No.

IN THE

Supreme Court of the United States

SUSAN L. VAUGHAN, PETITIONER,

v.

ANDERSON REGIONAL MEDICAL CENTER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

The Age Discrimination in Employment Act, in prohibiting unlawful retaliation, expressly incorporates the Fair Labor Standards Act's remedial provision, which permits courts to provide any "legal or equitable relief as may be appropriate to effectuate the purposes" of the retaliation provision of the Act.

The issue presented is whether a plaintiff who has been retaliated against under 29 U.S.C. § 623(d) of the Age Discrimination in Employment Act is able to seek compensatory and punitive damages as potential remedies for her claim.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

OTHER AUTHORITIES

OPINIONS BELOW

The February 15, 2017 opinion of the Fifth Circuit on Appellant's Petition for Rehearing *En Banc* is reported at *Vaughan v. Anderson Regional Medical Center*, 849 F.3d 588 (5th Cir. 2017); App. 1a-12a. The December 16, 2016 panel decision of the Fifth Circuit, which was withdrawn and superseded, is reported at *Vaughan v. Anderson Regional Medical Center*, 843 F.3d 1055 (5th Cir. 2016); App. 13a-24a. The December 7, 2015, decision of the United States District Court, S.D. Mississippi, Northern Division dismissing the plaintiff's claims for punitive and compensatory damages under the Age Discrimination in Employment Act ("ADEA") retaliation provisions is unpublished. App. 25a-27a.

JURISDICTION

The Fifth Circuit Court of Appeals entered its final order on February 15, 2017. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

The Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621, *et seq.*, prohibits age discrimination in employment.

29 U.S.C. § 626(b) provides, in pertinent part:

> (b) Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference, and persuasion
>
> The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: Provided, that liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section.

29 U.S.C. § 215(a)(3) provides, in pertinent part:

> (a) After the expiration of one hundred and twenty days from June 25, 1938, it shall be unlawful for any person—
> (3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or

caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

29 U.S.C. § 216(b) provides, in pertinent part:

(b) Damages; right of action; attorney's fees and costs; termination of right of action
Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages.

STATEMENT

Petitioner, Susan L. Vaughan, asserts that compensatory and punitive damages should be available for retaliation claims under the ADEA and FLSA. Ms. Vaughan asserts that the statement in 29 U.S.C. § 216(b), "…for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title…" should be interpreted to include compensatory and punitive damages.

1. Ms. Vaughan was employed by Anderson Regional Medical Center ("Anderson") as a Nurse Supervisor. During her employment, Ms. Vaughan claims that she was harassed by a co-worker based on her age, which was fifty-four (54). On March 20, 2014,

Ms. Vaughan complained to Appellee that she was being harassed by another co-worker based on her age. On April 30, 2014, Ms. Vaughan was terminated. Ms. Vaughan has now filed a claim for retaliation under the ADEA that is pending in the United States District Court for the Southern District of Mississippi.

2. On February 3, 2015, Anderson filed a motion to dismiss Ms. Vaughan's claims for compensatory and punitive damages for her retaliation claim under the ADEA. On December 7, 2015, the district court granted the motion to dismiss, and on January 7, 2016, the district granted Ms. Vaughan's motion for certification pursuant 28 U.S.C.A. 1292(b). On February 23, 2016, the Fifth Circuit granted Ms. Vaughan's petition for interlocutory appeal.

3. On December 16, 2016, the Fifth Circuit Court of Appeals issued its initial Opinion affirming the district court's decision. On January 6, 2017, Petition filed a petition for rehearing *en banc*. On February 15, 2017, the Fifth Circuit treated the petition as petition for rehearing, and issued its Amended Opinion affirming the district court's decision.

This petition followed.

REASON FOR GRANTING THE PETITION

I. Introduction

This case presents the Court with the opportunity to resolve an issue that has plagued the courts for decades—whether compensatory and punitive damages are available under the Age Discrimination in Employment Act (ADEA) for retaliation claims. The issue has created a division in

the circuit courts and places the United States government's position on the issue in direct conflict with several of these circuits.

Despite Congress' express incorporation of the anti-retaliation remedies of the Fair Labor Standards Act (FLSA) into the ADEA, the circuits have split on the availability of these damages, interpreting differently whether the phrase "legal relief" means:

1.) as it is generally understood, the ability to seek compensatory and punitive damages as some circuits have held; or
2.) as other circuits have ruled, simply compensatory damages; or
3.) simply punitive damages; or
4.) as still other circuits have held neither compensatory nor punitive damages.[1]

The ADEA's remedial provisions, including its incorporation of the FLSA, "reflect[ed], on the one hand, Congress's desire to use an existing statutory scheme and a bureaucracy with which employers and employees would be familiar and, on the other hand, its dissatisfaction with some elements of each of the

[1] The Court in *C.I.R. v. Schleier*, 515 U.S. 323 (1995) addressed whether a monetary settlement under the Age Discrimination in Employment Act was excludable as gross income for income tax purposes. In its analysis, the Court noted that the lower courts had found, and the respondent had not contested, the contention "that the ADEA does not permit a separate recovery of compensatory damages for pain and suffering or emotional distress." *Id.* at 326. Here, the expanded remedies for retaliation claims under the FLSA, which is expressly incorporated into the ADEA remedies provision for unlawful retaliation, has created confusion, calling for the Court's resolution.

preexisting schemes." *Lorillard, Div. of Loew's Theatres, Inc. v. Pons*, 434 U.S. 575, 579 (1978). Not only are the two statutes a reflection of each other, but also the Court has noted that "[p]ursuant to § 7 (b) of the Act, 29 U.S.C. § 626(b) violations of the ADEA generally are to be treated as violations of the FLSA." *Id.* Despite these directives, courts of appeals have taken inconsistent positions on this issue.

The United States Government has also taken a position on this issue, interpreting that compensatory and punitive damages are available in ADEA retaliation cases. This directly conflicts with the holding of several circuits. Accordingly, the split across the circuits makes litigants' reliance on the Government's guidance conditional on the particular circuit in which they pursue their claims, another factor which calls for the Court to settle this issue.

Because the question revolves around the statutory provisions of both the FLSA and the ADEA, lower court practice has been a patchwork analysis of both statutes to determine the availability of remedies. A clear and precise decision from the Court is needed to provide consistency across the country on the availability of remedies for retaliation claims under the ADEA.

II. There Is a Defined Circuit Split On Whether the ADEA, Which Expressly Incorporates the Damages Provisions of the FSLA, Permits Compensatory and Punitive Damages for ADEA Retaliation Cases.

A. In Analyzing the Confusion Across the Circuits, the Court Should Look to Cases Under Both the FLSA and ADEA Because The ADEA Expressly Incorporates The FLSA Remedial Provisions.

The FLSA, as amended in 1977, states at 29 U.S.C. § 216(b) that employers found liable for retaliation under 29 U.S.C. § 215(a)(3) shall face such "legal or equitable relief" as appropriate to achieve the purposes of the section. The ADEA incorporates this FSLA provision through 29 U.S.C. § 626(b), providing that enforcement of its provisions shall be "in accordance with the powers, remedies and procedures provided in" the FLSA under 29 U.S.C. § 216. This incorporation of the FLSA's enforcement provision in 29 U.S.C. § 626 goes on to give courts the jurisdiction to grant such "legal or equitable relief" as may be appropriate to achieve the purposes of the chapter.

The Court has recognized this incorporation. *Hoffmann-La Roche v. Sperling*, 493 U.S. 165, 168 (1989) ("[T]he ADEA shall be enforced using certain of the powers, remedies, and procedures of the FLSA."); *Kimel v. Florida Board of Regents*, 528 U.S. 62, 67-68 (2000) ("Section 626(b) also permits aggrieved employees to enforce the Act through certain provisions of the . . . FLSA, and the ADEA specifically incorporates § 16(b) of the FLSA."). The Court has

given weight to the incorporation, not only in the context of the ADEA, but the Court has also used its interpretations of the ADEA to support its interpretations of the FLSA. *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1047 (2015) (citing *Hoffmann-La Roche*, 493 U.S. at 170, a case about the ADEA, in support of the proposition that the FLSA's remedial goals should be read to the full extent of the statute).[2]

In its construction of the ADEA and the subsequent amendments of both statutes, Congress has also treated these two statutes as interrelated. *See Lorillard*, 434 U.S. at 579. As noted above, the Court has consistently noted the extensive connections Congress created between the ADEA and the FLSA. Further, subsequent to enacting the ADEA, Congress has also amended the two provisions in the same legislation, demonstrating the interrelated nature of the statutes. PL 93–259, (S 2747), PC 93-259, April 8, 1974, 88 Stat 55.

The hybrid nature of the two statutes recognized by the Court and the resulting legal effects given by the Court to this entwinement dictate that the availability of specific remedies in the statutes cannot be solved independently of each other. Indeed, the Court has expressly said as much: "[W]e have explained *repeatedly* that § 626(b) incorporates the FLSA's enforcement provisions, and that those remedial

[2] This is consistent with how this Court has interpreted these types of remedial statements by holding that courts should "… presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise." *Franklin v. Gwinnett County Pub. Sch.*, 112 S. Ct. 1028, 1032 (1992)

options operate together with [the ADEA provisions]." *Kimel*, 528 U.S. at 74 (emphasis added). The analysis of whether compensatory and punitive damages are available in FSLA retaliation cases cannot be divorced from whether these same damages are available in ADEA retaliation cases.

B. The Confusion Across the Circuits Demonstrates this Issue Calls For Resolution by The Court.

The federal circuit courts are splintered over whether the ADEA and the FLSA allow potential punitive and compensatory damages for retaliation claims. On the precise issue of whether these damages are available under the ADEA, there is a circuit split. The Seventh Circuit explained in *Moskowitz v. Trustees of Purdue University* that the 1977 amendments to the FLSA allow compensatory and punitive damages for ADEA retaliation claims. *Moskowitz v. Trustees of Purdue Univ.*, 5 F.3d 279, 283 (7th Cir. 1993). The Seventh Circuit reasoned the 1977 amendments were intended to enlarge remedies for retaliatory actions "beyond those standardly available for FLSA (and ADEA) violations." *Id.* at 284.

Demonstrating the confusion, both across circuits and within circuits, the Fifth Circuit in this case held that neither compensatory or punitive damages are available for an ADEA retaliation claim. *Vaughan v. Anderson Reg'l Med. Ctr.*, 849 F.3d 588, 594 (5th Cir. 2017). The Fifth Circuit relied on its 1977 decision in *Dean v. Am. Sec. Ins. Co.*, 559 F. 1036 (5th Cir. 1977), which held that compensatory and punitive damages were not available for an ADEA discrimination claim.

In *Vaughn*, the Fifth Circuit held that, although *Dean* was not a case about retaliation, it still applied to the employee's claim, and that the 1977 amendments to the FLSA did not change the remedies available in the ADEA. *Vaughan* at 591. The Fifth Circuit in *Vaughn* placed substantial weight on its previous precedent, reasoning that none of the language in *Dean*'s broad holding suggested an exclusion for retaliation claims. Further, the Fifth Circuit noted that at the time of *Dean*, the ADEA already had substantively identical language, giving the court power to grant appropriate "legal or equitable relief . . . without limitation . . . ." *Id.* at 592. The Fifth Circuit, therefore, refused to differentiate retaliation claims from its holding in *Dean*.

The Fifth Circuit's decision in *Pineda v. JTCH Apartments, L.L.C.*, 843 F.3d 1062 (5th Cir. 2016), further highlights the confusion this issue has created. Despite the ADEA's express incorporation of the FLSA's anti-retaliation remedies into the ADEA's anti-retaliation remedies, The Fifth Circuit found, three days after its initial panel decision in *Vaughan*, compensatory damages to be allowed under the FLSA for retaliation claims. *Pineda*, 843 F.3d at 1067. The Fifth Circuit favorably cited the Seventh Circuit's decision in *Travis v. Gary Community Mental Health Ctr., Inc.*, 921 F.2d 108 (7th Cir. 1990), which permitted compensatory and punitive damages under the FLSA, although the *Travis* Court did not directly discuss punitive damages. *Pineda*, 843 F.3d at 1064. These decisions show the inconsistency not only within the Fifth Circuit but also how other circuits are struggling with the issue.

The Ninth Circuit's treatment of the issue illustrates the same confusion. In *Lambert v. Ackerly*, 180 F.3d 997 (9th Cir. 1999), the Ninth Circuit allowed compensatory damages for a FLSA anti-retaliation claim. The Ninth Circuit found the Seventh Circuit's decision in *Travis v. Gary Community Mental Health Ctr., Inc.*, persuasive, but the Ninth Circuit did not reach the punitive damages issue because it found the issue had been waived. *Lambert*, 180 F.3d at 1011.

This decision is in contrast with *Stilwell v. City of Williams*, 831 F.3d 1234, 1247 (9th Cir. 2016) (citing *C.I.R. v. Schleier*, 515 U.S. 323, 326 (1995)), where the Ninth Circuit held that compensatory damages were not available in an ADEA retaliation case. The Ninth Circuit did not rely on the language of either statute. Instead, it relied on its view that under Court precedent the ADEA appears to not permit compensatory damages in ADEA cases. However, the court in *Stilwell* did not distinguish between normal ADEA discrimination claims and ADEA retaliation claims. *Stilwell*, 831 F.3d 1234. This narrow analysis ignores the express incorporation of the FSLA's retaliation remedies into the ADEA's retaliation remedies and the fact that these statutes should be read as mirror images. When the statutes are viewed together, the courts are in extreme disarray.

The other circuits which have addressed this issue have shown less intra-circuit inconsistency, but the circuits have reached divergent conclusions as to whether compensatory damages, or punitive damages, or both, or neither are available under the ADEA or FLSA in retaliation cases. For example, the Second Circuit appears to believe that the ADEA and the

FLSA do not allow for punitive damages in retaliation cases because it would discourage use of the statute's administrative conciliation scheme, a scheme it believed did not allow for calculation of such damages. *Johnson v. Al Tech Specialties Steel Corp.*, 731 F.2d 143, 148 (2d Cir. 1984).[3]

The Sixth Circuit, on the other hand, has held that the FLSA includes compensatory damages, but has not reached the punitive damages issue. *Moore v. Freeman*, 355 F.3d 558 (6th Cir. 2004). The Sixth Circuit allowed punitive damages to stand as a procedural matter in *Moore* because the plaintiff failed to appeal from the appropriate district court order and was, therefore, barred from raising the issue before the appellate court. *Id.* at 565.

The Seventh Circuit has held, consistent with Supreme Court precedent, that the FLSA and the ADEA remedies mirror each other, holding the FLSA authorizes both compensatory and punitive damages. In *Travis v. Gary Community Mental Health Ctr.*, the Seventh Circuit examined the history of the FLSA. The Seventh Circuit noted that, as originally written, the FLSA only allowed recovery of wages, overtime compensation, and an additional equal amount in liquidated damages. However, the Seventh Circuit then explained that Congress amended the FLSA in 1977 to make "legal and equitable relief" available, removing limitations on remedies without imposing new

[3] It is not clear from the decision if this case is an ADEA retaliation claim. The case was originally filed *pro se*; however, the Second Circuit did comment on the damages available under the both of the statutes.

limitations. *Travis*, 921 F.2d at 112. The Seventh Circuit concluded that "legal relief" is a term of art that is widely understood to include compensatory and punitive damages. *Id.* at 111. Furthermore, the Seventh Circuit noted that Congress removed previous limitations on damages without instituting new ones, going so far as to state that relief was to be "without limitation," before giving a non-exhaustive list of possible remedies. As discussed at page 6 of this petition, the Seventh Circuit has expressed the same views when analyzing the remedies available in ADEA retaliation cases. *Moskowitz*, 5 F.3d at 283-84.

In direct contrast to the Seventh Circuit, the Eleventh Circuit held that the damages in the FLSA are compensatory in nature, and that the listing of criminal penalties in a separate provision precluded the availability of punitive damages. *Snapp v. Unlimited Concepts, Inc.*, 208 F.3d 928, 936 (11th Cir. 2000). The Eleventh Circuit relied on prior Fifth Circuit precedent in *Dean*, stating that because the remedial provisions of the ADEA mirrored the FLSA, the lack of punitive damages as decided in *Dean* means that there are no punitive damages available under the FLSA. This, however, as discussed at page 7 of the petition, is contrary to the Fifth Circuit's discussion of *Dean* in *Pineda*, finding that compensatory damages are available under the FLSA retaliation provision because the Fifth Circuit has "never said that . . . the ADEA automatically applies to the FLSA . . . ." *Pineda*, 843 F.3d at 1066.

There is disagreement on this issue across circuits and indeed within circuits. Reams of paper, significant employee and employer resources, and

weeks of the court's time will be dedicated to briefing and appealing this issue. The Court should grant certiorari and resolve the issue.

III. The Court Should Grant Certiorari To Resolve the Direct Conflict Between The United States Government and Those Circuits Holding that Punitive and Compensatory Damages Are Not Available For ADEA Retaliation Claims.

The Equal Employment Opportunity Commission (EEOC) is charged with interpreting and enforcing the anti-retaliation provisions of the ADEA. Further, and the Court has recognized that the EEOC's views are entitled to deference. The EEOC's interpretations of the ADEA reflect "a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 399 (2008) (quoting *Bragdon v. Abbott*, 524 U.S. 624, 642 (1998)).

The EEOC has interpreted the remedies available in an ADEA retaliation case to include compensatory and punitive damages. As discussed at pages 6 to 10, the United States Government's interpretation directly conflicts with the position taken by several of the circuit courts.

The EEOC in its Enforcement Guidance on Retaliation and Related Issues provides guidance on the statutes enforced by the EEOC and communicates the Commission's position on important legal issues. The EEOC issued enforcement guidance recognizing the availability of compensatory and punitive damages for retaliation claims under the ADEA. EEOC

Directive No. 915. 004, EEOC Enforcement Guidance on Retaliation and Related Issues, at n. 186 (Aug. 25, 2016), https://www.eeoc.gov/laws/guidance/retaliation-guidance.cfm#_ftn186).

The EEOC relies on the Sixth Circuit's analysis in *Moore* and the Seventh Circuit's analysis in *Moskowitz* as support for its position. The EEOC's position is clear as it explains "the FLSA, as amended in 1977, 29 U.S.C. § 216(b), authorizes compensatory and punitive damages for retaliation claims under both the EPA and the ADEA." *Id.* (citations omitted).

This position is not of recent vintage, but is a consistent, long-held position. The predecessor to this directive issued in 1998 likewise recognized that punitive and compensatory damages are available in ADEA retaliation cases. EEOC Directive No. 915.003: Retaliation, EEOC Compliance Manual, Section 614, Vol. 2, 8-III(B)(1) at p. 17 (noting that compensatory and punitive damages are available under the ADEA for retaliation claims). The EEOC has also expressed this view in other sub-regulatory guidance. *See* EEOC Compliance Manual § 8, Charge-Processing Outline at IV(B), 2006 WL 4672791; EEOC Compliance Manual § 8-III, Special Remedial Issues at B (1), 2006 WL 4672794; EEOC Compliance Manual § 10, Compensation Discrimination, 2006 WL 4672894.

Petitioner recognizes that a legal issue exists regarding what level of deference the government's position is owed. However, the United States Government has taken a position that is directly in conflict with some of the circuit courts. Both employees and employers look to the United States' views on

these issues to attempt to comply with the law. Regardless of the deference owed, those regulated or protected by the EEOC should be entitled to guidance from the government that is, in fact, a correct expression of the law.

In order to resolve the conflicting views expressed by the EEOC and those taken by the circuits disallowing these damages, the Court should grant the petition and answer the question presented.

CONCLUSION

For the foregoing reasons, this Court should issue a writ of certiorari to review the February 15, 2017 judgement of the Unites States Court of Appeals for the Fifth Circuit. Additionally, this Court should invite the Solicitor General to file a brief in this matter, expressing the views of the United States.

Respectfully Submitted,

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SUSAN L. VAUGHAN, Plaintiff-Appellant, v. ANDERSON REGIONAL MEDICAL CENTER, Defendant-Appellee.

United States Court of Appeals, Fifth Circuit.

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Before: BENAVIDES, HAYNES, and GRAVES, Circuit Judges.

JAMES E. GRAVES, *Circuit Judge*.

Treating Appellant's Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition is DENIED. We withdraw the prior opinion and substitute the following.

This single-issue interlocutory appeal arises out of a wrongful termination lawsuit filed by Susan Vaughan, a nurse supervisor, against Anderson Regional Medical Center. Vaughan alleges the Medical Center discharged her in retaliation for raising age-discrimination complaints. Vaughan's claims invoke the Age Discrimination in Employment Act (ADEA), and she

seeks, among other things, damages for pain and suffering and punitive damages.

The district court dismissed Vaughan's claims for pain and suffering damages and punitive damages because precedent bars such recoveries under the ADEA. The district court's dismissal order did, however, note divergent views held by other circuits and the Equal Employment Opportunity Commission. Finding the damages issue "a controlling question of law as to which there is substantial ground for difference of opinion," the district court certified an appeal to this Court under 28 U.S.C. § 1292(b). We granted leave to file an interlocutory appeal.

The district court correctly concluded that *Dean v. Am. Sec. Ins. Co.*, 559 F.2d 1036 (5th Cir. 1977) requires dismissal of Vaughan's pain and suffering and punitive damages claims.[1] Accordingly, we AFFIRM.

JURISDICTION

We have jurisdiction over Vaughan's interlocutory appeal pursuant to 28 U.S.C. § 1292(b). The district court properly exercised its jurisdiction over the federal statutory claim under 28 U.S.C. § 1331.

STANDARD OF REVIEW

The district court dismissed Vaughan's damages claims pursuant to Fed. R. Civ. P. 12(b)(6). Accordingly, this Court reviews the decision below *de novo*, "accepting all well-pleaded facts as true and viewing those facts in the light most favorable to the plaintiff." *True v. Robles*, 571 F.3d 412, 417 (5th Cir. 2009). "Dismissal is appropriate

when the plaintiff has not alleged `enough facts to state a claim to relief that is plausible on its face' and has failed to `raise a right to relief above the speculative level.'" *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007)).

ANALYSIS

The parties dispute *Dean*'s applicability. The district court relied upon *Dean* below, but certified its ruling for interlocutory review after recognizing a circuit split regarding the availability of pain and suffering and punitive damages in ADEA retaliation cases.
This Court adheres to a "rule of orderliness," under which a panel may not overturn a controlling precedent "absent an intervening change in law, such as by a statutory amendment, or the Supreme Court, or our en banc court. Indeed, even if a panel's interpretation of the law appears flawed, the rule of orderliness prevents a subsequent panel from declaring it void." *Sprong v. Fidelity Nat'l Property & Cas. Ins. Co.*, 787 F.3d 296, 305 (5th Cir. 2015) (block quotation and citation omitted). To decide whether the rule of orderliness applies, we must therefore analyze whether: (1) *Dean* is distinguishable from this case; or (2) an intervening change in law justifies setting *Dean* aside.

We conclude that the answer to both questions is "no."

I. Dean is not distinguishable

We perceive no basis upon which to distinguish *Dean.* Vaughan concedes that *Dean* forecloses pain and suffering and punitive recoveries for ADEA age discrimination claims, *see* Appellant's Br. at 2, but

suggests that *Dean* does not control ADEA retaliation claims. We disagree.

Dean held in unqualified terms that "neither general damages [i.e., compensatory damages for pain and suffering] nor punitive damages are recoverable in private actions posited upon the ADEA." *Dean*, 559 F.2d at 1040. ADEA age discrimination and retaliation claims are equally "private actions posited upon the ADEA," and the ADEA has contained a prohibition on employer retaliation since its inception. *See* Age Discrimination in Employment Act of 1967, Pub. L. 90-202 at § 4(d), 81 Stat. at 603 (1967) ("It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this Act.") (current version at 29 U.S.C. § 623(d)). A plaintiff could file a retaliation claim under the ADEA when we decided *Dean*, and *Dean* contains no suggestion that its holding regarding damages for "private actions posited upon the ADEA" silently excluded ADEA retaliation actions. *See Dean*, 559 F.2d at 1036.

Dean's holding therefore controls this case if, as we will conclude below, no intervening changes in law undermine its continued vitality.

II. No intervening change in law justifies setting *Dean* aside

Vaughan's effort to undermine *Dean* relies heavily upon the 1977 amendments to the remedies provided for retaliatory discharges under the Fair Labor Standards Act (FLSA), a statute we interpret to provide remedies "consistent" with the ADEA.[2] Vaughan's argument that the 1977 FLSA amendments enlarged the remedies available for ADEA retaliation claims finds support in the decisions of at least one circuit, and the EEOC endorses that interpretation. *See Moskowitz v. Trustees of Purdue Univ.*, 5 F.3d 279, 284 (7th Cir. 1993) (indicating that the 1977 FLSA amendments "enlarge[d] the remedies . . . beyond those standardly available for . . . ADEA . . . violations" when a plaintiff brings retaliation claims); *see also* EEOC Directive No. 915.004, *EEOC Enforcement Guidance on Retaliation and Related Issues*, at n. 186 (Aug. 25, 2016) ("The FLSA, as amended in 1977, 29 U.S.C. § 216(b), authorizes compensatory and punitive damages for retaliation claims under . . . the ADEA."), *available at* https://www.eeoc.gov/laws/guidance/retaliation-guidance.cfm#_ftnref186 (last accessed Dec. 12, 2016).
We conclude, however, that Vaughan's argument fails to recognize the 1977 FLSA amendments incorporated remedial language substantively identical to passages *already provided* in the ADEA. Put simply, the 1977 FLSA amendments do not disturb our holding in *Dean*, because they added language to the FLSA that we have already construed in the context of the ADEA—in *Dean*.

We issued our opinion in *Dean* on September 23, 1977, more than a month prior to the 1977 FLSA

amendments. *Compare Dean*, 559 F.2d at 1036, *with* Fair Labor Standards Amendments of 1977, Pub. L. No. 95-151, 91 Stat. 1245 (Nov. 1, 1977) (current version at 29 U.S.C. §§ 201-219). By the time we interpreted it in *Dean*, the ADEA had for nearly ten years "authori[zed] a court to grant such `legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section.'" *Dean*, 559 F.3d at 1037-38; *see also* Age Discrimination in Employment Act of 1967, Pub. L. No. 90-902 at § 7(b), 81 Stat. 604-05 (1967) (current version at 29 U.S.C. § 626(b)). Several weeks after we decided *Dean*, Congress added the following similar remedial language to the FLSA: "Any employer who violates the provisions of section 15(a)(3) of this Act, 29 USC 215, shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 15(a)(3), including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages." 91 Stat. 1245 at 1252 (current version at 29 U.S.C. § 216(b). *Dean* held that similar language in the ADEA's remedy provision did not make pain and suffering damages available, because such damages would frustrate the ADEA's preference for administrative resolutions. *See Dean*, 559 F.2d at 1038-39. That preference remains in the ADEA, and requires the same result we reached in *Dean* for all "private actions posited upon the ADEA." *See id.* at 1040. We express no view on how the remedial language discussed above should be applied in FLSA retaliation cases.

Our interpretation is buttressed by our history of applying *Dean* long after the 1977 FLSA amendments. *See Smith v. Berry Co.*, 165 F.3d 390, 396 (5th Cir. 1999) (citing *Dean* for the proposition that "punitive damages and damages for mental pain and suffering . . . are not available" for age discrimination claims under the ADEA). The Eleventh Circuit, which views Fifth Circuit precedents predating Sept. 30, 1981, as binding precedent,[3] has also continued to cite *Dean*. *See Snapp v. Unlimited Concepts, Inc.*, 208 F.3d 928, 938 (11th Cir. 2000) ("We . . . feel some constraint to exclude punitive damages from the `legal relief' provided in the [FLSA] by the former Fifth Circuit's decision in *Dean*.");[4] *see also Goldstein v. Manhattan Industries, Inc.*, 758 F.2d 1435, 1446 (11th Cir. 1985) (citing *Dean* for the proposition that "neither punitive damages nor compensatory damages for pain and suffering are recoverable under the ADEA.").

Having concluded that the 1977 FLSA amendments' borrowing of the ADEA's remedial language does not constitute an intervening change in the ADEA warranting our departure from *Dean*, we address two other points raised by Vaughan's briefing.

First, the fact that the EEOC believes the ADEA permits pain and suffering and punitive recoveries does not constitute an intervening legal change sufficient to displace *Dean*. The EEOC has stated its interpretation of the ADEA's remedial provisions in a policy directive and at least three sections of its Compliance Manual,[5] and we are mindful that the EEOC's interpretations of the ADEA reflect "a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Fed. Exp. Corp. v. Holowecki*, 552

U.S. 389, 399 (2008) (quoting *Bragdon v. Abbott*, 524 U.S. 624, 642 (1998)). The EEOC's interpretation merits *Skidmore* deference "to the extent that . . . interpretation[] ha[s] the power to persuade." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 111 n.6 (2002) (quotations and citations omitted); *see also Holowecki*, 552 U.S. at 399. In this case, the EEOC's interpretation of the ADEA's remedial provision appears to depend almost entirely upon *Moskowitz*, an opinion we find unpersuasive.[6] Even if we found the EEOC's interpretation persuasive, however, it would not provide a sufficient basis for departing from an established precedent. *See Spong v. Fid. Nat. Prop. & Cas. Ins. Co.*, 787 F.3d 296, 306 (5th Cir. 2015) (noting that "[a]n intervening change in law must be binding on this court," and "merely persuasive, not binding" interpretations do not overcome the rule of orderliness).

Second, the transfer of ADEA functions previously performed by the Secretary of Labor to the EEOC does not constitute an intervening change in law sufficient to displace *Dean*. When we decided *Dean*, the ADEA gave certain roles and powers to the Secretary of Labor. *See Dean*, 559 F.2d at 1038-40. As Vaughan notes, the current version of the statute gives those roles and powers to the EEOC. The transfer of ADEA functions occurred pursuant to Reorganization Plan No. 1 of 1978, which called for a straightforward substitution of the EEOC in place of certain statutory references to the Secretary of Labor.[7] Vaughan fails to demonstrate that the transfer of functions created any significant differences for ADEA plaintiffs.

For example, Vaughan argues that "[i]n the past private suits for age discrimination were secondary to administrative proceedings by the Secretary of Labor, which did not allow for compensatory damages." Appellant's Br. at 5. The ADEA's current text demonstrates no less of a preference for administrative proceedings than the version *Dean* interpreted. In *Dean*, we concluded that the ADEA "patently encouraged and preferred . . . administrative remedies and suits brought by the Secretary of Labor . . . to private actions." *Dean*, 559 F.2d at 1038. As evidence of this preference, we noted two specific aspects of the statute: (1) its requirement that private individuals give the Secretary of Labor 60 days' advance notice of their intention to file a private ADEA claim, and (2) the Secretary of Labor's ability to cut off an individual's right to maintain a private ADEA suit by commencing an enforcement action within the notice period. *See id.* Those aspects of the statute remain the same, other than the substitution of the EEOC for the Secretary of Labor. *See* 29 U.S.C. § 626(d)(1) (notice requirement); § 626(c)(1) (termination of private right of action upon commencement of EEOC action).

CONCLUSION

Our opinion in *Dean* applies to all "private actions posited upon the ADEA," *Dean*, 559 F.2d at 1040, including Vaughan's ADEA retaliation claim. Under *Dean*, Vaughan may not invoke the ADEA as a basis for general compensatory damages for pain and suffering or punitive damages. *Id.* Perceiving no intervening change in law that would lead us to set *Dean* aside, we AFFIRM.

FootNotes

1. To avoid any confusion of terms, this opinion uses the phrase "pain and suffering damages" as a more precise method of referencing the "general compensatory damages" *Dean* foreclosed. *Dean*'s convention of referring to pain and suffering damages, which a plaintiff may not recover under the ADEA, as "general compensatory damages" does not prevent other types of ADEA recoveries our precedents sometimes label "compensatory," such as back pay awards. *See Dean*, 559 F.2d at 1039 (recognizing availability of ADEA back pay awards); *see also Tyler v. Union Oil Co. of Cal.*, 304 F.3d 379, 400-02 (5th Cir. 2002) (referring to a permissible ADEA back pay award as "compensatory damages").
The Medical Center's motion below sought dismissal of all "compensatory" damages claims, "including but not limited to deep pain, humiliation, anxiety and emotional distress," and its appellate briefing phrases the question before this court as "whether a plaintiff can be awarded general compensatory (e.g., pain and suffering) and/or punitive damages for an ADEA retaliation claim," Appellee's Br. at 1. We emphasize that the examples of damages the Medical Center identifies—damages we hold *Dean* forecloses in all private ADEA actions—should not be read to limit the availability of other types of monetary damages the ADEA plainly permits, such as back pay awards.
2. *See 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.").

3. *See Bonner v. City of Prichard, Ala.*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc) (stating that decisions handed down prior to the close of business of Sept. 30, 1981, serve as binding precedent within the Eleventh Circuit).

4. In the *Snapp* litigation, the district court denied defendant's motion to dismiss a claim for pain and suffering damages. *See* Appellees' Br. at *2, *Snapp v. Unlimited Concepts*, No. 98-2936-GG, 1999 WL 33617525 (11th Cir. 1999). The Eleventh Circuit never analyzed the substance of that ruling, as the jury "awarded . . . no money in compensatory damages." *Id.* at *4.

5. *See* EEOC Directive No. 915.004, *EEOC Enforcement Guidance on Retaliation and Related Issues*, at n. 186 (Aug. 25, 2016) ("The FLSA, as amended in 1977, 29 U.S.C. § 216(b), authorizes compensatory and punitive damages for retaliation claims under . . . the ADEA."), *available at* https://www.eeoc.gov/laws/guidance/retaliation-guidance.cfm#_ftnref186 (last accessed Dec. 12, 2016); *see also* EEOC Compliance Manual § 8, Charge-Processing Outline at IV(B), 2006 WL 4672791; EEOC Compliance Manual § 8-III, Special Remedial Issues at B(1), 2006 WL 4672794; EEOC Compliance Manual § 10, Compensation Discrimination, 2006 WL 4672894.

6. *Moskowitz* suggested that the 1977 FLSA amendments "enlarge[d] the remedies . . . beyond those standardly available for . . . ADEA . . . violations" when a plaintiff brings retaliation claims. 5 F.3d at 284. Because the ADEA already permitted retaliation claims before the 1977 FLSA amendments, and appears to have supplied the 1977 FLSA's remedial text, we decline to view *Moskowitz* as persuasive authority.

7. *See* Reorganization Plan No. 1 of 1978, 92 Stat. 3781 at § 2 (1978) ("All functions vested in the Secretary of Labor or in the Civil Service Commission pursuant to Sections 2, 4, 7, 8, 9, 10, 11, 12, 13, 14, and 15 of the Age Discrimination in Employment Act of 1967, as amended, (29 U.S.C. 621, 623, 626, 627, 628, 629, 630, 631, 632, 633, and 633a) are hereby transferred to the Equal Employment Opportunity Commission. All functions related to age discrimination administration and enforcement pursuant to Sections 6 and 16 of the Age Discrimination in Employment Act of 1967, as amended, (29 U.S.C. 625 and 634) are hereby transferred to the Equal Employment Opportunity Commission.").

No. 16-60104.

843 F.3d 1055 (2016)

Susan L. VAUGHAN, Plaintiff-Appellant v. ANDERSON REGIONAL MEDICAL CENTER, Defendant-Appellee.

United States Court of Appeals, Fifth Circuit.

FILED December 16, 2016.

Attorney(s) appearing for the Case

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Romney Hastings Entrekin, Esq., Peeler Grayson Lacey, Jr., Esq., Benjamin Blue Morgan, Esq., Attorney, Burson Entrekin Orr Mitchell & Lacey, P.A., Laurel, MS, for Defendant-Appellee.

Before BENAVIDES, HAYNES, and GRAVES, Circuit Judges.

JAMES E. GRAVES, *Circuit Judge*:

This single-issue interlocutory appeal arises out of a wrongful termination lawsuit filed by Susan Vaughan, a nurse supervisor, against Anderson Regional Medical Center. Vaughan alleges the Medical Center discharged her in retaliation for raising age-discrimination complaints. Vaughan's claims invoke the Age Discrimination in Employment Act (ADEA), and she seeks, among other things, damages for pain and suffering and punitive damages.

The district court dismissed Vaughan's claims for pain and suffering damages and punitive damages because Fifth Circuit precedent bars such recoveries under the ADEA. The district court's dismissal order did, however, note divergent views held by other circuits and the Equal Employment Opportunity Commission. Finding the damages issue "a controlling question of law as to which there is substantial ground for difference of opinion," the district court certified an appeal to this Court under 28 U.S.C. § 1292(b). We granted leave to file an interlocutory appeal.

The district court correctly concluded that *Dean v. Am. Sec. Ins. Co.*, 559 F.2d 1036 (5th Cir. 1977) requires dismissal of Vaughan's pain and suffering and punitive damages claims.[1] Accordingly, we AFFIRM.

JURISDICTION

We have jurisdiction over Vaughan's interlocutory appeal pursuant to 28 U.S.C. § 1292(b). The district court properly exercised its jurisdiction over the federal statutory claim under 28 U.S.C. § 1331.

STANDARD OF REVIEW

The district court dismissed Vaughan's damages claims pursuant to Fed. R. Civ. P. 12(b)(6). Accordingly, this Court reviews the decision below *de novo*, "accepting all well-pleaded facts as true and viewing those facts in the light most favorable to the plaintiff." *True v. Robles*, 571 F.3d 412, 417 (5th Cir. 2009). "Dismissal is appropriate when the plaintiff has not alleged `enough facts to state a claim to relief that is plausible on its face' and has failed to `raise a right to relief above the speculative

level.'" *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)).

ANALYSIS

The parties dispute *Dean*'s applicability. The district court relied upon *Dean* below, but certified its ruling for interlocutory review after recognizing a circuit split regarding the availability of pain and suffering and punitive damages in ADEA retaliation cases.

This Court adheres to a "rule of orderliness," under which a panel may not overturn a controlling precedent "absent an intervening change in law, such as by a statutory amendment, or the Supreme Court, or our en banc court. Indeed, even if a panel's interpretation of the law appears flawed, the rule of orderliness prevents a subsequent panel from declaring it void." *Sprong v. Fidelity Nat'l Property & Cas. Ins. Co.*, 787 F.3d 296, 305 (5th Cir. 2015) (block quotation and citation omitted). To decide whether the rule of orderliness applies, we must therefore analyze whether: (1) *Dean* is distinguishable from this case; or (2) an intervening change in law justifies setting *Dean* aside.

We conclude that the answer to both questions is "no."

I. *Dean* is not distinguishable

We perceive no basis upon which to distinguish *Dean*. Vaughan concedes that *Dean* forecloses pain and suffering and punitive recoveries for ADEA age discrimination claims, *see* Appellant's Br. at 2, but suggests that *Dean* does not control ADEA retaliation claims. We disagree.

Dean held in unqualified terms that "neither general damages [i.e., compensatory damages for pain and suffering] nor punitive damages are recoverable in private actions posited upon the ADEA." *Dean*, 559 F.2d at 1040. ADEA age discrimination and retaliation claims are equally "private actions posited upon the ADEA," and the ADEA has contained a prohibition on employer retaliation since its inception. *See* Age Discrimination in Employment Act of 1967, Pub. L. 90-202 at § 4(d), 81 Stat. at 603 (1967) ("It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this Act.") (current version at 29 U.S.C. § 623(d)). A plaintiff could file a retaliation claim under the ADEA when we decided *Dean*, and *Dean* contains no suggestion that its holding regarding damages for "private actions posited upon the ADEA" silently excluded ADEA retaliation actions. *See Dean*, 559 F.2d at 1036.

Dean's holding therefore controls this case if, as we will conclude below, no intervening changes in law undermine its continued vitality.

II. No intervening change in law justifies setting *Dean* aside

Vaughan's effort to undermine *Dean* relies heavily upon the 1977 amendments to the remedies provided for retaliatory discharges under the Fair Labor Standards Act (FLSA), a statute we interpret to provide remedies "consistent" with the ADEA.[2] Vaughan's argument that the 1977 FLSA amendments enlarged the remedies available for ADEA retaliation claims finds support in the decisions of at least one circuit, and the EEOC endorses that interpretation. *See Moskowitz v. Trustees of Purdue Univ.*, 5 F.3d 279, 284 (7th Cir. 1993) (indicating that the 1977 FLSA amendments "enlarge[d] the remedies ... beyond those standardly available for ... ADEA ... violations" when a plaintiff brings retaliation claims); *see also* EEOC Directive No. 915.004, *EEOC Enforcement Guidance on Retaliation and Related Issues*, at n. 186 (Aug. 25, 2016) ("The FLSA, as amended in 1977, 29 U.S.C. § 216(b), authorizes compensatory and punitive damages for retaliation claims under... the ADEA."), *available at* https://www.eeoc.gov/laws/guidance/retaliation-guidance.cfm#_ftnref186 (last accessed Dec. 12, 2016).

We conclude, however, that Vaughan's argument fails to recognize the 1977 FLSA amendments incorporated remedial language substantively identical to passages *already provided* in the ADEA. Put simply, the 1977 FLSA amendments do not disturb our holding in *Dean*, because they added language to the FLSA that we have already construed in the context of the ADEA — in *Dean*.

We issued our opinion in *Dean* on September 23, 1977, more than a month prior to the 1977 FLSA amendments. *Compare Dean*, 559 F.2d at 1036, *with* Fair Labor Standards Amendments of 1977, Pub. L.

No. 95-151, 91 Stat. 1245 (Nov. 1, 1977) (current version at 29 U.S.C. §§ 201-219). By the time we interpreted it in *Dean*, the ADEA had for nearly ten years "authori[zed] a court to grant such `legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section.'" *Dean*, 559 F.3d at 1037-38; *see also* Age Discrimination in Employment Act of 1967, Pub. L. No. 90-902 at § 7(b), 81 Stat. 604-05 (1967) (current version at 29 U.S.C. § 626(b)). Several weeks after we decided *Dean*, Congress added the following substantively equivalent remedial language to the FLSA: "Any employer who violates the provisions of section 15(a)(3) of this Act, 29 USC 215, shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 15(a)(3), including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages." 91 Stat. 1245 at 1252 (current version at 29 U.S.C. § 216(b)).

Given the remedial passages' textual similarities, we conclude that the 1977 FLSA amendments simply brought the FLSA's remedies for employer retaliation into line with the ADEA's remedies for similar conduct. This interpretation comports with our history of applying *Dean* long after the 1977 FLSA amendments. *See Smith v. Berry Co.*, 165 F.3d 390, 396 (5th Cir. 1999) (citing *Dean* for the proposition that "punitive damages and damages for mental pain and suffering ... are not available" for age discrimination claims under the

ADEA). The Eleventh Circuit, which views Fifth Circuit precedents predating Sept. 30, 1981, as binding precedent,[3] has also continued to cite *Dean*. *See Snapp v. Unlimited Concepts, Inc.*, 208 F.3d 928, 938 (11th Cir. 2000) ("We ... feel some constraint to exclude punitive damages from the `legal relief' provided in the [FLSA] by the former Fifth Circuit's decision in *Dean*.");[4] *see also Goldstein v. Manhattan Industries, Inc.*, 758 F.2d 1435, 1446 (11th Cir. 1985) (citing *Dean* for the proposition that "neither punitive damages nor compensatory damages for pain and suffering are recoverable under the ADEA."). Within this circuit, our district courts have reasonably inferred that *Dean* remains good law, and therefore forecloses pain and suffering and punitive damages under the FLSA. *See, e.g., Douglas v. Mission Chevrolet*, 757 F.Supp.2d 637, 640 (W.D. Tex. 2010) ("Because of the Fifth Circuit's expressed desire for remedies under the ADEA and the FLSA to be interpreted consistently, and because the Fifth Circuit has held that emotional distress damages and punitive damages are unavailable under the ADEA, this Court holds that emotional distress damages and punitive damages are unavailable in an FLSA anti-retaliation claim.").[5]

Having concluded that the 1977 FLSA amendments' borrowing of the ADEA's remedial language does not constitute an intervening change in the ADEA warranting our departure from *Dean*, we address two other points raised by Vaughan's briefing.

First, the fact that the EEOC believes the ADEA permits pain and suffering and punitive recoveries does not constitute an intervening legal change sufficient to displace *Dean*. The EEOC has stated its interpretation

of the ADEA's remedial provisions in a policy directive and at least three sections of its Compliance Manual,[6] and we are mindful that the EEOC's interpretations of the ADEA reflect "a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Fed. Exp. Corp. v. Holowecki*, 552 U.S. 389, 399, 128 S.Ct. 1147, 170 L.Ed.2d 10 (2008) (quoting *Bragdon v. Abbott*, 524 U.S. 624, 642, 118 S.Ct. 2196, 141 L.Ed.2d 540 (1998)). The EEOC's interpretation merits *Skidmore* deference "to the extent that ... interpretation[] ha[s] the power to persuade." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 111 n.6, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002) (quotations and citations omitted); *see also Holowecki*, 552 U.S. at 399, 128 S.Ct. 1147. In this case, the EEOC's interpretation of the ADEA's remedial provision appears to depend almost entirely upon *Moskowitz*, an opinion we find unpersuasive.[7] Even if we found the EEOC's interpretation persuasive, however, it would not provide a sufficient basis for departing from an established precedent. *See Spong v. Fid. Nat. Prop. & Cas. Ins. Co.*, 787 F.3d 296, 306 (5th Cir. 2015) (noting that "[a]n intervening change in law must be binding on this court," and "merely persuasive, not binding" interpretations do not overcome the rule of orderliness).

Second, the transfer of ADEA functions previously performed by the Secretary of Labor to the EEOC does not constitute an intervening change in law sufficient to displace *Dean*. When we decided *Dean*, the ADEA gave certain roles and powers to the Secretary of Labor. *See Dean*, 559 F.2d at 1038-40. As Vaughan notes, the current version of the statute gives those roles and powers to the EEOC. The transfer of ADEA

functions occurred pursuant to Reorganization Plan No. 1 of 1978, which called for a straightforward substitution of the EEOC in place of certain statutory references to the Secretary of Labor.[8] Vaughan fails to demonstrate that the transfer of functions created any significant differences for ADEA plaintiffs.

For example, Vaughan argues that "[i]n the past private suits for age discrimination were secondary to administrative proceedings by the Secretary of Labor, which did not allow for compensatory damages." Appellant's Br. at 5. The ADEA's current text demonstrates no less of a preference for administrative proceedings than the version *Dean* interpreted. In *Dean*, we concluded that the ADEA "patently encouraged and preferred ... administrative remedies and suits brought by the Secretary of Labor ... to private actions." *Dean*, 559 F.2d at 1038. As evidence of this preference, we noted two specific aspects of the statute: (1) its requirement that private individuals give the Secretary of Labor 60 days' advance notice of their intention to file a private ADEA claim, and (2) the Secretary of Labor's ability to cut off an individual's right to maintain a private ADEA suit by commencing an enforcement action within the notice period. *See id.* Those aspects of the statute remain the same, other than the substitution of the EEOC for the Secretary of Labor. *See* 29 U.S.C. § 626(d)(1) (notice requirement); § 626(c)(1) (termination of private right of action upon commencement of EEOC action).

CONCLUSION

Our opinion in *Dean* applies to all "private actions posited upon the ADEA," *Dean*, 559 F.2d at 1040,

including Vaughan's ADEA retaliation claim. Under *Dean*, Vaughan may not invoke the ADEA as a basis for general compensatory damages for pain and suffering or punitive damages. *Id.* Perceiving no intervening change in law that would lead us to set *Dean* aside, we AFFIRM.

FootNotes

1. To avoid any confusion of terms, this opinion uses the phrase "pain and suffering damages" as a more precise method of referencing the "general compensatory damages" *Dean* foreclosed. *Dean*'s convention of referring to pain and suffering damages, which a plaintiff may not recover under the ADEA, as "general compensatory damages" does not prevent other types of ADEA recoveries our precedents sometimes label "compensatory," such as back pay awards. *See Dean*, 559 F.2d at 1039 (recognizing availability of ADEA back pay awards); *see also Tyler v. Union Oil Co. of Cal.*, 304 F.3d 379, 400-02 (5th Cir. 2002) (referring to a permissible ADEA back pay award as "compensatory damages").

The Medical Center's motion below sought dismissal of all "compensatory" damages claims, "including but not limited to deep pain, humiliation, anxiety and emotional distress," and its appellate briefing phrases the question before this court as "whether a plaintiff can be awarded general compensatory (e.g., pain and suffering) and/or punitive damages for an ADEA retaliation claim," Appellee's Br. at 1. We emphasize that the examples of damages the Medical Center identifies — damages we hold *Dean* forecloses in all private ADEA actions — should not be read to limit the

availability of other types of monetary damages the ADEA plainly permits, such as back pay awards.

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4. In the *Snapp* litigation, the district court denied defendant's motion to dismiss a claim for pain and suffering damages. *See* Appellees' Br. at *2, *Snapp v. Unlimited Concepts*, No. 98-2936-GG, 1999 WL 33617525 (11th Cir. 1999). The Eleventh Circuit never analyzed the substance of that ruling, as the jury "awarded ... no money in compensatory damages." *Id.* at *4.

5. One district court within this circuit relied upon *Dean* as a bar to FLSA punitive damages claims, but did not analyze or apply *Dean* as a bar to compensatory damages for injuries including mental anguish. *See Little v. Tech. Specialty Prod., LLC*, 940 F.Supp.2d 460, 480 (E.D. Tex. 2013). That case appears to be an outlier. *Little* relied upon *Lee v. U.S. Sec. Associates, Inc.*, No. A-07-CA-395-AWA, 2008 WL 958219, at *7 (W.D. Tex. Apr. 8, 2008), but the Western District of Texas actually changed its position before the *Little* ruling. *See Douglas*, 747 F.Supp.2d at 640 (finding that the FLSA does not permit emotional distress damages) (NB: *Douglas* does not expressly acknowledge *Lee*, but *Douglas* rejects the same out-of-circuit precedents *Lee* relied upon).

6. *See* EEOC Directive No. 915.004, *EEOC Enforcement Guidance on Retaliation and Related Issues*, at n. 186 (Aug. 25, 2016) ("The FLSA, as amended in 1977, 29 U.S.C. § 216(b), authorizes compensatory and punitive damages for retaliation claims under ... the ADEA."), *available at* https://www.eeoc.gov/laws/guidance/retaliation-guidance.cfm#_ftnref186 (last accessed Dec. 12, 2016); *see also* EEOC Compliance Manual § 8, Charge-Processing Outline at IV(B), 2006 WL 4672791; EEOC Compliance Manual § 8-III, Special Remedial Issues at B(1), 2006 WL 4672794; EEOC Compliance Manual § 10, Compensation Discrimination, 2006 WL 4672894.

7. *Moskowitz* suggested that the 1977 FLSA amendments "enlarge[d] the remedies ... beyond those standardly available for ... ADEA... violations" when a plaintiff brings retaliation claims. 5 F.3d at 284. Because the ADEA already permitted retaliation claims before the 1977 FLSA amendments, and appears to have supplied the 1977 FLSA's remedial text, we decline to view *Moskowitz* as persuasive authority.

8. *See* Reorganization Plan No. 1 of 1978, 92 Stat. 3781 at § 2 (1978) ("All functions vested in the Secretary of Labor or in the Civil Service Commission pursuant to Sections 2, 4, 7, 8, 9, 10, 11, 12, 13, 14, and 15 of the Age Discrimination in Employment Act of 1967, as amended, (29 U.S.C. 621, 623, 626, 627, 628, 629, 630, 631, 632, 633, and 633a) are hereby transferred to the Equal Employment Opportunity Commission. All functions related to age discrimination administration and enforcement pursuant to Sections 6 and 16 of the Age Discrimination in Employment Act of 1967, as amended, (29 U.S.C. 625 and 634) are hereby transferred to the Equal Employment Opportunity Commission.").

Cause No. 3:14-CV-979-CWR-FKB.

SUSAN L. VAUGHAN, Plaintiff, v. ANDERSON REGIONAL MEDICAL CENTER, Defendant,

United States District Court, S.D. Mississippi, Northern Division.

December 7, 2015.

Attorney(s) appearing for the Case

Susan L. Vaughan, Plaintiff, represented by Louis H. Watson, Jr., WATSON & NORRIS, PLLC & Robert Nicholas Norris, WATSON & NORRIS, PLLC.
Anderson Regional Medical Center, Defendant, represented by Romney H. Entrekin, GHOLSON, BURSON, ENTREKIN & ORR, PLLC & Peeler Grayson Lacey, Jr., GHOLSON, BURSON, ENTREKIN & ORR, PLLC.

ORDER

CARLTON W. REEVES, *District Judge.*

Before the Court is Defendant's *Motion to Dismiss Plaintiff's Claims For Damages Not Recoverable Under the Age Discrimination In Employment Act.* Docket No. 3. Plaintiff has responded. Docket No. 6. Defendant has replied. Docket No. 9. In addition, the Court held a hearing on said motion. Having reviewed the parties' arguments and supporting authorities, the Court finds that the motion should be granted.

The question is whether compensatory and punitive damages are available for a claim of retaliation brought under the Age Discrimination in Employment Act (ADEA).[1] The Fifth Circuit, by whose rulings this Court is bound, has answered that question in the negative, holding that "[N]either [compensatory] damages nor punitive damages are recoverable in private actions posited upon the ADEA." *Dean v. American Sec. Ins. Co.*, 559 F.2d 1036, 1040 (5th Cir. 1977); *See also Palasota v. Haggar Clothing Co.*, 499 F.3d 474, 491 (5th Cir. 2007) (stating that damages are not meant to be punitive in ADEA cases).

Plaintiff urges the Court to consider that other circuits have addressed whether compensatory and punitive damages are available for *retaliation* claims under the ADEA. Federal appellate courts to have considered the issue are split on whether the incorporation of the Fair Labor Standard Act's (FLSA) § 216(b) into the ADEA authorized compensatory and punitive damages in retaliation cases.[2] The split revolves around the use of the term "legal relief" in § 216(b) and whether it is understood to include such damages. *Compare Moskowitz v. Trustees of Purdue Univ.*, 5 F.3d 279, 283 (7th Cir. 1993) (concluding that the ADEA's incorporation of the FLSA's § 216(b) authorized compensatory and punitive damages in retaliation cases), and *Travis v. Gary Cmty. Health Ctr.*, 921 F.2d at 111-12 (7th Cir. 1990) (concluding that punitive damages are available in FLSA retaliation claims), *with Snapp v. Unlimited Concepts, Inc.*, 208 F.3d 928, 933-35 (11th Cir. 2000) (concluding that punitive damages are not available in FLSA retaliation claims).[3]

The Equal Employment Opportunity Commission's enforcement guidance comes down on the side of the Seventh Circuit's reasoning, advising that compensatory and punitive damages are available for ADEA retaliation claims. U.S. Equal Emp. Opportunity Comm'n, EEOC Directive No. 915.003, EEOC Compliance Manual (1998) (citing *Moskowitz*, 5 F.3d 279). Number 11.18 of the 2014 Edition of the Fifth Circuit Pattern Jury Instructions, however, states that "[n]either damages nor compensatory damages for pain and suffering are recoverable under the ADEA."

Because the Fifth Circuit has not adopted the Seventh Circuit's reasoning or altered its decision in *Dean* to enlarge available damages under ADEA retaliation claims, Defendant's motion is granted.

The parties are directed to contact the Chambers of the Magistrate Judge for entry of an amended scheduling order.

SO ORDERED.

FootNotes

1. Plaintiff alleged both age discrimination and retaliation claims, the former to which she conceded she cannot recover compensatory or punitive damages.
2. The remedies provisions of the ADEA and the FLSA are the same. *Johnson v. Martin*, 473 F.3d 220, 222 (5th Cir. 2006).
3. *See also* Carol Abdelmesseh and Deanne M. DiBlasi, *Why Punitive Damages Should Be Awarded For Retaliatory Discharge Under the Fair Labor Standards Act*, 21 Hofstra Lab. & Emp. L.J. 715, Spring 2004.