

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY

CIVIL TRIAL DIVISION

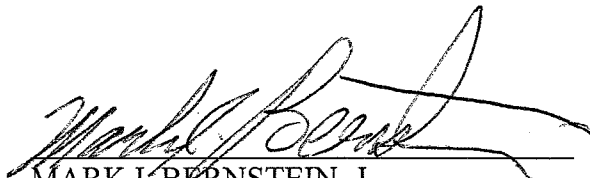
MICHELLE BRAUN : MARCH TERM, 2002
: :
vs. : :
: :
WAL-MART STORES, INC., ET AL. : NO. 3127

DOLORES HUMMEL : AUGUST TERM, 2004
: :
vs. : :
: :
WAL-MART STORES, INC., ET AL. : NO. 3757

ORDER

AND NOW, this 3rd day of October, 2007, statutory liquidated damages in the amount of \$62,253,000.00 are awarded to the plaintiff class.

BY THE COURT


MARK I. BERNSTEIN, J.

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OPINION

The Pennsylvania wage payment and collection law (WPCL) 43 P.S. Section 260.10 provides:

“Where wages remain unpaid for thirty days beyond the regularly scheduled payday...and no good faith contest or dispute of any wage claim or counterclaim exist accounting for such non-payment the employees shall be entitled to claim, in addition, as liquidated damages an amount equal to 25 percent of the total amount of wages due or \$500.00 which ever is greater.”¹

By this statute the legislature created significant financial incentives for employers to pay workers all the money they’ve earned by their hard work. Reasonably the legislature exempted an employer who had a “good faith” dispute about what was actually owed.

¹ The parties agree that \$500.00 liquidated damages is greater than 25% of the total of wages due and found owing by the jury in this case.

In this class action, by special verdict, the jury found that the defendant required its employees to work without pay by directing them not to record their hours on Walmart's computerized pay system. The jury found that Walmart saved \$1,031,430.00 during the statutory period by not paying their workers for all the time they had worked. The jury also found, that defendant Walmart prohibited employees from taking the needed rest breaks which they had been promised. By prohibiting promised rest breaks during the statutory period defendant Walmart saved an additional \$48,258,111.00.

By agreement of the parties, and in accord with Pennsylvania law, the jury was also specifically asked, and properly found, that defendant Walmart did not have a good faith reason for refusing to pay their employees everything they had earned. Thus, the jury found that defendant Walmart abused their workers in precisely the manner for which remedies were created by the Pennsylvania Wage Payment and Collection Law. Following these valid jury findings, the Court must add statutory damages to the verdict.²

Defendant Walmart claims these verdicts are not subject to the liquidated damages provision of the WPCL.

The WPCL defines "wages" as:

"All earnings of an employee, regardless of whether determined on time, task, piece, commission, or other method of calculations. The term 'wages' also includes fringe benefits or wage supplements whether payable by an employer from his funds or from amounts withheld from the employee pay by the employer."

The term "Fringe benefits" is also defined, to include:

"Separation, vacation, holiday, or guaranteed pay; reimbursement for expenses; union dues withheld from the employee's pay by the employer and any other amount to be paid pursuant to an agreement to the employee...."³

² Oberneder v. Link Computer Corp., 548 Pa. 201, 696 A.2d 148 (1997).

³ 43 P.S. Section 260.2a.

Only in defense of litigation does Walmart claim that their employees' hourly earnings during guaranteed "paid rest breaks" are not "compensation." Every Walmart employee has been given an Associate benefit book called "My money." This book describes paid rest breaks as a supplement to employee wages. Under the heading: "Pay Programs" Walmart tells every employee: "In addition to the pay you receive for a regular days work, there are other programs and benefits that can supplement your income." "Paid Break Period: Take a break and get paid for it." The class employees claim for payment of wages earned but unpaid because they were required to miss rest breaks and to work without time clock records, is clearly seeking payment for "wages," "fringe benefits," and "wage supplements" as defined by the Act.

In cases brought by highly paid executives, the Federal District Court, the Supreme Court of Pennsylvania and the Superior Court of Pennsylvania have all held that "esoteric" fringe benefits are subject to the protection of the WPCL. These cases have held that the penalty of "liquidated damages" were mandated even though the individual executive plaintiffs had been regularly and fully paid their substantial base salaries.

In Regier v. Rhone-Poulenc Rorer, Inc.,⁴ the District Court for the Eastern District of Pennsylvania held that the WPCL protects stock options given "to a small member of key executives." That Court found that those highly paid executive were entitled to liquidated damages. The District Court said:

"The WPCL is the statutory vehicle for employees to recover wages and fringe benefits that are contractually owed to them by their employers. *See Wurst v. Nestle Foods Corp.*, 791 F. Supp. 123 (W.D. Pa. 1991). The statute itself does not create a separate right to compensation, but rather gives additional protections to employees by providing statutory remedies for an employer's breach of its contractual obligation to pay wages. *See Sendi v. NCR Comten, Inc.*, 619 F. Supp. 1577 (E.D. Pa. 1985), *aff'd*, 800 F.2d 1138 (3d Cir. 1986).

⁴1995 U.S. Dist. Lexis 9384.

The term "wages" is broadly defined by the WPCL. It encompasses "all earnings of an employe" and specifically includes "fringe benefits" and "wage supplements," which, in relevant part, are defined as "separation . . . pay . . . and any other amount to be paid pursuant to an agreement to the employe." 43 P.S. § 260.2a.

The Court's examination of the paucity of cases which interpret the WPCL reveals none which squarely address the question whether an employer's blocking of options such as the ones in this case subjects it to liability under the WPCL. However, because the Court predicts that the Pennsylvania Supreme Court would hold that the WPCL should be broadly construed to protect all forms of compensation due to employees, the Court concludes that the actions of defendants violated the WPCL."

Even non-monetary compensation is included:

"Non-monetary compensation is "earnings of an employe" which is included in the definition of "wages" contained in § 260.2a, and there is no reason to believe that the Pennsylvania Legislature intended § 260.3 to restrict the statute's coverage. *See Sanzone v. Phoenix Technologies, Inc.*, No. 89-5397, 1990 U.S. Dist. LEXIS 4656 (E.D. Pa. April 19, 1990) ("payment" in stock covered by WPCL).

Second, according to the rules of construction enacted by the Pennsylvania Legislature, the Court is directed to construe the WPCL liberally "to effect [its] objects and to promote justice." 1 Pa. Cons. Stat. Ann. § 1928(c). The Court concludes that the object of the WPCL is to provide employees with statutory remedies to recover compensation of all types which are owed to them by their employers. *See Barnhart v. Compugraphic Corp.*, 936 F.2d 131, 133 (3d Cir. 1991) ("Generally, the purpose underlying the WPCL is to protect employees, and to remove some of the obstacles to litigation facing many employees."). There is nothing in the statute itself or in its legislative history which suggests that the WPCL was intended to apply only to compensation which is "payable" in the manner defendants assert. The definition of "wages" contained in the statute includes "all earnings of an employe" and there is no reason to believe that cash compensation was intended to receive more protection than non-cash compensation."

Likewise in *Bowers v. National Technologies*,⁵ the District Court for the Eastern District of Pennsylvania held payments in the form of "put options" were wages under the Act. That Court said:

"Nor may plaintiff's claim to the stock repurchase payments be dismissed. Although defendants argue that such payments were not true "wages", earned by plaintiffs, I find to the contrary. For purposes of this motion for judgment on the pleadings, I conclude that the stock repurchase payments were offered by defendants to plaintiffs to encourage plaintiffs to join Phoenix as employees. Like other fringe benefits,

⁵ 690 F. Supp. 349 (1988).

which are offered to employees when they first join a company, the stock repurchase payments were not provided to the employees on a weekly or even annual basis. Nevertheless, they were certainly "wages" within the broad definition of the WPCL in that they were payments pursuant to agreement, and they were offered to plaintiffs as employees, and not for some reason entirely unrelated to their employment by Phoenix."

In Hartman v. Baker⁶ the Superior Court found that even an "equity interest" was included in the definition of wages under the WPCL and therefore subject to liquidated damages penalties. The Superior Court said:

"...we consider it worthwhile to set forth the statute's purpose and focus. "Pennsylvania enacted the WPCL to provide a vehicle for employees to enforce payment of their wages and compensation held by their employers." *Oberneder v. Link Computer Corp.*, 449 Pa. Super. 528, 674 A.2d 720, 721 (Pa.Super. 1996), affirmed, 548 Pa. 201, 696 A.2d 148 (1997). "The underlying purpose of the WPCL is to remove some of the obstacles employees face in litigation by providing them with a statutory remedy when an employer breaches its contractual obligation to pay wages." *Id.*, 674 A.2d at 722. The WPCL "does not create an employee's substantive right to compensation; rather, it only establishes an employee's right to enforce payment of wages and compensation to which an employee is otherwise entitled by the terms of an agreement." *Banks Engineering Co., Inc. v. Polons*, 697 A.2d 1020, 1024 (Pa.Super. 1997), appeal granted, 550 Pa. 715, 706 A.2d 1210 (1998)(citation omitted)."

"Like the plaintiff in *Bowers, supra*, the equity interest offered to appellee was payment pursuant to a binding agreement. As we stated previously, the equity interest was provided in exchange for a reduction in appellee's pay structure. This equity interest was offered to appellee as an employee, not for some reason unrelated to his employment with appellants. *See Bowers, supra*. Thus, pursuant to a liberal construction of § 260.2a of the WPCL and the reasoning in *Bowers, supra*, we agree with the Chancellor's determination that appellee's equity interest constitutes "wages" as defined by the WPCL."

The Supreme Court of Pennsylvania in Oberneder v. Link Computer Corp.⁷ held that the WPCL mandates attorney fees to the prevailing party. Oberneder was a claim by the company President for a percentage of the sale of a Division of his corporation. This percentage compensation claim was subject to the WPCL.

⁶ 2000 Pa. Super. 140, 766 A.2d 347 (2000).

⁷ 548 Pa. 201, 696 A.2d 148 (1997).

The law in its majesty applies equally to highly paid executives and minimum wage clerks. Just as highly paid executives' promised equity interests, or put options or percentage of sale proceeds are protected fringe benefits and wage supplements, so too the monetary equivalents of "paid break" time cashiers and other employees were prohibited from taking are protected fringe benefits and wage supplements. Even more clearly, the wages which were withheld because employees were forced to work "off the clock" are subject to mandatory liquidated damages. Clearly the WPCL liquidated damages provision applies to the verdict in this case.

Defendant claims that even though their employees did not receive all money earned, a fact now proven at trial, statutory liquidated damages are not required because the employees were paid some of what they were owed. Case law however demonstrates that highly paid executives may recover statutory liquidated damages even though they had timely and correctly received their entire substantial base pay.⁸ Defendant further claims in a post verdict revisionist rewriting of history that both the issue of entitlement and the amount of liquidated damages should have been presented for jury determination. Defendant is incorrect in these contentions.

Prior to trial the defense asked that the Court preclude any mention of liquidated damages, either entitlement or amount, before the jury. The Court entered the order the defendant requested. The defendant moved in limine to preclude plaintiff from presenting any evidence concerning their statutory liquidated damages claim to the jury. On August 18, 2006, during argument on that Motion in Limine, counsel for the defense said:

⁸ The inclusion in the statutory definition of "reimbursement for expenses, union dues" and "any other amount to be paid pursuant to an agreement" would be nonsense if any partial payment vitiated recovery under the act.

Ms. Cook: "In the Wage Payment and Collection Act there is a provision that provides that claimants can recover 25 percent or \$500.00 as a liquidated damages additional clause.

The Court: Alright.

Ms. Cook: Under the case law that calculation is a matter for the Court and not the jury so we are moving to exclude any references or talking about calculating these damages for the jury."

Less than a month later, at the pretrial conference of September 5, 2006, Ms. Cook, reiterated that defense request. At that conference the Court asked if plaintiff opposed defendant's "Motion in Limine to Preclude any Evidence in Support of Making Reference to Liquidated Damages." Mr. Donovan for the plaintiff class raised no objection. Because all parties agreed that the issue of the liquidated damages calculation was exclusively for judicial determination the Defendant's "Motion to Preclude any Reference to Liquidated Damages before the Jury" was granted.⁹

One month later, on Friday, October 6, 2006, counsel for the defendant further agreed that the determination of the number of people who would be subject to the liquidated damages calculation was also for the court to make. Counsel for the defense, Mr. Manne, stated:

"There is no use that the jury could make of that information so it wouldn't be appropriate for it to go to the jury. And if the jury findings on the special verdict question make the kind of damages a relevant issue post verdict, I agree that information could be provided to the Court with respect to the parties views as to the number of people implicated with respect to liquidated damages. I don't think there is any issue remaining for the jury with respect to that people. In short there is nothing to do here with the jury. Anything we have to do on liquidated damages can be done later."

Apparently, this statement which is clear and precise when read, was still confusing because the court said:

⁹ The order was entered on September 5, 2006 on motion control number 081291.

“So I am not quite following except to hear both counsel saying to me that insofar as there is any number of people to be determined for purposes of damages that are to be applied by the Court, that factual finding is a court factual finding.”

Mr. Mannie [for the Defense]: Agreed.

Mr. Donovan [for plaintiff]: Agreed.

The Court: Good.”

A party may not cavalierly diametrically change their position after a jury finds against them. Having argued strenuously for an order precluding any mention of liquidated damages before the jury, it is disingenuous to claim, on a Motion to Calculate and Assess Liquidated Damages after the jury has rendered a verdict and been discharged, that this issue should have been submitted for jury determination. Additionally, defendant’s position, repeatedly advanced prior to verdict, that liquidated damages is exclusively for Court determination is a correct statement of Pennsylvania law.¹⁰

Likewise, the defense correctly claimed pretrial that the question of whether meal and rest breaks were covered by the Wage Payment and Collection Act is also a matter of law for Judicial determination. On September 29, 2006, Mr. Manne for the defense said “It does need a ruling at some point, but in our view it is an issue of law so it doesn’t effect, in our view, any jury decision.”

On this motion plaintiff presented the expert affidavit of Dr. Scott Baggett calculating the number of class members to whom liquidated damages are owed, and determining the amount owed.¹¹ Dr. Baggett determined that 98.81 percent of the

¹⁰ The defense claim that plaintiff has waived their right to liquidated damages because evidence was not presented to the jury may be reasonably described as first eating the cake and thereafter taking the cake.

¹¹The strict rules of evidence are relaxed for purposes of preliminary questions and other matters which are to be decided by the Court. Accordingly affidavits are admissible.

126,005 class employees or 124,506 people had not been properly paid within the statutory period. Seeking liquidated damage for only one violation per class member regardless of the number of times a class member had been wronged he concluded that the sum of \$62,253,000.00 was owing.¹²

The defense at oral argument makes the remarkable claim that no class member exists.¹³ At argument, Defendant claims that even should the verdict be affirmed on appeal no class member is owed a penny of the millions dollars awarded by the jury. Defendant's own expert affidavit however belies counsel's words and acknowledges liquidated damages in an amount remarkably close to plaintiffs expert's calculation albeit slightly higher.¹⁴

The opinion expressed in Plaintiff's expert affidavit is valid. That opinion is grounded in an analysis Walmart's payroll records, the precise records used by both parties, admitted at trial, and on which the jury rendered its verdict. Walmart is required by law to accurately maintain these records. These records are the only documentation the defendant maintains for Federal Tax, State Tax, other regulatory, or internal management purposes. Federal, and State and municipal tax withholding, unemployment compensation assessments, social security deductions and employee contributions, are based entirely on the accuracy of these records. Presumably insurance premiums such as worker's compensation, and pension payments are also be based upon these records. The testimony clearly established that defendant's corporate management relied upon the

¹²To avoid any possibility of overlapping claims by class members plaintiffs are limiting their claims.

¹³ At oral argument on this motion defense counsel refused even to concede that Ms. Hummel herself the named class member who testified at trial, was individually entitled to recover any damages.

¹⁴ Exhibit 1 to the affidavit of Dr. Denise Martin presented by the defense, calculates the maximum awardable statutory damages as "62,652,000.00."

accuracy of these records for a myriad of purposes, including an internal analysis referred to as the "Shipley audit" which documented the company's abuse of their employees.

Walmart has presented no evidence whatsoever, either at trial or by affidavit on this motion, which has contested the accuracy of these records. Indeed the defense at trial claimed that the payroll records did not prove the reasons why breaks were missed or demonstrated only employee failure to properly record time. Walmart contended that the \$28,000,000.00 compensation hourly employees had earned but had not been paid represented dedicated employees voluntarily renouncing their breaks. This was the issue presented to the jury which found in favor of the plaintiff class.

The declaration of Scott Baggett concluded that hourly class associates experienced an average of 25 rest break violations per associate. The Act requires a \$500.00 penalty for each violation. Nonetheless plaintiff's are seeking only a single \$500.00 penalty per class member. Scott Baggett's affidavit based upon analysis of records defendant is required to accurately maintain, affirms that 98.81 percent of the hourly class associates experienced at least one rest break violation. All hourly associates have been sent class notices and few have opted out. Accordingly, Dr. Baggett calculated the \$500.00 statutory liquidated damages in the amount of \$62,253,000.00.¹⁵

In response the defense presented the Affidavit of Denise Neumann Martin a well qualified Harvard educated expert. She is a Senior Vice President of National Economic Research Associates, Inc. Ms. Martin had not been asked to calculate the number of class

¹⁵ The Court notes that even the lesser calculation of 25 percent of the jury award (which requires no calculation of the number of class members or the number of specific violations) would be \$12,392,135.25. The Court further notes in the event no award for liquidated damages is entered over \$6,000,000.00 would be added as interest. Given these calculations Walmart's adamant position that no sums whatsoever can be added to the verdict is inexplicable in the extreme.

members.¹⁶ Ms. Martin was asked only to criticize Dr. Baggett's opinion. Dr. Martin states: "At best they can only approximate the number of associates to include in a calculation of liquidated damages using extrapolated data and a probabilistic approach."¹⁷ Ms. Martin does not believe this is an appropriate method "to determine which unique associates maybe entitled to damages."¹⁸ Dr. Martin's affidavit does however acknowledge the extent of the class. She says: "However, even if we assume that every single one of the 125,304 class members who worked after January 1, 2002 should be entitled to receive \$500.00 in liquidated damages-which is itself a likely overstatement-total damages would only be about \$63,000,000.00."¹⁹ Her report, entered into evidence by the defense expresses her opinion that if every one of that 125,304 class members were entitled to claim liquidated damages the statutory award should be \$62,652,000.00 a sum greater than plaintiffs claim.²⁰ Accordingly, if each class member had not received their pay just once \$62,253,000.00 in liquidated damages must be awarded.²¹

Finally, defendant's remaining objections²² are either grounded in inaccurate statements of law or claims which do not exist in plaintiff's request.

¹⁶ Walmart offers no calculation whatsoever although the computer records remain accessible in their possession.

¹⁷ Page 1 Martin Affidavit.

¹⁸ Page 1 Martin Affidavit.

¹⁹ Page 4 Martin Affidavit.

²⁰ In awarding the required aggregate statutory damages the court need not determine which "unique associates" will recover. The jury in their award of \$46,000,000.00 was not asked to identify unique associates nor must they now be identified by the Court. The class members have been identified and provided with an option to opt out through repeated class action notices which have met all due process requirements. At a subsequent procedure class employees entitled to recovery will be paid.

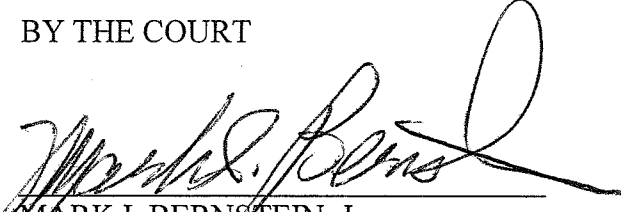
²¹ In enacting the WPCL the legislature did not provide for any free failure to pay wages. An employer who fails to pay an employee is not thereafter immunized from penalties for additional violations to that same employee in other pay periods or for additional violations as part of a systematic and continual practice. Nonetheless the Court awards only the lesser sum of one \$500 sum as liquidated damages per class member because that is what competent class counsel seeks and the defense has not raised this inadequacy issue.

²² Walmart claims that WPCL liquidated damages may not be awarded where statutory interest has also been claimed. In support of this position, defendant directs the Court to the case of Signora v. Liberty Travel, 2005 Pa. Super 366, 886 A.2d 284. The Signora decision holds that interest and statutory liquidated

The sum of \$62, 253,000.00 in liquidated damages pursuant to the WPCL is awarded together with attorney fees.

BY THE COURT

10/3/07
DATE


MARK I. BERNSTEIN, J.

damages may not be awarded on the same verdict for the same period of time. Plaintiff's herein are not seeking interest for any period for which they seek liquidated damages. The holding of Signora that a party may not make a double recovery is both salutary and irrelevant. Plaintiffs are seeking statutory mandated liquidated damages, not a double recovery. If interest were permitted \$6,000.00 would be added to the verdict.