

Second Circuit Rejects Cumulative Liquidated Damages

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On December 7, 2016, the U.S. Court of Appeals for the Second Circuit resolved a split among district courts within the circuit regarding whether liquidated damages may be awarded under both the Fair Labor Standards Act (“FLSA”) and New York Labor Law (“NYLL”) for the same violation(s).

Background

The FLSA allows for liquidated damages equal to 100 percent of unpaid wages as compensatory damages, unless the employer demonstrates that the violation was in good faith and that it had reasonable grounds for believing that its failure to pay was lawful. The NYLL allows for liquidated damages equal to 100 percent of unpaid wages as a punitive measure, unless the employer proves a good-faith basis for believing that its underpayment of wages was lawful.

Many courts in the Second Circuit have granted successful plaintiffs cumulative liquidated damages because they serve different purposes, i.e., compensatory under the FLSA and punitive under the NYLL. This practice was recognized by courts as the “different purposes” rationale.¹ However, other courts in the Second Circuit have refused to award double liquidated damages.²

The Decision

In [*Chowdhury v. Hamza Express Food Corp., et al.*](#), No 15-3142-cv, 2016 WL 7131854 (2d Cir. Dec. 7, 2016), the Second Circuit affirmed the lower court’s decision denying the award of cumulative liquidated damages. In *Chowdhury*, the plaintiff, a deli employee, alleged wage and hour claims pursuant to the FLSA and NYLL. The plaintiff

¹ See, e.g., *Bazignan v. Team Castle Hill Corp.*, No. 13 Civ. 8382 (PAC), 2015 WL 1000034, at *3 (S.D.N.Y. Mar. 5, 2015) (“While a split of authority exists on whether a plaintiff may recover liquidated damages under both the FLSA and the NYLL for the same violations during the same time period, the majority of courts in the Second Circuit allow for the simultaneous recovery of both forms of liquidated damages.”).

² *Inclan v. New York Hospitality Grp., Inc.*, 95 F. Supp. 3d 490, 506 (S.D.N.Y. 2015) (“[T]he distinction between compensatory and punitive for characterizing liquidated damages under the FLSA and NYLL [is] semantic, exalting form over substance.”).

was ultimately successful via a default judgment and subsequently awarded approximately \$20,000 by Magistrate Judge Roanne Mann. Noting a split among district courts as to whether cumulative liquidated damages awards are permissible, Magistrate Judge Mann denied the cumulative damages award, concluding that it would constitute an impermissible double recovery. Magistrate Judge Mann's recommendation was subsequently adopted in full by federal District Court Judge Jack Weinstein.

The Second Circuit affirmed the district court's decision barring the double recovery of liquidated damages, relying on 2009 and 2010 state legislative changes to the NYLL's liquidated damages provision, Section 198(1-a). Prior to 2009, this liquidated damages provision entitled employees to liquidated damages only in the amount of 25 percent of wages owed, and only if the employee proved that the employer's violation of the statute was "willful." Section 198(1-a) was changed in 2009 to make liquidated damages mandatory unless the employer could show good faith and amended again in 2010 to increase the amount of damages to 100 percent of the back wages.

The Second Circuit observed that the current version of Section 198(1-a) is consistent with the FLSA, and that the 2009 and 2010 changes to Section 198(1-a) confirmed that the New York State Legislature intended to conform the NYLL to the FLSA. The Second Circuit reasoned that had the Legislature intended the law to allow for treble damages, it would have explicitly stated so. Finding that the NYLL's and FLSA's liquidated damages provisions "are identical in all material respects, serve the same functions, and redress the same injuries," the Second Circuit ruled that the district court was correct in not awarding cumulative liquidated damages.

In reducing the potential exposure for employers facing wage and hour claims, the Second Circuit's ruling is significant; however, employers should be mindful that it is only a "summary order," which means that it does not have "precedential effect." Federal procedural rules explicitly allow for citation to summary orders. And while summary orders need not necessarily be followed by other courts, they do have persuasive effect.

What Employers Should Do Now

Despite the Second Circuit's rejection of cumulative liquidated damages, which seemingly alleviates the potential financial exposure for employers that are liable for unpaid back wages, employers should still remain vigilant in maintaining compliance with federal and state wage and hour laws, such as ensuring that all time worked by non-exempt employees is accurately recorded and compensated.

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