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Petition for a Writ of Certiorari. Dellinger v. Science Applications International Corp. (No. 11-598), 2011 U.S. S. Ct. Briefs LEXIS 2153

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11 598 No. ______

Supreme Court, U.S.
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In The
Supreme Court of the United States

NATALIE R. DELLINGER,

Petitioner,

v.

SCIENCE APPLICATIONS
INTERNATIONAL CORPORATION,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Does the anti-retaliation provision in section 15(a)(3) of the Fair Labor Standards Act apply to retaliation by an employer against a job applicant?

(2) Is the private cause action provided by section 16(b) of the FLSA available to a job applicant who is retaliated against by an employer?

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Petitioner Natalie R. Dellinger respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals entered on August 12, 2011.

OPINIONS BELOW

The August 12, 2011 opinion of the Court of Appeals, which is reported at 649 F.3d 226 (4th Cir. 2011), is set out at pp. 1a-26a of the Appendix. The October 7, 2011 order of the Court of Appeals denying rehearing en banc, which is not reported, is set out at p. 40a of the Appendix. The April 2, 2010 Memorandum Opinion of the District Court, which is unofficially reported at 2010 WL 1375263 (E.D.Va.), is set out at pp. 27a-39a of the Appendix.

JURISDICTION

The decision of the Court of Appeals was entered on October 7, 2011. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 3(a) of the Fair Labor Standards Act, 29 U.S.C. § 203(a), provides:

> "Person" means any individual, partnership, association, corporation, business trust, legal

representative, or any organized group of persons.

Section 3(e)(1) of the Fair Labor Standards Act, 29 U.S.C. § 203(e)(1), provides in pertinent part "'employee' means any individual employed by an employer."

Section 15(a)(3) of the Fair Labor Standards Act, 29 U.S.C. § 215(a)(3), provides in pertinent part:

> (a) ... [I]t shall be unlawful for any person –
>
> * * *
>
> (3) 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....

Section 16(b) of the Fair Labor Standards Act, 29 U.S.C. § 216(b), provides in pertinent part:

> Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in ... the preceding sentence[ ]

> may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.

STATEMENT OF THE CASE

This petition concerns a startling Fourth Circuit decision which the government has correctly described as creating an "untenable gap in [the] coverage"[1] provided by the anti-retaliation provision of the Fair Labor Standards Act. A sharply divided court of appeals has held that the FLSA permits an employer to expressly refuse to hire any job applicant who has ever filed a suit under the FLSA or complained to the Department of Labor. That decision poses a serious threat to the enforceability of the FLSA, and frames an important question of law which should be settled by this Court.

In July 2009 petitioner Dellinger brought suit against her former employer, CACI, Inc., for alleged violations of the FLSA's minimum wage and overtime provisions. About the same time she applied for a job with the defendant, Science Applications International Corporation. In late August 2009, Science Applications offered Dellinger a position, contingent

[1] Department of Labor Rehearing Brief, p. 4.

on her passing a drug test, completing certain forms, and verifying and transferring her security clearance. Dellinger accepted the offer and began the process of satisfying the contingencies. (App. 3a, 28a).

Dellinger filled out the required forms and passed the drug test. On one form which Science Applications required her to complete, Dellinger was asked to identify any pending civil litigation to which she was a party. She listed her then pending FLSA action against CACI, Inc. Several days after Dellinger submitted her completed form, Science Applications withdrew its offer of employment. (App. 3a, 29a). Science Applications gave Dellinger no explanation for its decision to cancel the job offer it had made to her only days earlier.

Dellinger commenced this action against Science Applications, alleging that it had retaliated against her by withdrawing its job offer because of her FLSA lawsuit against CACI.[2] The plaintiff asserted that Science Applications' action violated section 15(a)(3) of the Act, which forbids retaliation in reprisal for the assertion of rights under the FLSA. 29 U.S.C. § 215(a)(3).

Science Applications moved to dismiss the complaint for failure to state a claim. It contended that 15(a)(3) permits a prospective employer to reject a job

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[2] The FLSA action against CACI was settled in January 2010.

applicant because he or she had previously filed an action under the FLSA. The District Court granted the defendant's motion to dismiss the complaint. The district judge held that a job applicant is not an "employee" within the meaning of the FLSA,[3] and thus is not entitled to the protections of section 15(a)(3). (App. 31a, 34a-35a).

A divided panel of the Fourth Circuit affirmed. The central issue on appeal was whether Dellinger was an "employee" within the meaning of the FLSA. Section 15(a)(3) forbids retaliation against "any employee" and the remedial provision of the Act, section 16(b), authorizes suits by "any employee." A majority of the court of appeals held that "employee" means only an individual who is "in an employment relationship with" the employer that is alleged to have violated section 15(a)(3) and that is sued under section 16(b). (App. 7a). The Fourth Circuit therefore concluded that a job applicant (such as Dellinger) is not an employee. "This presents the question of whether an applicant for employment is an 'employee'.... [W]e conclude that ... an applicant is not an employee." (App. 6a).

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[3] App. 31a ("Plaintiff has not alleged facts sufficient to show that she was an 'employee' of [Science Applications] within the meaning of 29 U.S.C. § 215(a)(3)"), 35a ("Without reading beyond the plain language of the statute, a job applicant cannot be considered an 'employee.' ").

> Although she was an applicant for employment with Science Applications and her application had been approved on a contingent basis, she never began work.... [A]n applicant who never began or performed any work could not, by the language of the FLSA, be an 'employee.'

(App. 8a).

Based on its view that a job applicant is not an "employee" within the scope of the FLSA, the panel majority ruled that section 15(a)(3) "permit[s] future employers effectively to discriminate against prospective employees for having exercised their rights under the FLSA in the past." (App. 11a). "[W]e hold that the FLSA anti-retaliation provision, 29 U.S.C. § 215(a)(3), does not authorize prospective employees to bring retaliation claims against prospective employers." (App. 12a). "Congress was ... providing protection to those in an employment relationship with their employer." (App. 6a-7a; see App. 10a (insisting there is no authority for "extend[ing] FLSA protections to applicants or prospective employees."))

The panel majority also held that, regardless of whether an employer engaged in conduct which violated the rights of a job applicant, section 16(b) of the FLSA does not authorize prospective employees to file lawsuits against employers. "[W]e conclude that the FLSA gives an employee the right to sue only his or her current or former employer and that a prospective employee cannot sue a prospective employer." (App. 2a-3a). "[T]here is ... no remedy for an employee

to sue anyone but his employer for violations of the anti-retaliation provision." (App. 9a).

> Because an employee is given remedies ... only from an employer, Dellinger could only sue Science Applications if she could show that she was an employee and that Science Applications was *her* employer. Yet Dellinger cannot make that showing.

(App. 7a-8a) (emphasis added). "§216(b) provides that ... employees may sue only *their* employers for retaliation." (App. 7a) (emphasis added and omitted).

Judge King dissented. The term "employee," he argued, is sufficiently ambiguous that it could include a prospective employee. (App. 17a, 18a). Because section 15(a)(3) was intended to prevent fear of reprisals from deterring workers from asserting their rights under the FLSA, Judge King reasoned, section 15(a)(3) should be construed to forbid retaliation against prospective employees, and section 16(b) should be interpreted to authorize civil actions by prospective employees. (App. 23a-25a). The majority opinion, Judge King objected, was inconsistent with this Court's interpretation of the term "employee" in *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997). (App. 12a, 14a).

Dellinger filed a timely petition for rehearing en banc. On October 7, 2011, the Court of Appeals denied the petition for rehearing. (App. 40a).

The Department of Labor, together with the EEOC,[4] filed a brief in the original appeal[5] and a second brief with regard to the petition for rehearing en banc.[6] Both briefs contended that section 15(a)(3) forbids an employer from retaliating against job applicants and that section 16(b) provides a private cause of action to a job applicant who was the victim of such retaliation. In its brief regarding rehearing en banc, the government argued that the panel opinion was inconsistent with this Court's decisions in *Robinson v. Shell Oil Co.* and several other cases. (See pp. 14-15, 20-21, *infra*).

REASONS FOR GRANTING THE WRIT

The Fourth Circuit has held that the Fair Labor Standards Act permits an employer to retaliate against a job applicant for having filed an action under the Act, and provides to job applicants no cause of action against a retaliatory employer. The government has correctly described that court of appeals

[4] The EEOC joined these briefs because complaints and legal actions under the Equal Pay Act are protected by the anti-retaliation provision of section 15(a)(3) and the private cause of action in section 16(b).

[5] Brief for the Secretary of Labor and the Equal Employment Opportunity Commission as *Amici Curiae* in Support of Plaintiff-Appellant ("Department of Labor Merits Brief").

[6] Brief for the Secretary of Labor and the Equal Employment Opportunity Commission as *Amici Curiae* ("Department of Labor Rehearing Brief").

opinion as threatening to "drastically weaken the FLSA's anti-retaliation protection."[7]

Enforcement of the wage and hour and overtime provisions of the Act depends upon "information and complaints received from employees seeking to vindicate rights claimed to have been denied." *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960). The anti-retaliation provision of the FLSA is essential to that enforcement machinery, because "fear of economic retaliation" would otherwise induce workers whose rights had been violated to avoid complaining to or cooperating with the Department of Labor and to refrain from filing lawsuits seeking redress for those statutory violations. *Id.* The Fourth Circuit decision in the instant case expressly permits the use of just such economic retaliation by prospective employers. As the dissenting judge emphasized in the court below, the panel majority "giv[es] its thumbs-up to the company's conduct and pav[es] the way for other employers to adopt similar practices." (App. 14a).

The Fourth Circuit's decision is inconsistent with this Court's interpretation of the term "employee" in *Robinson v. Shell Oil Corp.* The court of appeals' insistence that section 15(a)(3) protects an individual only from retaliation by his or her employer is in conflict with decisions of the Third, Sixth and Seventh Circuits. The Fourth Circuit's express legalization of

[7] Department of Labor Merits Brief, p. 21.

retaliation against job applicants poses a serious threat to the enforcement of the Fair Labor Standards Act, and presents legal issues which should be settled by this Court.

I. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH DECISIONS OF THIS COURT

A. THE FOURTH CIRCUIT'S "EMPLOYMENT RELATIONSHIP" REQUIREMENT CONFLICTS WITH THIS COURT'S DECISION IN *ROBINSON V. SHELL OIL CO.*

The Fourth Circuit's decision rests on its insistence that the term "employee" necessarily refers only to an individual who is "in an employment relationship" with the employer in question. (App. 7a). In *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997), this Court unanimously rejected that very interpretation of "employee." Both the government and the dissenting judge below correctly objected that the panel decision conflicts with this Court's decision in *Robinson*. See Sup.Ct. Rule 10(c). Judge King insisted that "*Robinson* mandates the opposite result from that reached by the majority today." (App. 14a) (dissenting opinion).[8] The Department of Labor objected

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[8] "Ms. Dellinger's construction of the word 'employee' in § 215(a) is ... compelled by *Robinson*." (App. 22a) (King, J., dissenting). "[T]he majority ... ignores *Robinson*." (App. 21a) (King, J., dissenting).

that "the majority decision departs from [the] analysis [in *Robinson*]" (Department of Labor Rehearing Brief, pp. 3-4).[9]

Robinson concerned the interpretation of the term "employees" in Title VII. The plaintiff in *Robinson* had complained about unlawful action by his former employer, and then been retaliated against when he sought a job with a new employer. Robinson, like Dellinger, had no current employer at the point in time when the retaliation occurred. This Court nonetheless held that Mr. Robinson was an "employee[ ]" under Title VII, which defines "employee" in terms essentially identical to the definition in the FLSA.[10] The Court's decision in *Robinson* rested on the ambiguity of the word "employee," 519 U.S. at 340-45, and on the danger that workers would be afraid to complain about unlawful employment practices if such complaints could lead to retaliation that would prevent them from finding future employment. 519 U.S. at 345-46. This Court's decision in *Robinson* reversed a Fourth Circuit opinion which had held that "employee" refers only to a current employee. 70 F.3d 325 (4th Cir. 1995) (en banc). The situation in the instant

[9] Department of Labor Rehearing Brief, p. 11 ("[t]he majority did not apply the Supreme Court's statutory analysis of the term 'employees' ... [i]n *Robinson*").

[10] Section 701(f) of Title VII defines an employee as "an individual employed by an employer." 42 U.S.C. § 2000e(f). Section 3(e)(1) of the FLSA defines employee as "any individual employed by an employer." 29 U.S.C. § 203(e)(1).

case differs from *Robinson* only in that here the retaliation was by a prospective employer, whereas in *Robinson* the retaliation was by the plaintiff's former employer.

In *Robinson* the defendant contended that the term "employee" necessarily refers only to an individual who is in an "employment relationship" with the employer in question.

> [T]he statute does contain [a] bright-line test. And that bright line is whether or not you have an employment relationship.... [I]f you do not have an ongoing employment relationship, I don't see how you can be covered by the statute.

1996 WL 656475 at *34-*35 (transcript of oral argument). The Fourth Circuit's now overturned 1995 decision in *Robinson* was similarly based on that circuit's insistence that "employee" refers to an existing employment relationship. The en banc majority in *Robinson* repeatedly asserted that the term "employee" means an individual who is in an "employment relationship" with the defendant. The Fourth Circuit in *Robinson* repeated the phrase "employment relationship" ten times[11] in explaining its interpretation of "employee." 70 F.3d at 330-31. "The term 'employed' ... is commonly used to mean 'performing work under an employer-employee relationship.'" 70 F.3d at 330 (quoting *Black's Law Dictionary* 525 (6th ed. 1990)).

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[11] 70 F.3d at 330-31.

The Fourth Circuit in *Robinson* refused to construe the protection afforded to an "employee" by the anti-retaliation provision of Title VII to reach "beyond the employment relationship." 70 F.3d at 331. "If Congress intended Title VII to remedy [retaliatory] discrimination beyond the employment relationship, then it could have easily done so...." 70 F.3d at 330.

This Court, however, expressly rejected in *Robinson* the argument that "employee" necessarily refers only to those "in an employment relationship" with the employer in question.

> At first blush, the term "employees" ... would seem to refer to those having an existing employment relationship with the employer in question.... This initial impression, however, does not withstand scrutiny....

Robinson, 519 U.S. at 341.

In the teeth of this Court's specific rejection of the Fourth Circuit's 1995 holding that "employee" means an individual in an "employment relationship" with the employer in question, the Fourth Circuit in the instant case resurrected and applied that very discredited interpretation. In a decision written by one of the Fourth Circuit judges who earlier joined that 1995 Fourth Circuit opinion, the majority opinion below held that "by using the term 'employee' ... Congress was referring to the employer-employee relationship, ... and was therefor providing protection to those in an employment relationship with their employer." (App. 6a-7a). To be protected by the FLSA,

the majority insisted, an individual must "have an employment relationship with the defendant." (App. 10a). The anti-retaliation provision of the FLSA only applies "within the employer-employee relationship." (App. 10a).

The now-overruled 1995 Fourth Circuit decision in *Robinson* had insisted that this limitation on the application of the term "employee" was dictated by "the plain meaning of [the] unambiguous statutory language." 70 F.3d at 329; see 70 F.3d at 330 ("employee" "is not ambiguous"). But this Court emphatically rejected that claim. General usage of the term "employee," the Court held, "tends to rebut a claim that the term 'employee' has some intrinsically plain meaning." 519 U.S. at 344 n.4. *Robinson* expressly pointed out that "employee" could "mean 'prospective employee[ ].'" 519 U.S. at 343 n.3. The Court concluded that in the context of Title VII, which defines "employee" in language essentially identical to the FLSA, the term is indeed ambiguous. 519 U.S. at 343, 345, 346.

Despite this aspect of the Court's 1997 decision in *Robinson*, the Fourth Circuit in the instant case again insisted that the requirement that an FLSA plaintiff be in an employment relationship with the employer in question is literally dictated by the "plain terms" of the statute. (App. 11a). The government correctly described the conflict between the panel decision below and this Court's opinion in *Robinson*.

> [T]he majority failed to apply the Supreme Court's statutory analysis in *Robinson* in holding, based on the "statutory text," that the term "employee" excludes prospective employees like Dellinger. In *Robinson*, the Supreme Court analyzed ... the term "employees" in Title VII's anti-retaliation provision ... and found "employees" to be ambiguous.... The majority decision departs from such analysis by failing to determine that "any employee" in the FLSA's anti-retaliation provision is, at minimum, ambiguous as to whether Dellinger may bring a claim against her prospective employer.

(Department of Labor Rehearing Brief, pp. 3-4).

> [B]ecause the three criteria for application of the *Robinson* analysis are satisfied here, the majority should have applied *Robinson* and determined that "employee" in the FLSA's anti-retaliation provision is, at minimum, ambiguous as to whether prospective employees may bring claims.

(*Id.*, pp. 12-13). The dissenting opinion below noted the same conflict.[12]

In its now-overturned 1995 decision in *Robinson*, the Fourth Circuit had reasoned that the term

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[12] "The *Robinson* Court concluded that the word 'employee' in title VII was ambiguous." (App. 14a). "[T]he word 'employee,' as used in the FLSA, is as necessarily ambiguous there as it is in Title VII." (App. 17a). "We have, in fact, called the two definitions 'identical.'" (App. 16a).

"employee" in the anti-retaliation provision of Title VII must be limited to individuals in an employment relationship with the employer because the substantive provisions of Title VII are themselves directed at regulating that employment relationship.

> [T]he types of practices that Title VII forbids strongly point toward the scope of its anti-retaliation provision not extending beyond the employment relationship. The types of practices that Title VII forbids are particularly related to *employment*....

70 F.3d at 330-31 (emphasis in original). Despite the fact that this line of reasoning was necessarily rejected by this Court's decision in *Robinson*, the same argument was made yet again by the Fourth Circuit in the instant case. "[B]y using the term 'employee' ... Congress was referring to the employer-employee relationship the regulation of which underlies the Act as a whole...." (App. 6a-7a). Limitation of "employee" to those "in the employment relationship" is required, the court below reasoned, because that relationship "is the context in which the substantive provisions operate." (App. 8a).

The Fourth Circuit decision in *Robinson* had argued that limiting the term "employee" under Title VII to an individual in a current employment relationship with the employer was compelled by the Title VII definition of "employee." 70 F.3d at 330. Despite this Court's decision to the contrary in *Robinson*, the Fourth Circuit in the instant case again insisted that the FLSA definition of "employee" – which is identical

to the Title VII definition – compels such a limitation. (App. 6a).

The Fourth Circuit in the instant case dismissed this Court's decision in *Robinson* in a footnote, commenting merely that "[b]ecause *Robinson* deals only with former employees, it does not speak to the issue in this case." (App. 10a n.2). But the reasoning of the Fourth Circuit decision in the instant case – reiterating much of the reasoning in the Fourth Circuit's long ago overturned decision in *Robinson* – is entirely inconsistent with this Court's analysis in *Robinson* of the meaning of "employee." The Fourth Circuit in the instant case repeatedly insisted that "employee" refers only to individuals "in an employment relationship" with the defendant. Yet sixteen years ago, the Fourth Circuit itself correctly recognized in its en banc decision in *Robinson* that limiting employees to those "in an employment relationship" with a defendant would necessarily exclude former employees; that was the very basis of the Fourth Circuit's mistaken conclusion that "employee" did not include a former employee. A former employee like Mr. Robinson is no more "in an employment relationship" with his or her former employer than an ex-husband is in a marital relationship with his ex-wife. There is simply no way to reconcile the reasoning in the Fourth Circuit decision in the instant case with this Court's decision in *Robinson*.

B. THE FOURTH CIRCUIT'S NARROW INTERPRETATION OF SECTIONS 15(a)(3) AND 16(b) OF THE FLSA IS INCONSISTENT WITH THIS COURT'S REPEATED CONSTRUCTION OF THE TERM "ANY"

The FLSA delineates in particularly sweeping language the individuals who are protected from retaliation by section 15(a)(3) and who can obtain judicial relief under section 16(b). In four separate passages identifying those protected by, and authorized to sue to enforce, the FLSA anti-retaliation provision, the FLSA deliberately uses the all-encompassing word "any." The Fourth Circuit's narrow interpretation of sections 15(a)(3) and 16(b) conflicts with a series of emphatic decisions by this Court regarding the meaning and significance of the adjective "any."

Section 15(a)(3) forbids retaliation by "any person" (not merely retaliation by the employer of the person retaliated against) and protects from retaliation "any employee" (not only an employee of the retaliating entity). The defendant in this case is certainly a "person." The court below acknowledged that Dellinger was an employee within the meaning of the FLSA, in the sense that she was a former employee of her prior employer. (App. 10a n.2). The Fourth Circuit, however, held that the phrase "any person" in section 15(a)(3) – delineating the entities from whose retaliatory acts workers are protected – should be narrowly interpreted to mean "*their* employer." (App. 6a) (emphasis added). In the Fourth Circuit's view "any employee"

in section 15(a)(3) would thus have to mean "an employee of the retaliating employer."

Similarly, section 16(b) authorizes "any one or more employees" (not merely one or more employees of the defendant) to maintain an action, and provides for suit against "any employer" (not merely against the employer of the plaintiff). The court of appeals, however, held that phrase "any employee" in section 16(b) means an employee of the defendant, and that the phrase "any employer" in section 16(b) should be interpreted to mean only an employer of the plaintiff. "[T]he text of the applicable remedy allows for private civil actions only by employees against *their* employers." (App. 12a) (emphasis added). "[T]here is ... no remedy for an employee to sue anyone but *his* employer." (App. 9a) (emphasis added). "[Under] § 216(b) ... Dellinger could only sue Science Applications if she could show that Science Applications was *her* employer." (App. 7a-8a) (emphasis added). "§ 216(b) provides that ... employees may sue only *their* employer." (App. 7a) (emphasis added and omitted). "[T]he FLSA gives an employee the right to sue only *his or her* current or former employer." (App. 2a) (emphasis added). "[U]nder § 216(b) ... employees can sue *their* current or former employers." (App. 6a) (emphasis added).

As the government has correctly pointed out, "[t]he majority ... read the word 'any' out of sections 15(a)(3) and 16(b) and thus failed to give proper consideration to its expansive meaning, as recognized by the Supreme Court in other contexts." (Department of Labor Rehearing Brief, p. 3). In five emphatic

decisions, this Court has held that the adjective "any" signifies that the noun which it modifies is to be given the most expansive meaning. *Kasten v. Saint-Gobain Performance Plastics Corporation*, 131 S.Ct. 1325, 1332 (2011) ("the phrase '*any* complaint' suggests a broad interpretation") (emphasis in original); *Republic of Iraq v. Beaty*, 556 U.S. 848, ___, 129 S.Ct. 2183, 2189 (2009) ("the word 'any' ... has an 'expansive meaning'"); *United States v. Gonzales*, 520 U.S. 1, 5 (1997) ("[r]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind") (quoting *Webster's Third New International Dictionary* 97 (1996)); *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 589 (1980) (noting that "any" is "expansive language"); *Shea v. Vialpando*, 416 U.S. 251, 260 (1974) ("the normal meaning of 'any' [allows of] no limitation").

The Fourth Circuit decision conflicts with this entire line of this Court's decisions. As the government has correctly explained,

> The Supreme Court has repeatedly interpreted "any" expansively, consistent with th[e] plain meaning, including in the context of FLSA retaliation claims. In *Kasten v. Saint-Gobain Performance Plastics Corp.* 131 S.Ct. 1325, 1332 (2011), the Supreme Court noted that the use of "any" in the phrase "filed any complaint" in section 15(a)(3) "suggests a broad interpretation that would include an oral complaint." More generally, the Supreme Court has made clear that "any" has an "expansive meaning" that does not limit the word it modifies.... ["]Read

> naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.["].... *U.S. v. Gonzalez*, 520 U.S. 1, 5 (1977).

(Department of Labor Rehearing Brief, p. 7).

The repeated use of the adjective "any" in sections 15(a)(3) and 16(b) is particularly significant because in other provisions of the FLSA Congress deliberately used narrower, more limited language. The Fourth Circuit held that the phrase "any employee" in sections 15(a)(3) and 16(b) must mean (referring to a current or, perhaps, former employer) "his employee" or "its employee." But when Congress, in drafting the FLSA, wanted to restrict in this manner the meaning of "employee," it did so expressly. Seven different provisions of the FLSA use the narrow phrase "his employee,"[13] and two provisions use the phrase "its employee."[14] Similarly, the Fourth Circuit insisted that the phrase "any employer" in sections 16(b) means "his," "her," or "their employer." But when Congress wanted to impose such a limitation it did so expressly. In six other provisions of the FLSA Congress did limit in that just way the term "employer."[15]

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[13] 29 U.S.C. §§ 203(m), 206(a), 206(b), 206(e)(1), 206(e)(2), 207(a)(1), 207(a)(2).

[14] 29 U.S.C. §§ 203(s)(2), 207(p)(1)(A).

[15] 29 U.S.C. §§ 203(m) ("the employee's employer"), 207(n)(1) ("his employer"), 207(o)(5) ("the employee's employer"), 213(a)(6) ("his employer's immediate family"), 213(a)(6)(B) ("his employer"), 213(b)(28) (same).

C. THE FOURTH CIRCUIT'S LIMITATION ON THE PURPOSE OF SECTION 15(a)(3) IS INCONSISTENT WITH THE DECISIONS OF THIS COURT IN *ROBINSON V. SHELL OIL CO.* AND *MITCHELL V. DEMARIO JEWELRY*

The Fourth Circuit opinion rests in part on a uniquely narrow characterization of the purpose of section 15(a)(3).

> [T]he anti-retaliation provision was meant to ensure that employees could sue to obtain minimum wages and maximum hours from their employers without *the employers* taking adverse action against them for the exercise of those rights. This purpose is inherent in the employment relationship, which is the context in which the substantive provisions operate.

(App. 9a-10a) (emphasis added). On this view the sole, limited purpose of section 15(a)(3) is to prevent retaliation by the particular entity with whom the victim has an employment relationship. The Fourth Circuit insisted that section 15(a)(3) was never intended to interfere with retaliation by anyone else, or to provide "protection against any societal retaliation." (App. 9a). The goal of section 215(a)(3), according to the court of appeals, was not to end retaliation against workers who complain to the Department of Labor or file lawsuits under the FLSA, but only to regulate which employers are permitted to engage in such reprisals.

That narrow interpretation of the purpose of section 15(a)(3) is inconsistent with this Court's repeated description of the goal of that anti-retaliation provision. The intent behind section 15(a)(3), this Court has held, is to prevent interference with the enforcement process.

> Congress ... chose to rely on information and complaints received from employees seeking to vindicate rights claimed to have been denied. Plainly, effective enforcement could thus only be expected if employees felt free to approach officials with their grievances. This end the prohibition of § 15(a)(3) against discharges and other discriminatory practices was designed to serve. For it needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions.

Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 292 (1960). It is the "economic retaliation" that impedes enforcement of the FLSA, not merely retaliation from some particular source, which *Mitchell* explains section 15(a)(3) was enacted to prevent.

Referring to anti-retaliation laws generally, this Court reiterated in *Robinson* that "a primary purpose of anti-retaliation provisions [is] [m]aintaining unfettered access to statutory remedial mechanisms." *Robinson*, 519 U.S. at 345. The danger that "fear of economic retaliation" will "[ ]fetter[ ] access to statutory remedial mechanisms" depends on the gravity of

the possible retaliation, not on the identity of the retaliator. *Robinson* recognized that it "would undermine the effectiveness of Title VII ... [to] allow[ ] the threat of postemployment retaliation to deter victims of discrimination from complaining" *Robinson*, 519 U.S. at 345. The postemployment retaliation held unlawful in *Robinson* was the refusal of a former employer to provide a job reference, a refusal that *might* have made it more difficult for the former employee to get a particular job. The postemployment retaliation held lawful by the Fourth Circuit in the instant case – the outright refusal of an employer to hire applicants who had engaged in protected activity – would assuredly be an even greater deterrent.

The type of retaliation alleged in this case falls squarely within the statutory purpose delineated by *Mitchell* and *Robinson*. Workers would hesitate to complain about a violation of the FLSA if doing so would likely prevent them from obtaining another job. Workers are well aware of the danger, recognized by the Fifth, Sixth and Tenth Circuits, that they be subject to retaliation by a prospective employer who "finds out that the employee has in the past cooperated with the Secretary [of Labor],"[16] as well as the risk, acknowledged by the Fourth Circuit itself, of retaliation by prospective employers "who learn they have challenged

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[16] *Rutherford v. American Bank of Commerce*, 565 F.2d 1162, 1166 (10th Cir. 1977); *Dunlop v. Carriage Carpet Co.*, 548 F.2d 139, 146 (6th Cir. 1977); *Hodgson v. Charles Martin Inspectors of Petroleum, Inc.*, 459 F.2d 303, 306 (5th Cir. 1972).

the labor practices of previous employers." *Darveau v. Detecon, Inc.*, 515 F.3d 334, 343 (4th Cir. 2008). In conflict with the purpose of section 15(a)(3) set out in *Mitchell* and *Robinson*, the panel opinion "permit[s] future employers effectively to discriminate against prospective employees for their having exercised their rights under the FLSA in the past." (App. 11a).

II. THE FOURTH CIRCUIT'S HOLDING THAT "EMPLOYEE" IN THE FLSA REFERS ONLY TO AN INDIVIDUAL WHO IS "IN AN EMPLOYMENT RELATIONSHIP" WITH THE RETALIATORY FLSA EMPLOYER CONFLICTS WITH DECISIONS OF THE THIRD, SIXTH AND SEVENTH CIRCUITS

The linchpin of the Fourth Circuit's decision is that the term "employee" in sections 15(a)(3) and 16(b) refers only to an individual who is in (or, perhaps, was once in) an employment relationship with the retaliator or defendant, and that the terms "person" in section 15(a)(3) and "employer" in section 16(b) refer only to the particular employer with whom the plaintiff employee has that relationship.

The Third, Fifth and Seventh Circuits have all rejected that limitation on the meanings of "employee," "employer," and "person" in the FLSA. The court of appeals' opinion squarely conflicts with the Third Circuit decision in *Bowe v. Burns*, 137 F.2d 37 (3d Cir. 1943). The plaintiffs in *Bowe* alleged that, in retaliation for filing a lawsuit under the FLSA, their union had expelled them and prevented them from securing

other employment. The District Court in *Bowe* dismissed the action, holding that retaliation by a union was not forbidden by section 15(a) because "the word 'person' as used in Section 215 refers to 'employer' violators." *Bowe v. Burns*, 46 F.Supp. 745, 749 (E.D.Pa. 1942). The union was not and never had been the employer of the plaintiffs. The Third Circuit reversed, emphasizing that the terms of section 15(a)(3) forbid retaliation by "any person," not merely by the employer of the plaintiff, and thus protected from retaliation those who were not and never had been employees of the retaliator.

> Those portions of the Act ... relating to wages and to hours do apply only to employers. The prohibitions in Section 15 ... , however, are applicable "to any person." ... Section 15(a) makes it unlawful ... for "any person," whether or not he is an employer, to discriminate against any employee.... The congressional intent is very plain and the pattern of the statute is perfect.

137 F.2d at 38-39. The Third Circuit permitted the plaintiff to maintain a civil action against the union under section 16(b) even though the union was not Bowe's employer.

The panel opinion conflicts as well with the Sixth Circuit decision in *United States v. Meek*, 136 F.2d 679 (6th Cir. 1943). Meek had been convicted for having caused the unlawful discharge of an individual named Crutcher. Meek attacked the conviction "on the ground that he could not be guilty ... because he was

not [Crutcher's] employer." 136 F.2d at 679. The United States argued in *Meek* that the prohibitions of section 15(a)(3) are not limited to employers of the victim.[17] The Sixth Circuit held that it was legally irrelevant whether Meek was in any sense Crutcher's employer (or whether Crutcher was Meek's employee).

> It is immaterial whether Meek, at the time, was Crutcher's employer, ... since the prohibitions of the statute are directed to "any person." ... *Bowe* ... *v.* ... *Burns*. As there pointed out, the differentiation between the prohibitions in other sections of the Act directed to the "employer," and those here [in section 15(a)] directed to "any person," is significant of the intent of the Congress.

136 F.2d at 679-80.

Similarly, in *Sapperstein v. Hagen*, 188 F.3d 852 (7th Cir. 1999), the Seventh Circuit held that the protections of section 15(a)(3) are not limited to employees who work for firms or individuals subject to the minimum wage and overtime provisions of sections 206 and 207.

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[17] Brief for Appellee, *Meek v. United States*, Crim. No. 9389 (6th Cir.) 15-16 ("The Section is expressly applicable to 'any person' It is not limited to an employer or to a person ... being an employer; it prohibits discharge or other discrimination against 'any employee' without any such limitations.... Applying a literal construction, the conclusion thus appears to be plain that the Section applies to all employees and *all persons*....") (Emphasis in original).

> [T]he statutory language is quite clear and very broad. Congress made it illegal for any person, not just an "employer" as defined under the statute, to retaliate against any employee for reporting ... violations of the federal minimum wage or maximum hour laws....

188 F.3d at 857. *Sapperstein* rejects the interpretation of section 15(a)(3) adopted by the Fourth Circuit in the instant case. The Fourth Circuit's insistence that section 15(a)(3) protects only an individual who is "in an employment relationship" with the retaliator necessarily means that the retaliator must indeed be an employer, the employer of the victim.

III. THE FOURTH CIRCUIT HAS DECIDED TWO CRITICAL QUESTIONS OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT

The Fourth Circuit held, at the urging of the defendant employer, that the FLSA permits an employer to openly refuse to hire any job applicant who has previously filed an action under the FLSA or cooperated with the Department of Labor's efforts to enforce the statute. (See pp. 5-6, *supra*). The court below also ruled that the private cause of action provided by the FLSA does not permit suits by job applicants. The government, in its brief regarding rehearing, correctly characterized the Fourth Circuit's decision as creating an "untenable gap in coverage." (Department of Labor Rehearing Brief, p. 4). Because of the serious

implications of the decision below for the enforcement of the FLSA, this is an issue that should be settled by this Court.[18]

Refusing to hire applicants because of their past involvement in the enforcement of the FLSA would be a particularly effective method of punishing protected activity.

> It is difficult to imagine a more severe form of retaliation than the refusal to hire a job applicant because the applicant once exercised her FLSA rights.... If the majority decision stands ... , an individual not currently employed who is seeking a job could potentially remain unemployed indefinitely solely because she engaged in FLSA protected activity.

(Department of Labor Rehearing Brief, p. 15).

Fear of this form of retaliation would be especially likely to deter workers from asserting their rights under the FLSA. "Individuals would be reluctant to engage in any protected activity under section 15(a)(3) for fear of being blacklisted by future employers." (Department of Labor Merits Brief, p. 2). "Far fewer employees would assert their FLSA rights if they

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[18] The respondent correctly observed in the court of appeals that "[t]his case squarely presents for decision the question whether a[n] ... applicant for a position is entitled to the protection of the anti-retaliation provision of the Fair Labor Standards Act...." Brief of Appellee, p. 2.

could be excluded from future employment as a result. Such a chilling effect would undermine FLSA enforcement...." (Department of Labor Rehearing Brief, p. 15).

> Employees will be deterred from invoking their FLSA rights and cooperating in FLSA actions for fear of being retaliated against by all future employers when seeking employment.... Forcing an employee to choose between asserting her FLSA rights and possibly rendering herself ineligible for employment with all future employers or accepting FLSA violations without asserting her rights would severely constrain FLSA enforcement....

(Department of Labor Rehearing Brief, p. 4).[19]

If, as the Fourth Circuit held, this type of retaliation is lawful under the FLSA, an employer could openly adopt such a retaliatory policy, expressly notifying job applicants that it does not hire FLSA complainants.

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[19] "Far fewer individuals would exercise their rights under section 15(a)(3) if they could be lawfully excluded from all future employment as a result." (Department of Labor Merits Brief, p. 20) (footnote omitted). "[I]f an employee can potentially be denied employment by all future employers because she engages in FLSA protected activity, far fewer employees would exercise their FLSA rights and FLSA enforcement would be severely undermined" (Secretary of Labor's Motion for Leave to File Amicus Brief, pp. 2-3).

> Employers could ask all job applicants, or find out on their own, whether those applicants exercised their FLSA rights and then reject every applicant who did so, thereby creating a permanent class of "blacklisted" individuals who exercised their FLSA rights.

(Department of Labor Rehearing Brief, p. 15). Job seekers could be required as part of the application process to provide written assurances that they had never filed, joined or testified in an action under the FLSA, and had never complained to or cooperated with the Department of Labor. Employers could caution their own employees that the assertion of rights under the FLSA, although protected from reprisals by that current employer, could be fatal to future job prospects.

The type of reprisal held lawful by the Fourth Circuit in the instant case poses a substantially greater threat to enforcement of the underlying statute than did the retaliatory practices at issue in *Thompson v. North American Stainless, LLP*, 131 S.Ct. 863 (2011), and *Crawford v. Metropolitan Government of Nashville and Davidson County*, 555 U.S. 271 (2009). In *Thompson* the employer had allegedly dismissed one worker to retaliate against another employee, the fiancée of the dismissed worker. This Court noted the likelihood that reprisals against family members could deter protected activity. 131 S.Ct. at 868. But this type of reprisal is not widespread; it can be utilized, and could deter protected activity, only where the worker who engaged in the protected

activity happens to be related to (or have a particularly close relationship with) another employee of the same employer. In *Crawford* the employer had retaliated against a worker when, in response to questions by a personnel official, she complained that she had been sexually harassed. But this type of protected activity is not common; most complaints regarding sexual harassment are made at the initiative of the victim, not in response to questions.

In the instant case, on the other hand, the form of reprisal sanctioned by the Fourth Circuit could be used to punish and deter all forms of protected activity, not merely the particular form of protected activity at issue in *Crawford*. Moreover, almost all employees over the course of their careers work for a number of different employers, and thus can expect (except toward the end of their careers) to at some point be looking for a new job. The typical American worker has changed jobs an average of ten times by the age of 44.[20] Thus virtually all workers could be injured, and deterred, by the type of reprisal declared lawful by the Fourth Circuit, not merely (as in *Thompson*) employees who work at the same office or plant as a family member or workers who (as in *Crawford*) are questioned by their employers about statutory violations.

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[20] See http://www.bls.gov/news.release/pdf/nlsoy.pdf and http://www.bls.gov/nls/nlsfaqs.htm#anch41, visited October 31, 2011.

There are sound economic reasons why an employer, if permitted, might want to avoid hiring workers who had previously filed FLSA actions or complained to the Department of Labor. Violations of the wage and hour and overtime provisions of the FLSA, unlike violations of many other federal employment laws (such as Title VII), are ordinarily profitable. Every dollar not paid to a worker is an additional dollar retained by the employer, and thus usually an additional dollar of net income to that employer. Even employers who believe in good faith that they are complying with the FLSA understand that some aspect of their personnel practices might be subject to challenge under the Act. In either circumstance, it makes economic sense for an employer to avoid hiring workers whose prior conduct (such as filing a lawsuit under the FLSA) indicates that they understand the legal rights created by the FLSA and might take action if those rights were violated. Thus the government has correctly warned that, in light of the Fourth Circuit decision, "employers ... are more likely to refuse to hire those who have asserted their FLSA rights." (Department of Labor Rehearing Brief, p. 4).

Under the Fourth Circuit rule a worker, once hired, could not *later* be retaliated against if the employer subsequently learned about pre-hiring protected activity. An employer thus has a considerable incentive to find out prior to hiring a worker if he or she had, for example, previously filed an FLSA action. Obtaining that type of information will often be quite easy. Although in the instant case the employer

openly asked the job applicant about her prior involvement in litigation, an employer could often readily obtain such information on its own, without the job applicant knowing that the employer had that information or ever seeing – as in the instant case – a connection between the information and the denial of employment. Simply by using PACER, for example, an employer could ascertain in about one minute whether a job applicant had ever filed an FLSA action in federal court.[21]

The Fourth Circuit held, not only that this form of retaliation is lawful under section 15(a)(3), but also that a prospective employee can never maintain an action under section 16(b) to enforce the FLSA. That procedural holding alone would effectively legalize retaliation against prospective employees.

> [T]he Secretary [of Labor]'s practical ability to remedy retaliation by such employers is limited. The Secretary relies heavily on private actions under the FLSA (as does the EEOC under the Equal Pay Act), and the Secretary's own enforcement actions comprise a small percentage of FLSA lawsuits.

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[21] Upon accessing the PACER website, an employer need only (a) click on "find a case," (b) click on "search the PACER case locator," (c) under "region" pick "all courts," (d) under "party" type the name of the job applicant, and then (e) click on "search."

Information about individuals who have filed federal complaints can be obtained from other sources, such as Westlaw, Lexis, and www.justia.com.

> The FLSA's ... private remedies are thus critical....

(Department of Labor Rehearing Brief, p. 14). Civil actions filed by the Department of Labor are only 2% of all FLSA actions.[22] Thus "[b]arring employees from bringing FLSA retaliation claims against prospective employers would severely undermine FLSA enforcement." (*Id.*, p. 13) (capitalization omitted).

The threat to enforcement of the FLSA created by the Fourth Circuit decision is sufficiently serious that it should be addressed by this Court without awaiting further developments in the lower courts. In the Fourth Circuit today an attorney would have to warn any client considering filing suit under the FLSA, or complaining to the Department of Labor, that he or she could legally be blacklisted by all other employers for doing so. Lawyers throughout the nation will have to admonish workers, at the least, that this form of reprisal may indeed be lawful. Any worker of ordinary prudence would hesitate to engage in protected activity if aware that future employers could legally ask about and reject applicants based on such activity. The chilling effect of the decision below, and the perverse incentives it creates for preemptive retaliatory conduct by employers, should not be permitted to continue unabated for years while other lower courts

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[22] In 2010, there were 6,864 FLSA actions filed in federal district courts. The Department of Labor filed 126 of those actions. See http://www.uscourts.gov/Statistics/StatisticalTablesForTheFederalJudiciary/December2010.aspx (Table C-2).

explore the issue. The Solicitor General's observation about the similar problem created by the Sixth Circuit decision in *Crawford* is applicable here.

> [T]he question whether an employee in petitioner's circumstance is covered [by the anti-retaliation provision] ... is of core importance to the effective enforcement of [the Act] and of recurring significance. The decision below creates an inexplicable gap in [the] anti-retaliation provision.... If the decision below is correct, there is every reason to believe that Congress would want to act promptly to correct the anomaly. Accordingly, there is little reason to leave employees in the ... Circuit unprotected while awaiting [decisions in other circuits].[23]

Because the controlling legal principles have already been repeatedly addressed by decisions of this Court, little purpose would be served by delaying consideration of this vital question.

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[23] Brief for the United States as *Amicus Curiae*, No. 06-1595, p. 18, available at 2007 WL 4439456.

CONCLUSION

For the above reason, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fourth Circuit. In the alternative, the Solicitor General should be invited to file a brief expressing the views of the United States.

Respectfully submitted,

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NATALIE R. DELLINGER,
Plaintiff-Appellant,
v.
SCIENCE APPLICATIONS
INTERNATIONAL CORPORATION,
Defendant-Appellee.

Secretary of Labor; Equal
Employment Opportunity Commission,
Amici Supporting Appellant.

No. 10-1499.
United States Court of Appeals,
Fourth Circuit.

Argued: May 10, 2011.
Decided: August 12, 2011.

ARGUED: Zachary Alan Kitts, COOK, KITTS & FRANCUZENKO, PLLC, Fairfax, Virginia, for Appellant. Dean Romhilt, United States Department of Labor, Washington, D.C., for Amici Supporting Appellant. Robert Sparks, Jr., Sparks & Craig, LLP, McLean, Virginia, for Appellee. **ON BRIEF:** John J. Rigby, McInroy & Rigby, LLP, Arlington, Virginia, for Appellant. Robert L. Levin, Science Applications International Corporation, San Diego, California, for Appellee. P. David Lopez, General Counsel, Vincent J. Blackwood, Acting Associate General Counsel, Paul D. Ramshaw, Equal Employment Opportunity Commission, Washington, D.C.; M. Patricia Smith, Solicitor of Labor, William C. Lesser, Acting Associate Solicitor, Paul L. Frieden, Counsel for Appellate Litigation, Melissa Murphy, United States Department of Labor, Washington, D.C., for Amici Supporting Appellant.

Before NIEMEYER, KING, and KEENAN, Circuit Judges.

Affirmed by published opinion. Judge Niemeyer wrote the opinion, in which Judge Keenan joined. Judge King wrote a dissenting opinion.

OPINION

NIEMEYER, Circuit Judge:

Natalie Dellinger commenced this action under the Fair Labor Standards Act of 1938 ("FLSA") against Science Applications International Corporation which, she alleges, retaliated against her, in violation of the FLSA's anti-retaliation provision, 29 U.S.C. § 215(a)(3), by refusing to hire her after learning that she had sued her former employer under the FLSA.

The district court granted Science Applications' motion to dismiss, concluding that Dellinger was not an "employee" of Science Applications, as defined in the FLSA, and that the FLSA's anti-retaliation provision does not cover prospective employees.

On appeal, Dellinger contends that the FLSA's anti-retaliation provision protects any employee that has been the victim of FLSA retaliation by "any person," including future employers.

Based on the statutory text, we conclude that the FLSA gives an employee the right to sue only his or her current or former employer and that a

prospective employee cannot sue a prospective employer for retaliation. We therefore affirm.

I.

According to Dellinger's complaint, Dellinger sued her former employer, CACI, Inc., in July 2009 for alleged violations of the FLSA's minimum wage and overtime provisions. Around the same time, she applied for a job with Science Applications International Corporation. In late August 2009, Science Applications offered Dellinger a job, contingent on her passing a drug test, completing specified forms, and verifying and transferring her security clearance. Dellinger accepted the offer and began the process of satisfying the contingencies.

On the form required for her security clearance, Dellinger was required to list any pending noncriminal court actions to which she was a party, and she listed her FLSA lawsuit against CACI, Inc. Several days after Dellinger submitted her completed form to Science Applications, Science Applications withdrew its offer of employment.

Dellinger commenced this action against Science Applications, alleging that Science Applications' motive for withdrawing its offer was "retaliation and unlawful discrimination based on Ms. Dellinger's exercise of her protected right to file an FLSA lawsuit," in violation of 29 U.S.C. § 215(a)(3). Science Applications filed a motion to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6), contending

that Dellinger's complaint did not state a claim for which relief could be granted under the FLSA because the FLSA's anti-retaliation provision protects only employees, not prospective employees. The district court agreed with Science Applications and granted its motion, dismissing Dellinger's complaint.

This appeal followed.

II

The Fair Labor Standards Act of 1938 regulates the relationship between employers and their employees to "correct and as rapidly practicable to eliminate" "the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. § 202. To this end, the Act establishes a *minimum wage* that "[e]very employer shall pay to each of his employees," 29 U.S.C. § 206(a), and *maximum hours,* providing that "no employer shall employ any of his employees . . . for a workweek longer than forty hours" unless the employee receives overtime pay at one and one-half times the regular rate, 29 U.S.C. § 207(a). These duties are imposed on employers and the beneficiaries are the employers' employees. In addition, the FLSA protects these substantive rights by prohibiting retaliation, which it defines in relevant part as discrimination "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." *Id.* § 215(a)(3).

The Act is enforced through criminal prosecutions, 29 U.S.C. § 216(a); private civil actions by employees, *id.* § 216(b); and civil enforcement actions by the Secretary of Labor, *id.* §§ 216(c), 217. *See also Castillo v. Givens,* 704 F.2d 181, 186 n.11 (5th Cir. 1983) (describing causes of action under the FLSA), *overruled on other grounds* by *McLaughlin v. Richland Shoe Co.,* 486 U.S. 128 (1988). To protect their right to a minimum wage and maximum hours, employees are authorized to sue not only for violations of the Act's wage and hours provisions, but also for retaliation. The authorization for employee enforcement, which is included in § 216(b), provides:

> *Any employer* who violates the provisions of section 206 [providing for minimum wages] or section 207 [providing for maximum hours] of this title shall be liable *to the employee or employees affected* in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. *Any employer* who violates the provisions of section 215(a)(3) [prohibiting retaliation] of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) [prohibiting retaliation] of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional

> equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer . . . in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.

Id. § 216(b) (emphasis added).

In this case, Dellinger has not sued her employer, but rather a prospective employer, for retaliation. She alleges that Science Applications, her prospective employer, retaliated against her because she had sued a former employer under the FLSA. This presents the question of whether an applicant for employment is an "employee" authorized to sue and obtain relief for retaliation under § 216(b). Consistent with the FLSA's purpose to regulate the employer-employee relationship and the relevant text of the Act, we conclude that only employees can sue their current or former employers for retaliation under the FLSA and that an applicant is not an employee.

Section 215(a)(3) prohibits retaliation "against any *employee*" because the employee sued the employer to enforce the Act's substantive rights. An "employee" does not, in the Act, exist in a vacuum; rather it is defined in relationship to an employer. Section 203(e)(1) provides that an employee is "any individual employed by an employer." Thus, by using the term "employee" in the anti-retaliation provision, Congress was referring to the employer-employee relationship,

the regulation of which underlies the Act as a whole, and was therefore providing protection to those in an employment relationship with their employer.

Consistent with this context in which § 215(a)(3) protects only employees, § 216(b) provides that such employees may sue *only* their employer for retaliation (as well as for violations of the Act's substantive wage and hour protections). Section 216(b) begins with a sentence stating that any employer who violates § 206 (the minimum wage protection) and § 207 (the maximum hours protection) is liable to the "employees affected" by the violations. Section 216(b) then continues with a sentence stating that any "employer" who violates § 215(a)(3) (the anti-retaliation provision) is also liable for legal and equitable remedies.[1] Those two sentences are followed by the provision authorizing employees to file suit under the Act: "An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer . . . in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated." Because an employee is given remedies for violations of § 215(a)(3)

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[1] The dissent notes that § 216(b) includes remedies of both "employment" and "reinstatement" and reasons that the inclusion of "employment" as a remedy necessarily means that the FLSA protects prospective employees. But this logic is not compelling because "employment" is not limited to prospective employees. That remedy can also be afforded to a former employee hired back to a different position, and its inclusion, therefore, simply reflects Congress' desire to cover all possibilities.

only from an employer, Dellinger could only sue Science Applications if she could show that she was an employee and that Science Applications was her employer.

Yet Dellinger cannot make that showing. Although she was an applicant for employment with Science Applications and her application had been approved on a contingent basis, she never began work. Section 203(g) provides that "employ" means "suffer or permit to work." Therefore an applicant who never began or performed any work could not, by the language of the FLSA, be an "employee."

Dellinger argues that because § 215(a), defining "prohibited acts," states that "it shall be unlawful for *any person*" to retaliate against any employee, she can sue any "person," rather than simply her employer. She argues that because Science Applications is a "person" prohibited from retaliating, she therefore can sue Science Applications.

While § 215(a)(3) does prohibit all "persons" from engaging in certain acts, including retaliation against employees, it does not authorize employees to sue "any person." An employee may only sue *employers* for retaliation, as explicitly provided in § 216(b). The use of the term "person" in § 215(a) is attributable to the structure of the provision, which prohibits a number of separate acts in addition to retaliation, not all of which are acts performed by employers. For instance, § 215(a)(1) prohibits any person from transporting "any goods in the production of which any

employee was employed in violation of section 206 [minimum wages] or section 207 [maximum hours] of this title." Thus, Congress prohibited the shipment of goods produced by employees who are paid in violation of the Act, and for enforcement, it authorized the criminal prosecution of any "person" violating the prohibition. *See* 29 U.S.C. § 216(a). Just as there is no remedy for an employee to sue such a shipper, there is also no remedy for an employee to sue anyone but his employer for violations of the anti-retaliation provision. Accordingly, if the person retaliating against an employee is not an employer, the person is not subject to a private civil action by an employee under § 216(b).

Considering the Act more broadly, we cannot overlook the fact that the FLSA was intended at its core to provide minimum wages and maximum hours of work to ensure *employees* a minimum standard of living necessary for "health, efficiency, and general well-being of workers." 29 U.S.C. § 202(a). The anti-retaliation provision is included, not as a free-standing protection against any societal retaliation, but rather as an effort "to foster a climate in which compliance with the substantive provisions of the [FLSA] would be enhanced." *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 293 (1960). Thus, the anti-retaliation provision was meant to ensure that employees could sue to obtain minimum wages and maximum hours from their employers without the employers taking adverse action against them for the exercise of those rights. This purpose is

inherent in the employment relationship, which is the context in which the substantive provisions operate.

We have been unable to find any case that extends FLSA protections to applicants or prospective employees. Indeed, prior cases have reached the conclusion that we have, applying the anti-retaliation provision only within the employer-employee relationship. *See, e.g., Glover v. City of North Charleston, S.C.*, 942 F. Supp. 243, 245 (D.S.C. 1996) (noting that the "any employee" language in the anti-retaliation provision mandates that the plaintiff have an employment relationship with the defendant); *Harper v. San Luis Valley Reg'l Med. Ctr.*, 848 F. Supp. 911 (D. Col. 1994) (same); cf. *Darveau v. Detecon, Inc.*, 515 F.3d 334, 340 (4th Cir. 2008) (requiring, as part of a *prima facie* FLSA retaliation case, a showing of "adverse action by the employer"); *Dunlop v. Carriage Carpet Co.*, 548 F.2d 139 (6th Cir. 1977) (holding that an employee could sue his *former employer* when the former employer retaliated against the employee by advising a prospective employer that the employee had previously filed an FLSA suit).[2]

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[2] The dissent, in urging that we rely on *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997), to extend the FLSA to applicants and prospective employees, overlooks the fact that *Robinson* held that "employee" as defined in Title VII included *former* employees. Indeed, we accept that "employee" under the FLSA also affords protection from retaliation to former employees. The issue here is whether the FLSA applies to persons who are not yet employees and who have never worked for the employer. Because *Robinson* deals only with former employees, it does not speak to the issue in this case.

We are sympathetic to Dellinger's argument that it could be problematic to permit future employers effectively to discriminate against prospective employees for having exercised their rights under the FLSA in the past. The notion, however, that any person who once in the past sued an employer could then sue any prospective employer claiming that she was denied employment because of her past litigation would clearly broaden the scope of the FLSA beyond its explicit purpose of fixing minimum wages and maximum hours between employees and employers. We are, of course, not free to broaden the scope of a statute whose scope is defined in plain terms, even when "morally unacceptable retaliatory conduct" may be involved. *Ball v. Memphis Bar-B-Q Co.*, 228 F.3d 360, 364 (4th Cir. 2000).

Dellinger urges us to extend the FLSA's definition of "employee" to protect job applicants, pointing to other statutes under which applicants are protected. In particular, she refers to the Energy Reorganization Act, the National Labor Relations Act ("NLRA"), the Occupational Safety and Health Act ("OSHA"), and the Pipeline Safety Improvement Act. Reference to these statutes, however, does not advance her cause. The case cited by Dellinger with respect to the Energy Reorganization Act merely assumed, without deciding, that an applicant was covered under that Act. *See Doyle v. Secretary of Labor*, 285 F.3d 243, 251 n.13 (3d Cir. 2002). While the NLRA does protect prospective employees from retaliation, the Act itself defines "employee" more

broadly than does the FLSA, providing that the term "employee" "shall not be limited to the employees of a particular employer" unless explicitly stated. *See* 29 U.S.C. § 152(3). With respect to OSHA and the Pipeline Safety Improvement Act, regulations implementing those statutes have been promulgated to extend protections to prospective employees. *See* 29 C.F.R. § 1977.5(b) (OSHA); 29 C.F.R. § 1981.101 (Pipeline Safety Improvement Act). The Secretary of Labor has not, however, promulgated a similar regulation for the FLSA.

Because we conclude that the text and purpose of the Fair Labor Standards Act of 1938 link the Act's application closely to the employment relationship and because the text of the applicable remedy allows for private civil actions only by employees against their employers, we hold that the FLSA anti-retaliation provision, 29 U.S.C. § 215(a)(3), does not authorize prospective employees to bring retaliation claims against prospective employers. The judgment of the district court is accordingly

AFFIRMED.

KING, Circuit Judge, dissenting:

It has been just short of fifteen years since Justice Thomas delivered the opinion on behalf of a unanimous Supreme Court in *Robinson v. Shell Oil Co.,* 519 U.S. 337 (1997), a decision that has since stood as the definitive authority on statutory

construction. Then, as now, a plaintiff having no active employment relationship with the defendant employer had commenced a lawsuit alleging unlawful retaliation pursuant to a federal remedial statute that, on its face, provides redress solely to "employees." Prior to the Court's reversal of our en banc judgment in *Robinson,* few imagined that a former employee could successfully sue under Title VII of the Civil Rights Act of 1964. In like fashion here, Natalie Dellinger, a prospective employee of Science Applications International Corporation, has brought suit against the company pursuant to the Fair Labor Standards Act of 1938 (the "FLSA" or "Act"). Dellinger's Complaint alleges that Science Applications agreed to hire her but wrongly refused to follow through notwithstanding that she had fulfilled each disclosed condition of employment.

It appears, however, that Ms. Dellinger failed to meet one additional, undisclosed condition: that she not have demonstrated an inclination to hold her bosses accountable under the law. Science Applications terminated the hiring process upon being informed that Dellinger had recently filed suit against her previous employer pursuant to the FLSA. According to the Complaint, the allegations and reasonable inferences of which we are bound to take as true, Science Applications jettisoned Dellinger's paperwork in retaliation for her having exercised her lawful rights. The district court nonetheless ruled that Dellinger had failed to state a viable FLSA claim against Science Applications and dismissed her case.

The majority affirms with no discussion of *Robinson* or its established methodology, giving its thumbs-up to the company's conduct and paving the way for other employers to adopt similar practices. Because I cannot escape the conclusion that *Robinson* mandates the opposite result from that reached by the majority today, I respectfully dissent.

I.

A.

In *Robinson,* the Court instructed that 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. Our inquiry must cease if the statutory language is unambiguous and the statutory scheme is coherent and consistent." 519 U.S. at 340 (citations and internal quotation marks omitted). To determine whether a statutory provision is ambiguous, a court looks "to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Id.* at 341 (citations omitted).

The *Robinson* Court concluded that the word "employee" in Title VII was ambiguous because (1) there was no temporal qualifier in the statute to indicate that it applied either to current or former employees, i.e., neither the term "current employee" nor the term "former employee" appeared anywhere in Title VII; (2) the statute's prescribed definition of employee

also contained no temporal qualifier, meaning that it could include either current or former employees; and (3) the statute referred to "reinstatement" and "hiring" of employees, both of which indicate an expansion of the definition beyond current employees. *See* 519 U.S. at 341-43. The Court continued: "Once it is established that the term 'employees' includes former employees in some sections, but not in others, the term standing alone is *necessarily ambiguous* and each section must be analyzed to determine whether the context gives the term a further meaning that would resolve the issue in dispute." *Id.* at 343-44 (emphasis added).

Finding it necessary, in light of Title VII's ambiguity, to embark on a contextual analysis, the Supreme Court observed that "several sections of the statute plainly contemplate that former employees will make use of the remedial mechanisms of Title VII." 519 U.S. at 345. The Court endorsed the government's position, as amicus curiae, that a restrictive interpretation "would undermine the effectiveness of Title VII by allowing the threat of postemployment 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." *Id.* at 346. The Court thus ordered reinstatement of the plaintiff's retaliation action, "[i]t being more consistent with the broader context of Title VII and the primary purpose of [the antiretaliation provision]." *Id.*

Robinson, of course, did not arise under the FLSA, but its analytical framework readily admits of a more widely reaching application, and it should therefore powerfully inform our analysis of Dellinger's appeal. Indeed, we have acknowledged "the almost uniform practice of courts in considering the authoritative body of Title VII case law when interpreting the comparable provisions of other federal statutes." *Darveau v. Detecon, Inc.,* 515 F.3d 334, 342 (4th Cir. 2008) (citations omitted). The FLSA's designation of an "employee" as "any individual employed by an employer," 29 U.S.C. § 203(e)(1), is more than "comparable" to that of Title VII, which defines the same term as "an individual employed by an employer," 42 U.S.C. § 2000e(f). We have, in fact, called the two definitions "identical." *Darveau,* 515 F.3d at 342.

It is hardly surprising, then, that in *Darveau* we determined that the FLSA, just like Title VII as applied in *Robinson,* protects former employees from retaliation. In so concluding, we discerned "no significant differences in either the language or intent of the two statutes regarding the type of adverse action their retaliation provisions prohibit." 515 F.3d at 342. Judge Motz explained, somewhat prophetically, that it is necessary to afford such protection to former employees "because they often need references from past employers, *they may face retaliation from new employers who learn they have challenged the labor practices of previous employers,* and they sometimes must return to past employers for a variety of reasons,

putting them once more at risk of retaliation." *Id.* at 343 (emphasis added) (citation omitted).

B.

1.

We could not have ruled as we did in *Darveau* without acknowledging, though tacitly, that the word "employee," as used in the FLSA, is as necessarily ambiguous there as it is in Title VII. To that extent, at least, *Darveau* binds the majority, but it nonetheless appears to have reached the same conclusion on its own that this is not a "plain language" case. Although it purports to rule "[b]ased on the statutory text," *ante* at 3, the majority also relies on its divination of the purpose of the Act, together with an assessment of the statutory context, to circumscribe who may be considered an employee thereunder. *See ante* at 6-8.

As the majority correctly notes, the FLSA primarily concerns itself with establishing minimum wages and maximum hours for current employees. That notwithstanding, the Act also prohibits the movement in commerce of goods with respect to "the production of which any employee *was* employed" in violation of the wage and hour requirements. 29 U.S.C. § 215(a)(1) (emphasis added). The word "employee" in that sense can refer to former employees, as made clear by the subsection following, which provides that the government may establish a prima facie case of an employer's violation by showing that

the overworked or underpaid employee was employed "within ninety days prior to the removal of the goods from" the employee's place of employment. § 215(b).

It is, of course, scarcely remarkable that the FLSA applies to former employees; that was, after all, our plain holding in *Darveau.* The more salient point for our purposes is that the Act's ascription of more than one meaning to the word "employee" establishes, for *Robinson* purposes, that the statutory term is "necessarily ambiguous." I therefore agree with the majority that we must examine contextual clues to ascertain the breadth of the FLSA's antiretaliation provision.

2.

It is unlawful under the FLSA "for any person," not just employers, "to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted . . . any proceeding under or related to this chapter[.]" 29 U.S.C. § 215(a), -(a)(3). The Act criminalizes willful violations of § 215, and it also provides civil recourse to "employees affected" by the retaliatory acts described in subsection (a)(3). *See* § 216(a), -(b). Affected employees are entitled to "legal or equitable relief as may be appropriate to effectuate the purposes of" the antiretaliation provision, "including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages." § 216(b). Liability

attaches to "[a]ny employer," *id.*, which "includes any person acting directly or indirectly in the interest of an employer in relation to an employee." § 203(d).

A plain reading of these several sections of the Act, taken together, indicates that Congress was concerned enough with retaliatory conduct to impose criminal penalties on actual decisionmakers ("any person"), regardless of whether that person could also be considered the employing entity or was acting at the entity's behest. Civil liability for retaliation, on the other hand, is reserved for employers and their agents who are sued by an "employee," which generally means "any individual employed by an employer." § 203(e)(1). Science Applications is undoubtedly an employer subject to the Act, and Ms. Dellinger broadly qualifies as an employee, having once sued her former employer for allegedly violating the FLSA. It does not follow perforce, however, that "Dellinger could only sue Science Applications if she could show . . . that Science Applications was *her* employer." *Ante* at 7 (emphasis added).

It would hardly be a stretch to interpret the FLSA to permit Ms. Dellinger's action, particularly considering that other, similar remedial statutes already apply to employees in her situation. For example, the National Labor Relations Act ("NLRA") defines the term "employee" to "include any employee, and shall not be limited to the employees of a particular employer." 29 U.S.C. § 152(3). Moreover, as the majority sets forth, regulations implementing the Occupational Safety and Health Act ("OSHA") have construed that

statute to afford court access to prospective employees. *See ante* at 10 (citing 29 C.F.R. § 1977.5(b)). This has occurred notwithstanding that OSHA defines "employee" arguably more narrowly than does the FLSA as "an employee of an employer who is employed in a business of *his* employer which affects commerce." 29 U.S.C. § 652(6) (emphasis added).

The majority finds these analogs unpersuasive, observing unremarkably that the NLRA's particularized definition of "employee" more readily lends itself to an expansive reading of who may sue. *See ante* at 10. The majority's point appears to be that the absence of similarly detailed language in the FLSA demands the conclusion that Congress intended the eligibility for bringing a retaliation suit under that statute to be more restrictive. But *Robinson* counsels against just that sort of negative inference:

> [T]hat other statutes have been more specific in their coverage of "employees" and "former employees," *see, e.g.,* 2 U.S.C. § 1301(4) (1994 ed., Supp. I) (defining "employee" to include "former employee"); 5 U.S.C. § 1212(a)(1) (including "employees, former employees, and applicants for employment" in the operative provision), proves only that Congress *can* use the unqualified term "employees" to refer only to current employees, not that it did so in this particular statute.

519 U.S. at 341-42 (emphasis in original). Likewise, Congress can certainly use the word "employee" in a manner that excludes prospective employees or

applicants for employment, but that it declined in this case to expressly include them is not, under *Robinson,* reliable evidence of legislative intent to the contrary.

The majority sloughs off the approach taken in administering OSHA, noting simply that "[t]he Secretary of Labor has not . . . promulgated a similar regulation for the FLSA." *Ante* at 10. True enough, we have not been specifically tasked with deciding whether the Secretary could reasonably construe the Act in the manner that Ms. Dellinger seeks. But in dismissing outright her arguments, even in this non-deferential context, are we not implicitly passing upon the objective reasonableness of the construction for which she advocates? I suppose the majority would be constrained to rejoin that permitting retaliation suits absent some sort of employment privity is indeed unreasonable if one accords significance to the FLSA having been fashioned in the crucible of that privity, a proposition enthusiastically endorsed by the majority, *ante* at 8-10. Following that logic, and mindful of OSHA's similarly discrete mandate that an employer "furnish to each of *his* employees . . . a place of employment . . . free from recognized hazards," 29 U.S.C. § 654(a)(1) (emphasis added), the Secretary should be grateful that her occupational safety and health regulations are not before us today, for they would surely wither under the majority's unforgiving gaze.

The majority thus ignores *Robinson* and resorts to its unsanctioned "original intent" methodology,

presumably because it cannot adequately square the result it reaches with the Act's substantive context, that is, the literal words of § 216(b) affording victims of retaliation the alternative remedies of "reinstatement" and "employment." Obviously, only former employees can be reinstated, leaving the remedy of employment to those who cannot be reinstated, i.e., those, like Dellinger, who have yet to be employed. *See Robinson,* 519 U.S. at 342 (illustrating intended breadth of term "employee" in Title VII through alternative remedies of reinstatement and hiring, observing that "because one does not reinstate current employees, that language necessarily refers to former employees") (internal brackets and quotation marks omitted); *see also Broughman v. Carver,* 624 F.3d 670, 677 (4th Cir. 2010) (reiterating "our duty to give effect, if possible, to every clause and word of a statute") (citation omitted). Informed by the context of § 216(b), Ms. Dellinger's construction of the word "employee" in § 215(a) is, in my opinion, compelled by *Robinson.* At the very least, her construction seems eminently reasonable.

I am therefore left to wonder why, in the face of a statute's relative silence as to a material enforcement term, we must presume that a particular avenue is foreclosed because it is not explicitly mentioned, rather than permitted because it is not specifically prohibited. *See Healy Tibbitts Builders, Inc. v. Dir., Office of Workers' Comp. Programs,* 444 F.3d 1095, 1100 (9th Cir. 2006) ("[F]aced with two reasonable and conflicting interpretations, [an act] should be

interpreted to further its remedial purpose."). The majority's decision today bucks the trend begun by *Robinson,* which is indisputably toward an expansive interpretation of protective statutes like Title VII and the FLSA to thwart employer retaliation. *See, e.g., Gomez-Perez v. Potter,* 553 U.S. 474, 491 (2008) (concluding that, under applicable provision of ADEA, federal employee may state claim for retaliation as form of discrimination); *CBOCS West, Inc. v. Humphries,* 553 U.S. 442, 457 (2008) (ruling that anti-discrimination provisions of 42 U.S.C. § 1981 encompass action for retaliation); *Jackson v. Birmingham Bd. of Educ.,* 544 U.S. 167, 178 (2005) (same with respect to Title IX).

Behind this impressive array of authority is the Supreme Court's acknowledgment of the vital role that antiretaliation provisions play in regulating a vast range of undesirable behaviors on the part of employers. *See, e.g., Crawford v. Metro. Gov't of Nashville & Davidson Cnty., Tenn.,* 129 S. Ct. 846, 852 (2009) (observing that fear of retaliation is primary motivation behind employees' failure to voice concerns about bias and discrimination and reversing Sixth Circuit's judgment in employer's favor as inconsistent with primary objective of Title VII to avoid harm to employees) (citations omitted); *Burlington N. & Santa Fe Ry. Co. v. White,* 548 U.S. 53, 57 (2006) (explaining that liability for Title VII retaliation extends well beyond those actions affecting terms and conditions of employment to include employer's acts outside workplace that are "materially adverse

to a reasonable employee or job applicant"). There is no reason to doubt that similar concerns obtain in the FLSA context, as expressed in *Reyes-Fuentes v. Shannon Produce Farm,* 671 F. Supp. 2d 1365, 1368 (S.D. Ga. 2009) ("Congress chose to rely upon information and complaints from employees seeking to vindicate their rights. Plainly, effective enforcement could thus only be expected if employees felt free to approach officials with their grievances") (citations omitted).

In *Robinson* itself, Justice Thomas took note of the plaintiff's and the government's arguments that the essence and continued vitality of Title VII's enforcement scheme depended on a beneficent view of its scope.

> These arguments carry persuasive force given their coherence and their consistency with a primary purpose of antiretaliation provisions: Maintaining unfettered access to statutory remedial mechanisms. . . . [I]t would be destructive of this purpose of the antiretaliation provision for an employer to be able to retaliate with impunity against an entire class of acts. . . . We agree with these contentions and find that they support the inclusive interpretation of "employees" . . . that is already suggested by the broader context of Title VII.

519 U.S. at 346 (citations omitted). Indeed, the conduct in which Science Applications is alleged to have engaged in this very case is especially troubling,

vividly demonstrating through Dellinger's example of how easily it can identify "litigious" applicants and resolve to exclude the entire class from its payroll. It is beyond my comprehension that the majority can shrug its shoulders and countenance this sort of behavior when the Supreme Court has provided the means and encouragement to do something about it.

II.

Finally, the majority overlooks our decision in *McLaughlin v. Ensley,* 877 F.2d 1207 (4th Cir. 1989), in which we opened the door to a less restrictive interpretation of "employee" in the FLSA context. In *Ensley,* we ruled that the employer's unpaid trainees must be considered employees and entitled to minimum wage payments even though the culmination of the hiring process was made contingent upon the successful completion of the training. *Id.* at 1210. In so concluding, the *Ensley* majority rejected the dissent's view that the trainees did not fit within § 203(e)(1)'s definition of "employee." *See* 877 F.2d at 1210 (Wilkins, J., dissenting) (characterizing "the true legal issue" as being the classification of the trainees as employees under the FTCA).

At Science Applications, Ms. Dellinger found herself in the same position as the trainees in *Ensley.* There was no legitimate impediment between her and the imminent assumption of her job duties. Cf. *Ensley,* 877 F.2d at 1208 (reciting that the trainees could, in theory, have demonstrated themselves unqualified,

but observing that "no person, who had completed the training, was not subsequently hired"). *Ensley* is, of course, binding upon subsequent panels, and it requires us to recognize the validity of Ms. Dellinger's FLSA retaliation claim, just as we recognized as valid the trainees' claim for wage payments under the Act.

III.

For all the foregoing reasons, I am convinced that Ms. Dellinger, an employee within the meaning of the FLSA, has pleaded a legally sufficient retaliation claim against Science Applications. Inasmuch as the majority holds to the contrary, I respectfully dissent.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

NATALIE DELLINGER Plaintiff, v. SCIENCE APPLICATIONS INTERNATIONAL CORPORATION, Defendant.	1:10cv25 (JCC)

MEMORANDUM OPINION

(Filed Apr. 2, 2010)

This case is before the Court on a Motion to Dismiss filed by Defendant Science Applications International Corporation ("SAIC"). (Dkt. 3.) Plaintiff, Natalie Dellinger ("Dellinger" or "Plaintiff"), alleges that SAIC violated the anti-retaliation provision of the Fair Labor Standards Act ("FLSA") codified at 29 U.S.C. § 215(a)(3), by refusing to hire her after they received notice that she had filed a separate FLSA action against a former employer. On February 3, 2010 Defendant moved to dismiss on the basis that Plaintiff was never an "employee" of Defendant. Plaintiff opposed on February 22 and Defendant replied on February 26, 2010. For the reasons stated below, and in accordance with this Court's decision from the bench at the March 5, 2010 motion hearing, the Motion to Dismiss is granted.

I. Background

The relevant factual allegations in the Complaint are as follows. Plaintiff has worked as an administrative assistant on various government contracts requiring security clearance, most recently in 2008 and part of 2009, when plaintiff was an employee of CACI. Inc. (Compl. ¶¶ 1-2.) In late July 2009, Plaintiff filed a claim against CACI, Inc. for violations of the minimum wage and overtime provisions of the FLSA. (Compl. ¶¶ 13-14.) At the same time, Plaintiff applied for a job with SAIC at the Sherman Kent School of the CIA for, at least in part, administrative support requiring an individual with security clearance. (Compl. ¶¶ 16-18.) After interviewing her for the position, SAIC offered Plaintiff the position of Administrative Assistant on or about August 21, 2009. (Compl. ¶ 20-22.)

This offer was contingent, however, upon Plaintiff's successful completion of a drug test, her submission of a "standard I-9 form," and, because the position plaintiff was offered required a security clearance, her offer was also contingent upon the successful verification, crossover, and maintenance of her security clearance including the completion and submission of a government document known as Standard Form 86 ("SF 86".) (Compl. ¶¶ 25-27.) The SF 86 is used for national security positions, and contains a variety of background questions includes, among other things, a request for the applicant to list any non-criminal court actions to which the applicant has been or is currently a party. (Compl. ¶ 28.) As required,

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. (Compl. ¶ 29.)

Ms. Dellinger hand-delivered her signed employment offer letter, her SF 86, and other required documents to an SAIC employee named Brian Powers on August 24, 2009. (Compl. ¶ 32.) That same day, Ms. Dellinger took and passed the drug test required for employment with SAIC. (Compl. ¶ 33.) SAIC withdrew its offer of employment after August 24 (Compl. ¶ 34.) Two SAIC employees independently confirmed that SAIC had taken no action regarding her employment application after August 24, 2010. (Compl. ¶ 35-36.) The Complaint alleges that SAICs failure to employ Ms. Dellinger was retaliatory action for her filing of her FLSA action against CACI.

II. Standard of Review

A Rule 12(b)(6) motion to dismiss tests the legal sufficiency of a complaint. See *Randall v. United States*, 30 F.3d 518, 522 (4th Cir. 1994) (citation omitted). In deciding a Rule 12(b)(6) motion to dismiss, the Court is first mindful of the liberal pleading standards under Rule 8, which require only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8. Thus, the Court takes "the material allegations of the complaint" as admitted and liberally construes the Complaint in favor of Plaintiffs. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969) (citation omitted).

While Rule 8 does not require "detailed factual allegations," a plaintiff must still provide "more than labels and conclusions" because "a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65 (2007) (citation omitted). Courts will also decline to consider "unwarranted inferences, unreasonable conclusions, or arguments." *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 2009 WL 5126224, *3 (4th Cir. 2009) (citing *Wahi v. Charleston Area Med. Ctr., Inc.*, 562 F.3d 599, 615 n. 26 (4th Cir.2009); *see also Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1951-52 (2009). Indeed, the legal framework of the Complaint must be supported by factual allegations that "raise a right to relief above the speculative level." *Twombly*, 127 S.Ct. at 1965.

In its recent decision, *Ashcroft v. Iqbal*, 129 S.Ct 1937 (2009), the Supreme Court expanded upon *Twombly* by articulating the two-pronged analytical approach to be followed in any Rule 12(b)(6) test. First, a court must identify and reject legal conclusions unsupported by factual allegations because they are not entitled to the presumption of truth. *Id.* at 1951. "[B]are assertions" that amount to nothing more than a "formulaic recitation of the elements" do not suffice. *Id.* (citations omitted). Second, assuming the veracity of "well-pleaded factual allegations", a court must conduct a "context-specific" analysis drawing on "its judicial experience and common sense" and determine whether the factual allegations

"plausibly suggest an entitlement to relief." *Id.* at 1950-51.

Satisfying this "context-specific" test does not require "detailed factual allegations." *Nemet Chevrolet, Ltd.*, 2009 WL 5126224 at *4 (citing *Iqbal* at 1949-50 (quotations omitted)). The complaint must, however, plead sufficient facts to allow a court, drawing on "judicial experience and common sense," to infer "more than the mere possibility of misconduct." ***Id.***

III. Analysis

Plaintiff alleges a cause of action under the anti-retaliation provision of the FLSA, 29 U.S.C. § 215. Defendant argues that Plaintiff cannot state a plausible claim for relief as she is not, nor has she ever been an "employee" within the meaning of the Act. This Court agrees with Defendant and finds that Plaintiff has not alleged facts sufficient to show that she was an "employee" of SAIC within the meaning of 29 U.S.C. § 215(a)(3).

A. Plain Meaning

"In a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue[,] judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished." *Ramey v. Director, office of Workers' Compensation Program*, 326 F.3d 474, 476 (4th Cir. 2003) (citing *Estate of*

Cowart v. Nicklos Drilling Co., 505 U.S. 469, 475 (1992)). The statute at issue here, 29 U.S.C. § 215 states, in pertinent part:

> (a) [I]t shall be unlawful for any person . . .
>
> (3) 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 . . .

29 U.S.C. § 215 (emphasis added). Congress chose to define "employee" as "any individual employed by an employer." 29 U.S.C. § 203(e)(l)[1]. For an individual to be "employed" by an "employer" they must be "suffer[ed] or permitt[ed] to work." 29 U.S.C. § 203(g). Here, Plaintiff was never "permitted" to work for SAIC, in fact, her main allegation is that the offer of employment was withdrawn. (See Compl. 34.)

The two district courts that have addressed this issue have found that a job applicant should not be considered an "employee" for purposes of the anti-retaliation provision of the FLSA. In *Harper v. San Luis Valley Regional Medical Center*, an applicant for a nursing position at defendant hospital was involved in an unrelated federal wage claim suit against several municipalities. *Harper*, 848 F.Supp. 911 (D. Colo. 1994). The hospital hired several allegedly less

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[1] An "employer includes any person acting directly or indirectly in the interest of an employer in relation to an employee. . . ." 29 U.S.C.§ 203(d).

qualified individuals over plaintiff Harper and Harper filed suit alleging FLSA retaliation. In reaching its decision the Court specifically relied on the plain language of the statute, noting that "where a statute names parties who come within its provisions, other unnamed parties are excluded." *Id.* at 913-914 (D.Colo. 1994) (citing *Foxgord v. Hischemoeller*, 820 F.2d 1030, 1035, *cert. denied*, 484 U.S. 986, (9th Cir. 1987); See *Contract Courier Services, Inc. v. Research and Special Programs Admin, of U.S. Depart, of Transp.*, 924 F.2d 112, 114 (7th Cir. 1991) (holding "statutory words mean nothing unless they distinguish one situation from another; line-drawing is the business of language"). The Court in *Harper* held that § 215(a)(3) "specifically identifies those individuals who come within its provisions i.e. employees. Therefore, other unnamed parties such as non-employee job applicants are excluded from its protection." *Harper*, 848 F.Supp. at 914.

In the similar case of *Glover v. City of North Charleston*, plaintiff was also the lead plaintiff in a separate FLSA wage and hour suit against the North Charleston (Fire Dept.) District. *Glover*, 42 F. Supp. 243 (D.S.C. 1996). After Glover brought suit against the District, the District Fire Department was disbanded and the City of North Charleston Fire Department was formed; however, the City had discretion to determine which of the District Department's employees would be hired. *Id.* at 245. In his suit against the City, Glover alleged a violation of § 215(a)(3) claiming the City's decision not to hire Glover was retaliation for his earlier FLSA claims. In

dismissing the case, the *Glover* court found that plaintiffs were job applicants and thus not yet "employees" within the meaning of the Act. *Id.* at 246.

In so doing, the Court drew a careful distinction between § 215's initial language holding that it "shall be unlawful for *any person*" to commit certain acts (§ 215(a)), and more limited language of the provision at issue here, protecting "*any employee*" from the person's misconduct (§ 215(a)(3)). *Id.* at 245-246 (emphasis added). The court found that the statute's application to "any person" did not bar suit against the "non-employer" City, however, the plain language of the statue [sic] restricting its protections to "any employee" did mean that a mere job "applicant" did not have standing to bring a § 215 action. *Id.* As the *Glover* court found, the first sentence of the statute applies to "any person," if "Congress wanted to cover non-employees, it could have written § 215(a)(3) to prevent discrimination [or retaliation] against "any person" instead of "any employee." *Id.* at 246-247. Based on the plain language of the statute, the courts that have considered the issue have found that § 215(a)(3) does not cover job applicants.

Plaintiff attempts to distinguish these cases as outliers and non-binding on this Court. As decisions from other Districts they are clearly not binding precedent, however, their reasoning is, contrary to Plaintiff's argument, applicable here. Both opinions rest on the plain language of the statute and both were unwilling to read the term "employee" to mean an individual who was *never* employed the Defendant.

Defendant points to the leading Fourth case regarding the sufficiency of an anti-retaliation claim under FLSA, *Darveau v. Detecon, Inc.*, 515 F.3d 334 (4th Cir. 2008.) In the Fourth Circuit, to assert a prima facie claim of retaliation under the FLSA a plaintiff must show: "that (1) he engaged in an activity protected by the FLSA; (2) he suffered adverse action by the employer subsequent to or contemporaneous with such protected activity; and (3) a causal connection exists between the employee's activity and the employer's adverse action." *Darveau v. Detecon, Inc.*, 515 F.3d 334, 340 (4th Cir. 2008) (citing *Wolf v. Coca-Cola Co.*, 200 F.3d 1337, 1342-43 (11th Cir. 2000); *Conner v. Schnuck Mkts., Inc.*, 121 F.3d 1390, 1394 (10th Cir.1997)). Similarly, Defendant argues that as the Fourth Circuit standard requires a "casual [sic] connection" between the "employee's activity" and the "employer's" action, Plaintiff has no standing to bring suit as she was never an "employee." (Mem. in Supp. Mot. to Dismiss at 4.) Without reading beyond the plain language of the statute, a job applicant cannot be considered an "employee."

B. Alternative Arguments

Plaintiff offers a number of arguments why this Court should expand the definition of "employee" to include job applicants. While the Court believes that the plain language of the statute is clear, it will nevertheless address each of Plaintiff's arguments in turn.

First, Plaintiff argues that the FLSA taken as a whole indicates that "employee" should include job applicants. In support of this argument, Plaintiff points to § 216(a) of the statute which makes it unlawful for "any person" to violate the terms of § 215 and provides that the remedies of both "employment" and "reinstatement" are available to aggrieved employees. 29 U.S.C. § 216. As the Court in *Glover* found and Defendant argues here had Congress wanted to include non-employees such as job applicants, it could have used the "any person" language from § 216 rather than the "any employee" language it chose. *Glover*, 942 F. Supp. at 246-247

Second, Plaintiff argues that this Court should look to Title VII of the Civil Rights Act for guidance regarding the ambiguity of the definition "employee." (Opp. at 5.) Title VII's definition of "employee" is identical to the FLSA. See 42 U.S.C. § 2000e; 29 U.S.C. § 203. In *Robinson v. Shell Oil*, the Supreme Court found that Title VII's definition of "employee" was ambiguous as to whether or not it covered individuals who were fired by their employers and thus were now former employees. 519 U.S. 337 (1997). Ultimately the Court determined that Title VII did protect the actions of "former employees" in part because "Title VII's definition of "employee" [ ] lacks any temporal qualifier and is consistent with either current or past employment." *Id.* at 342. The Court held that the word "employed" could mean, both "is employed" but also could just as easily be read to mean "*was* employed." *Id. at* 342.

This approach to interpreting FLSA has been used in the Fourth Circuit in *Darveau*, where the Court considered "Title VII's authoritative body" of case law in analyzing "comparable provisions of other federal statutes" including the FLSA. *Darveau*, 515 F.3d at 342. *Darveau* specifically finds that the definitions of "employee" in Title VII and FLSA are identical. *Id.* As Defendants argue and is discussed above, the Fourth Circuit notes that *Robinson*, found that "employee" included former and current employees (those who "are employed" and those who "were employed"), but did not find it also included applicants who were never employees.

There are several relevant distinctions between the *Robinson* case and the case at bar. First, in *Robinson* the Court was trying to determine if an employee that was fired by an employer could bring a FLSA claim against that former employer for subsequent discriminatory action. *Id.* at 339. The Court found that "employed" could mean both "is" employed" or "was" employed, not that "employed" could mean "never" employed. See *Id.* at 342. Furthermore, the statute at issue in *Robinson*, already specifically prohibits refusing to hire a job applicant who has exercised her Title VII rights in prior employment, no such provision exists in the FLSA. See 42 U.S.C. § 2000e-3. Had Congress intended to similarly protect job applicants it could have incorporated similar language into the anti-retaliation provisions of the FLSA.

Third, Plaintiff argues that other statutes from the "same era" as the FLSA, such as the National Labor Relations Act ("NLRA"), should influence this Court's interpretation of the term "employee." Specifically, Plaintiff argues that it is similarly unlawful for an "employer" to retaliate against an "employee" in the NLRA and that "case law interpreting the NLRA" indicates that the refusal to hire an applicant for employment is contrary to the NLRA. (Opp. at 11 (citing *NLRB v. Lamer Creamery Co.*, 246 F.2d 8 (5th Cir. 1957).) Plaintiff also argues that Fifth Circuit case law applying the NLRA protections to a "job applicant who is discriminately denied employment in violation of the NLRA" should be applied in the FLSA context. (Opp. at 11 (citing *NLRB v. George D. Auchter Co.*, 209 F.2d 273, 277 (5th Cir. 1954).)

As Defendant argues, the analogy to NLRB is not apt. As an initial matter, the definition of employee under the NLRA includes "any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise," 29 U.S.C. § 152(3), rather than the more narrow, "an individual employed by an employer" used in the FLSA. 29 U.S.C. § 203. This definition contemplates a wider sweep of individuals then is included in the FLSA's definition, as it specifically states that an employment relationship need not exist with a particular employer. Here, while the Plaintiff was never hired to work for SAIC, the statute requires that the "employee" be "permitted to work" by the specific "employer." See *Id.*

Finally, Plaintiff argues that a decision that refuses to include job applicants under the definition of "employee" would be contrary to the public policy purpose of the FLSA as it would have a chilling effect on individuals from bringing FLSA actions for fear of losing future employment opportunities. Plaintiff does not offer any case law where any court ruled on this basis. As stated above, Congress could have determined that the FLSA's anti-retaliation provision could apply to "any person" rather than "any employee," however, Congress has not made that policy determination and this Court will not do so, absent Congressional intent.

IV. Conclusion

For the reasons stated above, this Court will grant Defendant's Motion to Dismiss. An appropriate Order will issue.

/s/

April 2, 2010
Alexandria, Virginia

James C. Cacheris
UNITED STATES DISTRICT COURT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 10-1499
(1:10-cv-00025-JCC-JFA)

NATALIE R. DELLINGER

Plaintiff-Appellant v. SCIENCE APPLICATIONS INTERNATIONAL CORPORATION

Defendant-Appellee

SECRETARY OF LABOR; EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Amici Supporting Appellant

ORDER

[FILED: October 7, 2011]

The petition for rehearing en banc and amici curiae brief were circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk