

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

IN THE MARION SUPERIOR COURT
CIVIL DIVISION, ROOM 5

BERDITA L. BAILEY and)
SUE RHODUS,)
)
Plaintiffs,)

CAUSE NO. 49D05-0008-CT-001177

v.)

WAL-MART STORES, INC., and)
SAM'S EAST, INC, d/b/a SAM'S CLUB)
and WAL-MART,)
MARIE WARD, and NATHAN CLARK,)
)
Defendants.)

FILED

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APR 22 2003

Doris Ann Miller
CLERK OF THE
MARION CIRCUIT COURT

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND
ORDER ON PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

Comes now Gary L. Miller, Judge of the Marion Superior Court, Civil Division, Room 5, and having set this matter before the Court on the matter of Plaintiffs' Motion for Class Certification (the "Motion"), which was heard by the Court on the 4th day of March 2003 and hereby issues these Findings of Fact, Conclusions of Law and Order. Pursuant to Trial Rule 23 of the Indiana Rules of Trial Procedure, the Court conducted an evidentiary hearing (the "Hearing") at which Plaintiff Berdita L. Bailey appeared in person and by counsel, and Plaintiff Sue Rhodus appeared by counsel. The Defendants each appeared by counsel. Prior to the Hearing the parties agreed, by mutual stipulation, to designate testimonial and documentary evidence to be considered by the Court in ruling upon the Motion. Therefore the Hearing consisted of oral argument and a limited presentation of portions of the evidence that the parties had

previously designated. Based upon the pleadings before the Court, the parties designated evidence, and the arguments of counsel, the Court now makes the following Findings of Fact, Conclusions of Law and Order:

FINDINGS OF FACT

1. The Plaintiffs designated representative testimony from 32 fact witnesses, 4 expert witnesses, and 98 documentary exhibits. The Defendants designated testimony from 33 fact witnesses, the Plaintiffs' 4 expert witnesses, and 123 documentary exhibits.
2. The testimony presented to the Court by the Plaintiffs and Defendants included several representatives from Wal-Mart's home offices; a district manager, former store managers and assistant managers, as well as employees from stores scattered throughout Indiana.
3. The documents designated by the parties included several hundred affidavits, management compensation agreements for Wal-Mart and Sam's Clubs, personnel records, employee handbooks, time clock records, complaint letters, and complaint records.
4. The designations also included a report of an internal audit conducted by Wal-Mart dated July of 2000.
5. The parties stipulated to an Order prior to the Hearing that all designated testimony, documents, and exhibits were admitted as evidence for purposes of the Hearing only.
6. On August 17, 2000, Berdita L. Bailey and Sue Rhodus filed their lawsuit in this Court. The Plaintiffs' First Amended Complaint alleges claims for

breach of contract, implied contract, unjust enrichment, conversion, and constructive fraud.

7. The lawsuit seeks redress for the named Plaintiffs and all other similarly situated hourly employees of Wal-Mart who allegedly suffered harm as a result of Wal-Mart's alleged pattern of wage abuses including the failure to record and pay for all of the time it requires its hourly employees to work, failing to permit hourly employees to take rest or lunch breaks to which they were entitled, and forcing them to work off the clock during breaks without compensation.
8. The lawsuit alleges that Berdita Bailey and Sue Rhodus were each required to work off the clock and missed portions of rest and meal breaks because the named Plaintiff's were asked to work instead of getting the full amount of their breaks.
9. The lawsuit alleges that Wal-Mart directs and controls the actions of its management down to the store level and had knowledge of these types of practices that are allegedly common in the stores.
10. The lawsuit sets out 11 common questions of fact and law to be decided in this case.
11. The Motion requests the Court to certify a class consisting of "all current and former hourly employees of Wal-Mart Stores, Inc., (including its operating divisions Sam's Club and Wal-Mart Supercenters) in the State of Indiana during the period August 17, 1994 to present."
12. Wal-Mart has 14 Sam's Club and 85 Wal-Mart stores in the State of

Indiana.

13. Wal-Mart's corporate headquarters is located in Bentonville, Arkansas.
14. Wal-Mart operates over 3000 stores in the United States.
15. Wal-Mart has estimated that approximately 166,000 hourly employees would be included within the proposed class definition of all hourly employees who worked for Wal-Mart stores or Sam's Club stores in the State of Indiana from 1994 through the present. Wal-Mart further estimates that approximately 82,400 hourly employees terminated employment at Indiana Wal-Mart or Sam's Club stores between August 1, 1998 and October 31, 2002, and that, as of December 19, 2002, Indiana Wal-Mart and Sam's Club stores employed approximately 30,800 hourly employees. Thus from two years immediately preceding the filing of the Plaintiffs' Complaint, to late last year, there were approximately 113,200 employees who worked for Wal-Mart or Sam's Club in Indiana.
16. Wal-Mart's management structure divides its retailing operations into operating divisions, each of which is headed by a divisional manager. Each division has a number of regions headed by a regional manager, and each region contains a number of districts, with each district being headed by a district manager. Each district manager maintains authority over approximately 5-7 individual Wal-Mart or Sam's Club stores. Each of the stores is headed by a store manager.
17. In addition to the store manager, Wal-Mart stores may, in some instances have a co-manager. Each store also has at least several assistant

managers who report directly to the store manager.

18. Wal-Mart has an extensive computer system that links all of its stores with its home office.
19. The Wal-Mart computer system reports sales and labor costs to the home office on a daily basis and compares each stores' budgeted labor costs with its actual results daily.
20. Each store has a time clock connected to the Wal-Mart computer system that is used to keep track of employee work hours, meal and rest breaks.
21. An employee's presence in the store is not only recorded by the employee's use of the time clock, but there are other employee functions that require the employee to log on to the computer elsewhere in the store in order that there will be a computer record of the employee's use of certain types of equipment in the store, when the employee used the equipment, and how long the employee used it.
22. Many employees are required to log on to the store computer for computer-based learning, which Wal-Mart uses to train employees while on the job. Wal-Mart also has its inventory scanners tied in to its computers and employees are required to log in to operate the inventory scanning system.
23. There are several ways to cross check whether some employees who have logged out for the day at the time clock might still be working in the store.
24. Wal-Mart's individual stores retain paper copies of payroll records.

Pursuant to a stipulation entered into between Wal-Mart and one of Plaintiffs' counsel in another case, Wal-Mart has agreed to retain its existing Indiana records for this litigation.

25. Wal-Mart has computerized records of its employees' time records for all time worked since January of 2001. Wal-Mart has agreed to keep and preserve this data for this litigation, and much of it has been turned over to Plaintiffs' counsel for review by their experts.
26. Every Wal-Mart employee has a badge that is used to swipe (or punch) in and out for beginning work, ending work, beginning a rest break prior to Feb 10, 2001, ending a rest break, beginning a meal break and ending a meal break.
27. Prior to February 10, 2001, the payroll records of every full time hourly employee (meaning one working a shift of 7 hours and 1 minute or more), should have recorded 8 punches for each day worked; 2 for clocking in at the beginning of the shift and then clocking out at the end of the shift; 4 for clocking in and out for two 15 minute rest breaks, and two for clocking in and out for a 1 hour meal break.
28. After February 10, 2001, the records of each full time employee should have just 4 punches since Wal-Mart stopped having employees record rest breaks after that date, so in examining the records one would expect to see just the 2 punches for beginning and ending work and the 2 for beginning and ending a meal break.
29. If any Wal-Mart employee works when they are not swiped in, he or she is

said to be working "off the clock."

30. Wal-Mart computers produce a weekly report called a Time Clock Archive Report for every store. The Time Clock Archive Report shows the time that every swipe of every employee is made. These reports are important documents because they are the basis upon which hourly employees are paid. These records are available in paper form at each of the Wal-Mart stores in Indiana up to December 31, 2000, and the records are available in electronic form after December 31, 2000.
31. Each day the Wal-Mart computer produces an exception report called a Time Clock Punch Exception Report for each store. This report shows all anomalies from the prior day, such as someone who did not swipe out when they left work, or someone who missed a meal break, or did not take a long enough meal break, or who missed a rest break. In order to close the payroll, these exceptions must be reconciled by the store personnel office.
32. Besides tracking missed lunches and breaks, the computers also track short breaks, short meals, short shifts, long meals, absences, and tardies whether they are excused or unexcused.
33. Both the computer and the time clock keep track of total hours worked cumulatively for each hourly employee during each day of the current payroll period so that the employee and managers know how many hours remain before overtime is incurred.
34. Wal-Mart's computers allow the employee punches to be edited from the

payroll office. The computer allows a punch to be placed on the employee's payroll record to clock the employee out.

35. After the daily exception report is issued, Wal-Mart personnel must manually reconcile the exceptions by appropriately showing the employee as clocked in or out at any time for the day when the error occurred.
36. Using the computer, Wal-Mart store employees can insert lunch hours and rest breaks where none appear; they can change the time people actually clocked out to show fewer hours than an employee actually worked.
37. Every rest break that is not taken by an employee that is shorter than scheduled, is extra time worked to the benefit of Wal-Mart and its management. Wal-Mart benefits by this in two ways; first, an employee is working who would normally not be, and second, another employee who was doing something else is not taken off that work to cover for the employee who missed the break. The effect is cumulative. Every time a break of any kind is missed, Wal-Mart allegedly profits twice.
38. Corporate-wide, Wal-Mart's divisional, regional, district, store managers, co-managers, and assistant managers are all compensated as salaried employees. All managers, except assistant managers, are eligible to receive a bonus based upon the performance of their assigned areas of responsibility.
39. In the case of a store manager or co-manager, the principal element of the bonus is directly tied to the profitability of the store the manager oversees.
40. For an average store, a manager's salary is just over half the manager's

annual pay. This salary/bonus structure existed in a comparable form in prior years.

41. Sam's Club has similar salaries, with a similar, heavily weighted bonus structure.
42. All other employees in Wal-Mart and Sam's Club stores are hourly employees.
43. Thus, the store manager's bonus is based upon the store's profitability. Much of the inventory ordering and other costs of operating the store are administered by Wal-Mart's headquarters in Bentonville. Labor cost is the largest expense factor which the store manager can control. The more managers save on labor cost, the more likely they are to get a bonus and the bigger the bonus will be.
44. John Lehman, a former manager with over 16 years experience, stated that labor cost is 70% of the costs which a store manager can control.
45. Approximately 61% of Wal-Mart's employees leave within a year after being hired.
46. Plaintiffs' expert on labor relations, Dr. William Cooke, attributes part of this phenomenon to the fact that if Wal-Mart promises its employees they will be paid for all of the work they do and then they are forced to work off the clock and/or miss promised rest and meal breaks, many will not tolerate this contradiction in terms of their employment. Thus, they leave. Those who stick it out allegedly undergo what Dr. Cooke describes as unobtrusive control and are willing to overlook the conflicting terms of their

employment in the hope that other benefits of the job will offset these problems.

47. The quantity of affidavits furnished the Court by Wal-Mart is not a random sampling of store employees.
48. Plaintiffs designated in excess of 50 complaint letters from Indiana hourly employees submitted to Wal-Mart management through its "open door" policy complaining that they had been forced to work off the clock or otherwise deprived of meal and rest breaks. Plaintiffs introduced logs of 142 telephone complaints, again submitted through the "open-door" policy, complaining of similar treatment.
49. An audit report detailing an audit conducted by Wal-Mart Internal Audit Services dated July 14, 2000, introduced by the Plaintiffs, concluded that out of 128 Wal-Mart stores audited, 127 "[s]tores were not in compliance with company and state regulations concerning the allotment of breaks and meals as 76,472 exceptions were noted . . . for a one-week period." The audit included three stores in Indiana where 1,699 exceptions were noted.
50. According to Wal-Mart policy, after seven hours, every hourly employee is entitled to receive two 15-minute rest breaks and a one-hour meal break. Employees are to be paid during their rest breaks, but not during their meal breaks.
51. Working less than 3 hours, an employee earns no breaks; from 3 to 6 hours an employee earns one 15-minute break; and at 6 hours and one

minute, up to 7 hours, an employee earns a 2-hour meal break and two 15-minute rest breaks.

52. Sam's Club employees have the same rest and meal break policies except that lunch is only 2 hours when a shift is more than 7 hours.
53. Wal-Mart has in place a number of written policies that ostensibly are designed to prevent abuses of hourly employee's work time.
54. Wal-Mart has vast experience in planning for labor costs in its stores. It is able to predict the staffing needs of each department in each store around the country through the retailing season cycles. Wal-Mart budgets the labor hours for each store on a weekly basis. The labor budget schedule for an individual store proposed by corporate headquarters is referred to as "Preferred Hours Budget".
55. The Preferred Hours Budget contains the preferred number of hours for all shifts, in all departments within each store, including coverage for the rest and meal breaks owed to the hourly employees.
56. Plaintiffs presented evidence at the Hearing that every store manager is required to create his own budget, and to be acceptable to his district manager; the budgeted amount of labor costs must be below the Preferred Hours Budget. As a result, many shifts in various departments at the store that were filled by the Preferred Hours Budget are not filled by the store manager's budget.
57. Generally, Wal-Mart expects its managers to increase sales each year, yet decrease labor costs by two tenths of a percent from the prior year's

figures.

58. Wal-Mart's home office in Bentonville monitors its payroll costs at each of its Wal-Mart and Sam's Club stores on a weekly basis using a form called a Customer Service Review.
59. District managers and store managers monitor payroll costs weekly, and sometimes daily.
60. When the Customer Service Review indicates that labor costs are over budget, then word is sent down through the chain of command, beginning at the division level through the region and district levels, to correct the problem.
61. When labor costs for some stores within a district are out of line, the district manager initiates a "chain call" requesting each of the managers, in turn, to pass along the word to other managers that they all must further reduce labor costs below what they have budgeted for the current period to make up for underperforming stores in the district.
62. Store managers end up being expected to generate increased sales, but budget anticipated labor costs as a smaller percentage of sales than in the prior year. This is alleged to be a difficult, if not impossible task when coupled with the "chain call" requests that store managers must further lower labor costs to make up for other stores in the district that are underperforming.
63. The store manager must keep the store profitable, or the manager's bonus will shrink or disappear. Since the bonus may be half of the manager's

total pay, the store manager must focus on store profit. Since labor is 70% of the controllable costs available to the store manager, the store manager must also focus on labor cost.

64. Time and a half overtime pay is due to hourly employees who work more than 40 hours in any weekly pay period. An employee could work four 10-hour days or five 8-hour days and the result is the same, no overtime.
65. Wal-Mart and Sam's Club store management work extremely hard to avoid paying overtime. The record is replete with evidence of employees being warned about working more than 40 hours and getting themselves into overtime pay eligibility. In many instances, employees testified that they would be reprimanded if they worked more than 40 hours.
66. The evidence suggests that Wal-Mart stores are knowingly understaffed in proportion to their needs; and that this is a common practice throughout Indiana and other states.
67. To remain profitable, and to increase sales, a store needs to be properly staffed. If a store is not properly staffed, then allegedly those employees who are there must do more than can reasonably be expected of them within a normal work shift.
68. In most stores, the employees are allegedly faced with the dilemma of having more work to do in a shift than they can complete; yet, generally, they may not work overtime to finish it.
69. Many witnesses testified that they were told to "Do whatever it takes" and that this was generally understood as a direction to find some way to

accomplish one's assigned work under circumstances where it was known that it could not be accomplished within the normal work shift; yet the employee could not work overtime to complete it.

70. To "Do whatever it takes" allegedly places the employee in an impossible position. If the employee remains at work on the clock, they may be reprimanded for working overtime. If they leave without finishing, they may be reprimanded for not completing their assigned work. Some of Plaintiffs' witnesses have testified that an employee who wants to remain employed at Wal-Mart will do the work and not remain clocked in after their scheduled shift is over.

71. Plaintiffs allege that the stores have developed a variety of tactics to allow or force employees to "Do whatever it takes." Some of these were described in testimony as follows:

1. Employees not being given rest breaks;
2. Employees being called back from rest breaks before they are over;
3. Employees not being given meal breaks;
4. Employees who have clocked out for the day being asked to do additional work before leaving;
5. Employees voluntarily swiping out on the time clock and then returning to work off the clock;
6. Employees arriving for work at the store, but not swiping in until after work has commenced;
7. Employees working overtime and then knowingly allowing his/her

time to be edited, deleting hours from the employee time record so that they will not have recorded more than 40 hours;

8. Store managers and store office personnel editing missed meals and rest breaks into employee time records without confirming whether the employee actually took the meal or rest break;
 9. Store managers and store office personnel editing employee time records to show the employee as clocking out immediately after arriving at work or immediately after the end of the lunch break because the employee forgot to clock out;
 10. Requiring employees to perform Wal-Mart charity work on their own time;
 11. Requiring employees to attend mandatory store meetings without being on the clock;
 12. Locking employees in the stores overnight and then not opening the store on time the next morning;
 13. Supervisory personnel refusing to approve overtime after it is earned; and
 14. Supervisory personnel promising to "look into" employee claims for overtime and then leaving the claim unresolved until the employee stops asking.
72. Each of the alleged tactics described above allegedly has the same end result of not compensating hourly employees for actual time worked; or not providing employees earned meal and rest breaks in order to lower

