GRUBE BROWN & GEIDT LLP

United States Supreme Court Affirms $2.9 Million Jury Award in FLSA Donning and Doffing Class Action Relying on Representative Evidence

By Amanda Bolliger Crespo and Tom Geidt

In *Tyson Foods, Inc. v. Bouaphakeo*, the United States Supreme Court held that plaintiffs could use representative sampling to establish the number of unpaid "donning and doffing" hours worked in an overtime class and collective action under the FLSA and Iowa state law. The Court concluded that all of the class members were "similarly situated" to those who were sampled in that they all worked in the same facility, performed similar jobs, and were paid under the same policy. In declining to adopt a blanket rule disallowing representative testimony in all wage and hour class or collective actions decided under federal law, the Court relied heavily on the fact that the employer in this case had not maintained records of each employee's donning and doffing time.

While the Court showed greater lenience toward the use of representative evidence in employment class actions than is suggested by prior Supreme Court precedent, the Court limited its key holding to the unique factual and procedural background before it. The Court also left open whether the representative sample in this case resulted in a jury verdict that would impermissibly award damages to "uninjured" class members – those who did not work more than 40 hours in a week, even accounting for the don and doff time. This issue was returned to the trial court for further review. A concurring opinion by Chief Justice Roberts all but answered that question in the affirmative, in which case the verdict may still need to be set aside. Given these limitations and unanswered questions, it remains to be seen to what extent the *Bouaphakeo* decision actually will help plaintiffs who seek to rely on representative evidence in future wage and hour class actions.

This case was decided under the FLSA and federal class and collective action principles. It does not affect California law on the use of statistical sampling techniques in wage and hour class actions. California law, although it does not ban the use of such techniques outright, severely limits such techniques at the class certification stage and as a means of establishing class-wide liability at the trial stage.

Legal and Factual Background

The named plaintiffs were employed at a pork processing plant in Iowa. Depending on the tasks they performed, employees at the plant donned various types and amounts of protective gear. Tyson did not compensate some employees for donning and doffing time, but instead paid them for time spent at their work stations. Tyson also maintained no records regarding donning and doffing time, despite the fact that it did compensate some other employees for that time. Instead, it paid those employees a set amount based on its estimate of how long those employees needed to don and doff the gear.

Plaintiffs who received no donning and doffing compensation filed a class and collective action under the FLSA and Iowa state law, alleging that their donning and doffing time, when added to their regular work time, exceeded 40 hours in a week. Consequently, Tyson's failure to pay them for donning and doffing time allegedly denied them overtime pay. The district court granted certification, concluding that the common issue of whether the donning and doffing time was compensable predominated over individualized issues regarding the amount of time worked by each employee. The resulting class included 3,344 employees from three different departments at the plant.

To overcome the lack of evidence regarding actual donning and doffing time, plaintiffs' expert sampled 53 employees to establish an "average" donning and doffing time for each of the three departments in the class. At trial, another plaintiffs' expert used that average to calculate class-wide damages at $6.7 million. That expert admitted that, if the average were true, 212 employees in the class would have no overtime claim at all since they had not exceeded 40 hours, even with the donning and doffing time. Lowering the 18-minute average for one department by just three minutes would eliminate approximately 400 more class members. Tyson objected to plaintiffs' use of the sampling on a class-wide basis and moved to decertify the class because the expert's own testimony showed that donning and doffing times varied from a little more than 30 seconds to more than 10 minutes in one department. Additionally, some individual class members testified that they spent significantly less time donning and doffing gear compared to the sampling average. However, Tyson never challenged the admissibility of the sampling expert via a "*Daubert"* motion, the procedure by which expert reports can be excluded from evidence for unreliability.

The district court refused to decertify the class and instructed the jury that "expert testimony" – including the representative sampling – should get "as much weight as you think it deserves." The jury awarded plaintiffs $2.9 million on a class-wide basis. The Court of Appeals for the Eighth Circuit affirmed the district court's decision to certify and maintain the class.

The U.S. Supreme Court likewise held that the district court did not err in certifying the class and declined to set aside the award.

The Court's Holding and Rationale

The Court characterized the central dispute as whether it was permissible to infer that "each employee donned and doffed for the same average time observed in [the expert's] sample."

Under the facts and circumstances of the case, the Court held that:

> One way . . . to show . . . that the sample relied upon here is a permissible method of proving classwide liability is by showing that each class member could have relied on that sample to establish liability if he or she had brought an individual action. If the sample could have sustained a reasonable jury finding as to hours worked in each employee's individual action, that sample is a permissible means of establishing the employees' hours worked in a class action.

The Court reasoned that relevant "representative evidence . . . cannot be deemed improper merely because the claim is brought on behalf of a class."

Instead, relying on a 1940's case, *Anderson v. Mt. Clemens*, 328 U.S. 680 (1946), the Court held that "when employers violate their statutory duty to keep proper records, and employees thereby have no way to establish the time spent doing uncompensated work," representative evidence could provide "a permissible means to make that . . . showing." The Court construed *Mt. Clemens* as permitting employees to carry their burden to prove hours worked by proving "that [they] in fact performed work for which [they were] improperly compensated" and producing "sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." The employer must then "come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence."

"Since there were no alternative means for the employees to establish their hours worked, [Tyson's] primary defense was to show that [the sampling] study was unrepresentative or inaccurate." For example, "[r]epresentative evidence that is statistically inadequate or based on implausible assumptions could not lead to a fair or accurate estimate of the uncompensated hours an employee has worked." Because Tyson did not challenge the sampling expert's methodology under *Daubert*, however, the Court had "no basis in the record to conclude it was legal error to admit that evidence."

The Court distinguished its decision in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), disallowing representative testimony in a Title VII discrimination class action, because the plaintiffs there failed to "provide significant proof of a common policy of discrimination to which each employee was subject." Instead, the *Dukes* plaintiffs sought to "use representative evidence as a means of overcoming this absence of a common policy," by relying on depositions from a sample set of class members to establish liability and damages. The plaintiffs in *Dukes* "were not similarly situated, so none of them could have prevailed in an individual suit by relying on depositions detailing the ways in which other employees were discriminated against by their particular store managers." The Court reached a different conclusion in *Bouaphakeo* because "the employees . . . worked in the same facility, did similar work, and were paid under the same policy." As a result, according to the Court, they "could have introduced [the expert's sampling] study in a series of individual suits."

Having affirmed the district court's decision not to set aside the verdict based on the representative evidence, the Court likewise affirmed the decision not to decertify the class. The Court concluded that the averages from the representative sampling made individualized inquiries into the time each employee spent donning and doffing gear unnecessary and thus permitted plaintiffs to satisfy the Rule 23(b)(3) requirement that common issues predominate over individualized ones.

Impact of Holding

The *Bouaphakeo* decision is troubling in several respects. As Justice Thomas noted in his dissenting opinion, the decision appears to "redefine" class action requirements by permitting plaintiffs to "prove an individualized issue with classwide evidence." That result relieved plaintiffs of the burden of proving a critical element of their overtime claim: that they actually worked more than 40 hours a week. Ironically, testimony by plaintiffs' own expert showed that many plaintiffs could not, in fact, prove that element on a class-wide basis because many class members did not exceed 40 hours in a week even applying the sampling expert's average. By requiring Tyson to challenge the representative evidence via a *Daubert* motion, the Court appeared to relax a district court's obligation to assess, independently, whether plaintiffs should be permitted to use common proof in a class action. That oversight allowed plaintiffs to overcome the individualized issue of time worked with a seemingly circular argument: variations in donning and doffing time raise no individualized issue because plaintiffs may use an average that subsumes those very variations.

Moreover, the district court apparently ignored the *Dukes* holding that representative sampling that falls below a 1:8 ratio of anecdotes to class members is "too weak to raise any inference . . . ." The *Bouaphakeo* survey only sampled 57 employees out of a 3,344-member class (*i.e.*, a ratio of 1 to 58).

Further, the *Bouaphakeo* decision appears to announce a new standard of admissibility for representative evidence in FLSA cases. Although the Court limited that standard to cases where employers failed to maintain statutorily required records, that exception may swallow the rule in many wage and hour cases. If an employer believes certain time to be non-compensable, it is not likely to

maintain records tracking that time. Thus, Justice Thomas correctly observed that the *Bouaphakeo* decision forces an "untenable choice" on employers: "They must either track any time that might be the subject of an innovative lawsuit, or they must defend class actions against representative evidence that unfairly homogenizes an individual issue."

While plaintiffs can be expected to count the *Bouaphakeo* decision as a win, it is less clear what practical impact it will have in wage and hour class actions in California and elsewhere. The Court declined to adopt any "broad and categorical rules governing the use of representative and statistical evidence in class actions . . . ." Instead, the Court held that "[w]hether a representative sample may be used to establish classwide liability will depend on the purpose for which the sample is being introduced" and "the elements of the underlying cause of action." The Court further cautioned that "[t]he fairness and utility of statistical methods in contexts other than those presented here will depend on facts and circumstances particular to those cases." Even for other FLSA cases, not "all inferences drawn from representative evidence . . . are 'just and reasonable.'" Representative evidence still must pass muster under the Federal Rules of Evidence. Had Tyson filed a *Daubert* motion raising the same arguments against the representative sample that it raised in seeking to decertify the class and set aside the verdict, the Court may well have reached a different result.

Unanswered Questions

Importantly for employers, the Court did *not* hold that an "uninjured" class member – in this case, an employee who did not work more than 40 hours in any week – can nonetheless recover damages in a class action. Tyson argued that it is impossible to determine from the experts' methodology and the jury's $2.9 million award which of the class members were injured and which were not, thus rendering the verdict invalid. However, the Court concluded that this assertion was not "fairly presented," because the damages award had not yet been disbursed. Instead, the Court remanded the case for the district court to determine whether any "methodology will be successful in identifying uninjured class members." Chief Justice Roberts' concurring opinion all but instructs the district court to conclude it cannot possibly identify any such methodology:

> Tyson contends that unless the District Court can fashion a means of identifying those class members not entitled to damages, it must throw out the jury's verdict and decertify the class. I agree with the Court's decision to leave that issue to be addressed in the first instance by the District Court. But I am not convinced that the District Court will be able to devise a means of distributing the aggregate award only to injured class members.
>
> ***
>
> Article III [of the Constitution] does not give federal courts the power to order relief to any uninjured plaintiff, class action or not. The Judiciary's role is limited "to provid[ing] relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm." [Citation omitted]. Therefore, if there is no way to ensure that the jury's damages award goes only to injured class members, that award cannot stand.

Because the jury did not award the full amount of damages that would follow from the sampling expert's average (awarding $2.9 million compared to the expert calculation of $6.7 million), "the jury obviously did not credit [the] average," as the Chief Justice noted. And, because the verdict form did not specify how much donning and doffing time the jury found to have occurred in each department, it provides no way to know which plaintiffs failed to cross that 40-hour threshold.

Therefore, it remains to be seen whether the jury verdict in this case will stand or whether instead the plaintiffs' right to use statistical sampling will prove to be a hollow victory.

Conclusion

The *Bouaphakeo* decision highlights the importance for employers of maintaining all statutorily required wage and hour records, particularly where there is no dispute as to compensability. Though Tyson initially contested the compensability of donning and doffing time for the class members in *Bouaphakeo*, it later stipulated that at least some class members should have been compensated for donning and doffing time, consistent with prior court rulings involving protective gear in meat and poultry processing plants. However, Tyson also did not track the donning and doffing time. This surely made the Court (and the jury) less sympathetic to its arguments. Employers should take this opportunity to review their recordkeeping policies, as well as their and donning and doffing and other compensation practices, to ensure they square with federal and state law.

Employers facing wage and hour class actions also can expect plaintiffs to rely on *Bouaphakeo* in attempts to gloss over individualized issues – like time worked – with representative samples and averages. Plaintiffs also may try to cut costs and shape representative evidence to their favor by using smaller samples than the previously approved 1:8 ratio. In the wake of *Bouaphakeo*, it will be particularly important for employers to pursue all avenues of argument against representative evidence, especially problems of reliability in each expert's assumptions, conclusions, and methodology.

This is particularly true in California following *Duran v. U.S. Bank National Assoc.*, where the California Supreme Court in 2014 expressed significant concerns about the use of sampling to establish employer liability, particularly where the sampling approach could cause uninjured class members to recover monetary damages. *See* *http://www.gbgllp.com/assets/duran.pdf*, containing our analysis of the *Duran* decision. In contrast to the *Bouaphakeo* decision, which was decided under Federal Rule of Civil Procedure 23(b)(3) and the FLSA, *Duran* was decided under California law. Thus, *Bouaphakeo* does not alter the burden of a California class action plaintiff, under *Duran*, to demonstrate that the court will be able to conduct a manageable trial on a class-wide basis without impinging on the employer's substantive rights. Chief Justice Roberts' concurring opinion lays the roadmap for California employers to argue why substituting an average for actual hours worked will rarely, if ever, meet that test.

* * *

Amanda Bolliger Crespo Email: amandacrespo@gbgllp.com Telephone: (213) 358-2812	Thomas E. Geidt Email: tomgeidt@gbgllp.com Telephone: (415) 603-5003