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September 21, 2011

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The Fair Labor Standards Act Anti-retaliation Provisions and Job Applicants - the Fourth Circuit Court of Appeals Says Not Applicable

By Bethany C. McCurdy, Esq.

We have all heard the cautionary tales about how retaliation cases are skyrocketing at exponential rates. Most employers know that once an employee files a complaint, any subsequent action against that employee carries with it some risk of a retaliation claim. But what about job applicants - are they protected too? Surely it would be reasonable for employers to assume that taking action against a job applicant because of prior protected activity could also lead to a retaliation claim. While this would be the prudent approach for employers to take, a recent decision from the Fourth Circuit Court of Appeals turns this position on its head.

In a case of first impression, *Dellinger v. Science Applications International Corporation*, 2011 WL 3528750, Case No. 10-1499 (Aug. 12, 2011, 4th Cir.), the Fourth Circuit held that the Fair Labor Standards Act (FLSA or the Act) does not protect job applicants from retaliation; rather its coverage is limited only to an employer's current and former employees.

In July 2009, Natalie Dellinger sued her former employer for alleged FLSA minimum wage and overtime violations. Contemporaneously, Ms. Dellinger applied for a position with Science Applications. In August 2009, Science Applications extended a conditional job offer to Ms. Dellinger. As part of the contingency, Ms. Dellinger was required to complete certain forms in order to gain the required security clearance for the job. Among the information requested was whether she was currently involved as a party to any

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civil litigation. Ms. Dellinger disclosed her pending FLSA lawsuit against her former employer. Several days after she provided the information, Science Applications withdrew the job offer. Ms. Dellinger then filed a lawsuit alleging that, by withdrawing the job offer, Science Applications discriminated and retaliated against her in violation of the FLSA.

Science Applications argued that Ms. Dellinger did not have a viable claim under the Act because the FLSA's anti-retaliation provision protects only current and former employees, not job applicants who have never worked for the employer. The section at issue, section 216(b) of the FLSA, prohibits retaliation "against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter." Science Applications' position was that this section is limited only to employees who have had some employment relationship with an employer. The court agreed, holding that under the FLSA, "an applicant is not an employee."

Even the fact that Ms. Dellinger had been given a conditional job offer did not affect the outcome of the decision. The court reasoned that section 203(g) of the FLSA defines "employ" to mean "suffers or permits to work." Because Ms. Dellinger never actually began working for Science Applications, she was not an employee and thus not covered by the Act.

While the court expressed sympathy for Ms. Dellinger's position, it was not willing to find in Ms. Dellinger's favor because to do so would "clearly broaden the scope of the FLSA beyond its explicit purpose of fixing minimum wages and maximum hours between employers and employees."

So does this case give employers *carte blanche* not to hire any applicant who has filed a FLSA complaint? While the court expressly provided that the FLSA's anti-retaliation provisions do not extend to job applicants, the case is limited to the Fourth Circuit (which includes Maryland, Virginia, South Carolina, North Carolina and West Virginia). Moreover, this issue is far from settled and sure to be tested in other circuits, perhaps eventually ending up at the Supreme Court's door.

Indeed, this case should not cause employers to let their guard down when it comes to job applicants. When the case was tried, the Department of Labor (DOL) and the Equal Employment Opportunities Commission submitted an amicus (friend of the court) brief in support of Ms. Dellinger's position. The DOL, which enforces the FLSA, was unequivocal in its agreement with Ms. Dellinger that the FLSA's anti-retaliation provisions extend to job applicants. The DOL expressed concern that applicants would be "blacklisted" and remain unemployed indefinitely if the lower court's decision were allowed to stand. The DOL also argued that such an action would have "a chilling effect" on individuals' willingness to exercise their rights under the FLSA.

The language of the brief proves instructive and reminds employers that despite the *Dellinger* decision, the DOL's position is that the employers cannot discriminate against job applicants who

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have made FLSA complaints. Indeed, given how strongly the DOL advocated for the court to find in Ms. Dellinger's favor, it seems clear it will continue to actively pursue action against employers who take adverse action against job applicants.