Why Private Sector Should Watch Gov't DEI Firing Class Bid

By **Shaun Southworth** (June 18, 2026)

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In Fell v. Trump, a group of former federal employees is seeking class certification in the U.S. District Court for the District of Columbia, alleging that the federal government violated Title VII of the Civil Rights Act, the First Amendment and the Civil Service Reform Act.[1]

The plaintiffs allege that, following Executive Orders No. 14151 and 14173,[2] the U.S. Office of Personnel Management and federal agencies carried out a centrally orchestrated reduction in force, or RIF, that closed diversity, equity, inclusion, and accessibility-related offices, placed the affected employees on paid administrative leave, and separated them through competitive areas defined solely in terms of the particular office where each employee worked.[3]

That last directive is central to the case in two ways. By drawing the competitive area office-by-office, the OPM allegedly overrode agency authority and stripped many employees of the bump-and-retreat rights they would have retained, had the competitive areas been defined more broadly. That same instruction supplies what the plaintiffs contend is the centralized glue warranting class treatment under Rule 23 of the Federal Rules of Civil Procedure.

This is a case to follow for two reasons.

First, U.S. District Judge Tanya Chutkan could certify the proposed class and its subclasses, given the OPM's role in dictating the competitive areas for these RIFs in a way unlike anything modern federal personnel law has seen. Even though any such ruling would arise in the federal sector, it could carry implications for private employers defending class certification in commonality fights, where the Rule 23 commonality standard is the same.

Second, the case could address circuit split on a Title VII advocacy theory that neither the D.C. Circuit nor the U.S. Supreme Court has yet resolved.

Background

On March 12, eight plaintiffs across seven agencies sought class treatment. The plaintiffs allege that the OPM, following two January 2025 executive orders, issued a Jan. 21 memorandum directing agencies to close DEIA offices and to place DEIA employees on paid administrative leave by the next day — based on lists of DEIA offices and employees as of Election Day, Nov. 5, 2024, rather than as they existed when the memo issued.[4]

Three days later, a Jan. 24 memorandum directed agencies to terminate DEIA offices and positions "to the maximum extent allowed by law," to issue RIF notices "now," and to define the "competitive area solely in terms of the DEIA office where the employees worked."[5]

The plaintiffs assert these directives were not individualized assessments, but were instead driven by race, sex, perceived political affiliation and advocacy for colleagues in protected classes. The named plaintiffs — three Black women, a Latina woman, a Latino man, a nonbinary white individual and two white women — have tenures ranging from under one

year to roughly 25 years.[6]

The plaintiffs bring several counts:

- A First Amendment retaliation claim;
- Five Title VII claims based on an advocacy theory, plus intentional discrimination and disparate impact theories based on gender and race/ethnicity; and
- A Civil Service Reform Act claim.[7]

The plaintiffs are seeking class certification for a proposed class of all federal employees subject to separation under the anti-DEIA executive orders and OPM directives, with two subclasses: one for women and nonbinary employees and one for Black, Hispanic, Asian American and Pacific Islander, and Native American employees.[8]

The defendants are President Donald Trump, 27 agencies, and 27 cabinet secretaries or agency heads sued in their official capacities.[9] Briefing is complete on both class certification and the defendants' motion to dismiss, and the case is pending a decision on both.[10]

Wal-Mart and Commonality

For the class to be certified, the plaintifs need to show commonality of issues among the class members. The key touchstone for that determination is the Supreme Court's 2011 decision in Wal-Mart Stores Inc. v. Dukes.

In the Wal-Mart case, the court held that Rule 23(a)(2) commonality requires a common contention capable of classwide resolution such that its determination "will resolve an issue that is central to the validity of each one of the claims in one stroke," and that a discrimination class must therefore show "some glue holding the alleged reasons for all those decisions together" — glue that decentralized, manager-by-manager discretion cannot supply.[11]

To establish that glue, the plaintiffs in Fell argue that the OPM's directives were themselves unusual: Federal RIF regulations contemplate reductions initiated by individual agencies in their discretion, yet here the OPM dictated the competitive areas for every affected employee, overriding agency autonomy and stripping employees of the bump-and-retreat rights that ordinarily soften a federal layoff.

Put more directly, the plaintiffs contend that the OPM tied agencies' hands on how to eliminate these positions in a way that forced most, if not all, of the affected employees out of the federal workforce — a single common policy, rather than a collection of discretionary agency or local choices.[12]

In opposition, the defendants argue the named plaintiffs have little in common: They had different employers, supervisors and job duties, they were removed by different decision-makers on different factual records and personnel histories, and they seek different remedies.[13]

In reply, the Fell plaintiffs distinguish Wal-Mart: They say their case does not involve numerous discretionary decisions by thousands of managers, but one common policy each agency was obligated to follow. They point to a Jan. 22, 2025, email internal to the U.S.

Department of Health and Human Services that directed the closure of DEIA offices "in accordance with President Trump's executive orders."[14]

Of note, Judge Chutkan declined to stay class certification briefing pending the motion to dismiss — suggesting she wants the Rule 23 record developed on the merits.[15]

The Title VII Advocacy Theory

The case could also address an open circuit split with implications for both the federal and private sectors — complicated by the fact that the split has developed under the private sector Title VII text, while, arguably, a separate provision, Section 2000e-16(a) of Title 42 of the U.S. Code, governs federal employees.

The question is whether a plaintiff can sue under Title VII when an adverse action was motivated by the plaintiff's advocacy for a protected group, regardless of the plaintiff's own group membership.

The U.S. Court of Appeals for the Sixth Circuit has said yes. In 2009 in Barrett v. Whirlpool, it held that Title VII forbids discrimination based on association with or advocacy for a protected party, relying on its 2000 decision in Johnson v. University of Cincinnati that a white affirmative-action officer fired for advocating on behalf of minorities could sue because their race was "imputed" to him.[16]

The U.S. Court of Appeals for the First Circuit has said no. In its 2022 decision in Frith v. Whole Foods, it held that the statute's text requires the plaintiff's own protected status to be at issue — and under the advocacy theory, the plaintiff's race is irrelevant.[17]

The defendants in Fell have invoked Frith. The plaintiffs counter that Frith does not control because Title VII uses different language for federal employees.

The plaintiffs rely on the Supreme Court's 2020 decision in Babb v. Wilkie. There, the court interpreted the federal-sector age-discrimination statute, which — like the federal-sector provision of Title VII — requires that personnel actions be "free from any discrimination." The court in Babb held that this language sets a more demanding standard for the government than the rule that governs private employers, which bars only actions taken "because of" a protected trait or activity.

The Fell plaintiffs argue the same broader standard applies here: A federal personnel action violates the statute if discrimination played any part in it, even if the action would have been taken anyway.[18]

What Is at Stake

The stakes in Fell are significant. If Judge Chutkan certifies the class, it would be one of the largest post-Wal-Mart federal sector employment class actions — thousands of separated employees seeking declaratory relief, reinstatement and damages against the executive branch.

However it is decided, the ruling could also reach the private sector. Wal-Mart has anchored employers' class certification defense for more than a decade, and Fell squarely tests what happens when the operative decision is dictated from headquarters — here, the OPM — rather than by local managers, and how that bears on commonality.

A ruling on the Title VII advocacy theory, either way, would add judicial weight to a doctrine that neither the D.C. Circuit nor the U.S. Supreme Court has yet addressed.

Best Practices for Practitioners

On both the employee and employer sides, the certification analysis often turns on the same record:

- Whether the decisions reflect decentralized discretion or a centralized directive;
- Whether the employer pushed a uniform template or directive and what effect it had; and
- Whether the employer documented unit-level decision-making, a business-necessity analysis and consideration of individual performance.

On the advocacy theory, employers should train human resources and compliance teams to document adverse actions cleanly when an employee has recently advocated for a protected group. They should also be taught to assess whether an actionable claim exists.

Employee-side practitioners should screen for cases where an employee faced discrimination for advocating on behalf of a protected class regardless of the employee's own membership in it. They should consider whether the facts also support retaliation for protected activity or based on association with or advocacy for a protected party — both of which may remain available even in jurisdictions that follow Frith, which expressly preserved the associational theory.

Conclusion

Whichever way Judge Chutkan rules, practitioners on both the employer and employee sides should follow Fell: It could shape when employment class actions are certified and how far the developing advocacy theory protects employees.

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[1] First Am. Class Action Compl., Fell v. Trump, No. 1:25-cv-04206 (D.D.C. Jan. 12, 2026), ECF No. 8.

[2] Exec. Order No. 14,151, 90 Fed. Reg. 8339 (Jan. 29, 2025); Exec. Order No. 14,173, 90 Fed. Reg. 8633 (Jan. 31, 2025).

[3] First Am. Class Action Compl. ¶¶ 18-25, ECF No. 8.

[4] Mem. from Charles Ezell, Acting Dir., U.S. Off. of Pers. Mgmt., to Heads & Acting Heads of Depts. & Agencies, Initial Guidance Regarding DEIA Executive Orders (Jan. 21, 2025).

[5] Mem. from Charles Ezell, Acting Dir., U.S. Off. of Pers. Mgmt., to Heads & Acting Heads of Depts. & Agencies, Guidance Regarding RIFs of DEIA Offices (Jan. 24, 2025); 5 C.F.R. § 351.402.

[6] First Am. Class Action Compl. ¶¶ 7-9, ECF No. 8.

[7] First Am. Class Action Compl. ¶¶ 26-80, ECF No. 8.

[8] Pls.' Mot. for Class Cert., Fell v. Trump, No. 1:25-cv-04206 (D.D.C. Mar. 3, 2026), ECF No. 70.

[9] First Am. Class Action Compl., ECF No. 8 (naming as defendants President Trump, 27 agencies, and 27 agency heads in their official capacities).

[10] Pls.' Mot. for Class Cert., ECF No. 70 (Mar. 3, 2026); Defs.' Opp. to Pls.' Mot. for Class Cert., ECF No. 77 (Apr. 6, 2026); Pls.' Corrected Reply ISO Mot. for Class Cert., ECF No. 80-1 (Apr. 28, 2026); Defs.' Mot. to Dismiss, ECF No. 76 (Apr. 6, 2026); Pls.' Opp. to Mot. to Dismiss, ECF No. 81 (May 11, 2026). As of June 18, 2026, no ruling had issued on either motion.

[11] Wal-Mart Stores Inc. v. Dukes, 564 U.S. 338, 350, 352, 355-56 (2011).

[12] Pls.' Mot. for Class Cert., ECF No. 70 (Mar. 3, 2026).

[13] Defs.' Opp. to Pls.' Mot. for Class Cert. at 5, 14, ECF No. 77 (Apr. 6, 2026); 5 U.S.C. §§ 301, 3101.

[14] Pls.' Corrected Reply ISO Mot. for Class Cert., ECF No. 80-1 (Apr. 28, 2026).

[15] Min. Order, Fell v. Trump, No. 1:25-cv-04206 (D.D.C. Apr. 3, 2026).

[16] Barrett v. Whirlpool Corp., 556 F.3d 502, 511 (6th Cir. 2009); Johnson v. Univ. of Cincinnati, 215 F.3d 561, 575 (6th Cir. 2000).

[17] Frith v. Whole Foods Mkt. Inc., 38 F.4th 263, 271-72 (1st Cir. 2022); Bostock v. Clayton County, 590 U.S. 644 (2020).

[18] Defs.' Mot. to Dismiss, ECF No. 76 (Apr. 6, 2026); Pls.' Opp. to Mot. to Dismiss, ECF No. 81 (May 11, 2026); Babb v. Wilkie, 589 U.S. 399, 405 (2020); 42 U.S.C. § 2000e-16(a).