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Report Warned Wal-Mart of Risks Before Bias Suit

By STEVEN GREENHOUSE

More than six years before the biggest sex discrimination lawsuit in history was filed against [Wal-Mart Stores](#), the company hired a prominent law firm to examine its vulnerability to just such a suit.

The law firm, Akin Gump Strauss Hauer & Feld, found widespread gender disparities in pay and promotion at Wal-Mart and Sam's Club stores and urged the company to take basic steps — like posting every job opening and creating specific goals to promote women and minorities — to avoid liability.

The 1995 report said that women employed by Wal-Mart earned less than men in numerous job categories, with men in salaried jobs earning 19 percent more than women. 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.

Without significant changes, the lawyers said in their confidential analysis, Wal-Mart “would find it difficult to fashion a persuasive explanation for disproportionate employment patterns.”

In 2001, seven women filed a class-action suit on behalf of all women working at the company. They complained of a general pattern of discrimination in pay and promotions.

Wal-Mart, the world's largest retailer, has denied any systematic discrimination and asserts that any claims should be tried individually, not as a class action that would sweep in more than a million current and former

employees.

The lower courts have ruled that the case could proceed as a class action, but this summer, Wal-Mart plans to ask the [Supreme Court](#) to overturn the class certification.

Akin Gump's report, which has never been made public, foreshadowed the claims made by the plaintiffs in the lawsuit, known as *Dukes v. Wal-Mart*. Outside legal experts say the report is likely to be protected by attorney-client privilege, and thus probably could not be introduced as evidence to support the sex discrimination claims.

But Brad Seligman, the lead lawyer for the women suing Wal-Mart, says he intends to subpoena the report, which he had not known about, in hopes of using it in the case.

Wal-Mart said on Wednesday that the Akin Gump document was "deeply flawed" and "stale."

"This memo is 15 years old and has no bearing or relevance to the *Dukes* case or our strong employment practices and diversity programs," said David Tovar, a Wal-Mart spokesman. "We are proud of our work to promote diversity at Wal-Mart and are continually recognized for our efforts."

The report, which the company asserted was "confidential and privileged," was made available to *The New York Times* by someone not involved in the lawsuit who said that Wal-Mart had not done enough to address the issues it raised.

Akin Gump estimated that for 1993 alone, Wal-Mart's potential legal exposure in a class-action sex discrimination suit was \$185 million to \$740 million. Mr. Seligman said the women suing Wal-Mart were seeking damages for every year since 1997, meaning the company could be on the hook for billions of dollars.

The report examined employment patterns at all Wal-Mart and Sam's Club stores. It found that men employed by Wal-Mart as department managers, an hourly position, earned 5.8 percent more than women in those positions in 1993 (\$236.80 versus \$223.70). Men in salaried jobs earned \$644.20 a week compared with \$540.50 for women.

Akin Gump also found large disparities in job assignments. Fifty-five percent of women were initially hired as cashiers compared with 12 percent of men. Twenty-nine percent of men were initially hired in receiving jobs

like unloading, which generally pay at least 20 percent more than cashier jobs, compared with 7 percent of women.

The law firm found smaller, but still significant, disparities in the company's employment of black employees.

The report warned that the overall disparities it found were "statistically significant and sufficient to warrant a finding of discrimination unless the company can demonstrate at trial that the statistical disparities are caused by legitimate, nondiscriminatory factors."

Wal-Mart criticized Akin Gump's methodology, saying it had deliberately mimicked the type of statistical analysis done by plaintiffs' lawyers in class-action cases. Even using that methodology, the retailer said, Akin Gump did not find significant disparities between the hourly wages of men and women.

Mr. Tovar, the Wal-Mart spokesman, also said that in the last five years, Wal-Mart has told its 50,000 managers to promote more women and minorities, with 15 percent of managers' bonuses tied to achieving diversity goals. Women now hold 45.8 percent of assistant store manager positions — a pipeline to higher-level jobs — up from 39.7 percent five years ago.

Employment experts say there can be innocent reasons for the types of disparities found by Akin Gump. For example, women might apply disproportionately to be cashiers and men disproportionately to work in receiving. But there could be improper discriminatory reasons for the differences, like managers believing that cashier jobs are for women.

Akin Gump recommended that Wal-Mart document applicants' job preferences, post notice of all openings and training opportunities, establish promotion goals and timetables for women and minorities, and monitor progress. It also suggested that the company set up a mandatory arbitration system for employment claims to reduce the risks of court cases.

Company documents and depositions in the lawsuit suggest that Wal-Mart's initial adoption of the report's recommendations was fitful and incomplete.

Wal-Mart began posting more, but not all, job openings and adopted numerical goals for promoting women. But in a February 2000 memorandum to Wal-Mart board members, Coleman H. Peterson, executive vice

president for human resources at the time, bemoaned the lack of progress toward diversity goals.

“Female management representation at Wal-Mart super centers, Sam’s and logistics and, therefore, total company are worse than prior year,” he wrote in the memorandum, which was turned over to the plaintiffs.

And in June 2002, Wal-Mart’s senior vice president for human resources sent a memorandum voicing alarm that “we do not have a poster, brochure” that explained “how to get promoted into the management training program,” according to documents in the case.

Mr. Seligman, the plaintiffs’ lawyer, says the Akin Gump report, which he has not seen, would seem to confirm that “top managers were fully aware that women were not getting promoted in proper numbers.”

George Fisher, a [Stanford University](#) law professor who specializes in evidence, said he doubted that a judge would allow the plaintiffs’ lawyers to subpoena the report because it was protected by attorney-client privilege. Another legal expert concurred.

Akin Gump’s findings parallel those of the plaintiffs’ main expert, Richard Drogin, an emeritus statistics professor at [California State University](#), East Bay, who examined payroll data from 1996 to 2002 that Wal-Mart provided in the case.

Mr. Drogin found that among hourly workers in 2001, the year the lawsuit was brought, women earned about \$1,100, or 6 percent, less a year than men, while among salaried employees, women earned \$14,500, or 26 percent, less.

Mr. Drogin also found that 65 percent of Wal-Mart’s overall work force was female in 2001, compared with 33 percent of its managers.

A study by Joan Haworth, an expert hired by Wal-Mart, disputed that analysis, finding that more than 90 percent of the stores had no statistically significant pay differences between men and women.

Mr. Tovar, the Wal-Mart spokesman, said groups representing women and minorities had repeatedly recognized the company’s performance on diversity in recent years.

“We use state-of-the-art hiring and promotional systems to make sure that every applicant has the opportunity

to apply and be considered for any position they're qualified for and interested in," he said.

Akin Gump has long worked for Wal-Mart, although it does not represent the company in the sex discrimination suit. Jose H. Villarreal was a partner at the firm when he served on Wal-Mart's board from 1998 to 2006.

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