



## Guest Commentary

# A Modern Day David Versus Goliath

## Supreme Court hears landmark Wal-Mart class action

By JENNIFER TURNER

All eyes are on the U.S. Supreme Court in a case that involves millions of female employees facing off against the nation's largest retailer. In March, the justices heard arguments in the most closely watched case before the Court this year, and the largest employment class action in history, *Wal-Mart Stores Inc. v. Dukes*.

Betty Dukes, along with several other current and former employees of the superstore, filed an action in the District Court for the Northern District of California in 2001 alleging that the chain engaged in discriminatory pay and promotion practices adversely affecting women. They sought money damages, as well as an injunction ordering Wal-Mart to cease and desist such practices. A class was certified including between 500,000 and 1.5 million current and former employees, making it one of the largest class actions in U.S. history. The class includes all women who have worked for the retail giant since 1998. It was certified by the District Court and upheld by the en banc 9<sup>th</sup> Circuit Court of Appeals.

Specifically, the plaintiffs allege that women employed in Wal-Mart stores are paid less than their male counterparts holding comparable positions, and despite having higher performance ratings and greater seniority. Additionally, they claim that women receive fewer, and wait longer for, promotions to management-level positions.

In seeking class certification, the plaintiffs claimed that the retailer's internal structure promotes discrimination and stereotyping on the basis of sex, that such practices are consistent throughout Wal-Mart's national sphere and that this discrimination affects

all women who have ever been employed by the retail giant. The effect, they claim, is that company-wide men are paid on average 5 to 15 percent more than women, or an average of approximately \$5,000 more per year.

For its part, Wal-Mart contends that the case has grave procedural flaws. It asserts that the named plaintiffs have little in common with one another, let alone the remaining million-plus women who make up the class. It further contends that there is no statistical difference in pay between men and women at 90 percent of its stores, where the plaintiffs claim the relevant employment related decisions are actually made.

Despite the extensive media hype the case has received, the Court will not decide whether Wal-Mart is guilty of discrimination. Rather, the Court must decide whether the small group of plaintiffs has satisfied federal class-action rules, allowing them to stand for co-workers nationwide who they say have suffered under common discriminatory practices. Specifically, it has been asked to answer whether claims for monetary relief can be certified under Federal Rule of Civil Procedure 23(b)(2). The Court has taken up the question, *sua sponte*, under what circumstances and whether the class certification ordered under rule 23(b)(2) was consistent with rule 23(a).

### Multi-Factor Test

To be certified, a class must meet various requirements. Namely, it must show that joinder of all class members would be impracticable, that class members share common questions of law or fact, that claims or

defenses of the representative parties are typical of the claims and defenses of the class, and that the representative parties will fairly and adequately protect the interests of the class.



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In addition to meeting these requirements, the class may be certified only if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief...is appropriate respecting the class as a whole." Class certification under this provision does not extend to cases in which the appropriate final relief relates exclusively or predominately to money damages.

That raises considerable problems for this class because, in addition to seeking injunctive and declaratory relief, the plaintiffs also want potentially billions of dollars in back pay. The 9th Circuit, however, affirmed the class based upon its application of a new multi-factor predominance test which considers several factors to determine whether monetary damages "predominate" over the

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injunctive relief.

The unprecedented nature of the case, and the Court's anticipated decision, has drawn an outpouring of competing briefs from corporate America and the nation's leading civil rights groups.

Many feel that class actions are an imperative instrument in holding corporations accountable for widespread, institutional bias. As such, the legal implications of the case are significant. If the Court denies the class the right to proceed, the ability of employees to fight institutional bias will, no doubt, be severely hampered. As a matter of course, an individual discrimination action has vastly less impact on a corporate employer, particularly one with Wal-Mart's size and global reach. Individual employees have fewer financial resources to devote to the battle and discovery in such cases is limited, such that company-wide patterns are often missed.

Conversely, there are obvious practical problems with certifying such a massive class, such as managing the litigation and

calculating damages. Additionally, many feel that class certification is unfair and inappropriate, where such litigation involves countless individual employment decisions. It effectively denies an employer the right to present defenses with respect to how individual employees were actually treated, or to provide the basis for particular employment decisions in light of relevant facts and circumstances.

Pundits are also watching the Court closely for reasons unrelated to the litigation itself. The Court has been criticized by leading civil rights groups, Democratic leaders, and even the president himself for being too friendly toward big business. A ruling in favor of the corporate giant would, no doubt, do little to quell their consensus.

Equally notable is the current gender makeup of the court, one-third female for the first time in history. Many feel that the plaintiffs' claims of institutional gender bias will resonate with Justices Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan. Ginsburg

has a notable history on women's rights issues. It was she who delivered the opinion of the Court in *United States v. Virginia*, holding that the Virginia Military Institute's male-only admission's policy violated the Equal Protection Clause of the Fourteenth Amendment. Similarly, it was her dissenting opinion in the landmark case of *Ledbetter v. Goodyear Tire & Rubber Co.*, which later formed the basis of the law reversing the Court's opinion favoring a 180-day time limitation in pay discrimination claims.

On a broader scale, the gender wage gap is anything but unique to Wal-Mart. According to the U.S. Department of Labor's Bureau of Labor Statistics, women who worked full time in 2009 in wage and salary jobs had median weekly earnings of 20 percent less than their male counterparts—though such statistics varied widely by industry.

Corporate America and its counsel will, no doubt, be on the edge of their seats until the Court reaches a decision, which is expected by the end of June. ■