

Walmart in the big Supreme Court squeeze

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Dec. 5, 2010 (United Press International) -- Suspense is beginning to build over whether the U.S. Supreme Court will agree to review a massive class-action lawsuit brought by women who allege employment discrimination by retail giant Walmart -- the largest class-action suit in U.S. history.

If allowed to proceed, the case could cost Walmart billions.

Many court observers expected the justices to reject, or more probably accept, the case last week, having reviewed it behind closed doors in conference. Instead, the high court took no action for the moment, playing it close to the vest and keeping its options open.

Analysts are also busy trying to see through the mystic chemistry that seems to govern which cases the Supreme Court accepts for argument. They see, and most probably will see, major repercussions from the Walmart case for all class-action suits in the United States no matter which way the court jumps.

If the justices refuse to review the case involving the Bentonville, Ark.-headquartered corporation, that allows a lower-court ruling to stand, which means the 1.5 million current and former Walmart workers are allowed, or "certified," to form the class and continue their case.

But in Supreme Court terms, a refusal means nothing. It doesn't mean the justices "uphold" the lower court ruling -- as some media outlets erroneously report -- it just means the high court doesn't want to deal with the certification issue at the time of the rejection. The justices could still accept the case on different grounds at a later time and rule any way it wants.

For a case to be accepted for review, at least four of the nine justices must vote for it. Sometimes justices believe a case is important but don't vote to review it, purportedly because they're afraid a final decision will not go the way they favor.

If the justices agree to review a case, the court schedules the dispute for argument. If and when the Supreme Court accepts the Walmart case, argument probably would not occur until next year.

The justices actually could act on the case in a third way without rejecting or granting review: rendering "summary judgment," issuing an opinion that rules on the case without hearing argument, or sending the case back down for more briefing to clear up a point or two.

If as expected the Supreme Court agrees to hear the case, the Walmart plaintiffs -- and the future of other large class-action suits against corporations -- could be in for a rough time in the nine-member high court, currently dominated by a narrow five-justice conservative majority.

Professor Deborah Hensler of Stanford Law School told the Chicago Tribune, "If the Supreme Court takes this case, it will signal this business-friendly court is hostile to class actions against corporate defendants."

"This is the big one that will set the standards for all other class actions," Robin S. Conrad, executive vice president of the National Chamber Litigation Center, an agency of the U.S. Chamber of Commerce, told The New York Times. The center has filed several friend of the court briefs supporting Walmart.

If the class action is allowed to proceed, the Los Angeles Times reported, the number of plaintiffs would be larger than the combined active-duty service members in the U.S. Army, Navy, Air Force, Marines and Coast Guard.

The case started in San Francisco in 2001 when six women filed suit claiming Walmart discrimination, in part because they were passed over for promotion in favor of men -- one says she was told, "It's a man's world."

The dispute before the Supreme Court is not about whether the women's complaints have merit, but about the certification of the huge class.

Many gender discrimination cases are handled by the courts on an individual basis. However, when cases are brought under federal law, and plaintiffs are spread out across the states, plaintiffs can be combined into a class-action suit. The Walmart plaintiff class includes all women who worked in any of the company's 3,400 U.S. stores since the late 1990s.

Walmart argues it cannot adequately defend itself against such a large class since the facts are different for each woman.

"In our (Supreme Court) petition," the company said in a statement earlier this year, "we point out that this case involves important issues about class-action procedure and Title VII (of the Civil Rights Act), and that the (U.S. Appeals Court for the) 9th Circuit's opinion (allowing the class) contradicts numerous decisions of other appellate courts and even the Supreme Court itself.

"It is important to remember that the 9th Circuit's opinion dealt only with class certification," the company said, "not with the merits of the lawsuit. Walmart is an excellent place for women to work and has been recognized as a leader in fostering the advancement and success of women in the workplace."

In its actual petition to the Supreme Court, Walmart said the size of the class action is huge.

"This nationwide class includes every woman employed for any period of time over the past decade, in any of Walmart's approximately 3,400 separately managed stores, 41 regions and 400 districts, and who held positions in any of approximately 53 departments and 170 different job classifications," the petition said.

"The millions of class members collectively seek billions of dollars in monetary relief under Title VII of the Civil Rights Act of 1964, claiming that tens of thousands of Walmart managers inflicted monetary injury on each and every individual class member in the same manner by intentionally discriminating against them because of their sex, in violation of the company's express anti-discrimination policy."

The petition questions whether monetary claims can be brought under the Rule 23 of the Federal Rules of Civil Procedure "which by its terms is limited to injunctive or corresponding declaratory relief," and whether the certification of the huge class passes muster under civil rights law and the Constitution's "due process," or fair proceedings, guarantee.

The petition argued, "This unprecedented class (was brought) on the ground Walmart's delegation of decentralized decision-making authority to local managers opened a 'conduit' for gender bias, a charge that can be levied against every organization of any size (including the federal

government)." If the appeals court decision stands, "virtually every employer in the land could be subject to a similar suit."

Washington attorney Joseph Sellers, co-leading counsel for the plaintiffs, scoffed at the idea Walmart would have a tough time defending itself against such a large class action.

Speaking by telephone from his office at Cohen Milstein Sellers & Toll, Sellers told United Press International earlier this year, "There's a substantial body of evidence that comes from Walmart's own workforce data," including "very sophisticated analysis" to show what company policy was. Walmart can use the evidence in an attempt to show that there was no company-wide discrimination, just as plaintiffs can use the same evidence to show there was, he said.

"We have evidence that there is a culture at the company that condones or says women are second-class citizens," Sellers said, some of it surfacing at managers' meetings at strip clubs or at Hooters restaurants.

Along the course of the case, judges have not been hesitant to comment on the validity of the class.

A federal judge and two sittings of the 9th U.S. Circuit Court of Appeals -- a three-judge panel and the full 11-member court rehearing the appeal en banc -- approved the class. But the vote was narrow in both cases -- 2-1 for the panel and 6-5 for the full court.

In the panel's majority opinion, U.S. Circuit Judge Harry Pregerson said the women's "factual evidence, expert opinions, statistical evidence and anecdotal evidence demonstrate that Walmart's female employees nationwide were subjected to a single set of corporate policies (not merely a number of independent discriminatory acts) that may have worked to unlawfully discriminate against them in violation of Title VII."

He added, "Evidence of Walmart's subjective decision-making policies provide further evidence of a common practice of discrimination."

U.S. Circuit Judge Andrew Kleinfeld dissented: "Women employed by Walmart who have suffered sex discrimination stand to lose a lot if this sex discrimination class action goes forward. All the members of the class will be bound by the judgment or settlement because, under Rule 23 (of the

Federal Rules of Civil Procedure), the judgment 'shall include' all class members, 'whether or not favorable to the class.' ... What if the plaintiffs' class loses? Worse, for many women in the class, what if the plaintiffs win? Women who have suffered great loss because of sex discrimination will have to share the punitive damages award with many women who did not. Women entitled to considerable compensatory damages in addition to lost pay will be deprived of them. Women who have left Walmart will get injunctive and declaratory relief of no value to them, while new female Walmart employees will benefit from the injustice done to other women."

He added, "If the settlement is mostly words for the women and money for the lawyers, a realistic possibility, it will be a pyrrhic victory indeed."

In the April ruling by the entire court upholding the panel and district court judge, all of the six circuit judges in the majority were appointed by Democrats, Law.com reported.

Four of the five dissenters, including Kleinfeld, were appointed by Republicans.

At the high court, Justice Stephen Breyer has recused -- or withdrawn -- himself from a Walmart case in the past because he held stock in the company. It is not known whether Breyer is still a stockholder, or whether other members of the high court hold Walmart stock.