SPECIAL UPDATE

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U.S. Supreme Court Allows Averages and Other Statistical Analyses To Determine A Classwide Injury

On Tuesday the United States Supreme Court ruled that workers can use averages and other statistical analyses to show similarities between disparate class members.

The Court affirmed a $5.8 million judgment against Tyson Foods in a worker don-doff dispute. Workers at a Tyson facility in Iowa brought a hybrid class and collective action seeking compensation for time spent donning and doffing required gear and for time spent walking between stations.

An Iowa federal jury found that the employees proved the time they spent donning and doffing hard hats, work boots, hairnets, aprons, gloves and earplugs constituted an indispensable part of their work, and was therefore compensable. The Eighth Circuit upheld the judgment finding that the lower court had properly certified the claims under the Fair Labor Standards Act and Iowa law. In order to prove liability and damages, the workers relied on individual timesheets and average times calculated from 744 observations of employees donning, doffing and walking between stations.

The averages were calculated in a study performed by Dr. Kenneth Mericle, who analyzed how long various donning and doffing activities took, averaged the time, and then added the estimates to the timesheets of each employee to determine which class members worked more than 40 hours a week. With these figures Mericle was able to calculate the value of the classwide recovery.

Tyson Foods argued that the class was improperly based on "extrapolation and averaging," despite differences in the amount of time workers actually spent donning, doffing and walking, and that this class should not have been certified in the first place because it conflicted with *Wal-Mart Stores Inc. v. Dukes* ruling. *Dukes*, a landmark case, prohibits class certification that is based on establishing liability and damages classwide through "trial by formula."

Here, however, the U.S. Supreme Court found that Mericle's statistical analysis was permissible because it "filled an evidentiary gap" created by Tyson's failure to keep adequate records. The Court reasoned that had the more than 3,300 individual class members proceeded with separate lawsuits, each employee would likely have introduced the Mericle study to prove the hours worked. Thus, because each individual class member could have

relied on the sample in an individual lawsuit, the members of the class could show that the sample is a permissible means of establishing work hours in this class action.

Finally, the Court cautioned that it was not adopting a broad rule governing the use of statistical evidence, and confirmed that the ability to use such a representative sample will be determined on a case by case basis, depending on the purpose for which the sample is being introduced and on the underlying cause of action.