

Walmart Faces New Legal Battle From Old Pay Bias Claims

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- Shift to focus on resolving individual worker claims
- Same claims, individual plaintiffs from *Dukes* class

Walmart Inc. has managed to toss out allegations of pay discrimination brought by potentially thousands of women over the last decade, even garnering a U.S. Supreme Court win in 2011. Now the retail giant is being hit with a new round of individual pay bias lawsuits, alleging the same claims, as lawyers and former class members take another stab at having the merits of their cases heard.

Since February 2019, at least 13 individual lawsuits have been brought against Walmart, symbolizing a strategy shift by lawyers who represent the employees making the allegations. More are on the way, according to Cohen Milstein partner Christine Webber, who is serving as a litigation quarterback of sorts.

“There are a lot of women who have been personally affected by these practices,” Webber said. The change in strategic approach is “really focused on trying to wrap up this sort of unfinished business.”

Plaintiffs’ attorneys across several states are now getting creative, pursuing curated individual claims against Walmart, after the Supreme Court nixed a class of about 1.5 million women in 2011 and effectively blocked smaller regional class actions against the company with a June 2018 decision in an unrelated securities case.

Most of those classes were shot down as courts questioned the timeliness of the claims or the certification requirements for each class. Walmart also settled with many of the named plaintiffs in the cases representing many workers.

The goal of the new individual suits? Finally close claims that have been years in the making by hitting Walmart from all sides, similar to how plaintiffs’ attorneys have approached mandatory arbitration clauses that include class waivers.

But a behemoth like Walmart isn’t brought down easily, based on Bloomberg Law analysis of past litigation tactics. The company has used its deep pockets to pick off named plaintiffs by offering settlements after they’ve exhausted their abilities to certify a class.

“It’s just never going to be as efficient as class actions,” University of Oregon School of Law professor Elizabeth Tippetts said about individual claims. “You have to have a lot of cuts,” for it to look like a class action, she said.

The claims, which date back to 2001, are legally timely because of a procedural grace period; their statute of limitations was paused as the case made its way to the high court. Individual plaintiffs then filed their cases with the Equal Employment Opportunity Commission, which has been investigating the claims before issuing right-to-sue letters—a process required before workers can bring private litigation against an employer. Now, the lawsuits are being filed.

The allegations against Walmart are more than 15 years old, and not representative of opportunities for women in the company, Walmart spokesperson Randy Hargrove said in an email.

“We’ve said that if one of these plaintiffs believes they have been treated unfairly, they deserve to have their timely, individual claims heard in court,” he said. “The lawyers could have pursued litigation on behalf of these plaintiffs as early as 2012, but instead attempted to manufacture smaller class actions that the courts have consistently dismissed.”

Lengthy Timeline

Women have brought pay bias claims against Walmart dating back to 2001, when Betty Dukes alleged the super retailer systemically underpaid her and other female employees. The case was pending for 10 years before the Supreme Court weighed in on the procedural issues, rather than the case’s merits, in 2011. The class of women alleging the pay bias was decertified.

After the Supreme Court decertified the class in *Wal-Mart Stores, Inc. v. Dukes*, plaintiffs from the previously certified class broke off, forming their own “mini-Dukes” cases. The regional classes of workers could each have included up to 200,000 women according to Webber.

Those actions also failed to hurdle the procedural barriers thrown up by Walmart. Of the five regional pay bias cases brought, only one suit was allowed to proceed with class claims based on a U.S. Court of Appeals for the Sixth Circuit ruling.

The high court threw another curve-ball in the plaintiffs’ litigation strategy with its 2018 ruling that prohibited follow-on class actions after the statute of limitations in the original case ended. In *China Agritech v. Resh*, the court said only plaintiffs pursuing individual claims can benefit from a rule that delays the normal filing deadline after class certification was denied in the first lawsuit involving those claims.

After the high court took away that tolling rule, workers resorted to filing lawsuits individually. Courts have still not heard the merits of those claims, Webber said.

“It’s time for them to have their claims resolved,” she said.

New Strategy, New Players, Same Game

The new cases are being brought by the same line-up of lawyers. Many of the old complaints remain the same, but the strategy and the named plaintiffs are new, even if they were part of the originally certified *Dukes* class.

“These are the claims that we pursued all along,” Webber said, but their merits have never been heard.

But the plaintiffs' attorneys have learned along the way, and much can be predicted from Walmart's past approach to the claims by either settling with the named plaintiffs, in a class or individual claim, or throwing up procedural hurdles. In fact, Walmart is already resorting to these tactics.

"Once again, Walmart's action has been to put up procedural hurdles" instead of looking at the claims themselves, Webber said of the retailer's response to the first of the individual complaints, which was filed in July 2018.

Arbitration Similarities

In response to Walmart's defense tactics, plaintiffs' attorneys are taking a page out of the book of workers bound by mandatory arbitration clauses. Because their classes weren't certified, the former class members are filing many individual suits. But proceeding with individual claims means fewer workers potentially affected by the pay bias could benefit, if the workers are successful.

The current wave of lawsuits, which is nearly complete, will press pay bias claims against Walmart on behalf of 150 women, Webber said. That represents a tiny fraction—just a tenth of a percent—of the women who were part of the original, nationwide class that sued the company.

"Then we turn to the next wave," Webber said.

Workers who agree to waive their class arbitration rights can't bring claims in large groups, meaning that they face the same challenges as Walmart workers who also can't have their claims heard in large groups. In both situations, bringing multiple individual suits might achieve some small success, but it's not very efficient, Tippett said.

Like mass arbitration, defending individual suits can be costly for companies, George Washington University School of Law professor Michael Selmi said in an email.

"I suspect Wal-Mart may have been better off litigating one massive case than all of these smaller cases, just as many employers are now realizing that 1,000 or more arbitrations can be very expensive and difficult to manage," Selmi said.

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