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Comments

Discrimination, Retaliation, and the EEOC: The Circuit Split Over the Administrative Exhaustion Requirement in Title VII Claims

Jordan J. Feist*

Abstract

Title VII of the Civil Rights Act of 1964 established the procedure by which an individual may bring a claim of employment discrimination. Before an individual can sue an alleged violator of Title VII, that person must first file a charge with the Equal Employment Opportunity Commission (EEOC). In many cases, an individual who does not file an EEOC charge will see his or her case dismissed for failure to adhere to the administrative exhaustion requirement.

Although seemingly simple, the administrative exhaustion requirement is not devoid of controversy. For nearly a decade, federal courts have been split over the issue of whether an individual who has filed an employment discrimination charge with the EEOC and who later alleges unlawful retaliation must file a subsequent EEOC charge on the retaliation claim. Some courts have recognized an exception to the administrative exhaustion requirement under circumstances such as these, whereby an individual could allege retaliation for the first time in

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district court so long as the alleged retaliation is "like or reasonably related" to the previously alleged discrimination. Other courts have ruled that no exceptions to the administrative exhaustion requirement should be made and that failure to file a subsequent retaliation charge precludes the claim.

This Comment first details the purpose of Title VII. This Comment then examines the split among federal courts over whether courts should make exceptions to the administrative exhaustion requirement. Finally, this Comment concludes that to preserve the important functions of the charge-filing process—putting the employer and EEOC on notice of an alleged violation and allowing the employer and aggrieved party to engage in voluntary conciliation proceedings—courts should not make any exceptions to the administrative exhaustion requirement.

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I. INTRODUCTION

Congress enacted Title VII of the Civil Rights Act of 1964[1] to end workplace discrimination on the basis of "race, color, religion, sex, [and] national origin."[2] The main purposes of Title VII are to ensure equal opportunities in employment[3] and to "remedy discrimination against members of groups that [have] historically been excluded from equal access to social, political, and economic power."[4] To achieve these goals, Title VII provided for the creation of an enforcement commission—the Equal Employment Opportunity Commission (EEOC).[5] Rather than providing an automatic private right of action, Congress established a procedure by which an individual seeking to file an employment discrimination claim must first file a charge with the EEOC.[6] The charge-filing requirement is significant because plaintiffs who fail to exhaust their administrative remedies before filing a lawsuit will see their lawsuit dismissed.[7]

In addition to its importance, the charge-filing requirement is also the subject of disagreement among the federal courts as to whether courts should make exceptions to the administrative exhaustion requirement.[8] Specifically, some courts have concluded that an individual who has filed an EEOC charge need not file a charge alleging subsequent discrimination or retaliation if the subsequent acts complained of are "like or reasonably related" to the acts complained of in the initial charge.[9] Other courts have decided that no exceptions to the administrative exhaustion requirement should be made.[10]

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1. 42 U.S.C. § 2000e-2(a) (2006).
2. *Id.*
3. *See* Griggs v. Duke Power Co., 401 U.S. 424, 429–30 (1971).
4. Rosa Ehrenreich, *Dignity and Discrimination: Toward a Pluralistic Understanding of Workplace Harassment*, 88 GEO. L.J. 1, 62 (1999).
5. 42 U.S.C. § 2000e-4(a).
6. *Id.* § 2000e-5(e)(1).
7. *See, e.g.*, Bonds v. Leavitt, 629 F.3d 369, 379 (4th Cir. 2011) ("In the context of *Title VII*, prior to filing a discrimination claim, a claimant is required to exhaust administrative remedies with the EEOC or its state equivalent."); Shikles v. Sprint/United Mgmt. Co., 426 F.3d 1304, 1317 (10th Cir. 2005) ("It is well-established that Title VII requires a plaintiff to exhaust his or her administrative remedies before filing suit.").
8. *See infra* Part II.D.
9. *See* Jones v. Calvert Grp., 551 F.3d 297 (4th Cir. 2009); Delisle v. Brimfield Twp. Police Dep't, 94 F. App'x 247 (6th Cir. 2004); Lyons v. England, 307 F.3d 1092 (9th Cir. 2002); Fentress v. Potter, No. 09-C-2231, 2012 U.S. Dist. LEXIS 62484 (N.D. Ill. May 4, 2012).
10. *See* Richter v. Advance Auto Parts, Inc., 686 F.3d 847 (8th Cir. 2012); Martinez v. Potter, 347 F.3d 1208 (10th Cir. 2003); Terhune v. Potter, No. 8:08-cv-1218-T-23MAP, 2009 U.S. Dist. LEXIS 66343 (M.D. Fla. July 31, 2009); Casiano v. Gonzales, No. 3:04CV67/RV/MD, 2006 U.S. Dist. LEXIS 3593 (N.D. Fla. Jan. 31, 2006); Romero-Ostolaza v. Ridge, 370 F. Supp. 2d 139 (D.D.C. 2005).

This Comment will demonstrate why the application of the "like or reasonably related" test is improper in employment discrimination claims. Consequently, this Comment will argue that federal courts should not make any exceptions to the administrative exhaustion requirement.

Part II of this Comment will examine the history and purposes of Title VII and the EEOC. Additionally, Part II will explain the "like or reasonably related" test and detail the rationale of the courts that adhere to this test. Part II will also address the circuit split that has grown out of conflicting interpretations of *National Railroad Passenger Corp. v. Morgan*,[11] a recent U.S. Supreme Court decision.

Part III will address potential solutions to the circuit split and will weigh the merits of each potential solution. Part III concludes that, in order to adhere to the U.S. Supreme Court's interpretation of Title VII and to promote important policy considerations, an individual who has filed an EEOC charge should be required to file another charge for each subsequent alleged Title VII violation.

Part IV will provide a conclusion to the issues raised in this Comment.

II. THE BACKGROUND OF TITLE VII AND THE CIRCUIT SPLIT OVER THE ADMINISTRATIVE EXHAUSTION REQUIREMENT

A. *The Purpose, Scope, and Implications of Title VII*

Title VII classifies certain actions of employers as "unlawful employment practices."[12] For example, Title VII makes it unlawful for employers to hire, refuse to hire, fire, or otherwise discriminate against individuals with regard to "compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[13] The U.S. Supreme Court has enumerated a number of additional "discrete acts"[14] that qualify as unlawful employment practices under Title VII, such as an employer's denial of an employee's transfer request and an employer's refusal to promote an employee.[15] Furthermore, Title VII prohibits employers from retaliating against an

11. Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101 (2002).
12. 42 U.S.C. § 2000e-2(a) (2006).
13. *See id.*
14. *Morgan*, 536 U.S. at 111. A discrete act or single occurrence of discrimination should be distinguished from hostile work environment claims because the latter inherently "involve[] repeated conduct" such that the "unlawful employment practice . . . cannot be said to occur on any particular day." *Id.* at 115. Furthermore, a hostile work environment claim "occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own." *Id.*
15. *See id.* at 114.

employee or potential employee who has "made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing."[16]

To enforce the provisions of Title VII, Congress created the EEOC by passing the Civil Rights Act of 1964.[17] Initially, the EEOC had little authority to enforce Title VII[18] and was often regarded as a "toothless tiger."[19] In an effort to strengthen the power of the EEOC, Congress passed the Equal Employment Opportunity Act of 1972 ("1972 Act").[20] As a result of the 1972 Act, Congress granted the EEOC the statutory authority to bring a civil action against private employers who violate Title VII.[21] The 1972 Act led to the EEOC's mission shifting from "mere investigation and conciliation to litigation against private employers."[22]

For an aggrieved person to bring a Title VII action, he or she must first file a charge with the EEOC within 180 days of the alleged unlawful employment practice.[23] However, when the person filing the charge has initiated a similar proceeding with a state or local agency that has the authority to grant relief for employment discrimination claims, that individual has 300 days from the occurrence of the unlawful employment practice to file a charge with the EEOC.[24]

After the charging party has filed an EEOC charge, the EEOC must investigate the claim.[25] If the EEOC determines that there is "reasonable cause" to believe that the allegations in the charge are true, the EEOC has the statutory duty to eliminate the unlawful employment practice by "informal methods of conference, conciliation, and persuasion."[26] Under Title VII, conciliation is a method by which the EEOC is required to attempt to remedy findings of unlawful employment practices.[27] The EEOC may choose, at its discretion, to bring a civil claim against a

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16. 42 U.S.C. § 2000e-3(a).
17. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 258.
18. Anne N. Occhialino & Daniel Vail, *Why the EEOC (Still) Matters*, 22 HOFSTRA LAB. & EMP. L.J. 671, 672 (2005).
19. *Id.* at 677.
20. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103–13.
21. *See* 42 U.S.C. §§ 2000e-4(g)(6), 2000e-5(f)(1).
22. Occhialino & Vail, *supra* note 18, at 677.
23. 42 U.S.C. § 2000e-5(e)(1).
24. *Id.*
25. *Id.* § 2000e-5(b).
26. *Id.*
27. *See id.* ("If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.").

private employer that is accused of violating Title VII.[28] But if the EEOC dismisses a charge, or if the EEOC has not filed a lawsuit, or has not entered into a conciliation agreement with the aggrieved person and respondent within 180 days of the charge's filing, notice must be given to the aggrieved person, who then has 90 days to file a civil lawsuit against the named respondent.[29] In resolving a Title VII claim, a federal court may grant injunctive relief,[30] compensatory damages, or punitive damages.[31]

B. *The "Like or Reasonably Related" Test*

Under Title VII, it is well-established that plaintiffs must exhaust their administrative remedies by filing a charge with the EEOC before being permitted to bring a lawsuit in federal court.[32] Not uncommonly, however, plaintiffs who have received a Notice of Right to Sue on a discrimination claim have brought federal lawsuits alleging retaliation for having filed the initial EEOC charge.[33] Such lawsuits ask whether a plaintiff who has exhausted his or her administrative remedies with respect to the discrimination claim must file a separate charge with the EEOC on the retaliation claim.[34]

Prior to the U.S. Supreme Court's ruling in *National Railroad Passenger Corp. v. Morgan*, courts generally permitted plaintiffs to raise a claim of unlawful retaliation for the first time at the district court level without first filing an additional EEOC charge.[35] Courts have allowed plaintiffs to bring such a claim for the first time in district court so long as the newly alleged acts of retaliation were "like or reasonably related" to the discrete acts for which the administrative remedies had been exhausted.[36] However, some circuit courts have taken the view that

28. 42 U.S.C. §§ 2000e-4(g)(6), 2000e-5(f)(1).

29. *Id.* § 2000e-5(f)(1). Such notice is commonly referred to as a "Notice of Right to Sue." *See, e.g.*, Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 106 (2002).

30. 42 U.S.C. § 2000e-5(g)(1).

31. *Id.* § 1981a(1) (2006).

32. *See supra* note 7 and accompanying text.

33. *See, e.g.*, Nealon v. Stone, 958 F.2d 584 (4th Cir. 1992) (involving a plaintiff who raised an unlawful retaliation claim for the first time in federal court after the EEOC found no reasonable cause for the plaintiff's gender discrimination charge); Wentz v. Md. Cas. Co., 869 F.2d 1153 (8th Cir. 1989) (involving a plaintiff who was terminated the day after filing an age discrimination charge with the EEOC and who raised an unlawful retaliation claim for the first time in federal court).

34. *See infra* Part II.D.

35. *See, e.g.*, *Nealon*, 958 F.2d at 590; *Wentz*, 869 F.2d at 1155.

36. *See, e.g.*, Ingels v. Thiokol Corp., 42 F.3d 616, 625 (10th Cir. 1994) ("[W]hen 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

Morgan prohibits using the "like or reasonably related" test to allow a plaintiff to raise an unlawful retaliation claim for the first time in district court when the plaintiff did not first file a retaliation charge with the EEOC.[37]

C. *The Root of the Controversy:* National Railroad Passenger Corp. v. Morgan

In 1990, Morgan, an African-American male, began working for Amtrak as an "Electrician Helper."[38] From 1991 to 1995, Morgan was subject to disciplinary action by Amtrak on several occasions.[39] As a result, several times to no avail Morgan contacted Amtrak's Equal Employment Office, as well as his Congressperson, complaining that he was discriminated against because of his race.[40] Then, in February of 1995, Morgan was accused of threatening one of his supervisors.[41] When another of Morgan's supervisors demanded to discuss the incident with Morgan, Morgan refused to have the conversation without union representation and went home.[42] Ultimately, Morgan was suspended, and, after an investigatory hearing, Morgan's employment was terminated.[43]

On February 27, 1995, after Morgan's suspension but before his termination, he filed a charge with the EEOC and the California Department of Fair Employment and Housing, alleging discrimination and retaliation.[44] The EEOC issued a Notice of Right to Sue, and in October of 1996, Morgan filed a lawsuit in federal court against the National Railroad Passenger Corporation (NRPC), which was doing business as Amtrak.[45] Although some of the alleged discriminatory acts fell within the 300-day statutory period for filing an EEOC charge,[46]

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pendency of the charge." (quoting Brown v. Hartshorne Pub. Sch. Dist. No. 1, 864 F.2d 680, 682 (10th Cir. 1988))) (internal quotation marks omitted). *See also infra* Part II.D.2.

37. *See infra* Part II.D.1.

38. Morgan v. Nat'l R.R. Passenger Corp., 232 F.3d 1008, 1011 (9th Cir. 2000), *rev'd in part, aff'd in part*, 536 U.S. 101 (2002).

39. *See id.* at 1011–13.

40. *See id.*

41. *See id.* at 1013.

42. *See id.*

43. Morgan v. Nat'l R.R. Passenger Corp., 232 F.3d 1008, 1013 (9th Cir. 2000), *rev'd in part, aff'd in part*, 536 U.S. 101 (2002).

44. *See id.* at 1014.

45. Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 106 (2002).

46. *See* 42 U.S.C. § 2000e-5(e)(1) (2006). Because Morgan filed his charge with an appropriate state agency in addition to filing a charge with the EEOC, Morgan had 300 days to bring a lawsuit in federal court as opposed to only 180 days, which Morgan would have had if he filed the charge only with the EEOC. *See id.*; *Morgan*, 536 U.S. at 105–06.

many of the alleged acts occurred much earlier and fell outside of the statutory period.[47] As a result, the NRPC filed a motion for summary judgment on all incidents that had occurred more than 300 days before Morgan filed his EEOC charge.[48]

The district court granted the NRPC's motion and concluded that the NRPC could not be held liable for the alleged acts of discrimination that occurred more than 300 days before Morgan filed his EEOC charge because of the statute of limitations.[49] On appeal, the Ninth Circuit reversed, reasoning that the "continuing violation doctrine . . . allows courts to consider conduct that would ordinarily be time barred as long as the untimely incidents represent an ongoing unlawful employment practice."[50] The Ninth Circuit reasoned that a plaintiff could utilize the continuing violation doctrine in one of two ways: (1) by establishing that an alleged act of discrimination which occurred outside the statute of limitations period was "sufficiently related" to the alleged acts which occurred within the statute of limitations period; or (2) by proving a "systematic policy or practice of discrimination that operated, in part, within the limitations period."[51] The Ninth Circuit concluded that the "pre-limitations conduct at issue in this case [was] sufficiently related to the post-limitations conduct to invoke the continuing violation doctrine."[52]

On appeal, the U.S. Supreme Court considered whether a plaintiff in a Title VII action may file a lawsuit and allege discrete acts of

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

48. *See id.*

49. *See id.*

50. *Id.* at 106–07 (internal quotation marks omitted). The continuing violation doctrine was first adopted by a district court at the request of the EEOC. *See* King v. Ga. Power Co., 295 F. Supp. 943, 947 (N.D. Ga. 1968) (noting that the complaint is "confined to those issues the original complaint has standing to raise, but may properly encompass any such discrimination like or reasonably related to the allegations of the charge and growing out of such allegations during the pendency of the case before the [EEOC]"). The doctrine was later adopted by federal circuit courts. *See, e.g.*, Sanchez v. Standard Brands, Inc., 431 F.2d 455, 466 (5th Cir. 1970) (adopting the continuing violation doctrine as prescribed in *King*, 295 F. Supp. at 947). One should note that the "like or reasonably related" test is often associated with the continuing violation doctrine in addition to being associated with otherwise time-barred discrete acts. *See, e.g.*, *King*, 295 F. Supp. at 947. As a result, many courts have used the term "continuing violation doctrine" to describe the practice of allowing a plaintiff to raise a claim of post-charge-filing retaliation for acts "like or reasonably related" to discrete acts of discrimination for which administrative remedies have already been exhausted. *See, e.g.*, Martinez v. Potter, 347 F.3d 1208, 1211 (10th Cir. 2003). *But see* Delisle v. Brimfield Twp. Police Dep't, 94 F. App'x 247, 253 (6th Cir. 2004) (treating the continuing violation doctrine as only applying to pre-charge-filing discrete acts).

51. *Morgan*, 536 U.S. at 107.

52. Morgan v. Nat'l R.R. Passenger Corp., 232 F.3d 1008, 1016 (9th Cir. 2000), *rev'd in part, aff'd in part*, 536 U.S. 101 (2002).

discrimination that fall outside of the statute of limitations period.[53] The Court held that a plaintiff may not recover for alleged acts of discrimination or retaliation that occurred outside of the statute of limitations period.[54] This rule applies even if the discrete acts outside of the statute of limitations period are related to the discrete acts that fall within the statute of limitations period.[55] However, the Court preserved the use of the continuing violation doctrine in hostile work environment claims because of the unique nature of such claims.[56]

Although *Morgan* involved discrete acts which took place outside of the statute of limitations period, the Court's holding and rationale have raised new questions. For example, *Morgan* has raised the question of whether plaintiffs, who have exhausted their administrative remedies on a discrimination claim, must file a separate EEOC charge before being able to allege a post-charge-filing discrete act, such as retaliation, in a federal lawsuit.[57] *Morgan* may affect post-charge-filing discrete acts such as retaliation in addition to discrete acts that fall outside of the statute of limitations period because of the Court's interpretation of the text of Title VII.[58]

For instance, the U.S. Supreme Court considered what constitutes an "unlawful employment practice."[59] The Court dismissed Morgan's argument that the continuing violation doctrine is available to plaintiffs because an "unlawful employment practice" can be ongoing.[60] In response to Morgan's argument, the Court stated that Title VII does not suggest "the term 'practice' converts related discrete acts into a single unlawful practice for the purposes of timely filing."[61] In support of its conclusion, the Court noted that the term "practice" has consistently been interpreted to apply to discrete or single acts regardless of whether the "practice" was connected to other discrete acts.[62] The Court further explained that "[e]ach discrete discriminatory act starts a new clock for filing charges alleging that act,"[63] and that "[e]ach incident of

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

54. *See id.* at 105, 111.

55. *See id.*

56. *See id.* at 105; *supra* note 14 and accompanying text.

57. *See, e.g.*, Richter v. Advance Auto Parts, Inc., 686 F.3d 847 (8th Cir. 2012); Jones v. Calvert Grp., 551 F.3d 297 (4th Cir. 2009).

58. *See, e.g.*, *Richter*, 686 F.3d at 850; *Jones*, 551 F.3d at 301.

59. *See Morgan*, 536 U.S. at 105.

60. *See id.*

61. *See id.* at 111.

62. *Id.* (citing Int'l Union of Elec. Workers, Local 790 v. Robbins & Myers, Inc., 429 U.S. 229, 234 (1976)).

63. *Id.* at 113.

discrimination and each retaliatory adverse employment decision constitutes a separate actionable 'unlawful employment practice.'"[64]

D. *The Controversy Itself: The Circuit Split Over* Morgan*'s Effect on Post-Charge-Filing Discrete Acts*

In *Morgan*, the Court interpreted the text of Title VII to mean that each discrete act of discrimination constitutes a separate unlawful employment practice for which an EEOC charge must be filed within the statute of limitations period.[65] Even after *Morgan*, an issue remains in cases where a plaintiff receives a Notice of Right to Sue on a discrimination claim and subsequently pleads a retaliation claim in district court.[66] For example, courts have considered whether post-charge-filing discrete acts of retaliation can be raised for the first time in district court or whether *Morgan* requires an aggrieved person to file a separate EEOC charge alleging retaliation.[67] Federal courts across the country are increasingly split on the issue in two ways.[68]

Some federal courts have decided that a plaintiff who has alleged retaliation for the first time in district court after receiving a Notice of Right to Sue has not exhausted his or her administrative remedies.[69] These courts have held that the plaintiff must file an additional EEOC charge on the retaliation claim, even if the retaliatory acts are "like or reasonably related" to the discrimination alleged in the initial EEOC charge.[70] Other federal courts have confined *Morgan* strictly to its facts and have concluded that *Morgan* did not abrogate a plaintiff's ability to raise a retaliation claim for the first time in district court so long as the retaliation is "like or reasonably related" to the discrimination alleged in the initial EEOC charge.[71]

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64. *See Morgan*, 536 U.S. at 114.

65. *See id.* at 105.

66. *See, e.g.*, Richter v. Advance Auto Parts, Inc., 686 F.3d 847 (8th Cir. 2012); Jones v. Calvert Grp., 551 F.3d 297 (4th Cir. 2009).

67. *See, e.g.*, *Richter*, 686 F.3d at 850; *Jones*, 551 F.3d at 301.

68. *See, e.g.*, *Richter*, 686 F.3d at 850; *Jones*, 551 F.3d at 301.

69. *See generally Richter*, 686 F.3d 847; Martinez v. Potter, 347 F.3d 1208 (10th Cir. 2003); Terhune v. Potter, No. 8:08-cv-1218-T-23MAP, 2009 U.S. Dist. LEXIS 66343 (M.D. Fla. July 31, 2009); Casiano v. Gonzales, No. 3:04CV67/RV/MD, 2006 U.S. Dist. LEXIS 3593 (N.D. Fla. Jan. 31, 2006); Romero-Ostolaza v. Ridge, 370 F. Supp. 2d 139 (D.D.C. 2005).

70. *See, e.g.*, *Martinez*, 347 F.3d at 1211.

71. *See Jones*, 551 F.3d 297; Delisle v. Brimfield Twp. Police Dep't, 94 F. App'x 247 (6th Cir. 2004); Lyons v. England, 307 F.3d 1092 (9th Cir. 2002); Fentress v. Potter, No. 09-C-2231, 2012 U.S. Dist. LEXIS 62484 (N.D. Ill. May 4, 2012).

1. Courts Disapproving of the "Like or Reasonably Related" Test in Cases Involving Post-Charge-Filing Acts of Retaliation

The Tenth Circuit considered the effect of *Morgan* on post-charge-filing retaliation claims in a case involving an individual who filed an EEOC charge in November of 2000, alleging discrimination and retaliation that took place in May of 1999.[72] When the plaintiff filed a lawsuit in federal court in 2002, he included allegations of retaliation that occurred in September of 2000 and April of 2001 for which the plaintiff had never filed an EEOC charge.[73] The court held that *Morgan* proscribed the ability of a plaintiff to raise a retaliation claim for the first time in district court unless the plaintiff originally filed an EEOC charge alleging unlawful retaliation.[74] According to the court, the requirement to exhaust administrative remedies applies to each discrete unlawful employment practice.[75] The court concluded that its holding supported three policy goals of Title VII: (1) putting employers on notice of a claim; (2) encouraging resolution of the conflict internally; and (3) avoiding costly litigation.[76]

More recently, the Eighth Circuit, in *Richter v. Advance Auto Parts, Inc.*,[77] considered the effect of *Morgan* on post-charge-filing retaliation and came to the same conclusion as the Tenth Circuit.[78] In *Richter*, the plaintiff filed a charge with the EEOC on August 18, 2009, alleging race and sex discrimination.[79] The plaintiff was terminated from her employment on August 25, 2009.[80] When the plaintiff filed her employment discrimination lawsuit in district court, she alleged

72. *See Martinez*, 347 F.3d at 1210.
73. *See id.*
74. *See id.*
75. *See id.*
76. *See id.* at 1211. Other courts have considered the same or similar policy goals in concluding that *Morgan* requires the filing of a new EEOC charge for post-charge-filing acts of retaliation. *See, e.g.*, Romero-Ostolaza v. Ridge, 370 F. Supp. 2d 139, 149 (D.D.C. 2005) (noting that applying the exhaustion requirement to each discrete claim of retaliation is in line with the Title VII purposes of "giv[ing] the agency notice of a claim" as well as allowing the employer and the EEOC to "handle . . . [the claim] internally"). The importance of providing notice of claims to employers is also recognized by courts that have held that *Morgan* does not require a new EEOC charge to be filed for post-charge-filing retaliation. *See, e.g.*, *Delisle*, 94 F. App'x at 254 ("[T]he administrative exhaustion requirement's purpose is, at least in part, to put potential defendants on notice while giving the EEOC the opportunity to investigate. . . .").
77. Richter v. Advance Auto Parts, Inc., 686 F.3d 847 (8th Cir. 2012).
78. *See id.* at 849.
79. *See id.*
80. *See id.* at 850.

discrimination based on the anti-retaliation provision of Title VII, but did not allege race- or sex-based discrimination.[81]

In concluding that the plaintiff failed to exhaust her administrative remedies, the court first noted the importance that the *Morgan* Court placed on strictly following the text of Title VII.[82] The court focused especially on the language in *Morgan* which established that each act of retaliation constitutes a "separate actionable unlawful employment practice."[83] The court recognized that *Morgan* concerned discrete acts that occurred before an EEOC charge was ever filed.[84] Additionally, the court wisely pointed out that the meaning of the term "unlawful employment practice," as defined in *Morgan*, does not vacillate depending on whether the case involves pre-charge-filing discrete acts or post-charge-filing discrete acts.[85]

The *Richter* court also focused primarily on one important public policy consideration to support its holding: preserving the voluntary conciliation and settlement process between the EEOC, the employee, and the employer.[86] In focusing on the conciliation process, the court considered whether filing a separate EEOC charge for retaliation was unnecessary because the EEOC would likely uncover evidence of retaliation during its investigation of the underlying alleged discrimination.[87] The court rejected this argument because the EEOC was apparently never aware of the alleged retaliation against Richter and never initiated any investigatory or conciliatory proceedings regarding unlawful retaliation.[88]

2. Courts Approving of the "Like or Reasonably Related" Test in Cases Involving Post-Charge-Filing Acts of Retaliation

In contrast to the Tenth and Eighth Circuits, the Fourth, Sixth, and Ninth Circuits have held that *Morgan* only abrogates the continuing violation doctrine with respect to pre-charge-filing discrete acts.[89]

81. *See id.* at 849.

82. *See Richter*, 686 F.3d at 851–52 (quoting Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 114 (2002)).

83. *See id.* at 851 (internal quotation marks omitted).

84. *See id.* at 852.

85. *See id.* ("The 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.").

86. *See id.* at 853.

87. *See Richter*, 686 F.3d at 853.

88. *See id.*

89. *See* Jones v. Calvert Grp., 551 F.3d 297 (4th Cir. 2009); Delisle v. Brimfield Twp. Police Dep't, 94 F. App'x 247 (6th Cir. 2004); Lyons v. England, 307 F.3d 1092 (9th Cir. 2002).

Further, these courts have concluded that a claim of post-charge-filing retaliation could be raised for the first time in district court so long as the "like or reasonably related" test is met.[90]

In one such case, *Jones v. Calvert Group*,[91] the plaintiff, Jones, a 56-year-old African-American female, filed a charge of age, race, and sex discrimination when a 40-year-old white male was selected over Jones for promotion to a position for which Jones was qualified.[92] The charge, filed before the Maryland Commission on Human Rights in May of 2003, was resolved in February of 2004 by an agreement between the parties.[93] The agreement provided that Jones's employer would provide her with the necessary training and assistance needed for her to qualify for promotions in the future.[94]

Not long after Jones's charge was resolved, for the first time in her career she received a negative performance review, causing Jones to file a second charge alleging retaliation for having filed the initial charge.[95] After considering Jones's case for over a year, the Maryland Commission on Human Rights issued a right-to-sue letter in August of 2006.[96] In October of 2006, Jones was terminated for "not taking 'ownership' of her work assignments."[97]

In November of 2006, Jones filed a lawsuit in federal court alleging that she was terminated in retaliation for filing a charge under Title VII.[98] The district court found for the employer and concluded that Jones had failed to exhaust her administrative remedies as to the latter retaliation claim.[99] The Fourth Circuit reversed, holding that Jones had not failed to exhaust her administrative remedies because "the scope of a Title VII lawsuit may extend to any kind of discrimination like or related to allegations contained in the charge and growing out of such allegations during the pendency of the case before the Commission."[100]

In reaching its decision, the *Jones* court relied on two policy considerations: (1) that plaintiffs will be reluctant to file a second charge alleging retaliation in fear of further retaliation by the employer; and (2) that a second attempt at conciliation on a retaliation claim, after

90. *See Jones*, 551 F.3d at 303–04; *Delisle*, 94 F. App'x at 254; *Lyons*, 307 F.3d at 1104.
91. Jones v. Calvert Grp., 551 F.3d 297 (4th Cir. 2009).
92. *See id.* at 299.
93. *See id.*
94. *See id.*
95. *See id.*
96. *See Jones*, 551 F.3d at 299.
97. *Id.* (citation omitted).
98. *See id.*
99. *See id.* at 299–300, 301.
100. *Id.* at 302.

conciliation had already failed on a discrimination claim, would be just as likely to fail.[101] Although the *Jones* court does not explicitly use this characterization, other courts have called a requirement that an individual file an additional EEOC charge after the occurrence of new discrete acts a "needless procedural barrier."[102]

III. A DISCUSSION OF THE SOLUTIONS TO THE CIRCUIT SPLIT

Although courts remain divided on whether post-charge-filing claims of retaliation can be asserted for the first time in district court, the courts that have considered the issue generally focus on two main public policy considerations: (1) notice of claims to employers,[103] and (2) the conciliation process as a means of avoiding costly litigation.[104] Any discussion of a proper solution to the circuit split must necessarily be made with these policy considerations in mind.

A. *A Proposed Solution to the Circuit Split: Allowing for an Exception to the Administrative Exhaustion Requirement for Post-Charge-Filing Claims of Retaliation Under Certain Circumstances*

At least one commentator has proposed an exception to the administrative exhaustion requirement for post-charge-filing discrete acts.[105] This exception would exempt claims "that derive from an underlying discrimination or retaliation charge specifically stating that the retaliatory behavior was continuous and ongoing."[106] Arguably,

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101. *See Jones*, 551 F.3d at 299. The court opined:

> [A] plaintiff should be excused from exhausting claims alleging retaliation for the filing of a previous EEOC charge largely because such a plaintiff would be expected to be gun shy about incurring further retaliation after an additional EEOC charge and because a second conciliation could not be expected to be any more fruitful than the first.

Id. at 302. Other courts have also concluded that a second attempt at conciliation is unlikely to be successful when the first attempt has failed. *See, e.g.*, Delisle v. Brimfield Twp. Police Dep't, 94 F. App'x 247, 254 (6th Cir. 2004) (citation omitted).

102. Lyons v. England, 307 F.3d 1092, 1104 (9th Cir. 2002) (quoting Anderson v. Reno, 190 F.3d 930, 938 (9th Cir. 1999)). *See also* Eberle v. Gonzales, 240 F. App'x 622, 628 (5th Cir. 2007) ("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. . . ." (alteration in original) (quoting Gupta v. East Texas State Univ., 654 F.2d 411, 414 (5th Cir. 1981))).

103. *See* Romero-Ostolaza v. Ridge, 370 F. Supp. 2d 139, 149 (D.D.C. 2005); *Delisle*, 94 F. App'x at 254; Martinez v. Potter, 347 F.3d 1208, 1211 (10th Cir. 2003).

104. Richter v. Advance Auto Parts, Inc., 686 F.3d 847, 853 (8th Cir. 2012); *Jones*, 551 F.3d at 302; *Delisle*, 94 F. App'x at 254.

105. Benjamin J. Morris, Comment, *A Door Left Open?* National Railroad Passenger Corp. v. Morgan *and Its Effect on Post-Filing Discrete Acts in Employment Discrimination Suits*, 43 CAL W. L. REV. 497, 530 (2007).

106. *Id.*

without such a standard, employers might be encouraged to continually retaliate against employees, forcing employees to file endless EEOC charges in an effort to prevent the employees' claims from ever reaching a court.[107] An employer might engage in such activity with hope that the employee would give up on his or her claim for lack of "time and money."[108] An additional requirement would be that the retaliation must be "identical in nature to those [discrete acts] identified in the charge as being continuous and ongoing."[109]

Although this standard may seem praiseworthy upon initial consideration, the adoption of such a standard would lead to unintended consequences. For example, under such a standard, an employee who merely alleges in an EEOC charge that he or she was the victim of continuous and ongoing discrimination can subsequently raise an identical claim at any point in the future.[110] Thus, a plaintiff who alleged that he or she was continuously discriminated against on the basis of sex, for example, can sue an employer in federal court for any future act of alleged sex-based discrimination without ever using the EEOC administrative process on the subsequent claim. The plaintiff would have this right to sue regardless of whether the initial claim was ever litigated or proven false.

Furthermore, the failure to adopt such a standard would not likely result in an employer "continuously retaliat[ing] against the employee with the goal of forcing them to file more and more charges."[111] An employer would have little incentive to engage in such malicious and calculated retaliation after the EEOC has begun to investigate an initial charge of unlawful employment practices. This is true because the EEOC has the statutory authority to file a lawsuit against an employer when the EEOC finds Title VII violations,[112] and such malicious

107. *See id.*

108. *See id.* at 531.

109. *Id.*

110. *See, e.g.*, Fentress v. Potter, No. 09-C-2231, 2012 U.S. Dist. LEXIS 62484, at *7–8 (N.D. Ill. May 4, 2012) (concluding that a plaintiff who had filed a claim for retaliation resulting from the filing of an initial EEOC charge had not failed to exhaust her administrative remedies even though the alleged retaliation took place two years after the initial EEOC charge was filed); Turpin v. WellPoint Cos., No. 3:10CV850-HEH, 2011 U.S. Dist. LEXIS 56000, at *3–4, 10 (E.D. Va. May 25, 2011) (concluding that even though the alleged retaliation occurred three years after the filing of a discrimination charge with the EEOC, the plaintiff was "free to raise this claim for the first time in federal court").

111. Morris, *supra* note 105, at 531.

112. *See* 42 U.S.C. § 2000e-5(f)(1) (2006) ("If . . . the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge.").

retaliation by an employer may be more likely to gain the attention of the EEOC.

In addition, allowing for exceptions to the administrative exhaustion requirement undermines the important conciliation process contemplated by Title VII. Furthermore, allowing exceptions will lead to more litigation as a result of the requirement that a subsequent claim be "identical" to the original claim that was alleged to be continuous and ongoing.[113] Litigation over whether the alleged subsequent discrimination is actually "identical" to the prior discrimination is likely to ensue, rather than the informal conciliation process with which Congress tasked the EEOC.[114]

B. *The Best Solution: The Eighth Circuit's Approach*

The Eighth Circuit properly applied *Morgan* by declining to make exceptions to the administrative exhaustion requirement using the "like or reasonably related" test.[115] As such, the circuit courts or the U.S. Supreme Court should adopt the reasoning in *Richter* and abrogate the "like or reasonably related" test exception to the administrative exhaustion requirement. A rule without exceptions to the administrative exhaustion requirement would not only be consistent with the analysis in *Morgan*, but would also produce a desirable public policy result.

1. The Eighth Circuit Properly Applied the Reasoning of the *Morgan* Court

The Eighth Circuit in *Richter* concluded that *Morgan* precluded a plaintiff from asserting a claim for post-charge-filing acts of retaliation for the first time in federal court.[116] In reaching this conclusion, the court first focused on the U.S. Supreme Court's analysis of the text of Title VII.[117]

Many courts that have concluded that *Morgan* does not preclude plaintiffs from raising claims of post-charge-filing retaliation in federal court have decided to confine *Morgan* strictly to its facts and thus have dismissed the U.S. Supreme Court's textual analysis of Title VII altogether.[118]

113. *See* Morris, *supra* note 105, at 531.

114. *See* 42 U.S.C. § 2000e-5(b) (noting that the role of the EEOC is to eliminate unlawful employment practices by employing "informal methods of conference, conciliation, and persuasion").

115. Richter v. Advance Auto Parts, Inc., 686 F.3d 847, 852 (8th Cir. 2012).

116. *Id.*

117. *Id.*

118. *See, e.g.*, Jones v. Calvert Grp., 551 F.3d 297, 303 (4th Cir. 2009); Delisle v. Brimfield Twp. Police Dep't, 94 F. App'x 247, 253 (6th Cir. 2004); Lyons v. England,

In contrast, the Eighth Circuit properly recognized that the meaning of the term "unlawful employment practice" as defined by the *Morgan* Court does not change depending on whether a court is considering pre-charge-filing discrete acts, as in *Morgan*, or post-charge-filing discrete acts, as in *Richter*.[119] Additionally, the *Richter* court recognized the importance of the language in *Morgan*, which stated that "each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable 'unlawful employment practice.'"[120] As a result, the *Richter* court concluded that a claim involving a plaintiff who alleged that she was demoted because of her race and sex, and who subsequently alleged retaliation for filing the EEOC charge, necessarily involved "two discrete acts of alleged discrimination."[121] Because a charge was filed for only one of the two discrete acts of discrimination that were involved, the Eighth Circuit properly concluded that the plaintiff had not exhausted her administrative remedies.[122]

Furthermore, the Eighth Circuit's reasoning is persuasive, especially when considering that the *Morgan* Court did not create a special definition of "unlawful employment practice" that only applied in cases involving the issue of whether a charge was timely filed. Although some courts have suggested that *Morgan* must be confined strictly to its facts,[123] the *Morgan* Court made no attempt to limit its reasoning solely to the facts of the case. Indeed, the *Morgan* Court stated broadly that the critical questions in the case were: "[w]hat constitutes an 'unlawful employment practice' and when has that practice 'occurred?'"[124] The Court stated that the answer to these questions "varies with the *practice*," but did not state that the answer to the questions varies with respect to whether the complaint involved pre-charge-filing discrete acts or post-charge-filing discrete acts.[125] The only attempt the Court made to limit

307 F.3d 1092, 1103–04 (9th Cir. 2002); Fentress v. Potter, No. 09-C-2231, 2012 U.S. Dist. LEXIS 62484, at *5–6 (N.D. Ill. May 4, 2012).

119. *See Richter*, 686 F.3d at 854.

120. *Id.* at 851 (quoting Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 114 (2002)).

121. *Id.*

122. *Id.*

123. *See, e.g.*, *Jones*, 551 F.3d at 303 ("*Morgan* addresses only the issue of when the limitations clock for filing an EEOC charge begins ticking with regard to discrete unlawful employment practices."); *Delisle*, 94 F. App'x at 253 ("When taken out of context, *Morgan* may appear to address the issue we have before us; however, the dissent's application of the *Morgan* holding to the facts of this case is completely inapposite.").

124. Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 110 (2002).

125. *See id.* (emphasis added).

its holding with regard to the *practice* was with respect to hostile work environment claims.[126]

Not only is the Eighth Circuit's approach in *Richter* a proper application of *Morgan*, but the approach also has important public policy advantages.

2. The Eighth Circuit's Approach Provides Valuable Notice to Employers and the EEOC

The administrative exhaustion requirement serves the purpose of putting employers on notice of potential Title VII violations while giving the EEOC notice of the alleged violation and an opportunity to perform an investigation.[127] Some courts have reasoned that requiring a plaintiff to file a second EEOC charge for similar or identical discrete acts is unnecessary to fulfill the goal of providing notice because the employer and the EEOC would already be on notice of the first claim.[128] However, this proposition does not always hold true. For example, in *Richter*, the plaintiff advanced a similar argument.[129] The *Richter* court responded by pointing out that even though the alleged subsequent retaliation took place only seven days after the plaintiff filed the initial EEOC charge, the EEOC's correspondence never made reference to the alleged retaliation, and the EEOC never investigated the alleged retaliation nor initiated conciliation proceedings on the matter.[130] The *Richter* case demonstrates the advantage of a rule that requires a plaintiff to formally file an EEOC charge in response to alleged retaliation, even if the retaliation is "like or reasonably related" to the conduct previously included in an EEOC charge.

Furthermore, despite the suggestion that requiring a second filing would create a "needless procedural barrier,"[131] such a second filing would not place a substantial burden on the claimant. The claimant would not incur such a burden because he or she will already have become acquainted with the charge-filing process and requirements as a result of filing the initial charge. Thus, refusing to allow exceptions to

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126. *See id.* at 115; *supra* note 14 and accompanying text.

127. *See Delisle*, 94 F. App'x at 254 ("[T]he administrative exhaustion requirement's purpose is, at least in part, to put potential defendants on notice while giving the EEOC the opportunity to investigate and, if possible, to mediate claims. . . ."); Martinez v. Potter, 347 F.3d 1208, 1211 (10th Cir. 2003) ("[R]equiring exhaustion of administrative remedies serves to put an employer on notice of a violation prior to the commencement of judicial proceedings.").

128. *See, e.g.*, *Delisle*, 94 F. App'x at 254.

129. Richter v. Advance Auto Parts, Inc., 686 F.3d 847, 853 (8th Cir. 2012).

130. *Id.*

131. Lyons v. England, 307 F.3d 1092, 1104 (9th Cir. 2002) (quoting Anderson v. Reno, 190 F.3d 930, 938 (9th Cir. 1999)). *See supra* note 102 and accompanying text.

the administrative exhaustion requirement properly places both the employer and the EEOC on notice of a potential Title VII violation, without harming the individual plaintiff.

3. The Eighth Circuit's Approach Promotes Conciliation, Not Litigation

Conciliation is a process by which the EEOC seeks to resolve allegations of unlawful employment practices before litigation ensues.[132] In 2012, approximately 86 percent of resolved cases in which the EEOC found meritorious allegations of discrimination either resulted in a negotiated settlement, successful conciliation, or a withdrawal of the charge by the claimant after the claimant received some desired benefit.[133] Because the EEOC is statutorily charged with carrying out voluntary conciliation proceedings,[134] and because of the EEOC's success at fulfilling this duty,[135] the conciliation process should be preserved and preferred over litigation as often as is possible.

A rule that requires employers and employees to attempt conciliation on a retaliation claim filed after the initial EEOC charge has been met with criticism by the *Jones* court.[136] Specifically, the *Jones* court wrote that filing a subsequent EEOC charge for retaliation should not be a requirement because "a second conciliation could not be expected to be any more fruitful than the first."[137]

Fortunately, the Eighth Circuit's approach avoids this criticism for two reasons. First, in some cases, the retaliation will have occurred before the conciliation process for the original claim has even begun.[138] Thus, requiring the claimant to file a second EEOC charge will put the EEOC and the employer on notice of the alleged subsequent violation and will allow the EEOC to properly address the original discrimination claim and the retaliation claim during the same conciliation proceeding. By allowing the EEOC to attempt conciliation on both claims of discrimination in one proceeding, the conciliation process might operate more efficiently.

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132. *See supra* note 27 and accompanying text.

133. *See Title VII of the Civil Rights Act of 1965 Charges (Includes Concurrent Charges with ADEA, ADA, and EPA) FY1997–FY2011*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, http://1.usa.gov/14qae1V (last visited Aug. 28, 2013).

134. *See* 42 U.S.C. § 2000e-5(b) (2006).

135. *See supra* note 133 and accompanying text.

136. *See* Jones v. Calvert Grp., 551 F.3d 297, 302 (4th Cir. 2009).

137. *Id.*

138. *See* Richter v. Advance Auto Parts, Inc., 686 F.3d 847, 849 (8th Cir. 2012) (involving alleged retaliation which took place a mere seven days after the initial EEOC charge was filed and before the EEOC attempted to resolve the initial claim).

Second, even if the alleged retaliation occurred after an unsuccessful conciliation attempt on the alleged discrimination claim, the Eighth Circuit's approach might still avoid the criticism of the *Jones* court. For example, a situation could arise where an employer believed allegations of discrimination against it to be false and thus the employer did not voluntarily settle the discrimination claim during conciliation proceedings. Such an employer might only then retaliate against the claimant as a result of the claimant filing what the employer believed was a false claim of discrimination.

In such a situation, the EEOC investigation might produce evidence supporting the retaliation claim, while producing no evidence to support the initial discrimination claim. As a result, the employer might be willing to voluntarily resolve a claim of retaliation even though the employer was unwilling to voluntarily resolve the initial discrimination claim. Thus, requiring an individual to file a separate EEOC charge on a retaliation claim is not always futile as was suggested by the *Jones* court,[139] nor does it serve as a "needless procedural barrier."[140] Rather, the Eighth Circuit's approach in requiring that a claimant file a subsequent EEOC charge on a retaliation claim may prove beneficial to preserving the voluntary conciliation process—a major goal and purpose of Title VII.[141]

IV. CONCLUSION

The U.S. Supreme Court's reasoning in *Morgan* applies equally to pre-charge-filing discrete acts and to post-charge-filing discrete acts, and the Eighth Circuit properly applied the reasoning in *Morgan* in deciding whether post-charge-filing discrete acts may be alleged for the first time in federal court.[142] The Eighth Circuit wisely concluded that no exception should be made to the administrative exhaustion requirement under Title VII for retaliation claims made after an initial EEOC charge was filed for discrimination, even if the retaliation was "like or reasonably related" to the alleged initial discrimination.[143]

The split among the courts over the implication of *Morgan* on post-charge-filing claims of retaliation has only deepened since *Morgan* was

139. *See Jones*, 551 F.3d at 302.

140. Lyons v. England, 307 F.3d 1092, 1104 (9th Cir. 2002) (quoting Anderson v. Reno, 190 F.3d 930, 938 (9th Cir. 1999)). *See supra* note 102 and accompanying text.

141. *See* Richter, 686 F.3d at 850 ("Congress set up an elaborate administrative procedure, implemented through the EEOC, that is designed 'to assist in the investigation of claims of . . . discrimination in the workplace and to work towards the resolution of these claims through conciliation rather than litigation.'" (quoting Patterson v. McLean Credit Union, 491 U.S. 164, 180–81 (1989))).

142. *See supra* Part III.B.1.

143. *See supra* Part II.D.1.

decided in 2002.[144] As such, the U.S. Supreme Court should adopt the holding and reasoning of the Eighth Circuit in *Richter* and refuse to allow any exception to the administrative exhaustion requirement. Requiring a claimant to file an EEOC charge for every alleged unlawful act would ensure that both the EEOC and employers are put on notice of alleged post-charge-filing retaliation.[145] Furthermore, such a requirement would ensure that employers will have the opportunity to engage in voluntary conciliation and settlement proceedings with claimants instead of being forced into litigation at the outset of a claim of alleged retaliation.[146]

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144. *See supra* Part II.D.
145. *See supra* Part III.B.2.
146. *See supra* Part III.B.3.

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