Robinson v. Shell Oil Co.: Providing Former Employees with Protection from Retaliation

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ROBINSON v. SHELL OIL CO.: PROVIDING FORMER EMPLOYEES WITH PROTECTION FROM RETALIATION

I. INTRODUCTION

Under Title VII of the Civil Rights Act of 1964, an employer is prohibited from discriminating against an employee based on the employee’s race, color, religion, sex or national origin.1 The statute also has an anti-retaliation provision, which provides that an employer is further prohibited from discriminating against “employees or applicants for employment” because he/she has invoked his/her rights under this subchapter, and opposed any unlawful, discriminatory practice, or because he/she has made a “charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.”2

In general, although there is a lack of legislative history regarding this portion of Title VII,3 it is believed that, since the statute is enforced through aggrieved individuals filing charges, Congress intended to provide victims of alleged discrimination with protection from retaliation, once they have invoked their rights under the statute.4 However, there has been some dispute as to whether or not former employees are protected from retaliation under section 704(a), since the statute does not explicitly mention them.5

4. See Tafuri, supra note 3, at 806-16 (discussing arguments for a broad interpretation, including specifically Congress’s overall purpose behind Title VII).
5. There is currently a split in the circuit courts, and recently this issue came before the Supreme Court in Robinson v. Shell, 70 F.3d 325 (4th Cir. 1995), rev’d, 117 S. Ct. 843 (1997). The 4th Circuit followed a narrow interpretation in Robinson, and concluded that former employees are not protected under the statute. See id. The 4th Circuit first promulgated this
According to the statute's definition, the term "employee" means "an individual employed by an employer." Although this phrase is generally acknowledged to mean someone currently employed, it is argued that it can also refer to someone who was formerly employed. Consequently, this definition is not helpful in providing clarification on the issue, and can be viewed as ambiguous by supporters of a broad interpretation.

There was a recent split in the circuits on this issue, making the fate of former employees who brought suits based on retaliation unclear. However, the Supreme Court finally resolved this debate last year with its opinion in *Robinson v. Shell Oil Co.*, declaring
that former employees are protected under section 704(a). The Court concluded that, although both sides presented persuasive arguments, after careful analysis and consideration, the statutory language was in fact ambiguous, and in order to resolve this ambiguity, it was necessary to look to the overall purpose of Title VII and the EEOC's interpretation. The Court held that Congress did intend to provide former employees with protection from retaliation after the employment relationship has been terminated, and that a broad interpretation is appropriate.

After the oral argument, although it appeared likely that the Supreme Court would support a broad interpretation and follow the lead of the majority of the circuit courts, the unanimous decision was surprising. In light of the questions and comments made by Chief Justice Rehnquist, and strict constructionist, Justice Scalia, reversed the District Court. The Fourth Circuit granted rehearing en banc, vacated the panel decision, and thereafter affirmed the District Court's determination that former employees may not bring suit under § 704(a) for retaliation occurring after termination of their employment.

Id. at 845.

10. See id. at 843.
11. See id. at 846. Justice Thomas stated:

The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole. In this case, consideration of those factors leads us to conclude that the term "employees," as used in § 704(a), is ambiguous as to whether it excludes former employees.

Id. (citations omitted).

12. See id. 848. The author of this Note strongly agrees with the decision which the Supreme Court rendered. However, for an interesting critique of the decision from the opposition's perspective, which declares that the Supreme Court's "judicial extension of Title VII was unwarranted," see generally Barry T. Meek, Note, Robinson v. Shell Oil Co.: Policy -- Not Ambiguity -- Drives the Supreme Court's Decision to Broaden Title VII's Retaliation Coverage, 31 U. Rich. L. Rev. 473, 475 (1997) (arguing that it was not Congress's intent to extend coverage to former employees, evidenced by the absence of any express language doing so).

13. See infra text accompanying notes 132-46.
15. See supra text accompanying note 8. Seven circuit courts have held that former employees have a cause of action for retaliation related to the employment relationship. See Veprinsky v. Fluor Daniel, 87 F.3d 881 (7th Cir. 1996); Berry v. Stevinson Chevrolet, 74 F.3d 980 (10th Cir. 1996); Charlton v. Paramus Bd. of Educ., 25 F.3d 194 (3d Cir. 1994); EEOC v. J.M. Huber Corp., 927 F.2d 1322 (5th Cir. 1991); Sherman v. Burke Contracting, Inc., 891 F.2d 1527 (11th Cir. 1990); Bailey v. USX Corp., 850 F.2d 1506 (11th Cir. 1988); O'Brien v. Sky Chefs, Inc., 670 F.2d 864 (9th Cir. 1982); Pantchenko v. C.B. Dolge Corp., 581 F.2d 1052 (2d Cir. 1978); Rutherford v. American Bank of Commerce, 565 F.2d 1162 (10th Cir. 1977).
a dissent seemed likely. Furthermore, after analysis of prior Court decisions involving Title VII and the EEOC, deference to the enforcement agency was not anticipated, and although not explicitly a Chevron decision, the opinion relies heavily on the position promulgated by the EEOC and virtually constitutes deference.

Had the Court been split, the author would have recommended legislative reform in order to ensure protection of the rights of former employees, yet such a recommendation seems fruitless in light of a unanimous decision. The chance of employers combating a unanimous decision is nil and, therefore, what must be analyzed are the repercussions of the decision on employers' willingness to give references. According to the reaction of employer associations, in all probability, Robinson will make employers hesitant to give out references more extensive than "name, rank and serial number." However, this result is a small price to pay, in return for protecting former employees from retaliation and ensuring that they will not be reluctant to file a complaint if they are victimized by retaliation. In actuality, the Robinson decision does not impose any onerous burdens on employers to avoid liability. All it does is simply force employers "to start living up to the obligations of the law."

II. The Road to Robinson

A. Statutory Language

The anti-retaliation provision explicitly covers employees and applicants and makes no reference to former employees. Title VII's definition of an "employee" refers to "an individual employed by an employer." Many strict constructionists have argued that the statutory language is unambiguous, and there is no need to look to

16. See infra text accompanying notes 147-49.
17. See infra text accompanying notes 154-56.
19. See infra text accompanying note 153.
20. See infra text accompanying notes 169-78.
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legislative history or congressional intent. However, supporters of a broad interpretation have argued that there is room to include former employees in the definition of the term “employee” under the statute. They argued that although “employed” can be used in the passive voice to mean presently employed, it can also be used in the active voice to mean employed in the past. Supporters of a broad interpretation also pointed out that “employee” is used in nine instances in Title VII, in which the term “clearly encompasses former employees.”

Both sides of this argument (over how the term “employee” should be construed within section 704(a) of Title VII), were summarized nicely in the briefs submitted to the U.S. Supreme Court prior to the oral arguments for Robinson v. Shell.

According to the respondent’s brief, if the “normal rules of statutory construction” were followed, the Fourth Circuit’s decision should have been affirmed, and the statute interpreted so as not to include former employees. The respondent asserted that, “[t]he language of Section 704(a) is clear and unambiguous. Employers are prohibited from retaliating against ‘his employees and applicants for employment.’ Former employees are not included within the protection of Section 704(a).” The respondent stated that the only time a court may stray from the plain language of an unambiguous statute is when either, “the literal application of the statute would lead to an absurd result,” or “when literal application of the statutory language would produce a result demonstrably at odds with the intent of Congress.”

Furthermore, the respondent highlighted the distinction between the use of the words “individual” and “employee” in the statutory language of Title VII. “Had Congress intended to prohibit retaliation by an employer against former employees or applicants for employment it could have easily substituted the term ‘individual’

26. Id. at 14.
29. Id.
30. Id. at 11-12.
31. See id. at 15.
for 'his employees' in Section 704(a)." The respondent noted that this is exactly what Congress did with recent legislation such as the Americans with Disabilities Act of 1990, and the Family and Medical Leave Act of 1993.

Also, the respondent noted that Congress could have easily included "former employees," along with "employees or applicants for employment" in section 704(a). The respondent cited other examples of legislation in which Congress did exactly that, i.e., The Occupational Safety and Health Act, and The Whistleblower Protection Act of 1989.

The respondent argued that, in light of these statutes which either include specific reference to former employees or language broad enough to cover them under the general interpretation, "it can hardly be argued that the omission of former employees from the protection of section 704(a) was inadvertent or unforeseen. There is no ambiguity."

The petitioner on the other hand, argued that the statutory definition of "employee" in Title VII, "an individual employed by an employer," can mean, "'an individual formerly employed,' because 'employed' is both the past and present tense, passive voice and the past tense, active voice of the verb 'employ.'"

**B. Lack of Legislative History**

Although Justice Scalia disagrees with this method of interpretation, one way of trying to resolve the issue of whether or not the term "employees" should be construed to include "former employees," was to look to Congressional intent and the underlying purpose of Title VII. However, it was virtually impossible to look to

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32. Id.
36. Id. at 16.
42. See William N. Eskridge, Jr., Reneging on History? Playing the Court/Congress/President Civil Rights Game, 79 CAL. L. REV. 613, 676 (1991) (referring to Justice Scalia's "new textualist" approach, focusing on the "plain meaning" of the statutory text, without consideration of the "subjective" preferences of Congress).
the legislative history of the anti-retaliation provision of Title VII in order to determine Congressional intent, because there is sparse legislative history on the applicable section, section 704(a), and it does not address the issue of whether or not former employees are covered by the section.43

C. EEOC’s Position

In light of the lack of legislative history, and the split in the circuits, it appears as though the next place to look for guidance in analyzing this question was the Equal Employment Opportunity Commission (EEOC). Under Title VII, the EEOC is the administrative agency responsible for the enforcement of Title VII.44 In its Compliance Manual, the EEOC explicitly states in the introduction portion of the retaliation section that, “[s]ection 704(a) of Title VII of the Civil Rights Act of 1964, as amended, is intended to provide ‘exceptionally broad protection’ for protesters of discriminatory employment practices,” and the Commission is committed to this “exceptionally broad” policy of protecting individuals who protest unlawful employment discrimination.45

In its Compliance Manual, the Commission emphasizes the importance of the anti-retaliation provision for the effective enforcement of Title VII:

The effective enforcement of Title VII . . . depends in very large part on the initiative of individuals to oppose employment policies or practices which are reasonably believed to be unlawful. Protesting or otherwise opposing suspected discrimination serves to alert potential respondents to possible violations and allows them the opportunity to examine the matter brought to their attention and, where necessary, to take independent corrective action. Similarly, the filing of charges or complaints of discrimination and the information or assistance provided by witnesses and others in connection with an investigation greatly enhances the Commission’s ability to carry out its duty of administering and enforcing Title VII . . . . If 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. 46

Later on, within this same section on retaliation, under a list of examples of forbidden retaliations, the Commission explicitly states that post-employment retaliation is prohibited. 47 According to the Commission,

[a] respondent employer's obligation to refrain from retaliation against a former employee who has opposed discrimination does not end once that employee leaves its employ. It is a violation of Section 704(a) . . . to retaliate against a former employee in either of the following ways: (1) Discriminatorily unfavorable recommendation . . . [and] (2) Unwarranted contesting of an unemployment compensation claim . . . 48

Clearly, the EEOC's position makes logical sense and presumably seems to support the underlying purpose of Title VII and section 704(a). 49 However, many disagree with this position and state that this presumption is incorrect because of the lack of any explicit Congressional statement on the issue. 50 Yet, in light of the fact that this clear EEOC position statement exists and the majority of the circuit courts have enforced this position, it seems hard to believe that if this was not their intent, Congress would not have attempted to take some affirmative action to correct the situation prior to the case reaching the U.S. Supreme Court. 51

D. Legislative Inaction

It has reasonably been argued that if Congress disagreed with the broad interpretation of Title VII's anti-retaliation clause by the majority of the circuit courts, they would have taken some affirmative action to correct the situation and, therefore, their inaction has been interpreted to mean they agree with the broad interpreta-

46. Id. at 614-17.
47. See id. at 614-34.
48. Id.
50. See id. at 802.
51. See infra text accompanying notes 53-57.
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In fact, the Supreme Court has been known to rely on this one type of "subsequent legislative history: legislative inaction." It has been noted that, "[w]hile legislative inaction may not conclusively reflect legislative intent, one may reasonably infer that a Congress that enacted civil rights legislation affecting the very provision in question as recently as five years ago would have corrected such a widespread misapprehension—especially if it intended to exclude former employees."

The following argument presented in *Berry v. Stevinson Chevrolet,* refers to a case in which Congress directly responded to a statutory interpretation decision with which it disagreed. In *Berry* the defendants argued that the, Supreme Court's decision in *EEOC v. Aramco Services Co.,* 499 U.S. 244 (1991), constitutes an intervening case requiring [the court's] reconsideration of [it's prior decision in] *Rutherford.* *Rutherford* eschewed a literal reading of the section in favor of a reading that comported with the broad, remedial goals of Title VII. [Rutherford v. American Bank of Commerce, 565 F.2d 1162, 1165 (10th Cir. 1977)]. Defendants argue that *Aramco* stands for the proposition that a plain or literal reading of Title VII must govern judicial interpretation.

However, the defendants' argument in *Berry* was baseless, in light of what occurred after the *Aramco* decision came down. Shortly after the Court interpreted the application of the statute narrowly, Congress overruled the result and amended Title VII, to rebut the "literal reading" and the presumption of strictly territorial...
application.57 This exemplifies the theory that if Congress disagreed with judicial interpretation of a statute, they would immediately reform the statute in response. Therefore, the fact that Congress has failed to take any action in response to the circuit courts’ broad interpretation of section 704(a), can be interpreted as Congress’s silent affirmation that a broad interpretation is in fact the correct one.58

III. SPLIT IN THE CIRCUITS: NARROW VS. BROAD JUDICIAL INTERPRETATION OF THE ANTI-RETALIATION PROVISION

A. Narrow Interpretations

The Fourth Circuit is the only circuit which has stated flatly that former employees are excluded from protection against any form of retaliation.59 The Seventh Circuit and the Third Circuit have also interpreted the provision narrowly in part, excluding former employees from protection against any act of retaliation which is personal in nature, or cannot be considered an adverse employment action.60

The Fourth Circuit initially stated its position, excluding former employees from protection against retaliation from their former employers in Polsby v. Chase,61 and most recently they reiterated this position in Robinson v. Shell Oil Co.62 The majority and dissenting opinions of the Robinson decision will be discussed in more detail below, but the following is a summary of the majority’s decision (which is basically the same as the reasoning annunciated in Polsby).

The underlying rationale of the court’s opinion is that former employees should be excluded in accordance with the “plain meaning” approach. According to the Fourth Circuit, the statute clearly

58. See Mitchell, supra note 52, at 399.
60. See Nelson v. Upsala College, 51 F.3d 383 (3d Cir. 1995); Reed v. Shepard, 939 F.2d 484 (7th Cir. 1991).
provides that it is unlawful for an employer to retaliate against "employees" and "applicants," and in the court's opinion, if Congress intended former employees to be covered, they would have explicitly provided so.\textsuperscript{63} They concluded that former employees have alternative remedies; for example, under section 704(a), an applicant who is not hired by a prospective employer because they sought Title VII relief from a former employer, can bring suit against the prospective employer.\textsuperscript{64} Furthermore, they held that the rationale presented by the other circuit courts, which have interpreted the term "employee" broadly, to include a former employee, is unpersuasive,\textsuperscript{65} and "disregard[s] . . . the established analytical framework for statutory construction."\textsuperscript{66}

In contrast to the Fourth Circuit's sweeping exclusion of former employees from protection under Title VII's anti-retaliation provision, two other circuit courts, the Third and Seventh Circuits, have concluded that former employees are protected from certain types of acts.\textsuperscript{67} These courts have made the distinction between retaliatory acts which are personal in nature or unrelated to the employment context (which are unprotected), and those which are deemed "adverse employment actions" (which should be protected under Section 704(a)).\textsuperscript{68}

The Seventh Circuit was the first circuit court to annunciate a narrow interpretation of the term "employee," and the Fourth Circuit stated that they were following the Seventh Circuit's lead in their holding in Polsby.\textsuperscript{69} Initially the holding in Reed v. Shepard\textsuperscript{70} appeared to be broader than the court actually intended, and many interpreted it to mean that former employees did not have standing under Title VII to bring retaliation suits against former employers.\textsuperscript{71} However, the Seventh Circuit recently clarified the rule

\begin{footnotesize}
\begin{enumerate}
\item See Robinson, 70 F.3d at 330; Polsby, 970 F.2d at 1364.
\item See Polsby, 970 F.2d at 1365.
\item See id.
\item Robinson, 70 F.3d at 332.
\item See Polsby, 970 F.2d at 1364.
\item 939 F.2d 484 (7th Cir. 1991).
\item See, e.g., Polsby v. Chase, 970 F.2d 1360.
\end{enumerate}
\end{footnotesize}
promulgated in Reed, in the case Veprinsky v. Fluor Daniel.\textsuperscript{72} The court stated that Reed, “excludes from the realm of actionable retaliation only those post-termination acts which are unrelated to the plaintiff’s employment. Conduct that is related to the plaintiff’s employment or his efforts to gain new employment is not addressed by Reed.”\textsuperscript{73} The court went on to say that they believe that “post-termination acts of retaliation that have a nexus to employment are actionable under Title VII.”\textsuperscript{74}

The Third Circuit asserts basically the same position, however, they did it in the reverse order of the Seventh Circuit. The Third Circuit followed a broad interpretation of the term “employee” in the case Charlton v. Paramus Board of Education.\textsuperscript{75} However, a year later, it too needed to clarify its position (to resemble that of the Seventh Circuit), in Nelson v. Upsala College.\textsuperscript{76} The majority in Nelson stated,

That case [Charlton] does not hold that all post-employment activity of an employer aimed at a former employee in response to her having brought or participated in a Title VII proceeding is actionable under section 704. Rather, Charlton simply holds that a former employee has standing to bring a retaliation suit under section 704. . . . Indeed, if anything, Charlton suggests that post-employment conduct, to give rise to a retaliation complaint, must relate to an employment relationship. Charlton makes this implication by indicating that “courts . . . have extended anti-retaliation protection . . . where the retaliation results in discharge from a later job, a refusal to hire the plaintiff, or other professional or occupational harm.”\textsuperscript{77}

Therefore, in light of these decisions, it is clear that an interpretation totally excluding former employees from pursuing any type of retaliation suit against their former employers is the minority view, currently held only by the Fourth Circuit.\textsuperscript{78} It is a view with a very narrow analysis, which ignores the “chilling effect” it could have on individuals from asserting their rights under Title VII if they are not guaranteed protection once the employment relationship has

\textsuperscript{72.} 87 F.3d 881 (7th Cir. 1996).
\textsuperscript{73.} Id. at 888 (citations omitted).
\textsuperscript{74.} Id.
\textsuperscript{75.} 25 F.3d 194 (3d Cir. 1994).
\textsuperscript{76.} 51 F.3d 383 (3d Cir. 1995).
\textsuperscript{77.} Nelson, 51 F.3d at 387.
\textsuperscript{78.} See Robinson v. Shell Oil Co., 70 F.3d 325; Polsby v. Chase, 970 F.2d 1360.
Although Reed and Nelson are considered to be narrow constructions, in actuality they are not; they do not refute that a former employee is protected from retaliation related to the employment relationship. They only assert that acts unrelated to employment (even if deemed retaliatory in nature) should be excluded.

B. Broad Interpretations

The Second, Third, Fifth, Seventh, Ninth, Tenth and Eleventh Circuits have interpreted the provision broadly, prohibiting retaliation against former employees, in circumstances related to employment. Since there are a number of cases which follow a broad interpretation of the term "employee," rather than reiterate the reasoning in each case, the author will summarize the general arguments presented supporting this interpretation.

In response to the "plain meaning" approach urged by supporters of a narrow interpretation, supporters of a broad interpretation have argued that the statutory language of section 704(a) is ambiguous. Supporters of a broad interpretation have asserted that a narrow interpretation is inappropriate in light of their opinion that Congress intended to protect former employees from retaliation. Furthermore, they have argued that since Title VII enforcement relies on individual initiative and determination, employees and former employees who come forward must be protected from retaliation. Absent protection, aggrieved individuals would be deterred from invoking their rights. As stated in Charlton,
Title VII prohibits retaliation "to protect the employee who utilizes the tools provided by Congress to protect his rights." The need for protection against retaliation does not disappear when the employment relationship ends. Indeed, post-employment blacklisting is sometimes more damaging than on-the-job discrimination because an employee subject to discrimination on the job will often continue to receive a paycheck while a former employee subject to retaliation may be prevented from obtaining any work in the trade or occupation previously pursued.87

The Tenth Circuit was the first court to consider the issue of whether section 704(a) applied to former employees in Rutherford v. American Bank of Commerce.88 In Rutherford, the court asserted that in cases involving such a remedial statute,89 a broad interpretation is favorable and consistent with the purpose and objectives of the statute, and that a narrow reading excluding former employees was unjustified.90

The court in Rutherford based its reasoning on two other cases decided shortly beforehand,91 involving the corresponding provision in the Fair Labor Standards Act.92 The Tenth Circuit first cited Dunlop v. Carriage Carpet Shop,93 stating that it was aligning itself with the position taken by the Sixth Circuit in that case. In Dunlop, the Sixth Circuit held that,

A former employee, voluntarily separated from his former employer, was protected from discrimination by his former employer under 29 U.S.C. sec. 215, even though the statute did not refer to "former employees" and in fact only proscribed discrimination against employees.... [T]he Sixth Circuit concluded that former employees, no less than present employees, needed protection from discrimination by employers resentful of the fact

87. Id. at 200 (citations omitted).
88. 565 F.2d 1162 (10th Cir. 1977).
89. See id. at 1165 (stating that, "[a] statute which is remedial in nature should be liberally construed.").
90. See id.
91. See id. at 1165-66 (citing Dunlop v. Carriage Carpet Shop, 548 F.2d 139 (6th Cir. 1977); Hodgson v. Charles Martin Inspectors of Petroleum, Inc., 459 F.2d 303 (5th Cir. 1972)).
92. 29 U.S.C. § 215(a)(3) (1991) (providing that it is unlawful to discharge or in any other manner discriminate against "any employee" because such employee has filed a complaint under the Fair Labor Standards Act).
93. 548 F.2d 139 (6th Cir. 1977).
that a complaint had been made against them for alleged violation of the Fair Labor Standards Act.\(^{94}\)

The Rutherford court then went on to further address this rationale by discussing the case in which the Dunlop court cites, Hodgson v. Charles Martin Inspectors of Petroleum, Inc.\(^{95}\) The Rutherford court in its conclusion, quoted the Fifth Circuit’s commentary in Hodgson:

The possibility of retaliation, however, is far from being “remote and speculative” with respect to former employees for three reasons. First, it is a fact of business life that employers almost invariably require prospective employees to provide the names of their previous employees as references when applying for a job. Defendant’s former employees could be severely handicapped in their efforts to obtain new jobs if the defendant should brand them as “informers” when references are sought. Second, there is the possibility that a former employee may be subjected to retaliation by his new employer if that employer finds out that the employee has in the past cooperated with the Secretary. Third, a former employee may find it desirable or necessary to seek reemployment with the defendant. In such a case the former employee would stand the same risk of retaliation as the present employee.\(^{96}\)

The following year, the Second Circuit followed suit, and adopted the broad interpretation approach of the Tenth Circuit, in the case Pantchenko v. C.B. Dolge.\(^{97}\) In Pantchenko, the Second Circuit expanded upon the inappropriateness of a literal reading of the statute by noting the following wise observation of Learned Hand: “‘[I]t is a commonplace that a literal interpretation of the words of a statute is not always a safe guide to its meaning.’”\(^ {98}\)

Since the late seventies, the other circuits which have broadly interpreted section 704(a) have grounded their decisions on the rationale first promulgated by the Tenth Circuit in Rutherford v. American Bank of Commerce,\(^ {99}\) which was reiterated shortly thereafter by the Second Circuit in Pantchenko v. C.B. Dolge Company.

\(^{94}\) Rutherford, 565 F.2d at 1165-66 (citing Dunlop, 548 F.2d 139).

\(^{95}\) 459 F.2d 303 (5th Cir. 1972).

\(^{96}\) Rutherford, 565 F.2d at 1166 (citing Hodgson, 459 F.2d 303).

\(^{97}\) 581 F.2d 1052 (2d Cir. 1978).

\(^{98}\) Id. at 1055.

\(^{99}\) 565 F.2d 1162.
Since that time, the courts have slightly expanded upon this theory of broad interpretation, but the underlying theme throughout is the same: In order to effectuate the purpose of the statute, "former employees" must be provided with the same sort of protection from retaliation as current employees and applicants.  

IV. ROBINSON V. SHELL OIL CO.  

A. The Court of Appeals Decision  

The underlying rationale expressed by the Fourth Circuit, in support of a narrow interpretation of the statute, was primarily based on the "plain meaning" doctrine. According to the majority, in the absence of an explicit provision covering former employees, the statutory language is unambiguous, and there is no need to look any further. The majority stated that,  

...  

there are, however, rare and narrow exceptions when courts may stray beyond the plain language of unambiguous statutes. One such circumstance arises if the literal application of statutory language would lead to an absurd result. . . . Another circumstance permitting courts to look beyond the plain meaning of unambiguous statutory language arises if literal application of the statutory language would produce a result demonstrably at odds with the intent of Congress; in such cases, the intent of Congress rather than the strict language controls.  

The majority then concluded that,  

...  

neither exception applies because both require Congress to have made plain that it intended a result different than literal application would produce. Indeed, the absence of any language in Title VII's anti-retaliation provision referring to former employees is strong evidence that Congress did not intend Title VII to protect former employees.

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100. 581 F.2d 1052.  
103. Id.  
104. Id. at 330.
In the majority’s opinion, the circuit courts which have supported a broad interpretation, disregard the established analytical framework for statutory construction and inappropriately rely only on broad policy considerations. The majority stated that these other circuit courts, fall to heed to the Supreme Court’s repeated mandate: “We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: ‘judicial inquiry is complete.’”

The majority asserted that the type of practices which Title VII forbids strongly point to the exclusion of former employees, since according to the majority, these practices do not extend beyond the employment relationship and are no longer relevant once that relationship has been terminated. The anti-retaliation provision does not redress post-employment retaliation because of the second element of a prima facie case of retaliation under Title VII; in order for an employee to suffer an “adverse employment action,” according to the majority, such conduct must occur during the employment relationship.

In response to the majority’s decision, Circuit Judge Hall made a very convincing point by posing a hypothetical which resulted in “grossly absurd [and] plainly unintended result[s].” In his hypothetical, Judge Hall posed a situation in which two employees are to leave their place of employment, after filing Title VII claims against their employer on the same day. Both requested references shortly before they terminate their employment with the employer. Hall then stated that an accidental mail delay, of one of the two (allegedly retaliatory) bad references, could have created a situation in which one employee may have redress against the employer and the other employee “would be left in the cold.”

105. See id. at 332.
106. Id.
107. See id. at 330.
108. See Robinson, 70 F.3d at 331.
109. Id. at 333 (Hall, J., dissenting).
110. See id.
111. See id.
112. See id. The following is Judge Hall’s hypothetical:
Imagine that on Friday, the first day of the month, XYZ Corporation decides to terminate two of its line workers, Smith and Jones, and immediately gives them two
Hall stated that the majority could obviously not dispute the fact that both employees were equally "harmed" by their employer. Yet, due to a mere mail delay (of one day), according to the majority's opinion, only one of the two employees (the one who was a current employee when the letter was sent) would have standing. Clearly, Hall's hypothetical posed what could be referred to as an "absurd result," as mentioned by the majority, and pulls the rug out from the basis of the majority's opinion.

Judge Murnaghan, in support of Judge Hall's view, also made a persuasive argument for the broad interpretation of the term "employee," especially with his concluding remark: "After all, despite the long lapse of time, Joe DiMaggio can still be referred to as a center fielder for the New York Yankees." Murnaghan's statement illustrated how a former employee could still reasonably be referred to as an employee of his/her former place of employment, and in fact often is.

The dissent blatantly combated the majority's underlying arguments and made it clear that the majority's approach was too focused and did not properly consider the possible repercussions of completely excluding former employees. "By [the majority] choosing instead to focus exclusively on the time when the employee was actively working, the majority has framed its inquiry much too narrowly; such a myopic approach only frustrates Con-

weeks' written notice. Smith and Jones, each believing that she has been unlawfully discriminated against, file charges with the EEOC on Monday the fourth. Unable, however, to afford the luxury of undue optimism, both Smith and Jones explore the possibility of signing on with XYZ's competitor, LMNOP, Inc. On Tuesday the twelfth, XYZ's personnel department receives a letter from its LMNOP counterpart, requesting employment information and references on Smith and Jones. Annoyed that the pair have filed EEOC charges against the company, XYZ's personnel director intentionally and vindictively prepares false reports for dissemination to LMNOP. The spurious reports are place in separate envelopes and stamped for mailing on Friday the fifteenth, which also happens to be Smith and Jones' last day at XYZ. Although Smith's report is included in Friday's outgoing mail, Jones' report is inadvertently excluded, and, therefore, not sent to LMNOP until Monday the eighteenth.

Id. at 332.

113. See Robinson, 70 F.3d at 332-33.
114. See id. at 333.
115. Id. at 329 (referring to the language used in the majority's opinion).
116. Id. at 335 (Murnaghan, J., dissenting).
117. See id. at 332-35.
gress's attempt, through Title VII, to eradicate workplace discrimination.118

B. The Oral Argument: Speculation on the
Supreme Court's Decision

In light of the narrow basis of the Fourth Circuit's opinion,119 and the thought provoking points made by the dissenting opinions, it did not appear that the Supreme Court would rely heavily on the decision of the lower court. Rather, after hearing the questions posed during the oral argument for the case on November 6, 1996,120 it appeared that the Supreme Court would give the issue much broader consideration than the Fourth Circuit, and hopefully delve into some of the arguments made by both sides in their appellate briefs.

Although Robinson built a strong appellate case, and with the help of the EEOC, presented a powerful argument,121 prior to the decision coming down, it was not completely clear that the Court would support a broad interpretation of the statute, in light of the views expressed by Chief Justice Rehnquist and Justice Scalia.

[They] appeared unpersuaded, saying employees could gain the upper hand over their employers by filing a discrimination complaint a few days before they quit or [in anticipation of] being fired. Employers faced with the possibility of a post-employment retaliation claim would be loath to say anything bad about their former employee to a prospective employer.122

Justice Scalia stated that if former employees were covered, the only way an employer could definitely avoid liability, and avoid being sued, would be to not give out any references.123 Furthermore, Scalia

118. Id. at 334 (Hall, J., dissenting).
120. The author went to the Supreme Court on Nov. 6, 1996, to hear the oral arguments presented. See Transcript of Oral Argument, Robinson v. Shell Oil Co., 1996 WL 656475.
123. See id. Scalia stated, "You would be very wise to file an EEOC complaint before you quit. . . . He [the former employer] is buying a lawsuit, 'if he says anything unflattering about the ex-employee." Id.
[d]isagreed with the notion that the intent of lawmakers was evident thirty two years ago\(^1\)\(^2\)\(^4\) when Title VII was passed. [He said,] “If I was Congress, I would have a hard time figuring out how an employer could discriminate against an employee after the employment relationship is terminated.”\(^1\)\(^2\)\(^5\)

However, on the flip side, Justice Ruth Bader Ginsburg, appeared unconvinced with Shell’s attorney, Lawrence C. Butler’s assertion that, “[t]he Act does afford more protection to those who are employed than those who are not employed.”\(^1\)\(^2\)\(^6\) Justice Ginsburg stated that Butler’s argument would “allow employers to retaliate freely against people they had fired for filing discrimination claims. It tells employers, ‘You are home free.’”\(^1\)\(^2\)\(^7\)

Ironically, on a more surprising note, was the comment made by the conservative Justice Clarence Thomas (who proceeded to write the Court’s unanimous decision),\(^1\)\(^2\)\(^8\) who rarely questions lawyers during oral arguments. Justice Thomas asked Butler, “whether it was [his] position that an employer could turn to a former employee and say, ‘Look, you filed a claim against me, and I will see that you never work in this business again.’”\(^1\)\(^2\)\(^9\)

At one point, Justice Souter also, “appeared ready to . . . Butler concede that former employees must enjoy Title VII protection, otherwise fired workers would be unable to sue former employers for discriminatory terminations.”\(^1\)\(^3\)\(^0\) Then later on, Justices Kennedy and Stevens got into a debate with Robinson’s lawyer, Allen M. Lenchek, over whether a company pension kept the employment relationship alive; Justice Kennedy felt it did, and for the purposes of Title VII, it could not be taken away in retaliation.\(^1\)\(^3\)\(^1\)


125. Id.


127. Id. at *41-42.

128. Although Justice Thomas is a conservative, the fact that he served as the Chairman of the EEOC during President Ronald Regan’s administration may account for his sentiments on this issue. See Linda Greenhouse, *Justices Say Ban on Bias Forbids Retaliation, Even Against Ex-Employees*, N.Y. TIMES, Feb. 19, 1997, at A12.

129. Lash, supra note 122.

130. Lash, supra note 122.

131. See Lash, supra note 122.
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After the oral argument (in light of the comments made, questions posed, and the general views of the individual Justices), prior to the decision being released, the author presumed that Justices Ginsburg, Souter, Kennedy, and probably Thomas, would support a broad interpretation, and that at least Chief Justice Rehnquist and Justices Scalia would support a narrow interpretation and want to affirm the Fourth Circuit’s opinion based on the “plain meaning” approach. At that point, it was difficult to speculate on which way Justices O’Connor, Stevens, and Breyer would vote, so it was hard to say for sure what the outcome would be. Yet, it seemed likely that at least one of the “indeterminable” votes would swing, in order to enable the Court to find in accordance with the majority of the circuits and interpret the term “employee” broadly to cover former employees. Therefore, the reversal of the Fourth Circuit’s decision, in light of the analysis done shortly after the oral arguments, was not surprising; however, the fact that the decision was unanimous was quite a shock.

V. THE UNANIMOUS SUPREME COURT DECISION

The Supreme Court handed down its unanimous decision in Robinson v. Shell Oil Co.,132 on Tuesday, February 18, 1997, holding that former employees have the same rights as current employees and job applicants to sue on the basis that they were retaliated against for asserting their protected rights under Title VII.133 The decision was written by Justice Clarence Thomas, who served as the chairman of the EEOC during the Reagan administration.134

In the decision, the Court first determined whether “the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.”135 According to the Court, this determination must be made in light of three factors: “the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.”136 After analyzing these factors, the Court concluded, in direct contradiction to the finding of the Fourth Circuit, that the term “employees” as used in section 704(a), “is ambiguous as to whether it excludes former employ-

133. See id. at 849.
134. See Greenhouse, supra note 128, at A12.
136. Id.
The Court stated a variety of reasons why the statutory language is in fact ambiguous. Justice Thomas first wrote that the lack of temporal qualifiers in either section 704(a) (the anti-retaliation provision) or section 701(f) (the definition of the term "employees"), fails to make it plain that section 704(a) "protects only persons still employed at the time of the retaliation," and therefore results in ambiguity. Thomas then cited the argument made by Robinson, noting that "a number of provisions in Title VII use the term 'employees' to mean something more inclusive or different than 'current employees.'" Finally, Thomas noted that the failure to include "former employees" (since the statute specifically designates "employees" and "applicants for employment") or to use the broader term "individual" (which is used in other portions of the statute) is not evidence of congressional intent not to include former employees.

After concluding that section 704(a) is ambiguous, the Court was "left to resolve that ambiguity." In resolving this ambiguity, the Court looked to the broader context of the statute for assistance. In doing so, the Court concluded that "several sections of the statute plainly contemplate that former employees will make use of the remedial mechanisms of Title VII." Furthermore, the Court agreed with the petitioner's argument, and the EEOC's position, that the word "employees" includes former employees because to hold otherwise would effectively vitiate much of the protection afforded by Section 704(a). . . . According to [the] EEOC, exclusion of former employees from the protection of Section 704(a) would undermine the effectiveness of Title VII by allowing the threat of post-employment retaliation to deter victims of discrimination from complaining to [the] EEOC, and would provide a perverse incentive for employers to fire employees who might bring Title VII claims.

137. Id.
138. Id.
140. Robinson, 117 S. Ct. at 847 (citing examples such as sections 706(g)(1) and 717(b)).
141. See id. at 848.
142. Id.
143. Id.
144. Id.
The Court deemed these persuasive arguments, consistent with the primary purpose of the anti-retaliation provision: "[m]aintaining unfettered access to statutory remedial mechanisms."\textsuperscript{145}

Accordingly, the Court reversed the Fourth Circuit's narrow interpretation and dismissed its "plain meaning" approach, after concluding that the statutory language was in fact ambiguous, and that in light of the broad purpose of Title VII, former employees should rightly be covered under section 704(a).

\textbf{A. The Missing Piece: Scalia's Dissent}

Although the fact that the Court ruled in favor of a broad interpretation is not surprising, the fact that it was a unanimous decision is. Both Chief Justice Rehnquist and Justice Scalia seemed hesitant to adopt such an approach during the oral arguments. Furthermore, such a decision seems completely out of sync with Justice Scalia's general plain meaning approach, or his "new textualist" approach.

In other words, it appears clear that in order to effectuate the purpose of Title VII, former employees should be protected under the anti-retaliation provision. However, it seemed as though the Fourth Circuit's opinion, deeming the statutory language unambiguous, would have appealed to Justice Scalia and provided him with a foundation upon which to apply his "plain meaning" approach. In general, Justice Scalia's theory\textsuperscript{146} is that,

the Court's role is not to implement the preferences of either the enacting or the current legislature, but to apply the "plain meaning" of the statutory text as passed by both chambers of Congress and presented to the President. The new textualism posits that truly "neutral" statutory interpretation does not consider the "subjective" preferences of Congress, only the "objective" meaning of a statute's words. If the plain meaning of the words runs counter to current legislative preferences, textualism's adherents reason, Congress can always amend the statute. New textualists

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\textsuperscript{145} Id.
\textsuperscript{146} See Robinson, 117 S. Ct. at 848-49.
\textsuperscript{147} See William N. Eskridge, Jr., \textit{Reneging on History? Playing the Court/Congress/President Civil Rights Game}, 79 CAL. L. REV. 613, 676 (1991) (referring to Justice Scalia's theory as "new textualism").
\end{flushright}
believe it is better . . . for Congress to do the amending than for the Court to do so through "interpretation."\textsuperscript{148}

However, some things are not in fact as predictable as they first seem, and Justice Scalia apparently found the arguments presented by the petitioner and the EEOC to be more persuasive and logically appealing than the Fourth Circuit’s opinion and the arguments presented by the respondent.\textsuperscript{149}

Another possible rationale behind the Supreme Court’s decision is provided by Professor William Eskridge. According to Professor Eskridge, “civil rights statutory policy is dynamic and interactive. Civil rights policy is interactive because it involves the cooperation, and often the conflict, among the Congress, the President, and the Court.”\textsuperscript{150} Eskridge poses the following model:

The Court makes the first move when it interprets a civil rights statute. Once the Court has interpreted the statute, the gatekeepers then decide whether they want to seek a legislative override; if they do, Congress must decide what policy to adopt, and it is not constrained by the gatekeepers’ choice. If Congress passes a statute, the President must decide whether to veto it. Should the President veto it, Congress must decide whether to override the President’s veto.\textsuperscript{151}

In his model, Eskridge suggests that the Court is in a sense a “political actor.”\textsuperscript{152} Basically, Eskridge states that,

each player in making its moves will not want to make a decision that will be overturned by another player with the authority to do so. In other words, in deciding whether to act, each player will do nothing if it realizes that its decision will be overturned by the next player.\textsuperscript{153}

In the author’s opinion, this model seems to provide a logical reason for the unanimous decision. Basically, had the Supreme Court’s decision been split, rather than unanimous, the saga would not have been over. Supporters of protection for former employees, as the author, would have supported efforts for legislative reform, in order to counteract the statutory ambiguity and backlash.

\textsuperscript{148} Id. at 676-77.
\textsuperscript{149} See Robinson, 117 S. Ct. 843 (1997) (Scalia, J., concurring).
\textsuperscript{150} Eskridge, \textit{supra} note 147, at 641-42.
\textsuperscript{151} Eskridge, \textit{supra} note 147, at 643-44.
\textsuperscript{152} Eskridge, \textit{supra} note 147, at 664.
\textsuperscript{153} Eskridge, \textit{supra} note 147, at 644.
from employer groups, in order to truly protect the rights of former employees. Yet, now such a recommendation seems pointless. The rights of former employees are no longer in jeopardy. Backlash from employer groups is not going to be very abundant or successful, in light of a unanimous Supreme Court decision, without the support of the conservative Justices on their side.

B. Deference to the EEOC

Although not an explicit *Chevron*\(^{154}\) decision, it does appear that the Court did in fact give deference to the EEOC on this issue, and this may possibly be the beginning of a new attitude towards giving greater consideration to the position of the EEOC. This subtle deference to the EEOC was also quite surprising in view of the Court's prior attitude in other cases calling for such deference.\(^{155}\) As one author has commented:

In this post-*Chevron* era, in which the judiciary often defers to agency interpretations of statutes, one would suppose it is the EEOC to whom Congress, expressly or impliedly, confided the authority to interpret the laws administered by that agency. Yet the Supreme Court has not confirmed this supposition. Instead, despite strong disagreement from within the Court, the majority has suggested a lesser role for the EEOC on questions of statutory interpretation than is enjoyed by most independent agencies, in turn reserving for the judiciary a greater lawmaking role in the employment discrimination area.\(^{156}\)

In the author's opinion, it is only proper for the Court to recognize the EEOC's expertise in this area and to seriously consider the positions promulgated by the agency in its Compliance Manual.\(^{157}\) "The decision marks the second time [in 1997] all nine justices have issued a ruling in which they sided with the Equal Employment Opportunity Commission in a Title VII case."\(^{158}\) Therefore, Robin-

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155. See White, *supra* note 154, at 54.

156. White, *supra* note 154, at 54.

157. See *supra* text accompanying notes 44-51.

son may be a bright light indicating a change in the majority view, and may signify the beginning of a new trend towards deference to the EEOC.

Rebecca Hanner White makes a compelling argument that the courts “should find an implied delegation to the EEOC of authority to interpret Title VII.”159 If this is to occur, clearly the costs associated with Title VII (related to many of its ambiguous provisions) will be reduced, and the controversy over judicial interpretation will be virtually eliminated. Furthermore, “[i]t [will place] important policy choices into the hands of a politically accountable actor, rather than those of politically unaccountable courts.”161 Not to mention the fact that, “the enforcement powers granted the agency under Title VII make it obvious that statutory interpretation by the agency necessarily must occur.”162 Finally, it only makes sense that the EEOC is given deference in its interpretation of Title VII, since it is, “the sole arm of the federal government with an exclusive focus on eradicating job discrimination.”163

The Aramco decision, discussed supra,164 helps illustrate the benefits of deference to the EEOC. This case was a clear situation in which, “the Court refused to defer to the EEOC’s construction of Title VII that allowed extraterritorial application of the statute. Although admitting the statute was ambiguous, the Court did not follow the Chevron approach....”165 Consequently, the Court held that Title VII did not apply extraterritorially, and Congress amended the statute shortly thereafter in order to counteract the decision.166 However, had the Court deferred to the agency’s interpretation initially, the ensuing legislative effort and time could have been conserved.

159. White, supra note 154, at 57-58.
160. See Gregory E. Maggs, Reducing the Costs of Statutory Ambiguity: Alternative Approaches and the Federal Courts Study Committee, 29 HARV. J. ON LEGIS. 123, 126-30 (1992) (discussing the costs associated with ambiguous statutes, i.e., increased legal research costs, litigation costs, judicial system costs, increased unlawful activity, decreased lawful activity, discrimination, separation of powers problems, replacement costs, and diminished utility and justice).
161. White, supra note 154, at 107.
162. White, supra note 154, at 96.
163. White, supra note 154, at 53.
164. See supra notes 56-58 and accompanying text.
165. White, supra note 154, at 74.
Furthermore, *Robinson* also illustrates the benefits of deference to the EEOC in interpreting Title VII—had all of the circuit courts done so initially, a broad interpretation would have been adopted and this issue would have never come to the Supreme Court. However, once the issue reached the Supreme Court, the EEOC's position was given the consideration it deserves, and although the Court did not explicitly state that it was giving deference to the agency, it does appear that is in fact what they did. Hopefully, *Robinson* marks the beginning of a future trend which will substantially mitigate the time and effort devoted for future debates over other ambiguous portions of Title VII.

VI. THE ANTICIPATED RESPONSE FROM EMPLOYERS

Reporters deemed Tuesday, February 18, 1997, "a bad day for business," in the Supreme Court. After the Supreme Court announced its decision in *Robinson*, business advocates said that, "the ruling strengthens the law against workplace bias and will make bosses more reluctant to offer candid job references for fear of being sued." At a minimum, the decision will certainly fuel managers' complaints that giving honest job references is not always easy these days.

According to Allan Weitzman, "Relevant information about prospective employees is drying up, and this is another reason why." A number of business groups say that in reality the decision will make employers rethink a decision to give a negative job reference - even if warranted - to a former worker who previously filed a discrimination complaint. General Counsel to the Equal Employment Advisory Counsel, Ann Reesman, said that the deci-

167. See infra notes 44-51 and accompanying text.
171. See Felsenthal, supra note 169, at B12.
172. Mauro, supra note 170, at 1A; see Allan H. Weitzman & Kathleen M. McKenna, *In Light of Several Decisions Holding Employers Liable for Their Employee References, Many Companies Choose Not to Give Any*, NAT'L L. J., May 19, 1997, at B4 (Mr. Weitzman & Ms. McKenna are employment lawyers from Florida).
sion will likely limit employers’ references to merely “name, rank and serial number.” This position was supported by the statement made by Mona Zeilberg, Senior Counsel for the U.S. Chamber of Commerce National Litigation Center, who stated, “It will probably fuel litigation in this area . . . . [a]nd it could possibly lead to even more anxiety about writing letters of reference for employees. The policy of many companies now is only to confirm dates of employment.” Some employer representatives even say that they expect “employers to refuse to provide references or to require that employees surrender their right to sue in exchange for references.” The new mantra of employment attorneys for their corporate clients, “especially those whose former employees have filed civil rights complaints [is]: Speak no evil, and if you speak, be very careful.”

However, contrary to what these employer groups are saying, the decision does not impose onerous, undue burdens on employers to avoid liability. Rather, as Richard T. Seymour of the Lawyers Committee for Civil Rights Under the Law said, “[the] decision, combined with other recent rulings, sends a message to employers: ‘Stop thinking that there is refuge in technical loopholes. It is time to start living up to the obligations of the law.’” Basically, all the Robinson decision does is enable former employees (who previously filed discrimination suits) to bring suit against employers who they feel gave them retaliatory negative references, which were unfounded. The decision in no way implies that former employees can successfully bring suit against any former employer who gave them a negative job reference, which was in fact grounded in a poor employee record (i.e. unsatisfactory performance, bad attitude, etc.). In fact, a number of states “have enacted legislation to protect employers from the threat of having to defend a defamation action brought by an employee who disagrees with the reference

174. Id.
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provided,” and the rest of the nation appears to be following suit.179 Therefore, “the argument that allowing former employees to bring a retaliatory action claim under Title VII destroys the vital exchange of information about employees is practically rendered moot.”180

In the author’s view, Robinson in no way imposes any undue burdens on employers, in order to avoid liability. The only repercussion that the Robinson decision will have on employers is to force them to keep complete and accurate personnel records. In other words, an employer should feel free to give a negative job reference for a former employee, if he/she is so deserving of one. All the employer will have to do is make sure that they have verifying documentation for the references they give, and that they are adhering to their general policy of giving references (as they have done in the past), in order to combat any possible allegations of retaliation.181 In other words, employers should have strict policies requiring supervisors to complete employee reviews and disciplinary memos, in order to ensure thorough and accurate personnel records. Furthermore, employers need to promulgate policies of non-discrimination and non-retaliation, and make their reference policies clear to all employees at the outset of their employment. If employers implement such personnel policies, or improve existing ones, they should have no trouble providing substantial evidence of an employee’s work performance and employment history, and compliance with their annunciated company policies, to support the references they give. Obviously, an employer will not be held liable for retaliation if in fact they can substantiate why they provided a negative review for a former employee, and demonstrate that the reference was in compliance with company policy.

180. Id. at 1192.
VII. Conclusion

In concluding, based on the foregoing analysis of this debate, it is clear that the Supreme Court properly granted former employees the protection they deserve. Former employees should be protected under section 704(a), from retaliatory acts related to the employment realm, after the employment relationship has ended. In light of the purpose of Title VII, and the nature of its enforcement, it is only logical that they be provided with the same protection given to current employees and applicants; if they were denied this protection, the results could be absurd. Although a bit surprising, the unanimous Supreme Court decision provides former employees with solid protection from retaliation by their former employers, and hopefully indicates a trend of deference to the EEOC for future debates over other ambiguous portions of Title VII. Furthermore, despite statements made by employer advocates, concerning the inhibiting consequences of the decision and the resulting fear of employers to provide honest negative references, Robinson does not impose any undue burdens on employers and simply requires them to live up to their legal obligations.

Donna P. Fenn

182. See supra text accompanying notes 48-58.
183. See supra text accompanying notes 73-80.
184. See supra text accompanying note 45.
185. See supra text accompanying note 46.
186. See supra text accompanying notes 109-15 (discussing Judge Hall's dissent in Robinson).
187. See supra text accompanying notes 132-68.
188. See supra text accompanying notes 164-81.