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The U.S. Supreme Court Holds That Employment Discrimination Claims By 1.5 Million Women Cannot Proceed As One Class

By JILL YAZIJI

In *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2451 (June 20, 2011), the U.S. Supreme Court denied class status to approximately 1.5 million women, current and former Wal-Mart employees, alleging sex-based employment discrimination in all 3,400 Wal-Mart stores nationwide. In a 5-4 decision, the Supreme Court held the plaintiffs failed to demonstrate enough commonality among them to meet the threshold requirement of Federal Rule of Civil Procedure 23(a)(2) for class action.[1]

The plaintiffs in *Wal-Mart* did not contend that the company had an express policy of discrimination, nor company-wide policies and practices that resulted in a disparate impact on women, such as a mandatory testing procedure. They claimed, rather, that sexual stereotypes and subjective criteria embedded in Wal-Mart's corporate culture regularly determined pay and promotion decisions, resulting in a significant disparity between the number of men and women promoted to managerial positions. The "broad discretion" that Wal-Mart vested in its supervisors, plaintiffs complained, was practiced disproportionately in favor of men and had a disparate impact on female employees in the form of lower pay and fewer promotions. In the absence of a "common contention" of discrimination or a "single employment practice," the validity of plaintiffs' case rested entirely on the strength of evidence offered to prove Wal-Mart's discriminatory culture. That evidence, the Court's majority held, fell far short of what is required to glue together an expansive class action.

The evidence of Wal-Mart's corporate culture of bias was statistical, anecdotal, and in the form of expert testimony. The Wal-Mart workplace, plaintiffs' sociologist and only expert testified had a "strong corporate culture" that made it "vulnerable" to "gender bias." The expert's testimony was quickly disregarded by the Court after he admitted in deposition that he could not tell "whether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking." This was a crucial question in a case alleging that every woman employee suffered from gender stereotypes. "If [plaintiff's expert] admittedly has no answer to that question" Justice Scalia wrote, "we can safely disregard what he has to say."

The majority likewise questioned the statistical and anecdotal evidence offered by plaintiffs. Statistical evidence compared the number of women versus men promoted into managerial positions, concluding that "there are statistically significant disparities between men and women at Wal-Mart." The data underlying this conclusion were regional, not store-by-store. Hence, the Court concluded that the statistical evidence did not prove a nationwide policy of discrimination in all 3,400 stores, because figures from a particular store or cluster of stores may have skewed the overall data.

The anecdotal evidence presented in plaintiffs' affidavits was deemed equally insufficient. For instance, the Court noted that there were 120 affidavits filed on behalf of almost 1.5 million women, representing one anecdote of discrimination for every 12,500 class members. Indeed, the affidavits complained of only 234 stores of the 3,400 stores included in the litigation, leaving all the other stores without any evidence of discrimination in the eyes of the Court's majority.

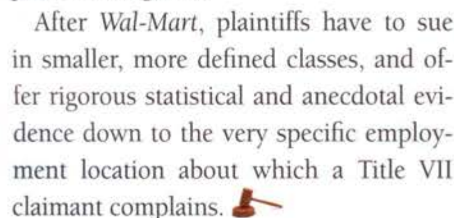
What doomed the Wal-Mart plaintiffs was the expansive breadth of the class contrasted with the narrow sampling of evidence presented. In a sentence that captured the majority's sentiment vis-à-vis class actions of this size, Justice Scalia exclaimed that "in a company of Wal-Mart's size and geographical scope, it is quite unbelievable that all managers would exercise their discretion in a common way without some common direction."

Yet, the majority's commonality test was seen by the dissent as too exacting in an otherwise threshold inquiry of Rule 23(a)(2). "[E]ven a single question of law or fact common to the members of the class will satisfy the communality requirement," wrote Justice Ginsburg in her dissent. Plaintiffs' evidence, she wrote, suggested that "gender bias suffused Wal-Mart's corporate culture," where supervisors often referred to female associates as "little Janie Qs" or uttered statements such as "[m]en are here to make a career and women aren't." Discrimination can often be an unconscious practice, even in the absence of intentional decisions by each supervisor to discriminate.

Yet, *Wal-Mart* should not be read to spell the end of employment discrimination class action, even those based entirely on evidence of discretionary policies. Justice

Scalia wrote the Court recognizes discretionary decisions can be the basis of Title VII claims. But there must be a "common contention" among class members, that discrimination, for instance, was practiced by the same manager, or that there was a single policy in place. "Without some glue holding the alleged reasons for all these employment decisions together," there is no common answer to the "crucial question *why was I disfavored*." (Emphasis in original.)

After *Wal-Mart*, plaintiffs have to sue in smaller, more defined classes, and offer rigorous statistical and anecdotal evidence down to the very specific employment location about which a Title VII claimant complains.



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Endnote

1. The less remarkable holding of Wal-Mart was the Court's unanimous decision that Federal Rule 23(b)(2) should not be used for monetary damages (in this case "back pay") claims. The Rule is adequate only when a "single injunction or declaratory judgment" provides relief to each class member. "Individualized monetary claims belong to Rule 23(b)(3)," with its procedural protections and opt out provisions.

Paid or Incurred, Post-Haygood v. Escabedo

By ROBERT W. PAINTER

In a major 7-2 opinion, *Haygood v. Escabedo*, 2011 WL 2601363 (Tex., July 1, 2011), the Texas Supreme Court interpreted the "paid or incurred" statute enacted in the tort reform legislation of 2003.

At issue is the meaning of Texas Civil Practice & Remedies Code Section 41.0105, which states that, "recovery of medical or health care expenses incurred is limited to the amount actually paid or incurred by or on behalf of the claimant."

"In a major 7-2 opinion, Haygood v. Escabedo, *2011 WL 2601363 (Tex., July 1, 2011), the Texas Supreme Court interpreted the 'paid or incurred' statute enacted in the tort reform legislation of 2003."*

As soon as Section 41.0105 became law, there was a vigorous grammatical debate over whether the adjective "actually" only modified "paid" or whether it modified both "paid" and "incurred." The difference has significant implications.

Indeed, as a result of this ambiguity, pre-*Haygood*, many plaintiffs argued that they should be permitted to put on evidence of the full amount of all medical or health care expenses that had been incurred, regardless of whether they had been paid or adjusted in any way. Under that scenario, should the plaintiff prevail any necessary reduction of the awarded medical expenses would occur post-verdict. In turn, many defendants urged trial courts to exclude any evidence of medical or health care expenses that had not actually been paid.

The *Haygood* decision weighed in, settling the linguistic issue by deciding that "actually" modifies both "paid" and 'incurred." Further, the court held that only evidence of paid medical expenses and medical

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