# A BAD DECISION

## In women vs. Walmart case, Supreme Court strikes a blow

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**AS I NOTED** in last month's column, the National Labor Relations Board has finally awoken from its slumber. Unfortunately, the Supreme Court has not. In its 2010-2011 term, the high court issued several decisions that may have a devastating impact upon organized labor and individual employee rights.

The most pernicious of these decisions is *Walmart Stores v. Dukes*, which the court handed down this summer. This widely anticipated decision concerned whether or not a class action against Walmart might be maintained by over 1.5 million woman who claimed that the country's largest employer had discriminated against them. See my column in the March 2011 issue for more background.

The women claimed that they had been systematically denied promotions and paid less than male counterparts.

Whether the case could have proceeded as a class action basically rested on at least two questions:

- Did all of the plaintiffs have common issues?
- Was it more practical than not to proceed as a class action?

In a 5 to 4 decision, Justice Scalia, writing for the majority, reversed two lower court decisions and said no -- the case could not proceed as a class action. Justice Scalia noted Walmart is divided into seven regional divisions, each having authority over employment decisions. This fact made it impossible, Scalia said, for the women to demonstrate that Walmart had engaged in a pattern and practice of discrimination. No common thread could be woven among the millions of employment decisions the court would have to sort through.

But in coming to this conclusion, the majority totally discounted the fact that the plaintiffs had presented an expert's analysis demonstrating that pay and promotional disparities between men and woman at Walmart could only be explained by the existence of gender discrimination. In this respect, it is clear that rather than focusing on common claims and issues actually uniting the potential class members, the court focused on their dissimilarities. In a dissenting opinion, Justice Ginsberg asserted that the majority had turned the class certification statute on its head.

The ultimate impact of this decision remains to be seen in its application in future suits. However, its immediate impact upon the litigants is profound. Ten years of litigation has now been tossed out and the claimants will have to make the determination whether or not to proceed individually. There is, of course, the possibility that the claimants can bring related or jointly administered actions. However, the cold fact is that each and every claimant will have to retain counsel and pursue litigation at their own cost, which is the opposite of a class action. I hope a substantial number of these women decide to pursue litigation and hold Walmart accountable.

### SOMETHING TO CHEER ABOUT (FINALLY!)

While the Walmart decision is extremely disappointing, union advocates still have cause to celebrate. On Aug. 26, the NLRB finally reversed its decision in the case called *Dana Corp.*

That decision, from 2004, had been a blow to union organizers. There, the NLRB held that an employer who voluntarily recognizes a union without requiring an election can request that the board post a notice advising bargaining unit members that they may file for a decertification election within 45 days of the posting. Prior to the issuance of the Dana decision, the board had held that a voluntarily recognized union could not have its representational status challenged for a reasonable period of time after the recognition. Because of Dana, unions were unjustifiably threatened with decertification in a process that was antithetical to promotion of industrial peace and collective bargaining.

But things have changed now. In *Lamons Gasket Company* (16-RD-1597), the NLRB examined statistical evidence concerning the impact of Dana and found that only 1 percent of the time where a decertification election was held after voluntary recognition was granted was the union actually decertified. The board concluded that the logic underpinning Dana – that employees were often coerced into signing voluntary recognition cards and that they required a secret ballot election to truly exercise their free choice – was erroneous. If employees were truly coerced into requesting voluntary recognition, then voluntarily recognized unions would be decertified in the vast majority of cases. This was not borne out by the facts.

The board has finally returned to an unfettered recognition bar, a principal that has been the foundation of bargaining relationships for over 50 years. Now that is something to cheer about.

### LEGAL CORNER

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