

Tyson Foods Inc. v. Bouaphakeo: Employees win on liability, but will they ultimately bring home the bacon?

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The U.S. Supreme Court recently issued its opinion in *Tyson Foods Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016), favoring a class of employees who sought overtime pay for time spent donning and doffing protective gear at a pork processing plant. The case was litigated under the Fair Labor Standards Act and the Iowa Wage Payment Collection Law. A jury awarded the class \$2.9 million in compensatory damages under the FLSA. The plaintiffs had sought damages of \$6.7 million.

FLSA donning-and-doffing cases seem to be a dime a dozen, but this case has some unique implications for employers to consider regarding the consequences of failing to record compensable time, class-action certification, evidence and how damages should be allocated.

COMPENSABLE TIME

The employees at the Tyson plant wore various types of protective gear to perform the “grueling and dangerous” work of slaughtering, cutting and re-trimming pigs for consumption. Tyson compensated some employees for the time spent donning and doffing the gear by adding between four and eight minutes to the employees’ daily time records (depending on the employee’s assigned task). Other employees received no extra time.

Tyson kept no records indicating how long it took employees to put on and take off the gear. So when over 3,000 employees filed suit alleging that the actual time was compensable time and they were due overtime under the FLSA and state law, issues relating to class certification, liability and damages were hotly contested.

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The employees sought certification of their state claims as a class action under Federal Rule of Civil Procedure 23 and of their federal claims as a collective action under Section 216 of the FLSA.

Interestingly, at trial the parties stipulated that the donning and doffing time for protective gear to guard against knife cuts was compensable. However, they disputed whether:

- The time spent donning and doffing other types of protective gear was compensable.
- Donning and doffing during meal breaks was compensable.

- Most importantly, employees were accurately compensated for donning and doffing activities by the company’s policy to automatically add a predetermined amount of time to an employee’s daily time worked.

In a post-trial appeal, Tyson first challenged the certification of the class under Rule 23

and under the FLSA as a collective action, arguing that the plaintiff employees were too differently situated to be certified as a class. The plaintiff employees had different jobs, and each wore job-specific protective gear that took varying times to don and doff. Thus, Tyson argued, the employees were not “similarly situated” as the law requires.

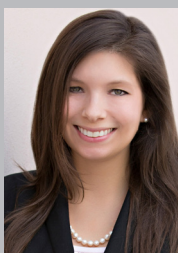
CLASS CERTIFICATION APPROVED

Common circumstances

The Supreme Court held that even if the gear varied from employee to employee, the plaintiffs’ claims were essentially the same because “each employee worked in the same facility, did similar work, and was paid under the same policy.” Thus, the court affirmed the trial court’s determination that common questions of law existed.

The court said the case was different from *Wal-Mart Stores Inc. v. Dukes*, 131 S. Ct. 2541 (2011), in which it held that a group of over 1.5 million employees who worked in different Wal-Mart stores across the country did not meet the requirements for Rule 23 class certification in a sex discrimination case and could not use representative evidence to determine liability or damages.

The Wal-Mart employees were spread among thousands of stores where managers had discretion to handle employment



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matters. Thus, they were not all challenging a single corporate policy; rather, they alleged a smattering of discriminatory treatment resulting from different management and personnel policies. Rule 23 certification was improper because the plaintiffs did not “share a common question of fact or law,” the high court said.

In contrast, the court said class certification could stand in *Tyson Foods* — even though the employees wore various types of protective clothing that took different amounts of time to don and doff — because the employees were all under one roof and subject to a common policy.

Tyson also challenged the meat and potatoes of the case: the employees’ reliance on representative evidence to establish liability and quantify the amount of overtime due.

Representative evidence

The problem was that there was no data indicating how long it took each employee to don and doff protective gear — even though the FLSA requires employers to keep accurate records. Without such data, the employees could not prove the most important part of their case: that each employee worked over 40 hours per week and was thus entitled to overtime.

Tyson advocated for a broad rule that excludes generalized representative evidence from class-action lawsuits, saying it was “unfair” that the employer could not litigate the individual defenses.

The court declined to issue a categorical rule on the types of evidence that can be used in class actions, and it emphasized that using representative evidence in FLSA cases has long been appropriate.

The court cited its FLSA opinion in *Anderson v. Mt. Clemens Pottery Co.*, 66 S. Ct. 1187 (1946), as authority for the proposition that “in FLSA actions, inferring the hours an employee has worked from a study ... [is] permitted ... so long as the study is otherwise admissible.”

To block the use of a generalized study, Tyson should have challenged its admissibility at the district court level. Once the study was admitted as evidence, the jury was left to gauge its study’s probative value.

In *Mt. Clemens*, the employer similarly did not keep actual records of compensable time that employees spent walking to their work stations on the factory’s large campus. The trial court created its own formula to apply to every employee.

The Supreme Court in *Mt. Clemens* upheld the standardized approach, explaining that the employer had violated its duty to keep time records under the FLSA and that “the solution ... is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work.”

The court also said any challenges must be based on evidentiary grounds rather than a far-reaching rule applicable to class actions. Similarly, in *Tyson Foods* the high court said, “the representative evidence was a permissible means of showing individual hours worked.”

To remedy the problem of a lack of time records, in *Tyson Foods* the employees

and it urged the court to apply that ruling in the instant case. In *Wal-Mart*, the plaintiffs proposed determining liability and damages with a “trial by formula,” in which a special master would individually evaluate the claims of 137 randomly selected employees and the percentage of valid claims would be multiplied by the average back pay award among the sample set. These averages were to be apportioned to the entire class without any other individualized rulings.

The Supreme Court distinguished Tyson’s case from Wal-Mart’s, noting that it had disapproved the use of representative evidence given Wal-Mart’s facts. It reasoned that statistical evidence must be sufficient such that an individual employee could rely on it if he filed an individual case.

Employers should carefully consider preventive maintenance measures to ensure that they are compensating employees for all hours worked, which in some cases may include preliminary and postliminary activities.

added a uniform average amount of time, calculated by an expert, to their time worked each day — regardless of how long it actually took to don and doff the gear.

The employees’ expert relied on a study using employee testimony and 744 videos of the donning and doffing procedure, and then calculated an average time to don and doff each type of gear. This resulted in a supposedly authentic amount of time each employee actually worked without compensation.

The study concluded that employees in the cutting and re-trimming departments spent 18 minutes per day donning and doffing, and that employees in the kill department spent 21.25 minutes per day doing so — significantly more than the automatically added time that Tyson added for some of employees.

Tyson argued that this evidence could not be used to establish liability and did not accurately reflect damages. In the company’s view, the employees were not similarly situated because they wore different types of gear and because some of them did not work more than 40 hours per week — even with the time added for each pay period. Therefore, an individualized analysis was necessary, the company said.

Tyson cited *Wal-Mart* to support its position against using the representative evidence,

According to the court, the employees in *Wal-Mart* were too diverse for class-action certification because the only common thread among them was that they worked for Wal-Mart. If each employee had filed her own case, the court explained, she would not rely on the same evidence as the special master’s sample did. Rather, she would have a different fact scenario, different managers, a different set of management policies and a different back pay calculation unique to her pay and position.

Further, if the *Wal-Mart* class was certified under Rule 23 and the “trial by formula” was approved, each employee would recover damages that he was not necessarily entitled to because he was not similarly situated to the employees in the representative sample. Thus, given the facts of *Wal-Mart*, representative evidence was inappropriate.

This was not so in Tyson’s case, the court said. Instead, it sided with the use and admissibility of the representative evidence because Tyson necessitated the use of representative evidence by failing to keep time records and thus creating an “evidentiary gap.”

Moreover, the court reasoned that even if Tyson employees filed 3,000 individual FLSA lawsuits instead of one class action, each employee could have relied on the same representative evidence due to the dearth of timekeeping records. The Tyson employees

worked at the same plant and wore the same types of protective gear. In addition, many of them were subject to the same policy of adding a predetermined amount of time to compensate for donning and doffing activities.

On the other hand, the *Wal-Mart* employees, who alleged over 1 million fact-intensive employment discrimination claims, were spread throughout myriad stores, were subject to different policies and would not be compensated in the same way according to a back pay calculation, the court said.

Therefore, the underlying study presented by the *Tyson Foods* plaintiffs was properly admitted based on the shared experiences of the employees. The court did not take Tyson's bait and rule that representative evidence is per se inaccurate and inadmissible. Instead, it said such evidence is adequate in an FLSA case where the underlying inquiry concerns quantifiable hours worked rather than a qualitative analysis of whether employment discrimination occurred as to a specific individual.

"The ability to use a representative sample to establish classwide liability will depend on the purpose for which the sample is being introduced and on the underlying cause of action," the court explained.

Moreover, Tyson failed to even attempt to attack the study's admissibility with federal evidentiary standard challenges under *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). The court reiterated that if the underlying admissibility of the evidence was at issue, it should have been challenged in the district court. Once it is admitted, the trier of fact (here, the jury) exclusively determines what weight it is to receive, the court said. Because Tyson did not argue that the plaintiffs' study was inadmissible in the first place, it was left with the argument that the study was inapplicable.

On appeal, Tyson tried to attack the study by arguing that it assumed away the differences and therefore manufactured predominance. But this attack came too late. Therefore, statistical averages were held to be admissible to build the employees' case for liability as well as damages.

Perhaps a better strategy would have been to cut the study off at the pass at the trial court level, argue against the expert opinion, and attack the study upon which the opinion was based by showing that it was inaccurate

or unrepresentative, according to the court. Once the study was admitted, the only way to deny class certification was for the trial court to conclude that "no reasonable juror could have believed that the employees spent roughly equal time donning and doffing."

The company's final challenge concerned the threshold question of a claim for overtime compensation: whether each employee worked more than 40 hours per week.

Several hundred employees in the class did not reach 40 hours in a week even after the average donning and doffing time calculated by the plaintiffs' expert was added. Thus, Tyson argued, these employees had no right to recover overtime and needed to present the court with a "mechanism" to identify the non-injured class members and ensure that they do not receive compensation from the \$2.9 million awarded.

The court recognized that this concern is "one of great importance," but it also said it would be premature to consider it. Instead, it punted the issue to the trial court, leaving that court to distribute damages among class members and directing Tyson to contest the damages distribution at a later date.

This issue will be one to watch, as the court did not decide whether all of the aggrieved employees will receive the damages awarded.

LESSONS FOR EMPLOYERS

The *Tyson* case provides a few lessons for employers.

First, employers should carefully consider preventive maintenance measures to ensure that they are compensating employees for all hours worked, which in some cases may include preliminary and postliminary activities.

The high court's opinion makes it clear that the federal courts are not and will not be lenient toward an employer that fails to keep time records as required by the FLSA, and it illustrates the unfavorable consequences that can result from such a failure. Tyson stipulated that the time spent donning and doffing was compensable, and the company's policy of automatically adding a predetermined amount of time for donning and doffing each day demonstrated that it understood that the time was compensable.

The FLSA commands that compensation for time worked be accurate, even if employees spend only a few minutes a day putting

on protective gear. Shortcuts to recording preliminary and postliminary activities may be efficient, but they can result in serious legal consequences.

Second, generalized statistical averages can be used to determine liability and damages where there is no other data available and the study is accurate. As demonstrated by this case, courts will not penalize employees for a lack of records under the FLSA. Instead, they will penalize employers, who have an affirmative duty under the FLSA to maintain them.

Moreover, if an employer does not attempt to derail the underlying methodology used to calculate the representative evidence, such as through a *Daubert* challenge, the employer will likely be stuck with the admission of that evidence to be considered by the jury at trial. As explained in *Tyson*, once admitted, the persuasiveness of the representative evidence is a matter for the jury.

Finally, employers should take heed of the Supreme Court's disapproval of Tyson's litigation strategy. Tyson argued that the damages award should not be distributed if the employees could not prove who was entitled to it, presenting a serious quandary for finalizing the case. The Supreme Court spent comparatively little time analyzing the legal arguments on this issue, casting them off as premature and for the lower court to consider on remand.

The court pointed out that "it bears emphasis that this problem appears to be one of petitioner's own making." In the early stages of the case, the employees had proposed bifurcating the trial on liability and damages — but Tyson argued that this would make the case too difficult. The court lambasted Tyson, who had vehemently opposed a bifurcated trial but then "[sought] to profit from the difficulty it caused" on appeal.

Therefore, in cases where representative evidence arguably complicates the ultimate determination of apportioning damages among a class, a bifurcated trial could alleviate this problem and avoid the problem of having the entire case hang in limbo until a determination on remand.

While it remains unclear if all of the employees will bring home the bacon in this case, *Tyson Foods Inc. v. Bouaphakeo* certainly gives employers facing wage-and-hour claims some food for thought. Shortcuts to compensable time may literally not be worth it. **WJ**