



KEY FACTS SHEET

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# The Equal Employment Restoration Act of 2012

## Removing the Obstacles Imposed by the *Wal-Mart v. Dukes* Decision and Restoring Justice for Women Workers

Last year, the Supreme Court issued a decision in *Wal-Mart v. Dukes* that created huge barriers for women workers who seek to challenge company-wide sex discrimination by heightening the burden to certify class action lawsuits. In a 5-4 decision, the Court ruled that a group of over 1.5 million women who sued Wal-Mart for gender discrimination in pay and promotion could not move forward as a class. The Court held that the women had not provided sufficient evidence to support a nationwide class of over 1.5 million.<sup>1</sup> The Court created a heightened standard for certifying class-actions by:

- (1) Requiring plaintiffs who challenge discrimination caused by “subjective decision making” to provide “significant proof” that the employer engaged in a “general policy of discrimination” that affected the class as a whole in order to satisfy the commonality standard under Federal Rules of Civil Procedure Rule 23(a).
- (2) Holding that backpay and other monetary damages must be pursued under Rule 23(b)(3), and cannot be pursued under Rule 23(b)(2), if the monetary relief is not incidental to the injunctive or declaratory relief.
- (3) Requiring that employers have an opportunity to assert individual defenses to backpay.<sup>2</sup>

Class actions have been the most effective, and often the only way civil rights litigants could challenge employment discrimination. When employers

discriminate against groups of employees, such as women, it is often more effective and efficient for these groups to pursue their claims as a group in court. By allowing workers to challenge discriminatory practices as a group, the class action mechanism provides critical support and protection that helps workers, particularly low-wage workers, overcome the superior resources of large corporations through collective action. The *Wal-Mart* decision placed nearly impossible barriers for civil rights litigants to overcome, especially low-wage workers who go up against large corporations such as Wal-Mart, the largest retailer in the world.

### The Equal Employment Opportunity Restoration Act of 2012 would restore women workers’ and other employees’ rights to challenge discriminatory employment practices on a class-wide basis by:

- *Creating a new judicial mechanism for collective group action.* The Act would provide an alternative mechanism called “group actions.” The requirements for establishing a group action would be the same as the pre-*Wal-Mart v. Dukes* requirements for maintaining a class action under Rule 23 of the Federal Rules of Civil Procedure, in that the merits of the case need not be proven to certify the group action. This mechanism would be available for groups challenging discriminatory employment practices under Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, the Rehabilitation Act, 42 U.S.C. §1981, or the Genetic Information Nondiscrimination Act, thus making it easier for these groups to establish that their members’ claims should be tried as a class.

<sup>1</sup> *Wal-Mart Stores, Inc. v. Dukes*, No. 10-277,131 S.Ct. 2541 (2011).

<sup>2</sup> *Id.* at 2545

- *Providing that group actions can be used to challenge an objective employment practice, a subjective employment practice, or a mixed employment practice.* The Act would broaden the types of claims a class could pursue once a group achieves class certification— it could challenge an objective practice, such as a written policy, or a subjective practice. Many of the women in *Dukes v. Wal-Mart* were denied promotions or equal pay because of “subjective discretion.” The Act would allow litigants like the women of Wal-Mart to challenge discriminatory employment practices made up of several or one individual supervisor decision.
- *Clarifying that employers’ written anti-discrimination policies can be considered as a defense to certification only if the employer demonstrates that the policy has actually been implemented in practice.* The Supreme Court’s *Wal-Mart* decision gave undue weight to the existence of the store’s written anti-discrimination policy, suggesting that if employers have such policies they can escape liability for sex-based discrimination. The act would ensure that an employer may only use a written anti-discrimination policy as a defense if the employer proves that the policy was actually implemented in practice.
- *Restoring courts’ discretion to determine the appropriate method for assessing remedies.* In *Wal-Mart*, women presented both anecdotal and statistical evidence of gender based discrimination in pay and promotion to management, resulting in lower pay and fewer promotions for women workers. The Act would restore judicial discretion in allowing the use of such evidence to support class litigants’ claims and would allow courts to use statistical analyses and other methods they deem necessary to determine appropriate remedies (including monetary damages) and provide justice to prevailing plaintiff classes.

Although deeply disappointed in the Court’s decision, ERA is committed to eliminating the barriers to gender equality and continues to fight for justice for the women of Wal-Mart. For more information about ERA’s ongoing fight for justice since the Supreme Court decision, visit these links: [ERA Files Amended Wal-Mart Complaint](#), [ERA Attorneys Advocate for Equal Pay](#).