

# Request for Determination of Eligibility for Awards in Discrimination Cases

September 20, 1995

MEMORANDUM FOR: Bruce Crawford, Director, Community Planning and Development Division, Pittsburgh Office, 3ED

FROM: Robert J. Kenison, Associate General Counsel for Assisted Housing and Community Development

**SUBJECT: CDBG-Eligibility of Liquidated Damages Awarded Pursuant to the Age Discrimination in Employment Act of 1967 Urban Redevelopment Authority of Pittsburgh**

This responds to your May 31, 1995, letter to James Broughman requesting an opinion from the Office of General Counsel regarding the CDBG-eligibility of the liquidated damages portion of awards paid by the Urban Redevelopment Authority (URA) of Philadelphia. The awards were paid pursuant to court-ordered settlements of recent age discrimination lawsuits brought under the Age Discrimination in Employment Act of 1967 (ADEA). It is our understanding that the URA disagrees with this office's opinion of December 9, 1994, characterizing the liquidated damages portions of the awards as fines or penalties which are ineligible under OMB Circular A-87†, and has asked that we reconsider in light of an opinion written by the URA's Assistant General Counsel, Sharon M. O'Neill. The URA bases its objection on the assertion that liquidated damages awarded pursuant to the ADEA should be viewed as compensatory, not penal. In support of this position, Ms. O'Neill cites to opinions of the Supreme Court and federal appeals courts.

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†OMB issued a revised Circular A-87 on May 17, 1995 (60 FR 26484), which includes new provisions governing fines or penalties. However, this issue must be decided in accordance with the provisions of A-87 in effect at the time the costs were incurred.

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As Ms. O'Neill's opinion explains, the ADEA expressly incorporates the remedies and procedures of section 216(b) of the Fair Labor Standards Act (FLSA). These procedures make violators liable for unpaid wages or compensation, and an additional equal amount as liquidated damages. However, the ADEA limits the applicability of section 216(b) by providing that a prevailing plaintiff is entitled to liquidated damages only in cases of willful violations. Thus, while double or liquidated damages are mandatory and automatic under the FLSA, under the ADEA they are available only when the violation is willful. See, *Kossmann v. Calumet County*, 800 F.2d 697, 700-701 (7th Cir. 1986).

Two Supreme Court cases decided in the 1940's held that liquidated damages under the FLSA were intended to compensate the victim of discrimination for "damages too obscure and difficult of proof for estimate," due to the retention of the worker's pay. *Overnight Motor Co. v. Missel*, 316 U.S. 572, 583 (1941); *Brooklyn Bank v. O'Neil*, 324 U.S. 697, 707 (1945). Ms. O'Neill relied on these cases in her opinion. However, these are FLSA cases that were decided before enactment of the ADEA. Moreover, liquidated damages awarded pursuant to the ADEA have been treated differently by the Supreme Court.

Recent Supreme Court holdings on the interpretation of section 216(b) as applied to the ADEA have characterized such damages as punitive or penal. *Trans World Airlines v. Thurston*, 469 U.S. 111 (1985); *Hazen Paper Co. v. Biggins*, 113 S.Ct. 1701 (1993).

In *Thurston*, the Court held that "[t]he legislative history of the ADEA indicates that Congress intended for liquidated damages to be punitive in nature," and that the double damage liability would serve as a deterrent to willful violations. 469 U.S. at 125. *Hazen* reaffirmed this view, referring to liquidated damages awarded pursuant to the ADEA as "penal." 113 S.Ct. at 1710. These cases do not refer to the compensatory language used to describe liquidated damages under the FLSA in *Overnight Motor and Brooklyn Bank*. The lower court cases cited by Ms. O'Neill as applying the compensatory language to liquidated damages under the ADEA, with one exception, predated *Thurston*. The single exception is *Kossmann v. Calumet County*, where the 7th Circuit cited a pre-*Thurston* holding of the 8th Circuit that ADEA liquidated damages "are intended to provide compensation for losses that cannot be calculated with certainty." 800 F.2d 697, 702 (1986, 7th Cir.). However, *Kossmann* nonetheless found the damages to be punitive, directly quoting *Thurston's* holding that "[t]he legislative history of the ADEA indicates that Congress intended for liquidated damages to be punitive in nature." Since the Supreme Court has clearly held that liquidated damages under the ADEA are penal or punitive in nature, and subsequent opinions of lower courts have followed suit, we cannot agree with Ms. O'Neill's assertion that they are not fines or penalties.

Finally, Ms. O'Neill's opinion cites a law dictionary definition of liquidated damages in support of her argument that liquidated damages under the ADEA should not be viewed as fines or penalties. Her opinion paraphrases the definition as "the sum which a party to a contract agrees to pay if he breaks some promise and which, having been arrived at by a good faith effort to estimate actual damage that will probably ensue from a breach, is recoverable as agreed damages if a breach occurs." She argues that the difference between liquidated damages under the ADEA and contractual liquidated damages is simply that Congress, rather than the parties, set the amount of liquidated damages. We disagree with this argument.

In our opinion, the use of the term "liquidated damages" in the statute does not make reference to the definition of liquidated damages in a contractual context. In the ADEA context, the event precipitating the award of "liquidated damages" is a willful violation of a federal nondiscrimination statute, not merely a breach of a private contract. Moreover, as indicated above, the Supreme Court has held that a liquidated damages award under the ADEA constitutes a penalty. The Court's interpretation of the statutory term is determinative.

In light of the above, we reaffirm our opinion that the liquidated damage awards paid by the URA in this case constitute fines or penalties under OMB Circular A-87, and consequently may not be paid out of CDBG funds.