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Labor Law - Fair Labor Standards Act - Recovery in Suit by Secretary of Labor of Wages Lost Through Wrongful Discharge

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LABOR LAW—FAIR LABOR STANDARDS ACT—RECOVERY IN SUIT BY SECRETARY OF LABOR OF WAGES LOST THROUGH WRONGFUL DISCHARGE—Several employees of respondent had requested the Secretary of Labor to institute an action against the respondent under the Fair Labor Standards Act¹ to recover unpaid minimum wages and overtime compensation. As a result, the employees were discharged, in violation of section 15 (a) (3) of the act.² The Secretary brought an action under section 17³ to enjoin respondents from the violation, for reinstatement and for wages lost due to the wrongful discharge. The court of appeals⁴ held that the district court had no jurisdiction under section 17 to award wages lost through wrongful discharge. On certiorari to the United States Supreme Court, *held*, reversed, three justices dissenting.⁵ The proviso in section 17 of the FLSA depriving the district courts of jurisdiction to award unpaid minimum wages or overtime compensation in a suit by the Secretary of Labor to restrain violations of the act does not apply to wages lost by wrongful discharge. *Mitchell v. Robert DeMario Jewelry, Inc.*, 80 S. Ct. 332 (1960).

The Fair Labor Standards Act prohibits the discharge of an employee because he has taken action seeking enforcement of the minimum wage and

¹ 52 Stat. 1060 (1938), 29 U.S.C. (1958) §201 et seq.

² 52 Stat. 1068 (1938), 29 U.S.C. (1958) §215 (a) (3), making it unlawful for any employer within the scope of the act to "discharge . . . any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act. . . ."

³ 52 Stat. 1069 (1938), as amended, 63 Stat. 919 (1949), 29 U.S.C. (1958) §217, granting district courts jurisdiction to restrain violations of §15, including §15 (a) (3), note 2 supra.

⁴ (5th Cir. 1958) 260 F. (2d) 929.

⁵ Justices Whittaker, Black, and Clark, dissenting.

overtime compensation provisions of the act.⁶ To implement the enforcement of this prohibition, the statute provides criminal sanctions⁷ and, in section 17,⁸ empowers the Secretary of Labor to enjoin its violation. No provision is made for the recovery of wages lost through wrongful discharge. Under the original act, however, in a section 17 injunction suit by the Administrator of the Wages and Hours Division,⁹ it was held in *Walling v. O'Grady*¹⁰ that district courts had jurisdiction to award wages lost due to wrongful discharge, and in *McComb v. Scerbo*¹¹ that unpaid minimum wages and overtime compensation could be awarded. In 1949, due to the hesitancy of workers to bring suit under the act in their own right for fear of resulting discriminatory action by employers, Congress added section 16 (c)¹² authorizing the administrator, at the written request of an employee, to bring suit for deficiencies in minimum wages and overtime compensation required under sections 6¹³ and 7¹⁴ of the act. In view of the remedy provided by section 16 (c), a proviso was added to section 17 to deprive district courts of jurisdiction "in any action brought by the Secretary of Labor to restrain . . . violations [of the act], to order the payment to employees of unpaid minimum wages or unpaid overtime compensation. . . ."¹⁵ This proviso was to "have the effect of reversing such decisions as *McComb v. Scerbo*."¹⁶ The principal case held that the *O'Grady* case, allowing recovery of wages lost through wrongful discharge in a section 17 suit, was not such a decision as *McComb v. Scerbo*, within the meaning of the proviso. The soundness of this decision seems to be assured by a comparison of the facts in each case in relation to the respective remedies available under the act. The *Scerbo* case, wherein an injunction was sought by the Secretary against violations of the minimum wage and overtime compensation provisions of the act, involved just such a situation as section 16 (c) was designed to remedy. Back minimum wages may also be recovered in an action by the employee in his own right.¹⁷ Thus allowing recovery of deficiencies in minimum wages and overtime compensation in an injunction suit by the Secretary would lead to a superfluity of remedies for that particular violation. But in the case of a wrongful discharge, such as in *Walling v. O'Grady* and

⁶ See note 2 supra.

⁷ Section 16 (a), 52 Stat. 1069 (1938), 29 U.S.C. (1958) §216 (a), provides for a fine or not more than \$10,000, for the first willful violation of §15, and the same fine, imprisonment for not more than six months, or both, for subsequent willful violations.

⁸ See note 3 supra.

⁹ Under the Reorganization Plan of 1950, Congress transferred the exclusive power to bring injunctions under §17 of the FLSA to the Secretary of Labor.

¹⁰ (2d Cir. 1944) 146 F. (2d) 422.

¹¹ (2d Cir. 1949) 177 F. (2d) 137.

¹² 63 Stat. 919 (1949), 29 U.S.C. (1958) §216 (c).

¹³ 52 Stat. 1062 (1938), 29 U.S.C. (1958) §206.

¹⁴ 52 Stat. 1063 (1938), 29 U.S.C. (1958) §207.

¹⁵ See note 3 supra.

¹⁶ H. R. 1453, 81st Cong., 1st sess., p. 32 (1949).

¹⁷ Section 16 (b), 52 Stat. 1069 (1938), 29 U.S.C. (1958) §216 (b).

the principal case, the act fails expressly to provide any remedy. Nor can the discharged employee maintain a civil action for the lost wages.¹⁸ Public interest in enforcing the FLSA dictates that employees within the scope of the act be enabled to recover wages lost through such retaliatory action by the employer. The danger of discharge and a resulting loss of income for an indefinite period is often more than enough to deter an underpaid employee from taking action to recover deficiencies in past wages. Since enforcement of the act is largely dependent upon the action of employees and upon information supplied by them,¹⁹ the inaction which would result from failure to restore discharged employees to the status quo could render the FLSA a virtual nullity. The injunction suit by the Secretary under section 17 seems the most reasonable vehicle for accomplishing the recovery. And the introduction of a case involving public policy invokes full utilization of the traditionally broad and flexible character of an equity court's remedial powers.²⁰ Since the enforcement of a statute is not limited to the remedies expressly provided therein,²¹ the scope of an equity court's jurisdiction in providing for such enforcement will be limited only by a clear expression of legislative intent.²² A district court may order payment of wages lost by an employee after his wrongful discharge has been enjoined.²³ It is difficult to see why a judicial command should be more favorably enforced than that of a legislature, both being in furtherance of the same policy. Failure of the employee to cause the institution of an immediate injunction would not seem to justify depriving him of a remedy for wages lost during the delay.²⁴

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¹⁸ Since the FLSA makes no provision for a civil action by an employee to recover damages for discharge in violation of the act, redress for such action is by criminal proceedings as provided by the act. *Powell v. Washington Post Co.*, (D.C. Cir. 1959) 267 F. (2d) 651; *Bonner v. Arden*, (2d Cir. 1949) 177 F. (2d) 703. But see *Northwestern Yeast Co. v. Broutin*, (6th Cir. 1943) 133 F. (2d) 628, holding that each provision of the FLSA becomes a part of the employment contract of employees within the coverage of the act.

¹⁹ In 1949, the Wages and Hours Division inspected less than 5% of the establishments covered by the act. S. Hearings Before a Subcommittee of the Committee on Labor and Public Welfare on S. 653, 81st Cong., 1st sess., p. 72 (1949).

²⁰ E.g., *Virginian Ry. Co. v. System Federation No. 40, Railway Employees Dept.*, A. F. of L., 300 U.S. 515 (1937).

²¹ E.g., *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941).

²² *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946).

²³ *McComb v. Jacksonville Paper Co.*, 336 U.S. 187 (1949).

²⁴ The dissent in the principal case stated that a wrongfully discharged employee is entitled to the same remedies as are provided for violation of the minimum wage and overtime compensation provisions of the act. While there seems to be no real reason to differentiate in the enforcement of the various provisions of the act, the language of the statute seems clearly to preclude such uniform means of enforcement. Section 16(b), note 17 *supra*, gives an employee a right of action in his own name against "any employer who violates the provisions of section 6 or section 7 of the Act," which deal with minimum wages and overtime compensation. Section 16(c), note 12 *supra*, authorizes the Secretary of Labor "to supervise the payment of unpaid minimum wages or the unpaid overtime compensation owing to any employees" under the same two sections, i.e., 6 and 7.