STATE OF MICHIGAN

COURT OF APPEALS

KEVAN JACKSON, JR.,

Plaintiff-Appellant/Cross-Appellee,

and

BRENDA SCOTT, PAMELA MACKERWAY, LINDSAY ARMANTROUT, NADIA ZUFELT CRYSTAL PATTON, and TERESA BAUSCHKE,

Plaintiffs,

v

WAL-MART STORES, INC. and SAM'S CLUB,

Defendants-Appellees/Cross-Appellants.

UNPUBLISHED
November 29, 2005

No. 258498
Saginaw Circuit Court
LC No. 01-040751-NZ

Before: Gage, P.J., and Hoekstra and Murray, JJ.

PER CURIAM.

Plaintiff Kevan Jackson, Jr. appeals as of right the trial court's opinion and order denying class certification of this action alleging unjust enrichment and breach of an implied-in-law contract.[1] Defendant Wal-Mart Stores, Inc. cross-appeals, challenging the trial court's opinion and judgment, entered following a bench trial, awarding Jackson $539.14 for time worked by Jackson for which he was not compensated during his employment by Wal-Mart. In both instances, we affirm.

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[1] Although plaintiffs Brenda Scott, Pamela Mackerway, Lindsay Armantrout, Nadia Zufelt, Crystal Patton, and Teresa Bauschke originally joined Jackson in seeking class action certification, each has since been either dismissed from this suit or have had their claims severed from the instant action and transferred to their counties of residence. Accordingly, Jackson is the sole-remaining plaintiff and appellant in this matter. Nonetheless, to avoid confusion we refer to all plaintiffs in discussing the class certification matter at issue in this appeal.

I. Basic Facts and Procedural History

This case arises from allegations that, through a system of restrictive budgetary and employment practices, Wal-Mart Stores, Inc. (Wal-Mart) and its subsidiary, Sam's Club, improperly required employees of their Michigan stores to perform work without compensation during the six-year period between September 26, 1995 and September 26, 2001. On September 26, 2001, onetime plaintiff Brenda Scott[2] filed a six-count complaint seeking, on behalf of herself and all other similarly situated current and former hourly employees of Wal-Mart's Michigan stores, compensation for time she allegedly worked "off the clock" and for missed and/or shortened rest and meal break periods. Although initially alleging various tort theories of recovery, Scott's complaint was ultimately amended to allege only breach of an implied in law contract and unjust enrichment, and to add Kevan Jackson, Jr., Pamela Mackerway, Crystal Patton, Lindsay Armantrout, Teresa Bauschke, and Nadia Zufelt as plaintiffs and potential class representatives.

In accordance with MCR 3.501(B)(1), plaintiffs moved for class certification on December 26, 2001, arguing that their suit meets the requirement for class certification as set forth in MCR 3.501(A)(1).[3] Following an extensive period of discovery and an evidentiary hearing on plaintiffs' motion, the trial court concluded that plaintiffs had failed to meet any of the several requirements for certification of plaintiffs' suit as a class action under MCR 3.501(A)(1). Each of the plaintiffs' individual claims were thereafter severed, and their respective cause of actions transferred to the counties in which the claim arose. Because his claims arose from employment at Wal-Mart's Saginaw store, plaintiff Kevan Jackson, Jr.'s claims remained in the Saginaw Circuit Court and were tried before the bench. As previously noted, at the conclusion of the proofs at trial, the trial court issued an opinion and judgment awarding Jackson $539.14 as compensation for missed breaks and time worked while "off the clock" during his employment at Wal-Mart's Saginaw store. These appeals followed.

II. Analysis

A. Denial of Class Certification

Plaintiffs argue that the trial court erred in finding that he failed to meet any of the several requirements for certification of his suit as a class action. A trial court's decision on a motion for certification as a class action is reviewed for clear error. *Hamilton v AAA Michigan*, 248 Mich App 535, 541; 639 NW2d 837 (2001). "A finding is clearly erroneous when, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake has been made." *Neal v James*, 252 Mich App 12, 15; 651 NW2d 181 (2002).

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[2] See note 1.

[3] MCR 3.501(B)(1)(a) provides that "[w]ithin 91 days after the filing of a complaint that includes class action allegations, the plaintiff must move for certification that the action may be maintained as a class action."

Pursuant to MCR 3.501(A)(1), a member of a class may maintain a suit as a representative of all members of that class only if each of the following requirements are met:

> (a) the class is so numerous that joinder of all members is impracticable;
>
> (b) there are questions of law or fact common to the members of the class that predominate over questions affecting only individual members;
>
> (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class;
>
> (d) the representative parties will fairly and adequately assert and protect the interests of the class; and
>
> (e) the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice.

Plaintiff argues that these requirements, often referred to as numerosity, typicality, commonality, adequacy, and superiority, are each present in this case and that class certification should, therefore, have been granted by the trial court. We disagree.

The party requesting certification of the class action bears the burden of demonstrating that the action meets the conditions for certification found in MCR 3.501(A)(1). *Neal, supra* at 16. When evaluating a motion for class certification, the trial court may not examine the merits of the case. *Id*. at 15. Rather, it must accept as true the allegations made in support of the request for certification. *Id*. This does not, however, require that the trial court "blindly rely on conclusory allegations" that merely "parrot" the requirements for class certification. See 3 Newberg & Conte, Newberg on Class Actions (4th ed), § 7.26, p 81. To the contrary, class certification should be granted only "if the trial court is satisfied, after a rigorous analysis, that the prerequisites of [class certification] have been satisfied." *Gen Tel Co of the Southwest v Falcon*, 457 US 147, 161; 102 S Ct 2364; 72 L Ed 2d 740 (1982).[4] Because "the class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action,'" such analysis may, and often does, require that the court "probe behind the pleadings" and analyze the claims, defenses, relevant facts, and applicable substantive law "before coming to rest on the certification question." *Id*. at 155, 160 (citation and internal quotation marks omitted).

With these principles in mind, we address the merits of plaintiffs' challenge of the trial court's denial of its request to certify this matter as a class action.

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[4] "Because there is limited case law in Michigan addressing class certifications, this Court may refer to federal cases construing the federal rules on class certification." *Neal, supra* at 15; see also *Zine v Chrysler Corp*, 236 Mich App 261, 288 n 12; 600 NW2d 384 (1999).

1. Numerosity

As previously noted, in order to obtain class certification, a plaintiff must satisfy each of the requirements of numerosity, commonality, typicality, adequacy, and superiority. *Neal*, *supra* at 16. To prove numerosity, a plaintiff is required to demonstrate that the putative class is "so numerous that joinder of all members is impracticable." MCR 3.501(A)(1)(a). Although in doing so the party is not required to plead and prove the exact number of class members, *Zine v Chrysler Corp*, 236 Mich App 261, 288; 600 NW2d 384 (1999), "impracticability of joinder must be positively shown, and cannot be speculative." *McGee v East Ohio Gas Co*, 200 FRD 382, 389 (SD Ohio, 2001) (citations and internal quotation marks omitted). As stated by this Court in *Zine*, *supra* at 287-288:

> Because the court cannot determine if joinder of the class members would be impracticable unless it knows the approximate number of members, the plaintiff must adequately define the class so potential members can be identified and must present some evidence of the number of class members or otherwise establish by reasonable estimate the number of class members. [(Internal citations omitted).]

In *Zine*, *supra* at 265, plaintiffs Christopher Zine and Leonard and Lois Terry filed a proposed class action alleging that informational booklets provided by Chrysler to each purchaser of new Chrysler products erroneously misled the purchaser to believe that Michigan did not have a "lemon law" and that an arbitration board established by Chrysler was their only remedy for defective vehicles. The plaintiffs asserted that the class potentially included each of the more than 522,600 persons who had purchased a Chrysler vehicle during the relevant time period. *Id*. at 267. In affirming the trial court's conclusion that the plaintiffs' evidence and allegations in this regard were insufficient to establish numerosity, this Court stated:

> Neither Zine nor the Terrys identified a specific number of class members, but indicated that the class potentially included all 522,658 purchasers of new Chrysler products from February 1, 1990, onward. However, class members must have suffered actual injury to have standing to sue, *Sandlin* [*v Shapiro & Fishman*, 168 FRD 662, 666 (MD Fla, 1996)], so plaintiffs must show that there is a sizable number of new car buyers who had seriously defective vehicles and lost their right to recovery under Michigan's lemon law because they were mislead by the documents supplied by Chrysler. Neither Zine nor the Terrys indicated even approximately how many people might come within this group, nor did they indicate a basis for reasonably estimating the size of the group. Therefore, both Zine and the Terrys failed to show that the proposed class is so numerous that joinder of all members is impracticable. [*Id*. at 288-289.]

In this case, plaintiffs defined the class sought to be represented by them as "all current and former hourly employees of Wal-Mart Stores, Inc., . . . in the State of Michigan who have worked off-the-clock without compensation, and/or worked through any part of a rest and/or meal break during the period from September 26, 1995 to the present . . . ." Relying on *Zine*, *supra*, the trial court found that although plaintiffs had presented evidence that Wal-Mart had employed approximately 96,000 people in its Michigan stores during the prescribed period, plaintiffs "made no allegations as to a number of potential members that have suffered an actual injury," and failed to present any "reasonable way to estimate the size of the proposed class."

Therefore, the court concluded plaintiffs had failed to meet their burden of establishing that "the class is so numerous that joinder is impracticable."

On appeal, plaintiffs do not challenge the applicability of *Zine*, or the trial court's reliance thereon to conclude that plaintiffs had failed in their burden of establishing that the class was so numerous as to make joinder of the members impracticable. Rather, plaintiffs assert that the trial court was required to accept as true that each of the 96,000 persons employed by Wal-Mart during the prescribed period had been forced to work off the clock or otherwise forgo rest or meal breaks as a result of the corporate-wide budgetary policies allegedly employed by Wal-Mart. This assertion, however, is inconsistent with both the rationale employed in *Zine* as well as the definition of the class provided by plaintiffs in their complaint, which expressly limits the proposed class to those employees who in fact worked off the clock or had forgone rest or meal breaks. Moreover, the principle that a court must accept as true a plaintiff's allegations in support of class certification merely limits review of the merits of the plaintiff's claim, and should not be invoked to artificially limit the required "rigorous analysis" of the factors necessary to the determination whether plaintiffs have met their burden of establishing each of the certification requirements. *Falcon*, *supra*; see also *Love v Turlington*, 733 F2d 1562, 1564 (CA 11, 1984); *Bell v Ascendant Solutions, Inc*, 422 F3d 307, 311-313 (CA 5, 2005) (noting that the suggestion that a court "must accept, on nothing more than pleadings, allegations of elements central to the propriety of class certification" is fundamentally "at odds" with the court's duty to make findings that the requirements for certification have been met).

As recognized by the trial court in employing the rationale of *Zine*, in order to meet their burden of establishing numerosity, i.e., that joinder of all class members is impracticable, plaintiffs were required to provide some evidence reasonably estimating or otherwise showing the number of proposed class members who suffered actual injury. *Zine*, *supra* at 288-289. Although plaintiffs offered evidence estimating the total number of persons employed by Wal-Mart during the relevant time period, plaintiffs offered no proof or estimate of the size of the actual proposed class, i.e., those employees who were forced to work off the clock or to forgo rest and meal breaks during that period.[5] Accordingly, the trial court could not ascertain whether

[5] Plaintiffs attempted, through the use of expert testimony, to assert a method for reasonably estimating the size of the proposed class through a series of random surveys and extrapolation of electronic time card punch data available for a five-week period between January 2001 and early February 2001, when Wal-Mart repealed its policy requiring that employees punch out for rest breaks. However, although not expressly addressing the merits of this methodology, in concluding that "[t]here is no way to reasonably estimate the size of the proposed class," the trial court impliedly rejected that methodology as unreasonable for purposes of establishing numerosity. Other than their assertion that the testimony of their expert constitutes, under *Zine*, *supra* at 288, "some evidence" to establish by reasonable estimate the number of class members, plaintiffs offer no argument to support that the trial court clearly erred in rejecting a methodology by which the break patterns of more than 96,000 employees over a six-year period would be determined through the use of random polling and extrapolation of electronic data collected over a period of only five weeks.

the numerosity requirement was satisfied and, as such, did not clearly err in concluding that plaintiffs had failed to meet their burden in that regard. *Zine*, *supra*; *Neal*, *supra* at 15.

2. Commonality

As indicated above, MCR 3.501(A)(1)(b) requires that there be "questions of law or fact common to the members of the class that predominate over questions affecting only individual members." In *Zine*, *supra* at 289, this Court explained that this "common question factor is concerned with whether there 'is a common issue the resolution of which will advance the litigation,' [and] requires that 'the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, must predominate over those issues that are subject only to individualized proof.'" (Citations omitted). Here, the trial court concluded that although such matters as whether Wal-Mart engaged in a pattern or practice that caused its employees not to report all time worked or to forgo rest and meal breaks were common to all members of the proposed class, Wal-Mart's liability for such conduct, and the extent thereof, could "only be answered by individualized inquiry" into the circumstances of each class member. Thus, the court concluded, "common questions of law or fact do not predominate over questions affecting only individual members." In reaching this conclusion, the trial court rejected plaintiffs' allegation that the need for such individualized inquiry could be obviated by the use of statistical models developed through the use of random surveys and the records of Wal-Mart's employee database.[6] As explained below, we find no clear error in the trial court's conclusion that individual inquiries, which cannot be adequately circumvented by statistical sampling or a general review of employee time records, predominate over the common questions in this matter.

As previously noted, in determining whether certification as a class action is appropriate, it is often necessary that the court analyze the claims, defenses, and substantive law applicable in the suit at issue. *Falcon*, *supra* at 155, 160. Here, plaintiffs alleged damages and associated liability under two purportedly separate theories of recovery: breach of an implied in law contract and unjust enrichment. It is well settled, however, that a contract implied by law "is not a contract at all," but rather an obligation imposed by the law "where there is a receipt of a benefit by a defendant from a plaintiff and retention of the benefit is inequitable, absent reasonable compensation." *In re Lewis Estate*, 168 Mich App 70, 74; 423 NW2d 600 (1988). Thus, plaintiffs' claim for breach of an implied in law contract is itself a claim for unjust enrichment. See *Tingley v 900 Monroe, LLC*, 266 Mich App 233, 247; ___ NW2d ___ (2005) ("[a] claim of unjust enrichment requires proof that the defendant received a benefit from the plaintiff and that permitting the defendant to retain the benefit would result in inequity to the plaintiff"); see also *Barber v SMH (US), Inc*, 202 Mich App 366, 375; 509 NW2d 791 (1993)

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[6] Contrary to plaintiffs' assertion, the trial court did not reject statistical modeling as an acceptable manner of overcoming the need for individual inquiry into such matters as liability and damages solely on the ground that plaintiffs' statistical expert, Dr. Martin Shapiro, acknowledged at the class certification hearing that such modeling would not be "100% accurate." Although noting Shapiro's acknowledgement in this regard, the court also relied on the highly individualized nature of the inquiries that, as explained below, are required to establish liability and damages under the theories of recovery alleged by plaintiffs.

(when such elements exists, "the law operates to imply a contract in order to prevent unjust enrichment"). As such, to establish liability under either theory alleged, plaintiffs are required to show that Wal-Mart received a benefit from its employees, the retention of which without compensation would result in an inequity to those persons. *Tingley*, *supra*. While the receipt of a benefit by Wal-Mart, in the form of work performed off the clock or during periods when an employee was entitled to be on break, might adequately be shown by the statistical models profferred by plaintiffs, whether inequity would result from retention of that benefit necessarily requires inquiry into the reasons why each individual member of the proposed class performed work off the clock or missed rest or meal breaks. As noted by the trial court, the evidence presented by the parties indicated that while some potential class members were expressly required by their supervisors to work off the clock or forgo a break, others had either never performed work off the clock or simply chose to do so for a number of personal reasons.[7] Other evidence indicated that the performance of work off the clock or during rest or break periods varied with the positions held by an employee. Indeed, plaintiff Pamela Mackerway herself testified that although she occasionally performed off-the-clock work while assigned to the receiving department, she never did so while working in the claims department. Plaintiff Kevan Jackson similarly testified that while he regularly missed rest breaks as an inventory control specialist and bike assembler, he always received all meal and rest breaks to which he was entitled while working as an overnight stocker. The evidence further indicated that many proposed class members failed to consistently punch in and out for both breaks and scheduled work shifts for a variety of reasons, including forgetfulness and mere convenience, and that some employees opted to forgo submission of a request to adjust their time to account for missed breaks or work performed off the clock, despite their awareness they could do so. These highly individualized scenarios directly affect the equities of any claim for unjust enrichment by the proposed class members. Moreover, as recognized by the court in *Basco v Wal-Mart Stores, Inc*, 216 F Supp 2d 592, 603 (ED La, 2002), plaintiffs' "proposed statistical analysis ignores the highly individualized issues . . . [regarding] the myriad of reasons why any employee may have missed a meal or work break or worked off-the-clock, [and the] possible defenses available to defendant to explain or justify any employee's missed work or meal break or work off-the-clock."

Accordingly, because many of the claims will stand or fall, not on the answer to the question whether Wal-Mart, as the result of a policy or practice that caused its employees not to report all time worked or to forgo required rest and meal breaks, received a benefit, but on the resolution of the highly individualized question whether it would be inequitable for Wal-Mart to retain that benefit without compensation, we do not conclude that the trial court clearly erred in finding that plaintiffs failed to satisfy the requirement of commonality set forth in MCR 3.501(A)(1)(b). See *Rutstein v Avis Rent-A-Car Systems, Inc*, 211 F3d 1228, 1234 (CA 11,

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[7] Although plaintiffs assert in their brief on appeal that "numerous courts" have rejected the contention that the voluntary nature of missed breaks or off-the-clock work will excuse an employer from compensating its employees for such matters, the sole authority cited by plaintiffs for their assertion in this regard concerns the statutory requirement for overtime pay under the Fair Labor Standards Act of 1938, 29 USC 201, *et seq*. In contrast, the claims at issue here seek recovery in equity, for which the voluntary nature of the work at issue is highly relevant.

2000) ("[w]hether an issue predominates can only be determined after considering what value the resolution of the class-wide issue will have in each class member's underlying cause of action"); see also *Klay v Humana, Inc*, 382 F3d 1241, 1255 (2004) (when, "after adjudication of the class-wide issues, [the] plaintiffs must still introduce a great deal of individualized proof or argue a number of individualized legal points to establish most or all of the elements of their individual claims, such claims are not suitable for class certification").

3. Typicality

MCR 3.501(A)(1)(c) requires that the claims of the representative parties be "typical of the claims . . . of the class" as a whole. As this Court explained in *Neal, supra* at 21:

> The typicality requirement . . . directs the court "to focus on whether the named representatives' claims have the same essential characteristics as the claims of the class at large." While factual differences between the claims do not alone preclude certification, the representative's claim must arise from "the same event or practice or course of conduct that gives rise to the claims of the other class members and . . . [be] based on the same legal theory." In other words, the claims, even if based on the same legal theory, must all contain a common "core of allegation." [quoting *Allen v Chicago*, 828 F Supp 543, 553 (ND Ill, 1993) (citations omitted).]

Here, the trial court found that because the claims of each class member were, as discussed above, highly individualized, "there was no single event or course of conduct that can be applied to all of the class representatives." In doing so, the court reasoned that "there are simply too many different factual circumstances involved in these claims to show that the claims presented by the class representatives are typical of the claims of the remaining members of the class." We again find no clear error in the trial court's conclusion in this regard.

As previously discussed, although plaintiffs' claim that Wal-Mart has been unjustly enriched arguably arises from a "common core of allegation," i.e., that it employs a practice or policy causing its employees to perform work off the clock or forgo rest and meal breaks to which they are entitled, the question whether it is inequitable for Wal-Mart to retain any benefit received as a result of a particular employee having performed work off the clock or missed a break varies with each individual class member. See *Falcon, supra* at 157 n 13 ("[t]he commonality and typicality requirements . . . tend to merge"); see also *Newton v Merrill Lynch, Pierce, Fenner & Smith, Inc*, 259 F3d 154, 183 (CA 3, 2001) ("[t]he typicality inquiry . . . centers on whether the named plaintiffs' individual circumstances are markedly different"). Indeed, a named plaintiff who proves his or her claim will not necessarily have proven the claim of any other member of the proposed class and, as such, the trial court did not clearly err in finding that plaintiffs' claims were not typical of those of the "class at large," *Neal, supra*, and that, therefore, plaintiffs failed to meet the requirement of typicality set for in MCR 3.501(A)(1)(c). See *Sprague v Gen Motors Corp*, 133 F3d 388, 399 (CA 6, 1998) (summarizing the typicality requirement as entailing the premise that "as goes the claim of the named plaintiff, so goes the claim of the class").

4. Adequacy of Representative Parties

MCR 3.501(A)(1)(d) requires that "the representative parties will fairly and adequately assert and protect the interests of the class." To assess whether this requirement is met, a court must employ a two-part inquiry: "'First, the court must be satisfied that the named plaintiffs' counsel is qualified to sufficiently pursue the putative class action. Second, the members of the advanced class may not have antagonistic or conflicting interests.'" *Neal*, *supra* at 22, quoting *Allen*, *supra*.

In this case, although finding "no reason to challenge the competency" of plaintiffs' counsel to adequately represent the class, the trial court concluded that there exists an "inherent conflict" between the named plaintiffs and those members of the class who are hourly department managers, because such managers may in fact be the cause of another class member's complaint. In challenging the trial court's conclusion in this regard, plaintiffs argue that because they allege misconduct on the corporate, as opposed to department level, the conflict envisioned by the trial court simply does not exist. Plaintiffs' argument in this regard, however, ignores the statements of proposed class representatives such as Pamela Mackerway Lindsay Armantrout, and Kevan Jackson, each of whom recalled during their testimony having been asked by their department managers to perform work off the clock despite their knowledge that doing so was a clear violation of Wal-Mart policy. Given the disciplinary consequences for such conduct testified to by nearly every Wal-Mart employee who provided evidence in this matter, we reject plaintiffs' claim that the trial court erred by finding conflict where none exists. See also *Neal*, *supra* at 23 (finding that the potential for conflict between class members who competed for but were denied promotions, allegedly on the basis of race, properly supported a finding that the requirement of MCR 3.501(A)(1)(d) had not been satisfied).

5. Superiority

Finally, MCR 3.501(A)(1)(e) requires that "the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice." In deciding this factor, a court may consider the practical problems that can arise if the class action is allowed to proceed. *Dix v American Bankers Life Assurance Co of Florida*, 429 Mich 410, 414 n 6; 415 NW2d 206 (1987). "The relevant concern . . . is whether the issues are so disparate" that a class action would be unmanageable. *Lee v Grand Rapids Bd of Ed*, 184 Mich App 502, 504-505; 459 NW2d 1 (1989). Thus, as recognized by this Court in *Zine*, *supra*, the question whether a class action would be the superior form of suit is closely tied to the commonality factor because, "if individual questions of fact predominate over common questions, the case will be unmanageable as a class action." *Id*. at 289 n 14, citing *Lee*, *supra*. Recognizing this fact, the trial court here found that "the proposed class should not be certified because this is not a superior method of litigation, due to the seemingly vast amount of individualized inquiry that will be needed to prove the plaintiffs' claims," which the court found would render the proposed class action "unmanageable." In challenging the trial court's conclusion in this regard plaintiffs argue simply that, given the small nature of each individual class members claim in relation to the cost to litigate those claims, a class action is the superior method to resolve the claims at issue here. However, although the likely "negative value" of the individual suits is a "compelling rationale for finding superiority in a class action," *Castano v American Tobacco Co*, 84 F3d 734, 748 (CA 5, 1996), it is insufficient in and of itself to justify a "headlong plunge into an unmanageable and interminable litigation process" involving predominantly individual-specific issues, *Thompson v American Tobacco Co, Inc*, 189 FRD 544,

556 (D Minn, 1999) (citation and internal quotation marks omitted). See also *Allison v Citgo Petroleum Corp*, 151 F3d 402, 419 (CA 5, 1998) (predominance of individual-specific issues relating to the plaintiffs' claims detracts from the superiority of the class action device in resolving those claims). Here, the problems inherent in managing the proposed class action include the involvement of more than 96,000 potential plaintiffs spread across the state, who have worked or are currently working in more than forty different departments of eighty-five stores over a period of six years. Given these factors, we cannot conclude that the trial court clearly erred in finding that this matter would unmanageable and, therefore, not superior, as a class action suit. Consequently, we do not find that the trial court's denial of plaintiffs' motion for class certification was clearly erroneous. *Hamilton*, *supra*.

B. Cross-Appeal

1. Denial of Motion for Summary Disposition

Following the trial court's denial of plaintiffs' motion for class certification, Wal-Mart moved for summary disposition of plaintiffs' claims under MCR 2.116(C)(10). Wal-Mart argued, among other things, that because plaintiffs' claims for breach of an implied in law contract and unjust enrichment were equitable in nature, the availability of adequate remedies at law under both the federal Fair Labor Standards Act of 1938 (FLSA), 29 USC 201 *et seq*., and the Michigan wages and fringe benefits act (WFBA), MCL 408.471 *et seq*., precluded recovery under those theories. The trial court denied Wal-Mart's motion without addressing the applicability of the state and federal statutory remedies alleged by Wal-Mart to be available to plaintiffs in lieu of their equitable claims. On cross-appeal, Wal-Mart renews its assertion that summary disposition of plaintiffs' claims was appropriate on the ground that adequate remedies at law were available to plaintiffs. As explained below, we find such claim to be without merit, at least insofar as argued by Wal-Mart.

As previously discussed, Wal-Mart is correct that the claims asserted by plaintiffs are equitable in nature, *Tingley*, *supra*, and that equitable remedies are not appropriate where an adequate remedy at law is available, *Jeffrey v Clinton*, 195 Mich App 260, 263-264; 489 NW2d 211 (1992). With respect to the FLSA, Wal-Mart cites §§ 204, 211, and 216 of the act as authority for the proposition that the act applies and provides for enforcement of its provisions via "prompt administrative investigation, private rights of action, double damages, and attorneys' fees." See 29 USC 204, 211, and 216. Sections 204 and 211 of the FLSA, however, merely provide for the creation of a "Wage and Hour Division" within the United States Department of Labor, and grant authority to its representatives to "investigate such facts, conditions, practices, or matter as [they] may deem necessary or appropriate to determine whether any person has violated" the provisions of the act. See 29 USC 204 and 211. Moreover, although § 216(b) of the act provides for a private right of action against any employer that violates the minimum wage, 29 USC 206, or overtime, 29 USC 207, provisions of the act, it provides no such right of action for the claims asserted by plaintiffs, i.e., that, through a pattern or practice that caused its employees not to report all time worked or to forgo rest and meal breaks, Wal-Mart has been unjustly enriched by its employees. See 29 USC 216(b). As such, the FLSA does not, insofar as argued by Wal-Mart, provide plaintiffs with an adequate remedy at law precluding their equitable claims.

Regarding the WFBA, Wal-Mart cites §§ 481, 488 and 489 of the act as authority for the proposition that the act applies and provides for enforcement of its provisions via "prompt administrative investigation, private rights of action, double damages, and attorneys' fees." See MCL 408.481, 488, 489. Section 481 of the act provides that "[a]n employee who believes that his or her employer has violated this act may file a written complaint with the [Michigan] department [of labor] within 12 months after the alleged violation." MCL 408.481. Pursuant to § 488, the department may thereafter "order an employer who violates section 2, 3, 4, 5, 6, 7, or 8 [of the act] to pay" any wages due the employee, the amount of which may be doubled by the department "if the violation was flagrant or repeated." See MCL 471.488; see also MCL 408.472-473. Section 488(2) further provides for the imposition of attorney fees and other costs for violation of the act. MCL 408.488. However, with respect to the violations enumerated in § 488, none are even arguably applicable to the claims asserted by plaintiffs in this suit. To the contrary, the sections enumerated in MCL 408.488 concern only delineation of pay periods, MCL 408.472, payment of fringe benefits in accordance with a written contract or policy, MCL 408.473, the withholding of compensation due as a fringe benefit at termination of employment, MCL 408.474, payment of wages due at discharge, MCL 408.475, permissible methods for the payment of wages, MCL 408.476, permissible deductions from wages, MCL 408.477, and gratuities as a condition of employment, MCL 408.478. Consequently, there is no merit to Wal-Mart's assertion that summary disposition of plaintiffs' equitable claims was required on the ground that the WFBA and the FLSA provide adequate remedies at law.

B. Judgment in Favor of Plaintiff Kevan Jackson, Jr.

As previously noted, following denial of plaintiffs' motion for class certification, each of the originally named plaintiffs' individual claims were severed, and their respective cause of actions transferred to the counties in which the claim arose. Because his claims arose from employment at Wal-Mart's Saginaw store, plaintiff Kevan Jackson, Jr.'s claims remained in the Saginaw Circuit Court and were tried before the bench. At the conclusion of trial, the court issued an opinion and judgment awarding Jackson $539.14 as compensation for missed or shortened breaks and work performed by him off the clock.[8] On appeal, Wal-Mart challenges the trial court's award in this amount on the ground that the evidence at trial was insufficient to support any finding that the equities in this matter weighed in favor of Jackson. We disagree.[9]

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[8] In rendering this award, the trial court rejected as incredible Jackson's claims regarding having been locked either inside or outside the store at the beginning or end of shifts and, therefore, awarded Jackson nothing for these claimed times.

[9] Wal-Mart also argues that the trial court erred in awarding Jackson compensation for all missed or shortened rest break time evidenced by the time card punch exception report summary submitted by Jackson at trial, which it further asserts erroneously calculates a portion of such time. However, these arguments are not preserved for appellate review because Wal-Mart failed to include these issues in its statement of questions presented. See MCR 7.212(C)(5); *Busch v Holmes*, 256 Mich App 4, 12; 662 NW2d 64 (2003). Consequently, we decline to consider these arguments. *Busch*, *supra*.

Where, as here, the proceeding was equitable in nature, this Court reviews the trial court's ultimate determination de novo and reviews for clear error the findings of fact supporting that determination. *Webb v Smith*, 224 Mich App 203, 210; 568 NW2d 378 (1997). A trial court's findings are clearly erroneous only where, although there is evidence to support those findings, this Court is left with a definite and firm conviction that a mistake has been made. *Glen Lake-Crystal River Watershed Riparians v Glen Lake Ass'n*, 264 Mich App 523, 531; 695 NW2d 508 (2004); see also MCR 2.613(C). This Court will defer, however, to the trial court's superior ability to judge the credibility of the witnesses. *Glen Lake*, *supra*.

As previously discussed, to be successful Jackson's claims for breach of an implied in law contract and unjust enrichment required that he establish that Wal-Mart received a benefit from him that it would be inequitable for the company to retain without compensation to Jackson. *Tingley*, *supra*; see also *Lewis*, *supra*. In arguing that the evidence proffered at trial failed to meet this required showing, Wal-Mart cites its provision of a procedure for employees to request that their time be adjusted to reflect work performed but not otherwise recorded, of which Jackson acknowledged he was aware but failed to use to inform Wal-Mart of the missed or shortened breaks and off-the-clock work at issue in this case. Wal-Mart asserts that, in the face of such evidence, any conclusion that it would be unjust or otherwise inequitable for it to retain the benefits it may have received as a result of Jackson's claimed uncompensated work is clearly in error. Wal-Mart's argument in this regard, however, ignores the basic premise of the inequity claimed in this suit and supported by the testimony of organizational behavior expert William Cooke, i.e., that the business strategy employed by Wal-Mart, in conjunction with the corporate culture expressly fostered by the company, resulted in a work environment wherein employees were compelled to perform work off the clock and to forgo rest and meal breaks. Indeed, Cooke testified that Wal-Mart employees would do so without "a second thought," because it was simply a part of the culture in which they worked. Given this premise and the testimony in support thereof, we do not find the trial court's award inequitable under the circumstances of this case, despite the knowing existence of procedures purportedly set in place to prevent such inequity.

Affirmed.

/s/ Hilda R. Gage
/s/ Joel P. Hoekstra
/s/ Christopher M. Murray