On March 29, 2011, the U.S. Supreme Court in Wal-Mart Stores, Inc. v. Dukes.1 (“Wal-Mart”) heard oral arguments in what is shaping up to be a landmark class action case. I was fortunate enough to attend the oral arguments. With a potential class of around 1.5 million women, and gender allegations against the country’s largest and most well known retailer, the case understandably has garnered a great deal of attention both in and outside the legal community.

Wal-Mart Stores, Inc. (“Wal-Mart”) currently operates approximately 3,400 stores in forty-one separate regions with 170 job classifications and employs over one million workers. The plaintiffs allege company wide gender discrimination in hiring practices, promotion policies and compensation. The proposed class in Wal-Mart includes all current and former female employees of Wal-Mart as of December 26, 1998, no matter what their position.

Although the underlying allegations in the case are focused on employment discrimination, the issue before the U.S. Supreme Court is solely whether the certification of the nationwide class for monetary relief is proper under Rule 23(b)(2) of the Federal Rules of Civil Procedure. It became clear from oral arguments that a number of justices, whether or not they are sympathetic to the employment discrimination claims, have concerns about the certification of such a large and diverse class.

A. Background

A federal district court may certify a class only if all the prerequisites of Rule 23(a) are met and at least one of the three conditions of Rule 23(b) is satisfied. Under Rule 23(a), one or more members of a class may sue on behalf of all class members if: (1) the class is so numerous that joinder of all members is not practical; (2) there are questions of fact or law common to the class; (3) the named plaintiff’s claims are typical of the claims of the class; and (4) the proposed named plaintiff fairly and adequately protects the interests of the class.2 The U.S. District Court for the Northern District of California certified the class in Wal-Mart under Rule 23(b)(2). Under Rule 23(b)(2), a class action may be certified if the elements of Rule 23(a) are satisfied and “the party opposing the class [Wal-Mart] has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.”3 The Ninth Circuit upheld class certification for females hired by Wal-Mart at any time after December 26, 1998 and the class certification encompassed all plaintiffs’ claims for injunctive relief, declaratory relief and back pay. The Ninth Circuit remanded for additional analysis the claims for punitive damages and the claims of the putative class members who were no longer employed by Wal-Mart when the action was filed (i.e., June 19, 2001). Wal-Mart appealed and the U.S. Supreme Court granted certiorari on December 6, 2010. The U.S. Supreme Court heard oral argument on two issues. The first issue was whether the certified class was consistent with Rule 23(a). The second issue was whether claims for monetary relief can be certified under Rule 23(b)(2) and, if so, under what circumstances.

B. The Parties’ Briefs

Wal-Mart, in its briefs to the U.S. Supreme Court, argued that the certified class did not meet the prerequisites of Rule 23(a) because: (i) the class members, potentially millions of women supervised by tens of thousands of different managers, assert highly individualized fact intensive claims for monetary relief that are subject to individualized statutory defenses; and (ii) the myriad of claims, defenses, issues, locales, events, and individuals make it impossible for the named plaintiffs to be adequate representatives of the absent class members. Wal-Mart also contended that the certification order could not be reconciled with the requirements of Rule 23(b)(2) because the
plaintiffs seek billions of dollars in back pay and Rule 23(b)(2), on its face, is limited to claims for “injunctive relief or corresponding declaratory relief.” While Wal-Mart acknowledged that certain circuits have ruled that some monetary claims may proceed under Rule 23(b)(2), Wal-Mart argued that those circuit courts have not permitted monetary claims when the monetary claims predominate over the injunctive or corresponding declaratory relief. Wal-Mart posited that plaintiffs’ request for billions of dollars in back pay predominated over plaintiffs’ request for injunctive and declaratory relief.

The plaintiff-respondents argued that certification was proper because: (i) Wal-Mart operated through common subjective policies implemented by managers at all levels; and (ii) there was a sufficient nexus between the challenged practices and the adverse outcomes for women to satisfy Rule 23(a). The plaintiff-respondents also contended that the Advisory Committee in drafting Rule 23(b)(2) plainly anticipated that a Rule 23(b)(2) action could include money damages as long as the monetary damages did not predominate over the sought after injunctive or declaratory relief. Specifically, the Advisory Committee Notes to Rule 23(b)(2) provide that Rule 23(b)(2) “does not extend to cases in which the appropriate final relief relates to exclusively or predominantly to money damages.” The plaintiff-respondents also asserted that back pay is an equitable remedy under Title VII, rather than a form of compensatory damages.

C. Oral Argument

1. Wal-Mart’s Presentation

Theodore J. Boutrous, Jr. of Gibson, Dunn & Crutcher argued on behalf of Wal-Mart before the Supreme Court. He contended that plaintiffs failed to satisfy the commonality, typicality and adequacy requirements of Rule 23(a) because Wal-Mart delegated all its hiring, promotion and compensation decisions “to individual managers throughout the country.” Chief Justice Roberts asked Boutrous whether Wal-Mart should have realized that its decentralized decision making process was causing and/or permitting gender discrimination at Wal-Mart since Wal-Mart on a weekly basis received reports of gender discrimination from its various stores. Boutrous answered “no” because there was no “typical” gender discrimination claim.

In support of this argument, Boutrous cited the stories of the three named plaintiffs, who each had very different career experiences at Wal-Mart – one was promoted to a managerial position; one was terminated for violating company policy; and one was promoted and then demoted after disciplinary problems. Boutrous asserted that such different experiences lack the commonality necessary to assert a class action claim for gender discrimination. Boutrous further stated that “[Wal-Mart] has a very strong policy against discrimination and in favor of diversity” and the fundamental flaw in plaintiffs’ case is that plaintiffs’ statistics do “not show that there were gender gaps at the stores among comparable people.” Boutrous also posited that a Wal-Mart report “showed that at 90 percent of the stores, there was no pay disparity.”

Boutrous also argued that the problem with a Rule 23(b)(2) certification is that it does not permit opt-outs because the primary relief sought is class wide injunctive and declaratory relief -- which is not subject to individual opt-outs. According to Boutrous, in the event the putative class in Wal-Mart was certified and a judgment was entered against Wal-Mart or a settlement was reached between the parties -- and a class member tried to file a separate claim for compensatory damages -- she would not be able to file such a claim because the named plaintiffs retained that right for themselves “but waived those [rights] for the class members in order to get a class certified.” Boutrous further contended that “back pay is monetary relief for individuals” and it is unfair to bind individuals to a judgment to which they were not a party when individual monetary relief is at stake.

2. The Plaintiff-Respondents’ Presentation

The colloquy between plaintiffs’ attorney, Joseph M. Sellers of Cohen Milstein, and the justices was more lively from the start, with the justices questioning plaintiffs’ theory of discrimination. Specifically, Justice Kennedy
asked Sellers to articulate Wal-Mart’s unlawful policy. Sellers responded by stating that Wal-Mart provided its managers “unchecked discretion” and, as a result, the managers paid women “less than men who were doing the same work in the same facilities at the same time, even though … [the] women had more seniority and higher performance, [but were] provided fewer opportunities for promotion … because of sex.” Justice Kennedy found plaintiffs’ theory of gender discrimination contradictory and stated “[y]our complaint faces in two directions. Number one, you said this is a culture where Arkansas knows, the headquarters knows, everything that’s going on. Then in the next breath, you say, well, now these supervisors have too much discretion. It seems to me there’s an inconsistency there[.]” Justice Kennedy’s thoughts were echoed in the questions of the other justices, most notably Justice Scalia, who sharply questioned Sellers regarding the assertion that the subjective discretion of the individual store managers was guided by the corporate culture, noting that the written corporate policy of Wal-Mart did not condone discrimination. In response, Sellers argued that all store managers were trained at the Sam Walton Institute, where a discriminatory corporate policy was imparted to them, and store managers were taught that more men were promoted than women because men tended to be more aggressive in seeking promotions. Justice Scalia took issue with this argument on the grounds that if there was an aggressive woman, she would be promoted, and that this point alone was not enough to show that Wal-Mart maintained a corporate culture of discrimination.

Even the justices who seemed to be more sympathetic to the discrimination claim still took issue with the back pay being provided under Rule 23(b)(2). Justice Ginsburg seemed particularly worried about how back pay would be calculated for each class member. The plaintiffs proposed using an analysis of statistical models based on the records kept by Wal-Mart to determine back pay, as opposed to hundreds of thousands of individual hearings. Almost all of the justices who questioned Sellers on this point, including Justices Ginsburg, Kagan and Sotomayor, appeared troubled by this proposed course of action because it took away Wal-Mart’s right to defend itself by showing that a female employee “could have been fired, disciplined, and wasn’t owed any back pay.”

**D. Conclusion**

Overall, the sense of the hearings was that the class action claim put forth by Wal-Mart faced serious obstacles. A number of the justices seemed to believe that the claim lacked the commonality requirement of Rule 23(a) and an even larger number took issue with the fact that: (i) class members would not be able to opt-out of a back pay award under Rule 23(b)(2); and (ii) the plaintiffs’ proposal for determining back pay awards violated Wal-Mart’s right to due process.

**Ms. McGrath is an associate with D’Amato & Lynch, LLP whose practice focuses on directors and officers liability, and other lines of professional liability, insurance coverage.**

kmcgrath@damato-lynch.com

---

8. Id. at 9.
9. Id. at 16.
10. Id. at 20.
11. Id. at 27.
12. Id. at 28.
13. Id. at 38.