

A win for Wal-Mart, and all workers

The Supreme Court decision protects the due-process rights of all those involved and helps ensure that class actions are used for the right reasons and under the right circumstances.

By Theodore J. Boutrous Jr. and Theane Evangelis Kapur

Critics are apoplectic about the Supreme Court's decision last week to reject a class-action suit brought against Wal-Mart. They claim the ruling, made in a case brought by an employee named Betty Dukes and two others alleging gender discrimination, will make it more difficult to enforce civil rights protections.

What's gotten lost in the debate is that all nine justices — including Ruth Bader Ginsburg, a pioneer for women's rights — agreed that this class action went too far and jeopardized the due-process rights of millions of employees, who would have been powerless to determine their own fate if the court hadn't stepped in to protect their rights.

All nine justices agreed that the rule used by plaintiffs to certify the class would "nullify" important protections for class members. Under the rule, all women who worked at Wal-Mart stores since 1998 were forced into the class without notice, whether they wanted to be or not — including the many women who have thrived and succeeded at the company. Absent the Supreme Court's ruling, women with potentially meritorious claims would forever lose their day in court if the plaintiffs gambled and lost the case. The court rightfully — and unanimously — rejected plaintiffs' attempt to hijack the rights of millions of employees.

The court did divide 5 to 4 in deciding that the three plaintiffs in the case could not, under any circumstances, fairly represent the experiences of more than 1.5 million women across the company. According to the majority, women "held a multitude of different jobs, at different levels of Wal-Mart's hierarchy, for variable lengths of time, in 3,400 stores, sprinkled across 50 states, with a kaleidoscope of supervisors (male and female)." Therefore, this case presented exactly the opposite of a common policy that affected everyone the same way, precluding class treatment.

Ginsburg's partial dissent disagreed with one section of the majority's opinion, arguing that plaintiffs should have been given another chance to try to certify a class under stricter standards, but notably did not find that the plaintiffs could meet those standards, let alone that the majority's approach would jeopardize civil rights. Nor did she say the sky is falling. And while dissenting opinions often call for congressional action, Ginsburg did not do so here.

The Dukes plaintiffs advanced a radical theory that finds no support in either civil rights law or the rules governing class actions. They argued that allowing local managers to use discretion in making employment decisions, together with a strong companywide culture, made Wal-Mart "vulnerable" to bias. But as the Supreme Court held, such individualized decision-making within large companies is "a very common and presumptively reasonable way of doing business" that "should itself raise no inference of discriminatory conduct."

The court recognized that Wal-Mart's "policy forbids sex discrimination," and "the company imposes penalties for denials of equal employment opportunity." The court said that plaintiffs' evidence was "worlds away" from showing any discriminatory practice at the company. The record included many examples of success stories involving women who began their careers at Wal-Mart in positions similar to the plaintiffs in this case and rose into leadership roles.

The supposed "glue" holding plaintiffs' theory together was the testimony of a sociologist, William Bielby, who claimed that subconscious stereotypes could potentially "seep" into decision-making processes at any large institution. But because Bielby could not say whether "0.5% or 95% of the employment decisions" at Wal-Mart actually "might be determined by stereotyped thinking," the court concluded that it could "disregard what he has to say." Ginsburg's partial dissent did not defend Bielby's testimony.

Had the court accepted plaintiffs' theory, the ramifications for American businesses and their workers would have been disastrous. As 20 of the nation's leading companies explained in a brief supporting Wal-Mart, the plaintiffs' theory, if upheld, would have exposed companies to massive class actions even when they had adopted and enforced companywide diversity policies.

The three Dukes plaintiffs still can pursue their individual claims for hundreds of thousands of dollars — and attorneys' fees — and have them fairly resolved. In fact, they could have had those claims resolved long ago if they hadn't tried to transform their highly idiosyncratic individual claims into a mammoth class action.

The Supreme Court decision protects the rights of all those involved and helps ensure that class actions are used for the right reasons, under the right circumstances. And that's good for everyone.

Theodore J. Boutrous Jr. and Theane Evangelis Kapur, lawyers in the Los Angeles office of Gibson, Dunn & Crutcher LLP, represented Wal-Mart before the Supreme Court in the Dukes case.