

EMPLOYMENT

FACT SHEET

The Equal Employment Opportunity Restoration Act of 2012: What It Means for Low-Wage Women Workers

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One year ago in Wal-Mart Stores, Inc. v. Dukes, a deeply divided Supreme Court in a narrow 5-4 decision limited workers' ability to come together as a group to challenge discrimination by large employers.¹ It dealt a particular blow to women in low-wage jobs, who make up a disproportionate share of the low-wage workforce. For this group of workers, the challenges of living on low wages are too often compounded by persistent workplace discrimination.

Many Working Women Struggle to Make Ends Meet

Women make up 59 percent of the low-wage workforce—the portion of the workforce earning hourly wages that average between \$8.21 and \$9.09 per hour.² They make up an even greater share of the lowest-paid workers, comprising nearly two-thirds of those workers earning minimum wages.³

Women workers with lower levels of education not only typically earn lower wages, they are also hit hard by the wage gap. The typical woman working full time, year round, who started high school but did not graduate, is paid about 71 percent of what of her male peer is paid, a gap that translates into an annual loss of more than \$8,550 per year. Assuming no change in the wage gap over time, this culminates in a loss of over \$342,000 over a 40-year career.⁴

It comes as no surprise that poverty is common among low-wage working mothers, and particularly common for mothers who are raising children on their own. In 2010, nearly 3.7 million families headed by working single mothers lived below 200 percent of the federal poverty line.⁵

Low-Wage Women Workers Also Face Wide-Scale Sex Discrimination

Court decisions and settlements reveal that many women earning relatively low wages also confront systemic discrimination in hiring, pay, promotions, or working conditions. For example:

- In 2011, the Office for Federal Contract Compliance Programs (OFCCP) settled lawsuits against three employers in low-wage industries for systemic sex discrimination: Tyson Fresh Meats entered into two consent decrees with OFCCP through which it was required to pay a total of \$2.25 million in damages for failure to hire women into certain positions at its meat processing plants.⁶ Green Bay Dressed Beef entered into a consent decree for \$1.65 million with OFCCP based on its failure to hire women into jobs for which they were qualified.⁷ OFCCP also settled a lawsuit against ThyssenKrupp Elevator Manufacturing, Inc. for \$288,000 for systematically rejecting female applicants to the position of assembler/packer and utility positions.⁸



- In 2011, Best Buy settled a class action lawsuit alleging that the retailer denied promotions and more lucrative sales positions to women and minorities working in its stores.⁹ Best Buy agreed to make its personnel policies and procedures more transparent and open and to adopt new recruitment programs to attract women and minorities. It also agreed to pay \$200,000 to settle the claims of the nine named plaintiffs.
- In 2009, the EEOC settled a lawsuit against a Baltimore chain of grocery stores on behalf of a class of women denied transfers to jobs as meatcutters.¹⁰ The stores agreed to provide jobs and \$275,000 to a group of women denied these positions.
- In 2000, the EEOC negotiated a settlement of a class action lawsuit on behalf of twenty-two low-wage women workers against Grace Culinary Systems, Inc. and Townsend Culinary, Inc. for \$1 million.¹¹ The suit alleged that female immigrant workers in a food processing plant were routinely subject to unwanted groping and requests for sexual favors over the course of several years. Some of the women reported being demoted and fired for rejecting these advances.

Similarly, in 2001, a group of female Wal-Mart employees sued the retailer alleging company-wide sex discrimination in pay and promotions. The women employees alleged that Wal-Mart allowed sex stereotypes to influence personnel decisions by adopting pay and promotions policies that permitted local managers to exercise unfettered discretion – resulting in lower pay and fewer promotions for women workers.¹² They introduced evidence showing that women were paid less than men doing the same work company-wide,¹³ and that only 33 percent of managers were women, although women made up 70 percent of hourly workers.¹⁴ The women presented anecdotal evidence “suggest[ing] that gender bias suffused Wal-Mart’s company culture.”¹⁵

In 2011, in a narrow 5-4 decision, the Supreme Court prohibited these women from proceeding with their claims as a class. This decision dealt a blow to low-wage workers seeking to challenge company-wide discrimination.¹⁶

Low-Wage Women Workers Need the Equal Employment Opportunity Restoration Act

The Equal Employment Opportunity Restoration Act of 2012 would remove the obstacles the Supreme Court placed in the way of ordinary Americans seeking their day in court and provide a clear avenue for employees to seek redress as a group.

A group action tool is critical for low-wage women workers for the following reasons:

1. **Standing up to an employer to challenge discrimination carries a substantial risk of retaliation.** As the Supreme Court has recognized, the “[f]ear of retaliation leads many victims of pay and other discrimination to remain silent.”¹⁷ And, as numerous court cases show, employer retaliation against workers for standing up for their rights is common.¹⁸

Low-wage workers are particularly vulnerable to the threat of retaliation, both because they are more likely to live paycheck to paycheck and thus less able to absorb the impact of a job loss, and because their employers may perceive them as easily replaceable. With the unemployment rate hovering at 8.2 percent and the typical unemployed worker out of work for almost 5 months, many low-wage workers simply cannot afford to put their jobs on the line by making a discrimination complaint.¹⁹

In contrast, when workers participate in a discrimination case as anonymous class members, the employer has no reason to single out any particular employee for retaliation. Those class members who do choose to speak up have protection, in that an employer is far less likely to target any individual for retaliation when that individual is just one member of a large group of employees alleging discrimination.

2. **Individual litigation is unaffordable for low-wage workers.** Many low-wage workers cannot afford to pay a lawyer to represent them in individual cases. Furthermore, the stakes in many of these cases, while high to the individual, are often low in absolute terms. Not only does this make it prohibitively difficult to find a lawyer willing to take these cases, but it makes it less likely that individual cases will have a

significant deterrent value. In contrast, lawyers often take group actions on contingency or partial contingency, meaning employees who cannot afford representation pay no fee or a reduced fee upfront and the lawyers only get paid if the employees win the case. This makes legal representation possible for the many low-wage workers who could not otherwise afford legal fees.

or sometimes three jobs, raising children, and pursuing education and training. Allowing workers to participate in group actions takes the burden off individual workers of initiating and litigating a claim, which is exactly how the class-action tool was designed to work.

3. **Bringing an individual claim is time-consuming.** Many low-wage women workers have significant demands on their time that may include holding down one, two,

The Equal Employment Opportunity Restoration Act of 2012 is critical for low-wage women workers. It would discourage employers from discriminating in the first place, and make it easier for low-wage women workers to put a stop to company-wide discrimination when it occurs.

- 1 Wal-Mart Stores, Inc. v. Dukes, __ U.S. __, 131 S. Ct. 2541 (2011).
- 2 U.S. Government Accountability Office, Gender Pay Differences: Progress Made, but Women Remain Overrepresented among Low-Wage Workers at 8 (October 2011), available at <http://www.gao.gov/assets/590/585721.pdf>. Low-wage workers are defined as those workers who are paid an hourly rate that is in the bottom 20 percent of wages across the entire workforce. GAO data include usual weekly hours and earnings for wage and salary workers age 25-64 from Bureau of Labor Statistics monthly Current Population survey data. See pages 3 and 19 of the report for more detail.
- 3 NWLC, Fair Pay for Women Requires Increasing the Minimum Wage and Tipped Minimum Wage (June 2012), available at <http://www.nwlc.org/resource/fair-pay-women-requires-increasing-minimum-wage-and-tipped-minimum-wage>.
- 4 NWLC calculations from U.S. Census Bureau, Current Population Survey, 2011 Annual Social and Economic Supplement, Table PINC-03: Educational Attainment— People 25 Years Old and Over, by Total Money Earnings in 2010, Work Experience in 2010, Age, Race, Hispanic Origin, and Sex, available at <http://www.census.gov/hhes/www/cpstables/032011/perinc/toc.htm> (last visited Sept. 13, 2011). This compares median earnings for men and women with some high school who did not graduate or receive a G.E.D. who are 25 and older, and who worked full time, year round. Men in this group had median earnings of \$29,435 while women in this group had median earnings of \$20,883 for a gap of \$8,552 annually. This calculation assumes a constant gap and is not adjusted for inflation.
- 5 NWLC calculations from U.S. Census Bureau, Current Population Survey, 2011 Annual Social and Economic Supplement using CPS Table Creator I, available at http://www.census.gov/hhes/www/cpstc/cps_table_creator.html (last visited Oct. 4, 2011). The term “single mothers” refers to female-headed families with children. Figure includes all employed individuals, not just full-time, year-round workers. A small number of single mothers who were employed in the Armed Forces in 2010 were excluded from these calculations.
- 6 Tyson Fresh Meats, DOL ALJ Case No. 2010-OFC-00008 (2011); Tyson Fresh Meats, DOL ALJ Case No. 2011-OFC-00009 (2011); see also News Release, Office for Federal Contract Compliance Programs, Dep’t of Labor, *Tyson Fresh Meats to pay \$2.25 million to settle sex discrimination cases with US Labor Department* (Sept. 20, 2011), available at <http://www.dol.gov/opa/media/press/ofccp/OFCCP20110799.htm>.
- 7 News Release, Office for Federal Contract Compliance Programs, Dep’t of Labor, *US Labor Department settles gender discrimination case with Green Bay Dressed Beef on behalf of 970 female applicants for \$1.65 million* (Feb. 3, 2011), available at <http://www.dol.gov/opa/media/press/ofccp/OFCCP20110146.htm>.
- 8 News Release, Office for Federal Contract Compliance Programs, Dep’t of Labor, *ThyssenKrupp to pay more than \$288,000 to rejected female job applicants at Tennessee facility to settle sex discrimination case with US Labor Department* (June 16, 2011), available at <http://www.dol.gov/opa/media/press/ofccp/OFCCP20110903.htm>.
- 9 Holloway v. Best Buy, Case No. C-05-5056 PJH (MEJ), Order Granting Final Approval to Class Action Settlement and Consent Decree (N.D. Cal. Nov. 9, 2011).
- 10 Press Release, EEOC, *Mars Super Markets to Pay \$275,000 and Offer Jobs to Women to Settle EEOC Sex Discrimination Lawsuit* (Sept. 1, 2009), available at <http://www.eeoc.gov/eeoc/newsroom/release/9-1-09b.cfm>.
- 11 Press Release, EEOC, *EEOC Obtains \$1 Million for Low-Wage Workers Who Were Sexually Harassed at Food Processing Plant* (June 1, 2000), available at <http://www.eeoc.gov/eeoc/newsroom/release/archive/6-1-00.html>.
- 12 Wal-Mart Stores, Inc. v. Dukes, __ U.S. __, 131 S. Ct. 2562-2563 (2011) (Ginsburg, J., dissenting).
- 13 Id. at 2563.
- 14 Id.
- 15 Id.
- 16 Id.
- 17 Crawford v. Metro. Gov’t of Nashville & Davidson Cnty, 129 S. Ct. 846, 852 (2009) (quoting Deborah Brake, “The Function of Retaliation: Silencing Challengers and Preserving Existing Power Structures,” 90 Minn. L. Rev. 18, 20 (2005)).
- 18 See, e.g., Thompson v. N. Am. Stainless, LP, __ U.S. __, 131 S. Ct. 863, 868 (2011) (asserting that fear of retaliation operates to “dissuade[] [employees] from engaging in protected activity”); NLRB v. Main Street Terrace Care Center, 218 F.3d 531, 538 (6th Cir. 2000); NLRB v. Vanguard Tours, Inc., 981 F.2d 62, 67 (2d Cir. 1992).
- 19 Bureau of Labor Statistics, Current Population Survey, Table A-1: Employment status of the civilian population by sex and age, available at <http://www.bls.gov/news.release/empsit.t01.htm> and Table A-36: Unemployed persons by age, sex, race, Hispanic or Latino ethnicity, marital status, and duration of unemployment, available at <http://www.bls.gov/web/empsit/cpseea36.htm> (last visited June 8, 2012). The median duration of unemployment was 22 weeks in May 2012. Data are for those 16 and older.