



WORKPLACE JUSTICE

THE EQUAL EMPLOYMENT OPPORTUNITY RESTORATION ACT OF 2016: WHAT IT MEANS FOR WOMEN

Since the civil rights laws were enacted, employees have been able to come together as a group to enforce their rights to a workplace free from discrimination. But in 2011, in *Wal-Mart Stores, Inc. v. Dukes*,¹ a deeply divided Supreme Court voted 5-4 to erect significant barriers to employees' rights to bring class actions under our nation's nondiscrimination laws. The Equal Employment Opportunity Restoration Act of 2016 will 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 subject to company-wide discrimination to come together to seek redress.

In *Wal-Mart v. Dukes*, a group of women workers from across the country sued Wal-Mart, the nation's largest private employer, for sex discrimination in pay and promotions. The workers alleged that Wal-Mart delegated authority to local managers to make decisions about pay and promotions without meaningful guidance and that this resulted in widespread discrimination against women. Despite evidence showing that across the country women at Wal-Mart made less than men doing the same work and were grossly underrepresented in management jobs, the Supreme Court held that the employees did not have enough in common to proceed as a class. The decision dealt a blow to employees, by calling into question the scope of their rights to come together as a group to challenge discrimination by large employers, and in particular to challenge employment practices implemented by many individual supervisors within large companies.

Group Actions Are Critical to Preserve Women's Rights in the Workplace

Unfortunately, employment discrimination remains alive and well in today's workplace. Experience has shown that employees' ability to come together as a group to challenge discrimination is critical to ending it:

- *Group actions reduce the likelihood of retaliation.* As the Supreme Court has recognized, "[f]ear of retaliation leads many victims of pay and other discrimination to remain silent."² When employees come together as a group to challenge discriminatory practices, they gain critical support and protection, as they are less likely to be individually targeted when many others are also challenging the same employment practice.
- *Many employees can only stand up for their right to a workplace free from discrimination if they can do so as part of a group.* Employees in individual cases usually must pay hefty legal fees upfront, which many employees cannot afford. In comparison, lawyers are often willing to take group actions on contingency or partial-contingency, meaning the lawyer is awarded fees by the court if the case is successful, and the employees pay little to no attorney fees.³ An individual is even less likely to find a lawyer when the financial stakes of a case, while large to the employee, are small in absolute terms—as will often be the situation in pay discrimination cases brought by low-wage workers in low-wage jobs.
- *Successful group actions result in employer-wide solutions to employer-wide problems.* In a group action, employees may seek injunctive relief to end company-wide discrimination, while in an individual action an employee can only receive a remedy for the discrimination that has occurred against her, which may not solve the broader problem.



- *The very possibility of successful group actions to combat company-wide discrimination has a far greater deterrent effect on employers than individual actions.* Employers know that the consequences of being held to account for discrimination against many employees in a single lawsuit can be significant and thus have increased incentives to ensure wide-scale discrimination does not occur.
- *Group actions promote more efficient and consistent results in court by aggregating and disposing of similar claims at one time, rather than in hundreds of individual actions.* Courts should not have to decide numerous individual cases challenging the same discriminatory practice, when a single case could end the practice and provide remedies to those harmed by it.
- *Clarifies employees' ability to challenge subjective employment practices.* The bill makes clear that employees can challenge an employer's policy or practice of leaving personnel decisions to the unfettered discretion of supervisors to the same extent as employees can challenge other employment practices. In other words, a group action can challenge a discriminatory employment practice made up of many different supervisors' individual decisions.
- *Ensures that employers' nondiscrimination policies will not be given undue weight.* The Supreme Court's *Wal-Mart* decision gave undue weight to the fact that "Wal-Mart's announced policy forbids sex discrimination" – leaving the unfortunate misimpression among some employers that merely maintaining a boilerplate nondiscrimination policy will insulate them from liability. The bill states that an employer's written nondiscrimination policy will only be considered in determining whether to allow a group of employees to challenge an employer's practice of discrimination, when the employer demonstrates that the policy has been consistently and effectively implemented.

Employees Need the Equal Employment Opportunity Restoration Act (H.R.5692)

The Equal Employment Opportunity Restoration Act clarifies and restores employees' rights to challenge discriminatory employment actions as a group. The bill:

- *Provides a new avenue for group actions.* The bill provides an alternative mechanism for group actions challenging discriminatory employment practices that violate Title VII, the Americans with Disabilities Act, the Rehabilitation Act, 42 U.S.C § 1981, or the Genetic Information Nondiscrimination Act. As an alternative to pursuing a class action under Rule 23 of the Federal Rules of Civil Procedure, this bill allows an employee to bring a group action, on her own behalf and for other affected employees.
- *Restores courts' discretion to determine the appropriate relief.* The bill restores broad discretion to courts to determine the most appropriate method for determining what remedies to award victims of discrimination in a group action. The bill allows courts to determine which methods will best make victims whole while minimizing burdens on the parties, including individual hearings, economic or statistical models, mathematical calculations, or sampling.

1 564 U.S. 338 (2011).

2 *Crawford v. Metro. Gov't of Nashville & Davidson County*, 555 U.S. 271, 279 (2009) (quoting Deborah L. Brake, *Retaliation*, 90 Minn. L. Rev. 18, 20 (2005)).

3 *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (noting that the policy at the very core of the class action mechanism "is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights").

