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# IS THE FAIR LABOR STANDARDS ACT FAIRLY CONSTRUED?

JOSEPH V. LANE, JR.†

THE prenatal history of the Fair Labor Standards Act<sup>1</sup> is replete with expressions of lofty purpose and Utopian aims. Its birth was heralded as a great social advancement and, surprisingly enough, it has proven for the most part to be the *bonum* which was intended. In retrospect most people will agree that it has not lost with time its congenial qualities. But recently, the interpretation of the Act by some of our courts has resulted in conclusions which are unfair, unjust and inequitable. The courts have pointed to the Act and blamed its phraseology for their harsh conclusions. Is the Act to blame?

In March, 1943, Judge Murrah of the Tenth Circuit Court of Appeals wrote:

"Concededly, the employer acted in the good faith belief that the employment was not covered by the Act, or that the employment contract fully complied with its requirements, and when it became reasonably apparent that the employment did come within the Act, the correct amount of overtime compensation was determined in accordance with the prescribed formula and voluntarily paid without legal compulsion and before suit was filed. If any amount of good faith will excuse the payment of liquidated damages imposed by Section 16(b), it would seem wholly justified by the unchallenged factual findings of the Trial Court. . . ."<sup>2</sup>

It must indeed be a harsh statute which will drive a court to penalize an employer who acts in good faith, reasonably and without legal compulsion.

In October, 1943, Judge Swan, writing for the Second Circuit, said:

"It is urged that such a construction (the imposition of a penalty after overtime has been paid) of the statute produces too harsh a result; but the harshness is inherent in the legislation. We see no escape from the statutory language."<sup>3</sup>

In December, 1943, the New York Appellate Division (First Department) in a *per curiam* decision has the following to say in *O'Neil v. Brooklyn Savings Bank*:<sup>4</sup>

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1. 52 STAT. 1069, 29 U. S. C. A. § 201-218 (1938).

2. *Seneca Coal and Coke Co. v. Lofton*, 136 F. (2d) 359 (C. C. A. 10th, 1943).

3. *Rigopoulos v. Kervan*, — F. (2d) — (C. C. A. 2d, 1943).

4. *O'Neil v. Brooklyn Savings Bank*, 267 App. Div. 317, — N. Y. S. (2d) — (1st Dept.

"We appreciate that the results of our decision may seem harsh. The harshness, however, is inherent in the legislation and in the decisions which have construed it. As was said in *Rigopoulos v. Kervan* (C. C. A. —2) 'We see no escape from the statutory language'".

In the *O'Neil* case the employee was a watchman in a loft building from November 5, 1938 to May 3, 1940. Two years after leaving his employment he met a friend who had been a fellow worker in the building and who told him that one of his former employer's officers wished to see him as he had a check for him. When the employee called at the office, he was told that a check for \$423.16 for overtime wages had been waiting for him, but that the employer had been unable to locate him. The employee accepted the check and signed a general release after that paper had been explained to him. The release recited that there was uncertainty as to whether the employee had any enforceable claim under the Fair Labor Standards Act, that the amount due, if any, was difficult of ascertainment and that the parties desired to settle the claim by payment of the sum mentioned. Concededly, the amount paid was the full amount of employee's claim for overtime wages.

An action for liquidated damages alone was then brought. Upon the trial the employer offered substantial proof that plaintiff was not covered by the Act. The trial court dismissed the complaint thus resolving the disputed issues of fact in the employer's favor.

The Appellate Term reversed and the Appellate Division affirmed such reversal by a divided court. Coverage was disputed on each appeal.

When O'Neil's employment was terminated on May 3, 1940, there was not one authoritative appellate decision in the entire country<sup>5</sup> in line with the subsequent and startling decision by the United States Supreme Court in *Kirschbaum v. Walling*<sup>6</sup> which held that the Fair Labor Standards Act was applicable to employees engaged in the maintenance and operation of a building whose tenants are engaged particularly in the production of goods for interstate commerce. Indeed the earlier cases were to the contrary.<sup>7</sup> Prior to the *Kirschbaum* case,

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1943). On February 25, 1944, the Seventh Circuit Court of Appeals in *Birbalas v. Cuneo Printing Industries, Inc.*, — F. (2d) —, likewise found the statute "harsh."

5. *Killingbeck v. Garment Center Capitol, Inc.*, 259 App. Div. 691, 20 N. Y. S. (2d) 521 (1940), *appeal denied*, 284 N. Y. 818 (1940). This was the earliest reported appellate decision.

6. 316 U. S. 517, 62 Sup. Ct. 1116 (1942). "The closed door of finality is now open to litigious bedlam." (1943) 29 VA. L. REV. 502, 504. *See also* (1942) 41 MICH. L. REV. 340.

7. *Pederson v. Fitzgerald Construction Co.*, 262 App. Div. 655, 30 N. Y. S. (2d) 989

no one could reasonably question the good faith of an employer who withheld the payment of overtime wages under the Act to employees so engaged.

### *Section 7 of the Act*

The sections of the Fair Labor Standards Act which have caused the Courts so much difficulty are Section 7<sup>8</sup> and Section 16(b).<sup>9</sup> The Supreme Court has held in *Overnight Transportation Co. v. Missel*,<sup>10</sup> that Section 16(b) is mandatory in its application where the employer has violated the Act.

In that case the employer refused to pay the overtime required by the Act and made it necessary for his employee not only to bring suit,

(1941), *aff'd*, 288 N. Y. 687, 53 N. E. (2d) 83 (1942), *cert. granted*, 318 U. S. 740, 63 Sup. Ct. 558 (1942), *aff'd*, 318 U. S. 742, 63 Sup. Ct. 558 (1943), *see also* 266 App. Div. 1032, 44 N. Y. S. (2d) 595 (1943); Cecil v. Gradioson, — Ohio St. —, 40 N. E. (2d) 958 (1941); Robinson v. Massachusetts Mutual Life Ins. Co., — Tenn. —, 158 S. W. (2d) 441 (1941); Fleming v. Arsenal Bldg. Corp. 38 Fed. Supp. 207 (S. D. N. Y. 1941), *rev'd* 125 F. (2d) 278 (C. C. A. 2d, 1941). (The district court decision was concededly a "test" case. N. Y. Herald Tribune, Mar. 22, 1941, p. 1). *Accord* Fleming v. Kirschbaum, 38 Fed. Supp. 204 (E. D. Pa., 1941), *aff'd*, 124 F. (2d) 279 (C. C. A. 3d, 1941). *See* note 6 *supra*. Davisson, *Coverage of the F. L. S. A.* (1943) 41 MICH. L. REV. 1060.

8. "Maximum hours:

(a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." 52 STAT. 1063, 29 U. S. C. A. § 207 (1938).

9. "Any employer who violates the provisions of section 6 or section 7 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. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. 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." 52 STAT. 1069, 29 U. S. C. A. § 216(b) (1938).

10. 316 U. S. 572, 62 Sup. Ct. 1216 (1942).

but to go to the highest court in the country before the employer would recognize that the employee was entitled to the overtime. The court's conclusion on Section 16(b) seems to be reasonable where the employer has adopted an "I will not obey" attitude. The same might also be said for the conclusion reached by Judge Swan in the *Rigopoulos* case, for there the employer had refused to comply and would not agree to pay overtime until the Administrator brought a plenary suit. Our attention should be directed, therefore, to employees in the position of Lofton<sup>11</sup> and O'Neil<sup>12</sup> whose employers went forward voluntarily and paid overtime when the courts decided that their employees came within the coverage of the Fair Labor Standards Act.

Accepting Section 16(b) as mandatory, where the employee had to resort to litigation before he could get his overtime, let us examine Section 7(a) and see if the employers of Lofton and O'Neil "violated" that Section. Section 7(a) may be summarized as follows:

No employer shall employ any of his employees for more than the prescribed time unless such employee receives compensation for his employment in excess of the hours prescribed at a rate not less than 1½ times the regular rate.

Both Lofton and O'Neil received compensation for their employment in excess of the hours specified at a rate not less than 1½ times the regular rate at which they were employed *long before each instituted suit*. Lofton, it is true, received only 99% of what was found to be due to him, but O'Neil concededly received all. For present purposes we shall consider Lofton as an employee who received 100% of his overtime compensation before suit; the court treated him as such. Congress has not stated when payment is to be made. Neither Section 7 nor Section 16(b) provides when such wage payment should be made, whether by the week, month or year. The only requirement is that the employee receive the specified compensation. Both Lofton and O'Neil received it. Section 16(b) imposes liability upon an employer who "violates" the provisions of Section 7. How can it be said that an employer who performs the statutory requirement without even being asked by the employee to do so has "violated" that statute when the statute did not advise the employer when the payment should be made?

It would appear that under a literal construction of Section 7 there

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11. See note 2 *supra*.

12. See note 4 *supra*.

has been no violation by late payment of wages. As the United States Supreme Court has pointed out, Congress avoided writing Section 7 along rigid lines. Even on such a basic point as "the regular rate" at which a person was employed, the court found that Congress had provided no specific formula.<sup>13</sup> Although Congress did not say when the payments should be made, the courts have implied promptness and the duty to pay wages at the end of each pay period.<sup>14</sup> By such implication they have reached the harsh conclusions which they deprecate and the blame is put on the Act.

Employers can be protected from the extreme conclusion reached by the courts in the *Lofton* and *O'Neil* cases by implying a rule of reason. If the employer unreasonably refused to comply with the Act when it was clear that he should have, the penalty should fall; but if he voluntarily complied with the Act within a reasonable time after he became aware of his duty to pay, there should be no penalty.<sup>15</sup> The

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13. *Walling v. Belo*, 316 U. S. 624, 634-635, 62 Sup. Ct. 1223 (1942): "The problem presented by this case is difficult because we are asked to provide a rigid definition of 'regular rate' when Congress has failed to provide one. Presumably, congress refrained from attempting such a definition because the employment relationships to which the Act would apply were so various and unpredictable. And that which it was unwise for Congress to do, this Court should not do. When employer and employees have agreed upon an arrangement which has proven mutually satisfactory, we should not upset it and approve an inflexible and artificial interpretation of the Act which find no support in its text and which as a practical matter eliminates the possibility of steady income to employees with irregular hours. Where the question is as close as this one, it is well to follow the Congressional lead and to afford the fullest possible scope to agreements among the individuals who are actually affected. This policy is based upon a common sense recognition of the special problems confronting employer and employee in business where the work hours fluctuate from week to week and from day to day. Many such employees value the security of a regular weekly income. They want to operate on a family budget, to make commitments for payments on homes and automobiles and insurance. Congress has said nothing to prevent this desirable objective. This Court should not." See also Note (1942) 22 B. U. L. REV. 495; Note (1942) 16 TEMP. L. Q. 442.

14. *Seneca Coal and Coke Co. v. Lofton*, 136 F. (2d) 359 (C. C. A. 10, 1943); *Rigopoulos v. Kervan*, — F. (2d) — (C. C. A. 2d 1943); *O'Neil v. Brooklyn Savings Bank*, 267 App. Div. 317, — N. Y. S. (2d) — (1st Dept. 1943).

15. *Connally v. General Const. Co.*, 269 U. S. 385, 391, 46 Sup. Ct. 126 (1926): "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." See also *International Harvester Co. v. Kentucky*, 234 U. S. 216, 221, 34 Sup. Ct.

New York Court of Appeals has specifically warned against giving effect to an assumed Congressional intent in matters involving this Act.<sup>16</sup>

Courts, in implying promptness with its harsh effect, fly in the face of express Congressional intent. Nowhere, either in the Statute or in the Reports to the House and Senate or in the Congressional Debates, has anything been found to indicate that Congress intended explainable delay in payment to be treated as wrongful failure of payment; or payment without the necessity of suit as the basis for creating double liability. If Congress intended to penalize for delay alone, more apt language could have been used.

### *The Congressional Intent*

On May 24, 1937, the President sent a message to Congress urging the enactment of legislation "to help those who toil in factory and on farm" to obtain "a fair day's pay for a fair day's work." Bills were introduced in both the House<sup>17</sup> and the Senate<sup>18</sup> but when those bodies could not agree on the form which the legislation should take, the matter was referred to a Committee of Conferees from both Houses who worked out their differences so that the message of the President became part of our body of laws. The Fair Labor Standards Act did not become law until more than one year after the President's message.<sup>19</sup>

It is clear from an examination of the Congressional Record that Congress never intended to penalize an employer who voluntarily complied with the Act. Neither in the original House Bill nor in the original Senate Bill will anything be found which indicates an intention on the part of Congress to punish innocent non-prompt compliance with the Act. Neither of the original bills contained a section similar to Section 16. The provision for double damages first made its appearance in the final bill.

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853 (1914); *Collins v. Kentucky*, 234 U. S. 634, 638, 34 Sup. Ct. 924 (1914). In *U. S. v. Katz*, 271 U. S. 354, 357, 46 Sup. Ct. 513 (1926), Stone, J., states "All laws are to be given a sensible construction; and a literal application of a statute, which would lead to absurd consequences, should be avoided whenever a reasonable application can be given to it, consistent with the legislative purpose."

16. "We may not disregard the definitive language thus employed; nor may we by judicial construction give effect to an assumed congressional intent. . . ." *Stoike v. First National Bank*, 290 N. Y. 195, 202, 50 N. E. (2d) 246 (1943); *cert. denied*, — U. S. —, 64 Sup. Ct. 50 (1943).

17. H. R. 1452, 75th Cong., 1st Sess (1937) 1-23.

18. SEN. REP. No. 884, 75th Cong., 1st Sess (1937) 1-9.

19. June 25, 1938.

In the conference report which accompanied that bill the full discussion regarding employees' remedies was this paragraph:

*"Penalties"*

"Sec. 16 of the conference agreement provides a fine of not more than \$10,000, or imprisonment for not more than six months, or both, for violation of the Act. No person is to be imprisoned upon conviction for a first offense. This section also provides for civil reparations for violations of the wages and hours provisions. If an employee is employed for less than the legal minimum wage, or if he is employed in excess of the specified hours without receiving the prescribed payment for overtime, he may recover from his employer *twice the amount by which the compensation he should have received exceeds that which he actually received.*"<sup>20</sup>

The Congressional understanding of Section 16, declared by the conferees who drew up the bill in its present form, clearly was that the right to double damages would arise only where it became necessary for an employee to sue for the difference between what he had received and what he should have received. In the cases under consideration each employee, without suing, received the amount which he should have received. Following the formula of the Congressional conferees, an employee such as Lofton or O'Neil is entitled to nothing because no overtime compensation was owing when he started his suit.

The only reference in the discussions in either Chamber to the matter of enforcement appears in the following paragraph of the remarks of Representative Keller, a member of the conference committee:

"Among the provisions for the enforcement of the Act an old principle has been adopted and will be applied to new uses. If there shall occur violations of either the wages or hours, the employees can themselves, or by designated agent or representatives, maintain an action in any court to recover the wages due them and *in such a case* the court shall allow liquidated damages in addition to the wages due equal to such deficient payment and shall also allow a reasonable attorney's fee and assess the court costs against the violator of the law so that employees will not suffer the burden of an expensive lawsuit. The provision has the further virtue of minimizing the cost of enforcement by the Government. It is both a commonsense and economical method of regulation. The bill has other penalties for violations and other judicial remedies, but the provision which I have mentioned puts directly into the hands of the employees who are affected by violation the means and ability to assert and enforce their own rights, thus avoiding the assumption by Government of the sole responsibility to enforce the Act."<sup>21</sup>

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20. 83 CONG. REC. 9255. (1938). Italics added.

21. 83 CONG. REC. 9264 (1938). Italics added. See Reese, *Concurrent Jurisdiction of*

What better evidence could there be of congressional intent than the statement of Representative Keller, who, as a conferee, was one of the draftsmen of the bill? He does not say that an employee has the right to sue for liquidated damages alone after his employer has voluntarily complied with the Act; on the contrary, he definitely states that if there are violations the employee may go to court to recover the wages due and "in such case the Court shall allow liquidated damages. . . ." If the employee has to sue for overtime he may get liquidated damages.

In describing the conference bill on the floor of the House, one of the members of the Conference Committee stated:

"So instead of being harsh your conferees have attempted to be sensible in this matter, and exemptions have been made and definitions have been placed in the bill which make it possible to bring a measure here which retains the best features of the House bill and good features of the Senate measure."<sup>22</sup>

As another of the conferees said:

"A genuinely democratic spirit of adjustment characterized everything that was done and said by members in a resolute effort to write a bill that would be practicable, fair and at the same time constitutional. . . ."<sup>23</sup>

The Congressional Record does not throw too much light on the thoughts of the Senate, since most of their debates were dedicated to the constitutional questions involved. We do find, however, that Senator Walsh, who was Chairman of the Senate Conferees, answered in a memorandum, many of the questions which had been placed before him. One of such questions is:

"Q. What effect will the application of this sudden and rigid regulation of employment and wages have upon industry?"

After considering the effect on smaller business, the Senator makes the following answer:

"A. . . . In my opinion, unless this law is carefully and prudently administered, it will tend to increase monopolies and eliminate smaller industries. To be successful, the law, with its commendable humanitarian objects, must be administered with the caution, care and sympathy of a physician and not with the autocracy and force of a police officer."<sup>24</sup>

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*State and Federal Courts under Section 16(b) of F. L. S. A. (1941) 27 VA. L. REV. 328, 333-4.*

22. 83 CONG. REC. 9258 (1938).

23. 83 CONG. REC. 9264 (1938).

24. 83 CONG. REC. 9176-77 (1938).

The thoughts of the legislators are of utmost importance in construing a statute and it has been said:

"That in order to form a right judgment whether a case be within the equity of the statute, it is a good way to suppose the law maker present, and that you have asked him this question; 'Did you intend to comprehend this case?' Then you must give yourself such answer as you imagine he, being an upright and reasonable man, would have given. If this be that he did mean to comprehend it, you may safely hold the case to be within the equity of the statute, for while you did no more than he would have done, you do not act contrary to the statute, but in conformity thereto."<sup>25</sup>

Did our Congress, as reasonable men, intend to penalize an employer who voluntarily complied with the Act and paid all overtime prescribed in the statute within a reasonable time after it became clear that the statute applied to his employees? Did our Congress, as reasonable men, intend to punish an employer which sought out a former employee within a reasonable time after the United States Supreme Court held that such employee was covered by the Act?

Here there is no need to speculate as to what the legislators would have answered to the questions above propounded. Their answers were given before the Act was passed. They tell us that any implication should not produce a result which will be harsh or unfair—it must be reasonable. In the dissenting opinion in the *O'Neil* case the court said: "The statute has specified no time when the overtime wages must be paid. The intention to permit a reasonable time for payment should be inferred."<sup>26</sup> This seems to be the first cautious, careful and sympathetic treatment of the subject and it reflects the hand of a physician rather than the club of a police officer. Although this quotation represents the view of the minority of the court, it does reflect the Congressional intent. It protects the employee against an unreasonable employer and it likewise protects a reasonable employer from an unwarranted penalty.

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25. 6 BACON'S ABRIDGEMENT (6th ed. 1793) 386. See also *Donahue v. Keeshan*, 91 App. Div. 602, 87 N. Y. Supp. 144 (1904); *People ex rel. Manhattan Ry. Co. v. Barker*, 152 N. Y. 417, 46 N. E. 875 (1897); *Riggs v. Palmer*, 115 N. Y. 506, 22 N. E. 188 (1889), (1889) 5 L. R. A. 340; *U. S. v. Darby*, 312 U. S. 100, 61 Sup. Ct. 481 (1941) which upheld the constitutionality of the statute and examined its legislative background.

26. See Callahan, J., dissenting in *O'Neil v. Brooklyn Savings Bank*, 267 App. Div. 317, — N. Y. S. (2d) — (1st Dept. 1943).

*Section 16(b) of the Act*

Further evidence of the fact that Congress did not intend the penalty to apply if the employee had been paid is indicated by an analysis of Section 16(b).<sup>27</sup>

Under Section 16(a) no fine or imprisonment may be imposed upon the employer until he has twice violated the Act, and each of such violations must be wilful. Even then the maximum imprisonment can be but six months. Congress declined to concern itself with technicalities and specifically provided no criminal liability for those who might be guilty of a single wilful violation of the Act. With this background, we pass to Section 16(b) and find in the first sentence thereof that the employer who violates the Act "shall be liable to the employee . . . in the amount of . . . unpaid overtime compensation . . . and in an additional equal amount as liquidated damages."

In the quoted sentence Congress admonished the employer that if he violated,<sup>28</sup> that is, failed to comply with the statute, he would be liable to the employee for unpaid overtime *and* an equal amount as damages. The conjunctive "and" was used and not the disjunctive "or." In other words, the employer who made the employee sue for unpaid overtime compensation might be sued for both the compensation and the penalty. Congress did not say that if the compensation were paid the employer might be sued for the penalty alone; it said exactly the opposite. In the second sentence of Section 16(b) we are told that "action to recover such liability may be maintained. . . ." *Such* liability refers to the matter mentioned at the end of the first sentence of the section, viz., unpaid overtime compensation *and* liquidated damages.<sup>29</sup> Again no au-

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27. See note 9 *supra*.

28. There may of course be a violation of law despite ignorance of the application of a statute. This rule is but a corollary to the well known maxim: "*Ignorantia legis neminem excusat.*" Here however a reasonable delay in payment does not violate one word, one phrase or one clause of Section 7a, unless we are to substitute judicial legislation for the expressed language of Congress.

29. "The argument of plaintiff's counsel that the provided liquidated damages of double the amount of alleged overtime service, plus the amount of a reasonable attorney's fee—both of which are provided for in the Federal Act—are neither to be considered in computing the jurisdictional amount for an appeal, is most non-convincing, since both of such items of recovery by plaintiff are expressly provided for in the act, as much as deficiency in compensation. They are all grouped by the act as component parts for which entire recovery may be had. Neither of those items is recoverable at all unless compensation for overtime service is due under the act. . . ." *Sneider v. Justice*, 293 Ky. 126, 168 S. W. (2d) 591, 592 (1943).

thorization is given to recover liquidated damages alone. The third sentence begins with the words "The court in such action shall . . . allow a reasonable attorney's fee. . . ." *Such* action refers to the action authorized in the previous sentence, that is, an action to recover both unpaid overtime and liquidated damages.

The very wording of Section 16(b) shows that Congress intended the penalty to apply if it became necessary for an employee to institute suit to recover the overtime compensation. There is nothing anywhere in the Act to indicate that Congress considered the statute to be "violated" if the employer voluntarily paid the overtime compensation, thereby making it unnecessary for the employee to resort to the processes of law.

#### *Administration of the Act*

The Wage and Hour Administrator has taken no positive position on this subject. There have, however, been many expressions in support of the position here taken.<sup>30</sup> The Administrator advocates reasonableness.<sup>31</sup> A reasonable time is, of course, a relative term and, as the Administrator points out, may vary depending on the circumstances. It may be implied to accomplish what Congress intended. It has become a well settled policy that in the administration of the Act employers have been permitted to make restitution of statutory wages legally

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30. WAGE AND HOUR MANUAL (1942) 729: "Stripped of legal verbiage what does it mean? (Referring to Section 16(b) of the Act.) Simply, that if, for example, your employer owes you \$100 under the Act, you can go to court, prove your case and thereupon the employer will have to pay you not \$100 but \$200." *Id.* at 703: "A further restraint upon the potential violator is the separate and independent remedy afforded under Section 16(b), which enables employees affected by violations of the minimum wage or overtime provisions, or the representatives of such employees, to bring suit for the collection of wages legally earned but unpaid, plus an equal amount as liquidated damages, costs in the action and reasonable attorney's fees."

31. WAGE AND HOUR MANUAL (1940) 120, (1941) 165: *Making Payments for Overtime*. "Question: Is there any time limitation on payment of overtime to employees on monthly salary basis? May overtime compensation be accumulated for payment quarterly, or possibly even annually, in order to reduce clerical work?"

"Answer: (General Counsel) Our Regulations, Part 516 which are the only regulations dealing with questions of wages and overtime compensation do not specify any particular date on which wages (including overtime compensation) must be paid. So long as payment of overtime compensation is made within a reasonable time after earned, it would seem that the provisions of Section 7(a) 'unless such employee receives compensation' would be complied with. Accumulation for as long as a month before payment would appear to be payment within a reasonable time. Perhaps accumulation for a quarter would likewise be deemed reasonable, depending on the circumstances."

earned but unpaid where the "violations" have been unwitting and unintentional.<sup>32</sup>

Further evidence of Congressional intent can be found in the fact that the Administrator, despite his sweeping powers under the Act, clearly has no standing to sue an employer for liquidated damages under Section 16(b) of the Act. Congress did not give the Administrator power to compel such an employer to pay twice. This supports the contention that the Congressional scheme was that such damages were recoverable only where the individual employee, at his own expense, conducted litigation against an employer, whose conduct made litigation necessary. "An old principle has been adopted and will be applied to new uses."<sup>33</sup>

The above quoted statement by Representative Keller indicates that there is statutory precedent for suit by employees to recover their wages. There are many statutes so operating.<sup>34</sup> But the only federal statute which purports to penalize for tardiness is the Seaman's Act, an Act which expressly provides for the imposition of a penalty for delay in payment without sufficient cause.<sup>35</sup> Even there the courts would not permit the imposition of a penalty if the employer was reasonable or if the delay was unavoidable.<sup>36</sup> A stricter attitude towards the employers of seamen is particularly pertinent because the latter are "wards of the courts"<sup>37</sup> and "are a class of persons remarkable for their rashness,

32. ANNUAL REPORT, WAGE AND HOUR ADMINISTRATION (1941).

33. See note 21 *supra*.

34. WALSH-HEELEY ACT, 49 STAT. 2036 *et seq.*, 41 U. S. C. A. § *et seq.*; THE MILLER ACT, 49 STAT. 793-4, 40 U. S. C. A. § 270a-c; N. Y. LABOR LAW § 565, 220.

35. SEAMAN'S ACT, 38 STAT. 1164, 46 U. S. C. A. § 596 (1915), 41 STAT. 1006, 46 U. S. C. A. § 597 (1920). "Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the courts." 38 STAT. 1164, 46 U. S. C. A. § 596 (1913). See also Reese, *Concurrent Jurisdiction of States and Federal Courts under Section 16(b) of F. L. S. A.* (1941) 27 VA. L. REV. 228, 238-9: ". . . the closest analogy to 16(b) on this point seems to be Section 596 of the Federal law regulating shipping."

36. *Collie v. Ferguson*, 281 U. S. 52, 50 Sup. Ct. 189 (1930); *McCrae v. U. S.*, 294 U. S. 23, 55 Sup. Ct. 291 (1935); *Morgan v. Eastern Transportation Co.*, 31 F. (2d) 327 (E. D. Va. 1927), *aff'd*, 31 F. (2d) 332 (C. C. A. 4th, 1929); *Gold v. Matsom Navigation Co.*, 73 F. (2d) 808 (C. C. A. 9th, 1934).

37. *Petterson v. U. S.*, 274 Fed. 1000, 1003 (S. D. N. Y. 1921). See also *Bonici v. Standard Oil Co. of N. Y.*, 103 F. (2d) 437 (C. C. A. 2d, 1939); *Sitchon v. American Export Lines*, 113 F. (2d) 830 (C. C. A. 2d, 1940); *Hume v. Moore-McCormack Lines*, 121 F. (2d) 336 (C. C. A. 2d, 1941).

thoughtlessness and improvidence."<sup>38</sup> Yet the courts have not permitted them "to catch at penalties, where they suffered no wrongs."<sup>39</sup>

### Releases

The Act is silent on the subject of release or accord and satisfaction and, the courts, despite the fact that Congress in the final bill eliminated a non-waiver clause which had appeared in prior bills<sup>40</sup> have for the most part held releases to be ineffectual without any analytical explanation therefor. The conclusions have been varied and it has been held that employee's claims may not be compromised for less than full overtime plus liquidated damages (where there has been delay in payment);<sup>41</sup> they may be settled for full overtime;<sup>42</sup> they may be settled for less than full overtime;<sup>43</sup> and finally, they may be settled for less than full overtime if it is an arm's length transaction.<sup>44</sup>

The best known case is *Guess v. Montague*.<sup>45</sup> There the Fourth Circuit upheld as a valid accord and satisfaction a release given for full overtime. There is a *dictum* to the contrary in the Seventh Circuit<sup>46</sup> in a case which did not involve a release and a conflict has been suggested.<sup>47</sup> The *Guess* case has been criticized on the theory that Congress lumped overtime and liquidated damages together<sup>48</sup> in 16(b) and "probably did not intend that any right created for the employees' benefit should be subject to coercive compromise in a market where

38. Story, J., in *Brown v. Lull*, 2 Sumner 443 (U. S. 1836).

39. *Petterson v. U. S.*, 274 Fed. 100, 1003 (S. D. N. Y. 1921).

40. "Sec. 20 . . . (b) any contract, agreement, understanding, condition, stipulation, or provision binding any person to waive compliance with any provision of this Act or with any regulation or order thereunder shall be null and void." SEN. REP. No. 844, 75 Cong. 1st Sess. (1937).

41. *O'Neil v. Brooklyn Savings Bank*, 267 App. Div. 317, 319, — N. Y. S. (2d) — (1st Dept. 1943).

42. *Guess v. Montague*, — F. (2d) — (C. C. A. 4th, 1943).

43. *David v. Atlantic Co.* — Ga. —, 26 S. E. (2d) 650 (1943).

44. *Cissel v. Great Atlantic and Pacific Tea Co.*, 37 Fed. Supp. 913 (W. D. Ky. 1941); *Schnell v. Park-Lexington Co., Inc.*, — Fed. Supp. — (S. D. N. Y. 1943).

45. — F. (2d) — (C. C. A. 4th, 1943).

46. *Fleming v. Warshawsky*, 123 F. (2d) 622 (C. C. A. 7th, 1941). But in *Birbalas v. Cuneo Printing Industries, Inc.*, — F. (2d) —, see note 4 *supra*, the same circuit recognized a distinction between employees who were forced to sue for overtime and those who were paid in full before suit.

47. *Rigopoulos v. Kervan*, — F. (2d) — (C. C. A. 2d, 1943). See also *Gangi v. Schulte, Inc.*, — Fed. Supp. — (S. D. N. Y. 1943).

48. See note 20 *supra*.

bargaining power is unequal.”<sup>49</sup> As already suggested, the lumping of overtime and liquidated damages in Section 16(b) indicates that Congress contemplated a suit for both overtime and liquidated damages and not a suit for liquidated damages alone. The *Guess* case was for liquidated damages alone. Further, there is nothing in the case which indicates a coercive compromise, nor is there anything in the case to indicate that the employees were entitled to liquidated damages whether or not the release had been executed.

In the case of *Gangi v. D. A. Schulte, Inc.*,<sup>50</sup> the court made the following comment on a suit by an employee who in compromise had received overtime and executed a release:

“The plaintiffs had the option of bringing the suit and taking the risk of recovering nothing or avoiding that risk by the acceptance of a compromise proposal. Having exercised their option and pocketed the price of the release executed and delivered by them I see nothing in the law which compels the courts to permit them to play ‘heads I win, tails you lose.’

“The assertion of this claim is sharp practice, offensive to every moral instinct, and assiduous search of the statute fails to reveal anything which renders it fair or legal.”

The critics of the *Guess* case apparently feel that it conflicts in principle with the doctrine of *Seneca v. Lofton*.<sup>51</sup> This was suggested to the Supreme Court in the *Lofton* case,<sup>52</sup> but certiorari was denied.<sup>53</sup>

There is some force to the argument, that a settlement for less than 100% overtime is violative of public policy. But if the 100% has been paid, public policy should approve such a settlement and the recognition by the employer of the application of the statute. If penalties are to be the same whether the employer voluntarily complies with the statute or deliberately refuses, Section 16(b) becomes a strong

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49. (1943) 57 HARV. L. REV. 257, 258.

50. — Fed. Supp. — (S. D. N. Y. 1943).

51. 136 F. (2d) 359 (C. C. A. 10th, 1943).

52. “The employer in the Fourth Circuit and the employer in the Tenth Circuit each paid full overtime before being sued. Each payment was intended to be payment in full. Each employer was later sued for liquidated damages and attorney’s fees. One was held liable, the other was not. Although the Fourth Circuit attempted to avoid the appearance of direct conflict with the decision of the Tenth Circuit in the present case by suggesting that there the employee did not accept the employer’s payment in full settlement, the opinion of the Tenth Circuit shows that this was not the ground for its decision and that a direct conflict does exist between the Circuits.” Brief filed in support of petition for certiorari in *Seneca Coal and Coke Co. v. Lofton*, 136 F. (2d) 359 (C. C. A. 10th, 1943).

53. *Cert. denied*, *Seneca Coal & Coke Co. v. Lofton*, — U. S. —, 64 Sup. Ct. 77 (1943).

reason for non-compliance rather than a deterrent. Settlements are favored in the law and if by a settlement the employee receives full overtime, the Congressional Mandate has been satisfied, the statute has been fulfilled and a proper accord and satisfaction has been consummated.

### *Conclusion*

The Fair Labor Standards Act should be liberally construed to give effect to its humanitarian purposes and to insure to employees full payment of the overtime prescribed, but we see no reason whatever for brushing aside some of the fundamental principles of law and equity for the benefit of litigious employees whose overtime has been fully paid.<sup>54</sup>

It would seem that the courts have been unnecessarily unfair in interpreting the Act which is most flexible and can be applied so that justice and equity is done to employer and employee alike. The intent of Congress can be carried out by reasonable implication wherever necessary. As in the question of coverage,<sup>55</sup> the correct interpretation of 16(b) and of settlements under the Act, will not be set at rest until our Supreme Court speaks, but whatever the conclusion of that Court may be it cannot properly be based upon the "harshness" of the statute.

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54. ". . . If this is the proper construction of the Act, then we may well ponder whether it is one 'to help those who toil in factory and on farm' to obtain 'a fair day's pay for a fair day's work', as the Presidential Message stated in recommending the legislation, or one to aid litigious clients and their lawyers." Callahan, J., *O'Neil v. Brooklyn Savings Bank*, 267 App. Div. 317, 323, — N. Y. S. (2d) — 1st Dep't 1943).

55. See note 7 *supra*.

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