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U.S. Supreme Court holds Expert Evidence Sufficient to Establish Common Questions for Class Action and Collective Action Alleging Unpaid Overtime for Donning and Doffing.

On March 22, 2016, the United States Supreme Court issued an opinion making it clear that employees can establish commonality through the analysis of an expert, and application of his representative sample evidence, for purposes of class certification of state law claims, under Rule 23, and certifying FLSA claims as a collective action, under 29 U.S.C. 216. *Tyson Foods, Inc. v. Bouaphakeo*, __ S. Ct. __, No. 14-1146, 2016 WL 1092414 (March 22, 2016).

The plaintiffs in *Tyson Foods* worked in the kill, cut, and retrim departments of a Tyson Foods pork processing plant in Iowa. To do their work, the plaintiffs had to don and doff protective gear that varied from day to day depending on the nature of the work being done that given day. Tyson Foods compensated some, but not all, of the employees for donning and doffing the gear, and it did not keep records of the plaintiffs donning and doffing time. The plaintiffs sued, claiming they were denied overtime pay for donning and doffing time that was owed under the federal Fair Labor Standards Act (FLSA) and pursuing a collective action of similarly situated employees under 29 U.S.C. 216. The named plaintiffs also asserted claims under Iowa state law seeking class certification under Federal Rule of Civil Procedure 23. After the trial court granted class certification, a jury returned a verdict of \$2.9 million in unpaid wages and the Eighth Circuit Court of Appeals affirmed. This appeal followed.

On appeal to the Supreme Court, Tyson Foods chief argument was that the action should not have been certified as a collection action because there were too many individual differences between the type of gear worn by the class members and the time spent donning and doffing the gear. Tyson Foods also argued that reliance on the proffered representative evidence would result in awards of overtime damages to class members who had never actually worked any overtime hours.

The Supreme Court rejected Tyson Foods arguments, holding that the plaintiffs could rely on representative statistical evidence from an expert to establish liability and damages across the plaintiff class. The plaintiffs expert had videotaped a sampling of employees engaged in donning and doffing activities to establish the average amounts of time spent per day on donning and doffing. These averages were then added to the plaintiffs time cards to establish which class members worked over 40 hours per week and the amount of their overtime pay damages.

Of particular interest in this case, third parties who filed friend of court briefs, called *amici* had urged the Court to announce a broad rule against the use of representative evidence in class actions. This type of blanket prohibition could have significantly weakened plaintiffs ability to maintain class actions. Rather, the Court relied on Federal Rules of Evidence and explained that admissibility depends on the reliability of evidence in proving or disproving elements of the relevant cause of action. One consideration will be whether an individual plaintiff could have relied on the statistics to prove his or her own claim if brought in an individual lawsuit. The Court also noted that the admissibility of statistics will depend on the nature of the cause of action at issue, the nature of the statistics being offered, and the purpose for which the statistics are offered. While not explicitly stated by the Court, its decision can be read to give approval to a case-by-case approach to the admissibility of representative evidence in employment class actions.

In issuing its ruling, the Supreme Court held that its decision was in accordance with its well-known 2011 class action decision in *Walmart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). You might recall that, in *Dukes*, representative evidence established by an expert was not admissible because there, unlike here, the employees themselves could not have relied on testimony from others about how they were discriminated against by their supervisor in their particular store. Here, the Court concluded that plaintiffs worked in the same facility, did similar work, and were paid under the same policy. Thus, respondents could have introduced the experts study in a series of individual suits.

Interestingly, the Supreme Court held that Tyson Foods had a legitimate concern that the representative evidence might result in uninjured employees, who had not actually worked overtime, improperly receiving overtime pay that was not due. The Court concluded that this issue was not yet properly before it given that the damages distribution allocation to the class had not yet been established. The Court, therefore, reserved ruling on this issue.

Significantly, in this case, the evidentiary-gap that the plaintiffs sought to fill by representative statistical evidence was the making of the employerimproper record keeping. The FLSA requires employers to make, keep, and preserve . . . records of the persons employed by him and of the wages, hours, and *other conditions and practices of employment*. 29 U.S.C. 211(c) (emphasis supplied). Further, the *Tyson Foods* Court emphasized, again, that the remedial nature of the FLSA and the great public policy which it embodies militates against making the burden of proving uncompensated work an impossible hurdle.

In light of *Tyson Foods*, employers should review their FLSA policies and practices, including recordkeeping practices. Proactive compliance can help decrease the risk of individual or collective wage and hour claims.