RECORD NUMBER: 10-1499

United States Court of Appeals

for the

Fourth Circuit

NATALIE R. DELLINGER,

Appellant,

– v. –

SCIENCE APPLICATIONS INTERNATIONAL CORP.,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA AT ALEXANDRIA

OPENING BRIEF OF APPELLANT

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 10-1499 Caption: Natalie Dellinger v. Science Applications International Corporation

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STATEMENT OF JURISDICTION

Natalie Dellinger ("Ms. Dellinger") filed her Complaint against Science Applications International Corporation ("SAIC") alleging violations of the anti-retaliation provisions of the Fair Labor Standards Act (29 U.S.C. §215(a)(3)). Ms. Dellinger alleged that SAIC violated § 215(a)(3) by withdrawing its written offer of employment after Ms. Dellinger disclosed that she had filed an FLSA lawsuit against her former employer, CACI. Pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1337, the U.S. District Court for the Eastern District of Virginia had jurisdiction over her Complaint.

SAIC filed a Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6), arguing that Ms. Dellinger had failed to state a cognizable claim because she had only received a written job offer from SAIC and thus was not an employee as defined by the FLSA. Ms. Dellinger filed a brief opposing the Motion to Dismiss. On April 2, 2010, the U.S. District Court for the Eastern District of Virginia entered an Opinion and Order granting SAIC's motion. The April 2, 2010 Order was the Final Order in the case pursuant to 28 U.S.C. §1291 in that it ended litigation of the case on the merits. On April 29, 2010, Ms. Dellinger filed her Notice of Appeal with the District Court; her Notice of Appeal was filed within 30 days of the District Court's Final Order.

ISSUES POSED BY THIS APPEAL

The issues posed by this appeal are:

1. Whether it is lawful for a prospective employer to discriminate against an

applicant because the applicant has filed a Fair Labor Standards Act case against a former employer?

2. Whether the anti-retaliation provisions of the Fair Labor Standards Act prohibit an employer from not finalizing its hiring of someone with an offer of employment because the person it was hiring had filed a Fair Labor Standards Act overtime case against a prior employer?

STATEMENT OF THE CASE

Natalie Dellinger ("Ms. Dellinger") filed a Complaint alleging that the Science Applications International Corporation ("SAIC") unlawfully retaliated against her by withdrawing a written offer of employment after she disclosed that she had filed an FLSA lawsuit against a previous employer. Dellinger alleged that this conduct violated the anti-retaliation provisions of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §215(a)(3). J.A. at 9. SAIC moved to dismiss Ms. Dellinger's Complaint, on the basis that Ms. Dellinger had never been an "employee" of SAIC as that term is defined by the FLSA. J.A. at 12. The District Court granted SAIC's Motion to Dismiss, finding that Ms. Dellinger was never an employee of defendants. J.A. at 61,75.

STATEMENT OF THE FACTS

Ms. Dellinger has worked as an administrative assistant on various government contracts requiring a security clearance. J.A. at 5, 62. Most recently, Ms. Dellinger worked for CACI, Inc. ("CACI") in 2008 and part of 2009. J.A. at 62. In July 2009, Ms.

Dellinger filed a Complaint against CACI alleging violations of the minimum wage and overtime provisions of the FLSA. J.A. at 62. Ms. Dellinger applied for a position with SAIC on or about July 2009. J.A. at 6, 62. Ms. Dellinger's qualifications for the job include several years of relevant experience in similar positions; Ms. Dellinger also had the required security clearance for this job. J.A. at 6. By way of a phone call on August 21, 2009, and an offer letter which Ms. Dellinger received on August 22, 2009, SAIC offered Ms. Dellinger the position of administrative assistant. J.A. at 6, 62.

The offer letter from SAIC came in a package together with information about the fringe benefits available to Ms. Dellinger as an employee of SAIC, to include health and welfare benefits, 401(k) retirement benefits, and paid time off. J.A. at 7. Ms. Dellinger was directed to sign and return one copy of the offer letter and other associated documents by August 28, 2009 if she wished to accept the job with SAIC. J.A. at 7. Ms. Dellinger's employment was also contingent upon her successful completion of a drug test and her submission of a standard I-9 form. J.A. at 7.

Because the job required a security clearance, Ms. Dellinger's offer was also contingent on the successful verification, crossover, and maintenance of Ms. Dellinger's security clearance. To begin this process, Ms. Dellinger was directed to submit a government document known as a Standard Form 86 ("SF 86"). J.A. at 7, 62. The SF 86 is used for national security positions and asks the applicant to list, among other things, any non-criminal court actions to which the applicant has been or is currently a party. J.A. at 7,

62-63.

Ms. Dellinger listed on the SF 86 that she had filed a lawsuit in the U.S. District Court for the Eastern District of Virginia alleging FLSA violations against her former employer, CACI. J.A. at 7, 63. Ms. Dellinger hand-delivered her SF 86, a signed copy of the offer letter, and other required documents to SAIC on August 24, 2009. J.A. at 8. Ms. Dellinger passed the drug test the same day. J.A. at 8. SAIC withdrew its offer of employment after receiving the SF 86, which stated that Ms. Dellinger had filed an FLSA lawsuit against a former employer. J.A. at 63.

Two SAIC employees independently confirmed that SAIC had taken no action regarding her employment application after August 24, 2009. J.A. at 8, 63. The motivation behind SAIC's withdrawal of Ms. Dellinger's job offer was retaliation and unlawful discrimination based on Ms. Dellinger's exercise of her protected right to file an FLSA lawsuit. J.A. at 9, 63.

SUMMARY OF ARGUMENT

The question in this case is whether a prospective employer can lawfully discriminate against an applicant for employment by withdrawing an offer of employment because that applicant filed an FLSA lawsuit against a previous employer.

The District Court's ruling that Ms. Dellinger was not an "employee" for purposes of the anti-retaliation provisions of the FLSA should be reversed. The FLSA anti-retaliation provision is very broad and covers someone in Ms. Dellinger's situation. As used in the

FLSA, the term "employee" is ambiguous and should be interpreted broadly. An employer may not lawfully refuse to finalize its hiring of someone with an offer of employment because the person it was hiring had filed an FLSA overtime case against a prior employer.

STANDARD OF REVIEW

The standard of review for dismissal pursuant to Rule 12(b)(6) is *de novo*. *Robinson v. American Honda Motor Co., Inc.*, 551 F.3d 218, 222 (4th Cir. 2009) *citing Schatz v. Rosenberg*, 943 F.2d 485, 489 (4th Cir.1991). The Court must assume the truth of the material facts as alleged in the complaint. *Jackson v. Birmingham Bd. of Education,* 544 U.S. 167 (2005).

ARGUMENT

I. THE TERM "EMPLOYEE" MUST BE GIVEN A BROAD READING IN THE CONTEXT OF THE FLSA AND OTHER REMEDIAL STATUTES.

This case involves a statutory interpretation of the term "employee" as used in the FLSA. The first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which it is used, and the broader context of the statute as a whole. *Robinson v. Shell Oil Co.*, 519 U.S. at 341.

Concerning another employment law statute, the Supreme Court stated that the definition of the word "employee" "must be answered primarily from the history, terms and purposes of the legislation." *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 124 (1944) . "The word ' is not treated by Congress as a word of art having a definite meaning . . . .' Rather, 'it takes color from its surroundings . . . [in] the statute where it appears,' and derives meaning from the context of that statute, which 'must be read in the light of the mischief to be corrected and the end to be attained." *Hearst Publications*, 322 U.S. at 124, *quoting U.S. v. American Trucking Assns.*, 310 U.S. 534, 545 (1940) and *South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251, 259 (1940).

A. The language of 29 U.S.C. §215(a)(3).

When the FLSA was enacted in 1938, Congress included an anti-retaliation provision. Section 15(a)(3) of the FLSA provides, in relevant part:

> [I]t shall be unlawful for any person to discharge or in any other manner discriminate 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, or has testified or is about to testify in any such proceeding[.]

29 U.S.C. 215(a)(3). The Conference report for the legislation states that section 15 makes it unlawful "to do certain other acts which violate provisions of the Act or obstruct its administration." *See H.R. Rep. No.* 2738, 75th Cong. 3d Sess. p. 33 (1938).

B. The term "employee" is ambiguous in the FLSA.

The term "employee" is ambiguous as used in the FLSA. *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728 (1947)(finding no clear definition of employee in the FLSA). It is more consistent with the broader context of the FLSA and the primary purpose of the anti-retaliation provisions to include within its provisions someone who had a written offer of employment withdrawn because of her protected activity.

C. The term "employee" as used in the FLSA should be read in a very broad manner.

The term "employee" is used and construed very broadly in the FLSA. *Tony & Susan Alamo Found. v. Sec. of Labor*, 471 U.S. 290, 295 (1985). The Supreme Court has recognized that the FLSA definition of "employee" is "the broadest definition that has ever been included in any one act." *United States v. Rosenwasser*, 323 U.S. 360, 363 n.3 (1994) (quoting then Senator Black). The Court also declared that: "A broader or more comprehensive coverage of employees within the stated categories would be difficult to frame." 323 U.S. at 362.

Courts have interpreted the term "employee" broadly to include former employees as within the protection of the FLSA anti-retaliation provision. *See e.g., Dunlop v. Carriage Carpet Co.*, 548 F.2d 139 (6th Cir. 1977). Similarly, this Court reversed a lower court which effectively limited the protections of the FLSA anti-retaliation provisions to current employees by requiring a materially adverse employment action. *Darveau v. Detecon. Inc.*, 515 F.3d

334, 341 (4th Cir. 2008).

Other courts have also applied the FLSA's anti-retaliation provisions to cover persons other than current employers. In *Bowe v. Judson C. Burns*, 137 F.2d 37 (3rd Cir. 1943), the Court held that a union, its officers, and members, in addition to the statutory "employer," could be liable under the FLSA's anti-retaliation provisions.

Similarly, the court in *Donovan v. Schoolhouse Four Inc.*, 573 F. Supp. 185 (W.D. Va. 1983), held that "individuals who were personally involved in retaliatory firings were liable under the FLSA's anti-retaliation provisions."

This Court has found that workers who performed duties for an employer during an orientation period, before the start of their normal employment, "were employees for purposes of the FLSA's minimum wage and overtime provisions." *McLaughlin v. Ensley*, 877 F.2d 1207, 1208 (4th Cir. 1989).

D. In particular, the term "employee" as used in the FLSA's anti-retaliation provisions is extremely broad.

The FLSA has an extremely broad anti-retaliation provision, which prohibits retaliation by "any person." 29 U.S.C. §215(a) (3); *Bowe v. Judson C. Burns*, 137 F.2d 37, 38-29 (3rd Cir. 1943). Further, the anti-retaliation provision includes both "employment" and "reinstatement" as remedies to victims of retaliation. 29 U.S.C. §216 (b). The use of the term "any person," rather than "employer" or "current employer," and the inclusion of both "employment," and "reinstatement" as potential remedies (rather than simply "reinstatement") indicate that the anti-retaliation provisions were intended to protect applicants

who are denied employment because of their protected FLSA activity.

E. The anti-retaliation provisions of the FLSA are intended to facilitate enforcement of the statute.

The anti-retaliation provisions of the FLSA are a central component of the Act's complaint-based enforcement mechanism. *Darveau v. Detecon. Inc.*, 515 F.3d 334, 340 (4th Cir. 2008). The FLSA's anti-retaliation provision "effectuates enforcement of the Act's substantive provisions by removing 'fear of economic retaliation' so that employees need not 'quietly . . . accept substandard conditions." *Darveau*,515 F.3d at 340, quoting *Mitchell v. Robert DeMario Jewelry. Inc.*, 361 U.S. 288, 292 (1960).

This Court must interpret the FLSA's anti-retaliation provisions bearing in mind the Supreme Court's admonition that the FLSA "must not be interpreted or applied in a narrow, grudging manner." *Darveau*, 515 F.3d at 340, *quoting Tenn. Coal. Iron & R.R. v. Muscoda Local No. 123*. 321 U.S. 590, 597 (1944). This is especially true for the anti-retaliation provisions of the FLSA, which are designed to "foster a climate in which compliance with the substantive provisions of the Act would be enhanced." *Mitchell*, 361 U.S. at 292. By including the anti-retaliation provision, Congress sought to "remov[e] the risk of employer retaliation against efforts by employees to secure their just wage deserts under the Act." *Dunlop*, 548 F.2d at 145.

If the term "employee" in the FLSA's anti-retaliation provision is interpreted narrowly to exclude applicants like Ms. Dellinger, it would clearly be contrary to the intent of Congress and to the Supreme Court's guidance. Under a narrow interpretation, an

employer could legally require all applicants for employment to state whether they had filed a prior FLSA lawsuit or complained to the Department of Labor concerning FLSA violations. The employer could then legally refuse to hire any applicant who answered "yes" to either of those questions. Any interpretation allowing such actions would strongly discourage employees from bringing FLSA lawsuits or filings complaints with the Department of Labor alleging FLSA violations.

Any interpretation allowing such actions would also be inconsistent with the strong public policy prohibiting retaliation as expressed in numerous recent Supreme Court decisions. For example, the Supreme Court has read an anti-retaliation provision into laws that do not expressly include an anti-retaliation provision. See, *Jackson v. Birmingham Bd. of Education*, 544 U.S. 167 (2005) (reading an anti-retaliation provision into Title IX); *CBOCS West, Inc. v. Humphries*, 553 U.S. 442 (2008) (reading an anti-retaliation provision into 42 U.S.C. §1981); *Gomez-Perez v. Potter*, 553 U.S. 474 (2008) (reading an anti-retaliation provision into the ADEA for federal employees).

F. The Supreme Court has found the term "employee" to be ambiguous in the FLSA and elsewhere.

The term "employee" in the FLSA's anti-retaliation provisions cannot be limited solely to current employees of a particular employer. Within the context of the FLSA anti-retaliation provisions, the term "employee" should be interpreted to cover someone like Ms. Dellinger, who suffered the withdrawal of a written offer of employment after she truthfully disclosed her prior protected activity of bringing an FLSA lawsuit.

Ms. Dellinger brought an FLSA lawsuit based on her status as an "employee" of CACI; as a result of her lawsuit, SAIC refused to finalize its hiring of her and refused to take the final step towards making her an "employee" of SAIC. On the facts alleged in the Complaint, SAIC refused to finalize its hiring of her specifically because of her prior actions as an "employee." It would be inconsistent with the broad reach of the FLSA and its anti-retaliation provisions to exclude Ms. Dellinger from its protections.

II. THE TERM "EMPLOYEE" HAS BEEN INTERPRETED AS COVERING APPLICANTS IN THE ANTI-RETALIATION PROVISIONS OF OTHER STATUTES.

The term "employee" has been interpreted as covering applicants for employment who suffer retaliation for protected activity in anti-retaliation provisions of other statutes. At least some of these other statutes are not as broad, on their face, as the anti-retaliation provisions of the FLSA.

A. Occupational Safety And Health Act

Regulations adopted by the U.S. Department of Labor under the anti-retaliation provisions of the Occupational Safety and Health Act, 29 U.S.C. §660(c), make it clear that "even an applicant for employment could be considered an employee" under the anti-retaliation provision. 29 C.F.R. §1977.5(b). The Department of Labor adopted the regulation although the statute, on its face, does not explicitly mention applicants. 29 C.F.R. §1977.5(a); 29 U.S.C. § 660(c).

B. Pipeline Safety Improvement Act

Regulations adopted by the U.S. Department of Labor under the anti-retaliations provisions of the Pipeline Safety Improvement Act, 49 U.S.C. § 60129(a), define an "employee" as including "an individual applying for work for a person owning or operating a pipeline facility or a subcontractor of such a person . . . ." 29 C.F.R. §1981.101. The Department of Labor adopted the regulations although the statute, on its face, does not explicitly mention applicants. 49 U.S.C. § 60129(a).

C. Energy Reorganization Act

In *Doyle v. Sec. of Labor*, 285 F.3d 243 (3d Cir. 2002), the court considered alleged retaliation against an applicant for employment under the anti-retaliation provisions of the Energy Reorganization Act (ERA), 42 U.S.C. § 5851. The issue in the case was whether a refusal to sign a release of liability in connection with an application for employment was protected activity under the Energy Reorganization Act. There was no dispute in the case that an applicant for employment was covered by the anti-retaliation provisions of the ERA. This was in spite of the fact that the statute, on its face, does not explicitly cover applicants.

D. National Labor Relations Act

It is clear that applicants for employment are covered by the anti-retaliation provisions of the National Labor Relations Act (NLRA). *See, e.g. NLRB v. Lamar Creamery Co.* 246 F.2d 8 (5th Cir. 1957); *NLRB v. George D. Auchter Co.*, 209 F.2d 273, 277 (5th Cir. 1954). The anti-retaliation provisions of the NLRA and those of the FLSA are similar. *Kasten v.*

Saint-Gobain Performance Plastics Corp., 585 F.3d 310, 315 (7th Cir. 2009) (dissent). Decisions interpreting coverage of the NLRA have persuasive force as to coverage of the FLSA. *Id.; Rutherford Food Corp. v. McComb*, 331 U.S. 722, 723-24 (1947).

CONCLUSION

The FLSA anti-retaliation provision is very broad and covers someone in Ms. Dellinger's situation. As used in the FLSA anti-retaliation provision, the term "employee" is ambiguous and should be interpreted broadly to prevent prospective employers from discriminating against applicants for employment who previously exercised their protected right to file an FLSA lawsuit. Such an interpretation is entirely consistent with the Supreme Court's admonition that the anti-retaliation provisions of the FLSA are designed to "foster a climate in which compliance with the substantive provisions of the Act would be enhanced."

Any contrary interpretation would allow "retaliation with impunity" against those who had previously exercised their protected right to file a lawsuit seeking unpaid minimum wage or overtime compensation.

REQUEST FOR ARGUMENT

Appellant requests oral argument.

Respectfully submitted,

/s/

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 10-1499 **Caption:** Dellinger v. SAIC

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Dated: July 26, 2010

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I hereby certify that on July 26, 2010, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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