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EMPLOYMENT

FACT SHEET

Wal-Mart v. Dukes: New Hurdles – and a Significant Step Back – for Women Employees

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The Supreme Court's deeply divided 5-4 decision in Wal-Mart Stores, Inc. v. Dukes[1] *struck a devastating blow for employees who seek to hold their employers accountable for discrimination and other violations of workplace law. In* Dukes*, a group of women Wal-Mart employees sued the retailer alleging companywide sex discrimination in pay and promotions. The lower courts concluded that the women shared enough in common to proceed in a class action – that is, they met the standard for "commonality" under existing law.[2] But Justice Scalia's opinion for the majority reversed class certification and set a new standard for commonality – a standard employees will find very difficult to meet, especially when going up against the very largest corporations.[3] The decision will have significant repercussions for the women of Wal-Mart and for women employees nationwide.*

Background – The Women Employees' Case for Sex Discrimination at Wal-Mart

As Justice Ginsburg detailed in her dissent, 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 unmonitored discretion – resulting in lower pay and fewer promotions for women workers.[4]

- The women employees offered statistical evidence showing "pay and promotions disparities at Wal-Mart [that] can be explained only by gender discrimination."[5] Women were paid less than men companywide[6], and although women made up 70 percent of hourly workers, only 33 percent of managers were women.[7]
- The women also presented anecdotal evidence "suggest[ing] that gender bias suffused Wal-Mart's company culture."[8] Examples include managers' statements that certain desirable positions were "a man's job";[9] that men are breadwinners, but women work only "for the sake of working";[10] and that women's family responsibilities interfere with work, so they "should be at home with a bun in the oven."[11]
- The women offered evidence on companywide subjective decision-making practices – including a "tap on the shoulder process" for promotions, "in which managers have discretion about whose shoulders to tap,"[12] and a policy that gave supervisors significant discretion in setting wages, with "no standards or criteria" "to counter unconscious bias."[13] In addition, expert sociological testimony indicated that Wal-Mart's standardless delegation to local managers – and a corporate culture that tolerated pervasive sex stereotypes – facilitated discriminatory personnel decisions.[14]

The Majority Opinion

Justice Scalia's majority opinion[15] held that the women employees did not have enough in common to proceed

as a class. But in analyzing "commonality," the Court took an extremely narrow view, emphasizing the class members' dissimilarities rather than their common ties.[16]

First, the majority imposed a new, more stringent evidentiary standard, holding for the first time that employees must provide "significant proof" that their employer "operated under a general policy of discrimination" to establish commonality.[17] And on that basis the Court rejected plaintiffs' evidence as insufficient to meet this new standard of proof.

- The majority dismissed plaintiffs' statistical evidence on the rationale that the data described nationwide trends rather than regional or store-level disparities in pay and promotions.[18] But (as the dissent pointed out), in doing so the majority needlessly rejected the lower courts' determination as to the proper scope of statistical evidence.[19]
- The Court also discounted the employees' personal stories of discrimination and companywide subjective decision-making as insufficient,[20] although courts have widely considered similar anecdotal evidence to illustrate a common experience of discrimination.[21]
- Finally, the majority disregarded expert evidence on subjective decision-making because the expert didn't specify "how regularly" negative sex stereotypes affect Wal-Mart's employment decisions.[22] Yet courts have long accepted similar sociological evidence without requiring such quantification.[23]

Second, the majority put forth the unsubstantiated assertion that "most managers . . . would select sex-neutral, performance-based criteria for hiring and promotion that produce no actionable disparity at all."[24]

Third, Justice Scalia 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 anti-discrimination policy will insulate them from liability.[25]

Under the majority's conception of commonality and its new "significant proof" standard, employers that grant unfettered and unmonitored discretion to managers will more easily avoid accountability for workplace discrimination.

Dissent

In contrast to the majority, the dissent found the employees' evidence compelling. Justice Ginsburg's dissenting opinion[26] objects that the majority overstates what is needed to establish commonality. Commonality should be "easily satisfied," requiring only "a single question of law or fact common to the members of the class."[27] The dissent criticizes the majority for focusing on the class members' "dissimilarities"[28] rather than recognizing their common claim: that Wal-Mart's personnel policies resulted in unlawful discrimination in pay and promotions.[29]

The dissent also disapproves the majority's failure to give full weight to existing Supreme Court precedent holding that subjective decision-making may serve as a foundation for discrimination lawsuits. For example, *Watson v. Fort Worth Bank & Trust*[30] held that an employer's "undisciplined system of subjective decision-making" can "give rise to Title VII claims" when that system "produces discriminatory results."[31] And *Wards Cove Packing Co. v. Atonio*[32] firmly established that subjective decision-making is an "employment practice subject to disparate impact attack."[33] As the dissent explains, the Court's precedents recognize that "the practice of delegating to supervisors large discretion to make personnel decisions, uncontrolled by formal standards, has long been known to have the potential to produce disparate effects" – because "managers, like all humankind, may be prey to biases of which they are unaware."[34]

What the Decision Means for Women Workers, at Wal-Mart and Beyond

The Court's decision in *Dukes* departed from precedent and rewrote the law governing class actions in employment discrimination cases. It also altered the playing field for workers who face violations of workplace law.

After *Dukes*, workers now face an uphill battle in certifying a class. And those who fail to gain approval for a class proceeding will be forced to proceed individually, losing out on the numerous advantages of class actions, such as:

- Lower litigation costs and greater efficiency;
- The ability to lump small dollar claims together to fund the cost of legal representation;[35]

- Notice mechanisms for employees who may be unaware of discrimination;[36] and
- The opportunity to change systemic discriminatory employment practices that affect a large number of workers through class-wide injunctive relief.

The Court's decision does not mean the end of the road for the women of Wal-Mart, who will return to court to continue the lawsuit on a smaller scale. The strong evidence they've already assembled will assist in proving their claims of discrimination in smaller class actions or individual cases. But, unfortunately, the Court's decision undermines the employees' goal of achieving companywide change at Wal-Mart through their lawsuit.

1 *Wal-Mart Stores, Inc. v. Dukes,* __ U.S. __, 131 S. Ct. 2541 (2011).
2 Commonality, the existence of "questions of law or fact common to the class," is one of the prerequisites for a class action under the Federal Rules of Civil Procedure. Fed. R. Civ. P. 23(a).
3 Moreover, under another section of the opinion that all of the Justices joined, it will be harder for employees to seek backpay in class actions. *See Dukes*, 131 S. Ct. at 2557-2561. Under the decision, employees seeking backpay will now have to meet additional evidentiary burdens under Rule 23(b)(3) of the Federal Rules of Civil Procedure, and will be required to provide individual notice to prospective class members allowing the opportunity to "opt out" of the class, increasing the costs of such class actions.
4 *Dukes*, 131 S. Ct. at 2562-2563 (Ginsburg, J., dissenting).
5 *Id.* at 2564 (internal quotation marks and citation omitted).
6 *Id.* at 2563.
7 *Id.*
8 *Id*.
9 Joint Appendix 839-41a, 1110a.
10 *Id*. at 1313-14a.
11 *Id*. at 845a.
12 *Dukes,* 131 S. Ct. at 2563 (Ginsburg, J., dissenting) (internal quotation marks and citation omitted).
13 *Id.*
14 *See Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 601 (9th Cir. 2010) (en banc) (describing in detail testimony by plaintiffs' sociologist expert analyzing Wal-Mart's corporate culture and personnel practices).
15 Chief Justice Roberts and Justices Kennedy, Thomas and Alito joined the majority.
16 *See Dukes*, 131 S. Ct. at 2565 (Ginsburg, J., dissenting).
17 *Id*. at 2553 (majority opinion) (citation omitted).
18 *Id.* at 2555.
19 *Id.* at 2564 n.5 (Ginsburg, J., dissenting).
20 *Id.* at 2556 (majority opinion).
21 *See Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977) (noting that "individuals who testified about their personal experiences with the company brought the cold numbers [of statistical evidence] convincingly to life"); *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 168 (2nd Cir. 2001) (observing that anecdotal evidence of individual experiences of discrimination "provides texture") (internal quotation marks omitted).
22 *Dukes*, 131 S. Ct. at 2553 (internal quotation marks and citation omitted).
23 *See, e.g., Price Waterhouse v. Hopkins*, 490 U.S. 228, 235-36, 255-56 (1989).
24 *Dukes,* 131 S. Ct. at 2554.
25 *Id.* at 2553-54.
26 Justices Breyer, Sotomayor and Kagan also joined the dissent.
27 *Dukes,* 131 S. Ct. at 2562, 2565 (Ginsburg, J., dissenting) (internal quotation marks and citations omitted).
28 *Id.* at 2565.
29 *Id.* at 2564 (identifying the claim that "Wal-Mart's pay and promotions policies gave rise to unlawful discrimination" as the common issue linking the class members).
30 487 U.S. 977 (1988).
31 *Dukes*, 131 S. Ct. at 2564-65 (Ginsburg, J., dissenting) (citing Watson, 487 U.S. at 988, 990-991) (internal quotation marks omitted).
32 490 U.S. 642 (1989).
33 *Dukes*, 131 S. Ct. at 2565 (Ginsburg, J., dissenting) (citing Wards Cove, 490 U.S. at 657).
34 *Id.* at 2564.
35 *See AT&T Mobility LLC v. Concepcion*, __ U.S. __, 131 S.Ct. 1740, 1761 (2011) (Breyer, J., dissenting) (discussing the difficulty of securing legal representation for plaintiffs with low dollar-value claims).
36 Lack of awareness of discrimination is an especially acute problem in the context of pay discrimination because many employers prohibit the discussion of wages and compensation among employees. *See, e.g.,* H. R. REP. 110-237, at 7 (2007) (House Report on the Lilly Ledbetter Fair Pay Act of 2007); Leonard Bierman & Rafael Gely, *"Love, Sex and Politics? Sure. Salary? No Way": Workplace Social Norms and the Law,* 25 BERKELEY J. EMP. & LAB. L. 167, 168, 171 (2004).