

NEWSSTAND

Ninth Circuit Holds that ADA Retaliation Claim Does Not Warrant Compensatory and Punitive Damages

Winter 2010

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On December 11, 2009, a panel of the Ninth Circuit Court of Appeals, in *Alvarado v. Cajun Operating Company*, held that compensatory and punitive damages are not available to a plaintiff who brings an Americans with Disabilities Act (ADA) retaliation claim, greatly limiting the scope of damages available for a retaliation claim under the ADA. Joining district courts from the Fourth and Seventh Circuits, the Ninth Circuit instead held that plaintiffs alleging ADA retaliation claims are entitled only to equitable relief, such as reinstatement and back pay.

Background

Tannislado Alvarado, 65, was hired by Church's Chicken – a fast food restaurant – to perform part-time work, and eventually became a cook. During his first three and a half years working at Church's Chicken, Alvarado consistently received satisfactory performance reviews. However, three days after calling the company's hotline to report that his manager had made inappropriate comments about his age, Alvarado received his first negative written performance counseling, which outlined alleged deficiencies in his job performance. Over the next several months, Alvarado received six additional write-ups, some of which were issued by an assistant manager who later admitted to having been instructed to issue the write-ups by the manager about whom Alvarado had complained. Around this time, Alvarado also reported experiencing pain in his hand that prevented him from completing certain job duties. In response to the additional write-ups, Alvarado called the company hotline a second time, accusing his manager of retaliating against him for making the first hotline call. Soon after making this second complaint on the company hotline, Alvarado was terminated.

Alvarado's Retaliation Claim

In response to his termination, Alvarado sued his employer asserting several employment-related claims, including disability discrimination and retaliation under the ADA, and seeking, among other things, compensatory and punitive damages. The trial court dismissed Alvarado's ADA discrimination claim, finding that Alvarado did not establish that he was actually disabled, but allowed Alvarado's claim of retaliation for complaining about alleged discrimination to remain. However, the trial court barred Alvarado from seeking punitive or compensatory damages for the retaliation claim based on its reading of the plain language of 42 U.S.C. § 1981a(a)(2). In addition, because the court ruled that ADA remedies for retaliation are "equitable" and not "legal," the trial court also denied Alvarado's request for a jury trial on his retaliation claim. Alvarado appealed.

The Ninth Circuit's Ruling

On appeal, Alvarado argued that the remedies available under the ADA are coextensive with

remedies available under the Civil Rights Acts of 1964 and 1991 and therefore, because compensatory and punitive damages are available under the Civil Rights Acts, compensatory and punitive damages are available for ADA retaliation claims. The Ninth Circuit, however, disagreed.

In affirming the lower court's decision and concluding that the remedies set forth in the ADA expressly provide for compensatory and punitive damages only for disability-based discrimination claims (e.g. claims that allege disparate treatment or failure to accommodate), the Ninth Circuit looked to the plain language of the ADA. The court noted that the sections of the ADA providing for such remedies noticeably omit any reference to the ADA's anti-retaliation provision. The court found that the omission was intentional, stating "Congress may have well-advisedly limited punitive and compensatory damage awards to those plaintiffs who are able to prove discrimination due to actual disability," something which plaintiffs need not prove to show retaliation under the ADA. Thus, the court held that compensatory and punitive damages remedies are not available in ADA retaliation cases, limiting the recovery to equitable remedies, such as reinstatement, back pay and front pay.

In affirming the lower court's decision, the Court also rejected the Equal Employment Opportunity Commission's (EEOC) position, set forth in its Compliance Manual, that the same damages should be available for ADA retaliation claims as are available for ADA discrimination claims. Although the court acknowledged that the EEOC's Compliance Manual is generally entitled to deference, the Court noted that the Manual "did not contain a reasoned analysis of the issue" and, therefore, the EEOC's position was not owed deference. In doing so, the panel discussed, exhaustively, the myriad of district court decisions reaching differing interpretations of the statute.

Accordingly, the Ninth Circuit joined the district courts in the Fourth and Seventh Circuits in taking the position that compensatory and punitive damages are not available in ADA retaliation cases. District courts in the Second Circuit have held the opposite.

What Alvarado Means for Employers

While *Alvarado* is an employer-friendly decision, employers should not allow it to impact their commitment to prohibiting and preventing unlawful discrimination and retaliation in the workplace. The ultimate concerns for employers remain the same: awards of equitable damages can be significant and retaliation for protected activity remains unlawful under the ADA and other state and federal laws. Workplace claims remain prevalent – EEOC enforcement shows that 93,277 charges were filed with the EEOC in fiscal year 2009 and that allegations of retaliation were one of the most frequently filed charges.

In addition, it will be important to follow the legislative response to *Alvarado*, as Congress has a history of amending the ADA when judicial interpretations of the Act have conflicted with Congressional intent.