IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 04-16688 & 04-16720

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

Plaintiffs-Appellees/Cross-Appellants,

v.

WAL-MART STORES, INC.,

Defendant-Appellant/Cross-Appellee.

On Appeal from the United States District Court
for the Northern District of California

BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS ON REHEARING EN BANC

JAMES L. LEE
Depute General Counsel

VINCENT J. BLACKWOOD
Acting Associate General Counsel

CAROLYN L. WHEELER
Assistant General Counsel

BARBARA L. SLOAN
Attorney

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of General Counsel
131 M Street, N.E., 5th Floor
Washington, D.C. 20507
(202) 663-4721
FAX: (202 663-7090

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions, Statutes and Rules

Legislative History

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 04-16688 & 04-16720

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

Plaintiffs-Appellees/Cross-Appellants,

v.

WAL-MART STORES, INC.,

Defendant-Appellant/Cross-Appellee.

On Appeal from the United States District Court
for the Northern District of California

BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS ON REHEARING EN BANC

STATEMENT OF INTEREST

The Equal Employment Opportunity Commission is the agency charged by Congress with administering, interpreting and enforcing Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e et seq. ("Title VII"), and other federal employment discrimination statutes. In this appeal, defendant challenges the district court's holdings, upheld by the panel, that classwide punitive damages remain available and may be determined by a jury in Stage 1 of a Title VII pattern-or-practice case;

and that backpay may be determined without individualized hearings. Although the Commission's ability to bring an enforcement action alleging a pattern or practice of discrimination does not require class certification under Federal Rule 23, this Court's resolution of issues relating to punitive damages and backpay in class cases may directly affect the Commission's enforcement of Title VII, particularly its systemic litigation. We therefore offer our views to the Court.

STATEMENT OF ISSUES[1]

1. Whether classwide punitive damages questions can be resolved in Stage 1 of a bifurcated Title VII pattern-or-practice proceeding.

2. Whether, in appropriate cases, backpay may be determined without individualized hearings.

STATEMENT OF THE CASE

1. Nature of the Case and Course of Proceedings

This is an interlocutory appeal under Federal Rule of Civil Procedure 23(f), seeking review of an order granting in part and denying in part plaintiffs' motion for class certification under Federal Rule 23(b)(2). In 2001, six current or past female Wal-Mart employees brought suit under Title VII alleging that Wal-Mart engages in a pattern or practice of pay and promotion discrimination on the basis of gender. In particular, plaintiffs allege that, due largely to Wal-Mart's subjective

[1] The Commission takes no position on any other issue in this case.

decisionmaking practices, female employees are paid less and promoted into management positions more slowly (if at all) than similarly situated male employees. Plaintiffs challenge these practices under both disparate impact and disparate treatment/pattern-or-practice theories and seek injunctive and declaratory relief as well as backpay and punitive damages, though no compensatory damages. Dukes v. Wal-Mart Stores, 222 F.R.D. 137, 141 (N.D. Cal. 2004).

In 2003, plaintiffs moved to certify a class of "[a]ll women employed at any Wal-Mart domestic retail store at any time since December 26, 1998, who have been or may be subjected to Wal-Mart's challenged pay or management track promotion policies and practices." 222 F.R.D. at 141-42. To support the motion, plaintiffs proffered expert statistical evidence, largely in the form of regression analyses reported on a regional level, showing statistically significant disparities in pay and promotion between similarly situated male and female employees in each of Wal-Mart's 41 regions.[2] Id. at 154-55. In addition, plaintiffs proffered an

[2] Regarding pay, plaintiffs' statistical expert concluded that women working in Wal-Mart stores are paid less than men in every region, that pay disparities exist in most job categories, that the salary gap widens over time even for men and women hired into the same jobs at the same time, that women take longer to enter into management positions, and that the higher one looks in the organization, the lower the percentage of women. 222 F.R.D. at 155-57 (adding that total earnings paid to women ranged between 5 and 15 percent less than total earnings paid to similarly-situated men in each year of class period).

expert comparison of the percentage of women in management at Wal-Mart and 20 other "benchmark" companies and a sociological study indicating that the lack of women managers at Wal-Mart may result from gender stereotyping. Id. at 151-52. Finally, plaintiffs offered evidence of company policies and practices, including the extent of Home Office oversight of each store, and anecdotal evidence detailing individual experiences from class representatives and other potential class members. To address manageability concerns, plaintiffs recommended that the case be tried in bifurcated proceedings in which a jury would decide in Stage 1 whether there was a pattern or practice of discrimination; if so, whether Wal-Mart acted with malice or reckless disregard of the federally protected rights of the class; and, if so, what amount of punitive damages would be appropriate to punish and deter the conduct. Thereafter, the court would determine disparate-impact liability, as well as injunctive and declaratory relief. Further, plaintiffs suggested, each employee's injury and backpay, if any, would be determined in Stage 2 by computerized computations relying largely on information from Wal-Mart's detailed personnel databases, thus obviating any need for mini-trials. Only women

---

As for promotion, the expert found, for example, that it took women 4.38 years longer from date of hire to be promoted to assistant manager while men took 2.86 years, and it took women 10.12 years to reach store manager compared to only 8.64 years for men. Id. at 161.

found eligible for backpay through this procedure would share in any punitive damages award. See generally id. at 169-70, 175.

Wal-Mart opposed class certification. The company mainly argued that a nationwide class action was improper, and plaintiffs' statistical evidence unpersuasive, because the company's decisionmaking processes were subjective and decentralized. Under this view, discrimination, if any, was store- or even manager-specific. Wal-Mart's own expert disaggregated the statistical data into units containing only one store or, frequently, part of a store, and performed separate regressions on each unit — over 7500 regressions in all. Under this method, the expert found that few statistically significant disparities could be shown.[3] 222 F.R.D. at 173-74. Wal-Mart also argued that it was entitled to prove in face-to-face mini-trials with each potential class member that the company would have made the same decision without regard to discrimination; the company argued that this scenario would be impossible given the size of the potential class. Finally, Wal-Mart argued that liability for punitive damages could not be determined on a classwide basis because each class member must independently

[3] In his rebuttal report, plaintiffs' statistical expert duplicated Wal-Mart's expert's sub-unit analyses, reaggregated the data after weighting them to account for the size of the various data pools and found that, even using Wal-Mart's methods, men nationally earned slightly more than women and the result was statistically significant. Dukes v. Wal-Mart Stores, 222 F.R.D. 189, 195 (N.D. Cal. 2004) (decision on motion to strike expert reports).

prove that Wal-Mart acted with malice or reckless indifference to her federally protected rights and the amount of punitive damages, if any, she received must be calibrated to the particular harm she suffered. See, e.g., id. at 172.

2. The District Court's Decision

After extensive briefing and oral argument, the district court issued a lengthy decision granting in large part plaintiffs' motion to certify a class under Rule 23(b)(2). The court concluded that, although the class was large, the issues were "not novel," and plaintiffs' claims "were relatively narrow in scope." 222 F.R.D. at 142. Regarding the promotion claim, however, the court denied certification, "on grounds of unmanageability, with respect to Plaintiffs' promotion claims for backpay and punitive damages as to those class members for whom no objective applicant data is available." Id. at 143. Noting that Wal-Mart had only recently begun posting vacancies for entry-level management positions, having previously employed the "tap-on-the-shoulder" method, the court reasoned that interest in promotion could not be presumed and, given the potential size of the class, plaintiffs could not feasibly identify victims of any proven discrimination without objective applicant data. Id. at 182.

More generally, the district court found that class certification under Federal Rule of Civil Procedure 23(b)(2) was appropriate because plaintiffs' evidence adequately established that there were issues common to the class, that the claims

of the class representatives were typical, that they and their counsel would adequately represent the class, and that injunctive and declaratory relief would predominate over any individual relief awarded. Although it declined to choose between the parties' expert's statistical evidence (222 F.R.D. at 156-57). the court concluded that there was sufficient evidence of similar practices and interchange of employees to support, at this preliminary stage, plaintiffs' expert's decision to analyze data on a regional rather than a store or sub-store basis. Id. at 147, 157.

Further, the court found, class treatment would be manageable. The court rejected Wal-Mart's arguments that the claim for punitive damages would preclude class certification. 222 F.R.D. at 170-72. The court reasoned that, "since the purpose of punitive damages is not to compensate the victim but to punish and deter the defendant, a punitive damage claim focuses 'not on facts unique to each class member, but on the defendant's conduct toward the class as a whole.'" Id. (citations omitted). The court distinguished State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. 408 (2003), cited by defendant. The plaintiff in State Farm had sued its insurer under Utah law but, in assessing punitive damages, the jury was allowed also to consider conduct by the insurer that affected only persons from states where such conduct was legal; the Supreme Court held that this result "improperly punished the defendant for conduct that 'bore no relation to the [plaintiff's] harm.'" 222 F.R.D. at 172 (quoting State Farm, 538

U.S. at 423). In contrast, here, the court explained, it could ensure that "any award of punitive damages to the class is based solely on evidence of conduct that was directed toward the class." Id. Moreover, the court could "limit recovery of any punitive damages to those class members who actually recover an award of lost pay," thereby ensuring that "they were in fact personally harmed by the defendant's conduct," and could ensure that "any punitive damage award is allocated among the lost pay class in reasonable proportion to individual lost pay awards." Id.

The court also rejected Wal-Mart's argument that it was entitled to defend against the punitive damages claim on an individual basis in Stage 2 proceedings. 222 F.R.D. at 174-75. Rather, the claim would be addressed in Stage 1, where, assuming the jury found liability on the pattern-or-practice claims, plaintiffs would then be required to persuade the jury that "the pattern and practice of discrimination was undertaken maliciously or recklessly in the face of a perceived risk that defendant's actions would violate federal law." Id. If the jury found that punitive damages were appropriate, it would assess also what amount was necessary to punish and deter the conduct; that amount would then be divided among those persons identified as victims in Stage 2.

As for backpay, the court concluded that victims of discrimination could be identified, and backpay calculated, through computer models comparing individual

women to similarly situated men. The court noted that cases such as Segar v. Smith, 738 F.2d 1249, 1291 (D.C. Cir. 1984), and EEOC v. O&G Spring & Wire Forms Specialty Co., 38 F.3d 872, 879-80 & n.9 (7th Cir. 1994), have endorsed such a "formula approach" where, as here, the subjectivity built into the employer's system would call forth a 'quagmire of hypothetical judgments' in which any supposed accuracy in result would be purely imaginary. 222 F.R.D. at 175-78. The court noted that Wal-Mart maintains a detailed personnel database containing ample information about the objective factors on which pay and promotion decisions were based. The court rejected Wal-Mart's argument that class treatment was impossible because individual liability and relief must be determined in the type of mini-trials contemplated by Teamsters v. United States, 431 U.S. 324 (1977), with respect to each class member. The court noted that "nothing in Teamsters precludes calculating a total backpay award that is allocated among potential victims, where the actual victims cannot realistically be identified even were the court to undertake individual hearings." 222 F.R.D. at 186-87.

3. The Ninth Circuit Panel Decision

A divided panel of this Court affirmed — both initially and on panel rehearing — the majority of the district court's decision. The majority stressed that its review was limited to whether the district court had "correctly selected and applied Rule 23's criteria." Under that standard, if plaintiffs "demonstrate that

they meet Rule 23's requirements, they should be allowed to pursue their action as a class." Dukes v. Wal-Mart Stores, 509 F.3d 1168, 1176 (9th Cir. 2007). The majority found no abuse of discretion in the district court's conclusion that plaintiffs had made the requisite demonstration.

Initially, the majority reviewed the evidence and concluded that it satisfied the requirements of Rule 23(a) (numerosity, commonality, typicality and adequacy of representation). In considering the statisticat evidence, for example, the majority agreed with the district court that "the proper test of whether workforce statistics should be viewed at the macro (regional) or micro (store or sub-store) level depends largely on the similarity of the employment practices and the interchange of employees at the various facilities." Id. at 1181. In light of those factors, the majority concluded that plaintiffs' expert provided "a reasonable explanation for conducting his research on a regional level," such that the district court did not abuse its discretion in relying on that evidence in certifying the class. Id. at 1181. See also id. at 1183 (adding that plaintiffs' "factual evidence, expert opinions, statistical evidence, and anecdotal evidence demonstrate that Wal-Mart's female employees nationwide were subjected to a *single set of corporate policies* (not merely a number of independent discriminatory acts) that may have worked to unlawfully discriminate against them in violation of Title VII")(original emphasis).

The majority also concluded that the district court did not abuse its discretion in finding that class certification under Rule 23(b)(2) was permissible despite the claims for backpay and punitive damages. The majority acknowledged that Rule 23(b)(2) applies where claims for injunctive or declaratory relief predominate over claims for monetary relief. In determining whether such claims do predominate, however, the majority declined Wal-Mart's invitation to apply the "bright-line rule distinguishing incidental from nonincidental damages" since the Ninth Circuit had already held that predominance should be determined on a case-by-case basis. 509 F.3d at 1186. The majority then concluded that the court did not abuse its discretion in finding that, because a reasonable plaintiff would bring the case seeking to enjoin unlawful pay and promotion practices even in the absence of monetary relief, Rule 23(b)(2) certification was appropriate. 509 F.3d at 1187-88.

Nor was the majority swayed by Wal-Mart's argument that the claim for punitive damages would preclude certification under Rule 23(b)(2), reasoning that "it would be nonsensical to prevent victims of particularly egregious discrimination from simultaneously proceeding as a class action under Rule 23(b)(2) — which is specifically designed to facilitate discrimination class actions — and seeking the punitive damages provided for under Title VII." 509 F.3d at 1188. For similar reasons, the majority also rejected Wal-Mart's argument that the

size of the backpay request should preclude Rule 23(b)(2) certification, noting that a focus on the "potential size of the damage award" would "have the perverse effect of making it more difficult to certify a class the more egregious the defendant's conduct or the larger the defendant. Such a result hardly squares with the remedial purposes of Title VII." Id. at 1186. See also id. at 1187-88 (quoting district court decision, adding that Wal-Mart's argument would lead to "nonsensical result" that the "principal category of cases contemplated by the advisory committee as being certifiable under Rule 23(b)(2) — i.e., 'actions in the civil rights field where a party is charged with discriminating unlawfully against a class' . . . — would no longer be eligible for (b)(2) certification unless the class members agreed to forego the backpay remedy Congress specifically made available to discrimination victims under Title VII"). The majority agreed with Wal-Mart, however, that persons who were no longer employed at Wal-Mart when suit was filed lacked standing to pursue injunctive or declaratory relief. Id. at 1189-90.

Finally, the majority considered whether the suit could proceed in a way that was both manageable and in accordance with due process. The majority noted that the district court had carefully assessed whether the class size would present undue obstacles, and concluded that, for the most part, it would not. The majority first summarized the proposed trial plan. 509 F.3d at 1191 n.16. Then, without

expressly endorsing that plan, the majority concluded that because "there are a range of possibilities . . . that would allow this class action to proceed in a manner that is both manageable and in accordance with due process, manageability concerns present no bar to class certification." 509 F.3d at 1191. In particular, the majority pointed to the procedure used in Hilao v. Estate of Marcos, 103 F.3d 767, 782-87 (9th Cir. 1996), a tort action in which some 10,000 individuals sought damages for injuries resulting from torture or death during the regime of Ferdinand Marcos. To resolve that action, the majority explained, the Court had upheld a procedure whereby a representative sampling of claims was tried and the results were then used to determine damages for the remainder of the class. 509 F.3d at 1192-93. The majority noted that such a procedure, if followed in this case, would allow Wal-Mart to present individual defenses in the randomly selected sample cases. Id. at 1192 n.22; see also id. at 1193 n.23 (suggesting consideration of a "more limited 'test case' procedure").

Judge Kleinfeld dissented. In his view, the proposed class could not be certified because it did not meet the requirements of Rule 23(a). Moreover, the dissent asserted, it is "risible to say that injunctive and declaratory relief 'predominate'"; where, as here, "billions of dollars" in punitive damages are at stake, he asked, "[w]hat Wal-Mart cashier or stocker would care much about how

the district court told Wal-Mart to run its business after getting enough cash to quit?" 509 F.3d at 1196-97 (Kleinfeld, J., dissenting).

Further, the dissent concluded, both phases of the proposed trial plan are "constitutionally defective" because Wal-Mart is entitled to an individual jury trial as to each claimant and there is no "legitimate way" for the jury or court to decide upon a punitive damages award. 509 F.3d at 1197. According to the dissent, it is "now firmly established that the Due Process Clause constrains punitive damages to compensatory damages, and that the ratio can rarely exceed a nine to one ratio." Id. at 1198. Furthermore, punitive damages must reflect the harm that each defendant inflicted on each plaintiff, by comparing each plaintiff's individual compensatory damages with the punitive damages awards against each defendant. Here, however, compensatory damages will never be determined, and back pay will be determined by formula. Thus, "a ratio analysis will not be possible because punitive damages will be unanchored to compensatory damages." Id.

ARGUMENT

I. THE DISTRICT COURT REASONABLY CONCLUDED THAT A CLAIM FOR PUNITIVE DAMAGES MAY BE DETERMINED ON A CLASSWIDE BASIS IN TITLE VII PATTERN-OR-PRACTICE CASES.

The district court reasonably held that a claim for punitive damages can be determined on a classwide basis in a Title VII pattern-or-practice case. Such a

claim focuses on the employer's mental state and conduct toward the class as a whole, rather than specific individuals. A properly-instructed jury can therefore determine whether the employer's conduct warrants a classwide punitive damages award.

Title VII, as amended by the Civil Rights Act of 1991, Pub.L. 102-166 (1991), makes punitive damages available where a "complaining party" demonstrates that the employer engaged in a discriminatory practice "with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1). Interpreting that language, the Supreme Court held that liability for punitive damages depends on the employer's mental state, rather than the nature of the alleged discriminatory conduct. Kolstad v. American Dental Ass'n, 527 U.S. 526, 534-35 (1999). Thus, for example, an employer is "appropriately subject to punitive damages if it acts 'in the face of a perceived risk that its actions will violate federal law.'" Hemmings v. Tidyman's, 285 F.3d 1174, 1197 (9th Cir. 2002) (quoting Kolstad, 527 U.S. at 536). Punitive damages are not appropriate, however, if the employer proves that the discriminatory decisionmaking was "contrary to the employer's good faith efforts to comply with Title VII." Kolstad, 527 U.S. at 545-46; accord Hemmings, 285 F.3d at 1197-98; Passantino v. Johnson & Johnson Consumer Prods., 212 F.3d 493, 517 (9th Cir. 2000).

Punitive damages lend themselves to classwide determination in a Title VII pattern-or-practice case since neither the claim nor the damages focuses on individual victims of discrimination. The focus of a claim under a pattern-or-practice theory is not on individual employment decisions but rather on an overall "pattern of discriminatory decisionmaking." See Teamsters, 431 U.S. at 360 n.46; cf. Cooper v. Federal Reserve Bank, 467 U.S. 867, 876 (1984) (distinguishing such claims from individual claims). Similarly, punitive damages "are not intended to compensate an injured party, but rather to punish the [wrongdoer] and to deter him and others from similar extreme conduct." Newport v. Fact Concerts, 453 U.S. 247, 266-67 (1981); accord State Farm Mutual Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003) (compensatory damages redress plaintiff's "concrete loss" resulting from defendant's wrongful conduct, but punitive damages "serve a broader function" – "deterrence and retribution").

Accordingly, if plaintiffs persuade a Stage 1 jury that the employer engaged in a pattern or practice of discrimination "in the face of a perceived risk that its actions will violate federal law," they have done all that needs to be done to justify an award of punitive damages. And since the focus is on the "defendant's conduct toward the class as a whole," injured class members' entitlement to share in the award should not vary based on facts unique to their individual claims. See Barefield v. Chevron, No. C 86-2427 TEH, 1988 WL 188433, at *3 (N.D. Cal.

Dec. 6, 1988) (unpublished); cf. Jenkins v. Raymark Indus., 782 F.2d 468, 474 (5th Cir. 1986) (punitive damages may be determined separately from individuals' injuries). See also EEOC v. Outback Steakhouse, 576 F. Supp. 2d 1202, 1205-06 (D. Colo. 2008) (holding that punitive damages should be decided by Stage 1 jury); EEOC v. Dial Corp., 259 F. Supp. 2d 710, 712-13 (N.D. Ill. 2003) (same).

Wal-Mart disputes this reasoning on three grounds, none of which has merit. First, the company asserts that the language of § 1981a(b)(1) precludes class treatment of punitive damages by requiring "proof of wrongdoing towards an 'aggrieved individual.'" Appellate docket number ("R")41, Opening Brief at 58. Initially, we note that this characterization of § 1981a is inaccurate. The provision does not require "proof of wrongdoing" directed "towards" an aggrieved individual but rather proof of "malice or reckless indifference to the federally protected rights" of an aggrieved individual. All class members have the same "federally protected right" to be free of gender discrimination in pay and promotion.

Nor does § 1981a's use of the word "individual" render class treatment inappropriate. On the contrary, that word also appears in Title VII's substantive discrimination provisions, which prohibit failing or refusing "to hire or to discharge any individual or otherwise to discriminate against any individual" and limiting, segregating or classifying employees "in any way which would . . . tend to deprive any individual of employment opportunities." 42 U.S.C. § 2000e-2(a).

See also, e.g., 42 U.S.C. 2000e-5(f)(1) (charge may be filed by or on behalf of "person claiming to be aggrieved"; within 90 days after receipt of right-to-sue notice, "person claiming to be aggrieved" may bring civil action). Nevertheless, both the Commission and plaintiff-classes have successfully challenged discrimination under these provisions in suits involving multiple potentially "aggrieved individuals." See, e.g., General Tel. Co. v. EEOC, 446 U.S. 318 (1980); Griggs v. Duke Power, 401 U.S. 424 (1971). The term "aggrieved individual" in § 1981a ensures that "complaining parties," including the Commission, may not obtain punitive damages for non-class members regardless of the employer's treatment of those individuals. Cf. State Farm, 538 U.S. at 422 (no damages merely because defendant is an "unsavory individual or business"). But use of the word "individual" no more precludes class treatment here than in § 2000e-2(a).

Second, Wal-Mart argues that assessment of classwide punitive damages in Stage 1 "without regard to each claimant's actual injury" violates due process since punitive damages must be "calibrated" to the specific harm suffered by the plaintiff. Opening Brief at 46-47 (citing, e.g., State Farm, 538 U.S. at 422); R147, En Banc Brief at 16. Further, the company argues, individualized trials on this question are required because it is entitled to present "every available defense" before punitive damages can be assessed against it. En Banc Brief at 16-17.

This argument is flawed for several reasons. Under the district court's decision, assuming liability is established, only persons identified as victims and, so, awarded backpay in Stage 2 proceedings, may share in the punitive damages award. At that point, the court will have ample opportunity to apportion punitive damages, as appropriate, based on class members' individual backpay awards.

Moreover, and importantly, unlike in the state law tort cases relied on by Wal-Mart, there is no requirement that punitive damages be proportional to compensatory damages or backpay in Title VII cases. On the contrary, punitive damages may be available to Title VII claimants even in the absence of any backpay or compensatory damages award. See, e.g., Cush-Crawford v. Adchem Corp., 271 F.3d 352, 359 (2d Cir. 2001); Timm v. Progressive Steel Treating, 137 F.3d 1008, 1010 (7th Cir. 1998). This is because, in adding damage claims in the 1991 Civil Rights Act, Congress enunciated a clear standard for the award of punitive damages and imposed caps on the amount of damages, thereby satisfying the Supreme Court's requirement in Pacific Mutual Ins. Co. v. Haslip, 499 U.S. 1, 21 (1991), that punitive damages be "reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition." As the Fifth Circuit recently explained, "the combination of the statutory cap and high threshold of culpability for any [punitive damages] award confines the amount of the award to a level tolerated by due process," and since the circuit "has approved

punitive damages with accompanying nominal damages, a ratio-based inquiry becomes irrelevant." Abner v. Kansas City So. R.R., 513 F.3d 154, 161-165 (5th Cir. 2008); accord Cush-Crawford, 271 F.3d at 357-59 ("To the extent that courts worry about unleashing juries to award limitless punitive damages in cases where no harm had occurred, this concern is eliminated by the imposition of the statutory caps."). Similarly, this Court has also suggested that punitive damages may not need to be anchored to another form of relief in Title VII cases. See Passantino, 212 F.3d at 514 (without deciding Title VII question, noting that this Circuit has held that punitive damages may be awarded in § 1983 cases without an award of compensatory or nominal damages if plaintiff shows that defendant violated a "federally protected right").[4]

As for whether Wal-Mart is entitled to present "every available defense" to punitive damages, as noted above, the Supreme Court has specified that, once the jury has determined that the challenged actions were taken with the requisite

[4] In the panel decision, the dissenting opinion suggests that punitive damages must be calibrated to compensatory damages without regard to backpay. 509 F.3d at 1197-98 (Kleinfeld, J., dissenting). We are not aware that any circuit has taken that position, although some require nominal damages or backpay as a predicate. See, e.g., Corti v. Storage Tech. Corp., 304 F.3d 336, 341-43 (4th Cir. 2002) (backpay); compare Kerr-Selgas v. American Airlines, 69 F.3d 1205, 1214-15 (1st Cir. 1995) (holding that Title VII punitive damages could not be anchored to state compensatory damages), with Provencher v. CVS Pharmacy, 145 F.3d 5, 11-12 (1st Cir. 1998) (distinguishing Kerr-Selgas, upholding Title VII punitive damages where backpay was awarded).

mental state, the employer's only recourse is to prove that the conduct was contrary to its own good faith efforts to comply with Title VII. Such a showing might be difficult to make if the jury had found a nationwide pattern-or-practice of discrimination.

Third, Wal-Mart argues that trying punitive damages in Stage 1 would violate its Seventh Amendment right to a jury trial. Opening Brief at 46. Any such violation is easily avoided. Typically, as was proposed in this case, in addition to liability, the Stage 1 jury would decide all facts related to punitive damages: whether the defendant acted with malice or reckless indifference and, if so, what award would be required to punish and deter the conduct. Wal-Mart argues that, under this framework, women who had suffered no injury could receive punitive damages, but, as noted above, that simply is not true. Punitive damages would be apportioned only among persons identified as victims in Stage 2 backpay proceedings. Backpay is an equitable determination as to which no jury trial is required. Williams v. Owens-Ill., 665 F.2d 918, 929 & n.10 (9th Cir. 1982). There is, therefore, no Seventh Amendment right to a jury trial on backpay.

Finally, we note that if Wal-Mart's arguments were accepted, it could effectively preclude a claim for punitive damages in most if not all Title VII pattern-or-practice cases including those brought by the Commission. As the panel majority noted, however, it would be "nonsensical" to prevent victims of

particularly egregious discrimination from proceeding collectively, whether in an EEOC enforcement action or a private class action, and seeking the punitive damages Title VII provides. 509 F.3d at 1188. Nor would such a result accord with Congressional intent. On the contrary, Congress added damages to Title VII because it found that "additional remedies [were] needed to deter unlawful harassment and intentional discrimination in the workplace." Pub. L. 102-166, § 2(1). Moreover, there is evidence that these remedies were intended to apply to collective actions. The damage provision, 42 U.S.C. § 1981a(b)(3), specifies that the amount of damages may not exceed the statutory cap for "each complaining party." That phrase, which was added by amendment to clarify that "[t]he amount of damages that a victim can recover should not depend on whether that victim files her own lawsuit or joins with other similarly situated victims in a single case," would be unnecessary if punitive damages were limited to single-claimant cases. See 137 Cong. Rec. S15471 (daily ed. Oct. 30, 1999) (remarks of Sen. Kennedy). We therefore urge this Court to reject Wal-Mart's attempts to restrict punitive damages to small or individual discrimination suits and instead ensure that they remain available in large Title VII pattern-or-practice cases.

II. THE DISTRICT COURT REASONABLY CONCLUDED THAT, IN APPROPRIATE CASES, BACKPAY MAY BE DETERMINED ON A CLASSWIDE BASIS WITHOUT INDIVIDUALIZED HEARINGS.

The district court reasonably concluded that, in appropriate pattern-or-practice cases, backpay may be determined on a classwide basis without individualized hearings. To achieve Title VII's key goal of providing make-whole relief to victims of discrimination, this Court and others have held that classwide relief may be appropriate where, because of factors such as the passage of time and the employer's own subjective employment practices, any attempt to reconstruct individual employment histories more precisely would drag the court into a quagmire of hypothetical judgments. Notwithstanding Wal-Mart's arguments to the contrary, such a procedure conflicts with neither the Seventh Amendment nor Title VII.

The standards for liability and relief in pattern-or-practice cases are controlled by Teamsters v. United States, 431 U.S. 324, and its progeny. In Teamsters, the Supreme Court held that, to establish a prima facie case under a pattern-or-practice theory, plaintiffs must demonstrate that discrimination was "the company's standard operating procedure, the regular rather than the unusual practice." Id. at 336. If they carry that burden, injunctive and other classwide prospective relief follows. Id. at 361. If backpay or other individual relief is sought, however, the district court must "usually" conduct "additional

proceedings" to determine "the scope" of that relief. Id. Because the employer has already been shown to be a wrongdoer, each class member is entitled to individual relief unless the employer proves that she was "denied an employment opportunity for lawful reasons." Id. at 361-62.

While Teamsters held that the make-whole relief is "usually" determined in some kind of "additional proceedings," courts construing this language have held that separate mini-trials for individual victims may not always be either necessary or, indeed, preferable. A key goal of Title VII is to ensure that victims of discrimination are made whole for their injuries. Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975). In addition, once an employer has been shown to be a discriminator, there is a presumption in favor of backpay that can seldom be overcome. See, e.g., Liberles v. County of Cook, 709 F.2d 1122, 1136 (7th Cir. 1983). In some cases, however, because of the class size, the passage of time, and the ambiguity of the challenged employment practices, for example, "any attempt to reconstruct individual employment histories would drag the court into 'a quagmire of hypothetical judgments.'" Segar v. Smith, 738 F.2d 1249, 1290 (D.C. Cir. 1984) (citation omitted); see also Domingo v. New England Fish Co., 727 F.2d 1429, 1444 (9th Cir. 1984). The "choice" therefore is between "no compensation" for injured victims and "an approximate measure of damages." See Stewart v. General Motors Corp., 542 F.2d 445, 452-53 (7th Cir. 1976). In such

cases, courts, including this one. have held that relief may be determined on a classwide basis without individualized hearings. See, e.g., Liberles, 709 F.2d at 1136 (pay case).[5] Moreover, "unrealistic exactitude" in backpay calculations is not required (id.), and "[a]ll uncertainties should be resolved against the employer." Domingo, 727 F.2d at 1445. Cf. Albemarle Paper Co., 422 U.S. at 421 ("backpay should be denied [only] for reasons which, if applied generally, would not frustrate the central statutory purpose of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination").

Applying similar logic in this case, the district court here reasoned that, if liability were found in Stage 1, since Wal-Mart relied on largely subjective decisionmaking and did not regularly post openings for entry-level management positions, this caselaw would allow the determination of individual relief in something other than Stage 2 mini-trials. Specifically, the court proposed that in Stage 2, victims would be identified and relief, if any, determined through computerized calculations comparing each class member's pay to that of comparable men, mainly with information from Wal-Mart's extensive personnel

[5] See also EEOC v. O&G Spring & Wire Forms Specialty Co., 38 F.3d 872, 879-80 (7th Cir. 1994) (upholding district court's decision to apportion total backpay award pro-rata among all eligible class members); Shipes v. Trinity Indus, 987 F.2d 311, 318-19 (5th Cir. 1993) (upholding use of backpay formula in hiring, promotion and termination case); Catlett v. Missouri Highway & Transp. Comm'n, 828 F.2d 1260, 1267-68 (8th Cir. 1987) (noting that backpay may be awarded on a classwide rather than individual basis).

databases. 222 F.R.D. at 180-86. Compare Shipes v. Trinity Indus., 987 F.2d at 319 (upholding similar procedure).[6]

Wal-Mart takes exception to this proposal, arguing that it is entitled to an individualized hearing for every claimant. Initially, the company characterizes the "formula" caselaw as "stale" since it pre-dates passage of the Civil Rights Act of 1991. Opening Brief at 39. On the contrary, however, Teamsters and its progeny remain the standard for pattern-or-practice cases notwithstanding passage of the 1991 Civil Rights Act. Although that Act changed the law in response to a number of Supreme Court cases, Teamsters was not among them. See, e.g., H.R. Rep. No. 40(I) 23-63, 102 Cong., 2d Sess. 23-63, reprinted in 1991 U.S.C.C.A.N. 549, 561-601. Moreover, both O&G Spring and Shipes came down several years after the 1991 Act was passed.

Alternatively, Wal-Mart argues that these proposed classwide relief procedures would violate its rights under the Seventh Amendment and 706(g)(2) of Title VII. The first point is easily dismissed. As noted above, there is no Seventh Amendment right to a jury trial for backpay awards. See Williams, 665 F.2d at 929. Indeed, until the 1991 Civil Rights Act added damages to Title VII, cases were routinely tried to the court.

---

[6] Alternatively, the majority suggested trying a representative sampling of the claims or using a test case procedure. 509 F.3d at 1190-93 & nn.22-23.

Title VII likewise does not support Wal-Mart's position. As noted above, the argument centers around section 706(g)(2) of Title VII, 42 U.S.C. § 2000e-5(g)(2), which, according to the company, "explicitly prohibits monetary awards against non-victims." En Banc Brief at 16; see also Opening Brief at 40 ("individual relief may be provided only to those who were actually injured and those injuries must be proved individually"). To ensure that no non-victim recovers, the company argues, each class member's eligibility for relief must be determined in individualized hearings.

That vastly overstates the meaning of section 706(g)(2). The provision has two parts. Subpart A has been part of Title VII since it was enacted in 1964 (Legislative History of Titles VII and XI, at 1014) and was originally part of a single subsection (g). It states, in pertinent part: "No order of the court shall require . . . the hiring, reinstatement or promotion of any individual as an employee, or the payment to him of any back pay, if such individual was . . . refused employment or advancement or was suspended or discharged for any reason other than discrimination." 42 U.S.C. § 2000e-5(g)(2)(A). As noted above, despite this language, courts in appropriate cases have regularly upheld awards of backpay without individualized hearings, reasoning that "unrealistic exactitude is not required" and "ambiguities" should be resolved against the discriminating employer. See Liberles, 709 F.2d at 1136; see also Segar, 738 F.2d at 1292

(holding that § 706(g)(2)(A) cannot be read to require individualized hearings where result would be that many injured claimants would be denied relief "to account for the risk that a small number of undeserving individuals might receive backpay").

Wal-Mart's Opening Brief makes clear that the company is actually relying on Subpart B, which was added to the statute by the 1991 Civil Rights Act. According to the company, that provision "prevents a court from ordering monetary relief if the employer can show it would have made the same decision in the absence of a discriminatory motive." Opening Brief at 43-44. The company takes the position that the provision essentially supersedes Teamsters as the operative defense to a pattern-or-practice claim. See, e.g., Opening Brief at 37 (§ 2000e-5(g)(2)(B) "codifies" Teamsters defense). Quoting selectively, Wal-Mart characterizes § 2000e-5(g)(2) as providing: "where the employer 'demonstrates that [it] would have taken the same action in the absence of the impermissible motivating factor, the court . . . shall not award damages.'" Opening Brief at 44 (alterations in Wal-Mart's brief). Thus, the argument goes, if pattern-or-practice liability were established, § 2000e-5(g)(2) would entitle Wal-Mart to face-to-face mini-trials with each class member where the company may attempt to prove that no backpay is owing because the same decision would have been made for

legitimate reasons – something the district court thought would be impractical here, given the number of potential claimants. Id.

There is no textual basis for this argument. The starting point for analyzing a statute is the statutory text itself. Desert Palace v. Costa, 539 U.S. 90, 98 (2003). Section 2000e-5(g)(2)(B) is part of § 107 of the 1991 Civil Rights Act – the "mixed-motives" provision responding to Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). See Desert Palace, 539 U.S. at 94. Under Price Waterhouse, if a plaintiff proved that sex played a "motivating" role in the challenged conduct, a defendant could avoid all liability by proving a same-decision defense. Desert Palace, 539 U.S. at 93. To impose liability but limit relief in such cases, Congress enacted § 107. Section 107(a), codified at 42 U.S.C. § 2000e-2(m), provides:

> [A]n unlawful employment practice is established when the complaining party demonstrates that [sex] . . . was a motivating factor for any employment practice, even though other factors also motivated the practice.

§ 107(b), § 2000e-5(g)(2)(B), then states:

> On a claim in which an individual proves a violation under § 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court . . . may grant declaratory relief, injunctive relief . . . and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m); and . . . shall not award damages . . .."

(Emphasis added). Thus, § 2000e-5(g)(2)(B) plainly applies only in situations where plaintiffs prove a violation of § 2000e-2(m).

That is simply not the situation here. Plaintiffs have brought a Teamsters-style pattern-or-practice claim, so § 706(g)(2)(B) has no applicability to the case. Indeed, by rewriting the provision to fit a pattern-or-practice case, Wal-Mart essentially admits that Title VII itself would not require Stage 2 mini-trials for every class member here.

In short, courts' ability to determine backpay on a classwide basis without individualized hearings has proved to be an important tool for ensuring that individuals injured by systemic discrimination may obtain redress for those injuries where, due to specific circumstances in the case, "any attempt to reconstruct individual employment histories would drag the court into a quagmire of hypothetical judgments" (Segar, 738 F.2d at 1290). This is true in EEOC enforcement actions no less than in private class actions. We therefore urge the Court to ensure that nothing in its decision restricts the availability of these relief procedures in Title VII pattern-or-practice cases.

CONCLUSION

For the foregoing reasons, should it choose to reach these issues, this Court should hold that punitive damages remain available in pattern-or-practice cases and that backpay may be determined on a classwide basis without individualized hearings.

Respectfully submitted,

JAMES L. LEE
Deputy General Counsel

VINCENT J. BLACKWOOD
Acting Associate General Counsel

CAROLYN L. WHEELER
Assistant General Counsel

/s/ Barbara L. Sloan
BARBARA L. SLOAN
Attorney

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Office of General Counsel
131 M Street, N.E., 5th Floor
Washington, D.C. 20507
(202) 663-4721
FAX: (202) 663-7090

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6906 words, from the Statement of Interest through the Conclusion, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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) because it has been prepared in a proportional typeface using Microsoft Word 2003 with Times New Roman 14-point font.

/s/ Barbara L. Sloan
Barbara L. Sloan
Attorney for Equal Employment
Opportunity Commission

Dated: March 19, 2009

CERTIFICATE OF SERVICE

When Not All Case Participants are Registered for theAppellate CM/ECF System

I hereby certify that on March 19, 2009 , I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellateCM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users.I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Raymond C. Fay
CONSTANTINE CANNON LLP
1627 Eye Street, NW, Suite 1000
Washington, DC 20015

Richard L. Berkman
DECHERT PRICE & RHOADS LLP
4000 Bell Atlantic Tower
2929 Arch Street
Philadelphia, PA 19103

Mark E. Burton
HERSH & HERSH LLP
601 Van Ness Avenue, Suite 2080
San Francisco, CA 94102

Terri L. Ross
MCDERMOTT WILL & EMERY
50 Rockefeller Plaza
New York, NY 10020

Michael Foreman
LAWYERS' COMMITTEE FOR CIVIL RIGHTS
1401 New York Avenue, N.W., Suite 400
Washington, DC 20005

Marisa M. Tirona
NATIONAL EMPLOYMENT LAWYERS ASSOCIATION
44 Montgomery St., Suite 2080
San Francisco, CA 94104

Shauna Marshall
UC HASTINGS COLLEGE OF LAW
200 McAllister Street
San Francisco, CA 94102

/s/ Barbara L. Sloan
Barbara L. Sloan