



# Wal-Mart Makes the Case for Affirmative Action

## Lessons from the Supreme Court's ruling on sex discrimination.

BY JEANNETTE WICKS-LIM

On June 20, 2011, the Supreme Court put an end to what would have been the largest class-action lawsuit in U.S. history. The lawsuit, filed on behalf of more than 1.5 million current and former female Wal-Mart employees, alleged that Wal-Mart supervisors routinely discriminated against female workers by promoting and paying them less than their male counterparts.

That's too bad, because the facts presented by the plaintiffs describe a situation that surely calls out for redress.

Wal-Mart has a bare-bones policy telling managers how to dole out promotions. Eligible workers need only meet three basic criteria: 1) an above-average performance rating, 2) at least one year of job tenure, and 3) a willingness to relocate. Among these candidates, local supervisors have full discretion over whom to promote.

With the door wide open for supervisors to act on their subjective preferences, it may be no surprise that men dominate the company's management team. In 2001 women made up only 33% of Wal-Mart's managers, according to labor economist Richard Drogin, even though they made up 70% of its hourly workforce. Compare that with Wal-Mart's peer companies, where 57% of managers were women.

Wal-Mart also gives its (mostly male) managers significant wiggle room in setting their supervisees' wages. The result? Drogin reported that in 2001, Wal-Mart women earned consistently less than their male counterparts even after controlling for such factors as job performance and job tenure. He concluded that "... there are statistically significant disparities between men and women at Wal-Mart ... [and] these disparities ... can be explained only by gender discrimination."

The trouble is that these disparities exist even though no part of Wal-Mart's wage or promotion policy directs managers to make biased decisions. In fact, Wal-Mart has an anti-discrimination policy on its books.

With no "smoking gun" corporate policy, the Supreme Court blocked the women of Wal-Mart from lodging a collective complaint against the company. In the majority opinion, Justice Antonin Scalia writes: "Other than the bare existence of delegated discretion, respondents have identified no 'specific employment practice' ... Merely showing that Wal-Mart's policy of dis-



cretion has produced an overall sex-based disparity does not suffice."

In other words, the majority of Supreme Court justices intend to take a narrow view of which employment practices justify class-action discrimination lawsuits. Potential plaintiffs will have to show exactly how an employer discriminated. And as the Wal-Mart case demonstrates, this can boil down to the murky business of trying to expose employers' unspoken intentions.

What this means is that the traditional, complaint-driven approach to enforcing the 1964 Civil Rights Act cannot protect workers from discrimination. Deprived of class-action lawsuits as a tool, the women behind the Wal-Mart case and other workers in plainly discriminatory workplaces will now have to pursue their claims individually—at best putting them into a much weaker position with fewer resources.

To eliminate workplace discrimination and achieve true equality, policies have to focus squarely on the pattern of outcomes of employers' decisions. In a

phrase, on the question of whether an employer discriminates, "the proof is in the pudding." President Lyndon Johnson recognized this more than 40 years ago when his administration first put such policies into action under the rubric of affirmative action.

What does affirmative action require? First, the employer keeps a record of whether the race and gender make-up of its workforce is proportional to the wider pool of eligible workers. If not, the employer develops a plan to act "affirmatively"—with goals and timetables—to improve female and minority representation.

Affirmative action plans may include sexual harassment awareness training for supervisors, for instance, or directing recruitment efforts toward minority and women's organizations. Rigid quotas—the most controversial aspect of affirmative action policies—can only be used in the context of a court-ordered or -approved plan in response to a discrimination suit.

The Wal-Mart case demonstrates why workers need affirmative action policies to eradicate discrimination. As President Johnson put it in 1965, affirmative action represents "... the next and more profound stage of the battle for civil rights. We seek ... not just equality as a right and a theory, but equality as a fact and as a result." **D&S**

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**SOURCES:** "Statistical analysis of gender patterns in Wal-Mart workforce," Expert testimony by Richard Drogin, Ph. D., February 2003 (walmartclass.com); "The representation of women in store management at Wal-Mart Stores, Inc.," Expert testimony by Marc Bendick, Jr., Ph.D., January 2003 (walmartclass.com); Supreme Court of the United States, Wal-Mart Stores, Inc., petitioner v. Betty Dukes et al. (No. 10-277) June 20, 2011.