

# Washington Law Review

---

Volume 76 | Number 1

---

1-1-2001

## Qualifying Immunity: Protecting State Employees' Right to Protect Their Employment Rights after *Alden v. Maine*

Raymond J. Farrow

Follow this and additional works at: <https://digitalcommons.law.uw.edu/wlr>



Part of the [Labor and Employment Law Commons](#)

---

### Recommended Citation

Raymond J. Farrow, Notes and Comments, *Qualifying Immunity: Protecting State Employees' Right to Protect Their Employment Rights after Alden v. Maine*, 76 Wash. L. Rev. 149 (2001).

Available at: <https://digitalcommons.law.uw.edu/wlr/vol76/iss1/4>

This Notes and Comments is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington Law Review by an authorized editor of UW Law Digital Commons. For more information, please contact [lawref@uw.edu](mailto:lawref@uw.edu).

## QUALIFYING IMMUNITY: PROTECTING STATE EMPLOYEES' RIGHT TO PROTECT THEIR EMPLOYMENT RIGHTS AFTER *ALDEN v. MAINE*

Raymond J. Farrow

**Abstract:** Recent U.S. Supreme Court decisions have barred state employees from bringing private suits against their state employers to recover back wages due them as a result of having been paid in violation of the Fair Labor Standards Act (FLSA). This Comment proposes that the only method by which state employees may protect their FLSA rights on their own behalf is to bring suits against responsible state supervisory personnel in their individual capacities. Although such actions are not barred by sovereign immunity, the potential ability of state agents to invoke a defense of "qualified immunity" would severely impair state employees' ability to protect their FLSA rights. This Comment therefore argues that there is no basis either in the language of the FLSA or at common law for applying the doctrine of qualified immunity to state officers liable for violations of the FLSA.

In December of 1993, John Alden and ninety-five current and former state probation officers sued the state of Maine<sup>1</sup> seeking to enforce their right under the Fair Labor Standards Act<sup>2</sup> (FLSA) to receive time-and-one-half pay for overtime hours worked. The district court determined that Maine had failed to pay the officers appropriate overtime compensation<sup>3</sup> and in a subsequent decision ordered the computation of damages due each officer in the form of two years of backpay.<sup>4</sup> Five years later, after an odyssey through the federal and state court systems, John Alden and his fellow officers found themselves unable to collect the sums awarded them under the FLSA. The U.S. Supreme Court determined that no court in the land had the power to force Maine to defend itself against Alden's attempt to enforce his statutory rights.<sup>5</sup> A

---

1. *Mills v. Maine*, 839 F. Supp. 3, 4 (D. Me. 1993) *aff'd* 118 F.3d 37, 41 (1st Cir. 1997). The original named plaintiff Jon Mills was later replaced as the named plaintiff by John Alden. To avoid confusion, this Comment refers to Alden as the named plaintiff. *See Mills v. Maine*, 118 F.3d 37, 41 (1st Cir. 1997) (explaining that ninety-six officers were included in original suit).

2. Act of June 25, 1938, ch. 676, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201-219 (1994)). The FLSA governs child labor laws, minimum wage laws, and overtime pay requirements. *See id.*

3. *Mills*, 839 F. Supp. at 6.

4. *Mills v. Maine*, 853 F. Supp. 551, 556 (D. Me. 1994) *aff'd* 118 F.3d 37, 41 (1st Cir. 1997).

5. *See Alden v. Maine*, 527 U.S. 706, 712 (1999) (immunizing state from FLSA suit brought by state employees in state court); *Seminole Tribe v. Florida* 517 U.S. 44, 72-73 (1996) (immunizing state from suit in federal court brought by individuals based on statutes enacted under Congress's Commerce Clause powers).

controversial<sup>6</sup> pair of U.S. Supreme Court decisions<sup>7</sup> regarding the scope of state sovereign immunity from suit had denied Congress the ability to subject states to private suit for violating federal laws enacted pursuant to Congress's Commerce Clause powers. As a result, the state of Maine would forever be able to keep the thousands of dollars in wages that had been wrongfully withheld from Alden and his colleagues.<sup>8</sup>

Despite the U.S. Supreme Court's dramatic re-interpretation of the doctrine of sovereign immunity in the 1990s, state employees such as Alden may have the ability to protect their right to recover back wages due to them, as specified by the FLSA.<sup>9</sup> The FLSA provides an expansive definition as to who may be considered liable for a violation of the FLSA, specifically allowing complaining parties to seek relief from "any person acting directly or indirectly in the interest of an employer."<sup>10</sup> The FLSA thereby provides a cause of action allowing state employees to sue appropriate state supervisory personnel responsible for allegedly violative employment practices.<sup>11</sup> While sovereign immunity does not protect individual state agents sued in their individual capacities,<sup>12</sup> the doctrine of qualified immunity is available to government officials sued for violating a plaintiff's constitutional rights

---

6. In *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000), Justice Stevens harshly criticized one of the Court's recent sovereign immunity cases:

I remain convinced that . . . the decision of five Justices in *Seminole Tribe* . . . was profoundly misguided. Despite my respect for stare decisis, I am unwilling to accept *Seminole Tribe* as controlling precedent . . . [T]he reasoning of that opinion is so profoundly mistaken . . . that it has forsaken any claim to the usual deference or respect owed to decisions of this Court.

*Id.* at 97-98 (Stevens, J., concurring in part, dissenting in part).

7. *Alden*, 527 U.S. at 754 (holding that Congress lacks power to subject states to private suit in state court when legislating under its Article I powers); *Seminole Tribe*, 517 U.S. at 72-73 (same result in federal court).

8. The exact amount owed had not been determined when the *Seminole Tribe* decision was issued. See *Mills v. Maine*, 118 F.3d 37, 41 (1st Cir. 1997).

9. Only seven years before *Seminole Tribe*, the Court stated that Congress had the power to abrogate sovereign immunity when acting pursuant to its Commerce Clause powers. See *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 14-15 (1989).

10. 29 U.S.C. § 203(d) (1994).

11. See *Luder v. Endicott*, 86 F. Supp. 2d 854, 866 (W.D. Wis. 2000); *infra* notes 33-57 and accompanying text.

12. *Hafer v. Melo*, 502 U.S. 21, 30-31 (1991) ("[T]he Eleventh Amendment does not erect a barrier against suits to impose 'individual and personal liability' on state officials . . .") (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 238 (1974)).

when acting within the course of their official duties.<sup>13</sup> Qualified immunity protects government officers from liability if their conduct was objectively reasonable in light of clearly established law.<sup>14</sup> If qualified immunity were available to defendants facing FLSA claims, state employees' ability to protect their FLSA rights would be considerably weakened.<sup>15</sup> However, an examination of the basis for granting government officials qualified immunity from civil rights claims leads to the conclusion that this defense should not be available to bar an FLSA action brought against state agents in their individual capacities.

Part I of this Comment outlines the substantive features of the FLSA and examines the basis on which courts have imposed individual liability for FLSA violations. The historical basis for granting state employees limited immunity from suit when acting within the scope of their official duties is developed in Part II. Parts III and IV explain the two major recent U.S. Supreme Court decisions regarding sovereign immunity and their impact on the ability of state employees to protect their rights under the FLSA. Part V analyzes why the FLSA should be interpreted to provide a cause of action against state supervisory personnel responsible for FLSA violations and proposes that the common law defense of qualified immunity for governmental officials has no application to such actions.

## I. THE FAIR LABOR STANDARDS ACT

The FLSA establishes minimum standards for employment practices within both the private and public sector. The FLSA establishes a cause of action for aggrieved employees against their "employer," a term that has a specific interpretation in the context of the FLSA.

---

13. Evan J. Mandery, *Qualified Immunity or Absolute Impunity? The Moral Hazards of Extending Qualified Immunity to Lower-Level Public Officials*, 17 HARV. J.L. & PUB. POL'Y 479, 483-85 (1994).

14. *Anderson v. Creighton*, 483 U.S. 635, 639 (1987).

15. The U.S. Supreme Court has noted that qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

A. *The FLSA Protects State Employees from Underpayment for Overtime Hours Worked*

Enacted in 1938, the FLSA<sup>16</sup> applies to all enterprises in the nation in which interstate activities take place.<sup>17</sup> A series of amendments from 1966 to 1985 extended FLSA coverage to states in their roles as employers.<sup>18</sup> The FLSA establishes a federal minimum wage to be paid to all employees<sup>19</sup> and requires that an overtime wage of time-and-a-half apply for all hours worked in excess of forty hours per week.<sup>20</sup> Specific exemptions to the overtime requirement apply to certain classes of state employees,<sup>21</sup> as well as to executive, administrative, and professional employees.<sup>22</sup> The FLSA imposes strict liability on any employer who knowingly or unknowingly pays an employee less than the minimum wage or fails to pay a non-exempt employee time-and-a-half for hours worked beyond the statutory level.<sup>23</sup> The U.S. Supreme Court has affirmed that the FLSA represents a valid exercise of Congress's constitutional powers under the Commerce Clause,<sup>24</sup> and that Congress

---

16. Act of June 25, 1938, ch. 676, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201–219 (1994)).

17. See 29 U.S.C. § 206(a) (1994).

18. See Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, 80 Stat. 830 (codified as amended in scattered sections of 29 U.S.C.) (extending coverage to schools, hospitals, nursing homes, and local transit systems, including those run by states); Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55 (codified as amended in scattered sections of 29 U.S.C.) (expanding class of state employees brought within terms of Act). In 1976 the U.S. Supreme Court ruled that it was beyond Congress's constitutional authority to apply the FLSA to state employees. See *Nat'l League of Cities v. Usery*, 426 U.S. 833, 843 (1976), overruled by *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985). After the Court overruled *National League of Cities* in *Garcia*, Congress recognized certain special conditions applicable to various classes of state employees. See Fair Labor Standards Amendments of 1985, Pub. L. No. 99-150, 99 Stat. 787–91 (1985) (codified at 29 U.S.C. § 203(e)(2)(C) (1994)).

19. 29 U.S.C. § 206.

20. *Id.* § 207(a)(1).

21. *Id.* § 207(k), (o), (p) (providing exceptions for employees of public agencies engaged in fire protection and law enforcement activities, and providing special rules for compensatory time in lieu of overtime for certain public-sector employees).

22. *Id.* § 213(a)(1).

23. But see *id.* § 259 (providing one exception if employer has made "good faith . . . reliance on any administrative regulation, order, ruling, approval, or interpretation" of Wage and Hour Division of Department of Labor).

24. See *Maryland v. Wirtz*, 392 U.S. 183, 188–99 (1968).

has the power to require that state employment practices conform to the FLSA.<sup>25</sup>

Even though the FLSA permits the Department of Labor (DOL) to pursue FLSA actions on behalf of employees,<sup>26</sup> Congress intended that aggrieved parties have the power to pursue relief under the FLSA on their own initiative.<sup>27</sup> With regard to state employees, Congress has noted that “[s]ince the 1974 Amendments extend FLSA coverage to additional state government employees, it is now all the more necessary that employees in this category be empowered themselves to pursue vindication of their rights.”<sup>28</sup> Indeed, the United States’ brief before the U.S. Supreme Court in *Alden v. Maine*<sup>29</sup> noted that “the Department of Labor[’s] . . . recent experience confirms Congress’s judgment that private enforcement is necessary to ensure that state employees receive the wages to which they are entitled by federal law.”<sup>30</sup> One commentator has noted that the DOL has averaged less than fifty cases per year brought under the FLSA since 1950.<sup>31</sup> In contrast, between 1993 and 1997 alone, plaintiffs filed more than 61,000 civil FLSA actions in federal courts.<sup>32</sup>

#### *B. The FLSA Contemplates an Expansive Definition of Employer Liability*

The use of an expansive definition as to who may be held liable for relief owed to employees arising from an FLSA violation supports the broad remedial objectives of the FLSA.<sup>33</sup> The FLSA states that “any

---

25. See *Auer v. Robbins*, 519 U.S. 452, 457 (1997) (“In 1974 Congress extended FLSA coverage to virtually all public-sector employees . . . and in 1985 we held that this exercise of power was consistent with the Tenth Amendment.”) (citations omitted).

26. 29 U.S.C. § 216(c) (“The Secretary may bring an action . . . to recover the amount of unpaid minimum wages or overtime compensation and an equal amount as liquidated damages . . . . Any sums thus recovered . . . shall be paid . . . directly to the employee or employees affected.”).

27. See S. REP. NO. 93-690, at 26-27 (1974) (“[T]he enforcement capability of the Secretary of Labor is not alone sufficient to provide redress in all or even a substantial portion of the situations where compliance is not forthcoming voluntarily.”).

28. *Id.* at 27.

29. 527 U.S. 706 (1999).

30. Brief for United States at 37, *Alden v. Maine*, 527 U.S. 706 (No. 98-436).

31. See Gregg A. Rubenstein, *The Eleventh Amendment, Federal Employment Laws, and State Employees: Rights Without Remedies?*, 78 B.U. L. REV. 621, 659 n.211 (1998).

32. Tina Kelley, *When Overtime Doesn't Feel So Fine*, N.Y. TIMES, May 31, 1998, at B10.

33. See, e.g., *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 139 (2d Cir. 1999).

employer who violates the . . . [FLSA] shall be liable to the employee or employees affected in the amount of their . . . unpaid overtime compensation . . . and in an additional equal amount as liquidated damages.”<sup>34</sup> An employer is defined as “includ[ing] any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency.”<sup>35</sup> Courts have construed this definition broadly,<sup>36</sup> determining those with “managerial responsibilities” and “substantial control of the terms and conditions of the [employee’s] work” may be employers for the purpose of establishing FLSA liability.<sup>37</sup>

*1. Involvement in the Activity Giving Rise to the FLSA Violation Determines Liability, Even Where No Personal Benefit Accrues to the Individual Liable for the Violation*

The critical determinant of liability for an FLSA violation is *involvement* in the activity that gives rise to the violation.<sup>38</sup> The alleged employer must have sufficient control over the employees’ working conditions to ensure compliance with the FLSA.<sup>39</sup> In *Bonnette v. California Health & Welfare Agency*,<sup>40</sup> the Ninth Circuit established a four-part test that has been widely adopted to help evaluate whether an individual or organization may be considered an employer within the terms of the FLSA.<sup>41</sup> Factors weighing in favor of a ruling that an

---

34. 29 U.S.C. § 216(b) (1994). Senator (later Justice) Hugo Black described this as “the broadest definition that has ever been included in any one act.” *United States v. Rossenwasser*, 323 U.S. 360, 363 n.3 (1945) (quoting 81 Cong. Rec. 7657, July 27, 1937) (statement of Senator Black)).

35. 29 U.S.C. § 203(d).

36. *E.g.*, *Dole v. Elliott Travel & Tours, Inc.*, 942 F.2d 962, 965 (6th Cir. 1991) (“The remedial purposes of the FLSA require the courts to define ‘employer’ more broadly than the term would be interpreted in traditional common law applications.”) (quoting *McLaughlin v. Seafood Inc.*, 867 F.2d 875, 877 (5th Cir. 1989) (per curiam)).

37. *Falk v. Brennan*, 414 U.S. 190, 195 (1973).

38. *See, e.g.*, *House v. Cannon Mills Co.*, 713 F. Supp. 159, 161 (M.D.N.C. 1988) (holding individuals accountable due to their authority over employment decisions under ADEA, relying on FLSA precedents).

39. *Brickley v. County of Smyth*, 944 F. Supp. 1310, 1315 (W.D. Va. 1996).

40. 704 F.2d 1465 (9th Cir. 1983).

41. *See id.* at 1470 (applying four-factor test to determine that public welfare agencies were employers of in-home service providers for blind and disabled). The Second Circuit adopted this test in *Herman v. RSR Security Services Ltd.*, 172 F.3d 132, 139 (2d Cir. 1999). A number of district courts have also adopted this test. *See Robertson v. Bd. of County Comm’rs*, 78 F. Supp. 2d 1142, 1151 (D. Colo. 1999); *Baker v. Stone County*, 41 F. Supp. 2d 965, 979–80 (W.D. Mo. 1999);

individual has employer status include (1) the power to hire and fire, (2) supervision and control of work schedules or conditions of employment, (3) involvement in determining the rate and method of payment, and (4) involvement in maintaining employment records.<sup>42</sup> No one factor standing alone is dispositive; rather courts look to the totality of the circumstances.<sup>43</sup> Further, not all factors must be present: the factors are to be treated as merely a guide to an examination of the facts of each case.<sup>44</sup>

Whether the putative employer stands to benefit financially from the underpayment of the employees is not a factor to be considered.<sup>45</sup> For example, within the private sector the courts distinguish ownership of an enterprise from involvement in the activity.<sup>46</sup> Although there are many cases imposing individual liability on substantial shareholders of closely held corporations,<sup>47</sup> a substantial ownership interest alone, without some degree of control, is insufficient to justify liability for FLSA violations.<sup>48</sup> Significantly, courts have imposed individual liability against individuals with no ownership interest but with supervisory authority over employees' working conditions.<sup>49</sup>

---

Barfield v. Madison County, 984 F. Supp. 491, 497 (S.D. Miss. 1997); *Brickley*, 944 F. Supp. at 1315.

42. *Bonnette*, 704 F.2d at 1470.

43. *See id.*

44. *See RSR Sec. Servs.*, 172 F.3d at 140 (finding three of four factors sufficient).

45. *Falk v. Brennan*, 414 U.S. 190, 195 (1973) (holding that partners in real-estate-management partnership were employers of maintenance personnel despite employee's pay being determined independently of management fee going to partnership).

46. *See Donovan v. Sabine Irrig. Co.*, 695 F.2d 190, 195 (5th Cir. 1983) (noting that stock ownership in corporate employer is not sine qua non of employer status under FLSA, and looking to control of employment relationship to determine status as employer).

47. *See, e.g., United States Dep't of Labor v. Cole Enters., Inc.*, 62 F.3d 775, 778 (6th Cir. 1995) (imposing liability on fifty percent shareholder and president).

48. *Patel v. Wargo*, 803 F.2d 632, 637-38 (11th Cir. 1986) (deciding that principal stockholder and president was not employer because he had no operational control of matters relating to employees); *Wirtz v. Pure Ice Co.*, 322 F.2d 259, 262-63 (8th Cir. 1963) (holding that seventy-five percent shareholder who played no active role in company was not employer); *see also House v. Cannon Mills Co.*, 713 F. Supp. 159, 161 (M.D.N.C. 1988) ("A position as an officer or shareholder is not a condition for liability, but merely an indicia of authority.").

49. *See, e.g., Schultz v. Falk*, 439 F.2d 340, 344-45 (4th Cir. 1971) (holding that rental agents were employers of maintenance personnel, despite lack of ownership interest in buildings managed, and fact that agents were fully reimbursed by building owners for all wages paid to personnel); *Cannon Mills*, 713 F. Supp. at 161 (relying on FLSA definition of employer to hold two non-director, non-officer supervisors with no ownership interest liable as employers under Age Discrimination in Employment Act); *Brock v. VAFLA Corp.*, 668 F. Supp. 1516, 1520 (M.D. Fla. 1987) (finding that general manager of amusement park with no apparent ownership interest is



## 2. *Courts Have Imposed Individual Liability on State Officials.*

Cases imposing individual liability for FLSA violations within the public sector are extremely rare. This partly reflects the more recent coverage of state employees within the terms of the FLSA<sup>50</sup> and partly reflects that until the U.S. Supreme Court's recent decisions on sovereign immunity,<sup>51</sup> plaintiffs did not need to look to private parties for relief when the state's resources were available to satisfy any judgment. However, a number of district courts have declined to dismiss claims against individual state officers who hold positions that give them responsibility for the employment practices giving rise to the alleged FLSA violations.<sup>52</sup>

Only three circuit courts have had the opportunity to consider whether individual liability for FLSA violations applies to public officials. The Seventh Circuit affirmed without comment an FLSA damage award against the director of the Illinois Department of Central Management in his individual capacity.<sup>53</sup> In *Lee v. Coahoma County*,<sup>54</sup> the Fifth Circuit determined that a sheriff who had responsibilities for appointing

---

employer); *Donovan v. Schoolhouse Four, Inc.*, 573 F. Supp. 185, 186, 190 (W.D. Va. 1983) (holding that consultant to, and manager of, corporation are both employers when personally involved in retaliatory firings despite no apparent ownership interest); *Brennan v. Control Mfg., Inc.*, 22 Wage & Hour Cas. (BNA) 212, 212-13 (D. Ariz. 1975) (holding that salaried president with no ownership interest is employer when president supervised employees and set pay practices).

50. See *supra* note 18.

51. *Supra* note 7 and accompanying text.

52. *Luder v. Endicott*, 86 F. Supp. 2d 854, 866 (W.D. Wis. 2000) (declining to dismiss claim against state correctional officers in their individual capacities); *Mosley v. Douglas County Corr. Ctr.*, no. 8-99CV78, 2000 WL 952681, \*3 (D. Neb. May 17, 2000) (declining to dismiss individual-capacity claim against state official under Family and Medical Leave Act, relying in part on *Endicott*); *Jama v. INS*, 22 F. Supp. 2d 353, 371 (D.N.J. 1998) (denying motion to dismiss complaint against INS officials in their individual capacities for FLSA violations); *Barfield v. Madison County*, 984 F. Supp. 491, 499 (S.D. Miss. 1997) (holding sheriff liable in his individual capacity for FLSA overtime violations suffered by sheriff's department employees); *Marshall v. Miller*, 873 F. Supp. 628, 632 (M.D. Fla. 1995) (declining to dismiss individual-capacity suits against sheriff and other supervisors for development of record to allow application of "economic reality" test); *Bankston v. Illinois*, No. 93-C-39, 1993 WL 141785, at \*3 (N.D. Ill. Apr. 30, 1993) ("It is not beyond the ken that . . . [the] director of the Department could qualify as a person acting directly or indirectly in the interest of the Department."), *aff'd*, 60 F.3d 1249 (7th Cir. 1995).

53. *Bankston v. Illinois*, 60 F.3d 1249, 1257 (7th Cir. 1995); see also *Riordan v. Kempiners*, 831 F.2d 690, 694 (7th Cir. 1987) (suggesting that state employee could be considered "employer" under FLSA "provided the [official] had supervisory authority over the complaining employee and was responsible in whole or part for the alleged violation").

54. 937 F.2d 220 (5th Cir. 1991).

deputies and fixing their compensation fell “within the class of managerial personnel considered employers by the FLSA”<sup>55</sup> and hence could be held jointly and severally liable for damages resulting from the FLSA violation.<sup>56</sup> The *Lee* court relied on U.S. Supreme Court and Fifth Circuit precedent determining the scope of employer liability in the private sector as support for its holding.<sup>57</sup>

Contrary to the opinions of the Seventh and Fifth Circuits are two Eleventh Circuit panel decisions denying that the definition of “employer” used in the FLSA justifies holding individual state employees liable for violations of statutes based on the FLSA.<sup>58</sup> In *Welch v. Laney*,<sup>59</sup> an Eleventh Circuit panel asserted, in a single conclusory sentence supported by no authority,<sup>60</sup> that the defendant sheriff was an employer in his official capacity<sup>61</sup> but *not* in his individual capacity<sup>62</sup> for the purposes of the Equal Pay Act, a part of the FLSA.<sup>63</sup> In *Wascura v. Carver*,<sup>64</sup> a subsequent Eleventh Circuit panel relied on *Welch* in dismissing an individual-capacity claim against a state official under the Family and Medical Leave Act (FMLA).<sup>65</sup> The FMLA incorporates the FLSA definition as to who may be considered an employer held liable for violations of the Act.<sup>66</sup> The *Wascura* court stated that “we are bound by the *Welch* decision regardless of whether

---

55. *Id.* at 226.

56. *Id.*

57. *Id.* at 226 (citing *Falk v. Brennan*, 414 U.S. 190, 194 (1973) & *Donovan v. Grim Hotel*, 747 F.2d 966 (5th Cir. 1984)).

58. *Wascura v. Carver*, 169 F.3d 683, 687 (11th Cir. 1999) (dismissing claims against various public officials in their individual capacities); *Welch v. Laney*, 57 F.3d 1004, 1011 (11th Cir. 1995) (dismissing individual-capacity claim against sheriff).

59. 57 F.3d 1004 (11th Cir. 1995).

60. *Id.* at 1011 (“Sheriff Laney in his individual capacity had no control over Welch’s employment and does not qualify as Welch’s employer under the Act.”).

61. *Id.* at 1010.

62. *Id.* at 1011.

63. The 1963 Equal Pay Act is a part of the FLSA. It amended the FLSA minimum-wage provisions to prohibit wage differentials based solely on sex. Pub. L. No.88-38, 77 Stat 56 (codified at 29 U.S.C. § 206(d) (1994)). The EPA relies on the same definition of employer as the FLSA. *Wascura*, 169 F.3d at 686 (noting that EPA is extension of FLSA and incorporates FLSA’s definition of employer).

64. 169 F.3d 683 (11th Cir. 1999).

65. *Id.*

66. *See id.* at 686–87.

we agree with it”<sup>67</sup> and made no attempt to rebut the claim that the *Welch* decision was “unclear and inadequate.”<sup>68</sup>

Despite the split in the circuits, the definition of who may be held liable as an employer under the FLSA is sufficiently broad to warrant consideration of the doctrine of qualified immunity.

## II. THE DOCTRINE OF QUALIFIED IMMUNITY

The doctrine of qualified immunity presents a potential impediment to FLSA individual-capacity suits against state officials. Qualified immunity grants limited *personal* immunity to state employees when sued in their *individual* capacities,<sup>69</sup> “shield[ing the official] from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”<sup>70</sup> Qualified immunity is distinct from sovereign immunity, which attaches to states or to state employees sued in their *official* capacities.<sup>71</sup> To determine whether qualified immunity protects state officials from FLSA liability it is necessary to understand the historical development and underlying policy rationales for the granting of such immunities to government officials.<sup>72</sup>

### A. *State Employees’ Protection from Constitutional Tort Liabilities Protects the Public from the Consequences of Impairing Those Officials in the Performance of Their Public Duties*

Qualified immunity is a personal defense available to state employees when sued in their individual capacities.<sup>73</sup> Qualified immunity shields public officials from pretrial procedural obligations<sup>74</sup> and from personal

---

67. *Id.* at 687.

68. *Id.*

69. See *Hafer v. Melo*, 502 U.S. 21, 25 (1991).

70. *Wilson v. Layne*, 526 U.S. 603, 609 (1999) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

71. See *Hafer*, 502 U.S. at 26–27 (stating that actions against state officials are not individual-capacity complaints simply because complained-of conduct was undertaken in course of their official duties); *Kentucky v. Graham*, 473 U.S. 159, 166–67 (1985) (noting that state’s sovereign immunity only restricts suits against public officials in their official capacities).

72. See *Richardson v. McKnight*, 521 U.S. 399, 404 (1997) (explaining that history and policy guide application of qualified immunity).

73. See *Hafer*, 502 U.S. at 25.

74. *Behrens v. Pelletier*, 516 U.S. 299, 308 (1996).

liability for money damages.<sup>75</sup> Immunity for public servants has been justified by the desire to prevent harm to the public that may result if government officials are distracted from the effective performance of their public duties by harassing lawsuits.<sup>76</sup> The defense is designed to protect public officials from undue interference with their duties,<sup>77</sup> to prevent public officials from acting with an excess of caution,<sup>78</sup> and to ensure that talented candidates are not deterred from public service.<sup>79</sup>

The qualified immunity defense imposes an extraordinarily high burden on plaintiffs seeking civil liability for public officials accused of violating a plaintiff's constitutional rights.<sup>80</sup> Determining whether a government official has violated a constitutional right generally requires the application of a balancing test or a determination of whether the official's acts were reasonable under the circumstances.<sup>81</sup> Courts' willingness to grant qualified immunity in civil rights cases reflects the difficulty of determining that an official knowingly violated a right defined in such ephemeral terms. As Professor Pillard notes,

because of the common-law, case-by-case method through which constitutional standards develop . . . and the high level of specificity at which the clearly-established-law inquiry is conducted, most fact-intensive constitutional claims can reasonably be characterized as new. A nonfrivolous defense based on the merits of a constitutional issue will generally suffice to support immunity.<sup>82</sup>

---

75. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

76. *Clinton v. Jones*, 520 U.S. 681, 693–94 (1997).

77. *Harlow*, 457 U.S. at 806.

78. *Forrester v. White*, 484 U.S. 219, 223 (1988).

79. *Wyatt v. Cole*, 504 U.S. 158, 167 (1992).

80. Cornelia Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under Bivens*, 88 GEO. L.J. 65, 66 (1999) (reporting that in only four of approximately 12,000 *Bivens* actions brought between 1971 and 1985 did plaintiffs obtain judgments). See *infra* note 84 for an explanation of *Bivens* actions.

81. Alan K. Chen, *The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law*, 47 AM. U. L. REV. 1, 45, 48 (1997) (noting that "balancing tests have become the predominant mode of articulating substantive constitutional doctrine" and that "the Court often invokes a substantive reasonableness standard as a metric for unconstitutional behavior"); see also *Anderson v. Creighton*, 483 U.S. 635, 643–44 (1987) ("[T]he precise content of most of the Constitution's civil-liberties guarantees rests on assessment of what accommodation between governmental need and individual freedom is reasonable.").

82. Pillard, *supra* note 80, at 79.

Understanding the development of the doctrine of qualified immunity is essential to determining the scope of its application.

*B. The Historical Development of Qualified Immunity Shapes the Scope of Its Application*

The U.S. Supreme Court developed the doctrine of qualified immunity for public officials in response to the explosion in the number of suits brought against state and federal officials<sup>83</sup> following the Court's expansion of liability for constitutional torts.<sup>84</sup> In *Monroe v. Pape*,<sup>85</sup> the Court expanded the ability of plaintiffs to enforce constitutional rights against state officials through damages actions under 42 U.S.C. § 1983.<sup>86</sup> Rejecting the argument that the "under color of law" clause reached only unconstitutional acts taken by state officials when authorized by the state, the Court held that § 1983 reached unconstitutional acts taken by state officials even if they were acting without authority.<sup>87</sup> The Court thereby provided federal protection to private citizens "deprived of constitutional rights . . . by [a state] official's abuse of his position."<sup>88</sup> Having thus exposed state officials to civil liability, the Court subsequently attempted to limit the exposure of government officials to such actions through the development of an immunity doctrine calculated to counter *Monroe's* expansive statement of individual liability.<sup>89</sup>

---

83. Crawford-El v. Britton, 93 F.3d 813, 830 (D.C. Cir. 1996) (noting that while there were only twenty-one cases decided under 42 U.S.C. § 1983 in its first fifty years, in 1988 alone more than 40,000 civil-rights actions were filed against government officials).

84. The term "constitutional torts" refers to damages actions brought against public officials in their individual capacities for the deprivation of federal constitutional rights. See *Berry v. Funk*, 146 F.3d 1003, 1013 (D.C. Cir. 1998). When brought against state officials, such actions are authorized by 42 U.S.C. § 1983 (1994). Federal agents may be sued directly under the Constitution as established by *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 397 (1971). Such suits have become known as *Bivens* actions.

85. 365 U.S. 167 (1961).

86. *Id.* at 187 (holding that § 1983 provides cause of action against state officials). Section 1983 states: "[E]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects . . . any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . . for redress." 42 U.S.C. § 1983.

87. See *Monroe*, 365 U.S. at 172.

88. *Id.*; see also *id.* at 194-98 (Harlan, J., concurring) (explaining need for federal remedy even if unauthorized acts by state officials would constitute state tort).

89. Harold S. Lewis, Jr. & Theodore Y. Blumoff, *Reshaping Section 1983's Asymmetry*, 140 U. PA. L. REV. 755, 774 (1992).

Although § 1983 contains no language granting immunity to defendants, the Court developed an immunity doctrine to protect officials from § 1983 claims.<sup>90</sup> The U.S. Supreme Court first addressed the existence of immunity for government officials from constitutional tort claims in *Tenney v. Brandhove*.<sup>91</sup> The *Tenney* Court granted immunity to members of a committee of the California State Assembly on Un-American Activities,<sup>92</sup> determining that the privilege of legislative immunity was so deeply entrenched in the common law that it was impossible to believe that Congress would have intended to abrogate it in § 1983 without doing so explicitly.<sup>93</sup> *Tenney* granted the legislators in question absolute immunity from suit, protecting them from civil liability irrespective of fault or motive. Such “absolute immunity” has a limited reach, only protecting officials when acting within the scope of their legislative, judicial, or prosecutorial capacities.<sup>94</sup>

In contrast to absolute immunity, the Court has also recognized a form of “good faith,” or qualified immunity, a more limited form of immunity available to a broader class of government officials than are protected by *Tenney*’s absolute immunity.<sup>95</sup> Relying on *Tenney*’s assertion that common law immunities survived passage of § 1983,<sup>96</sup> the Court in *Pierson v. Ray*<sup>97</sup> noted that the common law provided a good-faith defense for police officers accused of false arrest<sup>98</sup> and held that this defense was also available to officers charged under § 1983.<sup>99</sup>

Later U.S. Supreme Court decisions have extended the reach of the qualified-immunity doctrine to include a broader class of government

---

90. Subsequently, § 1983 immunities have been applied in an identical manner to *Bivens* actions. See *Wilson v. Layne*, 526 U.S. 603, 609 (1999).

91. 341 U.S. 367 (1951).

92. *Id.* at 374–78.

93. See *id.* at 376.

94. See *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982).

95. See *Mandery*, *supra* note 13, at 487. Employment cases trigger only qualified immunity. Cf. *Forrester v. White*, 484 U.S. 219, 228–29 (1988) (denying absolute immunity but remanding for factual determination of whether judge accused of wrongful dismissal was entitled to qualified immunity, because discharge was undertaken when acting in administrative capacity).

96. See *id.* at 554–55.

97. 386 U.S. 547 (1967).

98. *Id.* at 557.

99. *Id.*

officials.<sup>100</sup> In *Scheuer v. Rhodes*,<sup>101</sup> the Court expanded the class of officials able to rely on qualified immunity beyond police officers, noting that government officials with a broad range of duties face the same need for swift, firm action as police officers.<sup>102</sup> *Scheuer* concerned the liability of the Governor of Ohio for acts taken during the Kent State University riots, a situation calling for rapid, intuitive judgments akin to those undertaken by police officers in the course of their duties.<sup>103</sup> Unable to cite any specific historical basis for qualified immunity for officials in *Scheuer's* position,<sup>104</sup> the Court instead relied on the need to protect such officials from harassment.<sup>105</sup>

Subsequently, in *Harlow v. Fitzgerald*<sup>106</sup> the Court abandoned the subjective good-faith aspect of the qualified-immunity doctrine as developed in *Pierson* and *Scheuer*.<sup>107</sup> The *Harlow* Court adopted an objective standard for evaluating a defendant's entitlement to qualified immunity because of concerns that the subjective features of the good-faith defense were failing to prevent insubstantial claims from proceeding to trial, thus failing to free officers from time-consuming court proceedings.<sup>108</sup> As a result, qualified immunity protects "government officials performing discretionary functions . . . from 'liability for civil damages insofar as their conduct [does] not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'"<sup>109</sup>

---

100. See *Anderson v. Creighton*, 483 U.S. 635, 645 (1987) (noting that qualified immunity has been expanded beyond its common law scope).

101. 416 U.S. 232 (1974).

102. *Id.* at 246-47.

103. *Id.*

104. *Id.* at 248.

105. *Id.* at 239-49.

106. 457 U.S. 800 (1982).

107. See *id.* at 815-16.

108. See *id.* at 818.

109. *Wyatt v. Cole*, 504 U.S. 158, 166 (1992) (quoting *Harlow*, 457 U.S. at 818).

### III. SEMINOLE TRIBE AND ALDEN GRANT THE STATES IMMUNITY FROM PRIVATE SUITS ALLEGING VIOLATIONS OF THE FLSA

Two recent U.S. Supreme Court decisions have severely curtailed the ability of state employees to protect their rights under the FLSA.<sup>110</sup> These controversial decisions<sup>111</sup> held that sovereign immunity shields the states against private actions brought to enforce federal laws enacted under Congress's Commerce Clause powers.<sup>112</sup> These decisions reversed previous rulings as to the ability of state employees to sue states under the FLSA. Prior to 1996, the U.S. Supreme Court had established that Congress had the power to abrogate a state's sovereign immunity from suit when acting pursuant to its Commerce Clause powers as long as Congress explicitly stated its intent to do so.<sup>113</sup> In particular, the Commerce Clause empowered Congress to specify that employee FLSA rights may be enforced by private suit even if the defendant is a state or state agency.<sup>114</sup>

In 1996, the U.S. Supreme Court, in *Seminole Tribe v. Florida*,<sup>115</sup> reconsidered whether the Commerce Clause afforded Congress the power to abrogate the states' Eleventh Amendment immunity<sup>116</sup> from suit in federal court.<sup>117</sup> Chief Justice Rehnquist, speaking for a five-justice majority, announced that Article I of the Constitution did not confer on Congress the power to expand the jurisdiction of the federal courts over the states, overruling the Court's *Union Gas* decision of just seven years earlier.<sup>118</sup>

---

110. See *Alden v. Maine*, 527 U.S. 706 (1999); *Seminole Tribe v. Florida* 517 U.S. 44 (1996).

111. *Supra* note 6.

112. *Alden*, 527 U.S. at 754 (holding that Congress lacks power to subject states to private suit in state court when legislating under its Commerce Clause powers); *Seminole Tribe*, 517 U.S. at 47 (same result in federal court).

113. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 14–15 (1989), overruled by *Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

114. See, e.g., *Hale v. Arizona*, 993 F.2d 1387, 1391–92 (9th Cir. 1993) (applying *Union Gas* to allow private FLSA action against state in federal court).

115. 517 U.S. 44 (1996).

116. U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

117. See *Seminole Tribe*, 517 U.S. at 76.

118. See *id.* at 72–73.



Following the *Seminole Tribe* decision, a number of FLSA suits brought by state employees were dismissed from federal court on the basis of the defendant state's Eleventh Amendment immunity.<sup>119</sup> Having been denied access to the federal courts, many of the defeated plaintiffs turned to state courts for protection of their rights.<sup>120</sup> The state courts disagreed as to whether the states were immune from FLSA suits in their own courts,<sup>121</sup> leading the U.S. Supreme Court to grant certiorari to resolve this question.<sup>122</sup> On June 23, 1999, the Court announced its decision in *Alden v. Maine*.<sup>123</sup> Again by a five-to-four margin, the Court announced that "the States retain immunity from private suit in their own courts, an immunity beyond the congressional power to abrogate by Article I legislation."<sup>124</sup> Without any plain constitutional language upon which to base its extension of sovereign immunity to actions in state court, the majority contended that "the scope of States' immunity from suit is demarcated not by the text of the [Eleventh] Amendment alone but by fundamental postulates implicit in the constitutional design."<sup>125</sup>

As a result of the *Seminole* and *Alden* decisions, state employees who believe that their state's compensation practices violate the requirements of the FLSA may not bring a private action against the state seeking an award of back-pay or liquidated damages in either state or federal court. The *Alden* court rejected the argument that its decision to bar private actions against states would effectively confer on a state the right to disregard valid federal law.<sup>126</sup> The Court identified six avenues of judicial review that are available to enforce the states' obligation to obey validly implemented federal law in light of a series of limits implicit in the constitutional principle of state sovereign immunity.<sup>127</sup>

---

119. See, e.g., *Mills v. Maine*, 118 F.3d 37, 48 (1st Cir. 1997) (deciding that FLSA was enacted pursuant to Congress's Commerce Clause powers and therefore granting sovereign immunity to State of Maine on basis of *Seminole Tribe*).

120. See, e.g., *Alden v. Maine*, 715 A.2d 172, 173 (Me. 1998).

121. Compare *id.* (holding suit barred from state court), with *Jacoby v. Ark. Dep't of Educ.*, 962 S.W.2d 773, 778 (Ark. 1998) (determining that Eleventh Amendment does not protect states from suit for violations of FLSA in state court).

122. *Alden v. Maine*, 525 U.S. 981 (1998).

123. 527 U.S. 706 (1999).

124. *Id.* at 754.

125. *Id.* at 729.

126. *Id.* at 754-55.

127. *Id.* at 755-57.

First, states may consent to suit.<sup>128</sup> Second, in ratifying the Constitution, the states consented to suits brought by the federal government.<sup>129</sup> Third, Congress may abrogate sovereign immunity when acting pursuant to its Fourteenth Amendment powers.<sup>130</sup> Fourth, sovereign immunity does not extend to lesser entities such as “municipal corporation[s] or other government entit[ies] which are not an arm of the state.”<sup>131</sup> Fifth, the *Ex parte Young*<sup>132</sup> doctrine permits individuals to seek an injunction against officers of the state to perform a duty which they have neglected or refused to perform, so long as the relief sought is merely prospective injunctive or declaratory relief.<sup>133</sup> Finally, the Court suggested that an action for damages may be brought against state officers in their individual capacities.<sup>134</sup>

#### IV. PERSONAL-CAPACITY SUITS PROVIDE THE ONLY AVENUE FOR STATE EMPLOYEES TO PROTECT THEIR FLSA RIGHTS

If state employees wish to pursue claims for back wages on their own behalf, the only cause of action available (absent waiver by the state) is an individual-capacity suit against a state officer based on that official's status as an employer. None of the other enforcement mechanisms suggested by the *Alden* Court provide a means for state employees to protect their rights under the FLSA on their own behalf, as envisioned by Congress. The *Alden* Court suggested that individual-capacity suits may be an available option to enforce some statutory rights, relying on *Scheuer v. Rhodes*<sup>135</sup> and *Ford Motor Co. v. Department of Treasury*<sup>136</sup> as support for the availability of this cause of action.<sup>137</sup> However, neither *Scheuer* nor *Ford* provides a basis for concluding that this option is available under the FLSA.

---

128. *Id.* at 755.

129. *Id.* at 755–56.

130. *Id.* at 756.

131. *Id.*

132. 209 U.S. 123 (1908).

133. *See Alden*, 527 U.S. at 757.

134. *See id.*

135. 416 U.S. 232, 237–38 (1974).

136. 323 U.S. 459, 462 (1945).

137. *Alden*, 527 U.S. at 757.

A. *Excepting the Use of Individual-Capacity Suits, the Alden Court's Proposed Enforcement Options Fail To Provide State Employees with an Enforceable Cause of Action Under the FLSA.*

The first five enforcement options suggested by the *Alden* Court are either inapplicable to the FLSA or fail to provide state employees with the ability to seek financial compensation on their own behalf as envisioned by the FLSA. First, the states' history of antipathy to the FLSA<sup>138</sup> suggests that few state employees will be able to rely on their states' voluntary waiver of sovereign immunity. Indeed, in the short period of time since the *Seminole Tribe* decision, twenty-two states and Puerto Rico have invoked immunity in FLSA and related actions.<sup>139</sup> As a political question, state employees may be able to lobby for legislative action to waive reliance on sovereign immunity by their state; however, courts are bound by the political decision of the states as to this matter. Second, reliance on DOL representation is likely to be unavailing due to a lack of resources and is clearly contrary to Congress's intent for private enforcement of the FLSA.<sup>140</sup> Third, no court has accepted an argument that the FLSA represents an exercise of Congress's Fourteenth Amendment powers.<sup>141</sup> Fourth, the opportunity to bring suit against a lesser entity is of no value to any state employee who does not work for such a lesser entity. Finally, the *Ex parte Young* doctrine is inapplicable to actions to enforce the FLSA because the FLSA permits only the Secretary of Labor to bring actions for injunctive relief.<sup>142</sup>

---

138. See Joanne Brant, *Seminole Tribe, Flores and State Employees: Reflections on a New Relationship*, 2 EMPLOYEE RTS. & EMP. POL'Y J. 175, 208-12 (1998) (providing brief history).

139. See *Aaron v. Kansas*, 115 F.3d 813, 818 (10th Cir. 1997) (relying on cases dismissing FLSA claims against states from federal court after *Seminole Tribe* in Arizona, Arkansas, Illinois, Iowa, Kansas, Louisiana, Maine, Maryland, New York, Ohio, Rhode Island, Texas, and Virginia); see also *Powell v. Florida*, 132 F.3d 677, 678 (11th Cir. 1998); *Jackson v. Kentucky*, No. 95-6238, 1997 U.S. App. LEXIS 32763 (6th Cir. Nov. 12, 1997); *Balgowan v. New Jersey*, 115 F.3d 214 (3d Cir. 1997); *Castro v. Puerto Rico*, 43 F. Supp. 2d 186 (D.P.R., 1999); *Larry v. Univ. of Ala.*, 975 F. Supp. 1447, 1450 (N.D. Ala. 1997); *Arndt v. Wis. Dep't of Corr.*, 972 F. Supp. 475 (W.D. Wis. 1996); *Goebel v. Colorado*, No. 93-K-1227, 1996 U.S. Dist. LEXIS 20929 (D. Colo. June 25, 1996) (decided on other grounds); *Whittington v. N.M. Dep't of Pub. Safety*, 966 P.2d 188, 189 (N.M. Ct. App. 1998) (denying immunity); *Butterfield v. State*, 987 P.2d 569 (Or. Ct. App. 1999); *Lawson v. Univ. of Tenn.*, No. E1999-02516-COA-9-CV, 2000 WL 116312 (Tenn. Ct. App. Jan. 28, 2000).

140. *Supra* notes 21-24 and accompanying text.

141. See, e.g., *Mills v. Maine*, 118 F.3d 37, 44-49 (1st Cir. 1997).

142. See 29 U.S.C. § 211(a) (1994); see also *Lorillard v. Pons*, 434 U.S. 575, 581 (1978) (holding that FLSA precludes employee's access to injunctive relief).

B. *Alden Provides No Guidance as to Whether Individual-Capacity Suits Provide an Enforcement Mechanism Applicable to State Employee FLSA Rights*

Because neither *Scheuer* nor *Ford* concerned suits brought under the FLSA, the *Alden* Court's reliance on these decisions provides no guidance as to whether the FLSA provides a cause of action against individual state officials. Furthermore, the Court's reliance on *Scheuer* raises, but does not answer, the question as to whether a state official accused of responsibility for an FLSA violation is entitled to the shield of qualified immunity.

The passage from *Ford* relied on by the *Alden* Court is dictum because no individual-capacity action was at issue. The *Ford* Court determined that Ford had a cause of action against the state.<sup>143</sup> The specific passage in *Ford* relied on by the *Alden* Court refers to two cases concerning the recovery of unconstitutional taxes from a state tax collector.<sup>144</sup> However, at the time of those decisions "taxes were collected by a revenue officer whose relation to the state was closer to that of an independent contractor than to that of an employee."<sup>145</sup> Furthermore, personal-capacity actions against state tax collectors could only proceed if the collector had not yet turned the wrongfully withheld taxes over to the state.<sup>146</sup> Since no individual state official will ever personally hold the funds wrongfully withheld because of underpayment of a state employee's wages, no analogous liability can exist for an FLSA violation.

The *Alden* Court's reliance on *Scheuer v. Rhodes*<sup>147</sup> provides no guidance either, because the cause of action in *Scheuer* was provided by § 1983, which establishes a cause of action against state employees in their individual capacities for constitutional violations.<sup>148</sup> While § 1983 provides a cause of action for constitutional torts, it does not provide the basis for a cause of action against a state official accused of violating the

---

143. See *Ford Motor Co. v. Dep't of Treasury*, 323 U.S. 459, 462-63 (1945).

144. See *Ford*, 323 U.S. at 462 (citing *Atcheson, Topeka, & Santa Fe Ry. Co. v. O'Connor*, 223 U.S. 280 (1912) & *Matthews v. Rodgers*, 284 U.S. 521 (1932)).

145. Carlos Manuel Vázquez, *What is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683, 1774 (1997).

146. See Michael Lepp, *Action Against Collector*, 72 AM. JUR. 2D *State And Local Taxation* § 1113 (1974).

147. 416 U.S. 232 (1974).

148. See *supra* notes 84-87 and accompanying text.

FLSA.<sup>149</sup> Furthermore, the primary issue in *Scheuer* was whether the parties in question could invoke either absolute or qualified immunity from suit.<sup>150</sup> If anything, this case identifies the difficulties of bringing an individual-capacity suit against a state employee, rather than suggesting that this is a viable cause of action.

V. THE FLSA PROVIDES A CAUSE OF ACTION AGAINST RESPONSIBLE STATE AGENTS AND DOES NOT PERMIT THOSE AGENTS TO INVOKE A QUALIFIED-IMMUNITY DEFENSE

If state employees are unable to prosecute supervisory personnel for FLSA violations, their ability to protect their FLSA rights will be severely compromised.<sup>151</sup> In order to preserve a cause of action for state employees to bring individual-capacity suits against appropriate state supervisory personnel, state employee defendants in FLSA actions should not be entitled to rely on a qualified-immunity defense. Qualified immunity should not shield state officials from liability under the FLSA because there is no basis for applying the qualified-immunity doctrine to FLSA actions based on either accepted principles of statutory construction or on the basis of the common law underpinnings of the doctrine.

A. *The History and Language of the FLSA Contemplate Individual Liability for Supervisory State Officers Involved in the Activity Giving Rise to the FLSA Violation*

Permitting state employees to sue state agents in their individual capacities is consistent with the policy of holding a broad class of people liable for FLSA violations if they are involved in the decisions leading to a violation.<sup>152</sup> The history of the FLSA indicates that Congress's intent was to attach individual liability to government employees in the

---

149. See *Barfield v. Madison County*, 984 F. Supp. 491, 509 (S.D. Miss. 1997) (determining that FLSA violation cannot form basis of § 1983 claim because FLSA contains its own complete remedial scheme).

150. See *Scheuer*, 416 U.S. at 247-48.

151. See *supra* notes 138-42 and accompanying text.

152. See *supra* notes 35-39 and accompanying text.

same way that the statute had been applied to corporate employees.<sup>153</sup> When Congress wishes to treat government employees accused of statutory violations differently from corporate employees, it is free to do so.<sup>154</sup> As noted by a widely cited<sup>155</sup> district court opinion,<sup>156</sup> Congress had explicitly stated its intent to limit those who could be sued in federal employment discrimination cases in 42 U.S.C. § 2000e-16(c) two years before the 1974 FLSA amendments.<sup>157</sup> Congress was aware of how to indicate that it wished government defendants to be treated differently from private-party defendants and yet chose not to do so in the FLSA. This omission suggests that Congress intended that government employees could be sued as individuals under the FLSA.<sup>158</sup>

Furthermore, Congress has on a number of occasions recognized that special rules may be required when applying the FLSA to states as employers.<sup>159</sup> Yet Congress chose to adopt existing definitions as to who may be held liable for FLSA violations when expanding protection to state employees.<sup>160</sup> Congress must be presumed to have been aware of the courts' expansive interpretation as to who could be held liable as an employer under the FLSA.<sup>161</sup> Therefore, the decision to adopt the same definition of "employer" when extending protection to state employees

153. See H. REP. NO. 93-913, at 28 (1974), *reprinted in* 1974 U.S.C.C.A.N. 2811, 2837 ("It is the intent of the committee that . . . the provisions of the law [be applied to public employees] in such a manner as to assure consistency with the . . . application . . . to other sectors of the economy.").

154. See, e.g., 29 U.S.C. § 207(k), (o), & (p) (1994); 29 C.F.R. § 541.5d (1999) (Special Provisions Applicable to Employees of Public Agencies).

155. See, e.g., *Jama v. INS*, 22 F. Supp. 2d 353, 371 (D.N.J. 1998); *Marshall v. Miller*, 873 F. Supp. 628, 632 (M.D. Fla. 1995); *Bankston v. Illinois*, No. 93-C39, 1993 WL 141785, \*3 (N.D. Ill. Apr. 30, 1993).

156. *Weiss v. Marsh*, 543 F. Supp. 1115, 1121 (M.D. Ala. 1981).

157. See *id.*

158. Cf. *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 176-77 (1994) ("Congress knew how to impose aiding and abetting liability when it chose to do so . . . [Therefore] [i]f . . . Congress intended to impose aiding and abetting liability, we presume it would have used the words 'aid' and 'abet' in the statutory text."); *In re Haas*, 48 F.3d 1153, 1156-57 (11th Cir. 1995) ("Where Congress knows how to say something but chooses not to, its silence is controlling . . . [even if in different statutes] because Congress is presumed to be aware of pertinent, existing law when it passes legislation.").

159. See 29 U.S.C. §§ 207(k), (o), & (p); see also 29 C.F.R. § 541.5d.

160. See 29 U.S.C. § 203.

161. See *United States v. Jordan*, 915 F.2d 622, 628 (11th Cir. 1990) ("Under accepted rules of statutory construction, it is generally presumed that Congress, in drafting legislation, is aware of well-established judicial construction of . . . existing statutes.").

implies that Congress envisioned the same expansive exposure to liability in the public sector.<sup>162</sup>

In summary, based on the history and the language of the FLSA, individual state officers who are responsible for violative employment conditions may be held liable as employers within the terms of the FLSA.

*B. There Is No Basis in the Statute or Common Law for Granting State Officers a Qualified Immunity for Violations of the FLSA*

The U.S. Supreme Court has provided extensive guidance as to how the qualified-immunity doctrine is to be applied to a particular statute: § 1983 of the Civil Rights Act.<sup>163</sup> However, whether other statutes should be interpreted to admit this defense is a question that the lower courts have addressed without guidance from the U.S. Supreme Court.<sup>164</sup> Lower courts have, for the most part, blindly assumed that the doctrine is available to a state official accused of violating any federal statute.<sup>165</sup>

---

162. The courts have consistently taken this view with regard to other extensions of the FLSA. For example the Equal Pay Act (EPA) was enacted as an amendment to the FLSA in 1963. Equal Pay Act of 1963, Pub. L. No. 88-38, § 3, 77 Stat. 56 (codified at 29 U.S.C. §§206(d)). The EPA incorporates unchanged the definition of "employer" from § 203(d) of the FLSA. The courts have universally relied on FLSA precedent to determine interpretation of "employer" status under the EPA. See, e.g., *Welch v. Laney*, 57 F.3d 1004, 1011 (11th Cir. 1995) (relying on *Wirtz v. Lone Star Steel Co.*, 405 F.2d 668 (5th Cir. 1968), which was decided under FLSA, to guide interpretation as to who may be employer under EPA); cf. *Auer v. Robbins*, 519 U.S. 452, 457 (1997) (noting that salary-basis test used to determine exemptions from FLSA overtime requirement was adopted in 1940 before coverage of public-sector employees, but applying test identically to public-sector employees to determine exemptions from Act.); *Bryant v. Delbar Prods.*, 18 F. Supp. 2d 799, 807 (M.D. Tenn. 1998) (noting near identity of language of FMLA and FLSA definitions of employer to adopt interpretations of employer status from FLSA into FMLA).

163. See *supra* notes 69-79, 97-108 and accompanying text.

164. Every U.S. Supreme Court decision on qualified immunity has involved either a claim under § 1983 or a *Bivens* action. The Court recently declined to grant certiorari to consider the application of qualified immunity to the Federal Wiretap Act. See *Petition For Writ of Certiorari at i*, *Blake v. Wright* (99-848) (stating question presented as "[s]hould the common law qualified-immunity defense afforded to public officials in claims based upon constitutional rights be extended to claims arising from violations of statutory rights?"), *cert. denied*, 120 S. Ct. 980 (2000).

165. See Gary Gildin, *Dis-Qualified Immunity for Discrimination Against the Disabled*, 1999 U. ILL. L. REV. 897, 900 (1999) ("In short, the courts adjudicating damage claims under the Rehabilitation Act, [American with Disabilities Act, and Individuals with Disabilities in Education Act] have blindly cloned the § 1983 qualified immunity defense without considering whether the defense is consonant with Congress's intent."); see also *Baker v. Stone County*, 41 F. Supp. 2d 965, 1003 (W.D. Mo. 1999) (relying on fact that "no Defendant has intentionally acted to violate Plaintiffs' rights" to grant qualified immunity to various officials in their individual capacities). *But*

This ignores the fact that the U.S. Supreme Court “look[s] to both the history and to the purposes that underlie government employee immunity”<sup>166</sup> to determine the reach of the qualified-immunity doctrine. To respect both Congress’s intent with regard to the interpretation of a federal statute and the U.S. Supreme Court’s approach to qualified immunity, courts should conduct a preliminary inquiry as to whether the grant of qualified immunity is appropriate for the statute at issue.<sup>167</sup> Applying qualified immunity to the FLSA is inconsistent with both Congress’s intent and with the common law basis for the doctrine.

*1. There Is No Basis for Granting Qualified Immunity to Defendants in an FLSA Action Based on the Language or History of the Statute*

The courts should not apply personal-immunity defenses developed in the context of constitutional torts to federal statutes without consideration of the language of the statute and congressional intent.<sup>168</sup> The Court of Appeals for the District of Columbia has noted that because both § 1983 and *Bivens* actions were essentially Court-created actions, it was within the U.S. Supreme Court’s discretion to apply common law immunities to these common law torts.<sup>169</sup> However, when the statute at issue provides its own limited defenses, there is no scope for the courts to “graft common law defenses on top of those that Congress creates.”<sup>170</sup>

---

see *Barfield v. Madison County*, 984 F. Supp. 491, 496 n.8 (S.D. Miss. 1997) (rejecting defendant’s claim to qualified immunity from FLSA claim since defendant failed to cite any cases recognizing qualified immunity as defense to claim for violation of FLSA).

166. *Richardson v. McKnight*, 521 U.S. 399, 404 (1997); see also *Wyatt v. Cole*, 504 U.S. 158, 167–68 (1992) (declining to extend qualified immunity to private persons who conspired with state officials to violate constitutional rights, because “the nexus between private parties and the historic purposes of qualified immunity is simply too attenuated to justify such an extension of our doctrine of immunity”); *Tower v. Glover*, 467 U.S. 914, 920–33 (1984) (declining to extend qualified immunity to public defenders because no such immunity existed at common law).

167. See *Berry v. Funk*, 146 F.3d 1003, 1013 (D.C. Cir. 1998) (rejecting argument that qualified-immunity doctrine applies to federal wiretap statute); *Samuel v. Holmes*, 138 F.3d 173, 178 (5th Cir. 1998) (relying on language and purpose of Federal Claims Act to reject application of qualified immunity).

168. See, e.g., *Berry*, 146 F.3d at 1013; *McClelland v. McGrath*, 31 F. Supp. 2d 616, 619 (N.D. Ill. 1998).

169. See *Berry*, 146 F.3d at 1013; see also *Crawford-El v. Britton*, 523 U.S. 574, 611–12 (1998) (Scalia, J., dissenting) (“We find ourselves engaged . . . [in] crafting a sensible scheme of qualified immunities for the statute we have invented—rather than . . . the statute that Congress wrote.”); *Lewis & Blumoff*, *supra* note 89, at 759 (“As it stands today, § 1983 is almost entirely a judicial construct.”).

170. *Berry*, 146 F.3d at 1013.



The FLSA contains both a cause of action<sup>171</sup> and its own enumerated defenses. Congress has included in the FLSA a grant of immunity to actors who act in "good faith . . . reliance on any administrative order, ruling, approval, or interpretation" of an administrative agency.<sup>172</sup> Furthermore, defendants may avoid an award of liquidated damages by establishing that they acted in good faith and on the basis of a reasonable belief that they were not violating the FLSA.<sup>173</sup> It is inappropriate for the courts to import common law doctrines to expand those defenses that Congress, within the terms of a statute, has provided to the cause of action it has created.<sup>174</sup>

Furthermore, in no congressional record of the various amendments to the FLSA extending coverage to state employees in 1966, 1974, and 1985 is there any mention that Congress wished state employers to be able to rely on any special defense not granted to private-sector employees.<sup>175</sup> Instead, the legislative history suggests that it was Congress's intent to grant state employees the identical protection available to private sector employees.<sup>176</sup>

It is also significant that Congress has recognized the special needs of state employers in delimiting certain exceptions to the terms of the FLSA when applied to public sector employees,<sup>177</sup> yet no such special treatment is accorded to state officers liable in their individual capacities under the FLSA. Furthermore, Congress has, when it so desired, specified statutory defenses available to state employees not available to private-sector individuals.<sup>178</sup> The absence of such language in the FLSA should, therefore, be determinative of Congress's intent.

---

171. See 29 U.S.C. § 216(b) (1994) ("An action to recover the liability prescribed . . . may be maintained against any employer . . . by any one or more employees . . .").

172. *Id.* § 259.

173. See *id.* § 260.

174. See *Wyatt v. Cole*, 504 U.S. 158, 164 (1992) ("Irrespective of the common law support, we will not recognize an immunity available at common law if § 1983's history or purpose counsel against applying it in § 1983 actions.").

175. This arguably reflects the presumption at the time that state employees would be able to enforce their rights directly against the states.

176. See *supra* note 153.

177. See 29 U.S.C. § 207(k), (o), & (p).

178. See 40 U.S.C. § 489(a) (1994) (specifying that "no officer or employee of the government shall be . . . liable"); 16 U.S.C. § 831c-2(a)(1) (1994) (providing that no action shall be brought against individual employees of Tennessee Valley Authority); 50 U.S.C. app. §§ 501-525 (1994) (providing, *inter alia*, temporary immunity against military personnel during course of active duty).

## 2. *There Is No Common Law Basis for Granting Qualified Immunity to Defendants in FLSA Actions*

Even if a court were to decide that established common law defenses to tort claims against government officials survive passage of the FLSA, unless Congress explicitly rules otherwise,<sup>179</sup> there is no common law basis for the existence of immunity for a public official accused of violating the FLSA. In evaluating the reach of qualified immunity the U.S. Supreme Court looks to whether there is a specific historical application of immunity granted to the type of official in question.<sup>180</sup> In addition, the Court considers whether the need to protect public officials from suit is of sufficient gravity to outweigh the rights of plaintiffs to have their rights protected.<sup>181</sup> Neither test supports allowing a qualified-immunity defense to an FLSA suit.

There is no historical basis for qualified immunity for state employees who violate the FLSA. In looking to the historical basis for the common law defense, a court must consider what common law defenses were available at the time of the passage of the FLSA.<sup>182</sup> The first extension of the FLSA to cover a limited number of state employees was enacted in 1966.<sup>183</sup> Because this predates both *Pierson* and *Scheuer*, none of the qualified-immunity defenses subsequently established under § 1983 were available at the time of the passage of the 1966 amendments.<sup>184</sup> Although the *Pierson* precedent has, over time, been extensively broadened to give a variety of administrative personnel protection for employment-related decisions,<sup>185</sup> these extensions have not been based on any pre-1966 historical precedent. Numerous commentators have noted that qualified immunity is no longer grounded

---

179. See *Blake v. Wright*, 179 F.3d 1003, 1012 (6th Cir. 1998) (relying on fact that federal Wiretap Act does not indicate that public officials *cannot* claim qualified immunity rather than looking to defenses that statute does include).

180. See *supra* note 163.

181. See *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982).

182. See *supra* note 163. Justices Scalia and Rehnquist have criticized the Court's grant of immunity from § 1983 actions on the basis of doctrines developed after the passage of the Civil Rights Act. See, e.g., *Burns v. Reed*, 500 U.S. 478, 505 (1991) (Scalia, J., concurring in part and dissenting in part); *Smith v. Wade*, 461 U.S. 30, 66 (1983) (Rehnquist, J., dissenting).

183. See Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, 80 Stat. 830 (1966). While later amendments broadened the class of state employees covered by the FLSA, see *supra* note 18, the first time Congress acted to extend protection to government employees was in 1966.

184. See *Wade*, 461 U.S. at 66 (Rehnquist, J., dissenting).

185. See *supra* notes 101–08 and accompanying text.

in its historical roots,<sup>186</sup> so that it is inconceivable that Congress, in 1966, could have anticipated the establishment of such a broad-based defense by subsequent U.S. Supreme Court decisions.

There is no persuasive policy argument for granting a special defense to state officers responsible for FLSA violations. In establishing the parameters of the qualified-immunity defense, the U.S. Supreme Court has balanced the interests of those who have been injured by official misconduct against the harm to the public that may result if government officials are distracted from the effective performance of their public duties by harassing lawsuits.<sup>187</sup> The Court has identified two distinct threats from which it wishes to protect public employees. One is the threat to their time that would result from being forced to contest actions.<sup>188</sup> The second is the financial threat that may deter those officials from carrying out their duties "with the decisiveness and the judgment required by the public good"<sup>189</sup> and that may also act to discourage qualified workers from seeking employment in the public sector.<sup>190</sup>

There is far less need to protect state officers from the risk of time-consuming court actions resulting from insubstantial FLSA claims than is the case for constitutional tort claims. The contrast between the legal standard required for constitutional violations and for violations of the FLSA is of great relevance in establishing the need for such protection. Determining whether a constitutional right has been violated frequently requires a court either to determine whether an official's conduct was reasonable under the circumstances or to balance competing interests.<sup>191</sup> As a result, potentially harassing accusations of constitutional violations are likely to proceed to time-consuming court actions due to the

---

186. See David Rudovsky, *The Qualified Immunity Doctrine in the U.S. Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23, 38 (1989) ("[T]he Court rejected the limits of common law [regarding immunity] and, invoking considerations of public policy, substituted its own policy judgments for the commands of . . . § 1983."); Stephen Shapiro, *Public Officials' Qualified Immunity in Section 1983 Actions Under Harlow v. Fitzgerald and Its Progeny: A Critical Analysis*, 22 U. MICH. J. L. REF. 249, 268 (1989) (noting that reformulated qualified-immunity standard is "not a minor adjustment to some arcane rule of the common law . . . [but] a complete departure from the whole concept of common law good faith immunity").

187. See *Wyatt v. Cole*, 504 U.S. 158, 167 (1992).

188. See *Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982).

189. *Scheuer v. Rhodes*, 416 U.S. 232, 240 (1974).

190. See *Harlow*, 457 U.S. at 814.

191. See *supra* note 81 and accompanying text.

difficulty of evaluating such standards in pre-trial procedures. The strict liability nature of FLSA violations<sup>192</sup> leads to a far greater likelihood that harassing accusations can be dealt with prior to the commencement of time-consuming litigation. The need for a qualified-immunity defense designed to act as a gatekeeper allowing "a procedural mechanism for disposing of...cases at the earliest possible stage of litigation...through summary judgment"<sup>193</sup> is absent when the cause of action itself may be disposed of in this way. Hence, in weighing the need to protect state officers from harassment, the threat of insubstantial claims proceeding to the point of presenting a distraction from those employees' abilities to undertake their public duties is greatly reduced.<sup>194</sup>

The need for protection of state employees from time-consuming, insubstantial lawsuits is also less significant because the circumstances of an FLSA violation differ from those accompanying constitutional violations. Unlike the broad language of the Constitution, the FLSA represents a carefully drafted statute with an extensive history of interpretation by the courts and by the DOL.<sup>195</sup> The long history of application of the FLSA to private-sector employers has ensured that many of the potential ambiguities of the law have been clarified. If an application of the FLSA is in doubt, employment administrators may request clarification from the DOL as to how the FLSA applies to specific factual situations.<sup>196</sup> Further, an experienced administrative officer establishing a state's employment practices is not subject to the stressful need to make on-the-spot decisions akin to those of the Governor of Ohio facing student riots in *Scheuer*<sup>197</sup> or the police officers or prison officials who are the most common targets of § 1983 and

---

192. See *supra* note 23 and accompanying text.

193. Chen, *supra* note 81, at 21.

194. Further, the fear of harassment by particularly litigious individuals is not as significant when the plaintiffs in FLSA actions will themselves be government employees, not members of the public with an ax to grind against the government. See *Crawford-el v. Britton*, 523 U.S. 574, 575 n.1 (1998) (referring to problems of "litigious prisoners" and "legal troublemakers").

195. The DOL has the responsibility to promulgate rules interpreting and implementing the Act. 29 U.S.C. § 213(a)(1) (1994).

196. For example, Freeman Wood, the official responsible for setting the Maine probation officers' pay and employment practices, specifically stated that he had seen DOL opinion letters relating to the issue of pay for probation officers, yet chose not to determine how these applied to the Maine probation officers. See *Mills v. Maine*, 853 F. Supp. 551, 554-55 (D. Me. 1994) *aff'd* 118 F.3d 37, 41 (1st Cir. 1997).

197. See *supra* notes 101-05 and accompanying text.

*Bivens* actions.<sup>198</sup> The circumstances that have led the courts to give deference to government officials operating in such stressful environments do not apply to state administrative officials responsible for establishing a state's employment practices.<sup>199</sup> The courts' willingness to accept that when making spur-of-the-moment decisions in stressful situations a state officer may not know the fine details of judicial interpretation of constitutional rights has no relevance to administrative officers who are responsible for violations of the FLSA.

Furthermore, the threat to a state employee's pocketbook is overstated in the FLSA context. The widespread existence of state reimbursement statutes<sup>200</sup> greatly alleviates the financial threat to state employees from individual-capacity suits.<sup>201</sup> Even absent such relief from financial penalty, the need for protection of state officials from suit depends on whether the fear of being sued will "dampen the ardor . . . [of public officials] . . . in the unflinching discharge of their duties"<sup>202</sup> so as to cause harm to the public. Absent the potential for harm to the public there is no reason for providing protection to such an official.<sup>203</sup> A law enforcement officer's timidity in stopping, interrogating, or searching a suspected criminal may result in less effective crime prevention, and ultimately in harm to the public. However, as to a public official operating in an administrative capacity determining the pay practices of state employees, the only likely effect of greater timidity is to cause

---

198. See Arthur Wallberg, *More Than a Defense: Absolute and Qualified Immunities of State Officials Under 42 U.S.C. §1983*, 69 FLA. B.J. 108, 109 (1995) (noting that due to sheer number of adversarial contacts with citizenry, police are likely most common target of § 1983 actions); see also *Scheuer v. Rhodes* 416 U.S. 232, 244-45 (1974) (noting that police officers are "that segment of the executive branch . . . that is most frequently and intimately involved in day-to-day contacts with the citizenry, and hence, most frequently exposed to situations which can give rise to claims under § 1983").

199. See A. Allise Burris, Comment, *Qualifying Immunity in Section 1983 & Bivens Actions*, 71 TEX. L. REV. 123, 175 (1992) ("The fearlessness and independence required of judges, cited in *Pierson* and early common law immunity decisions, do not justify the breadth of protection that has ensued.").

200. See Vázquez, *supra* note 145, at 1796 n.464 (listing forty-five states with reimbursement statutes).

201. Statutory reimbursement of state employees for liabilities incurred when performing official duties does not imply that a suit against that individual becomes an official-capacity suit potentially subject to sovereign immunity. See Erwin Chemerinsky, *Ability to Sue State Governments Narrowed*, TRIAL, Dec. 1999, at 72, 74 (citing cases from Sixth, Seventh, and Ninth Circuits).

202. *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949)).

203. See *supra* notes 76, 187, and accompanying text.

greater care in ensuring compliance with the law. Congress has provided a defense to employers who rely in good faith on an administrative ruling by the DOL.<sup>204</sup> Therefore, timid state administrators can protect them-selves against the threat of financial liability arising from their decisions by requesting a ruling on any doubtful application of the FLSA from the DOL. As a result, at worst, a threat to a state officer's pocketbook will result in that officer taking a more considered approach to determining pay policies and a possible increase in the number of inquiries fielded by the DOL. This burden to the public does not outweigh the rights of plaintiffs in an FLSA action.

Finally, the fear that the threat of liability may discourage qualified people from seeking public sector employment<sup>205</sup> is irrelevant in the context of the FLSA. Because only public officials may be the target of constitutional tort claims,<sup>206</sup> an individual considering public-sector employment can avoid exposure to constitutional torts by taking a position in the private sector. In contrast, a personnel officer cannot avoid the threat of an individual-capacity FLSA claim by working in the private sector.<sup>207</sup> Hence, this concern provides no justification for providing special protection to public sector employees.

In summary, the threat to effective government that concerned the U.S. Supreme Court when developing the qualified-immunity doctrine in the context of constitutional torts is largely absent from FLSA causes of action. Hence, in balancing the interests in plaintiffs' abilities to protect their FLSA rights against the threat to the public from exposing government officials to liability for FLSA violations, the balance favors allowing state employees to protect their FLSA rights unburdened by any additional defenses beyond those enumerated in the FLSA itself.

---

204. See 29 U.S.C. § 259 (1994) (providing defense for employer who has in "good faith . . . rel[ie]d on any administrative regulation, order, ruling, approval, or interpretation" of Wage and Hour Division of DOL).

205. See *Harlow*, 457 U.S. at 814.

206. See Joseph D. McCann, *The Interrelationship of Immunity and the Prima Facie Case in Section 1983 and Bivens Actions*, 21 GONZ. L. REV. 117, 117-18 (1985) (noting that § 1983 actions provide remedies against state or municipal officials and that *Bivens* provides remedies against federal officials, but private parties can be liable only for conspiring with such officials).

207. See *supra* note 46-49 and accompanying text.

## CONCLUSION

As a result of the U.S. Supreme Court's recent reinterpretation of the reach of state sovereign immunity, state employees are prevented from seeking restitution for wages wrongfully withheld due to having been paid in violation of the FLSA. For these employees to be able to protect their own rights as intended by Congress, the only form of relief available is for the wronged state employees to bring an individual-capacity suit against state agents responsible for establishing the violative pay practices. Individual-capacity suits against appropriate state agents can provide an effective means for state employees to protect their rights, ensuring that the fate that befell John Alden and his fellow probation officers need not be suffered by other state employees. However, the courts must recognize that qualified immunity is an inappropriate doctrine to apply to protect individual state officers from liability for FLSA violations if state employees are to be afforded an opportunity to defend their rights as Congress intended.