

Wal-Mart discrimination ruling: a victory for US employers

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"This is without doubt the most important class action case in more than a decade."

On June 20, 2011, the US Supreme Court reversed a Ninth Circuit court decision and ruled in favor of Wal-Mart in the country's largest-ever sex discrimination case. The decision will make it significantly harder for other class-action suits against large employers to succeed, particularly in relation to discrimination claims.

Background

The Supreme Court was asked to decide the issue of whether the sex discrimination claims of up to 1.5 million current and former female employees from approximately 3,400 Wal-Mart stores across the US could be joined into a single lawsuit; a lawsuit that could have cost Wal-Mart billions of dollars in back-pay and punitive damages had it succeeded.

At the heart of the case was the allegation that Wal-Mart's policies and practices relating to compensation and promotions fostered gender bias which impacted on all its female employees. The plaintiffs (six employees who sought to represent the rest of Wal-Mart's female workforce) alleged that by having centralized personnel policies which were operated by managers at a local level, Wal-Mart created the possibility of subjective (and biased) decision-making by these predominantly male local managers. In support of this contention, the plaintiffs brought evidence from a sociologist who argued that Wal-Mart's approach of local decision-making could allow stereotypes to impact on areas such as pay and promotions.

The plaintiffs also brought statistical evidence to try to evidence differentials in pay and promotion figures across Wal-Mart's stores (such as the fact that women held 70 per cent of the hourly jobs within the company, but only 33 per cent of the management jobs). In addition, they relied upon anecdotal evidence from the six plaintiffs as to examples of behavior which they alleged constituted discrimination (such as a male manager shouting at female employees but not male employees). The plaintiffs argued that their evidence as a whole illustrated an institutional bias against women, "thereby making every woman at the company the victim of one common discriminatory practice".

The Supreme Court did not rule on whether or not Wal-Mart had in fact discriminated against female employees, but rather decided the procedural question of whether or not the 1.5 million employees could proceed as a class. In order to bring a class-action, the plaintiffs were required to satisfy class-certification rules, including the requirement that there be 'questions of law or fact common to the class' of female employees (put simply, that their claims were sufficiently similar). The court was sharply divided on this key issue, finally ruling five to four in Wal-Mart's favor.

Commonality

The court held that the plaintiffs had not provided convincing proof of a company-wide discriminatory pay and promotion policy, and that accordingly they had not established the existence of a common question or fact. The court highlighted that the crux of a discrimination claim is "the reason for a particular employment decision". The court went on to explain that this was inconsistent with certifying a class of up to 1.5 million women where literally millions of separate employment decisions were being challenged on the basis of subjective decision-making over a period of time by numerous individuals nationwide.

In the court's view, the mere claim by employees from the same company that they have suffered discrimination did not in itself provide sufficient reason to believe that their claims were sufficiently similar that they should be litigated together. Rather, the court held that their claims must depend upon a common allegation, such as the assertion that they were discriminated against by the same supervisor or that there was a common mode of exercising discretion that pervaded the entire company. In addition, that common allegation must be of such a nature that it is capable of class-wide resolution; namely, "that the determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."

As such, the court held that the plaintiffs had failed to establish a "common question of law or fact" as required under class-certification rules: "Without some glue holding the alleged reasons for all those decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question 'why was I disfavored?'"

The court was unswayed by the plaintiffs' evidence, calling it "worlds away from 'significant proof' that Wal-Mart operated under a general policy of discrimination". The court also noted that the limited anecdotes, which represented "about one for every 12,500 class members" were "insignificant".

Also fatal to the plaintiffs' claim was the court's view that having a national policy which was implemented at local level was in fact "just the opposite of a uniform employment practice that would provide the commonality needed for a class action; it is a policy against having uniform employment practices. It is also a very common and presumptively reasonable way of doing business." The court thought it highly unlikely in a company of Wal-Mart's size that managers nationwide would be exercising their discretion in a common way without common direction, noting that the plaintiffs had fallen far short of establishing the contrary.

What does this mean for employers?

By narrowing the definition of what constitutes a "common issue" for class certification purposes, the court has effectively made it harder for plaintiffs to meet the requirements for a class-action. The ruling has been therefore been welcomed by employers across the US, who have frequently faced expensive class-action suits from groups of employees who would not otherwise have pursued action individually. While future courts are likely to examine more closely exactly what level and type of evidence is sufficient in discrimination cases, it is clear that plaintiffs will need to provide far greater proof of pervasive discrimination than was evident in this case in order to meet this narrowed standard.