

NINTH CIRCUIT REJECTS EEOC GUIDANCE: COMPENSATORY AND PUNITIVE DAMAGES ARE NOT AVAILABLE IN ADA RETALIATION CLAIMS

By: Paul J. Siegel and Ana C. Shields

Jackson Lewis LLP

58 South Service Road, Suite 410

Melville, New York 11747

Phone: (631) 247-4605

Fax: (631) 247-0425

siegelp@jacksonlewis.com

shieldsa@jacksonlewis.com

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The U.S. Court of Appeals for the Ninth Circuit recently interpreted the retaliation provision of the Americans with Disabilities Act (“ADA”) to allow for equitable relief only, such as reinstatement and back pay. Based on its reading of the plain language of the statute, the Ninth Circuit limited greatly the scope of damages available under the ADA for a retaliation claim. As the Ninth Circuit explained, because Congress did not specifically provide for compensatory and punitive damage relief in ADA retaliation cases, such damages are not available. See Alvarado v. Cajun Operating Co. d/b/a AFC Enters. Inc., No. 08-15549 (9th Cir. Dec. 11, 2009).

Alvarado alleged that his former employer, Cajun Operating Co. d/b/a AFC Enters. Inc. (“AFC”) retaliated against him for complaining that he was discriminated against on the basis of his purported disability. Subsequently, Alvarado filed a lawsuit alleging retaliation and seeking, among other things, punitive and compensatory damages under the ADA. Prior to trial, the lower Court barred Alvarado from seeking compensatory and punitive damages under his ADA retaliation claim on the ground that only equitable relief was available.

The Ninth Circuit agreed with the lower Court. In doing so, the Ninth Circuit surprisingly rejected the EEOC’s position, as set forth in its Compliance Manual, that the same damages should be available for ADA retaliation claims as are available for ADA discrimination claims. While acknowledging that the EEOC’s Compliance Manual generally is entitled to deference, the Ninth Circuit explained its refusal to grant deference as follows:

Without mentioning § 1981a, the EEOC Manual provides that “[a] 1977 amendment to the Fair Labor Standards Act authorizes both legal and equitable relief for retaliation claims under that Act. **Compensatory and punitive damages therefore are available for retaliation claims brought under** the EPA and the ADEA, as well as under Title VII and **the ADA.**” *See* EEOC Compliance Manual, 5/20/98, Section 8-III B. and nn. 56-57, available at <http://www.eeoc.gov/policy/docs/retal.html>, last visited 12/3/09. However, the Manual references only 29 U.S.C. § 216, *Moskowitz v. Trs. of Purdue Univ.*, 5 F.3d 279 (7th Cir. 1993), and *Soto v. Adams Elevator Equip. Co.*, 941 F.2d 543 (7th Cir. 1991). Section 216 and the corresponding cases involve the Fair Labor

Standards Act, not Title VII or the ADA. See 29 U.S.C. § 216(b); *Moskowitz*, 5 F.3d at 283; *Soto*, 941 F.2d at 551. **Because the EEOC Manual did not contain a reasoned analysis of the issue we address, there is no EEOC position to which we defer.** See *E.E.O.C. v. Puget Sound Log Scaling & Grading Bureau*, 752 F.2d 1389, 1391 (9th Cir. 1985) (recognizing that no deference is owed if the EEOC does not provide “a reasoned and supportable interpretation of the applicable statute.”).¹

Accordingly, the Ninth Circuit, which covers Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington, takes the position that compensatory and punitive damages are not available in ADA retaliation cases. The Ninth Circuit’s position is consistent with that of District Courts in the Fourth and Seventh Circuits. District Courts in the Second Circuit (which includes Connecticut, New York and Vermont) have held that such damages are available.

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Regardless of the Circuit in which the claim is brought, employers and their carriers should be reminded that equitable relief, such as reinstatement and back pay, may be costly in and of itself in circumstances where a plaintiff’s earnings were high. This is particularly true in this economy given the likelihood that a plaintiff will be unable to successfully find comparable subsequent employment. Back pay may be especially costly given the recent enactment of the Lilly Ledbetter Fair Pay Act of 2009.² Workplace claims continue unabated and in fact the EEOC recently announced that 93,277 workplace discrimination charges were filed nationwide during Fiscal Year 2009, the second highest charge filings in a year in history.³ For these reasons, comprehensive and accessible anti-discrimination, anti-harassment and anti-retaliation policies together with preventive training are as essential as ever.

¹ *Id.* at 10, fn 7 (emphasis added).

² That statute provides that a pay discrimination claim is timely so long as the employee received at least one discriminatory paycheck within the filing period. This “paycheck” rule applies to, *inter alia*, ADA claims.

³ See Job Bias Charges Approach Record High In Fiscal Year 2009, EEOC Reports www.eeoc.gov/newsroom/release/1-6-10.cfm.