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Protection for Employee Whistleblowers under the Fair Labor Standards Act and Missouri's Public Policy Exception: What Happens If the Employee Never Whistled

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Protection for Employee Whistleblowers Under the Fair Labor Standards Act and Missouri's Public Policy Exception: What Happens if the Employee Never Whistled?

Saffels v. Rice[1]

I. INTRODUCTION

The Fair Labor Standards Act ("FLSA") was implemented by Congress in 1938 in an attempt to assure most workers of an adequate minimum wage and payment for overtime work.[2] FLSA § 15(a)(3) was enacted to protect employees from retaliatory discharges based upon the reporting of violations of the substantive FLSA provisions.[3] In *Saffels v. Rice*, the Court of Appeals for the Eighth Circuit extended protection to employees who were dismissed based on the employer's mistaken belief the employee reported violations of the law to the authorities based on both FLSA § 15(a)(3) and Missouri's common law public policy exception to the at-will employment doctrine. The court, by extending protection to employees who have taken no protected action, removed analysis under FLSA § 15(a)(3) from the plain language of the statute.[4] Furthermore, the court allowed the plaintiff employees to proceed under both FLSA § 15(a)(3) and Missouri's common law public policy exception to the at-will employment doctrine, thus becoming the first court to hold § 15(a)(3) does not preempt the public policy exception.[5]

II. FACTS AND HOLDING

Ronny D. Saffels and Carol S. Morriss filed suit against Kris Rice, Randall Haynes, and R.B. Industries, Inc. ("Defendants")[6] in the federal district court for the Western District of Missouri. Saffels and Morriss alleged

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1. 40 F.3d 1546 (8th Cir. 1994).

2. 29 U.S.C.A. § 206 (West Supp. 1995). *See infra* notes 22-73 and accompanying text.

3. *See generally* Mitchell v. Robert De Mario Jewelry, Inc., 361 U.S. 288 (1960).

4. *See infra* notes 97-118 and accompanying text.

5. *See infra* notes 145-158 and accompanying text.

6. R.B. Industries, Inc. is a small, family-operated business. Rice is the company's president and Haynes is the director of finance. Saffels v. Rice, 40 F.3d 1546, 1547 (8th Cir. 1994).

they had been wrongfully terminated in violation of § 15(a)(3) of the Fair Labor Standards Act ("FLSA")[7] and Missouri's common law public policy exception to the at-will employment doctrine.[8]

Saffels and Morriss were employees of R.B. Industries, Inc. Saffels was first employed by R.B. Industries in October 1990 as a telemarketer and was promoted in April 1991 to telemarketing manager.[9] Morriss was hired by R.B. Industries in March 1991 as a telemarketer and was promoted in June 1991 to the accounting department.[10] In July 1991, Saffels and Morriss became romantically involved with each other.[11] Defendants claim this relationship resulted in poor work performance by Saffels and Morriss.[12] In late October 1991, Saffels was demoted from telemarketing manager to telemarketer.[13]

On November 7, 1991, Rice and Haynes met with Saffels and Morriss.[14] At this meeting, Rice informed Saffels that he had reason to believe Saffels had called the Occupational Safety and Health Administration (OSHA) and the Department of Labor's Wage and Hour Division.[15] In fact, neither Morriss

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7. Section 15(a)(3) of the Fair Labor Standards Act states:

> (a) After the expiration of one hundred and twenty days from June 25, 1938, it shall be unlawful for any person—
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> (3) 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, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee;

29 U.S.C.A. § 215(a)(3) (West Supp. 1995). Section 15(a)(3) of the Fair Labor Standards Act was codified as § 215(a)(3) in the United States Code.

8. *Saffels*, 40 F.3d at 1547. Haynes also counterclaimed for defamation against Saffels and Morriss and assault against Saffels; however, Haynes did not appeal after the district court entered judgment against him on his counterclaim. *Id.* at 1547 n.2. *See* Loomstein v. Medicare Pharmacies, Inc., 750 S.W.2d 106, 112 (Mo. Ct. App. 1988) (holding that an employee may prevail against an employer on a claim of discharge in contravention of public policy if the employee can show she was discharged because she "refused to violate the law or any well established and clear mandate of public policy as expressed in the constitution, statutes and regulations.").

9. *Id.* at 1547.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* Rice and Haynes tape recorded this meeting. *Id.*

15. *Id.* Several days preceding this meeting, Morriss, while at work, had received a telephone call from Saffels. At the completion of this call, Morriss announced "OSHA and Wage and Hour have been called." Apparently, Morriss was referring to

nor Saffels had contacted OSHA or the Wage and Hour Division.[16] Rice indicated he had lost faith in Saffels and Morriss and terminated their employment after the meeting.[17]

The district court, in granting Defendants' motion for summary judgment, held Saffels and Morriss did not have standing to sue for wrongful discharge under either the FLSA or Missouri's common law public policy exception to the at-will employment doctrine.[18] The district court concluded Saffels and Morriss did not have standing to sue under the FLSA because they never actually filed a complaint with OSHA or the Wage and Hour Division.[19]

The Eighth Circuit Court of Appeals, in reversing the district court and remanding for further proceedings, held § 15(a)(3) of the FLSA and the Missouri common law public policy exception to the at-will employment doctrine[20] protect an employee who is terminated on the employer's mistaken belief the employee reported violations of the law to the authorities.[21]

III. LEGAL BACKGROUND

A. § 15(a)(3) of the Fair Labor Standards Act

In 1938, Congress passed the Fair Labor Standards Act ("FLSA") in order to assure most workers[22] a uniform minimum wage[23] and payment for overtime work.[24] Congress stated in § 2 of the FLSA that its policy was to correct "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of

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a call made by another employee. *Id.* at 1547 n.3.

16. *Id.* at 1548.

17. *Id.*

18. *Id.* at 1547.

19. *Id.* at 1548.

20. Oddly, the court did not mention that the great weight of authority has held § 15(a)(3) of the FLSA preempts state law public policy remedies for wrongful discharge. Apparently, the 8th Circuit implicitly overruled previous Missouri law. *See infra* notes 145-158 and accompanying text.

21. *Id.* at 1550. The court expressed no opinion on whether Rice and Haynes actually believed Saffels and Morriss had reported violations to OSHA and the Wage and Hour Division; rather, the court remanded to the district court to decide the issue. *Id.*

22. The FLSA only applies to workers that are employed in interstate commerce. *See* Stewart v. Region II Child & Family Servs., 788 P.2d 913, 917 (Mont. 1990).

23. 29 U.S.C.A. § 206 (West Supp. 1995).

24. *Id.* § 207.

workers."[25] In addition to providing substantive rights, the FLSA makes it illegal to discharge or discriminate against any employee in retaliation for filing a complaint, instituting a proceeding under the FLSA, or testifying in a proceeding.[26] Furthermore, the FLSA provides specific remedies to employees, and against employers, for violations of § 15(a)(3).[27] For instance, § 216(b) provides that an employee may bring an action in federal or state court for "reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages."[28]

The United States Supreme Court construed the apparent Congressional policy behind FLSA § 15(a)(3) in *Mitchell v. Robert De Mario Jewelry, Inc.*[29] Justice Harlan, writing for the majority, explained "Congress did not seek to secure compliance with prescribed standards through continuing detailed federal supervision . . . [r]ather it chose to rely on information . . . from employees."[30] Therefore, Justice Harlan argued that "effective enforcement [of the FLSA] could . . . only be expected if employees felt free to approach officials with their grievances."[31] Consequently, § 15(a)(3) was promulgated in order to "foster a climate"[32] in the workplace that would safeguard employee rights under the substantive FLSA provisions.[33]

An aggrieved employee may choose to prove a violation of § 15(a)(3) either by direct or indirect evidence.[34] If the employee chooses to prove a violation by indirect evidence, the employee must present a prima facie case of discrimination.[35] In order to present a prima facie case, an employee

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25. *Id.* § 202(a).

26. *Id.* § 215(a)(3).

27. *Id.* § 216(b); *see, e.g.*, Dockins v. Ingles Markets, 413 S.E.2d 18 (S.C. 1992).

28. *Id.*

29. 361 U.S. 288 (1960).

30. *Id.* at 292.

31. *Id.* Justice Harlan assumed that fear of discharge, without § 15(a)(3), would often force employees to accept the very conditions that Congress attempted to remedy with the FLSA. *Id.*

32. *Id.* This "foster a climate" language has been used to justify substantially broader readings of § 15(a)(3) than the plain language of the section would appear to justify. *See infra* note 73.

33. *Id.*

34. *See generally* Strickland v. MICA Info. Sys., 800 F. Supp. 1320, 1323 (M.D.N.C. 1992). Obviously, there may often be a dearth of direct evidence regarding the employer's intentions.

35. Malone v. Signal Processing Technologies, Inc., 826 F. Supp. 370, 376 (D. Co. 1993). The United States Supreme Court first fashioned this approach in Title VII controversies because of the difficulty plaintiffs experience in attempting to show retaliatory actions by employers. It has been extended to actions under FLSA § 15(a)(3) due to the same difficulty. *Strickland*, 800 F. Supp. at 1323 (quoting

"must demonstrate that (1) the employer was aware of [the employee's] participation in protected activity; (2) that an adverse employment action was taken against the [employee] engaged in the protected activity; and (3) that the two elements are related causally."[36] Once the employee has met this burden, the employer may present evidence showing a permissible reason for the adverse employment action.[37]

In some cases, an aggrieved employee may be able to present direct evidence that an adverse employment action is in violation of § 15(a)(3).[38] In such a situation, the employee does not need to resort to the three-pronged approach because the employee can present a prima facie case by direct evidence.[39] However, in order to prevail, the employee must first demonstrate that she has standing under § 15(a)(3).[40] Few courts have had the opportunity to analyze the standing issue under § 15(a)(3) because prior to 1977[41] the "vast majority of cases . . . were brought by the Secretary of Labor"[42] and these cases were nearly always initiated by a complaint.[43]

In the few cases analyzing the issue, courts have frequently extended standing to employees who have engaged in activities not specifically

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McDonnell Douglas Corp. v. Green, 411 U.S. 792, 793 (1973)). This approach has the effect of shifting the burden of production after the plaintiff presents a prima facie case.

36. *Strickland*, 800 F. Supp. at 1323. The same approach is utilized when analyzing an alleged retaliatory discharge under the Occupational Health and Safety Act (OSHA). *See* Reich v. Hoy Shoe Co., 32 F.3d 361, 365 (8th Cir. 1994).

37. *Id.* The employee may still prevail at this point if the employer's reasons are found to be pretextual. *Id.*

38. This is the approach Saffels and Morriss took. *Saffels*, 40 F.3d at 1547.

39. *See supra* note 34 and accompanying text.

40. Hayes v. McIntosh, 604 F. Supp. 10, 15 (N.D. Ind. 1984). In other words, the employee must show she "fall[s] within the protection of . . . 29 U.S.C. § 215(a)(3)." *Id.* An employee who chooses to present her case by indirect evidence must show "participation in a protected activity" which is the equivalent of showing standing. *See supra* note 34 and accompanying text.

41. Prior to 1977, the Secretary of Labor had exclusive authority to institute actions under FLSA § 15(a)(3). *See, e.g.*, Reeves v. ITT, 616 F.2d 1342, 1348 (5th Cir. 1980). However, some courts inferred Congressional intent to provide a private cause of action. *See, e.g.*, Boll v. Federal Reserve Bank, 365 F. Supp. 637, 650 (E.D. Mo. 1973), *aff'd*, 497 F.2d 335 (8th Cir. 1974). Section 216(b) was amended in 1977 to explicitly provide for private actions by aggrieved employees under § 215(a)(3). *See generally Reeves*, 616 F.2d at 1350.

42. *Hayes*, 604 F. Supp. at 15.

43. *Id.* If the employee filed a complaint under the FLSA, she clearly has standing under § 15(a)(3). 29 U.S.C.A. § 215(a)(3) (West Supp. 1995).

enumerated in § 15(a)(3).[44] For instance, the Court of Appeals for the Second Circuit in *Brock v. Casey Truck Sales, Inc.*[45] held the discharge of five employees for their failure to take a "loyalty oath"[46] and repudiate their rights under the FLSA violated FLSA § 15(a)(3).[47] The five employees had been interviewed by an officer of the United States Department of Labor concerning lack of payment for overtime.[48] The officer had determined that the five employees were owed approximately $24,000 in back overtime and the employer agreed to pay the amount.[49] However, the employer then attempted to coerce the five employees into not accepting the money.[50] The court reasoned that, although the employees had not engaged in any activities specifically protected under § 15(a)(3),[51] allowing an employer to coerce employees into giving up FLSA benefit's would make those benefits "worthless."[52] Therefore, the court held § 15(a)(3) applies to "activities less directly connected to formal proceedings where retaliatory conduct has a similar chilling effect on employees' assertion of rights."[53]

One test for standing under § 15(a)(3) was enunciated by the court in *Wirtz v. C.H. Valentine Lumber Co.*[54] and followed in *Hayes v. McIntosh.*[55] The *C.H. Valentine Lumber Co.* court stated that § 15(a)(3) "protect[s] those employees who have made a *positive and overt act* within the language of the statute."[56] The court went on to explain that "some positive action"[57] was

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44. *See* Wirtz v. Ross Packaging Co., 367 F.2d 549 (5th Cir. 1966). Recall that § 15(a)(3) specifically makes it illegal to discriminate against employees based on the fact that the employee has "filed any complaint or instituted . . . any proceeding . . . or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee." 29 U.S.C.A. § 215(a)(3) (West Supp. 1995).

45. 839 F.2d 872 (2d Cir. 1988).

46. *Id.* at 879.

47. *Id. See also* Brennan v. Maxey's Yamaha, Inc., 513 F.2d 179, 181-82 (8th Cir. 1975) (holding on nearly identical facts as those in *Brock* that the employer had violated the aggrieved employee's § 15(a)(3) rights by attempting to force the employee to repudiate her FLSA rights.)

48. *Brock*, 839 F.2d at 874.

49. *Id.* at 875.

50. *Id.* at 875-76.

51. Arguably, that the five employees testified in "any proceeding" when they were interviewed by the Labor Department officer.

52. *Brock*, 839 F.2d at 879.

53. *Id.*

54. 236 F. Supp. 616 (E.D.S.C. 1964).

55. 604 F. Supp. 10 (N.D. Ind. 1984).

56. *C.H. Valentine Lumber Co.*, 236 F. Supp. at 620 (emphasis added). The court prefaced this statement by declaring that it found it unnecessary to decide the issue, thus apparently making the statement dictum. *Id.*

required of an employee before § 15(a)(3) could be violated by an employer.[58] The Department of Labor had investigated the employer and determined certain employees were owed back wages. However, the aggrieved employees had never filed a complaint, instituted an action, or demanded payment of their back wages.[59] Therefore, the court held the aggrieved employees had not made a positive and overt action under § 15(a)(3) and therefore could not claim its protection.[60]

The *Hayes* court adopted the "positive and overt act" test in holding an employee had standing under § 15(a)(3).[61] The employee had spoken with a Department of Labor official, signed a statement for that official, refused to return a back pay check to the employer, and informed the employer of his intention to notify the Wage and Hour division about the situation.[62] The court concluded "[t]hese activities . . . constitute[d] sufficient 'positive and overt' acts within the meaning, and protection, of section [15(a)(3)] so as to permit [the employee] to bring . . . suit."[63] The court reasoned its holding was necessary to ensure "employees felt free to approach officials with their grievances."[64]

Until *Saffels*, the Court of Appeals for the 3rd Circuit in *Brock v. Richardson*[65] was the only court that had addressed the issue of whether an employee had standing under § 15(a)(3) if she was discharged upon the employer's erroneous belief that the employee had filed a complaint under the FLSA.[66] In *Richardson*, the employer told a Wage and Hour Division investigator that she had fired the aggrieved employee because she believed the employee had filed a complaint with the Wage and Hour Division.[67] In fact, the employee had not filed a complaint.[68] The court recognized § 15(a)(3) had been interpreted broadly in order to incorporate activities that are not "explicitly covered" by the statutory language.[69] Next, the court

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57. *Id.*

58. *Id. See infra* notes 137-144 and accompanying text for a discussion of the rationale behind this test.

59. *Id.* at 618-19.

60. *Id.* at 619-620.

61. *Hayes*, 604 F. Supp. at 17.

62. *Id.*

63. *Id.*

64. *Id.* (citing Mitchell v. Robert De Mario Jewelry, Inc., 361 U.S. 288, 292 (1960)).

65. 812 F.2d 121 (3rd Cir. 1987).

66. *Id.* at 123.

67. *Id.* at 122-23.

68. *Id.* at 122.

69. *Id.* at 124. *See* Love v. RE/MAX of America Inc., 738 F.2d 383, 387 (10th

looked to cases arising under § 158(a)(3) of the National Labor Relations Act ("NLRA")[70] holding that employees are protected by the NLRA even if they did not engage in protected activities.[71] Finally, the court held the policy behind the FLSA[72] made it "evident that the discharge of an employee in the mistaken belief that the employee has engaged in protected activity creates the same atmosphere of intimidation as does the discharge of an employee who did in fact complain of FLSA violations."[73]

B. The Public Policy Exception to Missouri's At-Will Employment Doctrine[74]

Missouri courts recognize a "narrow"[75] exception to the employment at-will doctrine[76] for employees who are discharged in contravention of public

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Cir. 1984) (holding employee who complained to employer about FLSA violations has standing); Brennan v. Maxey's Yamaha, Inc., 513 F.2d 179, 183 (8th Cir. 1975) (holding employer who attempted to coerce employee into repudiating FLSA rights violated § 15(a)(3)).

70. Section 158(a)(3) of the NLRA states:

> (a) Unfair labor practices for an employer
> It shall be an unfair labor practice for an employer—
> ***
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization

29 U.S.C.A. § 158(a)(3) (West Supp. 1995).

The NLRA and the FLSA were passed by Congress at the same time and "NLRA cases are often considered of assistance in interpreting" the FLSA. *Brock*, 812 F.2d at 124.

71. *Brock*, 812 F.2d at 124-25. *See* N.L.R.B. v. Ritchie Mfg. Co., 354 F.2d 90, 98 (8th Cir. 1966) (holding employer violated NLRA by discharging an employee believed to be involved in union activity); N.L.R.B. v. Clinton Packing Co., 468 F.2d 953, 955 (8th Cir. 1972).

72. *See supra* notes 29-33 and accompanying text.

73. *Brock*, 812 F.2d at 125.

74. This is often referred to as the "whistle-blower" exception. *See* Komm v. McFliker, 662 F. Supp. 924, 926 (W.D. Mo. 1987).

75. *See* Lay v. St. Louis Helicopter Airways, Inc., 869 S.W.2d 173, 176 (Mo. Ct. App. 1993); Prewitt v. Factory Motor Parts, Inc., 747 F. Supp. 560, 566 (W.D. Mo. 1990).

76. *See* Dake v. Tuell, 687 S.W.2d 191, 193 (Mo. 1985) ("Under Missouri's employment at will doctrine an employer can discharge--for cause or without cause--an at will employee who does not otherwise fall within the protective reach of a contrary statutory provision and still not be subject to liability for wrongful discharge.")

policy.[77] The Missouri Supreme Court in *Johnson v. McDonnell Douglas Corp.*[78] limited the public policy exception to employees who were discharged in violation of a policy that was stated in "a constitutional provision, a statute, or a regulation based on a statute."[79] Furthermore, the public policy exception only applies to employees at-will and not contract employees.[80]

The purpose behind the public policy exception "is the vindication or the protection of certain strong policies of the community."[81] Therefore, several Missouri courts have held that if these policies are adequately safeguarded by other remedies, the public policy exception to the at-will employment doctrine does not apply.[82] For instance, the court in *Gannon v. Sherwood Medical Co.*[83] held that allowing an employee to make a wrongful discharge claim pursuant to the public policy exception as well as a wrongful discharge claim under the Age Discrimination in Employment Act ("ADEA")[84] and the Missouri Workers' Compensation Act[85] would be "duplicative and unwarranted."[86] Since both the ADEA and the Workers' Compensation Act contain remedial provisions, the court held they preempted the public policy exception.[87]

The federal district court for the Western District of Missouri decided a case in which the aggrieved employee asserted both a common law wrongful discharge claim based on the public policy exception and a statutory claim based on FLSA § 15(a)(3).[88] The court, in dismissing the wrongful discharge claim based on the public policy exception,[89] stated "[t]he public policy that would be furthered by a wrongful discharge claim based on a

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77. *See* Johnson v. McDonnell Douglas Corp., 745 S.W.2d 661, 663 (Mo. 1988); Loomstein v. Medicare Pharmacies, Inc., 750 S.W.2d 106, 112 (Mo. Ct. App. 1988); *Komm*, 662 F. Supp. at 925-26.

78. 745 S.W.2d 661 (Mo. 1988).

79. *Id.* at 663.

80. *See* Luethans v. Washington Univ., 838 S.W.2d 117, 120 n.1 (Mo. Ct. App. 1992); *Komm*, 662 F. Supp. at 925-26.

81. Prewitt v. Factory Motor Parts, Inc., 747 F. Supp. 560, 565 (W.D. Mo. 1990).

82. *Id.*; Gannon v. Sherwood Medical Co., 749 F. Supp. 979, 981 (E.D. Mo. 1990); Kramer v. St. Louis Regional Health Care Corp., 758 F. Supp. 1317, 1318-19 (E.D. Mo. 1991).

83. 749 F. Supp. 979 (E.D. Mo. 1990).

84. 29 U.S.C.A. § 621 (West Supp. 1995).

85. MO. REV. STAT. § 287.780 (1994).

86. *Gannon*, 749 F. Supp. at 981.

87. *Id.*

88. *Prewitt*, 747 F. Supp. at 565.

89. Specifically, the court held that the employee failed to state a claim upon which relief could be granted. *Id.* at 566.

violation of § 215(a)(3) is fully vindicated by [the employee's] claim in Count I brought pursuant to the FLSA."[90]

Courts across the nation have held claims under common law public policy exceptions are preempted by the FLSA. These courts have advanced several reasons in support of their finding of preemption. For instance, the court in *Tate v. Pepsi Cola Metro. Bottling Co.*[91] reasoned that FLSA § 15(a)(3) preempted Wisconsin's common law public policy exception because the FLSA "provid[ed] its own exhaustive enforcement remedies."[92] The court in *Jarmoc v. Consolidated Elec. Distrib., Inc.* [93] decided the FLSA preempted state law because it contained sufficient remedies to deter improper employer conduct.[94] Courts have generally expressed concern that allowing claims under the state common law public policy exceptions will "upset the balance struck by Congress in enacting the FLSA."[95] This fear is sparked by the fact that employees may gain a "substantially larger damage award in a wrongful discharge case" than they might under FLSA § 15(a)(3) alone.[96]

IV. INSTANT DECISION

In *Saffels v. Rice*, the Eighth Circuit examined whether an employee was protected by the common law public policy exception and/or by FLSA § 15(a)(3) from discharge based upon the employer's erroneous belief the employee had reported FLSA violations.[97] The court analyzed FLSA § 15(a)(3) by three major methods.[98]

First, the court looked at cases that had extended protection to aggrieved employees beyond the plain language of § 15(a)(3).[99] However, the court

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90. *Id.*

91. 32 Empl. Prac. Dec. (CCH) ¶ 33,951 (E.D. Wis. 1983), *aff'd*, 742 F.2d 1459 (7th Cir. 1984).

92. *Id.* at 31,512. *See also* Corbin v. Sinclair Marketing, Inc., 684 P.2d 265, 267 (Colo. Ct. App. 1984).

93. 123 Lab. Cas. (CCH) ¶ 35,701 (N.D. Ill. 1992).

94. *Id.* at 48,458. The court noted the FLSA's liquidated damages clause and potential criminal sanctions are sufficient to deter improper employer conduct. *Id.*

95. Michael D. Moberly, *Fair Labor Standards Act Preemption of "Public Policy" Wrongful Discharge Claims*, 42 DRAKE L. REV. 525, 562 (1993) (citing Lerwill v. Inflight Motion Pictures, 343 F. Supp. 1027, 1028 (N.D. Cal. 1972)).

96. Victoria W. Shelton, Note, *Will the Public Policy Exception to the Employment-at-will Doctrine Ever Be Clear?*—Amos v. Oakdale Knitting Co., 14 CAMPBELL L. REV. 123, 133 (1991).

97. *Saffels*, 40 F.3d at 1548.

98. *See infra* note 99-111.

99. *Saffles*, 40 F.3d at 1548-49. The court noted cases such as *Brock v. Casey Truck Sales, Inc.* and *Brennan v. Maxey's Yamaha, Inc* had extended § 15(a)(3)

noted that all of the cited cases involved employees who had "assert[ed] protected rights."[100] Furthermore, the court recognized that Saffels and Morriss allegedly had not engaged in any "protected activity."[101] Therefore, the court decided to go beyond previous case law.[102]

Next, the court probed the policy behind the FLSA.[103] The court observed that one of the Congressional policies behind § 15(a)(3) was to encourage employees to report violations to the authorities.[104] In order to effectuate this policy, the court reasoned § 15(a)(3) must be read broadly in order to "foster an environment in which employees are unfettered in their decision to voice grievances without 'fear of economic retaliation.'"[105] Therefore, the court decided the statute's "animating spirit"[106] encompassed "activit[ies] that fall outside the express wording of the statute."[107]

Finally, the court examined and adopted the Third Circuit's reasoning in *Brock v. Richardson*.[108] In relying on *Richardson*, the court explicitly adopted the support of various cases under the National Labor Relations Act and the Occupational Safety and Health Act.[109] In addition to adopting the reasoning in *Richardson*, the court noted giving protection to Saffels and Morriss under § 15(a)(3) would "in no way diminish"[110] the FLSA policy of encouraging the reporting of violations by employees.[111]

The court held Saffels and Morriss had stated a claim under Missouri's common law public policy exception to the employment at-will doctrine.[112] The court, in citing *Johnson*,[113] noted that Saffels' and Morriss' claim arose under a statute; namely, FLSA § 15(a)(3).[114] Furthermore, the court stated

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protection to employees that had not met the formal requirements of § 15(a)(3). *See supra* notes 45-53 and accompanying text.

100. *Saffles*, 40 F.3d at 1548.

101. *Id.* at 1549.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* (citing Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 292 (1960)).

106. *Id.* (citing Brock v. Richardson, 812 F.2d 121, 124 (3rd Cir. 1987).

107. *Id.*

108. *Id.* at 1549-50.

109. *Id.* at 1549. *See supra* notes 70-71 and accompanying text for cases under the NLRA and OSHA.

110. *Id.* at 1549-50.

111. *Id.*

112. *Id.* at 1550. At no time did the court discuss preemption.

113. *See supra* notes 78-80 and accompanying text.

114. *Saffels*, 40 F.3d at 1550.

that discouraging employers from discharging employees based on an erroneous belief the employee had reported FLSA violations was "in the realm of . . . sound public policy."[115] Therefore, the court reversed the district court's grant of summary judgment in favor of the defendant and remanded for further proceedings.[116]

Judge Hansen briefly dissented from the majority opinion.[117] He recognized § 15(a)(3) had been broadly interpreted in order to protect employees. However, Judge Hansen felt the majority opinion in effect "amended" the FLSA to protect Saffels and Morriss.[118]

V. COMMENT

The Eighth Circuit's decision in *Saffels v. Rice* made two questionable extensions of existing law. First, the court extended protection under FLSA § 15(a)(3) to employees who have not taken any action that is remotely associated with the FLSA.[119] This action by the court does nothing to further the underlying policies of the FLSA. Second, and perhaps more importantly, the court extended coverage of Missouri's common law public policy exception to these employees, thus implicitly holding FLSA § 15(a)(3) does not preempt the Missouri common law public policy exception to the employment at-will doctrine.[120] This holding makes the Eighth Circuit the first court to fail to find the FLSA preempts state law wrongful discharge claims.

A. Extension of FLSA § 15(a)(3)

Before *Saffels* and *Richardson*, analysis of § 15(a)(3) began by interpreting whether an aggrieved employee had "filed any complaint or instituted or caused to be instituted any proceeding under . . . this chapter, or has testified . . . in any such proceeding.".[121] Depending on whether the employee chose to present direct or indirect evidence of a retaliatory discharge, his or her first hurdle was to prove either "standing"[122] or engagement in a "protected activity."[123] Although courts have construed

115. *Id.* at n.6.
116. *Id.* at 1550-51.
117. *Id.* at 1551.
118. *Id.*
119. *See infra* notes 121-144 and accompanying text.
120. *See infra* notes 146-158 and accompanying text.
121. 29 U.S.C.A. § 215(a)(3) (West 1995).
122. *See supra* notes 40-73 and accompanying text.
123. *See supra* notes 35-37 and accompanying text; Strickland v. MICA

these tests liberally,[124] every court before *Saffels* and *Richardson* had required the employee to have taken some positive action.[125]

The *Saffels* court recognized it was extending protection under § 15(a)(3) to employees who had taken no positive action and attempted to bolster its position by invoking the policy behind § 15(a)(3).[126] The court explicitly acknowledged "the FLSA's underlying purpose [is] that employees, not the federal government, serve as the enforcement mechanism for the act".[127] The court argued that its extension of § 15(a)(3) was necessary to "foster an environment"[128] in which employees would feel free to voice complaints.[129] However, the court went on to reason "[n]othing in [its] reading of [§] 15(a)(3) will *discourage* or *prevent* employees from coming forward with reports of wrongdoing by their employers."[130]

The Eighth Circuit has previously stated "[t]he sole object of [statutory] construction is to determine the legislative intent. Such intent must be found primarily in the language of the statute itself . . . ."[131] Furthermore, the court should "construe [the statute] as to effectuate and not destroy the spirit and force of the law . . . ."[132] In other words, the *Saffels* court should have looked primarily to the language of the statute[133] in order to effectuate the intent of Congress. However, the court took a backwards approach by arguing that at least its holding did not *defeat* the statute's purpose.[134] Perhaps the court chose this rationalization because it is difficult to explain how protecting

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Information Systems, 800 F. Supp. 1320, 1323 (M.D. N.C. 1992).

124. *See supra* notes 44-53 and accompanying text.

125. *See, e.g., Hayes*, 604 F. Supp. at 17 (requiring some "positive and overt" action by the employee); *Strickland*, 800 F. Supp. at 1323 (requiring the employee to show participation in a "protected activity"); *Casey Truck Sales, Inc.*, 839 F.2d at 879 (extending coverage under § 15(a)(3) to "*activities*" not connected with formal proceedings) (emphasis added).

126. *Saffels*, 40 F.3d at 1549.

127. *Id.* at 1549-50.

128. *Id.* (citing *Robert De Mario Jewelry, Inc.*, 361 U.S. at 292).

129. *Id.*

130. *Id.* at 1550 (emphasis added).

131. Premachandra v. Mitts, 727 F.2d 717, 727 (8th Cir. 1984).

132. *Id.*

133. The United States Supreme Court has stated "[i]n the absence of persuasive reasons to the contrary, we attribute to the words of a statute their ordinary meaning." Banks v. Chicago Grain Trimmers Assoc., 390 U.S. 459, 465 (1968). The *Saffels* court obviously went well beyond the ordinary meaning of the language in § 15(a)(3).

134. Recall that the court argued its holding would not "discourage or prevent" employees from voicing their complaints. However, § 15(a)(3)'s purpose is to *encourage* employees to voice their complaints. *See supra* notes 110-111 and accompanying text.

an employee who may have never even *considered* voicing a complaint[135] would *further* the FLSA policy of encouraging employees to report violations of the FLSA.[136]

The decision in *Saffels* untethers § 15(a)(3) analysis from the language of the statute.[137] In order to invoke § 15(a)(3), the plain language of the statute requires an employee to file a complaint, institute a proceeding, or testify in a proceeding.[138] Although previous courts had interpreted these phrases broadly,[139] all (except *Richardson*) had at least required a "positive and overt act"[140] by the employee.[141] Under the reasoning of *Saffels*, the relevant analysis no longer focuses on the actions of the employee.[142] Therefore, there appears to be nothing limiting courts' analysis except that § 15(a)(3) should be interpreted so as to "foster an environment" in which employees "feel free to approach . . . officials with their grievances."[143] It is unclear exactly how far a court can stray from the plain language of § 15(a)(3) in order to create this "environment."[144]

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135. Apparently, under *Saffels*' reasoning, the employee does not even have to be *aware* that there is an FLSA violation. In fact, the same reasoning would allow the court to find for the employees even if *no* FLSA violation occurred. As long as the employer subjectively "thought" the employee had contacted the authorities and then terminated the employee, § 15(a)(3) would be violated. This does nothing to further the policy that employees report FLSA violations.

136. Prior to *Saffels*, § 15(a)(3) already had been interpreted to protect employees who asserted FLSA rights either officially or at work. Therefore, any employee who actually voiced a complaint would be protected. *See* Bonham v. Copper Cellar Corp., 476 F. Supp. 98, 103 (E.D. Tenn. 1979).

137. The court analogized FLSA § 15(a)(3) to § 8(a)(3) of the National Labor Relations Act (NLRA). However, § 8(a)(3) of the NLRA makes it illegal to "discourage membership in any labor organization." 29 U.S.C.A. § 158(a)(3) (West 1995). This language would allow a court to find that dismissing an employee on the erroneous belief the employee had participated in union activities "discourages membership" in the union and is thus statutorily prohibited. *See generally* N.L.R.B. v. Clinton Packing Co., 468 F.2d 953 (8th Cir. 1972).

138. 29 U.S.C.A. § 215(a)(3) (West 1995).

139. *See supra* notes 44-53 and accompanying text.

140. *C.H. Valentine Lumber Inc.*, 236 F. Supp. at 620.

141. *See supra* notes 54-64 and accompanying text.

142. *Saffels*, 40 F.3d at 1550. The court never explicitly stated the employee's actions do not matter; however, the court held the employer's erroneous belief the employees had "reported violations or otherwise engaged in protected activity" was sufficient to afford them protection under § 15(a)(3). *Id.*

143. *Id.* at 1549.

144. *See supra* note 135.

The court's reasoning is flawed in that it explicitly recognized that the FLSA's purpose is to act as an incentive for employees to report violations of the substantive FLSA provisions. However, the court's holding is designed to act as a disincentive to employers who terminate employees in bad faith. The holding in *Saffles* effectively punishes employers based on their subjective beliefs about their employees' actions. Therefore, the holding does nothing to further the purposes of FLSA § 15(a)(3).

B. FLSA § 15(a)(3) preemption of Missouri common law public policy exception to the employment at-will doctrine

Although the Eighth Circuit never addressed the issue, it calls into question prior case law[145] by allowing Saffels and Morriss to assert claims under the Missouri common law public policy exception as well as FLSA § 15(a)(3).[146] This implicit holding appears to make the Eighth Circuit the first court to have held FLSA § 15(a)(3) does *not* preempt common law wrongful discharge claims based on the public policy behind the FLSA.[147]

Since the *Saffels* court did not address the preemption issue, it is difficult to determine whether preemption should have been found. The United States Supreme Court has stated that state law is preempted if "the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress."[148] The *Prewitt* court, in finding preemption,[149] observed that "[a] statutory right of action shall not be deemed to supersede and displace remedies otherwise available at common law in the absence of language to that effect unless the statutory remedy fully comprehends and envelopes the remedies provided by common law."[150] Since the *Saffels* court held both § 15(a)(3) and Missouri's common law public policy exception protect employees from discharge based on their employer's erroneous belief the

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145. The federal district court for the Western District of Missouri had held § 15(a)(3) preempted claims under Missouri's common law public policy exception that were based on the policy underlying the FLSA. *Prewitt*, 747 F. Supp. at 565. *See supra* notes 81-96 and accompanying text.

146. *Saffels*, 40 F.3d at 1550. The record does not disclose whether the issue was briefed to the Eighth Circuit.

147. *See* Moberly *supra* note 95 at 562 (stating "[e]very court to have addressed the issue has concluded . . . the remedies available under the FLSA preempt a common-law wrongful discharge claim premised on the public policy reflected in the FLSA").

148. Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984).

149. *See supra* notes 88-90 and accompanying text.

150. *Prewitt*, 747 F. Supp. at 565 (citing Detling v. Edelbrock, 671 S.W.2d 265, 271-72 (Mo. 1984)).

employee reported violations of the law to the authorities,[151] it would appear that preemption was warranted because of the complete overlap of remedies.[152]

By not finding preemption, the *Saffels* court risks thwarting Congress' attempt (through the FLSA) to carefully balance the need for a minimum level of compensation for employees with the potentially disruptive effect a uniform minimum wage may have on employers.[153] In fact, one court has noted that Congress has repeatedly amended the FLSA in order to maintain this tenuous balance.[154] Both courts and commentators alike have recognized that the common law wrongful discharge claim offers an aggrieved employee a larger award than s/he could gain under FLSA § 15(a)(3).[155] Allowing recovery under both the FLSA and the state common law public policy exception would be duplicative;[156] thereby upsetting the balance Congress has sought to attain.[157] Furthermore, allowing an employee to pursue both remedies might actually encourage the employee to completely bypass the FLSA.[158]

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151. *Saffels*, 40 F.3d at 1550.

152. If, for example, the court had found FLSA § 15(a)(3) did *not* protect Saffels and Morriss, a finding that they were protected by the public policy exception would have made sense. Of course, the court would have to have first found that Saffels' and Morriss' discharge was protected by public policy affirmatively set forth in "a statute, a regulation based on a statute, or a constitutional provision." *Johnson*, 745 S.W.2d at 663.

153. *See* Lerwill v. Inflight Motion Pictures, 343 F. Supp. 1027, 1029 (N.D. Cal. 1972). Some courts and commentators have argued that allowing recovery under the state common law public policy exception would adversely affect economic growth by discouraging new employment. *See* Shelton, *supra* note 96, at 133; Coman v. Thomas Mfg. Co., 381 S.E.2d 445, 452 (N.C. 1991) (Meyer, J., dissenting).

154. *Lerwill*, 343 F. Supp. 1029.

155. *See supra* note 96 and accompanying text; Chappell v. Southern Md. Hosp., 578 A.2d 766, 774 (Md. 1990).

156. Since recovery under the common law public policy exception is larger than under the FLSA, even non-duplicative recovery would upset the balance.

157. *See* Moberly, *supra* note 95, at 545 (stating that "the [harm to employers by minimum wage laws] would be exacerbated by the recognition of a wrongful discharge tort claim based on the public policy expressed in the FLSA").

158. *See* M.E. Knack, Note, *Do State Fair Employment Statutes by "Negative Implication" Preclude Common-Law Wrongful Discharge Claims Based on the Public Policy Exception?*, 21 MEM. ST. U. L. REV. 527, 533 (1991) (arguing that employees would pursue the state law public policy claim because it would offer more damages); Moberly, *supra* note 95, at 558 (arguing that allowing the public policy claim "with its attendant tort remedies . . . undoubtedly would have the effect of encouraging [employees] to bypass the FLSA's remedial scheme . . . . ") (footnote omitted).

VI. CONCLUSION

In *Saffels v. Rice*, the Eighth Circuit turned the plain meaning of FLSA § 15(a)(3) on its head. Instead of analyzing the statute as an incentive to encourage employees to file complaints, the court used the statute to punish what it considered bad faith conduct by the employer. In so doing, the court failed to enunciate any clear standard with which to limit employers' liability. Furthermore, the court failed to discuss previous case law holding that § 15(a)(3) preempted Missouri's common law public policy exception to the at-will employment doctrine. Therefore, the court missed an opportunity to weigh the advantages of preemption and make a rational decision whether to support the prior case law.

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