Supreme Court Refuses to Review $188M Class Action Verdict Against Wal-Mart Based Upon “Trial by Formula”

Barbara E. Hoey, James B. Saylor

April 5, 2016

Wal-Mart may have felt the first aftershock of the Supreme Court’s March 2016 opinion in *Tyson Foods, Inc. v. Bouaphakeo*, which undercut overbroad interpretations of its landmark 2011 *Wal-Mart v. Dukes* decision and found that representative sampling of absent class members is not a *per se* improper method of establishing class-wide liability or damages.

On April 4, 2016, the Supreme Court denied a Petition for Writ of Certiorari by Wal-Mart Stores, Inc. arising out of a December 2014 ruling by the Pennsylvania Supreme Court. The Pennsylvania high court’s decision in *Braun v. Wal-Mart Stores Inc.*, 47 A.3d 1174 (Pa. 2012), affirmed a nearly $188M judgment against the national retailer for 187,979 class member employees allegedly forced to work through meal and rest breaks mandated by state law and Wal-Mart policy. The Plaintiffs in *Braun* relied on expert reports that analyzed 24,000 individual employee work shifts in twelve Pennsylvania Wal-Mart stores and concluded that some 40% of hourly workers had not received the number or duration of rest breaks to which they were entitled. The Plaintiffs argued that this finding squared with the results of a prior audit conducted by Wal-Mart.

As we previously reported, the Supreme Court’s *Tyson* decision came as a surprise to many who had come to rely on *Wal-Mart Stores, Inc. v. Dukes* and *Comcast Corp. v. Behrend* for the broad proposition that liability in class actions could not be satisfied through representative sampling because such proof failed the commonality and/or predominance requirements under the Federal Rules of Civil Procedure. The *Tyson* decision did not overrule *Wal-Mart* or *Comcast*, but it weakened these decisions and sent a strong signal that SCOTUS never intended to say that representative sampling can never be used for a damages model in class actions, even where the plaintiffs had some individual experiences.

The Supreme Court’s refusal to review the Pennsylvania high court’s decision in *Braun* solidifies the *Tyson* opinion, and leaves the contours of what representative proof will suffice on a case-by-case basis to lower courts. The *Braun* decision remarkably traces the reasoning of the Supreme Court’s decision in *Tyson* – finding that *Wal-Mart v. Dukes* and *Comcast Corp. v. Behrend* did not overrule longstanding, recognized and acceptable methods of proof in wage and hour cases where an employer failed to keep adequate records of time.

As we advised, employers must continue to regularly review and revamp their timekeeping policies, and follow-up these efforts with repeating and vigorous notice and training to their employees. Counsel for Wal-Mart, responding to the Supreme Court’s refusal to hear the case, stated that the company has taken additional steps in the years since the *Braun* suit was initiated to enhance its

timekeeping system and create more employee training.