

Walmart Can't Escape NY Workers' Late-Pay Suit

By **Grace Elletson**

Law360 (March 25, 2022, 2:28 PM EDT) -- A New York federal judge shut down an attempt by Walmart to dismiss a suit claiming the company paid manual workers late under New York law, ruling that the company misinterpreted a prior court decision in arguing the workers couldn't sue under a specific statute.

U.S. District Judge Thomas J. McAvoy said Thursday that he could not grant Walmart's request to toss a proposed class action filed by Brigitte Mabe. He said Walmart misapplied the 2022 New York state appellate decision in *Konkur v. Utica Academy of Science Charter School* to justify the Mabe suit's dismissal, ruling that the case applied to a labor statute covering wage kickbacks, not late payment.

"Although the *Konkur* court held that an employer-required kickback claim ... did not qualify as a wage claim under Section 198 [of the New York Labor Law], it did not address whether the late payment of wages is an underpayment of wages and thus a wage claim privately actionable," Judge McAvoy said.

Mabe sued Walmart in May 2020, alleging that the company should have been paying manual workers weekly, not biweekly. Under New York labor law, employers who are considered manual workers have to be paid on a weekly basis.

Mabe also claimed that the company failed to provide accurate wage statements to employees. That claim was dismissed by the court in March 2021, but the late-pay claim survived.

In Walmart's most recent attempt to toss the claim, it used the *Konkur* decision to argue that the timely wages statute does not provide a mechanism to sue for a nonwage claim, given that Mabe does not allege missing wages, only that the wages were late.

In *Konkur*, a worker claimed that they were required to give unlawful wage kickbacks to their employer. The court found that the statute does not give citizens a right to sue, and instead grants the commissioner of the New York Department of Labor, or the attorney general, the ability to find restitution for workers, according to Judge McAvoy's decision.

The *Konkur* court used a three-factor test to determine if the legislative intent of the statute included the right to sue. It includes whether the plaintiff is one of a class who would benefit from the statute, whether a right to sue would promote the statute's legislative purpose and whether the creation of a right to sue would be consistent with the legislative scheme. The court found that the worker did not meet the third test in *Konkur*.

But *Konkur* did not address NYLL Statutes 191 and 198(1-a), which define that wages be

paid to manual workers on a weekly basis, Judge McAvoy said. The timely wages statute does provide a right to sue, he said.

Judge McAvoy pointed to the 2019 New York Supreme Court case [Vega v. CM & Associates Construction Management](#), which assessed whether a manual employee could recover damages after being paid on a biweekly schedule instead of a weekly one. The court found that the worker was underpaid the moment that wages were late, Judge McAvoy said, making their claim a wage claim.

The court also found that Labor Code 198(1-a) allows for the right to sue and to collect damages, rejecting CM & Associates' argument that the statute does not give citizens the right to sue because the claim "is dependent on its erroneous assertion that the late payment of wages is not an underpayment of wages," Judge McAvoy said.

"Based upon this, the court is not convinced that the New York Court of Appeals would reach conclusions different than those expressed in Vega," Judge McAvoy said.

Walmart spokesperson Abby Williams told Law360 on Friday that this was a procedural step in the case.

"The case now proceeds to the fact-finding stage, and we will continue defending the company," she said.

Counsel for the parties did not immediately respond to requests for comment.

Mabe is represented by Brian S. Schaffer and Hunter G. Benharris of Fitapelli & Schaffer LLP.

Walmart is represented by Henry M. Greenberg of Greenberg Traurig LLP.

The case is Mabe v. Wal-Mart Associates Inc., case number 1:20-cv-00591, in the U.S. District Court for the Northern District of New York.

--Editing by Neil Cohen.