No. 04-16688

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, DEBORAH GUNTER, KAREN WILLIAMSON, CHRISTINE KWAPNOSKI, and EDITH ARANA,
Plaintiffs-Appellees,

v.

WAL-MART STORES, INC.,
Defendant-Appellant.

On Appeal From The United States District Court
for the Northern District of California
Honorable Martin J. Jenkins, Judge Presiding
D.C. No. C01-02252

BRIEF *AMICUS CURIAE* OF AARP IN SUPPORT OF PLAINTIFFS-APPELLEES OPPOSING PETITION FOR REHEARING *EN BANC*

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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) (1993) of the Internal Revenue Code and is exempt from income tax. AARP is also organized and operated as a non-profit corporation pursuant to the provisions of Title 29 of chapter 6 of the District of Columbia Code 1951.

Other legal entities related to *amicus curiae* AARP include AARP FOUNDATION, AARP SERVICES, INC., LEGAL COUNSEL FOR THE ELDERLY, AARP FINANCIAL, AARP GLOBAL NETWORK and FOCALYST.

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INTEREST OF *AMICUS CURIAE*

AARP is a nonprofit, nonpartisan membership organization of more than thirty-eight million people age 50 or older that is dedicated to addressing the needs and interests of older Americans. AARP supports the rights of older workers and public policies designed to protect their rights and to preserve the legal means to enforce them.

More than half of AARP's members remain active in the work force and most are protected by federal laws prohibiting employment discrimination, such as Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act (ADEA), which was modeled on Title VII. Consequently, the proper interpretation and application of these statutes, especially in the context of class or collective actions, are of paramount importance to the millions of workers, including older workers, who rely on them to root out, remedy, and deter invidious bias in the workplace. The availability of money damages in the form of class-wide awards of back pay and punitive damages is an important element in Congress' remedial and deterrent scheme embodied in these statutes. In this case, which involves the largest certified class in history, the panel correctly rejected Wal-Mart's assertion, renewed in its Petition for Rehearing *En Banc*, that due process requires individualized hearings to determine the relief available to each class member, a requirement which would not only completely undermine the

purpose of a class action, but also eviscerate the enforcement system designed by Congress to deter, remedy, and eventually eliminate employment discrimination. Contrary to Wal-Mart's claims, the panel's holding that "substantive law does not mandate individualized hearings and that Wal-Mart's Constitutional rights will not be violated if statistical formulas are employed to fashion the appropriate [class-wide] remedy"[1/]is unassailable. The panel's further conclusion that "the district court did not abuse its discretion when it found that the class size does not deprive Wal-Mart of its opportunity to present a defense"[2/] also is undoubtedly correct. Accordingly, AARP files this brief *amicus curiae* to urge this Court to deny Wal-Mart's Petition for Rehearing *En Banc*.

I. INTRODUCTION

When it enacted Title VII, "the Congress took care to arm the courts with full equitable powers" and, in so doing, imposed upon them the "duty to render a decree which [would] *so far as possible* eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975) (emphasis added). Wal-Mart has proffered no

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[1/] *Dukes, et al. v. Wal-Mart Stores, Inc.*, 474 F.3d 1214, 1242 (9th Cir. 2007).

[2/] *Id*. at 1242.

sufficient reason that the full Court should re-examine the panel's conclusion that the district court's certification order here has complied with this mandate.

The Supreme Court has observed that "the primary objective" of Title VII is the "prophylactic one" of "'achiev[ing] equality of employment opportunities and remov[ing] barriers that have operated in the past to favor an identifiable group of white [male] employees over other employees.'" *Albemarle*, 422 U.S. at 417, (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971)). As the Court has explained, "back pay has an obvious connection with that purpose." *Id*. On the other hand, "[t]he purpose of punitive damages … is not to compensate, but to punish." *Philip Morris USA v. Williams*, 127 S.Ct. 1057, 1068 (2007) (Ginsburg, J., dissenting). They "are a sanction for the public harm the defendant's conduct has caused or threatened. There is little difference between the justification for a criminal sanction, such as a fine or a term of imprisonment, and an award of punitive damages." *Philip Morris*, 127 S.Ct. at 1066 (Stevens, J., dissenting).

By punishing an employer's policies and practices exhibiting "malice [or] reckless indifference to the federally protected rights" of workers, 42 U.S.C. § 1981a(b)(1), an award of punitive damages supports the salutary purpose of Title VII. When discrimination is proved and malice or reckless indifference is shown,

"[i]f employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality." *Albemarle*, 422 U.S. at 417-18. This conclusion applies with equal force in class as well as individual Title VII actions. If this Court were to grant Wal-Mart's Petition based on its legally unsupportable due process challenge to the panel's decision affirming the district court's order certifying the class, such a ruling would both undermine the purpose of Title VII and eviscerate the deterrent effect of class actions.

II. THE PANEL CORRECTLY HELD THAT DUE PROCESS DOES NOT REQUIRE INDIVIDUALIZED REMEDY HEARINGS.

The panel correctly rejected Wal-Mart's assertion that *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977) *requires* individualized hearings to determine remedies in Title VII pattern or practice cases in order to afford defendants due process. *Dukes v.Wal-Mart, Inc.*, 474 F.3d 1214, 1238 (9th Cir. 2007). No court has so held and thus, the supposed inter- and/or intra-circuit conflict proffered by Wal-Mart on this issue as a basis for granting its Petition is non-existent.

As the panel pointed out, the teaching of *Teamsters* is that while at the remedy stage of a pattern or practice case the district court "must *usually* conduct additional proceedings … to determine the scope of individual relief," 431 U.S. at 361 (emphasis supplied), the court "has the discretion to be flexible and to '*fashion*

such relief as the particular circumstances of a case may require to effect restitution.'" *Dukes*, 474 F.3d at 1238 (quoting *Teamsters*, 431 U.S. at 364) (internal citation and quotation marks omitted) (emphasis supplied). Further, the panel pointed out that this Court has held that "where [as here] the employer's conduct would reduce efforts to reconstruct individually what would have happened in the absence of discrimination to a 'quagmire of hypothetical judgments,'" *Id*. at 1239, (quoting *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 260 (5th Cir. 1974)), "class-wide relief is appropriate." *Domingo v. New England Fish Co.*, 727 F.2d 1429, 1444 (9th Cir. 1984). Thus, due process does *not* require individualized hearings. Indeed, under the facts of this case they are a wholly inappropriate substitute for class-wide relief.

Similarly unavailing is Wal-Mart's reliance on *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1990) – a single-plaintiff Title VII "mixed motives" sex discrimination case in which there was no majority opinion – for the proposition that in a class action seeking injunctive as well as monetary relief Title VII affords employer-defendants a "right," Petition for Rehearing *En Banc* (hereinafter "Petition") at 13, to individualized damages hearings. Indeed, in the eighteen years since the *Price Waterhouse* decision, no court has construed the language cited by Wal-Mart to establish such a "right." Petition at 13, (citing 490 U.S. at 244 n. 10,

"we have … held that Title VII does not authorize affirmative relief for individuals as to whom, the employer shows, the existence of systemic discrimination had no effect"). Further, in *Franks v. Bowman Transp. Co.*, 424 U.S. 747 , 772 (1976), which the *Price Waterhouse* plurality cited for the aforementioned proposition, the Supreme Court concluded that "[g]eneralizations concerning such individually applicable evidence cannot serve as a justification for the denial of relief to the entire class." *Id*. at 772.

Similarly misplaced is Wal-Mart's reliance on this Court's decision in *Fadhl v. San Francisco*, 741 F.2d 1163 (9th Cir. 1984), an individual sex discrimination case that had "aspects both of rejecting an application for permanent employment and of outright termination," 741 F.2d at 1167, and which this Court simply remanded for further fact-finding. In the context of a class action the *Fadhl* language quoted by Wal-Mart – *i.e.*, "that an award of back pay … is appropriate only if the discrimination is a but for cause of the disputed employment action …, 741 F.2d at 1166 – should be read to support not individualized damages hearings, but class-wide relief.[3/]

Additionally, the recent decision of the U.S. Supreme Court in *Philip Morris USA*, 127 S.Ct. at 1062, in which the Court concluded that any defendant

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[3/] Of course, such relief will be warranted only if, in the first instance, the district court finds the Wal-Mart engaged in a pattern or practice of discrimination.

threatened with punitive damages must have "an opportunity to present every available defense" does not support Wal-Mart's claim that it is entitled to individualized hearings. Rather, in context, this language points in a different direction altogether, and one that does not support Wal-Mart's claims. The opinion in *Philip Morris* clearly establishes that the Court's "every available defense" language is intended merely to buttress the Court's holding that the Due Process Clause forbids states from using punitive damages "to punish a defendant for injury that it inflicts upon nonparties…those who are essentially strangers to the litigation." *Id*. at 1063. Since punitive damages may legitimately fall on a defendant for injury it inflicts on a class of plaintiffs who, of course, are all parties to the litigation, the Due Process Clause provides no barrier to class-wide relief.

Wal-Mart's reliance on still other cases that are far off-the-mark shows that it is reduced to grasping at straws in a desperate effort to overturn the panel's sound decision. For example, Wal-Mart asserts incorrectly that the Supreme Court precluded non-individualized punitive damages awards to class members when it held in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003), that such awards "must have a nexus to the specific harm suffered by the plaintiff." As pointed out by the panel, however, unlike this case, *State Farm* "involved an action brought on behalf of *one* individual under *state* law." *Dukes*, 474 F.3d at 1242.

Moreover, the context surrounding Wal-Mart's quotation suggests that the required "nexus" between punitive damages and the *Campbell* plaintiffs is geographical, not legal. Indeed, the Court's very next sentence makes clear that "nexus" refers to the fact that a jury "may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." *Id.* Since this requirement stands on principles of federalism, the due process concerns at issue in *Campbell* arise only when a defendant is saddled with punitive damages in one State based on its otherwise legal conduct in another. This kind of nexus requirement is therefore wholly inapplicable here, where a federal law, Title VII, uniformly governs Wal-Mart's actions in every state.

Finally, the due process concerns that caused this Court to conclude in *Beck v. Boeing Co.*, 60 Fed. Appx. 38, 39 (9th Cir. 2003), that the trial court's certification of a class for purposes of determining punitive damages was "premature," all are adequately addressed by safeguards and protections built in to the district court's carefully crafted certification order in this case. Indeed, the panel properly expressed confidence in the continued discretion of the district court, observing that "in the event that Wal-Mart faces a punitive damages award, the district court took – and presumably will continue to take – sufficient steps to

ensure that any award will comply with due process." *Dukes*, 474 F.3d at 1242. *See* Plaintiffs/Appellees' Opposition to Petition for Rehearing *En Banc* at 17.

CONCLUSION

The panel correctly concluded that, contrary to Wal-Mart's arguments, due process does not mandate individualized hearings to determine back pay and punitive damages if it is found to have engaged in a pattern or practice of sex discrimination. Since it is clear, as the panel concluded, that statistical methods may be applied to determine class-wide relief, rehearing would serve only one purpose, unconscionable delay. Wal-Mart's Petition should, therefore, be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B). Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(a)(7)(B)(iii), this brief includes 1559 words. See 9th Cir. R. 35-4(a); 9th Cir. R. 40-1(a).

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). This brief has been prepared in proportionally-spaced typeface using WordPerfect 12 in 14 Point type, Times New Roman font.

Dated: March 22, 2007

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CERTIFICATE OF SERVICE

I hereby certify that on March 22, 2007, an original and twenty-five copies of the foregoing Brief *Amicus Curiae* of AARP in Support of Plaintiffs-Appellees Opposing Petition For Rehearing *En Banc*, were sent via Federal Express service, to the Clerk of the Court for the Ninth Circuit and two copies to counsel listed below:

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