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## Note

### Amending Title VII to Safeguard the Viability of Retaliation Claims

*Brandon Wheeler\**

From 1999 until 2009, Mischelle Richter worked as a store manager at Advance Auto Parts, Inc.<sup>1</sup> After reporting to her supervisor that some of her coworkers were engaging in various transgressions, the supervisor demoted Ms. Richter from the store manager position.<sup>2</sup> Four days after the demotion, Ms. Richter filed a charge with the Equal Employment Opportunity Commission (EEOC), alleging race and sex discrimination.<sup>3</sup> Seven days after filing the EEOC charge, Advance Auto Parts terminated Ms. Richter.<sup>4</sup> The EEOC eventually dismissed the charge, and Ms. Richter filed a suit in federal district court.<sup>5</sup> However, instead of alleging the charges found within her original EEOC complaint, Ms. Richter alleged that Advance Auto Parts had illegally retaliated against her for filing a charge, a violation of Title VII of the Civil Rights Act of 1964.<sup>6</sup> The district court dismissed Ms. Richter's complaint for failure to exhaust administrative remedies.<sup>7</sup> The Eighth Circuit affirmed that holding, reasoning that a retaliation claim was an act "discrete" from the discriminatory actions complained of in an

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1. Richter v. Advance Auto Parts, Inc., 686 F.3d 847, 849 (8th Cir. 2012) (per curiam).

2. *Id.*

3. *Id.*

4. *Id.* at 850.

5. *Id.* at 849.

6. *Id.* at 849–50.

7. *Id.* at 851.

EEOC charge.<sup>8</sup> Under the reasoning of the Eighth Circuit, each discrete act requires review by the EEOC.<sup>9</sup>

While some circuits have held that post-EEOC-filing discriminatory acts are “discrete acts” and require an additional EEOC charge,<sup>10</sup> others have held that some post-EEOC-filing discriminatory acts are “reasonably related” to the original EEOC charge and do not require an additional EEOC charge.<sup>11</sup> The circuit split arose from the Supreme Court’s holding in *National Railroad Passenger Corp. v. Morgan* that discrete discriminatory acts which preceded an EEOC charge by more than 300 days were barred by the statute of limitations, even if the discriminatory acts were reasonably related.<sup>12</sup> Courts have interpreted *Morgan* two different ways: (1) *Morgan* should be read narrowly to apply only to pre-EEOC-charge discriminatory acts; or (2) *Morgan* should be read broadly to apply to all discriminatory acts that are “discrete acts.”<sup>13</sup> Mrs. Richter’s case exemplifies the problems with this circuit split and evidences the growing administrative and procedural mess that is Title VII litigation.

The *Richter* holding is particularly problematic because it requires double litigation.<sup>14</sup> It potentially leads to a logistical nightmare in which a plaintiff must concurrently navigate both the EEOC process and the civil litigation process while at the same time ensuring that the stringent statute of limitations

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8. *Id.* at 852–53.

9. *Id.* at 853.

10. *See id.* at 852; *see also* *Martinez v. Potter*, 347 F.3d 1208, 1211 (10th Cir. 2003).

11. *See* *Jones v. Calvert Grp., Ltd.*, 551 F.3d 297, 304 (4th Cir. 2009) (holding that a retaliation claim was reasonably related to the EEOC charge and therefore did not require a second EEOC charge to be filed).

12. *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114 (2002) (“Each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable ‘unlawful employment practice.’ . . . [such that a plaintiff] can only file a charge to cover discrete acts that ‘occurred’ within the appropriate time period.”).

13. *See Richter*, 686 F.3d at 858 (Bye, J., concurring in part and dissenting in part).

14. In a situation where the EEOC issued a right to sue letter for an initial act of discrimination, and the employee is subsequently retaliated against, the employee will have an EEOC proceeding (for the retaliation) and a lawsuit (for the initial discriminatory act) concurrently active. *See id.* at 859 (“Requiring prior resort to the EEOC would mean that two charges would have to be filed in a retaliation case—a double filing that would serve no purpose except to create additional procedural technicalities . . . .” (quoting *Gupta v. E. Tex. State Univ.*, 654 F.2d 411, 414 (5th Cir. 1981))).

under Title VII is not violated.<sup>15</sup> This Note argues that Title VII should be amended to alleviate the unnecessary burden imposed by this new addition to the exhaustion of administrative remedies doctrine. Part I examines the framework of Title VII and its current treatment of the exhaustion of administrative remedies doctrine regarding retaliation. Part II argues that *Richter* and its companion decisions align logically with the statute and precedent but cause unnecessary hardships and inequity. Part III proposes amending Title VII in order to exempt post-charge retaliation from the requirement of exhaustion of administrative remedies.

### I. THE FRAMEWORK OF TITLE VII AND THE EXHAUSTION OF ADMINISTRATIVE REMEDIES DOCTRINE

This Note will first explore the history and framework of Title VII, including the EEOC's procedural requirements in filing a charge and the issuance of a right-to-sue letter. This Note will then identify the important case law regarding the exhaustion of administrative remedies doctrine. Prior to the Supreme Court's decision in *Morgan*, most circuits were reluctant to enforce the exhaustion of administrative remedies requirement to retaliation claims. Following *Morgan*, however, circuits split about how broadly to construe the requirement in retaliation claims.

#### A. THE PURPOSE AND GOALS OF TITLE VII AND ITS ANTI-RETALIATION PROVISION

Congress introduced Title VII as part of the Civil Rights Act of 1964 with the purpose of eliminating the effects of employment discrimination.<sup>16</sup> Congress intended to draft Title VII in such a way that it could provide individuals with effective protection against discriminatory practices by employers.<sup>17</sup> Ti-

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15. An employee must file a charge with the EEOC within 180 days of when the discriminatory act occurred; if the individual has filed a similar complaint with a state human rights agency, the EEOC charge must be filed within 300 days. 42 U.S.C. § 2000e-5(e)(1) (2006). After the EEOC has issued a right to sue letter, an employee will only have 90 days to commence a civil suit before that action is barred. 29 C.F.R. § 1601.28(e)(1) (2013).

16. *Johnson v. Transp. Agency*, 480 U.S. 616, 650 (1987).

17. See 110 CONG. REC. 1540 (1964) (statement of Rep. Lindsay) ("This bill is designed for the protection of individuals. When an individual is wronged he can invoke the protection to himself, but if he is unable to do so

title VII purports to accomplish this by making it an unlawful employment practice for an employer to take an adverse employment action against an individual because of his or her race, color, religion, sex, or national origin.<sup>18</sup> An “adverse employment action” includes a refusal to hire or a discharge.<sup>19</sup> Title VII also makes it unlawful for an employer to segregate or classify its employees in any way that would lead to an adverse employment action.<sup>20</sup> Finally, and most relevant to this Note, Title VII makes it unlawful for an employer to retaliate against an employee for opposing an unlawful employment action (the “opposition clause”) or for making a charge, testifying, assisting, or participating in any manner in a Title VII investigation or proceeding (the “participation clause”).<sup>21</sup> By banning retaliation against individuals who perform the types of duties found in the participation clause, Congress intended to maintain “unfettered access to statutory remedial mechanisms.”<sup>22</sup> Without protections from retaliation, employers who seek to deter Title VII claims would have an incentive to fire employees who had Title VII claims.<sup>23</sup>

The “opposition clause” has been read narrowly to only include a complainant’s “active and purposive” conduct.<sup>24</sup> In contrast, the protections of the “participation clause” have been construed much more broadly, with the Second Circuit going so far as to hold that defending oneself against charges of discrimination is a protected activity under Title VII.<sup>25</sup> For either type of retaliation, a plaintiff must establish a *prima facie* case: (1) she must show that she engaged in an activity protected by Ti-

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because of economic distress or because of fear then the Federal Government is authorized to invoke that individual protection for that individual . . .”).

18. 42 U.S.C. § 2000e-2(a)(1).

19. *Id.*

20. *Id.* § 2000e-2(a)(2).

21. *Id.* § 2000e-3(a). For a general overview of the two different clauses, see *EEOC v. Total Sys. Servs., Inc.*, 221 F.3d 1171, 1175–76 (11th Cir. 2000).

22. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997).

23. *Id.* at 345–46.

24. *Crawford v. Metro. Gov’t of Nashville*, 555 U.S. 271, 282 (2009).

25. *Deravin v. Kerik*, 335 F.3d 195, 204 (2d Cir. 2003); see also *Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1187 (11th Cir. 1997) (holding that involuntary participation in a Title VII proceeding is protected from retaliation); *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1312 (6th Cir. 1989) (stating that the “participation” clause is an exceptionally broad protection). *But see also Slagle v. County of Clarion*, 435 F.3d 262, 267–68 (3d Cir. 2006) (holding that the participation clause does not protect individuals who file facially invalid claims).

tle VII, (2) that the employer took an adverse employment action against her, and (3) that there was a causal connection between the two.<sup>26</sup> Before a plaintiff can pursue any of the above claims in federal court, however, she must satisfy certain procedural requirements.

#### B. EEOC FILING AND REVIEW OF THE CHARGE

Congress created the EEOC in order to oversee proceedings arising under Title VII, among other tasks.<sup>27</sup> When a discriminatory act occurs, the aggrieved employee must first file a charge with the EEOC before she can sue in federal court, a doctrine known generally as the exhaustion of administrative remedies.<sup>28</sup> The relevant provision states:

A charge under this section *shall* be filed within one hundred and eighty days after the alleged unlawful employment practice occurred . . . except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice . . . within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier . . . .<sup>29</sup>

This requirement encourages the settlement of discrimination disputes through the EEOC's processes instead of the courts, a purpose which would be defeated if an individual could litigate a claim not previously presented to and investigated by the EEOC.<sup>30</sup>

The EEOC has passed many regulations regarding how an aggrieved employee should present a Title VII claim.<sup>31</sup> On the charge form provided by the EEOC, an employee must indicate what they believe their discrimination is based on, and can choose from the following options: race, color, sex, religion, national origin, age, disability, retaliation, genetic information, or other.<sup>32</sup> The employee must also provide “[a] clear and concise statement of the facts, including pertinent dates, constituting

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26. *Moore v. City of Philadelphia*, 461 F.3d 331, 340–41 (3d Cir. 2006).

27. 42 U.S.C. § 2000e-4(a) (2006).

28. *Id.* § 2000e-5(e)(1).

29. *Id.* (emphasis added).

30. *Miller v. Int'l Tel. & Tel. Corp.*, 755 F.2d 20, 26 (2d Cir. 1985).

31. *See* 29 C.F.R. § 1601.6–.12 (2013).

32. EEOC, CHARGE OF DISCRIMINATION (FORM 5) (Nov. 2009), available at [http://www.eeoc.gov/eeoc/foia/forms/upload/form\\_5.pdf](http://www.eeoc.gov/eeoc/foia/forms/upload/form_5.pdf).

the alleged unlawful employment practices.”<sup>33</sup> Within ten days of the employee’s filing of the charge, the employer must be served with notice of the charge.<sup>34</sup>

Following receipt of the charge and notice to the adverse parties, Title VII requires the EEOC to investigate the charge in order to determine whether “reasonable cause” exists.<sup>35</sup> Such a finding represents an administrative determination of fact that it is reasonable to believe that the discriminatory act occurred.<sup>36</sup> If the EEOC determines that reasonable cause exists, then Title VII requires the EEOC to “endeavor to eliminate any such alleged unlawful employment practice.”<sup>37</sup> Such an endeavor includes the option for the EEOC to commence a civil case on behalf of a claimant.<sup>38</sup> This does not mean that Title VII requires the EEOC to fully litigate the claim;<sup>39</sup> alternatively, it can resolve the issue through negotiated settlements.<sup>40</sup> However, as is nearly always the case,<sup>41</sup> the EEOC may find that no probable cause exists.<sup>42</sup> If this is the case, then the EEOC will usually not bring suit or attempt to reach a settlement on be-

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33. 29 C.F.R. § 1601.12(a)(3). The specific contents of a charge are determined by EEOC regulations. *See generally id.* § 1601.6–.29.

34. 42 U.S.C. § 2000e-5(e)(1).

35. *Id.* § 2000e-5(b). The EEOC does not make a finding of cause or no cause in all charges, as individuals can request their right-to-sue letter within 180 days regardless of where the EEOC is in the investigation. 29 C.F.R. § 1601.28(a)(1).

36. *EEOC v. Chi. Miniature Lamp Works*, 526 F. Supp. 974, 976 (N.D. Ill. 1981). Even if the EEOC finds that a discriminatory act occurred, it cannot be used in subsequent proceedings without consent of the persons concerned. 42 U.S.C. § 2000e-5(b).

37. 42 U.S.C. § 2000e-5(b).

38. 29 C.F.R. § 1601.27.

39. The EEOC is not required to bring suit on behalf of the aggrieved individual, even if it finds reasonable cause. *See id.* (“The Commission *may* bring a civil action against any respondent named in a charge . . . .”) (emphasis added).

40. *Id.* § 1601.20; *see also Definitions of Terms*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <http://www.eeoc.gov/eeoc/statistics/enforcement/definitions.cfm> (last visited Oct. 25, 2012) (explaining the EEOC’s role as a party to negotiated settlements).

41. In 2011, the EEOC found reasonable cause in only 3.8 percent of all Title VII cases (including charges filed concurrently under the ADA, ADEA, and EPA). *Enforcement and Litigation Statistics: Title VII Charges*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <http://www.eeoc.gov/eeoc/statistics/enforcement/titlevii.cfm> (last visited Nov. 3, 2013) [hereinafter *Litigation Statistics*]. The year 2001 had the highest percent of the past fifteen years, with the EEOC finding reasonable cause in 9.2 percent of Title VII cases. *Id.*

42. 42 U.S.C. § 2000e-5(b).

half of the plaintiff.<sup>43</sup> Instead, the EEOC will issue a right-to-sue letter.<sup>44</sup>

### C. THE RIGHT-TO-SUE LETTER

For a vast majority of aggrieved employees, the right-to-sue letter comes following a finding of no probable cause.<sup>45</sup> The content of the right-to-sue letter includes the EEOC's decision and authorizes the aggrieved individual to bring a civil action in federal court for violation of Title VII.<sup>46</sup> Although the EEOC retains the right to intervene in the lawsuit,<sup>47</sup> as a practical matter the EEOC has neither the time nor the resources to do so.<sup>48</sup> The right-to-sue letter requires the aggrieved individual to bring their civil action within 90 days of its receipt.<sup>49</sup> If she does not bring the action within that statutory period, Title VII bars her from bringing suit, absent equitable tolling.<sup>50</sup> Equitable tolling has been allowed, for example, if a claimant was tricked into letting the deadline expire,<sup>51</sup> or if the EEOC gave inadequate notice of the statute of limitations.<sup>52</sup> Barring these equitable exceptions, the complainant must comply with the exhaustion of administrative remedies doctrine.

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43. *Id.* (“If the Commission determines after . . . investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge.”). However, the EEOC reserves the right to offer assistance to individuals even after they have received their right-to-sue letter. 29 C.F.R. § 1601.28(b)(4).

44. The EEOC can issue a right-to-sue letter in two different ways: either by notice after 180 days of the filing of the charge or immediately following disposition of the charge. 29 C.F.R. § 1601.28.

45. Over two-thirds of the nearly 83,000 resolutions in fiscal year 2011 were dispositions due to the EEOC finding no reasonable cause. *Litigation Statistics*, *supra* note 41.

46. 29 C.F.R. § 1601.28(e).

47. *Id.* § 1601.28(a)(4), (b)(4).

48. See U.S. EQUAL EMP'T OPPORTUNITY COMM'N, ASSESSMENT OF A NATIONAL CONTACT CENTER SOLUTION FOR EEOC (2003), available at <http://www.eeoc.gov/eeoc/meetings/archive/9-8-03/center.html> (“The EEOC is a small, chronically understaffed agency.”).

49. 42 U.S.C. § 2000e-5(f)(1) (2006).

50. See *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95 (1990) (“[W]e have held that the statutory time limits applicable to lawsuits against private employers under Title VII are subject to equitable tolling.”).

51. See *id.* at 96 (“We have allowed equitable tolling in situations where . . . the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass.”).

52. See *Scholar v. Pac. Bell*, 963 F.2d 264, 267–68 (9th Cir. 1992) (“The equitable tolling doctrine has been applied . . . when the EEOC's notice of the statutory period was clearly inadequate.”).

## D. THE EXHAUSTION OF ADMINISTRATIVE REMEDIES

The exhaustion of administrative remedies doctrine<sup>53</sup> gives civil defendants an affirmative defense to claims arising under Title VII.<sup>54</sup> Under this doctrine, if a plaintiff does not fully exhaust all of her administrative remedies, a defendant would succeed on a motion to dismiss for failure to state a claim.<sup>55</sup> Courts have interpreted Title VII to mandate the exhaustion of administrative remedies since the naissance of Title VII jurisprudence.<sup>56</sup> There are two general requirements that must be fulfilled before a complainant has exhausted her administrative remedies: (1) the filing of a timely charge with the EEOC, and (2) receipt of a right-to-sue letter following the EEOC's review of the case.<sup>57</sup> In order for a charge to be valid, it must be complete enough to allow the EEOC to have a fair opportunity to investigate the claims found in the charge.<sup>58</sup> If, for example, a claimant solely alleges sex discrimination in the charge to the EEOC but then attempts to sue for race discrimination, the EEOC would not have had an opportunity to investigate the race discrimination claim, and thus a court would find that the claimant did not exhaust her administrative remedies with re-

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53. See *supra* Part I.B (introducing the exhaustion of administrative remedies doctrine).

54. See *Williams v. Runyon*, 130 F.3d 568, 573 (3d Cir. 1997) (“In Title VII actions, failure to exhaust administrative remedies is an affirmative defense in the nature of statute of limitations.”).

55. The Supreme Court has held that failures to comply with EEOC time requirements are not a jurisdictional prerequisite, but rather a statutory requirement. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982).

56. See *Love v. Pullman Co.*, 404 U.S. 522, 523 (1972) (“A person claiming to be aggrieved by a violation of Title VII of the Civil Rights Act of 1964 may not maintain a suit for redress in federal district court until he has first unsuccessfully pursued certain avenues of potential administrative relief.” (citation omitted)).

57. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974) (citing 42 U.S.C. § 2000e-5 (1970)).

58. A valid charge must: (1) be timely; (2) be in writing, signed, and verified; and (3) be “sufficiently precise to identify the parties, and to describe generally the action of practices complained of.” 2 BARBARA T. LINDEMANN ET AL., *EMPLOYMENT DISCRIMINATION LAW* 26–57 (5th ed. 2012) (quoting 29 C.F.R. §§ 1601.9, 1601.12(b) (2013)). Beyond this minimum threshold, the EEOC prefers, but does not require, charges to contain five components: (1) the name and address of the employee making the charge; (2) the full name and address of the employer; (3) a clear and concise statement of the facts, including pertinent dates; (4) the approximate number of persons employed by the employer; and (5) information about any related proceedings in other state or local agencies. *Id.* (citing 29 C.F.R. § 1601.12(a)).



gard to that claim.<sup>59</sup> However, certain types of claims were, prior to *Morgan*, excepted from this rule.

### 1. Pre-Morgan Treatment of the Exhaustion of Administrative Remedies Doctrine

Before the Supreme Court's decision in *Morgan*, most courts allowed claims arising out of "continuing violations" to escape the harshness of the exhaustion of administrative remedies doctrine.<sup>60</sup> "Continuing violations" could be both discrimination and retaliation claims.<sup>61</sup> For example, some courts held that retaliation claims following the filing of an EEOC charge were "reasonably related to" and "growing out of" the original discriminatory act, and therefore constituted "continuing violations."<sup>62</sup> If, however, the retaliatory act occurred before any EEOC charge, complainants were required to include that retaliatory act in their EEOC charge.<sup>63</sup>

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59. *Cf. Reynolds v. Solectron Global Servs.*, 358 F. Supp. 2d 688, 692–93 (W.D. Tenn. 2005) (holding that the court did not have subject matter jurisdiction over a race discrimination claim because the claim was filed with the EEOC after the complaint was filed with the court).

60. *See Morgan v. Nat'l R.R. Passenger Corp.*, 232 F.3d 1008, 1014 (9th Cir. 2000) ("[T]he continuing violations doctrine, however, allows courts to consider conduct that would ordinarily be time barred 'as long as the untimely incidents represent an ongoing unlawful employment practice.'" (quoting *Anderson v. Reno*, 190 F.3d 930, 936 (9th Cir. 1999))), *aff'd in part, rev'd in part*, 536 U.S. 101 (2002).

61. *See Oubichon v. N. Am. Rockwell Corp.*, 482 F.2d 569, 571 (9th Cir. 1973) ("When an employee seeks judicial relief for incidents not listed in his original charge to the EEOC, the judicial complaint nevertheless may encompass any discrimination like or reasonably related to the allegations of the EEOC charge, including new acts occurring during the pendency of the charge before the EEOC.").

62. *See, e.g., Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1312 (7th Cir. 1989) ("[A] separate administrative charge is not prerequisite to a suit complaining about retaliation for filing the first charge."), *superseded by statute on other grounds*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C.), *as recognized in Luevano v. Wal-Mart Stores, Inc.*, 722 F.3d 1014, 1030 (7th Cir. 2013); *Brown v. Harts-horne Pub. Sch. Dist. No. 1*, 864 F.2d 680, 682 (10th Cir. 1988) (holding that when a plaintiff alleges that she was retaliated against for filing an EEOC charge, she is not required to file another EEOC complaint); *Kirkland v. Buffalo Bd. of Educ.*, 622 F.2d 1066, 1068 (2d Cir. 1980) (holding that when a plaintiff sued for retaliation for filing an EEOC charge, "a second authorization to sue was not required").

63. *See, e.g., Steffen v. Meridian Life Ins. Co.*, 859 F.2d 534, 545 n.2 (7th Cir. 1988) ("These cases [that held that retaliation arose after the charge had been filed] are distinguishable from the present case where the alleged retaliatory acts occurred *before* [the plaintiffs] . . . charge of discrimination was filed and [the employer] was not given clear notice that retaliation was at issue.").

Retaliation claims were given special protection for several reasons. Some courts insisted that the initial filing in such a situation satisfied Title VII's intent.<sup>64</sup> Others reasoned that public policy encourages the punishment of retaliatory actions.<sup>65</sup> Still other courts argued that notice is an essential purpose of requiring an EEOC claim, not adjudication, and that the EEOC's first review of the claim puts an employer on notice for all reasonably related claims that follow.<sup>66</sup> Regardless of their rationales, circuits unanimously held prior to *Morgan* that a post-charge retaliatory action was a "continuing violation" that did not necessitate an additional charge.<sup>67</sup>

## 2. *National Railroad Passenger Corp. v. Morgan*

The Supreme Court's decision in *Morgan* drastically changed the exhaustion of administrative remedies doctrine under Title VII. The facts of *Morgan* are relatively simple. Morgan, a black male, filed discrimination and retaliation charges with the EEOC against his employer.<sup>68</sup> In the EEOC charge, Morgan alleged acts that occurred within the past 300 days,<sup>69</sup> but he also alleged acts that occurred prior to that time period.<sup>70</sup> The employer was successful in a motion for summary judgment in regards to all incidents that predated the 300-day mark.<sup>71</sup> The Ninth Circuit reversed, citing the continuing viola-

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64. See *Gottlieb v. Tulane Univ.*, 809 F.2d 278, 284 (5th Cir. 1987) ("Requiring [a plaintiff] to resort to the EEOC a second time on a retaliation claim would serve no purpose 'except to create additional procedural technicalities when a single filing would comply with the intent of Title VII.'" (quoting *Gupta v. E. Tex. State Univ.*, 654 F.2d 411, 414 (5th Cir. 1981))).

65. See *Malhotra*, 885 F.2d at 1312 ("[H]aving once been retaliated against for filing an administrative charge, the plaintiff will naturally be gun shy about inviting further retaliation by filing a second charge complaining about the first retaliation.").

66. See *EEOC v. St. Anne's Hosp.*, 664 F.2d 128, 131 (7th Cir. 1981) ("A reasonable cause determination is not to adjudicate a claim but to notify an employer of the Commission's findings. There is no requirement that the agency begin its investigation anew on discovering a reasonably related theory of liability." (citation omitted)).

67. See *Nealon v. Stone*, 958 F.2d 584, 590 (4th Cir. 1992) ("All other circuits that have considered the issue have determined that a plaintiff may raise the retaliation claim for the first time in federal court. On consideration, we . . . adopt this position.").

68. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 105 (2002).

69. According to Title VII, a charge must be filed within 300 days after the unlawful employment practice occurred. 42 U.S.C. § 2000e-5(e)(1) (2006).

70. *Morgan*, 536 U.S. at 106.

71. *Id.*

tions doctrine.<sup>72</sup> National Railroad petitioned, and the Supreme Court granted certiorari to determine, among other issues, the scope of the continuing violations doctrine.<sup>73</sup>

The Supreme Court distinguished between hostile environment claims and discrete acts.<sup>74</sup> It recognized that acts occurring outside the 300-day period could be part of a hostile environment claim.<sup>75</sup> A hostile environment claim is one that by its very nature involves a series of separate acts that collectively constitute an unlawful employment practice, such as an employer continuously calling its employee racial epithets.<sup>76</sup> The Court, however, ultimately reversed in favor of the employer on the issue of continuing violations in non-hostile environment claims.<sup>77</sup> It examined the statutory language of 42 U.S.C. § 2000e-5(e)(1): “A charge under this section *shall be filed* within one hundred and eighty days *after the alleged unlawful employment practice occurred.*”<sup>78</sup> The Court found that “[t]here is simply no indication that the term ‘practice’ converts related discrete acts into a single unlawful practice for the purposes of timely filing.”<sup>79</sup> The Court explicitly overruled the Court of Appeal’s application of the continuing violations doctrine to acts that are “sufficiently related,” instead labeling such acts as discrete acts.<sup>80</sup> The Supreme Court explained its definition of discrete acts within the meaning of the statute: “Discrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify. Each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable ‘unlawful employment practice.’”<sup>81</sup> In effect, this holding requires complainants to file any complaint based on a discrete act within the 180- or 300-day period after the act occurred. A complainant may include multiple dis-

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72. *Id.* at 106–07.

73. *Id.* at 108.

74. *Id.* at 115.

75. *Id.* at 118 (“The statute does not separate individual acts that are part of the hostile environment claim from the whole for the purposes of timely filing and liability.”).

76. *Id.* at 117 (citing 42 U.S.C. § 2000e-2(a)(1) (2006)).

77. *Id.* at 113–14.

78. *Id.* at 109.

79. *Id.* at 111.

80. *Id.* at 114.

81. *Id.*

crete acts in her charge, but if the discrete acts are more than 300 days apart, they require separate charges.<sup>82</sup>

### 3. The Post-*Morgan* Circuit Split

The discrete acts doctrine implemented by the Supreme Court quickly led to a circuit split about whether *Morgan* should apply to post-EEOC filing discriminatory acts, particularly retaliation. In *Martinez v. Potter*, the Tenth Circuit held that the rule was equally applicable to post-EEOC filing acts.<sup>83</sup> The *Martinez* Court firmly held that “*Morgan* abrogates the continuing violation doctrine as previously applied to claims of discriminatory or retaliatory actions by employers, and replaces it with the teaching that each discrete incident of such treatment constitutes its own ‘unlawful employment practice’ for which administrative remedies must be exhausted.”<sup>84</sup> In addition, the *Martinez* Court reasoned that an employer should be on notice of the specific violation prior to a lawsuit in order to “facilitate internal resolution of the issue rather than promoting costly and time-consuming litigation.”<sup>85</sup>

In *Richter*, the Eighth Circuit followed the Tenth Circuit’s holding. It reasoned that Title VII’s use of the word “the” in describing unlawful employment practices<sup>86</sup> showed that the “the complainant must file a charge with respect to each alleged unlawful employment practice.”<sup>87</sup> The *Richter* Court determined that *Morgan* had effectively changed the continuing violations doctrine to the extent that it applied to post-EEOC filing discriminatory acts, including retaliation.<sup>88</sup> The court read *Morgan* as an admonishment to the circuits to follow statutory text, and interpreted the term “practice” similarly, holding that “[t]he term ‘practice’ no more subsumes multiple discrete acts when one of those acts occurs after the filing of an EEOC charge than it does when all acts occur before the charge is filed.”<sup>89</sup> A vivid

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82. *Id.* at 113.

83. *Martinez v. Potter*, 347 F.3d 1208, 1210–11 (10th Cir. 2003).

84. *Id.* at 1210.

85. *Id.* at 1211.

86. *Richter v. Advance Auto Parts, Inc.*, 686 F.3d 847, 851 (8th Cir. 2012) (per curiam) (“Title VII requires that a complainant must file a charge with the EEOC within 180 days ‘after *the* alleged unlawful employment practice occurred,’ and give notice to the employer of the circumstances of ‘*the* alleged unlawful employment practice.’” (quoting 42 U.S.C. § 2000e-5(e)(1) (2006))).

87. *Id.*

88. *Id.* at 852.

89. *Id.*

dissent argued that policy considerations supported an exception for post-filing retaliation claims from the requirement of exhaustion of administrative remedies,<sup>90</sup> but the majority found that different policies,<sup>91</sup> as well as the statute itself overrode those policy considerations.<sup>92</sup>

The Sixth Circuit, in an unpublished opinion, held contrary to the Tenth Circuit, that retaliation for an EEOC filing does not require a second filing.<sup>93</sup> The Sixth Circuit made a distinction between the old continuing violations doctrine and retaliation for filing an EEOC charge, arguing that retaliation for an EEOC filing was never part of the continuing violations doctrine to begin with.<sup>94</sup> In doing so, it held that *Morgan* was not applicable to certain retaliatory acts.<sup>95</sup>

The Fourth Circuit, in *Jones v. Calvert Group, Ltd.*, also held contrary to the Tenth Circuit. The *Jones* Court reasoned that *Morgan* only applied to discriminatory acts for the purposes of starting the statute of limitations.<sup>96</sup> The *Jones* Court distinguished *Morgan* by stating: “[*Morgan*] does not purport to address the extent to which an EEOC charge satisfies exhaustion requirements for claims of related, post-charge events.”<sup>97</sup> As opposed to the Sixth Circuit, the *Jones* Court argued that the continuing violations doctrine survived in post-charge discriminatory actions.<sup>98</sup> The court therefore held that its pre-*Morgan* precedent survived to the extent that it related to post-charge discriminatory acts, and that retaliation for an EEOC

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90. *Id.* at 859 (“In concluding a plaintiff should not be required to file a new EEOC charge for retaliation claims arising after the filing, the Fifth Circuit, for example, emphasized the needless procedural barrier a contrary rule would require.” (internal quotation marks omitted) (citing *Eberle v. Gonzales*, 240 F. App’x 622, 628 (5th Cir. 2007))).

91. *Id.* at 853 (“Exempting retaliation claims from the administrative framework established by Congress could frustrate the conciliation process, which we have called ‘central to Title VII’s statutory scheme.’” (quoting *Williams v. Little Rock Mun. Water Works*, 21 F.3d 218, 222 (8th Cir. 1994))).

92. *Id.*

93. *Delisle v. Brimfield Twp. Police Dep’t*, 94 F. App’x 247, 254 (6th Cir. 2004).

94. *Id.* at 253.

95. *Id.* (“Plaintiff before us is not looking to raise the issue of retaliatory acts that may have occurred prior to his filing of his EEOC claim that are statutorily time-barred. That was the issue in *Morgan*, and hence *Morgan*’s holding.”).

96. *Jones v. Calvert Grp., Ltd.*, 551 F.3d 297, 303 (4th Cir. 2009).

97. *Id.*

98. *Id.*

charge is thus still exempted from the exhaustion requirement.<sup>99</sup>

The Eleventh and Second Circuits have both maintained their pre-*Morgan* precedents and held that a plaintiff is not required to bring a second EEOC charge for retaliation. Both circuits did so without even so much as a reference to *Morgan*.<sup>100</sup>

The EEOC has taken the position that post-charge discriminatory acts such as retaliation do not warrant the filing of a second charge.<sup>101</sup> It adopted this position in its Compliance Manual after seeing the circuit split that arose out of *Morgan*.<sup>102</sup> In the manual, the EEOC argues that *Morgan* should be read narrowly to not apply to post-charge discriminatory acts.<sup>103</sup> However, courts have held that the Compliance Manual does not determine the rights of parties,<sup>104</sup> but instead serves merely as an internal guideline for the agency,<sup>105</sup> or at most a body of

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99. *Id.*

100. Perhaps a reason that the Second Circuit did not discuss *Morgan* was because the defendant never argued in its appellate brief that *Morgan* overruled the precedent; instead, the defendant merely tried to distinguish its case from the precedent on the facts. The appellate briefs in *Thomas v. Miami Dade Public Health Trust*, however, gave the Eleventh Circuit ample opportunity to consider the impact of *Morgan*; but the court opted to write a short, unpublished opinion that did not reference *Morgan*. See *Thomas v. Miami Dade Pub. Health Trust*, 369 F. App'x 19, 23 (11th Cir. 2010) (“[I]t is unnecessary for a plaintiff to exhaust administrative remedies prior to urging a retaliation claim growing out of an earlier charge . . . .” (quoting *Gupta v. E. Tex. State Univ.*, 654 F.2d 411, 414 (5th Cir. 1981))); *Terry v. Ashcroft*, 336 F.3d 128, 151 (2d Cir. 2003) (finding that a second charge is not required “where the complaint is ‘one alleging retaliation by an employer against an employee for filing an EEOC charge’” (quoting *Butts v. City of N.Y. Dept. of Hous. Pres. & Dev.*, 990 F.2d 1397, 1402–03 (2d Cir. 1993), *superseded by statute on other grounds*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C.), *as recognized in Carter v. New Venture Gear, Inc.*, 310 F. App'x 454, 458 (2d Cir. 2009))).

101. See U.S. EQUAL EMP'T OPPORTUNITY COMM'N, COMPLIANCE MANUAL SECTION 2: THRESHOLD ISSUES § 2-IV(C)(1)(a) (2009) [hereinafter COMPLIANCE MANUAL SECTION 2], available at <http://www.eeoc.gov/policy/docs/threshold.html#2-IV-C-1-a> (“A timely charge also may challenge related incidents that occur *after* the charge is filed.”).

102. See *Compliance Manual*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <http://www.eeoc.gov/laws/guidance/compliance.cfm> (last visited Nov. 4, 2013).

103. See COMPLIANCE MANUAL SECTION 2, *supra* note 101, at n.185 (“Nothing in *Morgan* suggests that a new charge must be filed when a charge challenging related acts already exists.”).

104. *Hall v. EEOC*, 456 F. Supp. 695, 702 (N.D. Cal. 1978).

105. *Sunbeam Appliance Co. v. Kelly*, 532 F. Supp. 96, 99 (N.D. Ill. 1982).

experience to which a court *may* resort to for guidance.<sup>106</sup> Despite the EEOC's definitive opinion on the matter, the Tenth and Eighth Circuits still hold that a post-charge retaliatory act must be included in an EEOC charge in order to fully exhaust administrative remedies, leaving complainants in the undesirable position of re-navigating the lengthy EEOC process while simultaneously pursuing a claim in federal court.

## II. THE STATUTORY AND JURISPRUDENTIAL MERITS OF A STRICT READING OF TITLE VII AND ITS CONSEQUENCES

*Richter* and *Martinez* provide a proper interpretation of Title VII and *Morgan*: all claims of retaliation must be submitted to the EEOC for review before they can be litigated in federal court in order to satisfy the exhaustion of administrative remedies doctrine. However, this proper interpretation is detrimental to Title VII claimants because it significantly hinders the viability of retaliation claims. In this part, this Note will first examine the statutory language of Title VII and the Supreme Court's holdings in *Morgan*. Then, it will analyze the consequences of the proper interpretation for the viability of retaliation claims, as well as the implications for employers and employees in future Title VII litigation.

### A. INTERPRETATIONS OF TITLE VII AND MORGAN

#### 1. Statutory Language of Title VII

When interpreting a statute, a court will first look to the plain meaning of the statute to determine if it is ambiguous.<sup>107</sup> Looking at the three key words ("shall," "practice," and "the") in the context of the entirety of § 2000e-5(e), it is clear that the plain language of the statute mandates the filing of an additional charge for post-charge retaliation. Even if this results in unfair outcomes, the Supreme Court has noted that "strict adherence to the procedural requirements specified by the legisla-

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106. *Clackamas Gastroenterology Assocs. v. Wells*, 538 U.S. 440, 449 n.9 (2003).

107. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340–41 (1997); *see also* *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.").

ture is the best guarantee of evenhanded administration of the law.”<sup>108</sup>

The relevant language of Title VII states: “A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred . . . .”<sup>109</sup> This charge must be filed with the EEOC or the appropriate state or local agency.<sup>110</sup> It is unambiguous that some kind of charge must be filed with the EEOC,<sup>111</sup> as the statute’s usage of “shall” mandates.<sup>112</sup> Rather, courts differ on the definition of the term “unlawful employment practice.”

In the absence of a statutory definition of a term, courts will look to common usage of the term, such as a dictionary definition.<sup>113</sup> Although Title VII does not include the term “unlawful employment practice” in its list of definitions,<sup>114</sup> it does define the term in §§ 2000e-2 and 2000e-3. Title VII partially defines, through examples, an “unlawful employment practice” as the (1) failure or refusal to hire or discharge any individual, (2) the limitation, segregation, or classification of an employee that would adversely affect her status as an employee, and (3) retaliation for opposing a practice or participating in a Title VII proceeding.<sup>115</sup> Some of these definitions allow for a more expansive interpretation of “unlawful employment practice” than others. For instance, a discharge is an unlawful employment practice that is easily temporally defined; it is usually a singular event.<sup>116</sup> On the other hand, segregation of employees is an

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108. *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980).

109. 42 U.S.C. § 2000e-5(e)(1) (2006).

110. *See id.* § 2000e-5 (establishing the framework of the EEOC filing process).

111. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974) (“[Title VII] specifies with precision the jurisdictional prerequisites that an individual must satisfy before he is entitled to institute a lawsuit. In the present case, these prerequisites were met when petitioner (1) filed timely a charge of employment discrimination with the Commission, and (2) received and acted upon the Commission’s statutory notice of the right to sue.”).

112. *See Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998).

113. *CBS Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1223 (11th Cir. 2001).

114. 42 U.S.C. § 2000e (2006).

115. *Id.* §§ 2000e-2(a), 2000e-3(a).

116. *See, e.g., Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114 (2002) (“Discrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify.”); *Int’l Union of Elec. Workers v. Robbins & Meyers, Inc.*, 429 U.S. 229, 234–35 (1976) (holding that a discharge was final rather than tentative). Even in more difficult cases, such as those



unlawful employment practice that by its nature can extend over days, months, or even years.<sup>117</sup> Because a singular unlawful employment practice like segregation extends over such a lengthy period of time, one could argue that Congress did not intend for the term “practice” to limit an act to a singular concrete event for the purpose of determining when the statute of limitations starts running. Rather, it would support a pre-*Morgan* or *Jones* interpretation that allowed “reasonably related” acts to constitute a singular unlawful employment practice.

Proponents of the *Jones* holding might argue that congressional use of “practice” instead of a term such as “act” indicates that Congress intended for “practice” to be defined by its ordinary usage, not by the statutory examples. Ordinary usage of “practice” would be “the customary, habitual, or expected procedure or way of doing something.”<sup>118</sup> This definition implies a continuing act rather than a discrete act. However, in defining an “unlawful employment practice” Congress provided examples such as retaliation and segregation.<sup>119</sup> Segregation is generally a continuing event, but retaliation can consist of a singular event, such as a discharge. Because both singular and continuing events are considered “unlawful employment practices,” the term cannot be confined to a simple dictionary definition. Instead, *Morgan*’s differentiation between discrete acts and continuing violations logically divides the different types of practices based on their temporal attributes.<sup>120</sup>

Title VII’s usage of “the” in “the alleged employment practice” is also instructive. Title VII mandates that a charge must

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involving a constructive discharge, there is still a singular event that defines the ultimate discharge. See Martin W. O’Toole, Note, *Choosing a Standard for Constructive Discharge in Title VII Litigation*, 71 CORNELL L. REV. 587, 594 (1986) (discussing *Young v. Southwestern Savings & Loan Ass’n*, 509 F.2d 140 (5th Cir. 1975), in which the court held an employee’s resignation constituted a constructive discharge).

117. See *Morgan*, 536 U.S. at 115 (“Hostile environment claims are different in kind from discrete acts. Their very nature involves repeated conduct.”). For a discussion of segregation in the workforce and the amount of time and number of employees it can encompass, see *Johnson v. Transportation Agency*, 480 U.S. 616, 621, 634 (1987).

118. *Definition of Practice*, OXFORD DICTIONARIES (2013), <http://oxforddictionaries.com/definition/english/practice?q=practice>.

119. 42 U.S.C. § 2000e-3(a).

120. *Morgan* stated that “[Title VII] explains in great detail the sorts of actions that qualify as ‘[u]nlawful employment practices’ and includes among such practices numerous discrete acts.” *Morgan*, 536 U.S. at 111. The *Morgan* Court distinguishes between such discrete acts and hostile environment claims involving “repeated conduct” and a “cumulative effect.” *Id.* at 114–15.

be filed within 180 or 300 days after *the* alleged employment practice occurred.<sup>121</sup> The *Richter* court found its usage persuasive because “the” is a definite article.<sup>122</sup> The usage of “the” indicates that a charge must be filed for each discriminatory practice.<sup>123</sup> If Congress had used “an,” for example, it would seem that a complainant would only have to file a charge relating to one discriminatory practice in order to satisfy the exhaustion requirements.

## 2. Interpretations of *Morgan*

While *Morgan*, *Richter*, and *Martinez* all recognize that the plain meaning of the statute mandates the filing of an additional charge for post-charge retaliation, *Jones* not only ignores the language of the statute<sup>124</sup> but also dismisses the obvious interpretation of *Morgan*. In *Jones*, the Fourth Circuit justified its holding by reading *Morgan* very narrowly to apply only when the “limitations clock . . . begins ticking” with regard to discrete acts.<sup>125</sup> The *Jones* Court determined that *Morgan* therefore did not overrule its pre-*Morgan* jurisprudence,<sup>126</sup> which had held that post-charge discriminatory acts did not require a second filing.<sup>127</sup> However, this narrow reading of *Morgan* is erroneous.

While it is true that *Morgan* did not directly contemplate a post-charge discriminatory act in its analysis, it was critical of the breadth of the continuing violations doctrine, stating, “There is simply no indication that the term ‘practice’ converts related discrete acts into a single unlawful practice for the purposes of timely filing.”<sup>128</sup> It also reversed the Court of Appeals’ holding that acts that are sufficiently related to the original act

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121. 42 U.S.C. § 2000e-5(e)(1).

122. *Richter v. Advance Auto Parts, Inc.*, 686 F.3d 847, 851 (8th Cir. 2012) (per curiam).

123. *Id.*

124. *Jones v. Calvert Grp. Ltd.*, 551 F.3d 297, 301–04 (4th Cir. 2009). In contrast, the Supreme Court in *Mohasco* rejected ignorance of statutory language as a reason for overlooking the statute’s plain meaning and refused to adopt a less literal reading of the statute, regardless of an unfair result in the case. *Mohasco Corp. v. Silver*, 447 U.S. 807, 824–26 (1980). *Richter* also noted that “[t]he overriding message of *Morgan* was to follow statutory text.” 686 F.3d at 852.

125. *Jones*, 551 F.3d at 303.

126. *Id.* at 303–04.

127. See *Nealon v. Stone*, 958 F.2d 584, 590 (4th Cir. 1992) (holding that “a plaintiff may raise the retaliation claim for the first time in federal court”).

128. *Morgan*, 536 U.S. at 111.

are not required to fall within the charge filing period.<sup>129</sup> Ultimately, the *Morgan* Court limited the continuing violations doctrine as it applies to all discrete acts, regardless of how closely related they are to another discrete act.<sup>130</sup>

Even given the commands of *Morgan* to follow the statutory text and to limit the continuing violations doctrine, the *Jones* Court largely dismissed *Morgan*, holding that *Morgan* only applies to pre-charge discriminatory acts.<sup>131</sup> The *Jones* Court did this because a narrow reading of *Morgan* was the only way to reach its desired conclusion. Under a broader reading of *Morgan*, the *Jones* Court would have to argue that post-charge retaliation is not a discrete, singular act. This argument fails because common retaliatory acts such as discharge or refusal to promote by their very nature may require only one single act to occur.<sup>132</sup> Under a broad reading, it does not matter that the retaliatory discharge is “related” to an earlier discriminatory act;<sup>133</sup> *Morgan* explicitly rejected the argument that related discrete acts can be converted into an “ongoing violation that can endure or recur over a period of time.”<sup>134</sup> Especially in conjunction with the plain meaning of Title VII, *Morgan* should be read broadly to require EEOC review of post-charge retaliation. However, many negative consequences arise as a result of this reading.

#### B. THE CONSEQUENCES OF A STRICT READING OF TITLE VII AND A BROAD READING OF *MORGAN*

Retaliation following an initial EEOC charge is a type of discrimination distinct from most of the employment practices made unlawful by Title VII, and implicates conflicting goals of Title VII. In circuits that follow the strict statutory text of Title

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129. *Id.* at 113; see *Morgan v. Nat'l R.R. Passenger Corp.* 232 F.3d 1008, 1015 (9th Cir. 2000), *rev'd*, 536 U.S. 101 (2002).

130. See *Morgan*, 536 U.S. at 113.

131. The *Jones* Court's discussion of *Morgan* took up less than one page of text. *Jones*, 551 F.3d at 303.

132. For a discharge, there is a single discriminatory event: the employee is fired from employment. In contrast, a hostile environment claim usually includes a series of acts: the very nature of this type of claim is the “cumulative effect of individual acts.” *Luciano v. Coca-Cola Enters., Inc.*, 307 F. Supp. 2d 308, 318 (D. Mass. 2004) (quoting *Morgan*, 536 U.S. at 115).

133. “Relatedness” was the very basis of the continuing violation doctrine: it allowed a claim to survive the statute of limitations if a plaintiff showed that there were a series of related acts, one of which fell within the 180-day period. *Berry v. Bd. of Supervisors*, 715 F.2d 971, 979 (5th Cir. 1983).

134. *Morgan*, 536 U.S. at 110–11.

VII, employers have gained certain advantages. However, serious negative consequences exist that damage an employee's opportunity to pursue all of her claims.

### 1. Retaliation Claims and Conflicting Goals of Title VII

A post-charge retaliation claim possesses unique qualities that differentiate it from other unlawful employment practices covered by Title VII. Before a claim for post-charge retaliation can arise, an original EEOC claim must have been filed.<sup>135</sup> By a strict reading of Title VII and a broad reading of *Morgan*, an individual must file a second claim and receive a right-to-sue letter before she can sue for retaliation.<sup>136</sup>

The anti-retaliation provision by its very nature prohibits discrimination by enforcing fair procedure, not by directly banning discrimination.<sup>137</sup> It does this through "[m]aintaining unfettered access to statutory remedial mechanisms."<sup>138</sup> This concern implicates two conflicting purposes of Title VII. First, courts have read Title VII's creation of the EEOC to encourage employers and employees to engage in conciliation efforts before coming to federal court.<sup>139</sup> Further, Congress strengthened conciliatory efforts in 1972 by giving the EEOC the power to commence civil suits if voluntary compliance failed.<sup>140</sup> The filing

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135. See *Gupta v. E. Tex. State Univ.*, 654 F.2d 411, 414 (5th Cir. 1981) ("It is the nature of retaliation claims that they arise after the filing of the EEOC charge.").

136. See *id.* ("Requiring prior resort to the EEOC would mean that two charges would have to be filed in a retaliation case . . .").

137. See *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 54 (2006) ("The antidiscrimination provision seeks a workplace where individuals are not discriminated against because of their status, while the antiretaliation provision seeks to prevent an employer from interfering with an employee's efforts to secure or advance enforcement of the Act's basic guarantees.").

138. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997).

139. See *Richter v. Advance Auto Parts, Inc.*, 686 F.3d 847, 853 (8th Cir. 2012) (per curiam) ("Exempting retaliation claims from the administrative framework established by Congress could frustrate the conciliation process, which we have called 'central to Title VII's statutory scheme.'" (quoting *Williams v. Little Rock Mun. Water Works*, 21 F.3d 218, 222 (8th Cir. 1994))).

140. Many civil rights groups in the 1960s referred to the EEOC as a "toothless tiger" because of its lack of an enforcement mechanism. *1965-1971: A "Toothless Tiger" Helps Shape the Law and Educate the Public*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <http://www.eeoc.gov/eeoc/history/35th/1965-71/index.html> (last visited Nov. 3, 2013); see also *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 358-66 (1977) (discussing the legislative history of the Equal Employment Opportunity Act, which gave the EEOC additional enforcement powers); Anne Noel Occhialino & Daniel Vail, *Why the EEOC (Still)*

of the charge itself also serves conciliatory purposes, as it puts the employer on notice of the claim so that it can commence internal resolution of the issue.<sup>141</sup> This conciliatory purpose is clearly satisfied by a strict reading of Title VII, as it gives the EEOC the opportunity to review and conciliate all retaliatory acts.<sup>142</sup>

The second purpose implicated by post-charge retaliation is reducing discrimination in general. The EEOC relies heavily on the availability of private lawsuits in order to reduce discrimination;<sup>143</sup> in 2011, 31.4 percent of charges filed under Title VII with the EEOC contained a claim of retaliation.<sup>144</sup> Without a robust anti-retaliation mechanism, it would be difficult to effectively combat discrimination in the workplace, as employees would be hesitant to file charges against their employers.<sup>145</sup> While it is clear that a strong anti-retaliation provision is necessary to reduce discrimination, a more in-depth examination of the implications for employers and employees is needed in order to see how a strict reading of Title VII results in a weakening of the provision.

## 2. Implications for Employers

At first it may appear as if a strict reading of Title VII is beneficial to an employer. It might allow employers to more ef-

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*Matters*, 22 HOFSTRA LAB. & EMP. L.J. 671, 688–89 (2005) (noting that in 1996 the EEOC recovered \$169.2 million from conciliation and settlement efforts).

141. See *Martinez v. Potter*, 347 F.3d 1208, 1211 (10th Cir. 2003) (“First, requiring exhaustion of administrative remedies serves to put an employer on notice of a violation prior to the commencement of judicial proceedings. This in turn serves to facilitate internal resolution of the issue rather than promoting costly and time-consuming litigation.”).

142. See *Richter*, 686 F.3d at 853; see also *supra* note 139.

143. See *Gupta v. E. Tex. State Univ.*, 654 F.2d 411, 414 (5th Cir. 1981) (“We are reluctant to erect a needless procedural barrier to the private claimant under Title VII, especially since the EEOC relies largely upon the private lawsuit to obtain the goals of Title VII.”); *Litigation Statistics*, *supra* note 41 (showing that in Fiscal Year 2011, 66.7 percent of cases were found to have no reasonable cause, meaning that the EEOC did not successfully conciliate or settle the case, nor did it commence a lawsuit on behalf of the employee).

144. *Enforcement and Litigation Statistics: Charge Statistics*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <http://eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited Nov. 3, 2013).

145. See *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67 (2006) (“Title VII depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses. . . . Interpreting the antiretaliation provision to provide broad protection from retaliation helps ensure the cooperation upon which accomplishment of the Act’s primary objective depends.” (citation omitted)).

ficiently retaliate against employees who file charges with the EEOC.<sup>146</sup> Or, to phrase it less cynically, it may cut down on the number of retaliation claims brought before the EEOC because an employee may be deterred by the extra time and money it would cost to navigate the EEOC process a second time.<sup>147</sup>

Could a strict reading of Title VII actually be bad for employers? Some might argue that a second EEOC charge would increase litigation costs.<sup>148</sup> Additionally, although an employer would certainly not want to see a second retaliation claim in federal court, barring the retaliation claim would not affect the viability of the other claims already reviewed by the EEOC. However, employers are more likely to have the resources to withstand a lengthy and expensive litigation process.<sup>149</sup> There could also be cost savings if employers were able to more efficiently retaliate against employees because it could cut down on the number of charges or lawsuits brought, as employees either might not understand the complexities of a double filing, or might be unwilling to take on the costs and risks of a second filing.<sup>150</sup> Ultimately, a strict reading of Title VII is more advantageous than not for employers.

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146. *Cf. Gupta*, 654 F.2d at 414 (“Eliminating this needless procedural barrier will deter employers from attempting to discourage employees from exercising their rights under Title VII.”).

147. *See id.*; *Nat’l Org. for Women v. Sperry Rand Corp.*, 457 F. Supp. 1338, 1344 (D. Conn. 1978) (noting that requiring a second charge with the EEOC for a retaliation claim erects “another procedural barrier to a Title VII suit”).

148. According to the EEOC, it took an average of six months to investigate a charge in 2004. *The Charge Handling Process*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <http://www.eeoc.gov/employees/process.cfm> (last visited Nov. 3, 2013). The addition of a second charge and investigation could add upwards of six months more onto the dispute. However, a second investigation may not be nearly as lengthy, as the EEOC would have uncovered much of the pertinent information already. *See Clockedile v. N.H. Dep’t of Corr.*, 245 F.3d 1, 4 (1st Cir. 2001) (“Further, the EEOC has appeared as amicus curiae, advising us that . . . it is ‘likely’ that the alleged retaliation against Clockedile for filing her charge would ‘have been uncovered in a reasonable EEOC investigation’ of the charge.”).

149. Some of the concerns about financial burdens for plaintiffs are alleviated by the fact that an employee who prevails in a Title VII dispute can collect attorney’s fees, economic damages, non-economic damages, and punitive damages. *See* Margaret H. Lemos, *Special Incentives to Sue*, 95 MINN. L. REV. 782, 799–800 (2011) (discussing the damages available in Title VII suits). However, this does not necessarily resolve whether litigation costs may dissuade aggrieved employees from filing suit, as the prospect of years of litigation for a mere chance at receiving damages may scare off some individuals with shakier claims or evidence. *See id.* at 790.

150. Of course, the procedural barriers of a second filing are not so great

### 3. Implications for Employees

The first problem for employees under a strict reading of Title VII is that it confuses even further the already complex statute of limitations scheme.<sup>151</sup> Without a strict reading, a normal case might look like this: an employer refuses to promote a female due to her gender. The employee then must file her claim with the EEOC within 180 days.<sup>152</sup> If the employer retaliates against the employee at any time after the filing of the charge, pre-*Morgan* a court would have considered the acts substantially related and not require an additional charge.<sup>153</sup> Then, the only other EEOC requirement the employee would deal with is ensuring that she filed her lawsuit within ninety days after receiving the right-to-sue letter.<sup>154</sup>

However, if a court follows the strict reading of Title VII, the statute of limitations is not as clear. If the employer immediately retaliated against the employee for filing the claim, the employee may have a chance to amend her EEOC charge, or could instead opt to file an additional charge.<sup>155</sup> Either way, the employee would have to file the amendment or new charge with the EEOC within 180 days of the retaliation in order to be considered timely.<sup>156</sup> If there were two concurrent charges, the em-

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that an employee would refuse to take on the difficulty and costs of pursuing the second claim if the employer obviously retaliated. *Cf. id.* at 797 n.64 (discussing how plaintiffs are most likely to sue when optimistic about their success). However, employers rarely leave direct evidence of discrimination, leaving employees with the arduous task of proving intent through indirect evidence. See Ann C. McGinley, *Viva la Evolución!: Recognizing Unconscious Motive in Title VII*, 9 CORNELL J.L. & PUB. POL'Y 415, 448–66 (2000) (discussing the difficulty of proving intent through indirect evidence after recent Supreme Court decisions).

151. See Charles A. Sullivan, *Raising the Dead?: The Lilly Ledbetter Fair Pay Act*, 84 TUL. L. REV. 499, 507 (2010) (“The [EEOC] scheme obviously has pitfalls in plenty for the potential plaintiff . . . It is fair to say that the run-up to a Title VII suit is a procedural minefield, which is especially unfortunate given that the structure is designed to be initiated by individuals without the assistance of private attorneys.”).

152. 42 U.S.C. § 2000e-5(e)(1) (2006). The situation becomes even more complex when a state enforcement agency is involved. In that situation, the employee must comply with the state statute’s time limitations, and must file with the EEOC within 300 days of the unlawful employment practice or within thirty days after termination of the proceedings by the state agency. *Id.*

153. See *supra* Part I.D.1.

154. 29 C.F.R. § 1601.28(e)(1) (2013).

155. The regulations require an amendment alleging additional acts which constitute unlawful employment practices to be related to or growing out of the subject matter of the original charge. 29 C.F.R. § 1601.12(b).

156. 42 U.S.C. § 2000e-5(e)(1).

ployee would have to make sure that she filed her lawsuit within ninety days of receipt of each right-to-sue letter,<sup>157</sup> and then either pursue both lawsuits separately or seek a joinder.<sup>158</sup> If the employer waited to retaliate until the EEOC issued the initial right-to-sue letter and the employee filed suit, the employee would be required to file a new EEOC charge,<sup>159</sup> and would then be tasked with simultaneously navigating the EEOC process a second time and pursuing a claim in federal court.<sup>160</sup> Even with the added complexity to the process, an employee should be able to navigate a double filing with the assistance of competent counsel. However, not only is it possible for an employee to initially navigate the EEOC process without the assistance of counsel,<sup>161</sup> it is very common.<sup>162</sup> Ultimately, the confusions and strict deadlines resulting from the above EEOC process make it inevitable that some employees will have their retaliation claims barred by the statute of limitations.<sup>163</sup>

In addition to the daunting EEOC procedures, other factors may dissuade an employee from filing a second EEOC claim for retaliation. First, an employee may feel as if a second EEOC filing would be useless.<sup>164</sup> If the first EEOC charge resulted in a

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157. 29 C.F.R. § 1601.28(e)(1).

158. The Federal Rules of Civil Procedure allow a plaintiff to join as many claims as she has against an opposing party. FED. R. CIV. P. 18(a).

159. See *Richter v. Advance Auto Parts, Inc.*, 686 F.3d 847, 853 (8th Cir. 2012) (per curiam).

160. See *id.* at 859 (Bye, J., dissenting) (discussing the negative policy implications of requiring a double filing).

161. For example, the EEOC publicly states on its website that a complainant does not need to be represented by an attorney in order to file a discrimination complaint. *Youth at Work FAQ*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <http://www.eeoc.gov/youth/filingfaq.html#Q2> (last visited Nov. 3, 2013).

162. See *Love v. Pullman Co.*, 404 U.S. 522, 527 (1972) (calling a particularly worrisome procedural technicality in Title VII “inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process”); see also Ann C. Hodges, *Mediation and the Americans with Disabilities Act*, 30 GA. L. REV. 431, 482 (1996) (examining EEOC proceedings under the ADA, and determining that “in many cases, the employer will be represented by legal counsel while the employee will not”).

163. See Michael Lee Wright, *Time Limitations for Civil Rights Claims: Continuing Violation Doctrine*, 71 TENN. L. REV. 383, 384–85 (2004) (discussing confusing case law regarding time-barred discrimination claims and how employees may fail to timely file).

164. See *Butts v. City of N.Y. Dept. of Hous. Pres. & Dev.*, 990 F.2d 1397, 1402 (2d Cir. 1993) (“Due to the very nature of retaliation, the principle benefits of EEOC involvement, mediation of claims and conciliation, are much less likely to result from a second investigation.”), *superseded by statute on other grounds*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified



federal lawsuit, it is apparent that the EEOC's conciliatory efforts did not work for the first charge, and would likely not work for a second charge either.<sup>165</sup> Additionally, an employee may feel as if she wants to pursue the retaliation claim, but is afraid of the employer retaliating again for the filing of a charge, which in turn would necessitate another EEOC charge.<sup>166</sup> And, of course, there are time and money costs associated with a second EEOC filing and a second lawsuit that may deter employees or their lawyers from pursuing a retaliation claim.<sup>167</sup>

It is not as if these concerns about an employee's rights are new; many of these policy arguments were made in pre-*Morgan* cases when the continuing violations doctrine was the norm.<sup>168</sup> However, *Morgan* and the statutory language of Title VII make it clear that the EEOC has mandatory review of all claims arising under Title VII, and thus that a post-charge retaliatory act necessitates a second filing.<sup>169</sup> Given how this proper reading affects the viability of a post-charge retaliation claim, it is evident that Title VII must be amended in order to ensure the viability of retaliation claims.

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as amended in scattered sections of 42 U.S.C.), *as recognized in* *Carter v. New Venture Gear, Inc.*, 310 F. App'x 454, 458 (2d Cir. 2009).

165. See *Jones v. Calvert Grp., Ltd.*, 551 F.3d 297, 302 (4th Cir. 2009) ("Addressing the facts of [*Nealon*], we reasoned that . . . because conciliation with the [employer] had not improved [the employee's] position following the first EEOC charge, it would not have been likely to do so had she filed a second charge." (citing *Nealon v. Stone*, 958 F.2d 584, 590 (4th Cir. 1992))).

166. See *Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1312 (7th Cir. 1989) ("[H]aving once been retaliated against for filing an administrative charge, the plaintiff will naturally be gun shy about inviting further retaliation by filing a second charge complaining about the first retaliation."), *superseded by statute on other grounds*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C.), *as recognized in* *Luevano v. Wal-Mart Stores, Inc.*, 722 F.3d 1014, 1030 (7th Cir. 2013).

167. In an hourly fee billing arrangement, a client may pressure their attorney to not file a second claim because of the additional hours that would have to be billed. Conversely, in a contingency-fee billing arrangement, an employee's attorney may pressure their client not to file a second claim unless the second claim significantly increases the likelihood or amount of a judgment or settlement. For both arrangements, these costs include the costs of representing an employee in front of EEOC investigations and conciliation efforts. See *The Charge Handling Process*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <http://www.eeoc.gov/employees/process.cfm> (last visited Nov. 3, 2013).

168. See, e.g., *Gupta v. E. Tex. State Univ.*, 654 F.2d 411, 414 (5th Cir. 1981).

169. See *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 116–17 (2002) (discussing the statutory scheme regarding review).

### III. AMELIORATING THE HARDSHIPS AND INEQUITY CAUSED BY A STRICT READING OF TITLE VII TO RETALIATION CLAIMS

In order to ensure the viability of retaliation claims, this Note proposes adding the following language to 42 U.S.C. § 2000e-5(e)(1): “An allegation of retaliation arising from the prior filing of a charge under this section shall not require an additional filing to, or review by, the Commission.” The narrow purpose of this amendment is to exempt post-charge retaliation claims from mandatory EEOC review. Doing so essentially preempts a future Supreme Court from expanding its principles in *Morgan* to post-charge retaliation claims. Ideally, the amendment would return all the circuits to the way they treated post-charge retaliation before *Morgan* admonished them to follow the strict text of Title VII.

Why is an amendment necessary? The other obvious solution would be to let the courts deal with the issue; after all, the Fourth Circuit successfully minimized the holding of *Morgan* to not affect a post-charge retaliatory act.<sup>170</sup> However, two other circuits have explicitly come down on the other side,<sup>171</sup> and the Supreme Court would have both its own precedent<sup>172</sup> and a recent history of conservativeness towards statutory text in employment law<sup>173</sup> to support a strict reading of Title VII. Further, the Supreme Court will likely not have a chance to settle the split in the near future, as the Court dismissed the petition for certiorari pursuant to Rule 46 on March 1, 2013.<sup>174</sup> Even it was able to hear such a case, the current Court has proven itself hostile to complainants under Title VII.<sup>175</sup> With a second term of President Obama, it is certainly possible that a new liberal court could interpret Title VII in favor of a new plaintiff who is

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170. See *Jones v. Calvert Grp., Ltd.*, 551 F.3d 297, 303 (4th Cir. 2009).

171. *Richter v. Advance Auto Parts, Inc.*, 686 F.3d 847 (8th Cir. 2012) (per curiam); *Martinez v. Potter*, 347 F.3d 1208 (10th Cir. 2003).

172. *Morgan*, 536 U.S. at 101.

173. For an exploration of the Supreme Court's recent conservative approach to Title VII, particularly concerning *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), see Kathryn A. Eidmann, Comment, *Ledbetter in Congress: The Limits of a Narrow Legislative Override*, 117 YALE L.J. 971, 972–78 (2008).

174. *Richter v. Advance Auto Parts, Inc.*, 133 S. Ct. 1391 (2013) (mem.) (dismissing petition for writ of certiorari pursuant to Supreme Court Rule 46.1). Rule 46.1 of the Supreme Court Rules allows parties to file an agreement to dismiss the case. SUP. CT. R. 46.1.

175. See, e.g., *Vance v. Ball State Univ.*, 133 S. Ct. 2434 (2013).

similarly situated to Ms. Richter. However, trying to predict the makeup of a future Supreme Court, let alone what their decision on the issue would be, is conjectural at best.<sup>176</sup> Instead of hoping that a future Supreme Court will skirt around the language of Title VII, which the Court in *Morgan* admonished lower courts for doing,<sup>177</sup> the better answer is to change the source of the issue: the statutory text.

Some critics might argue that the solution is too narrow, and that it solves only a small solution in the larger mess of EEOC procedure.<sup>178</sup> This often is based on the assertion that the EEOC lacks resources for effective conciliation or litigation, a claim often made by the EEOC itself.<sup>179</sup> However, the two extreme solutions—either completely eliminating the EEOC’s mandatory review or significantly increasing its funding—would fundamentally alter the employment litigation process in the United States. This note does not propose such radical solutions, and instead operates under the assumption that the EEOC will continue to operate under its current level of authority. Alternatively, critics might argue that such a small change to Title VII is not worth of Congressional time or attention. However, a change of similar scope was made in 2009 by

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176. For a recent example, see the conservative reaction to Chief Justice Roberts’ decision in *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012). See Caroline May, *After Obamacare Ruling, Conservatives Turn on Chief Justice Roberts*, DAILY CALLER (June 28, 2012, 4:34 PM), <http://dailycaller.com/2012/06/28/after-obamacare-ruling-conservatives-turn-on-chief-justice-roberts> (“Our Constitution is dead . . . and we can thank our chief justice for that.” (quoting Young America’s Foundation spokesperson Ron Meyer)).

177. See *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 108 (2002) (“While the lower courts have offered reasonable, albeit divergent, solutions, none are compelled by the text of the statute. In the context of a request to alter the timely filing requirements of Title VII, this Court has stated that ‘strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law.’” (quoting *Mohasco Corp. v. Silver*, 447 U.S. 907, 826 (1980))).

178. See, e.g., Eidmann, *supra* note 173, at 972, 978 (arguing that overly specific amendments to certain parts of Title VII would hinder future discrimination claims and “promote future narrowing of the doctrine interpreting Title VII’s EEOC charge provision”).

179. See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-712, EQUAL EMPLOYMENT OPPORTUNITY: PILOT PROJECTS COULD HELP TEST SOLUTIONS TO LONG-STANDING CONCERNS WITH THE EEO COMPLAINT PROCESS 13 (2009) (“Many EEO practitioners across the various practitioner groups identified a lack of resources . . . as impeding the timely processing of federal EEO complaints.”).

the Lilly Ledbetter Fair Pay Act.<sup>180</sup> The Fair Pay Act of 2009 amended Title VII to allow the statute of limitations for an equal pay lawsuit to renew each time a plaintiff is compensated under the discriminatory scheme.<sup>181</sup> It was enacted in direct response to the Supreme Court's strict adherence to Title VII's text.<sup>182</sup> Of course, Congress is more likely to enact legislation because of a controversial Supreme Court decision than from a seemingly innocuous circuit split. Nevertheless, President Obama has shown that he supports employee's rights in amending Title VII, so another amendment could certainly be enacted with effective lobbying or political pressure.

Other critics might dispute whether the EEOC needs to be amended at all. After all, if Title VII is to retain the EEOC's mandatory review of all other charges except for retaliation, critics would argue that there is nothing special about retaliation that should exempt it from the EEOC's notice and conciliatory purposes. These critics would argue that conciliation and notice play important<sup>183</sup> and effective roles.<sup>184</sup> However, while conciliation efforts do remain an essential justification for the very existence of a mandatory filing EEOC,<sup>185</sup> it is harder to

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180. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (codified as amended in scattered sections of 29 and 42 U.S.C. (2006)). Admittedly, the issue of equal pay of women is a much more politically charged issue in the national discourse. See Deborah Thompson Eisenberg, *Money, Sex, and Sunshine: A Market-Based Approach to Pay Discrimination*, 43 ARIZ. ST. L.J. 951, 954 (2011) (discussing recent equal-pay lawsuits and highlighting some of the public calls for reform).

181. 42 U.S.C. § 2000e-5(e) (2006).

182. Lilly Ledbetter Fair Pay Act § 2, 123 Stat. at 5 ("The Supreme Court in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), significantly impairs statutory protections against discrimination in compensation that Congress established . . . . The Ledbetter decision undermines those statutory protections by unduly restricting the time period in which victims of discrimination can challenge and recover for discriminatory compensation decisions or other practices, contrary to the intent of Congress.").

183. Indeed, in many decisions that enforce the EEOC's review and investigation powers, courts note the importance of the EEOC's conciliatory efforts. See *Eatmon v. Bristol Steel & Iron Works, Inc.*, 769 F.2d 1503, 1509 (11th Cir. 1985) ("The courts concluded that the emphasis in Title VII on conciliation and the legislative history of Title VII indicate that Congress intended Title VII to be enforced primarily through conciliation and voluntary compliance.").

184. In fiscal year 2011, the EEOC reported that it successfully settled and conciliated 9.8 percent of all cases. See *Litigation Statistics*, *supra* note 41.

185. For a particularly scathing analysis of the EEOC's role in employment litigation, see Katherine A. Macfarlane, *The Improper Dismissal of Title VII Claims on "Jurisdictional" Exhaustion Grounds: How Federal Courts Require that Allegations Be Presented to an Agency Without the Resources to Consider Them*, 21 GEO. MASON U. CIV. RTS. L.J. 213, 238-39 ("Thus, the

justify the requirement of a second conciliation effort for the sake of uniformity, especially when the first conciliation effort so clearly failed.<sup>186</sup> While conciliation efforts should remain necessary in Title VII litigation for most forms of discrimination, retaliation following an EEOC filing is a unique form of discrimination, and Title VII must be amended to ensure that employees are protected with a robust anti-retaliation clause.

#### CONCLUSION

Recent court decisions have significantly weakened the viability of retaliation claims under Title VII. Courts have struggled to find a balance between adhering to the strict language of Title VII and upholding the goals and policies of the anti-discrimination statute. While requiring an aggrieved individual to file an additional charge for retaliation ensures that the EEOC has an opportunity to review and investigate all claims arising under Title VII, it incentivizes employers to retaliate against employees who file charges and discourages employees from filing additional charges of retaliation. Unfortunately for employees, such a strict adherence to the text of Title VII is a proper reading of the statute and of Supreme Court precedent. The damaging ramifications to an employee's retaliation claims, which are essential for Title VII's success, necessitate a statutory change. A statutory exception of post-charge retaliation from mandatory EEOC review would most effectively resolve this conflict. Without this statutory change, Title VII lays another significant mine to the already complex procedural minefield of employment discrimination litigation.

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presentment requirement ignores the realities of Title VII enforcement. . . . Although the EEOC lacks the funds to enforce Title VII in the way it was intended to and private plaintiffs are left to stand in its stead, private plaintiffs, even those that have the resources which the EEOC lacks to investigate, are left more restricted than the agency whose role they are performing.”).

186. See *Nealon v. Stone*, 958 F.2d 584, 590 (4th Cir. 1992) (holding that a second filing was unnecessary because “conciliation with the [employer] did not improve her position the first time and would be unlikely to do so a second time”).