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Robinson v. Shell Oil Co.: Policy-Not Ambiguity-Drives the Supreme Court's Decision to Broaden Title VII's Retaliation Coverage

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NOTE

ROBINSON V. SHELL OIL CO.: POLICY—NOT AMBIGUITY—DRIVES THE SUPREME COURT'S DECISION TO BROADEN TITLE VII'S RETALIATION COVERAGE

Before the Supreme Court's pronouncement in *Robinson v. Shell Oil Co.*,[1] a majority of the circuit courts were blurring seemingly unambiguous language to expand Title VII's coverage to comport with amiable policy goals. Only policy justifications could explain the courts' willingness to cover postemployment retaliation based on language that prohibits an employer from discriminating "against his employees"[2] and that further defines employees as those persons "employed by an employer."[3] Clearly, the plain meaning of such language envisions that persons protected under Title VII have an existing employment relationship with the covered employer at the time of the alleged retaliatory conduct. Yet, nearly all circuit courts addressing the issue before *Robinson* found the policy arguments more compelling. In *Robinson*, the Supreme Court also found that the amiable policy goals of extended coverage weighed more heavily than the plain language of Title VII's anti-retaliation provision.

I. INTRODUCTION

This note deals with the conflict between competing interpretations of the scope of Title VII of the Civil Rights Act of 1964

1. 117 S. Ct. 843 (1997).
2. 42 U.S.C. § 2000e-3(a) (1994).
3. 42 U.S.C. § 2000e(f) (1994).

(Title VII)[4] and the Supreme Court's resolution of that conflict in *Robinson v. Shell Oil Co.*[5] In *Robinson*, the Court was squarely presented with the question of whether "former employees" are protected from postemployment retaliation by Title VII. In 1977, the Court of Appeals for the Tenth Circuit became the first to hold that Title VII's anti-retaliation provision, in section 704(a), protected former employees.[6] By including former employees, i.e., those having no existing or on-going employment relationship with their former employer at the time of the alleged retaliatory conduct, the court arguably extended Title VII's coverage beyond that which Congress had envisioned or intended. The Tenth Circuit relied primarily on two earlier decisions[7] interpreting similar, but not identical, language in the Fair Labor Standards Act of 1938 (FLSA).[8] This interpretation was adopted consistently by other circuits subsequently addressing the issue, often with little or no independent analysis.[9] Additionally, circuit courts interpreting identical anti-retaliation language in the Age Discrimination in Employment Act of 1967 (ADEA)[10] adopted this rationale for protecting former employees from postemployment retaliation. Thus, the ADEA's scope with regard to postemployment retaliation became coextensive with that of Title VII.[11]

In 1991, however, the Court of Appeals for the Seventh Circuit broke from the formerly unanimous interpretation. In *Reed*

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4. 42 U.S.C. § 2000e-3(a) (1994).

5. 117 S. Ct. 843 (1997).

6. *See* Rutherford v. American Bank of Commerce, 565 F.2d 1162 (10th Cir. 1977).

7. *See* Dunlop v. Carriage Carpet Co., 548 F.2d 139 (6th Cir. 1977); Hodgson v. Charles Martin Inspectors of Petroleum, Inc., 459 F.2d 303 (5th Cir. 1972).

8. 29 U.S.C. § 215(a)(3) (1994).

9. *See* Christopher v. Stouder Mem. Hosp., 936 F.2d 870 (6th Cir. 1991); EEOC v. J.M. Huber Corp., 927 F.2d 1322 (5th Cir. 1991); Sherman v. Burke Contracting, Inc., 891 F.2d 1527 (11th Cir. 1990); Bailey v. USX Corp., 850 F.2d 1506 (11th Cir. 1988); O'Brien v. Sky Chefs, Inc., 670 F.2d 864 (9th Cir. 1982); Pantchenko v. C.B. Dolge Co., Inc., 581 F.2d 1052 (2d Cir. 1978). *See also* Todd Mitchell, Note, *Terminate, Then Retaliate: Title VII Section 704(a) and* Robinson v. Shell Oil Co., 75 N.C. L. REV. 376, 388 (1996) (noting the "brevity" of decisions extending Title VII coverage).

10. 29 U.S.C. § 631(c)(1) (1994).

11. *See* Passer v. American Chem. Soc'y, 935 F.2d 322 (D.C. Cir. 1991); EEOC v. Cosmair, Inc., 821 F.2d 1085 (5th Cir. 1987).

v. Shepard,[12] the Seventh Circuit held that Title VII's anti-retaliation language did not cover former employees.[13] A year later, in *Polsby v. Chase*,[14] the Fourth Circuit followed this reasoning and refused to extend Title VII's anti-retaliation coverage to former employees. Other courts, however, remained unpersuaded by this "narrow interpretation" and continued to adopt and apply the majority view.[15] Courts downplayed the significance of, or did not address at all, Title VII's statutory language and definitions, opting instead to focus on broad policy based considerations for protecting former employees.[16]

In *Robinson v. Shell Oil Co.*,[17] the United States Supreme Court was squarely presented with the issue and an opportunity to resolve the conflicting interpretations of section 704(a)'s scope. Unlike earlier decisions construing the scope of Title VII's anti-retaliation language, *Robinson* presented one of the more troubling scenarios of alleged retaliation by a former employer, and consequently one of the strongest arguments to include former employees within the protective veil of Title VII.

Opposition to the expansion of Title VII focused primarily on the statutory language and other remedies available at common law or alternative federal and state legislation.[18] Proponents of expanding Title VII's coverage to the postemployment context found strongest support in policy-based arguments.[19] In an ef-

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12. 939 F.2d 484 (7th Cir. 1991).

13. *See id.* Intimations of discontent with the expansive reading of section 704(a) preceded *Reed*. In *Sherman v. Burke Contracting, Inc.*, the Eleventh Circuit panel followed the majority view, but two members of the three judge panel concurred specially. *See Sherman*, 891 F.2d at 1536 (Tjoflat, C.J., specially concurring). Chief Judge Tjoflat, writing for the concurrence, acknowledged that the panel was constricted by principles of *stare decisis* to follow the prior Eleventh Circuit panel holding in *Bailey v. USX Corp.*, and therefore concurred in the judgment. *See id.* He and Judge Atkins, however, were "convinced that *Bailey* and the cases it relied upon for the result it reached were wrongly decided." *Id.*

14. 970 F.2d 1360 (4th Cir. 1992), *vacated on other grounds sub nom.* Polsby v. Shalala, 507 U.S. 1048 (1993).

15. *See* Charlton v. Paramus Bd. of Educ., 25 F.3d 194 (3d Cir. 1994); EEOC v. Ohio Edison Co., 7 F.3d 541 (6th Cir. 1993).

16. *See, e.g.*, Charlton v. Paramus Bd. of Educ., 25 F.3d 194 (3d Cir. 1994); Bailey v. USX Corp., 850 F.2d 1506 (11th Cir. 1988); EEOC v. Cosmair, Inc., 821 F.2d 1085 (5th Cir. 1987).

17. 117 S. Ct. 843 (1997).

18. *See* Respondent's Brief at *11, *Robinson*, No. 95-1376, 1996 WL 419672 (U.S. July 25, 1996).

19. *See* Sandra Tafuri, Note, *Title VII's Antiretaliation Provision: Are Employees*

fort to reach policy issues as a basis for decision, they argued successfully that ambiguity in the use of the term "employee" within Title VII required the Court to focus on the underlying purpose of the Act.[20] Alternatively, they argued that a literal interpretation of the statutory language lead to absurd results, and therefore justified the Court's reliance on the broad policies embodied within Title VII's language and remedial framework.[21]

In Part II, this note explores the facts of *Robinson* and other postemployment retaliation scenarios. The note turns next to the language of Title VII. Part III probes the language of section 704(a) and examines the definitions Congress provided in section 701 of the Act. Additionally, it compares and contrasts the language of section 704(a) with other Title VII provisions. Part III also examines Congress' choice of language in subsequent legislation aimed at employees and former employees. As will become evident, however, courts and commentators alike have been seemingly less concerned with the actual scope of Title VII's language, and this inquiry has been quickly subsumed by the question of whether Title VII should cover former employees. Therefore, Part IV reviews the history of the judicial expansion of section 704(a) and discusses the policy based arguments for and against extending Title VII coverage to postemployment retaliation. Part IV also applies the various arguments and alternatives to the facts of those cases that have previously addressed the issue. It argues that most cases extending Title VII coverage could have been resolved with existing remedies and presented no basis for extending the Act's plain language. Finally, based on this analysis and examination of the facts in *Robinson*, Part V argues that including former employees in section 704(a) was neither supported by Title VII's

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Protected After the Employment Relationship Has Ended?, 71 N.Y.U. L. REV. 797 (1996).

20. *See* Petitioner's Brief at *7, *Robinson*, No. 95-1376, 1996 WL 341308 (U.S. June 21, 1996); Patricia A. Moore, Note, *Parting is Such Sweet Sorrow: The Application of Title VII to Post-Employment Retaliation*, 62 FORDHAM L. REV. 205, 211-18 (1993); Tafuri, *supra* note 19, at 810-16.

21. *See* Petitioner's Brief at *20, *Robinson*, No. 95-1376, 1996 WL 341308 (U.S. June 21, 1996); James Francis Barna, Comment, *Keeping the Boss at Bay, Post-Termination Retaliation Under Title VII:* Charlton v. Paramus Board of Education, 47 WASH. U. J. URB. & CONTEMP. L. 259, 268-69 (1995); Tafuri, *supra* note 19, at 810-16.

unambiguous language, nor required by public policy. Part V also gives a synopsis of the Supreme Court's brief analysis in *Robinson*, but concludes that the Court read ambiguity into otherwise unambiguous language in an effort to achieve policy goals. These goals, however amiable, were obviously not contemplated when Title VII was enacted, and have not driven Congress to extend the statute's coverage in subsequent amendments.

The Supreme Court could not resist the temptation to judicially augment Title VII's scope. This note will ultimately conclude that the Court's judicial extension of Title VII was unwarranted. This conclusion is not drawn from an unrealistic presupposition that former employees need no protection after participating in Title VII enforcement activities. Rather, it merely recognizes the congressional intent inherent in the plain language of section 704(a), and that the statute as narrowly construed, together with existing common-law remedies, provides adequate protection against the threat of postemployment retaliation.

In a policy-driven effort to provide a comprehensive scheme of federal protection for aggrieved former employees, the Supreme Court has introduced new pitfalls and burdens on potential defendants and plaintiffs alike. The courts do not occupy the advantageous position of Congress to appropriately study and debate policy choices, nor should they be charged with this task. Admittedly, there are legitimate policy rationales supporting an extension of Title VII coverage to postemployment retaliation, but Congress clearly did not intend to include former employees in section 704(a). An expansion of federal employment legislation, if warranted at all, should have been left to the legislature that initially created it. In *Robinson*, the Supreme Court chose to reject the protective scheme adopted by Congress for one which it deemed a more logical and beneficial means of deterring and remedying postemployment retaliation.

II. POSTEMPLOYMENT RETALIATION: *ROBINSON* AND RELATED SCENARIOS OF DISCRIMINATION

Postemployment retaliation can be described as any action by a covered employer taken against a former employee for the

purpose of discriminating against the former employee because of his or her participation in protected Title VII enforcement activities.[22] Postemployment retaliation may take many forms. The cases dealing with postemployment acts reveal a wide array of retaliatory measures used by former employers to harass and malign former employees. Although the facts of these cases differ, postemployment retaliation can be divided into two broad categories: (1) "direct" retaliation; and (2) "indirect" retaliation, including employer to employer communications.

Direct postemployment retaliation includes employer actions taken directly against the former employee. It may include threats, intimidation, physical harassment, or abuse.[23] It may also include the suspension or termination of benefits over which the employer has direct control.[24] Direct retaliation is typically easy to identify and although retaliatory in nature, is usually prohibited by other federal and state legislation.[25] Thus, cases that deal with direct retaliation will be discussed periodically throughout this note to demonstrate that the expansion of section 704(a) adds little additional protection in this area. Indirect retaliation, however, is often more complex and the expansion of Title VII's coverage may have a significant impact in these cases.

Indirect retaliation involves actions by two or more employers, i.e., a former employer and prospective employer(s), and an attempt to discern their latent motivations based on their actions.[26] The focal point for inquiry under Title VII is the

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22. *See* 42 U.S.C. § 2000e-3(a) (1994).

23. *See, e.g.*, Reed v. Shepard, 939 F.2d 484 (7th Cir. 1991) (alleging retaliatory measures included assault, phone threats, and shooting at plaintiff's vehicle).

24. *See, e.g.*, Passer v. American Chem. Soc'y, 935 F.2d 322 (D.C. Cir. 1991) (employer canceled symposium in honor of former employee after he filed charge); EEOC v. J.M. Huber Corp., 927 F.2d 1322 (5th Cir. 1991) (employer withheld benefit plan funds from employees who challenged termination); EEOC v. Cosmair, Inc., 821 F.2d 1085 (5th Cir. 1987) (employer discontinued severance pay after former employee filed charge).

25. See, for example, the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001 to 1461 (1994), and generally state criminal and tort laws prohibiting assault, battery, threats, defamation, and interference with contract. *But see infra* notes 226-35 and accompanying text (discussing the likelihood that the plaintiff in *Passer* had no recourse unless the court expanded section 704(a) to accommodate his claim).

26. *See, e.g.*, Sherman v. Burke Contracting, Inc., 891 F.2d 1527 (11th Cir. 1990) (alleging former employer persuaded current employer to discharge employee for that

employer's motive in providing or refusing to provide information, regardless of the truth or falsity of the information involved. Certainly the falsity of a reference and the negligence, recklessness, or maliciousness with which the falsehood was disseminated may indicate an employer's motive, but under Title VII an employer's decision even to furnish truthful and accurate information about an employee could be the basis of liability if the employer intended to discriminate by furnishing such information.[27] In this respect, enlarging the scope of Title VII coverage will expand liability beyond current common-law remedies for defamation and will force employers to reevaluate the prudence of providing references. The facts of *Robinson* illustrate the new quandary for employers.

In *Robinson*, the plaintiff, Charles T. Robinson (Robinson) asserted that his former employer, Shell Oil Company (Shell) gave a negative reference to a prospective employer because Robinson had filed a charge with the Equal Employment Opportunity Commission (EEOC).[28] Robinson was discharged by Shell in 1991. He subsequently filed a charge with the EEOC alleging that his discharge was motivated by race. Robinson then sought employment with Metropolitan Life Insurance Company (Metropolitan). Metropolitan requested a reference from Shell, which Shell provided. Robinson alleged that Shell provided a negative reference to Metropolitan because Robinson had filed the earlier racial discrimination charge with the EEOC. Shell's reference to Metropolitan occurred after Robinson had been terminated and Robinson argued that it constituted postemployment retaliation in violation section 704(a). Shell conceded that the information it provided concerning Robinson's performance was negative, but contended the information was true and responsive to Metropolitan's inquiry.[29]

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employee's participation in charge against former employer); Bailey v. USX Corp., 850 F.2d 1506 (11th Cir. 1988) (alleging that employer made disparaging comment to prospective employer); Pantchenko v. C.B. Dolge Co., Inc., 581 F.2d 1052 (2d Cir. 1978) (refusing to provide reference to prospective employer); Rutherford v. American Bank of Commerce, 565 F.2d 1162 (10th Cir. 1977) (advising prospective employer that plaintiff had filed sex discrimination charge).

27. *See Rutherford*, 565 F.2d at 1164.

28. *See* Robinson v. Shell Oil Co., 117 S. Ct. 843, 845 (1997).

29. *See* Robinson v. Shell Oil Co., 70 F.3d 325 (4th Cir. 1995), *rev'd*, 117 S. Ct. 843 (1997). See also Respondent's Brief at *5, *Robinson*, No. 95-1376, 1996 WL 419672 (U.S. July 25, 1996) for a more detailed account of the factual setting.

III. SECTION 704(A): LINGUISTIC CONTORTIONS TO INCLUDE FORMER EMPLOYEES

Title VII's retaliation prohibition is contained in section 704(a).[30] That section provides:

> It shall be an unlawful employment practice 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 title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.[31]

This language prohibits an employer from retaliating against "any of *his employees*"[32] for that employee's participation in enforcing the substantive provisions of Title VII. The substantive provisions relating to covered entities (i.e., employers, employment agencies, and labor organizations) are contained in section 703 of the Act.[33] Additionally, both "employer"[34] and "employee"[35] are defined for the purposes of Title VII in section 701 of the Act. Before addressing section 704(a)'s scope relating to former employees, it is helpful to note its general contours, its breadth, and its limitations.

A. *The "Retaliation" Prohibition*

As an initial matter, it should be noted that "retaliation" is a shorthand description of the anti-discrimination language contained in section 704(a). While it does provide an effective method of distinguishing the focus of the prohibitions contained in section 704(a) from the substantive provisions found in section 703, the shorthand is not entirely accurate. Although retal-

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30. 42 U.S.C. § 2000e-3(a) (1994).

31. *Id.*

32. *Id.* (emphasis added).

33. *See* 42 U.S.C. § 2000e-2(a) (1994).

34. 42 U.S.C. § 2000e(b) (1994). "The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks." *Id.*

35. 42 U.S.C. § 2000e(f) (1994). "The term 'employee' means an individual employed by an employer." *Id.*

iation is commonly used to describe conduct prohibited by section 704(a), the term "retaliation" is not used anywhere in Title VII. Moreover, section 704(a) not only prohibits typical retaliatory conduct, or retribution by an employer for charges filed against it by a current employee, but also, more broadly encompasses any discrimination against an employee because of that employee's participation in protected Title VII enforcement activities.[36]

Section 704(a) also protects "applicants for employment."[37] Consistent with this protection, the Act prohibits a prospective employer from discriminating against an applicant for that applicant's prior or current participation in enforcement proceedings against a former employer or other covered entity.[38] Thus, section 704(a) is much broader than its "retaliation" shorthand indicates. Meaningful discussion of the section's scope and the purported impact of its expansion requires awareness of this breadth. Likewise, it requires careful scrutiny of the section's inherent limitations.

Proponents of expanding section 704(a) extol the goals of Title VII as a comprehensive remedy for employment discrimination, but section 704(a) does not, by its terms, attempt to prohibit the entire universe of discrimination or retaliation in the employment relationship. Rather, section 704(a) declares it an unlawful employment practice to discriminate because of a protected individual's opposition to Title VII violations or participation in an "investigation, proceeding, or hearing" relating to such violations.[39] Discrimination on other bases is prohibited by other substantive sections of the Act,[40] as well as other federal legislation.[41] Section 704(a), like the Act itself, has recog-

36. *See* 42 U.S.C. § 2000e-3(a) (1994) (stating protected activities include opposing any practice made unlawful under Title VII such as making a charge, testifying, assisting or participating in any manner in an investigation, proceeding, or hearing).

37. *Id.*

38. *See* Polsby v. Chase, 970 F.2d 1360, 1365 n.4 (4th Cir. 1992), *vacated on other grounds sub nom.* Polsby v. Shalala, 507 U.S. 1048 (1993); Christopher v. Stouder Mem. Hosp., 936 F.2d 870 (6th Cir. 1991).

39. 42 U.S.C. § 2000e-3(a) (1994).

40. *See* 42 U.S.C. §§ 2000e-2 (1994) (prohibiting discrimination because of race, color, religion, sex, or national origin).

41. *See* 29 U.S.C. § 2615(b) (1994) (FMLA); 42 U.S.C. § 12112(a), § 12132 (1994) (ADA); 29 U.S.C. § 623 (1994) (ADEA); 29 U.S.C. § 794(a) (1994) (Rehabilitation Act of 1973); 29 U.S.C. § 206(d) (1994) (Equal Pay Act of 1963); 42 U.S.C. § 1981 (1994).

nized limitations and is not the "cure-all" for every ill encountered in the employment relationship. Within these margins, however, section 704(a) seeks to prevent discriminatory and retaliatory conduct against protected individuals.

B. *Making the "Former Employee" an "Employee" for Section 704(a) Purposes*

One premise for including "former employees" within the protection of section 704(a) is the purported ambiguity of the statutory language. Because of this ambiguity courts are free to rely on the policy objectives underlying the Act to guide their decisions and can grant the language a broad interpretation to further those goals.[42] This argument focuses on a seemingly inconsistent use of the term "employee" throughout Title VII and Congress' failure to expressly exclude former employees from section 704(a). This threshold finding of ambiguity in the term "employee" formed the basis of the Court's decision in *Robinson*.[43]

1. Defining an "Employee"

Facially, section 704(a) appears clear, prohibiting discrimination by an employer against "*his employees* or applicants for employment."[44] Section 701(f) further provides that an "employee" is a person "*employed by* an employer."[45] In fact, the *Robinson* Court prefaced its ultimate finding of ambiguity by admitting that "[a]t first blush, the term 'employees' in [section] 704(a) would seem to refer to those [persons] having an existing employment relationship with the employer in question."[46] The Court, however, seized on the lack of a temporal qualifier that would plainly establish section 704(a) protects only persons still

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42. *See* Petitioner's Brief at *7, Robinson v. Shell Oil Co., No. 95-1376, 1996 WL 341308 (U.S. June 21, 1996); Tafuri, *supra* note 19, at 806-08. *See also infra* Part IV (discussing whether including or excluding former employees would further Title VII's underlying policies).

43. *See Robinson*, 117 S. Ct. at 848.

44. 42 U.S.C. § 2000e-3(a) (1994) (emphasis added).

45. 42 U.S.C. § 2000e(f) (1994) (emphasis added).

46. *Robinson*, 117 S. Ct. at 846. *Accord* Walters v. Metropolitan Educ. Enter., 117 S. Ct. 660 (1997).

employed at the time of the alleged retaliation.[47] The Court concluded that the absence of a temporal qualifier left the term ambiguous and open to interpretation.[48]

The Court also dismissed the significance of the qualification that section 704(a) only prohibits an employer's discrimination against *"his* employees."[49] Section 704(a) does not define the protected class as "employees" generically, but as *"his employees"* referring obviously to the employer perpetrating the discrimination.[50] Admittedly, this qualifier "narrows the scope of the provision."[51] Yet, the Court still found the term "could include 'his' former employees, but still exclude persons who have never worked for the particular employer being charged with retaliation."[52] In its brief discussion of this qualification, it is apparent that the Court rejected the plain connotation of the qualifying term because it was linguistically possible to read alternative meanings into the phrase.[53]

Finally, the Court found that the definition of "employee" contained in section 701(f) also lacked a temporal qualifying term.[54] In *Nationwide Mutual Insurance Co. v. Darden*,[55] the Court had criticized a similar definition of "employee" in the Employee Retirement Income Security Act as a tautology which explained very little.[56] Despite its simplicity, the definition arguably remained open to multiple interpretations including both present and past employees.[57] The *Robinson* Court found that

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47. *See Robinson*, 117 S. Ct. at 846. According to the Court, "his employees" is ambiguous absent a qualifier such as "his 'current' employees." *Id.*

48. *See id.*

49. *See id.* at 847-48.

50. 42 U.S.C. § 2000e-3(a) (1994) (emphasis added).

51. *Robinson*, 117 S. Ct. at 847-48.

52. *Id.* at 848.

53. *See id.*

54. *See id.* at 846-47.

55. 503 U.S. 318 (1992).

56. *See id.* at 323 (focusing on the similar definition of 'employee' in ERISA and concluding that it is "completely circular and explains nothing"). The ERISA definition provides that an employee is "any individual employed by an employer." 29 U.S.C. § 1002(6) (1994). *But see* Robinson v. Shell Oil Co., 70 F.3d 325, 328 (4th Cir. 1995) (stating general rule that "a definition which declares what a term means . . . excludes any meaning that is not stated" (quoting 2A GEORGE SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 47.07, at 152 (5th ed. 1992)), *rev'd*, 117 S.Ct. 843 (1997).

57. As the petitioner in *Robinson* argued, "'employed' is both the past and present

a broad interpretation was further supported by the inconsistent usage of "employee" throughout Title VII.

2. Inconsistency Invites the Court to Find Ambiguity

There are numerous instances throughout Title VII, where "employee" must be interpreted to encompass different combinations of present, former, and future employees.[58] For example, sections 706(b) and 709(e) restrict employees of the EEOC from disclosing information to the public.[59] This prohibition should logically extend to former employees of the agency in order for these sections to completely prevent the unauthorized dissemination of information. Therefore, "employee" in the context of sections 706(b) and 709(e) most likely encompasses former employees as well as current ones.[60] Similarly, sections 706(g)(1) and 717(b) provide for the "reinstatement or hiring of employees" as remedies.[61] In *Robinson*, the Court found that because an employer does not "reinstate" or "hire" an existing employee, reinstatement necessarily refers to former employees and hiring refers to prospective employees even though Title VII uses "employee" rather than "individual" to refer to the recipients of these remedies.[62] The concept of "employee" with-

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tense, passive voice and the past tense, active voice of the verb 'employ.'" Petitioner's Brief at *17, *Robinson*, No. 95-1376, 1996 WL 341308 (U.S. June 21, 1996). Thus, the language could refer to individuals who may be employed, are employed, or have been employed. *See id.* at *18 n.10.

58. Robinson and the Amici pointed out the inconsistent use of the term "employee" throughout Title VII. *See* Petitioner's Brief at *13-17, *Robinson*, No. 95-1376, 1996 WL 341308 (U.S. June 21, 1996); Amicus Brief of The Lawyers' Committee for Civil Rights Under Law et al. at *10, *Robinson*, No. 95-1376, 1996 WL 341297 (U.S. June 21, 1996); Amicus Brief of United States and The Equal Employment Opportunity Commission at *10, *Robinson*, No. 95-1376, 1996 WL 346815 (U.S. June 21, 1996). The Court noted, however, that the term may have a specific usage within section 704(a) that would give it a single plain meaning within the particular context of that section. *See Robinson*, 117 S. Ct. at 847.

59. *See* 42 U.S.C. § 2000e-5(b) (1994) (prohibiting officers and employees of the EEOC from disclosing conciliation efforts to the public); 42 U.S.C. § 2000e-8(e) (1994) (prohibiting any officer or employee of the EEOC from disclosing any information related to an investigation or proceeding under Title VII, and providing that any officer or employee making such a public disclosure shall be guilty of a misdemeanor).

60. *See* Petitioner's Brief at *14, *Robinson*, No. 95-1376, 1996 WL 341308 (U.S. June 21, 1996).

61. 42 U.S.C. § 2000e-5(g)(1) (1994); 42 U.S.C. § 2000e-(b) (1994).

62. *See Robinson*, 117 S. Ct. at 847. *But see* Respondent's Brief at *22, *Robinson*,

in Title VII could not always, however, include former and/or future employees.[63]

Employers covered by Title VII are defined by the scope provision in section 701(b) as those having "fifteen or more employees."[64] Congress could not have intended to include many, if not most, small employers under the Act by requiring that they count all present and past employees in reaching this threshold.[65] This would clearly contravene Congress' intent to exclude small businesses from the scope of Title VII.[66] In fact, in *Walters v. Metropolitan Educational Enterprises, Inc.*,[67] the Court held that "the ultimate touchstone" in determining the number of employees employed by an employer is the presence of an "employment relationship" on the day in question.[68] Thus, the term "employee" in section 701(b) does not include former employees. In *Robinson*, however, the Court found that the temporal qualifiers used to define an "employer" in section 701(b) significantly differentiate it from definition of an "employee" in section 701(f).[69] Therefore, the Court concluded that even though an "employee" must have an existing employment relationship to be counted for section 701(b) purposes, he need

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No. 95-1376, 1996 WL 419672 (U.S. July 25, 1996) (arguing that employee in the context of sections 706(g)(1) and 717(b) need not encompass past and future employees, because at the time of the adverse employment action (discharge or failure to hire) the affected individual was an employee or applicant for hire, and thus, covered under the act and entitled to such relief).

63. *See Robinson*, 117 S. Ct. at 847 (discussing the term "employee" in the context of sections 703(h) (standards of compensation for employees in different locations) and 717(b) (promotion of employees) and concluding that in these sections the term unambiguously refers only to current employees).

64. 42 U.S.C. § 2000e(b) (1994).

65. *See* Walters v. Metropolitan Educ. Enter., 117 S. Ct. 660 (1997).

66. *See* Tomka v. Seiler Corp., 66 F.3d 1295, 1314 (2d Cir. 1995) (finding that the cost "associated with defending against discrimination claims [and complying with federal regulations] was a factor in the decision to implement a minimum employee requirement"); Miller v. Maxwell's Int'l, Inc., 991 F.2d 583, 587 (9th Cir. 1993) (stating that "Congress did not want to burden small entities with the costs associated with litigating discrimination claims").

67. 117 S. Ct. 660 (1997).

68. 117 S. Ct. at 666. *Walters* was argued before the Court on November 6, 1996, the same day as *Robinson*.

69. *See Robinson*, 117 S. Ct. at 846 n.2. Compare the temporal qualifiers in 42 U.S.C. § 2000e(b) (defining "employer" as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks . . . ") with 42 U.S.C. § 2000e(f) (defining "employee" as "an individual employed by an employer").

not have an existing relationship to be protected from retaliation under section 704(a).[70]

Differences in the use of "employee" throughout Title VII to encompass various combinations of individuals compels the conclusion that the term has no inherent singular meaning.[71] Many words have multiple meanings, however, and this fact alone does not necessarily mean that the term in the section 704(a) context is ambiguous or that it requires a broad reading.[72] Even in light of the foregoing examples of inconsistent usage, the *Robinson* Court suggested that within Title VII "the term 'employees' may have a plain meaning in the context of a particular section."[73] Thus, although "employee" was not used as a term of art consistently throughout Title VII, it should be read in a light consistent with "its surroundings . . . in the statute where it appears."[74] The Court then considered the context in which "employee" is used within section 704(a) to determine whether this context provided any further meaning.[75]

3. Express Protection for Employees and Applicants Implicitly Excludes Former Employees

The canon of statutory construction *expressio unius est exclusio alterius*[76] suggests a construction of section 704(a) that

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70. *See Robinson*, 117 S. Ct. at 846-47.

71. *But cf.* BFP v. Resolution Trust Corp., 114 S. Ct. 1757, 1771 (1994) (Souter, J., dissenting) (stating that a "common rule of construction calls for a single definition of a common term occurring in several places within a statute"); Commissioner of Internal Revenue v. Keystone Consol. Indus., Inc., 508 U.S. 152, 159 (1993) (stating that "[i]t is a 'normal rule of statutory construction' that identical words used in different parts of the same act are intended to have the same meaning").

72. *See Robinson*, 117 S. Ct. at 847.

73. *Id.*

74. NLRB v. Hearst Publications, 322 U.S. 111, 124 (1944) (quoting United States v. American Trucking Ass'ns, 310 U.S. 534 (1940) (interpreting scope of the National Labor Relations Act (NLRA)).

75. The Court rejected Robinson's argument that common usage and judicial interpretations of "employee" from other statutes should persuade the Court to give it a similar interpretation in the Title VII context. *See* Petitioner's Brief at *9-13, *Robinson*, No.95-1376, 1996 WL 341308 (U.S. June 21, 1996). The Court found these interpretations "largely irrelevant" as to Congress' use of the term in section 704(a). *Robinson*, 117 S. Ct. at 847 n.4.

76. Roughly translated as: "The expression of one thing implies the exclusion of

does not include former employees.[77] Section 704(a) explicitly provides coverage for employees and applicants for employment. It does not expressly provide coverage for former employees. Thus, the statutory language expressly covers existing employment relationships and prospective relationships, but not former ones. It is unclear why Congress would not also expressly include former employees, or past relationships, among those in the protected class if it had intended to cover them.

Throughout Title VII Congress has used "employee" to describe several different temporal combinations of employment relationships.[78] Therefore, since "employee" is not a term of art used consistently throughout Title VII, Congress could not have relied on a uniform interpretation of the term to implicitly include former employees in section 704(a).[79] Moreover, it is obvious from subsequent legislation that Congress is aware of the temporal variations along the employment continuum and has taken steps to expressly include former employees within the scope of statutes where it consciously intended to cover them.

In those instances, despite language that otherwise included "employees" generically, Congress saw fit to expressly include "former employees." In the Congressional Accountability Act of 1995,[80] The Whistleblower Protection Act of 1989,[81] The Inter-

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another." BLACK'S LAW DICTIONARY 581 (6th ed. 1990).

77. *See* Tennessee Valley Auth. v. Hill, 437 U.S. 153, 188 (1978) (finding that where Congress is aware of the broad sweep necessary to accomplish its purpose, the inclusion of some exceptions within a statute, mandates finding that those not included were not intended to fall within the statute's scope). *Accord* California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 600 (1987) (Powell, J., concurring in part and dissenting in part). *But see* SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344, 350-51 (1943). Referring to the maxim the Court stated:

> However well these rules may serve at times to aid in deciphering legislative intent, they long have been subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose, will read text in light of context and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy.

Id. See also 2A NORMAN J. SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION §§ 47.23-47.25 (5th ed. 1992) (discussing the application of *expressio unius est exclusio alterius*).

78. *See supra* Part II.B.2.

79. *See supra* text accompanying notes 64-66 (suggesting that "employee" could not possibly include former employees in the context of section 701(b), because it would contravene Congress' intent to exclude small businesses).

80. 2 U.S.C.A. § 1301(4) (West Supp. 1996) (stating that the "term 'employee'

nal Revenue Code,[82] The Federal Credit Union Act,[83] The Federal Deposit Insurance Corporation Act,[84] and The Occupational Safety and Health Act[85] Congress expressly covered "former employees." Absent express language in section 704(a), the courts should not draw an inference that Congress' implicitly intended to cover former employees where it expressly provided for applicants and current employees, but failed to provide for individuals who no longer have an existing employment relationship with the employer.[86] This argument is significantly strengthened by the express language Congress chose to cover former employees in the statutory definitions reported above. Moreover, even with the sweeping amendments to Title VII in The Civil Rights Act of 1991,[87] the language of section 704(a) remained without any reference to former employees.[88] Admittedly, this final observation about Congress' failure to expressly include former employees in subsequent amendments to Title VII is a double-edged sword.

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includes an applicant for employment and a former employee").

81. 5 U.S.C. §§ 1212(a)(1) (stating that the statute "shall protect employees, former employees and applicants for employment from prohibited personnel practices), 1213(a)(3), 1214(a)(3) & 1221 (1994) (protecting employees, former employees, and applicants for employment).

82. 26 U.S.C. §§ 79(e) (stating that "for the purposes of this section the term 'employee' includes a former employee"), 5000(b) (1994) (stating that the section covers "employees, former employees . . . [and] others associated or formerly associated with the employer").

83. 12 U.S.C. § 1790b(b) (1994) (granting a right of action to any "employee or former employee" for discrimination against such person for providing information to Board or Attorney General regarding violations of law or regulations).

84. 12 U.S.C. § 1831j(b) (1994) (granting a right of action to any "employee or former employee" for discrimination against such person for providing information to Board or Attorney General regarding violations of law or regulations).

85. 29 U.S.C. § 657(c)(3) (1994) (providing each employee or former employee with access to records of exposures to potentially toxic materials or harmful agents).

86. *See* Sherman v. Burke Contracting, Inc., 891 F.2d 1527, 1540 n.6 (11th Cir. 1990) (Tjoflat, C.J., specially concurring). That

> Congress specifically referred to 'applicants for employment' in addition to 'employees' makes it unlikely that Congress intended the term 'employee' to be interpreted to cover former employees; if Congress wished the statute to reach former employees, it could have simply used words to that effect, as it did with respect to job applicants.

Id. Accord Polsby v. Chase, 970 F.2d 1360, 1365 (4th Cir. 1992) (stating "Congress could certainly have included a former employee if it had desired"), *vacated on other grounds sub nom.* Polsby v. Shalala, 507 U.S. 1048 (1993).

87. Pub. L. No. 102-166, 105 Stat. 1071 § 105(b).

88. *See* Tafuri, *supra* note 19, at 817-18.

In light of the courts' unanimous interpretation of section 704(a) prior to the enactment of the Civil Rights Act of 1991, Congress may have felt no particular need to amend the section to expressly cover former employees.[89] On the contrary, "[w]hile 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."[90] The Court has looked favorably on Congress' implicit ratification of judicial interpretations in the past.[91] Yet, the focus in determining Title VII's intended scope should not be whether Congress has acted to exclude former employees in response to the courts' misinterpretations, but rather whether it ever envisioned covering them when Title VII was created.[92]

Title VII has no legislative history that clarifies Congress' intent regarding former employees.[93] In *Rutherford v. American Bank of Commerce*,[94] the Tenth Circuit Court of Appeals rejected an argument that former employees were not protected by section 704(a) because a literal reading "would result in a narrow interpretation of the statute not justified by its legislative history."[95] The court, however, failed to cite any history in support of its expansive interpretation.[96] As courts after *Ruth-*

89. *See* Christopher v. Stouder Mem. Hosp., 936 F.2d 870 (6th Cir. 1991) (holding former employees within protected class of section 704(a)); EEOC v. J.M. Huber Corp., 927 F.2d 1322 (5th Cir. 1991) (same); Sherman v. Burke Contracting, Inc., 891 F.2d 1527 (11th Cir. 1990) (same); Bailey v. USX Corp., 850 F.2d 1506 (11th Cir. 1988) (same); O'Brien v. Sky Chefs, Inc., 670 F.2d 864 (9th Cir. 1982) (same); Pantchenko v. C.B. Dolge Co., Inc., 581 F.2d 1052 (2d Cir. 1978) (same); Rutherford v. American Bank of Commerce, 565 F.2d 1162, 1165 (10th Cir. 1977) (same).

90. Mitchell, *supra* note 9, at 399.

91. *See* 2B NORMAN J. SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION §49.09 (5th ed. 1992). In discussing "implicit ratification," Singer suggests that where Congress reenacts a statute without changing language that has been judicially construed Congress knows and approves of prior judicial interpretations. *See id.*

92. *See id.* (stating that the "acquiescence of the legislature seems to be of small consequence where the statute or its contemporaneous interpretation was not called to the attention of the legislature" and the legislature's awareness is not evident from committee reports or other legislative history pertaining to the reenactment).

93. *See* Moore, *supra* note 20, at 210 (concluding that Title VII's "legislative history provides no guidance").

94. 565 F.2d at 1165 (10th Cir. 1977).

95. *Id.* at 1165.

96. *See id.* (citing no legislative history suggesting Congress intended to include

erford have suggested, Congress did elaborate on section 704(a)'s purpose,[97] but remained silent about its scope.[98]

In *Robinson*, the Supreme Court also rejected the argument that the express coverage of employees and applicants for employment implicitly excluded former employees. The Court determined that "[t]he use of the term 'applicants' in [section] 704(a) does not serve to confine, by negative inference, the temporal scope of the term 'employees.'"[99] The Court found that such a conclusion must be based on the premise that "the term 'applicants' is equivalent to the phrase 'future employees.'"[100] Although the Court correctly determined that the term "applicants" is much broader than "future employees," it is unclear why the Court constructed this prerequisite determination before applying a common canon of statutory interpretation.[101] The negative implication would certainly be stronger if Congress included one classification of individuals (e.g., future employees) and failed to include a nearly identical distinct classification (e.g., former employees), but Congress' recognition that a single term could not encompass all of the individuals that it intended to cover and its subsequent choice to expressly include some individuals while not including others does not completely negate the force of that choice.

Congress' choice to expressly cover both applicants and employees, but not former employees, is one of the strongest indications that Congress did not intend to provide these individuals with a private right of action. The Court's suggestion that "[b]ecause the term 'applicants' in [section] 704(a) is not synonymous with the phrase 'future employees,' there is no basis for engaging in the further (and questionable) negative inference that inclusion of the term 'applicants' demonstrates intentional

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former employees).

97. *See* 110 CONG. REC. 7213 (Interpretive Mem. of Sen. Clark & Sen. Case).

98. *See* Sherman v. Burke Contracting, Inc., 891 F.2d at 1540 n.6 (11th Cir. 1990) (Tjoflat, C.J., specially concurring).

99. *Robinson*, 117 S. Ct. at 848.

100. *Id.*

101. The Court found that the term "applicants" could cover unsuccessful applicants or those who turn down offers, but neither would necessarily be "future employees." Moreover, the Court stated that "applicants" fails to cover "'future employees' who may be offered and will accept jobs without having to apply for those jobs." *Id.*

exclusion of former employees" defies logic and reason.[102] The Court's construction of a threshold requirement that all included and excluded classifications of individuals need to have identical parameters before invoking a common canon of statutory construction has no basis in the canon itself or its previous use.[103] Thus, the Court's analysis should be viewed as an attempt to conveniently avoid the clear import of Congress' choice to expressly include only some individuals.

4. Comparison of Sections 703 and 704(a) Suggests A Narrow Interpretation

Comparison of section 704(a)'s language with other sections of Title VII should provide guidance in construing "employee" in this specific context. Congress used different language to define the scope of the relevant protected classes in section 703 and section 704(a) which suggests that it has prohibited different types of discrimination against different categories of persons in those sections.[104] While section 703 uses broad language to

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102. *Id.*

103. *See, e.g.*, Tennessee Valley Auth. v. Hill, 437 U.S. 153, 188 (1978).

104. Section 703 contains the substantive provisions of Title VII, prohibiting discrimination "on the basis of race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2 (1994). The prohibitions contained in section 703 define a broad protected class of *individuals*. Likewise, section 704(a) prohibits retaliation by employment agencies and labor organizations against any individual, but confines the class of persons protected from *employer* realization to *employees and applicants* for employment. *Compare* 42 U.S.C. § 2000e-2(a) (1994) (prohibiting an employer from discriminating in hiring or termination *"against any individual"* and from limiting, segregating, or classifying "his employees or applicants for employment in any way which would deprive or tend to deprive *any individual* of employment opportunities") *and* 42 U.S.C. § 2000e-2(b) (1994) (prohibiting an employment agency from discriminating *"against any individual"* or classifying or referring *"any individual"*) *and* 42 U.S.C. § 2000e-2(c) (1994) (prohibiting a labor organization from discriminating *"against any individual"*; from limiting, segregating, or classifying its membership or applicants for membership "in a way which would deprive *any individual* of employment opportunities"; and from causing or attempting "to cause an employer to discriminate *against an individual*") *and* 42 U.S.C. § 2000e-2(d) (1994) (prohibiting any employer, labor organization, or joint labor-management committee from discriminating *"against any individual"*) *with* 42 U.S.C. § 2000e-3(a) (1994) (prohibiting an employer from discriminating against *"any of his employees or applicants for employment"*) (emphasis added). Note also that although protection from retaliatory conduct of employers, employment agencies, and labor organizations is all contained in section 704(a) (rather than subdividing protection for each covered entity as in section (703)), section 704(a) uses the above described dichotomous language in defining the protected classes. "Employees

prohibit discrimination against "any individual," section 704(a) prohibits an employer's discrimination only against "employees and applicants for employment."[105] Section 704(a) therefore, should be construed as covering a more narrow class of persons than its broader counterparts in section 703.

In *Pantchenko v. C.B. Dolge Co., Inc.*,[106] the court reasoned that the use of the term "individual" when referring to discrimination by prospective employers, employment agencies, and labor organizations was appropriate because no employment relationship existed between these entities and the protected persons.[107] Likewise, the court found that the term "employee" was appropriate for prohibiting discrimination by employers where an employment relationship existed or had at one time existed.[108] The court concluded that "use of the term 'employee' in referring to a former employee, while colloquial, is not inappropriate."[109] Moreover, the court found that the term did not indicate an intent by Congress to limit the scope of section 704(a)'s protected class. This reasoning may sufficiently explain the difference in language between section 704(a) and sections 703(b) and 703(c), which relate to employment agencies and labor organizations. It does not, however, account for the different terms in sections 704(a) and 703(a), both of which apply to employers.

In *Robinson*, the Court also rejected the section 703 / section 704(a) comparison and determined that it provided "no meaningful assistance."[110] The Court admitted that "'individual' is a broader term than 'employee' and would facially seem to cover a former employee," but it would also cover "persons who have

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and applicants" are protected from the retaliation of employers, and "individuals" are protected from the retaliation of employment agencies and labor organizations. *See* 42 U.S.C. § 2000e-3(a) (1994).

105. *See* Sherman v. Burke Contracting, Inc., 891 F.2d 1527, 1539 (11th Cir. 1990) (Tjoflat, C.J., specially concurring) (noting "contrast between the open-ended language of section [703(a)] and the limiting terminology of section [704(a)]"); *see also* Respondent's Brief at *15, *Robinson*, No. 95-1376, 1996 WL 419672 (U.S. July 25, 1996) (arguing that had Congress intended the scope of section 704 to be coextensive with 703 it would have used identical language (i.e., "individual")).

106. 581 F.2d 1052 (2d Cir. 1978).

107. *See id.* at 1055.

108. *See id.*

109. *Id.*

110. *Robinson*, 117 S. Ct at 848.

never had an employment relationship with the employer at issue."[111] Thus, the Court concluded that the "term 'individual' does not seem designed to capture former employees, as distinct from current employees, and its use provides no insight into whether the term 'employees' is limited only to current employees."[112]

Use of the term "employee" in the section 704(a) context, however, leaves little doubt that it unambiguously does not include former employees. The section's terms limit its scope to cover only *"his employees and applicants."*[113] Moreover, although the definition of "employee" is open to multiple interpretations,[114] a person "employed by an employer" has a common, plain and ordinary meaning which indicates the existence of a present employment relationship. Additionally, Congress could have expressly included former employees when the Act was written and again in 1991, but yet, there is no evidence that Congress ever contemplated the former employee issue or intended to cover them under section 704(a).[115] It is apparent that Congress can use the words "former employees" where it clearly intends such coverage.[116] Finally, the difference between language used in sections 703 and 704(a) defining the scope of the protected class and the express coverage of "applicants for employment" suggests that even though "employee" may have multiple meanings throughout Title VII, it does not include former employees in the section 704(a) context. Thus, the statute should not have been read to grant an implicit right of action to a class of individuals Congress never envisioned.[117]

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111. *Id.*

112. *Id.*

113. 42 U.S.C. § 2000e-3(a) (1994) (emphasis added).

114. *See supra* notes 54-57 and accompanying text.

115. Justice Scalia seemed to indicate as much during oral argument on *Robinson*, stating "[i]f I were a Congressman, I would have a hard time figuring out how an employer could retaliate against somebody who is no longer an employee. He could retaliate by refusing to rehire the guy, perhaps. But, in that case, he's covered because he would be an applicant for employment." Transcript at *11, *Robinson*, No. 95-1376, 1996 WL 656475 (U.S. Nov. 6, 1996).

116. *See supra* notes 80-85 and accompanying text.

117. *See* Robinson v. Shell Oil Co., 70 F.3d 325, 330 (4th Cir. 1995), *rev'd*, 117 S. Ct. 843 (1997). "We are simply prohibited from reading into the clear language of the definition of 'employee' that which Congress did not include." *Id.*

The Court's inquiry should have concluded with the plain meaning of section 704(a).[118] In the most recent efforts to confine judicial interpretation to the language Congress chooses and avoid debates over policy and legislative history, the Court should have concluded that reading the language of section 704(a) and section 701(f) in *pari materia* leads unambiguously to the conclusion that former employees are not protected from retaliation under Title VII.[119] Given other courts' treatment of this issue, however, it was likely that the Supreme Court would move beyond Title VII's express language. The Court concluded that the language of section 704(a) was ambiguous and implied that a strict interpretation of that language would lead to absurd results which Congress could not have intended.[120] This threshold finding opened the door to policy analysis,[121] which was relied on nearly exclusively by courts previously considering the issue. Even though the Court squared the inclusion of former employees with the statutory language of section 704(a), it did not recognize that such coverage may not further many of Title VII's underlying policies.

IV. EXPANDING SECTION 704(A): INCONSISTENT WITH TITLE VII'S UNDERLYING FRAMEWORK

Despite the significant interpretational questions regarding the statutory language used in section 704(a), few courts paid more than passing attention to Congress' word choice before moving quickly to the policy bases for broadening the scope of Title VII's anti-retaliation provision.[122] There are numerous

118. "We have stated time and again that courts 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.'" Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 254 (1992).

119. *See Robinson*, 70 F.3d at 328 (quoting United States v. Ron Pair Enter., Inc., 489 U.S. 235, 240-41 (1989)).

120. *See Robinson*, 117 S. Ct. at 848.

121. See *Russello v. United States*, 464 U.S. 16, 20 (1983) and *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930) discussing the ambiguity and absurdity exceptions to the plain-meaning rule. *But see Robinson*, 70 F.3d at 329 (rejecting exceptions to the plain-meaning rule in the case of section 704(a)).

122. *See* Polsby v. Chase, 970 F.2d 1360, 1365 (4th Cir. 1992) (criticizing other circuit courts for ignoring the clear language of section 704(a) in favor of decisions

policy-based arguments that have developed through repeated analysis of the issue which support an expansive reading of section 704(a), but expansion is also inconsistent with many of the underlying policies of Title VII. The earliest interpretation expanding section 704(a)'s scope relied significantly on interpretations of similar statutory language in the FLSA and policy justifications which Title VII effectively addresses without extending its scope to former employees.

A. *Reliance on Dissimilar Authority and a Failure to Analyze Title VII's Framework Independently Lead Courts Down the Wrong Path*

In *Rutherford*, the Tenth Circuit expanded section 704(a) coverage,[123] and cited with approval two earlier cases interpreting similar anti-retaliation language in the FLSA.[124] Relying on *Hodgson v. Charles Martin Inspectors of Petroleum, Inc.*[125] and *Dunlop v. Carriage Carpet Co.*,[126] the court concluded that there was no ground for affording any less protection to former employees than to current employees.[127] The *Rutherford* court was persuaded by the broad coverage previously established under the FLSA. This reliance, however, was misplaced for several reasons.

Hodgson rejected district court analysis that had found the probability of damaging employer retaliation remote and speculative.[128] Explaining the need to shield former employees, the *Hodgson* court reasoned that the possibility of retaliation is far

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based "entirely on dubious considerations of policy and the supposed purpose of the statute"), *vacated on other grounds sub nom.* Polsby v. Shalala, 507 U.S. 1048 (1993).

123. *See Rutherford*, 565 F.2d 1162, 1165-66 (10th Cir. 1977).

124. The FLSA provides that "it shall be unlawful for any person to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this act . . . or has testified or is about to testify in any such proceeding." 29 U.S.C. § 215(a)(3) (1994). It further provides that an "'employee' means any individual employed by an employer." 29 U.S.C. § 203(e)(1) (1994).

125. 459 F.2d 303 (5th Cir. 1972).

126. 548 F.2d 139 (6th Cir. 1977).

127. *See Rutherford*, 565 F.2d at 1166 (10th Cir. 1977) (quoting *Hodgson*, 459 F.2d at 306 (5th Cir. 1972)).

128. *See Hodgson*, 459 F.2d at 306 (5th Cir. 1972).

from "remote and speculative" with respect to former employees for three reasons.[129]

> 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.[130]

Reliance on these justifications is troublesome primarily because section 704(a)'s anti-retaliation language expressly addresses the concerns raised by *Hodgson* without any extended coverage of former employees.

Retaliation or discrimination by an employer against a current employee for his or her participation in Title VII enforcement activity is prohibited, regardless of whether that activity is directed at the current employer, a past employer, or other covered entity.[131] No extension of section 704(a) is necessary to protect employees from discrimination by their current employer. Section 704(a)'s express language protects these individuals. Thus, even if the employee's participation in enforcement activity is directed at another covered entity (i.e., a former employer, employment agency, or union), a current employer is prohibited from discriminating against the employee for engaging in such activity.

Moreover, section 704(a) expressly covers applicants for employment, and does not limit its protection to any particular

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129. *Id.*

130. *Id.*

131. *See supra* Part III.A. (discussing breadth of section 704(a) and emphasizing that it covers not only traditional retaliation, but all forms of discriminatory conduct directed at participants in enforcement related activities).

type of applicant. It equally protects first-time applicants as well as those seeking reemployment with a former employer. It effectively prohibits discrimination against an ex-employee, as an applicant for employment, where he or she is seeking reemployment with a former employer.[132] This protection exists without any extension of section 704(a). Thus, the examples cited in *Hodgson* which support an expansive interpretation of the FLSA, do not carry equal force for an extension of section 704(a), which already addresses these concerns. Similarly, cases often cited to support extending section 704(a) coverage do not necessarily require an extension to provide an effective remedy for the aggrieved former employee.

In *EEOC v. Ohio Edison Co.*,[133] the plaintiff (a former employee) alleged that the defendant withdrew its offer to reinstate him based on retaliation.[134] The plaintiff had been discharged, but was offered reinstatement by his former employer. The former employer then allegedly withdrew its offer of reinstatement after a co-employee protested the plaintiff's original discharge.[135] Although the court relied heavily on precedent extending the protection of section 704(a) to former employees,[136] the plaintiff's claim was more appropriately cognizable as one of an applicant for employment, without considering his status as a former employee.

Similarly, in *Christopher v. Stouder Memorial Hospital*,[137] the plaintiff's claim was more appropriately analyzed as one growing out of the defendant's unusual ability to directly impact the plaintiff's future employment. In *Christopher*, a nurse who had briefly held a position at Stouder Memorial Hospital, was seeking limited privileges at the hospital as a private duty scrub nurse.[138] Although Christopher was not seeking to re-

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132. *See id.*

133. 7 F.3d 541 (6th Cir. 1993).

134. *See id.* at 542.

135. *See id.*

136. *See id.* at 544 (relying on Passer v. American Chem. Soc'y, 935 F.2d 322 (D.C. Cir. 1991) (holding former employee could maintain an action under the ADEA anti-retaliation provision) and Bailey v. USX Corp., 850 F.2d 1506 (11th Cir. 1988) (holding section 704(a) protected former employees because strict and narrow interpretation would undercut remedial purpose of statute)).

137. 936 F.2d 870 (6th Cir. 1991).

138. *See id.* at 872.

enter an employment relationship with the hospital,[139] the hospital did control her ability to practice as a private scrub nurse at its facility.[140] The court, therefore, properly focused more on Stouder's ability to impact Christopher's employment opportunities, similar to that of a union hiring hall or employment agency, than its role as her former employer.[141]

Finally, the legislative history and earlier interpretations of the FLSA were far more supportive of an expansive reading of its anti-retaliation language than its Title VII counterpart in section 704(a). "Senator (later Justice) Black stated on the floor of the Senate during the debates of the [FLSA] that the term 'employee' had been given 'the broadest definition that has ever been included in any one act.'"[142] Moreover, the Supreme Court had determined that it was the "Congressional intention to include all employees within the scope of the [FLSA] unless

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139. As the court noted, "[p]rivate duty scrub nurses are normally paid by the doctors with whom they work. They are not employees of the hospital itself, and the hospital does not cover their insurance or benefits." *Id.*

140. *See id.* at 874.

141. *See id.* at 875 (analogizing to Sibley Mem. Hosp. v. Wilson, 488 F.2d 1338 (D.C. Cir. 1973)).

In *Sibley*, a male private duty nurse claimed that a hospital discriminated against him on the basis of his sex because the hospital's nursing office would not refer him to female patients. The court determined "that the hospital, while not the plaintiff's employer, was in the same position to interfere with the plaintiff's employment opportunities as unions or employment agencies," and therefore, neither the spirit nor language of the Act prohibited the plaintiff from proceeding against the hospital. *Id.* at 1342.

The claim in *Sibley* was based on sexual discrimination prohibited by section 703. As previously discussed, section 703 prohibits discrimination against any "individual" on the basis of sex. The court reasoned that the hospital's similarity in these circumstances, to a union or employment agency which has "a highly visible nexus with the creation and continuance of direct employment relationships" made a claim against the hospital cognizable in the absence of a direct employment relationship with the plaintiff. *Id.* This rationale applies equally in the section 704(a) (anti-retaliation) context. Like section 703, section 704(a) expressly protects "individuals" engaging in enforcement activities under Title VII from discrimination by an employment agency. *See supra* note 104 (noting that "individuals" are protected from discrimination and retaliation by employment agencies and labor organizations in sections 703 and 704(a)). Thus, *Christopher*, like *Sibley*, stands for the proposition that a covered employer in a position analogous to that of a union or employment agency may be liable for discriminatory conduct in the absence of an employment relationship. No extension of section 704(a) to protect former employees is required to reach this conclusion.

142. Dunlop v. Carriage Carpet Co., 548 F.2d 139, 143 (6th Cir. 1977) (quoting United States v. Rosenwasser, 323 U.S. 360, 363 n.3 (1945)).

specifically excluded."[143] Additionally, the FLSA's remedy provisions were much broader than Title VII's original equitable remedy provisions.[144]

Although concern for a former employee's ability to obtain fair and accurate references and other benefits of employment weigh in favor of protecting them from retaliation for exercising Title VII rights, reliance on FLSA precedent of *Hodgson* and *Dunlop* is questionable. Unfortunately, the *Rutherford* court provided little independent analysis of the interplay of these issues in the context of Title VII, adding only that a "statute which is remedial in nature should be liberally construed."[145]

B. *Title VII's Remedial Purpose*

The most significant, and in many cases only, justification announced by courts which expanded section 704(a) to cover former employees was that the remedial purpose of the statute required a broad interpretation.[146] It was argued that a broad reading of section 704(a), producing a comprehensive federal remedy, would further Congress' underlying intent to eliminate discrimination in employment relationships. Moreover, this interpretation was partly supported by the liberal construction granted other remedial statutes.[147] Even in light of Title VII's

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143. *Id.* at 143-44 (quoting *Rosenwasser*, 323 U.S. at 363).

144. *See* Sherman v. Burke Contracting, Inc., 891 F.2d 1527, 1541 n.7 (11th Cir. 1990) (Tjoflat, C.J., specially concurring) (criticizing reliance on FLSA cases to extend scope of section 704(a) because of differing remedy provisions). *See also infra* Part IV.D. (arguing that Title VII's original remedy provisions do not support a conclusion that section 704(a) was intended to cover former employees, and that subsequent amendment by the Civil Rights Act of 1991 did not implicitly amend section 704(a)'s scope).

145. 565 F.2d 1162, 1165 (10th Cir. 1977).

146. *See* Pantchenko v. C.B. Dolge Co., Inc., 581 F.2d 1052, 1055 (2d Cir. 1978) (concluding that "a narrow construction would 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") (emphasis added). It is unclear where the court gleaned this statutory purpose for section 704(a), as it cited no authority for such an expansive proposition.

147. *See* Dunlop v. Carriage Carpet Co., 548 F.2d 139 (6th Cir. 1977) (FLSA); Hodgson v. Charles Martin Inspectors of Petroleum, Inc., 459 F.2d 303 (5th Cir. 1972) (FLSA). *See also* NLRB v. Scrivener, 405 U.S. 117, 122 (1972) (expressing preference for a broad reading of a remedial statute, where consistent with the purpose and objective of the statute).

remedial purpose, however, the statute has recognized limitations.

Courts broadly interpreting section 704(a)'s coverage relied primarily on the remedial purpose underlying Title VII and the need to protect former employees from retaliatory conduct. The purpose of Title VII is to enhance the opportunities of minorities to "be hired on the basis of merit"[148] by eliminating "discrimination in employment based on race, color, religion, or national origin."[149] This primary purpose could be thwarted by under-enforcement of the Act's substantive provisions because of threatened retaliation.[150]

The potential for retaliatory conduct can arise frequently where an employee, after discharge, files a Title VII action alleging the discharge or some earlier employment action (e.g., failure to promote) was discriminatory.[151] Although employed at the time of the discriminatory conduct, it is argued that the former employee would be subject to subsequent retaliation by the employer, and would not be covered without extending the scope of section 704(a). Moreover, courts hastened to point out that discrimination against a former employee may, in many instances be worse than discrimination practiced against a current or prospective employee.[152] Congress, it is argued, could never have intended to allow this type of postemployment retaliatory conduct.[153] But Congress, in Title VII, did not create an all-encompassing employment discrimination remedy.

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148. 110 CONG. REC. 6549 (1964) (statement of Sen. Humphrey).

149. H.R. REP. NO. 914 (1964) *reprinted in* 1964 U.S.C.C.A.N. 2355, 2391, 2401.

150. *But see infra* Part IV.C. (arguing that failure to include former employees in section 704(a) will not result in under-enforcement).

151. *See* Charlton v. Paramus Bd. of Educ., 25 F.3d 194, 198 (3d Cir. 1994).

152. *See id.* at 200 (suggesting that "post-employment blacklisting is sometimes more damaging than on-the-job discrimination because an employee subject to discrimination on the job will often continue to receive a paycheck while a former employee subject to retaliation may be prevented from obtaining any work in the trade or occupation previously pursued").

153. *See, e.g., id.* (finding that "Congress hardly intended to permit employers to retaliate with impunity against a former employee after an assertion of Title VII rights"); EEOC v. Ohio Edison Co., 7 F.3d 541, 543 (6th Cir. 1993) (finding that "[i]n enacting section [704(a)] Congress unmistakably intended to ensure that *no person* would be deterred from exercising his rights under Title VII by the threat of discriminatory retaliation") (emphasis added).

Title VII is not a panacea to remedy all employment related discrimination.[154] It is "not a 'bad acts' statute."[155] Rather, Title VII's enactment was the result of substantial compromises in scope and application.[156] Courts have struggled to define Title VII's coverage and have previously recognized the limitations Congress placed on its scope.

Courts expanding section 704(a) to cover former employees often relied on the apparent absurdity that would result from protecting prospective and current employees from retaliation for participation in enforcement activity, without protecting former employees. Defining a statute's scope, however, to include some and exclude others is not patently absurd. The exclusion of former employees from section 704(a) is no more absurd than the exclusion of an employee of an employer with fewer than fifteen persons from racial and sexual discrimination under section 703(a).[157] The point, simply, is that Title VII was not drafted to protect every employee from every form of discrimination. Where there is line-drawing in the scope and application of a statute seemingly absurd results will follow where persons in substantially similar, but not exactly the same, circumstances will be treated differently, some falling within, and others falling outside the boundaries of the statute. Congress weighed policy considerations and, for better or worse, decided against covering all employers, employees, and employment relationships under Title VII.[158]

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154. *See* Polsby v. Chase, 970 F.2d 1360, 1365 (4th Cir. 1992) (holding that Title VII "does not redress discriminatory practices, however unsavory, which occur after the employment relationship has ended"), *vacated on other grounds sub nom.* Polsby v. Shalala, 507 U.S. 1048 (1993).

155. *See id.* (quoting Holder v. City of Raleigh, 867 F.2d 823, 828 (4th Cir. 1989)).

156. *See* Herbert Hill, *The Equal Employment Opportunity Acts of 1964 and 1972: A Critical Analysis of the Legislative History and Administration of the Law*, 2 INDUS. REL. L.J. 1, 2 (1977) (commenting on over one hundred amendments to The Civil Rights Act of 1964 occurring during the legislative process).

157. *See* 42 U.S.C. § 2000e(b) (1994) (defining a covered employer as one with fifteen or more employees).

158. *See* Falls v. Sporting News Publ'g Co., 834 F.2d 611, 613 (6th Cir. 1987) (holding that even though "employee" is to be construed broadly, it was not meant to reach independent contractors). A former employee, one with whom no employment relationship currently exists (or may not have existed for a significant period of time), should not be afforded more protection from retaliation than an individual currently engaged in a contractual quasi-employment relationship with a covered entity. While expanding the scope of section 704(a) may enlarge the class of protected persons, it

Undoubtedly, the courts' prior construction of similar language in other remedial statutes lends support to a consistent construction of Title VII's anti-retaliation language.[159] Again, however, these statutes have similar, but not identical language, purposes, and remedies. Title VII's scope need not be construed to be coextensive where it differs in significant respects from these other "remedial statutes." Moreover, not all of Title VII's underlying provisions and policies are furthered by an extension of section 704(a) to protect former employees.[160]

C. *Enforcing Title VII Through Existing Remedies Would Not Chill Claims*

Effective Title VII enforcement relies, at least initially, on the willingness of individuals to report suspected violations.[161] The *Robinson* Court cited this enforcement scheme as a primary reason to extend protection from retaliation to former employees.[162] In the absence of such protection, proponents of extension argued that the threat of retaliation would chill Title VII claims.[163] The EEOC, charged with enforcing the statute, had interpreted section 704(a) to include former employees[164] and argued persuasively in *Robinson* that section 704(a) must include former employees in order that Title VII effectively prevent postemployment retaliation.[165] These arguments and

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does not eliminate seemingly absurd results that flow naturally from line-drawing.

159. *See* Moore, *supra* note 20, at 214-18 (supporting broad interpretation of section 704(a) by Court's prior broad interpretations of other remedial employment statutes (i.e., FLSA, NLRA, ADEA)).

160. *See infra* Part IV.E. (discussing Title VII's short period of limitations and Congress' obvious intent to limit time-frame of potential employment disputes).

161. *See* 42 U.S.C. § 2000e-5 (1994) (setting out how an aggrieved individual files a charge with the EEOC, thereby beginning investigation and enforcement proceedings).

162. *See* Robinson v. Shell Oil Co., 117 S. Ct. 843, 848-49 (1997). *See also* Tafuri, *supra* note 19, at 810-14.

163. *See* Charlton v. Paramus Bd. of Educ., 25 F.3d 194, 200 (3d Cir. 1994) (finding that "fear of unremediable reprisal would chill Title VII claims for discriminatory discharges"); Barna, *supra* note 21, at 269; Tafuri, *supra* note 19, at 813.

164. *See* 29 C.F.R. § 1614.101(b) (1992) (stating "*No person* shall be subject to retaliation for opposing any practice made unlawful by Title VII") (emphasis added); EEOC COMPLIANCE MANUAL § 614.7(f) (stating "respondent employer's obligation to refrain from retaliation against a former employee who has opposed discrimination does not end once that employee leaves its employ").

165. *See Robinson*, 117 S. Ct. at 849. In light of the Supreme Court's inconsistent

the examples cited to support them often fail to take account of other remedies, both within Title VII and at common law, that would adequately protect the interests of former employees.[166] Despite these remedies, some still contend that overarching federal protection is necessary to protect former employees from an employer's retaliatory conduct that is calculated to fall between the cracks of a piece-meal approach under existing statutory and common-law remedies.[167]

Both opponents and proponents of section 704(a)'s extension recognize that individual reporting drives enforcement of Title VII.[168] Individuals responsible for enforcing the Act's substantive provisions "cannot be penalized for resorting to the legal procedures that Congress has established in order to right congressionally recognized wrongs."[169] An expansion of section 704(a)'s language, however, does not necessarily follow from this premise. Many cases extending section 704(a) coverage could have provided effective relief under existing Title VII provisions or common-law remedies.[170]

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deference to EEOC interpretations of the Act in the past, the weight that the agency's interpretation carried in the section 704(a) conflict was far from clear until *Robinson*. *Compare* Griggs v. Duke Power Co., 401 U.S. 424 (1971) (stating that the "administrative interpretation of the Act by the enforcing agency is entitled to great deference) *with* General Elec. Co. v. Gilbert, 429 U.S. 125, 140-42 (1976) (stating that "Congress . . . did not confer upon the EEOC authority to promulgate rules or regulations." The level of deference that should be afforded therefore depends on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."). *See also* Chevron v. Natural Resources Defense Council, 467 U.S. 837, 842-44 (1984) (reviewing agency interpretations generally). Where "there is an express delegation of authority to an agency to elucidate a specific provision of the statute by regulation . . . legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Id.* Where the delegation is implicit rather than explicit, however, "a court may not substitute its own construction of statutory provision for a reasonable interpretation made by the administrator of an agency." *Id.*

166. *See* Reed v. Shepard, 939 F.2d 484 (7th Cir. 1991).

167. *See* Tafuri, *supra* note 19, at 819 (arguing that "[f]ormer employers no doubt would be savvy enough not to engage in retaliation that could give rise to state claims or criminal charges, thereby immunizing themselves against any type of penalty").

168. *See* Sherman v. Burke Contracting, Inc., 891 F.2d 1527, 1537 (11th Cir. 1990) (Tjoflat, C.J., specially concurring). *Accord* Tafuri, *supra* note 19, at 813.

169. East v. Romine, Inc., 518 F.2d 332, 340 (5th Cir. 1975).

170. *See, e.g., supra* notes 135-41 and accompanying text (discussing alternative analysis and grounds of relief in Christopher v. Stouder Mem. Hosp., 936 F.2d 870

1. Title VII Protection

In *Sherman v. Burke Contracting, Inc.*,[171] the court extended coverage under section 704(a) to a former employee, even though Sherman's claim was clearly cognizable under existing section 704(a) protections. Sherman, an African American, alleged that Burke terminated his employment because he was married to a white woman.[172] Sherman filed a timely complaint with the EEOC alleging discriminatory discharge. Thereafter, Sherman secured employment with another contractor, Palmer Construction Company (Palmer).[173] Sherman was then fired by Palmer. Sherman alleged that Burke had retaliated against him by persuading Palmer to fire him.[174] Sherman sued his former employer, Burke, but more clearly had a cause of action against Palmer, his employer at the time of the alleged discriminatory conduct, for discriminating against him because of his participation in Title VII enforcement activity. "Sherman had already obtained new employment when the act of retaliation occurred."[175] More importantly, the "act" of discrimination was not Burke's rhetoric, regardless of its persuasiveness, but rather Palmer's discriminatory termination of Sherman based on his participation in enforcement activity. Sherman's remedy under section 704(a) was against Palmer, the discriminatory actor and his employer at the time of the alleged retaliation. Thus, Sherman should have maintained an action against Burke for discriminatory discharge on the basis of race under section 703, and against Palmer for discriminatory discharge on the basis of participation in enforcement activity under section 704(a). No extension of section 704(a) was required to provide Sherman adequate relief under these circumstances.

Similarly, in *Rutherford v. American Bank of Commerce*,[176] the plaintiff alleged that her former employer retaliated against

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(6th Cir. 1991)).

171. 891 F.2d 1527 (11th Cir. 1990).

172. *See id.* at 1529.

173. *See id.*

174. *See id.*

175. *Id.* at 1532.

176. 565 F.2d 1162 (10th Cir. 1977).

her by informing prospective employers that she had filed a discrimination charge. Rutherford claimed that a prospective employer refused to hire her after receiving this information.[177] The court rejected a "literal reading" of section 704(a), and instead expanded its scope to encompass former employees allowing Rutherford to assert a cause of action against her former employer.[178] This interpretation does not properly take notice of the existing remedies that Congress made available in section 704(a). Rutherford was an "applicant for employment" and had an adequate remedy under the express terms of section 704(a) against any prospective employer who discriminated against her on the basis of her prior Title VII activities.[179] Thus, the intended remedy under section 704(a) lies against any prospective employer that utilizes an applicant's participation in enforcement activities as a factor in its decision-making process. A "literal reading" of the section does not foreclose this remedy.[180] More importantly, the *Rutherford* court's expanded construction of section 704(a) allowed Rutherford to seek a remedy, but avoid prosecuting her claim against the discriminatory prospective employer. This is the remedy Congress clearly wished an individual in Rutherford's situation to exercise when seeking relief, because it explicitly included protection for applicants for employment in section 704(a).[181] Thus, the *Sherman* and *Rutherford* courts' expansion of section 704(a) allows the plaintiff to forego action against the employer who actually practices discriminatory conduct, but recover from a former employer.

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177. *See id.* at 1164.

178. *Id.* at 1165.

179. *See* Polsby v. Chase, 970 F.2d 1360, 1365 n.4 (4th Cir. 1992) (stating that "Title VII does redress discriminatory practices by a prospective employer who denies employment to an applicant who has participated in a Title VII action against a former employer"), *vacated on other grounds sub nom.* Polsby v. Shalala, 507 U.S. 1048 (1993).

180. *See supra* text accompanying notes 133-36 (discussing alternate analysis and grounds of relief for plaintiff as an "applicant for employment" in EEOC v. Ohio Edison Co., 7 F.3d 541 (6th Cir. 1993)).

181. It is unclear in the cases presented, why employees chose to sue former employers rather than prospective ones. Most likely, this decision is based on the same principles that generally guide a plaintiff's choice of defendant. These include availability of proof and an ability to satisfy a judgment, but may also stem from animosity toward the former employer for the circumstances that surrounded the employee's termination.

2. Common-Law Protection

State common-law remedies also provide protection for former employees.[182] In *Pantchenko v. C.B. Dolge Co., Inc.*,[183] the plaintiff alleged that her former employer made "disparaging and untrue statements about her to her prospective employers."[184] False references would give rise to an action for defamation.[185] Although an employer could claim a qualified privilege with respect to information furnished to prospective employers about a candidate's qualifications, the privilege would not immunize the former employer where it knowingly or with a reckless disregard for the truth furnished false information.[186] This knowing or reckless standard would certainly be satisfied where a former employer falsified a reference in retaliation for an individual's assertion of Title VII rights. Moreover, it would properly limit an employer's duty to defend, in cases where accurate, but negative information was related to a prospective employer.[187]

In *Reed v. Shepard*,[188] the plaintiff alleged that she was the victim of postemployment retaliation. This retaliation included a grand jury investigation of her purported illegal activities while employed with her former employer; an attack by a disguised assailant urging her to drop her discrimination action; late night phone calls threatening her with reprisals for continuing the lawsuit; and someone shooting at her car while she was driving.[189] The court concluded that "Reed may have had a state law damage claim and perhaps a criminal charge[, but]

182. *See, e.g.*, Reed v. Shepard, 939 F.2d 484 (7th Cir. 1991).

183. 581 F.2d 1052 (2d Cir. 1978).

184. *Id.* at 1054.

185. *See* Edward R. Horken, Note, *Contracting Around the Law of Defamation and Employment References*, 79 VA. L. REV. 517, 520-23 (1993) (discussing defamation in context of employment references); Bradley Saxton, *Flaws in the Laws Governing Employment References: Problems of "Overdeterrence" and a Proposal for Reform*, 13 YALE L. & POL'Y REV. 45, 69-74 (1995) (same).

186. *See* Horken, *supra* note 185, at 23-26 (discussing defense of qualified privilege in context of employer-employee relationship); Bradley, *supra* note 185, at 69-74 (same).

187. *See infra* Part V.C. (discussing defendant's increased duty to defend under an expansive reading of section 704(a)).

188. 939 F.2d 484 (7th Cir. 1991).

189. *See id.* at 492.

Title VII does not address such claims."[190] Thus, the court recognized both the limitations of Title VII and the other avenues of relief available to remedy such wrongful conduct.

D. *Original Title VII Remedies Suggest Former Employees Were Not Contemplated*

Some courts have argued that the remedies available to a successful plaintiff under Title VII's original framework also support a narrow interpretation of section 704(a).[191] Originally, Title VII provided only equitable relief to successful claimants.[192] In both *Polsby* and *Sherman* the courts suggested that these remedies were more suited to afford complete relief to a claimant against a current or prospective employer than a former one. Equitable relief directed at these entities is most effective because the "current or prospective employer has control over the conditions of the workplace and is in a position to correct the acts of discrimination."[193] On the other hand, equitable relief is less beneficial to a former employee who has suffered postemployment retaliation.[194]

Under the circumstances of most postemployment retaliation, the former employee is not seeking reinstatement or hiring from the employer that has allegedly perpetrated the discriminatory act. Although neither *Polsby* nor *Sherman* offer any examples where equitable relief could meet some needs of former employees, there are equitable decrees that could provide partial prospective relief. For example, a former employer could be enjoined from providing incorrect or misleading information to prospective employers in future references. Additionally, a former employer could be ordered to provide references to pro-

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190. *Id.* at 493.

191. *See* Polsby v. Chase, 970 F.2d 1360, 1366 (4th Cir. 1992) *vacated on other grounds sub nom.* Polsby v. Shalala, 507 U.S. 1048 (1993); Sherman v. Burke Contracting, Inc., 891 F.2d 1527, 1538 (11th Cir. 1990) (Tjoflat, C.J., specially concurring).

192. *See* 42 U.S.C. § 2000e-5(g)(1) (1994) (providing that the court may enjoin the defendant from engaging in any unlawful employment practice, "and order such affirmative action as may be appropriate, which may include, *but is limited to,* reinstatement or hiring . . . or any other equitable relief as the court deems appropriate.") (emphasis added).

193. *Sherman,* 891 F.2d at 1538 (Tjoflat, C.J., specially concurring).

194. *See Polsby,* 970 F.2d at 1365.

spective employers when it had previously refused. These remedies offer some relief, but they do not provide the depth of "make-whole" relief available to current employees or applicants for employment against current or prospective employers. The inability of these remedies to afford complete judicial relief for discrimination encountered by former employees suggests that these individuals were not the intended beneficiaries of section 704(a) coverage.[195] Instead, former employees were left to more appropriate remedies existing under other federal and state legislation.[196] This argument remains persuasive despite amendments that have enhanced and enlarged Title VII's remedy provisions.[197]

The Civil Rights Act of 1991 significantly enhanced the remedies available to successful Title VII plaintiffs, providing both compensatory and punitive damages in cases of intentional discrimination.[198] These remedies provide more comprehensive relief to former employees subjected to postemployment retaliation. Some commentators have suggested that, in light of the 1991 amendments, the remedies argument is moot.[199] The court in *Polsby* however, found that even with the availability

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195. *See id.* at 1366.

> Although 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 who based its decision not to employ the ex-employee on the fact that she sought Title VII relief from a prior employer.

Id. See also Sherman, 891 F.2d at 1538 (Tjoflat, C.J., specially concurring) (arguing that the inability of Title VII's equitable remedies to provide complete relief illustrates "why Congress gave a cause of action only to current employees and job applicants").

196. The *Polsby* court further suggested that including former employees within the scope of section 704(a) could have a damaging preclusive effect on their other avenues of judicial relief. *See Polsby*, 970 F.2d at 1366. Citing *Brown v. GSA*, the court noted that Congress could never have intended to lock former employees into a Title VII remedy, which at that time provided only equitable relief and could not "make-whole" a damaged claimant. *See id.* (citing Brown v. GSA, 425 U.S. 820, 835 (1976) (holding Title VII "provides the exclusive judicial remedy for claims of discrimination in federal employment")).

197. *But cf.* Barna, *supra* note 21, at 262 n.16; Moore, *supra* note 20, at 218 n.85 (arguing that based on 1991 amendments, ability to now obtain legal relief under Title VII is additional support for extending section 704(a) protection to former employees); Tafuri, *supra* note 19, at 803.

198. *See* 42 U.S.C. § 1981a (1994).

199. *See* Tafuri, *supra* note 19, at 803, 817-18.

of these enhanced remedies, proof of damages against former employers would require purely speculative calculations.[200] More importantly, the 1991 amendments did not expressly enlarge the scope of section 704(a).[201] Therefore, the best indications of Congress' intent regarding the coverage of former employees in section 704(a) remain the remedy provisions it originally put in place to effectuate the section's purpose. The narrow remedies available before the Civil Rights Act of 1991, suggest that Congress did not intend to include former employees within section 704(a).

E. *Title VII's Short Limitations Period is Undermined by Section 704(a) Expansion*

The limitations period for filing charges and subsequent civil actions are an additional part of Title VII's statutory framework that support a narrow reading of section 704(a). Title VII's limitations periods for filing charges and civil actions is relatively short. An aggrieved party must file a charge with the EEOC within 180 days (or 300 days in states with a deferral agency) from the occurrence of the unlawful employment practice.[202] The party must file a subsequent civil action within ninety days of receipt of a "right-to-sue" notification.[203] A "bright-line" approach whereby no claim under section 704(a) could arise after the termination of the employment relationship is undoubtedly more consistent with this short limitations period.[204]

A short limitations period evinces Congress' intent to resolve employment disputes quickly, without prolonged disruption in

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200. *See Polsby*, 970 F.2d at 1366. The court provided an example analogous to the facts in *Robinson* to demonstrate this difficulty in proof. "If the former employer wrote poor references in retaliation, the employee would have to show that but for the poor references, she would have received one of the jobs she was seeking. If successful, she then must give the court evidence as to which job, pay scale, promotions, bonuses, etc. . . . she would have received." *Id.*

201. *See supra* notes 87-92 and accompanying text.

202. *See* 42 U.S.C. § 2000e-5(e)(1) (1994).

203. *See* 42 U.S.C. § 2000e-5(f)(1) (1994).

204. *See, e.g.*, Respondent's Brief at *32, Robinson v. Shell Oil Co., No. 95-1376, 1996 WL 419672 (U.S. July 25, 1996) (arguing that including former employees within section 704(a) would create a cause of action "unlimited in time").

the workplace.[205] Furthermore, a short limitations period prevents burdensome stale claims complicated by the dissipation of proof over time, fading memories and missing witnesses. It could be argued that, in many instances, the expansion of section 704(a) would not give rise to these problems. Since the limitations period accrues on the occurrence of the discriminatory act[206] (e.g., the retaliatory reference), the discriminating actors and the evidence would be as fresh as in any other Title VII case. This is not necessarily true, however, where the discriminatory acts and subsequent effects are remote events. For example, a supervisor could pad an ex-employee's file with negative comments after being the target of an EEOC charge, but leave the employer and an unknowing replacement to disseminate incorrect assessments of the ex-employee's performance when references are requested several years in the future. In this case, the discriminatory act, dissemination of a false or misleading reference, could occur based on documentation recorded by a supervisory employee who left the employer years before the reference was actually given by a subsequent supervisor.[207] Moreover, even assuming no personnel changes, the facts surrounding the initial charge that brings about subsequent retaliation may have occurred well before the retaliation itself. These long forgotten details of the initial charge would have a significant impact on the later retaliation claim.

An example of this open-ended liability is illustrated by the facts of *Christopher v. Stouder Memorial Hospital*.[208] Christopher alleged that she was denied nursing privileges at Stouder Memorial in part because her former employer (Wright State University School of Nursing) informed Stouder that she had filed a sex discrimination charge against it.[209] Although Chris-

205. *See id.*

206. *See, e.g.*, Delaware State College v. Ricks, 449 U.S. 250 (1980) (determining what constitutes an "occurrence" of a discriminatory act).

207. *But see* Transcript at *17-18, *Robinson*, No. 95-1376, 1996 WL 656475 (U.S. Nov. 6, 1997). Petitioner argued that long intervals, such as ten or more years, between the end of the employment relationship and alleged postemployment retaliation are not within the EEOC's experience. "[T]hat is really a very remote situation, and it has to be contrasted with the very realistic situation, where somebody goes to the EEOC and, very quickly after that, suffers retaliation." *Id. See also* Tafuri, *supra* note 19, at 821 (dismissing stale claims as too infrequent to justify denying coverage to former employees).

208. 936 F.2d 870 (6th Cir. 1991).

209. *See supra* text accompanying notes 135-41 (discussing facts surrounding

topher sued Stouder for denial of her nursing privileges, under the expanded section 704(a) she could have sued Wright State, her former employer, for retaliating against her by informing Stouder of the prior charge.[210] Christopher had been employed by Wright State from 1978-83.[211] Wright State informed Stouder of the charge in 1986, in response to Stouder's inquiry.[212] An expansive reading section 704(a) would leave Wright State open to liability three years after Christopher left its employ.

The three-year delay under the relatively typical circumstances present in *Christopher* significantly conflicts with the purposes that underlie Title VII's short limitations period. It significantly increases an employer's exposure to liability long after the employment relationship that is the basis of the action has ended. Moreover, in many cases the lapse in time between the existence of an employment relationship and a subsequent civil action for retaliation could be much longer than three years.[213]

V. *ROBINSON V. SHELL OIL CO.*: AN EMPLOYER'S EXPANDED DUTY TO DEFEND

The facts of *Robinson* illustrate one of the significant concerns attendant with enlarging the scope of section 704(a). As previously noted, a purposefully false and misleading reference gives rise to a common-law action for defamation.[214] Generally, a truthful, but negative or critical reference would not give rise to such an action. A truthful, but negative reference could, however, give rise to a claim under the expanded section 704(a)

Stouder's denial of nursing privileges).

210. *See, e.g.*, Rutherford v. American Bank of Commerce, 565 F.2d 1162 (10th Cir. 1977) (finding that informing a prospective employer of a former employee's Title VII enforcement activity was retaliatory in and of itself and actionable under section 704(a)).

211. *See Christopher*, 936 F.2d at 871.

212. *See id.* at 873.

213. *See* Respondent's Brief at *32-33, Robinson v. Shell Oil Co., No. 95-1376, 1996 WL 419672 (U.S. July 25, 1996) (arguing that a "cause of action for retaliation could be brought one, five, or even twenty years after the job ended (since the cause of action would not accrue until the alleged retaliation occurred)").

214. *See supra* notes 182-87 and accompanying text.

where the employer gave a truthful reference with the intent to retaliate against a former employee.[215]

A former employer could become subject to burdensome litigation by providing prospective employers with additional or detailed information of a former employee's employment history, or discussing the circumstances surrounding the employee's termination and subsequent relationship with the employer.[216] Conversely, an employer cannot effectively insulate itself from liability by remaining silent about a former employee's performance, as this too could indicate an intent to retaliate.[217] In expanding section 704(a), the Court has turned the focus of inquiry from the difficult determination of the "truthfulness" of an employer's disclosure to an even murkier one, the employer's latent motivations.

The sections that follow discuss the Supreme Court's brief policy analysis in *Robinson* which led to section 704(a)'s expansion. Additionally, they compare the likely repercussions had the Court excluded former employees from section 704(a) coverage with the Court's decision to extend that coverage. There is likely to be a significant impact on relations between employers and former employees under *Robinson*. The increasing trend of litigation in employment law, as well as the cases which have already tested this area of expanded coverage raise particular concerns about an employer's significantly increased duty to defend claims under *Robinson's* interpretation of section 704(a).

A. *The Policies That Drive the* Robinson *Decision*

After determining that section 704(a)'s use of "employees" was ambiguous, the *Robinson* Court followed the lead of the

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215. *Cf. Christopher*, 936 F.2d at 879 (holding that even if new hospital standards were valid, their application to the plaintiff, the first person to be evaluated under them, was retaliatory).

216. *See* Rutherford v. American Bank of Commerce, 565 F.2d 1162, 1164 (10th Cir. 1977).

217. *See* Pantchenko v. C.B. Dolge Co., Inc., 581 F.2d 1052, 1055 (2d Cir. 1978). *But see* Tafuri, *supra* note 19, at 819 n.139 (arguing that without anti-retaliation protection, "employers could discriminate by refusing to give references to employees who filed Title VII claims, while giving references to those who do not oppose discriminatory practices. This would shield the employer from a defamation suit, while still injuring the employee in her pursuit of other employment.").

circuit courts and dispensed with the policy analysis in a mere three paragraphs.[218] The Court first noted that section 703 prohibits discriminatory discharge and that section 704(a) protects from discrimination for the filing of EEOC charges.[219] The Court reasoned that since there is a potentially significant class of persons that will be discriminatorily discharged, and thus, filing charges as former employees, "it is far more consistent [with the regulatory scheme of Title VII] to include former employees within the scope of 'employees' protected by section 704(a)."[220]

The Court then noted the primary purpose of the anti-retaliation provision: "Maintaining unfettered access to statutory remedial mechanisms."[221] The Court was persuaded that a failure to protect former employees would chill Title VII claims "by allowing the threat of post-employment retaliation to deter victims of discrimination from complaining to the EEOC, and would provide a perverse incentive for employers to fire employees who might bring Title VII claims."[222] The Court was apparently unpersuaded by arguments that alternative federal, state, and common-law remedies provide sufficient protection. It refused to recognize the existence of these other remedies and found that a failure to extend section 704(a) protection would allow "an employer to retaliate with impunity."[223] Thus, the Court concluded that it is "more consistent with the broader context of Title VII and the primary purpose of [section] 704(a)" to include former employees within the Act's protective scope.[224]

B. *The Repercussions of Excluding Former Employees from Section 704(a)*

In addition to the purportedly absurd results that would follow from excluding former employees from Title VII protec-

218. *See* Robinson v. Shell Oil Co., 117 S. Ct. 843, 848-49 (1997).
219. *See id.* at 848.
220. *Id.*
221. *Id.*
222. *Id.*
223. *Id.* at 849.
224. *Id.*

tion, critics of the narrow interpretation pointed to a host of complications that would endanger a former employee's future employment opportunities without such protection. Most significant among these complications are those types of retaliatory conduct which currently have little or no remedy without an expansion of section 704(a).[225]

Passer v. American Chemical Society,[226] presented conduct by a former employer that would be difficult to address under existing state and federal remedies. Dr. Passer (Passer) served as the Director of the American Chemical Society's (ACS) Education Division from 1964 until his involuntary retirement in 1987.[227] ACS had been planning a symposium to honor Passer at its 1987 annual meeting.[228] ACS cancelled the symposium following Passer's involuntary retirement and decision to file charges of age discrimination with the EEOC.[229] ACS admitted that the symposium's cancellation was directly linked to Passer's age discrimination suit. It contended, however, that it was not motivated by retaliatory animus toward Passer, but by an interest in successfully defending Passer's pending suit.[230] ACS's actions in cancelling the symposium indicated a lack of planning and serious consideration.[231] Nonetheless, the district court held that ACS's cancellation of the Passer Symposium was not retaliatory because "the symposium was not part of [Passer's] past or future employment relationship with [ACS],

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225. *See* Barna, *supra* note 21, at 268 (arguing that excluding former employees from section 704(a) protection would allow "employers to harm former employees who may have no available legal recourse").

226. 935 F.2d 322 (D.C. Cir. 1991). *Passer* is an ADEA case, but as previously noted, the ADEA's anti-retaliation language is substantially similar to Title VII's. Therefore, the circumstances in *Passer* provide analogous support for critics' contention that some retaliatory conduct would go without remedy if former employees were not included in section 704(a).

227. *See id.* at 324.

228. *See id.* at 325 (describing the special symposium as a "rare and prestigious laurel" and "one of the highest honors that could have been bestowed" on Passer).

229. *See id.*

230. *See id.* (noting ACS's attorney advised the Board that it "would be remiss to allow the symposium to take place . . . [because] presentations made at the symposium might inadvertently affect the [age discrimination] suit").

231. *See id.* ACS was aware of the discrimination charges filed by Passer in January 1987. ACS did not inform Passer of the symposium's cancellation until the night before he was scheduled to leave for the conference, on April 5, 1987. The next afternoon, ACS notified the other speakers who had agreed to participate in the Passer Symposium, and all voluntarily withdrew their papers. *See id.*

nor did the cancellation affect his relationship with potential employers."[232] The D.C. Circuit Court of Appeals reversed, holding that the ADEA's anti-retaliation language does not limit its reach to retaliatory conduct that takes "the form of cognizable employment actions such as discharge, transfer, or demotion."[233] Although ACS's conduct is troubling, it would not likely give rise to any form of relief besides that available under an expansion of section 704(a).[234] ACS's conduct had the effect of limiting Passer's exposure to prospective employers, but ACS did not actually interfere with any tangible prospective employment relationship.[235] Thus, without an expansion of section 704(a), Passer would conceivably have been left without recourse.

The *Robinson* Court found that excluding former employees from protection under section 704(a) could encourage employers to terminate employees quickly so that the employer could actively retaliate after the discharge.[236] This reasoning ignores section 704(a)'s protection of current employees. An employer's

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232. Passer v. American Chem. Soc'y, 701 F. Supp. 1, 3 (D.D.C. 1988).

233. *Passer*, 935 F.2d at 331.

234. *But see* Sherman v. Burke Contracting, Inc., 891 F.2d 1527, 1542 (Tjoflat, C.J., specially concurring) (emphasizing that the common law recognizes the torts of malicious and intentional interference with contract and interference with prospective economic advantage). The RESTATEMENT (SECOND) OF TORTS § 766B provides that "one who intentionally and improperly interferes with another's prospective contractual relation . . . is subject to liability . . . [where] the interference consists of (a) inducing or otherwise causing a third person not to enter into or continue the prospective relation."

These existing common-law remedies would not likely have been sufficient in Passer's circumstances, however, because the relationship between the symposium and Passer's prospective employment was extremely tenuous. *See Passer*, 935 F.2d at 325 (noting that the symposium would provide Passer with "an excellent opportunity to renew acquaintances and make contacts that *might lead* to new employment").

235. *Cf. Sherman*, 891 F.2d at 1532 (former employer urged new employer to fire employee in retaliation for employee's participation in protected Title VII enforcement activities against the former employer).

236. *See* Robinson v. Shell Oil Co., 117 S. Ct. 843, 848 (1997). *See also* Petitioner's Brief at *29, *Robinson*, No. 95-1376, 1996 WL 341308 (U.S. June 21, 1996) (arguing that "an employer that intends to discriminate against an employee would be well advised to fire the employee, since a dismissed employee—unlike a demoted, transferred, or underpaid employee—could be openly intimidated from filing charges through threats of retaliatory action"); Robinson v. Shell Oil Co., 70 F.3d 325, 334 n.4 (4th Cir. 1995) (Hall, J., dissenting) (suggesting that excluding former employees from section 704(a) would give employers "free rein to retaliate against disfavored employees, so long as the employee is first terminated").

discriminatory discharge for the purpose of retaliating later would most certainly fall within existing section 704(a) protection. Thus, it is unlikely that critics' fears of employer discharges to promote a climate of hostility and patent postemployment retaliation would be realized by denying 704(a) coverage to former employees.

C. *The Repercussions of Including Former Employees in Section 704(a)*

Opponents of section 704(a) expansion have also made arguments about the drastic effects of such a decision. For example, some have predicted a significant decline or end of employment references because of an employer's increased exposure to lawsuits. Until recently, this has been unlikely because references played such a significant role in the evaluation and hiring of prospective applicants,[237] but employers should begin to recognize that even furnishing accurate information may be grounds for a cause of action under section 704(a) after *Robinson*.[238] Employers provide references expecting reciprocation from other employers to assist in evaluating candidates.[239] Employers already face exposure to liability for defamation for providing references, but the expansive interpretation of section 704(a) further extends this potential liability.[240] It is likely that increased exposure will significantly undermine the benefit of references because employers will become less willing to provide details about an employee's work history and more inclined to disclose only basic information such as dates of employment.[241] As references become more one-dimensional, and consequently less helpful in evaluating candidates, while at the same time exposing the employer to increased liability, it would not be surprising to see them fall into disfavor and even extinc-

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237. *See* Ramona L. Paetzold & Steven L. Willborn, *Employer (Ir)Rationality and the Demise of Employment References*, 30 AM. BUS. L. J. 123, 124 (1992).

238. *See infra* notes 242-54 and accompanying text.

239. *See* Tafuri, *supra* note 19, at 822-23.

240. *See id.*

241. *See* Valerie L. Acoff, Note, *References Available Upon Request . . . Not!—Employers are Being Sued for Providing Employee Job References*, 17 AM. J. TRIAL ADVOC. 755 (1994).

tion. Additionally, an increased burden on employers to defend retaliation claims is also more likely.

The facts of *Robinson* illustrate the difficulties inherent in an employer's duty to defend multiple Title VII claims stemming from its relationship with a single employee. Robinson alleged that he was terminated from Shell Oil Company in 1991 because of his race.[242] He subsequently filed charges of racial discrimination with the EEOC.[243] Robinson alleged that Shell retaliated against him for his EEOC filing by providing a negative reference. The action for discriminatory termination proceeded to a bench trial and the district court entered judgment in favor of Shell. Robinson, however, continued to press his retaliation claim. Shell asserted that it gave Robinson a negative reference, but one that was truthful and accurately reflected Robinson's performance as a Shell employee.[244] Shell also contended that as a part of the discrimination trial it put into evidence the reasons for Robinson's termination which included poor attendance and below average performance.[245] Shell argued that the district court accepted its articulated nondiscriminatory reasons for firing Robinson and that it had already successfully litigated these issues.[246] Thus, in the retaliation action Shell was in a position of relitigating the basis for Robinson's termination, proving again that its evaluation of his performance was valid, and that its disclosure to Metropolitan was truthful and lacked an intent to retaliate. This burdensome duty to defend is recurrent in many of the cases previously discussed.

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242. *See* Robinson v. Shell Oil Co., 70 F.3d 325 (4th Cir. 1995), *rev'd*, 117 S. Ct. 843 (1997).

243. *See id.* at 327.

244. *See* Respondent's Brief at *30, *Robinson*, No. 95-1376, 1996 WL 419672 (U.S. July 25, 1996).

245. *See id.* (arguing that Shell already proved that Robinson performed below average in his: "performance of duties, ability to work harmoniously with others, ability to work conscientiously and for long hours away from close supervision, sincerity and integrity, moral habits, ability to live within his means or meet his obligations, judgment and quick thinking abilities, trustworthiness in handling money, and effectiveness in making sales").

246. *See id.* There was no appeal of the discriminatory discharge case.

In *Bailey v. USX Corp.*,[247] the plaintiff also filed a cause of action alleging discriminatory termination.[248] While that action was pending, Bailey received an unfavorable reference from USX and filed a subsequent action for retaliation.[249] Bailey lost the discrimination claim and did not appeal that decision.[250] Yet, USX was forced to defend Bailey's second claim which also was ultimately dismissed. Likewise, in *Charlton v. Paramus Board of Education*,[251] the plaintiff claimed discrimination resulted in her discharge.[252] Her discrimination claims were ultimately dismissed.[253] Her retaliation claim was also dismissed by the district court because she was not an employee at the time of the alleged retaliatory conduct, but was remanded by the Third Circuit under an expanded definition of section 704(a). The school board had to defend a retaliation claim even though it had validly discharged Charlton.[254] These

247. 850 F.2d 1506 (11th Cir. 1988).

248. *See id.* at 1507.

249. *See id.* at 1508. Bailey's supervisor at USX advised the prospective employer that "he thought Bailey was 'unproductive' and would not be rehired by USX." *Id.*

250. *See id.* Bailey's discrimination action was dismissed on defendant's motion at the close of plaintiff's case. *See id.*

251. 25 F.3d 194 (3d Cir. 1994).

252. *See id.* at 195-97.

253. The school board initiated tenure revocation proceedings against Charlton, which ultimately resulted in her termination. *See id.* at 196. A review by a state administrative board affirmed the school board's decision, and the New Jersey Superior Court affirmed the decision of the review board. The New Jersey Supreme Court denied Charlton's petition for certification. *See id.* Charlton filed a federal lawsuit alleging discrimination, which was dismissed by the district court and subsequently affirmed by the Third Circuit.

254. *See id. Accord* EEOC v. J.M. Huber Corp., 927 F.2d 1322, 1324 (5th Cir. 1991). In *J.M. Huber Corp.*, the plaintiff filed charges with the EEOC alleging racial discrimination in her termination. Huber withheld funds that it had paid into the plaintiff's qualified employee benefit plan, pursuant to its policy of withholding such funds for any employee that challenged termination (for any reason). The EEOC issued a determination that there was no reasonable cause to believe that the plaintiff's termination resulted from racial discrimination and the plaintiff did not seek an administrative review of this determination or file suit in federal court. *See id.* at 1324 & n.4. The EEOC, however, filed suit alleging that Huber's withholding of funds constituted retaliation for plaintiff's initial filing of discrimination charges. Huber released the funds after the EEOC's determination on the original charges, but the EEOC pressed the claim for interest on the funds from the time that they were withheld by Huber until they were released to the plaintiff. The Fifth Circuit ultimately concluded that Huber's withholding was properly motivated by ERISA regulations and did not amount to a per se violation of Title VII's anti-retaliation language (as the district court had previously found). *See id.* at 1330. Nonetheless, Huber had to defend the Title VII retaliation claim by a former employee, even

examples demonstrate the increased burden that is likely to rest on a significant number of defendants under the expansion of section 704(a) coverage.

It is possible for an employer to retaliate against an ex-employee, even though it did not initially discriminate in discharging her. In *Rutherford*, for example, the former employee initially brought an action alleging sex discrimination.[255] A trial on the merits resulted in a verdict for Rutherford's former employer and was affirmed on appeal.[256] The employer was, however, held liable in a subsequent suit for retaliating against Rutherford by informing a prospective employer that she had filed the earlier Title VII lawsuit.[257]

The plight of employers, especially those historically engaging in discriminatory practices, does not evoke a great deal of sympathy. The duty to defend, however, should be weighed every time a new substantive right is imposed on any class of defendants. In the case of former employees, who already enjoy a panoply of state and federal protection, an employer should not be forced to relitigate the validity of its evaluations through multiple Title VII actions. This opportunity presents extreme difficulty for the former employer of a litigious former employee who can challenge future references into infinity. Remembering that an employer's refusal to provide a reference may also form the basis of a section 704(a) retaliation claim, the employer sits in an unenviable position somewhere between a rock and a hard place. The duty to defend should not be a bar to providing protection for former employees, but it holds particular significance where the judicial extension of section 704(a) merely adds a duplicative remedy in most instances. Expanding section 704(a) adds a layer to the patchwork of employee protections, without providing a truly comprehensive remedy.[258] It is a du-

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though it properly discharged the employee and complied with ERISA requirements.

255. *See* Rutherford v. American Bank of Commerce, 565 F.2d 1162, 1163 (10th Cir. 1977).

256. *See id.*

257. *See supra* notes 176-81 and accompanying text (discussing alternative analysis of *Rutherford* and suggesting the court needlessly expanded section 704(a) in that instance).

258. *But see* Barna, *supra* note 21, at 268 n.55 (arguing that section 704(a) should be extended to cover former employees and "serve as a catch-all provision" that will ensure former employees a federal remedy, rather than the state common-law alterna-

ty that, if imposed at all, should have been imposed after careful balancing by Congress and not by the Court.

VI. CONCLUSION

The language used to define the class of individuals protected from discrimination in section 704(a) is not ambiguous. Title VII defines an employee as a person "employed by an employer."[259] Section 704(a) coverage is limited to "*his employees* and applicants for employment" referring unambiguously to the covered employer's current employees and applicants.[260] Although "employee" is used inconsistently throughout Title VII, and is open to semantic manipulation, its context in section 704(a) has a plain and unambiguous meaning that requires covered persons to have an existing employment relationship with the covered employer. The *Robinson* Court created ambiguity by looking at the semantic variations which are plausible under section 704(a) rather than limiting its inquiry to the plain meaning of Congress' words. The Court gave short shrift to Congress' limitation and its choice to expand coverage to expressly include "applicants for employment" but not other individuals. Merely defining a protected class to include some individuals while excluding others is not in and of itself absurd. Moreover, even though section 704(a) has been construed to include former employees the retaliation coverage is far from the comprehensive panacea touted by the proponents of extended coverage. Many employees and employers remain outside its scope, as many continue to remain outside the scope of section 703's substantive protection from race, color, religion, sex, and national origin discrimination.

Furthermore, excluding former employees from the scope of section 704(a) is not at odds with Title VII's underlying purpose or remedial framework. Despite its breadth, there is no indication that Congress contemplated or attempted to provide an implicit cause of action for former employees. It is obvious from more recent legislation that Congress is keenly aware of the

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tives).

259. 42 U.S.C. § 2000e(f) (1994).

260. 42 U.S.C. § 2000e-3(a) (1994) (emphasis added).

various stages of employment relationships and that it can use express language to include former employees. Yet, amendments to Title VII have made no effort to expand section 704(a) or expressly include former employees.

Although Title VII enforcement relies on individual reporting, failure to include former employees in the anti-retaliation provision would not chill enforcement efforts. While inclusion of former employees would create a federal remedy for many retaliation claims, other avenues exist to protect former employees. Moreover, most cases that extended section 704(a) coverage to former employees, could have been effectively resolved by these other remedies. Additionally, coverage of former employees is inconsistent with Title VII's relatively short limitations period. It is clear that Congress did not envision this type of open-ended liability after creating a structured and narrow limitations period for filing charges and subsequent civil actions.

This note has attempted to paint an accurate picture of the implications of expanding section 704(a)'s scope in the context of Title VII enforcement. There are certainly good arguments that former employees should enjoy protection under Title VII, but terms in section 704(a) should also be read by their plain meaning. Policy weighs both pro and con, and absent Congress' express coverage of former employees the Court should have resisted the temptation to judicially amend Title VII and augment its scope beyond Congress' contemplation. *Robinson* may reflect the policy choices of the Supreme Court, but does not so clearly represent those of Congress.

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