

# Clearinghouse REVIEW

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Journal of  
Poverty Law  
and Policy

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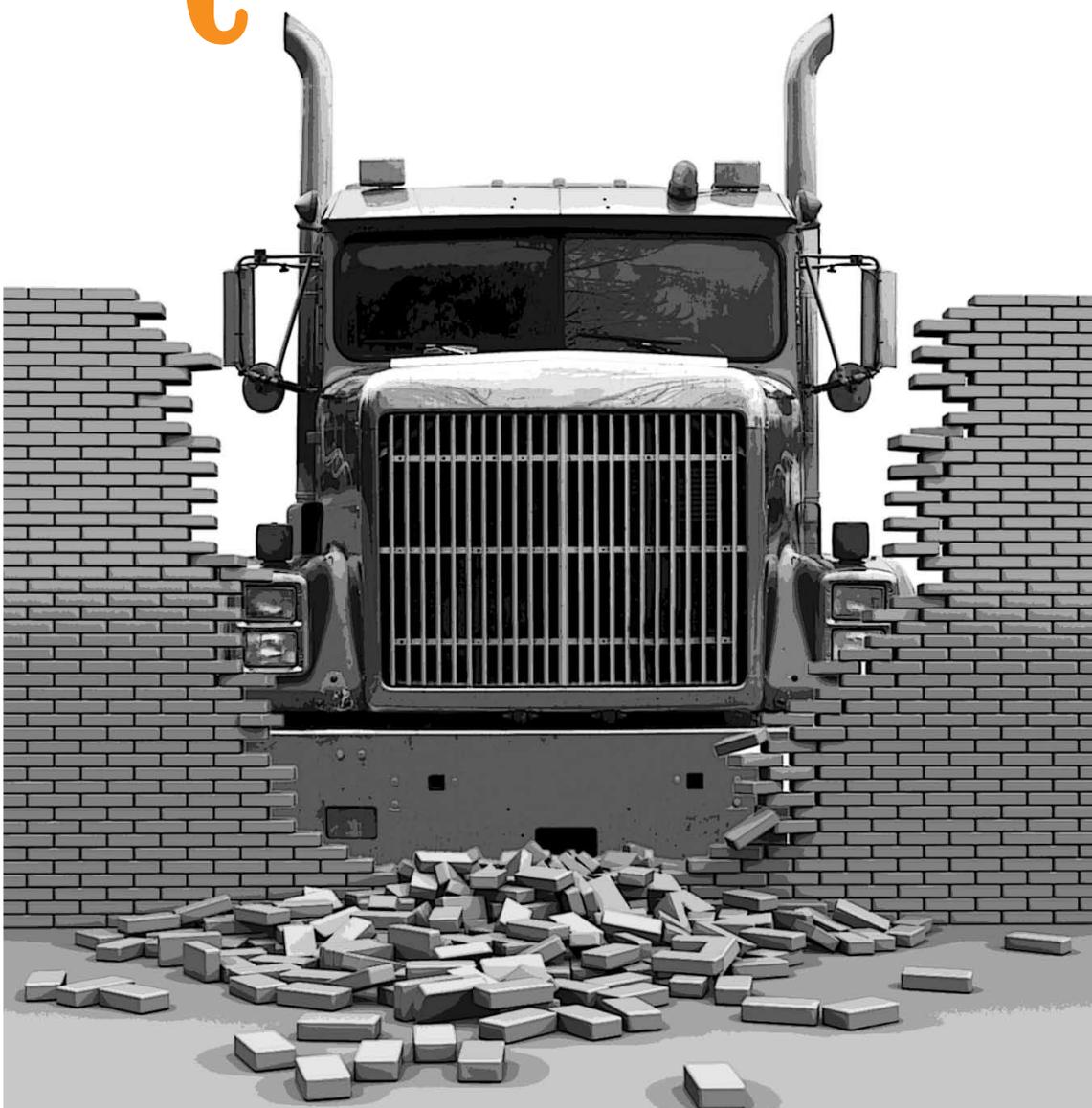
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Lawyers and Community  
Organizers Collaborating  
to Save Homes



# EMPLOYMENT

ONE MODEL FOR BREAKING DOWN BARRIERS



Sargent Shriver National Center on Poverty Law

for preliminary injunction, which we should have obtained quickly following the temporary restraining order, was difficult for the plaintiffs.

Nevertheless, four families became first-time cooperative homeowners, and four more are now renting their homes with their vouchers. The litigation was critical to sustaining the tenants' hope of keeping their homes. Also paramount to the success of the purchase were the involvement of a transactional attorney who was knowledgeable about low-income tenant purchases, flexible funding sources, and a pool of tenant educators to support the contentious purchase.

This case demonstrates that collaboration not only among litigators from different legal aid organizations but also with transactional counsel yields maximum benefits for low-income tenants.

### **Authors' Acknowledgments**

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## **Jury Awards Cook \$84,250 for Unpaid Overtime and Retaliation**

For almost ten years, Jose Lopez worked as a cook for a chain of restaurants operating in Mission, Texas, under the name of Danny's Mexican Restaurant. By all accounts, including testimony from the owners of Danny's, Lopez was a hard worker, a valued employee, and a good cook. Lopez regularly worked more than forty hours per week, thus entitling him to overtime pay equal to one and one-half his regular rate of pay under the federal minimum wage and overtime law called the Fair Labor Standards Act (29 U.S.C. §§ 201 *et seq.*). Danny's did not pay Lopez overtime, and Lopez never complained because he did not know about the law. That all changed in June 2006 when, after a routine investigation by the U.S. Department of Labor, Lopez learned that he was entitled to overtime pay.

After its investigation, the Labor Department concluded that Danny's owed Lopez back wages for work performed up to the time of its investigation. Shortly after the investigation and after requesting that his future overtime hours be properly recorded and paid, Lopez's employment with Danny's ended. The reasons for the termination were hotly contested: Lopez claimed that his employment ended because of Danny's continued refusal to pay overtime for future work, and Danny's claimed that Lopez's employment ended because Danny's had told Lopez that, due to the Labor Department's investigation, Danny's could no longer pay Lopez part of his wages in cash.

The Labor Department attempted to settle Lopez's overtime claim but failed. About a year after the investigation, Texas RioGrande Legal Aid took on Lopez's cause, and, after a one-day jury trial, the jury awarded him \$84,250 (*Lopez v. Ramirez*, No. M-07-186m (S.D. Tex. Oct. 16, 2008) (jury verdict)).

### **Fair Labor Standards Act**

The Fair Labor Standards Act is a product of the Great Depression. It protects workers by setting a minimum wage and establishing an overtime system. Congress enacted the Act in 1938 in order to "give specific minimum protections to individual workers and to ensure that each employee covered by the Act would receive [a] fair day's pay for a fair day's work and would be protected from the evil of overwork as well as underpay" (*Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728, 739 (1981)). Congress intended not only to establish minimum protections for workers but also to have the time-and-a-half-for-overtime provision be an incentive to get employers to create more jobs in order to decrease unemployment. The Act was also meant to create a standard floor for wages across the nation so that businesses engaged in interstate commerce could compete fairly.

More than seventy years later, Fair Labor Standards Act lawsuits are now among the fastest-growing type of civil litigation filed in federal court. The Act provides a private right of action for the minimum-wage, overtime, and retaliation provisions (there are child labor and record-keeping provisions, too) and provides for the award of unpaid wages and an equal amount of liquidated damages. The current wave of such lawsuits is due partly to the realization by some private plaintiff's lawyers that even small claims for unpaid wages under the Act, with

its statutory attorney-fee provision and collective action procedures (which are less stringent than class action procedures) can be very lucrative. Yet, while more private plaintiff's lawyers are accepting such cases, most low-wage workers with claims for unpaid minimum and overtime wages under the Act are unable to find legal representation and thus do not recover their unpaid wages. Historically employment cases have not been a significant priority for most legal aid offices. However, the need for private enforcement of rights under the Act has never been greater. Wages are being driven down, and working conditions are worsening in many low-wage sectors.

The broad goals articulated by Congress in enacting the Fair Labor Standards Act can be highlighted in front of juries to communicate the importance of enforcing the Act in a way people understand. The Lopez case exemplifies how this strategy worked.

### Factual Background

Lopez worked as a cook at Danny's from 1997 until August 2006. Lopez regularly worked between fifty-eight and seventy-four hours per week and was paid \$7 per hour. Lopez and the other employees who worked more than forty hours per week were required to use two time cards to record their hours each week: the first time card for recording up to the first forty hours of work, and the second time card for the hours over forty. Lopez was paid \$275 each week by check and an additional amount in cash. The cash amount was compensation for the hours over forty that were recorded on the second time card. Danny's routinely destroyed all of its employee time cards and payroll information.

In June 2006 the Labor Department routinely investigated Danny's pay practices. Lopez participated in the investigation and learned that he was entitled to overtime pay. After the Labor Department investigator left, Lopez complained repeatedly to his employers about their failure to pay him the required overtime pay. Danny's refused to pay Lopez the required overtime and told him that if he insisted on demanding overtime pay, there would be no more work for him.

Lopez filed a claim for unemployment benefits with the Texas Workforce Commission. The commission found that Lopez had quit his job for good cause related to his work because Danny's refused to pay him overtime pay. The commission awarded Lopez unemployment benefits.

After Lopez was discharged, the Labor Department concluded that Danny's had violated Lopez's and two other employees' rights under the Fair Labor Standards Act by failing to pay them overtime pay. Because Danny's had destroyed all of its time and pay records, the Labor Department investigator based his calculations of the amount of wages owed on statements taken from Danny's and the employees. Based on those statements, the Labor Department determined that Lopez was owed \$5,500 in unpaid overtime for the two years prior to the investigation. Lopez declined the Labor Department-supervised settlement because he disputed the amount of hours that the Labor Department calculated he worked.

### Prelitigation Investigation

The statute of limitations under the Fair Labor Standards Act is generally two years but is extended to three years for willful violations of the Act (29 U.S.C. § 255(a)). The limitations period begins to run separately for each workweek on the date wages are due for that workweek. Lopez spent a year trying to find a private attorney but did not obtain legal counsel until he came to Texas RioGrande Legal Aid. During the year he spent looking for a lawyer to file his case, he lost one year's worth of unpaid wages and an equal amount in liquidated damages. The prelitigation investigation was limited in order to preserve his claims, some of which were disappearing each week his suit went unfiled. Under the open records act, Legal Aid requested, from the Labor Department, copies of documents related to investigations of Danny's; from the Texas Workforce Commission, copies of any wage-and-hour complaints made against Danny's; and, from the commission, Lopez's complete unemployment benefits file. The records requests revealed that another former employee had complained to the commission about the failure of Danny's to pay wages, including overtime, and Danny's had been cited for a gross intentional violation of state law. Lopez's unemployment file also has an admission by Danny's under oath that Lopez was paid at his regular hourly rate of pay for his overtime hours.

### Legal Claims

Lopez sued Danny's and its owners in federal court in McAllen, Texas. He alleged that violations by Danny's of the Fair Labor Standards Act were willful and sought his unpaid overtime wages going back three years from the filing of the lawsuit. A violation is willful if the employer knew or showed reckless disregard for whether its conduct was prohibited by the Act (*McLaughlin v. Richland Shoe Company*, 486 U.S. 128, 133 (1988)). Lopez also sought liquidated damages in an amount equal to his unpaid wages. Under the Act, once a violation is proven, the award of liquidated damages is mandatory unless the employer shows that it both acted in good faith and had reasonable grounds to believe its actions were not in violation of the Act (29 U.S.C. § 260; *Doty v. Elias*, 733 F.2d 720, 725 (10th Cir. 1984)).

Lopez also alleged that he was unlawfully discharged after he complained to Danny's about its failure to pay him overtime, in violation of 29 U.S.C. § 215(a)(3). The Fair Labor Standards Act provides that an employer who unlawfully retaliates against an employee shall be liable for "such legal or equitable relief as may be appropriate, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages" (29 U.S.C. § 216(b)). For retaliation by Danny's, Lopez sought back pay, an equal amount of liquidated damages, and mental-anguish damages. The U.S. Supreme Court has not addressed the availability of compensatory damages under the Act. Nonetheless, every circuit (the Sixth, Seventh, Eighth, and Ninth Circuits) to address the issue has allowed compensatory damages (including mental-anguish damages) in the context of a retaliation claim under the Act (*Moore v. Freeman*, 355 F.3d 558, 563-64 (6th Cir. 2004); *Travis v. Gary Community Health Center Incorporated*, 921 F.2d 108, 111-12 (7th Cir. 1990); *Broadus v. O.K. Industries Incorpor-*

rated, 238 F.3d 990, 992 (8th Cir. 2001); *Lambert v. Ackerley*, 180 F.3d 997, 1011 (9th Cir. 1999)).

## Trial

Discovery yielded few documents since Danny's had prematurely destroyed all of its wage-and-hour records. Remarkably the defendants had no records identifying any current or former employees or showing dates of employment, hours worked, amounts paid, or rate of pay. The only contemporaneous records Danny's produced for Lopez were three time cards and three checks from after the Labor Department investigation. The few records produced by Danny's did not show a rate of pay or the hours worked each week.

Danny's did not dispute that Lopez was owed overtime, but Danny's contended that he was owed much less than what was claimed in the lawsuit. Danny's contended that Lopez worked only an average of forty-eight hours per week. Danny's also disputed the method of pay; that is, Danny's claimed that Lopez was paid not on an hourly basis but on a salary basis by means of cash and check and that these amounts were meant to compensate him for forty-eight hours of work per week.

In a Fair Labor Standards Act case the employee bears the burden of proving that he was not properly paid and for showing the amount of the underpayment (*Anderson v. Mount Clemens Pottery Company*, 328 U.S. 680, 687–88 (1946)). Danny's duty under the Act, however, is to maintain most wage-and-hour records for three years (29 U.S.C. § 211(c); 29 C.F.R. § 516.5). Where the employer's records are incomplete or inaccurate, courts employ the burden-shifting scheme established in *Anderson*. When the employer's records are not complete and accurate, the employee may carry his initial burden with a reasonable estimate of the hours worked and the pay received. This evidence may be anecdotal, imprecise, and even inaccurate. The burden then shifts to the employer to present evidence of the precise amount of work performed or evidence to negate the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court awards damages to the employee even though they may be only approximate.

At trial the time cards produced by Danny's and the defendants' own testimony corroborated Lopez's testimony about his estimate of the number of hours he worked each week. The defendants failed to produce precise evidence of the amount of hours that Lopez worked. They also failed to explain adequately why Lopez's estimate was unreasonable other than to opine on the impossibility for anyone to work the number of hours Lopez claimed he worked.

To prove the retaliation claim, we had first to make a prima facie case that Lopez engaged in protected activity under the Fair Labor Standards Act, that he was subject to an adverse employment action, and that there was a causal connection between the protected activity and the adverse employment action (*Kanida v. Gulf Coast Medical Personnel Limited Liability Partnership*, 363 F.3d 568, 577 (5th Cir. 2004); *McDonnell Douglas v. Green*, 411 U.S. 792, 802–4 (1993)). The defendants claimed that Lopez had voluntarily quit his job because they refused to continue to pay him part of his wages in cash. They claimed that they paid Lopez partly in cash in order to help Lopez hide part of his earnings and remain qualified for

social security disability benefits, which Lopez received for his daughter with Down syndrome. They claimed that they had followed the Labor Department's instructions and had started paying Lopez his entire weekly wages by check after the investigation. According to the defendants, once they started paying him all of his wages by check, Lopez quit.

However, the defendants admitted that they still paid about half of their employees in cash because those employees were undocumented. Defense counsel focused on Lopez's previous statements to the state unemployment board that he had quit his job. However, Lopez had told the unemployment board that the reason he quit was that Danny's refused to pay him overtime. We argued alternatively that Lopez was constructively discharged following his complaints about overtime pay. To help make his case for constructive discharge, we inserted into the jury instructions a summary of a district court's finding in a similar Fair Labor Standards Act retaliation case that involved a constructive discharge (*Ellis v. Yum!Brands Incorporated*, 556 F. Supp. 2d 677, 683 (W.D. Ky. 2008) (constructive discharge was found where the plaintiff was told to accept unjust working conditions, resign, or be terminated)).

In the closing statement we conveyed the importance of the case by highlighting the broad purposes of the Fair Labor Standards Act: to protect workers and law-abiding businesses and promote the health of the economy. We argued that defendants' failure to pay overtime was not fair to other businesses abiding by the law and that it can force other businesses to cheat in order to remain competitive. We emphasized that the overtime laws were meant to create jobs and that violating the overtime laws was detrimental to the economy. These arguments were targeted at members of the jury who might not have sympathized with Lopez or who questioned the significance of his claims.

## Jury Verdict

The jury returned with a verdict finding that the defendants willfully failed to pay Lopez overtime and retaliated against him for demanding that he be paid properly. The jury awarded Lopez \$84,520: \$19,000 for three years of unpaid overtime wages, \$23,260 for back pay as a result of the retaliation, and equal amounts in liquidated damages. Lopez had asked for a small amount of mental-anguish damages but did not receive any.

To have a larger impact, the verdict was publicized in English- and Spanish-language media. The defendants in the case own and operate four restaurants and employ approximately fifty employees.

## Practice Tips

This case was relatively straightforward because it involved a single plaintiff who had a long, stable period of employment with a single employer. Nonetheless, there were some problems proving a violation of the Fair Labor Standards Act and damages because Danny's failed to keep accurate records of the hours worked and the wages paid to Lopez. This problem was exacerbated because there was conflicting testimony about the hours worked by Lopez each week, the wages paid to Lopez each week, and about the reasons Lopez's employ-

ment at Danny's ended. In a case similar to this one where an employer has not complied with the record-keeping provisions of the Act, this is what you can try to do to increase your chance of winning at trial:

- After informing the jury in the jury charge about the employee's initial burden to prove a violation of the Fair Labor Standards Act, you need to inform the jury that once an employee makes this initial showing, the employer cannot complain that a damage request is not as precise as it would be if the employer had kept proper records. Otherwise this would give an employer an incentive to keep inaccurate records. For those members of the jury who are more probusiness, you can also point out that allowing this defendant to cheat is unfair to those businesses trying to comply with the law. This is true even in a case such as this in which an employer tries to label itself as a small, unsophisticated business that cannot be expected to comply with the law because you can point out that keeping a record of hours worked by and wages paid to an employee is not overly onerous. In this case, when the owners of Danny's argued that they did not have the space to keep stacks and stacks of time cards, we pointed out that if Danny's had kept one time card per week, the stack would really not have been that large.
- You can try to explain why the reasons offered by the defendant for not keeping accurate records do not make sense. For example, in the Lopez case, Danny's argued that Lopez, who had a disabled child, asked to be paid part of his wages in cash so that he would not have to report his total earnings and therefore he could qualify for income-based disability benefits for his child. Lopez, however, testified that he never made this request, that Danny's had implemented this pay system without explanation, and that the pay system was intended to allow Danny's to evade compliance with basic labor laws. The defendants claimed that they learned of their duty to keep accurate records only after the Labor Department investigation and that after learning of this duty they told Lopez that they would no longer pay him in cash. Danny's also argued that Lopez quit because Danny's refused to continue to pay part of his wages in cash. Thus Danny's claimed that it should not be penalized for failing to keep accurate records because this failure was inadvertent and because not keeping records was at Lopez's request. We were able to show that this explanation made no sense: (1) based on his family size and the income paid to Lopez by check, the cash payments did not trigger a reduction in the disability benefits paid to him; (2) the Labor Department does not prohibit the payment of cash wages but rather requires only that accurate records be kept; and (3) Danny's employed a number of workers who were not authorized to work in the United States and who were still being paid in cash. We also had a former employee testify that Danny's failure to keep accurate records was a normal business practice to avoid having to pay overtime. This combination of factors allowed the jury to conclude that Danny's set up this pay system for its own benefit.

■ ■ ■

This case is significant: First, a jury found that the failure by Danny's to pay overtime was a willful violation of the Fair Labor Standards Act, thus triggering the three-year statute of limitations instead of the two-year limitations normally applied to violations of the Act. Second, despite Lopez having stated again and again—for example at an unemployment compensation hearing—that he quit, a jury found that Lopez was constructively discharged. The finding that Lopez did not quit entitled him to lost wages and liquidated damages. These damages mattered because they were equal to the amounts of money Lopez should have earned between the date his employment ended and the date of trial. Even though Lopez found another job relatively quickly, he earned much less than he had earned at Danny's.

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## Domestic Violence Survivor Achieves Policy Changes at Michigan Management Company

In recent years Congress and a small number of states have begun to recognize and codify housing rights for domestic violence victims. However, most tenants in the United States are not covered by laws or policies that expressly prohibit eviction based on violence perpetrated against them. The case of Tanica Lewis, a domestic violence survivor, illustrates how fair housing laws can be used to create new policies that overcome these statutory gaps. The settlement of her case compelled the adoption of a housing policy that incorporates protections beyond those in federal and state law and that affirmatively supports housing stability for victims of violence.

### Domestic Violence and Homelessness

Domestic violence leads to homelessness. In 2008 twenty-two of twenty-five surveyed U.S. cities reported that approximately 15 percent of homeless persons were victims of domestic violence.<sup>1</sup> Preserving rental opportunities for domestic violence survivors is especially crucial because women living in rental housing experience intimate partner violence at three times the rate of women who own their homes.<sup>2</sup> Victims of violence

<sup>1</sup>U.S. Conference of Mayors, *Hunger and Homelessness Survey: A Status Report on Hunger and Homelessness in America's Cities: A 25-City Survey 18* (2008), [http://usmayors.org/pressreleases/documents/hungerhomelessnessreport\\_121208.pdf](http://usmayors.org/pressreleases/documents/hungerhomelessnessreport_121208.pdf).

<sup>2</sup>Callie Marie Rennison & Sarah Welchans, U.S. Department of Justice, Bureau of Justice Statistics Special Report: *Intimate Partner Violence 5* (2000), [www.ojp.usdoj.gov/bjs/pub/pdf/ipv.pdf](http://www.ojp.usdoj.gov/bjs/pub/pdf/ipv.pdf).

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