

## Wal-Mart Class Action Blocked

*Ruling Deals Huge Blow to Large-Scale Employment Discrimination Cases*

By Robert Iafolla

WASHINGTON In a decision that shields employers from nationwide discrimination class actions, the U.S. Supreme Court blocked a lawsuit brought against Wal-Mart Stores Inc. by more than 1.5 million female workers, the largest class ever for a gender-bias case.



A five-justice majority rejected class certification - a necessary step for plaintiffs to band together and sue collectively - based on a combination of statistics, anecdotal evidence and a social science theory of implicit bias in the company's personnel decisions.

"The decision will deprive the plaintiffs' bar [of] a blunt-force weapon to use against American employers both large and small," said Anthony J. Oncidi, a partner with Proskauer Rose LLP in Los Angeles who heads the firm's California labor and employment group. "The most telling aspect is the court said you can't have 'trial by

formula,' you can't have a paint-by-numbers approach for serious, billion-dollar litigation."

The court also unanimously held that the 9th U.S. Circuit Court of Appeals erred in certifying the plaintiffs as a certain type of class because they sought back pay.

But employment law experts said the finding by the five justices - Justice Anthony M. Kennedy and the four conservatives - will have a much greater impact in restricting employment discrimination class actions. The majority's holding threatens large-scale employment discrimination lawsuits that rely on statistics, like pattern-or-practice suits and disparate-impact cases, experts said.

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"The five folks in the majority just don't like the theory of the case, and that to me takes us back to 1960," said Ann C. McGinley, a University of Nevada Las Vegas School of Law professor who writes about employment discrimination. "The court is expecting

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the type of proof from early on in civil rights cases, like a sign in the window that says 'no blacks shall apply.' We don't have that kind of evidence anymore, but that doesn't mean there's no discrimination."

The ruling will also likely end a large-scale discrimination class action brought against Costco Wholesale Corp., which was certified by a federal court in California's Northern District but has been held at the 9th Circuit pending the decision in the Wal-Mart case. In addition, it should also push similar suits filed against Bayer Corp., Goldman Sachs Group Inc. and Toshiba Corp. to quick conclusions, said Dana A. Kravetz, the partner heading the labor and employment group at Michelman & Robinson LLP in Encino. *Ellis v. Costco*, No. 07-15838 (2007).

California, known as the country's epicenter for employment litigation, is headquarters for the types of nationwide chains that would be most affected by the ruling, like Safeway Inc., Gap Inc., and California Pizza Kitchen.

The class-certification issue came to the court out of the 2001 lawsuit brought by lead plaintiff Betty Dukes, who worked as a greeter at a Wal-Mart store in California. She claimed the nation's largest private employer systematically discriminated against female employees by paying them less and promoting them at a slower rate than male workers.

Former U.S District Judge Martin J. Jenkins of San Francisco certified the class in 2004. The 9th Circuit partially upheld the certification in 2010, leading to Wal-Mart's challenge at the Supreme Court. *Wal-Mart v. Dukes*, 10-277.

Joseph M. Sellers, a partner with Cohen Milstein Sellers & Toll PLLC who argued the plaintiff's case before the high court, said the female workers will pursue their claims either "splintered" individually or in a smaller, reformulated class.

"The court has not ruled that Wal-Mart did not discriminate," he said.

But Wal-Mart's lawyer, Theodore J. Boutros Jr. of Gibson, Dunn & Crutcher LLP in Los Angeles, said the ruling "doesn't leave any room for a class action of any size moving forward." He added that the company is prepared to defend against individual claims.

Although the Supreme Court killed the gargantuan class action against Wal-Mart, some employment law experts said the suit, in combination with other litigation against the company, has pushed the company to increase the diversity of its workforce and improve opportunities for women and minorities. For example, the company has

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taken a strong hand in pushing outside law firms to hire women and attorneys of color.

"Undoubtedly the suits have prompted Wal-Mart to undertake diversity efforts," said Susan Bisom-Rapp, a professor at Thomas Jefferson School of Law and expert on employment discrimination.

But Monday's decision opens up room for the company to backslide on these efforts, experts warned. Even though the court ruled on a procedural issue, the general public may lose that nuance and think the court ruled that Wal-Mart had not discriminated, they said.

The core of the court's 5-4 ruling was that the plaintiffs didn't show the 1.5 million female employees - who had different job titles and worked at more than 3,400 locations in 50 states - had enough in common to move forward as a class.

"In a company of Wal-Mart's size and geographical scope, it is unlikely that all managers would exercise their discretion in a common way without some common direction," Justice Antonin Scalia wrote for the court.

Wal-Mart's stated policy is to give local supervisors discretion over personnel decisions. Absent more explicit evidence, the court held that the plaintiffs failed to show common direction through statistical analysis or anecdotal accounts.

As for the expert testimony from a sociologist who claimed that Wal-Mart, with its nearly all-male management who are given wide discretion, has a corporate culture implicitly biased against women, Scalia called it "worlds away" from showing company-wide discrimination.

Justice Ruth Bader Ginsburg, writing for the left-leaning dissenters, argued that the plaintiffs met the commonality requirement through individuals' testimony and statistical analysis on pay and promotion practices. Moreover, she wrote that Wal-Mart's policy of delegating personnel decisions to local supervisors allows for bias.

"Managers, like all humankind, may be prey to biases of which they are unaware," Ginsburg wrote. "The risk of discrimination is heightened when those managers are predominantly of one sex, and are steeped in a corporate culture that perpetuates gender stereotypes."

Still, the dissenters joined the majority's holding that the plaintiffs' request for back pay disqualifies it for a type of class, called a b2 after a subsection of civil procedure rules, that requires injunctive relief to be the dominant remedy sought. But where the dissenters would have remanded the case back to the district court to determine if the plaintiffs could move forward as a different type of class, the five-justice majority eliminated the case altogether.