

No. 04-16688

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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

**BRIEF OF PUBLIC JUSTICE, PC, AS *AMICUS CURIAE* IN OPPOSITION
TO DEFENDANT-APPELLANT WAL-MART STORES, INC.'S
PETITION FOR REHEARING *EN BANC***

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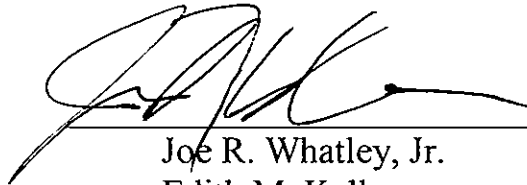
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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26-1 of the Federal Rules of Appellate Procedure, *Amicus Curiae* Public Justice, P.C., hereby states that it does not have any parent corporation, nor does it issue stock to the public, and that no publicly held company owns any of the stock of Public Justice.

March 26, 2007

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STATEMENT OF CONSENT
PURSUANT TO FED. R. APP. P. 29(a)

Public Justice has obtained the consent of all parties to file this *Amicus Curiae* brief in support of plaintiffs.

INTEREST OF *AMICUS CURIAE*

This brief is filed on behalf of Public Justice, P.C. (formerly Trial Lawyers for Public Justice, P.C.), a nationwide public interest law firm that specializes in precedent-setting and socially significant civil litigation and is dedicated to pursuing justice for the victims of corporate and governmental abuses. Public Justice prosecutes cases designed to advance consumers' and victims' rights, civil rights and civil liberties, occupational health and employees' rights, the preservation and improvement of the civil justice system, and the protection of the poor and the powerless.¹

Public Justice regularly represents consumers and employees in class actions, and our experience is that the class action device often represents the only meaningful way that individuals can vindicate important legal rights. Because some of the arguments advanced by Defendant and its *amici* in this case would, if adopted, undermine the class action device in important respects, Public Justice has a significant interest in the issues before this Court.²

¹ More information can be found at www.publicjustice.net.

² Public Justice also notes that the District Court, pursuant to its authority under *Molski v. Gleich*, 318 F.3d 937, 947-48 (9th Cir. 2003), provided for notice to the class and a right of class members to opt-out. No party raised the issue of the due process rights of the class before this Court, and in light of the notice and right to opt-out, no such issue can fairly be said to exist. Therefore, Public Justice will focus on the due process rights of the Defendant and demonstrate how those rights are not violated.

INTRODUCTION

Public Justice writes to express its position that the inclusion of punitive damages in the certification of this class does not violate the due process rights of the Defendant, Wal-Mart Stores, Inc. (“Defendant” or “Wal-Mart”) for the following reasons:

First, contrary to Defendant’s arguments, punitive damages will *not* be recovered by any class member who has not been harmed by Defendant’s illegal conduct;

Second, there is no need for individualized determinations of the relationship between the harm caused by Defendant to individual class members and the amount of any punitive damages awarded; and

Third, it is appropriate, when determining the proper amount of punitive damages, for the fact-finder to consider the potential or likely harm, as opposed to the actual harm, caused by Defendant to the plaintiff class.

Moreover, the question of whether any punitive damages award that might be granted in this case comports with due process is prematurely asked at this stage of the litigation. An appellate court can more ably make such an evaluation after an award is granted, with the benefit of a fully-developed record and the ability to examine the amount of the actual award in light of the facts as proven at trial.

ARGUMENT

I. Non-Victims of Defendant's Conduct Will Not Recover Punitive Damages Under the Procedure Approved by the District Court

Wal-Mart argues that the District Court established a procedure that allows non-victims to recover punitive damages. That is simply wrong. The District Court ruled that any award of punitive damages would be limited to plaintiffs who were “personally harmed” by Wal-Mart’s conduct:

First, courts can ensure that any award of punitive damages to the class is based solely on evidence of conduct that was directed toward the class. Second, as Plaintiffs propose here, courts can limit recovery of any punitive damages to those class members who actually recover an award of lost pay, and thus can demonstrate that they were in fact personally harmed by the defendant's conduct. Finally, courts also can ensure that any punitive damage award is allocated among the lost pay class in reasonable proportion to individual lost pay awards. Accordingly, this Court is satisfied that procedures exist that permit Plaintiffs' punitive damage claim to be managed in a manner fully consistent with the principles of *State Farm*.

Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 172 (N.D. Cal. 2004)(“*Dukes I*”).

The majority of the Panel was satisfied with this procedure when it affirmed the inclusion of punitive damages in the class certification. *Dukes v. Wal-Mart, Inc.*, 474 F.3d 1214, 1236-38 (9th Cir. 2007)(“*Dukes III*”). Therefore, the assertion that non-victims will recover punitive damages under the District Court’s decision – a premise that forms the basis of Wal-Mart’s entire argument – is a figment of Wal-Mart’s imagination.

II. Due Process Does Not Require Individualized Consideration of Punitive Damages with Respect to Each Class Member

Wal-Mart and its *amici* ask this Court to find that there must be individualized determinations with respect to each class member before there can be a punitive damage award with respect to the class. No court of which Public Justice is aware has held or even suggested that this is the law.

First, the cases relied upon by Defendant, including *Philip Morris USA v. Williams*, 127 S.Ct. 1057 (2007), are individual cases, comparing the award of punitive damages to the potential harm to the individual plaintiff. Here, the appropriate comparison is to the potential harm to the plaintiff class.

Moreover, Wal-Mart's focus on harm to individual class members is misplaced, as punitive damages address the degree of wrongful conduct of the defendant, not the degree of harm to any individual caused by that conduct. As the Supreme Court has repeatedly recognized, compensatory damages and punitive damages serve different purposes: while compensatory damages "are intended to redress the concrete loss that the plaintiff has suffered," punitive damages "serve a broader function; they are aimed at deterrence and retribution." *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 416, (2003) (citing *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001); *Kolstad v. American Dental Ass'n*, 527 U.S. 526 (1999) (punitive damages focus on the conduct of the defendant and the need to deter future corporate misconduct). The

questions of individual injury and punitive damages are thus subject to separate, very different analyses: “A jury’s assessment of the extent of a plaintiff’s injury is essentially a factual determination, whereas its imposition of punitive damages is an expression of its moral condemnation.” *Cooper Industries*, 532 U.S. at 432. Indeed, the fact that punitive damages may be tied to the *potential* harm that a defendant’s conduct *may* cause underscores the distinction between compensatory and punitive damages.

Moreover, while there must be a “nexus” between the punitive damages and the actual or potential harm that Defendant’s conduct caused or may cause the plaintiff class under *Philip Morris*, “the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of *the defendant’s conduct*.” *State Farm*, 538 U.S. 408 (emphasis added)(citing *BMW, Inc. v. Gore*, 517 U.S. 559, 575 (1996)). Accordingly, Defendant’s argument that an individualized inquiry into the harm suffered by each class member must precede a determination of punitive damages is unavailing.

Defendant’s reliance on *Philip Morris* and *State Farm* for this argument is misplaced. Neither of these opinions supports a conclusion that a punitive damages award to a class requires an individualized inquiry into the actual harm suffered by each class member. In *Philip Morris*, the Supreme Court concluded that, in an *individual* action brought by the estate of a smoker against a cigarette

manufacturer, the jury had improperly based its punitive damages award, not on the actual or potential harm to the plaintiff, but on the potential and actual harm to thousands of other smokers not a party to the action. It was this punishment of conduct directed at strangers to the litigation, and against whom the defendant had not had a chance to defend itself, that was problematic for the *Philip Morris* Court. In this *class action*, the District Court has noted that “courts can ensure that any award of punitive damages to the class is based solely on evidence of conduct that was directed *toward the class*.” *Dukes I* at 172. As Defendant will have ample opportunity to defend itself against the claims of the class, the concern raised in *Philip Morris* does not pertain. The District Court’s other precautions – that only “those class members who actually recover an award of lost pay, and thus can demonstrate that they were in fact personally harmed by the defendant’s conduct” will be eligible for a share of punitive damages, and that the allocation of punitive damages to individual class members will be “in reasonable proportion to individual lost pay awards,” *id.*, further demonstrate that, unlike in *Philip Morris*, any punitive damages award here will relate solely to conduct causing harm and potential harm to parties to the action, rather than “harm caused strangers.” 127 S. Ct. at 1064.

Similarly, in *State Farm*, another individual action, the Court's concern was that the jury had "awarded punitive damages to punish and deter conduct that bore no relation to the [plaintiffs'] harm." 538 U.S. at 422.

A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. *A defendant should be punished for the conduct that harmed the plaintiff*, not for being an unsavory individual or business.

Id. at 422-423 (emphasis added).³ The District Court's plan does not run afoul of this legal premise, as any punitive damages awarded here will address *only* the wrongful conduct that harms and threatens to harm the class – Defendant's discriminatory employment practices – and not any other wrongful conduct Defendant may engage in as part of its general business practices.

III. Permitting the Exemplary Damages Phase to Precede A Determination of Actual Losses Is Consistent With Prior Decisions in This and Other Circuits

The procedure established by the District Court is similar to the one approved by this Court in *Hilao v. Estate of Marcos*, 103 F.3d 767, 780-81 (9th Cir. 1996). There, this Court approved the district court's decision to allow the exemplary damages phase of the trial to precede the compensatory damages phase. 103 F.3d at 782. Likewise, in *Jenkins v. Raymark Industries, Inc.*, 782 F.2d 468,

³ While Wal-Mart's Amicus Equal Employment Advisory Council quotes *State Farm* as requiring that punitive damages be determined only after proof of liability to individual plaintiffs in a Title VII case (Letter Brief of Equal Employment Advisory Council at 4), the quoted language does not appear in that opinion, and indeed, *State Farm* dealt neither with a class action *nor* a Title VII case.

474-75 (5th Cir. 1986), the Fifth Circuit also affirmed a district court's plan for trial on punitive damages before actual damages in a class action suit. As these decisions make clear, allowing the punitive damages phase to precede a determination of actual losses is not an abuse of discretion, and does not violate due process.

As in *Hilao*, the liability stage of the litigation will provide a check on the punitive damages award that ensures that Defendant will be punished only for conduct that actually harmed class members. During that phase, the District Court will be able to determine back pay and front pay liability to the class. The District Court will then be able to review the jury's punitive damages award to determine whether it is excessive under *Gore*. See *Hilao*, 103 F.3d at 782.

Moreover, the law is clear that a jury may properly consider the "potential" or "likely" harm that may be caused by Defendant to the plaintiff class in determining an award of punitive damages, and that determination can be made by the jury without the benefit of any analysis of the actual harm to individual class members. See, e.g., *Philip Morris*, 127 S.Ct. at 1063 (it is proper to consider the "potential harm the defendant's conduct could have caused.") (emphasis in original); *State Farm*, 583 U.S. at 424 (same); see also *Hilao*, 103 F.3d at 780 (punitive damages depend in part upon "the harm likely to result from the defendant's conduct...") (quoting *TXO Production Corp. v. Alliance Resources*

Corp., 509 U.S. 443, 458 (1993)) (emphasis in original); *Simon II*, 407 F.3d at 128 (court should consider “*potential harm* to the plaintiff class”) (emphasis added).

For all of these reasons, Defendant’s objections to the District Court’s approved procedure are misplaced.⁴

IV. Any Evaluation of Due Process Relating to the Determination of Punitive Damages Should Be Conducted Post-Trial

In any event, Defendant’s due process arguments are premature for two important reasons. First, the District Court has stated that it retains the authority to revisit the issue of certification and to modify it “as circumstances require.” *Dukes I*, 222 F.R.D. at 187. Based on a voluminous record and rigorous analysis, the District Court has determined at this time that all of the requirements for consideration of a punitive damage award can be satisfied. If circumstances change, the District Court remains in the best position to make any such

⁴ The dissent criticized the procedure by which punitive damages would be determined by the jury because “there will never be an adjudication of compensatory damages,” and “the allocation of back and front pay will follow the jury determination of punitive damages.” *Dukes III*, 474 F.3d at 1248. But first, in Title VII cases, an award of punitive damages may be warranted, even where the jury does not award compensatory damages. *Cush-Crawford v. Adchem Corp.*, 271 F.3d 352, 357-59 (2d Cir. 2001); *Tisdale v. Fed. Express Corp.*, 415 F.3d 516, 534-35 (6th Cir. 2005). They can instead be tied to nominal or back pay damages. *Timm v. Progressive Steel Treating, Inc.*, 137 F.3d 1008, 1010 (7th Cir. 1998); *Hennessy v. Penril Datacomm Networks, Inc.*, 69 F.3d 1344, 1352 (7th Cir. 1995); *U.S. EEOC v. W&O, Inc.*, 213 F.3d 600, 615 (11th Cir. 2000). Moreover, there is no requirement that back pay be calculated *before* the jury determines the amount of punitive damages. *Corti v. Storage Technology Corp.*, 304 F.3d 336, 340 (4th Cir. 2002).

determination as the case proceeds, and indeed, the District Court has indicated it intends to continue considering this issue as the case continues to develop.

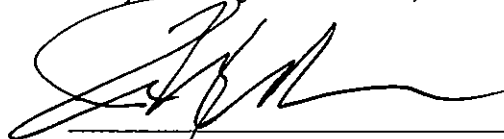
Moreover, as is demonstrated in all of the Supreme Court decisions addressing punitive damages and due process cited herein, the question of whether a punitive damages determination violates due process is much better addressed by an appellate court when it has a fully-developed record and can compare the punitive damages award to Defendant's wrongful conduct and the potential harm to a plaintiff class as demonstrated at trial.

CONCLUSION

For all of the foregoing reasons, as well as the reasons stated in Plaintiffs' Opposition to Defendant's Petition for Rehearing *En Banc*, the petition for rehearing with respect to the punitive damages issue should be denied.

March 26, 2007

Respectfully submitted,



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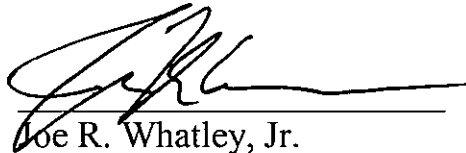
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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached *amicus* brief is proportionally spaced, has a typeface of 14 points or more and contains 2100 words or less.

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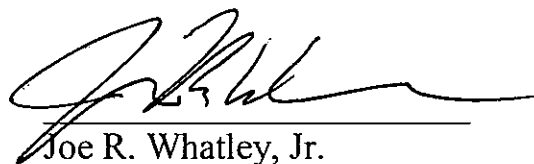
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