MACDERMID, INC. *v.* STEPHEN J. LEONETTI*
(SC 19077)

Rogers, C. J., and Norcott, Palmer, Zarella, Eveleigh and McDonald, Js.

Argued May 15—officially released November 26, 2013

John R. Horvack, Jr., with whom, on the brief, was *John L. Cordani, Jr.*, for the appellant (plaintiff).

Kathleen Eldergill, for the appellee (defendant).

Opinion

NORCOTT, J. The sole issue in this appeal is whether the doctrine of absolute immunity, which affords protection against certain claims relating to the commencement and prosecution of a cause of action, shields an employer who has brought an action against a former employee from a counterclaim by that former employee alleging that the employer's cause of action is in retaliation for the former employee's decision to exercise his rights under the Workers' Compensation Act (act), General Statutes § 31-275 et seq., in violation of General Statutes § 31-290a.[1] The plaintiff, MacDermid, Inc., appeals[2] from the trial court's denial of its motion to dismiss the counterclaim brought by the defendant, Stephen J. Leonetti. Specifically, the plaintiff asserts that the trial court improperly applied the factors set forth in *Rioux* v. *Barry*, 283 Conn. 338, 350–51, 927 A.2d 304 (2007), and incorrectly determined that absolute immunity did not bar the defendant's claim of employer retaliation. We disagree and, therefore, affirm the trial court's decision denying the plaintiff's motion to dismiss.

"Because in this appeal we review the trial court's ruling on a motion to dismiss, we take the facts to be those alleged in the complaint, construing them in a manner most favorable to the pleader." *Beecher* v. *Mohegan Tribe of Indians of Connecticut*, 282 Conn. 130, 132, 918 A.2d 880 (2007). We derive our summary of the facts alleged in the defendant's counterclaim and the relevant procedural history from our recent opinion in *Leonetti* v. *MacDermid, Inc.*, 310 Conn. 195, A.3d (2013), and from the record in the present appeal. The defendant worked for the plaintiff "for twenty-eight years until he was discharged in early November, 2009. Five years earlier, in June, 2004, the [defendant] sustained a lower back injury during the course of his employment. The [defendant] timely filed notice of a workers' compensation claim related to this injury on April 14, 2005. The parties stipulated to the [Workers' Compensation Commissioner (commissioner)] that the injury suffered by the [defendant] was a compensable injury.

"At the time that the [plaintiff] informed the [defendant] that he would be discharged from his employment, the [plaintiff] presented the [defendant] with a proposed termination agreement [agreement]. Article II of the agreement signed by the parties provides that the [defendant] agreed to release the [plaintiff] from [inter alia] 'any and all . . . workers' compensation claims . . . .'

"Article III of the agreement provides that, in consideration 'for the agreements and covenants made herein, the release given, the actions taken or contemplated to be taken, or to be refrained from,' the [defendant] would

be paid twenty-seven weeks 'severance pay, determined solely upon the [defendant's] current base salary,' which amounted to $70,228.51, within thirty days of the [defendant's] receipt of the properly executed agreement . . . .

"Article III of the agreement also provided that '[the defendant] understands that the payments and benefits listed above are *all* that [the defendant] is entitled to receive from [the plaintiff]. . . . [The defendant] agrees that the payments and benefits above are more than [the plaintiff] is required to pay under its normal policies, procedures and plans.' . . .

"Article IV of the agreement . . . contained a clause stating in part that '[the defendant] acknowledges that he has been given a reasonable period of time of at least thirty (30) days to review and consider this agreement *before* signing it. [The defendant] is encouraged to consult his or her attorney prior to signing this agreement.' . . .

"The [defendant] did not want to release his preexisting workers' compensation claim relating to the 2004 injury by signing the agreement. He consulted with his attorney, who contacted the [plaintiff's] counsel and requested that the [plaintiff] remove from the agreement the language that could operate to release the [defendant's] workers' compensation claim. The [plaintiff] refused to modify the language of the agreement. The [defendant's] counsel [thereafter] wrote a letter to the [plaintiff's] counsel asserting that the release language of article II of the agreement 'really has no effect without the [c]ommissioner's approval' and scheduled an informal hearing before [the] . . . commissioner for January 8, 2010. The [plaintiff's] counsel did not attend the informal hearing . . . . Nothing was resolved on January 8, and on January 27, 2010, the hearing was rescheduled for March 1, 2010.

"On January 26, 2010, the [plaintiff] sent the [defendant] a letter stating that, unless the [defendant] signed the unmodified agreement within the next ten days, [the plaintiff] would withdraw its offer of $70,228.51 in severance pay. The [defendant] signed the agreement on February 2, 2010, and the commissioner found that the [defendant] did so because he did not wish to forfeit his severance pay. After the [plaintiff] received the signed agreement from the [defendant], it paid [him] the $70,228.51. At that time, the commissioner had not approved the agreement as a 'voluntary agreement' or stipulation as defined in [General Statutes] § 31-296.[3]

"A formal hearing was held several months later to determine the enforceability of the language in article II of the agreement that dealt with the release of the [defendant's] workers' compensation claim. Specifically, the parties asked the commissioner to determine as follows: (1) '[w]hether a signed termination

agreement between [an] employer and [an] employee can effectively waive the parties' rights and obligations set forth in the [act] . . . absent approval of the agreement by a [commissioner]'; and (2) '[i]f the termination agreement does not waive the parties' rights and obligations set forth in the [act]—whether the [c]ommissioner would issue an order that the termination agreement be entered as a full and final stipulation of the [defendant's] workers' compensation claim against the [plaintiff].'

"The commissioner . . . found that, without approval by a commissioner, the agreement did not effectively waive the parties' rights and obligations under the act . . . [and] that the agreement should not be approved as a full and final stipulation of the [defendant's] workers' compensation claim." (Emphasis in original; footnote added.) Id., 199–202. The plaintiff appealed from the commissioner's decision to the Workers' Compensation Review Board (board), which affirmed the commissioner's decision. Id., 203. Thereafter, the plaintiff appealed from the decision of the board to the Appellate Court[4] and filed the present action in Superior Court alleging civil theft, fraud, unjust enrichment, and conversion, premised on the defendant's admission that he never intended to release his workers' compensation claim. In the present action, the plaintiff seeks, inter alia, rescission of the agreement, return of the $70,228.51 it paid the defendant under the agreement, and damages. In response, the defendant filed a counterclaim alleging that the plaintiff violated § 31-290a by initiating the present action solely in retaliation for the defendant's exercise of his rights under the act. In his counterclaim, the defendant seeks compensatory damages, punitive damages, costs, and attorney's fees. Thereafter, the plaintiff moved to dismiss the defendant's counterclaim, arguing that the court lacked subject matter jurisdiction over that claim because the act of filing an action is protected by the doctrine of absolute immunity.

The trial court noted that the "question of whether a claim of retaliation under [the act] may be asserted as a result of [an action] brought by an employer against a former employee . . . appears [to be] a matter of first impression." The trial court then identified the competing interests at issue, namely, the public policy of encouraging unfettered access to the courts to seek redress for grievances and the right of a former employee to pursue his statutorily protected rights under the act. Guided by the analysis set forth in *Rioux* v. *Barry*, supra, 283 Conn. 350–51,[5] the trial court concluded that: (1) "the purposes of absolute immunity are equally applicable to the present counterclaim as [they are] to defamation and other torts to which absolute immunity has been applied"; (2) "the actual impact, in terms of a chilling effect, is de minimis and will potentially arise only in those circumstances where an

employer brings an action against an employee who has also made a claim for benefits under the act"; (3) "the very broad and remedial nature of the act," which "reflects the public policy of this state that employees be able to seek redress under the statutory provisions of the act without fear of reprisal or retaliation" weighs heavily against the application of absolute immunity in the present case; and (4) the act's focus on the retaliatory motive of the employer rendered the statutory claim of retaliation under § 31-290a "more akin to an abuse of process claim [which is not barred by absolute immunity], than, for example a defamation or tortious interference claim [which are barred by absolute immunity]."[6] Thereafter, the trial court concluded that the defendant's retaliation counterclaim was not barred by absolute immunity and, accordingly, denied the plaintiff's motion to dismiss. This appeal followed. See footnote 2 of this opinion.

On appeal, the plaintiff claims that the trial court improperly applied *Rioux* v. *Barry*, supra, 283 Conn. 350–51, and denied its motion to dismiss because absolute immunity protects the act of filing a cause of action. Specifically, the plaintiff claims that the trial court correctly determined that the purposes of absolute immunity are equally applicable to the defendant's counterclaim as they are to a claim for defamation, and that applying absolute immunity to causes of action under § 31-290a predicated solely upon the employer's act of filing a civil action against an employee will not effectively eliminate that statutory cause of action. The plaintiff further claims, however, that the trial court improperly concluded that the elements of a claim under § 31-290a were more akin to an abuse of process claim than they are to a defamation or tortious interference claim because § 31-290a does not contain "stringent requirements" to provide adequate protections to encourage individuals to report wrongdoing and seek redress from the courts. Finally, the plaintiff does not challenge the trial court's recognition that § 31-290a is remedial in nature, but asserts that the remedial nature of the statute does not outweigh the interests underlying absolute immunity. Relying on case law from other jurisdictions that have expressly recognized a broad "litigation privilege," the plaintiff argues that the policies on which the doctrine of absolute immunity is based are derived from constitutional guarantees and, therefore, should prevail over the policies embodied in statutory causes of action, even when the statute is remedial in nature like § 31-290a. Thus, the plaintiff claims that all of the *Rioux* factors weigh in favor of affording it absolute immunity and that the trial court's conclusion to the contrary should be reversed.

In response, the defendant contends that the trial court properly considered the factual background of the present case when balancing the interests at stake. The defendant also argues that the cases from other

jurisdictions upon which the plaintiff relies are inapposite because: (1) many of those cases are consistent with Connecticut case law and, therefore, "add nothing new to the principles annunciated in *Rioux*"; (2) some of those cases decided issues not implicated in the present case; and (3) the remaining cases simply applied a more expansive "litigation privilege" than has been recognized in Connecticut. The defendant also contends that the principles underlying the doctrine of absolute immunity apply equally to his interest in exercising his rights under the act free from retaliation from his employer and, thus, do not weigh in favor of imposing absolute immunity to bar his counterclaim. The defendant further contends that the trial court properly determined that the interests protected by § 31-290a are sufficient to outweigh those protected by absolute immunity. Specifically, the defendant cites to numerous federal cases that have recognized claims of retaliation predicated upon the employer's sole act of initiating litigation against an employee for exercising his rights under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e et seq., which this court has considered instructive in interpreting the scope of the protections provided under the act. The defendant also challenges the plaintiff's assertion that § 31-290a does not contain "stringent requirements" that provide adequate protections to encourage individuals to report wrongdoing and seek redress, and asserts that the trial court properly concluded that his counterclaim alleged that the plaintiff's claims had been "brought for an illegal purpose and with retaliatory motive."[7]

We agree with the defendant and conclude that the trial court properly determined that, when an employer's interest in unfettered access to the courts is weighed against an employee's interest in exercising his rights under the act without fear of facing a baseless retaliatory civil action, the employee's interest prevails. We, therefore, also conclude that the doctrine of absolute immunity does not bar a claim for retaliation predicated solely upon the employer's act of filing a cause of action. Accordingly, we conclude that the trial court properly denied the plaintiff's motion to dismiss the defendant's counterclaim on the basis of absolute immunity.[8]

"The standard of review for a court's decision on a motion to dismiss [under Practice Book § 10-31 (a) (1)] is well settled. A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . [O]ur review of the court's ultimate legal conclusion and resulting [determination] of the motion to dismiss will be de novo. . . . When a . . . court decides a jurisdictional question raised by a pretrial motion to dismiss, it must consider the allegations of the complaint in their most favorable light. . . . In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessar-

ily implied from the allegations, construing them in a manner most favorable to the pleader. . . . The motion to dismiss . . . admits all facts which are well pleaded, invokes the existing record and must be decided upon that alone. . . . In undertaking this review, we are mindful of the well established notion that, in determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged." (Citations omitted; internal quotation marks omitted.) *Dayner* v. *Archdiocese of Hartford*, 301 Conn. 759, 774, 23 A.3d 1192 (2011).

We begin our analysis with a review of the doctrine of absolute immunity, which is also referred to as the litigation privilege in Connecticut, as set forth in *Simms* v. *Seaman*, 308 Conn. 523, 531–40, 69 A.3d 880 (2013). In *Simms*, we noted that the doctrine of absolute immunity originated in response to "the need to bar persons accused of crimes from suing their accusers for defamation." Id., 531. The doctrine then developed to encompass and bar defamation claims against all participants in judicial proceedings, including judges, attorneys, parties, and witnesses. Id., 532. We further noted that, "[l]ike other jurisdictions, Connecticut has long recognized the litigation privilege," and that "[t]he general rule is that defamatory words spoken upon an occasion absolutely privileged, though spoken falsely, knowingly, and with express malice, impose no liability for damages recoverable in an action in slander . . . ." (Internal quotation marks omitted.) Id., 536.

Furthermore, in *Rioux* v. *Barry*, supra, 283 Conn. 343–44, we explained that "[t]he purpose of affording absolute immunity to those who provide information in connection with judicial and quasi-judicial proceedings is that in certain situations the public interest in having people speak freely outweighs the risk that individuals will occasionally abuse the privilege by making false and malicious statements. . . . [T]he possibility of incurring the costs and inconvenience associated with defending a [retaliatory] suit might well deter a citizen with a legitimate grievance from filing a complaint. . . . Put simply, absolute immunity furthers the public policy of encouraging participation and candor in judicial and quasi-judicial proceedings. This objective would be thwarted if those persons whom the common-law doctrine [of absolute immunity] was intended to protect nevertheless faced the threat of suit. In this regard, the purpose of the absolute immunity afforded participants in judicial and quasi-judicial proceedings is the same as the purpose of the sovereign immunity enjoyed by the state. . . . As a result, courts have recognized absolute immunity as a defense in certain retaliatory civil actions in order to remove this disincentive and thus encourage citizens to come forward with complaints or to testify." (Citations omitted; internal quotation marks omitted.)

In *Simms* v. *Seaman*, supra, 308 Conn. 540–45, we further discussed the expansion of absolute immunity to bar retaliatory civil actions beyond claims of defamation. For example, we have concluded that absolute immunity bars claims of intentional interference with contractual or beneficial relations arising from statements made during a civil action. See *Rioux* v. *Barry*, supra, 283 Conn. 350–51 (absolute immunity applies to intentional interference with contractual relations because that tort comparatively "is more like defamation than vexatious litigation"). We have also precluded claims of intentional infliction of emotional distress arising from statements made during judicial proceedings on the basis of absolute immunity. See *DeLaurentis* v. *New Haven*, 220 Conn. 225, 263–64, 597 A.2d 807 (1991). Finally, we have most recently applied absolute immunity to bar retaliatory claims of fraud against attorneys for their actions during litigation. See *Simms* v. *Seaman*, supra, 545–46. In reviewing these cases, it becomes clear that, in expanding the doctrine of absolute immunity to bar claims beyond defamation, this court has sought to ensure that the conduct that absolute immunity is intended to protect, namely, participation and candor in judicial proceedings, remains protected regardless of the particular tort alleged in response to the words used during participation in the judicial process. Indeed, we recently noted that "[c]ommentators have observed that, because the privilege protects the *communication*, the nature of the theory [on which the challenge is based] is irrelevant." (Emphasis in original; internal quotation marks omitted.) Id., 548.

We have, however, recognized a distinction between attempting to impose liability upon a participant in a judicial proceeding for the words used therein and attempting to impose liability upon a litigant for his improper use of the judicial system itself. See *DeLaurentis* v. *New Haven*, supra, 220 Conn. 263–64 ("whether or not a party is liable for vexatious suit in bringing an unfounded and malicious action, he is not liable for the *words used* in the pleadings and documents used to prosecute the suit" [emphasis added; internal quotation marks omitted]). In this regard, we have refused to apply absolute immunity to causes of action alleging the improper use of the judicial system.

For example, in *Simms* v. *Seaman*, supra, 308 Conn. 540–41, we observed that, in *Mozzochi* v. *Beck*, 204 Conn. 490, 491–92, 494, 529 A.2d 171 (1987), an abuse of process case, "this court determined that attorneys are not protected by absolute immunity . . . [for] conduct constitut[ing] the use of legal process in an improper manner or primarily to accomplish a purpose for which it was not designed. . . . The court nevertheless sought to reconcile its responsibility to ensure unfettered access to the courts and to avoid a possible

chilling effect on would-be litigants of justiciable issues by limiting liability [for abuse of process] to situations in which the plaintiff can point to specific misconduct intended to cause specific injury outside of the normal contemplation of private litigation. Any other rule would ineluctably interfere with the attorney's primary duty of robust representation of the interests of his or her client." (Citation omitted; internal quotation marks omitted.) *Simms* v. *Seaman*, supra, 540–41.

Furthermore, "[t]his court also has determined that absolute immunity does not bar claims against attorneys for vexatious litigation or malicious prosecution. . . . [T]he court in *Rioux* [v. *Barry*, supra, 283 Conn. 341–49] expressly permitted a claim for vexatious litigation against . . . members of the state police for allegedly false statements they had made in the course of a quasi-judicial proceeding . . . [because] whether and what form of immunity applies in any given case is a matter of policy that requires a balancing of interests . . . and the fact that the tort of vexatious litigation itself employs a test that balances the need to encourage complaints against the need to protect the injured party's interests counsels against a categorical or absolute immunity from a claim of vexatious litigation. . . . The court concluded that the stringent requirements of the tort of vexatious litigation, including that the prior proceeding had terminated in the plaintiff's favor, provide[d] adequate room for both appropriate incentives to report wrongdoing and protection of the injured party's interest in being free from unwarranted litigation." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Simms* v. *Seaman*, supra, 308 Conn. 541–42.

Turning to the present case, we begin by noting that, notwithstanding the plaintiff's claims to the contrary, the factors considered in *Rioux* v. *Barry*, supra, 283 Conn. 350–51, are simply instructive. In *Rioux*, we emphasized that "whether and what form of immunity applies in any given case is a matter of policy that requires a balancing of interests." Id., 346. We also observed that, in previous cases that had presented a question of the applicability of the doctrine of absolute immunity, we applied the general principles underlying that doctrine to "the particular context" of those cases. Id., 345. Furthermore, the cases following *Rioux* have not relied exclusively or entirely on the factors enumerated therein, but instead have considered the issues relevant to the competing interests in each case. See, e.g., *Simms* v. *Seaman*, supra, 308 Conn. 545–46.

With respect to the competing interests in the present case, the plaintiff contends that it is entitled to absolute immunity from the defendant's § 31-290a counterclaim because that claim is founded solely on the plaintiff's conduct in filing the present action, and absolute immunity is necessary to protect and encourage injured par-

ties to resolve their disputes peacefully through the judicial process. We disagree.

First, we agree with the trial court's conclusion that, for balancing purposes, "the allegations in the counterclaim are more akin to an abuse of process claim [than] a defamation or tortious interference claim." The torts of vexatious litigation and abuse of process both prohibit conduct that subverts the underlying purpose of the judicial process. Specifically, these causes of action prevent, or hold an individual liable for, the improper use of the judicial process for an illegitimate purpose, namely, to inflict injury upon another individual in the form of unfounded actions. See *DeLaurentis* v. *New Haven*, supra, 220 Conn. 264. Section 31-290a mirrors the purpose of these torts by preventing, or holding employers liable for, discrimination against an employee who exercises his rights under the act. See footnote 1 of this opinion. In the context of employer initiated litigation, like that involved in the present case, § 31-290a is designed to prevent, or hold the employer liable for, the improper use of the judicial process for the illegitimate purpose of retaliating against an employee for his exercise of his rights under the act. The illegitimate use of litigation in such a retaliatory manner subverts the purpose of the judicial system and, as a matter of public policy, we will not encourage such conduct by affording it the protection of absolute immunity. See *Simms* v. *Seaman*, supra, 308 Conn. 545–46 (whether claim subverts underlying purpose of judicial proceeding is relevant to determination of whether absolute immunity should apply); see also *Rioux* v. *Barry*, supra, 283 Conn. 350 (absolute immunity does not bar claims of vexatious litigation); *Mozzochi* v. *Beck*, supra, 204 Conn. 495 (absolute immunity does not bar claims of abuse of process).

The plaintiff contends, however, that § 31-290a does not contain stringent requirements to protect an employer's right to petition the courts for redress for its grievances. In this respect, the plaintiff claims that § 31-290a does not require the defendant to prove an illegal purpose or retaliatory motive in order to make out a prima facie case of discrimination and, therefore, that proof of a claim under § 31-290a is far less stringent than both vexatious litigation and abuse of process. The plaintiff takes particular issue with the burden shifting test that courts perform to determine whether an employee has established that he has been subjected to illegal discrimination by his employer. See *Mele* v. *Hartford*, 270 Conn. 751, 768–69, 855 A.2d 196 (2004).[9] Nevertheless, "[w]e have stated on several occasions that this burden shifting methodology is intended to provide guidance to fact finders who are faced with the difficult task of determining intent in complicated discrimination cases. [Therefore] [i]t must not . . . cloud the fact that it is the [employee's] ultimate burden to prove that the [employer] *intentionally discrimi-*

nated against [him] . . . ." (Emphasis added; internal quotation marks omitted.) Id. Given that the defendant bears the ultimate burden to prove that the plaintiff's claims constitute retaliation in violation of § 31-290a, we disagree that the burden shifting methodology renders the requirements of the defendant's counterclaim appreciably less stringent. Cf. *Simms* v. *Seaman*, supra, 308 Conn. 549 (heightened burden of clear and convincing evidence insufficient to render elements of fraud appreciably more stringent).

In addition, in *Rioux* v. *Barry*, supra, 283 Conn. 347, we highlighted the "stringent requirements" embodied in the elements of a vexatious litigation claim, namely that the plaintiff prove actual malice, lack of probable cause, and the prior termination of proceedings in the plaintiff's favor, because those stringent requirements provided an *additional consideration* relevant to our balancing analysis. Thus, stringent requirements that partially embody the balancing analysis this court undertakes to determine the applicability of absolute immunity simply add weight to the side of the balance that counsels against applying absolute immunity. Put differently, stringent proof requirements are relevant in determining whether absolute immunity should apply, but are not *required* to make that determination.

Indeed, the elements of abuse of process, a tort which also falls outside the scope of absolute immunity, are less stringent than the elements of vexatious litigation. Specifically, unlike the tort of vexatious litigation, a claim for abuse of process does not require termination of the underlying litigation in favor of the plaintiff. See *Mozzochi* v. *Beck*, supra, 204 Conn. 494 ("An action for abuse of process lies against any person using a legal process against another in an improper manner or to accomplish a purpose for which it was not designed. . . . Because the tort arises out of the accomplishment of a result that could not be achieved by the proper and successful use of process . . . the gravamen of the action for abuse of process is the use of a legal process . . . against another *primarily* to accomplish a purpose for which it is not designed . . . . [T]he [use] of primarily is meant to exclude liability when the process is used for the purpose for which it is intended, but there is an incidental motive of spite or an ulterior purpose of benefit to the defendant." [Citations omitted; emphasis in original; internal quotation marks omitted.]); cf. *Lewis Truck & Trailer, Inc.* v. *Jandreau*, 11 Conn. App. 168, 170–71, 526 A.2d 532 (1987) ("Abuse of process differs from malicious prosecution in that the gist of the tort is not commencing an action or causing process to issue without justification, but misusing, or misapplying process justified in itself for an end other than that which it was designed to accomplish. The *purpose* for which process is used, once it is issued, is the only thing of importance. Consequently, in an action for abuse of process it is unnecessary for

the plaintiff to prove that the proceeding has terminated in his favor, or that the process was obtained without probable cause or in the course of a proceeding begun without probable cause." [Emphasis added; internal quotation marks omitted.]). Therefore, the absence of an element requiring termination of a prior action in the employee's favor under § 31-290a does not undermine our conclusion that the balance of the interests in the present case weighs against the application of absolute immunity to the defendant's counterclaim.

We also note that the factual allegations required to support a § 31-290a claim may be more stringent than those required to support an abuse of process claim. While an abuse of process claim requires only proof that the use of legal process was "*primarily* to accomplish a purpose for which it was not designed"; (emphasis in original; internal quotation marks omitted) *Mozzochi* v. *Beck*, supra, 204 Conn. 497; in the present case, the defendant has pleaded that the plaintiff filed its claims against him "*solely* because [the defendant] exercised his rights under the [act]." (Emphasis added.) Although retaliation may not be the sole motivation in all § 31-290a cases, it often may be. See footnote 9 of this opinion.

Furthermore, we also agree with the trial court's conclusion that, under the circumstances of the present case, "the purposes of absolute immunity are equally applicable to the present counterclaim as [they are] to defamation and other torts to which absolute immunity has been applied." Indeed, where an employer initiates litigation following an employee's exercise of his rights under the act, the potential of a counterclaim alleging that the employer's litigation constitutes improper retaliation may serve to deter some employers with justiciable grievances from filing civil actions in the first instance. That some employers may be deterred from initiating litigation against an employee in good faith for fear of defending against a retaliation counterclaim, however, does not undermine our conclusion that, on balance, the interests in the present case weigh against applying absolute immunity. Indeed, most plaintiffs must make a determination regarding whether initiating a cause of action is worth the risk of opening the door to potential counterclaims, not just employers wishing to sue their former employees. Moreover, as the trial court properly observed, "the vast majority of retaliation claims under the act do not involve litigation related conduct by the employer." We, therefore agree with the trial court that the actual impact, in terms of a chilling effect caused by the potential threat of facing a counterclaim alleging retaliation pursuant to § 31-290a, "is de minimis and will potentially arise only in those circumstances where an employer brings an action against an employee who has *also* made a claim for benefits under the act. Compare this somewhat unique confluence of circumstances with a defamation claim arising out of

judicial proceedings and the difference is stark. . . . In short, *every* judicial or quasi-judicial proceeding creates a potential defamation claim based upon the statements made in connection therewith. Protection against such claims is essential to ensure candor within and fair access to the proceedings. In contrast, the potential for a retaliation claim as is brought [in the present case] is *extremely limited* in type and circumstance." (Emphasis added.) This limited potential for a § 31-290a claim brought in response to an employer's initiation of litigation against an employee weighs against applying absolute immunity to bar the defendant's counterclaim in the present case.[10]

It also bears noting that employees have successfully asserted federal claims of employer retaliation under Title VII, predicated on their employers' initiation of litigation against the employees in response to the exercise of their Title VII rights.[11] See, e.g., *Berry* v. *Stevinson Chevrolet*, 74 F.3d 980, 986 (10th Cir. 1996) (retaliatory prosecution may constitute adverse action sufficient to violate Title VII); *Spencer* v. *International Shoppes*, *Inc.*, 902 F. Supp. 2d 287, 294 (E.D.N.Y. 2012) (employer initiated litigation "may be considered retaliatory if motivated, even partially, by a retaliatory animus"); *Gliatta* v. *Tectum*, *Inc.*, 211 F. Supp. 2d 992, 1009 (S.D. Ohio 2002) (allegedly bad faith counterclaim brought by employer against employee can constitute Title VII retaliation); *Ward* v. *Wal-Mart Stores*, *Inc.*, 140 F. Supp. 2d 1220, 1231 (D.N.M. 2001) ("the filing of frivolous lawsuits may constitute an adverse employment action for purposes of a retaliation claim"); *Equal Employment Opportunity Commission* v. *Outback Steakhouse of Florida*, *Inc.*, 75 F. Supp. 2d 756, 758 (1999) (employer filing action, not in good faith, but motivated by retaliation can be basis for claim under Title VII); *Equal Employment Opportunity Commission* v. *Virginia Carolina Veneer Corp.*, 495 F. Supp. 775, 778 (W.D. Va. 1980) (employer defamation action was retaliation under Title VII); cf. *Beckham* v. *Grand Affair of North Carolina*, *Inc.*, 671 F. Supp. 415, 419 (W.D.N.C. 1987) (employer instituted criminal prosecution of former employee who filed claim with Equal Employment Opportunity Commission constituted retaliation under Title VII); but see *Hernandez* v. *Crawford Building Material Co.*, 321 F.3d 528, 533 (5th Cir. 2003) (given strict interpretation of retaliation claims, employer's filing of counterclaim cannot support Title VII retaliation claim).

As the plaintiff points out, we acknowledge that the defense of absolute immunity was not raised in any of the preceding cases. Nevertheless, the fact that federal courts have entertained such claims weighs against applying absolute immunity to bar the defendant's § 31-290a counterclaim in the present case. Moreover, the only federal court to address the applicability of absolute immunity to a counterclaim alleging retaliatory liti-

gation by an employer in the context of Title VII ultimately reached the conclusion that the doctrine did not apply. See *Steffes* v. *Stepan Co.*, 144 F.3d 1070, 1075–76 (7th Cir. 1998). In *Steffes*, although the court eventually dismissed the retaliation counterclaim because the employer's alleged conduct was insufficient as a matter of law to sustain a claim of retaliation under Title VII, the court noted that "recognition of the litigation privilege sought by the [employer] could interfere with the policies underlying the anti-retaliation provisions of Title VII . . . . Retaliatory acts come in infinite variety . . . and even actions taken in the course of litigation could constitute retaliation in appropriate circumstances. . . . The point is that, since some actions taken in the course of litigation could conceivably constitute retaliation, an absolute litigation privilege as defined in Illinois law would be too broad [to augment the federal common-law litigation privilege] because it would insulate behavior that could otherwise be actionable under Title VII . . . ." (Citations omitted.) Id., 1075. The court went on to state that "[w]e do not wish to foreclose the possibility that some actions taken in the course of litigation could constitute retaliation, and so we cannot agree with the [D]istrict [C]ourt's decision extending an absolute litigation privilege to this case." Id., 1076. Thus, our conclusion that absolute immunity should not bar the defendant's retaliation counterclaim in the present case accords with the treatment of Title VII retaliation claims in federal court.

As a final matter, the plaintiff claims that cases from jurisdictions that have embraced a broader litigation privilege support its argument that we should similarly interpret the doctrine of absolute immunity to encompass and protect the act of filing a cause of action. In support of this claim, at oral argument before this court, the plaintiff pointed to our reliance on, inter alia, several cases from Florida in explaining our reasoning for extending the litigation privilege to bar claims of fraud against attorneys in *Simms* v. *Seaman*, supra, 308 Conn. 567. Although we did note in *Simms*, that "many jurisdictions have followed an approach that has strengthened the litigation privilege, not abrogated it," we further explained that our willingness to extend the litigation privilege on the facts of that case was because "[o]ne objective of expanding the privilege has been to prevent plaintiffs from subverting the purposes of the defamation privilege by bringing actions on other legal theories. . . . Thus, courts have applied the privilege to bar causes of action for, among others, intentional infliction of emotional distress; interference with contractual relationship; fraud; invasion of privacy; abuse of process; and negligent misrepresentation. . . . Another objective simply has been to recognize that the privilege should apply to other acts associated with an attorney's function as an advocate." (Citations omitted; internal quotation marks omitted.) Id., 566–67.

Therefore, it is clear that our recognition, in *Simms*, that other jurisdictions have extended the litigation privilege did not suggest that Connecticut similarly adopt a litigation privilege protecting *all* conduct associated with judicial proceedings. On the contrary, our reference to those states that have extended the litigation privilege served only to bolster our conclusion that, under the circumstances of the case in *Simms*, wherein attorneys faced fraud claims for allegedly concealing their client's true financial condition during an alimony proceeding, that claim should be barred by the doctrine of absolute immunity because it was the very type of claim that that doctrine was intended to prevent. Given that we have concluded that the defendant's claim of employer retaliation in violation of § 31-290a is *not* the type of claim that the doctrine of absolute immunity was intended to protect, we reject the plaintiff's argument that our reference with approval, in *Simms* v. *Seaman*, supra, 308 Conn. 566–67, to other jurisdictions that have adopted broader litigation privileges justifies extending the doctrine of absolute immunity to bar the defendant's counterclaim in the present case. This conclusion is also bolstered by the fact that federal courts, which apply the federal common-law litigation privilege, have declined to apply a broader state litigation privilege to employer retaliation claims. See *Pardi* v. *Kaiser Foundation Hospitals*, 389 F.3d 840, 851 (9th Cir. 2004); *Steffes* v. *Stepan Co.*, supra, 144 F.3d 1075–76.

Accordingly, we conclude that an employer's right to seek redress for its alleged grievances in court simply does not outweigh an employee's interest in exercising his rights under the act without fear of retaliation by his employer, in the form of litigation or otherwise. To afford absolute immunity under these circumstances would serve only to incentivize retaliatory litigation and discourage employees from exercising their rights under the act, a situation the legislature clearly intended to prevent when it enacted § 31-290a. Allowing claims of retaliation in violation of § 31-290a properly discourages an employer from filing baseless and retaliatory causes of action and, therefore, is unlikely to significantly deter employers seeking to utilize the judicial system for the proper purpose of filing legitimate, nonretaliatory claims against their employees.

The judgment is affirmed.

In this opinion the other justices concurred.

* The listing of justices reflects their seniority status on this court as of the date of oral argument.

[1] General Statutes § 31-290a provides in relevant part: "(a) No employer who is subject to the provisions of this chapter shall discharge, or cause to be discharged, or in any manner discriminate against any employee because the employee has filed a claim for workers' compensation benefits or otherwise exercised the rights afforded to him pursuant to the provisions of this chapter.

"(b) Any employee who is so discharged or discriminated against may . . . (1) [b]ring a civil action in the superior court . . . for the reinstatement of his previous job, payment of back wages and reestablishment of employee

benefits to which he would have otherwise been entitled if he had not been discriminated against or discharged and any other damages caused by such discrimination or discharge. The court may also award punitive damages. Any employee who prevails in such a civil action shall be awarded reasonable attorney's fees and costs to be taxed by the court . . . ."

[2] The plaintiff appealed from the trial court's denial of its motion to dismiss to the Appellate Court, and we transferred that appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1. With respect to our appellate jurisdiction under General Statutes § 52-263, "[w]e previously have determined that, under the second prong of *State* v. *Curcio*, [191 Conn. 27, 31, 463 A.2d 566 (1983)], a colorable claim to a right to be free from an action is protected from the immediate and irrevocable loss that would be occasioned by having to defend an action through the availability of an immediate interlocutory appeal from the denial of a motion to dismiss." *Dayner* v. *Archdiocese of Hartford*, 301 Conn. 759, 771, 23 A.3d 1192 (2011); see also *Chadha* v. *Charlotte Hungerford Hospital*, 272 Conn. 776, 786–87, 865 A.2d 1163 (2005) (allowing interlocutory appeal for claim of absolute immunity predicated upon participation in judicial proceedings).

[3] General Statutes § 31-296 (a) provides in relevant part: "If an employer and an injured employee . . . reach an agreement in regard to compensation, such agreement shall be submitted in writing to the commissioner by the employer with a statement of the time, place and nature of the injury upon which it is based; and, if such commissioner finds such agreement to conform to the provisions of this chapter in every regard, the commissioner shall so approve it. . . ."

Although § 31-296 (a) was amended by the legislature in 2011 and 2012; see Public Acts 2011, No. 11-44, § 48; Public Acts, Spec. Sess., June, 2012, No. 12-1, § 85; those amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

[4] The plaintiff appealed from the decision of the board to the Appellate Court pursuant to General Statutes § 31-301b, claiming that the board improperly failed to: (1) approve the agreement as a "voluntary settlement" of the defendant's claim for workers' compensation; and (2) consider allegedly deceitful and fraudulent conduct by the defendant when it decided not to enforce the release of his workers' compensation claim. *Leonetti* v. *MacDermid, Inc.*, supra, 310 Conn. 204 n.6.

[5] In analyzing whether absolute immunity should bar a claim of intentional interference with contractual or beneficial relations in *Rioux*, we looked to whether: (1) "the underlying purpose of absolute immunity applies just as equally to [that] tort as it does to the tort of defamation"; (2) "[that] tort . . . contain[s] within it the same balancing of relevant interests that are provided in the tort of vexatious litigation"; (3) "the elements of [that tort] . . . provide the same level of protection against the chilling of witness' testimony as do the elements of vexatious litigation"; and (4) "[that] tort is more like defamation than vexatious litigation." *Rioux* v. *Barry*, supra, 283 Conn. 350–51.

[6] The trial court also rejected the plaintiff's argument that the court should follow the rule embodied in the jurisprudence of Florida. The trial court observed that Florida's " 'litigation privilege' " has its genesis in that state's constitution, and the Florida Supreme Court has since expanded the privilege to cover all acts related to and occurring within judicial proceedings. As the trial court noted, however, neither has the plaintiff advanced any "argument based upon the Connecticut constitution [in its motion to dismiss, nor] has our appellate jurisprudence created as expansive a 'litigation privilege.' "

[7] In this regard, the defendant argues that disallowing the application of absolute immunity to his claim would not deter employers from bringing claims against employees in good faith and that, therefore, there is no reason to encourage or protect, as a matter of public policy, employer litigation that is properly alleged to be both baseless and retaliatory. Instead, the defendant contends, applying absolute immunity to bar retaliation claims predicated solely upon an employer's act of filing a civil action would only improperly deter employees from exercising their rights under the act.

[8] The defendant also posits, as an alternate ground for affirmance, that absolute immunity does not implicate subject matter jurisdiction and, therefore, must be raised as a special defense rather than by way of a motion to dismiss. Because we affirm the judgment of the trial court, we need not address this argument.

[9] To prove employer discrimination, "[t]he plaintiff bears the initial burden of proving by the preponderance of the evidence a prima facie case of

discrimination. . . . In order to meet this burden, the plaintiff must present evidence that gives rise to an inference of unlawful discrimination. . . . If the plaintiff meets this initial burden, the burden then shifts to the defendant to rebut the presumption of discrimination by producing evidence of a legitimate, nondiscriminatory reason for its actions. . . . If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity. . . . The plaintiff then must satisfy her burden of persuading the factfinder that she was the victim of discrimination either directly by persuading the [factfinder] . . . that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." (Internal quotation marks omitted.) *Mele* v. *Hartford*, supra, 270 Conn. 768.

[10] Indeed, as we have noted previously in this opinion, the question of whether an employer's act of filing a cause of action following an employee's exercise of his rights under the act is entitled to absolute immunity is one of first impression before this court. The absence of cases presenting this particular issue suggests that our refusal to afford absolute immunity to the plaintiff's litigation conduct in the present case will not have the widespread chilling effect on employers that the plaintiff posits will occur.

[11] "We look to federal law for guidance in interpreting state employment discrimination law, and analyze claims under our act in the same manner as federal courts evaluate federal discrimination claims." *Jackson* v. *Water Pollution Control Authority*, 278 Conn. 692, 705 n.11, 900 A.2d 498 (2006).