No. 10-1499

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NATALIE DELLINGER,
Plaintiff-Appellant,

v.

SCIENCE APPLICATIONS INTERNATIONAL CORPORATION,
Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of Virginia

BRIEF FOR THE SECRETARY OF LABOR AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT

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**BRIEF FOR THE SECRETARY OF LABOR
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AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT**

Pursuant to Federal Rule of Appellate Procedure 29, the Secretary of Labor ("Secretary") and the Equal Employment Opportunity Commission ("EEOC") submit this brief as *amici curiae* in support of Plaintiff-Appellant. The district court erred by concluding that an individual may bring a retaliation claim under the Fair Labor Standards Act ("FLSA" or "Act") only against his or her employer. The FLSA's anti-retaliation provision at section 15(a)(3), 29 U.S.C. 215(a)(3), does not require a current or former employment relationship for a retaliation claim to be viable. The retaliation claim of Plaintiff-Appellant should therefore be allowed to proceed.

INTEREST AND AUTHORITY

Federal Rule of Appellate Procedure 29(a) authorizes the Secretary and the EEOC to file this brief as *amici curiae*.

The Secretary has a substantial interest in the proper construction of section 15(a)(3) because she administers and enforces the FLSA. See, e.g., 29 U.S.C. 204(a), 204(b), 211(a), 216(c), 217. The EEOC is charged by Congress with the interpretation, enforcement, and administration of the Equal Pay Act, 29 U.S.C. 206(d), which is codified as part of the FLSA and incorporates section 15(a)(3)'s protections. The prohibition against retaliation in section 15(a)(3) is central to achieving FLSA compliance. See Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 292 (1960). If the district court's decision interpreting section 15(a)(3) to require an employment relationship between the individual bringing the retaliation claim and the alleged retaliator is allowed to stand, the intended scope and purpose of the FLSA's anti-retaliation protection would be severely narrowed. Individuals would be reluctant to engage in any protected activity under section 15(a)(3) for fear of being blacklisted by future employers. Although an individual who engages in protected activity may be able to bring a retaliation claim if her employer retaliates, the import of the district court's decision is that such individual may be lawfully excluded from future employment by

all prospective employers as a result of the protected activity. Moreover, the Secretary, through the promulgation of regulations and through adjudication, has interpreted anti-retaliation provisions in other statutes that she is responsible for enforcing to include prospective employees.

STATEMENT OF THE ISSUE

Whether an individual may bring a retaliation claim under section 15(a)(3) of the FLSA against a person who is not and has never been her employer.

STATEMENT OF THE CASE

1. Plaintiff-Appellant Natalie Dellinger ("Dellinger") was employed by CACI, Inc. ("CACI") in a position requiring a security clearance. See Joint Appendix ("J.A."), 62.[1] In July 2009, Dellinger filed a lawsuit in district court against CACI alleging violations of the minimum wage and overtime provisions of the FLSA arising from her employment. See id. Around that time, Dellinger applied for a position with Defendant-Appellee Science Applications International Corporation ("SAIC"). See id. SAIC interviewed Dellinger and offered her the position. See id. Dellinger accepted the offer of employment, signed the

[1] The factual allegations recited herein are from the district court's Memorandum Opinion, located at J.A., 61-74. See also Dellinger v. Sci. Applications Int'l Corp., 2010 WL 1375263, Case No. 1:10cv25 (E.D. Va. Apr. 2, 2010).

employment offer letter she received, and returned the letter to SAIC. See id. at 63.

Because Dellinger's position with SAIC required a security clearance, however, her employment with SAIC was contingent on successfully transferring the security clearance that she already possessed. See J.A., 62. To effectuate the transfer, SAIC provided to Dellinger, and Dellinger completed and returned to SAIC, a government document known as Standard Form 86 ("SF 86"). See id. at 62-63. The SF 86 is used for positions requiring a security clearance and contains a variety of background questions, including a request for the applicant to list any non-criminal court actions to which the applicant has been or is currently a party. See id. Dellinger listed on the SF 86 the lawsuit alleging FLSA violations that she had filed against CACI. See id. at 63.

Several days after Dellinger returned the completed SF 86 to SAIC, it withdrew the offer of employment that she had accepted. See J.A., 63. Dellinger alleges that she would have been employed by SAIC but for her engaging in protected activity under the FLSA. See id.

2. Dellinger filed a lawsuit with the U.S. District Court for the Eastern District of Virginia, alleging that SAIC unlawfully retaliated against her in violation of section 15(a)(3) by withdrawing her accepted offer of employment because

she had filed an FLSA lawsuit against her previous employer. See J.A., 63. SAIC moved to dismiss Dellinger's lawsuit pursuant to Federal Rule of Civil Procedure 12(b)(6), arguing that Dellinger was never an employee of SAIC within the meaning of section 15(a)(3). See id. at 62, 65. The district court granted SAIC's motion to dismiss.

The district court noted that Dellinger applied for and was offered employment with SAIC but was never an employee of SAIC. See J.A., 66-67. Focusing on the word "employee," the district court concluded that an employment relationship with the alleged retaliator was required before an individual could bring a retaliation claim. See id. at 66-70. In other words, the district court stated that section 15(a)(3) requires an individual bringing a retaliation claim to have been employed by the "specific" employer against whom the claim is brought. See id. at 73. The district court relied on two district court decisions that held that job applicants are not employees for purposes of section 15(a)(3). See id. at 66-69 (discussing Glover v. City of Charleston, 942 F. Supp. 243, 245 (D.S.C. 1996), and Harper v. San Luis Valley Reg'l Med. Ctr., 848 F. Supp. 911, 913 (D. Colo. 1994)). Following those two cases, the district court noted that it was significant that section 15(a)(3) uses "employee" instead of "person" in describing who may bring retaliation claims. See id. at 68-70. The district

court concluded that the plain language of section 15(a)(3) — specifically the plain meaning of "employee" — excludes job applicants such as Dellinger. See id. at 66-70.

ARGUMENT

SECTION 15(a)(3) PERMITS INDIVIDUALS TO BRING RETALIATION CLAIMS AGAINST PERSONS WHO ARE NOT AND NEVER WERE THEIR EMPLOYERS

A. The Plain Meaning of Section 15(a)(3) Demonstrates That Individuals May Bring Retaliation Claims against Persons Who Are Not and Never Were Their Employers.

The plain meaning of section 15(a)(3) shows that no employment relationship between the parties is required for a retaliation claim to be viable. The district court erred in ruling otherwise.

Section 15(a)(3) provides, in relevant part, that:

> it shall be unlawful for any person to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding.

29 U.S.C. 215(a)(3). The Supreme Court "has consistently construed the Act 'liberally to apply to the furthest reaches consistent with congressional direction.'" Tony & Susan Alamo Found. v. Secretary of Labor, 471 U.S. 290, 296 (1985) (quoting Mitchell v. Lublin, McGaughy & Assocs., 358 U.S. 207, 211 (1959)). Moreover, the FLSA "must not be interpreted or applied in a narrow, grudging manner." Tennessee Coal, Iron & R.R. v. Muscoda Local No. 123, 321 U.S. 590, 597 (1944).

Section 15(a)(3) broadly prohibits retaliation by "any person." 29 U.S.C. 215(a)(3). "Person" is defined by the Act as "an individual, partnership, association, corporation, business trust, legal representative, of any organized group of persons." 29 U.S.C. 203(a). Plainly, one does not need to be an employer under the Act to be subject to retaliation claims. Individuals and groups and organizations that employ no one are examples of persons who are prohibited from engaging in retaliation by section 15(a)(3). The phrase "any person" refutes a narrow reading of section 15(a)(3) that would limit the anti-retaliation provision to parties who have an employment relationship.

Likewise, section 15(a)(3)'s protection against retaliation extends broadly to "any employee." 29 U.S.C. 215(a)(3).[2] The district court erred by focusing solely on the word "employee" instead of on the phrase "any employee," section 15(a)(3) as a whole, and other statutory provisions of the FLSA. The Supreme Court has "stressed that 'in expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.'" U.S. Nat'l Bank of Oregon v. Indep. Ins. Agents of

[2] "Employee" is defined by the Act as, subject to a few exceptions, "any individual employed by an employer." 29 U.S.C. 203(e)(1).

Am., Inc., 508 U.S. 439, 455 (1993) (quoting United States v. Heirs of Boisdore, 49 U.S. (8 How.) 113, 122 (1849)).

The use of the phrase "any employee" is instructive given that sections 6 and 7 of the FLSA, 29 U.S.C. 206, 207 (the minimum wage and overtime protections), make clear that an employment relationship is required for those protections to apply by using the phrase "his employees." Thus, an employer must pay at least the minimum wage to "each of his employees" (29 U.S.C. 206(a), (b)), and must pay overtime to "any of his employees" (29 U.S.C. 207(a)(1), (2)).[3] Accordingly, an individual is subject to the Act's minimum wage and overtime protections only in the context of an employment relationship.

By contrast, Congress did not use the same or similar statutory language in section 15(a)(3). See 29 U.S.C. 215(a)(3). In fact, there are no words in section 15(a)(3) that require an employment relationship between the "any person" prohibited from retaliating and the "any employee" who is protected against retaliation. Id. The plain meaning of section 15(a)(3) shows that no current or former employment relationship between the alleged retaliator and the alleged victim of the retaliation is required.

[3] In addition, the Act's equal pay provision requires an employer to not discriminate on the basis of sex in the payment of wages to employees in its establishments. See 29 U.S.C. 206(d).

The district court and the cases on which it relied emphasized the fact that section 15(a)(3) uses "any employee" instead of "any person" to define who is protected against retaliation. See J.A., 68-70. However, using "any person" would have been inconsistent with the underlying wage protections of the Act which, as noted *supra*, apply only in the context of an employment relationship. See 29 U.S.C. 206, 207. In other words, only an individual who is or has been an employee of someone enjoys the Act's underlying wage protections, is able to complain about them if they are violated, and is protected against retaliation by section 15(a)(3) for such complaint. See 29 U.S.C. 206, 207, 215(a)(3).[4] The use of "any employee" in section 15(a)(3) thus simply recognizes that this is how the Act's underlying wage protections work. It does not limit an individual's retaliation claims to her employer, especially considering that section 15(a)(3)'s prohibition against retaliation extends to "any person." 29 U.S.C. 215(a)(3).[5]

[4] Here, Dellinger was employed by one employer (CACI), engaged in protected activity arising from that employment relationship, and was allegedly retaliated against by a separate prospective employer (SAIC) because of that protected activity. See J.A., 62-63.

[5] Any argument that it is instructive that Congress has used more detailed anti-retaliation provisions in statutes enacted more recently than the anti-retaliation provision in the FLSA (enacted in 1938) is unavailing. As the Ninth Circuit observed

B. The FLSA's Remedies for Retaliation Violations Support the Conclusion That Individuals May Bring Retaliation Claims against Persons Who Are Not Their Employers.

The FLSA provides remedies specific to retaliation violations, and those remedies reinforce the conclusion that the plain meaning of section 15(a)(3) is that retaliation claims are permitted regardless whether there is an employment relationship

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in its *en banc* decision in Lambert v. Ackerley, 180 F.3d 997, 1005 (9th Cir. 1999), "[t]he fact that Congress decided to include a more detailed anti-retaliation provision more than a generation later . . . tells us little about what Congress meant at the time it drafted the comparable provision of the FLSA." Congress' use of more detailed anti-retaliation provisions in more recent statutes does not indicate that Congress intended to narrow, *sub silentio*, the FLSA's anti-retaliation provision. Likewise, any argument that Congress could have used the express phrase "prospective employee" in section 15(a)(3) is immaterial to construing the meaning of the language actually used. As the Supreme Court noted in holding that Title VII's anti-retaliation protection for "employees" includes "former employees": "That the statute could have expressly included the phrase 'former employees' does not aid our inquiry." Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997). In addition to not aiding the inquiry, the anti-retaliation provisions in statutes such as Title VII, 42 U.S.C. 2000e-3(a), and the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. 623(d), expressly include "applicants for employment" because of the language used in those provisions. Unlike section 15(a)(3) which prohibits "any person" from retaliating against "any employee," 29 U.S.C 215(a)(3), Title VII and the ADEA more narrowly prohibit "an employer" from retaliating against "any of his employees or applicants for employment." 42 U.S.C. 2000e-3(a); 29 U.S.C. 623(d). Title VII's and the ADEA's express inclusion of "applicants for employment" therefore is a necessary addition to what would otherwise be language limited to a direct employment relationship. Section 15(a)(3) is not so limited.

between the parties.[6] Section 16(b) of the Act provides remedies for retaliation violations as follows:

> [A]ny employer who violates the provisions of section 15(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate . . . including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages.

29 U.S.C. 216(b). As an initial matter, the remedies provision in section 16(b) for violations of the wage protections in sections 6 or 7 expressly provides that the violator "shall be liable to the employee or employees affected." Id. By contrast, the remedies provision in section 16(b) for retaliation violations does not contain such limiting language. See id. This further confirms that retaliation claims are not limited to one's employer.

Moreover, unlike the remedies for violations of sections 6 and 7, which are limited to unpaid wages and an additional equal amount as liquidated damages, the remedies for violations of section 15(a)(3) are expansive, permitting "such legal or

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[6] Using other provisions of the FLSA to determine the plain meaning of section 15(a)(3) is a settled means of statutory construction. This Court "recognize[s] that '[s]tatutory construction is a holistic endeavor.'" Pallisades Collections LLC v. Shorts, 552 F.3d 327, 330 (4th Cir. 2008) (quoting Koons Buick Pontiac GMC, Inc. v. Nigh, 543 U.S. 50, 60 (2004)). Moreover, the plain meaning of statutory language is determined not only by reference to the language itself but also to "the specific context in which that language is used, and the broader context of the statute as a whole." Robinson, 519 U.S. at 341.

equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3)." 29 U.S.C. 216(b). Significantly, the provision expressly identifies both "employment" and "reinstatement" as examples of appropriate remedies. Id. "[R]einstatement" clearly means that individuals may bring retaliation claims against their former employers, as that is the only context in which a remedy of reinstatement would be appropriate. And "employment" is an appropriate remedy only against a person who never employed the individual bringing the claim, such as prospective employees like Dellinger. If Congress had intended "employment" to be a remedy available only to former employees, then including the remedy of "reinstatement" would be superfluous and serve no purpose — a conclusion which would be contrary to principles of statutory construction. See PSINet, Inc. v. Chapman, 362 F.3d 227, 232 (4th Cir. 2004) ("General principles of statutory construction require a court to construe all parts to have meaning and to reject constructions that render a term redundant.") (citing Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979)). In sum, the remedies available in section 16(b) for retaliation violations, and particularly the fact that both "employment" and "reinstatement" are expressly provided as remedies, confirm that neither a current nor a former employment relationship between

the individual bringing the retaliation claim and the alleged retaliator is required.

C. Courts Permit Individuals to Bring Retaliation Claims against Persons Who Are Not and Never Were Their Employers.

Courts have not required an employment relationship, past or present, for an FLSA retaliation claim to be viable. For example, in Bowe v. Judson C. Burns, Inc., 137 F.2d 37, 38–39 (3d Cir. 1943), the Third Circuit ruled that a union that conspired with an employer to retaliate could be a "person" that retaliated against "any employee," even though the employees in question were not, and never had been, employees of the union. The Third Circuit reasoned as follows:

> Those portions of the Act (Sections 6 and 7, 29 U.S.C.A. § 206 and 207) relating to wages and to hours do apply only to employers. The prohibitions expressed in Section 15, 29 U.S.C.A. § 215, however, are applicable "to any person". Section 15(a) makes it unlawful for "any person", an employer, to discharge an employee and for "any person", whether or not he is an employer, to discriminate against any employee.

Id. at 38; see Donovan v. Schoolhouse Four, Inc., 573 F. Supp. 185, 190 (W.D. Va. 1983) (in part because section 15(a)(3)'s prohibitions extend to "any person," plant manager and consultant were personally liable for retaliation violation); see also McComb v. Lando, 8 WH Cases 205, 207 (S.D.N.Y. 1948) (explaining that relief could be given against defendant "whether he is shown to be an employer or not, since the statute

is directed against such acts by 'any person'") (copy attached as Addendum).

Further, the "hot goods" prohibition in section 15(a)(1) of the Act has the same "any person-any employee" language as section 15(a)(3), prohibiting "any person" from shipping or selling "any goods in the production of which any employee was employed in violation of [certain sections of the Act]." 29 U.S.C. 215(a)(1). The Fifth Circuit held that a steel mill operator could be liable as "any person" under section 15(a)(1) for selling steel although the employees who were paid in violation of the Act were not its employees but, rather, were employees of the contractors that delivered ore to the mill operator. See Wirtz v. Lone Star Steel Co., 405 F.2d 668, 670 (5th Cir. 1968).

In addition, decisions interpreting the anti-retaliation provision of the National Labor Relations Act ("NLRA"), which uses similar language to section 15(a)(3), should be considered persuasive authority. See, e.g., Rutherford Food Corp. v. McComb, 331 U.S. 722, 723-24 (1947) (decisions interpreting coverage of the NLRA are persuasive authority as to coverage of the FLSA). The NLRA's definition of "employee" includes "any employee, and shall not be limited to the employees of a particular employer . . . ." 29 U.S.C. 152(3). Although this definition may not be identical to the FLSA's definition of

"employee," it nonetheless — like the FLSA's definition — does not expressly include prospective employees. Courts, however, have ruled that prospective employees are covered by the NLRA's anti-retaliation provision, and have set forth no requirement that an individual must be employed in some capacity in order to seek protection under the provision. See Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 185-86 (1941) ("employee," as used in the NLRA, includes job applicants because otherwise the NLRA's prohibition of "discrimination in regard to hire" would "serve no function"); NLRB v. Lamar Creamery Co., 246 F.2d 8, 10 (5th Cir. 1957) (denial of employment to applicant by employer because applicant had been active union member or had given testimony against former employer in unfair labor practice proceeding was unlawful); NLRB v. George D. Auchter Co., 209 F.2d 273, 277 (5th Cir. 1954) ("employee" is not limited to those already employed; "[w]e think that the word 'employee' is broad enough to include, and does include, a job applicant who is discriminately denied employment"); Mut. Life Ins. Co. v. NLRB, 191 F.2d 483, 485 (D.C. Cir. 1951) (applicant for employment should be treated as "employee").

Finally, this Court has held that a former employee may bring an FLSA retaliation claim against his former employer.

See Darveau v. Detecon, Inc., 515 F.3d 334 (4th Cir. 2008).[7] This Court rejected the argument that "the FLSA's prohibition applies to retaliation exclusively against current, and not former, employees." Id. at 341. It noted that Title VII's anti-retaliation protection for employees covers current and former employees. See id. (citing Robinson, 519 U.S. at 345-46). This Court further noted that the scope of Title VII's anti-retaliation provision "'extends beyond workplace-related or employment-related retaliatory acts and harm.'" See id. at 341-42 (quoting Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 67 (2006)). Because this Court saw "no significant differences in either the language or intent" of Title VII's and the FLSA's prohibitions against retaliation, it found the Title VII precedent determinative of whether a former employee could bring an FLSA retaliation claim. See id. at 342-43.[8]

[7] In Darveau, the plaintiff was terminated by his employer and then filed a lawsuit against his former employer alleging he was not paid overtime compensation due. See 515 F.3d at 337. The former employer then sued the former employee for fraud in state court, and the former employee amended his FLSA lawsuit to allege that his former employer's state court lawsuit was retaliation for his original FLSA lawsuit. See id.

[8] In Dunlop v. Carriage Carpet Co., 548 F.2d 139 (6th Cir. 1977), the Sixth Circuit similarly held that a former employee is protected from retaliation by his former employer under section 15(a)(3). "In view of the broad purposes and clear policies of the [FLSA] and cognizant of the practicalities of enforcement of the Act," the Sixth Circuit rejected the "narrow reading" that a former employee is not protected. Id. at 142. It concluded that there "is no ground for affording any less protection to

Indeed, the district court acknowledged that former employees are protected from retaliation by their former employers under section 15(a)(3).[9] For example, the district court stated that an individual "who was *never* employed" by a person could not bring a retaliation claim against that person (J.A., 69 (emphasis in original)), suggesting that an individual who was at some time employed would be covered. Moreover, the district court acknowledged this Court's decision in Darveau. See id. at 69-72. The district court's conclusion, though, that the word "employee" alone is determinative and requires an employment relationship without regard to the rest of section 15(a)(3) cannot be reconciled with the fact that this Court and others permit claims by former employees. Former and prospective employees are legally indistinguishable in the sense that neither has a current employment relationship with the alleged retaliating employer, and neither is explicitly included in section 15(a)(3).

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defendant's former employees than to its present employees" and stated that "[t]o read the Act as excluding employees voluntarily separated from their work from the protections of [section] 15(a)(3) would create an anomaly in the statute not in keeping with the tenor of Congressional intent or judicial interpretation of this Act or of other similar social legislation." Id. at 146-47.

[9] SAIC also acknowledged (in briefing its motion to dismiss before the district court) that former employees are protected from retaliation by section 15(a)(3). See J.A., 44.

D. Strong Policy Considerations Favor Permitting Individuals to Bring Retaliation Claims against Persons Who Are Not and Never Were Their Employers.

The FLSA is a broad remedial statute designed to eliminate substandard working conditions for employees in covered industries. See Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 739 (1981). As discussed *supra*, in order to effectuate that purpose, the Supreme Court "has consistently construed the Act 'liberally to apply to the furthest reaches consistent with congressional direction.'" Tony & Susan Alamo, 471 U.S. at 296 (quoting Lublin, McGaughy & Assocs., 358 U.S. at 211). Moreover, the "object and policy" of a statute are relevant to determining its meaning. U.S. Nat'l Bank of Oregon, 508 U.S. at 455.

The FLSA's anti-retaliation provision is critical to ensuring effective compliance with the substantive provisions of the FLSA. See DeMario Jewelry, 361 U.S. at 292. "Congress did not seek to secure compliance with prescribed standards through continuing detailed federal supervision or inspection of payrolls. Rather, it chose to rely on information and complaints received from employees seeking to vindicate rights claimed to have been denied." Id. "By the proscription of retaliatory acts set forth in § 15(a)(3) . . . Congress sought to foster a climate in which compliance with the substantive provisions of the Act would be enhanced." Id. Indeed, it is

indisputable that "fear of economic retaliation" may often cause individuals not to complain about violations. Id.; see Crawford v. Metro. Gov't of Nashville and Davidson County, Tenn., -- U.S. --, 129 S. Ct. 846, 852 (2009) (noting that it has been documented in studies that fear of retaliation is the leading reason why people stay silent instead of voicing their concerns about bias and discrimination). This Court has noted that section 15(a)(3) "is a central component of the Act's complaint-based enforcement mechanism" and "therefore effectuates enforcement of the Act's substantive provisions by removing 'fear of economic retaliation.'" Darveau, 515 F.3d at 340 (quoting DeMario Jewelry, 361 U.S. at 292).

It is difficult to imagine a more severe form of economic retaliation than the refusal to hire a job applicant because that applicant at one time exercised her rights under the FLSA. If the district court's decision is allowed to stand, an individual not currently employed who is seeking a job could potentially remain unemployed indefinitely solely because she engaged in protected activity under section 15(a)(3). Indeed, all individuals who engage in such protected activity could be lawfully disqualified from all employment with other future employers. Employers could ask all job applicants whether they have ever exercised their rights under the Act, and would then be free to immediately reject every applicant who ever engaged

in protected activity, thereby creating a permanent class of "blacklisted" individuals who exercised their rights under section 15(a)(3). 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.[10] The fact that the district court's interpretation of a provision central to the enforcement of the FLSA could have such a chilling effect further demonstrates that the district court's interpretation cannot be reconciled with the object and policy underlying section 15(a)(3).

Dellinger's particular allegations reveal the potential dangers of affirming the district court's decision. As alleged by Dellinger, she was offered a job, accepted the offer, and timely completed all of the pre-employment tasks asked of her. See J.A., 62-63. However, once SAIC learned that Dellinger had exercised her rights under the FLSA, the offer of employment was

[10] Courts have recognized the harm that "blacklisting" can cause. See, e.g., Charlton v. Paramus Bd. of Educ., 25 F.3d 194, 200 (3d Cir. 1994) (Title VII's anti-retaliation provision protecting "employees" covers former employees; "[i]ndeed, post-employment blacklisting is sometimes more damaging than on-the job discrimination because an employee subject to discrimination on the job will often continue to receive a paycheck while a former employee subject to retaliation may be prevented from obtaining any work in the trade or occupation previously pursued"). Just as the need for protection does not dissipate when the employment relationship between an employer and employee ends, the need for such protection is no less urgent when an employment relationship is being formed and the prospective employer retaliates against an individual before she becomes an employee.

rescinded. See id. at 63. SAIC attempts to use a narrow interpretation of the Act to contend that Dellinger simply has no protection or remedy for such retaliation. This interpretation, however, which could drastically weaken the FLSA's anti-retaliation protection as described *supra*, is not consistent with the Act's broad and remedial purpose and the central role that section 15(a)(3) plays in effectuating that purpose.

E. The Secretary, through Regulations and Adjudication, Has Interpreted Anti-Retaliation Provisions Similar to Section 15(a)(3) to Include Prospective Employees.

As part of its enforcement of anti-retaliation provisions containing similar statutory language to section 15(a)(3), the Department of Labor ("Department") has promulgated regulations consistently interpreting such provisions to cover prospective employees. For example, the anti-retaliation provision in the Occupational Health and Safety Act ("OSH Act") is nearly identical to the FLSA's anti-retaliation provision, providing that "[n]o person shall discharge or in any manner discriminate against any employee because such employee . . . ." 29 U.S.C. 660(c)(1). The Department's regulation interprets "employee" in the OSH Act's anti-retaliation provision to encompass prospective employees, stating:

> For purposes of section 11(c), even an applicant for employment could be considered an employee. See, *NLRB v. Lamar Creamery*, 246 F. 2d 8 (5th Cir., 1957).

> Further, because section 11(c) speaks in terms of any employee, it is also clear that the employee need not be an employee of the discriminator. The principal consideration would be whether the person alleging discrimination was an "employee" at the time of engaging in protected activity.

29 C.F.R. 1977.5(b). This Court should apply this same reasoning to section 15(a)(3).

Further, the whistleblower provisions of the Sarbanes-Oxley Act ("SOX"), 18 U.S.C. 1514A, and the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"), 49 U.S.C. 42121, both of which protect "an employee" from retaliation, have been interpreted by the Department to include prospective employees. See 29 C.F.R. 1980.101 (SOX regulation defining "employee" to include "an individual applying to work for a company or company representative" and "an individual whose employment could be affected by a company or company representative"); 29 C.F.R. 1979.101 (AIR 21 regulation defining "employee" to include "an individual applying to work for an air carrier or contractor or subcontractor of an air carrier" and "an individual whose employment could be affected by an air carrier or contractor or subcontractor of an air carrier"). Similarly, the whistleblower provision of the Pipeline Safety Improvement Act, 49 U.S.C. 60129, uses the term "employee," and the regulation makes clear that "employee" includes an "individual applying to work for a person owning or operating a

pipeline facility or a contractor or subcontractor of such a person." 29 C.F.R. 1981.101.

In addition, the Secretary has issued adjudicatory decisions concluding that the term "employee," as used in whistleblower statutory provisions which she is responsible for enforcing, includes prospective employees. Thus, the Secretary has recognized that "[e]xcluding job applicants from coverage would contravene the purpose of the whistleblower provisions to encourage the reporting of safety and environmental deficiencies." Stultz v. Buckley Oil, 1995 WL 848030, at *2, Case No. 93-WPC-6 (DOL Off. Admin. App. June 28, 1995). "The reason for, and necessity of, such an interpretation is obvious; without it, . . . encouraging [individuals] to assist in the enforcement of federal law would be frustrated, for even the best protected worker, under the interpretation which respondent urges, would have no protection against any employer except that particular one in whose employ he was at the time, and might thus be barred from his entire occupation with any other prospective employer." Flanagan v. Bechtel, 1986 WL 327038, at *4, Case No. 81-ERA-7 (DOL Off. Admin. App. June 27, 1986) (agreeing with ALJ's conclusion that an applicant is an "'employee' within the sense of the term as used in the [Energy Reorganization Act] and was within class of persons meant to be protected by use of that term"); see Agbe v. Texas Southern

Univ., 1999 WL 566971, at *17, Case No. 97-ERA-13 (Admin. Rev. Bd. July 27, 1999) (complainant was protected under Energy Reorganization Act's employee protection provision as a job applicant); Stultz, 1995 WL 848030, at *2 (under anti-retaliation provision of Water Pollution Control Act, term "employee" is broad enough to cover applicants for employment); Samodurov v. Gen. Physics Corp., 1993 WL 832030, at *3, Case No. 89-ERA-20 (DOL Off. Admin. App. Nov. 16, 1993) (although whistleblower provision of Energy Reorganization Act covers only "employees," this term is sufficiently broad to cover applicants for employment); cf. Doyle v. Dep't of Labor, 285 F.3d 243, 251 n.13 (3d Cir. 2002) (addressing applicant's Energy Reorganization Act claim on the merits, and noting that defendant "does not contend that the Secretary erred in regarding Doyle as covered by section 210 even though he was merely an applicant for employment").

This consistent interpretation of these parallel statutory provisions to include prospective employees should apply with equal force to section 15(a)(3). Although the Department has not promulgated a regulation specifically interpreting section 15(a)(3), its interpretation of virtually identical statutory language through adjudicatory decisions should be accorded controlling deference in the event that the language of section 15(a)(3) is deemed to be ambiguous regarding coverage of

prospective employees. See United States v. Mead Corp., 533 U.S. 218, 229 (2001); see also Yellow Transp., Inc. v. Michigan, 537 U.S. 36, 45 (2002) (agency adjudications entitled to Chevron deference) (citing Mead, 533 U.S. at 229); Cervantes v. Holder, 597 F.3d 229, 232 (4th Cir. 2010) (decisions of a properly constituted Board of Immigration Appeals, by means of its case-by-case adjudication, receives Chevron deference). At a minimum, the Secretary's longstanding and reasoned interpretation, as reflected in the Secretary's adjudications under nearly identical anti-retaliation provisions in whistleblower statutes, the Secretary's regulatory interpretations of such statutes, and the amicus brief filed in this case, is entitled to substantial deference. See Skidmore v. Swift & Co., 323 U.S. 134, 139-40 (1944); cf. Auer v. Robbins, 519 U.S. 452, 462 (1997) (controlling deference to an interpretation the Secretary advanced in amicus brief); Intracomm, Inc. v. Bajaj, 492 F.3d 285, 293 (4th Cir. 2007) (recognizing controlling deference for the Secretary's interpretation of her regulations as set forth in amicus brief).

CONCLUSION

The district court erred by focusing on only one word in section 15(a)(3) instead of the meaning of the provision as a whole. The plain meaning of section 15(a)(3) as a whole, with particular reference to "any person" and "any employee," is that

an individual may bring a retaliation claim under the FLSA against a person who is not and never has been her employer. This plain meaning is supported by the remedies set out in section 16(b) of the Act, caselaw, the policy behind section 15(a)(3), and the Secretary's regulations and adjudicatory decisions interpreting similar anti-retaliation provisions in other laws that she enforces. For the foregoing reasons, the district court's decision should be reversed.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 10-1499 **Caption:** Natalie Dellinger v. Science Applications Int'l Corp.

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Attorney for Secretary of Labor

Dated: Oct. 15, 2010

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Brief for the Secretary of Labor and the Equal Employment Opportunity Commission as *Amici Curiae* in Support of Plaintiff-Appellant was served this 15th day of October, 2010, by pre-paid overnight delivery (for delivery on the 18th day of October, 2010) on each of the following:

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ADDENDUM

McCOMB v. LANDO

U. S. District Court,
Southern District of New York

McCOMB, ETC. v. LANDO ET AL., doing business as NEW YORK NEWS COMPANY, No. 43-683, July 20, 1948

FAIR LABOR STANDARDS ACT

—Enforcement — Injunction suits — Discharge and reinstatement
• 40.638

Although court would be reluctant to order reinstatement at request of employee discharged for filing wage suit against his employer because record discloses malicious intent underlying employee's suit, Administrator is entitled to injunction requiring reinstatement of such employee effective until trial and entry of judgment in case filed by employee or until further order of court. Court will grant relief at request of Administrator who is acting in public interest to protect employees generally from fear of discriminatory discharge.

Employee who is ordered reinstated, at request of Administrator, following his discharge because he filed wage suit under Act, held not entitled to back pay at this time for period between discharge and reinstatement. Decision on back pay issue should be deferred pending decision on merits in employee's wage suit which is held to have been filed with malicious intent.

Action by Administrator for mandatory injunction ordering reinstatement of employee with back pay and injunction against future violations. Judgment in accordance with opinion.

FEE, District Judge:—This is an action by the Administrator of the Wage and Hour Division to obtain the issuance of a mandatory injunction requiring defendants to reinstate one Hutchings in employment from which it was claimed he had been unlawfully discharged because he filed an action under the Fair Labor Standards Act to recover wages for overtime against the present defendants. Injunction against future violations and for the recovery of back wages from the date of discharge are asked.[1]

[FACTS OF CASE]

The evidence shows that Hutchings had worked in this business as employee of various members of the Lando family, with the exception of two years, ever since he was a boy of fourteen for about sixteen years. He was in this employment as a part time employee in 1939 and in July, 1944, was engaged on full time. Since July, 1946, he has received $55.00 per week.

On August 19, 1947, without previous statement of grievances or consultation or warning, he had served on Sherwin Lando a complaint under the Fair Labor Standards Act, in which he asked judgment for $25,300.00 against Sherwin Lando and Max Lando. There is considerable dispute about exactly what was said. There is no doubt that the employment of Hutchings was thereupon terminated. The Court finds as a fact that Sherwin Lando discharged Hutchings because the latter had instituted an action under the act. However, the action initiated by this complaint is still pending and has not yet been tried.

If this Court were required to pass upon the question of the right to relief here for the first time, there could be little doubt of the power of the Court to grant re-employment to plaintiff. The actions given by the statute could be rendered nugatory, if the employer could with impunity discharge an employee for taking advantage of provisions thereof. In order that the protective measures should not themselves be abused, the law conferred the secondary right not upon the employee, but upon the Administrator.[2]

[MANDATORY REEMPLOYMENT]

But this matter does not arise in this Court for the first time. In an able opinion, Judge Leibell, of this Court, held this remedy of mandatory re-employment available upon proof that the employee had been discharged for filing action under the Fair Labor Standards Act and without proof that the employee or employer was engaged in commerce or in the production of goods for commerce. This holding was affirmed. Walling v. O'Grady, 2 Cir., 146 F.2d 422 [4 WH Cases 937].

However, at the trial this Court held that the extraordinary remedy

1 29 U.S.C.A. § 215(a)(3), § 216(b), § 217.

2 29 U.S.C.A. § 211(a), § 216(b).

of a mandatory injunction should not be issued on the basis of any mathematical formula, but solely in judicial discretion. Testimony was therefore taken as to the situation surrounding the discharge for the purpose of informing the Court.

The situation of Hutchings was such that it might be doubted whether his hands were clean. He had been in the employment of this family for many years. He had started there as a boy. The personal relations were close and intimate. The duties which he performed in some respects involved relations of personal trust. In this situation, he suddenly filed a suit for over Twenty-five Thousand Dollars against a business which probably would have difficulty in paying even a much smaller judgment. The circumambient events indicate malice upon his part for some reason which the record does not explain. But Hutchings is not plaintiff. The Administrator has brought the action in the capacity of protector of those who have rights under the statute. The Court finds that the relief then is asked in the public interest to protect employees generally from fear of discharge if they attempt truly to use remedies which the statute provides,[3] rather than to serve vindictive purposes of Hutchings.[4] Therefore, an order will issue requiring defendant Sherwin Lando to reinstate Hutchings in the position he formerly occupied under like conditions and at a like salary until the trial and entry of judgment in the main case or until further order of the Court.

[BACK PAY]

However, there is a further claim to back pay between the time of discharge and the time of reinstatement. The Circuit Court of Appeals of this circuit holds[5] this Court has power to make such award based upon the authority of the Chancellor to restore a situation to the condition in which it was before a wrongful act had taken place. This decision is binding here and is well founded in theory.

In the instant case, the circumstances may be such that Hutchings should receive back pay in whole or in part. This is a question for the informed discretion of the equity judge, when in possession of all the facts. Unsettled still is the case which Hutchings initiated. If he is entitled to recover there, his brusqueness in enforcing a right well founded in law and fact might not stay the hand of the Judge from awarding him full recovery of back pay in this case. But on the other hand, if that action were ill-founded, the tinge of malice above noted might be worthy of consideration. The principal litigation has moved with unwilling feet, but how much of the delay has been justified and how much is chargeable to Hutchings has not been made clear.

It is urged that one of the Judges of this Court has held the complaint in the main action well founded, and therefore any doubt of the appropriateness of awarding back pay is dispelled. As we read the opinion, the Judge only held the matter must be tried on the facts, instead of making disposal thereof on defendant's motion for summary judgment of dismissal. Most Judges justly try such cases upon the facts, rather than on the claims of the pleadings. Trial Judges are extremely wary of granting motions for summary judgments in delicate questions where notice pleadings and affidavits furnish uncertain grounds.

The arguments imply that the Court should now require payment of back pay because the Administrator has placed the stamp of approval upon the demand, and furthermore because the attorney for Hutchings in the main case had certainly advised him that he had valid grounds for the action. But we are Judges, not automata. Judges do not respond to a given stimulus with robotlike precision. The administrative officials' reach must exceed the grasp or the Court would serve no function. As to a lawyer for a private litigant, his very raison d'etre is that he advances his client's claim to his utmost without misleading Court or jury. The Judge must weigh the compulsion of bureaucratic theory and the zeal of counsel in presentation, but decide on the facts under the rule of law.

3 The Circuit Court of Appeals of the Second Circuit, in an analogous case, says, "* * the reasons for requiring reinstatement * *" are that "employees may hesitate fearlessly to exercise their rights, secured to them by the statute." National Labor Relations Board v. Regal Knitwear Co., 140 F.2d 746, 747 [13 LRR Man. 824].

4 In a case where flagrant violations of good faith by the employee and other factors were present, Judge Nordbye, in an able opinion, denied reinstatement. Walling v. Barnesville Farmers Elevator Co., 58 F. Supp. 821 [5 WH Cases 95].

5 Walling v. O'Grady, supra.

[PUBLIC INTEREST]

It is clear that the standards of public interest do not require vindictive enforcement of back pay provisions at this instant, even if it be so nominated in the bond. The congressional purposes of great national importance will not be thwarted if the Court pause with flexible hand to mould the decree to fit the necessities of the situation once they have been ascertained. Sound discretion demands delay. [6]

Notwithstanding the traditional reluctance of equity to compel by mandatory action and supervise the continuance of a relationship requiring the reception and rendition of a personal service, the statute gives clear warrant for such compulsion here in order to maintain the situation which existed before the tortuous act of discharge. Whatever may be the requirements of the situation in the public interest upon final decree, it seems best to treat this proceeding now as ancillary to the action for overtime. Analogous states of fact in the chancery precedents met responsive compulsion upon an offending party to retain or restore the status quo ante until the ultimate could be justly crystallized in the same or an alien forum.

In a suit in equity ancillary to an action at law brought for possession of a mining claim, the Supreme Court directed the lower Court to restore an injunction against defendants who had intruded upon the claim to prevent them from mining or extracting ore therefrom until the final determination of the law action which had also been reversed and sent back for retrial. Erhard v. Boaro, 113 U.S. 537.

[ORIGINAL ACTION]

After the original action here has been decided, the Court can determine whether the situation calls for a final injunction restraining defendant from future violations of the Act and whether Hutchings is equitably entitled to have his restoration made permanent and to be awarded back pay.

The facts which should weigh with the Court in awarding or refusing back pay are not as yet in this record. Hutchings, if reinstated in his position and drawing current pay, can have the main action disposed of and move the Court for a further consideration of this question. The claim of back pay can then be determined justly to all concerned. In the above discussion, there has been no disposition to forecast the result which will then be attained, but only to suggest the considerations which impel the Court to forbear present decision.

The question of whether an injunction against future violation will issue should be reserved for final hearing.

This case will be held open for further action. Specifically, the Court here does not presently determine whether there is any evidence upon which any relief can be given against Max Lando. It is true, relief could be given against Max Lando whether he is shown to be an employer or not, since the statute is directed against such acts by "any person." But there is insufficient evidence in the present record to show that Max Lando brought about, counseled or had any connection with discharge. The question whether he is an employer or not must necessarily be determined in the main case. Nor is it determined whether Hutchings is covered by the Fair Labor Standards Act. These matters must be determined in the action already filed.

[6] See Hecht v. Bowles, 321 U.S. 321.

FISCH v. GENERAL MOTORS CORP.

U. S. Circuit Court of Appeals, Sixth Circuit (Cincinnati)

FISCH ET AL. v. GENERAL MOTORS CORPORATION; BATEMAN ET AL. v. FORD MOTOR COMPANY, Nos. 10692 and 10685, August 2, 1948

PORTAL-TO-PORTAL ACT

—Constitutionality • 100.300

Section 2(a) of Act which nullifies employer liability for certain existing wage claims of employees and Section 2(d) of Act which withdraws jurisdiction from federal district court to act on such claims are constitutional as an exercise of commerce power of