# A New Type of Circuit Split: The Hidden Circuit Split in Retaliation Cases

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## INTRODUCTION

In 2006, the Supreme Court decided *Burlington Northern & Santa Fe Ry. v. White*, articulating the standard to be used in assessing what constitutes "actionable retaliation" under Title VII of the Civil Rights Act of 1964.[1] Before *Burlington Northern*, the federal appellate courts had been splintered on the issue, with at least four different approaches being taken among them. In the wake of *Burlington Northern*, scholars and practitioners initially agreed that the decision was employee favorable. The Supreme Court's standard appeared to allow more retaliation claims to be brought by approving claims where an employer took any action against an employee that would be "materially adverse to a reasonable employee" because of the employee's protected activity under Title VII.[2] Under this standard, an employee need not prove that there was a tangible employment action such as being fired or demoted to bring a retaliation claim.[3] Instead, the focus was on whether the employer's conduct was materially adverse such that it would have dissuaded a reasonable employee from complaining of discrimination.[4] More recently, however, there has been a sense among scholars that federal courts have applied the *Burlington Northern* standard in an employer-favorable manner, making it difficult for retaliation plaintiffs to bring claims. This Article investigates the extent to which these scholarly reactions are accurate. Specifically, this Article assesses the rates at which employers have prevailed since *Burlington Northern*.

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1. 548 U.S. 53, 57 (2006).

2. *Id.* at 57.

3. *See id.* (holding that "the antiretaliation provision does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace").

4. *Id.*

Using data from three federal courts of appeals, cases were coded according to whether the employer prevailed on the issue of whether the action taken against the employee satisfied the *Burlington Northern* standard. On average, employers prevailed in sixty percent of these situations.[5] However, when results were assessed by circuit, the three federal circuits researched had widely divergent results. This radical split among the federal appellate courts in outcomes of these cases, which I term a "hidden" circuit split, casts doubt on whether the law is being applied consistently throughout the country. It also raises questions as to whether this type of circuit split is present in other legal contexts.

This Article proceeds as follows. Part I explains the circuit split that led to the Supreme Court's decision in *Burlington Northern*, outlines the *Burlington Northern* decision, and provides an overview of retaliation claims after *Burlington Northern*. Part II describes the research study. Part III details the study's findings, explores the implications of the findings, and analyzes possible reasons for them.

## I. DEVELOPMENT OF THE BURLINGTON NORTHERN RETALIATION STANDARD

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of "race, sex, color, national origin, or religion."[6] In addition, it also prohibits employers from retaliating against employees who file charges of discrimination or oppose employer discrimination.[7] This antiretaliation provision provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.[8]

As the statute indicates, there are two components to the protection against employer retaliation: the opposition clause, which protects employees who opposed an unlawful employment practice, and the participation clause, which protects employees who participate in any proceeding under the statute, which includes filing a charge with the Equal Employment

5. *See infra* Section III.A.1.
6. 42 U.S.C. § 2000e-2 (2012).
7. *Id.* § 2000e-3(a).
8. *Id.*

Opportunity Commission ("EEOC").[9]

The core concept of the antiretaliation provision is to ensure that employees are effectively able to enforce their right to be free from discrimination in the workplace.[10] If an employee lawfully can be fired for complaining of discrimination, the promise of Title VII would be hollow, because many, if not all, employees would be unwilling to risk termination in order to complain of discrimination.[11] In the years leading up to *Burlington Northern*, federal courts struggled to define the scope of this protection. What, specifically, was unlawful retaliation? Clearly, firing an employee was unlawful.[12] But what about less severe actions such as issuing a negative performance evaluation?

The EEOC took the position that the antiretaliation provision prohibited employers from taking any "adverse employment action" against an employee who engaged in protected activity of either opposing an unlawful employment practice or participating in a Title VII proceeding. The EEOC defined "adverse employment action" as "any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity."[13] The Ninth Circuit approved of this approach, noting that it covered "lateral transfers, unfavorable job references, and changes in work schedules."[14] A substantially similar approach was taken by the Seventh Circuit, which allowed retaliation claims if the employer's actions "would have been material to a reasonable employee."[15] As an example of this, the Seventh Circuit approved a retaliation claim where the employer allegedly removed the employee's flex-time schedule.[16]

However, other federal courts took a more restrictive approach to retaliation claims. The most restrictive approach limited the reach of the antiretaliation provision to situations in which the employer took "an

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9. *Id.*

10. Indeed, even retaliation against someone other than the employee who complained of discrimination can be protected activity. *See* Thompson v. N. Am. Stainless, LP, 562 U.S. 170, 175–78 (2011) (allowing claim where alleged retaliation targeted employee's fiancé).

11. As the Supreme Court stated in *Burlington Northern*, "The antiretaliation provision seeks to secure [Title VII's] primary objective by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of [Title VII's] basic guarantees." Burlington N. & Santa Fe Ry. v. White, 548 U.S. 53, 63 (2006).

12. *See, e.g.*, Mattern v. Eastman Kodak Co., 104 F.3d 702, 707 (5th Cir. 1997) (finding that the antiretaliation provision applies to actions such as hiring, firing, and promoting employees).

13. U.S. EQUAL EMP. OPPORTUNITY COMM'N, COMPLIANCE MANUAL SECTION 8: RETALIATION, ¶ 8008 (1998).

14. Ray v. Henderson, 217 F.3d 1234, 1243 (9th Cir. 2000).

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

16. *Id.* at 63.

ultimate employment decision," such as firing or demoting an employee who engaged in protected activity.[17] A slightly less restrictive approach was to limit the scope of the antiretaliation provision to employer actions that were "adverse employment actions"—the same language the EEOC used—but with a different definition of that term. Under this approach, an employee was protected against retaliation if the retaliatory action had an adverse effect on the terms, conditions, or privileges of employment.[18] Unlike the EEOC approach, this limited claims to situations where specific actions were taken that had a tangible effect on the employee, such as a decrease in compensation, or where the employer conduct was harassment that was so severe or pervasive that it constituted an abusive working environment.

Given this array of different interpretations of the scope of the antiretaliation provision, it was unsurprising that the Supreme Court took up the issue. In *Burlington Northern & Santa Fe Ry. v. White*, the Court reviewed the different approaches taken by the federal appellate courts before determining that the correct approach combined various aspects of these approaches.[19] In order to be actionable under the antiretaliation provision, the Court stated that the retaliation must result in an "injury or harm."[20] The Court then defined the required injury as follows: "[A] plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination."[21]

The Court identified three key aspects to the standard it announced. First, the "materially adverse" portion of the standard was designed to draw a distinction between "trivial" employer conduct, which is not actionable, and "significant" employer conduct, which is.[22] In explaining the dividing line between trivial and significant, the Court stated that significant actions are "employer actions that are likely 'to deter victims

17. *See* Mattern v. Eastman Kodak Co., 104 F.3d 702, 707–08 (5th Cir. 1997) ("Ultimate employment decisions include acts such as hiring, granting leave, discharging, promoting, and compensating.") (citing Dollis v. Rubin, 77 F.3d 777, 782 (5th Cir. 1995) (internal quotation marks omitted).

18. *See, e.g.*, Von Gunten v. Maryland, 243 F.3d 858, 865–66 (4th Cir. 2001) (finding the antiretaliation provision applies to "adverse employment actions" that affect "[t]he essential terms, conditions and benefits of the employment"). This is the same standard that applies to discrimination claims under Title VII. In other words, in order to state a claim under Title VII, the discrimination must have affected a term, condition, or privilege of employment.

19. 548 U.S. 53, 60–61, 67 (2006).

20. *Id.* at 67.

21. *Id.* at 68 (internal quotation marks and citations omitted).

22. *Id.*

of discrimination from complaining to the EEOC,' the courts, and their employers. And normally petty slights, minor annoyances, and simple lack of good manners will not create such deterrence."[23] The second key aspect to the new standard was that it was objective. Retaliation would only be actionable if it would deter a reasonable employee, considered from an objective perspective so as to be judicially administrable.[24] And the third key feature to the standard was that the employer's conduct had to be considered in the circumstances in which it arose, because "the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters."[25]

In reaching its decision, the Court rejected the employer's argument that the standard for actionable retaliation should be the same as the standard for actionable discrimination. Under established Title VII doctrine, a discrimination claim could only be brought where there was an adverse action taken by an employer.[26] The Court focused on the differences in the language between Title VII's substantive anti-discrimination language and antiretaliation language as well as the need for a broader reach of the antiretaliation standard to ensure the effectiveness of the anti-discrimination provision.[27]

The initial reaction to the *Burlington Northern* standard was that the decision was employee favorable;[28] specifically, the new standard was seen as opening the door to more retaliation claims because of the lower standard for bringing such claims.[29] And there was indeed a surge of retaliation claims after *Burlington Northern*. From 2001 to 2006, leading up to *Burlington Northern*, the number of retaliation claims, called "charges," that were filed with the EEOC remained essentially flat, at approximately 22,000 each year.[30] Since 2006, retaliation charges have

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

24. *Id.* at 68–69.

25. *Id.* at 69.

26. Different standards apply to harassment claims, but even there, there is a similar requirement that the harassment be so severe or pervasive that it affects the terms and conditions of employment. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993) ("[T]he very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin offends Title VII's broad rule of workplace equality.").

27. *Burlington N.*, 548 U.S. at 67–69.

28. *See, e.g.*, Christopher J. Eckhart, Note, *Employers Beware:* Burlington Northern v. White *and the New Title VII Anti-Retaliation Standard*, 41 IND. L. REV. 479, 479–80 (2008).

29. *See* Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. REV. 859, 907 (2008) (noting that "[e]arly commentary on Burlington Northern generally construed it as pro-plaintiff"); Lindsay Roshkind, Comment, *Employment Law: An Adverse Action Against Employers: The Supreme Court's Expansion of Title VII's Anti-Retaliation Provision*, 59 FLA. L. REV. 707, 715 (2007) (calling the decision "an enormous victory" for employees).

30. *See Retaliation Based Charges (Charges Filed With EEOC) FY 1997–2018*, U.S. EQUAL

increased nearly every year. In absolute numbers, between 2006 and 2007, the total number of charges increased by approximately 4,000.[31] In 2008, the number of retaliation charges increased again, by 6,000.[32] The increases slowed in 2009 and 2010, with approximately 4,000 more charges being brought in those years combined.[33] The increase in number of charges also led to an increase in the percentage of all charges filed that included a retaliation component. In 2006, 29.8% of all charges included retaliation charges.[34] By 2017, 48.8% of all charges included a retaliation charge.[35]

However, the initial sense of an employee victory in the new standard quickly faded. In 2008, Professors Deborah Brake and Johanna Grossman argued that lower courts were interpreting *Burlington Northern* in a manner that made it difficult for plaintiffs to establish a retaliation claim, in part because "lower courts expect the reasonable employee to endure a substantial degree of adversity for the sake of challenging discrimination."[36] Others also noted problems after *Burlington Northern* as it became evident that the lower courts were struggling to apply the new standard.[37]

More recently, Professor Sandra Sperino critiqued the lower courts' application of the *Burlington Northern* standard, arguing that a survey she conducted of students' perspectives on what employer conduct would dissuade them from complaining of discrimination indicates that lower courts reach inaccurate factual determinations as to whether employer conduct would dissuade a reasonable employee from complaining of discrimination.[38] Specifically, students found that many employer

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EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/eeoc/statistics/enforcement/retaliation.cfm [https://perma.cc/2P4Y-5WHX] (last visited Oct. 23, 2019).

31. *Id.*

32. *Id.*

33. *Id.*

34. *See Charge Statistics (Charges filed with EEOC) FY 1997 Through FY 2017*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm [https://perma.cc/85JG-HXNC] (last visited Oct. 23, 2019).

35. *Id.*

36. Brake & Grossman, *supra* note 29, at 908.

37. J. Gregory Grisham & Frank L. Day, *Title VII Retaliation Claims After* White*: The Struggle to Define Materially Adverse Conduct in the Context of the Reasonable Employee Standard*, 10 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS 80, 83 (2009) (surveying decisions post-*White* and finding that "these post-*White* decisions demonstrate that the 'objective standard' adopted by the Supreme Court is not nearly as objective and easy to apply as the Court appeared to suggest it would be").

38. Sandra F. Sperino, *Retaliation and the Reasonable Person*, 67 FLA. L. REV. 2031, 2052 (2015) ("The most important insight [of her research] relates to the accuracy of the lower courts' factual determinations that negative consequences, such as threatened termination or negative

responses to employees reporting discrimination that courts had held were insufficient to state a retaliation claim would in fact deter the students from reporting discrimination. In discussing the standard, Professor Sperino noted:

> In case after case, appellate courts determine that a certain action does not constitute an adverse action without mentioning any of the individual circumstances of the plaintiff or his workplace. While purporting to apply Burlington, courts also ignore a significant portion of the opinion and consequently are not following the applicable law.[39]

However, none of these scholars or critiques conducted any empirical assessment of federal court decisions.

## II. THE RESEARCH STUDY

This research project was undertaken to provide empirical information on the application of the *Burlington Northern* standard in the federal courts of appeals.

### *A. Scope of the Research*

For this study, federal court of appeals decisions available on Westlaw were used. District court cases were not considered because of the potential for reversal of decisions and the concomitant difficulty in determining the outcomes of those cases. In addition, federal appellate court decisions are generally more carefully analyzed and written because of the smaller caseload of the judges. This smaller caseload and more careful consideration also make the opinions more valuable for analyzing the basis for the decision. The cases are also easier for research assistants to read and code outcomes because they tend to be well organized. Furthermore, federal appellate court decisions provided a more manageable number of cases to review.

In the time since the Supreme Court decided *Burlington Northern*, there have been a total of 993 opinions[40] issued by federal courts of appeals that have cited *Burlington Northern*.[41] Of these, 319 are reported

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evaluations, would not dissuade reasonable people from complaining. These determinations are likely incorrect.").

39. *Id.* at 2060–61.

40. The opinions used for this research were obtained on May 22, 2018. Obviously, this number will increase over time.

41. This research considered cases from the First through Eleventh Circuits. No cases from specialized federal appellate courts were considered because they have different jurisdictional

decisions. The sheer number of total cases made it infeasible to review all the opinions. While a sample from across all federal circuits was one possibility, this study instead focused on three federal circuits: the Fourth, Eighth, and Tenth Circuits. These circuits were selected because they had manageable numbers of opinions: fifty-one in the Fourth Circuit, forty-five in the Eighth Circuit, and seventy-four in the Tenth Circuit.[42] In addition, it seemed plausible that different circuits might be applying the law differently, perhaps to reach results in alignment with their circuit's approach before *Burlington Northern*. Therefore, reviewing all cases from several circuits presented opportunities to uncover more information than a sample out of all the circuits. On the other hand, the downside of considering three circuits rather than a broader sample was the potential for the cases in the three circuits to be non-representative of the larger pool of cases across all of the circuits. However, this presented less of a concern because there were a significant number of individual cases within each of the circuits and it seemed unlikely that they would be substantially different than a sample drawn from all available decisions.

Three research assistants were hired to code the decisions. Each research assistant received identical written instructions for reading and coding the decisions.[43] The research assistants were told to use Westlaw to locate *Burlington Northern* and read it. After they read it, they wrote a brief explanation of the case which was reviewed for accuracy. There were then two sets of coding tests. An initial test was done of two cases. For each case, the research assistants were told to read the synopsis of the case provided by Westlaw as well as the portion(s) of the case which involved *Burlington Northern*. The students then coded the case as follows. First, students categorized the case as either addressing the issue of whether the employer's conduct was sufficient to support a retaliation claim or not addressing that issue.[44] Second, for cases that addressed whether the employer's conduct would support a retaliation claim, research assistants determined whether the employer prevailed on that

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requirements—an additional consideration that had the potential to affect results. Further, the Westlaw research platform was used for this research. The number of opinions was obtained by pulling up *Burlington Northern* using its official citation, clicking on the "Citing References" tab, and clicking on the "Cases" link on the left side of the screen. Under the heading "Jurisdiction" on the left side of the screen, the "Federal" option was expanded, then "Courts of Appeals." This then displayed the total number of cases for each federal court of appeals.

42. While the First Circuit also has a manageable number of decisions, it has few cases and issues reported decisions in nearly all of them, raising concerns about whether it would be an outlier circuit.

43. The written instructions are available from the author upon request.

44. Even though all the cases in the study cited *Burlington Northern*, some of them referenced it for other issues such as whether retaliation directed at a third party, not the employee who complained of discrimination, would be actionable.

issue.[45]

All three students coded the two initial test cases identically and consistently with how I coded them. However, when the research assistants began coding cases for the study, it became apparent that there were inconsistencies in coding. For this reason, I held an in-depth session in which I walked the students through several difficult cases and explained the analyses of them. Following this session, we developed a protocol by which any student who was unsure of how to code a case would immediately email me with their question. I would circulate the question and my answer to all research assistants to ensure consistency.

As noted above, each case in the study was coded initially by two research assistants. If both research assistants agreed on the coding of a decision, then that was the coding that was used in the study's analysis. If they disagreed on the coding, the case was assigned to a third research assistant for coding.[46] In nearly all the cases where this occurred, the third research assistant's coding matched the coding of one of the two previous research assistants, and that majority decision was then used as the final coding. There were a few cases in which all three research assistants coded the cases differently; these cases I reviewed and coded myself.

### *B. Hypotheses*

Previous research on outcomes in employment discrimination cases indicates that employers prevail at higher rates in these cases than in other civil claims.[47] In one study, researchers found that employees prevailed in claims brought under Title VII at a rate of 10.88%.[48] Similarly, in

45. The spreadsheet that the research assistants filled out required them to select either "Employer prevailed" or "Employer did not prevail." For most of these cases, there is no way of determining whether the *employee* ultimately prevailed on this issue because the bulk of the reported decisions reviewed a lower court determination either on a motion to dismiss or a motion for summary judgment that the employer's conduct, as a matter of law, was insufficient to support a retaliation claim. If the employer did not win at the appellate level on that issue, the case was remanded to the lower court for further proceedings. However, because the vast majority of civil claims are settled, there is no court determination on the *Burlington Northern* issue in favor of the employee. Thus, coding the cases to choose between "Employer prevailed" and "Employee prevailed" would be misleading and potentially inaccurate.

46. For the Tenth Circuit, the two initial research assistants coded sixty-two out of seventy-four decisions the same. For the Fourth Circuit, forty-eight out of fifty-one were coded the same, and for the Eighth Circuit, the two initial research assistants coded thirty-four out of forty-five decisions the same.

47. *See generally* Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429 (2004) (analyzing employment discrimination claims in comparison to other civil claims brought in federal court).

48. Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 117 (2009) (data found in Display 6:

retaliation cases brought under the Americans with Disabilities Act, one study found that employers prevailed at a 75% rate.[49] Based on this, it seemed likely that employers would prevail at high rates on the *Burlington Northern* issue. This potential outcome was buttressed also by the research on outcomes in whistleblowing cases, in which employers prevail at a high rate.[50] Employment discrimination claims bear a number of similarities to whistleblowing cases. The core commonality in both cases is that an employee is alleging that the employer is violating a law and that when the employee raised concerns about such violations, the employer retaliated against the employee. Thus, given that employment discrimination plaintiffs win at low rates, and whistleblowing plaintiffs win at low rates, it seemed likely that in an employment discrimination retaliation situation, the employee would not prevail often.

However, a competing consideration was the fact that the standard for what is actionable under *Burlington Northern* is broader than for discrimination claims, allowing more retaliation claims to be brought than discrimination claims. This suggested that retaliation plaintiffs would succeed at higher rates than if they were alleging discrimination. On the other hand, given the sense, discussed above, that lower courts are applying *Burlington Northern* in an employer-favorable manner, perhaps the broader standard would not result in greater plaintiff success rates. Or, perhaps, the initial reaction to the broader standard was with plaintiff success, but that rate declined over time. In short, it was far from clear how plaintiffs would fare on the *Burlington Northern* issue.

Furthermore, there is potential for the outcomes in reported cases to be different from unreported cases. According to one study, approximately one-third of employment discrimination decisions are unreported.[51] Scholars have suggested that unreported decisions are issued where the law is "settled and straightforward."[52] This suggests that

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Numbers and Win Rates, Employment Discrimination Cases by Type, Fiscal 1998-2006, U.S. District Courts).

49. Nicole Buonocore Porter, *Disabling ADA Retaliation Claims*, 19 NEV. L.J. 823, 836 (2019).

50. Richard E. Moberly, *Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win*, 49 WM. & MARY L. REV. 65, 66 (2007) (finding that "during [the] first three years [Sarbanes-Oxley was in force], only 3.6% of Sarbanes-Oxley whistleblowers won relief through the initial administrative process that adjudicates such claims, and only 6.5% of whistleblowers won appeals through the process").

51. *See* Lee Reeves, *Pragmatism Over Politics: Recent Trends in Lower Court Employment Discrimination Jurisprudence*, 73 MO. L. REV. 481, 492 (2008) (summarizing findings based on various Westlaw searches). The author also notes that in the Westlaw research conducted, the searches did not yield mutually exclusive categories, and therefore the total number of cases found is likely overstated.

52. *Id.* (discussing Cass Sunstein's research on employment discrimination cases and indicating

reported cases would involve more complex legal scenarios, which in turn might lead to statistically different outcomes.

## II. RESULTS AND IMPLICATIONS

Overall, employers prevailed at a 60% rate in retaliation cases on the issue of whether the alleged actions taken against an employee are actionable under *Burlington Northern*.[53] A second significant finding of this study is that there was a vast difference between the circuits at the rates at which employers prevailed, which raises questions about the consistency of federal appellate court decisions applying *Burlington Northern*.[54] The third finding of this study is that within each circuit, employers were more likely to prevail in unreported cases than in reported cases.[55] Research results are discussed in detail below.

### *A. Data*

#### 1. Combined Results and Overview of the Circuit Split

Table 1 shows the combined results of all the circuits. On average, combining all three circuits, employers prevail at a rate of 60% on the issue of whether an employee has suffered a materially adverse employment action sufficient to fulfill the requirements of *Burlington Northern*. Overall, employers are successful on this retaliation issue less often than in employment discrimination cases, retaliation cases under the American with Disabilities Act, or in whistleblowing cases.[56] When considering the combined circuits, there is only a tiny difference between the rate of success for employers in unreported decisions and reported decisions, with employers prevailing in 1% more of the unreported cases than the reported cases.

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that the author agrees with Sunstein on this point).

53. *See infra* Section III.A.1.

54. *Id.*

55. *Id.*

56. *See supra* Section II.B (discussing outcomes in these cases).

TABLE 1: COMPARISON OF RATES AT WHICH EMPLOYERS PREVAIL

| | Fourth Circuit | Eighth Circuit | Tenth Circuit | Combined Circuits |
|---|---|---|---|---|
| Reported Decisions | 14% | 77% | 50% | 59% |
| Unreported Decisions | 43% | 100% | 75% | 60% |
| Combined: All Decisions | 37% | 79% | 64% | 60% |

What is particularly fascinating is the incredible variability of the employer success rates in the circuits. Employers in the Eighth Circuit are more likely to prevail on this issue than in either other circuit. The difference between the Eighth Circuit and the Fourth Circuit is particularly large, with the employer being more than twice as likely to prevail in the Eighth Circuit than in the Fourth Circuit.

While the overall number of cases coded was large enough for statistical significance, breaking down the data by circuit produces only three data points (one for each circuit). This makes testing for statistical significance at the circuit level impossible, because the sample size (n=3) is so small. However, it is still worth considering the deviations of each circuit from the overall average.

The outcomes in all three circuits were consistent on one point. Employers are more likely to succeed on the *Burlington Northern* issue in unreported cases than in reported cases within each circuit. For the Fourth Circuit, there was a 43% success rate in unreported cases versus 14% in reported cases. In the Eighth Circuit, employers had a 100% success rate in unreported cases, as opposed to a 77% success rate in reported cases. And in the Tenth Circuit, employers had a 75% success rate in unreported cases, as contrasted with 50% in reported cases.

The results of the study for each circuit are discussed below.

2. Fourth Circuit

In the Fourth Circuit, there were a total of fifty-one decisions that cited to *Burlington Northern*. Thirty-five were unreported decisions, and

sixteen were reported. Out of the fifty-one total decisions, thirty (59%) addressed the question of whether the employer's conduct was sufficient for the plaintiff to bring a retaliation claim. Table 2 shows the outcomes in cases where the court addressed the question of whether the employer's conduct was sufficient for the plaintiff to bring a viable retaliation claim. Using the expected 60% rate at which employers prevailed in all cases, we would expect to find eighteen cases in which the employer prevailed. Instead, employers prevailed in eleven cases, or 37%.

Breaking the cases down into unreported and reported decisions is of somewhat limited value in the Fourth Circuit because of the small number of reported decisions. The Fourth Circuit had a total of seven reported cases in which the court addressed the *Burlington Northern* issue.[57] If employers prevailed in the Fourth Circuit at the rate they prevailed across all reported cases, the expected number of cases in which the employer would prevail would be 4.2 cases. In reality, the employer prevailed in only one reported case, or 14%, in the Fourth Circuit.[58] However, this is a small sample size, and this differential should therefore be considered with that limitation in mind. As for unreported cases, if employers prevailed in the Fourth Circuit at the rate at which they prevailed across all unreported cases, employers would be expected to prevail in 13.6 cases. In reality, employers in the Fourth Circuit prevailed in ten unreported cases, for a success rate of 43%.[59]

57. Darveau v. Detecon, Inc., 515 F.3d 334, 341–43 (4th Cir. 2008); Hoyle v. Freightliner, LLC, 650 F.3d 321, 337 (4th Cir. 2011); Boyer-Liberto v. Fontainebleau Corp., 786 F.3d 264, 283–84 (4th Cir. 2015); Adams v. Anne Arundel Cty. Pub. Sch., 789 F.3d 422, 430–31 (4th Cir. 2015); DeMasters v. Carilion Clinic, 796 F.3d 409, 416 (4th Cir. 2015); Smith v. Clark/Smoot/Russell, 796 F.3d 424, 434 (4th Cir. 2015); S.B. *ex rel.* A.L. v. Bd. of Educ. of Harford Cty., 819 F.3d 69, 78 (4th Cir. 2016).

58. *Adams*, 789 F.3d at 424.

59. Csicsmann v. Sallada, 211 F. App'x 163, 164 (4th Cir. 2006); Parsons v. Wynne, 221 F. App'x 197, 198 (4th Cir. 2007); Pueschel v. Peters, 340 F. App'x 858, 859 (4th Cir. 2009); Scurlock-Ferguson v. City of Durham, 381 F. App'x 302, 302 (4th Cir. 2010); Mascone v. Am. Physical Soc'y, Inc., 404 F. App'x 762, 763 (4th Cir. 2010); Jensen-Graf v. Chesapeake Emp'rs Ins. Co., 616 F. App'x 596, 597 (4th Cir. 2015); Wilson v. Gaston Cty., N.C., 685 F. App'x 193, 194–95 (4th Cir. 2017); McKinney v. G4S Gov't Sols., Inc., 711 F. App'x 130, 132 (4th Cir. 2017); Cooper v. Smithfield Packing Co., 724 F. App'x 197, 199 (4th Cir. 2018); Sanders v. Tikras Tech. Sols. Corp., 725 F. App'x 228, 229 (4th Cir. 2018).

TABLE 2: FOURTH CIRCUIT EMPLOYER SUCCESS RATES

| | Employer Prevailed | Employer Did Not Prevail |
|---|---|---|
| Reported Decisions | 14% | 86% |
| Unreported Decisions | 43% | 57% |
| Combined Decisions | 37% | 63% |

3. Eighth Circuit

In the Eighth Circuit, there were twenty-eight cases out of the initial data set of 45 cases that addressed whether the employer's behavior was sufficient to support a retaliation claim. Employers prevailed on this issue in 22 of these 28 cases. The Eighth Circuit percentage results, shown in Table 3, are a stark contrast to the Fourth Circuit results. In the Eighth Circuit, employers prevailed in all of the unreported cases. However, there were only 2 unreported cases in which the *Burlington Northern* issue was addressed.[60] Using the 60% average rate, we would expect to find 1.2 cases in which the employer prevailed, as compared to the actual result of 2 cases. The fact that the employer prevailed in both of the unreported cases may be insignificant because of the extremely small sample size of reported decisions that actually addressed the *Burlington Northern* issue in the Eighth Circuit. What is of more value is considering the combined result of the reported and unreported cases in which employers prevailed in the Eighth Circuit. Using the overall rate at which employers prevailed (60%), we would expect to find employers prevailing in 16.8 out of the total 28 cases. However, employers actually prevailed in 22 of the cases, which represents a 79% success rate.[61] In short, in the Eighth Circuit,

60. Cano v. Geithner, 354 F. App'x 283, 284 (8th Cir. 2009); Duren v. URS Corp., 676 F. App'x 620, 621 (8th Cir. 2017).

61. *Cano*, 354 F. App'x at 284; *Duren*, 676 F. App'x at 620; Higgins v. Gonzales, 481 F.3d 578, 581 (8th Cir. 2007), *abrogated by* Torgerson v. City of Rochester, 643 F.3d 1031 (8th Cir. 2011); Carpenter v. Con-Way Cent. Express, Inc., 481 F.3d 611, 614 (8th Cir. 2007); Vajdl v. Mesabi Acad. of Kids Peace, Inc., 484 F.3d 546, 548 (8th Cir. 2007); Devin v. Schwan's Home Serv., Inc., 491 F.3d 778, 781 (8th Cir. 2007), *abrogated by* Torgerson v. City of Rochester, 643 F.3d 1031 (8th Cir. 2011); Clegg v. Ark. Dep't of Corr., 496 F.3d 922, 924 (8th Cir. 2007); Weger v. City of Ladue, 500 F.3d 710, 713 (8th Cir. 2007); Brannum v. Mo. Dep't of Corr., 518 F.3d 542, 544–45 (8th Cir. 2008); Recio v. Creighton Univ., 521 F.3d 934, 936 (8th Cir. 2008); Moore v. Forrest City Sch. Dist., 524 F.3d 879, 880–81 (8th Cir. 2008); Jackson v. United Parcel Serv., Inc., 548 F.3d 1137, 1139 (8th Cir. 2008); Littleton v. Pilot Travel Ctrs., LLC, 568 F.3d 641, 643 (8th Cir. 2009); Sutherland v. Mo. Dep't of Corr., 580 F.3d 748, 750 (8th Cir. 2009); Helton v. Southland Racing Corp., 600 F.3d 954, 956 (8th

employers are winning an unexpected number of cases on the *Burlington Northern* issue.

TABLE 3: EIGHTH CIRCUIT EMPLOYER SUCCESS RATES

| | Employer Prevailed | Employer Did Not Prevail |
|---|---|---|
| Reported Decisions | 77% | 23% |
| Unreported Decisions | 100% | 0% |
| Combined Decisions | 79% | 21% |

4. Tenth Circuit

In the Tenth Circuit, there were a total of seventy-four decisions that cited to *Burlington Northern*. Thirty-nine of these were unreported cases and thirty-six were reported. The seventy-four decisions were divided nearly evenly between those that addressed the *Burlington Northern* issue and those that did not, with thirty-six decisions addressing the issue and thirty-eight not addressing it. Table 4 shows the outcomes in cases where the court addressed the question of whether the employer's conduct was sufficient for the plaintiff to have a viable retaliation claim.

The employer success rate in the Tenth Circuit for combined cases, 64%, is very close to the 60% average success rate in the study. Interestingly, the success rates diverge for reported and unreported cases, with employers prevailing at a much higher rate (75%) in unreported decisions than in reported decisions (50%).

TABLE 4: TENTH CIRCUIT EMPLOYER SUCCESS RATES

| | Employer Prevailed | Employer Did Not Prevail |
|---|---|---|
| Reported Decisions | 50% | 50% |
| Unreported Decisions | 75% | 25% |
| Combined Decisions | 64% | 36% |

Cir. 2010); Burkhart v. Am. Railcar Indus., Inc., 603 F.3d 472, 473 (8th Cir. 2010); Fercello v. Cty. of Ramsey, 612 F.3d 1069, 1074 (8th Cir. 2010); Fanning v. Potter, 614 F.3d 845, 847 (8th Cir. 2010); Lisdahl v. Mayo Found., 633 F.3d 712, 715 (8th Cir. 2011); Quinn v. St. Louis Cty., 653 F.3d 745, 748 (8th Cir. 2011); Hill v. City of Pine Bluff, Ark., 696 F.3d 709, 711 (8th Cir. 2012); AuBuchon v. Geithner, 743 F.3d 638, 640 (8th Cir. 2014).

### *B. Implications*

The three most significant findings were: (1) the overall rate of employer success; (2) the circuit split on employer success rates; and (3) the difference within each circuit between outcomes on reported versus unreported cases. The implications of each finding, as well as potential reasons for it, are discussed below. In discussing each finding and its implications, the goal is to begin a discussion, not reach ultimate conclusions.[62]

#### 1. Overall Rate of Employer Success

The overall success rate of employers, 60%, could be understood to suggest that scholars are correct who have opined that the federal courts are applying *Burlington Northern* in a pro-employer manner.[63] However, employers are prevailing at a far lower rate on this retaliation issue than overall in employment discrimination cases, where their success rate is nearly 90%.[64] Thus, the study's finding on this point could be read to indicate that courts are less hostile to retaliation cases than employment discrimination cases. Alternatively, it might suggest that the narrow *Burlington Northern* issue is somewhat immune from the overall judicial hostility to employment discrimination claims.

A third possibility is that the initial scholarly reaction to *Burlington Northern* was accurate—that, in fact, the standard is employee favorable, as shown by the better results for plaintiffs on this issue than in employment discrimination cases in general.[65] Bolstering this possibility

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62. The work of Victoria Nourse & Gregory Shaffer in their article, *Empiricism, Experimentalism, and Conditional Theory*, 67 SMU L. REV. 141, 156 (2014), greatly influenced the structure of this section of this Article. I have attempted to write this section in keeping with their comment that "[f]actual inquiry is essential to producing meaningful critiques of existing practice, discovering new forms of legal interaction with political and social dynamics, and assessing basic normative claims." *Id.* This Article's goal is to do this with "due humility for methodological fallibility" while remaining "wary of broad claims." *Id.* at 146.

63. This study did not assess the accuracy of the federal court decisions. It is possible that the facts of the cases were such that the courts were clearly correct in the 60% of cases that they decided in favor of the employer. This would mean that the courts are not pro-employer. The inability to determine what the correct outcome of the cases in any data set would be is part of what makes analyzing success rates difficult.

64. The information on outcomes in whistleblowing cases is not as comprehensive, but in the administrative process, employers prevail in the investigative process at rates above 95%. *See* Richard Moberly, *Sarbanes-Oxley's Whistleblower Provisions: Ten Years Later*, 64 S.C. L. REV. 1, 29 (2012) (finding that in the period studied, employees won less than 2% of Occupational Safety and Health Administration cases).

65. There did not appear to be much, if any, change in the outcomes of cases over time, at least in the Fourth Circuit, as discussed below.

is the fact that employers usually succeed at higher rates on appeal in employment discrimination claims than plaintiffs do.[66] Employers win in the vast majority of cases at the trial court level.[67] When plaintiffs appeal, the employer prevails at an 80% rate at the appellate level, which is higher than the 60% average success rate for employers in this study.[68]

Finally, it is also plausible that the relatively low success rate for employers in this study is misleading. In two of the circuits studied, the employer success rate in this study was significantly closer to the success rates of employers in employment discrimination cases in general. Perhaps the best explanation for the relatively low employer success rate overall is the circuit split in outcomes, discussed below. If this is correct, then the most significant aspect to this research is the circuit split it revealed.

2. Circuit Split on Employer Success Rates

The second significant finding of the research was the circuit split it revealed. This finding is disturbing. *Burlington Northern* was a case taken by the Supreme Court to resolve a split among the federal courts of appeals in retaliation claims. And while *Burlington Northern* did resolve the split as to the legal standard, in its wake, the data shows that a new type of circuit split has emerged: a circuit split of results, not standards. Using the same legal standard, the federal circuits are reaching dramatically different outcomes.

There are two things that make this new type of circuit split particularly troubling: (1) that it is hidden; and (2) the potential implication of injustice. As for the first implication, before this research study, there was no way to know that the outcomes in cases in different federal circuits were so varied. The circuit split illuminated by this research was hidden because there is no database that collects statistical information on the substantive court rulings made in each case.[69] Before this research study, there was no way to effectively engage in questions about why federal circuits' decisions might vary so greatly in retaliation claims.

The research results raise the very troubling question of the extent to

66. Clermont & Schwab, *supra* note 48, at 111 (finding that courts reverse plaintiffs' wins at the trial court level "far more often than defendants' wins [at the trial court level]").

67. *Id.* at 117 (demonstrating in Display 6 that from 1998–2006, plaintiffs' win rate was 10.88% in Title VII cases in federal district court).

68. *Id.* (showing in Display 2 verdicts that result in the employer prevailing are only overturned on appeal 8.72% of the time).

69. Information is collected on outcomes of civil cases; thus, it is possible to identify rates of success for plaintiffs in civil cases. *See* discussion *supra* Section III.A.

which this type of circuit split—a split in the circuits on *outcomes*, not standards—exists in other contexts. How many more of these hidden circuit splits are present today? Furthermore, because of the manner in which judicial opinions are used in subsequent cases as binding authority, the *outcomes* are reinforced within that circuit. As noted by Professor Sperino, once a court determines that a particular employer's action is not actionable in a retaliation claim, there is a tendency of courts in subsequent cases to reach the same outcome in any case involving that type of employer action.[70] At heart, this behavior is driven by one key component of judicial decision making: fear of reversal.[71]

The second disturbing aspect to the hidden circuit split revealed in this study is that it has the potential to undermine the appearance of justice and impartiality in judicial decision making. "Equal Justice Under Law," the phrase carved into the Supreme Court building, suggests not only equality of opportunity to be heard, but equality in the application of the uniform legal standard that *Burlington Northern* represents. Taken to its logical extreme, it raises difficult questions about the legitimacy of judicial decisions. The results of this research study suggest that while there is formal equality in retaliation cases, as represented by the articulation of the legal standard, there may not be substantive equality, as represented by the divergent outcomes in the application of the legal standard.

The divergence between common standards and outcomes is related to new legal realism's inquiry into "when and how formal law matters."[72] As one proponent of new legal realism stated, new legal realism avoids the reductivism of earlier legal realism, seeking instead "to explain the 'conditions' under which [formal] law does or does not matter in various public arenas, such as the . . . courts."[73] If formal law matters, the outcomes in the Fourth Circuit and the Eighth Circuit should not be diametrically opposed, unless the facts of cases brought in the Fourth Circuit and Eighth Circuit are essentially the opposite.[74]

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70. *See* Sperino, *supra* note 38, at 2057 (discussing this phenomenon and labeling it "perceived precedent").

71. *See* Jeffrey J. Rachlinski & Andrew J. Wistrich, *Judging the Judiciary by the Numbers: Empirical Research on Judges*, 13 ANN. REV. L. & SOC. SCI. 203, 210 (2017) (noting mixed outcomes but that some "studies support the conclusion that avoiding reversal matters to judges").

72. Nourse & Shaffer, *supra* note 62, at 145.

73. *Id.*

74. While one could expect that different federal circuits might vary in the results they reach simply by virtue of the different facts of the cases, the split between the Fourth and Eighth Circuits is particularly wide. It is possible that if all the circuits were coded, the Fourth and Eighth Circuits could be the outliers—i.e. the trailing ends of the bell curve—and that the study included the two most widely divergent circuits by chance.

Of course, this is not to suggest that the outcomes of all cases involving the *Burlington Northern* issue should be resolved the same. Nor is it to suggest that even in similar factual scenarios, the same outcome should be reached. As Professor Jessie Allen stated, discussing new legal realism, outcomes in cases are not determined "mechanically, without the involvement of some subjective judgment from the decision maker."[75] Professor Allen takes this one step further, arguing that it is impossible to test the determinacy of legal doctrine on outcomes in cases. Specifically, Professor Allen states that, even if we could observe the mental process by which a decision in a case is reached, "we would not be able to confirm that the legal outcomes in those minds were the result of doctrinal determinacy."[76]

Regardless of whether one agrees with Professor Allen, the results of this research are troubling because of the possibility that doctrine, far from being determinate, is in fact irrelevant to outcome. If doctrine plays a role in determining outcomes, one would anticipate that results in circuits would tend to converge. While it is expected that there will be variability in outcomes, just as there is indeterminacy in the applicable legal standard, it is surprising to see the degree of difference in the outcomes reached in the various circuits.

This variability has previously been uncovered in other contexts. Variability in judicial decision making has been found in contexts such as in criminal convictions and whether to grant bonds.[77] Research on immigration asylum cases has shown wide variation among immigration judges, with some granting asylum at a much higher rate than other judges.[78] Applying this to the current context, it may be that panel participants vote in similar ways across cases, with the result that a few judges could be driving the results in each circuit. The circuit level variation in this study was similar to the variations that also occurred at the immigration court level, resulting in asylum seekers' chances of success varying widely between courts in different locations.[79]

Another way of articulating the troubling nature of the results in this

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75. Jessie Allen, *Empirical Doctrine*, 66 CASE W. RES. L. REV. 1, 10 (2015).

76. *Id.* at 30.

77. *See* Rachlinski & Wistrich, *supra* note 71, at 204 (surveying research on variability in outcomes and opining that "judicial decisions are too chaotic").

78. Some judges' rates of granting asylum deviated more than 50% from the national average. *See* Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 333 (2007).

79. One example of this was with Chinese asylum seekers: "[A] Chinese asylum seeker unlucky enough to have her case heard before the Atlanta Immigration Court had a 7% chance of success on her asylum claim, as compared to 47% nationwide." *Id.* at 329.

study is to say it indicates a lack of predictability in general.[80] If the Fourth Circuit and Eighth Circuit's outcomes are so variable, attorneys are less able to predict their future success in retaliation cases. And at the same time, the circuit split raises the troubling hypothesis that doctrine does not matter.

Because of the concerns raised above, the results beg for some rational explanation. Why are judges in the Fourth Circuit and Eighth Circuit reaching different outcomes? There are multiple bodies of research, running the gamut from psychological to political forces, that focus on identifying factors relating to judicial behavior.[81] Numerous researchers have identified a link between judicial behavior and political ideology.[82] For example, one study found that Democrat-appointed judges are more likely to rule in favor of plaintiffs than Republican-appointed judges.[83] On the other hand, there have been inevitable critiques of this body of research, and at least one research study found that political ideology had "only a modest influence" on judicial decision making.[84] The possibility of political ideology affecting outcomes in these cases is assessed below.

Another factor identified in previous research is geography. In the immigration asylum context, one research study found wide variation among outcomes in different circuits.[85] The researchers considered political ideology briefly as a rationale, but went on to suggest that regional culture was a factor, noting that the circuits most hostile to asylum seekers were all in the South.[86] In that study, the Eighth and Tenth Circuits occupied the middle tier of circuits in terms of the outcomes in asylum cases, being neither as hostile as the "Southern" circuits, nor as welcoming as circuits such as the Seventh, which was most receptive to asylum

80. As Professor Allen states, "a lack of predictability in legal outcomes creates its own legitimacy problems. Among other things, unpredictable law enforcement punishes people who had no way to conform their behavior to avoid losses." Allen, *supra* note 75, at 45.

81. Lee Epstein, *Some Thoughts on the Study of Judicial Behavior*, 57 WM. & MARY L. REV. 2017, 2023–30 (2016) (discussing the wide variety of research into judicial behavior).

82. *See id.* at 2041–43 (concluding that several researchers found support for the argument that ideology influences judicial decision making).

83. *See* Jeffrey J. Rachlinski et al., *Judicial Politics and Decisionmaking: A New Approach*, 70 VAND. L. REV. 2051, 2096 (2017) ("Democrats favored the plaintiffs more than Republicans did. None of the scenarios demonstrated a significant effect of political attitude on awards, although one yielded a marginally significant effect. Aggregating across all of the six scenarios suggests a modest effect.").

84. *See id.* at 2054–56 (discussing the limits of the existing research and noting that "[o]ur results suggest that politics has only a modest influence on trial judges").

85. Ramji-Nogales et al., *supra* note 78, at 363–64.

86. *Id.*

claims.[87] The value of geography as an explanatory factor in my research study seems questionable. One can envision reasons why Southern circuits would have more hostility to immigrants than Northern circuits.[88] However, it is difficult to conceive of similar geographic variation as to retaliation claims.

Other explanations might focus on demographic characteristics of judges. Social science researchers have focused on demographic characteristics of judges to explain divergence in case outcomes.[89] There is some research suggesting that judges vote in a way that benefits demographic groups to which they belong.[90] This includes characteristics of race and gender.[91] The correlation between outcomes in retaliation cases and these two demographic characteristics are discussed below.

Life experience can also affect outcomes in cases. For example, in the immigration research study referenced above, researchers considered a wide variety of judges' demographic characteristics as variables that could affect rates of granting asylum. Prior work experience had an effect on these rates. For example, a judge with a law enforcement background was linked to a lower rate of granting asylum, while those with nonprofit backgrounds were linked to higher rates.[92] In terms of demographic characteristics, it seemed unlikely that there would be a work experience characteristic that would play out in the retaliation context the way it would in the immigration context, but even if it did, obtaining that type of information was beyond the capacity of this research.

In sum, it seemed plausible that a few readily obtainable characteristics of federal judges might help explain the outcomes in these cases. Political affiliation, race, and sex are discussed below. In addition, several other possible explanations for the circuit split were evident. First, the outcomes might be consistent with each circuit's approach prior to *Burlington Northern*. That is, the circuit split that existed before *Burlington Northern* might have simply replicated itself after *Burlington Northern* in the outcomes of the cases rather than the legal standard. Second, the circuit split might reflect each circuit's hostility to employment discrimination plaintiffs in general. Third, the fact that the Fourth Circuit contains so many federal employees might be a contributing

87. *Id.* at 366.

88. The long history of legal segregation and codified racism cannot be ignored in this context.

89. *See generally* Rachlinski & Wistrich, *supra* note 71 (describing research that evaluates demographic characteristics of judges that affect their rulings).

90. *Id.* at 206–09.

91. *Id.* at 207–08.

92. Ramji-Nogales et al., *supra* note 78, at 345–47 (discussing the role of a judge's background in immigration enforcement).

factor to its outcomes. Each one of these possibilities is addressed below.

a. The Circuit Split and Political Affiliation of Judges

As noted above, one possible explanation for the circuit split is that the difference in the circuit outcomes are driven by the political affiliations of the judges within each circuit. There is a body of research indicating that political affiliation is correlated with outcomes in politically-charged settings.[93] With respect to employment discrimination cases, one study of success rates found that, "[w]hen a Republican-appointed judge gave the decision, plaintiffs won 30.8% of the time, and when a Democrat-appointed judge gave the decision, plaintiffs won 38.6% of the time."[94] This research might help explain the differences between the circuits depending on the composition of each circuit during the timeframe from 2006–2018.[95] On the other hand, research conducted of immigration asylum cases found no statistically significant correlation between political affiliation of judges and outcomes in one federal circuit, but did find a correlation in another.[96] In the context of the Voting Rights Act, one study found that outcomes of cases were correlated to political affiliation of the judges sitting on the panel.[97]

As with all circuits, the composition of the Fourth Circuit from 2006–2018, which was the timeframe involved in this study, was split between Democrat-appointed and Republican-appointed judges. If all judges who were active, including Senior Judges, at any time during that interval are considered, there were twelve Democrat-appointed judges (48%) and

93. Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831, 838 (2008) ("In many areas of law, Democratic appointees cast liberal votes more often than Republican appointees do, whatever the partisan configuration of the panel.").

94. John Friedl & Andre Honoree, *Is Justice Blind? Examining the Relationship Between Presidential Appointments of Judges and Outcomes in Employment Discrimination Cases*, 38 CUMB. L. REV. 89, 97 (2008).

95. *See Biographical Directory of Article III Federal Judges, 1789-present*, FED. JUD. CTR., https://www.fjc.gov/history/judges [https://perma.cc/TZ55-7P9D] (enter judge's name into search box) (last visited Oct. 23, 2019) [hereinafter *Biographical Directory*] (providing information on judicial composition of the federal circuit courts). In order to obtain information on the period in question, searches were run to identify judges who have been appointed since 1964. Judges who retired, resigned, or died before 2006, and those appointed after the closing date of this study (May 2018), were eliminated from the list. All remaining judges were coded by the party of the appointing president.

96. Ramji-Nogales et al., *supra* note 78, at 369–71 (finding no correlation in the Third Circuit but finding a correlation in the Sixth Circuit).

97. Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1, 3 (2008) ("Democratic appointees are significantly more likely than Republican appointees to cast votes in favor of the plaintiff under section 2 of the Voting Rights Act.").

thirteen Republican-appointed judges (52%)—a nearly even split.[98] However, these figures include judges who were on senior status and also some who resigned, retired, or died during the interval.[99] Removing these individuals from the pool of judges results in eight Democrat-appointed judges (62%) and five Republican-appointed judges (38%). It is impossible to ignore the fact that the percentage of Republican-appointed judges corresponds almost identically to the 37% employer success rate in the Fourth Circuit.

However, because some judges were active for much of the study period before taking senior status, it seemed prudent to weigh the percentage of Republican-appointed and Democrat-appointed judges who had been active for the majority of the study period. The number of years each judge was active during the study interval was identified. The total years of Democrat-appointed and Republican-appointed judges were calculated and then expressed as a percentage of the total number of judging years during the study interval. Using this metric, 54% of judging years were accounted by Democrat-appointed judges and 46% Republican-appointed judges. While it seems that the percentage of Republican-appointed judges is related to the employer success rate, it was not clear that it was a close correlation.

Because of this, the study also tested this theory on the two other federal circuit courts in the study to see whether they supported any correlation between employer success rates and percentage of Republican-appointed judges. In the Eighth Circuit during the 2006–2018 interval, there were a total of five Democrat-appointed judges (20%) and nineteen Republican-appointed judges (80%).[100] Excluding judges who took senior status, resigned, retired, or died between 2006–2018 results in one Democrat-appointed judge (10%) and nine Republican-appointed judges (90%).[101] These figures may overrepresent Republican-appointed judges,

98. The Democrat-appointed judges were: J. Harris, J. Thacker, J. Floyd, J. Diaz, J. Wynn, J. Keenan, J. Davis, J. King, J. Traxler, J. Motz, J. Michael, and J. Phillips. The Republican-appointed judges were: J. Agee, J. Duncan, J. Shedd, J. Gregory, J. Williams, J. Luttig, J. Hamilton, J. Niemeyer, J. Wilkins, J. Wilkinson, J. Chapman, J. Widener, and J. Butzner. A more accurate picture could be obtained by weighting the judges based on number of years during this interval that the judge was on active status. This level of detail is simply beyond the scope of this Article.

99. The Fourth Circuit judges that resigned, retired, or died are: J. Davis, J. Shedd, J. Traxler, J. Michael, J. Williams, J. Luttig, J. Hamilton, J. Wilkins, J. Chapman, J. Phillips, J. Widener, and J. Butzner.

100. The Democrat-appointed judges were: J. Bright, J. Bye, J. Kelly, J. Lay, and J. Murphy. The Republican-appointed judges were: J. Arnold, J. Beam, J. Benton, J. Bowman, J. Colloton, J. Erickson, J. Fagg, J. Gibson, J. Grasz, J. Gruender, J. Hansen, J. Loken, J. Melloy, J. Riley, J. Ross, J. Shepherd, J. Smith, J. Stras, and J. Wollman.

101. The Democrat-appointed judges who took senior status, resigned, retired, or died were: J.

however, because two Democrat-appointed judges took senior status fairly late in the study interval, in 2015 and 2016.[102] Using the metric of percentage of years occupied by Democrat-appointed and Republican-appointed judges in the study's timeframe results in 23% Democrat-appointed judging years and 77% Republican-appointed judging years. In the Eighth Circuit, the employer success rate is very similar to the percentage of Republican-appointed judging years.

In the Tenth Circuit during the study interval, there were a total of twelve Democrat-appointed judges (44%) and fifteen Republican-appointed judges (56%).[103] However, a substantial proportion of the Republican-appointed judges were in senior status or terminated their commissions during the study period. Excluding these results in seven Democrat-appointed judges (64%) and four Republican-appointed judges (36%).[104] This may overrepresent Democrat-appointed judges, though, because two Republican-appointed judges either terminated their commission or took senior status very late in the study, in 2017.[105] Using the alternative metric, Democrat-appointed judges represented 41% of the total years of active judging during the study interval compared to 59% for Republican-appointed judges.

Considering all of this together, the possibility that the differences between circuits are driven at least in part by the political affiliations of judges seems very plausible. Here, there appears to be a connection between being Republican-appointed and ruling in favor of the employer. This is not surprising, given the generally pro-employer stance of the Republican Party.[106] This research is suggestive, but not conclusive,

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Bright, J. Bye, J. Lay, and J. Murphy. The Republican-appointed judges who took senior status, resigned, retired, or died were: J. Arnold, J. Beam, J. Bowman, J. Fagg, J. Gibson, J. Hansen, J, Melloy, J. Riley, J. Ross, and J. Wollman.

102. The two Democrat-appointed judges who took senior status were J. Bye (2015) and J. Murphy (2016).

103. The Democrat-appointed judges were: J. Bacharach, J. Briscoe, J. Henry, J. Holloway, J. Lucero, J. Matheson, J. McHugh, J. McKay, J. Moritz, J. Murphy, J. Phillips, and J. Seymour. The Republican-appointed judges were: J. Anderson, J. Baldock, J. Barrett, J. Brorby, J. Ebel, J. Eid, J. Gorsuch, J. Hartz, J. Holmes, J. Kelly, J. McWilliams, J. O'Brien, J. Porfilio, J. Tacha, and J. Tymkovich.

104. The Democrat-appointed judges who took senior status or terminated their commissions were: J. Henry, J. Holloway, J. McKay, J. Murphy, and J. Seymour. The Republican-appointed judges who took senior status or terminated their commissions were: J. Baldock, J. Barrett, J. Brorby, J. Ebel, J. Gorsuch, J. Kelly, J. McWilliams, J. O'Brien, J. Porfilio, and J. Tacha.

105. The Republican-appointed judges who terminated their commission or took senior status in 2017 were J. Gorsuch and J. Kelly.

106. *See, e.g.*, Louis L. Chodoff et al., *Expect Pro-Business, Pro-Employer Changes Under Trump Administration*, BALLARD SPAHR, LLP (Jan. 20, 2017), https://www.ballardspahr.com/alerts publications/legalalerts/2017-01-20-expect-pro-business-pro-employer-changes-under-trump-adminsitration [https://perma.cc/UNA2-F66U].

because it did not assess the composition of the judicial panels reaching the decisions in the cases studied and did not test for statistical significance.[107]

b. Sex and Race of the Judges in the Circuits

Research in the immigration asylum context revealed that the sex of the deciding judge had a statistically significant effect on whether asylum was granted, with female judges granting more asylum claims than male judges.[108] There is similar research on the effect of district court judges' sex on the outcomes of employment discrimination cases. Plaintiffs in cases tried before a female judge were more likely to be successful.[109]

Examining the circuits in this study, the Eighth Circuit had the fewest female judges during the study period. One was appointed in 2013, and a second was active from the beginning of the study period until 2016, when she took senior status.[110] I weighted this in terms of years, adding the total number of years female judges were active in the Eighth Circuit as a percentage of the total of number of years of all active judges during the study period. Female judges occupied 10% of total years of judging during the study period. Using the same method in the Tenth Circuit resulted in 18% female judging years, and in the Fourth Circuit, 26%. While I did not conduct an analysis of statistical significance, the employer success rates are higher in the circuits with lower percentages of female judges.

As for race, using data from the Federal Judicial Center,[111] judges were coded for race by including all judges who had any race or ethnicity indicated in addition to or other than white. They were then weighted for years of active judging in the same manner as sex and political affiliation. Using this metric, 28% of the active judging years were served by judges of color in the Fourth Circuit, 10% of the Tenth Circuit, and 8% of the Eighth Circuit.[112] As with sex, the lower the percentage of active judging years by judges of color, the higher the employer's success rates.

In addition to considering sex and race separately, taking them

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107. The focus of this research project was on the outcomes of the *Burlington Northern* issue. The results were surprising and there was simply inadequate time or funding to reach the level of detail that would link panel political composition with outcomes.

108. Ramji-Nogales et al., *supra* note 78, at 342.

109. *Id.* at 343 n.79 (summarizing various research studies that have analyzed the impact of a judge's gender on the outcome of cases, specifically in employment discrimination cases).

110. J. Kelly was appointed in 2013, and J. Murphy took senior status in 2016.

111. *See Biographical Directory*, *supra* note 95.

112. The Fourth Circuit was served by J. Diaz, J. Wynn, J. Davis, J. Duncan, and J. Gregory. The Tenth Circuit was served by J. Holmes and J. Lucero. Finally, the Eighth Circuit was served by J. Smith.

together seemed fruitful because of the research indicating that both race and sex affect outcomes in employment discrimination cases. Using this metric, in the Fourth Circuit, 46% of active judging years were by judges that were female and/or of color. For the Eighth Circuit, it was 18%, and for the Tenth Circuit, it was 30%. Table 5 provides a snapshot of this data along with the employer success rates for each circuit.

TABLE 5: JUDICIAL DEMOGRAPHICS AND EMPLOYER SUCCESS RATES

| | Female | Of Color | Female/Of Color | Employer Success |
|---|---|---|---|---|
| Fourth Circuit | 26% | 28% | 46% | 37% |
| Eighth Circuit | 10% | 8% | 18% | 79% |
| Tenth Circuit | 18% | 16% | 30% | 64% |

As is evident from Table 5, the percentage of active judging years of female/of color judges appears to be inversely related to employer success rates. The higher the percentage of female/of color judges, the better the outcomes for employees. However, the Fourth and Tenth Circuits have nearly identical percentages of judges who are female and/or of color, yet the employer success rates are quite different in the two circuits. Furthermore, since I did not conduct a test of statistical significance, caution is warranted in considering the relationship between sex/race and outcomes.

c. Circuits Retained Their Approach in Outcomes

Looking beyond demographics and political affiliation, there was another plausible legal explanation for the result: that the circuits were retaining their pre-*Burlington Northern* approach to these cases. While the courts were stating the legal standard from *Burlington Northern*, they were applying the standard in a way that was more aligned with their own circuit's approach to the issue before *Burlington Northern* was decided. It seemed possible that, in the aftermath of *Burlington Northern*, the lower courts were using the language of the new standard but applying it in a way that would be more consistent with the circuit's approach pre-*Burlington Northern*. In other words, the federal courts might be articulating the standard according to the new Supreme Court case while still reaching results that would be more consistent with their circuit's prior standard.

This theory could explain the Eighth Circuit's outcomes. Before *Burlington Northern*, the Eighth Circuit required that the plaintiff suffer

an "adverse employment action that constitutes the sort of ultimate employment decision."[113] This was one of the most restrictive, employer-favorable approaches taken before *Burlington Northern*. Thus, the 77% employer success rate in the Eighth Circuit might simply be the Eighth Circuit continuing to adhere to the types of outcomes it reached before *Burlington Northern* while articulating the *Burlington Northern* legal standard in its decisions.

However, this theory is less compelling in explaining the outcomes in the Tenth and Fourth Circuits. Before *Burlington Northern*, the Tenth Circuit had one of the more employee-favorable approaches to what constituted an actionable retaliation claim.[114] In discussing its standard, one panel of the Tenth Circuit rejected the approach taken by the Eighth Circuit and noted that "[i]n recognition of the remedial nature of Title VII, the law in this circuit liberally defines adverse employment action."[115] Thus, one would expect the Tenth Circuit to be employee favorable. And, to a certain extent, one can see the Tenth Circuit as being employee favorable. It is certainly more employee friendly than the Eighth Circuit on this issue. However, it is not as employee favorable as the Fourth Circuit; and overall, employers are more likely to succeed on the *Burlington Northern* issue than employees in the Tenth Circuit. In short, the evidence from the Tenth Circuit could be read to support or refute the possibility that federal courts are achieving their pre-*Burlington Northern* outcomes even after the change in legal standard.

This leaves the Fourth Circuit. Before *Burlington Northern*, the Fourth Circuit's standard was among the most employer favorable in the country.[116] Yet its outcomes since *Burlington Northern* are highly employee favorable. Could this be because of the change in composition of the Fourth Circuit since *Burlington Northern*? To test this, I divided the Fourth Circuit cases into two groups: one for the first period after *Burlington Northern* was decided in 2006, through 2011, and a second group for 2011 through 2018. In the earlier timeframe, the employer prevailed in 36% of the cases. For the period from 2012 to 2018, that increased by 2%, with the employer prevailing 38% of the time. This relatively minor increase does not support the hypothesis that the composition of the Fourth Circuit changed after *Burlington Northern* in a way that affected the rates of employer success.

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113. Manning v. Metro. Life Ins. Co., 127 F.3d 686, 692 (8th Cir. 1997), *abrogated by* Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006).

114. *See, e.g.*, Gunnell v. Utah Valley State Coll., 152 F.3d 1253, 1264 (10th Cir. 1998).

115. *Id.* (quoting Jeffries v. Kansas, 147 F.3d 1220, 1232 (10th Cir. 1998), *abrogated by* McInnis v. Fairfield Communities, Inc., 458 F.3d 1129 (2006)).

116. *See supra* Part I.

Perhaps, instead, there was a change in the Fourth Circuit before *Burlington Northern*. It is possible that some of the judges of the Fourth Circuit were unhappy with the pre-*Burlington Northern* standard but bound by circuit precedent. After the new standard was articulated in *Burlington Northern*, judges were able to decide cases in favor of employees that were not possible under the pre-*Burlington Northern* standard in the Fourth Circuit.[117]

Overall, given that only the Eighth Circuit's outcomes are obviously explainable under this theory, it is not a satisfactory explanation of the circuit split.

d. Fourth Circuit as an Outlier

It was suggested[118] that the Fourth Circuit might be an outlier because so many employment cases in that circuit involve the United States Government as the employer-defendant. If cases involving the government as employer are excluded from the Fourth Circuit cases, the success rate of employers rises by one percent, to 38%. This does not appear to be a driver of the employer success rate in the Fourth Circuit.

e. Circuit Hostility to Employment Discrimination Plaintiffs

Yet another possible explanation is that the outcomes are driven by the degree to which each circuit is hostile to employment discrimination plaintiffs. Professors Kevin Clermont and Stewart Schwab suggested this as a possible reason for the sharper decline in employment discrimination cases filed in some federal circuits than in others.[119] However, scholars suggest that the Fourth Circuit is hostile toward employment discrimination plaintiffs,[120] and this is inconsistent with what was found in

117. Another possibility to explain the circuit split is that the Fourth Circuit's own reputation for being pro-employer created a pool of cases that differs from other circuits. One could posit that plaintiff's attorneys in the Fourth Circuit are incentivized to bring fewer cases that are close calls, resulting in a higher rate of plaintiff victories over time. However, the same argument could be made for the Eighth Circuit with its tougher stance on retaliation claims.

118. Professor Margaret Johnson made this interesting suggestion when I presented preliminary findings to the faculty of the University of Baltimore School of Law.

119. Clermont & Schwab, *supra* note 48, at 119 (noting "the steepest decline in case terminations comes in the Eleventh Circuit, with the Fifth, Fourth, Eighth, and Sixth Circuits following. Those circuits correspond well with those a plaintiffs' lawyer previously described as circuits perceived by the bar to be the most hostile to employment discrimination plaintiffs").

120. *Id*; *see also Empirical Studies: How Do Discrimination Cases Fare in Court? Proceedings of the 2003 Annual Meeting of the Association of American Law Schools, Section on Employment Discrimination*, 7 EMP. RTS. & EMP. POL'Y J. 533, 542 (2003) (discussing the hostility of the Fourth Circuit to plaintiffs in ADA cases). However, the number of Democrat-appointed judges in the Fourth

this study. Research has also shown the hostility of the Fourth Circuit toward asylum seekers,[121] which one would predict would be more likely to suggest an employer-favorable outcome here, which was not the case.

3. Better Employee Outcomes in Reported Cases

Overall, employees fared marginally better in reported cases than in unreported cases within each circuit. In the Fourth Circuit, the employer success rate was 6% lower in reported cases than in unreported cases. In the Eighth Circuit, the employer success rate was 21% lower in reported cases, and in the Tenth Circuit, it was 25%. It may be that reported cases, by their nature, are given greater attention by the judges, and this greater attention leads to better outcomes for employees. This is consistent with Elliott Ash and W. Bentley MacLeod's research on motivations of state court judges.[122] In that research study, Ash and MacLeod found that "judges prefer working on important cases that can influence the law in the future."[123] By their nature, unreported cases are of limited precedential value, with concomitant limited influence on the development of the law.

Another possibility is that plaintiffs are more likely to be represented in court in reported cases as contrasted with unreported cases. In research involving immigration cases, the single largest factor affecting outcomes of the cases was whether the immigrant was represented.[124] Thus, a lack of representation by employees may be influencing the higher rates of employer success in unreported cases.

## CONCLUSION

The 60% employer success rate found in this research is a metric that can support competing theories. On the one hand, it indicates that employers are prevailing in the majority of situations where the *Burlington Northern* issue is addressed. On the other hand, it indicates that employers are prevailing at significantly lower rates on this issue than in employment discrimination cases in general, which suggests that on this issue at least, the federal appellate courts are not as hostile to plaintiffs as in other Title VII contexts.

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Circuit during the study period suggests that the Fourth Circuit has moved away from its status as one of the most conservative circuits in the country.

121. Ramji-Nogales et al., *supra* note 78, at 363.

122. *See generally* Elliott Ash & W. Bentley MacLeod, *Intrinsic Motivation in Public Service: Theory and Evidence from State Supreme Courts*, 58 J.L. & ECON. 863 (2015).

123. *Id.* at 865.

124. Ramji-Nogales et al., *supra* note 78, at 340.

Perhaps more importantly, the hidden circuit split revealed in this study raises important questions about the expectations we have for the application of uniform legal standards across the country and the reasons for different outcomes in different circuits. Exploration of other contexts in which this is occurring would contribute to our understanding of the extent to which this is a common occurrence, whether it is significant, and whether steps need to be taken to limit the frequency of these hidden circuit splits.