

Nos. 04-16688 & 04-16720

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, DEBORAH GUNTER,
KAREN WILLIAMSON, CHRISTINE KWAPNOSKI, and EDITH ARANA,

Plaintiffs/Appellees/Cross-Appellants,

v.

WAL-MART STORES, INC.,

Defendant/Appellant/Cross-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

PRINCIPAL BRIEF FOR WAL-MART STORES, INC.

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CORPORATE DISCLOSURE STATEMENT

Wal-Mart Stores, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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Wal-Mart Stores, Inc. respectfully submits that the district court's order certifying the largest employment class action in history should be vacated. The district court recognized that "no court has ever confronted a motion for class certification in an employment case of this size—or anything close to it." ER 1193-1194. Contradicting Supreme Court precedent and decisions from inside and outside this Circuit, the court certified an elephantine class action that, if allowed to proceed, would strip both absent class members and Wal-Mart of basic due process rights. In violation of the Rules Enabling Act, the district court repeatedly, and expressly, altered substantive law in its effort to jam this case into the class action procedural device. Indeed, the court acknowledged that its approach—which it labeled "rough justice"—would allow persons who have suffered no injury to recover backpay and, potentially, punitive damages, while undercompensating others whose rights to sue individually could be foreclosed by the judgment. The district court's unprecedented, unworkable, unconstitutional, and unlawful certification order should be vacated forthwith.

STATEMENT OF JURISDICTION

The district court, which had jurisdiction over this Title VII action pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 2000e-5(f)(3), entered its class certification order on June 21, 2004. Pursuant to Federal Rule of Civil Procedure 23(f), Wal-Mart petitioned for permission to appeal on July 6, 2004, and this Court granted

the petition on August 13, 2004. This Court has jurisdiction under 28 U.S.C. § 1292(e).

STATEMENT OF ISSUES

1. Did the district court err in concluding that the divergent sex-discrimination claims of the six named plaintiffs are both common to and typical of all claims that might be asserted by more than 1.5 million absent class members challenging discretionary pay and promotion decisions made locally by tens of thousands of managers at approximately 3,400 stores nationwide?

2. Did the district court err in concluding that Wal-Mart is not entitled to mount an individualized defense at any stage of the contemplated class proceedings?

3. Did the district court err in concluding that plaintiffs' claims for monetary relief, which potentially amount to billions of dollars, do not predominate over their claims for injunctive or declaratory relief, which most of the putative class members lack standing even to seek?

STATEMENT OF THE CASE

The named plaintiffs, six current or former employees of Wal-Mart, sued under Title VII, alleging a pattern and practice of intentional discrimination against women with respect to pay and promotions. ER 7. Over Wal-Mart's objection, the district court certified a class consisting of more than 1.5 million

members, defined to include “[a]ll women employed at any Wal-Mart domestic retail store at any time since December 26, 1998, who have been or may be subjected to Wal-Mart’s challenged pay and management track promotions policies and practices.” ER 1220.

STATEMENT OF FACTS

1. Wal-Mart, the largest private employer in the world, operates approximately 3,400 retail stores in the United States and employs more than 1 million people. ER 1139. Wal-Mart’s domestic stores, each of which includes as many as 53 departments and 170 job classifications, comprise 7 divisions, 41 regions, and more than 400 districts within those regions. ER 497-504. Wal-Mart has adopted and enforces company-wide equal employment opportunity policies to foster diversity, to ensure fair treatment for all employees, and to prohibit unlawful discrimination. ER 656-673.

It is undisputed that compensation and promotion decisions for hourly employees at Wal-Mart are made almost exclusively on a case-by-case, discretionary basis by local store managers in response to the particular needs of their individual stores and the vagaries of the local markets from which employees are drawn. ER 1146. As the district court explained, individual store managers “are granted substantial discretion in making salary decisions for hourly employees in their respec-

tive stores” and, “[a]s with salary decisions, the parties agree that subjectivity is a primary feature of promotion decisions for in-store employees.” ER 1149, 1151.

2. The named plaintiffs are four former and two current Wal-Mart employees. They worked at different stores, at different times, in different positions. They were promoted to (and demoted from) different job classifications, disciplined for different offenses, and paid different amounts for performing different jobs. They transferred to different stores and different positions within stores, applied for different management training opportunities, and quit (or were fired) for different reasons. They claim to have been discriminated against on the basis of sex in different ways, by different managers, in different circumstances. These are their different stories:

Edith Arana worked at the Duarte, California store from 1995 to 2001. ER 313. She began as a personnel manager, and several months later, after receiving a mixed performance review, she moved to the position of test scanner. ER 322-327. In July 1997, she applied for and received a promotion to support manager, along with a raise. ER 315-316, 328-331, 341. In July 1998, she stepped down from the support manager position because she did not wish to work the required shifts. ER 332-336. Ms. Arana claims that she expressed interest in or applied for several positions but that men were hired instead. ER 317-319. She was fired in 2001 for falsifying her time records. ER 320, 337-340.

Betty Dukes was hired as a cashier in the Pittsburg, California store in 1994. ER 376. She sought a promotion to customer service manager in April 1996 and was promoted to that position in June 1997. ER 376, 377. A series of disciplinary infractions precluded further promotions and, ultimately, led to a demotion to cashier. ER 377-378, 383-387. In 2001, she was reassigned as a greeter because unspecified injuries prevented her from performing the cashier's job. ER 379. Ms. Dukes claims that two male greeters in the same store are paid higher wages than she is. ER 380.

Deborah Gunter worked part-time at a Texas store in 1993 and full-time at three California stores from 1996 to 1999. ER 402. She requested and received transfers between departments, shifts, and stores to accommodate her circumstances. ER 403-404, 406, 408. She applied for a department manager position but was not selected; she also claims that two less-qualified men were promoted over her as support manager. ER 404-407. She also claims that a supervisor made sexually explicit comments that upset her. ER 406. Her store manager made clear to the alleged harasser that harassment would not be tolerated, and Ms. Gunter's request to transfer to another store was granted. ER 411-416. About three months later, she quit after complaining about her schedule. ER 417-418.

Christine Kwapnoski has "spent most of [her] adult life" working for SAM'S CLUB stores in Missouri and California. ER 432. She began work in

