Analysis&Perspective

COLLECTIVE ACTIONS

Under the procedures for handling collective actions under the Fair Labor Standards Act, defendants frequently cannot conduct discovery before the court holds a hearing on class certification. While many defendants consider this rule unfair, author Aashish Y. Desai says they have misunderstood the underlying rationale of the FLSA.

Since members of the class in an FLSA action must affirmatively opt in to become part of the litigation, an early notice to class members is necessary to prevent statute of limitations problems. Desai points out that the initial test for certification—similarly situated plaintiffs—is much less stringent than the standards set out under Federal Rule of Civil Procedure 23.

Furthermore, the defendant will have the option to move for decertification if discovery shows that the claims are too individualized. This protects the defendant, Desai says, while still making sure notice is promptly sent to all potential class members.

The Discovery Conundrum in Fair Labor Standards Act Collective Actions

BY AASHISH Y. DESAI

The thought that a defendant is not allowed to conduct discovery before class counsel files a motion for class certification sounds inconceivable. But that is what sometimes can occur in a collective class action for unpaid overtime wages under the Fair Labor Standards Act of 1938 (FLSA).

Since the majority of these actions are either filed—or removed—to federal court, the Federal Rules of Civil Procedure apply. Under Rule 26(f), no discovery may be conducted prior to the initial meeting of counsel. Most prudent class counsel, however, file a motion for class certification almost immediately after filing the complaint because of the rolling statute of limitations in a FLSA action. *See*, 29 U.S.C. § 216(b).

In this scenario, the defendant will not be able to propound written discovery or even notice depositions before the hearing date on the certification motion. Defendants across the nation scream foul. But before employers move their respective legislators for change, it is important to consider the rationale: the different standard for class certification in FLSA cases. The issue is made more complicated because two lines of cases set out disparate treatment for class certification in FLSA collective class actions.

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Cases Applying Rule 23 Standards. One group treats collective class actions as if they were Federal Rule of Civil Procedure 23 class certifications and applies the stringent numerosity, typicality, commonality, and adequacy of representation requirements. *Shushan v. Univ. of Colo.*, 132 F.R.D. 263 (D.Colo. 1990). However, this ignores the more lenient "similarly situated" language of Section 216 of the FLSA which mandates a different procedural approach.

Overtime cases under the FLSA are "opt-in," not "opt-out," cases. 29 U.S.C. § 216(b). In FLSA actions, the absent class members must file written consents with the court to opt in and be included in the action. Without their consent, they are not bound by any settlement or judgment.

On the other hand, traditional class actions are governed by Rule 23, which provides that all absent class members are automatically part of the action if a class is certified and they do not explicitly opt out. Different procedural standards are implicated.

Indeed, some courts in the Ninth Circuit have expressed concern that applying the same certification requirements to collective actions under the FLSA is inconsistent with the congressional intent in specifically

setting up the variant procedure for Section 216(b) actions. *See, e.g., Bonilla v. Las Vegas Cigar Co.*, 61 F. Supp.2d 1129, 1136 (D. Nev. 1999) (noting that the "Section 216(b) requirement that plaintiffs consent to the suit serves essentially the same due process concerns that certification serves in a Rule 23 action").

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Second Line: Two-Step Approach. The second line of cases has a two-step approach to the "similarly situated" inquiry. *See, e.g., Monney v. Aramco Servs. Inc.*, 54 F.3d 1207, 1213-14 (5th Cir. 1995) (describing the two approaches but declining to endorse either); *Lusardi v. Xerox Corp.*, 122 F.R.D. 463 (D. N.J. 1988); *Schwed v. General Elec. Co.*, 159 F.R.D. 373, 375 (N.D. N.Y. 1995) (even where later discovery proves the putative class members to be not similarly situated, notice prior to discovery is appropriate as it furthers the remedial purpose of the FLSA).

The first step occurs at the notice stage, such as a motion for conditional certification to facilitate notice to absent class members. At that time, the courts use the relatively lenient standard of whether the proposed class members are "similarly situated" and conditionally "certifies" the class. *Monney*, 54 F.3d at 1213-14 (describing the process); *Grayson v. K-Mart Corp.*, 79 F.3d 1086 (11th Cir. 1996) (observing that the "similarly situated" standard is less stringent than for joinder under Rule 20(a) or for separate trials under Rule 42(b)).

The key is that the determination of "similarly situated" at the notice stage is appropriately made based upon the pleadings and affidavits. *Grayson*, 79 F.3d at 1097 (noting that plaintiffs' burden at this stage is not heavy, as they may rely on "detailed allegations supported by affidavits which 'successfully engage' defendants' affidavits to the contrary"); *Ballaris v. Wacher Silttronic Corp.*, No. 00-1627-KI, 2001 WL 1335809 at *2 (D. Or. 8/24/01) (relying on affidavits and the allegations of the complaint to find that the potential plaintiffs were "similarly situated").

Motions for Decertification. The courts describe a second step, if necessary, after the discovery is largely complete. *Mooney*, 54 F.3d at 1214. The defendant may then bring a motion for "decertification." *Id.* The Court then has much more information regarding the situation of the plaintiffs who have "opted in" and if they are "similarly situated" in fact. *Id.*

In *Church v. Consolidated Freightways Inc.*, 137 F.R.D. 297 (N.D. Cal. 1991), plaintiffs filed a motion for class certification to facilitate notice in an Age Discrimination in Employment Act (ADEA) class action. Age discrimination claims brought under the ADEA are subject to the same opt-in mechanisms as FLSA actions. *Sperling v. Hoffmann-LaRoche*, 493 U.S. 165, 110 S.Ct. 482, 107 L.Ed.2d 480 (1989). While opposing the motion for certification, defendants argued that the representative plaintiffs were not "similarly situated" because discovery would prove the putative class member employees were employed at 112 different locations in 74 different jobs and left employment on 103 different dates. *Church*, 137 F.R.D. at 298. Defendants also contended that discovery would show that staffing decisions for the merged company were "highly decentralized." *Id.* at 298. Thus, the defendants really argued that "in determining the scope of the proposed class," the court could not simply rely on the definition of "similarly situated" under the FLSA. *Id.* at 304.

The court rejected that argument. It held that "the standards governing a conclusive finding of 'similar situation' appear to require nothing more than substantial allegations that the putative class members were together the victims of a single decision, policy, or plan infected by discrimination." *Id.* at 303. The court found that the plaintiffs' allegations alone were sufficient to show that the proposed class was similarly situated since the allegations in the pleadings were "detailed" and plaintiff "had supported those allegations with affidavits which successfully engage defendant's affidavits to the contrary." *Id.* at 303, citing *Sperling*, 118 F.R.D. at 406. The court noted that "nothing would appear to prevent a court from modifying or reversing a decision on 'similar situations' at a later time in an action as new facts emerge." *Id.*

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U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA IN *CHURCH V. CONSOLIDATED FREIGHTWAYS*

Similarly Situated Standards. Likewise, in *Harrison v. Enterprise Rent-A-Car*, 4 WH Cases 2d 1339 (July 1, 1998), the court authorized notice to current and former management assistants where the declarations of the original and opt-in plaintiffs—together with the allegations in the complaint—suggested that the class members were similarly situated with respect to their pay provisions and job requirements. In *Harrison*, the defendants argued that notice was not appropriate because discovery would prove that the range of duties performed by the management assistants was too wide and too varied for the members of such a class to be "similarly situated." *Id.* at 1341. Defendants also argued that notice was overbroad and the class members were actually exempt employees.

The court disagreed. It remarked that "defendants demand too much of the standard, at least at this stage. At the notice stage, the burden on plaintiffs to show that

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they and potential opt-ins are similarly situated is a 'lenient' one." *Id.* at 1341, citing with approval, *Mooney*, 54 F.3d at 1213-14; *See also Hoffman*, 982 F. Supp. at 261 ("[T]he burden on the plaintiffs is not a stringent one, and the court need only reach a preliminary determination that potential plaintiffs are 'similarly situated' "). The court went on to point out that "[d]iscovery may prove the [defendant's exemption argument] to be the case. Indeed, discovery may prove that plaintiffs and the potential opt-ins are not similarly situated after all, in which case defendants may move to decertify the class . . . ." *Id.* at 1341. The point is that subsequent discovery may well prove that the original plaintiffs and the opt-in class members are not, after all, "similarly situated," but this should not work against the original decision to facilitate notice.

Most circuits view the latter line of cases as persuasive because it is consistent with the more lenient "similarly situated" requirement and the "opt-in" process that ensures that only consenting plaintiffs are included in collective class actions. Further, it has been approved in the Ninth Circuit and the Eleventh Circuit Court of Appeals. See *Grayson*, 79 F.3d 1086; *Ballaris*, 2001 WL 1335809; *Bonilla*, 61 F. Supp.2d 1129. As such, class and defense counsel should be aware of the somewhat counter-intuitive process in a collective class action, lest they be caught in a certification paradox.