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## Jury's Wal-Mart Whammy Jolts State Labor Law

### \$115 Million Penalty Over Wage Violation Is New Punitive Twist

#### Uneasy Employers

By Robert Selna  
Daily Journal Staff Writer

An Alameda County jury's decision to award \$115 million in punitive damages to 200,000 workers who sued Wal-Mart because the mega-retailer denied them meal breaks provoked strong reactions from both sides of the employment bar.

Attorneys used words such as "huge," "rare," "stunning" and "surprising" to describe the Dec. 22 judgment, which included \$57 million in compensatory damages.

The superlatives are warranted, say employment law specialists, because of the sheer size of the award and maybe more importantly because it appeared to mark the first time in California that a state jury granted punitive damages for a wage and hour violation of the Labor Code. Traditionally, punitive damages in the employment arena have been granted in torts, such as wrongful termination, and civil rights claims, such as discrimination.

#### News Analysis

Court observers say Judge Ronald Sabraw's decision to let the jury award punitive damages will inspire plaintiffs to seek punitive damages in future meal break cases and for other Labor Code violations, exposing employers to potentially costly litigation.

They say that the case may also encourage parties suing Wal-Mart in the 40 other workplace suits the company faces across the country.

While Alameda County stands out as a magnet for civil actions against deep-pocketed defendants because of its liberal-leaning jury pool, a judge in Minnesota recently allowed plaintiffs to amend a wage and hour complaint against Wal-Mart in order to seek punitive damages.

"This case is potentially ground-breaking with respect to the punitive damages ... plaintiffs lawyers will look at this issue closely, and to the extent punitive damages are available under the Labor Code and warranted, they will pursue them," said plaintiffs employment lawyer Peter Rukin, a partner with the San Francisco firm Rukin Hyland Doria & Dufrene.

Wal-Mart declined to discuss the Alameda County judgment. The company announced in a written statement that it will appeal the outcome. Officials said recent California precedent holds that companies penalized for violating Labor Code provisions can't be doubly punished with punitive damages.

"This means that punitive damages cannot be recovered in this case. In short, California law prohibits penalties on top of penalties," the Wal-Mart statement read.

Wal-Mart is ranked as one of the world's top retailers, with more than 5,700 stores in the United States and overseas, and more than 1.3 million employees. The company's

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profits topped \$10 billion in 2004.

In that same year, Wal-Mart paid \$50 million to settle a meal break claim filed by store workers in Colorado, while an Oregon jury awarded approximately \$160,000 to 83 Wal-Mart workers for missed meal breaks.

The company has acknowledged problems complying with California's 2001 law that requires employers to give 30-minute unpaid lunch breaks to employees who work at least six hours in a shift. In a written statement the corporation said that, "Wal-Mart has since taken steps to ensure all associates receive their meal periods."

The Alameda County trial was the most recent in many cases against Wal-Mart across the United States. They include a federal discrimination class action filed in San Francisco on behalf of 2 million women that has not been scheduled for trial.

While Wal-Mart's lawyers declined interviews, other management-side employment lawyers say Judge Sabraw abandoned an accepted principle in employment law when he allowed jurors to punish the company on top of penalties already available in the Labor Code.

Sabraw, 55 years old with 18 years on the bench, is known as a thoughtful jurist who has deftly handled Alameda County's complex litigation calendar. In the past year, he managed the 150 clergy sex-abuse cases litigated in Northern California.

"Other courts have said that if the statute provides for a penalty then it's clearly inappropriate to award punitive damages," said Rick Bergstrom, a partner at Morrison & Foerster in San Diego, who represents employers.

Bergstrom cites *Murphy v. Kenneth Cole Productions Inc.*, 2005 Cal. App. Lexis 1861, which came down in December, during the Alameda County trial. Bergstrom said *Murphy* holds that Labor Code Section 226.7 requires a penalty be imposed on employers that deny meal breaks. And the existence of that penalty means a jury must be barred from piling on punitive damages.

"The presumption is that the remedies available are limited to what's stated in the Labor Code sections," Bergstrom said. "When the statutory scheme doesn't provide for punitive damages, the presumption is that you can't get them."

Bergstrom noted that when the *Murphy* decision came down, Wal-Mart asked Sabraw to reconsider his earlier ruling to allow punitive damages. In response, Sabraw confirmed his former ruling, yet all but encouraged Wal-Mart to appeal.

"Judge Sabraw was already three months into a jury trial when the *Murphy* case was decided; more than anything, I think he was compelled by the desire not to waste judicial resources after three months into a jury trial," Bergstrom said.

That argument is way off base, according

to Jessica Grant, the lead plaintiffs attorney in the Alameda case. She argues that a line of California authority going back 100 years shows that punitive damages can come on top of statutory penalties if the underlying statute does not require willful conduct by the defendant.

"That's the case here. The plaintiffs only need to show that they were denied the extra hour of pay [for the missed lunch break] that was required by law," Grant said. "Then the punitive damages are there to punish the defendant for willful malicious conduct."

She relies on a line of cases starting with the 1903 decision in *Greenberg v. Western Turf Ass'n*, 140 Cal. 357, none of which involve employment circumstances. The plaintiff in *Greenberg* sued under a statute that made it unlawful to "refuse admission to places of amusement."

Grant, who spent six years as a management-side attorney before the Wal-Mart case, said she looked at the evidence with an employer's perspective in mind but was nonetheless "blown away" by how Wal-Mart treated its employees. She first sued for conversion (believing that Wal-Mart had retained wages it owed employees), but Sabraw would not certify that claim as a class, ruling the harm was too individualized.

"When I looked at this conduct, it screamed out for punitive damages," Grant said. "The documents showed that managers, all the way up to the CEO, knew about the conduct and did nothing to remedy it and instead did everything to conceal it ... It was the most egregious conduct I'd ever seen."

William Gould, an emeritus professor at Stanford law school who specializes in labor law, said the premise in Grant's argument is "well accepted" in a variety of cases based on employment statute violations.

"On the face of it, it makes sense for the punitive damages to apply to wage and hour cases as well," said Gould, who served as chairman of National Labor Relations Board under President Clinton. "The statutory remedy is compensation. The punitive damages proceed from the idea that they provide a message as well as a rebuke to other similarly situated employers."

Brad Seligman, the lead plaintiffs attorney in the federal sex discrimination case in San Francisco, was heartened by the damages in Wal-Mart's Alameda County case. He said the standard for punitive damages is lower in federal court than it is in state court — reckless disregard rather than malice.

He also noted that despite Wal-Mart's admissions about failing to comply with the statute, the jury did not cut the company any slack.

"Wal-Mart has said, 'We've cleaned up,'" Seligman said. "Nonetheless, the jury bounced them pretty hard."