

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ANDREW SWANK,	)	
	)	
on behalf of himself and	)	
all others similarly situated,	)	Civil Action No. 2:13-1185 MRH
	)	
Plaintiff,	)	<i>Electronically Filed</i>
	)	
v.	)	THIRD AMENDED INDIVIDUAL
	)	AND COLLECTIVE/CLASS ACTION
	)	COMPLAINT
WAL-MART STORES, INC.,	)	
	)	Jury Trial Demanded
Defendant.	)	

THIRD AMENDED INDIVIDUAL AND COLLECTIVE/CLASS ACTION COMPLAINT

NATURE OF THE ACTION, JURISDICTION AND VENUE

1. This is an individual and collective/class action<sup>1</sup> under the Fair Labor Standards Act of 1938, as amended (FLSA)(29 U.S.C. §201 et seq.), and the Pennsylvania Minimum Wage Act, (PMWA)(43 P.S. §333.101 et seq.), to recover damages for non-payment of overtime wages for Plaintiffs (James Paolicelli, Andrew Swank, Sean McCracken) and all others similarly situated.
2. Jurisdiction of this court is invoked pursuant to 28 U.S.C. §1331 and, for supplemental state claims, 28 U.S.C. §1367(a). This action is authorized and instituted pursuant to the FLSA and the PMWA.
3. The actions and policies alleged to be unlawful were committed in and around Bethel Park, West Mifflin, Tarentum and Fox Chapel, PA, where Plaintiffs worked, and other retail

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<sup>1</sup>This consolidates the claims in *Paolicelli v. Wal-Mart Stores, Inc.* (Civil Action No. 2:14-267 MRH) with the claims in the instant case.

outlets owned and operated by Defendant in Western Pennsylvania and elsewhere in Pennsylvania. Therefore, this action is within the jurisdiction of, and venue is proper in, the United States District Court for the Western District of Pennsylvania.

PARTIES

4. Plaintiff James Paolicelli (hereinafter "Plaintiff" or "Paolicelli") has resided at all relevant times at 241 West Schwab Avenue, Munhall, PA 15120, and was employed by Defendant, most recently as an Assistant Manager at the Wal-Mart in Bethel Park, PA, from 2009 until in or about November 2013. (Plaintiff worked as an Assistant Manager at the Bethel Park store from in or about October 2011 until in or about November 2013.)
5. Plaintiff Andrew Swank (hereinafter "Plaintiff Swank" or "Swank") has resided at all relevant times at 225 Lansdowne Drive, Verona, PA 15147, is a citizen of Pennsylvania and was employed by Defendant, most recently as an Assistant Manager at the Pittsburgh Mills (Tarentum) store, from on or about October 26, 2011, until on or about July 10, 2013.
6. Plaintiff Sean McCracken (hereinafter "Plaintiff McCracken" or "McCracken") resided at 434 Lincoln Avenue, Springdale, PA 15144, while working for Defendant as an Assistant Manager at the Pittsburgh Mills and Fox Chapel stores from on or about October 10, 2012, until on or about July 26, 2013.
7. Defendant Wal-Mart Stores, Inc., operating under the name Wal-Mart Stores East, LP (hereinafter "Defendant," or "Wal-Mart"), is headquartered at 702 SW 8<sup>th</sup> Street, Bentonville, AR 72716, and maintains retail outlets at 5055 Library Road, Bethel Park, PA 15102, and at 590 Pittsburgh Mills Circle, Tarentum, PA 15084, and maintains other retail outlets in Western Pennsylvania and elsewhere in Pennsylvania.

8. Defendant engages in interstate commerce.
9. Defendant has annual revenues in excess of \$500,000.
10. Defendant is an employer within the meaning of the FLSA and the PMWA.
11. Defendant is subject to the minimum wage and overtime provisions of the FLSA and the PMWA.

**BACKGROUND AND STATEMENT OF CLAIMS**

12. Plaintiff Paolicelli was employed by Defendant as an Assistant Manager (paid a salary) from in or about October 2011 until in or about November 2013, at Defendant's Bethel Park store.
13. Prior to that (October 2011) Plaintiff Paolicelli was an Associate and Zone Manager (paid hourly) at the West Mifflin store from 2009 until October 2011.
14. Plaintiff Swank was employed by Defendant as an Assistant Manager from on or about October 26, 2011, until on or about July 10, 2013, at Defendant's Pittsburgh Mills store.
15. Plaintiff McCracken was employed by Defendant as an Assistant Manager from on or about October 10, 2012, until on or about July 26, 2013, at Defendant's Pittsburgh Mills store and at Defendant's Fox Chapel Store.

16. As Assistant Managers, Plaintiffs (Paolicelli, Swank, McCracken) were paid a salary of approximately \$43,000 annually.
17. Plaintiffs were scheduled to work either a 4 on/4 off schedule (4 days working 12 hours per shift when working the night shifts, then the next 4 days “off” the schedule) or a 3 on/3 off schedule (3 days working 12 hours per shift when working the day shift, then the next 3 days “off” the schedule).
18. Whether working the 4 on/4 off schedule or the 3 on/3 off schedule Plaintiffs were scheduled to work at least 48 hours each workweek.
19. The 4 on/4 off or 3 on/3 off schedule was followed as a matter of corporate policy that applied to the Bethel Park store, the West Mifflin store, the Pittsburgh Mills store, the Fox Chapel store and the other Wal-Mart stores in the Pittsburgh region and elsewhere in Pennsylvania, and nationally.
20. In addition, as Assistant Managers Plaintiffs would frequently have to come to work before the start of their scheduled shift, stay after the end of the scheduled shift, and come into work on their “off” days.
21. Plaintiffs normally worked a minimum of 55 to 60 hours each week, and regularly worked in excess of 65 hours in many workweeks.
22. Plaintiffs were paid no overtime.
23. Plaintiffs’ only compensation was a salary, plus an occasional bonus based on store

performance.

24. Defendant classified Plaintiffs as exempt employees within the meaning of the FLSA and the PMWA.
25. The classification was improper: Plaintiffs were non-exempt.
26. Plaintiffs' primary duties were to perform various retail functions such as working the cash register, stocking shelves, cleaning the store and assisting customers, the same duties normally performed by the hourly (non-exempt) associates.
27. By way of further explanation, these tasks included: receiving and unloading trucks; sorting trucks; stocking shelves; side counter maintenance; scanning inventory; arranging end caps and stack bases; zoning (such as straightening and maintaining shelves); customer service (working the cash registers, answering questions, shopping for customers); gathering and moving carts; pushing carts out of the parking lot; salting and shoveling sidewalks during the winter; cleaning out merchandise storage bins in the back of the store; restacking pallets with the forklift; and, cleaning (mopping, sweeping, Zamboni, bathrooms).
28. Plaintiffs spent 90% to 95% of their time performing such duties.
29. Plaintiff Paolicelli reported to the Store Manager at the Bethel Park store.
30. Plaintiffs Swank and McCracken reported to a Shift Manager at the Pittsburgh Mills and Fox Chapel stores.

31. There were another 4 or 5 Assistant Managers at the Bethel Park store.
  
32. There were approximately 6-8 Assistant Managers at the Pittsburgh Mills and Fox Chapel stores (total of 12-16) and about 6-8 Assistant Managers at the West Mifflin store (which, like the Pittsburgh Mills and Fox Chapel stores, had Shift Managers).
  
33. The Store Manager at Bethel Park reported to a Market Manager, Rick Carvetta.
  
34. The West Mifflin Store Manager also reported to Rick Carvetta.
  
35. The Store Manager at the Pittsburgh Mills store reported to either Rick Carvetta or one of Carvetta's peers (another Market Manager).
  
36. The Store Manager at the Fox Chapel store reported to either Rick Carvetta or one of Carvetta's peers (another Market Manager).
  
37. There are at least twelve (12) stores in the Pittsburgh region:
  - Bethel Park
  - West Mifflin
  - Carnegie
  - Natrona Heights
  - North Versailles
  - Robinson Township
  - Fox Chapel
  - Pittsburgh Mills (Tarentum)
  - Belle Vernon

- **Kittanning**
  - **Gibsonia**
  - **Monaca**
38. **These stores all report to a Market Manager (Rick Carvetta and/or one or more other Market Managers).**
39. **The Market Managers report to the Regional Manager, who is responsible for all of the Wal-Mart stores in PA.**
40. **There are in excess of 100 Wal-Mart stores in PA.**
41. **Each of the stores in the Pittsburgh region (Bethel Park, West Mifflin, Carnegie, Natrona Heights, North Versailles, Robinson Township, Fox Chapel, Pittsburgh Mills (Tarentum), Belle Vernon, Kittanning, Gibsonia, Monaca) is organized along the same basic hierarchy as the Bethel Park, West Mifflin, Pittsburgh Mills and Fox Chapel stores: hourly associates (including employees with the title of Associate, Zone and Merchandise “Managers” or “Supervisors”), salaried Assistant Managers, salaried Shift Managers (generally in the larger Wal-Mart stores such as Pittsburgh Mills, Fox Chapel and West Mifflin), a salaried Store Manager in charge of the store, a salaried Market Manager and the salaried Regional Manager.**
42. **This is the same basic hierarchy at the other stores elsewhere in Pennsylvania as well.**
43. **While there are some variations among stores in terms of the number of Assistant Managers and the number (if any) of Shift Managers, these variations do not - as discussed below - materially change the primary duties of the Assistant Managers, including Plaintiffs.**

44. **Plaintiffs were given detailed specific instruction about what to do each day by the Store Manager/Shift Manager.**
45. **These instructions were referred to as “Notes” or “Daily Notes.”**
46. **These Notes had to be followed each day by Plaintiffs.**
47. **These “Notes” were normally communicated to store personnel, including Assistant Managers and hourly non-exempt associates, such as Zone Managers/Merchandise Managers, during daily meetings run by the Store Manager and/or the Shift Managers.**
48. **As a result, Plaintiffs did not decide themselves what to do each day.**
49. **Rather, they were told by management what to do and how to do it.**
50. **Plaintiffs did not have the discretion to deviate from these instructions (Notes) or from the corporate policies and procedures in the performance of their duties.**
51. **The corporate policies and procedures that Plaintiffs were required to follow were issued mostly by Corporate (in Bentonville, AR).**
52. **These included what are referred to as Standard Operating Procedures (SOP).**
53. **Plaintiffs were required to follow the Standard Operating Procedures (SOPs) in the performance of their duties. Most if not all of these SOPs were issued by Wal-Mart Corporate Headquarters. This included such things as how to stack shelves, how to take**



inventory, how to order supplies, how to schedule associates, etc..

54. Plaintiffs did not have the discretion to deviate from these SOPs, or from other written and verbal instructions regularly communicated to Plaintiffs from Corporate and Regional (PA) Management.
55. There was very little Plaintiffs could do that was not dictated by an SOP, and Plaintiffs were not normally allowed to deviate from the SOPs.
56. Wal-Mart also has a centralized, automated merchandising system for tracking and replenishing merchandise/inventory in the stores.
57. This system automatically tracks the movement of inventory out of the store through purchases and shrink, for example, and replaces (orders) this inventory automatically.
58. Plaintiffs had no control over this automatic system, or the ordering automatically done by this system.
59. This is another example of how Plaintiffs could not exercise discretion and control over the exercise of their duties.
60. As a result, the performance of the duties Plaintiffs were assigned was strictly controlled and dictated by Defendant's policies and procedures; its automated, centralized automated systems (like the merchandising system and the "Smart System," discussed below ), and, the detailed daily duty instructions (Notes) from the Store Manager.
61. Plaintiffs did not have the discretion to deviate from these policies and procedures, the

automated systems (like the merchandising system and the “Smart System”) or the Notes.

62. Plaintiffs were trained on the importance of complying with corporate policies.
63. Plaintiffs were trained on the importance of complying with corporate procedures.
64. Plaintiffs were required to follow Wal-Mart procedures.
65. According to Wal-Mart, some of its Assistant Managers use “notes” in carrying out their respective duties.
66. According to Wal-Mart, some of its Assistant Managers use “standard operating procedures” (SOPs) in carrying out their respective duties.
67. The “Wire” is Wal-Mart’s intranet system.
68. The “Wire” is controlled by corporate (Bentonville).
69. The “Wire” contains the information necessary for all employees, including Plaintiffs, to comply with Wal-Mart procedures.
70. Plaintiffs were expected to do whatever was necessary to get the work done, including the work normally performed by hourly associates.
71. As for the administrative exemption to the FLSA and the PMWA, Plaintiffs did not meet the requirements.

72. For example, Plaintiffs did not make decisions relative to management policy or general business operations of Defendant.
73. These decisions are controlled by SOPs, automated management systems (such as the merchandising system) and Daily Notes, among other things.
74. Plaintiffs also did not regularly exercise independent judgment and/or discretion in the performance of their duties, as the performance of the duties they were assigned was strictly controlled and dictated by Defendant's policies, automated management systems (like the merchandising system and "Smart System") and procedures and daily instructions.
75. Plaintiffs did not meet the requirements for the executive exemption of the FLSA or PMWA either.
76. Plaintiffs' primary duty was not to regularly supervise or manage two or more full time employees or the equivalent; rather, Plaintiffs' primary duty was to perform the manual tasks normally performed by the Associates.
77. Plaintiffs did not have the authority to hire, discipline or fire the hourly employees (referred to by Wal-Mart as "Associates") or make recommendations which were given particular weight by management in regard to those decisions.
78. Plaintiffs participated in Panel interviews of potential hirees, but Plaintiffs could not finally approve their hiring.
79. Plaintiffs also did not have the authority to schedule the hourly associates outside of the

strict guidelines - and format - in the "Smart System."

80. The "Smart System" is a corporate guideline for scheduling.
81. The "Smart System" had to be complied with by Plaintiffs and the other Assistant Managers at the Bethel Park, West Mifflin, Pittsburgh Mills and Fox Chapel stores, the other stores in Western PA, and the other stores elsewhere in PA.
82. Plaintiffs did not have the discretion to deviate from the "Smart System."
83. The other Assistant Managers at the Bethel Park, West Mifflin, Pittsburgh Mills and Fox Chapel stores, the other stores in Western PA, and the other stores elsewhere in PA did not have the discretion to deviate from the "Smart System."
84. Wal-Mart admits that the "Smart System" is a computer program used by Wal-Mart for scheduling hourly personnel.
85. Considering their hours worked, Plaintiffs made the same or even less per hour than some of the Associates, particularly the admittedly non-exempt Zone/Merchandise Supervisors, and particularly when the Associates also earned overtime pay.
86. In fact, some hourly Associates can and do make as much as \$17.00 per hour, meaning the Associates make as much as or more in a year, and per hour, particularly if they are allowed to work any overtime, as Plaintiffs did.
87. Thus, Plaintiffs did not meet the requirements for any of the exemptions within the FLSA or PMWA.

88. Defendant has known since before Plaintiffs became Assistant Managers that Plaintiffs were non-exempt.
89. Improperly claiming Plaintiffs were exempt was a deliberate act by Defendant to avoid the payment of overtime hours to Plaintiffs and to further reduce overtime payments to the hourly Associates, and to enable Wal-Mart to reduce the number of Associates in Wal-Mart's stores.
90. In short, Wal-Mart's strategic objective has been to reduce labor costs by whatever means practical, even where it means shifting more and more of the manual duties normally performed by the hourly Associates to the Assistant Managers.
91. Defendant has known since at least August 2010 that it has been in violation of the FLSA and PMWA and has acted in reckless disregard of the FLSA and the PMWA with respect to the classification and payment of Plaintiffs.
92. With respect to the other Assistant Managers at the Bethel Park, West Mifflin, Pittsburgh Mills and Fox Chapel stores, Plaintiffs worked directly with, and personally observed on a regular basis, the other Assistant Managers at these stores.
93. Based on these observations, the primary duties of the other Assistant Managers at these stores (Bethel Park, West Mifflin, Pittsburgh Mills and Fox Chapel) were the same as Plaintiffs'.
94. Specifically, the other Assistant Managers at these stores (Bethel Park, West Mifflin, Pittsburgh Mills and Fox Chapel) also devoted the vast majority of their time (90% or more)

to the same kinds of duties Plaintiffs did: receiving and unloading trucks; sorting trucks; stocking shelves; side counter maintenance; scanning inventory; arranging end caps and stack bases; zoning (such as straightening and maintaining shelves); customer service (working the cash registers, answering questions, shopping for customers); gathering and moving carts; pushing carts out of the parking lot; salting and shoveling sidewalks during the winter; cleaning out merchandise storage bins in the back of the store; restacking pallets with the forklift; and, cleaning (mopping, sweeping, Zamboni, bathrooms).

95. Concerning the other Assistant Managers at the Bethel Park, West Mifflin, Pittsburgh Mills and Fox Chapel stores, Plaintiffs personally observed their duties because Plaintiffs worked at one time or another with most if not all of the other Assistant Managers during their time at the Bethel Park, West Mifflin, Pittsburgh Mills and Fox Chapel stores.
96. The other Assistant Managers at the Bethel Park, West Mifflin, Pittsburgh Mills and Fox Chapel stores had to do the same duties Plaintiffs did that were performed by the hourly associates, and spent 90% or more of their time doing so, and also had to follow the same instructions (Notes), automated management systems (such as the merchandising system and "Smart System") and corporate guidelines Plaintiffs did.
97. The other Assistant Managers at the Bethel Park, West Mifflin, Pittsburgh Mills and Fox Chapel stores were given detailed specific instruction (Daily Notes) about what to do each day by the Store Manager/Shift Manager.
98. These Notes had to be followed each day by the other Assistant Managers at the Bethel Park, West Mifflin, Pittsburgh Mills and Fox Chapel stores.
99. These same Notes were also given to the hourly non-exempt Zone and Merchandise

**Managers at the Bethel Park, West Mifflin, Pittsburgh Mills and Fox Chapel stores by the Store Manager/Shift Manager as their (the hourly non-exempt Zone and Merchandise Managers) daily tasks.**

- 100. As a result of the Notes, automated systems, SOPs, and policies and procedures, among other things, the other Assistant Managers at the Bethel Park, West Mifflin, Pittsburgh Mills and Fox Chapel stores did not decide themselves what to do each day.**
- 101. The other Assistant Managers at the Bethel Park, West Mifflin, Pittsburgh Mills and Fox Chapel stores did not have the discretion to deviate from these instructions (Notes), automated management systems or from the corporate policies and procedures in the performance of their duties.**
- 102. The other Assistant Managers at the Bethel Park, West Mifflin, Pittsburgh Mills and Fox Chapel stores did not have the discretion to deviate from these SOPs, the automated management systems or from other written and verbal instructions regularly communicated to the other Assistant Managers at the Bethel Park, West Mifflin, Pittsburgh Mills and Fox Chapel stores from Corporate and Regional (PA) Management.**
- 103. There was very little the other Assistant Managers at the Bethel Park, West Mifflin, Pittsburgh Mills and Fox Chapel stores could do that was not dictated by an SOP, Notes, automated systems, or policies and procedures, among other things, and they were not allowed to deviate from them.**
- 104. As a result, the performance of the duties the other Assistant Managers at the Bethel Park, West Mifflin, Pittsburgh Mills and Fox Chapel stores were assigned was strictly controlled and dictated by Defendant's policies and procedures, automated systems and SOPs,**

among other things, and the detailed daily duty instructions (Notes) from the Store Manager/Shift Manager.

105. The other Assistant Managers at the Bethel Park, West Mifflin, Pittsburgh Mills and Fox Chapel stores were trained on the importance of complying with corporate policies.
106. The other Assistant Managers at the Bethel Park, West Mifflin, Pittsburgh Mills and Fox Chapel stores were trained on the importance of complying with corporate procedures.
107. The other Assistant Managers at the Bethel Park, West Mifflin, Pittsburgh Mills and Fox Chapel stores were required to follow Wal-Mart procedures.
108. The other Assistant Managers at the Bethel Park, West Mifflin, Pittsburgh Mills and Fox Chapel stores were expected to do whatever was necessary to get the work done, including the work normally performed by hourly associates.
109. The other Assistant Managers at the Bethel Park, West Mifflin, Pittsburgh Mills and Fox Chapel stores did not make decisions relative to management policy or general business operations of Defendant.
110. The other Assistant Managers at the Bethel Park, West Mifflin, Pittsburgh Mills and Fox Chapel stores did not regularly exercise independent judgment and/or discretion in the performance of their duties, as the performance of the duties they were assigned were strictly controlled and dictated by Defendant's policies and procedures, Notes, automated systems and SOPs, among other things, and daily instructions.
111. The other Assistant Managers' primary duties at the Bethel Park, West Mifflin, Pittsburgh



Mills and Fox Chapel stores were not to regularly supervise or manage two or more full time employees or the equivalent; rather, their primary duties were to perform the manual tasks normally performed by the Associates.

112. The other Assistant Managers at the Bethel Park, West Mifflin, Pittsburgh Mills and Fox Chapel stores did not have the authority to hire, discipline or fire the hourly employees (referred to by Wal-Mart as “Associates”) or make recommendations which were given particular weight by management in regard to those decisions.
113. The other Assistant Managers at the Bethel Park, West Mifflin, Pittsburgh Mills and Fox Chapel stores also did not have the authority to schedule the hourly associates outside of the strict guidelines - and format - in the “Smart System.”
114. The other Assistant Managers at the Bethel Park, West Mifflin, Pittsburgh Mills and Fox Chapel stores did not have the discretion to deviate from the “Smart System.”
115. Considering their hours worked, the other Assistant Managers at the Bethel Park, West Mifflin, Pittsburgh Mills and Fox Chapel stores made the same or even less per hour than some of the Associates, particularly the non-exempt Zone/Merchandise Supervisors, and particularly when the Associates also earned overtime pay.
116. The other Assistant Managers at the Bethel Park, West Mifflin, Pittsburgh Mills and Fox Chapel stores did not meet the requirements for any of the exemptions within the FLSA or PMWA.
117. Plaintiffs personally observed that the other Assistant Managers at the Bethel Park, West Mifflin, Pittsburgh Mills and Fox Chapel stores regularly worked in excess of 50 hours in

workweeks since Plaintiffs stated to work for Defendant (Paolicelli - 2009; Swank - October 2011; McCracken - October 2012).

118. The Assistant Managers at Bethel Park, West Mifflin, Pittsburgh Mills and Fox Chapel, like Plaintiffs, were scheduled to work either a 4 on/4 off or 3 on/3 off schedule (either 4 or 3 12-hour shifts, minimum 48 hours per workweek).
119. Sometimes the Assistant Managers at the Bethel Park, West Mifflin, Pittsburgh Mills and Fox Chapel stores would be scheduled "off" even fewer than the normal 4 days off or 3 days off, depending on the direction of the Store Manager.
120. This would mean the Assistant Managers at the Bethel Park, West Mifflin, Pittsburgh Mills and Fox Chapel stores frequently would work far in excess of the minimum 48 hours in a workweek.
121. The scheduling of the Assistant Managers on a 4 on/4 off or 3 on/3 off, resulting in a minimum standard 48-hour workweek, was done by Wal-Mart as a matter of regional and corporate policy.
122. This policy (4 on/4 off or 3 on/3 off with minimum standard of 48-hour workweek) applied not only to the Bethel Park, West Mifflin, Pittsburgh Mills and Fox Chapel stores but to the other Wal-Mart stores in the Pittsburgh region (Bethel Park, West Mifflin, Carnegie, Natrona Heights, North Versailles, Robinson Township, Fox Chapel, Pittsburgh Mills (Tarentum), Belle Vernon, Kittanning, Gibsonia, Monaca), the stores elsewhere in Pennsylvania and the Wal-Mart stores nationally.
123. Plaintiffs were personally informed this was the store and corporate policy (4 on/4 off or 3

on/3 off with a minimum of 48 hours per workweek) by Store Managers at Bethel Park, West Mifflin, Pittsburgh Mills and Fox Chapel.

124. Plaintiff Paolicelli was also personally informed by management at the Belle Vernon store that this schedule was followed at Fox Chapel and Belle Vernon and was Wal-Mart corporate policy (4 on/4 off or 3 on/3 off).
125. Plaintiffs also discussed this schedule with Assistant Managers throughout the Pittsburgh region (Bethel Park, West Mifflin, Carnegie, Natrona Heights, North Versailles, Robinson Township, Fox Chapel, Pittsburgh Mills (Tarentum), Belle Vernon, Kittanning, Gibsonia, Monaca) and with Assistant Managers elsewhere in Pennsylvania at various corporate functions, such as training sessions.
126. Plaintiffs were also instructed by corporate training personnel at the training they attended for Assistant Managers in Cranberry, PA, when they first became Assistant Managers that this was the policy (4 on/4 off or 3 on/3off) for Assistant Managers throughout Wal-Mart.
127. Significantly, the hourly (non-exempt) Zone/Merchandise Supervisors at the Bethel Park, West Mifflin, Pittsburgh Mills and Fox Chapel stores perform essentially the same primary duties as Plaintiffs and the other Assistant Managers at Bethel Park, West Mifflin, Pittsburgh Mills and Fox Chapel stores, and at the other Pittsburgh region stores (Carnegie, Natrona Heights, North Versailles, Robinson Township, Fox Chapel, Pittsburgh Mills (Tarentum), Belle Vernon, Kittanning, Gibsonia, Monaca), and at the other stores in Pennsylvania.
128. Plaintiffs know this (§127) because of:
  - personal observation;

- being told this by Assistant Managers and hourly (non-exempt) Zone/Merchandise Supervisors at the other stores in the Pittsburgh region;
- being told this by Assistant Managers and hourly (non-exempt) Zone/Merchandise Supervisors at other stores in Pennsylvania; and,
- the fact that Wal-Mart SOPs, automated systems and corporate instructions applied to all employees, including the Assistant Managers and the hourly (non-exempt) Zone/Merchandise Supervisors.

129. Reflecting Defendant's policy of using Plaintiffs and the other Assistant Managers to perform the same primary duties as the hourly Associates, Plaintiffs and the other Assistant Managers are referred to by Defendant as "floating associates."

130. This term, "floating associates," is a term that was used by the Corporate Training Department instructors when training Plaintiffs and other Assistant Managers, and a term Plaintiffs have heard used by managers throughout Wal-Mart.

131. By requiring Plaintiffs and the other Assistant Managers in the Pittsburgh region stores (Bethel Park, West Mifflin, Carnegie, Natrona Heights, North Versailles, Robinson Township, Fox Chapel, Pittsburgh Mills (Tarentum), Belle Vernon, Kittanning, Gibsonia, Monaca), and at the other stores in Pennsylvania, to perform the same primary duties of the hourly Associates, Wal-Mart reduces the amount of overtime pay it would otherwise have to pay to its non-exempt hourly Associates and, in turn, reduces overall labor costs.

132. There have been in excess of 1,000 Assistant Managers (or "floating associates" according to Wal-mart) in Pennsylvania who, as a matter of Wal-Mart policy and practice in Pennsylvania, have performed the same or very similar primary duties as Plaintiffs and the

other Assistant Managers in the Pittsburgh region stores (Bethel Park, West Mifflin, Carnegie, Natrona Heights, North Versailles, Robinson Township, Fox Chapel, Pittsburgh Mills (Tarentum), Belle Vernon, Kittanning, Gibsonia, Monaca) since at least August 2010 (three years prior to the filing of the *Swank* complaint).

133. Specifically, these other Assistant Managers devote the vast majority of their time performing the same primary duties as Plaintiffs, the Assistant Managers at the Bethel Park, West Mifflin, Pittsburgh Mills and Fox Chapel stores, and the Assistant Managers at the other Pittsburgh region stores (Carnegie, Natrona Heights, North Versailles, Robinson Township, Fox Chapel, Pittsburgh Mills (Tarentum), Belle Vernon, Kittanning, Gibsonia, Monaca) do: receiving and unloading trucks; sorting trucks; stocking shelves; side counter maintenance; scanning inventory; arranging end caps and stack bases; zoning (such as straightening and maintaining shelves); customer service (working the cash registers, answering questions, shopping for customers); gathering and moving carts; pushing carts out of the parking lot; salting and shoveling sidewalks during the winter; cleaning out merchandise storage bins in the back of the store; restacking pallets with the forklift; and, cleaning (mopping, sweeping, Zamboni, bathrooms).

134. Plaintiffs know this because of:

- personal observation when visiting other stores;
- discussions with other Assistant Managers from the Pittsburgh region at various corporate functions and training sessions;
- being told by Store Managers and the Market Managers in the Pittsburgh region that Wal-Mart expected uniformity among its stores;
- corporate training; and,
- knowledge that Wal-Mart imposes the same policies, procedures and practices - and

**automated management systems - on Assistant Managers throughout Wal-Mart's stores.**

- 135. The other Assistant Managers in the Pittsburgh region and elsewhere in Pennsylvania have not and do not meet the administrative exemption of the FLSA or PMWA.**
- 136. The other Assistant Managers in the Pittsburgh region and elsewhere in Pennsylvania also do not meet the requirements for the executive exemption of the FLSA or PMWA.**
- 137. The other Assistant Managers' primary duty is not to regularly supervise two or more full time employees or the equivalent.**
- 138. The Assistant Managers in the Pittsburgh region and elsewhere in Pennsylvania are trained on the importance of complying with corporate policies.**
- 139. The Assistant Managers in the Pittsburgh region and elsewhere in Pennsylvania are trained on the importance of complying with corporate procedures.**
- 140. All employees in the stores in the Pittsburgh region and elsewhere in Pennsylvania, including the Assistant Managers, are required to follow Wal-Mart procedures.**
- 141. According to Wal-Mart, Assistant Managers in Pennsylvania are expected to comply with corporate policies.**
- 142. According to Wal-Mart, Assistant Managers in Pennsylvania are expected to comply with corporate "procedures."**

143. According to Wal-Mart, all employees in stores in Pennsylvania are expected to follow Wal-Mart “procedures.”
144. Considering their hours worked, the other Assistant Managers in the Pittsburgh region and elsewhere in Pennsylvania make the same or even less per hour than some of the Associates, particularly when the Associates are permitted to earn overtime pay.
145. In fact, some hourly Associates in the Pittsburgh region and elsewhere in Pennsylvania, not only at Defendant’s Bethel Park, West Mifflin, Pittsburgh Mills and Fox Chapel stores but at stores throughout Pennsylvania, can and do make in excess of \$17.00 per hour, meaning the Associates make as much as or more in a year and per hour as the Assistant Managers, indicating Wal-Mart does not value any alleged managerial duties of the Plaintiffs or the other Assistant Managers.
146. Improperly claiming Plaintiffs and other Assistant Managers in the Pittsburgh region and elsewhere in Pennsylvania to be exempt is a deliberate act by Defendant to avoid the payment of overtime hours to the Assistant Managers, to further reduce the payment of overtime to hourly Associates, and to reduce overall labor costs.
147. By requiring Plaintiffs and other Assistant Managers in the Pittsburgh region and elsewhere in Pennsylvania to perform the same primary duties as hourly Associates, Wal-Mart reduces the amount of overtime pay paid to its non-exempt hourly Associates and, overall, reduces overhead.
148. For at least the past five years Wal-Mart has enforced a policy of prohibiting, or at the very

least severely limiting, overtime hours for the hourly Associates and, in turn, overtime pay.

149. This is for the specific, corporate-wide purpose of reducing overhead (labor costs) and increasing profits.
150. This policy has resulted in the significant reduction of overtime pay paid to the hourly Associates since at least 2012.
151. It has also resulted in the reduction of overtime hours worked by the hourly Associates, and the reduction of labor costs.
152. However, the work itself required to be done at the Wal-Mart stores, including the stores where Plaintiffs worked (Bethel Park, West Mifflin, Pittsburgh Mills, Fox Chapel), the other stores in the Pittsburgh region (Carnegie, Natrona Heights, North Versailles, Robinson Township, Belle Vernon, Kittanning, Gibsonia, Monaca), and the other stores in Pennsylvania, has in most instances not diminished.
153. The result is that work that previously would have been performed by hourly Associates working overtime hours now must be performed by someone else: namely, the Assistant Managers.
154. Wal-Mart has been successful over the past two years in reducing its operating costs nationwide, estimated at a \$740 million reduction.
155. These savings, in significant part, have been realized by exploiting the Assistant Managers, specifically (as noted above) by having the Assistant Managers perform primarily as



“floating associates” who can be -and are - expected to work ever more hours without any additional compensation.

156. Defendant has known since at least August 2010 (three years prior to the filing of the *Swank* complaint) that it has been in violation of the FLSA and the PMWA and has acted in reckless disregard of the FLSA and the PMWA with respect to the classification and payment of Plaintiffs and the other Assistant Managers (aka “floating associates”) in the Pittsburgh region (Bethel Park, West Mifflin, Carnegie, Natrona Heights, North Versailles, Robinson Township, Fox Chapel, Pittsburgh Mills (Tarentum), Belle Vernon, Kittanning, Gibsonia, Monaca) and the other stores in Pennsylvania.

COLLECTIVE/CLASS ACTION ALLEGATIONS

157. Defendant has employed in excess of 1,000 non-exempt Assistant Managers in Pennsylvania who are subject to the same policies (non-payment of overtime despite having the primary duty of performing non-exempt work) at all times relevant to this matter (since August 2010).<sup>2</sup>
158. The similarly situated employees of Defendant on whose behalf this lawsuit is brought include all non-exempt Assistant Managers in Pennsylvania who have worked hours in excess of forty (40) hours in workweeks since August 2010 who have been subjected to the same policies regarding the performance of non-exempt primary duties and the non-

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<sup>2</sup>Consistent with the Rule 26(f) Report filed by the Parties in this matter, the relevant time period for the Rule 23 class under the PMWA commences August 16, 2010, three years prior to the filing of the *Swank* case, and not February 28, 2011 (three years prior to the filing of the *Paolicelli* case). The August 2010 date, whenever referred to in the Third Amended Complaint in the context of the “class,” refers only to the Rule 23 PMWA class. The relevant period of time for any FLSA 216(b) collective action is yet to be determined based on further proceedings in this matter, specifically, whether the Court were ultimately to approve Notice and fix a date in that Notice for any FLSA collective period.

payment of overtime, and who have not been paid overtime compensation at a rate of time-and-one-half (1½) their regular rate of pay for the overtime hours worked.

159. Defendant has violated §207(a) of the FLSA and the PMWA by failing to pay Plaintiffs, and all other similarly situated non-exempt Assistant Managers in Pennsylvania, who have performed work in excess of forty (40) hours in workweeks since August 2010 at a rate of time-and-one-half (1½) their regular rate of pay for the overtime hours worked.
160. Prosecuting this case as a collective action under the FLSA and a class action under the PMWA for similarly situated non-exempt Assistant Managers who have been unlawfully denied overtime wages will promote judicial efficiency and will best protect the interest of the class members.
161. There are no conflicts of interest among the class members.
162. Counsel for the Representative Plaintiffs, Joseph H. Chivers and John R. Linkosky, are experienced in the field of employment law (including FLSA and PMWA wage claims), and collective/class actions, and will fairly and competently represent the interests of the class members.
163. The class is so numerous that joinder of all members is impracticable [numerosity].
  - As noted above, there are in excess of 1,000 class members and it would be impractical - if not impossible - to join them all individually.
164. There are questions of law or fact common to the class [commonality].
  - As noted above, the members of the class of Assistant Managers are uniformly

classified by Wal-Mart as exempt from overtime (common questions of law); perform the same or similar primary duties as do Plaintiffs and the hourly Associates and hourly Zone/Merchandise Managers (common questions of fact) consistent with uniform Wal-Mart policies and procedures and practices (common questions of fact); are improperly classified as exempt (common questions of law and fact); work more than 40 hours in workweeks since August 2010 (common questions of fact) and are paid no overtime at time-and-one-half the regular rate of pay (common questions of fact).

165. The claims or defenses of the representative parties are typical of the claims or defenses of the class [typicality].

- As noted above, the claims of the named Plaintiffs are typical of the claims of the other Assistant Managers, i.e., failure to pay overtime in accordance with the FLSA/PMWA. The defenses to Plaintiffs' claims (proper classification as exempt under the executive and/or administrative exemptions) are typical of (actually identical to) any defenses to the claims of the class.

166. The representative parties will fairly and adequately protect the interests of the class [adequacy].

- As noted above, counsel for the representative Plaintiffs, Joseph H. Chivers and John R. Linkosky, are experienced in the field of wage and hour law, and collective/class actions, and will fairly and competently represent the interests of the class members.

167. The questions of law or fact common to class members predominate over any questions affecting only individual members.

- As noted above, any questions of law are common. To the extent there are any variations in fact (for example, in the precise percentage of time spent by the class members performing particular duties or in the number of Assistant Managers in each store or the number of Associates or Shift Managers in each store), common questions predominate. In particular, Plaintiffs have identified specific company-wide policies and practices (SOPs, Notes, automated management systems (like the merchandising system and “Smart System”) prohibition against overtime, treating Assistant Managers as “floating associates,” policy of reducing payroll expenses without having to reduce the workload, strict control of the Assistant Managers and the performance of their duties, etc.) that give rise to the common liability (improper classification and failure to pay overtime).
168. In light of the above (numerosity, commonality, impracticability of joinder of separate actions), prosecuting this case as a collective/class action for similarly situated non-exempt Assistant Managers who have been unlawfully denied overtime wages will promote judicial efficiency and will best protect the interests of the class members.
169. Common issues predominate.
170. A collective/class action is superior to other available methods for fairly and efficiently adjudicating this controversy, and would avoid duplicative and potentially inconsistent or varying adjudications that could impair or impede the ability of either party to protect its interests.
171. Proof of liability for Wal-Mart’s conduct depends on the conduct of Wal-Mart, not on the conduct of the individual class members.

172. Wal-Mart has acted on grounds that apply generally to the class of non-exempt Assistant Managers in Pennsylvania (as noted above), making declaratory relief appropriate respecting the class as a whole.
173. There are no conflicts of interest among the class members.

**COUNT I: FAIR LABOR STANDARDS ACT (FLSA)/PENNSYLVANIA MINIMUM WAGE ACT (PMWA)  
FAILURE TO PAY OVERTIME (INDIVIDUAL AND COLLECTIVE/CLASS ACTION)**

174. Plaintiffs hereby incorporate by reference Paragraphs 1 through 173 of their Third Amended Complaint as though the same were more fully set forth herein.
175. Plaintiffs, and all other similarly situated non-exempt Assistant Managers in the Pittsburgh region (Bethel Park, West Mifflin, Carnegie, Natrona Heights, North Versailles, Robinson Township, Fox Chapel, Pittsburgh Mills (Tarentum), Belle Vernon, Kittanning, Gibsonia, Monaca), and in Pennsylvania, are employees of Defendant within the meaning of the FLSA and the PMWA.
176. Defendant is an employer within the meaning of the FLSA and the PMWA.
177. The primary duties of Plaintiffs, and all other similarly situated non-exempt Assistant Managers in the Pittsburgh region (Bethel Park, West Mifflin, Carnegie, Natrona Heights, North Versailles, Robinson Township, Fox Chapel, Pittsburgh Mills (Tarentum), Belle Vernon, Kittanning, Gibsonia, Monaca), and in Pennsylvania, are non-exempt duties within the meaning of the FLSA and the PMWA.

178. These non-exempt primary duties are the result of common policies and practices applied by Defendant to Plaintiffs, and all other similarly situated non-exempt Assistant Managers in the Pittsburgh region (Bethel Park, West Mifflin, Carnegie, Natrona Heights, North Versailles, Robinson Township, Fox Chapel, Pittsburgh Mills (Tarentum), Belle Vernon, Kittanning, Gibsonia, Monaca), and in Pennsylvania.
179. Plaintiffs, and all other similarly situated non-exempt Assistant Managers in the Pittsburgh region (Bethel Park, West Mifflin, Carnegie, Natrona Heights, North Versailles, Robinson Township, Fox Chapel, Pittsburgh Mills (Tarentum), Belle Vernon, Kittanning, Gibsonia, Monaca), and in Pennsylvania, have worked in excess of 40 hours in workweeks since August 2010.
180. Plaintiffs, and all other similarly situated non-exempt Assistant Managers in the Pittsburgh region (Bethel Park, West Mifflin, Carnegie, Natrona Heights, North Versailles, Robinson Township, Fox Chapel, Pittsburgh Mills (Tarentum), Belle Vernon, Kittanning, Gibsonia, Monaca), and in Pennsylvania, have been subject to the same common policies and practices since August 2010.
181. The common policies and practices result in the unlawful denial of overtime pay at time-and-one-half ( $1\frac{1}{2}$ ) the regular rate of pay in weeks where Plaintiffs and the other similarly situated non-exempt Assistant Managers in the Pittsburgh region (Bethel Park, West Mifflin, Carnegie, Natrona Heights, North Versailles, Robinson Township, Fox Chapel, Pittsburgh Mills (Tarentum), Belle Vernon, Kittanning, Gibsonia, Monaca), and in Pennsylvania, have worked more than forty (40) hours.
182. Plaintiffs, and all other similarly situated non-exempt Assistant Managers in the Pittsburgh

region (Bethel Park, West Mifflin, Carnegie, Natrona Heights, North Versailles, Robinson Township, Fox Chapel, Pittsburgh Mills (Tarentum), Belle Vernon, Kittanning, Gibsonia, Monaca), and in Pennsylvania, are entitled to be paid overtime compensation at time-and-one-half (1½) their regular rate of pay pursuant to the FLSA and the PMWA for hours worked in excess of forty (40) hours in workweeks since August 2010.

183. Defendant has violated the FLSA and the PMWA by not paying Plaintiffs, and all other similarly situated non-exempt Assistant Managers in the Pittsburgh region (Bethel Park, West Mifflin, Carnegie, Natrona Heights, North Versailles, Robinson Township, Fox Chapel, Pittsburgh Mills (Tarentum), Belle Vernon, Kittanning, Gibsonia, Monaca), and in Pennsylvania, overtime compensation at time-and-one-half their regular rate of pay in workweeks in which the non-exempt Assistant Managers have worked more than 40 hours since August 2010.
184. Plaintiffs, and all other similarly situated non-exempt Assistant Managers in the Pittsburgh region (Bethel Park, West Mifflin, Carnegie, Natrona Heights, North Versailles, Robinson Township, Fox Chapel, Pittsburgh Mills (Tarentum), Belle Vernon, Kittanning, Gibsonia, Monaca), and in Pennsylvania are also, under the FLSA, entitled to liquidated damages in an amount equal to the unpaid overtime.
185. Defendant's failure to pay overtime at time-and-one-half (1½) the regular rate of pay is knowing and willful.
186. Defendant's failure to pay overtime at time-and-one-half (1½) the regular rate of pay is a violation of the FLSA and the PMWA.

187. Because Defendant has knowingly and intentionally violated the FLSA since August 2010 the three-year statute of limitations for intentional violations under the FLSA applies. (The statute of limitations under the PMWA is three years regardless of willfulness.)

PRAYER FOR RELIEF

188. Wherefore, Plaintiffs, and all other similarly situated non-exempt Assistant Managers in the Pittsburgh region (Bethel Park, West Mifflin, Carnegie, Natrona Heights, North Versailles, Robinson Township, Fox Chapel, Pittsburgh Mills (Tarentum), Belle Vernon, Kittanning, Gibsonia, Monaca), and in Pennsylvania, who have worked hours in excess of forty (40) hours in workweeks since August 2010 without being paid overtime compensation at a rate of time-and-one-half (1½) their regular rate of pay for the overtime hours worked, respectfully request that this Court enter judgment in their favor in an amount equal to the overtime compensation due, together with liquidated damages (FLSA), reasonable attorney's fees and costs.

Respectfully submitted,

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