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Wal-Mart v. Women

The employment discrimination lawsuit against **Wal-Mart**, which the Supreme Court heard last week, is the largest in American history. If the court rejects this suit, it will send a chilling message that some companies are too big to be held accountable.

It began in 1999 after Stephanie Odle was fired when she complained of sex discrimination. As Ms. Odle recounted in sworn testimony, as an assistant manager she discovered that a male employee with the same title and less experience was making \$10,000 a year more than her.

She complained to her boss, who defended the disparity by saying the male had a family to support. When she replied that she was having a baby that she needed to support, the supervisor made her provide a personal budget and then gave her a raise closing just one-fifth the gap.

The plaintiffs who have brought a class action on behalf of 1.5 million current and former female Wal-Mart employees allege that they, too, faced discrimination in pay and promotion. If Wal-Mart loses, it could owe more than \$1 billion in back pay.

Wal-Mart has tried to end the litigation by arguing that 1.5 million women do not have enough in common to sue for discrimination as a single class under the Federal Rules of Civil Procedure. A federal trial judge said they do. The United States Court of Appeals for the Ninth Circuit upheld that ruling, twice.

But during oral argument last week, conservative justices and liberals to some degree expressed skepticism: Is there enough “cohesion” among the women to justify treating them as a single class? If so, how could a solo trial judge manage such an enormous class action?

A [brief](#) by 31 professors of civil procedure explains why the women are a suitable class. Their claims meet the core test: They have in common the question of whether Wal-Mart discriminated against them. Meanwhile, the high cost of litigation compared to the low likely individual recoveries would make it hard for the women to proceed any other way.

The average wage gap each year for every member of the class is around \$1,100, too little to give lawyers an incentive to represent them. The best way to judge their rights efficiently and fairly is by recognizing them as a group. That is the purpose of the class-action rule.

The case record contains 120 sworn statements made recounting sex discrimination in pay and promotion but also in the work environment: required company fishing trips where women weren’t included on their male peers’ boat; a supposedly retaliation-free system for complaints that led to women being fired. The lower courts ruled that this and other evidence provide compelling reasons for the case to move forward. The justices should move it along by having the trial judge allow further fact-finding.

If the court has doubts about whether the class is cohesive or manageable enough, it should ask the trial judge to explore whether there is a single class or more than one — say, salaried female employees and hourly employees or female store managers and other kinds of employees. That would be much fairer than dismissing the case and insisting that 1.5 million women fend for themselves.

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