

TITLE VII'S ANTIRETALIATION PROVISION: ARE EMPLOYEES PROTECTED AFTER THE EMPLOYMENT RELATIONSHIP HAS ENDED?

SANDRA TAFURI

INTRODUCTION

Title VII of the Civil Rights Act of 1964 prohibits an employer from discriminating against an employee because of the employee's race, color, religion, sex, or national origin.¹ In addition, Title VII prohibits employers from retaliating against employees who have protested an unlawful employment practice under Title VII.² Title VII's antiretaliation provision, section 704(a) of the Civil Rights Act of 1964, explicitly protects "employees" and "applicants for employment" from retaliation by their employers.³ Section 704(a) does not explicitly refer to *former* employees, and courts differ as to whether the provision continues to protect an individual once the formal employment relationship has ended.

¹ Civil Rights Act of 1964 § 703, 42 U.S.C. § 2000e-2 (1994). Section 703(a), 42 U.S.C. § 2000e-2(a), states in relevant part:

It shall be an unlawful employment practice for an employer—

1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or 2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Section 703 is the core antidiscrimination section of Title VII.

² Civil Rights Act of 1964 § 704(a), 42 U.S.C. § 2000e-3(a) (1994) states in relevant part:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he [the employee] 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.

See *infra* text accompanying notes 81-86 for a fuller discussion of § 704(a) and its purpose.

³ Civil Rights Act of 1964 § 704(a), 42 U.S.C. § 2000e-3(a).

Six circuit courts have interpreted Title VII's antiretaliation provision to prohibit postemployment retaliation.⁴ Two other circuit courts, the Fourth and the Seventh Circuits, have declined to extend Title VII's antiretaliation protection to former employees.⁵ Four other circuits have yet to address the issue.

The Fourth Circuit's complex history on this issue illustrates the difficulty of this question. In past panel decisions, Fourth Circuit appellate panels have, at times, interpreted section 704(a) narrowly⁶ and, at other times, interpreted it broadly.⁷ Most recently, after an en banc hearing, the circuit adopted a narrow interpretation, denying section 704(a) protection to former employees.⁸

⁴ The Second, Third, Fifth, Ninth, Tenth, and Eleventh Circuits have interpreted § 704(a) broadly and have held that § 704(a) prohibits retaliation against former employees. See *Charlton v. Paramus Bd. of Educ.*, 25 F.3d 194, 200 (3d Cir.) (involving former employer who retaliated by initiating procedures to revoke employee's teaching license), cert. denied, 115 S. Ct. 590 (1994); *EEOC v. J.M. Huber Corp.*, 927 F.2d 1322, 1331 (5th Cir. 1991) (involving former employer withholding retirement and profit-sharing benefits from former employee); *Sherman v. Burke Contracting, Inc.*, 891 F.2d 1527, 1532 (11th Cir.) (involving former employer who persuaded new employer to fire former employee), cert. denied, 498 U.S. 943 (1990); *Bailey v. USX Corp.*, 850 F.2d 1506, 1509-10 (11th Cir. 1988) (involving negative reference by former employer); *O'Brien v. Sky Chefs, Inc.*, 670 F.2d 864, 869 (9th Cir. 1982) (holding former employer's refusal to rehire and negative recommendations sufficient for employee to assert retaliation claim); *Pantchenko v. C.B. Dolge Co.*, 581 F.2d 1052, 1055 (2d Cir. 1978) (involving employer who refused to provide references and made disparaging statements about former employee to prospective employers); *Rutherford v. American Bank of Commerce*, 565 F.2d 1162, 1165-66 (10th Cir. 1977) (involving former employer who advised former employee's prospective employers that employee had filed Title VII sex discrimination suit).

⁵ Presently, the Fourth and Seventh Circuits are the only circuit courts to interpret § 704(a) narrowly. See *Robinson v. Shell Oil Co.*, 70 F.3d 325, 327 (4th Cir. 1995) (en banc) (involving allegations that former employer gave false information and negative job references to prospective employers), cert. granted, No. 95-1376, 1996 WL 97912 (U.S. Apr. 22, 1996); *Reed v. Shepard*, 939 F.2d 484, 492-93 (7th Cir. 1991) (involving allegations that employer made late-night phone calls and threatened former employee).

⁶ *Polsby v. Chase*, 970 F.2d 1360, 1365 (4th Cir. 1992), vacated on other grounds, 113 S. Ct. 1940 (1993).

⁷ *Robinson v. Shell Oil Co.*, No. 93-1562, 1995 WL 25831 (4th Cir. Jan. 18, 1995), vacated and reh'g granted en banc, on reh'g, 70 F.3d 325 (4th Cir. 1995), cert. granted, No. 95-1376, 1996 WL 97912 (U.S. Apr. 22, 1996).

⁸ *Robinson*, 70 F.3d at 332 (en banc). The Fourth Circuit's interesting history on the reach of § 704(a) demonstrates the division among judges on this issue. In *Polsby*, the Fourth Circuit held as an alternative ground that § 704(a) did not apply to postemployment retaliation. *Polsby*, 970 F.2d at 1367. The initial ground for denying the plaintiff retaliation relief was a finding that the plaintiff had failed to bring her claim within the 30-day limit. *Id.* at 1364. The Supreme Court granted certiorari and vacated the *Polsby* decision. *Polsby v. Shalala*, 113 S. Ct. 1940 (1993). The Supreme Court did not address the question of whether § 704(a) applied to postemployment retaliation because the Court agreed with respondent that the case did not "provide a suitable occasion" for the Supreme Court to resolve this issue since neither party had briefed or argued the issue in the court of appeals. See Brief for Respondents at 7, *Polsby v. Shalala*, 113 S. Ct. 1940 (1993) (No. 92-966) (on file with the *New York University Law Review*). The Court vacated and remanded on the

Retaliatory acts that give rise to a section 704(a) claim occur after an individual has filed an action under Title VII charging discrimination against the employer or has opposed discrimination by the employer in some other manner.⁹ There is no typical individual who is retaliated against nor is there any one way for an employer to retaliate. For example, in *Robinson v. Shell Oil Co.*, Robinson filed a Title VII claim alleging that his former employer had terminated him because he was black.¹⁰ Robinson's former employer retaliated against him for filing the complaint by providing false negative references to prospective employers.¹¹ In *Rutherford v. American Bank of Commerce*,¹² Rutherford filed a Title VII claim alleging that she was demoted because of her sex.¹³ Rutherford voluntarily left the position and applied for new employment. Her old employer retaliated by informing all of Rutherford's prospective employers that she had filed a Title VII claim.¹⁴ In *Sherman v. Burke Contracting, Inc.*,¹⁵ Sherman, a black man, brought Title VII claims alleging he was terminated because he was married to a white woman.¹⁶ His former employer retaliated by convincing Sherman's new employer to fire him.¹⁷

As these examples illustrate, the scope of Title VII's antiretaliation protection has significant implications. If section 704(a) is interpreted narrowly, former employers are given enormous power to derail former employees' subsequent careers. Former employers have

issue of whether the plaintiff was on notice, by posters or otherwise, of the time limits for pursuing her Title VII claims. *Polsby v. Shalala*, 113 S. Ct. 1940 (1993).

In *Robinson*, the Fourth Circuit took the fact that the Supreme Court had vacated *Polsby* as an opportunity to "ask anew whether the protection against retaliation afforded by Title VII to 'employees' extends to former employees." *Robinson*, 1995 WL 25831, at *1. In a panel decision, it initially reversed its position in *Polsby* and joined the majority of the courts in interpreting § 704(a) broadly. *Id.* at *2 (Hall, J., and Michael, J., with Hamilton, J., dissenting). That panel decision was subsequently vacated and an en banc hearing was granted. In its en banc decision, the Fourth Circuit created a decisive split among the circuits and held that § 704(a) did not extend to former employees. *Robinson*, 70 F.3d at 332 (en banc). On April 22, 1996, the United States Supreme Court granted a petition of certiorari to review this issue. *Robinson v. Shell Oil Co.*, No. 95-1376, 1996 WL 97912 (U.S. Apr. 22, 1996).

⁹ Under § 704(a), it is also unlawful for an employer to retaliate because the employee has opposed an unlawful employment practice or has testified, assisted, or participated in any investigation, proceeding, or hearing under Title VII. Civil Rights Act of 1964 § 704(a), 42 U.S.C. § 2000e-3(a).

¹⁰ *Robinson*, 70 F.3d at 327 (en banc).

¹¹ *Id.*

¹² 565 F.2d 1162 (10th Cir. 1977).

¹³ *Id.* at 1163.

¹⁴ *Id.* at 1163-64.

¹⁵ 891 F.2d 1527 (11th Cir.), cert. denied, 498 U.S. 943 (1990).

¹⁶ *Id.* at 1529.

¹⁷ *Id.*

the unique power to control the favorableness of recommendations, and in some industries, even have the power to blacklist employees.¹⁸ Nor is this retaliation limited to the employee's career: Employers have retaliated in manners unconnected to a former employee's future employment opportunities, including retaliation with threatening phone calls, physical attacks, harassment, and defamation suits.¹⁹ In order to accomplish the goals of Title VII, former employers must be prohibited from engaging in retaliation that is "personal" in nature as well as retaliation that affects employment opportunities.

A narrow interpretation of section 704(a) not only fails to protect former employees from retaliatory acts but, because the statute relies for enforcement on individuals coming forward to file claims, also directly impacts Title VII's effectiveness in fighting discrimination.²⁰ Employees will be reluctant to file Title VII violations with the Equal Employment Opportunity Commission (EEOC) if employers may legally retaliate once an employee resigns or is terminated. Allowing these employees to be intimidated into not filing claims severely inhibits Title VII's ability to combat discrimination in the workplace.²¹

This Note will demonstrate that Title VII's antiretaliation provision must be interpreted broadly to achieve Title VII's basic purpose—the elimination of employment discrimination. Part I discusses the rationale supporting those decisions that have argued for a narrow interpretation. Part II argues for a broad interpretation of the provision by responding to the arguments discussed in Part I and offering a normative argument that reflects the general purpose of Title VII and section 704(a)'s role in Title VII's framework. Part III concludes with an argument for expanding retaliatory protection to include not only postemployment retaliation that is employment-related, but also post-employment retaliation that is personal in nature.

I

ARGUMENTS FOR INTERPRETING TITLE VII'S ANTIRETALIATION PROVISION NARROWLY

Section 704(a) does not explicitly state whether it applies to former employees; the current split in the circuit courts turns on whether

¹⁸ For examples of retaliatory acts affecting former employees' employment opportunities, see *infra* notes 93-97 and accompanying text.

¹⁹ For examples of such "personal" retaliation, see *infra* notes 158-62 and accompanying text.

²⁰ See *infra* notes 81-86 and accompanying text for discussion of the critical role of individual initiative in Title VII's framework.

²¹ See *infra* notes 83-85 and accompanying text for discussion of how fear of employer retaliation inhibits employee filing of Title VII claims.

Title VII's statutory language should be interpreted narrowly or broadly. In order to provide an understanding of the rationale behind a narrow interpretation, this Part examines the majority, dissenting, and concurring opinions of circuit judges who have argued for a narrow interpretation of section 704(a). These opinions rely on strict statutory interpretation and public policy concerns to support their denial of section 704(a) protections to former employees.

A. Plain Meaning of Title VII

The opinions construing section 704(a) narrowly have relied most heavily on a "plain meaning" approach. In so doing, they have strictly construed the language of section 704(a), Title VII's definition of the term "employee," the scope of prohibited employment practices listed in section 703, and the prima facie case framework of section 704(a).

Those advocating a narrow reading stress that a judge's inquiry into the meaning of a statute must end when "the statutory language is unambiguous."²² When a statute is unambiguous, they argue, it must be interpreted by its plain language²³ and must be applied as written.²⁴

Opinions reaching a narrow interpretation find that section 704(a) is unambiguous by reading Title VII's language literally. Noting first that section 704(a)'s language prohibits "an employer [from] discriminat[ing] against any of his *employees* or applicants for employment,"²⁵ these opinions look next to Title VII's definition of an employee. Subsection 42 U.S.C. § 2000e(f) defines the term "employee" for all provisions of Title VII as an "individual employed by an employer."²⁶ Reading these two provisions in concert, strict interpreters conclude that the term "employee" is not ambiguous.²⁷

²² *Robinson v. Shell Oil Co.*, 70 F.3d 325, 328-29 (4th Cir. 1995) (en banc), cert. granted, No. 95-1376, 1996 WL 97912 (U.S. Apr. 22, 1996); *Robinson v. Shell Oil Co.*, No. 93-1562, 1995 WL 25831, at *4 (4th Cir. Jan. 18, 1995) (Hamilton, J., dissenting), vacated and reh'g granted en banc, on reh'g, 70 F.3d 325 (4th Cir. 1995), cert. granted, No. 95-1376, 1996 WL 97912 (U.S. Apr. 22, 1996).

²³ *Robinson*, 70 F.3d at 329-31 (en banc); *Robinson*, 1995 WL 25831, at *4-5 (Hamilton, J., dissenting); *Polsby v. Chase*, 970 F.2d 1360, 1365 (4th Cir. 1992), vacated on other grounds, 113 S. Ct. 1940 (1993); *Sherman v. Burke Contracting, Inc.*, 891 F.2d 1527, 1540 (11th Cir.) (Tjoflat, C.J., concurring), cert. denied, 498 U.S. 943 (1990).

²⁴ *Robinson*, 70 F.3d at 329-31 (en banc); *Robinson*, 1995 WL 25831, at *4-5 (Hamilton, J., dissenting); *Polsby*, 970 F.2d at 1365; *Sherman*, 891 F.2d at 1540 (Tjoflat, C.J., concurring).

²⁵ Civil Rights Act of 1964 § 703(a), 42 U.S.C. § 2000e-3 (1994) (emphasis added); see, e.g., *Polsby*, 970 F.2d at 1365; *Sherman*, 891 F.2d at 1540 (Tjoflat, C.J., concurring).

²⁶ 42 U.S.C. § 2000e(f) (1994); see also *Robinson*, 1995 WL 25831, at *5 (relying on statutory definition of employee).

²⁷ *Robinson*, 70 F.3d at 330 (en banc); *Robinson*, 1995 WL 25831, at *5 (Hamilton, J., dissenting).

The strict interpreters further reason that since Congress distinguished “applicants for employment” from regular “employees” in section 704(a), Congress would have expressly mentioned former employees if it had desired to provide this group with section 704(a) protection.²⁸ Because they believe that both the term “employee” and the language of section 704(a) are unambiguous, and that none of the exceptions allowing a nonliteral interpretation apply,²⁹ strict interpreters conclude that statutory interpretation guidelines require them to interpret section 704(a) narrowly.³⁰

Opinions strictly construing section 704(a) also look to the types of activities prohibited by section 703(a)(1) and incorporate these prohibitions into section 704(a). Section 703(a) is the substantive antidiscrimination provision of Title VII.³¹ Section 703(a)(1) states that “[i]t shall be an unlawful employment practice for an employer . . . to . . . refuse to hire or to discharge . . . or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”³² Some strict interpreters conclude that since the type of practices explicitly forbidden under section 703(a)(1) are particularly related to employment and do not extend to discrimination that occurs after the employment relationship has ended, section 704(a) must also similarly apply only to retaliation that occurs during the formal employment relationship.³³

Another “plain meaning” justification used to limit section 704(a)’s coverage is a literal interpretation of the elements a plaintiff

²⁸ *Robinson*, 70 F.3d at 330 (en banc); *Polsby*, 970 F.2d at 1365; *Sherman*, 891 F.2d at 1540-41 (Tjoflat, C.J., concurring).

²⁹ There are two exceptions that allow courts to go beyond the plain language of unambiguous statutes. One is when a literal application would lead to an absurd result. *Robinson*, 70 F.3d at 329 (en banc); *Polsby*, 970 F.2d at 1367. The other is when a literal application would produce a result at odds with the intent of Congress. *Robinson*, 70 F.3d at 329 (en banc); *Polsby*, 970 F.2d at 1367. See *infra* text accompanying notes 52-60 for a discussion of these exceptions.

³⁰ As will be discussed in Part II, *infra*, this application of statutory interpretation guidelines has not been universally accepted, and courts have looked beyond the statute’s literal meaning to expand Title VII’s retaliation protection.

³¹ See *supra* note 1 and accompanying text.

³² Civil Rights Act of 1964 § 703(a)(1), 42 U.S.C. § 2000e-2(a).

³³ See *Robinson*, 70 F.3d at 330 (en banc) (interpreting statute as excluding former employers from definition of employee). But see *Shehadeh v. Chesapeake & Potomac Tel. Co.*, 595 F.2d 711, 721 (D.C. Cir. 1978) (interpreting § 703(a) broadly to encompass post-employment discrimination). The court found that even though there was no formal employment relationship, the employer’s providing an adverse reference constituted an unlawful employment practice when the basis for doing so was discriminatory. *Id.* at 720-23. In deciding to give § 703(a) a broad interpretation, the court placed a high premium on Title VII’s purpose of “equality of employment opportunities.” *Id.* at 721.

is required to prove to state a prima facie case for retaliation. The three elements that a plaintiff must prove to make her prima facie case are: "1) the employee was engaged in a protected activity; 2) the employee suffered an adverse employment action; and 3) there was a causal connection between the protected activity and the adverse action."³⁴ Relying on the plain meaning approach, the Fourth and Seventh Circuits have strictly construed the second element—"an adverse employment action"—to require that the act occur while the individual was actually employed by the employer.³⁵ Because the retaliatory acts occurred after the employment relationship had ended, the courts in these cases concluded that postemployment retaliation did not meet the element of an "adverse employment action."³⁶

Finally, those courts interpreting section 704(a) narrowly also find support in the fact that Congress initially authorized only equitable remedies, and not compensatory or punitive damages, under the Civil Rights Act of 1964.³⁷ Although it is doubtful that this argument will continue to be made since the passage of the Civil Rights Act of 1991, which now provides compensatory relief for retaliatory claims,³⁸ it is still useful to discuss this argument to get a complete understanding of how the narrow interpreters framed their arguments.

The strict interpreters first determine that former employees who are retaliated against cannot be made whole solely by equitable remedies.³⁹ This is because reinstatement and backpay are not appropriate options where the employee has left his employer voluntarily and has

³⁴ *Reed v. Shepard*, 939 F.2d 484, 492 (7th Cir. 1991).

³⁵ See, e.g., *id.* at 493 ("Under [§ 704(a)], it is an employee's discharge or other employment impairment that evidences actionable retaliation, and *not* events subsequent to and unrelated to his employment."); see also *Robinson*, 70 F.3d at 331 (en banc) (relying on and citing *Reed* for this argument).

³⁶ *Robinson*, 70 F.3d at 331 (en banc); *Reed*, 939 F.2d at 492.

³⁷ *Polsby v. Chase*, 970 F.2d 1360, 1366 (4th Cir. 1992), vacated on other grounds, 113 S. Ct. 1940 (1993); *Sherman v. Burke Contracting, Inc.* 891 F.2d 1527, 1536-37 (11th Cir.) (Tjoflat, C.J., concurring), cert. denied, 498 U.S. 943 (1990).

The relevant section of Title VII, § 706(g), 42 U.S.C. § 2000e-5(g) (1994), provides:

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

³⁸ Compare 42 U.S.C. § 2000e-5(g) with Civil Rights Act of 1991 § 102, 42 U.S.C. § 1981(a)(1) (1994), which now provides Title VII claimants the right to compensatory and punitive damages. See also *infra* text accompanying notes 122-28.

³⁹ *Polsby*, 970 F.2d at 1366 n.5 (pointing out that reinstatement would not be an option, except for employee who was unlawfully terminated "in retaliation for the employee seeking redress under Title VII").

been retaliated against after his resignation. Future pay also cannot be given because, the strict interpreters argue, this calculation would be far too speculative.⁴⁰ Because the "equitable means to accomplish" the goal of making the "former employee whole . . . are lacking," the strict interpreters conclude that Congress never intended to include former employees under section 704(a).⁴¹

B. *Alternative Remedies, Speculative Damages, and Stale Claims*

Relying on the equitable damages argument and a literal interpretation of section 704(a), the strict interpreters advocate the use of alternative remedies they believe to be more appropriate than the use of section 704(a).⁴² They argue that Congress intended for section 704(a) to be used against *prospective* employers who fail to hire an applicant because the applicant had sought Title VII relief against a former employer since Congress explicitly made it unlawful for employers to retaliate against "applicants for employment."⁴³ Thus, the prospective employer who failed to hire an employee because she engaged in protected activity would bear the liability, despite the former employer's retaliatory acts.

Strict interpreters also assert that, in addition to suing a prospective employer under section 704(a), the former employee could either pursue state claims or seek criminal charges against the former employer.⁴⁴ These other remedies, they argue, fulfill Congress's intention to provide adequate relief to the former employee who is retaliated against while remaining within the literal language of Title VII.

Other justifications for interpreting section 704(a) narrowly include the potential for highly speculative damages⁴⁵ and the unfair burden that would be placed on employers to defend stale claims if

⁴⁰ See *infra* text accompanying notes 45-48. But see *Sherman*, 891 F.2d at 1535 (awarding \$10,000 in future pay representing salary from time former employee would have been hired by prospective employer until time of trial).

⁴¹ *Polsby*, 970 F.2d at 1366; see also *Sherman*, 891 F.2d at 1536-37 (Tjoflat, C.J., concurring).

⁴² See *Polsby*, 970 F.2d at 1366 (arguing that § 704(a) should be used against prospective employers); *Reed v. Shepard*, 939 F.2d 484, 493 (7th Cir. 1991) (suggesting that former employee who was physically attacked seek state law damage claims and criminal charges); *Sherman*, 891 F.2d at 1538, 1541-42 (Tjoflat, C.J., concurring) (arguing that § 704(a) should be used against prospective employers and asserting availability of state tort remedies when employer maliciously and intentionally interferes with former employee's contract with new employer and common law remedies under tort of interference with prospective economic advantage when former employer interferes with prospective job opportunity).

⁴³ 42 U.S.C. § 2000e-3(a); *Polsby*, 970 F.2d at 1366; *Sherman*, 891 F.2d at 1538.

⁴⁴ See cases cited *supra* note 43.

⁴⁵ See, e.g., *Polsby*, 970 F.2d at 1366.

section 704(a) were interpreted broadly.⁴⁶ Where the employer retaliates by interfering with the former employee's job prospects, a damage award would be based on the employee's potential future pay.⁴⁷ Calculating this award, it is argued, would be a highly speculative endeavor since it would be difficult for an employee to show that, but for the former employer's retaliation, he would have been employed with the new employer for a particular length of time, at a certain pay, and with certain raises, bonuses, commissions, and promotions.⁴⁸

A broad interpretation would also place an undue burden on future generations of management who themselves have not committed a Title VII violation.⁴⁹ Former employers, the strict interpreters argue, would be forced to defend and potentially be held liable for retaliation claims brought by former employees many years after the act occurred.⁵⁰ One judge arguing for a narrow interpretation observed that extending protection to former employees would force employers, without knowledge of the discriminatory acts of a predecessor, to defend against claims by "former employees several decades in the future when material evidence in [the employer's] defense has likely vanished."⁵¹

⁴⁶ See, e.g., *Robinson v. Shell Oil Co.*, No. 93-1562, 1995 WL 25831, at *8 (4th Cir. Jan. 18, 1995) (Hamilton, J., dissenting) (expressing concern that broad interpretation will produce "absurd results" of stale claims), vacated and reh'g granted en banc, on reh'g, 70 F.3d 325 (4th Cir. 1995), cert. granted, No. 95-1376, 1996 WL 97912 (U.S. Apr. 22, 1996).

⁴⁷ See *Polsby*, 970 F.2d at 1366 (en banc); *Sherman*, 891 F.2d at 1538.

⁴⁸ *Polsby*, 970 F.2d at 1366 (concluding that formulating relief for former employee "entails calculating future damages and is far too speculative"). The *Polsby* court provided examples of the problems that would be encountered in formulating relief for a former employee and concluded that such calculations would be speculative. First, it pointed out that reinstatement would not be an option (except for an employee who was unlawfully terminated "in retaliation for the employee seeking redress under Title VII"). *Id.* at 1366 n.5. The court then gave an illustration of an employer giving poor references in retaliation to a former employee. The court stressed that:

[T]he employee would have to show that but for the poor references, she would have received one of the jobs she was seeking. If successful, she then must give the court evidence as to which job, pay scale, promotions, bonuses, etc. . . ., she would have received. Because employment opportunities greatly differ from each other, speculation would necessarily rule any calculations.

Id. at 1366 (citing *Sherman*, 891 F.2d at 1538 (Tjoflat, C.J., concurring) (citations omitted)).

⁴⁹ *Robinson*, No. 93-1562, 1995 WL 25831, at *3 (Hamilton, J., dissenting).

⁵⁰ *Id.* at *8.

⁵¹ *Id.* at *3. Judge Hamilton gives the following example:

[S]uppose Employee X, a minority, files a race discrimination charge against his employer, Company A. In retaliation, Employee X's supervisor falsely adds negative performance comments to Employee X's personnel file. Employee X leaves Company A and accepts a job with Company B; thirty years pass. Employee X leaves Company B and seeks a new job with Company C who requests recommendations of X from A and B. Employee X's supervisor at Company A died five years earlier; his replacement researches Employee X's personnel file and writes a negative recommendation according to the in-

The arguments of the strict interpreters, whatever their merits, fail to interpret section 704(a) in a manner consistent with Title VII's framework. Moreover, closer examination of Title VII's purposes reveals that the strict interpreters rely on several faulty assumptions to support the denial of antiretaliation protection to former employees. Part II explores these weaknesses and argues for the broad interpretation of section 704(a).

II

ARGUING FOR A BROAD INTERPRETATION OF TITLE VII'S ANTIRETALIATION PROVISION

To form a more complete understanding of section 704(a), one must look beyond its literal language. First, ambiguity exists in the definition of employee, which requires a departure from the language of the section. Second, an understanding of Congress's intent in passing Title VII and the Civil Rights Act of 1991, and the role Congress assigned to section 704(a), suggest that a broad interpretation is appropriate. Third, absurd results follow from a literal reading of section 704(a). Finally, contrary to the assumption of the narrow interpreters, alternative remedies are inadequate to remedy postemployment retaliation.

A. Statutory Interpretation of Section 704(a): Legislative Purpose, Ambiguity, and Absurd Results

Statutory interpretation frequently raises questions as to when it is proper for a judge to rely on external sources (such as legislative history) to construe a statute rather than to limit her interpretation to its four corners.⁵² Current Supreme Court guidelines require an in-

formation in Employee X's file. Under the majority's holding, Employee X can bring a suit under § 704(a), alleging retaliation against Company A for conduct that occurred thirty years earlier by a person no longer employed, let alone deceased.

Id. at *8.

⁵² Many articles discuss the use and proper role of legislative history in statutory interpretation. See, e.g., Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 1991 Justice Lester W. Roth Lecture, 65 S. Cal. L. Rev. 845, 847 (1992) (defending, on pragmatic grounds, clinical practice of using legislative history); Maxwell O. Chibundu, *Structure and Structuralism in the Interpretation of Statutes*, 62 U. Cin. L. Rev. 1439, 1495-1540 (1994) (using federal securities law to explore use of structure and structuralism in statutory interpretation); Frank H. Easterbrook, *Text, History and Structure in Statutory Interpretation*, 17 Harv. J.L. & Pub. Pol'y 61, 67-70 (1994) (listing eight propositions supporting position that text and structure, rather than legislative history and intent, supply appropriate foundation meaning); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation As Practical Reasoning*, 42 Stan. L. Rev. 321, 322 (1990) (favoring modest and practical approach to statutory interpretation); Daniel A. Farber, *Statutory*

quiry into a statute's meaning to begin with the language of the statute itself.⁵³ When the language "is plain and admits of no more than one meaning,"⁵⁴ the inquiry should end. However, where the plain language of the statute is ambiguous, or would lead to a result that would contradict the drafters' intent,⁵⁵ or where a literal application of the statute would lead to an absurd result,⁵⁶ further inquiry is permissible, and indeed necessary.

Even though Title VII provides a definition of employee,⁵⁷ it has been argued that the term "employees" in section 704(a) is ambiguous. Judge Hall in his dissent in the en banc decision of *Robinson v. Oil Shell Co.* argues that Title VII's definition of "employee" is unhelpful since the root "employ" has more than one meaning.⁵⁸ Because "employ" has several meanings, Judge Hall argues it is ipso facto ambiguous.⁵⁹ Once the term "employee" is found to be ambigu-

Interpretation and Legislative Supremacy, 78 Geo. L.J. 281, 281-83 (1989) (exploring principle that judges are constrained by language and intent); Geoffrey P. Miller, Pragmatics and the Maxims of Interpretation, 1990 Wis. L. Rev. 1179, 1209-20 (taking renewed look at statutory maxims and interpretation); Martin H. Redish & Theodore T. Chung, Democratic Theory and the Legislative Process: Mourning the Death of Originalism in Statutory Interpretation, 68 Tul. L. Rev. 803, 807-09 (1994) (proposing "textualist originalism," through which judges respect policymaking power of Congress while consulting legislative sources to best interpret text of statutes).

⁵³ See *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (beginning inquiry about postpetition interest with language of Bankruptcy Code); *Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis*, 444 U.S. 11, 16 (1979) ("We begin with the language of the statute itself.").

⁵⁴ *Caminetti v. United States*, 242 U.S. 470, 485 (1917); see also, e.g., *Ron Pair Enters.*, 489 U.S. at 241 (ending inquiry into meaning of statute at its plain language where language expresses Congress's intent with sufficient precision so that review of legislative history and precode practice is unnecessary).

⁵⁵ *Ron Pair Enters.*, 489 U.S. at 242.

⁵⁶ See, e.g., *Hubbard v. United States*, 115 S. Ct. 1754, 1759, 1765 (1995) (using straightforward reading to define word "department"); *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 470-71 (1989) (Kennedy, J., concurring) (urging use of absurdity exception only when Congress could not possibly have intended result); *FBI v. Abramson*, 456 U.S. 615, 640 (1982) (O'Connor, J., dissenting) (citing rule from *United States v. Brown*, 333 U.S. 18 (1948), but finding that Court is not claiming presence of absurd results); *Brown*, 333 U.S. at 27 (finding that no rule requires Court to accept an interpretation that leads to "patently absurd results"); *Crooks v. Harrelson*, 282 U.S. 55, 59-60 (1930) (finding that absurdity exception should be used rarely).

⁵⁷ See *supra* text accompanying note 26.

⁵⁸ *Robinson v. Shell Oil Co.*, 70 F.3d 325, 335 (4th Cir. 1995) (en banc) (Hall, J., dissenting), cert. granted, No. 95-1376, 1996 WL 97912 (U.S. Apr. 22, 1996). Judge Hall explains that "employ" is used in many ways. For example, "employee" may be used to describe the current contractual relationship between a company and a designated worker, or a manufacturing concern may be described as a "major 'employer'" without regard to any particular worker. *Id.* at 335 & n.9 (Hall, J., dissenting). Similarly, retirees with long service are sometimes introduced "as a long-time 'employee' of the company." *Id.* (Hall, J., dissenting).

⁵⁹ *Id.* (Hall, J., dissenting).

ous, under statutory interpretation guidelines it is permissible to look at other sources—such as the drafters' intent—to construe its meaning.⁶⁰

Although the ambiguity argument has not been used widely, even if the statute is deemed unambiguous, strong reasons exist for a broad interpretation. Indeed, Congress's intent in enacting Title VII and the absurd results that would follow from a narrow interpretation of "employee" provide compelling arguments for a broad interpretation of section 704(a).

Looking to congressional comments and debate on section 704(a) for a decisive answer on whether section 704(a) protects against post-employment retaliation is not possible.⁶¹ Only scant legislative history exists on section 704(a), and it provides no guidance as to whether section 704(a) applies to former employers.⁶² Thus, the answer to this issue must come from Congress's overall purpose in enacting Title VII and its more specific purpose in including section 704(a).

Looking to Congress's overall purpose behind Title VII—and its specific purpose behind section 704(a)—as interpretive guides is an appropriate interpretive approach. The Supreme Court has looked favorably upon interpretations of remedial statutes that are consistent with the purpose and objectives of the prohibitions present in the statute.⁶³ As early as 1892, the Supreme Court used an "evil which it is designed to remedy" standard as a guide to interpreting a statute's meaning.⁶⁴ Courts have traditionally felt that a literal interpretation is

⁶⁰ *Id.* (Hall, J., dissenting) (deciding to interpret term "employee" consistently with "the clear intent of Congress to effectively remedy the problem of discrimination in employment").

⁶¹ See Edward C. Walterscheid, *A Question of Retaliation: Opposition Conduct as Protected Expression Under Title VII of the Civil Rights Act of 1964*, 29 B.C. L. Rev. 391, 393 (1988) (stating that there is an "almost total absence of any legislative history" on § 704(a) and that committee reports "simply repeat certain language of Section 704(a) without any explanation of its meaning" (citation omitted)).

⁶² See Interpretative Memorandum on Title VII (1964), reprinted in *Equal Employment Opportunity Comm'n, Legislative History of Titles VII and XI of the Civil Rights Act of 1964*, at 3040 (1969) (making no relevant statements concerning whether § 704(a) applies to former employers). The Interpretative Memorandum on Title VII only states that § 704(a) "prohibits discrimination by an employer or labor organization against persons for opposing discriminatory practices, and for bringing charges before the commission or otherwise participating in proceedings under the title." *Id.*

⁶³ See, e.g., *Charlton v. Paramus Bd. of Educ.*, 25 F.3d 194, 200 n.6 (3d Cir.) (noting Supreme Court's "favorabl[e]" look upon interpretations of remedial statutes consistent with purpose (citing *NLRB v. Scrivener*, 405 U.S. 117, 122 (1972))), cert. denied, 115 S. Ct. 590 (1994).

⁶⁴ *Holy Trinity Church v. United States*, 143 U.S. 457, 463 (1892) (holding that Congress did not intend to include ministers in specified group of laborers).

not always the safest guide to a statute's meaning⁶⁵ and that "[t]here is no surer guide in the interpretation of a statute than its purpose."⁶⁶ In fact, there have been situations where a statute's language "inescapably covering the occasion" was disregarded by courts when the literal interpretation defeated the "manifest purpose of the statute as a whole."⁶⁷ Where a statute is capable of being read with more than one meaning, it "must be read in the manner which effectuates rather than frustrates the major purpose of the legislative draftsmen,"⁶⁸ and it should be construed to fit most "logically and comfortably into the body of both previously and subsequently enacted law."⁶⁹

This broader interpretive approach has already been applied to Title VII. Legislative history, historical context, and the purposes of Title VII have been used in Title VII cases where the statute was ambiguous and where a literal application would contradict Congress's intent.⁷⁰ In addition, Title VII has been recognized to be remedial in character.⁷¹ That fact has led courts to construe the statute liberally in

⁶⁵ See, e.g., *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960) (refusing to limit Copyright Act's excuse of notice to its literal words).

⁶⁶ *Pantchenko v. C.B. Dolge Co.*, 581 F.2d 1052, 1055 (2d Cir. 1978) (quoting Judge Learned Hand in *FDIC v. Tremaine*, 133 F.2d 827, 830 (2d Cir. 1943)).

⁶⁷ *Peter Pan Fabrics*, 274 F.2d at 489 (citing *Holy Trinity Church*, 143 U.S. at 457); see also *Watt v. State of Alaska*, 451 U.S. 259, 266 & n.9 (1981) (interpreting Wildlife Refuge Revenue Sharing Act of 1935 and citing *Markham v. Cabell*, 326 U.S. 404 (1945)); *Cabell*, 326 U.S. at 406-07 (limiting statute because of its enactment after outbreak of war); *Lewis v. Grinker*, 965 F.2d 1206, 1215 (2d Cir. 1992) (citing *Cabell* in interpreting amendment to complex statute that produced probable unintended result); *CIA Petrolera Caribe, Inc. v. Arco Caribbean, Inc.*, 754 F.2d 404, 428-29 (1st Cir. 1985) (interpreting Clayton Act and relying on principle of trying to effectuate congressional goals); *Cawley v. United States*, 272 F.2d 443, 445 (2d Cir. 1959) (putting court in position of legislature and expanding scope of recovery in light of purposes of Congress).

⁶⁸ *Schultz v. Louisiana Trailer Sales, Inc.*, 428 F.2d 61, 64-65 (5th Cir.) (citing *Shapiro v. United States*, 335 U.S. 1, 31 (1948), in holding that when statute has more than one possible meaning, purposes of drafters should be obeyed rather than frustrated), cert. denied, 400 U.S. 902 (1970).

⁶⁹ *West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 100 (1991) (discussing expert fees under 42 U.S.C. § 1988), superseded by statute as stated in *Stender v. Lucky Stores*, 780 F. Supp. 1302 (N.D. Cal. 1992).

⁷⁰ See, e.g., *International Union v. Johnson Controls, Inc.*, 499 U.S. 187, 205-06 (1991) (inferring congressional intent from language of statute, legislative history, and other sources); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 243-44 (1989) (relying on Title VII's interpretative memorandum entered into congressional record by Senators Case and Clark for definition of discrimination); *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 200-04 (1979) (determining that affirmative action plans are not in violation of Title VII after examining legislative history and historical context of Title VII); *Coles v. Penny*, 531 F.2d 609, 614-15 (D.C. Cir. 1976) (interpreting term "notice" liberally to effectuate history of legislation and purposes of Title VII).

⁷¹ See, e.g., *Rutherford v. American Bank of Commerce*, 565 F.2d 1162, 1165 (10th Cir. 1977) (stating that Title VII is remedial in nature); *Bell v. Brown*, 557 F.2d 849, 853 (D.C. Cir. 1977) (same); *Coles*, 531 F.2d at 615 (same).

order to achieve its general purposes and "resolve[] ambiguities . . . in favor of those whom the legislation was designed to protect."⁷²

Title VII provides a clear mandate from Congress that the United States will no longer tolerate discrimination in the workplace.⁷³ Courts have thus interpreted Title VII's terms within the spirit and intention of its drafters⁷⁴ and have seen it as their duty "to make sure that [Title VII] works, and [that] the intent of Congress is not hampered by a combination of a strict construction of the statute and a battle with semantics."⁷⁵

The next two subsections explore the purposes of Title VII, section 704(a), and the Civil Rights Act of 1991. This analysis demonstrates that a narrow, literal interpretation of section 704(a) would be in direct conflict with Congress's intentions in enacting these statutes. As this conflict would frustrate Congress's goal, a correct application of statutory interpretation principles demands that courts interpret section 704(a) broadly to fulfill the spirit and intention of the drafters.

1. *A Narrow Interpretation Produces Results That Are Absurd and Inconsistent with Section 704(a)'s Role in Title VII's Framework*

As discussed above, statutory interpretation guidelines dictate that strict literalism should not govern, even where the language is unambiguous in its "plain meaning," if the final result would be at odds with the drafters' intent.⁷⁶ To determine whether a plain-meaning approach under section 704(a) would be contrary to Con-

⁷² *Bell*, 557 F.2d at 853 (determining that Title VII's § 717(c) requirement that federal employees file a civil action "(w)ithin thirty days of receipt of notice" means personal receipt by affected employee); see also *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 892 (11th Cir. 1986) (concluding that discrimination against employee based on employee's interracial marriage states claim under Title VII); *Coles*, 531 F.2d at 616 (interpreting term "notice" in § 717(c) broadly to effectuate "the broad humanitarian and remedial purposes underlying" Title VII); *Culpepper v. Reynolds Metals Co.*, 421 F.2d 888, 891 (5th Cir. 1970) (reaffirming that Title VII should receive liberal construction).

⁷³ See *Parr*, 791 F.2d at 892; *Culpepper*, 421 F.2d at 891.

⁷⁴ See, e.g., *United Steelworkers*, 443 U.S. at 201-04 (interpreting prohibition against racial discrimination in § 703(a) and (d) of Title VII against Title VII's background and historical context).

⁷⁵ *Culpepper*, 421 F.2d at 891. The court noted that this sentiment had been echoed by the Honorable Griffin B. Bell, Judge, United States Court of Appeals for the Fifth Circuit. In a speech at a Title VII seminar, Bell stated:

We think that the statute as enacted by Congress is designed to eliminate an unfortunate chapter in our history, when persons have been denied jobs simply by reasons of their race. Therefore, we approach the statute in a generous way. We want to make it work. We want to fill in these gaps, and we want to stay within the intent of Congress in making it work.

Id. at 891 n.3.

⁷⁶ See *supra* text accompanying notes 64-70.

gress's intent, the purposes behind Title VII, Title VII's framework, and the Civil Rights Act of 1991 need to be examined.

Title VII was enacted to establish a federal right to equal opportunity in employment.⁷⁷ By enacting Title VII, Congress sent a clear mandate that the United States would no longer tolerate discrimination in employment.⁷⁸ Simply put, Title VII's primary purposes are to enhance the opportunity of minorities to "be hired on the basis of merit"⁷⁹ and to eliminate discrimination in employment based on race, color, religion, sex, or national origin.⁸⁰

Title VII relies on individual initiative and determination to bring to light an employer's unlawful behavior. To achieve Title VII's goal of eliminating employment discrimination, employees must come forward to enforce their rights and oppose unlawful employment practices.⁸¹ However, enforcement in the employment context is complicated by the threat of retaliation. There is little doubt that, absent some form of protection, employees would not come forward and file discrimination complaints for fear of employer retaliation. To deter employers from retaliating against employees, Congress included section 704, which states in relevant part:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because [the employee] has opposed any practice made an unlawful employment practice by this subchapter, or because he has

⁷⁷ See Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 1972 U.S.C.A.N. (86 Stat.) 122 (stating that Title VII's goal is to "further promote equal employment opportunities for American workers"); see also *Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 423 (1986) (stating that Title VII guarantees equal employment opportunity).

⁷⁸ See *Culpepper*, 421 F.2d at 891.

⁷⁹ *Sherman v. Burke Contracting, Inc.*, 891 F.2d 1527, 1536 (11th Cir.) (Tjoflat, C.J., concurring) (citation omitted), cert. denied, 498 U.S. 943 (1990).

⁸⁰ The EEOC elaborates: "To discriminate is to make a distinction, to make a difference in treatment or favor, and those distinctions or differences in treatment or favor which are prohibited . . . are those which are based on any five of the forbidden criteria: race, color, religion, sex, and national origin." Interpretative Memorandum on Title VII, supra note 62, reprinted in *Equal Employment Opportunity Comm'n, Legislative History of Titles VII and XI of the Civil Rights Act of 1964*, at 3039-40 (1969).

⁸¹ See *Proulx v. Citibank, N.A.*, 659 F. Supp. 972, 978 (S.D.N.Y. 1987) (stating that "enforcement of Title VII rights is necessarily dependent on individual complaints" (quoting Weinfeld, J., in *EEOC v. Kallir, Philips, Ross, Inc.*, 401 F. Supp. 66, 72 (S.D.N.Y. 1975))); H.R. Rep. No. 40, 102d Cong., 1st Sess., pt. 1, at 70 (1991), reprinted in 1991 U.S.C.A.N. 603, 608 (recognizing that Title VII is enforced by individuals); 2 EEOC Compl. Man. (BNA) § 614.1(f)(2), at 614:0007 (Apr. 1988) (stating that "[i]f retaliation for engaging in such protected activity were permitted to go unremedied, it would have a chilling effect upon the willingness of individuals to speak out against employment discrimination"); Nancy J. Sedmak & Michael D. Levin-Epstein, *Primer on Equal Employment Opportunity* 141 (5th ed. 1991) (stating that "[t]he provisions forbidding retaliatory action are not self-enforcing").

made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subsection.⁸²

The purpose of section 704 "is to protect the employee who utilizes the tools provided by Congress to protect his rights."⁸³ Its goal is to make employees feel protected when they oppose an employer's unlawful discrimination by prohibiting employers from retaliating.⁸⁴ Indeed, if an employer could lawfully retaliate against an employee for asserting his rights "then the rights created [under Title VII] would be without substance."⁸⁵ Section 704 is therefore vital to achieve Title VII's intended goals.⁸⁶

Even with the protections of section 704, retaliation continues to be a problem, and the fear of retaliation continues to be a deterrent in filing formal discrimination charges. Many workers "are 'afraid to speak out for fear they [will] lose their jobs,'"⁸⁷ and some victims have found that after filing a complaint the harassment actually escalated.⁸⁸ It has been confirmed that "[w]orkers filing claims often encounter retaliatory discharges, demotions, ostracism by coworkers, and even 'black-listing.'"⁸⁹ This reality underscores the importance of strong efforts to deter retaliation.

Retaliation need not end when the employment relationship ends.⁹⁰ Former employees, as much as current employees, need protection from employers resentful of the fact that a complaint has been made against them.⁹¹ The possibility of retaliation against former employees is neither remote nor speculative; former employers retain significant control over a former employee and can have a tremendous impact on a former employee's career.⁹²

Many cases show that employers' retaliatory acts can extend past the formal employment relationship and can impact prospective employment. Retaliatory acts by former employers have included an ex-

⁸² Civil Rights Act of 1964 § 704(a), 42 U.S.C. § 2000e-3(a).

⁸³ *Vasconcelos v. Meese*, 907 F.2d 111, 113 (9th Cir. 1990) (quoting *Sias v. City Demonstration Agency*, 588 F.2d 692, 695 (9th Cir. 1978)); see also 2 EEOC Compl. Man. (BNA) § 614.1(f)(2), at 614:0007 (discussing the ramifications of not protecting employees against retaliation).

⁸⁴ 2 EEOC Compl. Man. (BNA) § 614.1(a), at 614:0001.

⁸⁵ *Id.* § 614.1(f), at 614:0006.

⁸⁶ *Id.* § 614.1(f), at 614:0006-0007.

⁸⁷ H.R. Rep. No. 40, *supra* note 81, pt. 1, at 71, reprinted in 1991 U.S.C.C.A.N. at 609.

⁸⁸ *Id.* (reprinting parts of testimony before the Committee).

⁸⁹ *Id.*

⁹⁰ See *infra* text accompanying notes 93-97 for examples of postemployment retaliation.

⁹¹ *Rutherford v. American Bank of Commerce*, 565 F.2d 1162, 1165-66 (10th Cir. 1977) (citing *Dunlop v. Carriage Carpet Co.*, 548 F.2d 139, 147 (6th Cir. 1977)).

⁹² E.g., *Hodgson v. Martin Inspectors of Petroleum, Inc.*, 459 F.2d 303, 306 (5th Cir. 1972).

pansive range of abominable behavior such as making intentionally unfavorable or untrue statements to prospective employers,⁹³ persuading a new employer to fire the former employee,⁹⁴ beginning procedures to revoke the former employee's teaching license,⁹⁵ advising prospective employers that the former employee had filed a discrimination charge,⁹⁶ and refusing to give letters of recommendation.⁹⁷ This list illustrates that retaliatory acts by former employers are real and intimidating, and, absent statutory protection, may deter employees from reporting unlawful discrimination.

Because Title VII's enforcement depends solely on individual initiative,⁹⁸ a literal interpretation of section 704(a) would be inconsistent with Title VII's overall framework as constructed by Congress. Simply put, employees need reassurance that employers cannot legally retaliate against them for filing Title VII claims. If section 704(a)'s protections were interpreted narrowly, they would lose much of their potency: Employees who had been terminated or had voluntarily left their jobs because of discrimination would not come forward to make Title VII claims because they would know that protection from retaliation ended as soon as they left their employment.⁹⁹ Ultimately, the "fear of unremediable reprisal would chill Title VII claims for discriminatory discharges"¹⁰⁰ and thereby "erode the vitality of [Title VII's] provisions."¹⁰¹

The EEOC has adopted this argument and, accordingly, has interpreted section 704(a) broadly to include former employees.¹⁰² The

⁹³ E.g., *Pantchenko v. C.B. Dolge Co.*, 581 F.2d 1052, 1054 (2d Cir. 1978).

⁹⁴ E.g., *Sherman v. Burke Contracting, Inc.*, 891 F.2d 1527, 1529 (11th Cir.), cert. denied, 498 U.S. 943 (1990).

⁹⁵ E.g., *Charlton v. Paramus Bd. of Educ.*, 25 F.3d 194, 196 (3d Cir.), cert. denied, 115 S. Ct. 590 (1994).

⁹⁶ E.g., *Rutherford v. American Bank of Commerce*, 565 F.2d 1162, 1164 (10th Cir. 1977); *EEOC v. Metzger*, 824 F. Supp. 1, 2 (D.D.C. 1993).

⁹⁷ E.g., *Pantchenko*, 581 F.2d at 1054.

⁹⁸ See supra note 81 and accompanying text. "The effective enforcement of Title VII . . . depends in very large part on the initiative of individuals to oppose employment policies or practices . . ." 2 EEOC Compl. Man. (BNA) § 614.1(f)(2), at 614:0007.

⁹⁹ See supra notes 82-86 and accompanying text.

¹⁰⁰ *Charlton*, 25 F.3d at 200.

¹⁰¹ *Robinson v. Shell Oil Co.*, No. 93-1562, 1995 WL 25831, at *2 (4th Cir. Jan. 18, 1995), vacated and reh'g granted en banc, on reh'g, 70 F.3d 325 (4th Cir. 1995), cert. granted, No. 95-1376, 1996 WL 97912 (U.S. Apr. 22, 1996). It is important to keep in mind that the claims chilled are those challenging discriminatory practices prohibited under § 703 of Title VII. Only after the plaintiff has opposed an employer's discriminatory practices under Title VII will she be entitled to § 704(a)'s retaliatory protection.

¹⁰² 2 EEOC Compl. Man. (BNA) § 614.7(f), at 614:0034 ("[A]n . . . employer's obligation to refrain from retaliation against a former employee . . . does not end once that employee leaves its employ."). The EEOC's interpretations are entitled to great deference. *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971).

EEOC's position is grounded in the concern that Title VII's rights would be without substance if retaliation were lawful.¹⁰³ If retaliation were permitted to go unremedied, the law would effectively condone employers' efforts to intimidate employees into foregoing their rights to be free of employment discrimination.¹⁰⁴

The Fourth Circuit en banc in *Robinson v. Shell Oil Co.*¹⁰⁵ failed to consider the role of section 704(a) in Title VII's structure. That court found determinative the fact that Congress never expressly stated its intention for a result other than the result a literal reading of section 704(a) would produce.¹⁰⁶ Because Congress did not expressly include former employees, the court reasoned, it must not have intended for section 704(a) to apply to former employees.¹⁰⁷ The problem with the Fourth Circuit's approach is that it fails to consider the "design of the statute as a whole and . . . its object and policy"¹⁰⁸ and fails to recognize what Congress recognized when it included section 704(a): "Title VII [can] only be enforced effectively if the persons most aggrieved by discriminatory practices [can] come forward without fear of retribution."¹⁰⁹ Even given the arguably "unambiguous" language of section 703(a), a broad reading of "employee" is necessary to effectuate the intent and framework of Title VII.

Finally, section 704(a) should also be interpreted broadly because a narrow interpretation may well produce absurd results. Under statutory interpretation guidelines, a court may go beyond the words of the statute if a literal interpretation would produce an absurd result that Congress could not possibly have intended.¹¹⁰ Such results would surely follow from a narrow interpretation of section 704(a).¹¹¹ To

¹⁰³ See 2 EEOC Compl. Man. (BNA) § 614.1(f), at 614:0006 (stating that § 704(a) guarantees that individual's right to be free from discrimination is not "without substance").

¹⁰⁴ See id. § 614.1(f)(2), at 614:0007.

¹⁰⁵ 70 F.3d 325 (4th Cir. 1995) (en banc), cert. granted, No. 95-1376, 1996 WL 97912 (U.S. Apr. 22, 1996).

¹⁰⁶ Id. at 330.

¹⁰⁷ Id.

¹⁰⁸ *Crandon v. United States*, 494 U.S. 152, 158 (1990).

¹⁰⁹ *Robinson*, 70 F.3d at 333 (en banc) (Hall, J., dissenting).

¹¹⁰ See, e.g., *United States v. Brown*, 333 U.S. 18, 27 (1948) ("No rule of construction necessitates our acceptance of an interpretation resulting in patently absurd consequences."); *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930) (adding requirement that "there must be something to make plain [Congress's intent] that the letter of the statute is not to prevail").

¹¹¹ The majority in the Fourth Circuit en banc decision of *Robinson* found that the absurdity exception did not apply. The court concluded that the absurdity exception did not apply because the absurdity was not "so gross as to shock the general moral or common sense," *Robinson*, 70 F.3d at 329 (en banc) (citing *Crooks*, 282 U.S. at 60), and because there was nothing in the statute to convey that Congress intended "that the letter of the statute is not to prevail." Id. (citing *Crooks*, 282 U.S. at 60). Supporting this decision, the

borrow the Sixth Circuit's language from a similar context, "[t]o read the Act as excluding employees voluntarily separated from their work from the protections of [the antiretaliation provision] would create an anomaly in the statute not in keeping with the tenor of Congressional intent or judicial interpretation of this Act or of other similar social legislation."¹¹²

Under a narrow interpretation, employers would be free to retaliate "with impunity"¹¹³ against former employees who had asserted Title VII claims solely due to the "fortuity of the employment status."¹¹⁴ For example, for a large number of employees the discriminatory conduct against them is unlawful termination. Under a narrow interpretation, these terminated employees would never be protected from retaliation, simply because they become former employees as of the date of the discriminatory conduct. It is unlikely that Congress intended to leave so large a portion of Title VII victims without retaliatory protection.

A narrow interpretation would produce another, similarly absurd result: The same retaliatory act could be committed against two individuals such that the act is legal in one situation and illegal in the other.¹¹⁵ For example, consider two employees who work for the same employer and who are demoted because they are black. One employee decides to file an EEOC charge and remain with her em-

Fourth Circuit stated that the lack of reference to former employees "was strong evidence that Congress did not intend Title VII to protect former employees." *Id.* at 330. But see *id.* at 333 (Hall, J., dissenting) (arguing that grossly absurd results would follow from literal application of statute).

¹¹² *Dunlop v. Carriage Carpet Co.*, 548 F.2d 139, 147 (6th Cir. 1977) (interpreting antiretaliation provision of Fair Labor Standards Act (FLSA) to include former employees). Courts routinely look to the FLSA, the National Labor Relations Act (NLRA), the Age Discrimination in Employment Act (ADEA), and Title VII when interpreting analogous sections of these statutes. See, e.g., *McKennon v. Nashville Banner Publishing Co.*, 115 S. Ct. 879, 884 (1995) (stating that ADEA, Title VII, and FLSA are all part of statutory scheme to eradicate workplace discrimination and noting that rule barring after-acquired evidence does not accord with such scheme); *Lorillard v. Pons*, 434 U.S. 575, 582 (1978) (determining that ADEA incorporated most remedies and procedures of FLSA); *Rutherford v. American Bank of Commerce*, 565 F.2d 1162, 1165-66 (10th Cir. 1977) (drawing support from interpretation of FLSA's antiretaliation provision in *Dunlop* to find that Title VII protects former employees against retaliation); *Pettway v. American Cast Iron Pipe Co.*, 411 F.2d 998, 1005-06 (5th Cir. 1969) (relying "guarded[ly]" on NLRA and FLSA to interpret § 704(a)).

¹¹³ *Charlton v. Paramus Bd. of Educ.*, 25 F.3d 194, 200 (3d Cir.), cert. denied, 115 S. Ct. 590 (1994).

¹¹⁴ *Robinson v. Shell Oil Co.*, No. 93-1562, 1995 WL 25831, at *2 (4th Cir. Jan 18, 1995), vacated and reh'g granted en banc, on reh'g, 70 F.3d 325 (4th Cir. 1995), cert. granted, No. 95-1376, 1996 WL 97912 (U.S. Apr. 22, 1996).

¹¹⁵ See *Robinson*, 70 F.3d at 332-33 (en banc) (Hall, J., dissenting) (offering example where employer's behavior toward two employees is equally culpable but, due to chance, only one employee may state Title VII antiretaliation claim).

ployer until she finds another job. The other employee decides to quit immediately after the demotion, files an EEOC charge, and starts to look for another position. Both employees ask the employer for references and, in retaliation for their filing race discrimination claims, the employer lies to prospective employers, giving both employees poor references. Even though the employer's retaliatory actions are the same for both employees, if section 704(a) were interpreted narrowly, the employee who remained with the employer would be protected while the employee who left would not. Only by interpreting section 704(a) broadly can these inequities be avoided.

2. *Civil Rights Act of 1991*

In 1991, Congress reaffirmed and expanded its commitment to eradicating discrimination in the workplace by passing the Civil Rights Act of 1991.¹¹⁶ The Civil Rights Act of 1991 strengthened existing protections and remedies available under federal civil rights law and provided more "effective deterrence and adequate compensation for victims of discrimination."¹¹⁷ Although Title VII was intended to prohibit employers from discriminating, prior to the enactment of the Civil Rights Act of 1991, Title VII did not financially punish employers for their bad acts.¹¹⁸ Cooperation and voluntary compliance were the preferred means of achieving Title VII goals,¹¹⁹ and only if conciliation failed could the employee turn to the courts for equitable remedies.¹²⁰

Title VII relief is no longer limited to equitable remedies, however.¹²¹ Congress has enacted the Civil Rights Act of 1991, which, *inter alia*, allows monetary, punitive, and compensatory damages to be awarded under Title VII.¹²² The 1991 amendments provide monetary damages to Title VII plaintiffs who prove intentional discrimination.¹²³

¹¹⁶ H.R. Rep. No. 40, *supra* note 81, pt. 1, at 14, reprinted in 1991 U.S.C.C.A.N. at 552.

¹¹⁷ H.R. Rep. No. 40, *supra* note 81, pt. 2, at 1, reprinted in 1991 U.S.C.C.A.N. at 694.

¹¹⁸ See *Sherman v. Burke Contracting, Inc.*, 891 F.2d 1527, 1536 (11th Cir.) (Tjoflat, C.J., concurring) (arguing that antiretaliation provision of Title VII was not intended to allow monetary damages), cert. denied, 498 U.S. 943 (1990).

¹¹⁹ *Id.* (Tjoflat, C.J., concurring) (citing *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974)).

¹²⁰ *Id.* at 1537 (Tjoflat, C.J., concurring) (discussing 42 U.S.C. § 2000e-5(g), which permits court to enjoin employer and order reinstatement or hiring of employee with backpay and other equitable relief as court deems appropriate). Equitable remedies usually take the form of reinstatement and backpay.

¹²¹ Civil Rights Act of 1964 § 706(g)(1), 42 U.S.C. § 2000e-5(g)(1) (1994).

¹²² Civil Rights Act of 1991 § 102, 42 U.S.C. § 1981(a)(1).

¹²³ *Id.* Compensatory and punitive damages are not permitted in cases alleging unlawful discrimination based on disparate impact. *Id.*

This change increases the cost employers will pay for intentional discrimination. Compensatory damages allow successful plaintiffs to recover for "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses."¹²⁴ Punitive damages may be given if the plaintiff shows that the defendant acted "with malice or reckless indifference to the federally protected rights of . . . [the] individual."¹²⁵

The 1991 amendments permit compensatory and punitive damages in intentional discrimination cases brought under sections 706 and 717.¹²⁶ Congress made monetary damages available to compensate victims for their injuries, to provide more effective deterrence, and to encourage citizens to enforce the statute.¹²⁷ The Civil Rights Act of 1991 works with Title VII to achieve the goal of eradicating discrimination by imposing on employers a financial cost for their discrimination. Equally important, monetary damages provide employers with additional incentives to prevent intentional discrimination in the workplace before it happens.¹²⁸

The 1991 amendments do not explicitly create a cause of action for former employees under section 704(a). Although some may argue that Congress reaffirmed its intention to exclude former employees from protection under section 704(a) by not expressly extending this protection as part of the Civil Rights Act of 1991, the purpose behind the Civil Rights Act of 1991 does not support this construction. Indeed, Congress frequently remains silent when it agrees with the courts. Only when Congress disagrees is it compelled to act.¹²⁹

¹²⁴ Id. § 1981(b)(3).

¹²⁵ Id. § 1981(b)(1).

¹²⁶ Id. § 1981(a)(1). Section 1981(a)(1) allows compensatory and punitive damages for intentional discrimination suits brought under §§ 706 or 717 for violations of §§ 703, 704, or 717 of Title VII. Id.

¹²⁷ H.R. Rep. No. 40, supra note 81, pt. 1, at 14, 65, 70, reprinted in 1991 U.S.C.C.A.N. at 552, 603, 608.

¹²⁸ H.R. Rep. No. 40, supra note 81, pt. 1, at 65, reprinted in 1991 U.S.C.C.A.N. at 603.

¹²⁹ For example, one impetus for the Civil Rights Act of 1991 was a desire to overrule a number of Supreme Court cases with which Congress disagreed. See H.R. Rep. No. 40, supra note 81, pt. 2, at 2, reprinted in 1991 U.S.C.C.A.N. at 695. Congress's disapproval of the Supreme Court's new burden of proof standard established in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), provides an example of Congress specifically enacting legislation to overrule a judicial decision with which it disagreed. *Wards Cove* construed Title VII to place on employees the burden of proving that employment practices with a "disparate impact" were not significantly related to a legitimate business objective. Id. at 659-60. In the Civil Rights Act of 1991, Congress expressly overruled *Wards Cove* and shifted the burden to the employer to prove that employment practices with a "disparate impact" were in fact required by business necessity. H.R. Rep. No. 40, supra note 81, pt. 2, at 2, reprinted in 1991 U.S.C.C.A.N. at 695. Similarly, Congress disagreed with the Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), which ruled that an employment decision motivated in part by prejudice does not violate Title VII if the employer can

When the House of Representatives's Education and Labor Committee and Judiciary Committee reported the Civil Rights Act of 1991 on April 24, 1991,¹³⁰ and May 17, 1991,¹³¹ respectively, no circuit had interpreted section 704(a) narrowly. When President Bush signed the Civil Rights Act of 1991 on November 21, 1991,¹³² all decisions, except the Seventh Circuit's *Reed v. Shepard*¹³³ decision, which was decided on August 11, 1991, interpreted the section broadly. Congress's failure to respond to the overwhelming number of cases giving former employees a cause of action under section 704(a) provides some indication that Congress agreed with the broad interpretation.

Finally, the fact that monetary damages are now permitted discounts the argument, discussed above, that Congress manifested its lack of intent to create a cause of action under section 704(a) for former employees by providing only equitable damages.¹³⁴ This argument no longer stands now that Congress has provided monetary damages which can make former employees whole.

B. *Alternative Remedies*

The lack of alternative remedies for former employees faced with retaliation lends further support to a broad interpretation of section 704(a). As discussed earlier, some have argued that section 704(a) does not need to be interpreted broadly because former employees are protected by a variety of other remedies that serve the same function.¹³⁵ It was suggested by those arguing for a narrow interpretation that former employees use section 704(a) against prospective employers and/or avail themselves of state damage claims, injunctions, or criminal charges against the former employer.¹³⁶ Examined more closely, however, these suggested alternatives are not practical.

show after the fact that the same decision would have been made for nondiscriminatory reasons. *Id.* at 242. The Civil Rights Act of 1991 overruled *Price Waterhouse* and reaffirmed that any reliance on prejudice in making employment decisions is illegal. H.R. Rep. No. 40, *supra* note 81, pt. 2, at 2, reprinted in 1991 U.S.C.C.A.N. at 695.

¹³⁰ H.R. Rep. No. 40, *supra* note 81, pt. 1, at 1, reprinted in 1991 U.S.C.C.A.N. at 549.

¹³¹ *Id.*

¹³² Statement on Signing the Civil Rights Act of 1991, 27 Weekly Comp. Pres. Doc. 1701 (Nov. 21, 1991) (Statement of President George Bush).

¹³³ 939 F.2d 484 (7th Cir. 1991).

¹³⁴ See *supra* text accompanying notes 37-41.

¹³⁵ See *supra* notes 42-44 and accompanying text.

¹³⁶ See *supra* text accompanying notes 43-45. In *Reed v. Shepard*, 939 F.2d 484 (7th Cir. 1991), the plaintiff claimed that she had been retaliated against by her former employer who caused a physical attack to be made on her. *Id.* at 492. The Seventh Circuit held that § 704(a) did not apply since the events occurred after termination of her employment. The court held that the plaintiff should seek state-law damage claims and a criminal charge instead. *Id.* at 493. Similarly, in *Pelech v. Klaff-Joss*, 828 F. Supp. 525 (N.D. Ill. 1993), an Illinois district court followed *Reed* and suggested that plaintiffs seek redress for postem-

Although Title VII explicitly allows applicants to sue prospective employers,¹³⁷ in practice, this remedy is usually unavailable to a former employee. Indeed, in many situations, the prospective employer has done nothing illegal. A common example involves the situation where a former employer retaliates by giving a false, poor recommendation to the former employee's prospective employer. Where the prospective employer relies in good faith on the recommendation and fails to give the applicant an offer, the prospective employer has not violated Title VII. He is not denying employment on the basis of section 704(a) protected activity; he has merely decided not to hire an individual with a record of poor job performance.¹³⁸

The lack of an adequate Title VII remedy provides a strong reason to extend section 704(a) coverage to retaliation that occurs after the employment relationship has ended. If employees were left with no remedy, employers would, in many cases, be given free reign to retaliate against employees after the employment relationship has ended. Former employers no doubt would be savvy enough not to engage in retaliation that could give rise to state claims or criminal charges, thereby immunizing themselves against *any* type of penalty.¹³⁹ This would have a devastating effect on the filing of Title VII claims. Employees would not come forward to enforce Title VII since employees would undoubtedly conclude—and rightly so—that they are not protected from employer retaliation once they left their present employment.

ployment acts by availing "themselves of other equitable and legal remedies, such as state law damage claims, injunctions, or . . . criminal charges." *Id.* at 533. In *Polsby v. Chase*, 970 F.2d 1360, 1365 (4th Cir. 1992), vacated on other grounds, 113 S. Ct. 1940 (1993), the court suggested that the former employee use Title VII against prospective employers or seek either state or other federal-law remedies against the former employer. *Id.* at 1366. Chief Judge Tjoflat, concurring in *Sherman v. Burke Contracting, Inc.*, 891 F.2d 1527 (11th Cir.), cert. denied, 498 U.S. 943 (1990), suggested that an employee seek state common-law damages. *Id.* at 1541 (Tjoflat, C.J., concurring).

¹³⁷ Civil Rights Act of 1964 § 704(a), 42 U.S.C. § 2000e-3(a) (stating in relevant part that "[i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment").

¹³⁸ In contrast, a prospective employer would violate 42 U.S.C. § 2000e-3(a) if she failed to hire an individual solely because the applicant filed a Title VII charge against a former employer.

¹³⁹ For example, employers could discriminate by refusing to give references to employees who filed Title VII claims, while giving references to those who do not oppose discriminatory practices. This would shield the employer from a defamation suit, while still injuring the employee in her pursuit of other employment. Or, the employer could deny the former employee access to the employer's premises. In *Baker v. Summit Unlimited, Inc.*, the employer, a child care center, denied the former employee access to the center to pick up children as a parent designee. *Baker v. Summit Unlimited, Inc.*, 855 F. Supp. 375, 377 (N.D. Ga. 1994).

*C. Speculative Damages, Unfairness to the Employer,
and Other Concerns*

In addition to relying on statutory interpretation guidelines, narrow interpreters have based their decisions to limit the reach of section 704(a) to exclude former employees on separate policy grounds involving speculativeness and unfairness to the employer.¹⁴⁰ This section explores those concerns as well as the fear of misuse of the provision by employees and the potential decrease in the availability of letters of recommendation. Examination shows that these concerns are unpersuasive as support for a narrow interpretation.

Some of the judges who concluded that section 704(a) should be interpreted narrowly have supported their decision by noting that damages would be highly speculative under a broad interpretation of section 704(a) in cases where, for example, the former employer gave false, negative references.¹⁴¹ Although concerns over speculativeness are valid, they cannot serve as a complete obstacle to allowing a cause of action under section 704(a) for former employees. Courts have provided other Title VII litigants with front-pay awards when reinstatement was not feasible.¹⁴² Although there are different issues in question in postemployment section 704(a) cases because an employer the plaintiff has never worked for is at issue, these differences do not demand a complete denial of the cause of action.¹⁴³ In calculating front-pay awards for other Title VII plaintiffs, courts have dealt with the speculative issue by being flexible and looking to the circumstances of the particular case.¹⁴⁴ Courts, when calculating front pay in

¹⁴⁰ See *supra* notes 45-51 and accompanying text.

¹⁴¹ See *supra* notes 47-48 and accompanying text.

¹⁴² See, e.g., *Shore v. Federal Express Corp.*, 42 F.3d 373, 378 (6th Cir. 1994) (stating that courts need to be flexible in calculating front pay); *Goss v. Exxon Office Sys. Co.*, 747 F.2d 885, 890 (3d Cir. 1984) (stating that front pay is an alternative to reinstatement); see also *Maxfield v. Sinclair Int'l*, 766 F.2d 788, 796 (3d Cir. 1985) (involving Age Discrimination in Employment Act (ADEA) violation where reinstatement was not possible and stating that "an award for future lost earnings is no more speculative than awards for lost earning capability routinely made in personal injury and other types of cases"), cert. denied, 474 U.S. 1057 (1986). Courts also have provided ADEA plaintiffs with front pay. See, e.g., *Duke v. Uniroyal Inc.*, 928 F.2d 1413, 1423 (4th Cir.) (allowing trial court to consider front-pay award on remand), cert. denied, 502 U.S. 963 (1991); *Hansard v. Pepsi-Cola Metro Bottling Co.*, 865 F.2d 1461, 1469 (5th Cir.), cert. denied, 493 U.S. 842 (1989) (noting that front pay is available for ADEA claims "in limited circumstances").

¹⁴³ Even where future pay cannot be ascertained reliably, the plaintiff may be entitled to injunctive relief. See Civil Rights Act of 1964 § 706(g)(1), 42 U.S.C. § 2000e-5(g)(1).

¹⁴⁴ See, e.g., *Suggs v. Servicemaster Educ. Food Management*, 72 F.3d 1228, 1234 (6th Cir. 1996) (stating that following factors are relevant in calculating front pay: "(1) the employee's future in the position from which she was terminated; (2) her work and life expectancy; (3) her obligation to mitigate her damages; (4) the availability of comparable employment opportunities and the time reasonably required to find substitute employ-

postemployment cases, should also look to the plaintiff's particular circumstances and, if necessary, limit front pay to a period that is ascertainable. In addition, Title VII plaintiffs do have a duty to mitigate which will limit possible awards.¹⁴⁵

As for the unfairness factor of stale claims discussed earlier,¹⁴⁶ this too is insignificant when compared to the greater and more important purpose behind section 704(a). The stale claim scenario envisions future generations of management, who had not committed the retaliatory act, being forced to defend section 704(a) retaliatory suits. Although this scenario could occur, its probable infrequency does not justify the denial of retaliatory claims to former employees. In situations where this scenario did occur, and it would truly be unfair for the claim to go forward,¹⁴⁷ the court case could decide, in the interest of fairness and justice, not to employ the "discovery rule" and thereby bar the claim.¹⁴⁸

Other concerns about unintended effects of an expansive view of section 704(a) are similarly outweighed by the need to effectuate the purposes of Title VII. There is a concern that former employees may abuse section 704(a). For instance, former employees who have been

ment; (5) the discount tables to determine the present value of future damages; and (6) "other factors that are pertinent in prospective damage awards" (citations omitted); *Scarfo v. Cabletron Sys.*, 54 F.3d 931, 954-55 (1st Cir. 1995) (taking into consideration plaintiff's likelihood of returning to full employment); *Fitzgerald v. Sirloin Stockade*, 624 F.2d 945, 951 (10th Cir. 1980) (affirming five-year front-pay award and deducting plaintiff's present salary); *Toth v. American Greetings Corp.*, Nos. C83-4402, C84-725, 1985 WL 6145, at *9 (N.D. Ohio Mar. 28, 1985) (awarding front pay for six-month period where reinstatement not feasible and plaintiff confident of her promotability), *aff'd*, 811 F.2d 608 (6th Cir. 1986), *cert. denied*, 484 U.S. 988 (1987); *Reeder-Baker v. Lincoln Nat'l Corp.*, 649 F. Supp. 647, 663-64 & n.27 (N.D. Ind. 1986) (awarding front pay for two years and deducting plaintiff's salary), *aff'd*, 834 F.2d 1373 (7th Cir. 1987).

¹⁴⁵ Civil Rights Act of 1964 § 706(g)(1), 42 U.S.C. § 2000e-5(g)(1).

¹⁴⁶ See *supra* notes 49-51 and accompanying text.

¹⁴⁷ See *supra* note 51 for the example Judge Hamilton provides in his dissent of *Robinson v. Shell Oil Co.*, No. 93-1562, 1995 WL 25831 (4th Cir. Jan 18, 1995), vacated and reh'g granted en banc, on reh'g, 70 F.3d 325 (4th Cir. 1995), *cert. granted*, No. 95-1376, 1996 WL 97912 (U.S. Apr. 22, 1996).

¹⁴⁸ Under the discovery rule, the cause of action does not accrue until the date of the discovery of the prohibited conduct, or the date when, by the exercise of reasonable care and diligence, it would have been discovered. *Black's Law Dictionary* 466 (6th ed. 1990). The use of the discovery rule should turn on standards of reasonableness, considerations of the prejudice to the defendant, and potential injustice to the plaintiff. See *Robinson*, 1995 WL 25831, at *3 (expressing confidence in ability of judiciary to distinguish between just and unjust applications of doctrine); *Antos v. Bell & Howell Co.*, 891 F. Supp. 1281, 1287 (N.D. Ill. 1995) (discussing discovery rule and doctrine of equitable tolling and noting court should be guided by standards of "reasonableness"); *Slack v. Kanawha County Hous. & Redev. Auth.*, 423 S.E.2d 547, 552 (W. Va. 1992) (adopting discovery rule for tort of invasion of privacy and noting its purpose "to remedy the unjust and unreasonable effects of strict application of the statute of limitations").

terminated on legitimate grounds may file strategic Title VII claims, hoping to intimidate their former employers into giving them positive letters of recommendation; or the former employee may believe that since she has filed a Title VII claim, she may maliciously defame the employer without fear of a defamation suit. These concerns, however, should not be obstacles to a broad interpretation.

A Title VII claim will not "buy" former employees glowing letters of recommendation because section 704(a)'s antiretaliation provision does not prevent an employer from giving poor references that are truthful.¹⁴⁹ Section 704(a) does not "shield the delinquent or unsatisfactory employee,"¹⁵⁰ and filing a Title VII claim does not "automatically immunize [the employee] from legitimate discipline for unsatisfactory performance"¹⁵¹ or from references that are truthful.

Section 704(a) also does not give the employee an unrestricted right to make malicious Title VII claims or a right to slander the employer in other contexts. Employers may still file defamation suits against former employees who have filed Title VII claims so long as the employers' suits are initiated in "good faith and as an attempt to rehabilitate the employer's [sic] reputations."¹⁵² Only when an employer files a defamation suit that is in retaliation for the employee's protected act may the employee make a section 704(a) retaliation claim.

The concern that an extension of section 704(a) protection to former employees would discourage employers from providing letters of recommendation and references is likewise minimal. Employers are unlikely to cease providing references to all employees in order to minimize their risk of exposure to section 704(a) retaliation suits due to the widely recognized value of such letters to both employers and employees. Employment references "serve an important human re-

¹⁴⁹ See, e.g., *Fields v. Phillips Sch. of Business and Technology*, 870 F. Supp. 149, 153 (W.D. Tex. 1994) (finding insufficient evidence that employer's reference, which stated that employee was "below average" and was fired because of tardiness and insubordination, was motivated by malice or retaliation); *Bahu v. Fuller O'Brien Paints*, No. S85-508, 1986 WL 12048, at *8 (N.D. Ind. July 25, 1986) (finding that employer's reference, which stated that former employee was well qualified but did not accept criticism well, was not retaliation but honest appraisal).

¹⁵⁰ *Martin K. Denis*, Title VII Retaliation Claims, 9 *Employee Rel. L.J.* 642, 651 (1984).

¹⁵¹ *Id.*

¹⁵² *EEOC v. Levi Strauss & Co.*, 515 F. Supp. 640, 644 (N.D. Ill. 1981) (holding that federal court can enjoin defamation suit brought by employer only when suit is brought in bad faith and for improper purposes such as retaliation); see also *Baker v. Summit Unlimited, Inc.*, 855 F. Supp. 375, 377 (N.D. Ga. 1994) (holding that [§] 704(a) was not violated when employer opposed former employee's claim for unemployment benefits because it was not retaliatory in nature).

sources selection function,"¹⁵³ and though many other types of individuals can provide references, the most useful reference providers are former employers.¹⁵⁴ If employers hope to continue receiving information on job applicants from other employers, they themselves must continue to provide references to other employers.¹⁵⁵ In addition, employers have another interest at stake—employees who know that their employers provide references have a greater incentive to be more productive and to be better workers.¹⁵⁶ Finally, although employers already face potential defamation liability under state law,¹⁵⁷ many employers continue to provide references despite this threat; this suggests that employers are unlikely to discontinue providing references even with the threat of section 704(a) suits.

III

POSTEMPLOYMENT RETALIATION THAT IS PERSONAL IN NATURE

Even among those who believe that section 704(a) should be interpreted broadly to prohibit postemployment retaliation, there is doubt as to whether Title VII's antiretaliation provision should apply to postemployment retaliation that is personal in nature, rather than directly related to employment conditions. This Part will address this issue and argue that section 704(a) must be interpreted in a way that prohibits postemployment retaliation that is personal in nature for Congress's intent to be fulfilled under Title VII.

Personal retaliation comes not in the form of bad references or blacklisting; instead, it takes the form of harassment, physical threats, or defamation suits. Examples of personal retaliation against former employees have included: directing the police to arrest the former employee;¹⁵⁸ making late-night phone calls threatening the former employee;¹⁵⁹ physically attacking the former employee;¹⁶⁰ filing a for-

¹⁵³ Ramona L. Paetzold & Steven L. Willborn, *Employer (Ir)Rationality and the Demise of Employment References*, 30 *Am. Bus. L.J.* 123, 124 (1992).

¹⁵⁴ Between 50-100% of all employers check references to screen job applicants. *Id.* at 125.

¹⁵⁵ *Id.* at 126.

¹⁵⁶ See *id.*

¹⁵⁷ An employer is liable to an employee for defamation if the employer publishes a false statement about the employee that harms the employee's reputation and that is not privileged. *Id.* at 128.

¹⁵⁸ *Beckham v. Grand Affair, Inc.*, 671 F. Supp. 415, 417 (W.D.N.C. 1987).

¹⁵⁹ *Reed v. Shepard*, 939 F.2d 484, 492 (7th Cir. 1991).

¹⁶⁰ *Id.*

gery and theft charge against the former employee,¹⁶¹ and filing a defamation suit against the former employee.¹⁶²

One commentator has argued that section 704(a) should only apply to post-retaliation acts that are "related to employment."¹⁶³ Under this interpretation, false references would qualify, but physical threats and harassment would not since these "have no affect [sic] on a former employee's previous or future working conditions and, therefore, are unrelated to an employment relationship."¹⁶⁴

The majority of courts have not addressed as of yet the issue of whether section 704(a) attaches to postemployment retaliation that is personal in nature.¹⁶⁵ One court has broadened the application of section 704(a) and expressly stated that the retaliation need not directly affect present or future employment.¹⁶⁶

Although many courts have not yet expressly formulated a standard for delineating the scope of actionable postemployment retaliation, the few courts that have have followed the "related to employment test."¹⁶⁷ This standard requires that the retaliation be "related to or aris[e] out of an employment relationship."¹⁶⁸

If it is assumed that the "related to employment" test has support and will be applied in personal postemployment retaliation dis-

¹⁶¹ *Berry v. Stevinson Chevrolet*, 804 F. Supp. 121, 134 (D. Colo. 1992), *aff'd in part, rev'd in part on other grounds*, 74 F.3d 980 (10th Cir. 1996).

¹⁶² *EEOC v. Virginia Carolina Veneer Corp.*, 495 F. Supp. 775, 777 (W.D. Va. 1980).

¹⁶³ Patricia A. Moore, Note, Parting Is Such Sweet Sorrow: The Application of Title VII to Post-Employment Retaliation, 62 *Fordham L. Rev.* 205, 219 (1993) ("[I]n order to balance congressional objectives in the enactment of the statute against the potential for statutory abuse in the post-employment context, section 704(a) should protect former employees only when the post-employment actions are both retaliatory and related to employment.").

¹⁶⁴ *Id.* at 221; see also Samuel Estreicher & Michael C. Harper, *Cases and Materials on the Law Governing the Employment Relationship* 42 (2d Supp. 1995) (raising question of whether § 704(a) reaches postemployment retaliation and if answer should depend on whether adverse actions implicate employment conditions).

¹⁶⁵ But see *Berry*, 804 F. Supp. at 136 (expressly stating that § 704(a) applies to retaliation that does not interfere with employment); *Beckham v. Grand Affair, Inc.*, 671 F. Supp. 415, 419 (W.D.N.C. 1987) (applying § 704(a) to retaliation that harmed former employee personally). *Beckham* was impliedly overruled by *Polsby v. Chase*, 970 F.2d 1360, 1365 (4th Cir. 1992), vacated on other grounds, 113 S. Ct. 1940 (1993).

¹⁶⁶ *Berry*, 804 F. Supp. at 136. The court held that an employer's forgery suit constituted retaliation under § 704(a).

¹⁶⁷ *Robinson v. Shell Oil Co.*, No. 93-1562, 1995 WL 25831, at *2 (4th Cir. Jan. 18, 1995) (stating that § 704(a) exists when the retaliation either "arose from the employment relationship or was related to the employment"), vacated and reh'g granted en banc, on reh'g, 70 F.3d 325 (4th Cir. 1995), cert. granted, No. 95-1376, 1996 WL 97912 (U.S. Apr. 22, 1996); *Charlton v. Paramus Bd. of Educ.*, 25 F.3d 194, 200 (3d Cir.) (same), cert. denied, 115 S. Ct. 590 (1994); *Pantchenko v. C.B. Dolge Co.*, 581 F.2d 1052, 1055 (2d Cir. 1978) (same).

¹⁶⁸ *Pantchenko*, 581 F.2d at 1054; see also *Robinson*, 1995 WL 25831, at *2; *Charlton*, 25 F.3d at 200.

putes,¹⁶⁹ as this Note argues it should, the issue thus becomes whether threats or physical attacks by a former employer against an employee who has filed an EEOC charge qualify as being related to or arising out of an employment relationship. Personal postemployment retaliation passes the “related to or arises out of employment relationship” test because section 704(a) protection stems initially from the employer-employee relationship wherein the initial Title VII violation occurred. But for the prior employment relationship, there would be no section 703 violation and no section 704 protection. As has been noted, “[i]n the instant case, we may conclusively state that [the former employer’s] alleged retaliation . . . arose from their employment relationship because [the former employer] would not have been provided the opportunity to retaliate against [the former employee] but for the fact that [the former employer] had employed him.”¹⁷⁰ Given this direct “but for” causation in all cases of retaliation, attempts to cabin section 704(a) to only certain forms of retaliation seem unpersuasive.

The best interpretation of section 704(a) is one which effectuates its complete purpose. To do this, section 704(a) needs to encompass all retaliatory acts, including personal retaliation that occurs after the formal employment relationship has ended. A retaliatory act that is personal in nature is as much of a threat to an employee who is contemplating a Title VII action as retaliation that is employment related. In addition, if section 704(a) did not apply to retaliation that was personal in nature, employees would be left with no remedy in certain circumstances.

Consider, for example, *Passer v. American Chemical Society*,¹⁷¹ where the retaliation took the form of cancelling a symposium in honor of a former employee who had filed an age discrimination claim.¹⁷² As the cancelling of the symposium did not appear to affect future employment opportunities, the former employee was left with no remedy since there was no prospective employer to pursue and no state-law claim or criminal charge available.¹⁷³ This dilemma was also

¹⁶⁹ This can be safely assumed since no case has objected to the “related to employment” test, and no case has offered a different test.

¹⁷⁰ *Robinson*, 1995 WL 25831, at *2.

¹⁷¹ 935 F.2d 322 (D.C. Cir. 1991).

¹⁷² *Id.* at 324-25. The ADEA has a provision similar to Title VII’s antiretaliation provision. Courts frequently rely on Title VII when interpreting the ADEA. See *id.* at 330.

¹⁷³ The court in *Passer*, however, did accept that the retaliation affected future employment opportunities. *Id.* at 331. The court held that the ADEA’s antiretaliation provision covered the cancellation of the symposium, reasoning that the “cancellation of the seminar humiliated [Passer] before the assemblage of his professional associates and peers . . . and

present in *Berry v. Stevinson Chevrolet*¹⁷⁴ and *EEOC v. Virginia Carolina Veneer Corp.*,¹⁷⁵ where former employers filed forgery and defamation suits, respectively, against their former employees, retaliations which did not impact each former employee's future employment. A requirement that retaliation be "related to employment" leaves these victims unprotected by the very statutes designed to eliminate invidious discrimination in the workplace.

Only under a broad interpretation of section 704(a) will employees feel free to come forward and effectuate Congress's purpose in enacting Title VII. If personal retaliatory acts are exempted from section 704(a) coverage, employees will still fear retaliation and not come forward with their Title VII claims.

CONCLUSION

This Note has argued that section 704(a) should be interpreted to protect both current and former employees from retaliation. The broadest interpretation of section 704(a) would cover all postemployment retaliation including retaliation that affected future employment opportunities and retaliation that was personal in nature.

The most compelling reason to interpret section 704(a) to its broadest extent is its underlying purpose and the purpose of Title VII itself. The purpose of section 704(a) is to make employees feel safe from employer retribution so that these individuals come forward with their Title VII claims. The failure to prohibit postemployment retaliation directly leads to a chilling of Title VII claims. Since alternative remedies are unavailable in many retaliatory circumstances, section 704(a) plays a crucial role as the primary means of protection for former employees. Only a broad interpretation of section 704(a) will fulfill Congress's purpose in enacting section 704(a) and fit coherently in Title VII's self-initiative framework.

made it more difficult for him to procure future employment." *Id.* However, similar situations that would not affect future employment could easily be envisioned.

¹⁷⁴ 804 F. Supp. 121, 134 (D. Colo. 1992) (former employer reported possible forgery and theft to sheriff's office in retaliation for employee filing discrimination claim), *aff'd in part, rev'd in part on other grounds*, 74 F.3d 980 (10th Cir. 1996).

¹⁷⁵ 495 F. Supp. 775, 776-77 (W.D. Va. 1980) (former employer filed defamation suit against former employee in retaliation for employee filing sex-discrimination charge).