Minute Order Form (06/97)

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Warren K. Urbom	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	99 C 3356	DATE	2/14/2003
CASE TITLE	EEOC vs. Dial Corp.		

[In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3rd party plaintiff, and (b) state briefly the nature of the motion being presented.]

MOTION:

DOCKET ENTRY:

(1) ☐ Filed motion of [use listing in "Motion" box above.]

(2) ☐ Brief in support of motion due _____.

(3) ☐ Answer brief to motion due_____. Reply to answer brief due_____.

(4) ☐ Ruling/Hearing on _____ set for _____ at _____.

(5) ☐ Status hearing[held/continued to] [set for/re-set for] on _____ set for _____ at _____.

(6) ☐ Pretrial conference[held/continued to] [set for/re-set for] on _____ set for _____ at _____.

(7) ☐ Trial[set for/re-set for] on _____ at _____.

(8) ☐ [Bench/Jury trial] [Hearing] held/continued to _____ at _____.

(9) ☐ This case is dismissed [with/without] prejudice and without costs[by/agreement/pursuant to]
☐ FRCP4(m) ☐ Local Rule 41.1 ☐ FRCP41(a)(1) ☐ FRCP41(a)(2).

(10) ■ [Other docket entry] **ENTER MEMORANDUM AND ORDER ON DEFENDANT'S MOTION FOR CLARIFICATION OF THE COURT'S ORDER OF A BIFURCATED TRIAL.**

(11) ■ [For further detail see order attached to the original minute order.]

	No notices required, advised in open court.		number of notices	Document Number
	No notices required.			
✓	Notices mailed by judge's staff.		FEB 20 2003 date docketed	313
	Notified counsel by telephone.			
	Docketing to mail notices.	U.S. DISTRICT COURT	docketing deputy initials	
	Mail AO 450 form.			
	Copy to judge/magistrate judge.	03 FEB 19 PM 4:2	date mailed notice	
SCT	courtroom deputy's initials	FILED-EASTERN	mailing deputy initials	
		Date/time received in central Clerk's Office		

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, vs. DIAL CORPORATION, Defendant.	CIVIL ACTION NO. 99 C 3356 MEMORANDUM AND ORDER ON DEFENDANT'S MOTION FOR CLARIFICATION OF THE COURT'S ORDER OF A BIFURCATED TRIAL

In my order of August 9, 2001, I said at page 21:

> In the first phase of the proceedings, EEOC will bear the burden of demonstrating a pattern or practice. *See Mitsubishi,* 990 F. Supp. at 1070-77. The second phase will then focus on individuals' entitlement to relief. *Id.* at 1077-1082.

Dial seeks clarification "that punitive damages cannot be considered, if at all, until Phase II of the trial."

I shall proceed to attempt to clarify. It will perhaps assuage some of the defendant's concerns, but will not accord with its wants.

My primary guidance in this description of how I see the trial in the interpreting of 42 U.S.C. § 1981a (b)(1) comes from *General Telephone Company of the Northwest, Inc. v. Equal Employment Opportunity Commission*, 446 U.S. 318, 100 S. Ct. 1698 (1980); *BMW of North America Inc., v. Gore,* 517 U.S. 559, 116 S. Ct. 1589 (1996), *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 , 97 S.Ct. 1843 (1977); *International Brotherhood of Electrical Workers* v. Foust, 442 U.S. 42, 99 S.Ct.. 2121 (1979); *Kolstad v. American Dental Association*, 527 U.S. 526, 119 S.Ct. 2118 (1999); *Jefferson v. Ingersoll International Inc.*, 195 F.3d 894 (7th Cir. 1999); *Hennessy v. Penril Datacomm Networks*, 69 F.3d 1344 (7th Cir. 1995); *Shea v. Galaxie Lumber & Construction Co., Ltd.* , 152 F.3d 729 (7th Cir. 1998); *Timm v. Progressive Steel Treating, Inc.*, 137 F.3d 1008 (7th Cir. 1998); *Segar v. Smith*, 738 F.2d 1249 (D.C. 1984); *Equal Employment Opportunity Commission v. Indiana Bell Telephone Company*, 256 F.3d 516 (7th Cir. 2002); *United States Equal Employment Commission v. Foster Wheeler Constructors, Inc.*, 1999 WL 528200 (N.D. Ill.); and the dissenting opinion of Judge Reavley in *Smith v. Texaco, Inc.*, 263 F.3d 394 (2001).

I conclude that in this case the overall scheme should be that the trial should proceed in this order:

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First, whether a pattern or practice existed and, if so, when; second, whether any such pattern or practice was done with malice or reckless indifference, and, if so, an amount, if any, of punitive damages to the class; third, compensatory damages; and fourth, an apportionment of any punitive damages. If that be understood as being in four phases, so be it.

Phrased in terms of four phases, Phase I should result by a finding by the jury of whether and when a pattern or practice of tolerating sexual harassment existed. Because evidence to support the claim of such a pattern or practice necessarily will include some episodes that may tend to show whether the pattern or practice was engaged in "with malice or reckless indifference to the federally protected rights" of aggrieved persons of the class, such state-of-the-mind evidence may be received in Phase I and the malice-or-reckless-indifference issue should be decided by the same jury as decides the pattern-or-practice issue. There may be some evidence that is applicable only to the issue of pattern or practice and not at all to the issue of malice or reckless indifference; such evidence, of course, should be presented in Phase I. There may be some evidence that pertains solely to the malice-or-reckless-indifference issue and that evidence should be retained until Phase II. Phase II, if Phase I ends in the plaintiff's favor, would end with a verdict of whether the pattern or practice was done with malice or reckless indifference to the federally protected rights of the class members, including an amount to be awarded to the aggrieved persons of the class. That will allow the jury to take into account in Phase II the evidence that pertains to the issue of pattern or practice, as well as other evidence that pertains only to the malice-or-reckless-indifference issue.

Phase III should resolve the issue of compensatory damages, including the subjective feature of the individual claimant, probably requiring the service of more than one jury, if numerous members of the class remain to claim compensatory damages. Phase IV would consist of an apportionment by the punitive damages by the judge to individuals of the class shown to have had some damage, compensable or not, as a result of the pattern or practice engaged in with the requisite malice or reckless indifference.

I am persuaded that awarding a single punitive sum to the class is the best way to go. Expecting several separate juries to determine with reason separate and individual amounts for the purposes of punishment of the defendant and deterrence of the defendant and others from similar unlawful patterns and practices in the future is unrealistic at best. I realize that the matter of allotment of punitive damages may have to be done by the judge, but I think any rigid plan of separate division by the several juries, where no jury would have the benefit of a prior jury's award, or knowledge of the statutory cap or awareness of constitutional strictures, would result in a series of guesswork decisions beyond reason. The equitable powers of the judge would allow the judge to make a division of punitive damages in light of the compensatory damages, if any, the statutory cap, and the constitutional considerations of *BMW of North America Inc. v. Gore, supra*. As stated in *Segar v. Smith, supra*:

> Though *Teamsters* certainly raises a presumption in favor of individualized hearings, the case should not be read as an unyielding limit on a court's equitable power to

> fashion effective relief for proven discrimination. The language of *Teamsters* . . . is not so inflexible; after stating that individual hearings are "usually" required, *Teamsters* . . . , 431 U.S. at 361, 97 S.Ct. at 1867, the court went on to note that "[i]n determining the specific remedies to be afforded, a district court is 'to fashion such relief as the particular circumstances of a case may require to effect restitution.'" *Id.* at 364, 97 S.Ct. at 1869, quoting *Franks, supra*, 424 U.S. at 764, 96 S.Ct. at 1264. Later courts have often faced situations in which the *Teamsters* hearing preference had to bend to accommodate Title VII's remedial purposes. . . .

Id. at 738 F.2d 1289-90. Division of punitive damages awarded by a jury has the same demand on need as does acquirement of restitution. Multiple trials to determine compensatory damages for many individual plaintiffs are feasible. Not so with punitive damages.

I am hopeful that this memorandum and order will clarify my earlier one of August 9, 2001. Issues within the issues here addressed remain. They can be resolved hereafter at any appropriate stage.

IT IS ORDERED that trial shall be conducted essentially in the manner set out in the foregoing memorandum, subject to alterations that may come to be needed.

Dated February 14, 2003.

BY THE COURT

Warren K. Urbom
United States Senior District Judge