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No "Duking" it Out Before the High Court as Justices Indicate Willingness to Let Wage and Hour Class Claims Stand

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On Tuesday, I attended the Supreme Court's oral argument in *Tyson Foods, Inc. v. Bouaphakeo*. This case has been closely watched as employers have been hoping to see whether the Supreme Court would explicitly apply a *Walmart v. Dukes* approach and severely restrict wage and hour class actions in a similar fashion as the Court did for Title VII class actions. Indeed, the week before and the day of the argument, I spoke to several plaintiffs' and government lawyers and they admitted their fear in this regard.

The upshot of the argument is that the Court is unlikely to further dial back class actions dramatically as it did in *Dukes*. Justice Kennedy and the four liberal judges did not express any broad desire to restrict the use of representative proof underpinning wage and hour class actions. Further, no one on the Court, expressed any strong desire to roll back the light burden plaintiffs initially have in collective actions where the employer did not keep records. As such, the burden shifting test enunciated in the Court's *Anderson v. Mt. Clemons* decision is likely to stand.

The case arose out of two donning and doffing cases brought against Tyson by workers at an Iowa processing facility. One matter was a Rule 23 class action and the second was a FLSA collective action. The district court, over the objection of Tyson, certified a class of over 3,000 workers spread out over the "kill floor" and those on the processing floor. At trial, the plaintiff's expert testified that workers spent on average of 18 minutes of uncompensated time related to the kill floor and 21.25 hours on the slaughter floor. Notably, Tyson neither objected to bifurcation of the trial nor hired its own expert to determine the actual time workers spent donning and doffing and subsequently walking to their work stations. Plaintiff's damages expert calculated classwide damages at $6.6 million for the Rule 23 class and $1.6 million for the FLSA collective action. The jury awarded damages

but cut the amounts due to $2.8 million combined. The Eighth Circuit affirmed and the Supreme Court granted certiorari. In addition to a significant number of amici on both sides, the Court invited the government to participate.

The two questions briefed by the parties were 1) whether the representative proof, as well as other evidence, were sufficient to sustain the liability determination; and 2) whether the class was properly certified when it included members who may not have been injured. Notably, Tyson essentially abandoned its position on the second issue.

In my opinion, the argument was a surprise in what was perhaps not mentioned. No justice asked about *Dukes*. Also, a big question going into the argument was whether the Court was going to overturn or severely limit its decision in the seminal *Anderson* v*. Mt. Clemons* case*. Mt. Clemons* allows employees to prove their case by a representative sample of testimony where the employer did not keep required time records. This presumption favors plaintiffs and can make defense of wage and hour class actions difficult. No justice indicated that he or she would not respect *stare decisis* and disturb the ruling in *Mt. Clemons*.

Outside of the overall question regarding representative testimony, a dispute existed as to whether the expert's broad calculation of average uncompensated time was sufficiently representative to establish the claim here. Justice Breyer's questions indicated that he believes averaging would be appropriate because there would be no other way to calculate the time where the employer did not keep records. Justice Alito seemed troubled by the inequity of employers having to essentially keep two set of books (one for the actual time and one for what may conceivably be compensable time) or face the presumption.

The justices had several questions about the vast discounting in the jury verdict from the amounts calculated by the plaintiff's expert. Specific questions arose as to whether the jury's discount meant that it believed that the workers worked less time, or whether the jury believed that the differences in the workers' duties led them to believe that a significant number of workers were not entitled to overtime. (Presumably, if it was the latter, then the Court could have found that the class was truly not similarly situated and not representative.) Tyson's failure to seek a bifurcated trial came into play here because the Court could have had further insight into the jury's discount if the trial had been bifurcated.

As for questions for the government, the justices were mainly interested in what standard should apply when looking at what is sufficiently representative. The government noted that the class should be substantially similar, and argued that if that standard is met and the employer did not keep records, the class should be allowed to put on representative testimony for liability and damages purposes.

At bottom, we will have to see how the decision comes out. But it was a tough day for employers hoping to get a signal that the Court would give them additional tools to fight wage and hour class actions.

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