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# Title VII and Negative Job References: Employees Find Safe Harbor in Robinson v. Shell Oil Company, 31 J. Marshall L. Rev. 521 (1998)

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# COMMENTS

# TITLE VII AND NEGATIVE JOB REFERENCES: EMPLOYEES FIND SAFE HARBOR IN *ROBINSON V. SHELL OIL COMPANY*

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## INTRODUCTION

Imagine for a moment, that a chicken was an employee on Mr. Adams' farm. Now imagine Mr. Adams fired that employee because there were too many chickens on the farm. Upon its release, the chicken filed a charge with the Equal Employment Opportunity Commission (EEOC),[1] claiming that it was discriminated against and fired because of its race.[2] While the charge was pending, the chicken decided to get a new job at Betty Lou's Farm, which requested a job reference from Mr. Adams regarding his former employee.[3] Mr. Adams supplied Betty Lou with a negative job reference, and Betty Lou refused to hire the chicken. The chicken, believing that Mr. Adams provided the negative job reference in retaliation for filing the discrimination charge with the EEOC, filed another charge against Mr. Adams under Title VII's

* J.D. Candidate, June 1998.

1. 42 U.S.C. §§ 2000e-4(a) & 2000e-5(b) (1994). Congress, through Title VII, created the EEOC to investigate and attempt to resolve unlawful discrimination practices. *Id.* §§ 2000e-4(a) & 2000e-5(b). *See* James Francis Barna, *Keeping the Boss at Bay Post-Termination Retaliation Under Title VII*, 47 WASH. U.J. URB. & CONTEMP. L. 259, 267-69 (1995) (analyzing the applicability of § 704(a) to post-employment retaliation claims in the Third Circuit). The Equal Employment Opportunity Commission (EEOC) may also file suit on behalf of the employee or authorize the employee to file suit against his or her employer if it reasonably believes the charge to be true. 42 U.S.C. § 2000e-5(f).

2. *See* Robinson v. Shell Oil Co., 70 F.3d 325, 327-28 (4th Cir. 1995), *rev'd*, 117 S. Ct. 843 (1997) (discussing a former employee bringing suit against a former employer for retaliation under Title VII § 704(a)). In the *Robinson* case, a former employee claimed he had been discriminated against because he was black. *Id.* at 327. The facts outlined in *Robinson* provide some basis for the above textual hypothetical.

3. *See id.* at 327. Robinson attempted to get a job at another company, which requested a job reference from Shell Oil Company. *Id.*

anti-retaliation provision.[4] At this point, the question is not whether a chicken may sue under Title VII's anti-retaliation provision, but whether the chicken, as a former employee, may sue the former employer under the same provision.[5] Instead of determining what is a chicken,[6] the question now becomes "what is an employee?"

In 1960, the Honorable Henry J. Friendly of the Federal District Court in New York asked the question, "what is a chicken?"[7] Although to most, this would seem like a rather simple question, apparently there was enough confusion regarding the definition, meaning and understanding of this word to merit a trial in a federal district court.[8] What does chicken have to do with Title VII[9] and discrimination in the workplace? To date, there has not been a single reported incident involving a chicken being discriminated against in the workplace, or more specifically, claiming retaliation by a former employer who provided a bad job reference to a subsequent employer. Yet, the problem Judge Friendly had in defining a chicken[10] is the same problem a number of circuits were having in determining who an employee is in relation to Title VII's retaliation provision.[11]

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4. 42 U.S.C. § 2000e-3(a).

5. *See* Brief for Charles T. Robinson, Sr. at *i, Robinson v. Shell Oil Co., 116 S. Ct. 1541 (1996) (No. 95-1376) (asking whether a former employee is covered by the anti-retaliation provision in Title VII).

6. Frigaliment Importing Co. v. B.N.S. Int'l Sales Corp., 190 F. Supp. 116, 117 (S.D.N.Y. 1960).

7. *Id.* In *Frigaliment*, there was a contract dispute between the parties as to what the word "chicken" meant. *Id.* One side defined chicken as "a young chicken, suitable for broiling and frying," while the opposing counsel defined chicken as "any bird of that genus that meets contract specifications on weight and quality, including what it calls 'stewing chicken'." *Id.* Judge Friendly ruled that in order to enforce a particular meaning of a common term, the plaintiff must show that the defendant had actual knowledge of that particular meaning or knowledge of a universal usage or meaning. *Id.* at 119.

8. *Id.* at 118. Judge Friendly noted that because the word chicken was ambiguous, it was necessary to look at the contract language to determine the proper interpretation. *Id.*

9. 42 U.S.C. §§ 2000e-2000e-17 (1994).

10. *Frigaliment*, 190 F. Supp. at 117.

11. *See* Veprinsky v. Fluor Daniel, Inc., 87 F.3d 881, 891 (7th Cir. 1996) (holding Title VII protected former employees); *Robinson*, 70 F.3d at 332 (ruling that Title VII does not protect former employees); Charlton v. Paramus Bd. of Educ., 25 F.3d 194, 199-200 (3d Cir. 1994) (instructing the district court to broadly interpret § 704(a) to include former employees); Reed v. Shepard, 939 F.2d 484, 493 (7th Cir. 1991) (finding that former employees are not covered under Title VII § 704(a)); Bailey v. USX Corp., 850 F.2d 1506, 1509-10 (11th Cir. 1988) (finding that the exclusion of former employees would undermine the clear remedial purposes of Title VII); O'Brien v. Sky Chefs, Inc., 670 F.2d 864, 869 (9th Cir. 1982) (holding that former employees required protection under Title VII), *overruled on other grounds by* Atonio v. Wards Cove Packing Co., 810 F.2d 1477, 1481-82 (9th Cir. 1987) (*en banc*);

The circuits were split on how to define an employee.[12] The problem lay in statutory construction because the majority of circuits that confronted the issue believed the word "employee" in Title VII should be read broadly to include former employees.[13] Conversely, the minority of circuits stood firm on the ground of strict statutory interpretation excluding former employees from Title VII's definition of employee.[14] Due to such a conflict among the circuits, the Supreme Court, in 1996, agreed to hear *Robinson v. Shell Oil Company*,[15] a case from the Fourth Circuit, in order to determine who really is an employee in relation to Title VII's anti-retaliation provision.[16]

However, in order to answer that particular question, the Supreme Court needed to tackle the difficult, but necessary, task of statutory interpretation. Additionally, the Court needed to determine if it wished to base its decision on policy considerations or clear rules defining statutory interpretation. Not unlike the simple question asked by Judge Friendly some thirty-six years ago,[17] the Supreme Court faced seemingly simple questions such as: (1) Who is an employee?;[18] (2) What does it mean to be "employed?";[19]

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Pantchenko v. C.B. Dolge Co., 581 F.2d 1052, 1054-55 (2d Cir. 1978) (reasoning that a narrow construction excluding former employees would not give effect to the statute's purpose); Rutherford v. American Bank of Commerce, 565 F.2d 1162, 1166 (10th Cir. 1977) (deciding to include former employees under Title VII's anti-retaliation provision).

12. See *supra* note 11 listing decisions from various United States Court of Appeals addressing the issue of former employees and § 704(a) of Title VII.

13. *See Veprinsky*, 87 F.3d at 891 (holding that Title VII applied to former employees so long as the alleged retaliatory acts were related to the plaintiff's employment); *Charlton*, 25 F.3d at 199-200 (deciding to broadly interpret § 704(a) of Title VII to include former employees); *Bailey*, 850 F.2d at 1509 (relying on policy considerations to broadly interpret Title VII's retaliation provision); *O'Brien*, 670 F.2d at 869 (holding that an allegation of a bad recommendation after termination was sufficient to assert a retaliation claim); *Pantchenko*, 581 F.2d at 1054-55 (reasoning that a narrow construction of Title VII would not give effect to the statute's purpose); *Rutherford*, 565 F.2d at 1165 (holding a narrow interpretation of the statute would not live up to the legislative intent behind the statute's anti-discriminatory policy).

14. *See Robinson*, 70 F.3d at 330 (finding that the terms used in Title VII are not ambiguous, and therefore are not subject to a broad interpretation); Polsby v. Chase, 970 F.2d 1360, 1365 (4th Cir. 1992) (holding that post-termination acts of a former employer were not actionable by former employees under Title VII's retaliation provision), *vacated on other grounds sub nom.*, Polsby v. Shalala, 507 U.S. 1048 (1993).

15. 116 S. Ct. 1541 (1996).

16. *Robinson*, 117 S. Ct. 843 (1997). The exact issue presented to the Court was "[d]oes Title VII § 704(a) of the Civil Rights Act of 1964 give former employees a cause of action for acts of retaliation allegedly occurring after the employment relationship has ended?" Brief for Shell Oil Co. at *i, Robinson v. Shell Oil Co., 116 S. Ct. 1541 (1996) (No. 95-1376).

17. Frigaliment Importing Co. v. B.N.S. Int'l Sales Corp., 190 F. Supp. 116, 117 (S.D.N.Y. 1960).

18. An employee is defined as, "a person in the service of another under

and (3) Can a former employee be considered a current employee under Title VII? While the first two questions seemed simple enough, the third question seemed to border on the absurd. Yet, the Supreme Court determined that there was a need for clarification regarding these questions due to the conflict among the circuit courts.[20]

Before addressing the Court's decision and its progeny, it is important to first understand the historical background of Title VII[21] and statutory construction. Part I examines the precise language of Title VII § 704(a),[22] as well as § 701[23] and § 703,[24] and provides a historical look at how the circuits have interpreted § 704(a) of the Civil Rights Act of 1964. After establishing the historical background of Title VII's anti-retaliation provision, Part II provides an analysis of why the Supreme Court erred in *Robinson* when it determined that Title VII § 704 protected former employees. Part II also highlights remedies, other than Title VII remedies that are readily available to former employees, which the Supreme Court summarily dismissed. Following the analysis, Part III offers a proposal to Congress, as well as a guide for employers in light of the *Robinson* decision. Finally, this Comment asserts that it is unnecessary for Title VII to include former employees. Not only are former employees protected by laws other than Title

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any contract of hire, express or implied, oral or written, where the employer has the power or right to control and direct the employee in the material details of how the work is to be performed." BLACK'S LAW DICTIONARY 525 (6th ed. 1990).

19. Employed means "performing work under an employer-employee relationship." *Id.*

20. A majority of the circuit courts have held that a former employee does have a cause of action against his former employer under Title VII § 704(a). *See Veprinsky*, 87 F.3d at 891 (ruling that Title VII did apply to former employees so long as the alleged retaliatory acts were related to the plaintiff's employment); *Charlton*, 25 F.3d at 202 (holding that § 704(a) protects former employees); *Bailey*, 850 F.2d at 1509 (deciding that a strict interpretation does not effectuate the statute's remedial purpose); *O'Brien*, 670 F.2d at 869 (reasoning that an allegation of a bad recommendation after termination was sufficient to assert a retaliation claim); *Pantchenko*, 581 F.2d at 1054-55 (allowing a broad interpretation of § 704(a) to further the underlying purpose of Title VII by preventing discrimination in the workplace); *Rutherford*, 565 F.2d at 1165 (holding a narrow interpretation of the statute would not live up to the legislative intent behind the statute's anti-discriminatory policy). *But see Robinson*, 70 F.3d at 332 (holding that when the language of a statute is plain and unambiguous, judicial inquiry must cease), Koelsch v. Beltone Electronics Corp., 46 F.3d 705, 709 (7th Cir. 1995) (stating that the Seventh Circuit does not recognize causes of action of former employees under § 704(a) of Title VII), *and Reed*, 939 F.2d at 492 (finding that former employees are not covered under Title VII § 704(a)).

21. 42 U.S.C. § 2000e, *et al.* (1994).

22. 42 U.S.C. § 2000e-3(a) (1994).

23. 42 U.S.C. § 2000e.

24. 42 U.S.C. § 2000e-2.

VII, but such an exclusion will maintain the integrity of Title VII. Before reaching this conclusion, though, it is necessary to understand the historical background of Title VII § 704(a) and the cases surrounding it.

## I. A LOOK INTO TITLE VII AND ITS PROGENY

It would be impossible to provide an accurate analysis of Title VII's anti-retaliation provision without first exploring the words and meanings within the statute itself. More importantly, it is essential to understand the purpose behind Title VII before trying to understand how the courts have interpreted it. Section A focuses on the precise language and purpose of Title VII. Section B discusses the majority view, which the Supreme Court eventually adopted, granting former employees a cause of action under Title VII § 704(a). Next, Section C examines how the Seventh Circuit historically excluded former employees from protection under § 704(a) but changed its stance prior to the *Robinson* decision. Section D examines the minority view from the Fourth Circuit, which did not allow former employees a cause of action under § 704(a). Finally, Section E will provide a brief overview of the Supreme Court's decision and reasoning in reversing the Fourth Circuit in the *Robinson* case.

### *A. Eradication of Discrimination in the Workplace*

In 1964, Congress passed Title VII of the Civil Rights Act.[25] The purpose behind Title VII was to "eliminate . . . discrimination in employment based on race, color, religion, [sex], or national origin"[26] and to enhance the hiring opportunities of minorities "on the basis of merit."[27] The first section of Title VII defines an employee as "an individual employed by an employer."[28] This definition controls the understanding and meaning of the word employee throughout Title VII.[29] The first section of Title VII also defines the word 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 in the current or preceding calendar year."[30] The legislative history indicates that unless

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

26. H.R.REP. NO. 914, at 11 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2401.

27. *See* 110 CONG. REC. 6549 (1964) (statement of Sen. Humphrey). *See also* Griggs v. Duke Power Co., 401 U.S. 424, 429-31 (1971) (stating that the purpose of Title VII was to "achieve equality of employment opportunities and remove barriers that have operated in the past").

28. 42 U.S.C. § 2000e(f).

29. *See generally* 42 U.S.C. §§ 2000e-2000e-17 (applying the word employee throughout the equal employment opportunities statutes).

30. 42 U.S.C. § 2000e(b). *See generally Recent Case*, 109 HARV. L. REV. 675

otherwise limited by the Act, the word "employer" is intended to have its ordinary dictionary meaning.[31] Congress clearly acknowledged that there was some confusion here but did not intend for a broad interpretation of the statutory language.[32]

While § 703 of Title VII prohibits employers from discriminating on the basis of race, sex, religion or national origin,[33] Title VII also includes an anti-retaliation provision in § 704(a).[34] This provision protects employees and applicants from discrimination by an employer for their involvement in protesting unlawful discrimination employment practices or involvement in proceedings related to such practices.[35] Section 704(a) explicitly protects two groups of individuals, employees and applicants for employment.[36] This Section is much narrower in coverage than that of § 703, which prohibits discrimination towards any individual.[37] The legislative history on Title VII, in general, offers little guidance in determining whether Congress actually intended for former employees during post-termination retaliatory action to be protected

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(1996) (discussing the Seventh Circuit's narrow definition of "employer" for the purposes of Title VII).

31. 110 CONG. REC. 7216 (1964) (responding to Sen. Dirksen Memorandum).

> Question. Who is an employer within the meaning of title VII? I am not sure, the bill is indefinite, we have no committee hearings, no report. Can an employer readily ascertain from the language of the bill whether or not he is included? . . . Answer. The term "employer" is intended to have its common dictionary meaning, except as expressly qualified by the act.

*Id.*

32. *See id.*

33. 42 U.S.C. § 2000e-2(a)(1).

34. 42 U.S.C. § 2000e-3(a). This provision states in pertinent part:

> 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 subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

*Id.*

35. *Id.* This section also states that it is as an unlawful employment practice for "an employment agency, or joint labor-management committee . . . to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership." *Id.* It is important to include "individual," "member," and "applicant for membership," in order to analyze who is specifically protected within the context of § 704(a). See *infra* notes 129-58 and accompanying text for an analysis of Title VII's words and context.

36. 42 U.S.C. § 2000e-3(a).

37. 42 U.S.C. § 2000e-2(a)(1); CHARLES A. SULLIVAN, ET AL., FEDERAL STATUTORY LAW OF EMPLOYMENT DISCRIMINATION 185 (1980). *See* Sibley Mem'l Hosp. v. Wilson, 488 F.2d 1338, 1341 (D.C. Cir. 1973) (stating that the coverage of § 703 is broader than that of § 704(a)).

under § 704(a).[38]

It is clear from the plain language of the statute that employees and applicants for employment are specifically granted protection under § 704(a).[39] The only legislative material relating to § 704(a) is a House Labor Committee report which describes who to protect from retaliation by casually using the word "person" instead of "employee."[40] Yet, Title VII, as enacted, contains the more limiting terms "his employees."[41] Although by just looking at the plain language of § 704, there is no mention of former employees. The majority of circuits strongly believed that such an interpretation exists within the context of Title VII and Congress' intent in writing the Act.[42]

### *B. The Majority: Policy Considerations*

A number of circuits relied on the belief that § 704(a) was ambiguous, thus warranting a broad interpretation to include former employees under its protection.[43] This Section will look at decisions from the Tenth, Second, Third, Ninth, and Eleventh Circuits. The decisions of these circuits constituted the majority view of interpreting "former employees," which the Supreme Court adopted in its *Robinson* decision.

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38. Patricia A. Moore, *Parting is Such Sweet Sorrow: The Application of Title VII to Post-Employment Retaliation*, 62 FORDHAM L. REV. 205, 210 (1993). Moore argues that Title VII's retaliation provision protects former employees. *Id.* at 219-24. She bases her argument on the assumption that the exclusion of former employees would overlook the broad purpose and intent of Congress' enactment of Title VII. *Id.* at 224. Moore does suggest, however, that there is a possibility of abuse of such protection of post-termination actions. *Id.* To further justify her stance, Moore qualifies her conclusion by stating that § 704(a) "should protect only those post-employment actions that relate to an employment relationship." *Id.* This qualification clearly ignores the fact that there are other remedies available to former employees, and they should not rely on Title VII in this context. See *infra* notes 192-204 and accompanying text discussing other remedies available to former employees.

39. 42 U.S.C. § 2000e-3 (a) (1994).

40. H.R.REP. NO. 1370, at 11 (1962).

41. 42 U.S.C. § 2000e-3 (a). *See* Davel v. Sullivan, 902 F.2d 559, 562 (7th Cir. 1990) (noting that statutory language controls the interpretation of the statute over the language in the legislative history).

42. See *infra* notes 44-71 and accompanying text discussing the majority of circuits which include former employees under Title VII § 704(a).

43. *See generally* Veprinsky v. Fluor Daniel, Inc., 87 F.3d 881 (7th Cir. 1996); Charlton v. Paramus Bd. of Educ., 25 F.3d 194 (3d Cir. 1994); 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. 1981), *overruled on other grounds by* Antonio v. Wards Cove Packing Co., 810 F.2d 1477 (9th Cir. 1987); Pantchenko v. Dolge C.B. Co., 581 F.2d 1052 (2d Cir. 1978); Rutherford v. American Bank of Commerce, 565 F.2d 1162 (10th Cir. 1977). These cases have all held that § 704(a) of Title VII protects former employees from retaliation.

In *Rutherford v. American Bank of Commerce*,[44] the Tenth Circuit Court of Appeals allowed a former employee to bring a discrimination suit against her former employer under § 704(a) of Title VII.[45] The Tenth Circuit rejected the defendant's argument that § 704(a) applies only to "employees and applicants for employment," not former employees.[46] The court simply stated that as a remedial statute, Title VII should be liberally construed.[47] Without discussing the legislative history of § 704(a), the Tenth Circuit asserted that a literal reading would not be justified.[48]

Following the *Rutherford* decision, the Second Circuit also allowed the plaintiff to file suit against her former employer under Title VII's anti-retaliation provision.[49] In *Pantchenko v. C.B. Dolge Co.*,[50] the court used reasoning similar to that in *Rutherford* stating that a narrow interpretation would not effectuate the statute's purpose.[51] The court concluded that because the purpose of Title VII was to prohibit discrimination in the workplace, a broad interpretation justified including former employees under § 704(a).[52]

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44. 565 F.2d 1162 (10th Cir. 1977).

45. *Rutherford*, 565 F.2d at 1163. Rutherford was a former bank employee who voluntarily resigned from her job at the American Bank of Commerce (the Bank). *Id.* She filed a sexual discrimination charge against the Bank, which was later resolved in favor of the Bank. *See* Rutherford v. American Bank of Commerce, No. 74-1313 (10th Cir. filed January 27, 1975) (affirming the District Court's finding that there was no sexual discrimination). Rutherford attempted to get two other jobs, one at another bank and one with an airline. *Rutherford*, 565 F.2d at 1164. Both prospective employers requested recommendations from her former employer. *Id.* Her former employer informed both prospective employers that Rutherford had filed sex discrimination charges against the Bank. *Id.*

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

47. *Id.* Using this reasoning, the court pointed to broad interpretations of the Fair Labor Standards Act (FLSA) by other circuit courts which included former employees as protected persons, even though the interpretations were not specifically stated in the statutory language. *Id.* at 1165-66. *See* Dunlop v. Carriage Carpet Co., 548 F.2d 139, 142 (6th Cir. 1977) (interpreting the Fair Labor Standards Act to include the protection of former employees); Hodgson v. Charles Martin Inspectors of Petroleum, Inc., 459 F.2d 303, 306 (5th Cir. 1972) (holding that the FLSA affords protection to former employees).

48. *Rutherford*, 565 F.2d at 1165. Additionally, the court did not discuss or raise the issue of any ambiguities in the language of § 704(a) to further support its broad interpretation. *Id.*

49. *Pantchenko*, 581 F.2d at 1055. A female chemist filed sexual discrimination charges against her former employer. *Id.* at 1054. The plaintiff filed another charge against her former employer for retaliation under § 704(a) after the defendant allegedly refused to write her a letter of recommendation and "made disparaging and untrue statements about her to her prospective employers." *Id.*

50. 581 F.2d 1052 (2d Cir. 1978).

51. *Id.* at 1055.

52. *Id.* (citing Federal Deposit Ins. Corp. v. Tremaine, 133 F.2d 827, 830 (2d Cir. 1943) (Hand, C.J.)). "There is no surer guide in the interpretation of a statute than its purpose when that is sufficiently disclosed." *Id. Cf.* Peter

Similarly, in *Charlton v. Paramus Board of Education*,[53] the Third Circuit refused to strictly interpret § 704(a).[54] The court set forth a two part test in order to secure the rights of former employees.[55] First, the retaliation must stem from a protection specifically stated in Title VII.[56] Second, the protected action and the retaliation must "arise[ ] out of or . . . relate[ ] to the employment relationship."[57] The *Charlton* court held that for purposes of an employer retaliating against an employee after the employment relationship has ended, Title VII's definition of the word "employee" includes former employees.[58]

Unlike the other circuits, the Ninth Circuit, in *O'Brien v. Sky Chefs, Inc.*,[59] offered no discussion or analysis of why it decided to allow a former employee to sue its former employer for retaliation.[60] To its credit, though, the *O'Brien* court did not have the opportunity to fully address this matter because the charging party dropped the claims of retaliation.[61]

In *Sherman v. Burke Contracting, Inc.*[62] and *Bailey v. USX Corp.*,[63] the Eleventh Circuit relied on the prior opinions from the Tenth[64] and Second Circuits[65] to afford protection to former em-

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Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960) (observing that "it is commonplace that a literal interpretation of the words of a statute is not always a safe guide to its meaning").

53. 25 F.3d 194 (3d Cir. 1994).

54. *Charlton*, 25 F.3d at 202. The court of appeals remanded the case to the district court with instructions to broadly interpret § 704(a) to include former employees. *Id.* *See generally* Barna, *supra* note 1 (analyzing the applicability of § 704(a) to post-employment retaliation claims in the Third Circuit).

55. *Charlton*, 25 F.3d at 200.

56. *Id.* An employer may not discriminate on the basis of race, sex, national origin, or religion. 42 U.S.C. § 2000e-2(a)(1) (1994). Also, an employer may not retaliate for a charge, testimony, or assistance and participation in an investigation or hearing. 42 U.S.C. § 2000e-3(a).

57. *Charlton*, 25 F.3d at 200.

58. *Id.*

59. 670 F.2d 864 (9th Cir. 1981), *overruled on other grounds by* Antonio v. Wards Cove Packing Co., 810 F.2d 1477 (9th Cir. 1987).

60. *O'Brien*, 670 F.2d at 869. This case involved three female former employees who alleged that their former employer discriminated against them on the basis of their gender. *Id.* at 866. In addition, two of the women claimed their former employer retaliated against them after they filed charges with the EEOC. *Id.*

61. *Id.* at 869. The court did state, however, that after an employee is terminated and has filed charges with the EEOC, if the employer refuses to rehire or gives bad recommendations, such action would be sufficient to assert a claim of retaliation. *Id.*

62. 891 F.2d 1527 (11th Cir. 1990).

63. 850 F.2d 1506 (11th Cir. 1988).

64. See *supra* notes 44-48 and accompanying text discussing the *Rutherford* decision from the Tenth Circuit.

65. See *supra* notes 49-52 and accompanying text discussing the *Pantchenko* opinion from the Second Circuit.

ployees under § 704(a).[66] In *Sherman*, the defendant spoke with the plaintiff's new employer and persuaded the new employer to fire the plaintiff.[67] The court affirmed the award of $10,000 in compensatory damages in favor of the plaintiff.[68] In *Bailey*, the court held that a former employee is protected under Title VII's anti-retaliation provision,[69] and reasoned that a strict interpretation of the statute "would undercut the obvious remedial purposes of Title VII."[70] The Seventh Circuit eventually adopted this view, although the court historically excluded former employees from Title VII's protection.

### *C. The Seventh Circuit: Confusion or Conformity?*

The Seventh Circuit aligned more with the majority view than with the minority view. But, a careful look at the decisions that arose out of this Circuit suggest the court interpreted § 704(a) in such a way as to achieve a desired outcome.[71] The court strongly disfavored discrimination and retaliation of any sort, regardless of the status of the individual, and wanted to insure protection or a remedy for the aggrieved individual.[72] This Section first focuses on two cases from the Seventh Circuit, *Reed v. Shepard*[73] and *Koelsch v. Beltone Electronics Corp.*,[74] which excluded former employees from § 704(a) protection. Next, this Section discusses the court's switch in *Veprinsky v. Fluor Daniel*[75] to include former employees under § 704(a).[76]

In *Reed*, the court affirmed a district court's ruling that a former employee was not protected under § 704(a) of Title VII.[77] The court examined the language of § 704(a), rather than relying on policy considerations, and found that retaliation against an

66. *Sherman*, 891 F.2d at 1536; *Bailey*, 850 F.2d at 1509.
67. *Sherman*, 891 F.2d at 1529.
68. *Id.* at 1536.
69. *Bailey*, 850 F.2d at 1509-10.
70. *Id.*
71. *Compare* Reed v. Shepard, 939 F.2d 484, 492-93 (7th Cir. 1991) (describing how "discharge or another employment impairment . . . evidences actionable retaliation"), *and* Koelsch v. Beltone Elecs. Corp., 46 F.3d 705, 709 (7th Cir. 1995) (rejecting the assertion that a former employee has a cause of action under § 704(a)), *with* Veprinsky v. Fluor Daniel, Inc., 87 F.3d 881, 888 (7th Cir. 1996) (stating that the court interpreted Title VII liberally to ensure the remedial nature of the statute).
72. *See e.g. Veprinsky*, 87 F.3d at 886-87 (disregarding established precedent and stare decisis to provide protection for a former employee under § 704(a)).
73. 939 F.2d 484 (7th Cir. 1991).
74. 46 F.3d 705 (7th Cir. 1995).
75. 87 F.3d 881 (7th Cir. 1996).
76. See *infra* notes 83-88 and accompanying text for a discussion of the *Veprinsky* case.
77. 939 F.2d at 492-93.

employee in the form of discharge or other adverse employment action in the current employment relationship constitutes an unfair practice prohibited by § 704(a).[78] The court, in other words, addressed the harm caused to current employees by an employer's retaliation to that employee's protected statutory activity.[79] Soon after the decision in *Reed*, the Seventh Circuit in *Koelsch* clearly asserted its position regarding former employees and § 704(a) of Title VII.[80] The court stated that § 704(a) does not afford a cause of action for post-termination events.[81]

Contrary to the ruling in *Reed* and *Koelsch*, one year later the court in *Veprinsky* held that a former employee, adversely affected by post-termination acts of retaliation, has a cause of action under Title VII § 704(a).[82] The court justified its holding by asserting that *Reed* had been too broadly interpreted,[83] and that the remarks made in *Koelsch* were dictum.[84] Furthermore, the Seventh Circuit specifically pointed to the growing number of circuits which allowed Title VII protection of former employees from retaliation.[85] The court, feeling the sudden need to clarify its previous decisions, reasoned that if protection under § 704(a) extended only to an employee and an applicant, it would greatly undermine the purpose behind Title VII.[86]

Furthermore, the court criticized the Fourth Circuit's reliance upon *Reed*.[87] In fact, the Seventh Circuit appeared to be saying

78. *Id.* The court also relied on the district court's finding that the alleged retaliation took place after the plaintiff's termination, and therefore was not an adverse employment action protected under § 704(a). *Id.*

79. *Id.*

80. *Koelsch*, 46 F.3d at 709. In this case, a former employee of Beltone Electronics filed suit complaining that a fellow employee sexually harassed her while employed at Beltone. *Id.* at 706. The plaintiff also claimed that she was fired in retaliation for reporting the alleged harassment. *Id.* The plaintiff stated that she continued to be a victim of sexual harassment following her termination. *Id.* at 709. The court found that the plaintiff failed to establish that the employer discharged her in retaliation for reporting the alleged harassment. *Id.* at 708.

81. *Id.* at 709 (citing *Reed*, 939 F.2d at 492).

82. *Veprinsky*, 87 F.3d at 891.

83. *Id.* at 884-89. *See Koelsch*, 46 F.3d at 709 (remarking "the law in this circuit is quite clear . . . that post-termination events are not actionable under § 2000e-3(a).").

84. *Veprinsky*, 87 F.3d at 886. In arriving at the holding in *Veprinsky*, the court based its decision on policy arguments echoed from the other circuits holding the majority view. *Id.* See *supra* notes 54-81 and accompanying text discussing the majority of circuits holding in favor of former employees.

85. *Veprinsky*, 87 F.3d at 884-85.

86. *Id.* at 889-91.

87. *Id.* at 886-88. The court stated that the decision in *Reed* provided the basis for the Fourth Circuit's interpretation of § 704(a) to not protect former employees from retaliation. *Veprinsky*, 87 F.3d at 886. The court also discussed at length how the Fourth Circuit incorrectly relied on *Reed* as a basis for its holding in both *Polsby* and *Robinson*. *Id.* at 886.

that "but for" the misinterpretation of *Reed*, the Fourth Circuit's interpretation of § 704(a) would include former employees. This seems unfounded considering that the Fourth Circuit presented a number of solid arguments to support its decision to exclude former employees from § 704(a).[88]

### *D. "The Mouse that Roared":[89] The Fourth Circuit*

The Fourth Circuit held the minority opinion excluding former employees from § 704(a) protection until the Supreme Court reversed it in *Robinson v. Shell Oil Company*.[90] In so holding, the Fourth Circuit based its decisions on strict statutory construction, rather than broad policy considerations.[91] Two cases distinctly set forth the Fourth Circuit's view regarding former employees in relation to Title VII's retaliation provision: *Polsby v. Chase*[92] and *Robinson*.[93]

In *Polsby*,[94] the Fourth Circuit relied heavily on the Seventh Circuit's decision in *Reed* to find that § 704(a) of Title VII did not cover post-termination acts of retaliation.[95] Furthermore, the court

88. See *infra* notes 91-117 and accompanying text discussing the arguments and reasoning set forth in the decisions from the Fourth Circuit.

89. LEONARD WIBBERLEY, THE MOUSE THAT ROARED (1955). This book is about a little country, which was basically an island "five miles long and three miles wide," named Pinot Grand Fenwick. *Id.* at 4. This country decided to wage war on the United States so that it could lose and receive aid from the U.S. Government. *Id.* at 51-52. The significance of the book lies in the fact that this small island ended up defeating the United States despite the odds. *Id.* at 164.

90. 117 S. Ct. 843, 849 (1997).

91. *See* Robinson v. Shell Oil Co., 70 F.3d 325, 332 (4th Cir. 1995), *rev'd*, 117 S. Ct. 843 (1997) (criticizing other circuits for not adhering to established rules of statutory construction and interpretation).

92. 970 F.2d 1360 (4th Cir. 1992), *vacated on other grounds sub nom.*, Polsby v. Shalala, 507 U.S. 1048 (1993).

93. 70 F.3d 325 (4th Cir. 1995), *rev'd*, 117 S. Ct. 843 (1997).

94. 970 F.2d 1360. In this case, the plaintiff claimed her former employer retaliated against her by writing a letter to the American Board of Psychiatry and Neurology. *Id.* at 1362. The plaintiff alleged that the letter contained errors that resulted in the Board denying her residency credit for the time spent working for the defendant. *Id.* The plaintiff also alleged that the defendant refused her requests to correct the errors in the letter. *Id.* at 1364.

95. *Id.* at 1365. The court looked at the plain language of § 704(a), and determined that § 704(a) did not include the term "former employee." *Id.* at 1365-67. The court also relied, in part, on a concurrence in *Sherman v. Burke Contracting, Inc.*, 891 F.2d 1527, 1536 (11th Cir. 1990). In *Sherman*, Judge Tjoflat's concurrence admitted that he was bound to follow the precedent set by *Bailey*, 850 F.2d at 1509, but disagreed that § 704(a) protected former employees. *Sherman*, 891 F.2d at 1536. The concurrence not only argued that § 704(a) applied to current employees and applicants for employment, but that the retaliation provision limited recoverable damages by providing equitable relief rather than money damages. *Id.* at 1538. *But cf.* Civil Rights Act of 1991, Pub. L. No. 102-166 § 102 (1), 105 Stat. 1074 (1991) (amending Title VII

reasoned that Congress specifically included "applicants for employment as distinct from an employee to be protected from retaliation, [and therefore] Congress could certainly have also included a former employee if it had desired."[96] Finally, the Fourth Circuit criticized other circuits for not only failing to recognize the clear language of Title VII, but for focusing on questionable policy considerations for their holdings.[97]

In *Robinson*, the Fourth Circuit had the opportunity to again address the question whether former employees are protected under § 704(a) of Title VII.[98] The court, sitting *en banc*, held that the retaliation provision of Title VII does not protect former employees.[99] The court acknowledged that this holding was inconsistent with the majority of circuits which have also considered the issue,[100] but it felt that those circuits had summarily dismissed clear logical methods of statutory interpretation without any sound justification.[101]

The Fourth Circuit presented four major arguments to bolster its holding. First, the court looked to the actual language in § 704(a) and concluded that no ambiguities existed because the word "former" does not appear anywhere in Title VII's anti-retaliation provision.[102] The Fourth Circuit further stated that Congress would have explicitly included former employees had it so intended.[103] Therefore, the exclusion of former employees strongly suggests that Congress had no intention of extending protection beyond the employment relationship to former employees under § 704(a).[104]

Second, the Fourth Circuit addressed Robinson's assertion

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to provide for compensatory and punitive damages).

96. *Polsby*, 970 F.2d at 1365.

97. *Id.*

98. *Robinson*, 70 F.3d at 327.

99. *Id.*

100. *Id.* at 331-32.

101. *Id. See, e.g.*, United States v. Ron Pair Enters., Inc., 489 U.S. 235, 240-41 (1989) (stating that the Court's inquiry ceases where the language of the statute is unambiguous); Caminetti v. United States, 242 U.S. 470, 485 (1917) (stating that the duty of interpretation does not arise where the language of the statute "is plain and admits of no more than one meaning").

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

103. *Id.*

104. *Id. See* United States v. Goldberger & Dubin, P.C., 935 F.2d 501, 506 (2d Cir. 1991) (reasoning that absent expressed congressional intent, the normal meaning should control). *See also* 2A GEORGE SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 47.07, 152 (5th ed. 1992) (stating that "a definition which declares what a term means . . . excludes any meaning that is not stated"). The Supreme Court granted certiorari to decide the proper interpretation of this remedial statute, Robinson v. Shell Oil Co., 116 S. Ct. 1541 (1996), and eventually held that former employees could bring a cause of action under § 704(a) of Title VII for post-termination retaliation. *Robinson*, 117 S. Ct. at 849.

that the term "employee" was ambiguous, thus warranting judicial interpretation to include former employees in the definition of employees under § 701(f).[105] The court explicitly rejected Robinson's contention. The court reasoned that "[b]ecause Title VII does not define 'employee' as an individual no longer employed by an employer, then, under the rules of statutory construction, that meaning is excluded as a meaning from the term 'employee'."[106] Furthermore, the court discussed the rules of statutory construction which requires courts to give words their common ordinary usage, and determined that logic dictated that "employed" and "employer" as used in § 701(f) and § 704(a) could only contemplate an existing employment relationship.[107] Having thus concluded that no ambiguities existed, the Fourth Circuit refused to look to legislative history or other sources of legislative intent, and refused to engage in any further analysis of the issue regarding the ambiguity of the statute.[108]

However, the Fourth Circuit embarked on a discussion of two additional points, which further supported their holding and interpretation of § 704(a). The court first addressed the fact that Title VII is a statute, which contemplates protection of individuals from discrimination in an existing employment relationship.[109] Furthermore, the court asserted that Congress did not design Title VII to provide protection to persons outside of an existing employment relationship with the exception, being specifically addressed by Congress, to include "applicants for employment."[110] If an employer does discharge an employee because of his race, for example, that employee is protected by Title VII because the discriminatory action occurred when there was an on-going employment relationship.[111] Additionally, if that discharged employee then goes to another employer and is refused employment for the sole reason that the discharged employee filed a Title VII discrimination charge against his former employer, then that discharged employee is protected by § 704 from the new employer's retaliatory

105. *Robinson*, 70 F.3d at 330. The court responded to Robinson's argument by stating that, "[h]is contention is legally untenable." *Id.*

106. *Id.* *See* 2A GEORGE SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 47.07, at 132 (5th ed. 1992) (stating that "as a general rule 'a definition which declares what a term means excludes any meaning that is not stated'").

107. *Robinson*, 70 F.3d at 330. The court referred to Black's Law Dictionary to determine the common usage of the terms "employed" and "employer." *Id.*

108. *Id.*

109. *Id.* at 330-31.

110. *Id.* at 331.

111. *Id.* Although the employee would bring suit against the employer as a former employee, it would not change the fact that Title VII does not contemplate the protection of former employees because the discriminatory act took place when an employment relationship existed. *Id.*

refusal as "an applicant for employment."[112]

Next, the Fourth Circuit focused on the fact that § 704(a) does not specifically account for one of the particular elements of claiming retaliation under Title VII: "adverse employment action."[113] Under § 704, an employee or applicant for employment claiming retaliation must suffer an "adverse employment action."[114] The court reasoned that adverse employment action could only occur where a current employment relationship existed.[115] The court, referring to language from the Seventh Circuit's decision in *Reed*, stated, "because 'the alleged retaliatory activities took place after the termination of Reed's employment' those activities were 'not an adverse employment action.'"[116] This reasoning falls well within the Congressional intent of discouraging discrimination in the workplace, as well as allowing discrimination charges to be brought without fear of retaliation from their employers. Unfortunately, the Supreme Court refused to accept this line of reasoning and adopted a broad, more "legislative", approach by reading the word "former" into the language of § 704(a).

### *E. Judicial Activism at Work*

In early 1996, the Supreme Court acknowledged that there was a split among the circuit courts on whether Title VII § 704(a) protected former employees from retaliation and granted certorari for the *Robinson* case from the Fourth Circuit.[117] The Supreme Court rejected the Fourth Circuit's interpretation of § 704(a) and accepted the broad interpretations and constructions adopted by the majority of circuits in order to be "more consistent with the broader context of Title VII and the primary purpose of § 704(a)."[118] The Court attempted to adhere to proper methods of statutory interpretation by first addressing the ambiguity or clarity of the precise language of the Act.[119] Interestingly, the Court actually looked beyond the precise language, and instead looked at the "broader context of the statute as a whole," and concluded that the language was ambiguous.[120] The Court supported that conclusion

112. 42 U.S.C. § 2000e-3(a).

113. *Robinson*, 70 F.3d at 331.

114. 42 U.S.C. § 2000e-3.

115. *Robinson*, 70 F.3d at 331. The court specifically stated, "[a]dverse employment action necessarily requires that the adverse action taken by the employer must be in relation to its own act of employing the employee bringing the charge." *Id.*

116. *Id.* (citing *Reed*, 939 F.2d at 492-93).

117. Robinson v. Shell Oil Co., 116 S. Ct. 1541 (1996).

118. Robinson v. Shell Oil Co., 117 S. Ct. 843, 849 (1997).

119. *Id.* at 846.

120. *Id.* Upon reciting this rule, the Court summarily stated, "consideration of those factors leads us to conclude that the term "employees," as used in § 704(a), is ambiguous as to whether it excludes former employees." *Id.*

by focusing on the absence of any "temporal qualifiers" to limit the interpretation of the word "employees" in both § 704(a) and Title VII's definition of the word in § 701(f).[121]

Next, the Supreme Court focused on other provisions within Title VII utilizing the word "employees" to show that, within those contexts, the word implicitly included "former" employees.[122] Although there are also a number of provisions in which the word "employees" could only contemplate current employees, the Court reasoned that this fact only strengthened the argument that the word "employee" was, by itself, ambiguous.[123] This determination opened the door for the Court to broadly construe the language of the statute and read the word "former" into the definition of employee, as it appears in § 704(a).

Keeping in mind the remedial purpose behind Title VII, yet ignoring that the statute did not contemplate post-employment protection, the Court asserted that former employees must be protected from retaliation in § 704.[124] The main focus of the court revolved around the possible chilling effect, which could result by not protecting former employees.[125] The Court accepted the argument made by the EEOC, which stated:

> [E]xclusion of former employees from the protection of § 704(a) would undermine the effectiveness of Title VII by allowing the threat of post-employment retaliation to deter victims of discrimination from complaining to the EEOC, and would provide perverse incentive for employers to fire employees who might bring Title VII claims.[126]

By protecting former employees from post-termination re-

121. *Id.* at 846-47. The Court felt that there was a distinction to be made because the statute does not define an employee as an individual who "is" employed by an employer. *Id.* Rather, the Court pointed out that the definition, as written in Title VII and not Black's Law Dictionary, states that an employee is "an individual employed by an employer." *Id.* The Court further stated that the ambiguity rested in the fact that the definition could very easily be interpreted as referring to an individual who "was" employed by an employer. *Id.* Interestingly, the Court used this same type of circular reasoning when it asserted that Congress could very well have included the word "current" if it had, indeed, wished to specifically exclude former employees. *Id.*

122. *Id.* at 847.

123. *Id.* However, the Court stated, "the term 'employees' may have a plain meaning in the context of a particular section—not that the term has the same meaning in all other sections and in all other contexts. *Id.* This suggests that the language in § 704(a) could very well have been given its plain meaning, yet it was more convenient for the Court to find ambiguity in order to broadly interpret the provision to include former employees, thus extending the protection of Title VII.

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

125. *Id.*

126. *Id.*

taliation, the Court felt that it was "[m]aintaining unfettered access to statutory remedial mechanisms."[127] Although the majority of circuits historically supported the Supreme Court's decision, the Court went too far in its interpretation of § 704(a) by inserting language into the statute which did not exist prior to its decision nor which was meant to exist there at all.

## II. WHEN INTERPRETATION GOES TOO FAR

Having established the historical foundation of Title VII, the focus now shifts to why Title VII's retaliation provision excludes former employees from its protection. In this analysis, Section A shows that the Supreme Court erred by broadly interpreting § 704. Section B reveals that despite the Court's holding, no ambiguities exist regarding the word "employee" or its definition. Section C focuses on the inapplicability of the two exceptions to the plain-meaning rule of statutory construction. Then, Section D briefly analyzes how the Fair Labor Standards Act and other remedial statutes impact the interpretation of Title VII. Finally, Section E further analyzes what protections are provided to former employees aside from Title VII. The most important step in this analysis is determining what role the court will assume when interpreting this statute.

### *A. The Courts as Superlegislatures*

"What this all boils down to is who is going to make the laws?"[128] It is undisputed that the courts have the power to interpret the laws.[129] When interpreting a statute, courts must begin

127. *Id.*

128. Telephone Interview with L. Christopher Butler, Counsel of Record for Shell Oil Company (Sept. 5, 1996). Montesquieu also warned against the courts involving themselves with legislative powers, stating, "there is no liberty, if the judiciary power be not separated from the legislative . . . . Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator." CHARLES DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS, Bk. XI, Ch. 6, 151-52 (J.V. Prichard ed. & Thomas Nugent trans., 1955).

129. U.S. CONST. art III, § 1. *See* Marbury v. Madison, 5 U.S. 137, 173-79 (1803) (establishing judicial review as the proper role of the judiciary). In addition, since the time of Lochner v. New York, 198 U.S. 45 (1905), the Supreme Court has proclaimed adamantly that it does not "sit as a superlegislature to weigh the wisdom of legislation." Ferguson v. Skrupa, 372 U.S. 726, 731 (1963); *See* Griswold v. Connecticut, 381 U.S. 479, 482 (1965) (asserting that the Court is not a superlegislature determining "the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions"). Although these cases deal primarily with the Due Process Clauses of the Fifth Amendment and Fourteenth Amendment of the Constitution, the very pronouncement that the Court is not a superlegislature is highly significant. *See* Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 532 & 545-46 (1947) (describing how legisla-

first by looking at the statutory language.[130] If certain words are not included within the statutory language, courts are not free to rewrite the statute or fill in perceived gaps.[131] Upon examination, Title VII's retaliation provision specifically refers to "employees" and "applicants for employment;"[132] nowhere does it mention "former employees."[133] A broad interpretation of the language in Title VII to include former employees would, in essence, require the court to rewrite that part of the statute.[134] This power is well outside that of the court's judicial power.[135] If courts were arbitrarily allowed to pick and choose how broadly or narrowly to interpret statutes, it would become impossible to know exactly what a statute means or even what it is trying to accomplish. However, as a result of the *Robinson* decision, the Court has done just that, thus leaving Title VII, as a whole, in a state of flux to be interpreted any way the Court sees fit.

Where statutory language is unambiguous looking at the plain language, as it is in § 704(a), the court must go no further in

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tion should come from legislators, who are chosen to legislate, and not from the courts).

130. K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988); Veprinsky v. Fluor Daniel, Inc., 87 F.3d 881, 888 (7th Cir. 1996); Robinson v. Shell Oil Co., 70 F.2d 325, 328 (4th Cir. 1995), *rev'd*, 117 S. Ct. 843 (1997).

131. *Veprinsky*, 87 F.3d at 897 (Manion, J., concurring in part and dissenting in part). Judge Manion stated that courts are often called upon to interpret a statute. *Id.* Yet, Judge Manion strongly points out "[i]t is quite another thing to rewrite a statute to include language Congress chose to exclude." *Id.* *See* Crooks v. Harrelson, 282 U.S. 55, 60 (1930) (asserting that courts must follow the rules of statutory interpretation rather than searching for underlying meanings); United States v. Murphy, 35 F.3d 143, 145 (4th Cir. 1994) (stating that courts should give statutory words their common meaning and refrain from reading words into the statute which were not originally there), *cert. denied*, 115 S. Ct. 954 (1995).

132. 42 U.S.C. § 2000e-3 (a) (1994).

133. *Id.*

134. *Veprinsky*, 87 F.3d at 896-97 (Manion, J., concurring in part and dissenting in part). Judge Manion noted that the plain meaning of the word "employee" cannot be read to include "former employees" because the word "former" is a modifier that changes the meaning of the word employee. *Id.*

135. U.S. CONST. art. III, § 1. *See* Iselin v. United States, 270 U.S. 245, 251 (1926) (stating that "to supply omissions transcends the judicial function"). If the court rewrote the statute to include former employees, it would disrupt the very essence of the Constitution and the separation of powers doctrine. *See generally* THE FEDERALIST NO. 47 (James Madison) (discussing the separation of powers in terms of the specifically granted powers rather than separate and distinct government entities); Matthew Bergman, *Montesquieu's Theory of Government and the Framing of the American Constitution*, 18 PEPP. L. REV. 1 (1990) (discussing Montesquieu's theory of separation of powers and its impact on the Framer's of the Constitution); William Gwyn, *The Indeterminacy of the Separation of Powers and the Federal Courts*, 57 GEO. WASH. L. REV. 474 (1989) (discussing the importance of the separation of powers to "protect our liberty and prevent tyranny").

its interpretation of the statute.[136] The Fourth Circuit acknowledged this generally accepted rule of statutory construction, and yet the highest court in the land seemed to ignore or overlook the fact that the plain language of § 704(a) did not contain the word "former" nor did it refer to "former employees."[137] The Supreme Court once stated that courts should refrain from "exercis[ing] a high degree of ingenuity in the effort to find justification for wrenching from the words of a statute a meaning which literally they did not bear."[138] Yet in the *Robinson* decision, the Court "wrenched" from the plain words of § 704(a), "his employees and applicants for employment," one small, albeit significant word, "former."[139] In a world where stare decisis forms the basis of our common law system, the Supreme Court's action not only callously ignores this, but transcends and desecrates another deeply rooted concept in our federal system, the separation of powers doctrine.

### *B. The Absence of Ambiguities Within Title VII*

The statutory interpretation of Title VII must go no further than the plain language because no ambiguities exist.[140] Does the statute specifically state that former employees are protected? No, so how can ambiguities exist? "His employees," "applicant for employment," and "members" are clear classifications of those individuals § 704(a) protects.[141] Because these terms are self-limiting, they do not allow room for broad definitions. In contrast, the word "individual" may have permitted a broader definition, including even former employees.[142] Had Congress really intended for former

136. Robinson v. Shell Oil Co., 70 F.3d 325, 328-29 (4th Cir. 1995). *See* United States v. Ron Pair Enters., Inc., 489 U.S. 235, 240-41 (1989) (reasoning that it is unnecessary for the court to inquire any further into the statutory language where the "scheme is coherent and consistent"); Caminetti v. United States, 242 U.S. 470, 485 (1917) (stating that the court's duty to interpret the statute does not arise where only one meaning exists and the language of the statute is plain).

137. *Robinson*, 70 F.3d at 328. The Fourth Circuit specifically stated, "[c]ourts are not free to read into the language what is not there, but rather should apply the statute as written." *Id.*

138. Crooks v. Harrelson, 282 U.S. 55, 60 (1930).

139. Robinson v. Shell Oil Co., 117 S. Ct. 843, 846-47 (1997).

140. *Ron Pair Enters., Inc.*, 489 U.S. at 240-41. This case focused on the interpretation of the Bankruptcy Code of 1978. *Id.* at 235, 237. The court went into a lengthy discussion regarding statutory interpretation. *Id.* at 241-44. The court began by looking at the statutory language. *Id.* at 241. Applying a rule of statutory interpretation, the court concluded that there was no reason to look beyond the plain language of the statute because "the plain meaning of legislation should be conclusive." *Id.* at 241-42.

141. 42 U.S.C. § 2000e-3(a) (1994). See *supra* notes 28-42 and accompanying text discussing the definition of employee.

142. See *supra* notes 36-38 and accompanying text for a discussion of how the word "individual" is used broadly.

employees to be protected, however, it could have easily done so by simply stating, "an employer may not retaliate against any individual."[143]

Yet, one argument is that the word employee, as defined by § 701(a) of Title VII,[144] is ambiguous.[145] Because this argument relies on the mistaken assumption that the word employee is ambiguous, it is necessary to turn to the legislative history for explanation.[146] As stated before, the legislative history regarding the definition of the word "employee" offers little insight into congressional intent.[147] More importantly, the final language of the act limited the protection to "employees" rather than "persons."[148] Interestingly, looking at the legislative history, it is clear that Congress intended the word "employer" to have its common dictionary meaning.[149] Therefore, it would not be wrong to interpret the word "employee" in much the same manner. This would also be consistent with the rules of statutory interpretation.[150]

Furthermore, in the absence of express congressional intent, courts should rely on the plain language and common, ordinary meaning of that language.[151] Not only does this maintain a level of

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143. Brief for Shell Oil Co. at *15, *Robinson* (No. 95-1376). The Respondent carefully looks at both words, "employee" and "individual," noting that an individual can become an employee. *Id.* at *14. In addition, the respondent particularly focuses on how the two words are used differently in § 703(a) and § 704(a) to reach the conclusion that the word individual takes on a broader interpretation than the words "employee" or "applicant for employment." *Id.*

144. 42 U.S.C. § 2000e(f). An employee is "an individual employed by an employer." *Id.*

145. Brief for Charles T. Robinson, Sr. at *8-18, *Robinson* (No. 95-1376).

146. Robinson v. Shell Oil Co., 70 F.3d 325, 329 (4th Cir. 1995), *rev'd*, 117 S. Ct. 843 (1997).

147. See *supra* note 38 and accompanying text for a discussion of the legislative history of Title VII's retaliation provision.

148. *See generally* Davel v. Sullivan, 902 F.2d 559, 562 (7th Cir. 1990) (asserting that statutory language controls over those stated in the legislative history).

149. 110 CONG. REC. 7216 (1964). This was a response to Senator Dirksen's memorandum questioning how to define the word "employer." *Id.* The response specifically stated that beyond the limitations imposed on the definition of the word "employer" by the statutory language, the "common dictionary meaning" applied. *Id.*

150. *See Robinson*, 70 F.3d at 328 (asserting that terms in a statute be given their "common usage"); United States v. Goldberger & Dubin, P.C., 935 F.2d 501, 506 (2d Cir. 1991) (stating that "the words of a statute should be given their normal meaning and effect in absence of showing that some other meaning was intended").

151. *See* Gonzales v. Garner Food Services, Inc., 89 F.3d 1523, 1528 (11th Cir. 1996). *See also* Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980) (stating that plain language controls unless Congress clearly expressed its intent to the contrary); Perrin v. United States, 444 U.S. 37, 42 (1979) (discussing "a fundamental canon of statutory construction . . . that, unless otherwise defined, words will be interpreted as taking their ordi-

consistency in judicial power when interpreting statutes, but it also maintains the doctrine of the separation of powers.[152] Applying such reasoning to Title VII would justify the exclusion of former employees because there was no expressed intent in the legislative history to extend the protections of the statute.[153]

Another argument, which supports a broad interpretation of § 704(a), is that the word "employed" within the definition of "employee" is also ambiguous.[154] This argument, however, is completely unfounded and borders on the ridiculous. Title VII was not designed to protect people from discrimination outside the workplace.[155] To argue that being employed, within the context of § 704(a), means anything other than having a current employment relationship runs contrary to common sense. For example, a person who no longer works for a company rarely refers to himself or herself as an "employee" of that company.[156] Granted, that person was, at one time, "employed" by the employer, but that relationship has since terminated. Thus, the word "employed" cannot refer to a former employee within the context of Title VII.

However, the Supreme Court would have us believe quite the contrary. The Court asserted that the term "employed" does not necessarily mean "[p]erforming work under an employer-employee relationship," and could be read as "was employed" rather than "is employed."[157] The Court took extraordinary measures to arrive at this conclusion because simple logic dictates that if an individual no longer works for an employer, that individual does not, in fact cannot, consider himself or herself employed by that employer.

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nary, contemporary, common meaning"); Bailey v. USX Corp., 850 F.2d 1506, 1509 (11th Cir. 1988) (describing the "cardinal rule" of statutory interpretation as defining statutory language in its ordinary manner and usage, unless specifically stated otherwise).

152. *See* Marbury v. Madison, 5 U.S. 137, 173-79 (1803) (discussing the separation of powers between the legislative and judicial branches of government. *See also* William B. Gwyn, *The Indeterminacy of the Separation of Powers and the Federal Courts*, 57 GEO. WASH. L. REV. 474, 475-85, 503-04 (1989) (analyzing the courts' role within the separation of powers doctrine).

153. See *supra* notes 25-38 and accompanying text describing the lack of congressional intent regarding the inclusion of former employees.

154. Brief for Charles T. Robinson, Sr. at *18-19, *Robinson* (No. 95-1376). The Petitioner attempts to assert that the word "employed" may apply to both current and former employees because it is the past form of the verb employ. *Id.* The Petitioner relies on this absurd distinction to make the argument that such an ambiguity causes the entire definition of employee to be ambiguous. *Id.*

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

156. Brief for Shell Oil Co. at *24, *Robinson* (No. 95-1376). The Respondent also argues that a person no longer working at the company would instead refer to "himself [or herself] as a former employee, or ex-employee, or retiree." *Id.* at *24-25. *See Veprinsky v. Fluor Daniel, Inc.*, 87 F.3d 881, 897 (7th Cir. 1996)(Manion, J., concurring in part and dissenting in part) (rejecting the nonsensical attempt to define "employed" as one who is "unemployed").

157. Robinson v. Shell Oil Co., 117 S. Ct. 843, 846-47 (1997).

Further, that individual cannot be considered an employee of that employer because there no longer exists a working relationship. Based on this reasoning, the Supreme Court's decision in *Robinson* almost adds ambiguity to the plain-meaning rule because of the blatant disregard of such a simple and logical rule regarding statutory interpretation.

### *C. Exceptions to the Plain Meaning Rule*

Although the inquiry should end where no ambiguities exist,[158] there are, however, two exceptions to the plain-meaning rule. The first exception to the plain meaning rule applies when a literal interpretation of the statute would lead to absurd results, and the court may then go beyond the plain language of the statute.[159] The second exception applies only when the interpretation of the plain language of the statute would result in a direct conflict with the expressed intent of Congress.[160] This Section first addresses a number of absurdities, which would result if § 704(a) protected former employees. Then, this Section shows how the integrity of Title VII will remain without the inclusion of former employees.

The first exception allows courts to look beyond the plain-meaning of the statute if a literal interpretation would produce an absurd result, even if no ambiguities exist.[161] An absurd result is something that is "so gross as to shock the general moral or common sense."[162] Thus, courts are cautious in applying this exception. A literal interpretation of § 704(a) of Title VII does not rise to this "shocking" level. The statute, as enacted by Congress, clearly protects employees and applicants for employment.[163] It is difficult to understand how this interpretation would grossly shock moral or common sense because the statute prevents discrimination in the workplace.[164]

However, if the retaliation provision protected former employees, the opposite result would occur; looking beyond the plain-meaning of the statute to include former employees would produce a result in direct conflict with expressed congressional intent regarding other parts of the statute. For example, the inclusion of

158. United States v. Ron Pair Enters., Inc., 489 U.S. 235, 240-41 (1989).

159. Crooks v. Harrelson, 282 U.S. 55, 60 (1930).

160. *Ron Pair Enters., Inc.*, 489 U.S. at 242; Russello v. United Sates, 464 U.S. 16, 20 (1983).

161. *Crooks*, 282 U.S. at 59-60.

162. *Id.* at 60. Contrary to the policy arguments made by the majority of circuits, a literal interpretation of Title VII's retaliation provision would hardly rise to this level.

163. 42 U.S.C. § 2000e-3(a) (1994).

164. 42 U.S.C. § 2000e. Title VII prohibits discrimination of any kind on the basis of race, color, religion, sex or national origin. *Id.* Furthermore, Title VII prohibits discrimination if an employee or applicant for employment opposes discrimination or participates in EEOC proceedings. 42 U.S.C. § 2000e-3(a).

former employees in Title VII's definition of employee would significantly expand the coverage of Title VII.[165] Such an expansion would destroy the specific requirement of fifteen or more employees in the definition of employer,[166] thus directly conflicting Congress' clear intent to exclude small businesses from the statute.[167]

Furthermore, an expansion of Title VII to include former employees would also produce absurd results in connection with a number of states' laws designed to protect job references.[168] For example, Illinois recently passed the Employment Record Disclosure Act which provides immunity to employers who provide truthful information in employment references.[169] Yet, if § 704(a) allowed former employees a cause of action for retaliation, even truthful information may not free the employer from liability.[170]

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165. Brief for Shell Oil Co. at *23, *Robinson* (No. 95-1376). If Title VII protected former employees, a person bringing a charge under Title VII could use those former employees to calculate the minimum number of employees required for their employer to be covered by the Act. *Id.* Thus, if an employer employs less than fifteen employees, but has a high turnover rate, the inclusion of former employees would force this employer to come under the umbrella of Title VII. *Id.* at *23-24.

166. 42 U.S.C. § 2000e (b). Title VII defines an 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 in the current or preceding calendar year." *Id.*

167. See *supra* notes 30-32 and accompanying text regarding the legislative history of the word employer. By just looking at the limited definition of employer, Congress did not expect employers with less than fifteen current employees to be subject to Title VII. 42 U.S.C. § 2000e (b). *See generally* Walters v. Metropolitan-Educ. Enter., Inc., 60 F.3d 1225 (7th Cir. 1995), *cert. granted*, 116 S. Ct. 1260 (1996) (discussing the appropriate method for counting employees to determine the liability of small employers under Title VII). The Seventh Circuit the held that the proper method of calculating the number of employees in a Title VII case is by looking at the plain language of the statute. *Id.* at 1228. Thus, the court adopted the method of looking "to the number of employees physically at work on each day of the week." *Id.*

168. *See generally* CLARK BOARDMAN CALLAGHAN, EMPLOYMENT COORDINATOR, ¶¶ EP-22,935-EP-22,935.51 (1996) (describing employer immunity statutes for references made in good faith from 21 states). *See, e.g.*, ALASKA STAT. § 09.65.160 (Michie 1994); ARIZ. REV. STAT. ANN. § 23-1361 (West 1995 & Supp. 1996); CAL. GOV'T CODE § 1031.1 (West 1995); FLA. STAT. ANN. § 768.095 (West Supp. 1996); GA. CODE § 34-1-4 (Supp. 1996); 745 ILCS 46/10 (West Supp. 1996); KAN. STAT. ANN. § 44-119a (Supp. 1995); ME. REV. STAT. ANN. TIT. 26 § 598 (West Supp. 1995); N.M. STAT. ANN. § 50-12-1 (Michie Supp. 1996); OKLA. STAT. ANN. TIT. 40 § 61 (West Supp. 1997); TENN. CODE ANN. § 50-1-105 (Supp. 1996). These statutes all contain similar language, which limits an employer's liability when giving a truthful job reference.

169. 745 ILCS 46/10 (West Supp. 1996).

170. *See* Brief for Shell Oil Co. at *37-40, *Robinson* (No. 95-1376) (noting the conflict between state laws protecting employers from liability and retaliation claims made by former employees under § 704(a)). If an employer provided a negative, yet truthful, job reference for a former employee with a pending discrimination charge, the retaliation provision would nullify the employer's immunity granted by the state statute. *Id.* at *38-39. The assumption is that if

This would create a chilling effect on employment references forcing employers to give nothing more than the former employee's job description and length of employment.[171] Furthermore, the problem with providing references persists because employers are becoming more concerned about who they hire due to a rise in cases involving negligent hiring.[172]

The second exception only applies where Congress' clearly expressed its intent within the legislative history.[173] Yet, the established legislative history regarding Title VII's retaliation provision is silent as to Congress' intent.[174] Thus, this exception does not apply, and the language Congress used governs and should be in-

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the former employer is providing a negative job reference, then it must be in retaliation for the former employee's filing of the discrimination charges or participating in Title VII proceedings. *Id.* The problem that arises with such a negative assumption is what if the job reference is true, despite its poor evaluation of the former employee?

171. *See* LEWIN G. JOEL III, EVERY EMPLOYEE'S GUIDE TO THE LAW 34 (1993) (pointing out that defamation lawsuits have forced employers to "adopt a name, rank and serial number approach" to employment references); Jonathan Vegosen, *Figuring Out Whether to Tell All or Zip Your Lip on References*, CHI. LAW., Sept. 1996, at 15 (discussing how employers are "adopting a name, rank and serial number approach" for job references to avoid being sued). In his article, Vegosen points out that employers' fears of being sued greatly undermine the purpose behind employment references. *Id.* He states that adopting such a policy limits the potential of prospective employers to gain valuable information about the applicant's ability and job performance. *Id.*

172. JOEL, *supra* note 171, at 35. *See* DONALD H. WEISS, FAIR, SQUARE AND LEGAL 87-94 (rev. ed. 1995) (discussing the employer's duty to exercise reasonable care when hiring someone); *cf.* Vegosen, *supra* note 171, at 15 (showing how some former employers have been sued by former employee's new employers for providing negligent references). So, a former employer, by limiting the information included in a job reference, may create additional problems for the employer requesting the employment reference. Vegosen, *supra* note 171, at 15. Furthermore, if the former employer refuses to give a recommendation to a prospective employer, that action could also be considered retaliation if giving recommendations is an established company practice. *Id.* In both cases, the prospective employer may decide not to hire the applicant for fear of a negligent hiring lawsuit by a third party. *Id.* For example, an Afro-American doctor files a discrimination charge with the EEOC, and quits his job at that hospital. This doctor has a long history of malpractice claims, and a general reputation as a bad doctor. The doctor applies to another hospital, which requests a reference from the doctor's prior employer. The former employer knows that the doctor has a bad record and reputation, but only discloses the doctor's dates of employment and job description to avoid the possibility of a retaliation lawsuit. The prospective hospital hires the doctor. Two months later, the doctor replaces the left hip of a patient scheduled to receive a new right hip. Who is liable? As Vegosen accurately points out, employers are left saying, "I'm damned if I say something, and I'm damned if I don't." *Id.*

173. Russello v. United States, 464 U.S. 16, 20 (1983).

174. See *supra* notes 33-38 and accompanying text concluding that the legislative history provides no guidance as to Congress' intent regarding § 704(a).

terpreted according to its ordinary meaning.[175]

Alternatively, if one were to rely on Congress' expressed purpose of Title VII, which is to prohibit discrimination in the workplace,[176] the exclusion of former employees would not undermine the integrity of such intent. On the contrary, the statute would still prevent employers from retaliation and discrimination. Firing current employees who bring discrimination charges, as well as not hiring applicants on the basis that they had brought discrimination charges under Title VII, continues to be prohibited, and therefore protects employees and applicants for employment.[177] This limitation applies to the very heart of Title VII by preventing retaliation in a current employment relationship.[178]

### *D. The Fair Labor Standards Act and Other Remedial Statutes*

Instead of looking into the legislative history and Congress' intent, courts have also looked to the Fair Labor Standards Act (FLSA)[179] for guidance when interpreting Title VII.[180] The Supreme Court, however, never once referred to nor otherwise acknowledged, the FLSA to support or bolster its rationale. Yet, when comparing the two statutes, Congress' intent to limit Title VII's re-

175. United States v. Ron Pair Enters., Inc., 489 U.S. 235, 242 (1989); Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980); Gonzales v. Garner Food Services, Inc., 89 F.3d 1523, 1528 (11th Cir. 1996).

176. See *supra* notes 26-27 and accompanying text discussing the purpose of Title VII.

177. 42 U.S.C. § 2000e-3(a) (1994). *See* UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMM'N, EMPLOYER EEO RESPONSIBILITIES B-14 (rev. 1996) (giving examples of unlawful retaliation practices). The types of retaliation for which the statute was specifically designed to guard against include: employers obstructing an employee's or applicant's participation in an EEOC proceeding or investigation; threats and harassment on the job; refusing to promote or reassign to desired position according to established company policy; terminating the employee; and denying benefits related to employment benefits. *Id.* *See also* STEVEN MITCHELL SACK, FROM HIRING TO FIRING 256-57 (1995) [hereinafter HIRING TO FIRING] (listing a number of retaliatory practices). Other types of retaliation may also include: moving the employee to undesirable locations through transfer or reassignment; unjustly increasing employee's workload; and unilaterally changing company policies with specific intent to adversely affect the employee. *Id.*

178. 42 U.S.C. § 2000e-3(a).

179. 29 U.S.C. §§ 201-19 (1994). Congress enacted the Fair Labor Standards Act of 1938 to regulate the wages and hours of employees. Rutherford Food Corp. v. McComb, 331 U.S. 722, 727 (1947); Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 706-07 (1945). *See* MICHAEL C. HARPER & SAMUEL ESTREICHER, LABOR LAW 90 (4th ed. 1996) (stating the federal government guarantees "minimum wages, maximum hours, and overtime pay in the Fair Labor Standards Act.").

180. Rutherford v. American Bank of Commerce, 565 F.2d 1162, 1165-66 (10th Cir. 1977). *See* Dunlop v. Carriage Carpet Co., 548 F.2d 139, 143 (6th Cir. 1977) (discussing how the FLSA can be useful in Title VII cases).

taliation protection becomes much clearer.[181] Despite the provision in the FLSA covering only an "employee" from retaliation,[182] courts have often interpreted this word to include former employees.[183] Unlike the FLSA, however, Title VII's retaliation provision is specifically limited by the inclusion of "applicants for employment."[184] This would suggest that the exclusion of former employees was not inadvertent.[185]

Furthermore, Congress made no changes to the wording of § 704(a) when it amended Title VII in 1991.[186] If Congress intended to include or protect former employees, it could have easily done so during that time.[187] Yet, Title VII, as enacted and amended, does not include the terms "former employees."[188] Even more compelling than an analysis of the FLSA are other statutes which specifically include former employees under their protection.[189] Regardless of the arguments that can be made supporting the inclusion of

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181. The FLSA's retaliation provision provides, in pertinent part:

> 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 chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

29 U.S.C. § 215 (a)(3).

182. *Id.*

183. *Dunlop*, 548 F.2d at 147. *See generally* Hodgson v. Charles Martin Inspectors of Petroleum, Inc., 459 F.2d 303 (5th Cir. 1972) (extending the protections of the informer's privilege in FLSA cases to former employees); Wirtz v. B.A.C. Steel Products, Inc., 312 F.2d 14 (4th Cir. 1962) (stating that former employees should be afforded no less protection than present employees).

184. 42 U.S.C. § 2000e-3(a) (1994).

185. *See* Polsby v. Chase, 970 F.2d 1360, 1365 (4th Cir. 1992) (reasoning that Congress could very well have included former employees had it so intended due to the specific inclusion of "applicant[s] for employment").

186. Pub.L.No. 102-166, 105 Stat. 1071 (1991).

187. While it is true that the 1991 amendments to Title VII added punitive damages to those remedies already available to protected individuals, those new damages are purely penal in nature. 42 U.S.C. § 102 (a)(1) (1994). Contrary to the argument that the expansion of the remedies provides justification for the inclusion of former employees, the rule of narrow construction specifically requires strict interpretation of statutes assessing penalties. Moore, *supra* note 38, at 224, n.85; Commissioner v. Acker, 361 U.S. 87, 91 (1959); Gold Kist, Inc. v. United States Dep't of Agric., 741 F.2d 344, 347 (11th Cir. 1984).

188. 42 U.S.C. § 2000e-3(a). The word former does not appear in this section of Title VII. *Id.*

189. *See generally* The Congressional Accountability Act of 1995, 2 U.S.C. § 1301 (4) (1994 & Supp. 1997); The Whistleblower Protection Act of 1989, 5 U.S.C. §§ 1212 (a)(1), 1213 (a)(1), 1214 (a)(3), & 1221 (1994); The Federal Credit Union Act, 12 U.S.C. § 1790b(b) (1994); The Federal Deposit Insurance Corporation Act, 12 U.S.C. § 1831j (1994); The Internal Revenue Code, 26 U.S.C. § 5000(b) (1994). All these statutes specifically include the terms "former employees."

former employees, Congress specifically did not include those individuals in the statutory language.[190] Congress' inclusion of "applicants for employment" not only limited the interpretation of Title VII's retaliation provision, but also provided protection for those individuals looking for jobs who are no longer employed. Moreover, individuals could have received protection from Title VII without the Supreme Court expanding the plain language of § 704, as well as protection from other sources wholly separate and apart from Title VII.

### *E. Remedies Available to Former Employees: Title VII and Beyond*

This section will first focus on how those who are no longer employed are protected from retaliation by § 704(a) as "applicants for employment." Then this Section analyzes how other federal laws protect former employees. Finally, this section analyzes how state common law would protect the former employee.

Since Congress explicitly included "applicants for employment" under § 704(a),[191] former employees have mistakenly assumed that Congress left them unprotected by the statute. This is not true. Those individuals have simply been suing the wrong people.[192] Instead of bringing a retaliation suit against a former employer, the individual must bring the suit against the prospective employer as an applicant.[193] The prospective employer is prohibited from refusing to hire that applicant based solely on his or her past discrimination charges or participation in EEOC investigations or hearings.[194] Similarly, a former employee is protected from discrimination as an applicant for employment if he or she reapplies to the former employer.[195]

Beyond the protection of Title VII, former employees will find protection from retaliation by other federal statutes. For example, the National Labor Relations Act protects former employees against blacklisting.[196] If a former employer attempted to withhold other employee benefits such as severance payments, retirement benefits, or medical benefits, the Employee Retirement Income Se-

190. 42 U.S.C. § 2000e-3(a).

191. *Id.*

192. Telephone Interview with L. Christopher Butler, Counsel of Record for Shell Oil Company (Sept. 5, 1996). *See* Brief for Shell Oil Co. at *26, *Robinson* (No. 95-1376) (arguing that a retaliation cause of action exists against prospective employers).

193. Brief for Shell Oil Co. at *26, *Robinson* (No. 95-1376).

194. 42 U.S.C. § 2000e-3(a) (1994).

195. *Id.* This provision specifically protects "applicants for employment." *Id.* If the individual is attempting to get rehired by his old company by reapplying, the former employer could not refuse employment solely out of retaliation for the applicant's involvement with discriminatory charges or EEOC proceedings. *Id.*

196. 29 U.S.C. § 158(a)(3) (1994).

curity Act would prevent such action.[197]

Beyond the aforementioned examples, there are a limited number of ways a former employer can retaliate against a former employee. However, former employees are protected from these methods of retaliation without including "former employees" within the context of Title VII's anti-retaliation provision. The most common type of "retaliation" by a former employer is giving false, negative job references.[198] Yet, the common law provides a remedy for this type of behavior in defamation.[199] If a former employer gives a negative job reference which he knows to be false or acts with malicious intent, there would be grounds for a defamation cause of action.[200]

Another example of "retaliation" by the former employer is the use or threat of physical force.[201] This type of conduct falls under the protection of the common law cause of action assault and battery.[202] In fact, the Third Circuit, which has held that former employees are protected by § 704(a), was unwilling to extend protection to a physical assault by a former employer.[203] Since these common law protections exist, there is no reason to take Title VII's focus away from preventing discrimination in the workplace by focusing on post-employment actions and trying to expand the language of § 704(a) to include former employees.

## III. THE NEED FOR LEGISLATIVE ACTION AND A GUIDE FOR EMPLOYERS

Despite the Supreme Court's activism in rewriting and expanding the language of § 704(a) to include former employees, Congress is not prevented from acting to rectify this imposition on the separation of powers established by our federal system. Section A proposes a new federal statute which Congress could enact in

197. 29 U.S.C. §§ 1001-461 (1994). *See* HIRING TO FIRING, *supra* note 177, at 84-91 (discussing ERISA benefits and protections).

198. *See* STEVEN MITCHELL SACK, THE EMPLOYEE RIGHT'S HANDBOOK 156 (1990) [hereinafter HANDBOOK] (showing that 30% of all defamation claims stem from former employees suing former employers).

199. WEISS, *supra* note 172, at 132. Weiss defines defamation as, "the communication, disclosure, or publication of private information with malice or to someone who does not have the right to know." *Id.*

200. *See* WEISS, *supra* note 172, at 122 (defining defamation, slander, libel and malice).

201. *See* Nelson v. Upsala College, 51 F.3d 383, 388 (3rd Cir. 1995) (describing a hypothetical situation in which a former employee is physically assaulted); Reed v. Shepard, 939 F.2d 484, 492-93 (7th Cir. 1991) (describing a former employer's alleged attack on a former employee).

202. Brief for Shell Oil Co. at *29, *Robinson* (No. 95-1376).

203. *Nelson*, 51 F.3d at 388. In this case, the plaintiff was also denied protection from her former employer's alleged retaliation in the form of defamatory remarks. *Id.* at 388-89. The court simply stated that, "she does not need a section 704(a) retaliation action to obtain relief." *Id.* at 388.

order to reestablish its role as law-maker. However, until Congress acts, employers must now beware of their actions towards former employees. Section B offers advice to employers faced with job references for former employees who filed discrimination charges or participated in EEOC proceedings or investigations.

### A. *A New Federal Reference Act: Reestablishing the Lawmakers*

Congress should enact a new law entitled the Federal Employment Reference Act (FERA) to create a uniform federal statute on which employers across the country could rely when making job references in good faith, as well as to restore the separation of powers. The Act's purpose would be to prevent former employers from providing employment references which are discriminatory in nature. Using language from Title VII,[204] FERA would prohibit a former employer from including information based on race, color, religion, sex, or national origin. In addition, FERA would prohibit a former employer from making any reference to any charge of discrimination made by the former employee. This law would apply strictly to former employees seeking references from former employers.

The FERA also would include two major aspects. First, the former employee must show that the former employer had an improper motive for giving a negative recommendation. Second, the burden would shift onto the former employer to show that the references were truthful and made in good faith. By enacting this new law, Congress would protect former employees without including them in the statutory language of § 704(a) of Title VII.

### B. *Employers: Err on the Side of Caution*

Despite the growing number of states enacting legislation immunizing employers from liability when providing truthful references made in good faith,[205] employers should err on the side of caution to avoid litigation. Employers should refrain from giving unfavorable job references, especially when motivated by malice and other Title VII discrimination charges are pending.[206] In addition, employers must be aware of the types of statements they are making on job references, and to whom they are making those statements.[207]

The employer should implement a policy in which employees are given performance evaluations on a regular basis. These performance evaluations provide documented proof of an employee's

204. 42 U.S.C. § 2000e (1994).

205. See *supra* note 168 and accompanying text discussing state employer immunity statutes.

206. HIRING TO FIRING, *supra* note 177, at 305.

207. WEISS, *supra* note 172, at 132.

ability. These evaluations could also provide an employer guidance when giving a job reference to a former employee's prospective employer. In addition, the written documentation could also strengthen the employer's argument that the reference was truthful and made in good faith.[208]

In most instances, employers should refrain from giving negative job references. A negative reference, in light of pending discrimination charges, only invites a retaliation suit no matter how truthful the reference. However, certain extenuating circumstances may warrant the use of a unfavorable references, such as if the former employee may inflict great bodily harm on himself or herself or others or otherwise place others in danger. Here again, a former employer must have a good faith basis for making such assertions in a reference, they must be truthful, and in the end, the former employer may still be subject to a lawsuit based on retaliation. This is because the *Robinson* decision totally ignores whether the references were made in good faith or were truthful. Basically, most employers should continue to use the "name-rank-serial number" approach to giving references where no other policies or period evaluation process has been established.

## CONCLUSION

"'When I use a word,' Humpty Dumpty said, in a rather scornful tone, 'it means just what I choose it to mean—neither more nor less.'

'The question is,' said Alice, 'whether you can make words mean so many different things.'"[209]

Congress chose to protect "his employees" and "applicants from employment;" nothing more, nothing less. While it is true that words can have numerous meanings, such is not the case in the context of § 704(a). The enacted statutory language is controlling. Title VII is a remedial act designed to eliminate discrimination in the workplace. Despite the well articulated policy arguments favoring a broad interpretation of § 704(a), the retaliation provision is self-limiting and must be interpreted according to established rules of statutory construction. If no other remedies from retaliation were available to former employees, those policy arguments would carry much greater weight. But, because other federal statutes provide remedies, as well as the common law, Title VII's retaliation provision should not protect former employees. A broad interpretation of § 704(a) which includes former employees,

208. Employer may be protected by a "qualified privilege" in defamation cases. FRED S. STEINGOLD, THE EMPLOYER'S LEGAL HANDBOOK 10/41 (1994). This privilege can only be asserted when there is a "common interest" between the two parties (the requester and the requestee), and the former employer limits the information given in a job reference to such interest. *Id.*

209. LEWIS CARROLL, THROUGH THE LOOKING-GLASS, 94 (1946).

in essence, rewrites the statute and strikes a blow to the very foundation of our federal system—the separation of powers. The Supreme Court went too far when it decided, in Robinson, to create a safe harbor for bad employees by rewriting the plain language of § 704 to include former employees.

As a result, employers must now be more careful when giving references to former employees or their prospective employer. Employers should consider setting up an evaluation procedure to better document the performance of their employees. Recommendation could therefore be substantiated and supported by those evaluations. Although truth is ultimately a defense, employers have to be cognizant that a former employee could still bring a retaliation charge, whether or not the reference is truthful.