

EQUAL EMPLOYMENT OPPORTUNITY RESTORATION ACT OF 2012

Senator Al Franken

The Equal Employment Opportunity Restoration Act addresses the Supreme Court’s decision in *Wal-Mart v. Dukes* by restoring workers’ ability to challenge discriminatory employment policies and practices.

The Law before *Dukes*

Before *Dukes* was decided, groups of workers could use Rule 23 of the Federal Rules of Civil Procedure to challenge discriminatory employment practices on a class-wide basis. Under that rule, to certify a class, employees would have to establish:

- (1) Commonality—there were legal or factual questions common to all class members;
- (2) Numerosity—the class was sufficiently large (that joinder would be impracticable)
- (3) Typicality—the named plaintiff’s claims were typical of the class claims; and
- (4) Adequacy—the class is adequately represented by counsel and the named plaintiff.

At issue here is the commonality requirement, which historically only required a group of plaintiffs to demonstrate that all of their cases depend on resolution of a common issue—it was not required that the merits of that issue be resolved prior to class certification. This standard was well settled¹.

The Law since *Dukes*

In *Wal-Mart v. Dukes*, the Supreme Court made it harder for workers to use Rule 23 to enforce the nation’s civil rights laws. In that case, a class sued their employer under Title VII of the Civil Rights Act of 1964, alleging that the employer’s policy of giving managers unfettered discretion to make pay and promotion decisions resulted in a disparate impact on women². For example, the group presented evidence that women were paid less than men in each of the employer’s 41 regions and that women comprised 70 percent of the employer’s hourly workforce but only 33 percent of its management team. The district court and the appellate both concluded that class certification was appropriate in this case.

¹ As one leading treatise explained: “[T]he requirement is easily met in most cases. When the party opposing the class has engaged in some course of conduct that affects a group of persons and gives rise to a cause of action, one or more of the elements of that cause of action will be common to all of the persons affected.” 1 Newberg on Class Actions § 3:20 (5th ed.). As another treatise notes, “those courts that have focused on Rule 23(a)(2) have given it a permissive application so that common questions have been found to exist in a wide range of contexts.” 7A Fed. Prac. & Proc. Civ. § 1763 (3d ed.).

² Their claim is in line with a 1988 decision in *Watson v. Fort Worth Bank*, in which the Supreme Court held that claims of this nature could proceed under Title VII.

But last June, in a 5–4 decision, the Supreme Court concluded otherwise. Its rationale was unprecedented. It said that, to satisfy the commonality requirement under Rule 23, the women had to show “convincing proof” of a companywide discriminatory pay and promotion policy. This, of course, is an evidentiary standard typically reserved for a trial on the merits, not for class certification. As Justice Ginsburg explained in dissent, the Court’s decision “disqualifies the class from the starting gate.” In addition, the Court emphasized that the employer had in place a written non-discrimination policy, thus ignoring the women’s allegation that the written policy was not followed in practice. Finally, the Court called into doubt the longstanding practice of courts utilizing statistical analyses to calculate damages in employment discrimination cases.

In just the one year since *Dukes* was decided, district courts across the country have cited it as a basis for denying class certification motions in numerous employment discrimination cases.

Restoring the Law

The Equal Employment Opportunity Restoration Act will restore workers’ ability to challenge discriminatory employment practices on a class-wide basis. It adds to Title 28 of the U.S. Code a new section 4201, which does the following:

- **Section 4201(a)** creates a new judicial procedure – called “group actions” – that workers can use when bringing employment discrimination cases. The requirements for establishing a group action are the same as the pre-*Dukes* requirements for maintaining a class action under Rule 23 of the Federal Rules of Civil Procedure—namely, clarifying that the merits of the case need not be proven to certify the group action.
- **Section 4201(b)** provides that group actions can be used regardless of whether the group is challenging an objective employment practice, a subjective employment practice, or a mixed employment practice (such as the use of a written test to qualify for an interview). It also provides that employers’ written anti-discrimination policies can be considered as a defense to certification only insofar as the employer demonstrates that the policy actually has been implemented in practice.
- **Section 4201(c)** says that the group actions authorized by this section are subject to the same procedural requirements as class actions authorized by Rule 23. These include notice and opt-out requirements. This section also preserves the application of the Class Action Fairness Act and the availability of appeals.
- **Section 4201(d)** says that courts can use statistical analyses and any other procedures they deem necessary to provide justice to prevailing plaintiffs.

Cosponsors

Senate

Al Franken (D-Minn.)
Patrick Leahy (D-Vt.)
Patty Murray (D-Wash.)
Tom Harkin (D-Iowa)
Sheldon Whitehouse (D-R.I.)
Richard Blumenthal (D-Conn.)
Barbara Mikulski (D-Md.)
Bernie Sanders (I-Vt.)
Barbara Boxer (D-Calif.)
Daniel Akaka (D-Hawaii)
Chris Coons (D-Del.)
Daniel Inouye (D-Hawaii)
John Kerry (D-Mass.)
Jeanne Shaheen (D-N.H.)
Jeff Bingaman (D-N.M.)
Sherrod Brown (D-Ohio)
Kirsten Gillibrand (D-N.Y.)
Tom Udall (D-N.M.)
Dick Durbin (D-Ill.)
Ron Wyden (D-Ore.)
Jeff Merkley (D-Ore.)
Maria Cantwell (D-Wash.)

House

Chu, Judy
Cohen, Steve
Conyers, John Jr.
DeGette, Diana
Ellison, Keith
Farr, Sam
Filner, Bob
Hinchey, Maurice D.
Hirono, Mazie K.
Jackson, Jesse L., Jr.
Johnson, Henry C. "Hank", Jr.
Kaptur, Marcy
Lee, Barbara
Lowey, Nita M.
Maloney, Carolyn B.
McCollum, Betty
McDermott, Jim
Miller, George
Moore, Gwen
Moran, James
Nadler, Jerrold
Norton, Eleanor Holmes
Richardson, Laura
Roybal-Allard, Lucille
Rush, Bobby L.
Schakowsky, Janice D.
Slaughter, Louise McIntosh
Stark, Fortney Pete
Waters, Maxine
Woolsey, Lynn C.
Lofgren, Zoe
Eshoo, Anna G.
Wasserman-Schultz, Debbie
Grijalva, Raul M.
Deutch, Theodore E.
Larsen, Rick