PA. SUPREME COURT RULES DUKES DOES NOT APPLY TO WAGE-AND-HOUR VERDICT

January 2015 - Alyssa E. Lambert

The Pennsylvania Supreme Court has upheld a $154 million jury award to plaintiffs in a group of wage-and-hour class actions against Walmart, concluding that the methods the trial court used to determine liability and damages for each class member did not constitute a "trial by formula," which the U.S. Supreme Court disapproved of in *Wal-Mart Stores, Inc. v. Dukes* in 2011. Walmart is considering petitioning the Supreme Court, but plaintiff attorneys doubt that the Court would grant review. (*Braun v. Wal-Mart Stores, Inc.*, 2014 WL 7182170 (Pa. Dec. 15, 2014).)

Former Pennsylvania Walmart employees sued the retail giant for forcing them to miss paid rest and meal breaks and making them work "off the clock" after scheduled shifts were done. The plaintiffs alleged breach of contract, unjust enrichment, and violations of several Pennsylvania wage-and-hour laws. The trial court certified a class of nearly 188,000 members who were current and former employees between 1998 and 2005.

In 2006, a jury awarded the class $187.6 million for claims that Walmart did not properly compensate them for off-the-clock work and missed rest breaks but

ruled in the employer's favor on the meal break claims. Walmart argued that the plaintiffs did not prove liability on a classwide basis. The Pennsylvania appellate court disagreed, ruling that the plaintiffs proved commonality through Walmart's business records, which showed that the workers missed breaks, had too few of them, or had them cut short. The court upheld the award but reduced the attorney fees, and Walmart appealed.

The main issue before the court was whether class action proceedings subjected Walmart to a trial by formula that relieves plaintiffs of the burden to produce classwide, common evidence of their liability claims. In a trial by formula, the court appoints a special master to determine whether and how much back pay is due to a sample set of class members, and then the court multiplies the total number of class members by the percentage of claims determined to be valid. In *Dukes,* the Supreme Court said this was not an appropriate method of establishing liability and damages. Walmart argued that this method was used at trial and that the class should not have been certified. The plaintiffs countered that the class action involved "replicated proof"—where the same underlying evidence proves each class member's claim.

Noting that much of Walmart's challenge to the trial method was based on its argument that the class should not have been certified, the Pennsylvania Supreme Court refused to disturb class certification approval. The court also held that *Dukes* did not govern: The lack of proof of class commonality in *Dukes* was not present in this case, and liability at trial was not evaluated based on a formula. "Walmart's liability was proven on a classwide basis. Damages were assessed based on a computation of the average rate of an employee's pay (about $8 per hour) multiplied by the number of hours for which pay should have been received but was not. In our case, this was not a case of 'trial by formula' or a class action 'run amok,'" the court wrote.

Walmart also cited the Supreme Court's 2013 decision in *Comcast Corp. v. Behrend,* which held that a trial court improperly certified a class of consumers in an antitrust case because the plaintiffs did not establish that their damages could be measured on a classwide basis. But the Pennsylvania Supreme Court distinguished *Comcast.* Here, the plaintiffs offered data and analysis from Walmart's own records to prove that their damages were related to systemic wage-and-hour violations.

Judge Thomas Saylor dissented, arguing that the majority relaxed the class action requirements, and the defense bar has argued that the decision breaks with federal court rulings. Philadelphia lawyer Michael Donovan, who represents the plaintiffs, said the ruling is "100 percent consistent with scores of federal appellate decisions," including three 2014 circuit court decisions that rejected the defendants' trial-by-formula arguments and affirmed wage-and-hour decisions and verdicts. (*Bouaphakeo v. Tyson Foods, Inc.,* 765 F.3d 791 (8th Cir. Aug. 25, 2014)); (*Jimenez v. Allstate Ins. Co.,* 765 F.3d 1161 (9th Cir. Sept. 3, 2014)); (*Garcia v. Tyson Foods, Inc.,* 770 F.3d 1300 (10th Cir. Aug. 19, 2014).)

Given the decision's alignment with the circuit courts, Donovan doesn't believe the Supreme Court would grant certiorari. "The decision breaks no new ground on substantive law or established class action practice. It just recognizes the truism that the plaintiffs may use employer records to establish the amount of their damages and that where the employer has intentionally failed to maintain the records to thwart the class calculation of damages, the employer will have to pay the consequences," he said.

Donovan offered other reasons why Supreme Court review would not be appropriate. "This was not a trial by formula, because the damages were based

on all 52 million work shifts reflected in Walmart's own employment records; Walmart destroyed evidence relating to those records that resulted in an adverse inference jury instruction at trial; and the decision is consistent with two sister state supreme court cases," he said.

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