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*

P. DAVID LOPEZ
General Counsel

VINCENT J. BLACKWOOD
Acting Associate General Counsel

PAUL D. RAMSHAW
Attorney

Equal Employment Opportunity Commission
Office of General Counsel
131 M Street, N.E.
5th Floor
Washington, D.C. 20507
(202) 663-4737

M. PATRICIA SMITH
Solicitor of Labor

WILLIAM C. LESSER
Acting Associate Solicitor

PAUL L. FRIEDEN
Counsel for Appellate Litigation

MELISSA A. MURPHY
Attorney

DEAN A. ROMHILT
Attorney

U.S. Dep't of Labor, Office of the Solicitor
200 Constitution Avenue, N.W., Rm. N-2716
Washington, D.C. 20210
(202) 693-5550

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BRIEF FOR THE SECRETARY OF LABOR AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS *AMICI CURIAE*

The Secretary of Labor ("Secretary") and the Equal Employment Opportunity Commission ("EEOC") submit this brief as *amici curiae*.[1]

STATEMENT OF PURPOSE AND SUMMARY OF ARGUMENT

1. Plaintiff-Appellant Natalie Dellinger ("Dellinger") alleged that Defendant-Appellee Science Applications International Corporation ("SAIC") withdrew its conditional offer of employment to her, which she had accepted, once it learned that she had filed a Fair Labor Standards Act ("FLSA" or "Act") lawsuit

[1] The Secretary has filed a separate motion seeking leave to file this amicus brief.

against CACI, Inc. ("CACI"), her former employer. A panel of this Court, in a 2-1 decision authored by Judge Niemeyer, held that, "[b]ased on the statutory text," Dellinger could not bring an FLSA retaliation claim against SAIC, her prospective employer. Slip Op. at 3. The majority concluded that the private right of action for retaliation claims in section 16(b), 29 U.S.C. 216(b), allows employees to "sue *only* their employer for retaliation," thus foreclosing Dellinger's retaliation claim against SAIC as she was not its employee. Slip Op. at 6-7 (emphasis in original). While the majority stated that "by using the term 'employee'" the FLSA's prohibition against retaliation in section 15(a)(3), 29 U.S.C. 215(a)(3), provides "protection to those in an employment relationship with their employer," Slip Op. at 6, it also acknowledged that section 15(a)(3)'s prohibition against retaliation applies to "persons" as opposed to "employers" (id. at 7) – creating an ambiguity in the decision as to whether SAIC's alleged conduct violates section 15(a)(3) even if Dellinger has no right of action against it under section 16(b).

In his dissent, Judge King found the FLSA's anti-retaliation provision to be ambiguous and concluded, when reading that provision in the context of the whole statute and in conjunction with the Supreme Court's decision in Robinson v. Shell Oil Co., 519 U.S. 337 (1997), that Dellinger is an "employee" who is protected from retaliation. Specifically, Judge King noted that although Robinson was not an FLSA case, "its analytical framework readily admits of a more widely reaching

application, and it should therefore powerfully inform our analysis of Dellinger's appeal." Slip Op. at 13. Dellinger has filed a petition for rehearing *en banc*.

2. The FLSA prohibits retaliation by "any person" against "any employee," 29 U.S.C. 215(a)(3), and it permits "any one or more employees" to sue "any employer" for retaliation, 29 U.S.C. 216(b). The use of "any" in section 15(a)(3) means that no employment relationship (former or current) between the "person" prohibited from retaliating and the "employee" protected from retaliation is required for the retaliation prohibition to apply. Likewise, because section 16(b) permits an employee to sue "any employer," an employee is not limited to suing just her employer (former or current). The majority, however, 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.

3. Furthermore, the 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 whether the term "employees" in Title VII's anti-retaliation provision includes protection for former employees, and it found "employees" to be ambiguous. See 519 U.S. at 343-45. Robinson resolved the ambiguity in favor of including former employees within Title VII's anti-retaliation protection. See id. at 345-46. In Darveau v. Detecon, Inc., 515 F.3d 334 (4th Cir.

2008), this Court adopted and applied Robinson's analysis to determine the scope of the FLSA's anti-retaliation provision – just as the panel was tasked with here. 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.

4. Although the exact consequences of the panel's decision are unclear given the ambiguity in the decision as to whether Dellinger's alleged conduct violates section 15(a)(3), the Secretary and the EEOC are concerned that the decision will undermine enforcement of the FLSA. 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. Moreover, employers, who can now search for past FLSA actions of prospective employees more easily than ever before, are more likely to refuse to hire those who have asserted their FLSA rights. Barring retaliation claims by employees against prospective employers thus creates an untenable gap in coverage. 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 and is contrary to Congress' intent that the Act in general, and section 15(a)(3) in particular, have a broad remedial purpose.

ARGUMENT

I. The Majority Incorrectly Read the Word "Any" and Its Recognized Expansive Meaning Out of Sections 15(a)(3) and 16(b).

1. The majority concluded that because Dellinger was never an employee of SAIC, she could not sue SAIC for alleged retaliation. See Slip Op. at 6-7. According to the majority:

> 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.

Id. at 6. Additionally, the majority concluded that section 16(b)'s right of action for retaliation "provides that such employees may sue *only* their employer for retaliation." Id. (emphasis in original). The majority determined that section 16(b) "explicitly provide[s]" that "[a]n employee may only sue *employers* for retaliation." Id. at 7 (emphasis in original). "Because an employee is given remedies for violations of § 215(a)(3) only from an employer," the majority decided that Dellinger may sue SAIC only if she was its employee. Id.

2. Section 15(a)(3), however, makes it unlawful for "any person" to "discharge or in any other manner discriminate against any employee because such employee" has engaged in FLSA protected activity. 29 U.S.C. 215(a)(3). And, section 16(b) permits a retaliation claim "against any employer . . . by any one or more employees." 29 U.S.C. 216(b). Thus, the statutory phrases at issue are "any

person" and "any employee" in the prohibition against retaliation, 29 U.S.C. 215(a)(3), and "any employer" and "any one or more employees" in the right of action to sue for retaliation, 29 U.S.C. 216(b). The majority's analysis of these statutory phrases was not faithful to the FLSA's text. Rather, the majority repeatedly read out of the text the word "any" and substituted phrases such as "*his or her* current or former employer" (Slip Op. at 3), "*their* current or former employers" (id. at 6), "in an employment relationship with *their* employer" (id.), "*their* employer" (id.), and "*her* employer" (id. at 7). (Emphases added.) Similarly, the majority stated that "an employee is given remedies for violations of § 215(a)(3) only from an employer" and that "[a]n employee may only sue *employers* for retaliation, as explicitly provided in § 216(b)," id. at 7 (emphasis in original), despite the express language of section 16(b) providing that "*any* one or more employees" may sue "*any* employer" for retaliation, 29 U.S.C. 216(b) (emphases added).[2] Therefore, in addressing both sections 15(a)(3) and 16(b), the majority improperly relegated the critical term "any."

[2] Where appropriate, Congress did use the phrase "his employee" instead of "any employee" in the FLSA to create the requirement of an employment relationship. For example, sections 6 and 7 use the phrase "his employees" to make clear that an employment relationship is required for the minimum wage and overtime protections to apply. 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). By contrast, Congress did not use such language in sections 15(a)(3) or 16(b).

Removing "any" from the statutory text fundamentally alters the text's meaning. The plain meaning of "any" is "one or some indiscriminately of whatever kind." Merriam-Webster Online Dictionary (2011), available at http://www.merriam-webster.com; see Random House College Dictionary 61 (rev. ed. 1982) ("any" means "one or more without specification or identification," and "every; all"). The Supreme Court has repeatedly interpreted "any" expansively, consistent with this 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:

> The question we face is whether the phrase "any other term of imprisonment" "means what it says, or whether it should be limited to some subset" of prison sentences . . . namely, only federal sentences. Read naturally, the word "any" has an expansive meaning, that is, "one or some indiscriminately of whatever kind." Webster's Third New International Dictionary 97 (1976). Congress did not add any language limiting the breadth of that word, and so we must read § 924(c) as referring to all "term[s] of imprisonment," including those imposed by state courts.

U.S. v. Gonzales, 520 U.S. 1, 5 (1997). And in interpreting a statutory provision that gave the President authority to waive application of "any other provision of laws," the Supreme Court held that "[o]f course the word 'any' (in the phrase 'any other provision of law') has an 'expansive meaning,' . . . giving us no warrant to

limit the class of provisions of law that the President may waive." Republic of Iraq v. Beaty, 129 S. Ct. 2183, 2189 (2009).

The majority was thus wrong to read "any" out of the text and potentially limit the class of employees protected by section 15(a)(3) from retaliation by a person to only current or former employees of that person, and limit the class of employees who may sue an employer under section 16(b) to only current or former employees of that employer.[3] In concluding that Dellinger cannot bring a retaliation claim, the majority noted that the anti-retaliation provision was "meant to ensure that employees could sue to obtain minimum wages and maximum hours" without employers taking adverse action against them, and that this purpose is "inherent in the employment relationship, which is the context in which the substantive provisions operate." Slip Op. at 8. Yet, there is nothing anomalous about an anti-retaliation provision that provides broader protection for victims of retaliation than for those whom the statute primarily seeks to protect (in this case,

[3] In fact, Dellinger's claim fits within sections 15(a)(3) and 16(b). Dellinger was "any employee" and "any one or more employees" because she was an employee of CACI who engaged in protected activity arising from that employment relationship. The FLSA's definition of "employee" as "any individual employed by an employer" supports this conclusion. 29 U.S.C. 203(e)(1). SAIC was "any person" prohibited by section 15(a)(3) from retaliating given that the FLSA defines "person" as "an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons." 29 U.S.C. 203(a). And SAIC was "any employer" subject to Dellinger's section 16(b) retaliation claim given that the Act defines "employer" as "any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. 203(d).

employees entitled to minimum wages and overtime). See Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 66-67 (2006); see also Darveau, 515 F.3d at 343.

3. The remedies specific to retaliation violations reinforce the conclusion that retaliation claims are permitted against prospective employers. The remedies for retaliation violations expansively include "such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3)." 29 U.S.C. 216(b). Additionally, both "employment" and "reinstatement" are specifically identified as remedies. Id. "[R]einstatement" applies to retaliation claims against former employers, as that is the only context in which a remedy of reinstatement would be appropriate. And given that "reinstatement" is already identified, "employment" is an appropriate remedy only against an employer who never employed the individual bringing the claim, such as prospective employees. As Judge King stated in his dissent, "[o]bviously, 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." Slip Op. at 17. Because this Court must "construe all parts to have meaning" and "reject constructions that render a term redundant," PSINet, Inc. v. Chapman, 362 F.3d 227, 232 (4th Cir. 2004), the fact that both "employment" and "reinstatement" are identified as remedies confirms that neither a current nor a former employment relationship between the individual bringing the retaliation claim and the alleged retaliator is required.

The majority stated that "this logic is not compelling" because the remedy of employment "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." Slip Op. at 6 n.1. However, "reinstatement" encompasses hiring a former employee back to a different position. See, e.g., NLRB v. D & D Enter., Inc., 125 F.3d 200, 205 (4th Cir. 1997) ("[A]n employer is permitted [under the NLRA] to reinstate an employee to a 'substantially equivalent' position when the employer has permanently replaced the employee during the strike."); Garcia v. City of Albuquerque, 232 F.3d 760, 770 (10th Cir. 2000) (stating that "[t]he City . . . reinstated Garcia's employment, albeit to a different position"); Salazar v. City of Albuquerque, 776 F. Supp.2d 1217, 1240 (D.N.M. 2011) ("Reinstatement to a different position . . . does not necessarily defeat a liberty-interest claim."). Thus, the assertion that "employment" refers to hiring a former employee to a different position is strained and makes the term "employment" superfluous.[4] Moreover, the majority's statement that the inclusion of "employment" as a remedy for retaliation

[4] In analyzing similar language of the Family and Medical Leave Act, the First Circuit explained that the remedies of "employment," "reinstatement," and "promotion" "most naturally" refer "to employees who are in different temporal circumstances-one 'promot[es]' a current employee, one 'reinstate[s]' a former employee, and one 'employ[s]' a prospective employee." Duckworth v. Pratt & Whitney, Inc., 152 F.3d 1, 8 (1st Cir. 1998) (brackets in original). Interpreting "employment" as being limited to former employees would render "the remedy of 'employment' . . . essentially the same as the statutory remedy of 'reinstatement' . . . making the terms redundant." Id. at 8-9. The court cautioned that such an interpretation would go against principles of statutory construction. See id. at 9.

"simply reflects Congress' desire to cover all possibilities," Slip Op. at 6 n.1, does not explain away the inclusion of "employment," and actually supports the argument that the retaliation remedies are available against prospective employers.

II. The Majority Did Not Apply the Supreme Court's Statutory Analysis of the Term "Employees."

In Robinson, the Supreme Court analyzed whether the term "employees" in Title VII's anti-retaliation provision, 42 U.S.C. 2000e-3(a), includes protection for former employees, and concluded that "employees" is ambiguous in that context for three reasons. See 519 U.S. at 343-45. First, there is "no temporal qualifier" in Title VII's anti-retaliation provision "as would make plain that [it] protects only persons still employed at the time of the retaliation." Id. at 341. Second, "Title VII's definition of 'employee' likewise lacks any temporal qualifier and is consistent with either current or past employment." Id. at 342. Third, other provisions in Title VII use "employees" to "mean something more inclusive or different than 'current employees,'" such as authorizing both hiring and reinstatement as remedies for employees subject to unlawful retaliation. Id.

The three bases on which Robinson determined that "employees" in Title VII's anti-retaliation provision is ambiguous apply equally to "employee" in the FLSA's anti-retaliation provision. First, there is no temporal qualifier that modifies "employee." See 29 U.S.C. 215(a)(3) ("any employee"), 216(b) ("any one or more employees"). Second, the FLSA defines "employee" as "any individual employed

by an employer" (29 U.S.C. 203(e)(1)) – a definition that is "identical" to Title VII's definition (Darveau, 515 F.3d at 342). This definition lacks any temporal qualifier and is consistent with protecting both a current and former employee as well as someone like Dellinger who engaged in FLSA protected activity arising from her employment with CACI. Third, the FLSA includes both "employment" and "reinstatement" as remedies for unlawful retaliation, 29 U.S.C. 216(b), suggesting that retaliation claims are not limited to current or former employees.

Indeed, this Court has already adopted Robinson's analysis to analyze the scope of "employees" in the FLSA's anti-retaliation provision. See Darveau, 515 F.3d at 341-42. It noted that "we and other courts have looked to Title VII cases in interpreting the FLSA." Id. at 342. And this Court found "no significant differences in either the language or intent of the two statutes regarding the type of adverse action their retaliation provisions prohibit." Id. The exact same language that was at issue in Darveau is at issue here.[5]

Because this Court in Darveau previously applied the Robinson analysis to the meaning of "employee" in the FLSA's anti-retaliation provision and because the three criteria for application of the Robinson analysis are satisfied here, the majority should have applied Robinson and determined that "employee" in the

[5] Significantly, the majority does not address Darveau but, rather, refers to it only once as a *cf.* cite, with a parenthetical stating that the decision "require[s], as part of a *prima facie* FLSA retaliation case, a showing of 'adverse action by the employer.'" Slip Op. at 8-9 (quoting Darveau, 515 F.3d at 340).

FLSA's anti-retaliation provision is, at minimum, ambiguous as to whether prospective employees may bring claims. Moreover, there is no reason to allow claims by former employees based largely on the Robinson criteria elucidated supra, as this Court did in Darveau, and then to bar claims by prospective employees here. Rather, these criteria – the absence of any temporal qualifier for the term "employee" (in either the Act's anti-retaliation provision or its definition section) and the availability of "employment" as a remedy – support the inclusion of both former and prospective employees in the FLSA's anti-retaliation scheme. As Judge King noted in his dissent, this Court in Darveau used broad language in stating why former employees need protection from retaliation:

> it is necessary to afford [retaliation] 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."

Slip Op. at 13 (quoting Darveau, 515 F.3d at 343) (emphasis added by the dissent). And as he further noted, the same necessity exists here.

III. Barring Employees from Bringing FLSA Retaliation Claims against Prospective Employers Would Severely Undermine FLSA Enforcement.

Although the majority held that Dellinger had no right of action for retaliation under section 16(b), the decision is ambiguous as to whether SAIC's alleged conduct nonetheless violates section 15(a)(3). See supra, pg. 2. Whether the alleged conduct violates section 15(a)(3) is significant because, if it does, the

Secretary could still bring enforcement actions against prospective employers under 29 U.S.C. 217, and prospective employers could face criminal penalties under 29 U.S.C. 216(a). Resolving this ambiguity would clarify the exact consequences of the decision. Specifically, if the decision is read to mean that SAIC's alleged conduct violates section 15(a)(3), then the degree of harm to FLSA enforcement may be lessened by virtue of the Secretary's ability to seek remedies on her own. However, even if the Secretary may bring actions against prospective employers, the Secretary'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.

The FLSA's anti-retaliation provision and private remedies are thus critical to ensuring that employees assert their FLSA rights and to achieving effective compliance with the substantive provisions of the FLSA:

> 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.

Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 292 (1960). "[F]ear of economic retaliation" often causes individuals not to complain about violations. Id.; see Crawford v. Metro. Gov't of Nashville and Davidson County, Tenn., 129 S. Ct. 846, 852 (2009) (citing studies showing that fear of retaliation is the leading

reason why people stay silent instead of voicing concerns about 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 retaliation than the refusal to hire a job applicant because the applicant once exercised her FLSA rights. If the majority decision stands (and especially if it precludes the Secretary's enforcement actions in addition to private actions), an individual not currently employed who is seeking a job could potentially remain unemployed indefinitely solely because she engaged in FLSA protected activity. 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. Far fewer employees would assert their FLSA rights if they could be excluded from future employment as a result. Such a chilling effect would undermine FLSA enforcement and the congressional intent that underlies the Act's enforcement scheme.

CONCLUSION

The Secretary and the EEOC respectfully request that this Court consider this amicus brief in determining whether to grant *en banc* review.

Respectfully submitted,

P. DAVID LOPEZ
General Counsel

VINCENT J. BLACKWOOD
Acting Associate General Counsel

PAUL D. RAMSHAW
Attorney

Equal Employment Opportunity Commission
Office of General Counsel
131 M. Street, N.E.
5th Floor
Washington, D.C. 20507
(202) 663-4737

M. PATRICIA SMITH
Solicitor of Labor

JENNIFER S. BRAND
Associate Solicitor

PAUL L. FRIEDEN
Counsel for Appellate Litigation

MELISSA A. MURPHY
Attorney

/s/
DEAN A. ROMHILT
Attorney
U.S. Department of Labor
Office of the Solicitor
200 Constitution Avenue, N.W.
Room N-2716
Washington, D.C. 20210
(202) 693-5550

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that the foregoing Brief for the Secretary of Labor and the Equal Employment Opportunity Commission as *Amici Curiae*:

(1) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) because it was prepared in Times New Roman 14-point – a proportionally spaced typeface that includes serifs, and

(2) complies with the length limitation of Federal Rule of Appellate Procedure 32(a)(7) because it is 15 pages, excluding the parts of the Brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

/s/
DEAN A. ROMHILT

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* was served this 9th day of September, 2011, by pre-paid overnight delivery (for delivery on the 12th day of September, 2011) on each of the following (who should also receive an electronic copy via the Court's ECF system):

Zachary A. Kitts
Cook Kitts & Francuzenko, PLLC
3554 Chain Bridge Road
Suite 402
Fairfax, VA 22030

John J. Rigby
McInroy & Rigby, LLP
2200 Wilson Boulevard
Suite 800
Arlington, VA 22201

Counsel for Appellant

Robert Sparks, Jr.
Sparks & Craig, LLP
6862 Elm Street
Suite 360
McLean, VA 22101

Counsel for Appellee

/s/
DEAN A. ROMHILT