

FBA Labor & Employment Law Section

Monthly 4th Circuit Updates

September 2011

The Fourth Circuit limits the scope of retaliation claims in *Dellinger v. Science Applications International Corp.*, No. 10-1499 (4th Cir. Aug. 12, 2011)

Plaintiff brought an action for FLSA retaliation alleging that Defendant retaliated against her by refusing to hire her after learning she had sued a former employer under the FLSA. The Fourth Circuit Court of Appeals affirmed the District Court of Maryland's grant of Defendant's motion to dismiss and held that the FLSA does not allow a prospective employee to sue a prospective employer for retaliation. In so holding, the Court focused on the purpose of the FLSA which is to regulate the "relationship between employers and their employees" and the specific language of the Act which frequently and consistently includes the terms "employee" and "employer." The Court clarified that a prospective employee or job applicant is not an "employee" under the Act.

The Court also explained that because the Act only allows employees to receive remedies for FLSA violations from *employers*, Plaintiff can only bring an action against Defendant under the FLSA if she can prove that she was an employee and Defendant was her employer. Even though her application had been approved on a contingent basis, Plaintiff had not begun work and, thus, was not an employee because the FLSA defines "employ" as suffering or permitting *to work*.

Plaintiff's argument was based on the language in Section 215(a) which states that it is unlawful for "any person" to retaliate against an employee. The Court disagreed with her argument and clarified that Section 215, when read in conjunction with Section 216, only allows an employee to sue *an employer* for retaliation. The Court also focused on the fact that the retaliation provision of the FLSA was intended to foster employers' compliance with the substantive provisions of the FLSA which is only relevant in the context of the employment relationship. While the Court understood Plaintiff's concerns, it ultimately decided that to rule in Plaintiff's favor would broaden the scope of the FLSA.

In a lengthy dissent, Circuit Judge King compared the case to *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997), which provided that prospective employees could bring suit under Title VII. His dissent argues that the analytical framework of *Robinson* should "powerfully inform" the Court's analysis of the case at hand, yet the majority failed to even mention *Robinson* in its opinion. In fact, the FLSA's definition of an employee is almost identical to Title VII's definition of an employee.

His dissent also focuses on the fact that the Court has already decided that the FLSA protects *former* employees from retaliation "because they often need references from past employers

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[and] they may face retaliation from new employers who learn they have challenged the labor practices of previous employees.” In ruling that the FLSA protects former employees, the Court acknowledged that the term “employee” has more than one meaning. As such, the dissent questions why, “in the face of a statute’s relative silence as to a material enforcement term, we must presume that a particular avenue is foreclosed because it is not explicitly mentioned, rather than permitted because it is not specifically prohibited.”

The dissent also points out that the majority ignored the Court’s previous ruling that the term “employee” under the FLSA includes an employer’s unpaid trainees, which is essentially the category Plaintiff was in when her application had been approved on a contingent basis because there were no legitimate impediments between her and the imminent assumption of her job duties.

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July 2011

Fourth Circuit upholds large ADA emotional distress jury verdict in *Blake v. Baltimore County*, No. 10-1849 (4th Cir. July 15, 2011)

In an unpublished opinion on July 15, 2011, the Fourth Circuit Court of Appeals affirmed the District Court of Maryland's denial of Defendant's motions for judgment as a matter of law and remittitur. The Court affirmed the denial of the motion for judgment as a matter of law because the Defendant failed to renew its pre-verdict Rule 50(a) motion through a Rule 50(b) post-verdict motion and, thus, the Fourth Circuit had no power to order a new trial.

The Court reviewed the district court's denial of the remittitur motion for abuse of discretion and held that the district court did not abuse its discretion. In so holding, the Court upheld the jury's verdict of \$225,000 for Plaintiff's emotional distress damages in a case brought pursuant to the Americans with Disabilities Act.