

HONORABLE TERRY LUKENS

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IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

DEBRA BARNETT, GEORGIE HARTWIG,
and BELLA BLAUBERGS, on their own
behalf and on behalf of all others similarly
situated,

Plaintiffs,

v.

WAL-MART STORES, INC., a Delaware
corporation, d/b/a WAL-MART, d/b/a SAM'S
CLUB, d/b/a SUPERCENTER,

Defendant.

No. 01-2-24553-8 SEA

**ORDER GRANTING CLASS
CERTIFICATION IN PART**

This matter, after being duly noticed, came on regularly for hearing before the
Honorable Terry Lukens on May 14, 2004, on Plaintiffs' Motion for Class Certification.
Beth E. Terrell and Toby J. Marshall of Tousley Brain Stephens PLLC and Richard T. Seymour
and Karin Kramer of Lieff, Cabraser, Heimann & Bernstein, LLP appeared on behalf of
Plaintiffs. Michael Reiss, Michael J. Killeen, and Kathryn S. Loppnow of Davis Wright
Tremaine LLP appeared on behalf of Defendant Wal-Mart Stores, Inc. ("Wal-Mart").

The Court, having reviewed the pleadings, heard the oral argument of the parties, and
being otherwise fully informed,

1 For purposes of this Order, claims 1 and 2 are referred to as the Contract Claims, claims
2 3 through 7 are referred to as the Labor Claims, and claim 8 is referred to as the Consumer
3 Claim. In essence, Plaintiffs allege that Wal-Mart has engaged in a comprehensive course of
4 wage and hour abuse in Washington, depriving tens of thousands of employees of the breaks
5 and pay to which they are entitled. For their alleged injuries, Plaintiffs seek statutory damages,
6 exemplary damages, interest, injunctive and declaratory relief, attorneys' fees, and costs. Wal-
7 Mart denies Plaintiffs' claims and opposes class certification.

8 Where, as here, class certification is sought at the early stages of the litigation, factual
9 allegations in the pleadings are assumed to be true. *Miller v. Farmer Bros. Co.*, 115 Wn. App.
10 815, 820, 64 P.3d 49 (2003). Thus, this Court will not attempt to resolve material factual
11 disputes or make any inquiry into the merits of the claims. *See id.*

12 **C. The Requirements for Class Certification Are Satisfied**

13 A plaintiff seeking class certification must satisfy the requirements of Civil Rule 23(a)
14 and (b). Rule 23(a) enumerates the following four prerequisites to a class action: (1) the class
15 is so numerous that joinder of all members is impracticable; (2) there are questions of law or
16 fact common to the class; (3) the claims or defenses of the representative parties are typical of
17 the claims or defenses of the class; and (4) the representative parties will fairly and adequately
18 protect the interests of the class. CR 23(a).

19 In addition to the criteria set forth in Rule 23(a), a plaintiff seeking class certification
20 must satisfy one of the three subsections of Rule 23(b). CR 23(b). Though Plaintiffs allege in
21 their Third Complaint that the requirements of both Rule 23(b)(2) and 23(b)(3) are satisfied,
22 Plaintiffs presently seek certification under Rule 23(b)(3) only. Pursuant to this subsection,
23 certification is appropriate if the court finds as follows: (1) that the questions of law or fact
24 common to the class predominate over any questions affecting only individual members; and
25 (2) that a class action is superior to other available methods for the fair and efficient
26 adjudication of the controversy. CR 23(b)(3).

1 "Washington courts favor a liberal interpretation of CR 23 as the rule avoids
2 multiplicity of litigation, saves members of the class the cost and trouble of filing individual
3 suits, and also frees the defendant from the harassment of identical future litigation." *Smith v.*
4 *Behr Process Corp.*, 113 Wn. App. 306, 318, 54 P.3d 665 (2002) (quoting *Brown v. Brown*,
5 6 Wn. App. 249, 256-57, 482 P.2d 581 (1971)) (internal marks omitted). Thus, "if there is to
6 be an error made, let it be in favor and not against the maintenance of the class action, for it is
7 always subject to modification should later developments during the course of the trial so
8 require." *Brown*, 6 Wn. App. at 256 (citation omitted).

9 While Civil Rule 23 is liberally interpreted in favor of class actions, "[c]lass actions are
10 specialized types of suits, and as a general rule must be brought and maintained in strict
11 conformity with the requirements of CR 23." *DeFunis v. Odegaard*, 84 Wn.2d 617, 622,
12 529 P.2d 438 (1974). Accordingly, before granting class certification, the trial court must
13 engage in a "rigorous analysis" to ensure that the prerequisites of the rule have been met. *Gen.*
14 *Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 161, 102 S. Ct. 2364, 72 L. Ed. 2d 740
15 (1982); *Oda v. State*, 111 Wn. App. 79, 93, 44 P.2d 8, *rev. denied*, 56 P.3d 992 (2003). Once
16 the trial court's decision is made, however, it "will not be overturned absent a manifest abuse of
17 discretion." *Lacey Nursing Ctr., Inc. v. Dep't of Revenue*, 128 Wn.2d 40, 47, 905 P.2d 338
18 (1995) (citation omitted). In other words, if the record shows that the court considered all of
19 the criteria of Rule 23, the decision will be upheld unless it is manifestly unreasonable or based
20 on untenable grounds. *Id.*

21 **1. CR 23(a)(1) - Numerosity**

22 Here, the Class is alleged to contain thousands of current and former employees, and
23 Wal-Mart does not contest Plaintiffs' allegation that joinder of all proposed members would be
24 impracticable. Assuming that the other criteria of CR 23 are satisfied, the Plaintiffs have
25 satisfied the numerosity requirement.
26

1 **2. CR 23(a)(2) – Common Questions of Law or Fact**

2 To meet the second prerequisite for class certification, Plaintiffs must demonstrate
3 “there are questions of law or fact common to the class.” CR 23(a)(2). Because “[t]he
4 commonality test is qualitative rather than quantitative . . . there need be only a single issue
5 common to all members of the class.” *Behr Process*, 113 Wn. App. at 320 (citation and
6 internal marks omitted). This is “a low threshold,” and the test is not demanding. *Id.*
7 Moreover, the commonality requirement is subsumed under the more stringent requirements of
8 Civil Rule 23(b)(3), which are discussed below. *Schwendeman v. USAA Cas. Ins. Co.*,
9 116 Wn. App. 9, 20, 65 P.3d 1 (2003). As will be shown, Plaintiffs have met the requirements
10 of Rule 23(b)(3) with respect to all but the Contract Claims. Thus, the commonality
11 requirement is satisfied as to the Labor and Consumer Claims.

12 **3. CR 23(a)(3) - Typicality**

13 The third prerequisite for class certification is a finding that “the claims and defenses of
14 the representative parties are typical of the claims or defenses of the class.” CR 23(a)(3). This
15 test is also not demanding and tends to merge with the commonality requirement. *Falcon*,
16 457 U.S. at 157 n.13. Typicality is satisfied if the named plaintiffs’ claims “arise from the
17 same event or practice or course of conduct that gives rise to the claims of the other class
18 members, and . . . are based on the same legal theory.” *Behr Process*, 113 Wn. App. at 320.
19 “Representative claims need not be substantially identical; they are typical if they are
20 reasonably coextensive with those of the absent class members.” *Hansen v. Ticket Track, Inc.*,
21 213 F.R.D. 412, 415 (W.D. Wash. 2003). “Where the same unlawful conduct is alleged to have
22 affected both the named plaintiffs and the class members, varying fact patterns in the individual
23 claims will not defeat the typicality requirement.” *Behr Process*, 113 Wn. App. at 320.

24 Here, each Plaintiff and Class member is a current or former hourly paid employee of
25 Wal-Mart. While in Wal-Mart’s employ, each of the Plaintiffs — like all Class members —
26 allegedly worked off-the-clock or through rest and meal breaks. Plaintiffs claim they have
 suffered damages as a result of Wal-Mart’s alleged course of wage and hour abuse, as could all

1 Class members. Thus, Plaintiffs' claims are typical of the Class members' claims because all
2 claims arise from the same course of conduct and are based on the same legal and remedial
3 theories.

4 **4. CR 23(a)(4) – Protection of Interests of Class**

5 The fourth prerequisite for class certification is a finding that the named plaintiffs will
6 “fairly and adequately protect the interests of the class.” CR 23(a)(4). In determining whether
7 this element is met, courts look at two factors: (1) whether the representative plaintiffs and
8 their counsel will prosecute the action vigorously on behalf of the class; and (2) whether the
9 representative plaintiffs have antagonistic or conflicting interests with the unnamed class
10 members. *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978).

11 Throughout this litigation, the named Plaintiffs and their attorneys have competently
12 and diligently prosecuted this lawsuit on behalf of the Class. Plaintiffs' counsel have extensive
13 experience with class actions, and Wal-Mart does not challenge counsel's adequacy. The Court
14 finds Plaintiffs' counsel are qualified and capable of prosecuting this action. Plaintiffs have
15 also demonstrated an intention to vigorously prosecute this action and have shouldered the
16 responsibilities of serving as representatives for the Class, including retaining experienced
17 counsel, responding to written discovery requests, and being deposed.

18 Wal-Mart nevertheless argues that Debra Barnett and Georgie Hartwig are not suitable
19 Class representatives because they, for a time, held supervisory positions.¹ This argument is
20 without merit. *See McReynolds v. Sodexo Marriott Servs. Inc.*, 208 F.R.D. 428, 448 (D.D.C.
21 2002); *see also Rainbow Group, Ltd. v. Johnson*, 990 S.W.2d 351, 359 (Tex. Ct. App. 1999)
22 (supervisors found to be adequate representatives). Moreover, Wal-Mart has failed to
23 demonstrate an actual conflict.

24 The Court finds all three Plaintiffs are adequate representatives, none having interests
25 antagonistic to or in conflict with the Class. Thus, the adequacy requirement is satisfied.

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¹ While these two Plaintiffs did hold supervisory positions, neither was ever a salaried manager.

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5. CR 23 (b)(3)

Once the four prerequisites of Civil Rule 23(a) have been satisfied, “[c]lass certification is appropriate under CR 23(b)(3) . . . if common questions of fact or law predominate over individual ones and a class action is superior to other available methods of adjudication.” *Sitton*, 116 Wn. App. at 253. The predominance inquiry tests “whether proposed classes are sufficiently cohesive to warrant adjudication by representation.” *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 594, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997). In the Court’s opinion, this is the most significant and critical inquiry in determining whether to certify a class.

a. Common Factual and Legal Issues Predominate Over Any Individual Issues

“In deciding whether common issues predominate over individual ones, the court is engaged in a pragmatic inquiry into whether there is a common nucleus of operative facts to each class member’s claim.” *Behr Process*, 113 Wn. App. at 323 (citations and internal marks omitted). While the courts in some states appear to utilize a stringent standard with respect to the predominance requirement, Washington courts have a more expansive view. *See, e.g., Sitton*, 116 Wn. App. at 254; *Miller*, 115 Wn. App. at 825. The Court of Appeals’ decision in *Sitton* guides the inquiry this Court must make:

The predominance requirement is not a rigid test, but rather contemplates a review of many factors, the central question being whether adjudication of the common issues in the particular suit has important and desirable advantages of judicial economy compared to all other issues, or when viewed by themselves. The predominance requirement is not a demand that common issues be dispositive, or even determinative; it is not a comparison of court time needed to adjudicate common issues versus individual issues; nor is it a balancing of the number of issues suitable for either common or individual treatment. Rather, a single common issue may be the overriding one in the litigation, despite the fact that the suit also entails numerous remaining individual questions.

116 Wn. App. at 254 (citations and internal marks omitted).

1 There is no dispute that Washington law applies to the claims of all Plaintiffs and Class
2 members. Whether common questions of fact predominate, however, is perhaps the greatest
3 area of controversy in this motion. At the outset, the Court notes that much of what Wal-Mart
4 raises in its arguments against certification is clearly merits-oriented. The heart of the issue is
5 not whether Plaintiffs' allegations are true; rather, it is whether Plaintiffs' allegations, assuming
6 their truth, are sufficient to satisfy the predominance requirement. The Court will address those
7 allegations as they relate to each of the three categories of claims — the Contract Claims, the
8 Labor Claims, and the Consumer Claim.

9 Plaintiffs' Contract Claims, as alleged, do not satisfy the predominance requirement of
10 Civil Rule 23(b)(3). No evidence has been presented to show that Wal-Mart has a standardized
11 format for hiring hourly employees or negotiating an employment relationship with them.
12 Determining whether a contract existed between any particular employee and Wal-Mart, the
13 terms of that contract, and whether the contract has been breached could potentially involve as
14 many factual patterns as there are Class members. Thus, with respect to the Contract Claims,
15 Plaintiffs have not demonstrated that there are sufficient common questions of fact to meet the
16 predominance requirement. This conclusion is in accord with the majority of the jurisdictions
17 that have considered the question. *See, e.g., Basco v. Wal-Mart Stores, Inc.*, 216 F. Supp. 2d
18 592, 602–03 (E.D. La. 2002); *Wal-Mart Stores, Inc. v. Lopez*, 93 S.W.3d 548, 555–58 (Tex. Ct.
19 App. 2002); *but see Braun v. Wal-Mart, Inc.*, No. 19-CO-01-9790, 2003 WL 22990114, at *7–
20 8 (Minn. Dist. Ct. Nov. 3, 2003) (common issues predominate as to contract claims because
21 “unilateral promises can form contractual obligations when accepted by employees through the
22 consideration provided by their labor”).

23 Plaintiffs' Labor Claims, on the other hand, do not suffer from the same infirmity. Wal-
24 Mart maintains individualized questions predominate, such as why did each employee work off
25 the clock or through a break and did the employee do so voluntarily. But these are not valid
26 defenses to Plaintiffs' claims. The statutory definition of “to employ” includes “to permit to

1 work" and allows for actual or constructive knowledge of off-the-clock work. *United Food &*
2 *Commercial Workers Union Local 1001 v. Mut. Benefit Life Ins. Co.*, 84 Wn. App. 47, 52,
3 925 P.2d 212 (1996), *abrogated on other grounds*, *Seattle Prof'l Eng'g Employees Ass'n v.*
4 *Boeing Co.*, 139 Wn.2d 824, 991 P.2d 1126 (2000). Thus, the question is simply whether
5 employees did or did not work off the clock, miss meal breaks, miss rest breaks or were locked
6 in the building at the end of a shift and whether Defendant had actual or constructive
7 knowledge of this work. As Plaintiffs' trial plan highlights, this common nucleus of operative
8 facts will be the centerpiece of the liability phase.

9 Wal-Mart further argues that determining whether it had actual or constructive
10 knowledge of the alleged wage and hour abuses will, of necessity, involve resolution of
11 thousands of individual fact patterns. That, however, was the same argument raised — and
12 rejected — in *Sitton*:

13 Under State Farm's interpretation of the predominance
14 requirement, no subsection (b)(3) class could be certified where
15 the claim requires resolution of individual issues such as
16 causation and harm. We reject this interpretation of the rule as
17 inconsistent with the purpose of class actions and as failing to
18 consider judicial economy.

19 116 Wn. App. at 256.

20 A similar conclusion was reached in *Miller*, which was a Washington Minimum Wage
21 Act case. There, the employer argued that each employee's situation required an individualized
22 factual inquiry, thus precluding commonality. Rejecting this argument, the Court of Appeals
23 concluded:

24 [T]o invalidate this class on the basis of predominance or
25 commonality would practically preclude class certification for
26 any similar claim under the MWA, since any group of employees
claiming they were illegally classified as exempt will inevitably
have some variations in their job duties. Such a reading of the
predominance requirement would contravene the clear policy in
this state that CR 23 should be read liberally in the interest of
judicial economy.

Miller, 115 Wn. App. at 827.

1 As in *Miller and Sitton*, Plaintiffs have alleged a "common course of conduct" with
2 respect to the Labor Claims that satisfies the commonality and predominance requirements.
3 "That class members may eventually have to make an individual showing of damages does not
4 preclude class certification." *Behr Process*, 113 Wn. App. at 323 (citing *Blackie v. Barrack*,
5 524 F.2d 891, 905 (9th Cir. 1975)). As discussed below, any individual issues that exist can be
6 handled separately.

7 The last claim for discussion is the Consumer Claim. Relying on *Smith v. K-Mart*
8 *Corp.*, 899 F. Supp. 503 (E.D. Wash. 1995), Wal-Mart contends that employee claims are not
9 covered by the Consumer Protection Act. In response, Plaintiffs maintain that the Court of
10 Appeals permitted such claims to proceed in *Bruce v. Northwest Metal Prods. Co.*, 79 Wn.
11 App. 505, 903 P.2d 506 (1995). Upon review, the Court finds that both the decision in *Bruce*
12 and the language of the statute support this claim. In its Employee Handbook, Wal-Mart makes
13 representations regarding payment for work and entitlement to rest and meal breaks. If proven,
14 these representations will constitute a business practice affecting commerce. Indeed, Plaintiffs'
15 allegations, if proven, will demonstrate a significant impact on commerce and the public
16 interest because Wal-Mart will have received services from employees for which it was not
17 paying, unlike Wal-Mart's competitors. As with the Labor Claims, these common questions
18 predominate over any individualized issues.

19 In sum, the Court finds the predominance requirement is satisfied with respect to the
20 Labor and Consumer Claims, but individual issues predominate with respect to the Contract
21 Claims. With some variation, this is the same conclusion reached by the court in *Savaglio v.*
22 *Wal-Mart Stores, Inc.*, Case No. 835687-7 (Alameda County Cal. Super. Ct. Nov. 6, 2003).
23 There, the court undertook a detailed analysis of claims by Wal-Mart employees that are
24 similar to those presented in this case. Recognizing that *Sitton* sets up a somewhat more
25 expansive view of the commonality and predominance requirements, this Court finds the
26 studied analysis of the *Savaglio* decision instructive. The California court found individual

