Context Matters in Systemic Disparate Treatment Theory

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Tristin Green, *The Future of Systemic Disparate Treatment Law*, 32 **Berkeley J. of Employment & Labor Law** __ (forthcoming 2011), available on SSRN.

On June 20, 2011, the Supreme Court issued a decision in what has been billed as the largest employment discrimination case in U.S. history: Wal-Mart v. Dukes. The case was a class action against Wal-Mart, the country's largest private employer, for pay and promotion decisions that discriminated on the basis of sex, and the class consists of every woman who currently works for the company or who formerly did, going back to 1998. Estimates of the number of class members range from about 500,000 to 1.6 million. The numbers are what tended to make headlines, were to some extent the focus of Wal-Mart's defense, and played a large role in the Court's decision. But those numbers were driven in large part by the sheer size of the company. Some have suggested that Wal-Mart is arguing that it is "too big to sue," the newest variation of "too big to fail." To the extent that Wal-Mart's size contributed to the Court's conclusion that the causes of any injuries were too complex for those allegedly injured to constitute a class, the Court agreed.

What was at stake in the case was more than just the interests of the women or the interests of Wal-Mart. At stake was the future of class actions to redress harm from mass injuries and the future of systemic discrimination cases. That is why Tristin Green's article, *The Future of Systemic Disparate Treatment Law*, 32 Berkeley Journal of Employment & Labor Law __ (forthcoming 2011), currently available on SSRN, is such a welcome addition to the discussion of the theory of systemic discrimination. Tristin, Noah Zatz, Richard Ford, Melissa Hart, and Michael Selmi will all contribute articles to a symposium issue on the subject, but Tristin's was the first article to be made publicly available.

Tristin's article focuses on the fundamental underpinnings of individual disparate treatment theory and the unintended consequences of importation of that theory into systemic cases. She describes quite perceptively how focusing on individual decisionmakers distorts analysis of entity liability for discrimination. And it was this trap that the majority fell into.

Tristin begins her analysis of systemic disparate treatment with a discussion of the Supreme Court cases that fleshed out the theory, and the view of systemic disparate treatment liability proposed by one of the dissenters to the Ninth Circuit's en banc decision to affirm the class certification. Judge Ikuta would have held that in order to demonstrate a systemic disparate treatment claim, plaintiffs would have to show a company-wide policy of discrimination, in other words, that the managers at the top imposed their policy with the intent that the policy injure women. The Supreme Court essentially agreed that plaintiffs needed to show a company-wide policy of discrimination for this class to be certified.

It is this view of entity liability as fundamentally vicarious that poses the greatest threat to systemic disparate treatment theory. If the policy view of entity liability is required for systemic disparate treatment, then systemic disparate treatment will, in operation, be limited to express official policies, regardless of how widespread the disparities are or how strong the correlation between protected status and injury. This view of entity liability also focuses too much attention on individual decisionmakers, ignoring the role of the systems in place in causing or perpetuating disparities of treatment for members of a protected class.

Tristin proposes using a context model of organizational wrongdoing as the theoretical underpinning for systemic disparate treatment. In her words,

> A context model of organizational wrongdoing helps make clear why entity liability for systemic disparate treatment is direct rather than vicarious. The employer is being held responsible for something that *it* has done. The employer‘s responsibility under this model turns not on identification of a single instance or even multiple instances of disparate treatment; rather, its responsibility turns on its own role in producing disparate treatment.

Changing the focus this way holds entities responsible when disparate treatment is the regular practice within the organization. When disparate treatment is the regular practice, it is unlikely that the disparities are being caused by a few “rogue” individuals acting on biases uninfluenced by the norms of the organization. It is the entity itself that is exercising disparate treatment, and it is not only vicariously liable. When disparate treatment exists, but is unusual rather than regular, individual disparate treatment is the appropriate approach, and the employer may be vicariously liable for the acts of its agents. Tristin goes further to operationalize the way that this theoretical underpinning would play out in a systemic disparate treatment case.

The analysis is thorough and the arguments provocative. Certainly, those who view liability of entities as principle-agent problems will resist the notion that entities can ever be responsible other than vicariously except in limited circumstances. The view that an organization is in anyway independent of the people who run it, that it can act without the fully self-aware, conscious volition of actors, that protected status rather than individual motive can cause discrimination, is not something that large groups of lawyers, judges, or legal scholars wholeheartedly accept. And that was clearly the view of the majority in *Wal-Mart*. Despite that limitation, Tristin’s contribution illuminates much about the principles that underlie systemic disparate treatment and the challenges to full implementation of Title VII that remain.

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