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limit its application. Bryson's plan did not satisfy those principles, and, therefore, the court ruled the exception inapplicable. Although the Fourth Circuit failed to conclusively decide the fate of the new capital exception, it determined that fairness and equity control the exception as well as the absolute priority rule. Therefore, if the absolute priority rule includes the exception, it does so in only narrow circumstances.

C. Civil Rights

Proud v. Stone

945 F.2d 796 (4th Cir. 1991)

The Age Discrimination in Employment Act,[62] (ADEA) prohibits employers from engaging in any unfair treatment of employees on the basis of their age. In *Fink v. Western Electric Co.*,[63] the United States Court of Appeals for the Fourth Circuit set forth the three elements necessary to establish a prima facie case under the ADEA: (1) that the plaintiff is a member of the group that the ADEA protects; (2) that the plaintiff has suffered adverse treatment by an employer; and (3) that age was a motivating factor in the employer's action.[64] In *Conkwright v. Westinghouse Electric Corp.*,[65] moreover, the Fourth Circuit adopted for use in ADEA cases the same scheme for burden of proof that the Supreme Court established for Title VII cases in *McDonnell Douglas Corp. v. Green*.[66] The *Conkwright* court held that once the plaintiff presents a prima facie case of age discrimination, the burden is on the defendant to show a nondiscriminatory reason for the action taken. Once the defendant meets that burden, the plaintiff must then show that the defendant's stated reason was pretextual.[67]

In most ADEA cases, the difficult, and usually the only, issue is the existence of discriminatory animus on the part of the employer.[68] The resolution of this issue often requires the parties to proceed through the entire proof scheme at trial. Even in a seemingly frivolous ADEA claim, an employer may be subject to a costly ADEA action as the employer attempts to justify its actions.[69] One recurrent situation often giving rise to an insubstantial ADEA claim is when an employer hires an individual and discharges that individual within a short time.[70]

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62. 29 U.S.C. §§ 621-633 (1988).
63. 708 F.2d 909 (4th Cir. 1983).
64. Fink v. Western Elec. Co., 708 F.2d 909, 914 (4th Cir. 1983).
65. 933 F.2d 231, 234-35 (4th Cir. 1991).
66. 411 U.S. 792, 793 (1973).
67. Conkwright v. Westinghouse Elec. Corp., 933 F.2d 231, 234-35 (4th Cir. 1991).
68. *Fink*, 708 F.2d at 914.
69. Proud v. Stone, 945 F.2d 796, 798 (4th Cir. 1991).
70. *Id.* at 796.

In *Proud v. Stone*, the United States Court of Appeals for the Fourth Circuit considered whether the discharge of an employee by the same individual who had hired him less than six months earlier was the result of illegal age discrimination. In *Proud*, the plaintiff, Warren Proud, applied for a position as Chief Accountant in the Army's Central Accounting Division. Klauss, the Central Accounting Officer, considered Proud along with six other applicants for the position. While Proud, at 68 years of age, was the oldest of the seven applicants, Klauss selected Proud because of his superior qualifications in terms of education and experience. Shortly after Proud took his position, Klauss detected numerous deficiencies in Proud's job performance. Klauss held two separate counselling sessions with Proud and, after observing no improvement in his performance, Klauss requested Proud's dismissal.

Proud filed suit in the United States District Court for the District of Columbia alleging that his discharge violated the ADEA. The district court thereafter granted the Army's motion to move the case to the United States District Court for the Eastern District of Virginia. The Virginia District Court dismissed the suit at the close of the plaintiff's evidence because of insufficient evidence to support a cause of action.

Proud appealed offering several contentions in support of his ADEA claim including, *inter alia*, that his supervisors provided him with inadequate training and guidance, that the work for which his supervisors criticized him was standard practice, and that his employer did not discharge younger, similarly-situated employees who committed the same errors. The Fourth Circuit, however, declined to address each of the plaintiff's contentions. Rather, the court focused on whether the plaintiff had established a prima facie case of age discrimination by proving that his age was a motivating factor in his employer's termination decision.

In examining whether Proud established his prima facie case, the Fourth Circuit focused on the fact that the same individual, Klauss, was both the hirer and the firer and the fact that the duration of employment lasted a relatively short time. The Fourth Circuit held that there is a strong presumption that age discrimination is not a motivating factor in an employer's decision when the employer hires an individual with full knowledge of that individual's age and, within a relatively short time, fires that same individual. The Fourth Circuit reasoned that it would be senseless for an employer to hire employees from an age group that the employer dislikes, only to dismiss the employees once they have taken their position. While the Fourth Circuit recognized that there may be instances where discriminatory motivation could still be proven under these circumstances, the strong inference likely would allow the resolution of most cases at an early stage.

The Fourth Circuit applied this presumption of nondiscrimination to the facts in *Proud* and concluded that because Klauss hired Proud with full knowledge of Proud's age and, within a short time period, fired Proud for legitimate reasons, the facts clearly gave rise to the inference of nondiscrimination. The Fourth Circuit therefore held that Proud failed

to present evidence sufficient to overcome this strong inference and, accordingly, affirmed the district court's dismissal of the plaintiff's claim.

The Fourth Circuit then proceeded to reconcile its holding with the *McDonnell* proof scheme. The Fourth Circuit noted that the purpose of the proof scheme is to assist judges by setting forth the key issues and the respective burdens of proof in an ADEA case. While the proof scheme is unnecessary to resolve the issue of discrimination in cases where the hirer and firer are the same individual, the result of the inference is the same when courts use the proof scheme. When an employer hires and, within a short time, fires the employee, there is a strong inference that the employer's proffered reason for the termination is not pretextual. The plaintiff generally will be unable to present sufficient evidence to overcome the strong presumption of nondiscrimination.

Finally, the Fourth Circuit discussed its holding in light of the purposes of the ADEA. The Fourth Circuit observed that if courts allowed ADEA plaintiffs to proceed to trial under these circumstances, the courts would subject employers to the possibility of a costly ADEA suit in any termination of an older employee, even where there are legitimate reasons for dismissal. Ultimately employers may simply refuse to hire older workers to avoid liability. The Fourth Circuit noted that the presumption of nondiscriminatory intent would further the aims of the ADEA by providing for an early resolution of insubstantial claims.

The *Proud* court essentially refined the ADEA analysis to provide for an early resolution of those cases in which the hirer and firer are the same individual and the time span involved is relatively brief. The United States Court of Appeals for the Eighth Circuit expressly adopted the *Proud* presumption of nondiscrimination in a similar case in which the employer dismissed the plaintiff within two years of hiring him.[71] Because the *Proud* presumption of nondiscrimination logically flows from these facts, and because the presumption does not conflict with the *McDonnell* scheme of proof, other circuits likely will follow the Eighth Circuit in adopting the *Proud* presumption.

Gordon v. Kidd

971 F.2d 1087 (4th Cir. 1992)

An incarcerated person, whether serving a sentence or awaiting a trial, has a clearly established right to medical attention.[72] Jail officials violate

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71. Lowe v. J.B. Hunt Transp., Inc., 963 F.2d 173 (8th Cir. 1992).

72. Whisenant v. Yuam, 739 F.2d 160, 164-65 (4th Cir. 1984), *abrogated on other grounds*, 490 U.S. 296 (1989). In the case of a convicted prisoner, deliberate indifference to his medical needs constitutes cruel and unusual punishment in violation of the prisoner's Eighth Amendment rights. Estelle v. Gamble, 429 U.S. 97, 104-05 (1976), *reh'g denied*, 429 U.S. 1066 (1977). Jailers owe at least the same level of care to a person awaiting trial, because, although Eighth Amendment protections do not apply to a pretrial detainee, that person's due process rights are at least as great as a convicted prisoner's Eighth Amendment rights. City of Revere v. Massachusetts Gen. Hosp., 463 U.S. 239, 243-44 (1983); Hall v. Ryan, 957 F.2d 402, 405 (7th Cir. 1992).

that right if they are deliberately indifferent to an inmate's medical needs,[73] including any serious psychological impairment.[74] The duty of state officials to refrain from deliberate indifference includes a responsibility to protect an inmate from self-destruction or self-injury.[75] Jail officials do not fall short of this duty by mere negligence,[76] and simply failing to prevent a suicide does not constitute deliberate indifference.[77] Rather, the test for deliberate indifference in a jail-suicide case is whether jail officials actually knew, or reasonably should have known, of a particular inmate's suicidal tendencies.[78] Applying this standard in *Gordon v. Kidd*,[79] the United States Court of Appeals for the Fourth Circuit upheld a district court's denial of summary judgment to a jail official on the issue of deliberate indifference.

On June 17, 1988, Elise Gordon called 911 from her home. She told a dispatcher that her husband, Clarence Gordon, was carrying a knife in his hand, was "sloppy drunk," and was threatening to kill himself.[80] Two Charlotte, North Carolina police officers responded to the call and entered the Gordon home, where Clarence approached them with his knife. The officers ordered Clarence to drop the knife. When he did, the police arrested Clarence on an assault charge. After the police took Clarence into their custody, Elise asked one of the officers whether her husband could be put in a safe place, where he could sleep off the effects of alcohol. The officer told Elise, "we could do that."[81] The next morning, Clarence was dead. He had hung himself in his cell.

Elise filed a section 1983 lawsuit in the United States District Court for the Western District of North Carolina.[82] She named as defendants the city of Charlotte, various city employees, and employees of the Mecklenburg County Jail. The defendants moved for summary judgment, but the district court denied that motion. The defendants appealed to the Fourth Circuit.

The court of appeals began its analysis of *Gordon* with a discussion of *Estelle v. Gamble*,[83] the United States Supreme Court decision that

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73. Loe v. Armistead, 582 F.2d 1291, 1295-96 (4th Cir. 1978), *cert. denied*, 446 U.S. 928 (1980).

74. Buffington v. Baltimore County, 913 F.2d 113, 120 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1106 (1991); Greason v. Kemp, 891 F.2d 829, 834 (11th Cir. 1990); Partridge v. Two Unknown Police Officers, 791 F.2d 1182, 1187 (5th Cir. 1986); Bowring v. Godwin, 551 F.2d 44, 47 (4th Cir. 1977).

75. Lee v. Downs, 641 F.2d 1117, 1121 (4th Cir. 1981).

76. Davidson v. Cannon, 474 U.S. 344, 347 (1986).

77. Edwards v. Gilbert, 867 F.2d 1271, 1276 (11th Cir. 1989).

78. Elliott v. Cheshire County, 940 F.2d 7, 10-11 (1st Cir. 1991).

79. 971 F.2d 1087 (4th Cir. 1992).

80. Gordon v. Kidd, 971 F.2d 1087, 1090 (4th Cir. 1992).

81. *Id.*

82. 42 U.S.C. § 1983 (1988). Section 1983 provides that a person who under color of state law deprives another person of constitutional rights shall be liable for that deprivation. *Id.*

83. 429 U.S. 97 (1976).

established the deliberate indifference standard. Under *Estelle*, prison officials violate an inmate's civil rights by displaying deliberate indifference to serious medical needs.[84] Those needs can include a prisoner's psychological condition.[85] In a jail-suicide case, deliberate indifference exists if police officers, knowing a prisoner has threatened to commit suicide, nevertheless place the prisoner in an unsupervised cell.[86] Conversely, if officers have no reason to suspect a prisoner is a suicide risk, deliberate indifference does not exist merely because the prisoner kills himself.[87]

Applying the *Estelle* standard to the *Gordon* facts, the Fourth Circuit noted that the police officers who arrested Clarence reported his suicide threat to another officer, C.G. Lyman. Lyman, in turn, took Clarence's belt from him and warned the Mecklenburg County Jail's assistant supervisor, Deputy John Smith, that Clarence might be suicidal. Based on these efforts, the Fourth Circuit concluded that the arresting officers and Lyman were not deliberately indifferent to Clarence's condition. The court reached a different finding, however, with regard to Smith. The assistant jail supervisor admitted that Lyman warned him that Clarence was a suicide threat. Consequently, the Fourth Circuit determined that Smith's failure to take any action in response to that information was sufficient reason to deny him summary judgment. Conversely, three additional defendants—two other deputies and the jail's night nurse—were unaware of Clarence's suicide threats because Smith did not pass on that information. Thus, the Fourth Circuit concluded, the district court improperly denied summary judgment to all the defendants save Smith.

The Fourth Circuit's application of the deliberate indifference standard in *Gordon* is in accord with jail-suicide cases from other circuits.[88] For example, in *Hall v. Ryan*,[89] an inmate's guardian brought a section 1983

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84. Estelle v. Gamble, 429 U.S. 97, 104 (1976).

85. Bowring v. Godwin, 551 F.2d 44, 47-48 (4th Cir. 1977).

86. Buffington v. Baltimore County, 913 F.2d 113, 119-20 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1106 (1991).

87. Belcher v. Oliver, 898 F.2d 32, 35 (4th Cir. 1990).

88. In addition to those cases cited in the text of this comment, see, *e.g.*, Colburn v. Upper Darby Township, 946 F.2d 1017, 1024 (3d Cir. 1991) (stating that deliberate indifference exists if officials knew or should have known of inmate's particular vulnerability to suicide); Buffington v. Baltimore County, 913 F.2d 113, 120 (4th Cir. 1990) (stating that police who know pretrial detainee is on verge of suicide have duty under due process clause to refrain from deliberate indifference), *cert. denied*, 111 S. Ct. 1106 (1991); Belcher v. Oliver, 898 F.2d 32, 34-35 (4th Cir. 1990) (applying deliberate indifference standard to pretrial detainee's suicide); Cabrales v. County of L.A., 864 F.2d 1454, 1456-57 (9th Cir. 1988) (affirming jury verdict finding defendants deliberately indifferent with regard to prisoner who had previously attempted suicide), *vacated*, 490 U.S. 1087, *reinstated*, 886 F.2d 235 (9th Cir. 1989), *cert. denied*, 494 U.S. 1091 (1990); Freedman v. City of Allentown, 853 F.2d 1111, 1115 (3d Cir. 1988) (stating that evidence officials knew of prisoner's suicidal tendencies yet failed to take reasonable precautions will preclude summary judgment); Partridge v. Two Unknown Police Officers, 791 F.2d 1182, 1187 (5th Cir. 1986) (stating that failure to take steps to prevent suicidal detainee from harming himself may violate due process).

89. 957 F.2d 402 (7th Cir. 1992).

claim against the city of Decatur, Illinois, and five of its police officers.[90] The defendants sought summary judgment, arguing that they had not acted with deliberate indifference.[91] The United States District Court for the Central District of Illinois denied summary judgment,[92] and the United States Court of Appeals for the Seventh Circuit affirmed.[93] One police officer testified that the inmate, Clifford Howard, Jr., threw his shoes across the booking room, urinated on the floor, cursed at the officers, and flushed the toilet in his cell repeatedly.[94] Based on this behavior, and also on indications in Howard's arrest record that he had attempted suicide before, the Seventh Circuit concluded that whether the defendants actually knew Howard was a serious suicide risk was a question for a jury.[95] Consequently, denying the defendants' summary judgment motion was proper.[96]

Similarly, in *Elliott v. Cheshire County*,[97] a prisoner's father brought a section 1983 action after the prisoner, Guy Elliott, Jr., committed suicide in the county jail.[98] Other inmates testified that Elliott had discussed suicide, had banged his head against the bars of his cell, and had tried to break his neck by jamming his head underneath a shelf.[99] The inmates said that they reported Elliott's erratic behavior to corrections officers.[100] The United States Court of Appeals for the First Circuit found that the inmates' testimony created a jury issue.[101] If the inmates reported Elliott's threats to jail officials, the First Circuit reasoned, the officers' possible failure to assess Elliott's mental condition and to take steps to prevent a suicide attempt may have constituted deliberate indifference.[102] Therefore, the First Circuit vacated a decision by the United States District Court for the District of New Hampshire granting summary judgment to the jail officials.[103]

The *Gordon* decision also is consistent with jail-suicide cases in which defendants prevailed on summary judgment.[104] For example, in *Edwards*

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90. Hall v. Ryan, 957 F.2d 402, 402-03 (7th Cir. 1992).
91. *Id.* at 404.
92. *Id.*
93. *Id.*
94. *Id.* at 403.
95. *Id.* at 405.
96. *Id.* at 404.
97. 940 F.2d 7 (1st Cir. 1991).
98. Elliott v. Cheshire County, 940 F.2d 7, 8 (1st Cir. 1991).
99. *Id.* at 9.
100. *Id.*
101. *Id.* at 11.
102. *Id.* at 11-12.
103. *Id.*
104. In addition to those cases cited in the text of this comment, see Williams v. Borough of West Chester, 891 F.2d 458, 466 (3d Cir. 1989) (concluding that jail officials who did not know inmate's history of suicide attempts were at most negligent, and not deliberately indifferent, in failing to remove inmate's belt, which he later used to commit suicide); Estate of Cartwright

v. Gilbert,[105] the United States Court of Appeals for the Eleventh Circuit found that the defendants, the jail officials, had no indication that the inmate in question might commit suicide.[106] Therefore, the Eleventh Circuit concluded that the trial court should have granted summary judgment to those officials.[107] Likewise, in *State Bank v. Camic*[108] the United States Court of Appeals for the Seventh Circuit found that police officers did not know, and did not have any reason to suspect, that a person they arrested had suicidal tendencies.[109] Thus, as was the case for those *Gordon* defendants who did not know of Clarence's suicidal threats, summary judgment for the *Camic* defendants was appropriate.[110]

Polsby v. Chase

970 F.2d 1360 (4th Cir. 1992),
petition for cert. filed (Dec. 7, 1992)

Under Title VII of the Civil Rights Act of 1964[111] it is an unlawful employment practice for an employer to retaliate against an employee or an applicant for employment because that employee or applicant files or participates in the filing of a discrimination charge with the Equal Employment Opportunity Commission (EEOC).[112] The definition of an unlawful employment practice in Title VII encompasses those actions an employer takes that are related to certain aspects of employment, such as hiring and compensation.[113] Despite the plain language of the statute, there is a split among the federal circuit courts on whether the "employee" protected by Title VII includes the former employee of an employer.[114]

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v. City of Concord, 856 F.2d 1437, 1438 (9th Cir. 1988) (affirming trial court's dismissal of complaint against jail officials who, according to trial court, had no reason to believe inmate was contemplating suicide).

105. 867 F.2d 1271 (11th Cir. 1989).

106. Edwards v. Gilbert, 867 F.2d 1271, 1275-76 (11th Cir. 1989). Although the plaintiff introduced an expert's affidavit listing possible indications of inmates' suicidal tendencies in general, there was no evidence that the defendants were aware of these possible indicators or had any duty to be aware of them. *Id.*

107. *Id.* at 1277.

108. 712 F.2d 1140 (7th Cir. 1983).

109. State Bank v. Camic, 712 F.2d 1140, 1146 (7th Cir.), *cert. denied*, 464 U.S. 995 (1983).

110. *Id.*

111. Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, § 701, 78 Stat. 241, 253-55 (codified as amended at 42 U.S.C. 2000e-2000e-17 (1988 & Supp. II 1990)).

112. 42 U.S.C. § 2000e-3(a) (1988 & Supp. II 1990).

113. 42 U.S.C. § 2000e-2(a)(1) (1988 & Supp. II 1990).

114. *See* Reed v. Shepard, 939 F.2d 484, 493 (7th Cir. 1991) (holding that Title VII does not address claims of discrimination occurring subsequent to employment); Bailey v. USX Corp., 850 F.2d 1506, 1509-10 (11th Cir. 1988) (holding that former employees may sue for retaliation against them under Title VII); Pantchenko v. C.B. Dolge Co., 581 F.2d 1052, 1055 (2d Cir. 1978) (holding that statute prohibits discrimination arising out of employment relationship whether or not person discriminated against is employee at time of discriminatory event); Rutherford v. American Bank of Commerce, 565 F.2d 1162, 1165 (10th Cir. 1977) (same).

In *Polsby v. Chase*,[115] the United States Court of Appeals for the Fourth Circuit addressed this specific issue. The court also considered when the waiver and equitable tolling of a time limit barring a sexual discrimination claim is appropriate under Title VII. Further, the court reviewed whether the district court abused its discretion in refusing to allow the plaintiff to amend her complaint to add a Racketeering, Influence and Corrupt Organizations (RICO) charge.

Plaintiff, M. Maureen Polsby, M.D., complained of numerous acts of sexual discrimination by defendant Dr. Thomas Chase, Director of the National Institute of Neurological and Communicative Disorders and Stroke (NINCDS), while she was employed there from 1983 to 1985. During her employment, Polsby consulted a person who she erroneously thought was an EEOC counselor about this sexual discrimination. Other persons Polsby consulted, including one attorney, incorrectly told her that there was a six month statute of limitations on filing a discrimination complaint.

Polsby left NINCDS on July 9, 1985, after Chase told her that NINCDS would not renew her contract. She talked with an EEOC counselor for the first time on December 13, 1985 and filed a formal complaint with the Department of Health and Human Services (HHS) in January 1986. In March 1988, the HHS issued a Proposed Disposition, which later became the Final Disposition of Polsby's complaint. The Proposed Disposition found that Polsby did not file her complaint within the requisite thirty days of the alleged discriminatory event and that regardless of the late filing, the evidence did not support Polsby's claim.

Meanwhile, in December 1985, Polsby requested a letter from NINCDS describing her training there, to assist her in obtaining certification from the American Board of Psychiatry and Neurology. Although NINCDS sent the letter, it included statements that NINCDS would not grant Polsby credit towards residency for her time spent at NINCDS. Despite her requests, NINCDS refused to modify its position. Polsby claimed that the defendants at NINCDS subsequently began to slander her professional competency.

Upon Final Disposition, Polsby filed a pro se complaint in the United States District Court for the District of Maryland, against various persons at NINCDS and the HHS, alleging sexual discrimination under Title VII and various common-law torts. She sought declaratory and injunctive relief and money damages. The district court dismissed the common-law claims and some of the defendants. HHS filed an answer, but raised no affirmative defenses.

Polsby subsequently moved to amend her complaint to add RICO and common-law tort claims and to join other defendants. Polsby asserted that in December 1989 she discovered that the defendants at NINCDS had

115. 970 F.2d 1360 (4th Cir. 1992), *petition for cert. filed*, 61 U.S.L.W. 3446 (U.S. Dec. 7, 1992) (No. 92-966).

appropriated her research without her consent and used it in a published scientific article, which damaged her reputation by use of fabricated data. The district court denied her motion, finding that the new claims were merely restatements of her original complaint.

HHS moved for summary judgment in July 1992 on the grounds that Polsby's claim was time barred and that she could not make out a prima facie case for retaliation under Title VII. The district court granted the motion on the first ground without commenting on the second. Polsby subsequently appealed to the Fourth Circuit, raising three issues: 1) whether the time limits barred her claim of sexual discrimination; 2) whether she made out a prima facie case for retaliation; and 3) whether the court abused its discretion when it denied her motion to amend her complaint to add a RICO claim.

The Fourth Circuit first addressed the time limit issue. There was no dispute that Polsby had failed to bring her complaint of sexual discrimination within the time limits prescribed by regulation.[116] As the time limit was not a jurisdictional issue, the court turned to a consideration of whether it should grant equitable relief to Polsby in light of her failure to file a timely claim before the expiration of the statute of limitations. The Fourth Circuit noted that it usually granted equitable relief when the claimant was diligent in pursuit of judicial remedies and when the failure to file timely was the result of either the deliberate design of the employer or actions the employer should unmistakably have known would cause a delay in filing. The court found that Polsby was not diligent in the filing of her claim and that HHS did nothing to mislead her. The court denied Polsby's plea for equitable relief from the time bar on the basis of that finding. Further, the Fourth Circuit held that the district court did not abuse its discretion in allowing HHS to amend its complaint to include the time limit defense after the filing of its answer. Finally the court of appeals held that a proper reading of Title 29 of the Code of Federal Regulations, section 1613.214(a)(4)[117] requires HHS to extend the time limit for filing a claim only when the claimant shows that her employer did not notify her of the time limits *and* that she did not know of them otherwise. Because Polsby offered no proof that her employer failed to post notice of the time limits, she did not meet the requirement of the regulation.

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116. 29 C.F.R. § 1613.214(a)(1)(i) (1985). The EEOC may accept the complaint only if the complainant brought to the attention of an EEOC Counselor the matter causing her to believe she had been discriminated against within 30 days of the date of the alleged discriminatory event. *Id.*

117. 29 C.F.R. § 1613.214(a)(4) (1985). Section 1613.214(a)(4) reads in pertinent part:

> The agency shall extend the time limits in this section: (i) When the complainant shows that he was not notified of the time limits and was not otherwise aware of them, or that he was prevented by circumstances beyond his control from submitting the matter within the time limits; (ii) or for other reasons considered sufficient by the agency.

Id.

Proceeding to the second issue, the Fourth Circuit held that Title VII provides no cause of action against a former employer by a former employee for acts of retaliation after termination of employment. The Fourth Circuit found unpersuasive the reasoning of the majority of circuits, which read former employees into the statute based on policy considerations and perceived statutory purpose.[118] The court instead chose to follow the United States Court of Appeals for the Seventh Circuit's decision in *Reed v. Shepard*.[119] Quoting *United States v. Ron Pair Enterprises, Inc.*,[120] the court stated that the resolution of the meaning of a statute begins with the language of the statute itself, and when its language is plain, the sole function of the court is to enforce the statute according to its terms.[121]

Looking at the language barring discriminatory practices found in Title VII,[122] the court noted no mention of former employees. Further, the specific inclusion of "applicants for employment" in the language of the statute, and the specific exclusion of former employees, is a clear expression of Congress's intent to exclude former employees from protection under Title VII. The court of appeals also found that the type of discriminatory practices which Title VII prohibits were those particularly related to employment.[123] Thus, the court held, Title VII does not protect against discriminatory practices after the termination of employment.

Finally, the Fourth Circuit looked at the remedies available for discriminatory practices and noted that the statute provides for equitable but not legal remedies.[124] The court found that the great difficulty in applying equitable remedies to post-employment retaliation is a strong policy reason why Title VII protections should not apply to former employees. The

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118. *See* Bailey v. USX Corp., 850 F.2d 1506, 1509 (11th Cir. 1988) (holding that court should not apply plain meaning rule to produce result inconsistent with policies underlying statute); Pantchenko v. C.B. Dolge Co., 581 F.2d 1052, 1055 (2d Cir. 1978) (stating that giving narrow construction to term "employee" would not give effect to statute's purpose, which is to furnish remedy against employer's use of discrimination in connection with prospective, present, or past employment relationship to cause harm); Rutherford v. American Bank of Commerce, 565 F.2d 1162, 1165 (10th Cir. 1977) (finding that excluding former employee would result in narrow interpretation of statute not justified by its legislative history).

119. 939 F.2d 484 (7th Cir. 1991) (holding that under § 2000e-3(a) events subsequent to and unrelated to employment do not evidence actionable retaliation).

120. 489 U.S. 235 (1989).

121. United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241 (1989).

122. 42 U.S.C. § 2000e (1982). Section 2000e reads in pertinent part: "It shall be an unlawful employment practice for an employer to discriminate against one of his employees or applicants for employment, . . . because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." *Id.*

123. 42 U.S.C. § 2000e-2(a)(1) (1982). Section 2000-2(a)(1) reads: "It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment. . . ." *Id.*

124. 42 U.S.C. § 2000e-5(g) (1982). Section 2000e-5(g) reads in pertinent part: ". . . the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate . . . or any other equitable relief as the court deems proper." *Id.*

court determined that, given both the clear language of the statute and the policy considerations, a claim of postemployment retaliatory acts is not a cognizable claim under Title VII.

Finally, the Fourth Circuit held that Polsby's allegation of a RICO claim lacked the required element of continuity to show a pattern of racketeering activity. The court noted that two Fourth Circuit cases previously had held that the pattern requirement is necessary to prevent someone from transforming a claim of ordinary fraud into a RICO claim.[125] Thus, the Fourth Circuit held that the district court correctly refused Polsby's motion to amend her complaint to add a RICO claim.

The Fourth Circuit's holding excluding a former employee from protection under Title VII is contrary to a significant number of other circuit decisions interpreting Title VII.[126] It is also contrary to a number of court of appeals decisions interpreting similar language in other federal statutes.[127] However, the Fourth Circuit's interpretation is consistent with the statute's definition of the term "employee"[128] and with the holding of *Whatley v. Metropolitan Atlanta Rapid Transit Authority* that to prove a prima facie case under Title VII a plaintiff must establish, *inter alia*, the occurrence of an adverse employment action.[129] The court of appeals' exclusion of former employees is consonant with the remedies prescribed by Title VII for retaliatory action.[130] The court's interpretation of Title VII's protections is arguably consistent with the underlying purpose of the

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125. *See* Menasco, Inc. v. Wasserman, 886 F.2d 681, 685 (4th Cir. 1989) (holding that if "pattern requirement" has any force whatsoever, it is to prevent transformation of ordinary commercial fraud into federal RICO claim); International Data Bank, Ltd. v. Zepkin, 812 F.2d 149, 155 (4th Cir. 1987) (holding that to allow pattern of racketeering to flow from single, limited scheme would undermine congressional intent).

126. *See* Sherman v. Burke Contracting, Inc., 891 F.2d 1527, 1531-32 (11th Cir. 1990) (holding that term "employee" in 42 U.S.C. § 2000e-3(a) includes former employee), *cert. denied*, 111 S. Ct. 353 (1990); Bailey v. USX Corp., 850 F.2d 1506, 1509-10 (11th Cir. 1988) (holding that former employees may sue for retaliation against them under Title VII); Pantchenko v. C.B. Dolge Co., 581 F.2d 1052, 1055 (2d Cir. 1978) (holding that Title VII prohibits discrimination arising out of employment relationship whether or not person discriminated against is employee at time of discriminatory event); Rutherford v. American Bank of Commerce, 565 F.2d 1162, 1165 (10th Cir. 1977) (same).

127. *See* Passer v. American Chem. Soc'y, 935 F.2d 322, 330-31 (D.C. Cir. 1991) (holding that term "employee" used in antiretaliation provision of Age Discrimination in Employment Act, 29 U.S.C. § 623(d) (1988), encompasses former employees); EEOC v. Cosmair, Inc., 821 F.2d 1085, 1088 (5th Cir. 1987) (same); Dunlop v. Carriage Carpet Co., 548 F.2d 139, 147 (6th Cir. 1977) (holding that term "employee" in antiretaliation provision of Fair Labor Standards Act, 29 U.S.C. § 215(a)(3) (1988) encompasses former employees).

128. 42 U.S.C. § 2000e(f) (1988 & Supp. II 1992). Section 2000e(f) reads in pertinent part: "The term 'employee' means an individual employed by an employer. . . ." *Id.*

129. 632 F.2d 1325, 1328 (5th Cir. 1980).

130. *See* 42 U.S.C. § 2000e-5(g) (1988 & Supp. II 1990) (providing equitable and not legal remedies); *see also* Sherman v. Burke Contracting, Inc., 891 F.2d 1527, 1536-42 (11th Cir. 1990) (Tjoflat, C.J., specially concurring) (arguing that presence of equitable remedies and lack of legal remedies are indications of congressional intent to protect only employees and not former employees).