

KEEPING THE BOSS AT BAY POST-
TERMINATION RETALIATION UNDER TITLE VII:
CHARLTON V. PARAMUS BOARD OF EDUCATION,
25 F.3d 194 (3d Cir. 1994)

Title VII of the Civil Rights Act of 1964¹ defines unlawful employment discrimination and provides relief for employees discriminated against by their employers.² An employee claiming employment discrimination must file charges with the Equal Employment Opportunity Commission (EEOC), which notifies the employer of the charges and investigates the employee's complaint.³ Anticipating that some employers might further discriminate against employees, Congress proscribed retaliation against "employees" and "applicants for employment" who file employment discrimination charges.⁴ Some employees do not

1. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253 (codified as amended at 42 U.S.C. §§ 2000e-2000e-17 (1988 & Supp. V 1993)).

2. Section 703 defines unlawful employment practices to include failing or refusing to hire, discharging, or otherwise discriminating against an individual "with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin." 42 U.S.C. § 2000e-2(a)(1) (1988).

Section 706 lists the following remedies available to a successful claimant: "[T]he court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without backpay, . . . or any other equitable relief as the court deems appropriate." 42 U.S.C. § 2000e-5(g) (1988).

3. Title VII created the EEOC to investigate charges of employment discrimination. 42 U.S.C. §§ 2000e-4(a), 2000e-5(b) (1988).

If an investigation discovers reasonable cause to believe that a charge is true, the statute instructs the EEOC to attempt to eliminate the unlawful employment practice "by informal methods of conference, conciliation and persuasion." 42 U.S.C. § 2000e-5(b). If the EEOC fails to eliminate the unlawful practice through informal methods, it may file suit against the employer or authorize the aggrieved party to bring suit. *Id.* § 2000e-5(f). If the EEOC investigation does not result in a reasonable belief that the charge is true, or if the EEOC fails to file a civil action within 180 days of the charge, the employee may request a "right to sue" letter from the EEOC and may sue the employer. 42 U.S.C. § 2000e-5(f) (1988).

4. 42 U.S.C. § 2000e-3(a) (1988). Section 704 states that

[I]t shall be an unlawful employment practice for an employer to discriminate against any of his *employees* or *applicants for employment* . . . because [the employee] has opposed a practice made unlawful by this subchapter, or because [the employee] has made a charge, testified, assisted or participated in any manner in an

file charges under Title VII against their employer until after their employment relationship ends.⁵ Courts disagree on whether such former employees are protected as "employees" under Title VII.⁶ In *Charlton v. Paramus Board of Education*,⁷ the Third Circuit Court of Appeals held that the word "employee"⁸ in Title VII includes former employees, allowing an ex-employee to sue a previous employer for retaliatory acts related to, but occurring after, the employment relationship has ended.⁹

investigation, proceeding, or hearing under this subchapter.

Id. (emphasis added).

The purpose of the retaliation provision "is to protect the employee who utilized the tools provided by Congress to protect his rights." *Pettway v. American Cast Iron Pipe Co.*, 411 F.2d 998, 1005 (5th Cir. 1969).

See generally Patricia A. Moore, *Parting is Such Sweet Sorrow: The Application of Title VII to Post-Employment Retaliation*, 62 *FORDHAM L. REV.* 205 (1993) (analyzing applicability of § 704 to post-employment retaliation claims); Francis J. Vaas, *Title VII: Legislative History*, 7 *B.C. INDUS. & COM. L. REV.* 431 (1965) (analyzing the legislative history of Title VII).

5. Retaliation against a former employer may take many forms. See, e.g., *Sherman v. Burke Contracting, Inc.*, 891 F.2d 1527 (11th Cir. 1990), (persuading new employer to terminate employee), *cert. denied*, 498 U.S. 943 (1990); *Bailey v. USX Corp.*, 850 F.2d 1506 (11th Cir. 1988) (giving unfavorable references); *Pantchenko v. C.B. Dolge Co.*, 581 F.2d 1052 (2d Cir. 1978) (refusing to furnish references); *Dunlop v. Carriage Carpet Co.*, 548 F.2d 139 (6th Cir. 1977) (informing prospective employer of discrimination charge); *Cohen v. S.U.P.A., Inc.*, 814 F. Supp. 251, 259-60 (N.D.N.Y. 1993) (cancelling employee's health benefits); *EEOC v. Metzger*, 824 F. Supp. 1 (D.D.C. 1993) (informing prospective employer of discrimination charge); *Miles v. J.C. Penney, Inc.*, No. CIV. A. 89-0881-CA, 1991 WL 326498 at *1-2 (E.D. Tex. Dec. 31, 1991) (same).

6. A number of circuits hold that the term "employee" in § 704 includes former employees. See *Sherman v. Burke Contracting, Inc.*, 891 F.2d 1527 (11th Cir. 1990), *cert. denied*, 498 U.S. 943 (1990); *Bailey v. USX Corp.*, 850 F.2d 1506 (11th Cir. 1988); *Pantchenko v. C.B. Dolge Co.*, 581 F.2d 1052 (2d Cir. 1978); *Rutherford v. American Bank of Commerce*, 565 F.2d 1162 (10th Cir. 1977). However, several circuits have adopted a more restrictive definition of "employee." See *Polsby v. Chase*, 970 F.2d 1360 (4th Cir. 1992); *Reed v. Shepard*, 939 F.2d 484 (7th Cir. 1991).

7. 25 F.3d 194 (3d Cir. 1994).

8. Title VII defines "employee" as "an individual employed by an employer . . ." 42 U.S.C. § 2000e(f) (1988).

9. 25 F.3d 194, 200. A number of courts allow antidiscrimination actions under § 703 of Title VII in the absence of an employment relationship. See *Zaklama v. Mt. Sinai Medical Ctr.*, 842 F.2d 291, 293-95 (11th Cir. 1988) (holding that a hospital's ability to control staff privileges will support a plaintiff's claim); *Doe v. St. Joseph's Hosp. of Fort Wayne*, 788 F.2d 411, 422-24 (11th Cir. 1986) (noting that § 703 uses the term "individual," not "employee"); *Shehadeh v. Chesapeake and Potomac Tel. Co. of Maryland*, 595 F.2d 711, 721-22 (D.C. Cir. 1978) (holding that § 703 applies when a former employer interferes with an ex-employee's future employment opportunities); *Sibley Memorial Hosp. v. Wilson*, 488 F.2d 1338, 1341 (D.C. Cir. 1973) (noting that a hospital's ability to affect employment opportunities is

In *Charlton*, a teacher sued her former employer alleging that she was terminated after she resisted her supervisor's sexual advances.¹⁰ Charlton further alleged that the administrators of her former school district retaliated against her for filing the Title VII suit by seeking revocation of her state teaching certification.¹¹ The district court granted the school district's motion for summary judgment on the retaliation charge, reasoning that Charlton was not an employee of the school district within the meaning of Title VII at the time of the alleged retaliation.¹² On appeal, the Third Circuit Court of Appeals reversed and re-

sufficient to support a plaintiff's claim); *LeMasters v. Christ Hosp.*, 777 F. Supp. 1378, 1380 (S.D. Ohio 1991) (holding that § 703 applies when employer controls access to employment opportunities for non-employees).

10. 25 F.3d at 196. Ann Mery Charlton was a tenured music supervisor and taught in the Paramus School District for seventeen years. *Id.* She alleged that her supervisor, Janice Dime, the Assistant Superintendent of Schools for the Paramus School District, made unwanted sexual advances toward her. *Id.* She alleged that after she rejected Dime's sexual advances, Dime and other "lesbian teachers" formed a conspiracy to discredit her, which eventually led to the revocation of her tenure and the loss of her job. *Id.*

The Paramus School Board claimed that it took action against Charlton because Charlton had spread "vicious and false rumors about the sexual preferences and sexual activities of Paramus administrators and employees . . ." and had implied that hiring practices in the district were controlled by the sexual orientation of employees and their sexual relationships with administrators. *Id.* The school board also alleged that Charlton had used malicious language when referring to administrators and other teachers, and had sought information about Janice Dime's personal life in an effort to discredit her. *Id.*

Charlton unsuccessfully challenged her termination before a state administrative board and the New Jersey Superior Court. *Id.* She then filed a charge of discrimination with the EEOC while she awaited a decision on her petition for appeal before the New Jersey Supreme Court. *Id.* When the New Jersey Supreme Court denied her appeal, she filed a Title VII action. *Id.*

11. *Id.* Charlton alleged that the school district initiated proceedings to revoke her teaching certification following her filing of a Title VII claim. *Id.* Charlton further alleged that although the school district had no role in the certification review process beyond reporting a teacher's termination to the state, the school district attempted to revoke Charlton's certification nearly two years after her termination. *Id.* Additionally, Charlton alleged that the school district offered to stop the certification review process if Charlton agreed not to pursue her charge of discrimination. *Id.*

12. *Id.* at 198. In granting the school district's motion, the district court relied on *Ferguson v. Mobil Oil Corp.*, 443 F. Supp. 1334, 1339 (S.D.N.Y. 1978) (holding post-employment blacklisting not actionable under § 703 of Title VII), *aff'd without opinion*, 607 F.2d 995 (2d Cir. 1979). The *Charlton* court distinguished *Ferguson* in part because it dealt with a § 703 claim while Charlton's claim dealt with § 704. *Charlton*, 25 F.3d at 198.

In its unreported decision, the district court also granted summary judgment for the school district on Charlton's discrimination and hostile work environment claims. *Id.* at 197.

manded with instructions that the district court broadly interpret the retaliation provision of Title VII to allow a former employee relief from employment-related retaliation by a former employer.¹³

To address the problem of discrimination in employment, Congress enacted Title VII of the Civil Rights Act of 1964.¹⁴ This statute directs employees to file charges of discrimination with the EEOC.¹⁵ If a federal court finds an employer guilty of committing unlawful employment practices, Title VII authorizes a variety of remedies including enjoining the unlawful employment practice, reinstatement, back pay, other appropriate equitable remedies, or compensatory and punitive damages.¹⁶

Additionally, Title VII prohibits employers from retaliating against employees or applicants for employment who have exercised their rights under Title VII.¹⁷ Most retaliatory actions

13. 25 F.3d at 202.

14. H.R. REP. NO. 914, 88th Cong., 2d Sess. 287 (1964), reprinted in 1964 U.S.C.C.A.N. 2401. Congress enacted Title VII to "eliminate . . . discrimination in employment based on race, color, religion, or national origin." *Id.*

15. 42 U.S.C. § 2000e-5(b) (1988). The statute instructs the EEOC to investigate the charge to determine whether there is probable cause to believe the charge is true. *Id.* See *supra* note 3 and accompanying text. If the EEOC finds probable cause, Title VII mandates that the Commission attempt to end the unlawful practices through informal interaction with the employer. 42 U.S.C. § 2000e-5(f). See *supra* note 3 and accompanying text. Should informal conciliation methods fail, the EEOC may sue the employer in federal court. *Id.* If the EEOC finds no probable cause to believe the charge is true, or otherwise fails to take action to end the alleged unlawful employment practices, the aggrieved employee may seek permission from the Commission to bring a private action under Title VII. *Id.* If the Commission issues a "right to sue letter," the employee may commence a civil suit against the employer under Title VII. *Id.*

16. 42 U.S.C. § 2000e-5(g)(1) (1988). See *supra* note 2 discussing remedies available under Title VII. Additionally, in 1991, Congress amended Title VII to make compensatory and punitive damages available to victims of unlawful employment practices. The Civil Rights Act of 1991 reads that "[i]n an action brought by a complaining party under . . . the Civil Rights Act of 1964 against a respondent who engaged in unlawful intentional discrimination prohibited under § 704 . . . the complaining party may recover compensatory and punitive damages . . ." Civil Rights Act of 1991, Pub. L. No. 102-166, § 102(1), 105 Stat. 1074 (1991) (amended 1993).

The ability to obtain legal remedies, as a result of the Civil Rights Act of 1991, is an additional argument for broadly interpreting § 704. Moore, *supra* note 4, at 218 n.85. See also, EEOC: Policy Guide on Compensatory and Punitive Damages Under 1991 Civil Rights Act, 7 FAIR EMPL. PRAC. REP. (BNA) 405:7091 (July 7, 1992); John M. Husband & Jude Biggs, *The Civil Rights Act of 1991: Expanding Remedies in Employment Discrimination Cases*, COLO. LAW., May 1992, at 881.

17. 42 U.S.C. § 2000e-3(a) (1988). This section provides that "[i]t shall be an unlawful employment practice for an employer to discriminate against any

occur during the employment relationship.¹⁸ In some cases, however, an employee whose employment relationship has ended will face retaliation from his or her former employer.¹⁹ The federal courts disagree concerning a *former* employee's right to redress for retaliation under Title VII. Giving effect to the remedial character of Title VII, some courts interpret the statute broadly to include former employees.²⁰ Other courts hold that

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 . . . under this subchapter." *Id.*

In order to establish a *prima facie* case of discriminatory retaliation under § 704, a plaintiff must demonstrate that: (1) the employee engaged in conduct protected by Title VII; (2) the employer took adverse action against the employee; and (3) a causal link exists between the employee's protected conduct and the employer's adverse action. *Weiss v. Parker Hannifan Corp.*, 747 F. Supp. 1118, 1128 (D.N.J. 1990) (citing *Jalil v. Avdel Corp.*, 873 F.2d 701, 708 (3d Cir. 1989)), *cert. denied*, 493 U.S. 1023 (1990).

18. Moore, *supra* note 4, at 205.

19. *Charlton v. Paramus Bd. of Educ.*, 25 F.3d 194, 198 (3d Cir. 1994). "Retaliation claims can often arise post-employment when an employee who has been terminated files an action under Title VII charging discrimination in discharge only to meet continued harassment from its employers in retaliation for the filing of the action." *Id.*

20. *See Sherman v. Burke Contracting, Inc.*, 891 F.2d 1527 (11th Cir. 1990), *cert. denied* 498 U.S. 943 (1990); *Pantchenko v. C.B. Dolge Co.*, 581 F.2d 1052 (2d Cir. 1978); *Rutherford v. American Bank of Commerce*, 565 F.2d 1162 (10th Cir. 1977); *EEOC v. Metzger*, 824 F. Supp. 1 (D.D.C. 1993); *Miles v. J.C. Penney, Inc.*, No. CIV. A. 89-0881-CA, 1991 WL 326498 at *1 (E.D. Tex. Dec. 31, 1991); *Bahu v. Fuller O'Brien Paints*, 41 Fair Empl. Prac. Cas. (BNA) 1231 (N.D. Ind. 1986); *Atkinson v. Oliver T. Carr Co.*, 40 Fair Empl. Prac. Cas. (BNA) 1041 (D.D.C. 1986); *Bilka v. Pepe's, Inc.*, 601 F. Supp. 1107 (N.D. Ill. 1984); *Sparrow v. Piedmont Health Sys. Agency, Inc.*, 593 F. Supp. 1107 (M.D.N.C. 1984); *Helwig v. Suburban Chevrolet*, 33 Fair Empl. Prac. Cas. (BNA) 1261 (D.Md. 1983); *Czarnowski v. Desoto, Inc.*, 495 F. Supp. 1252 (N.D. Ill. 1981); *EEOC v. Virginia Carolina Veneer Corp.*, 495 F. Supp. 775 (W.D. Va. 1980).

The Supreme Court has approved interpretations of remedial statutes that are consistent with the "purpose and objective" of the statute. *See, e.g., NLRB v. Scrivener*, 405 U.S. 117, 122 (1972) (expressing preference for broad reading of statute over strict reading where consistent with purpose and objective of statute); *EEOC v. Ohio Edison Co.*, 7 F.3d 541, 545 (6th Cir. 1993) ("The antiretaliation provision of an employment statute should not be construed narrowly if it defeats the purpose of the statute.").

Courts have construed "employee" in the retaliation provision of several other federal employment discrimination statutes to include former employees. *See, e.g., Passer v. American Chem. Soc'y*, 935 F.2d 322, 330-31 (D.C. Cir. 1991) (interpreting retaliation provision of the Age Discrimination in Employment Act (ADEA) and noting that cases used to interpret the ADEA are frequently relied upon in interpreting Title VII); *EEOC v. Cosmair, Inc.*, 821 F.2d 1085, 1088-89 (5th Cir. 1987) (same); *Dunlop v. Carriage Carpet Shop*, 548 F.2d 139, 142, 147 (6th Cir. 1977) (rejecting a narrow reading of parallel retaliation provision of the Fair Labor Standards Act (FLSA) and holding

the rules of statutory interpretation require courts to interpret Title VII according to its plain meaning, which excludes former employees from claiming retaliation.²¹

Rutherford v. American Bank of Commerce,²² an early case interpreting the retaliation provision of Title VII, protected former employees from retaliation. In *Rutherford*, a former bank employee claimed retaliation in violation of Title VII after her former supervisor told a prospective employer about Rutherford's Title VII charge of employment discrimination.²³ The Tenth Circuit Court of Appeals rejected the bank's contention that because Rutherford was not an employee of the bank when the alleged retaliation occurred, there was no violation of the retaliation provision of Title VII.²⁴ The court ruled that a decision based on a literal reading of the statute would result in an unjustifiably narrow interpretation.²⁵ The court held that the remedial nature of Title VII required courts to construe the retaliation provision broadly, to include former employees.²⁶

The Second Circuit Court of Appeals adopted a similar interpretation of Title VII in *Pantchenko v. C.B. Dolge Co.*²⁷ In *Pantchenko*, a female chemist filed retaliation charges against her employer six months after her resignation, alleging that her former employer refused to give her a letter of recommendation and made disparaging remarks about her to prospective employers.²⁸ The court noted that although Title VII fails to mention former employees, "a narrow construction would not give effect to the statute's purpose," to provide relief against discrimination in connection with a "prospective, present or past employment relationship."²⁹ The *Pantchenko* court, cautioning

that the provision applies to former employees); *Hodgson v. Charles Martin Inspectors of Petroleum, Inc.*, 459 F.2d 303, 306 (5th Cir. 1972) (holding that former employees require protection from retaliation under the FLSA).

21. See *Polsby v. Chase*, 970 F.2d 1360 (4th Cir. 1992); *Reed v. Shepard*, 939 F.2d 484 (7th Cir. 1991).

22. 565 F.2d 1162 (10th Cir. 1977).

23. *Id.* at 1163. Rutherford worked as a loan officer trainee. She resigned when her supervisor directed her to perform clerical duties after a secretary quit. *Id.*

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

25. *Id.* at 1164-65.

26. *Id.* The *Rutherford* court relied heavily on *Dunlop v. Carriage Carpet Shop*, 548 F.2d 139 (6th Cir. 1977). See also Moore, *supra* note 4, at 211-18 (interpreting § 704 by analogy to other remedial employment statutes).

27. 581 F.2d 1052 (2d Cir. 1978).

28. *Id.* at 1054.

29. *Id.* The court of appeals reversed the trial court's entry of summary judgment for the defendant on plaintiff's retaliation claim. *Id.* at 1055.

against interpreting statutes literally,³⁰ held that the retaliation provision of Title VII applies to discrimination "related to or arising out of the employment relationship," regardless of the plaintiff's status as an employee at the time of the discrimination.³¹

One court, interpreting Title VII more broadly than most other courts, granted a former employee relief from retaliation even though the retaliation was unrelated to an employment relationship.³² In *Berry v. Stevinson Chevrolet*,³³ an automobile salesperson filed charges under Title VII alleging that his former employer accused him of forgery in retaliation for his filing of an employment discrimination charge with the EEOC.³⁴ The United States District Court for the District of Colorado held that retaliation against an employee for filing a Title VII claim is actionable "regardless of whether it interferes with an employment relationship."³⁵

While some courts interpret Title VII's retaliation provision broadly, some recent decisions have narrowly construed the section's applicability to employees. The Seventh Circuit Court of Appeals followed this view in *Reed v. Shepard*.³⁶ In *Reed*, a female civilian jailer alleged that her employer retaliated against her for filing charges under Title VII after her termination.³⁷ The court denied *Reed* relief, noting that the alleged retaliation occurred after *Reed*'s termination and was "not an adverse employment action."³⁸ The court held that actionable retaliation

30. *Id.* The court noted Learned Hand's observation that "it is a commonplace [sic] that a literal interpretation of the words of a statute is not always a safe guide to its meaning." *Id.* The court also argued that "once an employment relationship has been created, use of the term 'employee' in referring to a former employee, while colloquial, is not inappropriate." *Id.*

31. *Pantchenko*, 581 F.2d at 1055.

32. *Berry v. Stevinson Chevrolet*, 804 F. Supp. 121 (D. Colo. 1992).

33. *Id.*

34. *Id.* at 130-31.

35. *Id.* at 136. The court declined to follow *Polsby*. See *infra* notes 42-48 and accompanying text. Instead, the opinion relied heavily on *Rutherford*, as teaching "a liberal reading of this remedial statute." Judge Babcock found that "Congress' intent of protecting EEOC complainants from retaliation is furthered when all forms of retaliation, not just those related to employment, are cognizable under section [704]." *Berry*, 804 F. Supp. 121.

36. 939 F.2d 484 (7th Cir. 1991).

37. *Id.* at 492. The alleged retaliation took the form of an investigation of *Reed*'s work activities before a grand jury, a "mysterious attack on her person by a disguised assailant" who urged *Reed* to drop her case against the department, "disturbing late-night phone calls threatening her with reprisals for her lawsuit," and "someone shooting at her car with a gun while she was driving." *Id.*

38. *Id.* at 492-93.

involves an employee's discharge or other discrimination, and "not events subsequent to and unrelated to his or her employment."³⁹

The Fourth Circuit Court of Appeals expanded on the *Reed* holding in *Polsby v. Chase*.⁴⁰ In *Polsby*, a former employee of the National Institute of Health (NIH) filed charges against the NIH under Title VII after her employment contract ended.⁴¹ The Fourth Circuit held that Title VII's retaliation provision does not protect former employees.⁴² The court's opinion criticized other circuits for "bas[ing] their decisions entirely on

39. *Id.* at 493. The *Reed* court noted that the plaintiff might have obtained relief under criminal or tort law instead of Title VII. *Id.*

40. 970 F.2d 1360 (4th Cir.) *vacated sub nom.*, *Polsby v. Shalala*, 113 S. Ct. 1940 (1993).

41. *Id.* at 1362. *Polsby* alleged that her employer retaliated against her by writing a letter to the American Board of Psychiatry and Neurology which erroneously denied her residency credit for her time at the NIH, and by failing to correct the letter at her request. *Id.* at 1362, 1364.

42. *Id.* at 1365. The *Polsby* court relied in part on Judge Tjoflat's special concurrence in *Sherman v. Burke Contracting, Inc.*, 891 F.2d 1527 (11th Cir.), *cert. denied* 491 U.S. 943 (1990). The *Sherman* majority followed *Bailey v. USX Corp.*, 850 F.2d 1506 (11th Cir. 1988), which held that § 704 applies to former employees. In his concurrence, Judge Tjoflat wrote that while he was bound by prior Eleventh Circuit precedent holding that prior decisions may only be overruled by the court sitting en banc, he was also convinced that *Bailey* was erroneously decided. He argued that § 704 does not create a post-employment retaliatory action for money damages because the availability of a state tort action for malicious and intentional interference with contract obviated the need for a § 704 action. *Sherman*, 891 F.2d 1541 (Tjoflat, J., concurring), *citing* *Nager v. Lad 'n Dad Slacks*, 251 S.E.2d 330, 333 (Ga. Ct. App. 1978).

The *Polsby* court applied this reasoning in stating that former employees should seek state or federal legal remedies against former employers. The court also suggested that plaintiffs bring Title VII actions against the prospective employer who refuses to hire, rather than against the former employer who blacklists. *Polsby*, 970 F.2d at 1366.

Judge Tjoflat then embarked on an exhaustive analysis of the proper scope of § 704. Reflecting on principles of judicial construction, Judge Tjoflat argued that courts should read § 704 strictly to allow relief only to current employees and applicants for employment. Judge Tjoflat bolstered his argument by stressing that Title VII contains no clear congressional intent for a broad application. In addition, the equitable nature of Title VII, and the fact that the statute was not intended to provide money damages for former employees indicates that the statute should be interpreted narrowly. *Sherman*, 891 F.2d at 1538. *But see* *NLRB v. Scrivener*, 405 U.S. 117, 122 (1972) (encouraging a broad interpretation of remedial statutes); *EEOC v. Ohio Edison*, 7 F.3d 551, 545 (6th Cir. 1993) (criticizing a narrow construction that defeats the statute's purposes). *But cf.* Civil Rights Act of 1991, Pub. L. No. 102-166 § 102(1), 105 Stat. 1074 (1991) (amending Title VII to provide for compensatory and punitive damages).

dubious considerations of policy” and for failing to rely on the statute’s clear language.⁴³ The opinion analyzed the history of Title VII⁴⁴ and decisions of the Supreme Court of the United States concerning statutory construction, which the court read to require a plain language interpretation of the retaliation provision.⁴⁵ The *Polsby* court also noted that the legislative history showed no intent by Congress to provide relief to former employees.⁴⁶

*Charlton v. Paramus Board of Education*⁴⁷ presented the Third Circuit Court of Appeals with its first opportunity to interpret the scope of the term “employees” in Title VII’s retaliation provision. The *Charlton* court agreed with the view of other courts that a strict interpretation of “employees” would undercut the remedial intent of Title VII by permitting employers to retaliate with impunity against former employees.⁴⁸ Accordingly, the court rejected a strict definition of the term “employees”

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

44. *Id.* at 1365-67. “[T]he paucity of legislative history, if offering any guidance . . . actually supports a normal reading of the statute without adding former employees.” *Id.* citing *Sherman*, 891 F.2d at 1536-42 (Tjoflat, J., concurring). For a discussion of the legislative history of Title VII see Vaas, *supra* note 4.

45. 970 F.2d at 1365, 1367. “[W]here, as here, the statute’s language is plain, ‘the sole function of the courts is to enforce it according to its terms.’” *Id.* at 1365 (quoting *United States v. Ron Pair Enter.*, 489 U.S. 235, 241 (1989)) (citations omitted). “We are bound to follow the clear language of the statute absent a ‘scrivener’s error’ producing an absurd result.” *Polsby*, 970 F.2d at 1367 (quoting *Union Bank v. Wolas*, 502 U.S. 151, 112 (1991) (Scalia, J., concurring)).

46. 970 F.2d at 1365.

47. 25 F.3d 194 (3d Cir. 1994).

48. *Id.* at 200. The court noted the decisions in *Bailey v. USX Corp.*, 850 F.2d 1506, 1509 (11th Cir. 1988) (“[A] strict and narrow interpretation of the word ‘employee’ to exclude former employees would undercut the obvious remedial purposes of Title VII.”), and *Passer v. American Chem. Soc’y*, 935 F.2d 322, 331 (D.C. Cir. 1991) (“To read the statute otherwise would be to deny protection to any person who has suffered discharge or termination due to unlawful discrimination.”).

The court concluded that “Congress did not intend Title VII’s protection against retaliation to end with termination of employment when it is the termination itself that gives rise to the protected act of filing a Title VII action.” *Charlton*, 25 F.3d at 200.

The court stated that “[t]he need for protection against retaliation does not disappear when the employment relationship ends.” *Id.* The court also found that postemployment retaliation may be more damaging than on-the-job discrimination because a current employee subject to retaliation will generally continue to receive a paycheck, “while a former employee subject to retaliation may be prevented from obtaining any work.” *Id.* Finally, the court noted that under the strict interpretation of “employees” in § 704, the “fear of unremediable reprisal would chill Title VII claims.” *Id.*

in favor of a broad definition that included former employees.⁴⁹ The court, however, refused to expand the applicability of the retaliation provision beyond the employment realm.⁵⁰

The *Charlton* court announced two requirements for former employee retaliation claims.⁵¹ First, the retaliatory act complained of must be in reprisal for an act protected under Title VII.⁵² Second, the protected conduct and the employer's retaliatory act must arise out of or relate to the employment relationship.⁵³ The court held that upon remand plaintiff would bear the burden of proving the link between plaintiff filing a Title VII charge and defendant's retaliatory act.⁵⁴

The Third Circuit in *Charlton* properly declined to adopt a strict interpretation of the term "employees" in Title VII's retaliatory provision and correctly advocated a broad interpretation that includes former employees when the alleged retaliation arises out of the employment relationship. A broad interpretation of the term "employees" makes employment discrimination remedies available by not arbitrarily denying relief to potential plaintiffs according to their employment status at the time of the retaliation. The strict interpretation of the term "employees," in contrast, unfairly excludes former employees from the protection of Title VII's retaliatory provision and allows employers to harm former employees who may have no available legal recourse.⁵⁵ Strictly interpreting the term "employees" ignores the remedial objectives of Title VII and its

49. *Id.* at 200. See *supra* notes 42-48 and accompanying text and notes 38-41 and accompanying text discussing the Fourth Circuit case, *Polsby*, and the Seventh Circuit case, *Reed*, respectively, regarding the plain meaning of "employees" in § 704.

50. *Cf.* *Berry v. Stevinson Chevrolet*, 804 F. Supp. 121 (D. Colo. 1992) (holding that § 704 reaches retaliation against former employees regardless of whether the retaliation affects an employment relationship).

51. 25 F.3d at 200.

52. *Id.*

53. *Id.* The court apparently refused to extend the application of § 704 beyond employment situations. See also Moore, *supra* note 4, at 220-24 (advocating a similar two-part rule for § 704 claims).

54. The court stated that on remand, Charlton would be required to show that "but for the intervention of the school board . . . the revocation proceeding would not have gone forward," and "that the school board intervened in retaliation for her Title VII suit." 25 F.3d at 202.

55. 25 F.3d at 201. Several courts stated that former employees could seek redress for injuries occasioned by retaliatory acts of their former employer under state tort or criminal law or other federal statutes. See *supra* note 42 and accompanying text. That suggestion constitutes mere speculation. The availability of such a remedy will of course vary by state and according to the facts of each case. On the other hand, § 704, where interpreted to include former employees, can serve as a catch-all provision to ensure former employees a remedy.

retaliatory provision's purpose of ensuring that discrimination victims can bring actions for relief without fear of reprisal.⁵⁶

After encountering and protesting unlawful employment practices, employees frequently face retaliation for exercising their rights under Title VII. This retaliation often occurs after employment has ended. By joining the majority of courts interpreting the retaliatory provision of Title VII to allow former employees to bring retaliation claims, the *Charlton* court helped ensure that the threat of retaliation will not deter discrimination victims from enforcing their rights under Title VII.

*James Francis Barna**

56. See *supra* notes 2-4, and 14 and accompanying text, discussing the purposes of Title VII.

* J.D. 1996, Washington University.

