

Supreme Court of Pennsylvania

Court of Common Pleas

Civil Cover Sheet

CAMBRIA

County

For Prothonotary Use Only:

Docket No:

2013 - 367

TIME STAMP

The information collected on this form is used solely for court administration purposes. This form does not supplement or replace the filing and service of pleadings or other papers as required by law or rules of court.

Commencement of Action:

- ☒ Complaint ☐ Writ of Summons ☐ Petition
☐ Transfer from Another Jurisdiction ☐ Declaration of Taking

Lead Plaintiff's Name:

JACQUELINE RUMMEL, on behalf of others similarly

Lead Defendant's Name:

HIGHMARK, INC.

Are money damages requested? ☒ Yes ☐ No

Dollar Amount Requested: ☐ within arbitration limits
☒ outside arbitration limits (check one)

Is this a *Class Action Suit*? ☒ Yes ☐ No

Is this an *MDJ Appeal*? ☐ Yes ☒ No

Name of Plaintiff/Appellant's Attorney:

☐ Check here if you have no attorney (are a Self-Represented [Pro Se] Litigant)

Nature of the Case:

Place an "X" to the left of the ONE case category that most accurately describes your **PRIMARY CASE**. If you are making more than one type of claim, check the one that you consider most important.

TORT (do not include Mass Tort)

- ☐ Intentional
☐ Malicious Prosecution
☐ Motor Vehicle
☐ Nuisance
☐ Premises Liability
☐ Product Liability (does not include mass tort)
☐ Slander/Libel/ Defamation
☐ Other:

CONTRACT (do not include Judgments)

- ☐ Buyer Plaintiff
☐ Debt Collection: Credit Card
☐ Debt Collection: Other
☐ Employment Dispute: Discrimination
☒ Employment Dispute: Other Unpaid overtime wages
☐ Other:

CIVIL APPEALS

- Administrative Agencies
☐ Board of Assessment
☐ Board of Elections
☐ Dept. of Transportation
☐ Statutory Appeal: Other
☐ Zoning Board
☐ Other:

MASS TORT

- ☐ Asbestos
☐ Tobacco
☐ Toxic Tort - DES
☐ Toxic Tort - Implant
☐ Toxic Waste
☐ Other:

REAL PROPERTY

- ☐ Ejectment
☐ Eminent Domain/Condemnation
☐ Ground Rent
☐ Landlord/Tenant Dispute
☐ Mortgage Foreclosure: Residential
☐ Mortgage Foreclosure: Commercial
☐ Partition
☐ Quiet Title
☐ Other:

MISCELLANEOUS

- ☐ Common Law/Statutory Arbitration
☐ Declaratory Judgment
☐ Mandamus
☐ Non-Domestic Relations Restraining Order
☐ Quo Warranto
☐ Replevin
☐ Other:

PROFESSIONAL LIABILITY

- ☐ Dental
☐ Legal
☐ Medical
☐ Other Professional:

JACQUELINE RUMMEL, on behalf of
herself and all others similarly situated,

Plaintiff,

v.

HIGHMARK, INC.,

Defendant.

: IN THE COURT OF COMMON PLEAS OF
: CAMBRIA COUNTY, PENNSYLVANIA
: CIVIL ACTION-LAW

: No.

: **CLASS ACTION COMPLAINT**

: COUNSEL OF RECORD FOR PARTY:

: RONALD P. CARNEVALI, JR., ESQUIRE

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: ROSE, LLC

: AMERISERV FINANCIAL BUILDING

: POST OFFICE BOX 280

: JOHNSTOWN, PENNSYLVANIA 15907

: (814) 536-0735

: **JURY TRIAL DEMANDED**

NOTICE TO DEFEND

YOU HAVE BEEN SUED IN COURT. IF YOU WISH TO DEFEND against the claims set forth in the following pages, YOU MUST TAKE ACTION WITHIN TWENTY (20) DAYS after the Complaint and Notice are served, by entering a written appearance personally or by attorney and filing in writing with the Court your defenses or objections to the claims set forth against you. You are warned that IF YOU FAIL TO DO SO, the case may proceed without you and a JUDGMENT MAY BE ENTERED AGAINST YOU BY THE COURT without further notice for any money claimed in the Complaint OR FOR PROPERTY OR OTHER RIGHTS IMPORTANT TO YOU.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE OR KNOW A LAWYER, THEN YOU SHOULD GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP.

**Laurel Legal Services, Inc.
225-227 Franklin Street, 400 Franklin Ctr.
Johnstown, Pennsylvania 15901
(814) 536-8917**

JACQUELINE RUMMEL, on behalf of	:	IN THE COURT OF COMMON PLEAS OF
herself and all others similarly situated,	:	CAMBRIA COUNTY, PENNSYLVANIA
	:	CIVIL ACTION-LAW
Plaintiff,	:	
	:	No.
v.	:	
	:	
HIGHMARK, INC.,	:	
	:	
Defendant.	:	

COMPLAINT

NOW COMES, the Plaintiff, Jacqueline Rummel, on behalf of herself and all others similarly situated, by and through her attorneys, Spence, Custer, Saylor, Wolfe & Rose, and files this Class Action Complaint:

1. Plaintiff, Jacqueline Rummel, is an adult individual residing at 1945 Minno Drive, Johnstown, Cambria County, Pennsylvania 15905.
2. Defendant, Highmark, Inc., is a corporation organized and existing under the laws of Pennsylvania, with an address of 1800 Center Street, Camp Hill, Pennsylvania 17011.
3. This action arises under the laws of the Commonwealth of Pennsylvania and is within the subject matter jurisdiction of this Honorable Court.
4. The Defendant maintains offices throughout Pennsylvania and conducts business in those offices, including Cambria County, such that venue is proper in the Court of Common Pleas of Cambria County.
5. Ms. Rummel began employment with Highmark on or about February 20, 1995.

6. Beginning in May 1997, Ms. Rummel was promoted to the role of a supervisor in the Customer Service unit of Highmark's "Healthplan Operations" department.

7. As part of her job duties, Ms. Rummel was responsible for monitoring customer service representatives in a Highmark call center, located in Johnstown, Pennsylvania.

8. Ms. Rummel monitored the customer service representatives' adherence to established company policies, including, among other things, attendance, tardiness and productivity.

9. These policies were not determined by Ms. Rummel, but instead, were established by the Plaintiff's superiors at Highmark.

10. The customer service representatives' adherence to those policies was based on objective, numerical standards and involved no subjective determinations by Ms. Rummel.

11. On a yearly basis, Ms. Rummel was responsible for completing a preprinted performance evaluation worksheet for each of the employees which she monitored.

12. Ms. Rummel did not create that preprinted evaluation worksheet or have any input as to its use in the evaluation process.

13. Ms. Rummel inputted the customer service representative's objective performance data and adherence to objective Highmark goals onto the appropriate sections of the evaluation worksheet.

14. The data on this worksheet was then converted into an objective numerical rating number for the employee. The method for calculating the rating

number was established by Plaintiff's superiors at Highmark, and Plaintiff played no role in establishing this method.

15. The employee's rating number was then compared with the employee's length of service, based upon objective comparison standard established by Highmark. An employee could be entitled to annual merit raises and/or bonuses within a prescribed range based upon the results of that comparison.

16. The range of possible raises and/or bonuses was determined by the Plaintiff's superiors at Highmark.

17. Ms. Rummel had no role in creating this bonus/raise calculation method.

18. Additionally, as part of her job duties, Ms. Rummel participated in interviewing job applicants for customer service representative positions, with the use of a job application questionnaire and a predetermined list of interview questions.

19. The job applications and interview questions were created by Highmark, and Ms. Rummel made no contributions or input into the creation or use of these applications or interview questions.

20. During these interviews, Ms. Rummel was required to give each applicant a numerical score for each question, based upon a predetermined objective standard.

21. Ms. Rummel had no role in establishing this point system.

22. Ms. Rummel also had no ability to subjectively assess each applicant beyond this objective point system.

23. After the interviews, Ms. Rummel tabulated each applicant's total score for the interview and entered the data into a spreadsheet.

24. Ms. Rummel then compared the applicant's total score with a predetermined threshold minimum score for the job in question.

25. Ms. Rummel made an indication to her superiors about each applicant's candidacy, based solely on a numerical comparison between the applicant's total score and the minimum threshold score. For every applicant that met or exceeded the threshold score, Ms. Rummel made an indication that the applicant could be hired.

26. These hiring indications were forwarded to one of the Plaintiff's Managers.

27. The Managers reviewed the Plaintiff's spreadsheet data on each applicant, as well as the data of the other supervisors who interviewed other job applicants.

28. The Managers were solely responsible for making the ultimate personnel decisions and hiring the applicants.

29. At various times, the Managers did not follow the objective indications provided by Ms. Rummel.

30. Ms. Rummel had no authority to override the Managers' hiring decisions.

31. Throughout her employment with Highmark, Ms. Rummel received positive performance reviews and regular pay raises.

32. In fact, in or around Summer 2012, Ms. Rummel received her regularly mid-year review and was given "exemplary" remarks for her performance.

33. Highmark terminated Ms. Rummel's employment on or about August 31, 2012.

34. By the nature of her position, Ms. Rummel worked more than forty (40) hours in a work week and/or more than eight (8) hours in a workday at various times throughout her employment.

35. These additional hours were required on an at least monthly basis and were for various purposes, including, but not limited to, attending meetings, receiving training, completing staff merit reviews, providing training to new employees and conducting interviews.

36. The number of additional hours that were required varied by month, but overtime was a continuing, regular and required part of the Plaintiff's job.

37. Evidence of the precise number of hours worked by Plaintiff and every other member of the class is in the possession of the Defendant. If unavailable, the Plaintiffs may establish the hours they worked by their testimony.

38. Neither Ms. Rummel nor the class members have been compensated for these additional hours in any way.

39. The work that the Plaintiff and class members performed did not involve the use, or ability to use, any independent judgment or discretion, nor did it require any specialized training, experience or knowledge.

40. The work that the Plaintiff and class members performed did not involve the hiring or firing of other employees, as the ultimate personnel decisions were solely made by superiors at Highmark.

41. The Plaintiff was closely supervised by her direct Managers and was also under the supervision of a Director.

42. The Plaintiff was not treated like a supervisor by Highmark in that, among other things, she was reprimanded and/or disciplined for certain aspects of her

conduct, including, but not limited to, deviating from her arrival/departure time and assigned parking spot.

43. Ms. Rummel was entitled to the "overtime" protections of the Pennsylvania Minimum Wage Act, 43 Pa. Cons. Stat. §333.104 *et seq.*, as she was not an exempt employee under the statute.

CLASS ACTION ALLEGATIONS

44. Plaintiff and the class members hereby incorporate by reference paragraphs 1 through 43 of this Complaint as if the same were fully set forth herein.

45. Plaintiff brings this action on behalf of herself and on behalf of the class defined herein, for claims under the Pennsylvania Minimum Wage Act, the Pennsylvania Wage Payment and Collection Law as a class action, pursuant to Pa. R. Civ. P. 1702.

46. Highmark is comprised of several departments, including, but not limited to, a Sales department, a Provider Relations department, a Health Management Services department, an IT department and Healthplan Operations ("HPO") department.

47. Each of those departments is comprised of various subunits within that department.

48. Within the HPO department, there are numerous subunits, including, but not limited to, customer service, claims processing, claim adjustments, quality assurance and other-party liability subunits. As more fully set forth below, the supervisors within these subunits of HPO performed the same type of work and under the same employment conditions and circumstances.

49. The putative class is brought on behalf of Highmark "supervisors," defined as "Individuals employed as supervisors in Highmark's "Healthplan Operations"

department, from 2010 to the present, to recover unpaid overtime compensation pursuant to the Pennsylvania Minimum Wage Act of 1968."

Numerosity

50. The members of the class are so numerous that joinder of all members is impracticable. While the exact number of the members is unknown to Plaintiff at this time, and can only be ascertained through appropriate discovery, the Plaintiff believes that there are, at a minimum, dozens, of individuals in the class of supervisors.

51. In fact, the Plaintiff knows firsthand of at least 27 supervisors within Highmark's HPO department.

Common Questions

52. The supervisors in the class were all subject to the same performance evaluations and similar goals and expectations with respect to their employment.

53. The supervisors were all subject to the same guidelines for time off from work, as well as the same bonus structure and compensation ratios.

54. The supervisors in the class all performed nondiscretionary jobs in which they monitored the work of lower-ranking Highmark employees.

55. For instance, the supervisors of Highmark's claims adjusters and claims processors monitored the productivity of each employee by examining the number of claims handled over a specified time period, and comparing that number to an objective standard.

56. The methods of objective evaluation were established by the supervisors' superiors at Highmark, and the supervisors played no role in the creation or use of these methods.

57. Also, the supervisors all performed annual evaluations of the employees that they monitored, which involved objectively examining the employee's adherence to Highmark's objective standards.

58. As part of those annual evaluations, all supervisors rated each employee according to an objective numbering system and completed a preprinted evaluation worksheet. No supervisors played any role in the usage of this worksheet, as the same was dictated by the supervisors' superiors at Highmark.

59. The class members all inputted the employee's objective performance data and adherence to objective Highmark goals onto the appropriate sections of the evaluation worksheet.

60. The data on this worksheet was then converted into an objective numerical rating number for the employee. The method for calculating the rating number was established by Highmark superiors.

61. The employee's rating number was then compared with the employee's length of service, based upon objective comparison standard established by Highmark. An employee could be entitled to annual merit raises and/or bonuses within a prescribed range based upon the results of that comparison.

62. The range of possible raises and/or bonuses was determined by the class members' superiors at Highmark.

63. The class members had no role in creating this bonus/raise calculation method.

64. As part of their job duties, all supervisors were also asked to interview job applicants.

65. The job applicants completed preprinted applications forms, and the supervisors had no role in the creation, content or use of these forms.

66. During the interviews, all supervisors were required to ask each applicant a list of questions from a predetermined list. No supervisors had any role in the creation, content or use of that list.

67. For each question, all supervisors were required to give each applicant a numerical score, based upon a predetermined objective standard.

68. No supervisors had any role in establishing this point system.

69. No supervisors had any ability to subjectively assess each applicant beyond this objective point system.

70. After the interviews, all supervisors tabulated each applicant's total points for the interview and entered the data onto a spreadsheet.

71. The supervisors then compared the applicant's total score with a predetermined threshold minimum score for the job in question.

72. The supervisors then made an indication to their supervisors about each applicant's candidacy, based solely on a numerical comparison between the applicant's total score and the minimum threshold score. For every applicant that met or exceeded the threshold score, the supervisors made an indication that the applicant could be hired.

73. These hiring indications were forwarded to one of the supervisors' Managers.

74. The Managers reviewed the spreadsheet data on each applicant, as well as the data of the other supervisors who interviewed other job applicants.

75. The Managers were solely responsible for making the ultimate personnel decisions and hiring the applicants.

76. At various times, the Managers did not follow the objective indications provided by the supervisors and hired applicants who did not meet the minimum threshold scores.

77. No supervisors had any authority to override the Managers' hiring decisions, even though the employees ultimately reported to the supervisors.

78. The supervisors were all required to attend and/or participate in the same types of meetings, some of which included the participation of other supervisors.

79. There exist common questions of law and fact which affect the class as a whole, including but not limited to:

- a. Whether the supervisors were willfully, uniformly and wrongfully classified by Highmark as exempt from overtime compensation;
- b. Whether Highmark failed to pay the Plaintiff and members of the class all overtime compensation due to them;
- c. Whether the Plaintiff and class members were expected to and/or required to work hours in excess of forty (40) per week;
- d. Whether the Plaintiff and class members have sustained damages, and, if so what is the proper measure of damages;
- e. Whether the Defendant violated any other statutory provisions regarding compensation owed to the Plaintiff and class members;

f. Whether the supervisors had any independent discretion or authority that would exempt them from the mandatory overtime provisions of the PMWA;

g. Whether the supervisors were charged with hiring/firing employees, or whether their recommendations to the same were given particular weight.

80. These common questions predominate over any individualized determinations present in this case.

Typicality

81. The claims of the named Plaintiff are representative of the claims of the class as a whole.

82. The Plaintiff was employed by Highmark since 1997, and as a supervisor, performed the same types of duties as the other class members, including, but not limited to, monitoring employees in her department, conducting interviews and performing employee evaluations.

83. The Plaintiff was also subject to the same types of standards and guidelines as those of the class as a whole with respect to her performance of her required job duties.

84. The Plaintiff was on the same level in the hierarchical structure of Highmark personnel as the putative class members. That is, the Plaintiff reported to a manager and director, as did the other supervisors.

85. The Plaintiff and all other supervisors were under the ultimate control of the same individual, Mr. Wayne Berger, Highmark's Vice President of Healthplan Operations.

Fair and Adequate Representation

86. The Plaintiff has no conflict in this representation.

87. Plaintiff's counsel are experienced litigators in good standing, and counsel will faithfully, competently and zealously advocate for the interests of the class as a whole.

88. Plaintiff's counsel has agreed to advance all costs of this litigation and has entered into a contingent fee agreement with the Plaintiff, such that counsel will only be compensated in the event of a recovery for the Plaintiff and class members.

Fair and Efficient Method of Adjudication

89. A class action is a superior method of adjudicating the claims of the class members.

90. The damages suffered by individual members may be relatively small when compared to the expense and burden of litigation, making it virtually impossible for members of the class to individually seek redress.

91. Even if any member of the class could afford individual litigation against Highmark, it would be unduly burdensome to the courts to bring dozens of lawsuits arising from the same course of conduct.

92. It would also be burdensome to Highmark to be a named Defendant in dozens of lawsuits arising from the same course of conduct.

93. Concentrating this litigation in one forum will promote judicial economy and parity among the claims of individual members of the class and provide for judicial consistency.

94. There is a risk of inconsistent adjudications should these cases not proceed as a class action, for supervisors who perform the same duties may be treated differently by different juries.

95. Absent this class action, the members of the class are unlikely to obtain redress of their injuries.

96. The Plaintiff is unaware of any other litigation already commenced by the class members arising from this course of conduct.

97. This forum is appropriate for adjudication of this action. The supervisors worked at various Highmark offices through Western Pennsylvania, including Pittsburgh, Erie, Johnstown and Camp Hill. Cambria County is located in proximity to all of these offices.

COUNT I

Violations of the Pennsylvania Minimum Wage Act

98. Plaintiff and the class members hereby incorporate by reference Paragraphs 1 through 97 of this Complaint as if the same were fully set forth herein.

99. The Pennsylvania Minimum Wage Act and its implementing regulations state that an employee must be paid overtime of at least one and one-half times the regular rate of pay, for all hours worked in excess of forty (40) per week and/or eight (8) per day, unless the employee falls under one of the enumerated exemptions.

100. Members of the class, including the Plaintiff, regularly worked more than forty (40) hours per week and received no additional pay for those additional hours.

101. Members of the class, including the Plaintiff, are not part of any group that is exempt from the overtime requirements.

102. Specifically, the members of the class and Plaintiff are not exempt executives or administrative employees because.

103. As set forth above, the class members' job duties do not involve the exercise of independent discretion, nor do they make hiring or firing decisions or recommendations to the same that are given particular weight.

104. For each work week in which the Plaintiff and class members worked more than 40 hours, they were entitled to overtime compensation of at least one and one-half times their regular rate of pay, pursuant to the Pennsylvania Minimum Wage Act of 1968.

105. Highmark violated this Act because the Plaintiff and class members were not paid the additional compensation to which they were entitled.

106. Highmark acted willfully and with reckless disregard to the Act's clearly applicable provisions, including, but not limited to, requiring attendance at meetings (some of which required travel) and knowingly requiring the performance of duties which could not reasonably be completed during a forty hour work week.

107. The Pennsylvania Minimum Wage Act also requires employers to keep a true and accurate record of, among other items, the hours worked each day and each workweek by its employees, and how much overtime was worked. Additionally, employers are required to furnish a statement to all employees with each payment of wages, indicating the number of hours worked during the specific pay period.

108. Upon information and belief, the Defendant did not keep such records, nor did it provide or furnish an accurate statement to the Plaintiff and class members, in violation of Pennsylvania Labor Laws.

WHEREFORE, the Plaintiff and class members seek judgment and damages to the fullest extent allowed by law, including, but not limited to, unpaid wages, overtime wages, pre and post-judgment interest, costs of suit, including reasonable attorney's fees, punitive damages and such other relief as this Court may deem proper and just. **JURY TRIAL DEMANDED.**

Respectfully submitted,

SPENCE, CUSTER, SAYLOR, WOLFE & ROSE, LLC



Ronald P. Carnevali, Jr., Esquire
Michael J. Parrish, Jr., Esquire
Bradley E. Holuta, Esquire
Attorneys for Jacqueline Rummel

VERIFICATION

I, the undersigned, verify that the statements made in the foregoing pleading are true and correct to the best of my knowledge, information and belief. I understand that false statements herein are made subject to the penalties of 18 Pa.C.S. §4904 relating to unsworn falsification to authorities.

1-30-13
DATE


JACQUELINE RUMMEL

JACQUELINE RUMMEL, on behalf of
herself and others similarly situated,

Plaintiff,

vs.

HIGHMARK, INC.

Defendant.

: IN THE COURT OF COMMON PLEAS
: OF CAMBRIA COUNTY, PENNSYLVANIA

: CIVIL ACTION – LAW

: FOR TRIAL

: PRELIMINARY OBJECTIONS
: TO PLAINTIFF'S CLASS ACTION
: COMPLAINT, BRIEF IN SUPPORT,
: AND PROPOSED ORDER

: COUNSEL OF RECORD FOR PARTY:

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FILED FOR RECORD
2013 MAR 25 AM 11:44
PROCTOR JEFF
CAMBRIA COUNTY, PA

JACQUELINE RUMMEL, on behalf of	:	IN THE COURT OF COMMON PLEAS
herself and others similarly situated,	:	OF CAMBRIA COUNTY, PENNSYLVANIA
	:	
Plaintiff,	:	CIVIL ACTION – LAW
vs.	:	
	:	Docket No. 2013-367
HIGHMARK, INC.	:	
	:	
Defendant.	:	

**DEFENDANT'S PRELIMINARY OBJECTIONS
TO PLAINTIFF'S CLASS ACTION COMPLAINT**

NOW COMES Defendant Highmark Inc. ("Highmark" or "the Company") by and through its counsel Reed Smith LLP, and files the following Preliminary Objections to Plaintiff Jacqueline Rummel's Class Action Complaint ("Complaint"), and states as follows:

1. Plaintiff Jacqueline Rummel ("Plaintiff") filed a one count Complaint purporting to bring individual and class claims under the overtime provision of the Pennsylvania Minimum Wage Act ("MWA"), 43 P.S. § 333.104(c).

2. Plaintiff's MWA claim fails as a matter of law.¹

I. PRELIMINARY OBJECTION IN THE NATURE OF A DEMURRER TO PLAINTIFF'S MWA CLAIM

3. Plaintiff's MWA claim fails because, accepting her allegations as true, she cannot establish that she is covered by the overtime provision of the MWA.

4. In Count I of her Complaint, Plaintiff alleges that Highmark violated the overtime provision of the MWA by failing to pay her one and one-half times her regular rate of pay for all hours worked in excess of forty per week.

¹ Although Plaintiff's Complaint contains only one count, she makes reference to the Pennsylvania Wage Payment and Collection Law ("WPCL"), 43 P.S. § 260.3, when stating her class claim under the MWA. (Complaint ¶ 45). To the extent Plaintiff purports to bring a WPCL claim, that claim also must fail as a matter of law.

5. Under the overtime provision of the MWA, an employer must pay an employee who works overtime (any hours worked beyond 40 hours per week) at a rate of one and one-half times the employee's regular rate of pay. 43 P.S. § 333.104(c); 34 Pa. Code § 231.41.

6. However, the overtime provision of the MWA does not cover all employees. 34 Pa. Code § 231.81. Specifically, as it relates to Plaintiff, the overtime provision does not cover an employee employed in an executive capacity. Id.

7. The MWA includes two tests (a short test and a long test) for determining whether an employee is employed in an executive capacity. 34 Pa. Code § 231.82. The short test applies when an employee makes \$250 or more per week and the long test applies when the employee makes less than \$250 per week. Id.

8. Under the short test, “an employee [1] who is compensated on a salary basis at a rate of not less than \$250 per week, exclusive of board, lodging or other facilities, and [2] whose primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized department or subdivision thereof, and [3] includes the customary and regular direction of the work of two or more other employees therein shall be deemed to meet all of the requirements of this section.” 34 Pa. Code § 231.82(6).

9. In other words, the overtime provision of the MWA does not apply to an employee (1) who is compensated on a salary basis at a rate of not less than \$250 per week, (2) whose primary duty consists of the management of a customarily recognized subdivision of the company, and (3) who customarily and regularly directs the work of two or more other employees.

10. Plaintiff's allegations, accepted as true, conclusively establish that she was employed in an executive capacity and, therefore, is not covered by the overtime provision of the MWA.

11. First, at all relevant times, Plaintiff was paid an annual salary of at least \$69,645, which equates to a weekly salary of \$1,339 per week – significantly more than \$250 per week.²

12. Next, Plaintiff's allegations, accepted as true, conclusively establish that her primary duty consisted of management of the customer service unit at the call center in Johnstown. (Complaint ¶¶ 6-7).

13. Indeed, accepting Plaintiff's allegations as true, every duty she performed was a management duty.³ Specifically, Plaintiff alleges that:

- She was in charge of the customer service unit. (Complaint ¶¶ 6-7).
- She interviewed applicants. (Complaint ¶¶ 18, 35, 64, 82).
- She assessed the qualifications of the applicants. (Complaint ¶ 20).
- She used her assessments to make hiring recommendations, (Complaint ¶¶ 25-26, 72-73), which were sometimes followed. (Complaint ¶ 29).

² To state a *prima facie* claim, Plaintiff must allege facts to establish her salary and the approximate overtime hours she worked per week. See Mell v. GNC Corp., 2010 WL 4668966, at *5 (W.D. Pa. Nov. 9, 2010); Zhong v. August August Corp., 498 F. Supp. 2d 625, 628 (S.D. N.Y. 2007). As Plaintiff has failed to allege her salary, this Court could dismiss her Complaint for insufficient specificity under Rule 1028(a)(3) and grant her leave to amend; however, doing so would simply delay the process because it is beyond dispute that Plaintiff's salary is accurately reflected in her W-2s. Copies of Plaintiff's relevant W-2s, which have been redacted to protect her social security number and home address, are attached as Exhibit A.

³ The MWA does not define management so the courts apply the Fair Labor Standards Act definition, which states that "management" includes, but is not limited to, activities such as interviewing, selecting, and training of employees; maintaining employee records; appraising employee performance; and disciplining employees. Jean-Louis v. RGIS Inventory Specialists, LLC, 2011 WL 3678532, at *11-12 (E.D. Pa. Aug. 22, 2011) (applying 29 C.F.R. § 541.102 to MWA claim); McClain v. McDonald's Corp., 2007 WL 210440, at *8-10 (E.D. Pa. Jan. 25, 2007) (same).

- She trained her employees. (Complaint ¶ 35).
- She directed and monitored her employees. (Complaint ¶ 54, 82).
- She maintained employee records, which she used to conduct employee performance evaluations. (Complaint ¶¶ 13-14, 59-60).
- She conducted formal performance appraisals of her employees. (Complaint ¶¶ 11, 35, 57, 82).
- She disciplined her employees when they did not comply with the Company's established policies. (Complaint ¶ 8, 82).

14. Finally, Plaintiff's allegations, accepted as true, conclusively establish that she customarily and regularly supervised two or more employees. Specifically, Plaintiff repeatedly refers to the subordinate employees she supervised in the plural. (See Complaint ¶¶ 6-8, 11, 18, 25-26, 35, 54, 57, 64, 72-73, 82).

15. Plaintiff's MWA claim fails as a matter of law because her own allegations establish that she meets the requirements of the short test and, therefore, is not covered by the overtime provision of the MWA.

16. Accordingly, this Court should sustain Highmark's Preliminary Objections and dismiss Plaintiff's MWA claim with prejudice pursuant to Rule 1028(a)(4).

II. PRELIMINARY OBJECTION IN THE NATURE OF A DEMURRER TO PLAINTIFF'S WPCL CLAIM

17. Although the Complaint contains only one count, Highmark, out of an abundance of caution, files a preliminary objection asserting that Plaintiff's passing mention of the WPCL is insufficient as a matter of law.

18. Plaintiff asserts no legal basis for a WPCL claim.

19. Plaintiff alleges no facts in support of a WPCL claim.

20. The WPCL provides a statutory remedy when an employer fails to pay wages that the employer had previously agreed to pay. See Hartman v. Baker, 766 A.2d 347, 352 (Pa. Super. Ct. 2000) (“The WPCL ‘does not create an employee’s substantive right to compensation; rather, it only establishes an employee’s right to enforce payment of wages and compensation to which an employee is otherwise entitled by the terms of an agreement’”).

21. To state a viable WPCL claim, “an employee must aver a contractual entitlement to compensation from wages and a failure to pay that compensation.” Sullivan v. Chartwell Inv. Partners, LP, 873 A.2d 710, 716 (Pa. Super. Ct. 2005).

22. Plaintiff does not – and cannot – allege the existence of a contract entitling her to payment of overtime wages.

23. Accordingly, in addition to the legal insufficiency of Rummel’s MWA claim noted above, this Court should sustain Highmark’s Preliminary Objections and dismiss Plaintiff’s WPCL claim with prejudice with prejudice pursuant to Rule 1028(a)(4).

CONCLUSION

For all of the foregoing reasons, Defendant Highmark Inc. requests that its Preliminary Objections be sustained and Plaintiff Jacqueline Rummel’s Class Action Complaint be dismissed in its entirety with prejudice.

Respectfully submitted,



Patrick W. Ritchey
PA I.D. No. 19924
Richard L. Etter
PA I.D. No. 92835

REED SMITH LLP
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225 Fifth Avenue
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(412) 288-3072/3806

**Counsel for Defendant
Highmark Inc.**

Date: March 22, 2013

REDACTED		This information is being furnished to the Internal Revenue Service.				OMB No. 1545-0046	
a Employer identification number (EIN) 23 1294723		1 Wages, tips, other compensation 69,645.91		3 Federal income tax withheld 12,680.30			
c Employer's name, address, and ZIP code Highmark Inc 1800 Center Street Camp Hill PA 17011		3 Social security wages 74,180.55		4 Social security tax withheld 4,599.19			
		5 Medicare wages and tips 74,180.55		6 Medicare tax withheld 1,075.62			
		8 Advance EIC payment		10 Dependent care benefits			
f Control number 113		11 Nonqualified plans		12a See instructions for box 12 code C		471.86	
e Employee's first name and initial JACQUELINE		13a Retirement plan ☒ 13b Third-party sick pay ☐		12b code D		4,534.64	
Last name RUMMEL		14 Other PAU 59.35 HDV 1,387.61 PRK 488.00		12c code			
Employee's address and ZIP code				12d code			
15 State PA	Employer's state ID number 231294723	16 State wages, tips, etc. 74188.69	17 State income tax 2277.55	18 Local wages, tips, etc. 74188.69	19 Local income tax 741.91	20 Locality name L YODER T	

Form W-2 Wage and Tax Statement
Copy B To Be Filed With Employee's FEDERAL Tax Return.

2010

Department of the Treasury - Internal Revenue Service

REDACTED		This information is being furnished to the Internal Revenue Service.				OMB No. 1545-0046	
a Employer identification number (EIN) 23 1294723		1 Wages, tips, other compensation 72,991.00		3 Federal income tax withheld 13,847.68			
c Employer's name, address, and ZIP code Highmark Inc 1800 Center Street Camp Hill PA 17011		3 Social security wages 77,636.67		4 Social security tax withheld 3,260.74			
		5 Medicare wages and tips 77,636.67		6 Medicare tax withheld 1,125.73			
		11 Nonqualified plans		12a See instructions for box 12 code C		491.07	
f Control number 171		13a Retirement plan ☒ 13b Third-party sick pay ☐		12b code D		4,645.67	
e Employee's first name and initial JACQUELINE		Last name RUMMEL		12c code			
Employee's address and ZIP code				12d code			
15 State PA	Employer's state ID number 231294723	16 State wages, tips, etc. 77265.60	17 State income tax 2372.03	18 Local wages, tips, etc. 77265.60	19 Local income tax 772.62	20 Locality name L YODER T	

Form W-2 Wage and Tax Statement
Copy B To Be Filed With Employee's FEDERAL Tax Return.

2011

Department of the Treasury - Internal Revenue Service

REDACTED		This information is being furnished to the Internal Revenue Service.				OMB No. 1545-0046	
a Employer identification number (EIN) 23 1294723		1 Wages, tips, other compensation 51554.16		3 Federal income tax withheld 9767.94			
c Employer's name, address, and ZIP code HIGHMARK INC 1800 CENTER STREET CAMP HILL PA 17011		3 Social security wages 54860.25		4 Social security tax withheld 2304.13			
		5 Medicare wages and tips 54860.25		6 Medicare tax withheld 795.47			
		11 Nonqualified plans		12a See instructions for box 12 code C		354.80	
f Control number		13a Retirement plan ☒ 13b Third-party sick pay ☐		12b code D		3306.09	
e Employee's first name and initial JACQUELINE		Last name RUMMEL		12c code DD		4799.79	
Employee's address and ZIP code				12d code			
15 State PA	Employer's state ID number 231294723	16 State wages, tips, etc. 54505.45	17 State income tax 1673.34	18 Local wages, tips, etc. 54505.45	19 Local income tax 54.49	20 Locality name 21	

Form W-2 Wage and Tax Statement
Copy B To Be Filed With Employee's FEDERAL Tax Return.

2012

Dept. of the Treasury - IRS
Visit the IRS website at www.irs.gov/efile

Exhibit A

JACQUELINE RUMMEL, on behalf of herself and others similarly situated,	:	IN THE COURT OF COMMON PLEAS OF CAMBRIA COUNTY, PENNSYLVANIA
	:	
Plaintiff,	:	CIVIL ACTION – LAW
vs.	:	
	:	Docket No. 2013-367
HIGHMARK, INC.	:	
	:	
Defendant.	:	

ORDER OF COURT

AND NOW, this __ day of ____, 2013, upon consideration of Defendant's Preliminary Objections to Plaintiff's Class Action Complaint and Memorandum in Support thereof, it is hereby ORDERED, ADJUDGED AND DECREED that Defendant's Preliminary Objections are sustained and that Plaintiff's Class Action Complaint is dismissed with prejudice.

BY THE COURT,

_____. J.

JACQUELINE RUMMEL, on behalf of herself and others similarly situated,	:	IN THE COURT OF COMMON PLEAS OF CAMBRIA COUNTY, PENNSYLVANIA
	:	
Plaintiff,	:	CIVIL ACTION – LAW
vs.	:	
	:	Docket No. 2013-367
HIGHMARK, INC.	:	
	:	
Defendant.	:	

**DEFENDANT'S MEMORANDUM IN SUPPORT OF
PRELIMINARY OBJECTIONS TO PLAINTIFF'S CLASS ACTION COMPLAINT**

NOW COMES Defendant, Highmark Inc. ("Highmark" or "the Company") by and through its counsel Reed Smith LLP, and files the following memorandum of law in support of its Preliminary Objections to Plaintiff's Class Action Complaint:

I. INTRODUCTION AND PROCEDURAL BACKGROUND

Plaintiff Jacqueline Rummel ("Plaintiff") was employed as the supervisor in charge of the customer service unit at Highmark's call center in Johnstown, Pennsylvania. Plaintiff was in charge of the customer service unit from May 1997 until August 31, 2012. In Plaintiff's more than 15 years as a supervisor in charge of the unit, she never once filed a complaint or otherwise suggested that she was improperly classified or that she should be paid overtime compensation.

On August 31, 2012, Plaintiff was terminated following an investigation into employee complaints about how she managed her unit. Following her termination, Plaintiff, through her counsel, filed a praecipe with the Court of Common Pleas for Cambria County, Docket No. 2012-3335, seeking pre-complaint discovery from Highmark. Plaintiff argued that pre-complaint discovery was necessary to obtain specific facts to support claims for wrongful discharge and defamation that she intended to file against Highmark. However, after the pre-complaint discovery revealed that Plaintiff's proposed claims had no merit, Plaintiff chose not to pursue those claims but developed a new legal theory.

On February 1, 2013, Plaintiff filed a Class Action Complaint alleging that Highmark failed to pay her overtime wages for all hours worked in excess of forty in a week in violation of the overtime provision of the Pennsylvania Minimum Wage Act ("MWA"). Based on the allegations in the Complaint, it is beyond dispute that Plaintiff is not covered by, and cannot recover under, the overtime provision of the MWA.

II. SUMMARY OF ARGUMENT

Plaintiff's MWA claim should be dismissed because her allegations, accepted as true, conclusively establish that she was employed in an executive capacity and, therefore, is not covered by the overtime provision of the MWA. An employee is employed in an executive capacity and not covered by the overtime provision of the MWA if (1) the employee's primary duty is management of a unit; (2) the employee regularly supervises two or more employees; and (3) the employee is paid a salary of \$250 or more per week. 34 Pa. Code § 231.82(6).

In her Complaint, Plaintiff admits that her primary duty was managing a customer service unit and admits that she regularly supervised two or more customer service representatives. Despite these admissions, Plaintiff argues that she was not employed in an executive capacity because she did not exercise discretion. Indeed, the vast majority of the Complaint is directed at attempting to establish that Plaintiff did not exercise discretion when performing her many management duties. While the exercise of discretion is a requirement that must be met under the long test, 34 Pa. Code §§ 231.82(1)-(5), it is not a requirement that must be met under the short test, 34 Pa. Code § 231.82(6). The short test applies in this case. It is beyond dispute that Plaintiff earned a weekly salary of at least \$1,339 – significantly more than the \$250 threshold that triggers the short test. See 34 Pa. Code § 231.82(6). Accordingly, the issue of whether Plaintiff exercised discretion is irrelevant to the analysis of her claim. Id.

Based solely on the allegations in Plaintiff's complaint, it is beyond dispute that her primary duty was management of a unit and that she regularly supervised two or more employees. Likewise, based on Plaintiff's payroll records, it is clear that Plaintiff earned a weekly salary of at least \$1,339 at all relevant times. Accordingly, Plaintiff cannot recover under the overtime provision of the MWA. As such, this Court should grant Highmark's Preliminary Objections and dismiss Plaintiff's MWA claim with prejudice.

Although the Complaint contains only one count, Plaintiff makes passing mention of the Pennsylvania Wage Payment and Collection Law ("WPCL"). To the extent Plaintiff's mention of the WPCL is sufficient to require a response, her WPCL claim should be dismissed because it is conclusory and wholly unsupported by factual allegations necessary to state a wage payment claim. It is well-established that the WPCL does not create a substantive right to compensation; rather, it merely provides a statutory remedy when an employer breaches an existing contract to pay wages. Plaintiff does not, and cannot, allege that she had a contract with Highmark entitling her to overtime wages – a necessary prerequisite to the maintenance of a WPCL claim. As such, this Court should grant Highmark's Preliminary Objections and dismiss Plaintiff's WPCL claim with prejudice.

III. PLAINTIFF'S ALLEGATIONS AND ADMISSIONS¹

Plaintiff was employed as a supervisor of customer service. (Complaint ¶ 6). As a customer service supervisor, Plaintiff was in charge of a customer service unit. (Complaint ¶ 7). The customer service unit managed by Plaintiff included two or more customer service representatives. (Id.).

¹ An assertion of fact made in a verified pleading constitutes an admission that cannot later be contradicted by the party making it. See, e.g., Dale Mfg. Co. v. Workmen's Compensation Appeal Bd., 382 A.2d 1256 (Pa. Commw. Ct. 1978), aff'd, 421 A.2d 653 (Pa. 1978).

As a supervisor, Plaintiff was responsible for managing the unit. (Complaint ¶¶ 6, 7). Specifically, Plaintiff interviewed applicants, (Complaint ¶¶ 18, 35, 64, 82), assessed their qualifications, (Complaint ¶ 20), and made hiring recommendations. (Complaint ¶¶ 25-26, 72-73). Plaintiff's hiring recommendations were sometimes followed, but not always. (Complaint ¶ 29). Plaintiff trained her employees. (Complaint ¶ 35). Plaintiff conducted performance evaluations of her employees, and maintained these and other employee records. (Complaint ¶¶ 11, 13-14, 35, 57, 59-60, 82). Plaintiff monitored her employees and disciplined them when they failed to comply with the Company's policies. (Complaint ¶ 8, 54, 82).

IV. STANDARD OF REVIEW

Where the facts averred in a complaint will not permit recovery under the law, preliminary objections in the nature of a demurrer must be sustained. See McNeil v. Jordan, 894 A.2d 1260, 1272 (Pa. 2006); Pike County Hotels Corp. v. Kiefer, 396 A.2d 677 (Pa. Super. Ct. 1978). When analyzing a demurrer, the court must accept as true all well-pleaded facts and all reasonable inferences. See McNeil, 894 A.2d at 1273. However, where a complaint fails to aver the requisite requirements necessary to maintain a cause of action, the granting of a demurrer is appropriate. See Mahoney v. Furches, 468 A.2d 458 (Pa. 1983); Weber v. Bell Telephone Co., 203 A.2d 554, 556 (Pa. 1964).

V. ARGUMENT

A. This Court Should Grant Highmark's Preliminary Objection And Dismiss Plaintiff's MWA Claim Because Plaintiff's Admissions Establish That She Cannot Recover Under The Overtime Provision Of The MWA.

This Court should dismiss Plaintiff's MWA claim because her allegations, accepted as true, conclusively establish that she is not covered by the overtime provision of the MWA. Under the overtime provision of the MWA, an employer must pay an employee who works

overtime (any hours worked beyond 40 hours per week) at a rate of one and one-half times the employee's regular rate of pay. 43 P.S. § 333.104(c); 34 Pa. Code § 231.41. Significantly, however, not every employee is covered by the overtime provision of the MWA.

As it relates to the present case, the overtime provision of the MWA does not apply to an employee employed in an executive capacity. 34 Pa. Code § 231.81. The MWA includes two tests for determining whether an employee is employed in an executive capacity: the short test applies when an employee makes \$250 or more per week and the long test applies when the employee makes less than \$250 per week. 34 Pa. Code § 231.82(6).

Under the short test, an employee “shall be deemed to meet all of the requirements of [the long test]” if (1) the employee is compensated on a salary basis at a rate of not less than \$250 per week, (2) the employee’s primary duty consists of the management of a customarily recognized subdivision of the company, and (3) the employee customarily and regularly directs the work of two or more other employees. 34 Pa. Code § 231.82(6).¹ Plaintiff’s allegations conclusively establish that Plaintiff meets each of the requirements of the short test and, therefore, is not covered by the MWA’s overtime provision.

With respect to the first requirement, it is well-settled that to state a claim for unpaid overtime compensation, a complaint must at a minimum allege the plaintiff’s salary and the approximate overtime hours plaintiff worked per week. See Mell v. GNC Corp., 2010 WL 4668966, at *5 (W.D. Pa. Nov. 9, 2010); Zhong v. August August Corp., 498 F. Supp. 2d 625,

¹ Under the long test, which does not apply in this case, an employee must meet all the requirements of the regulation to be deemed to be employed in an executive capacity. 34 Pa. Code § 231.82; see also Jean-Louis v. RGIS Inventory Specialists, LLC, 2011 WL 3678532, at *11-12 (E.D. Pa. Aug. 22, 2011) (noting that the exercise of discretion is not an element under the short test).

628 (S.D. N.Y. 2007).¹ Although her failure to plead this essential fact is in itself a basis for this Court to sustain Highmark's preliminary objection for insufficient specificity under Rule 1028(a)(3); at this point, dismissing the complaint with leave to amend would be futile and serve only to delay the process because Plaintiff's actual pay records conclusively establish that at all relevant times she was paid a salary of at least \$1,339 per week (\$69,645 per year). (See Exhibit A). Accordingly, it is beyond dispute that Plaintiff was paid a salary of \$250 or more per week.

With respect to the second requirement, when analyzing whether the employee performs management duties for purposes of the MWA, courts apply the definition of "management" from the Fair Labor Standards Act ("FLSA") implementing regulations. See, e.g., Jean-Louis v. RGIS Inventory Specialists, LLC, 2011 WL 3678532, at *11-12 (E.D. Pa. Aug. 22, 2011) (applying 29 C.F.R. § 541.102 to MWA claim); McClain v. McDonald's Corp., 2007 WL 210440, at *8-10 (E.D. Pa. Jan. 25, 2007) (same). For purposes of the MWA, "management" includes, but is not limited to, activities such as interviewing, selecting, and training of employees; maintaining employee records; appraising employee performance; and disciplining employees. Id.

In her Complaint, Plaintiff alleges a list of duties she performed as the supervisor in charge of the customer service unit at the Johnstown call center. Every duty Plaintiff lists is a management duty. Every one. Specifically, Plaintiff alleges she was responsible for interviewing applicants, training employees, appraising employee performance, disciplining employees, maintaining the records related to these functions, and generally monitoring and overseeing the customer service representatives at the call center. (Complaint ¶¶ 6-8, 11, 18, 25-

¹ Pennsylvania courts look to case law interpreting the FLSA for guidance on interpreting the MWA. See Commw. Dep't of Labor and Industry, Bureau of Labor Law Compliance. v. Stuber, 822 A.2d 870, 873 (Pa. Commw. Ct. 2003), aff'd, 859 A.2d 1253 (Pa. 2004).

26, 35, 54, 57, 64, 72-73, 82). Accordingly, it is beyond dispute that Plaintiff's primary duty was the management of the customer service unit.

With respect to the third requirement, Plaintiff alleges that she was employed as a supervisor in charge of a customer service unit. (Complaint ¶¶ 6-7). Further, Plaintiff repeatedly alleges that she supervised customer service representatives – plural. (Complaint ¶¶ 6-8, 11, 18, 25-26, 35, 54, 57, 64, 72-73, 82). Accordingly, it is beyond dispute that Plaintiff regularly supervised two or more employees.

The undisputed facts conclusively establish that Plaintiff was employed in an executive capacity and, therefore, cannot recover under the overtime provision of the MWA. Accordingly, this Court should grant Highmark's Preliminary Objections and dismiss Plaintiff's MWA claim with prejudice.

B. This Court Should Grant Highmark's Preliminary Objection And Dismiss Plaintiff's WPCL Claim Because She Has Failed To Allege Any Facts To State A Claim Under The WPCL.

This Court should dismiss Plaintiff's WPCL claim because she has not alleged any facts to support such a claim. For example, Plaintiff has not alleged that she had a contract with Highmark that entitled her to payment of overtime wages – a necessary prerequisite to a WPCL claim.

It is well-established that "The WPCL 'does not create an employee's substantive right to compensation; rather, it only establishes an employee's right to enforce payment of wages and compensation to which an employee is otherwise entitled by the terms of an agreement.'"

Hartman v. Baker, 766 A.2d 347, 352 (Pa. Super. Ct. 2000) (quoting Banks Engineering Co., Inc. v. Polons, 697 A.2d 1020, 1024 (Pa. Super. Ct. 1997)). To state a claim under the WPCL "an employee must aver that [she] was contractually entitled to compensation from wages and that

[she] was not paid." See Sullivan v. Chartwell Inv. Partners, LP, 873 A.2d 710, 716 (Pa. Super. Ct. 2005).

In the absence of an alleged contractual right to overtime wages, Plaintiff's WPCL claim fails as a matter of law. Plaintiff has alleged no facts to suggest that she had such a contractual right. Accordingly, this Court should grant Highmark's Preliminary Objections and dismiss Plaintiff's WPCL claim with prejudice.

VI. CONCLUSION

For all of the foregoing reasons, Defendant Highmark Inc. requests that its Preliminary Objections be sustained and Plaintiff Jacqueline Rummel's Class Action Complaint be dismissed in its entirety with prejudice.

Respectfully submitted,



Patrick W. Ritchey
PA I.D. No. 19924
Richard L. Etter
PA I.D. No. 92835

REED SMITH LLP
Reed Smith Centre
225 Fifth Avenue
Pittsburgh, PA 15222-2716
(412) 288-3072/3806

Counsel for Defendant
Highmark Inc.

March 22, 2013

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing
PRELIMINARY OBJECTIONS TO PLAINTIFF'S CLASS ACTION COMPLAINT,
BRIEF IN SUPPORT AND PROPOSED ORDER was caused to be served by first class,
United States mail, postage prepaid upon the following on March 22, 2013:

Ronald P. Carnevali, Jr., Esq.
Michael J. Parrish, Jr., Esq.
Bradley E. Holuta, Esq.
Spence, Custer, Saylor, Wolfe & Rose LLC
Ameriserv Financial Building
P.O. Box 280
Johnstown, PA 15907

A handwritten signature in black ink, appearing to read "B. Holuta", is written over a horizontal line.

JACQUELINE RUMMEL, on behalf of
herself and all others similarly situated,

Plaintiff,

v.

HIGHMARK, INC.,

Defendant.

: IN THE COURT OF COMMON PLEAS OF
: CAMBRIA COUNTY, PENNSYLVANIA
: CIVIL ACTION-LAW

: No. 2013-367

: **AMENDED CLASS ACTION COMPLAINT**

: COUNSEL OF RECORD FOR PARTY:

: RONALD P. CARNEVALI, JR., ESQUIRE

: I.D. NO. 47733

: MICHAEL J. PARRISH, JR., ESQUIRE

: I.D. NO. 74834

: BRADLEY E. HOLUTA, ESQUIRE

: I.D. NO. 314301

: SPENCE, CUSTER, SAYLOR, WOLFE &

: ROSE, LLC

: AMERISERV FINANCIAL BUILDING

: POST OFFICE BOX 280

: JOHNSTOWN, PENNSYLVANIA 15907

: (814) 536-0735

: **JURY TRIAL DEMANDED**

NOTICE TO DEFEND

YOU HAVE BEEN SUED IN COURT. IF YOU WISH TO DEFEND against the claims set forth in the following pages, YOU MUST TAKE ACTION WITHIN TWENTY (20) DAYS after the Complaint and Notice are served, by entering a written appearance personally or by attorney and filing in writing with the Court your defenses or objections to the claims set forth against you. You are warned that IF YOU FAIL TO DO SO, the case may proceed without you and a JUDGMENT MAY BE ENTERED AGAINST YOU BY THE COURT without further notice for any money claimed in the Complaint OR FOR PROPERTY OR OTHER RIGHTS IMPORTANT TO YOU.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE OR KNOW A LAWYER, THEN YOU SHOULD GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP.

**Laurel Legal Services, Inc.
225-227 Franklin Street, 400 Franklin Ctr.
Johnstown, Pennsylvania 15901
(814) 536-8917**

JACQUELINE RUMMEL, on behalf of
herself and all others similarly situated,

Plaintiff,

v.

HIGHMARK, INC.,

Defendant.

: IN THE COURT OF COMMON PLEAS OF
: CAMBRIA COUNTY, PENNSYLVANIA
: CIVIL ACTION-LAW

: No. 2013-367
:
:
:
:
:
:

AMENDED CLASS ACTION COMPLAINT

NOW COMES, the Plaintiff, Jacqueline Rummel, on behalf of herself and all others similarly situated, by and through her attorneys, Spence, Custer, Saylor, Wolfe & Rose, LLC, and files this Amended Class Action Complaint:

1. Plaintiff, Jacqueline Rummel, is an adult individual residing at 1945 Minno Drive, Johnstown, Cambria County, Pennsylvania 15905.
2. Defendant, Highmark, Inc., is a corporation organized and existing under the laws of Pennsylvania, with an address of 1800 Center Street, Camp Hill, Pennsylvania 17011.
3. This action arises under the laws of the Commonwealth of Pennsylvania and is within the subject matter jurisdiction of this Honorable Court.
4. The Defendant maintains offices throughout Pennsylvania and conducts business in those offices, including Cambria County, such that venue is proper in the Court of Common Pleas of Cambria County.
5. Ms. Rummel began employment with Highmark on or about February 20, 1995.

6. Beginning in May 1997, Ms. Rummel was promoted to the role of a supervisor in the Customer Service unit of Highmark's "Healthplan Operations" ("HPO") department.

7. As part of her job duties, Ms. Rummel was responsible for monitoring customer service representatives in a Highmark call center, located in Johnstown, Pennsylvania.

8. Ms. Rummel monitored the customer service representatives' adherence to established, objective company standards, including, among other things, attendance, tardiness, quality and productivity.

9. In monitoring the customer service representatives' adherence to those standards, Ms. Rummel followed the instructions of her managers and implemented the objective job requirements applicable to the customer service representatives, established by Highmark and taught during Highmark's corporate training program.

10. Ms. Rummel did not plan the employee's work, apportion work among the employees, direct the tasks that needed to be done, or determine the techniques that were to be used, for those were all directed by Ms. Rummel's superiors at Highmark.

11. The policies, rules and standards by which employees were monitored were not determined by Ms. Rummel, but instead, were established by the Plaintiff's superiors at Highmark. Ms. Rummel had no discretion to deviate from the same.

12. The customer service representatives' adherence to those policies was based on objective, numerical standards and involved no subjective determinations by Ms. Rummel.

13. On a yearly basis, Ms. Rummel was responsible for completing a preprinted performance evaluation worksheet for each of the employees which she monitored.

14. Ms. Rummel did not create that preprinted evaluation worksheet or have any input as to its use in the evaluation process.

15. Ms. Rummel inputted the customer service representative's objective performance data and adherence to objective Highmark goals onto the appropriate sections of the evaluation worksheet:

16. The data on this worksheet was then converted into an objective numerical rating number for the employee. The method for calculating the rating number was established by Plaintiff's superiors at Highmark, and Ms. Rummel played no role in establishing this method.

17. The employee's rating number was then compared with the employee's length of service, based upon an objective comparison standard established by Highmark. An employee could be entitled to annual merit raises and/or bonuses within a prescribed range based upon the results of that comparison.

18. The range of possible raises and/or bonuses was determined by the Plaintiff's superiors at Highmark.

19. Ms. Rummel had no role in creating this bonus/raise calculation method.

20. Additionally, as part of her job duties, Ms. Rummel participated in interviewing job applicants for customer service representative positions, with the use of a job application questionnaire and a predetermined list of interview questions.

21. The job applications and interview questions were created by Highmark, and Ms. Rummel made no contributions or input into the creation or use of these applications or interview questions.

22. During these interviews, Ms. Rummel was required to give each applicant a numerical score for each question, based upon a predetermined objective scoring system.

23. Ms. Rummel had no role in establishing this point system.

24. Ms. Rummel also had no ability to subjectively assess each applicant beyond this objective point system.

25. After the interviews, Ms. Rummel tabulated each applicant's total score for the interview and entered the data into a spreadsheet.

26. Ms. Rummel then compared the applicant's total score with a predetermined threshold minimum score, established by her superiors, for the job in question.

27. Ms. Rummel made an indication to her superiors about each applicant's candidacy, based solely on a numerical comparison between the applicant's total score and the minimum threshold score. For every applicant that met or exceeded the threshold score, Ms. Rummel made an indication that the applicant could be hired.

28. These hiring indications were forwarded to one of the Plaintiffs' Managers.

29. The Managers reviewed the Plaintiff's spreadsheet data on each applicant, as well as the data of the other supervisors who interviewed other job applicants.

30. The Managers were solely responsible for making the ultimate personnel decisions and hiring the applicants.

31. On numerous occasions, the precise number of which will be identified during discovery, the Managers did not follow the objective indications provided by Ms. Rummel and made a hiring decision contrary to the indication she provided. Ms. Rummel had no authority to override the Managers' decisions in this respect.

32. As such, Ms. Rummel did not have the authority to hire or fire employees, nor did she make recommendations or suggestions that were given particular weight. In fact, she only tabulated the scores for each applicant and forwarded the data to her superiors, as opposed to making actual "recommendations" or "suggestions."

33. Throughout her employment with Highmark, Ms. Rummel received positive performance reviews and regular pay raises.

34. In fact, in or around Summer 2012, Ms. Rummel received her regular mid-year review and was given "exemplary" remarks for her performance.

35. Highmark terminated Ms. Rummel's employment on or about August 31, 2012.

36. By the nature of her position, Ms. Rummel had to work more than forty (40) hours in a work week and/or more than eight (8) hours in a workday at various times throughout their employment.

37. Ms. Rummel needed to work these additional hours on at least a monthly basis and were for various purposes, including, but not limited to, attending meetings, receiving training, completing staff merit reviews, providing training to new employees and conducting interviews.

38. The number of additional hours that were required varied by month, but overtime was a continuing, regular and required part of the Plaintiff's job.

39. Evidence of the precise number of hours worked by Plaintiff and every other member of the class is in the possession of the Defendant. If unavailable, the Plaintiffs may establish the hours they worked by their testimony and through discovery.

40. Ms. Rummel has not been compensated for these additional hours in any way.

41. The work that the Plaintiff performed did not involve the use, or ability to use, any independent judgment or discretion, nor did it require any specialized training, experience or knowledge.

42. The work that the Plaintiff performed did not involve the hiring or firing of other employees, as the ultimate personnel decisions were solely made by superiors at Highmark.

43. The Plaintiff was closely supervised by her direct Managers and was also under the supervision of a Director.

44. The Plaintiff was not treated like a supervisor by Highmark in that, among other things, she was reprimanded and/or disciplined for certain aspects of her conduct, including, but not limited to, deviating from her arrival/departure time and assigned parking spot.

45. Ms. Rummel was entitled to the "overtime" protections of the Pennsylvania Minimum Wage Act, 43 Pa. Cons. Stat. §333.104 *et seq.*, and the Fair Labor Standards Act, 29 U.S.C. §201 *et seq.*, as she was not an "exempt" employee.

46. Despite this entitlement, Highmark systematically and willfully deprived Ms. Rummel of overtime pay, in violation of the statutes set forth herein, including the PMWA and FLSA. Among other things, Highmark knowingly required Ms. Rummel to work more than 40 hours per week, required travel and attendance at various functions and meetings and the preparation of time-consuming performance reviews.

CLASS ACTION ALLEGATIONS/CLASS ACTION STATEMENT

47. Ms. Rummel and the class members hereby incorporate by reference paragraphs 1 through 46 of this Amended Class Action Complaint as if the same were fully set forth herein.

48. Ms. Rummel brings this action on behalf of herself, and on behalf of the class defined herein, for claims under the Pennsylvania Minimum Wage Act and the Fair Labor Standards Act, 29 U.S.C. §201 *et seq.*, as a class action.

49. Highmark is comprised of several departments, including, but not limited to, a Sales department, a Provider Relations department, a Health Management Services department, an IT department and Healthplan Operations ("HPO") department.

50. Each of those departments is comprised of various subunits within that department.

51. Within the HPO department, there are numerous subunits, including, but not limited to, customer service, claims processing, claim adjustments,

quality assurance and other-party liability subunits. As more fully set forth herein, the supervisors within these subunits of HPO performed the same type of work and under the same employment conditions and circumstances.

52. The putative class is brought on behalf of Highmark "supervisors," defined as "Individuals employed as supervisors in Highmark's "Healthplan Operations" department, from 2010 to the present, to recover unpaid overtime compensation pursuant to the Pennsylvania Minimum Wage Act and the Fair Labor Standards Act.

53. As more fully set forth herein, the class members performed similar types of tasks as Ms. Rummel, including interviewing applicants, monitoring employee performance, and completing performance evaluations. The class members were closely supervised by Managers and solely implemented objective standards that were established by Highmark.

54. As more fully set forth herein, neither the class members nor Ms. Rummel made hiring or firing decisions, nor recommendations or suggestions that were given particular weight, for the ultimate decisions were made by the class members' supervisors. Upon information and belief, the supervisors only acted as "scorekeepers" and reported an employee's objective attendance and performance data to the Managers, who ultimately made all decisions relating to personnel.

Numerosity

55. The members of the class are so numerous that joinder of all members is impracticable. While the exact number of the members is unknown to Plaintiff at this time, and can only be ascertained through appropriate discovery, the Plaintiff believes that there are, at a minimum, dozens, of individuals in the class of supervisors.

56. In fact, the Plaintiff knows firsthand of at least 27 supervisors within Highmark's HPO department.

57. It would be cumbersome on the parties and the Court to maintain dozens of separate lawsuits brought by dozens of plaintiffs, all with the same "supervisor" position, in the same HPO department, and with the same substantive claims for overtime pay.

Common Questions

58. The supervisors in the class were all subject to the same performance evaluations and similar goals and expectations with respect to their employment.

59. The supervisors were all subject to the same guidelines for time off from work, as well as the same bonus structure and compensation ratios.

60. The supervisors in the class all performed nondiscretionary jobs in which they monitored the work of lower-ranking Highmark employees, pursuant to objective standards established by Highmark.

61. For instance, the supervisors of Highmark's claims adjusters and claims processors monitored the objective productivity and quality performance of each employee by examining the number of claims handled over a specified time period, and comparing that number to an objective standard established by Highmark.

62. The methods of objective evaluation were established by the supervisors' superiors at Highmark, and the supervisors played no role in the creation or use of these methods.

63. Also, the supervisors all performed annual evaluations of the employees that they monitored, which involved objectively examining the employee's adherence to Highmark's objective standards.

64. As part of those annual evaluations, all supervisors rated each employee according to an objective numbering system and completed a preprinted evaluation worksheet. No supervisors played any role in the usage of this worksheet, as the same was dictated by the supervisors' superiors at Highmark.

65. The class members all inputted the employee's objective performance data and adherence to objective Highmark goals onto the appropriate sections of the evaluation worksheet.

66. The data on this worksheet was then converted into an objective numerical rating number for the employee. The method for calculating the rating number was established by Highmark superiors.

67. The employee's rating number was then compared with the employee's length of service, based upon objective comparison standard established by Highmark. An employee could be entitled to annual merit raises and/or bonuses within a prescribed range based upon the results of that comparison.

68. The range of possible raises and/or bonuses was determined by the class members' superiors at Highmark.

69. The class members had no role in creating this bonus/raise calculation method.

70. As part of their job duties, all supervisors were also asked to interview job applicants.

71. The job applicants completed preprinted applications forms, and the supervisors had no role in the creation, content or use of these forms.

72. During the interviews, all supervisors were required to ask each applicant a list of questions from a predetermined list. No supervisors had any role in the creation, content or use of that list.

73. For each question, all supervisors were required to give each applicant a numerical score, based upon a predetermined objective standard.

74. No supervisors had any role in establishing this point system.

75. No supervisors had any ability to subjectively assess each applicant beyond this objective point system.

76. After the interviews, all supervisors tabulated each applicant's total points for the interview and entered the data onto a spreadsheet.

77. The supervisors then compared the applicant's total score with a predetermined threshold minimum score for the job in question.

78. The supervisors then made an indication to their supervisors about each applicant's candidacy, based solely on a numerical comparison between the applicant's total score and the minimum threshold score. For every applicant that met or exceeded the threshold score, the supervisors made an indication that the applicant could be hired.

79. These hiring indications were forwarded to one of the supervisors' Managers.

80. The Managers reviewed the spreadsheet data on each applicant, as well as the data of the other supervisors who interviewed other job applicants.

81. The Managers were solely responsible for making the ultimate personnel decisions and hiring the applicants.

82. At various times, the Managers did not follow the objective indications provided by the class members and made hiring decisions to the contrary.

83. No supervisors had any authority to override the Managers' hiring decisions, even though the employees ultimately reported to the supervisors.

84. Highmark knowingly required the class members to attend and/or participate in the same types of meetings, training sessions and other events, and to complete time-consuming performance evaluations, even though Highmark knew that meeting these requirements would require working in excess of 40 hours per week.

85. There exist common questions of law and fact which affect the class as a whole, including, but not limited to:

- a. Whether the supervisors were willfully, uniformly and wrongfully classified by Highmark as exempt from overtime compensation;**
- b. Whether Highmark failed to pay the Plaintiff and members of the class all overtime compensation due to them;**
- c. Whether the Plaintiff and class members were expected to and/or required to work hours in excess of forty (40) per week;**
- d. Whether the Plaintiff and class members have sustained damages, and, if so what is the proper measure of damages;**
- e. Whether the Defendant violated any other statutory provisions regarding compensation owed to the Plaintiff and class members;**

f. Whether the supervisors had any independent discretion or authority that would exempt them from the mandatory overtime provisions of the statutes set forth herein;

g. Whether the supervisors were charged with hiring/firing employees, or whether their recommendations to the same were given particular weight.

86. These common questions predominate over any individualized determinations present in this case because the class members performed substantially the same job functions as supervisors within the HPO department.

Typicality

87. The claims of Ms. Rummel are typical and representative of the claims of the class as a whole.

88. Ms. Rummel was employed by Highmark since 1997, and as a supervisor, performed the same types of duties as the other class members, including, but not limited to, monitoring employees in her department, conducting interviews and performing employee evaluations—all pursuant to objective standards established by Highmark.

89. Ms. Rummel was also subject to the same types of standards and guidelines as those of the class as a whole with respect to her performance of her required job duties.

90. Ms. Rummel was on the same level in the hierarchical structure of Highmark personnel as the putative class members. That is, Ms. Rummel reported to a manager and director, as did the other supervisors.

91. Ms. Rummel and all other supervisors were under the ultimate control of the same individual, Mr. Wayne Berger, Highmark's Vice President of Healthplan Operations.

Fair and Adequate Representation

92. The Plaintiff has no conflict in this representation.

93. Plaintiff's counsel are experienced litigators in good standing, and counsel will faithfully, competently and zealously advocate for the interests of the class as a whole.

94. Plaintiff's counsel has agreed to advance all costs of this litigation and has entered into a contingent fee agreement with the Plaintiff, such that counsel will only be compensated in the event of a recovery for the Plaintiff and class members.

Fair and Efficient Method of Adjudication

95. A class action is a superior method of adjudicating the claims of the class members than other methods.

96. The damages suffered by individual members may be relatively small when compared to the expense and burden of litigation, making it virtually impossible for members of the class to individually seek redress.

97. Even if any member of the class could afford individual litigation against Highmark, it would be unduly burdensome to the courts to bring dozens of lawsuits arising from the same course of conduct.

98. It would also be burdensome to Highmark to be named as a defendant in dozens of lawsuits arising from the same course of conduct.

99. Concentrating this litigation in one forum will promote judicial economy and parity among the claims of individual members of the class and provide for judicial consistency.

100. This forum is appropriate for adjudication of this action. The supervisors worked at various Highmark offices through Western Pennsylvania, including Pittsburgh, Erie, Johnstown and Camp Hill. Cambria County is located in proximity to all of these offices.

101. There is a risk of inconsistent and/or varying adjudications should these cases not proceed as a class action, for supervisors who perform the same duties may be treated differently by different juries and/or Highmark.

102. There is also a risk that prosecuting separate actions would, as a practical matter, be dispositive of the interests of the other members who are not parties to the individual adjudications, in that a precedent would be established in this jurisdiction that would apply to future similar claims.

103. As set forth herein, common questions of law and fact predominate over any questions affecting individual members, such that a class action is superior to other methods of adjudication.

104. Absent this class action, the members of the class are unlikely to obtain redress of their injuries.

105. The Plaintiff is unaware of any other litigation already commenced by the class members arising from this course of conduct.

COUNT I

Violations of the Pennsylvania Minimum Wage Act

106. Plaintiff and the class members hereby incorporate by reference Paragraphs 1 through 105 of this Amended Class Action Complaint as if the same were fully set forth herein.

107. At all times pertinent hereto, Highmark was an employer within the meaning of the PMWA, 43 Pa. Cons. Stat. §333.103 *et seq.*

108. The Pennsylvania Minimum Wage Act and its implementing regulations state that an employee must be paid overtime of at least one and one-half times the regular rate of pay, for all hours worked in excess of forty (40) per week and/or eight (8) per day, unless the employee falls under one of the enumerated exemptions. 43 Pa. Cons. Stat. §333.104(c) *et seq.*

109. Members of the class, including Ms. Rummel, regularly worked more than forty (40) hours per week and received no additional pay for those additional hours.

110. Members of the class, including Ms. Rummel, are not part of any group that is exempt from the overtime requirements.

111. Specifically, the members of the class and Plaintiff are not exempt executives or administrative employees. 43 Pa. Cons. Stat. §333.105(a)(5) *et seq.*

112. As set forth herein, the class members' job duties do not involve the exercise of independent discretion because all standards and rules for employees are objective and determined by Highmark. Further, the class member do not make hiring or firing decisions, nor recommendations or suggestions that are given particular weight,

for the ultimate personnel decisions are made by the class members' Managers, who routinely deviate from the employee data provided by the class members.

113. For each work week in which the Plaintiff and class members worked more than 40 hours, they were entitled to overtime compensation of at least one and one-half times their regular rate of pay, pursuant to the Pennsylvania Minimum Wage Act of 1968.

114. Highmark violated this Act because the Plaintiff and class members were not paid the additional compensation to which they were entitled.

115. Highmark acted willfully and with reckless disregard to the Act's clearly applicable provisions, including, but not limited to, having policies which required attendance at meetings (some of which required travel) and knowingly requiring the performance of duties which could not reasonably be completed during a forty hour work week.

116. The Pennsylvania Minimum Wage Act also requires employers to keep a true and accurate record of, among other items, the hours worked each day and each workweek by its employees, and how much overtime was worked. Additionally, employers are required to furnish a statement to all employees with each payment of wages, indicating the number of hours worked during the specific pay period.

117. Upon information and belief, the Defendant did not keep such records, nor did it provide or furnish an accurate statement to the Plaintiff and class members, in violation of Pennsylvania Labor Laws.

WHEREFORE, the Plaintiff and class members seek judgment and damages to the fullest extent allowed by law, including, but not limited to, unpaid wages, overtime wages, pre and post-judgment interest, costs of suit, including reasonable

attorney's fees, punitive damages and such other relief as this Court may deem proper and just. **JURY TRIAL DEMANDED.**

COUNT II

Fair Labor Standards Act

118. Plaintiff and the class members hereby incorporate by reference Paragraphs 1 through 117 of this Amended Class Action Complaint as if the same were fully set forth herein.

119. At all times pertinent hereto, Highmark was an employer subject to the Fair Labor Standards Act. 29 U.S.C. §203 *et seq.*

120. The Fair Labor Standards Act, 29 U.S.C. §201 *et seq.*, and its implementing regulations, require employers to pay overtime wages at the rate of one and one-half times the statutory mandated minimum rate of pay, for all hours worked in excess of 40 hours per week.

121. Members of the class, including Ms. Rummel, regularly worked more than forty (40) hours per week and received no additional pay for those additional hours.

122. Members of the class, including Ms. Rummel, are not part of any group that is exempt from the overtime requirements.

123. Specifically, the members of the class and Plaintiff are not exempt executives or administrative employees.

124. As set forth herein, the class members' job duties do not involve the exercise of independent discretion because all standards and rules for employees are objective and determined by Highmark. Further, the class members do not make hiring or firing decisions, nor recommendations or suggestions that are given particular weight,

for the ultimate personnel decisions are made by the class members' Managers, who routinely deviate from the employee data provided by the class members.

125. For each work week in which the Plaintiff and class members worked more than 40 hours, they were entitled to overtime compensation of at least one and one-half times their regular rate of pay, pursuant to the Fair Labor Standards Act.

126. Highmark violated this Act because the Plaintiff and class members were not paid the additional compensation to which they were entitled.

127. Highmark acted willfully and with reckless disregard to the Act's clearly applicable provisions, including, but not limited to, requiring attendance at meetings (some of which required travel) and knowingly requiring the performance of duties which could not reasonably be completed during a forty hour work week.

WHEREFORE, the Plaintiff and class members seek judgment and damages to the fullest extent allowed by law; including, but not limited to, unpaid wages, overtime wages, pre and post-judgment interest, costs of suit, including reasonable attorney's fees, punitive damages and such other relief as this Court may deem proper and just. **JURY TRIAL DEMANDED.**

Respectfully submitted,

SPENCE, CUSTER, SAYLOR, WOLFE & ROSE, LLC



Ronald P. Carnevali, Jr., Esquire
Michael J. Parrish, Jr., Esquire
Bradley E. Holuta, Esquire
Attorneys for Plaintiffs

VERIFICATION

I, the undersigned, verify that the statements made in the foregoing pleading are true and correct to the best of my knowledge, information and belief. I understand that false statements herein are made subject to the penalties of 18 Pa.C.S. §4904 relating to unsworn falsification to authorities.

4-4-13
DATE


JACQUELINE RUMMEL

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I have served a true and correct copy of the within upon the following persons by first-class mail, postage prepaid, this 5th day of April, 2013.

Patrick W. Ritchey, Esquire
Rick Etter, Esquire
Reed Smith
Reed Smith Centre
225 Fifth Avenue
Pittsburgh, Pennsylvania 15222-2716

SPENCE, CUSTER, SAYLOR, WOLFE & ROSE, LLC



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