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FACTS

Shortly after being fired by Shell Oil Company ("Shell") in 1991, Charles T. Robinson, Sr. filed a charge with the Equal Employment Opportunity Commission ("EEOC") claiming discrimination based on race.[1] While that charge was being processed, Robinson applied for another job.[2] Seeking an employment reference, the company to which Robinson had applied contacted Shell.[3] Robinson believed Shell provided a negative reference to the potential employer in retaliation for filing a discrimination charge with the EEOC. Robinson thereafter filed an antiretaliatory discrimination charge against Shell with the EEOC and sued in the Federal District Court for the District of Maryland[4] under § 704(a) of Title VII of the Civil Rights Act of 1964.[5] Section 704(a) makes it unlawful for an "employer to discriminate against any of his employees or applicants for employment" in retaliation for having taken advantage of Title VII's protections or having assisted another in so doing.[6]

Alleging that § 704(a) does not apply to retaliatory acts against former employees, Shell filed, and was ultimately granted, a motion to dismiss for failure to state a claim upon which relief may be granted.[7] The District Court's decision to grant the motion was consistent with Fourth Circuit precedent that § 704(a) did not apply to former employees.[8] On appeal to the Fourth Circuit, the District Court was reversed by a divided panel of judges.[9] Upon rehearing *en banc*, the Fourth Circuit vacated its earlier decision and affirmed the District Court's dismissal of the action.[10] The Supreme Court granted *certiori* due to conflicting decisions among the circuits.[11]

HOLDING

Justice Thomas delivered the unanimous opinion of the Supreme Court that the use of the word "employee" in § 704(a) includes former employees. According to the Court, Congress's use of "employee" in § 704(a) was ambiguous.[12] Without plain language to reveal whether the word "employee" included former employees, the Supreme Court turned to the broader context and purposes of Title VII.[13] Finding it more consistent with the broader context and purposes of Title VII to interpret the term "employee" to include former employees, the Court reversed the decision of the Fourth Circuit.[14]

ANALYSIS/APPLICATION

Confronted with the damaging interpretation of § 704(a) by the Fourth Circuit, the Supreme Court secured the effectiveness of Title VII's antiretaliatory provisions by looking beyond the most literal interpretation of the term "employee:" "A person in the service of another under any contract of hire . . . ."[15] When attacking any question of statutory interpretation, the Supreme Court first inquires into any plain and unambiguous meaning of the language.[16] Analysis of statutory language includes examination of the language in question itself, the specific context in which the language is used, and the broader context of the statute as a whole.[17] If, after scrutinizing the statutory language in accordance with these three factors, the Court determines that the language is clear, the inquiry must cease.[18] When left with no clear meaning, however, the Court, as in Robinson, then endeavors to rule in a way that protects the purposes of the statute.[19]

I. STATUTORY ANALYSIS

A. The language itself

In its analysis of Robinson, the Court first questioned the meaning of the term "employee" standing alone.[20] The Court recognized that the word "employee" refers to the status of a relationship between one person and

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[1] *Robinson v. Shell Oil Co.*, 117 S.Ct. 843, 845 (1997).
[2] *Robinson*, 177 S.Ct. at 845.
[3] *Id.* at 485.
[4] *Id.*
[5] 42 U.S.C. § 2000e-3(a) (1988).
[6] 42 U.S.C. § 2000e-3(a).
[7] *Robinson*, 117 S.Ct. at 845.
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.* at 846.
[12] *Id.* at 849.
[13] *Id.*
[14] *Id.*
[15] Black's Law Dictionary 525 (6th ed. 1990).
[16] *Robinson*, 117 S.Ct. at 846; *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240 (1989); *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992).
[17] *Robinson*, 117 S.Ct. at 846; *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 477 (1992); *McCarthy v. Bronson*, 500 U.S. 136 (1991).
[18] *Ron Pair Enterprises, Inc.*, 489 U.S. at 235; *see also Connecticut Nat'l Bank*, 503 U.S. at 253-54.
[19] *Robinson*, 177 S.Ct. at 848.
[20] *Id.* at 846.

another,[21] and, that the relationship is also judged with respect to a point in time. When evaluating the point in time against which the relationship is judged, the Court gave no weight to the absence of a temporal qualifier preceding the word "employee."[22] Although Congress could have easily used the term "former employees" to make it clear that the anitretaliation provisions protect employees that have been discharged or have left the employment voluntarily, its absence is not determinative of Congress's intent.[23] The Court noted that Title VII never uses the words "former employees" or "current employees," even where the specific context makes it clear that one or the other is intended.[24] For example, the Court held in *Walters v. Metropolitan Educational Enterprises, Inc.*, one month prior to *Robinson,* that the word "employee" in § 701(b)[25] referred only to current employees.[26] Section 701(b) limits the coverage of Title VII to those employers that have "fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year."[27] In determining that § 701(b) should be interpreted to mean fifteen or more employees on the payroll for an entire week for twenty or more calendar weeks, the Court implicitly referred to current employees.[28] In Robinson, the Court stated that even though the use of the unqualified word "employees," has been used by Congress to mean current employees, as in § 701(b) analyzed by the *Walters* case, it does not necessarily follow that the term "employees" can only refer to current employees.[29]

B. The specific context in which the language is used

Second, the Court examined the more immediate context of the term "employee." The Court turned to the statutory definition of "employee"[30] and found that it also did not indicate whether former employees are included within the term.[31] Title VII defines an employee as "an individual employed by an employer . . . ."[32] The term "employed" that is used in the statutory definition of "employee" is defined by Black's Law Dictionary as "[p]erforming work under an employer-employee relationship."[33] "Performing," as an action word, implies that there is a current employment relationship. After taking note of the definition of "employed" in Black's Law Dictionary, the Court summarily stated that the word "employed," as it is used in the statutory definition of "employee," could "just as easily be read to mean 'was employed.'"[34]

C. The broader context of the statute as a whole

Third, the Court turned to the broader context of Title VII as a whole and found that "employee" in some contexts refers to current employees, but in other contexts the term was "more inclusive or different."[35] Those sections dealing with salaries and promotions, such as § 703(h),[36] for example, refer "unambiguously to a current employee."[37] That section allows an employer to provide differing levels of compensation to employees based on geography and a bona fide seniority or merit system.[38] Section 703(h) plainly refers to current employees because compensation for services is only awarded to employees that are currently employed.

Sections 706(g)(1) and 717(b), however, demonstrate that the word "employee" can be used by Congress to mean something more inclusive than current employee. Both sections[39] authorize equitable actions by a court or the EEOC including "reinstatement or hiring of employees."[40] "Employee" in sections 701(g)(1) and 717(b) must include former employees and applicants for employment; only former employees can be "reinstat[ed]" and only applicants for employment can be "hir[ed]."[41] Section 717(b) also requires departments, agencies, and units of the federal government to include in their required equal employment opportunity plan a provision "that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him . . . ."[42] Since discriminatory discharge is a prohibited "personnel action" under § 717(a),[43] the "employee" in § 717(b) to be notified is necessarily a former employee.[44] Section 717(c) goes on to give an aggrieved "employee" the right to file a civil suit within ninety days of notice of final action or within one hun-

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[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] 42 U.S.C. § 2000e(b) (1988).
[26] *Walters v. Metropolitan Educational Enterprises, Inc.*, 117 S.Ct. 660, 664 (1997).
[27] 42 U.S.C. § 2000e(b) (1988).
[28] *Walters,* 117 S.Ct. at 664.
[29] *Robinson,* 117 S.Ct. at 846.
[30] 42 U.S.C. § 2000e(f) (1988).
[31] *Robinson,* 117 S.Ct. at 846-47.
[32] 42 U.S.C. § 2000e(f) (1988).
[33] Black's Law Dictionary 525 (6th ed. 1990).
[34] *Robinson,* 117 S.Ct. at 847.
[35] *Id.*
[36] 42 U.S.C. § 2000e-2(h) (1988).
[37] *Robinson,* 117 S.Ct. at 847.
[38] 42 U.S.C. § 2000e-2(h) (1988).
[39] 42 U.S.C. § 2000e-5(g)(1) (applies to the private sector); and 42 U.S.C. § 2000e-16(b) (applies to the federal government).
[40] *Robinson,* 117 S.Ct. at 847.
[41] *Id.*
[42] 42 U.S.C. § 2000e-16(b) (1988).
[43] 42 U.S.C. § 2000e-16(a).
[44] *Robinson,* 117 S.Ct. at 847.

dred and eighty days of filing a charge with the department, agency, or unit.[45] Again, since § 717(a) prohibits discriminatory discharge, the "employee" that has the right to file a civil suit must be a former employee.

Section 701(c)[46] which defines "employment agency" demonstrates that the term "employee" may be used to mean something different than "current employee."[47] "Employment agency" is defined as "any person regularly undertaking . . . to procure employees for an employer or to procure for employees opportunities to work for an employer.[48] "Employees" is most logically read to mean "prospective employees."[49] In regards to labor organizations, the term "employees" in § 701(e),[50] which uses the same language as § 701(c), is also understood as "prospective employees."[51]

II. PROTECTING THE STATUTE

After reviewing these sections which established that the term "employee" can mean either "current employee," or something "more inclusive or different" than "current employee," the Court noted that the "examples at most demonstrate that the term . . . may have a plain meaning in the context of a particular section—not that the term has the same meaning in all other sections and in all other contexts."[52] Without any clear understanding from the word itself, or its context, the Court concluded that the term standing alone in § 704(a) must be ambiguous.[53] Therefore, in each section the term must be analyzed in its context to determine whether the extent of its meaning is clear.[54]

Here, the Court found that the context of § 704(a) does not make it clear whether the term "employee" is meant to include former employees. Section 704(a) states: "It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has . . . made a charge . . . under this subchapter."[55] The Court rejected Shell's argument that the word "his" before "employee" narrows the scope of the word to current employees.[56] The Court stated that the "phrase 'his employees' could include 'his' former employees, but could still exclude persons who have never worked for the particular employer being charged with retaliation."[57] The Court also rejected the respondent's argument that the "inclusion in § 704(a) of 'applicants for employment' as persons distinct from 'employees,' coupled with its failure to include 'former employees,' is evidence of congressional intent not to include former employees. The use of the term 'applicants' in § 704(a) does not serve to confine, by negative inference, the temporal scope of the term 'employees.'"[58]

Since the context of § 704(a) evidenced no plain meaning of the term "employee," the Court, in the interest of consistency and to protection of the spirit of § 704(a), held that the term includes former employees.[59] This decision is consistent with the broader context of Title VII that clearly intends to protect discharged employees.[60] Because § 703(a) expressly prohibits discriminatory "discharge," it is only logical that former employees claiming an act of discriminatory discharge be protected by the antiretaliatory provisions of § 704(a) for filing a charge with the EEOC. In addition, a decision that the term "employees" does not include "former employees" would topple the effectiveness of the antiretaliatory provision of Title VII.[61] Paraphrasing the EEOC's *amici curiae* brief, the Court ultimately stated that the "exclusion of former employees from the protection of § 704(a) would undermine the effectiveness of Title VII by allowing the threat of post-employment retaliation to deter victims of discrimination from complaining to the EEOC, and would provide a perverse incentive for employers to fire employees who might bring Title VII claims."[62]

CONCLUSION

After painstaking analysis of statutory language by the Court, the decision in *Robinson* preserves the force of Title VII's antiretaliatory provisions by holding that § 704(a) protects former employees from retaliatory actions spurred by the former employee's use or cooperation with Title VII's discrimination laws. Perhaps creative legal argument by counsel was the source the

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[45] 42 U.S.C. § 2000e-16(c).
[46] 42 U.S.C. § 2000e(c).
[47] *Robinson,* 117 S.Ct. at 847, n.3.
[48] 42 U.S.C. § 2000e(c).
[49] *Robinson,* 117 S.Ct. at 847, n.3.
[50] 42 U.S.C. § 2000e(e).
[51] *Robinson,* 117 S.Ct. at 847, n.3.
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] 42 U.S.C. § 2000e-3(a).
[56] *Id.* at 847-48.
[57] *Id.* at 848.
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] *Id.*

Fourth Circuit's interpretation of § 704(a), but common sense, more than any other reason, dictates the ultimate result in *Robinson.* The extraordinary aspect of *Robinson* is the hermetic exegesis the Court conducts to reach its decision. Aware, perchance, that the word "employee" does not mean to the average man a person who no longer provides labor for compensation, the Court felt compelled to prove beyond a reasonable doubt that the word really is ambiguous. The most obvious reason for its decision, the purpose of the statute, was given an almost cursory treatment. Legislative intent is accorded secondary treatment to patent language, if any. In *Robinson,* the Court reaches the right result, but without enough emphasis on the right reason.

Summary and Analysis Prepared by:
Jennifer Schooley