TO FILE (AGAIN) OR NOT TO FILE (AGAIN): THE POST-*MORGAN* CIRCUIT SPLIT OVER THE DUTY TO FILE AN AMENDED OR SECOND EEOC CHARGE FOR CLAIMS OF POST-CHARGE EMPLOYER RETALIATION

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I. INTRODUCTION

Prior to filing a Title VII lawsuit, a plaintiff[1] must exhaust her administrative remedies.[2] This exhaustion requirement includes filing a charge with the Equal Employment Opportunity Commission (EEOC), receiving a right-to-sue notice, and filing suit within ninety days of receiving that notice.[3] Most relevant to this Article, however, is the rule that

[1] Although an employee, job applicant, or former employee does not become a "plaintiff" until she files a lawsuit, I will be using the term "plaintiff" throughout this Article, regardless of whether I am referring to someone who has filed a lawsuit or someone who is simply in the pre-lawsuit stage.

[2] *See* 42 U.S.C. § 2000e-5(e)(1) (2006).

[3] For a detailed description of the administrative exhaustion requirements, along with the relevant filing time periods see *Filing a Lawsuit*, EEOC, http://www.eeoc.gov/employees/lawsuit.cfm (last visited Dec. 25, 2013). *See also* 42 U.S.C. § 2000e-5(e)(1)–(f)(1).

the lawsuit the plaintiff files typically must raise only the issues raised in her EEOC charge.[4]

There are, however, some exceptions to the rule regarding the lawsuit's scope.[5] This Article's focus involves the exception for claims involving post-charge retaliation; specifically, most courts do *not* require a plaintiff to file an amended or second EEOC charge if her employer engages in retaliation *because* the plaintiff filed her initial EEOC charge.[6] Although this exception was widely recognized prior to the Supreme Court's decision in *National Railroad Passenger Corp. v. Morgan*,[7] after *Morgan* some courts started requiring plaintiffs to amend their original charges or file additional charges alleging retaliation.[8] Most courts do not require this,[9] but cases from the Eighth Circuit, the Tenth Circuit, and possibly the Fifth Circuit have created questions regarding whether a plaintiff must now jump over this additional hurdle.[10] While the plaintiff from the Eighth Circuit case asked the Supreme Court to answer this question,[11] the parties eventually settled.[12] The plaintiff from the Fifth Circuit case also asked the Court to answer a similar question,[13] but the Court denied certiorari.[14]

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[4] For examples of cases where the court discussed the fact that a plaintiff's court complaint is limited to the allegations she raises in her EEOC charge, *see infra* Parts III and V.

[5] For example, the Second Circuit has carved out three exceptions to this rule. *See* Butts v. City of New York Dep't of Hous. Pres. & Dev., 990 F.2d 1397, 1402–03 (2d Cir. 1993). The Second Circuit's exceptions to this rule are the "loose pleading exception," the "retaliation exception," and the "further incidents of discrimination exception." *Id.* Of course, this case was decided *prior* to the Supreme Court's decision in *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), which changed some courts' positions regarding the viability of these exceptions. *See infra* Part V.

[6] *See infra* Part V.B.

[7] *See* 536 U.S. 101, 108 (2002). *See infra* Part III.

[8] *See infra* Part V.A.

[9] *See infra* Part V.

[10] Richter v. Advance Auto Parts, Inc., 686 F.3d 847, 854 (8th Cir. 2012), *cert. dismissed*, 133 S. Ct. 1491 (2013); Martinez v. Potter, 347 F.3d 1208, 1211 (10th Cir. 2003). The case from the Fifth Circuit, *Simmons-Myers v. Caesars Entm't Corp.*, 515 F. App'x 269 (5th Cir.), *cert. denied*, 134 S. Ct. 117 (2013), is slightly different in that the question the plaintiff asked the Court to address on certiorari was the following: "If an employee files a charge with the EEOC, and the employer subsequently again violates Title VII, must the employee file a second charge with the EEOC before filing suit to challenge the post-charge violation?" Petition for a Writ of Certiorari, *Simmons-Meyers*, 515 F. App'x 269 (No. 12-1393).

[11] Petition for a Writ of Certiorari at i, *Richter*, 686 F.3d 847 (2013) (No. 12-854).

[12] *See* Richter v. Advance Auto Parts, Inc., 133 S. Ct. 1491 (2013).

[13] Petition for a Writ of Certiorari at i, *Simmons-Myers*, 515 F. App'x 269 (2013) (No.12-1393).

This Article will first address Title VII's administrative exhaustion requirement and the "retaliation exception" to it.[15] Next, the Article will focus on pre-*Morgan* cases in which the courts applied the retaliation exception.[16] The Article will then focus on *Morgan*, which has caused some courts to eliminate the retaliation exception.[17] The Article will then discuss the post-*Morgan* circuit split.[18] Finally, the Article will set forth options courts have when deciding this issue and will suggest one option that balances the goals behind Title VII's administrative exhaustion requirement with an employee's need for a fair resolution of her claim.[19] Although the proposed solution is not perfect, it does address the concerns many courts have raised when confronted with this important issue.

II. TITLE VII'S ADMINISTRATIVE EXHAUSTION REQUIREMENT AND ITS RETALIATION EXCEPTION

Before a plaintiff can file a Title VII complaint, she must file an EEOC charge.[20] This charge determines the lawsuit's scope; a plaintiff typically cannot raise issues in the lawsuit that were not raised in the charge.[21] The relevant statutory provision regarding administrative exhaustion provides:

> A charge under this section *shall be filed* within one hundred and eighty days after the alleged *unlawful employment practice* occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, 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 or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on

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[14] *Simmons-Myers*, 515 F. App'x 269, *cert. denied*, 134 S. Ct. 117 (2013); *see supra* note 10.

[15] *See infra* Part II.

[16] *See infra* Part III.

[17] *See infra* Part IV.

[18] *See infra* Part V.

[19] *See infra* Part VI.

[20] *See* 42 U.S.C. § 2000e-5(e)(1) (2006); *Filing a Lawsuit*, EEOC, http://www.eeoc.gov/employees/lawsuit.cfm (last visited Dec. 25, 2013).

[21] *See infra* Parts III, V.

> behalf of the person aggrieved 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, and a copy of such charge shall be filed by the Commission with the State or local agency.[22]

While the provision is relatively clear regarding the limitations periods for EEOC charges, it is not as clear regarding how the contents of the charge determine the lawsuit's scope.[23] Courts have, however, concluded that the charge does determine the lawsuit's scope.[24] There are some exceptions to this rule; specifically, courts have allowed plaintiffs to pursue claims not raised in their EEOC charges so long as the claims are "reasonably related" to the issues raised in the EEOC charge.[25] One of these "reasonably related" exceptions is the following:

> The second type of "reasonably related" claim is one alleging retaliation by an employer against an employee for filing an EEOC charge. [I]n such situations, we have relaxed the exhaustion requirement based on the close connection of the retaliatory act to both the initial discriminatory conduct and the filing of the charge itself. . . . Indeed, requiring a plaintiff to file a second EEOC charge under these circumstances could have the perverse result of promoting employer retaliation in order to impose further costs on plaintiffs and delay the filing of civil actions relating to the underlying acts of discrimination.[26]

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[22] 42 U.S.C. § 2000e-5(e)(1) (emphasis added). This administrative exhaustion requirement serves to put the employer on notice of the charge; to allow the EEOC to investigate the charge; and to allow for the parties to attempt to conciliate the dispute prior to resorting to litigation. EEOC v. Am. Nat'l Bank, 652 F.2d 1176, 1185 (4th Cir. 1981).

[23] *See* U.S.C. § 2000e-5(e)(1); *see also* Clockedile v. N.H. Dep't of Corr., 245 F.3d 1, 4 (1st Cir. 2001) ("Title VII does not say explicitly that the court suit must be limited to just what was alleged in the agency complaint.").

[24] *See infra* cases cited throughout Parts III, V; *see also* LEX K. LARSON, EMPLOYMENT DISCRIMINATION, § 76.06[1][d] n.38 (2013).

[25] *See infra* Parts III, V.B.

[26] Butts v. City of New York Dep't of Hous. Pres. & Dev., 990 F.2d 1397, 1402 (2d Cir. 1993) (citations omitted).

The exception described above was contained in the pre-*Morgan-Butts* opinion from the Second Circuit; that court and many others still recognize this exception even after *Morgan*.[27] This Article will next examine several pre-*Morgan* cases where the courts recognized this exception and allowed the plaintiff to pursue a claim of post-charge retaliation despite not amending her original EEOC charge or filing a second one alleging retaliation.[28]

III. THE PRE-*MORGAN* APPROACH: PLAINTIFFS DO *NOT* HAVE TO AMEND THEIR ORIGINAL CHARGE OR FILE A SECOND CHARGE TO SUE FOR POST-CHARGE ACTS OF RETALIATION

Prior to *Morgan*, most courts agreed that the administrative exhaustion requirement did not apply to claims of post-charge retaliation. The Article will now address several of these cases and how the courts concluded that administrative exhaustion was not required when plaintiffs alleged they suffered adverse employment actions in retaliation for filing an EEOC charge.

Pre-*Morgan*, the First Circuit decided that a plaintiff did not have to amend an initial charge or file a second charge when she was the victim of post-charge retaliation.[29] The court in *Clockedile* broke from First Circuit precedent and noted, quite optimistically, that "[s]omeday the Supreme Court will bring order to this subject."[30] Unfortunately, the Court has still not decided the issue.[31] In *Clockedile*, the plaintiff filed an EEOC charge alleging sexual harassment and retaliation.[32] The plaintiff claimed her employer then retaliated against her again.[33] The plaintiff sued, alleging

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[27] *E.g.*, Terry v. Ashcroft, 336 F.3d 128, 151 (2d Cir. 2003); Sundaram v. Brookhaven Nat. Lab., 424 F. Supp. 2d 545, 560 (E.D.N.Y. 2006); *see also infra* Part V.B.

[28] *See infra* Part III.

[29] *See* Clockedile v. N.H. Dep't of Corr., 245 F.3d 1, 6 (1st Cir. 2001).

[30] *Id.* The First Circuit opinion with which this court disagreed was *Johnson v. Gen. Elec.*, 840 F.2d 132, 139 (1st Cir. 1988). *Id.* at 4.

[31] As will be addressed later, some courts have determined that the Court's reasoning in *Morgan* has answered this question. *See infra* Part V.A. Nonetheless, this is not the unanimous view of the courts of appeals. *See infra* Part V.A–B. The Court recently denied certiorari in a case, which, while similar to the issue raised in this Article, did not address the *precise* issue raised in this Article. *See* Simmons-Myers v. Caesars Entm't Corp., 515 F. App'x 269 (5th Cir.), *cert. denied*, 134 S. Ct. 114 (2013); *see also supra* note 10.

[32] *Clockedile*, 245 F.3d at 2.

[33] *Id.*

sexual harassment and retaliation.[34] A jury found for the plaintiff on her second retaliation claim, but because the plaintiff did not exhaust her administrative remedies regarding that claim, the court granted the employer's motion for judgment as a matter of law.[35]

The court addressed Title VII's administrative exhaustion requirements and acknowledged that some courts "have sometimes allowed court claims that go beyond the claim or claims made to the agency, and sometimes not."[36] The court then noted it was "concerned . . . with . . . whether . . . a lawsuit following a discrimination complaint can include a claim of retaliation not made to the agency."[37] First Circuit precedent had held that lawsuits were limited to "claims that 'must reasonably be expected to . . . have been within the scope of the EEOC's investigation[,]'" and previously, "this did not include retaliation for filing a charge where the complainant had not 'even informed the EEOC of the alleged retaliation.'"[38] Because this position conflicted with pro-employee decisions on this topic, the district court asked the First Circuit to address the issue.[39] The district court also asked the First Circuit to re-examine its position because many employees file their charges *pro se* and because of the EEOC's pro-employee position on this issue.[40] When the court addressed the issue, it noted that other courts had decided that "claims of retaliation growing out

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[34] *Id.* at 3.

[35] *Id.*

[36] *Id.* at 4.

[37] *Id.*

[38] *Id.* (quoting Johnson v. Gen. Elec., 840 F.2d 132, 139 (1st Cir. 1988)).

[39] *Id.* The other pro-employee cases which the First Circuit cited were *Kirkland v. Buffalo Board of Education*, 622 F.2d 1066, 1068 (2d Cir. 1980); *Howze v. Jones & Laughlin Steel Corp.*, 750 F.2d 1208, 1212 (3d Cir. 1984); *Nealon v. Stone*, 958 F.2d 584, 590 (4th Cir. 1992); *Gottlieb v. Tulane University*, 809 F.2d 278, 284 (5th Cir. 1987); *Malhotra v. Cotter & Company*, 885 F.2d 1305, 1312 (7th Cir. 1989); *Wentz v. Maryland. Casualty Company*, 869 F.2d 1153, 1155 (8th Cir. 1989), *abrogated by Wedow v. City of Kansas City, Missouri*, 442 F.3d 661 (8th Cir. 2006); *Anderson v. Reno*, 190 F.3d 930, 938 (9th Cir. 1999); *Brown v. Hartshorne Public School District #1*, 864 F.2d 680, 682 (10th Cir. 1988); and *Baker v. Buckeye Cellulose Corporatoin*, 856 F.2d 167, 169 (11th Cir. 1988). The court also observed that the Sixth Circuit's position was unclear, and that the D.C. Circuit had not yet addressed this issue. *Clockedile*, 245 F.3d at 4 n.3. Notably, because *Clockedile* was decided before *Morgan*, all of the pro-employee cases it cited were also decided before *Morgan*.

[40] *Clockedile*, 245 F.3d at 4. The EEOC's current pro-employee opinion on this issue can be found in the EEOC COMPLIANCE MANUAL § 2-IV(C)(1)(a) & n.185.

of a discrimination filing are regularly included."[41] Ultimately ruling in the plaintiff's favor, the court relied on policy considerations:

> The result, at least as to retaliation, can be justified in policy terms. Retaliation uniquely chills remedies; and by retaliating against an initial administrative charge, the employer discourages the employee from adding a new claim of retaliation. If the retaliation is official, there is no need to worry about notice: the employer should already know. And, as between the employer and the employee, the former is in a better position to appreciate the rules about what legitimate legal claims may exist and be preserved.[42]

The court then declared its new rule: "Retaliation claims are preserved so long as the retaliation is reasonably related to and grows out of the discrimination complained of to the agency – *e.g.* the retaliation is for filing the agency complaint itself."[43] The court then ordered the jury's pro-employee verdict involving the retaliation claim to be reinstated.[44]

The Second Circuit also decided that exhaustion was not required for claims of post-charge retaliation.[45] This was discussed in the previously described *Butts* opinion,[46] but the Second Circuit had addressed the issue even before *Butts*.[47] In *Kirkland*, the court decided a plaintiff's retaliation claim was appropriate even though the plaintiff did not exhaust administrative remedies regarding the retaliation allegation.[48] The court noted that Title VII's jurisdictional requirements were not meant to be applied narrowly, and even though a right-to-sue notice does not allow a plaintiff to litigate *any* claim he wants, such a notice "does permit a court to consider claims of discrimination reasonably related to the allegations in the complaint filed with the EEOC, 'including new acts occurring during the

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[41] *Clockedile*, 245 F.3d at 5. The court noted that the Second, Fourth, Seventh, Eighth, Ninth, and Tenth Circuits have used the "reasonably related" analysis, and that the Fifth Circuit has used the ancillary jurisdiction rule. *Id.* The court cited to *Kirkland*, 622 F.2d at 1068, for the reasonably related rule, and to *Gottlieb*, 809 F.2d at 284, for the ancillary jurisdiction rule. *Id.*

[42] *Id.* at 5–6 (citation omitted).

[43] *Id.* at 6.

[44] *Id.* at 7.

[45] *See* Butts v. City of New York Dep't of Hous. Pres. & Dev., 990 F.2d 1397, 1402 (2d Cir. 1993); *Kirkland*, 622 F.2d at 1068.

[46] *See generally Butts*, 990 F.2d at 1401–03.

[47] *Kirkland*, 622 F.2d at 1066.

[48] *Id.* at 1068.

pendency of the charge before the EEOC.'"[49] Because the employer retaliated against the plaintiff because of his original charge, the claims were "directly related," and the plaintiff was not required to file a separate charge.[50] The court concluded: "Under the circumstances, the issuance of a right to sue letter should be broadly construed to permit [the plaintiff] to seek judicial redress for acts of discrimination related to and stemming from the [earlier] incident."[51]

The Third Circuit also followed this pro-employee rule.[52] The plaintiff in *Howze* wanted to amend her complaint to add a retaliation claim, but the district court denied the motion.[53] The Third Circuit reversed, believing there was no prejudice to the defendant.[54] The employer also argued that the trial court was correct "because the amended complaint raised a claim of retaliation which was never presented to or investigated by the EEOC."[55] While recognizing that "there must be some limitation on the presentation of new claims in the district court[,]" the court noted that "'the parameters of the civil action in the district court are defined by the scope of the EEOC investigation which can reasonably be expected to grow out of the charge . . . including new acts which occurred during the pendency of proceedings before the Commission.'"[56] It then indicated that the plaintiff's claim "may fairly be considered [an] explanation[ ] of the original charge . . . ."[57] The court observed:

> [W]e rejected the view that the EEOC investigation sets an outer limit on the scope of the civil complaint. Rather, we

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[49] *Id.* (quoting Oubichon v. N. Am. Rockwell Corp., 482 F.2d 569, 571 (9th Cir. 1973)). Prior to *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006), there was some question regarding whether this was a jurisdictional issue. In *Arbaugh*, the Court decided that Title VII's fifteen-employee threshold was not jurisdictional. 546 U.S. at 516. Although the Court did not answer the jurisdictional/non-jurisdictional issue, some courts since *Arbaugh* have interpreted that case to stand for the proposition that administrative exhaustion for post-charge retaliation claims is *not* a *jurisdictional* prerequisite. *See* LARSON, *supra* note 24, § 70.03[1] n.8.4 (2013).

[50] *Kirkland*, 622 F.2d at 1068.

[51] *Id.*; *see also* Malarkey v. Texaco, Inc., 983 F.2d 1204, 1209 (2d Cir. 1993) (allowing plaintiff to pursue retaliation claim despite not exhausting administrative remedies for the retaliation claim).

[52] Howze v. Jones & Laughlin Steel Corp., 750 F.2d 1208, 1212 (3d Cir. 1984).

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] *Id.* (quoting Ostapowicz v. Johnson Bronze Co., 541 F.2d 394, 398–99 (3d Cir. 1976)).

[57] *Id.* (quoting *Ostapowicz*, 541 F.2d at 399).

> held that a district court may assume jurisdiction over additional charges if they are reasonably within the scope of the claimant's original charges and if a reasonable investigation by the EEOC would have encompassed the new claims.[58]

As a result, the court determined that the district court should have allowed the plaintiff to amend her complaint and add a claim alleging post-charge retaliation.[59]

The Fourth Circuit also allowed plaintiffs to pursue post-charge retaliation claims without first exhausting administrative remedies.[60] In *Nealon*, the plaintiff brought discrimination claims under the Equal Pay Act and Title VII, and she also brought a Title VII retaliation claim.[61] The court had to address whether the plaintiff was required to exhaust administrative remedies for her retaliation claim.[62] The court noted that it had not yet decided the issue, and it then discussed how other courts had resolved it.[63] At the time of the opinion, "[a]ll other circuits that ha[d] considered the issue ha[d] determined that a plaintiff may raise the retaliation claim for the first time in federal court."[64] The court then determined that those courts' opinions were "persuasive" and worth following.[65] The court decided that this was an "inevitable corollary" to the "generally accepted principle that 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

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[58] *Id.* (citing Hicks v. ABT Assocs., Inc., 572 F.2d 960, 967 (3d Cir. 1978)). Admittedly, the language quoted above addresses an issue slightly different from the precise issue involved in this Article, but the take-away from the opinion is that the court was willing to excuse a plaintiff's failure to amend an initial charge or file a second charge. *See also* Robinson v. Dalton, 107 F.3d 1018, 1026 (3d Cir. 1997) (where the Third Circuit remanded the case to determine the scope of the EEOC's investigation). Also, for pro-employee district court opinions from within the Third Circuit, see *Lazic v. University of Pennsylvania*, 513 F. Supp. 761, 768 (E.D. Pa. 1981) and *Ahmad v. Independent Order of Foresters*, 81 F.R.D. 722, 726–27 (E.D. Pa. 1979), *aff'd*, 707 F.2d 1399 (3d Cir. 1983).

[59] *Howze*, 750 F.2d at 1212. *But see* Williams v. Perry, 907 F. Supp. 838, 846 (M.D. Pa.) (dismissing post-charge claim of retaliation based on failure to exhaust administrative remedies), *aff'd*, 72 F.3d 125 (3d Cir. 1995).

[60] Nealon v. Stone, 958 F.2d 584, 590 (4th Cir. 1992).

[61] *Id.* at 586.

[62] *Id.* at 590.

[63] *Id.*

[64] *Id.*

[65] *Id.*

such allegations during the pendency of the case before the [EEOC].'"[66] After citing several cases,[67] the court quoted the Seventh Circuit in *Malhotra v. Cotter & Co.*:

> [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 . . . . [W]e [therefore] join the other circuits that have spoken to the question in adopting the rule that a separate administrative charge is not pre-requisite to a suit complaining about retaliation for filing the first charge.[68]

The court then cited cases from several courts of appeals for the same proposition.[69] The court then decided the plaintiff was entitled to pursue her retaliation claim.[70]

One of the more often-cited, pro-employee, pre-*Morgan* cases is *Gupta v. East Texas State University*, from the Fifth Circuit.[71] The court based its opinion on previous case law regarding this issue, practical considerations, and policy reasons.[72] In *Gupta*, the plaintiff appealed after he lost his Title VII trial.[73] One of the issues the court addressed was whether the plaintiff was required to exhaust his administrative remedies after he was terminated after filing the lawsuit.[74] The plaintiff had filed two charges, one in which he alleged discrimination, and one in which he alleged retaliation as a result

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[66] *Id.* (quoting Hill v. W. Elec. Co., 672 F.2d 381, 390 n.6 (4th Cir. 1982) (quoting Sanchez v. Standard Brands, Inc., 431 F.2d 455, 466 (5th Cir. 1970))).

[67] *Id.* Specifically, the court cited to the following authority for this proposition: *Hill*, 672 F.2d at 390 n.6; *Sanchez*, 431 F.2d at 466; and *EEOC v. General Electric Company*, 532 F.2d 359, 373 (4th Cir. 1976).

[68] *Nealon*, 958 F.2d at 590 (quoting Malhotra v. Cotter & Co., 885 F.2d 1305, 1312 (7th Cir. 1989)).

[69] *Id.* (citing Brown v. Hartshorne Pub. Sch. Dist. #1, 864 F.2d 680, 682 (10th Cir. 1988); Kirkland v. Buffalo Bd. of Educ., 622 F.2d 1066, 1068 (2d Cir. 1980); Wentz v. Md. Cas. Co., 869 F.2d 1153, 1154 (8th Cir. 1989), *abrogated by* Wedow v. City of Kan. City, Mo., 442 F.3d 661 (8th Cir. 2006); and Gottlieb v. Tulane Univ., 809 F.2d 278, 284 (5th Cir. 1987)).

[70] *Id.* For a pro-employee, pre-*Morgan* district court case from within the Fourth Circuit, see *Jeter v. Boswell*, 554 F. Supp. 946 (N.D. W. Va. 1983).

[71] 654 F.2d 411 (5th Cir. 1981).

[72] *Id.* at 413–14.

[73] *Id.* at 412.

[74] *Id.* at 413–14.

of the first charge.[75] The EEOC issued right-to-sue notices for both charges, but the defendant fired the plaintiff while the lawsuit was pending.[76] The plaintiff never filed a third charge.[77] Acknowledging that the court had not addressed this issue, the court noted that it had previously *suggested* that administrative exhaustion was not required "because the district court has ancillary jurisdiction" over retaliation claims based on the original charges.[78] The court also cited many district courts that had interpreted circuit precedent in the same way;[79] it then held the following:

> In keeping with the suggestion in *Pettway II* and the adherence to that suggestion by the lower courts of this circuit, we hold that it is unnecessary for a plaintiff to exhaust administrative remedies prior to urging a retaliation claim growing out of an earlier charge; the district court has ancillary jurisdiction to hear such a claim when it grows out of an administrative charge that is properly before the court.[80]

The court then noted the "practical reasons and policy justifications" for this outcome:

> There are strong practical reasons and policy justifications for this conclusion. It is the nature of retaliation claims that they arise after the filing of the EEOC charge. 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 when a single filing would comply with the intent of Title VII. 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. Intertwined

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[75] *Id.* at 412–13.

[76] *Id.* at 413.

[77] *Id.*

[78] *Id.* (relying on Pettway v. Am. Cast Iron Pipe Co., 411 F.2d 998 (5th Cir.), *reh'g denied*, 415 F.2d 1376 (5th Cir. 1969)).

[79] *Id.* The district court cases upon which the Fifth Circuit relied were *Held v. Missouri Pacific Railroad Company*, 373 F. Supp. 996, 1000–02 (S.D. Tex. 1974); *Thomas v. Southdown Sugars, Inc.*, 484 F. Supp. 1317, 1320 (E.D. La. 1980); and *Pouncy v. Prudential Insurance Company of America*, 499 F. Supp. 427, 435 (S.D. Tex. 1980), *aff'd*, 668 F.2d 795 (5th Cir. 1982).

[80] *Gupta*, 654 F.2d at 413–14.

> with this practical reason for our holding is a strong policy justification. Eliminating this needless procedural barrier will deter employers from attempting to discourage employees from exercising their rights under Title VII.[81]

Although the plaintiff ultimately lost,[82] this case is cited often for the proposition that plaintiffs need not exhaust administrative remedies for post-charge acts of retaliation.[83]

The Sixth Circuit also appeared to allow plaintiffs to pursue retaliation claims growing out of their initial EEOC charges without first exhausting administrative remedies.[84] While the court in *Duggins* did not have to answer this *specific* question, it seemed willing to accept the retaliation exception.[85] The court noted:

> If an EEOC charge does not properly allege a retaliation claim, the court only has jurisdiction over retaliation arising *as a result of filing the EEOC charge itself*. Therefore, the [district] court held that it could only properly consider allegations of retaliation arising after the date [the plaintiff] filed her EEOC charge . . . .[86]

Relevant to this Article, it is important to note that the court acknowledged that courts can hear "uncharged" acts of retaliation if the retaliation took place *because* of the filing of the original charge.[87]

The Seventh Circuit also decided that a plaintiff is not required to file a retaliation charge if the retaliation grows out of the plaintiff's original charge.[88] In *Malhotra*, the plaintiff sued his former employer, alleging he was passed over for promotions.[89] The plaintiff filed a charge alleging various failures to promote, but he never mentioned retaliation, despite the fact his employer terminated him two years after he filed the initial

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[81] *Id.* at 414 (citations omitted).

[82] *Id.*

[83] *See, e.g.*, Thomas v. Miami Dade Pub. Health Trust, 369 F. App'x 19, 23 (11th Cir. 2010); Carter v. S. Cent. Bell, 912 F.2d 832, 841 (5th Cir. 1990) (allowing the plaintiff to amend her complaint to add a retaliation claim, despite not raising the issue with the EEOC).

[84] Duggins v. Steak 'N Shake, Inc., 195 F.3d 828, 832–33 (6th Cir. 1999).

[85] *Id.* at 833.

[86] *Id.* at 831 (emphasis added).

[87] *See id.* at 832–33.

[88] Malhotra v. Cotter & Co., 885 F.2d 1305, 1312 (7th Cir. 1989).

[89] *Id.* at 1308.

charge.[90] Relying on Seventh Circuit precedent, the court observed that "the judicial complaint in a Title VII case can embrace not only the allegations in the administrative charge but also 'discrimination like or reasonably related to the allegations of the charge and growing out of such allegations,' specifically including retaliation for the filing of the charge."[91] Although the court had not previously articulated that position,[92] it noted that other courts had done so, and the court in *Malhotra* decided to "assume" that this was, in fact, correct.[93] The court noted:

> [W]e add that there is a practical reason for treating retaliation in this way: having 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. . . . [And] it is best to have a general rule, *and we join the other circuits that have spoken to the question in adopting the rule that a separate administrative charge is not prerequisite to a suit complaining about retaliation for filing the first charge*.[94]

Therefore, the Seventh Circuit was yet another court to decide that, prior to *Morgan*, plaintiffs were not required to amend an initial charge or file a second EEOC charge alleging retaliation.[95]

The Eighth Circuit also decided that a plaintiff did not have to file an amended or second EEOC charge when alleging post-charge retaliation.[96] Although *Wentz* was an ADEA claim, the court relied on Title VII case law to reach this outcome.[97] The plaintiff had been placed on probation for

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[90] *Id.* at 1308–09.

[91] *Id.* at 1312 (quoting Hemmige v. Chi. Pub. Sch., 786 F.2d 280, 283 (7th Cir. 1986) (quoting King v. Ga. Power Co., 295 F. Supp. 943, 947 (N.D. Ga. 1968))).

[92] *See id.*

[93] *Id.*

[94] *Id.* (emphasis added).

[95] *Id.*; *see also* Portlock v. Painewebber, Inc., No. 85 C 6247, 1987 U.S. Dist. LEXIS 794, at *2 (N.D. Ill. Feb. 4, 1987) (permitting the plaintiff to pursue a retaliation claim despite failing to receive a right-to-sue notice regarding that claim).

[96] Wentz v. Md. Cas. Co., 869 F.2d 1153, 1154 (8th Cir. 1989), *abrogated by* Wedow v. City of Kan. City, Mo., 442 F.3d 661 (8th Cir. 2006).

[97] *See id.* at 1154–55. For other cases involving the ADEA, see LARSON, *supra* note 24, § 76.06[1][d] n.38 (2013).

performance issues.[98] He then complained that his supervisors were not respectful toward him, they harassed him, and they treated him less favorably than they treated younger employees.[99] One day after filing his EEOC charge, the plaintiff was terminated.[100] The plaintiff sued, alleging age discrimination, retaliation, and state-law claims.[101] The district court granted summary judgment, and the plaintiff appealed.[102] One of the issues the court addressed was whether it had jurisdiction to hear the plaintiff's retaliation claim, because the plaintiff did not allege retaliation in the EEOC charge.[103] Relying on case law from the Seventh and the Eighth Circuits,[104] the court concluded that it could hear the retaliation claim "if the allegations in the judicial complaint [were] 'like or reasonably related to' the timely filed administrative charges."[105] Without much analysis, the court concluded that "[the plaintiff's] claim grew out of the discrimination charge . . . and, thus, [was] properly before the court."[106] Therefore, pre-*Morgan*, the Eighth Circuit did not require an amended or a second charge for post-charge retaliation.[107] However, as will be addressed later, the Eighth Circuit has changed its position regarding this issue.[108]

The Ninth Circuit also decided that plaintiffs did not always have to file retaliation charges to include them in a subsequent lawsuit.[109] In *Anderson*, the plaintiff alleged two acts of retaliation, one in 1994 and one in 1997.[110]

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[98] *Wentz*, 869 F.2d at 1153.

[99] *Id.* at 1153–54.

[100] *Id.* at 1154.

[101] *Id.*

[102] *Id.*

[103] *Id.*

[104] *Id.* The cases upon which the court relied were *Steffen v. Meridian Life Insurance Company*, 859 F.2d 534, 544 (7th Cir. 1988) and *Anderson v. Block*, 807 F.2d 145, 148 (8th Cir. 1986).

[105] *Id.* (quoting *Steffen*, 859 F.2d at 544).

[106] *Id.*

[107] *Id.* For pro-employee district court opinions from within the Eighth Circuit, see *Witherspoon v. Roadway Express, Inc.*, 782 F. Supp. 567 (D. Kan. 1992); *Jones v. ITT Ed. Services., Inc.*, 587 F. Supp. 1533 (E.D. Mo. 1984); and *Cummings v. D'Ambrosio*, No. 78-0-157, 1978 U.S. Dist. LEXIS 16358 (D. Neb. July 26, 1978). In 2006, the Eighth Circuit narrowed the reasonably related exception in *Wedow v. City of Kan. City, Mo.*, 442 F.3d 661, 672–73 (8th Cir. 2006).

[108] *See infra* Part V.A.

[109] Anderson v. Reno, 190 F.3d 930, 938 (9th Cir. 1999), *abrogated by* Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101 (2002).

[110] *Id.* at 934.

Regarding the 1997 incident, the court concluded that the plaintiff was *not* required to exhaust her administrative remedies.[111] The court noted: "Although administrative exhaustion is generally a prerequisite to obtaining judicial review, we have recognized that forcing an employee to begin the administrative process anew after additional occurrences of discrimination in order to have them considered by the agency and the courts 'would erect a needless procedural barrier.'"[112] The court then determined that the 1997 retaliation allegation was "without question . . . part and parcel of the other claims that *had* been exhausted."[113] Thus, the Ninth Circuit decided that administrative exhaustion was not always required after the original charge of discrimination.[114]

The Tenth Circuit addressed this issue in *Brown v. Hartshorne Public School District #1*, where it decided the plaintiff was not required to exhaust administrative remedies for her retaliation claim.[115] The plaintiff alleged that the school district failed to hire her in ten successive years, and that some of those decisions were based on her filing of a previous EEOC charge and lawsuit.[116] The district court granted the employer's motion for summary judgment and dismissed the plaintiff's entire complaint, concluding that the plaintiff had not exhausted her administrative remedies.[117] After noting that a plaintiff must exhaust administrative remedies prior to filing suit,[118] the court cited the following exception: "[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 pendency of the charge before the EEOC."[119] The court then noted that "[c]ourts have

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[111] *Id.* at 938.

[112] *Id.* (quoting Oubichon v. N. Am. Rockwell Corp., 482 F.2d 569, 571 (9th Cir. 1973)).

[113] *Id.*

[114] *Id.* Admittedly, this case was somewhat different from some of the previous cases because the plaintiff essentially alleged a *continuation* of previous conduct rather than a new act of retaliation. *Id*. at 930. The outcome, however, was the same in that the court was willing to excuse the plaintiff's failure to file an amended or second charge. *Id*. at 938.

[115] 864 F.2d 680, 682 (10th Cir. 1988).

[116] *Id.* at 681.

[117] *Id.* at 681–82.

[118] *Id.* at 682.

[119] *Id.* (quoting Oubichon v. N. Am. Rockwell Corp., 482 F.2d 569, 571 (9th Cir. 1973)). The court also relied on the following opinions for this proposition: *Loe v. Heckler*, 768 F.2d 409, 420 (D.C. Cir. 1985), *abrogated by Bowie v. Ashcroft*, 283 F. Supp.2d 25 (D.D.C. 2003); *Brown v. Continental Can Co.*, 765 F.2d 810, 813 (9th Cir. 1985); *Almendral v. New York State Office of*

held that *an act committed by an employer in retaliation for the filing of an EEOC complaint is reasonably related to that complaint, obviating the need for a second EEOC complaint*."[120] Thus, pre-*Morgan*, the Tenth Circuit decided plaintiffs were not required to file amended or second charges with the EEOC;[121] however, as will be addressed later, that court became one of the courts to change its position after *Morgan*.[122]

The Eleventh Circuit reached a similar conclusion in *Baker v. Buckeye Cellulose Corp*.[123] In *Baker*, the court decided that the district court erred in denying the plaintiff's request for a hearing seeking to prevent her employer from retaliating against her for filing an EEOC charge.[124] The plaintiff initially filed a Title VII charge alleging she had been discriminated against because she was black.[125] She eventually sued, alleging a Title VII claim and other causes of action.[126] Four months after she filed suit, the plaintiff sought an injunction prohibiting her employer from engaging in retaliatory behavior.[127] The employer argued that the court did not have jurisdiction to hear the motion because the motion was based on allegations not raised in the EEOC charge.[128] According to the employer, "[the plaintiff] would have had to file a new charge with the EEOC alleging retaliatory actions, obtain a right-to-sue letter, and either file a new complaint in the district court or amend the complaint in the pending case."[129] Relying on *Gupta*, the court disagreed:

> [I]t is unnecessary for a plaintiff to exhaust administrative remedies prior to urging a retaliation claim growing out of an earlier charge; the district court has ancillary jurisdiction to hear such a claim when it grows out of an administrative charge that is properly before the court. There are strong

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Mental Health, 743 F.2d 963, 967 (2d Cir. 1984); and *Waiters v. Parsons*, 729 F.2d 233, 237–38 (3d Cir. 1984). *Brown*, 864 F.2d at 682.

[120] *Brown*, 864 F.2d at 682 (emphasis added) (relying on Kirkland v. Buffalo Bd. of Educ., 622 F.2d 1066, 1068 (2d Cir. 1980); Gottlieb v. Tulane Univ., 809 F.2d 278, 284 (5th Cir. 1987); Gupta v. E. Tex. State Univ., 654 F.2d 411, 414 (5th Cir. 1981)).

[121] *See Brown*, 864 F.2d at 682.

[122] *See* Martinez v. Potter, 347 F.3d 1208, 1210 (10th Cir. 2003); *see also infra* Part V.A.

[123] 856 F.2d 167, 169 (11th Cir. 1988).

[124] *Id.* at 168.

[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] *Id.*

[129] *Id*.

> practical reasons and policy justifications for this conclusion. It is the nature of retaliation claims that they arise after the filing of the EEOC charge. 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 when a single filing would comply with the intent of Title VII.[130]

The court then noted: "It has long been established in this circuit that the scope of a judicial complaint is defined by the scope of an EEOC investigation that 'can reasonably be expected to grow out of the charge of discrimination.'"[131] The court concluded: "Because a claim of retaliation could reasonably be expected to grow out of the original charge of discrimination, the district court had jurisdiction over the motion . . . ."[132] This is another example of how, pre-*Morgan*, courts agreed that employees were not required to file amended or additional charges alleging post-charge retaliation.[133]

This Part of the Article illustrates that pre-*Morgan*, most courts agreed that plaintiffs were not required to file charges alleging retaliation for filing the original charge. Although *Morgan* did not address this issue, but instead addressed the continuing violation doctrine,[134] some courts used *Morgan* to decide that plaintiffs must file an amended or second charge, regardless of whether the retaliation was related to, or grew out of, the original charge.[135] *Morgan* will now be addressed.

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[130] *Id.* at 169 (quoting Gupta v. E. Tex. State Univ., 654 F.2d 411, 414 (5th Cir. 1981)).

[131] *Id.* (quoting Sanchez v. Standard Brands, Inc., 431 F.2d 455, 466 (5th Cir. 1970)).

[132] *Id.* For examples of some pro-employee, pre-*Morgan* district court cases from within the Eleventh Circuit, see *Goza v. Bolger*, 538 F. Supp. 1012 (N.D. Ga. 1982), *aff'd*, 741 F.2d 1383 (11th Cir. 1984); and *EEOC v. Reichhold Chemicals., Inc.*, 700 F. Supp. 524 (N.D. Fla. 1988), *rev'd on other grounds*, 988 F.2d 1564 (11th Cir. 1993).

[133] I did not address the D.C. Circuit because, as the First Circuit noted in *Clockedile*, the D.C. Circuit had not weighed in on this issue prior to (or since) *Morgan*. Clockedile v. N.H. Dep't of Corr., 245 F.3d 1, 4 n.3 (1st Cir. 2001).

[134] Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 105 (2002).

[135] *See infra* Part V.A.

IV. THE SUPREME COURT'S OPINION IN *MORGAN*

Although some courts have used *Morgan* to require plaintiffs claiming post-charge retaliation to file an amended or second EEOC charge,[136] that issue was not addressed in *Morgan*.[137] Nonetheless, some of the Court's language has been used to dismiss post-charge retaliation claims by plaintiffs who failed to amend their original charge or file a second one.[138] After over ten years, however, most courts have decided that *Morgan* was *not* applicable to this situation, and they continue to give plaintiffs alleging post-charge retaliation a "free pass" if they do not file an amended or second EEOC charge.[139]

The specific issue in *Morgan* was "whether, and under what circumstances, a Title VII plaintiff may file suit on events that fall outside [the 180-day or 300-day statute of limitations]."[140] The plaintiff filed an EEOC charge in February of 1995 and alleged that while he worked, he was "consistently harassed and disciplined more harshly than other employees on account of his race."[141] "While some of the [discriminatory actions] occurred within 300 days of the [filing of the EEOC charge], many [events took place outside of that] period."[142] The district court concluded the plaintiff could not recover for actions that took place outside the 300-day limitations period.[143] The Ninth Circuit reversed, believing that the continuing violation doctrine allowed the plaintiff to recover for what the district court believed were stale claims.[144] Focusing on Title VII's text, the Supreme Court decided that the critical questions in resolving the case were "what constitutes an 'unlawful employment practice,' and when has that unlawful employment practice 'occurred.'"[145] These questions were critical

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[136] *See infra* Part V.A.

[137] *Morgan*, 536 U.S. at 105 (2002) (noting that the issue before the Court was "whether, and under what circumstances, a Title VII plaintiff may file suit on events that fall outside [the relevant] statutory time period.").

[138] *See infra* Part V.A.

[139] *See infra* Part V.B.

[140] *Morgan*, 536 U.S. at 105 (2002).

[141] *Id.*

[142] *Id.* at 106.

[143] *Id.*

[144] *Id.* at 106–07.

[145] *Id.* at 110 (citing 42 U.S.C. § 2000(e)-(5)(e)(1) (2006)).

because the focus of *Morgan* was to take away a plaintiff's ability to bring stale claims.[146]

The Court in *Morgan* started by noting that "[a] discrete *retaliatory* or discriminatory act 'occurred' on the day that it 'happened.' *A party, therefore, must file a charge within either 180 or 300 days of the date of the act or lose the ability to recover for it*."[147] Although the plaintiff argued that Title VII requires a plaintiff to file a charge within 180 or 300 days of the "unlawful employment practice" and that the word "practice" "connotes an ongoing violation that can endure or recur over a period of time[,]" the Court disagreed.[148] The Court referred to the prohibited conduct Congress articulated in Title VII and concluded 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. We have repeatedly interpreted the term 'practice' to apply to a discrete act or single 'occurrence,' even when it has a connection to other acts."[149] Eventually, the Court stated that "*[e]ach discrete discriminatory act starts a new clock for filing charges alleging that act*. The charge, therefore, must be filed within the 180- or 300-day time period after the discrete discriminatory act occurred."[150] The Court continued: "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.'*"[151]

The Court therefore concluded that discrete acts of retaliation and/or discrimination constitute individual unlawful employment practices.[152] And because Title VII requires an EEOC charge for "unlawful employment practices," some courts are now requiring an amended or a second EEOC

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[146] *See id.* at 109–10. This concern over stale claims, however, is *not* relevant when a plaintiff alleges post-charge acts of retaliation, as those acts are *newer* than the acts of discrimination that caused the plaintiff to file her initial charge.

[147] *Id.* at 110 (emphasis added). While looking at this statement in isolation, one could understand why the Eighth and Tenth Circuits concluded that plaintiffs are required to amend the original charge or file a second charge; however, one must keep in mind the context in which the Court made this statement, which involved the continuing violation doctrine and the elimination of *stale* claims.

[148] *Id.* at 110–11.

[149] *Id.* at 111 (citation omitted).

[150] *Id.* at 113 (emphasis added).

[151] *Id.* at 114 (emphasis added).

[152] *Id*.

charge when a plaintiff alleges post-charge retaliation.[153] This is happening despite the fact that *Morgan* was concerned with *stale* claims, not with *new* claims, and despite the fact that the Court never addressed this *specific* issue in *Morgan*.[154] These post-*Morgan* cases will now be addressed.

V. POST-*MORGAN* CASES ADDRESSING WHETHER PLAINTIFFS HAVE TO AMEND THEIR ORIGINAL CHARGE OR FILE A SECOND CHARGE TO ALLEGE POST-CHARGE ACTS OF RETALIATION

Prior to *Morgan*, most courts agreed that plaintiffs alleging post-charge acts of retaliation were *not* required to amend their original EEOC charge or file a second one.[155] After *Morgan*, some courts began questioning the retaliation exception and decided that *Morgan* required plaintiffs to jump over this additional hurdle.[156] The next Parts of the Article will describe the split of authority on this issue. While a split does exist, most circuits still follow the pre-*Morgan* approach.[157] Although this is the majority approach, there is a trend of courts going the other way on this issue, requiring an amended or second charge.[158] The cases adopting the new, pro-employer approach will be addressed first.

A. Courts That Now Require an Amended or Second Charge

Although *Morgan* did not address whether plaintiffs need to file amended or additional charges alleging post-charge acts of retaliation, some courts have interpreted *Morgan* as adding this new requirement.[159] This Part of the Article will address some of those cases and how the courts decided that the retaliation exception to the administrative exhaustion requirement no longer exists.

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[153] *See infra* Part V.A.

[154] *See* discussion *supra* this Part.

[155] *See supra* Part III.

[156] Richter v. Advance Auto Parts, Inc., 686 F.3d 847, 852 (8th Cir. 2012), *cert. dismissed*, 133 S. Ct. 1491 (2013); Martinez v. Potter, 347 F.3d 1208, 1210 (10th Cir. 2003). As noted earlier, the Fifth Circuit might also be heading in this direction. *See* Simmons-Myers v. Caesars Entm't Corp., 515 F. App'x 269, 273 (5th Cir. 2013), *cert. denied*, 134 S.Ct. 117 (2013); *see also infra* note 234.

[157] *See* cases cited *infra* Part V.B.

[158] *Richter*, 686 F.3d at 851; *Martinez*, 347 F.3d at 1211; *Simmons-Myers*, 515 F. App'x at 273; *see also* Romero-Ostolaza v. Ridge, 370 F. Supp. 2d 139, 150 (D.D.C. 2005).

[159] *See infra* this Part.

One court to conclude that Title VII requires an amended or second charge is the Eighth Circuit.[160] In *Richter*, the court focused on Title VII's language and on *Morgan* to conclude that the district court correctly dismissed the plaintiff's Title VII retaliation claim.[161] This occurred despite the fact that the retaliation took place *after* the plaintiff filed her original EEOC charge.[162] The plaintiff in *Richter* was a store manager who was demoted after she complained about employee misconduct.[163] She filed a charge with the EEOC, alleging she was demoted based on her sex and race.[164] She did not allege retaliation.[165] Instead of filing a lawsuit based on her EEOC charge, the plaintiff alleged a violation of Title VII's anti-retaliation provision.[166] According to the complaint, the plaintiff informed her employer's regional vice president of the EEOC charge five days after she filed it, and two days later, the plaintiff was fired.[167] The district court dismissed the retaliation claim, believing that by not including retaliation in her EEOC charge, the plaintiff failed to exhaust her administrative remedies.[168]

On appeal, the plaintiff argued that "claims relating to direct retaliation for filing an original EEOC complaint are excepted from exhaustion requirements."[169] As noted earlier, this proposition was supported by several court opinions.[170] The Eighth Circuit noted the exhaustion requirement and stated that it was "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.'"[171] The court then quoted part of Title VII's administrative exhaustion requirement:

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[160] *Richter*, 686 F.3d at 851.

[161] *Id.* at 851–53.

[162] *Id.* at 850.

[163] *Id.* at 849.

[164] *Id.*

[165] *Id.*

[166] *Id.* at 849–50.

[167] *Id.* at 850.

[168] *Id.*

[169] *Id.* (quoting Brief for Appellant at 15, Richter v. Advance Auto Parts, Inc., 686 F.3d 847 (8th Cir. 2012) (No. 11-2570), 2011 WL 4071731, at *21).

[170] *See supra* Part III.

[171] *Richter*, 686 F.3d at 850 (quoting Patterson v. McLean Credit Union, 491 U.S. 164, 180–81 (1989), *superseded by statute on other grounds*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071)).

> A charge under this section *shall be filed* within one hundred and eighty days *after the alleged unlawful employment practice occurred* and notice of the charge (including the date, place and circumstances of *the alleged unlawful employment practice*) shall be served upon the person against whom such charge is made within ten days thereafter.[172]

The court then focused on *Morgan* and concluded that the plaintiff needed to exhaust her administrative remedies.[173] Quoting *Morgan*, the court noted that "[e]ach incident of discrimination *and each retaliatory adverse employment decision constitute[d] a separate actionable 'unlawful employment practice[,]*'" requiring administrative exhaustion.[174] Next, relying on the Tenth Circuit's decision in *Martinez v. Potter*, the court noted that *Morgan* "abrogate[d] the continuing violation doctrine as previously applied to claims of discriminatory or retaliatory actions by employers, and replace[d] it with the teaching that each discrete incident of such treatment constitutes its own 'unlawful employment practice' for which administrative remedies must be exhausted."[175] The court also focused on Title VII's language, which requires administrative exhaustion after the "alleged unlawful employment practice [has] occurred."[176] Because the plaintiff's firing was an "unlawful employment practice," she needed to exhaust her administrative remedies for it.[177] Noting that the plaintiff alleged only discrimination in her EEOC charge, the court stated: "Each discrete act [was] a different employment practice for which a separate charge [was] required. [The plaintiff] failed to exhaust the retaliation claim, and the district court correctly dismissed the claim on that basis."[178]

The court then addressed the plaintiff's "like or reasonably related to" argument which, at one time within the Eighth Circuit, was an exception to

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[172] *Id.* at 850–51 (quoting 42 U.S.C. § 2000e-5(e)(1) (2006)).

[173] *Id.* at 851–53.

[174] *Id.* at 851 (emphasis added) (quoting Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 114 (2002)).

[175] *Id.* (quoting Martinez v. Potter, 347 F.3d 1208, 1210 (10th Cir. 2003)). The *Martinez* opinion will be addressed in further detail later in this Part of the Article.

[176] *Id.* (quoting 42 U.S.C. § 2000e-5(e)(1)).

[177] *Id.*

[178] *Id.* (citation omitted).

the administrative exhaustion requirement.[179] Specifically, the Eighth Circuit had previously held that under similar facts, an ADEA plaintiff was *not* required to amend his original charge (or file a second charge) after he alleged he was terminated for filing the original charge.[180] The court in *Wentz* concluded that because the retaliation claim "grew out of the discrimination charge [the plaintiff] filed with the EEOC," the plaintiff did not have to amend his original charge or file a second one.[181] Despite the plaintiff's efforts to use *Wentz* to support her position, the court decided that in light of *Morgan*, *Wentz* was no longer good law.[182]

> While at one time, this judicial exception to the exhaustion doctrine permitted a finding that a subsequent retaliation claim growing out of an EEOC age discrimination complaint was sufficiently related to be within the scope of the lawsuit, we have subsequently recognized that "retaliation claims are not reasonably related to underlying discrimination claims."[183]

Although it acknowledged that *Morgan* dealt with a different issue, the court believed this distinction was irrelevant.[184] Relying on *Martinez*, the court noted that *Morgan* "is equally applicable . . . to discrete claims based on incidents occurring after the filing of [the] [p]laintiff's EEO complaint."[185] Finally, the majority addressed Judge Bye's partial dissent.[186] The majority rejected his opinion in two ways: first, it noted that the policy considerations relied upon by Judge Bye could not overcome Title VII's language; second, it noted that there were "countervailing policy reasons" for requiring plaintiffs to amend a charge or file a second one.[187] Specifically, the majority noted that not requiring an amended or additional charge "could frustrate the conciliation process."[188] In concluding, the

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[179] *Id.* at 851–53.

[180] *Id.* at 851–52 (the ADEA case upon which the plaintiff relied was *Wentz v. Maryland Casualty Company*, 869 F.2d 1153 (8th Cir. 1989)).

[181] 869 F.2d at 1154.

[182] *Richter*, 686 F.3d at 852.

[183] *Id.* (quoting Wedow v. City of Kan. City, Mo., 442 F.3d 661, 672–73 (8th Cir. 2006) (quoting Duncan v. Delta Consol. Indus., Inc., 371 F.3d 1020, 1025 (8th Cir. 2004))).

[184] *Id.*

[185] *Id.* at 852–53 (quoting Martinez v. Potter, 347 F.3d 1208, 1210–11 (10th Cir. 2003)).

[186] *Id.* at 853.

[187] *Id.*

[188] *Id.*

majority stated: "Unconvinced by the dissent's policy arguments, we conclude that federal law required exhaustion of [the plaintiff's] Title VII retaliation claim."[189]

As previously noted, Judge Bye authored a separate opinion.[190] He first noted that prior to *Morgan*, courts did not require an amended or second charge alleging retaliation.[191] He then noted that post-*Morgan*, some courts moved away from this position, despite the fact that *Morgan* focused only on the continuing violation doctrine and the elimination of stale claims.[192] He also noted that most courts had not interpreted *Morgan* so broadly:

> Some courts moved away from their approach to related, post-filing retaliation claims in the wake of *Morgan*. Interpreting *Morgan*'s holding broadly, these courts concluded a Title VII plaintiff must file a separate EEOC charge for each discrete act of retaliation, even when the retaliation occurs after a timely charge has been filed. Other courts, however, construed *Morgan* more narrowly and continued to adhere to the position post-filing acts of retaliation, resulting from filing the charge in the first instance, can be pursued without administrative exhaustion because they are like or reasonably related to the allegations in the charge.[193]

Judge Bye then explained why *Morgan* should not require an amended or second charge.[194] He noted that *Morgan* involved retaliatory actions that took place *prior to* the initial EEOC filing.[195] After noting that the issue in *Morgan* was "when the limitations clock for filing an EEOC charge begins ticking with regard to discreet unlawful employment practices[,]"[196] Judge Bye continued to explain why *Morgan* should not be interpreted to change the rule regarding allegations of post-charge retaliation.[197] In wrapping up this part of his opinion, Judge Bye noted that "*Morgan*'s holding, therefore, 'concerns only Congress's clear preference as expressed in Title VII for

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[189] *Id.*

[190] *Id.* at 857 (Bye, J., concurring in part and dissenting in part).

[191] *Id.* at 858.

[192] *Id.*

[193] *Id.* (citation omitted).

[194] *Id.* at 858–861.

[195] *Id.* at 858–59.

[196] *Id.* at 859 (quoting Jones v. Calvert Grp. Ltd., 551 F.3d 297, 303 (4th Cir. 2009)).

[197] *Id.*

prompt processing of all charges of employment discrimination . . . [and] does not purport to address the extent to which an EEOC charge satisfies exhaustion requirements for claims of related, post-charge events.'"[198]

Judge Bye then focused on policy reasons for following the pre-*Morgan* rule.[199] He relied on cases from the Fifth Circuit, both of which referenced the needless procedural barriers caused by a rule requiring an amended or second filing.[200] He also relied on the Fourth Circuit, which had observed: "[A] plaintiff that has already been retaliated against one time for filing an EEOC charge will naturally be reluctant to file a separate charge, possibly bringing about further retaliation."[201] Judge Bye also noted:

> In light of the Supreme Court's clear rejection in *Morgan* of the continuing violation theory as a means to toll the limitation period for discrete acts of discrimination that occurred prior to the limitation period for a timely filed charge, some courts have concluded that the rule applies with equal force to discrete acts of discrimination that occur subsequent to a timely filed EEOC charge. . . . These courts require a new or amended EEOC charge for each subsequent alleged incident of retaliation or discrimination, regardless of whether the subsequent acts are related to the allegations of the initial timely filed EEOC charge. . . . [But] [w]hile our court has narrowed its view of what subsequent acts are sufficiently related to be within the scope of the properly filed administrative charges, *we have not wholly abandoned the theory that reasonably related subsequent acts may be considered exhausted*.[202]

While Judge Bye did acknowledge, and was referring to, the pro-employer language in *Wedow*,[203] he also noted that this language came from a case that did not involve a "related, post-filing retaliation claim[]" and

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[198] *Id.* (quoting *Jones*, 551 F.3d at 303).

[199] *Id.*

[200] *Id.* (relying on Eberle v. Gonzales, 240 F. App'x 622, 628 (5th Cir. 2007); and Gupta v. E. Tex. State Univ., 654 F.2d 411, 414 (5th Cir. 1981)).

[201] *Id.* (quoting *Jones*, 551 F.3d at 302).

[202] *Id.* at 860 (emphasis added) (citations omitted) (quoting Wedow v. City of Kan. City, Mo. 442 F.3d 661, 674 (8th Cir. 2006)).

[203] *Id.* Judge Bye was referring to *Wedow v. City of Kansas City, Missouri*, 442 F.3d 661 (8th Cir. 2006), when he acknowledged that the Eighth Circuit had narrowed the circumstances in which an employee was not required to file an amended or second charge. *See id.*

was therefore not relevant.[204] Because the case upon which *Wedow*'s pro-employer language was based was distinguishable, Judge Bye concluded:

> I therefore decline to view *Wedow* as foreclosing the applicability of the like-or-reasonably-related-to exception to retaliatory acts occurring *after* the filing of a discrimination charge with the EEOC and growing out of said charge as such acts are necessarily reasonably related to the underlying allegations in the charge.[205]

Thus, Judge Bye believed the plaintiff's retaliation claim should not have been dismissed.[206] Nonetheless, despite Judge Bye's opinion, the Eighth Circuit now requires an amended or second charge when a plaintiff alleges a post-charge act of retaliation.[207]

Another court to reach a pro-employer outcome after *Morgan* was the Tenth Circuit.[208] In *Martinez*, the court decided that the plaintiff's unexhausted retaliation claims were properly dismissed.[209] The court relied on *Morgan*, believing that *Morgan* required plaintiffs to file charges for post-charge retaliation.[210] Because the plaintiff in *Martinez* did not do so, he was barred from suing for the retaliatory conduct.[211] The plaintiff in *Martinez* filed an EEO complaint in July of 1999, complaining of acts that took place in May.[212] The plaintiff eventually tried to raise a September 2000 reprimand and his April 2001 firing, both of which he claimed were retaliatory acts.[213] Unfortunately for the plaintiff, he never filed formal EEO complaints regarding these incidents.[214] The district court granted summary judgment, believing the two acts "were not like or reasonably related to the

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[204] *Id.*

[205] *Id.* at 861.

[206] *Id.*

[207] *Id.* at 853 (majority opinion).

[208] Martinez v. Potter, 347 F.3d 1208, 1211 (10th Cir. 2003). For a more recent pro-employer opinion from the Tenth Circuit, see *Eisenhour v. Weber County*, 739 F.3d 496 (10th Cir. 2013), *vacated in part*, 744 F.3d 1220 (2014).

[209] *Martinez*, 347 F.3d at 1210.

[210] *Id.* at 1210–11.

[211] *Id.* at 1211.

[212] *Id.* at 1210.

[213] *Id.*

[214] *Id.*

allegations in [the plaintiff's] EEO complaint, and [the plaintiff] had failed to exhaust administrative remedies."[215]

When addressing the issue of this Article, the court focused its attention on *Morgan*.[216] It noted that *Morgan* "has effected fundamental changes to the doctrine allowing administratively unexhausted claims in Title VII actions . . . We agree with the government that such unexhausted claims involving discrete employment actions are no longer viable."[217] Believing that each discrete employment action constituted an "unlawful employment practice," administrative exhaustion was required for each of these actions.[218] Quoting from *Morgan*, the court observed: "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*.'"[219] As a result, each required administrative exhaustion.[220] While the court acknowledged that *Morgan* did not present the same issue presented in *Martinez*, it believed that the discussion from *Morgan* applied to allegations of post-charge retaliatory conduct.[221] The court then noted that this interpretation of *Morgan* was consistent with Title VII's goals:

> Application of this rule to incidents occurring after the filing of an EEO complaint is consistent with the policy goals of the statute. 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.[222]

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[215] *Id.*

[216] *Id.*

[217] *Id.*

[218] *Id.*

[219] *Id.*

[220] *Id.*

[221] *Id.* at 1211.

[222] *Id.* (citing Brown v. Gen. Servs. Admin., 425 U.S. 820, 832–35 (1976)).

Based upon this policy and based on *Morgan*, the court concluded that the plaintiff needed to exhaust administrative remedies for his allegations of post-charge retaliation.[223]

Until recently, the Fifth Circuit was one jurisdiction in which plaintiffs could be confident that amended or additional charges were *not* required for allegations of post-charge retaliation;[224] however, a recent opinion from that court has cast some doubt on that position.[225] Although not precisely addressing the question which is the topic of this Article, the Fifth Circuit in *Simmons-Myers* did not allow a plaintiff to pursue a retaliation claim after she failed to file an EEOC retaliation charge.[226] This was a departure from the previously-discussed *Gupta* case, but the Fifth Circuit distinguished *Gupta*.[227] In *Simmons-Myers*, the plaintiff filed an EEOC charge alleging she was the victim of sex discrimination.[228] After filing the charge, the plaintiff's position was eliminated.[229] Despite losing her job, the plaintiff never filed another charge, but her lawsuit included a retaliation claim.[230]

The court eventually addressed whether the plaintiff was required to file an amended or second EEOC charge for acts that occurred after her original charge.[231] Relying on *Morgan*, the court stated that the plaintiff's "termination was a separate employment event for which [the plaintiff] was required to file a supplemental claim, or at the very least, amend her original EEOC charge."[232] The plaintiff relied on *Gupta*, but the court noted that it had "not applied the *Gupta* exception to claims *in which both retaliation and discrimination are alleged*."[233] Thus, it was unclear whether

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[223] *Id.*; *see also* Morris v. Cabela's Wholesale, Inc., 486 F. App'x 701, 704 (10th Cir. 2012); Duncan v. Manager, Dep't of Safety, City & Cnty. of Denver, 397 F.3d 1300, 1314 (10th Cir. 2005); Uriostegui v. Klinger Constructors, Inc., 106 F. App'x 8, 10 (10th Cir. 2004); Annett v. Univ. of Kan., 371 F.3d 1233, 1238 (10th Cir. 2004); Lewis v. Denver Fire Dep't, No. 09-cv-00004-PAB-MJW, 2010 U.S. Dist. LEXIS 102659, at *16–17 (D. Colo. Sept. 28, 2010)(relying on *Martinez* and *Morgan*).

[224] *See* Gupta v. E. Tex. State Univ., 654 F.2d 411, 413 (5th Cir. 1981).

[225] *See* Simmons-Myers v. Caesars Entm't Corp., 515 F. App'x 269, 273 (5th Cir.), *cert. denied*, 134 S. Ct. 117 (2013).

[226] *Id.*

[227] *Id.* at 273–74.

[228] *Id.* at 271.

[229] *Id.* at 272.

[230] *Id.*

[231] *Id.* at 272–74.

[232] *Id.* at 273.

[233] *Id.* (emphasis added) (citing Gupta v. E. Tex. State Univ., 654 F.2d 411, 414 (5th Cir. 1981); Sapp v. Potter, 413 F. App'x 750, 752–53 (5th Cir. 2011); Scott v. Univ. of Miss., 148 F.3d

the court was simply strictly applying *Gupta* or whether it was starting to shift to the pro-*employer* position on this issue.[234]

As this Part of this Article demonstrated, some courts have given a broad interpretation to *Morgan*. Although that opinion did not *specifically* address the topic of this Article, the Eighth Circuit's, the Tenth Circuit's, and possibly the Fifth Circuit's interpretations of *Morgan* have certainly caused some confusion regarding the extent of *Morgan*'s reach. As the next Part of the Article will show, not all courts agree with the Eighth and Tenth Circuits (and possibly the Fifth); in fact, most courts still apply the pre-*Morgan* rule that does *not* require an amended or second charge if the plaintiff is retaliated against for filing her original charge. Opinions from those courts will now be addressed.

B. Courts That Do Not Require an Amended or Second Charge (and Courts That Have Not Yet Definitively Answered the Question)

Post-*Morgan*, many courts still allow plaintiffs to proceed with retaliation claims without filing amended or second EEOC charges. These courts either ignore *Morgan* or decide that because *Morgan* addressed a separate issue, it does not apply to this issue. I will now address post-*Morgan* cases that have decided that no amended or additional charges alleging retaliation are required.

While not *specifically* addressing whether *Morgan* affected this issue, the First Circuit seems to believe that *Morgan* has not affected the administrative exhaustion requirement (or lack thereof) for plaintiffs asserting claims of post-charge retaliation.[235] In *Franceschi*, the plaintiff alleged both discrimination and retaliation.[236] The retaliation claim was based on an allegation that the plaintiff was retaliated against for complaining to the EEOC.[237] For reasons not made clear, the plaintiff failed

493, 514 (5th Cir. 1998), *abrogated on other grounds* by Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000)).

[234] Although I listed the Fifth Circuit in this Part of the Article, I did so only because of the pro-employer *outcome* in *Simmons-Myers*. Despite *Simmons-Myers*, courts within the Fifth Circuit currently appear to be sticking with the *Gupta* rule. Specifically, a post-*Simmons-Myers* district court case from within the Fifth Circuit noted the continued viability of *Gupta*. *See* Taylor v. Tex. S. Univ., No. 4:12-cv-01975, 2013 U.S. Dist. LEXIS 137185, at *13–14 n.4 (S.D. Tex. Sept. 25, 2013).

[235] *See* Franceschi v. U.S. Dep't of Veterans Affairs, 514 F.3d 81, 87 (1st Cir. 2008).

[236] *Id.* at 83.

[237] *Id.*

to wait the required time period before filing suit.[238] The district court therefore dismissed the plaintiff's discrimination claims, and it then dismissed the plaintiff's retaliation claim because the plaintiff was unable to demonstrate a causal connection between the EEOC charge and the adverse employment action.[239] The plaintiff then appealed.[240] After addressing the plaintiff's discrimination claims, the court addressed whether the retaliation claim was properly before the court.[241] Believing the retaliation claim was *not* properly before *even the district court*, the First Circuit affirmed the district court's judgment regarding this issue.[242] The court concluded that because the *discrimination* claims were not properly before the court, there were no properly exhausted claims before the court to which the plaintiff could "bootstrap" his retaliation claim.[243] However, in recognizing the retaliation exception, the court noted:

> A claim of retaliation for filing an administrative charge with the EEOC is one of the narrow exceptions to the normal rule of exhaustion of administrative remedies. . . . This is so because such a claim of retaliation is "reasonably related to and grows out of the discrimination complained of to the [EEOC]." In other words, the retaliation claim survives what would otherwise be a failure to exhaust administrative remedies by virtue of its close relation to and origins in the other Title VII discrimination claims.[244]

Despite this pro-employee language, the plaintiff failed because the *discrimination* claims he brought had not been exhausted, leaving him without any properly exhausted claims before the court to which he could bootstrap the retaliation claim.[245] The pro-employee take-away, however, is that the court continued to acknowledge the retaliation exception post-*Morgan*.[246] Therefore, plaintiffs who exhaust administrative remedies for *discrimination* claims will be able to pursue post-charge acts of retaliation

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[238] *Id.* at 84.

[239] *Id.*

[240] *Id.*

[241] *Id.* at 86–87.

[242] *Id.* at 87.

[243] *Id.*

[244] *Id.* at 86–87 (emphasis added) (citations omitted).

[245] *Id.* at 87.

[246] *See id.* at 86–87.

for filing an original EEOC charge without having to file an amended or new EEOC charge.[247]

The Second Circuit also appears to be sticking to its pre-*Morgan* position that victims of post-charge retaliation are not required to file an amended or second EEOC charge.[248] While the court in *Alfano* did not *specifically* address this issue, it cited with approval the *Butts* exceptions, with one of these exceptions being where a plaintiff is excused from the exhaustion requirement if the retaliatory action is in response to the initial EEOC charge.[249] In *Alfano*, after addressing why the plaintiff was not the victim of actionable harassment, the court addressed the claims regarding the plaintiff's disciplinary notice and subsequent termination.[250] Earlier, the district court had dismissed the plaintiff's termination claim because she had failed to raise it in her EEOC charge.[251] Of course, raising the claim was not possible because at the time of the charge, the plaintiff had not been terminated.[252] Relying on *Butts*, the court in *Alfano* referenced the "reasonably related" doctrine, noting that a claim is reasonably related if it "alleges retaliation for filing the EEOC charge . . . ."[253] The court then had to decide whether the plaintiff's allegations were sufficiently clear to be a claim that the acts of retaliation were a result of the EEOC charge.[254] Applying a narrow reading of the allegations, the court concluded:

> As to the second test, the district court considered that while [the plaintiff's] federal complaint generally alleged "retaliatory conduct" on the part of [the employer], the pleading alleged no link between that conduct and the filing of her EEOC charge. On appeal, [the plaintiff] argues that her complaint "can be interpreted [to say] that the notices of discipline were in retaliation for her having filed an EEOC charge against [the employer]." However, [the plaintiff] did not allege that [the employer] retaliated

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[247] *See id.*

[248] *See* Alfano v. Costello, 294 F.3d 365, 381 (2d Cir. 2002); *see also* Terry v. Ashcroft, 336 F.3d 128, 151 (2d Cir. 2003).

[249] *Alfano*, 294 F.3d at 381 (citing Butts v. City of N.Y. Dep't of Hous. Pres. & Dev., 990 F.2d 1397, 1402–03 (2d Cir. 1993)).

[250] *Id.* at 381–82.

[251] *Id.* at 381.

[252] *Id.*

[253] *Id.* (quoting *Butts*, 990 F.2d at 1402).

[254] *See id.* at 381–82.

> against her for filing an EEOC charge; her vague, conclusory accusations of "retaliatory conduct" are insufficient to meet the Butts requirement of a specific linkage between filing an EEOC charge and an act of retaliation.[255]

Therefore, the court affirmed the lower court's dismissal of the plaintiff's retaliation cause of action.[256] Despite this outcome, however, it appears the Second Circuit was willing to allow plaintiffs to pursue allegations of post-charge retaliation without first exhausting administrative remedies.[257]

Courts within the Third Circuit also appear to be taking the pro-employee approach.[258] Specifically, the United States District Court for the Western District of Pennsylvania determined that *Morgan* did not change the requirement (or lack thereof) for an amended or second EEOC charge if the retaliation claim arises out of the filing of the first charge.[259] In *Patsakis*, the court suggested that *Morgan* had no effect on the need for an amended or second EEOC charge, and it also predicted that if confronted with this issue, the Third Circuit would stay with the pre-*Morgan* approach.[260] The court addressed *Morgan* and observed that some courts had interpreted it as requiring EEOC charges for each act of discrimination or retaliation.[261] Importantly, however, the court noted that *Morgan* did not "hold that incidents of discrimination that occur *after* a charge of discrimination is filed must themselves be the subject of a new charge of discrimination filed

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[255] *Id.* at 382 (citation omitted).

[256] *Id.*

[257] This case was decided only two weeks after *Morgan*; however, since then, the Second Circuit in *Terry v. Ashcroft*, 336 F.3d 128 (2d Cir. 2003), seems to have concluded that *Morgan* did not change the pre-*Morgan* exceptions to the administrative exhaustion requirements. In *Terry*, the court reiterated the *Butts* exceptions and determined that the plaintiff's claim "falls within at least the second [*Butts*] exception." *Terry*, 336 F.2d at 151. This exception excuses administrative exhaustion when a plaintiff alleges retaliation as a result of filing a previous EEOC charge. *Butts*, 990 F.2d at 1402.

[258] *See* Patsakis v. E. Orthodox Found., No. 04-1662, 2006 U.S. Dist. LEXIS 55330, at *21–22 (W.D. Pa. May 17, 2006).

[259] *Id.*

[260] *Id.*

[261] *Id.* at *19–20 (citing Annett v. Univ. of Kan., 371 F.3d 1233, 1238 (10th Cir. 2004); Martinez v. Potter, 347 F.3d 1208, 1210–11 (10th Cir. 2003); and Bowie v. Ashcroft, 283 F. Supp. 2d 25, 34–35 (D.D.C. 2003)).

with the EEOC."[262] The court continued: "Other courts have noted that '*Morgan* does not address whether a previously filed EEOC complaint must be amended to encompass subsequent acts susceptible to judicial review.'"[263] The court stated that the Third Circuit had not yet decided whether *Morgan* changed this, and it also stated that the defendants were unable to produce any "persuasive authority that the [Third Circuit] would conclude that *Morgan* abrogates this long line of cases concerning post-charge conduct."[264] The court observed:

> This Court predicts that the Court of Appeals for the Third Circuit would not conclude that *Morgan* applies to post-filing conduct, but would continue to inquire whether the new incidents are "reasonably related to" or "reasonably could be expected to grow out of" the charge of discrimination filed with the agency. Therefore, Plaintiff was not required to file a new charge of discrimination within 300 days of the March 31, 2004 termination unless it was not reasonably within the scope of the EEOC investigation or could not have reasonably been expected to grow out of it.[265]

The court also noted that "allegations of retaliation arising out of a plaintiff's EEOC charge of discrimination are generally considered to be reasonably related to the charge."[266] Thus, although the Third Circuit has not directly confronted this issue, at least one district court within the Third Circuit believes that *Morgan* did not change the Third Circuit's pre-*Morgan* position.[267]

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[262] *Id.* at *19.

[263] *Id.* at *20 (citing Rivera v. P.R. Aqueduct & Sewers Auth., 331 F.3d 183, 189 (1st Cir. 2003)).

[264] *Id.* at *21. The court did, however, note that pre-*Morgan*, the Third Circuit followed the "reasonably related" exception. *Id.* at *22. The Third Circuit has not addressed this issue since *Morgan*; however, the court has held that post-charge filing conduct can be raised in federal court if it is reasonably related to, or reasonably could be expected to grow out of, the first charge. *Id.* at 21; *see* Anjelino v. N.Y. Times Co., 200 F.3d 73, 93–95 (3d Cir. 1999); Robinson v. Dalton, 107 F.3d 1018, 1025 (3d Cir. 1997); Antol v. Perry, 82 F.3d 1291, 1295 (3d Cir. 1996); Howze v. Jones & Laughlin Steel Corp., 750 F.2d 1208, 1212 (3d Cir. 1984); Waiters v. Parsons,729 F.2d 233, 237 (3d Cir. 1984); Hicks v. ABT Assocs., Inc., 572 F.2d 960, 965 (3d Cir. 1978); and Ostapowicz v. Johnson Bronze Co., 541 F.2d 394, 398–99 (3d Cir. 1976).

[265] *Patsakis*, 2006 U.S. Dist. LEXIS 55330, at *21–22.

[266] *Id.* at *22 (citing *Anjelino*, 200 F.3d at 96; *Howze*, 750 F.2d at 1209–10).

[267] *Id.* at *21–22.

Another court that decided that *Morgan* does not require an amended or second charge was the Fourth Circuit.[268] In *Jones*, the plaintiff filed an EEOC charge alleging discrimination based on race, age, and sex.[269] Soon after those issues were resolved, the plaintiff received a negative evaluation, which resulted in her filing a second charge, alleging retaliation.[270] Soon after the plaintiff received her right-to-sue notice, her employer terminated her.[271] The plaintiff sued, alleging she was terminated because of her age, her race, and her Title VII activity.[272] The district court granted summary judgment based on the plaintiff's failure to exhaust administrative remedies, and the plaintiff appealed.[273]

When addressing the topic of this Article, the court noted that "a claim in formal litigation will generally be barred if the EEOC charge alleges discrimination on one basis . . . and the formal litigation claim alleges discrimination on a separate basis . . . ."[274] After addressing her other claims, the court addressed whether the plaintiff exhausted her administrative remedies with respect to her retaliation claim.[275] Relying on Fourth Circuit precedent, the plaintiff argued that the district court erred when it concluded that she did not exhaust her administrative remedies.[276] The Fourth Circuit reviewed *Nealon*, which held that retaliation claims are like or related to the original charges, and that "'practical concerns' also supported the rule in that a plaintiff that has already been retaliated against one time for filing an EEOC charge will naturally be reluctant to file a separate charge, possibly bringing about further retaliation."[277] The court then addressed *Morgan*:

> Although [the employer] asserts that *Morgan* required [the plaintiff] to file a new EEOC charge alleging that she was terminated in retaliation for her first charge, we do not read *Morgan* that broadly. *Morgan* addresses only the issue of

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[268] Jones v. Calvert Grp., Ltd., 551 F.3d 297, 304 (4th Cir. 2009).

[269] *Id.* at 299.

[270] *Id.*

[271] *Id.*

[272] *Id.*

[273] *Id.* at 299–300.

[274] *Id.* at 300 (citing Bryant v. Bell Atl. Md., Inc., 288 F.3d 124, 132–33 (4th Cir. 2002); Evans v. Techs. Applications & Serv. Co., 80 F.3d 954, 963 (4th Cir. 1996)).

[275] *Id.* at 301–04.

[276] *Id.* at 301–02. Specifically, the plaintiff relied on *Nealon v. Stone*, 958 F.2d 584 (4th Cir. 1992). *Id.*

[277] *Id.* at 302 (citing *Nealon*, 958 F.2d at 590).

> when the limitations clock for filing an EEOC charge begins ticking with regard to discrete unlawful employment practices. . . . *It does not purport to address the extent to which an EEOC charge satisfies exhaustion requirements for claims of related, post-charge events*.[278]

The court then addressed whether the plaintiff's claim related back to her second EEOC charge, as the first charge did not result in the pending litigation.[279] According to the court, the plaintiff's second charge "alleged a pattern of conduct by her employer in retaliation for her filing the first charge that included denying her mentoring opportunities, unduly scrutinizing her performance, and giving her a negative performance review."[280] The court continued:

> The charge also indicated that the retaliatory behavior was ongoing. Particularly in light of the indication in the second charge that [the employer's] retaliatory conduct was continuing, we conclude that the alleged retaliatory termination was merely the predictable culmination of [the employer's] alleged retaliatory conduct, and . . . the claim of retaliatory termination was reasonably related to the allegations of the second charge.[281]

The court then reiterated the "practical concerns" it previously noted and held that the plaintiff's retaliation claim did relate back to her second charge, and did not require another charge.[282]

One of the first courts of appeals to address this issue post-*Morgan* was the Sixth Circuit.[283] While that court *initially* took a pro-employer approach,[284] it eventually changed its position.[285] In *Smith*, the court

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[278] *Id.* at 303 (emphasis added).

[279] *Id.* at 304.

[280] *Id.*

[281] *Id.* (citation omitted). Although the facts of this case are not identical to a situation where a plaintiff alleges retaliation for filing a charge, the pro-employee outcome is the same in that the court found that the continued behavior related back to the initial charge and the plaintiff was excused from going back to the EEOC. *Id.*

[282] *Id.*

[283] Sherman v. Chrysler Corp., 47 F. App'x 716 (6th Cir. 2002).

[284] *Id.* at 721.

[285] Smith v. Ky. State Univ., 97 F. App'x 22, 26 (6th Cir. 2004). As will be addressed later, the Sixth Circuit also reached a pro-employee outcome in *Delisle v. Brimfield Township Police Department*, 94 F. App'x 247, 253–54 (6th Cir. 2004).

concluded that plaintiffs are not required to file additional EEOC charges.[286] Without discussing *Morgan*, the court noted that "it is well-settled that a federal court has jurisdiction to hear Title VII claims that can be reasonably expected to grow out of an EEOC charge [,]"[287] and that "[a]s a general matter, 'retaliation claims based on conduct that occurs after the filing of the EEOC charge can be reasonably expected to grow out of the charge.'"[288] The court noted that the lower court "properly concluded that the plaintiff exhausted her claim of retaliation insofar as it relates to events occurring after she filed her EEOC charge as being reasonably related to, and having grown from, the underlying discrimination charge presented to and investigated by the EEOC."[289]

The Sixth Circuit also addressed this issue in *Delisle v. Brimfield Township Police Department*, where the court gave a more detailed explanation of this issue.[290] In *Delisle*, the plaintiff alleged both pre-charge and post-charge acts of retaliation, and the court addressed whether *Morgan* barred the plaintiff from pursuing the post-charge acts of retaliation.[291] The court first noted that several courts have recognized the retaliation exception when the retaliation was "'reasonably related' to [the claims] that the plaintiff did assert before the agency."[292] While the cases upon which the majority relied were pre-*Morgan*, the court did address *Morgan*.[293] It observed that many courts have limited *Morgan* and have not required a second filing.[294] The court noted that *Morgan* was concerned with continuing violations and how far back a plaintiff could reach to make his claims timely.[295] The court also noted that "*[w]hen taken out of context*, *Morgan* may appear to address the issue we have before us; however, the

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[286] *Smith*, 97 F. App'x at 26.

[287] *Id.* (relying on Strouss v. Mich. Dep't of Corr., 250 F.3d 336, 342 (6th Cir. 2001)).

[288] *Id.* (quoting *Strouss*, 250 F.3d at 342).

[289] *Id.*

[290] 94 F. App'x 247.

[291] *Id.* at 251–54.

[292] *Id.* at 252 (citing Fitzgerald v. Henderson, 251 F.3d 345, 360–61 (2d Cir. 2001); Anjelino v. N.Y. Times Co., 200 F.3d 73, 96 (3d Cir. 1999); White v. N.H. Dep't of Corr., 221 F.3d 254, 262 (1st Cir. 2000); Butts v. City of N.Y. Dep't of Hous. Pres. & Dev., 990 F.2d 1397, 1401–03 (2d Cir. 1993); Howze v. Jones & Laughlin Steel Corp., 750 F.2d 1208, 1212 (3d Cir. 1984); and Ostapowicz v. Johnson Bronze Co., 541 F.2d 394, 398–99 (3d Cir. 1976)).

[293] *Id.* at 252–54.

[294] *Id.* at 252–53 (citing Higbee v. Billington, 246 F. Supp. 2d 10, 16–17 (D.D.C. 2003); Doan v. NSK Corp., 266 F. Supp. 2d 629, 636 n.2 (E.D. Mich. 2003), *aff'd*, 97 F. App'x 555 (6th Cir. 2004)).

[295] *Id.* at 253.

dissent's application of the *Morgan* holding to the facts of this case is completely inapposite."[296] Continuing with *Morgan*, the court observed that there was "no precedent precluding this Court from the review of [the post-charge act of retaliation]."[297] Relying on the Sixth Circuit's opinion in *Weigel*, the court stated:

> Although *Weigel* does not address retaliatory actions that have occurred subsequent to administrative filings, it does, however, concern retaliation claims not alleged in an administrative filing that may be reviewed so long as they could "reasonably [be] expected to grow out of the [existing] EEOC charge." The court in *Weigel* also stated, given the allowable scope of an EEOC investigation, "'retaliation naturally grows out of an underlying substantive discrimination claim foreseeable to defendants.'" . . . [C]ase law in our Circuit supports our theory behind the policy of recognizing retaliatory adverse actions not previously administratively filed.[298]

The court ended by addressing the policy behind the exhaustion requirement and concluding that the plaintiff could pursue the retaliation claim for which he did not file an EEOC charge.[299]

Although the Seventh Circuit has not *directly* ruled on this issue post-*Morgan*,[300] at least one district court within the Seventh Circuit has concluded that the "tea leaves" suggest that court would *not* require an

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[296] *Id.* (emphasis added).

[297] *Id.*

[298] *Id.* at 253–54 (citation omitted) (quoting Weigel v. Baptist Hosp., 302 F.3d 367, 379–80 (6th Cir. 2002)).

[299] *Id.* at 254; *see also* Bhama v. Mercy Mem'l Hosp. Corp., No. 08-11560, 2009 U.S. Dist. LEXIS 73712, at *6 (E.D. Mich. Aug. 20, 2009) (deciding that a plaintiff was not required to file multiple EEOC charges).

[300] Although the court has not *directly* done so, the Seventh Circuit did note in passing that an employee would *not* be required to exhaust administrative remedies for a post-charge act of retaliation. *See* Swearnigen-El v. Cook Cnty. Sheriff's Dep't, 602 F.3d 852, 864 n.9 (7th Cir. 2010); *see also* Horton v. Jackson Cnty. Bd. of Cnty. Comm'rs, 343 F.3d 897, 898 (7th Cir. 2003). More recently, however, and relying on pre-*Morgan* case law, that court observed: "We have held for practical reasons, to avoid futile procedural technicalities and endless loops of charge/retaliation/ charge/retaliation, etc., that a plaintiff who alleges retaliation for having filed a charge with the EEOC need not file a second EEOC charge to sue for that retaliation." Luevano v. Wal-Mart Stores, Inc., 722 F.3d 1014, 1030 (7th Cir. 2013).

amended or second charge.[301] In *Fentress*, the court had to decide whether to dismiss a complaint when that complaint alleged a retaliation claim that had not been brought to the EEOC.[302] The defendant relied on *Morgan* and argued the plaintiff's failure to exhaust administrative remedies was fatal to her retaliation claim.[303] The court first noted the purposes of administrative exhaustion: (1) to provide the employer with notice of the charge; and (2) to allow the parties to settle the dispute prior to litigation.[304] After acknowledging the plaintiff did not file a retaliation charge, the court relied on *Malhotra* for the proposition that "'a separate administrative charge is not prerequisite to a suit complaining about retaliation for filing the first charge.'"[305] The court also cited to the Seventh Circuit's opinion in *Horton v. Jackson County Board of County Commissioners*, which had observed that "'retaliation for complaining to the EEOC need not be charged separately from the discrimination that gave rise to the complaint, at least . . . if the person discriminated against and the person retaliated against are the same.'"[306] The court then concluded that the plaintiff's complaint fell within this exception.[307]

The employer attempted to argue that *Morgan* changed this; however, the court rejected that argument.[308] The court noted that the courts had split regarding this topic and cited cases on both sides of the issue.[309] After acknowledging that the Seventh Circuit had not directly addressed this issue, the court observed that the Seventh Circuit's mentioning of the

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[301] Fentress v. Potter, No. 09 C 2231, 2012 U.S. Dist. LEXIS 62484, at *6–7 (N.D. Ill. May 4, 2012); *see also* Mandewah v. Wis. Dep't of Corr., No. 07C0410, 2009 U.S. Dist. LEXIS 51047, at *9–10 (E.D. Wis. June 17, 2009); Hill v. Potter, No. 06-CV-3105, 2009 U.S. Dist. LEXIS 29061, at *22–23 (N.D. Ill. Mar. 31, 2009); Troutt v. City of Lawrence, No. 1:06-cv-1189-DFH-TAB, 2008 U.S. Dist. LEXIS 61641, at *37–38 (S.D. Ind. Aug. 8, 2008); Spellman v. Seymour Tubing, Inc., No. 4:06-cv-0013-DFH-WGH, 2007 U.S. Dist. LEXIS 28779, at *3–5 (S.D. Ind. Apr. 12, 2007); and Kruger v. Principi, 420 F. Supp. 2d 896, 906–07 (N.D. Ill. 2006).

[302] *Fentress*, 2012 U.S. Dist. LEXIS 62484, at *4–5.

[303] *Id.* at *5–6.

[304] *Id.* at *4 (quoting Cheek v. W. & S. Life Ins. Co., 31 F.3d 497, 500 (7th Cir. 1994)).

[305] *Id.* at *5 (quoting Malhotra v. Cotter & Co., 885 F.2d 1305, 1312 (7th Cir. 1989)).

[306] *Id.* (citing Horton v. Jackson Cnty. Bd. of Cnty. Comm'rs, 343 F.3d 897, 898 (7th Cir. 2003)).

[307] *Id.*

[308] *Id.* at *5–7.

[309] *Id.* at *6. (citing Jones v. Calvert Grp., Ltd., 551 F.3d 297, 303 (4th Cir. 2009); Wedow v. City of Kan. City, Mo., 442 F.3d 661, 673–74 (8th Cir. 2006); Delisle v. Brimfield Twp. Police Dep't, 94 F. App'x 247, 252–54 (6th Cir. 2004); Martinez v. Potter, 347 F.3d 1208, 1210–11 (10th Cir. 2003)).

exception in *Horton* (which was post-*Morgan*) suggested that the Seventh Circuit agreed that *Morgan* did not change the exception for claims of post-charge retaliation.[310] Specifically, the court noted: "Given these post-*Morgan* tea leaves from the Seventh Circuit, as well as the three-to-one circuit split against abrogation, the court concludes that the exception remains valid."[311] The court ended its discussion with citations to other cases that had reached the same pro-employee conclusion, even after *Morgan*.[312]

Another district court from within the Seventh Circuit weighed in on this issue, and it gave a thorough explanation why the administrative exhaustion requirement does not exist for post-charge acts of retaliation.[313] In *Spellman*, the plaintiff sought to amend her complaint to allege an act of post-charge retaliation.[314] The employer argued that *Morgan* required a second charge, but the court allowed the plaintiff to amend her complaint.[315] The court started with a discussion of the exhaustion requirement and the exceptions to it.[316] Relying on pre-*Morgan* precedent, the court observed:

> The Seventh Circuit has long held "that the judicial complaint in a Title VII case can embrace not only the allegations in the administrative charge but also discrimination like or reasonably related to the allegations of the charge and growing out of such allegations, specifically including retaliation for the filing of the charge." Therefore, "[o]f course, an employee is not

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[310] *Id.* at *6–7.

[311] *Id.* (citing Luna v. U. S., 454 F.3d 631, 636 (7th Cir. 2006); and Gacy v. Welborn, 994 F.2d 305, 310 (7th Cir. 1993)). Another case from a district court from within the Seventh Circuit, *Mandewah v. Wisconsin. Department of Corrections*, Case No. 07C0410, 2009 U.S. Dist. LEXIS 51047, at *9 (E.D. Wis. June 17, 2009), also favorably cited *Horton* for the proposition that no second or amended charge is required if the retaliation grows out of the initial charge.

[312] *Id.* at *7–8. The Seventh Circuit opinion which the court cited was *Horton v. Jackson County Board of County Commissioners*, 343 F.3d 897, 898 (7th Cir. 2003). The court also cited the following pre-*Morgan* cases from the Seventh Circuit: *Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1312 (7th Cir. 1989); *Gawley v. Indiana University*, 276 F.3d 301, 314 n.8 (7th Cir. 2001); *Heuer v. Weil-McLain*, 203 F.3d 1021, 1023 (7th Cir. 2000); and *McKenzie v. Illinois Department of Transportation*, 92 F.3d 473, 482–83 (7th Cir. 1996). The court also cited to the opinions cited in *supra* note 301.

[313] Spellman v. Seymour Tubing, Inc., No. 4:06-cv-0013-DFH-WGH, 2007 U.S. Dist. LEXIS 28779 (S.D. Ind. Apr. 12, 2007).

[314] *Id.* at *1.

[315] *Id.* at *1–2, 5.

[316] *Id.* at *2–4.

> required to file a separate EEOC charge alleging retaliation when the retaliation occurs in response to the filing of the original EEOC charge." This is a pragmatic rule, one that avoids requiring plaintiffs to file multiple charges and/or multiple lawsuits with overlapping evidence and issues.[317]

The court then concluded that this was "precisely" the type of case the above-mentioned rule was meant to address.[318] The court then addressed and distinguished *Morgan*:

> In reaching its decision, the Court considered only discriminatory and retaliatory acts that occurred more than 300 days *before* the plaintiff filed an EEOC charge. In that way, *Morgan* differs significantly from the case at hand, where [the plaintiff] seeks to litigate a retaliatory act that occurred *after* she filed her EEOC complaint.[319]

The court then rejected the courts that had used *Morgan* to conclude that a plaintiff was required to amend her EEOC charge or file another one.[320] Next, the court relied on a pre-*Morgan* case that had distinguished between pre-charge claims of retaliation and retaliation claims that arose after the filing of an EEOC charge:

> [The plaintiff] cites to a number of cases that have allowed a retaliatory discharge claim to proceed even though the underlying charge did not mention retaliation. These cases, however, all involved situations where the alleged retaliation arose *after* the charge of discrimination had been filed or the employer was given clear notice from the EEOC that retaliation was at issue; thus, a double filing . . . would serve no purpose except to create additional procedural technicalities when a single filing would comply with the intent of Title VII.[321]

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[317] *Id.* at *3–4 (citations omitted).

[318] *Id.* at *4–5.

[319] *Id.* at *6.

[320] *Id.* at *6–8. One of the courts the *Spellman* court referred to as not requiring a second or amended charge was the Eighth Circuit. *Id.* at *7–8. However, that court has since adopted the pro-*employer* rule regarding this issue. *See supra* Part V.A.

[321] *Id.* at *9–10 (quoting Steffen v. Meridian Life Ins. Co., 859 F.2d 534, 545 n.2 (7th Cir. 1988)).

Finally, the court addressed policy concerns and whether they would be served by requiring an amended or second EEOC charge.[322] Concluding that these goals would *not* be served, the court stated:

> Even without requiring the complainant to file a charge of retaliation, it is evident the defendant has notice of the act in which it engaged as a direct result of the filing. . . . As a result, the defendant's ability to defend the claim and initiate voluntary settlement or conciliation attempts with the EEOC prior to the start of litigation is in no way prohibited or impeded by the absence of a second filing. Even if the EEOC does not investigate, the defendant has notice and can initiate discussions directly with the plaintiff.[323]

The court therefore concluded that the plaintiff was not required to file a second EEOC charge, and it granted her motion for leave to amend.[324] Thus, although the Seventh Circuit has not *directly* ruled on this issue, district courts from within the Seventh Circuit have not required plaintiffs to exhaust administrative remedies for post-charge acts of retaliation, even after *Morgan*.[325]

Another court to decide, post-*Morgan*, that plaintiffs do not have to file amended or second EEOC charges for post-charge retaliation is the Eleventh Circuit.[326] The court never mentioned *Morgan* in *Thomas*, but instead relied on *Gupta*.[327] In *Thomas*, the plaintiff appealed the district court's granting of summary judgment, and one of the issues the court addressed was whether the plaintiff had exhausted her administrative

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[322] *Id.* at *10–11.

[323] *Id.* at *11 (quoting Schwartz v. Bay Indus., Inc., 274 F. Supp. 2d 1041, 1048 n.8 (E.D. Wis. 2003) (quoting Kelly Koenig Levi, *Post Charge Title VII Claims: A Proposal Allowing Courts to Take "Charge" When Evaluating Whether to Proceed or to Require a Second Filing*, 18 GA. ST. U. L. REV. 749, 770–71 (2002)).

[324] *Id.* at *12.

[325] As noted earlier, the Seventh Circuit has noted in passing that it does not require a double-filing, but it has not specifically *held* that in any post-*Morgan* cases. *See supra* note 300. *But see* Craddock v. Am. Airlines, No. 02 C 5293, 2002 U.S. Dist. LEXIS 23369, at *8–9 (N.D. Ill. Dec. 5, 2002) (dismissing plaintiff's retaliation claim for failure to exhaust administrative remedies) (post-*Morgan*).

[326] Thomas v. Miami Dade Pub. Health Trust, 369 F. App'x 19, 23 (11th Cir. 2010).

[327] *Id.* at 21–23.

remedies.[328] The plaintiff alleged that she did not receive a promotion and was denied a reasonable accommodation as a result of her complaints about some of her employer's practices.[329] When addressing the "relationship between an EEOC charge and the ensuing judicial complaint," the court cited pre-*Morgan* case law and noted that claims are proper if they "amplify, clarify, or more clearly focus" what the plaintiff put in her EEOC charge.[330] The court also noted that it "must determine if the allegations in the complaint were like or related to, or grew out of, the allegations in the EEOC charge."[331] After determining that most of the plaintiff's claims had not been exhausted, the court addressed whether the plaintiff was required to file amended or new charges for post-charge retaliatory acts.[332] Following *Gupta*, and not mentioning *Morgan*, the court stated:

> "[I]t is unnecessary for a plaintiff to exhaust administrative remedies prior to urging a retaliation claim growing out of an earlier charge; the district court has ancillary jurisdiction to hear such a claim when it grows out of an administrative charge that is properly before the court." Thus, the district court could only consider claims to the extent [the plaintiff] contended they were caused by the filing of her EEOC charge, and any other causes for such actions were properly not considered.[333]

Unfortunately for the plaintiff, when the court addressed the case's merits, it determined that the plaintiff's claim of retaliation was properly decided against her at the summary judgment stage.[334]

As this Part of this Article demonstrated, after *Morgan*, most courts have continued to follow the pre-*Morgan* rule that victims of post-charge retaliation do not have to exhaust their administrative remedies for the

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[328] *Id.* at 22–23.

[329] *Id.* at 21.

[330] *Id.* at 21–22 (quoting Gregory v. Ga. Dep't of Human Res., 355 F.3d 1277, 1279–80 (11th Cir. 2004)).

[331] *Id.* at 22 (relying on *Gregory*, 355 F.3d at 1280).

[332] *Id.* at 23.

[333] *Id.* (quoting Gupta v. E. Tex. State Univ., 654 F.2d 411, 414 (5th Cir. 1981)); *see also* Sumrall v. Potter, No. 4:03cv103-SPM, 2007 U.S. Dist. LEXIS 29281, at *3–4 (N.D. Fla. Apr. 22, 2007) (agreeing that no amended or second charge was needed); Shamar v. City of Sanford, Fla., No. 6:06-cv-735-Orl-28GJK, 2008 U.S. Dist. LEXIS 111233, at *4–5 (M.D. Fla. July 17, 2008) (noting that subsequent charges are not required).

[334] *Thomas*, 369 F. App'x at 23.

retaliation claim.[335] Nonetheless, some courts do require administrative exhaustion for these claims.[336] Until the Supreme Court addresses this issue, which it has recently decided *not* to do,[337] there will continue to be confusion among the courts regarding this topic.[338]

VI. OPTIONS COURTS HAVE WHEN DECIDING WHETHER PLAINTIFFS MUST FILE AMENDED OR ADDITIONAL EEOC CHARGES ALLEGING POST-CHARGE RETALIATION

Courts have options available to them when addressing this issue. They could take the hard-line approach and always require an amended or second EEOC charge when the plaintiff is alleging retaliation for filing the initial charge;[339] they could take a more employee-friendly approach and not require a plaintiff to file an amended or second EEOC charge when the plaintiff is alleging retaliation for filing the initial charge;[340] or they could take a middle-ground approach. For example, one approach to take, and perhaps the most appropriate, would be one in which the plaintiff is required to file an amended or second charge only if the initial charge is still being investigated by the EEOC at the time the retaliation takes place; once the EEOC issues its right-to-sue notice, an employee would no longer be required to amend the original charge or file a new one.[341] While each of the

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[335] I realize I did not discuss any cases from the Ninth Circuit. That court seems to acknowledge some retaliation exception, but not one as broad as some of the other circuits have acknowledged. *See* Finley v. Salazar, No. CV 11-142-M-DWM-JCL, 2013 U.S. Dist. LEXIS 47741, at *26 (D. Mont. Mar. 5 2013) (noting that the Ninth Circuit applies the exception narrowly).

[336] *See supra* Part V.A.

[337] Simmons-Myers v. Caesars Entm't Corp., 515 F. App'x 269, *cert. denied*, 134 S. Ct. 117 (2013).

[338] For example, the district courts within the D.C. Circuit have not agreed with respect to *Morgan*'s effect on the issue of this Article. *Compare* Hazel v. Wash. Metro. Area Transit Auth., No. 02-1375 (RWR), 2006 U.S. Dist. LEXIS 89139, at *24–25 (D.D.C. Dec. 1, 2006) (applying a narrow retaliation exception), *with* Romero-Ostolaza v. Ridge, 370 F. Supp. 2d 139, 148–50 (D.D.C. 2005) (applying *Morgan* to allegations of post-charge retaliation). *Hazel* might no longer be relevant, as it was based, in part, on an Eighth Circuit opinion that was issued prior to *Richter*. *See Hazel*, 2006 U.S. Dist. LEXIS 89139, at *24–25.

[339] *See supra* Part V.A.

[340] *See supra* Part V.B.

[341] This proposed solution assumes that the litigation regarding the initial charge has not already concluded when the retaliatory action takes place. If the litigation is over at the time of the alleged retaliation, or if the parties have settled the initial dispute, the plaintiff would have to go back and file a new EEOC charge. For approaches different from the one suggested in this Article,

options listed above has legal support and policy-based support, the option consistent with many of Title VII's goals and with administrative and judicial economy would be to require plaintiffs to file amended or second charges if the EEOC is still investigating the original charge, and to excuse that requirement if the EEOC process has ended without a resolution to the dispute. These options will now be addressed.[342]

A. Always Requiring Plaintiffs to File an Amended or Second Charge Alleging Post-charge Retaliation

One option courts have is to require plaintiffs to *always* file amended or second EEOC charges when the retaliation was a result of the plaintiff's filing of her initial charge.[343] While I do not agree with this approach, it does have some merit. Specifically, although such a rule would yield harsh results for some plaintiffs, the rule would easily be applied in a consistent manner, and it would provide predictability for all parties involved.[344] Second, such an approach would, in some judges' opinions, be consistent with *Morgan*.[345] Finally, this approach would: (1) give the EEOC the opportunity to provide notice to the employer; (2) allow the EEOC to investigate the charge; and (3) allow the EEOC to possibly facilitate a settlement between the parties, which are three purposes behind Title VII's administrative exhaustion requirement.[346] Therefore, although such a pro-employer rule could end up depriving plaintiffs of their day in court, there are valid reasons why courts could adopt the approach used by the Eighth and Tenth Circuits.[347]

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see Benjamin J. Morris, Comment: *A Door Left Open?* National Railroad Passenger Corporation v. Morgan *and Its Effect on Post-Filing Discrete Acts in Employment Discrimination Suits*, 43 CAL. W. L. REV. 497, 530-32 (2006); and Levi, *supra* note 323 at 770–71.

[342] I realize there are options other than the three I am about to address; however, I have decided to limit this Part of the Article to these three options. *See supra* text accompanying note 341.

[343] *See supra* Part V.A.

[344] *See infra* Part VI.A.1.

[345] *See supra* Part V.A.

[346] *See* Martinez v. Potter, 347 F.3d 1208, 1211 (10th Cir. 2003).

[347] As noted earlier, the Fifth Circuit might also be heading toward this approach. *See supra* Part V.A.

1. Requiring an Amended or Second EEOC Charge Would Provide Consistency and Predictability for Cases Involving Post-charge Acts of Employer Retaliation

One reason courts could use to justify the very pro-employer approach of always requiring an amended or second EEOC charge alleging post-charge retaliation is that such a rule would provide consistency and predictability for all parties involved.[348] The plaintiff would know to file an amended or second charge, and if she failed to do so, the court would grant the employer's dispositive motion without wasting much of the court's time. In fact, if the Supreme Court were to adopt this pro-employer approach, plaintiffs could be subject to sanctions for filing frivolous claims of retaliation if they did not first exhaust their administrative remedies with respect to those claims.[349] While this might be a harsh result and deter plaintiffs from pursuing retaliation claims, it would most likely result in plaintiffs amending original charges (or adding additional charges) and giving the EEOC the opportunity to notify the employer and then investigate and possibly resolve the retaliation claim.[350] This, of course, assumes employees receive notice of this new approach to dealing with the administrative exhaustion requirement for post-charge acts of retaliation.[351]

2. Requiring an Amended or Second EEOC Charge Is Arguably Consistent with the Supreme Court's Interpretation of Title VII's Language In *Morgan*

Another reason for adopting this pro-employer approach is that it is *arguably* required by Title VII's language and the Supreme Court's *Morgan* opinion.[352] The Eighth Circuit and the Tenth Circuit have already reached this conclusion, and the Fifth Circuit is possibly heading in this direction.[353]

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[348] *See infra* Part VI.A.1.

[349] *See* Fed. R. Civ. P. 11.

[350] *See Martinez*, 347 F.3d at 1211. As will be discussed later in this Article, successful conciliation of retaliation claims through the EEOC's formal process does not occur often. *See infra* Part VI.B.5. Of course, many claims are resolved informally while the EEOC charge is pending and prior to the EEOC's determination. *See* Brief of the Equal Employment Opportunity Commission in Support of Plaintiff-Appellant's Petition for Reh'g En Banc at 13, Richter v. Advance Auto Parts, Inc., 686 F.3d 847 (8th Cir. 2012) (No. 11-2570).

[351] This would also require the EEOC to amend its Compliance Manual, as the Manual currently adopts the pro-employee approach. *See* EEOC COMPLIANCE MANUAL § 2-IV(C)(1)(a) & n.185.

[352] *See supra* Parts IV and V.A.

[353] *See supra* Part V.A.

Fortunately for plaintiffs, these are the only circuits that have reached a pro-employer outcome regarding this issue.[354] Nonetheless, based on the language quoted below, more courts might start relying on *Morgan* and requiring plaintiffs to amend a charge or file a second one when alleging retaliation for filing the first charge. Specifically, the relevant language from Title VII provides:

> A charge under this section *shall be filed* within one hundred and eighty days after the alleged *unlawful employment practice* occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter . . . .[355]

And the Court in *Morgan* interpreted this language in the following manner:

> Each discrete discriminatory act starts a new clock for filing charges alleging that act . . . . 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."*[356]

The relevant statutory language and the above statement from *Morgan* could certainly be interpreted as requiring a plaintiff to amend an original charge or file a second charge alleging retaliation, as that retaliation would be an "unlawful employment practice," and pursuant to Title VII's language, a plaintiff must exhaust administrative remedies for all unlawful employment practices.[357] While relying on Title VII's language and *Morgan*, the court in *Richter* noted: "Each discrete act [was] a different employment practice for which a separate charge [was] required."[358] Thus, based on *Morgan*, the Eighth Circuit viewed post-charge retaliation as a separate employment practice for which the plaintiff needed to exhaust her administrative remedies.[359]

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[354] *See supra* Part V.

[355] 42 U.S.C. § 2000e-5(e)(1) (2006) (emphasis added).

[356] Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 113–15 (2002) (emphasis added).

[357] *See supra* Parts II, IV, and V.A.

[358] Richter v. Advance Auto Parts, Inc., 686 F.3d 847, 851 (8th Cir. 2012).

[359] *Id.*

The Tenth Circuit also believed that *Morgan* changed the rule regarding exhausting administrative remedies.[360] Specifically, that court noted that *Morgan* "has effected fundamental changes to the doctrine allowing administratively unexhausted claims in Title VII actions. We agree with the government that such unexhausted claims involving discrete employment actions are no longer viable."[361] Believing that each discrete employment action, including retaliation, constituted an "unlawful employment practice," administrative exhaustion was required.[362] Quoting from *Morgan*, the Tenth Circuit observed: "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*.'"[363]

Therefore, while most courts do *not* believe that *Morgan* changed the rule requiring administrative exhaustion for post-charge acts of retaliation, some courts have changed their position on this issue.[364] Those courts have done so based on *Morgan*, and although *Morgan* did not address this specific issue, the language used in *Morgan* and relied upon by the Eighth and Tenth Circuits can, when taken in isolation, be interpreted to require an amended or second EEOC charge.[365]

3. Requiring an Amended or Second EEOC Charge Would Provide the Employer with Notice of the Alleged Unlawful Employment Practice and Would Provide the EEOC with the Opportunity to Investigate the Charge and Perhaps Facilitate a Resolution Between the Parties

The administrative exhaustion requirement serves three important functions in the resolution of workplace discrimination claims; specifically, it provides notice to the employer that an employee has accused it of an unlawful employment practice; it allows the EEOC to investigate the charge; and it allows the EEOC to possibly resolve the dispute prior to litigation.[366] Allowing plaintiffs to skip the administrative exhaustion

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[360] Martinez v. Potter, 347 F.3d 1208, 1210 (10th Cir. 2003).

[361] *Id.* (relying on *Morgan*, 536 U.S. at 110–13).

[362] *Id.* (relying on *Morgan*, 536 U.S. at 110–13).

[363] *Id.* (emphasis added) (quoting *Morgan*, 536 U.S. at 114).

[364] *See supra* Part V.A.

[365] *Id.*

[366] *See Martinez*, 347 F.3d at 1211.

requirement for retaliation claims would certainly frustrate these purposes, although the employer would most likely be on notice that the employee has been the victim of post-charge retaliation.[367] The bigger problem with allowing plaintiffs to forego the exhaustion requirement is that allowing this would prevent the EEOC from investigating and possibly resolving these claims prior to litigation.[368] The Tenth Circuit noted the potential frustration of these goals in *Martinez*:

> Application of this rule to incidents occurring after the filing of an EEO complaint is consistent with the policy goals of the statute. 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.[369]

Additionally, a district court within the D.C. Circuit also mentioned this benefit of applying *Morgan* to post-charge acts of retaliation; specifically, the court in *Romero-Ostolaza* observed:

> Requiring a plaintiff to exhaust each discrete claim of discrimination or retaliation "comports with the purpose of the exhaustion doctrine to give the agency notice of a claim and [the] opportunity to handle it internally and ensures that only claims plaintiff has diligently pursued will survive." Further, requiring exhaustion encourages internal, less costly resolution of Title VII claims.[370]

Therefore, requiring an amended or second charge would serve some of the policy goals behind Title VII's administrative exhaustion requirement (employer notice, the opportunity for the EEOC to investigate the charge, and the opportunity for the parties to settle); however, these concerns are typically not particularly relevant in most cases. Specifically, employers certainly are aware if they have taken retaliatory actions against a

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[367] Clockedile v. N.H. Dep't of Corr., 245 F.3d 1, 5–6 (1st Cir. 2001).

[368] *See id.* at 4–5.

[369] *Martinez*, 347 F.3d at 1211.

[370] Romero-Ostolaza v. Ridge, 370 F. Supp. 2d 139, 149 (D.D.C. 2005) (citation omitted) (quoting Velikonja v. Mueller, 315 F. Supp. 2d 66, 74 (D.D.C. 2004)).

plaintiff,[371] and as will be addressed later, very few retaliation cases are successfully resolved through the EEOC's formal conciliation process.[372]

While the Eighth and Tenth Circuits are currently in the minority with respect to this issue, there are legitimate reasons for requiring plaintiffs to go through a second round of administrative exhaustion. Specifically, this requirement would provide consistency and predictability; it is arguably consistent with *Morgan*; and it would be consistent with the goals behind Title VII's administrative exhaustion requirement because it would provide notice to employers, allow the EEOC to investigate the charge, and allow the parties to attempt to resolve the dispute prior to litigation. As the next Part of this Article will demonstrate, however, there are also several reasons why the majority position of *not* requiring an amended or second charge has remained the majority position, even after *Morgan*.

B. Not Requiring Plaintiffs to File an Amended or Second Charge As Long As the Retaliation Was the Result of Filing the Original Charge[373]

Another option courts have is to allow individuals alleging post-charge acts of retaliation to pursue those claims without amending the original EEOC charge or filing a second one. There are several reasons such an approach would be a good one. First, it would provide consistency and predictability to employees, employers, the EEOC, and the courts, and it would discourage employers from filing frivolous motions that would delay the litigation process.[374] Second, this would prevent the plaintiff from being tripped up by a procedural hurdle, especially if that plaintiff is representing herself.[375] Third, this approach would deter additional acts of retaliation.[376] Fourth, this approach will promote efficiency at the EEOC and in the judicial process.[377] Fifth, it would not significantly affect the EEOC's conciliation and notice functions, as very few claims are resolved through

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[371] The court in *Clockedile* made this observation when it noted: "If the retaliation is official, there is no need to worry about notice: the employer should already know. And, as between the employer and the employee, the former is in a better position to appreciate the rules about what legitimate legal claims may exist and be preserved." 245 F.3d at 5–6.

[372] *See infra* Part VI.B.5.

[373] Again, this assumes the case is still in litigation and has not been settled or adjudicated by a court.

[374] *See infra* Part VI.B.1.

[375] *See infra* Part VI.B.2.

[376] *See infra* Part VI.B.3.

[377] *See infra* Part VI.B.4.

the formal conciliation process, and most employers know when they have engaged in retaliation.[378] Finally, despite what the Eighth and Tenth Circuits have determined, this approach would most likely *not* run afoul of *Morgan*.[379] The benefits of adopting this approach will now be discussed.

1. Not Requiring an Amended or Second EEOC Charge Would Provide Consistency and Predictability for Cases Involving Post-charge Acts of Employer Retaliation

The first reason courts could use to justify the pro-employee approach of not requiring an amended or second charge alleging post-charge retaliation is the same as for the previously-discussed rule that *would* require an amended or second charge alleging post-charge retaliation—such a rule would provide consistency and predictability for all parties. The plaintiff would know that she would not have to go back to the EEOC and delay her day in court; the employer would know not to waste the court's time with various motions based on the plaintiff's failure to exhaust administrative remedies (motions which could result in sanctions against the employer); and the EEOC would be able to cut down on its considerable workload because it would know not to investigate this type of charge if a plaintiff filed one.[380] These are all potential benefits of this pro-employee approach.

2. Not Requiring an Amended or Second EEOC Charge Would Eliminate Needless Procedural Barriers and Pitfalls That Currently Exist in the Eighth and Tenth Circuits

The second benefit of this approach is that it would prevent plaintiffs from falling into a procedural trap.[381] The EEOC charge-filing process is a complicated one, and requiring an employee to jump over another procedural hurdle on her way to a just resolution of her claim would frustrate one of Title VII's main goals of preventing and providing a remedy for discrimination and retaliation.[382] Courts have recognized the potential pitfalls and procedural barriers the current process has; for

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[378] *See infra* Part VI.B.5.

[379] *See infra* Part VI.B.6.

[380] *See infra* Part VI.B.4.

[381] *See* Gupta v. E. Tex. State Univ., 654 F.2d 411, 414 (5th Cir. 1981).

[382] *See supra* Parts III, V.B.

example, the Fifth Circuit in *Gupta* noted the following regarding the already-complicated charge-filing process:

> 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 when a single filing would comply with the intent of Title VII. *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*.[383]

Similarly, as the district court from within the Seventh Circuit noted in *Spellman*, requiring an additional filing "would serve no purpose except to create additional procedural technicalities when a single filing would comply with the intent of Title VII."[384] The Eleventh Circuit also noted this problem when it referred to the additional charge-filing requirement as an "additional procedural technicalit[y]."[385] Finally, the Seventh Circuit expressed concern over this issue when it noted the following: "We have held for practical reasons, to avoid futile procedural technicalities and endless loops of charge/retaliation/ charge/retaliation, etc., that a plaintiff who alleges retaliation for having filed a charge with the EEOC need not file a second EEOC charge to sue for that retaliation."[386]

Therefore, some courts have recognized the additional, and needless, hurdle this extra charge-filing requirement would place on plaintiffs if they were required to file a charge for post-charge acts of retaliation. This pro-employee approach would lower the number of plaintiffs who end up losing

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[383] *Gupta*, 654 F.2d at 414 (citations omitted) (emphasis added).

[384] Spellman v. Seymour Tubing, Inc., No. 4:06-cv-0013-DFH-WGH, 2007 U.S. Dist. LEXIS 28779, at *10 (S.D. Ind. Apr. 12, 2007) (quoting Steffen v. Meridian Life Ins. Co., 859 F.2d 534, 545 n.2 (7th Cir. 1988)).

[385] Baker v. Buckeye Cellulose Corp., 856 F.2d 167, 169 (11th Cir. 1988) (quoting *Gupta*, 654 F.2d at 414).

[386] Luevano v. Wal-Mart Stores, Inc., 722 F.3d 1014, 1030 (7th Cir. 2013) (citing McKenzie v. Ill. Dep't of Transp., 92 F.3d 473, 482–83 (7th Cir. 1996); Malhotra v. Cotter & Co., 885 F.2d 1305, 1312 (7th Cir. 1989)). See also the Ninth Circuit's opinion in *Anderson v. Reno*, where that court noted that "[a]lthough administrative exhaustion is generally a prerequisite to obtaining judicial review, we have recognized that forcing an employee to begin the administrative process anew after additional occurrences of discrimination in order to have them considered by the agency and the courts 'would erect a needless procedural barrier.'" 190 F.3d 930, 938 (9th Cir. 1999) (quoting Oubichon v. N. Am. Rockwell Corp., 482 F.2d 569, 571 (9th Cir. 1973)).

their retaliation claims based on their inability to follow the complicated procedural requirements of getting into federal court to pursue a Title VII retaliation claim.

3. Not Requiring an Amended or Second EEOC Charge Would Further Title VII's Goal of Eliminating Discrimination and Retaliation

Another reason to allow plaintiffs to pursue claims of post-charge retaliation without having to amend the initial charge or file another charge is that requiring an amended or additional charge could result in additional acts of retaliation.[387] For example, the Second Circuit in *Butts*, when addressing the reason plaintiffs should not have to file an amended or second charge, observed the following:

> Rather, in such situations, we have relaxed the exhaustion requirement based on the close connection of the retaliatory act to both the initial discriminatory conduct and the filing of the charge itself. . . . *Indeed, requiring a plaintiff to file a second EEOC charge under these circumstances could have the perverse result of promoting employer retaliation in order to impose further costs on plaintiffs and delay the filing of civil actions relating to the underlying acts of discrimination.*[388]

The First Circuit recognized this concern in *Clockedile* when it observed: "Retaliation uniquely chills remedies; and by retaliating against an initial administrative charge, the employer discourages the employee from adding a new claim of retaliation."[389] The Fourth Circuit also addressed the concern about additional acts of retaliation if additional EEOC charges were required:

> [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. . . . [W]e [therefore] join the other circuits that have spoken to the

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[387] *See supra* Parts III, V.B.

[388] Butts v. City of N.Y. Dep't of Hous. Pres. & Dev., 990 F.2d 1397, 1402 (2d Cir. 1993) (emphasis added).

[389] Clockedile v. N.H. Dep't of Corr., 245 F.3d 1, 5–6 (1st Cir. 2001).

> question in adopting the rule that a separate administrative charge is not pre-requisite to a suit complaining about retaliation for filing the first charge.[390]

The Fifth Circuit in *Gupta* also noted the following: "Eliminating this needless procedural barrier will deter employers from attempting to discourage employees from exercising their rights under Title VII."[391] The Seventh Circuit also recognized the concern about deterring additional acts of retaliation:

> [W]e add that there is a practical reason for treating retaliation in this way: having 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. . . . [And] it is best to have a general rule, and we join the other circuits that have spoken to the question in adopting the rule that a separate administrative charge is not prerequisite to a suit complaining about retaliation for filing the first charge.[392]

Thus, the goals of preventing further acts of discrimination and/or retaliation, and encouraging (rather than discouraging) employees to pursue remedies for discrimination and retaliation are furthered by *not* requiring an amended or second filing. This is another reason for not imposing this additional requirement on Title VII plaintiffs.

4. Not Requiring an Amended or Second EEOC Charge Would Promote Efficiency at Both the EEOC and in the Litigation Process

Another benefit of not requiring an amended or second charge is that this policy would promote efficiency at both the administrative and judicial level.[393] Specifically, with respect to the burden on the EEOC, not requiring an amended or second charge would lessen the EEOC's already tremendous

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[390] Nealon v. Stone, 958 F.2d 584, 590 (4th Cir. 1992) (quoting *Malhotra*, 885 F.2d at 1312).

[391] Gupta v. E. Tex. State Univ., 654 F.2d 411, 414 (5th Cir. 1981).

[392] *Malhotra*, 885 F.2d at 1312.

[393] *See* EEOC Charge Statistics, http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last visited January 9, 2014); Spellman v. Seymour Tubing, Inc., No. 4:06-cv-0013-DFH-WGH, 2007 U.S. Dist. LEXIS 28779, at *4 (S.D. Ind. Apr. 12, 2007).

workload.[394] With respect to the burden on the court system, not requiring an amended or second charge would eliminate the need for two trials and/or eliminate a significant delay in the first judicial proceeding while the second charge is stuck being investigated by the EEOC.[395]

With respect to the burden on the EEOC, during 2010, 2011, and 2012, the EEOC received over 99,000 charges each year.[396] During each of these years, approximately 31,000 charges alleged Title VII retaliation, while an additional 6,000 charges alleged retaliation under other statutes the EEOC enforces.[397] These numbers demonstrate how burdened this agency is, and adding more charges to investigate will worsen the problem. Therefore, any reduction in the number of EEOC charges would benefit that agency's effectiveness in dealing with the numerous charges it receives each year.

With respect to judicial economy, allowing plaintiffs to include post-charge acts of retaliation in their initial complaints or as amendments to their initial complaints would serve several purposes. First, allowing plaintiffs to pursue these claims in the same complaint would allow the parties to resolve all disputes with one lawsuit that would involve the same parties, many of the same witnesses, and some overlapping testimony.[398] This would save time, attorney's fees, and judicial resources. Second, allowing plaintiffs to pursue these retaliation claims at the same time as the initial claim would avoid needless delay; specifically, once a plaintiff receives her right-to-sue notice, she must file suit within ninety days.[399] If the retaliatory act takes place between the receipt of the right-to-sue notice and the filing of the lawsuit, and if the plaintiff is required to exhaust her administrative remedies again, she would have to file her initial complaint and then possibly have to wait a significant amount of time before either amending her complaint or filing a second lawsuit. Worse than that scenario, however, is if the retaliatory action takes place well past the filing of the original lawsuit, in which case the original lawsuit would have to be delayed during the EEOC process, or there would have to be a second trial to address the retaliation claim. Clearly, these options do not promote

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[394] Specifically, in 2012, the EEOC received over 99,000 charges of discrimination. *See* EEOC Charge Statistics, *supra* note 393.

[395] *See Spellman*, 2007 U.S. Dist. LEXIS 28779, at *4.

[396] *See* EEOC Charge Statistics, *supra* note 393.

[397] *Id.*

[398] *Spellman*, 2007 U.S. Dist. LEXIS 28779, at *4.

[399] 42 U.S.C. § 2000e-5(f)(1) (2006).

judicial economy. In fact, a district court from within the Seventh Circuit addressed this issue and noted the wasted resources involved:

> Therefore, "[o]f course, an employee is not required to file a separate EEOC charge alleging retaliation when the retaliation occurs in response to the filing of the original EEOC charge." *This is a pragmatic rule, one that avoids requiring plaintiffs to file multiple charges and/or multiple lawsuits with overlapping evidence and issues*.[400]

The Second Circuit also recognized these judicial economy concerns in *Butts*: "Indeed, requiring a plaintiff to file a second EEOC charge under these circumstances could have the perverse result of promoting employer retaliation in order to impose further costs on plaintiffs *and delay the filing of civil actions relating to the underlying acts of discrimination*."[401]

Clearly, requiring an amended or second filing would cause more work for the already overworked EEOC, and delaying the trial or having a second trial runs afoul of promoting judicial economy. These are two additional reasons not to require an amended or second charge for post-charge acts of retaliation.

5. Not Requiring an Amended or Second EEOC Charge Would Not Substantially Affect the EEOC's Ability to Facilitate an Agreement, and It Would Not Affect an Employer's Notice of a Retaliation Claim

One *potential* problem with this approach of not requiring an amended or second charge is that it would prevent the EEOC from successfully conciliating retaliation disputes between the parties.[402] While this could be a concern, very few Title VII retaliation charges are successfully resolved through the formal EEOC conciliation process,[403] which is one reason why this should not be a *significant* concern. Specifically, the EEOC engages in formal conciliation efforts when it finds cause to believe there has been a

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[400] *Spellman*, 2007 U.S. Dist. LEXIS 28779, at *3–4 (emphasis added) (citations omitted) (quoting Gawley v. Ind. Univ., 276 F.3d 301, 314 n.8 (7th Cir. 1996)).

[401] Butts v. City of N.Y. Dep't of Hous. Pres. & Dev., 990 F.2d 1397, 1402 (2d Cir. 1993) (emphasis added).

[402] *Id.*

[403] *See* Brief of the Equal Employment Opportunity Commission in Support of Plaintiff-Appellant's Petition for Reh'g En Banc at 13, Richter v. Advance Auto Parts, Inc., 686 F.3d 847 (8th Cir. 2012) (No. 11-2570).

Title VII violation.[404] In 2011, the EEOC found cause in fewer than 5% of these cases.[405] And, of course, not all of these cases were resolved through conciliation.[406] Also, a plaintiff can opt out of the process by requesting a right-to-sue notice after 180 days.[407] And, as some courts have noted, the likelihood of a successful conciliation of a retaliation claim is unlikely if the parties were unable to successfully resolve the underlying discrimination claim.[408] Specifically, the Fourth Circuit in *Nealon* observed the following: "Conciliation with the [employer] did not improve [the plaintiff's] position the first time and would be unlikely to do so a second time."[409] Echoing *Nealon*, the court in *Jones* noted:

> Addressing the facts of [*Nealon*], we reasoned that the EEOC charge that the plaintiff alleged prompted the retaliatory discrimination had been submitted in good faith, and that because conciliation with [the employer] had not improved her position following the first EEOC charge, it would not have been likely to do so had she filed a second charge.[410]

Thus, while not requiring an amended or second charge might frustrate the formal conciliation process, that conciliation process plays a rather minor role in the resolution of most Title VII claims.

Another reason for the administrative exhaustion requirement is to put the employer on notice of the employee's allegation of discrimination or retaliation; however, as the court noted in *Clockedile*, notice is typically not an issue in cases involving retaliation: "*If the retaliation is official, there is no need to worry about notice: the employer should already know*. And, as between the employer and the employee, the former is in a better position to appreciate the rules about what legitimate legal claims may exist and be

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[404] 42 U.S.C. § 2000e-5(b).

[405] Brief of the Equal Employment Opportunity Commission in Support of Plaintiff-Appellant's Petition for Reh'g En Banc at 13–14, Richter v. Advance Auto Parts, Inc., 686 F.3d 847 (8th Cir. 2012) (No. 11-2570).

[406] *Id.* at 13.

[407] *Id.* at 14. (citing 42 U.S.C. § 2000e-5(f)(1)).

[408] *See, e.g.*, Nealon v. Stone, 958 F.2d 584, 590 (4th Cir. 1992).

[409] *Id.*

[410] Jones v. Calvert Grp. Ltd., 551 F.3d 297, 302 (4th Cir. 2009). The court in *Jones* also noted that a second conciliation attempt would most likely not be "any more fruitful" than the first. *Id.* (citing *Nealon*, 958 F.2d at 590).

preserved."[411] The court in *Spellman* also addressed the notice issue when it observed:

> Even without requiring the complainant to file a charge of retaliation, it is evident the defendant has notice of the act in which it engaged as a direct result of the filing. . . . As a result, the defendant's ability to defend the claim and initiate voluntary settlement or conciliation attempts with the EEOC prior to the start of litigation is in no way prohibited or impeded by the absence of a second filing. Even if the EEOC does not investigate, the defendant has notice and can initiate discussions directly with the plaintiff.[412]

Therefore, even though the exhaustion requirement exists to help facilitate the conciliation process and to provide employers with notice of allegations of discrimination or retaliation, those two goals would not be significantly frustrated if all courts were to adopt the pro-employee approach of not requiring an amended or second EEOC charge for post-charge acts of retaliation.

6. Not Requiring an Amended or Second EEOC Charge Is Not Inconsistent with the Supreme Court's Decision in *Morgan*

Finally, although some courts have concluded that not requiring an amended or second charge would conflict with *Morgan*,[413] it should be remembered that, as many post-*Morgan* cases have pointed out, *Morgan* did *not* address post-charge acts of employer retaliation;[414] rather, its focus was on the continuing violation doctrine and the elimination of stale claims.[415] The language upon which the Eighth and Tenth Circuits relied in reaching their conclusions was not written in the context of deciding whether plaintiffs must amend their EEOC charges or file additional ones in

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[411] Clockedile v. N.H. Dep't of Corr., 245 F.3d 1, 5–6 (1st Cir. 2001) (emphasis added).

[412] Spellman v. Seymour Tubing, Inc., No. 4:06-cv-0013-DFH-WGH, 2007 U.S. Dist. LEXIS 28779, at *11 (S.D. Ind. Apr. 12, 2007) (emphasis added) (quoting Schwartz v. Bay Indus., Inc., 274 F. Supp. 2d 1041, 1048 n.8 (E.D. Wis. 2003) (quoting Levi, *supra* note 323, at 770–71)).

[413] *See supra* Part V.A.

[414] *See supra* Part V.B.

[415] *See supra* Part IV.

cases involving post-charge acts of retaliation.[416] The Fourth Circuit recognized this when it wrote the following:

> Although [the employer] asserts that *Morgan* required [the plaintiff] to file a new EEOC charge alleging that she was terminated in retaliation for her first charge, we do not read *Morgan* that broadly. *Morgan* addresses only the issue of when the limitations clock for filing an EEOC charge begins ticking with regard to discrete unlawful employment practices. In this respect, it concerns only Congress's clear preference as expressed in Title VII for "prompt processing of all charges of employment discrimination." *It does not purport to address the extent to which an EEOC charge satisfies exhaustion requirements for claims of related, post-charge events*.[417]

In addition to the Fourth Circuit, other courts have concluded that *Morgan*'s holding was not as broad as the Eighth and Tenth Circuits have concluded, and continue to look at whether the retaliation claim grew out of, or was reasonably related to, the filing of the first charge.[418] One example of a post-*Morgan* case that determined that *Morgan* did not require an amended or additional charge was from a United States District Court from within the Seventh Circuit, which described *Morgan* as follows:

> In reaching its decision, the Court considered only discriminatory and retaliatory acts that occurred more than 300 days *before* the plaintiff filed an EEOC charge. In that way, *Morgan* differs significantly from the case at hand, where [the plaintiff] seeks to litigate a retaliatory act that occurred *after* she filed her EEOC complaint.[419]

Additionally, as noted before, Judge Bye's opinion in *Richter* emphasized the same point: "*Morgan*'s holding, therefore, 'concerns only Congress's clear preference as expressed in Title VII for prompt processing of all charges of employment discrimination . . . [and] *does not purport to address the extent to which an EEOC charge satisfies exhaustion*

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

[417] *Id.* (emphasis added) (citation omitted).

[418] See supra Part V.B.

[419] Spellman v. Seymour Tubing, Inc., No. 4:06-cv-0013-DFH-WGH, 2007 U.S. Dist. LEXIS 28779, at *6 (S.D. Ind. Apr. 12, 2007).

requirements for claims of related, post-charge events."[420] Therefore, although the language in *Morgan* could, when taken in isolation, justify a pro-employer approach, most courts do not believe it requires one.

Courts that allow plaintiffs to pursue post-charge acts of retaliation without exhausting administrative remedies have solid justifications for doing so. Doing so would provide consistency and predictability when these situations arise and would eliminate frivolous employer motions.[421] It would also eliminate the problem of hurting the unsuspecting plaintiff unfamiliar with the procedural minefield applicable to Title VII claims.[422] Further, staying with the majority position would be consistent with Title VII's goals of deterring discrimination and retaliation,[423] and it would also be more efficient at both the administrative and judicial levels.[424] Such an approach would also not have a significant effect on conciliation and notice, both of which are goals behind Title VII's administrative exhaustion requirement.[425] Finally, sticking with the majority position would not necessarily be inconsistent with *Morgan*, as that case addressed the continuing violation doctrine and the issue of eliminating stale claims.[426] These reasons provide sufficient justification for courts to stick with the majority position.[427]

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[420] Richter v. Advance Auto Parts, Inc., 686 F.3d 847, 859 (8th Cir. 2012) (Bye, J., concurring in part and dissenting in part) (emphasis added) (quoting *Jones*, 551 F.3d at 303).

[421] *See supra* Part VI.B.1.

[422] *See supra* Part VI.B.2.

[423] *See supra* Part VI.B.3.

[424] *See supra* Part VI.B.4.

[425] *See supra* Part VI.B.5.

[426] *See supra* Part IV.

[427] An additional reason that supports adopting the pro-employee rule is that it is consistent with the EEOC's position on this issue. *See* Brief of the Equal Employment Opportunity Commission in Support of Plaintiff-Appellant's Petition for Reh'g En Banc at 15, Richter v. Advance Auto Parts, Inc. 686 F.3d 847 (8th Cir. 2012) (No. 11-2570); *see also* EEOC COMPLIANCE MANUAL § 2-IV(C)(1)(a) & n.185.

C. Requiring Plaintiffs to File an Amended or Second Charge Only if the EEOC is Still Investigating the Original Charge[428]

Another option courts have when addressing this issue, and perhaps the most sensible one, is to require plaintiffs to file an amended or second charge *only* if the initial charge is still being investigated by the EEOC—if the plaintiff has already received her right-to-sue notice, an amended or new charge would not be required unless the merits of the first charge have been resolved through settlement or through litigation. While this solution does not protect employees from some of the problems I mentioned when I addressed the pro-employer approach courts could take, it does provide consistency and predictability for the parties, the courts, and the EEOC; it does provide the employer notice of alleged retaliation while the EEOC is investigating the original charge; and it provides the EEOC with the opportunity to investigate and attempt to facilitate an agreement regarding all claims prior to the filing of a lawsuit.[429] Also, it would not delay the EEOC's investigation very long (if at all).[430] Additionally, it would not cause a long delay in the plaintiff's ability to have her claims heard in federal court.[431] This approach would also eliminate the need for plaintiffs to file separate lawsuits for each individual act of retaliation, and it would take a reasonable, middle-ground approach with respect to how to respond to the Supreme Court's language in *Morgan*.[432] These benefits will now be addressed.[433]

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[428] Admittedly, some of the arguments made in support of this approach conflict and/or are consistent with some of the arguments made in favor of the other approaches. This, however, is predictable, as any compromise will have some of the benefits and some of the negative aspects of any all-or-nothing approach.

[429] *See infra Part* VI.C.1; Part VI.C.2.

[430] *See infra Part* VI.C.3.

[431] *See infra Part* VI.C.3.

[432] *See infra Parts* VI.C.4 and VI.C.5.

[433] Although no court has specifically proposed this approach, some courts' word choice might suggest that they favor the opposite approach (the plaintiff does not have to amend her initial charge or file a second charge while the first charge is with the EEOC). *See* Kirkland v. Buffalo Bd. of Educ., 622 F.2d 1066, 1068 (2d Cir. 1980) (noting that a charge "does permit a court to consider claims of discrimination reasonably related to the allegations in the complaint filed with the EEOC, '*including new acts occurring during the pendency of the charge before the EEOC.*'") (emphasis added) (quoting Oubichon v. N. Am. Rockwell Corp., 482 F.2d 569, 571 (9th Cir. 1973)); Howze v. Jones & Laughlin Steel Corp., 750 F.2d 1208, 1212 (3d Cir. 1984) ("the parameters of the civil action in the district court are defined by the scope of the EEOC investigation which can reasonably be expected to grow out of the charge . . . *including new acts which occurred during the pendency of proceedings before the Commission*.") (emphasis added)

1. This Approach Provides for Consistency and Predictability for the Parties, the Courts, and the EEOC

Similar to the two other options described in this Part of the Article, this proposed rule also has the benefit of providing consistency and predictability; if the EEOC is still investigating the initial charge, the plaintiff must amend that charge or file a second one, and if the EEOC has already issued its right-to-sue notice, the plaintiff is relieved of that obligation.[434] Similar to the other approaches, this easy-to-follow rule will provide guidance to the parties, putting the plaintiffs on notice not to include retaliation claims in their complaints if they did not amend the original charge or file a second charge while the initial charge was with the EEOC, and putting the employers on notice not to file frivolous motions if the plaintiffs did follow this proposed rule. While it might seem obvious that any rule the Court adopts will provide consistency and predictability, that is not necessarily so. For example, other options, such as making the decision about the necessity to amend the original charge or file a second one based on (1) whether the employer's post-charge conduct is similar to the pre-charge conduct, or (2) whether the employer's post-charge conduct was, or could have been, within the scope of the EEOC investigation, do *not* provide the level of consistency and predictability the approaches raised in this Article provide. Those two standards are less clear and can provide a court with more flexibility to reach the outcome it believes is the appropriate one, which can lead to inconsistent and unpredictable results. The three options mentioned in this Article, however, do not allow for such judicial flexibility, making it easier for all parties to know the "rules of the

(quoting Ostapowicz v. Johnson Bronze Co., 541 F.2d 394, 398–99 (3d Cir. 1976)); Nealon v. Stone, 958 F.2d 584, 590 (4th Cir. 1992) (noting the "generally accepted principle that 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 [EEOC]*.'") (emphasis added) (quoting Hill v. W. Elec. Co., 672 F.2d 381, 390 n.6 (4th Cir. 1982) (quoting Sanchez v. Standard Brands, Inc., 431 F.2d 455, 466 (5th Cir. 1970)), *cert. denied*, 459 U.S. 981 (1982))); Brown v. Hartshorne Pub. Sch. Dist. #1, 864 F.2d 680, 682 (10th Cir. 1988) ("[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 pendency of the charge before the EEOC*.") (emphasis added) (quoting Oubichon, 482 F.2d at 571).

[434] *See* Brief of the Equal Employment Opportunity Commission in Support of Plaintiff-Appellant's Petition for Reh'g En Banc at 10, Richter v. Advance Auto Parts, Inc., 686 F.3d 847 (8th Cir. 2012) (No. 11-2570).

game" when making decisions about what actions need to be taken in any given situation involving post-charge acts of retaliation.

2. Following This Approach Would Put the Employer On Notice of the Alleged Retaliation While the Initial Charge Is Being Investigated by the EEOC, and It Would Allow the EEOC to Investigate (and Possibly Settle) All of the Plaintiff's Claims Before the Plaintiff Resorts to Litigation

Requiring an amended or second charge when the initial charge is still at the EEOC would provide the EEOC with the opportunity to perform three of its main functions. Specifically, such a rule would allow the EEOC to put the employer on notice of the employee's allegation, and it would also allow the EEOC to investigate the charge and possibly facilitate a resolution prior to litigation.[435]

First, putting the employer on notice of the retaliation charge would make the employer aware that it could be facing additional liability, and it would force the employer to articulate its rationale behind the adverse employment action it took. This could make it more likely the parties would be willing to settle the dispute, as the employer would realize the potential for additional liability, and the employee might understand why she experienced the adverse employment action.[436]

Second, with respect to the issues of investigation and possible conciliation, although the EEOC does not complete investigations of all charges filed with it, and although formal conciliation is achieved in very few cases,[437] requiring an amended or second charge while the EEOC is investigating the initial charge would at least provide the EEOC with the *opportunity* to satisfy these goals of investigation and conciliation.[438] It would allow the EEOC investigator to interview the relevant parties and witnesses at the same time (before the EEOC has closed its investigation)

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[435] *See* Martinez v. Potter, 347 F.3d 1208, 1211 (10th Cir. 2003).

[436] Of course, requiring a charge after the EEOC has issued a right-to-sue notice would accomplish this same goal, but as was noted earlier, very few cases are successfully resolved through the EEOC's formal conciliation process. Brief of the Equal Employment Opportunity Commission, *supra* note 434, at 13–14; *see also supra* Part VI.B.5. Many charges are, however, resolved informally while the charge is pending. *See* EEOC Charge Statistics, http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last visited January 9, 2014).

[437] *See* Brief of the Equal Employment Opportunity Commission, *supra* note 434, at 13; *see also supra* Part VI.B.5.

[438] *See* Brown v. Gen. Servs. Admin., 425 U.S. 820, 832–35 (1976).

and reach a determination on all of the claims prior to litigation.[439] Allowing the EEOC to investigate *all* relevant claims and wrap up the investigation of all claims in one determination before the plaintiff files suit would be a more efficient use of the EEOC's time and resources, and it would further the goals of investigation and facilitation of settlement prior to litigation.[440] Also, the parties might be more likely to settle all claims at this point because the attorney's fees have not yet increased to the level they undoubtedly would as the matter progresses through the litigation process, and because the level of hostility might still be relatively small.

The benefits of notice and conciliation were recognized by the court in *Martinez*, when it noted that plaintiffs should always be required to file an amended or second charge:

> Application of this rule to incidents occurring after the filing of an EEO complaint is consistent with the policy goals of the statute. 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*.[441]

Thus, although adopting this rule of requiring an amended or second charge if the initial charge is still with the EEOC will not cure some of the problems associated with a rule that would *always* require an amended or second filing,[442] it would accomplish the goals of putting the employer on notice of the allegation of retaliation, it would allow the EEOC to investigate the charge, and it would perhaps increase the chances for a successful conciliation.

3. This Approach Would Minimize Delays in the EEOC Process

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[439] *See* Spellman v. Seymour Tubing, Inc., No. 4:06-cv-0013-DFH-WGH, 2007 U.S. Dist. LEXIS 28779, at *4 (S.D. Ind. Apr. 12, 2007).

[440] As noted earlier, while the chances of a successful conciliation of a retaliation claim are not particularly good, this approach at least provides the parties with the *opportunity* to settle with the EEOC's help, and perhaps employers would have more motivation to settle if they knew they faced multiple causes of action.

[441] Martinez v. Potter, 347 F.3d 1208, 1211 (10th Cir. 2003) (emphasis added).

[442] For example, this rule would not eliminate the concern about preventing additional retaliation and the concern about forcing the plaintiff to jump over additional hurdles in order to have a court hear her retaliation claim.

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Another benefit of applying this rule is that any delay in the EEOC's determination would not be a significant one, especially when compared to a delay that could be caused if the EEOC has already issued its right-to-sue notice for the first charge and the plaintiff was then required to file another charge alleging post-charge retaliation. Specifically, with this rule, the EEOC investigator will have access to all relevant witnesses, and she would be able to obtain a clear picture of the entire employment relationship by doing a more thorough investigation of both claims at the same time rather than by treating them as being totally separate. It would be less likely that the investigator would have to interview the witnesses several times, and this would allow for a quicker and more streamlined EEOC process in most cases (the exception being if the investigator had already substantially completed the investigation at the time of the retaliation allegation). Overall, however, the benefit of this rule of requiring an amended or second filing when the initial charge is still with the EEOC is that it would not cause much of a delay in the EEOC's investigation and in the plaintiff's ability to bring her suit in federal court. On the other hand, requiring the plaintiff to go to the EEOC after the EEOC closes its file on the plaintiff's initial charge and issues a right-to-sue notice would start another lengthy EEOC process, and would simply serve to delay the plaintiff's day in court for her retaliation claim. And, as was previously discussed, several courts have expressed concern about this type of potential delay in the process.[443]

4. Adopting This Rule Would Result in Fewer Lawsuits, Which Would Provide for More Judicial Economy

Another benefit of this proposed solution is that adopting it would result in fewer lawsuits. If the plaintiff files her lawsuit immediately after receiving her right-to-sue notice, and she then experiences a retaliatory action, requiring her to go back to the EEOC and waiting for the EEOC to conduct its investigation and issue its right-to-sue-notice would most likely result in the need for separate trials or in a stay of the initial lawsuit. Both of these results would be inefficient and would harm the plaintiff. Specifically, multiple lawsuits and/or stays would put an added burden on plaintiffs because they are usually the economically weaker party, and they would be less able to afford protracted litigation. In fact, courts have expressed

[443] *See supra* Parts VI.B.2 and VI.B.4.

concern about requiring multiple lawsuits to resolve all of a plaintiff's charges.[444] Specifically, the court in *Spellman* noted:

> Therefore, "[o]f course, an employee is not required to file a separate EEOC charge alleging retaliation when the retaliation occurs in response to the filing of the original EEOC charge." This is a pragmatic rule, one that *avoids requiring plaintiffs to file multiple charges and/or multiple lawsuits* with overlapping evidence and issues.[445]

Requiring the plaintiff to file an amended or new EEOC charge while the EEOC is investigating the initial charge will allow the EEOC to resolve both charges at the same time. The plaintiff will then be able to file one lawsuit with both claims included in that lawsuit. Also, under this approach, if the retaliatory action takes place *after* the EEOC has issued its right-to-sue notice and the plaintiff does *not* have to go through the EEOC process again, she should be able to include a retaliation claim in her original complaint or simply amend her complaint and add a retaliation claim. At worst, this would cause the court to require a *slight* delay for the parties to conduct additional discovery regarding only the retaliation claim, and it would not require a second lawsuit.[446] This would be much more efficient than two lawsuits involving the same parties, many of the same witnesses, and overlapping testimony.

5. This Approach Takes a Fair, Middle-Ground Approach to the Supreme Court's Language in *Morgan*

The final reason for adopting this middle-ground approach is that it would draw a balance between the ways in which the courts have interpreted *Morgan*.[447] It would be consistent with the pro-employer approach to the extent it would require an amended or second charge while the EEOC completes its investigation, and it would be consistent with the

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[444] *See* York v. Dep't of Juvenile Servs., No. WDQ-12-1068, 2012 U.S. Dist. LEXIS 171956, at *8 n.8, (N.D. Md. Dec. 3, 2012); Spellman v. Seymour Tubing, Inc., No. 4:06-cv-0013-DFH-WGH, 2007 U.S. Dist. LEXIS 28779, at *3–4 (S.D. Ind. Apr. 12, 2007).

[445] *Spellman*, 2007 U.S. Dist. LEXIS 28779, at *3–4 (emphasis added) (citations omitted).

[446] As previously noted, this proposed solution assumes that the litigation regarding the initial discrimination charge has not already concluded at the time the retaliatory action takes place.

[447] *See supra* Part V.

pro-employee approach to the extent it would obviate the need for an amended or second charge once the EEOC issues its right-to-sue notice.[448]

With respect to being consistent with the pro-employer approach to *Morgan* some courts have taken, as those courts have noted:

> Each discrete discriminatory act starts a new clock for filing charges alleging that act. . . . 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."* [The plaintiff] can only file a charge to cover discrete acts that "occurred" within the appropriate time period.[449]

As noted earlier, this language could certainly be interpreted as requiring a plaintiff to amend an original charge or file a second charge alleging retaliation, as that retaliation would be an "unlawful employment practice," and a plaintiff must exhaust administrative remedies for unlawful employment practices.[450] As the court in *Richter* noted while relying on Title VII's language and on the Court's interpretation of it in *Morgan*: "Each discrete act [was] a different employment practice for which a separate charge [was] required."[451] Thus, requiring an amended or additional EEOC charge while the initial charge is still with the EEOC is consistent with the pro-employer interpretation of *Morgan*.

With respect to being consistent with the pro-employee approach to *Morgan* some courts have taken, as one of those courts has noted:

> Although [the employer] asserts that *Morgan* required [the plaintiff] to file a new EEOC charge alleging that she was terminated in retaliation for her first charge, we do not read *Morgan* that broadly. *Morgan* addresses only the issue of when the limitations clock for filing an EEOC charge begins ticking with regard to discrete unlawful employment practices. In this respect, it concerns only Congress's clear preference as expressed in Title VII for "prompt processing of all charges of employment discrimination." It does not

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[448] *See supra* Parts VI.A and VI.B.

[449] Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 113–14 (2002) (emphasis added).

[450] *See supra* Part V.A.

[451] Richter v. Advance Auto Parts, Inc., 686 F.3d 847, 851 (8th Cir. 2012).

> purport to address the extent to which an EEOC charge satisfies exhaustion requirements for claims of related, post-charge events.[452]

Thus, not requiring an amended or additional EEOC charge once the initial charge is no longer with the EEOC is also consistent with the pro-employee interpretation of *Morgan*.

This middle-ground approach is one more option courts have, and it is not an all-or-nothing approach. It promotes predictability and consistency; it supports the EEOC's notice requirement and its investigatory and conciliatory functions; it promotes administrative and judicial economy; and it is consistent, to a certain extent, with the courts that take a broad view of *Morgan* and with courts that take a narrow view of *Morgan*. Therefore, many goals would be served by this approach.

VII. CONCLUSION

The Supreme Court's decision in *Morgan* has created a split among the circuits regarding whether plaintiffs must file amended or second EEOC charges for post-charge acts of retaliation.[453] While most courts still follow the pre-*Morgan* rule of not requiring amended or additional charges, the current trend appears to be to require plaintiffs to jump through yet another administrative hurdle before having their retaliation claims heard in court.[454]

While the courts do have several options when deciding how to handle these cases, three of these choices are: (1) adopting a pro-employer approach that requires an amended or second filing in cases involving post-charge acts of retaliation for filing an initial EEOC charge; (2) adopting a pro-employee approach that does not require an amended or second filing in cases involving post-charge acts of retaliation for filing an initial EEOC charge; or (3) adopting a middle-ground approach that requires an amended or second filing if the EEOC is still in the process of investigating the initial EEOC charge.[455] While each of these approaches has merit, and there are certainly other options courts have when addressing this issue, the third approach identified above strikes the appropriate balance among the various

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[452] Jones v. Calvert Grp. Ltd., 551 F.3d 297, 303 (4th Cir. 2009) (citation omitted) (quoting *Morgan*, 536 U.S. at 109); *see also supra* Part V.B.

[453] *See supra* Part V.

[454] *See supra* Part V.

[455] *See supra* note 341 regarding two other approaches to resolving this issue.

interests involved: (1) adherence to prior case law; (2) consistency and predictability for the parties, the courts, and the EEOC; (3) the promotion of administrative and judicial economy; (4) proper consideration of the EEOC's notice, investigatory, and conciliatory roles; (5) fairness to plaintiffs who might not know the procedural minefield involved with the administrative exhaustion process; and (6) regard to the Supreme Court's statements in *Morgan*.[456] While no option is perfect, this middle-ground approach is a workable one, and it should be an option the Supreme Court strongly considers if it decides to affirmatively rule on this issue.[457]

[456] *See supra* Part VI.C.

[457] While I suggest that the Court *should* seriously consider this middle-ground approach, I suspect the court will not adopt it. It will most likely take an all-or-nothing position, and given the current make-up of the court and the language in *Morgan*, I suspect it *will* require plaintiffs to file amended or additional charges in cases involving separate and distinct acts of employer retaliation that take place after, and as a result of, the plaintiff's initial charge. The other potential likely outcome is for the Court to eliminate the need for an amended or second charge only if the alleged retaliation is essentially a continuation of what was alleged in the initial charge.