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U.S. Supreme Court to Address Limits on Class Action Litigation in Tyson Foods Case

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Earlier this week the Supreme Court granted review in *Tyson Foods, Inc. v. Bouaphakeo*, a case that is likely to have a significant effect on the survival of class action litigation in a post-*Dukes* world.

By way of brief background, under Federal Rule of Civil Procedure 23, class certification may be granted where "questions of law or fact common to class members predominate over any questions affecting only individual members." In 2011, the Supreme Court addressed this commonality requirement in *Dukes v. Wal-Mart*, 564 U.S. ___ (2011) and ruled against the plaintiffs in a class action employment discrimination case because each plaintiff suffered different and distinct injuries – each involving unique facts unrelated to any general policy. The court further rejected the idea of a "trial by formula" to calculate damages, finding that the experiences of a few plaintiffs do not generally apply to the entire class. According to the Court, the mere statistical showing of disparate impact is not enough and there must be a "specific employment practice that is challenged" to justify this general application. Justice Scalia, writing for the majority, explained that "[p]ermitting the combination of individualized and class-wide relief in (b)(2) class is also inconsistent with the structure of Rule 23(b)." The decision in *Dukes* signaled the death knell for similar employment class actions where the plaintiffs could not allege that their claims arose from a general policy.

Now, the high court is once again addressing this commonality requirement in the *Tyson Foods* case. Here, approximately 3,000 former and current "knife-wielding" employees filed suit against Tyson Foods Inc., an Arkansas-based company, contending that the company violated the Fair Labor Standards Act by failing to pay overtime pay for time spent putting on and taking off mandated protective clothing and equipment at Tyson's pork processing plant in Storm Lake, Iowa. The District Court certified the class and awarded a $5.8 million class-action judgment against Tyson Foods, Inc. In doing so, the court permitted the employees to demonstrate damages to the class at-large with evidence that equated all class members to the "average employee." In other words, the lower court permitted the employees to rely on statistical sampling to demonstrate liability and damages. The Eighth Circuit Court of Appeals affirmed class certification and the multi-million dollar award against Tyson.

Tyson appealed, arguing that certification of the class was improper and that this class action suffers from problems with commonality because particular facts vary between each of the claims – the type and number of responsibilities, the kind of required protective clothing and equipment, and manner of tracking performance and compensation. For example, certain employees are paid based on predetermined start and end times known

as “gang time” and others are paid based on when they clock in and out, but how time is tracked depends on each employee’s supervisor. Moreover, Tyson contends that it was improper for the lower court to utilize statistics to assess damages for the entire class (as opposed to deciding damages on an individual basis for each employee) because the plaintiffs are using the “trial-by-formula” method previously rejected by the Supreme Court in *Dukes* in order to presume that the entire class suffered the same injury despite the factual differences. Furthermore, Tyson argues that the “trial-by-formula” is improper because it awards damages to hundreds of members who suffered no injury.

In support of Tyson’s position, the U.S. Chamber of Commerce said this case “gives the court a chance to address ongoing abuses in class action litigation and to restore proper constitutional limits on lawsuits involving individuals who have suffered no injury.” However, the employees argue that despite these variations in facts, all the claims arise from a common policy to require employees to work without compensation. Plaintiffs contend that representative proof is permissible and that courts have allowed class representatives to stand as representative proof for the entire class.

Oral argument and a ruling are expected in the October 2015 term. Interestingly, this is the second class action the Supreme Court is set to hear next term. Employers in all industries should follow this case closely as it may determine the course of future employment-related litigation. In the event the Supreme Court renders a decision to uphold the class certification, employers are at risk of facing a higher volume of class action employment lawsuits for a variety of individualized workplace claims.

If you or your institution has any questions or concerns regarding related issues, please contact Hayley B. Dryer at hdryer@cullenanddykman.com or at 516-357-3745.

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