

Supreme court tells working women, you're on your own

Written by Irma D. Herrera, New America Media
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SYNOPSIS: Despite a vast amount of evidence of wage discrimination against women, the court's conservative (all-male) majority decided to give Wal-Mart -- a company well known for its union-busting policies -- the benefit of the doubt.

Sitting in the majestic paneled courtroom in the U.S. Supreme Court three months ago, it did not take long to get that dreaded sense that Betty Dukes and 1.5 million other current and former women employees at Wal-Mart were not likely to prevail in their epic 10-year battle against the nation's largest private employer.

On Monday, that premonition came true. The Supreme Court threw out several lower-court rulings and declared that the women's claims of massive, persistent sex discrimination were not sufficiently similar to merit class-action status. Ladies, you are on your own!

In order to get the case certified as a class action, Dukes and her fellow plaintiffs had introduced vast amounts of evidence supporting their claims of discrimination. Women made up two-thirds of the Wal-Mart work force, yet held only one-third of management jobs. Wal-Mart had a far smaller proportion of women managers when compared to the other major retailers. Indeed, in 1999 (the most recent date for which data were available) Wal-Mart had a lower percentage of female managers than its top competitors had in 1975.

Other evidence from Wal-Mart's own personnel records showed that women were paid less on average than their male counterparts in all job classifications, despite having higher performance ratings and more seniority than their male co-workers.

This evidence, along with more than 100 declarations from women employees around the United States, convinced a San Francisco federal court to certify the class in 2004, allowing the women to sue en masse and giving them a fighting chance against the corporate giant. The Ninth U.S. Circuit Court of Appeals upheld the class certification three separate times, albeit by a narrow majority. Wal-Mart was thrilled when the pro-big business Supreme Court agreed to hear its appeal.

To no one's surprise, the court sided with Goliath. Where Wal-Mart's women workers and their lawyers see group inequality in the form of common practices and policies that place women in a disadvantageous position, the Supreme Court's conservative, all-male majority could only see 1.5 million individual women with specific, unrelated gripes about how much Wal-Mart pays them, and individualized complaints about promotional opportunities they may have been denied.

In my notes of the hour-long oral argument this past March, the conservative majority's skepticism comes across loud and clear. Justice Kennedy: "Let's suppose that experts' testimony, sociologists and so forth, establish that in industry generally and in the retail industry (in particular), women still are discriminated against by a mathematical factor of X. You have a company that has a very specific policy against discrimination, and you look at their -- the way their employees are... treated, and you find a disparity by the same mathematical factor X. Does that give you a cause of action?" Translation into common English: If everyone else does it, how in the world can a woman claim there's discrimination at Wal-Mart?

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This same question was asked, in one form or another, by each of the conservatives (except Clarence Thomas, who asked no questions during oral argument, as is his custom). In the end, they decided to give Wal-Mart — a company well known for its union-busting policies and for profitting off the backs of its low-wage workforce — the benefit of their doubt. In a corporation with 3,400 stores located in 50 states, with an express policy forbidding discrimination, and where managers had substantial discretion as to how much employees were paid or who was promoted, the court's majority held that the plaintiffs could not establish that their claims of discrimination had enough in common to warrant suing en masse.

The dissenting justices -- Ginsburg, Sotomayor, Kagan and Breyer -- strongly disagreed. They found the evidence convincing that "gender bias suffused Wal-Mart's corporate culture" and noted that the company's policy of giving supervisors great discretion to make personnel decisions "has long been known to have the potential to produce disparate effects." The justices (three of whom are female) argued that the suit should go back to the lower court for further determination as to whether the class action could proceed. The majority dismissed the class altogether.

On March 28, 2011, the night before the Supreme Court argument, the American Association for University Women and the Alliance for Justice hosted a reception for Betty Dukes and the other Wal-Mart plaintiffs. These working-class women were thrilled to be in Washington and proudly introduced their family members, who stood by them on the eve of the most public day in their otherwise ordinary lives. The women had spent a decade fighting Wal-Mart because they had tired of second-class status in the workplace, and they refused to watch while their daughters and nieces and another generation of women were paid less and passed over for well-deserved promotions. Whatever happened, they had fought the good fight -- and the support they felt that night sustained them, despite the odds.

After the oral arguments, the women of Wal-Mart stepped into the crisp Washington sunshine with their heads held high. Win or lose, their case had already brought about some major changes at the retailer. Two years after the lawsuit was filed, the company finally began posting management opportunities, and the "tap on the shoulder" system of promotions that had clearly favored male employees was eliminated. Later, the company restructured its pay system, erasing some (but not all) of the wage disparity. It also put in place training programs aimed at increasing the number of women managers. Only when it felt the heat of the class action was Wal-Mart willing to mend its ways.

What will happen to the women of Wal-Mart now that their class action has been disbanded? As a lawyer who was once part of the legal team that represented Betty Dukes, Chris Kwapnoski, Edith Arana and the other plaintiffs in this case, I can't help but find the Supreme Court's decision deeply disappointing, not just for the women but for all people who band together to challenge corporate practices that inflict widespread harm.

I know the plaintiffs are disappointed, too. But they haven't come this far to give up now. The evidence of discrimination at Wal-Mart is not wiped out by this ruling, and although the case cannot proceed as a nationwide class action, these resourceful and determined women will regroup and continue their fight for justice and equality. They have no other choice.

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Wal-Mart v. Dukes Case -- The Back Story Rosenburg Foundation

Although the U.S. Supreme Court ruled against the plaintiffs in a historic class action lawsuit brought against the giant retailer Walmart, the story of the women that championed the sex discrimination battle is an inspiring tale of perseverance in face of tremendous odds. The following video was produced by the Rosenberg Foundation.

Watch and embed the video at this location: <http://newamericamedia.org/2011/06/walmart-vs-dukes-case---the-back-story.php>