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EXPERT ANALYSIS

Supreme Court: Representative Evidence Can Prove Classwide Liability for Wage-And-Hour Violations

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The U.S. Supreme Court issued a decision March 22 that undoubtedly will fuel the growing nationwide trend of wage-and-hour class-action lawsuits

In *Tyson Foods Inc. v. Bouaphakeo*, No. 14- 1146, 2016 WL 1092414 (U.S. Mar. 22, 2016), the high court upheld a jury verdict and $5.8 million judgment in favor of Tyson Foods employees in Storm Lake, Iowa. The employees claimed the company violated federal and state labor laws by not paying them time-and-a-half for overtime hours worked.

PROVING CLASS-WIDE LIABILITY

The employees alleged, among other claims, that putting on and taking off (also known as "donning" and "doffing") protective gear at the beginning and end of their shifts should have been counted as hours worked for purposes of calculating and paying overtime.

Critically, the court ruled that the employees' use of "representative evidence" was permissible to maintain class proceedings and prove liability — at least where Tyson Foods failed to keep time records.

The plaintiffs' counsel relied on a study performed by an industrial relations expert. The expert used 744 videotaped observations of employees to infer the average amount of time it took particular employees in a given Tyson Foods department to don and doff their protective gear.

Using these averages, a jury in the U.S. District Court for the Northern District of Iowa in 2011 found Tyson Foods liable for unpaid overtime and awarded the class of employees damages based on the estimated hours.

For years, federal and state courts have struggled with the issue of whether such representative evidence is permissible to prove liability on a class-wide basis — or whether it unfairly prevents employers from asserting defenses as to each individual employee.

As demonstrated by the Tyson Foods case, such evidence is based on a statistical sampling of the overall employee population. The sampling is used to draw certain inferences as to each individual plaintiff-employee. Employers, including Tyson Foods, have argued that such a methodology fails to account for disparities between individual employees and cuts against finding liability on a class-wide basis.

Prior to the *Tyson Foods* ruling, employers had hoped the Supreme Court would adopt, in the context of wage-and-hour lawsuits, a position similar to the one it took in *Wal-Mart Stores Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

In *Dukes*, the court rejected the use of representative evidence to prove Wal-Mart's classwide liability for sex discrimination. However, in *Tyson Foods* the court found *Dukes* readily distinguishable.

The court ruled that the employees' use of "representative evidence" was permissible to maintain class proceedings and prove liability — at least where Tyson Foods failed to keep time records.

It said the Wal-Mart employees were not substantially similar, as there was no common policy of sex discrimination and each employee's experience differed by worksite and supervisor. By contrast, the Tyson Foods employees worked in the same facility, did similar work and were paid under the same policy. Thus, the Tyson Foods employees were "sufficiently similar," according to the opinion.

The court reasoned that if the Tyson Foods employees had each brought individual lawsuits instead of filing a class-action lawsuit, they nonetheless could have relied on the representative evidence to prove their respective individual cases. The Wal-Mart employees could not do so.

RULING'S EFFECT ON EVIDENCE STANDARDS

The court's decision in *Tyson* is not all bad news for employers. The court merely rejected Tyson Foods' argument for a broad prohibition on the use of representative evidence in all class proceedings. It did not approve any particular method and left it to lower courts to decide the admissibility of such evidence on a case-by-case basis.

The court held that the use of such evidence remains subject to normal evidentiary standards for admissibility and scientific reliability. Also, the weight to give any admissible representative evidence is left to the jury.

Significantly, the court noted that Tyson Foods did not challenge the admissibility of the representative evidence as statistically unreliable. Therefore, employers may still argue that a particular statistical sample is too small, unreliable or otherwise not fairly representative of a particular group of employees.

Also, just as employees may be able to make a case using representative evidence, so too can an employer use such evidence for its defense. Tyson Foods did not rebut the employees' evidence with its own expert testimony regarding representative evidence.

Furthermore, Chief Justice John Roberts, in a concurring opinion, questioned the lower court's ability to separate Tyson Foods employees who did not work overtime from those who did for purposes of disbursing the damages award.

Even the court's majority recognized that employees who did not actually work overtime were not entitled to any damages.

Plaintiffs' attorneys may find themselves between a rock and a hard place if they win a case using representative evidence and receive less in damages than the damages suggested by the representative evidence.

For instance, in the Tyson Foods case, the jury's award of $2.9 million in compensatory damages was far less than the $6.7 million that should have been awarded if the representative evidence of the employees had been fully credited. This suggests the jury discredited some of the representative evidence concerning average donning and doffing times. Thus, the jury must have found some employees did not work overtime.

As Chief Justice Roberts noted, if the verdict cannot be backward constructed to determine the actual averages credited by the jury — in order to remove from the award those employees who did not work overtime — the entire damages award may be invalid.

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