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FAIR LABOR STANDARDS ACT PREEMPTION OF "PUBLIC POLICY" WRONGFUL DISCHARGE CLAIMS

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I. INTRODUCTION

One of the three frequently recognized exceptions to the traditional rule that an employment contract for an indefinite term is terminable at the will of either party[1] is commonly referred to as the "public policy" exception.[2] The exception began as a narrow rule permitting discharged employees to sue their employers if a statute expressly prohibited their discharge.[3] It subsequently was expanded to prohibit discharges violating more general constitutional or statutory expressions of public policy.[4] More recently, courts have allowed a cause of action for wrongful discharge in violation of public policy even in the absence of a specific constitutional or statutory provision.[5]

Although not all courts interpret the exception so broadly,[6] most states recognize a cause of action for wrongful discharge based on the public policy

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1. The "at-will" employment rule has been described as "uniquely a product of the American common law." Wagner v. City of Globe, 722 P.2d 250, 252 (Ariz. 1986). It recently has fallen into disfavor and the trend is to modify the rule by creating exceptions to its operation. *Id.* at 253. *See generally* Jane P. Mallor, *Discriminatory Discharge and the Emerging Law of Wrongful Discharge*, 28 ARIZ. L. REV. 651, 651 (1986) ("The doctrine of employment at will, which was so well-entrenched by the beginning of the 20th century as to be elevated to constitutional status, has eroded substantially as the century nears its end.").

2. Wagner v. City of Globe, 722 P.2d at 253; Wagenseller v. Scottsdale Memorial Hosp., 710 P.2d 1025, 1031-36 (Ariz. 1985). The other principal exceptions are (1) the "implied-in-fact contract" exception, which establishes an implied contract through proof of an implied promise of continued employment established by oral representations, a course of dealing, personnel manuals, or memoranda, and (2) the "implied-in-law covenant of good faith and fair dealing" exception, which protects the parties' respective rights to receive the benefits of their employment contract and, in some states, may protect employees from a discharge for "bad cause." Wagner v. City of Globe, 722 P.2d at 253; Chambers v. Valley Nat. Bank, 721 F. Supp. 1128, 1130 (D. Ariz. 1988).

3. *See* Wagenseller v. Scottsdale Memorial Hosp., 710 P.2d at 1031.

4. *Id.*

5. *See id.* Arizona, for example, recognizes a cause of action for wrongful discharge based on public policies expressed in its constitutional, statutory, or decisional law. *Id.* at 1034, 1036. Arizona also protects "whistleblowers" who are discharged for reporting illegal or unsafe conduct on the part of their employers. *See* Wagner v. City of Globe, 722 P.2d 250, 257 (Ariz. 1986). The Utah Supreme Court recently held the public policy exception to Utah's employment-at-will doctrine may encompass the public policy expressed in the statutes of another state. Peterson v. Browning, 832 P.2d 1280, 1283 (Utah 1992).

6. *See, e.g.*, Gantt v. Sentry Ins., 824 P.2d 680, 687 (Cal. 1992) ("[C]ourts in wrongful discharge actions may not declare public policy without a basis in either the constitution or statutory provisions.") (emphasis deleted); Martin v. Platt, 386 N.E.2d 1026, 1028 (Ind. Ct. App. 1979) (suggesting the public policy exception is limited to legislative directives); Hancock v. Express One Int'l, 800 S.W.2d 634, 636-37 (Tex. Ct. App. 1990) (declining to permit public policy wrongful discharge claims to be premised on statutes providing for civil, as opposed to criminal, penalties); *see also* Payne v. Rozendaal, 520 A.2d 586, 588 (Vt. 1986) ("Courts vary on the extent to which considerations of public policy will curtail an employer's right to discharge an at will employee."); M.E. Knack, Note, *Do State Fair Employment Statutes by "Negative Implication"*

exception in some form.[7] The key to the claim in most cases is defining the public policy that has been violated.[8]

Because the public policy upon which the claim typically is based is one expressed in a state or federal statute,[9] employers frequently argue that the claim is "preempted"[10] when the statute at issue contains a remedy of its own.[11] The courts' receptivity to the argument has been varied.[12] This Article considers one variation of the issue:[13] whether the Fair Labor Standards Act

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Preclude Common-Law Wrongful Discharge Claims Based on the Public Policy Exception? 21 MEM. ST. U. L. REV. 527, 528 (1991) ("[S]tates differ in defining the scope of their public policy exceptions; . . . the public policy that may constitute a basis for the exception in one state may be insufficient in another.").

7. *See* Gantt v. Sentry Ins., 824 P.2d at 684 ("[T]he vast majority of states have recognized that an at-will employee possesses a tort action when he or she is discharged for performing an act that public policy would encourage, or for refusing to do something that public policy would condemn."); Sharon L. Tasman & Margaret A. Jacobsen, Survey, *Developments in Maryland Law, 1989-90: Employment*, 50 MD. L. REV. 1153, 1169 (1991) ("[M]ost jurisdictions have adopted the 'public policy exception.'").

8. Wagenseller v. Scottsdale Memorial Hosp., 710 P.2d 1025, 1032 (Ariz. 1985). The court in *Gantt* stated:

> [D]espite its broad acceptance, the principle underlying the public policy exception is more easily stated than applied. The difficulty . . . lies in determining where and how to draw the line between claims that genuinely involve matters of public policy, and those that concern merely ordinary disputes between employer and employee. This determination depends in large part on whether the public policy alleged is sufficiently clear to provide the basis for such a potent remedy.

Gantt v. Sentry Ins., 824 P.2d at 684.

9. Not all courts agree, however, that a state law wrongful discharge claim can be premised on the public policy expressed in a federal statute. *See, e.g.*, Rachford v. Evergreen Int'l Airlines, 596 F. Supp. 384, 385 (N.D. Ill. 1984); Burrow v. Westinghouse Elec. Corp., 363 S.E.2d 215, 220 (N.C. Ct. App. 1988). *See generally* Victoria W. Shelton, Note, *Will the Public Policy Exception to the Employment-at-Will Doctrine Ever Be Clear?—*Amos v. Oakdale Knitting Co., 14 CAMPBELL L. REV. 123, 131 (1991) ("[T]he courts have left open the question whether violations of federal public policy can form the basis for a wrongful discharge action in state courts.").

10. In this context, "preemption" refers to the situation in which a legislative enactment displaces or precludes state common law on the same subject. *See* Amos v. Oakdale Knitting Co., 416 S.E.2d 166, 171 (N.C. 1992). This aspect of the preemption doctrine has been described as the "converse of implied private rights of action." HENRY H. PERRITT, JR., EMPLOYEE DISMISSAL LAW AND PRACTICE § 2.40, at 174 (3d ed. 1992).

11. *Compare* Vaughn v. AG Processing, 459 N.W.2d 627, 638 (Iowa 1990) (holding public policy tort claim premised on religious harassment is preempted by the Iowa Civil Rights Act) *with* Bernstein v. Aetna Life & Casualty, 843 F.2d 359, 364-65 (9th Cir. 1988) (holding public policy tort claim based on age and religious discrimination is not preempted by the Arizona Civil Rights Act).

12. *See generally* Tasman & Jacobsen, *supra* note 7, at 1169 ("A majority of courts hold that a common law tort is barred if an employer's action is prohibited by a statute already conferring a remedy.").

13. For a recent discussion of the issue in another context, see Knack, *supra* note 6.

of 1938 (the FLSA or the Act)[14] preempts common-law wrongful discharge claims premised on the public policy reflected in the FLSA.[15]

II. THE FLSA AS A SOURCE OF PUBLIC POLICY

Congress passed the FLSA to protect workers from substandard wages by requiring payment of a uniform minimum wage[16] and payment of additional compensation for overtime work[17] to most individuals employed in interstate commerce.[18] The FLSA also makes it unlawful for an employer "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" the FLSA.[19]

There is little doubt that, absent preemption, these FLSA provisions would support a public policy wrongful discharge claim.[20] The FLSA provides

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14. 29 U.S.C. §§ 201-219 (1988).

15. *Compare* Prewitt v. Factory Motor Parts, 747 F. Supp. 560 (W.D. Mo. 1990) (holding state law wrongful discharge claims are preempted by the FLSA) *with* Chappell v. Southern Md. Hosp., 578 A.2d 766, 776 (Md. 1990) (Adkins, J., dissenting) (arguing wrongful discharge claims are not preempted by the FLSA).

16. 29 U.S.C. § 206 (1988).

17. *Id.* § 207.

18. *See* Elkins v. Showcase, Inc., 704 P.2d 977, 987 (Kan. 1985) ("The expressed Congressional purpose in passing FLSA was to enable a substantial part of the American work force to maintain a minimum standard of living."); Stewart v. Region II Child & Family Servs., 788 P.2d 913, 917 (Mont. 1990) ("Congress passed the Fair Labor Standards Act to prevent the use of unfair trade practices in interstate commerce . . . ."). The congressional policy underlying the FLSA, as expressed in § 2 of the Act, is the correction and elimination of labor conditions that are "detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. § 202 (1988).

19. 29 U.S.C. § 215(a)(3) (1988); *see* Dockins v. Ingles Markets, 413 S.E.2d 18, 18 (S.C. 1992). The Supreme Court has summarized the congressional intent underlying this provision of the FLSA in the following terms:

> 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. This ends the prohibition of § [2]15(a)(3) against discharges and other discriminatory practices was designed to serve. 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 § [2]15(a)(3), . . . Congress sought to foster a climate in which compliance with the substantive provisions of the Act would be enhanced.

Mitchell v. Robert DeMario Jewelry, 361 U.S. 288, 292 (1960) (citation omitted).

20. *See, e.g.*, Prewitt v. Factory Motor Parts, 747 F. Supp. 560, 566 (W.D. Mo. 1990) (indicating that, but for the remedies available under the FLSA, "public policy . . . would be furthered by a wrongful discharge claim based on a violation of § 215(a)(3) . . . ."); Chappell v. Southern Md. Hosp., 578 A.2d 766, 768-69 (Md. 1990) ("[V]iolations of . . . federal wage and hour

specific remedies, however, for violation of its provisions.[21] For example, employees may bring actions on their own behalf in state or federal court to enforce the provisions of the FLSA, and may obtain reinstatement, an award of back pay, liquidated damages, and "such legal or equitable relief as may be appropriate."[22] The existence of these remedial provisions suggests state law remedies may be preempted.[23]

III. THE VIEW THAT THE FLSA PREEMPTS WRONGFUL DISCHARGE CLAIMS

A. *The Federal Cases*

In the context of a public policy wrongful discharge claim, the FLSA preemption issue first arose in *Tate v. Pepsi-Cola Metropolitan Bottling Co.*[24] The plaintiff in *Tate* claimed to have been discharged for refusing to work overtime without pay.[25] He alleged discharging him for that reason violated the public policy embodied in the FLSA,[26] and asserted a wrongful discharge tort claim against his former employer.[27]

The district court held the claim was precluded because the FLSA "provides its own exhaustive enforcement remedies," and the Wisconsin courts consistently had held when statutory remedies are available for the enforcement of particular rights, the statutory remedies are exclusive.[28] The Court of Appeals for the Seventh Circuit subsequently affirmed that ruling.[29]

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laws . . . may contravene the public policy of [Maryland]."); *cf.* Amos v. Oakdale Knitting Co., 416 S.E.2d 166, 167 (N.C. 1992) ("[F]iring an employee for refusing to work for less than the statutory minimum wage violates the public policy of North Carolina.").

21. *See generally* Spieth v. Adasen Distrib., 4 Indiv. Empl. Rts. Cas. (BNA) 350, 351-52 (D. Ariz. 1989).

22. 29 U.S.C. § 216(b) (1988); *see* Dockins v. Ingles Mkts., 413 S.E.2d 18, 19 (S.C. 1992).

23. *Compare* O'Quinn v. Chambers County, 636 F. Supp. 1388, 1392 (S.D. Tex. 1986) ("[T]he FLSA probably provides an exclusive remedy for violations of rights conferred by the FLSA.") *and* Carter v. Marshall, 457 F. Supp. 38, 40-41 (D.D.C. 1978) ("Because [§ 216] specifically outlines the type of relief available and also provides for liquidated damages, it appears that Congress intended the relief provided to be exclusive.") *with* Amos v. Oakdale Knitting Co., 416 S.E.2d 166, 171 (N.C. 1992) (stating the availability of FLSA remedies does not necessarily prevent a plaintiff from seeking tort remedies for wrongful discharge based on the public policy exception to the employment-at-will doctrine).

24. Tate v. Pepsi-Cola Metro. Bottling Co., 32 Empl. Prac. Dec. (CCH) ¶ 33,951, at 31,509 (E.D. Wis. 1983), *aff'd*, 742 F.2d 1459 (7th Cir. 1984).

25. *Id.* at 31,512.

26. *Id.*

27. *Id. Tate* arose in Wisconsin, which recognizes the public policy exception to the at-will employment rule. Brockmeyer v. Dun & Bradstreet, 335 N.W.2d 834, 840 (Wis. 1983). In *Brockmeyer*, the Wisconsin Supreme Court recognized the exception, but limited plaintiffs to the recovery of contract damages and confined such claims to statutory or constitutional violations. *Id.* at 840-41; *see* Gantt v. Sentry Ins., 824 P.2d 680, 685 (Cal. 1992) (discussing *Brockmeyer*).

28. Tate v. Pepsi-Cola Metro. Bottling Co., 32 Empl. Prac. Dec.(CCH) at 31,512 (citing McCluney v. Jos Schlitz Brewing Co., 489 F. Supp. 24, 27 (E.D. Wis. 1980); State *ex rel.* Conn v.

Shortly after the decision in *Tate* was affirmed, the United States District Court for the District of Colorado reached the same result in *Wanderlingh v. May Department Stores Co.*[30] As in *Tate*, the *Wanderlingh* court concluded that when the statute from which the public policy at issue is derived provides the employee with a remedy, the public policy exception to the employment-at-will rule is inapplicable.[31] Because the FLSA provides its own specific remedies,[32] the court dismissed the plaintiffs' wrongful discharge claim.[33]

The federal courts generally have adhered to the view expressed in *Tate* and *Wanderlingh*.[34] In *Gusdonovich v. Business Information Co.*,[35] for example, the plaintiff contended he had been wrongfully discharged in violation of public policy for asserting his right to overtime compensation under the FLSA.[36] The employer argued when a statutory remedy is available to the aggrieved employee, an action for wrongful discharge in violation of public policy cannot be maintained.[37] The court agreed.[38] Because the FLSA provided its own remedies, the court dismissed the plaintiff's claim against his former employer.[39]

Board of Trustees, 171 N.W.2d 418 (Wis. 1969); Metzger v. Wisconsin Dep't of Taxation, 150 N.W.2d 431 (Wis. 1967)). The court's preemption ruling was an alternative holding; it also concluded the plaintiff's wrongful discharge claim was deficient because no evidence existed that the employer had suggested he work overtime without pay. *Id.*

29. Tate v. Pepsi-Cola Metro. Bottling Co., 742 F.2d 1459 (7th Cir. 1984) (mem.).

30. Wanderlingh v. May Dep't Stores Co., 7 Indiv. Empl. Rts. Cas. (BNA) 1244 (D. Colo. 1984).

31. *Id.* at 1245 (citing Corbin v. Sinclair Mktg., 684 P.2d 265 (Colo. Ct. App. 1984)); *cf.* Bernstein v. Aetna Life & Casualty, 843 F.2d 359, 365 (9th Cir. 1988) ("'[W]here statutory right is given, with statutory remedy provided to enforce that right, the parties to whom the right is given are limited to the remedy provided by statute.'") (quoting National Sur. Co. v. Conway, 33 P.2d 276, 278 (Ariz. 1933)).

32. *See supra* text accompanying notes 21-22.

33. Wanderlingh v. May Dep't Stores Co., 7 Indiv. Empl. Rts. Cas. (BNA) at 1245.

34. For examples of specific reliance on *Tate* and *Wanderlingh* by other federal courts addressing the preemption issue, see Prewitt v. Factory Motor Parts, 747 F. Supp. 560, 565 (W.D. Mo. 1990) and Spieth v. Adasen Distrib., 4 Indiv. Empl. Rts. Cas. (BNA) 350, 351-52 (D. Ariz. 1989).

35. Gusdonovich v. Business Info. Co., 705 F. Supp. 262 (W.D. Pa. 1985).

36. *Id.* at 263.

37. *Id.* at 266 (citing Wehr v. Burroughs Corp., 438 F. Supp. 1052 (E.D. Pa. 1977), *aff'd as modified*, 619 F.2d 276 (3d Cir. 1980)).

38. *Id.*

39. *Id.* The court refused to dismiss the plaintiff's claims against the individually-named defendants, however, because it was unclear whether they should be considered "employers" within the meaning of the FLSA, and accordingly, whether the FLSA remedies preempted the plaintiff's wrongful discharge claim against them. *Id.* The court did not explore the implications of this suggestion that individuals who by definition are not subject to the requirements of the FLSA nevertheless may be liable in tort for the violation of its provisions. *Cf.* Leong v. Hilton Hotels Corp., 689 F. Supp. 1565, 1568 (D. Haw. 1988) (holding plaintiff's supervisor could not be held liable for wrongful discharge because he was not plaintiff's employer). *But cf.* Kerrigan v. Magnum Entertainment, 804 F. Supp. 733 (D. Md. 1992) (permitting public policy tort claim

Similarly, in *Prewitt v. Factory Motor Parts,*[40] the plaintiff alleged she was discharged because she had contacted the United States Department of Labor regarding her employer's plan to change salaries and working hours of its employees.[41] She asserted both a statutory claim under section 215(a)(3) of the FLSA[42] and a common-law claim for wrongful discharge in violation of public policy.[43] The court held the availability of the statutory remedy preempted the plaintiff's common-law claim and dismissed the action for failure to state a claim upon which relief could be granted.[44]

A federal court recently dismissed on preemption grounds a tort claim for wrongful discharge in violation of the public policy set forth in the FLSA in *Jarmoc v. Consolidated Electrical Distributors.*[45] The court observed the Illinois Supreme Court originally recognized the tort in *Kelsay v. Motorola*[46] as a means of providing "otherwise remediless" employees with an effective remedy against being discharged in contravention of public policy.[47] The court noted the Illinois Supreme Court subsequently expanded the tort in *Midgett v. Sackett-Chicago*[48] to permit a plaintiff to maintain a claim for wrongful discharge notwithstanding the availability of an alternative remedy, if the alternative did not include the possibility of an award of punitive damages because "merely providing job reinstatement and back pay . . . fail[s] to provide an effective deterrent to improper employer conduct."[49]

The *Jarmoc* court concluded from this that recognition of a wrongful discharge claim is appropriate only when the remedies otherwise available to the plaintiff would not likely deter future employer misconduct.[50] Accordingly, the critical issue in the FLSA context is whether the remedies

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premised on alleged sex discrimination to be maintained against employer with insufficient number of employees to be covered by Title VII of the Civil Rights Act of 1964 or the Maryland Fair Employment Practices Act); Tasman & Jacobsen, *supra* note 7, at 1170-71 (suggesting tort remedies should be available when the "public policy" expressed in the FLSA is implicated but its express remedies are unavailable).

40. Prewitt v. Factory Motor Parts, 747 F. Supp. 560 (W.D. Mo. 1990).

41. *Id.* at 561.

42. *Id.* Count I of the plaintiff's action alleged wrongful discharge under 29 U.S.C. § 215(a)(3).

43. Prewitt v. Factory Motor Parts, 747 F. Supp. at 561.

44. *Id.* at 566. The court stated the public policy underlying the FLSA was identical to, and therefore preempted, the public policy upon which the plaintiff relied in her common-law claim. The plaintiff did not respond to the employer's preemption argument. *See id.* at 565.

45. Jarmoc v. Consolidated Elec. Distribs., 123 Lab. Cas. (CCH) ¶ 35,701, at 48,457 (N.D. Ill. 1992). The plaintiff in *Jarmoc* alleged she was wrongfully discharged from a clerical position after complaining to her employer she had not been compensated for overtime. *Id.*

46. Kelsay v. Motorola, 384 N.E.2d 353 (Ill. 1978).

47. Jarmoc v. Consolidated Elec. Distribs., 123 Lab. Cas. (CCH) at 48,457.

48. Midgett v. Sackett-Chicago, 473 N.E.2d 1280 (Ill. 1984), *cert. denied sub nom.* Prestress Engineering Corp. v. Gonzalez, 472 U.S. 1032, *and cert. denied*, 474 U.S. 909 (1985).

49. Jarmoc v. Consolidated Elec. Distribs., 123 Lab. Cas. (CCH) at 48,458 (citing Midget v. Sackett-Chicago, 473 N.E.2d at 1283).

50. *Id.*

provided by the FLSA serve as an effective deterrent to retaliatory discharges.[51]

The *Jarmoc* court concluded they do.[52] Not only can the liquidated damages award available under the FLSA[53] be construed as having a deterrent effect,[54] but the potential imposition of criminal sanctions[55] "certainly vindicates the public policy of prohibiting the discharge of an employee for complaining about the failure to pay overtime wages."[56] By acting as a deterrent to employers who otherwise might discharge employees for complaining about a failure to compensate for overtime, the *Jarmoc* court concluded, these FLSA provisions constitute an effective alternative remedy, thereby eliminating any need for the recognition of a common-law wrongful discharge claim premised on the public policy expressed in the FLSA.[57]

B. *The State Cases*

State courts have tended to reach the same result.[58] In *Dockins v. Ingles Markets,*[59] for example, the plaintiff claimed he had been required to work excessive hours without compensation.[60] When he was discharged shortly after reporting that fact to the United States Department of Labor, he brought a tort action for wrongful discharge.[61]

The employer argued the remedy available under section 216(b) of the FLSA[62] precluded any claim the plaintiff otherwise might have under state

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51. *Id.*

52. *Id.*

53. *See* 29 U.S.C. § 216(b) (1988).

54. Jarmoc v. Consolidated Elec. Distribs., 123 Lab. Cas. (CCH) ¶ 35,701, at 48,458 (N.D. Ill. 1992).

55. Section 216(a) of the FLSA provides:

> 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.

29 U.S.C. § 216(a) (1988).

56. Jarmoc v. Consolidated Elec. Distribs., 123 Lab. Cas. (CCH) at 48,458.

57. *Id.*

58. State courts routinely look to federal decisions for guidance in addressing preemption issues. *See* Carpenters Health & Welfare Trust Fund v. Parnas Corp., 222 Cal. Rptr. 668, 670 (Ct. App. 1986).

59. Dockins v. Ingles Mkts., 413 S.E.2d 18 (S.C. 1992).

60. *Id.* at 18.

61. *Id.* The South Carolina Supreme Court previously had held a cause of action in tort for wrongful discharge exists when an employee is retaliatorily discharged in violation of a clear mandate of public policy. Ludwick v. This Minute of Carolina, 337 S.E.2d 213, 216 (S.C. 1985).

62. 29 U.S.C. § 216(b) (1988).

law.[63] The trial court granted summary judgment in favor of the employer on that basis, and the plaintiff appealed.[64]

The South Carolina Supreme Court affirmed the trial court's ruling.[65] The court noted, under South Carolina law, "When a statute creates a substantive right and provides a remedy for infringement of that right, the plaintiff is limited to that statutory remedy."[66] Because the court found this rule to be equally applicable to rights and remedies created by a federal statute,[67] the plaintiff was limited to the remedy available under the FLSA.[68] The case was remanded to the trial court to allow the plaintiff to amend his complaint to substitute a statutory claim under the FLSA in place of the common-law wrongful discharge claim he had originally alleged.[69]

The preemption issue also arose in *Chappell v. Southern Maryland Hospital*.[70] The plaintiff in *Chappell* was the Director of Personnel for Southern Maryland Hospital.[71] During his employment, he claimed to have discovered various personnel practices that violated both state and federal wage and hour laws.[72] He reported the alleged violations to the hospital's management, but to no avail.[73] After the plaintiff documented the problems in writing, he was discharged.[74] He then brought suit for wrongful discharge, claiming he was terminated for insisting, among other things, that the hospital "cease its illegal policy regarding wage and hour laws."[75]

The hospital moved to dismiss the complaint.[76] It conceded that violations of state and federal wage and hour laws may contravene public policy,[77] but argued it did not follow that a discharge for bringing such violations to the attention of management would warrant recognition of a tort action for wrongful discharge.[78] Specifically, the hospital argued the plaintiff's wrong-

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63. Dockins v. Ingles Mkts., 413 S.E.2d at 18.
64. *Id.*
65. *Id.* at 19.
66. *Id.* (citing Campbell v. Bi-Lo, 392 S.E.2d 477, 480-81 (S.C. Ct. App. 1990)).
67. *See, e.g.*, Fleming v. Miller, 47 F. Supp. 1004, 1008 (D. Minn. 1942) (applying the rule in the FLSA context), *modified on other grounds sub nom.* Walling v. Miller, 138 F.2d 629 (8th Cir. 1943), *cert. denied*, 321 U.S. 784 (1944).
68. Dockins v. Ingles Mkts., 413 S.E.2d 18, 19 (S.C. 1992). The court also noted the South Carolina courts have refused to extend the public policy exception to the at-will employment rule "beyond situations where the termination is in retaliation for an employee's refusal to violate the law at the direction of his employer." *Id.* at 18 (citing Epps v. Clarendon County, 405 S.E.2d 386 (S.C. 1991)).
69. *Id.* at 19.
70. Chappell v. Southern Md. Hosp., 578 A.2d 766 (Md. 1990).
71. *Id.* at 768.
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.* at 768-69.
78. *Id.* at 769.

ful discharge claim must fail "because exclusive statutory remedies existed to vindicate the violations" of public policy that had been alleged.[79]

This argument was premised on the Maryland Court of Appeals' earlier decision in *Makovi v. Sherwin-Williams Co.*[80] In *Makovi*, the plaintiff claimed she had been discriminated against on the basis of sex in violation of Title VII of the Civil Rights Act of 1964 (Title VII)[81] and the Maryland Fair Employment Practices Law.[82] Rather than bringing an action under those statutes, however, she filed a tort action for abusive discharge.[83] The court held the tort is unavailable when the public policy at issue is expressed in a statute that "carries its own remedy for vindicating that public policy."[84] Because Title VII and the Maryland Fair Employment Practices Law both provide remedies for employment discrimination, the court concluded "the generally accepted reason for recognizing the tort, that of vindicating an otherwise civilly unremedied public policy violation, [did] not apply."[85]

The plaintiff in *Chappell* argued the analysis in *Makovi* was not applicable because he was not alleging his employer had violated his rights under the wage and hour laws, but that he had been discharged for *questioning* his employer's alleged violations of those laws.[86] He also argued that, in any event, the statutory remedies were inadequate, and the recognition of a tort claim was necessary to compensate him fully for his injuries by means of an award of compensatory and punitive damages.[87]

The court rejected the former argument, noting the relevant statutory antiretaliation provisions were sufficiently broad to apply to the conduct alleged.[88] It also rejected the argument the statutory remedies were inadequate, on the ground that allowing for the recovery of tort damages in the name of vindicating public policy when Congress had not provided for such damages "'would upset the balance between right[s] and remed[ies] struck by [Congress] in establishing the very policy being relied upon.'"[89]

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79. *Id.*

80. Makovi v. Sherwin-Williams Co., 561 A.2d 179 (Md. 1989). One commentator has stated *Makovi* "perhaps best exemplifies the reasoning employed by state courts in rejecting [public policy] claims." Knack, *supra* note 6, at 537.

81. 42 U.S.C. §§ 2000e-3 to 2000e-17 (1988).

82. Makovi v. Sherwin-Williams Co., 561 A.2d at 180-81. For the text of the Maryland Fair Employment Practices Law, see 1965 Md. Laws 717.

83. Makovi v. Sherwin-Williams Co., 561 A.2d at 180-81. In Maryland, the terms "abusive discharge" and "wrongful discharge" appear to be used interchangeably. *See, e.g.*, Kerrigan v. Magnum Entertainment, 804 F. Supp. 733, 734 (D. Md. 1992); Chappell v. Southern Md. Hosp., 578 A.2d 766, 768 (Md. 1990).

84. Makovi v. Sherwin-Williams Co., 561 A.2d at 182.

85. *Id.* at 190.

86. Chappell v. Southern Md. Hosp., 578 A.2d at 771 (emphasis added).

87. *Id.*

88. *Id.* at 773. Both the Title VII and FLSA antiretaliation provisions were at issue in *Chappell*. *See id.* at 772-73.

89. *Id.* at 774 (quoting Makovi v. Sherwin-Williams Co., 561 A.2d 179, 190 (Md. 1989)).

IV. THE VIEW THAT THE FLSA DOES NOT PREEMPT WRONGFUL DISCHARGE CLAIMS

A. *The* Chappell *Dissent*

Three dissenting judges in *Chappell* were of the view the FLSA should not preempt common-law wrongful discharge claims premised on the public policy set forth in the FLSA.[90] The *Chappell* dissent concluded the plaintiff should be entitled to pursue a common-law wrongful discharge claim because, as an individual employed in a "'bona fide executive, administrative, or professional capacity,'" he was exempt from the Maryland wage and hour laws, and the applicable statutory remedies therefore were not available to him.[91]

Insofar as the FLSA is concerned, that analysis is incorrect. Unlike the Maryland Minimum Wage Act, which excepts from the definition of "employee" any individual employed in a "bona fide executive, administrative, or professional capacity,"[92] the FLSA makes it unlawful for an employer to retaliate against "*any* employee,"[93] and defines "employee" as "any individual employed by an employer."[94] Thus, the protection of the FLSA's antiretaliation provision extends to *all* employees, including those who are exempt from the FLSA's minimum wage and overtime compensation requirements.[95]

The view expressed by the *Chappell* dissent nevertheless was embraced in a subsequent law review article.[96] Ironically, the article's authors alluded to, but then ignored, the error in the *Chappell* dissent's reasoning. The authors acknowledged that the FLSA "makes it unlawful for an employer to

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90. *Id.* at 774-75 (Adkins, J., dissenting).

91. *Id.* at 776 (Adkins, J., dissenting) (quoting MD. ANN. CODE art. 100, § 82(e)(2) (1985)); *cf.* Tasman & Jacobsen, *supra* note 7, at 1171 n.133 (suggesting the *Chappell* majority accepted the employer's contrary argument that because the plaintiff was excluded from the protection of the Maryland Minimum Wage Act, public policy considerations were not implicated by his discharge).

92. MD. ANN. CODE art. 100, § 82(e)(2) (1985).

93. 29 U.S.C. § 215(a)(3) (1988) (emphasis added).

94. *Id.* § 203(e)(1).

95. *See* Wirtz v. Ross Packaging Co., 367 F.2d 549 (5th Cir. 1966).

> Unlike the wage and hour provisions of Sections 6 and 7 of the Act, . . . the protections of Section [2]15(a)(3) apply, without qualification, to "any employee." . . . Thus, the clear and unambiguous language of the statute refutes the . . . view that . . . the employee . . . must be engaged in activities covered by the Act's wage and hour provisions in order for the strictures against discriminatory discharge to be invoked.

Id. at 550-51; *see also* Mitchell v. Equitable Co., 13 Wage & Hour Cas. (BNA) 606 (D.N.J. 1958).

> Section [2]15(a)(3) renders unlawful the discharge of "any employee," whether or not such employee is engaged in the performance of work which is covered by the Act. A showing of coverage of [the] discharged employee is therefore unnecessary in an [action] . . . for wrongful discharge . . . in violation of Section [2]15(a)(3) of the Fair Labor Standards Act.

Id. at 607.

96. Tasman & Jacobsen, *supra* note 7, at 1163-74.

discriminate against an employee for reporting violations of the Act, and provides its own remedies."[97] Like the *Chappell* dissent, however, the authors took issue with the conclusion that the plaintiff in that case was precluded from bringing a common-law tort action on the ground that, as an administrative employee, he was excluded from the protection of the Maryland Minimum Wage Act's "whistle-blowing" provisions.[98] Because the state statute "express[ed] a clear public policy to protect those who act for the public good in reporting violations of state minimum wage and hour laws," but provided the plaintiff with no remedy, the authors concluded, "under *Makovi*, 'the generally accepted reason for recognizing the tort, that of vindicating an otherwise civilly unremedied public policy violation,' applie[d]."[99] Accordingly, the plaintiff "should have been allowed to sue in tort for abusive discharge."[100]

The authors of the article are simply incorrect in suggesting the exclusion of the plaintiff from the protection of the Maryland Minimum Wage Act undermines the conclusion the FLSA preempted his wrongful discharge claim.[101] It obviously is the broader definition of "employee" contained in the FLSA (within which the plaintiff in *Chappell* did fall),[102] and not the definition in the Maryland statute, that is relevant to the preemption conclusion.[103]

B. Amos v. Oakdale Knitting Co.[104]

1. *The Decision in* Amos

The analysis in *Amos v. Oakdale Knitting Co.*[105] suggests the FLSA may not preempt common-law wrongful discharge claims.[106] The plaintiffs in *Amos* were former employees of the Oakdale Knitting Company in Surry

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97. *Id.* at 1170-71.
98. *Id.* at 1171.
99. *Id.* (quoting Makovi v. Sherwin-Williams Co., 561 A.2d 179, 190 (Md. 1989)).
100. *Id.*
101. *Cf.* Estate of Walton, 794 P.2d 131, 134 (Ariz. 1990) (stating differences between the language of a federal statute and that of a state statute patterned after the federal statute suggest the statutes should be interpreted differently).
102. *See supra* text accompanying notes 92-95.
103. *See* Walling v. McKay, 70 F. Supp. 160 (D. Neb. 1946), *aff'd sub nom.* McComb v. McKay, 164 F.2d 40 (8th Cir. 1947).

> The [FLSA] is a law complete in itself and, since Congress has defined the meaning of certain terms as used in the Act, these statutory definitions are controlling. . . . And there being no ambiguity or doubtful significance in the meaning of these terms, the court[s] may not, for purposes of interpretation and construction, resort to other statutes . . . .

Id. at 170.
104. Amos v. Oakdale Knitting Co., 416 S.E.2d 166 (N.C. 1992).
105. *Id.*
106. *Id.* at 170-72.

County, North Carolina.[107] In February 1988 their compensation was reduced to $2.18 per hour, which was substantially below the $3.35 per hour minimum wage then prevailing in North Carolina.[108]

When the plaintiffs objected to the reduction, they were told they had to work at the reduced rate or be fired.[109] They refused to work under those conditions, and were discharged.[110] They then brought suit claiming they had been wrongfully discharged in violation of the public policy expressed in the minimum wage provisions of the North Carolina Wage and Hour Act.[111]

The trial court agreed with the plaintiffs that discharging an employee for refusing to work for less than the statutory minimum wage would violate the public policy of North Carolina.[112] Because it felt bound, however, by the decision in *Coman v. Thomas Manufacturing Co.*,[113] in which the North Carolina Court of Appeals held the public policy exception to the employment-at-will rule was limited to instances in which an employer has attempted to interfere with an employee's testimony in a legal proceeding,[114] the court dismissed the plaintiffs' action.[115]

While *Amos* was pending on appeal, the North Carolina Supreme Court overturned the court of appeals' decision in *Coman*,[116] thereby allowing the plaintiffs in *Amos* to cite the North Carolina Supreme Court's intervening decision in *Coman* in support of their wrongful discharge claim.[117] The

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107. Amos v. Oakdale Knitting Co., 403 S.E.2d 565, 566 (N.C. Ct. App. 1991), *rev'd*, 416 S.E.2d 166 (N.C. 1992).

108. Amos v. Oakdale Knitting Co., 416 S.E.2d at 167-69. The North Carolina minimum wage was increased to $3.80 per hour on January 1, 1992, and to $4.25 per hour on January 1, 1993. N.C. GEN. STAT. § 95-25.3(a) (1991).

109. Amos v. Oakdale Knitting Co., 416 S.E.2d at 168.

110. *Id.*

111. *Id.*

112. Amos v. Oakdale Knitting Co., 403 S.E.2d 565, 567-68 (N.C. Ct. App. 1991), *rev'd*, 416 S.E.2d 166 (N.C. 1992).

113. Coman v. Thomas Mfg. Co., 371 S.E.2d 731 (N.C. Ct. App. 1988), *rev'd*, 381 S.E.2d 445 (N.C. 1989).

114. *Id.* at 734-35.

115. Amos v. Oakdale Knitting Co., 416 S.E.2d at 169; *see also* Shelton, *supra* note 9, at 124-25. Interestingly, the court of appeals in *Coman* had stated it "recognized a tort cause of action against an employer only when an exception to the 'at will' doctrine has been created by our legislature which specifically gives an employee a right to sue an employer for retaliatory discharge," and cited as an example of such an exception the prohibition of discharges for filing a Wage and Hour Act complaint set forth in N.C. GEN. STAT. § 95-25.20. Coman v. Thomas Mfg. Co., 371 S.E.2d at 735.

116. Coman v. Thomas Mfg. Co., 381 S.E.2d 445 (N.C. 1989), *rev'g* 371 S.E.2d 731 (N.C. Ct. App. 1988).

117. Amos v. Oakdale Knitting Co., 403 S.E.2d at 566-67; *see also* Shelton, *supra* note 9, at 125. A decision of the North Carolina Supreme Court reversing a decision of the North Carolina Court of Appeals generally is given retrospective application, and therefore applies to cases pending on appeal at the time the North Carolina Supreme Court's decision is issued. *See* Cox v. Haworth, 284 S.E.2d 322, 324 (N.C. 1981); Fauchette v. Zimmerman, 338 S.E.2d 804, 808 (N.C. Ct. App. 1986); *cf.* Bernstein v. Aetna Life & Casualty, 843 F.2d 359, 362-64 (9th Cir. 1988)

employer responded by arguing the FLSA preempted the claim.[118] The North Carolina Court of Appeals declined to consider the preemption argument because it had not been raised at the trial court level.[119] The court effectively held, however, the claim was preempted by the remedies available under the FLSA's state law counterpart, the North Carolina Wage and Hour Act.[120]

In reaching that conclusion, the court acknowledged that the minimum wage provisions of the North Carolina Wage and Hour Act reflect the public policy of North Carolina.[121] It also noted, however, the North Carolina legislature had provided employees with a remedy in the event an employer failed to comply with the minimum wage requirements of the state act, or retaliates against an employee for exercising rights available under the Act.[122]

The plaintiffs argued the latter remedy was not available to them because "they were terminated before they had an opportunity to file a complaint."[123] The court concluded, however, the plaintiffs' claim was preempted by the remedy provided for violations of the Act's minimum wage provisions, because the plaintiffs could have continued to work at the reduced wage and pursued that remedy.[124] Given the availability of that option, the plaintiffs were not entitled to refuse to work and, after being discharged, pursue a wrongful discharge claim independent of the statute.[125]

The plaintiffs in *Amos* appealed the North Carolina Court of Appeals' decision.[126] The North Carolina Supreme Court subsequently accepted the plaintiffs' petition for discretionary review as to additional issues,[127] and ultimately reversed the Court of Appeals' decision.[128]

The employer argued to the North Carolina Supreme Court that its alleged conduct was peculiar to the plaintiffs, was not injurious to the public,

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(giving retroactive application to the Arizona Supreme Court's recognition of the public policy exception in Wagenseller v. Scottsdale Memorial Hosp., 710 P.2d 1025 (Ariz. 1985)).

118. Amos v. Oakdale Knitting Co., 403 S.E.2d at 566.

119. *Id.* Given the limited nature of the public policy exception at the time of the trial court's decision, as represented by the North Carolina Court of Appeals' decision in *Coman*, the employer in *Amos* may not have considered it necessary to make the preemption argument at the trial court level.

120. *Id.* at 567-68.

121. *Id.* at 567; *see also* Iturbe v. Wandel & Goltermann Technologies, 774 F. Supp. 959, 962 (M.D.N.C. 1991) ("Without question, the minimum wage law [expresses] the public policy of North Carolina.").

122. Amos v. Oakdale Knitting Co., 403 S.E.2d at 567 (citing N.C. GEN. STAT. §§ 95-25.20(a), 95-25.22 (1985)).

123. *Id.* The North Carolina Act provides a remedy when an employer has "discharge[d] or . . . discriminate[d] against [an] employee because the employee file[d] a complaint or participate[d] in [an] investigation or proceeding" under the Act. N.C. GEN. STAT. § 95-20(a) (1985).

124. Amos v. Oakdale Knitting Co., 403 S.E.2d at 567.

125. *Id.*

126. *See* Amos v. Oakdale Knitting Co., 416 S.E.2d 166 (N.C. 1992).

127. *See id.* at 168.

128. *Id.* at 174.

and did not affect the public good.[129] The employer argued, therefore, its alleged conduct did not violate public policy as defined in *Coman*.[130] The employer further argued the "employee must either be required to engage in unlawful conduct or the employer's conduct must threaten public safety" before a public policy claim may be stated.[131] The court concluded, however, the employer was interpreting *Coman* too narrowly.[132] "[A]t the very least public policy is violated when an employee is fired in contravention of express policy declarations contained in the North Carolina General Statutes."[133] Discharging an employee for refusing to work for less than the statutory minimum wage meets that test,[134] the court concluded, because the North Carolina Wage and Hour Act expressly states:

> The public policy of this State is declared as follows: The wage levels of employees, hours of labor, payment of earned wages, and the well-being of minors are subjects of concern requiring legislation to promote the general welfare of the people of the State without jeopardizing the competitive position of North Carolina business and industry.[135]

The court observed, however, the Court of Appeals had effectively established a two-part test, in which application of the public policy exception requires not only "'that the discharge violate some well-established public policy,'" but "'that there be no [statutory] remedy to protect the interest of the aggrieved employee or society.'"[136] The North Carolina Supreme Court characterized the second prong of the test as a "limitation" on its holding in *Coman*,[137] and indicated the issue before it was whether the creation of such a limitation had been appropriate.[138]

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129. *Id.* at 169.

130. *Id.*; *cf.* Gantt v. Sentry Ins., 824 P.2d 680, 684 (Cal. 1992) ("[T]he policy in question must involve a matter that affects society at large rather than a purely personal or proprietary interest of the plaintiff or employer.").

131. Amos v. Oakdale Knitting Co., 416 S.E.2d at 169.

132. *Id.*

133. *Id.*

134. *Id.* at 170.

135. *Id.* at 169 (quoting N.C. GEN. STAT. § 95-25.1(b) (1989)).

136. *Id.* at 170 (quoting Wehr v. Burroughs Corp., 438 F. Supp. 1052, 1055 (E.D. Pa. 1977) *aff'd as modified*, 619 F.2d 276 (3d Cir. 1980)); *see also* Iturbe v. Wandel & Goltermann Technologies, 774 F. Supp. 959, 962-63 (M.D.N.C. 1991).

137. Amos v. Oakdale Knitting Co., 416 S.E.2d at 170; *cf.* Iturbe v. Wandel & Goltermann Technologies, 774 F. Supp. at 962 (observing the North Carolina Court of Appeals' decision in *Amos* "clarifie[d] the reach of the public policy exception to the employment at will doctrine created in *Coman*"); Shelton, *supra* note 9, at 124 (observing the North Carolina Court of Appeals' decision in *Amos* "narrowed the public policy exception" as defined in *Coman*).

138. Amos v. Oakdale Knitting Co., 416 S.E.2d at 170. The court noted courts in other jurisdictions had split on this issue. *Id.* It also cited a decision of the United States Court of Appeals for the Fourth Circuit that concluded "no North Carolina authority" existed for such a limitation on *Coman*. *Id.* (citing Harrison v. Edison Bros. Apparel Stores, 924 F.2d 530, 533 (4th Cir. 1991)).

The court indicated that if it had adopted the public policy exception merely "to provide a remedy where [none previously] existed, then the reasoning of the Court of Appeals would be persuasive."[139] The unavailability of an alternative remedy, however, had not been the key factor behind the adoption of the public policy exception in *Coman*.[140]

The court explained adoption of the exception in *Coman* had been prompted, instead, by the view that the employment-at-will doctrine had limits, and it was the role of the courts to define those limits.[141] The court noted the public policy exception was not a "remedial gap-filler," but rather a "judicially recognized outer limit to a judicially created doctrine, designed to vindicate the rights of employees" discharged for reasons contrary to public policy.[142] The existence of alternative statutory remedies, therefore, "does not necessarily render the public policy exception moot."[143]

The court recognized this analysis, however, did not resolve the matter.[144] Although the availability of a statutory remedy does not *necessarily* preclude a claim for wrongful discharge, the existence of a federal remedy has that effect if Congress intended to preempt state law.[145] Accordingly, the plaintiffs in *Amos* would not be entitled to pursue tort remedies for wrongful discharge if the remedies available under the FLSA preempted those tort remedies.[146]

Although the parties apparently urged the North Carolina Supreme Court to address the FLSA preemption issue,[147] it declined to do so.[148] The

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139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*; *cf.* Percell v. IBM, 765 F. Supp. 297, 300 (E.D.N.C. 1991) ("Because the employment-at-will doctrine is a judicially adopted rule, it is the province of the courts to delineate the scope of that rule.") (citations omitted). *But cf.* Bottijliso v. Hutchison Fruit Co., 635 P.2d 992, 997-98 (N.M. Ct. App. 1981) ("[I]n light of New Mexico's long standing recognition of the 'at will' rule, the issue of whether a new cause of action should be recognized in this state for retaliatory dismissal is more appropriately addressed to the state legislature than to the judiciary.").

143. Amos v. Oakdale Knitting Co., 416 S.E.2d at 171. Even before the North Carolina Supreme Court rejected the court of appeals' attempt to place a limitation on the supreme court's holding in *Coman*, there was doubt as to whether the availability of an alternative *federal* remedy would preclude a common-law wrongful discharge claim in North Carolina. *Compare* Mayse v. Protective Agency, 772 F. Supp. 267, 275 (W.D.N.C. 1991) (holding the availability of a federal remedy does not preclude a common-law cause of action) *with* Percell v. IBM, 765 F. Supp. 297, 302 (E.D.N.C. 1991) (stating "the North Carolina legislature chose not to provide any remedies beyond those available under federal discrimination statutes.").

144. *See* Amos v. Oakdale Knitting Co., 416 S.E.2d at 171 ("Although we now hold that the existence of an alternative remedy does not *automatically* preclude a claim for wrongful discharge based on the public policy exception, we also hold that under certain circumstances a legislative remedy may be deemed exclusive.").

145. *Id.* ("If federal legislation preempts state law under the Supremacy Clause, U.S. Const. art. VI, cl.2, then state claims, such as one for wrongful discharge, will be precluded.").

146. *See id.* at 171-72.

147. *Id.* at 170. The parties appear to have agreed the employer was covered by the FLSA, and therefore exempt from the North Carolina Wage and Hour Act. *Id.* The court never-

court, however, did address the issue of whether the North Carolina legislature had intended for the North Carolina Wage and Hour Act to supplant the common law with exclusive statutory remedies.[149] The court's analysis of that issue provides some guidance as to how it would have been likely to resolve the FLSA preemption issue.[150]

The court looked first to the language of the statute to determine whether the state legislature had expressly precluded the pursuit of common-law remedies.[151] Finding that it had not,[152] the court turned to an examination of the "purpose and spirit of the statute" in an effort to determine what the legislature was seeking to accomplish,[153] considering "both the history and circumstances surrounding the legislation and the reason for its enactment."[154] Because the legislature had provided a remedy for employees who are discharged "in retaliation for filing a complaint or participating in an investigation under the Wage and Hour Act," but not for those who are discharged for "refusing to work for less than the statutory minimum wage," the court concluded the statute did not preempt common-law remedies in the latter situation.[155]

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theless concluded the record did not contain sufficient information to make that determination. *Id.* at 171.

148. *Id.* at 172. The court declined to address the issue because it had not been passed upon by the trial court or the court of appeals: "The issue of federal preemption is a constitutional question and therefore will not be reviewed by this court unless it affirmatively appears from the record that the issue was raised and passed upon in the court below." *Id.*

149. *Id.*

150. Preemption analysis is essentially the same regardless of whether a state statute or a federal statute is at issue. *See* Becker v. Litty, 566 A.2d 1101, 1107 (Md. 1989); HENRY H. PERRITT, JR., EMPLOYEE DISMISSAL LAW AND PRACTICE § 2.40, at 175 n.633, 177 n.650 (3d ed. 1992).

151. Amos v. Oakdale Knitting Co., 416 S.E.2d at 172.

152. *Id.*; *cf.* Maccabees Mut. Life Ins. Co. v. Perez-Rosado, 641 F.2d 45, 46 (1st Cir. 1981) ("The FLSA does not expressly prohibit state legislation in the area of wages and working conditions."); Smith v. Batchelor, 832 P.2d 467, 471 (Utah 1992) ("[T]he FLSA contains no express federal intent to preempt state law.").

153. *But cf.* Knack, *supra* note 6, at 543 ("[C]ourts could logically conclude that by failing to include a simple statement of exclusivity in the . . . statute, legislatures intended for the statutory remedies to be cumulative and not exclusive.").

154. Amos v. Oakdale Knitting Co., 416 S.E.2d at 172 (quoting Biddix v. Henredon Furniture Indus., 331 S.E.2d 717, 720 (N.C. Ct. App. 1985)).

155. *Id.* The court based its conclusion in part on the fact that, at the time the statutory remedial provisions were enacted, "neither this Court nor the Court of Appeals had recognized the public policy exception to the employment-at-will doctrine." *Id.* Not only does this reasoning seem to be at odds with the notion of looking to the "spirit" of the statute to determine what the legislature intended to accomplish, *see* Kenneth L. Hirsch, *Toward a New View of Federal Preemption*, 1972 U. ILL. L. F. 515, 540 (observing legislatures cannot anticipate "all of the preemption problems which may arise. . . ."), but it clearly would be incorrect as a matter of *federal* preemption analysis. A federal statute that "occupies the field," for example, displaces all state laws on the same subject, regardless of the time of the state law's enactment (or judicial recognition). *See generally id.* at 529 ("[W]hen . . . a federal act . . . 'occup[ies] the field' regarding a particular subject, . . . the states are precluded from regulating the subject in any way.").

2. *FLSA Implications of the Analysis in* Amos

Because the North Carolina Wage and Hour Act is patterned after the FLSA,[156] the North Carolina Supreme Court's interpretation of the state act provides an indication of how it would be likely to analyze the FLSA preemption issue.[157] In this regard, there are some significant problems with the *Amos* court's analysis.

First, the FLSA's antiretaliation provision is not interpreted as narrowly as the North Carolina Supreme Court interpreted the comparable North Carolina provision.[158] In *Brock v. Casey Truck Sales,*[159] for example, several employees were discharged after they refused to repudiate their right to back wages awarded in connection with a Department of Labor investigation concerning the employer's "compliance with the overtime pay provision of the FLSA."[160] The employer argued the employees' conduct did not fall within the protection of the antiretaliation provision of the FLSA.[161] The court disagreed.[162] It acknowledged that the antiretaliation provision "by its terms protects only against retaliation for initiating or testifying in proceedings."[163] Because the provision is intended to enhance compliance with the FLSA's substantive provisions, however, its protection generally has been extended to any activity in which retaliatory conduct would have a "chilling effect" on the assertion of FLSA rights, and not merely to those "directly connected to formal proceedings."[164] Noting the "[p]rotection against discrimination for instituting FLSA proceedings would be worthless if an employee could be fired for declining to give up the benefits he is due under the Act," the court concluded the employer's conduct violated the antiretaliation provision of the FLSA.[165]

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156. Poole v. Local 305 Nat'l Post Office, 318 S.E.2d 105, 107 (N.C. Ct. App. 1984); *see also* Amos v. Oakdale Knitting Co., 416 S.E.2d at 169 (noting the similarities in remedies between the state and federal acts).

157. *See supra* text accompanying notes 149-50.

158. *Compare* Amos v. Oakdale Knitting Co., 416 S.E.2d 166, 172 (N.C. 1992) (stating "[b]ecause plaintiffs in this case did not file a complaint, [the antiretaliation provision of the North Carolina Wage and Hour Act] presumably has no application.") *with* Prewitt v. Factory Motor Parts, 747 F. Supp. 560, 563 (W.D. Mo. 1990) ("[C]ourts have interpreted [the antiretaliation provision of the FLSA] broadly and have not limited its protection to activities explicitly covered by its language.") (citations omitted). *See* 29 U.S.C. § 215(a)(3) (1988).

159. Brock v. Casey Truck Sales, 839 F.2d 872 (2d Cir. 1988).

160. *Id.* at 874-76, 879.

161. *Id.* at 879; *see* 29 U.S.C. § 215(a)(3) (1988).

162. Brock v. Casey Truck Sales, 839 F.2d at 879.

163. *Id.*

164. *Id.*

165. *Id.*; *see* Brennan v. Maxey's Yamaha, 513 F.2d 179, 180-81 (8th Cir. 1975) (holding discharge based on employee's insistence upon receiving benefits provided by the FLSA fell within the antiretaliation provision of the FLSA); *see also* 29 U.S.C. § 215(a)(3) (1988).

It seems clear the conduct alleged in *Amos* similarly is unlawful, if at all, because discharging employees for refusing to work for less than the minimum wage constitutes retaliation against them for declining to give up their statutory rights,[166] which would be prohibited by the antiretaliation provision of the FLSA under the *Brock* court's analysis.[167] This obviously suggests the *Amos* court's preemption analysis cannot properly be extended to the FLSA.

Even more fundamental problems may exist, however, with the *Amos* court's reasoning. Suppose, for example, the plaintiffs in *Amos* had been permitted to continue to work at the prevailing North Carolina minimum wage rate of $3.35 per hour until January 1, 1992, when the rate was increased to $3.80 per hour.[168] Suppose further the employer then concluded it could not profitably employ the plaintiffs at the increased rate.[169] A decision to discharge the plaintiffs for that reason presumably would not have been violative of the FLSA.[170]

By the same token, the actual facts in *Amos* may simply reflect the employer's conclusion it could not profitably *continue* to employ the plaintiffs at the *then*-prevailing minimum wage rate.[171] Its initial reaction to that con-

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166. But see *infra* text accompanying notes 168-86 for a discussion of the possibility the conduct alleged in *Amos* should not be considered unlawful.

167. *See supra* text accompanying notes 158-65.

168. *See* N.C. GEN. STAT. § 95-25.3(a) (1992).

169. *Cf.* Albert v. Parish of Rapides, 237 So. 2d 380 (La. 1970) (increasing the minimum wage prompted a layoff of firemen because the parish lacked funds to pay the increased wages), *overruled by* Bowen v. Doyal, 253 So. 2d 200 (La. 1971).

170. *See* H. R. REP. NO. 521, 95th Cong., 1st Sess. 64 (1977), *reprinted in* 1977 U.S.C.C.A.N. 3201, 3251 ("Clearly as the required rate of compensation increases, a point is reached at which the employer must determine the value of the worker's contribution in light of his compensation. . . . [A]t this point . . . resultant reductions in the work force occur . . . .") (minority views). *But cf.* Employment Coordinator (Research Inst. Am.) ¶ C-14,130, at 54,084 (Jan. 18, 1993) ("Where the FLSA minimum wage is raised, contractual rates lower than the new minimum must also be raised to comply with the Act.") (citing Lexington Fed'n of Tel. Workers v. Kentucky Tel. Corp., 202 F.2d 153 (6th Cir. 1953)). *See generally* Maria O. Hylton, *"Parental" Leaves And Poor Women: Paying The Price for Time Off*, 52 U. PITT. L. REV. 475 (1991):

> [T]here is considerable empirical evidence suggesting that employment opportunities for low-skill workers are reduced with each increase [in the minimum wage]. What happens is that an employer, faced with a rising cost for labor, substitutes away from labor and in favor of capital to the extent that substitution is possible. Where substitution is not possible and the added cost cannot be passed on to consumers, the real rate of employment is reduced.

Id. at 488-89.

171. *See generally* Hylton, *supra* note 170, at 489 ("When an employer is faced with a legal minimum wage, if it exceeds the contribution of some employees to the firm's revenue, the firm can either lay these persons off or 'subsidize' their employment.") (quoting Marvin Kosters & Finis Welch, *The Effects of Minimum Wages By Race, Sex and Age*, *in* RACIAL DISCRIMINATION IN ECONOMIC LIFE 109 (Anthony Pascal ed., 1972)). Any other characterization of the discharges in *Amos* is difficult to reconcile with the fact the employer was willing to continue to employ the plaintiffs at a reduced rate. *Cf.* RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 74 n.13 (1992) (concluding employers

clusion—attempting to "coerce" the plaintiffs into working for less than the minimum wage[172]—obviously was unlawful.[173] Standing alone, however, the employer's decision to discharge the plaintiffs rather than employ them at the higher minimum wage rate does not appear to be violative of the FLSA.[174]

The *Amos* court reached a contrary conclusion by emphasizing the plaintiffs had been terminated after refusing to work for less than the minimum wage.[175] That fact does not necessarily compel the conclusion the plaintiffs' discharges were unlawful, however.[176] Indeed, it is not at all clear an employer should be subject to potential tort liability merely because, prior to implementing an otherwise lawful decision to discharge an employee for economic reasons,[177] it offers the employee the seemingly less Draconian

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generally are unwilling to subject themselves to potential FLSA liability by "seek[ing] to undercut the minimum wage").

172. Amos v. Oakdale Knitting Co., 403 S.E.2d 565, 567 (N.C. Ct. App. 1991) (suggesting the employer's conduct in *Amos* was a "coercive attempt[ ] to deprive employees of the wages to which they are lawfully entitled"), *rev'd*, 416 S.E.2d 166 (N.C. 1992).

173. *See* Allen v. Atlantic Richfield Co., 724 F.2d 1131, 1135 (5th Cir. 1984) ("[A]n agreement for an employee . . . to work at less than the minimum wage would not be enforceable, since an employee's right to a minimum wage per hour . . . is not subject to waiver by the employee."); Oliver v. Mercy Medical Ctr., 695 F.2d 379, 381 (9th Cir. 1982) ("[A]n agreement providing for less than the statutory minimum wage . . . is prohibited by the act.").

174. *See* Atlantic Co. v. Walling, 131 F.2d 518, 522 (5th Cir. 1942) ("[N]othing in the [FLSA] requires employers to continue to employ, or employees to continue to work, except on terms mutually agreeable to both . . ."). An analogous issue arose in Adams v. City of McMinnville, 890 F.2d 836 (6th Cir. 1989). The employer in *Adams*, a municipality, responded to the fiscal pressures created by the extension of the FLSA to public employers by reducing the hours of work of its firefighters in order to avoid paying them an overtime premium. *Id.* at 837. The court held the municipality's action did not violate the antiretaliation provisions of the FLSA. *Id.* at 840. It reasoned although "[t]he FLSA guarantees that premium compensation will be paid to employees who work overtime," it does not guarantee employees "that they will be able to work overtime hours in order to receive premium pay." *Id.*; *cf.* Smith v. Batchelor, 832 P.2d 467, 472 (Utah 1992) ("It is possible for an employer to comply with [the FLSA] . . . by compensating for or *curtailing* hours worked in excess of forty per week . . . .") (emphasis added). By analogy, it seems clear although the FLSA requires employers to pay the minimum wage to those individuals they do employ, it does not require anyone actually be employed.

175. Amos v. Oakdale Knitting Co., 416 S.E.2d 166, 170 (N.C. 1992); *cf.* Dockins v. Ingles Mkts., 413 S.E.2d 18, 18 (S.C. 1992) (holding the public policy exception applies when a "termination is in retaliation for [the] employee's refusal to violate the law at the direction of his employer"). *But cf.* Shelton, *supra* note 9, at 132 (concluding "the plaintiffs in *Amos* were not asked to violate the law").

176. *Cf.* Harrison v. Edison Bros. Apparel Stores, 924 F.2d 530, 533 (4th Cir. 1991) ("[T]he only . . . successful wrongful discharge plaintiffs . . . in [previously] reported North Carolina cases have had to choose between their jobs and violating the *criminal* law.") (emphasis added); Percell v. IBM, 765 F. Supp. 297, 301 (E.D.N.C. 1991) ("[A] question [exists] as to whether the North Carolina courts would allow a wrongful discharge action where an employee is terminated for refusing to perform a non-criminal act that violates a well established public policy."); Shelton, *supra* note 9, at 131 ("From the cases that have addressed the employment-at-will doctrine so far, it appears that the [public policy] exception is limited to those policies supported by criminal statutes and regulations.").

177. *See supra* text accompanying notes 168-74.

(although admittedly unlawful) alternative of working for less than the minimum wage.[178]

In this sense, the analysis in *Amos* serves to illustrate that, in the words of one commentator, the "very existence of [a] minimum wage law . . . increases the incentive of the employer to discriminate against . . . workers whose low skill levels leave them at the fringes of the economic market."[179] In other words, the FLSA (and state minimum wage laws patterned after it) effectively provide employers with no alternative but to discharge, or to refuse to hire, individuals who cannot profitably be employed at the minimum wage.[180] Professor Richard Epstein has provided an apt description of the phenomenon:

> [The FLSA] forbids employers to offer positions below a certain stated rate. But where enforcement of the law is highly effective, the statute destroys opportunities for workers and employers alike. Since employers may no longer offer wages below the legal minimum, . . . workers are deprived of the opportunity to accept them. The statute thus drives some workers (and some firms) from the market . . . .[181]

If anything, the problem would be exacerbated by the recognition of a wrongful discharge tort claim based on the public policy expressed in the FLSA.[182] It is, moreover, the North Carolina Court of Appeals, not the North

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178. On this point, see Judge Richard Posner's recent observation, in a different context, that "rarely is a person made better off by having an option removed." RICHARD A. POSNER, SEX AND REASON 253 (1992); *cf.* Coman v. Thomas Mfg. Co., 381 S.E.2d 445, 452 (N.C. 1989) (Meyer, J., dissenting) (predicting increased social costs resulting from an expanded interpretation of the public policy exception because, among other things, "[e]mployers will be less likely to discharge economically unnecessary employees").

179. EPSTEIN, *supra* note 171, at 125.

180. *See generally* S. REP. NO. 145, 87th Cong., 1st Sess. (1961), *reprinted in* 1961 U.S.C.C.A.N. 1620, 1638 (discussing reports indicating of 12,000 individuals employed in 150 plants surveyed, "about 1,800 workers"—15% of the total—"may have been discharged as a result of the minimum wage").

181. EPSTEIN, *supra* note 171, at 74. The courts also have alluded to the issue:

> Economists and other public policy makers debate the value to those of low and moderate incomes of having . . . a federal minimum wage . . . . While a wage floor increases the welfare of those who are hired, it is arguable that, if there were no prevailing wage requirement, social utility would be increased because [employers] would be able to hire more workers on a fixed labor budget.

Kam Shing Chan v. City of New York, 803 F. Supp. 710, 725 n.13 (S.D.N.Y. 1992), *aff'd*, 1 F.3d 96, *cert. denied*, 114 S. Ct. 472, *and cert. denied sub nom.* Chinese Am. Planning Council v. Kam Shing Chan, 114 S. Ct. 472 (1993).

182. *See* Shelton, *supra* note 9, at 133 (discussing the disincentive to development and industry that would result from recognition of a wrongful discharge tort under the circumstances presented in *Amos* because of the potential for a "substantially larger damage award in a wrongful discharge case" than in a case in which only statutory remedies are available); *cf.* Coman v. Thomas Mfg. Co., 381 S.E.2d 445, 452 (N.C. 1989) (Meyer, J., dissenting) (observing in-

Carolina Supreme Court, that appears to have been cognizant of this fact. The court of appeals observed, for example, the plaintiffs in *Amos* had the option of continuing to work and pursuing their statutory remedies, or refusing to work and being discharged.[183] The court further noted although the former option would have made the plaintiffs whole, they chose the latter.[184] Although the court emphasized it would not condone violations of the minimum wage laws, and denounced "coercive attempts to deprive employees of the wages to which they are lawfully entitled," it nevertheless concluded the employer in *Amos* should not be subject to potential tort liability for wrongful discharge.[185] The court reasoned:

> The General Assembly in enacting the Wage and Hour Act expressly recognized that the general welfare of the people necessitated a balancing of the employee's right to earn acceptable wages and the competitive position of North Carolina business and industry. The statutory remedy . . . reflects this balancing. [T]he legislature having expressed its intent, . . . we decline to extend the public policy exception to the employment at will doctrine to afford a cause of action in addition to that provided by statute. Relegating an employee to his statutory remedy is, in our view, a sound policy where . . . the employee has not been required to engage in unlawful conduct and the employer's statutory violation does not threaten the public safety.[186]

3. *The Analogy Between* Amos *and Constructive Discharge Cases*

The desirability of the North Carolina Court of Appeals' decision[187] can be further illustrated by comparing the North Carolina Supreme Court's analysis to that in constructive discharge cases.[188] Although there have been relatively few FLSA constructive discharge cases,[189] the courts that have con-

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creasingly expansive interpretations of the public policy exception will make employers "less willing to 'take a chance' on a marginal applicant").

183. Amos v. Oakdale Knitting Co., 403 S.E.2d 565, 567 (N.C. Ct. App. 1991), *rev'd*, 416 S.E.2d 166 (N.C. 1992).

184. *Id.*

185. *Id.* at 567-68.

186. *Id.* (citations omitted); *see also* Shelton, *supra* note 9, at 133 (suggesting "the North Carolina Court of Appeals' reluctance to apply the public policy exception in *Amos* stems from its desire to promote industry and development in North Carolina"); *cf.* Coman v. Thomas Mfg. Co., 381 S.E.2d 445, 452 (N.C. 1991) (Meyer, J., dissenting) (observing an expansive interpretation of the public policy exception "may indeed have an effect on the economic vitality of our state, particularly on the recruitment of new industry").

187. *See generally* Shelton, *supra* note 9, at 124 (concluding the court of appeals' decision "can be reconciled with other case law in North Carolina").

188. "Constructive discharge" refers to the situation in which an employer deliberately makes an employee's working conditions so intolerable that the employee is forced into involuntary resignation. Bourque v. Powell Elec. Mfg. Co., 617 F.2d 61, 65 (5th Cir. 1980).

189. *See* Ford v. Alfaro, 785 F.2d 835, 841 (9th Cir. 1986) ("[N]o FLSA cases discuss particular working conditions with a view to assessing whether an ordinary employee would feel

sidered the issue in the FLSA context generally have applied the doctrine as it has evolved in cases arising under Title VII.[190]

Bourque v. Powell Electrical Manufacturing Co.[191] is the leading Title VII constructive discharge case.[192] The plaintiff in *Bourque* claimed she had been constructively discharged by her employer's failure to compensate her at the same rate as male employees who held similar positions.[193] The court held, however, "that discrimination manifesting itself in the form of unequal pay cannot, alone, be sufficient to support a finding of constructive discharge."[194] In a critical passage, the court stated:

> [Plaintiff] contends . . . to require employees suffering illegal discrimination to seek legal redress while remaining in their jobs would contravene the policies served by Title VII because then only "foolhardy" victims would seek relief from discrimination. We disagree. Title VII itself accords legal protection to employees who oppose unlawful discrimination. Moreover, we believe that society and the policies underlying Title VII will be best served if, wherever possible, unlawful discrimination is attacked within the context of existing employment relationships.[195]

The applicability of this analysis to the facts in *Amos* seems self-evident. When the *Amos* plaintiffs' wages were reduced below the statutory minimum, they were entitled to pursue the statutory remedy available to them[196] within the context of the existing employment relationship.[197] If the employer discharged or otherwise discriminated against them for pursuing that remedy, they had available a statutory remedy for that conduct as

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compelled to resign if confronted with a difficult work environment."); Sheila Finnegan, Comment, *Constructive Discharge Under Title VII and the ADEA*, 53 U. CHI. L. REV. 561, 579 n.103 (1986) (stating "the issue of constructive discharge under the FLSA apparently was not considered until quite recently").

190. *See, e.g.*, Ford v. Alfaro, 785 F.2d at 840, 840 n.1 (observing Title VII constructive discharge analysis is instructive in FLSA cases).

191. Bourque v. Powell Elec. Mfg. Co., 617 F.2d 61 (5th Cir. 1980).

192. *See* Derr v. Gulf Oil Corp., 796 F.2d 340, 343 n.3 (10th Cir. 1986); Bailey v. Binyon, 583 F. Supp. 923, 928 (N.D. Ill. 1984).

193. Bourque v. Powell Elec. Mfg. Co., 617 F.2d at 64. Significantly, the conduct alleged in *Bourque* would be violative not only of Title VII, but also of the Equal Pay Act of 1963, 29 U.S.C. § 206(d) (prohibiting gender discrimination), which is a part of the FLSA. *See* Hill v. J. C. Penney Co., 688 F.2d 370, 372 n.1 (5th Cir. 1982); 29 C.F.R. § 1620.1 (1992).

194. Bourque v. Powell Elec. Mfg. Co., 617 F.2d at 65 ("[W]e simply do not believe that working for unequal pay . . . constitutes a condition of employment so intolerable that an employee is forced into involuntary resignation.").

195. *Id.* at 65-66 (citation omitted).

196. N.C. GEN. STAT. § 95-25.22 (1989).

197. Amos v. Oakdale Knitting Co., 416 S.E.2d 166, 172 (N.C. 1992) ("[P]laintiffs could have stayed on the job, working for $2.18 per hour, and pursued an action to recover unpaid wages.").

well.[198] Because their refusal to continue to work under those circumstances presumably would not be considered a constructive discharge under the *Bourque* analysis, they should have been precluded from pursuing a wrongful discharge claim.[199]

The North Carolina Supreme Court very nearly acknowledged this point, noting because the North Carolina Wage and Hour Act contained no remedy for an employee who is discharged for refusing to work for less than the statutory minimum wage, "it seems apparent that the intent of the legislature was to provide an employee an avenue to recover back wages *while remaining employed.*"[200] It nevertheless appears to have assumed the prospect of working for less than the state minimum wage while simultaneously pursuing the state statutory remedy was so intolerable that no reasonable person could be expected to continue to work under those conditions.[201] At least under the *Bourque* analysis, it seems unlikely courts construing the FLSA would reach the same conclusion.[202]

4. *The Implications of the* Amos *Court's Reference to* Webster v. Bechtel, Inc.[203]

One additional indication the North Carolina Supreme Court would have been likely to conclude the FLSA does not preempt wrongful discharge claims is its suggestion it would have looked to the analysis in *Webster v. Bechtel, Inc.*[204] for guidance on the issue.[205] Although the opinion in *Webster* reflects the most exhaustive consideration of the FLSA preemption issue by

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198. N.C. GEN. STAT. § 95-25.20(a) (1989); *see* Amos v. Oakdale Knitting Co., 403 S.E.2d 565, 567 (N.C. Ct. App. 1991), *rev'd*, 416 S.E.2d 166 (N.C. 1992).

199. *Cf.* Thomas v. Douglas, 877 F.2d 1428, 1434 (9th Cir. 1989) (holding wrongful discharge claim was precluded by the fact the plaintiff's working conditions were not so intolerable that they constituted a constructive discharge).

200. Amos v. Oakdale Knitting Co., 416 S.E.2d at 172.

201. That this is so can be demonstrated by postulating a slight variation on the facts in *Amos*. Suppose the employer had merely informed the plaintiffs they would not be permitted to work unless (or until) they agreed to the reduced wage, but had said nothing about discharging them. Had the plaintiffs refused to work under those conditions and brought suit claiming they had been constructively discharged, it is difficult to believe the court's analysis would have been different. *Cf.* J. P. Stevens & Co. v. NLRB, 461 F.2d 490, 494 (4th Cir. 1972) (holding an employee was constructively discharged when she was paid on a production rate set at an "artificially low level" that effectively made it "impossible for her to earn the federal minimum wage").

202. *Cf.* Ottaviani v. State Univ., 679 F. Supp. 288, 340 (S.D.N.Y. 1988) (holding compensation that violates the Equal Pay Act provisions of the FLSA "is not sufficient, by itself, to prove constructive discharge") (citing Bourque v. Powell Elec. Mfg. Co., 617 F.2d 61, 65 (5th Cir. 1980), *aff'd*, 875 F.2d 365 (2d Cir. 1989), *cert. denied*, 493 U.S. 1021 (1990)).

203. Webster v. Bechtel, Inc., 621 P.2d 890 (Alaska 1980).

204. *Id.*

205. *See* Amos v. Oakdale Knitting Co., 416 S.E.2d 166, 171-72 (N.C. 1992).

any court to date,[206] the case did not involve a wrongful discharge claim.[207] The issue in *Webster* instead was whether the FLSA preempted a claim for unpaid overtime compensation under the Alaska Wage and Hour Act (the "Alaska Act").[208]

The court analyzed the issue under a bipartite preemption test[209] established by the United States Supreme Court in *Ray v. Atlantic Richfield Co.*[210] Under the first prong of the test, a state remedy is preempted if the policy, intent, and context of a related federal statute expressly or impliedly declare it to be preempted.[211] If the federal statute contains no such declaration, the state remedy still is preempted under the second prong if (1) imposition of both remedies would be impossible, or (2) imposition of the state remedy would frustrate the purposes of the federal statute.[212]

The first prong requires a determination as to whether Congress intended for the FLSA to "occupy the field"[213] of wage and hour regulation.[214] The *Webster* court concluded it had not.[215] It based that conclusion primarily on the existence of the FLSA saving clause,[216] which expressly permits states to regulate some aspects of wages and hours.[217]

Having concluded Congress did not intend to occupy the field, the court indicated the Alaska Act nevertheless would be preempted under the second

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206. *See* Michael D. Moberly, *Fair Labor Standards Act Preemption of State Wage Payment Remedies*, 23 ARIZ. ST. L.J. 991, 1001 (1991).

207. *See id.* at 1005 (stating "Webster held only that the [FLSA] saving clause precludes pre-emption of a state statute requiring higher minimum wages or a shorter maximum workweek than the FLSA").

208. Webster v. Bechtel, Inc., 621 P.2d at 893 (citing ALASKA STAT. §§ 23.10.050-.150).

209. *Id.* at 897.

210. Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978).

211. Webster v. Bechtel, Inc., 621 P.2d at 897.

212. *Id.* at 897, 900-01.

213. *Id.* at 897 (citing LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 6-23, 6-27 (1978)).

214. *Id.* This aspect of the preemption inquiry has not gone without criticism:

> Little aid can be derived from the vague and illusory but often repeated formula that Congress "by occupying the field" has excluded from it all state [regulation]. Every Act of Congress occupies some field, but we must know the boundaries of that field before we can say that it has precluded a state from the exercise of any power . . . .

DeCanas v. Bica, 424 U.S. 351, 360 n.8 (1976) (quoting Hines v. Davidowitz, 312 U.S. 52, 78 (1941) (Stone, J., dissenting)).

215. Webster v. Bechtel, Inc., 621 P.2d at 898-99; *see also* Stewart v. Region II Child & Family Servs., 788 P.2d 913, 917 (Mont. 1990) (stating "in passing the F.L.S.A., Congress declined to pre-empt the entire field of wage and hour regulation"); Smith v. Batchelor, 832 P.2d 467, 471 (Utah 1992) (stating "the FLSA is not so comprehensive that it implies congressional intent to occupy the field").

216. 29 U.S.C. § 218(a) (1988).

217. Webster v. Bechtel, Inc., 621 P.2d at 898-99. *See generally* Overnite Transp. Co. v. Tianti, 926 F.2d 220, 222 (2d Cir.) ("Congress' intent to allow state regulation to coexist with the federal scheme can be found in § [2]18(a) of the FLSA, which explicitly permits states to mandate greater overtime benefits."), *cert. denied*, 112 S. Ct. 170 (1991). *See* 29 U.S.C. § 218(a) (1988).

prong of the *Atlantic Richfield* test if it conflicted with the FLSA.[218] The court concluded the Alaska Act did not conflict with the FLSA in the sense that compliance with both statutes was impossible,[219] however, because complying with the Alaska Act would not require the employer to violate the FLSA.[220] Compliance with both statutes would merely be more expensive than compliance with the FLSA alone,[221] which does not necessarily result in a conflict.[222]

With respect to whether the Alaska Act interfered with the purposes of the FLSA, on the other hand, the court indicated if recovery under both statutes was allowed, the statutes would conflict.[223] The court was able to avoid that result by holding any award under the Alaska Act must be offset by any recovery under the FLSA.[224] Assuming the remedy available under the Alaska Act is the same as the remedy the FLSA provides,[225] the court's analysis would avoid the possibility of double recovery, and permit the conclusion the Alaska Act was not preempted.[226]

V. APPLYING THE *WEBSTER* COURT'S ANALYSIS TO WRONGFUL DISCHARGE CLAIMS

The *Webster* preemption analysis was extended to a wrongful discharge claim in *Spieth v. Adasen Distributing*.[227] The plaintiff in *Spieth* asserted: (1) a claim for unpaid overtime under an Arizona wage payment statute,[228] and

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218. Webster v. Bechtel, Inc., 621 P.2d at 900.

219. *Id.* at 901.

220. *Id. See generally* Hirsch, *supra* note 155, at 519 ("Cases of direct conflict are rare, but easy to recognize and to decide. Such a conflict is presented . . . where a federal law unconditionally requires persons to act in a way state law forbids them to act.").

221. Webster v. Bechtel, Inc., 621 P.2d at 901.

222. *Cf.* Divine v. Levy, 36 F. Supp. 55, 58 (W.D. La. 1940) ("[T]he penalties of both . . . state and federal statutes could be imposed without there being a direct conflict. . . .").

223. Webster v. Bechtel, Inc., 621 P.2d at 901; *cf.* Divine v. Levy, 36 F. Supp. at 58 (stating to allow recovery under both state and federal statutes would result in a conflict "because of duplicity").

224. Webster v. Bechtel, Inc., 621 P.2d at 901. Although acknowledging the state statute itself was silent on the issue, the court essentially created a set-off provision by judicial fiat in order to preserve the statute's constitutionality. *Id.*

225. The assumption is not entirely warranted. Liquidated damages are mandatory under the Alaska Act, ALASKA STAT. § 23.10.110 (1990), although they are discretionary under the FLSA in the absence of bad faith, 29 U.S.C. § 260 (1988). That fact may result in a greater recovery for employees allowed to proceed under the Alaska Act. Webster v. Bechtel, Inc., 621 P.2d at 904; *see also* Stewart v. Region II Child & Family Servs., 788 P.2d 913, 919 (Mont. 1990) (noting application of the mandatory liquidated damages provision of the Alaska statute at issue in *Webster* could result in greater recovery than if the FLSA was applied); Moberly, *supra* note 206, at 999-1000 (stating the fact that liquidated damages "are mandatory under the Alaska Act, while they are discretionary under the FLSA in the absence of bad faith, . . . obviously may result in a greater recovery for employees if the state statute is not preempted") (citation omitted).

226. Webster v. Bechtel, Inc., 621 P.2d at 905.

227. Spieth v. Adasen Distrib., 4 Indiv. Empl. Rts. Cas. (BNA) 350 (D. Ariz. 1989).

228. ARIZ. REV. STAT. ANN. § 23-355 (1983).

(2) a tort claim for wrongful discharge premised on the contention she had been discharged for requesting overtime compensation.[229]

The court observed the FLSA provides remedies for employees who have not been compensated for overtime work as well as for those who are discharged for asserting a right to overtime compensation.[230] Applying the analysis in *Webster*, the court concluded those remedies preempted the plaintiff's common-law wrongful discharge claim.[231]

In reaching that conclusion, the *Spieth* court did not engage in an explicit analysis of the first prong of the *Webster* test.[232] It obviously agreed with the *Webster* court's conclusion that Congress did not intend to "occupy the field" of wage and hour regulation when it enacted the FLSA,[233] however, because it held the FLSA did *not* preempt the Arizona wage payment statute.[234]

With respect to the second prong of the *Webster* test, the *Spieth* court concluded that recognition of a common-law wrongful discharge claim would "obstruct[] the execution of the purpose of the federal regulation."[235] The court based that conclusion primarily on its interpretation of the FLSA saving clause,[236] which states, in relevant part, "No provision of [the FLSA] . . . shall excuse noncompliance with any . . . State law . . . establishing a minimum wage higher than the minimum wage established under [the FLSA] or a maximum workweek lower than the maximum workweek established under [the FLSA]. . . ."[237]

The court began by considering the clause's impact on the plaintiff's claim under Arizona's wage payment statute.[238] It noted the *Webster* court had concluded the language of the saving clause "warranted the finding that the [Alaska Wage and Hour Act], which provided for overtime payments in excess of the federal law, was not pre-empted."[239] Because the Arizona

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229. Spieth v. Adasen Distrib., 4 Indiv. Empl. Rts. Cas. (BNA) at 350-51.

230. *Id.* at 351.

231. *Id.* at 351-52.

232. The court did refer to the first prong of the test with approval. *Id.* at 351 (citing Webster v. Bechtel, Inc., 621 P.2d at 897).

233. *See* Webster v. Bechtel, Inc., 621 P.2d at 898-99.

234. Spieth v. Adasen Distrib., 4 Indiv. Empl. Rts. Cas. (BNA) 350, 351 (D. Ariz. 1989); *cf.* Smith v. Batchelor, 832 P.2d 467, 472 (Utah 1992) ("Since Congress allows state regulation even in areas directly affected by the FLSA, Congress could not have intended federal law to occupy the field of wage regulation that the FLSA does not affect, such as [a state statutory] requirement of the prompt payment of wages."). *But cf.* Tombrello v. USX Corp., 763 F. Supp. 541, 545 (N.D. Ala. 1991) (stating FLSA creates an exclusive remedy and bars state law claims for unpaid wages).

235. Spieth v. Adasen Distrib., 4 Indiv. Empl. Rts. Cas. (BNA) at 351.

236. *Id.*

237. 29 U.S.C. § 218(a) (1988).

238. Spieth v. Adasen Distrib., 4 Indiv. Empl. Rts. Cas. (BNA) at 351.

239. *Id.*; *see* Webster v. Bechtel, Inc., 621 P.2d at 899-900; *cf.* State v. Comfort Cab, 286 A.2d 742, 747-48 (N.J. Bergen County Ct. 1972) (stating saving clause "specifically prohibits preemption, by the federal act, of any state minimum wage or maximum hour/overtime ('maximum

statute did "nothing more than provide a greater recovery than that provided by the FLSA," the *Spieth* court concluded it also fell within the terms of the saving clause.[240]

Because the *Webster* court had interpreted the Alaska Act so as to avoid the possibility of double recovery, it did not address the scope of the saving clause.[241] Its opinion did give some indication, however, that it viewed the clause as being sufficiently broad to save state law remedies, such as the one at issue in *Spieth*, that are more beneficial to employees than the FLSA remedy.[242]

The employer in *Webster* had argued, for example, that a state law more beneficial to employees than the FLSA that did not fall within the express terms of the saving clause would be preempted by negative inference.[243] Although declining to reach the issue,[244] the court indicated the argument was consistent with a restrictive interpretation of the saving clause[245] it had rejected elsewhere in its opinion,[246] and concluded the clause was intended to allow for the recovery of "additional amounts" under more protective state laws.[247]

Because the recognition of a common-law wrongful discharge claim would provide the plaintiff with a greater potential recovery than is available

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workweek') provision more favorable to the employee than that prescribed by the federal act"). *See generally* Overnite Transp. Co. v. Tianti, 926 F.2d 220, 222 (2d Cir.) ("[E]very Circuit that has considered the issue has reached the . . . conclusion . . . [that] state overtime wage law is not pre-empted by . . . the FLSA."), *cert. denied*, 112 S. Ct. 170 (1991).

240. Spieth v. Adasen Distrib., 4 Indiv. Empl. Rts. Cas. (BNA) 350, 351 (D. Ariz. 1989). For a criticism of this conclusion, see Moberly, *supra* note 206, at 1002-06.

241. In the *Webster* court's view, consideration of the scope of the saving clause would have been necessary only if there had been a conflict between the Alaska Act and the FLSA:

> Because of the conclusion we reach, a discussion concerning the scope of § 218(a) is obviated. . . . Were we to find . . . conflicts here, the scope of § 218(a) would become crucial, as a saving clause may prevent pre-emption of state statutes which conflict with the purpose of a federal [statute]. Since . . . the provisions in question do not conflict with the FLSA, we need not determine whether they are saved by § 218(a), the saving clause.

Webster v. Bechtel, Inc., 621 P.2d at 900 (citations omitted).

242. *See* Moberly, *supra* note 206, at 1001.

243. Webster v. Bechtel, Inc., 621 P.2d at 900; *cf.* Divine v. Levy, 36 F. Supp. 55, 58 (W.D. La. 1940) ("The [saving clause] refers only to minimum wage, maximum workweek, and child-labor; it is silent as to penalty provisions. Therefore, we should assume that the act of Congress, through this section, by implication, supersedes the penalty provisions of the various state statutes on the relation of employer and employee."). *See generally* William L. Lynch, Note, *A Framework for Preemption Analysis*, 88 YALE L.J. 363, 366 n.12 (1978) ("By forbidding courts to pre-empt certain state laws, a savings clause implicitly permits pre-emption of other state laws. It is often argued that this implicit permission is a congressional mandate to pre-empt the state laws that are not expressly saved.").

244. *See* Webster v. Bechtel, Inc., 621 P.2d at 900.

245. *Id.*

246. *See id.* at 899.

247. *Id.* at 902.

under the FLSA,[248] this analysis seems to suggest wrongful discharge claims should fall within the saving clause.[249] The *Spieth* court concluded, however, the *Webster* court's interpretation of the saving clause did not extend so far as to save wrongful discharge tort claims, because the clause "deals quite explicitly with 'saving' State laws pertaining to the *hours and wages* of employees."[250]

If the saving clause is read literally, the conclusion that it does not save common-law wrongful discharge claims undoubtedly is correct.[251] Moreover, although not all courts appear to be inclined to read the clause literally,[252] the conclusion that it does not save wrongful discharge claims appears to be consistent with Congress' attempt to balance the competing interests of employers and employees reflected in the enactment of, and various amendments to, the FLSA.[253]

In *Lerwill v. Inflight Motion Pictures*,[254] for example, the plaintiff sought to recover unpaid overtime compensation under the terms of a collective bargaining agreement.[255] The court held the FLSA provides the exclusive

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248. *See* Chappell v. Southern Md. Hosp., 578 A.2d 766, 774-76 (Md. 1990) (Adkins, J., dissenting) (stating the FLSA did not leave the plaintiff with a statutory remedy because he did not fall within the definition of "employee" and therefore he should be entitled to state a claim for wrongful discharge); Moberly, *supra* note 206, at 1003 n.110.

249. *See* Moberly, *supra* note 206, at 1003 n.110.

250. Spieth v. Adasen Distrib., 4 Indiv. Empl. Rts. Cas. (BNA) 350, 351 (D. Ariz. 1989) (emphasis added); *cf.* Davenport Taxi v. Labor Comm'r, 319 A.2d 386, 389 (Conn. 1973) ("[The saving clause] allows state laws to apply . . . only where the state hour and wage provisions are more beneficial to the laborer than those in the federal act.").

251. *See, e.g.*, Davenport Taxi v. Labor Comm'r, 319 A.2d at 389 ("Had Congress intended that the states have concurrent jurisdiction to enforce state laws respecting the domain . . . covered by the Act we believe it would not have specifically limited [the saving clause] to instances where the state minimum wage is higher and the state maximum workweek is lower than wages and hours provided by the FLSA."); Cosme Nieves v. Deshler, 786 F.2d 445, 452 (1st Cir.), ("Section 218(a) simply makes clear that the FLSA does not pre-empt any existing state law that establishes a higher minimum wage or a shorter workweek than the federal statute."), *cert. denied*, 479 U.S. 824 (1986); Divine v. Levy, 36 F. Supp. 55, 58 (W.D. La. 1940) (stating the saving clause applies "only to minimum wage, maximum workweek, and child-labor" provisions).

252. *See, e.g.*, Williams v. W.M.A. Transit Co., 472 F.2d 1258 (D.C. Cir. 1972); Webster v. Bechtel, Inc., 621 P.2d 890 (Alaska 1980). Indeed, the court in *Spieth* was not applying the clause literally when it held the clause prevented preemption of the Arizona wage payment statute. Spieth v. Adasen Distrib., 4 Indiv. Empl. Rts. Cas. (BNA) at 351. *See* Moberly, *supra* note 206, at 105-06.

253. *See generally* Marshall v. Frozen Assets, Ltd., 513 F. Supp. 591, 595 (E.D. Mo. 1981) (referring to the "balance struck by Congress . . . between the statutory rights of employees to specified workplace conditions and the rights of employers to challenge the Act without undue sacrifice").

254. Lerwill v. Inflight Motion Pictures, 343 F. Supp. 1027 (N.D. Cal. 1972).

255. *Id.* at 1028. For reasons that were not explained in the court's opinion, the plaintiff in *Lerwill* elected not to pursue a claim directly under the FLSA. *Id.* He instead argued because the collective bargaining agreement incorporated the provisions of the FLSA, his claim for unpaid overtime could be pursued in a state law breach of contract action. *Id.* at 1028-29.

remedy for a failure to compensate employees for overtime.[256] It noted Congress had amended the FLSA on several occasions in an effort to avoid imposing unanticipated and economically disruptive liabilities on employers, although simultaneously assuring a minimally-acceptable level of compensation for employees.[257] The careful balancing process reflected in those amendments would be undermined, the court concluded, if employees were entitled to pursue alternative state law remedies that were more beneficial than the FLSA remedy.[258]

This analysis seems equally applicable to wrongful discharge claims. For example, the court in *Chappell v. Southern Maryland Hospital*[259] concluded the FLSA preempts wrongful discharge claims precisely because allowing for the recovery of tort damages as a means of vindicating the public policy expressed in the FLSA would upset the balance struck by Congress in enacting the FLSA.[260]

Among the judiciary, only the dissenting judges in *Chappell* have reached a contrary conclusion.[261] The dissenting view argued the FLSA should not preempt the common-law tort because the remedy available under the FLSA fails to compensate plaintiffs for losses attributable to mental anguish, stress, humiliation, and the cost of psychiatric care.[262] The dissent also concluded the allowance of tort damages would supplement, rather than hin-

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256. *Id.* at 1029.

257. *Id.*; *cf.* Stewart v. Region II Child & Family Servs., 788 P.2d 913, 917 (Mont. 1990) (stating the FLSA was amended because judicial interpretations of the Act as originally enacted had imposed wholly unexpected liabilities on employers).

258. Lerwill v. Inflight Motion Pictures, 343 F. Supp. at 1029.

259. Chappell v. Southern Md. Hosp., 578 A.2d 766 (Md. 1990).

260. *Id.* at 774; *cf.* Amos v. Oakdale Knitting Co., 403 S.E.2d 565, 567 (N.C. Ct. App. 1991) (affirming the dismissal of the plaintiffs' wrongful discharge claim in part because the state statutory remedy reflected a balancing of "the employee's right to earn acceptable wages and the competitive position of . . . business and industry"), *rev'd*, 416 S.E.2d 166 (N.C. 1992).

261. Chappell v. Southern Md. Hosp., 578 A.2d at 774 (Adkins, J., dissenting). The *Chappell* dissent's view also was embraced, however, by the authors of a subsequent law review article. *See* Tasman & Jacobsen, *supra* note 7, at 1172-73.

262. Chappell v. Southern Md. Hosp., 578 A.2d at 775-76 (Adkins, J., dissenting); *cf.* Tasman & Jacobsen, *supra* note 7:

> "Common law remedies should be available because statutory remedies often fail to capture the personal nature of the injury done to a wrongfully discharged employe[e]. . . . Reinstatement, back pay, and injunctions [may] vindicate the rights of the victimized group without compensating the plaintiff for such personal injuries as anguish, physical symptoms of stress, a sense of degradation, and the cost of psychiatric care. [In such cases,] [l]egal as well as equitable remedies are needed to make the plaintiff whole."

Tasman & Jacobsen, *supra* note 7, at 1173 n.141 (quoting Holiens v. Sears, Roebuck & Co., 689 P.2d 1292, 1303-04 (Or. 1984)); *see also* Broomfield v. Lundell, 767 P.2d 697, 705 (Ariz. Ct. App. 1988) (recognizing a common-law wrongful discharge claim encompassing traditional tort remedies because statutory remedies "may, at times, prove to be inadequate").

der, the congressional goals underlying the FLSA by helping to deter future unlawful conduct.[263]

Because the liquidated damages provided for in the FLSA[264] appear to serve the deterrent effect that concerned the *Chappell* dissent,[265] their availability suggests a congressional intent to preclude other remedies.[266] In *Skrove v. Heiraas*,[267] for example, an audit by the United States Department of Labor had resulted in a determination the plaintiff had not been fully compensated for overtime.[268] Although the employer paid the Department's overtime wage assessment, it proceeded to recover the amount of the payment in increments over the next several months by reducing the plaintiff's wages.[269]

The plaintiff contended that, in furtherance of this plan, he was instructed to submit time cards that reflected fewer hours than he actually worked, and was informed he would be terminated if he refused to comply.[270] The plaintiff worked for several months under those conditions, and then brought suit against the employer.[271]

The trial court found in favor of the plaintiff.[272] Finding the employer had not acted in good faith and with reasonable grounds for believing its conduct was in compliance with the FLSA,[273] the court awarded the plaintiff both

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263. Chappell v. Southern Md. Hosp., 578 A.2d at 775-76; *cf.* Amos v. Oakdale Knitting Co., 416 S.E.2d 166, 171 (N.C. 1992) ("The availability of alternative common law and statutory remedies, we believe, supplements rather than hinders the ultimate goal of protecting employees who have been fired in violation of public policy.").

264. *See* 29 U.S.C. § 216(b) (1988) (providing an employer who violates the FLSA may be liable for unpaid wages, overtime compensation, and an "additional equal amount as liquidated damages").

265. *See* Thompson v. Sawyer, 678 F.2d 257, 281 (D.C. Cir. 1982) (stating liquidated damages were "aimed to deter or penalize wayward employers"); 93 CONG. REC. 2372-73 (1947) (characterizing liquidated damages as a "penalty" creating "an incentive to employers to meet the requirements of the act").

266. *See, e.g.*, Jarmoc v. Consolidated Elec. Distrib., 123 Lab. Cas. (CCH) ¶ 35,701, at 48,458 (N.D. Ill. 1992) (concluding because the potential for an award of liquidated damages under the FLSA serves to deter employers from discharging employees for complaining about a failure to pay overtime wages, "the FLSA provides an effective alternative remedy, thus eliminating the need for a common law retaliatory discharge claim"); Carter v. Marshall, 457 F. Supp. 38, 40-41 (D.D.C. 1978) ("Because the [FLSA] specifically outlines the type of relief available and also provides for liquidated damages, it appears that Congress intended the relief provided to be exclusive.").

267. Skrove v. Heiraas, 303 N.W.2d 526 (N.D. 1981).

268. *Id.* at 527.

269. *Id.* at 527-28.

270. *Id.* at 528.

271. *Id.*

272. *Id.* at 528-29.

273. *See* 29 U.S.C. § 260 (1988) ("[I]f the employer shows to the satisfaction of the court that the act or omission giving rise to [an] action [under the FLSA] was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the [FLSA], the court may, in its sound discretion, award no liquidated damages . . . .").

liquidated damages under section 216(b) of the FLSA, and exemplary damages under state law.[274] The employer appealed.[275]

The North Dakota Supreme Court affirmed the judgment in favor of the plaintiff, as well as the trial court's decision to award liquidated damages.[276] It reversed the award of punitive damages,[277] however, holding such damages are not available in an action arising under the FLSA.[278]

The trial court had concluded the employer violated section 215(a)(3) of the FLSA[279] by discriminating against the plaintiff in retaliation for his exercise of rights available under the FLSA.[280] The North Dakota Supreme Court noted section 216(b) of the FLSA[281] provides a remedy for such a violation, and disagreed with the trial court's conclusion the remedy provided was "without limitation," and therefore permitted the court to award exemplary damages.[282]

The court acknowledged that, shortly after the FLSA was enacted, the United States Supreme Court had held in *Brooklyn Savings Bank v. O'Neil*[283] that the liquidated damages provision of section 216(b) was not punitive in nature, but rather "'constitute[d] compensation for retention [by the employer] of a workman's pay which might result in damages too obscure and difficult of proof for estimate other than by liquidated damages.'"[284] It also noted, however, that shortly after *Brooklyn Savings Bank* was decided, Congress had amended the FLSA in an effort to reduce the harshness that would result from an award of liquidated damages against an employer that had acted in good faith.[285] The court suggested this amendment had undermined the holding in *Brooklyn Savings Bank*, and stated "the United States

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274. Skrove v. Heiraas, 303 N.W.2d 526, 528-29 (N.D. 1981).
275. *Id.* at 529.
276. *Id.* at 533.
277. *Id.*
278. *Id.* at 531-32.
279. 29 U.S.C. § 215(a)(3) (1988).
280. Skrove v. Heiraas, 303 N.W.2d 526, 531 (N.D. 1981).
281. 29 U.S.C. § 216(b) (1988); *see supra* note 264.
282. Skrove v. Heiraas, 303 N.W.2d at 531.
283. Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697 (1945).
284. Skrove v. Heiraas, 303 N.W.2d at 531 (quoting Brooklyn Sav. Bank v. O'Neil, 324 U.S. at 707).
285. *Id.* at 532. The amendment to which the court was referring was the portion of the Portal-to-Portal Pay Act of 1947, 29 U.S.C. §§ 251-262 (1988), which provides in part:

> In any action . . . to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act . . ., if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act . . . the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 of this title.

29 U.S.C. § 260 (1988).

Congress has, by implication, established liquidated damages as partially punitive in nature in those instances in which they are awarded by the court."[286] The court concluded:

> [B]ecause the standard for awarding liquidated damages under the Federal Act is now the same as that for awarding exemplary damages under State Law, i.e., a lack of good faith, and because the Federal Law is silent with respect to an award of exemplary damages, in addition to liquidated damages, . . . the trial court was without authority to award . . . exemplary damages.[287]

A similar analysis appears in *Gore v. Schlumberger, Ltd.*[288] In *Gore*, the plaintiff sought to recover punitive damages as the result of his employer's failure to compensate him for overtime work.[289] In holding punitive damages were not recoverable, the Alaska Supreme Court relied on the fact the Alaska Wage and Hour Act[290] provides a specific remedy when an employer fails to compensate an employee for overtime work.[291] The court found the existence of a provision for the recovery of liquidated damages to be "especially telling" and concluded the comprehensiveness of the statutory remedial scheme implied the Alaska legislature did not intend to permit the recovery of further unenumerated remedies.[292] The court observed this conclusion was consistent with the manner in which the FLSA (upon which the Alaska Wage and Hour Act is patterned)[293] is interpreted.[294]

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286. Skrove v. Heiraas, 303 N.W.2d 526, 532 (N.D. 1981); *cf.* Laffey v. Northwest Airlines, 567 F.2d 429, 465 n.271 (D.C. Cir. 1976) (declining to decide "[t]he *degree* to which Congress' 1947 modification may have changed the character of liquidated damages from compensatory to punitive") (emphasis added), *cert. denied*, 434 U.S. 1086 (1978); Michael D. Moberly, *The Recoverability of Prejudgment Interest Under the ADEA After Thurston*, 8 LAB. LAW. 225, 239 (1992) ("By creating a pattern of recovery in which the award of liquidated damages is now mandatory only where the employer has not acted in good faith, Congress has indicated that there is a punitive dimension to the FLSA award . . . ."); Richard F. Richards, *Monetary Awards in Equal Pay Act Litigation*, 29 ARK. L. REV. 328, 349 (1975) ("Given the enactment of the [Portal-to-Portal Pay Act], . . . it appears that Congress envisages the award as having both compensatory and punitive aspects.").

287. Skrove v. Heiraas, 303 N.W.2d at 532. Although the *Skrove* court had been unable to find any previous authority on the issue, its conclusion is supported by the analysis in King v. J.C. Penney Co., 58 F.R.D. 649, 650 (N.D. Ga. 1973) and Carter v. Marshall, 457 F. Supp. 38, 40-41 (D.D.C. 1978).

288. Gore v. Schlumberger, Ltd., 703 P.2d 1165 (Alaska 1985).

289. *Id.* at 1165.

290. ALASKA STAT. § 23.10.050(a) (1990).

291. Gore v. Schlumberger, Ltd., 703 P.2d at 1165-66.

292. *Id.* at 1166. The court concluded the effect of allowing punitive damages "would be to exceed, in essence, the limitations imposed on the amount of liquidated damages." *Id.*

293. *See* McKeown v. Kinney Shoe Corp., 820 P.2d 1068, 1070 n.2 (Alaska 1991); Webster v. Bechtel, Inc., 621 P.2d 890, 895 (Alaska 1980).

294. Gore v. Schlumberger, Ltd., 703 P.2d 1165, 1166 (Alaska 1985).

Moreover, in enacting the FLSA Congress provided for, and intended to encourage the utilization of, an administrative process.[295] The *Chappell* dissent itself acknowledged there may be instances in which a plaintiff may "wish to pursue the administrative route."[296] Although the dissent indicated the FLSA remedy may be "perfectly viable and sensible as an avenue of relief *alternative* to a tort action," however, it concluded Congress' adoption of limited statutory remedies is not necessarily indicative of an intent to preclude common-law claims in which more comprehensive relief would be available.[297] In the dissent's view, the availability of a statutory remedy should not preclude the pursuit of common-law remedies in the absence of "clear legislative language to the contrary."[298]

It is not clear, however, why any rational litigant would elect to pursue the statutory remedy as an "alternative" to the tort remedy once a wrongful discharge claim had been recognized.[299] Recognition of a wrongful discharge claim, with its attendant tort remedies exceeding those provided for in the FLSA, undoubtedly would have the effect of encouraging plaintiffs to bypass the FLSA's remedial scheme, including its investigatory and administrative provisions, altogether.[300] By encouraging plaintiffs to bypass the statutory

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295. *See* Mitchell v. Robert DeMario Jewelry, 361 U.S. 288, 292 (1960); Shudtz v. Dean Whitter & Co., 418 F. Supp. 14, 18 (S.D.N.Y. 1976); Fagot v. Flintkote Co., 305 F. Supp. 407, 411 (E.D. La. 1969).

296. Chappell v. Southern Md. Hosp., 578 A.2d 766, 775 (Md. 1990) (Adkins, J., dissenting).

297. *Id.* at 775-76 (emphasis added).

298. *Id.* at 775; *cf.* Tasman & Jacobsen, *supra* note 7, at 1173 (advocating the recognition of alternative remedies absent an express indication of congressional intent to the contrary); Knack, *supra* note 6, at 530 (arguing against a "presumption that state legislatures, merely by their silence, have impliedly precluded claims for . . . discharges as against public policy").

299. *See* Makovi v. Sherwin-Williams Co., 561 A.2d 179 (Md. 1989):

> "[B]ecause of [the] expansion of remedies, . . . employees would be encouraged to circumvent or ignore the very statutes on which the public policy exception is based. Why should a discharged employee go to the trouble of filing a claim with [an administrative] agency . . . before bringing an action for back pay, when disregarding those procedures may bring the possibility of recovering not only lost wages but also a healthy sum in punitive damages?"

Id. at 190 (quoting 1 LEX K. LARSEN, UNJUST DISMISSAL § 6.10[6][e], at 6-91 (1989)); *see also* Knack, *supra* note 6, at 533 ("[P]laintiffs prefer the public policy claim because of the [increased] potential for . . . damages.").

300. *See* Bruno v. Western Elec. Co., 829 F.2d 957 (10th Cir. 1987):

> In agency proceedings, punitive damages are not available; thus, [a] . . . plaintiff who may be able to recover punitive damages in a court action would be less inclined to seek reconciliation at the agency level. In fact, he might . . . seek to thwart reconciliation in order to reach the courts. . . . If punitive damages are not available, plaintiffs will . . . more willingly participate in agency reconciliation efforts.

Id. at 967.

Although *Bruno* involved a claim under the Age Discrimination in Employment Act of 1967 (the ADEA), 29 U.S.C. §§ 621-634 (1988 & Supp. III 1985), in which the administrative scheme differs in some respects from that of the FLSA, *see* Vazquez v. Eastern Air Lines, 405 F.

remedy in favor of more beneficial tort remedies, the recognition of a wrongful discharge claim would undermine the congressional goal of encouraging the use of the administrative process.[301] That fact obviously militates in favor of the conclusion the common-law claim is preempted.[302]

Finally, in reaching its conclusion, the *Chappell* dissent observed because common-law wrongful discharge claims had not been recognized at the time the FLSA was enacted, there is nothing to suggest Congress actually considered the possible benefits of recognizing a common-law claim.[303] Not only is that observation misleading[304] and largely irrelevant,[305] it is undermined by the legislative and judicial history of the FLSA itself. Private causes of action often have been inferred from statutory provisions,[306] including those in the FLSA,[307] and Congress undoubtedly was aware of that when it created a private right of action under the FLSA.[308]

Supp. 1353, 1355 (D.P.R. 1975), its reasoning is highly pertinent in FLSA cases in view of the fact the ADEA generally incorporates the FLSA remedial scheme. Kelly v. American Standard, 640 F.2d 974, 977-78 (9th Cir. 1981). *See generally* Knack, *supra* note 6, at 537 ("Because of . . . limited remedies found in . . . statutes, [plaintiffs] have in the last decade attempted to circumvent administrative agency proceedings by stating a common law claim for wrongful discharge based on the public policy exception.").

301. *See* Knack, *supra* note 6, at 544 ("[B]y allowing circumvention of the detailed procedural requirements of [a] legislative scheme, courts may in effect undermine the efforts of the legislature.").

302. *Cf.* Spieth v. Adasen Distrib., 4 Indiv. Empl. Rts. Cas. (BNA) 350, 351 (D. Ariz. 1989) (holding wrongful discharge claim was preempted by the FLSA because it would "obstruct[] the execution of the purpose of the federal regulations").

303. Chappell v. Southern Md. Hosp., 578 A.2d 766, 775-76 (Md. 1990) (Adkins, J., dissenting). The dissent actually made this observation while discussing the Maryland Fair Employment Practices Law, but it indicated it would recognize a common-law wrongful discharge claim premised upon the public policy expressed in the FLSA "[f]or the [same] reasons." *Id.* at 776 (Adkins, J., dissenting); *cf.* Amos v. Oakdale Knitting Co., 416 S.E.2d 166, 172 (N.C. 1992).

304. Because the FLSA is a federal statute with nationwide application, *see* Waialua Agric. Co. v. Maneja, 216 F.2d 466, 474 (9th Cir. 1954), *rev'd on other grounds*, 349 U.S. 254 (1955), it is not necessarily the date of the recognition of the claim in Maryland that would be relevant. The claim was judicially recognized in California, for example, as early as 1959, when a California appellate court concluded an employer's right to terminate an employee was limited by "considerations of public policy." Petermann v. International Bhd. of Teamsters, 344 P.2d 25, 27 (Cal. Ct. App. 1959). *See generally* Knack, *supra* note 6, at 527 ("An important judicial inroad to the employment-at-will rule began in California in 1959 with the creation of the public policy exception . . . ."). Thus, when Congress created a private right of action for retaliatory discharge under the FLSA in 1977, *see infra* text accompanying notes 314-15, common-law wrongful discharge claims *had* been recognized in at least some states. *See* Knack, *supra* note 6, at 527 n.3.

305. *See supra* note 155; *cf.* Knack, *supra* note 6, at 548 (observing courts frequently infer legislatures intended to foreclose public policy claims without actually being cognizant of the claim or foreseeing the potential for its expansion).

306. *See generally* Cort v. Ash, 422 U.S. 66 (1975).

307. In discussing the FLSA, one court has stated, "Where the Congress creates a right by legislation, the federal courts have a duty to implement the statutory intent by providing the appropriate remedy." Fagot v. Flintkote Co., 305 F. Supp. 407, 410 (E.D. La. 1969).

308. *See generally* Square D. Co. v. Niagara Frontier Tariff Bureau, 476 U.S. 409, 420 (1986).

Indeed, as originally enacted, the FLSA did not provide a private right to seek redress for violations of section 215(a)(3).[309] Instead, it gave the Secretary of Labor the exclusive authority to bring an action to enforce section 215(a)(3).[310] Although a number of courts interpreted this remedial scheme as evidence of a congressional intent to preclude a private right of action for retaliatory discharge in violation of the FLSA,[311] there was support for the contrary view,[312] and the Supreme Court declined to decide the issue.[313]

The issue was resolved when the FLSA was amended in 1977[314] to permit employees discharged or otherwise discriminated against in violation of section 215(a)(3) to seek redress in a private action directly under section 216(b).[315] The FLSA's provision terminating an employee's right to bring a private action when the Secretary of Labor brings an action to enforce section 215(a)(3) suggests Congress intended for this statutory remedy to be the exclusive means of private enforcement of the "public policy" expressed in section 215(a)(3).[316]

The provision for the termination of private actions reflects a congressional intent to avoid duplicative litigation.[317] Recognition of a common-law wrongful discharge claim, which presumably would not be subject to termination on the filing of an action by the Secretary of Labor,[318] would seem to upset the balance Congress attempted to strike by providing employees with

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309. *See* Bush v. State Indus., 599 F.2d 780, 786 (6th Cir. 1979); Britton v. Grace Line, 214 F. Supp. 295, 296 (S.D.N.Y. 1962).

310. *See* Reeves v. ITT, 616 F.2d 1342, 1348 (5th Cir. 1980), *cert. denied*, 449 U.S. 1077 (1981).

311. *Id.* at 1350; Powell v. Washington Post Co., 267 F.2d 651, 652 (D.C. Cir.), *cert. denied*, 360 U.S. 930 (1959); Bonner v. Elizabeth Arden, Inc., 177 F.2d 703, 705 (2d Cir. 1949).

312. Boll v. Federal Reserve Bank, 365 F. Supp. 637, 650 (E.D. Mo. 1973), *aff'd*, 497 F.2d 335 (8th Cir. 1974); Fagot v. Flintkote Co., 305 F. Supp. 407 412-13 (E.D. La. 1969).

313. In Mitchell v. Robert DeMario Jewelry, 361 U.S. 288 (1960), the Supreme Court declined to adopt a dissenting justice's view an employee discharged in violation of the FLSA could bring a private action for wrongful discharge. *Id.* at 293; *see* Fagot v. Flintkote Co., 305 F. Supp. at 412-13 (comparing the majority and dissenting opinions in *Mitchell*). Citing Powell v. Washington Post Co., 267 F.2d 651 (D.C. Cir.), *cert. denied*, 360 U.S. 930 (1959) and Bonner v. Elizabeth Arden, Inc., 177 F.2d 703 (2d Cir. 1949), the Court in *Mitchell* instead assumed, without deciding, the Act "did not contemplate the private vindication of rights it bestowed." Mitchell v. Robert DeMario Jewelry, 361 U.S. at 293.

314. *See* Fair Labor Standards Act Amendments of 1977, Pub. L. No. 95-151, § 10, 91 Stat. 1252.

315. *See generally* Reeves v. ITT, 616 F.2d 1342, 1350 (5th Cir. 1980), *cert. denied*, 449 U.S. 1077 (1981); Bush v. State Indus., 599 F.2d 780, 783 (6th Cir. 1979).

316. 29 U.S.C. § 216(b) (1988) ("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 . . . .").

317. *See* Webster v. Bechtel, Inc., 621 P.2d 890, 903-04 (Alaska 1980).

318. *Id.* at 902 (stating the FLSA provision for termination of private actions "does not mention nor purport to extinguish any private rights under state law").

a private right of action that *is* subject to termination.[319] Indeed, the court in *Fagot v. Flintkote Co.*[320] appears to have recognized an implied private right of action for violation of section 215(a)(3) of the FLSA[321] prior to the 1977 amendment precisely because the FLSA at that time did not contain the same "intricate private remedy for violation of the protections of 215(a)(3)" (including the provision for "termination should the Secretary of Labor take action on the same controversy") that it did for violations of its wage and hour provisions.[322] Because the 1977 amendment extended the FLSA's "intricate private remedy" to violations of section 215(a)(3), the recognition of a private right of action other than the one expressly provided for in the FLSA (such as a wrongful discharge tort claim) would seem to be contrary to Congress' intent.[323]

This analysis is not necessarily undermined by the fact the court in *Webster v. Bechtel, Inc.*[324] rejected similar reasoning as a basis for concluding the FLSA preempted the overtime compensation provisions of the Alaska Wage and Hour Act.[325] Although acknowledging that permitting the maintenance of state actions that are not subject to termination upon the filing of a suit by the Secretary of Labor may disrupt the "balance" created by Congress, the *Webster* court nevertheless rejected the contention that allowing a state action for unpaid overtime compensation would frustrate the purposes of the FLSA.[326] The court reasoned Congress had explicitly provided in other employment areas that the commencement of an action by the Secretary of Labor "cuts off any state action."[327] Because the FLSA provision by contrast refers only to the termination of "federal private actions," the court concluded Congress must not have intended for the commencement of a

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319. *See* Fagot v. Flintkote Co., 305 F. Supp. 407, 414 (E.D. La. 1969) (observing the recognition of a "general right to sue at law for damages caused by an invasion of a federal right" would be "qualitatively different" from the statutory remedy available under § 216(b) of the FLSA, which is a "custom-designed cause of action, complete with . . . the possibility of termination should the Secretary of Labor take action on the same controversy").

320. Fagot v. Flintkote Co., 305 F. Supp. 407 (E.D. La. 1969).

321. *Id.* at 414 (citing 29 U.S.C. § 215(a)(3)).

322. *Id.*

323. *Cf.* Bush v. State Indus., 599 F.2d 780 (6th Cir. 1979):

> [I]t is not necessary . . . to decide . . . whether [an employee] had an implied right to maintain [an] action prior to the amendment. [W]hen § [2]16(b) of the Act was amended, . . . it created a private cause of action for enforcement of the rights protected by § [2]15 of the Act. . . . *[A]ny question as to whether an implied right of action exist[s] was mooted by the 1977 amendments to the Act.*

Id. at 786-87 (emphasis added).

324. Webster v. Bechtel, Inc., 621 P.2d 890 (Alaska 1980).

325. *Id.* at 902-04.

326. *Id.* at 903-04.

327. *Id.* at 904. "[A]lthough federal private actions following a suit by the Secretary are duplicative in very literal terms, private state actions clearly are not. They provide entirely separate and distinct causes of action which the Secretary is not empowered to enforce." *Id.*

FLSA suit by the Secretary to terminate state actions for unpaid overtime compensation.[328]

The termination provision in section 216(b) actually does not refer to the termination of "federal" private actions, but to the termination of "[t]he right provided by *this subsection* to bring an action by or on behalf of any employee. . . ."[329] Because an action under section 216(b) (that is, under "this subsection") generally has been regarded as the only means of enforcing section 215(a)(3) of the FLSA,[330] Congress' failure to provide for the termination of "state" actions does not appear to have the same significance in the wrongful discharge context that the *Webster* court attached to it in the overtime compensation context.[331] This conclusion is consistent with the language of the FLSA saving clause, which is limited to state wage and hour laws, and does not appear to save state law wrongful discharge claims.[332]

Indeed, the *Webster* court specifically relied upon the saving clause to support its holding.[333] This would seem to undermine any suggestion in *Webster* (if, indeed, there can be said to be one) that the recognition of state law wrongful discharge tort claims premised on the public policy set forth in the FLSA would not upset the balance struck by Congress in enacting (and subsequently amending) the FLSA.[334]

VI. CONCLUSION

Congress has never expressly stated section 216(b) of the FLSA provides the sole means of recovery for an employee claiming to have been discharged in violation of the public policy reflected in the FLSA.[335] Every court to have addressed the issue has concluded, however, the remedies available under the FLSA preempt a common-law wrongful discharge claim premised on the

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328. *Id.*

329. 29 U.S.C. § 216(b) (1988) (emphasis added).

330. *See supra* text accompanying notes 306-23.

331. *See* Webster v. Bechtel, Inc., 621 P.2d 890, 904 (Alaska 1980).

332. *See supra* text accompanying notes 236-51.

333. The court in *Webster* stated:

> [I]f the Secretary's suit terminated private state suits, it would prevent employees from recovering the additional increment *of wages* which they are entitled to under the state law, thereby frustrating Congress' clear intent established in [the saving clause] that no 'provision of this chapter . . . shall excuse noncompliance with . . . any State law' providing for such additional recovery.

Webster v. Bechtel, Inc., 621 P.2d at 904 (emphasis added).

334. *See* Spieth v. Adasen Distrib., 4 Indiv. Empl. Rts. Cas. (BNA) 350, 351 (D. Ariz. 1989) (rejecting the proposition that the analysis in *Webster* suggests wrongful discharge claims are not preempted by the FLSA).

335. *See* Lerwill v. Inflight Motion Pictures, 343 F. Supp. 1027, 1028 (N.D. Cal. 1972). *See generally* Hirsch, *supra* note 155, at 538 ("Congress [may] explicitly deal[] with the problem of preemption in the body of its legislation . . . by using a 'pre-emption' or 'exclusiveness' clause declaring state laws unenforceable.").

public policy reflected in the FLSA. Indeed, one court has indicated "a clearer case of implied intent to exclude other alternative remedies by the provision of one would be difficult to conceive."[336]

The general basis for that view has been the belief that allowing for the recovery of tort damages would upset the balance struck by Congress in enacting the FLSA.[337] For that reason, the provision of a detailed remedy that "necessarily works to define the substantive right to be enforced" should preclude resort to alternative remedies "in the absence of a clear showing that Congress intended such alternatives to be provided by judicial construction."[338] Because Congress was silent on the issue, the statutory remedy should be the only remedy available for the enforcement of the rights an employee may have under the FLSA.[339]

Only the dissent in *Chappell v. Southern Maryland Hospital*[340] and the authors of a recent law review article[341] have reached a contrary conclusion,[342] and both did so based on an incomplete analysis of the congressional intent underlying the FLSA. The authors of the Maryland law review article stated, for example, that by "formulating common law remedies that parallel [the] statutory remedies,"[343] the courts would "produce a result more responsive to the legislature's policy considerations."[344] This observation, which was unaccompanied by any significant supporting analysis, fails to take into account the policy considerations that have led Congress to *limit* the remedies available under the FLSA, not the least of which is a concern for the indirect negative impact unlimited remedies would have on workers.[345] Given the

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336. Lerwill v. Inflight Motion Pictures, 343 F. Supp. at 1028.

337. Chappell v. Southern Md. Hosp., 578 A.2d 766, 774 (Md. 1990).

338. Lerwill v. Inflight Motion Pictures, 343 F. Supp. at 1028-29.

339. *Cf.* Tasman & Jacobsen, *supra* note 7, at 1173 ("[T]he Supreme Court of late has been unreceptive to claims of [implied] private causes of action—it demands affirmative evidence of legislative intent to create private remedies. . . .").

340. Chappell v. Southern Md. Hosp., 578 A.2d 766, 774 (Md. 1990) (Adkins, J., dissenting).

341. Tasman & Jacobsen, *supra* note 7.

342. *See supra* text accompanying notes 261-63.

343. Tasman & Jacobsen, *supra* note 7, at 1173.

344. *Id.* at 1173 n.145.

345. Perhaps the most obvious example of this is the Portal-to-Portal Pay Act of 1947, 29 U.S.C. §§ 251-262 (1988), which amended the FLSA to make the previously mandatory award of liquidated damages discretionary in some cases. *See* Trans World Airlines v. Thurston, 469 U.S. 111, 128 n.22 (1985); Laffey v. Northwest Airlines, 567 F.2d 429, 464 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978). The legislative history of the amendment has been said to reflect a clear intention on the part of Congress to "cut back on the rights . . . created when the FLSA was originally enacted." Lerwill v. Inflight Motion Pictures, 343 F. Supp. 1027, 1029 (N.D. Cal. 1972). The stated purpose of the amendment was to limit the potential recovery under the FLSA in order to avoid the "financial ruin of many employers," which in turn obviously would "curtail[] employment, and the earning power of employees." 29 U.S.C. § 251(a) (1988). *See generally* Northwestern-Hanna Fuel Co. v. McComb, 166 F.2d 932 (8th Cir. 1948):

> [A]s a matter of general knowledge, of legislative history in the enactment of the Portal-to-Portal Act, and of direct expression in section 1 of that Act,

detrimental impact that even the imposition of the remedies actually enumerated in the FLSA occasionally has had,[346] it is difficult to see how the recognition of additional common-law remedies would be more responsive to the policy considerations that motivated Congress than the remedies it actually chose to provide.[347] In short, the choice of remedies to enforce the FLSA is a matter for Congress, and not the courts, to decide.[348]

> Apart from the matter of the *power* of Congress to so provide, about which there can be no doubt, it seems that the legislative process is far better suited than the judicial to fashion a balanced remedy suited to the particular circumstances, if for no other reason than that the legislature is much more free to adjust and modify its handiwork in the light of actual experience.[349]

Under the circumstances, the judicial construction of an alternative remedy by recognizing wrongful discharge tort claims based on the public policy expressed in the FLSA not only would seem to be unwarranted, but unwise.[350]

> there can be no doubt that the concern of Congress . . . was with the vast unforeseen accumulation of windfall wage, overtime and damage claims . . . , with their possible threat to the solvency of numerous employers and to the stability of the industrial structure generally.

Id. at 939 (citations omitted).

346. *See, e.g.*, Torres v. American R. Co., 157 F.2d 255, 255-56 (1st Cir.), *cert. denied*, 329 U.S. 782 (1946) (stating employer was unable to pay its employees the amounts due them under the FLSA "and thereafter continue operations or avoid insolvency"); *cf.* Skrove v. Heiraas, 303 N.W.2d 526, 528 (N.D. 1981) (considering employer's argument that as the result of an unexpected overtime wage assessment under the FLSA, "it was necessary for budget purposes to substantially reduce [the] wages [of its employees] . . . because [its] business had only a given amount of dollars available for wages").

347. *See* Lerwill v. Inflight Motion Pictures, 343 F. Supp. 1027 (N.D. Cal. 1972):

> Congress created a remedy conditioned with both advantages and disadvantages to the claimant. It would be difficult indeed to find any purpose in [Congress'] careful [balancing] process if alternative remedies, varying with variations of state law were also to be available in any case in which the alternative seemed more advantageous to the plaintiff-employee seeking to enforce his [FLSA] rights.

Id. at 1029.

348. Battaglia v. General Motors Corp., 169 F.2d 254, 260 n.12 (2d Cir.), *cert. denied*, 335 U.S. 887 (1948); Reeves v. Howard County Ref. Co., 33 F. Supp. 90, 92 (N.D. Tex. 1940).

349. Lerwill v. Inflight Motion Pictures, 343 F. Supp. at 1029.

350. *See id.*