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EDVA Judges Wade Into Circuit Split Over Certifying FLSA Collective Actions

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In an August 11 decision, Judge Henry Hudson of the EDVA conditionally certified a class of food service workers employed by a federal contractor at Fort Pickett who sued for unpaid overtime pay under the Fair Labor Standards Act (FLSA). ***Hernandez v. KBR Servs., LLC***, Civil Action No. 3:22CV530-HEH, 2023 U.S. Dist. LEXIS 140795 (E.D.Va. Aug. 11, 2023). The ruling highlights a split among EDVA judges as to the correct procedure for handling collective actions under the FLSA that mirrors a three-way split among the federal courts.

Background

Under the FLSA, private plaintiffs may bring a collective action on behalf of themselves and other "similarly situated" employees. The federal courts are divided, however, on how to determine whether plaintiffs in an FLSA action are "similarly situated" to other employees. The Fourth Circuit has never decided the issue, but district courts in the Fourth Circuit have traditionally followed the two-step process set forth in *Lusardi v. Xerox Corp.*, 118 F.R.D. 351 (D.N.J. 1987).

In 2021, the Fifth Circuit rejected *Lusardi* as contrary to the language of the FLSA. *See Swales v. KLLM Transp. Servs., LLC*, 985 F.3d 430 (5th Cir. 2021). Last year, Judge Novak of the EDVA certified for interlocutory appeal whether *Lusardi* or *Swales* set forth the proper legal standard, but the Fourth Circuit refused to hear the appeal. ***Thomas v. Maximus, Civil Action No. 3:21cv498 (DJN), 2022 U.S. Dist. LEXIS 84827 (May 10, 2022)*****, appeal denied, No. 22-185 (4th Cir. July 7, 2022)**. Then, in April of this year, Judge Ellis issued a decision adopting the Fifth Circuit's analysis in *Swales*, creating a divide among EDVA judges on this important issue for FLSA cases. ***Mathews v. United States Today Sports Media Grp., LLC***, Case No. 1:22CV1407-TSE (E.D.Va. April 14, 2023). A month after the *Mathews* decision, the Sixth Circuit took yet another approach, rejecting the reasoning of both *Lusardi* and the Fifth Circuit, creating a split between two circuits and a three-way split among the federal courts. *Clark v. A&L Homecare and Training Ctr., LLC*, 68 F.4th 1003 (6th Cir. 2023).

Judge Hudson Rejects the Fifth and Sixth Circuit "Similarly Situated" Tests

In *Hernandez*, the plaintiffs moved for conditional certification of a class of "similarly situated" employees under the two-step process set forth in *Lusardi*. As Judge Hudson noted, *Lusardi* requires plaintiffs to first show that other employees are "similarly situated" to them under a "lenient standard," which resembles, but is not identical

to, the requirements for class certification under Fed. R. Civ. P. 23. If the plaintiffs satisfy the first step, the court conditionally certifies the class of employees and authorizes notice to similarly situated employees so that they can decide whether to opt into the collective action. In the second step, after an opt-in period and discovery, the court conducts a more stringent factual determination to determine whether the putative collective satisfies the "similarly situated" standard.

The defendants in *Hernandez* urged Judge Hudson to analyze whether the plaintiffs were "similarly situated" to other employees under either the Fifth Circuit framework established in *Swales* or the Sixth Circuit test adopted in *Clark*. In *Swales*, the court rejected the process set forth in *Lusardi* and held that district courts should identify the facts and legal considerations material to determining whether a group of employees is similarly situated and then authorize preliminary discovery on those issues, without first sending notice to other employees, who were potentially "similarly situated." *See Swales*, 985 F.3d at 441.

In *Clark*, the Sixth Circuit likewise rejected *Lusardi* but refused to adopt the *Swales* standard, creating a three-way split among the federal courts. In *Clark*, the court held that plaintiffs must make a preliminary showing of a "strong likelihood" that other employees are similarly situated to the plaintiffs, which is greater than a showing necessary to create a genuine issue of fact in the summary judgment context but less than that necessary to satisfy a preponderance of the evidence standard. *Clark*, 68 F.4th at 1011.

In *Hernandez*, Judge Hudson chose to follow the traditional two-step process set forth in *Lusardi*, characterizing Judge Ellis' contrary decision in *Mathews* as "an extreme outlier." While the Fourth Circuit had never prescribed a process for certification of FLSA collectives, Judge Hudson found that, like most federal courts across the country, the district courts in the Fourth Circuit had "uniformly" followed the *Lusardi* two-step process.

Applying *Lusardi*, Judge Hudson concluded that the plaintiffs worked at the same location and performed closely related job duties such as food preparation, cooking, serving food and cleaning the kitchen and bathrooms. In addition, the judge found that the plaintiffs' declarations established that the defendants engaged in a common policy or plan regarding the payment of overtime. The consistent description in the plaintiffs' declarations, the court found, satisfied the "modest factual showing" necessary for conditional certification.

EDVA Judges Split on How to Determine Whether Employees are "Similarly Situated"

As Judge Hudson noted, district courts in the Fourth Circuit, including in the EDVA, have traditionally followed the *Lusardi* approach. *See e.g., Winks v. Virginia Dep't of Transportation*, Civil Action No. 3:20-cv-420-HEH, 2021 U.S. Dist. LEXIS 114057 (E.D.Va. June 17, 2021).

In his April decision in *Mathews*, however, Judge Ellis held that the *Lusardi* test has no basis in FLSA's statutory language and adopted the approach in *Swales* concluding that "the Fifth Circuit's approach is the better one." *Lusardi*, Judge Ellis held, is flawed because it is based on the premise that, at step one, a broad group of potential collective members will receive notice, and some of those receiving notice will not be "similarly situated." That, the court held, is contrary to the plain language of the statute, which authorizes notice *only* to those "similarly situated" to the named plaintiff. Thus, the correct approach is for the court to first determine, as *Swales* held, whether a proposed collective is similarly situated to the named plaintiffs before sending notice to other employees.

Takeaway: Parties Must Preserve Their Position Until the Fourth Circuit or the Supreme Court Resolves the Issue

To date, the Fourth Circuit has declined the opportunity to decide whether district courts should apply *Lusardi*, *Swales,* or *Clark*. In his decision in *Thomas* last year, Judge Novak conditionally certified an FLSA collective under the *Lusardi* approach while also certifying for interlocutory appeal the issue of whether *Lusardi* or *Swales* should apply. The Fourth Circuit, however, denied the petition for interlocutory appeal, and so the issue remains unresolved. Now that there is a three-way split among the approaches in *Lusardi*, *Swales* and *Clark* it is more likely that the Supreme Court will resolve the issue. Until then, EDVA judges are left to reach case-by-case decisions on which approach to follow, and parties must be sure to preserve their position for a potential appeal.

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