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SCOTUS Denies Wal-Mart's Appeal of $187.6M Class Action

Ben Seal, The Legal Intelligencer

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The U.S. Supreme Court on Monday denied Wal-Mart Stores' petition for certiorari seeking to overturn a $187.6 million class-action damages award against the company over wage-and-hour violations.

The denial lets stand a 4-1 ruling by the Pennsylvania Supreme Court in December 2014 in *Braun v. Wal-Mart Stores* and *Hummel v. Wal-MartStores* that affirmed the award. The majority found that despite the size of the 188,000-member class, the methods used to extrapolate liability and damages to each member did not constitute an improper "trial by formula" that deprived the retail giant of its due process rights.

"In this case, where systemic wage-and-hour violations were asserted, evidence was presented by appellees that, if believed, supported an inference that Wal-Mart managers companywide were pressured to increase profits and decrease payroll by understaffing stores through the preferred scheduling system, and that these factors, including the managers' annual bonus compensation program, impeded the ability of employees, across the board, to take scheduled, promised, paid rest breaks," the majority opinion said. "The lack of proof of class commonality present in [*Wal-Mart Stores v.*] *Dukes* is not present here."

Michael Donovan of Donovan Litigation Group in Berwyn, who represented the class at the Pennsylvania Supreme Court, said he was gratified by the U.S. Supreme Court's decision.

"We're hopeful that our clients will finally be paid the back wages that they've been due for over 16 years," Donovan said.

Robert S. Peck of the Center for Constitutional Litigation in Washington, D.C., class counsel before the U.S. justices, said he was pleased by the decision and felt it was presaged by the court's recent ruling in *Tyson Foods v. Bouaphakeo*, which affirmed a class-action award for Tyson Foods workers in Iowa who contended they were underpaid.

Gibson, Dunn & Crutcher attorney Theodore J. Boutrous Jr. represented Wal-Mart. Company spokesman Randy Hargrove said in a statement that Wal-Mart was disappointed by the court's decision not to review the case.

"While we continue to believe these claims should not be bundled together in a class-action lawsuit, we respect the court's decision," he said. "We will now determine how we move forward in the trial court."

Hargrove also said the company has taken steps in the past decade, since most of the claims were filed, including enhancing its timekeeping systems and additional training, "to make sure all our associates understand the importance of those policies and comply with them."

A jury in 2006 had awarded the plaintiffs in *Braun* and *Hummel* $187.6 million in damages for claims that Pennsylvania employees were not properly compensated for off-the-clock work and missed rest breaks. Although the state Superior Court in 2011 upheld the award, it determined that a $33.8 million award for attorney fees needed to be recalculated by the trial court.

While Wal-Mart argued in the Superior Court that the proof offered by the class only showed individual proof, not classwide proof, the intermediate appellate court said the commonality of the class was demonstrated through Wal-Mart's own business records to show that class members missed breaks, had too few breaks or had their breaks truncated. Wal-Mart had additionally argued that individual employees would have to be questioned to determine if they were forced by managers to work through or truncate their breaks.

In a dissent, then-Justice Thomas G. Saylor said he felt the majority's decision relaxed the approach to class action law.

"Here, the appellee class was permitted to effectively project the anecdotal experience of each of six testifying class members upon 30,000 other members of the class at large, to extrapolate abstract data concerning missed and mistimed 'swipes' from 16 Pennsylvania stores to 139 others, to overlay discrete data taken from several years' experience across a distinct four-year period, and to attribute a single cause to missed and mistimed swipes, all despite indisputable variations across store locations, management personnel, time, and other circumstances," Saylor said.

Saylor added he felt the subject should be "of overt consideration in the political branch."

The majority focused its decision on the proof at trial, and whether the proceedings relieved the plaintiffs of their burden to produce common evidence on the key elements of the claims.

Although Wal-Mart argued the trial process had been disapproved of by the U.S. Supreme Court in its 2011 decision in *Dukes* and 2013 decision in *Comcast v. Behrend*, the plaintiffs argued Wal-Mart had not faced a "trial by formula," but rather a "replicated proof"-style class action, in which underlying evidence proves each class member's claim as if each class - member had proceeded alone.

According to the opinion, the "trial by formula" outlined in *Dukes* consisted of a master determining whether backpay was warranted, and how much should be due to a sample set of class members. The master would then multiply the average backpay amount by the number of claims the master determined to be valid.

The majority opinion, however, said that, because the liability in *Braun* and *Hummel* was not determined by a formula, *Dukes* did not apply.

"Instead, the extrapolation evidence Wal-Mart challenges in this appeal involves the amount of damages to the class as a whole," the opinion said. "By contrast, the evidence of Wal-Mart's

liability to the entire class for breach of contract and [Pennsylvania Wage Payment and Collection Law] violations was established at trial by presentation of Wal-Mart's own universal employment and wage policies, as well as its own business records and internal audits."

The justices likewise found the *Behrend* decision to be dissimilar, as the *Braun* and *Hummel* plaintiffs had offered data and analysis to support that their damages were related to "systematic wage-and-hour violations."

The *Behrend* decision further recognized, according to the opinion, that, "where a theory of liability is capable of classwide proof, calculations of damages need not be exact."

"The essence of Wal-Mart's appeal is its assertion that the class action device, in this instance, had 'run amok,'" the opinion said. "In our view, this was not a case of 'trial by formula' or of a class action 'run amok.'"

Donovan said at the time that interest on the award continued to accrue since the 2006 verdict, and would bring the total award to approximately $244 million.

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