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Fulk v. Norfolk Southern Railway Company

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JONATHON SIZEMORE

Fulk v. Norfolk Southern Railway Company

60 N.Y.L. SCH. L. REV. 659 (2015–2016)

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Legislators use a variety of tools when penning new legislation, and one such tool is the reference statute. It is important to note that all statutes are referential in some sense, being part of a larger body of law and influenced by statutes of similar subject.¹ However, the courts have come to use “reference statute” as a precise term of art.² A reference statute is one “which refers to and by reference adopts, wholly or partially . . . one or more provisions of other statutes.”³ This method of legislation by reference is a well-established practice dating back to the English Parliament in the thirteenth century.⁴ The most common issue that arises from this practice is that the statute referenced has been amended or repealed entirely.⁵ For these instances, the courts have developed common law rules categorizing statutes as either general or specific references. Courts then determine whether the legislature intended the inclusion of subsequent changes.⁶ Yet another issue that may arise, but has never been fully examined, is that the reference is either ambiguous—meaning it does not specify a section—or uses modifying language regarding the reference—for example, some language limiting what should be adopted.

The Federal Railroad Safety Act (FRSA) illustrates the use of modifying language in a reference statute. The FRSA’s stated purpose is “to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents.”⁷ In 2007, the FRSA was amended to include an anti-retaliation, or “whistleblower,”

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1. COURTENAY ILBERT, *LEGISLATIVE METHODS AND FORMS* 254 (1901) (“All legislation is obviously referential in the widest sense. No statute is completely intelligible as an isolated enactment. Every statute is a chapter, or a fragment of a chapter, of a body of law. It involves references, express or implied, to the rules of the common law, and to the provisions of other statutes bearing on the same subject.”).
 2. Terms of art are particular words or phrases which have come to have a particular meaning in the view of the court, and whose definitions are presumed to be known by the legislature. 73 AM. JUR. 2D *Statutes* § 143, Westlaw (database updated Feb. 2016).
 3. Horace Emerson Read, *Is Referential Legislation Worth While?*, 25 MINN. L. REV. 261, 261–62 (1941).
 4. *Id.* at 262.
 5. When a referred-to statute has been amended or repealed, the type of reference used comes into play—whether the statute is general or specific. *See* 82 C.J.S. *Statutes* § 92, Westlaw (database updated Dec. 2015).
 6. Scott A. Baxter, *Reference Statutes: Traps for the Unwary*, 30 McGEORGE L. REV. 562, 564 (1999). A specific reference statute refers to another statute by the title or section number, and will generally not include subsequent alterations to the referred-to statute. 2B SUTHERLAND STATUTORY CONSTRUCTION § 51:7, Westlaw (database updated Nov. 2015). A general reference statute, on the other hand, will refer to a law generally and is intended by the legislature to incorporate subsequent changes to the referenced statute. *Id.*
 7. 49 U.S.C. § 20101 (2012). It has been proffered by both attorneys and railroad workers that the railroad industry promulgates the concept of “behavior-based safety,” meaning that accidents and subsequent injuries are assumed to be avoidable, and therefore the fault of the employee. Kari Lydersen, *Blood on the Tracks: Railway Whistleblowers Get Some Federal Protection at Last*, IN THESE TIMES (Apr. 15, 2013), http://inthesetimes.com/article/14836/blood_on_the_tracks. This approach allows railway companies to deny workers’ compensation claims and other benefits initially, and provides a ground for firing to eliminate contact with the employee. As a result, railway workers are conditioned not to report injuries or unsafe conditions for fear of reprisal. *Id.*

provision to further this purpose.⁸ Federal whistleblower statutes generally reflect a congressional intent to protect private sector employees who reveal misconduct that threatens public safety and welfare.⁹ Under the anti-retaliation provision of the FRSA, a railroad carrier “may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee” for performing certain protected activities, including refusal to violate a federal law.¹⁰ An employee who experiences discrimination may seek relief by filing a complaint with the Department of Labor (DOL) under section 20109(d)(1) of the FRSA.¹¹ The Occupational Safety and Health Administration (OSHA), a sub-agency within the DOL, is responsible for enforcing the retaliation provision of the FRSA, among sixteen other federal retaliation statutes.¹²

The FRSA incorporates by reference¹³ the rules and procedures of the whistleblower section in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (“AIR-21”).¹⁴ In section 20109(d)(2)(A), the FRSA states that any action under section 20109(d)(1) “shall be governed under the rules and procedures set forth in” AIR-21.¹⁵ The referenced section of AIR-21 allows a third

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8. *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 156 (3rd Cir. 2013). Anthony Araujo’s case has come to be known as a leading example of the whistleblower provision in execution. Glenn Phillips, *Railroad Whistleblowers Receive Federal Protection*, PHILLIPS L. FIRM (Apr. 12, 2013), <http://www.justiceforyou.com/blog/railroad-whistleblowers-receive-federal-protection>. After witnessing the tragic death of a coworker, Araujo was diagnosed with post-traumatic stress disorder. His employer alleged a violation of company policy after Araujo requested leave, and ceased paying him. After a safety investigation, OSHA awarded Araujo \$500,000 for lost wages and suffering. *Id.*
 9. Lois A. Lofgren, *Whistleblower Protection: Should Legislatures and the Courts Provide a Shelter to Public and Private Sector Employees who Disclose the Wrongdoing of Employers?*, 38 S.D. L. REV. 316, 328 (1993).
 10. 49 U.S.C. § 20109(a).
 11. *Id.* § 20109(d)(1).
 12. *The Whistleblower Protection Programs*, U.S. DEP’T LAB., http://www.whistleblowers.gov/statutes_page.html (last visited Apr. 20, 2016). *See generally* National Transit Systems Security Act of 2007, 6 U.S.C. § 1142; Consumer Product Safety Improvement Act of 2008, 15 U.S.C. § 2087; Toxic Substances Control Act, *id.* § 2622; Asbestos Hazard Emergency Response Act of 1986, *id.* § 2651; Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A; Occupational Safety and Health Act of 1970, 29 U.S.C. § 660; Federal Water Pollution Control Act, 33 U.S.C. § 1367; Safe Drinking Water Act, 42 U.S.C. § 300j-9; Energy Reorganization Act of 1974, *id.* § 5851; Solid Waste Disposal Act, *id.* § 6971; Clean Air Act, *id.* § 7622; Comprehensive Environmental Response Compensation, and Liability Act of 1980, *id.* § 9610; International Safe Container Act, 46 U.S.C. § 80507; Federal Railroad Safety Act of 1970, 49 U.S.C. § 20109; Surface Transportation Assistance Act of 1982, *id.* § 31105; Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, *id.* § 42121; Pipeline Safety Improvement Act of 2002, *id.* § 60129.
 13. Legislatures use reference statutes as a strategy to avoid repetition and over-encumbering statute books. 82 C.J.S. *Statutes* § 92, Westlaw (database updated Dec. 2015). Reference statutes are read as if the section referred to was written into the statute. *Id.*; *see also* *Panama R.R. Co. v. Johnson*, 264 U.S. 375, 392 (1924) (stating that incorporating the system of one statute into another “serves to bring into the latter all that is fairly covered by the reference”).
 14. 49 U.S.C. § 20109(d)(2)(A); *see also* *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 157 (3rd Cir. 2013).
 15. 49 U.S.C. § 20109(d)(2)(A).

party to file a complaint with the Secretary of Labor on behalf of the employee.¹⁶ Whether Congress intended to incorporate AIR-21's "or have any person file on his or her behalf" language into the FRSA is unclear because the modifying language preceding the reference is ambiguous as to which regulations are to be incorporated.¹⁷

In *Fulk v. Norfolk Southern Railway Company*, the U.S. District Court for the Middle District of North Carolina considered whether a decedent's widow and personal representative has standing to file a claim with the DOL under the whistleblower section of the FRSA.¹⁸ The court held that the FRSA allows posthumous third-person filing of complaints with the DOL, "assuming Mrs. Fulk was in fact authorized to file the complaint on behalf of Mr. Fulk"—meaning that third-person filing would be allowed if the decedent instructed his widow to file prior to his death.¹⁹ To permit this conclusion, the court chose to incorporate AIR-21's "or have any person file on his or her behalf" language.²⁰

This case comment contends that the *Fulk* court incorrectly incorporated certain rules and procedures of AIR-21 into the FRSA, ultimately extending the federal court's jurisdiction beyond that which was statutorily granted by Congress. The court committed two errors in its analysis. First, the court incorrectly interpreted the plain meaning²¹ of the statute in determining that the entire referenced section, with the exception of three sections, should be incorporated. This reading allowed the court to bring in language that was in direct conflict with the statute, making other parts of the FRSA superfluous as well.²² Second, regardless of whether an administrative complaint can be filed by a third party, the court misinterpreted the de novo review clause in either of two possible ways: (a) by incorrectly applying the third-party filing language to the de novo review clause in a different section, or (b) by improperly interpreting the de novo review clause as a continuation of a filed complaint with the DOL, when it should have recognized it as the original action

16. *Id.* § 42121(b).

17. *Fulk v. Norfolk S. Ry. Co.*, 35 F. Supp. 3d 749, 761–62 (M.D.N.C. 2014).

18. *Id.* at 760–64.

19. *Id.* at 764.

20. *Id.* at 762. The Secretary of Labor also read the statute to incorporate the third-party filing language, as the *Fulk* court noted. *Id.* at 761; *see also* 29 C.F.R. § 1982.103(a) (2015). But the court correctly did not consider this in its analysis because "an implementing regulation cannot expand a statutory grant of jurisdiction." *Fulk*, 35 F. Supp. 3d at 762.

21. The plain-meaning rule dictates that "if a legal text is unambiguous it should be applied by its terms without recourse to policy arguments, legislative history, or any other matter extraneous to the text unless doing so would lead to an absurdity." *Plain-Meaning Rule*, BLACK'S LAW DICTIONARY (10th ed. 2014).

22. James R. Barney, *In Search of "Ordinary Meaning,"* 85 J. PAT. & TRADEMARK OFF. SOC'Y 101, 119 (2003) (the rule against superfluous language "holds that a term in one body of text should be construed, if possible, to avoid rendering other terms in that body of text superfluous"); *see also* *Kungys v. United States*, 485 U.S. 759, 778 (1988) ("[N]o provision should be construed to be entirely redundant."); *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883) ("It is the duty of the court to give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed.").

that it is and dismissed the action for lack of standing. The court's decision sets a precedent that allows an expansion of federal court jurisdiction over claims for which the plaintiff has no statutory standing, essentially allowing a federal court to hear an administrative complaint over a protection Congress created but never intended to reach the judicial branch. The court reached into the executive branch and tore out the authority to hear an administrative issue and grant an administrative remedy.

John Fulk worked for Norfolk Southern Railway as a railroad car inspector at the Linwood Yard in North Carolina.²³ As part of his duties, he was required to examine rail cars for defects or non-compliance with Federal Railroad Administration (FRA) regulations.²⁴ Defective or non-compliant cars were marked with "bad order" tags listing the issues and what needed to be done in the shop to rectify them.²⁵ Over time, Fulk became uncomfortable with Norfolk Southern management's policies towards FRA regulations. The management had instituted quotas for "bad order" tags and pressured inspectors to stay below those quotas.²⁶ At the Linwood Yard, employees who continued to add to the total after the quota was reached were targeted for harassment.²⁷

Fulk, aware of the management's expectations, continued to place the "bad order" tags where appropriate to remain in compliance, even though he knew they were removed shortly after, before repairs were made.²⁸ As a result, Fulk was subjected to "abusive intimidation, disciplinary threats, and job threats."²⁹ On January 6, 2011, Fulk was accused of sabotaging the braking system on one of the rail cars.³⁰ A formal hearing was scheduled for January 19, 2011, for the charges of improper performance of duty and conduct unbecoming an employee.³¹ A week before the hearing, Fulk arrived at work and committed suicide in the parking lot.³² Before he took his life, Fulk drafted letters to both the FRA and OSHA to report the conduct of Norfolk Southern and its supervisors and to make a complaint of retaliation.³³ A few days after Fulk's death, his widow filed a retaliation complaint with the OSHA Regional Director and submitted a complaint to the FRA with Fulk's letter attached.³⁴ The

23. *Fulk*, 35 F. Supp. 3d at 752.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at 753.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

FRA conducted an investigation and found that, according to other employees, Fulk was in fact targeted by Norfolk Southern supervisors.³⁵

Fulk's widow filed the de novo action³⁶ in question in the federal district court 210 days after she filed the complaint with the DOL.³⁷ Norfolk Southern Railway moved to dismiss Mrs. Fulk's FRSA claim, alleging that the federal court lacked subject matter jurisdiction³⁸ on the issue.³⁹ The U.S. District Court for the Middle District of North Carolina denied Norfolk Southern Railway's motion to dismiss, holding that the FRSA permitted a posthumous filing of the complaint with the DOL, as long as Mrs. Fulk was authorized to do so by the decedent before he passed.⁴⁰

This case comment will show that the court, in holding Mrs. Fulk could file the claim, failed to rely upon the plain meaning and totality of the statute to guide its interpretation and instead incorporated AIR-21's third-party filing language. Additionally, the court misinterpreted the de novo clause in one of two ways, neither of which are workable: (a) by incorrectly applying the third-party filing language to the de novo review clause in a different section, or (b) by improperly interpreting the de novo review clause as a continuation of a filed complaint with the DOL when it should have considered it as the original action that it is and dismissed the action for lack of standing.

First, in allowing Mrs. Fulk's claim to continue, the court failed to rely on the text and plain meaning of the statute and the statute in totality. A statute should be construed according to its text if it is unambiguous;⁴¹ if it is ambiguous, the court should consult the legislative history, to the extent that the text can support the interpretation.⁴² If the text is clear and unambiguous, it would be inappropriate to use

35. *Id.*

36. See 49 U.S.C. § 20109(d)(3) (2012) (allowing a de novo review if the Secretary of Labor has not issued a final decision within 210 days after the filing of the complaint). See generally *Trial De Novo*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining a trial de novo as a "new trial on the entire case—that is, on both questions of fact and issues of law—conducted as if there had been no trial in the first instance").

37. *Fulk*, 35 F. Supp. 3d at 753.

38. A defendant in federal court can move to dismiss a claim where the court lacks appropriate subject matter jurisdiction. FED. R. CIV. P. 12(b)(1). Traditionally, state courts are tribunals of general jurisdiction, while federal courts are of limited subject matter jurisdiction. 13 RICHARD D. FREER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 3522, Westlaw (3d ed., database updated Apr. 2015). Because federal courts can only hear those cases that a federal court has authority to hear, either vested by the Constitution or granted by Congress, there is a presumption that the federal court lacks subject matter jurisdiction. *Id.* "A plaintiff has the burden of establishing subject matter jurisdiction, for which standing is a prerequisite." *Jones v. Gale*, 470 F.3d 1261, 1265 (8th Cir. 2006).

39. *Fulk*, 35 F. Supp. 3d at 753.

40. *Id.* at 764–65.

41. *Carcieri v. Alazar*, 555 U.S. 379, 387 (2009) (citing *United States v. Gonzales*, 520 U.S. 1, 4 (1997)).

42. *United States v. Pub. Utils. Comm'n of Cal.*, 345 U.S. 295, 315 (1953) (holding that when the text is ambiguous, "the judiciary may properly use the legislative history to reach a conclusion").

interpretative rules and extrinsic aids to contort the language.⁴³ The text of the FRSA clearly references the AIR-21's regulatory provisions concerning the filing of a complaint with the Secretary of Labor.⁴⁴ It is, however, ambiguous regarding which provisions and rules are incorporated.⁴⁵ The *Fulk* court determined the third-party filing language of the AIR-21 should be included based on its interpretation of section 20109(d)(2)(A) of the FRSA, which states that any action shall be governed by the rules and procedures set forth by the AIR-21, *including* (i) burdens of proof, (ii) statutes of limitations, and (iii) civil actions to enforce.⁴⁶ The court focused its analysis on the word "including" and the statute of limitations clause, which requires a complaint to be "commenced not later than 180 days after the date on which the alleged violation . . . occurs."⁴⁷ They noted that AIR-21 lists a ninety-day statute of limitations, whereas the FRSA explicitly lists a 180-day statute of limitations. From this discrepancy, the court concluded that "including" is intended to add to or modify the language of the AIR-21 where noted and that therefore the rest of the language was incorporated.⁴⁸ However, this interpretation of the FRSA essentially ignored the actual text of the statute and incorporated superfluous language from the AIR-21.

To determine that "including" is meant to add to or modify the incorporation fails as a mode of interpretation when applied to the other two listed items under "including." The "burden of proof" section simply states that actions brought under the FRSA "shall be governed by the legal burdens of proof set forth in section 42121(b)," and does not add to or modify the referenced statute because the terms are not inconsistent.⁴⁹ And the "civil action to enforce" section allows the Secretary of Labor to bring a civil action to enforce orders as prescribed by AIR-21, and similarly does not add to or modify the referenced statute because once again the terms are not inconsistent.⁵⁰ Neither section adds to or modifies the language of AIR-21; at most they highlight those sections. This misinterpretation of the plain meaning of the

43. *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) ("[C]anons of construction are no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there."); *see also* *Thompson v. Greenwood*, 507 F.3d 416, 422–23 (6th Cir. 2007); *Miss. Poultry Ass'n, Inc. v. Madigan*, 992 F.2d 1359, 1364–65 (5th Cir. 1993).

44. *Fulk*, 35 F. Supp. 3d at 761–62; *see also* 49 U.S.C. § 20109(d)(2)(A) (2012).

45. *Fulk*, 35 F. Supp. 3d at 762.

46. *Id.*

47. 49 U.S.C. § 20109(d)(2)(A)(ii); *Fulk*, 35 F. Supp. 3d at 762.

48. *Fulk*, 35 F. Supp. 3d at 762.

49. 49 U.S.C. § 20109(d)(2)(A)(i).

50. *Compare id.* § 20109(d)(2)(A)(iii) ("If a person fails to comply with an order issued by the Secretary of Labor pursuant to the procedures in section 42121(b), the Secretary of Labor may bring a civil action to enforce the order in the district court of the United States for the judicial district in which the violation occurred, as set forth in 42121.") with *id.* § 42121(b)(5) ("Whenever any person has failed to comply with an order issued under paragraph (3), the Secretary of Labor may file a civil action in the United States district court for the district in which the violation was found to occur to enforce such order.").

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statute, however, then led the court to include the language permitting a person to file a complaint on behalf of the employee.⁵¹

The general rule of construction involving a reference statute, such as the FRSA, is to adopt the language of the referred-to statute as if it was written into the adopting statute initially.⁵² However, the use of a modifier can show a different intent by the legislature.⁵³ And whenever possible, the court should give significance to every word of a statute, avoiding superfluous language.⁵⁴ In *Doe v. Saenz*, the California Court of Appeals had to determine whether the legislature wanted to incorporate burglary⁵⁵ as a non-exemptible⁵⁶ offense because of an exemption statute's reference to a specific California Penal Code section.⁵⁷ The language at issue was a modifying phrase prior to the reference which stated "a conviction of another crime *against an individual* specified in subdivision (c) of section 667.5 of the Penal Code."⁵⁸ The court held that to ignore the modifying language and incorporate all crimes under Penal Code section 667.5(c) would directly violate the rule of statutory construction against superfluous language.⁵⁹ To support this interpretation, the *Saenz* court addressed the purpose of the statute and the legislature's intent.⁶⁰ The court ultimately found that due to the modifying language preceding the reference, the crime of occupied

51. *Fulk*, 35 F. Supp. 3d at 762.

52. *Hassett v. Welch*, 303 U.S. 303, 314 (1938) ("Where one statute adopts the particular provisions of another by a specific and descriptive reference to the statute or provisions adopted, the effect is the same as though the statute or provisions adopted had been incorporated bodily into the adopting statute." (quoting 2 JABEZ SUTHERLAND, LEWIS' SUTHERLAND ON STATUTORY CONSTRUCTION 787-88 (John Lewis ed., 2d ed. 1904))).

53. *Doe v. Saenz*, 45 Cal. Rptr. 3d 126, 137-39 (Cal. Ct. App. 2006).

54. *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (holding that it is a court's "duty 'to give effect, if possible, to every clause and word of a statute'" (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883))).

55. Burglary as defined by California's Penal Code occurs when a "person . . . enters any house, room, apartment . . . or other building . . . with intent to commit grand or petit larceny or any felony." CAL. PENAL CODE § 459 (West 2015).

56. Under California law, "[p]ersons convicted of crimes other than minor traffic offenses are presumptively disqualified from working in licensed community care facilities, which provide care and services to people such as the disabled, the elderly, and foster children." *Doe*, 45 Cal. Rptr. 3d at 129 (citing CAL. HEALTH & SAFETY CODE §§ 1502(a), 1522(c)(3) (West 2015)). However, the law permits the Director of the Department of Social Services "to allow persons convicted of certain offenses to work in community care facilities, although the Director has no discretion to grant such a criminal record exemption to persons convicted of specified 'non-exemptible' offenses." *Id.*

57. *Id.* at 136-37.

58. *Id.* at 129 (quoting CAL. PENAL CODE § 1522(g)(1)(A)(i)).

59. *Id.* at 138-39.

60. *Id.* at 141-42 ("The apparent purpose of the exemption statutes is to protect clients of community care facilities from persons who have exhibited a propensity to commit sex crimes or acts of violence. . . . In adding occupied burglary to the list of offenses specified in Penal Code section 667.5(c), the Legislature concluded that a multiple violent felony offender who commits or has committed a burglary should be punished more harshly if someone was present at the time of the burglary.").

burglary was not included because it was not against an individual.⁶¹ Here, similarly, to incorporate all the language of AIR-21 as the *Fulk* court suggested would make sections (d)(2)(A)(i) and (d)(2)(A)(iii) of the FRSA entirely superfluous. Accordingly, the *Fulk* court should have found the reference to be ambiguous.

The language of the FRSA is ambiguous as to exactly which parts of the referenced statute should be incorporated because it references generally the “rules and procedures” of AIR-21 section (b).⁶² Following the common law rule of transcribing the entirety of the referenced statute would raise many issues. As mentioned earlier, the “burdens of proof” and “civil actions to enforce” sections would be utterly redundant. Additionally, if all language under AIR-21 section (b) were literally transferred, several other sections of the FRSA would become superfluous as well. For instance, the rules involving appeals are listed in both in section (d)(4) of the FRSA⁶³ and in section (b)(4)(A) of AIR-21.⁶⁴ And the remedies available for claims are listed in both section (e) of the FRSA and section (b)(3)(B) of AIR-21 and contain slight variations including interest on back-pay and litigation costs.⁶⁵ Since incorporating the entirety of AIR-21 section (b) would create several problems and the statute utilizes ambiguous modifying language, the court should use rules of statutory construction to determine legislative intent regarding precisely which sections are adopted.

The *Fulk* court should have considered its incorporation of AIR-21 more carefully. After all, a court should interpret a statute if possible to give effect to every word and clause.⁶⁶ Section (d)(1) unambiguously states that “an *employee* . . . may seek relief” for discrimination.⁶⁷ In the following subsection, which contains the incorporation language, the statute states that “[a]ny action under paragraph (1)” shall be governed by the rules and procedures set forth in AIR-21.⁶⁸ The rules and procedures are subordinate and utilized to facilitate the right to file with the DOL in section (d)(1). Under the court’s interpretation of the statute, the language in section (d)(1) becomes entirely superfluous when it incorporates the language of AIR-21 that

61. *Id.*

62. *See* 49 U.S.C. § 20109(d)(2)(A) (2012).

63. *Id.* § 20109(d)(4).

64. *Id.* § 42121(b)(4)(A).

65. *Compare id.* § 20109(e), *with id.* § 42121(b)(3)(B).

66. *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883) (“It is the duty of the court to give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed.”); *see also* *Scheidler v. Nat’l Org. for Women, Inc.*, 547 U.S. 9, 21 (2006) (saying that there is “a canon of statutory construction that favors interpretations that give a function to each word in a statute, thereby avoiding linguistic superfluity”); *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (“[A] statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.” (quoting *Market Co. v. Hoffman*, 101 U.S. 112, 115 (1879))).

67. 49 U.S.C. § 20109(d)(1) (emphasis added).

68. *Id.* § 20109(d)(2)(A).

permits third-party filings. In addition, allowing third-party filings runs counter to the remaining language of the statute. Congress's use of verb tense is significant in reading a statute.⁶⁹ The remaining language of the statute contemplates a living employee filing the claim, as the *Fulk* court admits;⁷⁰ the statute utilizes present tense verbs such as “has,” “alleges,” “assist,” and others.⁷¹ Congress was fully aware when drafting the statute that it used present tense verbs, which imply a living employee performing the various actions in the statute.

Additionally, the possible remedies listed in section (e) of the statute are constructed for a living employee. Section (e)(1) states that a prevailing employee is “entitled to all relief necessary to make the employee whole.”⁷² The following section provides that the relief shall include reinstatement in the same position, any back-pay with interest and “compensatory damages, including compensation for any special damages sustained as a result of the discrimination.”⁷³ These remedies demonstrate that the legislature had a living employee in mind in the creation of this whistleblower section. In this case, none of these required remedies are applicable, and none can make Fulk whole. The FRSA does allow for the possibility of punitive damages up to \$250,000.⁷⁴ However, the *Fulk* court already addressed this possibility and determined that due to the death of Fulk, a federal claim for punitive damages would not be available.⁷⁵ Because of the ambiguity of the reference and the statutory construction issues raised, the court should have considered the legislative history in its analysis.

Further, the legislative history supports the interpretation that a living employee must file the complaint. The House Conference Report specifically noted that “railroad carrier employees must be protected when reporting” and that the “intent of

69. *United States v. Wilson*, 503 U.S. 329, 333 (1992); *see also* *United States v. Balint*, 201 F.3d 928, 933 (7th Cir. 2000) (rejecting the argument that a grammatical argument is too hyper-technical, noting that “the Supreme Court does not consider grammar a mere technicality”).

70. *Fulk v. Norfolk S. Ry. Co.*, 35 F. Supp. 3d 749, 762–63 (M.D.N.C. 2014).

71. 49 U.S.C. § 20109(a)(1), (b)(2)(C), (d)(1).

72. *Id.* § 20109(e)(1). The remedy of making an employee whole is commonly utilized by both state and federal whistleblower statutes, and generally consists of “reinstatement, backpay, and in most instances, reasonable attorneys’ fees.” DANIEL P. WESTMAN & NANCY M. MODESITT, *WHISTLEBLOWING: THE LAW OF RETALIATORY DISCHARGE* 74 (2d ed. 2004).

73. 49 U.S.C. § 20109(e)(2)(C).

74. *Id.* § 20109(e)(3).

75. *Fulk*, 35 F. Supp. 3d at 764. The Supreme Court has reasoned that federal law dictates whether a federal claim survives the death of one of the parties. *Carlson v. Green*, 446 U.S. 14, 23 (1980). The Court held that when an action is a creation of federal law, such as a *Bivens* claim, survivorship “is a question of federal law.” *Id.* That same logic has been applied by courts even in situations where the claim is a creation of a federal statute. *Mallick v. Int’l Bhd. of Elec. Workers*, 814 F.2d 674, 676 (D.C. Cir. 1987). Whether a federal statutory claim survives the death of one of the parties is a question of statutory interpretation. *Cox v. Roth*, 348 U.S. 207, 210 (1955). “The basic federal rule is that an action for penalty does not survive . . . though remedial actions do.” *Faircloth v. Finesod*, 938 F.2d 513, 518 (4th Cir. 1991). Because the punitive damages in the FRSA are clearly penal, the *Fulk* court limited the remedies available for Mrs. Fulk to those listed in section (e)(2) of the FRSA. *Fulk*, 35 F. Supp. 3d at 764.

[the] provision is to ensure that employees can report their concerns without the fear of possible retaliation or discrimination from employers.”⁷⁶ The intent of Congress was to encourage living employees to report illegal or illicit activity of their employers without fear of retaliation, a purpose that cannot be realized when the employee has already passed away and no retaliation may occur. Congress could have incorporated AIR-21’s rules and procedures in its entirety by using language such as *any claim* arising under this section shall be governed by AIR-21. And indeed Congress did use similar language in the statute prior to its amendment in 2007.⁷⁷ From this, it is possible to infer that Congress intentionally included the language limiting the filing of a claim to an employee.⁷⁸

The FRSA is clear in its language that an “employee . . . may seek relief . . . by filing a complaint with the Secretary of Labor.”⁷⁹ However, the *Fulk* court chose to incorporate AIR-21’s language—in contradiction to this unambiguous language—which would otherwise not allow a third party to file. This improperly granted Mrs. Fulk standing to file a claim with the DOL.

Regardless of whether it was proper to incorporate a third-party filing with the DOL, the action filed by Mrs. Fulk is still not permitted in federal court. Mrs. Fulk filed the original action in the district court under section (d)(3) of the FRSA.⁸⁰ That section states that if the Secretary of Labor has not issued a final decision within 210 days after filing with the DOL, then “the employee may bring an original action at law or equity for de novo review in the appropriate district court.”⁸¹ By allowing the claim to continue in federal court, the *Fulk* court either misinterpreted the original action as a natural step in the administrative claim instead of an original action requiring statutory standing, or misapplied the incorporated language of section (d)(2) to section (d)(3). Neither is permissible.

The federal claim is not a continuation of the filing of a complaint with the DOL, so it requires statutory standing. For a court to hear a cause of action created by statute, the court must first inquire whether the plaintiff falls into the group of

76. H.R. REP. NO. 110-259, at 348 (2007) (Conf. Rep.).

77. Revision of Title 49, United States Code Annotated, “Transportation,” Pub. L. No. 103-272, § 1(e), 108 Stat. 745 (1994) (amended 2007) (“A dispute, grievance, or claim arising under this section is subject to resolution under section 3 of the Railway Labor Act (45 U.S.C. 153).”).

78. See *Stone v. I.N.S.*, 514 U.S. 386, 397 (1995) (“When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect.”); *People v. Weitzel*, 255 P. 792, 793 (Cal. 1927) (“The very fact that the prior act is amended demonstrates the intent to change the pre-existing law, and the presumption must be that it was intended to change the statute in all the particulars touching which we find a material change in the language of the act.” (quoting *United States v. Bashaw*, 50 F. 749, 754 (8th Cir. 1894))); *Childers v. Parker’s Inc.*, 162 S.E.2d 481, 483 (N.C. 1968) (“In construing a statute with reference to an amendment it is presumed that the legislature intended either (a) to change the substance of the original act, or (b) to clarify the meaning of it.” (citing 82 C.J.S. *Statutes* § 384 (1953))).

79. 49 U.S.C. § 20109(d)(1).

80. *Fulk*, 35 F. Supp. 3d at 753.

81. 49 U.S.C. § 20109(d)(3).

people to which the legislature granted the private right.⁸² The FRSA is one of only two federal anti-retaliation statutes that include access to the federal courts for a de novo action.⁸³ Both the Sarbanes-Oxley Act and the FRSA require that the claim be filed first with the DOL, but if there is no final decision within the statutory limit, the employee may sue in federal court.⁸⁴ This was designed to be a “safety valve” for the employee who has not received resolution of his claim from the DOL and an encouragement for the DOL to process claims within the statutory window.⁸⁵ While this new anti-retaliation structure may provide the employee with access to the federal courts—it is by no means automatic. For this reason, a de novo action under the FRSA requires its own statutory standing.

The FRSA specifically states that an employee “may bring” the action in federal court.⁸⁶ The use of the word “may” allows the employee the option to seek resolution in federal courts, but they may also choose not to do so for various reasons.⁸⁷ The FRSA does provide a pathway for a claim that could be considered a continuation of the original claim. The statute provides an appeals option, which would allow “[a]ny person adversely affected or aggrieved by an order” of the DOL to “obtain review of the order” in federal court.⁸⁸ Had this been how Mrs. Fulk arrived in federal court, then it would have been appropriate for the *Fulk* court to focus its analysis on the circumstances of the filing of the complaint with the DOL because she would most likely be able to establish standing to appeal.⁸⁹ Since, however, the case came to federal court from an original claim by Mrs. Fulk under section (d)(3), she had no

82. For further commentary on the growing legal doctrine of statutory standing, see Radha A. Pathak, *Statutory Standing and the Tyranny of Labels*, 62 OKLA. L. REV. 89 (2009).

83. Jarod S. Gonzalez, *A Pot of Gold at the End of the Rainbow: An Economic Incentives-Based Approach to OSHA Whistleblowing*, 14 EMP. RTS. & EMP. POL’Y J. 325, 332–33 (2010). Whistleblower claims generally follow the same procedural path: (1) the whistleblower who alleges retaliation files a complaint with the DOL; (2) OSHA investigates the claim; (3) if the claim is valid, then there will be an adjudication by an Administrative Law Judge; (4) the party adversely affected by the decision may appeal to the Administrative Review Board; and (5) a final appeal of the decision may then be made to a federal court under substantial evidence review. *Id.* at 328.

84. *Id.* at 332–33.

85. *Id.*

86. 49 U.S.C. § 20109(d)(3).

87. These reasons can be similar to those for not filing a complaint with the DOL. Even if a whistleblower wins her claim, she may pay a high price. Beverly H. Earle & Gerald A. Madek, *The Mirage of Whistleblower Protection Under Sarbanes-Oxley: A Proposal for Change*, 44 AM. BUS. L.J. 1, 23–25 (2007). The whistleblower may risk losing her home, becoming ostracized if reinstated, becoming stigmatized as a troublemaker, making a future job search impossible, and receiving no compensation should the claim fail. *Id.*

88. 49 U.S.C. § 20109(d)(4).

89. Standing to appeal is usually an easier prerequisite to establish. It shifts the focus from injury due to the underlying facts, which can be difficult to establish, to injury as a result of the judgment. 15A EDWARD H. COOPER, *FEDERAL PRACTICE & PROCEDURE* § 3902, Westlaw (2d ed., database updated Apr. 2015). Standing to appeal is established by an appellant if an adverse effect from the judgment can be shown. *Id.*

statutory standing to file the claim pursuant to the FRSA.⁹⁰ Statutorily granted standing can only be permitted in situations where the statute can properly be read “as granting persons in the plaintiff’s position a right to judicial relief.”⁹¹ As discussed earlier, the language of section (d)(3) unambiguously grants standing only to the employee. Therefore, Mrs. Fulk did not have standing and the court should have dismissed the case on those grounds.

The other possibility is that the *Fulk* court extended language from another section to the de novo review clause. Even allowing the possibility that the third-party filing language from the AIR-21 was included in section (d)(2), it was explicitly not included in section (d)(3).⁹² The de novo review section unambiguously reads that if the DOL does not issue a decision, then “the *employee* may bring an original action.”⁹³ Section (d)(3) does not incorporate by reference another statute and does not reference another section of the FRSA. The language is clear about to whom Congress granted statutory standing to bring a de novo claim, so there is no need to look beyond the statute.⁹⁴ It would be inappropriate for the court to transfer language from one section of the statute to another. A long enforced rule of statutory construction is that when Congress has included particular language in one section of a statute, its omission from another section must be interpreted as purposeful and intentional.⁹⁵ If it is conceded that a third-party filing is permitted for a complaint to the DOL, the inclusion of AIR-21’s language only reinforces that it cannot be extended to another section and the employee must file the original action in federal court. Therefore, Mrs. Fulk did not have standing and the court should have dismissed the complaint for lack thereof. In taking jurisdiction of the claim, the court overstepped its authority and created precedent for the judiciary to review administrative claims that Congress never intended for the judiciary to see—for a plaintiff Congress never granted statutory standing.

To conclude, the *Fulk* court incorrectly incorporated language from the AIR-21 to allow Mrs. Fulk to file a complaint of retaliation on behalf of her deceased husband. The court’s misreading of the reference section and modifying language was impermissible because it rendered large swaths of the FRSA superfluous and

90. See 49 U.S.C. § 20109(d)(3).

91. *Warth v. Seldin*, 422 U.S. 490, 500 (1975). Congress can create certain rights by statute which otherwise would not exist without such a grant. 25 JOHN BOURDEAU ET AL., *FEDERAL PROCEDURE, LAWYERS EDITION* § 59:3, Westlaw (database updated Dec. 2015).

92. See 49 U.S.C. § 20109(d)(2)–(3).

93. *Id.* § 20109(d)(3) (emphasis added).

94. See *Rubin v. United States*, 449 U.S. 424, 430 (1981) (holding when the “terms of a statute [are] unambiguous, judicial inquiry is complete”); see also *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) (holding that statutory construction begins with the language, and where it “provides a clear answer, it ends there as well”).

95. *Russello v. United States*, 464 U.S. 16, 23 (1983) (“[Where] Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (1972))).

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unnecessary. The court incorrectly incorporated a third-party filing procedure by disregarding well-established interpretive canons, which require courts to give full effect to every word of a statute and to consider legislative intent. Moreover, the *Fulk* court ignored the fact that Mrs. Fulk reached federal court through the application of a completely different section of the FRSA which unambiguously requires the employee to file the federal claim. Instead of allowing the claim to proceed, the district court should have dismissed the case because Mrs. Fulk had no statutory standing. The court's decision to ignore that language of the FRSA creates a dangerous precedent that allows an expansion of federal court jurisdiction over claims where the plaintiff had no previous statutory standing. Courts cannot interpret a statute in such a way as to contort Congress's intent and unduly expand judicial review.