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Sex Discrimination Plaintiffs', Management Lawyers See Reasons For Optimism After Wal-Mart Oral Argument

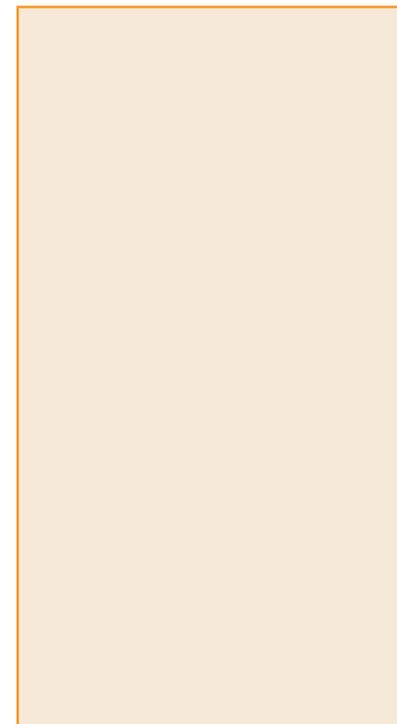
Speaking after the U.S. Supreme Court heard [oral argument](#) regarding certification of a massive sex discrimination class action against Wal-Mart Stores Inc., attorneys for each side March 29 expressed markedly different views regarding the fairest, most effective process for handling the female workers' discrimination claims.

Management attorneys emphasized that during oral argument, some justices expressed skepticism that the Wal-Mart plaintiffs had identified a "common" company practice causing discrimination that would satisfy the requirements of Rule 23(a) of the Federal Rules of Civil Procedure. Most of the justices also seemed receptive to Wal-Mart's due process argument, management lawyers said.

But plaintiffs' advocates countered that the court did not seem very focused on the Rule 23(a) commonality issue and that most of the questioning involved how to ensure fairness in a Rule 23(b)(2) class action that includes claims for monetary relief.

The "whole question here is process" and what procedures will ensure "everyone gets their day in court," Theodore J. Boutrous Jr., of Gibson, Dunn & Crutcher in Los Angeles, who represented Wal-Mart, said after the argument. As he did during oral argument (see [related article](#) in this issue), Boutrous contended that the class action certified by a federal district court and upheld by the U.S. Court of Appeals for the Ninth Circuit would deprive potential class members as well as Wal-Mart of fundamental due process rights and substantive claims and defenses under Title VII of the 1964 Civil Rights Act.

The named plaintiffs cannot satisfy the threshold requirements for class certification under Rule 23(a) because they cannot demonstrate a common corporate policy having the same effects on members of a widely diverse proposed class of female Wal-



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Mart employees, Boutrous said.

The only “common policy” that can be identified is Wal-Mart’s written policy prohibiting sex discrimination, Boutrous said after the argument. Boutrous said he was “very pleased” that the justices “focused on those issues” during the argument about whether plaintiffs reporting divergent working experiences at Wal-Mart could identify a common employment practice that would satisfy Rule 23(a).

Asked about Chief Justice John Roberts’s question during argument about whether Wal-Mart’s alleged policy of delegating “unchecked discretion” to store managers would be such a “common policy,” Boutrous replied that even if it were, plaintiffs could not demonstrate similar results from that policy. The plaintiffs’ sociologist expert admitted that he could not say whether Wal-Mart’s alleged common policy resulted in discrimination against women 90 percent of the time or 0.5 percent of the time, Boutrous said.

Class Action Benefits All, Plaintiffs Assert

“I think we’ve gotten a fair hearing today,” said Joseph M. Sellers of Cohen Milstein in Washington, D.C., who argued for the plaintiffs. But he disputed Wal-Mart’s assertion that individual suits are the best process to address what the plaintiffs claim is systemic sex discrimination by the giant retailer.

Instead, Sellers said after the argument that because plaintiffs are challenging a companywide policy that has “consistently” resulted in discrimination against Wal-Mart’s female employees nationwide, a class action is “an economic, most efficient way” to litigate the case. A class action benefits the employer as well as class members by allowing the discrimination issue to be resolved in a single proceeding, Sellers contended.

Brad Seligman, a plaintiffs’ co-counsel with the Impact Fund in Berkeley, Calif., said despite Wal-Mart’s written policy against sex discrimination, there have been internal complaints about sex bias for years. Wal-Mart “well knew of the problem” as the evidence indicates some managers repeatedly informed company executives that Wal-Mart lagged “behind” other U.S. employers in its treatment of female employees, Seligman said.

During oral argument, Justice Antonin Scalia questioned Sellers about whether Wal-Mart could be held liable for sex discrimination under Title VII if the company’s pay and promotion statistics simply mirrored those of other employers. Sellers replied that under Title VII, an employer can be held liable for discrimination even if its statistics resemble the norm for its industry.

Sellers added later during the argument, however, that the evidence shows Wal-Mart actually was the “exceptional” employer, as statistics indicated that its female employees fared worse in terms of pay and advancement than female workers at Wal-Mart’s closest competitors.

Focus on Due Process

The justices during oral argument seemed to be most focused on due process concerns for Wal-Mart and absent class members regarding their ability to raise Title VII claims and defenses, said management attorneys Mark Batten and Elise Bloom during a March 29 post-argument webinar sponsored by Proskauer Rose.

Bloom, a partner in Proskauer’s New York office, said that prior to the argument, she had hoped the Supreme Court would use the Wal-Mart case to “iron out” the differing standards federal circuit courts use to evaluate the Rule 23(a) factors, but she now thinks the court is less likely to do so. Batten, a partner in the firm’s Boston office, said he also now expects a “narrower decision” that will be a victory for Wal-Mart in the Title VII context, but perhaps not that helpful for other potential class action defendants.

Bloom said based on the argument, it “doesn’t look good” for plaintiffs regarding an “all-out affirmance” of the Ninth Circuit’s decision. She said the court’s questioning was “perhaps a little bit tougher” on plaintiffs’ attorney Sellers than on Boutrous. The justices also “picked up” on Wal-Mart’s expressed due process concerns related both to the company’s ability to raise Title VII defenses and possible restrictions on the rights of absent class members, Bloom said.

All the justices who spoke during the argument “seemed to agree that there are due process concerns” raised by the

certified class "that permeate the case," Bloom said.

Scalia and Justice Anthony Kennedy also seemed "very focused" on the apparent conflict between the plaintiffs' assertion of "centralized control" of employment policies from Wal-Mart headquarters in Arkansas and the alleged "unfettered discretion" of local store managers, Bloom said. "They had a real concern on the commonality aspect of Rule 23," she said.

During the argument, the court's "conservative wing" for the most part "seemed clearly to be on Wal-Mart's side" because of their due process concerns, Batten said. He added, however, that questions from Justices Sonia Sotomayor and Ruth Bader Ginsburg indicated they also appeared "troubled by the breadth" of the certified class. "It seems clear from both the tone and the content" of the justices' questions that the court is "leaning" more "in Wal-Mart's direction" than toward the plaintiffs, Batten said.

Possibility of Injunctive Class Only

Batten said "the most interesting suggestion" arose from Sotomayor's question about whether the court could affirm a Rule 23(b)(2) class for injunctive relief only, effectively knocking the monetary relief issue from the case.

Sotomayor's line of questioning suggests that "one of the things" the court "may be toying with" is partial affirmance of the class certification order, but limiting it to injunctive relief, Batten said. But he also noted that half or more of the proposed class consists of former Wal-Mart employees, who are presumably more interested in monetary relief than an injunction regarding the company's future employment practices. Batten questioned whether the class could stand as a "cohesive" whole if monetary relief were eliminated.

Bloom said if the court does reverse based on due process concerns specifically related to Title VII, she is "not sure what kind of guidance that provides" regarding other types of class actions outside the Title VII context. Such a narrower decision could mean the Wal-Mart case becomes "less significant" regarding Rule 23 and class action jurisprudence generally, she said.

Batten predicted reversal of the Ninth Circuit based on the Supreme Court's due process concerns or a partial affirmance in which the justices trim the claims for monetary relief and affirm certification of a Rule 23(b)(2) class for injunctive relief only.

Bloom also predicted that "reversal will be a little narrower" than she might have thought before oral argument. She said the court could base its ruling on the "statutory structure of Title VII," reasoning that the class certification order deprived Wal-Mart and absent class members of their due process rights to adjudicate particular Title VII claims and defenses.

Bloom and Batten are co-heads of Proskauer's class action and collective action group, according to the firm.

Rule 23(b)(2) Issue the Key, Plaintiffs' Advocate Says

Michael Foreman, a Pennsylvania State University law professor who collaborated on an amicus brief on behalf of the plaintiffs, said his reading of the argument is that the Rule 23(a) commonality issue, while raised by Roberts, Scalia, Kennedy, and Justice Samuel Alito, "really did not have that much traction."

Foreman said that is appropriate because denying class certification based on a purported lack of a common policy would "basically exempt" large employers like Wal-Mart that have written, anti-discrimination policies, "but allow discrimination to infect the actual employment decisions."

Rather, Foreman said the court's discussion regarding Rule 23(b)(2) focused on the "harder issue" regarding "when can you get monetary relief" and what impact class certification has on the absent class members. "Even the liberal side of the court seemed to be concerned" about how to protect the rights of Wal-Mart and class members, Foreman told BNA March 29.

Based on the argument, Foreman said key issues for the court appear to be how to balance Wal-Mart's right to a defense and the interests of absent class members with certification of a class action against systemic discrimination. "I think that's the more difficult issue" than whether plaintiffs established "commonality" under Rule 23(a), Foreman said.

As for Sotomayor's suggestion about an injunctive relief class only, Foreman said he thought Sotomayor was working through her own thinking aloud. He said the Supreme Court should trust district courts to balance the due process rights of the various parties, through means including notice to class members and procedures for timely objections and raising of employer defenses.

Foreman said, based on the argument, he believes "a majority of the court" thinks there is a class to be certified under Rule 23(a). He pointed out that no justices expressed the view that "no monetary relief" is available under Rule 23(b)(2). But he acknowledged the court must "grapple" with the fairness issues the justices raised regarding Rule 23(b)(2).

By Kevin P. McGowan

Transcript of the oral argument may be accessed at <http://op.bna.com/dlrcases.nsf/r?Open=kmgm-8fetn5>.

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