



**Action of the 2010-2011 American Sociological Association Council
On Preparing an *Amicus Curiae* Brief on *Walt-Mart v. Dukes et al.*
By Unanimous Email Vote of those Responding
January 27, 2011**

Present by Vote: Cecelia Menjivar, David Snow, Debra Minkoff, Edward E. , Erik Wright, Evelyn Nakano Glenn, Jennifer Lee, John Logan, Joya Misra, Kate Berheide, Mario Luis Small, Omar M. McRoberts, Randall Collins, Robin Wagner-Pacifici, Rosanna Hertz, Sandra Smith, Sarah Soule.

Absent from Vote: Pierrette Hondagneu-Sotela, Sara Fenstermaker.

ASA Executive Officer Sally T. Hillsman provided the following background information by email.

Background

Late last week ASA received an inquiry from former ASA President Barbara Reskin about whether the Association would submit an *amicus curiae* brief to the U.S. Supreme Court in the case of Wal-Mart v. Dukes, et al. Former ASA President William Bielby provided extensive analysis as an expert witness in this case on behalf of the plaintiffs, a class of female workers at Wal-Mart from across the country who contend significant sex discrimination. This case, which is described in greater detail below,* not only draws heavily on social science data, but at the appellate level, the United States Supreme Court will be drawing on sociological work on organizations and organizational culture that has a strong empirical base in the field.

Discussions with President Randy Collins, President-elect Erik Wright, and Secretary Kate Berheide (as well as other sociologists who met last weekend at the EOB meeting) produced a strong consensus that ASA should embark on this *amicus* brief, and that the modest expenses involved should be covered by the Spivack Fund.

Any decision to prepare or to sign an *amicus* brief requires the vote of Council. We recognized that the Council meeting is coming up shortly, but the brief must be submitted to the Supreme Court by March 1, 2011.

In anticipation of submitting this to Council for a vote by email, I have relied on the advice of knowledgeable ASA members and contacted Laura Beth Nielsen, PhD, JD, Associate Professor of Sociology, and Director of Legal Studies, Northwestern University; Research Professor, American Bar Foundation; and Editor, *Law and Social Inquiry*. She has agreed to take the lead as writer of the brief, assisted by Robert Nelson, Frank Dobbin, and Ellen Berrey, and she anticipates that Laurie Edelman, Sandra Kalev, and others will review drafts and help her with it.

I have also contacted ASA's lawyer, Michael Trister, who is admitted to practice in the United States Supreme Court and has done this type of submission before, and he will submit the brief on ASA's behalf if Council gives its approval. Mr. Trister has been ASA's lawyer for almost twenty years.

Now that I am sure ASA is able to complete this task in the short period required, and Council can know who will be writing and submitting the draft, it is important to get Council's input and vote.

Proposed Action: That the ASA support the preparation of an *amicus curiae* brief and submit it to the United States Supreme Court in Wal-Mart v. Dukes et al.; that it be prepared to Laura Beth Nielsen; and that Michael Trister, Esq. will act as ASA's attorney on the filing of this brief by March 1 2011.

Action Steps

Over the period from 3:30 pm January 26, 2011 through 3:30 pm January 27, 2011, please send any questions or concerns you have to the Council group for discussion. On Thursday evening January 27, 2011, I will ask for a vote by email.

Council Members' Responses

During the initial question period, 17 members of Council responded affirmatively that ASA should support this brief. Two members also indicated that the Council should also vote a second time to approve filing the brief after reviewing the core sociological arguments that will be presented in the final brief. There were no objections from Council members to this two-step procedure.

<p><u>Action:</u> Council approves ASA supporting the writing of an <i>amicus curiae</i> brief to the US Supreme Court in Wal-Mart v. Dukes et al. by Laura Beth Nielsen et al., with the intent to authorize using ASA's name on the brief before it is submitted to the Supreme Court on or before March 1, 2011, pending Council's review of appropriate drafts prior to a final Council vote.</p> <p>Passed unanimously</p>
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***Case Summary (Prepared by Joe Sellers, Counsel for the Plaintiffs, who will argue the case before the Supreme Court)**

This class action was filed in the US District Court for the Northern District of California in June, 2001. The plaintiffs allege that Wal-Mart systematically engaged in sex discrimination in pay and promotion decisions against women holding hourly sales and salaried positions in the company's stores in the United States since December, 1998. The class was certified in June, 2004. Wal-Mart appealed the class certification decision which was affirmed by a divided three-judge panel of the US Court of Appeals for the Ninth Circuit and then by the Court of Appeals sitting *en banc* by a 6 to 5 vote. The Supreme Court granted Wal-Mart's petition for certiorari on December 6, 2010. Wal-Mart's opening brief was submitted January 20, 2011 (and is attached) and the plaintiffs' brief is due February 22. Amicus briefs filed in support of the plaintiffs' are due on March 1, 2011.

The plaintiffs allege that Wal-Mart maintained a strong corporate culture that pervaded all operations of the company through which stereotypes portraying women as of lower value to the company were regularly communicated to managers in the company's stores. There is abundant evidence of gender stereotyping that is in the record in this

case. The means by which Wal-Mart managers made pay and promotion decisions was highly discretionary, allowing managers to make these decisions unconstrained by merit.

Wal-Mart failed to post most job vacancies within its stores until well after this action was filed and provided no organized way for employees to apply for promotions or no announced criteria for selection for store-based vacancies. Similarly, Wal-Mart set ranges within which it expected its managers to make annual pay adjustments to store-based employees but provided no guidance or criteria to guide these pay-adjustment decisions and allowed the managers to make adjustments more frequently than once each year with no guidance or criteria to guide those decisions. Although Wal-Mart closely monitors from its headquarters virtually every facet of its store operations, such as the temperature of the freezers and music playing at each store and the amount of stock sold and remaining in each store for each item, it failed to monitor or compare in any way by gender the promotions awarded and compensation paid to store employees. The plaintiffs contend that these practices permitted the company's strong, centralized corporate culture, which conveyed stereotypes about the value of women in the workplace, to influence the promotion and compensation decisions made by managers at its stores. The plaintiffs' claims rely upon both systemic disparate treatment and disparate impact theories of liability.

At the time the case was filed, women held nearly 70% of all hourly positions in the stores and only 32% of the salaried store positions. An analysis of Wal-Mart's workforce data shows that women received fewer promotions than expected although they received higher evaluations of their performance and were paid less than men performing the same work and that women were underpaid compared to men at statistically significant levels in every one of the 41 divisions in which it operates in the United States .

The stores that Wal-Mart operates in the United States are organized identically. The two divisions, Wal-Mart Stores and Sams Clubs, are organized and managed in identical ways. Each store has the same jobs. The same personnel policies apply to each store. Managers frequently are transferred between stores within the same division and between the two divisions. Wal-Mart admits that the same KSAOs are required for jobs in each store and in both divisions. Wal-Mart also maintains that no store job requires any special skills or training above high-school graduation, other than pharmacists who are excluded from the class certified.

Questions Designated For Review

The Supreme Court has designated two questions for review. First, it intends to review whether the awards of back pay and punitive damages, the only forms of monetary relief that the class is pursuing, are compatible with certification of a class under Rule 23 (b)(2), Fed. R. Civ. P. Second, it intends to review whether the class certified satisfies the requirements of Rule 23 (a), Fed. R. Civ. P.

Possible Topics for Treatment in an Amicus Brief

1. To what extent can corporate culture influence discretionary personnel decisions made by individual managers. The Court recognized that gender stereotypes can lead to bias in personnel decisions in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) and that discretionary personnel decisions can be challenged under both disparate treatment and disparate impact theories of discrimination in *Watson v. Fort Worth Bank*, 487 U.S. 977 (1988). The Court has not yet considered the impact of stereotyping and the role of corporate culture in communicating stereotyping and whether it can influence multiple discretionary personnel decisions. The Court is expected to address this question in this case.

2. By what standards should personnel practices be judged whether they are excessively subjective. And, based upon uncontested evidence in the record about Wal-

Mart's promotion and compensation policies, do these policies qualify as excessively subjective and why.

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