

ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: CHARLES T. ROBINSON , Petitioner v.
SHELL OIL COMPANY
CASE NO: 95-1376
PLACE: Washington, D.C.
DATE: Wednesday, November 6, 1996
PAGES: 1-54

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 CHARLES T. ROBINSON, SR., :

4 Petitioner :

5 v. : No. 95-1376

6 SHELL OIL COMPANY :

7 - - - - -X

8 Washington, D.C.

9 Wednesday, November 6, 1996

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 11:10 a.m.

13 APPEARANCES:

14 ALLEN M. LENCHEK, ESQ., Rockville, Maryland; on behalf of
15 the Petitioner.

16 PAUL R. Q. WOLFSON, ESQ., Assistant to the Solicitor
17 General, Department of Justice, Washington, D.C.; on
18 behalf of the United States, as amicus curiae,
19 supporting Petitioner.

20 LAWRENCE C. BUTLER, ESQ., Houston, Texas; on behalf of the
21 Respondent.

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On behalf of the Petitioner	3
PAUL R. Q. WOLFSON, ESQ.	
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1 P R O C E E D I N G S

2 (11:10 a.m.)

3 CHIEF JUSTICE REHNQUIST: We will hear argument
4 next in No. 95-1376, Charles T. Robinson, Sr., v. Shell
5 Oil Company.

6 Mr. Lenchek.

7 ORAL ARGUMENT OF ALLEN M. LENCHEK

8 ON BEHALF OF THE PETITIONER

9 MR. LENCHEK: Mr. Chief Justice, and if it
10 please the Court:

11 This case presents the question: Does the
12 provision of Title VII of the 1964 Civil Rights Act that
13 prohibits retaliation against, quote, employees, unquote,
14 for filing charges of discrimination or otherwise availing
15 themselves of their rights under Title VII -- namely
16 Section 704(a) -- does that section cover former
17 employees, employees such as Petitioner, Charles Robinson,
18 who were discharged prior to the alleged retaliation?

19 In this case, after Charles Robinson was
20 terminated by Shell Oil, he filed a charge of
21 discrimination against Shell under Title VII, and
22 subsequently, Shell gave him a negative job reference. He
23 then brought the present action, alleging that that
24 negative reference was made in retaliation for his earlier
25 charge of discrimination.

1 The Fourth Circuit held that Charles Robinson
2 was not even entitled to have the court determine whether
3 that reference was retaliatory, because he was not
4 employed by Shell at the time of the reference. If Shell
5 had given him that reference the day before he was
6 terminated, everyone agrees, he would have had that right
7 to a judicial determination.

8 QUESTION: Well, if you're right, it's -- it's a
9 rather sure way to make -- make sure you don't get a bad
10 reference; you just file a complaint with the EEOC a
11 couple of days after -- or a couple of days before you're
12 fired, even though the firing is completely justified.

13 MR. LENCHEK: Well, that is not, in fact, what
14 actually happens.

15 QUESTION: No, it may not be what in fact
16 happened in your case, but it certainly might happen in a
17 number of other cases if we sustain your position.

18 QUESTION: Or even if you're not going to be
19 fired, even if you just intend to quit, it would be very
20 wise, before you quit, to file an EEOC complaint. Because
21 then, if -- if the employer gives you a bad reference in
22 -- in your later job, he takes the risk of being sued for
23 that, on the basis of retaliation. He's buying a lawsuit.

24 MR. LENCHEK: There are, in fact, disincentives
25 to frivolous charges built into Title VII, which hopefully

1 would take care of that problem.

2 QUESTION: Well, what are -- what are they?

3 MR. LENCHEK: A principal brings a frivolous
4 lawsuit under Title VII may be hit with attorney's fees
5 and costs.

6 QUESTION: What about, are there any
7 disincentives to filing a frivolous complaint with the
8 EEOC? Any similar disincentives?

9 MR. LENCHEK: There -- there are -- no, the EEOC
10 can't apply any disincentives like that. That's true.
11 But we believe that the language --

12 QUESTION: What other remedies are available to
13 someone who, after he's -- he's been terminated, thinks
14 that a reference was erroneously made and given by the
15 former employer? Is there any other action at law that
16 would be open for redress?

17 MR. LENCHEK: There are possible actions under
18 State law.

19 QUESTION: Right.

20 MR. LENCHEK: But it is well established that
21 Title VII is intended to give parallel remedies to any
22 other remedies that may be available.

23 We believe that the language of Title VII, and
24 the purpose of Section 704(a), indicate that Congress
25 intended former employer -- employees -- to be covered by

1 the retaliatory section. Section 704(a) provides that it
2 shall be an unlawful employment practice for an employer
3 to discriminate against any of his employees or applicants
4 for employment because he has opposed the charge or
5 because he has opposed an unlawful practice or because he
6 has made a charge or participated in an EEOC proceeding as
7 a possible witness.

8 I emphasize that Section 704(a) protects an
9 employee who has made a charge, because the substantive
10 provision of Title VII, Section 703(a), cited in full and
11 verbatim in the Respondent's brief at page 14, makes it an
12 unlawful employment practice to discharge any individual
13 because of his race, and so on. An individual --

14 QUESTION: And that -- that complaint was made
15 here?

16 MR. LENCHEK: That's exactly what happened in
17 this case.

18 QUESTION: And -- and the plaintiff lost?

19 MR. LENCHEK: Right. That's right. That's
20 right.

21 Now, an employee who is discharged will
22 necessarily file his charge of discrimination after he
23 ceases working for that employer. So when Congress wrote
24 Section 704(a) --

25 QUESTION: Well, he'll file his charge if -- if

1 he claims the discharge is discriminatory?

2 MR. LENCHEK: Yes.

3 QUESTION: He could -- the employee could remain
4 employed and file a complaint that a failure to promote
5 was discriminatory, couldn't he?

6 MR. LENCHEK: That's right. That's right. But
7 he would remain an employee, and if he were retaliated
8 against because of that charge, he would ordinarily still
9 be an employee and clearly be covered by the Act.

10 The point I want to make is that when Congress
11 wrote this statute, it contemplated that people would file
12 charges alleging that they were discriminatorily
13 discharged --

14 QUESTION: It -- it's the time of the
15 discrimination that -- that -- that's relevant for
16 704(a) --

17 MR. LENCHEK: Exactly.

18 QUESTION: -- and the person who is fired
19 because he filed a complaint --

20 MR. LENCHEK: Exact --

21 QUESTION: -- was an employee at the time he was
22 fired.

23 MR. LENCHEK: Exactly.

24 QUESTION: So he would be -- he would be well
25 covered, even if "employee" means only current employee?

1 MR. LENCHEK: He would be covered by 7 --
2 703(a). The issue in this case is, if he's no longer an
3 employee at the time of the retaliation, is he covered by
4 the statute?

5 QUESTION: Well --

6 QUESTION: If he's fired as a means of retal --
7 if he's either not promoted or fired --

8 MR. LENCHEK: Of course, if he's --

9 QUESTION: -- as a means of retaliation --

10 MR. LENCHEK: Of course, that --

11 QUESTION: -- he would be covered under 704(a),
12 even if 704(a) is just limited to current employees,
13 right?

14 MR. LENCHEK: That's right.

15 QUESTION: Okay.

16 MR. LENCHEK: That's right.

17 QUESTION: So --

18 MR. LENCHEK: But the point I want to make is
19 that Congress knew that people would be subject to
20 retaliation under 704(a) when they were no longer
21 employees, because there would be people who file charges
22 alleging that they were discharged because of race and so
23 on, and those people would necessarily be no longer
24 employees at the time they might be retaliated against.
25 So Congress must have contemplated that people who would

1 be firing -- fired, would be filing charges and then might
2 be retaliated against when they were no longer employees.

3 QUESTION: Well, do we have to look at the
4 definition in the applicable section here of the word
5 "employee"? Is that how we should proceed?

6 MR. LENCHEK: Un -- unfortunately, that
7 definition has -- this Court has said that definition
8 doesn't help us much --

9 QUESTION: Well, the definition says the term
10 "employee" means an individual employed by an employer.
11 And that is ambiguous in your view?

12 MR. LENCHEK: Well, this Court --

13 QUESTION: It could include former employees, a
14 person employed?

15 MR. LENCHEK: That is precisely what we're
16 saying. Because, as the Court has said in Darden, that
17 definition is a circular definition, which doesn't help
18 much in deciding who is an employee. And as --

19 QUESTION: -- a purpose that's not relevant in
20 this --

21 MR. LENCHEK: That's right.

22 QUESTION: -- a traditional common-law type
23 employee versus an independent contractor.

24 MR. LENCHEK: That --

25 QUESTION: So it's not -- it's not circular for

1 that purpose, but it just doesn't speak to what's at issue
2 here?

3 MR. LENCHEK: That's right. But as -- as Your
4 Honor pointed out in the earlier argument, a word in a
5 statute may have different meanings in different --
6 different parts of the statute, and one must look at the
7 purpose of the statute to decide what that particular
8 meaning is in a given place in the statute.

9 QUESTION: Well, I understand it to be your
10 position that the -- circular though the -- the definition
11 may be, it is helpful to you in the sense that it is as
12 consistent with the reading, who was employed by an
13 employer, as with the reading, who is employed by an
14 employer. So -- so you're still in the game, even though
15 the word "employed" is the modifier.

16 MR. LENCHEK: That's right.

17 QUESTION: That's your argument?

18 MR. LENCHEK: That is exactly right.

19 QUESTION: Yeah.

20 MR. LENCHEK: And -- and in order to decide
21 which of the multiple meanings the word "employee" has in
22 this statute, one must look to the purpose of the statute.
23 And the purpose of the statute, obviously, is to protect
24 those people who get discharged and then file charges of
25 discrimination, and may be subject to retaliation. And

1 Congress clearly contemplated that those people would be
2 making charges, would be subject to retaliation, and wrote
3 the retaliation provision, using the simple --

4 QUESTION: Why should Congress contemplate that?
5 I would -- if I were a congressman, I would have had a
6 hard time figuring out how an employer could retaliate
7 against somebody who is no longer an employee. He could
8 retaliate by refusing to rehire the guy, perhaps. But, in
9 that case, he's covered, because he would be an applicant
10 for employment. But the notion that he could retaliate
11 once -- once the employ -- employment relationship is
12 terminated -- I mean, I guess he could -- he could send
13 somebody over to -- to mug him or something like that, but
14 --

15 QUESTION: How about cutting off his pension
16 benefits?

17 MR. LENCHEK: That's right.

18 QUESTION: Well, that -- surely that would be
19 unlawful, wouldn't it?

20 MR. LENCHEK: No question about it; this Court
21 has said so.

22 QUESTION: Well, would -- would you need this
23 Act to -- to prevent his -- that's like sending somebody
24 over to mug him.

25 MR. LENCHEK: Yes, one does need this Act.

1 QUESTION: You don't have to worry about that?
2 You have laws against it.

3 MR. LENCHEK: Yes, one does need this Act. In
4 Arizona Governing Committee, which was cited in Hishon,
5 which we cite in our case, this Court said that cutting
6 off pension benefits or discriminating with regard to
7 pension benefits on the basis of sex was a violation of
8 the substantive provision of Title VII.

9 The reason one needs this Act is because, if an
10 employer chose to cut off pension benefits as a
11 retaliatory measure, and then were -- was -- was charged
12 under the substantive provision of Title VII -- the claim
13 would be you cut off my pension benefits because I'm black
14 -- the employer then -- if this Court upholds the Fourth
15 Circuit -- could come in and use the fact that it was
16 motivated by retaliation as an affirmative defense to the
17 charge that it was motivated by sex or race.

18 If this Court upholds the Fourth Circuit, an
19 employer will have carte blanche to retaliate against
20 discharged employees. As a matter of fact --

21 QUESTION: I'm not sure -- I'm not sure, in the
22 context of a pension or a bonus, that there is not a
23 sufficient ongoing relation, so that the discrimination
24 that you are hypothesizing would be against an employee,
25 even though the employee has been terminated. I think

1 there still are certain subsisting relations between the
2 -- the individual and the employer, one of which is
3 entitlements to pension, which would mean that he's an
4 employee for that purpose.

5 MR. LENCHEK: Yes, Justice Kennedy, that's
6 right. That would take care of -- of that one particular
7 class. But there's a broader class that would not be
8 covered if this Court upheld the Fourth Circuit. And that
9 is all those people who have no remaining relationship
10 with that employer. And if the Court upholds the Fourth
11 Circuit --

12 QUESTION: I -- I was -- I was just directing my
13 -- my comments to the pension and bonus example. But I --
14 I agree with your next point that you --

15 MR. LENCHEK: Yes. But consider -- consider
16 what Shell Oil or any employer could do if this Court
17 upholds the Fourth Circuit. The day after this Court
18 hands down its decision, Shell Oil could announce a policy
19 that any terminated employee who then later files a charge
20 of discrimination against the company will be subject to
21 retaliation. We will retaliate against you. We will cut
22 off your pension, if you have one. We will cut off your
23 health benefits, if you have --

24 QUESTION: And it wouldn't violate this law?

25 MR. LENCHEK: And it would not violate --

1 QUESTION: But --

2 QUESTION: But it would violate other laws,

3 though?

4 MR. LENCHEK: Maybe not. Maybe not.

5 QUESTION: Well, you know, if a person has a

6 vested pension and he's dismissed by an employer --

7 MR. LENCHEK: That's right.

8 QUESTION: -- there is no law that protects his

9 enjoyment of that pension?

10 MR. LENCHEK: That is absolutely right. But

11 there is -- that person --

12 QUESTION: Well, I mean, I said -- and there --

13 there's no law that protects his --

14 MR. LENCHEK: Yes, there is. Of course, ERISA

15 would protect him.

16 QUESTION: Yeah.

17 MR. LENCHEK: But there would be no cause of

18 action against the employer who announced a policy of

19 simply, we will not give you any reference --

20 QUESTION: But I --

21 MR. LENCHEK: -- and we will not even

22 acknowledge you worked for us.

23 QUESTION: I thought in my earlier -- I thought

24 in our earlier colloquy that we just had that you agreed

25 that in the pension and bonus example --

1 MR. LENCHEK: Yes.

2 QUESTION: -- the terminated individual would
3 have a sufficient nexus --

4 MR. LENCHEK: Yes.

5 QUESTION: -- for the purpose of pension, to be
6 an employee, even under the Respondent's view?

7 MR. LENCHEK: Right.

8 QUESTION: All right.

9 MR. LENCHEK: But --

10 QUESTION: So, then, I don't think we should
11 talk about employers who are going to threaten former
12 employees with cutting off their pensions. Because I
13 thought we just agreed that that wasn't -- wasn't a
14 problem.

15 MR. LENCHEK: Well, he could threaten not to
16 give any reference --

17 QUESTION: Yeah, but can you speak for the --
18 can you speak for the Respondent on that issue? The
19 Respondent's literal, plain language argument, it seems to
20 me, applies there as well as here. How -- how do you know
21 the Respondent will agree with Justice Kennedy's
22 suggestion? I don't think you have authority to say that.

23 MR. LENCHEK: No, I -- I'd like to reserve the
24 balance of my time.

25 QUESTION: Well, but -- but it -- but it is

1 certainly within the purview of a logical construction of
2 his position?

3 MR. LENCHEK: I -- I'll -- I'll leave that for
4 Respondent to answer.

5 QUESTION: Very well. Very well, Mr. Lenchek.

6 (Laughter.)

7 QUESTION: You'll let Justice Stevens and
8 Justice Kennedy fight that out between themselves is what
9 you mean?

10 (Laughter.)

11 QUESTION: Mr. Wolfson. We'll hear from you
12 Mr. Wolfson.

13 ORAL ARGUMENT OF PAUL R. Q. WOLFSON

14 ON BEHALF OF THE PETITIONER

15 MR. WOLFSON: Mr. Chief Justice, and may it
16 please the Court:

17 Under the Court of Appeals reading of Section
18 704(a), any employee who was discharged and who went to
19 the EEOC with a complaint of discrimination would lack
20 protection against his former employer for -- for --
21 against retaliation by his former employer.

22 I want to focus for a minute on why that seems
23 just to be implausible that Congress would have carved out
24 such a large category of employees from the reach of
25 Section 704, especially since discharged employees are

1 probably among the -- the category of employees that are
2 really --

3 QUESTION: If we are talking about what Congress
4 might have intended, do you think Congress really intended
5 that an action could be brought against an employer who
6 makes a reference for a person after -- after he's been
7 discharged? Do you think that was what Congress had in
8 mind when it talked about retaliation against an employee?

9 MR. WOLFSON: Well, I -- I mean, I -- I think
10 that --

11 QUESTION: Do -- do you?

12 MR. WOLFSON: I -- I think that's -- that is
13 quite a possible reach within Section 704. One of the
14 things I want to focus is that --

15 QUESTION: Well, I mean -- but you're talking
16 about what did Congress intend. Do you think that was
17 what Congress had in mind?

18 MR. WOLFSON: Congress -- Congress made Section
19 704 very -- a very clear and strong protection against
20 retaliation. And I can't say that it focussed
21 specifically on the issue of references, but it did know
22 that it was very necessary for employees to be able to
23 approach the EEOC without fear of adverse economic
24 consequences from their employer for doing so. Because
25 the --

1 QUESTION: Well, what -- what if, in this case,
2 the -- the thing -- the request for references came 10
3 years --

4 MR. WOLFSON: I -- I -- I'm aware of that
5 hypothetical. I have to -- first of all, I have to say
6 that that hypothetical is not within the EEOC's
7 experience, that that -- that that happens. Secondly, I
8 think that that is really a very remote situation, and it
9 has to be contrasted with the very realistic situation,
10 where somebody goes to the EEOC and, very quickly after
11 that, suffers retaliation. To focus on --

12 QUESTION: Well, but -- we're -- we're going to
13 -- we're going to have to cover them both, I gather --

14 MR. WOLFSON: Well, I -- I -- I --

15 QUESTION: -- either to not cover them both or
16 cover them both.

17 MR. WOLFSON: I -- I acknowledge, Mr. Chief
18 Justice, that that could plausibly come within the --
19 within the reach of the statute, under Section 704. But,
20 I have to say, I think that is a remote danger. I want to
21 focus on a point that Justice Kennedy --

22 QUESTION: Suppose -- never mind that -- suppose
23 the retaliation comes not from the employer but from the
24 -- the individual employee, and not within the scope of
25 the business at all -- whom the -- whom the -- the

1 complainant charged with discrimination.

2 MR. WOLFSON: I --

3 QUESTION: That individual goes in the --
4 scratches his car or slashes his tires or -- or destroys
5 his home or something of that --

6 MR. WOLFSON: Right.

7 QUESTION: Would that be covered by this?

8 MR. WOLFSON: Two -- two points. I mean, first
9 of all --

10 QUESTION: Would -- would that be covered by the
11 Act?

12 MR. WOLFSON: Not necessarily.

13 QUESTION: So, not at all?

14 MR. WOLFSON: Well, it -- it has to be an
15 employer, first of all, who is -- through a Section 704 --

16 QUESTION: Okay. So -- so you acknowledge there
17 are some limitations within the Act upon retaliation?

18 MR. WOLFSON: Yes.

19 QUESTION: Not all retaliation is meant to be
20 protected?

21 MR. WOLFSON: It --

22 QUESTION: So all we're arguing about is whether
23 one of the limitations is a limitation between present
24 employer and former employer.

25 MR. WOLFSON: Right, present employer and -- and

1 former employer. And -- but it's not -- but it isn't just
2 references that -- that is at issue. I mean, Justice
3 Kennedy had a colloquy -- a colloquy earlier about the --
4 -- the -- the problem of pension benefits.

5 Contesting an unemployment claim is a situation
6 that you would -- might see. And the Court, in the
7 sixties, had a case called Nash against Florida
8 Unemployment Commission, where it said that, under the
9 NLRA, that contesting an unemployment claim could be
10 prohibited retaliation under the National Labor Relations
11 Act.

12 And that, I think, is a -- a situation that one
13 might very well expect to see. Somebody quits or is
14 fired, believes that he was discharged, went to the EEOC,
15 filed an unemployment claim, and, immediately thereafter,
16 the employer decides, well, this one we'll contest, even
17 though most unemployment claims for compensation we let go
18 because it isn't worth it, because we're just -- we're mad
19 at the employee for filing a claim of discrimination.

20 And references are also, I think, a situation
21 where an employee might very well find that he receives an
22 adverse reference or he receives no reference in all -- at
23 all -- an employee -- an employer might normally have a
24 practice of saying, well, we -- we say reasonably nice
25 things about our employees once they've gone, but -- but

1 did he -- because this one has filed a discrimination
2 charge, this one, if we get any requests for a reference,
3 we're just going to pitch the request in the bin and not
4 say anything at -- at all. That could be --

5 QUESTION: I don't know why you'd give any
6 references if there is even the slightest risk of your
7 being sued for it. I don't know why you'd give -- why --
8 why would an employer give any references? What -- what
9 is there in it for him, if -- if there's a -- a possible
10 liability attached?

11 MR. WOLFSON: Well, I mean, first of all, the --
12 the fact is that employers still do give references. The
13 second --

14 QUESTION: Well -- well, isn't -- isn't the
15 answer going to be what you've just said -- that if he
16 doesn't, under your view of the case, it's going to be
17 retaliation, too?

18 MR. WOLFSON: Well, it's only -- it's only --

19 QUESTION: He must -- he must -- he must give a
20 reference?

21 MR. WOLFSON: It's only retaliation if he treats
22 people differently. I mean, the Section 704 is -- is
23 discrimination against an employee because he has filed a
24 charge with the EEOC.

25 QUESTION: But, Mr. Wolfson --

1 MR. WOLFSON: And it is certainly the employee's
2 burden to show that there was -- there was a different
3 approach taken in his case and that it was caused by --

4 QUESTION: But, Mr. Wolfson, may I ask you a
5 question right there? One of the troubling things about
6 the case is, even assuming a former employee may be an
7 employee within the meaning of the statute, can file a
8 charge and so forth, is it clear that the employer can
9 discriminate against a former employee? Why is it
10 discrimination?

11 MR. WOLFSON: Well, it doesn't say -- the
12 statute doesn't say specifically -- 704, unlike 703,
13 doesn't say discrimination in the terms, conditions or
14 privileges of employment. It just says discrimination.
15 But I would -- but even if -- even if that's not the case,
16 I certainly would think that failing to give a reference
17 or giving an adverse reference -- if -- if a reference is
18 under the normal course of what an employer does for his
19 employees once the employees leave the -- leave the
20 company -- if that -- if an employer decides, for one
21 employee, because he's filed an EEO charge, I'm going to
22 treat him differently --

23 QUESTION: Yeah, but their policy assumes to
24 tell the truth in all -- in all -- you know, whether they
25 like the employee or not, they say, we didn't like this

1 guy -- that's discrimination?

2 MR. WOLFSON: It -- it's only discrimination if
3 it -- if it is effected by the retaliation. That is to
4 say, if they say --

5 QUESTION: Mr. Wolfson, wouldn't this play out
6 in how -- suppose this case had gone to court. The
7 employer says, We gave an honest reference. The plaintiff
8 is then out of court unless the plaintiff shows that's a
9 pretext, right?

10 MR. WOLFSON: Well --

11 QUESTION: That's a -- that's a legitimate
12 nonretaliatory reason.

13 MR. WOLFSON: It could be the -- the allegation
14 in this case, of course, is that the -- the -- and it's --
15 the complaint is reprinted in the joint appendix -- the
16 allegation in this case is that the reference was false,
17 in fact, and that it was motivated by -- by retaliation.

18 I want to talk about the word "employee" --

19 QUESTION: I assume -- I assume that the -- that
20 the employer cannot protect himself when he gets a request
21 for a reference by simply saying, you know, I do normally
22 give references, but I'm sorry, in the case of this
23 employee, I don't want to say anything either good or bad,
24 because he had filed a complaint and I'm worried about
25 being prosecuted. You would say that that is

1 discrimination --

2 MR. WOLFSON: Yes. Yes.

3 QUESTION: -- not giving a reference either way?

4 MR. WOLFSON: Certainly, if -- if -- if
5 referring to the fact that that -- that he's filed an EEOC
6 charge. One thing --

7 QUESTION: So -- so the only way for the
8 employer to be sure that he -- that he won't be sued is
9 not to give any references for any employees?

10 MR. WOLFSON: Well, not to treat any employee
11 differently --

12 QUESTION: Yeah.

13 MR. WOLFSON: -- on the -- on -- not to affect a
14 reference because the employee filed an EEOC charge. One
15 of the things, though, is that this -- this is something
16 that it doesn't really turn on just former -- it doesn't
17 turn on former and current employees.

18 That is, the lower court says -- it pointed out
19 that giving someone an adverse reference as retaliation
20 for filing an EEO charge is some -- something that a
21 current employee could bring also. So it doesn't --
22 whatever problems there may be with what is retaliation,
23 and is giving an adverse reference, you know, quote, you
24 know, discrimination, or is it in -- as retaliation?

25 It -- it doesn't -- it's not directly addressed

1 to the analytical question in this case. And I don't
2 think the Court has to reach any of the -- the specific,
3 difficult issue -- the difficult issues that might arise
4 on any specific factual circumstances about, you know,
5 would a bad reference be a retaliation in a particular
6 case?

7 Turning to the question of employee, our
8 position is that employee is -- is susceptible of -- of
9 two meanings, and one -- and certainly including former
10 employee. And ordinary usage or common usage of the word
11 bears that out. One could say that he gives his employees
12 good references and -- in that -- in that situation, the
13 speaker would certainly be --

14 QUESTION: Mr. Wolfson, I just want to make sure
15 I understood the point you made before. You are saying,
16 commonly, people know that they're on their way out, and
17 so they start looking around for a job earlier. So, the
18 -- exactly, the employer is -- faces the same problem with
19 respect to references for people who are currently on the
20 work force, but they didn't get the promotion, so they're
21 just biding their time till they get a new job.

22 MR. WOLFSON: Right.

23 QUESTION: Exactly the same problem for the
24 employer. But doesn't the --

25 MR. WOLFSON: But nobody suggests that that's

1 not covered by Title VII.

2 QUESTION: Right.

3 MR. WOLFSON: At least --

4 QUESTION: But if -- if the interpretation that
5 you are opposing were the law, then the message to the
6 employer is, don't keep that person on and give him time
7 to look for another job; get rid of him. Because as soon
8 as he's a nonemployee, then he has nothing that he can do.

9 MR. WOLFSON: Well, I -- I -- I think it's --
10 the result you point is -- is -- and this was pointed out,
11 I believe, in the -- in the dissenting opinion below --
12 that that's one of the anomalies of that construction,
13 which is it encourages --

14 QUESTION: I don't think that was a question,
15 Mr. Lenchek. Your time has expired. Not Mr. Lenchek --
16 Mr. Wolfson.

17 MR. BUTLER, we'll hear from you.

18 ORAL ARGUMENT OF LAWRENCE C. BUTLER

19 ON BEHALF OF THE RESPONDENT

20 MR. BUTLER: Mr. Chief Justice, and may it
21 please the Court:

22 This is a case involving statutory
23 interpretation. Any case involving the proper
24 interpretation of a statute must begin by examining the
25 statutory language.

1 QUESTION: Don't you think that language in the
2 definition section can be read two ways?

3 MR. BUTLER: No, I don't, Your Honor.

4 QUESTION: "Employed"?

5 MR. BUTLER: No, I don't. Nor do I think that
6 the definition of employee within Title VII is a total
7 tautology. It does serve a purpose: to distinguish
8 between individuals and employees. I think that that
9 distinction between the two is very apparent when you look
10 at Section 703.

11 If you look at Section 703(a), which is at page
12 14 of my brief, you can see that "employee," or
13 "employment," is a status that is obtained by an
14 individual.

15 QUESTION: Well, but Title VII authorizes courts
16 to order reinstatement or hiring of employees. Now, that
17 has to include former employees.

18 MR. BUTLER: Yes, but I -- I think you get back
19 to what Justice Scalia pointed out: If there is an event,
20 a discriminatory event that occurs, then you look at the
21 event and the status of the individual at the time the
22 event occurred. And certainly, if an employer fires
23 someone --

24 QUESTION: Yes, but not if the statute doesn't
25 say that. On filing charges, it says an employee may file

1 a charge.

2 MR. BUTLER: That's true. That's right.

3 QUESTION: And even though he's a former

4 employee.

5 MR. BUTLER: Yeah, but I think you do have to

6 look at the distinction between alleging discrimination

7 under 703 and retaliation under 704, because they are not

8 coextensive.

9 QUESTION: There has been --

10 QUESTION: How do you resolve the -- excuse me

11 --

12 QUESTION: Go ahead.

13 QUESTION: How do you resolve the debate between

14 Justice Kennedy and me? Is an -- is a retired employee

15 who's getting a pension still an employee?

16 MR. BUTLER: No. No.

17 QUESTION: So you agree with me?

18 MR. BUTLER: I -- I do agree with you, Justice

19 Scalia.

20 (Laughter.)

21 MR. BUTLER: With all due respect.

22 QUESTION: Even if you lose the case?

23 (Laughter.)

24 MR. BUTLER: I would hope not, Justice Kennedy.

25 But I do not agree that a person can be an employee for

1 the purposes of some benefits and not others. I think
2 that that is a line drawing that is not justified by the
3 statute. The statute talks in terms of employment, and I
4 think that is a bright line. I think --

5 QUESTION: But you've already -- you've already
6 acknowledged that the word "employee," the word
7 "employee," in this very statute, means former employee in
8 a number of contexts. One, the time you have to file a
9 charge. It uses the word "employee," right? It doesn't
10 say "former employee." It just says "employee," but
11 obviously it's talking about former employee.

12 MR. BUTLER: Well, I would disagree, only to
13 state, Justice Ginsburg, that, at the time the charge is
14 filed, the status is irrelevant. It is the time of the
15 retaliatory act or the time of dis -- discrimination.

16 QUESTION: But the -- the statute uses the word
17 "employee."

18 MR. BUTLER: Yes.

19 QUESTION: The statute uses the word "employee"
20 to describe an individual --

21 MR. BUTLER: Yes.

22 QUESTION: -- who happens to be a former
23 employee. But the statute identifies that individual as
24 "employee," and everybody knows that "employee" -- the
25 word "employee," in that statute, means former employee.

1 MR. BUTLER: I -- I disagree with the
2 construction, because I do think it depends on when you
3 have to identify the employee. Now, the words are the
4 same. It is used the same. But I would add something
5 else, Justice Ginsburg --

6 QUESTION: When the statute says an employee may
7 file a charge within X number of days --

8 MR. BUTLER: Right.

9 QUESTION: -- does that word "employee" mean
10 current employee and former employee?

11 MR. BUTLER: It can mean either -- it can mean
12 an employee at the time the event occurred. Also, under
13 703 --

14 QUESTION: Yeah, but the person who's filling
15 out the form, at the time he fills out the form is what
16 the statute is talking about. And at the time he fills
17 out the form, he's not an employee; isn't that correct?

18 MR. BUTLER: That -- that's right, at the time
19 he fills out the form. But are we under 703 or 704?

20 QUESTION: But that's a different argument. And
21 I don't know why you don't make that argument, that --
22 that it can mean other things in -- in other contexts, but
23 in this context it doesn't. I really think you're taking
24 on a terrible burden, to say that it always and everywhere
25 means a current employee. It quite obviously doesn't.

1 MR. BUTLER: Your Honor, I do accept that
2 argument. But I would point out there is an additional
3 word that I think does bear looking at under Section 704.
4 Employers are told that they are responsible for his
5 employees. And I think if you go -- if you take the
6 common usage of that term and you go to any employer in
7 this country, and you say, for whatever purpose, you're
8 responsible for your employees -- his employees -- no one
9 is going to assume that, well, gee, I guess that means I'm
10 responsible for Joe Blow who works for me --

11 QUESTION: What you're saying is that the normal
12 meaning is a current employer --

13 MR. BUTLER: Exactly.

14 QUESTION: -- although, in some contexts, it's
15 -- it can be used differently. That's unusual, but --

16 MR. BUTLER: Certainly.

17 QUESTION: -- in some contexts, you -- you have
18 to understand that it -- it's being used differently.

19 MR. BUTLER: That's right. And --

20 QUESTION: And you say this is just the normal
21 context?

22 MR. BUTLER: That's correct. That's correct.
23 There is no reason not to accept the normal construction
24 of the word "employee," at least in Section 704.

25 QUESTION: Mr. Butler, I -- I know there's an

1 answer to this, and I'm really asking you for help on it.
2 In 704 that's quoted on page 4 of your text, there's also
3 reference to discriminating against any individual.

4 MR. BUTLER: That's right.

5 QUESTION: Why --

6 MR. BUTLER: That's because if you look at who
7 that --

8 QUESTION: That can't be right.

9 MR. BUTLER: -- affects, the "individual"
10 language is used for employment agencies. So if an
11 employment agency -- I'm sorry, I'm looking at 703 --

12 QUESTION: You mean, it refers back -- it says
13 for --

14 MR. BUTLER: Yeah, I'm sorry. Right. It -- it
15 -- it does relate to employment agencies, joint labor
16 management committees. Well, certainly the person would
17 not be an employee of the agency or the labor management
18 committee or other training programs. That's why they
19 have to use the word "individual" there. But I think it's
20 telling that they didn't use "individual" throughout.

21 QUESTION: Well, it's not all that telling.
22 Because "individual" is a lot broader than "present and
23 former employee."

24 MR. BUTLER: Yes.

25 QUESTION: I mean, you can -- you could want

1 "employee" to include former employees without wishing it
2 to include everybody in the world, former employee or not.

3 MR. BUTLER: That's -- that's certainly true.
4 And I think the point there is that it demonstrates that
5 704 is a narrowly constructed statute. It is not even --

6 QUESTION: Mr. Butler, would it cover a case
7 where an applicant -- an employee -- current employee --
8 doesn't get the promotion and is -- stays on the payroll,
9 continues to work, but is looking for another job; in the
10 course of that job search, gets a reference which that
11 employee says is retaliatory? Such a person would have
12 both the discrimination claim, the 703 claim and the
13 retaliation claim, right?

14 MR. BUTLER: That's right.

15 QUESTION: It may be a baseless claim, it may be
16 a frivolous claim, but he has it?

17 MR. BUTLER: That's correct.

18 QUESTION: So, now, let me go back to the
19 question that I was putting before to Mr. Wolfson.
20 Doesn't that scenario mean that the employer, once he
21 doesn't give the promotion to this person, should say, And
22 you're out, because if the employer keeps the person on
23 for any interval, then the employer is subject to
24 retaliation charge; but the employer can insulate the
25 company from any retaliation charge by saying, if we don't

1 promote this person, they're out the door -- we don't keep
2 them on?

3 MR. BUTLER: I would -- I would agree with you
4 to this extent: That once the employment is over, yes,
5 704 does not apply. If the employment relationship is
6 ongoing, yes, it does apply.

7 QUESTION: So the incentive for the employer, of
8 your reading, is get rid of the person?

9 MR. BUTLER: Yeah.

10 QUESTION: Then we insulate ourself, at least
11 from the retaliation charge?

12 MR. BUTLER: To the extent an employer is
13 motivated by a desire to give negative references, I'd
14 agree with that. But that's a little --

15 QUESTION: Well, he doesn't have to fire him.
16 He could just -- he could just tell him, I'll -- I'll
17 write you a letter but -- but not now. My policy is to
18 write reference letters after you've left the company.

19 MR. BUTLER: Sure.

20 QUESTION: That -- that would handle the
21 problem, wouldn't it? You don't have to fire him; just
22 say, I -- I don't give any reference letters for anybody
23 while you're still employed here.

24 MR. BUTLER: That's correct. That's correct.

25 I do think that the statute does contain a

1 bright-line test. And that bright line is whether or not
2 you have an employment relationship. I listened with
3 great interest to the case that was argued just before
4 mine. And what interested me was not whether or not the
5 Court decides between the payroll plan or the day-by-day
6 plan and counting the number of employees, but the fact
7 that each of the speakers in this morning's argument said
8 that, at least to be an employee under that section of the
9 statute, you had to have an ongoing employment
10 relationship. And I couldn't agree more.

11 You cannot have an ongoing employment
12 relationship -- and if you do not have an ongoing
13 employment relationship, I don't see how you can be
14 covered by the statute.

15 QUESTION: But, of course, there, in -- in the
16 previous case, the test was whether a small employer is
17 covered. And that's probably a narrower definition of
18 "employee" than someone who is entitled to sue under --
19 under the Act.

20 MR. BUTLER: That's certainly true. But I do
21 think that it -- it's a strained argument to suggest that
22 "employee" means different things in different places
23 within the Act. And to -- for the EEOC to insist --

24 QUESTION: Yeah, but you've just admitted that.
25 I mean, in response to Justice Scalia's attempt to help

1 you out, you said, Well, yeah, that's right; I'd accept
2 that argument.

3 (Laughter.)

4 QUESTION: You're -- you're not going to --
5 you're not going to kick him now, are you?

6 (Laughter.)

7 MR. BUTLER: Perhaps I should have accepted his
8 help.

9 (Laughter.)

10 MR. BUTLER: But I think that the test that has
11 been established --

12 QUESTION: You're sowing all sorts of dissension
13 in the Court here, you know.

14 (Laughter.)

15 MR. BUTLER: I think the test that has been
16 established does make some sense -- not that I'm trying to
17 divine the will of Congress from 32 years ago. I don't
18 think any of us can do that. But the point that you
19 brought up, Justice O'Connor, about there being other
20 remedies available under common law, is certainly true in
21 this instance in particular.

22 And in fact, it seems to be a burgeoning area of
23 the law for the States to enact employment reference
24 statutes that protect both the employee and an ability to
25 get an employment reference and the employer, to protect

1 them against frivolous claims.

2 QUESTION: Mr. Butler, assuming -- and I think
3 we would all recognize that your interpretation is a
4 reasonable one. If one also thinks that the EEOC's
5 interpretation is a reasonable one, without giving any
6 undue deference, shouldn't the Court respect the agency
7 that is administering the statute day in and day out?

8 MR. BUTLER: Well, I would disagree in this case
9 certainly, Your Honor. I think that the reason for that
10 is because the EEOC position, the petitioner's position,
11 is not supported by the statutory language. I mean, it's
12 all well and good to speak about the policies and purposes
13 of the Act, but Congress doesn't pass declarations of
14 policy. It doesn't pass resolutions of purpose. It
15 passes statutes. And we have to read the statute to see
16 what it is they wanted to do.

17 QUESTION: But the word "employed by" can mean
18 past tense or present, I suppose?

19 MR. BUTLER: If you want to look at it from a
20 linguist's standpoint, I think that's absolutely true.
21 But statutes aren't passed for linguists; they're passed
22 for ordinary citizens. And if we accept --

23 QUESTION: Well, I don't know. This Court gets
24 pretty picky sometimes about what language --

25 (Laughter.)

1 MR. BUTLER: I think if you -- if you try to
2 analyze the language into whether it's active or passive
3 voice, and whether it's past or present tense, you
4 completely lose sight of what any ordinary individual
5 would read when they read 704 -- that an employer cannot
6 do certain things to his employees.

7 QUESTION: Yes. But if you go back to the -- if
8 you go back to the pension example, there are some pension
9 plans that allow disability benefits or, say, benefits
10 based on length of service and so forth. And the
11 disability plans will often require a medical examination
12 to qualify for that particular benefit. And you're
13 suggesting that the company could say to the doctor, black
14 former employees, find them not disabled, but doctors, of
15 others employees, they could. And that doesn't seem
16 likely to fit into the scheme of the statute.

17 MR. BUTLER: I -- I would say it would be highly
18 illegal, but not necessarily under this Act. I think it
19 would --

20 QUESTION: What act would it violate?

21 MR. BUTLER: ERISA. You couldn't get away with
22 it.

23 QUESTION: Oh, I see. All right. But this, of
24 course, came before ERISA.

25 MR. BUTLER: That's true.

1 QUESTION: It would have been -- it would have
2 been perfectly lawful until ERISA was passed.

3 MR. BUTLER: Well, we --

4 QUESTION: Indeed, you say, that's why they
5 passed ERISA, right, to bag that guy?

6 MR. BUTLER: Exactly.

7 (Laughter.)

8 MR. BUTLER: You took the words right out of my
9 mouth.

10 (Laughter.)

11 QUESTION: You only find that out if you go into
12 the legislative history of ERISA -- and -- and great
13 doubts.

14 (Laughter.)

15 MR. BUTLER: I find the statute, alone,
16 impenetrable, so the legislative history, I doubt it'd be
17 any help.

18 I would conclude, Your Honor, by suggesting that
19 a strained interpretation or, in fact, really, a rewording
20 of 704 is what the petitioner is asking for -- to include
21 terms that were not included when this Act was passed 32
22 years ago.

23 And if you do that, then you will lead to absurd
24 results. It will create is disincentive for employers to
25 ever issue any reference. They'd either issue no

1 references, all good references, or all bad references.
2 Because if they do anything else, they're setting
3 themselves up for a claim of retaliation by anyone who had
4 previously filed a charge, valid or not.

5 QUESTION: That's true. But as -- as -- as
6 Justice Ginsburg points out, that problem isn't -- isn't
7 entirely solved by how we come out on this case. Because
8 you do have the problem of references for current
9 employees. And -- and you do subject yourself --

10 MR. BUTLER: That's true.

11 QUESTION: -- to a problem there.

12 MR. BUTLER: That's true. As long as you can
13 prove that the issuance of a reference is a benefit of
14 employment, yes, you do have that problem.

15 QUESTION: No, you don't even have to show that.
16 If it's a retal -- retaliatory --

17 MR. BUTLER: Oh, yeah.

18 QUESTION: It doesn't -- doesn't have to be a
19 term or condition.

20 MR. BUTLER: I agree. That's right. You can do
21 that.

22 QUESTION: And so the -- the -- the problem that
23 you brought up, which is a real one, about truthfulness in
24 performance ratings and the remedy for that, do you make a
25 false representation -- all of that is just the same if

1 you give the reference before the person leaves your
2 employ. So you don't -- so you're putting out that this
3 is a problem -- yes, it's a problem, but the problem
4 doesn't depend upon whether former employees are covered.
5 The problem exists for current employees.

6 MR. BUTLER: Well --

7 QUESTION: It's a not a reason to reject
8 inclusion of former employees.

9 MR. BUTLER: Well, timing is everything. And
10 under the Act, the time of the Act is important to
11 determine the status. And the Act does offer more
12 protection to people who are employed to those who are not
13 employed. And I think that that is consistent with the
14 purposes of the Act, such as we can divine from what they
15 -- they wrote. Because the Act was not meant to be a bad
16 acts law. It was not designed to cure all forms of
17 discrimination --

18 QUESTION: Well, your answer to me does say,
19 then, for whatever reason, employers, you are home free by
20 discharging someone; you will not be by keeping -- keeping
21 that person --

22 MR. BUTLER: Well --

23 QUESTION: -- in the current position, where the
24 person is doing okay?

25 MR. BUTLER: I would hesitate to say "home

1 free," only because there are other acts, other statutes,
2 other causes of actions --

3 QUESTION: At least for purposes of Title VII.

4 MR. BUTLER: Yeah, for --

5 QUESTION: For purposes of the retaliation
6 section.

7 MR. BUTLER: For the -- yes, for -- if you
8 narrow it down to the purposes of 704(a), yeah, I agree
9 with you. But there are other acts and laws that would
10 have to come into play. It would be very foolish for an
11 employer to retaliate against anyone.

12 QUESTION: Mr. Butler, it just occurs to me, is
13 it entirely clear that the -- the phrase, "to discriminate
14 against any of his employees," is -- is cut apart from --
15 with respect to terms or conditions of employment? I
16 mean, suppose I run a very small business and -- and
17 somebody -- what happens is what happens here -- somebody
18 files a -- a discrimination complaint that is totally
19 groundless. I don't fire the individual, because I'm --
20 I'm afraid that that'll be considered retaliation.

21 However, I used to have other members of -- or other
22 employees home for dinner with my wife and me with some
23 frequency, and I no longer invite this fellow, because I
24 don't like him anymore --

25 MR. BUTLER: Right.

1 QUESTION: -- because he filed this frivolous
2 complaint. Is that covered by this?

3 MR. BUTLER: Well, if he's no longer employed,
4 my --

5 QUESTION: No, no, he's still employed.

6 MR. BUTLER: Yeah, oh --

7 QUESTION: He's still employed. I mean --

8 MR. BUTLER: I see. I see what you're saying.
9 No --

10 QUESTION: You see --

11 MR. BUTLER: I -- I don't think he is. Because
12 -- and I think the -- the circuit courts that have tried
13 to address that type of question have -- have retreated
14 into language about it being reasonably related to the
15 employment.

16 QUESTION: Reasonably related to the employment.

17 MR. BUTLER: Right.

18 QUESTION: Mr. Butler, does the Act itself, does
19 it use the word "retaliate"?

20 MR. BUTLER: No, actually, it does not --

21 QUESTION: So why are we talking about
22 retaliation?

23 MR. BUTLER: It's a shorthand term. It says
24 discriminate on the basis of having made a charge,
25 participated in a investigation or proceeding. And that's

1 just a shorthand term.

2 QUESTION: Well, what if the employer treats
3 everybody alike who has made a charge, he retaliates
4 against them all?

5 (Laughter.)

6 MR. BUTLER: Well, the argument on the other
7 side, Your Honor, would be that he's treating them
8 differently than the people who have not made charges.
9 And, in that sense, it's discrimination.

10 QUESTION: But it is -- it's a -- it's a short
11 -- "retaliate" is a shorthand form for the statutory
12 language?

13 MR. BUTLER: Exactly right. The words
14 "retaliation" are not included in Title VII, so it is --
15 it's different.

16 You know, you don't need to look any further
17 than the facts of this case to see what types of results
18 can accrue. Because we have tried the discrimination
19 case. And as part of the discrimination case, we had to
20 prove -- I had to put on evidence that showed all of the
21 events that form the basis for the discharge.

22 QUESTION: But wouldn't that evidence also show
23 that you're -- the discrimination charge has no merit?

24 MR. BUTLER: Absolutely. And that's what
25 Justice Motts -- Judge Motts, in Baltimore, ruled, that

1 there was no discrimination. We put on that evidence and,
2 in effect, proved the reasons for discharging the
3 individual. And yet, truth is no defense --

4 QUESTION: And then set forth those same reasons
5 in the reference to the new employer?

6 MR. BUTLER: They are the basis for the
7 reference, yes.

8 QUESTION: The same -- the same reasons that had
9 been affirmed in litigation?

10 MR. BUTLER: That's correct. And there's
11 nothing in the reference that says that the man filed a
12 charge of discrimination. We simply --

13 QUESTION: But since -- since the language
14 relied on is the same -- you refer to discrimination -- is
15 that not the law of the case now, or --

16 MR. BUTLER: No it wouldn't be, Your Honor.

17 QUESTION: -- binding?

18 MR. BUTLER: It wouldn't be, Your Honor, because
19 of it being two different statutes, and each statute has a
20 separate basis for discrimination. Not discrimination on
21 the basis of sex or religion or national origin, but,
22 rather, discrimination on the basis of having filed a
23 charge or participated in a proceeding.

24 Now, but I do think that I'd be entitled to
25 collateral estoppel effect for the evidence that was put

1 on, on the events themselves that led to the discharge.
2 Well, those events were the basis for giving a bad
3 employment reference.

4 You know, it's not like Title VII ignores what
5 happens to people after they lose their employment.

6 QUESTION: Well, nobody is disagreeing with
7 that. I think the EEOC would agree with you that -- that
8 you have a very strong defense to this claim.

9 MR. BUTLER: Well, I think so.

10 QUESTION: The question is whether you have to
11 defend.

12 MR. BUTLER: I -- I think so. But I don't think
13 I should even have to put that evidence on twice. I've
14 tried this case once. I don't think I should have to try
15 it again, because he's not covered by the statute.

16 QUESTION: I go back to my question about how
17 much of a trial is involved. Don't you -- aren't you a
18 situation of getting summary judgment just by putting in
19 the -- the -- the result of the prior trial, and then, the
20 plaintiff has to -- has a pretty heavy burden to overcome.
21 If he can't do anything, to say it was all a pretext or
22 whatever. The -- that plaintiff would never get to trial
23 on a case like this, would they?

24 MR. BUTLER: No, I wouldn't think so. And that
25 would have been the motion I filed if my motion to dismiss

1 hadn't been granted.

2 QUESTION: Well, I don't know. Why couldn't he
3 put on the fact that you -- you, the employer -- had some
4 very mean things to say about him after this complaint was
5 filed, and after you were vindicated in court, and you
6 said, that -- you know, that son of a gun, we got him.
7 And he is an odious and hateful person. All right. And
8 -- and -- and this is all put on the record. And the
9 allegation to be made would be, oh, yes, there were good
10 reasons for the bad recommendation.

11 MR. BUTLER: Yes.

12 QUESTION: But, in fact, the motive here -- the
13 truth isn't a defense, is it? If -- if the -- if the
14 motive is retaliatory --

15 MR. BUTLER: You're exactly right.

16 QUESTION: -- it doesn't matter that what you
17 say is true?

18 MR. BUTLER: That's right.

19 QUESTION: So you have to convince a jury that
20 this is not only true, but that the real reason you wrote
21 that letter was -- was what -- I don't know -- to be
22 helpful to the new employer, rather than to retaliate
23 against this fellow you've called hateful and odious?

24 MR. BUTLER: Exactly right. No; it would take
25 additional evidence, other than what was put on --

1 QUESTION: And the jury might not believe you?

2 MR. BUTLER: That's true. That's true.

3 So, you know, even though we have proved the
4 truth of the underlying basis, that truth forms no
5 defense, absolute, against a claim of retaliation under
6 704(a). So we're left with having told the truth about a
7 former employee, and yet, find ourselves accused of
8 retaliation under 704.

9 QUESTION: Indeed, if truth were a defense, this
10 retaliatory cause of action would -- would give this
11 particular plaintiff no -- no -- no more benefit than
12 would the normal libel law?

13 MR. BUTLER: Exactly. It would -- it would be
14 pretty much the same as any defamation action in any
15 State. But, you know, I wanted to point out that 704 --

16 QUESTION: Mr. Butler -- Mr. Butler, may I ask
17 you one question?

18 MR. BUTLER: Sir?

19 QUESTION: How often do you give references in
20 discharge cases?

21 MR. BUTLER: In discharge cases? Quite often.
22 They do give references.

23 QUESTION: In discharge cases?

24 MR. BUTLER: Where it's discharge for cause?

25 Yes.

1 QUESTION: Yeah.

2 MR. BUTLER: Even at that, we will --

3 QUESTION: And your solution for your case is --
4 is a solution that will also preclude a claim in a case in
5 which someone says -- the employer says, Look, you file a
6 charge against me, and I will see to it that you will
7 never work in this business again?

8 MR. BUTLER: Your Honor --

9 QUESTION: So it's not -- it's -- well, what I'm
10 getting at is that it is not just the frivolous case, the
11 frivolous charge in your case, the reference, but it is
12 also an instance in which an employer says you will
13 absolutely never work in this business again? It
14 precludes that?

15 MR. BUTLER: It precludes any claim of
16 retaliation by someone, after they've dis -- been
17 discharged, whether it's frivolous or whether it's
18 serious.

19 QUESTION: Okay.

20 MR. BUTLER: You're -- you're quite correct.

21 QUESTION: And you could solve your problem by
22 not giving references in discharge cases?

23 MR. BUTLER: That's correct.

24 But, Your Honor, I would also point out that
25 that does -- the Act itself does give a cause of action to

1 someone caught in that situation. And the Act points them
2 to the direction of the next employer, the prospective
3 employer. Because if the second employer will refuse to
4 hire somebody, will not accept their application in
5 retaliation for having filed a charge or participated in a
6 proceeding, that is a 704 --

7 QUESTION: But why wouldn't somebody who is not
8 yet an employer retaliate? That -- I know that was in
9 your brief, but that seemed to me very strange. The --
10 the employer that has fired a person gives a bad
11 reference, and then your suggesting, well, there may be a
12 claim against the next person who won't hire that person
13 in reliance -- I mean as a -- as a lawyer, don't you,
14 don't you have a much stronger case against the one who
15 gave the reference, allegedly false, than the one who
16 credited it?

17 MR. BUTLER: No, I don't, because that's not
18 what the statute says. The statute says that the person
19 who is doing the hiring. I think it -- I think --

20 QUESTION: It wouldn't be retaliation, of
21 course, but the statute doesn't use the word
22 "retaliation"?

23 MR. BUTLER: That's right. It discrimination.

24 QUESTION: But if you are a -- a prospective
25 employer and you turn down an applicant because I don't

1 want to hire an applicant who has filed an EEOC complaint
2 with his previous employer -- this guy is a troublemaker
3 -- it wouldn't really be retaliation, but it would violate
4 this provision, because it specifically refers to
5 applicants for employment, right?

6 MR. BUTLER: Yes. We may be getting ourselves
7 in trouble by using the shorthand term of "retaliation."

8 QUESTION: Retaliation.

9 MR. BUTLER: That's right.

10 QUESTION: Yeah, but as -- as a practical
11 matter, it seems to me the -- the situation, because it is
12 not what's going to happen except among very, very stupid
13 employers, because the -- the retaliatory letter is -- is
14 not going to say, Don't hire this guy because he filed a
15 complaint. The letter is going to say, Don't hire him
16 because he does lousy work.

17 MR. BUTLER: That's right.

18 QUESTION: And -- and the prospective employer
19 who relies upon that is -- is not drawing any distinction
20 among employees, that -- or among prospective employees --
21 that is not a legitimate distinction. So there's not
22 going to be any cause of action there.

23 MR. BUTLER: I would agree; if it is a truthful
24 reference, why should there be? If the employer is making
25 a truthful reference about someone, does the employee

1 really deserve to be protected?

2 QUESTION: Yeah, but I thought your argument --
3 I thought your argument was that the person who is subject
4 to this discrimination will have a cause of action under
5 the statute against the prospective employer who relies
6 upon the retaliatory letter.

7 MR. BUTLER: Well --

8 QUESTION: And unless the retaliatory letter is
9 expressly based upon filing the EEOC complaint, that won't
10 be true.

11 MR. BUTLER: That's right. Or if he could
12 somehow prove that whatever statements were made in the
13 letter were actually fabricated because of that, because
14 of the charge, and he knew about it, the prospective
15 employer knew -- knew about it --

16 QUESTION: Right. But that's --

17 MR. BUTLER: -- then you could make a case on
18 that, yes.

19 QUESTION: Yeah, that's a tough, uphill fight.
20 But that's not going to be the characteristic case --

21 MR. BUTLER: I -- I would think not. But -- you
22 know, it wasn't extensively discussed in any of the
23 briefs, but I was struck by an analysis that Chief Justice
24 Toflatt, in the 11th Circuit, wrote in 1990, where he
25 analyzed this whole claim under Court v. Ash, and whether

1 there would be an implied cause of action under that test.
2 And he said there's no conclusion other than it cannot.

3 Because there is a remedy contained within the
4 statute. And what you're doing is trying to broaden that
5 statute for an additional remedy against additional
6 parties. And that's not -- you know, that's not what you
7 should be doing, in recognizing a new cause of action.

8 I think the -- the language of the statute is
9 very plain. I think it -- it's plain to employers,
10 certainly. And we can only assume it was plain to
11 Congress when they wrote it. This Act applies to
12 employees and applicants for employment. It does not
13 apply to anyone else. Those two groups will always be
14 able to claim their rights under 704, regardless of the
15 outcome of this case. But to rewrite this Act to include
16 former employees will only destroy the Act by destroying
17 the certainty of the statute itself.

18 If you rewrite it, then no one will be sure what
19 it means in the future, and to whom it will apply. I
20 think we're best sticking with the bright line. Once the
21 employment is over, any rights under 704 have terminated.

22 Thank you.

23 QUESTION: Thank you, Mr. Butler.

24 Mr. Lenchek, you have 3 minutes remaining.

25 MR. LENCHEK: Mr. Chief Justice, unless the

1 Court has additional questions, we have nothing further.

2 CHIEF JUSTICE REHNQUIST: Very well, the case --
3 the case is submitted.

4 (Whereupon, at 12:06 p.m., the case in the
5 above-entitled matter was submitted.)
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CERTIFICATION

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CHARLES T. ROBINSON SR, Petitioner v SHELL OIL COMPANY
CASE NO. 95-1376

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BY Don Mari Federico

(REPORTER)