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"SORT OF SIMILAR" MIGHT BE ENOUGH: SUPREME COURT SIDES WITH WORKERS IN LATEST CLASS ACTION BATTLE

Insights
Mar 23, 2016

The Supreme Court today lowered the bar for plaintiffs seeking to bring a class or collective action, handing employers a stinging loss. In a 6 to 2 decision, the Court held that lower courts can use representative evidence or statistical data that ignores differences among employees to prove damages in a class or collective action. The Court also held that a class may be certified even if some members of the class did not actually suffer any damages. *Tyson Foods, Inc. v. Bouaphakeo.*

Background: "Sort Of Similar" Standard Satisfies Lower Courts

This case concerns overtime claims brought by line workers at Tyson Food's pork processing plant in Storm Lake, Iowa. The employees brought a Fair Labor Standards Act (FLSA) claim alleging that they should have been paid for time spent before and after working on the production line.

The main contention of the employees concerned an issue frequently raised in wage claims: donning and doffing. Donning and doffing refers to the practice of putting on and taking off protective gear or clothing prior to starting work. While the time spent donning and doffing is sometimes considered compensable, courts have ruled that employers do not have to pay for such

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time if the safety gear is not unique to a specific job or is only a brief, minor intrusion.

All Tyson employees making up the class were required to wear safety equipment. However, based on job requirements and personal preferences, employees took varying amounts of time to put on the equipment. In 2007, a group of employees brought a wage and hour class action lawsuit in the District Court of Iowa claiming they should have been paid for the donning and doffing time.

Typically, employees seeking to bring a class action need to show that they are all substantially similar. But in this case, the district court allowed the case to proceed as a class and collective action without solid proof of similarity. The court ruled that the employees could prove both liability and damages by introducing statistical information that glossed over individual differences in class members and creating a fictional "average" employee. In fact, it did not matter to the court that certain members of the class never worked any time for which they were not compensated.

A jury ruled for the workers, but awarded only about half of the damages that the plaintiffs' statistical experts had calculated. The 8th Circuit Court of Appeals upheld the ruling in 2014, leading to the Supreme Court appeal.

The Decision: "Sort Of Similar" Is Good Enough For The Supremes

In a 6 to 2 ruling, with Justice Anthony Kennedy writing for the majority, the Supreme Court affirmed the decision of the Court of Appeals. In its ruling, the Court ruled that even if differences among class members exist, the employees may use representative evidence– such as statistical data – not only to assess damages, but also to define the class.

In reaching its conclusion, the Court relied on Tyson's failure to keep records of the time its employees spent donning and doffing as grounds for admitting expert testimony on average times as the basis for liability. It

noted that Tyson's failure would allow an employee to use the statistical data as proof of time worked in an individual cause of action. Conspicuously absent from the Court's opinion is any recognition regarding why Tyson did not keep records of basic donning and doffing time. Under a number of state and federal cases, donning and doffing of basic safety gear that requires a minimal amount of time does not require additional compensation. When the job required additional donning and doffing beyond basic safety gear, Tyson compensated its employees. Nevertheless, the Court did not provide any safe harbor from FLSA time keeping requirements based on Tyson's good faith efforts to comply with the law.

What This Means for Employers
After a string of defense victories, this case is a pronounced setback for employers. As a result, you should expect to see an increase in wage and hour class and collective actions filed against businesses.

From a preventive standpoint, employers are now put on renewed notice of the importance of maintaining accurate records of time worked for each employee. In this case, the employer had followed past legal precedent and reasonably believed that the donning and doffing was generally not compensable. When the court disagreed with this assessment, it did not have records to demonstrate the amount of time an employee needed to put on the protective gear. In such an absence, courts now may allow employees to use representative evidence and statistical data to represent the group as a whole, even when there are obvious differences between members. This case truly underscores the importance of the "gray area" audit of your pay practices. When reviewing pay practices, companies frequently limit scrutiny to clear violations of wage and hour law. Unfortunately, after this recent case, failing to notice areas of potential concern can prove very costly.

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