

Retaliatory Litigation Conduct after *Burlington Northern & Santa Fe Railway Company v. White*

ADAM J. BERNSTEIN*

In Burlington Northern & Santa Fe Railway Co. v. White, the Supreme Court articulated a new standard defining the scope and materiality of actions that could be considered retaliatory under Title VII of the Civil Rights Act of 1964. While otherwise sensible, this capacious standard has created the problem that employees can now claim retaliation for their employer's litigation conduct. This Note proposes that to alleviate the resulting tension caused between the purposes of Title VII and the adversarial system, the Supreme Court should adopt the Seventh Circuit's presumption against finding litigation conduct retaliatory, as defined in Steffes v. Stepan Co.

I. INTRODUCTION

Federal law has long prohibited retaliation against employees who bring discrimination claims.¹ This stems from a recognition that retaliation is as significant a problem as the original act of discrimination.² Prior to the recent Supreme Court decision in

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1. 42 U.S.C. § 2000e-3(a) (2006).

2. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63 (2006).

The anti-discrimination provision seeks a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender-based status. The anti-retaliation provision seeks to secure that primary objective by preventing an employer from interfering (through retaliation) with an employer's efforts to secure or advance enforcement of the Act's basic guarantees.

Id. (internal citations omitted).

Burlington Northern & Santa Fe Railway Co. v. White, federal circuit courts were split as to whether the anti-retaliation provision of Title VII of the Civil Rights Act of 1964³ was limited to actions in the employment context, or whether it extended to actions outside the employment context.⁴ The circuits were also split on how harmful or material an action had to be for it to violate the anti-retaliation provision.⁵ These uncertainties precluded the resolution of another, subtler question: whether the litigation conduct of an employer, such as the initiation of a lawsuit, the filing a counterclaim, or the raising of an affirmative defense, could form the basis of a retaliation claim. This Note argues that the *Burlington* decision, while providing a sensible resolution to the issues that split the circuits, has created a new problem: the possibility that employees can now claim retaliation for their employer's litigation conduct.

The anti-retaliation provision of Title VII prohibits employers from discriminating against individuals who oppose unlawful employment practices or participate in their "investigation, proceeding, or hearing" pursuant to the statute.⁶ Prior to *Burlington*, the circuit courts had been divided on the extent of this provision's protections.⁷ Some circuits had restrictive definitions of what actions⁸ could be considered retaliatory. In those circuits, it

3. § 2000e-3(a).

4. *Burlington*, 548 U.S. at 60–61; see also Megan E. Mowrey, *Establishing Retaliation for Purposes of Title VII*, 111 PENN ST. L. REV. 893 (2007) (discussing the standards, and the cases that announce them).

5. *Burlington*, 548 U.S. at 60–61.

6. § 2000e-3(a).

7. *Burlington*, 548 U.S. at 60–61; see also Mowrey, *supra* note 4, at 893.

8. An employee who alleges retaliation under Title VII must establish three elements in order to survive a motion for summary judgment. The employee must establish that (1) he or she engaged in a protected activity, (2) that an adverse action occurred, and (3) that a causal connection exists between the adverse action and the protected activity. See § 2000e-3(a). See also *Nichols v. S. Ill. Univ.-Edwardsville*, 510 F.3d 772, 784–85 (7th Cir. 2007) (discussing the test under the rubric of the "direct method," as compared to the "indirect method"); *Williams v. W.D. Sports, N.M., Inc.*, 497 F.3d 1079, 1086, n.4 (10th Cir. 2007) (discussing the elements of a prima facie case and how they are drawn from the language of Title VII); Lorrie E. Bradley, *Striking Back Against Retaliatory Discrimination: How Burlington Northern & Santa Fe Railway Company v. White Expands Protections for Employees Under Title VII's Participation and Opposition Clauses*, 85 N.C. L. REV. 1224, 1228–30 (2007) (discussing the three part test, and what a plaintiff must show to satisfy each prong); Peter M. Panken, *Retaliation: A Tidal Wave of Employment Litigation — Getting Mad, Getting Even, Getting Sued*, Feb. 14–16, 2008, SN021 ALI-ABA 799, 805–806 (discussing the three elements a plaintiff must prove to establish a retaliation claim: protected activity, adverse action, and causal connection). This Note uses the term

was very difficult for employees to bring retaliation claims premised on litigation conduct.⁹ The Seventh Circuit, by contrast, had a permissive standard. It held that an employer's action was material if it could have dissuaded a reasonable worker from making or supporting a charge of discrimination.¹⁰ The Seventh Circuit, despite its permissive standard, had a limiting background presumption against finding litigation conduct retaliatory.¹¹ Courts in other circuits occasionally did allow employees to sue for retaliation based on litigation conduct, including both

“action” synonymously with adverse action, or adverse employment action, as the second element is sometimes referred to.

9. The Third, Fourth, Fifth, Sixth and Eighth Circuits employed restrictive standards. *Burlington*, 548 U.S. at 60–61. Two cases from the Eleventh Circuit illustrate the judicial reasoning some plaintiffs encountered when they attempted to bring retaliation claims premised on litigation conduct in the circuits with restrictive standards. In those cases, retaliation claims alleging manufactured evidence or perjured testimony were dismissed on the grounds that actions in the litigation context simply did not affect or implicate an individual's employment. In *Boyd v. Brookstone*, 857 F. Supp. 1568, 1571–73 (S.D. Fla. 1994), the district court granted the defendant's motion to dismiss a retaliation claim premised on allegations of submission of manufactured evidence to an EEOC hearing because the claim did not “implicate ‘employment’ in any form or manner,” and did not affect the terms and conditions of the plaintiff's employment. *Id.* at 1573. Similarly, in *Garcia-Cabrera v. Cohen*, 81 F. Supp. 2d 1272 (M.D. Ala. 2000), a district court in the middle district of Alabama adopted *Boyd's* reasoning and held that allegedly lying in an EEO hearing does not affect the terms or conditions of employment, and thus, is not actionable retaliation. *Id.* at 1285. Nevertheless, a few cases from those circuits with restrictive standards did allow retaliation claims to go forward premised on litigation conduct. These cases were mostly premised on retaliatory lawsuits. *See, e.g.*, *Urquiola v. Linen Supermarket, Inc.*, No. 94-14-CIV-ORL-19, 1995 WL 266582, at *1 (M.D. Fla. March 23, 1995) (“[A] state court defamation suit filed in retaliation for making an EEOC charge clearly violates Title VII.”); *Beckham v. Grand Affair of N.C., Inc.*, 672 F. Supp. 415, 419 (W.D.N.C.1987) (allowing an individual to pursue a retaliation claim against her former employer for instituting a criminal prosecution against her); *EEOC v. Va. Carolina Veneer Corp.*, 495 F. Supp. 775, 778 (W.D. Va. 1980) (finding retaliation where an employer filed a defamation suit against an employee based upon statements made by the employee to the EEOC). In addition, a few recent cases from the Sixth Circuit allowed retaliation claims to go forward premised on counterclaims.

10. *Washington v. Ill. Dep't of Revenue*, 420 F.3d 658, 662 (7th Cir. 2005).

11. *Steffes v. Stepan*, 144 F.3d 1070, 1076 (7th Cir. 1998) (“*McKenzie* and *Aurimedia* suggest . . . that litigation tactics for the most part will not give rise to actionable retaliation . . .”). Cases in the Seventh Circuit that did allow litigation conduct to form the basis of a retaliation action were confined to the baseless or malicious initiation of lawsuits. *See Power Sys, Inc. v. N.L.R.B.*, 601 F.2d 936, 940 (7th Cir. 1979) (“We recognize that civil actions for malicious prosecution carry with them a potential for chilling employee complaints to the Board and that the Board may, in a proper case, act to curb such conduct.”); *EEOC v. Levi Strauss & Co.*, 515 F. Supp. 640, 644 (N.D. Ill. 1981) (recognizing that state defamation suit brought by an employer in the wake of an employee discrimination claim could be considered retaliatory in the appropriate circumstances).

the initiation of a lawsuit and those actions taken while in a defensive posture.¹²

In *Burlington*, the Supreme Court first concluded that the anti-retaliation provision is not confined to actions that are related to employment or occur at the workplace.¹³ The Court next answered the question of how harmful an action must be before it constitutes retaliation under Title VII. The Court adopted the Seventh Circuit's approach and announced that actions must be "harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination."¹⁴ These holdings are sensible. Retaliation can take many forms, and there are numerous actions that would fall outside the employment context which would impede "unfettered access to statutory remedial mechanisms."¹⁵ As the Circuit Court for the District of Columbia has hypothesized, "the IRS could retaliate against a complaining employee by subjecting him to an audit. Or an employer could falsely accuse an employee of engaging in criminal activity"¹⁶ The "dissuade a reasonable worker" standard has its virtues, as it appropriately allows for flexibility.¹⁷ However, the standard has one serious shortcoming. By broadening what can be considered retaliatory under Title VII, *Burlington*, without directly holding so, makes retaliation suits premised on litigation conduct possible.¹⁸ Such claims may compromise the

12. See *Berry v. Stinson Chevrolet*, 74 F.3d 980, 986 (10th Cir. 1996) (concluding that "malicious prosecution can constitute [an] adverse employment action," where the employer had filed false criminal charges against a former employee who had complained about discrimination); *Ward v. Wal-Mart Stores, Inc.*, 140 F. Supp. 2d 1220, 1231 (D.N.M. 2001) ("The Court agrees that the filing of frivolous lawsuits may constitute an adverse employment action for purposes of a retaliation claim."). This is consistent with cases from the Fourth, Seventh, and Eleventh Circuits which also allowed retaliation claims premised on retaliatory lawsuits. See *infra* Part III.

13. *Burlington*, 548 U.S. at 57. See also *id.* at 63 ("An employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm outside the workplace.").

14. *Id.* at 57.

15. *Id.* at 64 (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997)).

16. *Rochon v. Gonzales*, 438 F.3d 1211, 1218 (D.C. Cir. 2006).

17. "We phrase the standard in general terms because the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters." *Burlington*, 548 U.S. at 69. Judges must be allowed to consider the facts of a given case, and determine whether or not those facts rise to the level of retaliation.

18. See, e.g., *Nesselrotte v. Allegheny Energy, Inc.*, No. 06-01390, 2007 WL 3147038, at *11-12 (W.D. Pa. Oct. 25, 2007) (allowing a plaintiff to amend her complaint in order to

integrity of the adversarial system by allowing employees to harass opposing counsel.

Post-*Burlington*, an employee in a discrimination suit can make a number of allegations that could stifle vigorous advocacy on the part of the employer's attorney. For instance, a plaintiff can allege that a defendant's counterclaim is retaliatory. Even though the allegation, if unfounded, will ultimately be dismissed, the harassment cannot be undone. One commentator notes that while the Petition Clause of the First Amendment¹⁹ still guarantees that employers have access to the courts, "employers must now make an individualized assessment of whether any legal claim they may have against an employee who has exercised statutory rights justifies the risk of provoking a retaliation claim."²⁰ This enforced caution, even for meritorious counterclaims, prevents defense counsel from advocating as vigorously as possible.

This Note argues that the *Burlington* "dissuade a reasonable worker" standard may compromise the adversarial system in employment litigation. Part II discusses the Seventh Circuit's approach to retaliation, and the Supreme Court's subsequent analysis in *Burlington*. The Supreme Court adopted the Seventh Circuit's standard, but neither considered nor adopted the Seventh Circuit's limiting background presumption, thus allowing retaliation claims to go forward premised on litigation conduct. Part III surveys the current state of retaliation law, and the post-*Burlington* landscape for Title VII. Part IV discusses potential solutions, and proposes that the most effective resolution to the problem is for the Supreme Court to adopt the Seventh Circuit's presumption against finding litigation conduct retaliatory. By doing so, the Court would alleviate the tension that *Burlington* has caused between Title VII and the adversarial system, effect-

add a claim for retaliation based upon the defendant's proposed compulsory counterclaims).

19. "Congress shall make no law respecting . . . the right of the people . . . to petition the Government for a redress of Grievances." U.S. CONST. amend. I. See generally Carol Rice Andrews, *After BE & K: The "Difficult Constitutional Question" of Defining The First Amendment Right to Petition Courts*, 39 HOUS. L. REV. 1299 (2003) (discussing the evolution of the constitutional right to petition the courts).

20. Judith A. Moldover, *When the Empire Strikes Back: In light of Burlington Northern, could employer suits or counterclaims constitute retaliation?*, N.Y.L.J., Apr. 19, 2007, at 20.

ing a compromise that gives appropriate consideration to the primary purposes of each.

II. THE SEVENTH CIRCUIT'S APPROACH AND THE *BURLINGTON* DECISION

This part of the Note discusses the Seventh Circuit's approach to retaliation claims in light of its limiting background presumption, the litigation privilege doctrine.²¹ This part then discusses the Supreme Court's decision in *Burlington*, and argues that the Supreme Court's adoption of the Seventh Circuit's standard, without the adoption of the Seventh Circuit's limiting background principle, has created a tension between Title VII and the adversarial system.

A. THE SEVENTH CIRCUIT'S STANDARD IN LIGHT OF ITS "LITIGATION PRIVILEGE DOCTRINE"

1. *The "Dissuade a Reasonable Worker" Standard*

The Seventh Circuit articulated the "dissuade a reasonable worker" standard in *Washington v. Illinois Department of Revenue*.²² In *Washington*, the employee alleged that her supervisor changed her schedule from 7 a.m. to 3 p.m. to 9 a.m. to 5 p.m. in retaliation for her having brought a race discrimination suit.²³ This change, while not material to most, was significant to the plaintiff because she had a child with Down syndrome whom she needed to care for beginning at 3 p.m. every day. The issue before the Seventh Circuit was whether the adverse action element of a Title VII retaliation claim precluded retaliation claims pre-

21. Some states have litigation privilege doctrines categorically precluding tort claims based on conduct during the course of litigation or judicial proceedings. For instance, the Eleventh Circuit, analyzing Florida law, found such a privilege in *Green Leaf Nursery v. E.I. DuPont De Nemours & Co.*, 341 F.3d 1292, 1302–03 (11th Cir. 2003). In fact, "[a]ll but two states recognize absolute immunity for lawyers involved in litigation with 'very little variation' from state to state." T. Leigh Anenson, *Absolute Immunity from Civil Liability: Lessons for Litigation Lawyers*, 31 PEPP. L. REV. 915, 917 (2004). This is not to be confused with a federal privilege.

22. 420 F.3d 658, 662 (7th Cir. 2005).

23. *Id.* at 659.

mised on actions that occurred outside the workplace.²⁴ At the beginning of the opinion, the court emphatically rejected the contention that retaliation could only occur in the workplace.²⁵ The court then parsed the statutory language²⁶ and announced the standard by which to review such claims.

An employer's action is not material under § 2000e-3(a) if it would not have dissuaded a reasonable worker from making or supporting a charge of discrimination. By and large a reassignment that does not affect pay or promotion opportunities lacks this potential to dissuade and thus is not actionable. But “by and large” differs from “never.”²⁷

In making all reasonable inferences in the plaintiff's favor, the court hypothesized that the defendant may have been seeking to “exploit a known vulnerability,”²⁸ by acting in a way that would, to a normal worker, not have much meaning, but which to the plaintiff was significant. Thus, the court allowed the employee to go forward with her retaliation claim.²⁹

The *Washington* court announced the “dissuade a reasonable worker” standard in a case that did not concern retaliatory litigation conduct. This decision does not appear to have altered the Seventh Circuit's background presumption limiting attorney exposure to retaliation claims, as evidenced by subsequent citing of the presumption.³⁰ By providing judges with flexibility to assess the existence of retaliatory animus,³¹ the Seventh Circuit did not abandon its suspicion of retaliatory claims premised on litigation conduct. Rather, the court simply discerned congressional intent and concluded that certain actions that do not affect pay or promotion opportunities can be considered retaliatory.³²

24. *Id.* at 659–60.

25. *Id.* at 660 (“Retaliation may take the form of acts outside the workplace.”).

26. *Id.* at 660–62.

27. *Id.* at 662.

28. *Id.* at 663.

29. *Id.*

30. *See infra* note 36.

31. *Id.* at 662–63.

32. *Id.* at 660–62.

2. *The Development of the "Litigation Privilege Doctrine"*

In the years leading up to *Washington*, the Seventh Circuit developed a "litigation privilege doctrine."³³ Depending on the panel, the privilege amounted to either a presumption against finding litigation conduct retaliatory³⁴ or an absolute prohibition against doing so.³⁵ The Northern District of Illinois, analyzing an adverse action under *Burlington*, cited the presumption against finding litigation conduct retaliatory, indicating that the "dissuade a reasonable worker" standard is meant to act in tandem with the litigation privilege doctrine.³⁶

The Seventh Circuit's litigation privilege doctrine originated in *Auriemma v. Montgomery*.³⁷ *Auriemma* involved two lawsuits filed by members of the Chicago Police Department against the city and city officials.³⁸ The complaint alleged that Montgomery and Hubert, lawyers for the city, violated the Fair Credit Reporting Act by hiring investigators to obtain credit reports about the plaintiffs for unauthorized purposes.³⁹ The defendant's motion to dismiss was denied by the district court. On appeal to the Seventh Circuit, the defendants argued that as government attorneys they were "entitled to absolute immunity from suit for actions taken in preparing and presenting their clients' defense."⁴⁰

The Seventh Circuit began its discussion by surveying Supreme Court cases where absolute immunity from civil liability had been granted for litigation conduct.⁴¹ First, the Supreme Court held that prosecutors are absolutely immune from liability for suits challenging the initiation of a criminal trial, the conduct of trial, and the presentation of evidence at trial.⁴² Then, the Su-

33. *Probst v. Ashcroft*, 25 F. App'x 469, 471 (7th Cir. 2001).

34. *Steffes v. Stepan Co.*, 144 F.3d 1070, 1075 (7th Cir. 1998).

35. *Probst*, 25 F. App'x. at 471.

36. *Ergo v. Int'l Merch. Servs., Inc.*, 519 F. Supp. 2d 765, 781 (N.D. Ill. 2007). *Ergo* cited *Steffes* for the presumption against finding litigation conduct retaliatory in a suit under FLSA. Though this case was not brought under Title VII, it analyzed the adverse action element using the *Burlington* standard. Thus, the "dissuade a reasonable worker" standard in the Seventh Circuit has not been interpreted to preempt the litigation privilege doctrine.

37. 860 F.2d 273 (7th Cir. 1988).

38. *Id.* at 274.

39. *Id.* at 274-75.

40. *Id.* at 275.

41. *Id.* at 275-76.

42. *Imbler v. Pachtman*, 424 U.S. 409 (1976).

preme Court extended absolute immunity to judges for their participation in judicial proceedings,⁴³ and to agency officials and attorneys who perform functions analogous to those of a prosecutor for their actions in initiating and conducting administrative proceedings.⁴⁴ Finally, the Supreme Court extended absolute immunity to witnesses for their participation in judicial proceedings.⁴⁵

The Seventh Circuit cautioned that the grant of absolute immunity in these cases, “should not . . . be confused with a blanket grant of immunity for government attorneys. Absolute immunity is designed to protect the functions that particular government officials perform, not the government officials themselves.”⁴⁶ *Auriemma* drew a distinction between quasi-judicial functions and investigative or administrative functions. The former may warrant absolute immunity, while the latter may only be entitled to qualified immunity.⁴⁷ In dicta, *Auriemma* gave two examples of quasi-judicial activities which the court reasoned should be protected by absolute immunity: conducting discovery under the rules of civil procedure, and the presentation of evidence at trial.⁴⁸ However, the court ruled that the activity the defendants actually engaged in — an unlawful investigation conducted outside the discovery process — was not entitled to absolute immunity. As a result, the Seventh Circuit upheld the District Court’s dismissal of the defendant’s motion to dismiss.

The issue of whether litigation conduct could be considered retaliatory arose again in *McKenzie v. Illinois Department of Transportation*.⁴⁹ At the time of *McKenzie*, the question of whether the alleged retaliatory act had to be job-related remained unsettled.⁵⁰ In *McKenzie*, the plaintiff complained of sexual harassment and a hostile work environment.⁵¹ She further alleged, with the support of a coworker’s affidavit, that a supervisor had told her co-workers not to give her affidavits or to assist

43. *Stump v. Sparkman*, 435 U.S. 349 (1978).

44. *Butz v. Economou*, 438 U.S. 478 (1978).

45. *Briscoe v. LaHue*, 460 U.S. 325 (1983).

46. *Auriemma v. Montgomery*, 860 F.2d 273, 277 (7th Cir. 1988) (citations omitted).

47. *Id.* at 278.

48. *Id.*

49. 92 F.3d 473 (7th Cir. 1996).

50. *Id.* at 486.

51. *Id.* at 476–78.

her in her lawsuit against the company.⁵² The Seventh Circuit assumed, *arguendo*, that a retaliatory act need not be job related, and still held, with scant discussion, that such activities could not be considered retaliatory. “An attempt to obstruct the litigation of the underlying discrimination complaint, like oppressive discovery requests and the withholding of other evidence, is inseparable from the litigation of the claim. Accordingly, it is a matter to be resolved pursuant to court rules, not by Title VII.”⁵³

The logic here departs quite significantly from *Auriemma* in a number of ways. First, whereas in *Auriemma* the defendants were government attorneys, the defendant in *McKenzie* was neither a government employee nor an attorney but simply the plaintiff’s boss. Second, labeling the disputed action as “inseparable from the litigation of the claim” is debatable. The alleged actions are more fairly characterized as outside the realm of judicial action. In other words, they are more analogous to the unlawful investigations conducted outside the discovery process than they are to the presentation of evidence. Nevertheless, the Seventh Circuit found that such action could not form the basis of a retaliation claim.

The Seventh Circuit engaged in more sustained analysis of the question of whether litigation conduct could be considered retaliatory for purposes of Title VII in *Steffes v. Stepan Co.*⁵⁴ The plaintiff in *Steffes* worked for the Stepan Company⁵⁵ and was removed from her position in favor of a more senior worker.⁵⁶ The plaintiff was also denied an alternate position because of her medical condition. The plaintiff sued, alleging sex and disability discrimination.⁵⁷ During the course of that suit, Stepan’s Human Resources manager was advised by the corporate counsel to contact the plaintiff’s new employer, Dow Chemicals. The Human Resources manager did, calling Dow to relay information about the plaintiff’s pending suit against Stepan, and about the plaintiff’s medical condition. This communication prompted the plaintiff to bring a second action against Stepan in which she alleged

52. *Id.* at 485.

53. *Id.* at 486.

54. 144 F.3d 1070, 1075 (7th Cir. 1998).

55. *Id.* at 1071.

56. *Id.*

57. *Id.* at 1071–72.

that the phone call to Dow resulted in her not being asked back to work for two weeks.⁵⁸

The question before the Seventh Circuit was whether the alleged phone call constituted actionable retaliation under Title VII or the ADA. The trial court had dismissed the complaint on the grounds that such action was protected by “an absolute privilege for attorney communications pertinent to litigation.”⁵⁹ The trial court reasoned that the human resources manager was the “agent” of the attorneys and that the call was pertinent to the ADA litigation.⁶⁰ On appeal, the Seventh Circuit considered the availability of a state law absolute litigation privilege, and whether the Seventh Circuit should recognize an analogous federal privilege. The court declined to adopt an absolute privilege for two reasons: (1) the alleged action was not committed by a witness, judge, or attorney, but by a human resource manager, and (2) adopting such an absolute privilege could “interfere with the policies underlying the anti-retaliation provisions of Title VII and ADA. Retaliatory acts come in infinite variety, and even actions taken in the course of litigation could constitute retaliation in appropriate circumstances.”⁶¹

While the court left open the possibility, it stressed “that it will be the rare case in which conduct occurring within the scope of litigation constitutes retaliation prohibited by these statutes.”⁶² Brief discussions of *McKenzie* and *Auriemma* followed, before the court provided their analysis of the issue.

Defendants in discrimination suits must have some leeway to investigate possible defenses without undue fear of being subjected to additional liability in retaliation suits . . . The prerogative to prepare a defense is not broad enough to warrant recognition of an absolute litigation privilege, which would effectively insulate everything done in preparation for

58. *Id.* at 1073–74.

59. *Id.* at 1074.

60. *Id.*

61. *Id.* at 1075 (internal citations omitted).

62. *Id.* at 1075.

litigation, but neither is it so stingy as to offer no protection to the communication at issue here.⁶³

The complaint was thus dismissed because it failed to satisfy the adverse action element,⁶⁴ the very element *Burlington* later modified.⁶⁵

McKenzie, *Auriemma*, and *Steffes* were cited together in *Probst v. Ashcroft*⁶⁶ to support the existence of “the litigation privilege doctrine.”⁶⁷ The plaintiff in *Probst* was a Special Agent for the DEA who had previously sued the DEA and the Department of Justice (“DOJ”) for racial discrimination and retaliation.⁶⁸ During the first suit, the plaintiff alleged that the defendants engaged in various actions, including delaying the production of relevant documents, and disputing the amount they owed in damages and attorney’s fees.⁶⁹ The district court granted summary judgment to the defendant, and the Seventh Circuit affirmed: “[N]one of these actions can support a finding of liability in this retaliation lawsuit, because they are all excluded from consideration by the litigation privilege — a doctrine that simply precludes actions taken in the adversarial setting of litigation and otherwise redressable through court process from supporting further litigation.”⁷⁰ The announcement of such a privilege, with the use of *McKenzie*, *Auriemma*, and *Steffes* for support, seems curious, particularly since the *Probst* court did not discuss nor analyze the above cases. It seems questionable whether these cases amounted to a “litigation privilege doctrine” that absolutely privileged actions taken in the adversarial setting, particularly since *Steffes* explicitly left the door open for such suits.⁷¹ Nevertheless, the cases taken together do suggest hostility to claims of retaliation based on litigation conduct, and a high threshold for would-be plaintiffs.

63. *Id.* at 1077 (internal citations omitted).

64. *Id.* at 1074.

65. *Burlington N. and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006).

66. 25 F. App’x 469 (7th Cir. 2001).

67. *Id.* at 471.

68. *Id.* at 470.

69. *Id.* at 470–71.

70. *Id.* at 471.

71. *Steffes v. Stephan Co.*, 144 F.3d 1070, 1075 (7th Cir. 1998).

B. *BURLINGTON* RESOLVES DISAGREEMENT AMONG THE CIRCUITS

Five years after *Probst*, the Supreme Court decided *Burlington*. Two issues were considered in the case. First, the Court addressed whether the anti-retaliation provision of Title VII was limited to actions that occurred in the workplace, or whether it encompassed actions that occurred both in and outside of the workplace.⁷² Second, the Court analyzed how harmful adverse actions must be to fall within the scope of Title VII protection.⁷³ The Court's resolution of these issues will allow employees to claim retaliation premised on their employer's litigation conduct.

1. *The Decision*

The *Burlington* plaintiff worked as a forklift operator for a railway company.⁷⁴ After a few months on the job, she complained to company officials that her supervisor made insulting and inappropriate remarks about women.⁷⁵ An internal investigation supported her complaints. Nevertheless, following the internal investigation the plaintiff was reassigned to a more arduous position. The plaintiff subsequently filed two complaints with the EEOC.⁷⁶ Shortly thereafter, she got into a disagreement with a new supervisor and was suspended without pay for 37 days.⁷⁷ After invoking the company grievance procedures, the plaintiff was reinstated and awarded backpay for her time off.⁷⁸ She then exhausted her administrative remedies and filed suit, claiming that the company retaliated against her in violation of Title VII.⁷⁹

Prior to *Burlington*, the circuit courts had been split on whether actions outside the workplace could be considered retaliatory under Title VII.⁸⁰ The circuits disagreed on the question of

72. *Burlington N. and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 56–59 (2006).

73. *Id.* at 57–58.

74. *Id.* at 57.

75. *Id.* at 58.

76. *Id.*

77. *Id.* at 58–59.

78. *Id.*

79. *Id.* at 59.

80. *Id.* at 59–61.

how harmful such action had to be in order to qualify as retaliation.⁸¹ The Supreme Court resolved these issues by holding:

[T]he anti-retaliation provision does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace. We also conclude that the provision covers those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant. In the present context that means that the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination.⁸²

Burlington supported its reading of Title VII linguistically. The Court cited extensive workplace related language in the anti-discrimination provision, 42 U.S.C. § 2000e-2(a), including, "hire," "discharge," "compensation, terms, conditions, or privileges of employment," "employment opportunities," and "status as an employee." The Court read this language as "explicitly limit[ing] the scope of that provision to actions that affect employment or alter the conditions of the workplace."⁸³ The anti-retaliation provision, 42 U.S.C. § 2000e-3(a), by contrast, contains no such "limiting words."⁸⁴

Burlington understood these linguistic differences in terms of what it saw as the different policy rationales behind the anti-discrimination and the anti-retaliation provisions. The Court viewed the objective of the anti-discrimination provision as bringing about "a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender-based status."⁸⁵ To secure this objective, the Court reasoned, Congress only had to prohibit employment related discrimination.⁸⁶ However, in terms of retaliation, the Court argued that "[a]n employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm

81. *Id.*

82. *Id.* at 57.

83. *Id.* at 62.

84. *Id.*

85. *Id.* at 63.

86. *Id.*

outside the workplace.”⁸⁷ Such discrimination would prevent achievement of the primary purpose of the provision, “maintaining unfettered access to statutory remedial mechanisms.”⁸⁸

After establishing that actions taken outside the workplace could be considered retaliatory, the Court saw the need to impose a limit. The Court first noted that Title VII only protects against those actions, “that produce[] an injury or harm,” or are, in other words, “materially adverse.”⁸⁹ The Court then defined a materially adverse action as that which, “well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.”⁹⁰ The phrasing leaves the lower courts a large amount of discretion. The Court justified the ambiguity with an appeal to context,⁹¹ and the common sense intuition that each case must be determined according to the particular circumstances and facts of a given act of retaliation.⁹²

2. *Implications for the Litigation Context*

The Court twice signaled that litigation conduct could be considered retaliatory. First, *Burlington* cited with approval *Berry v. Stevinson Chevrolet*,⁹³ a Tenth Circuit decision that found the initiation of false criminal charges to be actionable retaliation.⁹⁴ Then, towards the end of the opinion, while making analogies between Title VII and the National Labor Relations Act (NLRA),⁹⁵ *Burlington* specifically cited *Bill Johnson’s Restaurants, Inc. v. National Labor Relations Board*,⁹⁶ a case in which the Supreme

87. *Id.* (emphasis omitted).

88. *Id.* at 64.

89. *Id.* at 67–68.

90. *Id.* at 68 (internal quotations omitted).

91. *Id.* at 69 (“Context matters.”).

92. *Id.*

93. 74 F.3d 984 (10th Cir. 1996).

94. *Burlington*, 548 U.S. at 53, 64.

95. *Id.* at 66.

96. 461 U.S. 731, 740–41 (1983).

The Court has liberally construed these laws as prohibiting a wide variety of employer conduct that is intended to restrain, or that has the likely effect of restraining, employees in the exercise of protected activities. A lawsuit no doubt may be used by an employer as a powerful instrument of coercion or retaliation. As the Board has observed, by suing an employee who files charges with the Board or engages in other protected activities, an employer can place its employees on notice that anyone who engages in such conduct is subjecting himself to the possibility of a burdensome lawsuit. Regardless of how unmeritorious the

Court held that, “it is an enjoicable unfair labor practice to prosecute a baseless lawsuit with the intent of retaliating against an employee for the exercise of rights protected by § 7 of the NLRA.”⁹⁷ Though *Burlington* makes this reference, it makes no mention of *BE & K Construction Co. v. NLRB*,⁹⁸ a more recent Supreme Court decision on the NLRA. *BE & K* appeared to limit retaliation claims premised on employer lawsuits, due in part to statutory interpretation and in part to concerns that even unsuccessful employer lawsuits advance some First Amendment interests.⁹⁹ This mention and omission signals a willingness on behalf of the Supreme Court to allow Title VII retaliation suits premised on litigation conduct, at least in so far as counterclaims are concerned.¹⁰⁰ One commentator has opined that “the question of whether [a] counterclaim would have been asserted but for the discrimination claim will often be outcome-determinative and left to a jury.”¹⁰¹ Another commentator echoes the sentiment, asserting that as a result of the *Burlington* decision, “more plaintiffs may get a chance to prove these elements to a jury instead of to a judge reviewing a motion for summary judgment.”¹⁰² This will

employer's suit is, the employee will most likely have to retain counsel and incur substantial legal expenses to defend against it. Furthermore, as the Court of Appeals in the present case noted, the chilling effect of a state lawsuit upon an employee's willingness to engage in protected activity is multiplied where the complaint seeks damages in addition to injunctive relief.

Id. (citations omitted).

97. *Id.* at 744.

98. 536 U.S. 516 (2002).

99. *Id.* at 529–33, 36.

100. Loren Gesinsky, *When is it Retaliatory to Bring a Counterclaim: 'Burlington' Increased the Risks to Employers of Filing Such Claims*, NAT'L L.J., May 21, 2007, at S4.

Thus, although counterclaims were not directly at issue in *Burlington*, *Burlington* increased significantly the risks to employers of filing such claims in the 3d, 4th and 6th U.S. circuit court of appeals, which limited retaliation to adverse employment actions, and in the 5th and 8th circuits, which had espoused the even more restrictive limitation to ultimate employment decision.

Id.

101. *Id.*

102. Lorrie E. Bradley, *Striking Back Against Retaliatory Discrimination*, 85 N.C. L. REV. 1224, 1228 (2007).

The *Burlington Northern* decision has expanded the kinds of activities that will meet the second element of a claim, the retaliatory action . . . with more actions qualifying as retaliation under *Burlington Northern*, more plaintiffs may get a chance to prove these elements to a jury instead of to a judge reviewing a motion for summary judgment.

Id.

give employees more leverage in any pre-trial settlement talks with employers, altering the employment litigation playing field.

The possibility that even a frivolous retaliation claim will go to the jury puts pressure on an employer to settle¹⁰³ or simply to avoid bringing counterclaims. One commentator notes that while First Amendment rights still guarantee that employers have access to the courts, “employers must now make an individualized assessment of whether any legal claim they may have against an employee who has exercised statutory rights justifies the risk of provoking a retaliation claim.”¹⁰⁴ The specter of a retaliation claim, even for an employer’s meritorious counterclaim, must give defense counsel pause. While this may not impede an employer’s constitutional right to petition the courts,¹⁰⁵ the possibility of an additional claim may well have a chilling effect on employers’ counsel and their ability to advocate vigorously for their clients. The *Burlington* standard has thus potentially compromised the adversarial system in so far as employment litigation is concerned.

III. CURRENT STATE OF THE LAW

This part of the Note discusses case-law developments after *Burlington* in the Title VII context, and the current state of retaliation law under other statutes. This part is broken into four sections. The first section discusses judicial reactions to allegations that employers filed retaliatory lawsuits. The second section discusses judicial reactions to allegations that employers filed retaliatory counterclaims. The third section discusses judicial reactions to allegations of retaliation in EEOC or unemployment benefits hearings. Finally, the fourth section discusses data from the EEOC documenting the surge in retaliation claims filed over the

103. See generally Rachel H. Yarkon, Note, *Bargaining in the Shadow of the Lawyers: Negotiated Settlement of Gender Discrimination Claims Arising from Termination of Employment*, 2 Harv. Negot. L. Rev. 165, 174–75, n.50 (Spring 1997) (discussing how the unpredictability of the jury pushes both employees and employers to settlement).

104. See Moldover, *supra* note 20.

105. See generally Carol Rice Andrews, *After BE &K: The “Difficult Constitutional Question” of Defining The First Amendment Right to Petition Courts*, 39 HOUS. L. REV. 1299 (2003) (discussing the evolution of the constitutional right to petition the courts, and the implications of *BE&K Construction Co. v. NLRB*).

last few years, and the lack of knowledge about what happens to most of these claims due to the high rate of settlement.

A. RETALIATORY SUITS

In *Hasan v. Foley & Lardner, LLP*,¹⁰⁶ the Northern District of Illinois ruled that the complained of offenses, false allegations and the threat of litigation, “do not rise to the level of a materially adverse employment action,” and that “[u]nless it can be shown that it is an abuse of process, filing a lawsuit would not be considered retaliation.”¹⁰⁷ In a troubling assertion, the court wrote, “it is difficult to see how threatening a lawsuit could be considered retaliation.”¹⁰⁸ The court cited *Burlington*, but did not examine nor discuss the implications of its expansive standard.¹⁰⁹

The *Hasan* reasoning contrasts sharply with a decision from the Eastern District of Pennsylvania, *Walsh v. Irvin Stern’s Costumes*.¹¹⁰ In *Walsh*, the plaintiff alleged that the defendant “threaten[ed] to accuse Plaintiff of a crime and seek criminal charges against her unless she withdr[ew] her employment discrimination claims.”¹¹¹ The allegations in *Walsh* are egregious, but the reasoning is sound: “A fair reading of *Burlington Northern* reveals the case imposes no requirement that a threat be fulfilled.”¹¹² The court went on to conclude, “we are convinced that ‘a reasonable employee facing the choice between [facing criminal charges and continuing to press her] discrimination complaint might well choose [to drop her discrimination claims].”¹¹³ The contrast between *Hasan* and *Walsh* demonstrates how Seventh Circuit courts have resisted the *Burlington* standard with regard to finding litigation conduct retaliatory, while courts in other Circuits have appreciated the full implications of the decision.¹¹⁴

106. No. 04 C 5690, 2007 WL 2225831 (N.D. Ill. July 26, 2007).

107. *Id.*, at *10.

108. *Id.*

109. *Id.*

110. No. 05-2515, 2006 WL 2380379 (E.D. Pa. Aug. 15, 2006).

111. *Id.*, at *2.

112. *Id.*

113. *Id.*, at *3.

114. See *EEOC v. Seelye-Wright of South Haven, Inc.*, No. 1:05-CV-677, 2006 WL 2884464, at *3–6 (W.D. Mich. Oct. 10, 2006). In *Seelye-Wright*, the court recognized that “an employer’s filing of a defamation action in response to an employee’s filing of a charge with the EEOC can constitute an adverse action.” However, in that case, the employer

In the wake of *Burlington*, the issue of whether lawsuits can be considered actionable retaliation has arisen under other statutes as well. In *Spiegel v. Schulmann*,¹¹⁵ the district court questioned whether a post-termination lawsuit could be considered an “adverse employment action” under the Americans with Disabilities Act of 1990 (“ADA”).¹¹⁶ *Spiegel* cited *Hernandez v. Crawford Building Material Co.*¹¹⁷ for the proposition that an employer’s counterclaim against an employee was not actionable retaliation under Title VII or the ADEA, but then recognized that the rationale underlying *Hernandez* was potentially abrogated by *Burlington*. The *Spiegel* court nevertheless dismissed the plaintiffs’ claim because they were suing individuals who were not their former employers.¹¹⁸

The Ohio Supreme Court cited the *Burlington* standard when considering whether to bar an employer from suing an employee who had engaged in a protected activity.¹¹⁹ The case, *Greer-Burger v. Temesi*, cited *Burlington* for the proposition that “the filing of a lawsuit or a counterclaim can constitute an adverse employment action.”¹²⁰ The Court held that under Ohio law, and in light of the First Amendment of the Federal Constitution, “an employer is not barred from filing a well-grounded, objectively based action against an employee who has engaged in a protected activity.”¹²¹

Despite *Hasan*, the initiation of a lawsuit can be considered retaliatory under Title VII. This was the law prior to *Burlington*¹²² and does not appear to have changed.

articulated a legitimate, non-discriminatory reason for their suit, and the plaintiff did not establish that the reason was pretextual. Therefore, the court dismissed the retaliation charge.

115. No. 03-CV-5088, 2006 WL 3483922, at *19–21 (E.D.N.Y. Nov. 30, 2006).

116. 42 U.S.C.A. §§ 12101–12213 (2008).

117. 321 F.3d 528 (5th Cir. 2003).

118. *Spiegel*, 2006 WL 3483922, at *20.

119. *Greer-Burger v. Temesi*, 879 N.E.2d 174 (Ohio 2007).

120. *Id.* at 180 n.2.

121. *Id.* at 178.

122. See cases cited *supra* note 12; see *infra* Part IV, Section A.

B. RETALIATORY COUNTERCLAIMS

1. *Retaliatory Counterclaims Prior to Burlington*

Prior to *Burlington*, plaintiffs challenged counterclaims as retaliatory when they brought discrimination claims under various federal statutes. Two Supreme Court decisions, *Bill Johnson's Restaurants, Inc. v. NLRB*¹²³ and *BE&K Construction Co. v. NLRB*,¹²⁴ provided analytical framework for considering whether counterclaims were retaliatory in the NLRA context. District courts had also allowed retaliation claims premised on employer counterclaims to go forward under the Family Medical Leave Act (FMLA),¹²⁵ and Title VII.¹²⁶

2. *Retaliatory Counterclaims in the Seventh Circuit*

Two recent decisions from the Northern District of Illinois interpreting the Fair Labor Standards Act demonstrate the reluctance of courts in the Seventh Circuit to find litigation conduct retaliatory. A few months before *Burlington*, in *Beltran v. Brentwood North Healthcare Center, LLC*, the court held “the mere filing of [the defendant’s] counterclaim is not an adverse action that can provide the basis for an FLSA retaliation claim.”¹²⁷ The court advanced three arguments to support this conclusion. First, filing a counterclaim would “not chill plaintiffs from exercising and enforcing their statutory rights because by the time the employer files its counterclaim, plaintiffs have already made their charges and initiated a lawsuit.”¹²⁸ Second, plaintiffs in

123. 461 U.S. 731, 740–41 (1983).

124. 536 U.S. 516 (2002).

125. *Rosania v. Taco Bell of Am., Inc.*, 303 F. Supp. 2d 878, 889 (N.D. Ohio 2004) (allowing plaintiff to amend her complaint to include a retaliation claim based on a counterclaim allegedly made in bad faith, finding that the language of the statute allows for the claim and holding that it is not barred by any litigation privilege doctrine).

126. *Gliatta v. Tectum, Inc.*, 211 F. Supp. 2d 992, 1009 (S.D. Ohio 2002) (“[T]his Court concludes that the adverse action requirement for a retaliation claim encompasses an allegedly bad faith counterclaim brought by the employer against its former employee.”); *EEOC v. Outback Steakhouse*, 75 F. Supp. 2d 756, 761 (N.D. Ohio 1999) (rejecting the defendant’s argument that a counterclaim could not be considered an adverse employment action and allowing the EEOC to proceed with a suit premised on said counterclaim).

127. 426 F. Supp. 2d 827, 835 (N.D. Ill. 2006).

128. *Id.* at 834.

FLSA suits would not incur additional costs, and thus, would not be deterred, because they already had legal representation.¹²⁹ Third, counterclaims are compulsory under Rule 13 of the Federal Rules of Civil Procedure, and therefore, their timing cannot be considered suspicious.¹³⁰ The court referred to *Steffes* for the presumption that “except in rare cases, conduct occurring within the scope of litigation does not provide grounds for a retaliation claim.”¹³¹ Nevertheless, the court did not foreclose the possibility that a counterclaim could serve as the basis for a retaliation claim.¹³²

The *Burlington* decision does not appear to have altered the reasoning of the Seventh Circuit district courts. In *Ergo v. International Merchant Services, Inc.*,¹³³ the Northern District of Illinois referred to *Steffes* for the presumption against finding litigation conduct retaliatory, quoted the *Beltran* court’s reasoning above, and then wrote that under the FLSA, “the threshold for concluding that a compulsory counterclaim is retaliatory should be high.”¹³⁴ To survive summary judgment, a plaintiff must put forth evidence that a counterclaim is (1) motivated by retaliatory animus and (2) baseless.¹³⁵ Interestingly, the court looked for guidance to *Bill Johnson’s Restaurant v. NLRB*,¹³⁶ a case arising under the NLRA. Despite the different statutes at play, “the Court [saw] no principled distinction between that case and the facts presented here.”¹³⁷

3. Retaliatory Counterclaims in Other Circuits

Decisions coming from other circuits are not so uniform.¹³⁸ In *Nesselrotte v. Allegheny Energy, Inc.*,¹³⁹ a district court in the

129. *Id.*

130. *Id.*

131. *Id.* at 833.

132. *Id.* at 835.

133. 519 F. Supp. 2d 765 (N.D. Ill. 2007).

134. *Id.* at 781.

135. *Id.* at 781–82.

136. 461 U.S. 731 (1983).

137. *Ergo*, 519 F. Supp. 2d at 781. Similarly, in *Burlington*, the Supreme Court made analogies between Title VII and the NLRA before itself citing *Bill Johnson’s*. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 66 (2006).

138. See, e.g., *Reed v. Cedar County*, No. 05-CV-64-LRR, 2007 WL 509186, at *6 (N.D. Iowa Feb. 12, 2007). In *Reed*, the district court implicitly accepted the proposition that

Third Circuit was confronted with the issue of whether to allow a plaintiff to amend her complaint in order to add a claim for retaliation based upon the defendant's proposed compulsory counterclaims.¹⁴⁰ The case involved Title VII, ADEA, and Pennsylvania state law claims.¹⁴¹ The defendants argued that, as a matter of law, counterclaims cannot form the basis of a retaliation claim.¹⁴² The court rejected this argument. Furthermore, the court dismissed the decisions in *Beltran v. Brentwood North Healthcare Center, LLC* and *Ergo v. International Merchant Services, Inc.* because of "the Supreme Court's expansive interpretation of retaliation under Title VII in *Burlington Northern*."¹⁴³ This decision is important because it demonstrates the effect *Burlington* has had on circuits that had previously required adverse actions to affect the terms, conditions, or benefits of employment in order to be actionable.¹⁴⁴

This issue arises under related statutes as well, such as the FMLA. In *McLaughlin v. Innovative Logistics Group, Inc.*,¹⁴⁵ the Eastern District of Michigan concluded that "there is case law supporting McLaughlin's claim that the *filing* of a frivolous or bad faith counter-claim, *in itself*, constitutes retaliation under the FMLA."¹⁴⁶ The Eastern District of Michigan reasoned that the language of the FMLA "does not prohibit discrimination with respect to only adverse employment action," and "is similar to and can even be considered broader than the anti-retaliation provision in Title VII."¹⁴⁷

Burlington enabled employees to sue for retaliation based on employer counterclaims. However, the court dismissed the employee's retaliation claim because the employee had failed to amend her complaint in time for trial. *See also* *Timmerman v. U.S. Bank, N.A.*, 483 F.3d 1106 (10th Cir. 2007). In *Timmerman*, the Tenth Circuit wrote that, "it is certainly an interesting question whether the filing of counterclaims in response to discrimination claims brought by a former employee constitutes an adverse employment action . . ." *Id.* at 1123. The case involved Title VII and ADEA claims. *Id.* at 1110. The court did not reach the "interesting" question, however, because the defendant offered a legitimate, nondiscriminatory reason for filing its counterclaims, and the plaintiff did not show that the reason was merely pretext. *Id.*

139. No. 06-01390, 2007 WL 3147038 (W.D. Pa. Oct. 25, 2007).

140. *Id.*, at *11.

141. *Id.*, at *1.

142. *Id.*, at *11.

143. *Id.*, at *12.

144. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 60 (2006).

145. No. 05-72305, 2007 WL 1017101 (E.D. Mich. Mar. 29, 2007)

146. *Id.*, at *1.

147. *Id.*, at *4.

C. RETALIATORY ACTIVITY IN UNEMPLOYMENT BENEFITS OR EEOC HEARINGS

Two decisions in the Tenth Circuit demonstrate how the *Burlington* standard for analyzing Title VII retaliation claims has changed the landscape for suits involving litigation conduct in quasi-judicial settings. In *Williams v. W.D. Sports, N.M., Inc.*,¹⁴⁸ the Tenth Circuit reversed the district court's legal findings on account of *Burlington*.¹⁴⁹ The court held that allegations that the defendant threatened the plaintiff and presented false accusations at a state unemployment benefit hearing were sufficient to meet the *Burlington* "dissuade a reasonable employee" standard, and therefore, remanded the case for trial.¹⁵⁰

The quasi-judicial nature of the employment benefits proceeding in *Williams* played a pivotal role in the reasoning in *Gray v. Oracle Corp.*,¹⁵¹ a Utah district court case which involved allegations that the defendants "knowingly provid[ed] the EEOC with a fabricated and falsely dated employment evaluation."¹⁵² The defendant in *Oracle* argued that actions before the EEOC are covered by the judicial proceeding privilege, and that even if the allegations were true, knowingly providing the EEOC with fabricated and falsely dated employment information would not dissuade a reasonable employee from filing a discrimination claim.¹⁵³ Citing *Williams*, the *Oracle* court concluded without much discussion that actions in quasi-judicial EEOC hearings are not "absolutely privileged sufficient to defeat a federal cause of action . . ." ¹⁵⁴ However, the court dismissed the case based on evidence that the evaluations were made in good faith, and that given the circumstance of the case, even if they were not, the mere submission of allegedly false performance evaluations with the EEOC, as a matter of law, would not dissuade a reasonable employee from filing or supporting a charge of discrimination.¹⁵⁵

148. 497 F.3d 1079 (10th Cir. 2007).

149. *Id.* at 1083.

150. *Id.* at 1090–91, 1095.

151. No. 2:05-CV-534 TS, 2007 WL 3333388, at *3–6 (D. Utah Nov. 8, 2007).

152. *Id.*, at *3.

153. *Id.*

154. *Id.*, at *4.

155. *Id.*, at *5–6.

D. DATA

Retaliation claims are an increasingly popular tool for plaintiffs.¹⁵⁶ Between 1997 and 2007, the number of retaliation claims filed with the EEOC rose from 18,198 per year to 26,663 per year.¹⁵⁷ Perhaps more significantly, while retaliation claims filed in 1997 represented 22.6% of all claims filed with the EEOC, the retaliation claims filed in 2007 represented 32.3%.¹⁵⁸ As to be expected in the wake of *Burlington*, the number of retaliation claims filed under Title VII rose from 19,560 in 2006 to 23,371 in 2007.¹⁵⁹ This represents an increase of over 3,800 claims, or 19.5%, in one year. These statistics, when considered in light of the fact that the total number of EEOC claims have not deviated much from 80,000 per year during the ten year period from 1997 to 2007,¹⁶⁰ suggests plaintiffs' growing reliance on the type of employment discrimination claim that *Burlington* has made easier to bring.

There does not appear to be a compelling reason for the overall surge in the number of retaliations claims filed.¹⁶¹ One commentator noted, "[a]ttorneys just started to plead it more."¹⁶² Another said, "[p]ractitioners have awoken in last decade to the need to include retaliation in their cases. Fundamentally, juries may or may not agree with you about sex or race discrimination, but every one of them who has ever worked understands retaliation."¹⁶³ Whatever the reason, it is clear that the number of retaliation claims have increased substantially.

Many of the claims filed with the EEOC ultimately reach the federal court system. Once there, "[n]obody really knows what

156. Sylvia A Bier, *Protect Against the Surge of Employee Retaliation Claims: Understanding Title VII and Its Application to Recent EEOC Cases*, 36 Brief 15, 15 & 22 (2007) (discussing the surge in retaliation claims filed with the EEOC, and advising employers to "take protective measures to defend themselves" from such suits).

157. U.S. Equal Employment Opportunity Comm'n, Charge Statistics FY 1997 Through FY 2007, <http://www.eeoc.gov/stats/charges.html> (last visited Mar. 5, 2008).

158. *Id.*

159. *Id.*

160. *Id.* (showing, for the period 1997 through 2007, a low of 75,768 in 2005 and a high of 82,792 in 2007).

161. Marcia Coyle, *Retaliation Cases Hit High Court En Masse: Justices to Review Trio of Key Cases*, NAT'L L.J., Jan. 28, 2008, at 1.

162. *Id.*

163. *Id.*

happens to [them].”¹⁶⁴ Only a tiny fraction, 3.4%, go to trial.¹⁶⁵ Commentators speculate that 70% of such cases are resolved by settlement. However, “[t]his is only an assumption, because employment discrimination settlements are almost uniformly governed by private contracts containing confidentiality clauses.”¹⁶⁶ As a result of the high proportion of private settlements, public policy debates may be skewed,¹⁶⁷ and parties in employment discrimination suits may have a harder time reaching settlements due to the absence of reliable benchmarks.¹⁶⁸

The apparently high percentage of confidential settlements has troubling public policy implications.¹⁶⁹ When employees claim retaliation for litigation tactics, such as counterclaims, are they complaining of true retaliation or merely attempting to intimidate and impede? Canvassing the tiny percent of cases that do go to trial cannot answer this question, as we cannot assume that these cases are representative of all claims filed.

IV. PROPOSAL

The Note begins with the premise that *Burlington’s* adoption of the Seventh Circuit’s retaliation standard, without addressing their limiting background presumption, may compromise the adversarial system by allowing plaintiffs to strategically harass opposing counsel with a civil suit. The preceding Parts outline the Seventh Circuit’s retaliation standard, the *Burlington* decision, the current state of retaliation law and the reasoning employed by various courts in response to retaliation claims premised upon litigation conduct. This Part discusses possible ways to resolve

164. Minna J. Kotkin, *Outing Outcomes: An Empirical Study of Confidential Employment Discrimination Settlements*, 64 WASH. & LEE. L. REV. 111, 112 (2007) (arguing that, based on the analysis of an anonymously coded dataset of 1,170 cases over a six-year period, “employment discrimination litigation is neither jeopardizing nor resulting in undeserved windfalls for disgruntled employees”).

165. *Id.* at 113.

166. *Id.* at 112–13.

167. *Id.* at 116 (“The well-known Priest-Klein hypothesis asserts that trials should result in a 50% win rate for plaintiffs because settlements will weed out the extremely strong and the extremely weak cases. The less than 50% win rate fuels the perception that plaintiffs are abusing the system.”).

168. *Id.* at 116.

169. *See id.* at 113 (“The public policy discourse about employment discrimination is hotly contested, with divergent competing narratives.”).

the tension caused by Supreme Court's adoption of the Seventh Circuit's standard without their presumption against finding litigation conduct retaliatory. This Part concludes that the Supreme Court should adopt the Seventh Circuit's presumption. This proposal gives effect to Congressional intent and basic notions of fairness, while at the same time protecting the adversarial system.

A. ADOPT THE SEVENTH CIRCUIT'S PRESUMPTION

The most effective resolution to the tension created by the *Burlington* standard is the adoption of the Seventh Circuit's presumption against finding litigation conduct retaliatory, as articulated in *Steffes*. While recognizing the possibility that actions taken in the course of litigation could constitute retaliation, *Steffes* asserts "that it will be the rare case in which conduct occurring within the scope of litigation constitutes retaliation prohibited by these statutes."¹⁷⁰ This presumption raises the threshold for would-be retaliation claims to a high level, requiring the alleged actions to be egregious. This presumption has been cited by numerous courts, both in the Title VII context and otherwise.¹⁷¹ This section will clarify an element of this presumption, and then explore additional reasons supporting its adoption.

1. Clarification Regarding Retaliatory Lawsuits

There is a difference between the initiation of a lawsuit and an action taken while in defense of a discrimination claim, such as the filing of a counterclaim. While the initiation of a lawsuit can certainly constitute retaliation in some instances, actions taken while in a defensive posture rarely do. *Steffes* implied this distinction through its reasoning.

Defendants in discrimination suits must have some leeway to investigate possible defenses without undue fear of being

170. 144 F.3d 1070, 1075 (7th Cir. 1998).

171. *E.g.*, *Ergo v. Int'l Merch. Serv., Inc.*, 519 F. Supp. 2d 765, 780–81 (N.D. Ill. 2007) (FLSA); *Diletto v. Potter*, No. 2:04-CV-00566-NVW, 2005 WL 3234748 (D. Ariz. Oct. 28, 2005) (Title VII); *Neuffer v. York Corrugated Container Corp.*, No. 03 C 1658, 2004 WL 1354442, at *1 (N.D. Ill. Apr. 30, 2004).

subjected to additional liability in retaliation suits . . . The prerogative to prepare a defense is not broad enough to warrant recognition of an absolute litigation privilege, which would effectively insulate everything done in preparation for litigation, but neither is it so stingy as to offer no protection to the communication at issue here.¹⁷²

The rationale supporting the presumption is the protection of an employer's right to pursue a defense as vigorously as possible. *Steffes* implied, but did not clearly make this distinction. What was implicit should be made explicit: the Seventh Circuit's presumption should only apply to actions taken while an employer is in a defensive posture, and not when an employer initiates a lawsuit.

There are a number of reasons that support this distinction. First, when defending a suit, an employer must bring certain counterclaims or lose the right to them.¹⁷³ The forfeiture of an otherwise actionable claim is a strong motivation to file. As a result, it will frequently be difficult to discern retaliatory animus, and thus, causation. Second, as the court in *Equal Employment Opportunity Commission v. K & J Management, Inc.* reasoned, the filing of a counterclaim is unlikely to "chill plaintiffs' exercise of their rights to challenge discrimination under Title VII" because "plaintiffs have already made their charges with the EEOC and initiated a lawsuit against their employer before any counterclaim is even brought."¹⁷⁴ In other words, the timing is wrong. Once the employee has filed the claim and the case has proceeded to court, the employer can no longer interfere with the "employee's efforts to secure or advance enforcement of the Act's basic guarantees,"¹⁷⁵ at least in so far as the discrimination claim at issue is concerned. Third, for certain conduct that is exclusively related to the defense of a claim, like raising an affirmative defense, the plaintiff does not face the prospect of an adverse monetary judgment. The court in *Harmar v. United Airlines, Inc.* reasoned that since no damages are claimed, the raising of an affir-

172. *Steffes*, 144 F.3d at 1077.

173. See FED. R. CIV. P. 13(a).

174. No. 99 C 8116, 2000 WL 34248366, at *4 (N.D. Ill. June 7, 2000).

175. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63 (2006).

mative defense simply “does not chill plaintiff’s exercise of their rights.”¹⁷⁶

The initiation of a baseless lawsuit, however, could very likely chill an employee’s exercise of their statutory rights. The filing of false criminal charges and the initiation of a criminal prosecution certainly “damage” an employee personally.¹⁷⁷ Moreover, purely retaliatory lawsuits interfere with free access to agency proceedings by coercing employees from initiating or maintaining their discrimination claims.¹⁷⁸ Thus, retaliatory lawsuits “seriously undermine the clear policy of section 2000e-3(a) to protect an employee who utilizes the procedures provided by Congress for the vindication of his right to be free from unlawful discrimination in employment.”¹⁷⁹

Numerous pre-*Burlington* courts argued that retaliatory lawsuits should be considered actionable retaliation under Title VII.¹⁸⁰ This case law should remain undisturbed. Thus, the proposed presumption should not apply to an employer’s initiation of a lawsuit.

176. No. 95 C 7665, 1996 WL 199734 (N.D. Ill. Apr. 23, 1996).

177. *Beckham v. Grand Affair of N.C., Inc.*, 671 F. Supp. 415, 419 (W.D.N.C. 1987).

178. See generally *EEOC v. Va. Carolina Veneer Corp.*, 495 F. Supp. 775, 778 (W.D. Va. 1980).

179. *Va. Carolina Veneer*, 495 F. Supp. at 778 (quoting *Cooper v. Pic-Walsh Freight Co.*, 1976 U.S. Dist. LEXIS 17022, at *3 (E.D. Mo. Jan. 23, 1976)).

180. See, e.g., *Berry v. Stinson Chevrolet*, 74 F.3d 980, 986 (10th Cir.1996) (concluding that “malicious prosecution can constitute [an] adverse employment action,” where the employer had filed false criminal charges against a former employee who had complained about discrimination); *Power Systems, Inc. v. N.L.R.B.*, 601 F.2d 936, 940 (7th Cir. 1979) (“We recognize that civil actions for malicious prosecution carry with them a potential for chilling employee complaints to the Board and that the Board may, in a proper case, act to curb such conduct.”). Nevertheless, the court found the complained of lawsuit in this case to have some basis, and thus, not be retaliatory. *Id.*; *Ward v. Wal-Mart Stores, Inc.*, 140 F. Supp. 2d 1220, 1231 (D.N.M. 2001) (“The Court agrees that the filing of frivolous lawsuits may constitute an adverse employment action for purposes of a retaliation claim.”); *Urquiola v. Linen Supermarket, Inc.*, No. 94-14-CIV-ORL-19, 1995 WL 266582, at *1 (M.D. Fla. Mar. 23, 1995) (“[A] state court defamation suit filed in retaliation for making an EEOC charge clearly violates Title VII.”); *Beckham v. Grand Affair of N.C., Inc.*, 671 F. Supp. 415, 419 (W.D.N.C. 1987) (allowing an individual to pursue a retaliation claim against her former employer for instituting a criminal prosecution against her); *EEOC v. Levi Strauss & Co.*, 515 F. Supp. 640, 644 (N.D. Ill. 1981) (recognizing that a state defamation suit brought by an employer in the wake of an employee discrimination claim could be considered retaliatory in the appropriate circumstances); *EEOC v. Va. Carolina Veneer Corp.*, 495 F. Supp. 775, 778 (W.D. Va. 1980) (finding retaliation where an employer filed a defamation suit against an employee based upon statements made by the employee to the EEOC).

2. *Additional Reasons to Adopt the Seventh Circuit's Presumption*

Burlington sees the primary purpose of the anti-retaliation provisions of Title VII as “maintaining unfettered access to statutory remedial mechanisms.”¹⁸¹ For actions occurring outside the workplace, an expansive standard may be justified since there are few deterrence mechanisms in place discouraging employers from such retaliation. However, for actions that occur during the course of litigation, it is not at all clear that anti-retaliation claims will provide any greater measure of protection to those employees who wish to make discrimination charges. Numerous deterrence mechanisms are already in place to protect employees from such abuses. First, advocates are never free to suborn perjury or lie about “critical” documents. If they lie, or allow a witness to lie, their assertions can and will be contested in open court by opposing counsel.¹⁸² Second, since a lawyer can never be certain about the truth of the testimony they present, liability to civil suit may discourage them from advocating as vigorously as they might otherwise for their clients.¹⁸³ Third, conduct such as perjury and the subornation of perjury are illegal and punishable by fines and imprisonment.¹⁸⁴ These criminal penalties likely provide a greater disincentive than civil liability.¹⁸⁵ Fourth, egre-

181. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 64 (2006) (citations omitted).

182. *Butz v. Economou*, 438 U.S. 478, 516–17 (1978) (“[E]vidence will be subject to attack through cross-examination, rebuttal, or reinterpretation by opposing counsel. Evidence which is false or unpersuasive should be rejected upon analysis by an impartial trier of fact.”); *Auremma v. Montgomery*, 860 F.2d 273, 278 (7th Cir. 1988) (“Conducting discovery under the rules of civil procedure falls within the unique duties of an advocate and such activities are conducted in the adversarial arena where opposing counsel and the trial court can quickly put the brakes on unethical or unlawful behavior.”).

183. *Imbler v. Pachtman*, 424 U.S. 409, 439–40 (1976) (White, J. concurring). Of course, witnesses should not be encouraged to testify falsely nor lawyers encouraged to call witnesses who testify falsely. However, if the risk of having to defend a civil damage suit is added to the deterrent against such conduct already provided by criminal laws against perjury, the risk of self-censorship becomes too great. This is particularly so because it is very difficult if not impossible for attorneys to be absolutely certain of the objective truth or falsity of the testimony which they present. *Id.*

184. 18 U.S.C.A. § 1621 (West 2008) (perjury); 18 U.S.C.A. § 1622 (West 2008) (subornation of perjury); 18 U.S.C.A. § 1623 (West 2008) (false declarations before grand jury or court).

185. While penalties exist for perjury and subornation of perjury, it is unclear whether violations are pursued in great enough number to provide enough of a deterrence mechanism. *See infra* note 213.

gious conduct is punishable by court sanctions¹⁸⁶ and disbarment. Fifth, advocates have professional obligations and ethical codes of conduct which they are required to follow.¹⁸⁷ Finally, advocates are bound by powerful extralegal measures, particularly reputation. An advocate who is known for engaging in improper conduct suffers from a lack of creditability before both attorneys and judges. These deterrence mechanisms help to minimize improper litigation conduct, and provide protection against unscrupulous and unethical attorneys.¹⁸⁸

The issue is not clear-cut. At base is a value judgment: Is the risk of retaliatory litigation conduct so high that we are willing to put the adversarial system at risk to stop it? Congress has spoken, and this Note makes no issue with Title VII as it stands or the *Burlington* standard generally.¹⁸⁹ However, the implications the standard has in the litigation contexts are troubling, and the adoption of the Seventh Circuit's presumption would alleviate this tension. On the one hand, it would not foreclose the possibility that egregious conduct could be considered retaliatory.¹⁹⁰ On the other, it would create a presumption whereby judges would dismiss such claims unless they were "the rare case"¹⁹¹ where the

186. FED. R. CIV. P. 11(c).

187. American Bar Association, ABA Model Rules of Professional Conduct, http://www.abanet.org/cpr/mrpc/model_rules.html (last visited Aug. 30, 2008).

188. In addition to these deterrence mechanisms, there are powerful policy considerations militating in favor of adopting of such a presumption. Chief among them is the risk of forum shopping. The Supreme Court has written, "[t]he loser in one forum will frequently seek another, charging the participants in the first with unconstitutional animus . . . Absolute immunity is thus necessary to assure that judges, advocates, and witnesses can perform their respective functions without harassment or intimidation." *Butz v. Economou*, 438 U.S. 478, 512 (1978). Forum shopping is a danger to the American model of adjudication, not just because of efficiency concerns but because advocates, among others, need to be able to perform their duties without fear of suit from disgruntled litigants.

189. Some commentators do take issue. See, e.g., Lisa M. Durham Taylor, *Adding Subjective Fuel to the Vague-Standard Fire: A Proposal for Congressional Intervention After Burlington Northern & Santa Fe Railway Co. v. White*, 9 U. PA. J. LAB. & EMP. L. 533, 592-601 (2007) (arguing that *Burlington* created problems of "over-breadth, vagueness, and impracticability," and that Congress should fix these problems by revising Title VII to have the anti-retaliation provisions clearly cover the same scope of actions as the anti-discrimination provisions). *But cf.* Lena P. Ryan, Note, *Expanding the Scope of the Expansive Approach: The Burlington Northern Standard as a Per Se Approach to Federal Anti-Retaliation Law*, 49 ARIZ. L. REV. 745, 746-48 (2007) (arguing that the "deterrence standard" adopted by the Supreme Court in *Burlington* should be extended to all federal statutes including similar anti-retaliation provisions).

190. *Steffes v. Stepan Co.*, 144 F.3d 1070, 1075 (7th Cir. 1998) ("[E]ven actions taken in the course of litigation could constitute retaliation in the appropriate circumstances.")

191. *Id.*

egregiousness of the conduct rose to a level that was clearly retaliatory.

B. IMMUNITY

To resolve the tension between the *Burlington* standard and the adversarial system, the Supreme Court might adopt a federal privilege whereby attorneys and their clients have immunity from civil suit for their conduct during the course of Title VII litigation. This section first discusses the possibility of absolute immunity from civil suit for litigation conduct, and then discusses the possibility of qualified immunity. Either form of immunity would resolve the tension caused by the *Burlington* standard, but each would exact a substantial price.

1. *Absolute Immunity*

The Seventh Circuit discussed the appropriateness of adopting absolute immunity for litigation conduct in both *Steffes* and *Auriemma*. *Steffes* declined to adopt an absolute privilege because doing so could “interfere with the policies underlying the anti-retaliation provisions of Title VII and the ADA. Retaliatory acts come in infinite variety, and even actions taken in the course of litigation could constitute retaliation in appropriate circumstances.”¹⁹² In other words, to adopt an absolute privilege would be to undermine Congressional legislation. If for no other reason, this alone militates against the adoption of such a federal privilege.

Auriemma examined the possibility in greater detail, but recognized that the policy rationale supporting absolute immunity requires caution. “Absolute immunity from civil liability for damages is of a ‘rare and exceptional character.’ Public officials seeking absolute immunity from civil liability bear the burden of showing that overriding considerations of public policy require that they be exempt from personal liability for their alleged conduct.”¹⁹³ There are significant costs associated with the grant of absolute immunity.¹⁹⁴ Chiefly, absolute immunity deprives those

192. *Steffes*, 144 F.3d at 1075 (internal citations omitted).

193. *Auriemma v. Montgomery*, 860 F.2d 273, 275 (7th Cir. 1988) (citations omitted).

194. *Imbler v. Pachtman*, 424 U.S. 409, 427–28 (1976).

persons genuinely wronged of their day in court and the redress of their injuries.¹⁹⁵

Auriemma nevertheless reasoned that certain functions, such as conducting discovery under the rules of civil procedure, or presenting evidence at trial, should be protected by absolute immunity. The primary reason the court offered is that advocates need to be able to present their clients' cases without "intimidation or harassment."¹⁹⁶ The court noted that additional safeguards protect against the possibility that such litigation conduct would be used or abused for unlawful ends. As to the conduct of discovery under the rules of civil procedure, the court reasoned that "in the adversarial arena . . . opposing counsel and the trial court can quickly put the brakes on unethical or unlawful behavior."¹⁹⁷ The argument here is that unlawful or unethical behavior should be resolved by court rules and procedures, not additional lawsuits. As to the presentation of evidence, the court reasoned that, "[f]alse or unreliable evidence presented at trial is subject to immediate exposure through cross examination, rebuttal, or reinterpretation by opposing counsel."¹⁹⁸ Lies, in other words, will be exposed by competent opposing counsel.

Despite this analysis, there are several reasons why this reform is untenable and unreasonable. The Supreme Court,¹⁹⁹ the circuit courts,²⁰⁰ and common sense argue that retaliation can take many forms. There is no reason why employers would not attempt or threaten to abuse legal processes to discourage employees from filing discrimination claims. Absolute immunity would shield them from such suit, flaunting Congress and basic notions of fairness. Moreover, the grant of such a privilege would impose costs that rival the potential benefits, like the protection of the adversarial system. As *Auriemma* recognized, the grant of absolute immunity "does impose a significant cost upon society in that some persons who are genuinely wronged are denied redress for their injuries."²⁰¹ By denying those wronged their day in

195. *Auriemma*, 860 F.2d at 277.

196. *Id.* at 278.

197. *Id.*

198. *Id.* (internal quotations and citations omitted).

199. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 57 (2006).

200. *E.g.*, *Rochon v. Gonzalez*, 438 F.3d 1211, 1218 (D.C. Cir. 2006).

201. *Auriemma*, 860 F.2d at 276.

court, the grant of absolute immunity to all litigants could lead to decreased confidence in the rule of law, and de-legitimization of the judiciary. While attempting to protect one cornerstone of the system, we must be careful not to smash the foundation.

2. *Qualified Immunity*

The Supreme Court might also adopt a federal privilege whereby attorneys and their clients would have qualified immunity from civil suit for their conduct during the course of Title VII litigation. This possibility, discussed briefly in *Auriemma*, would be analogous to existing qualified immunity for public officials performing discretionary functions.²⁰² The doctrine of qualified immunity provides public officials with “qualified immunity in a civil action for damages, provided [their] conduct does not violate clearly established federal statutory or constitutional rights of which a reasonable person would have known.”²⁰³

Qualified immunity is an affirmative defense. When moving for summary judgment premised upon qualified immunity,

[t]he defendant bears the initial burden of coming forward with facts to suggest that he acted within the scope of his discretionary authority during the incident in question. Thereafter, the burden shifts to the plaintiff to establish that the defendant's conduct violated a right so clearly established that any official in his position would have clearly understood that he was under an affirmative duty to refrain from such conduct.²⁰⁴

If a court finds that the defendant acted within the scope of his discretionary authority, and the plaintiff cannot come forward with facts to suggest that the defendant clearly violated an “established federal statutory or constitutional right[],”²⁰⁵ then the

202. *Id.* at 279.

203. Karen M. Blum, *Section 1983: Qualified Immunity*, 765 PLI / Lit 9, at *87 (2007).

204. *Gardenshire v. Schubert*, 205 F.3d 303, 311 (6th Cir. 2000). *See also* *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (articulating the objective reasonableness standard). *See generally* David L. Noll, Note, *Qualified Immunity in Limbo: Rights, Procedure, and the Social Costs of Damages Litigation Against Public Officials*, 83 N.Y.U. L. Rev. 911, 917–22 (2008) (discussing the evolution of the qualified immunity doctrine).

205. *Blum*, 765 PLI / Lit 9, at *87.

immunity granted is “*an immunity from suit* rather than a mere defense to liability.”²⁰⁶

Qualified immunity in this context would call for a similar burden shifting. If an employer moves for summary judgment based upon qualified immunity, he would have to come forward with facts to suggest that his litigation conduct was based on a legitimate, non-discriminatory reason.²⁰⁷ The plaintiff claiming retaliation based on litigation conduct would then have to argue that the defendant’s conduct clearly violated Title VII, and that the defending attorney and his or her client should have understood as much.²⁰⁸ To demonstrate a clear violation, plaintiffs would have to establish egregiousness. Two examples illustrate what is meant by a clear violation: threatening criminal charges if one makes a discrimination claim would satisfy the egregiousness standard;²⁰⁹ allegations of a non-frivolous counterclaim would not.

Qualified immunity in this context suffers fatal flaws. First, the central problem with *Burlington* is the possibility of placing the litigation conduct of the employer at issue. Forcing an employer to explain his litigation strategy, even if it means the dismissal of the retaliation claim, compromises the ability of the employer to defend against the original discrimination claim. The employer will have to reveal his litigation strategy, which, if the original discrimination claim is ongoing, will cause obvious problems. Furthermore, the employer will generally be hesitant to bring even meritorious counterclaims for fear that he will have to defend against them as well. Second, immunity doctrines are

206. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (emphasis in original).

207. This proposal bears some similarity to the McDonnell-Douglas burden-shifting framework, established in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 802–03 (1973).

208. *Id.*

Where a defendant moves for summary judgment based on qualified immunity, the plaintiff must first identify a clearly established right alleged to have been violated and second, establish that a reasonable officer in the defendant’s position should have known that his conduct violated that right . . . The ultimate burden of proof is on the plaintiff to show that the defendant is not entitled to qualified immunity.

Id.

209. *Walsh v. Irvin Stern’s Costumes*, No. 05-2515, 2006 WL 2380479, at *2 (E.D. Pa. Aug. 15, 2006).

plagued by confusion and misapplication.²¹⁰ One commentator notes “the substantial doctrinal confusion about the application of conventional summary judgment standards to the qualified immunity defense.” The commentator further laments the lack of “a coherent explanation of the parties’ evidentiary burdens,” since “the application of the summary judgment doctrine is entirely contingent upon the allocation of the burden of persuasion on the issue being litigated.”²¹¹ Third, confusion as to the nature of the immunity will make it much more difficult to argue and to analyze employee’s argument that the employer’s litigation conduct clearly violated Title VII. This poses obvious problems. If the parties do not know exactly what they are required to argue, and the courts do not know how to analyze the arguments they are presented with, then the rule of law becomes a misnomer.

For these reasons, immunity doctrines are best to be avoided in this context. Here, the central goal is to establish an egregiousness standard with a minimum amount of procedural and substantive complexity. As discussed in Section A above, the simplest way to do so is to adopt the Seventh Circuit’s presumption against finding litigation conduct retaliatory.

C. COUNTER-ARGUMENTS

There are a number of potential counter-arguments to the premise that the “dissuade a reasonable worker” standard creates a problem. First, one might argue that the deterrence mechanisms in place before *Burlington* did not adequately protect employees from retaliatory litigation conduct in response to their discrimination claims. Second, as there does not seem to be a proliferation of retaliation suits premised on litigation conduct,

210. T. Leigh Anenson, *Absolute Immunity from Civil Liability: Lessons For Litigation Lawyers*, 31 PEPP. L. REV. 915, 948 (May 2004) (“[T]he doctrine of absolute immunity has not been a model of clarity.”); *see also* Steffes v. Stepan Co., No. 96 C 8225, 1997 WL 305306, at *3–5 (N.D. Ill. 1997) (using absolute immunity to dismiss retaliation claims, but failing to specify whether the immunity derives from state law or federal common law); *Auremma v. Montgomery*, 860 F.2d 273, 278 (7th Cir. 1988) (“[T]he rule that a government attorney is entitled to absolute immunity when acting in a ‘quasi-judicial’ function but only qualified immunity when acting in an ‘investigative’ or ‘administrative’ role is much more easily stated than applied.”).

211. Alan K. Chen, *The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law*, 47 AM. U. L. REV. 1, 8–9 (1997).

why is there a need for reform? Third, why not simply allow the district and circuit courts to resolve these cases on their own, engaging in the fact intensive, contextual analysis envisioned by the Supreme Court in *Burlington*?²¹²

The first counter-argument questions the reasoning in Section A above, and asserts that without *Burlington* counsel would be relatively free to engage in retaliatory litigation conduct. There are at least four sub-arguments that must be addressed. First, the specter of criminal sanctions is not sufficient because enforceability is an issue. Federal prosecutors have limited resources, and cannot go after every offender.²¹³ Thus, it is highly unlikely that they will spend their time prosecuting those attorneys who merely put on questionable witnesses. Second, sanctions are infrequently granted and ineffective,²¹⁴ and disbarment is rare.²¹⁵ Third, no matter the success of these deterrence mechanisms, they cannot eliminate retaliatory litigation conduct entirely. Finally, the assertion of some defenses, such as the after-acquired evidence defense, can have “precisely the chilling effect that the anti-retaliation provisions of federal law were designed to prevent.”²¹⁶

These counter-arguments have merit. However, they do not tip the scales in favor of expanding what should be considered

212. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006).

213. Michael Edmund O’Neill, *When Prosecutors Don’t: Trends in Federal Prosecutorial Declinations*, 79 *NORTE DAME L. REV.* 221, 235 (2003) (“Federal prosecutors, after all, have limited resources and must allocate them accordingly.”).

214. See Leslie C. Levin, *The Emperor’s Clothes and Other Tales About the Standards for Imposing Lawyer Discipline Sanctions*, 48 *AM. U. L. REV.* 1, 5–6 (1998).

[T]he lack of well-defined standards, the tendency to impose non-public sanctions on lawyers, the failure to publicize the ‘public’ sanctions, and the amount of recidivism that seems to occur, also raise serious questions about how well the sanctions imposed on lawyers achieve the basic goals of lawyer discipline: protection of the public, protection of the administration of justice and preservation of confidence in the legal profession.

Id. (footnotes omitted).

215. See Katherine M. Lasher, *A Call for a Uniform Standard of Professional Responsibility in the Federal Court System: Is Regulation of Recalcitrant Attorneys at the District Court Level Effective?*, 66 *U. CIN. L. REV.* 901, 912–13 (1998) (“Once the committee determines that the attorney’s conduct is unbecoming to a member of the bar under the state’s rules of professional conduct, the state supreme court has the authority to disbar the attorney from practice in the forum state. However, sanctions involving disbarment are rare.”) (footnotes omitted).

216. Melissa Hart, *Retaliatory Litigation Tactics: The Chilling Effects of “After-Acquired Evidence,”* 40 *ARIZ. ST. L.J.* 401, 438 (2008).

retaliatory for purposes of Title VII. For one thing, empowering counsel to police their opposition's courtroom conduct enables harassment. This puts the adversarial system squarely at risk. For another, federal judges have wide authority to sanction attorneys for egregious conduct.²¹⁷ While very little is actually known about the frequency and effectiveness of such sanctions,²¹⁸ their existence presumably provides some measure of deterrence.

The second and third lines of counter-argument raise equally compelling questions. However, a number of factors militate for either judicial or congressional intervention. These factors include the lack of reliable data, evident tension between the *Burlington* standard and the adversarial process, and pockets of judicial recalcitrance which lead to the massaging of precedent. First, as noted in Part III, there were more than 26,663 retaliation claims filed in 2007, a marked increase from 1997.²¹⁹ While there has been no study to date on what number of these suits involve retaliation claims premised on litigation conduct, the fact that retaliation suits now impact so many employers makes it imperative that the framework for analyzing them is as fair and sensible as possible. Second, there is an obvious tension between the *Burlington* standard and the adversarial system. Even non-frivolous retaliation claims premised on litigation conduct can imperil judicial proceedings by discouraging attorneys from advocating as vigorously as possible for their clients. Third, as evidenced by *Hasan's* treatment of *Burlington*, unless and until the Supreme Court gives firmer signals, courts in the Seventh Circuit and possibly elsewhere will make conclusory assertions that certain behavior is not retaliation under the "dissuade a reasonable worker" standard. For obvious reasons, this is an undesirable result. If the goal of Title VII's anti-retaliation provision is to maintain "unfettered access to statutory remedial mechanisms,"²²⁰ then allowing lower courts to massage the standard un-

217. Lasher, *supra* note 215, at 923 ("Under the current system, judges are accorded wide discretion when sanctioning attorney misconduct.").

218. See Leslie C. Levin, *The Case for Less Secrecy in Lawyer Discipline*, 20 GEO. J. LEGAL ETHICS 1, 2 (2007) ("Moreover, the secrecy surrounding most lawyer discipline in this country makes the fairness and effectiveness of the discipline process virtually impossible to ascertain.").

219. See *supra* note 157.

220. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 64 (2006) (quoting *Robinson v. Shell*, 519 U.S. 337, 346 (1997)).

dermines Supreme Court precedent and the doctrine of *stare decisis*.

V. CONCLUSION

The *Burlington* “dissuade a reasonable worker” standard creates a tension between the principles of Title VII and the adversarial system. With this broad standard, the Supreme Court has allowed plaintiffs to sue for actions in the litigation context, and has indirectly sanctioned the harassment of opposing counsel. Post-*Burlington* cases have approached the issue cautiously, with courts in the Seventh Circuit looking to their Circuit’s presumption against finding litigation conduct retaliatory. The most effective resolution to the tension is for the Supreme Court to adopt the Seventh Circuit’s presumption. This solution has the advantage of enabling suits that complain of egregious attorney conduct, while at the same time filtering out the majority of cases and thus protecting the integrity of the adversarial system.