

# Walmart v. Dukes: A Failure of the Supreme Court

October 5, 2011

*Wal-Mart v. Dukes* was the largest class action lawsuit ever filed in the U.S., representing as many as 1.5 million women associates who were systematically discriminated against by the retail giant on the basis of sex in determining pay and promotions.

In a 5-4 Supreme Court opinion revoking the right of underpaid women associates to sue as a class, the Roberts Court declared Wal-Mart too big to sue and claimed a lack of commonality among the plaintiffs.

The facts pose no question as to whether Wal-Mart discriminates against women. An analysis conducted for the lawsuit showed that women employees were paid five to 15 percent less than men in similar positions, even after taking into account factors including seniority and performance.

Justice Antonin Scalia wrote, “Even if every single one of these accounts is true, that would not demonstrate that the entire company ‘operate[s] under a general policy of discrimination ... Respondents have identified no ‘specific employment practice’—much less one that ties all their 1.5 million claims together. Merely showing that Wal-Mart’s policy of discretion has produced an overall sex-based disparity does not suffice.”

Penning the minority opinion, Justice Ruth Bader Ginsburg wrote, “Wal-Mart’s delegation of discretion over pay and promotions is a policy uniform throughout all stores ... A system of delegated discretion ... is a practice actionable ... when it produces discriminatory outcomes.”

In the wake of *Wal-Mart v. Dukes*, NOW calls on women’s rights activists and supporters around the country to support legislative and worker-led remedies that will support justice for women associates:

First, holding Congress accountable to passing a Paycheck Fairness Act, which will provide more effective remedies to victims of sex-based wage discrimination.

Second, supporting unions and in particular the associate-led Organization United for Respect at Wal-Mart (OUR Wal-Mart). Women workers in unions earn 11.2 percent more, or \$2.00 more per hour, than non-union women workers, and the gender wage gap is smaller in unionized workplaces.

NOW also reaffirms Wal-Mart as a “Merchant of Shame” as part of its Women-Friendly Workplace Campaign. NOW chapters continue to lead countless community

demonstrations at Wal-Mart stores around the country to educate shoppers about Wal-Mart's exploitation of women.