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Supreme Court Opens Wide Door For Use of Statistics in Class Action Employment Cases

By Hope Eastman

Summary: The Supreme Court, in a class action involving compensation for “donning and doffing” ruled in favor of the employees, ending hopes that the Court would put additional curbs on class actions. In fact, the Court opened the door to expanded use of statistics to prove liability in FLSA cases. The Court’s 6-2 majority distinguished the *Wal-Mart Stores, Inc. v. Dukes* decision which had sharply limited the use of such statistics to establish liability in a class action suit. The case is expected to have sweeping repercussions for defending wage-and-hour claims generally, especially since the Court’s ruling was based on the fact that the employer had failed to keep records of the time and that the employees should not suffer as a result. Watch for plaintiffs’ lawyers who bring class action cases to push the envelope into other types of cases. Look closely too at the ways in which your companies track hours.

In the case, a 6-2 decision in *Tyson Foods, Inc. v. Bouaphakeo*, the Court ruled against Tyson Foods, ruling that plaintiffs seeking overtime compensation for the time they spent donning and doffing sanitation and protective gear could proceed as a class action because they met the predominance standard. In the majority’s opinion, if one or more questions were common, that was enough to predominate even in the face of others that were clearly individual. Despite the Supreme Court's ruling rejecting a trial-by-formula approach to class actions in *Wal-Mart Stores, Inc. v. Dukes*, the Court allowed the plaintiffs to use statistical proof to estimate the amount of time owed to the class, even where significant numbers of class members did not suffer any injury and time varied greatly, to establish the appropriateness of proceeding as a class or collective action.

The U.S. district court, which certified a class of more than 3,300 employees relied on statistical proof presented by the plaintiffs' expert, who calculated the amount of donning, doffing and walking times based on videotaped evidence of 744 employees. The times were then averaged and extrapolated to the entire class to estimate the amount of donning and doffing time that was not captured by Tyson's time records. This ruling was affirmed by the Eighth Circuit Court of Appeals. Tyson Foods sought review by the Supreme Court which gave the victory to the plaintiffs.

The majority argued that these employees worked in similar enough situations, unlike the Dukes class members, that it was appropriate to use this statistical proof to show the claims were common to all class members. A key element in the decision was based on 1946 Supreme Court case, *Anderson v. Mt. Clemens Pottery Co.*, allowing the employees to use a representative sample to establish how long it took to walk to and from their workstations where the employer failed to keep records of the time.

The dissent, written by Justice Thomas for himself and Justice Alito, sharply criticized the majority’s reliance on *Mt. Clemens*, laying out a detailed argument that distinguished that case as having been rejected by Congress in later developments. The dissenters also argued that *Mt. Clemens* did not in fact simply allow the use of representative sample in the *Tyson Foods* circumstances in which even the plaintiffs’ expert conceded there was considerable variance among employees in the time spent donning and doffing and not all of the plaintiffs were even eligible for overtime. Justice Thomas concluded that these individual questions would predominate over common questions and, thus, proceeding as a class action was inappropriate.

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