

BUSINESS VOICES OUTSIDE OPINION

Debating implications of Wal-Mart sex-bias ruling

A Chicago professor and a lawyer discuss the significance of the decision that the company's employees are not a class in seeking damages against the retailer regarding sex-discrimination charges

By **KRISTIN SAMUELSON** | Tribune reporter

In what is considered the most important job-bias case in a decade, the U.S. Supreme Court ruled last month that some 1.5 million female employees of Wal-Mart Stores Inc. could not act as a class in seeking billions in damages from the nation's largest retailer.

The issue was whether the women all had the same interests, not whether Wal-Mart engaged in practices that denied them proper pay and promotion opportunities. Supporters say it will keep business from facing such large, potentially costly lawsuits; opponents fear it has

stripped employees of a potent tool to challenge working conditions.

We asked Jeff Nowak, an attorney who supports the ruling, and Laura Beth Nielsen, a professor who opposes it, to answer four questions about its implications.

Nielsen is an associate professor of sociology and director of legal studies at Northwestern University and research professor at the American Bar Foundation. Nowak, co-chairman of Franczek Radelet P.C.'s Labor and Employment Practice, represents management in all aspects of labor and employment law.

Q

The majority of the news coverage on this ruling has said it will have positive implications for businesses and negative implications for victims of discrimination. What do you see as the implications?

L.B.N.: I think there's what happens in the law and then what businesses need to be doing to be the best business they can be. Yes, this gives big business greater protection from class-action lawsuits by any group. But just because workers are going to have a harder time bringing cases, I don't think (businesses are) going to be like, "Aha, now we're free to discriminate."



JEFF NOWAK

Attorney and co-chairman of Franczek Radelet P.C.'s
Labor and Employment Practice

J.N.: Clearly, this decision is a win for employers, but it's no magic bullet for employers, since there's still plenty of risk for employers in the employment-discrimination arena. It sends a message to plaintiffs that class-action standards will be applied rigorously to ensure there's a commonality among all claims to the members of the class.

As the court pointed out, to move a class action forward, there must be some glue to hold it together. Otherwise there's no common answer to the critical question of "Why was I discriminated against?"

The bottom line for employees and employers is that plaintiffs/employees should be prepared to produce specific and substantial evidence that there's a commonality across the class so that a class action is the best way to resolve the issues. That's what Wal-Mart says.

There are many (media outlets) that have noted that this decision will effectively reduce the number of class-action lawsuits filed. I see no reason that that's going to be the case. To the contrary; the Wal-Mart decision may have the effect of producing a greater number of class actions that are limited in scope.

Before the final ruling, the business community feared this case could lead to more such suits and force them into settlements to avoid exposure to large damage awards. How will the ruling affect employees contemplating a discrimination suit?

L.B.N.: There are two groups of people that determine whether suits will be filed. One is ordinary citizens who are still going to do something (and, if a lawyer won't take the case, they may represent themselves). The other is the lawyers who will dissect Wal-Mart, determine what it means and file suits that make sense given the new state of the law.

If a worker feels unfairly treated at work and wants to bring a suit, he or she is still going to go talk to a lawyer. The lawyers are the ones we really have to worry about. If a lawyer can't make money on a case, she can't take the case. You can't be practicing law for millions of hours if there's no chance (it will result in any monetary award).

Will it deter lawyers? I hope they will look at what the decision means and they'll bring a different kind of class, which is what these attorneys are doing. Maybe it'll be a particular job category, like cashiers, or a particular store. So the classes will become smaller as a result of this, but it doesn't mean there's no market for (them).

J.N.: I don't think we'll at all see a decrease in the number of class-action suits. Quite possibly, we'll see more. A greater number of class actions (might appear) now with a focus on a geographic area or among a specific group of employees that include much more detail ... that might meet the demanding standards outlined by the Supreme Court in this case. It could be a costly one for both employees and employers. Anecdotal evidence and statistical evidence will take on greater importance to establish or defeat the plaintiffs' claim that there's some sort of commonality of the class.

Could the plaintiffs have done anything differently to win?

L.B.N.: There's two ways you can file for class certification. Which one you file under depends on which kind of remedy you want. The 9-0 part of this ruling (the justices ruled 5-4 for Wal-Mart in another part) is on a very technical question. What's required to certify a class if you want a particular kind of damages — whether Wal-Mart is ordered to do something differently or the plaintiffs seek money. That wouldn't have changed the outcome of the case.

The courts are moving farther and farther away from hearing collective grievances — large classes like Wal-Mart — or being willing to use statistical disparities to show discrimination. It's unfortunate, because the Civil Rights Act was intended to motivate law to address the serious social problem of systemic workplace discrimination.

Individual claims just are not going to get litigated because of the economics of them, so every move toward individualized claims and away from collectivities erodes the power of the CRA.

J.N.: What helped Wal-Mart here was evidence that it wasn't making personnel decisions from an imaginary tower in Bentonville, Ark. Local management had much discretion and control over how employees were paid and promoted. The plaintiffs fell short because they weren't able to articulate some general policy of discrimination. It really is a key aspect of the case for employers to cling to, because the decision supports the notion that you should, wherever possible, delegate to local managers the authority to make subjective pay and promotion decisions.

That approach, however, shouldn't be taken lightly by employers. It's not enough to decentralize everything. (The decentralizing) should really be in writing and with the assistance of counsel so as to best defend it from litigation that might arise. There still needs to be some oversight in that process. It should be well thought out so there aren't renegade pockets in the company making discriminatory decisions.

What does this mean for labor?

L.B.N.: Hopefully, it will begin to motivate workers to be more interested in collective action through union activity or other ways to collectively discuss working conditions, pay equity, transparent promotion processes and other employment issues.

Courts, in general, aren't very sympathetic. That means it's up to workers. You have to use the threat of (bringing lawsuits) as a backdrop. Hopefully, it will encourage workers to learn to have these conversations about pay equity, etc., in other forums.

Management should be interested in that too. Not just because you want to avoid lawsuits, but because workers who believe they're being fairly treated will want to stay there. There are a lot of reasons to want a happy, stable workforce in your company.

J.N.: Organized labor will tout this as more evidence for a unionized workforce. The Wal-Mart decision doesn't offer union leaders any great fodder to energize the masses. I don't see it changing the game among unions.

I do see this changing a bit the way employers do business. ... First, employers should consider how their policies and structure affects their exposure to class actions. They may wish to standardize employment practices to ensure employees are treated the same but allow for discretion among local management to make those decisions. Second, employers must ensure that their corporate policies prohibit discrimination and discipline for employees who discriminate and deny equal opportunity.

Employers might consider adopting an internal review or grievance process ... to provide an opportunity to address (complaints) prior to litigation. Wal-Mart did not, and most companies don't, but that clearly is something to consider.

(Employers should promote) a culture that embraces diversity in the workplace. Obviously, the need for continuous audits of employment practices is imperative.

The Supreme Court in Wal-Mart clearly was skeptical of the plaintiffs' statistical and anecdotal data. But that, combined with companywide policy, can provide good grounds for a viable employment action, whether it be individual or class action.

Send questions or comments to businessvoices@tribune.com