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PARTING IS SUCH SWEET SORROW: THE APPLICATION OF TITLE VII TO POST-EMPLOYMENT RETALIATION

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INTRODUCTION

Suppose that an employee charges her employer with racial discrimination. If the employer subsequently discharges that employee for making the charge, the employee has a remedy under the anti-retaliation provision of Title VII of the Civil Rights Act of 1964.1

But suppose instead that an employee leaves her job and charges her former employer with racial discrimination, claiming constructive discharge.2 Later a prospective employer requests a reference from the applicant's former employer. If the former employer, in retaliation for the ex-employee's initiation of a race discrimination suit, provides a negative reference that prevents her from obtaining the new job, it is questionable whether the former employee has a remedy under Title VII.

The debate surrounding this issue centers on differing interpretations of Title VII's anti-retaliation provision. Section 704(a) of Title VII specifically protects both "employees" and "applicants for employment" against employer retaliation.3 Because the provision does not include the term "former employee," however, it is unclear whether a former employee has a cause of action under section 704(a) against a former employer for acts of retaliation that occur after the employment relationship has ended.

Some federal circuit courts have found that the plain statutory language of section 704(a) indicates that Congress intended to protect only employees and applicants for employment.4 In other words, if Congress

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2. A plaintiff who claims constructive discharge must allege that her employer rendered working conditions so intolerable as to compel the employee to quit voluntarily. See Parratt v. City of Connersville, 737 F.2d 690, 694 (7th Cir. 1984), cert. dismissed, 469 U.S. 1145 (1985); Clark v. Marsh, 665 F.2d 1168, 1176 (D.C. Cir. 1981).

3. Section 704(a) provides, in pertinent part:

   It shall be unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.


4. See Polsby v. Chase, 970 F.2d 1360, 1365 (4th Cir. 1992) (holding that Title VII does not protect former employees against post-employment discrimination), vacated on other grounds sub. nom. Polsby v. Shalala, 113 S. Ct. 1940 (1993); Reed v. Shepard, 939 F.2d 484, 492-93 (7th Cir. 1991) (same). The Supreme Court granted certiorari in the Polsby decision and remanded the case to the Fourth Circuit for reconsideration in light
also had intended to protect ex-employees who assert grievances for incidents that occur after their employment relationship has ended, it could have done so. Other federal circuit courts have found that only a broad reading of Title VII gives full effect to the statute's remedial purpose. This purpose, as justified by legislative history and policy rationales, is to provide a remedy against employer retaliation related to a prospective, present, or past employment relationship.

This Note examines whether section 704(a) of Title VII protects former employees from post-employment retaliation. Part I discusses the general policy issues underlying Title VII as revealed in the legislative history and in courts' interpretations of the statute. Specifically, this Part explores whether Congress enacted Title VII primarily to eradicate discrimination solely in the workplace, or whether Congress was more broadly concerned with general notions of equality—a reading that would extend the scope of Title VII to protect former employees from post-employment retaliation. Part II discusses judicial interpretations of post-employment actions in the context of other Title VII provisions and other remedial labor statutes. Part III examines the practical considerations of applying section 704(a) in the post-employment context. This Part proposes a two-step analysis that evaluates whether the post-employment actions are both (1) related to an employment relationship and (2) in retaliation for activity protected under Title VII. This Note concludes that the two-step analysis balances congressional intent in enacting Title VII against the potential for unlimited employer liability, by defining and restricting the post-employment actions covered by section 704(a).

of the Acting Solicitor General's brief filed March 5, 1993. See Brief for Respondents, Polsby v. Shalala, 113 S. Ct. 1940 (1993) (No. 92-966) (on file at Fordham Law Review). Although the government, in its brief, rejected the Fourth Circuit's position that former employees are not covered under section 704(a), it argued that the issue was not ripe for Supreme Court consideration because the parties did not brief or argue the issue in the Court of Appeals. "[B]ecause the decision of the court of appeals constitutes an alternative ground for decision unnecessary to the result and does not rest on an adversary presentation of the question, there is no reason for this Court to consider the question at this time." Id. at 9. On June 17, 1993, the Fourth Circuit remanded the case to the district court. See Polsby v. Chase, No. 92-1176 (4th Cir. June 17, 1993) (on file at Fordham Law Review). The case (Docket No. HAR88-2344) has been assigned to Judge John R. Hargrove, United States District Court, District of Maryland.

5. See Polsby, 970 F.2d at 1365.


7. See Sherman, 891 F.2d at 1535-36; Bailey, 850 F.2d at 1509-10; Pantchenko, 581 F.2d at 1054-55; Rutherford, 565 F.2d at 1165.

I. TITLE VII—STATUTORY LANGUAGE AND CONGRESSIONAL INTENT

Section 704(a) of Title VII states, in pertinent part:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.9

Based upon the language of this provision, it is unclear whether section 704(a) proscribes discrimination only in the current and prospective employer-employee relationship, or whether the provision also protects former employees against post-employment retaliation.

A. Strict Statutory Interpretation Versus Underlying Policy Concerns

Because there is disagreement as to whether the language of section 704(a) is ambiguous, courts have reached disparate conclusions as to the intended meaning of the anti-retaliation provision. The Fourth Circuit, for example, held that the language of section 704(a) is clear on its face. In Polsby v. Chase,10 the court concluded that, because Congress included "applicant for employment" as a person distinct from "employee" to be protected from retaliation, Congress would have also included "former employee" if it so desired.11 The court reasoned that Congress intentionally omitted "ex-employees" from the language of section 704(a) in order to limit the remedies available under Title VII.12 Under this "plain language" interpretation, section 704(a) does not protect ex-employees from retaliation after the employment relationship has ended.13

Other courts, however, have interpreted the language of the anti-retaliation provision more broadly, presumably to maintain consistency with congressional intent in the enactment of Title VII as a whole. In Pantchenko v. C. B. Dolge Co.,14 the Second Circuit held that a literal reading of the language of section 704(a) would not give effect to Title VII's intended remedial purpose.15 The court explained that Congress distinguished between "applicants for employment" and "employees" in order to establish that individuals who have not yet entered into an employment relationship have a cause of action against retaliation by prospective employers. The term "employees," however, encompasses an

11. See id. at 1365.
12. See id. at 1366.
13. See id. at 1365-66; Reed v. Shepard, 939 F.2d 484, 492-93 (7th Cir. 1991).
14. 581 F.2d 1052 (2d Cir. 1978).
15. See id. at 1054-55.
established employment relationship—a relationship that is not necessarily severed on the date of an employee's separation—and, therefore, includes former employees. "An applicant for employment, unlike a former employee, may not be described as an 'employee.' . . . [O]nce an employment relationship has been created, use of the term 'employee' in referring to a former employee, while colloquial, is not inappropriate." 16

Similarly, in Bailey v. USX Corp., 17 the Eleventh Circuit held that courts should not interpret individual statutory provisions in isolation when a literal reading will defeat the underlying policies of the statute. 18 In Bailey, the court found that interpreting section 704(a) according to the plain meaning rule would defeat Congress' intent in enacting the statute. 19 According to Bailey, "a strict and narrow interpretation of the word 'employee' to exclude former employees would undercut the obvious remedial purposes of Title VII." 20

As these cases demonstrate, in addition to the conflict over the meaning of section 704(a), there is a broader disagreement as to whether courts should narrowly construe statutes according to their "plain" meaning or, alternatively, whether courts should look to the statute's purpose and legislative history in order to determine congressional intent. 21 The conflicting opinions of courts as to the meaning of section 704(a) reveals, however, that the language of this provision is subject to

16. Id. at 1055.
17. 850 F.2d 1506 (11th Cir. 1988).
18. See id. at 1509; see also Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960) ("[I]t is a commonplace that a literal interpretation of the words of a statute is not always a safe guide to its meaning.") (citations omitted).
19. See 850 F.2d at 1509.
21. See West Va. Univ. Hosp. Inc. v. Casey, 111 S. Ct. 1138, 1153-54 (1991) (Stevens, J., dissenting) ("In recent years, the Court has vacillated between a purely literal approach to the task of statutory interpretation and an approach that seeks guidance from historical context, legislative history, and prior cases identifying the purpose that motivated the legislation."). Indeed, scholars, practitioners, and judges have written numerous articles both condemning and praising the judicial use of legislative history in statutory interpretation. For examples of articles discussing the use of legislative history in statutory interpretation, see Stephen Breyer, On the Uses of Legislative History In Interpreting Statutes, 65 S. Cal. L. Rev. 845 (1992); Reed Dickerson, Statutory Interpretation: Dipping Into Legislative History, 11 Hofstra L. Rev. 1125 (1983); William T. Mayton, Law Among the Pleonasms: The Futility and Aconstitutionality of Legislative History in Statutory Interpretation, 41 Emory L.J. 113 (1992); W. David Slawson, Legislative History and the Need to Bring Statutory Interpretation Under the Rule of Law, 44 Stan. L. Rev. 383 (1992); Patricia M. Wald, Some Observations on the Use of Legislative History in the 1981 Supreme Court Term, 68 Iowa L. Rev. 195 (1983).
more than one interpretation; therefore, the "plain" meaning analysis may prove inconclusive. In addition, when interpreting Title VII, the Supreme Court frequently consults the statute's legislative history, if only to confirm that a literal reading of the language comports with congressional intent.22 For these reasons, Title VII's legislative history may provide some guidance as to the intended scope and application of section 704(a).23

B. Legislative History and Congressional Intent

The Civil Rights Act of 1964 was introduced against the backdrop of considerable civil unrest in the United States.24 In 1963, eight days prior to sending the proposed civil rights bill to Congress, President John F. Kennedy gave a televised speech to the American public outlining his intended purposes in promoting the legislation:

We are confronted primarily with a moral issue. It is as old as the Scriptures and it is as clear as the American Constitution. The heart of the question is whether all Americans are to be afforded equal rights and equal opportunities, whether we are going to treat our fellow Americans as we want to be treated . . . . I shall ask the Congress of the United States to act, to make a commitment it has not fully made in this century to the proposition that race has no place in American life or law.25

Under these initial directives, the President presented Congress with the task of enacting a "strong civil rights bill" that included comprehensive


23. See also United States v. Ron Pair Enters., 489 U.S. 235, 242 (1989) ("The plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.' In such cases, the intention of the drafters, rather than the strict language, controls.") (citations omitted); Train v. Colorado Public Interest Research Group, 426 U.S. 1, 10 (1976) ("When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'") (citations omitted); Continental Can Co. v. Mellon, 825 F.2d 308, 310 (11th Cir. 1987) ("When faced with various . . . interpretations of a statute, it is appropriate for a court to look to legislative history as a guide to its meaning."); United States v. Noe, 634 F.2d 860, 861 (5th Cir.) (same), cert. denied, 454 U.S. 876 (1981); Bell v. Brown, 557 F.2d 849, 853 (D.D.C. 1977) ("The initial guidepost is the consideration that 'where congressional purpose is unclear, courts have traditionally resolved ambiguities in remedial statutes in favor of those whom the legislation was designed to protect.") (citations omitted).


25. See id. at xx.
provisions prohibiting discrimination in employment.\textsuperscript{26}

Title VII of the Civil Rights Act of 1964\textsuperscript{27} applies this mandate to the labor and employment context. The statute was the result of an "epic legislative struggle"\textsuperscript{28} that included over 100 amendments during the legislative process.\textsuperscript{29} Due to the extensive congressional debate\textsuperscript{30} and the protracted compromise necessary to ensure Title VII's enactment, the statute's provisions are contradictory and the legislative history is unclear.\textsuperscript{31}

In particular, the legislative history provides no guidance as to whether Congress intended post-employment retaliation to be covered under Title VII. For example, an interpretive memorandum dated April 8, 1964 merely discusses the statute's prohibition of adverse employer actions against "persons" who oppose discriminatory practices or who file charges under the statute.\textsuperscript{32} No mention is made as to whether such persons include former employees.\textsuperscript{33} Review of other congressional analyses and comments on the anti-retaliation provision provides no additional insight on this issue.\textsuperscript{34}

Although the legislative history of Title VII furnishes little interpretative guidance on the anti-retaliation provision itself, it does state Congress' overall intent in enacting the statute. Title VII was enacted to establish a "national policy of nondiscrimination" in employment and to forbid "[d]iscrimination by those who control employment and promo-

\textsuperscript{26} See id. at xix. The legislative history of the Civil Rights Act of 1964 explains the statute's effect as follows:

  The depth, the revolutionary meaning of this act, is almost beyond description.
  It cannot be circumscribed, it cannot be said that it goes this far and no farther.
  The language written into the bill . . . has open-ended provisions that give it whatever depth and intensity one desires to read into it.


\textsuperscript{28} Howard McCoach, Applying Title VII to Partners: One Step Beyond, 20 Rutgers L.J. 741, 743-44 (1989).


\textsuperscript{30} See EEOC, Legislative History of Titles VII and XI of Civil Rights Act of 1964, at 11 (1969) [hereinafter EEOC, Legislative History] ("According to the records, the measure was considered and debated by the House Judiciary Committee 22 days, by the Rules Committee seven days, by the House six days, and by the Senate 83 days. The extended debate in the Senate lasted 534 hours, 1 minute and 37 seconds.").


\textsuperscript{32} See 110 Cong. Rec. at 7213, reprinted in EEOC, Legislative History, supra note 30, at 3040.

\textsuperscript{33} See id.

\textsuperscript{34} See, e.g., 110 Cong. Rec. 13170, reprinted in EEOC, Legislative History, supra note 30, at 3120.
tion[ ] . . . .”35 Congress intended the statute to achieve “equality of employment opportunities”36 for workers and job applicants and to send a definitive message that discriminatory employment practices would not be tolerated.37 Furthermore, Congress’ enactment of the Civil Rights Act of 1991,38 which amended Title VII to expand its remedial scope, demonstrates Congress’ present intent that Title VII should not be narrowly construed.39

The purpose of Title VII, therefore, is to achieve fairness in employment practices. Courts have the duty to ensure that “the Act works, and the intent of Congress is not hampered by a combination of strict construction of the statute and a battle with semantics.”40 In keeping with the remedial nature of the statute, courts should liberally interpret the statutory provisions41 to provide individuals with a remedy against employer retaliation. As discussed in the sections that follow, this reading of the anti-retaliation provision is supported by judicial analyses of other Title VII provisions and judicial interpretations of other remedial labor statutes.

II. SUPPORT FROM OTHER PROVISIONS OF TITLE VII AND OTHER REMEDIAL LABOR STATUTES

Courts have held that other Title VII provisions and other remedial labor statutes protect against post-employment discrimination. Judicial

35. 110 Cong. Rec. 13169 (1964), reprinted in EEOC, Legislative History, supra note 30, at 3119; see also H.R. Rep. No. 914, 88th Cong., 2d Sess. (1964), reprinted in 1964 U.S.C.C.A.N. 2401 (Title VII’s purpose was “to eliminate, through the utilization of formal and informal remedial procedures, discrimination in employment based on race, color, religion, or national origin.”).


The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities . . . . What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.

401 U.S. at 429-31.


39. One of the purposes of the statute is “to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes.” Id. at 1071. See also infra note 85 for a discussion of additional Title VII remedies provided by the Civil Rights Act of 1991.


41. See Culpepper, 421 F.2d at 891 n.3; see also Coles v. Penny, 531 F.2d 609, 615 (D.C. Cir. 1976) (“Title VII is remedial in character and should be liberally construed to achieve its purposes.”); Henderson v. Eastern Freight Ways, Inc., 460 F.2d 258, 260 (4th Cir. 1972) (same), cert. denied, 419 U.S. 912 (1973).
interpretations of these provisions and statutes provide a useful framework for analyzing section 704(a) in the post-employment context.

A. Support From Other Provisions of Title VII

Interpreting section 704(a) to provide former employees with a remedy against post-employment retaliation is consistent with judicial interpretations of other Title VII provisions. In Shehadeh v. Chesapeake & Potomac Telephone Co., for example, the court held that section 703(a)(1) of Title VII, which prohibits unlawful employment discrimination, applies when an employer unlawfully interferes with a former employee's future employment opportunities. In Shehadeh, a former employee brought a claim under section 703(a)(1) alleging that her former employer sent unfavorable references to a prospective employer because of her gender and her husband's ancestry. The court found that the plaintiff had stated a claim under section 703(a)(1) of Title VII even though

42. 595 F.2d 711 (D.C. Cir. 1978).
43. Section 703(a)(1) of Title VII states:
   (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.
Note that § 703(a)(1) protects "individuals" whereas § 704(a) protects "employees" and "applicants for employment." See supra note 3. Based upon the different language used in the two provisions, the scope of § 703(a)(1) arguably differs from the scope of § 704(a). The Shehadeh court, however, did not predicate its finding that former employees are covered under § 703(a)(1) on the fact that the provision's language specified "individuals" rather than "employees" or "applicants for employment." See Shehadeh, 595 F.2d at 721-23. To the contrary, the court cited both Pantchenko v. C.B. Dolge Co., 581 F.2d 1052 (2d Cir. 1978), and Rutherford v. American Bank of Commerce, 565 F.2d 1162 (10th Cir. 1977), as support for its conclusion that former employees are covered under § 703(a)(1). See Shehadeh, 595 F.2d at 720-21 n.44.

Moreover, in Sibley Memorial Hospital v. Wilson, 488 F.2d 1338 (D.C. Cir 1973), the court held that non-employees were covered under § 703(a)(1). See infra notes 50-51 and accompanying text. The court recognized that Congress' use of the word "individual" rather than "employee" in § 703(a)(1) made the provision somewhat unique. See Sibley, 488 F.2d at 1341. However, the court found that this difference in terminology allowed the broader protection of non-employees under § 703(a)(1) rather than "only former employees and applicants for employment, in addition to present employees." Id. (emphasis added). Therefore, because § 704(a) uses the term "employee" rather than "individual," it would appear that the Sibley court would allow the coverage of former employees but not non-employees under § 704(a). The issue of whether non-employees are covered under § 704(a) is beyond the scope of this Note.

In addition, there is no legislative history indicating that Congress intended § 703(a)(1) to be broader in scope or remedial protection than § 704(a). See H.R. Rep. No. 914, 88th Cong., 2d Sess., reprinted in 1964 U.S.C.C.A.N. 2402-03. For all of these reasons, Congress' use of "individual" in § 703(a)(1), in contrast to the use of "employees" and "applicants for employment" in § 704(a), does not appear to distinguish the two provisions with respect to their coverage of former employees.

44. See Shehadeh, 595 F.2d at 719-23.
45. See id. at 719-20.
she had left her position with her former employer:46

This broad statutory language hardly lacks a potential for intercepting discriminatory efforts by former employers to dissuade prospective employers from engaging discharged employees . . . . Denial of employment on grounds of sex or national origin is as repugnant to the legislative goal [of equality of employment opportunities] when induced by a former employer as when perpetuated directly by an employer with whom a job is sought.47

Thus, the Shehadeh court held that even though Title VII does not explicitly provide ex-employees with a remedy against their former employer, courts should interpret section 703(a)(1) to protect former employees against post-employment discrimination in order to carry out Congress' intent in enacting the statute. If Title VII protects former employees under section 703(a)(1), Title VII should also protect these individuals against post-employment retaliation under section 704(a).48

In addition to finding that section 703(a)(1) protects ex-employees, at least one court has held that section 703(a)(1) also protects non-employees.49 In Sibley Memorial Hospital v. Wilson,50 a male private duty nurse filed a sex discrimination suit against a hospital for allegedly failing to refer him to female patients who requested private nursing care. Because patients hired the nurse directly, the nurse was not an employee of the hospital. Consistent with Congress' objective to achieve equal opportunities in employment, the court interpreted section 703(a)(1) to protect non-employees against discrimination even though these individuals had never worked nor ever intended to work for the party discriminating against them. Specifically, the court stated:

To permit a covered employer to exploit circumstances peculiarly affording it the capability of discriminatorily interfering with an individual's employment opportunities with another employer, while it could not do so with respect to employment in its own service, would be to condone continued use of the very criteria for employment that Congress has prohibited.51

46. See id. at 721.
47. Id.
48. The Shehadeh court cited both Pantchenko v. C.B. Dolge Co., 581 F.2d 1052 (2d Cir. 1978) (holding that § 704(a) provides a remedy against post-employment retaliation) and Rutherford v. American Bank of Commerce, 565 F.2d 1162 (10th Cir. 1977) (same). Shehadeh, 595 F.2d at 720 n.44. The Shehadeh court noted that both § 703(a)(1) and § 704(a) may provide a cause of action against a former employer for the discriminatory issuance of negative references. See id. at 721 n.44; see also supra note 43 (discussing the language of § 703(a)(1)).
49. See supra note 43.
51. Id. at 1341; see also Vanguard Justice Soc'y v. Hughes, 471 F. Supp. 670, 696 (D. Md. 1979) ("[T]he term 'employer,' as it is used in Title VII, is sufficiently broad to encompass any party who significantly affects access of any individual to employment opportunities, regardless of whether that party may technically be described as an 'employer' of an aggrieved individual as that term has generally been defined at common law.").
Thus, applying section 703(a)(1) to cover both former employees and non-employees supports the conclusion that the anti-retaliation provision of section 704(a) is also intended to protect former employees. In addition, as discussed below, judicial interpretation of other remedial labor statutes also supports this liberal reading of section 704(a).

B. Support From Other Remedial Labor Statutes

In addition to finding that section 703(a)(1) of Title VII applies in the post-employment context, courts have also held that other remedial labor statutes protect former employees. These findings provide additional support for the application of section 704(a) to post-employment retaliation.

1. The Fair Labor Standards Act and the National Labor Relations Act

Title VII is part of Congress' continuing effort over the past fifty years to provide increased statutory protection for employees. Recognizing Congress' progressive efforts in employment law, courts interpreting Title VII have been persuaded by judicial analyses of other labor statutes such as the Fair Labor Standards Act of 1938 (the "FLSA") and the National Labor Relations Act (the "NLRA"). As with Title VII, Congress intended the FLSA to be a "broadly remedial and humanitarian statute." The FLSA was an "ambitious effort to [increase] wages and influence the length of the workweek." Congress enacted the NLRA to protect workers in their organizational efforts and union activity and to provide for peaceful resolution of industrial disputes.

Like Title VII, the FLSA and the NLRA were enacted to correct perceived inequities and imbalances in the workplace. For example, both the FLSA and the NLRA contain anti-retaliation provisions that are similar to section 704(a) of Title VII. It is not surprising, then, that courts interpreting section 704(a) have turned for guidance to cases that

56. Dunlop, 548 F.2d at 143.
57. Sanford Cohen, Labor Law 58 (1964); see also Rutherford Food Corp. v. McComb, 331 U.S. 722, 727 (1947) (The FLSA was "[a]n effort to eliminate low wages and long hours [in order to] free commerce from the interferences arising from production of goods under conditions that were detrimental to the health and well-being of workers.").
59. Section 8(a)(4) of the NLRA provides:
It shall be an unfair labor practice for an employer—
have interpreted the anti-retaliation provisions of the NLRA and the FLSA. For example, in *Pettway v. American Cast Iron Pipe Co.*, the Fifth Circuit found support from section 8(a)(4) of the NLRA and section 15(a)(3) of the FLSA in its interpretation of section 704(a) of Title VII. The court noted that although there are differences among the statutes, the similarities between the anti-retaliation provisions of Title VII, the NLRA, and the FLSA support the conclusion "that protection must be afforded to those who seek the benefit of statutes designed by Congress to equalize employer and employee in matters of employment." In fact, the court found the language of Title VII to be broader than that contained in the NLRA and the FLSA, providing further support for a liberal reading of section 704(a).

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter.


Section 15(a)(3) of the FLSA provides, in pertinent part:

[I]t shall be unlawful for any person—

. . .

(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.


Note that section 704(a) of Title VII covers both "applicants for employment" and "employees," see supra note 3, whereas the anti-retaliation provisions of the FLSA and NLRA cover only "employees." Based upon this distinction, a court such as the Fourth Circuit in *Polsby v. Chase*, 970 F.2d 1360 (4th Cir. 1992), *vacated on other grounds sub nom. Polsby v. Shalala*, 113 S. Ct. 1940 (1993), could assert that § 15(a)(3) of the FLSA and § 8(a)(4) of the NLRA are broader than § 704(a) of Title VII, and therefore that the FLSA and NLRA should not be used as persuasive support for Title VII. The *Polsby* court stated that because "Congress considered it necessary to add 'applicant for employment' as a person distinct from 'employee' to be protected from retaliation, Congress could certainly have also included a former employee if it had desired." *Id.* at 1365; see supra notes 10-13 and accompanying text. Based on the *Polsby* court's reasoning, the inclusion of "applicants for employment" demonstrates Congress' intent to limit the coverage under § 704(a). It would follow that because Congress did not use such limiting language in the anti-retaliation provisions of the FLSA and the NLRA, the provisions were intended to have a broader remedial scope.

However, the better argument may well be that § 704(a) protects "applicants for employment" in addition to "employees" because Congress determined that it was necessary to protect individuals who had not yet entered into an employment relationship against retaliation by potential employers. See supra notes 14-16 and accompanying text. Based on this reasoning, § 704(a) may well be broader than the anti-retaliation provisions of the FLSA and the NLRA. See infra notes 64-65 and accompanying text.

60. 411 F.2d 998 (5th Cir. 1969).
61. See supra note 59.
62. See supra note 59.
63. See *Pettway*, 411 F.2d at 1005-06.
64. *Id.* at 1006.
65. See *id.* at 1005-06, 1006 n.18 ("The protective provisions of Title VII are substantially broader than even those included in the Fair Labor Standards Act and the National Labor Relations Act . . . . This indicates the exceptionally broad protection intended for protestors of discriminatory employment practices.").
Similarly, in *Ford v. Alfaro*, a case involving an unlawful discharge claim, the Ninth Circuit specifically looked to the anti-retaliation provisions of Title VII and the NLRA when interpreting section 15(a)(3) of the FLSA. The court found that section 15(a)(3) is analogous to the anti-retaliation provisions contained in section 8(a)(4) of the NLRA and section 704(a) of Title VII. The court, therefore, held that "the case authority interpreting these analogous provisions [in the NLRA and Title VII] is instructive in the context of the FLSA."

Significantly, courts have found post-employment retaliation by a former employer to be actionable under the FLSA. In *Hodgson v. Charles Martin Inspectors of Petroleum, Inc.*, former employees had cooperated in a government investigation against their former employer. In light of the potential need to obtain references from their former employer, the court held that the possibility of future retaliation against these ex-employees by the employer was significant: "In such a case the former employee would stand the same risk of retaliation as the present employee. There is no ground for affording any less protection to . . . former employees than to . . . present employees.”

Similarly, at least one court has held that post-employment retaliation violates section 8(a)(4) of the NLRA even though the statute does not explicitly mention "former" employees. In *NLRB v. Whitfield Pickle Co.*, an employer refused to rehire a former employee allegedly because she had filed unfair labor practice charges against her employer. The court concluded that, regardless of whether the former employee actually proved the unfair labor practice charges, the employer's discriminatory refusal to rehire the individual violated the NLRA's anti-retaliation provision.

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66. 785 F.2d 835 (9th Cir. 1986).
67. See id. at 840 & n.1.
68. See id.
69. Id. at 840.
70. 459 F.2d 303 (5th Cir. 1972).
71. Id. at 306 (citing Wirtz v. B.A.C. Steel Prods., Inc., 312 F.2d 14 (4th Cir. 1962)). It should be noted that the actual claim in *Hodgson* was not brought under § 15(a)(3), the anti-retaliation provision of the FLSA. Rather, the court used the example of an employer sending unfavorable post-employment references to demonstrate that former employees are not removed from the threat of retaliation. See id. Although it is dictum, the example demonstrates the court's opinion that former employees would be protected under the FLSA. See *Dole v. International Ass'n Managers, Inc.*, Civ. No. 90-0219PHX RCB, 1991 WL 270194 at *3 (D. Ariz. Apr. 2, 1991) (citing *Hodgson*, 459 F.2d at 305, for the proposition that the threat of retaliation exists for former as well as current employees); *Brock v. Frank V. Panzarino, Inc.*, 109 F.R.D. 157, 158 n.2 (E.D.N.Y. 1986) (citing *Hodgson*, 459 F.2d at 305, for the proposition that "[r]etaliation [may] take the form of a refusal to rehire or of providing a future employer with a negative reference").
72. See supra note 59.
73. 374 F.2d 576 (5th Cir. 1967).
74. See id. at 582-83.
2. The Age Discrimination in Employment Act

In addition to the FLSA and the NLRA, the Age Discrimination in Employment Act of 1967 ("ADEA"), as amended in 1978, also supports a broad reading of section 704(a). The ADEA protects individuals over the age of 40 against employment discrimination. The statute is essentially a hybrid of Title VII and the FLSA—the ADEA prohibitions are analogous to those of Title VII, while the ADEA remedies replicate those of the FLSA. Thus, because the ADEA is a remedial employment statute with strong similarities to both Title VII and the FLSA, judicial interpretation of the ADEA also provides persuasive support for the intended scope of section 704(a).

For example, in EEOC v. Cosmair, Inc., the court held that the anti-retaliation provision of the ADEA protects former employees even though the statutory language mentions only "employees." In Cosmair, an employer refused to continue severance payments to a former employee allegedly because the individual had filed an age discrimination charge against the employer. Specifically relying on Title VII and FLSA cases, the court held that the failure to pay severance arose directly from the employment relationship, and therefore courts should broadly interpret the statute to cover former employees.

As these cases show, courts have consistently held that the anti-retaliation provisions of the FLSA, the NLRA, and the ADEA protect former employees. Moreover, Title VII should be interpreted consistently with

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77. See Lorillard Inc. v. Pons, 434 U.S. 575, 584 (1978) ("[T]he prohibitions of the ADEA were derived in haec verba from Title VII.").
78. See id. at 584-85.
79. 821 F.2d 1085 (5th Cir. 1987).
80. 29 U.S.C. § 623(d) (1988). This section provides, in pertinent part:

It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment . . . because such individual . . . has opposed any practice made unlawful by this section, or because such individual . . . has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

Id. Note that the language of this provision is virtually identical to the language of § 704(a) of Title VII. See supra note 3.
81. Cosmair, 821 F.2d at 1088-89.
83. See id.; see also Passer v. American Chem. Soc'y, 935 F.2d 322, 330-31 (D.C. Cir. 1991) (The ADEA protects the complainant "even after he . . . ceased to be an active employee . . . To read the statute otherwise would be to deny protection to any person who has suffered discharge or termination due to unlawful discrimination. Obviously Congress could not have intended such an absurd result.").
84. Courts appear to be unanimous on the issue of whether the FLSA, the NLRA, and the ADEA protect former employees against post-employment retaliation. See
other remedial labor statutes unless it can be discerned that Title VII has a clearly different purpose. Because Title VII, like these other statutes, is a remedial labor statute, and contains a comparable anti-retaliation provision, courts should adopt a similar view in interpreting the scope of section 704(a).

III. PRACTICAL CONSIDERATIONS OF APPLYING SECTION 704(A) IN THE POST-EMPLOYMENT CONTEXT

Those courts that have limited Title VII to protecting only current employees and applicants for employment have done so out of concern that extending protection to former employees may expose employers to highly “speculative” and unlimited liability. These courts have concluded that because this liability arises from retaliation occurring after the employment relationship has ended, the employer’s action cannot be considered an unlawful employment practice under Title VII. There-

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85. See Polsby v. Chase, 970 F.2d 1360, 1366 (4th Cir. 1992), vacated on other grounds sub nom. Polsby v. Shalala, 113 S. Ct. 1940 (1993). According to the Polsby court, the remedies available under Title VII are limited to equitable relief such as reinstatement, back pay, and injunctions against further violations. See id.; see also Eastman v. Virginia Polytechnic Inst. and State Univ., 939 F.2d 204, 208 (4th Cir. 1991) (same). The court determined that such equitable remedies would be insufficient to compensate former employees who sought a remedy against the retaliatory interference with future employment opportunities. Rather, legal remedies such as compensatory and punitive damages would be necessary to compensate victims of post-employment retaliation, and therefore the court held that the statute does not protect former employees. See Polsby, 970 F.2d at 1366 (“While relief must be in the form of making the former employee whole as if the retaliatory act had not occurred, the equitable means to accomplish this goal are lacking. Such relief would entail calculating future damages and is far too speculative.”).

The Polsby court was not alone in limiting the remedies available under Title VII. Even courts that allow former employees to recover legal remedies under the statute have held that such remedies include compensatory but not punitive damages. See Sherman v. Burke Contracting, Inc., 891 F.2d 1527, 1535-36 (11th Cir.), cert. denied, 498 U.S. 943 (1990). Based upon these judicial limitations and recognizing that additional remedies were needed to deter harassment and discrimination in the workplace, Congress enacted the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991), which amended Title VII.

The enactment of this statute resolves the debate over which remedies are allowed under Title VII. Section 102(a)(1) of the statute allows the complaining party to recover both compensatory and punitive damages in a suit under § 704(a): “In an action brought by a complaining party . . . against a respondent who engaged in unlawful intentional discrimination . . . prohibited under section 703, 704, or 717 of the Act (42 U.S.C. 2000e-2 or 2000e-3) . . . the complaining party may recover compensatory and punitive damages . . . .” Pub. L. No. 102-166, 105 Stat. 1071, 1072 (1991).

Therefore, based on the amendments to Title VII included in the Civil Rights Act of 1991, the ability to obtain legal relief under the statute is an additional argument for extending § 704(a) protection to former employees.

86. See Polsby, 970 F.2d at 1365.
fore, proponents of strict statutory interpretation argue that former employees must assert such grievances either against former employers under state or other federal law or against prospective employers under Title VII.87

Congress, of course, did not intend the remedies available under Title VII to expose employers to limitless liability for post-employment occurrences. For example, the mere fact that a former employer and a former employee were once engaged in a relationship covered under Title VII does not automatically bring all of their future dealings under the protections of the statute. Conversely, however, if the "employment relationship" were narrowly construed so as to terminate automatically when an employee ceases to be included on the payroll, the statute would not protect any post-employment action, even if clearly retaliatory and related to employment. Such an interpretation would seem to frustrate the congressional intent behind Title VII.88 Therefore, in order to balance congressional objectives in the enactment of the statute against the potential for statutory abuse in the post-employment context, section 704(a) should protect former employees only when the post-employment actions are both retaliatory and related to employment.

This reasoning suggests a two-step analysis to determine whether an allegation of post-employment retaliation is actionable under section 704(a) of Title VII. Step one would require the plaintiff to establish that the conduct at issue is related to an employment relationship. Step two would require the plaintiff to establish that the defendant's actions were retaliatory within the meaning of section 704(a).

87. See id. at 1366; Reed v. Shepard, 939 F.2d 484, 493 (7th Cir. 1991). Based on this reasoning, a former employer who sends retaliatory references concerning an ex-employee would be free from liability under Title VII, but a potential employer who accepts such references and fails to hire the ex-employee could violate the statute. But c.f. Charles R. Richey, Manual on Employment Discrimination Law and Civil Rights Actions in the Federal Courts A-13 (1988) (stating that future employers who make hiring decisions based on such references are not liable under the statute, while citing a case that does not support this proposition and an unpublished decision that may not be cited as precedent according to the local rules of the issuing circuit). Not only does such a result defeat the purposes of Title VII, see supra notes 24-41 and accompanying text, but it also presumes that the potential employer knows that the references are retaliatory. Suppose, for example, that the former employer retaliates against a former employee by disseminating an unfounded, derogatory reference to a potential employer without disclosing the fact that the former employee filed a charge under Title VII. Assuming there is no reason to disbelieve these references, the potential employer would have a valid, non-discriminatory reason for failing to hire the individual and, therefore, would not violate § 704(a). If the statute is construed narrowly in this situation, former employees have absolutely no recourse under Title VII even though they are clearly the victims of discrimination within the meaning of § 704(a). Congress certainly did not intend for these individuals to seek state or other federal remedies under such circumstances.

Because a former and a potential employer could simultaneously violate § 704(a) in the case of retaliatory referencing, perhaps there is an argument for joint and several liability under Title VII in this unique situation. Such a discussion, however, is beyond the scope of this Note.

88. See supra notes 24-41 and accompanying text.
A. Step One: Establishing that Post-Employment Actions Are Related to an Employment Relationship

In order to ensure that section 704(a) protections are not abused, former employees should be required to prove that the allegedly culpable conduct by the former employer is related to an employment relationship. For example, in Lutcher v. Musicians Union Local 47, the court held that the protections of Title VII apply only when there is some "connection" to the employment relationship itself. The court noted that this connection need not be direct, however, as when an employer interferes with an individual's employment opportunities with another employer. In addition, in Pantchenko v. C. B. Dolge Co., the court explained that Title VII "prohibits discrimination related to or arising out of an employment relationship, whether or not the person discriminated against is an employee at the time of the discriminatory conduct." Even the court in Polsby v. Chase, although strictly construing the statute to exclude former employees, acknowledged that the practices prohibited by Title VII "are those particularly related to employment."

Two post-employment practices that are related to an employment relationship include the sending of references and the payment of severance. For example, prospective employers almost invariably require job applicants to provide the names of their previous employers as references on a job application, and regularly contact these references to obtain information about the applicant's performance during the previous employment relationship. Similarly, the calculation and payment of

89. 633 F.2d 880 (9th Cir. 1980).
90. See id. at 883.
91. See id. at 883 & n.3. For a discussion of other Title VII cases examining interference with future employment opportunities see supra notes 42-51 and accompanying text.
92. 581 F.2d 1052 (2d Cir. 1978).
93. Id. at 1055; see also Bilka v. Pepe's Inc., 601 F. Supp. 1254, 1259 (N.D. Ill. 1985) ("Section 704 was plainly written to protect employees who assert Title VII rights. If an employee asserts her rights after the relationship is over, her assertion nevertheless grows out of that relationship.").
95. Id. at 1365.
96. See, e.g., Bailey v. USX Corp., 850 F.2d 1506, 1509 (11th Cir. 1988) (discussing post-employment referencing); Pantchenko v. C. B. Dolge Co., 581 F.2d 1052, 1055 (2d Cir. 1978) (same); Rutherford v. American Bank of Commerce, 565 F.2d 1162, 1165 (10th Cir. 1977) (same). In Sherman v. Burke Contracting, Inc., 891 F.2d 1527 (11th Cir.), cert. denied, 498 U.S. 943 (1990), the court went even farther to hold that an employer violates Title VII if it persuades a former employee's new employer to fire the employee. See id. at 1532 ("[T]he distinction between a blacklisting that prevents a former employee from obtaining a new job and similar conduct that causes him to lose a new job is meaningless.").
97. See, e.g., EEOC v. Cosmair, Inc., 821 F.2d 1085, 1088-89 (5th Cir. 1987) (discussing failure to pay severance to a former employee).
severance are typically based on the employer's policy or on the provisions of a pre-termination employment contract and therefore are also related to employment. Because these post-employment practices maintain a close connection to an employment relationship, such practices should fall within the scope of section 704(a).

Establishing such a connection becomes more difficult, however, when the post-employment action, in isolation, is not typically related to an employment relationship. For example, if a former employer physically threatens a former employee who files a section 704(a) claim, this conduct is not within the contemplated scope of an employment relationship. Such threats arguably have no affect on a former employee's previous or future working conditions and, therefore, are unrelated to an employment relationship. In addition, there are no cases that have held that section 704(a) protects former employees against threats by their former employer.

It should be noted, however, that at least one circuit court has held that threats, if made during the employment relationship, violate Title VII. In Berger v. Iron Workers Reinforced Rodmen Local 201, the

99. See Cosmair, 821 F.2d at 1089.
100. See id. at 1087. In Cosmair, the court looked at the discontinuation of severance pay in the context of the ADEA. The court cited Pantchenko v. C. B. Dolge, Co., 581 F.2d 1052, 1055 (2d Cir. 1978), and Rutherford, 565 F.2d at 1165-66, as support for the proposition that former employees are covered under the ADEA as long as the post-employment discrimination arises out of the employment relationship. See Cosmair, 821 F.2d at 1088. The court held that “[c]ertainly the discontinuance of severance pay arose out of [the] employment relationship . . . . The company agreed to continue to pay . . . salary and medical insurance premiums, and calculated the length of time payments would continue based on the length of [the former employee’s] tenure with the company.” Id. at 1089. See supra notes 75-84 and accompanying text for a comparison of the anti-retaliation provisions of the ADEA and Title VII.
101. See, e.g., Reed v. Shepard, 939 F.2d 484, 492-93 (7th Cir. 1991) (reviewing plaintiff’s allegations that she was physically attacked, shot at, and threatened by her former employer).
102. See, e.g., id. at 493 (“[I]t is an employee’s discharge or other employment impairment that evidences actionable retaliation, and not events subsequent to and unrelated to employment.”) (emphasis added). It should be noted that a district court sitting in the Fourth Circuit held that a former employee of a bar had stated a claim under § 704(a) where she alleged that when she returned to the bar as a customer, her former employer had her arrested for trespassing in retaliation for her filing of a sex discrimination suit. See Beckham v. Grand Affair of N.C., Inc., 671 F. Supp. 415, 419 (W.D.N.C. 1987). However, the Beckham court noted that at the time of its opinion, the Fourth Circuit had not yet addressed the issue of whether Title VII applied to former employees. Id. Because the Fourth Circuit subsequently addressed this issue in Polsby v. Chase, 970 F.2d 1360 (4th Cir. 1992), vacated on other grounds sub nom. Polsby v. Shalala, 113 S. Ct. 1940 (1993), Beckham presumably retains little persuasive value, although Polsby did not discuss the Beckham decision.
103. Physical threats made during an employment relationship also have been held to violate both the FLSA and the NLRA. See Ford v. Alfaro, 785 F.2d 835, 841 (9th Cir. 1986); McLane/Western, Inc. v. NLRB, 723 F.2d 1454, 1456-57 (10th Cir. 1983). See supra notes 52-74 and accompanying text for a comparison of the FSLA, the NLRA, and Title VII.
court held that “repeated threats against individuals in response to their exercise of protected rights [under Title VII] may amount to harassment sufficient to establish a claim of retaliation.” However, this harassment occurred during the employment relationship and presumably affected the employee's work environment. Unlike either actions that take place during an employment relationship, such as threats by a current employer, or post-employment actions that are related to an employment relationship, such as referencing or payment of severance, post-employment threats are not “related to” or “connected to” an employment relationship. Because the first step of this test places the burden of proof on the plaintiff, only those claims that the former employee proves are sufficiently related to an employment relationship will be protected under section 704(a).

B. Step Two: Establishing that the Conduct Was Retaliatory Under Section 704(a)

The mere fact that a post-employment action is related to an employment relationship does not automatically entitle former employees to relief under section 704(a). For example, an employer's refusal to provide a reference does not alone violate section 704(a). Instead, section 704(a) makes the dissemination of unfavorable references, or similar conduct, actionable only when the employer takes such actions in retaliation for the employee's assertion of rights protected under Title VII.

Therefore, the second step in this analysis requires proof that the post-employment action was retaliatory as defined by section 704(a).

The Supreme Court's decision in *McDonnell Douglas Corp. v. Green* delineates the order and allocation of proof applied in Title VII cases. Under the *McDonnell Douglas* approach, the plaintiff must first make a prima facie showing of retaliation. In order to meet this burden, plaintiffs must show that: (1) they were engaged in protected activity; (2) they suffered some disadvantageous employment action; and (3) there was a causal link between the activity and the disadvantage such that the retali-
atory motive played a part in the adverse employment action. Once a plaintiff establishes a prima facie case, the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for its conduct. If the employer meets this burden, the burden then shifts back to the plaintiff to show that the asserted reason is pretextual.

Applying the proposed two-step analysis to the facts of an actual case illustrates the appropriate order and allocation of proof as applied in the post-employment context. Bertha Rutherford, a loan officer-trainee, resigned from the bank for which she worked ("the Bank") after she was asked to perform certain clerical duties that she considered to be a demotion. She subsequently filed a sex discrimination suit against the Bank. Before learning of the discrimination suit, the Bank gave Rutherford a "highly complimentary" recommendation letter. When Rutherford later contacted the Bank for an updated reference, however, the Bank informed her that the reference would include the fact that she had filed a sex discrimination charge against the Bank. When a prospective employer requested references concerning Rutherford's employment application, the Bank disclosed the fact of the pending suit, and Rutherford was denied the job.

In order to establish a cause of action under section 704(a), the plaintiff must establish a prima facie case of retaliation. The McDonnell Douglas test first requires Rutherford to show that she was engaged in a protected activity. Rutherford's filing of a sex discrimination charge against the Bank constitutes protected activity within the meaning of section 704(a). Second, Rutherford's failure to obtain a new job establishes that she suffered some disadvantageous employment action. Last, Rutherford must demonstrate a causal link between the Bank's retaliatory action and the disadvantage. The Bank gave Rutherford a favorable reference until she filed the discrimination charge. All subsequent refer-


112. See Jalil, 873 F.2d at 708; Jordan, 847 F.2d at 1376; Schlei & Grossman, supra note 58, at 557.

113. See Jordan, 847 F.2d at 1376; Jalil, 873 F.2d at 706-07; Schlei & Grossman, supra note 58, at 557, 560-62. In a recent decision, the Supreme Court further clarified the McDonnell Douglas scheme. In St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742 (1993), the Court held that although the burden of production shifts to the defendant to provide a legitimate, non-discriminatory reason for its actions, the burden of persuasion remains at all times with the plaintiff. Id. at 2747. Therefore, even if a court determines that the employer's reasons are pretextual, the plaintiff is not entitled to judgment as a matter of law unless it meets its ultimate burden of proof. Id. at 2748-49.


115. See id. at 1163.

116. See id.

117. See supra notes 109-13 and accompanying text.

118. See supra note 3 and accompanying text.
ences included the fact about the pending charge. Only then did her future employers deny her employment. These facts are sufficient to establish that the Bank’s retaliatory motive played a part in Rutherford’s failure to obtain a new job.\textsuperscript{119}

Once the plaintiff proves a prima facie case, the burden then shifts to the employer to give a legitimate, non-discriminatory reason for its actions. The Bank gave Rutherford a highly complimentary recommendation before she filed the Title VII charge. After she filed the charge, the Bank qualified its recommendations to future employers by stating that Rutherford had filed the charge. Because Rutherford had a good employment record and a favorable recommendation before she filed the charge, the Bank would find it difficult to articulate a legitimate reason for the adverse references. Even if the Bank did articulate some reason for its actions, Rutherford would probably not find it difficult to demonstrate that such a reason was pretextual\textsuperscript{120}—especially in light of the Bank’s disclosure of the pending suit to Rutherford’s future employers.

The two-step analysis proposed above would ensure that (1) the post-employment action is related to an employment relationship, and (2) the action was in retaliation to the assertion of a right protected under Title VII. This test would balance congressional intent in enacting Title VII against the potential for unlimited employer liability by defining and limiting the post-employment actions covered by section 704(a).

\textbf{CONCLUSION}

Although reading section 704(a) to exclude former employees would provide a bright-line interpretation of the provision’s meaning, such a restrictive reading overlooks congressional intent in the enactment of Title VII. In addition, broad judicial construction of other Title VII provisions, as well as consistent interpretation of analogous provisions within other remedial labor statutes, support the proposition that section 704(a) should protect former employees against acts of retaliation. In order to prevent abuse of the statutory protections when applied in the post-employment context, section 704(a) should protect only those post-employment actions that relate to an employment relationship. In addition, the traditional approach to the order and allocation of proof in Title VII cases, as delineated in \textit{McDonnell Douglas},\textsuperscript{121} ensures that these post-employment actions are in fact retaliatory as defined by section 704(a).

\textsuperscript{119} See, e.g., \textit{Burrus v. United Tel. Co.}, 683 F.2d 339, 343 (10th Cir.) ("The causal connection may be demonstrated by evidence of circumstances that justify an inference of retaliatory motive, such as protected conduct closely followed by adverse action.") (citations omitted), \textit{cert. denied}, 459 U.S. 1071 (1982).

\textsuperscript{120} See \textit{Schlei & Grossman}, \textit{supra} note 58, at 560-62; \textit{supra} note 113.

\textsuperscript{121} 411 U.S. 792 (1973).