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Fifth Circuit Adopts More Stringent Approach to Collective Action Certification Under the FLSA

Labor & Employment Workforce Watch

WRITTEN BY

Jeffrey M. McPhaul

On January 12, 2021, the United States Court of Appeals for the Fifth Circuit issued its opinion in the case of *Swales v. KLLM Transport Services, L.L.C.*, drastically changing the landscape of wage and hour litigation there and potentially marking the beginning of a new approach that other courts will follow. 2021 WL 98229 (5th Cir. Jan. 12, 2021).

Prior to the *Swales* decision, district courts within the Fifth Circuit, similar to most jurisdictions, applied the "two-step" certification process to collective actions under the Fair Labor Standards Act (FLSA). Set forth in *Lusardi v. Xerox Corporation*, 118 F.R.D. 351 (D.N.J. 1987), for example, the court first conducted an analysis into whether the putative collective action members were "similarly situated." Courts at this step typically require little more than substantial allegations that the putative collective members were together the victims of a single decision, policy, or plan. If the named plaintiff makes this threshold showing, a collective action typically is conditionally certified and notice is sent to potential collective action members. At the conclusion of discovery, the court makes a second and final determination, using a stricter standard, as to whether the named plaintiff and opt-ins are "similarly situated" and therefore whether the case may proceed to trial as a collective action.

In *Swales*, the Fifth Circuit rejected application of the *Lusardi* approach. In *Swales*, it ruled that the district court must "rigorously scrutinize the realm of 'similarly situated' workers, and must do so from the outset of the case, not after a lenient, step-one 'conditional certification.'" The Fifth Circuit instructed district courts to identify, at the outset of the case, what facts and legal considerations would be material to determining the issue of whether putative collection action members are "similarly situated" and then authorize appropriate preliminary discovery on that issue. Unlike the *Lusardi* test, where issues about the merits often were reserved for the second stage, the *Swales* Court stated that district courts should consider all available evidence (including that going to the heart of the merits, if appropriate) in conducting the rigorous analysis into whether the putative collective action members are "similarly situated."

The *Swales* decision is a significant win for employers in Texas, Louisiana, and Mississippi. As the Fifth Circuit noted, "the leniency of the stage-one standard, while not so toothless as to render conditional certification automatic, exert[ed] formidable settlement pressure" on employers. As a result of this pressure, FLSA collective actions often settled, meaning they did not reach the second stage or a final decision on the merits, depriving employers of the ability to fully litigate the merits and defend themselves. With the new requirement that district courts conduct a rigorous analysis into whether the putative collective action members are "similarly situated" at the outset, including delving into the merits if appropriate, employers are less likely to embrace settlement early in a case.

To date the plaintiffs in *Swales* have not sought rehearing or appealed to the Supreme Court. It remains to be seen whether other circuits will adopt the Fifth Circuit's more demanding approach to the certification of collective actions.

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