Senate Judiciary Committee

Written Testimony Submitted For

Barriers to Justice and Accountability:

How the Supreme Court's Recent Rulings Will Affect Corporate Behavior

By

The National Employment Lawyers Association

June 29, 2011

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The National Employment Lawyers Association (NELA) advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA provides assistance and support to lawyers in protecting the rights of employees against the greater resources of their employers and the defense bar. It is the country's largest professional organization exclusively comprised of lawyers who represent individual employees in cases involving employment discrimination and other employment-related matters. NELA and its 68 state and local affiliates have more than 3,000 members around the country. Our membership includes private attorneys as well as staff attorneys of the U.S. Equal Employment Opportunity Commission (EEOC) and state anti-discrimination agencies.

Title VII of the Civil Rights Act of 1964 and other modern civil rights statutes are landmarks that declare the nation's commitment to eliminating exclusion and discrimination. In framing these measures, Congress made sure not only to recognize rights and protections but to create enforcement mechanisms to make those rights a practical reality. These laws guarantee to women, minorities, individuals with disabilities, older Americans and other protected groups prohibition of exclusion and discrimination in the nation's workplaces, places of public accommodations, housing markets, educational institutions, and other important areas of life.

These statutes provide for government administrative enforcement, such as the EEOC's conciliation process, and government prosecution of civil actions in federal court. Recognizing that government enforcement alone would not be adequate, these laws expressly and uniformly provide for prosecution of civil enforcement actions by the victims of discrimination through cases brought by private counsel. Recovery of costs and reasonable attorneys' fees are provided in order to facilitate private enforcement. The U.S. Supreme Court long ago recognized the important role that the federal courts play in the enforcement of civil rights guarantees in

"private attorney general" actions. *Newman v. Piggy Park Enters, Inc.*, 390 U.S. 400, 400-02 (1968).

Federal enforcement agencies such as the Department of Justice and the EEOC have prosecuted significant employment discrimination lawsuits. However, small budgets, inadequate staffing, and the demands of other enforcement priorities have historically limited the ability of government prosecutors to carry the principal burden of enforcing the prohibition against employment discrimination.

Private attorney general actions prosecuted by public interest organizations and the private bar have been the driving force for federal civil rights enforcement since *Brown v. Board of Education*, 347 U.S. 483 (1954). From the seminal *Griggs v. Duke Power Co*., 401 U.S. 424 (1971) that established the disparate impact standard[1] for proving employment discrimination to *Lewis v. City of Chicago*, 130 S. Ct. 2191 (2010) last term, most of the significant Title VII cases in which the Supreme Court and other federal courts have enforced civil rights acts were initiated by the victims of discrimination who donned the mantle of the sovereign to seek redress for civil rights violations through private civil actions.

Rule 23 class actions under the Federal Rules of Civil Procedure have been the engine of Title VII enforcement by private attorneys general. Rule 23 class actions where an employer "has acted or refused to act on grounds generally applicable to the class," Fed. R. Civ. P. 23(b)(2), were designed for "actions in the civil rights field where a party is charged with discriminating unlawfully against a class." *Amchem Prods., Inc. v. Windsor*, 521 U.S.591, 614

[1] Title VII prohibits employers from using practices that have the effect of disproportionately excluding persons based on race, color, religion, sex, or national origin, where the tests or selection procedures are not "job-related and consistent with business necessity." *Id.*

(1997); Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 359 (1967). Based on experience in early civil rights cases, the drafters of Rule 23 created Rule 23(b)(2) class actions because individual lawsuits were an "inadequate" and "inefficient" means to address discrimination encountered by victims of discrimination at the hands of employers and other large institutions. *Id.* at 389.

The drafters were proven right. Many of the landmark civil rights enforcement cases were prosecuted as private attorney general class actions, from *Newman v. Piggie Park Enterprises* to *Phillips v. Martin Marietta*, *Griggs v. Duke Power* to *Albermarle Paper Co.v. Moody*, 422 U.S. 405 (1975), to *Lewis v. City of Chicago*.

Progress has been uneven in the judicial enforcement of Congress' ban on employment discrimination. The Supreme Court and lower federal courts have sometimes erred in interpreting the will of Congress too narrowly or otherwise frustrating the essential purpose of providing for practical implementation of an important national objective. At such times Congress has had to step in to ensure that the national commitment to eliminate exclusion and discrimination from the workplace remains strong and effective. This includes enacting remedial legislation to correct judicial error and to clarify the language and purpose of Title VII. The most recent examples of such Congressional action are the Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat.5, 5-6 codified as 42 U.S.C. § 2000e-5(e)(3), reproving the Supreme Court for its restrictive statute of limitations ruling for a disparate impact compensation claim, *Ledbetter v. Goodyear Tire & Rubber Co*., 550 U.S. 618 (2007), and the ADA Amendments Act of 2008, Pub. L. No. 93-112, 87 Stat. 355 codified throughout 29 U.S.C. and 42 U.S.C., overturning *Sutton v. United Airlines, Inc*., 527 U.S. 471(1999), *Toyota Motor Mfg, Ky, Inc. v.*

Williams, 534 U.S. 184 (2002) and numerous other related restrictive rulings on the definition of disability, *see* Maurice Wexler, *et al., The Law of Employment Discrimination from 1985 to 2010,* 25 ABA J. of Labor & Employ. Law 349, 367, 371-75 (2010).

Congress passed the Civil Rights Act of 1991in order to overturn no fewer than seven Supreme Court decisions that, contrary to Congressional intent, erected jurisdictional and procedural obstacles to the enforcement of Title VII protections. *Wards Cove Co. v. Atonio*, 490 U.S. 642 (1989) (weakening *Griggs'* disparate impact standard of proof); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (limiting scope of 42 U.S.C. § 1981 to hiring claims); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (limiting liability in mixed motive cases); *Lorance v. AT&T Technologies, Inc*., 490 U.S. 900 (1989) (limiting actions to challenges to discriminatory seniority systems); *Martin v. Wilks*, 490 U.S. 755 (1989) (permitting non-parties to challenge consent decrees); *EEOC v. Arabian American Oil Co*., 499 U.S. 244 (1991) (limiting exterritorial reach of Title VII); *West Virginia University Hospital, Inc. v. Casey*, 499 U.S. 83 (1991) (barring recovery of expert witness fees). *See* Maurice Wexler, *et al., The Law of Employment Discrimination, supra*, at 352-55.

Congress must now again intercede to reverse the Supreme Court's decisions in *AT&T Mobility v. Concepcion* and *Wal-Mart v. Dukes*, which deny America's consumers and workers the right to band together to vindicate their rights when they are violated by our nation's largest corporations.

AT&T Mobility v. Concepcion: Barring the Courthouse Door

On April 27, 2011, the U.S. Supreme Court handed down its decision in *AT&T Mobility v. Concepcion*, ___ U.S. ___ (2011), ruling that arbitration agreements can bar class action

lawsuits. In its 5-4 decision, the Court held that the Federal Arbitration Act (FAA) preempts California law on this issue. In *Concepcion*, AT&T customers alleged the company charged an undisclosed $30 for cell phones it advertised as "free." Customers sought a class action on behalf of millions who accepted the deal believing the cell phone was free. AT&T attempted to avoid the lawsuit arguing that the contract's forced arbitration clause contained a class action ban.

Employers are increasingly inserting arbitration clauses with class action bans into employment contracts, presenting them to employees on a take-it-or-leave-it basis. The *Concepcion* decision severely limits, if not eliminates, an important means for enforcing longstanding civil rights and employee protections for many of America's workers. This case presents a missed opportunity for the Supreme Court to protect America's workers from ad-hoc, arbitrary, and unexamined decisions by their employers.

NELA strongly supports all *voluntary* forms of alternative dispute resolution, including arbitration and mediation. In fact, NELA has been at the forefront nationally in encouraging mediation as a preferred method for resolving employment disputes. Our organization helped draft the Due Process Protocol for the Resolution of Statutory Disputes and worked closely with the American Arbitration Association in the development of its specialized employment arbitration rules and procedures – which we endorse when applied in voluntary arbitrations.

In *Concepcion*, the majority held under the FAA that arbitration "efficiency" trumps the right of consumers (and also employees) to take concerted action to remedy legal wrongs. Congress crafted the FAA to facilitate enforcement of arbitration agreements between consenting parties. By endorsing the presumptive right of corporations to bootstrap class action waivers

onto such agreements, and to impose them unilaterally on consumers with minimal judicial scrutiny, the Court carries the FAA in an unanticipated, anti-consumer direction.

For these reasons, NELA has been a strong advocate for the passage of the Arbitration Fairness Act (AFA) of 2011. The AFA would ban forced arbitration in employment, consumer, and civil rights disputes.[2] A national study commissioned by The Employee Rights Advocacy Institute For Law & Policy, NELA's public interest arm, found that a solid majority of Americans (59%) opposes forced arbitration clauses in the fine print of employment and consumer contracts, including both men and women, as well as majorities of Democrats, Independents, and Republicans. Similarly, strong majorities (59%) support the AFA, which also cross traditional gender and political lines. The study can be found at www.employeeerightsadvocacy.org.

Wal-Mart v. Dukes: Preventing Access To Justice

In another blow to workers' rights, on June 20, 2011, a deeply divided U.S. Supreme Court in *Wal-Mart, Inc. v. Dukes*, ___ U.S. ___ (2011) reversed the U.S. Court of Appeals for the Ninth Circuit's decision to uphold the district court's certification of a class representing approximately 1.5 million female employees at Wal-Mart stores throughout the country. The workers sued the nation's largest private employer for sex discrimination in Wal-Mart's pay, promotions, and other employment practices, alleging that employer policies delegating authority to make subjective and discretionary employment decisions allowed for widespread discrimination against women. Though the Court's decision did not rule on the validity of the

[2] It is worth noting that the Civil Rights Act of 2008, which passed in the U.S. House of Representatives, would have provided that "any clause of any agreement between an employer and an employee that requires arbitration of a dispute arising under the Constitution or laws of the United States shall not be enforceable." H.R. 5129, 110th Cong., § 423 (2008).

women's discrimination claims, significant barriers have now been erected that will make it much more difficult for America's workers to achieve justice.

The Court's majority eviscerates decades of jurisprudence by suggesting that highly subjective decision-making systems, such as those at Wal-Mart, are immune from scrutiny in cases involving multiple facilities. Led by Justice Ruth Bader Ginsburg, four justices dissented from these notions and asserted that "the practice of delegating to supervisors large discretion to make personnel decisions, uncontrolled by formal standards" was enough to present a common question that would allow the class to proceed.

The majority also ignores the reality of the workplace that individual workers are often unable to perceive a pattern or practice of discrimination beyond themselves. *See Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 340 n.20 (1977) (noting that companywide statistics may be the only way "'to uncover clandestine and covert discrimination by the employer or union involved'") (internal citation omitted). Even when they are able to identify such patterns, workers often are fearful of coming forward individually because employers, "by virtue of the employment relationship, may exercise intense leverage." *Nat'l Labor Relations Bd. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 240 (1978). "Not only can the employer fire the employee, but job assignments can be switched, hours can be adjusted, wage and salary increases can be held up, and other more subtle forms of influence exerted." *Id.*; see also David Weil & Amanda Pyles, *Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace*, 27 Comp. Lab. L. & Pol'y J. 59, 83 (Fall 2005) (citing studies showing "being fired is widely perceived to be a consequence of exercising certain workplace rights").

In addition, the majority embraces the premise that a written policy forbidding sex discrimination may be enough to immunize employers from accountability for discrimination that can affect personnel decisions. These five justices would bar many class actions because in their view most managers today truly and scrupulously observe anti-discrimination norms. In such a Pollyannaish world, isolated pockets of discrimination simply cannot be "common." Justice Antonin Scalia writes that "left to their own devices most managers in any corporation – and surely most managers in a corporation that forbids sex discrimination – would select sex-neutral, performance-based criteria for hiring and promotion that produce no actionable disparity at all." The majority offers no support for this supposition, aside from the *ipse dixit* that managers as a class are enlightened and law-abiding. But experience and scholarly research tell us something quite different – that managers are indifferent to or unconscious of the factors that guide their managerial judgment, and that the pattern of employment decisions too often tilts in one direction – against female and minority employees. *See generally* Linda Hamilton Krieger and Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 Cal. L. Rev. 997 (2006) (Krieger and Fiske) and David L. Faigman, Nilanjana Dasgupta and Cecilia Ridgeway, *A Matter of Fit: The Law of Discrimination and the Science of Implicit Bias*, 59 Hastings L.J. 1389 (2008). As The Institute For Women's Policy Research notes in its *amicus* brief submitted in the *Dukes* case, employers like Wal-Mart with a history of sex segregation in management are not apt to change voluntarily:

> Employers' propensity to resist changing personnel policies and practices perpetuates pre-existing corporate cultures and structures. As a result, organizations that had segregated the sexes into different (and unequal) jobs or failed to assign women to managerial roles in the past are unlikely to change without outside pressure. "[B]usiness as usual" in staffing patterns and intransigence of personnel policies and practices allows

> discriminatory cultures within organizations to endure and results in barriers for equal advancement opportunities.

Amicus Brief of The Institute For Women's Policy Research, at 9, *citing* Tristin K. Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 Fordham L. Rev. 659, 672 (Dec. 2003) ("employers are unlikely to undertake this task [of devising strategies to counteract discrimination] without some outside incentive to do so"). The Supreme Court has, however, apparently given Wal-Mart and other employers license to abrogate their workers' rights.

Conclusion

Both the *Concepcion* and *Dukes* cases represent the Court's continued erosion of workers' rights by effectively barring the courthouse door for a large segment of America's workforce. Class actions play a vital role in vindicating not just the rights of workers. Class actions also protect employees from the threat of retaliation, provide an incentive to employees and to private attorneys to prosecute small claims that would not be brought individually, and increase awareness of workplace violations. Additionally, class actions provide systemic relief, produce systemic change, and deter employers from violating the law. In enacting Title VII and other landmark civil rights statutes protecting workplace rights, Congress intended that workers would be able to join together to assert their rights. The Supreme Court's decisions in *Concepcion* and *Dukes* ignore the realities of today's workplace and will make discrimination more prevalent unless Congress acts to reverse yet another misguided set of opinions by the Court.