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Posted on Wed, Jun. 22, 2011

Reining in frivolous class-action lawsuits

The high court takes plaintiffs' lawyers down a peg.

By Walter Olson

In the run-up to the Supreme Court's opinion this week in *Wal-Mart v. Dukes*, the Ninth Circuit U.S. Court of Appeals had given the go-ahead to a lawsuit on behalf of a vast number of female Wal-Mart employees, each of whom had supposedly suffered harm as a result of the giant retailer's way of doing business. In the minds of some advocates, the only question remaining was whether the Supreme Court would stand in the way of justice. Prejudging Wal-Mart's guilt without so much as a trial, the left-leaning Alliance for Justice asked: "Will the Supreme Court Protect Wal-Mart's Discrimination Against Women?"

These advocates must have been surprised on Monday, when not a single justice on the Supreme Court, liberal or conservative, voted to uphold the Ninth Circuit's ruling - not Ruth Bader Ginsburg, not Elena Kagan, not Stephen Breyer, not Sonia Sotomayor.

Pointedly ignoring amicus briefs filed by a long list of liberal pressure groups and law professors, all nine justices agreed that the Ninth Circuit had jumped the gun and erroneously approved the case's certification as a class action. The four liberal justices wanted to send the case back for further consideration, while a five-justice majority led by Antonin Scalia ruled that it clearly wasn't suitable for class treatment based on the evidence available.

The misconceptions about this case begin with the identities of the real combatants. On NPR's *Marketplace* this week, Slate's Dahlia Lithwick described the plaintiffs as "1.5 million female employees of Wal-Mart who are trying to file a class-action suit." But, of course, most of those women are not "trying" to do anything of the sort.

Rather, a relative handful of them have hired lawyers, and those lawyers daringly sought to get themselves declared the legal representatives of the other 1.496 million (or however many), who have expressed no inclination whatsoever to sue.

Class-action litigation is typically lawyer-driven. In the employment field, it's common for lawyers to target companies they want to sue, amass a file over a period of years, discreetly (or not-so-discreetly) reach out to employees or ex-employees, and select those with the most media-friendly stories to step forward as public representatives.

Representatives of whom, though? In a company as big as Wal-Mart, it's inevitable that some employees will experience unfair treatment. As Chief Judge Alex Kozinski noted in dissenting from the Ninth Circuit's decision to certify the case as a class action, the members of the approved class "held a multitude of jobs . . . in 3,400 stores, sprinkled across 50 states, with a

kaleidoscope of supervisors (male and female), subject to a variety of regional policies that all differed depending on each class member's job, location, and period of employment. . . . They have little in common but their sex and this lawsuit."

Indeed, one of the plaintiffs' complaints against Wal-Mart was that its personnel practices were too decentralized, giving too much discretion to store managers, not all of whom could be trusted to use it fairly. The more you accept that contention, the less a pattern of bias at Store No. 423 says anything about Store No. 187, a thousand miles away.

In recent years, the Supreme Court has been reverting to the once-standard view that class actions are best suited for economic disputes in which any damages awarded can be fairly allocated according to a mechanical formula; securities complaints are the model here. Thus, it has increasingly rejected the use of class actions for personal-injury claims.

This week's decision will make it harder, though not impossible, to apply class actions to employment-discrimination cases in which cash damages are the main point. (As the court noted, though, class treatment is still more liberally available for injunctive relief, such as in a suit asking that a company be ordered to change a discriminatory personnel policy.)

That does not mean, as one veteran Supreme Court reporter wrote this week, that future aggrieved employees will all have to "file their own lawsuits," or that large companies can operate with impunity. The court did not rule out lawsuits on behalf of groups of employees affected by the actions of some identifiable corporate policy, for example, or by particular managers or supervisors or offices. And even suits by individual employees against big companies regularly demand, and sometimes get, million-dollar damages.

The message of this ruling is simple: Employees have to prove that they have been legally wronged, not just cash in because somebody else was.

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