10/03/2012

PENNSYLVANIA SUPREME COURT TAKES A CRACK AT THE PROGENY OF *WAL-MART[1] STORES, INC. v. DUKES*

On July 2, 2012, the Pennsylvania Supreme Court granted the Petition for Allowance of Appeal. The following issue was certified:

> Whether, in a purported class action tried to verdict, it violates Pennsylvania law (including the Pennsylvania Rules of Civil Procedure) to subject Wal-Mart to a "Trial by Formula" that relieves Plaintiffs of their burden to produce class-wide "common" evidence on key elements of their claims.

The ideological etiology of the question presented by the Pennsylvania Supreme Court's grant of the Allowance of Appeal can be found at *Wal-Mart Stores, Inc. vs. Dukes*, 131 S.Ct. 2541 (2011).

The Pennsylvania Superior Court had affirmed the judgment of $187,648,589.11 resting on the trial testimony of a limited number of the 186,979 members of the Plaintiff class. Utilizing the verbiage of *Wal-Mart Stores, Inc. vs. Dukes*, Supra, the Petition for Allowance of Appeal filed by Wal-Mart Stores, Inc. and Sam's Club decried the "Trial by Formula" disapproved in the *Dukes* case.

Needless to say Pennsylvania law arguably is different than federal law with respect to requirements of a class action.

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[1] All the Court opinions hyphenate the store name, but its website does not.

The Superior Court issued a *per curiam* opinion June 10, 2011, in *Braun v. Wal-Mart Stores, Inc.*, 24 A.3d 875, reargument denied August 11, 2011. The panel was made up of Musmanno, Donohue and Fitzgerald. Fitzgerald is a former Justice specially assigned to the Superior Court.

The court began its analysis by noting the "unique facts and the liberal construction" of Pennsylvania's class action rules. The court concluded that monetary payments for contractual rest breaks qualify as "wages" under the Pennsylvania Wage Payment and Collection Act ("WPCL"). Further, the *per curiam* panel concluded that the trial court construed 43 P.S. § 260.10 correctly to permit recovery of statutory liquidated damages and hence that the class action members are entitled to recover under the WPCL. The *per curiam* panel found sufficient evidence in the record for a fact finder to conclude that it was a breach of contract, unjust enrichment, violation of the Pennsylvania Minimum Wage Act ("MWA") and a violation of the WPCL. The trial court was said to have erred in calculating some of the counsel fees by enhancing the lodestar to reflect contingent risk when the lodestar already accounted for contingent risk.

The underlayment to the issue for which allowance of appeal was granted is whether the Pennsylvania courts will adopt reasoning of the United States Supreme Court in *Wal-Mart Stores, Inc. v. Dukes, supra.*, with respect to the legitimacy of "trial by formula" disapproved by the United States Supreme Court in the *Dukes* opinion.

State's rights to consideration, a rallying cry of conservatives in the tea party movement, 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 examined the testimony in minute detail. Wal-Mart claimed that the testimony could not demonstrate on a class-wide basis whether employee's swiped 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, claimed the defendant, that did not mean that employees were forced to work off the clock.

The Superior Court, reciting to the incredible 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.

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 concerns "trial by formula" or instead whether the trial court should be upheld in its findings that were 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 *Braun* appears to be the use of evidence to draw conclusions based upon logical inferences. The fact that the Pennsylvania Supreme Court would refer to *Braun* as "trial by formula" 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 suspect that the Pennsylvania Supreme Court will view *Braun v. Wal-Mart* in the way that the United States Supreme Court characterized *Wal-Mart v. Dukes.* Counsel in *Braun* will undoubtedly seek to distinguish the decisions by pointing out the very specific factual evidence of overtime 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.