No. 16-60104

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SUSAN L. VAUGHAN,

Plaintiff- Appellant,

v.

ANDERSON REGIONAL MEDICAL CENTER,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District Of Mississippi, Northern Division
Carlton Reeves, United States District Court Judge

BRIEF FOR AARP AND AARP FOUNDATION AS AMICI CURIAE SUPPORTING PLAINTIFF-APPELLANT'S PETITION FOR REHEARING EN BANC

DARA S. SMITH*
DANIEL B. KOHRMAN
LAURIE MCCANN
WILLIAM ALVARADO RIVERA
**Counsel of Record*
AARP FOUNDATION LITIGATION
601 E Street, NW
Washington, DC 20049
dsmith@aarp.org
Tel.: (202) 434-6280

Counsel for Amici Curiae

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The Internal Revenue Service has determined that AARP is organized and operated exclusively for the promotion of social welfare pursuant to Section 501(c)(4) of the Internal Revenue Code and is exempt from income tax. The Internal Revenue Service has determined that AARP Foundation is organized and operated exclusively for charitable purposes pursuant to Section 501(c)(3) of the Internal Revenue Code and is exempt from income tax. AARP and AARP Foundation are also organized and operated as nonprofit corporations under the District of Columbia Nonprofit Corporation Act.

Other legal entities related to AARP and AARP Foundation include AARP Services, Inc., and Legal Counsel for the Elderly. Neither AARP nor AARP Foundation has a parent corporation, nor has either issued shares or securities.

Undersigned counsel further certifies to the belief that the certificate of interested persons filed by the appellant is complete.

January 12, 2017

/s/Dara S. Smith
Dara S. Smith

Counsel for Amici Curiae

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MISCELLANEOUS

STATEMENT OF INTEREST OF AMICI CURIAE[1]

AARP is a nonprofit, nonpartisan organization dedicated to fulfilling the needs and representing the interests of people age fifty and older. AARP fights to protect older people's financial security, health, and well-being. AARP's charitable affiliate, AARP Foundation, creates and advances effective solutions that help low-income individuals fifty and older secure the essentials. Among other things, AARP and AARP Foundation combat employment discrimination against older workers, including through participation as amici curiae in state and federal courts. *See, e.g.*, *Villarreal v. R.J. Reynolds Tobacco Co., Inc., et al.*, 839 F.3d 958 (11th Cir. 2016) (en banc); Br. of AARP as Amicus Curiae, *McDaniel v. Momentive Specialty Chems., Inc.*, Nos. 14-20410, 14-20462 (5th Cir.) (filed Oct. 7, 2014). Assuring proper interpretation of the Age Discrimination of Employment Act of 1967, 29 U.S.C. §§ 621, et seq. ("ADEA"), has been a particular focus of AARP's and AARP Foundation's legal advocacy. AARP and AARP Foundation submit this brief because vigorous enforcement of the ADEA's prohibition on retaliation is crucial to the Act's vitality, and effective enforcement of that prohibition turns on plaintiffs having access to all appropriate remedies, including compensatory damages. The

[1] In accordance with Fed. R. App. P. 29(c)(5), amici hereby state that no party's counsel authored this brief either in whole or in part, and further, that no party or party's counsel, or any person or entity other than amici, their members and counsel, contributed money intended to fund preparing or submitting this brief.

panel's decision of December 16, 2016 conflicts with this Court's recent ruling in *Pineda v. JTCH Apartments, LLC*, No. 15-10932 (5th Cir., Dec. 19, 2016), and also with rulings of the other U.S. Circuit Courts of Appeals that have permitted plaintiffs to seek damages, other than lost wages, under the relevant statutory provision. *See, e.g., Travers v. Flight Servs. & Sys., Inc.*, 808 F.3d 525, 530, 539–42 (1st Cir. 2015); *Moore v. Freeman*, 355 F.3d 558, 563 (6th Cir. 2004); *Broadus v. O.K. Indus., Inc.*, 238 F.3d 990, 992 (8th Cir. 2001); *Lambert v. Ackerley*, 180 F.3d 997, 1011 (9th Cir. 1999); *Moskowitz v. Trustees of Purdue Univ.*, 5 F.3d 279, 284 (7th Cir. 1993). The panel decision creates an unnecessary inconsistency in the law that undermines the ADEA's effective enforcement in the Fifth Circuit.

ARGUMENT

This is not a garden-variety case in which a party simply disagrees with an appeals panel's decision. Rather, this case presents precisely the issues for which en banc rehearing is available: it concerns an exceptionally important question of law on which this Court's case law now conflicts. The Court should vacate the panel's decision in this case and overrule or clarify *Dean v. Am. Sec. Ins. Co.*, 559 F.2d 1036 (5th Cir. 1977), to harmonize Fifth Circuit precedent and ensure the ADEA's effective enforcement consistent with the statute's design.

I. Plaintiffs' Ability To Seek Damages Beyond Lost Wages In ADEA Retaliation Cases Is An Exceptionally Important Issue Because This Remedy Is Vital To The ADEA's Effective Enforcement.

The Supreme Court has repeatedly explained that a remedy for retaliation is integral to effective protection from employment discrimination. The Court has explained that "broad protection from retaliation helps assure the cooperation" of employees "willing to file complaints and act as witnesses," and it is this "cooperation upon which accomplishment of [Title VII's] primary objective depends." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67 (2006); *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 180 (2005) ("Without protection from retaliation, individuals who witness discrimination would likely not report it . . . and the underlying discrimination would go unremedied."); *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960) ("effective enforcement could thus only be expected if employees felt free to approach officials with their grievances"). To ensure this essential cooperation, the Court has recognized that victims of retaliation must have "unfettered access to statutory remedial mechanisms." *Burlington,* 548 U.S. at 58 (citing *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997)).

Monetary damages are a critical remedial mechanism in any discrimination case, both as a retrospective remedy and as a deterrent against future unlawful activity. In employment discrimination cases in particular, monetary damages

beyond lost wages are necessary to effectively remediate retaliation claims because retaliation does not always involve any direct loss of wages. In *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006), the Supreme Court held that a "materially adverse action" necessary to state a retaliation claim under Title VII need not affect a term or condition of employment. *Id.* at 62-63. The Court concluded that an employee may sue for any retaliatory action that would deter a reasonable person from opposing discrimination, such as a change in schedule or exclusion from training. *Id.* at 63-64, 69 ("A provision limited to employment-related actions would not deter the many forms that effective retaliation can take.").

Such adverse actions do not necessarily result in any lost wages, but, nonetheless, they fall under the Court's deliberately broad construction of retaliation. Unless an employment discrimination statute allows non-wage damages for retaliation claims, employees who experience retaliation that does not involve wage loss have no remedy for past retaliatory action. *Id.* at 64. Such a construction would thwart the Court's purpose in construing retaliation provisions broadly, covering precisely these actions to ensure effective private enforcement of the laws' discrimination bans. *See id.* ("The antiretaliation provision seeks to . . . prevent[] an employer from interfering (through retaliation) with *an employee's efforts to secure or advance enforcement* of [Title VII's] basic guarantees." (emphasis added).

That purpose is no less relevant under the ADEA than under Title VII, particularly given that the two statutes' retaliation protections are identical. *Compare* 29 U.S.C. § 623(d)(2012) (ADEA), *with* 42 U.S.C. § 2000e-3 (2012)(Title VII); *see also Wooten v. McDonald Transit Assocs., Inc.*, 788 F.3d 490, 499 n.5 (5th Cir. 2015) (applying *Burlington* adverse action standard to ADEA retaliation claim). Without an effective remedy for the actions the Court found so important to encompass in anti-retaliation protections, employees will surely not feel free to oppose, report, and cooperate with the investigation of age discrimination claims without fear of reprisal, as the Court and Congress intended. At stake in this case is no less than the effective enforcement of the ADEA, using the "unfettered access to statutory remedial mechanisms" that the Supreme Court has vigilantly guarded. *See Burlington,* 548 U.S. at 58. That is a matter of exceptional importance.

II. The Tension Between *Vaughan* And *Pineda* Leaves Fifth Circuit Precedent Unclear Regarding Whether The 1977 Amendments To The FLSA Permit ADEA Plaintiffs To Seek Non-Wage Damages In Retaliation Cases.

The panel decision in this case and another panel's subsequent decision in *Pineda v. JTCH Apartments, LLC*, No. 15-10932, 2016 U.S. App. LEXIS 22569 (5th Cir., Dec. 19, 2016), contain sharply differing reasoning about the impact of the 1977 amendments to section 216(b) of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 216(b)(2012), which section 7(b) of the ADEA expressly incorporates,

29 U.S.C. § 626(b)(2012), on the Court's prior case law. That tension creates unnecessary conflict and confusion in the Court's precedent that is ripe for en banc consideration.

In *Dean*, 559 F.2d 1036 (5th Cir. 1977), an age discrimination case, this Court ruled that the ADEA did not provide for non-wage damages, based on: (1) the Court's construction of the ADEA's general damages provision (the "freestanding" ADEA language); and (2) the absence of any non-wage damages in section 216(b) of the FLSA. In 1977, after *Dean*, Congress amended section 216(b) of the FLSA to include a broader remedies provision for the newly created cause of action for retaliation. *Travis v. Gary Cmty. Mental Health Ctr.*, 921 F.2d 108, 111 (7th Cir. 1990). The Courts of Appeals have uniformly concluded that the amended section 216(b) permits plaintiffs to seek non-wage damages in retaliation cases under the FLSA. *Pineda*, 2016 U.S. App. LEXIS 22569, at *5 (collecting cases).

In *Pineda*, a panel of this Court followed suit. *Id.* at *5-9. In doing so, the panel reaffirmed *Dean*'s analysis of the ADEA's freestanding language with respect to damages in age discrimination cases, but concluded that *Dean*'s interpretation of section 216(b) of the FLSA was inapposite because "when *Dean* considered whether the ADEA afforded a remedy for emotional harm by looking to the FLSA remedy provision via the cross reference, it was looking at the pre-1977 FLSA," which

"limited relief to economic damages and did not even allow private retaliation suits." *Id.* (citing *Dean*, 559 F.2d at 1037). However, three days earlier, the panel in the instant case concluded something very different: that *Dean*'s reasoning survived the 1977 FLSA amendment. *Vaughan v. Anderson Reg'l Med. Ctr.*, No. 16-60104, 2016 U.S. App. LEXIS 22412, at *6-8 (5th Cir., Dec. 16, 2016).

Although *Vaughan* construes the ADEA while *Pineda* interprets the FLSA, both address the effect of the same amendments (in 1977) to the same statutory language (section 216(b) of the FLSA) on the reasoning of the same case (*Dean*)—and arrive at opposite conclusions. *Compare Vaughan*, 2016 U.S. App. LEXIS 22412, at *6-8, *with Pineda*, 2016 U.S. App. LEXIS 22569, at *6. The two decisions contain consistent interpretations of the ADEA's freestanding general damages provision, but the decisions' differing interpretations of the effect of the 1977 amendments on section 216(b)'s meaning in *retaliation* cases conflicts sharply. Especially in light of this Court's settled precedent that "[b]ecause the remedies available under the ADEA . . . track the FLSA, cases interpreting remedies under the statutes should be consistent," *Lubke v. City of Arlington*, 455 F.3d 489, 499 (5th Cir. 2006), the two holdings cannot be reconciled.

The full court's consideration is necessary to address this conflict—either by overruling *Dean* or by clarifying that *Dean* only addresses the ADEA's general,

freestanding damages provision, not the post-amendment section 216(b) of the FLSA.

CONCLUSION

For these reasons, the Court should grant Plaintiff-Appellant's petition for rehearing en banc.

Respectfully submitted,

/s/Dara S. Smith
Dara S. Smith*
Daniel B. Kohrman
Laurie McCann
William Alvarado Rivera
**Counsel of Record*
AARP Foundation Litigation
601 E Street, NW
Washington, DC 20049
dsmith@aarp.org
Tel.: (202) 434-6280

January 12, 2017

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 1,664 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced 14-point typeface using Microsoft Word 2010.

Dated: January 12, 2017

/s/Dara S. Smith
Dara S. Smith
Counsel for Amici Curiae

CERTIFICATE OF SERVICE AND FILING

I hereby certify that on January 12, 2017, the foregoing BRIEF FOR AARP AND AARP FOUNDATION AS AMICI CURIAE SUPPORTING PLAINTIFF-APPELLANT'S PETITION FOR REHEARING EN BANC was electronically filed with the Clerk of the Court for the United States Court of Appeals of the Fifth Circuit using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: January 12, 2017

/s/Dara S. Smith
Dara S. Smith
Counsel for Amici Curiae