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Carol Abdelmesseeh

Deanne M. DiBlasi

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WHY PUNITIVE DAMAGES SHOULD BE AWARDED FOR RETALIATORY DISCHARGE UNDER THE FAIR LABOR STANDARDS ACT†

*“[G]overnment must have some control over maximum hours, minimum wages, the evil of child labor, and the exploitation of unorganized labor. . . . to protect the fundamental interest of free labor and a free people.”*¹

Franklin D. Roosevelt, May 24, 1937

I. INTRODUCTION

The Fair Labor Standards Act (“FLSA” or “Act”) was originally enacted in 1937. Its purpose was to set a federal minimum wage, require compensation for overtime work, and prohibit child labor.² Section 215(a)(3) of the FLSA specifically prohibits employers from firing or discriminating against an employee because the employee has asserted his or her rights under the Act.³ In 1977, Congress amended § 216(b) of the FLSA, which added the language:

[a]ny 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 appro-

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1. THE FAIR LABOR STANDARDS ACT 12 (Ellen C. Kearns et al. eds., 1999). President Franklin D. Roosevelt sent a message to Congress to urge the enactment of a law that would establish fair labor standards. *Id.* at 12.

2. *Id.* at 15.

3. 29 U.S.C. § 215(a)(3) (2000). “[I]t shall be unlawful for any person . . . (3) 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, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.” *Id.*

priate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages.⁴

Upon the enactment of this amendment, a question arose as to whether this very language includes the awarding of punitive damages within its list of prescribed remedies.⁵

Currently, there is a circuit split as to whether the language, as amended, warrants an interpretation that punitive damages should be granted to victims of retaliatory discharge. The Seventh Circuit supports the position that punitive damages should be permitted under this section.⁶ However, the Eleventh Circuit does not agree that this section of the FLSA warrants such an interpretation.⁷ Despite this obvious issue that has arisen, only the Seventh and Eleventh Circuits have conclusively reached a decision as to whether § 216(b) of the FLSA permits an award of punitive damages. The Eleventh Circuit's conclusion that puni-

4. *Travis v. Gary Cmty. Mental Health Ctr., Inc.*, 921 F.2d 108, 111 (7th Cir. 1990). Section § 216(b) of the statute in its entirety reads:

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. 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 and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefore under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

29 U.S.C. § 216(b) (2000).

5. *See, e.g., Snapp v. Unlimited Concepts, Inc.*, 208 F.3d 928 (11th Cir. 2000).

6. *Travis*, 921 F.2d at 112.

7. *Snapp*, 208 F.3d at 928.

tive damages should not be awarded to an employee arose mainly from its belief that § 216(b) does not include any remedies that are punitive in nature.⁸ The Seventh Circuit, on the other hand, concluded that punitive damages are generally appropriate in cases of retaliatory discharge and are included in the remedies contemplated by § 216(b).⁹

Very few other courts have decided the issue of whether this controversial section of the Act allows for punitive damages. The Seventh Circuit, in *Soto v. Adams Elevator Equipment Co.*, stated that punitive damages are permissible.¹⁰ Nine years later, in *Perez v. Z Frank Oldsmobile, Inc.*, the Seventh Circuit reaffirmed its position.¹¹ In *Marrow v. Allstate Security & Investigative Services, Inc.*¹² and in *Martin v. American International Knitters Corp.*,¹³ two different district courts followed the Seventh Circuit and allowed for punitive damages under § 216(b) of the FLSA. Conversely, a few courts have taken the position that punitive damages should not be awarded. In *Lanza v. Sugarland Run Homeowners Ass'n, Inc.*, the district court held that punitive damages should not be permitted under the FLSA.¹⁴ The rejection of such damages was also exhibited in *Johnston v. Davis Security*, where the district court refused to grant punitive damages.¹⁵

In analyzing this particular section of the FLSA, in conjunction with other statutes and the history and trends of our legislature, one is compelled to take the position that § 216(b) of the FLSA¹⁶ does and should include the awarding of punitive damages as a remedy for retaliatory discharge as defined by § 215(a)(3)¹⁷ of the Act. Section II of this note, will discuss the history and purposes of the FLSA. Both the history and purposes behind the enactment of the FLSA are important to understanding why Congress enacted an anti-retaliation provision and designated remedies. The legislative history also serves to explain why punitive damages further the goals of the Act as contemplated by Congress. Section III is a discussion of the plain language of the statute, from which its true meaning can be derived. Also included within this section, is a discussion of the canons of construction, a common and useful tool

8. *Id.* at 934.

9. *Travis*, 921 F.2d at 112.

10. 941 F.2d 543, 551–52 (7th Cir. 1991).

11. 223 F.3d 617, 622 (7th Cir. 2000).

12. 167 F. Supp. 2d 838 (E.D. Pa. 2001).

13. No. 91-0027, 1992 U.S. Dist. LEXIS 3888, at *1 (D. N. Mar. I. Feb. 3, 1992).

14. 97 F. Supp. 2d 737, 742 (E.D. Va. 2000).

15. 217 F. Supp. 2d 1224 (Utah 2002).

16. 29 U.S.C. § 216(b) (2000).

17. 29 U.S.C. § 215(a)(3) (2000).

that is often used by courts engaging in statutory interpretation. Based on this analysis, the text of § 216(b) leads to the interpretation that Congress intended to include punitive damages within its list of prescribed remedies. Furthermore, this section explains how punitive damages have been commonly deemed a proper remedy for victims of retaliatory discharge. Section IV of the note explains and analyzes the *Franklin* presumption,¹⁸ another tool used by the courts in determining what forms of relief may be available to an individual seeking remedial action under this Act.

Section V provides a presentation and discussion of the legislative history of § 216(b) of the FLSA. Legislative history is often used to determine Congress' intent and purpose in the enactment of a particular statute. A more comprehensive description of what retaliatory discharge is, and why many states and the common law have traditionally treated it as an intentional tort is included in Section VI. Section VII discusses the use and purpose of punitive damages in retaliatory discharge cases. Section VIII discusses some of the criticisms of punitive damages as a remedy and why those criticisms are without merit. Section IX examines the reasoning presented by states for granting punitive damages in retaliatory discharge cases and applies that reasoning to the FLSA. Section X explores the anti-retaliation provisions of other federal statutes, which have been interpreted as including punitive damages. Section XI discusses the U.S. Equal Employment Opportunity Commission's view on retaliatory discharges in regards to the statutes that it enforces, including the Equal Pay Act and the Age Discrimination in Employment Act, both of which are parts of the FLSA. This note will argue that § 216(b) does in fact warrant the interpretation that in cases of retaliatory discharge, punitive damages are permissible and should be granted to a victim of retaliatory discharge when such a violation is found.

II. FLSA: HISTORY AND PURPOSE

In 1937, at the urging of President Franklin D. Roosevelt, the 75th Congress of the United States held several hearings to discuss the effects of substandard labor conditions on interstate commerce.¹⁹ The House and Senate Labor Committees found that substandard labor conditions, even existing in only a few places of employment, lowered the standards of the whole industry and led to lower wages, dissatisfaction of employ-

18. See *infra* Section IV.

19. THE FAIR LABOR STANDARDS ACT 12 (Ellen C. Kearns et al. eds., 1999).

ees, and an increase in labor disputes.²⁰ The Committees concluded that the labor conditions were detrimental to the “health, efficiency and general well-being” of a fair standard of living.²¹ Moreover, they required Congress to exercise its power to remedy these conditions.²² In June of 1938, both Houses of Congress adopted the Fair Labor Standards Act²³ and it was then signed into law by President Roosevelt.²⁴ The primary provisions of the Act, as originally adopted included: (1) setting of a minimum wage, (2) the requirement of overtime pay for work exceeding 40 hours, (3) prohibitions on child labor, (4) record keeping requirements, (5) certain exemptions, and (6) enforcement provisions.²⁵

Over the years, Congress has made various amendments to the FLSA, several of which were highly significant.²⁶ The first amendment was the Portal-to-Portal Act of 1947, which defined “work” and “work-week,” allowed for compromise or waiver of liquidated damages, gave judicial discretion in awarding liquidated damages, limited the availability of class actions, and added a two year statute of limitations for claims under the Act.²⁷ In 1966, it was amended again to extend protection under the FLSA to include all employees, if two or more employees were engaged in commerce or in the production of goods for commerce.²⁸ This extended coverage to public employees and included both schools and hospitals as well.²⁹ Congress later added the Age Discrimination in Employment Act (“ADEA”) as part of the FLSA.³⁰ In 1974, Congress again amended the FLSA to extend coverage to most government employees.³¹ Again, three years later, the FLSA was further amended and it

20. *Id.* at 12–13 (citing Joint Hearings on H.R. 7200 and S. 2475, H.R. REP. NO. 75-2182, at 6 (1937)).

21. *Id.* at 13.

22. *Id.*; see also Jeff Le Richie, Note, *Protection for Employee Whistleblowers Under the Fair Labor Standards Act and Missouri’s Public Policy Exception: What Happens if the Employee Never Whistled?*, 60 MO. L. REV. 973, 975–76 (1995); 29 U.S.C. § 202(a) (2000) (codifying the Congressional policy and purpose in enacting the FLSA as well as the Congressional findings which led to the enactment).

23. 29 U.S.C. §§ 200–219.

24. THE FAIR LABOR STANDARDS ACT, *supra* note 20, at 15.

25. *Id.* at 15–16.

26. *Id.* at 16.

27. *Id.* at 16–22. See Portal-to-Portal Act of 1947, Pub. L. No. 80-99, 61 Stat. 84 (codified as amended at 29 U.S.C. §§ 251–262 (1994)).

28. THE FAIR LABOR STANDARDS Act 24–25 (Ellen C. Kearns et al. eds., 1999) (containing a table on page 24 that illustrates the extension of coverage under the 1966 amendments).

29. *Id.*

30. *Id.* at 27.

31. *Id.* at 28.

was at this point that Congress created an individual cause of action for violations of § 215(a)(3).³²

The aim of the FLSA was to achieve “certain minimum labor standards.”³³ Under § 215(a)(3), it is illegal to “discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding.”³⁴ The Supreme Court, in *Mitchell v. Robert DeMario Jewelry, Inc.*, found that this particular section allowed employees to be secure in reporting all violations of labor standards and it was deemed as proscribing retaliatory acts.³⁵ Such anti-retaliation provisions serve to deter employers from retaliating against employees, and encourage employees to report violations, which in effect enforce the Act.³⁶ Even prior to the 1977 amendment,³⁷ the Supreme Court in *Robert DeMario Jewelry, Inc.*, explained the importance of § 215(a)(3):

The provisions of the statute affect weekly wage dealings between vast numbers of business establishments and employees. For weighty practical and other reasons, 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. Plainly, effective enforcement could thus only be expected if employees felt free to approach officials with their grievances. . . . For it needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions. By the proscription of retaliatory acts set forth in § 15(a)(3) . . . Congress sought to foster a climate in which compliance with the substantive provisions of the Act would be enhanced.³⁸

Congress’ amendment of § 216(b) of the FLSA codified the Supreme Court’s dicta in *Robert DeMario Jewelry, Inc.*, by adding remedies for violations of § 215(a)(3).³⁹ The 1977 amendment added the language “[a]ny employer who violates the provisions of § 215(a)(3) of this Act

32. *Id.* at 29; see also 29 U.S.C. § 216(b) (2000).

33. *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1959).

34. 29 U.S.C. § 215(a)(3) (2000).

35. 361 U.S. at 292.

36. *Id.*

37. Fair Labor Standards Amendments of 1977, Pub. L. 95-151, § 10(a), 91 Stat. 1245 (1980) (codified as amended at 29 U.S.C. § 216(b)).

38. 361 U.S. at 292 (citations omitted).

39. See *id.*

shall be liable for such legal or equitable relief as may be appropriate to *effectuate the purposes of section 215(a)(3).*"⁴⁰ By adding the language "without limitation" to the remedial provision, Congress enhanced the effectiveness of the provisions.⁴¹ The purposes of the anti-retaliation provision would best be served by the use of punitive damages. The availability of punitive damages maximizes the incentive for employees to enforce the statute and their rights.⁴² It also serves as an effective deterrent to employers in two ways. First, it deters employers from wrongfully discharging employees that assert their rights. Second, because employees will serve as watchdogs and enforcers of the Act, employers will be deterred from committing other violations.

The history of the FLSA is important in understanding the reasons for its enactment. The Act, when read in its totality, allows for more a comprehensive and a clearer understanding of each of the individual sections found within it. Fundamentally, the purpose of enacting the FLSA was to protect employees from abuse. To further comprehend the specific congressional amendment of § 216(b), it is imperative to look to the plain language of that section.

III. THE PLAIN LANGUAGE OF § 216(B): PUNITIVE DAMAGES ARE PERMITTED

Statutory interpretation begins with a reference to the exact language of the statute.⁴³ The Supreme Court has held that "[i]t is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed."⁴⁴ A court can elicit the exact meaning of a particular federal act through a reading of the plain language of a statute. If a court makes the determination that the language of the statute itself gives the act its definitive meaning, the court must

40. Fair Labor Standards Amendments of 1977 § 10(a) (emphasis added).

41. *Id.*

42. See 361 U.S. at 292; see also ROBERT BELTON, REMEDIES IN EMPLOYMENT DISCRIMINATION LAW § 13.1 (1992). Belton cites to *Smith v. Wade*, 461 U.S. 30, 41 (1983), where the Court endorsed the policy objectives of punitive damages. The Court said that punitive damages punish the defendant, "deters persons from violating the rights of others," and "encourages private lawsuits seeking to assert legal rights." *Id.*

43. See *United States v. Monsanto Co.*, 858 F.2d 160, 167 n.10 (4th Cir. 1988). When "resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear." *Id.* (quoting *Blum v. Stenson*, 465 U.S. 886, 896 (1984)).

44. ABNER J. MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS 9-10 (1997) (citing *Caminetti v. United States*, 242 U.S. 470, 485 (1917)).

ensure that it considers the language of the alleged ambiguous section fully.⁴⁵

When interpreting amendments, the question often arises as to whether the amended language changes the meaning of the statute or simply clarifies it. As a result, courts will often look to the plain language of the statute, in addition to other factors, in order to make this determination.⁴⁶ Thus, this note looks to the plain language of § 216(b) to decide the intended purpose of these amendments.

The FLSA, as enacted in 1938, established statutory wages and overtime compensation, "an additional equal amount as liquidated damages," and attorneys fees as remedies.⁴⁷ At that point, compensatory and punitive damages were not included and thus were unavailable.⁴⁸ Congress later amended this remedial section of the statute through the following language:

Any employer who violates the provisions of section 15(a)(3) of this Act shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 15(a)(3), including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages.⁴⁹

From these amendments it is clear that Congress has authorized other forms of relief and it is these very changes that lead to the controversy: Does § 216(b) warrant an interpretation that permits the granting of punitive damages for a successful claim brought for retaliatory discharge? And if it does, would the inclusion of punitive damages serve the purposes of the FLSA?

45. See *United States v. Weitzenhoff*, 35 F.3d 1275, 1289 (9th Cir. 1993). See generally *Pa. Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 557–58 (1990) (explaining that statutory interpretation begins with text of statute); *Cent. Mont. Elec. Power Coop., Inc. v. Bonneville Power Admin.*, 840 F.2d 1472, 1477 (9th Cir. 1988) (holding that statutory interpretation begins with language of statute itself).

46. See 73 AM. JUR. 2D *Statutes* § 65 (2001) (discussing that in determining whether an amendment changes the meaning of a statute or just clarifies it, courts will look at the plain language, legislative history, time, and circumstances of an amendment); *Corsentino v. Cordova*, 4 P.3d 1082, 1091 (Colo. 2000) (stating that courts look to an amendment's plain language and legislative history to determine whether an amendment clarifies or changes a statute).

47. *Travis v. Gary Cmty. Mental Health Ctr., Inc.*, 921 F.2d 108, 111 (7th Cir. 1990) (citing 29 U.S.C. § 216(b) (2002)).

48. *Id.*

49. Fair Labor Standards Amendments of 1977, Pub. L. 95-151, § 10(a), 91 Stat. 1245 (1980) (codified as amended at 29 U.S.C. § 216(b) (2000)).

A. “Legal Relief”: Congressional Intent to Include Punitive Damages?

To support its interpretation or to make a determination as to the meaning of a specific statute, a court may rely on the interpretative maxim *ejusdem generis*. This is a doctrine that is used for statutory interpretation and stipulates “where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.”⁵⁰ In addition, the general words are then viewed as extending the statute’s provisions to include everything within that class that is not explicitly enumerated.⁵¹ Therefore, proponents of this doctrine suggest, “general statutory term[s] should be [interpreted] in light of the specific terms that surround it.”⁵² Essentially, the ambiguous words can only be interpreted to be of the same nature as those that are explicitly stated.

In applying this doctrine to the text found in the 1977 amendments of § 216(b), it once again can be concluded that Congress did in fact authorize the granting of punitive damages for victims of retaliatory discharge. The addition and authorization of “‘legal’ relief” is the first issue to be dealt with. This term, “legal relief,”⁵³ is one that is commonly understood to mean both compensatory and punitive damages.⁵⁴ More specifically, some commentators have stated that in regards to a case involving a retaliatory discharge claim, legal relief includes both compensatory and punitive damages for emotional distress resulting from such a discharge.⁵⁵ Therefore, the inclusion of this term in the 1977 amendments suggests that Congress intended the authorization of punitive damages, as may be appropriate, as a form of relief for victims of retaliatory discharge.⁵⁶

In applying this principle of *ejusdem generis* to § 216(b), it is clear that Congress authorizes and enumerates specific forms of relief in this section, but does not limit the authorized forms to those expressly listed.

50. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114–15 (2001).

51. *See United States v. Faudman*, 640 F.2d 20, 23 (6th Cir. 1981).

52. *Hughey v. United States*, 495 U.S. 411, 419 (1990).

53. 29 U.S.C. § 216(b) (2000).

54. *Travis v. Gary Cmty. Mental Health Ctr., Inc.*, 921 F.2d 108, 111 (7th Cir. 1990); *see, e.g., Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 460 (1975) (stating that an individual who establishes a cause of action under § 1981 is entitled to legal relief, including compensatory and punitive damages).

55. 48A AM. JUR. 2D *Labor and Labor Relations* § 4682 (1994).

56. *See Travis*, 921 F.2d at 111 (suggesting that by authorizing “legal” relief Congress was also authorizing punitive damages).

The forms of relief that surround the term “legal relief,” are “employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages.”⁵⁷ Based on the principle of *ejusdem generis*, the courts that have mistakenly interpreted § 216(b) to not warrant the granting of punitive damages have declared these explicitly enumerated forms of relief as only compensatory in nature. Therefore, the courts that support the conclusion that punitive damages are not included under the statute use their incorrect characterization as indicia of Congressional intent.⁵⁸

To the contrary, the specific terms that surround “legal relief” can be seen as possessing punitive, as well as compensatory traits.⁵⁹ This list includes liquidated damages, which the U.S. Supreme Court itself has held to be punitive in nature.⁶⁰ Therefore, as a result of this section containing specific terms that are characterized as both compensatory and punitive, the term “legal relief” can be viewed as expanding the available forms of relief for retaliatory discharge as including all forms of relief in both classes. Congress authorizes these types of remedies, whenever a court deems it necessary to grant such and where it finds it as a beneficial way to effectuate the purposes of the prescribed section.⁶¹ Thus, punitive damages are both permissible and warranted according to this doctrine.

57. 29 U.S.C. § 216 (2000).

58. See *Snapp v. Unlimited Concepts, Inc.*, 208 F.3d 928,934 (11th Cir. 2000) (declaring that in turning to the principle of *ejusdem generis*, all the relief in § 216(b) is compensatory in nature and that punitive damages have nothing to do with compensation); *Lanza v. Sugarland Run Homeowners Ass'n*, 97 F. Supp. 2d 737, 740 (E.D. Va. 2000) (claiming that “[t]o allow punitive damages, which are designed to ‘punish and deter the wrongdoer,’ would therefore be inconsistent with the statute’s compensatory scheme”); *Looney v. Commercial Union Assurance Co.*, 428 F. Supp 533, 537 (E.D. Mich. 1977). “The word ‘legal’ refers to the liquidated damages award which the preceding sentence of the Act makes available and the principle of *ejusdem generis* limits the available unlisted forms of relief to the same kind of relief as that enumerated. The remedies contained in the list are, without exception, equitable remedies.” *Id.* (citation omitted).

59. See *Travis*, 921 F.2d at 111.

60. ROBERT BELTON, REMEDIES IN EMPLOYMENT DISCRIMINATION LAW § 13.1 (1992) (stating that the remedy of liquidated damages has a different nature in employment law than it does in contracts, where it takes a compensatory nature); *Trans World Airlines v. Thurston*, 469 U.S. 111, 125–26 (1984) (discussing how liquidated damages have a punitive nature and are designed to “furnish an effective deterrent to willful violations”).

61. See *Marrow v. Allstate Security & Investigative Servs., Inc.*, 167 F. Supp 2d 838, 842–43 (E.D. Pa. 2001); *Travis*, 921 F.2d at 111–12.

B. Liquidated Damages v. Punitive Damages

It is pertinent to note that in determining the meaning of a statute the legislature's intent is determined by its action, not by its failure to act.⁶² Therefore, Congress' clear distinction between liquidated damages and punitive damages, as set out in the first and second sentences of § 216(b) is significant in this analysis. The first sentence of this particular section reads:

[a]ny employer who violates the provision of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid over-time compensation, as the case may be, and in an additional equal amount as liquidated damages.⁶³

This language is unambiguous and limits the authorized remedies to very specific forms. In contrast, the second sentence does not provide such limitations, for it reads:

[a]ny 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 and an additional equal amount as liquidated damages.⁶⁴

Thus, the remedies here are not finite and Congress clearly intended for the authorization of unlimited forms through its inclusion of the phrases, "without limitation" and "legal or equitable relief."⁶⁵ These differences and the implementation of broad language both indicate that Congress intended to authorize different remedies depending on which section of the FLSA is being violated.⁶⁶

Here Congress does clearly act (via the express language of the statute) and based on the condition that § 215(a)(3) is violated, Congress

62. See *Nat'l Rifle Ass'n of Am., Inc. v. Reno*, 216 F.3d 122, 137 (D.C. Cir. 2000); *Nawrocki v. Macomb County Road Comm'n*, 615 N.W.2d 702, 720 (Mich. 2000); *Bottomly v. Ford*, 157 P.2d 108, 112 (Mont. 1945).

63. 29 USC § 216(b) (2000).

64. *Id.* (emphasis added).

65. *Id.*

66. See *Martin v. Am. Int'l Knitters Corp.*, No. 91-0027, 1992 U.S. Dist. LEXIS 3888, at *1 (D. N. Mar. 1. Feb. 3, 1992) (discussing that victims under § 216(b) have a full range of remedies available to them, including punitive damages, as opposed to victims of § 206 and § 207).

distinctly sets out the forms of remedies that it authorizes. In regards to this issue, many courts that are not in support of awarding punitive damages have held that if Congress wanted to include punitive damages then it would have done so as it clearly did in § 216(a), by providing specific punitive sanctions.⁶⁷ These courts have failed to see that Congress has actually done so through the amended language and through the distinctions that exist between relief for violations of § 215(a)(3) alone, and § 206 and § 207 together. In § 206 and § 207, Congress does not include broad language and limits the relief, but it does just the opposite for § 215(a)(3). Therefore, it is clear that where there is a violation under § 216(b), a victim of retaliatory discharge is entitled to a broader range of relief, including punitive damages, and it is so authorized by Congress within the language of this statute.⁶⁸

In addition, the courts that set forth this argument involving § 216(a) fail to notice an important distinction between the two sections. Section 216(a) deals with punishing the offender criminally by way of fines and imprisonment,⁶⁹ where § 216(b), in contrast, deals with damages and the civil relief that should be granted to a victim.⁷⁰ It would therefore be logical for Congress to treat both of these sections quite differently, as it does.

IV. THE FRANKLIN PRESUMPTION: DOES IT APPLY HERE?

In addition to the number of canons of construction that may be used to interpret the language of a statute, including those previously stated, there are other doctrines a court can use. One such doctrine is the *Franklin* presumption.⁷¹ In *Franklin v. Gwinett County Public Schools*,⁷² the Supreme Court held that federal courts may use the available forms of relief to remedy a wrong, where the legal rights of an individual have

67. See *Snapp v. Unlimited Concepts, Inc.*, 208 F.3d 928,935 (11th Cir. 2000) (stating that Congress provided for punitive damages in § 216(b)); 29 U.S.C. § 216(b) (2000). "Any person who willfully violates any of the provisions of section 215 of this title shall upon conviction thereof be subject to a fine of not more than \$10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection." *Id.*

68. See *Travis v. Knappenberger*, No. CV-00-393-HU, 2000 U.S. Dist. LEXIS 18398, at *36-37 (Or. Oct. 6, 2000); *Travis v. Gary Cmty. Mental Health Ctr., Inc.*, 921 F.2d 108, 111-12 (7th Cir. 1990) (discussing that the statute provides that legal and equitable relief available is "without limitation," so it therefore may include compensatory and punitive damages)

69. 29 U.S.C. § 216(a) (2000).

70. *Id.* at § 216(b).

71. *Snapp*, 208 F.3d at 937.

72. 503 U.S. 60 (1992).

been invaded and where the federal statute in question provides for a general right to sue.⁷³ In fact, the Supreme Court specifically stated that as a general rule, “absent clear direction to the contrary by Congress, the federal courts have the power to award *any* appropriate relief in a cognizable cause of action brought pursuant to a Federal statute.”⁷⁴ This principle has come to be known as the *Franklin* presumption.⁷⁵ Based on this definition by the Supreme Court, it is clear that this presumption does apply to § 216(b). This section of the FLSA deals with the invasion of the rights of an individual and the right to enforce the FLSA without being punished by his or her employer for doing so; and it also sets out a general right for such individuals to sue. Therefore, in retaliatory discharge cases a court is permitted to grant punitive damages in the appropriate circumstances.⁷⁶

Section 216(b) clearly falls within the *Franklin* presumption. As stated above, in regards to retaliatory discharge claims, the issue of an individual’s rights being invaded arises.⁷⁷ These are the rights of an employee to report the unlawful practices and behavior of his or her employer. In addition, § 216(b) certainly provides a general right to sue since it authorizes a broad range of relief, including both punitive and compensatory forms.⁷⁸ This section cannot be considered as merely setting out a specified set of enumerated remedies as the Eleventh Circuit suggests⁷⁹ because of its expansive language of “including without limi-

73. *Id.* at 66. In *Bell v. Hood*, the Supreme Court stated that “where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.” 327 U.S. 678, 684 (1946) (citations omitted). See also 3 WILLIAM BLACKSTONE, COMMENTARIES *23 (1783) (explaining that this principle originated in English common law and describes it as an indisputable and general rule, that where there is a legal right, there is also a remedy whenever the right in question is violated).

74. 503 U.S. at 70–71 (emphasis added).

75. *Snapp v. Unlimited Concepts, Inc.*, 208 F.3d 928,937 (11th Cir. 2000) (explaining the *Franklin* presumption and declaring that it applies to circumstances where a cause of action exists to enforce a federal right).

76. See *Travis v. Gary Cmty. Mental Health Ctr., Inc.*, 921 F.2d 108, 112 (7th Cir. 1990) (claiming that courts are required to award relief to a prevailing party even if the party did not rely on the right statute or if they did not request the specific relief).

77. See *id.* at 111–12; see also *Snapp*, 208 F.3d at 937.

78. See *Travis*, 921 F.2d at 111.

79. *Snapp*, 208 F.3d at 937 (stating that § 216(b) offers a general right to sue is a laughable contention and that Congress specifically laid out a statutory scheme here with a distinct set of “circumscribed remedies”).

tation" and "legal relief."⁸⁰ Thus, it is not a limited set of relief that Congress prescribes here.

Therefore, the *Franklin* presumption is applicable to § 216(b). It also compels a finding that punitive damages are permitted under the statute. Under this doctrine, a victim of retaliatory discharge would be able to seek punitive damages under the Act.

V. THE LEGISLATIVE HISTORY OF § 216(B): AN UNHELPFUL TOOL

Another more common tool in the interpretation of a statute is the use of legislative history. It has been expressed that the courts may turn to legislative history for help in interpreting statutes to: (1) avoid absurd results, (2) prevent the law from turning on drafting errors, (3) understand the meaning of specialized terms, (4) understand the reasonable purpose a provision might serve, and (5) choose among reasonable purposes for language in politically controversial law.⁸¹ Therefore, the legislative history often indicates the action and intent of the legislature in drafting the corresponding law. In addition, it is a well settled rule that the intent of the legislature is revealed by its action and not by its failure to act.⁸² Unfortunately, the legislative history for this particular section, § 216(b), is very unhelpful.⁸³

The language of § 216(b) originated in the Senate, yet the committee reports fail to discuss it. From analyzing the legislative history, it is apparent that the Conference Committee adopted the Senate's proposal. However, the remarks provided are limited and ambiguous.⁸⁴ The Conference Committee reports simply state that the bill authorizes claims for "appropriate legal or equitable relief," but they fail to describe or clarify what might actually be considered appropriate relief.⁸⁵

The legislative history is unhelpful here and offers little guidance. The limited and simplistic history that is available compels us to turn to other forms of interpretation such as the ones previously discussed. In determining whether the statute includes punitive damages, it is important to also look at the policies behind allowing punitive damages. To do

80. 29 U.S.C. § 216(b) (2000).

81. See Stephen Breyer, *The 1991 Justice Lester W. Roth Lecture On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 860-61 (1992).

82. 73 AM. JUR. 2d *Statutes* § 84 (2001).

83. See *Snapp*, 208 F.3d at 933 (deeming the legislative history unhelpful); see also *Travis*, 921 F.2d at 112 (also deeming the legislative history unhelpful in interpreting this section).

84. *Id.*

85. *Id.*

so, the conduct that is prohibited must be examined. Similarly, it is important to analyze how such a prohibition can or should be facilitated and implemented.

VI. RETALIATORY DISCHARGE: A TORTIOUS ACT

Section 215(a)(3) prohibits retaliatory discharges,⁸⁶ while § 216(b) provides the remedy that a court may grant to an employee when the employer has violated § 215(a)(3). In this specific instance, § 215(a)(3) prohibits the firing or discrimination of any employee that may have asserted his or her rights included within the FLSA.⁸⁷ Generally, retaliatory discharge consists of the firing of an employee that is undoubtedly violative of public policy and that is made in retaliation for the employee's conduct. One example of retaliatory discharge is an employer discharging his or her employee for reporting the employer for an alleged violation of the FLSA to the Department of Labor. Many states have drafted statutes in response to this type of discharge in order to protect the victims and allow these individuals to recover punitive damages.

Employment relationships are commonly developed through contractual agreements, yet there are many circumstances where this is not so. In these circumstances, the employee and employer choose not to agree, expressly or impliedly, on a specified period of employment, nor do they agree to end their relationship on the occurrence of a particular event. Therefore, there is no agreement between these individuals as to what constitutes "good cause" sufficient for dismissal. Under these circumstances, courts will presume that these are "at-will" employees.⁸⁸

Under the doctrine of at-will employment, an employer may discharge an employee with or without cause, and therefore has a "free hand" in firing or retaining an employee without incurring liability.⁸⁹ Although an employer can dismiss the employee as he or she chooses, the courts have carved out exceptions to this doctrine.⁹⁰ These exceptions include situations where the discharge is retaliatory and conflicts with a state's public policy,⁹¹ usually when it is related to public health, wel-

86. 29 U.S.C. § 215(a)(3) (2000).

87. *Id.* at § 216(b).

88. Richard E. Kaye, Annotation, *Liability Under Common Law For Wrongful or Retaliatory Discharge of At-Will Employee For In-House Complaints or Efforts Relating to Health or Safety*, 93 A.L.R. 5th 269 (2002).

89. 82 AM. JUR. 2D *Wrongful Discharge* § 1 (2002).

90. *Id.* at § 3, § 63.

91. *Id.* at § 53.

fare, or safety.⁹² Some courts also permit employees to bring claims for retaliatory discharge for in-house complaints that deal with issues of the internal health and safety of the place of employment as well.⁹³ In limited circumstances, the “at-will” employee that falls into any of these exceptions will be permitted to commence a tort action against his or her employer.⁹⁴

Retaliatory discharge is a type of intentional tort.⁹⁵ Generally, punitive damages are awarded for intentional torts.⁹⁶ This type of remedy is granted to punish and deter a wrongdoer and other potential wrongdoers.⁹⁷ Punitive damages are granted in instances where there is outrageous conduct either because the defendant’s acts are executed with an evil motive or because they are performed with a reckless indifference to the rights of others.⁹⁸ In addition, punitive damages may be awarded because of, and are measured by, the defendant’s wrongful purpose or intent.⁹⁹ Retaliatory discharges are precisely these situations in which the employer is acting in an outrageous manner, with an evil motive to impermissibly punish his or her employee, with a conscious disregard of his or her rights to report unlawful conduct engaged in by their employers. Therefore, it is a logical inference that successful retaliatory dis-

92. *Id.* at § 55; see also *Green v. Ralee Eng’g Co.*, 960 P.2d 1046, 1051 (Cal. 1998) (upholding the employee’s claims, where employee was fired subsequent to complaining about the company shipping parts that failed inspection, noting that there were FAA regulations that prohibited the employer’s conduct of which employee specifically complained).

93. See, e.g., *Kaye*, *supra* note 89 (discussing how some courts view in house complaints as sufficient to state a claim, but other courts have held the opposite, which is that these internal complaints do not suffice).

94. *Id.* at § 59.

95. See Paul Berks, *Social Change And Judicial Response: The Handbook Exception To Employment-At-Will*, 4 EMPLOYEE RTS. & EMP. POL’Y J. 231, 251 (2000) (discussing that common law courts developed a “public policy exception” to the at-will rule). Berks article also states that the “public policy” exception made judicial redress available to employees whose discharges were sufficiently outrageous that, if proven, would give rise to a cause of action for an intentional tort. *Id.* See also Robert C. Lockwood, *Alabama’s Statutory Exception to the Employee At-Will Doctrine: Retaliatory Discharge Claims Under Alabama Code Section 25-5-11.1*, 47 ALA. L. REV. 541 (1996) (discussing how tort actions require jury trials and therefore so too should an action for retaliatory discharge since it is a tort action); Nancy Lee Firak & Kimberly A. Schmaltz, *Air Rage: Choice Of Law For Intentional Torts Occurring In Flight Over International Waters*, 63 ALB. L. REV. 1, 75–76 (1999) (recognizing that a retaliatory discharge contravenes public policy and the court stated that the employer’s retaliatory discharge is properly characterized as an intentional tort entitling the seaman to damages caused by the abusive firing); *Hinton v. Pac. Enters.*, 5 F.3d 391, 394 (9th Cir. 1993) (applying state wrongful discharge statutes of limitations under either contract or tort theories).

96. RESTATEMENT (SECOND) OF TORTS § 908 cmt. b (1979).

97. *Id.*

98. *Id.*

99. *Id.*

charge claims provide the proper and necessary circumstances needed to justify a court granting punitive damages.

VII. PUNITIVE DAMAGES: REMEDY FOR RETALIATORY DISCHARGE

Punitive damages have been defined by the Supreme Court as “private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence.”¹⁰⁰ Further, the Restatement of Torts has defined punitive damages as “damages, other than compensatory or nominal damages, awarded against a person to punish him for similar conduct in the future.”¹⁰¹ In *Smith v. Wade*, the Supreme Court explicitly stated that “[f]irst, punitive damages ‘are assessed for the avowed purpose of visiting a punishment upon the defendant.’ Second, the doctrine is rationalized on the ground that it deters persons from violating the rights of others. Third, punitive damages are justified as a ‘bounty’ that encourages private lawsuits seeking to assert legal rights.”¹⁰² Generally, the purposes of punitive damages is to further an interest by punishing “unlawful conduct and deterring its repetition.”¹⁰³ Punitive damages may also “certify” the existence of rights or interests of plaintiffs, as well as the legal duty of a defendant to respect that right.¹⁰⁴

The uses of punitive damages as retribution are inherent in their nature because of the effect of punishing a wrongdoer. The justification for the retribution is that the punishment pays back society, as well as the victim for what he has “taken.”¹⁰⁵ Moreover, the use of punitive damages also significantly increases the likelihood that these violators will be identified and justifiably punished.¹⁰⁶

The use of these types of damages in employment cases, where the employee is at-will, has been recognized and expanded by the courts over the years.¹⁰⁷ The general rule regarding at-will employment, as de-

100. ROBERT BELTON, REMEDIES IN EMPLOYMENT DISCRIMINATION LAW § 13.1 (1992) (citing *Gertz v. Robert Welch Inc.*, 418 U.S. 30, 41 (1983)).

101. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 908(1) (1979)).

102. *Id.* (citing *Smith v. Wade*, 461 U.S. 30, 58 (1983)).

103. *BMW of N. Am. v. Gore*, 517 U.S. 559, 568 (1996).

104. David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 VILL. L. REV. 363, 374 (1994) (providing a brief historical background on the origination of punitive damages and the controversy around their use). See Jane P. Mallor, *Punitive Damages for Wrongful Discharge of at Will Employees*, 26 WM. & MARY L. REV. 449, 472–80 (1985), for a discussion of the history of punitive damages.

105. Owen, *supra* note 104, at 375.

106. *Id.* at 380–81.

107. See Mallor, *supra* note 104, at 451; See also *Adler v. Am. Standard Corp.*, 538 F. Supp. 572, 580 (D. Md. 1982); *Tameny v. Atl. Richfield Co.*, 610 P.2d 1330, 1336 (Cal. 1980); *Kelsay v.*

scribed above, is that employers can discharge employees for essentially any reason at all.¹⁰⁸ To restrain this unbounded power of employers, federal and state laws were enacted to prevent discharges that violated important public policies.¹⁰⁹ Therefore, these laws provided exceptions and worked to curtail the power that these employers had with regard to their at-will employees.

The exception to the broad and unlimited at-will rule encompasses situations where discharging an employee violates public policy. This exception has been created by the courts and is founded in the area of tort law.¹¹⁰ Therefore, these exceptions are implemented in cases where the employee is discharged for refusing to commit an illegal act, for performing a legal duty or invoking a statutory right, or where employees assert their rights and alert authorities as to illegal acts of the employer.¹¹¹ It is pertinent to note that punitive damages are awarded when the employer's conduct is "willful, wanton, malicious, reckless, oppressive, grossly negligent" and "fraudulent and . . . [in] bad faith."¹¹² Courts that use punitive damages in cases of wrongful discharge do so when the claim is recognized as an intentional tort.¹¹³ The need for a deterrent effect occurs in these cases since there are occasions where important public or social policy is threatened by the wrongful discharge of the employee.¹¹⁴

The objective for a cause of action, such as the entitlement to punitive damages for wrongful discharge is to protect the public interest from interference and deter unwanted behavior.¹¹⁵ Under this public policy tort theory, the plaintiff is required to plead and prove "the existence of a clear public policy manifested in a state or federal constitution, statute or

Motorola, Inc., 384 N.E.2d 353, 359 (Ill. 1978); *Nees v. Hocks*, 536 P.2d 512, 515-16 (Or. 1975).

108. See Mallor, *supra* note 104, at 455; see also Richard E. Kaye, Annotation, *Liability Under Common Law For Wrongful or Retaliatory Discharge of At-Will Employee For In-House Complaints or Efforts Relating to Health or Safety*, 93 A.L.R. 5th 269 (2002).

109. See Mallor, *supra* note 104, at 456.

110. *Id.* at 458.

111. *Id.* at 462-64.

112. *Id.* at 476.

113. See *id.* at 480; Berks, *supra* note 95, at 251; see also Lockwood, *supra* note 95, at 544 (discussing how retaliatory discharge is a tort action); Firak & Schmaltz, *supra* note 95, at 75 (recognizing that a retaliatory discharge contravenes public policy and the court stated that the employer's retaliatory discharge is properly characterized as an intentional tort entitling the seaman to damages caused by the abusive firing); *Hinton v. Pac. Enters.*, 5 F.3d 391, 394 (9th Cir. 1993) (applying state wrongful discharge statutes of limitations under either contract or tort theories).

114. Mallor, *supra* note 104, at 480.

115. *Id.* at 489-90.

administrative regulation, or common law.”¹¹⁶ In addition, the employee has the burden to prove that the reason for his or her dismissal violates public policy, that the dismissal was motivated by conduct related to the public policy, and finally, that the employer lacked a legitimate justification for the dismissal.¹¹⁷

The Supreme Court has held that “[p]unitive damages may properly be imposed to further a state’s legitimate interests in punishing unlawful conduct and deterring its repetition.”¹¹⁸ This concept can and should be extended to the interests of the federal government. The FLSA was enacted for the purpose of protecting employees from their employers, by keeping the power of both entities balanced. Section 215(a)(3) specifically makes it unlawful for an employer to retaliate against an employee if that employee asserts his or her rights.¹¹⁹ In essence, § 215 (a)(3) provides a mechanism by which employees can facilitate and ensure the enforcement of the FLSA. By interpreting § 216(b) to include punitive damages, Congress’ interests in punishing the unlawful conduct and deterring its repetition is achieved.¹²⁰ Also, such an interpretation promotes Congress’ intent and the purpose of the Act.

VIII. PUNITIVE DAMAGES IN RETALIATORY DISCHARGE CLAIMS: IS THERE A LIMIT?

The use of punitive damages brings about concerns about overuse or misuse. One such concern that many courts have is that if punitive damages are permitted, then they would be awarded in every case of retaliatory discharge and a jury would find it almost impossible not to award these damages.¹²¹ This is due to the fact that in retaliatory discharge claims, the defendant’s act is almost always willful or intentional and motivated by a conscious desire to retaliate against an employee.¹²² In addition to this concern, these courts also fear that there will be no

116. 1 HENRY H. PERRITT, JR., *EMPLOYEE DISMISSAL LAW AND PRACTICE* § 4 (4th ed. 1998)

117. *Id.*

118. *BMW of N. Am. v. Gore*, 517 U.S. 559, 568 (1995).

119. 29 U.S.C. § 215(a)(3) (2000).

120. *Gore*, 517 U.S. at 568.

121. *See Snapp v. Unlimited Concepts, Inc.*, 208 F.3d 928, 936 (11th Cir. 2000) (stating that punitive damages would inexorably flow from any finding for the plaintiff); *Johnston v. Davis Sec., Inc.*, 217 F. Supp. 2d 1224, 1230 (2002); *Lanza v. Sugarland Run Homeowners Ass’n*, 97 F. Supp. 2d 737, 741 (E.D. Va. 2000).

122. *See id.*

limit on these damages and that they will far exceed the boundaries set out in § 216(a).¹²³

These contentions are without merit or justification. First, it is a clear and well-settled rule that courts should make certain that awards for punitive damages do not exceed an amount that will suffice to punish and deter. In achieving this goal, courts are instructed to assess the defendant's financial position and take that into consideration, while determining an amount that clearly reflects and mirrors the harm incurred.¹²⁴ In addition to this regulation, courts must decide, when challenged, whether a punitive damage award violates state common law, or whether it is extraordinarily excessive and in violation of a defendant's due process rights. Furthermore, when a punitive award is challenged as excessive and unconstitutional, the court must review the award granted and ensure that it is not.¹²⁵ Therefore, it is evident that certain safeguards have been developed in order to deal with the very problem and concern that most of the courts have expressed.

In addition to these commonly followed principles that act as safeguards, the plain language of § 216(b) also makes certain that punitive damages will not always be awarded and will not be excessive or unfair. These internal safeguards are contained within the statute, by the limiting language: "as may be appropriate to effectuate the purposes of section 215(a)(3)."¹²⁶ This very language indicates that although Congress authorizes a broad range of relief for victims of retaliatory discharge, it only does so to the extent that the award or the relief is in congruence with the purposes of the statute. Therefore, there is a third safeguard in place to guarantee that only fair grants of punitive damages are made.

123. *See id.*

124. *Owens-Corning Fiberglass Corp. v. Malone*, 972 S.W. 2d 35, 40 (Tex. 1998) (discussing that the jury can consider many factors in determining the proper punitive damage award, such as fines already imposed on the defendant, their financial status, past awards actually paid by the defendant for similar violations, as well as factors). The court also indicates that the jury can also consider evidence introduced by the defendant to mitigate the damages. *Id.* *See* RESTATEMENT (SECOND) OF TORTS, § 908 cmt. e (1979) (suggesting that it is appropriate to consider both punitive damages awarded in prior suits and those that may be granted in future suits).

125. *See Owens-Corning Fiberglass Corp.*, 972 S.W.2d at 35; *Gore*, 517 U.S. at 568 (setting constitutional limits on the amount of punitive damage awards); *see also* David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 VILL. L. REV. 363, 384-385 (1994) (indicating that adequate jury instructions an review of punitive damages help assure that the standards and procedures are applied in the most fair and accurate manner); Richard A. Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control*, 52 FORDHAM L. REV. 37, 59 (1983) (noting that a bifurcated trial procedure and review on the appellate level leads to juries having a voice as to how much of an award should be granted, but also ensures that there are safeguards which will protect a defendant from unfairness).

126. 29 U.S.C. § 216(b).

Further, by amending the statute to add the language “including without limitation,”¹²⁷ Congress is also permitting the courts to have discretion as to what forms of relief should be granted. Depending on the facts of the case, courts will deem what relief is appropriate. Thus, the courts must engage in a case-by-case analysis, which makes it unlikely that punitive damages will be deemed as appropriate in every case. Based on the unique circumstances of each case, it would be impossible for one to conclude that punitive damages will always be a form of relief that is indefinitely granted to all victims of retaliatory discharge. Through the inclusion of this language, in both instances, Congress has actually limited the amount of relief available in an explicit manner. It has done so in order to protect against violations of a defendant’s rights, and more specifically, to ensure that the award and damages granted are constitutional and that they do not offend the due process rights of that individual.

IX. PUNITIVE DAMAGES FOR RETALIATORY DISCHARGE IN STATE CLAIMS

To further determine whether punitive damages are appropriate under the FLSA, we examine the use of punitive damages in other areas. One such area is the use of punitive damages in state law. More specifically, many states have recognized retaliatory discharge as a tort claim and have therefore allowed for the recovery of punitive damages.¹²⁸

In *Kelsay v. Motorola, Inc.*,¹²⁹ the Supreme Court of Illinois held that punitive damages may be awarded where the plaintiff was discharged in retaliation for filing a workers’ compensation claim.¹³⁰ The court found that the purpose of the enactment of the State Workmen’s Compensation Act was to further public policy.¹³¹ The court surmised

127. *Id.*

128. *See, e.g.,* Webner v. Titan Distribution, Inc. 101 F. Supp. 2d 1215 (N.D. Iowa 2000); Adler v. Am. Standard Corp., 538 F. Supp. 572 (D. Md. 1982); Tameny v. Atl. Richfield Co., 610 P.2d 1330 (Cal. 1980); Kelsay v. Motorola, Inc., 384 N.E.2d 353 (Ill. 1978); Murphy v. Topeka-Shawnee County Dep’t of Labor Servs., 630 P.3d 186 (Kan. Ct. App. 1981); Hansen v. Harrah’s, 675 P.2d 394 (Nev. 1984); Nees v. Hocks, 536 P.2d 512 (Or. 1975); Harless v. First Nat’l Bank, 246 S.E.2d 270 (W. Va. 1982).

129. 384 N.E.2d 353.

130. *Id.* at 361. The court affirmed the trial court’s award of compensatory damages public policy reasons, and held that punitive damages could be awarded for retaliatory discharge. They also stated that in the absence of the deterrent effect of punitive damages there would be little to dissuade an employer from engaging in the practice of discharging an employee for filing a workmen’s compensation claim. *Id.*

131. *Id.* at 357. The Illinois Workmen’s Compensation Act was amended in 1975, making it

that in order to “uphold and implement this public policy” a cause of action for retaliatory discharge must exist.¹³² Further, the court also determined that a cause of action for retaliatory discharge is necessary. It found that the threat of discharge would seriously undermine the purpose of the statute since employees would be fearful of asserting their rights without the necessary protection.¹³³ The court rejected the argument that the legislature never intended civil remedies because of the absence of such a provision in the Act.¹³⁴ It explained that not only were civil remedies appropriate, but that punitive damages were also included.¹³⁵ The court noted that in the absence of punitive damages, “there would be little to dissuade an employer from engaging in the practice of discharging an employee” for filing a claim.¹³⁶

In *Hansen v. Harrah's*, the former employees brought an action similar to the above case, claiming that their employer wrongfully discharged them because they filed workers' compensation claims.¹³⁷ The Nevada Supreme Court held that punitive damages were appropriate where the employees could successfully demonstrate “malicious, oppressive, or fraudulent conduct.”¹³⁸ This court found that the granting of punitive damages would create a threat, which would be the most effective way of deterring such conduct.¹³⁹

Even in cases where an action is brought under both state law and federal law, the courts have awarded punitive damages on the state law claim. One example is illustrated by *Cancellier v. Federated Dept. Stores*, where a former employee brought an action for wrongful discharge based on the Age Discrimination in Employment Act and state law.¹⁴⁰ The court in this case recognized that under the federal statute, punitive damages were unavailable, but they proceeded to uphold the jury award of punitive damages under the state claim.¹⁴¹

unlawful for an “employer to interfere with or coerce the employee in the exercise of his rights under the Act.” *Id.* (citing Ill. Rev. Stat. 1975, ch. 48, par. 138.4(h)).

132. *Id.*

133. *Id.* at 357.

134. *Id.* at 358.

135. *Id.* at 360.

136. *Id.*

137. 675 P.2d 394 (Nev. 1984) (recognizing a public policy exception to the at-will rule, making retaliatory discharge for filing a workmen's compensation claim actionable in tort).

138. *Id.* at 397.

139. *Id.* (discussing that the threat of punitive damages may be the most effective means of deterring conduct which would frustrate the purpose of our workmen's compensation laws).

140. 672 F.2d 1312 (9th Cir. 1982).

141. *Id.* at 1320 (holding that a separate verdict for punitive damages, are preferred, and that the trial judge did not commit reversible error in instructing the jury on “determining factor” under

It is clear, that many of the states allow punitive damages as an award in cases where employees have been wrongfully discharged for asserting their rights.¹⁴² To do so, the courts have adopted the public policy exception to the at-will doctrine.¹⁴³ The presence of a law or statutory right, such as this, indicates that there is clear public policy favoring that right. In the case of employment, the right that is often favored is usually economic security for employees.¹⁴⁴ To effectuate this public policy, courts allow punitive damages in order to deter unwanted behavior.¹⁴⁵ The states have found that punitive damages are not only acceptable, but also that they are important in protecting the public policy for which the law was originally enacted to preserve.¹⁴⁶ Upon evaluating this reasoning of the state courts, it too should also be applied to the FLSA. Therefore, in awarding damages under the FLSA, the courts should follow and adopt the states' policies for awarding punitive damages.

In its original enactment at the time of the Great Depression, the FLSA's purpose was to increase standards of living, as well as to provide safe and healthy work environments. The importance of that policy remains today. Congress has amended the FLSA virtually every year since its enactment,¹⁴⁷ indicating the importance of the statute and the need to promote public policy. Punitive damages should be awarded in cases of retaliatory discharge, under the FLSA, in order to promote the intent of the statute, deter conduct that is clearly against its purpose and encourage employees to play an active role in the enforcement of this statute.

X. OTHER FEDERAL STATUTES AND RETALIATORY DISCHARGE PROVISIONS

In interpreting a statute, it is often a useful tool to look to statutes that have similar language in order to decipher the meaning of the one

the ADEA, in using a general verdict, or in allowing tort damages on pendent state claims)

142. See *Hansen*, 675 P.2d at 396 (claiming that many other states have adopted or recognized a public policy exception to the at-will rule making retaliatory discharge for filing a workmen's compensation claim actionable in tort). The court also stated that employers would have an inequitable advantage if they were able to intimidate employees with the loss of their jobs upon the filing of claims for insurance benefits as a result of industrial injuries. *Id.*

143. *Id.*

144. *Id.* at 397.

145. See *id.*

146. See *id.*

147. THE FAIR LABOR STANDARDS ACT 16 (Ellen C. Kearns et al. eds., 1999).

that is ambiguous.¹⁴⁸ In determining the availability of punitive damages under the FLSA, we will look to other federal statutes that contain similar language to that of the 1977 amendments. Further, many of these statutes specifically contain retaliatory discharge provisions. Thus, the language of these statutes and their purposes further assist in interpreting § 216(b).

A. Age Discrimination in Employment Act

One such act that can assist in determining whether punitive damages should be awarded under § 216(b) is the Age Discrimination in Employment Act ("ADEA"). The ADEA prohibits the employer from discriminating against their employees or job applicants because of age. Much like the FLSA, the ADEA has also included a section (§ 623(d)), which prohibits discrimination, including retaliatory discharge, where the applicant or employee has asserted his or her rights under the ADEA.¹⁴⁹ Much like the FLSA, the ADEA also provides statutory remedies for a violation of § 623(d).¹⁵⁰ These remedies prescribed by the ADEA must be analyzed.

148. See *Snapp v. Unlimited Concepts, Inc.*, 208 F.3d 928, 938 (11th Cir. 2000) (stating that the "legal relief" language in the ADEA is exactly the same as that found in the FLSA, and concluded that the FLSA should be interpreted similarly to preclude an award of punitive damages); *Bolick v. Brevard County Sheriff's Dep't*, 937 F. Supp. 1560, 1567 (M.D. Fla. 1996).

149. 29 U.S.C. § 623(d) (2000).

Opposition to unlawful practices; participation in investigations, proceedings, or litigation. It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

Id.

150. 29 U.S.C. § 626(b) (2000).

Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference, and persuasion. The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided*, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including

Under this section, most courts have refused to grant punitive damages for plaintiffs' claims.¹⁵¹ These courts have held that liquidated damages, which are prescribed and normally granted, are specifically punitive in nature and thereby they refuse to grant them.¹⁵² It is a common policy that courts will often deny or reduce punitive damages or deny liquidated damages in order to prevent "double recovery."¹⁵³ This is illustrated in *Kelly v. American Standard, Inc.*, where the Ninth Circuit found liquidated damages to be a substitute for punitive damages in cases of willful violations of the ADEA.¹⁵⁴ The Ninth Circuit reasoned that because liquidated damages have a deterrent effect like punitive damages they should not be awarded.¹⁵⁵ The court further explained that punitive damages would frustrate Congressional intent.¹⁵⁶ Every circuit court that has decided this issue has held that punitive damages are not available under the ADEA,¹⁵⁷ but it is important to look at the reasoning behind these decisions.

In the case of the ADEA, the House Conference Committee Report for the 1978 amendments expressly states, "the ADEA as amended by this act does not provide remedies of a punitive nature."¹⁵⁸ Therefore, Congress found that there is no need for such damages and explicitly stated this. There is no room for courts to decide otherwise. Since Congress clearly acted and specifically stated its intentions, it would be illogical to interpret the statute otherwise.

Many proponents of the contention that punitive damages should not be awarded under § 216 (b) tend to rely on the fact that the ADEA incorporated the remedial provisions of the FLSA to support their contentions.¹⁵⁹ However, it would be a circular argument to say that the

without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

Id.

151. LEX K. LARSON, EMPLOYMENT DISCRIMINATION § 146.03 (2d ed. 2003).

152. *Id.*

153. *Id.*

154. 640 F.2d 974-79 (9th Cir. 1981).

155. *Id.* at 979-80.

156. LARSON, *supra* note 151.

157. *Id.*

158. *Id.*

159. *Id.*

FLSA does not provide punitive damages because the ADEA does not. This is not a well-founded contention for two reasons. First, Congress clearly proscribes the granting of punitive damages through explicit language under the ADEA.¹⁶⁰ Second, it is the FLSA, which is referred to in interpreting the ADEA and not the converse.

In *Moskowitz v. Trustees of Purdue University*, the Seventh Circuit addressed this very issue when a plaintiff brought a claim under the ADEA.¹⁶¹ The court noted that the language of the statute through the inclusion of the words “such legal or equitable relief as may be appropriate,”¹⁶² was broad enough to include both compensatory and punitive damages for plaintiffs that were victims of retaliation.¹⁶³ When noting this, the court specifically referred to the fact that the ADEA incorporates the remedies and procedures of the FLSA, which have been recognized as creating an “exception to the narrow construal of legal relief.”¹⁶⁴ It is only fair to concede that as a result of no retaliation being alleged in *Moskowitz*, the court’s opinion on the issue is essentially dicta.¹⁶⁵ It is also important to realize that in cases under the FLSA and Equal Pay Act, where the same language applies, the courts interpret it as authorizing compensatory and punitive damages.¹⁶⁶

B. Americans with Disabilities Act

Another significant federal employment statute with an anti-retaliation provision is the Americans with Disabilities Act (“ADA”).¹⁶⁷ The ADA, which was enacted in 1990, to make it illegal for employers to discriminate against employees with disabilities.¹⁶⁸ It was enacted with a goal to “provide ‘reasonable accommodation’ to employees with disabilities.”¹⁶⁹ Like the FLSA, the ADA provides a statutory prohibition of retaliation against employees who assert their rights, oppose discrimi-

160. *See id.*

161. 5 F.3d 279 (7th Cir. 1993).

162. *Id.* at 283–84 (citing 29 U.S.C. § 626(b)).

163. *Id.* at 283.

164. *Id.*

165. *Id.*; *see also* LARSON, *supra* note 151.

166. *See* Travis v. Gary Cmty. Mental Health Ctr., Inc., 921 F.2d 108, 111 (7th Cir. 1990) (involving a retaliation claim under the FLSA); Soto v. Adams Elevator Equip. Corp., 941 F.2d 543 (7th Cir. 1991) (involving a retaliation claim under the Equal Pay Act).

167. 42 U.S.C. § 12203 (2002).

168. 1 HENRY H. PERRITT, JR., EMPLOYEE DISMISSAL LAW AND PRACTICE § 2.14 (4th ed. 1998).

169. *Id.* (citing ADA § 102(b)(5), 42 U.S.C. § 12112(b)(5)).

nation, or participate in proceedings under the ADA.¹⁷⁰ Section 503 of the ADA specifically prohibits such retaliation.¹⁷¹ This section applies to all the titles that fall under the ADA.¹⁷² Because the ADA was essentially an extension of the Rehabilitation Act of 1973,¹⁷³ the legislative history of the ADA indicates that it should be interpreted in the same way as the Rehabilitation Act.¹⁷⁴ Section 505 of the ADA states that the "remedies, procedures, and rights" of Title VI of the Civil Rights Act of 1964 are available under the ADA.¹⁷⁵ Further, § 102 of the Civil Rights Act of 1991 interprets that the ADA makes both compensatory and punitive damages available for violations of the ADA.¹⁷⁶

A number of courts have discussed the issue of whether punitive damages are available to plaintiffs in cases of retaliatory discharge under the ADA.¹⁷⁷ In *Niece v. Fitzner*, the court discusses the rationale used by most courts permitting the granting of punitive damages under the ADA.¹⁷⁸ The court stated that the remedies and procedures set out in the ADA were modeled after Title VI and Title IX of the Civil Rights Act of 1964.¹⁷⁹ Since the Supreme Court, in *Franklin v. Gwinnett County Pub-*

170. 1 HENRY H. PERRITT, JR., *AMERICANS WITH DISABILITIES ACT HANDBOOK* § 4.14 (3d ed. 1997).

171. 42 U.S.C. § 12203 (2002). The provision reads:

Prohibition against retaliation and coercion.

(a) Retaliation. No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.

(b) Interference, coercion, or intimidation. It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter.

(c) Remedies and procedures. The remedies and procedures available under sections 12117, 12133, and 12188 shall be available to aggrieved persons for violations of subsections (a) and (b) of this section, with respect to subchapter I, subchapter II and subchapter III, respectively.

Id.

172. *AMERICANS WITH DISABILITIES ACT HANDBOOK*, *supra* note 170, at § 5.34.

173. 29 U.S.C. §§ 701–709, 720–724, 730–732, 740–741, 750, 760–764, 770–776, 780–787, 790–794 (1988); *see also* *EMPLOYEE DISMISSAL LAW AND PRACTICE*, *supra* note 168, at § 2.15.

174. *EMPLOYEE DISMISSAL LAW AND PRACTICE*, *supra* note 168, at § 2.15.

175. *Id.*

176. *Id.*

177. *See e.g.*, *Niece v. Fitzner*, 922 F. Supp. 1208, 1219 (E.D. Mich. 1996); *Garrett v. Chi. Sch. Reform Bd. of Trs.*, No. 95 C 7341, 1996 U.S. Dist. LEXIS 10194, at * 1 (N.D. Ill. July 18, 1996).

178. 922 F. Supp. at 1219.

179. *Id.*

lic Schools,¹⁸⁰ held that under Title IX any remedy was available, this extended to the remedies available for retaliation under the ADA.¹⁸¹ Following the Supreme Court's decision in *Franklin* and the fact that the ADA was modeled after those acts, the courts have determined that punitive damages are available under the ADA's anti-retaliation section.¹⁸²

C. Title VII of the Civil Rights Act of 1964

The Fair Labor and Standards Act can be seen as quite similar to Title VII of the Civil Rights Act, as well, specifically in regards to their purposes.¹⁸³ By implementing certain safeguards and setting guidelines, both statutes were enacted in hopes of equalizing the playing field between employers and employees. An analysis of the history and enactment of § 1981 of Title VII, which explicitly permits punitive damages,¹⁸⁴ supports the argument that § 216(b) of the FLSA permits the granting of punitive damages.

Section 215(a)(3)(3) of the FLSA states:

[T]o 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, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.¹⁸⁵

Similarly, § 2000e-3(a) of Title VII states:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a

180. 503 U.S. 60.

181. *Niece*, 922 F. Supp. at 1219.

182. See, e.g., *id.*; *Rodgers v. Magnet Cove Pub. Schs.*, 34 F.3d 642, 644 (8th Cir. 1994); *Garrett*, 1996 U.S. Dist. LEXIS 10194, at *10.

183. *Hyland v. New Haven Radiology Assocs., P.C.*, 794 F.2d 793, 796 (2d. Cir. 1986) (stating that the FLSA and Title VII of the Civil Rights Act have a similar purpose which is to stamp out discrimination in various forms) The Second Circuit stated that cases construing provisions of one act are persuasive authority to interpret the other. *Id.* See also *Serapion v. Martinez*, 119 F.3d 982, 985 (1st Cir. 1997) (claiming that the FLSA and Title VII stand "in pari passu" and that one should endorse the practice of treating judicial precedents interpreting one statute as instructive in decisions involving the other).

184. 42 U.S.C. § 1981(b) (2000).

185. 29 U.S.C. § 215(a)(3) (2000).

labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title subchapter or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.¹⁸⁶

From the explicit text of both these statutes, it is clear that each of them find discrimination against an employee to be unlawful, where such employee opposed an unlawful practice, testified in a proceeding, or participated in similar activities. Therefore, both of these statutes serve as a deterrent for employers who contemplate engaging in the unlawful activity proscribed in the respective sections.

As stated above, in interpreting a statute, it is often a useful tool to look towards statutes that have similar language in order to elicit the meaning of the one that is ambiguous and that you are attempting to interpret.¹⁸⁷ Since the FLSA shares similar language within its body as that found in Title VII, it would be both beneficial and useful to determine the nature of the remedies that are permitted under Title VII. Section 1981a(a) states:

In an action brought by a complaining party under . . . the Civil Rights Act of 1964 against a respondent who engaged in unlawful intentional discrimination . . . prohibited under section 703, 704, or 717 of the Act . . . the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.¹⁸⁸

Therefore, the government finds a compelling interest in enabling an employee to be entitled to punitive damages in instances where an employer was found to be discriminating against that employee for opposing an unlawful practice or for engaging in similar behavior. Essentially, since the FLSA contains language similar to that found in Title VII and they share a common purpose, it appears only logical to interpret § 216(b) in the same manner.

Some may contend that the claim that punitive damages should be granted under § 216(b) due to the commonalities it shares with Title VII, is without merit and is actually contradictory. These individuals argue that if the legislature intended to permit this then it would have amended

186. 42 U.S.C. § 2000e-3(a) (2000).

187. See *supra* note 148.

188. 42 U.S.C. § 1981a (a) (2000).

§ 216(b) as it did Title VII in 1991¹⁸⁹ to expressly include such damages. Such individuals also purport that from the amendments made to Title VII, it is suggested that the legislature would be very clear and explicit if it in fact authorizes the granting of such relief. This particular attack is not valid, nor is it persuasive, because in making such a counterargument, one fails to see that certain characteristics of Title VII, which are not present in the FLSA, compelled the legislature to amend the text of Title VII.

Prior to these amendments to Title VII, it read:

The court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without backpay. . . or any other equitable relief as the court deems appropriate.¹⁹⁰

Therefore, although it includes language such as, “but is not limited to,” and “any other equitable relief as the court deems appropriate,” it is pertinent to follow the doctrine of *ejusdem generis* to determine how much discretion this statute actually gave the courts.¹⁹¹ Thus, it is pertinent to determine the nature of the relief that was originally permitted under this statute. It can be concluded that all the enumerated forms of relief are equitable, except for backpay. This is the only form that is not equitable, but is clearly a form of restitution, as it customarily has been considered under Title VII.¹⁹² There is no indication or suggestion from the text that any legal relief is permitted, such as punitive damages, since they are a legal form of relief and not equitable in nature.¹⁹³ As a result of the 1991 amendments, it is obvious that the legislature felt compelled to amend and include punitive damages in this statute. It is logical to conclude that Congress was forced to explicitly include them since any statutory interpretation, even through the use of certain doctrines, precluded such a finding. This is not the situation in § 216(b) of the FLSA however.

189. HENRY H. PERRITT, JR., *CIVIL RIGHTS IN THE WORKPLACE* § 4.1 (2d ed.1995). Section 102 of the 1991 Act adds a new § 1981a to Title 42, authorizing compensatory and punitive damages.” *Id.*

190. 42 U.S.C. § 2000e-5(g) (2000).

191. See *EEOC v. The Detroit Edison Co.*, 515 F.2d 301, 308-09 (6th Cir.1975) (stating that the catchall phrase, “other equitable relief as the court deems appropriate,” must be interpreted according to the doctrine of *ejusdem generis*).

192. See *id.* (stating that back pay in Title VII cases is considered as a form of restitution, not an award of damages).

193. See *id.*

As it has already been explained, in implementing the doctrine of *ejusdem generis* and by looking at the plain language, it is found that § 216(b) authorizes the granting of punitive damages. There are various remedies that are listed within this section and they include legal relief, employment, reinstatement, promotion, payment of wages lost, and liquidated damages.¹⁹⁴ The nature of these remedies are both equitable and punitive. First, the contention that these remedies include those that are punitive in nature is supported by the inclusion of legal relief, which has been considered by the courts to be a form of relief that has both compensatory and punitive characteristics.¹⁹⁵ Second, the inclusion of liquidated damages also supports this contention because such damages have been depicted as a punitive form of relief and have been designated as such by the United States Supreme Court.¹⁹⁶ Thus, the legislature most likely does not feel compelled to amend the text of § 216(b) since it clearly authorizes and permits punitive damages to be granted in cases where there is a willful violation of § 215(a)(3) of the FLSA. Therefore, unlike the original text of Title VII that acted as an obstacle to its own purpose, § 216(b) is clear and does not warrant such remedial amendments.

D. Occupational Safety and Health Act

In 1970, out of growing concern for the health and safety of employees, Congress passed the Occupational Health and Safety Act of 1970 ("OSHA").¹⁹⁷ The OSHA's purpose was to "assure as far as possible every working man and woman in the Nation safe and healthful working conditions."¹⁹⁸ Once again, as in the FLSA, Congress also included a section prohibiting discharge or discrimination of an employee because the employee has filed a complaint or testified against the employer.¹⁹⁹ The section that laid this out was § 660(c)(2), which provides that courts may grant "all appropriate relief" to an employee.²⁰⁰

194. 29 U.S.C. § 216(b) (2000).

195. *Travis v. Gary Cmty. Mental Health Ctr., Inc.*, 921 F.2d at 111 (indicating that legal relief can be deemed as possessing both punitive and compensatory traits and is therefore not solely in either one of those classifying categories); *see also supra* note 54.

196. *Trans World Airlines v. Thurston*, 469 U.S. 111, 125-26 (1985) (discussing how liquidated damages are designed to serve as a deterrent for willful violations of the law).

197. 29 U.S.C. § 651 *et. seq.* (2000).

198. *OCCUPATIONAL SAFETY AND HEALTH LAW*, 59 (Stephen A. Bokor & Horace A. Thompson, III eds., 1988) (citing 29 U.S.C. § 651(b) (1982)).

199. 29 U.S.C. § 660(c) (2002). This section reads:

(c) Discharge or discrimination against employee for exercise of rights under this chap-

Courts have primarily held that this language indicates that punitive damages are appropriate in certain cases of retaliatory discharge under OSHA.²⁰¹ In *Reich v. Cambridgeport Air Systems*, the circuit court relied on several factors in affirming an award for punitive damages.²⁰² The first factor the court relied on is the *Franklin* presumption.²⁰³ The Court found that under the Supreme Court's ruling in *Franklin*, punitive damages are available under OSHA because Congress had not "expressly indicated otherwise."²⁰⁴ The Court also found that the language "all appropriate relief," within the statute, suggests that all "relevant forms of relief" are appropriate.²⁰⁵ This further indicates that Congress did not provide "clear direction to the contrary" and under *Franklin*, would allow a court to permit any remedy that it saw as appropriate for the circumstances at hand.²⁰⁶ The second factor the Reich court relies on is the language of § 660(c).²⁰⁷ The court recognizes that OSHA authorizes a court to "order all appropriate relief" and names some possible remedies, but never limits the remedies to only those listed.²⁰⁸ Also, the court

ter; prohibition; procedure for relief.

(1) No person shall discharge or in any 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 or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this chapter.

(2) Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of this subsection may, within thirty days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall cause such investigation to be made as he deems appropriate. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall bring an action in any appropriate United States district court against such person. In any such action the United States district courts shall have jurisdiction, for cause shown to restrain violations of paragraph (1) of this subsection and order all appropriate relief including rehiring or reinstatement of the employee to his former position with back pay.

(3) Within 90 days of the receipt of a complaint filed under this subsection the Secretary shall notify the complainant of his determination under paragraph (2) of this subsection.

Id.

200. 29 U.S.C. § 660(c)(2).

201. See, e.g., *Reich v. Cambridgeport Air Sys., Inc.*, 26 F.3d 1187, 1194 (1st Cir. 1994); *Reich v. Skyline Terrace, Inc.*, 977 F. Supp. 1141, 1147 (N.D. Okla. 1997).

202. *Cambridgeport Air Sys., Inc.*, 26 F.3d at 1188. This is the first case in which double damages were sought and awarded. OCCUPATIONAL SAFETY AND HEALTH LAW: 1997 CUMULATIVE SUPPLEMENT 373 (Victoria L. Bor & John C. Artz eds., 1997).

203. *Cambridgeport Air Sys., Inc.*, 26 F.3d at 1190.

204. *Id.* (citing to *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992)).

205. *Id.* at 1191.

206. *Id.*

207. *Id.* at 1193 (citing 29 U.S.C. § 660(c) (2000)).

208. *Id.*

noted that it would be incorrect to assume that an omission by Congress limiting available remedies would mean that Congress did so unintentionally.²⁰⁹

Also, in *Reich v. Skyline Terrace, Inc.*, the district court followed the First Circuit's decision in *Cambridgeport Air Systems, Inc.*, in finding that punitive damages are available under § 660(c).²¹⁰ The court found that the defendant's actions were blatant, retaliatory, and egregious. As a result of this finding, the court awarded punitive damages.²¹¹

The language of § 660(c)(2) says that the court may order "all appropriate relief" for violations of the anti-retaliation provision.²¹² This is comparable to the language of the FLSA, which states that remedies are available "without limitation."²¹³ Since these courts have used the *Franklin*²¹⁴ presumption to decide that punitive damages are available under OSHA, it can be reasonably inferred that the same analysis should be applied to § 216 of the FLSA.²¹⁵ Based on the Supreme Court's decision in *Franklin*²¹⁶ and the cases that followed, the language of § 216(b) of the FLSA warrants an interpretation that punitive damages are permitted. Although Congress did not specifically include punitive damages to § 216(b), there is no direction to the contrary and therefore under *Franklin*, punitive damages should be permitted.

XI. THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

The U.S. Equal Employment Opportunity Commission ("EEOC") was established by Title VII of the Civil Rights Act of 1964 and is charged with enforcing a number of federal statutes.²¹⁷ The EEOC enforces Title VII of the Civil Rights Act of 1964, the ADEA of 1967, the Equal Pay Act of 1963, Title I and Title V of the ADA of 1990, §§ 501 and 505 of the Rehabilitation Act of 1973, and the Civil Rights Act of 1991.²¹⁸ Under the EEOC, as in all the previously listed acts, employers

209. *Id.* at 1194.

210. *Reich v. Skyline Terrace, Inc.*, 977 F. Supp. 1141, 1147 (N.D. Okla. 1997).

211. *Id.*

212. 29 U.S.C. § 660(c) (2000).

213. 29 U.S.C. § 216(b) (2000).

214. 503 U.S. 60.

215. A deeper analysis of the *Franklin* presumption, as applied to this section of the FLSA, is discussed in Section IV of this note.

216. *Id.*

217. The U.S. Equal Employment Opportunity Commission, *Statutory Authority*, at <http://www.eeoc.gov/statauth.html> (last modified April 5, 2002).

218. *Id.*

may not retaliate or interfere with an employee's protected rights.²¹⁹ Retaliation that occurs because an employee was engaged in "protected activity" under one of the statutes enforced by the EEOC subjects an employee to liability in the form of both punitive and compensatory damages.²²⁰ The EEOC Compliance Manual further states that under the 1977 amendment to the FLSA, both legal and equitable relief for retaliation is available.²²¹ Therefore, according to the EEOC, both compensatory and punitive damages are available for retaliation claims brought under both the FLSA and the ADEA, as well as under Title VII and the ADA.²²² Punitive damages are appropriate in retaliation claims brought under any of the statutes enforced by the EEOC, where the retaliation is done "with malice or with reckless indifference to the federally protected rights of an aggrieved individual."²²³ Also, the EEOC states that under the FLSA there are no statutory caps on how much may be awarded in damages.²²⁴

Essentially, the EEOC's position, in regards to retaliation against employees is that an employer may not interfere with "the protected right of employees to file a charge or participate in any manner in an investigation, hearing, or proceeding under the laws enforced by the EEOC."²²⁵ The EEOC maintains that this employee right is non-waivable.²²⁶ The reasoning behind this is that interference with these protected rights is against public policy.²²⁷

Congress entrusted the EEOC with the enforcement responsibilities of certain acts.²²⁸ The EEOC's purpose is "to vindicate the public policy interest in the eradication of employment discrimination."²²⁹ The public

219. The U.S. Equal Employment Opportunity Commission, *Enforcement Guidance On Non-Waivable Employee Rights Under Equal Employment Opportunity Commission (EEOC) Enforced Statutes*, at <http://www.eeoc.gov/docs/waiver.html> (last modified July 6, 2000).

220. The U.S. Equal Employment Opportunity Commission, *EEOC Compliance Manual — Section 8: Retaliation*, at <http://www.eeoc.gov/docs/retal.html> (last modified July 6, 2000).

221. *Id.* The EEOC enforces the Age Discrimination in Employment Act and the Equal Pay Act, both of which are parts of the FLSA.

222. *Id.*

223. *Id.*

224. *Id.*

225. The U.S. Equal Employment Opportunity Commission, *Enforcement Guidance On Non-Waivable Employee Rights Under Equal Employment Opportunity Commission (EEOC) Enforced Statutes*, *supra* note 219, at * 1.

226. *Id.*

227. *Id.*

228. *Id.*; see also *EEOC v. Astra USA*, 94 F.3d 738, 744 (1st Cir. 1996).

229. The U.S. Equal Employment Opportunity Commission, *Enforcement Guidance On Non-Waivable Employee Rights Under Equal Employment Opportunity Commission (EEOC) Enforced Statutes*, *supra* note 219, at *2.

policy interest prohibits any interference with governmental law enforcement. If employees who have either been discriminated against or have witnessed discrimination were unable to approach the EEOC or participate in an investigation, the powers of the EEOC would be hindered greatly.²³⁰ Further, in each of the statutes enforced by the EEOC, Congress enacted specific provisions prohibiting retaliation to “ensure that employees remain free to report suspected violations to the government.”²³¹

The EEOC’s interpretation of the anti-retaliation provisions of the FLSA, as well as the federal statutes it is charged with enforcing, should apply to private actions as well. The public policy concerns remain the same whether the enforcement is achieved through the EEOC or through private action. Congress’ inclusion of anti-retaliation statutes is to prohibit employers from interfering with those rights that Congress has granted and protected. In allowing private actions, Congress has granted individuals the right to enforce a statute. It is important for both government agencies, as well as private parties to be able to enforce the law that Congress has established.

Congress’ creation of and the granting of authority to the EEOC to enforce certain federal statutes provides another reason why the EEOC’s interpretation of § 216 of the FLSA should be deferred to, under the *Chevron* doctrine. In *Chevron v. Natural Resources Defense Council*, the Supreme Court held that when a statute is unclear, “federal courts must defer to the interpretation given to the statute by that agency to which Congress has delegated the power to apply the statute.”²³² It is clear from

230. *Id.*; see also *EEOC v. Shell Oil Co.*, 466 U.S. 54, 69 (1984).

231. The U.S. Equal Employment Opportunity Commission, *Enforcement Guidance On Non-Waivable Employee Rights Under Equal Employment Opportunity Commission (EEOC) Enforced Statutes*, *supra* note 219; see also *Veprinsky v. Fluor Daniel, Inc.*, 87 F.3d 881, 889 (7th Cir. 1996). “Given the instrumental role individual employees play in the statutory scheme, the protection of those individuals from retaliatory acts by the employer is essential to accomplish the purpose of [the act].” *Id.*; see also *Garcia v. Lawn*, 805 F.2d 1400, 1405 (9th Cir. 1986).

232. 467 U.S. 837 (1984). The Supreme Court’s reasoning is:

When a court reviews an agency’s construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute. . . . If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the

the existing circuit split regarding the meaning of § 216(b) and the lack of legislative history, that the courts have thought the statute to be unclear. After *Chevron*, courts have shown substantial deference to agency interpretations.²³³ Because Congress delegated authority to the EEOC to enforce the EPA and ADEA sections of the FLSA (all of which § 216 is applicable to), it is appropriate to defer to the EEOC's interpretation.²³⁴

Although the EEOC's interpretation of § 216(b) of the FLSA is limited to situations in which claims are brought to the Commission and adjudicated by the agency, it is a logical conclusion that it should be extended to apply in private actions as well. The case can be made that the EEOC's general expertise in cases of discrimination and retaliation should provide guidance to the courts. The EEOC's primary function is to enforce and regulate specific statutes relating to discrimination in the workplace. Therefore, EEOC's conclusion that punitive damages are permitted under the FLSA should extend to private actions as well.

XII. CONCLUSION: § 216(B) OF THE FLSA WARRANTS THE INTERPRETATION THAT PUNITIVE DAMAGES ARE PERMITTED

The purpose of § 215(a)(3) and § 216(b) of the FLSA were clearly enacted by Congress in order to implement certain safeguards and afford certain employees protection against retaliation by employers. In amending the language of § 216(b), Congress specifically added the text, "without limitation,"²³⁵ to further effectuate the policies and purpose of the FLSA and the remedies provision. The circuit split among the Seventh and Eleventh Circuits indicate that the courts are faced with the dilemma as to whether Congress intended to include punitive damages within the prescribed remedies that are authorized by this section.²³⁶ Based on the above analysis, the most persuasive argument is that §

statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

Id. at 842-844 (citations omitted).

233. T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 43 (1988).

234. *See id.* at 44.

235. 29 U.S.C. § 216(b) (2000).

236. *See* Travis v. Gary Cmty. Mental Health Ctr., Inc., 921 F.2d 108, 111 (7th Cir. 1990); *see also* Snapp v. Unlimited Concepts, Inc., 208 F.3d 928 (11th Cir. 2000).

216(b) does in fact authorize the granting of punitive damages in cases where willful violations of the anti-retaliation provision of the FLSA are found.

This contention is supported first by looking to the plain language of § 216(b). The amended text suggests that Congress intended to expand the remedies that were originally available under this section. Additionally, the fact that legal relief and liquidated damages are considered to be both compensatory and punitive in nature²³⁷ also indicates that Congress contemplated the use of punitive remedies. This latter contention is further supported by the doctrine of *ejusdem generis*, which suggests that ambiguous language should be interpreted as having the same characteristics as that language which is explicit and clear. Therefore, “without limitation,” should be deemed as including punitive damages.

Second, based on the *Franklin* presumption, this interpretation is also warranted since the Supreme Court held that where there is a general right to sue, a court may award any damages that it finds appropriate unless Congress has explicitly stated the contrary.²³⁸ Congress has not explicitly expressed a prohibition against the granting of punitive damages within § 216(b) and thus, courts are permitted to grant them where appropriate.

Third, the fact that retaliatory discharge has been considered an intentional tort under state and common law also supports this argument that punitive damages should be available.²³⁹ Because of the egregious nature of retaliatory discharge, courts have even carved out an exception to the at-will employment doctrine.²⁴⁰ It is only rational to conclude that an individual guilty of engaging in this type of egregious behavior towards their employees should be punished and deterred from doing so in the future.

Lastly, in addition to other findings, numerous federal statutes that contain anti-retaliation and remedy provisions also indicate that the 1977 amendments endorsed the granting of punitive damages. Looking towards statutes that have similar language is a useful tool commonly used to elicit the meaning of the one that is ambiguous and that you are attempting to interpret.²⁴¹ An analysis of the text and purposes of the ADEA, ADA, Title VII of the Civil Rights Act of 1964, OSHA, and the EEOC all support this argument.

237. See *supra* note 54.

238. See *supra* note 74.

239. See *supra* Section VI.

240. See *supra* Section VI.

241. See *supra* note 148.

The strongest argument for awarding punitive damages in cases of retaliatory discharge is the public policy argument. The purposes of the anti-retaliation statute is to protect employees, as well as to serve as an enforcement mechanism for illegal acts that the government itself cannot completely monitor. Punitive damages both deter employers from engaging in illegal conduct and are an incentive for employees to assert their rights and support the rights of others. The employer who willfully violates federal law and then adds insult to injury by retaliating against employees who stand up against the illegality should be punished.

*Carol Abdelmesseeh and Deanne M. DiBlasi**

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