Contradictory Findings in the Fair Labor Standards Act: A Circuit Court Split on Liquidated Damages

Edward F Simon, Catholic University of America

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ABSTRACT

This note examines a circuit court split concerning the assessment of liquidated damages under the Fair Labor Standards Act, hereinafter “FLSA” or “the Act.” A provision in FLSA permits a judge to reduce or not assess liquidated damages if he or she finds that an employer violated the Act in good faith and on reasonable grounds for believing that its actions were not in violation of FLSA. Meanwhile, another provision in the Act increases the statute of limitations from two years to three years when there is a willful violation of FLSA. Consequently, there is a divergence among courts as to whether a judge may limit or not assess liquidated damages when a jury finds that an employer willfully violated the Act for purposes of the statute of limitations.

In analyzing the circuit court split, the note highlights broader issues concerning statutory interpretation and civil procedure. A majority of circuits preclude judges from exercising their discretion on liquidated damages under these circumstances because a finding of good faith is seemingly irreconcilable with a jury’s determination of willfulness. Yet this approach, which is analyzed through a recent Eleventh Circuit opinion, circumvents the express language of the liquidated damages provision in FLSA. Meanwhile, two circuits follow the plain language of FLSA and permit a judge to disagree with a jury on the synonymous issues of willfulness and good faith. This approach, though, seemingly does not comport with the principle of collateral estoppel, and appears to be in violation of the Seventh Amendment. The note argues that while the Supreme Court could resolve the circuit court split, a better result would be for Congress to amend FLSA. Such an amendment would not require policy changes and would provide clarity for courts, businesses, and employees on the assessment of liquidated damages under FLSA.
I. INTRODUCTION

Sometimes, amending a statute leads to unintended consequences. In the Fair Labor
Standards Amendments of 1966, hereinafter “1966 Amendments,” Congress made a relatively
simple change to the statute of limitations in the Fair Labor Standards Act, hereinafter “FLSA”
or “the Act.”¹ Because of this amendment, however, courts that follow the plain language of
FLSA end up in certain circumstances permitting a judge to disagree with a jury on synonymous

limitations from two to three years for “a cause of action arising out of a willful violation”).
issues. This result seemingly violates the Seventh Amendment\(^2\) and it is hard to imagine that this was intended by Congress. Therefore, many courts in recent years have simply precluded a judge from disagreeing with a jury under these circumstances. However, in a recent Supreme Court decision, the Court stated that “[s]tatutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.”\(^3\)

In *Gross v. FBL Financial Services, Inc.* the Court held that the burden shifting framework employed under Title VII of the Civil Rights Act of 1964, hereinafter “Title VII,” for mixed motive discrimination claims did not apply to the Age Discrimination in Employment Act, \(^4\) hereinafter “ADEA,” even though “the substantive provisions of the ADEA were derived *in *haec *verba* from Title VII.”\(^5\) In Title VII cases, when a plaintiff shows that his or her membership in a protected class was a motivating factor in an employer’s decision, the burden shifts to an employer to prove that it was not.\(^6\) This framework was established by the Court in *Price Waterhouse v. Hopkins*,\(^7\) and codified by Congress when it amended Title VII in 1991.\(^8\)

Notwithstanding the similarities between Title VII and ADEA, the Court refused to apply this burden shifting framework in *Gross* because it was not authorized in the plain language of ADEA.\(^9\) Instead, the Court held that Gross would have to prove that his “age was the ‘but for’

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\(^2\) See U.S. CONST. amend. VII (stating in part that “no fact tried by a jury shall be otherwise re-examined…than according to the rules of common law”).


\(^4\) *Id.* at 2352.

\(^5\) *Gross*, 129 S.Ct. at 2354 (Stevens, J., dissenting).


\(^7\) *Price Waterhouse*, 490 U.S. at 258.


\(^9\) *Gross*, 129 S.Ct. at 2350.
cause of [his] employer’s decision” rather than just a motivating factor. Unfortunately for Gross, had Congress not codified the holding from *Price Waterhouse* in Title VII, it is probable that the Court would have upheld his motivating factor claim based on *Price Waterhouse*.

Like the disagreement among courts as to whether or not the burden shifting framework employed in Title VII actions applied to ADEA claims, courts have also diverged as to the scope of the statute of limitations provision in FLSA. Under the Act, an employee collects liquidated damages in addition to backpay if a jury finds that an employer violated FLSA. The liquidated damages are equal to the amount of actual damages, doubling the amount of damages assessed to the employer. However, a provision in the bill allows a judge to limit or deny liquidated damages if an employer acted in “good faith” and on reasonable grounds for believing its actions were not in violation of the Act. Meanwhile, the statute of limitations, as a result of the 1966 Amendments, permits an employee an additional year to file a FLSA claim if he or she proves that an employer’s violation of the Act was “willful.” A willful violation of FLSA also enables a worker to collect an additional year of backpay.

All of this raises the question: may a judge use his or her discretion to limit or deny liquidated damages based on an employer’s “good faith” when a jury finds that the employer “willfully” violated the Act for purposes of determining the statute of limitations.

In January 2008, the Eleventh Circuit became the latest federal arbiter to issue a holding on this issue. In *Alvarez Perez v. Sanford-Orlando Kennel Club, Inc.*, a maintenance worker at a greyhound track in Florida sued the summer and winter operators of the track to obtain overtime

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10 *Id.* at 2350-51.
12 *Id.*
wages under FLSA. The jury determined that the operators had willfully violated the Act for purposes of the statute of limitations. Then the district court judge denied liquidated damages based on his finding that the operators had acted in good faith and on reasonable grounds. On appeal, the Eleventh Circuit held that the judge’s finding of good faith could not be reconciled with the jury’s determination on willfulness and awarded liquidated damages to the maintenance worker.

Although the Eleventh Circuit joined the majority of circuits in holding that a judge is precluded from making a determination on good faith under these circumstances, the Fourth and Eighth Circuits have held to the contrary. The Supreme Court could resolve this split, but a better resolution would be for Congress to amend FLSA.

Part II of this note examines the legislative history of FLSA including a number of Supreme Court decisions in the years prior to its enactment that changed the scope of the Commerce Clause and allowed Congress to regulate workers’ pay and hours. It then looks at subsequent amendments to FLSA that added the statute of limitations and liquidated damages provisions to the bill. Part II also reviews how courts defined the term “willful” before 1988 when the Supreme Court addressed this issue in McLaughlin v. Richland Shoe Co.

Part III scrutinizes Fowler v. Land Management Groupe, Inc., in which the Fourth Circuit held that a judge could make a finding of good faith notwithstanding a jury’s determination of willfulness. In holding so, the court was following the plain language of 29 U.S.C. § 260, hereinafter “§ 260.”

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16 Id. at 1155.
17 Id.
18 Id. at 1166.
19 See Fowler v. Land Mgmt. Groupe, Inc., 978 F.2d 158, 162 (4th Cir. 1992) (stating that it is acceptable that the jury and judge reach conflicting conclusions); see also Broadus v. O.K. Industries, Inc. 226 F.3d 937, 944 (8th Cir. 2000) (holding that jury’s finding on willfulness is distinct from the judge’s decision to award liquidated damages).
Part IV analyzes whether or not taking the approach offered in *Fowler* violates the Seventh Amendment. One circuit has held that this approach is unconstitutional due to the principal of collateral estoppel.\textsuperscript{20} Part IV examines the two justifications provided by the Fourth Circuit as to why its holding overcame the Seventh Amendment issue.

Part V scrutinizes the Eleventh Circuit’s holding in *Alvarez Perez* and discusses another recent case decided by the same court in which the judge was not precluded from deciding the issue of good faith when the jury found that the employer’s violation of FLSA was not willful.

Part VI offers several options for Congress to consider with regard to amending the statute of limitations and liquidated damages provisions in FLSA. Finally, Part VII concludes the note.

II. LegisLative History of FLSA and Provisions Concerning the Statute of Limitations and Liquidated Damages

A. The Enactment of FLSA in 1938

Prior to the New Deal, the power of Congress to regulate the terms of employment for many workers was limited because predominant industries like manufacturing, agriculture, and mining were considered “local activities.”\textsuperscript{21} These industries were regulated by the states, not Congress, since such regulation only affected interstate commerce “indirectly.”\textsuperscript{22} In President Roosevelt’s first term, several bills enacted by Congress including the Agricultural Adjustment Act of 1933, the Railroad Retirement Act of 1934, and the Bituminous Coal Conservation Act of 1935, were struck down by the Supreme Court as unconstitutional.\textsuperscript{23} However, a number of Supreme Court decisions in Roosevelt’s subsequent terms upheld legislation enacted as part of

\textsuperscript{20} Brinkman v. Dep’t of Corr., 21 F.3d 370, 372 (10th Cir. 1994).


\textsuperscript{22} *Id.*

\textsuperscript{23} See Carter v. Carter Coal Co., 298 U.S. 238, 302 (1936) (stating “[t]hat commodities produced or manufactured within a state are intended to be sold or transported outside the state does not render their production or manufacture subject to federal regulation under the commerce clause”).
the New Deal and changed the scope of the Commerce Clause. Richard Epstein, a critic of these decisions, commented that there were two reasons for the expansion of Congress’s powers: the threat of court packing by President Roosevelt in 1936 and a “narrow majority” on the Court who believed that “national problems required national responses.” Barry Cushman, though, in referencing the Court’s abandonment of Formalism in *Wickard v. Filburn*, stated that “[i]t was…a determination to dismount this particular high horse altogether, only to mount another more suited to the spirit of the age.”

This expanded Congressional power paved the way for the enactment of FLSA in 1938. Just a year before, President Roosevelt had urged its passage to “help those who toil in factory and on farm to obtain a fair day's pay for a fair day's work.” The Act required that employers nationwide adhere to uniform standards concerning wages, child labor, and the number of hours employees could work each week.

In 1941 several provisions in FLSA were sustained by the Supreme Court as a result of the newly expanded Commerce Clause. However, questions arose through litigation as to the scope of the bill. Workers were filing wage and hour lawsuits on the premise that FLSA

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24 *See NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30-31 (1937) (upholding the National Labor Relations Act on the basis that it if activities “have…a close and substantial relation to interstate commerce,” Congress has the power to regulate them; *see also* *U.S. v. Darby*, 312 U.S. 100, 115 (1941) (concluding that, for purposes of FLSA, “the prohibition of the shipment interstate of goods produced under the forbidden substandard labor conditions is within the constitutional authority of Congress”).


27 *S. REP. No. 75-884*, at 2 (1938) (incorporating a message from President Roosevelt regarding FLSA).


29 *See U.S. v. Darby*, 312 U.S. 100, 115 (1941) (concluding that, for purposes of FLSA, “the prohibition of the shipment interstate of goods produced under the forbidden substandard labor conditions is within the constitutional authority of Congress”).

applied to travel to and from the workplace. In *Anderson v. Mt. Clemens Pottery Co.* the Supreme Court in 1946 held that “the time spent in walking to work on the employer’s premises after the time clocks were punched…must be included in the statutory workweek and compensated accordingly, regardless of contrary custom or contract.” Later that year, the Congressional mid-term elections shifted control of both the House and Senate to the Republicans.

**B. The Portal to Portal Pay Act of 1947**

After taking control of Congress, Republicans addressed the issues mentioned above by passing the Portal to Portal Pay Act in 1947. One of the issues addressed in the bill had to do with the assessment of liquidated damages in FLSA. As enacted in 1938, FLSA stipulated that in addition to backpay, liquidated damages be awarded automatically when an employer was found to have violated the Act. However, courts found the mandatory imposition of liquidated damages to be a harsh result for employers, especially those that violated FLSA in good faith. As a result, § 11 of the Portal to Portal Pay Act stipulated that a court could exercise its discretion to limit or eliminate liquidated damages if it found that the employer had acted in good faith and on reasonable grounds for believing that its actions were not in violation of the Act.

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32 Id. at 2.
Another issue with FLSA prior to 1947 concerned the lack of a statute of limitations in the original bill; instead, courts relied on the statute of limitations in their respective states.\textsuperscript{36} The Portal to Portal Pay Act addressed this by establishing a uniform statute of limitations period of two years.\textsuperscript{37} This two year statute of limitations for FLSA claims would remain in place for nearly two decades.

\textbf{C. 1966 Amendments}

By the mid-sixties, Democrats were again in control of Congress and President Johnson was initiating the “war on poverty.” One part of this initiative was to cover more workers under FLSA. In a message to Congress in 1965, the President stated that “[m]any American workers whose employment is clearly within the reach of this law have never enjoyed its benefits.”\textsuperscript{38} A year later, Congress incorporated the President’s recommendations in the 1966 Amendments.\textsuperscript{39} The bill sought to incorporate an estimated 7.2 million additional employees under FLSA, and increase the national minimum wage.\textsuperscript{40}

One provision in the 1966 Amendments amended the statute of limitations.\textsuperscript{41} In 1965, the Secretary of the Department of Labor, hereinafter “DOL,” proposed a three year statute of limitations for these actions.\textsuperscript{42} As a result, this proposal was incorporated into the bill, but only for cases in which the employer’s violation of the Act was “willful.”\textsuperscript{43}

This amendment, which is codified at 29 U.S.C. § 255(a), hereinafter “§ 255(a),” led to two complications. First, neither the 1966 Amendments nor their accompanying reports

\begin{footnotesize}
\textsuperscript{38} S. REP. NO. 89-1487, at 3 (1966).
\textsuperscript{39} Id.
\textsuperscript{40} Id.
\end{footnotesize}
provided courts with guidance on whether a jury or judge should decide the willfulness issue.\textsuperscript{44} Second, for courts that allowed a jury to decide the willfulness issue, there was no guidance on how this decision would affect a judge’s determination on the good faith issue.

In the years following the enactment of the 1966 Amendments, courts also diverged on the definition of the term “willful” in § 255(a). Based on the reading used by some courts, a positive finding on the issues of willfulness and good faith was plausible.\textsuperscript{45} For example, the Fifth Circuit adopted the “Jiffy June” standard, holding that an employer’s violation of FLSA was willful if it knew FLSA was “in the picture.”\textsuperscript{46} This standard only required that the employer had reason to know that its conduct was governed by FLSA.\textsuperscript{47} In \textit{Jiffy June} the court held that the employer’s discussions with his attorney regarding whether he could change the overtime pay rate for his employees demonstrated that he knew FLSA was “in the picture.”\textsuperscript{48} Although the employer followed his attorney’s advice, his violation of the Act was still considered willful.\textsuperscript{49}

\textbf{D. McLaughlin v. Richland Shoe Co.}

In \textit{McLaughlin} the Supreme Court in 1988 adopted the same definition of “willful” as was incorporated in ADEA.\textsuperscript{50} Three years prior to \textit{McLaughlin}, the Court in \textit{Trans World Airlines, Inc. v. Thurston} defined “willful” for purposes of ADEA statute of limitations as follows: “that the employer either knew or showed reckless disregard as to whether its conduct

\textsuperscript{44} \textit{See} EEOC v. City of Detroit Health Dep’t, Herman Kiefer Complex, 920 F.2d 355, 358, n.3 (6th Cir. 1990) (stating that “[t]here are cases in which the issue of willfulness for statute of limitations purposes was decided by the judge, and there are other cases in which it was decided by the jury”); \textit{see also} Alvarez Perez v. Sanford-Orlando Kennel Club, Inc., 515 F.3d 1150, 1163, n.3 (11th Cir. 2008) (noting that it could not find an authority that expressly states that the statute of limitations under FLSA is to be decided by a jury; instead it assumed that the issue was to be decided by a jury).

\textsuperscript{45} \textit{See} Alvarez Perez, 515 F.3d at 1166, n.4 (explaining that “under the Jiffy June standard, a finding of willfulness and a later finding of good faith were not contradictory”).

\textsuperscript{46} Coleman v. Jiffy June Farms, Inc., 458 F.2d 1139, 1142 (5th Cir. 1971).

\textsuperscript{47} Brennan v. Heard, 491 F.2d 1, 3 (5th Cir. 1974).

\textsuperscript{48} Coleman, 458 F.2d at 1141-42.

\textsuperscript{49} \textit{Id.}

\textsuperscript{50} McLaughlin, 486 U.S. at 135.
was prohibited by the statute…."

Since *McLaughlin*, this standard has been applied to § 255(a). Accordingly, a judge’s determination that an employer acted in good faith and on reasonable grounds for believing its actions were in compliance with the Act has appeared to be irreconcilable with a jury’s finding that an employer either knew or showed reckless disregard for whether its conduct was prohibited by FLSA. Yet, § 260 expressly grants the court discretion to limit or eliminate liquidated damages based on a finding of good faith.

As a result, a circuit split has developed on this issue. The Second, Fifth, Ninth, Tenth, and Eleventh Circuits have precluded a judge from determining liquidated damages when a jury finds willfulness while the Fourth and Eighth Circuits hold that divergent conclusions are acceptable.

**III. COMPLYING WITH THE PLAIN LANGUAGE OF THE STATUTE – *FOWLER V. LAND MANAGEMENT GROUPE, INC.***

**A. Holding**

In the aftermath of *McLaughlin*, several circuits precluded a judge from making a decision on good faith when a jury found a willful violation. However, in 1992 the Fourth Circuit held that a judge could determine that an employer had acted in good faith and on

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52 *McLaughlin*, 486 U.S. at 135.
53 *See Pollis v. New Sch. for Social Research*, 132 F.3d 115, 120 (2nd Cir. 1997) (stating that compensatory awards for willful violations of the EPA should be doubled pursuant to § 260); *see also* Singer v. City of Waco, Tex., 324 F.3d 813, 823 (5th Cir. 2003) (holding that as a result of the jury’s determination of willfulness, the city could not show that it acted in good faith); *see also* EEOC v. City of Detroit Health Dep’t, Herman Kiefer Complex, 920 F.2d 355, 358 (6th Cir. 1990) (stating that the district court was bound by the jury finding of willfulness); *see also* Chao v. A-One Med. Servs., Inc., 346 F.3d 908, 920 (9th Cir. 2003) (noting that “a finding of good faith is plainly inconsistent with a finding of willfulness”); *see also* Brinkman v. Dep’t of Corr., 21 F.3d 370, 372 (10th Cir. 1994) (stating that “the Seventh Amendment right to a jury trial prohibits the district court from reaching a contrary conclusion”); *see also* Alvarez Perez v. Sanford-Orlando Kennel Club, Inc., 515 F.3d 1150, 1166 (11th Cir. 2008) (holding that the judge’s finding of good faith could not be reconciled with the jury’s determination of willfulness); *see also* Fowler v. Land Mgmt. Groupe, Inc., 978 F.2d 158, 162 (4th Cir. 1992) (noting that “it is entirely acceptable that the two fact-finders reach conflicting conclusions on the issues”); *see also* Broadaus v. O.K. Indus., Inc., 226 F.3d 937, 944 (8th Cir. 2000) (stating that “[t]he jury’s decision on willfulness is distinct from the district judge’s decision to award liquidated damages).
reasonable grounds even if a jury found that the employer had willfully violated the Act.\textsuperscript{54} The court stated that “we do not discern any negative ramifications that would result from inconsistent determinations on the issues by the judge and the jury.”\textsuperscript{55}

\textbf{B. Facts}

The Land Management Groupe, Inc. (LMG), hired Barbara Johnston Fowler in 1987 as a Project Manager and paid her a starting annual salary of $32,000.\textsuperscript{56} Six months after she was hired, LMG retained Bruce Reese as a Vice President and paid him a starting annual salary of $62,000.\textsuperscript{57} Fowler then became the Vice President of Building Development, and earned $60,000 annually.\textsuperscript{58} However, LMG fired her in 1990; at that time, Reese was earning $73,500 annually.\textsuperscript{59} Soon after her termination, Fowler commenced a suit against LMG in the Eastern District of Virginia alleging discrimination in violation of the Equal Pay Act, hereinafter “EPA,” and Title VII.\textsuperscript{60} EPA is incorporated into FLSA and therefore provisions concerning liquidated damages and the statute of limitations in FLSA are applicable to EPA claims.\textsuperscript{61}

After the district court trial, Fowler appealed several rulings including the district court judge’s decision that LMG had not willfully violated EPA for purposes of determining the statute of limitations.\textsuperscript{62} She argued that this was a question for the jury. Although the statute of limitations is ordinarily presented to a jury, LMG contended that EPA claims were distinguishable because the judge had to decide a similar issue for the purposes of determining

\begin{footnotes}
\item[54] Fowler, 978 F.2d at 163.
\item[55] Id. at 162.
\item[56] Id. at 160.
\item[57] Id.
\item[58] Id.
\item[59] Id.
\item[60] Fowler, 978 F.2d at 160.
\item[62] Fowler, 978 F.2d at 162.
\end{footnotes}
liquidated damages.\textsuperscript{63} LMG’s argument was based on the premise that allowing two separate fact-finders to decide synonymous issues would lead to “inconsistencies and conflicts.”\textsuperscript{64} In response, the court stated that “[t]he consequences of the judge’s decision are entirely separate from the consequences of the jury’s determination, and it is entirely acceptable that the two-fact finders reach conflicting conclusions on the issues.”\textsuperscript{65} The court even proposed an alternative: have the jury decide both the statute of limitations and liquidated damages.\textsuperscript{66} However, it did not adopt this solution because of the express language of § 260.\textsuperscript{67}

\textbf{C. Analysis}

Although a judge’s determination on good faith has no consequence on the statute of limitations, it is difficult to reconcile how a judge and a jury could review the same set of facts and arrive at diametrically opposed conclusions. Furthermore, the Fourth Circuit’s holding seems at odds with the Seventh Amendment, which states that “no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.”\textsuperscript{68} Although the court concluded that it did not infringe upon the Seventh Amendment by following the express language of § 260,\textsuperscript{69} another circuit has held to the contrary.\textsuperscript{70}

\textsuperscript{63} Id.  
\textsuperscript{64} Id.  
\textsuperscript{65} Id.  
\textsuperscript{66} Id. at 162-63.  
\textsuperscript{67} Id. at 163; 29 U.S.C. § 260 (2006).  
\textsuperscript{68} U.S. CONST. amend. VII.  
\textsuperscript{69} Fowler, 978 F.2d at 163.  
\textsuperscript{70} Brinkman v. Dep’t of Corr., 21 F.2d 370, 372-73 (10th Cir. 1994).
IV. DOES A JUDGE’S DETERMINATION OF GOOD FAITH COMPLY WITH THE SEVENTH AMENDMENT WHEN A JURY FINDS A WILLFUL VIOLATION?

A. Brief History of the distinction between law and equity in civil trials

The proper role for judges and juries in the modern civil trial system has been debated for years. Prior to 1938, plaintiffs seeking equitable remedies, such as injunctions, had their claims decided by judges in courts of equity. Meanwhile, plaintiffs seeking legal remedies, such as compensatory damages, had their claims decided by juries in courts of law. In 1938, the Federal Rules of Civil Procedure merged these courts. Since the merger of the two systems, constitutional inquiries regarding the right to a jury trial have time and again arisen. Under the current civil trial system, whether a judge or jury decides an issue depends on the nature of the claim and the type of remedy sought. Courts have been tasked with analogizing issues within modern statutory claims to 18th century causes of action to determine if these issues would have been heard in courts of law or equity prior to the creation of the Seventh Amendment. A similar analysis is performed to determine whether the remedy sought is equitable or legal in nature. In the same year that the Federal Rules of Civil Procedure merged courts of law with courts of equity, Congress enacted FLSA. FLSA claims in general have been analogized to debtors’ cases that were tried in courts of law prior to the establishment of the Seventh Amendment, meaning that the right to a jury trial exists. However, provisions in the Act such as § 260 expressly grant a judge discretion to decide particular issues.

71 FED. R. CIV. P. 2.
72 See U.S. CONST. amend. VII (stating that “[i]n suits at common law…the right of a trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of common law”).
74 See Id. at 567-69 (analogizing an alleged breach of a collective bargaining agreement under the Labor Management Relations Act to a claim against a trustee for breach of fiduciary duty).
75 Id. at 565.
B. Are liquidated damages in FLSA legal or equitable in nature?

Many authorities have held that liquidated damages in FLSA are legal in nature because they are considered either compensatory or punitive.\(^\text{77}\) In *Fowler*, the court viewed the assessment of liquidated damages as an equitable consideration.\(^\text{78}\) Outside the scope of FLSA, liquidated damages are ordinarily incorporated into contracts by parties wishing to set an amount in advance of what damages should be if the contract is later breached.\(^\text{79}\) In a review of FLSA’s liquidated damages provision in 1942, the Supreme Court held in *Overnight Motor Transp. Co v. Missel* that these damages were compensatory in nature.\(^\text{80}\) However, the House Judiciary Committee Report for the Portal to Portal Pay Act of 1947, which included the good faith provision, quoted the Fourth Circuit’s ruling in *Missel* stating:

> Is this provision of the law as to liquidated damages mandatory or discretionary? Since the Act has been violated in good faith in this case, we would indeed like to hold that it is discretionary. It seems a keen injustice for employers bewildered by strange legislation and confused by divergent authority in the courts to be subjected to such a measure. Yet no matter how much we lament its harshness, the Section appears to be mandatory and virtually all the courts have so construed it.\(^\text{81}\)

In response to this opinion, Congress in 1947 granted a judge the discretion to limit or deny liquidated damages under § 260, but only if he or she found that the employer acted in good faith and on reasonable grounds for believing that its actions were not in violation of the Act.\(^\text{82}\)

Therefore, it appears that drafters of § 260, like the Fourth Circuit in *Missel*, considered

\(^{77}\) See EEOC v. First Citizens Bank of Billings, 758 F.2d 397, 403 (9th Cir.), *cert denied*, 474 U.S. 902 (1985) (holding that liquidated damages are compensatory in nature); *see also* Castle v. Sangamo Weston, Inc., 837 F.2d 1550, 1562 (11th Cir. 1988) (holding that liquidated damages in the ADEA are punitive in nature).

\(^{78}\) Fowler, 978 F.2d at 163.

\(^{79}\) See U.C.C. § 2-718 (2003) (stating that damages for breach may be liquidated in contracts).


liquidated damages as a form of punishment for employers rather than as compensation for employees. As a result, an employer may avoid or have this penalty reduced if it shows that it acted in good faith.

This assessment of liquidated damages in FLSA as punitive in nature has not been shared by many authorities.\textsuperscript{83} The dissenting views section of the House Judiciary Committee Report to the Portal to Portal Pay Act noted that the liquidated damages provision in FLSA was “not intended as a punitive device.”\textsuperscript{84} In 1974 DOL issued regulations establishing prerequisites for courts to consider before exercising their discretion under § 260.\textsuperscript{85} These regulations cited two Supreme Court cases in which the Court stated that liquidated damages under FLSA were “not penal in nature,” but rather “constitute compensation for the retention of a workman’s pay where the required wages were not paid on time.”\textsuperscript{86} However, the two cases cited by DOL, \textit{Brooklyn Savings Bank v. O’Neil} and \textit{Missel}, were decided prior to the enactment of § 260.\textsuperscript{87} Therefore, these cases do not accurately represent what the majority in Congress intended when in it enacted the Portal to Portal Pay Act: allowing employers to avoid the penalty of liquidated damages if they showed that they had acted in good faith and on reasonable grounds for believing that their actions were not in violation of FLSA.

Punitive damages, which punish liable parties in civil trials, are considered legal in nature and therefore are calculated by a jury.\textsuperscript{88} The Supreme Court in \textit{Tull v. United States} noted that civil penalties under the Clean Water Act were legal in nature because they were designed to

\begin{footnotes}
\item[85] 29 C.F.R. § 790.22 (1974).
\item[88] Castle v. Sangamo Weston, Inc., 837 F.2d 1550, 1562 (11th Cir. 1988).
\end{footnotes}
punish violators of the Act, rather than restore the status quo. Liquidated damages, though, are not easily calculable. Unlike the simple calculation of backpay in an overtime compensation case under FLSA (the employee’s regular rate of pay multiplied by 1.5, then multiplied by the number of overtime hours he or she worked), a proper calculation for reducing liquidated damages is nearly impossible. Thus, the assessment of liquidated damages is discretionary in nature. In Albermarle Paper Co. v. Moody then Justice Rehnquist stated in a concurring opinion to a Title VII case that “[t]o the extent, then, that the District Court retains substantial discretion as to whether or not to award backpay notwithstanding a finding of unlawful discrimination, the nature of the jurisdiction which the court exercises is equitable, and under our cases, neither party may demand a jury trial.” The Court in Tull acknowledged Rehnquist’s concurring opinion in holding that the assessment of civil penalties under the Clean Water Act, though legal in nature, could remain in the discretion of the judge. In FLSA claims, judges have exercised their discretion concerning liquidated damages since the enactment of § 260 in 1947. Thus, while liquidated damages in FLSA may not be equitable in terms of a historical analysis, they are best left for a judge’s discretion.

C. Does collateral estoppel preclude a judge from reaching a divergent conclusion on the issue of good faith?

When a legal claim is decided by a jury, a judge cannot come to a different conclusion on another claim involving the same set of facts even if the second claim is equitable in nature. There are exceptions to the normal rule though.

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92 Tull, 481 at 427 (citing Albermarle Paper Co. v. Moody, 422 U.S. 405, 442-43 (1975) (Rehnquist, J., concurring)).
93 Fowler, 978 F.2d at 163 (quoting Ohio-Sealy Mattress Manufacturing Co. v. Sealy, Inc., 585 F.2d 821, 844 (7th Cir. 1978), cert. denied, 440 U.S. 930 (1979)).
1. *Brinkman v. Dep’t of Corrections* – Collateral Estoppel applies in these circumstances

The Tenth Circuit used the principle of collateral estoppel, in holding that divergent conclusions on the issues of willfulness and good faith violate the Seventh Amendment.\(^95\) In *Brinkman v. Dep’t of Corrections*, the court stated that “[w]e have held that when fact issues central to a claim are decided by a jury upon evidence that would justify its conclusion, the Seventh Amendment right to a jury trial prohibits the district court from reaching a contrary conclusion.”\(^96\) Although a number of circuits have held that a judge should be precluded from determining good faith when a jury finds “willfulness,” the Tenth Circuit is the only circuit that has approached the Seventh Amendment question.

In *Brinkman* the court cited *Skinner v. Total Petroleum, Inc.*, which involved a plaintiff’s claims under § 1981 of the Civil Rights Act of 1866, hereinafter “§ 1981,” and Title VII.\(^97\) There, the Tenth Circuit considered backpay under § 1981 as legal in nature, while it regarded backpay under Title VII as equitable.\(^98\) The court held that the judge’s calculation of backpay at $40,251.43 in the plaintiff’s Title VII trial violated the Seventh Amendment because a jury had previously awarded only $3,945.48 in backpay during the plaintiff’s § 1981 trail.\(^99\)

2. *Fowler* – Collateral Estoppel should not apply in these circumstances

In *Fowler*, however, the court provided two reasons for why the principle of collateral estoppel should not preclude a judge from assessing liquidated damages. First, the court did “not believe that…Congressional intent would be effectuated by a scheme in which, in every case, the

\(^{94}\) *E.g.* Montana v. U.S., 440 U.S. 147, 162 (1979) (noting that there is an exception with regard to “unmixed questions of law in successive actions involving unrelated claims”); see also RESTATEMENT (SECOND) OF JUDGMENTS § 28 (1982) (providing exceptions to the normal rule of collateral estoppel).

\(^{95}\) *Brinkman v. Dept. of Corr.*, 21 F.3d 370, 372-73 (10th Cir. 1994).

\(^{96}\) *Id.*

\(^{97}\) *Id.*

\(^{98}\) *Id.*

\(^{99}\) *Skinner v. Total Petroleum, Inc.*, 859 F.2d 1439, 1443 (10th Cir. 1988).

\(^{99}\) *Id.* at 1445.
trial court’s discretion to award liquidated damages would be completely constrained by the jury’s determination on ‘willfulness’ for the purposes of the statute of limitations.”

Second, it held that “[t]he decision on whether or not to assess liquidated damages under section 260, after ‘good faith’ has been established, rests largely on equitable considerations.”

3. Analysis

Unlike Skinner where the jury and the judge looked to the same set of facts for the purposes of determining backpay, in FLSA cases a jury and a judge examine the same set of facts for two different purposes. Therefore, it is unlikely that Congress, when it amended the statute of limitations in 1966, intended for it to have a preclusive effect on the assessment of liquidated damages in FLSA. Yet, both determinations do involve synonymous issues: willfulness and good faith. In a Title VII action in which a jury had previously decided the same set of issues in the plaintiff’s state law claim, the First Circuit stated that “[i]f Congress directed in Title VII cases that the district judge ignore a prior jury finding, an exception to the presumptive rule of consistency would be warranted.” For FLSA claims, given that Congress did not expressly direct courts to ignore a jury’s determination on willfulness when deciding the issue of good faith for purposes of liquidated damages, it is unlikely that Congressional intent would overcome the principle of collateral estoppel.

The Fourth Circuit’s assessment of liquidated damages as an equitable consideration is more persuasive. The analogy that best describes the Fourth Circuit’s view of a judge’s role in awarding liquidated damages is the sentencing phase of a criminal trial. There, when a jury

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100 Fowler, 978 F.2d at 163.
101 Id.
102 Skinner, 859 F.2d at 1445.
103 See Fowler, 978 F.2d at 163 (explaining that a jury determines the issue of willfulness for purposes of the statute of limitations while a judge determines the issue of good faith for purposes of assessing liquidated damages).
convicts a defendant, the sentence for the defendant is at the discretion of a trial judge. In *Tull* the Supreme Court held that the Seventh Amendment only protected the right to a jury for essential parts of the trial, and that the remedy phase of a civil trial should not be considered essential.\(^{105}\) In *Martin v. Detroit Marine Terminals, Inc.*, which was cited by the Fourth Circuit in *Fowler*, the Eastern District of Michigan linked a judge’s discretion on liquidated damages under FLSA with a judge’s discretion in adjusting poor debtor’s sentences in tort actions from the early twentieth century.\(^{106}\) In *Feltner v. Columbia Pictures Television, Inc.* the Court likened the assessment of civil penalties by the Government in *Tull* to the sentencing phase of a criminal trial.\(^{107}\) Although in *Feltner* the Supreme Court stated that no such analogy existed for statutory damages in copyright cases, there was no indication that these damages were penal in nature.\(^{108}\) Furthermore, statutory damages in copyright cases, unlike liquidated damages in FLSA, had traditionally been awarded by juries.\(^{109}\)

The weakness of this argument is that, as the Fourth Circuit stated in *Fowler*, the decision of whether or not to assess liquidated damages comes only after a judge has determined that an employer violated FLSA in good faith. A judge has two separate responsibilities under § 260: to decide the issue of good faith; and only if he or she determines that the employer acted in good faith, to assess liquidated damages.\(^{110}\) Therefore, while the assessment of liquidated damages may accurately be described as an equitable consideration and linked to the sentencing phase of a criminal trial, the issue of good faith is a separate decision for a judge and more formulaic in nature.

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\(^{105}\) *Tull*, 481 U.S. at 426, n.9.  
\(^{108}\) *Id.*  
\(^{109}\) *Id.*  
\(^{110}\) See 29 C.F.R. § 790.22 (1974) (clarifying the prerequisites for courts to consider before exercising their discretion on liquidated damages).
Whether the Fourth Circuit’s justifications for permitting a judge to decide good faith when a jury finds willfulness are sufficient to avert collateral estoppel is a question the Supreme Court could answer. As the Eastern District of Michigan stated in Martin, this issue lies “within the gray area surrounding the protective cloak of the Seventh Amendment.”

V. PRECLUDING A JUDGE FROM DECIDING GOOD FAITH WHEN A JURY FINDS WILLFULNESS – ALVAREZ PEREZ V. SANFORD-ORLANDO KENNEL CLUB, INC.

A. Holding

Unlike the Fourth Circuit’s holding in Fowler, an analysis of the Seventh Amendment is unnecessary when reviewing the Eleventh Circuit’s more recent decision in Alvarez Perez. It held that a judge should be precluded from deciding liquidated damages when a jury finds that an employer willfully violated FLSA.¹¹²

Coincidentally, the day before the court decided Alvarez Perez it issued an opinion in Rodriguez v. Farm Stores Grocery, Inc. in which the district court judge had determined that the employer did not act in good faith after the jury found that the employer had not willfully violated FLSA.¹¹³ The Eleventh Circuit held that these findings were not inconsistent because the shifting burdens of proof.¹¹⁴ It aptly noted that “[f]or the willfulness issue on which the statute of limitations turns, the burden is on the employee; for the good faith issue on which liquidated damages turns, the burden is on the employer.”¹¹⁵ Therefore, even if the employee cannot show that the employer acted willfully, the employer still has to bring forth evidence to show that it acted in good faith.

¹¹¹ Martin, 189 F. Supp. at 583.
¹¹² Alvarez Perez, 515 F.3d at 1166.
¹¹³ Rodriguez v. Farm Stores Grocery, Inc., 518 F.3d 1259, 1273 (11th Cir. 2008).
¹¹⁴ Id. at 1274.
¹¹⁵ Id.
In *Alvarez Perez* the court looked to prior cases in which the employer’s violations were considered willful.\(^\text{116}\) In *Glenn v. Gen. Motors Corp.* the Eleventh Circuit held that the judge’s determination that the employer had willfully violated EPA precluded him from subsequently finding that the employer had acted in good faith.\(^\text{117}\) The court did acknowledge in *Alvarez Perez* that *Glenn* involved the same fact-finder coming to irreconcilable conclusions, whereas the issue before it concerned the determinations of the jury and the judge.\(^\text{118}\) The court also cited *Castle v. Sangamo Weston, Inc.*, which held that a jury determination on willfulness for the purposes of ADEA statute of limitations precluded the judge from deciding good faith for the purposes of awarding liquidated damages under ADEA.\(^\text{119}\) In *Castle* the court reasoned that the jury had factored in good faith when deciding willfulness.\(^\text{120}\)

**B. Facts**

In 2001 Collins & Collins Partnership d/b/a CCC Racing entered into an agreement with Kennel Club to operate greyhound races from May through October each year at Kennel Club’s Longwood Facility near Orlando, Florida.\(^\text{121}\) Kennel Club operated greyhound races at its facility during the winter months.\(^\text{122}\) Israel Alvarez Perez worked at the facility during the winter and summer months and received paychecks from both companies.\(^\text{123}\) In 2005 he filed a complaint in the Middle District of Florida under FLSA alleging that both companies failed to compensate him adequately for overtime hours worked.\(^\text{124}\)

\(^{116}\) *Alvarez Perez*, 515 F.3d at 1164.

\(^{117}\) *Glenn v. General Motors Corp.*, 841 F.2d 1567, 1573, n.14 (11th Cir. 1988).

\(^{118}\) *Alvarez Perez*, 515 F.3d at 1165.

\(^{119}\) *Castle v. Sangamo Weston, Inc.*, 837 F.2d 1550, 1561 (11th Cir. 1988).

\(^{120}\) *Id.*

\(^{121}\) *Alvarez Perez*, 515 F.3d at 1153.

\(^{122}\) *Id.*

\(^{123}\) *Id.* at 1154.

\(^{124}\) *Id.*
The defendants claimed that they were covered under a provision in FLSA codified at 29 U.S.C. § 213(a)(3), hereinafter “§ 213(a)(3),” which exempts “an amusement or recreational establishment…[that] does not operate for more than seven months in any calendar year….\textsuperscript{125}"

The jury, though, considered CCC Racing and the Kennel Club as one establishment for purposes of the exemption, and found that they had violated the Act.\textsuperscript{126} Furthermore, because the jury found that the employers either knew or showed reckless disregard as to whether their conduct was prohibited by FLSA, the suit was not barred despite the fact that it was filed more than two years after the violation.\textsuperscript{127} However, the district court judge denied liquidated damages based on his finding that the companies sought advice regarding the exemption issue from both an attorney and from their payroll company.\textsuperscript{128} The Eleventh Circuit, in a lengthy analysis, affirmed the jury’s finding that considered the two companies as one establishment for purposes of § 213(a)(3).\textsuperscript{129} The court then held that the district court judge should have been precluded from making a determination on liquidated damages.\textsuperscript{130}

C. Analysis

The Eleventh Circuit’s holding that a judge’s finding of good faith simply does not comport with a jury’s finding of willfulness makes sense logically and is convenient because it averts the Seventh Amendment question. The decision, though, is not without controversy. First, by holding that the trial judge was precluded from using his discretion on liquidated damages, the court avoided the express language of § 260.\textsuperscript{131} Second, as noted by the court in \textit{Fowler}, the trial judge’s decision on good faith had no bearing on the outcome of the statute of

\textsuperscript{125} \textit{Id.}
\textsuperscript{126} \textit{Id.} at 1155.
\textsuperscript{127} Alvarez Perez, 515 F.3d at 1155.
\textsuperscript{128} \textit{Id.}
\textsuperscript{129} \textit{Id.} at 1160.
\textsuperscript{130} \textit{Id.} at 1166.
\textsuperscript{131} \textit{See} 29 U.S.C. § 260 (2006) (permitting a judge to determine whether an employer acted in good faith and on reasonable grounds for the purposes of assessing liquidated damages).
limitations. Third, while the Eleventh Circuit stated that a judge’s finding of good faith could compel a judgment as a matter of law, \(^{132}\) hereinafter “JMOL,” this may be a difficult task for a trial judge as a practical matter. If a judge grants JMOL on the question of willfulness, he or she is essentially barring a case after the employer was found by a jury to be in violation of the Act.

**VI. Resolving the Circuit Court Split**

The Supreme Court could resolve the circuit court split on this issue, but a better result would be for Congress to amend FLSA. In a concurring opinion to a Sixth Circuit holding on this issue, Circuit Court Judge Ralph B. Guy, Jr. stated that “[s]ince Congress has readily acted in the past to amend the FLSA in response to court decisions not to its liking, I have no reason to believe other than the solution to this problem also lies with Congress.” \(^{133}\)

One option would be to establish a uniform statute of limitations in § 255(a), thereby removing from a jury the determination of whether an employer willfully violated FLSA. This proposal would involve policy considerations affecting both employers and employees. As noted earlier in this note, in 1965 the Secretary of DOL proposed a three year statute of limitations for these actions. \(^{134}\) Given the current makeup of Congress, adopting the former Secretary’s proposal and amending § 255(a) to read as follows would be plausible:

\[
\text{[I]f the cause of action accrues on or after May 14, 1947--may be commenced within two three years after the cause of action accrued, and every such action shall be forever barred unless commenced within two three years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued;} \]

\(^{135}\)

This proposal, though, would likely receive opposition from businesses as employees would no longer have the burden of proving a willful violation in order to receive an extra year of backpay.

\(^{132}\) Fowler, 978 F.2d at 162.

\(^{133}\) EEOC v. City of Detroit Health Dep’t, Herman Kiefer Complex, 920 F.2d 355, 360 (6th Cir. 1990) (Guy, Ralph B., concurring).

\(^{134}\) McLaughlin, 486 U.S. at 132.

under the Act. Likewise, a proposal for a uniform two year statute of limitations would likely be objected to by those representing the interests of employees.

A more practical solution would be to amend FLSA so that one fact finder looks at both issues of willfulness and good faith. One proposal would be to have a judge decide the issue of willfulness under § 255(a):

[I]f the cause of action accrues on or after May 14, 1947--may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation if the employee shows to the satisfaction of the court that the act or omission giving rise to such action was willful, may be commenced within three years after the cause of action accrued;  

This proposal would address discrepancies among courts as to who should decide the statute of limitations. It would also remove from a jury an uncomfortable decision on willfulness. For claims filed more than two years after the cause of action accrued, if a jury finds that there was a violation, but determines that such a violation was not willful, it is essentially exonerating an employer that would otherwise have been liable. Although the Eleventh Circuit correctly noted in Alvarez Perez that a judge may grant JMOL, such a decision by a judge would essentially bar a case after a jury had determined that a violation of the Act had occurred. Therefore, relying on judges to grant JMOLs under these circumstances may not be realistic. On the other hand, removing the question of willfulness from a jury may be seen by some critics as yet another attempt to diminish the role of juries in civil trials.  

With this sentiment in mind, yet another option for Congress would be to adopt the approach taken by the Eleventh Circuit in Alvarez Perez and amend § 260 to read:

136 *Id.*
137 *See* ELLEN E. SWARD, *THE DECLINE OF THE CIVIL JURY* 3 (CAROLINA ACADEMIC PRESS 2001) (commenting that “[c]hanges in the civil jury over the last several decades – whether conscious or not – have whittled away at it so that it is but a shell of its former self”).
In any action, except one arising out of a willful violation, commenced prior to or on or after May 14, 1947 to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended [29 U.S.C. § 201 et seq.], 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 of 1938, as amended, 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.\(^\text{138}\)

Notwithstanding the concerns mentioned above regarding the awkward nature of the willfulness issue in certain circumstances, this proposal would be practical in the sense that it would simply codify existing law in most jurisdictions.

Instead of waiting for the Supreme Court or the three remaining circuits that have not yet weighed in on this issue, Congress could amend the statute without having to debate policy considerations. Although the two latter proposals mentioned above have strengths and weaknesses, either one would improve upon the status quo where courts choose to either avoid the plain language of the statute or abide by it and confront the Seventh Amendment issue.

\textbf{VII. CONCLUSION}

The circuit split regarding whether or not judges should be precluded in certain circumstances from using their discretion to limit or deny liquidated damages in FLSA cases demonstrates a divergence in statutory interpretation. It also exemplifies the complex relationship that exists between judges and juries in civil trials. Congress created these issues when it amended FLSA in 1966, therefore it should resolve them by clarifying the statute.
