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## Court Upholds \$187.6 Million Award to Wal-Mart Workers

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The state Superior Court has upheld a \$187.6 million class action award against retail titan Wal-Mart over allegations that its Pennsylvania employees were not properly compensated for off-the-clock work and missed rest breaks.

However, the court said the attorney fees must be recalculated.

The award in *Braun v. Wal-Mart Stores Inc.* and *Hummel v. Wal-Mart Stores Inc.* was the largest class action verdict in Pennsylvania's history, *The Legal* previously reported.

In 2006, a Philadelphia jury awarded \$78.5 million in compensatory damages to 186,000 current and former Wal-Mart associates for off-the-clock work and missed rest breaks between March 19, 1998, and May 1, 2006. The jury found Wal-Mart saved \$1,031,430 by not paying their employees for the time they worked off the clock, and Wal-Mart saved \$48,258,111 by prohibiting their employees from taking promised rest breaks, the decision said.

A total of 124,506 current and former Pennsylvania employees also qualified for the \$62.3 million in statutory damages levied under the state's wage payment and collection law, which penalizes employers that fail to pay wages by requiring them to pay liquidated damages of \$500 or up to 25 percent of the total amount of wages due, *The Legal* previously reported.

The Superior Court panel of Judges John L. Musmanno and Christine L. Donohue and Senior Judge James J. Fitzgerald III also found that the \$45.6 million in attorney fees Philadelphia Common Pleas Court Judge Mark I. Bernstein awarded to law firms Donovan Searles & Axler in Philadelphia, Abbey Spanier Rodd Abrams & Paradis in New York, Bader & Associates of Denver, and Azar & Associates in Aurora, Colo., must be recalculated.

Bernstein "inadvertently double-counted" the firms' contingency fee rates, the panel said in a 211-page per curiam opinion released Friday.

When Bernstein granted the class counsel's request to apply a contingency multiplier of 3.7 to their total counsel fees of \$12.34 million and \$3.58 million in expenses for the work, among others, of 26 lawyers and 17 paralegals, he did not take into account that Donovan Searles, as well as Abbey Spanier, already factored the risk of a contingency fee into their rates, the panel said. The other firms calculated their rates based on their complex litigation hourly rates.

"Because the instant lodestar was based in part on contingency rates, and not the rates paid by a client regardless of winning or losing, the court should not have enhanced the lodestar to the extent the enhancement double-counted counsel's contingent risk," the panel said.

The court also said that Bernstein did not provide enough justification for applying a 3.7 multiplier to the fees.

The panel also said it hoped that litigation over attorney fees would not result in a second major round of litigation.

The Superior Court said it would not address whether a 3.7 multiplier went too far. The panel noted Wal-Mart's argument that the 3rd U.S. Circuit Court of Appeals has predicted that the Pennsylvania Supreme Court would accept a 1.5 multiplier as the outer limit.

Wal-Mart expended \$10.05 million in attorney fees and \$7.01 million in expenses in defending the case, the opinion said.

"We're very happy with the court's decision upholding the judgment for the class," said Michael D. Donovan of Donovan Searles. "With respect to the attorney fees we're confident the court will award a fair fee when it gets back down to the trial court."

Wal-Mart counsel William H. Lamb of Lamb McErlane in West Chester, Pa., could not be reached immediately late Friday afternoon.

In the heart of the case, the court upheld the judgment for \$29.18 million awarded because of violations of common law, \$10.16 million in statutory interest and \$62.25 million in penalties under the state Wage Payment and Collection Act (WPCL).

But the court also said the judgment regarding the jury's verdict that Wal-Mart violated the WPCL involved a mathematical error and needed to be adjusted from \$49,568,541 to \$49,289,541.

While Wal-Mart argued that the proof offered by the class only showed individual proof, not classwide proof, 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 break truncated, the panel said. Wal-Mart had argued that individual employees would have to be questioned to determine if they were forced by managers to work through or truncate their breaks.

"Payroll hours were transmitted to corporate headquarters in Bentonville," the panel said. "Wal-Mart's own internal audits revealed violations of company policies regarding missed breaks and work-off-the-clock."

The court said that monetary payments for rest breaks, if part of a contract, qualify as wages under the WPCL.

While the Wal-Mart employees were at-will employees, they were subject to a unilateral contract because of a companywide policy on providing 15 minute rest breaks for employees who worked more than three hours and two 15 minute breaks for employees who worked more than six hours, the panel said. Wal-Mart promised to pay a full-time hourly employee for 40 hours of work in exchange for 37.5 hours of labor and 2.5 hours of rest, the panel said.

Among other arguments, Wal-Mart reasoned that it paid employees regardless of whether they took rest breaks, so the employees should have no statutory right under the WPCL for missed or shortened rest breaks, the opinion said.

"We disagree with Wal-Mart's argument that its refusal to provide or curtailing of a contractual, paid rest break negates its WPCL liability because 'employees are paid regardless of whether or not they take their rest breaks,'" the panel said.

Later in the opinion, the court said: "The WPCL does not permit an employer to escape liability when it receives the benefit of, for example, an employee's eight hours of labor when that employee agreed to be paid to work seven-and-a-half hours and to rest for one-half hour."

Class representative Michelle Braun worked at a Wal-Mart from November 1998 to January 1999 and class representative Dolores Hummel worked at a Sam's Club store, the opinion said

Among other testimony by employees, Braun said she would be locked in after the store was closed and her shift was technically over and directed to continue working on the floor, the panel said.

Some Wal-Mart employees testified on the retailer's behalf that they always received the breaks they were entitled to receive and even would be scolded if they did not document all the time they spent working.

*(Copies of the 211-page opinion in Braun v. Wal-Mart Stores Inc. and Hummel v. Wal-Mart Stores Inc. , PICS No. 11-1089, are available from The Legal Intelligencer. Please call the Pennsylvania Instant Case Service at 800-276-PICS to order or for information. Some cases are not available until 1 p.m.) •*