HOUSE DOCKET, NO. 453 FILED ON: 1/11/2013

HOUSE . . . . . No. 1723

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 bill:

An Act relative to the treble damages provisions of the wage and hour laws.

PETITION OF:

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

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HOUSE . . . . . No. 1723

By Ms. Garlick of Needham (by request), a petition (accompanied by bill, House, No. 1723) of William J. Okerman relative to the treble damages provisions of the wage and hour laws. Labor and Workforce Development.

The Commonwealth of Massachusetts

In the Year Two Thousand Thirteen

An Act relative to the treble damages provisions of the wage and hour laws.

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

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

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

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

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

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

a fine of not more than $25,000 or by imprisonment for not more than one year, or by both such fine and such imprisonment.

G. L. c. 149, § 27C(a)(2); and

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

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

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

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

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

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

b. Legislative intent. The question presented by this case has not been raised previously under either § 9 or § 11. We begin with the canon of statutory construction that the primary source of insight into the intent of the Legislature is the language of the statute. Hoffman v. Howmedica, Inc., 373 Mass. 32, 37 (1977). The language of § 11, however, does not yield an answer. On one hand, the language focuses on the size of the injury and refers to the culpability of the defendant in an indirect manner. This suggests that the statute be read as requiring joint and several liability once any one of the defendants commits a "willful or knowing violation."

On the other hand, joint and several liability would conflict with the clear intent of the statute to distinguish among different degrees of culpability. Language alone does not tell us which of these inferences to follow.

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

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

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

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

We find a more apt analogy in our own decisions. We have held that concurrent wrongdoers are independently liable under statutes designed to impose a penalty. In Porter v. Sorell, 280 Mass. 457 (1932), the court considered the meaning of the former G. L. (Ter. Ed.) c. 229, § 5 – a wrongful death statute – which provided that a defendant "shall be liable in damages

in the sum of not less than [$ 500] or more than [$ 10,000], to be assessed with reference to the degree of his culpability." The court held that the execution in full of a judgment against one defendant did not release a concurrent wrongdoer. Sorell, supra at 463-464. It noted that the statute levied a penalty and reasoned that the payment by one wrongdoer of his penalty could not extinguish a penalty levied on a second wrongdoer. Supra at 463. The court stated that the Legislature might have provided otherwise, but that it could not "by construction add a limitation on punishment which the Legislature did not see fit to establish." Supra at 462.

The reasoning of Porter has been followed in subsequent cases. In Arnold v. Jacobs, 316 Mass. 81, 84 (1944), the court held that the wrongful death statute "does not limit the amount that can be collected from a number of wrongdoers for one death" since, "as in the criminal law, each wrongdoer may be made to suffer the maximum penalty, no matter how many are guilty." See Gaudette v. Webb, 362 Mass. 60, 73-74 n.9 (1972); O'Connor v. Benson Coal Co., 301 Mass. 145, 148 (1938).

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

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

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

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

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

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

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

St. 1985, c. 587; and

WHEREAS, according to the Supreme Judicial Court in International Fidelity Ins. Co. v. Wilson, the General Court must be presumed to have been aware of the Supreme Judicial Court's International Fidelity Ins. Co. v. Wilson and Mellor v. Berman decisions when it created the private remedy for Section 19B of Chapter 149 of the General Laws by enacting Chapter 587 of the Acts of 1985. International Fidelity Ins. Co. v. Wilson, 387 Mass. 841, 854 (1983); and

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

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

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

St. 1993, c. 110, § 173; and

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

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

St. 1993, c. 110, § 177; and

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

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

St. 1993, c. 110, § 178; and

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

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

St. 1993, c. 110, § 179; and

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

Any employee claiming to be aggrieved by a violation of section one-hundred and forty-eight, one-hundred and forty-eight B, one-hundred and fifty C, one-hundred and fifty-two and one-hundred and fifty-two A may, at the expiration of ninety days after the filing of a complaint with the attorney general, or sooner, if the attorney general assents in writing, and within three

years of such violation, institute and prosecute in his own name and on his own behalf, or for himself and for others similarly situated, a civil action for injunctive relief and any damages incurred, including treble damages for any loss of wages and other benefits.

St. 1993, c. 110, § 182; and

WHEREAS, in 1993 the General Court amended the existing private remedy under Section 1B of Chapter 151 of the General Laws, which prior to being so amended had provided that "if any person is paid by an employer less than such overtime rate of compensation [required by Section 1A of Chapter 151], such person may recover in a civil action the full amount of such overtime rate of compensation less any amount actually paid to him or her by the employer," G. L. c. 151, § 1B, as inserted by St. 1962, c. 371, by inserting after the word "action" the words "three times", so that upon being so amended Section 1B of Chapter 151 provided that "if any person is paid by an employer less than such overtime rate of compensation [required by Section 1A of Chapter 151], such person may recover in a civil action three times the full amount of such overtime rate of compensation less any amount actually paid to him or her by the employer." St. 1993, c. 110, § 183; and

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

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

WHEREAS, as with the private remedy of Section 19B of Chapter 149 of the General Laws created by Chapter 587 of the Acts of 1985, and pursuant to the Supreme Judicial Court's holding in International Fidelity Ins. Co. v. Wilson, the General Court modeled the private remedies of Sections 27, 27F, 27G, 27H, and 150 of Chapter 149 of the General Laws as inserted by Sections 173, 177, 178, 179, and 182 of Chapter 110 of the Acts of 1993, respectively, and the private remedies of Sections 1B and 20 of Chapter 151 of the General Laws as amended by Sections 183 and 185 of Chapter 110 of the Acts of 1993, respectively, on the Clayton Act by virtue of the fact that it did not enact in any of said statutes "a rule whereby the defendant's liability [for treble damages] is measured by the degree of his culpability," which according to the Supreme Judicial Court's clear and unambiguous holding in International Fidelity Ins. Co. v. Wilson must mean that the General Court must have intended that under said private remedies, "the trial judge has no discretion to deny the plaintiff treble damages once a violation – even a merely negligent one – is proved" and that "treble damages [must be] imposed for all violations," International Fidelity Ins. Co. v. Wilson, 387 Mass. 841, 854, 855 (1983), and which according to the Supreme Judicial Court's clear and unambiguous holding in Mellor v. Berman must mean that the General Court must have intended that under said private remedies "the [General Court] intends any violation of [the substantive provisions of the statutes] to result in the imposition of treble damages." Mellor v. Berman, 390 Mass. 275, 283 (1983); and

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

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

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

Multiple damages such as the treble damages at issue here "are 'essentially punitive in nature.' " Fontaine v. Ebtec Corp., 415 Mass. 309, 322 (1993), quoting McEvoy Travel Bur., Inc. v. Norton Co., 408 Mass. 704, 717 (1990). See Kansallis Fin. Ltd. v. Fern, 421 Mass. 659, 672

(1996). They are allowed only when expressly authorized by statute, Flesner v. Technical Communications Corp., 410 Mass. 805, 813 (1991), and are ordinarily applied by the Legislature "against those defendants with a higher degree of culpability than that sufficient to ground simple liability." See Kansallis Fin. Ltd., supra. Punitive damages may be awarded for conduct that is "outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others." Dartt v. Browning-Ferris Indus., Inc. (Mass.), 427 Mass. 1, 17a, (1998), quoting Restatement (Second) of Torts § 908(2) (1979). In the instant case, the judge found that, in light of the uncertainty of the state of the law in Massachusetts and the fact that Lane Bryant relied on the advice of counsel and followed law and procedures apparently sanctioned elsewhere, there was "no legal or equitable basis" on which to impose multiple damages. We agree. We find nothing in the record to support a finding that Lane Bryant intentionally or wilfully violated Massachusetts law or that its conduct was "evil in motive" or showed a "reckless indifference to the rights of others," and we therefore decline to award treble damages. To do otherwise absent evidence of heightened culpability would very likely constitute an "arbitrary or irrational deprivation[ ] of property," TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993) (Kennedy, J., concurring), and thus would be constitutionally impermissible. There was no error.

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

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

WHEREAS, the General Laws mandates:

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

. . . .

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

G. L. c. 4, § 6, Third; and

WHEREAS, according to the common and approved usage of the English language, the sentence "[a]ny person who purchases goods or services primarily for personal . . . purposes who suffers any ascertainable loss . . . by the use . . . by a person of a method . . . declared unlawful by section two . . . may bring an action . . . in equity to recover treble damages or five hundred dollars, whichever is greater" is a simple and complete sentence, the only permissible construction of which is that the subject of the sentence, which is "[a]ny person who purchases goods or services primarily for personal . . . purposes who suffers any ascertainable loss . . . by the use . . . by a person of a method . . . declared unlawful by section two," is permitted but not required to undertake a specific act, which is to "bring an action . . . in equity to recover treble damages or five hundred dollars, whichever is greater"; and

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

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

WHEREAS, the Supreme Judicial Court has held: "Where the language of a statute is plain, it is 'the sole function of the courts . . . to enforce it according to its terms.' " D'Avella v. McGonigle, 429 Mass. 820, 822-823 (1999), quoting from Boston Neighborhood Taxi Assn. v.

Department of Pub. Util., 410 Mass. 686, 690 (1991); "Where . . . the language of the statute is clear, it is the function of the judiciary to apply it, not amend it." Commissioner of Rev. v. Cargill, Inc., 429 Mass. 79, 82 (1999); "We do not read into the statute a provision which the Legislature did not see fit to put there, nor add words that the Legislature had an option to, but chose not to include." Commissioner of Correction v. Superior Ct. Dept. of the Trial Ct., 446 Mass. 123, 126 (2006). Also see Sullivan v. Brookline, 435 Mass. 353, 360 (2001); General Elec. Co. v. Department of Envt'l Protection, 429 Mass. 798, 803 (1999); Dartt v. Browning-Ferris Indus., Inc., 427 Mass. 1, 8 (1998); Pyle v. School Comm. of S. Hadley, 423 Mass. 283, 285-286 (1996); O'Brien v. Massachusetts Bay Transp. Auth., 405 Mass. 439, 443-444 (1989); Bronstein v. Prudential Ins. Co., 390 Mass. 701, 704 (1984); Department of Community Affairs v. Massachusetts State College Bldg. Auth., 378 Mass. 418, 427 (1979); Prudential Ins. Co. v. Boston, 369 Mass. 542, 546-547 (1976); Johnson v. District Attorney for the N. Dist., 342 Mass. 212, 215 (1961); Randall's Case, 331 Mass. 383, 385 (1954); Commonwealth v. Slome, 321 Mass. 713, 716 (1947); Johnson's Case, 318 Mass. 741, 746-747 (1945); Hanlon v. Rollins, 286 Mass. 444, 447 (1934); Commonwealth v. S. S. Kresge Co., 267 Mass. 145, 148 (1929); King v. Viscoloid Co., 219 Mass. 420, 425 (1914); Holbrook v. Holbrook, 1 Pick. 248, 249, 250 (1822); and

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

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

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

are not mentioned in the amended third paragraph. Based on accepted principles of statutory construction, their availability should not be implied and we decline to do so.

This conclusion comports with what we perceive to be the legislative intent as well as "with common sense and sound reason." Massachusetts Comm'n Against Discrimination v. Liberty Mut. Ins. Co., 371 Mass. 186, 190 (1976), quoting Atlas Distrib. Co. v. Alcoholic Beverages Control Comm'n, 354 Mass. 408, 414 (1968). The fourth paragraph was added to § 9 of G. L. c. 151B to enhance, or improve on, damages for age discrimination. A recovery of punitive damages under the third paragraph of § 9 of G. L. c. 151B is discretionary, and, therefore, uncertain. By way of contrast, the fourth paragraph provides for a certain recovery of at least double damages if the plaintiff proves that he was deliberately discriminated against on the basis of his age. It is not reasonable to assume that the Legislature intended to design a damages scheme which singles out age discrimination as significantly more egregious than, for example, racial or sexual discrimination by granting a victim of age discrimination the right to recover both punitive and multiple damages. We conclude that the fourth paragraph of the current G. L. c. 151B, § 9, see note 9, supra, establishes the appropriate measure of damages in an age discrimination claim.

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

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

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

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

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

[Chapter 93A] does, however, by its terms make a distinction between cases where simple compensatory damages are paid to the plaintiff and where there are double or treble -- that is, punitive -- damages. In those latter cases, the statute requires that the court find that "the act or practice was a willful or knowing violation." Thus the Legislature envisaged multiple damage awards against those defendants with a higher degree of culpability than that sufficient to ground simple liability. See, e.g., International Fidelity Ins. Co. v. Wilson, 387 Mass. 841, 855 (1983) ("The Massachusetts Legislature consciously enacted a rule whereby the defendant's liability is measured by the degree of his culpability"); Linthicum v. Archambault, 379 Mass.

381, 388 (1979), abrogated in part on other grounds by Knapp v. Sylvania Shoe Mfg. Corp., 418 Mass. 737 (1994); Heller v. Silverbranch Constr. Corp., 376 Mass. 621, 627-628 (1978); Wasserman v. Agnastopoulos, 22 Mass. App. Ct. 672, 680-681 (1986).

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

WHEREAS, the Supreme Judicial Court also stated in Kansallis Fin. Ltd. v. Fern that "[w]e note that our courts are already familiar with the task of determining degrees of culpability under [Chapter 93A] as they must determine whether to impose double or treble damages. See International Fidelity Ins. Co. v. Wilson, supra at 853 ("Based on the egregiousness of each defendant's conduct, the trial judge may assess between double and treble damages"). Kansallis Fin. Ltd. v. Fern, 421 Mass. 659, 675 (1996) (emphases added); and

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

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

WHEREAS, in their decision in Goodrow v. Lane Bryant, Inc. the Supreme Judicial Court conflates "punitive damages," which are intended to punish tortfeasors, and which in

Massachusetts are allowed only when expressly authorized by statute, with the multiple damages provisions of statutes that comprise the body of law that developed under the Clayton Antitrust Act, such as, for example, the treble damages provisions of Senate Doc. No. 211 of 1969, Section 19B of Chapter 149 as inserted by Chapter 587 of the Acts of 1985, Section 27 of Chapter 149 as inserted by Section 173 of Chapter 110 of the Acts of 1993, Section 27F of Chapter 149 as inserted by Section 177 of Chapter 110 of the Acts of 1993, Section 27G of Chapter 149 as inserted by Section 178 of Chapter 110 of the Acts of 1993, Section 27H of Chapter 149 as inserted by Section 179 of Chapter 110 of the Acts of 1993, Section 150 of Chapter 149 as inserted by Section 182 of Chapter 110 of the Acts of 1993, Section 1B of Chapter 151 as amended by Section 183 of Chapter 110 of the Acts of 1993, and Section 20 of Chapter 151 as amended by Section 185 of Chapter 110 of the Acts of 1993; and

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

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

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

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

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

> In Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., [429 U.S. 477 (1977)], after examining the legislative history of § 4 [of the Clayton Act], we described the Sherman Act as "conceived of primarily as a remedy for '[t]he people of the United States as individuals,' especially consumers," and the treble-damages provision of the Clayton Act as "conceived primarily as

'open[ing] the door of justice to every man . . . and giv[ing] the injured party ample damages for the wrong suffered.' " 429 U. S., at 486 n. 10.

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

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

Section 4 [of the Clayton Act] . . . is in essence a remedial provision. It provides treble damages to "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . ." Of course, treble damages also play an important role in penalizing wrongdoers and deterring wrongdoing, as we also have frequently observed. It nevertheless is true that the treble-damages provision, which makes awards available only to injured parties, and measures the awards by a multiple of the injury actually proved, is designed primarily as a remedy.

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

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

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

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

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

WHEREAS, the TXO Prod. Corp. v. Alliance Resources Corp. case involved "a common-law action for slander of title [in which] respondents obtained a judgment against petitioner for $19,000 in actual damages and $10 million in punitive damages" in which the

question decided by the United States Supreme Court was "whether that punitive damages award violates the Due Process Clause of the Fourteenth Amendment, either because its amount is excessive or because it is the product of an unfair procedure," TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 446 (1993), and had nothing whatsoever to do with private remedies providing for multiple damages; and

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

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

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

. . . .

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

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

Contrary to MMC's argument, this result is entirely consistent with our caselaw. In Purdy v. Community Telecommunications Corp., 663 A.2d 25, 28 (Me. 1995), we declined to "engraft a good faith exception on [section 626]" at the behest of an employer that was faced with complicated calculations of the commissions due a former employee. We reasoned that "the Legislature has not . . . provided for an exemption for action taken by an employer in good faith." Id. Although recognizing that "the effect of this statute is harsh, perhaps more so than the Legislature intended," we could not "ignore the statute's plain language and its broadly protective purpose." Id. Similarly, we stated in Burke v. Port Resort Realty Corp., 1999 ME 138, ¶ 16, 737 A.2d 1055, 1060, that "[u]nlike similar statutes in some other jurisdictions, section 626 does not have a 'bona fide dispute' exception." We have never recognized such an exception, and we have affirmed awards of section 626 treble damages and attorney fees without mentioning the employer's bad faith. See, e.g., Bernier v. Merrill Air Eng'rs, 2001 ME 17, ¶¶ 4-9, 770 A.2d 97, 100-01; Marston v. Newavom, 629 A.2d 587, 590-91 (Me. 1993).

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

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

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

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

We have previously held that the liquidated damage provision is not penal in its nature but constitutes compensation for the retention of a workman's pay which might result in damages too obscure and difficult of proof for estimate other than by liquidated damages. Overnight Motor Co. v. Missel, 316 U.S. 572. It constitutes a Congressional recognition that failure to pay the statutory minimum on time may be so detrimental to maintenance of the minimum standard of living "necessary for health, efficiency and general well-being of workers" and to the free flow of commerce, that double payment must be made in the event of delay in order to insure restoration of the worker to that minimum standard of well-being. Employees receiving less than the statutory minimum are not likely to have sufficient resources to maintain their well-being and efficiency until such sums are paid at a future date. The same policy which forbids waiver of the statutory minimum as necessary to the free flow of commerce requires that reparations to restore damage done by such failure to pay on time must be made to accomplish Congressional purposes. Moreover, the same policy which forbids employee waiver of the minimum statutory rate because of inequality of bargaining power, prohibits these same employees from bargaining with their employer in determining whether so little damage was suffered that waiver of liquidated damage is called for. This conclusion is in accord with decisions of the majority of the federal courts that have considered this question. This result, moreover, avoids the difficult problems of allocation that would arise in numerous cases where a lump sum was paid for back wages and waiver of right to liquidated damages and where issue was subsequently raised as to whether there had been full payment of the basic minimum and overtime wages specified in the Act. Nor does the instant case involve exceptional circumstances of the kind held to justify a waiver agreement such as was upheld in Fort Smith & Western R. Co. v. Mills, 253 U.S. 206.

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

courts have uniformly held that contracts tending to encourage violation of laws are void as contrary to public policy.

Prohibition of waiver of claims for liquidated damages accords with the Congressional policy of uniformity in the application of the provisions of the Act to all employers subject thereto, unless expressly exempted by the provisions of the Act. An employer is not to be allowed to gain a competitive advantage by reason of the fact that his employees are more willing to waive claims for liquidated damages than are those of his competitor. The same considerations calling for equality of treatment which we found so compelling in Midstate Horticultural Co., supra, exist here.

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

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

Petitioner relies on the fact that various other federal statutes authorizing employees to sue for wages or for damages arising from injuries sustained in the course of employment contain specific provisions prohibiting waiver of rights under the acts involved, or provide means by which compromises and settlements can be approved. There is no indication why Congress did not embody a similar provision in the Act under consideration in this case. Absence of such provisions, however, has not prevented the courts from invalidating waivers where the legislative

policy would be thwarted by permitting such contracts. The decision in the instant case is based on the legislative policy behind this enactment and issues arising under other acts having different legislative backgrounds are not conclusive in determining the legislative intent with respect to the Fair Labor Standards Act. Failure to provide a method of waiving claims under the Act can support contrary inferences, that such waivers were to be allowed or that the provisions of the Act state a settled policy which cannot be modified by private contracts. We are of the opinion that the legislative history and provisions of the Act support a view prohibiting such waiver. As was stated in West Coast Hotel Co. v. Parrish, 300 U.S. 379, 397, " 'while in individual cases hardship may result, the restriction will enure to the benefit of the general class of employees in whose interest the law is passed and so to that of the community at large.' [Adkins v. Children's Hospital, 261 U.S. 525.] Id., p. 563."

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

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

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

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

c. Treble damages and attorney's fees. The defendants also argue that the weekly wage law does not apply to this case because the commissions owed the plaintiff were not "definitely determined" as required by the weekly wage law and, therefore, the judge erred in awarding treble damages and attorney's fees pursuant to G. L. c. 149, § 150. In support of their argument that the amount owed the plaintiff was not definitely determined, the defendants rely solely on the fact that they disagree with the plaintiff over how her commissions should have been calculated and whether the plaintiff was overpaid. However, in light of the sanction for spoliation of evidence, the defendants have no factual basis for their assertion. See Fletcher v. Dorchester

Mut. Ins. Co., 437 Mass. 544, 550-551 (2002) (exclusion of evidence may be dispositive of merits of case).

In addition, the defendants concede that the only difference between the parties concerning the amount of commission due the plaintiff hinges on their claim that group payroll should always have been deducted before the commissions were determined. There is no dispute concerning the total from which deductions would be taken or about the other applicable formulas and deductions, thus making the amount owed the plaintiff arithmetically determinable. We conclude that the amount owed the plaintiff is definitely determined and, therefore, the weekly wage law applies. See generally Boston Police Patrolmen's Ass'n v. Boston, 435 Mass. 718, 719-720 (2002), quoting Champagne v. Champagne, 429 Mass. 324, 326 (1999) (we interpret statutory language according to intent of Legislature ascertained from its words considered in context of statute's purpose). Cf. Cumpata v. Blue Cross Blue Shield of Mass., Inc., 113 F. Supp. 2d 164, 168 (D. Mass. 2000), citing Klint vs. J.& J. Assocs., Middlesex Superior Court, No. 97-0251 (Sept. 3, 1998) (holding that commissions were not within scope of weekly wage law, where interpretation of written contract was in dispute).

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

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

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

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

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

However, there is nothing in the plain language of the statute that requires an award of treble damages. The text of the statute states only that a plaintiff "may" institute a suit for damages that includes a request for treble damages. See Brittle v. Boston, 439 Mass. 580, 594, 790 N.E.2d 208 (2003) ("may" is permissive, not mandatory). Cf. Hashimi v. Kalil, 388 Mass.

607, 609 (1983) ("shall" is interpreted as imposing mandatory obligation). Because the plain language of the statute does not require a judge to award treble damages, we decline to create such a requirement and conclude that such an award is in a judge's discretion. Our conclusion is similar to the conclusion in Goodrow v. Lane Bryant, Inc., 432 Mass. 165, 178-179 (2000), and cases cited. In the Goodrow case, the plaintiff argued that G. L. c. 151, § 1B, which states that any person paid less than the requisite overtime "may recover . . . three times the full amount," should be interpreted to mean that the plaintiff could request treble damages but that once the request was made, the award was mandatory. Id. at 178. The court stated that treble damages are punitive in nature, allowed only where authorized by statute, and appropriate where conduct is "outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others." Id., quoting Dartt v. Browning-Ferris Indus., Inc. (Mass.), 427 Mass. 1, 17a (1998). In the absence of factors that would make treble damages appropriate, the court affirmed the judge's decision denying such punitive damages. Id. at 179. Cf. Hampshire Village Assocs. v. District Court of Hampshire, 381 Mass. 148, 149, cert. denied sub nom. Ruhlander v. District Court of Hampshire, 449 U.S. 1062 (1980) (discussing G. L. c. 186, § 15B, which provides that tenant "shall be awarded [treble] damages").

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

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

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

a civil action for damages rather than to the amount of damages recoverable under the statute"; and

WHEREAS, based upon the common and approved usage of the English language, and in particular based upon the meaning and proper usage of the word "may," see, e.g., Webster's New World College Dictionary 889 (4th ed. 2002); Black's Law Dictionary 993 (7th ed. 1999); B. A. Garner, A Dictionary of Modern Legal Usage 552-553, 942 (2d ed. 1995), it is ridiculous to assert, as the Supreme Judicial Court has done in Goodrow v. Lane Bryant, Inc., 432 Mass. 165, 178 (2000) and in Wiedmann v. The Bradford Group, Inc., 444 Mass. 698, 709-710 (2005), that the General Court employed the word "may" in the treble damages provisions of the wage and hour laws as they were enacted in 1985 and 1993 to mean anything other than to permit employees in the Commonwealth to, in their sole discretion, sue for and recover, among other things, treble damages for lost wages and other benefits; and

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

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

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

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

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

WHEREAS, the effects of the Supreme Judicial Court's decisions in Goodrow v. Lane Bryant, Inc., 432 Mass. 165, 178-179 (2000); Wiedmann v. The Bradford Group, Inc., 444 Mass. 698, 708-710 (2005); and Rosnov v. Molloy, 460 Mass. 474 (2011), have been that, (1) some untold number of employees who have suffered a violation or violations of the Commonwealth's wage and hour laws that occurred prior to July 12, 2008, and who have chosen to prosecute a private civil action pursuant to the treble damages provisions of Chapters 149 and 151 of the General Laws, as those provisions were originally enacted, to seek redress— instead of relying upon the Attorney General to do so on their behalf—have either been denied their statutorily mandated treble damages after having proven a violation resulting in a loss of wages or other benefits, or have been forced to meet the burden of proof engrafted onto the statutes by the Supreme Judicial Court in their decisions in Goodrow v. Lane Bryant, Inc., 432 Mass. 165, 178-179 (2000) or Wiedmann v. The Bradford Group, Inc., 444 Mass. 698, 708-710 (2005), in order to be awarded treble damages; and (2) some untold number of employees who have suffered a violation or violations of the Commonwealth's wage and hour laws that occurred prior to July 12, 2008, have chosen not to prosecute a private civil action pursuant to the treble damages provisions of Chapters 149 and 151 of the General Laws, as those provisions were originally enacted, to seek redress because of the Supreme Judicial Court's decisions in Goodrow v. Lane Bryant, Inc., 432 Mass. 165, 178-179 (2000) or Wiedmann v. The Bradford Group, Inc., 444 Mass. 698, 708-710 (2005), to engraft onto the treble damages provisions a rule that ties liability for treble damages to the degree of the defendant's culpability; and

WHEREAS, the Supreme Judicial Court's engrafting, in their Goodrow v. Lane Bryant, Inc. and Wiedmann v. The Bradford Group, Inc. decisions, onto the treble damages provisions of Chapters 149 and 151 of the General Laws as those provisions were originally enacted a rule that ties liability for treble damages to the degree of the defendant's culpability and the Supreme Judicial Court's failure, in their Rosnov v. Molloy decision, to properly construe and apply Chapter 80 of the Acts of 2008 constitute both manifest error and manifest constitutional error, which have severely undermined both the statutory and constitutional rights of all of those who are subject to the Commonwealth's wage and hour laws; and

WHEREAS, it is the fundamental duty of the General Court to ensure that the laws that it enacts are being implemented in accordance with the intent of the General Court; and

WHEREAS, the treble damages provisions of Sections 19B, 27, 27F, 27G, 27H, and 150 of Chapter 149 and Sections 1B and 20 of Chapter 151 of the General Laws, as said provisions

were originally enacted, have been misconstrued by the Supreme Judicial Court and, therefore, have not been implemented in accordance with the intent of the General Court; and

WHEREAS, the amendments made by Chapter 80 of the Acts of 2008 to the treble damages provisions of Sections 27, 27F, 27G, 27H, and 150 of Chapter 149 and Sections 1B and 20 of Chapter 151 of the General Laws as said provisions were originally enacted in order "to clarify the existing law and to reiterate the original intention of the general court that triple damages are mandatory" have been misconstrued by the Supreme Judicial Court and, therefore, have not been implemented in accordance with the intent of the General Court; and

WHEREAS, the Supreme Judicial Court's misconstruing of the treble damages provisions of Sections 19B, 27, 27F, 27G, 27H, and 150 of Chapter 149 and Sections 1B and 20 of Chapter 151 of the General Laws, as said provisions were originally enacted, has had the effect of undermining compliance with and enforcement of the Commonwealth's wage and hour laws, resulting in serious and adverse effects to the economic well-being and general welfare of the inhabitants of the Commonwealth; and

WHEREAS, the only purposes of this Act are (1) to reiterate the original intention of the General Court in originally enacting the treble damages provision of Sections 19B of Chapter 149 of the General Laws in 1985 and the treble damages provisions of Sections 27, 27F, 27G, 27H, and 150 of Chapter 149 and Sections 1B and 20 of Chapter 151 of the General Laws in 1993 that treble damages are mandatory; and (2) to redress the serious and adverse effects that have resulted from the judicial misinterpretation of the treble damages provisions of Sections 19B, 27, 27F, 27G, 27H, and 150 of Chapter 149 and Sections 1B and 20 of Chapter 151 of the General Laws as said provisions were originally enacted; and

WHEREAS, the deferred operation of this Act would tend to defeat its purposes, which are (1) to reiterate the original intention of the General Court in originally enacting the treble damages provisions of Sections 19B 27, 27F, 27G, 27H, and 150 of Chapter 149 and Sections 1B and 20 of Chapter 151 of the General Laws that treble damages are mandatory; and (2) to redress the serious and adverse effects that have resulted from the judicial misinterpretation of said treble damages provisions as originally enacted, therefore it is hereby declared to be an emergency law, necessary for the immediate preservation of the public convenience.

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

SECTION 1. Chapter 80 of the Acts of 2008 is hereby repealed.

SECTION 2. Treble damages for any loss of wages or other benefits must be awarded for all violations prosecuted under the private remedy of Section 19B of Chapter 149 of the General Laws as inserted by Chapter 587 of the Acts of 1985.

SECTION 3. Treble damages for any loss of wages and other benefits must be awarded for all violations prosecuted under the private remedy of Section 27 of Chapter 149 of the General Laws as inserted by Section 173 of Chapter 110 of the Acts of 1993.

SECTION 4. Treble damages for any loss of wages and other benefits must be awarded for all violations prosecuted under the private remedy of Section 27F of Chapter 149 of the General Laws as inserted by Section 177 of Chapter 110 of the Acts of 1993.

SECTION 5. Treble damages for any loss of wages and other benefits must be awarded for all violations prosecuted under the private remedy of Section 27G of Chapter 149 of the General Laws as inserted by Section 178 of Chapter 110 of the Acts of 1993.

SECTION 6. Treble damages for any loss of wages and other benefits must be awarded for all violations prosecuted under the private remedy of Section 27H of Chapter 149 of the General Laws as inserted by Section 179 of Chapter 110 of the Acts of 1993.

SECTION 7. Treble damages for any loss of wages and other benefits must be awarded for all violations prosecuted under the private remedy of Section 150 of Chapter 149 of the General Laws as inserted by Section 182 of Chapter 110 of the Acts of 1993 and as amended through Section 2 of Chapter 99 of the Acts of 2005.

SECTION 8. Three times the full amount of any unpaid overtime compensation must be awarded for all violations prosecuted under the private remedy of Section 1B of Chapter 151 of the General Laws as amended by Section 183 of Chapter 110 of the Acts of 1993.

SECTION 9. Three times the full amount of any unpaid minimum wages must be awarded for all violations prosecuted under the private remedy of Section 20 of Chapter 151 of the General Laws as amended by Section 185 of Chapter 110 of the Acts of 1993.

SECTION 10. All judicial rulings that have been made relative to the private remedy of Section 19B of Chapter 149 of the General Laws as inserted by Chapter 587 of the Acts of 1985, the private remedy of Section 27 of Chapter 149 of the General Laws as inserted by Section 173 of Chapter 110 of the Acts of 1993, the private remedy of Section 27F of Chapter 149 of the General Laws as inserted by Section 177 of Chapter 110 of the Acts of 1993, the private remedy of Section 27G of Chapter 149 of the General Laws as inserted by Section 178 of Chapter 110 of the Acts of 1993, the private remedy of Section 27H of Chapter 149 of the General Laws as inserted by Section 179 of Chapter 110 of the Acts of 1993, the private remedy of Section 150 of Chapter 149 of the General Laws as inserted by Section 182 of Chapter 110 of the Acts of 1993 and as amended by Section 2 of Chapter 99 of the Acts of 2005, the private remedy of Section 1B of Chapter 151 of the General Laws as amended by Section 183 of Chapter 110 of the Acts of 1993, or the private remedy of Section 20 of Chapter 151 of the General Laws as amended by Section 185 of Chapter 110 of the Acts of 1993 in which treble damages have been denied or it has been held that treble damages are not mandatory for all violations are hereby declared to be

inconsistent with the plain language of said statutes, inconsistent with the manifest intent of the General Court in enacting said statutes, inconsistent with substantial justice, and violations of the substantial rights of the parties affected by such rulings; and, therefore, all civil actions that have been instituted under the treble damages provision of any of said statutes since said treble damages provision went into effect in which any such rulings have been made must, if such civil actions have been closed, be reopened and retried or, if any such civil actions are still pending as of the effective date of this act, be tried consistent with the plain language of and the manifest intent of the General Court in enacting said statutes and consistent with the provisions of this act.

SECTION 11. The Commonwealth must award to the parties in all civil actions prosecuted under the private remedy of Section 19B of Chapter 149 of the General Laws as inserted by Chapter 587 of the Acts of 1985, the private remedy of Section 27 of Chapter 149 of the General Laws as inserted by Section 173 of Chapter 110 of the Acts of 1993, the private remedy of Section 27F of Chapter 149 of the General Laws as inserted by Section 177 of Chapter 110 of the Acts of 1993, the private remedy of Section 27G of Chapter 149 of the General Laws as inserted by Section 178 of Chapter 110 of the Acts of 1993, the private remedy of Section 27H of Chapter 149 of the General Laws as inserted by Section 179 of Chapter 110 of the Acts of 1993, the private remedy of Section 150 of Chapter 149 of the General Laws as inserted by Section 182 of Chapter 110 of the Acts of 1993 and as amended by Section 2 of Chapter 99 of the Acts of 2005, the private remedy of Section 1B of Chapter 151 of the General Laws as amended by Section 183 of Chapter 110 of the Acts of 1993, or the private remedy of Section 20 of Chapter 151 of the General Laws as amended by Section 185 of Chapter 110 of the Acts of 1993, including both closed and pending actions, any and all costs incurred in the production and submission of any evidence intended to prove that the alleged violation was, or violations were, committed with a higher degree of culpability than that sufficient to ground simple liability or to defend against any such allegation; and such awards must be made regardless of whether or not the plaintiff or plaintiffs in such cases ultimately prevailed or ultimately prevails or prevail.

SECTION 12. This act is enacted for the sole purposes of (1) reiterating the manifest intent of the General Court in amending Section 19B of Chapter 149 of the General Laws by enacting Chapter 587 of the Acts of 1985, Section 27 of Chapter 149 of the General Laws by enacting Section 173 of Chapter 110 of the Acts of 1993, Section 27F of Chapter 149 of the General Laws by enacting Section 177 of Chapter 110 of the Acts of 1993, Section 27G of Chapter 149 of the General Laws by enacting Section 178 of Chapter 110 of the Acts of 1993, Section 27H of Chapter 149 of the General Laws by enacting Section 179 of Chapter 110 of the Acts of 1993, Section 150 of Chapter 149 of the General Laws by enacting Section 182 of Chapter 110 of the Acts of 1993, Section 1B of Chapter 151 of the General Laws by enacting Section 183 of Chapter 110 of the Acts of 1993, and Section 20 of Chapter 151 of the General Laws by enacting Section 185 of Chapter 110 of the Acts of 1993 that treble damages are mandatory; and (2) redressing the serious and adverse effects that have resulted from the judicial

misinterpretation of said sections of the General Laws as so amended and is not to be construed as a new enactment.