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Dellinger v. Science Applications International Corporation: Missing an Opportunity to Expand the Meaning of "Employee" Under the Fair Labor Standards Act

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In *Dellinger v. Science Applications International Corp.*,[1] the United States Court of Appeals for the Fourth Circuit decided whether an applicant for employment is considered an "employee" and permitted to sue for retaliation[2] under the Fair Labor Standards Act (FLSA).[3] The court held that because the FLSA's anti-retaliation provision is a private civil action remedy for employees against their employers, the provision does not authorize prospective employees to bring claims against prospective employers.[4] In reaching this result, the court narrowly defined the FLSA's use of "employee" in the Act to exclude prospective employees.[5] The court held that prospective employers do not hold the same duty toward prospective employees that current or previous employers hold for current or previous employees.[6] In holding, the Fourth Circuit permitted the kind of retaliatory behavior that the FLSA was enacted to prevent.[7]

The court should have found that the term "employee" is ambiguous, as used in the FLSA.[8] Additionally, the court overlooked the fact that the anti-retaliation provisions of the FLSA state that it is unlawful for "any person," not "any employer," to retaliate against an employee who has filed an FLSA claim.[9] Finally,

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1. Dellinger v. Sci. Applications Int'l Corp., 649 F.3d 226 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1542 (2012).
2. 29 U.S.C. § 215(a)(3) (2006).
3. *Id.* § 216(b).
4. *Dellinger*, 649 F.3d at 231.
5. *Id.*
6. *Id.*
7. *See infra* Part IV.
8. *See infra* Part IV.A.
9. *See infra* Part IV.B.

the court should have compared the retaliation provisions of the FLSA to similar remedial federal statutes that afford protection to prospective employees, like the plaintiff in *Dellinger*.[10] The *Dellinger* court missed an opportunity to expand the meaning of "employee" in the FLSA to include prospective employees and to hold that the anti-retaliation provisions of the FLSA regulate the behaviors of all employers, including prospective employers.

I. THE CASE

In late July 2009, Natalie Dellinger, an administrative assistant, filed a claim against her employer, CACI, Inc., for violations of the minimum wage and overtime provisions of the FLSA.[11] After filing the claim against CACI, Inc., Dellinger sought other employment and applied for an administrative support position at Science Applications International Corporation (Science Applications) at the Sherman Kent School of the CIA.[12] The position required applicants to have security clearance.[13] Throughout Dellinger's employment history, she had worked as an administrative assistant on various government contracts that also required security clearance.[14] Following an interview at Science Applications, Dellinger was offered the administrative support position on or about August 21, 2009.[15]

Science Application's offer was contingent on Dellinger's ability to meet several requirements for employment.[16] Dellinger had to successfully complete a drug test and complete several forms.[17] Additionally, Dellinger's offer of employment was contingent on the verification, crossover, and maintenance of her security clearance from CACI, Inc., including the completion and submission of a government document known as Standard Form 86.[18] Standard Form 86 is a form used for national security positions, and it contains a variety of background information questions, including whether there are any non-criminal court actions to which the applicant ever was or currently is a party.[19] In completing Standard Form 86, Dellinger disclosed that she had filed a lawsuit in the U.S. District Court for the

10. *See infra* Part IV.C.

11. Dellinger v. Sci. Applications Int'l Corp., No. 1:10CV25 (JCC), 2010 WL 1375263, at *1 (E.D. Va. Apr. 2, 2010), *aff'd*, 649 F.3d 226 (4th Cir. 2011).

12. *Dellinger*, 2010 WL 1375263, at *1.

13. *Id.*

14. *Id.* Dellinger received her most recent clearance in 2008 and 2009, while she was an employee of CACI, Inc. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

Eastern District of Virginia alleging FLSA violations against her former employer, CACI, Inc.[20]

On August 24, 2009, Dellinger returned her signed employment offer letter, her completed Standard Form 86, and the other required documents to Science Applications.[21] After receiving Dellinger's materials, Science Applications withdrew its offer of employment.[22] Dellinger then filed a complaint in the U.S. District Court for the Eastern District of Virginia alleging that Science Applications failed to employ Dellinger as retaliation against her for filing an FLSA claim against her previous employer, CACI, Inc.[23]

Science Applications filed a motion to dismiss.[24] In the motion to dismiss, Science Applications argued that Dellinger did not state a claim upon which relief could be granted because she was never an "employee" within the meaning of the FLSA.[25] The district court granted Science Applications's motion to dismiss and held that Dellinger was not an employee under the FLSA.[26]

In its opinion, the district court looked at the statutory language of the FLSA.[27] In the FLSA, "employee" is defined as "any individual employed by an employer."[28] In order for an individual to be "employed" by an "employer" she must be "suffer[ed] or permitt[ed] to work."[29] The court held that Dellinger was never permitted to work for Science Applications, thus she was not an "employee," as defined by the FLSA.[30] The court concluded that without reading beyond the plain meaning of the Act, a job applicant is not an employee within the FLSA.[31]

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20. *Id.*

21. *Id.* Dellinger also took and passed her drug-screening test. *Id.*

22. *Id.* Two employees from Science Applications independently confirmed that Science Applications had taken no action regarding her employment application after August 24, 2009. *Id.*

23. *Id.*

24. *Id.* In assessing the motion to dismiss, the district court used the United States Supreme Court two-pronged test from *Ashcroft v. Iqbal*. *Dellinger*. 2010 WL 1375263, at *2 (citing Ashcroft v. Iqbal, 556 U.S. 662 (2009)). Under the first prong, "a court must identify and reject legal conclusions unsupported by factual allegations because they are not entitled to the presumption of truth." *Id.* (citing *Iqbal*, 556 U.S. at 681). Under the second prong, "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.* (quoting *Iqbal*, 556 U.S. at 679, 681).

25. *Id.*

26. *Id.*

27. *Id.* at *3.

28. *Id.* (quoting 29 U.S.C. § 203(e)(1) (2006)).

29. *Id.* (quoting 29 U.S.C. § 203(g)). To "[s]uffer or permit to work means that if an employer requires or allows employees to work, the time spent is generally hours worked." *FLSA Hours Worked Advisor: Suffer or Permit to Work*, U.S. Dep't Labor, http://www.dol.gov/elaws/esa/flsa/hoursworked/screen1d.asp (last visited Mar. 26, 2013).

30. *Dellinger*, 2010 WL 1375263, at *4.

31. *Id.*

Dellinger appealed the district court's ruling to the United States Court of Appeals for the Fourth Circuit.[32]

II. Legal Background

In *Dellinger v. Science Applications International Corp.*,[33] the United States Court of Appeals for the Fourth Circuit interpreted the FLSA to protect only current and former employees from retaliation, not prospective employees or job applicants.[34] *Dellinger* was the first time that the Fourth Circuit interpreted the FLSA's anti-retaliation provision as it relates to prospective employees and job applicants.[35] Additionally, the issue has been litigated in only two cases before *Dellinger*.[36] While only two cases before *Dellinger* had interpreted the FLSA in terms of prospective employees, two Fourth Circuit cases prior to *Dellinger*, applied expansive interpretations of "employee" in the FLSA.[37] Moreover, cases dealing with Title VII of the Civil Rights Act of 1964 are also instructive on the issue before the court in *Dellinger* because courts have held in such cases that the term "employee" is ambiguous.[38] In reaching its conclusion, the *Dellinger* court interpreted the FLSA according to its plain meaning and held that the language of the Act does not permit job applicants to bring retaliation claims against prospective employers.

A. The Language of the FLSA Permits Employees to Bring Claims of Retaliation Against Employers

The Fair Labor Standards Act of 1938 regulates the relationship between employees and employers to correct and 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."[39] In order to meet this purpose, the FLSA establishes a minimum wage that every employer must pay each of its employees,[40] as well as maximum hours set at forty hours per week, unless an employee "receives compensation . . . at a rate not less than one and one-half times the regular rate at which he is employed."[41] Additionally, the FLSA prohibits retaliation against employees who bring claims under the FLSA. The Act defines

32. Dellinger v. Sci. Applications Int'l Corp., 649 F.3d 226 (4th Cir. 2011).
33. *Id.*
34. *Id.* at 231.
35. *Id.* at 230–31.
36. *See infra* Part II.B.
37. *See infra* Part II.C.
38. *See infra* Part II.D.
39. *Dellinger*, 649 F.3d at 228 (quoting 29 U.S.C. § 202 (2006)).
40. 29 U.S.C. § 206 (2006).
41. *Id.* § 207(a)(2)(C).

"retaliation" 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, or has testified or is about to testify in any such proceeding."[42] This retaliation provision is designed to protect employees from facing reprisal for filing claims against their employers.[43]

The FLSA is enforced in three ways: criminal prosecutions,[44] private civil actions by employees,[45] and civil enforcement actions by the Secretary of Labor.[46] Under the private civil action provision, employees are authorized to sue their employers under the minimum wage, maximum hours or retaliation provisions.[47] The FLSA defines an employee as "any individual employed by an employer"[48] and an employer as "any person acting directly or indirectly in the interest of an employer in relation to an employee."[49]

B. Two District Courts Before Dellinger *Held that Job Applicants Were Not "Employees" Under the Act*

Few courts have construed the FLSA retaliation provision in regards to job applicants and prospective employees. Only two district courts before *Dellinger* have addressed the issue, and both courts declined to extend the FLSA retaliation provision to job applicants and prospective employees.[50] The district courts, applying the plain statutory meaning of the Act, preserved retaliation claims for current and former employees, but did not extend protection to prospective employees.[51] Although one of these two cases took place in the Fourth Circuit, both cases were district court cases, and thus were not binding precedent on the *Dellinger* court.[52] However, because the issue of interpreting the FLSA's retaliation provision in regards to prospective employees was one of first impression in the Fourth Circuit, the reasoning from the two district court cases was persuasive in *Dellinger*.

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42. *Id.* § 215(a)(3).

43. *See, e.g.*, *Dellinger*, 649 F.3d at 228 ("[T]he FLSA protects these substantive rights by prohibiting retaliation . . . .").

44. *See* 29 U.S.C. § 216(a) (2006).

45. *See id.*§ 216(b).

46. *See id.*§ 216(c).

47. *Dellinger*, 649 F.3d at 228 (citing 29 U.S.C. § 216(b) (2006)).

48. 29 U.S.C. § 203(e)(1) (2006).

49. *Id.* § 203(d).

50. *See* Glover v. City of N. Charleston, 942 F. Supp. 243 (D. S.C. 1996); Harper v. San Luis Valley Reg'l Med. Ctr., 848 F. Supp. 911 (D. Colo. 1994).

51. *See Glover*, 942 F. Supp. at 247 ("Here, Plaintiffs were job applicants with no prior employment relationship with the City. Because Plaintiffs do not meet the requirements for 'any employee' under section 215(a)(3), their FLSA claims should be dismissed."); *Harper*, 848 F. Supp. at 914 ("Therefore, other unnamed parties such as non-employee job applicants are excluded from [the FLSA's] protection.").

52. The first case, *Harper*, took place in the District of Colorado, while the second case, *Glover*, took place in the District of South Carolina, which is in the Fourth Circuit. *Glover*, 942 F. Supp. 243; *Harper*, 848 F. Supp. at 911.

1. In Harper v. San Luis Valley Regional Medical Center*, the United States District Court of Colorado Held that the Retaliation Provision of the FLSA Did Not Extend to Non-employee Job Applicants*

In *Harper v. San Luis Valley Regional Medical Center*,[53] the Plaintiff, Thomas Harper, brought an FLSA anti-retaliation claim in the United States District Court for the District of Colorado against the Defendants, San Luis Valley Regional Medical Center (SLV Medical) and Lutheran Hospital Association.[54] Harper claimed that the Defendants did not hire him because he had been a party to an FLSA wage claim against his preceding employer.[55] Harper argued that the FLSA's anti-retaliation provision should be extended to prospective employees and job applicants.[56] However, the court did not accept Harper's claims.[57]

Judge Lewis T. Babcock determined that although courts from other circuits had extended rights under Section 215(a)(3) of the FLSA to protect former employees from retaliation from former employers, "no court ha[d] addressed whether this anti-retaliation statute extends further to protect job applicants who were neither former employees nor employees of the retaliating employer."[58] In deciding the scope of the FLSA, the *Harper* court began with the statutory language of the Act.[59] The court reasoned that when a statute names specific parties that fall within its provisions, other unnamed parties are precluded.[60] Therefore, the court held that because the FLSA specifically identifies "employees" as falling within its provisions, that all unnamed parties, such as prospective employees and job applicants, are precluded from the Act's protection.[61]

In holding that job applicants are not protected against retaliation from prospective employers, the *Harper* court declined to extend protection to prospective employees and job applicants.[62]

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53. *Harper*, 848 F. Supp. 911.

54. *Id.* at 912.

55. *Id.* In October of 1991, Harper was one of eleven individuals who filed a suit for unpaid overtime wages against the City and County of Alamosa. *Id.* In the spring and early summer of 1992, Harper applied for a nursing position at SLV Medical, however he was not hired into one of the available positions. *Id.* Seven or Eight of Harper's classmates were hired into the available nursing positions at SLV Medical, "notwithstanding Harper's higher class standing, more extensive experience in patient care, mobile intensive care, and teaching experience." *Id.* Harper claimed that SLV Medical failed to hire him because he had filed an FLSA claim against his previous employer and this gave rise to a retaliation claim. *Id.* at 912, 913.

56. *Id.* at 913.

57. *Id.*

58. *Id.*

59. *Id.* ("Statutory words mean nothing unless they distinguish one situation from another; line-drawing is the business of language.").

60. *Id.* at 914 (citing Foxgord v. Hischemoeller, 820 F.2d 1030, 1035, *cert. denied*, 484 U.S. 986 (9th Cir. 1987)).

61. *Id.*

62. *Id.* at 915.

2. In Glover v. City of North Charleston*, the Court Held that While the "Any Person" Language of the FLSA Anti-retaliation Provision Does Not Require the Defendant to Be the Employer of the Plaintiff, the "Any Employee" Language of the Provision Does Require a Current or Past Employment Relationship Between the Plaintiff and Defendant*

In *Glover v. City of North Charleston*,[63] Plaintiffs Steven Glover and Kevin Edgmon claimed they were retaliated against by a prospective employer.[64] Glover and Edgmon were employed with the North Charleston District Fire Department until March 31, 1996.[65] Glover and Edgmon had previously been the lead plaintiffs in two separate FLSA wage and hour disputes against the North Charleston District.[66] During the fall of 1995 and early 1996, the fire department, which employed Glover and Edgmon, disbanded and the City of North Charleston took over fire protection and related services for the North Charleston District.[67] The fire department's employees, including Glover and Edgmon, were permitted to apply for positions in the newly formed fire department run by the city.[68] However, the city decided not to hire the Plaintiffs, and subsequently Glover and Edgmon sued, alleging that they were not hired by the city in retaliation for filing and participating in their previous FLSA claims against the district.[69] The defendants filed a motion to dismiss claiming that Glover and Edgmon were not the defendants' employees, and thus were not able to maintain a suit under the FLSA.[70]

In reaching its decision, the *Glover* court first looked at the relevant language of the anti-retaliation provision:

> *[I]t shall be unlawful for* any person . . . *to discharge or in any other manner discriminate against* any employee *because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter* . . . .[71]

The court then looked at the FLSA's definitions of "any person," "employee," and "employ." The FLSA defines "any person" as "an individual, partnership,

63. 942 F. Supp. 243 (D.S.C. 1996).

64. *Id.* at 244.

65. *Id.*

66. *Id.* at 244–245. Glover was the lead plaintiff in an FLSA wage and hour dispute against the North Charleston District, while Edgmon was the lead plaintiff in a parallel FLSA wage and hour dispute against the North Charleston District and other defendants. *Id.*

67. *Id.* at 245.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* (quoting 29 U.S.C. § 215(a)(3) (2006)) (emphasis in case).

association, . . . or any organized group of persons,"[72] an "employee" as an "individual employed by an employer," and to "employ" as "to suffer or permit to work."[73] The court determined from this language that "any person" meant any defendant with or without an employment relationship to the plaintiff, but that "employee" mandated that the plaintiff have an employment relationship with the defendant.[74]

The *Glover* court ultimately followed the decision in *Harper v. San Luis Valley Regional Medical Center* The *Glover* court regarded *Harper* as "one of the few cases, if not the only case, to address whether the FLSA anti-retaliation provision extends to protect job applicants who are neither former nor current employees of the retaliating employer."[75] The *Glover* court held that the plaintiffs were job applicants with no prior employment relationship with the city and thus did not meet the requirements for "any employee" under 29 U.S.C. § 215(a)(3).[76] Therefore, the plaintiffs' FLSA claims were dismissed.[77]

C. In Two Fourth Circuit Cases Prior to Dellinger*, the Court of Appeals for the Fourth Circuit Applied Expansive Interpretations of "Employee" in the FLSA*

Before the Court of Appeals for the Fourth Circuit decided *Dellinger v. Science Applications International Corp.*, the court decided two cases that expanded the definition of "employee" within the FLSA: *Darveau v. Detecon, Inc.*[78] and *McLaughlin v. Ensley*.[79] *Darveau* held that former employees were afforded anti-retaliation protection under the FLSA,[80] and *Ensley* held that workers who only attended job orientation were employees within the FLSA.[81]

72. *Id.* (citing 29 U.S.C. § 203(a)).

73. *Id.* (citing 29 U.S.C. § 203(e)(1), (g)).

74. *Id.* The court first examined cases where courts have not required "any person" to be an employer under the retaliation provision of the FLSA. *Id.* (citing Bowe v. Judson C. Burns Inc., 137 F.2d 37, 38 (3d Cir. 1943); Wirtz v. Ross Packaging Co., 367 F.2d 549, 550 (5th Cir. 1966); Donovan v. Schoolhouse Four, Inc., 573 F. Supp. 185 (W.D.Va. 1983)). However, when the court looked to cases involving the language "any employee," they found that an employment relationship must exist between the plaintiff and defendant. *Glover*, 942 F. Supp. at 246.

75. *Id.*

76. *Id.* at 247.

77. *Id.*

78. 515 F.3d 334 (4th Cir. 2008).

79. 877 F.2d 1207 (4th Cir. 1989).

80. *Darveau*, 515 F.3d at 343.

81. *McLaughlin*, 877 F.2d at 1210.

1. In Darveau v. Detecon, Inc.*, the Court of Appeals for the Fourth Circuit Expanded the Term "Employee" in the FLSA to Include Former Employees*

In *Darveau v. Detecon, Inc.*, the plaintiff, Larry Darveau, worked for Detecon, Inc. from 2003 until January 2005.[82] At the end of 2004, Detecon, Inc. informed Darveau that they would be eliminating his position in the company in the beginning part of 2005 and that he would be terminated.[83] After Darveau's termination, he entered into a "Commission Settlement and Release Agreement," which provided that Darveau would not sue Detecon, Inc. regarding "commission claims" in exchange for $50,000.[84] However, the agreement did not specify the release from any potential FLSA claims.[85] In August of 2005, Darveau brought an FLSA claim against Detecon, Inc. for unpaid overtime.[86] Subsequently, Detecon, Inc. filed an action against Darveau alleging breach of contract and constructive fraud that arose during Darveau's employment with Detecon, Inc.[87] In response, Darveau amended his complaint to include a retaliation claim, alleging that Detecon, Inc.'s subsequent filing against Darveau constituted retaliation under the FLSA.[88]

While the Court of Appeals of the Fourth Circuit affirmed Detecon, Inc.'s motion for summary judgment on the overtime claim,[89] the court reversed the lower court's dismissal of Darveau's retaliation claim.[90] The court held that Darveau, a former employee of Detecon, Inc. at the time of the claim, was an employee within the meaning of the FLSA.[91] The court expanded the term "employee" to include former employees because former employees, like current employees, need FLSA protection against retaliation.[92]

2. The Court of Appeals for the Fourth Circuit, in McLaughlin v. Ensley*, Held that Employees Who Only Attended Job Orientation Were Employees Within the FLSA*

In *McLaughlin v. Ensley*, Defendant Kirby Ensley ran a snack food distribution company that stocked various vending machines.[93] Before hiring "route men" to drive his company trucks, Ensley required prospective employees to spend approximately five days and fifty to sixty hours on a route, performing the everyday

82. *Darveau*, 515 F.3d at 337.
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.* Darveau's amended complaint also contained a breach of contract claim. *Id.*
89. *Id.* at 339.
90. *Id.* at 343.
91. *Id.*
92. *Id.*
93. 877 F.2d 1207, 1208 (4th Cir. 1989).

duties of route men.[94] Ensley did not compensate the job applicants for work done during this time.[95] The question for the Court of Appeals for the Fourth Circuit was whether these uncompensated workers were "employees" within the meaning of the FLSA.[96] The court held that they were.[97]

The *Ensley* court determined that the proper inquiry was whether Ensley had benefitted from the work that that the potential route men had performed during their weeklong orientation.[98] The court determined that Ensley indeed benefitted when the route men performed uncompensated work for him during their orientations.[99] Additionally, the court found that the benefit that Ensley received from having the workers perform the duties of route men while not being compensated outweighed any benefit that the workers received in increased skill or learning.[100] In *Ensley*, the Fourth Circuit expanded the term "employee" to include a group of job applicants, who were not yet employed by their employer.

D. In Robinson v. Shell Oil Co.*, the Supreme Court of the United States Held that the Term "Employee" Was Ambiguous in Title VII of the Civil Rights Act of 1964*

In *Robinson v. Shell Oil Co.*,[101] the Supreme Court of the United States, in reversing a Court of Appeals for the Fourth Circuit decision, held that the term "employee" in Section 704(a) of Title VII of the Civil Rights Act of 1964[102] was ambiguous.[103] The Court also held that the retaliation provision of Section 704 included former employees.[104] Section 704(a) makes it unlawful to for an employer to discriminate against an employee or applicant for employment who has sought Title VII protections, or helped other in doing so.[105] Although *Robinson* deals with Title VII

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 1209. The *Ensley* court looked to *Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947), and *Walling v. Nashville, C. & St. L. Ry.*, 330 U.S. 158 (1947), Supreme Court cases that dealt with railroad workers. The two cases dealt with the distinction between training that was not covered by the FLSA and employment that was covered by the FLSA. *Portland Terminal*, 330 U.S. at 153; *Nashville*, 330 U.S. at 158. In *Portland Terminal*, the Court held that an important factor in determining FLSA application is whether the employer received an "immediate advantage" and benefitted from the work of the employees. *Portland Terminal*, 330 U.S. at 153.

99. *Ensley*, 877 F.2d at 1210. Ensley benefitted when the workers drove trucks, unloaded and loaded trucks, restocked retail store shelves and vending machines, learned basic food vending machine maintenance, and performed simple kinds of paperwork. *Id.*

100. *Id.*

101. 519 U.S. 337 (1997).

102. Section 704(a) is codified in 42 U.S.C. § 2000e-3 (2006).

103. *Robinson*, 519 U.S. at 346.

104. *Id.*

105. *Id.* at 339.

of the Civil Rights Act of 1964 and not the FLSA, the two Acts similarly prohibit retaliatory acts against employees.[106]

The defendant in *Robinson*, Shell Oil Co., fired one of its employees, Charles T. Robinson, Sr., in 1991.[107] Following his termination, Robinson filed a charge with the Equal Opportunity Employment Commission (EEOC), alleging that Shell Oil had discharged him because of his race.[108] While that charge was pending, Robinson applied for a job with a different company.[109] The subsequent company that Robinson applied to contacted Shell Oil, as Robinson's former employer, for an employment reference.[110] Robinson claimed that Shell Oil gave him a negative reference in retaliation for his having filed the EEOC charge.[111]

The Supreme Court began its decision in *Robinson* by finding that the term "employee" in Section 704(a) is ambiguous.[112] The Court then moved on to resolve the ambiguity of "employee" in the provision.[113] The Court stated that Section 704(a) expressly protects employees from retaliation for filing a charge under Title VII, which includes a charge of unlawful discharge.[114] The *Robinson* Court reasoned that an unlawful discharge claim would only be brought by a former employee; therefore, the Court held that the use of "employee" in Section 704(a) included former employees.[115] The Court also held that excluding former employees from Section 704(a) protection would undermine the effectiveness of Title VII because it would allow the threat of postemployment retaliation.[116] Therefore, the Supreme Court, in reversing the Fourth Circuit's decision, held that "employee" in Section 704(a) of Title VII of the Civil Rights Act of 1964 was ambiguous, and the Court expanded the Act's coverage to include former employees.[117]

III. The Court's Reasoning

In *Dellinger v. Science Applications International Corp.*,[118] the United States Court of Appeals for the Fourth Circuit affirmed the judgment of the District Court for the Eastern District of Virginia and held that the term "employee" in the FLSA does not

106. *Compare* 42 U.S.C. § 2000e-3, *with* 29 U.S.C. § 215.
107. *Robinson*, 519 U.S. at 339.
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.* at 345.
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.* at 346.
117. *Id.*
118. 649 F.3d 226 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1542 (2012).

include prospective employees.[119] Therefore, the court held that job applicants cannot bring anti-retaliation claims against prospective employers.

A. Majority Opinion

The majority, written by Judge Paul Victor Niemeyer, started its analysis with a discussion of the FLSA, including the minimum wage, minimum hour and retaliation provisions.[120] In looking at the language of the relevant FLSA sections, the court concluded that by using the term "employee" in the retaliation provision of the FLSA that Congress afforded protection only to those who were in an employment relationship with their employers.[121] Primarily, the majority looked at the language of Section 216(b), which states that an employer who violates Section 215(a)(3) (the anti-retaliation provision) is liable for legal and equitable remedies. In looking at the language of 215(a)(3), the court determined, "[w]hile § 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.'"[122] Therefore, the court concluded that Section 215(a)(3) only permits remedies for violations by an employer and since Dellinger could not prove Science Applications was her employer, she did not have standing to sue under the Act.[123]

In reaching its opinion, the majority relied on the fact that Dellinger had not brought an FLSA claim of retaliation against her current or former employer; instead, she brought one against her prospective employer.[124] Dellinger never had an employment relationship with Science Applications.[125] The court held that in order to be consistent with the purpose of the FLSA, to regulate employer-employee relations, only current and former employees could sue under the retaliation provision of the FLSA, not job applicants.[126]

Although the court was "sympathetic" to Dellinger's claims, it was unable to broaden the scope of the Act beyond the plain language of the statute, "even when 'morally unacceptable retaliatory conduct' may be involved."[127] The majority

119. *Id.* at 231.

120. *Id.* at 228.

121. *Id.* First, the court looked to Section 215(a)(3) of the Act, which prohibits retaliation against an "employee" and Section 203(e)(1), which defines "employee" as "any individual employed by an employer." Id. at 228–29 (citing 29 U.S.C. § 215(a)(3) (2006); 29 U.S.C. § 203(e)(1)). The court then looked at the language of Section 216(b) of the Act which provides for employees' right to civil litigation. *Id.* at 229. Section 216(b) provides that an employee may sue his employer for violations under the Act, including retaliation claims. *Id.* (citing 29 U.S.C. § 216(b)).

122. *Id.*

123. *Id.*

124. *Id.* at 228.

125. *Id.* ("In this case, Dellinger has not sued her employer, but rather a prospective employer, for retaliation.").

126. *Id.*

127. *Id.* at 230–31 (quoting Ball v. Memphis Bar–B–Q Co., 228 F.3d 360, 364 (4th Cir. 2000)).

concluded its opinion with a quick disposal of Dellinger's argument that the FLSA's definition of "employee" should be extended to be more consistent with other statutes, such as the Energy Reorganization Act, the National Labor Relations Act (NLRA), the Occupational Safety and Health Act (OSHA), and the Pipeline Safety Improvement Act.[128]

B. The Dissent

Judge Robert Bruce King dissented from the majority, relying on *Robinson v. Shell Oil Co.*, a United States Supreme Court case.[129] Although *Robinson* involved a former employee rather than a prospective employee, Judge King likened *Dellinger* to *Robinson*.[130] Judge King stated that the majority, in failing to address *Robinson*, gave a "thumbs-up" Science Application's conduct and paved the way for other employers to adopt similar retaliatory practices.[131] Judge King also compared *Dellinger* to *Darveau v. Detecon, Inc.*, which expanded the term "employee" in the anti-retaliation provisions of the FLSA to include former employees under the FLSA.[132]

Judge King argued that it would not have been a stretch for the *Dellinger* court to expand the FLSA's definition of "employee" to permit Dellinger's claim because other similar remedial statutes have been applied to prospective employees and job applicants.[133] In his dissent, Judge King opposed the majority's stance on the inapplicability of the National Labor Relations Act (NLRA) and the Occupational Safety and Health Administration (OSHA) to Dellinger's situation.[134] Unlike the majority in *Dellinger*, Judge King determined that these Acts support broadening the definition of "employee" in the FLSA to include job applicants and prospective employees.[135]

Judge King also argued that the majority overlooked *McLaughlin v. Ensley*, which "opened the door" to a less restrictive interpretation of "employee" under the

128. *Id.* at 231. The court held that the Energy Reorganization Act case cited by Dellinger merely assumed, without deciding, that an applicant was covered under that Act. *Id.* (citing Doyle v. Secretary of Labor, 285 F.3d 243, 251 n. 13 (3d Cir. 2002)). Further, the court held that although the NLRA protects 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." *Id.* (quoting 29 U.S.C. § 152(3) (2006)). In regards to OSHA and the Pipeline Safety Improvement Act, the court held that the regulations implementing those statutes were explicitly promulgated to extend protections to prospective employees. *Id.* (citing 29 C.F.R. § 1977.5(b) (2013) (OSHA); 29 C.F.R. § 1981.101 (Pipeline Safety Improvement Act)). The court concluded by stating that the Secretary of Labor has not promulgated a similar regulation for the FLSA. *Id.*

129. *Id.* at 231 (King, J. dissenting) (citing Robinson v. Shell Oil Co., 519 U.S. 337 (1997)).

130. *Id.*

131. *Id.* at 232.

132. *Id.* at 233 (citing Darveau v. Detecon, Inc., 515 F.3d 334, 342 (4th Cir. 2008)).

133. *Id.* at 234.

134. *Id.*

135. *Id.*

FLSA.[136] In *Ensley*, the Fourth Circuit held that an employer's uncompensated trainees were employees under the FLSA and were entitled to minimum wage payments, even though they were not officially hired until successfully completing the training.[137] Judge King reasoned that Dellinger was in the same position as the trainees in *Ensley* because, like the trainees in *Ensley*, "[t]here was no legitimate impediment between her and the imminent assumption of her job duties."[138] Judge King concluded that Dellinger was an employee within the meaning of the FLSA and that she had made a legally sufficient claim against Science Applications.[139]

IV. Analysis

In *Dellinger v. Science Applications International Corp.*,[140] the United States Court of Appeals for the Fourth Circuit held that a job applicant is not an "employee" under the FLSA.[141] In so holding, the majority in *Dellinger* relied too heavily on the strict statutory language of the FLSA, and missed an opportunity to expand the meaning of "employee" under the Act to allow job applicants to bring anti-retaliation claims against prospective employers. The anti-retaliation provision of the FLSA was intended to protect workers — including former, current, and prospective employees — from negative reprisals as a result of filing FLSA claims.[142] By not affording prospective employees the same protection as former and current employees, the *Dellinger* court failed to uphold the purpose of the anti-retaliation provision of the Act. A "policy that is undermined when an employer fires a current employee is also undermined when a subsequent employer refuses to hire the same person."[143] In *Dellinger*, the Fourth Circuit permitted the kind of retaliatory behavior that the FLSA was designed to prevent.[144]

By overlooking Supreme Court and Fourth Circuit cases that have expanded the term "employee," the *Dellinger* court failed to correctly apply precedent to the

136. *Id.* at 236 (citing McLaughlin v. Ensley, 877 F.2d 1207 (4th Cir. 1989)).

137. *Id.* (citing *McLaughlin*, 877 F.2d at 1210).

138. *Id.* at 237.

139. *Id.*

140. 649 F.3d 226 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1542 (2012).

141. *Id.* at 231.

142. *See, e.g.*, Saffels v. Rice, 40 F.3d 1546, 1549 (8th Cir. 1994) ("The purpose of § 15(a)(3) is not merely to vindicate the rights of complaining parties, but to foster an environment in which employees are unfettered in their decision to voice grievances without 'fear of economic retaliation,' . . . or reprisal."); Dunlop v. Carriage Carpet Co., 548 F.2d 139, 145 (6th Cir. 1977) ("Section 15(a)(3) of the Fair Labor Standards Act of 1938 was enacted by Congress to remove the risk of employer retaliation against efforts by employees to secure their 'just wage deserts under the Act.'" (citations omitted)).

143. Mark A. Rothstein, *Wrongful Refusal to Hire: Attaching the Other Half of the Employment-at-Will Rule*, 24 CONN. L. REV. 97, 120 (1991).

144. *See* Darveau v. Detecon, Inc., 515 F.3d 334, 343 (4th Cir. 2008) (the FLSA's purpose is "to secure [its] substantive protections 'by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees.'" (quoting Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 63 (2006))).

question of whether a job applicant is an employee within the FLSA. Based on FLSA and Title VII precedent, the majority in *Dellinger* should have found that the term "employee" in the FLSA is ambiguous.[145] Additionally, the *Dellinger* court overlooked the fact that the anti-retaliation provisions of the FLSA provide that it is unlawful for "any person," not "any employer," to retaliate against an employee for making an FLSA claim.[146] Finally, the court should have compared Dellinger's claims to similar federal remedial statutes that provide protection to prospective employees and job applicants.[147] The Fourth Circuit should have safeguarded employees' rights under the retaliation provision of the FLSA by expanding "employee" to include job applicants and prospective employees.

A. The Term "Employee" Is Ambiguous in the FLSA

In the *Dellinger* dissent, Judge King correctly found that the term "employee" in the FLSA is ambiguous,[148] just as the Supreme Court of the United States found that "employee" is ambiguous in Title VII of the Civil Rights Act of 1964 in *Robinson v. Shell Oil Co.*[149] Although *Robinson* dealt with Title VII and not the FLSA, both statutes have employee anti-retaliation provisions.[150] Additionally, the Fourth Circuit previously acknowledged the relevance of Title VII precedent to cases involving the FLSA.[151]

1. The Dellinger *Court Should Have Looked to Title VII Case Law in* Robinson v. Shell Oil Co. *to Determine that the Term "Employee" Is Ambiguous in the FLSA*

The majority in *Dellinger* should have determined that the term "employee" in the FLSA is ambiguous.[152] In finding that the term employee is unambiguous in the FLSA, the majority overlooked the statutory construction set forth in *Robinson*, which is seen by some as "the definitive authority on statutory construction."[153] In *Robinson*, the Supreme Court found "employee" to be ambiguous in the context of Title VII of the Civil Rights Act of 1964.[154] Although *Robison* dealt with Title VII and not the FLSA, the *Robinson* opinion should have been used to inform the majority's analysis in *Dellinger* because the *Robinson* opinion readily admits a more widely

145. *See infra* Part IV.A.
146. *See infra* Part IV.B.
147. *See infra* Part IV.C.
148. Dellinger v. Sci. Applications Int'l Corp., 649 F.3d 226, 233 (4th Cir. 2011) (King, J., dissenting).
149. 519 U.S. 337, 341 (1997).
150. *Compare* 42 U.S.C. § 2000e-3(a) (2006), *with* 29 U.S.C. § 215(a)(3).
151. Darveau v. Detecon, Inc., 515 F.3d 334, 342 (4th Cir. 2008) ("Of particular note here, we and other courts have looked to Title VII cases in interpreting the FLSA.").
152. *Dellinger*, 649 F.3d at 233 (King, J., dissenting).
153. *Id.* at 231.
154. *Id.* at 232 (citing *Robinson*, 519 U.S. at 341).

reaching application to other federal statutes, such as the FLSA.[155] Following the analysis of "employee" in *Robinson*, the use of "employee" in the FLSA is also ambiguous.[156]

The *Robinson* Court concluded that the term "employee," as used in Title VII, was ambiguous for three reasons.[157] For these same three reasons, the use of "employee" in the FLSA is also ambiguous. First, the *Robinson* court concluded that the term "employee" in Title VII did not have a temporal qualifier to indicate whether it applied to current or former employees.[158] Similarly, "employee," as it appears in Section 215 of the FLSA, does not have a temporal qualifier.[159] The statute only prohibits retaliating against "any employee."[160] Following the logic from *Robinson*, "employee" in the FLSA could include a prospective employee or job applicant.

Second, the *Robinson* Court held that Title VII's prescribed definition of employee also contained no temporal qualifier.[161] The act defines an employee as "an individual employed by an employer . . . ."[162] Therefore, the definition of "employee" in Title VII could include current or former employees. Equally, the FLSA's definition of "employee" does not contain a temporal qualifier.[163] The FLSA defines "employee" as "any individual employed by an employer," without any reference to when the employee was or will be employed.[164] Consequently, this definition of "employee" could include an employee who is to be employed in the future, such as a prospective employee or job applicant.

Finally, the *Robinson* Court held that the listed remedies of Title VII include "reinstatement" and "hiring," signaling that the use of employees in Title VII mean something more than just current employees.[165] Both "reinstatement" and "hiring" indicate an expansion beyond just current employees because an employer cannot reinstate or hire someone who is currently working for him.[166] Therefore, these Title VII remedies implicitly apply to former employees who desire reinstatement and prospective employees who desire to be hired. Similarly, among the specific

155. *Id.*

156. *Id.* at 233.

157. *Id.* at 232.

158. Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997) ("But nowhere in Title VII is either phrase ['current employee' or 'former employee'] used . . . .").

159. *See* 29 U.S.C. § 215(a)(3) (2006) ("[I]t shall be unlawful for any person . . . to discharge or in any other manner discriminate against *any employee* . . . ." (emphasis added)).

160. *Id.*

161. *Robinson*, 519 U.S. at 341.

162. 42 U.S.C. § 2000e(f).

163. 29 U.S.C. § 203(e)(1).

164. *Id.*

165. *Robinson*, 519 U.S. at 342.

166. *Id.*

remedies for retaliatory acts in the FLSA are "employment" and "reinstatement."[167] Like the remedies listed in Title VII, both of these terms provide for an expansive interpretation of "employee" beyond current employees. Specifically, Section 216's remedy of "employment" seems to reference prospective employees and job applicants. A current employee would not seek employment as a remedy because he is already employed, but someone who has yet to be employed, such as a job applicant, would seek employment as a remedy for retaliation.[168]

Based on the analysis of "employee" as an ambiguous term in Title VII in *Robinson*, the *Dellinger* court should have found "employee" to be equally ambiguous in the FLSA. The term "employee" is ambiguous in the anti-retaliation provision of the FLSA because it lacks a temporal quality and it implicitly referred to prospective employees.[169]

2. In Darveau v. Detecon, Inc.*, the Fourth Circuit Had Previously Applied a More Expansive Definition of "Employee" to Include Former Employees*

In *Darveau v. Detecon, Inc.*,[170] a case involving an FLSA retaliation claim, the Fourth Circuit permitted an expansive interpretation of the term "employee" to include former employees.[171] Although the *Darveau* court did not expressly state that the use of "employee" in the FLSA was ambiguous, the court could not have expanded the FLSA's use of "employee" to include former employees without first acknowledging that the term was ambiguous.[172] In *Darveau*, the Fourth Circuit relied on *Robinson v. Shell Oil, Co.*, a Title VII case which the majority declined to visit in its opinion in *Dellinger*.[173] By following *Robinson*, the Fourth Circuit, in *Darveau*, relied on Title VII precedent to expand the definition of "employee" in the FLSA to include former employees.[174] Using the same analysis, the Fourth Circuit, in *Dellinger*, should have

167. 29 U.S.C. § 216(b) ("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 . . . ." (emphasis added)).

168. *See Robinson*, 519 U.S. at 342 ("[O]ne may hire individuals *to be* employees, but one does not typically hire persons who already *are* employees." (emphasis in original)).

169. Dellinger v. Sci. Applications Int'l Corp., 649 F.3d 226, 232 (4th Cir. 2011) (King, J., dissenting).

170. 515 F.3d 334 (4th Cir. 2008).

171. *Id.* at 342.

172. *Dellinger*, 649 F.3d at 233 (King, J., dissenting).

173. *Dellinger*, 649 F.3d at 232 (King, J., dissenting) ("The majority affirms with no discussion of Robinson or its established methodology . . . .").

174. *Darveau*, 515 F.3d at 342. Before reaching its opinion in *Dellinger*, the Fourth Circuit "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.'" *Dellinger*, 649 F.3d at 232–33 (quoting *Darveau*, 515 F.3d at 342). The definitions of "employee" are almost identical in Title VII and the FLSA. *Id.* at 233 (citing Darveau, 515 F.3d at 342). The FLSA defines "employee" as "any individual employed by an employer." 29 U.S.C. § 203(e)(1) (2006). Title VII defines "employee" as "an individual employed by an employer." 42 U.S.C. § 2000e(f).

expanded the FLSA definition of "employee" to include prospective employees and job applicants.

In *Darveau*, the court set forth the standard for alleging a retaliation claim under the FLSA: a plaintiff only has to allege that his employer retaliated against him by engaging in an adverse action that would be "materially adverse to a reasonable employee" because the "employer's actions . . . could well dissuade a reasonable worker from making or supporting a charge of discrimination."[175] Following this Fourth Circuit precedent, the court in *Dellinger* should have held that Science Application's refusal to hire Dellinger was retaliation. Science Applications's withdrawal of its offer of employment to Dellinger because she had previously filed an FLSA claim would be materially adverse to a reasonable employee. A reasonable employee would not want their job offer revoked because of a prior, unrelated act. Additionally, permitting retaliatory actions from prospective employers, such as Science Applications's actions in *Dellinger*, could dissuade employees from making charges of discrimination for fear that their previous employers will say something negative about them to prospective employers and prevent them from seeking new employment. Therefore, under the standard set forth in *Darveau*, the *Dellinger* court should have found that Dellinger made a valid claim of retaliation against Science Applications.

The court in *Darveau*, in expanding FLSA retaliation protection to former employees, specifically addressed the problem faced by Dellinger. The *Darveau* court stated that former employees require protection "because they often need references from past employers, [and] *they may face retaliation from new employers* who learn they have challenged the labor practices of previous employers . . . ."[176] However, the *Dellinger* majority did not follow the precedent set forth in *Darveau* and did not provide protection for employees who face retaliation from new employers, like Dellinger.

Even though Title VII and the FLSA seek to combat separate workplace issues, the purposes of the two provisions are the same: "to secure their substantive protections 'by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees.'"[177] In order to further this purpose, the Fourth Circuit, in *Dellinger*, should have expanded the term employee to include prospective employees because prospective employees, like current and former employees, need protection from retaliation.[178] The *Dellinger* court, by refusing to expand the term "employee" in the FLSA to include job applicants and prospective employees, permitted the kind of

175. *Darveau*, 515 F.3d at 343 (citations omitted).

176. *Id.* (emphasis added).

177. *Id.* at 342 (quoting Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 63 (2006)).

178. *Id.* at 343 (holding employees may face retaliation from prospective employers who learn of past FLSA claims).

retaliatory behavior from Science Applications that the FLSA was directed at preventing.

B. Judge King Correctly Looked to Sections 215(a)(1) Through (3) of the FLSA, Which Specifically State That It Is Unlawful for "Any Person," Not "Any Employer" to Retaliate Against an Employee Who Has Filed an FLSA Claim.

The language of Sections 215(a)(1) through (3) of the FLSA specifically prohibits "any person" from discharging or discriminating against an employee for filing an FLSA claim.[179] The Act's use of the words "any person" instead of "any employer" opens the door for expanding the retaliation provision beyond just current employer-employee relationships because "any person" does not necessarily include employers.[180] The court should have expanded the anti-retaliation provisions of the FLSA to prospective employees and job applicants because the statute's use of "any person" instead of "any employer."

A plain reading of the FLSA reveals that Congress was concerned enough with retaliation that it imposed penalties on actual decisionmakers ("any person") and not just employers.[181] Section 216 of the FLSA provides for criminal and civil penalties for violations of the Act's anti-retaliation provisions.[182] Section 216(a) provides for criminal penalties against "any person" who willfully violates the anti-retaliation provision of the FLSA.[183] This language implies Congress's intent to hold anyone criminally responsible who violates the anti-retaliation provision of the FLSA.[184] Even though "any person" only appears in the criminal penalties provision of the FLSA, a plain reading of the civil liabilities provision would also permit Dellinger's claim against Science Applications.

The civil liabilities under Section 216 apply to "any employer" against an "employee or employees," not "any person."[185] However, this language does not preclude the FLSA's application to Dellinger. The *Dellinger* majority, in reaching its decision, overlooked the fact that Science Applications is an employer and Dellinger is an employee under the FLSA. Science Applications is an employer who is subject to the FLSA, as evidenced by its offer of employment to Dellinger.[186] Only an employer can make an offer of employment. Further, Science Applications fits into the definition of an employer under the FLSA. The FLSA defines an employer as

179. 29 U.S.C. § 215(a) (2006) ("After the expiration of one hundred and twenty days from June 25, 1938, it shall be unlawful for *any person* . . . ." (emphasis added)).

180. *Dellinger*, 649 F.3d at 234 (King, J., dissenting).

181. *Id.*

182. 29 U.S.C. § 216(a)–(c).

183. *Id.* § 216(a).

184. *Dellinger*, 649 F.3d at 234 (King, J., dissenting).

185. 29 U.S.C. § 216(b).

186. *Dellinger*, 649 F.3d at 234 (King, J., dissenting).

"any person acting directly or indirectly in the interest of an employer in relation to an employee."[187] Science Applications is an employer who acted in relation to Dellinger, who is an employee. The Act does not require the employer to be acting against *his* employee, just "an employee."[188] Additionally, Dellinger is an employee under the FLSA. Dellinger had previously qualified as an employee under the Act when she made her charge against her prior employer.[189] She did not lose her status as an employee under the Act when she applied to Science Applications. Therefore, the majority in *Dellinger* erred by not allowing Dellinger to sue Science Applications under the Act because she could not prove that Science Application was ever *her* employer.[190]

The *Dellinger* dissent rightly begged the question why "in the face of a statute's relative silence as to a material enforcement term, [the court] must presume that a particular avenue is foreclosed because it is not explicitly mentioned, rather than permitted because it is not specifically prohibited."[191] The majority declined to extend FLSA protection to prospective employees because it was not explicitly permitted in the Act, instead of extending protection to prospective employees because such protection is not specifically prohibited in the Act.[192] The majority's decision in *Dellinger* regresses from *Robinson,* which called for a move toward an expansive interpretation of protective statutes like Title VII and the FLSA to cease employer retaliation.[193] The majority in *Dellinger* overlooked the use of "any person" in Section 215 of the FLSA in enforcing liability to Science Applications under the Act. Further, the majority erred by not finding that Science Applications and Dellinger were an employer and employee under the FLSA, respectively.

C. The Dellinger *Court Should Have Compared Dellinger's Claims to Similar Federal Remedial Statutes that Already Apply to Prospective Employees and Job Applicants*

Two other major federal employment statutes include a retaliation provision: the National Labor Relations Act[194] and the Occupational Safety and Health Act.[195] 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."[196]

187. 29 U.S.C. § 203(d).

188. *Id.*

189. *Dellinger*, 649 F.3d at 234 (King, J., dissenting).

190. *Id.*

191. *Id.* at 235 ("[F]aced with two reasonable and conflicting interpretations, [an act] should be interpreted to further its remedial purpose." (quoting Healy Tibbitts Builders, Inc. v. Dir., Office of Workers' Comp. Programs, 444 F.3d 1095, 1100 (9th Cir. 2006))).

192. *Id.* at 229 (majority opinion).

193. *Id.* at 235 (King, J., dissenting).

194. 29 U.S.C. §§ 151–69 (2006).

195. *Id.* § 651.

196. *Id.* § 152(3).

Thus, the definition of "employee" in the NLRA permits prospective employees and job applicants to bring retaliation claims.[197] The Occupational Safety and Health Act (OSHA) defines "employee" as "an employee of an employer who is employed in a business of *his* employer which affects commerce."[198] While the NLRA definition is more inclusive than the definition of employee provided in the FLSA, OSHA's definition of employee arguably is narrower.[199] Notwithstanding this, the regulations implementing OSHA have specifically construed that the statute affords court access to prospective employees and job applicants.[200] In light of these two similar federal employment regulations that permit prospective employees to bring retaliation claims, it would not have been a stretch for the *Dellinger* court to expand the meaning of "employee" in the FLSA to include prospective employees and job applicants.[201]

The *Dellinger* majority incorrectly found the comparisons between the FLSA and the NLRA and OSHA unpersuasive.[202] The majority found that absent similar detailed language in the FLSA's definition of "employee," comparable to the language in the NLRA and OSHA regulation, that Congress intended to make the definition of "employee" under the FLSA more restrictive.[203] In dismissing the importance of comparing the FLSA with OSHA, which specifically allows for job applicants to make claims of retaliation, the majority in *Dellinger* superficially relied on the argument that the "Secretary of Labor has not, however, promulgated a similar regulation for the FLSA."[204] While this is a true sentiment, the majority's holding represents an unnecessary return to "original intent" methodology.[205]

The majority in *Dellinger* dismissed the applicability of the NLRA and OSHA to the construction of "employee" within the FLSA.[206] In doing so, the *Dellinger* court ignored the "vital role that antiretaliation provisions play in regulating a vast range of undesirable behaviors on the part of employers"[207] and permitted Science Applications to conduct retaliatory activity that the FLSA was designed to prevent.

197. *See* NLRB v. Town & Country Elec., Inc., 516 U.S. 85, 98 (1995) (holding that the term "employees" in the National Labor Relations Act applies to prospective employees who were paid union organizers).

198. 29 U.S.C. § 652(6).

199. Section 203(e)(1) of the FLSA defines employee as "any individual employed by an employer." 29 U.S.C. § 203(e)(1).

200. *Dellinger*, 649 F.3d at 234 (King, J., dissenting) (citing 29 C.F.R. § 1977.5(b) (2013)).

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.* at 231 (majority opinion).

205. *Id.* at 235 (King, J., dissenting).

206. *Id.* at 231 (majority opinion).

207. *Id.* at 236 (King, J., dissenting).

V. Conclusion

In *Dellinger v. Science Applications International Corp.*, the United States Court of Appeals for the Fourth Circuit decided whether a job applicant is an "employee" under the FLSA.[208] The court incorrectly held that the FLSA anti-retaliation provision does not authorize prospective employees to bring claims against prospective employers.[209] In reaching this result, the court narrowly defined the FLSA's use of "employee" in the Act to omit prospective employees and job applicants.[210] The majority's opinion in *Dellinger* permitted the kind of retaliatory behavior that the FLSA was aimed at preventing.[211] The court should have found that the term "employee" in the FLSA is ambiguous.[212] Further, the majority overlooked the fact that the anti-retaliation provisions of the FLSA state that it is unlawful for "any person," not "any employer" to retaliate against an employee who has filed an FLSA claim.[213] Finally, when looking at Dellinger's retaliation claims, the *Dellinger* court should have applied the analysis of similar remedial federal statutes that afford protection for employees in situations similar to Dellinger's.[214] The *Dellinger* court missed an opportunity to expand the meaning of "employee" in the FLSA to include prospective employees and to hold that the anti-retaliation provisions of the FLSA regulate the behaviors of all employers, including prospective employers.

208. *Id.* at 228 (majority opinion).
209. *Id.* at 231.
210. *Id.*
211. *See supra* Part IV.
212. *See supra* Part IV.A.
213. *See supra* Part IV.B.
214. *See supra* Part IV.C.