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# the corner

## Thursday, April 29, 2010

### The Class-Action Lawsuit against Wal-Mart [Carrie Lukas]

How do you know when someone has been the victim of discrimination? That's the question at the heart of the class-action lawsuit against [Wal-Mart](#), which alleges that up to 1 million female employees suffered because of discriminatory employment practices. This week, the Ninth Circuit allowed the lawsuit to proceed.

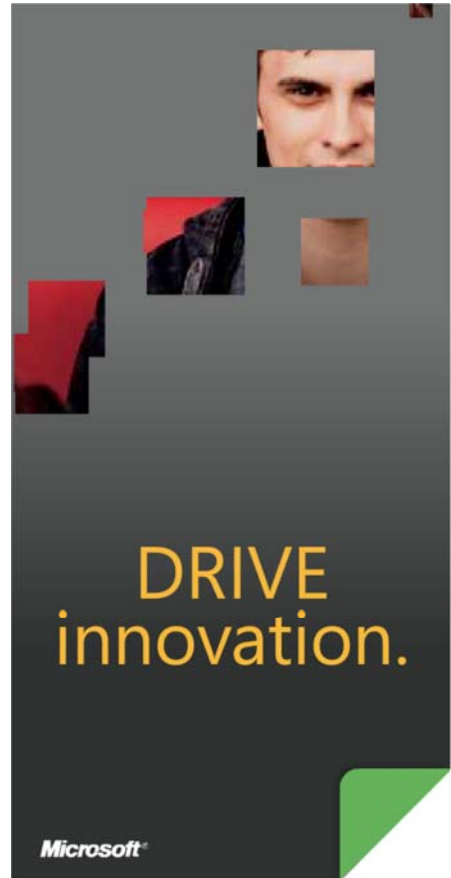
Legal analysts are questioning the ruling for how it approved the class eligible to file the suit, for broadening the understanding of civil-rights laws (by accepting the idea of "structural discrimination"), and for denying the defendant the ability to use individualized evidence to refute specific claims of discrimination (see [Cato's Mark Moller](#)).

In critiquing the ruling, the *Wall Street Journal* highlighted Judge Sandra Ikuta's dissent which concluded: "The majority's ruling provides scant limits to the types of [classes](#) that can be certified... Put simply, the door is now open to Title VII [discrimination] lawsuits targeting national and international companies, regardless of size and diversity, based on nothing more than general and conclusory allegations, a handful of anecdotes, and statistical disparities that bear little relation to the alleged discriminatory decisions."

The *Wall Street Journal* emphasized the concern that "anecdotal evidence" could be used as the basis for this class-action suit. They should be equally concerned about the use of statistics.

Politicians and feminist activists regularly claim that statistics like those showing a "wage gap" are evidence of discrimination; in reality, they are nothing of the sort. The oft-cited Department of Labor statistic compares the median income of a full-time working man to the median income of a full-time working woman, and finds that a woman's [earnings](#) are generally between 75 and 80 percent of the man's earnings. Yet this "gap" isn't evidence of discrimination, since that statistic ignores the many factors that influence how much someone earns.

Women and men tend to gravitate toward different industries and even different specialties within fields. [Women](#) leave the workforce more frequently than men do and take more time off while working, and even full-time working women spend about half an hour less in the office each day than their male co-workers. These differences add



up, and even liberal groups like the American Association of University Women admit that controlling for personal choices eliminates up to three-quarters of the wage gap.

It's hard to control for all of the factors that affect earnings. In his book, *Why Men Earn More*, Warren Farrell looks at many factors, and notes trends that make identifying discrimination difficult. For example, women often are promoted more quickly than men. As a result, women executives often have less experience than their male counterparts and therefore are paid less. Dr. Farrell uses the example of TV news directors. Some claimed discrimination because female news directors were paid about 27 percent less than their male counterparts. Yet the data also showed that the average female news director had less than six years of experience in news, while the average man had more than 14. In this instance, who exactly is being discriminated against?

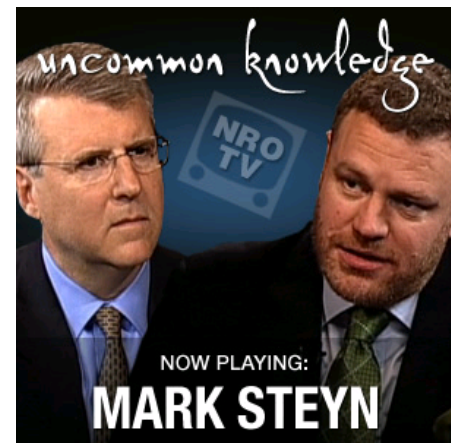
Other studies have found that women are less likely to negotiate their starting salaries or ask for raises and promotions, which may contribute to them earning less than men on average. That could be a result of socialization, natural instincts, and even the presumption that women who try to negotiate their salaries will be perceived as less attractive candidates (which studies have also found to be true).

Statistics also cannot capture the different goals that men and women have when negotiating employment contracts. While many men might focus exclusively on maximizing pay, many women focus on flexible work schedules or schedules that work with their children's school calendars.

Undoubtedly, there were some bad, even sexist bosses managing some of Wal-Mart's million female workers. But aggregate statistics aren't going to tell their story.

— *Carrie Lukas is vice president and director of policy at the Independent Women's Forum.*

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