WILLFULNESS AND THE STATUTE OF LIMITATIONS IN THE FAIR LABOR STANDARDS ACT

by Howard A. Gutman *

Introduction

The Fair Labor Standards Act (FLSA)[1] was enacted in 1938 to combat the low wages, long hours, and high unemployment prevalent in industry at the time.[2] Basically, the act requires enterprises engaged in interstate commerce having yearly sales of $250,000.00 or more to pay their employees the prevailing minimum wage and overtime pay.[3] Approximately fifty-six million workers are covered by the act.[4]

Violation of the FLSA subjects an employer to liability for unpaid back wages and an additional equal amount called liquidated damages. In most jurisdictions, liquidated damages are assessed unless the employer can show his actions were reasonable and in good faith.[5] Either the aggrieved employee or the Labor Department can bring suit under the act: in fiscal year 1980, the Labor Department recovered approximately eighty million dollars due almost 500,000 employees.[6] Also, if an employer

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[1] 29 U.S.C. §§ 201-19 (1976 & Supp. III 1979).

[2] *See* S. REP. NO. 1487, 89th Cong., 2d Sess., *reprinted in* [1966] U.S. CODE CONG. & AD. NEWS 3002; *see also id.* at 3005 (purpose of the legislation); 29 U.S.C. § 202 (1976) (findings and declaration of policy).

[3] Some industries, such as construction and laundries, need only meet the "commerce" test, regardless of their volume of sales. For discussion of the complex issues involved with coverage of the FLSA, *see* L. WEINER, FEDERAL WAGE AND HOUR LAW 55-108 (1977); Note, *The Scope of Coverage under the Fair Labor Standards Act of 1938,* 30 WASH. AND LEE L. REV. 149 (1973). In addition to requiring payment of minimum and overtime wages, the act forbids the use of child labor except in certain exempted situations. *See* WEINER, *supra* at 204-10.

[4] *See* Note, *The Class Action in Minimum Wage Back-Pay Suits: A Proposal to Increase the Efficiency of Private Enforcement of the FLSA,* 51 S. CAL. L. REV. 923, 924 (1978).

[5] *See* 29 U.S.C. § 216(b) (1976); Annot., *Liquidated Damages for Violation of Wage and Hour Provisions of Fair Labor Standards Act,* 26 A.L.R. FED. 607 (1976).

[6] U.S. DEPARTMENT OF LABOR, OFFICE OF INFORMATION, PUBLICATIONS AND REPORTS (Chicago, Ill.). Letter from Brad Mitchell, Public Information Officer (February 10, 1981). According to the letter, the Department of Labor recovered $79.6 million for 471,228 workers. These figures include a small percentage of claims involving other federal statutes. The Department uncovered a total of $110.9 million in wage underpayments. The difference between the $110.9 million and $79.6 million figures represents claims the Department believed the employer owed but that the Department deemed unsuitable for litigation.

deliberately violates the FLSA, he or she becomes subject to criminal liability.[7]

The FLSA embodies a general two-year statute of limitations. However, if a violation is found to be "willfull," the limitations period is extended to three years.[8] This article discusses the varying judicial interpretations of willfulness. One group of courts narrowly interprets willfulness to mean a deliberate or intentional violation of the FLSA.[9] The majority of courts, however, only require proof that the employer knew the "FLSA was in the picture" for the violation to be deemed willful.[10]

The original version[11] of the FLSA did not contain a statute of limitations provision. Instead, state statutes of limitation governed FLSA violations. In order to eliminate inequities arising from the operation of differing limitations periods among the states, Congress passed an amendment to the FLSA in 1947 which established a uniform two-year statute of limitations.[12] The two-year limitations period is relatively brief compared with the five-year statute of limitations for most criminal violations and the three-year period for most civil violations.[13]

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[7] 29 U.S.C. § 216(a) reads in relevant part:

> 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 (emphasis added).

Courts have read "willfully" to mean a deliberate or intentional violation of the law. *See* Darby v. United States, 132 F.2d 928 (5th Cir. 1943); Nabob Oil Co. v. United States, 190 F.2d 478 (10th Cir.), *cert. denied*, 342 U.S. 876 (1951). As will be seen in this article, courts interpret "willfully" more liberally in granting a one year extension of the statute of limitations than in imposing criminal liability. *See, e.g.*, notes 50-52 and accompanying text, *infra*. *See also* Laffey v. Northwest Airlines, Inc., 567 F.2d 429, 461-62 n.230 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978).

[8] 29 U.S.C. § 255 (1976). The Equal Pay Act amendment to the FLSA, 29 U.S.C. § 206(d) (1976), which prohibits wage discrimination on the basis of sex, and the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-34 (1976), which prohibits discrimination against workers who are between the ages of forty and sixty-five, embody the FLSA's two-tiered statute of limitations. Equal pay cases will be discussed in conjunction with the wage and hour cases, but ADEA cases will not be discussed here because of the difficulties involved in analyzing another statute. Illustrative ADEA cases dealing with the statute of limitations include Marshall v. Eastern Airlines, Inc., 474 F. Supp. 364 (S.D. Fla. 1979); Olson v. Southern Pac. Transp. Co., 480 F. Supp. 773 (N.D. Cal. 1979).

[9] *See, e.g.*, Dowd v. Blackstone Cleaners, 306 F. Supp. 1276 (N.D. Tex. 1969).

[10] Coleman v. Jiffy June Farms, Inc., 458 F.2d 1139, 1142 (5th Cir.), *cert. denied*, 409 U.S. 948 (1972); and cases cited in note 50 *infra*.

[11] Fair Labor Standards Act of 1938, ch. 676, §§ 1-19, 52 Stat. 1060 (1938).

[12] Portal to Portal Act of 1947, ch. 52, §§ 1-13, 61 Stat. 84 (1947) (current version at 29 U.S.C. §§ 251-62 (1976).

[13] *See* H.R. 8259, 89th Cong., 1st Sess., *reprinted in Minimum Wage-Hour Amendments: Hearings on H.R. 8259 Before the General Subcomm. on Education and Labor*, 89th Cong., 1st Sess. 4, 11 (1965) [hereinafter cited as *Hearings*] (statement of Secretary of Labor Wirtz).

In 1965, the Johnson Administration introduced a bill to extend the statute of limitations to three years. Secretary of Labor Wirtz told the House Subcommittee on Labor:

> The lengthening of the statute of limitations to 3 years will allow workers more time to familiarize themselves with their legal right to back wages and thus improve enforcement of the act. The short statute of limitations gives competitive advantage to violators and penalizes many workers in the collection of wages legally due.[14]

Employees with minimum wage or overtime claims are frequently poor and unaware of their rights. Consequently, many claims are not brought until a considerable time has elapsed after accrual of the cause of action. The two-year limitations period means that many meritorious claims will not be heard, or if a violation has persisted over a period of time, the statute of limitation could adversely affect the extent of wage recovery. Statutes of limitations encourage prompt filings of claims. When the plaintiff is unaware of a violation at the time it occurs, however, the punishment for late filing is unduly severe, and the incentive effect of the statute of limitations is slight.

Extending the statute of limitations, however, increases the liability of doing business. During hearings on the proposal to extend the limitations period, Secretary of Labor Wirtz[15] and industry spokesmen[16] testified that most FLSA violations are not deliberate. As a result, liability for unexpected violations could severely burden many businesses. The burden would be increased greatly if the limitations period were unreasonably long. Because in most FLSA cases the employer has the burden of proving compliance with the act,[17] extending the statute of limitations might allow employees to bring dubious or fraudulent claims which would be difficult to refute because of old or lost records.

After hearing testimony on the administration's proposal, the House Subcommittee on Labor adopted a compromise bill which is the law today:

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[14] *Id.*

[15] *See Hearings*, note 13 *supra* at 54 (Rep. Martin questioning Secretary of Labor Wirtz).

[16] *Id.* at 2241-42 (statement of a representative from the American Bottlers of Carbonated Beverages); *id.* at 2250 (statement of a representative from the American Bankers Association); *id.* at 533 (statement of Lawrence Leyton, National Retail Merchants Association).

[17] *See* 29 U.S.C. § 211(c) (1976); Marshall v. Suicide Prevention of Florida, 82 Lab. Cas. (CCH) ¶ 33,570 at 47,964 (S.D. Fla. 1977).

> Any action . . . 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 actions 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.[18]

Neither the statute nor the legislative history contains an explanation for the change. It seems that Congress intended to protect the inadvertent violator from the increased liability which a three-year, rather than a two-year, statute of limitations might carry with it.[19]

Willfulness Interpreted as a Deliberate or Intentional Violation of the FLSA

In *Dowd v. Blackstone Cleaners, Inc.*,[20] the court suggested a restrictive interpretation of willfulness: "To be willful, the violation must be shown to be deliberate, voluntary and intentional as distinguished from one committed through inadvertence, accident or by ordinary negligence."[21] Plaintiff must show that the employer knew that he or she was violating the statute, or else that the infraction was not willful.[22] One

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[18] 29 U.S.C. § 255 (1976).

[19] *See* note 84 *infra*.

[20] 306 F. Supp. 1276 (N.D. Tex. 1969); *but see* Fifth Circuit cases cited in note 50 *infra* which effectively overrule *Dowd*.

[21] *Id.* at 1281, *citing* Nabob Oil Co. v. United States, 190 F.2d 478 (10th. Cir.), *cert. denied*, 342 U.S. 876 (1951). *Accord*, Brennan v. Westinghouse Credit Corp., 21 Wage and Hour Cas. (BNA) 871 (E.D. Tenn. 1973), *aff'd*, 509 F.2d 81 (6th Cir. 1975); Boll v. Fed. Reserve Bank, 365 F. Supp. 637 (E.D. Mo. 1973), *aff'd*, 497 F.2d 335 (8th Cir. 1974); Hodgson v. Barge, Waggoner, and Sumner, Inc., 377 F. Supp. 842 (M.D. Tenn. 1972), *aff'd*, 477 F.2d 598 (6th Cir. 1973); Usery v. Johnson, 436 F. Supp. 35 (D.N.D. 1977); Marshall v. Johnson, 82 Lab. Cas. (CCH) ¶ 33,583 (D.N.D. 1977); Martin v. Penn Line Serv., Inc., 416 F. Supp. 1387 (W.D. Pa. 1976); Brennan v. DeLaney, 76 Lab. Cas. (CCH) ¶ 33,199 (M.D. Tenn. 1974); Hodgson v. Unified School Dist., 21 Wage and Hour Cas. (BNA) 574 (D. Kan. 1973); Hodgson v. Perkins, 63 Lab. Cas. (CCH) ¶ 32,388 (D.N.M. 1970); Hill v. Moss-American, Inc., 63 Lab. Cas. (CCH) ¶ 32,376 (N.D. Miss. 1970); Hodgson v. Hyatt, 318 F. Supp. 390 (N.D. Fla. 1970) (*but see* Fifth Circuit cases cited in note 50 *infra* which effectively overrule Hodgson v. Hyatt); Wirtz v. Greenhaw Supermarket, Inc., 59 Lab. Cas. (CCH) ¶ 32,128 (W.D. Okla. 1968).

[22] One court commented:

> [W]ithout knowledge of the facts giving rise to the potential violation, it cannot be said that a deliberate choice was made by defendant to ignore the law. One must have had the capacity to make a deliberate and intentional choice between violating the statute and observing its command before such person is guilty of a willful violation of § 255(a).

Hill v. Moss-American, Inc., 63 Lab. Cas. (CCH) ¶ 32,376 at 44,361 (N.D. Miss. 1970).

major problem with *Dowd* is that it may be difficult for plaintiffs to disprove their employers' assertions of good faith.[23]

Employers have successfully claimed that they did not realize that their employees were working overtime,[24] that their records did not comply with FLSA regulations,[25] or that their business did a sufficient volume to make them subject to the act.[26] The defense of good faith is likely to be successful if the employer can demonstrate that he did not know he was violating FLSA regulations.[27] The claim of good faith may also bar recovery if the employer promptly complies with FLSA, after being informed of the act's applicability to his business.[28] Also, the good faith defense will be successful if the employer can show he was following the advice of counsel in pursuing his unlawful conduct.[29]

Notwithstanding the employer's allegations of good faith, willfulness can be inferred from the circumstances of the infraction. For example, where employees apparently are instructed not to punch their time-clocks

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[23] 306 F. Supp. 1276 (N.D. Tex. 1969). There is no one "leading" case employing the strict definition of willfulness. *Dowd* is used to designate the standard for convenience; it is an early and relatively prominent case. Boll v. Federal Reserve Bank, 365 F. Supp. 637 (E.D. Mo. 1973), *aff'd*, 497 F.2d 335 (8th Cir. 1974), and Brennan v. Westinghouse Credit Corp., 21 Wage and Hour Cas. (BNA) 871 (E.D. Tenn. 1973), *aff'd*, 509 F.2d 81 (6th Cir. 1975) are also frequently cited.

[24] Hill v. Moss-American, Inc., 63 Lab. Cas. (CCH) ¶ 32,376 (N.D. Miss. 1970).

[25] Hodgson v. Perkins, 63 Lab. Cas. (CCH) ¶ 32,388 (D.N.M. 1970).

[26] Wirtz v. Greenhaw Supermarket, Inc., 59 Lab. Cas. (CCH) ¶ 32,128 (W.D. Okla. 1968). *See also* Martin v. Penn Line Serv., Inc., 416 F. Supp. 1387 (W.D. Penn. 1976) (defendant, in good faith, believed plaintiffs were exempt under the act). However, if an employer's claims that he did not know that he was subject to the act lack some basis in fact, they will not be believed. *See, e.g.*, Dowd v. Blackstone Cleaners, Inc., 306 F. Supp. 1276 (N.D. Tex. 1969).

[27] Marshall v. McAlester Corp., 438 F. Supp. 1005 (E.D. Okla. 1977) (decided under an unclear standard).

[28] Hodgson v. Perkins, 63 Lab. Cas. (CCH) ¶ 32,388 (D.N.M. 1970); Wirtz v. Greenhaw Supermarket, Inc., 59 Lab. Cas. (CCH) ¶ 32,128 (W.D. Okla. 1968). One court applying a less demanding standard of willfulness thought, however, that, "To allow exceptions . . . in situations where an employer, once charged with violating the Act, corrects the unlawful practice, would sap much of the E.P.A.'s [Equal Pay Act] vitality." Brennan v. J.M. Fields, Inc., 488 F.2d 443, 448 (5th Cir.), *cert. denied*, 419 U.S. 881 (1974).

[29] The *Dowd* court discussed consultation with counsel in the following words:

> Defendant testified that he did not pay minimum wages or overtime because he made some casual inquiries and determined that the Fair Labor Standards Act did not apply to him. However, he did not contact a lawyer or the Labor Department to verify this determination.

306 F. Supp. at 1282. Hodgson v. Heard, 69 Lab. Cas. (CCH) ¶ 32,776 at 45,600 (N.D. Ga. 1972), states that under *Dowd*, " 'good faith' was normally demonstrated by consultation with attorneys, CPA's, or other specialists. . . ." If, however, defendant consults with an attorney, but decides not to follow the attorney's advice, this may be compelling evidence that defendant knew that he was violating the law. The attorney-client privilege may, however, prevent disclosure of such information.

on Saturdays and Sundays, and are paid in cash on those days, the court can presume that defendant knows of FLSA and is attempting to evade the statute.[30] Likewise, alteration of records,[31] or a persistent course of noncompliance after defendant has been informed of FLSA violations,[32] demonstrate the subjective awareness needed for a willfulness finding.

The *Dowd* definition of willfulness is in accord with judicial definitions of willfulness in other areas.[33] Additionally, the legislative history of the amendment reveals no intention to deviate from the term's generally accepted meaning. In fact, the Subcommittee on Labor introduced the willfulness requirement after hearing testimony on the adverse effect of a three-year limitations period on inadvertent violators.[34]

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[30] Dowd v. Blackstone Cleaners, Inc., 306 F. Supp. 1276 (N.D.Tex. 1969). *See also* Marshall v. National Freight, Inc., 87 Lab. Cas. (CCH) ¶ 33,839 (D.N.J. 1979) (decided under an unclear standard), where the court found strong evidence of willfulness in the fact that defendant's supervisory employees "were instructed to record 40 hours worked per week for employees, regardless of how many hours they actually worked . . . ." *Id.* at 48,916. To the same effect and also decided under an ambiguous standard is Marshall v. Allen-Russell Ford, Inc., 88 Lab. Cas. (CCH) ¶ 33,899 (E.D. Tenn. 1980).

[31] Hodgson v. Hyatt, 318 F. Supp. 390 (N.D. Fla. 1970). In comparison to *Dowd,* the *Hodgson* court found willfulness in "conduct marked by *careless disregard* whether or not one has the right to act." *Id.* at 393, *citing* United States v. Illinois Cent. R.R. Co., 303 U.S. 239 (1938) (emphasis added).

The term "careless disregard" probably means recklessness. *See* Note, *Standards of Willfulness Under the Fair Labor Standards Act,* 78 MICH. L. REV. 626, 629 and 633 (1980) [hereinafter cited as *Standards*]. Despite the different phrasing of the standards, a reckless disregard of the law probably is a willful violation.

Attempts to conceal violations by refusing the statutory authority access to certain records was held to demonstrate willfulness in Marshall v. Baptist Hospital, Inc., 473 F. Supp. 465 (M.D. Tenn. 1979).

[32] *See* Hodgson v. Cactus Craft of Arizona, 481 F.2d 464 (9th Cir. 1973), which appears to have been decided under the *Dowd* standard, and Brennan v. DeLaney, 76 Lab. Cas. (CCH) ¶ 33,199 (M.D. Tenn. 1974). *See also* Brennan v. Authorized Appliance Servicenter, Inc., 73 Lab. Cas. (CCH) ¶ 33,050 (M.D.N.C. 1974).

[33] *See* United States v. Murdock, 290 U.S. 329 (1933) (criminal violation of tax laws); United States v. Illinois Cent. R.R., 303 U.S. 239 (1938) (civil violation by railroad for improperly transporting livestock); Wehr v. Burroughs Corp., 619 F.2d 276 (3d Cir. 1980) (award of liquidated damages under the Age Discrimination in Employment Act). *See also* cases cited in STANDARDS, note 31 *supra* at 634 n.55.

But see Intercounty Const. Co. v. Occupational Safety and Health Review Commission, 522 F.2d 777, 780 (4th Cir. 1975), *cert. denied,* 423 U.S. 1072 (1976) (a willful violation occurs when an employer "*knew* that his actions might violate the [Occupational Safety and Health Act]" (emphasis in original); Robb v. Chemetron Corp., 17 Fair Empl. Prac. Cas. (BNA) 1535, 1545 (S.D. Tex. 1978) (willfulness is "knowledge or suspicions on the part of the employer that its employment decision might violate" the Age Discrimination in Employment Act). *See also* Wehr v. Burroughs Corp., 619 F.2d 276, 280 (3d Cir. 1980), *citing* United States v. Bishop, 412 U.S. 346 (1973), in noting that "context is important in the quest for the word's meaning."

[34] *See* note 84 *infra.*

On the other hand, the legislative history and wording of the act reveal a strong concern for the worker's welfare.[35] In response to this concern, courts have interpreted other FLSA provisions liberally in favor of the aggrieved worker the statute seeks to protect.[36] The 1966 amendments expanded the coverage of the act,[37] while the 1977 amendments expanded the remedies available to the covered employee.[38] Protection of all good faith violators from the three-year period, without regard to the reasonableness of the violators' belief that their actions were lawful, is inconsistent with the pro-worker position of the original act and its subsequent amendments.

Willfulness Is Awareness of the Act and Failure to Take Reasonable Steps to Confirm that the Employment Policies Are Lawful

To give greater protection to the aggrieved employee[39] and to punish those who act unreasonably, the Circuit Court of Appeals for the District

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[35] The Senate Report on the 1966 amendments to the FLSA states:

> The Fair Labor Standards Act was enacted in 1938 to meet the economic and social problems of that era. Low wages, long working hours, and high unemployment plagued the Nation, which was then in the midst of an unprecedented depression. The policy of the act, as set forth therein, was to correct and as rapidly as practicable to eliminate labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well-being of workers.
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> . . . [The FLSA] has enabled countless Americans to enjoy a dignity, security, and a general well-being which would not otherwise have been possible.

S. REP. NO. 1487, 89th Cong., 2d Sess., *reprinted in* [1966] U.S. CODE CONG. & AD. NEWS 3002-3003. *See also id.* at 3005 (purpose of the legislation).

[36] *See* Laffey v. Northwest Airlines, Inc., 567 F.2d 429 (D.C. Cir. 1976), *cert. denied,* 434 U.S. 1086 (1978), *citing* Corning Glass Works v. Brennan, 417 U.S. 188 (1974) and Coles v. Penny, 531 F.2d 609 (D.C. Cir. 1976). *See also Hearings,* note 13 *supra* at 2241 (statement of a representative from American Bottlers of Carbonated Beverages) ("[t]hroughout its history, courts have held that [FLSA] is entitled to the most liberal and broadest interpretation of its provisions").

[37] *See* S. REP. NO. 1487, 89th Cong., 2d Sess. 1-4 (1966); H.R. REP. NO. 1366, 89th Cong., 2d Sess. 4-10 (1966).

[38] 29 U.S.C. § 216(b) (1976 & Supp. III 1979).

[39] The court commented:

> Atop all else, the Equal Pay Act, and the Fair Labor Standards Act of which the former is a part, undoubtedly are remedial statutes, as such to be liberally construed in favor of their intended beneficiaries. In light of this, as well as the historical backdrop against which we must view this legislation, we could not readily attribute to Congress a purpose to impose upon employee-claimants the much heavier burden sometimes, perhaps, a well-nigh impossible burden of proving an iniquitous employer state-of-mind as a prerequisite to a backpay recovery for the third year.

Laffey v. Northwest Airlines, Inc., 567 F.2d 429, 461 (D.C. Cir. 1976), *cert. denied,* 434 U.S. 1086 (1978).

of Columbia in *Laffey v. Northwest Airlines, Inc.*[40] framed the willfulness test as follows:

> [T]he employer's noncompliance is "willful" when he is cognizant of an appreciable possibility that he may be subject to the statutory requirements and fails to take steps reasonably calculated to resolve the doubt.[41]

In support of its position, the court stated:

> [E]mployers as a class occupy a much superior position vis-à-vis their employees to ascertain the effect of the law upon their business policies and practices. Even where the closeness of the question of the statute's applicability hampers or forestalls absolute decisional accuracy, there is no good reason for translating the employer's error into a loss of pay for the employee.[42]

A willfulness finding in many areas entails criminal liability or punitive civil liability. Accordingly, courts have interpreted the term narrowly. But as *Laffey* points out, under the FLSA, a willfulness finding only requires that the employer pay the employee wages he was legally entitled to receive. Moreover, the relatively small difference between the two- and three-year periods challenges the notion that the three-year period is a penalty imposed against those who deliberately violate the law.[43] Although *Laffey* has not been followed by any courts outside of the District of Columbia Circuit, the final part of this article will suggest a model standard closely resembling *Laffey*.

The *Laffey* test is a two-tiered one. First, plaintiff must prove that the employer knew he might be subject to FLSA. This burden is easier than

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[40] *Id.*

[41] *Id.* at 462. The court stated, however, "Nor need we undertake to precisely define 'willful' for cases closer than the one at bar." *Id.* at 461.

[42] *Id.* at 461.

[43] The *Laffey* court noted:

> [T]he requirement of willfulness is not one which must be met in order that there be liability, but rather is one to be satisfied before there can be expanded liability. The nonwillful character of a violation of the Act does not defeat recovery, although it does confine the period therefor to two years . . . . The relatively small difference between the two- and three-year periods tends to question any notion that the distinguishing criterion was to be moral rather than intellectual culpability. Since a morally innocent employer is nonetheless liable for two years, one may ask why a "willful" violator's accountability is for only one year more if the term is to imply wicked purpose.

Id. at 461.

the burden of showing willfulness under the *Dowd* test.[44] Employers are more likely to admit that they knew of the possible application of a statute to their conduct than that they intended to violate the law. Even if such evidence is not available, a court may presume that an employer had knowledge of FLSA if the circumstances so indicate. Factors which a court will consider are: the sophistication of the employer,[45] the direct applicability of the statute to defendant's conduct,[46] and any action taken by the defendant to rectify the violation.[47]

If defendant is aware of the statute, he is required to take reasonable steps to resolve his doubts about the statute's application to his conduct. Such steps include: seeking the advice of counsel,[48] requesting an opinion on the conduct from the statutory authority, and examining the matter by the corporation itself.[49]

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[44] *See, e.g., id.* at 462.

[45] *See* Coleman v. Jiffy June Farms, Inc., 458 F.2d 1139, 1142 (5th Cir.), *cert. denied,* 409 U.S. 948 (1972). The court in *Jiffy June* found that the willfulness standard was met as long as "employer knew the FLSA was in the picture." The similarity between the first part of the *Laffey* standard and the *Jiffy June* standard makes the case law between the two standards somewhat interchangeable. *See also* Marshall v. Suicide Prevention of Florida, 82 Lab. Cas. (CCH) ¶ 33,570 at 47,966 (S.D. Fla. 1977), decided under the *Jiffy June* standard, in which the sophistication of the employer's business indicated that he was aware of the FLSA regulations. *But see* Marshall v. McAlester Corp., 438 F. Supp. 1005 (E.D. Okla. 1977), decided under an unclear standard, where because defendant organized his business in an unusual and complex manner, the issue of FLSA coverage involved difficult questions of "enterprise coverage," thereby making defendant's violation not willful. The case can be criticized on the grounds that the employer's decision to organize his business in an unusual manner should not result in a loss of pay for the employee.

[46] *See* Marshall v. A & M Consol. Independent School Dist., 81 Lab. Cas. (CCH) ¶ 33,543 (S.D. Tex. 1977), *aff'd,* 605 F.2d 186 (5th Cir. 1979) (decided under the *Jiffy June* standard).

[47] Defendant's prompt compliance with the statute after being informed of its applicability to his conduct would indicate that he previously was unaware that his actions might be unlawful. Giving an employer the benefit of the shorter limitations period provides him or her with the incentive to comply promptly with the statutory requirements. This interest must be balanced against the hardships which the employee-plaintiffs would sustain from use of the two-year period.

[48] In Laffey v. Northwest Airlines, Inc., 567 F.2d 429 (D.C. Cir. 1976), *cert. denied,* 434 U.S. 1086 (1978), the court discussed the testimony of a Northwest official: "The witness had no recollection that NWA ever conferred with outside counsel on the subject, and he did not specifically mention any sort of legal advice at all." *Id.* at 462. The court implied that consultation with in-house counsel may not be sufficient; consultation with *outside* counsel may be necessary. The underlying rationale for such a judgment is that outside counsel might be more knowledgeable on such matters, thereby increasing the chances of compliance. Whether these assumptions are true is debatable, but consultation with outside people does tend to demonstrate that the corporation has taken the issue seriously and is sincerely interested in following the statutory requirements.

[49] *Id.* at 462 ("No written memorandum on the subject was prepared or received by the company").

The Jiffy June *Standard: A Willful Violation Occurs Whenever the Employer Was Aware that "FLSA Was in the Picture"*

The majority rule and the most liberal of the standards in defining willfulness was announced in *Coleman v. Jiffy June Farms, Inc.*[50] where the Fifth Circuit declared that willfulness is found whenever there is substantial evidence that "the employer knew or suspected that his actions might violate the FLSA."[51] In other words, the employer must realize

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[50] 458 F.2d 1139 (5th Cir.), *cert. denied*, 409 U.S. 948 (1972).

The following courts have adopted *Jiffy June*. Unless otherwise noted, the violation was held to be willful: *First Circuit:* Dunlop v. New Hampshire Jockey Club, Inc., 420 F. Supp. 416 (D.N.H. 1976), *rev'd on other grounds, sub. nom.* Marshall v. New Hampshire Jockey Club, Inc., 562 F.2d 1323 (1st Cir. 1977); Dunlop v. Rhode Island, 398 F. Supp. 1269 (D.R.I. 1975); *Second Circuit:* Marshall v. Sam Dell's Dodge Corp., 451 F. Supp. 294 (N.D.N.Y. 1978); *Third Circuit:* Bailey v. Pilots' Ass'n for Bay and River Delaware, 406 F. Supp. 1302 (E.D. Pa. 1976); *Fourth Circuit:* Brennan v. Air Terminal Parking, 72 Lab. Cas. (CCH) ¶ 32,979 (D.S.C. 1973), *aff'd*, 498 F.2d 1397 (4th Cir. 1974); Marshall v. Liggett & Myers, Inc., 22 Empl. Prac. Dec. (CCH) ¶ 30,591 (M.D.N.C. 1979); Marshall v. Elks Club of Huntington, 444 F. Supp. 957 (S.D. W.Va. 1977); *Fifth Circuit:* Marshall v. A & M Consol. Indep. School Dist., 605 F.2d 186 (5th Cir. 1974); Brennan v. Heard, 491 F.2d 1 (5th Cir. 1974); Brennan v. J.M. Fields, Inc., 488 F.2d 443 (5th Cir.), *cert. denied*, 419 U.S. 881 (1974); Brennan v. General Motors Acceptance Corp., 482 F.2d 825 (5th Cir. 1973); Kimball v. Goodyear Tire and Rubber Co., 504 F. Supp. 544 (E.D. Tex. 1980); Marshall v. New Floridian Hotel, Inc., 87 Lab. Cas. (CCH) ¶ 33,870 (S.D. Fla. 1979); Marshall v. Lutz, 86 Lab. Cas. (CCH) ¶ 33,829 (M.D. Fla. 1979) (violation held nonwillful); Marshall v. Suicide Prevention, 82 Lab. Cas. (CCH) ¶ 33,570 (S.D. Fla. 1977); Hodgson v. Eunice Superette, Inc., 368 F. Supp. 639 (W.D.La. 1973); Clark v. Atlanta Newspapers, Inc., 366 F. Supp. 886 (N.D. Ga. 1973); *Sixth Circuit:* Conklin v. Joseph C. Hofgesang Sand Co., 407 F. Supp. 1090 (W.D. Ky. 1975), *remanded on other grounds*, 565 F.2d 405 (6th Cir. 1977); Brennan v. Zager, 76 Lab. Cas. (CCH) ¶ 33,238 (M.D.Tenn. 1975), *aff'd sub nom.*, Dunlop v. Zager, 78 Lab. Cas. (CCH) ¶ 33,328 (6th Cir. 1975), *cert. denied*, 429 U.S. 821 (1976); Marshall v. Allen-Russell Ford, Inc., 88 Lab. Cas. (CCH) ¶ 33,899 (E.D.Tenn. 1980); Marshall v. Krystal Co., 467 F. Supp. 9 (E.D.Tenn. 1978); Brennan v. Nolens Inc., 77 Lab. Cas. (CCH) ¶ 33,270 (W.D.Tenn. 1975); Marshall v. Mattis, 89 Lab. Cas. (CCH) ¶ 33,914 (E.D.Mich. 1980); *Eighth Circuit:* Herman v. Roosevelt Fed. Sav. & Loan Ass'n, 432 F. Supp. 843 (E.D.Mo. 1977), *aff'd*, 569 F.2d 1033 (8th Cir. 1978); Lambert v. Beach Enterprises, Inc., 23 Empl. Prac. Dec. (CCH) ¶ 30,960 (E.D.Ark. 1980) (violation held nonwillful); Brennan v. Sears, Roebuck & Co., 410 F. Supp. 84 (N.D. Iowa 1976); Brennan v. Peifer, 77 Lab. Cas. (CCH) ¶ 33,295 (E.D.Mo. 1975) (violation held nonwillful); *Tenth Circuit:* Pedreyra v. Cornell Prescription Pharmacies, Inc., 465 F. Supp. 936 (D. Colo. 1979); Marshall v. DeBord, 84 Lab. Cas. (CCH) ¶ 33,721 (E.D.Okla. 1978) (violation held nonwillful).

The following cases have not adopted any clear standard: Hodgson v. Cactus Craft, 481 F.2d 464 (9th Cir. 1973); Marshall v. Burger King Corp., 504 F. Supp. 404 (E.D.N.Y. 1980); Marshall v. Gerwill, 495 F. Supp. 744 (D.Md. 1980); Krych v. Allbright Window Cleaning Co., 89 Lab. Cas. (CCH) ¶ 33,945 (N.D. Ill. 1980); Marshall v. National Freight, Inc., 87 Lab. Cas. (CCH) ¶ 33,839 (D.N.J. 1979); Marshall v. Baptist Hospital, Inc., 473 F. Supp. 465 (M.D.Tenn. 1979); Waters v. Heublein, 23 Fair Empl. Prac. 351 (BNA) (N.D.Cal 1979) (violation held not lawful); Pezzillo v. Gen. Tel. & Elec. Info. Sys. Inc., 414 F. Supp. 1257 (M.D. Tenn. 1976), *aff'd*, 572 F.2d 1189 (6th Cir. 1978); Marshall v. McAlester Corp., 438 F. Supp. 1005 (E.D. Okla. 1977) (violation held not willful); Brennan v. Authorized Appliance Servicenter, Inc., 73 Lab. Cas. (CCH) ¶ 33,050 (M.D.N.C. 1974).

[51] 458 F.2d at 1142.

that "FLSA was in the picture."[52] *Jiffy June* requires only that the employer consider the possible application of the FLSA to his conduct in order for his violation to be deemed willful. In contrast, *Dowd* requires that the employer know that he was violating the law, and *Laffey*, that the employer be cognizant of an "appreciable possibility" that the statute prohibited his actions. Under *Laffey*, the three-year limitations period would not be imposed if the employer took reasonable steps to investigate the situation; no such exception exists in *Jiffy June*.

The court justified the extensive scope of the standard with the following statement:

> The entire legislative history of the 1966 amendments of the FLSA indicates a liberalizing intention on the part of Congress. Requiring employers to have more than awareness of the possible applicability of the FLSA would be inconsistent with that intent.[53]

Many later cases have echoed this sentiment.[54]

One commentator, however, Professor Richard Richards, criticizes the liberality of *Jiffy June:*

> [S]ince virtually every employer knows of the possible applicability of the FLSA to his business, the practical effect of this interpretation is to eliminate the two year statute of limitations from the act. If this were the result Congress intended, it would not have drafted the statute so that the two year period is the rule and the three year period is the exception.[55]

Professor Richards' statement is correct in that *Jiffy June* makes a finding of willfulness the rule rather than the exception. Even internal memoranda advising *compliance* with applicable FLSA regulations may

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[52] *Id.*

[53] *Id.*

[54] *See, e.g.*, Dunlop v. New Hampshire Jockey Club, Inc., 420 F. Supp. 416 (D.N.H. 1976), *rev'd on other grounds sub nom.*, Marshall v. New Hampshire Jockey Club, Inc., 562 F.2d 1323 (1st Cir. 1977); Marshall v. A & M Consol. Indep. School Dist., 81 Lab. Cas. (CCH) ¶ 33,543 (S.D. Tex. 1977), *aff'd*, 605 F.2d 186 (5th Cir. 1979).

[55] Richards, *Monetary Awards in Equal Pay Act Litigation*, 29 ARK. L. REV. 328, 338 (1975), *cited in* Laffey v. Northwest Airlines, Inc., 567 F.2d 429, 461 n.229 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978). One court commented: "[T]his standard [*Jiffy June*] subjects all but the most ignorant unsophisticated businessman to the three-year statute. Except as to that group, FLSA is a well-known business fact of life. . . ." Hodgson v. Heard, 69 Lab. Cas. (CCH) ¶ 32,776 (N.D. Ga. 1972). *But see* cases cited in note 80, *infra* finding violations nonwillful under *Jiffy June*.

demonstrate corporate awareness that the FLSA is "in the picture." In *Brennan v. J.M. Fields, Inc.*,[56] defendant's issuance of notices advising its district managers of the implementation of the Equal Pay Act amendment to the FLSA, together with a plan for periodic examinations of the personnel files of the stores to insure compliance, constituted awareness of the statute. The infractions in *Fields* were random; not part of a systematic unlawful employment policy. The memoranda did not demonstrate an intent to evade the law; rather, they showed that the Fields chain was honestly interested in complying with the Equal Pay Act. Nonetheless, the memoranda were used to substantiate a finding of willfulness. One court summarized the law: " 'if the employer knew the FLSA was in the picture,' no amount of 'good faith' avoids a finding of willfulness."[57]

Consultation with counsel may also demonstrate awareness of the act. In *Jiffy June,* defendant signed a collective bargaining agreement which granted employees a raise in their regular rate of pay in exchange for a provision purportedly exempting the employees from the overtime sections of the FLSA.[58] Defendant signed the agreement on advice of counsel that such an arrangement was not unlawful. The court declared that

> defendant's decision to request an opinion of counsel is further evidence that he did not stop paying the statutory overtime without any inkling that the federal wage scheme might thereby be violated.[59]

The fact that defendant had "reasonable grounds for believing that his acts or omissions were not in violation" of the FLSA was no defense.[60]

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[56] 488 F.2d 443 (5th Cir.), *cert. denied,* 419 U.S. 881 (1974).

[57] Hodgson v. Heard, 69 Lab. Cas. (CCH) ¶ 32,776 at 45,600 (N.D. Ga. 1972), *citing* Coleman v. Jiffy June Farms, 458 F.2d 1139, 1142 (5th Cir. 1972).

Good faith compliance with the act after being informed of its applicability is no defense. In Brennan v. J. M. Fields, Inc., the Fifth Circuit stated: "To allow exceptions . . . in situations where an employer, once charged with violating the act, corrects the unlawful practice, would sap much of the E.P.A.'s vitality." 488 F.2d at 448. A later decision in that circuit held that "[c]urrent obedience to the Act does not make up for past transgressions." Marshall v. A & M Consol. Indep. School Dist., 605 F.2d 186, 191 (5th Cir. 1979).

[58] Coleman v. Jiffy June Farms, Inc., 458 F.2d 1139, 1140 (5th Cir.), *cert. denied,* 409 U.S. 948 (1972).

[59] *Id.* at 1141. *See also,* for the view that consultation with counsel demonstrates awareness under *Jiffy June*, Bailey v. The Pilots Ass'n for Bay and River Delaware, 406 F. Supp. 1302 (E.D.Pa. 1976), and Pedreyra v. Cornell Prescription Pharmacies, 465 F. Supp. 936 (D. Colo. 1979), where defendant's possession of copies of the Fair Labor Standards Act, accompanying regulations, and an employer reference guide demonstrated his awareness of the FLSA.

[60] *Id.* at 1140.

Jiffy June can be criticized not only for its expansive scope, but also for its inhibiting effect upon beneficial communications. Consultation with counsel increases compliance. The lawyer can inform the employer that acts which the employer considers permissible are in fact unlawful. A good attorney will also inform his client of the penalties for violation of the FLSA, and thus induce compliance through client awareness of possible civil[61] and criminal liability. In short, consultation increases compliance. Use of an employer's consultation with counsel as incriminating evidence of the employer's knowledge of the statute inhibits consultation and decreases compliance.

The court's justification for its position on lawyer-client consultation seems to be a fear that employers could evade the three-year limitations period by securing assurances of legality from counsel.[62] The court's fear of collusive arrangements is not justified by any empirical evidence. As a result, its solution is overbroad. Collusive arrangements could be combatted effectively by requiring that the employer's reliance on counsel be in good faith, and that the lawyer's conclusions have a reasonable basis.

Awareness of the act can also be shown by previous communications from either the statutory authority[63] or the aggrieved plaintiffs[64] about FLSA violations. These communications demonstrate that, at least after they were received, defendant's unlawful employment policies were not a result of mere inadvertence and that he was aware that "the FLSA was in the picture." Public policy strongly supports the use of such evidence. If such a policy were adopted, employees would be encouraged to report violations to their employers and to the wage and hour authority, thereby increasing employer awareness of FLSA provisions, and decreasing the

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[61] The employer will be liable for unpaid wages and possibly an additional amount as liquidated damages. *See* note 5 *supra.*

[62] The court commented:

> The advice of counsel to proceed with a favorable wage settlement which undercuts the FLSA would be an easy way of circumventing the requirements of the Act—far too easy a way for us to assume that Congress intended to subject employees to the strict two-year limitations period whenever an employer's lawyer had given him the green light to restructure their pay.

458 F.2d at 1141-42.

[63] *See* Brennan v. Gen. Motors Acceptance Corp., 482 F.2d 825 (5th Cir. 1973); Pedreyra v. Cornell Prescription Pharmacies, Inc., 465 F. Supp. 936 (D. Colo. 1979); Conklin v. Joseph C. Hofgesang Sand Co., 407 F. Supp. 1090 (W.D.Ky. 1975), *remanded on other grounds,* 565 F.2d 405 (6th Cir. 1977); Hodgson v. Veterans Cleaning Serv., Inc., 351 F. Supp. 741 (M.D. Fla. 1972), *modified on other grounds,* 482 F.2d 1362 (5th Cir. 1973).

[64] *See* Marshall v. Suicide Prevention of Florida, 82 Lab. Cas. (CCH) ¶ 33,570 at 47,966 (S.D.Fla. 1977).

number of violations which are a product of employer ignorance of the act.

Finally, defendants will sometimes admit in depositions their awareness of FLSA provisions. For example, the corporation's president's testimony will suffice for a finding of corporate awareness.[65] In-depth awareness or extensive knowledge of the statute is unnecessary; willfulness will be found if defendant admits he or she knew that his or her actions might be unlawful under the FLSA.[66]

The only violator protected under *Jiffy June* is one who acts without any knowledge of the FLSA's relevance to his conduct. The Fifth Circuit severely curtailed this immunity in *Brennan v. Heard*[67]:

> [N]either a good faith belief in the lawfulness of his wage and overtime regulations nor complete ignorance of their invalidity shields the employer from the additional year of liability. Such nescience and naivete are not determinative on the question of willfulness under the Act. An employer acts willfully and subjects himself to the three year liability provisions if he knows, or has reason to know that his conduct is *governed by* the Fair Labor Standards Act.[68]

A number of factors influence courts in finding that an employer should have known about the existence of FLSA regulations. Courts may first consider the sophistication and size of the employer.[69] For example, if an employer had the capability and resources to follow FLSA guidelines, but chose not to investigate their relevance, courts should be unsympathetic to the employer's plight. Courts may not wish, however, to subject the small businessman to the longer limitations period. The cost of ascertaining FLSA regulations may be substantial in relation to the size of his or her business. In addition, the congressional history of the act reveals some concern for the small businessman's interests.[70]

The type and scope of the violation will also be examined. If the violation affects a large number of employees in a significant way,[71] or if

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[65] *See* Hodgson v. Heard, 69 Lab. Cas. (CCH) ¶ 32,776 at 45,600 (N.D. Ga. 1972).

[66] *Id.*

[67] 491 F.2d 1 (5th Cir. 1974).

[68] *Id.* at 3 (emphasis in original).

[69] *See* note 45 *supra.*

[70] *See* S. REP. NO. 1487, 89th Cong., 2d Sess. 76-77 (statement of Sen. Fannin), *reprinted in* [1966] U.S. CODE CONG. & AD. NEWS 3044.

[71] Marshall v. A & M Consol. Indep. School Dist., 81 Lab. Cas. (CCH) ¶ 33,543 (S.D.Fla. 1977), *aff'd*, 605 F.2d 186 (5th Cir. 1979) (systematic unlawful wage discrimination against female teachers).

use of the shorter limitations period will deny the employees recovery, the court may tilt the issue in favor of the employees to avoid substantial injustice. The more substantial, systematic, and widespread a violation, the stronger the belief that someone in the organization should have known about and corrected it.[72] The more important a policy is to an organization, the greater care a reasonable man will take to assure its legality.

The clarity of the statute with respect to defendant's conduct will also be evaluated. If the FLSA provision is "directed squarely at the defendant's sole business and purpose,"[73] the court will conclude that defendant should have realized its relevance. However, when a statute is ambiguous in its application to defendant's conduct and a reasonable inquiry might not result in compliance, it cannot be said with certainty that the employer should have known his actions were unlawful.[74]

Brennan v. Heard amplifies the *Jiffy June* standard. In combination, the two cases virtually guarantee that willfulness will be found.[75] Any actions which demonstrate reasonableness under *Brennan v. Heard,* such as consultation with counsel, tend also to demonstrate subjective awareness under *Jiffy June.* However, an "ostrich-like cultivation of ignorance," nonwillful under *Jiffy June,* cannot preclude a finding of illegality under *Brennan v. Heard.*[76] Under the integrated standard, good faith,[77] reasonableness,[78] or a lack of subjective awareness,[79] are insufficient defenses to a charge of willfulness. Some courts, however, have taken a more conservative approach to the Fifth Circuit test and separated *Jiffy June*

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[72] If the violation were widespread, this would indicate the existence of a deliberate unemployment policy. The violation may be willful even under the *Dowd* standard. Dowd v. Blackstone Cleaners, 306 F. Supp. 1276 (N.D. Tex. 1969).

[73] Marshall v. A & M Consol. Indep. School Dist., 81 Lab. Cas. (CCH) ¶ 33,543 at 47,871 (S.D.Fla. 1977), *aff'd,* 605 F.2d 186 (5th Cir. 1979).

[74] *See generally* Marshall v. McAlester Corp., 438 F. Supp. 1005 (E.D.Okla. 1977) (decided under an ambiguous standard).

[75] Of the 29 cases decided under *Jiffy June*, 26, or almost 90%, were found to be willful. *See* note 50 *supra.*

[76] In *Brennan,* the court declared:

> Defendant's unwillingness to make further inquiries and to determine the exact parameters of his statutory obligation affords him no protection. An ostrich-like cultivation of ignorance has never been considered a defense to liability for willful violation of the Act.

491 F.2d 1, 3 (5th Cir. 1974). *See also* STANDARDS, note 31 *supra* at 633.

[77] *E.g.,* Hodgson v. Heard, 69 Lab. Cas. (CCH) ¶ 32,776 at 45,600 (N.D.Ga. 1972).

[78] *See* Coleman v. Jiffy June Farms, Inc., 458 F.2d 1139 (5th Cir.), *cert. denied,* 409 U.S. 948 (1972).

[79] *See* Brennan v. Heard, 491 F.2d 1 (5th Cir. 1974).

from *Brennan v. Heard.* After finding that the employer was unaware that the "FLSA was in the picture," both courts declared that the violations were nonwillful, and did not inquire further into whether the employer should have known that his policies were unlawful.[80]

The factors discussed above in connection with either the *Dowd*, *Laffey*, or *Jiffy June* standard are relevant under the others. It is therefore useful to list the factors which courts employing the three standards have considered in reaching their willfulness determination, bearing in mind that different courts accord these factors varying, and even contrary, weight. The factors are:

(1) the clarity of the statute with respect to defendant's conduct,
(2) the sophistication and size of defendant's business,
(3) the systematic or random nature of the violations,
(4) the effect of the limitations period on the employees,
(5) any consultation with counsel,
(6) the presence of previous complaints by the employees or the wage and hour authority,
(7) the willingness to rectify violations,
(8) the existence of corporate memoranda on the subject, and
(9) whether an opinion was sought from the statutory authority.

A Model Standard

This author rejects the three standards adopted by the courts and in its place, suggests a new standard: a violation is willful if the employer knew that "the FLSA was in the picture," and lacked reasonable grounds[81] for believing that his actions were lawful.[82] The standard

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[80] *See* Lambert v. Beach Enterprises, Inc., 23 Empl. Prac. Dec. (CCH) ¶ 30,960 (E.D.Ark. 1980); Marshall v. Lutz, 86 Lab. Cas. (CCH) ¶ 33,829 at 48,887 n.4 (M.D.Fla. 1979); Marshall v. DeBord, 84 Lab. Cas. (CCH) ¶ 33,721 (E.D.Okla. 1978); Brennan v. Peifer, 77 Lab. Cas. (CCH) ¶ 33,295 (E.D.Mo. 1975); *see also* Waters v. Heublein, 23 Fair Empl. Prac. (BNA) 351 (N.D. Cal. 1979).

[81] The following factors are evidence that the employer had a reasonable belief that his actions were lawful. They are listed according to their approximate persuasive value: reliance on the actions, opinions, or decisions of the wage and hour authority; the existence of novel or unsettled points of law regarding coverage; reliance on the advice of counsel; reliance on prevailing industry practice; and, the randomness of the violation.

[82] One alternative to the proposal stated in the text is a pure negligence standard, holding violations willful if the employer knew or had reason to know his actions were unlawful. *See* Richards, *Monetary Awards in Equal Pay Act Litigation,* 29 ARK. L. REV. 328, 350-52 (1975).

The negligence test relieves courts from the burden of judging an employer's subjective awareness of the FLSA, and promotes the same policies as the proposal stated in the text. Congress, however, was presumably aware of the negligence concept, and would have framed an entirely objective test based on reasonableness had it desired.

closely resembles that of *Laffey*. However, while the first requirement of *Laffey* is that the employer be "cognizant of an *appreciable* possibility that he may be subject to the statutory requirements,"[83] the proposal only requires *Jiffy June* awareness to trigger the reasonableness requirement. The proposal imposes the three-year period on employers who had some awareness of the act's provisions, but chose not to make a reasonable investigation of the legality of their employment practices.

The author rejects *Jiffy June* because it punishes the employer for his or her mere knowledge of the FLSA. Alone, such knowledge is not culpable; the employer's awareness that "the FLSA is in the picture" may only demonstrate that he or she is sincerely interested in complying with applicable FLSA regulations. The employer is only culpable when he or she is aware of the FLSA, and fails to take reasonable steps to determine the legality of his or her employment practices. Moreover, *Jiffy June* effectively legislates the two-year statute out of existence, contrary to Congress' intent to establish a two-tiered time period for claims.

Dowd contravenes Congress' intent in another way. The Labor Subcommittee introduced the willfulness requirement after industry spokesmen testified that FLSA decisions impose unexpected liability upon employers who sincerely attempt to comply with the act.[84] There is little likelihood that Congress wished to protect employers who were aware of the statute, but lacked the inclination to make reasonable efforts to comply.

Dowd ignores Congress' concern for the worker's welfare, a concern demonstrated in the original act and subsequent amendments. While a strict definition of willfulness may be appropriate where criminal liability

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[83] 567 F.2d at 462 (emphasis added).

[84] The representative from the American Bottlers of Carbonated Beverages stated:

> A study of decisions involving the act show the extreme and sometimes tortured constructions which have been resorted to in order to support coverage . . . . [I]t is not uncommon for an employer to find that actions, which he sincerely believed were in full compliance with the mandate of the act, have become violations through strained interpretation.

Hearings, note 13 *supra* at 2241-42.

The representative from the American Bankers Association asserted:

> Extending the statute of limitation would impose an unnecessary potential burden on thousands of small concerns that are honestly trying to live up to the laws and regulations, but because of the variety of possible interpretations [they] have, in good faith, arrived at a conclusion different than one subsequently arrived at by the Wage-Hour inspector.

Hearings, note 13 *supra* at 2250. Under the proposal, employers who reasonably relied on previous judicial or administrative rulings will not be subject to the longer period.

or extensive civil liability is involved, such strictness is inappropriate when a finding of willfulness will only compel the employer to pay wages he or she should have paid in the first place.[85] A strict interpretation of willfulness might "well give a competitive advantage to violators."[86]

A willfulness standard affects the employer's actions. A standard should encourage employers to investigate the relevance of the FLSA to their conduct, since many employers will comply with the act once they realize that their practices are unlawful. *Jiffy June* inhibits investigation by using any investigation or inquiry as incriminating evidence that the employer knew that "the FLSA was in the picture." *Dowd* discourages inquiry by immunizing the unreasonable but unintentional violator. The proposal encourages inquiry by providing a reasonableness defense for those who do inquire, and by punishing those other violators who are aware of the act but choose not to investigate. A prudent balance is struck between Congress' desire to protect violators who have made sincere efforts to comply with FLSA regulations, and its desire to promote the economic well-being of covered workers.

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[85] *See* notes 39 and 43 *supra.*

[86] *Hearings, supra* note 13 at 11.