A Just Victory For Walmart

On June 2 the Supreme Court ruled unanimously in favor of Walmart in a class action lawsuit on behalf of 1.5 million past and current female employees—an absurd lawsuit that presented virtually no proof of the gender discrimination claimed by the plaintiffs. According to the decision, "Walmart's announced policy forbids sex discrimination, and the company has penalties for denials of equal opportunity. Respondents' only evidence of a general discrimination policy was a sociologist's analysis asserting that Walmart's corporate culture made it vulnerable to gender bias. But because he could not [even] estimate what percent of Walmart employment decisions might be determined by stereotypical thinking, his testimony was worlds away from 'significant proof' that Walmart 'operated under a general policy of discrimination.'"

The plaintiffs relied on something called a "social framework analysis" by University of Illinois-Chicago professor William Bielby. Bielby offered no *proof* that Walmart had discriminated against anyone; he merely offered a *theory* of "unconscious prejudice" which, combined with Walmart's deep pockets, was enough to make the plaintiffs' attorneys drool over what they hoped would be a settlement of billions of dollars. The Bielby theory essentially argues that virtually everyone is guilty of discrimination even if only subconsciously, and if Walmart has more male managers than female managers, then that is necessarily proof of discrimination. Following that theory, practically every company in the nation is guilty of discrimination. If women make up X percent of the population then they must be represented by that same percentage in every aspect of life; if not, it is "proof" of discrimination. If Vietnamese-Americans make up Y percent of the population, then they too must be represented everywhere at Y percent levels—otherwise it is evidence of unfair discrimination by everyone who is not a Vietnamese-American. Needless to say, this argument is ludicrous—despite the fact that many people (mostly Democrats) support it. To their credit, Obama's far left court appointees Sonia Sotomayor and Elena Kagan sided with Walmart. If even the "wise Latina" Justice Sotomayor saw no discrimination against the entire class of employees, evidence of it was certainly not presented to the Supreme Court.

The ruling continued, "The only corporate policy that the plaintiffs' evidence convincingly establishes is Walmart's 'policy' of giving local supervisors discretion over employment matters. While such a policy could be the basis of a Title VII disparate-impact claim, recognizing that a claim 'can' exist does not mean that every employee in a company with that policy has a common claim." In other words, that Walmart's local supervisors have a fair amount of discretion in doing their jobs only means that one or more of them *could* potentially treat some employees unfairly and in conflict with official corporation policy—but that is *not* proof that any of them did. The Court wanted the proof, but it was not provided by the plaintiffs' attorneys. (Although the primary ruling was unanimous in stating that the plaintiffs presented no persuasive proof of harm to the class of plaintiffs, Sotomayor and Kagan did vote with the minority in a decision on a secondary issue of the lawsuit. The Court reasonably ruled 5–4 that merely sharing the same gender was not sufficient for the plaintiffs to be recognized as a class. Justices Sotomayor, Kagan, Ruth Bader Ginsburg, and Stephen Breyer disagreed. They will

therefore remain on the Obama Christmas card list—or Kwanza card list, or Muslim holiday card list.)

At NationalReview.com Carrie Severino wrote, "This case was a …move by class-action lawyers who, ever in search of bigger classes of plaintiffs and defendants with deeper pockets, set their sights on Walmart, the nation's largest private employer. They managed to create a class that consists of all women employed in one of Walmart's four brands of stores over more than a decade: some 1.5 million women. The problem is that there isn't a massive problem of discrimination at Walmart stores, so the lawyers needed to come up with a theory that didn't rely on finding actual discrimination in individual cases. Their theory is that Walmart violated the law because—even though it had a clear anti-discrimination policy—its employees may have been given enough discretion that they secretly ignored the policy and disadvantaged women in hiring and promotion because of surrounding cultural assumptions. But to take this case as a class action, the Court couldn't even look at the individual cases, and would just have to rely on general statistics. And even those statistics don't show a pattern of discrimination over all stores in the whole country—in 90 percent of stores there was no real difference between male and female salaries. If a theory like this can fly, then the due process guaranteed by the Fifth Amendment doesn't mean much."

The ruling does *not* suggest that there has never been or never will be gender discrimination at some Walmart stores, but *individual* female employees have the right to file claims if they are victims of future discrimination. The attorneys in this case chose *not* to represent individual female employees who may have had *legitimate* complaints against the company, but to instead file a class action lawsuit on behalf of *all* female Walmart employees—no doubt because they hoped to force (that is, blackmail) the company into agreeing to a gargantuan financial settlement. If the attorneys had sued only on behalf of a small number of employees with legitimate cases and won, their cut of the final awards might only have been enough to keep them in their McMansions and with BMWs in the driveways. But they were looking for something *much* more than that, something even beyond the John Edwards level of fees. (They chose California to file the lawsuit precisely because of its preponderance of sympathetic far-left judges.)

Walmart called the attorneys' bluff and said, "We'll see you in court." The case progressed as far as it did only because the Ninth Circuit ("Ninth Circus") Court of Appeals—which has a long history of incredibly bad decisions—ruled against Walmart. The eventual Supreme Court ruling was a victory for American consumers and workers as well as a victory for Walmart. A ruling against Walmart would have opened the floodgates for similar frivolous class action lawsuits across the country. Legitimizing the "Bielby theory" would result in companies going out of business left and right because of the cost of fighting those lawsuits. Virtually every business would be at risk of being sued and, as a result, far fewer Americans would want to risk their savings to start a new business—meaning fewer new jobs in an economy where 15 million people are out of work.

It is worth noting that had Walmart lost the discrimination case, the winners would *not* have been the corporation's female employees, but their attorneys. Assume, for example, that the plaintiffs might have won $5 billion in damages. Assume also that the attorneys would have received 40 percent of the payment. (With an out-of-court settlement 30 percent would be more typical. The plaintiffs' attorneys were no doubt hoping Walmart would cave in and offer a settlement to make the issue go away.) With a $5 billion award the attorneys would have raked in a whopping $2 billion, leaving $3 billion to be distributed among *at least 1.5 million plaintiffs*—or about $2,000 each.

Even if one assumes that Walmart has discriminated unfairly against *some* female employees, it has certainly not discriminated against *all* of them; and even if as many as 500 female employees have been treated unfairly over the years, how would *they* be helped by giving $2,000 to each of the *other* 1,499,500 female employees who were *not* victims of discrimination? In fact, the true victims of discrimination, whether they number one or 500 or 5,000, were harmed by the class action lawsuit because if the case had been successful their tiny portion of the total award would hardly have compensated them for the actual damages they suffered. (If they wish to now sue Walmart individually, they may be wise to base their cases on evidence of actual harm caused by the company, rather than a specious theory by a leftist university professor.)

Had the Walmart lawsuit been successful, the attorneys for the plaintiffs would have gained a fortune, the plaintiffs themselves would have received a mere $2,000 each (assuming a $5 billion verdict), and Walmart's customers would have had to pay higher prices to compensate for the $5 billion lost by the company. Unlike the federal government, Walmart cannot print money or sell Treasury Bonds to China, and even in winning the lawsuit the company has spent a small fortune defending itself. Those costs must necessarily be passed on to consumers or reflected in smaller dividend payments to everyone who owns Walmart stock.

Several *thousand* lawsuits are filed against Walmart every year. One can be certain that many fall into the frivolous ("I cut my finger on a Walmart shopping bag!") category, and some no doubt are legitimate. But each should be decided on its own merits. If a leaky store roof is left unrepaired for weeks and a customer then slips on the wet floor, suffering a severe injury, that customer certainly deserves compensation. But that does not mean that *every* Walmart customer should join together in a class action lawsuit demanding billions of dollars in damages because each of them *could* have been injured in a fall. Further, if the injured customer is of German-American heritage, that does not mean that Walmart owes every German-American customer a portion of a huge settlement. If a Cuban-American employee is denied a promotion on the basis of his background rather than his skills and job performance, a lawsuit is justified. But to group together all Cuban-American employees in an effort to "sweeten the settlement pot" is absurd.

There are certainly situations where a class action is justifiable. For example, if a manufacturer irresponsibly dumps dangerous chemicals and pollutes the ground water of a town with 50,000 residents, it is certainly reasonable for a lawsuit to be filed on behalf

of all 50,000. It would clearly be foolish to advocate the filing of 50,000 individual lawsuits. But a line has to be drawn when attorneys looking for a big settlement from a large corporation expect the courts to conclude that an offense against *some* employees caused harm to *all* employees. Walmart was justified in drawing that line, and the Supreme Court was wise not to insist on moving it.

Don Fredrick
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Note: An example of the "Bielby theory" is apparent in an article by Michael Beckel at OpenSecrets.org. Beckel whines that "Walmart's political action committee (PAC) supported 213 men whose names appeared on the ballot in November" but "During the same period, Walmart's PAC donated to just 30 women who were general election candidates of either the Democratic or Republican Party. That's about 12 percent of all House candidates the company's PAC backed." Beckel's argument—with no evidence to support it—is that a primary factor in the Walmart PAC's donation decisions was gender. Apparently it does not occur to Beckel that the candidates' positions on the issues are what matter, *not* which bathroom the candidate uses. Further, although there are far more women in politics than there were decades ago, most candidates are still men. Beckel does not explain how the Walmart PAC can avoid giving a donation to a male candidate when in most contests both the Democrat and the Republican are men.

http://www.opensecrets.org/news/2011/06/women-candidates-often-shorted-by-walmart.html