

## Examining Damages In ADEA Retaliation Claims

By Alan Rupe and Kyle Malone

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This year, the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq., turns 50. But despite its age, courts still disagree about one of its most important features: the remedies available to plaintiffs. Specifically, new questions have recently cropped up regarding the damages a plaintiff may seek when asserting an ADEA retaliation claim.

Retaliation claims are increasingly common in employment litigation. According to the U.S. Equal Employment Opportunity Commission, the total number of retaliation charges filed each year increased from 22,555 in 2006 to 42,018 in 2016. But where a plaintiff files a retaliation claim can have a significant effect on the plaintiff's potential recovery. This article will focus on the state of the law in the Fifth, Eighth and Tenth Circuits.

### What Does the ADEA Say?

Courts imposing remedies under the ADEA “shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter . . . .” 29 U.S.C. 626(b) These remedies include:

- Compelling employment, reinstatement or promotion;
- Back pay;
- Front pay;
- Unpaid overtime compensation;
- Liquidated damages equal to back pay award (requires a willful violation ); and
- Attorney's fees.



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The current debate focuses on whether a plaintiff alleging a retaliation claim under the ADEA may seek punitive damages or compensatory damages for pain and suffering. It is well-settled that these types of

damages are not available in ADEA discrimination claims. Some litigants, however, have sought to distinguish ADEA discrimination claims from ADEA retaliation claims. The divergent views on this issue have created not only a circuit split nationwide, but a split among panels within the Fifth Circuit.

### **Fifth Circuit**

The Fifth Circuit has held numerous times that remedies under the ADEA and the Fair Labor Standards Act should be consistent. *Johnson v. Martin*, 473 F.3d 220, 222 (5th Cir. 2006) (“The FLSA and ADEA have the same remedies provisions.”); *Lubke v. City of Arlington*, 455 F.3d 489, 499 (5th Cir. 2006) (“Because the remedies available under the ADEA and the FMLA both track the FLSA, cases interpreting remedies under the statutes should be consistent.”); *Purcell v. Seguin State Bank & Trust Co.*, 999 F.2d 950, 961 (5th Cir. 1993) (“The ADEA incorporated the remedies authorized by the Fair Labor Standards Act.”). But in December 2016, two panels of the Fifth Circuit issued opinions that appear to contradict this longstanding interpretation of the ADEA and FLSA.

On Dec. 16, 2016, a panel held in *Vaughan v. Anderson Regional Medical Center*, 843 F.3d 1055, 1058-59 (5th Cir. 2016) that neither compensatory damages for pain and suffering nor punitive damages are available to plaintiffs asserting a private cause of action for retaliation under the ADEA. The panel cited *Dean v. American Security Insurance Co.*, 559 F.2d 1036 (5th Cir. 1977), a case in which the court came to the same conclusion regarding damages. *Id.* at 1058. The appellant accepted the holding in *Dean* as it related to age discrimination claims under the ADEA, but argued that *Dean* is inapplicable to ADEA retaliation claims because a 1977 amendment to the FLSA “enlarged the remedies available for ADEA retaliation claims.” *Id.* at 1059. The court rejected this argument, noting that the amendment to the FLSA “incorporated remedial language substantively identical to passages already provided in the ADEA.” In other words, the court found that the 1977 amendment merely added language to the FLSA that the Fifth Circuit had already interpreted in *Dean* and therefore, there was no reason to revisit *Dean*.

While the *Vaughan* panel’s decision appeared clear and consistent with past Fifth Circuit precedent, the waters were quickly muddied. A mere three days later, another Fifth Circuit panel held in *Pineda v. JTCH Apartments LLC*, 843 F.3d 1062 (5th Cir. 2016) that a plaintiff alleging retaliation under the FLSA could seek compensation for emotional injuries. The *Pineda* court acknowledged that the ADEA and FLSA have similar remedies provisions, but found that the remedies appropriate to carry out the purposes of the two laws differ. *Id.* at 1066. For instance, the panel stated that “the ADEA’s administrative conciliation and mediation scheme” motivated the court in *Dean*. *Id.* But the FLSA has “no comparable legislative preference.” *Id.* Therefore, the panel ruled that FLSA retaliation claims demand different remedial measures.

On Feb. 15, 2017, the *Vaughan* panel denied a petition for rehearing. *Vaughan v. Anderson Regional Medical Center*, 849 F.3d 588 (5th Cir. 2017). It also withdrew its prior opinion and substituted a new opinion. The relatively minor changes the panel made in the substituted opinion, however, did not affect the panel’s holding. Therefore, a split within the Fifth Circuit will likely remain until the circuit hears the issue en banc or the U.S. Supreme Court offers a resolution. The plaintiff in *Vaughan* filed a petition for writ of certiorari with the Supreme Court on May 16, 2017.

### **Eighth Circuit**

The Eighth Circuit has long recognized the general rule that “compensation for pain and suffering is not recoverable in ADEA actions.” *Fiedler v. Indianhead Truck Line Inc.*, 670 F.2d 806, 809 (8th Cir. 1982). It has also held that punitive damages are not recoverable by ADEA plaintiffs. *Williams v. Valentec Kisco*

Inc., 964 F.2d 723, 729 (8th Cir. 1992). However, the Eighth Circuit has never addressed whether punitive damages or damages for pain and suffering are recoverable in ADEA retaliation cases.

In *Sellers v. Deere & Co.*, 2013 U.S. Dist. LEXIS 20389 (N.D. Iowa Feb. 14, 2013), the court was tasked with deciding the issue of what remedies are available in ADEA retaliation cases without any clear guidance from the Eighth Circuit. It found that the dispute regarding this issue among the United States circuit courts was “active.” *Id.* at \*11. In the end, the court concluded:

When finally called upon to address this issue, the Court believes the Eighth Circuit Court of Appeals will ... extend its previous holdings regarding available damages under the ADEA to include both discrimination claims and retaliation claims. That is, the Court concludes that emotional distress damages and punitive damages are not recoverable under the ADEA, whether the claim is one of discrimination or retaliation.

*Id.* at \*14-15.

The *Sellers* case reflects the opinion of a single district court in the Eighth Circuit. No other court had squarely addressed the issue since. Therefore, the availability of punitive damages or damages for pain and suffering in ADEA retaliation cases remains an open question in the Eighth Circuit.

### **Tenth Circuit**

Much like the Eighth Circuit, the Tenth Circuit has long held that punitive damages and damages for pain and suffering are generally not available in ADEA cases. *Bruno v. Western Electric Co.*, 829 F.2d 957, 967 (10th Cir. 1987) (punitive damages); *Perrell v. FinanceAmerica Corp.*, 726 F.2d 654, 657 (10th Cir. 1984) (pain and suffering). Also like the Eighth Circuit, it has not explicitly ruled on the question of whether more expansive remedies are available to plaintiffs asserting ADEA retaliation claims.

But in a 2004 opinion, Judge Wesley E. Brown roundly rejected the view that retaliation claims should be treated any differently than other ADEA claims. *Goico v. Boeing Co.*, 347 F. Supp. 2d 986, 995-97 (D. Kan. 2004). Judge Brown wrote that the current statutory language “does not support the view that Congress intended to single out retaliation claims under the FLSA (or ADEA) for potentially far greater recovery than it allowed with respect to virtually all other types of employment discrimination claims.” Consequently, the court disallowed the plaintiff’s request for punitive damages or damages for pain and suffering.

A number of district courts in the Tenth Circuit have adopted Judge Brown’s reasoning. See *Franklin v. MIQ Logistics LLC*, No. 10-2234-EFM, 2011 U.S. Dist. LEXIS 82388, at \*22 (D. Kan. July 28, 2011) (“Although not binding, this court finds the *Goico* opinion persuasive.”) *Huff v. Door Controls Inc.*, No. 10-2659-CM, 2011 U.S. Dist. LEXIS 62467, at \*10 (D. Kan. June 9, 2011) (“[T]his district has expressly rejected the Seventh Circuit’s position creating an exception for retaliation claims.”) *Lebow v. Meredith Corp.*, 484 F. Supp. 2d 1202, 1219 n.6 (D. Kan. 2007) (“Yet, as stated in a well reasoned opinion by United States District Judge Wesley Brown, there may be good reasons to decline to extend [the rule allowing mental and emotional distress damages] to an ADEA retaliation claim.”). Given the nationwide disagreement among the courts, we may see the Tenth Circuit take up this issue in the near future.

### **Conclusion**

The cases above impart two lessons. First, it reinforces the idea that jurisdiction matters. Regardless of

how this issue is ultimately resolved, district courts in the Fifth Circuit will likely be much more receptive to punitive or emotional distress damage claims from ADEA plaintiffs in the coming months. On the other hand, the Eighth and Tenth Circuits will likely continue to routinely dismiss these claims for damages. Second, this is a reminder to pay close attention to recent legal developments.

Any plaintiffs attorney practicing in the Fifth Circuit and not asserting claims for pain and suffering or punitive damages is doing their client a disservice. And anyone practicing in the Eighth and Tenth Circuits should be watching for appellate decisions within those circuits that will bind lower courts on this issue.

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