, it was meant to be limited to charges on which further action remained to be taken by the EEOC under its original mandate, the last step of which was issuance of notice of right-to-sue to the complainant. Because the suit was brought three-and-one-half years after the right-to-sue letter was issued to Mrs. Helm, the EEOC was without authority to prosecute the action. Id.

7. Section 706(k) provides:

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.


8. 550 F.2d at 951. The district court opinion on the attorneys' fees issue is unreported. The district court noted that construction of § 14, see note 5 supra, was an issue of first impression, accord, 376 F. Supp. at 1073, and that the Commission prevailed on two of Christiansburg's three motions for summary judgment. See 550 F.2d at 952.

9. 550 F.2d at 952.

10. Id. Christiansburg urged the reasonableness standard on the court.

11. Id. at 951.

12. Id. In a heated dissent, Judge Widener argued: (1) There is a split in the circuits on the standard to be applied to defendants' use of § 706(k); (2) policy decisions such as those made by the majority are matters for Congress, not the courts; (3) the remedies available under Title VII are so radical, and colorable claims so easy to come by, that a radically different standard for defendants is not needed to effectuate the policy of antidiscrimination; (4) it is unfair to defendants to impose such a strict standard, particularly in view of the political malleability of government agencies; and (5) defendants should recover attorneys' fees when the plaintiffs' claims, though colorable, are without merit. Id. at 952-54 (Widener, J., dissenting).


held that a prevailing plaintiff under Title II of the Civil Rights Act of 1964 should be awarded attorneys' fees under that provision's fee-shifting section as a matter of course, unless special circumstances would render such an award unjust. The Court noted that when a private plaintiff sues under Title II he may obtain injunctive relief only. Such an injunction benefits the public by advancing the strong Congressional policy of eliminating discrimination. Further, if aggrieved parties were forced to bear the cost of bringing suit under Title II, very few would be financially able to invoke the injunctive power. Because Title II depends upon private plaintiffs for enforcement, Congress must have enacted the Title II fee-shifting provision not just to penalize irresponsible litigants, but to encourage individuals injured by discrimination to seek injunctive relief.

The federal courts of appeals, apparently reading *Newman* as an expansion on the traditional, equitable power to award attorneys' fees, applied the "private attorney general" rationale to a number of other federal statutes—among them statutes that did not contain any fee-shifting provision. This practice was abruptly halted by the Supreme Court in *Alyeska Pipeline Service Co. v. Wilderness Society*. In *Alyeska*, the Supreme Court reversed an attorneys' fees award granted to a prevailing plaintiff suing under the Mineral Leasing Act of 1920 and the National Environmental Protection Act of 1969. The Court held that, absent statutory

16. Id. § 2000a-3(b).
17. 390 U.S. at 402.
18. Id.
19. Id.
20. Id.
21. Id. at 401.
22. Id. at 402.
23. The "American rule" generally prohibits attorneys' fees awards. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247-51 (1975). Under equitable principles, two exceptions have been fashioned to the rule. First, when the prevailing party has created or preserved a fund for the benefit of an ascertainable class, attorneys' fees may be awarded if that fund or the class of beneficiaries will absorb the cost of the award. Second, an award may be made to a party who was subjected to a bad faith attack by the other party in the course of the suit, or when the other party willfully disobeyed a court order. *Id.* at 257-59.
24. The "private attorney general" rationale has also been applied in nonstatutory cases. See, e.g., *Brewer v. School Bd.*, 456 F.2d 943, 953 (4th Cir.), cert. denied, 466 U.S. 933 (1972) ("Newman is directly applicable" in suit to force school board to provide bus transportation to students forced to change schools by desegregation plan); Comment, *Attorney's Fees: Only Congress Can Award Compensation to Private Attorneys General*, 1975 WASH. U.L.Q. 1071, 1076 n.22 (listing cases).
authority to award attorneys' fees, the traditional, equitable grounds of bad faith or common fund are the only grounds that a court may use for fee-shifting. 29

Criticism of the stifling effect of Alyeska on privately brought public interest suits 30 was noted in the lower federal courts. The lower courts, prohibited by Alyeska from applying the Newman "private attorney general" theory to cases not involving fee-shifting statutes, used the doctrine to formulate standards for invoking section 706(k) of Title VII. Specifically, a number of courts extended the "private attorney general" theory as grounds for allowing prevailing Title VII plaintiffs to recover attorneys' fees as a matter of course 31 and restricting awards to prevailing Title VII defendants to those who have been sued either in bad faith, or upon unreasonable, meritless grounds. 32

Those courts that have reached the issue are in disagreement as to whether the standard for defendants' recovery of attorneys' fees should be the same as that for plaintiffs in Title VII suits. 33 In United States Steel Corporation v. United States, 34 the Third Circuit explained the policies underlying the distinction:

A prevailing defendant seeking an attorney's fee does not appear before the court cloaked in a mantle of public interest. In contrast to the advantage to the public that inheres in a successful attack against discriminatory practices, as in Piggy [sic] Park, one cannot say as a general rule that substantial public policies are furthered by a successful defense against a charge of discrimination. Instead, a defendant seeking a counsel fee under Section 706(k) must rely on different equitable considerations. 35

29. 421 U.S. at 271. The Court stated that "the circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine." Id. at 262.


32. E.g., Carrion v. Yeshiva Univ., 535 F.2d 722 (2d Cir. 1976); United States Steel Corp. v. United States, 519 F.2d 359 (3rd Cir. 1975); Van Hoomissen v. Xerox Corp., 503 F.2d 1131 (9th Cir. 1974).

33. See cases cited notes 31-32 supra. Recently, the Fifth and Sixth Circuits have held that defendants should be subject to the same standard as plaintiffs in pursuit of § 706(k) awards. EEOC v. Bailey Co., 46 U.S.L.W. 2177 (6th Cir. Oct. 11, 1977); United States v. Allegheny Ludlum Indus., Inc., 46 U.S.L.W. 2153 (5th Cir. Sept. 27, 1977).

34. 519 F.2d 359 (3rd Cir. 1975).

35. Id. at 364, quoted in EEOC v. Christiansburg Garment Co., 550 F.2d at 951.
While distinguishing on policy grounds awards to plaintiffs and awards to defendants, the United States Steel court failed to formulate precisely the standard to be applied to defendants. Rather, the court used a string of adjectives that included "bad faith, vexatious, or harassing" as well as "unfounded [or] meritless."\(^{36}\)

The United States Steel decision commenced a new swing in the Newman doctrine pendulum. The Fourth Circuit decision in Christiansburg, calling for the application of the strict standard, one that requires actual bad faith, to Title VII defendants seeking the benefit of section 706(k), marks the apex of that swing.

The Christiansburg case raised two important issues: (1) whether the standard to be applied to prevailing Title VII defendants should be different from that applied to prevailing Title VII plaintiffs under section 706(k); and (2) if so, whether the standard for defendants should be the strict "good faith" standard, or the more expansive "reasonableness" standard.\(^{38}\)

On its face, section 706(k) requires only that the court use its discretion in awarding attorneys' fees and prescribes no standards by which that discretion is to be exercised. It would appear, however, that the statute intends to extend the equitable power of the courts to grant attorneys' fees when bad faith is present.\(^{39}\)

Though there is a paucity of legislative history pertaining specifically to section 706(k), comments from the floor of Congress concerning the strikingly similar fee-shifting provision of Title II\(^{40}\) indicate that the latter section was enacted to make it easier for poor plaintiffs to bring meritorious suits\(^{41}\) while at the same time discouraging frivolous ones.\(^{42}\)

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\(^{36}\) The court also stated that "[a] routine allowance of attorney fees to successful defendants . . . might effectively discourage suits in all but the clearest cases, and inhibit earnest advocacy on undecided issues." 519 F.2d at 364-65.

\(^{37}\) 519 F.2d at 364.

\(^{38}\) Id. at 363 (quoting the trial court finding, 385 F. Supp. 346, 349 (W.D. Pa. 1974), with approval).

\(^{39}\) See text accompanying note 10 supra. It should be patently unreasonable to abuse the judicial system in an attempt to harass, embarrass or otherwise act in bad faith. The "bad faith" category is contained, therefore, in the "unreasonableness" category.

\(^{40}\) The section provides: "In any action commenced pursuant to this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, and the United States shall be liable for costs the same as a private person." 42 U.S.C. § 2000a-3(b) (1970).

\(^{41}\) Senator Humphrey, arguing in favor of the section as floor manager of the Act, said, "This should make it easier for a plaintiff of limited means to bring a meritorious suit." 110 Cong. Rec. 12724 (1964).

\(^{42}\) Senator Pastore remarked that the provision's purpose was to force a prospective Title
apparently assumed that the application of the provision to plaintiffs and defendants would not be uniform. Plaintiffs were to be encouraged to bring suit under Title II by a liberal fee-shifting policy; awards to defendants were intended only to deter the institution of groundless suits. The difference in the policy goals of the two awards implies a difference in the standards regulating their invocation.

Any analogy between Title II and Title VII, however, must be drawn with care. Fundamental differences in the remedy provisions and enforcement mechanisms of the two titles caution against its unqualified adoption.43 As the Supreme Court noted in Newman, compensatory damages are not available under Title II.44 The Title II plaintiff could thus be appropriately characterized as a "private attorney general" because the injunctive relief he sought would not benefit him except as an incident to his membership in the aggrieved minority group. A Title VII plaintiff, however, may sue not only for injunctive relief but also for monetary relief in the form of up to two years’ back pay.46 A privately initiated Title VII suit is not, therefore, as clearly called "private in form only."47 From the Title VII plaintiff’s viewpoint, the prospect of "make-whole relief" can act as an incentive offsetting the danger that, should he lose, an award of attorneys’ fees would be made to the defendant. The Title II plaintiff, denied this prospect of monetary relief, would be more heavily burdened financially by a liberal policy of awarding attorneys’ fees to Title II defendants.48

Moreover, Title II relies primarily upon privately brought suits for enforcement.49 Title VII, by contrast, was originally concerned primarily...
with securing voluntary compliance in ending discrimination through the efforts of the EEOC, which was granted broad powers to investigate charges filed with it. In addition, in 1972, the EEOC was further empowered to bring suit *eo nomine* to enforce Title VII. It cannot be said, therefore, that the need for private enforcement of Title VII approaches in magnitude the need for private enforcement of Title II.

These distinctions do not, however, go to the essential justification for differentiating between plaintiffs' and defendants' invocation of section 706(k). When a private plaintiff brings suit under Title VII, he confers a substantial and judicially cognizable benefit on the public in furthering the strong Congressional policy of ending employment discrimination. Further, allowing prevailing Title VII defendants to recover attorneys' fees as a matter of course would severely impair the right conferred upon aggrieved employees by Congress in 1964 and expressly preserved in 1972 to bring suit to vindicate their civil rights. Prospective Title VII plaintiffs would be deterred from fully litigating complex or novel issues by the prospect of being forced to absorb the full cost of their resolution. Attorneys would be discouraged from representing Title VII plaintiffs by the increased likelihood that their clients, after paying a prevailing defendant's attorneys' fees, would be unable to pay their own counsel fees.
To be party-blind in awarding attorneys' fees under section 706(k) would be to ignore the financial advantage ordinarily enjoyed by a Title VII defendant because of its ability to spread the costs of litigation through an increase in union dues\(^59\) or the cost of its product. Adequate representation and litigation of important issues would be hampered by economic disparity;\(^60\) the traditional goals of fee-shifting\(^61\)—fair allocation of litigation costs and the strengthening of legal rights through increased access to judicial remedies—would be obscured.

Finally, Congress enacted the EEOC enforcement powers provision of the 1972 Act in an effort to curb abuse of the persuasion-conference-conciliation approach of Title VII by employers who, realizing that the litigation burdens shouldered by Title VII plaintiffs made private enforcement unlikely, found resistance economically preferable to negotiated compliance.\(^62\) Liberal application of section 706(k) to defendants would threaten the return of such abuse as private plaintiffs would be even more strongly deterred by the financial risks and burdens of Title VII litigation. The same level of deterrence presumably would not apply to the EEOC because of its deeper pocket. However, the effectiveness of a threatened EEOC suit as an encouragement to conciliation would be weakened if the employer could expect to recover his attorneys' fees in any suit he won.

Recognizing the need for preserving adequate incentives for private enforcement of Title VII, the Christiansburg court approved the basic distinction drawn in *United States Steel* between plaintiff and defendant attorneys' fees awards.\(^63\) The court went further, however, eliminating the good faith-reasonableness ambiguity present in the *United States Steel* standard. Judge Field's opinion extended the "private attorney general" rationale to justify adoption of the strict "good faith" standard and, in so holding, gave *Newman* the broadest reading it has received since *Alyeska*.

The Christiansburg court rested its decision solely on policy grounds. It did not purport to derive its holding from the legislative history of the Title

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\(^{60}\) See Tunney, *supra* note 13.


\(^{63}\) 550 F.2d at 951.
II fee-shifting provision. Nor did it undertake any textual analysis to support the rejection of the objective "reasonableness" standard.

Courts have traditionally had the equitable power to award attorneys' fees to a prevailing defendant who was sued in bad faith. The limit imposed by Christiansburg on defendants' use of section 706(k) does not, therefore, increase their opportunity to recover attorneys' fees against private plaintiffs beyond that available at common law. In effect, the court construed the word "party" in section 706(k) to mean "plaintiff" and thereby read prevailing defendants out of the statute.

The propriety of this interpretation of section 706(k) cannot be determined without considering the entirety of Title VII. In exercising the discretionary, remedial power under section 706(k), the courts should seek to further the substantive policies of the Act. The Christiansburg majority, while resting adoption of the strict standard on the need to further the policies of Title VII and an asserted lack of support for defendant awards discernible therefrom, failed to consider the legislative goals in detail.

The primary purpose of Title VII has been described as prophylactic, one of deterring discrimination. By prescribing in the original and amending acts the methods by which Title VII claims should be handled, Congress devised a scheme of enforcement calculated to provide the maximum deterring effect on unfair labor practices, while ensuring full, fair and efficient resolution of individual claims.

The EEOC was vested with no enforcement powers under the original version of Title VII, although it was empowered to conduct a full investigation of filed claims. If the Commission found reasonable cause to believe a violation of Title VII had occurred, it resorted to informal methods

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64. The comments on the Congressional floor concerning that provision fail to differentiate between the objective and subjective standards, see, e.g., notes 41-42 supra, and therefore cannot support the rejection of either.


66. See note 23 supra. The section does carve out an exception to the prohibition of 28 U.S.C. § 2412 (Supp. V 1975) against attorneys' fees awards against the federal government. Van Hoomissen v. Xerox Corp., 503 F.2d 1131 (9th Cir. 1974). But this can hardly be the sole effect that Congress intended § 706(k) to have on defendants' fee awards in view of the use of the word "party" in the section.


of conference, persuasion and conciliation in an effort to obtain voluntary compliance.\textsuperscript{70} Judicial recourse was available only to the complainant, who was given statutory standing to sue for injunctive and compensatory relief.\textsuperscript{71}

This voluntary approach proved inadequate,\textsuperscript{72} provoking the Ninety-first Congress to authorize the EEOC to bring suit to compel compliance with the title.\textsuperscript{73} The fact that Congress, upon discerning the inadequacies of the 1964 Act, did not provide further incentives for private enforcement, but instead enlarged the powers of the Commission, strongly suggests that the EEOC was to continue to play the primary role in administering Title VII.\textsuperscript{74}

The Fourth Circuit's adoption of the strict standard in \textit{Christiansburg} encourages Title VII litigation by the EEOC as well as by private plaintiffs. But the incentive to the EEOC must be presumed to be the lesser of the effects because its ability to satisfy adverse section 706(k) awards can be enhanced by Congress if the need arises. Conversely, the impetus to private litigation is substantially greater. Thus, the \textit{Christiansburg} court has effected a shift in the enforcement shares of complainants and the EEOC from that chosen by Congress.

The \textit{Christiansburg} court's invocation of the good faith standard is premised on the need for further incentives to private enforcement of Title VII. More fundamentally, the decision reflects a policy judgment that an increase in privately brought Title VII suits, to be achieved by minimizing the risk of double attorney costs to plaintiffs, will further the Congressional goal of eliminating discrimination; in other words, it assumes that further incentive to private plaintiffs is advisable as a method of furthering the policies of Title VII.

It is likely that more instances of employment discrimination will be remedied judicially by application of the strict standard, but the practical effect of the findings and conciliation efforts of the EEOC, achieved through expensive and time-consuming investigative and conference procedures, may be diminished. Aggrieved persons are not precluded from bringing Title VII actions by an EEOC finding of no reasonable cause.\textsuperscript{75} The more incentive a complainant has to sue, the more likely it is that he will disregard

\textsuperscript{70} \textit{Id.}  
\textsuperscript{71} Id. § 2000e-5(g).  
\textsuperscript{72} The House Labor Committee observed: "[T]he Commission has been able to achieve successful conciliation in less than half the cases in which reasonable cause was determined. It has been the emphasis on voluntariness that has proven to be most detrimental to the successful operation of Title VII." H.R. REP. No. 238, 92d Cong., 1st Sess. 7 (1971).  
\textsuperscript{74} See note 77 and accompanying text infra.  
such a finding. Similarly, a complainant dissatisfied with a conciliation agreement between the EEOC and the alleged offender may bring suit under Title VII for judicial resolution of his claim. With greater incentive, a complainant is more likely to find such an agreement unsatisfactory. Consequently, an employer or union may find that its efforts to cooperate with the EEOC investigation and negotiate a settlement are to a substantial degree wasted.

In considering the role the EEOC was to assume in enforcing Title VII, Congress was not concerned solely with finding the most efficient means of resolving employment disputes. Substantial concern was voiced in committee that the extra-judicial procedures of the EEOC do not adequately protect the rights of the parties. Some provision for access to the courts was deemed necessary to provide the due process safeguards of a full adversary proceeding and to afford the courts a measure of supervision over the EEOC’s findings and activities.

Promotion of the policies of Title VII, then, requires an allocation of enforcement burdens between private plaintiffs and the EEOC that, while effecting efficient claim disposition, preserves the due process safeguards and judicial control necessary to assure full and fair claim adjudication. The Christiansburg opinion offers no guidance as to why further encouragement to private plaintiffs is needed or advisable to effect a proper allocation of enforcement burdens. But in applying the strict “good faith” standard to prevailing defendants because the policies of Title VII were assertedly furthered thereby, it implicitly made such a judgment.

The Christiansburg court could be viewed as having relied solely on the absence of equitable or policy considerations supporting section 706(k) awards to defendants. If the court did so, however, it did so without comment. While stating that a prevailing defendant seeking to use section 706(k) must rely on “different equitable considerations,” it neglected to

77. The Senate Labor Committee permitted individuals to seek judicial remedies when the Commission has not reached a satisfactory resolution of their claims, but it expected that “recourse to this remedy will be the exception, and not the rule.” S. Rep. No. 415, supra note 62, at 23. One writer noted that § 706(k) was designed to encourage voluntary compliance with the EEOC requirements. Vass, Title VII: Legislative History, 7 B.C. Indus. & Com. L. Rev. 431, 453-54 (1966).
80. 550 F.2d at 951-52.
81. Id. at 951 (quoting United States Steel Corp. v. United States, 519 F.2d at 364).
discuss what those considerations might be. In so doing, the court may have overlooked some valid arguments for awards to defendants.

When an employer or union has defended against a suit unreasonably brought, that party has often vindicated one of the primary legislative goals of Title VII, the alleviation of "economic waste that is caused by denial of job opportunities." By preserving a legitimate employment practice the defendant has increased the set of court-approved devices that employers may use to obtain optimum production levels. Fairness and public policy would appear to dictate that such a defendant be made whole for his expenses in clearing the way for unhindered public use of the unreasonably challenged prerogative.

Moreover, an employer who is over-deterrred from defending legitimate labor practices may avoid instituting many of those practices at the outset. An alleged offender called to the EEOC conference table finds itself in an inferior bargaining position because, should it fail to reach a conciliation agreement, it faces an expensive lawsuit with virtually no chance of recovering its expenses under section 706(k). Should the suit be brought by the complainant, the defendant, should he lose, has certain double-expense to fear. As a result, practices that were never considered by Congress to be violative of Title VII may be abandoned without contest. A prudent employer, confronted with the substantial financial risks of defending his labor practices, may conform his labor practices, not to the construction of Title VII rendered by the courts, but to a reading of the title that avoids these threshold risks.

The effects of over-deterring a Title VII defendant otherwise disposed to defend its practice operate not only to limit the set of court-approved management prerogatives, but also to expand informally the scope of Title VII prohibitions. Adoption of the strict standard, to the extent that it precipitates abstention from labor practices not prohibited by Title VII as intended or construed, impairs the integrity of the Act and is therefore counter-productive.

Failure to consider this and other policies and equities detracts from the persuasive force of the Christiansburg reasoning. However, the analogy drawn from the legislative history of the fee-shifting provision of Title II and the Congressional policies of providing aggrieved employees access to the

82. Presumably, the court considered defendants' possible equities to be limited to the traditional punitive purpose of awards when the suit was brought in bad faith. See Hall v. Cole, 412 U.S. 1, 5 (1973).
83. 110 CONG. REC. 1639 (1964) (remarks of Mr. Lindsay).
84. "[M]anagement prerogatives, and union freedoms are to be left undisturbed to the greatest extent possible." H.R. REP. NO. 914, supra note 78, at 29.
courts, deterring discrimination and preventing abuse of Title VII procedures, support the Fourth Circuit conclusion that a stricter standard be applied to defendants seeking the benefit of section 706(k) than to plaintiffs. The weaknesses in the Title II analogy do not militate against the imposition of different standards. Rather, they demonstrate that the magnitude of that difference should be discerned from the policies underlying Title VII, not Title II. More generally, they highlight the need for a limit on the extension of the "private attorney general" (Newman) doctrine to Title VII issues.

The Christiansburg decision, in its failure to recognize such a limit, is not supportable by precedent or legislative history and distorts the plain meaning and import of section 706(k). The extension of the Newman doctrine to justify applying the strict "good faith" standard is dissonant with the scheme of enforcement of Title VII and the correlative enforcement responsibilities of EEOC and private complainants. Ignoring the warning voiced in Alyeska by the Supreme Court, the Christiansburg court has seen fit to substitute its policy judgment for that of Congress.

In view of the primary role played by the EEOC in Title VII enforcement, the need to encourage private attorneys general further is slight at best. Though the incremental increase in incentive to privately initiated suits is small, the threat to the efficient functioning of the Congressionally created enforcement mechanism, to legitimate employment practices and to the integrity of the Title, as drafted and construed, is increased by an amount quantifiable only upon future experience.

The equities are not all on the side of the plaintiff, as the Christiansburg majority asserts. Title VII, an exercise of the Congressional power over interstate commerce, quite appropriately is concerned with

85. "[A] search for the meaning of the Title VII [attorneys' fees] provisions in the language and application of other [attorneys' fees] statutes is to a great extent bound to be sterile and unprofitable. A better guide is the underlying policy of Title VII." Walker, supra note 39, at 505.

86. 421 U.S. at 263-64.

87. As previously noted, see note 46 and accompanying text supra, the back pay provision of Title VII provides substantial encouragement to many private attorneys general. In Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), the Supreme Court noted:
As the Court observed in Griggs v. Duke Power Co. . . . the primary objective [of Title VII] was a prophylactic one: "[i]t was to achieve equality of employment opportunities . . . ." Backpay has an obvious connection with this purpose. If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of a backpay award that "provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices . . . ."
Id. at 417-18 (quoting United States v. N.L. Indus., Inc., 479 F.2d 354, 379 (8th Cir. 1973)).

economic efficiency. An employer or union that successfully defends its labor practices against unreasonable attack confers a substantial benefit on commerce and vindicates the strong Congressional policy of efficient employment of labor.

Denying prevailing Title VII defendants the benefit of section 706(k), except when subjected to suits brought in bad faith, is inappropriate. The "reasonableness" standard, which would exclude all suits brought in bad faith or upon unreasonable or meritless (though perhaps colorable) grounds, more properly implements the policies of Title VII, and reflects more accurately the equities of Title VII litigation.

SAUL LOUIS MOSKOWITZ

Criminal Law—Controlled Substances—North Carolina Adopts a Novel View of Physician Punishment Under Controlled Substances Act

One of the major concerns of state and federal legislation in the past decade has been the illicit diversion of controlled substances from legitimate channels of distribution. While courts interpreting this legislation generally

89. The reasonableness of a Title VII suit should, of course, be resolved by the trial court by reference to the policies underlying Title VII and the equities of each case. Some factual considerations are of particular relevance. The court should determine to what extent the EEOC procedures were used to obtain settlement of the claim. A prior EEOC finding of no reasonable cause, though not dispositive of the reasonableness issue, should be accorded heavy weight, if based upon extensive investigation. Similarly, a conciliation agreement that was refused by the plaintiff-complainant, if fair and reached by the EEOC and defendant in good faith, should operate to thrust upon the plaintiff a greater risk of an adverse § 706(k) award. The court can thereby promote the full and effective involvement of the EEOC in Title VII disputes. Substantial abuse of the EEOC or court processes, including "bad faith" suits, seems to be patently unreasonable. Abuse of less egregious sorts can be balanced along with other considerations. Other considerations should be given weight. For example, did defendant prevail on the merits or on procedural grounds? An award of attorneys' fees for prevailing on procedural grounds does not further the policy of efficient allocation of labor for no labor practices have been approved.

In weighing relevant factors, the benefits foreseeably flowing from a successful complaint should be weighed according to the probability that success would have been realized. In the instant case, the probability of success by the EEOC was low, because the argument that its power to sue _eo nomine_ was retroactive to 1965 was untenable in view of the wording of § 14. _See note 5 supra._ If interpretation of that section had not been an issue of first impression, but had been previously construed in a manner hostile to the EEOC position, the probability of success would have been even lower. The probability of success turns, then, on what strength the case of both parties could reasonably have been said to have at the outset of the litigation.