

## Questions for the Record

Hearing on — “Barriers to Justice and Accountability: How the Supreme Court's Recent Rulings Will Affect Corporate Behavior”

June 29, 2011

Submitted by Senator Amy Klobuchar

### Question for Melissa Hart

- In your June 21<sup>st</sup> column in the New York Times, you argued that the Supreme Court overreached in several important ways in the *Wal-Mart* decision. Can you elaborate on what you see as the impact of this decision as compared to what the impact would have been had the Court ruled on more limited grounds?

### Response:

I think it will remain difficult to assess the full impact of this decision for some time, but the breadth of the majority's language has already led dozens of courts to ask for additional briefing as to whether the decision should significantly change the course of on-going litigation. I suspect that the next several months will see considerable litigation about how *Wal-Mart* has changed the landscape for class action law and for employment discrimination law.

If the Court had decided on the narrowest ground necessary to achieve a majority—which is a commonly held view of how courts should limit over-reaching—then the decision would have touched only on the appropriateness of certifying a class under the provision of Rule 23(b) that permits class actions seeking injunctive relief. All nine of the Justices concluded that the suit, which requested back pay for the women who were class members, did not fit into that provision of the Rule because of the individual back pay requests. If the decision had stopped there, the case would have been remanded to the lower courts to evaluate whether, for example, the class could be certified under any other provision of Rule 23(b). The decision would still have limited the use of class actions in significant ways.

The majority's decision to also conclude that the proposed class members' claims shared no common legal or factual questions expands the potential impact of the decision considerably. That part of the ruling could be read very broadly by lower courts to prohibit a wide range of employment discrimination claims as well as claims in other areas. The Court's definition of what might constitute a “common” sets an extremely high threshold that is very different from the relatively low bar intended by the drafters of Rule 23.