

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

DANIEL SEPULVEDA, ANITA PEREZ AND
ANTONIO PRANGNER, INDIVIDUALLY AND ON
BEHALF OF ALL SIMILARLY SITUATED INDIVIDUALS,
Plaintiffs-Appellants,

v.

WAL-MART STORES, INC.,
Defendant-Appellee.

On Appeal From the United States District Court
For the Central District of California
No. CV 04-1003 DSF (Ex)

APPELLANTS' OPENING BRIEF

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STATEMENT OF JURISDICTION

The district court had jurisdiction over this wage and hour labor rights action pursuant to 28 U.S.C. § 1332. It entered its order denying class certification on May 8, 2006.

Plaintiffs petitioned for permission to appeal pursuant to Federal Rules of Civil Procedure Rule 23 (“Rule 23”) subsection (f), on May 31, 2006. On August 11, 2006, this Court granted permission to appeal. This Court has jurisdiction under 28 U.S.C. § 1292(e).

STATEMENT OF ISSUES PRESENTED

1. Where a substantial claim for injunctive relief is made by current employees, does subsequent employee turnover preclude Rule 23(b)(2) class certification?
2. Is the asserted “complexity” of determining back pay an appropriate factor in Rule 23(b)(2) analysis?
3. Did the district court err when, despite its identification of numerous common questions, it refused to consider particular issue certification under Rule 23(c)(4)?
4. Did the district court misread the California Supreme Court’s mandate in *Sav-On Drug Stores v. Superior Court*, 34 Cal.4th 319 (2004),

when it concluded that an individualized inquiry was required to determine liability for each class member?

STATEMENT OF THE CASE

Plaintiffs, Assistant Managers at California Wal-Mart stores, filed this class action against Defendant Wal-Mart Stores, Inc., alleging that Wal-Mart had erroneously classified them as exempt, thereby denying them the protection of California's wage and hour laws. *See* Cal. Labor Code §§ 510, 1194, 1194.5 (overtime); *id.* §§ 512, 226.7 (meal and rest breaks); *id.* §§ 226, 226.3 (provision of wage and hour statements); *id.* §§ 201-203 (waiting time penalties); *id.* §§ 226, 1174, 1174.5 (maintenance of payroll records); Cal. Civ. Code §§ 3336, 3294 (conversion); Cal. Bus. & Prof. Code §§ 17200-17210 (unfair competition). The district court denied certification, finding that injunctive relief and common issues did not predominate.

STATEMENT OF FACTS

A. THE CHALLENGED POLICY

1. Wal-Mart's Corporate Structure

Wal-Mart Stores, Inc. ("Wal-Mart") is a retailer with its Home Office in Bentonville, Arkansas. Wal-Mart stores are grouped into large divisions, then smaller regions within each division, and finally districts within each

region. Each district contains six to ten stores. *Sepulveda v. Wal-Mart Stores, Inc.*, 237 F.R.D. 229, 236 (C.D. Cal. 2006).

In California, Wal-Mart operates more than 160 stores. California and several other states are within Wal-Mart's Division "A." California stores are divided into two regions, with Northern California stores in Region 19 and Southern California stores in Region 16. *Id.*

Each district has a district manager (DM) who has an office at one of the stores in the district. Below the DM, each store has one store manager (SM), and some stores also have one or two co-managers. Each store also has several Assistant Managers ("AMs") and a number of other, non-salaried hourly employees or associates. *Id.* at 236-37.

Most of the California stores are "Division 1" stores, which contain the main store area and several specialty areas such as Photo or Tire and Lube Express. California also has a few Wal-Mart Supercenters, which are similar to Division 1 stores but also contain a grocery section. The main area of each store has a number of separate merchandise departments, which are organized into areas including softlines (apparel and related departments), hardlines (hardware and related departments), and homelines. The front end area of each store includes cash registers, a customer service counter, a layaway counter, and cart pushers and greeters. The back office

area of each store includes several offices and a training room. Each store also has a stockroom. *Id.* at 237.

Each SM is responsible for his or her entire store. In turn, each AM works in one area of the store, such as hardlines, sofflines, front end, operations (or the back office), or the overnight shift. *Id.*

2. The Putative Class and the Plaintiffs

The putative class consists of all current and former AMs employed at any time since January 14, 2000 to the present (Class Period), at Wal-Mart stores in California. *Id.* at 232. Although, as the district court found, there are 1,200 current AMs, because of the rate of employee turnover during the Class Period, there are approximately 2,750 putative class members. *Id.* at 242, 245.

Wal-Mart has classified all AMs as exempt since the position was created, and it did not conduct any studies of AMs' actual individual work or job duties before making that classification. *Id.* at 239. Indeed, Wal-Mart's only two studies concerning AM duties were both conducted in response to

litigation.¹ *Id.* The district court found that Wal-Mart classified AMs as exempt based on grounds generally applicable to all AMs. *Id.* at 245.

The named plaintiffs seeking to represent the class, Daniel Sepulveda and Antonio Prangner, were both current employees when the Complaint was filed.² Collectively, they worked as AMs in eight of Wal-Mart's California stores. *See id.* at 240-41. All of Mr. Sepulveda's and Mr. Prangner's annual AM performance evaluations rated them as meeting or exceeding Wal-Mart's expectations for the AM position. ER 74 (¶ 4); ER 62 (¶ 3).

Both Messrs. Sepulveda and Prangner have declared that their purpose for bringing this case and pursuing it is to force Wal-Mart to change its policy of not paying AMs overtime for the many overtime hours worked by the class, and to ensure that Wal-Mart follows the law. *Sepulveda*, 237 F.R.D. at 245; ER 82 (¶ 33); ER 71 (¶ 35); *see also* ER 81 (¶ 31) ("We

¹ While plaintiffs disagree with the conclusions of these expert studies and question their methodology, the district court did not rely on Wal-Mart's expert's report in its class certification decision. *Id.* at 236.

² Mr. Sepulveda began working as an AM for Wal-Mart in 1998, and left Wal-Mart voluntarily in late 2004. *Sepulveda*, 237 F.R.D. at 240; ER 74 (¶ 5). Mr. Prangner began working as an AM in 1999 and is a current employee. *Sepulveda*, 237 F.R.D. at 240. However, he was injured at work while unloading freight and is currently on disability leave. *Id.* at 241; ER 68-69 (¶ 30). The original complaint was filed January 14, 2004. ER 2, 3 (¶ 9). Thus, both Messrs. Sepulveda and Prangner were employed by Wal-Mart when the complaint was filed.

[Plaintiffs] all spoke about ensuring that Wal-Mart abide by the labor laws and hoped we could change Wal-Mart's practice of not paying overtime to AMs").

The district court found that California AMs regularly work an average of 52 hours per week, and may work 80 hours or more per week during busy periods. *Sepulveda*, 237 F.R.D. at 240. AMs, however, are not paid for overtime or given wage and hour statements, and many AMs rarely receive uninterrupted breaks. *Id.*

3. AMs' Limited Authority Under Wal-Mart's Centralized Decision Making and Control Structure

Wal-Mart's Home Office establishes many standard operating procedures, metrics, and performance targets to run its stores. *Id.* at 237.

The Home Office decides what merchandise is sold in Wal-Mart stores. While a store may stock some merchandise not sold in other stores, only merchandise approved by the Home Office may be sold. The display arrangements for merchandise are also set by the Home Office through modulars, or detailed display plans, issued to each store. The store management has some discretion to make minor changes to the modulars or to create its own modulars for seasonal merchandise or flex spaces. *Id.*

Prices are set primarily by the Home Office. The Home Office sets base prices for all merchandise. A store may then make adjustments to account for local competitors, on the basis of guidelines issued by the Home Office. Rollbacks, or price reductions, are set by the Home Office. The Home Office controls many aspects of the physical environment in Wal-Mart stores, including the fixtures, store temperature, food storage temperature, and music. *Id.*

The Home Office constantly receives information about all computer transactions in every store, including all cash register sales, employees logging in or out of registers, employees clocking in or out, and inventory scanning. Many, though not all, items are kept in stock through a perpetual inventory system, whereby items are reordered automatically once a store has sold a certain quantity. AMs are responsible to some extent for ensuring that items are ordered when necessary. *Id.*

SMs, DMs, and regional managers routinely tour their stores to ensure adherence to Wal-Mart standards and policies. Each store is thoroughly audited periodically using a standard set of criteria. *Id.* at 238.

