Wal-Mart v. Dukes

Will the Supreme Court Protect Wal-Mart’s Discrimination Against Women?

I. Overview

The ability of the world’s largest retailer, and largest private employer in the United States, to discriminate on a massive scale against its female employees is at stake in the biggest case of the U.S. Supreme Court’s 2010-11 term – Wal-Mart v. Dukes. In Dukes, the district court approved, and the en banc Ninth Circuit Court of Appeals upheld, certification of a class action brought by Betty Dukes and others to hold Wal-Mart accountable for suppressing women’s pay and promotion for more than a decade. Despite detailed findings by the lower court and the lack of a circuit split on the issues in dispute, the Roberts Court accepted Wal-Mart’s appeal.

Powerful corporations like Wal-Mart have consistently enjoyed a home field advantage when litigating in front of the Roberts Court. Since 1953, corporate interests have won just 42 percent of the time in the Supreme Court, but that percentage has jumped to 61 percent in the Roberts Court, with three of the seven most pro-corporate terms occurring during Chief Justice Roberts’ first five years. Just last term, the Roberts Court ruled in favor of the side that the U.S. Chamber of Commerce supported in 13 of 16 cases. The U.S. Chamber, and a wide array of other large corporate interests, have lined up on Wal-Mart’s side in this case.

Why is Wal-Mart v. Dukes so important? When Congress passed Title VII as part of the Civil Rights Act of 1964 to prohibit discrimination in employment, women working full time were paid approximately 59 percent of what men were paid, on average. Today, nearly 37 years later, women are paid only 77 percent of what men are paid. Over an average lifetime of work, this difference will result in a loss of $700,000 for a female high school graduate, $1.2 million for a college graduate and $2 million for a professional school graduate. Working women and their children also experience higher rates of poverty than men, and have a greater need for public assistance to obtain health care, including those working at Wal-Mart.

If our Nation’s largest employer – with approximately 1.4 million employees, more than 860,000 of whom are women, a large percentage of whom are women of color – can avoid liability for systemic discrimination across its nationwide chain of stores, it will undermine the equal rights of all women workers. Moreover, any ruling by the Roberts Court that makes it harder for employees to bring a class action will remove an important safeguard that protects workers when they suffer discrimination. In today’s political climate, corporations are eager to roll back the clock and destroy many of the gains workers made during the Civil Rights era. Wal-Mart v. Dukes could dramatically boost or inhibit those efforts, depending on how the Court rules.
II. Spotlight on *Wal-Mart v. Dukes*

This case is before the Supreme Court on the question of whether class certification is proper, which turns in large part on perceptions of who is to blame for the wide disparity in pay and promotion levels between men and women working for Wal-Mart. Wal-Mart argues that there is no common bond between thousands of pay and promotion decisions made by its managers across the country. Plaintiffs counter that Wal-Mart’s system of granting vast pay and promotion discretion to its upper-level managers, nearly all of whom are men trained by Wal-Mart to embrace and promote the company’s practices, yielded discriminatory results that pervade every region and nearly every store within Wal-Mart’s vast retail empire.

To understand how Wal-Mart operates, it is important to review evidence submitted in this case.

**A. Personal Stories Demonstrate the Harm that Wal-Mart’s Discrimination Has Done to its Women Employees.**

When Betty Dukes started at Wal-Mart, she was energetically committed to advancing within the company. She dreamed of working her way up from a $5-an-hour part-time cashier position into corporate management. Instead, she toiled for several frustrating years with very few opportunities for advancement. After discussing her concerns with a district manager, store managers retaliated against her. They wrote her up for returning late from breaks despite the fact that male colleagues evaded punishment after doing the same thing or after failing to clock out at all. Dukes later received a demotion and pay cut for asking a colleague to let her make change from a cash register, even though this was a common employee practice. The financial strain forced Dukes to move in with her mother.

Dukes has said she hopes this case will change Wal-Mart’s practice of blocking women from entering management, and will ensure women receive equal pay. A Baptist minister, she put her “Betty vs. Goliath” struggle in biblical terms, stating that, “David had five stones but only needed one.”

Edith Arana, another named plaintiff, accepted a $7-an-hour job at Wal-Mart after 10 years in retail because she believed that Wal-Mart was “a family-based company” where “you can come in as a cashier, and the sky is the limit.” Arana often took on heavy workloads, was commended for going “beyond what is expected” and was praised for doing “an outstanding job filling in where she is needed—anywhere, anytime.” Nonetheless, management consistently denied her promotions and gave them to men with less experience.

Arana also tried to enlist in Wal-Mart’s assistant manager training program, but was consistently denied. A store manager promised to recommend Arana for the program but reneged after she was forced to take sick leave after a car accident. This missed opportunity became particularly important when Arana became the sole breadwinner for her husband and three children after her husband developed liver cancer. Arana felt that no matter how well she performed, store
management would not allow her to advance because she was a woman. Eventually, her heavy workload led a doctor to order her to take leaves of absence. Arana called herself “destroyed and devastated” by her experience with Wal-Mart.

**B. Personal Stories Confirm That Gender Discrimination Pervaded Wal-Mart.**

In addition to the testimony of Betty Dukes and Edith Arana, more than 110 other women filed declarations detailing stories of discrimination while working at Wal-Mart. For example:

- Senior management for Sam’s Club, a Wal-Mart affiliate, often referred to female store employees during Home Office executive meetings as “Janie Qs” and “girls.” When a female executive who was new to the company objected to the terms, the criticism was not well received and senior managers continued to use them.

- A Wal-Mart company newsletter featured a photograph from a company event showing Wal-Mart’s Executive Vice President of Operations and Chief Operating Officer posing on a leopard-skin stiletto high-heel-shoe chair while surrounded by women singing and dancing.

- When a female employee with five years at Wal-Mart and a Master’s Degree asked her department manager why her pay was less than that of a just-hired 17-year-old boy, the manager said: “You don’t have the right equipment….You aren’t male, so you can’t expect to be paid the same.”

- A manager told plaintiff Chris Kwapnoski that she needed to “doll-up” and “blow the cobwebs off” her make-up.

- A store manager also told Kwapnoski that he gave a male associate a larger raise because the male associate had “a family to support.” This was a common refrain from Wal-Mart managers.

- A male department manager told a female employee that male employees will always make more than female employees because “God made Adam first, so women would always be second to men.”

- During a job interview to be a department manager, an assistant manager told Cleo Page that it was man’s world and that men control managerial positions at Wal-Mart.

- A male support manager responded to a female employee’s request for a transfer to Hardware by asking, “[y]ou’re a girl, why do you want to be in Hardware?”

- When a female district manager asked a male store manager why he always put female assistant managers in charge of Softlines, he responded “because that’s what women know.”
When a female employee with experience in Sporting Goods expressed interest in becoming a Sporting Goods department manager, a male assistant manager told her, “[y]ou don’t want to work with guns.”

When a female employee sought a position as a meat cutter, a male meat manager told her that Wal-Mart does not hire women as meat cutters. Similar arguments were used by managers to keep women out of the Electronics and Domestics departments.

The bias against women also pervades the Walton Institute, a company training center that “provides an educational environment for Wal[-M]art leaders from around the world to learn more about themselves and about Wal[-M]art’s unique company culture and how to sustain that culture.” At Institute sessions, participants in a discussion on diversity within the company were told that so few women were managers because “men have been more aggressive in achieving those levels of responsibility.” Company executives and managers also said that promoting women would require standards to be lowered.

Sam Walton, Wal-Mart’s founder, was an avid quail hunter and from the earliest days of the company invited top managers to an annual quail hunt. When women urged an alternative bonding experience, it was rejected as interfering with tradition. One woman who was hired from outside to be a Vice President of Sam’s Club described Wal-Mart as a “very tight, deep culture” and “very closed.” As she recalled, “I didn’t go hunting with them, I didn’t go fishing with them, I wondered if I had been able to do some of those things if I might have assimilated more quickly into the organization.” Female store managers were also required to attend business functions at strip clubs and Hooters. Wal-Mart’s Executive Vice President for People defended holding a district meeting at Hooters by claiming it was “one of the best places to meet and eat” in town.


At the time this lawsuit was filed in 2001, Wal-Mart divided the United States into 41 regions. Each region contained approximately 11 districts, and each district contained six to eight stores. Overall, there were more than 3,000 stores. The lawsuit also includes Sam’s Club, which is wholly owned and run by Wal-Mart.

Plaintiff’s statistical expert, Dr. Richard Drogin, found that women employees at Wal-Mart were paid less than men in every year, and in virtually every job, even when relevant non-discriminatory factors were considered. This pattern was found in every one of the 41 Wal-Mart regions. Moreover, the disparity in pay between comparably employed women and men has increased every year since 1997. Strikingly, this disparity exists despite the fact that women, on average, have longer tenure at Wal-Mart – 4.47 years v. 3.13 years – and higher performance ratings.
Promotions are an equally dismal story for women at Wal-Mart, even though Wal-Mart promotes mostly from within and most of its employees are women. As the table below illustrates, women remain in hourly positions while management positions are awarded overwhelmingly to men, with the percentages of male domination increasing at nearly every stage up the ladder. Women who are promoted also wait longer than men for those promotions.62

The following table demonstrates the pay and promotion differential for field management positions and the three largest hourly job categories in 2001, the year this lawsuit was filed.63

<table>
<thead>
<tr>
<th>Job Title</th>
<th>Men</th>
<th>Women</th>
<th>Difference</th>
<th>Percent Held By Women</th>
</tr>
</thead>
<tbody>
<tr>
<td>Regional Vice President</td>
<td>$419,435</td>
<td>$279,772</td>
<td>$139,663</td>
<td>10.3%</td>
</tr>
<tr>
<td>District Manager</td>
<td>$239,519</td>
<td>$177,149</td>
<td>$62,370</td>
<td>9.8%</td>
</tr>
<tr>
<td>Store Manager</td>
<td>$105,682</td>
<td>$89,280</td>
<td>$16,402</td>
<td>14.3%</td>
</tr>
<tr>
<td>Co-Manager</td>
<td>$59,535</td>
<td>$56,317</td>
<td>$3,218</td>
<td>23%</td>
</tr>
<tr>
<td>Assistant Manager</td>
<td>$39,790</td>
<td>$37,322</td>
<td>$2,468</td>
<td>35.7%</td>
</tr>
<tr>
<td>Management Trainee</td>
<td>$23,175</td>
<td>$22,371</td>
<td>$804</td>
<td>41.3%</td>
</tr>
<tr>
<td>Department Head</td>
<td>$23,518</td>
<td>$21,709</td>
<td>$1,809</td>
<td>78%</td>
</tr>
<tr>
<td>(hourly)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Sales Associate</td>
<td>$16,526</td>
<td>$15,067</td>
<td>$1,459</td>
<td>67%</td>
</tr>
<tr>
<td>Cashier</td>
<td>$14,525</td>
<td>$13,831</td>
<td>$694</td>
<td>67%64</td>
</tr>
</tbody>
</table>

The massive disparities between men and women in these statistics support a prima facie case of employment discrimination.65 One reason for this is the stark break between hourly department managers, the vast majority of whom are women, and the next management level up, where employees are trained for salaried management positions. (See the entries above and below the black line in the table.) To move upward, an employee at Wal-Mart needs to receive a discretionary “tap on the shoulder” from upper-level management, which is overwhelmingly male.66 Women cannot apply for this promotion.67 Overall, if plaintiffs’ class certification is upheld, they will have a strong case of pattern-or-practice or disparate impact discrimination.68

Indeed, Wal-Mart has among the worst records of American retailers in the percentage of women in management, prompting the company’s Executive Vice President for People to say that “we are behind the rest of the world.”69 Wal-Mart had a far lower percentage of female managers in 2001 than their closest competitors had in 1975.70 When this lawsuit was filed, women comprised 34.5 percent of Wal-Mart’s managers, compared to 56.5 percent of comparable retailers’ managers.71 One of plaintiffs’ experts put the odds that this discrepancy can be explained by chance as “less than one chance in many billions.”72


A. The Lower Courts Certified Dukes’ Class Action.

Plaintiffs are seeking certification of a class action under Federal Rule 23 in order to hold Wal-Mart accountable for discrimination violating of Title VII of the Civil Rights Act of 1964. Title
VII prohibits employers from depriving or tending to deprive “any individual of employment opportunities or otherwise adversely affect[ing] his status as an employee because of such individual’s race, color, religion, sex, or national origin.” Rule 23(a) allows certification of a class action if:

1. The class is so numerous that joinder of all members is impracticable;
2. There are questions of law or fact common to the class;
3. The claims or defenses of the representative parties are typical of the claims or defenses of the class; and
4. The representative parties will fairly and adequately protect the interests of the class.

Plaintiffs must also meet one of the Rule 23(b) requirements. Rule 23(b)(2), which applies in this case, allows certification 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 or corresponding declaratory relief is appropriate respecting the class as a whole.”

Plaintiffs sought certification of a sex discrimination class action against Wal-Mart in federal district court in San Francisco in 2001, requesting injunctive relief, back pay, and punitive damages. Wal-Mart argued that the plaintiffs’ accusations were “a relative handful of widely divergent, and often unique, events” that rendered a class action an inappropriate remedy. The district court rejected this argument, finding in an 84-page decision that plaintiffs had “exceeded” their burden of establishing commonality and had demonstrated that Wal-Mart’s company-wide policy of subjective decision-making, within a consistent compensation and promotion structure, raised questions of fact and law common to the class. Therefore, the court certified the plaintiffs’ class of current and former female employees. The en banc Ninth Circuit Court of Appeals upheld class certification for current employees but told the district court to consider a separate class for women who left Wal-Mart prior to the date the case was filed. The Ninth Circuit also remanded the district court’s certification of plaintiffs’ claim for punitive damages.

B. The Core of the Case Supports Certification.

Wal-Mart argues that the plaintiffs’ theory of liability should fail because of Wal-Mart’s sheer size. The company maintains that the large number of its stores, managers, and employees means that pay and promotion decisions “turn[ed] on decisions made by individual store managers” and cannot support the commonality among class members that is required for class certification.

Plaintiffs counter with a powerful narrative that shows how sex discrimination at Wal-Mart was the inevitable byproduct of a strong and centralized corporate system that originated in the company’s Home Office in Bentonville, Arkansas, and permeated each of the company’s stores in the United States.
The key issue here is not the size of Wal-Mart. After all, if the core of an apple is rotten, it does not matter how large the apple is—it is still rotten. The issue is whether Wal-Mart’s employment system perpetuated a male-dominated hierarchy that suppressed women’s promotion and pay throughout Wal-Mart’s thousands of stores. The answer to this question is clearly yes.

Don Soderquist, the company’s former vice chairman and chief operating officer, wrote in his book *The Wal-Mart Way* that Wal-Mart is “intentional about dispersing our culture throughout the company and determined that our values and beliefs be on the mind of every associate.” Soderquist describes the numerous meetings that occur for employees at every level of the company’s hierarchy and writes that “we have taken advantage of every single one of these opportunities to preach Wal-Mart culture.”

Wal-Mart’s engrained practices are also maintained by promoting from within and requiring people in line to become assistant managers—the lowest salaried management position—to go through a 4-5 month training program at the Walton Institute, where the message is that women are not aggressive enough and would lower standards if promoted to management. Once employees become Store Managers, they are also required to relocate regularly, which spreads Wal-Mart culture but disadvantages women who typically have less flexibility than their male counterparts to relocate suddenly. Sam Walton, the company’s founder, recognized as early as 1992 that this requirement is unnecessary for business purposes and deprives the company of talented female managers, but the policy remains.

Centralized control at Wal-Mart is pervasive. All personnel policies, including compensation and promotion guidelines, are set by the Home Office. Each store has the same job categories, job descriptions, and management hierarchy. Regional management meets at least weekly at the Home Office to discuss developments in individual stores. The company has a sophisticated computer network that allows the Home Office to monitor daily activities at every store. Managers are tied to the Home Office through a computer link called the Manager’s Workbench. The Home Office controls each store’s temperature and mandates what music will be played inside. Wal-Mart also has a strict anti-union policy that it enforces uniformly throughout its stores.

Within the context of this highly uniform corporate structure devoted to pushing the “Wal-Mart Way,” Store Managers, District Managers, and Regional Vice Presidents—more than 85 percent of whom are men, and most of whom have been trained at the Walton Institute—get to make largely unfettered pay and promotion decisions. Under Wal-Mart’s employment system, there is:

- No criteria for making promotion selections;
- No oversight or systematic review of compensation or promotion decisions;
- No posting of most promotion opportunities; and
- No written information about the management trainee program, and no ability for hourly employees to apply for it.
In addition, Wal-Mart managers can:

- Offer raises based on undefined “exceptional performances;”
- Depart from starting pay rates for whomever they choose; and
- Through a “tap on the shoulder,” decide who becomes a management trainee.

The result is a system in which male managers promote people like themselves who accept and perpetuate Wal-Mart’s male-dominated corporate structure.

Tellingly, Wal-Mart knew at least six years before this lawsuit was filed that its employment practices would likely be seen by courts as discriminatory and subject to class-wide relief, after it hired a prominent law firm to evaluate whether its policies promoted sex discrimination.92 Akin Gump found widespread gender disparities. “By one measure, the law firm found, men were five and a half times as likely as women to be promoted into salaried, management positions.”93 The law firm advised Wal-Mart to take remedial steps in 1995, but Wal-Mart ignored the advice and continued its practices.94

As a legal matter, the Supreme Court has recognized that Title VII should apply when “an employer’s undisciplined system of subjective decisionmaking has precisely the same effects as a system pervaded by impermissible intentional discrimination.”95 A strong corporate structure “creates the context – the policies, the decisionmaking systems, the work environment and culture – in which individual decisions are made.”96 These holdings support liability here.

IV. What’s At Stake for American Workers?

If the Roberts Court rules for Wal-Mart and raises the bar for maintaining a class action, the result could be devastating for enforcement of civil rights and employment discrimination laws. Some of the most important civil rights cases in American history were class action lawsuits. Brown v. Board of Education ended racial segregation in public schools in a class action. Griggs v. Duke Power empowered employees to remedy seemingly neutral policies that disproportionately harmed racial minorities. The pollution case portrayed in the movie Erin Brockovich and the sexual harassment case portrayed in North Country were also class actions.97 Class actions have allowed for historic civil rights gains because of the unique tools they provide to combat discrimination and other forms of corporate misbehavior.

A. Class Actions Enable Workers to Level the Playing Field Against Huge Corporate Defendants Like Wal-Mart.

Class actions play an essential role in holding corporations accountable for their widespread unlawful behavior, particularly when the harm suffered by each individual is small relative to the larger discriminatory picture. An individual is far less likely to enforce rights in court if the
recoverable damages are too small to justify the cost of lengthy litigation or arbitration, a fact which often allows corporations to get away with unlawful conduct. The Supreme Court has recognized this function:

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. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone’s (usually an attorney’s) labor.98

As a result of the relative disadvantages of filing an individual claim, most plaintiffs who lose at the class certification stage, and are consequently unable to share the burdens of litigation with a larger class, do not pursue individual discrimination claims.99 One reason is that the cost of bringing a lawsuit can be much higher than the potential return to individual plaintiffs, resulting in “negative value” claims. For example, the average settlement in a sex discrimination claim deemed by the Equal Employment Opportunity Commission (EEOC) to have merit is $34,200,100 which is not enough to cover litigation costs and still compensate the plaintiff.

Many individual plaintiffs are also unaware that they have a claim. In the Wal-Mart case, for example, Wal-Mart strictly prohibits employees from discussing pay.101 It also tends to segregate women and men into different store departments.102 This keeps employees ignorant of pervasive pay discrepancies throughout Wal-Mart’s system. Even if aware they might have a claim, potential low returns and fear of retaliation keep individuals from seeking compensation when they have been discriminated against. Wal-Mart’s threats of retaliation are well-documented.103

Class actions allow plaintiffs to uncover company-wide statistics that provide a more accurate measure of whether the company is engaged in a pattern of discrimination or its conduct has a discriminatory effect. The standard of proof in pattern-or-practice and disparate impact cases is also very different than in an individual lawsuit. In the former, courts look at the overall practices of a company, with plaintiffs carrying the burden of showing that unlawful discrimination has been the regular procedure or policy, or that while fair in form, company policy is discriminatory in operation. In the latter, the focus is on the decisions of management applied to each individual. Statistical evidence is often decisive in class actions, but may be irrelevant in individual lawsuits. Without it, however, discriminatory practices that can be seen in a company overview may remain hidden.

B. If the Roberts Court Reverses Class Certification in Dukes, It Could Harm Enforcement of Civil Rights and Employment Discrimination Laws

If the Supreme Court limits access to a class action in this case, it will enable Wal-Mart to essentially rob its women employees of fair wages without serious legal consequences. In fiscal year 2010, Wal-Mart made $14 billion in profits on net sales of $405 billion.104 Individual sex discrimination lawsuits – even if hundreds were filed and successful – would not motivate Wal-
Mart to address disparities in pay and promotions between men and women. Far from being a deterrent, a company as big as Wal-Mart would simply consider isolated awards as the cost of doing business.

A decision decertifying the *Dukes* class action would also make it more challenging for other plaintiffs to bring class actions, depending on the Court’s reasoning. For example, if the Court finds that the discrepancy in pay and promotion for women at Wal-Mart is not common enough to support a class action on this record, it will tend to exonerate large companies with lots of employees, managers, and outlets. A class action pending against Costco, to cite one case, may turn on the outcome of this case. Other employment discrimination class actions, where the bar is already high, may also become more difficult. Alternatively, if the Court finds that Betty Dukes and her class members cannot obtain back pay through the particular type of class action they have sought to certify, it will cripple one of the most effective remedies that class actions provide.

**C. Government Enforcement Cannot Begin to Protect Vulnerable Workers.**

Proponents of greater restrictions on class action lawsuits claim that the suits are unnecessary because government agencies are responsible for enforcing workplace discrimination claims. Almost all workplace discrimination claims must first be filed with the EEOC before an employee may sue an employer. This, however, does not mean that the EEOC can do much about those claims. The EEOC received 99,992 workplace discrimination allegations in 2010 but filed only 271 enforcement actions in response. (By comparison, there are more than 860,000 women working at Wal-Mart today.) The agency has historically been underfunded and understaffed, resulting in a massive backlog of unresolved cases. As a result, the number of EEOC enforcement actions has decreased every year since 2004 despite the fact that 20,490 more discrimination claims were filed in 2010 than in 2004. Even under full staffing and funding, the EEOC would be woefully incapable of remedying even a small portion of workplace discrimination claims.

Class actions fill a void left by the inadequacy of individual lawsuits and government enforcement. The Supreme Court’s acceptance of Wal-Mart’s appeal in *Dukes* threatens one of the last remaining tools available to employees to protect themselves from discrimination.

**VI. How Have Other Plaintiffs Alleging Sex Discrimination Fared Before the Roberts Court?**

In recent years, the Roberts Court has ruled against women in a number of landmark cases that further shifted the balance of power to the side of powerful corporations and against everyday Americans. By enacting Title VII in 1964, and amending it in 1991, Congress attempted to close the gap between wages and opportunities available to men and women. Unfortunately, the activist Roberts Court has weakened those laws by narrowly construing them in ways that have protected sex discrimination in the workplace.
For example, in *Ledbetter v. Goodyear Tire & Rubber Co.*, the plaintiff sued Goodyear after discovering that she had been paid less than her male counterparts for many years. In a 5-4 decision, the Roberts Court ruled in favor of Goodyear and held that the statute of limitations barred Ledbetter’s claim. The statute required victims to bring claims within 180 days “after the alleged unlawful employment practice occurred.” Ledbetter argued that the issuance of a paycheck with wages that are lower because of illegal sex discrimination should constitute an unlawful employment practice. The court rejected that argument on the grounds that she was required to file a claim within 180 days of the initial decision to discriminate against her, which is typically impossible to pinpoint in the context of wages. Justice Ruth Bader Ginsburg called the majority opinion “a cramped interpretation of Title VII, incompatible with the statute’s broad remedial purpose.” Congress overturned the Supreme Court’s ruling by statute in 2009 and President Barack Obama made the Lilly Ledbetter Fair Pay Act the first bill he signed.

The Roberts Court also put the brakes on gender equality in the workplace in *AT&T v. Hulteen*. In *Hulteen*, the plaintiff sued AT&T for providing her with a lower pension than she would have received had the company given her full credit for her time on pregnancy leave. Under AT&T’s policy, a woman who took time off work while on pregnancy leave could apply a maximum of 30 days of that leave toward credit for pension calculations. Employees who took temporary disability leave for non-pregnancy reasons received credit from AT&T for the entire time they were away. The Pregnancy Discrimination Act, enacted in 1978, prohibited this type of distinction between benefits. However, AT&T continued to use the now-illegal formula to deprive women of full pensions for pregnancy leave they took prior to the effective date of the Act. The Roberts Court ruled in favor of this discriminatory policy.

**VII. Conclusion**

The evidence in this case, even at the class certification stage, demonstrates that as many as 1.5 million women who work at Wal-Mart have not received the same pay or promotion opportunities as men for a very long time. The only way for them to receive compensation for their injuries, and the best way to induce Wal-Mart to change its system of discrimination, is for the Court to allow Betty Dukes and her fellow plaintiffs to proceed with their class action lawsuit. Individual lawsuits against such a massive company as Wal-Mart, would not even register on the company’s bottom line.

The question in this case is whether the Roberts Court will again side with corporate interests, or buck recent trends and allow Betty Dukes and her fellow employees to proceed.

Oral argument is set for March 29, 2011.
Endnotes

2 Dukes v. Wal-Mart, 603 F.3d 571, 577 (9th Cir. 2010).
3 The Supreme Court often agrees to hear an appeal because circuit courts have split on the proper interpretation of a given law. Here, Wal-Mart claims that a circuit split exists concerning whether plaintiffs seeking any type of money damages may obtain class certification under Rule 23(b)(2) of the Federal Rules of Civil Procedure. Every circuit court that has ruled on this issue has held that class actions may be certified when plaintiffs seek back pay and either injunctive or declaratory relief, as is the case in Wal-Mart. See Reeb v. Ohio Dep’t of Rehab. & Corr., 435 F.3d 639, 650 (6th Cir. 2006); Cooper v. S. Co., 390 F.3d 695, 720 (11th Cir. 2004), overruled on other grounds, Ash v. Tyson Foods, Inc., 546 U.S. 454, 457 (2006) (per curiam); Robinson v. Metro-North Commuter R.R. Co., 267 F.3d 147, 169-170 (2d Cir. 2001); Jefferson v. Ingersoll Int’l Inc., 195 F.3d 894, 896 (7th Cir. 1999); Allison v. Citgo Petroleum Corp., 151 F.3d 402, 415-16 (5th Cir. 1998); Kirby v. Colony Furniture Co., 613 F.2d 696, 699-700 (8th Cir. 1980); Pettway v. Am. Cast Iron Pipe Co., 494 F.2d 211, 257-58 (5th Cir. 1974); Robinson v. Lorillard Corp., 444 F.2d 791, 802 (4th Cir. 1971).
6 Id. The United States Chamber of Commerce often files amicus briefs in support of corporations that are litigating in opposition to discrimination laws, whistleblower protections, or reasonable health and safety regulations. Just a few of the corporate interests that filed amicus briefs in support of Wal-Mart include Altria, Bank of America, Cigna, Dupont, UPS, and Costco. For the full list, see American Bar Association, Briefs: March Cases 2010 - 2011 Term, http://www.americanbar.org/publications/preview_home/publiced_preview_briefs_march2011.html (last visited March 10, 2011).
8 Id.
10 Women comprise nearly half of the employed workforce in the United States but experience higher rates of poverty and earn less than men. United States Department of Commerce and Executive Office of the President Office of Management and Budget, Women in America: Indicators of Social and Economic Well-Being 6 (March, 2011), available at http://www.whitehouse.gov/sites/default/files/rss_viewer/Women_in_America.pdf. Female-headed households have the lowest family earnings among all family types, which creates great hardships because more adults live in family households headed by unmarried women than headed by unmarried men. Id. at 6, 13. If women received the same pay as their male counterparts, poverty rates among their families would fall by more than 50%. AFL-CIO & Inst. For Women’s Pol’y Res., Equal Pay for Working Families: National and State Data on the Pay Gap and Its Costs at 14 (1999).
11 Wal-Mart’s expensive and inadequate health care plans exacerbate the problem by forcing employees to spend almost twice the percentage of their income on health care for themselves and their families as other workers spend and by pushing many to seek public assistance through Medicaid and SCHIP. Wal-Mart Stores, Inc., Supplemental Benefits Documentation, Board of Directors Retreat FY06 at 7 (2005), available at http://www.nytimes.com/packages/pdf/business/26walmart.pdf. Inadequate health care for Wal-Mart employees costs taxpayers $658 million for these public insurance programs and for reimbursements to health care providers who treat the uninsured. Arindrajit Dube, et al., Internal Wal-Mart Memo Validates Findings of UC Berkeley Study at 1 (Oct. 26, 2005), available at http://laborcenter.berkeley.edu/retail/walmartmemo.pdf. If women earned the same pay as men, poverty would be reduced by 50%.

Id.

Id.


Id.

Id.


Fields-White, supra note 18; Declaration of Edith Arana in Support of Plaintiffs’ Motion for Class Certification at para. 5, Dukes, 222 F.R.D. 137.

Id. at ¶¶ 14, 24.

Fields-White, supra note 18.

Arana Decl., supra note 23, at ¶¶ 15-17.

Fields-White, supra note 18.

Arana Decl., supra note 23, at ¶ 27.

Id. at ¶¶ 22, 29.

Fields-White, supra note 18.


Brown Decl. ¶¶ 2-5, Dukes, 222 F.R.D. 137.

Kwapnowski Decl. ¶ 16, Dukes, 222 F.R.D. 137.

Id. at ¶ 12.


McDonald Decl. ¶ 7, Dukes, 222 F.R.D. 137.

Pls. Third Am. Compl. ¶ 52, Dukes, 222 F.R.D. 137.

S. Hall Decl. ¶ 2, Dukes, 222 F.R.D. 137.

Collier Decl. ¶ 9, Dukes, 222 F.R.D. 137.

McKenna Decl. ¶ 4, Dukes, 222 F.R.D. 137.


Jaso Decl. ¶ 10, Dukes, 222 F.R.D. 137.

Mott Decl. ¶ 17, Dukes, 222 F.R.D. 137.


Walton Institute meetings, Ex. 89, Dukes, 222 F.R.D. 137.

The following is a description of a Wal-Mart work trip that female employees were required to take with their male co-workers: “I was the only woman in my car… During the approximately 16-hour drive, the male managers talked ceaselessly about sex despite my repeated requests that they stop. We stopped for gas and several of the male managers wanted to go for a drink at the club adjacent to the station. When we entered, I realized that it was a strip club. Although I…had no interest in being there, I had no choice but to stay because I did not have my own car. I did not believe that it would have been safe for me to sit in the parking lot in the dark outside the club. I tried to ignore the show, but at one point, I was approached by one of the strippers and District Manager Kevin [W.] proposed that he pay one of the strippers $50 to have a ‘threesome out back’ with me.’…On the return trip to Indiana, we stopped at two more strip clubs… The other female manager…and I sat in the back of the club as far away from the stage as possible, while several of the men sat up close and paid for lap dances… When we returned to the motel where we were to spend the night, District Manager [W.] and at least one other store manager dropped us off and announced that they were going to a massage parlor, which I understood to mean that they were planning to hire prostitutes.”

Howard Decl. ¶ 14, 17-19, Dukes, 222 F.R.D. 137.

The two hourly position percentages are estimates. Women make up 67 percent of Wal-Mart’s hourly staff, and Sales Associate and Cashier are two of the most common hourly positions. Drogin Decl. at ¶ 18, Table 3; ¶ 23, Table 7; ¶ 25, Table 9; ¶ 26, Table 10.

Drogin, 222 F.R.D. at 148.

See id. at n. 20 (“The company’s principal response to this evidence is that statistics can never in and of themselves prove the existence of a pattern or practice of discrimination, or even establish a prima facie case shifting to the employer the burden of rebutting the inference raised by the figures. But as even our brief summary of the evidence shows, this was not a case in which the Government relied on ‘statistics alone.’ The individuals who testified about their personal experiences with the company brought the cold numbers convincingly to life.”)

Bentonville ’99 People Strategic Planning Session, Ex. 111, Dukes, 222 F.R.D. 137.


Id. at ¶ 32.


Id. at 23(b)(2).


Dukes, 222 F.R.D. at 143.

Dukes, 603 F.3d at 577.
In its brief to the Supreme Court, Wal-Mart quotes the Ninth Circuit dissent’s description of the class as “gargantuan,” implying that a larger class makes certification less appropriate. Id. at 9.

Brief for Petitioner at 11, Wal-Mart, No. 10-277.

“Wal-Mart has been recognized by social scientists and management scholars as an organization with a strong corporate culture.” Plaintiffs’ Motion for Class Certification and Memorandum of Points and Authorities, Dukes, 222 F.R.D. 137 (citing Bielby Decl. ¶ 18).


For example, the company regularly moves managers to far-flung locations at a moment’s notice. Each employee who becomes a store manager is subsequently transferred an average of 3.6 times. A majority of transfers are between districts and many are between regions. Dukes, 222 F.R.D. at 152.

Ex. 87 at 217-218, Dukes, 222 F.R.D. 137.


Brief Amici Curie of the American Civil Liberties Union and National Women’s Law Center et al. in Support of Respondents at 26, Wal-Mart, No. 10-277 (Mar. 1, 2011).

Id. at 22.

When a group of female Wal-Mart employees used the company’s “open door” policy to inform management of sexism and racism in job assignments, an individual from personnel who worked in the Home Office responded with the following: “Don’t bother using your quarter to call us. I can fire you, without taking any steps, for using the open door.” An employee who knew about the reply stated that it made her “reluctant to use the ‘open door’ policy because of the fear of retaliation” and that it confirmed for her that “Wal-Mart was not concerned about discrimination in its stores.” Jones Decl. 973-74 ¶ 8, Dukes, 222 F.R.D. 137.


106 Brief Amici Curie of National Employment Lawyers Association et al. in Support of Respondents at 37-38, Appendix 2, *Wal-Mart*, No. 10-277 (Between 2008 and 2010, class certification was denied in three-fourths of all employment discrimination cases in which the plaintiffs sought certification.)

107 One of the issues in the case is whether claims for “monetary relief” predominate over injunctive and declaratory relief. Wal-Mart argues that they do because so many of the class members no longer work for Wal-Mart and could not be benefitted by an injunction. Brief for Petitioner at 50-52, Wal-Mart v. Dukes, No. 10-277. Wal-Mart also argues that back-pay awards should be considered monetary in this case, or otherwise be unavailable under Rule 23(b)(2). *Id.* at 53-55. Plaintiffs respond by arguing that Rule 23(b)(2) class certifications are not limited only to injunctive and declaratory relief. Brief for Respondents at 48-55, *Wal-Mart*, No. 10-277. Plaintiffs also point out that circuit courts concur that back pay may be awarded under Rule 23(b)(2) class actions, in large part because back pay awards are considered equitable remedies, not damages. *Id.* at 55-60. Plaintiffs rebut Wal-Mart’s claim about former employees by noting that they could also benefit from an elimination of sex discrimination at Wal-Mart, as they then might return to work for the company. Plaintiffs add that given the length of time it takes to certify a class, and the turnover in the retail industry, it would be a perverse result if these factors caused this long-delayed class action to be decertified. *Id.* at 61-64.


112 42 U.S.C. § 2000e et seq.


115 *Ledbetter*, 550 U.S. at 621.

116 *Id.* at 661.

