

ARIZONA SUPERIOR COURT, PIMA COUNTY

JUDGE: HON. CARMINE CORNELIO

CASE NO. C20014379

COURT REPORTER: NONE

DATE: December 23, 2004

FILED  
PATRICIA A. NOLAND  
CLERK, SUPERIOR COURT  
04 DEC 23 AM 11: 38  
B.R. ST. GERMAINE, DEPUTY

PENNY OSUNA, on her own behalf and on behalf  
of all others similarly situated  
Plaintiff

vs.

WAL-MART STORES, INC.; SAM'S CLUB  
Defendant

---

**RULING**

---

**IN CHAMBERS, UNDER ADVISEMENT RULING ON PLAINTIFF'S MOTION FOR CLASS CERTIFICATION:**

*BACKGROUND*

This case was filed on September 18, 2001, by Plaintiffs Patricia Carillo, Brian Thacker, Staci Thacker, and Tamela Wyble against Defendants Wal-Mart and Sam's Club (collectively, "Wal-Mart"). Plaintiffs alleged five causes of action in their Complaint: (1) Breach of Written Employment Agreement; (2) Breach of Oral Contract; (3) Quantum Meruit; (4) Restitution; and (5) Breach of Implied Covenant of Good Faith and Fair Dealing. In essence, Plaintiffs claimed Wal-Mart was unjustly enriched and breached a contract by forcing employees to work off-the-clock and failing to pay them for all time worked.

On June 12, 2002, Judge C. Browning granted Defendant's Motion to Dismiss as to all claims of Patricia Carillo, Brian Thacker and Staci Thacker, finding that the claims were barred by the one-year statute of limitations as to actions on breach of oral or written employment contracts in A.R.S. 12-541(3). The same Order dismissed Tamela Wyble's claims for breach of employment agreement and breach of the implied covenant of good faith and fair dealing.

Mary Mieler/llm  
Judicial Administrative Assistant

## RULING

Page: 2

Date: December 23, 2004

Case No: C20014319

---

Plaintiffs filed a Motion for Reconsideration on August 26, 2002, arguing that A.R.S. 12-541(3) applies only to Plaintiffs' contract causes of action. Consequently, Plaintiffs contended, their equitable claims should survive the Motion to Dismiss. Judge Browning denied the Motion for Reconsideration, finding that the one-year statutory period also applied to Plaintiffs' quasi-contractual claims. (Citing *Costanzo v. Stewart*, 9 Ariz. App. 430, 453 P.2d 526 (1969)).

Plaintiff filed a First Amended Complaint on October 31, 2003, adding Plaintiff Penny Osuna and removing Plaintiffs Carillo, Brian Thacker and Staci Thacker. Upon stipulated motion, a Second Amended Complaint was filed on January 14, 2004. That pleading removed Plaintiff Tamela Wyble, leaving only Penny Osuna as Plaintiff. In the Second Amended Complaint, Plaintiff alleges: (1) Breach of Implied-at-law Contract;<sup>1</sup> (2) Quantum Meruit; and (3) Restitution.

Now before the Court is Plaintiff's Motion For Class Certification. Plaintiff proposes to represent a class of "all current and former hourly employees of Arizona Wal-Mart stores during the applicable period of limitations." The Court has reviewed and considered Plaintiff's Motion, Defendant's Response, Plaintiff's Reply, Defendant's Surreply, and Plaintiff's Sur Surreply. Further, the Court heard oral argument on December 14, 2004. For the reasons set forth below, Plaintiff's Motion for Class Certification is denied.

### DISCUSSION

To be properly maintained as such, a class action must satisfy all the requirements of Ariz. R. Civ. P. 23(a), and, in addition, meet the requirements of one of the three subdivisions of Rule 23(b). The determination of whether these prerequisites are satisfied is within the discretion of the trial court. *London v. Green Acres Trust*, 159 Ariz. 136, 765 P.2d 538 (App. 1988). Rule 23(a) provides that to

---

<sup>1</sup> Prior to the filing of the Second Amended Complaint, this Court informed the Plaintiffs that the Amended Complaint could not be used to resurrect theories or claims dismissed by Judge Browning.

Mary Mieler/llm  
Judicial Administrative Assistant

RULING

Page: 3

Date: December 23, 2004

Case No: C20014319

---

certify a class action the Court must find: (1) the class is so numerous that joinder of all members is impracticable (“numerosity”), (2) there are questions of law or fact common to the class (“commonality”), (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class (“typicality”), and (4) the representative parties will fairly and adequately protect the interests of the class (“adequacy”).

In this case, in addition to the Rule 23(a) requirements, Plaintiff is seeking to certify the class under the third prong of Rule 23(b). That prong requires that the plaintiff show that the common questions of law or fact predominate over questions affecting only individual members of the class (“predominance”), and that the class action is superior to other methods of adjudicating the controversy (“superiority”). Ariz. R. Civ. P. 23(b)(3).

“If the plaintiff seeks to bring a class action, he bears the burden of showing that his case is appropriate for class action certification.” *Markiewicz v. Salt River Valley Water Users’ Ass’n*, 118 Ariz. 329, 341 (App. 1978). Therefore, Ms. Osuna bears the burden of convincing the Court that each requirement of Rule 23(a) and Rule 23(b)(3) has been met.

Plaintiff’s Motion for Class Certification urges that this Court must accept *all* of Plaintiff’s factual allegations as true for the purposes of the decision on certification. (Citing an *unpublished* case decision). The Court believes, however, that its role is considerably broader and more involved than merely accepting all of Plaintiff’s allegations at face value. The United States Supreme Court has recognized that a class should be certified only “if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.” *Gen. Tel. Co. Of S.W. v. Falcon*, 457 U.S. 147, 161 (1982). To undertake that rigorous analysis, the Court must evaluate the evidence proffered by Plaintiff against the elements of the Plaintiff’s claims and the Plaintiff’s burden of proof.

*NUMEROSITY*

Plaintiff proposes to represent a class of “all current and former hourly employees of Arizona

---

Mary Mieler/llm  
Judicial Administrative Assistant

## RULING

Page: 4

Date: December 23, 2004

Case No: C20014319

---

Wal-Mart stores during the applicable period of limitations.” This class, as defined, could range from between 31,000 to 55,000 individuals located throughout Arizona.

If the Court accepts the Plaintiff’s definition of the class, then the requirement of numerosity has been met. The class definition, however, is overly broad and is not tied to Plaintiff’s theories of recovery. The potentially aggrieved employees are only a subset of the current class definition unless one assumes, which this Court is unwilling to do, that every current and former hourly employee is aggrieved. Further, the Court expresses doubt that there exists any definition by which the class can be identified, without conducting an inquiry of each and every member. *See, e.g., Petty v. Wal-Mart Stores, Inc.*, 773 N.E.2d 576 (Ohio App. 2002) (“As defined, the persons who were exposed to the conduct would be a subset of the class rather than the class. If this type of class were permitted, plaintiffs would be able to define a class as broadly as possible in the hope of netting a certain percentage of injured members. This practice would render the class action vehicle unduly cumbersome.”) Given the current class definition, this Court questions whether the numerosity requirement has been met. If this were the only obstacle to certification, redefining and/or limiting the class, and/or creating subclasses might be a worthwhile endeavor. There are, however, other obstacles to certification.

### COMMONALITY

The “commonality” requirement of Rule 23(a)(2) requires only that there be one or more issues of either law or fact that are common to the class members. Plaintiff suggests the following common issues: (1) Is Wal-Mart contractually obligated to pay the Class for all time worked for Wal-Mart?<sup>2</sup> (2) Is Wal-Mart contractually obligated to provide rest and meal breaks to the Class?<sup>3</sup> (3) Do Wal-Mart stores in Arizona have a systemic practice of understaffing? and (4) Has Wal-Mart been unjustly

---

<sup>2</sup> Defined this way, the Plaintiffs are, in part or in whole, attempting to resurrect already dismissed claims.

<sup>3</sup> *Id.*

---

Mary Mieler/llm  
Judicial Administrative Assistant

R U L I N G

Page: 5

Date: December 23, 2004

Case No: **C20014319**

---

enriched by not fully compensating its hourly employees for all time worked and failing to provide rest and meal breaks? The commonality requirement has been held to be a low hurdle and is to be liberally construed. *Godbey v. Roosevelt School District No. 66 of Maricopa County*, 131 Ariz. 13, 638 P.2d 235 (App. 1981). Because this Court finds that at least one question, regarding unjust enrichment, is common, the commonality requirement has been met.

*TYPICALITY*

To assess whether the “typicality” requirement is satisfied, the Court must examine whether: (1) common issues of law and/or fact are presented; (2) the interests of the proposed class representative are antagonistic to those members of the putative class; and (3) absent class members have suffered the same type of injury as the class representative. *Lennon v. First Nat’l Bank of Arizona*, 21 Ariz.App. 306, 518 P.2d 1230 (App. 1974). The claims or defenses need not be identical. *Id.*

Defendant argues that Plaintiff is not typical of the class. Defendant argues, among other things, that she has admitted in her Deposition that: (1) her experience at Wal-Mart varied by department; (2) she did not work off-the-clock, or could not recall whether she worked off-the-clock, in every department in which she worked; (3) she has never worked in Sam’s Clubs, and (4) most of the managers listed in her disclosure statement did not ask her to work off-the-clock.

Here, Ms. Penny Osuna’s claims arise from the same alleged course of conduct or corporate culture that gives rise to the claims of the other class members. Common issues of law and fact exist as to Wal-Mart’s alleged conduct and unjust enrichment. Although there exist some differences between Ms. Osuna’s experience and the experiences of other class members, the Court finds that the requirement of typicality has been met.

*ADEQUACY*

The representative parties must fairly and adequately protect the interests of the class. Ariz. R. Civ. P. 23(a)(4). This requirement asks whether the class representative has any kind of material conflict

Mary Mieler/lm

Judicial Administrative Assistant

## RULING

Page: 6

Date: December 23, 2004

Case No: C20014319

---

of interest with the class with respect to the common questions involved. *London V. Green Acres Trust*, 159 Ariz. 136, 765 P.2d 538 (App. 1988). Further, the Court must find that counsel will vigorously prosecute the action on behalf of the class. *Id.*

This Court finds both Plaintiff and her counsel adequate. Defendant argues that Ms. Osuna is an inadequate class representative because she has a conflict with hourly supervisors who may have authority to schedule and control other associates' rest breaks and meal periods and who may have responsibility for enforcing Wal-Mart's policy barring off-the-clock work. This Court believes that this hypothetical or potential conflict does not rise to the level necessary to deny certification on the basis of inadequacy. Further, this Court finds that Plaintiff's counsel are more than competent to vigorously prosecute the action.

### *PREDOMINANCE and SUPERIORITY*

Rule 23(b)(3) permits a class action where questions of law or fact common to the class predominate over questions that affect only individual members, and the class action is a superior vehicle for resolving the controversy. It is not necessary for all questions of law or fact be common amongst class members, but only that the common issues predominate in the action. *Home Federal Sav. and Loan Ass'n v. Pleasants*, 23 Ariz.App. 467, 470, 534 P.2d 275, 278 (1975), *overruled on other grounds*. Here, this Court finds that common issues do not predominate, for the reasons set forth below.

### *Causes of Action*

Plaintiff alleges three counts: (1) Breach of Implied-at-law Contract; (2) Quantum Meruit; and (3) Restitution. Defendant argues that Plaintiff's Complaint alleges, effectively, only a single cause of action for unjust enrichment.

In support of its argument, Defendant cites Arizona law holding that an implied-in-law (or quasi) contract is a means of redressing an unjust enrichment, not a separate claim: it is a legal fiction used to impose "a duty . . . in equity upon a party to repay another to prevent his own unjust enrichment".

---

Mary Mieler/llm  
Judicial Administrative Assistant

## RULING

Page: 7

Date: December 23, 2004

Case No: C20014319

---

*Pyeatte v. Pyeatte*, 135 Ariz. 346, 353 (App. 1983). Further, restitution is a *remedy* for unjust enrichment, not a cause of action. *Mountain States Tel. & Tel. Co. & Ariz. Corp. Comm'n*, 124 Ariz. 433, 435 (App. 1979). Finally, quantum meruit is a *measure* of damages. *Landi v. Arkules*, 172 Ariz. 126, 135 (App. 1992).

Plaintiff posits that her implied-at-law contract claim is separate and distinct from her claim for unjust enrichment. She argues that an implied-at-law contract exists between Wal-Mart and its employees which obligates Wal-Mart to pay the employees for all missed rest breaks, meal periods and off-the-clock work. That position, according to Plaintiff, is based on the Arizona Legislature's statement in A.R.S. § 23-1501 that "[t]he public policy of this state is that . . . [t]he employment relationship is contractual in nature." Section 23-1501 falls under the Employment Protection Act and is titled, "Severability of employment relationships; protection from retaliatory discharges; exclusivity of statutory remedies in employment." Additionally, Plaintiff's counsel cited A.R.S. § 23-355 for the proposition that an employer has an obligation to pay all wages due. A.R.S. § 23-355. (Titled "Action by employee to recover wages; amount of recovery" and stating "[i]f an employer, in violation of the provisions of this chapter, shall fail to pay wages due any employee, such employee may recover in a civil action against an employer . . ."). Plaintiff cites no case law, nor any other authority, wherein those statutes have ever been used to establish the existence of an "implied-in-law" contract.

As previously noted, earlier in this case Judge Browning dismissed Plaintiffs' claims for breach of oral and written contract. Plaintiff's attempt to resurrect the contract claim via the new (and novel) argument that a statement concerning public policy in a statute is sufficient to provide contract formation is transparent and rejected. Under the Plaintiff's analysis, despite Judge Browning's rulings, she can continue to base a contract claim on Wal-Mart's policy to provide rest periods and meal time breaks as an "implied" contract. The Court disagrees that Plaintiff is able to do so. Therefore, the Court finds that there is no separate claim for contract in the present case that would remove individualized review of the

Mary Mieler/llm

Judicial Administrative Assistant

## RULING

Page: 8

Date: December 23, 2004

Case No: C20014319

---

facts and law. Rather, there exists only that quasi-contract which can be implied by a Court within the realm of an unjust enrichment claim.

To maintain her claim for unjust enrichment under Arizona law, Ms. Osuna must establish the following five elements: (1) an enrichment; (2) an impoverishment; (3) a connection between the enrichment and the impoverishment; (4) absence of justification for the enrichment and the impoverishment; and (5) an absence of a remedy provided by law. *Cnty. Guardian Bank v. Hamlin*, 182 Ariz. 627, 898 P.2d 1005 (App. 1995). Additionally, the mere existence of an enrichment and an impoverishment is not sufficient. Rather, “an obligation to pay, ordinarily, will not be implied in fact or by law if it is clear that there was indeed no expectation of payment, that a gratuity was intended to be conferred, that the benefit was conferred officiously, or that the question of payment was left to the unfettered discretion of the recipient.” *Pyeatte*, 135 Ariz. at 353.

In this case, there are three situations wherein Plaintiff alleges that Defendant has been unjustly enriched at the expense of its hourly employees: (1) off-the-clock work; (2) missed meal breaks; and (3) missed rest breaks. It is Plaintiff’s position that employees are entitled to unpaid meal breaks and paid rest breaks. Further, Plaintiff urges that, although employees were paid, the corporate culture/policy was such that it, essentially, forced employees to miss these breaks and work, thereby creating an unjust enrichment to Defendant. Plaintiff proposes to meet her burden of proof (and avoid the requirement of individualized inquiry) by offering the testimony and reports of four experts:

- (1) William N. Cooke is offered as an expert in labor relations and workplace culture. He will testify regarding the corporate culture Wal-Mart has created in which hourly employees are expected to work off-the-clock;
- (2) Dr. Martin Shapiro has qualified as an expert in litigation concerning numerical analysis, probability theory, and statistics. He proposes to examine the records that Wal-Mart generates (including time and payroll records and cash office records) and identify and quantify missed rest and meal breaks and instances of off-the-clock work class-wide;
- (3) John Zogby is, according to Plaintiff, “nationally renowned for his surveys and polls.” He

Mary Mieler/llm  
Judicial Administrative Assistant

## RULING

Page: 9

Date: December 23, 2004

Case No: C20014319

---

plans to conduct a confidential telephone poll of randomly-selected Wal-Mart employees and, by that poll, statistically quantify off-the-clock work that is not discernible from the electronic data; and

(4) Bernard Graber is, Plaintiff asserts, an expert in industrial engineering, work force management and labor standards. He opines that he can quantify the amount of hours necessary to complete the work at Wal-Mart stores and compare that number to Wal-Mart's "preferred, scheduled and actual" hours as reproduced in Wal-Mart's computer-generated time reports. From that comparison, Mr. Graber will quantify Wal-Mart's practice of understaffing as it affects the class as a whole and provide the number of hours that Defendant has been enriched.

Based on the data and opinions that will be generated by her four experts, in addition to Wal-Mart's own business records, Plaintiff proposes that the experts have "formulaic methodologies" by which they can establish the elements of her claims on a class-wide basis, thereby obviating individualized proof of the elements of her claims.

A number of courts have concluded that unjust enrichment claims are inappropriate for class certification because of the need for individualized proof. *See, e.g., In re Baycol Prods. Litig.*, 218 F.R.D. 197 (D.Minn. 2003) (individual issues predominate as to whether class members were injured); *Clopton v. Budget Rent A Car Corp.*, 197 F.R.D. 502 (N.D. Ala. 2000) (claims "would rise or fall based almost entirely on highly individualized circumstances"); *In re Old Kent Mortgage Co. Yield Premium Spread Litig.*, 191 F.R.D. 155, 164 (D.Minn. 2000) (liability "can be determined only on the individualized facts of each . . . transaction"). "Unjust enrichment is an equitable doctrine that . . . depends upon the analysis of each individual situation." *Clay v. Am. Tobacco Co.*, 188 F.R.D. 483, 500 (S.D. Ill. 1999). "This individual inquiry presents more than a simple question of whether a particular plaintiff can prove damages. Rather, it bears directly on the question of the defendants' liability for unjust enrichment to a particular plaintiff." *Id.* at 501.

This Court does not accept that Plaintiff's experts' "formulaic methodologies" can supplant the individualized inquiry necessary to establish Wal-Mart's liability for unjust enrichment. It is easy to conceive of any number of reasons why an employee might have chosen to skip a rest break, skip a meal

---

Mary Mieler/llm  
Judicial Administrative Assistant

## RULING

Page: 10

Date: December 23, 2004

Case No: C20014319

---

break, or even provide gratuitous work off-the-clock. The various affidavits submitted by Defendant (whether credible or not) set out some catalog of the variety of reasons there may be no expectation of payment. Plaintiff's mere showing that these events did occur cannot, in itself, establish general liability nor quantify damages.

Plaintiff argues that all the potential class members had a general expectation to be paid for all time worked and that the law requires it. The fallacy of the Plaintiff's argument lies in part with the fact that employees were, in fact, paid for "missed" meal times and breaks. Individualized issues, then, exist as to whether an employee who missed a break (or took a five-minute rather than a fifteen-minute break) had an expectation of additional payment. Similarly, for employees who skipped unpaid meal times to work, the expectation of the employee is an element of the claim. Here, the Court cannot accept the proposition that in *every instance (or even many instances)* when an hourly employee worked "off-the-clock", worked through a break, or missed an unpaid meal break by working, he or she had an expectation of payment, thereby rendering Wal-Mart liable for unjust enrichment.

In *Basic Inc. v. Levinson*, 485 U.S. 224, 245-46 (1988), the United States Supreme Court recognized that without a presumption of reliance in 10(b) securities cases, individualized issues would clearly cause a lack of predominance of common issues over individual questions or facts. In *Basic*, the Court found it appropriate to apply a presumption in "fraud on the market" cases. Here, this Court does not believe that any such presumption or other mechanism can avoid the necessity of inquiry and development of distinctly individual issues and facts.

In addition to individualized inquiry as to the elements of Plaintiff's claim, Defendant is entitled to assert individualized defenses. In particular, Defendant has asserted that the following defenses may apply to any class member:

(1) Waiver. Defendant may show that a class member waived a right to payment for a missed break or meal period or for off-the-clock work. This defense requires a showing of "either the express, voluntary, intentional relinquishment of a known right or such conduct as warrants an inference of such

---

Mary Mieler/llm  
Judicial Administrative Assistant

## RULING

Page: 11

Date: December 23, 2004

Case No: C20014319

---

an intentional relinquishment. *Am. Continental Life Ins. Co. V. Ranier Constr. Co.*, 125 Ariz. 53, 55 (1980).

(2) Equitable Estoppel. This defense requires a showing that “ (1) the party to be estopped commits acts inconsistent with a position it later adopts; (2) reliance by the other party; and (3) injury to the latter resulting from the former’s repudiation of its prior conduct.” *City of Tucson v. Whiteco Metrocom, Inc.*, 194 Ariz. 390, 396 (App. 1999).

(3) Unclean Hands. This doctrine bars a plaintiff who has “violated conscience, or good faith, or other equitable principle.” *Sines v. Holden*, 89 Ariz. 207, 209-210 (1961).

Because individualized inquiry is necessary to examine the unique circumstances surrounding each alleged occurrence of unjust enrichment, it follows that Plaintiff has failed to show that common issues predominate or that a class action is a superior method of adjudicating these claims, as required by Ariz. R. Civ. P. 23(b)(3).

### *Damages*

When determining whether to certify a class, Rule 23(b)(3) directs the Court to consider “the difficulties likely to be encountered in the management of a class action.” Ariz. R. Civ. P. 23(b)(3)(D). In addition to the requirement of individualized inquiry as to the elements of liability as set forth above, this Court believes that calculation of damages also enters into this manageability equation. To a large degree, the issues of liability and damages are interwoven and individualized by employee conduct, expectation, and, more importantly, time involved.<sup>4</sup>

Here, Plaintiff proposes that damages can be calculated in the aggregate and suggests that the use of statistics and representative sampling are legitimate methods. Plaintiff urges that, whatever individual issues exist, they are “trivial and secondary,” and that, further, questions of damages need not be resolved at the class certification stage. While the Court agrees that questions of the handling of damages need not always be *fully* resolved at this stage, the Court is entitled, and, in fact, obligated, to

---

<sup>4</sup> For example, who, when, why and quantity.

Mary Mieler/llm  
Judicial Administrative Assistant

## RULING

Page: 12

Date: December 23, 2004

Case No: C20014319

---

forecast potential damages issues when considering the manageability of an action pursuant to Rule 23(b)(3)(D).

Plaintiff argues that the class should be certified even if damages need to be determined individually, because the “individual damage questions do not preclude a (b)(3) action, when liability issues are common to the class,” citing *Esler v. Northrop Corporation*, 86 F.R.D. 20 (D.C.Mo. 1979), and *State v. Boykin*, 109 Ariz. 289 (1973). *Esler*, however, involved the recovery of pension plan benefits where the Court noted that, “[i]t is true that damages must be determined individually, but they may be determined according to the objective benefit plan formula.” *Id.* at 39. Here, there is clearly no objective formula to determine damages. And in *Boykin*, although it is true, as Plaintiff notes, that “despite *no indication whatsoever* that amounts of compensation sought were identical, class action nevertheless was proper,” the *Boykin* opinion also contains *no indication whatsoever* that calculation of damages (unpaid overtime) was a difficult issue. Neither *Esler* nor *Boykin* are comparable to the calculation of the damages issue at hand.

The proposition that damages can be calculated in the aggregate runs into the same road block as did the proposition that Wal-Mart’s liability can be found class-wide. That is, each employee’s situation and circumstance is unique. If a jury cannot find that Wal-Mart is liable for every instance of a missed break, a missed meal period, or each instance of off-the-clock work, without allowing Wal-Mart to inquire into the circumstances of each and present defenses as to each, it follows that the Court cannot allow an award of aggregate damages based on statistics and/or sampling. Finally, the Plaintiff has not provided the Court with any reasonable methodology to render individual awards to various class members, even if damages were awarded in the aggregate.

### *Due Process/Expert Evidence*

Defendant argues, and the Court tends to agree, that denying Wal-Mart the right to examine individual class members and to assert individual defenses, by using formulaic methodologies to

---

Mary Mieler/llm  
Judicial Administrative Assistant

## RULING

Page: 13

Date: December 23, 2004

Case No: C20014319

---

establish liability and damages, would deny Wal-Mart its rights to due process and a jury trial under the United States Constitution and the Arizona Constitution. *See* U.S. Const. Amends. VII, XIV; Ariz. Const. art. II, §§ 4, 23.

In *In re Fibreboard*, 893 F.2d 706 (5th Cir. 1990), the Fifth Circuit Court of Appeals disapproved of plaintiffs' proposal to determine the liability of asbestos manufacturers and damages suffered by plaintiffs by focusing on a sampling of class members. Specifically, the plaintiffs proposed to let the jury hear: (1) representational testimony from a small minority of class members; (2) expert testimony regarding questionnaires filled out by plaintiffs, and (3) summary evidence as to the aggregate amount of damages. The defendants argued, and the Court agreed, that the Plaintiff's proposed plan violated defendants' Seventh Amendment right to a jury trial. The Court explained that: (1) there was no certainty that the experts' statistical measures of representativeness and commonality would be sufficient for the jury to make informed judgments concerning damages, (2) there were disparities among members of the class concerning severity, nature and type of damages incurred, (3) the elements of the case focused on individuals, not groups, and (4) there were too many disparities among class members for their common concerns to predominate. *Id.*; *see also Basco v. Wal-Mart Stores, Inc.*, 216 F. Supp.2d 592 (E.D. La. 2002) (citing *In re Fibreboard* to determine that, in a case with facts and issues similar to the case at hand, plaintiffs reliance on a representational method to determine damages would deprive defendants of their due process rights).

This Court believes that, under the facts, circumstances, and proposed usage of experts (and their formulaic methodologies) in the instant case, Wal-Mart's right to due process and a jury trial would be violated if this matter were to proceed as envisioned by the Plaintiff. Wal-Mart would be denied its right to examine individual class members and assert individual defenses.

### *Evidence*

Although this Court cannot fully address the admissibility of the evidence, or whether Plaintiff's

Mary Mieler/llm  
Judicial Administrative Assistant

## RULING

Page: 14

Date: December 23, 2004

Case No: C20014319

---

experts will satisfy Arizona's evidentiary standards, the Court does express skepticism as to the methods of at least two of Plaintiff's proposed experts and as to the validity of the "evidence" that they propose to present. Further, Plaintiff's proposed use of statistics to globally establish the number of missed rest breaks, meal periods and off-the-clock work does not, in this Court's opinion, obviate the individualized proof of the elements of Plaintiff's claim or Defendant's right to establish defenses as to each alleged event.

John Zogby proposes to conduct a confidential telephone poll of randomly-selected Wal-Mart employees (outside the presence of the defense) and, by that poll, statistically measure Wal-Mart's class-wide abuses of its hourly employees. More specifically, Zogby asserts that he can reliably "quantify off-the-clock work that is not discernible from the electronic data." This Court questions whether, under the Arizona Rules of Evidence and the case law interpreting the same, Zogby's data and testimony would or could be admissible.

Likewise, Plaintiff plans to offer Bernard D. Graber to "establish that Wal-Mart's policy and practice is to understaff its stores to increase its profits at the detriment of its employees." To accomplish that, Mr. Graber claims to have designed a methodology to analyze Wal-Mart's labor standards, determine how many labor hours are necessary to operate each Wal-Mart store, and compare that figure to Wal-Mart's historical staffing levels. In other words, Mr. Graber proposes to be able to be able to opine on the number of hours that it should take and does take to run all of Wal-Mart. Given Wal-Mart's vast variety of departments, products and services, it is difficult to conceive of a single methodology by which one expert could accomplish this herculean task. Further, even if Mr. Graber could establish understaffing, it is questionable whether the evidence would establish an element of Plaintiff's claims.

Based on the foregoing issues concerning individualized determinations of liability and assertions of defenses, due process concerns, and evidentiary concerns, the Court finds that common

---

Mary Mieler/lm  
Judicial Administrative Assistant

RULING

Page: 15

Date: December 23, 2004

Case No: C20014319

---

issues would not predominate and that a class action would not be a superior vehicle to resolve these claims.

*CONCLUSION*

For all the foregoing reasons and under the facts and evidence presented, the Court finds that Plaintiff has not met her burden to show that all the requirements for class certification have been met.

**IT IS ORDERED** that Plaintiff's Motion for Class Certification is hereby **DENIED**.

cc: Hon. Carmine Cornelio  
Clerk of Court - Under Advisement Clerk  
Marty Harper, Esq. (SHUGHART THOMSON & KILROY, P.C.) 3636 North Central Avenue,  
Suite 1200, Phoenix, Arizona 85012  
Kelly J. Flood, Esq. (SHUGHART THOMSON & KILROY, P.C.) 3636 North Central Avenue,  
Suite 1200, Phoenix, Arizona 85012  
Gary Ansel, Esq. (SHUGHART THOMSON & KILROY, P.C.) 3636 North Central Avenue,  
Suite 1200, Phoenix, Arizona 85012  
Gerald L. Bader, Jr., Esq. (BADER & ASSOCIATES, LLC), 14426 East Evans Ave., Suite 200,  
Aurora, Colorado 80014  
Renee B. Taylor, Esq. (BADER & ASSOCIATES, LLC), 14426 East Evans Ave., Suite 200,  
Denver, Colorado 80014  
Franklin D. Azar, Esq. (FRANKLIN D. AZAR & ASSOCIATES, P.C.), 14426 East Evans Ave.,  
Suite 100, Aurora, Colorado 80014  
Bennett E. Cooper, Esq. (STEPTOE & JOHNSON LLP), , Collier Center, Suite 1600, 201 East  
Washington St., Phoenix, Arizona 85004  
Monica L. Goebel, Esq. (STEPTOE & JOHNSON LLP), , Collier Center, Suite 1600, 201 East  
Washington St., Phoenix, Arizona 85004  
Steven D. Wheelless, Esq. (STEPTOE & JOHNSON LLP), , Collier Center, Suite 1600, 201 East  
Washington St., Phoenix, Arizona 85004

Mary Mieler/llm  
Judicial Administrative Assistant