

IN THE 2010-2011 TERM, SUPREME COURT UNDERMINES PROTECTIONS FOR WOMEN WHILE SHIELDING CORPORATIONS AND AGREES TO HEAR OTHER MAJOR CASES NEXT TERM

The 2010-2011 Supreme Court Term included cases of major importance in which the Court ruled in favor of big corporations and powerful interests at the expense of ordinary Americans, and most particularly women. Epitomizing the Court's deeply divided, 5-4 decisions creating new hurdles for individuals joining together to vindicate their rights against powerful corporations, and new incentives for employers to evade their responsibility to maintain a fair and equitable workplace, are the Court's rulings in *Wal-Mart Stores, Inc. v. Dukes* and *AT&T Mobility, LLC v. Concepcion*. The message from the Court this Term: the bigger the corporation, the less likely it is to be held accountable. As the sharp dissents stated, these decisions disregarded past Court precedents, as well as the laws' intended purposes.

The Court's concern for big corporations had been dramatized in last Term's decision in *Citizens United v. Federal Election Commission*, overturning decades of law to protect corporations' "right" to influence elections. In other cases this Term, the Court narrowed private rights of action and allowed investment companies to shield themselves from lawsuits by creating related companies in *Janus Capital Group v. First Derivative Traders*; denied prisoners who claimed their religious rights were violated the right to sue states for damages in *Sossamon v. Texas*; and shielded generic drug companies from most lawsuits by injured patients in *PLIVA Inc. v. Mensing*.

In addition, the Court sent a disturbing signal about the strength of constitutional protections against sex discrimination. In its 4-4 ruling in *Flores-Villar v. United States*, with Justice Kagan not participating, four Justices appeared ready to uphold explicit and blatant official government discrimination on the basis of sex in the granting of the right of citizenship to the children of fathers in contrast to mothers.

The decisions of importance to women, in particular, this Term are described below. The Center filed or joined friend-of-the-court briefs in most of these cases.

Employment and Consumer Rights

This Term, the Court issued two major decisions that created daunting new hurdles for millions of women, workers, and also consumers who seek to defend their rights, in and out of court. In *Wal-Mart Stores, Inc. v. Dukes*, the Court rejected the efforts of a class of over a million women to pursue claims of sex discrimination against the giant retailer, and in *AT&T Mobility, LLC v. Concepcion*, the Court limited consumers' and employees' rights to arbitrate claims as a class. Many workers, especially low-income workers, who face violations of their rights under antidiscrimination laws do not have the resources to bring individual claims. Classwide proceedings allow employees to join together, making the cost of pursuing claims less onerous,

shielding employees from employer retaliation, and providing a means for other employees to learn about possible discrimination. Proceeding as a class also allows the full context of the discrimination to be identified and remedied company-wide.

- In *Wal-Mart Stores, Inc. v. Dukes*, a group of women employees at Wal-Mart who believed that they had faced discrimination in pay and promotions sought to bring suit against their employer in a class action on behalf of all the women across the country who worked at Wal-Mart. Wal-Mart has been fighting their effort to band together since 2001, and this Term, the Supreme Court, deeply divided, 5-4, on the major issue of whether the case could be brought as a class action at all, ruled in favor of the company. It held that the women employees in stores across the country did not have enough in common to go forward together. In essence, it declined to hold a corporation accountable for blatant sex discrimination that was described both in statistics and in individual testimony because of its size, scope, and official policy of decentralized decisionmaking on the issues of pay and promotion.

Justice Scalia, writing on behalf of the five-member majority, was dismissive of the evidence presented by the plaintiffs, which included dramatic statistics showing that women working at Wal-Mart earned less than men and were less likely to be promoted in every region of the country, even though they had more experience, higher performance ratings, and fewer disciplinary problems. Wal-Mart gave its managers broad discretion in setting pay and awarding promotions, despite evidence that gender bias was present in personnel decisions throughout the company. As recognized by Justice Ginsburg in her dissent (which was joined by Justices Breyer, Sotomayor and Kagan), the plaintiffs' evidence "suggests that gender bias suffused Wal-Mart's company culture." For example, the plaintiffs presented evidence that Wal-Mart managers stated that men are breadwinners while women work only for extra money, that women do not make good managers, and that they should stay at home "with a bun in the oven." The women of Wal-Mart — and women everywhere — will now face a far steeper road to challenge and correct pay and other forms of discrimination in the workplace as a result of the Court's decision.

- *AT&T Mobility, LLC v. Concepcion* involved claims by consumers, and therefore particularly affects women, who take charge of about 73% of household spending. The Court's 5-4 decision will also significantly limit employees' ability to vindicate their rights in the workplace, including women's ability to fight sex discrimination on the job. In *AT&T Mobility*, a lower court held that a cell phone contract clause waiving consumers' right to class arbitration was unenforceable because it was "unconscionable" (that is, fundamentally unfair) under California law. But the Supreme Court reversed on the grounds that the Federal Arbitration Act (FAA) preempted the California law – a decision that nullifies state laws meant to protect consumers, employees, and others from unfair contract terms.

Today, as in the consumer context, many employment contracts include similar boilerplate language requiring arbitration if a dispute arises, meaning that employees cannot pursue discrimination claims in court. In addition, many of those contracts also

preclude class actions in the arbitration that they require. Employees typically must sign such contracts as a condition of employment, and are given no input as to the terms. The decision in *AT&T Mobility*, therefore, is a blow to employees, for whom recourse to classwide proceedings – before an arbitrator or in court – was an essential protection. But now, because *AT&T Mobility* in essence allows employers to avoid classwide proceedings by contract, many employees will lose the option of banding together to enforce workplace rights.

- This Term, the Court also decided three employment discrimination cases that, while important, have far less impact than *Wal-Mart* and *AT&T Mobility*. These cases were brought one employee at a time, and two of these decisions followed a recent line of cases protecting employees against employer retaliation.
 - In *Thompson v. North American Stainless, LP*, Eric Thompson claimed that he had been fired in retaliation for his fiancée's complaints of sex discrimination. His fiancée worked for the same company as one of only a few women engineers. Only three weeks after the company learned that she had filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) (the first step for an employee who wishes to file a discrimination lawsuit), it terminated Thompson. He then filed his own EEOC charge and lawsuit claiming that he had been fired because of his fiancée's complaint. The Supreme Court unanimously decided that Thompson could bring a retaliation claim, providing protection against employers who retaliate against family members and other close associates of an employee who reports discrimination.
 - *Kasten v. Saint-Gobain Performance Plastics Corp.* also involved employer retaliation, in this case based on an employee's complaints of violations of the Fair Labor Standards Act (FLSA). The FLSA sets wage and hour standards and also includes the Equal Pay Act, which bars pay discrimination on the basis of sex. Writing for a 6-2 Court, Justice Breyer held that an employee's oral complaint of retaliation was sufficient, asking "Why would Congress want to limit the enforcement scheme's effectiveness by inhibiting use of the Act's complaint procedure by those who would find it difficult to reduce their complaints to writing, particularly illiterate, less educated, or overworked workers?"
 - The Court also issued a unanimous decision in *Staub v. Proctor Hospital*, in which it held an employer can be liable for discrimination when a company official who makes a final job decision acts on the basis of another official's bias.

Staub involves the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), which bars discrimination on the basis of military status. The plaintiff, Vincent Staub, was a member of the United States Army Reserve. His immediate supervisors resented the time that Staub

was obligated to devote to his Reserve duties, and notified an HR official that Staub had violated a company rule. Relying on that accusation – which Staub contended was false and motivated by anger regarding his Reserve duties – the HR official fired Staub after a cursory review of his personnel file. The Court held that an employer is liable if a supervisor motivated by antimilitary animus takes an action that is intended to harm the employee, and if that act is a “proximate cause” of the employer firing or taking other adverse action against the employee. The Court strongly suggested that its decision is applicable not only to USERRA, but also to cases brought under Title VII, which prohibits employment discrimination based on factors including sex and race.

Sex Discrimination and the Constitution

The Equal Protection Clause of the Fourteenth Amendment of the Constitution provides protection against discrimination by the government, including “heightened scrutiny” of any laws or practices that discriminate based on sex.

- This Term, *Flores-Villar v. United States* presented the question of whether a federal law violated the Equal Protection Clause because it treated unmarried men and women differently in conferring citizenship on children born abroad.

An equally divided Court – split 4-4 with Justice Kagan not participating – affirmed the decision of the Court of Appeals for the Ninth Circuit without opinion, allowing the discriminatory statute to stand. In doing so, four Justices indicated by their vote that they would not have applied the strong heightened scrutiny standard for laws that discriminate on the basis of sex established in past Supreme Court cases. For those who have assumed that such strong protection is secure, it was an ominous sign.

The Court has already decided that it will hear a number of cases that touch on legal issues of critical importance to women in the 2011-2012 Term:

- *Douglas v. Indep. Living Center of S. CA.* presents the question of whether one avenue for recipients and providers of Medicaid services to challenge state actions – specifically, that state actions conflict with their rights under the federal Medicaid statute – will continue to be available. In these difficult times, many states are seeking to cut back on their Medicaid programs, and the outcome of this case could affect the ability of women and children, who make up the majority of Medicaid beneficiaries, to challenge the effects of these, and possibly other, cutbacks in court.
- In *Coleman v. Maryland Court of Appeals*, the Court will return to the question of whether state employees can sue for damages for violations of the Family and Medical Leave Act (FMLA). In 2003, in *Nevada Department of Human Resources v. Hibbs*, the Court held that damages could be awarded under the FMLA provision that requires large employers to provide unpaid leave for employees who need time off to care for a child, spouse or parent with a serious health condition. Next term, it will decide whether state

employees who need leave because of their own illness or disability can also sue for damages.

- The Court is considering whether or not to hear the case of *Magner v. Gallagher*, which presents the question of whether rules or practices that seem neutral on their face but that have the effect of harming minorities or women can be challenged under the Fair Housing Act – an important issue for women who face discrimination in housing, including discrimination based on family composition.

The decisions of the Court can have a profound impact on the women of this nation for generations to come. Especially when cases involve interpreting statutes passed by Congress in the first place, it is Congress' duty to overrule the devastating effects of the decisions. The great potential harm caused by *Wal-Mart v. Dukes* and *AT&T v. Concepcion* demands congressional action. When constitutional interpretations are at issue, it is essential for Congress to mitigate the dangerous effects of the decisions.

Moreover, when decisions like *Wal-Mart* and *AT&T*, and others like the Court's recent decisions in *Ledbetter v. Goodyear Tire*, *Gonzales v. Carhart*, and *Parents Involved in Comm. Sch. v. Seattle Sch. Dist. No. 1*, are decided by just one vote, the impact of the composition of the Court on the legal protections upon which women, and all Americans, rely could not be more stark.