RECORD NOS. 08-2108(L), 08-2166 XAP

In The

United States Court of Appeals

For The Fourth Circuit

WORLDWIDE NETWORK SERVICES, LLC; WORLDWIDE NETWORK SERVICES, INTERNATIONAL, FZCO,

Plaintiffs – Appellees/Cross Appellants,

v.

DYNCORP INTERNATIONAL, LLC,

Defendant – Appellant/Cross Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA AT ALEXANDRIA

BRIEF OF AMICUS CURIAE CHAMBER OF COMMERCE OF UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANT-APPELLANT AND IN SUPPORT OF REVERSAL

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INTEREST OF THE AMICUS CURIAE [1]

The Chamber of Commerce of the United States of America ("the Chamber") is the nation's largest federation of businesses and associations, representing an underlying membership of over three million businesses and professional organizations of every size and in every relevant economic sector and geographical region of the country. A principal function of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs in cases involving issues of vital concern to the nation's business community. The Chamber categorically opposes discrimination and harassment of all types in employment and business decisions. However, the federal courts' fair, consistent, and predictable administration of discrimination and civil rights statutes is of profound concern to the Chamber's members. The Chamber seeks to assist this Court by highlighting the impact its decision may have beyond the immediate concerns of the parties to the case

This case presents highly important issues regarding the applicability of the standards set out by this Court sitting *en banc* in *Hill v. Lockheed Martin Logistics Management, Inc.*, 354 F.3d 277 (4th Cir. 2004), to cases arising under 42 U.S.C. § 1981 and particularly to business contract

[1] All parties have consented to the filing of this amicus brief.

decisions challenged under § 1981 as racially motivated. In *Hill*, an employment discrimination case in which the Chamber filed an amicus brief, this Court established the following standard for imputing the animus of individual employees to the corporation by which they are employed:

> In sum, to survive summary judgment, an aggrieved employee who rests a discrimination claim under Title VII or the ADEA upon the discriminatory motivations of a subordinate employee must come forward with sufficient evidence that the subordinate employee possessed such authority as to be viewed as the one principally responsible for the decision or the actual decisionmaker for the employer.

Id. at 291.

Whether this standard applies in § 1981 cases is very important to the Chamber's members. Companies must be free to make ordinary business decisions without having to investigate the underlying motives of every subordinate who may provide information or have tangential involvement in the decision.

The Chamber also has a substantial interest in the punitive damage issues raised in this case. Businesses must be free from excessive punitive damage awards, which serve no real purpose other than to create windfalls for plaintiffs and their attorneys. This is particularly true when significant business decisions such as the one at issue in this case are involved.

INTRODUCTION

This litigation arose out of a business contract dispute between DynCorp International LLC (DynCorp), a government contractor that performs police training and other services for the State Department in Iraq and Afghanistan, and Worldwide Network Services (Worldwide), DynCorp's subcontractor responsible for providing IT and communications services. After receiving three letters from the State Department criticizing Worldwide's performance under the subcontract, DynCorp decided not to renew the subcontract and to replace Worldwide with a different subcontractor.

Worldwide subsequently sued DynCorp under 42 U.S.C. § 1981, alleging that DynCorp's decision not to renew the subcontract was motivated by racial animus toward Worldwide's African-American owners. Lacking any evidence to show racial bias by DynCorp's decisionmaker, Richard Cashon, Worldwide presented evidence that subordinate employees of DynCorp had made racially offensive statements. The district court refused to apply *Hill* to this commercial § 1981 case, refused to give any jury instruction on how the jury should determine whether "DynCorp" acted with racial animus, and allowed the jury to punish DynCorp for the alleged racial inappropriateness of some of its employees. The jury returned a

verdict in favor of Worldwide for 3.42 million dollars in compensatory damages and 10 million dollars in punitive damages. DynCorp's post-trial motions for appropriate relief were denied by the district court.

SUMMARY OF ARGUMENT

Hill represented a thorough and thoughtful analysis of how to determine the "motives" of a corporation, and there is no logical or legal reason why its principles should not be applied to § 1981. Indeed, courts routinely apply Title VII principles in § 1981 cases. If anything, the need for limitations on § 1981 liability in business contract disputes is even more compelling.

Such decisions often involve a multitude of considerations that must be weighed by the decisionmaker, and neither courts nor juries are suited to judging the wisdom or merits of a corporation's business decisions. The failure to establish clear limitations in such cases will inhibit commerce, create unnecessary and unwise costs of doing business, create disincentives for businesses to enter into relationships with minority-owned businesses, and potentially lead to the shifting of business activities to other countries.

Had the district court properly applied the *Hill* principles, it should have concluded that the plaintiff's evidence was legally insufficient to sustain the jury verdict in favor of Worldwide. The record lacks any

probative evidence that DynCorp's decisionmaker, Richard Cashon, chose not to renew the contract with Worldwide for racial reasons, rather than because of legitimate concerns that renewal of the contract would send the wrong signal to the State Department and thereby jeopardize DynCorp's relationship with its largest and most important customer.

At the very least, the district court should have given the jury some guidance on how to determine whether "DynCorp" acted for illegal reasons. The evidence of racial animus on the part of subordinate employees presented by the plaintiff was inflammatory and would not easily have been disregarded or discounted by the jury without some instruction as to its significance. The district court's position that its instructions regarding causal effect adequately covered this issue is unrealistic and legally incorrect.

Finally, assuming that the jury's finding of liability under § 1981 is sustained, the punitive damage award should be vacated. The record lacks any evidence that Cashon acted with malice or reckless indifference to Worldwide's federally protected rights. Further, the amount of the award is grossly excessive under the Supreme Court's punitive damages jurisprudence. The district court's conclusion that compensatory damages of 3.42 million dollars are not "substantial" is erroneous on its face. Given the

statutory limitations on punitive damages established under Title VII and the substantial compensatory damages awarded, the punitive damage award should be remitted to $300,000.

ARGUMENT

A. There Is No Principled Basis Not To Apply Hill To Cases Arising Under 42 U.S.C. § 1981.

In *Hill v. Lockheed Martin Logistics Management, Inc.*, 354 F.3d 277 (4th Cir. 2004), this Court, sitting *en banc*, considered the legal standard by which the animus of subordinate employees toward a plaintiff's protected trait could be considered in determining whether a particular corporate employment decision violated Title VII or the Age Discrimination in Employment Act (ADEA). This Court observed that the ultimate question was whether the plaintiff was the subject of intentional discrimination, and that for evidence of animus toward a protected trait to be probative, the protected trait "must have actually played a role in the employer's decisionmaking process and had a determinative influence on the outcome." *Id.* at 286 (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 141 (2000)). The difficult question, however, that faced the Court was how to make this determination when the corporation's employment decision involved multiple actors and the plaintiff's evidence of animus was directed at actors other than the decisionmaker.

This Court in *Hill* conducted an exhaustive analysis of decisions of the Supreme Court and the courts of appeals regarding the various theories under which an employer could be found liable for discrimination based on the acts or statements of subordinates. Recognizing that "[t]he discrimination statutes . . . do not make employers vicariously liable for the discriminatory acts and motivations of everyone in their employ, even when such acts or motivations lead to or influence a tangible employment action," 354 F.3d at 287, and noting that in *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 151 (2000), an age discrimination case, the Supreme Court had focused on the motivations of the person "principally responsible" for the challenged employment decision, 354 F.3d at 288, this Court concluded that the appropriate inquiry is to focus on the motivation of the "person who in reality makes the decision," rather than either the "formal decisionmaker" or "the improperly motivated person who merely influences the decision." *Hill*, 354 F.3d at 291. The Court "decline[d] to endorse a construction of the discrimination statutes that would allow a biased subordinate who has no supervisory or disciplinary authority and who does not make the final or formal employment decision to become a decisionmaker simply because he had a substantial influence on the ultimate

decision or because he has played a role, even a significant one, in the adverse employment decision." *Id.* at 291.

The district court's conclusion that *Hill* has no applicability to cases arising under § 1981 is deeply disturbing because it lacks any rational basis. Although the plaintiff's claims in *Hill* arose under Title VII and the ADEA, the Court's analysis focused broadly on discrimination statutes in general. Many of the cases cited by this Court in its analysis of the decisions in other circuits arose under statutes other than Title VII and the ADEA, including some that arose under § 1981. *Wascura v. City of South Miami*, 257 F.3d 1238 (11th Cir. 2001) (ADA and FMLA); *English v. Colorado Department of Corrections*, 248 F.3d 1002 (10th Cir. 2001) (§ 1981, § 1983, and Title VII); *Kendrick v. Penske Transportation Services, Inc.*, 220 F.3d 1220 (10th Cir. 2000) (§ 1981); *Eiland v. Trinity Hospital*, 150 F.3d 747 (7th Cir. 1998) (§ 1981 and Title VII). Nothing in the *Hill* decision suggests that it is inapplicable to § 1981 cases.

In *Cerqueira v. American Airlines, Inc.*, 520 F.3d 1 (1st Cir. 2008), the First Circuit essentially adopted the same restrictive approach to imputed liability under § 1981 that this Court embraced in *Hill.* In that case, a passenger challenged an airline's decision to remove him from a flight as racially biased. The decision to remove the plaintiff was made by the

Captain based on his own observations, as well as information and concerns presented by three Flight Attendants. The plaintiff's theory of discrimination was not that the Captain was biased, but that Flight Attendant Two was motivated by racial prejudice and that her reports to the Captain substantially influenced the decision. The Captain conceded that he was "particularly concerned" by the report of Flight Attendant Two. *Id.* at 7. The case was tried and submitted to the jury, which returned a verdict in favor of the plaintiff and awarded $130,000 in compensatory damages and $270,000 in punitive damages. The district court denied the airline's post-trial motions for JNOV and a new trial.

On appeal, the airline challenged the legal sufficiency of the plaintiff's evidence as well as the district court's jury instructions. The First Circuit agreed with the airline and concluded that not only were the district court's jury instructions insufficient and erroneous, but that no reasonable jury could have found in favor of the plaintiff. To be sure, the court of appeals analyzed the case in the context of other federal statutes granting carriers the right to refuse to transport a passenger whom "the carrier decides is, or might be, inimical to safety," 49 U.S.C. § 44902(b), and implementing regulations making the Captain "the final authority as to the operation of the aircraft," 14 C.F.R. § 91.3(a). Nevertheless, the court's analysis clearly

demonstrates that corporations cannot be held liable under § 1981 for the racial motivation of every subordinate who may have influenced a decision of the corporation.

In *Cerqueira*, the court of appeals expressly rejected the theory that "liability may be found where (a) a discriminating subordinate (b) causes the firing of a plaintiff by (i) intentionally giving false information to and (ii) withholding accurate information from the decisionmaker, (c) the decisionmaker's decision is significantly based on these very inaccuracies, and (d) the plaintiff has been given no opportunity to provide contrary information." *Id.* at 19. The court cited the "principally responsible" person standard espoused by this Court in *Hill* and the "true, functional decision maker" standard espoused by the Seventh Circuit in *Brewer v. Board of Trustees of Univ. of Il.*, 479 F.3d 908, 918 (7th Cir. 2007), *id.*, n. 24, but did not directly address either theory. Nevertheless, the court of appeals was of the view that the "biases of a non-decisionmaker may not be attributed to the decisionmakers," *Id. at* 15, and that absent evidence that the Captain acted for prohibited reasons, no liability could be established under § 1981.

The First Circuit's decision also is instructive on the type of jury instructions that are required in a § 1981 case where the motives of subordinates have been impugned. The court rejected as erroneous

instructions (1) that effectively allowed the jury to find the carrier liable for the actions of non-decisionmakers, (2) that information provided by a biased non-decisionmaker could form a basis for finding discrimination, and (3) that the carrier had the ultimate burden of showing that it acted for legitimate reasons. *Id.* at 17. The court further concluded that the trial court erroneously refused to give instructions requested by the airline explaining that the Captain was entitled to rely upon information provided to him and had no duty to investigate the truthfulness of the information provided. *Id.* at 16.

In this Circuit, *Hill* represents a considered and thoughtful balancing of a corporation's right to make decisions without being subjected to liability whenever a biased subordinate may have had some involvement in a decision and the right of individuals to be free from pernicious discrimination because of their race, gender, or other protected trait. There not only is no valid reason why *Hill* should not apply to § 1981 cases, but, as we show below, there are compelling reasons why the *Hill* principles are absolutely essential in § 1981 cases challenging business contracts between arms-length entities.

B. The Failure To Establish Clear Legal Standards For Business Decisions Challenged Under 42 U.S.C. § 1981 Will Expose Small And Large Businesses To Costly Litigation And Large Damage Verdicts, Create A Disincentive To Contract With Minority Businesses, And Perpetuate Unproductive Business Relationships.

No one would debate the importance of civil rights statutes in general and 42 U.S.C. § 1981 in particular. Such statutes have played a critical role in providing equal rights for all citizens regardless of race or other protected characteristic. Nevertheless, Congress never intended that every business decision could be challenged based on nothing more than the racial insensitivity of some employees or other individuals affiliated with the business. Yet it is not mere hyperbole to state that this is the potential consequence if the district court's rudderless legal standards are not rejected.

1. Section 1981 Cases Challenging Business Decisions Are Unique.

Unlike Title VII, the ADEA, and other employment discrimination statutes, Section 1981 broadly covers all types of contracts. This section's most common application outside the employment context has been in the denial of services ostensibly open to the public such as restaurants, hotels, stores, and transportation services. These types of cases, however, differ from business disputes between companies in at least four material respects. These differences warrant even more stringent standards to reign in the use of § 1981 to challenge business decisions.

First, in the employment and public service contexts, there almost always is a wide disparity in bargaining power between the plaintiff and the defendant, and the relationship is seldom governed by a written contract. When employment or a public service is denied because of race, the plaintiff's only recourse is through discrimination statutes. In the business context, however, there almost always is a written contract and while there may be differences in bargaining power, these differences tend to be less dramatic. If the defendant breaches the contract, contractual remedies are available to the plaintiff, and discrimination remedies may overlap and may actually undermine contractual rights.

Second, the plaintiff in an employment or public service case is usually an individual who has an easily identifiable racial identity. If there is discrimination, it is personal in nature. But in the business context, the plaintiff is usually a corporation or entity with no readily identifiable racial identity. *See Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 263 (1977) (corporation has no racial identity). The Chamber recognizes that some courts have held that a corporation may acquire an imputed racial identity, *Bains LLC v. Arco Products Co.*, 405 F.3d 764, 770 (9th Cir. 2005), and we do not suggest that a corporation can never sue under § 1981. However, the corporate form does

create difficulties in determining whether the plaintiff is qualified to assert claims under § 1981. Is it sufficient that the corporation has minority ownership? If so, what percentage is required? Is the racial identity of its officers or managers sufficient to create claims under § 1981? What about the racial identity of the plaintiff's employees? And does racial animus toward individual officers, managers, or employees constitute animus toward the corporation? These are difficult questions that counsel caution against submitting business dispute cases to a jury under § 1981, but the problem is particularly acute where, as here, the jury is given no meaningful guidance on how to evaluate the racial animus issue.

Third, in the typical employment or public service case, the decision challenged by the plaintiff rarely is one that has major economic significance to the defendant's business. In the business context, however, the challenged decision frequently is one that has significant potential ramifications to the defendant's business. For example, here it is undisputed that DynCorp had legitimate and substantial concerns that Worldwide's deficiencies could cause DynCorp to lose its contract with the State Department. The loss of that contract would have had a major economic impact on DynCorp. It is highly questionable whether § 1981 was intended to allow juries to second guess significant business decisions of such magnitude.

Fourth, in employment and public service cases, the decision challenged by the plaintiff seldom involves a "better choice." Thus, employers do not typically terminate employees simply because there is a "better" employee waiting in the wings. And public service companies do not choose between potential customers; they take all who seek their service. When employment is terminated or public service denied, there is a specific reason that a jury can consider and assess, and can determine whether the asserted reason is the real reason. In the business context, however, contracts are terminated, and suppliers and subcontractors are replaced often for reasons that have little to do with the plaintiff itself. The nature of business is that there is always someone waiting in the wings—indeed actively seeking—to take your place. Thus, businesses may terminate contractual relationships because of what they perceive to be better price, greater service, better terms, better location, or simply a safer or wiser business choice. Such decisions are not easily assessed by jurors, particularly where, as here, they are bombarded with evidence of racially derogatory conduct by some employees within the corporation. More fundamentally, courts do not typically judge the wisdom of business decisions. *Yates v. Rexton, Inc.*, 267 F.3d 793, 800 (8th Cir. 2001); *Stacey v. Allied Stores Corp.*, 768 F.2d 402, 408 (D.C. Cir. 1985).

2. Strict Limitations Are Required In § 1981 Business Cases.

Although the Chamber does not propose completely exempting business decisions between corporations or entities from scrutiny under § 1981, it is critical that strict limitations be placed on such actions. Companies must be free to make ordinary business decisions without fear of incurring massive liability because of the racially derogatory acts of persons within the corporation who are not actual decisionmakers. Juries cannot simply be left to their own devices to determine whether a particular business decision was motivated by racial animus. Clear and limiting jury instructions are necessary. Further, clear limitations should be established on when and under what circumstances a corporation can acquire a racial identity.

The consequences of not placing clear and substantial limitations on challenging business decisions under § 1981 are considerable, not the least of which is the disincentive that will be created for companies to enter into relationships with "minority" businesses. If terminating a contract with a minority business can lead to substantial compensatory and punitive damages because subordinate employees of the company allegedly engaged in racially inappropriate behavior, companies may be extremely reluctant to enter into such contracts. Given the multitude of options available when a

company selects a supplier, vendor, or subcontractor, there is little possibility of being challenged by selecting the more established business over a smaller, “minority” business. But if the company chooses the minority business, it runs the risk that if the relationship does not live up to all expectations, it will be vulnerable to a lawsuit if it decides to terminate the relationship.

And if despite these risks, a company chooses to contract with a minority business, it may be reluctant to terminate the contract even if the minority business is underperforming. Unproductive relationships may be perpetuated, with a corresponding detrimental impact on the contractor’s business. Further, before terminating a relationship with a minority business, companies will be forced to expend significant resources ensuring that management’s decisions were not “tainted” at some point by information provided by an employee harboring any potential discriminatory animus.

In this case, DynCorp made a difficult business decision that it believed was in the best interest of its ongoing and strategically critical relationship with the State Department. DynCorp’s concerns clearly had a legitimate factual basis that even Worldwide does not dispute. Thus, this is not a case in which the asserted reasons were shown to be lacking any factual underpinning. The only possible basis for concluding that these

reasons were not the real reasons and that racial animus caused the decision was that various subordinates engaged in racially offensive behavior. But the record contains no basis to link this racially offensive behavior to the decision not to renew the contract, and the jury was left to speculate and in all likelihood punish DynCorp for the sins of its subordinates.

C. The Punitive Damage Award Is Unwarranted And Unconstitutionally Excessive.

The Supreme Court has observed that "[p]unitive damages pose an acute danger of arbitrary deprivation of property," *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 432 (1994), because "defendants subjected to punitive damages in civil cases have not been accorded the protections available in a criminal proceeding," *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003). The Court also has recognized that punitive damages, like many forms of punishment, are by their nature, designed to "engender adverse social consequences," *Addington v. Texas*, 441 U.S. 418, 426 (1979), and may have "potentially devastating" ramifications for a defendant's character, reputation, business, and good will. *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 281 (1989) (Brennan and Marshall, J.J., concurring).

In *Kolstad v. American Dental Assoc.*, 527 U.S. 526 (1999), the Supreme Court explored the contours of punitive damages and resolved a

split among the circuits over the standard for imposing punitive damages under 42 U.S.C. § 1981a(b)(1). The Court distinguished between two levels of damages for intentional discrimination. One level is the broader category of compensatory damages under the statute, and the other is a narrower category of punitive damages. While intentional discrimination must be found to award compensatory damages, punitive damages require an additional showing of "malice" or "reckless indifference." As explained in great detail by the Court, these terms demand that plaintiffs prove *a state of mind regarding the knowing violation of federally protected rights*. *Id.* at 534-537.

In response to "skyrocketing" and "wholly unpredictable" punitive awards, *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 10, 12 (1991) (internal quotation marks omitted), the Supreme Court has repeatedly held that the Constitution imposes limits on those awards. By the time of its decision on the subject in *State Farm I*, the Court had firmly established that due process imposes both procedural and substantive limitations on punitive damages, and that the constitutional requirements include judicial review to ensure that punitive awards are neither arbitrarily imposed nor excessive in amount. *See State Farm I*, 538 U.S. at 416-18.

In *State Farm I*, the Court provided detailed guidance to state and lower federal courts on how to review punitive damages awards to ensure that they are not excessive and that the defendants had fair notice of the potential amount of the awards. The Court elaborated on each of the three guideposts that it had previously instructed reviewing courts to consider: (1) the degree of the reprehensibility of the defendant's misconduct; (2) the ratio between the punitive damages award and the harm suffered by the plaintiff; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. *See* 538 U.S. at 418. And the Court has specifically instructed that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *State Farm*, 538 U.S. at 425.

Assuming that the jury verdict in favor of plaintiff under § 1981 can even be upheld, there are numerous problems with the punitive damage award in this case, not the least of which is the fact that the jury's award is plainly based on the racially derogatory acts of non-decisionmakers. The record evidence is insufficient to establish that DynCorp—through its decisionmaker Richard Cashon—acted with malice or reckless indifference to federally protected rights. To the contrary, he made a business decision

that he believed was essential to the future of his company. That others within the corporation may have acted in a racially insensitive manner does not warrant punitive damages against the corporation.

Insofar as an award of punitive damages can be justified at all, the jury's award of ten million dollars in punitive damages is shocking and completely disproportionate to the conduct or the injury. The district court clearly erred in characterizing the compensatory damage award of 3.42 million dollars as non-substantial. Thus, a one-to-one ratio would seem to constitute the outer boundary of any punitive award. Significantly, however, Congress has judged that $300,000 represents the outer limits in discrimination cases brought under Title VII. Given the similarities between Title VII and Section 1981, there is no basis for punishing violations of the latter far more severely than violations of the former. Under the third prong of the State Farm I guideposts, any award of punitive damages should be remitted to $300,000. *See*, *e.g.*, *Bains*, *supra*, (reducing 5 million dollar punitive award in § 1981 case to between $300,000 and $450,000).

CONCLUSION

The Chamber of Commerce respectfully supports the appeal of DynCorp and requests that this Court reverse the judgment of the district court and grant appropriate relief.

Respectfully submitted this 9th day of February 2009.

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Dated: February 9, 2009

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I hereby certify that on this 9th day of February, 2009, I caused this Brief of Amicus Curiae The Chamber of Commerce of the United States of America to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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