UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 75 | Number 1 Article 9

11-1-1996

Terminate, Then Retaliate: Title VII Section 704(a) and Robinson v. Shell Oil Co.

Todd Mitchell

Terminate, then Retaliate: Title VII Section 704(a) and *Robinson v. Shell Oil Co.*

In response to America's demand to improve the social and economic positions of minorities relative to other workers in the United States, Congress attempted to eradicate "the root of the problem"[1] by enacting Title VII of the Civil Rights Act of 1964.[2] Described as "both a centerpiece and an emblem of a kind of second reconstruction in which America determined to rise above the racism of the past and to resurrect ideals dormant since inception,"[3] Title VII's clear purpose was to eliminate employment discrimination.[4] Over three decades later, one of the many unresolved Title VII issues is whether the statute protects individuals from retaliatory conduct by employers that occurs after the employment relationship has terminated.

Recently, in *Robinson v. Shell Oil Co.*,[5] the United States Court of Appeals for the Fourth Circuit held that former employees are excluded from the anti-retaliation protection of Title VII.[6] The dissent responded by presenting this hypothetical situation:

> Imagine that on Friday, the first day of the month, XYZ Corporation decides to terminate two of its line workers, Smith and Jones, and immediately gives them two weeks' written notice. Smith and Jones, each believing that she has been unlawfully discriminated against, file charges with the EEOC on Monday the fourth. Unable, however, to afford the luxury of undue optimism, both Smith and Jones explore the possibility of signing on with XYZ's competitor, LMNOP, Inc.
>
> On Tuesday the twelfth, XYZ's personnel department receives a letter from its LMNOP counterpart, requesting

---

1. *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1113 (1971) [hereinafter *Developments*].

2. Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701-16, 78 Stat. 241, 253-66 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (1994)).

3. D. Marvin Jones, *The Death of the Employer: Image, Text, and Title VII*, 45 VAND. L. REV. 349, 350-51 (1992).

4. See HERMAN BELZ, EQUALITY TRANSFORMED 7-8 (1991) ("Congress guaranteed the right of equal employment opportunity in private industry to every individual.").

5. 70 F.3d 325 (4th Cir. 1995) (en banc), *cert. granted*, 116 S. Ct. 1541 (1996).

6. *See id.* at 327-32; *see also* 42 U.S.C. § 2000e-3(a) (1994) (Title VII anti-retaliation provision); *infra* text accompanying note 15.

> employment information and references on Smith and Jones. Annoyed that the pair have filed EEOC charges against the company, XYZ's personnel director intentionally and vindictively prepares false reports for dissemination to LMNOP. The spurious reports are placed in separate envelopes and stamped for mailing on Friday the fifteenth, which also happens to be Smith and Jones's last day at XYZ. Although Smith's report is included in Friday's outgoing mail, Jones's report is inadvertently excluded, and, therefore, not sent to LMNOP until Monday the eighteenth.[7]

The dissent noted that while the conduct of the company was equally reprehensible toward both employees, the majority's analysis would permit Smith to recover, but would disallow a remedy to Jones.[8] The apparent arbitrariness of this result deserves further attention.

This Note describes the *Robinson* decision and discusses the considerations influencing both the majority and dissent.[9] Next, the Note examines the historical background of Title VII's anti-retaliation provision, focusing particularly on the alternative judicial interpretations and legislative activity since its enactment.[10] This Note then considers judicial interpretations of statutory language in the anti-retaliation provisions of other anti-discrimination statutes.[11] Finally, this Note analyzes the Fourth Circuit's decision in light of policy considerations and concludes that a decision extending some protection to former employees would better serve the remedial purposes of Title VII.[12]

Charles T. Robinson alleged that after he charged Shell Oil Company with racial discrimination in connection with the termination of his employment, the company " 'provided false information and negative job references' " to prospective employers.[13] He sought relief under the anti-retaliation provision of the Civil Rights Act of 1964,[14] section 704(a) of Title VII, which states:

It shall be an unlawful employment practice for an employer

---

7. *Robinson*, 70 F.3d at 332 (Hall, J., dissenting).
8. *See id.* at 332-33 (Hall, J., dissenting).
9. *See infra* notes 13-59 and accompanying text.
10. *See infra* notes 60-75 and accompanying text.
11. *See infra* notes 76-132 and accompanying text.
12. *See infra* notes 133-75 and accompanying text.
13. *Robinson*, 70 F.3d at 327 (citation omitted).
14. *See id.*; *see also* 42 U.S.C. § 2000e-3(a) (1994) (Title VII anti-retaliation provision).

> to discriminate against any of his employees or applicants for employment . . . 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.[15]

After a divided panel held that Robinson could assert a claim for retaliation against a former employee,[16] the Fourth Circuit vacated the decision and reheard the case en banc.[17] Resolving the critical issue in the case, the court interpreted the term "employees" to include only persons still working for the defendant at the time the retaliatory act occurs.[18] Because Robinson's employment terminated prior to the alleged retaliation, the court denied Robinson relief under the anti-retaliation provision.[19]

Writing for the majority, Judge Hamilton justified this seemingly harsh decision as the strict construction of a statute that reflects an unambiguous legislative intent.[20] Adherence to the traditional framework for statutory construction, he noted, required the court to " 'give effect to the legislative will as expressed in the language' "[21] of the statute and to interpret words according to their "common usage."[22] Another particularly relevant rule of statutory construction provides that a definition of a term contained in a definitional section of the respective statute controls the meaning of that term throughout the statute.[23] For purposes of Title VII, § 2000e(f) defines "employee" as "an individual employed by an employer."[24] The court relied on this definition to determine that the statute was not

---

15. 42 U.S.C. § 2000e-3(a).

16. *See* Robinson v. Shell Oil Co., No. 93-1562, 1995 WL 25831 (4th Cir. Jan. 18, 1995).

17. *See Robinson*, 70 F.3d at 328.

18. *See id.* at 329-30.

19. *See id.*

20. *See id.* at 328-30.

21. *Id.* at 328 (quoting United States v. Murphy, 35 F.3d 143, 145 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 954 (1995)).

22. *Id.* Judge Hamilton also revealed his reluctance to " 'wrench[] from the words of a statute a meaning which literally they did not bear in order to escape consequences thought to be absurd or to entail great hardship.' " *Id.* (quoting Crooks v. Harrelson, 282 U.S. 55, 60 (1930)).

23. *See id.* (citing Florida Dep't of Banking & Fin. v. Board of Governors of Fed. Reserve Sys., 800 F.2d 1534, 1536 (11th Cir. 1986); 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 47.07, at 152 (5th ed. 1992) ("A definition which declares what a term means . . . excludes any meaning that is not stated.")).

24. 42 U.S.C. § 2000e(f) (1994).

ambiguous and thus did not require further interpretation.[25] Judge Hamilton emphasized that in most situations, if a statute is facially clear and constitutionally permissible, the legal system's responsibility is to enforce the terms of the statute.[26]

The majority conceded that there may be rare exceptions to the rule that courts should not "stray beyond the plain language of unambiguous statutes"[27] either when "literal application of statutory language would lead to an absurd result,"[28] or when the result would be clearly contrary to congressional intent.[29] However, finding no congressional intent to achieve a result that conflicted with the literal interpretation of Title VII, the majority held both exceptions inapplicable.[30] Judge Hamilton concluded that the language of the anti-retaliation provision contained an unambiguous meaning that was

25. *See Robinson*, 70 F.3d at 330 ("If Congress intended Title VII to remedy discrimination beyond the employment relationship, then it could have easily done so by including 'former employee' when defining the term 'employee.' "). The court noted that, under the rules of statutory construction, the fact that § 2000e(f) did not define "employee" to include "an individual *no longer employed* by an employer" excluded the term's inclusion of former employees. *See id.* (citing SINGER, *supra* note 23, at 152). Further, the court applied an extension of this logic to determine that the definition itself was not ambiguous. *See id.* The court looked to BLACK'S LAW DICTIONARY to find the term "employed," as contained in § 2000e(f), defined as " 'performing work under an employer-employee relationship' " rather than "no longer performing work under an employer-employee relationship." *Id.* (quoting BLACK'S LAW DICTIONARY 525 (6th ed. 1990)). Likewise, the court determined the common usage of § 2000e(f)'s "employer" to mean " 'one who employs the services of others' " rather than "one who no longer employs the services of others." *Id.* (quoting BLACK'S LAW DICTIONARY, *supra*, at 525). *But see id.* at 335 (Hall, J., dissenting) ("[U]nder the statute's tautological definition of the term . . . one could no more comprehend what an employee is than one could ascertain the legal essence of the term designee, if defined merely as an 'individual designated by a designator.' ").

26. *See id.* at 329 (citing Caminetti v. United States, 242 U.S. 470, 485 (1917); *Murphy*, 35 F.3d at 145.

27. *Id.* (citing *Murphy*, 35 F.3d at 145).

28. *Id.* (citing Crooks v. Harrelson, 282 U.S. 55, 60 (1930)). Under this exception, the majority recognized that the resulting absurdity " 'must be so gross as to shock the general moral or common sense.' " *Id.* (quoting *Crooks*, 282 U.S. at 60). Further, application of the exception requires a showing that Congress did not intend the literal meaning of the statute to prevail. *See id.*

29. *See id.* (citing United States v. Ron Pair Enters., Inc., 489 U.S. 235, 242 (1989)). This exception requires that the legislative body clearly express the contrary intent. *See id.* (citing Russello v. United States, 464 U.S. 16, 20 (1983)). Additionally, if no legislative intent is expressed, the court "must assume that Congress intended to convey the language's ordinary meaning." *Id.* (citing United States v. Goldberger & Dubin, P.C., 935 F.2d 501, 506 (2d Cir. 1991); United States v. Stokley, 881 F.2d 114, 116 (4th Cir. 1989)).

30. *See id.* at 330. The majority interpreted both the absence of a reference to former employees in section 704(a) and the inclusion of the term "applicants for employment" as strong evidence of congressional intent not to include former employees. *See id.*

not inconsistent with legislative intent, and thus did not permit further interpretation by the court.[31]

Having refused to apply section 704(a) to former employees, the majority noted some additional policy considerations in support of that conclusion.[32] First, the majority indicated that the types of practices forbidden by certain sections of Title VII—practices "particularly related to *employment, not* post-employment relationships"—illuminated the proper scope of the anti-retaliation provision.[33] Second, the majority contended that the second element of a prima facie case of Title VII retaliation—" 'an adverse employment action' "—required that the employer's adverse action "be in relation to its own act of *employing* the employee bringing the charge."[34] Thus, the purpose of the anti-retaliation provision was to permit applicants or employees to bring discrimination actions under Title VII without fear of retaliation within the employment relationship.[35]

Finally, the majority addressed the abundance of authority in conflict with its decision.[36] Acknowledging the more popular construction of the term "employee," which includes former employees " ' "as long as the alleged discrimination is related to or arises out of the employment relationship," ' "[37] the majority recognized the rationale supporting this interpretation—that literal application of the term might defeat the "underlying policies of Title VII to eradicate discrimination in the work place."[38] The majority criticized the circuits adhering to the broader interpretation for disregarding the established rules of statutory construction[39] and for relying on policy

---

31. *See id.*

32. *See id.* at 330-31.

33. *Id.* (citing 42 U.S.C.A. § 2000e-2(a)(1) (West 1994)).

34. *Id.* at 331 (citing Reed v. Shepard, 939 F.2d 484, 492-93 (7th Cir. 1991); Williams v. Cerberonics, Inc., 871 F.2d 452, 457 (4th Cir. 1989)).

35. *See id.*

36. *See id.*

37. *Id.* (quoting Passer v. American Chem. Soc'y, 935 F.2d 322, 330 (D.C. Cir. 1991) (quoting EEOC v. Cosmair, Inc., L'Oreal Hair Care Div., 821 F.2d 1085, 1088 (5th Cir. 1987))).

38. *Id.* at 331-32 (citing Charlton v. Paramus Bd. of Educ., 25 F.3d 194, 200 (3d Cir.), *cert. denied*, 115 S. Ct. 590 (1994); *Passer*, 935 F.2d at 331; Bailey v. USX Corp., 850 F.2d 1506, 1509 (11th Cir. 1988); Rutherford v. American Bank of Commerce, 565 F.2d 1162, 1165-66 (10th Cir. 1977)).

39. *See id.* at 332. Judge Hamilton noted the Supreme Court's primary rule of statutory construction: " '[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete.' " *Id.* (quoting

arguments to "divine what they posit as Congress' intent from the reach of Title VII."[40] While the court admitted that extending the anti-retaliation provision to cover former employees was "tantalizing fruit," the majority considered itself bound by statutory language it believed communicated an unambiguous congressional intent.[41]

In dissent, Judge Hall initially responded to the majority's assertion that the statute should be strictly construed by presenting a hypothetical situation illustrating the absurdity that could result from such a rigid interpretation.[42] Temporarily assuming the clarity of the term "employee," the dissent focused on the application of the exceptions to the plain-meaning rule of statutory construction.[43] Judge Hall contended that by examining the congressional purposes of Title VII, the legislative intent to avoid the absurd results presented by the hypothetical was obvious.[44] According to him, the broad sweep and remedial nature of Title VII,[45] along with the "detailed enforcement procedure,"[46] demonstrated that Congress was "serious about eradicating discrimination and its invidious effects within the employment relationship."[47]

Judge Hall suggested that the majority had given employers

Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 254 (1992) (internal quotation omitted)).

40. *Id.*

41. *See id.*

42. *See id.* at 332-33 (Hall, J., dissenting). This hypothetical is quoted in the text accompanying *supra* note 7. Judge Hall presented a situation where two employees of the same company are given termination notices, file discrimination claims, and seek alternative employment. *See Robinson*, 70 F.3d at 332 (Hall, J., dissenting). If prospective employers request employment references from the original employer and the original employer provides retaliatory negative job references, the existence of a section 704(a) claim will depend upon whether the individual was still working for the original employer at the time the negative reference was given. *See id.* at 332-33 (Hall, J., dissenting). Such disparate treatment of employers' actions occurring only days apart gives employers the incentive to retaliate freely once the employment relationship terminates and leaves employees unprotected. *See id.* (Hall, J., dissenting).

43. *See Robinson*, 70 F.3d at 333-35 (Hall, J., dissenting); *see also id.* at 329-30 (describing the exceptions which permit courts to look beyond the plain language of unambiguous statutes and dismissing their application to section 704(a)); *supra* notes 27-31 and accompanying text (presenting the majority's statutory construction analysis).

44. *See Robinson*, 70 F.3d at 333 (Hall, J., dissenting).

45. *See id.* (Hall, J., dissenting) ("[I]t applies to virtually all entities that affect the employment relationship, and it proscribes a vast range of ignoble behavior.").

46. *Id.* (Hall, J., dissenting) ("[F]ederal courts . . . are accorded broad power to grant legal and equitable relief.").

47. *Id.* (Hall, J., dissenting). Judge Hall noted that the inclusion of the anti-retaliation provision evidenced a congressional understanding that the goal of eliminating discrimination could be effectively enforced only if people could assert claims without fear of retribution. *See id.* (Hall, J., dissenting).

"carte blanche" to retaliate and noted that the resulting impediment to Title VII's enforcement mechanism would hinder Congress's goals in two ways.[48] First, the dissent asserted that the ruling would allow employers to escape sanctions for culpable conduct and would be interpreted by employers as a license to retaliate against employees as long as employment is first terminated.[49] Second, and possibly more problematic, would be the resulting effect on remaining employees' incentive to bring actions for subsequent violations; employees fearful of losing their jobs would abstain from action simply to avoid retaliation.[50] Criticizing the majority's "myopic approach" for interpreting a section intended to strengthen Title VII protection in a manner that would weaken it,[51] the dissent embraced a test that focused on "whether the alleged retaliation arose from the employment relationship or was related to the employment."[52]

After addressing the absurdity that could stem from the majority's conclusion and disputing the intent behind the statute, the dissent confronted the ambiguity of the term "employee."[53] Noting the similar conclusions of six other circuits, Judge Hall found the term inherently ambiguous.[54] Although the definitional section of Title VII offers a meaning for the term,[55] the dissent argued that comprehension of the term "employee" required an understanding of its root—"to employ"—a term that carries different contextual meanings.[56] Judge Hall's interpretation of congressional intent—eradication of workplace discrimination—led him to conclude that section 704(a)'s protection should be extended to employees discriminated against if the retaliation arose from or was related to the

48. *See id.* at 333-34 (Hall, J., dissenting).

49. *See id.* at 333-34 & 334 n.4 (Hall, J., dissenting).

50. *See id.* at 334 (Hall, J., dissenting) ("[A]n aggrieved person should not be forced to remain with an abusive employer solely to ensure that he or she receives the full protection of Title VII.").

51. *See id.* (Hall, J., dissenting).

52. *Id.* (Hall, J., dissenting) (citing Charlton v. Paramus Bd. of Educ., 25 F.3d 194, 200 (3d Cir. 1994); Pantchenko v. C.B. Dolge Co., 581 F.2d 1052, 1055 (2d Cir. 1978)).

53. *See id.* at 335 (Hall, J., dissenting).

54. *See id.* (Hall, J., dissenting).

55. *See* 42 U.S.C. § 2000e(f) (1994).

56. *See Robinson*, 70 F.3d at 335 (Hall, J., dissenting). Judge Hall explained:

> For example, a manufacturing concern may have been, or will be a major "employer," without regard to any particular worker. Similarly, a recent retiree of Company X receiving a gold watch for his or her faithful service may be introduced at the year-end awards banquet as a long-time "employee" of the company.

Id. at 335 n.9 (Hall, J., dissenting).

employment relationship.[57] Judge Murnaghan, writing separately in dissent, illustrated the contextual variation of employment-related terminology by noting that, "despite the long lapse of time, Joe DiMaggio can still be referred to as a center fielder for the New York Yankees."[58] Essentially, the dissenters believed that the ambiguity of the term, combined with the absurdity that an alternative conclusion might cause, imposed upon them a duty to construe the term "employee" broadly.[59]

The disputed definition of the term "employee" is the most recent controversy stemming from Title VII of the Civil Rights Act of 1964.[60] The thrust of the substantive provisions of Title VII is to prohibit employers from "discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of the individual's race, color, religion, sex, or national origin."[61] In the activist political atmosphere of the 1960s, Congress sought to enact effective legislation that would "open employment opportunities for [African-Americans] in occupations which have been traditionally closed to them."[62] The limited effect of prior legislative efforts[63] and the failure of civil rights advocates to

---

57. *See id.* at 334-35 (Hall, J., dissenting).

58. *Id.* at 335 (Murnaghan, J., dissenting). Judge Murnaghan agreed with Judge Hall's analysis of the meaning of section 704(a). *See id.* (Murnaghan, J., dissenting).

59. *See id.* (Hall, J., dissenting); *id.* (Murnaghan, J., dissenting).

60. Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701-16, 78 Stat. 241, 253-66 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (1994)). As one commentator has noted: "The Civil Rights Act of 1964 was the most important civil rights legislation of this century. Title VII of that Act . . . has been its most important part." Norbert Schlei, *Foreword* to BARBARA L. SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW at vii (2d ed. 1983).

61. 42 U.S.C. § 2000e-2 (1994).

62. 110 CONG. REC. 6548 (1964) (remarks of Sen. Humphrey). In the words of one commentator:

> Title VII reflected for America a new sense of national identity, an America no longer ambivalent about who it included or what its values were. It was thus both a vehicle for legal prohibitions and a celebration of moral rebirth. It served as both law and as a ceremony of redemption.

Jones, *supra* note 3, at 351 (footnote omitted). *But see* Nancy E. Dowd, *The Test of Employee Status: Economic Realities and Title VII*, 26 WM. & MARY L. REV. 75, 77 n.10 (1984) (noting that "[r]ecent statistics show that disparities in income and employment continue unabated") (citing U.S. COMM'N ON CIVIL RIGHTS, STATE OF CIVIL RIGHTS 1957-1983, at 60-61 (1983)).

63. *See* BELZ, supra note 4, at 7 (discussing federal and state governmental attempts to discourage employment discrimination); Larry M. Parsons, *Title VII Remedies: Reinstatement and the Innocent Incumbent Employee*, 42 VAND. L. REV. 1441, 1445-46 (1989) (tracing history of federal efforts to eradicate employment discrimination from the adoption of the Thirteenth, Fourteenth and Fifteenth Amendments to pre-1960 congressional rejection of employment regulation bills).

successfully place the struggle against discrimination on the national political agenda[64] had left America's minority work force in a disadvantaged position.[65] Activists finally succeeded in "penetrating the sphere of private employment relations" by attaching Title VII to the "more widely supported proposals to ban discrimination in public facilities and accommodations, elections, and public education."[66]

The development of the judicial interpretation of Title VII has been greatly influenced by the Supreme Court's recognition that "[t]he objective of Congress in the enactment of Title VII is plain . . . . It was to achieve equality of employment opportunities . . . [by] the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."[67] Seeking to improve the relative economic position of the African-American community, Congress had proscribed a practice thought to be the major contributor to the persistent disparity—discrimination in employment.[68] Due to the widespread legislative and political commitment to these policies, along with the difficulties inherent in their effective enforcement, courts have interpreted the provisions of Title VII liberally.[69]

A critical provision of Title VII is section 704(a),[70] which makes it unlawful for "an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or . . . participated in any manner in an investigation, proceeding,

---

64. *See* BELZ, supra note 4, at 7.

65. *See, e.g.*, Jones, *supra* note 3, at 351 n.6 (noting that before 1964 few blacks occupied skilled jobs and that the relative unemployment rate in the non-white community had nearly doubled between 1947 and 1962).

66. BELZ, *supra* note 4, at 8.

67. Griggs v. Duke Power Co., 401 U.S. 424, 429-31 (1971); *see also* Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975) (construing impetus behind Title VII as a desire to " 'achieve equality' . . . 'and to [cause employers to] endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history' "); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973) (finding congressional intent to equalize employment opportunities and eliminate discriminatory practices). Thus, the essence of Title VII is the deterrence of workplace discrimination and the elimination of unlawful employment practices. *See* Parsons, *supra* note 63, at 1447-48. Additionally, the Court has noted the importance of returning victims of unlawful discrimination to their prediscrimination state. *See Moody*, 422 U.S. at 418; Parsons, *supra* note 63, at 1448.

68. *See Developments*, *supra* note 1, at 1113-14.

69. *See, e.g.*, Rutherford v. American Bank of Commerce, 565 F.2d 1162, 1165 (10th Cir. 1977) ("A statute which is remedial in nature should be liberally construed.").

70. 42 U.S.C. § 2000e-3 (1994).

or hearing under this subchapter."[71] The substantial participation of the individual in the enforcement process governing Title VII claims[72] necessitates a protective measure to mitigate the deterrent effect that potential adverse employment consequences would surely have on would-be claimants or participants.[73] Additionally, the protection offered by section 704(a) extends to activities beyond the assertion of Title VII claims and includes a broad range of opposition to unlawful employment practices.[74] If Congress had prohibited discrimination

71. *Id.*; *see* R. Bales, *A New Standard for Title VII Opposition Cases: Fitting the Personal Manager Double Standard Into a Cognizable Framework*, 35 S. TEX. L. REV. 95, 96-97 (1994) (discussing Title VII protections); Edward C. Walterscheid, *A Question of Retaliation: Opposition Conduct as Protected Expression Under Title VII of the Civil Rights Act of 1964*, 29 B.C. L. REV. 391, 391 (1988) ("A corollary to the grant of a wide variety of statutorily protected rights has been the grant of statutory protection against retaliation for the exercise of those rights.") (footnotes omitted).

72. *See* 42 U.S.C. § 2000e-5. Before a "person claiming to be aggrieved" may seek a remedy through the court system, he must file a charge, or a charge must be filed on his behalf, with the Equal Employment Opportunity Commission (EEOC) alleging a violation of Title VII. *See id.*; *see also* Robert Keith Shikiar, *Employment Discrimination: Title VII Retaliation Claims*, 57 GEO. WASH. L. REV. 1168, 1168-69 (1989) (arguing that the procedural delay between the filing of a charge and the EEOC's final disposition gives rise to the need for preliminary injunctive relief). If the EEOC finds, after investigation, "reasonable cause to believe that the charge is true," it must attempt to eliminate the discriminatory practice through "informal methods of conference, conciliation and persuasion." 42 U.S.C. § 2000e-5(b). If attempts to induce voluntary compliance are unsuccessful, the EEOC may bring a civil action against a nongovernmental respondent. *See id.* § 2000e-5(f). If the EEOC does not file a charge, it notifies the individual of his right to sue in federal district court. *See id.* Alternatively, a commissioner of the EEOC may file a charge in place of an aggrieved individual. *See id.* § 2000e-5(b). However, the EEOC's independent action generally focuses on large employers or labor organizations, so in most situations the individual seeking redress must file the charge himself. *See* Joseph Kattan, *Employee Opposition to Discriminatory Employment Practices: Protection From Reprisal Under Title VII*, 19 WM. & MARY L. REV. 217, 226-27 (1977).

73. *See* Kattan, *supra* note 72, at 226-27 ("[T]he principal purpose of section 704(a) is to protect persons who use the Act's statutory machinery to assert discrimination grievances or who otherwise participate in or cooperate with the enforcement process. Access to this machinery is indispensable to realization of the goals of the Act."). Commonly referred to as the "participation clause," *see, e.g.*, Holden v. Owens-Illinois, Inc., 783 F.2d 745, 748 (6th Cir. 1986) (referring to 42 U.S.C. § 2000e-3's protection of employees who have "participated in any manner in an investigation, proceeding, or hearing" under Title VII), this protection recognizes that employer retaliation is a "serious threat to employees' economic security and thus to the efficient operation of the enforcement process." Kattan, *supra* note 72, at 227.

74. *See* Kattan, *supra* note 72, at 232-46. *See generally* Walterscheid, *supra* note 71 (analyzing the extent of section 704(a)'s protection of opposition conduct). Though more restrictive than the participation clause because it does not protect all opposition conduct, the "opposition clause" protects activities such as employee investigation or protest of unlawful employment practices. *See* Kattan, *supra* note 72, at 232 (discussing 42 U.S.C. § 2000e-3's protection of employees who have "opposed any practice made an unlawful employment" practice by Title VII) ("[I]f the form of an employee's opposition is not so destructive of important social or business interests as to outweigh the objectives of Sec-

on the basis of "race, sex, religion, color, or national origin,"[75] but permitted discrimination against individuals who pursued relief or opposed unlawful practices, the risk of opposing such practices often would outweigh the potential gain to an aggrieved party. By reducing the threat of employer reprisal, section 704(a) serves a vital role in the enforcement mechanism of Title VII.

To establish a prima facie case of retaliatory discrimination, an individual must show: (1) that he engaged in activity protected by Title VII;[76] (2) that an adverse employment action occurred;[77] and (3) that a causal connection existed between the protected activity and the adverse consequence.[78] Once the plaintiff has established these three elements, the burden shifts to the employer to rebut the plaintiff's showing with "legitimate nonretaliatory reasons for the adverse action."[79] If the employer succeeds, the burden of proof returns to the plaintiff to establish by a preponderance of the evidence that the proffered reasons are pretextual and that discrimination was a prime motive for the adverse action.[80]

---

tion 704(a) which are served by protecting it . . . the opposition will normally be held to be protected.") (citation omitted).

75. 42 U.S.C. § 2000e-2.

76. *See, e.g.*, Ross v. Communications Satellite Corp., 759 F.2d 355, 365 (4th Cir. 1985). Filing and pursuing a Title VII claim is protected by the participation clause. The range of activities protected by the opposition clause is disputed. Its limits, however, may be found in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), where the Supreme Court stated that employers "may justifiably refuse to rehire one who was engaged in unlawful, disruptive acts . . . but only if this criterion is applied alike to members of all races." *Id.* at 804.

77. *See, e.g.*, *Ross*, 759 F.2d at 365. Such adverse actions include "discharge, demotion, harassment, intimidation, nonpromotion, suspension, undesirable transfer or assignment, temporary layoff, refusal to hire, withholding wages" and, potentially, "poor employment references." Gary Phelan, *Employee Opposition Under Title VII: Immunity to Aggrieved Persons Filing Discrimination Claims*, 59 N.Y. ST. B.J. 42, 42-43 (1987) (footnote omitted).

78. *See, e.g.*, *Ross*, 759 F.2d at 365. This nebulous connection is often the most difficult element of a section 704(a) claim to prove. One commentator, noting the inconsistency among the circuits regarding "the proximity in time sufficient to establish a causal connection," has suggested that it "depend[s] in no small measure on the court's subjective discretion." Walterscheid, *supra* note 71, at 408.

79. Williams v. Cerberonics, Inc., 871 F.2d 452, 457 (4th Cir. 1989) (citing *Ross*, 759 F.2d at 365).

80. *See id.* The *Williams* court noted that the "ultimate burden of persuasion in a Title VII . . . employment discrimination case never 'shifts' from the plaintiff," but that the "shifting intermediate evidentiary burdens . . . merely expedite the process of plaintiff's proof." *Id.* at 456 n.2 (citing Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)); *see* Price Waterhouse v. Hopkins, 480 U.S. 228, 245-46 (1989) (stating that the burden of persuasion remains with the plaintiff). For a thorough discussion of this framework, see Walterscheid, *supra* note 71, at 394-426.

Scant legislative history[81] and limited Supreme Court interpretation[82] of section 704(a) have resulted in confusing and conflicting treatment of the provision.[83] In the context of retaliation claims by former employees, the meaning of the term "employee" has been particularly difficult for courts to interpret.[84] The federal courts of appeals are currently divided on the issue, with the majority extending section 704(a)'s protection to individuals who suffer retaliation arising out of or related to the employment relationship.[85] Additionally, many circuits have construed similar anti-retaliation provisions in the Fair Labor Standards Act,[86] the National Labor Relations Act,[87] and the Age Discrimination in Employment Act[88] to protect

---

81. *See* Kattan, *supra* note 72, at 223 & n.30 (noting the limited congressional consideration of section 704(a) and suggesting that "[t]he paucity of material evincing congressional intent with respect to the provision . . . counsels that it be construed in the overall historical context of the legislation"); Walterscheid, *supra* note 71, at 393 ("One of the inherent difficulties in ascertaining the purpose and extent of coverage of . . . Section 704(a) is the almost total absence of any legislative history.").

82. *See* Search of WESTLAW, Supreme Court Database (Sept. 30, 1996) (search for records containing the word "section" within two words of "704(a)") (revealing that only three Supreme Court opinions refer to section 704(a) in any way: Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366, 369-70 nn.4-6, 376-77 (1979); Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50, 71-72 (1975); and McDonnell Douglas Corp. v. Green, 411 U.S. 792, 796-97 (1973)); *see also* Walterscheid, *supra* note 71, at 394 n.22 (noting retrieval of the same three cases in a 1986 computer search). In *Emporium Capwell*, the Court refused to define the reach of the opposition clause despite acknowledging the unresolved issue. *See* 420 U.S. at 71 n.25.

83. *See, e.g.*, Patricia Davidson, *The Definition of "Employee" Under Title VII: Distinguishing Between Employees and Independent Contractors*, 53 U. CIN. L. REV. 203, 214-22 (1984) (discussing contrasting methods of distinguishing whether an individual is an employee or an independent contractor); Kattan, *supra* note 72, at 242-46 (discussing the extent of section 704(a)'s protection of opposition conduct); Phelan, *supra* note 77, at 43 (discussing whether employers' lawsuits subsequent to Title VII claims constitute unlawful retaliation).

84. *See* Dowd, *supra* note 62, at 80-114 (discussing the distinction between employees and independent contractors under section 704(a) and arguing that courts should employ an "economic reality" test to make this determination rather than the widely used "employer control" test).

85. *See* Charlton v. Paramus Bd. of Educ., 25 F.3d 194, 200 (3d Cir.), *cert. denied*, 115 S. Ct. 590 (1994); EEOC v. J.M. Huber Corp., 927 F.2d 1322, 1331 & n.41 (5th Cir. 1991); Bailey v. USX Corp., 850 F.2d 1506, 1509-10 (11th Cir. 1988); O'Brien v. Sky Chefs, Inc., 670 F.2d 864, 869 (9th Cir. 1982), *overruled on other grounds by* Antonio v. Wards Cove Packing Co., 810 F.2d 1477, 1481-82 (9th Cir. 1987) (en banc); Pantchenko v. C.B. Dolge Co., 581 F.2d 1052, 1054-55 (2d Cir. 1978); Rutherford v. American Bank of Commerce, 565 F.2d 1162, 1165-66 (10th Cir. 1977).

86. *See, e.g.*, Dunlop v. Carriage Carpet Co., 548 F.2d 139, 147 (6th Cir. 1977) (concluding that the anti-retaliation provision of the Fair Labor Standards Act, though using the term "employee," actually applied to former employees). For the text of the Fair Labor Standards Act anti-retaliation provision, see 29 U.S.C. § 215(a)(3) (1994).

87. *See, e.g.*, NLRB v. Whitfield Pickle Co., 374 F.2d 576, 582-83 (5th Cir. 1967) ("We

former employees.[89] Before discussing the Fourth Circuit's persistent refusal to recognize section 704(a) protection for former employees, consideration of the rationale employed by these decisions, as well as the underlying legislative policy, is necessary.

In a series of opinions that are notable for their brevity,[90] the majority of circuits quickly aligned to protect former employees from employer retaliation. The issue of section 704(a)'s application to former employees was first considered in *Rutherford v. American Bank of Commerce*,[91] where the Tenth Circuit cited the remedial nature of Title VII and the interpretation of the term in other remedial contexts as indicative of congressional intent.[92] The *Rutherford* court stated that a narrow reading of the statute excluding former employees from protection was unjustified and noted that "[a] statute which is remedial in nature should be liberally construed."[93] The next year, in *Pantchenko v. C.B. Dolge Co.*,[94] the Second Circuit held that while a literal reading of section 704(a) might be construed to require an existing employment relationship, "such a narrow construction would

---

hold that where an employer refuses to rehire a former employee because the employee has filed unfair labor practice charges agianst the employer . . ., the employer has violated [the NLRB anti-retaliation provision]."). For the text of the National Labor Relations Act anti-retaliation provision, see 29 U.S.C. § 158(a)(4) (1994).

88. *See, e.g.*, Passer v. American Chem. Soc'y, 935 F.2d 322, 330-31 (D.C. Cir. 1991) (construing the anti-retaliation provision of the Age Discrimination in Employment Act to apply to former employees). For the text of the Age Discrimination in Employment Act anti-retaliation provision, see 29 U.S.C. § 623(d) (1994).

89. *See* Patricia A. Moore, *Parting Is Such Sweet Sorrow: The Application of Title VII to Post-Employment Retaliation*, 62 FORDHAM L. REV. 205, 214-18 (1993).

90. *See, e.g.*, *Huber Corp.*, 927 F.2d at 1331 (resolving issue in one paragraph); *O'Brien*, 670 F.2d at 869 (resolving issue in one sentence).

91. 565 F.2d 1162, 1164-66 (10th Cir. 1977).

92. *See id.* The Tenth Circuit quoted *Hodgson v. Charles Martin Inspectors of Petroleum, Inc.*, 459 F.2d 303, 306 (5th Cir. 1972), regarding former employees' need for protection from retaliation:

> "The possibility of retaliation, however, is far from being "remote and speculative" with respect to former employees for three reasons. First, it is a fact of business life that employers almost invariably require prospective employees to provide the names of their previous employers as references when applying for a job. Defendant's former employees could be severely handicapped in their efforts to obtain new jobs if the defendant should brand them as "informers" when references are sought. Second, there is the possibility that a former employee may be subjected to retaliation by his new employer if that employer finds out that the employee has in the past cooperated with the Secretary. Third, a former employee may find it desirable or necessary to seek reemployment with the defendant. In such a case the former employee would stand the same risk of retaliation as the present employee."

Rutherford, 565 F.2d at 1166 (quoting *Hodgson*, 459 F.2d at 306).

93. *Rutherford*, 565 F.2d at 1165.

94. 581 F.2d 1052 (2d Cir. 1978).

not give effect to the statute's purpose, which is to furnish a remedy against an employer's use of discrimination in connection with a prospective, present or past employment relationship to cause harm to another."[95] Further, the court refused to accept that a literal reading of the statute actually excluded former employees.[96] Finding the use of the term "individual" in other sections of Title VII to be a mechanism to protect those who could not be classified as employees[97] rather than an exclusion of former employees from protection, the court recognized that "once an employment relationship has been created, use of the term 'employee' in referring to a former employee, while colloquial, is not inappropriate."[98]

While most circuits have aligned themselves with the *Rutherford* and *Pantchenko* courts based on their interpretations of the legislative purpose behind Title VII and section 704(a),[99] other circuits have been unpersuaded by the logic of these interpretations in the face of the plain meaning of the statutory language.[100] In *Reed v. Shepard*,[101]

---

95. *Id.* at 1055.

96. *See id.*

97. *See id.* (citing 42 U.S.C. §§ 2000e-2, e-3) ("An applicant for employment . . . may not be described as an 'employee.' Similarly, a person seeking employment through an agency is not an employee of the agency . . . . In such cases use of the word 'individual' rather than 'employee' is more appropriate . . . .").

98. *Id.*

99. *See* Charlton v. Paramus Bd. of Educ., 25 F.3d 194, 198-202 (3d Cir. 1994) (concluding that plaintiff was not barred from a section 704(a) claim merely because she was not an employee "at the time her former employer potentially acted to interfere with her prospects of future employment"); EEOC v. J.M. Huber Corp., 927 F.2d 1322, 1331 (5th Cir. 1991) (quoting Rutherford v. American Bank of Commerce, 565 F.2d 1162, 1166 (10th Cir. 1977), for the proposition that "[t]here is no ground for affording any less protection [against retaliation] to defendant's former employees than to its present employees"); Bailey v. USX Corp., 850 F.2d 1506, 1509-10 (11th Cir. 1988) (refusing to uphold the district court determination that "an employer may not retaliate either against his 'employees' or 'applicants for employment' but can retaliate against anybody else in the world, including his *former* employees"); O'Brien v. Sky Chefs, Inc., 670 F.2d 864, 869 (9th Cir. 1982) ("The allegations . . . that [the defendant] refused to rehire and gave bad recommendations after termination and the filing of EEOC charges, are sufficient to assert retaliation claims."), *overruled on other grounds by* Antonio v. Wards Cove Packing Co., 810 F.2d 1477, 1481-82 (9th Cir. 1987).

100. *See* Polsby v. Chase, 970 F.2d 1360, 1365 (4th Cir. 1992), *vacated on other grounds sub nom.* Polsby v. Shalala, 507 U.S. 1048 (1993); Reed v. Shepard, 939 F.2d 484, 492-93 (7th Cir. 1991). The Supreme Court vacated the *Polsby* decision "in light of the position asserted by the Acting Solicitor General in his brief for the United States." *Polsby*, 507 U.S. at 1048. The brief successfully argued that "because the decision of the court of appeals constitutes an alternative ground for decision unnecessary to the result and does not rest on an adversary presentation of the question, there is no reason for this Court to consider the question at this time." Brief for Respondents at 9, Polsby v. Shalala, 507 U.S. 1048 (1993) (No. 92-966).

101. 939 F.2d 484 (7th Cir. 1991).

the Seventh Circuit deviated from the majority of circuits by holding that under section 704(a), "it is an employee's discharge or other employment impairment that evidences actionable retaliation, and *not* events subsequent to and unrelated to his employment."[102] Without addressing the broad interpretation given section 704(a) by other circuits, the *Reed* court held that the "alleged retaliatory activit[y] took place *after* the termination of Reed's employment and was therefore not an adverse employment action."[103] Although the *Reed* court indicated the existence of other possible bases of decision, the implication of its statements concerning the timing of the alleged retaliation with regard to the termination of employment is clear; it did not consider the anti-retaliation provision to apply to actions occurring after the employment had terminated.[104] Given the broad gap between the alleged retaliatory acts and the employment context, the *Reed* decision appears to be influenced as much by the court's determination of the acts' lack of relation to "adverse employment action[s]" as by its interpretation of the term "employee."

No such ambiguity concerning the alleged retaliation's connection to the employment context was present when the Fourth Circuit

---

102. *Id.* at 492-93. Reed's termination occurred amidst a particularly "unprofessional atmosphere" at the jail where she worked. *Id.* at 486. For example, Reed contended that

> she was handcuffed to the drunk tank and sally port doors, that she was subjected to suggestive remarks . . ., that conversations often centered around oral sex, that she was physically hit and punched in the kidneys, that her head was grabbed and forcefully placed in members [sic] laps, and that she was the subject of lewd jokes and remarks. She testified that she had chairs pulled out from under her, a cattle prod with an electrical shock was placed between her legs, and that they frequently tickled her. She was placed in a laundry basket, handcuffed inside an elevator, handcuffed to a toilet and her face pushed into the water, and maced.

Id. (quoting the unpublished opinion of Judge Gene E. Brooks, May 25, 1990, at 9). Noting that Reed "experienced this depravity with amazing resilience, but . . . also relished reciprocating in kind," the court may have been influenced by Reed's participation in behavior that the court found "repulsive." *See id.* Reed's termination itself followed an investigation into her involvement in trafficking marijuana to prisoners and encouraging two female inmates to beat another inmate. *See id.* at 487.

103. *Id.* at 492-93.

104. *See id.* The decision may have been colored not only by the circumstances surrounding the termination, but also by the nature of the claimed retaliatory acts which took several forms, including

> having the Sheriff's Department's investigation file concerning her alleged illegal jail activities investigated by a grand jury, a mysterious attack on her person by a disguised assailant urging her to drop her case against the department, disturbing late night phone calls threatening her with reprisals for her lawsuit, and someone shooting at her car with a gun while she was driving.

Id. at 492. The court suggested that the plaintiff might have a state law tort claim or possibly grounds for a criminal charge. *See id.* at 493.

first considered the issue in *Polsby v. Chase*.[105] The *Polsby* court criticized the other circuits for "bas[ing] their decisions entirely on dubious considerations of policy and the supposed purpose of the statute [and] ignoring its clear language."[106] Far beyond the simple interpretation offered by the *Reed* decision, the *Polsby* court refused to protect former employees from retaliation, interpreting both section 704(a)'s inclusion of "applicant[s] for employment" and its silence with regard to "former employees" as precluding application of the statute to the latter group.[107] Further, the court felt that the "paucity of legislative history, if offering any guidance on the issue, and policy considerations actually support a normal reading of the statute without adding former employees."[108] Contending that Congress had provided Title VII claimants with exclusively equitable remedies[109] to accomplish its twin goals of providing "minorities the opportunity 'to be hired on the basis of merit' " and eliminating

105. 970 F.2d 1360, 1364-67 (4th Cir. 1992), *vacated on other grounds sub nom.* Polsby v. Shalala, 507 U.S. 1048 (1993). The plaintiff doctor in *Polsby* complained of an allegedly adverse reference letter sent to the American Board of Psychiatry and Neurology and additional defamatory statements. *See id.* at 1362.

106. *Id.* at 1365.

107. *See id.* ("Congress could certainly have also included a former employee if it desired."). *But see* Pantchenko v. C.B. Dolge Co., 581 F.2d 1052, 1055 (2d Cir. 1978) ("[U]se of the term 'employee' in referring to a former employee, while colloquial, is not inappropriate."). The *Polsby* court also felt that the statute's definition of "unlawful employment practice[s]" forbade practices particularly related to employment, not practices occurring after the employment relationship has ended. *See* 970 F.2d at 1365 (citing 42 U.S.C. § 2000e-2(a)(1) (1982)).

108. *Polsby*, 970 F.2d at 1365 (citing Sherman v. Burke Contracting, Inc., 891 F.2d 1527, 1536-42 (11th Cir. 1990) (Tjoflat, C.J., concurring)).

109. *See id.* at 1366. The court cited *Eastman v. Virginia Polytechnic Institute & State University*, 939 F.2d 204, 208 (4th Cir. 1991), for the proposition that Title VII provides only equitable relief "such as reinstatement, back pay, and injunctions against further violations." The relevant part of 42 U.S.C. § 2000e-5(g) (1994) states:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay ... or any other equitable relief as the court deems appropriate.

At the time, some disagreement existed over the proper interpretation of the provision. *Compare Eastman*, 939 F.2d at 208 (Title VII does not provide legal remedies) *with Sherman*, 891 F.2d at 1535-36 (allowing compensatory, but not punitive, damages to Title VII claimant). Congress ended the debate, however, by enacting the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, 1072 (codified as amended in scattered sections of 42 U.S.C. (1994)), which explicitly grants section 704(a) plaintiffs the right to "compensatory and punitive damages." *See infra* notes 117-19 and accompanying text.

workplace discrimination,[110] the court felt that the equitable means to remedy post-employment retaliation "would entail calculating future damages and is far too speculative."[111] Given its interpretation of the Title VII relief provisions, the *Polsby* court concluded that policy considerations made it "even more likely that Congress said what it meant" in the "clear language of the statute."[112]

However, just as the Supreme Court vacated the *Polsby* court's conclusion,[113] the Civil Rights Act of 1991 impeached the *Polsby* court's reasoning.[114] Consistent with its civil rights initiatives and enactments of the past[115] and in response to a recent Supreme Court decision that had "weakened the scope and effectiveness of Federal civil rights protections,"[116] Congress sought to "provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace" and to "expand[] the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination."[117] Specifically, Congress enacted a provision that expanded the remedies available to section 704(a) plaintiffs beyond " 'any . . . *equitable* relief . . . the court deems proper' "[118] to include

110. *Polsby*, 970 F.2d at 1365-66 (citing 110 CONG. REC. 6549 (1964) (remarks of Sen. Humphrey introducing the bill)). The court also argued that the remedies provided by the statute were intended to "mak[e] a complainant whole without penalizing the employer." *Id.* at 1366.

111. *Id.* The court stated that "[a]lthough a situation may arise where fashioning equitable relief presents no problems, the better solution is to allow the ex-employee to seek either state or other federal law remedies against the *former* employer or the same Title VII remedies against the *prospective* employer." *Id.*

112. *Id.* at 1367.

113. *See* Polsby v. Shalala, 507 U.S. 1048 (1993). The Supreme Court did not address the merits of the case, but vacated due to the improper consideration of the question. *See id.* at 1048; *Robinson*, 70 F.3d at 328 n.1 (noting that the Supreme Court's failure to address the issue did not render the decision legally incorrect and stating that "[i]n light of the Supreme Court's action, we write on a clean slate").

114. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C. (1994)).

115. *See, e.g.*, Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified as amended in scattered sections of 42 U.S.C. (1976)) (amending the Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701-16, 78 Stat. 253, 253-66 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (1994))). The 1972 amendments broadened the application of Title VII by extending protection to government employees and reducing the number of employees necessary for an employer to fall within Title VII's reach from 25 to 15. *See* Davidson, *supra* note 83, at 206.

116. Civil Rights Act of 1991, § 2(2), 105 Stat. at 1071 (citing Wards Cove Packing Co. v. Antonio, 490 U.S. 642 (1989)).

117. *Id.* § 3, 105 Stat. at 1071.

118. Polsby v. Chase, 970 F.2d 1360, 1366 (4th Cir. 1992) (quoting 42 U.S.C. § 2000e-5(g) (1982) for the proposition that no legal remedies are available to Title VII plaintiffs (emphasis added)), *vacated on other grounds sub nom.* Polsby v. Shalala, 507 U.S. 1048

"compensatory and punitive damages."[119] While the greatest effect of this addition may be realized through its application to other anti-discrimination provisions in Title VII, its implication for the section 704(a) context is to unravel the *Polsby* court's analysis of the policy considerations.[120]

Judicial interpretation of parallel anti-retaliation provisions in anti-discrimination contexts other than Title VII and the interpretation of the term "employee" by governmental agencies involved in the enforcement of Title VII provide further support for the position adopted by the majority of circuits. Not only have the Equal Opportunity Employment Commission[121] and the Solicitor General[122] taken the position that former employees should be protected by section 704(a), but virtually all case law concerning the scope of the term "employee" in the anti-retaliation provisions of other remedial labor statutes supports this interpretation. For example, section 15(a)(3) of the Fair Labor Standards Act of 1938 prohibits "discharge or . . . discriminat[ion] against any *employee* because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter."[123] Similarly, section 158(a)(4) of the National Labor Relations Act includes in its definition of unfair labor practices "discharge or . . . discriminat[ion] against an *employee* because he has filed charges or given testimony

---

(1993).

119. Civil Rights Act of 1991, § 102, 105 Stat. at 1072.

120. *See Polsby*, 970 F.2d at 1365-66. The *Polsby* court also suggested that the legislative history of section 704(a) might support the exclusion of former employees from protection. *See id.* However, courts and commentators alike have repeatedly noted the absence of any useful legislative history regarding the anti-retaliation provision. *See, e.g.*, Green v. McDonnell Douglas Corp., 463 F.2d 337, 341 (8th Cir.) (noting that section 704(a)'s history provides no guidance concerning its scope), *cert. granted*, 409 U.S. 1036 (1972), *remanded*, 411 U.S. 792 (1973); Kattan, *supra* note 72, at 223 n.26 (citing 110 CONG. REC. 12813 (1964)) ("During the congressional debates the only change in the provision, which was numbered § 705(a) in the original bill, was to renumber it § 704(a)."); Walterscheid, *supra* note 71, at 393 ("One of the inherent difficulties in ascertaining the purpose and extent of coverage of both the opposition and participation clauses in Section 704(a) is the almost total absence of any legislative history."); *see also* Hishon v. King & Spalding, 678 F.2d 1022, 1027 (11th Cir. 1982) (noting that legislative history is not useful in defining "employee"), *rev'd*, 467 U.S. 69 (1984).

121. *See* EEOC Compliance Manual § 614.7(f), at 614:0034 (Apr. 1988) ("It is a violation of § 704(a) . . . to retaliate against a former employee.").

122. *See* Brief for Respondents at 9, Polsby v. Shalala, 507 U.S. 1048 (1993) (No. 92-966).

123. 29 U.S.C. § 215(a)(3) (1994) (emphasis added); *see* Dunlop v. Carriage Carpet Co., 548 F.2d 139, 147 (6th Cir. 1977) (holding that the term "employee" in § 215(a)(3) encompasses former employees).

under this subchapter."[124] The similarity of the broad, remedial nature of these statutes to the purpose of Title VII makes their interpretation highly persuasive in the Title VII context.[125]

Additionally, the Age Discrimination in Employment Act of 1967[126] (ADEA) contains an anti-retaliation provision that is virtually identical to section 704(a). Section 4(d) of the ADEA prohibits discrimination "against any . . . *employees or applicants for employment* . . . because such individual . . . has opposed any practice made unlawful by this section."[127] While upholding the application of this provision to former employees, at least two circuits have noted the majority treatment of the analogous Title VII protection offered by section 704(a). In *EEOC v. Cosmair, Inc., L'Oreal Hair Care Division*,[128] the Court of Appeals for the Fifth Circuit responded to the contention that the ADEA anti-retaliation provision did not protect former employees from retaliation by stating that "[t]he term 'employee' . . . is interpreted broadly: it includes a former employee as long as the alleged discrimination is related to or arises out of the employment relationship."[129] Similarly, in *Passer v. American Chemical Society*,[130] the Court of Appeals for the District of Columbia relied heavily upon the rationale of section 704(a) decisions to conclude that "Congress could not have intended such an absurd result."[131] The history and logic of these decisions indicate that they carry precedential value equivalent to a determination that section 704(a)'s

124. 29 U.S.C. § 158(a)(4) (1994) (emphasis added); *see* NLRB v. Whitfield Pickle Co., 374 F.2d 576, 582-83 (1967) (finding that an employer's refusal to rehire an individual in retaliation for the individual filing an unfair labor practice charge violated the NLRB anti-retaliation provision). For a discussion of the Supreme Court's interpretation of the term with regard to the NLRA, see Davidson, *supra* note 83, at 209-10 (citing NLRB v. Hearst Publications, 322 U.S. 111, 124 (1944)) ("Explaining that the term 'employee' was not intended by Congress to be a term of art having a definite meaning, the Court stated that the statute must be interpreted in light of the evils to be corrected and the end to be achieved.").

125. *See* Moore, *supra* note 89, at 214-18.

126. 29 U.S.C. §§ 621-634 (1994).

127. *Id.* § 623(d). The ADEA's definition of "employee" also closely mirrors that of Title VII by defining the term as "an individual employed by any employer." *Id.* § 630(f).

128. 821 F.2d 1085, 1089 (5th Cir. 1987).

129. *Id.* at 1088 (citing Pantchenko v. C.B. Dolge Co., 581 F.2d 1052, 1055 (2d Cir. 1978); Rutherford v. American Bank of Commerce, 565 F.2d 1162, 1165-66 (10th Cir. 1977)).

130. 935 F.2d 322, 330 (D.C. Cir. 1991) ("[Section 4(d)] is parallel to the anti-retaliation provision contained in Title VII . . . and cases interpreting the latter provision are frequently relied upon in interpreting the former.").

131. *Id.* at 331.

protection extends to former employees.[132]

Against this substantial and consistent backdrop of administrative, judicial, and legislative interpretation of Title VII's anti-retaliation provision, the court in *Robinson v. Shell Oil Co.*[133] steadfastly adhered to the determination made in *Polsby*[134] that section 704(a) did not protect individuals from discriminatory acts that occurred after the employment relationship had terminated. Inexplicably, the court employed a lengthy argument in favor of strict statutory construction[135] and invoked policy considerations unrelated to its conclusion[136] to reestablish itself as one of two circuit courts denying all section 704(a) protection to former employees.[137] The decision cuts against the purpose of Title VII and will "weaken[] the scope and effectiveness of Federal civil rights protections"[138] by licensing employers to undertake retaliatory practices provided that they first terminate the employment relationship.

On its face, the *Robinson* decision relies heavily on the court's purported loyalty to the rules of statutory construction, but in truth it evidences the sheer unwillingness of the Fourth Circuit to acknowledge the purpose of section 704(a).[139] In an attempt to insulate its

---

132. Indeed, *Cosmair, Inc., L'Oreal Hair Care Div.* was cited favorably by the Fifth Circuit in *EEOC v. J.M. Huber Corp.*, 927 F.2d 1322, 1331 (5th Cir. 1991), in support of the court's extension of section 704(a) protection to former employees. Although the District of Columbia Circuit has not confronted the issue squarely, its reliance in *Passer* on section 704(a)'s interpretation leaves little room for doubt about its position. *See Passer*, 935 F.2d at 330.

133. 70 F.3d 325 (4th Cir. 1995), *cert. granted*, 116 S. Ct. 1541 (1996).

134. Polsby v. Chase, 970 F.2d 1360, 1364-67 (4th Cir. 1992), *vacated on other grounds sub nom.* Polsby v. Shalala, 507 U.S. 1048 (1993).

135. *See Robinson*, 70 F.3d at 328-32.

136. *See id.* at 330-31.

137. *See* Reed v. Shepard, 939 F.2d 484, 492-93 (7th Cir. 1991). *But see infra* note 169 and accompanying text (suggesting that the result in *Reed* would have been identical if the facts were analyzed under the majority's test due to the alleged retaliation's lack of relation to the employment context).

138. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C. (1994)) (responding to "recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination").

139. The extent of this unwillingness is perhaps no more apparent than in Judge Hamilton's dissenting opinion in the original panel consideration of *Robinson*. *See* Robinson v. Shell Oil Co., No. 93-1562, 1995 WL 25831, at *3 (4th Cir. Jan. 18, 1995) (Hamilton, J., dissenting). In that opinion, the dissent criticized the panel's decision by presenting a hypothetical that illustrated the "absurd results" that would stem from the decision:

> [S]uppose Employee X, a minority, files a race discrimination charge against his employer, Company A. In retaliation, Employee X's supervisor falsely adds negative performance comments to Employee X's personnel file. Employee X leaves Company A and accepts a job with Company B; *thirty years pass*. Em-

decision-making from the policy considerations that had been so influential to other circuit courts, the *Robinson* majority labored to construe the term "employee" unambiguously.[140] The ambiguity of the term, as the dissent noted, is at least implicitly reflected in the section 704(a) opinions of other circuits,[141] and an examination of Title VII adjudication reveals that the meaning of the term is consistently debated.[142] Quite apart from the black-letter law emerging from these decisions is the underlying persistence of the term's refusal to subject itself to anything but temporary definition. Nevertheless, the majority clung to Title VII's definition of employee as "an individual employed by an employer"[143] as the incontrovertible meaning of the term.[144] As the dissent noted, without resort to the historical debates over the scope of the term, "[w]here the use of a term in a particular context admits of more than one meaning, that term is, *ipso facto*, ambiguous."[145]

> ployee X leaves Company B and seeks a new job with Company C who requests recommendations of X from A and B. Employee X's supervisor at Company A died five years earlier; his replacement researches Employee X's personnel file and writes a negative recommendation according to the information in Employee X's file. Under the majority's holding, Employee X can bring a suit under § 704(a), alleging retaliation against Company A for conduct that occurred thirty years earlier by a person no longer employed, let alone deceased.

Id. at *9 (Hamilton, J., dissenting) (emphasis added). It is ironic that in the face of such imminent absurdity, *see supra* text accompanying note 44, a judge would engage in such remote speculation to find potential inequity 30 years in the future. This questionable hypothetical was omitted from Judge Hamilton's subsequent *en banc* majority opinion, probably due to the fact that the hypothetical did not consider the requirement of a causal link between the adverse employment action—the provision of a negative reference—and the employee's engagement in a protected activity, a requirement that would preclude the "absurd result." *See supra* note 78 and accompanying text.

140. *See Robinson*, 70 F.3d at 329-30.

141. *See id.* at 335 (Hall, J., dissenting).

142. *See* Davidson, *supra* note 83, at 203 n.5 (citing EEOC v. Zippo Mfg., 713 F.2d 32, 35-36 (3d Cir. 1983)) ("The word 'employee' is used in many federal statutes, but its legal meaning changes depending upon its context. Consequently, a person classified as an 'employee' under one statute may not qualify as an employee under another."); Walterscheid, *supra* note 71, at 397 (discussing possible distinctions to be drawn from section 704(a)'s use of the word "individual" rather than the phrase "employees or applicants for employment" and concluding that "[p]erceived distinctions of the type noted appear to be more a matter of semantics than any real variation"); *see also* Hishon v. King & Spalding, 678 F.2d 1022, 1027-28 (11th Cir. 1982) (discussing whether an associate at a law firm is an "employee"), *rev'd*, 476 U.S. 69 (1984); Sibley Mem'l Hosp. v. Wilson, 488 F.2d 1338, 1341-42 (D.C. Cir. 1973) (discussing impact of referral service's control of employment on "employee" status); McClure v. Salvation Army, 460 F.2d 553, 556-57 (5th Cir. 1972) (suggesting that certain volunteers might be "employees").

143. 42 U.S.C. § 2000e(f) (1994).

144. *See Robinson*, 70 F.3d at 330.

145. *Id.* at 335 (Hall, J., dissenting).

While the presence of substantial contrary interpretation and past dispute over the term's scope should have convinced the court of the necessity to engage in serious policy consideration before withholding protection from former employees, the majority was not persuaded.[146] Instead, Judge Hamilton offered terse, contradictory justifications for the majority view of legislative intent and relevant policy and their respective effect on two distinct, but not wholly unrelated, aspects of the majority decision. In considering the possibility of engaging in some statutory interpretation by virtue of an exception to the no ambiguity-no interpretation rule,[147] the majority refused on the basis that "both require Congress to have made plain that it intended a result different than literal application would produce."[148] In making this determination, the court reasoned that the inclusion of the term " 'applicants for employment' as persons *distinct* from 'employees,' coupled with its failure to likewise include 'former employees,' is strong evidence of Congressional intent that the term 'employees' in Title VII's anti-retaliation provision does not include former employees."[149] However, simply by engaging in this analysis the court concedes both the inherent ambiguity of the critical term and the possibility of an alternative meaning. Additionally, the court refused to consider the possibility that Congress included the term "applicants for employment" in section 704(a) to prevent retaliation against those individuals who had not yet entered an employment relationship, thereby broadening the statutory protection rather than limiting it.[150]

---

146. *See id.* at 332. Conceding that ambiguous terminology in statutes required judicial interpretation, the Robinson majority nevertheless noted that in the case of unambiguous statutes "if the statutory language is plain and admits of no more than one meaning, the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion." *Id.* at 329 (internal quotations omitted). The unambiguous term thus limited the scope of judicial interpretation.

147. *See id.* at 330. The exceptions include situations in which the literal application of statutory language would lead to an absurd result or would produce a result demonstrably at odds with the intent of Congress. *See id.* at 329 (citing United States v. Ron Pair Enters., 489 U.S. 235, 242 (1989); Crooks v. Harrelson, 282 U.S. 55, 59-60 (1930)); *supra* notes 27-30 and accompanying text.

148. *Robinson*, 70 F.3d at 330. For the argument that Congress has made plain that it intended something other than the *Robinson* result, see *infra* notes 167-68 and accompanying text.

149. *Robinson*, 70 F.3d at 330.

150. There is inherent appeal to construing an additional statutory term in a way that broadens rather than limits the statute. For a discussion of the contrast between the wording of the anti-retaliation provisions of Title VII, the Fair Labor Standards Act (FLSA), and the National Labor Relations Act (NLRA), see Moore, *supra* note 89, at 214 n.59. The FLSA and NLRA do not include the term "applicants for employment." *See* 29

Further, the court did not address the impact of the Civil Rights Act of 1991[151] on its interpretation of legislative intent. In *Polsby*,[152] the Fourth Circuit focused on the lack of explicit statutory legal remedies and the inefficacy of equitable remedies as applied to former employees in justifying its refusal to extend Title VII anti-retaliation protection beyond the employment relationship.[153] However, the Civil Rights Act of 1991 addressed both of these concerns,[154] which would appear to assuage the concerns of the *Polsby* court and clarify congressional intent that section 704(a) be given a broad reading. Nevertheless, the majority did not address the resolution of this issue.

Similarly, in noting the unpopularity of its decision, the majority failed to consider the ramifications of its own observations. The court acknowledged that during a period of almost twenty years, more than half of the other circuits had "interpreted the term 'employee' broadly to 'include[] a former employee as long as the alleged discrimination is related to or arises out of the employment relationship.' "[155] After criticizing the other circuits for infidelity to statutory construction and reliance on policy, the *Robinson* majority stated: "In no uncertain terms, Congress ... has chosen, through the anti-retaliation provision of Title VII, to protect 'employees' ... but not to protect former employees."[156] This conclusory statement ignores the basic fact that, in the majority of circuits, section 704(a) *is*

U.S.C § 158(a)(4) (1994); *id.* § 215(a)(3). While it is possible to argue that the inclusion of this term in section 704(a) is meant to limit protection, it seems ironic to suggest that a substantively positive term is meant to limit the scope of the anti-retaliation provision. *See* Moore, *supra* note 89, at 214 n.59. Moore suggests that this reasoning might be employed to eliminate judicial interpretation of the FLSA and NLRA anti-retaliation provisions as persuasive support for section 704(a), but notes that this is not the "better argument." *See id.*

151. Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C. (1994)) ("An Act [t]o amend the Civil Rights Act of 1964 to strengthen and improve Federal civil rights laws ... [and] to provide for damages in cases of intentional employment discrimination ...."). See *supra* notes 114-25 and accompanying text for a discussion of the relevant amendments.

152. Polsby v. Chase, 970 F.2d 1360, 1365-67 (1992), *vacated on other grounds sub nom.* Polsby v. Shalala, 507 U.S. 1048 (1993).

153. *See id.* Although Title VII did not explicitly provide legal remedies for retaliation victims, some courts had construed the statute's broad reach to implicitly include them. *See, e.g.*, Sherman v. Burke Contracting, Inc., 891 F.2d 1527, 1535-36 (11th Cir. 1990) (allowing compensatory damages to Title VII claimant).

154. *See supra* notes 109-10 and accompanying text (discussing congressional extension of legal remedies to Title VII plaintiffs in the Civil Rights Act of 1991).

155. *Robinson*, 70 F.3d at 331 (internal quotations omitted).

156. *Id.* at 332.

protecting former employees and has done so for many years.[157] While legislative inaction may not conclusively reflect legislative intent, one may reasonably infer that a Congress that enacted civil rights legislation affecting the very provision in question as recently as five years ago would have corrected such a widespread misapprehension—especially if it intended to exclude former employees. Failing to consider these factors, the Fourth Circuit may have misconstrued the very congressional intent it claimed to defend.

Possibly aware of the weakness of its position, the *Robinson* majority claimed that "several other important considerations" supported its interpretation of section 704(a).[158] In actuality, these "considerations" serve as a basis for a discussion of the reasons why section 704(a) should be applied to retaliation that occurs after employment has terminated. Searching for support within Title VII, the majority found that "the types of practices that Title VII forbids strongly point toward the scope of its anti-retaliation provision not extending beyond the employment relationship."[159] However, while other provisions of Title VII primarily address discrimination related to employment relationships,[160] section 704(a) must apply to post-employment retaliation in order to effectively serve as part of the Title VII enforcement mechanism. In this regard, the anti-retaliation provision is different from the other substantive provisions of Title VII; its purpose is to facilitate and encourage the filing of claims by eliminating the fear of reprisal. By limiting its analysis to specific provisions of Title VII, the court ignores the overriding purpose of the legislation—the eradication of workplace discrimination.

Finally, the *Robinson* court contends that the second element of a case of retaliation—adverse employment action—precludes application of section 704(a) to the post-employment context.[161] Noting the Seventh Circuit's similar conclusion in *Reed*, the court found that an "[a]dverse employment action necessarily requires that the ad-

157. *See, e.g.*, Charlton v. Paramus Bd. of Educ., 25 F.3d 194, 198-200 (3d Cir.) (applying section 704(a) to post-employment interference with future employment prospects), *cert. denied*, 115 S. Ct. 590 (1994).

158. *See Robinson*, 70 F.3d at 330-31.

159. *Id.* (citing 42 U.S.C.A. § 2000e-2(a)(1) (West 1994)). The majority's rationale for tying the scope of section 704(a) to other specific provisions of the statute, rather than Title VII's essential goal of eliminating workplace discrimination, is not apparent.

160. *See, e.g.*, 42 U.S.C. § 2000e-2(a)(1) (1994) (prohibiting failure or refusal "to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin").

161. *See Robinson*, 70 F.3d at 331.

verse action taken by the employer must be in relation to its own act of *employing* the employee bringing the charge."[162] However, regardless of the language used by the *Reed* court,[163] the factual settings are clearly distinct. Not only were Reed's allegations of retaliation of questionable veracity; they were completely unrelated to her employment except for the fact that the accusations were aimed at her former employer.[164] In contrast, the alleged retaliation in *Robinson* was a falsely negative *employment* reference,[165] which is much more related to the employment relationship than the attacks, disturbing phone-calls, and shootings complained of in *Reed.* In this sense, the holdings of *Robinson* and *Reed* are distinct indeed.[166]

Underlying these criticisms of *Robinson* is the purpose of the anti-retaliation provision in the overall context of Title VII and the techniques employed by other circuits to limit its scope while enhancing its efficiency. The primary legislative purpose behind section 704(a) is to remove the deterrent effect that fear of employer reprisal has on employees who might question employment conditions.[167] Given the crucial role that individual claims play in the policing and enforcing of discrimination claims, it is necessary to protect claimants and encourage others to assert their legal rights.[168] If retaliation is unrestricted, employment discrimination will be largely impossible to police.

The majority of the United States courts of appeals have adopted a test to determine whether an action is retaliatory under section 704(a) that is both consistent with the language of the statute and applicable to certain forms of post-employment retaliation. The essential consideration for this test is whether the alleged retaliation

---

162. *Id.*

163. *See* Reed v. Shepard, 939 F.2d 484, 492-93 (7th Cir. 1991). Resolving the issue in one paragraph, the *Reed* court refused to apply section 704(a) on the basis that "the alleged retaliatory activit[y] took place *after* the termination of Reed's employment and was therefore not an adverse employment action." *Id.* For a discussion of the *Reed* decision, see *supra* notes 102-04 and accompanying text.

164. *See Reed*, 939 F.2d at 492; *supra* note 102.

165. *See Robinson*, 70 F.3d at 327.

166. It is questionable whether the *Reed* court would have given such quick consideration to a more job-related, though less heinous, form of retaliation.

167. *See* Kattan, *supra* note 72, at 217-18. Other impediments to employee assertion of discrimination claims include the complexity of the law, the circumstances of the discrimination, and the difficulty of producing evidence beyond personal suspicions. *See id.* These impediments are much more difficult to address legislatively.

168. For a more detailed discussion of the Title VII enforcement mechanism, see *supra* notes 60-75 and accompanying text.

"arises out of or is related to the employment relationship."[169] This treatment provides a workable solution to the competing interests of encouraging valid claims and discouraging abuse by eliminating post-termination conduct that is unrelated to the employment relationship from consideration under section 704(a).[170]

In the face of legislative, judicial, administrative, and logical interpretation and illustration, the Fourth Circuit has twice refused to apply the anti-retaliation provision of Title VII to job-related post-employment retaliation and has thereby deprived section 704(a), and thus Title VII itself, of its effectiveness. The resulting choice for employees is clear: remain in an abusive employment atmosphere to ensure receipt of Title VII's full protection, or risk facing the retaliation accompanying employment termination.[171] The equally clear message to employers is that "they have... free rein to retaliate against disfavored employees, so long as the employee is first terminated."[172] This absurdity and the resulting inconsistency between Title VII's means and ends were surely not within the intent of the Congress when it labeled an employee "an individual employed by an employer."[173] On April 22, 1996, the United States Supreme Court

---

169. Charlton v. Paramus Bd. of Educ., 25 F.3d 194, 200 (3d Cir. 1994); *see Robinson*, 70 F.3d at 334 (Hall, J., dissenting); Pantchenko v. C.B. Dolge Co., 581 F.2d 1052, 1055 (2d Cir. 1978). The distinction between *Robinson* and *Reed* is apparent when the facts of the cases are considered under this analysis. The *Reed* court could have decided to deny the section 704(a) claim under either the majority test or by refusing to apply the provision to post-employment acts of retaliation; the *Robinson* court had only the latter option.

170. One commentator has clearly presented both this test and the balance it strikes:

> Congress, of course, did not intend the remedies available under Title VII to expose employers to limitless liability for post-employment occurrences. For example, the mere fact that a former employer and a former employee were once engaged in a relationship covered under Title VII does not automatically bring all of their future dealings under the protections of the statute. Conversely, however, if the "employment relationship" were narrowly construed so as to terminate automatically when an employee ceases to be included on the payroll, the statute would not protect any post-employment action, even if clearly retaliatory and related to employment. Such an interpretation would seem to frustrate the congressional intent behind Title VII. Therefore, in order to balance congressional objectives in the enactment of the statute against the potential for statutory abuse in the post-employment context, section 704(a) should protect former employees only when the post-employment actions are both retaliatory and related to employment.

Moore, *supra* note 89, at 219.

171. *See Robinson*, 70 F.3d at 334 (Hall, J., dissenting) (noting that the outcome of this choice is that "no reasonable employee will come forward if there is any chance that his or her term of employment will soon end").

172. *Id.* (Hall, J., dissenting).

173. *See* 42 U.S.C. § 2000e(f) (1994).

granted Charles T. Robinson's petition for writ of certiorari.[174] Given the critical position of section 704(a) within the overall framework of Title VII and the appeal of protecting individuals from retaliation that "arises out of or is related to the employment relationship," employees can be hopeful that the Court will reverse the Fourth Circuit's decision in *Robinson*. By eliminating a portion of the Title VII enforcement mechanism, the alternative ignores the importance of Title VII at a time when segments of our society need Title VII's protection the most:

> [T]he avowed goal of Title VII, to address the chronic exclusion of blacks from the mainstream of the American economy, is more distant than ever before. Overt discrimination has dramatically decreased, but twenty five years after the passage of Title VII, the economic disparity between whites and nonwhites has widened, and racial stratification has increased. The specter of racial caste, the evil which Title VII was conceived to excise, is not only still with us, but now has a stronger hold on the American soul.[175]

TODD MITCHELL

174. 116 S. Ct. 1541 (1996).

175. Jones, *supra* note 3, at 352.