
DETERMINING WHETHER PLAINTIFF PREVAILED IS A “CLOSE QUESTION”—BUT SHOULD IT BE?

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INTRODUCTION

A court may, in its discretion, award a prevailing party its attorney’s fees in an action brought under certain civil rights statutes, including, for example, the Americans with Disabilities Act.¹ Although this statutory language gives courts the discretion to award fees, courts have held that a plaintiff should recover attorney’s fees if she has prevailed, unless circumstances exist that would make the award unjust.² Private litigants enforce civil rights statutes in a vastly greater

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¹ 42 U.S.C. § 12205 (2000) reads:

In any action or administrative proceeding commenced pursuant to this chapter, the court or agency, in its discretion, may allow the prevailing party, other than the United States, 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.

² *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (citing S. REP. NO. 94-1011, at 4 (1976)) (discussing fee shifting in the context of the Civil Rights Attorney’s Fees Awards Act of 1976); *see also Newman v. Piggie Park Enterprises, Inc.*, 390

proportion than the government, and fee-shifting has enabled individuals seeking judicial relief to overcome prohibitively expensive attorney's fees in order to vindicate their civil rights, even if a case may not otherwise appear lucrative to an attorney.³ Thus, fee shifting statutes are an integral component of enforcing and vindicating certain rights. Courts have grappled over the issue of whether one has "prevailed" according to these statutes. What seems like a straightforward issue has instead developed into a voluminous and somewhat murky body of case law addressing who should be considered a prevailing party and what legal standard should apply⁴; therefore, litigants need and deserve guidance on this otherwise elusive standard.

In general, a district court's award of attorneys' fees is reviewed to determine first whether the party prevailed and second whether the fees awarded were reasonable. In order for a plaintiff to demonstrate she has "prevailed," the Supreme Court requires the plaintiff to have obtained: (1) an enforceable judgment against the defendant on the merits of her claim (2) that directly benefits the plaintiff at the time of judgment.⁵ In *Farrar v. Hobby*, the Court noted that the degree of

U.S. 400, 402-403 (1968) (per curiam) (stating that a party that obtains an injunction under Title II of the Civil Rights Act of 1965, a court should ordinarily award the plaintiff attorney's fees absent special circumstances). The Court has often interpreted fee-shifting provisions in the various civil rights statutes consistently with each other. See *Henley*, 461 U.S. at 433 n.7; *Buckhannon Bd. v. West Virginia Dept. of Health & Human Resources*, 532 U.S. 598, 603 n.4 (2001). Therefore, this Note will not draw any distinction between case law interpreting different fee shifting statutes.

³ Catherine R. Albiston and Laura Beth Nielsen, *The Procedural Attack on Civil Rights: The Empirical Reality of Buckhannon for the Private Attorney General*, 54 UCLA L. REV. 1087, 1089-90 (2007) (while state and federal governments enforce certain individual's rights, more than 90 percent of enforcement actions under civil rights statutes are initiated by private parties).

⁴ Matthew B. Tenney, *When Does a Party Prevail?: A Proposed "Third-Circuit-Plus" Test for Judicial Imprimatur*, 2005 B.Y.U. L. REV. 429, 449 (2005) (noting that Supreme Court has not formulated clear policy guidelines for the prevailing party inquiry, particularly regarding the sufficient judicial imprimatur needed to satisfy the Court's prevailing party standard).

⁵ *Farrar v. Hobby*, 506 U.S. 103, 111-112 (1992).

success a plaintiff was awarded weighs into the court's determination of what constitutes a reasonable attorney fee, not whether he would be considered a prevailing party.⁶ The Supreme Court noted that even if a plaintiff "formally prevails" at trial, she should not be awarded attorney's fees in certain circumstances, such as where a plaintiff fails to establish an element to his claim for compensatory damages and receives nominal damages instead.⁷

Recently, the Seventh Circuit applied the prevailing party standard in *Karraker v. Rent-A-Center* to determine whether a plaintiff class that had obtained injunctive relief against an employer was a prevailing party despite no indication in the record suggesting that any member of the class was still employed with the defendant at the time the injunction was ordered.⁸ Recognizing that it was a "close question," the court concluded that the plaintiffs had received a "valuable benefit" from the injunction, but did not address how the potentially non-existent employer-employee relationship should factor into the inquiry, if at all.⁹

This Note will argue that the Seventh Circuit ultimately concluded correctly in *Karraker II* by holding that the plaintiffs prevailed; however, it further argues that the Supreme Court should adopt a per se rule stating that a plaintiff's enforceable final judgment is sufficient to confer upon a plaintiff "prevailing party" so as to avoid the Seventh Circuit's analysis altogether. Part I will discuss the traditional bar to awarding prevailing litigants their attorney fees, the formulation of the "private attorney general" exception, and the Supreme Court's formulation of the "prevailing party" standard. Part II will introduce *Karraker v. Rent-A-Center*, including the relevant facts, the majority's holding, and its reasoning. Part III will analyze the Seventh Circuit's

⁶ *Id.* at 114 (noting that the "most critical factor" in determining the reasonableness of a fee award "is the degree of success obtained") (citing *Hensley*, 461 U.S. at 436).

⁷ *Id.* at 115 (internal quotations omitted).

⁸ *Karraker v. Rent-A-Center, Inc. (Karraker II)*, 492 F.3d 896 (7th Cir. 2007). Judge Terrence Evans authored the majority opinion in which Judge Ann Claire Williams joined. Judge Joel Flaum voiced his dissent in a separate opinion.

⁹ *Karraker II*, 492 F.3d at 898-899.

holding in light of the Supreme Court's formulation of the prevailing party standard. Part III then argues that the Supreme Court should adopt a *per se* rule stating that civil rights plaintiffs who obtain a permanent injunction are automatically prevailing parties within the meaning of the various fee shifting provision statutes.

I. LEGAL BACKGROUND

A. *The "American Rule" and the "Private Attorney General" Theory*

In the United States, private litigants are generally responsible to bear their respective costs associated with litigation, including attorneys' fees, absent statutory authorization stating otherwise.¹⁰ Courts dubbed this principle the "American rule"—distinguishing it primarily from the "English rule" in which the losing party ordinarily must pay the winning party the costs it incurred in the litigation.¹¹ While the precise legal origin of the "American rule" is debatable,¹² the Supreme Court declared its general disinclination to award attorneys' fees to a winning party as a matter of course early on in American jurisprudence.¹³ Despite the "American rule," courts carved out several exceptions to the general prohibition on recovering attorneys' fees from a losing party.¹⁴

¹⁰ See Daniel Steuer, *Another Brick in the Wall: Attorney's Fees for the Civil Rights Litigant After Buckhannon*, 11 GEO. J. ON POVERTY L. & POL'Y 53, 53 (2004) ("prevailing litigants typically do not receive an award of attorney's fees from the losing party . . .").

¹¹ *Id.*; David A. Root, Student Author, *Attorney Fee-Shifting in America: Comparing, Contrasting, and Combining the "American Rule" and the "English Rule,"* 15 IND. INT'L & COMP. L. REV. 583, 584-85 (2004).

¹² *EIU Group v. Citibank Delaware, Inc.*, 429 F.Supp.2d 367, 370 (D. Mass 2006), *rev'd on other grounds*.

¹³ See *Arcambel v. Wiseman*, 3 U.S. (Dall.) 306, *1 (1796) (deciding that counsel's fees awarded to a winning litigant should not be allowed in accordance with the general practice in the United States; intimating that this principle could be modified by statute).

¹⁴ *F.D. Rich Co., Inc. v. U.S. For the Use of Industrial Lumber Co., Inc.*, 417 U.S. 116, 129 (1974). One exception applies when a losing party has acted "in bad

One such exception was the “private attorney general” theory, which was developed from language found in a Supreme Court case addressing the fee-shifting statute in the Civil Rights Act of 1964.¹⁵ In *Newman v. Piggie Park Enterprises, Inc.*, the Supreme Court addressed whether the trial court should limit an award of attorney’s fees to the extent that the losing defendants had advanced certain defenses merely to prolong the litigation in bad faith.¹⁶ The Court held that the trial court was not required to limit its award of attorneys’ fees as such because the purpose behind the fee-shifting provision was to encourage individuals to seek judicial relief for racial discrimination.¹⁷ A plaintiff that obtains an injunction under Title II of the Civil Rights Act¹⁸ to correct prohibited discriminatory conduct does so not only as a private litigant, but also as a private attorney general vindicating a Congressional policy of importance.¹⁹ The Court further explained that the purpose of the fee-shifting provision in the Civil Rights Act was to encourage private suits so as to ensure broad compliance with a law that Congress considers a high priority.²⁰

In response to the Supreme Court’s “private attorney general” rationale, lower courts soon extended the concept to justify an award of fees absent statutory authorization; a distinct issue from the one the

faith, vexatiously, wantonly, or for oppressive reasons.” *Id.* (citing *Vaughan v. Atkinson*, 369 U.S. 527 (1962)). Another exception applies where a successful party has obtained a substantial benefit for a class, and the award of attorney’s fees acts to “spread the cost proportionately among the members of the benefited class. *F.D. Rich*, 417 U.S. at 129-30 (citing *Hall v. Cole*, 412 U.S. 1 (1973)); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970)). The Supreme Court has also held that courts may award attorney’s fees for “willful disobedience of a court order . . . as part of the fine to be levied on the defendant.” *Aleyska Pipeline Serv. Co. v. The Wilderness Society*, 421 U.S. 240, 258 (1975).

¹⁵ See Comment, *Court Awarded Attorneys Fees and Equal Access to the Courts*, 122 U. PA. L. REV. 636, 666-667 (1974) (discussing development of the “private attorney general” theory based on language in *Newman*, 390 U.S. at 400).

¹⁶ *Newman*, 390 U.S. at 401.

¹⁷ *Id.* at 401-402.

¹⁸ 42 U.S.C. § 2000a-3 (2000).

¹⁹ *Newman*, 390 U.S. at 402.

²⁰ *Id.* at 401-402.

Court addressed in *Newman*.²¹ By extending the theory absent a statute, the courts, in effect, carved out an exception to the “American rule.”²² Courts based this exception on the *Newman* Court’s rationale that an individual that obtains relief “vindicating a policy that Congress considered of the highest priority” acts as a “private attorney general”²³ and should typically recover attorney’s fees unless circumstances exist making such recovery unjust.²⁴ Based on the newly carved out exception, courts began awarding attorney’s fees absent statutory authorization to private parties that obtained success under legislation that depended, at least in part, on private enforcement—most notably in the field of civil rights.²⁵

The Supreme Court abrogated the application of the private attorney general exception to the American rule.²⁶ In *Aleyska Pipeline Serv. Co. v. The Wilderness Society*, Justice White, writing for the majority, stated it is solely within Congress’ powers to statutorily authorize an award of attorney’s fees to a prevailing party.²⁷ Justice White recognized that, although exceptions exist that allow courts to award fees without statutory authorization, the private attorney general theory was not among them.²⁸ While the Court recognized that Congress had added fee-shifting provisions in civil rights statutes

²¹ Comment, *supra* note 15, at 666-67.

²² Albiston and Nielsen, *supra* note 3, at 1093.

²³ *Newman*, 390 U.S. at 402.

²⁴ See e.g. *Cooper v. Allen*, 467 F.2d 836, 841 (5th Cir. 1972) (applying private attorney general theory absent a fee shifting statute to a § 1982 action); *Lee v. Southern Homes Sites Corp.*, 429 F.2d 290, 295-96 (5th Cir. 1970) (§ 1982 action).

²⁵ See e.g. *Knight v. Auciello*, 453 F.2d 852, 853 (1st Cir. 1972); *Lee*, 429 F.2d at 146-47; *La Raza Unida v. Volpe*, 57 F.R.D. 94, 102 (N.D. Cal. 1972), *abrogated by* *Aleyska Pipeline Service Co. v. The Wilderness Society*, 421 U.S. 240 (1975).

²⁶ *Aleyska Pipeline Service Co. v. The Wilderness Society*, 421 U.S. 240 (1975).

²⁷ *Id.* at 271. The plaintiffs in *Aleyska* were suing under the Mineral Leasing Act of 1920, 30 U.S.C. § 185, and the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 *et seq.* *Id.* at 242-43. Neither statute authorized courts to award attorney’s fees to a prevailing party. *Id.* at 245.

²⁸ *Id.* at 271 (stating “it is not for us to invade the legislature’s province by redistributing litigation costs in the manner suggested”).

based on the private attorney general theory, it noted that Congress' use of theory could not be "construed as a grant of authority to the Judiciary to jettison the traditional rule against nonstatutory allowances to the prevailing party and to award attorneys fees whenever the courts deem the public policy furthered by a particular statute important enough to warrant the award."²⁹

B. The Prevailing Party Standard: The Americans with Disabilities Act and Other Civil Rights Statutes

1. Supreme Court Precedent

In the wake of *Aleyska's* pronouncement that courts should not fashion a private attorney general exception to the "American rule," Congress increasingly included fee-shifting provisions in selected legislation.³⁰ For example, when Congress enacted the Americans with Disabilities Act (ADA) in 1990, it included a fee-shifting provision.³¹ Although Supreme Court case law interpreting the fee-shifting provision in the ADA is sparse due to its relatively recent enactment, the Supreme Court has guided lower courts to interpret the ADA fee-shifting provision consistently with the nearly identical provisions found in the Civil Right Act of 1964,³² the Voting Rights Act Amendments of 1975,³³ and the Civil Rights Attorney's Fees Awards

²⁹ *Id.* at 263.

³⁰ Jeffery S. Brand, *The Second Front in the Fight for Civil Rights: The Supreme Court, Congress, and Statutory Fees*, 69 TEX. L. REV. 291, 301 (1990).

³¹ 42 U.S.C. § 12205; see *supra* note 1.

³² 42 U.S.C. § 2000e-5(k) (2000) ("[T]he 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.").

³³ 42 U.S.C. § 19731(e) (2000) ("In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee, reasonable expert fees, and other reasonable litigation expenses as part of the costs.").

Act of 1976.³⁴ As a result, the case law interpreting fee-shifting provisions in civil rights statutes has been read consistently with one another; therefore, there is no need to distinguish the language in the fee-shifting provisions.

A party seeking attorney's fees must cross a threshold to be considered a prevailing party, as defined by fee-shifting statutes.³⁵ For a plaintiff to meet the threshold, he must show that he "succeeded on any significant issue in the litigation which achieve[d] some of the benefit the parties sought in bringing suit."³⁶ The "touchstone of the prevailing party inquiry" is that the relationship between the parties must have been materially altered "in a manner which Congress sought to promote in the fee statute."³⁷ In *Farrar v. Hobby*, the Supreme Court clarified the standard by stating that a plaintiff prevailed if he obtains "actual relief on the merits of his claim [that] materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that *directly benefits the plaintiff*."³⁸

The Supreme Court previously addressed whether a plaintiff that obtains a favorable judgment from the litigation will be considered a prevailing party despite not enjoying a direct benefit from the judgment. In *Rhodes v. Stewart*, the Supreme Court addressed whether two plaintiffs that had obtained a final, favorable judgment on the merits were prevailing parties, even though neither plaintiff benefited

³⁴ 42 U.S.C. § 1988(b) (2000) ("[T]he court, in its discretion, may allow the prevailing party... reasonable attorney's fee as part of the costs"); *see also* *Buckhannon v. West Virginia Dept. of Health and Human Services*, 532 U.S. 598, 602-603, n.4 (2001); *cf.* *Hensley v. Eckerhart*, 461 U.S. 424, 433, n.7 (1983) (per curiam) (citing *Hanrahan v. Hampton*, 446 U.S. 754, 758, n.4 (1980) (per curiam)) (noting that the legislative history of § 1988 demonstrated Congress's desire for courts to apply the standard for awarding attorneys' fees that had been used in conjunction with the Civil Rights Act of 1964).

³⁵ *Texas State Teachers Association v. Garland Indp. School Dist.*, 489 U.S. 782, 791-792 (1989).

³⁶ *Id.* (internal quotations omitted) (citing *Nadeau v. Helgemoe*, 581 F.2d 275, 278-279 (1st Cir. 1978)).

³⁷ *Garland*, 489 U.S. at 792-93.

³⁸ 506 U.S. 103, 111-12 (1992) (emphasis added).

from the judgment at the time it was entered.³⁹ The plaintiffs were two inmates that challenged a prison's denial of their First and Fourteenth Amendment rights when it refused to allow them to subscribe to magazines.⁴⁰ The district court entered declaratory judgment in the inmates' favor declaring that the prison had violated the plaintiffs' civil rights; however, by the time the court entered the judgment, one inmate had already passed away while the other inmate had been released from prison.⁴¹ After the declaratory judgment and the plaintiffs' release, the prison modified its policies to abide by the parameters set forth in the district court's judgment.⁴² The Court held that the plaintiffs had not prevailed because neither of the inmates could have benefited from the judgment due to the release of one inmate and the death of the other.⁴³

2. The Eleventh and Sixth Circuit: Application of the Prevailing Party Standard

Although various courts of appeal have applied the prevailing party standard, this section will focus on two cases where the plaintiff received a favorable judgment on the merits yet was denied prevailing party status. In *Barnes v. Broward County Sheriff's Office*, the Eleventh Circuit addressed whether a plaintiff that obtained an injunction against a potential employer had prevailed.⁴⁴ The plaintiff, a job applicant, sued a potential employer claiming it discriminated against him based on a perceived disability and his age.⁴⁵ The applicant also alleged that the employer administered a prohibited medical examination under the ADA to all job applicants, himself

³⁹ Rhodes v. Stewart, 488 U.S. 1, 3-4 (1988) (per curiam).

⁴⁰ *Id.* at 2.

⁴¹ *Id.* at 3.

⁴² *Id.* at 4.

⁴³ *Id.*

⁴⁴ Barnes v. Broward County Sheriff's Office, 190 F.3d 1274, 1275-76 (11th Cir. 1999).

⁴⁵ *Id.* at 1276.

included.⁴⁶ Although the plaintiff lost on the disability and age discrimination claims, the court found that the ADA prohibited the employer's medical examination and enjoined the employer from administering it in the future.⁴⁷ Despite the receipt of an injunction, the district court ultimately denied plaintiff an award of attorney's fees.⁴⁸

The Eleventh Circuit upheld the court's denial of attorney's fees because there was no material alteration in the relationship between the potential employer and the job applicant.⁴⁹ Furthermore, it held that there was nothing in the record to suggest that Barnes received a benefit from the injunction as there was no indication that Barnes was reapplying, or likely to reapply, to the position he was denied.⁵⁰ The court stated that the fact that the plaintiff may conceivably benefit from the injunction was insufficient to render him a prevailing party.⁵¹ Although the Eleventh Circuit recognized that fee-shifting statutes enable plaintiffs to vindicate important constitutional and civil rights under the private attorney general theory, the court declared it was bound by the Supreme Court's precedent requiring that the plaintiff receive some benefit from the judgment.⁵²

The Sixth Circuit upheld the denial of attorney's fees to a wheelchair user who obtained an injunction ordering the City of Sandusky to comply with the certain provisions within the ADA.⁵³ Initially, the district court granted summary judgment to the city on all counts.⁵⁴ Upon reconsideration, the district court vacated the summary judgment with regards to the ADA claim based on a subsequent decision from another judge in the same district, awarding injunctive

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 1278.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 1279 (stating that the court's decision is "not intended to ignore or eviscerate the continuing viability of the 'private attorney general' cause of action").

⁵³ *Dillery v. City of Sandusky*, 398 F.3d 562, 569-70 (6th Cir. 2005).

⁵⁴ *Id.* at 566.

relief on the same ADA claim in a contemporaneous class action suit not involving Dillery.⁵⁵ The Sixth Circuit held that the Dillery's injunction did not benefit her at the time it was entered because the class action injunction essentially mooted her relief; therefore, the court found that Dillery was not a prevailing party.⁵⁶ In dissent, Judge Merritt noted the bizarre nature of denying Dillery her attorney's fees despite having filed suit before the class action on a nearly identical ADA claim based on the wholly fortuitous circumstance of one set of litigation progressing through the legal system at a faster pace than the other.⁵⁷

C. "*The Only Reasonable Fee is Usually No Fee At All*"⁵⁸

Even if a plaintiff receives a benefit from the judgment, the Supreme Court suggested that the benefit may be so technical or *de minimis* that a party can not be considered a prevailing party.⁵⁹ However, in a subsequent decision, the Court definitively stated that plaintiff's degree of success did not bear on the inquiry of whether the plaintiff prevailed, but rather factored into what amount constituted a reasonable attorney's fee.⁶⁰ In *Farrar v. Hobby*, the Court addressed whether a plaintiff that sought seventeen million dollars in compensatory damages, while only receiving a dollar in nominal

⁵⁵ *Id.* The complaint in the class action suit was filed after Dillery's complaint; however, the class action progressed quicker through the legal system resulting in an injunctive order against the city before the Dillery's injunctive order was entered. *Id.* at 571 (Merritt, J., dissenting).

⁵⁶ *Id.* at 569-70 (majority opinion).

⁵⁷ *Id.* at 571 (Merritt, J., dissenting).

⁵⁸ *U.S. v. Farrar*, 506 U.S. 103, 115 (1992).

⁵⁹ *Texas State Teachers Association v. Garland Indp. School Dist.*, 489 U.S. 782, 792 (1989) ("Beyond this absolute limitation, a technical victory may be so insignificant, and may be so near the situations addressed in *Hewitt* and *Rhodes*, as to be insufficient to support prevailing party status").

⁶⁰ *Farrar*, 506 U.S. at 114 (stating "[a]lthough the 'technical' nature of a . . . judgment does not affect the prevailing party inquiry, it does bear on the propriety of fees awarded").

damages, had prevailed.⁶¹ Although the Court characterized the nominal damages as merely a technical victory, the judgment materially altered the relationship between the plaintiff and defendant because the plaintiff benefited from the judgment; thus the plaintiff prevailed.⁶²

After a court determines that a plaintiff prevailed in the litigation, a court must then assess an award for *reasonable* attorney's fees.⁶³ The degree of success that the plaintiff obtained is the most critical factor in measuring the reasonableness of attorney's fees awarded.⁶⁴ The *Farrar* plaintiff had prevailed because he was awarded one dollar in nominal damages even though he sued for millions of dollars; however, the Court held that where a plaintiff recovers nominal damages, the "only reasonable fee is usually no fee at all."⁶⁵ The *Farrar* holding indicated that a plaintiff that received nominal damages could be a prevailing party but would usually be denied any attorney's fee under the reasonableness inquiry.⁶⁶

In her concurrence to *Farrar*, Justice O'Connor noted that "[n]ominal relief does not necessarily a nominal victory make," and outlined other considerations that should be weighed to determine whether a nominal judgment could justify an award of attorney's fees.⁶⁷ Nominal damages may be considered a victory in the sense that the judgment served to vindicate the plaintiff's rights.⁶⁸ Justice O'Connor outlined three factors that may bolster the amount of fees that a plaintiff could receive, after receiving a nominal judgment: (1) the significance of the legal issue, (2) the public purpose served, and (3) the extent of relief granted to plaintiff.⁶⁹ Under the second factor,

⁶¹ *Id.* at 103.

⁶² *Id.* at 112.

⁶³ *Id.* at 114.

⁶⁴ *Id.* (citing *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983)).

⁶⁵ *Farrar*, 506 U.S. at 115.

⁶⁶ *Id.*

⁶⁷ *Id.* at 121 (O'Connor, J., concurring).

⁶⁸ *Id.*

⁶⁹ *Id.* at 122.

she noted that the fee-shifting provision ensures that individuals can vindicate important rights while recovering their attorney's fees under a private attorney general theory.⁷⁰ Justice O'Connor intimated that a judgment may serve a public purpose by deterring future unlawful conduct; however, she noted that Farrar's one dollar judgment was insufficient to deter any misconduct.⁷¹

II. *KARRAKER V. RENT-A-CENTER, INC.*

A. *Factual Background*

Steven Karraker, Michael Karraker, and Christopher Karraker worked at Rent-a-Center (RAC), and as a prerequisite to promotion, RAC required its employees to pass a management test administered by Associated Personnel Technicians (APT) called the APT Management Trainee-Executive Profile (management test).⁷² The management test consisted of a battery of nine separate written tests, one of which was the Minnesota Multiphasic Personality Inventory (MMPI).⁷³ The MMPI contained questions that measured certain personality traits; however, it also determined to what degree, if any, a person may possess traits such as depression, hypochondriasis, hysteria, paranoia, and mania.⁷⁴ Any applicant whose score revealed

⁷⁰ *Id.* (fee shifting provision in § 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”).

⁷¹ *Id.*

⁷² *Karraker v. Rent-a-Center, Inc. (Karraker I)*, 411 F.3d 831, 833 (7th Cir. 2005)

⁷³ *Id.*

⁷⁴ *Id.* The following true/false questions were examples of questions asked:

I see things or animals or people around me that others do not see.

My soul sometimes leaves my body.

At one or more time in my life I felt that someone was making me do things by hypnotizing me.

I have a habit of counting things that are not important such as bulbs on electric signs, and so forth.

Id. at 833 n.1.

more than 12 “weighted deviations” throughout the entire management test would not be eligible for promotion.⁷⁵ The Karrakers received more than 12 deviations on the management test and were denied promotion on that basis.⁷⁶ Steven Karraker filed a class action lawsuit challenging his employer’s administration of a personality test and its consideration of the test results in promotion decisions.⁷⁷

B. District Court Opinions

The district court initially granted summary judgment on most of Karrakers’ claims against RAC; however, upon remand from the Seventh Circuit, the district court entered a declaratory judgment in favor of Karraker, declaring the MMPI violated the ADA.⁷⁸ The court also entered an injunction ordering RAC to search various offices for the MMPI results of Illinois employees and destroy them, as well as not consider them in promotion decisions.⁷⁹ After the injunction was

⁷⁵ *Id.* at 834.

⁷⁶ *Karraker I*, 411 F.3d at 834.

⁷⁷ *Karraker II*, 492 F.3d at 897.

⁷⁸ *See* *Karraker v. Rent-A-Center*, 2005 WL 2001511, at *2 (C.D. Ill. Aug. 12, 2005).

⁷⁹ *Id.* at *4. The injunction ordered by the district court read, in relevant part, as follows:

(2) Defendant RAC is ordered to make a diligent search of its Illinois stores, offices of district and regional managers with authority over stores in Illinois, corporate headquarters and storage facilities to find the results of the Management Test scores of Illinois RAC employees and narratives and any copies thereof and remove the Management Test scores and narratives for its Illinois employees from its Illinois stores, from its district and regional managers’ offices, from corporate headquarters and from storage.

(3) RAC is ordered to destroy the Management Test results and not consider the scores or narratives in making any employment decision for its Illinois employees. However, Plaintiffs have ten days from the entry of this order to object to the destruction of documents if Plaintiffs feel they need access to these documents for the present litigation. RAC should not destroy any test results prior to ten days from entry of this order.

issued, Karraker petitioned the court for attorney's fees, and in a later petition requested that the court award compensation for the named plaintiff, Steven Karraker.⁸⁰ In the same opinion, the district court denied plaintiffs their attorney's fees but granted the unopposed motion to set compensation for Steven Karraker as the named plaintiff in the class action.⁸¹

Relying primarily on *Barnes v. Broward County Sheriff's Office*,⁸² the district court determined that the plaintiffs had not prevailed.⁸³ Based on the fact that RAC stopped administering the management test before the plaintiffs had filed the original complaint, the court held that plaintiff did not receive a benefit from the injunction but rather only obtained a judicial pronouncement that the RAC's management test violated the ADA.⁸⁴ Furthermore, the court held that the injunction's mandate to destroy the management test results did not benefit the plaintiffs because the results were in a locked room, and the court found no indication that the results were either vulnerable to disclosure to third parties or that RAC continued considering them for promotions.⁸⁵ Accordingly, the court held that the plaintiffs' success was *de minimis* and not enough to label them a prevailing party.⁸⁶

The court also noted that the defendants had failed to respond to the plaintiffs' motion to set compensation at \$5,000 for Steven Karraker.⁸⁷ Since RAC did not object to the motion to set compensation for Steven Karraker, Judge McCuskey deemed the compensation amount of \$5,000 to be reasonable and granted the motion.⁸⁸ The plaintiffs then appealed the denial of attorney's fees.⁸⁹

⁸⁰ *Karraker v. Rent-A-Center*, 431 F. Supp. 2d 883, 886-87 (C.D. Ill. 2006).

⁸¹ *Id.* at 887.

⁸² 190 F.3d 1274 (11th Cir. 1999).

⁸³ *Karraker*, 431 F.Supp.2d at 887.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Karraker v. Rent-A-Center (Karraker II)*, 492 F.3d 898, 900 (7th Cir. 2007).

C. The Seventh Circuit Opinion

On appeal for denial of attorney's fees, the Seventh Circuit reversed the district court's denial of attorney's fees and remanded the case for a determination of a reasonable amount of fees.⁹⁰ The court started its analysis by only briefly mentioning the district court's reliance on *Barnes* and then quickly turned its attention to *Farrar v. Hobby*.⁹¹

RAC argued that although the plaintiffs received an enforceable injunction against it, the judgment did not provide plaintiffs with a tangible benefit because RAC stopped administering the management test in 2000 before the entire litigation began.⁹² RAC also argued that it did not employ any of the named plaintiffs at the time the injunction was entered, and it was unclear from the record whether any plaintiff in the certified class was working at RAC at that time.⁹³ The destruction of the tests could not have benefited the plaintiffs because there was no evidence that RAC intended to disclose the records.⁹⁴ Despite RAC's arguments that plaintiffs had not received a judgment that benefited them in any manner, the court resolved the "close question" in favor of the plaintiffs.⁹⁵

The majority reasoned that the injunction that the plaintiffs received was worth at least as much as the one dollar in nominal damages awarded to the plaintiff in *Farrar*.⁹⁶ The court analyzed the three factors that Justice O'Connor laid out in her concurrence in *Farrar*, and it determined that the district court's judgment had conferred on plaintiffs a valuable benefit by ordering the destruction of

⁹⁰ *Id.* at 896.

⁹¹ *Id.* at 898.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 898, 900.

⁹⁶ *Id.* at 898.

all the management tests and the narratives that were produced.⁹⁷ Before the injunction, there was nothing to prevent RAC from disclosing or carelessly allowing the dissemination of the exam results or the narratives to anyone else.⁹⁸ Contrary to RAC's assertion, the Seventh Circuit stated that the test results were not safely locked away because the record demonstrated that numerous test results were scattered throughout various stores and offices.⁹⁹ It concluded by stating that the underlying judgment granting summary judgment to the plaintiffs had a significant impact on the law as well as on human resource departments across the nation, which refer to *Karraker I* for the proposition that an employer's use of an MMPI violates that ADA.¹⁰⁰

In dictum, the court addressed what role compensation for the named plaintiff played in the prevailing party inquiry.¹⁰¹ RAC argued that the compensation awarded Steven Karraker was similar in nature to a litigation expense rather than a recovery of damages.¹⁰² The court distinguished every case that RAC cited for that proposition because none dealt with whether a compensation payment, or incentive fee award, conferred prevailing party status to the plaintiff.¹⁰³ Ultimately, the court declined to address the issue because it found that the injunction alone was sufficient to prevail under the circumstances.¹⁰⁴

In his dissent, Judge Flaum disagreed from the majority as to whether the plaintiffs benefited from the injunction.¹⁰⁵ He recognized that the issue in the case is whether the plaintiffs prevailed, that is to say whether any member of the plaintiff class obtained relief on the merits of a claim that directly benefited them at the time of the

⁹⁷ *Id.* at 899.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 899-900.

¹⁰² *Id.* at 899.

¹⁰³ *Id.* at 899-900.

¹⁰⁴ *Id.* at 900.

¹⁰⁵ *Id.* at 900 (Flaum, J., dissenting).

judgment.¹⁰⁶ Judge Flaum believed that the lower court erred in entering an injunction ordering RAC to search for and destroy the results of the management test because the plaintiffs failed to establish that they sustained or were in danger of experiencing a direct injury from their existence.¹⁰⁷ With respect to the whether enjoining RAC from considering the test results in employment decisions benefited the plaintiffs, Judge Flaum noted that the record did not indicate whether any member of the plaintiff class had standing to challenge RAC's continued use of the management test and its results.¹⁰⁸ Judge Flaum recommended remanding the action to determine if any plaintiff had standing to challenge RAC's consideration of the management test results when the district court issued the injunction.¹⁰⁹

III. ANALYSIS

A. *The Seventh Circuit's Holding in light of the "Prevailing Party" Standard*

The prevailing party inquiry has endured a long and tortured—and more importantly unnecessary—history of judicial interpretation and application.

In *Karraker*, the Seventh Circuit noted that whether the plaintiffs had prevailed was a “close question.”¹¹⁰ Given the breadth and vagueness of Supreme Court cases on the prevailing party standard, it is no wonder courts have trouble applying the elusive apparent standard. The Seventh Circuit noted that the destruction of the results of an improperly administered test was a valuable benefit to the

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 900-901.

¹⁰⁹ *Id.* at 901. A class member may have had standing if she failed the APT test, failed an alternate test used for promotion decisions, and worked at RAC on the date the lower court issued the injunction. *Id.*

¹¹⁰ *Id.* at 898 (majority opinion).

plaintiffs, and without the injunction, nothing would prevent RAC from distributing the test results to others or negligently allowing their dissemination.¹¹¹ The plaintiff class obtained a declaratory judgment and an injunction, each discussed in turn.

The district court entered summary judgment on behalf of the plaintiffs declaring that the MMPI was a prohibited medical examination under the ADA.¹¹² It is unclear whether the declaratory judgment alone would confer prevailing party status on the class members.¹¹³ The Supreme Court clearly stated that a plaintiff's moral satisfaction derived from a court's declaration that his rights were violated was not the "stuff of which legal victories are made."¹¹⁴ In the present case, although the class received a final declaratory judgment, the only real benefit that the class received from the declaratory judgment was the moral satisfaction attributed to a court declaring that the plaintiffs' rights had been violated.¹¹⁵

Given that the declaratory judgment alone would not mean the class prevailed, the class needed, and actually obtained, something more: injunctive relief. The district court entered a two-fold injunction ordering RAC to search for the test results and narratives of Illinois employees and to destroy them as well as to stop considering them for any employment decisions.¹¹⁶ The majority correctly analyzes the injunction as the only relief plaintiffs received that could potentially

¹¹¹ *Id.* at 899.

¹¹² *Id.* at 897-98.

¹¹³ *See Pedigo v. P.A.M. Transport, Inc.*, 98 F.3d 396, 398 (8th Cir. 1996) (holding that, although plaintiff obtained a declaratory judgment declaring that the plaintiff's constitutional rights had been violated, plaintiff had not prevailed because he did not have an enforceable judgment against the defendant).

¹¹⁴ *Hewitt v. Helms*, 482 U.S. 755, 760, 762 (1987).

¹¹⁵ *See Petersen v. Gibson*, 372 F.3d 862, 866 (7th Cir. 2004) (noting that, after the district court vacated an award of nominal damages, the plaintiff's relief only consisted of a judicial statement that the plaintiff's rights had been violated, which was insufficient to support prevailing party status).

¹¹⁶ *See supra* note 79. As the majority notes, destroying the tests and the results would render the latter part of the injunction superfluous; therefore, the majority did not consider whether the order to RAC to stop considering the test scores meant the plaintiffs prevailed. *Karraker II*, 492 F.3d at 899, n.1.

satisfy the prevailing party standard.¹¹⁷ The majority noted that the class members received a valuable benefit from the destruction of the management test results.¹¹⁸ The court compared the value of the destruction of test results as great as the value of the dollar in nominal damages awarded to the prevailing plaintiff in *Farrar*.¹¹⁹

However, as Judge Flaum noted in his dissent, the court does not explain how any member of the class actually received a benefit from the destruction of the test results.¹²⁰ The court seems to rest its conclusion on the fact that, without the injunction, nothing would prevent RAC from disclosing or negligently disseminating the results of the tests to others.¹²¹ This justification seems to be at odds with *Farrar*, which held that there must be a direct benefit to the plaintiff *at the time the judgment is entered*.¹²² Plaintiffs did not establish that they obtained a victory that provided them a direct benefit at the time of judgment. Arguably, the class did not receive any benefit that it was not already enjoying before the court entered the injunction. The record demonstrated that the named plaintiffs were not even employed at RAC at the time of the judgment;¹²³ therefore, enjoining RAC from considering the test results in promotion decisions and destroying the results would not directly benefit them. Therefore, the benefit for the named plaintiffs seems akin to the hypothetical benefit that the plaintiff in *Barnes* received, in that the Karrakers could only

¹¹⁷ Although the majority states in dictum that the compensation payment to the named plaintiff may have been enough to materially alter the relationship between the parties, *Karraker II*, 492 F.3d at 900, this Note does not consider whether the compensation payment would have conferred prevailing party status on Steven Karraker, the named plaintiff.

¹¹⁸ *Id.* at 899.

¹¹⁹ *Id.* at 898.

¹²⁰ *Id.* at 900-901 (Flaum, J., dissenting).

¹²¹ *Id.* at 899 (majority opinion).

¹²² *Farrar v. Hobby*, 506 U.S. 103, 111 (1992).

¹²³ *Karraker II*, 492 F.3d at 898.

conceivably benefit from the injunction if they were to regain employment with RAC and apply for a promotion.¹²⁴

Turning to the class members, it is not clear whether any class member benefited from the injunction because the record does not reveal whether any member was still employed with RAC at the time of judgment.¹²⁵ Judge Flaum noted that RAC appeared to continue considering the results from the management test in promotion decisions;¹²⁶ therefore, it is possible that a class member received a direct benefit from the injunction. A class member that took and failed the management test and was still employed at the time of the judgment may have benefited from the destruction of the test results when applying for promotions.¹²⁷ The majority does not address whether the plaintiffs' benefit was merely a conjectural benefit, or whether the class members were employed during the relevant time period. Instead, it analyzes the benefit derived from the injunction under Justice O'Connor's framework in *Farrar*.¹²⁸

¹²⁴ See *Barnes v. Broward County Sheriff's Office*, 190 F.3d 1274, 1278 (11th Cir. 1999) (holding that although the job applicant could "conceivably benefit" from enjoining the potential employer from using a prohibited medical examination in its application process, that type of benefit was not adequate to render him a prevailing party).

¹²⁵ *Karraker II*, 492 F.3d at 898. Although RAC had ceased administering the management test before the plaintiff class received its injunction, it is not clear from the record whether RAC continued considering the test results when making promotion decisions. *Id.* at 900-01 (Flaum, J., dissenting).

¹²⁶ *Id.* at 901.

¹²⁷ *Id.* ("there may have been a plaintiff who had standing to challenge RAC's continued use of the APT test scores if he or she 1) failed the APT test, 2) did not pass the Future Choice Selection Process and did not complete any required Developmental Competencies, and 3) was still employed at RAC on the date that the district court issued the injunction").

¹²⁸ *Id.* at 898-99 (majority opinion). Numerous courts of appeal have adopted the factors that Justice O'Connor lays out in her concurrence in *Farrar* to analyze whether an attorney fees should be awarded despite only a nominal victory. See, e.g., *Mercer v. Duke Univ.*, 401 F.3d 199, 204 (4th Cir. 2005); *Murray v. City of Onawa*, 323 F.3d 616, 619 (8th Cir. 2003); *Brandau v. State of Kansas*, 168 F.3d 1179, 1181 (10th Cir. 1999); *Briggs v. Marshall*, 93 F.3d 355, 361 (7th Cir. 1996).

The *Farrar* Court held that a plaintiff that receives nominal damages is a prevailing party; however, a reasonable attorney's fee award to such a plaintiff is usually nothing at all.¹²⁹ Justice O'Connor's concurrence set forth three factors that courts should consider to determine whether a victory of nominal damages could justify an award of attorney's fees.¹³⁰ The factors included the extent of plaintiff's relief, the public purpose served, and the significance of the legal issue.¹³¹ Justice O'Connor clearly noted that these factors were relevant only to the amount of reasonable attorney's fees.¹³² In *Karraker II*, the Seventh Circuit states that Justice O'Connor's three factors weigh into the prevailing party inquiry, contrary to the language in her concurrence.¹³³ Thus, the Court applies the factors to the incorrect inquiry, and it concludes that plaintiffs received a valuable benefit, noting in particular that the *Karraker I* decision has had a significant public impact on human resources departments throughout the country.¹³⁴ The majority's misapplication of the O'Connor's framework highlights the confusion surrounding the prevailing party inquiry in general, due in great part from Supreme Court precedent.

Although the analysis did not conform formalistically to the Supreme Court precedent, the Seventh Circuit's brief analysis into whether the class prevailed is justified. Given that the plaintiff class received an injunction as a result of succeeding on one of its claims, it seems almost a waste of the court's time to analyze whether the class has prevailed. According to its definition, a "prevailing party" is "[a] party in whose favor a judgment is rendered, regardless of the amount

¹²⁹ *Farrar v. Hobby*, 506 U.S. 103, 115 (1992).

¹³⁰ *Id.* at 122 (O'Connor, J., concurring)

¹³¹ *Id.*

¹³² *Id.* at 117 ("[w]hile *Garland* may be read as indicating that this *de minimis* or technical victory exclusion is a second barrier to prevailing party status, the Court makes clear today that, in fact, it is part of the determination of what constitutes a reasonable fee").

¹³³ *Karraker II*, 492 F.3d at 898-99.

¹³⁴ *Id.* at 899.

of damages awarded[.]”¹³⁵ The plaintiffs received a favorable judgment, and according to the definition, that was sufficient to label them a prevailing party.¹³⁶ Whether the injunction actually benefited the plaintiffs is an inquiry more directly linked to calculating a reasonable attorney’s fee, where the extent of a plaintiff’s success factors into the court’s calculation of a reasonable attorney’s fee.¹³⁷ The Supreme Court’s formalistic analysis as to whether a permanent injunction directly benefits a plaintiff at the time of judgment has required courts, such as the Seventh Circuit in *Karraker II*, to engage in a needless analysis. The Supreme Court should end the confusion surrounding the prevailing party standard and apply a *per se* rule as discussed below.

B. Proposed Per Se Rule for Prevailing Party Standard

While Judge Flaum correctly noted that the majority did not identify a specific benefit that the plaintiffs received from the judgment,¹³⁸ the Supreme Court should adopt a *per se* rule to avoid that inquiry altogether where a plaintiff has received a permanent injunction, as plaintiffs did in *Karraker II*. Adopting a *per se* rule would render the Seventh Circuit’s analysis, albeit brief, of whether the plaintiffs prevailed unnecessary. Where a plaintiff obtains a final, enforceable judgment against the defendant on the merits, such as a permanent injunction, the plaintiff should automatically be considered a “prevailing party” for purposes of the ADA fee-shifting statute, as well as all other consistently interpreted fee-shifting statutes.¹³⁹ There are three reasons why the *per se* rule is a better option than the existing analysis: 1) the rule will be more efficient in resolving fee-shifting

¹³⁵ BLACK’S LAW DICTIONARY 1154 (8th ed. 2004).

¹³⁶ *See* *Buckhannon Bd. v. West Virginia Dept. of Health & Human Resources*, 532 U.S. 598, 603 (2001) (interpreting definition of “prevailing party” found BLACK’S LAW DICTIONARY (7th ed 1999) as consistent with the Supreme Court’s precedent).

¹³⁷ *See Farrar*, 506 U.S. at 114.

¹³⁸ *Karraker II*, 492 F.3d at 900 (Flaum, J., dissenting).

¹³⁹ *See supra* notes 32-34.

litigation, 2) the rule is consistent with Congress' private attorney general rationale underlying fee-shifting provisions in civil rights statutes, and 3) the *per se* rule is a logical and incremental extension of the current Supreme Court precedent deciding whether a plaintiff has prevailed.

First, the *per se* rule will provide an incremental step in creating a more efficient judicial determination of whether attorney's fees are warranted. In *Hensley v. Eckerhart*, Justice Brennan accurately characterized litigation disputing an award or denial of attorneys' fees as "one of the least socially productive types of litigation imaginable," in light of the fact that the merits of the case have already been decided.¹⁴⁰ By automatically classifying a plaintiff as a prevailing party, the trial court will bypass one step in determining whether an award of attorney's fees to the plaintiff is appropriate, and it may then proceed to calculating a reasonable attorney fee. Under the proposed approach, a court would not have to undertake the task of determining whether a party received a direct benefit at the time of the judgment because it would be irrefutably presumed as such. After the Seventh Circuit concluded that plaintiffs had prevailed, it had to remand the case for a determination of reasonable attorney's fees.¹⁴¹ Under the *per se* rule, the district court would have automatically classified the plaintiff class as a prevailing party, and proceed to determine a reasonable amount of attorney's fees, which may have still included no fee at all.¹⁴²

Second, although the Seventh Circuit does not emphasize this point, the ADA, and other civil rights statutes, included fee-shifting provisions to encourage private enforcement by means of private actions.¹⁴³ A *per se* rule would encourage private litigants to vindicate

¹⁴⁰ 461 U.S. 424, 442 (1980) (Brennan, J., dissenting).

¹⁴¹ *Karraker II*, 492 F.3d at 900.

¹⁴² See *Farrar*, 506 U.S. at 115 (stating that a court may find that the only reasonable attorney fee that should be awarded to a prevailing party is no fee at all).

¹⁴³ See *Aleyeska Pipeline Serv. Co. v. The Wilderness Society*, 421 U.S. 240, 263 (1975) (stating that "Congress has opted to rely heavily on private enforcement to implement public policy and to allow counsel fees so as to encourage private litigation").

important rights as private attorney generals because it would remove at least one obstacle to obtaining attorney's fees. The Supreme Court only abrogated the private attorney general theory in circumstances where there was no fee-shifting statute.¹⁴⁴ The theory still underpins the Congressional policy of fee-shifting provisions in civil rights statutes and could have contextualized and explained the true benefit the class obtained. The class challenged RAC's policy requiring employees to pass the MMPI in order to be considered for promotions and sought declaratory and injunctive relief that would stop the practice.¹⁴⁵ The class received that judgment, but as mentioned before, the record was unclear whether any of class members benefited from their judgment.¹⁴⁶

The plaintiff class in *Karraker II* brought suit, not only to challenge its employer's conduct, but also to privately enforce the civil rights of others similarly situated, which it did as is evidenced by the numerous human resources publications in which *Karraker I* is cited.¹⁴⁷ The class members provided a benefit to a class of people that extended beyond the members of the plaintiff class. The injunction's effect did not only potentially benefit the plaintiff class, but also vindicated a right that Congress has assigned a high priority; eliminating discrimination in hiring and promoting decisions pursuant to the ADA.¹⁴⁸ Given that plaintiffs' judgment helped privately enforce a law that benefits the public as a whole, the plaintiff class, in effect, fulfilled the purpose of the statute and achieved a significant victory.

Under the *per se* rule, the plaintiffs in *Dillery v. City of Sandusky*¹⁴⁹ and *Barnes v. Broward County Sheriff's Office*¹⁵⁰ would

¹⁴⁴ *See id.*

¹⁴⁵ *Karraker v. Rent-A-Center*, 2005 WL 2001511, at *2 (C.D. Ill. Aug. 12, 2005).

¹⁴⁶ *Karraker II*, 492 F.3d at 901 (Flaum, J., dissenting).

¹⁴⁷ *Karraker II*, 492 F.3d at 899 (majority opinion).

¹⁴⁸ *See Bruce v. City of Gainesville*, 177 F.3d 949, 952 (11th Cir. 1999) (noting that enforcement of the ADA by private plaintiffs acting as private attorney generals is a significant component underlying the law's policy).

¹⁴⁹ 398 F.3d 562 (6th Cir. 2005).

¹⁵⁰ 190 F.3d 1274 (11th Cir. 1999).

not have necessarily been denied an award of attorney's fees. The plaintiffs in both cases obtained injunctive relief; however, in both cases, the court determined that their injunction had not bestowed upon them a direct benefit sufficient to convey prevailing party status.¹⁵¹ However, if they had been classified as prevailing parties, the courts would likely have engaged in determining whether their otherwise technical victory justified an award of attorney's fees under Justice O'Connor's three factor framework.¹⁵² Allowing civil rights plaintiffs reach Justice O'Connor's framework serves the private attorney general theory because her framework considers the impact the injunction had on the public, an underlying premise of the private attorney general theory. The *per se* rule is consistent with the Congressional policy of encouraging private enforcement, and it is a significant reason why the Court should be willing to give more leeway to a plaintiff acting as a private attorney general when determining prevailing party status.

Third, the *per se* rule is consistent with Supreme Court precedent analyzing the prevailing party standard. For instance, the Court has implicitly held that the benefit to the plaintiff is a factor that should be considered in determining what constitutes a reasonable attorney's fees.¹⁵³ The Supreme Court has already held that the degree of success is critical in the reasonableness inquiry,¹⁵⁴ and whether a judgment benefits a plaintiff is an inquiry subsumed by considering the degree of success factor. Furthermore, the Supreme Court's has already

¹⁵¹ The Sixth Circuit held that the plaintiff in *Dillery* did not receive any relief from her injunction because an identical injunction had recently been issued by another court in the same district to a distinct class of plaintiffs. 398 F.3d at 569. In *Barnes*, the Eleventh Circuit held that the plaintiff, a job applicant, had not received a benefit from an injunction ordering the employer to cease using a certain medical examination because there was no indication that the plaintiff was going to, or likely to, reapply to the position he was denied. 190 F.3d at 1278.

¹⁵² The courts would have had to analyze the extent of relief the plaintiffs received, the significance of the legal issue they prevailed on, and the public purpose served by the injunction. *Farrar v. Hobby*, 506 U.S. 103, 122 (1992) (O'Connor, J., concurring)

¹⁵³ *See id.* at 114 (majority opinion).

¹⁵⁴ *Id.*

applied a *per se* rule in the prevailing party inquiry with regards to nominal damages.¹⁵⁵ Extending the *per se* rule to plaintiffs that have obtained a permanent injunction is a logical and incremental step in the Supreme Court's jurisprudence. The Seventh Circuit stated in *Karraker II*, the value of the Karrakers' injunction was worth as much as the one dollar of nominal damages awarded to the plaintiff in *Farrar*.¹⁵⁶ The majority's perspective on the value of the plaintiffs' injunction seems to flow logically in light of the holding in *Farrar*. For all the reasons above, the plaintiffs in *Karraker* should have been automatically considered prevailing parties.

One major drawback to the *per se* rule is that attorneys may file meritless claims on behalf of civil rights plaintiffs for the sole purpose of recovering attorney's fees. That danger is effectively curtailed by the doctrine of standing and the Supreme Court's decision in *Farrar*. Standing will prevent plaintiffs that cannot show actual injury to themselves, rather than society as a whole, from filing suit in the first place. And even though a civil rights plaintiff may obtain prevailing party status more readily, the plaintiff must still show that his judgment was not of the type which warrants a reasonable attorney fee award of zero.

V. CONCLUSION

The Seventh Circuit ultimately held correctly that the plaintiff class should be considered a prevailing party for purposes of awarded attorney's fees. The majority's analysis of whether the class had prevailed was required by the Supreme Court's formulation of the prevailing party standard. However, given the fact that the class had obtained a permanent injunction, it is an unnecessary waste of time for courts to engage in such analysis. The Supreme Court should adopt a *per se* rule that would automatically convey prevailing party status to plaintiffs, such as the class in *Karraker*, because it is more efficient

¹⁵⁵ *Id.* at 112 ("We therefore hold that a plaintiff who wins nominal damages is a prevailing party under § 1988").

¹⁵⁶ *Karraker II*, 492 F.3d at 898.

and fits into the Congress' private attorney general rationale underpinning its fee-shifting provisions in civil rights legislation. The rule also is an incremental and logical extension of the Supreme Court's *per se* rule that a plaintiff that receives nominal damages is a prevailing party. Therefore, the Supreme Court should adopt a *per se* rule that confers prevailing party status to a civil rights plaintiff that obtains a permanent injunction.