

Wal-Mart v. Dukes —

Why the Supreme Court Should Stand with Working Women

On March 29, the Supreme Court will hear arguments in Wal-Mart v. Dukes,ⁱ to determine whether the women employed at Wal-Mart stores across the country can join together in a class action to challenge pay and promotion practices alleged to discriminate against women. To establish that they should be allowed to bring their case together, as a class, the women employees presented statistics in the courts below showing that female workers at Wal-Mart earned less than comparable male workers and were less likely to be promoted.ⁱⁱ Those disparities were bolstered by evidence that Wal-Mart's corporate policies and practices allowed for sex-stereotyping to operate as the driving principle in the pay and promotion decisions for its women employees. Experts concluded that Wal-Mart's policies and corporate culture perpetuated these sorts of gender stereotypes across the entire company. The plaintiffs' evidence speaks for itself—and squarely establishes that a class should proceed.

The harmful gender stereotype that women workers are fundamentally inferior to male workers was widely held at Wal-Mart and deeply ingrained in the corporate culture, according to the plaintiffs' evidence.ⁱⁱⁱ The plaintiffs presented statements from over one hundred women describing their experiences at Wal-Mart with different expressions of this stereotype, including:

Men alone are breadwinners, “working as the heads of their households, while women are just working for the sake of working.”^x

- A manager told one employee, “Men are here to make a career and women aren't. Retail is for housewives who just need to earn extra money.”^{xi}
- Another female worker was told that “men need to be paid more because they have families to support.”^{xii}
- A male employee was selected for a position over an (unmarried) female employee because he “deserved the position” as “the head of household”—but she “did not ‘need’ the position.”^{xiii}

In addition to these stereotypes, the employees presented evidence that, in Wal-Mart's culture, women were devalued and demeaned:

- A male manager said “women weren't qualified to be managers because men had an extra rib.”^{iv}
- Women were referred to by demeaning names—such as “girls,”^v “Janie Qs,”^{vi} and “housewives”^{vii}—and with degrading language—such as “squatter” or “someone who squats to pee.”^{viii}
- One manager commented that the role of female assistant managers was to give women associates someone to discuss their periods with.^{ix}

Women’s family responsibilities interfere with work responsibilities; they “should be at home with a bun in the oven”^{xiv} instead of working.

- One male manager opined that “women should be home barefoot and pregnant.”^{xv}
- A manager told one woman she could not take an overnight supervisor position because she had children.^{xvi}
- One female employee was told to resign and “find a husband to settle down with and have children”^{xvii}—and another female employee was told, “you should raise a family and stay in the kitchen.”^{xviii}
- A supervisor asked the only female store manager in her district to resign because she “needed to be home raising [her] daughter” instead of running a store.^{xix}

Women can’t handle certain jobs—and can’t work in certain “traditionally male” departments—because those positions are “a man’s job”^{xx} or “need[]a man.”^{xxi}

- One woman employee was told, “You’re a girl, why do you want to work in Hardware?”^{xxii}
- Women were “required to clean and stock,” while men who worked with them were not.^{xxiii}
- One woman who applied to work in the Sporting Goods department was told, “You don’t want to work with guns.”^{xxiv}

As the plaintiffs’ evidence showed, these harmful stereotypes influenced personnel decisionmaking at Wal-Mart—for example women reported that promotions were awarded based on a “whom you knew, not what you knew” basis,^{xxv} a practice which can exacerbate existing sex disparities by leading managers to select candidates who share their own characteristics.^{xxvi}

- At Wal-Mart, promotion opportunities were not posted.^{xxvii} Employees described a “tap on the shoulder” process for making promotions decisions^{xxviii} and explained that workers had to be part of the “informal network versus the formal network” to succeed.^{xxix}
- A senior vice president told a woman employee that she would not advance because she did not “hunt, fish, or do other typically-male activities” and was not “a part of the boys club.”^{xxx}

Across the country, women lagged behind men in pay and promotions at Wal-Mart, according to the plaintiffs’ evidence.

Women at Wal-Mart earned less than men, even after accounting for seniority, turnover, and performance.^{xxxi}

- Women employees made 5% to 15% less (an average of \$5,000 less) than comparable men.^{xxxii}
- But women on average had higher performance ratings and more years of employment.^{xxxiii}
- The employees’ expert witness concluded that this pay gap could be reasonably attributed to discrimination.^{xxxiv}

The class action mechanism is essential to addressing the pay disparities at Wal-Mart and more broadly. In all industries (including the retail sector) a pay gap between women and men persists—and it cannot be fully explained by legitimate factors like experience or education.

- In 2009, women working full time earned 77 cents for each dollar paid to men.^{xxxv}
- Female workers in sales and related occupations—many of whom work in the retail sector—earned only 64 percent of their male counterparts’ wages in 2010.^{xxxvi}
- The pay gap between men and women persists even after controlling for factors such as experience, education, and industry.^{xxxvii}

Women were less likely to be promoted to in-store management positions at Wal-Mart and had to wait longer for promotions.

- Women received only 77 percent of expected promotions to Support Manager, only 70 percent to Management Trainee, only 67 percent to Co-Manager and only 80 percent to Store Manager based on their representation in the relevant feeder pools.^{xxxviii}
- Women waited 4.38 years from date of hire for promotion to Assistant Manager compared with 2.86 years for men, and 10.12 years before being promoted to Store Manager compared with 8.64 years for men.^{xxxix}

Barriers prevented Wal-Mart employees from learning of discriminatory pay practices or from reporting discrimination when it was discovered, according to the plaintiffs’ evidence.

Women employees faced challenges in identifying pay disparities due to Wal-Mart’s policy prohibiting discussions of pay,^{xi} but sometimes learned of disparities by chance.

- One female assistant manager learned a newly hired male assistant manager made \$6,000 more than she was paid, but “had always been told [she] would be fired for discussing salary issues so [she] never discussed this pay difference with anyone.”^{xli}
- Another female employee realized that she received a lower rate of pay because “many male associates [at her store] brag[ged] about their pay.”^{xlii}
- A female assistant manager discovered that a less-experienced male assistant manager earned \$10,000 more than her when someone found his misplaced W2 and turned it into her.^{xliii}

And, women employees who learned of discrimination feared retaliation if they complained.

- Although Wal-Mart’s “Open Door” policy purportedly allowed employees to air complaints, in reality “the Open Door policy . . . was a façade and resulted only in retaliation.”^{xliv}
- For example, a representative from Wal-Mart’s Home Office told female employees who made complaints of sex and race discrimination, “I can fire you, without taking any steps, for using the [O]pen [D]oor [policy].”^{xlv}

Based on this evidence, the courts below concluded that the women employees could come together to challenge Wal-Mart’s pay and promotion practices.^{xlvi} The Supreme Court should affirm the decision to certify the class of women workers.

Wal-Mart is challenging the employees’ right to proceed as a class, but the evidence presented of statistical pay and promotions disparities, pervasive gender stereotypes, and policies that allowed those stereotypes to influence pay and promotions decisions is more than sufficient to satisfy the federal rules class certification. Indeed, the federal rules for class actions were intended to make it possible for broad-scale civil rights challenges like this one to go forward in a single case.

A lawsuit such as this one—alleging company-wide discrimination against numerous employees—is particularly well-suited to class resolution. In fact, the Supreme Court has long recognized that employer policies that give managers the flexibility to discriminate may be challenged on a class-wide basis.^{xlvii} By proceeding as a class, the plaintiffs in this case have the ability to fully enforce their rights under Title VII—and only by permitting employees to proceed collectively and overcome the barriers to bringing thousands of individual lawsuits can Title VII’s goal of ending discrimination be achieved. Finally, class actions are well suited to addressing obstacles to individual litigation such as those faced by the employees in this case; the class action mechanism, for example, allows for collection of pay information and protection against retaliation.^{xlviii}

The Court’s decision in this case will have significant implications for women workers and their ability to challenge company-wide gender discrimination. A decision for Wal-Mart would make it far more difficult to challenge and remedy gender-based pay disparities and other forms of discrimination, eviscerating Title VII’s goal of ending workplace discrimination.

ⁱ *Wal-Mart Stores, Inc v. Dukes*, 131 S. Ct. 795 (2010) (granting certiorari); *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010) (en banc) (affirming class certification).

ⁱⁱ *Dukes*, 603 F.3d 571, 600; *Dukes v. Wal-Mart Stores, Inc.*, 22 F.R.D. 137, 166 (N.D. Cal. 2004).

ⁱⁱⁱ This Court has recognized that stereotypes about men and women continue to pervade the workplace. *See Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 730 (2003) (quoting *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973)). These stereotypes include views about the different earning needs of men and women, their capacity for and interest in management jobs, and “fixed notions”—conscious or unconscious—about their respective “roles and abilities,” *United States v. Virginia*, 518 U.S. 515, 541 (1996) (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982)).

^{iv} Deno Dep. 234:2-236:6.

^v S. Hall Decl. ¶ 2, J.A. 839-41a; Harper Dep. 103, J.A. 304a.

^{vi} Harper Dep. 103-104, J.A. 304a.

^{vii} Scott Decl. ¶ 8, J.A. 1188a.

^{viii} Houchins-Post Decl. ¶ 5, J.A. 917-18a.

^{ix} Hall Decl. ¶ 16, J.A. 849a.

^x Young Decl. ¶ 10, J.A. 1313-14a (comment by a male Assistant Manager during an employee meeting in response to a female employee’s question about why men made more than women employees).

^{xi} Scott Decl. ¶ 8, J.A. 1188a.

^{xii} Tallent Decl. ¶ 11, J.A. 1256a.

^{xiii} Crawford Decl. ¶ 5, J.A. 709a.

^{xiv} T. Hall Decl. ¶ 5, J.A. 845a.

^{xv} Deno Dep. 234:6-7, J.A. 337a.

^{xvi} Lovejoy Decl. ¶ 6, J.A. 1031-32a.

^{xvii} Rojas Decl. ¶ 5, J.A. 1175a.

^{xviii} Donovan Decl. ¶ 6, J.A. 741a.

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- ^{xix} Howard Decl. ¶ 23, J.A. 931a.
- ^{xx} Mott Decl. ¶ 17, J.A. 1110a.
- ^{xxi} Page Decl. ¶ 10, J.A. 1128-29a.
- ^{xxii} S. Hall Decl. ¶ 2, J.A. 839-41a.
- ^{xxiii} Brown Decl. ¶¶ 7-8, J.A. 674a.
- ^{xxiv} McKenna Decl. ¶ 4, J.A. 1073a.
- ^{xxv} Adams Decl. ¶ 12, J.A. 595a.
- ^{xxvi} Bielby Decl. ¶ 28 & n.37 (declaration of plaintiffs' expert).
- ^{xxvii} *Dukes*, 222 FRD at 149. Wal-Mart did not post job vacancies for its Assistant Management Training Program at all, posted only a small number of vacancies for the Co-Manager position, and did not post 80% of openings for the Support Manager position. *Id.*
- ^{xxviii} *Id.* at 148.
- ^{xxix} Harper Dep. 125, J.A. 304a.
- ^{xxx} Donovan Decl. ¶ 5, J.A. 741a.
- ^{xxx} *Dukes*, 222 F.R.D. at 156.
- ^{xxxii} *Id.* See also Drogin Decl. ¶ 77, JA 516a-517a, JA 518a (declaration of plaintiffs' expert). Women Regional Vice Presidents earned about \$139,000 less than their male counterparts, female District Managers \$62,000 less, and female managers \$16,000 less. *Id.* at ¶ 25, tbl. 9., J.A. 481a.
- ^{xxxiii} Drogin Decl ¶ 77, JA 516a-517a (describing women's higher performance ratings in hourly jobs).
- ^{xxxiv} *Id.* at ¶¶ 77(b), (p), (r).
- ^{xxxv} U.S. Census Bureau, *Current Population Survey, Annual Social and Economic Supplement*, tbl. PINC-05, parts 55 & 109, available at <http://www.census.gov/hhes/www/cpstables/032010/perinc/toc.htm> (last visited Mar. 1, 2011) (calculations by NWLC based on 2009 annual median earnings for all male and female full-time workers 15 years and over, of all races).
- ^{xxxvi} U.S. Dep't of Labor, Bureau of Labor Statistics, *Labor Force Statistics from the Current Population Survey*, tbl. 4, available at <http://www.bls.gov/cps/cpswktabs.htm> (last visited Mar. 1, 2011) (calculations by NWLC based on annual averages of quarterly median usual weekly earnings data). The last time women as a whole suffered from such a large gap was in 1981, when women in all sectors earned just 64.4 percent of men's earnings. *Id.* at tbl 1 (calculations by NWLC based on annual averages of quarterly median usual weekly earnings data). In other words, for women in sales and related occupations, the wage gap is approximately 30 years behind the times.
- ^{xxxvii} See, e.g., Cheryl Travis et al, *Tracking the Gender Pay Gap: A Case Study*, 33 *Psychology of Women* 410, 410-411 (2009) (citing studies concluding that an unexplained earnings gap between men and women persists even after controlling for factors believed to influence pay—such as demographic differences between male and female employees, worker qualifications, experience, occupation type, and industry).
- ^{xxxviii} *Id.* at ¶¶ 53-61, tbls. 22-25 (calculations by NWLC based on numbers and proportion of women promoted and numbers and proportion of women in the relevant applicant pool).
- ^{xxxix} *Id.* at ¶ 29, JA 484a.
- ^{xl} MacDonald Decl. ¶ 6, J.A. 1036-37a.
- ^{xli} Martin Decl. ¶ 5, J.A. 1054a.
- ^{xlii} MacDonald ¶ 6, J.A. 1036-37a. Similarly, one female employee learned, when a male employee confided in her, that he had received a more generous raise—although both had received identical promotions and had worked in the same departments. McKenna Decl. ¶ 6, J.A. 1073-74a.
- ^{xliii} Odle Decl. ¶ 10, J.A. 1114a.
- ^{xliv} Collier Decl. ¶ 15, J.A. 693a.
- ^{xl} Jones Decl. ¶ 8, J.A. 973-74a.
- ^{xlvi} *Dukes*, 603 F.3d 571, 627; *Dukes*, 222 F.R.D. 137, 188.
- ^{xlvii} See *Watson v. Forth Worth Bank and Trust*, 487 U.S. 977 (1988); *Hazelwood School Dist. v. United States*, 433 U.S. 299 (1977). In *Watson*, the Court observed that leaving personnel “decisions to the unchecked discretion of lower level supervisors” can contribute to inequality by inviting managers to make these decisions based, not on objective criteria, but on “subconscious stereotypes and prejudices.” 487 U.S. at 990.
- ^{xlviii} See, e.g., *Deposit Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 625 (5th Cir. 1999) (affirming the presumption that class members still working for the employer might be unwilling to sue individually for fear of retaliation); *Simmons v. City of Kansas City*, 129 F.R.D. 178, 180 (D. Kan 1989) (certifying class of police officers challenging discrimination in part to minimize the likelihood of retaliation against individual class members).