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Employers Eyeing Wal-Mart Class Action

Litigation Over Pay and Promotion of Women Could Rewrite Class Action Law

By Catherine Ho

A California woman's lawsuit against Wal-Mart Stores Inc. that has grown into the biggest sex discrimination case in history is poised to go before the U.S. Supreme Court on Tuesday, and the outcome could change the landscape of class-action litigation.

The case began in 2001 when lead plaintiff Betty Dukes, a greeter at a Pittsburg store, sued the behemoth retailer saying she was denied promotion opportunities. Dukes alleges Wal-Mart, the nation's largest private employer, systematically discriminates against women like her in its pay and



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Ted Boutros is lead counsel for Wal-Mart Stores in the largest sex discrimination case ever filed.

The central question is whether the case should be allowed to proceed as a class action, granting plaintiffs power in numbers, or whether they must bring claims individually. A decision on that key issue could have far-reaching impacts beyond employment law and affect all federal class actions, from securities to torts.

The case has large employers, and nationwide corporations especially, watching closely because it could open the door for class litigation against companies with multiple locations based on a single corporate policy.

"You're dealing with something that will have a ripple effect throughout the country," said Dana Kravetz, managing partner at Michelman & Robinson and chair of the firm's labor and employment department.

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If the Supreme Court finds there's enough commonality among the class members and thousands of Wal-Mart stores to uphold class certification, the move could trigger an avalanche of large-scale discrimination lawsuits, Kravetz said. Thus far, employment class actions in California and elsewhere have focused on wage-and-hour disputes, but that could change if class certification in *Dukes* is upheld, he said.

"If this goes through, you're going to have many more jumbo class actions being filed. That impacts corporate America and has everyone's attention. There's always that notion of copycat cases. You might see the plaintiffs bar swing toward seeking class action status on discrimination cases."

Despite potentially monumental effects, some court observers have given long odds to the plaintiffs, represented by Brad Seligman of the Berkeley-based Impact Fund. His co-counsel Joseph Sellers, a civil rights attorney at Cohen Milstein Sellers & Toll PLLC, will be arguing before the Supreme Court. Wal-Mart's legal team is led by Theodore Boutros of Gibson Dunn & Crutcher LLP in Los Angeles.

The Supreme Court has not heard an employment class action case since 1982, when the court established requirements for commonality and typicality needed in class actions, *General Telephone Co. of the Southwest v. Falcon*, 457 US 147 (1982).

Class certification is seen as the single most important step in class-action litigation because it gives plaintiffs leverage, and often signals a case will move toward settlement. If a class action isn't certified, the likelihood individual plaintiffs will continue litigating on their own for smaller amounts of money drops significantly.

The Supreme Court has not been friendly toward workers in employment discrimination cases, and will likely shoot down class certification, said Michael Waterstone, a Loyola Law School professor who specializes in employment law.

Waterstone cited decisions in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007) and *Ricci v. DeStefano*, 2009 DJDAR 9567. In *Ledbetter*, the court limited the time frame in which employees could sue for pay discrimination. In *Ricci*, the court made it harder for minorities to file race discrimination claims against employers.

"This is not really a court that has shown itself to be very interested in plaintiffs-side employment litigation and expansive use of the class action device," Waterstone said. "I think the court will overturn the 9th Circuit."

The lawsuit, which seeks injunctive relief and back pay, was granted class certification in 2004 by U.S. District Judge Martin Jenkins of the Northern District. That decision was upheld in part last year by the 9th U.S. Circuit Court of Appeals - the circuit that gets overturned more often than any other by the Supreme Court - in an en banc 6-5 decision.

The two sides do not agree on whether lower courts have already made clear how to certify class claims seeking monetary relief.

Wal-Mart attorney Boutros has argued that there is a split among appellate courts on whether to certify claims for monetary relief under a provision governing injunctive relief claims. He has argued the 9th Circuit's decision stripped Wal-Mart of its right to defend itself by grouping together claims that require proof of decision-making by managers at thousands of separate facilities.

Seligman, lead counsel for the plaintiffs, said there is no circuit split on the type of monetary relief - equitable back pay - plaintiffs are seeking, and Wal-Mart's position has been "vastly overstated."

The U.S. Chamber of Commerce, the Voice of the Defense Bar and dozens of corporations including Bank of America, Intel Corp., Microsoft Corp. and Costco Wholesale filed amicus briefs in support of Wal-Mart.