No. 01-12379

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JOHN BAILEY and FRANK DUNN,
individually and on behalf of
all other similarly-situated persons,

Appellants

v.

GULF COAST TRANSPORTATION, INC.,
and NANCY CASTELLANO,

Appellees

On appeal from the United States District Court
for the Middle District of Florida

BRIEF FOR THE SECRETARY OF LABOR AS AMICUS CURIAE SUPPORTING APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to 11th Circuit Rule 26.1-1, the undersigned counsel for the Secretary of Labor as amicus curiae supporting appellants adopts the persons and entities identified by John Bailey and Frank Dunn, individually and on behalf of all other similarly-situated persons, appellants, in their Certificate of Interested Persons, see appellants' brief, pp. C1-3 to C2-3, and certifies that the following additional persons also have an interest in the outcome of this case:

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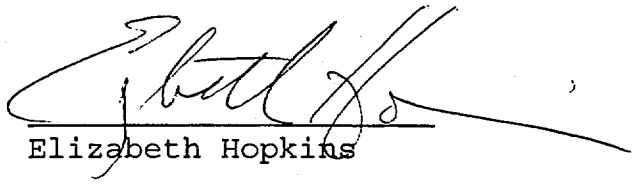

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BRIEF FOR THE SECRETARY OF LABOR AS AMICUS CURIAE SUPPORTING APPELLANTS

INTEREST OF THE SECRETARY OF LABOR

The case presents an issue concerning the meaning and remedial scope of Section 16(b) of the Fair Labor Standards Act of 1938 (the FLSA or the Act), 29 U.S.C. 216(b), in a suit by private plaintiffs to enforce Section 15(a)(3), 29 U.S.C. 215(a)(3), the FLSA's anti-retaliation provision. Congress charged the Secretary with the responsibility for administering the FLSA, and specifically authorized the Secretary to bring suit to enforce Section 15(a)(3). 29 U.S.C. 211(a). However, recognizing that the Secretary could not effectively enforce the

anti-retaliation provision alone, Congress amended the FLSA in 1977 to allow employee suits for legal or equitable relief to remedy violations of this provision. 29 U.S.C. 216(b). Given that Congress, in amending the Act, envisioned private enforcement of the Act's anti-retaliation provision as a necessary complement to government enforcement and essential to the effective enforcement of the Act's substantive provisions, the Secretary has a strong interest in ensuring that Section 16(b) is properly interpreted to allow the full range of appropriate remedies in such a suit.

STATEMENT OF THE ISSUE

Whether private parties can obtain injunctive relief for a violation of Section 15(a)(3) of the FLSA, pursuant to Section 16(b), 29 U.S.C. 216(b), which provides for such "legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and payment of wages."

STATEMENT OF THE CASE

A. Nature of the case and course of proceedings

This case arises from an action filed on January 10, 2001, by John Bailey and Frank Dunn ("appellants"), on behalf of themselves and "all other similarly-situated person," in the

United States District Court for the Middle District of Florida against appellees Gulf Coast Transportation and its general manager, Nancy Castellano, (collectively, "Gulf Coast") for minimum wage violations under the FLSA. Record, Volume 1 (R1)-1.[1] Gulf Coast operates a fleet of over 250 taxicabs in Hillsborough County, Florida. Bailey worked as a taxicab driver for Gulf Coast from 1994 until he was terminated after filing this suit, whereas Dunn was terminated prior to bringing suit. R1-9, at 2;

The original complaint, which was brought as a collective action under Section 16(b) of the FLSA, 29 U.S.C. 216(b), alleged that Gulf Coast willfully, knowingly and recklessly violated Section 6 by failing to pay the minimum wage to appellants. R1-1, at 19. The appellants requested declaratory relief, an award of damages in the amount of unpaid minimum wage compensation and unspecified amounts appellants had allegedly expended on Gulf Coast's behalf, liquidated damages or, in the alternative, prejudgment interest, and attorneys' fees and costs. R1-1, at 19-20. Shortly thereafter, appellants amended their complaint to also allege that Gulf Coast had engaged in

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[1] Citations to specific documents in the record (R) will indicate the volume that contains the document followed by a dash (-), then the document's number according to the certified list, and, finally, any reference to the document's original pagination (ex.: R1-2, at 4).

retaliatory conduct in violation of Section 15(a)(3)of the FLSA, 29 U.S.C. 215(a)(3), by terminating its business relationship with each of its drivers who were plaintiffs to this suit. R1-9, at 20. For this retaliation count, appellants sought, as additional relief, damages, liquidated damages, reinstatement, injunctive relief, attorneys' fees and costs, and other appropriate relief, including punitive damages. R1-9, at 20-22.

After having sought and been denied a temporary restraining order, (R1-3; R1-4), appellants moved for a preliminary injunction ordering Gulf Coast to reinstate certain of them to their former positions as taxicab drivers and to refrain from further retaliatory action against any of the plaintiffs in the suit. R1-12; R1-14. The court denied the motion (R2-37), and appellants filed this appeal pursuant to 28 U.S.C. 1292(a)(1), which permits an appeal as of right from, inter alia, "[i]nterlocutory orders of the district court . . . granting, continuing, modifying, refusing or dissolving injunctions."

B. Statement of the facts

On January 10, 2001, Bailey and Dunn filed a collective lawsuit in federal district court against Gulf Coast under Section 16(b) of the FLSA, 29 U.S.C. 216(b), for failure to pay minimum wage. R1-1. Twenty-five taxi drivers opted into the suit. R1-2. Within days of being served with the complaint,

Gulf Coast terminated all of its drivers who were plaintiffs to this lawsuit (R1-13, at 15), which Gulf Coast believed was unjustified because, in it view, the drivers were independent contractors not covered by the FLSA. R2-20, at 1-2. The plaintiff-appellants on the other hand claim that under the "economic reality" test applied by the Eleventh Circuit, Aimable v. Long & Scott Farms, 20 F.3d 434, 439 (11th Cir.), cert. denied, 513 U.S. 943 (1994), the drivers were employees under the FLSA and entitled to minimum wage.

In response to the terminations, appellants filed a motion for a preliminary injunction to reinstate the drivers who had been terminated, to prohibit Gulf Coast from terminating any other drivers participating in the lawsuit, and from taking any other retaliatory action against any driver who was participating in the lawsuit. R1-12. The plaintiffs argued that they were covered employees under the FLSA given the degree of control exercised by Gulf Coast over the drivers and the total economic dependance by the drivers on Gulf Coast, which maintained and usually owned the cabs and owned the permits that allowed the vehicles to operate as taxi cabs. R1-14, at 6-16. They also maintained, in a supplemental memorandum, that the language of the retaliation provision expressly provides for reinstatement and other forms of equitable relief. R2-27, at 2-

3. Gulf Coast maintained that only the Secretary of Labor can obtain an injunction under the FLSA and that, in any event, plaintiffs had failed to establish that they were likely to succeed on the merits because they were independent contractors who were not covered by either the minimum wage or the retaliation provision of the Act. R2-20.

C. Decision below

The district court denied the plaintiffs' motion for a preliminary injunction, concluding that the FLSA does not allow private plaintiffs to obtain injunctive relief. R2-37, at 13. The court relied on a case from the Eleventh Circuit, in which the court, in the context of a private suit for back wages as well as injunctive relief for overtime work, broadly stated that "the plain language of the [Act] provides that the Secretary of Labor has the exclusive right to bring an action for injunctive relief." R2-37, at 7-8, quoting Powell v. Florida, 132 F.3d 677, 678 (11th Cir.), cert. denied, 524 U.S. 916 (1998). Although the court recognized that "Powell admittedly addresses a wage claim rather than a retaliation claim," the court held that "the resolution of the instant issue is subsumed by the breadth of Powell and similar cases," which the court read as holding "broadly that injunctive relief is exclusively the right of the Secretary." R2-37, at 9. Based on its reading that

"Powell neither limits its conclusion to enforcement of specific sections of the FLSA nor limits its holding to the particular facts of Powell," the court denied the appellants' motion for a preliminary injunction. R2-37, at 13. The court, however, "not[ing] that the evidence supporting the substantive merits of the requested preliminary injunction is quite persuasive," and that Gulf Coast's conduct was "plainly retaliatory," concluded that "[w]ere preliminary injunctive relief available to a private litigant in an FLSA case, the plaintiffs would be entitled on this record to injunctive relief preserving the *status quo ante* pending further litigation." R2-37, at 13 n.6.

SUMMARY OF THE ARGUMENT

By its terms, Section 16(b) allows private plaintiffs to sue for appropriate equitable relief to enforce the FLSA's anti-retaliation provision. 29 U.S.C. 216(b). To be sure, private plaintiffs are limited to the recovery of specified legal relief in a suit to enforce the Act's minimum wage and overtime provisions, and in that context only the Secretary of Labor may sue for injunctive relief under Section 17 of the Act. 29 U.S.C. 217. The same limitation does not apply to private suits to enforce the Act's anti-retaliation provision, however. Section 16(b) was amended in 1977 to permit recovery of both legal and equitable relief in a private suit to enforce the

Act's anti-retaliation provision. The Powell decision by this Court, while broadly stated, decided only that an injunction was not available in a suit to enforce the Act's overtime provisions, and cannot be read to limit injunctive relief on a retaliation claim such as this one.

Instead, the plain terms of Section 16(b) make such relief available "without limitation" so long as it is "equitable" and "appropriate to effectuate the purposes" of the anti-retaliation provision. 29 U.S.C. 216(b). On the former point, it is undeniable that injunctions are equitable in nature. Indeed, an injunction is nothing more than a general term for a coercive order, one of the most common forms of equitable relief. Moreover, reinstatement, which is specified by Section 16(b) as an available remedy in a retaliation claim, and which is one of the remedies sought by the appellants in their motion for a preliminary injunction, is enforced through an injunctive order. Furthermore, in the analogous context of the Age Discrimination in Employment Act, which is modeled on the FLSA, the Supreme Court has recognized that similar language provides for reinstatement as well as other forms of injunctive relief. Thus, there is no support for a reading of Section 16(b) that would exclude injunctive relief.

Furthermore, it is clear that the purposes of the anti-retaliation provision are well-served by an injunction in a case presenting widespread and "plainly retaliatory" conduct such as this one. The anti-retaliation provision, which before 1977 could only be enforced by the Secretary of Labor, is designed to ensure that workers can act to protect or assert their rights under the FLSA without fear of suffering adverse economic or other employment consequences. But because Congress recognized that the Secretary's enforcement resources are too limited to adequately ensure the availability of this protection, essential to the enforcement of the Act's substantive provisions, the Act was amended in 1977 to allow private suits to also enforce the anti-retaliation provision. This history, like the amended language of Section 16(b), indicates that Congress intended private plaintiffs to act as enforcers of the retaliation prohibition in the many cases in which the Secretary's limited resources did not allow her to bring suit. Thus, like the Secretary, they should be able to obtain the full measure of relief, including injunctions, where appropriate to enforce the provision in Section 16(b) for reinstatement or otherwise serve the protective purposes of the anti-retaliation provision.

Finally, even if the language of the Act is not crystal clear, the Secretary's reading of the statutory provisions is at

least a reasonable one. As such, it is entitled to deference from this Court.

ARGUMENT

THE DISTRICT COURT ERRED IN HOLDING THAT THE FLSA DOES NOT PERMIT PRIVATE PLAINTIFFS TO OBTAIN INJUNCTIVE RELIEF IN AN ACTION ALLEGING ILLEGAL RETALIATION UNDER SECTION 15(a)(3)

Section 15(a)(3) of the FLSA makes it illegal "to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter." 29 U.S.C. 215(a)(3). Section 16(b) provides that "any one or more employees" may bring suit to recover the liability described in the subsection. 29 U.S.C. 216(b). The district court denied a preliminary injunction, not because the plaintiffs were not "employees" under the Act -- the court thought it likely they were -- but because, in its view, the Act does not provide for injunctive relief in a private suit for violation of Section 15(a)(3).[2] The court, however, misread the statute based on an erroneous application of this Court's precedent.

[2] The Secretary takes no position here on whether the appellants are, in fact, employees or independent contractors.

1. By its plain terms, Section 16(b), which governs private rights of action under the FLSA, provides for injunctive relief as well as damages for retaliation suits, but not for minimum wage or overtime suits. 29 U.S.C. 216(b). As most relevant here, the second sentence of Section 16(b) was amended in 1977 to provide that "[a]ny employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages." Fair Labor Standards Amendments of 1977, Pub. L. No. 95-151 § 10, 91 Stat. 1245, 1252. This contrasts with the language of the first sentence of Section 16(b) of the FLSA, which was not modified and which, by its terms, does not provide for equitable relief but rather makes an employer who violates the minimum wage or overtime provisions (Sections 6 and 7 respectively) "liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages." 29 U.S.C. 216(b).

The district court viewed two other provisions of the FLSA as relevant to the analysis here. First, Section 17,

denominated "Injunction proceedings," provides the federal district courts with jurisdiction "to restrain violations of section 215 of this title, including in the case of violations of section 215(a)(2) of this title the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this chapter." 29 U.S.C. 217. Second, Section 11(a) of the Act provides that the Administrator of the Wage and Hour Division[3] "shall bring all actions under section 217 of this title to restrain violations of this chapter."[4] 29 U.S.C. 211(a).

The interrelation of Section 16 and Sections 11 and 17 of the FLSA in this context is clear. Section 16(b) explicitly allows employees to seek such equitable relief "as may be appropriate" to serve the purposes of the anti-retaliation

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[3] The functions of the Administrator under the FLSA were transferred to the Secretary of Labor pursuant to the Reorganization Plan No. 6 of 1950, § 1, 15 Fed. Reg. 3174 (effective May 24, 1950), reprinted in 5 U.S.C. app. at 1469 (1994), and in 64 Stat. 1263 (1950).

[4] Section 11 makes the Administrator's otherwise exclusive authority to enforce Section 17 subject to two exceptions not applicable here. See 29 U.S.C. 211(a) ("[e]xcept as provided in section 212 of this title and in subsection (b) of this section"). Section 12(b) makes the Administrator's authority to enforce the child labor provisions of the Act subject to "the direction and control of the Attorney General." 29 U.S.C. 212(b). Section 11(b) allows cooperative arrangements between the Labor Department and the State agencies that enforce labor laws. 29 U.S.C. 211(b).

provision. 29 U.S.C. 216(b); see Avitia v. Metropolitan Club of Chicago, Inc., 49 F.3d 1219, 1231 (7th Cir. 1995) (allowing "front pay" because under the retaliation provision, "[a] victim of retaliation is expressly entitled to all legal and equitable relief that may be appropriate"). Moreover, no other provision limits the type of equitable relief an employee may seek to remedy this kind of violation. To be sure, Section 16(b) specifies damages as the only available liability in a private suit for minimum wage or overtime violations, but, as we have described, this stands in contrast to the broad language of the very next sentence of that provision, which specifically prescribes "such legal or equitable relief as may be appropriate to effectuate the purposes" of the anti-retaliation provision. 29 U.S.C. 216(b). Finally, while Section 11 gives the Secretary exclusive authority to seek injunctions under Section 17 of the Act, it does not purport to limit the equitable remedies otherwise available under Section 16(b). Certainly, Sections 11 and 17 do not override the second sentence of Section 16(b)'s grant of authority to seek equitable relief in a private action to remedy retaliation for the bringing of an FLSA suit, which, after all, was an amendment to the Act, which already contained Sections 11 and 17 as presently written. Cf. FTC v. A.P.W. Paper Co., 328 U.S. 193, 202 (1946) (recognizing necessity to

reconcile language of statutory amendment to that contained in prior if amendment in that case was not to be a nullity).

The statutory language requires a reading that so long as injunctive relief is "equitable" in nature and "appropriate to effectuate the purposes of section 215(b)(3)," it is available. See 29 U.S.C. 216(b). On the former point, it is clear that injunctions are one of the two or three forms of relief that constitute the sine qua non of "equitable" remedies. See Mertens v. Hewitt Assocs., 508 U.S. 248, 255, 256 (1993) (referring to an injunction as "traditional" equitable relief and as a category of relief "typically available in equity") (Court's emphasis). Whatever else equitable relief may encompass, traditionally or as a matter of modern construction, there can be no doubt that it includes injunctive relief. See Dan B. Dobbs, Remedies § 2.1(2) (2d ed. 1993) ("The most common equitable remedies are coercive. . . . The most general term for a coercive remedy is 'injunction.'"). Moreover, courts appropriately read broad grants of equitable power, such as the language at issue here, expansively to include all forms of equitable relief, presuming that Congress must "have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes." Mitchell v. Robert De Mario Jewelry, Inc., 361 U.S. 288, 292 (1960) (in an action

by the Secretary of Labor to enforce the FLSA's anti-retaliation provision, the Court relied on the principle that "'[u]nless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction.'" Id. at 291, quoting Brown v. Swann, 35 U.S. (10 Pet.) 497, 503 (1836)). Here, the relevant statutory language extends to "such . . . equitable relief . . . appropriate to effectuate" the purposes of section 15(a)(3), which, by its terms, includes "without limitation" such remedies as "employment, reinstatement, promotion," as well as lost wages and liquidated damages. 29 U.S.C. 216(b). Indeed, the appellants here specifically sought reinstatement in their motion for preliminary injunction. As Dobbs explains, reinstatement is a form of specific relief "backed by the power of compulsion through contempt sanctions," the "injunctive character" of which is "apparent." Dobbs, supra, § 2.1(2). In other words, an order of reinstatement (like an order requiring "employment" or "promotion") is a specific form of the more general term "injunction."

Moreover, Section 626(b) of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 626(b), the remedial provisions of which are modeled on of the FLSA, has correctly been viewed by the Supreme Court to allow private claimants to obtain

injunctive relief, and specifically reinstatement, even though that Section of the ADEA does not by its terms mention injunctions in providing for "such legal and equitable relief as may be appropriate to effectuate the purposes" of that Act. See McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 357 (1995) ("When confronted with a violation of the ADEA, a district court is authorized to afford relief by means of reinstatement, backpay, injunctive relief, declaratory judgment, and attorney's fees.") (emphases added); see also Lorillard v. Pons, 434 U.S. 575, 581 (1978) (by specifying the availability of appropriate equitable relief, Congress made plain its decision to depart from the general prohibition in the FLSA against private injunctions). So too, the statutory language at issue here, which is substantially similar to the language contained in the ADEA, cannot reasonably be read to extend to all forms of equitable relief except injunctions. Cf. Harris Trust & Sav. Bank v. Salomon Smith Barney Inc., 530 U.S. 238, 245-246 (2000) (refusing to impose limitations on Employee Retirement Income Security Act (ERISA) language broadly providing "appropriate equitable relief" for the purposes of redressing violations or enforcing provisions of that Act).

On the second point, this case -- in which the district court, not surprisingly, found that the company's admitted

conduct in terminating every plaintiff in the overtime suit "is plainly retaliatory" -- appears to exemplify the kind of case where injunctive relief is "appropriate to effectuate the purposes" of the anti-retaliation provision. R2-37, at 5, 13 n.6. The anti-retaliation provision was enacted by Congress to remove the risk of employer retaliation against efforts by employees to secure their rights to fair wages under the Act. Mitchell, 361 U.S. at 335. Prior to 1977, only the Department of Labor could file suit for retaliation, an arrangement that not only placed a heavy burden on the Department's resources, but also left employees without a remedy in the many cases where the Department did not sue. Fair Labor Standards Amendments of 1977: Hearings on S. 1871 Before the Subcomm. on Labor of the Senate Comm. on Human Resources, 95th Cong., 2d Sess. 15-16 (1977); see also Employees of Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare, 411 U.S. 279, 297 n.12 (1973) (Marshall, J., concurring) ("It is obviously unrealistic to expect Government enforcement [of the FLSA] to be sufficient.").[5] Congress amended Section 16(b) in 1977, however,

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[5] In 1999, the Department of Labor estimated that there were approximately 85 million workers in all industries covered by the FLSA's minimum wage provisions. Yet, at the end of fiscal year 2000, the Department had only 946 Wage & Hour Investigators. In order to decide to bring suit, the Wage and Hour Administrator must, first, know of a possible violation of (continued...)

in order to "authorize[] employee suits for appropriate legal or equitable relief against any employer who discharges or otherwise discriminates against an employee who seeks to enforce the Act or cooperates with the Secretary in enforcing the Act." H.R. Rep. No. 95-521, at 16 (1977), reprinted in 1977 U.S.C.C.A.N. 3201, 3260. The amendment was thus designed to strengthen a provision that, long before this amendment, the Supreme Court had recognized as essential to the effective enforcement of the Act, "[f]or it needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions." Mitchell, 361 U.S. at 292. Therefore, it seems clear that by amending Section 16(b) to allow private plaintiffs to obtain legal and equitable relief for illegal retaliation, Congress sought not only to allow private redress, but more broadly to allow private plaintiffs to obtain the full measure of protection essential to the effective enforcement of the Act and already available to the Secretary. And nowhere can the

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[5](...continued)
the FLSA, second, investigate the circumstances, and, third, come to the conclusion (in consultation with the Solicitor's Office, whose resources are likewise limited) that the agency's limited resources should be expended in prosecuting that case. Unlike this case, most retaliation cases involve a single individual, whereas most minimum wage or overtime cases involve numerous employees, a consideration that bears on the agency's enforcement-priority setting.

necessity of this protection be seen more clearly than in a case such as this one where a company terminates all of the plaintiffs to an FLSA suit, allegedly subject to reinstatement if they drop out of the case as plaintiffs. (R1-13, at 15). For all these reasons, to paraphrase what the Supreme Court said in a similar context, we cannot see any purpose related to the Act that "denial of a remedy would serve," and believe instead that granting injunctive relief is consistent with both the literal statutory language and the FLSA's protective purposes. Varity Corp. v. Howe, 516 U.S. 489, 515 (1996) (construing ERISA Section 502(a)(3), 29 U.S.C. 1132(a)(3), to allow individual equitable relief even though a related provision in Section 502(a)(2) had been read to allow only a suit to recover on behalf on a plan).

Powell and other cases, although stated broadly, were, in fact, addressing only whether an injunction could be sought in a private suit brought under the first sentence of Section 16(b) alleging only minimum wage and overtime violations, where the statutory language only provides for unpaid wages and an equal amount of liquidated damages. Powell, 132 F.3d at 678 ("the right to bring an action for injunctive relief under the [FLSA] rests exclusively with the United States Secretary of Labor"); see also, e.g., Barrentine v. Arkansas-Best Freight Sys., Inc.,

750 F.2d 47, 51 (8th Cir. 1984), cert. denied, 471 U.S. 1054 (1985); Roberg v. Phipps Estate, 156 F.2d 958, 963 (2d Cir. 1946). Thus, Powell cannot in any way be read to have decided the question of whether injunctive relief is appropriate in the context of a claim for retaliation brought by private plaintiffs under the second sentence of Section 16(b). And while several district courts, including the court below, have addressed and come out on both sides of the issue, see Martinez v. Deaf Smith County Grain Processors, Inc., 583 F. Supp. 1200, 1209 (N.D. Tex. 1984) (private individual may pursue injunctive relief for retaliation); Bjornson v. Daido Metal U.S.A., Inc., 12 F. Supp. 2d 837, 843 (N.D. Ill. 1998) (concluding, without much analysis, that private plaintiff may not), no court of appeals has yet addressed this precise issue.

2. Even if, contrary to our argument, the Court believes that our reading is not compelled, the Secretary's view that Section 16(b) allows private plaintiffs to obtain injunctive relief where appropriate to protect employees from retaliation is certainly a reasonable one. It is consistent with both the statutory provisions and the protective purposes of the FLSA generally and the anti-retaliation provision specifically. See Avitia v. Metropolitan Club of Chicago, Inc., 924 F.2d 689, 691 n.1 (7th Cir. 1991) (noting that the issue of private party

injunctive relief, while not reached in that case, "is a significant one, and not without sensible arguments on both sides").[6] Therefore, the Secretary's interpretation of Section 16(b) is entitled to deference. See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984); BellSouth Telecomm., Inc. v. Town of Palm Beach, ____ F.3d ____, No. 99-14272, 2001 WL 567711, at *17 (11th Cir. May 25, 2001) (whether or not Chevron deference is in order, interpretation of statutory provision by administering agency warrants respect); cf. Auer v. Robbins, 519 U.S. 452, 461-463 (1997) (agency interpretation of regulation set forth in an amicus brief entitled to Chevron deference).[7]

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[6] In Avitia, the court of appeals did not reach the merits of this issue, because it held that the appellant was barred by collateral estoppel from raising it in an appeal from the district court's second denial of injunctive relief (since he did not appeal the first denial). The issue presented to this Court is thus one of first impression for the courts of appeals.

[7] The purely legal issue in this case is subject to de novo review by this Court. Snapp v. Unlimited Concepts, Inc., 208 F.3d 928, 933 (11th Cir. 2000), cert. denied, 121 S. Ct. 1609 (2001). Accordingly, the district court's contrary view is not entitled to any deference. (The Secretary did not participate in the district court proceeding, and has not previously addressed this issue by regulation or brief. Therefore, the district court did not have the benefit of the Secretary's views presented in this brief and had no occasion to consider whether they are entitled to deference even if not compelled by the plain meaning of the statute.).

CONCLUSION

The order of the district court denying appellants' motion for a preliminary injunction should be reversed and the case remanded for further proceedings on the merits of the motion.

Respectfully submitted.

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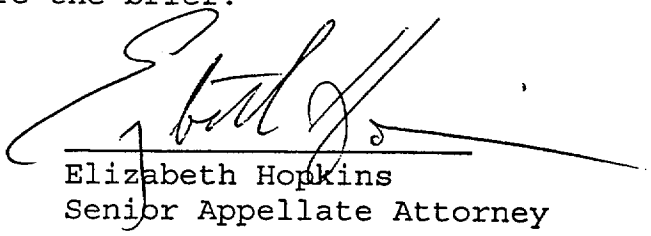
JUNE 2001

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7), I hereby certify that the Brief for the Secretary of Labor as Amicus Curiae Supporting Appellants is monospaced, has 10.5 or less characters per inch using the 12-point courier new font, and contains 4815 words as determined by the Word Perfect 8.0 word processing system used to prepare the brief.



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CERTIFICATE OF SERVICE

I certify that on this 15th day of June 2001, two copies of the foregoing Brief for the Secretary of Labor as Amicus Curiae Supporting Appellants, were served by first-class mail, postage prepaid, on the following counsel of record:

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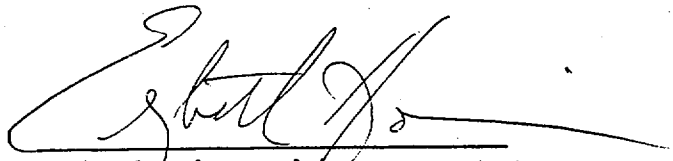

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