# PUBLICATION

## Fourth Circuit Draws a Line for Retaliation Suits Under the FLSA

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On August 12, 2011, the United States Fourth Circuit Court of Appeals affirmed the dismissal of a job applicant's anti-retaliation suit under the Fair Labor Standards Act (FLSA) against her prospective employer. The Fourth Circuit found that a job applicant is not an "employee" under the FLSA and, as a result, concluded that prospective employees cannot sue prospective employers under the FLSA's anti-retaliation provision.

Natalie 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 and, about a month later, was offered the job contingent on verifying and transferring her security clearance, among other things. On the form required for her security clearance, Dellinger listed her FLSA lawsuit against CACI, Inc. Several days later, Science Applications withdrew its contingent job offer.

In response, Dellinger sued Science Applications under the FLSA's anti-retaliation provision, alleging that Science Applications' motive for withdrawing its offer was retaliation for Dellinger's exercise of her protected right to file a FLSA lawsuit. Science Applications filed a motion to dismiss Dellinger's lawsuit, arguing that the anti-retaliation provision only applies to *former* or *existing* employers, not *prospective* employers. The district court agreed and dismissed Dellinger's complaint.

The Fourth Circuit noted that the FLSA was designed to regulate existing employer-employee relationships, and that the language of the FLSA required the dismissal of Dellinger's lawsuit. The FLSA only prohibits retaliation "against any employee," and "employee" is defined as "any individual employed by an employer." So, the Fourth Circuit concluded that the anti-retaliation provision was intended by Congress to provide protection only to those in an employment relationship with their employer. Thus, a job applicant who never began or performed work, such as Dellinger, could not be an "employee" entitled to sue under the anti-retaliation provision.

As the Fourth Circuit emphasized, businesses should remember that "[t]he 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." For this reason, businesses should ensure that their existing policies, including hiring criteria, are well-defined and in compliance with the law.

If you have questions about this case or about your company's policies and procedures, please contact the authors of this alert, Steven F. Griffith, Jr. or any of the nearly 70 Labor & Employment attorneys located in Birmingham, Alabama; Atlanta, Georgia; Baton Rouge, Mandeville and New Orleans, Louisiana; Jackson, Mississippi; and Chattanooga, Johnson City, Knoxville, Memphis and Nashville, Tennessee.