

WILLFULNESS, GOOD FAITH, AND THE FAIR LABOR STANDARDS ACT

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ABSTRACT

The statute of limitations for a minimum-wage or overtime violation under the Fair Labor Standards Act (FLSA) is generally two years, but extends to three years if a jury finds that an employer willfully violated the statute. Damages for an FLSA violation include unpaid minimum wages or overtime, which may be doubled as liquidated damages depending on whether the trial court judge (not a jury) finds that the employer acted in good faith. The federal courts of appeal are split on the issue of whether a jury's finding of a willful violation precludes a judge from finding good faith. This Article argues that a jury's positive finding of willfulness should preclude the judge's discretion to withhold liquidated damages based on good faith.

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I. INTRODUCTION

You are a federal judge hearing a case brought by former employees against an employer for failure to pay overtime wages under the Fair Labor Standards Act (hereinafter “FLSA”).¹ The employer has faced similar trouble several times in the past for failing to pay overtime wages to its employees, but has avoided litigation by paying back wages and promising future compliance. However, the jury found the employer’s current breach is in willful violation of the Act in light of the employer’s notice of previous violations. As such, a willful violation under the FLSA extends the statute of limitations from two to three years.² Now, as the judge, you must determine whether the employer should be assessed liquidated damages. The assessment of liquidated damages depends on whether you determine the employer is in good-faith compliance with the Act. The fundamental issue that confronts you as the judge is whether a finding of willfulness by the jury wholly precludes you from making a subsequent good-faith finding.

Circuit courts are split as to whether a finding of willfulness by the jury precludes a subsequent finding of good-faith compliance by the judge.³ One group of courts takes the approach that the judge is precluded from finding good-faith compliance once a jury finds a willful violation of the Act (the “Preclusion Majority Approach”).⁴ These courts reason that the jury, in its willfulness assessment, has already accounted for the good-faith determination, and that a subsequent finding of good faith is illogical.⁵ A second group of courts uses the approach that the two findings are wholly separate and, in essence, a positive finding of both willfulness and good faith can co-exist without conflict (the “Distinct Test Approach”).⁶ These courts reason that differential findings do not conflict because the analysis for each determination relies upon different burdens of proof.⁷

This Article argues for an approach which is similar to the Preclusion Majority Approach, where a jury’s positive finding of willfulness precludes the judge’s discretion to withhold liquidated damages based on good faith. Part II lays out the background and standards of FLSA as well as the Preclusion Majority and Distinct Test approaches. Part III closely analyzes and evaluates the persuasiveness of the arguments courts have used to support the Preclusion Majority and Distinct Test approaches. Finally, this Article seeks to resolve this

¹ WAGE & HOUR DIV., U.S. DEP’T OF LABOR, WH PUB. 1282, HANDY REFERENCE GUIDE TO THE FAIR LABOR STANDARDS ACT i, 2 (2010) (“All employees of certain enterprises having workers engaged in interstate commerce, producing goods for interstate commerce, or handling, selling, or otherwise working on goods or materials that have been moved in or produced for such commerce by any person, are covered by FLSA.”).

² 29 U.S.C. § 255(a) (2006).

³ See, e.g., *Rodriguez v. Farm Stores Grocery, Inc.*, 518 F.3d 1259, 1274 (11th Cir. 2008); *Alvarez Perez v. Sanford-Orlando Kennel Club, Inc.*, 515 F.3d 1150, 1166 (11th Cir. 2008); *Davis v. Mountaire Farms, Inc.*, 598 F. Supp. 2d 582, 588 n.4 (D. Del. 2009).

⁴ *Alvarez Perez*, 515 F.3d at 1166; see *Herman v. Palo Grp. Foster Home, Inc.*, 183 F.3d 468, 474 (6th Cir. 1999).

⁵ *Castle v. Sangamo Weston, Inc.*, 837 F.2d 1550, 1561 (11th Cir. 1988).

⁶ See *Rodriguez*, 518 F.3d at 1274; *Fowler v. Land Mgmt. Groupe, Inc.*, 978 F.2d 158, 162 (4th Cir. 1992).

⁷ *Rodriguez*, 518 F.3d at 1274; *Fowler*, 978 F.2d at 162.

split by arguing a jury's positive finding of willfulness precludes the judge's discretionary determination of good-faith compliance, unless there is an absence of willfulness by the jury, in which case each decision maker retains its distinct authority. This approach is rooted in the conditional statutory language of 29 U.S.C. §260, which implies that the judge's determination of good faith is contingent upon the jury's preliminary findings.

II. BACKGROUND AND FACTS

A. *Fair Labor Standards Act*

The Fair Labor Standards Act of 1938 established minimum wage, overtime pay, and youth employment standards that affect employees in the private sector as well as in federal, state, and local governments.⁸ Covered nonexempt workers are entitled to a minimum wage of no less than \$7.25 per hour.⁹ Overtime pay at a rate of not less than one-and-one-half times the regular rate of pay is required after 40 hours of work in a workweek.¹⁰ A workweek is defined as any fixed and regularly recurring period of 168 hours—seven consecutive 24-hour periods.¹¹

Department of Labor investigators stationed across the United States generally enforce FLSA.¹² The investigators gather data on wages, hours, and other employment conditions or practices in order to determine employer compliance with the law.¹³ Where investigators find violations, the Department of Labor may recommend changes in employment practices to bring an employer into compliance.¹⁴ Willful violations may be prosecuted criminally and the violator fined up to \$10,000.¹⁵ Employers who willfully or repeatedly violate the minimum wage or overtime pay requirements are subject to a civil penalty of up to \$11,000 for each violation.¹⁶

Upon violation of FLSA's overtime or minimum wage requirements, an employer may be liable to the affected employees for the amount of unpaid overtime compensation or unpaid wages, or both, as well as an additional equal amount in liquidated damages.¹⁷ FLSA provides several methods for recovering unpaid minimum and overtime wages.¹⁸ These methods include: (1) the supervised payment of back wages; (2) an action brought by the Secretary of Labor for back wages and liquidated damages; (3) a private suit brought by an employee for back pay and liquidated damages, plus attorney's fees and court costs; or (4) an injunction to restrain any person from violating FLSA, includ-

⁸ 29 U.S.C. §§ 203, 206, 207, 212 (2006).

⁹ *Id.* § 206(a)(1)(C).

¹⁰ *Id.* § 207(a)(1).

¹¹ WAGE & HOUR DIV., U.S. DEP'T OF LABOR, *supra* note 1, at 11.

¹² *See id.* at 13.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ 29 U.S.C. § 216(a).

¹⁶ *Id.* § 216(e)(1)(A)(i).

¹⁷ *Id.* § 216(b).

¹⁸ *See* WAGE & HOUR DIV., U.S. DEP'T OF LABOR, *supra* note 1, at 14.

ing through the unlawful withholding of proper minimum wage and overtime pay.¹⁹

B. Statute of Limitations

Generally, an action for unpaid minimum wages, unpaid overtime, or liquidated damages under FLSA has a two-year statute of limitations for the recovery of back pay, except when the jury finds a willful violation, in which case a three-year statute of limitations applies.²⁰ The determination of willfulness for statute of limitations purposes is an issue of fact for the jury.²¹ To establish willfulness for the purposes of extending the limitations period, the employee must prove by substantial evidence that the employer knew it was in violation of the Act or acted in reckless disregard as to whether it was in violation of the Act.²² The Code of Federal Regulation defines reckless disregard as the “failure to make adequate inquiry into whether conduct is in compliance with the Act.”²³

A violation of the Act is willful where undisputed evidence shows that the employer “had actual notice of the requirements of the FLSA by virtue of earlier violations, [an] agreement to pay unpaid overtime wages, and assurances of future compliance with the [Act].”²⁴ It is not necessary to show that the employer “knew” it was in violation of the Act; rather, it is sufficient to show that the employer knew that the Act “was in the picture” and was aware of the Act’s possible application to its employees.²⁵ Other courts distinguish willful conduct from accidental conduct.²⁶ These courts have held that a willful “violation must be shown to be deliberate, voluntary and intentional as distinguished from one committed through inadvertence, accident or by ordinary negligence.”²⁷ The employer’s state of mind or awareness of the law is irrelevant to the question of its willfulness.²⁸ From a practical standpoint, the willfulness

¹⁹ *Id.*

²⁰ 29 U.S.C. § 255(a).

²¹ *See* Fowler v. Land Mgmt. Groupe, Inc., 978 F.2d 158, 163 (4th Cir. 1992).

²² McLaughlin v. Richland Shoe Co., 486 U.S. 128, 130 (1988).

²³ 5 C.F.R. § 551.104 (2011).

²⁴ Dole v. Elliott Travel & Tours, Inc., 942 F.2d 962, 967 (6th Cir. 1991) (citing Brock v. Superior Care, Inc., 840 F.2d 1054, 1062 (2d Cir. 1988)).

²⁵ Donovan v. McKissick Prods. Co., 719 F.2d 350, 354 (10th Cir. 1983) (concluding that the general manager’s deposition testimony concerning necessity of meeting minimum wage and overtime requirements indicated that the violating company knew the Act was “in the picture”); Casserly v. State, 844 P.2d 1275, 1282 (Colo. App. 1992).

²⁶ *See* Terwilliger v. Home of Hope, Inc., 21 F. Supp. 2d 1305, 1308 (N.D. Okla. 1998) (holding “[n]egligence or an incorrect assumption that a pay plan complies with the FLSA do not meet the criteria for a willful violation of the FLSA,” which would trigger application of three-year statute of limitations); Dowd v. Blackstone Cleaners, Inc., 306 F. Supp. 1276, 1281 (N.D. Tex. 1969).

²⁷ *Dowd*, 306 F. Supp. at 1281.

²⁸ Andrews v. DuBois, 888 F. Supp. 213, 220 n.9 (D. Mass. 1995); *see also* Reich v. Newspapers of New England, Inc., 44 F.3d 1060, 1080 (1st Cir. 1995) (holding that evidence that employer was aware of Act’s requirements does not prove that the employer acted willfully); Mills v. Maine, 853 F. Supp. 551, 555 (D. Me. 1994) (reasoning that no reckless disregard was present where employer discussed the Act with state officials and reviewed brochures and pamphlets (citing Mireles v. Frio Foods, Inc., 899 F.2d 1407, 1416 (5th Cir. 1990))).

standard is difficult to satisfy because it places the burden upon employees to prove subjective intent or, at a minimum, extreme negligence on the part of the employer.²⁹

C. *Liquidated Damages*

Although the determination of willfulness for purposes of establishing the statute of limitations is an issue of fact for the jury, the determination of good faith for purposes of establishing liquidated damages is a question of law for the court to decide at its discretion.³⁰ The court can assess or withhold liquidated damages.³¹ Therefore, an employer that violates the provisions of the Act can be liable to affected employees for unpaid minimum wages or their overtime compensation, and, as the case may be, liquidated damages in an equal amount.³²

In 1947, the Portal-to-Portal Act amended FLSA, and among other substantive changes to the Act, it created a safe harbor clause by which an employer can avoid liquidated damages when it can establish it acted in good faith under the reasonable belief that it was in compliance with the Act.³³ Prior to this time, no such discretionary tool existed.³⁴ Specifically, the safe harbor clause provides:

In any action . . . to recover . . . unpaid overtime compensation, or liquidated damages, under the [FLSA] . . . , 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 . . . the court may, in its sound discretion, award no liquidated damages³⁵

The safe harbor clause allows the court discretion in assessing liquidated damages when it deems an employer acted in good faith. The purpose of the safe harbor clause is to enable the court to lessen the harshness of the liquidated damages provision by imposing merely compensatory damages.³⁶ An employer who violates FLSA provisions carries the burden of proving it is entitled to the safe harbor and must show that it acted with both objective and subjective good faith.³⁷ To prove subjective good faith, the employer must show it had “an honest intention to ascertain what [the Act] requires and to act in accordance with it.”³⁸ The employer must shoulder the additional objective good faith requirement of showing it had reasonable grounds for believing its conduct

²⁹ David H. Spalter, *The 11th Circuit Addresses the Interplay Between ‘Good Faith’ and ‘Willfulness’*, FLSA EMP. EXEMPTION HANDBOOK NEWSL., June 2008, at 6.

³⁰ 29 U.S.C. § 260 (2006).

³¹ *See id.*

³² *Id.*

³³ *Id.*

³⁴ Romualdo P. Eclavea, Annotation, *Liquidated Damages for Violation of Wage and Hour Provisions of Fair Labor Standards Act*, 26 A.L.R. FED. 607 n.15 (1976).

³⁵ 29 U.S.C. § 260.

³⁶ *Barcellona v. Tiffany English Pub, Inc.*, 597 F.2d 464, 468 (5th Cir. 1979).

³⁷ *Dybach v. Fla. Dep’t of Corr.*, 942 F.2d 1562, 1566–67 (11th Cir. 1991); *Joiner v. City of Macon*, 814 F.2d 1537, 1539 (11th Cir. 1987).

³⁸ *Dybach*, 942 F.2d at 1566 (citing *Brock v. Shirk*, 833 F.2d 1326, 1330 (9th Cir. 1987)).

comported with the Act.³⁹ This “reasonableness” requirement is objective, and ignorance alone does not exonerate the employer.⁴⁰ Objective good faith can exist when the employer has consulted with Department of Labor authorities and relied on such expert opinion.⁴¹ If the employer can demonstrate that it had both a subjective belief that it was in compliance with the Act and it had an objectively reasonable basis for its belief, then the court may apply the safe harbor provision and limit or deny an award of liquidated damages.⁴² However, “[a]bsent . . . a showing [of both the subjective and objective elements of the good faith defense], liquidated damages are mandatory.”⁴³

III. THE CIRCUIT SPLIT

The United States Circuit Courts of Appeals are split on the issue of whether a jury’s finding of willfulness is wholly separate from and can co-exist with a finding of good faith because the burdens of proof differ, or whether the findings are so inherently inconsistent that a positive finding of willfulness precludes a subsequent finding of good faith by the court.⁴⁴ The Fifth, Sixth, Ninth, Tenth, and Eleventh Circuits have adopted the Preclusion Majority Approach, holding that two positive findings are inherently inconsistent and cannot co-exist.⁴⁵ On the other hand, the Fourth and Eighth Circuit Courts have adopted the Distinct Test Approach, holding that the different burdens of proof allow for both findings to co-exist as they are irrelevant to each other.⁴⁶ The incompatible holdings from the circuit split will be examined in turn.

³⁹ *Marshall v. Brunner*, 668 F.2d 748, 753 (3d Cir. 1982); *Chao v. Tyson Foods, Inc.*, 568 F. Supp. 2d 1300, 1322 (N.D. Ala. 2008).

⁴⁰ *Andrews v. DuBois*, 888 F. Supp. 213, 221 (D. Mass. 1995).

⁴¹ *See Elwell v. Univ. Hosps. Home Care Servs.*, 276 F.3d 832, 841 (6th Cir. 2002) (recognizing the absence of good faith where the defendant did not rely on the expertise or opinion of any other person or entity with knowledge of the FLSA regulations, including its attorney or the Department of Labor); *Samson v. Apollo Res., Inc.*, 242 F.3d 629, 640–41 (5th Cir. 2001) (suggesting good faith could be found where an employer relies on the expertise or opinion of any other person or entity with knowledge of the FLSA regulations, including its attorney or the Department of Labor).

⁴² *See Stevenson v. Orlando’s Auto Specialists, Inc.*, No. 6:07-cv-500-Orl-19GJK, 2008 WL 4371830, at *4 (M.D. Fla. Sept. 23, 2008).

⁴³ *Dybach*, 942 F.2d at 1566–67 (quoting *EEOC v. First Citizens Bank of Billings*, 758 F.2d 397, 403 (9th Cir. 1985); *see also Hayes v. Bill Haley & His Comets, Inc.*, 274 F. Supp. 34, 37 (E.D. Pa. 1967).

⁴⁴ *See Davis v. Mountaire Farms, Inc.*, 598 F. Supp. 2d 582, 588 n.4 (D. Del. 2009); *Williams v. R.W. Cannon, Inc.*, No. 08-60168-CIV, 2009 WL 655730, at *2 (S.D. Fla. Mar. 12, 2009).

⁴⁵ *See Alvarez Perez v. Sanford-Orlando Kennel Club, Inc.*, 515 F.3d 1150, 1166 (11th Cir. 2008) (Although the Eleventh Circuit in *Alvarez* has adopted the Preclusion Majority Approach, its opinion in *Rodriguez* is the only FLSA authority that illustrates the Distinct Test Approach. Such illustration, however, does not conflict with its holding in *Alvarez* as there was no finding of both willfulness and good faith.); *see also Brinkman v. Dep’t of Corr.*, 21 F.3d 370, 372–73 (10th Cir. 1994); *Chao v. A-One Med. Servs. Inc.*, 346 F.3d 908, 920 (9th Cir. 2003); *Herman v. Palo Grp. Foster Home, Inc.*, 183 F.3d 468, 474 (6th Cir. 1999); *Singer v. City of Waco, Tex.*, 324 F.3d 813, 822–23 (5th Cir. 2003).

⁴⁶ *See Rodriguez v. Farm Stores Grocery, Inc.*, 518 F.3d 1259, 1274 (11th Cir. 2008); *Broadus v. O.K. Indus.*, 226 F.3d 937, 944 (8th Cir. 2000); *Fowler v. Land Mgmt. Groupe, Inc.*, 978 F.2d 158, 162 (4th Cir. 1992).

A. *The Preclusion Majority Approach*

Courts adopting the Preclusion Majority Approach have found that it is inconsistent to allow a good-faith safe harbor for liquidated damages when the jury has found the employer has acted in willful violation of the Act.⁴⁷ For example, the Tenth Circuit Court of Appeals in *Brinkman v. Department of Corrections* held that the same willfulness standard for the statute of limitations issue applies to the liquidated damages issue.⁴⁸ The Tenth Circuit centered its holding on the constitutional reasoning that the Seventh Amendment precludes the court from overriding the jury when a fact issue central to the claim has been decided upon evidence that justifies its conclusion.⁴⁹

In *Brinkman*, corrections officers sued the Department of Corrections, seeking overtime compensation for thirty-minute meal breaks.⁵⁰ The Department of Corrections did not pay its officers for meal breaks even though “they could not leave the prison grounds, go to their automobiles, or read, and were [still] required to respond to alarms.”⁵¹ The jury determined the Department of Corrections’ violations of FLSA established the willfulness of its current violation.⁵² The district court refused to admit evidence contrary to the jury’s finding of willfulness.⁵³ The district court assessed liquidated damages based on the jury’s finding of willfulness.⁵⁴ The Department of Corrections appealed the assessment of liquidated damages and argued that the willfulness and good faith standards are distinct.⁵⁵

On appeal, the Tenth Circuit affirmed the district court’s assessment of liquidated damages, holding the standards for willfulness and good faith are the same.⁵⁶ The Tenth Circuit reasoned the Seventh Amendment right to jury trial and its constitutional restraints precluded the court from substituting its judgment of the facts for that of the jury.⁵⁷ Thus, the Seventh Amendment prevented the court from reaching a contrary conclusion and, therefore, precluded the court from finding the defendant acted in good faith. For the Tenth Circuit, the right to a jury trial expressly precludes a contradictory finding by a judge.⁵⁸

The Sixth Circuit also held a finding of willfulness precludes a subsequent finding of good-faith compliance, but for different reasons.⁵⁹ Rather than focusing on the Seventh Amendment, the Sixth Circuit analyzed the statutory language of FLSA. In *Herman v. Palo Group Foster Home, Inc.*, the Sixth Circuit held a finding of willfulness was dispositive on the liquidated damages

⁴⁷ See *Bothell v. Phase Metrics, Inc.*, 299 F.3d 1120, 1130 (9th Cir. 2002) (noting the contrapositive, that a finding of good faith precludes a finding of willfulness).

⁴⁸ *Brinkman v. Dep’t of Corr.*, 21 F.3d 370, 373 (10th Cir. 1994).

⁴⁹ *Id.* at 372–73.

⁵⁰ *Id.* at 371.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 372.

⁵⁴ *Id.*

⁵⁵ See *id.* at 370.

⁵⁶ *Id.* at 373.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ See *Herman v. Palo Grp. Foster Home, Inc.*, 183 F.3d 468, 474 (6th Cir. 1999).

issue based on the statutory interpretation of Section 260.⁶⁰ The Sixth Circuit reasoned that the liquidated damages issue is so closely related to the willfulness issue that “[a]bsent a good-faith disagreement with the authority of the government to promulgate the statute, a finding of willfulness is dispositive.”⁶¹

In *Herman*, the Secretary of Labor sued to enjoin the Palo Group Foster Home from violating FLSA and to recover unpaid wages owed to employees plus statutory liquidated damages.⁶² The Department of Labor had investigated the foster home in the past for its failure to keep records required by the Act.⁶³ The foster home agreed to comply in the future; however, upon an investigation several years later, the Department of Labor discovered that the foster home had not changed its unlawful practices.⁶⁴ Undisputed evidence existed which indicated the foster home had actual notice of its violation of the Act and the court found the employer to be in willful violation.⁶⁵ Based on the inherent similarities of the good faith and willfulness tests, the district court assessed liquidated damages against the foster home.⁶⁶ On appeal, the foster home objected to the assessment of liquidated damages, arguing the tests for willfulness and good faith were not the same.⁶⁷ The Sixth Circuit affirmed the district court’s decision because it found that a finding of willfulness precludes a subsequent finding of good-faith compliance.⁶⁸ Regardless of the inherent inconsistency in allowing two positive findings, the court found that no statutory authority indicates the test for willfulness and good faith is separate and distinct.⁶⁹

Neither the *Brinkman* nor *Herman* courts specifically addressed the inherent inconsistency between a positive finding of both a willful violation and good-faith compliance. However, the Eleventh Circuit in *Alvarez Perez v. Sanford-Orlando Kennel Club, Inc.* dealt with the issue head-on.⁷⁰ The rationale behind the Eleventh Circuit’s finding of preclusion was based on the notion that the standards were so intrinsically similar that when a jury found a willful violation it had already taken into account the possibility of good faith.⁷¹ In *Alvarez Perez*, the employees of the kennel club sued for unpaid overtime wages under FLSA.⁷² At the trial court level, the jury found that the kennel club had willfully violated the Act because it repeatedly failed to compensate employees for overtime hours.⁷³ However, the district court subsequently found the kennel club had acted in good-faith compliance with FLSA.⁷⁴ The district court per-

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 470.

⁶³ *Id.* at 470–71.

⁶⁴ *Id.* at 471.

⁶⁵ *Id.* at 474.

⁶⁶ *Id.*

⁶⁷ *See id.* at 473–74.

⁶⁸ *Id.*

⁶⁹ *Id.* at 474.

⁷⁰ *Alvarez Perez v. Sanford-Orlando Kennel Club, Inc.*, 515 F.3d 1150, 1166 (11th Cir. 2008).

⁷¹ *Id.* at 1165.

⁷² *Id.* at 1153.

⁷³ *See id.* at 1154.

⁷⁴ *Id.* at 1155.

mitted the inconsistency between its finding and the jury's because it was the court's domain to determine good faith as a question of law, not the jury's.⁷⁵

On appeal, the employees contended the district court erred in finding the kennel club acted in good faith because the good-faith finding conflicted with the jury's willfulness finding, to which the court must yield.⁷⁶ The Eleventh Circuit agreed finding that the core of the conflict is that the judge and jury are answering essentially the same question for two different purposes.⁷⁷

The Eleventh Circuit provided three reasons for its holding. First, similar to Equal Pay Act ("EPA") and Age Discrimination in Employment Act ("ADEA") cases, which also apply the Portal-to-Portal Act, finding a defendant acted willfully precludes a subsequent finding of good faith.⁷⁸ Second, when a jury finds a defendant's violation is willful for statute of limitations purposes, "it has already factored the possibility of good faith into its examination."⁷⁹ Third, no distinction exists between the test for willfulness and that for good faith.⁸⁰ Because the two terms are mutually exclusive, finding an employer willfully violated FLSA *and* complied with its terms in good faith would be illogical.⁸¹

In sum, *Alvarez Perez* and the Preclusion Majority Approach stand for the proposition that in FLSA litigation a positive finding by a jury of willfulness precludes a subsequent finding by the court that the defendant was in good-faith compliance.⁸² The standards for determining willfulness and good faith are essentially the same and two positive findings cannot co-exist.⁸³ In addition to the Fifth, Sixth, Ninth, Tenth, and Eleventh Circuits, several district courts have held that a finding of willfulness and good faith cannot co-exist, including United States District Court for the Southern District of Florida and the United States District Court of Delaware.⁸⁴

⁷⁵ *Id.*

⁷⁶ *Id.* at 1162.

⁷⁷ *Id.*

⁷⁸ *Id.* at 1164; *see also* Glenn v. Gen. Motors Corp., 841 F.2d 1567, 1573 n.14 (11th Cir. 1988) (explaining that the "conclusion in the context of the discussion on the statute of limitations issue that [the defendant's] acting met . . . [the] definition of 'willful' precludes a finding of good-faith on the part of" the defendant); EEOC v. City of Detroit Health Dep't, Herman Kiefer Complex, 920 F.2d 355, 358 (6th Cir. 1990) (holding that "since the jury determined that the [defendant's] violation of the Equal Pay Act was willful, and since the district court was, in determining whether the violation was in good-faith and with reasonable grounds, presented with the same issue, the district court was bound by the jury finding").

⁷⁹ *Alvarez Perez*, 515 F.3d at 1165 (quoting *Castle v. Sangamo Weston, Inc.*, 837 F.2d 1550, 1561 (11th Cir. 1988)).

⁸⁰ *Id.* at 1165.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *See id.*

⁸⁴ *See Singer v. City of Waco, Tex.*, 324 F.3d 813, 823 (5th Cir. 2003); *Williams v. R.W. Cannon, Inc.*, No. 08-60168-CIV, 2009 WL 655730, at *1 (S.D. Fla. Mar. 12, 2009) (holding that "[b]ased upon the clear and binding Eleventh Circuit precedent that precludes a good faith finding by the Court after the jury has found a willful violation of the FLSA, the undersigned agrees that Plaintiff is entitled to an award of liquidated damages"); *Bothell v. Phase Metrics Inc.*, 299 F.3d 1120, 1130 (9th Cir. 2002) (noting the contrapositive, that a finding of good faith precludes a finding of willfulness); *Davis v. Mountaire Farms, Inc.*, 598

B. *The Distinct Test Approach*

The Distinct Test Approach relies upon the theory that the test for willfulness is a wholly separate and distinct test from that of good faith.⁸⁵ In theory, the courts following this approach have reasoned that a finding of willfulness by the jury can peacefully co-exist with a finding of good faith by the court. In practice, however, the circuit courts that follow the Distinct Test Approach have yet to deal with a circumstance where there are simultaneous findings of willfulness and good faith.

Though the Eleventh Circuit follows the Preclusion Majority Approach, its 2008 decision in *Rodriguez v. Farm Stores Grocery, Inc.* is currently the only FLSA authority that illustrates the Distinct Test Approach.⁸⁶ In *Rodriguez*, a group of former managers for a drive-through grocery store chain sued their employer for unpaid overtime.⁸⁷ At trial, the jury found the grocery store was not in willful violation of the Act, and this finding effectively limited the “managers to a maximum of two years of back pay.”⁸⁸ The former store managers also filed a post-trial motion, seeking an award of liquidated damages equal to the amount of the jury award and were awarded such because the judge did not find the employer was in good-faith compliance with the Act.⁸⁹

The grocery store appealed the imposition of liquidated damages, arguing the jury’s prior finding of no willful violation of FLSA on the statute of limitations issue “barred [the court] from finding that the company had not acted in good faith.”⁹⁰ The grocery store argued two points: first, “the absence of willfulness is inconsistent with the absence of good faith,” meaning that if there is no willfulness, then good faith must exist; second, “where there is evidence on both sides of a factual issue, the court cannot make findings inconsistent with those of the jury.”⁹¹ However, the Eleventh Circuit decided it was not necessary to deviate from its previous holding in *Alvarez Perez* in order to decide *Rodriguez*.⁹² The court recognized an important difference between the facts of this case and the Preclusion Majority Approach cases: because there was no

F. Supp. 2d 582, 588 n.4 (D. Del. 2009) (noting that “[t]he court does not deem willfulness and a lack of good faith to be equivalents, but recognizes, in concurrence with the majority of Circuit Courts, that a finding of willfulness would preclude a finding of good faith”); see also *Blackmon v. Brookshire Grocery Co.*, 835 F.2d 1135, 1138 (5th Cir. 1988) (holding that “[t]he trial court’s finding that [the defendant] acted in good faith negates any suggestion that [it] acted in reckless disregard of the rights of [the plaintiffs]”); cf. *Chao v. A-One Med. Servs., Inc.*, 346 F.3d 908, 920 (9th Cir. 2003) (affirming the assessment of liquidated damages on appeal because “a finding of good faith is plainly inconsistent with a finding of willfulness”); *Heidtman v. Cnty. of El Paso*, 171 F.3d 1038, 1042 (5th Cir. 1999) (reasoning that “[b]ecause employers cannot act in good faith based on reasonable grounds when they suspect that they are out of compliance with the FLSA, it would have been an abuse of discretion if the district court had *not* awarded liquidated damages”).

⁸⁵ See *Broadus v. O.K. Indus.*, 226 F.3d 937, 944 (8th Cir. 2000).

⁸⁶ See *Rodriguez v. Farm Stores Grocery, Inc.*, 518 F.3d 1259, 1273–75 (11th Cir. 2008).

⁸⁷ *Id.* at 1261–62.

⁸⁸ *Id.* at 1263.

⁸⁹ *Id.* at 1263, 1273.

⁹⁰ *Id.* at 1273.

⁹¹ *Id.*

⁹² See *id.*

finding of willfulness, there was no conflict between a finding of willfulness and good faith.⁹³

Although the *Rodriguez* court was not faced with a factual finding of willfulness, the decision clearly illustrated the two basic premises supporting the Distinct Test Approach. First, the jury's finding of no willful violation by the employer does not *per se* remove the court's statutory discretion to find that an employer did not act in good faith.⁹⁴ Unlike a positive finding of both a willful violation and good-faith compliance, which results in a logical inconsistency, no factual inconsistency exists when there is a failure to prove both good faith and willfulness.⁹⁵

Second, the court reasoned that the burdens of proof are different because the burden for the willfulness issue lies with the employee, while the burden for good faith is placed on the employer.⁹⁶ Courts have held that "[b]ecause the burden of proof is placed differently, a finding that willfulness was not present may co-exist peacefully with a finding that good faith was not present."⁹⁷ The placement of the burdens of proof in this circumstance allows a jury to conclude the evidence issue is evenly balanced and collateral estoppel does not necessarily apply.⁹⁸ Under this line of reasoning, each party is litigating a separate and distinct issue to different decision makers without fear of issue preclusion. The initial determination of willfulness by the jury does not prevent the subsequent determination of good faith by the judge. Therefore, collateral estoppel is inapplicable as no inconsistency is present.⁹⁹

The rationale behind the Distinct Test Approach is reinforced by the reasoning in the correlating EPA cases, such as *Fowler v. Land Management Groupe, Inc.*¹⁰⁰ The Portal-to-Portal Act of 1947, which is analyzed in FLSA litigation to determine the statute of limitations and liquidated damages, equally applies to litigation under the EPA.¹⁰¹ Courts making a decision under FLSA, as well as the EPA, use the same statutory language of the Portal-to-Portal Act in determining the culpability of an employer.¹⁰² Therefore, a circuit court's interpretation under the EPA and FLSA is essentially the same for purposes of determining willfulness and good-faith compliance.

In *Fowler*, the Fourth Circuit found wholly unconvincing the employer's argument that the good faith test for assessing liquidated damages is synonymous with the willfulness test for extending the statute of limitations.¹⁰³ A female employee sued her former employer, alleging she was underpaid in violation of EPA.¹⁰⁴ At trial, the district court ruled on the willfulness issue rather than submitting it to the jury, and found the employer did not willfully violate

⁹³ *Id.* at 1274–75.

⁹⁴ *See id.* at 1274.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *See id.*

¹⁰⁰ *See Fowler v. Land Mgmt. Groupe, Inc.*, 978 F.2d 158, 162 (4th Cir. 1992).

¹⁰¹ *See* 29 C.F.R. § 1621.4 (2011); *see generally Fowler*, 978 F.2d 158.

¹⁰² 29 C.F.R. § 1621.4.

¹⁰³ *Fowler*, 978 F.2d at 162.

¹⁰⁴ *Id.* at 160.

EPA.¹⁰⁵ On appeal, the employee contended the willfulness issue was a factual determination for the jury and the court should have assessed liquidated damages based on the jury's finding.¹⁰⁶ The employer argued "the trial court's inquiry into an employer's 'good faith' is synonymous with a determination of the employer's 'willfulness.'"¹⁰⁷ However, the Fourth Circuit rejected the employer's interpretation reasoning that it could "not discern any negative ramifications that would result from inconsistent determinations on the issues by the judge and the jury."¹⁰⁸ Furthermore, the court found "[t]he consequences of the judge's decision [were] entirely separate from the consequences of the jury's determination, and it [was] entirely acceptable that the two fact-finders reach[ed] conflicting conclusions on the issues."¹⁰⁹

Some of the negative ramifications that the Fourth Circuit could not discern included the constitutional issues the *Rodriguez* court did not address.¹¹⁰ The *Fowler* court rejected the argument that allowing inconsistent findings is a violation of the Seventh Amendment's right to a civil trial by jury.¹¹¹ Section 260 of the Portal-to-Portal Act expressly vests discretion in the trial judge, rather than the jury, to assess liquidated damages; thus, there is no inconsistency.¹¹² If the willfulness issue precluded the good-faith determination, it would constrain the judge's discretion in conflict with Congress's intent.¹¹³ The Fourth Circuit affirmed the district court's refusal to grant liquidated damages against the employer, but agreed with the employee's contention that it was an error for the trial court to refuse to submit the willfulness issue to the jury.¹¹⁴

In sum, the Distinct Test Approach under *Rodriguez* represents the idea that the tests for establishing willfulness and determining good-faith compliance are wholly separate because the burdens of proof are on separate parties and are determined by separate fact-finders.¹¹⁵ In theory, the varying burdens of proof allow the two findings to aptly co-exist.¹¹⁶ However, in practice, no Distinct Test Approach court has faced the dilemma of finding willfulness and good faith simultaneously. Other courts, in addition to those mentioned above, have also held similarly to the Distinct Test Approach courts, including the United States District Court for the Southern District of Florida, United States District Court for the Western District of Michigan, United States District Court for the Eastern District of Louisiana, and the Colorado Court of Appeals.¹¹⁷

¹⁰⁵ *Id.* at 160, 162.

¹⁰⁶ *Id.* at 162.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *See id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *See Rodriguez v. Farm Stores Grocery, Inc.*, 518 F.3d 1259, 1274 (11th Cir. 2008).

¹¹⁶ *See id.*

¹¹⁷ *Johnson v. Big Lots Stores, Inc.*, 604 F. Supp. 2d 903, 926 (E.D. La. 2009) (quoting *Rodriguez*, 518 F.3d at 1274, "[b]ecause the burden of proof is placed differently, a finding

IV. ANALYSIS

Inconsistent findings across the circuits have created a question of which approach the courts should apply. On one hand, the Preclusion Majority Approach finds that inconsistent holdings may not co-exist and a positive finding of willfulness by the jury precludes a positive finding of good faith by the court.¹¹⁸ The Distinct Test Approach holds that the standards for willfulness and good faith are distinct and differ based on burdens of proof, and thus, allow inconsistent findings to co-exist.¹¹⁹

The key distinguishing aspects of the cases turn on various factors, including the varying burdens of proof, the existence of two positive findings, and the absence of findings. The arguments in favor of the Distinct Test and Preclusion Majority approaches will be analyzed in turn to assess the persuasiveness of the courts' reasonings. Taking into account the level of persuasiveness in each argument, this Article proposes an approach that is similar to the Preclusion Majority Approach, where if the jury finds willfulness, the judge's discretion to withhold liquidated damages based on good faith is curtailed, but if the jury does not find willfulness, the judge has the authority to determine good faith.

A. *The Arguments of Each Side of the Circuit Split*

Noteworthy authority supports persuasive arguments on each side of the circuit split. However, the logical reasoning presented in the Preclusion Majority Approach provides a comprehensive guideline for evaluating claims under FLSA. Such consistency outweighs the factual contradictions ubiquitous in the Distinct Test Approach.

i. *Argument for the Distinct Test Approach*

The Distinct Test Approach is premised upon the idea that the good faith and willfulness standards have differing burdens of proof and therefore conflicting findings may co-exist. The issue of whether willful conduct exists on the part of the employer is an issue of fact that must be determined by the

that willfulness was not present may co-exist peacefully with a finding that good faith was not present," and reaffirming *Rodriguez* in that "[a] finding that defendant's actions were not willful does not preclude a finding that defendant did not act in good faith and on reasonable grounds"); *Brandt v. Magnificent Quality Florals Corp.*, No. 07-20129-CIV, 2009 WL 899922, at *2 (S.D. Fla. Mar. 31, 2009) (citing *Rodriguez*, 518 F.3d at 1274 and holding that "the difference in the burden of proof permits different outcomes between the jury determination of lack of willfulness and a court's determination of lack of good faith . . ." as the burden of proof was on the plaintiff to establish that the employer was in willful violation of the Act, while the burden of proof was on the defendant to prove objective and subjective good faith compliance with the Act); *Usery v. Godwin Hardware, Inc.*, 426 F. Supp. 1243, 1267 (W.D. Mich. 1976) ("Not even a finding of good faith, if one were justified, would call for a different conclusion . . .", as the good faith test for liquidated damages is different than the willfulness test for statute of limitations purposes.); *Casserly v. State*, 844 P.2d 1275, 1282 (Colo. App. 1992) (holding that "[t]he issue of willfulness is distinct from the issues of reasonableness and good faith).

¹¹⁸ *Alvarez Perez v. Sanford-Orlando Kennel Club, Inc.*, 515 F.3d 1150, 1166 (11th Cir. 2008).

¹¹⁹ *Rodriguez*, 518 F.3d at 1274.

jury.¹²⁰ The issue of whether good faith exists on the part of the employer is a question of law, which is expressly allocated to the judge's discretion by Section 260 of the Portal-to-Portal Act.¹²¹ The varying burdens of proof allow the judge to determine the question of law even when the answer contradicts the jury's prior determination of fact.¹²² The point of reconciliation of such inconsistent findings lies within divergence in the burdens of proof.¹²³ Furthermore, because the burdens of proof vary then it is possible that the initial determination rested on a conclusion in which the evidence for a finding of willfulness and a finding of good faith were in exact equipoise and collateral estoppel would not apply.¹²⁴

ii. The Flaws of the Distinct Test Approach

Although distinctions between the burdens of proof exist, the logic the Distinct Test Approach uses to reconcile its findings is limited to circumstances where there is no finding of either willfulness or good faith, or neither. In fact, the *Rodriguez* court specifically noted its reasoning did not have to take into account the possibility of inconsistent findings because there was no finding of willfulness¹²⁵—thus revealing its flawed logic. The *Rodriguez* court and other courts following this approach reason theoretically that willfulness and good faith may co-exist; yet none have dealt with such a factual circumstance.

The Distinct Test Approach fails to account for situations in which the jury finds the employer is in willful violation of the Act and where the judge subsequently finds the employer was in good-faith compliance. The conflict manifests where there are inconsistent findings of a judge and the jury who are answering essentially the same question for two different purposes—once for statute of limitations purposes and once under the safe harbor provision.¹²⁶ Though valid in the absence of findings, the Distinct Test Approach is unpersuasive when dealing with any situation where there are two positive findings.

iii. Argument for the Preclusion Majority Approach

Three premises support the Preclusion Majority Approach. First, an inherent conflict exists with the inconsistency in finding both willful violation and good-faith compliance. A positive finding of willfulness by the jury warrants preclusion of the court's ability to subsequently find good-faith compliance.¹²⁷ Specifically, preclusion is necessary to prevent the conflict that arises where

¹²⁰ See *id.*

¹²¹ See 29 U.S.C. § 260 (2006) (Noting that “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.”) (emphasis added).

¹²² See *Rodriguez*, 518 F.3d at 1274.

¹²³ *Id.*

¹²⁴ *Id.* (quoting 18 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4422 (2d ed. 2002)).

¹²⁵ *Id.* at 1273–74.

¹²⁶ See *id.* at 1273.

¹²⁷ *Alvarez Perez v. Sanford-Orlando Kennel Club, Inc.*, 515 F.3d 1150, 1166 (11th Cir. 2008).

there is a pronouncement by the jury of willful conduct and another by the judge that the employer acted in good-faith compliance.¹²⁸ Second, “when a jury finds [an employer’s] violation is willful, . . . ‘it has already factored the possibility of good faith into its examination.’”¹²⁹ A finding of “‘good faith’ after a finding of ‘willful’ violation is illogical [because] the two [concepts] are now mutually exclusive.”¹³⁰ Essentially, the tests for the two standards are so closely related that a positive finding of willfulness inherently precludes a subsequent positive finding of good faith.¹³¹ Third, the plaintiff’s Seventh Amendment right to a jury trial could potentially be violated by two positive findings.¹³² When facts “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 court from reaching a contrary conclusion.”¹³³

iv. The Flaws of the Preclusion Majority Approach

The drawback to the Preclusion Majority Approach is the potential conflict between the statutorily-authorized discretion of the judge to determine good-faith compliance and the right of the jury to determine willfulness.¹³⁴ The issue of whether good faith exists is expressly allocated to the trial judge’s discretion.¹³⁵ Restraining the trial judge’s vested discretion to award liquidated damages pursuant to the jury’s determination of willfulness potentially acts as a hindrance of the statute’s congressional intent to allocate authority specifically to the trial judge’s discretion.

B. Proposal

This Article argues for an approach that is similar to the reasoning in the Preclusion Majority Approach and allows for the statutory distinctions of the tests, but also accommodates differing factual circumstances. The jury’s positive finding of willfulness should preclude the judge’s discretion to withhold liquidated damages based on good faith, unless there is an absence of willfulness in which case each decision maker retains its authority. This proposed approach has three main advantages. First, this approach takes into account the expansive reasoning across the circuit. Second, it is most in line with the statutory language of the Act. Third, it most effectively advances a policy of consistency and a balance of statutory authority.

i. Incorporates Reasoning From Across the Circuit

This approach accounts for the positives in both the Distinct Test Approach and Preclusion Majority Approach while remaining mindful of the flaws in both approaches. As indicated by the Distinct Test Approach, the bur-

¹²⁸ See *id.* at 1162.

¹²⁹ *Id.* at 1165 (quoting *Castle v. Sangamo Weston, Inc.*, 837 F.2d 1550, 1561 (11th Cir. 1988)).

¹³⁰ *Id.* (quoting *Castle*, 837 F.2d at 1561).

¹³¹ See *Singer v. City of Waco, Tex.*, 324 F.3d 813, 823 (5th Cir. 2003).

¹³² See *Brinkman v. Dep’t of Corr.*, 21 F.3d 370, 372–73 (10th Cir. 1994).

¹³³ *Id.* (citing *Skinner v. Total Petroleum, Inc.*, 859 F.2d 1439, 1443 (10th Cir. 1988)).

¹³⁴ See 29 U.S.C. § 260 (2006).

¹³⁵ *Id.*

dens of proof are placed on different parties and the decision makers vary in each analysis; the jury decides the willfulness of an employer, while the judge determines an employer's good faith. This approach allows for each decision maker to maintain independent and distinct authority while recognizing the inherent conflict that arises when there are two positive findings.

Under this Article's approach, a jury determines whether the employee has proven by a preponderance of the evidence that the employer's conduct was in willful violation of the Act.¹³⁶ If the jury does not find willfulness and limits the statute of limitations to the statutory two years, the court maintains its expressly allocated discretion to determine whether the employer has proven objective and subjective good-faith compliance with the Act. In this circumstance, no inconsistency exists between the decision makers and each has maintained its own discretion and independence. If the jury determines that the employee has proven by a preponderance of the evidence that the employer was in willful violation of the Act, extending the statute of limitations to three years, the court's discretion to find good-faith compliance should be curtailed. In essence, the trier of the fact has already taken into account the determination of whether the employer acted in good-faith compliance when it determined that the employer acted in willful violation of the Act.¹³⁷ Under this approach, each decision maker maintains its respective authority, but the court's authority is curtailed only when the jury finds the employer acted willfully.

ii. In Line with Statutory Authority

This approach is also the most in line with relevant statutory authority. Pursuant to the Act, the judge's discretionary ability to withhold liquidated damages for good-faith compliance is a secondary determination, dependent upon the jury's primary finding of the existence or absence of willfulness.¹³⁸ The statutory language of Section 260 states that "if the employer shows [good faith] to the satisfaction of the court . . . , the court *may*, . . . in its sound discretion, award no liquidated damages or award any amount thereof."¹³⁹ The conditional language of the statute implies it is a provisional determination by the judge.¹⁴⁰ As it is well-settled in statutory interpretation case law, "the term

¹³⁶ See *Rodriguez v. Farm Stores Grocery, Inc.*, 518 F.3d 1259, 1274 (11th Cir. 2008); cf. *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133–35 (1988) (reading the "knew or showed reckless disregard" willfulness standard onto the language of the Act).

¹³⁷ See *Castle v. Sangamo Weston, Inc.*, 837 F.2d 1550, 1561 (11th Cir. 1988) (citing *Powell v. Rockwell Int'l Corp.*, 788 F.2d 279, 287 (5th Cir. 1986)).

¹³⁸ See *Herman v. Palo Grp. Foster Home, Inc.*, 183 F.3d 468, 474 (6th Cir. 1999) (holding that "[a]bsent a good faith disagreement with the authority of the government to promulgate the statute, a finding of willfulness is dispositive of the liquidated-damages issue"); *EEOC v. City of Detroit Health Dep't., Herman Kiefer Complex*, 920 F.2d 355, 356 (6th Cir. 1990) (holding "that once the jury determined that the [defendant] willfully violated the Equal Pay Act, the district judge had no discretion not to award liquidated damages").

¹³⁹ 29 U.S.C. § 260 (emphasis added).

¹⁴⁰ See *Brinkman v. Dep't of Corr.*, 21 F.3d 370, 372–73 (10th Cir. 1994) (holding 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") (citing *Skinner v. Total Petroleum, Inc.*, 859 F.2d 1439, 1443 (10th Cir. 1988)).

‘may’ typically indicates authorization without obligation.”¹⁴¹ In contrast, the language in Section 255 regarding the statute of limitations states actions “*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 may be commenced within three years after the cause of action accrued.”¹⁴² The use of the word “‘shall’ ‘normally creates an obligation impervious to judicial discretion.’”¹⁴³ The language in Section 255 is conclusive, implying that such determination takes priority over the determination of good faith for liquidated damages purposes.¹⁴⁴

Furthermore, “[p]roper statutory construction requires more than linguistic examination and review of the rules of statutory construction.”¹⁴⁵ “The interpretation should be reasonable, and where the result of one interpretation is unreasonable, while the result of another . . . is logical, the latter should prevail.”¹⁴⁶ Allowing the judge to subsequently determine an employer is in good-faith compliance after a jury has made the opposite finding of willfulness is not only incoherent, but also illogical.¹⁴⁷ This Article’s approach best addresses the illogical result of two positive findings and is most in line with the construction of the statutory authority.

iii. Furthers a Policy of Consistency

This Article’s proposed approach most effectively advances a policy of consistency because it accounts for the positives and negatives from the circuit courts in addition to being the most in line with the statutory authority. More importantly, it is applicable in all factual circumstances, including those situations where there are findings of willfulness and good faith. Moreover, this approach mirrors the statutory interpretations a majority of the circuit courts have settled on in employment discrimination cases for ADEA and EPA involving the same statutory willfulness and good-faith standards under the Portal-to-Portal Act.¹⁴⁸

¹⁴¹ *Air Line Pilots Ass’n, Int’l v. US Airways Grp.*, 609 F.3d 338, 342 (4th Cir. 2010).

¹⁴² 29 U.S.C. § 255 (emphasis added).

¹⁴³ *Whaley v. Tennyson (In re Tennyson)*, 611 F.3d 873, 877 (11th Cir. 2010) (quoting *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998)).

¹⁴⁴ *See Schultz v. W.R. Hartin & Son, Inc.*, 428 F.2d 186, 189 (4th Cir. 1970) (holding the FLSA’s terms of coverage must be liberally construed and its exemptions “narrowly construed and limited to ‘those plainly and unmistakably within their terms and spirit’”) (quoting *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960)); *Taylor v. Cnty. of Fluvanna, Va.*, 70 F. Supp.2d 655, 659 (W.D. Va. 1999) (finding that “the FLSA is to be interpreted liberally in the employee’s favor in order to promote its remedial purposes”); *Meyer v. Worsley Co.*, 881 F. Supp. 1014, 1017 (E.D. N.C. 1994) (holding “[t]he FLSA ‘is to be interpreted liberally with exceptions narrowly construed against those seeking to assert them’”) (quoting *Wirtz v. Jernigan*, 405 F.2d 155, 158 (5th Cir. 1968)).

¹⁴⁵ *Sierra Club v. Train*, 557 F.2d 485, 490 (5th Cir. 1977).

¹⁴⁶ *Id.*

¹⁴⁷ *See Castle v. Sangamo Weston, Inc.*, 837 F.2d 1550, 1561 (11th Cir. 1988); *see also E.E.O.C. v. City of Detroit Health Dep’t., Herman Kiefer Complex*, 920 F.2d 355, 360 (6th Cir. 1990) (holding that “it is hard to mount a serious argument that an employer, found to have acted willfully, could nonetheless still be found to have acted in good faith”).

¹⁴⁸ *See, e.g., E.E.O.C.*, 920 F.2d at 356; *Castle*, 837 F.2d at 1561; *Glenn v. Gen. Motor Corp.*, 841 F.2d 1567, 1573 (11th Cir. 1988) (holding that a finding the defendant acted

By following this approach, results in FLSA litigation across the circuits will be consistent regardless of differences in factual circumstances. Although this proposed standard is not absolute, as reasonable minds could differ on statutory interpretation, it is far more sound and straightforward than the inconsistent and illogical approach followed by some of the circuit courts as it accounts for varying factual circumstances, which courts frequently encounter in FLSA litigation.

V. CONCLUSION

The United States Circuit Courts of Appeals continue to stand divided on whether a finding of willfulness for the purposes of extending the statute of limitations in FLSA litigation precludes a judge's subsequent finding of an employer's good-faith compliance with the Act. The inconsistent holdings have created a dilemma among the circuits as to which approach is appropriate. On one end of the spectrum, courts in the Preclusion Majority Approach reason that a positive finding of willfulness precludes the judge from finding good-faith compliance. On the other end of the spectrum, the Distinct Test Approach courts reconcile such inconsistencies in the varying burdens of proof by focusing on negative findings in limited circumstances, and ignoring the inherent conflict where positive findings exist. To date, no court following this approach has dealt directly with both a finding of willfulness and a subsequent finding of good faith.

When the jury makes a positive finding of willfulness, the court's discretion to withhold liquidated damages based on good faith should be curtailed. Yet, when there is no finding of willfulness, each decision maker should maintain its distinct authority. Courts should employ this approach as it takes into account the positives and negatives of the current approaches, it is the most in line with the statutory language of the Fair Labor Standards Act, and it furthers a policy of consistency by mirroring the approach used by the majority of courts and providing a straightforward guideline for future cases.

willfully for statute of limitations purposes precludes a finding that the defendant acted in good faith for liquidated damages purposes).