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Upset about FLSA Retaliation? There's a Remedy for That.

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As if employers were not already sufficiently concerned about potential back pay exposure posed by wage and hour lawsuits, a relatively recent appellate court decision now puts emotional distress damages in play when employees bring claims for emotional distress damages in cases involving claims of retaliation. Specifically, the Fifth Circuit held late last year that emotional distress damages are available under the anti-retaliation provision of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 215(a)(3), exposing employers to heightened penalties for retaliating against employees who bring FLSA claims.

In *Pineda v. JTCH Apartments, L.L.C.*, 843 F.3d 1062 (5th Cir. 2016), Santiago Pineda sought overtime compensation from his employer, JTCH. The parties had an arrangement whereby Pineda performed maintenance work in exchange for discounted rent from JTCH. Three days after Pineda served JTCH with summons, he and his wife received a notice to vacate their apartment for nonpayment of rent. The amount of JTCH's demand was equal to the rent reductions Pineda and his wife had received during his employment. Pineda then amended his complaint to bring an FLSA retaliation claim.

Prior to trial, Pineda sought a jury instruction for emotional distress damages on his retaliation claim, but the court denied his request. At trial, the jury found for Pineda on both his overtime and retaliation claims and awarded him approximately \$5,200 in damages. The court subsequently awarded liquidated damages and attorney's fees to Pineda before both sides appealed.

Addressing Pineda's retaliation claim, the Fifth Circuit reversed and remanded, holding that emotional distress damages are available under the FLSA, and that a jury instruction was warranted in Pineda's case. In reaching its decision, the Court focused on the 1977 amendment to the FLSA, which provided a private cause of action to enforce the FLSA's anti-retaliation provision, and allowed for the recovery of not just wages and liquidated damages, which are available for minimum wage and overtime violations, but also for "such legal or equitable relief as may be appropriate." 29 U.S.C. § 216(b). In analyzing the amendment's "expansive" remedial language, the Fifth Circuit held that it "should be read to include the compensation for emotional distress," which is "typically available for intentional torts like retaliatory discharge." *Id.* at 1064. Moreover, reasoned the Court, a heightened remedy for retaliation claims is consistent with the heightened level of culpability associated with such claims as "an employer can inadvertently pay less than the law requires" but "it cannot unintentionally retaliate against an employee who complains about it."

In so holding, the Fifth Circuit acknowledged prior precedent, which held that the remedial provisions of the FLSA and the Age Discrimination in Employment Act (ADEA) should be interpreted consistently (because the ADEA expressly incorporates the FLSA's remedies), and that emotional distress damages are not available under the ADEA. See *Dean v. American Security Insurance Co.*, 559 F.2d 1036 (5th Cir. 1977). The Court, however, concluded that *Dean* was not controlling because it was decided prior to the 1977 amendment, and, unlike the ADEA, the FLSA follows the path of tort law by authorizing employees to file suit directly in court instead of first requiring the exhaustion of administrative remedies. *Pineda*, 843 F.3d at 1066. As such, according to the Court, there is little concern that awarding emotional distress damages under the FLSA would disrupt the dispute resolution procedure followed by the ADEA, as discussed in *Dean*.

Finally, in reviewing the factual record, the Court held that Pineda was entitled to a jury instruction on emotional

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distress damages for his retaliation claim because he “testified to experiencing marital discord, sleepless nights, and anxiety about where his family would live after JTCH made what the jury found to be a retaliatory demand for back rent.” According to the Court, this testimony was sufficient to enable the jury to find that Pineda suffered compensable emotional distress.

The Fifth Circuit joins the Sixth and Seventh Circuits in expressly holding that emotional distress damages are available for FLSA retaliation claims. See *Moore v. Freeman*, 355 F.3d 558 (6th Cir. 2004); *Travis v. Gary Community Mental Health Center, Inc.*, 921 F.2d 108 (7th Cir. 1990). The ruling is significant for employers because it adds another costly component to wage and hour cases, which are already expensive to litigate given their size and remedial scheme. It also introduces additional facts that must be established during discovery, including the plaintiff’s mental and emotional health and any medical treatment related thereto. Finally, with the number of retaliation claims on the rise generally, this latest ruling may encourage the plaintiff’s bar to pursue FLSA retaliation claims with increased rigor. To that end, employers would be well-advised to ensure that steps are taken to avoid conduct that could be perceived as discouraging employees from engaging in activities—such as seeking wages they believe they are owed—protected by the FLSA.

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