Darned if You Due Process, Darned if You Don't! Understanding the Due Process Dilemma for Punitive Damages in Title VII Class Actions

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I. INTRODUCTION

Almost immediately after Title VII was passed, courts and litigants alike recognized that employment discrimination cases were uniquely suited for adjudication as class actions. Because “suits alleging racial or ethnic discrimination are often by their nature class suits, involving classwide wrongs,” the class action became an important tool for resolving suits under Title VII. Indeed, a Title VII pattern-and-practice suit was considered the archetype for certification under Federal Rule of Civil Procedure 23(b)(2), which allows a case to proceed as a class action where a defendant has “acted or refused to act on grounds [generally applicable] to the class.”

Despite this well-recognized congruence between Title VII cases and the class action device, federal courts have recently begun to view employment discrimination cases and class actions as about as complementary as oil and water, or the Yankees and Red Sox, or even snakes and airplanes.
The reason behind this about-face was the judicial reaction to the addition of compensatory and punitive damages in the Title VII plaintiff's stable of remedies. When Congress expanded the remedies available to Title VII plaintiffs in the Civil Rights Act of 1991 to include compensatory and punitive damages, it did not realize that it was creating a minefield for certifying would-be Title VII class actions. The Fifth Circuit thoroughly explored

Yankees fans, of course, always have this retort: "Did you hear the news about Bill Buckner? He accidentally jumped in front of a bus. Luckily for him it went between his legs."

6. 42 U.S.C. § 1981a provides:
(a) Right of recovery
(1) Civil Rights
In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 [42 U.S.C. §§ 2000e-5 or 2000e-16] against a respondent who engaged in unlawful intentional discrimination . . . the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section . . . from the respondent.

(b) Compensatory and punitive damages
(1) Determination of punitive damages
A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.
(2) Exclusions from compensatory damages
Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964 [42 U.S.C. § 2000e-5(g)].
(3) Limitations
The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party—
(A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000;
(B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000;
(C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and
(D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.

7. As one commentator has noted, "[T]here is no indication in the legislative history [of the 1991 Act] that Congress considered the effect [that the authorization of punitive and compensatory damages may] have on class litigation as opposed to individual claims." Daniel
many of the new pitfalls and hazards in its landmark opinion in **Allison v. Citgo Petroleum Corp.**\(^8\) Previously, Title VII plaintiffs had sought class certification through Rule 23(b)(2), as was mentioned above. With the addition of monetary damages and the individualized issues preceding their calculation, however, Title VII plaintiffs seeking class certification suddenly found Rule 23(b)(2) to be an inhospitable host. The Fifth Circuit in **Allison** held that, unless monetary damages flowed directly to the class as a whole rather than requiring individualized damages determinations, the request for monetary damages would preclude certification under Rule 23(b)(2).\(^9\) Many commentators have argued that **Allison** signaled the death knell for Title VII class actions.\(^10\)

The purpose of this article is not to add to the already abundant scholarship dissecting **Allison.**\(^11\) Rather, this article attempts to evaluate critically a recent post-**Allison** trend whereby Title VII plaintiffs seeking class certification have foregone their claims for compensatory damages while still seeking punitive damages. Plaintiffs, relying on the Supreme Court’s recent cases concerning punitive damages—**BMW of North America Inc. v. Gore,**\(^12\) **State Farm Mutual Automobile Insurance Co. v. Campbell,**\(^13\) and most re-

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8. 151 F.3d 402 (5th Cir. 1998).

9. *Id.* at 415.


cently, *Philip Morris USA v. Williams*—argue that a classwide claim for punitive damages brought in a mandatory Rule 23(b)(2) class provides the best procedural mechanism for protecting a defendant's due process rights, while at the same time assuring that each plaintiff gets his or her fair share of the punitive damages pot. Although that argument is appealing, this article will show that the same cases relied on by Title VII plaintiffs—*BMW, State Farm,* and *Philip Morris*—create due process problems that are nearly insurmountable for any claim of classwide punitive damages.

Ultimately, the "due process dilemma" this article identifies is this: if a Title VII plaintiff brings a claim for punitive damages in an individual suit, he faces the specter of getting his punitive damages award remitted on due process grounds. However, if he brings a classwide claim for punitive damages in order to avoid the due-process problems inherent with individual suits for punitive damages, he faces new due-process objections. If the plaintiff focuses on remedying the potential due process problems for class members that attend aggregating punitive damages claims by letting class members opt out, he risks trampling on the employer's due process rights and subjecting the employer to duplicative punishment. However, if he focuses on solving the due process problems of the employer by keeping the class mandatory and seeking redress through a class award of punitive damages, he risks running ramshod over his fellow class members' due process rights and swamping the litigation in a morass of procedural unmanageability.

A few observations about the scope of this Article need to be discussed at the outset. First, this Article deals exclusively with Title VII suits sought to be certified under Rule 23(b)(2). Although some Title VII plaintiffs have sought certification of classwide claims for punitive damages under Rule 23(b)(3), discussion of those instances are outside the scope of this Article. The reason for the single-minded focus on Rule 23(b)(2) will become apparent later. Second, this Article focuses exclusively on the due process concerns with certifying a classwide claim for punitive damages. That means other aspects of classwide claims for punitive damages that have troubled

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15. See, e.g., *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 419–20 (5th Cir. 1998). Rule 23(b)(3) of the Federal Rules of Civil Procedure provides for class certification where "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." FED. R. CIV. P. 23(b)(3).
16. See infra Part II.B.2 (discussing why only a mandatory class avoids the due-process problems identified in *State Farm*).
courts, such as adequacy of representation, res judicata, and the Seventh Amendment will not be discussed. This choice to focus exclusively on due process does not mean that those concerns are of no import. To the contrary, many of those other objections are just as weighty, if not of greater concern, than the due process problems. Discussing every legal difficulty with certifying classwide claims for punitive damages, however, would tax the capacity of the humble authors of this Article and result in something more akin to a treatise than an article; thus, the exclusive focus on due process.

The Article will proceed as follows. Part II explains how the trend arose that Title VII plaintiffs were pushed toward class claims for punitive damages. Part II also explains how the Supreme Court’s punitive damages jurisprudence influenced that trend. Part III outlines the cases where courts have been faced with Title VII plaintiffs seeking class certification with punitive damages as their only non-equitable claim for monetary damages. Finally, Part IV explains the due process dilemma Title VII plaintiffs seeking punitive damages and class certification face as a result of the Supreme Court’s decisions in BMW, State Farm, and Williams.

II. THE APPEAL OF CLASSWIDE PUNITIVE DAMAGES

This section analyzes the emerging trend whereby Title VII plaintiffs have sought classwide punitive damages, but not compensatory damages. There are two reasons for that trend. First, although the Fifth Circuit’s opinion in Allison v. Citgo Petroleum Corp. slammed the door closed on claims for compensatory damages brought in a Title VII class action under Rule 23(b)(2), the Fifth Circuit appeared to leave open whether, given the right facts, a class-wide claim for punitive damages could survive Rule 23(b)(2) certification. Second, the Supreme Court’s decisions in BMW v. Gore and State Farm v. Campbell pushed plaintiffs towards the mandatory class action as a way to avoid the due process problems that led to the plaintiffs in BMW and State Farm having their awards of punitive damages overturned.

A. Compensatory Damages Foreclosed

Class suits are group suits. In a Rule 23(b)(2) class action, the group nature of class actions is especially apparent. Certification under Rule

20. Hart, supra note 1, at 821.
23(b)(2) is appropriate if "the party opposing the class has acted or refused to act on grounds that [are] generally [applicable] to the class, making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."\(^{21}\) Whereas a court in a Rule 23(b)(3) class action has to deal with the possibility of divergence of interest among class members due to differing-valued monetary claims,\(^{22}\) the "very nature of a (b)(2) class" is homogeneity "without any conflicting interests between the members of the class."\(^{23}\) A court facing a Rule 23(b)(2) class need not worry that some class members who have suffered greater harm than the rest will get short-changed by the bringing of a collective action, or conversely that those class members who were not harmed at all will still gain recovery, because uniformity in harm and remedy is the very nature of injunctive and declaratory relief. Because of the homogeneity of interest, Rule 23(b)(2) classes are mandatory—that is they do not give any class member the opportunity to opt out\(^{24}\) —and binding on all class members.\(^{25}\)

The injection of compensatory damages and punitive damages into Title VII litigation, however, caused courts to fear that the homogeneity of a class certified under (b)(2) would be lost. Because monetary relief opens up the possibility of divergent interests,\(^{26}\) courts have rigorously scrutinized any monetary relief requested by a Title VII plaintiff seeking class certification in order to protect individual interests and ensure that the underlying assumption of homogeneity is not undermined. The result of that scrutiny was the near-unanimous exclusion of claims for compensatory damages from Title VII class action litigation. The Fifth Circuit's decision in *Allison* is, to date, the most thorough explanation of why courts have rejected certification under Rule 23(b)(2) for proposed Title VII classes that include claims for compensatory damages.

21. FED. R. CIV. P. 23(b)(2).
22. Classes certified under Rule 23(b)(3) are required to provide the procedural protections of notice and the opportunity to opt out precisely because of the possibility of divergent interests. See FED. R. CIV. P. 23(c)(2) advisory committee's note.
25. Some courts have blurred the lines between Rule 23(b)(2) and 23(b)(3) by certifying classes for claims of punitive damages under Rule 23(b)(2), yet giving the class members the opportunity to opt out as though the class were certified under 23(b)(3). See Part III.A.
26. Indeed, the Supreme Court has questioned in dicta whether monetary damages can ever be recovered in a Rule 23(b)(2) class action for precisely this reason, stating that there was at least a "substantial possibility" that monetary damages are altogether impermissible in (b)(2) classes. Ticor Title Ins. Co. v. Brown, 511 U.S. 117, 121 (1994). The Supreme Court has never addressed this question square-on, though, for good reason. Holding that no monetary relief could be recovered in a (b)(2) class flies in the face of long-established circuit court precedent. Piar, *supra* note 7, at 319 (noting that "the availability of equitable monetary remedies" in Rule 23(b)(2) class actions is "entrenched as a matter of precedent").
Allison involved a challenge to Citgo's employment practices with regard to hiring, promotion, training, compensation, and harassment at its manufacturing facility in Lake Charles, Louisiana. The plaintiffs sought certification under Rule 23(b)(2) as well as punitive and compensatory damages. In affirming the denial of certification, the Fifth Circuit explained why it believed those two monetary remedies stymied certification under Rule 23(b)(2). According to the Fifth Circuit:

The underlying premise of the (b)(2) class—that its members suffer from a common injury properly addressed by class-wide relief—begins to break down when the class seeks to recover . . . monetary relief to be allocated based on individual injuries. [A]s claims for individually based money damages begin to predominate, the presumption of cohesiveness decreases while the need for enhanced procedural safeguards to protect the individual rights of class members increases, thereby making class certification under (b)(2) less appropriate.

We know, then, that monetary relief “predominates” under Rule 23(b)(2) when its presence in the litigation suggests that the procedural safeguards of notice and opt-out are necessary, that is, when the monetary relief being sought is less of a group remedy and instead depends more on the varying circumstances and merits of each potential class member’s case.

The court in Allison then held that, where damages did not flow directly from liability to the class as a whole on the claims forming the basis of the injunctive or declaratory relief, monetary damages predominated and the class could not be certified under Rule 23(b)(2). The Fifth Circuit spelled out what it meant by “flowing to a class as a whole”:

[T]he recovery of incidental damages [i.e. damages that flow directly from liability to the class as a whole] should typically be concomitant with, not merely consequential to, class-wide injunctive or declaratory relief. Moreover, such damages should at least be capable of computation by means of objective standards and not dependent in any significant way on the intangible, subjective differences of each class member’s circumstances. Liability for incidental damages should not require additional hearings to resolve the disparate merits of each individual’s case; it should neither introduce new and substantial legal or factual issues, nor entail complex individualized determinations. Thus, incidental

28. Id. at 407.
29. Allison, 151 F.3d at 413 (internal citations and quotations omitted).
30. Id. at 415.
damages will, by definition, be more in the nature of a group remedy, consistent with the forms of relief intended for (b)(2) class actions.\textsuperscript{31}

Applying those principles to the claims for compensatory damages and punitive damages before the court, the Fifth Circuit in \textit{Allison} held that the inclusion of both precluded certification under Rule 23(b)(2). The court found compensatory damages to be an “individual, not class-wide” remedy because the “very nature of” compensatory damages required “individualized proof of discrimination and actual injury to each class member.”\textsuperscript{32}

The Fifth Circuit’s finding that compensatory damages claims could not be squared with Rule 23(b)(2) has proved to be the death knell of claims for compensatory damages in employment discrimination class actions, except in rare cases—like when a specific damages award is statutorily mandated or otherwise immediately apparent.\textsuperscript{33} Although not all courts have followed \textit{Allison}—and most notably the Second\textsuperscript{34} and Ninth Circuits\textsuperscript{35} have not—the Fifth Circuit’s reasoning has been followed by an ever-increasing number of jurisdictions.\textsuperscript{36} Furthermore, the alternatives to \textit{Allison}’s categorical approach to monetary damages provided by the courts rejecting \textit{Allison} leave much to be desired in the way of providing legal clarity.\textsuperscript{37} Thus, whether the Fifth Circuit’s ruling in \textit{Allison} was right or wrong, Title VII plaintiffs have seen the handwriting on the wall: plaintiffs should not bring claims for compensatory damages if they want their class action to be certified in most jurisdictions.

But what about punitive damages? Although the Fifth Circuit in \textit{Allison} upheld the district court’s finding that the plaintiffs’ class claim for punitive damages was inconsistent with Rule 23(b)(2) as well, some language in the \textit{Allison} decision appeared to leave the door open for class-wide claims for punitive damages in Title VII class actions. The court in \textit{Allison} began its discussion by assuming that class-wide claims for punitive damages could

\begin{itemize}
  \item \textsuperscript{31} \textit{Id.}
  \item \textsuperscript{32} \textit{Id.} at 417.
  \item \textit{Allison} cited approvingly \textit{Arnold v. United Artists Theatre Circuit, Inc.}, 158 F.R.D. 439 (N.D. Cal. 1994), in which the defendant’s liability entitled the class to a statutorily-mandated damages award. \textit{Allison}, 151 F.3d at 415.
  \item Robinson v. Metro-North Commuter R.R. Co., 267 F.3d 147, 164 (2d Cir. 2001).
  \item Molski v. Gleich, 318 F.3d 937, 950 (9th Cir. 2003).
  \item See, e.g., Robinson, 267 F.3d at 164 (applying an ad hoc balancing determination to determine whether claims for compensatory damages can be brought in a class seeking certification under Rule 23(b)(2)). The effectively standardless approach of the Second Circuit to this issue has been rightfully criticized. See, e.g., Dasteel & McKaig, supra note 11.
\end{itemize}
be brought without individualized proof of injury\textsuperscript{38} where the entire class is "subjected to the same discriminatory act or series of acts."\textsuperscript{39} The Fifth Circuit found, however, that "no such discrimination is alleged in this case":\textsuperscript{40}

The plaintiffs challenge broad policies and practices, but they do not contend that each plaintiff was affected by these policies and practices in the same way. Indeed, the plaintiffs seek to certify a class of a thousand potential plaintiffs spread across two separate facilities, represented by six different unions, working in seven different departments, challenging various policies and practices over a period of nearly twenty years. Some plaintiffs may have been subjected to more virile discrimination than others: with greater public humiliation, for longer periods of time, or based on more unjustifiable practices, for example . . . . Some discriminatory policies may have been implemented more—or less—harshly depending on the department or facility involved.\textsuperscript{41}

Those factual differences demonstrated that, given the particular facts in \textit{Allison}, the potential class members in \textit{Allison} would have to put on individualized proof for punitive damages. Even though the facts of \textit{Allison} were not appropriate for a class-wide claim for punitive damages, the Fifth Circuit appeared to leave the door open for class-wide claims for punitive damages if plaintiffs alleged that each class member was affected by the employer's discriminatory policies and practices "in the same way." Thus, Title VII plaintiffs, after reading \textit{Allison}, could conclude—not altogether unreasonably—that, given the right facts, a class-wide claim for punitive damages could survive Rule 23(b)(2) certification.

Nevertheless, the Fifth Circuit was not as dismissive of the notion of bringing a class-wide claim for punitive damages in a Rule 23(b)(2) Title VII class action as it was to claims for compensatory damages. The court in \textit{Allison} indicated that class-wide claims for punitive damages would not necessarily have a rosy future in Title VII litigation, either. Title VII class actions typically have two stages. The first stage establishes whether the defendant employer has engaged in a pattern or practice of discrimination

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\item[\textsuperscript{38}] 42 U.S.C. § 1981a(b)(1) makes punitive damages available if an employer acted with malice or reckless indifference to rights of an "aggrieved individual." Some courts, like \textit{Allison}, have wondered whether the "aggrieved individual" language in the statute forecloses class-wide claims for punitive damages. \textit{See, e.g., Allison}, 151 F.3d at 417. Whether or not the plain language of the Civil Rights Act of 1991 prohibits class-wide punitive damages claim is another matter beyond the ken of this Article. It suffices to say that no court has expressly so held. And the Ninth Circuit rejected that argument in \textit{Dukes v. Wal-Mart}, 474 F.3d 1214, 1241 (9th Cir. 2007).
\item[\textsuperscript{39}] \textit{Allison}, 151 F.3d at 417.
\item[\textsuperscript{40}] \textit{Id.}
\item[\textsuperscript{41}] \textit{Id.}
\end{enumerate}
entitling the group to injunctive relief. The second stage establishes the defendant's actual liability to individual class members and those class members' entitlement to monetary damages such as back pay. The Fifth Circuit stated in dicta that it believed punitive damages could only be determined after the second stage of the litigation because the Supreme Court's punitive damages jurisprudence required the amount of punitive damages to be reasonably related to the compensatory damages awarded to the plaintiff. If the Fifth Circuit was correct in its reading of Supreme Court caselaw, then the same individualized determinations required for determining compensatory damages would also be required for determining punitive damages, making class-wide claims for punitive damages just as much of an impossibility as claims for compensatory damages.

B. Supreme Court Jurisprudence on Due Process and Punitive Damages Appeared to Encourage Classwide Award

At the same time as Title VII plaintiffs were watching courts close the door to claims for compensatory damages in Rule 23(b)(2) classes, their lawyers were reading the Supreme Court's case law on punitive damages in a very different manner than the Fifth Circuit in Allison. Although all the Supreme Court cases substantively limiting punitive damages involved state punitive damages awards and the Fourteenth Amendment's Due Process Clause, federal courts have not hesitated to apply the principles of those cases to punitive damages awarded under federal law. To plaintiffs, the Supreme Court's decisions in the area of due process and punitive damages appeared to be implicitly egging on class-action claims for punitive damages. Unfortunately for plaintiffs, however, the new constitutional rules adopted by the Supreme Court were not as hospitable to class treatment of punitive damages as they seemed.

1. BMW v. Gore

The first case to set substantive limits on punitive damages was BMW v. Gore. In BMW, an Alabama jury imposed a $4 million punitive damages award against BMW for its failure to disclose to Dr. Ira Gore, Jr., that his

43. See id. at 361.
44. Allison, 151 F.3d at 417.
45. See, e.g., Pollard v. E.I. DuPont De Nemours, Inc., 412 F.3d 657 (6th Cir. 2005); Swinton v. Potomac Corp., 270 F.3d 794, 817 (9th Cir. 2001). Cases like Pollard and Swinton are presumably applying the substantive dimensions of the Fifth Amendment's Due Process Clause.
car had been repainted prior to its sale.\textsuperscript{47} At trial, BMW had not disputed that it had adopted a nationwide policy of not informing consumers about repairs performed on new cars that did not exceed three percent of the retail price, and that Dr. Gore’s car had been sold without disclosing the new paint job pursuant to that policy.\textsuperscript{48} The Alabama Supreme Court reduced the jury award to $2 million, holding that the jury had improperly computed the amount of punitive damages by factoring in BMW’s conduct pursuant to its nationwide policy that had occurred in other states.\textsuperscript{49}

The United States Supreme Court, per Justice Stevens, found that the Alabama Supreme Court was correct in reducing Dr. Gore’s punitive damages award for having taken into account conduct that occurred in other states. According to the Court, principles of “state sovereignty and comity” dictated that BMW could not be punished for conduct that had no impact on Alabama or its residents.\textsuperscript{50} As for the rest of Dr. Gore’s $2 million award, the Court stated that punitive damages could be “properly imposed to further a state’s legitimate interest in punishing unlawful conduct and deterring its repetition.”\textsuperscript{51} The Court held, however, that the Due Process Clause of the Fourteenth Amendment was implicated by a state award of punitive damages when the award was “grossly excessive” in relation to the state’s legitimate interests of punishment and deterrence.\textsuperscript{52} According to the Court, “[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.”\textsuperscript{53}

Justice Stevens then laid out three guideposts to determine whether an award of punitive damages was “grossly excessive”: (1) the degree of reprehensibility of the defendant’s conduct; (2) the disparity between the harm or potential harm\textsuperscript{54} suffered by the plaintiff and his punitive damages award; and (3) the difference between the punitive damages award and the civil penalties authorized by law.\textsuperscript{55} The first two guideposts are the most impor-
tant for purposes of this article. With regard to reprehensibility, the Court found that BMW's conduct was not particularly egregious given that the damages were purely economic.\(^\text{56}\) Although the Court recognized that a defendant who "has repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful" would be deserving of a stiffer award of punitive damages, the Court did not find any such pattern in the case before it.\(^\text{57}\)

The Court then turned to the disparity between punitive damages and the actual harm suffered by the plaintiff.\(^\text{58}\) Although the Court declined to set any definite ratio between punitive damages and the harm inflicted, the Court emphasized that the amount of punitive damages Dr. Gore received was 500 times $4000, the amount of Dr. Gore's compensatory damages—which the Court characterized as his actual harm—as determined by the jury.\(^\text{59}\) The Court also noted that the punitive damages award was thirty-five times greater than the total damages of all fourteen Alabama consumers who purchased repainted BMWs.\(^\text{60}\) The Supreme Court held that the $2 million award of punitive damages was constitutionally excessive and remanded the case to the Alabama Supreme Court.\(^\text{61}\)

Commentators at once realized that BMW opened the door for unprecedented scrutiny of punitive damages awards. BMW's effect on class claims for punitive damages, however, was not as immediately apparent. Nevertheless, BMW laid the groundwork for a massive rethinking of the relationship between punitive damages and Title VII class actions. Although relying on a federalism and not a due-process rationale, the Supreme Court approved of the Alabama Supreme Court's reduction of the punitive damages award for taking into account out-of-state conduct. The reduction of Dr. Gore's award in BMW for punishing BMW for its actions against out-of-state customers was the first step along the way to holding that a court could not assess punitive damages for harm done to persons not before the court. The principle that a court could not punish for harm to persons not before the court, in turn, pushed plaintiffs towards the use of the class action, as will be explained in more detail below. Furthermore, the Supreme Court's anchoring in BMW of the maximum punitive damages award that was constitutionally permissible to the amount of harm the individual plaintiff suffered is of great significance. It is the establishment of the relationship between the

\(^{56}\) Id. at 576.

\(^{57}\) Id. at 576–77.

\(^{58}\) The Court explained that what it meant by "potential harm" was "the harm to the victim that would have ensued if the [defendant's] tortious plan had succeeded." Id. at 581.

\(^{59}\) Id. at 582.

\(^{60}\) Id. at 582 n.35.

\(^{61}\) BMW, 517 U.S. at 586.
harm done and the punitive damages recoverable that ultimately would be the undoing of classwide claims for punitive damages in Title VII cases.

2. State Farm v. Campbell

It was not until the Supreme Court’s decision in *State Farm Mutual Automobile Insurance Co. v. Campbell* that the implications of the Supreme Court’s punitive damages jurisprudence on Title VII class actions began to be realized. In *State Farm*, the Supreme Court held that a $145 million punitive damages award was excessive where the plaintiffs had received a compensatory award of $1 million. The Campbells sued State Farm, their automobile liability insurer, for State Farm’s role in litigation arising from an automobile accident Campbell had caused when he tried to pass six vans traveling ahead of him on a two-lane highway. The crash killed one motorist and maimed another. Although the consensus was that Campbell was at fault, State Farm, in defending Campbell in the tort suit arising from the accident, contested liability and declined to settle the claims for the policy limit of $50,000. State Farm took the case to trial and assured the Campbells that “their assets were safe, that they had no liability for the accident, that [State Farm] would represent their interests, and that they did not need to procure separate counsel.” When the jury returned a verdict far in excess of the policy limit, State Farm refused to cover the excess, telling the Campbells: “You may want to put for sale signs on your property to get things moving.”

The Campbells then brought a bad faith claim against State Farm. At trial, the Campbells introduced evidence that State Farm’s decision to take the case to trial was the result of the application of a nationwide “Performance, Planning and Review” policy that attempted “to deny benefits owed consumers by paying out less than fair value in order to meet preset, arbitrary payout targets designed to enhance corporate profits.” Based on the evidence that the Campbells presented concerning State Farm’s nationwide policy, the jury awarded the Campbells $2.6 million in compensatory dam-

63. Id. at 429.
64. Id. at 412.
65. Id. at 413.
66. Id.
67. Id. (quoting Campbell v. State Farm, 65 P.3d 1134, 1142 (2001)).
68. State Farm, 538 U.S. at 413 (quoting Campbell v. State Farm, 65 P.3d 1134, 1142 (2001)).
69. Id. at 413–14.
70. Id. at 415, 431–32 (Ginsburg, J., dissenting).
ages—which the trial court reduced to $1 million—and $145 million in punitive damages.\(^7\)

The Court in *State Farm* began by restating that, although punitive damages may be imposed validly to punish and deter, "[t]he Due Process Clause of the Fourteenth Amendment prohibit[ed] the imposition of 'grossly excessive' or arbitrary punishments on a tortfeasor."\(^7\) The Court noted that "defendants subjected to punitive damages in civil cases have not been accorded the protections applicable to a criminal proceeding" and that punitive damages therefore posed "an acute danger of arbitrary deprivation" of the defendant's property.\(^7\) According to the Court, the dangers are especially present when "evidence that has little bearing as to the amount of punitive damages that should be awarded" is presented.\(^7\) The Supreme Court found that was the case in *State Farm* because the punitive damages awarded were based more on exposing and punishing the perceived deficiencies of State Farm's operations throughout the country than State Farm's conduct towards the Campbells.\(^7\)

Turning to the reprehensibility guidepost, the Court gave two reasons why the introduction of evidence of State Farm's actions beyond what State Farm did to the Campbells was problematic:

Lawful out-of-state conduct may be probative when it demonstrates the deliberateness and culpability of the defendant's action in the State where it is tortious, but that conduct must have a nexus to the specific harm suffered by the plaintiff. A jury must be instructed, furthermore, that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred. A basic principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or prescribed within its borders . . . .

For a more fundamental reason, however, the Utah courts erred in relying upon this and other evidence: The courts awarded punitive damages to punish and deter conduct that bore no relation to the Campbells' harm. 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. Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the

71. *Id.* at 415.
72. *Id.* at 416.
73. *Id.* at 417 (quoting Honda Motor Cor., Ltd v. Oberg, 512 U.S. 415, 432 (2003)).
74. *State Farm*, 538 U.S. at 418.
75. *Id.* at 420.
guise of the reprehensibility analysis, but we have no doubt the Utah Supreme Court did that here. 76

Although the Court in State Farm, as in BMW, was concerned with the effect on state sovereignty and comity if a state was allowed to punish a defendant for conduct committed out-of-state, the Court was clear that federalism was not the only concern. 77 Rather, the Court was worried about unmooring the award of punitive damages from the harm to the plaintiff. 78 The Court also worried about "the possibility of multiple punitive damages awards for the same conduct" because "nonparties are not [usually] bound by the judgment some other plaintiff obtains." 79 This double-counting rationale is a due process concern not previously articulated in the opinion of the Court in BMW, although Justice Breyer did mention it in his concurrence in that case. 80 The Court did reiterate its BMW dicta that "a recidivist may be punished more severely than a first offender" and that evidence of similar acts committed by the defendant are relevant in assessing the reprehensibility of the defendant's acts to the plaintiff before the court. 81 However—despite evidence that State Farm's actions towards the Campbells were taken in conformity with a nationwide policy—the Court found "scant evidence of repeated misconduct of the sort" that injured the Campbells. 82 The Court, therefore, held that the conduct that harmed the Campbells was "the only conduct relevant to the reprehensibility analysis." 83

Turning to the ratio between the harm to the plaintiff and the punitive damages award, the Court rejected all of the Campbells' arguments justifying the 145 to 1 ratio of punitive damages to compensatory damages. 84 In doing so, the Court stressed that the precise award of punitive damages that comports with due process depends upon the "facts and circumstances of the defendant's conduct and the harm to the plaintiff." 85 A detailed investigation of the nature of the harm was necessary, according to the Court, to determine the proper ratio between punitive damages and the harm to the plaintiff. 86 The Court stated that such an investigation needed to include deter-

76. Id. at 421–23.
77. Id. at 422–23.
78. Id.
79. Id. at 423.
80. BMW v. Gore, 517 U.S. 559, 593 (1996) (Breyer, J., concurring) ("Larger damages might also 'double count' by including in the punitive damages award some of the compensatory, or punitive, damages that subsequent plaintiffs would also recover.").
81. State Farm, 538 U.S. at 423 (quoting BMW, 517 U.S. at 577).
82. Id.
83. Id. at 424.
84. Id. at 425–29.
85. Id. at 425.
86. Id. at 426.
mining whether the harm was economic or physical as well as whether the punitive damages were awarded for a reason already covered by the award of compensatory damages. The Court noted that the Campbells' punitive damages award was based in large part on the outrage and humiliation suffered by the Campbells, an element the Court claimed was already covered by the compensatory damages awarded for emotional distress.

Plaintiffs' lawyers intent on bringing Title VII class actions absorbed one of the teachings of \textit{State Farm} and ignored another. They rightly understood the Court's deployment of a due process, duplicative-punishment rationale to justify the exclusion of State Farm's conduct towards non-plaintiffs from the punitive damages equation as a harbinger of things to come. They realized that in situations in which the defendant employer harmed a group of employees, plaintiffs will always be subject to the specter of having any award of punitive damages remitted unless they joined all those who were harmed in one action. The employer would argue that it would be subject to duplicative punishment and over-deterrence unless the award of punitive damages was reduced. Moreover, in cases in which the plaintiff was harmed by an unlawful employment policy—as would be the case in most pattern and practice class actions—the employer would argue that introducing any evidence of others hurt by that policy for purposes of punitive damages would be impermissibly litigating the claims for punitive damages against the employer of other prospective plaintiffs. Thus, although the Supreme Court \textit{claimed} that the employer's repeated actions would be factored into the reprehensibility analysis, in reality a plaintiff was going to be limited to obtaining punishment only for the harm the employer caused that plaintiff.

Plaintiffs saw the class-action device as a way around those problems. If a Title VII plaintiff sought the certification of a mandatory class, then the defendant could not object on the grounds that he may be punished twice. A defendant also could not object that the plaintiff was impermissibly litigating the cases of other potential plaintiffs, because all of the potential plaintiffs would be participating in the action. For the strategy to work, of course,

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88. \textit{Id.} Emotional distress, of course, is a key component of compensatory damages recoverable under Title VII.
89. The Supreme Court would later validate plaintiffs' interpretations of its prior precedents when in \textit{Philip Morris USA v. Williams}, discussed in the next subsection, it held due process forbids punishing a defendant for injury inflicted on strangers to the litigation. \textit{See infra} Part II.B.3.
90. Employment discrimination, by its nature, easily becomes an offense against a class. \textit{See} Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 157 (1982) ("We cannot disagree with the proposition underlying the across-the-board rule[---]that racial discrimination is by definition class discrimination."). Many instances of employment discrimination have involved harm inflicted against a group of employees.
the class would have to be certified under Rule 23(b)(2). Only a mandatory
class removes the due process objection; once class members begin to opt
out, the plaintiffs again open themselves up to the same double-counting
argument.

Plaintiffs were not the only ones to see the class action as the potential
remedy for the due process problems identified in *State Farm*. The Eighth
Circuit’s opinion in *Williams v. ConAgra Poultry Co.*[^91] is one example of
some judicial thinking along these lines. In *Williams*, the Eight Circuit
re-mitted an award of punitive damages to an individual Title VII plaintiff
that was based, in part, on proof of the defendant’s discriminatory conduct
towards other employees.[^92] In doing so, the court in *Williams* noted:

> In assessing reprehensibility . . . it is crucial that a court focus on the
conduct related to the plaintiff’s claim rather than the conduct of the de-
fendant in general. In [State Farm], the Supreme Court emphasized that
courts cannot award punitive damages to plaintiffs for wrongful behavior
that they did not themselves suffer. Tying punitive damages to the harm
actually suffered by the plaintiff prevents punishing defendants repeated-
ly for the same conduct: If a jury fails to confine its deliberations with
respect to punitive damages to the specific harm suffered by the plaintiff
and instead focuses on the conduct of the defendant in general, it may
award exemplary damages for conduct that could be the subject of an in-
dependent lawsuit, resulting in a duplicative punitive damages award.[^93]

The Court finished by observing that

where there has been a pattern of illegal conduct resulting in harm to a
large group of people, our system has mechanisms *such as class action
suits* for punishing defendants.[^94] Punishing systematic abuses by a puni-
tive damages award in a case brought by an individual plaintiff, howev-
er, deprives the defendant of the safeguards against duplicative punish-
ment that inhere in the class action procedure.[^95]

As the *Williams* opinion demonstrates, plaintiffs’ conclusions about the
usefulness of the class action device to eliminate some of the due process
concerns raised in *State Farm* were sound. Unfortunately, in drawing the
above lessons, the plaintiffs downplayed the significance of the Supreme
Court’s tying of the punitive damages awardable to the level of *individa-
ialized* harm. Although paying lip service to the societal function of punitive

[^91]: 378 F.3d 790 (8th Cir. 2004).
[^92]: *Id.* at 797–98. The Court found a great deal of misconduct “insufficiently similar” to
that which harmed the plaintiff to count as evidence of recidivism under the reprehensibility
guidepost. *Id.* at 797.
[^93]: *Id.* at 797.
[^94]: *Id.* (emphasis added).
[^95]: *Id.*
damages in punishing wrongdoers and deterring future misconduct, *BMW* and *State Farm* demonstrated that the Supreme Court in fact viewed punitive damages as simply another individualized damages claim—an extension of compensatory damages awardable when "the defendant does something really bad." The Court’s focus in *BMW* and *State Farm* on the harm to the individual plaintiff as the channel marker for what amount of punitive damages was constitutionally permissible—as well as the Supreme Court’s statement in *State Farm* that any element of the punitive damages award attributable to an element of compensatory damages was not justifiable and the Supreme Court’s limiting evidence of the defendant’s misconduct towards other employees to that which was substantially similar to the misconduct that harmed the plaintiff—betrayed such an understanding. Thus, although aggregating punitive damages claims in a class action would remove some due process objections, especially with regard to due process as to the defendant, it would add others, this time centered on the plaintiffs. Due to the individualized nature of the punitive damages inquiry, as set forth by the Supreme Court, defendants in the class setting could argue that absent class members were stuck holding the due-process bag, because their individualized claims for punitive damages might be much better than most of the other class members’ claims. Yet, because their claims were lumped in with everyone else’s, they might not get their fair share. Defendants could also argue that the use of a class action to bring a punitive damages claim fails on procedural grounds because of the individualized nature of a punitive damages claim. As we will see in later sections, this is precisely what the defendants did.

3. Philip Morris USA v. Williams

Although decided relatively recently, and thus not yet fully digested, the holding of *Philip Morris USA v. Williams* further illustrates the principle that punitive damages are an individualized, rather than a collective, remedy. In *Philip Morris*, the state trial court instructed the jury that “[p]unitive damages are awarded against a defendant to punish misconduct and to deter misconduct” and “are not intended to compensate the plaintiff or anyone else for damages caused by the defendant’s conduct.” The trial court rejected Philip Morris’s proposed instruction, which stated that “you may consider the extent of harm suffered by others in determining what [the] reasonable relationship is” between any punitive award and “the harm caused to Jesse Williams” by Philip Morris’s misconduct, “[b]ut you are not to punish the defendant for the impact of its alleged misconduct on other

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97. *Id.* at 1061.
persons, who may bring lawsuits of their own in which other juries can resolve their claims." The Oregon Supreme Court, in affirming the trial court's decision, rejected Philip Morris's argument that the Constitution prohibits a state jury "from using punitive damages to punish a defendant for harm to nonparties."99

The United States Supreme Court reversed. It held that "the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, i.e., injury that it inflicts upon those who are, essentially, strangers to the litigation."100 The Court attempted to draw a line between allowing evidence of the defendant's similar conduct to nonparties to show the reprehensibility of the defendant's conduct to the plaintiff, on the one hand, and allowing that same evidence to serve as the basis of the punitive damages award, on the other. The Court stated that

[e]vidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible. . . . [Yet] a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties.101

The Court's holding in Philip Morris is significant because it further underscores the Court's understanding of punitive damages as a quasi-compensatory, individualized form of damages. As Justice Stevens explained in dissent, "[t]o award compensatory damages to remedy such third-party harm might well constitute a taking of property from the defendant without due process. But a punitive damages award, instead of serving a compensatory purpose, serves the entirely different purposes of retribution and deterrence that underlie every criminal sanction."102 In holding that due process forbade an award of punitive damages that punishes the defendant for any conduct besides the conduct that harmed the plaintiff before the Court, the Court in Philip Morris drove the final nail in the coffin of the notion that punitive damages could ever be a collective remedy. As we will see in the next section, however, several courts have clung to the notion of punitive damages as a collective remedy.

98. Id. (quoting Williams v. Phillip Morris Inc., 127 P.3d 1165, 1175 (Or. 2006)).
99. Id. at 1602.
100. Id. at 1063.
101. Id. at 1064.
102. Philip Morris, 127 S. Ct. at 1066.
III. DEVELOPING CASELAW ON CLASSWIDE PUNITIVE DAMAGES

Part III of this article considers the developing caselaw on classwide punitive damages. This part first examines cases allowing classwide punitive damages and then considers cases rejecting classwide punitive damages.

A. Cases Allowing Classwide Punitive Damages

Since 2003, at least three federal courts have certified classes seeking punitive, but not compensatory, damages under Title VII. This section critically examines these three cases and the courts' rationales for certification, with emphasis on the courts' treatment of due process concerns.

1. Palmer v. Combined Insurance Company of America

*Palmer v. Combined Insurance Co. of America* appears to be the first reported case involving certification of a class under Title VII in which the plaintiffs sought punitive damages but not compensatory damages. Palmer involved a group of female employees who sued Combined Insurance Company ("Combined") for sex discrimination and sexual harassment. The plaintiffs alleged that Combined discriminated against its female employees by providing them with inferior training and sales opportunities and fewer promotions than their male counterparts and by taking no steps to stop discrimination and sexual harassment in the workplace.

Combined sold various insurance products through door-to-door sales agents throughout the United States. The company did not maintain offices for its sales agents. Employees worked on their own, meeting with clients in their homes or at restaurants and other public places. Combined's organizational structure involved twelve sales territories, subdivided into regions, sub-regions, districts, and territories, with managers at each

104. Addressing the issue of whether a class seeking punitive and injunctive relief, but not compensatory damages, could be certified under Rule 23(b)(2) or 23(b)(3), the court noted that its review of federal case law identified no other Title VII class action proceeding in this manner. Id. at 438.
105. Id. at 433.
106. Id.
107. Id.
108. Id. at 433.
level of the hierarchy.\textsuperscript{110} The court in \textit{Palmer} did not specify the size of the plaintiff class except to say that it was “in the thousands.”\textsuperscript{111}

The court initially considered whether the plaintiffs could pursue punitive damages in the absence of compensatory damages.\textsuperscript{112} Combined argued that the plaintiffs could not because “an award of punitive damages must bear a reasonable relationship to a compensatory damages award, so taking compensatory damages out of the equation precludes recovery of punitive damages.”\textsuperscript{113} The court concluded, however, that “nothing in the plain language of 42 U.S.C. § 1981a conditions an award of punitive damages on an underlying award of compensatory damages.”\textsuperscript{114}

Having decided that the absence of a claim for compensatory damages was not, in and of itself, fatal to the plaintiffs’ punitive damages claim, the court turned to the issue of whether an individualized assessment of each plaintiff’s harm would be necessary.\textsuperscript{115} The court cited \textit{Allison v. Citgo Petroleum Corp.}\textsuperscript{116} for the proposition that “punitive damages may be awarded on a class-wide basis without individualized proof of injury, ‘where the entire class or subclass is subjected to the same discriminatory act or series of acts.’”\textsuperscript{117} The court conceded, however, that “each class member has suffered differing degrees of harm and thus, it appears that distribution of punitive damages will inevitably require individualized assessments.”\textsuperscript{118}

Interestingly, the court then contradicted itself, musing that an award of punitive damages might be awarded pro rata, “allocated by some other formula, to be determined at a later time,” or “awarded cy press to an appropriate organization.”\textsuperscript{119} The court finally avoided the issue altogether, stating, “[e]xactly how an award of punitive damages might be distributed need not be decided at this stage—as long as there are viable options that can adequately address manageability concerns, that is enough for class certification.”\textsuperscript{120}

The court then determined that the proposed class could be certified under Rule 23(b)(2) but treated “as if it were certified under 23(b)(3)” by

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{110} \textit{Id.}
  \item \textsuperscript{111} See \textit{id.} at 440 (noting that approximately twenty women had filed individual claims against Combined and, “while [twenty] would be a significant number if the class being proposed were in the hundreds, it is not so when the proposed class in is the thousands”).
  \item \textsuperscript{112} \textit{id.} at 438.
  \item \textsuperscript{113} \textit{id.}
  \item \textsuperscript{114} \textit{id.}
  \item \textsuperscript{115} \textit{Palmer, 217 F.3d at 438.}
  \item \textsuperscript{116} \textit{151 F.3d 402 (5th Cir. 1998).}
  \item \textsuperscript{117} \textit{Palmer, 217 F.R.D. at 438 (quoting Allison v. Citgo Petroleum Corp., 151 F.3d 402, 417 (5th Cir. 1998)).}
  \item \textsuperscript{118} \textit{id. at 439.}
  \item \textsuperscript{119} \textit{id.}
  \item \textsuperscript{120} \textit{id.}
\end{itemize}
\end{footnotesize}
giving the class members "notice and opportunity to opt out under Rule 23(d)(2)'s authority."\textsuperscript{121} The opportunity to opt out, the court stated, would "ensur[e] constitutionality and adequate due process."\textsuperscript{122} Although the court did not expressly state that this provision would protect the plaintiffs' due process rights by allowing individual plaintiffs to pursue adequate relief for individual harms that might not be fully addressed in a class action, the right to opt out targets this issue.\textsuperscript{123} The court, however, did not address the potential violations of the defendant's due process rights that might arise in this situation, such as the risk of duplicative punishment caused by a class award followed by individual awards punishing the same conduct.

The court in \textit{Palmer} recognized that certification of a class for monetary damages in an employment discrimination suit is inappropriate in most cases,\textsuperscript{124} but it repeatedly emphasized that it considered this case "unique" or a "rare exception" to the rule.\textsuperscript{125} The court never explained, however, exactly how this case was unique in comparison with other Title VII sex discrimination cases. Certainly the plaintiffs' claims that Combined failed to offer them opportunities for advancement and looked the other way when female employees were subjected to sexual harassment are not unusual. The court did note that the structure of Combined was unusual in that it did not have

\begin{itemize}
  \item \textsuperscript{121} \textit{Id.} at 439-40. Federal Rule of Civil Procedure 23(d)(2) provides that "[a]n order under Rule 23(d)(1) may be altered or amended from time to time . . . ." \textsc{FED. R. CIV. P.} 23(d)(2). Rule 23(d)(1) provides as follows:

  In conducting an action under this rule, the court may issue orders that: (A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument; (B) require[-]to protect class members and fairly conduct the action[-]giving appropriate notice to some or all class members of: (i) any step in the action; (ii) the proposed extent of the judgment; or (iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action; (C) impose conditions on the representative parties or on intervenors; (D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or (E) deal with similar procedural matters. \textsc{FED. R. CIV. P.} 23(d)(1).

  Although this rule expressly grants courts the authority to issue orders requiring that \textit{notice} be given class members, it does not expressly state that courts may issue orders granting class members the opportunity to \textit{opt out}. Nevertheless, some federal courts have held that members of a class certified under Rule 23(b)(2) may be given the opportunity to opt out. \textit{See, e.g., Jefferson v. Ingersoll Int'l Inc.}, 195 F.3d 894, 898 (7th Cir. 1999); \textit{see also Williams v. Burlington Northern, Inc.}, 832 F.2d 100, 103 (7th Cir. 1987).

  \textsuperscript{122} \textit{Palmer}, 217 F.R.D. at 440.

  \textsuperscript{123} \textit{Jefferson} for the proposition that due process considerations, among other factors, require that class members in actions for money damages be given personal notice and an opportunity to opt out. \textit{Jefferson}, 195 F.3d 894, 897 (citing Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999)).

  \textsuperscript{124} \textit{Palmer}, 217 F.R.D. at 441.

  \textsuperscript{125} \textit{Id.} at 439-41.
\end{itemize}
“actual facilities or other organizational structures,” and the plaintiffs argued that this was “precisely one of the key reasons why the alleged discriminatory practices and policies are able to flourish and remain consistent.” No explanation was offered, however, as to how Combined’s lack of office facilities more effectively contributed to a corporate culture of sex discrimination than would traditional office structures, or how this circumstance would render a class action for monetary damages more appropriate in this case than in other employment discrimination cases. Ultimately, the court’s rationale for certifying this class for punitive damages under Rule 23(b)(2) is unclear.

2. Anderson v. Boeing Company

The plaintiffs in *Anderson v. Boeing Co.* alleged that Boeing engaged in a pattern or practice of discrimination against female employees at its Oklahoma facilities, resulting in these women being paid less than men for the same work and being assigned less overtime. The plaintiffs sought injunctive and equitable relief, backpay, and punitive damages for a proposed class of over four hundred female employees.

Boeing argued against certification of the class for punitive damages on the ground that determination of punitive damages requires an individualized inquiry into the circumstances of each class member. Rejecting this argument, the court cited *BMW of North America Inc. v. Gore* for the proposition that “the major focus in the punitive damages inquiry is ‘the degree of reprehensibility of the defendant’s conduct.’” Thus, the court stated as follows:

[A] class claim for punitive damages is consistent with the notion that the focus of a (b)(2) action is the defendant’s conduct toward persons sharing a common characteristic. Because the purpose of punitive damages is not to compensate the victim, . . . [the inquiry] hinges, not on facts unique to each class member, but on the defendant’s conduct toward the class as a whole.

126. *Id.* at 438–39.
128. *Id.* at 530.
129. *Id.*
130. *Id.* at 531.
131. *Id.* at 541.
133. *Anderson*, 222 F.R.D. at 541.
The court in Anderson then certified the class claims for punitive damages pursuant to Rule 23(b)(2) with no further analysis of the issue of individualized assessment of plaintiffs' alleged injuries and no mention of due process concerns. 135

The court's assertion—that the inquiry necessary to determine an award of punitive damages hinges on conduct toward the class as a whole rather than conduct toward individual members—has tremendous rational appeal but ignores the disconnect between an inquiry into the defendant’s conduct and a determination of the amount of actual harm suffered as a result of such conduct. Under the logic of BMW and State Farm, the extent of the potential liability for punitive damages is not known until there is an evaluation of individual harm. For example, class members who had no desire to work overtime might have suffered no harm from the defendant’s alleged practice of assigning overtime to male employees, even assuming that the defendant would have denied the plaintiffs the opportunity to work overtime had they requested it. Because the Supreme Court has made clear that an award of punitive damages must bear a relationship to plaintiffs' actual harm as well as to the defendant’s conduct, the Anderson court’s faulty analysis of this issue lends no support to the proposition that a Title VII class seeking punitive damages may be certified without running afoul of the constitutional requirement of due process.


The most recent, and probably the best-known, Title VII case involving certification of a class seeking punitive but not compensatory damages is Dukes v. Wal-Mart, Inc. 136 In that case, a group of female employees of Wal-Mart brought suit alleging sex discrimination in terms of both pay and promotions. 137 In addition to punitive damages, the plaintiffs sought the equitable remedies of class-wide injunctive and declaratory relief and lost pay. 138

The plaintiff class included “[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 and management track promotions policies and practices.” 139 The class thus encompassed approximately 1.5 million women in a wide range of positions—from part-time, entry-level, hourly employees to salaried managers—who were working or had worked in one or more of Wal-Mart’s 3400 stores in forty-one regions.

135. Id. at 542.
136. 474 F.3d 1214 (9th Cir. 2007).
137. Id. at 1222.
138. Id.
139. Id.
at any time since 1998.\textsuperscript{140} The Ninth Circuit noted that this was the largest certified class in history, but concluded that the class, "although large, was not unmanageable."\textsuperscript{141}

The court acknowledged that Title VII class actions challenging a "pattern or practice" of discrimination usually proceed in two stages, with the second stage consisting of a remedy stage in which the district court conducts individualized hearings to determine the scope of individual relief.\textsuperscript{142} The Ninth Circuit concluded that individualized hearings were not required, however, instead approving the district court’s plan to employ a formula to determine the amount of backpay and punitive damages owed to the class members if Wal-Mart was to be found liable for discrimination.\textsuperscript{143} Under this plan, the jury would decide upon a lump sum of damages, and a special master would then decide on a formula to allocate the money among the plaintiffs.\textsuperscript{144} The Ninth Circuit found that statistical formulas can be accurate methods for determining class members' remedies.\textsuperscript{145} Moreover, the court stated, "[T]he allocation of relief need not be perfect; . . . 'unrealistic exactitude is not required and all doubts should be resolved against the discriminating employer.'\textsuperscript{146}

Wal-Mart disputed the constitutionality of this plan on grounds of due process.\textsuperscript{147} Citing \textit{State Farm}, Wal-Mart argued that awarding punitive damages without conducting individualized hearings would violate its due process rights because it might award damages to non-victims.\textsuperscript{148} The court conceded that Wal-Mart was "understandably concerned" about this issue,\textsuperscript{149} but distinguished \textit{State Farm} on the ground that it involved an action brought on behalf of one individual plaintiff.\textsuperscript{150} The court offered no explanation, however, as to how the presence of multiple plaintiffs would negate the Supreme Court's mandate in \textit{State Farm} and \textit{Williams} that an award of punitive damages must bear a direct relationship to the actual harm suffered by a plaintiff.

The court then upheld the constitutionality of the district court’s plan, stating:

\begin{itemize}
  \item \textsuperscript{140} \textit{Id}.
  \item \textsuperscript{141} \textit{Id.} at 1237--38.
  \item \textsuperscript{142} \textit{Dukes}, 474 F.3d at 1238 (citing \textit{Int'l Bhd. of Teamsters v. United States}, 431 U.S. 324, 361 (1977)).
  \item \textsuperscript{143} \textit{Id.} at 1238--40.
  \item \textsuperscript{144} \textit{Id.} at 1248 (Kleinfeld, J., dissenting).
  \item \textsuperscript{145} \textit{Id.} at 1239--40.
  \item \textsuperscript{146} \textit{Id.} at 1240 (quoting Shipes v. Trinity Indus., 987 F.2d 311, 317 (5th Cir. 1993)).
  \item \textsuperscript{147} \textit{Id.} at 1241--42.
  \item \textsuperscript{148} \textit{Dukes}, 474 F.3d at 1242.
  \item \textsuperscript{149} \textit{Id.} at 1239.
  \item \textsuperscript{150} \textit{Id.} at 1242.
\end{itemize}
[I]n its order, the district court imposed several due process protections to prevent unjust enrichment by non-injured plaintiffs. First, the order specifies that any punitive damages award will be "based solely on evidence of conduct that was directed toward the class." This ensures that the punitive damages award will be calibrated to the specific harm suffered by the plaintiff class. In addition, the order states that recovery of punitive damages will be limited "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, the order requires that allocations of punitive damages to individual class members must be "in reasonable proportion to individual lost pay awards." Thus, 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.\footnote{151}

Although the Ninth Circuit rejected Wal-Mart's assertion that an individualized assessment of harm was necessary to protect its rights, it upheld the district court's order granting the plaintiffs the right to opt out as to claims for punitive damages.\footnote{152} Although the Ninth Circuit, like the court in Palmer, did not explicitly state that the right to opt out would protect the plaintiffs' due process rights by allowing them to pursue punitive damages through individual proceedings, the right to opt out clearly has this benefit.\footnote{153} In other words, the Ninth Circuit implicitly determined that an opportunity for individualized assessment of harm was necessary to protect the plaintiffs' due process rights, but not Wal-Mart's.

Judge Kleinfeld dissented on the ground that certification of the class deprived Wal-Mart of due process of law, specifically asserting that "[t]he punitive damages claim poses a constitutional barrier to class certification."\footnote{154} Criticizing the district court's plan to allocate damages according to a formula, Judge Kleinfeld stated:

The district court devised a scheme under which an "expert or special master" using an unspecified formula will allocate back and front pay to the class members . . . . But before the "expert or special master" allocates pay, the jury will decide upon a lump sum amount of punitive damages. The special master will then decide on a formula to divide up all the money. There will never be an adjudication, by the jury or the special master, of whether any individual woman was injured by sex discrimination.\footnote{155}

\footnote{151} Id. at 1242 (citation omitted).
\footnote{152} Id. at 1236.
\footnote{153} See supra note 123 and accompanying text.
\footnote{154} Dukes, 474 F.3d at 1248 (Kleinfeld, J., dissenting).
\footnote{155} Id. at 1248 (internal citations omitted).
Judge Kleinfeld argued that this scheme cannot satisfy the constitutional requirement of due process for two reasons. First, he asserted, that there will never be an adjudication of compensatory damages. The Civil Rights Act expressly prohibits orders requiring the reinstatement, promotion, or payment of back pay to anyone injured 'for any reason other than discrimination.' According to Judge Kleinfeld, "[t]he district court's class certification scheme requires what the Civil Rights Act prohibits.

Although reinstatement, promotion, and back pay are actually forms of equitable relief rather than compensatory damages, Judge Kleinfeld's criticism is well-taken. The majority pointed out that recovery of punitive damages would be limited to "class members who actually recover an award of lost pay" and must be in "reasonable proportion" to the lost pay awards, but it failed to address the threshold issue of whether each class member suffered her loss of pay because of sex discrimination. In Judge Kleinfeld's words, "Women who were fired or not promoted for good reasons will take money from Wal-Mart they do not deserve, and get reinstated or promoted as well. This is 'rough justice' indeed. 'Rough,' anyway.'

Second, Judge Kleinfeld asserted that the district court's plan fell short of the constitutional requirement of due process because:

> the allocation of back and front pay will follow the jury determination of punitive damages. As the Supreme Court held in *State Farm*, "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." "Thus, punitive damages must be determined after proof of liability to individual plaintiffs at the second stage of a pattern or practice case, not upon the mere finding of general liability to the class at the first stage."

Judge Kleinfeld also expressed concern for the rights of any injured plaintiffs, asserting that "[t]he district court's formula approach to dividing up punitive damages and back pay means that women injured by sex discrimination will have to share any recovery with women who were not." Although this concern was likely valid with respect to any damages allocated for lost wages, the district court's order contained a provision allowing individual plaintiffs to opt out of claims for punitive damages. The plaintiffs' due process rights were thus preserved with respect to any claims for punitive damages.

156. *Id.*
157. *Id.* at 1248-49 (quoting 42 U.S. C. § 2000e-5(g)(2)(A)).
158. *Id.* at 1249.
159. *Id.*
160. *Dukes*, 474 F.3d at 1248 (Kleinfeld, J., dissenting) (emphasis added and internal citations omitted).
161. *Id.* at 1249.
Interestingly, however, neither the majority nor the dissent addressed the possibility that allowing plaintiffs to participate in the action to seek equitable relief while opting out as to punitive damages may expose Wal-Mart to duplicative punishment. According to the district court's plan, a jury will decide upon a lump sum of punitive damages, but the court's opinion in this case offered no explanation as to whether this sum will be determined based on consideration of harm to the class as a whole, or whether some procedure will be followed to exclude the harm caused to any plaintiffs who opt out. If, in determining the lump sum of punitive damages, the jury is allowed to consider the harm caused to plaintiffs who seek equitable relief in the class action but opt out as to claims for punitive damages, Wal-Mart could be repetitively punished for the same conduct in subsequent actions for punitive damages brought by individual plaintiffs who opted out.

The Ninth Circuit's decision in *Dukes* focuses on the due process rights of the class plaintiffs to the exclusion of the defendant. This plan compromised Wal-Mart's due process rights in two respects. First, if Wal-Mart is found liable for discriminatory policies and procedures, it will be denied an opportunity to defend itself in individualized hearings as to its conduct toward individual plaintiffs, leaving open the possibility that it will be forced to compensate individual plaintiffs who were not actually harmed. Second, by allowing plaintiffs to opt out as to claims for punitive damages, Wal-Mart may be subjected to duplicative punishment if it is required to pay an award to the class for its alleged misconduct and awards to individual plaintiffs for conduct that was previously considered in the class award.

B. Cases Rejecting Classwide Punitive Damages

As was discussed above, the Fifth Circuit in *Allison* laid the groundwork for the rejection of class-wide claims for punitive damages. Although most courts when faced with plaintiffs seeking both compensatory and punitive damages have denied certification, of the cases in which plaintiffs have sought punitive damages to the exclusion of compensatory damages, only two district courts have rejected certifying the punitive damages claim.


The plaintiffs in *Carlson v. C.H. Robinson Worldwide, Inc.*[162] filed suit against C.H. Robinson Worldwide, Inc. (CHR), a transportation logistics company with 134 branch offices in over forty-two states. The plaintiffs sought back pay, front pay, nominal damages, and punitive damages.[163]

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163. *Id.* at *15.
They alleged, among other things, that CHR had discriminated against female employees in pay and promotion and sought to certify pay and promotion classes consisting of "all females who have been employed on a full-time bases by [CHR] in a domestic branch office." For the pay class, the court found that the plaintiffs' allegations of a centralized group of male vice presidents who dictated compensation based on the subjective recommendations of the branch managers met the Rule 23(a) requirements. As for the promotions class, the court found Rule 23(a) satisfied because the plaintiffs supported their allegation that CHR failed to promote women proportionally to their workforce numbers as a result of an all-male, centralized, subjective decision-making process and a "tap on the shoulder" promotions policy.

Turning to the requirements of Rule 23(b), however, the court was concerned with the effect of the plaintiffs' request for punitive damages on the classes' certifiability under (b)(2). The court thought that the individualized inquiries required for punitive damages threatened to "overwhelm the litigation." The plaintiffs argued, based on Palmer v. Combined Insurance Co., that the court could distribute punitive damages formulaically and thereby dispense with the need for individualized determinations. But the district court in Carlson rejected that argument, stating that "a blanket award of punitive damages not premised on individualized harm is [not] appropriate." To support that holding, the court cited State Farm: "A defendant

164. Id. at *6-7. The subclass for promotions limited the class to those female employees who "had more than two years' experience in a sales and/or operations position at any time during the liability period." Id. at *7.
165. Id. at *8.
166. Id. at *10.
167. Id. at *16. The court also worried about the effect of the request for lost wages and nominal damages, but it should not have. The ability to bring a claim for lost wages in a (b)(2) class has been "entrenched as a matter of precedent." Piar, supra note 7, at 319. Because lost wages is an equitable, rather than legal, remedy, the same due process concerns attendant with compensatory and punitive damages are not present with lost wages. See Jefferson v. Ingersoll Int'l Inc., 195 F.3d 894, 896 (7th Cir. 1999); see generally Samuel Issacharoff, Preclusion, Due Process, and the Right to Opt Out of Class Actions, 77 NOTRE DAME L. REV. 1057 (2002) (drawing the distinction between equitable remedies and traditional common law compensatory remedies as far as the effect on due process of the aggregation of those respective remedies). As for nominal damages, they certainly bring to mind Allison's narrow exception for statutorily-determined damages to its bright-line rule forbidding the certification of claims for compensatory damages. See Allison v. Citgo Petroleum Corp., 151 F.3d 402, 415 (5th Cir. 1998) (citing Arnold v. United Artists Theatre Circuit, Inc., 158 F.R.D. 439 (N.D. Cal. 1994), a case in which the defendant's liability entitled the class to a statutorily mandated damages award, as an instance where a claim for compensatory damages could be certified under Rule 23(b)(2) as incidental to the injunctive and declaratory relief sought).
169. Id.
should be punished for the conduct that harmed the individual plaintiff, not for being an unsavory individual or business." The court distinguished Palmer on the basis that the court in Palmer had found "a unique set of circumstances," not present in Carlson, "where a blanket award of punitive damages based on the defendant's conduct might be appropriate." The court removed the problem punitive damages posed to certification by severing them pursuant to Rule 23(c)(4)(A) and certifying the pay and promotion classes on the issues of liability and the request for declaratory or injunctive relief only.


The discussion on the issue of punitive damages and the due-process implications for Title VII class actions in Nelson v. Wal-Mart Stores is by far the most thorough to date. Nelson involved a challenge to Wal-Mart's hiring practices for its workforce of over-the-road truck drivers. Wal-Mart's transportation division employed approximately 8000 drivers in forty-seven field transportation offices nationwide. The plaintiffs alleged that Wal-Mart engaged in a pattern-and-practice of discrimination against African American drivers through hiring policies promulgated by Wal-Mart's corporate offices in Bentonville, that placed new driver recruitment in the hands of its current driver workforce, which was predominately white. Such policies included word-of-mouth recruitment, interview screening committees consisting of current drivers, and allowing the final hiring decision to be unconstrained and subjective. The plaintiff sought to certify a class including (1) all African American applicants who met Wal-Mart's minimum requirements and were not hired and (2) all African American over-the-road truck drivers who met Wal-Mart's minimum requirements but were deterred from applying. Like the court in Carlson, the district court in Nelson had little trouble concluding that the Rule 23(a) prerequisites were met. When it came to Rule 23(b), however, the court believed that certification was stymied by the presence of a claim for punitive damages.

171. Id. The court in Carlson also cited Anderson v. Boeing Co., 224 F.R.D. 521 (N.D. Okla. 2004), but only to show the existence of a contrary precedent.
172. Federal Rule of Civil Procedure 23(c)(4)(A) provides that "an action may be brought or maintained as a class action with respect to particular issues." Fed. R. Civ. P. 23(c)(4)(A).
175. Id. at 362.
176. Id. at 363.
177. Id. at 363–64.
178. Id. at 365.
179. See id. at 367.
The court began by discussing the nature of a Rule 23(b)(2) class. Because a (b)(2) class is mandatory and assumes homogeneity of interest among the class members, the court noted that due-process concerns are raised when plaintiffs attempt to aggregate individual damages claims into a (b)(2) class because a class member might find his favorable damages claim compromised or, conversely, recover more than that to which he is entitled.\(^{180}\) The district court in Nelson, following Allison, framed the central inquiry for due process purposes as whether the plaintiffs’ request for punitive damages was a group remedy and therefore capable of being certified without any risk of violating the individual class members’ rights to due process, or an individual-by-individual remedy, for which certification would be inappropriate.\(^{181}\)

The plaintiffs asserted that their claim for punitive damages was a group rather than an individual-by-individual remedy and could therefore be awarded on a classwide basis without individualized proof of injury. They argued that the focus on punitive damages was on the egregiousness of the defendant’s conduct, and not on the injury to each class member.\(^{182}\) They further argued that, because they alleged each class member was affected by Wal-Mart’s hiring practices and policies in a similar way, they satisfied the dicta in Allison suggesting that punitive damages could be a classwide remedy if each class member “was affected by [the defendant’s] policies and practices in a similar way.”\(^{183}\)

The court noted that the plaintiffs’ arguments were not without appeal, especially in a pattern-and-practice case.\(^{184}\) When a fact finder finds that an employer has engaged in a pattern and practice of discrimination with respect to a specific employment practice, that fact finder has found, in essence, that the employer’s employment practice cannot be explained by anything else but discrimination against a class, irrespective of any individualized findings regarding discrimination specific to any class member.\(^{185}\) Thus, there is an intuitive sense that the defendant ought to be punished at the stage when it is found that they engaged in a pattern-and-practice of discrimination without the need to make any individualized findings of discrimination.\(^{186}\) And, where the act of discrimination is the same to each individual class member and the size of the class can be determined without resort to individual hearings, punitive damages could be thought of as flowing to the class as a whole immediately upon a finding of liability at the pat-

\(^{180}\) Nelson, 245 F.R.D. at 367–68.
\(^{181}\) Id. at 374.
\(^{182}\) Id. at 376.
\(^{183}\) Id. at 377.
\(^{184}\) Id.
\(^{185}\) Id.
\(^{186}\) See Nelson, 245 F.R.D. at 388.
tern-and-practice stage.\textsuperscript{187} Such would be the case with, for example, a class of plaintiffs who alleged that they were discriminated against, in that the defendant's practices prevented them from even hearing about a job opportunity.

Nevertheless, the court in \textit{Nelson} still rejected the argument that the plaintiffs' proposed class could be certified with their request for punitive damages. The court essentially applied the reasoning of \textit{State Farm} to determine that individualized proceedings would be needed before punitive damages could be assessed in a manner consonant with Wal-Mart's due process rights.\textsuperscript{188} The court stated:

\begin{quote}
[A] jury would not be able to determine the extent of the harm caused by Wal-Mart's conduct, and as a corollary the extent of the need for punishment and deterrence, at the classwide stage without engaging in further individualized determinations . . . . Typically, a court or jury is not able to determine, until the conclusion of the second stage of a \textit{Teamsters}-style proceeding, which alleged class members were actually harmed by the defendant's pattern of discriminatory acts and which were not. Thus, unless each alleged class member \textit{has actually suffered harm from the pattern of illegal acts}—which is highly unlikely—Wal-Mart would be over-deterred by any classwide award of punitive damages. Individualized determinations are necessary to fully realize the extent of the harm caused by Wal-Mart's conduct and properly assess the need for punishment and deterrence. Such individualized determinations in this case would include whether each proposed class member met Wal-Mart's minimum requirements at the time he or she applied for a position as an over-the-road truck driver or was deterred from applying . . . [and] whether Wal-Mart denied employment to an individual applicant who met the minimum requirements for lawful reasons.\textsuperscript{189}
\end{quote}

Because a determination of the total harm was a prerequisite, according to \textit{BMW} and \textit{State Farm}, to the proper assessment of punitive damages, and because the total harm would not be known until after individualized determinations were made, the court in \textit{Nelson} determined that the plaintiffs' request for punitive damages was non-incidental.\textsuperscript{190} Because the punitive damages were non-incidental, there was a serious risk that, due to the mandatory nature of the (b)(2) class, some class members would have their claims for punitive damages compromised or, worse, would be able to recover without having suffered any injury.\textsuperscript{191}

\begin{flushleft}
\textsuperscript{187} See id.
\textsuperscript{188} See id. at 377–78.
\textsuperscript{189} Id.
\textsuperscript{190} Id. at 377.
\textsuperscript{191} Id. at 377–78.
\end{flushleft}
The plaintiffs suggested that those due process problems could be avoided by allowing class members to opt out of the (b)(2) class. The court opined that an opt-out class would arguably relieve any due process concerns, but circuit-court precedent foreclosed such an option.\(^{192}\) The court did not mention the other due-process problem of duplicative punishment if class members were allowed to opt out. The court concluded by adopting the solution used by the district court in *Carlson*: severing the claim for punitive damages under Rule 23(c)(4)(A) and certifying a class as to liability and declaratory and equitable relief.\(^{193}\)

**IV. DARNED IF YOU DO, DARNED IF YOU DON’T**

The crux of the problem is that the Supreme Court’s jurisprudence on due process as applied to punitive damages awards has left Title VII class-action plaintiffs no way to have a class claim for punitive damages certified under Federal Rule of Civil Procedure 23(b)(2) that is consistent with the due process rights of both the plaintiffs and the defendants. As discussed above, certification of a mandatory class under Rule 23(b)(2), that is one that class members cannot opt out of, has historically been the most common means of pursuing class actions for Title VII plaintiffs because class certification pursuant to other sections of Rule 23(b) is generally inappropriate in employment discrimination actions. The addition of compensatory and punitive damages to Title VII plaintiffs’ arsenal of remedies, however, altered the balance because these damages hinge on the actual harm that the plaintiffs suffered, which often requires an individualized assessment to quantify. If a class claim for punitive damages cannot be certified under Rule 23(b), Title VII plaintiffs may be left with no avenue at all through which to pursue a class claim for punitive damages.

Of course, determination of back pay, deemed an equitable remedy, also generally requires some type of individualized determination of each class member’s entitlement to relief. However, such a determination has no adverse due process effects for either defendants or plaintiffs. Because back pay is an equitable remedy, some “rough justice” in distribution of the award—such as the use of a formula to allocate back pay among the class members—is permissible. As for a defendant employer, the entire amount of back pay for which the defendant will be liable is immediately determinable upon the finding of liability to the class. In a hiring case, for instance, if the defendant is found liable for a pattern or practice of discrimination, then the defendant will owe back pay determined by the number of positions open during the class period (which is usually determined by the statute of limita-


\(^{193}\) *Id.* at 380.
tions). That calculation can be made without reference to the individual circumstances of any of the class members. Any individualized inquiry necessary to allocate equitable relief follows the determination of the defendant’s liability for the lump sum, hence the two-stage procedure typically used in pattern-and-practice discrimination cases. As far as the defendant is concerned, though, the procedure ends with the determination of the lump sum—that is the actual harm.

Although a finding of liability for discrimination against the class as a whole would also necessarily precede an award of punitive damages, assessment of the amount of punitive damages owed to a class as a whole must follow individualized inquiry into the actual harm suffered because the Supreme Court has held that an award of punitive damages must bear a direct relationship to actual harm. Thus, the proceeding would not end with individualized inquiry into actual harm. After a jury had determined the issue of liability, it would need a determination as to each class member’s actual harm before it could determine a punitive damages award owed to the class as a whole. The requirement of individualized assessment of harm in the middle of the proceedings would render the conduct of the litigation as a class action unworkable in most cases.

As discussed above, the three federal courts that have thus far certified class claims for punitive damages under 23(b)(2) have failed to recognize that such assessments are necessary to determine a punitive damages award. The court in Palmer admitted that individualized assessment would be necessary to determine the “distribution of punitive damages,” but concluded that issues attendant to distribution need not be addressed prior to class certification.95 In Dukes, the Ninth Circuit stated that individualized assessment was not required because use of a statistical formula would provide an adequate means of allocating a punitive damages award to class members.96 Both courts thus avoided the problem of individualized assessment by framing the issue in terms of proper distribution of a punitive damages award rather than proper determination of the amount of harm justifying such an award in the first instance. By ducking the ultimate issue, courts are being intellectually dishonest. Defendants, of course, do not care about the distribution of punitive damages among the class members. Rather, they want to make sure their liability for punitive damages is minimized. When the amount of harm is yet-to-be-determined, defendants are not in a position to argue about what amount of punitive damages is constitutionally permissible under due process.

194. See supra Part III.A.
196. Dukes v. Wal-Mart, 474 F.3d 1214, 1239–40 (9th Cir. 2007).
Even if a court could solve the problems associated with the need to provide an individualized assessment of each class member's actual harm, however, one problem remains that is seemingly insurmountable in most cases: whether to certify the class as a mandatory class or an opt-out class. An opt-out class protects plaintiffs' due process rights by allowing individual class members to pursue claims for punitive damages in situations in which their claims might not be adequately addressed in the class action context, but, as noted above, this solution subjects defendants to the risk of duplicative punishment for the same conduct. The Supreme Court has established that repetitive punishment would violate the defendant's right to due process. A mandatory class, on the other hand, presents the opposite dilemma. The mandatory nature of the class would prevent individual awards of punitive damages based on the same conduct already punished through a punitive damages award to the class—thus addressing the risk of repeatedly punishing the defendant—but might deny some plaintiffs the opportunity to show that the defendant's conduct toward them was especially egregious and that they are therefore entitled to a larger award than that allocated to other members of the class. In other words, courts are generally damned if they allow plaintiffs to opt out and darned if they don't—either way, someone's due process rights are compromised.

Of course, given the fact that courts must ultimately choose between certifying a class as to claims for punitive damages, whether as a mandatory class or not, or refusing to certify the class, courts are understandably reluctant to refuse to certify the class where the defendant is alleged to have engaged in fairly reprehensible conduct. Although plaintiffs may still proceed on their own if class certification is denied, many of them will not do so. The courts in Palmer and Dukes were not blind to the existence of due process concerns, but they seemed to be reaching for a way to enable the plaintiffs to have their day in court as to their claims for classwide punitive damages. The court in Nelson, on the other hand, recognized that the plaintiffs had produced evidence "at least suggest[ing]" that the defendant routinely excluded African Americans from hiring opportunities for certain positions, but it determined upon thorough analysis that the plaintiffs did

197. There are limited circumstances in which an opt-out option is not necessary to protect the plaintiffs' rights. For example, a case involving only plaintiffs who were deterred from applying for employment because of discriminatory advertising and recruiting policies, such as the deterred applicants in Nelson, would be an appropriate fit for a mandatory Rule 23(b)(2) class. Each class member in this situation suffers exactly the same harm because of exactly the same corporate policies and procedures. This type of factual situation is relatively rare, however, because employment discrimination class actions generally involve numerous plaintiffs who may have worked in various locations, reported to different supervisors, or performed different jobs, and thus were subjected to different types or degrees of discriminatory conduct.
not meet the requirements for certification under either Rule 23(b)(2) or 23(b)(3) with respect to their claims for punitive damages. Thus, one could also argue that courts are darned if they certify the class and darned if they don't.

V. CONCLUSION

The due process dilemma faced by Title VII plaintiffs seeking class certification as to claims for punitive damages appears to be the result of the law of unintended consequences. In developing its jurisprudence as to the constitutional requirements of due process in awarding punitive damages, the Supreme Court showed no intent to thwart the will of Congress to allow Title VII plaintiffs to pursue class claims for punitive damages. The result, though somewhat unpalatable, is that probably the overwhelming majority of Title VII class actions cannot be certified as to claims for punitive damages without running afoul of the requirements of due process. Although some courts have certified classes as to such claims over the objections of defendants, this result can be achieved only through an intellectual compromise—one that also compromises the due process rights of the plaintiffs, the defendants, or both.

This issue will likely end up before the Supreme Court at some point. Until a decision of that Court clarifies the limits of due process upon Title VII class claims for punitive damages, however, plaintiffs and defendants in such actions must litigate in a minefield where class certification, and the course of proceedings for any such class actions that are certified, is uncertain at best and arbitrary at worst.

199. Id. at 373-79.