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The Implication of a Private Right of Action against Coercion under the Federal Employers' Liability Act

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THE IMPLICATION OF A PRIVATE RIGHT OF ACTION AGAINST COERCION UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT

Unlike other major federal labor legislation, the Federal Employers' Liability Act (FELA) lacks a statutory provision prohibiting employers' retaliatory acts against employees who resort to statutory processes and remedies. Consequently, employers' coercive tactics often discourage employees from pursuing their statutorily guaranteed rights. To prevent this impermissible chill on rights created by Congress, this Note advocates implying a private right of action under Section 51 of the FELA. Drawing from analogous federal labor legislation, the Note proposes the appropriate analytical framework under which to consider the employer's alleged coercive conduct. The Note concludes with a discussion of the possible remedies available to the aggrieved claimant.

INTRODUCTION

RAILROADING IS AN extremely hazardous occupation.[1] Statistics demonstrating a substantial decrease in the number of deaths and injuries of railroad workers since the Federal Employers' Liability Act (FELA) was enacted[2] suggest that the Act has had a favorable impact on railroad safety.[3] In Justice Douglas' words, "[t]he Federal Employers' Liability Act was designed to put on the railroad industry some of the cost for the legs, eyes, arms and lives which it consumed in its operations."[4]

Section 51 of the FELA provides:

> Every common carrier by railroad while engaging in com-

1. *See* Norton, *Federal Employers Liability Act—The Unusual Case*, TRIAL, Mar., 1978, at 42. In 1907, one year before the Federal Employers' Liability Act (FELA) was passed, 4,534 railroad employees were killed and 87,634 were injured. Lewis, *The Federal Employers Liability Act*, 14 S.C.L.Q. 447 (1962). In 1950, although more people were engaged in railroad work, only 329 were killed and 22,000 were injured. *Id.* at 447. There were 101 fatalities in 1979 and approximately 55,000 employee injuries. Federal Railroad Administration, OFFICE OF SAFETY, ACCIDENT INCIDENT BULLETIN 148 (1979) [hereinafter cited as ACCIDENT INCIDENT BULLETIN].

2. FELA, ch. 3073, 34 Stat. 232 (1906) (held unconstitutional); Second Employers' Liability Act, ch. 149, 35 Stat. 65 (1908) (current version at 45 U.S.C. §§ 51–60 (1976)).

3. Many factors in addition to the enactment of the FELA may have influenced this pattern. Most obvious are improvements in railroad equipment and the promulgation of explicit safety requirements. Comment, *The Construction of Indemnity Agreements Under the Federal Employers Liability Act: A Conflict of Public Policy and Contract Law*, 38 MD. L. REV. 71, 102 (1978). The increase in injuries may be due in part to the increase in manhours worked, train miles operated, and the biannual adjustment of the dollar threshold used to determine which accidents must be reported, which does not track the rate of inflation. *See* ACCIDENT INCIDENT BULLETIN, *supra* note 1.

4. Wilkerson v. McCarthy, 336 U.S. 53, 68 (1949) (Douglas, J., concurring).

> merce between any of the several states . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to negligence, in its cars, engines, appliances, machinery, track, roadbed . . . or other equipment.[5]

Thus, section 51 of the FELA promotes safety by awarding damages to negligently injured workers.[6]

The courts provide the only forum empowered to enforce the respective rights of the employer and employee under the FELA.[7] Employees rarely litigate FELA claims, however, because the courts present many barriers.[8] Most claims, therefore, are settled through a bargaining process removed from the act's spirit.[9] Threats, coercion, and economic pressure constitute important factors in the "adjustment" of many claims.[10]

Sections 55 and 60 of the FELA guard against potential employer abuses in settling employee claims. Section 60 proscribes disciplining an employee for voluntarily furnishing information in FELA cases.[11] Section 55 prohibits contractual exemption from FELA liability: "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from liability created by this act, shall to that extent be void . . . ."[12] While section 55 is susceptible to expansive interpretation by construing the word "device" broadly,[13] the courts have held uniformly that the application of section 55 is limited to actual contracts or releases.[14] Abusive con-

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5. 45 U.S.C. § 51 (1976).

6. Kozar v. Chesapeake & Ohio Ry., 320 F. Supp. 335, 387 (W.D. Mich. 1970), *aff'd in part and vacated in part*, 449 F.2d 1238 (6th Cir. 1971).

7. Pollack, *The Crisis In Work Injury Compensation On and Off the Railroads*, 18 LAW & CONTEMP. PROBS. 296, 305 (1953).

8. *Id.* Employees, for example, may fear that filing suit will jeopardize job tenure. Moreover, fellow employees who could serve as witnesses often share the same concern. *Id.*

9. *Id.* at 306.

10. *Id.*

11. 45 U.S.C. § 60 (1976).

12. *Id.* § 55.

13. Comment, *supra* note 3, at 99.

14. *See, e.g.*, Kozar v. Chesapeake & Ohio Ry., 320 F. Supp. 335, 383–85 (W.D. Mich. 1970), *aff'd in part and vacated in part*, 449 F.2d 1238 (6th Cir. 1971); Richter & Forer, *Federal Employers' Liability Act*, 12 F.R.D. 13, 53 (1952).

duct designed to defeat just claims of employees, therefore, goes unchecked when the railroad's efforts fail to produce an actual agreement. The result is an impermissible chill on congressionally created rights.[15]

This Note examines three federal acts which protect human rights in the employment context.[16] Each act contains a provision prohibiting retaliatory acts against employees who resort to statutory processes and remedies.[17] The FELA contains no such prohibition. Without this prohibition, the right to file a FELA claim is threatened because claimants can be harassed or even discharged if they pursue their statutory remedy.

This Note demonstrates that coercion by railroads against their injured employees may be actionable by implying a private right of action against such tactics under section 51 of the FELA.[18] Drawing from the analogous federal acts which statutorily proscribe employer retaliation against claimants, the Note suggests the appropriate analytical framework under which to consider the employer's alleged coercive activities once a right of action is established.[19] Finally, the Note suggests possible remedies available to such claimants.[20]

I. THE FEDERAL EMPLOYERS' LIABILITY ACT

Congress passed the initial FELA in 1906[21] "to equalize the positions of the employee and carrier before the law."[22] This act

15. *See* Kozar v. Chesapeake & Ohio Ry., 320 F. Supp. at 385.

16. *See infra* notes 79–113 and accompanying text.

17. These acts are the Civil Rights Act, § 704(a), 42 U.S.C. § 2000e-3(a) (1976); National Labor Relations Act (NLRA), § 8(a)(4), 29 U.S.C. § 158(a)(4) (1976); Fair Labor Standards Act, § 15(a)(3), 29 U.S.C. § 215(a)(3) (1976). For an explanation of the purpose of these sections see Mitchell v. DeMario Jewelry Inc., 361 U.S. 288, 292 (1960); NLRB v. Schill Steel Prods., Inc., 480 F.2d 586, 594 (5th Cir. 1973); NLRB v. J.P. Stevens & Co., 464 F.2d 1326, 1348 (2d Cir. 1972); Pettway v. American Cast Iron Pipe Co., 411 F.2d 998, 1005 (5th Cir. 1969).

18. *See infra* notes 126–32 and accompanying text.

19. *See infra* notes 152–66 and accompanying text.

20. *See infra* notes 167–81 and accompanying text.

21. FELA, ch. 3073, 34 Stat. 232 (1906).

22. Richter & Forer, *supra* note 14, at 57. Following passage of the Act, one of its authors, Edward A. Moseley, became concerned about a forthcoming campaign against the Act by railroad lawyers. Griffith, *The Vindication of a National Public Policy Under the Federal Employers' Liabilty Act*, 18 LAW & CONTEMP. PROBS. 160, 170 (1953). Mr. Moseley requested the intervention of the Justice Department on behalf of the legislation. *Id.* In announcing the government's decision to intervene in defense of the law, Mr. Moseley stated:

> I regard this action as one of the most important events in the interest of labor that has ever occurred. Were railway employees, who seek to obtain damages for

abolished the "fellow servant" rule and modified the "contributory negligence" rule which often insulated the railroad from liability arising from unsafe working conditions.[23] The law was applicable to all railroad employees engaged in interstate commerce, without regard to whether the particular employee was engaged in interstate commerce at the time of injury.[24] The Supreme Court almost immediately held the law unconstitutional because it interfered with the powers reserved to the states.[25]

President Theodore Roosevelt urged the adoption of a second FELA to correct the common law's manifest unfairness in meeting the injured worker's needs.[26] The president declared, "The practice of putting the entire burden of loss of life or limb upon the victim or victim's family is a form of social injustice in which the United States stands in unenviable prominence."[27] The Supreme Court upheld the act's constitutionality in the *Second Employers' Liability Cases*.[28] These legislative efforts yield a singularly important conclusion—the FELA was designed to promote adequate

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injuries received, left to their own resources there is no question that the benefits which this law seeks to confer upon them would be neutralized or entirely destroyed by the action of the courts.

The railroad companies have the strongest array of legal talent in the country, and *this talent will all be directed toward defeating the ends of any such law as this*. No private individual can hope to cope with such power; it will be impossible for any railway employee, who invokes the aid of this law, to employ attorneys who can successfully meet the arguments of counsel for the railroad companies. But with the resources of the Department of Justice placed at his command, in order to protect the integrity of the law, *the railway employee is placed on a plane of practical equality with the railway company, and he is thus insured a square deal.*

Id. at 171 (emphasis added) (quoting J. MORGAN, THE LIFE WORK OF EDWARD A. MOSELEY IN THE SERVICE OF HUMANITY 110 (1913)).

23. *See* Wilkerson v. McCarthy, 336 U.S. 53, 68 (1949) (Douglas, J., concurring). The "fellow servant" doctrine absolves an employer from liability to an employee whose injuries resulted from the negligence of other employees engaged in the same general type of work. *See, e.g.*, New England Ry. Co. v. Conroy, 175 U.S. 323 (1899). Contributory negligence on the part of a plaintiff bars recovery for his or her injuries or death. *See* Brakensiek v. Nickles, 216 Ark. 889, 227 S.W.2d 948 (1950). Under the FELA, contributory negligence serves only to diminish the damages in proportion to the amount of negligence attributable to the employee. *See* Lewis, *supra* note 1, at 451. Assumption of the risk, whereby an employee assumes the ordinary risks incident to his or her employment, was eliminated by the 1939 amendments to the Act. Act of Aug. 11, 1939, Pub. L. No. 76-382, § 1, 53 Stat. 1404 (codified at 45 U.S.C. § 54 (1976)).

24. Miller, *The Quest for a Federal Workmen's Compensation Law for Railroad Employees*, 18 LAW & CONTEMP. PROBS. 188, 189 (1953).

25. The Employers' Liability Cases, 207 U.S. 463 (1908). *See* Miller *supra* note 24, at 189.

26. Richter & Forer, *supra* note 14, at 15.

27. 42 CONG. REC. 73 (1907).

28. 223 U.S. 1 (1911) (Congress may regulate relations between common carriers by railway and their employees only while *both* are engaged in interstate commerce).

recovery for negligently injured railroad workers, thus promoting safe operating conditions.[29]

An employee seeking relief under the FELA today must be engaged in work which relates to interstate commerce.[30] Prior to 1939, the courts found it difficult to separate the duties of employees and classify them as either interstate or intrastate.[31] This difficulty was ameliorated by an amendment to the FELA in 1939 which broadened the act to include all activities which further or directly or closely and substantially affect interstate commerce.[32] Thus, if the task performed by the employee at the time of the injury is regarded as part of interstate commerce, the FELA provides the exclusive remedy.[33]

In defining an interstate carrier's liability, the FELA requires that the employee's injury or death result in whole or part from the carrier's negligence.[34] The act imposes a continuing nondelegable duty on railroad companies to furnish a safe workplace for its employees[35]—a duty which becomes more imperative as the risk increases.[36] This duty is not narrowly confined but extends to any defect that makes the workplace unsafe.[37] Failure to provide a

29. *See* Kozar v. Chesapeake & Ohio Ry., 320 F. Supp. at 387.

30. 45 U.S.C. § 51 (1976).

31. W. PROSSER, LAW OF TORTS 535 (4th ed. 1971).

32. Act of Aug. 11, 1939, Pub. L. No. 76-382, 53 Stat. 1404 (codified at 45 U.S.C. §§ 51, 54, 56, 60); W. PROSSER, *supra* note 31, at 535; *see* Reed v. Pennsylvania R.R., 351 U.S. 502 (1956). *Reed* involved a woman who worked in an office building whose duties consisted of filing and recovering original tracings of machinery from which blueprints were made. She was injured when a cracked window pane blew in during a high wind. Her work was held to be in furtherance of interstate commerce, and she recovered under the FELA. After *Reed*, it appears that all railroad employees are covered under the FELA. One commentator noted, "Implicit . . . in *Reed* is the assumption that if an employee's duties did not bear a close and substantial relation to the interstate transportation of goods, *the railroad would not have hired him*." Norton, *supra* note 1, at 44 (emphasis added). *See also* Southern Pac. Co. v. Gileo, 351 U.S. 493 (1956) (railroad employee, injured in railroad yard opened to interstate commerce four months after the accident, covered by the FELA); Lillie v. Thompson, 332 U.S. 459 (1947) (complaint which alleged that the circumstances of the railroad employee's work created likelihood that she would suffer injuries through the criminal acts of a nonrailroad employee and that the railroad employer failed to protect employee stated an FELA cause of action).

33. Since Congress had occupied the field, the FELA operates to the exclusion of all state remedies. New York Cent. R.R. v. Winfield, 244 U.S. 147, 149 (1917); W. PROSSER, *supra* note 31, at 535. If a plaintiff chooses to bring an FELA suit in a state court rather than in federal court pursuant to 45 U.S.C. § 56 (the jurisdiction of the federal courts is concurrent with that of the several states), the state court must apply federal law. *See* Urie v. Thompson, 337 U.S. 163 (1949); Chesapeake & O.R. Co. v. Kuhn, 284 U.S. 44 (1931).

34. 45 U.S.C. § 51 (1976).

35. *See* Lewis, *supra* note 1, at 449.

36. Bailey v. Central Vt. Ry., 319 U.S. 350 (1943).

37. This duty follows wherever the employee is sent to work, whether on the com-

safe workplace, therefore, is probably the most common ground for proving negligence in an FELA case.[38]

Exceptions to the requirement of showing negligence exist where the employee can identify some violation of the Safety Appliance Acts[39] or the Boiler Inspection Act.[40] These acts impose absolute and mandatory duties on the carrier to maintain equipment in a prescribed condition.[41] A violation of either the Safety Appliance Acts or the Boiler Inspection Act is unlawful and subjects the offending carrier to a fine.[42] Violation of these statutes does not create a cause of action for the injured employee; rather, the right to sue the carrier is found in the FELA.[43] Since the duty imposed by these acts is absolute, the FELA claimant establishes a case by showing that the defective appliance subject to the Safety Appliance Acts or the Boiler Inspection Act caused injury "in whole or part."[44]

The common law concept of proximate cause is displaced in FELA actions by the concept of causal connection.[45] Since the adoption of the 1939 amendments, the courts have construed the causal relation requirement liberally.[46] Following a series of decisions in which the question of the railroad's negligence went to the jury based on circumstantial or sketchy evidence,[47] the Supreme

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pany's premises or not, and whether the employer has control of the premises or not. Lewis, *supra* note 1, at 449. For a review of cases construing the duty to provide a safe place to work, see Funkhauser, *What is a Safe Place to Work Under the F.E.L.A.*, 17 OHIO ST. L.J. 367 (1956).

38. *See* Funkhauser, *supra* note 41, at 33.

39. 45 U.S.C. §§ 1–16 (1976).

40. *Id.* §§ 22–34.

41. *See* Lewis, *supra* note 1, at 452–55; Richter & Forer, *supra* note 14, at 40–48.

42. *See* 45 U.S.C. §§ 13, 34 (1976).

43. *See* Jacobson v. New York, N.H. & Hartford R.R., 206 F.2d 153 (1st Cir. 1953); *aff'd per curiam*, 347 U.S. 909 (1954); Moore v. Chesapeake & Ohio Ry., 291 U.S. 205 (1934); Lewis, *supra* note 1, at 452.

44. Kernan v. American Dredging Co., 355 U.S. 426, 432 (1957). Common law refinements of proximate cause need not be satisfied. It is necessary only to show that the appliance failed to properly function when used in the usual and ordinary manner. *See* Myers v. Reading Co., 331 U.S. 477, 482–83 (1947) (test is the performance of the appliance); Lewis, *supra* note 1, at 453.

45. *See, e.g.*, Webb v. Illinois Cent. Ry., 352 U.S. 512, 521 (1957); Arnold v. Panhandle & Santa Fe Ry., 353 U.S. 360 (1957); Thomson v. Texas & Pac. Ry., 353 U.S. 926 (1957).

46. *See* Steinberg, *The Federal Employers' Liability Act and Judicial Activism: Policymaking by the Courts*, 12 WILLAMETTE L.J. 79, 85 (1975).

47. Tennant v. Peoria & Pekin Union Ry., 321 U.S. 29 (1944); Bailey v. Central Vt. Ry., 319 U.S. 350 (1943); Hayes v. Wabash R.R. Co., 360 Mo. 1223, 233 S.W.2d 12 (1950); Sadowski v. Long Island R.R. Co., 292 N.Y. 448, 55 N.E.2d 497 (1944). *See* W. PROSSER, *supra* note 31, at 536.

Court ruled that causal connection is shown in a FELA case when "the proofs justify with reason the conclusion that employer negligence played *any part, even the slightest*, in producing the injury or death for which damages are sought."[48]

Some critics contend that this interpretation has transformed the FELA into a workers' compensation statute.[49] The Supreme Court confronted this argument in *Wilkerson v. McCarthy*[50] and stated that the FELA "does not make the railroad an absolute insurer against personal injury damages suffered by its employees . . . since the Act imposes liability only for negligent injuries."[51] While the courts have reduced the extent of negligence required in an ordinary common law negligence action, as well as the quantum of proof necessary to establish that negligence, there must be some shred of negligence and causation;[52] "[s]peculation, conjecture and possibilities"[53] will be insufficient.

Benefits under the FELA accrue only to those workers or their beneficiaries who successfully invoke its provisions.[54] Unfortunately, many factors have discouraged resort to FELA relief.[55] According to one commentator, most employees are apprehensive about "starting trouble" with the railroad, fearing that initiating court proceedings against the employer will jeopardize their fu-

48. Rogers v. Missouri Pac. R.R., 352 U.S. 500, 506 (1957) (emphasis added). The rationale for the Court's liberal approach, which culminated in the *Rogers* test, was based largely on the humanitarian and remedial nature of the FELA. "This statute . . . was a response to the special needs of railroad workers who are daily exposed to the risks inherent in railroad work and are helpless to provide adequately for their own safety." Sinkler v. Missouri Pac. R.R., 356 U.S. 326, 329 (1958). The Court recognized that the amounts railroads pay to injured employees might be passed on to the public as a cost of doing business. The Court, therefore, concluded that the equities of the situation demanded that the employee collect if he or she could prove that employer negligence played any role in the injury. *Id.* at 329–30. *See* Steinberg, *supra* note 46, at 82–85.

49. Note, *Supreme Court Certiorari Policy in Cases Arising Under FELA*, 69 HARV. L. REV. 1441, 1447–50 (1956); Note, *Federal Employers' Liability Act: Apostasy of Sufficiency of Evidence Policy*, 42 MISS. L.J. 418, 423 (1971); Comment, *The Federal Employers' Liability Act—A Plea for Reform*, 14 ST. LOUIS U.L.J. 112, 113 (1969) (concluding that the Court has modernized the FELA in the direction of strict liability); Comment, *Federal Employers' Liability Act—Certiorari Practice—Review of the Sufficiency of Evidence*, 6 VILL. L. REV. 549, 557 (1961).

50. 336 U.S. 53 (1949).

51. *Id.* at 61.

52. W. PROSSER, *supra* note 31, at 536.

53. Elgin, Joliet & E. Ry. v. Gibson, 355 U.S. 897 (1957) (Frankfurter, J., memorandum opinion denying cert.).

54. *See* Griffith, *supra* note 22, at 170.

55. *See id.* at 170–72; Pollack, *Workmen's Compensation for Work Injuries and Diseases*, 36 CORNELL L.Q. 236, 240–41 (1950).

ture employment.[56] This fear of retaliatory discharge renders many employees vulnerable to employer coercion.[57]

Thus, FELA claims are settled out-of-court[58]—a process that was not contemplated by the act's framers.[59] The claimant in this settlement process acts alone or with the occasional assistance of a trade union official[60] and often faces the financial impact of interrupted or severed income.[61] The employer, however, is represented by an experienced claim agent with access to vastly greater resources with which to process the case.[62] Consequently, equitable payments typically do not result from out-of-court negotiations. Moreover, confronting a period of interrupted income, uncertainty, and anxiety about the future, employees may prefer insufficient payments to the delays and uncertainties of litiga-

56. Pollack, *supra* note 55, at 240. *See also* RAILROAD RETIREMENT BOARD, WORK INJURIES IN THE RAILROAD INDUSTRY, 1938–40 (1947). Despite many assurances and safeguards, the Railroad Retirement Board found a widespread belief among injured employees that to bring a claim to court is to invite dismissal. This threat is used frequently by railroad claim agents in dissuading employees from filing suit or even engaging an attorney. Moreover, confirmation that actual practice justified such fears was demonstrated statistically in an analysis of actual returns to work in relation to whether an attorney had been hired or the case brought to court.

Other employer sanctions, short of discharge, for "starting trouble" include reduced compensation, unfavorable work assignments, inconvenient and frequent transfers, or foreclosure from advancement. *See* Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1406 (1967). Such harrassment may be aggravated to a point where it is the practical equivalent of discharge. *Id.*

57. Blades, *supra* note 56, at 1406. As a nation of employees, "[w]e are dependent upon others for our means of livelihood, and most of our people have become completely dependent upon wages. If they lose their jobs they lose every resource . . . . *For our generation, the substance of Life is in another man's hands.*" *Id.* at 1404 (quoting F. TANNENBAUM, A PHILOSOPHY OF LABOR 9 (1951) (emphasis added)).

58. One study found that only two percent of all FELA claims were actually litigated. Conrad, *Workmen's Compensation: Is It More Efficient Than Employer's Liability?*, 38 A.B.A.J. 1011, 1014 (1952). Furthermore, the courts passed judgment on only a fraction of those cases. *Id.*

59. *See* Pollack, *supra* note 55, at 237, 242–45. The entire purpose of the Act was to equalize the positions of the employee and carrier before the law. *See supra* note 22.

60. Pollack, *supra* note 7, at 306.

61. *See, e.g.*, Apitsch v. Patapsco & Back Rivers R.R., 385 F. Supp. 495 (D. Md. 1974).

62. Pollack, *supra* note 7, at 306. Persuasion, threats, and misrepresentations are important factors in the "adjustment" of many claims. Offers to employees are often coupled with a maximum of pressure to secure their acceptance. *Id. See, e.g.*, Apitsch v. Patapsco & Back Rivers R.R., 385 F. Supp. at 498 (railroad company had systematically solicited defective releases and agreements from injured employees for many years); Kozar v. Chesapeake & Ohio Ry., 320 F. Supp. 335, 387 (W.D. Mich. 1970) (noting that coercive tactics applied to claimant were part of management policy) *aff'd in part and vacated in part*, 449 F.2d 1238 (6th Cir. 1971).

tion.[63] Payments under FELA are thus comparatively low when contrasted with payments from non-FELA settlements over a given time period.[64]

Sections 55 and 60 guard against employer abuses in the settlement process.[65] Railroad employees theoretically are protected against economic coercion by section 55 which provides that "[a]ny contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void . . . ."[66] Section 55, therefore, voids releases or other exculpatory devices procured in an attempt to evade FELA liability.[67] Section 55, however, does not bar a valid release used in settling a liability claim.[68] Nevertheless, such releases are closely scrutinized by the courts since the release operates as a waiver of a federally created right.[69]

In practice, section 55 falls short of its guarantee against employer coercion. When an employer exempts itself from full liability by less tangible means than an actual contract or release, courts may not recognize that the forbidden end was achieved.[70] Even if such a settlement were recognized as a section 55 device,[71]

63. Pollack, *supra* note 7, at 307. *See, e.g.*, Apitsch v. Patapsco & Back Rivers R.R., 385 F. Supp. at 499.

64. Pollack, *supra* note 7, at 311.

65. See cases cited in *supra* note 62 for examples of such employer abuse. *See, e.g.*, Hendley v. Central of Ga. R.R., 609 F.2d 1146 (5th Cir. 1980) (disciplinary procedure to determine whether employee was guilty of disloyalty in connection with assisting co-employee in FELA suit held violative of § 60).

66. 45 U.S.C. § 55 (1976).

67. *See* Kozar v. Chesapeake & Ohio Ry., 320 F. Supp. at 384–85; 42 CONG. REC. 4527 (1908).

68. *See* Callen v. Pennsylvania R.R., 332 U.S. 625, 631 (1948).

69. *See* South Buff. Ry. v. Ahern, 344 U.S. 367 (1953).

70. Richter & Forer, *supra* note 14, at 53. *See, e.g.*, Callen v. Pennsylvania R.R., 332 U.S. 625 (1948) (release of claims against the railroad held to be a compromise and not a contract of exemption). The district court noted in Kozar v. Chesapeake & Ohio Ry., 320 F. Supp. 335 (W.D. Mich. 1970): "[The facts indicated] a strong probability that, from the moment of [Mr. Kozar's] death, his employer adopted some rather primitive means in an attempt to defeat the just claim of his widow . . . ." *Id.* at 383. The court went on to note that "had the railroad's efforts in this case produced an agreement or release by Mrs. Kozar, the . . . facts argue strongly against its survival under Section 55." *Id.* at 385.

71. In the workers' compensation area, the word "device" has been construed to include coercive conduct. *See, e.g.*, Frampton v. Central Ind. Gas. Co., 260 Ind. 249, 297 N.E.2d 425 (1973), where the court held that the threat of discharge was a device within the statutory prohibition against a contract, agreement, rule, regulation, or other device relieving an employer of its obligation to compensate an eligible employee. The court found a threat of discharge in clear contravention of public policy, because failure to construe "device" in this manner would be equivalent to "arming unethical employers with common

section 55 merely would void the coerced settlement. Section 55 would not award consequential or punitive damages.[72] This inadequacy indicates the need for an implied private right of action against employer coercion under section 51 to insure that FELA claimants will not be deprived unjustly of their section 51 remedy.

Beyond section 55's protection, section 60 prevents a railroad from interfering with employees who give information to a claimant concerning the facts incident to the injury or death of any employee.[73] Section 60 imposes a penalty on any person who attempts by contract, rule, regulation, threats, or intimidation to prevent a person from voluntarily giving such information.[74] This section's purpose is to enable claimants to obtain all available information from witnesses, especially railroad employees.[75] Railroad employees who consider testifying in a FELA case understandably would hesitate to testify in the face of employer-imposed sanctions and threatened job security.[76]

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law authority." *Id.* at 252, 297 N.E.2d at 428. Noting the well established tradition of liberally construing the Workers' Compensation Act, the court stated:

> The Act creates a *duty* in the employer to compensate employees for work-related injuries . . . and a *right* in the employee to receive such compensation. But in order for the goals of the Act to be realized and for the public policy to be effectuated, the employee must be able to exercise his right in an unfettered fashion without being subject to reprisal. If employers are permitted to penalize employees for filing workmen's compensation claims, a most important public policy will be undermined. The fear of being discharged would have a deleterious effect on the exercise of a statutory right. Employees will not file claims for justly deserved compensation—opting, instead, to continue their employment without incident. The end result, of course, is that the employer is effectively relieved of his obligation.

Id. at 251–52, 297 N.E.2d at 427. Because the purpose underlying both Workers' Compensation and the FELA is to promote compensation for work related injuries, *Frampton* lends support to the conclusion that employer coercion, intimidation, and economic pressure constitute a device within the framework of FELA § 55.

72. The Supreme Court, in Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979), construed Congress' declaration in § 215 of the Investment Advisors Act of 1940, 15 U.S.C. § 80b–15 (1976), that certain contracts are void, to intend the customary legal incidents of voidness to follow, including the remedies of recission, injunctive relief, and restitution. 444 U.S. at 19. FELA claimants have contended, however, that § 55 also provides a private cause of action for damages to an employee victimized by § 55 devices. Every court to address this contention has failed to imply such a cause of action. *See* Bay v. Western Pac. R.R., 595 F.2d 514, 515 (9th Cir. 1979); Fullerton v. Monongahela Connecting R.R., 242 F. Supp. 622, 624 (W.D. Pa. 1965); Greenwood v. Achison, Topeka & Santa Fe Ry., 129 F. Supp. 105, 107 (S.D. Cal. 1955).

73. Hendley v. Central of Ga. R.R., 609 F.2d 1146, 1150–51 (5th Cir. 1980).

74. A $1,000 fine and/or one year imprisonment are the penalties for discharging or disciplining an employee who voluntarily furnishes information. 45 U.S.C. § 60 (1976). *Cf.* Kozar v. Chesapeake & Ohio Ry. Co., 320 F. Supp. at 370 n.17 (§ 60 violations can be remedied through the criminal process or in an action for equitable relief).

75. Dugger v. Baltimore & O. R.R., 5 F.R.D. 334, 336 (E.D.N.Y. 1946).

76. *See* Hendley v. Central of Ga. R.R., 609 F.2d 1146 (5th Cir. 1980) (disciplinary

Although the drafters of section 60 realized the danger of direct coercion against railroad employees who testify in a FELA action, they apparently failed to recognize this danger regarding FELA claimants. The undisputed pressures applied to witnesses by an aggressive and powerful railroad company seeking to defeat the claims of injured employees presumably would be directed against the actual claimant. This anomaly, like the inadequacy within section 55, could be corrected by affording FELA claimants relief under section 51 when coercive settlement tactics are applied by the railroads in an attempt to affect an early and inequitable settlement.

II. FEDERAL LAWS WHICH PROSCRIBE RETALIATORY CONDUCT

The courts and legislatures repeatedly have recognized that threats, coercion, economic pressure, and retaliatory conduct are illegal if they chill rights created by Congress.[77] Although the framers of the FELA did not implement a cause of action to protect employees from coercive tactics designed to discourage resort to FELA remedies, subsequent legislative enactments and judicial decisions indicate the need for such an action to insure the uninhibited exercise of the federally created rights.[78]

Within the employment context, Congress has recognized the need to prohibit acts of retaliation against employees who resort to statutory processes and remedies. Section 704(a) of the Civil

investigation to determine whether employee was guilty of disloyalty for allegedly assisting a co-employee in a personal injury suit against the railroad violated § 60). In *Kozar*, the district court recognized the intimidating effect of a railroad's exercise of power against an FELA witness:

> [R]ailroad employees are subject to considerable pressure if called to give testimony against their employer. This pressure need not be the result of direct threats of arm-twisting; it is not necessarily the object of deliberate railroad policy. But whether by design or accident, the fact remains that these working men, through numerous contacts with supervisors and claim agents during the discovery process, often believe that a wrong step—defined by railroad rules (real or apparent) and interpreted by railroad officials—may result in sanctions, and that wrong testimony—potentially costing the railroad large amounts of money—might arouse the displeasure of those in control of their livelihood. The tremendous power of a corporation like the Chesapeake and Ohio Railroad, coupled with its aggressive efforts to defeat the claims of those injured by its activities—even when the victims are their most valuable employees—can overawe and even cower those individuals upon whom an opposing party must rely to substantiate his claim.

320 F. Supp. at 369–70 (footnote omitted).

77. *See, e.g.*, Hendley v. Central of Ga. R.R., 442 F. Supp. 482 (D.C. Ga. 1977), *rev'd on other grounds*, 609 F.2d (5th Cir. 1980), *reh'g denied*, 614 F.2d 294 (5th Cir. 1980), *cert. denied*, 449 U.S. 815 (1981).

78. *See infra* notes 79–102 and accompanying text.

Rights Act of 1964,[79] section 8(a)(4) of the National Labor Relations Act (NLRA),[80] and section 15(a)(3) of the Fair Labor Standards Act (FLSA)[81] guarantee freedom from reprisal to persons who invoke the aid of a federal agency.[82] Thus, the integrity of the particular administrative process created by Congress is preserved.

Section 704(a) of the Civil Rights Act provides: "It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because [the employee] has opposed any practice made an unlawful employment practice by this subchapter, or because [the employee] has made a charge . . . or participated . . . in an investigation, [or] proceeding . . . under this subchapter."[83] NLRA section 8(a)(4) declares that "[i]t shall be an unfair labor practice for an employer . . . to discharge or

79. Civil Rights Act § 704(a), 42 U.S.C. § 2000e-3(a) (1976). The Civil Rights Act creates the right to be free from discrimination in employment based on race, sex, color, religion, or national origin. The Act established the Equal Employment Opportunity Commission (EEOC) which assists aggrieved persons through conciliation or other remedial action. An aggrieved person may, however, commence a civil action if he or she is unable to obtain voluntary compliance with the law. 42 U.S.C. § 2000e (1976). For a summary of the procedures under Title VII of the Civil Rights Act, see *infra* notes 94–98 and accompanying text.

80. NLRA § 8(a)(4), 29 U.S.C. § 158(a)(4) (1976). The NLRA is the primary source of federal law governing labor-management relations in private industry. The basic NLRA principles are found in § 7, which grants employees the right to form labor organizations, to deal collectively through such organizations regarding terms and conditions of employment, and to engage in concerted activities in support of these rights. Unfair labor practices—certain acts committed by an employer or labor organization which interfere with § 7 rights—are monitored through quasi-judicial proceedings before the National Labor Relations Board. R. GORMAN, BASIC TEXT ON LABOR LAW—UNIONIZATION AND COLLECTIVE BARGAINING 1–3 (1976).

81. 29 U.S.C. § 215(a)(3) (1976). The Fair Labor Standards Act was aimed at eliminating labor conditions detrimental to the maintenance of a minimum standard of living by regulating wages and hours. Responsibility for its administration is placed with various agencies, as well as with the courts. *See, e.g.*, Goldberg v. Bama Mfg. Corp., 302 F.2d 152 (5th Cir. 1962) (held that plaintiff had been discriminutorily discharged but was not entitled to reinstatement although damages could be awarded by lower court in lieu of reinstatement); *see infra* notes 99–102 and accompanying text.

82. In express terms, these statutes prohibit employer discrimination against an employee who files a charge. The term "employee," however, is not limited to individuals standing in a present employer-employee relationship. "Employees" include former employees, employees of another employer, and job applicants. An employer who refuses to hire a job applicant because of the applicant's affiliation with a labor union is guilty of an unfair labor practice. Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941). The use of racial coding for job applications discriminates against black applicants and violates Title VII of the Civil Rights Act. EEOC v. Detroit Edison Co., 515 F.2d 301 (6th Cir. 1975). *Cf.* 3 FRES 21:166–21:253. Provisions of the FLSA protect only those individuals employed by an employer.

83. 42 U.S.C. § 2000e-3(a) (1976).

otherwise discriminate against an employee because [the employee] has filed charges or given testimony under this subchapter."[84] Section 15(a)(3) of the FLSA states:

> it shall be unlawful for any person . . . to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted . . . any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding or has served or is about to serve on an industry committee.[85]

According to the Supreme Court, the objective of NLRA section 8(a)(4) is "to prevent the [National Labor Relations] Board's channels of information from being dried up by employer intimidation of prospective complainants and witnesses."[86] Failure to give full effect to the section would thwart the congressional design for "implementation of this country's labor policies."[87] Similarly, section 704(a) of the Civil Rights Act proscribes retaliation and reprisal so that fear of discrimination or discharge will not prevent an employee from filing a charge with the Equal Employment Opportunity Commission (EEOC).[88] Congress intended that persons filing charges with the EEOC be free from retaliation, "both to secure the rights of the charging party and to avoid chilling the actions of others who might sue to implement the guarantees of the Act."[89] Section 15(a)(3) of the FLSA also was designed to obviate employees' fears of economic retaliation which might induce them to accept substandard employment con-

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84. 29 U.S.C. § 158(a)(4) (1976).

85. *Id.* § 215(a)(3) (1976).

86. NLRB v. Schrivener, 405 U.S. 117, 122 (1972).

87. Nash v. Florida Indus. Comm'n, 389 U.S. 235, 239 (1967). For a thorough discussion of § 8(a)(4), see R. GORMAN, *supra* note 80, at 142-43.

88. *See* Mead v. United State Fidelity & Guar. Co., 442 F. Supp. 114 (D. Minn. 1977). In Mitchell v. DeMario Jewelry, Inc., 361 U.S. 288 (1960), the Court described the problem:

> [T]he value of such an [employee's] effort [in filing a complaint] may pale when set against the prospect of discharge and the total loss of wages for the indeterminate period necessary to seek and obtain reinstatement. Resort to statutory remedies might thus often take on the character of a calculated risk, with restitution of partial deficiencies in wages due for past work perhaps obtainable only at the cost of irremediable entire loss of pay for an unpredictable period. Faced with such alternatives, employees understandably might decide that matters had best be left as they are. We cannot read the Act as presenting those it sought to protect with what is little more than a Hobson's choice.

Id. at 292–93. *Accord* NLRB v. Schill Steel Prod., Inc., 480 F.2d 586, 594 (5th Cir. 1973); NLRB v. J.P. Stevens & Co., 464 F.2d 1326, 1348 (2d Cir.), *cert. denied*, 410 U.S. 926 (1972).

89. Mead v. United States Fidelity & Guar. Co., 442 F. Supp. 114, 132 (D. Minn. 1977).

ditions in violation of the Act.[90]

Enforcement mechanisms for the three nondiscrimination provisions vary. A NLRA section 8(a)(4) charge is initiated by filing a claim in the office for the region in which the alleged wrongdoing occurred.[91] The Board, in its discretion, may decline to exercise its full statutory and constitutional jurisdiction.[92] If the Board declines to exercise its jurisdiction, state agencies and courts are permitted to assume jurisdiction.[93]

Under Title VII of the Civil Rights Act, an aggrieved person may file a charge with the EEOC.[94] The Commission then investigates the charge to determine whether there is reasonable cause to believe that the charge is true.[95] If reasonable cause exists, informal conciliation is initiated to remedy the alleged unlawful practice.[96] Failure to secure an acceptable conciliation agreement allows the Commission to bring suit in federal district court.[97] If a charge is dismissed by the Commission, the Commission does not

90. Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288 (1960). Compliance with the FLSA is dependent upon the information and complaints of employees seeking to vindicate their rights, rather than on detailed federal supervision. *Id.* Effective information could only be expected if employees felt free to approach officials without fear of reprisal or discrimination. *Id.*

91. R. GORMAN, *supra* note 80, at 7. The NLRB is prohibited from initiating its own proceedings. Thus, implementation of the NLRA is dependent upon the initiative of individuals. NLRB v. Industrial Union of Marine & Shipbuilding Workers, 391 U.S. 418 (1968).

92. Congress vested the NLRB with the fullest jurisdictional breadth constitutionally permissible under the commerce clause. NLRB v. Reliance Fuel Corp., 371 U.S. 224, 226 (1963). The Board has chosen not to exercise its power to its constitutional limit. *Id.* Otherwise, its caseload would be unmanageable and attention would be diverted from the more significant cases. *See* R. GORMAN, *supra* note 80, at 22. In 1959, Congress recognized the Board's practice of limiting its caseload by enacting what is now codified at 29 U.S.C. 164(c)(1) (1976). Act of Sept. 14, 1959, Pub. L. No. 86-257, § 701(a), 73 Stat. 519, 541. This statute provides that: "[t]he Board, in its discretion, may, by rule of decision or by published rules . . . decline to assert jurisdiction over any labor dispute . . . where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction . . . ." The published jurisdictional standards refer to minimum dollar amounts established by the Board.

Absent constitutional and statutory jurisdiction, the Board may assert jurisdiction over an employer who has violated § 8(a)(4), since public policy requires that the Board exercise jurisdiction, when an individual alleges interference with his or her statutory right to resort to NLRB processes. International Ass'n of Bridge, Structural & Ornamental Iron Workers, 199 N.L.R.B. 37 (1972).

93. 29 U.S.C. § 164(c)(2) (1976).

94. Members of the Commission also may initiate charges themselves. 42 U.S.C. § 2000e-5(b) (1976).

95. *Id.*

96. *Id.*

97. *Id.* § 2000e-5(f)(1).

file suit, or if an aggrieved party is dissatisfied with the pace of the EEOC proceedings, the aggrieved party may file a private civil action after receipt of a "right to sue" notice from the EEOC.[98]

Under the Fair Labor Standards Act, the Secretary of Labor is authorized to bring an action to recover unpaid minimum wages or overtime compensation.[99] This action may be brought without an employee filing a written request[100] and without joining as plaintiff the employees on whose behalf suit is filed.[101] Unlike its counterparts in the NLRA and Civil Rights Act, the FLSA expressly gives private individuals the right to seek redress for section 15 violations.[102]

Remedies under the Civil Rights Act, the NLRA, and the FLSA are essentially the same. The basic remedy, absent any loss of employment or pay, is a cease and desist order.[103] In addition,

98. *Id.* All private approaches to the courts under Title VII will be preceded by receipt of "right-to-sue" notification from the EEOC. *Id.* These notices inform the claimant of his or her right and commence the 90-day period during which suit may be brought by an individual. *See* Holly v. Alliance Rubber Co., 380 F. Supp. 1128, 1131 (N.D. Ohio 1974).

99. 29 U.S.C. § 216(c) (1976); *see* Wirtz v. Atlantic States Constr. Co., 357 F.2d 442 (5th Cir. 1966).

100. 29 U.S.C. § 216(c) (1976). The employee's consent to the Secretary of Labor's institution of an action constitutes a waiver by the employee. *Id.*

101. *See* Mitchell v. Stewart Bros. Constr. Co., 184 F. Supp. 886 (D. Neb. 1960).

102. 29 U.S.C. § 216(b) (1976 & Supp. 1979), now provides in part:

> Any employer who violates the provisions of section 206 or section 207 of this title shall be 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. Any 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. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves or other employees similarly situated.

See also Bush v. State Indus., Inc., 599 F.2d 780 (6th Cir. 1979) (implied private right of action under the FLSA).

103. Section 706(g) of title VII specifically gives the court the authority to "enjoin the respondent from engaging in such unlawful employment practice." 42 U.S.C. § 2000e-5(g) (1976). The Fair Labor Standards Act provides that the federal district courts have jurisdiction for cause shown to restrain violations of provisions of the Act. 29 U.S.C. § 217 (1976). *See* NLRB v. Schrivener, 405 U.S. 117 (1972) (cease and desist orders are routinely entered upon proof of retailiatory conduct). In Mead v. United States Fidelity & Guar. Co., 442 F. Supp. 114 (D. Minn. 1977), the court found that a permanent injunction restraining an employer from engaging in retaliatory actions imposes no undue hardship since it simply obligates the employer to comply with title VII's mandate to refrain from discriminating or interfering with an employee or applicant because that person exercised his or her

an employer may be required to communicate the order to the employees. Communication may consist of posting notice on the work premises that an employer will not discriminate,[104] or ordering a high ranking official in the company to read the order at a meeting attended by all employees during working hours.[105] This latter form of communication is one of the most effective means of curbing the chilling effect on the exercise of employee rights since it requires the source of the intimidation—the company—to announce cessation of its own illegal conduct.[106]

If the employee was disciplined for filing charges, the employer also may be ordered to expunge the employee's personnel records and other similar records of all adverse comments related to the incident.[107] Expungement is necessary to eliminate present and future discriminatory effects of past retaliation.[108] An order to remove reprimands from the employee's file often accompanies a cease and desist order.[109]

The remedy for refusing employment to a person who has filed charges against the employer is an order requiring the employer to offer the individual immediate employment in a position the claimant is qualified to perform and to pay wages lost as a result of the discrimination.[110] Nevertheless, if the employee is discharged under these circumstances and declines reinstatement,

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statutory right. *Id.* at 134. Furthermore, the court found that the permanent injunction protects the public interest in free and uninhibited access to the EEOC. *Id.*

104. *See, e.g.*, Mead v. United States Fidelity & Guar. Co., 442 F. Supp. 114 (D. Minn. 1977); Sanford Dress Corp., 123 N.L.R.B. 1106 (1959).

105. *See* Mead v. United States Fidelity & Guar. Co., 442 F. Supp. 114 (D. Minn. 1977). *Accord*, EEOC v. Union Bank, 12 Fair Labor Empl. Prac. Cas. 527, 530 (D. Ariz. 1976) (employer ordered to deliver a copy of the court's findings of facts, conclusions of law, and order to each employee); EEOC v. Midas, Inc., 8 Fair Empl. Prac. Cas. 719, 721 (1974) (company required to communicate to each employee both orally and by written statement the court's preliminary order). For a discussion of this remedy in the labor context, see NLRB v. Express Publishing Co., 312 U.S. 426, 438–39 (1941); Marine Welding & Repair Works v. NLRB, 439 F.2d 395, 399 (8th Cir. 1971); NLRB v. Local 294, Int'l Bhd. of Teamsters, 470 F.2d 57, 63 (2d Cir. 1972); Texas Gulf Sulpher Co. v. NLRB, 463 F.2d 778, 779 (5th Cir. 1972).

106. Mead v. United States Fidelity & Guar. Co., 442 F. Supp. at 135.

107. *Id.* at 136. *See* General Elec. Co., Automatic Blanket Plant, 155 N.L.R.B. 1365, *aff'd*, 367 F.2d 333 (D.C. Cir. 1966).

108. *See, e.g.*, Mead v. United States Fidelity & Guar. Co., 442 F. Supp. at 136 (employee discharged in retaliation for filing sex discrimination charges with the EEOC).

109. *See supra* note 107.

110. In the title VII context, see Mead v. United States Fidelity & Guar. Co., 442 F. Supp. 114 (D. Minn. 1977). In the labor context, see Virginia-Carolina Freight Lines, Inc., 155 N.L.R.B. 447 (1965); Redwing Carriers, Inc., 132 N.L.R.B. 982 (1961). In the FLSA context, see Bowe v. Judson C. Burns, Inc., 137 F.2d 37 (3d Cir. 1943); Mitchell v. Stewart Bros. Constr. Co., 184 F. Supp. 886 (D. Neb. 1960).

both back pay and a cease and desist order will be ordered[111] to effectuate the purposes of the acts.[112] Uncertainties in determining what an employee would have earned but for the discrimination should be resolved against the employer, since the employer's unlawful conduct created the necessity for a backpay judgment.[113]

III. An Implied Private Right of Action Against Coercion Under Section 51

The FELA claimant, unlike claimants under the NLRA, the Civil Rights Act of 1964, or the FLSA, receives inadequate protection against an employer's retaliation for pursuing the statutory right to compensation. These analogous acts guarantee freedom from reprisal against employees who resort to statutory processes and remedies.[114] The FELA, however, provides no mechanism to prevent employers from discouraging resort to FELA litigation and using coercive tactics in negotiating a settlement; "the result is an impermissible chill on rights created by Congress."[115] Any chilling effect extends not only to all prospective FELA plaitiffs, but to *all* employees and their families.[116] A private right of action against coercion, therefore, is needed to ensure the FELA claimant's unfettered right to recover fully damages for injuries caused by employer negligence.

Judicial implication of private causes of action is rooted in the ancient English common law doctrine that where there is a right, there is a remedy.[117] This principle, recognized by the Supreme Court as early as 1803,[118] was used sparingly until the post-World War II era, when the proliferation of federal regulatory legislation prompted private litigants to assert implied private rights of action to achieve statutory remedies.[119] A policy consideration support-

111. *See* California Footwear Co., 122 N.L.R.B. 37 (1958). Back pay is computed from the date the employee would have been put back to work absent the employer's discrimination against him or her. *See, e.g.*, Mitchell v. Dyers, 180 F. Supp. 852 (S.D. Ala. 1960); Nicky Chevrolet Sales, Inc., 199 N.L.R.B. 411 (1972).

112. *See, e.g.*, California Footwear Co., 122 N.L.R.B. 37 (1958).

113. Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 260–61 (5th Cir. 1974), *cert. denied*, 439 U.S. 1115 (1979); Mead v. United States Fidelity & Guar. Co., 442 F. Supp. at 134 (citing Hairston v. McLean Trucking Co., 520 F.2d 226, 233 (4th Cir. 1975)).

114. *See supra* notes 79–113 and accompanying text.

115. Kozar v. Chesapeake & Ohio Ry., 320 F. Supp. 335, 385 (W.D. Mich. 1970).

116. *Id.*

117. McMahon & Rodos, *Judicial Implication of Private Causes of Action: Reappraisal and Retrenchment*, 80 Dick. L. Rev. 167 (1975).

118. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

119. McMahon & Rodos, *supra* note 117, at 167.

ing the doctrine is that it may be the only means of effectuating the policy expressed in a particular statute.[120] In addition, an implied private right of action may encourage compliance with the statute as victims could actively assist in enforcement[121] and violators would face an additional penalty.[122]

During the tenure of Chief Justice Earl Warren, the Supreme Court utilized the implied rights doctrine to create private remedies for violations under a broad spectrum of regulatory legislation.[123] The current Supreme Court test used to determine the propriety of implying a private right of action, however, has evolved under the leadership of Chief Justice Warren Burger. In contrast to the Warren Court's philosophy, the Burger Court reflects a philosophy of judicial restraint and a reluctance to broaden federal jurisdiction.[124]

In determining whether to imply a private cause of action for injunctive relief or damages under a statute not expressly authorizing such a remedy, the Supreme Court in *Cort v. Ash*[125] considered the following four factors:

> First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted," . . . —that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?[126]

Four years later, in *Touche Ross & Co. v. Redington*,[127] the

120. Gamm & Eisberg, *The Implied Rights Doctrine*, 41 UMKC L. REV. 292, 297–300 (1972). "The legislature cannot know a priori what difficulties will be encountered in the enforcement of the provisions of a statute it enacts. Where enforcement is lax or otherwise problematical, it would be a frustration of the policy expressed by the statute to refuse civil relief to injured persons." *Id.* at 298.

121. *See* Note, *Implying Civil Remedies From Federal Regulatory Statutes*, 77 HARV. L. REV. 285, 291 (1963).

122. *Id.*

123. *See* McMahon & Rodos, *supra* note 117, at 167.

124. *Id.* at 167–68. The authors stated that private right of action cases during the Warren years reflected a willingness on the Court's part to go beyond the statute to create private remedies that Congress had not expressed an intent to grant. Recent decisions demonstrate a trend away from the Court's willing involvement in private disputes to promote social and statutory policies.

125. 422 U.S. 66 (1975).

126. *Id.* at 78 (emphasis supplied) (citations omitted).

127. 442 U.S. 560 (1978).

Supreme Court clarified the *Cort* test. The opinion stated that the four factors set forth in *Cort* were only *relevant* in determining whether a private remedy is implicit in a statute not expressly providing one.[128] The *Touche Ross* majority noted that *Cort* did *not* decide that each factor was entitled to equal weight. Rather, the central inquiry is whether Congress intended to create, either expressly or by implication, a private cause of action.[129] The appropriate analysis for determining congressional intent, therefore, is one of statutory construction focusing on the language of the statute, legislative history, and the statutory scheme of enforcement.[130]

The language of section 51 does not purport to create a private action against employer coercion. The language instead addresses the railroad's liability for injuries to employees which result from its negligence. Moreover, the legislative history of section 51 does not address the issue of private remedies for employer coercion. The legislative history of a statute which does not expressly create or deny a private remedy, however, typically will be silent or ambiguous on the question.[131] Therefore, Congress' failure to expressly consider a private remedy is not necessarily inconsistent with the intent to make such a remedy available.[132]

The *Touche Ross* Court, however, warned against implying a private right of action in the face of congressional silence.[133] Thus, the language and legislative history of section 51 weigh against implying a cause of action proscribing coercion.

The only provision of the FELA bearing on enforcement is section 60 which prevents railroads from interfering with third-party employees who testify in FELA actions.[134] There is no express remedy, however, for actual claimants when railroads interfere with FELA rights. Thus, an action which provides relief to claimants for employer coercion would appear to fit within the FELA's scheme of enforcement.

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128. *Id.* at 575.

129. *Id.* The Court rejected the notion that the implied rights doctrine should be invoked to effectuate the policy behind legislative enactments. *Id.* at 568, 575–76.

130. *Id.* at 575–76.

131. *See* Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 18 (1979) (implied private rights under the Investment Advisors Act); Cannon v. University of Chicago, 441 U.S. 677, 694 (1978) (implied private rights under Title IX of the Civil Rights Act recognized).

132. *See Transamerica*, 444 U.S. 11, 15-16 (requiring finding of affirmative intent).

133. 442 U.S. at 579.

134. *See supra* notes 73–76 and accompanying text.

Even though the scheme of enforcement does not seem to weigh against implying a private action, the language and congressional history do weigh against implication. Under a strict *Touche Ross* analysis, therefore it appears unlikely that the Supreme Court would imply a private right of action when threats, coercion, or economic pressure effectively deter resort to FELA or result in unjust settlements.

A different result may be reached, however, under the more liberal *Cort* analysis followed in *Cannon v. University of Chicago*.[135] In the same term that *Touche Ross* was decided, the Supreme Court held in *Cannon* that section 901(a) of Title IX[136] affords a private right of action, despite the absence of express statutory authorization. Title IX, like the FELA, creates a distinct federal right in a class of plaintiffs—women under Title IX, and railroad employees under the FELA. The Supreme Court in *Touche Ross* denied relief under the Securities Exchange Act of 1934, which is a regulatory statute unlike the FELA, which creates a distinct right. Thus, in determining whether to imply a private right of action, it appears that the Supreme Court will apply a more liberal *Cort* test when the statute creates a distinct federal right in the plaintiff.[137]

Under *Cort*, the first inquiry is whether the statute was enacted for the benefit of a special class of plaintiffs. The dispositive language in section 51 provides that "every common carrier while engaging in commerce between any of the several States or Territories . . . shall be liable in damages to *any person suffering injury while he is employed* by such carriers . . . , or, in the case of death of such employee, to his or her *personal representative* . . . ."[138] This language expressly identifies railroad employees and their beneficiaries as the class Congress intended to benefit. Analysis under the first *Cort* factor thus supports the implication of a private right of action.

Applying the second *Cort* factor, the legislative history does not explicitly address the availability of a remedy to FELA claimants deprived of their full remedy or forum. The enactment of sections 55 and 60 indicate, however, the drafters' implicit as-

135. 441 U.S. 677 (1979).

136. 20 U.S.C. § 1681(a) (1976).

137. Note, *The Federal Securities Acts: The Demise of the Implied Private Rights Doctrine?*, 1980 U. ILL. L.F. 627, 647–48.

138. 45 U.S.C. § 51 (1976) (emphasis added).

sumption that section 51 would be enforced.[139] Sections 51 and 60 were designed to eliminate the danger of coercion and retaliation against railroad employees who testify in FELA actions, and employees and their beneficiaries who pursue an FELA claim.[140] Moreover, by precluding from FELA actions the common law defenses of assumption of the risk, the fellow servant rule, and contributory negligence the drafters intended section 51 to provide an *effective* and *readily available* remedy for negligence-related injuries in the railroad industry.[141] The right to be free from intimidation and coercion in pursuing the section 51 right is a necessary legal incident of the statute.[142] Thus the FELA's legislative history demonstrates that Congress implicitly understood section 51 as granting a private remedy against coercion to FELA claimants, or their beneficiaries, who are denied FELA relief or who obtain unjust settlements.

Under the third prong of *Cort*, a private remedy against coercion is not only consistent with the underlying purpose of the legislative scheme, but is demanded to effectuate the orderly enforcement of the Act.[143] The purpose and policy behind the FELA is to promote adequate recovery for injured workers and thereby promote railroad safety.[144] Analogous federal employment statutes[145] indicate the need for a private action to ensure the uninhibited exercise of the right to file a claim under section 51. These statutes proscribe retaliation against claimants for exercising the rights guaranteed under the statutes.[146] FELA claimants have no such protection when pursuing their statutory remedy. Effective implementation and enforcement of section 51 depends on the initiative of railroad employees or their beneficiaries.[147] Rail-

139. *Cf.* Touche Ross & Co. v. Redington, 442 U.S. at 582 (Marshall, J., dissenting): "I am unwilling to assume that 'Congress simultaneously sought to protect a class and deprive [it] of the means of protection'" (quoting Redington v. Touche Ross & Co., 592 F.2d 617, 623 (2d Cir. 1978).

140. The actual operation of these provisions falls short of their intended goal of protecting employees who wish to fully and freely pursue a FELA claim. *See supra* notes 48–64 and accompanying text.

141. *See* Kozar v. Chesapeake & Ohio Ry., 320 F. Supp. at 383; *supra* notes 11–29 and accompanying text.

142. *See supra* note 72 and accompanying text.

143. *Cf.* Touche Ross & Co. v. Redington, 442 U.S. 560, 575 (1978). The Court rejected the notion that the implied rights doctrine should be invoked to effectuate the policy behind legislative enactments.

144. *See supra* notes 11–29 and accompanying text.

145. *See supra* notes 79–81 and accompanying text.

146. *See supra* notes 79–113 and accompanying text.

147. The FELA is not self-executing. *See* 45 U.S.C. § 51 (1976).

road employees, like employees covered under the analogous federal employment statutes, occupy a vulnerable position. Implication of a private right of action, therefore, is consistent with the underlying purposes of the legislative scheme, and will assist FELA claimants in obtaining adequate compensation.

The final inquiry under *Cort* is whether a federal remedy is inappropriate because the subject matter involves an area of basic concern to the states. An FELA action is entirely a creature of federal law.[148] The Act creates federal rights protected by federal, rather than local, rules of law.[149] Although a plaintiff may sue in state court, federal law must be applied to achieve uniform application of the act.[150] In sum, a straightforward application of the four *Cort* factors compels the implication of a private right of action for FELA claimants denied their remedy or forced into settling for an unjust amount by threats, coercion, or economic pressure.

IV. Making Out a Prima Facie Case Once an FELA Claimant Has Demonstrated That Coercion Is Actionable

In determining whether employer conduct interfered with an employee's FELA rights, the liability standards of analogous federal employment statutes[151] should be analyzed. The National Labor Relations Board, in an attempt to clarify the appropriate NLRA standard, stated in *Wright Line*[152] that a statutory violation occurs when anti-union animus is a motivating factor in the

148. *See supra* note 33.

149. *See* Baily v. Central Vt. Ry., 319 U.S. 350, 352 (1943).

150. *See* Dice v. Akron, C. & Y. R.R., 342 U.S. 359 (1952); Norfolk S. R.R. v. Ferebee, 238 U.S. 269 (1915).

151. Under the Civil Rights Act of 1964, see Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (burden of persuasion on the issue of discriminatory intent in title VII cases always remains with the plaintiff). Under the NLRA *compare* Nacker Packing Co. v. NLRB, 615 F.2d 456, 463 (7the Cir. 1980) ("discharge is unlawful . . . if it is motivated, even in part, by a desire to discourage union activity") *with* Waterbury Community Antenna, Inc. v. NLRB, 587 F.2d 90, 98 (2d Cir. 1978) ("The magnitude of the impermissible ground is immaterial . . . as long as it was the 'but for' cause of the discharge"). For a discussion of the employee's burden of proof under the NLRA, see Wolly, *What Hath* Mt. Healthy *Wrought*, 41 Ohio St. L.J. 385 (1980). Under the FLSA, *compare* Mitchell v. Goodyear Tire & Rubber Co., 278 F.2d 562, 565 (8th Cir. 1960) (discriminatory discharge found because employee would not have been discharged but for his admission of authoring a wage-hour complaint) *with* Goldberg v. Bama Mfg. Corp., 302 F.2d 152, 153 (5th Cir. 1962) (discriminatory discharge when the firing was motivated in part by assertion of employee's statutory rights).

152. [1980] 5 Lab. L. Rep. (CCH) (251 NLRB No.150) ¶ 17,356.

employer's decision to discharge an employee, and the action would not have taken place absent the employee's protected activity.[153] Under this standard, once a plaintiff has established a prima facie case, the burden of proof shifts to the employer to articulate some legitimate, nondiscriminatory reason for his conduct.[154]

The First Circuit recently has clarified[155] the *Wright Line* approach to coincide with the Civil Rights Act Title VII standard articulated in *Texas Department of Community Affairs v. Burdine*.[156] In *Burdine*, the Court held that "when the plaintiff has proved a prima facie case of discrimination, the defendant bears only the burden of explaining clearly the nondiscriminatory reasons for its actions."[157] The Court also noted, that "[t]he defendant need not persuade the court that it was actually motivated by the proffered reasons."[158] Similarly, the First Circuit in *NLRB v. Wright Line*[159] held:

> [T]he only burden which may be acceptably placed on the employer is a "burden of production" . . . . The imposition of this limited burden, however, does not shift to the employer the burden of proving that an unfair labor practice has not occurred . . . . Thus, the employer . . . has no more than the limited duty of producing evidence to balance, not to outweigh, the evidence produced by the general counsel.[160]

The First Circuit's clarification of the *Wright Line* approach may be challenged, however, due to the more stringent requirements of establishing a prima facie case under the NLRA when compared to the requirements under title VII.[161] Under the NLRA, the General Counsel must establish that the employer was motivated by discriminatory intent. Under title VII, the plaintiff must show only:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job which the employer was seeking applicants; (iii) that, despite his qualification, he was rejected; and (iv) that after his rejection the position remained open and the employer continued to seek applicants from persons of com-

153. *Id.* at 32,466.
154. *Id.*
155. NLRB v. Wright Line, 662 F.2d 899 (1st Cir. 1981).
156. 450 U.S. 248 (1981).
157. *Id.* at 260.
158. *Id.* at 254.
159. 662 F.2d 899 (1st Cir. 1981).
160. *Id.* at 904–05.
161. *Id.* at 906–07.

plainants' qualifications.[162]

Since under title VII the burden of showing a prima facie case is lighter than under the NLRA, the burden necessary to rebut such a showing is lighter.

Irrespective of the employer's burden, the elements necessary to establish a prima facie case under the NLRA[163] lend themselves more readily to the situation likely to be encountered under the FELA, than do those under title VII.[164] Title VII applies, with certain exceptions, to all persons subject to sex discrimination.[165] Both the NLRA and the FELA, however, protect a specified class of employees: the NLRA protects employees engaging in concerted activities;[166] the FELA protects railroad employees injured due to their employer's negligence. As an incident to a claimant's statutorily guaranteed rights under the FELA, as under the NLRA, employer activity intended to discourage resort to statutory rights should be actionable.

Thus, an FELA claimant must prove that intent to discourage resort to FELA remedies was a motivating factor behind the employer's coercive activities. Upon this prima facie showing, the employer must show that the same activities would have taken place absent the employee's attempted resort to FELA rights. This shifting burden of proof arguably should require then that the employer not only meet the burden of production, but also meet the burden of proving that the discriminatorily motivated conduct did not occur.

V. APPROPRIATE REMEDIES

Remedies for interfering with the right to pursue an FELA claim should substantially parallel remedies available under sections 704(a) of the Civil Rights Act of 1964, 8(a)(4) of the National Labor Relations Act, and 215(a)(3) of the Fair Labor Standards Act.[167] For example, a cease and desist order should issue, with a notice posted stating that the employer will refrain from applying pressure to FELA claimants to reach settlements.[168] If an em-

162. McDonnell Douglas Corp. v. Green, 441 U.S. 792, 802 (1973).

163. *See Wright Line*, [1980] 5 LAB. L. REP. (CCH) at 32,466.

164. *See* 441 U.S. at 802.

165. 42 U.S.C. § 2000e-3(a) (1976).

166. *See* 29 U.S.C. § 157 (1976).

167. For a discussion of these sections, see *supra* notes 103–13 and accompanying text.

168. *See* 29 U.S.C. § 160(c) (1976) (cease and desist order to remedy unfair labor practice).

ployee has been reprimanded for pursuing an FELA claim, the employer should be ordered to remove the reprimand from the employee's file.[169] Retaliatory discharge should be remedied by reinstatement and back pay.[170] Back pay should issue even though an employee declines reemployment.[171] Furthermore, a permanent injunction may be necessary to protect free and uninhibited access to the courts—the forum responsible for enforcing FELA claims.[172] In egregious cases,[173] the railroad company may be ordered to orally communicate the court's orders to employees.[174]

Contempt[175] and punitive damages provide remedies uniquely appropriate to the implied right of action for employer coercion. A railroad which willfully, wantonly, or recklessly disregards an employee's statutorily guaranteed rights should be liable for punitive damages.[176] Moreover, punitive damages may be especially appropriate where actual damages are negligible[177] or are impossible to measure.[178] In these cases, punitive damages may deter future wrongdoings and provide a recovery sufficient to induce employees to enforce their rights judicially.[179] The policies underlying the award of punitive damages[180] and the FELA[181] establish the propriety of awarding such damages to injured railroad employees and their beneficiaries when employer coercion discourages filing a lawsuit.

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169. *See supra* notes 107–09 and accompanying text.

170. *See* 29 U.S.C. § 160(c) (1976) (similar remedy in labor context). For a discussion of back pay see *supra* notes 111–13 and accompanying text.

171. *See* California Footwear Co., 122 N.L.R.B. 37 (1958).

172. *See* 29 U.S.C. § 160(j) (1976) (Labor Board empowered to issue injunctions).

173. *E.g.*, Kozar v. Chesapeake & Ohio Ry., 320 F. Supp. at 387 (coercive settlement tactics appeared to be part of management policy).

174. For a discussion of these remedies and the policies underlying them see *supra* notes 103–13 and accompanying text.

175. When railroads use coercive tactics to discourage employee resort to FELA litigation, every remedial weapon, including contempt will be available to ensure the uninhibited exercise of federal rights. *Kozar*, 320 F. Supp. at 386 (dictum).

176. *Id.* at 353.

177. *See, e.g.*, Wills v. TWA, 200 F. Supp. 360 (S.D. Cal. 1961).

178. Actual damages may be incapable of measurement by a money standard when the railroad's efforts do not produce an agreement or release. Punitive damages are measured according to the degree of malice, wantonness, or oppression of the defendant's conduct rather than in terms of harm or loss to the plaintiff. *Kozar*, 320 F. Supp. at 353.

179. Note, *supra* note 101, at 298.

180. The financial penalty imposed on a defendant is aimed at eliminating wrongful conduct which is quasi-criminal in nature. *See Kozar*, 320 F. Supp. at 353.

181. *See supra* notes 22–29 and accompanying text.

VI. CONCLUSION

Judges and commentators have characterized the FELA as a "futile Act"[182] and as an unjust and archaic method of compensation.[183] Courts confronting FELA cases have, therefore, devoted considerable time and research toward understanding the Act's true meaning.[184] These efforts lead to the conclusion that the FELA was designed to promote adequate recovery for negligently injured railroad workers and to thereby promote safety in the highly hazardous railroad industry. Congress has mandated that this policy of adequate recovery to injured workers should affect every substantive and procedural aspect of FELA litigation.[185] When coercive tactics are applied to FELA claimants, in contravention of congressional policy and public policy,[186] a private cause of action against such coercion should be available.

> Such coercion, whenever and wherever it exists, is utterly abhorent to our system of justice. It is an attempt to ignore the courts and settle disputes in the arena of private affairs and solely upon the basis of private power. The law is avoided as being incompatible with private interests. This is nothing more than a return to or continuation of the rule of the mighty, and will inevitably involve the sacrifice of the rights of the weak.[187]

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182. Frankfurter & Landis, *The Business of the Supreme Court at October Term, 1931*, 46 HARV. L. REV. 226, 249 (1932):

> The deepest significance of FELA cases is the proof they furnish of the futility of the Act itself. When the process of interpretation and application after twenty-five years still yields unabated litigation and reveals an apparent growing inability upon the part of the judges primarily trusted with its administration to know its meaning, surely the legislation has proven a failure.

183. Bailey v. Central Vt. Ry., 319 U.S. 350 (1943); Tiller v. Atlantic Coast Line R.R. Co., 318 U.S. 54 (1943).

184. *See, e.g.*, *Kozar*, 320 F. Supp. at 387.

185. *Id.*

186. The district court in *Kozar*, quoting from Pittsburgh, C., C., 7 St. L. Ry. v. Kinney, 95 Ohio 64, 68, 115 N.E.2d 505, 507 (1916), stated:

> [Public policy] may be said to be the community common sense and common conscience, extended and applied throughout the state to matters of public morals, public health, public safety, public welfare, and the like. It is that general and well-settled public opinion relating to man's plain, palpable duty to his fellow men, having due regard to all the circumstances of each particular relation and situation.

Id. at 387–88.

187. *Id.* at 385.