HOUSE DOCKET, NO. 452   FILED ON: 1/11/2013

HOUSE . . . . No. 1342

The Commonwealth of Massachusetts

PRESENTED BY:

***Denise C. Garlick*, (BY REQUEST)**

To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:

The undersigned legislators and/or citizens respectfully petition for the passage of the accompanying resolution:

Resolutions requesting the Governor to remove Supreme Judicial Court Justices .

PETITION OF:

NAME:	DISTRICT/ADDRESS:
William J. Okerman	*100 Meetinghouse Circle* *Needham, MA 02492*

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HOUSE . . . . No. 1342

By Ms. Garlick of Needham (by request), a petition (accompanied by resolution, House, No. 1342) of William J. Okerman of Address requesting the Governor to remove the Chief Justice and justices of the Supreme Judicial Court. The Judiciary.

The Commonwealth of Massachusetts

In the Year Two Thousand Thirteen

Resolutions requesting the Governor to remove Supreme Judicial Court Justices .

1 requesting the Governor (with consent of the council) to remove Roderick L. Ireland
2 from the office of chief justice of the Supreme Judicial Court, Francis X. Spina from the office of
3 associate justice of the Supreme Judicial Court, Robert J. Cordy from the office of associate
4 justice of the Supreme Judicial Court; Margot Botsford from the office of associate justice of the
5 Supreme Judicial Court; Ralph D. Gants from the office of associate justice of the Supreme
6 Judicial Court; and Fernande R. V. Duffly from the office of associate justice of the Supreme
7 Judicial Court.

8 WHEREAS, the Constitution of the Commonwealth of Massachusetts provides:

9 In the government of this Commonwealth, the legislative department shall never exercise
10 the executive and judicial powers, or either of them: the executive shall never exercise the
11 legislative and judicial powers, or either of them: the judicial shall never exercise the legislative
12 and executive powers, or either of them: to the end it may be a government of laws and not of
13 men.

14 Article XXX of Part the First, A Declaration of the Rights of the Inhabitants of the
15 Commonwealth of Massachusetts, of the Constitution of the Commonwealth of Massachusetts;
16 and

17 WHEREAS, the Constitution of the Commonwealth further provides:

18 [F]ull power and authority are hereby given and granted to the said general court, from
19 time to time, to make, ordain, and establish, all manner of wholesome and reasonable orders,
20 laws, statutes, and ordinances, directions and instructions, either with penalties or without; so as
21 the same be not repugnant or contrary to this constitution, as they shall judge to be for the good

22 and welfare of this commonwealth, and for the government and ordering thereof, and of the
23 subjects of the same, and for the necessary support and defence of the government thereof;

24 Article IV of Section I of Chapter I of Part the Second of the Constitution of the
25 Commonwealth of Massachusetts; and

26 WHEREAS, the statutes that have been enacted by the General Court have been codified
27 as the General Laws of the Commonwealth of Massachusetts; and

28 WHEREAS, among the purposes of certain sections of Chapters 149 and 151 of Title
29 XXI of the General Laws, titled "Labor and Industries," is ensuring that employees receive their
30 compensation; and

31 WHEREAS, compliance with and the strict enforcement of the Commonwealth's wage
32 and hour laws, including those relating to employee compensation, are matters of public policy
33 of the utmost importance to the well-being of the Commonwealth and its inhabitants; and

34 WHEREAS, among the "responsibilities and functions" of the Attorney General are
35 "field inspection, investigation and prosecution to enforce all laws pertaining to wages, hours
36 and working conditions, child labor and workplace safety, and fair competition for bidders on
37 public construction jobs, including enforcement of the provisions of chapters one hundred and
38 forty-nine and one hundred and fifty-one of the General Laws." St. 1993, c. 110, § 331; See, e.g.,
39 G. L. c. 149, §§ 2, 5, 27C, 148-150, and G. L. c. 151, §§ 3, 15, 19(3); and

40 WHEREAS, Section 27C of Chapter 149 of the General Laws provides, among other
41 things:

42 Any employer, contractor or subcontractor, or any officer, agent, superintendent, foreman
43 or employee thereof, or staffing agency or work site employer who without a willful intent to do
44 so, violates any provision of section 26, 27, 27A, 27B, 27F, 27G, 27H, 148, 148A, 148B or 159C
45 or section 1A, 1B or 19 of chapter 151, shall be punished by a fine of not more than $10,000, or
46 by imprisonment for not more than six months for a first offense, and for a subsequent offense by
47 a fine of not more than $25,000 or by imprisonment for not more than one year, or by both such
48 fine and such imprisonment.

49 G. L. c. 149, § 27C(a)(2); and

50 WHEREAS, in addition to the Attorney General's enforcement responsibilities and
51 functions, certain sections of Chapters 149 and 151 of the General Laws provide employees with
52 a concurrent right to pursue private civil actions against employers for various labor law
53 violations, including violations of the wage and hour laws. G. L. c. 149, §§ 19B(4), 27, 27F,
54 27G, 27H, 52D(f), 150, 152A(f), and G. L. c. 151, §§ 1B and 20; and

55 WHEREAS, these private remedies provide for, among other things, treble damages; and

56 WHEREAS, as the Supreme Judicial Court has recognized, "Massachusetts has long-
57 standing statutes providing for treble damages." International Fidelity Ins. Co. v. Wilson, 387
58 Mass. 841, 856 n.20 (1983); and

59 WHEREAS, in 1983 the Supreme Judicial Court held as follows with respect to statutes
60 that provide for awards of multiple damages:

61 4. Multiple damage awards under c. 93A. Wilson, Sr., Wilson, Jr., and Pignato also
62 challenge the trial judge's method of awarding multiple damages under c. 93A, § 11. They argue
63 that IFIC is limited to a single award of multiple damages for which they are jointly and
64 severally liable. We disagree.

65 a. Background. The Legislature first created a private remedy under c. 93A in 1969.
66 Chapter 93A ties liability for multiple damages to the degree of the defendant's culpability by
67 creating two classes of defendants. The first class is those defendants who have committed
68 relatively innocent violations of the statute's substantive provisions. These defendants are not
69 liable for multiple damages. Linthicum v. Archambault, 379 Mass. 381, 388 (1979). The second
70 class is those defendants who have committed "willful or knowing" violations. § 11, supra.
71 Based on the egregiousness of each defendant's conduct, the trial judge may assess between
72 double and treble damages. When the Legislature extended the protection of c. 93A to the
73 business context, it incorporated this scheme concerning multiple damages into § 11. St. 1972, c.
74 614, § 2.

75 b. Legislative intent. The question presented by this case has not been raised previously
76 under either § 9 or § 11. We begin with the canon of statutory construction that the primary
77 source of insight into the intent of the Legislature is the language of the statute. Hoffman v.
78 Howmedica, Inc., 373 Mass. 32, 37 (1977). The language of § 11, however, does not yield an
79 answer. On one hand, the language focuses on the size of the injury and refers to the culpability
80 of the defendant in an indirect manner. This suggests that the statute be read as requiring joint
81 and several liability once any one of the defendants commits a "willful or knowing violation."
82 On the other hand, joint and several liability would conflict with the clear intent of the statute to
83 distinguish among different degrees of culpability. Language alone does not tell us which of
84 these inferences to follow.

85 The language of the statute being inconclusive, we must look to extrinsic sources for
86 assistance in determining the correct construction of the statute. Barclay v. DeVeau, 384 Mass.
87 676, 680 (1981). One important source is preexisting law, see Condon v. Haitsma, 325 Mass.
88 371, 373 (1950), since the Legislature must be presumed to be aware of the decisions of this
89 court. In interpreting the language of § 9, we have looked to analogous statutory material and
90 relevant case law to determine the intent of the Legislature. Murphy v. Charlestown Sav. Bank,
91 380 Mass. 738, 747-750 (1980).

92 We find two distinct bodies of law which are analogous. The first body of law is that
93 developed under the Clayton Antitrust Act (Act) which provides that "[a]ny person who shall be
94 injured in his business or property by reason of anything forbidden in the antitrust laws may sue .
95 . . and shall recover threefold the damages by him sustained." 15 U.S.C. § 15 (1976 & Supp. V
96 1981). Under the Act, the trial judge has no discretion to deny the plaintiff treble damages once a
97 violation – even a merely negligent one – is proved. Liability under the Act is joint and several.
98 Texas Indus. v. Radcliff Materials, Inc., 451 U.S. 630, 646 (1981). Joint and several liability is
99 consistent with the Act's rule that liability does not vary with the degree of the defendant's
100 culpability. It is also needed to place a limit on liability for relatively innocent violations of the
101 Act and to discourage strike suits.

102 Some States have adopted statutes modeled on the Clayton Act. The Massachusetts
103 Legislature considered, but rejected, such a proposal when it enacted § 9. Senate Doc. No. 211 of
104 1969 provided that "[a]ny person who purchases goods or services primarily for personal . . .
105 purposes who suffers any ascertainable loss . . . by the use . . . by a person of a method . . .
106 declared unlawful by section two . . . may bring an action . . . in equity to recover treble damages
107 or five hundred dollars, whichever is greater." This language, which was not adopted, would
108 have imposed treble damages for all violations of the Act, and joint and several liability would
109 clearly have been appropriate. 1969 Bulletin of Committee Work, Legislative Record at 6A.

110 We find the analogy to the Clayton Act to be unpersuasive. The Massachusetts
111 Legislature consciously enacted a rule whereby the defendant's liability is measured by the
112 degree of his culpability. This rule completely distinguishes the multiple damage provisions of c.
113 93A. Engrafting the body of law developed under the Clayton Act on c. 93A would violate the
114 decision of the Legislature to enact a different type of statute.

115 We find a more apt analogy in our own decisions. We have held that concurrent
116 wrongdoers are independently liable under statutes designed to impose a penalty. In Porter v.
117 Sorell, 280 Mass. 457 (1932), the court considered the meaning of the former G. L. (Ter. Ed.) c.
118 229, § 5 – a wrongful death statute – which provided that a defendant "shall be liable in damages
119 in the sum of not less than [$ 500] or more than [$ 10,000], to be assessed with reference to the
120 degree of his culpability." The court held that the execution in full of a judgment against one
121 defendant did not release a concurrent wrongdoer. Sorell, supra at 463-464. It noted that the
122 statute levied a penalty and reasoned that the payment by one wrongdoer of his penalty could not
123 extinguish a penalty levied on a second wrongdoer. Supra at 463. The court stated that the
124 Legislature might have provided otherwise, but that it could not "by construction add a limitation
125 on punishment which the Legislature did not see fit to establish." Supra at 462.

126 The reasoning of Porter has been followed in subsequent cases. In Arnold v. Jacobs, 316
127 Mass. 81, 84 (1944), the court held that the wrongful death statute "does not limit the amount
128 that can be collected from a number of wrongdoers for one death" since, "as in the criminal law,
129 each wrongdoer may be made to suffer the maximum penalty, no matter how many are guilty."

130 See Gaudette v. Webb, 362 Mass. 60, 73-74 n.9 (1972); O'Connor v. Benson Coal Co., 301
131 Mass. 145, 148 (1938).

132 The analogy to c. 93A is helpful. The multiple damage provisions of c. 93A are designed
133 to impose a penalty, Heller v. Silverbranch Constr. Corp., 376 Mass. 621, 627-628 (1978), that
134 varies with the culpability of the defendant. Linthicum v. Archambault, 379 Mass. 381, 388
135 (1979). We believe that the Legislature intended that defendants would be independently liable
136 for multiple damages under § 11.

137 International Fidelity Ins. Co. v. Wilson, 387 Mass. 841, 853-856 (1983) (footnotes
138 omitted); and

139 WHEREAS, in 1983, the Supreme Judicial Court held with respect to Section 15B (7) of
140 Chapter 186 of the General Laws, that "the Legislature intends any violation of G. L. c. 186, §§
141 15B (6) (a), (d), and (e), to result in the imposition of treble damages," Mellor v. Berman, 390
142 Mass. 275, 283 (1983), and in so holding explained:

143 The language of other multiple damages statutes indicates that where the Legislature
144 intends to require a finding of bad faith or wilful violations it knows how to include such
145 requirement. Compare the language of G. L. c. 186, § 15B (7) with G. L. c. 93A, §§ 2, 9, and 11,
146 as amended, stating that "any person . . . who has been injured by another person's use or
147 employment" of "unfair or deceptive practices in the conduct of any trade or commerce" "may
148 bring an action . . . in the housing court" "for money damages only. Said damages may include
149 double or treble damages, attorneys' fees and costs, as herein provided . . . ." Compare also G. L.
150 c. 167, § 63, G. L. c. 137, §§ 1, 2, G. L. c. 242, §§ 4-6, G. L. c. 186, § 15F, G. L. c. 75D, § 14, G.
151 L. c. 91, § 59A, G. L. c. 140, § 159, G. L. c. 130, §§ 63, 68A, G. L. c. 130, §§ 24, 27, and G. L.
152 c. 131, § 42, with G. L. c. 165, § 24, G. L. c. 214, § 3A, G. L. c. 231, § 85J, G. L. c. 93, §§ 21,
153 42, and G. L. c. 272, § 85A.

154 Mellor v. Berman, 390 Mass. 275, 282 n.11 (1983); and

155 WHEREAS, in 1985 the General Court created a private remedy under Section 19B of
156 Chapter 149 of the General Laws that provides:

157 (4) Any person aggrieved by a violation of subsection (2) may institute within three years
158 of such violation and prosecute in his own name and on his own behalf, or for himself and for
159 other similarly situated, a civil action for injunctive relief and any damages thereby incurred,
160 including treble damages for any loss of wages or other benefits. The total awarded damages
161 shall equal or exceed a minimum of five hundred dollars for each such violation.

162 St. 1985, c. 587; and

163 WHEREAS, according to the Supreme Judicial Court in International Fidelity Ins. Co. v.
164 Wilson, the General Court must be presumed to have been aware of the Supreme Judicial Court's

165 International Fidelity Ins. Co. v. Wilson and Mellor v. Berman decisions when it created the
166 private remedy for Section 19B of Chapter 149 of the General Laws by enacting Chapter 587 of
167 the Acts of 1985. International Fidelity Ins. Co. v. Wilson, 387 Mass. 841, 854 (1983); and

168 WHEREAS, pursuant to the Supreme Judicial Court's holding in International Fidelity
169 Ins. Co. v. Wilson, the General Court modeled the private remedy of Section 19B of Chapter 149
170 of the General Laws created by Chapter 587 of the Acts of 1985 on the Clayton Act by virtue of
171 the fact that it did not enact in the statute "a rule whereby the defendant's liability [for treble
172 damages] is measured by the degree of his culpability," which according to the Supreme Judicial
173 Court's clear and unambiguous holding in International Fidelity Ins. Co. v. Wilson means that
174 the General Court must have intended that under the private remedy of Section 19B of Chapter
175 149 of the General Laws as enacted in 1985 "the trial judge has no discretion to deny the plaintiff
176 treble damages once a violation – even a merely negligent one – is proved" and that "treble
177 damages [must be] imposed for all violations," International Fidelity Ins. Co. v. Wilson, 387
178 Mass. 841, 854, 855 (1983), and which according to the Supreme Judicial Court's clear and
179 unambiguous holding in Mellor v. Berman must mean that the General Court intended that under
180 the private remedy of Section 19B of Chapter 149 of the General Laws as enacted in 1985 "the
181 [General Court] intends any violation of [Section 19B of Chapter 149 of the General Laws] to
182 result in the imposition of treble damages [for any loss of wages or other benefits]." Mellor v.
183 Berman, 390 Mass. 275, 283 (1983); and

184 WHEREAS, in 1993 the General Court created a private remedy under Section 27 of
185 Chapter 149 of the General Laws that provided:

186 Any employee claiming to be aggrieved by a violation of this section may, at the
187 expiration of ninety days after the filing of a complaint with the attorney general, or sooner, if
188 the attorney general assents in writing, and within three years of such violation, institute and
189 prosecute in his own name and on his own behalf, or for himself and for others similarly situated,
190 a civil action for injunctive relief and any damages incurred, including treble damages for any
191 loss of wages and other benefits."

192 St. 1993, c. 110, § 173; and

193 WHEREAS, in 1993 the General Court created a private remedy under Section 27F of
194 Chapter 149 of the General Laws that provides:

195 Any employee claiming to be aggrieved by a violation of this section may, at the
196 expiration of ninety days after the filing of a complaint with the attorney general, or sooner, if
197 the attorney general assents in writing, and within three years of such violation, institute and
198 prosecute in his own name and on his own behalf, or for himself and for others similarly situated,
199 a civil action for injunctive relief and any damages incurred, including treble damages for any
200 loss of wages and other benefits.

201 St. 1993, c. 110, § 177; and

202 WHEREAS, in 1993 the General Court created a private remedy under Section 27G of
203 Chapter 149 of the General Laws that provided:

204 Any employee claiming to be aggrieved by a violation of this section may, at the
205 expiration of ninety days after the filing of a complaint with the attorney general, or sooner, if
206 the attorney general assents in writing, and within three years of such violation, institute and
207 prosecute in his own name and on his own behalf, or for himself and for others similarly situated,
208 a civil action for injunctive relief and any damages incurred, including treble damages for any
209 loss of wages and other benefits.

210 St. 1993, c. 110, § 178; and

211 WHEREAS, in 1993 the General Court created a private remedy under Section 27H of
212 Chapter 149 of the General Laws that provided:

213 Any employee claiming to be aggrieved by a violation of this section may, at the
214 expiration of ninety days after the filing of a complaint with the attorney general, or sooner, if
215 the attorney general assents in writing, and within three years of such violation, institute and
216 prosecute in his own name and on his own behalf, or for himself and for others similarly situated,
217 a civil action for injunctive relief and any damages incurred, including treble damages for any
218 loss of wages and other benefits.

219 St. 1993, c. 110, § 179; and

220 WHEREAS, in 1993 the General Court created a private remedy under Section 150 of
221 Chapter 149 of the General Laws that provided:

222 Any employee claiming to be aggrieved by a violation of section one-hundred and forty-
223 eight, one-hundred and forty-eight B, one-hundred and fifty C, one-hundred and fifty-two and
224 one-hundred and fifty-two A may, at the expiration of ninety days after the filing of a complaint
225 with the attorney general, or sooner, if the attorney general assents in writing, and within three
226 years of such violation, institute and prosecute in his own name and on his own behalf, or for
227 himself and for others similarly situated, a civil action for injunctive relief and any damages
228 incurred, including treble damages for any loss of wages and other benefits.

229 St. 1993, c. 110, § 182; and

230 WHEREAS, in 1993 the General Court amended the existing private remedy under
231 Section 1B of Chapter 151 of the General Laws, which prior to being so amended had provided
232 that "if any person is paid by an employer less than such overtime rate of compensation [required
233 by Section 1A of Chapter 151], such person may recover in a civil action the full amount of such
234 overtime rate of compensation less any amount actually paid to him or her by the employer," G.

235 L. c. 151, § 1B, as inserted by St. 1962, c. 371, by inserting after the word "action" the words
236 "three times", so that upon being so amended Section 1B of Chapter 151 provided that "if any
237 person is paid by an employer less than such overtime rate of compensation [required by Section
238 1A of Chapter 151], such person may recover in a civil action three times the full amount of such
239 overtime rate of compensation less any amount actually paid to him or her by the employer." St.
240 1993, c. 110, § 183; and

241 WHEREAS, in 1993 the General Court amended the existing private remedy under
242 Section 20 of Chapter 151 of the General Laws, which prior to being so amended had provided
243 that "[i]f any person is paid by an employer less than the minimum fair wage to which such
244 person is entitled under or by virtue of a minimum fair wage regulation, or less than one dollar
245 and eighty-five cents per hour in any manufacturing occupation or in any other occupation not
246 covered by a minimum fair wage regulation; such person may recover in a civil action the full
247 amount of such minimum wage less any amount actually paid to him or her by the employer," G.
248 L. c. 151, § 20, as amended through St. 1973, c. 1192, § 17, by inserting after the word "action"
249 the words "three times", so that upon being so amended Section 20 of Chapter 151 provided that
250 "[i]f any person is paid by an employer less than the minimum fair wage to which such person is
251 entitled under or by virtue of a minimum fair wage regulation, or less than one dollar and eighty-
252 five cents per hour in any manufacturing occupation or in any other occupation not covered by a
253 minimum fair wage regulation; such person may recover in a civil action three times the full
254 amount of such minimum wage less any amount actually paid to him or her by the employer." St.
255 1993, c. 110, § 185; and

256 WHEREAS, according to the Supreme Judicial Court's holding in International Fidelity
257 Ins. Co. v. Wilson, the General Court must be presumed to have been aware of the Supreme
258 Judicial Court's decisions in International Fidelity Ins. Co. v. Wilson and Mellor v. Berman
259 when it created private remedies under Sections 27, 27F, 27G, 27H, and 150 of Chapter 149 of
260 the General Laws by enacting Sections 173, 177, 178, 179, and 182 of Chapter 110 of the Acts of
261 1993, respectively, and when it amended the private remedies under Sections 1B and 20 of
262 Chapter 151 of the General Laws by enacting Sections 183 and 185 of Chapter 110 of the Acts of
263 1993, respectively. International Fidelity Ins. Co. v. Wilson, 387 Mass. 841, 854 (1983); and

264 WHEREAS, as with the private remedy of Section 19B of Chapter 149 of the General
265 Laws created by Chapter 587 of the Acts of 1985, and pursuant to the Supreme Judicial Court's
266 holding in International Fidelity Ins. Co. v. Wilson, the General Court modeled the private
267 remedies of Sections 27, 27F, 27G, 27H, and 150 of Chapter 149 of the General Laws as inserted
268 by Sections 173, 177, 178, 179, and 182 of Chapter 110 of the Acts of 1993, respectively, and
269 the private remedies of Sections 1B and 20 of Chapter 151 of the General Laws as amended by
270 Sections 183 and 185 of Chapter 110 of the Acts of 1993, respectively, on the Clayton Act by
271 virtue of the fact that it did not enact in any of said statutes "a rule whereby the defendant's
272 liability [for treble damages] is measured by the degree of his culpability," which according to
273 the Supreme Judicial Court's clear and unambiguous holding in International Fidelity Ins. Co. v.

274 Wilson must mean that the General Court must have intended that under said private remedies,
275 “the trial judge has no discretion to deny the plaintiff treble damages once a violation – even a
276 merely negligent one – is proved” and that “treble damages [must be] imposed for all violations,”
277 International Fidelity Ins. Co. v. Wilson, 387 Mass. 841, 854, 855 (1983), and which according
278 to the Supreme Judicial Court’s clear and unambiguous holding in Mellor v. Berman must mean
279 that the General Court must have intended that under said private remedies “the [General Court]
280 intends any violation of [the substantive provisions of the statutes] to result in the imposition of
281 treble damages.” Mellor v. Berman, 390 Mass. 275, 283 (1983); and

282 WHEREAS, on July 31, 2000, the Supreme Judicial Court held as follows with respect to
283 awards of treble damages under Section 1B of Chapter 151 of the General Laws as amended by
284 Section 183 of Chapter 110 of the Acts of 1993:

285 5. Treble damages. Because we hold that Lane Bryant did not violate G. L. c. 151, § 1A,
286 Goodrow’s cross appeal from the denial of her claim of treble damages is moot. However, the
287 issue is likely to arise in the class action, trial of which has been severed from the trial of
288 Goodrow's individual claim, so we express our opinion on the matter.

289 General Laws c. 151, § 1B, provides in relevant part that, “if any person is paid by an
290 employer less than such overtime rate of compensation [required by § 1A], such person may
291 recover in a civil action three times the full amount of such overtime rate of compensation less
292 any amount actually paid to him or her by the employer.” Goodrow contends that, in light of the
293 fact that the Legislature declined to require a showing of intent or wilfulness with respect to the
294 treble damages provision, the plain meaning of the word “may” in the context of this sentence is
295 that an employee illegally deprived of overtime compensation is permitted but not required to
296 bring a civil action in which, if successful, she is entitled to recover treble damages. The word
297 “may,” argues Goodrow, therefore relates to a plaintiff’s option to initiate a civil action for
298 damages rather than to the amount of damages recoverable under the statute. We disagree.

299 Multiple damages such as the treble damages at issue here “are ‘essentially punitive in
300 nature.’ ” Fontaine v. Ebtec Corp., 415 Mass. 309, 322 (1993), quoting McEvoy Travel Bur., Inc.
301 v. Norton Co., 408 Mass. 704, 717 (1990). See Kansallis Fin. Ltd. v. Fern, 421 Mass. 659, 672
302 (1996). They are allowed only when expressly authorized by statute, Flesner v. Technical
303 Communications Corp., 410 Mass. 805, 813 (1991), and are ordinarily applied by the Legislature
304 “against those defendants with a higher degree of culpability than that sufficient to ground
305 simple liability.” See Kansallis Fin. Ltd., supra. Punitive damages may be awarded for conduct
306 that is “outrageous, because of the defendant’s evil motive or his reckless indifference to the
307 rights of others.” Dartt v. Browning-Ferris Indus., Inc. (Mass.), 427 Mass. 1, 17a, (1998),
308 quoting Restatement (Second) of Torts § 908(2) (1979). In the instant case, the judge found that,
309 in light of the uncertainty of the state of the law in Massachusetts and the fact that Lane Bryant
310 relied on the advice of counsel and followed law and procedures apparently sanctioned
311 elsewhere, there was “no legal or equitable basis” on which to impose multiple damages. We

312 agree. We find nothing in the record to support a finding that Lane Bryant intentionally or
313 wilfully violated Massachusetts law or that its conduct was “evil in motive” or showed a
314 “reckless indifference to the rights of others,” and we therefore decline to award treble damages.
315 To do otherwise absent evidence of heightened culpability would very likely constitute an
316 “arbitrary or irrational deprivation[ ] of property,” TXO Prod. Corp. v. Alliance Resources Corp.,
317 509 U.S. 443 (1993) (Kennedy, J., concurring), and thus would be constitutionally
318 impermissible. There was no error.

319

320 Goodrow v. Lane Bryant, Inc., 432 Mass. 165, 178-179 (2000); and

321 WHEREAS, according to the Supreme Judicial Court’s holding in International Fidelity
322 Ins. Co. v. Wilson, “the fact that the Legislature declined to require a showing of intent or
323 wilfulness with respect to the treble damages provision [of Section 1B of Chapter 151 of the
324 General Laws]” means that the treble damages provision of Section 1B of Chapter 151 of the
325 General Laws as amended through Section 183 of Chapter 110 of the Acts of 1993 is clearly of
326 the “body of law [that has] developed under the Clayton Antitrust Act” under which “the trial
327 judge has no discretion to deny the plaintiff treble damages once a violation – even a merely
328 negligent one – is proved,” just as was Senate Doc. No. 211 of 1969 – the language of which
329 employed the word “may” in exactly the same way as it is employed in the language of Section
330 1B of Chapter 151 of the General Laws as amended through Section 183 of Chapter 110 of the
331 Acts of 1993 – which, according to the Supreme Judicial Court, had it been adopted, “would
332 have imposed treble damages for all violations of the Act.” International Fidelity Ins. Co. v.
333 Wilson, 387 Mass. 841, 854-855 (1983); and

334 WHEREAS, the General Laws mandates:

335 In construing statutes the following rules shall be observed, unless their observance
336 would involve a construction inconsistent with the manifest intent of the law-making body or
337 repugnant to the context of the same statute:

338 . . . .

339 Third, Words and phrases shall be construed according to the common and approved
340 usage of the language;

341 G. L. c. 4, § 6, Third; and

342 WHEREAS, according to the common and approved usage of the English language, the
343 sentence “[a]ny person who purchases goods or services primarily for personal . . . purposes who
344 suffers any ascertainable loss . . . by the use . . . by a person of a method . . . declared unlawful
345 by section two . . . may bring an action . . . in equity to recover treble damages or five hundred
346 dollars, whichever is greater” is a simple and complete sentence, the only permissible

347 construction of which is that the subject of the sentence, which is "[a]ny person who purchases
348 goods or services primarily for personal . . . purposes who suffers any ascertainable loss . . . by
349 the use . . . by a person of a method . . . declared unlawful by section two," is permitted but not
350 required to undertake a specific act, which is to "bring an action . . . in equity to recover treble
351 damages or five hundred dollars, whichever is greater"; and

352 WHEREAS, according to the common and approved usage of the English language, the
353 word "may" in the sentence "[a]ny person who purchases goods or services primarily for
354 personal . . . purposes who suffers any ascertainable loss . . . by the use . . . by a person of a
355 method . . . declared unlawful by section two . . . may bring an action . . . in equity to recover
356 treble damages or five hundred dollars, whichever is greater" clearly and unambiguously relates
357 to a plaintiff's option to initiate an action in equity for treble damages rather than to the amount
358 of damages recoverable under the statute; and

359 WHEREAS, the word "may" in the sentence "if any person is paid by an employer less
360 than such overtime rate of compensation [required by § 1A], such person may recover in a civil
361 action three times the full amount of such overtime rate of compensation less any amount
362 actually paid to him or her by the employer" is used in exactly the same way as the word "may"
363 is used in the sentence "[a]ny person who purchases goods or services primarily for personal . . .
364 purposes who suffers any ascertainable loss . . . by the use . . . by a person of a method . . .
365 declared unlawful by section two . . . may bring an action . . . in equity to recover treble damages
366 or five hundred dollars, whichever is greater," which means that "according to the common and
367 approved usage of the language" the word "may" in the sentence "if any person is paid by an
368 employer less than such overtime rate of compensation [required by § 1A], such person may
369 recover in a civil action three times the full amount of such overtime rate of compensation less
370 any amount actually paid to him or her by the employer" clearly and unambiguously "relates to a
371 plaintiff's option to initiate a civil action for damages rather than to the amount of damages
372 recoverable under the statute"; and

373 WHEREAS, the Supreme Judicial Court has held: "Where the language of a statute is
374 plain, it is 'the sole function of the courts . . . to enforce it according to its terms.' " D'Avella v.
375 McGonigle, 429 Mass. 820, 822-823 (1999), quoting from Boston Neighborhood Taxi Assn. v.
376 Department of Pub. Util., 410 Mass. 686, 690 (1991); "Where . . . the language of the statute is
377 clear, it is the function of the judiciary to apply it, not amend it." Commissioner of Rev. v.
378 Cargill, Inc., 429 Mass. 79, 82 (1999); "We do not read into the statute a provision which the
379 Legislature did not see fit to put there, nor add words that the Legislature had an option to, but
380 chose not to include." Commissioner of Correction v. Superior Ct. Dept. of the Trial Ct., 446
381 Mass. 123, 126 (2006). Also see Sullivan v. Brookline, 435 Mass. 353, 360 (2001); General
382 Elec. Co. v. Department of Envt'l Protection, 429 Mass. 798, 803 (1999); Dartt v. Browning-
383 Ferris Indus., Inc., 427 Mass. 1, 8 (1998); Pyle v. School Comm. of S. Hadley, 423 Mass. 283,
384 285-286 (1996); O'Brien v. Massachusetts Bay Transp. Auth., 405 Mass. 439, 443-444 (1989);
385 Bronstein v. Prudential Ins. Co., 390 Mass. 701, 704 (1984); Department of Community Affairs

386 v. Massachusetts State College Bldg. Auth., 378 Mass. 418, 427 (1979); Prudential Ins. Co. v.
387 Boston, 369 Mass. 542, 546-547 (1976); Johnson v. District Attorney for the N. Dist., 342 Mass.
388 212, 215 (1961); Randall's Case, 331 Mass. 383, 385 (1954); Commonwealth v. Slome, 321
389 Mass. 713, 716 (1947); Johnson's Case, 318 Mass. 741, 746-747 (1945); Hanlon v. Rollins, 286
390 Mass. 444, 447 (1934); Commonwealth v. S. S. Kresge Co., 267 Mass. 145, 148 (1929); King v.
391 Viscoloid Co., 219 Mass. 420, 425 (1914); Holbrook v. Holbrook, 1 Pick. 248, 249, 250 (1822);
392 and

393 WHEREAS, the language from Fontaine v. Ebtec Corp. cited in Goodrow v. Lane
394 Bryant, Inc. is excerpted from the following passage:

395 2. We think it appropriate to comment on the question whether a plaintiff with an age
396 discrimination claim that is subject to the amendments to G. L. c. 151B, § 9, governing damages
397 is entitled, on proper proof, to recover both multiple and punitive damages. The parties have
398 briefed the issue and the question will undoubtedly arise in cases pending for trial in the Superior
399 Court.

400 "As a general rule, when the Legislature has employed specific language in one part of a
401 statute, but not in another part which deals with the same topic, the earlier language should not
402 be implied where it is not present." Hartford Ins. Co. v. Hertz Corp., 410 Mass. 279, 283 (1991).
403 Beeler v. Downey, 387 Mass. 609, 616 (1982). Section 9 of G. L. c. 151B sets forth procedures
404 to be followed, and the remedies available, to a plaintiff filing an action based on illegal
405 discriminatory conduct. The third paragraph of § 9 now provides that punitive damages "may"
406 be awarded to a plaintiff prevailing in such an action. The fourth paragraph of § 9 now sets forth
407 remedies available to a plaintiff who prevails on a specific claim of age discrimination. In the
408 case of a knowing or reckless statutory violation, those remedies include mandatory double (and
409 discretionary treble) damages. Both paragraphs address the same topic – that is, the measure of
410 damages to be awarded to a plaintiff who proves discriminatory conduct by his employer. The
411 measure of damages provided by each paragraph also serves a similar purpose because multiple
412 damages are "essentially punitive in nature." McEvoy Travel Bureau, Inc. v. Norton Co., 408
413 Mass. 704, 717 (1990). See International Fidelity Ins. Co. v. Wilson, 387 Mass. 841, 856 (1983).
414 With respect to the remedies available in age discrimination cases, punitive damages, as such,
415 are not mentioned in the amended third paragraph. Based on accepted principles of statutory
416 construction, their availability should not be implied and we decline to do so.

417 This conclusion comports with what we perceive to be the legislative intent as well as
418 "with common sense and sound reason." Massachusetts Comm'n Against Discrimination v.
419 Liberty Mut. Ins. Co., 371 Mass. 186, 190 (1976), quoting Atlas Distrib. Co. v. Alcoholic
420 Beverages Control Comm'n, 354 Mass. 408, 414 (1968). The fourth paragraph was added to § 9
421 of G. L. c. 151B to enhance, or improve on, damages for age discrimination. A recovery of
422 punitive damages under the third paragraph of § 9 of G. L. c. 151B is discretionary, and,
423 therefore, uncertain. By way of contrast, the fourth paragraph provides for a certain recovery of

424 at least double damages if the plaintiff proves that he was deliberately discriminated against on
425 the basis of his age. It is not reasonable to assume that the Legislature intended to design a
426 damages scheme which singles out age discrimination as significantly more egregious than, for
427 example, racial or sexual discrimination by granting a victim of age discrimination the right to
428 recover both punitive and multiple damages. We conclude that the fourth paragraph of the
429 current G. L. c. 151B, § 9, see note 9, supra, establishes the appropriate measure of damages in
430 an age discrimination claim.

431 Fontaine v. Ebtec Corp., 415 Mass. 309, 321-322 (1993); and

432 WHEREAS, the language from McEvoy Travel Bur., Inc. v. Norton Co. quoted in
433 Fontaine v. Ebtec Corp. is excerpted from the following passage:

434 [T]he multiple damages provisions of G. L. c. 93A are essentially punitive in nature.
435 "The multiple damage provisions of c. 93A are designed to impose a penalty . . . that varies with
436 the culpability of the defendant" (citation omitted). International Fidelity Ins. Co. v. Wilson, 387
437 Mass. 841, 856 (1983). See Linthicum v. Archambault, 379 Mass. 381, 388 (1979); Heller v.
438 Silverbranch Constr. Corp., 376 Mass. 621, 627-628 (1978).

439 McEvoy Travel Bur., Inc. v. Norton Co., 408 Mass. 704, 717 (1990) (emphasis added);
440 and

441 WHEREAS, the language from Kansallis Fin. Ltd. v. Fern quoted in Goodrow v. Lane
442 Bryant, Inc. is excerpted from the following passage:

443 [Chapter 93A] does, however, by its terms make a distinction between cases where
444 simple compensatory damages are paid to the plaintiff and where there are double or treble --
445 that is, punitive -- damages. In those latter cases, the statute requires that the court find that "the
446 act or practice was a willful or knowing violation." Thus the Legislature envisaged multiple
447 damage awards against those defendants with a higher degree of culpability than that sufficient
448 to ground simple liability. See, e.g., International Fidelity Ins. Co. v. Wilson, 387 Mass. 841, 855
449 (1983) ("The Massachusetts Legislature consciously enacted a rule whereby the defendant's
450 liability is measured by the degree of his culpability"); Linthicum v. Archambault, 379 Mass.
451 381, 388 (1979), abrogated in part on other grounds by Knapp v. Sylvania Shoe Mfg. Corp., 418
452 Mass. 737 (1994); Heller v. Silverbranch Constr. Corp., 376 Mass. 621, 627-628 (1978);
453 Wasserman v. Agnastopoulos, 22 Mass. App. Ct. 672, 680-681 (1986).

454 Kansallis Fin. Ltd. v. Fern, 421 Mass. 659, 672 (1996) (emphases added); and

455 WHEREAS, the Supreme Judicial Court also stated in Kansallis Fin. Ltd. v. Fern that
456 "[w]e note that our courts are already familiar with the task of determining degrees of culpability
457 under [Chapter 93A] as they must determine whether to impose double or treble damages. See
458 International Fidelity Ins. Co. v. Wilson, supra at 853 ("Based on the egregiousness of each

459 defendant's conduct, the trial judge may assess between double and treble damages"). Kansallis
460 Fin. Ltd. v. Fern, 421 Mass. 659, 675 (1996) (emphases added); and

461 WHEREAS, in International Fidelity Ins. Co. v. Wilson the Supreme Judicial Court held
462 that under private remedies that authorize awards of treble damages and that do not include a
463 "consciously enacted" "rule whereby the defendant's liability [for treble damages] is measured
464 by the degree of his culpability," such as is the case with the private remedy of the Clayton
465 Antitrust Act and statutes modeled on the Clayton Antitrust Act – including the statute that was
466 originally proposed for Section 9 of Chapter 93A of the General Laws, but that was ultimately
467 rejected in favor of a statute in which the General Court "consciously enacted a rule whereby the
468 defendant's liability [for multiple damages] is measured by the degree of his culpability"; the
469 private remedies of Sections 19B, 27, 27F, 27G, 27H, and 150 of Chapter 149 of the General
470 Laws as inserted by Chapter 587 of the Acts of 1985 and Sections 173, 177, 178, 179, and 182 of
471 Chapter 110 of the Acts of 1993, respectively; and the private remedies Sections 1B and 20 of
472 Chapter 151 of the General Laws as amended by Sections 183 and 185 of Chapter 110 of the
473 Acts of 1993, respectively – "the trial judge has no discretion to deny the plaintiff treble damages
474 once a violation – even a merely negligent one – is proved" and "[treble damages must be]
475 imposed . . . for all violations." International Fidelity Ins. Co. v. Wilson, 387 Mass. 841, 854,
476 855 (1983) (emphases added); and

477 WHEREAS, pursuant to the Supreme Judicial Court's holding in International Fidelity
478 Ins. Co. v. Wilson, had the General Court intended to require a showing of "a higher degree of
479 culpability than that sufficient to ground simple liability," such as "intent or willfulness" or
480 "conduct [that] was 'evil in motive' or showed a 'reckless indifference to the rights of others,' "
481 with respect to the treble damages provision [of Section 1B of Chapter 151 of the General
482 Laws]" it would have "consciously enacted" such a rule, which the General Court clearly did not
483 do when it amended Section 1B of Chapter 151 of the General Laws by enacting Section 183 of
484 Chapter 110 of the Acts of 1993. International Fidelity Ins. Co. v. Wilson, 387 Mass. 841, 853-
485 856 (1983); and

486 WHEREAS, in their decision in Goodrow v. Lane Bryant, Inc. the Supreme Judicial
487 Court conflates "punitive damages," which are intended to punish tortfeasors, and which in
488 Massachusetts are allowed only when expressly authorized by statute, with the multiple damages
489 provisions of statutes that comprise the body of law that developed under the Clayton Antitrust
490 Act, such as, for example, the treble damages provisions of Senate Doc. No. 211 of 1969,
491 Section 19B of Chapter 149 as inserted by Chapter 587 of the Acts of 1985, Section 27 of
492 Chapter 149 as inserted by Section 173 of Chapter 110 of the Acts of 1993, Section 27F of
493 Chapter 149 as inserted by Section 177 of Chapter 110 of the Acts of 1993, Section 27G of
494 Chapter 149 as inserted by Section 178 of Chapter 110 of the Acts of 1993, Section 27H of
495 Chapter 149 as inserted by Section 179 of Chapter 110 of the Acts of 1993, Section 150 of
496 Chapter 149 as inserted by Section 182 of Chapter 110 of the Acts of 1993, Section 1B of

497 Chapter 151 as amended by Section 183 of Chapter 110 of the Acts of 1993, and Section 20 of
498 Chapter 151 as amended by Section 185 of Chapter 110 of the Acts of 1993; and

499 WHEREAS, the differences between "punitive damages" and statutory multiple damages
500 — whether mandatory, as with statutes that are of the body of law that has developed under the
501 Clayton Antitrust Act, or measured by the degree of a defendant's culpability, as with statutes
502 such as Chapter 93A of the General Laws, see International Fidelity Ins. Co. v. Wilson, 387
503 Mass. 841, 853-856 (1983) — are well-known and well-understood, see, e.g., Fontaine v. Ebtec
504 Corp., 415 Mass. 309, 321-322 (1993); Exxon Shipping Co. v. Baker, 554 U.S. 471, 128 S.Ct.
505 2605, 2620-2640 (2008); and Cook County v. United States ex rel. Chandler, 538 U.S. 119, 132
506 (2003) ("Treble damages certainly do not equate with classic punitive damages, which leave the
507 jury with open-ended discretion over the amount."); and

508 WHEREAS, the United States Supreme Court has held in Exxon Shipping Co. v. Baker
509 with respect to the treble damages provision of the Clayton Act that

510 some regulatory schemes provide by statute for multiple recovery in order to induce
511 private litigation to supplement official enforcement that might fall short if unaided. See, e.g.,
512 Reiter v. Sonotone Corp., 442 U.S. 330, 344 (1979) (discussing antitrust treble damages). . . . We
513 know, for example, that Congress devised the treble damages remedy for private antitrust actions
514 with an eye to supplementing official enforcement by inducing private litigation, which might
515 otherwise have been too rare if nothing but compensatory damages were available at the end of
516 the day. See, e.g., Reiter, 442 U.S., at 344.

517 Exxon Shipping Co. v. Baker, 554 U.S. 471, 128 S.Ct. 2605, 2622, 2632 (2008); and

518 WHEREAS, the United States Supreme Court held as follows in Reiter v. Sonotone
519 Corp.:

520 In Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., [429 U.S. 477 (1977)], after examining
521 the legislative history of § 4 [of the Clayton Act], we described the Sherman Act as "conceived
522 of primarily as a remedy for '[t]he people of the United States as individuals,' especially
523 consumers," and the treble-damages provision of the Clayton Act as "conceived primarily as
524 'open[ing] the door of justice to every man . . . and giv[ing] the injured party ample damages for
525 the wrong suffered.' " 429 U. S., at 486 n. 10.

526 Reiter v. Sonotone Corp., 442 U.S. 330, 343-344 (1979); and

527 WHEREAS, the United States Supreme Court held as follows in Brunswick Corp. v.
528 Pueblo Bowl-O-Mat, Inc.:

529 Section 4 [of the Clayton Act] . . . is in essence a remedial provision. It provides treble
530 damages to "[a]ny person who shall be injured in his business or property by reason of anything
531 forbidden in the antitrust laws . . . ." Of course, treble damages also play an important role in

532 penalizing wrongdoers and deterring wrongdoing, as we also have frequently observed. It
533 nevertheless is true that the treble-damages provision, which makes awards available only to
534 injured parties, and measures the awards by a multiple of the injury actually proved, is designed
535 primarily as a remedy.

536 Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 485-486 (1977) (internal
537 citations omitted); and

538 WHEREAS, the United States Supreme Court held as follows with respect to the private
539 remedies of the Racketeer Influenced and Corrupt Organizations Act (RICO) and the Clayton
540 Act:

541 Both RICO and the Clayton Act are designed to remedy economic injury by providing for
542 the recovery of treble damages, costs, and attorney's fees. Both statutes bring to bear the pressure
543 of "private attorneys general" on a serious national problem for which public prosecutorial
544 resources are deemed inadequate; the mechanism chosen to reach the objective in both the
545 Clayton Act and RICO is the carrot of treble damages. Moreover, both statutes aim to
546 compensate the same type of injury; each requires that a plaintiff show injury "in his business or
547 property by reason of" a violation.

548 Agency Holding Corp. v. Malley-Duff & Associates, Inc., 483 U.S. 143, 151 (1987); and

549 WHEREAS, in holding in Goodrow v. Lane Bryant, Inc. that "to award treble damages
550 [under a statute providing a private remedy of treble damages] . . . absent evidence of heightened
551 culpability would very likely constitute an 'arbitrary or irrational deprivation[] of property,'
552 TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993) (Kennedy, J., concurring),
553 and thus would be constitutionally impermissible" the Supreme Judicial Court called into
554 question the constitutionality of the entire body of law that has been developed under the Clayton
555 Antitrust Act; and

556 WHEREAS, the TXO Prod. Corp. v. Alliance Resources Corp. case involved "a
557 common-law action for slander of title [in which] respondents obtained a judgment against
558 petitioner for $19,000 in actual damages and $10 million in punitive damages" in which the
559 question decided by the United States Supreme Court was "whether that punitive damages award
560 violates the Due Process Clause of the Fourteenth Amendment, either because its amount is
561 excessive or because it is the product of an unfair procedure," TXO Prod. Corp. v. Alliance
562 Resources Corp., 509 U.S. 443, 446 (1993), and had nothing whatsoever to do with private
563 remedies providing for multiple damages; and

564 WHEREAS, in a 2003 decision in a case involving one of Maine's wage payment
565 statutes, the Maine Supreme Judicial Court held that:

566 On appeal, MMC does not contest the jury's finding that it owed Bisbing $27,500 in
567 vacation pay, but it contends that the trial court erred in awarding Bisbing treble damages and
568 attorney fees pursuant to 26 M.R.S.A. § 626 without a finding that MMC acted in bad faith or
569 was otherwise culpable. Section 626 provides in relevant part:

570

571 An employee leaving employment must be paid in full within a reasonable time after
572 demand at the office of the employer where payrolls are kept and wages are paid . . . . Whenever
573 the terms of employment include provisions for paid vacations, vacation pay on cessation of
574 employment has the same status as wages earned.

575

576 . . . .

577

578 An employer found in violation of this section is liable for the amount of unpaid wages
579 and, in addition, the judgment rendered in favor of the employee or employees must include a
580 reasonable rate of interest, an additional amount equal to twice the amount of those wages as
581 liquidated damages and costs of suit, including a reasonable attorney's fee.

582 The construction of section 626 is governed by the plain language of the statute. Gallant
583 v. Bartash, Inc., 2002 ME 4, ¶ 3, 786 A.2d 628, 629. MMC advances numerous interpretive
584 arguments, asserting the existence of an implied bad faith element because section 626 is
585 allegedly a penal statute; because it should be read together with a related statute, 26 M.R.S.A. §
586 626-A (Supp. 2002); because it should be read in light of statutes in other states that include such
587 an element; and because such an interpretation is necessary to avoid constitutional problems. We
588 need not address any of these arguments because section 626 is unambiguous. See State v.
589 Millett, 392 A.2d 521, 525 (Me. 1978) ("[W]here the language of a statute [is] plain and
590 unambiguous, there is no occasion for resorting to the rules of statutory interpretation."). There is
591 no hint in the statute that treble damages and attorney fees can be awarded only on a showing
592 that the employer has acted in bad faith. We are not free to impose such an element in disregard
593 of the clear legislative intent expressed in the plain language of section 626.

594 Contrary to MMC's argument, this result is entirely consistent with our caselaw. In Purdy
595 v. Community Telecommunications Corp., 663 A.2d 25, 28 (Me. 1995), we declined to "engraft
596 a good faith exception on [section 626]" at the behest of an employer that was faced with
597 complicated calculations of the commissions due a former employee. We reasoned that "the
598 Legislature has not . . . provided for an exemption for action taken by an employer in good
599 faith." Id. Although recognizing that "the effect of this statute is harsh, perhaps more so than the
600 Legislature intended," we could not "ignore the statute's plain language and its broadly

601 protective purpose." Id. Similarly, we stated in Burke v. Port Resort Realty Corp., 1999 ME 138,
602 ¶ 16, 737 A.2d 1055, 1060, that "[u]nlike similar statutes in some other jurisdictions, section 626
603 does not have a 'bona fide dispute' exception." We have never recognized such an exception,
604 and we have affirmed awards of section 626 treble damages and attorney fees without
605 mentioning the employer's bad faith. See, e.g., Bernier v. Merrill Air Eng'rs, 2001 ME 17, ¶¶ 4-
606 9, 770 A.2d 97, 100-01; Marston v. Newavom, 629 A.2d 587, 590-91 (Me. 1993).

607 In addition to its statutory interpretation arguments, MMC contends that as written,
608 section 626 denies it due process. MMC does not cite, and we have not found, any case holding
609 that a statute providing a private remedy of liquidated or multiple damages violates due process
610 unless it includes a culpability element. The United States Supreme Court has said exactly the
611 contrary, holding in Overnight Motor Transportation Co. v. Missel, 316 U.S. 572, 581-84 (1942),
612 that a Fair Labor Standards Act provision awarding employees double damages for unpaid
613 overtime, without regard to the good faith or reasonableness of the employer, did not violate due
614 process.

615 Bisbing v. Maine Medical Center, 2003 ME 49, ¶¶ 4-7; and

616 WHEREAS, the United States Supreme Court has further held with respect to the Fair
617 Labor Standards Act provision awarding employees double damages for unpaid overtime that:

618 The legislative history of the Fair Labor Standards Act shows an intent on the part of
619 Congress to protect certain groups of the population from sub-standard wages and excessive
620 hours which endangered the national health and well-being and the free flow of goods in
621 interstate commerce. The statute was a recognition of the fact that due to the unequal bargaining
622 power as between employer and employee, certain segments of the population required federal
623 compulsory legislation to prevent private contracts on their part which endangered national
624 health and efficiency and as a result the free movement of goods in interstate commerce. To
625 accomplish this purpose standards of minimum wages and maximum hours were provided.
626 Neither petitioner nor respondent suggests that the right to the basic statutory minimum wage
627 could be waived by any employee subject to the Act. No one can doubt but that to allow waiver
628 of statutory wages by agreement would nullify the purposes of the Act. We are of the opinion
629 that the same policy considerations which forbid waiver of basic minimum and overtime wages
630 under the Act also prohibit waiver of the employee's right to liquidated damages.

631 We have previously held that the liquidated damage provision is not penal in its nature
632 but constitutes compensation for the retention of a workman's pay which might result in
633 damages too obscure and difficult of proof for estimate other than by liquidated damages.
634 Overnight Motor Co. v. Missel, 316 U.S. 572. It constitutes a Congressional recognition that
635 failure to pay the statutory minimum on time may be so detrimental to maintenance of the
636 minimum standard of living "necessary for health, efficiency and general well-being of workers"
637 and to the free flow of commerce, that double payment must be made in the event of delay in

638 order to insure restoration of the worker to that minimum standard of well-being. Employees
639 receiving less than the statutory minimum are not likely to have sufficient resources to maintain
640 their well-being and efficiency until such sums are paid at a future date. The same policy which
641 forbids waiver of the statutory minimum as necessary to the free flow of commerce requires that
642 reparations to restore damage done by such failure to pay on time must be made to accomplish
643 Congressional purposes. Moreover, the same policy which forbids employee waiver of the
644 minimum statutory rate because of inequality of bargaining power, prohibits these same
645 employees from bargaining with their employer in determining whether so little damage was
646 suffered that waiver of liquidated damage is called for. This conclusion is in accord with
647 decisions of the majority of the federal courts that have considered this question. This result,
648 moreover, avoids the difficult problems of allocation that would arise in numerous cases where a
649 lump sum was paid for back wages and waiver of right to liquidated damages and where issue
650 was subsequently raised as to whether there had been full payment of the basic minimum and
651 overtime wages specified in the Act. Nor does the instant case involve exceptional circumstances
652 of the kind held to justify a waiver agreement such as was upheld in Fort Smith & Western R.
653 Co. v. Mills, 253 U.S. 206.

654 The private-public character of this right is further borne out by an examination of the
655 enforcement provisions of the Act. Although the difficulties of enforcement under the Act were
656 recognized, the Administrator was given limited enforcement powers. Criminal prosecution was
657 available only for willful violations — difficult to prove. § 16 (a). The Administrator's civil
658 remedy lay by way of suit for an injunction, which by its nature tends to be prospective in
659 operation. No power was vested in the Administrator to bring an action at law to obtain payment
660 of minimum wages left unpaid and to recover damages arising from delay in payment. Sole right
661 to bring such suit was vested in the employee under § 16 (b). Although this right to sue is
662 compensatory, it is nevertheless an enforcement provision. And not the least effective aspect of
663 this remedy is the possibility that an employer who gambles on evading the Act will be liable for
664 payment not only of the basic minimum originally due but also damages equal to the sum left
665 unpaid. To permit an employer to secure a release from the worker who needs his wages
666 promptly will tend to nullify the deterrent effect which Congress plainly intended that § 16 (b)
667 should have. Knowledge on the part of the employer that he cannot escape liability for liquidated
668 damages by taking advantage of the needs of his employees tends to insure compliance in the
669 first place. To allow contracts for waiver of liquidated damages approximates situations where
670 courts have uniformly held that contracts tending to encourage violation of laws are void as
671 contrary to public policy.

672 Prohibition of waiver of claims for liquidated damages accords with the Congressional
673 policy of uniformity in the application of the provisions of the Act to all employers subject
674 thereto, unless expressly exempted by the provisions of the Act. An employer is not to be
675 allowed to gain a competitive advantage by reason of the fact that his employees are more
676 willing to waive claims for liquidated damages than are those of his competitor. The same

677 considerations calling for equality of treatment which we found so compelling in Midstate
678 Horticultural Co., supra, exist here.

679 The provisions of the statute reflect the policy considerations discussed above which
680 prohibit waiver of the right to liquidated damages. Sections 7 (a) and 16 (b) are mandatory in
681 form. In terms they direct that the employer shall not employ a worker longer than the specified
682 time without payment of overtime compensation and that, upon violation of this provision, the
683 employer shall be liable for statutory wages and liquidated damages. One section, § 16 (b),
684 creates the obligation for the entire remedy. Collection of both wages and damages is left to the
685 employee.

686 Respondent argues that § 16 (b) indicates that the right to liquidated damages arises only
687 if the employee is compelled to sue for minimum wages due. Section 16 (b) in no way bears out
688 this interpretation. It provides absolutely that the employer shall be liable for liquidated damages
689 in an amount equal to minimum wages overdue; liability is not conditioned on default at the time
690 suit is begun. It is also argued that the elimination from a predecessor bill of a provision
691 prohibiting waiver of the provisions of the Act indicates a Congressional intent to allow an
692 employee to waive his claim to liquidated damages. But such a contention proves too much. It
693 applies with equal force to the right to minimum wages. Such an interpretation would nullify the
694 effectiveness of the Act. It is also suggested that the failure to impose criminal sanctions for the
695 violation of the liquidated damage provisions or to authorize an injunction to prevent their
696 violation manifests a difference in Congress' attitude toward the waiver of the employee's right to
697 the basic statutory wage as compared with his right to liquidated damages. But there is no reason
698 for making an employer subject to a criminal penalty or an injunction for failure to pay
699 liquidated damages. They are collectible as private damages by the employee for failure to obey
700 the same requirements as to wages which are punished and controlled, so far as the purely public
701 interest is concerned, by criminal sanctions and injunction.

702 Petitioner relies on the fact that various other federal statutes authorizing employees to
703 sue for wages or for damages arising from injuries sustained in the course of employment
704 contain specific provisions prohibiting waiver of rights under the acts involved, or provide means
705 by which compromises and settlements can be approved. There is no indication why Congress
706 did not embody a similar provision in the Act under consideration in this case. Absence of such
707 provisions, however, has not prevented the courts from invalidating waivers where the legislative
708 policy would be thwarted by permitting such contracts. The decision in the instant case is based
709 on the legislative policy behind this enactment and issues arising under other acts having
710 different legislative backgrounds are not conclusive in determining the legislative intent with
711 respect to the Fair Labor Standards Act. Failure to provide a method of waiving claims under the
712 Act can support contrary inferences, that such waivers were to be allowed or that the provisions
713 of the Act state a settled policy which cannot be modified by private contracts. We are of the
714 opinion that the legislative history and provisions of the Act support a view prohibiting such
715 waiver. As was stated in West Coast Hotel Co. v. Parrish, 300 U.S. 379, 397, " 'while in

716 individual cases hardship may result, the restriction will enure to the benefit of the general class
717 of employees in whose interest the law is passed and so to that of the community at large.'
718 [Adkins v. Children's Hospital, 261 U.S. 525.] Id., p. 563."

719 Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 707-713 (1945) (footnotes omitted); and

720 WHEREAS, there is no hint in the plain language of Section 1B of Chapter 151 of the
721 General Laws as amended by Section 183 of Chapter 110 of the Acts of 1993 that treble
722 damages can be awarded only on a showing that the employer's conduct was 'evil in motive' or
723 showed a 'reckless indifference to the rights of others' "; and

724 WHEREAS, in Goodrow v. Lane Bryant, Inc. the Supreme Judicial Court, in disregard of
725 the clear legislative intent expressed in the plain language of the statute, in disregard of the
726 Court's own precedent, and in "violat[ion] [of] the decision of the [General Court] to enact a
727 different type of statute," see International Fidelity Ins. Co. v. Wilson, 387 Mass. 841, 853-856
728 (1983), engrafted onto Section 1B of Chapter 151 of the General Laws as amended by Section
729 183 of Chapter 110 of the Acts of 1993 a rule that treble damages could be awarded only upon a
730 finding that the defendant's conduct in committing a violation of Section 1A of Chapter 151 of
731 the General Laws was 'evil in motive' or showed a 'reckless indifference to the rights of others'
732 "; and

733 WHEREAS, on July 21, 2005, the Supreme Judicial Court held as follows with respect to
734 awards of treble damages under the private remedy of Section 150 of Chapter 149 of the General
735 Laws as inserted by Section 182 of Chapter 110 of the Acts of 1993:

736 c. Treble damages and attorney's fees. The defendants also argue that the weekly wage
737 law does not apply to this case because the commissions owed the plaintiff were not "definitely
738 determined" as required by the weekly wage law and, therefore, the judge erred in awarding
739 treble damages and attorney's fees pursuant to G. L. c. 149, § 150. In support of their argument
740 that the amount owed the plaintiff was not definitely determined, the defendants rely solely on
741 the fact that they disagree with the plaintiff over how her commissions should have been
742 calculated and whether the plaintiff was overpaid. However, in light of the sanction for spoliation
743 of evidence, the defendants have no factual basis for their assertion. See Fletcher v. Dorchester
744 Mut. Ins. Co., 437 Mass. 544, 550-551 (2002) (exclusion of evidence may be dispositive of
745 merits of case).

746 In addition, the defendants concede that the only difference between the parties
747 concerning the amount of commission due the plaintiff hinges on their claim that group payroll
748 should always have been deducted before the commissions were determined. There is no dispute
749 concerning the total from which deductions would be taken or about the other applicable
750 formulas and deductions, thus making the amount owed the plaintiff arithmetically determinable.
751 We conclude that the amount owed the plaintiff is definitely determined and, therefore, the
752 weekly wage law applies. See generally Boston Police Patrolmen's Ass'n v. Boston, 435 Mass.

753 718, 719-720 (2002), quoting Champagne v. Champagne, 429 Mass. 324, 326 (1999) (we
754 interpret statutory language according to intent of Legislature ascertained from its words
755 considered in context of statute's purpose). Cf. Cumpata v. Blue Cross Blue Shield of Mass.,
756 Inc., 113 F. Supp. 2d 164, 168 (D. Mass. 2000), citing Klint vs. J.& J. Assocs., Middlesex
757 Superior Court, No. 97-0251 (Sept. 3, 1998) (holding that commissions were not within scope of
758 weekly wage law, where interpretation of written contract was in dispute).

759 The defendants do not argue that, even if this court concludes that the amount owed the
760 plaintiff is definitely determinable, the award of attorney's fees and costs and treble damages
761 was unjustified. However, we examine whether, as a matter of law, the judge was correct in her
762 belief that she was required to award treble damages to the plaintiff. See Commonwealth v.
763 Cintolo, 415 Mass. 358, 359 (1993) (statutory interpretation is question of law).

764 General Laws, c. 149, § 150, states, in relevant part:

765 "Any employee claiming to be aggrieved by a violation of section 148 . . . may . . .
766 institute and prosecute in his own name . . . a civil action for injunctive relief and any damages
767 incurred, including treble damages for any loss of wages and other benefits. An employee so
768 aggrieved and who prevails in such an action shall be entitled to an award of the costs of
769 litigation and reasonable attorney fees." 13

770 13We conclude, and neither party argues otherwise, that the plain language of the statute,
771 with its use of "shall," required the judge to award the plaintiff attorney's fees. Moreover, the
772 defendants do not argue that the judge's award of attorney's fees was unreasonable.

773 In awarding the plaintiff treble damages, the judge cited to a number of cases adjudicated
774 in the trial courts to support her conclusion that the statute did not allow her discretion in this
775 regard.

776 However, there is nothing in the plain language of the statute that requires an award of
777 treble damages. The text of the statute states only that a plaintiff "may" institute a suit for
778 damages that includes a request for treble damages. See Brittle v. Boston, 439 Mass. 580, 594,
779 790 N.E.2d 208 (2003) ("may" is permissive, not mandatory). Cf. Hashimi v. Kalil, 388 Mass.
780 607, 609 (1983) ("shall" is interpreted as imposing mandatory obligation). Because the plain
781 language of the statute does not require a judge to award treble damages, we decline to create
782 such a requirement and conclude that such an award is in a judge's discretion. Our conclusion is
783 similar to the conclusion in Goodrow v. Lane Bryant, Inc., 432 Mass. 165, 178-179 (2000), and
784 cases cited. In the Goodrow case, the plaintiff argued that G. L. c. 151, § 1B, which states that
785 any person paid less than the requisite overtime "may recover . . . three times the full amount,"
786 should be interpreted to mean that the plaintiff could request treble damages but that once the
787 request was made, the award was mandatory. Id. at 178. The court stated that treble damages are
788 punitive in nature, allowed only where authorized by statute, and appropriate where conduct is
789 "outrageous, because of the defendant's evil motive or his reckless indifference to the rights of

790 others." Id., quoting Dartt v. Browning-Ferris Indus., Inc. (Mass.), 427 Mass. 1, 17a (1998). In
791 the absence of factors that would make treble damages appropriate, the court affirmed the
792 judge's decision denying such punitive damages. Id. at 179. Cf. Hampshire Village Assocs. v.
793 District Court of Hampshire, 381 Mass. 148, 149, cert. denied sub nom. Ruhlander v. District
794 Court of Hampshire, 449 U.S. 1062 (1980) (discussing G. L. c. 186, § 15B, which provides that
795 tenant "shall be awarded [treble] damages").

796 Our conclusion comports with underlying purpose of the statute, because a judge may
797 award treble damages if they are warranted. Here, the judge awarded treble damages under the
798 erroneous impression that they were mandatory, without exercising any discretion in the matter.
799 Our conclusion should not be interpreted to mean that we conclude that treble damages
800 necessarily are inappropriate in this case. Such a determination is in the discretion of the judge.
801 Accordingly, we vacate the award of treble damages and remand the issue for the judge's
802 reconsideration whether treble damages are warranted.

803 Wiedmann v. The Bradford Group, Inc., 444 Mass. 698, 708-710 (2005); and

804 WHEREAS, the word "may" in the sentence "[a]ny employee claiming to be aggrieved
805 by a violation of section 148 . . . may . . . institute and prosecute in his own name . . . a civil
806 action for injunctive relief and any damages incurred, including treble damages for any loss of
807 wages and other benefits" is used in exactly the same way as the word "may" is used in the
808 sentence "if any person is paid by an employer less than such overtime rate of compensation
809 [required by § 1A], such person may recover in a civil action three times the full amount of such
810 overtime rate of compensation less any amount actually paid to him or her by the employer" and
811 in the sentence "[a]ny person who purchases goods or services primarily for personal . . .
812 purposes who suffers any ascertainable loss . . . by the use . . . by a person of a method . . .
813 declared unlawful by section two . . . may bring an action . . . in equity to recover treble damages
814 or five hundred dollars, whichever is greater," which means that "according to the common and
815 approved usage of the language" the word "may" in the sentence "[a]ny employee claiming to be
816 aggrieved by a violation of section 148 . . . may . . . institute and prosecute in his own name . . . a
817 civil action for injunctive relief and any damages incurred, including treble damages for any loss
818 of wages and other benefits" clearly and unambiguously "relates to a plaintiff's option to initiate
819 a civil action for damages rather than to the amount of damages recoverable under the statute";
820 and

821 WHEREAS, based upon the common and approved usage of the English language, and in
822 particular based upon the meaning and proper usage of the word "may," see, e.g., Webster's New
823 World College Dictionary 889 (4th ed. 2002); Black's Law Dictionary 993 (7th ed. 1999); B. A.
824 Garner, A Dictionary of Modern Legal Usage 552-553, 942 (2d ed. 1995), it is ridiculous to
825 assert, as the Supreme Judicial Court has done in Goodrow v. Lane Bryant, Inc., 432 Mass. 165,
826 178 (2000) and in Wiedmann v. The Bradford Group, Inc., 444 Mass. 698, 709-710 (2005), that
827 the General Court employed the word "may" in the treble damages provisions of the wage and

828 hour laws as they were enacted in 1985 and 1993 to mean anything other than to permit
829 employees in the Commonwealth to, in their sole discretion, sue for and recover, among other
830 things, treble damages for lost wages and other benefits; and

831 WHEREAS, as with Section 1B of Chapter 151 of the General Laws as amended by
832 Section 183 of Chapter 110 of the Acts of 1993, there is no hint in the plain language of Section
833 150 of Chapter 149 of the General Laws as amended by Section 182 of Chapter 110 of the Acts
834 of 1993 that treble damages can be awarded only on a showing that the employer's conduct in
835 committing the violation was 'evil in motive' or showed a 'reckless indifference to the rights of
836 others' "; and

837 WHEREAS, as in Goodrow v. Lane Bryant, Inc. with respect to the treble damages
838 provision of Section 1B of Chapter 151 as amended by Section 183 of Chapter 110 of Acts of
839 1993, in Wiedmann v. The Bradford Group, Inc. the Supreme Judicial Court, in disregard of the
840 clear legislative intent expressed in the plain language of the statute, in disregard of the Court's
841 own precedent, and in "violat[ion] [of] the decision of the [General Court] to enact a different
842 type of statute," see International Fidelity Ins. Co. v. Wilson, 387 Mass. 841, 853-856 (1983),
843 engrafted onto Section 150 of Chapter 149 as amended by Section 182 of Chapter 110 of the
844 Acts of 1993 a rule that treble damages could be awarded only upon a finding that the
845 defendant's conduct in committing a violation of Section 148 of Chapter 149 of the General
846 Laws or certain other statutes was 'evil in motive' or showed a 'reckless indifference to the
847 rights of others' "; and

848 WHEREAS, in 2008 the General Court enacted without amendment 2007 Senate Doc.
849 No. 1059, which amended the private remedies of Sections 27, 27F, 27G, 27H, and 150 of
850 Chapter 149 and Sections 1B and 20 of Chapter 151 of the General Laws, and which includes a
851 section that states, "This act is intended to clarify the existing law and to reiterate the original
852 intention of the general court that triple damages are mandatory." See 2007 Senate Doc. No.
853 1059 and 2008 Senate Journal, p. 1418-1419; and

854 WHEREAS, 2007 Senate Doc. No. 1059 became law as Chapter 80 of the Acts of 2008.
855 St. 2008, c. 80; and

856 WHEREAS, on August 31, 2011, the Supreme Judicial Court held that the General
857 Court's intention in enacting 2007 Senate Doc. No. 1059 was not to "clarify[] and restat[e] its
858 original position in relation to mandatory treble damage awards," but was, instead, to "chang[e]
859 it" so as to for the first time mandate treble damages for all violations of certain sections of
860 Chapters 149 and 151 of the General Laws. Rosnov v. Molloy, 460 Mass. 474 (2011); and

861 WHEREAS, the effects of the Supreme Judicial Court's decisions in Goodrow v. Lane
862 Bryant, Inc., 432 Mass. 165, 178-179 (2000); Wiedmann v. The Bradford Group, Inc., 444 Mass.
863 698, 708-710 (2005); and Rosnov v. Molloy, 460 Mass. 474 (2011), have been that, (1) some
864 untold number of employees who have suffered a violation or violations of the Commonwealth's

865 wage and hour laws that occurred prior to July 12, 2008, and who have chosen to prosecute a
866 private civil action pursuant to the treble damages provisions of Chapters 149 and 151 of the
867 General Laws, as those provisions were originally enacted, to seek redress— instead of relying
868 upon the Attorney General to do so on their behalf—have either been denied their statutorily
869 mandated treble damages after having proven a violation resulting in a loss of wages or other
870 benefits, or have been forced to meet the burden of proof engrafted onto the statutes by the
871 Supreme Judicial Court in their decisions in Goodrow v. Lane Bryant, Inc., 432 Mass. 165, 178-
872 179 (2000) or Wiedmann v. The Bradford Group, Inc., 444 Mass. 698, 708-710 (2005), in order
873 to be awarded treble damages; and (2) some untold number of employees who have suffered a
874 violation or violations of the Commonwealth's wage and hour laws that occurred prior to July
875 12, 2008, have chosen not to prosecute a private civil action pursuant to the treble damages
876 provisions of Chapters 149 and 151 of the General Laws, as those provisions were originally
877 enacted, to seek redress because of the Supreme Judicial Court's decisions in Goodrow v. Lane
878 Bryant, Inc., 432 Mass. 165, 178-179 (2000) or Wiedmann v. The Bradford Group, Inc., 444
879 Mass. 698, 708-710 (2005), to engraft onto the treble damages provisions a rule that ties liability
880 for treble damages to the degree of the defendant's culpability; and

881 WHEREAS, the Supreme Judicial Court's engrafting, in their Goodrow v. Lane Bryant,
882 Inc. and Wiedmann v. The Bradford Group, Inc. decisions, onto the treble damages provisions of
883 Chapters 149 and 151 of the General Laws as those provisions were originally enacted a rule that
884 ties liability for treble damages to the degree of the defendant's culpability clearly violates the
885 decision of the General Court to enact said statutes without any such rule, and, therefore,
886 constitutes the exercise by the Supreme Judicial Court of the General Court's legislative powers,
887 in clear violation of Article XXX of Part the First of the Constitution of the Commonwealth of
888 Massachusetts, and also constitutes clear violations of Section 6, Third, of Chapter 4 of the
889 General Laws and the Supreme Judicial Court's own decisions; and

890 WHEREAS, the Supreme Judicial Court's failure, in their Rosnov v. Molloy decision, to
891 properly construe and apply the amendments made to the General Laws by Chapter 80 of the
892 Acts of 2008 as said amendments were, by their plain language, manifestly intended to be
893 construed and applied by the General Court in enacting said Act constitutes a clear violation of
894 Article XXX of Part the First of the Constitution of the Commonwealth of Massachusetts;
895 Section 6, Third, of Chapter 4 of the General Laws; and the Supreme Judicial Court's own
896 decisions; and

897 WHEREAS, the Constitution of the Commonwealth of Massachusetts provides:

898 All judicial officers, duly appointed, commissioned and sworn, shall hold their offices
899 during good behavior, excepting such concerning whom there is different provision made in this
900 constitution: provided nevertheless, the governor, with consent of the council, may remove them
901 upon the address of both houses of the legislature.

902 Article I of Chapter III of Part the Second of the Constitution of the Commonwealth of
903 Massachusetts; and

904 WHEREAS, for the foregoing reasons, the behavior of the justices of the Supreme
905 Judicial Court who rendered the Goodrow v. Lane Bryant, Inc., Wiedmann v. The Bradford
906 Group, Inc., and/or Rosnov v. Molloy decisions clearly warrants that they be removed from their
907 offices.

908 Be it enacted by the Senate and House of Representatives in General Court assembled,
909 and by the authority of the same, as follows:

910 Resolved, That both houses of the legislature hereby request the governor (with consent
911 of the council) to remove, under the provisions of Article I of chapter III of Part the Second of
912 the Constitution, Roderick L. Ireland from the office of chief justice of the Supreme Judicial
913 Court, Francis X. Spina from the office of associate justice of the Supreme Judicial Court, Robert
914 J. Cordy from the office of associate justice of the Supreme Judicial Court; Margot Botsford
915 from the office of associate justice of the Supreme Judicial Court; Ralph D. Gants from the
916 office of associate justice of the Supreme Judicial Court; and Fernande R. V. Duffly from the
917 office of associate justice of the Supreme Judicial Court; and be it further

918 Resolved, That the clerk of the Senate be directed to transmit an engrossed copy of these
919 resolutions to the governor forthwith.