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The Fourth Circuit Slows Recent Momentum Favoring Increased Protections for Prospective Employees

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At both the federal and state level, legislatures and courts continue to grapple with issues centered on the nation's financial woes. Prolonged economic stagnation and rising unemployment have prompted politicians to propose or enact laws that target barriers to attaining employment. For example, over the last couple of years, Congress and many state legislatures have sought to ban or limit credit and criminal background checks, and statutes designed to end or limit discrimination against unemployed job applicants have been passed or proposed. It is in this environment that the Fourth Circuit decided *Dellinger v. Science Applications International Corporation*, a ruling which may spark new debate over whether to provide job applicants with certain rights and recourse.

In *Dellinger*, Natalie Dellinger sued her former employer CACI, Inc. for allegedly violating the minimum wage and overtime provisions of the Fair Labor Standards Act (FLSA). Shortly thereafter, Dellinger accepted a position with Science Applications International Corporation, with her job offer contingent on security clearance. As part of the clearance process, Dellinger identified her FLSA lawsuit in response to a request that she list any pending noncriminal court actions to which she was a party. Several days after this revelation, Science Applications withdrew its offer of employment.

Dellinger commenced an action against Science Applications that alleged retaliation and unlawful discrimination for filing an FLSA lawsuit. Science Applications responded by moving to dismiss Dellinger's complaint for not stating a claim upon which relief can be granted. The district court agreed with Science Applications that the anti-retaliation protections of the FLSA do not protect prospective employees, a dismissal which the Fourth Circuit affirmed. In its reading of the statute, the Fourth Circuit found that "at its core" the FLSA (including its anti-retaliation provision) is designed to provide covered employees with minimum wages and maximum hours necessary for the general well-being of the *workforce*, not employee *candidates*.

Despite this holding, employers should note that the basis for the Fourth Circuit's decision was primarily textual (i.e., based on statutory language, purpose and scheme), not policy-driven. Indeed, the court was expressly "sympathetic" to Dellinger's argument and found it "problematic" to permit future employers to discriminate against prospective employees for previously exercising their rights under the FLSA. As the court noted, there are statutes such as the Occupational Health and Safety Act (by dint of regulation) that protect prospective employees. It is certainly within the realm of possibility that we might see a proposed amendment to the FLSA in the future addressing the issues raised in this case.

Accordingly, employers must continue to exercise care to avoid potential liability for making hiring decisions based on an applicant's prior litigation history, especially given recent legal developments and the current political and economic climate. Employers must be continually vigilant in monitoring their hiring practices, including reviewing the structure of their interviews and the content of their application forms. With the hiring process besieged by legislative and judicial scrutiny, diligence and knowledge of the law have never been more critical.

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