Washington Legal Foundation

On the Merits:

WAL-MART STORES, INC., a Delaware corporation, AND
SAM'S CLUB, an operating segment of WAL-MART STORES, INC.,

Petitioners,

v.

MICHELLE BRAUN AND DOLORES HUMMEL,
on behalf of themselves and all others similarly situated,

Respondents.

Nos. 551 & 552 EAL 2011
Supreme Court of Pennsylvania

Oral Argument: May 8, 2013

Question Presented: Whether, in a purported class action tried to verdict, it violates Pennsylvania law (including the Pennsylvania Rules of Civil Procedure) to subject a defendant to a "trial by formula" that relieves plaintiffs of their burden to produce class-wide "common" evidence on key elements of their claims.

Summary of the Case: Although no law requires it to do so, Wal-Mart grants its employees paid fifteen-minute breaks and unpaid meal periods, provided they work a minimum number of hours in one shift. Claiming Wal-Mart violated this policy, Michelle Braun and Dolores Hummel each filed a putative class action against Wal-Mart, which were consolidated in the Philadelphia Court of Common Pleas. The named plaintiffs sought to represent a broadly defined class of Wal-Mart employees asserting claims for breach of contract and violations of Pennsylvania's Wage Payment and Collection Law (WPCL). Although plaintiffs offered no common proof of contract formation between Wal-Mart and each employee of the class, the trial court certified a class of "all current and former hourly employees of Wal-Mart in the Commonwealth of Pennsylvania from March 19, 1998, to the present"—a class comprising some 186,979 employees from 159 different stores.

At trial, plaintiffs attempted to establish breach of contract and class-wide liability through expert testimony. Plaintiffs' experts conceded, however, that they could not determine from time-clock data whether any missed swipe actually corresponded to a missed break, much less an involuntarily missed break. Nevertheless, plaintiffs' experts assumed that Wal-Mart was liable for any earned breaks not taken. The jury returned a verdict in Wal-Mart's favor on all meal-period claims, but found against Wal-Mart on the remaining claims, awarding damages of $78.5 million for breach of contract, $62.3 million in liquidated damages under WPCL, $45.7 million in attorneys' fees, and $13.7 million in costs and interest. The trial court denied Wal-Mart's post-verdict motions and entered judgment for $187,648,549.11.

On June 10, 2011, a three-judge panel of the Superior Court issued a *per curiam* opinion largely affirming the judgment. The court began its analysis by noting the "unique facts and the liberal construction" of Pennsylvania's class action rules. It concluded that monetary payments for contractual rest breaks qualify as "wages" under the WPCL. The panel found sufficient evidence in the record for a fact finder to conclude that Wal-Mart's denial of breaks constituted a breach of contract and a violation of the WPCL. Granting the Petition, the Supreme Court of Pennsylvania certified the above question.

On The Merits: Judgment for Petitioners

Cory L. Andrews
WLF Senior Litigation Counsel

This case highlights the many problems associated with using aggregate proof in a class action to establish class-wide liability in a case that otherwise requires individualized proof under Pennsylvania substantive law.

"The class action in Pennsylvania is a procedural device designed to promote efficiency and fairness in the handling of large numbers of similar claims[.]" *Lilian v. Commonwealth*, 467 Pa. 15, 21, 354 A.2d 250, 253 (1976). Nevertheless, a class action is not a proper way to resolve every case involving many plaintiffs with similar claims against the same defendant. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. __, 131 S. Ct. 2541 (2011).

Rather, a class action is limited to those cases that raise "common questions" of law or fact that "predominate" over any issues that require individualized proof. Pa. R. Civ. P. 1702(2), (5); Pa. R. Civ. P. 1708(a)(1). The test is essentially whether the same proof that would establish one class plaintiff's right to recover could be used to establish the other plaintiffs' right to recover. *Samuel-Bassett v. Kia Motors Am., Inc.*, 34 A.3d 1, 22 (Pa. 2011). If the case turns on the resolution of issues that are unique to individual plaintiffs, the dispute is not appropriate for class-wide treatment. *Clark v. Pfizer, Inc.*, 990 A.2d 17, 27-28 (Pa. Super. Ct. 2010).

Many courts have recognized concerns with using aggregate proof in a class action to establish class-wide liability without engaging in individual inquiries. For example, in *Dukes*, the Supreme Court rejected the "novel project" of using a sample of test cases in a class action to determine an average number of valid claims for back pay under Title VII and using average amounts to calculate class-wide damages. *Dukes*, 131 S. Ct. at 2561. The majority reasoned that this "trial by formula" would alter the substantive right to raise defenses to individual claims. *Id.* Pennsylvania courts have recognized these concerns as well. *Samuel-Bassett*, 34 A.3d at 39-40 (acknowledging the concern but noting that the issue was waived); *id.* at 58-63 (Saylor, J., dissenting) (expressing concerns that class action has become a tool to ease the burden of proving actual damages); *Clark*, 990 A.2d at 27-28 ("[S]tatistical probability does not substitute for actual inquiry[.]").

In this case, the central theory of liability is breach of contract. To recover under Pennsylvania law, the plaintiff bears the burden of proving contract formation, breach, and damages. *See Sullivan v. Chartwell Inv. Partners, LP*, 873 A.2d 710, 716 (Pa. Super. 2005). Class plaintiffs would bear the same burden of proof in a breach of contract class action. In other words, a procedural rule authorizing class actions cannot change the substantive rights of the parties. PA. CONST. art. V, § 10. Accordingly, the class plaintiffs' burden cannot change simply because they are suing collectively.

To establish a breach in an individual case involving facts like this one, a plaintiff would bear the burden of proving that Wal-Mart (through managers, for example) prevented him from taking an earned rest break or forced him to work off the clock. That analysis does not change merely because a class action is involved.

To prove class-wide liability for breach here, however, the class plaintiffs relied on a combination of (a) testimony from six employees (out of a class of 187,000) who alleged they were forced to miss breaks or to work off the clock; (b) statistical analysis of Wal-Mart's vast electronic records showing whether and when employees clocked in and out from rest breaks to demonstrate that employees missed breaks or worked off the clock; and (c) supposition about Wal-Mart's allegedly understaffed stores.

At trial, the expert who supplied much of the plaintiffs' class-wide proof admitted that he could not determine from the data *why* any employee missed a rest break or worked off the clock. *Braun v. Wal-Mart Stores, Inc.*, 24 A.3d 875, 888 (Pa. Super. 2012). There may have been reasons unrelated to Wal-Mart. In fact, other employees testified that they were never forced to miss breaks or to work off the clock and that the electronic records would not necessarily or even accurately reflect whether a worker was in fact resting or working. *Id.* at 947-51.

The class plaintiffs therefore cannot possibly establish with class-wide proof that Wal-Mart actually breached 187,000 contracts. When confronted with the issue, the Superior Court panel below relied on a "liberal" application of class-action rules in Pennsylvania and upheld the judgment. In effect, the Superior Court altered the plaintiffs' burden of proof to fit the class-action procedure. That was error.

The judgment against Wal-Mart should be vacated and this case remanded with instructions to decertify the class without prejudice to any class member who wishes to pursue his or her claims individually.

Dissenting View:
Clifford A. Rieders
Rieders, Travis, Humphrey, Harris, Waters & Waffenschmidt

I respectfully dissent. The key issue underlying this appeal is whether the Pennsylvania courts will adopt the reasoning of the United States Supreme Court in *Wal-Mart Stores, Inc. v. Dukes* with respect to the legitimacy of a "trial by formula" disapproved by that Court in the *Dukes* opinion.

Needless to say, Pennsylvania law arguably is different than federal law with respect to the requirements of a class action. The interests of federalism, long a rallying cry of jurisprudential conservatives, would militate in favor of Pennsylvania going its own way in connection with what is permissible in accumulating evidence in the class action context.

The 122-page Superior Court opinion largely affirmed the trial court and examined the evidentiary trial testimony in minute detail. Wal-Mart claimed that testimony could not demonstrate on a class-wide basis whether an employee's timekeeping swipe records adequately reflected missed breaks. Wal-Mart claimed that individual employees would have to be questioned to determine whether Wal-Mart managers forced class members to work through or cut short their breaks. Similarly, it was argued, the methodology of the class action experts could not show the off-the-clock work. Analysis of data from cash registers of 60 Wal-Mart stores arguably would not show whether or why employees worked off the clock. Simply because an employee was not logged in to Wal-Mart's timekeeping system, the defendant argued, that did not mean that employees were forced to work off the clock.

The Superior Court, citing to the incredibly detailed review by the trial court, noted that Wal-Mart's own policies and directives for the enforcement of its policies are undisputed. Managers and associates at Wal-Mart would be disciplined if they violated the rest break policy. The policies were strictly enforced by Wal-Mart. If a manager reported that a fellow manager forced an employee to work off the clock, then the manager would be subject to discipline. That manager would not be promoted and might be fired. Undisputed testimony from Wal-Mart's own personnel verified that associates were not receiving rest breaks.

The Executive Vice President of Human Resources worldwide, who reported to the President and Chief Executive Officer, acknowledged a memo sent as early as 1998 that associates were not receiving rest breaks. Every associate had access to the twice yearly meetings attended by all store managers and Wal-Mart's top management via an internal internet system. Wal-Mart's policies were undeniably disseminated to associates. The Superior Court reviewed opinions around the country on virtually identical fact scenarios. The trial court was said to have erred only in calculating some of the counsel fees by enhancing the lodestar to reflect contingent risk when the lodestar already accounted for contingent risk.

Reviewing the decision of the Superior Court, the evidence accumulated by the trial court, and decisions around the country, one could not help but wonder whether the question here actually concerns "trial by formula" or instead whether the trial court should be upheld in its findings that went far beyond "trial by formula." Whatever occurred in *Wal-Mart v. Dukes*, the situation appears to be quite different in *Braun v. Wal-Mart Stores, Inc.* The latter does not appear to be a trial by formula, but rather appears to be the use of evidence to draw conclusions based upon logical inferences. The fact that this Court would refer to *Braun* as "trial by formula" in the question presented is worrisome. It is not unusual in class actions to utilize policy and data in order to arrive at conclusions with respect to overall methods of operation.

There is no reason to view this case in the same way that the United States Supreme Court characterized *Wal-Mart v. Dukes*. One can distinguish the decisions by pointing out the very specific factual evidence of overtime work without pay that represented a system-wide practice and pattern. Methodology extrapolating broad behavior from a sampling perspective is nothing new in the law. In fact, this is a modern scientific approach to analyzing evidence that is routinely utilized by the courts, whether Pennsylvania or elsewhere.

The decision of the Superior Court should be affirmed.

Cory L. Andrews is Senior Litigation Counsel for the Washington Legal Foundation in Washington, D.C. **Clifford A. Rieders** is a founding partner of the law firm Rieders, Travis, Humphrey, Harris, Waters & Waffenschmidt in Williamsport, PA and Past President of the Pennsylvania Trial Lawyers Association (now called the Pennsylvania Association for Justice).

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