

DISPUTE RESOLUTION ALERT

Certifying and decertifying class actions under the FLSA: Are employees similarly situated?

by Leonard K. Samuels, Esq.

The number of class actions filed under the Fair Labor Standards Act (FLSA) regarding minimum wage and overtime pay increased by 70 percent between 2000 and 2003. Although the regulations governing overtime exemptions were changed in 2004 at the request of the business community, class action filings under the FLSA have continued to rise.

The criteria for class certification of these lawsuits is set forth in section 216(b) of the FLSA, which provides that employees may maintain an action for minimum wage violation or unpaid overtime on behalf of themselves and others who are "similarly situated." Those employees may, upon receiving notice, opt into a case by filing a written consent with the court.

The catch is that the term "similarly situated" as used in § 216(b) has not been defined. The Eleventh Circuit Court of Appeals, in *Hipp v. Liberty National Life Insurance Co.*, 252 F.3d 1208 (11th Cir. 2001), teaches that the similarly situated requirement is more elastic and less stringent than requirements under Rule 20 governing the joinder of persons as plaintiffs in actions.

Employees in a Florida FLSA case may be determined to be similarly situated without the necessity of establishing the requirements for class certification under Rule 23: numerosity, commonality, typicality and adequacy of representation. Without a tight definition of the criteria, courts and litigators have continued to struggle to define the scope of similarly situated.

In Florida, although they are not mandated to do so, courts generally adopt a two-tiered approach to the similarly situated analysis. This approach is also used by the majority of district courts throughout the United States.

ROUND ONE - CONDITIONAL CERTIFICATION:

The first tier in determining whether an FLSA case can be class certified happens early in the case during the so-called "notice stage." At this preliminary stage, the district court makes the decision, usually based only on pleadings and affidavits, as to whether notice

should be given to potential class members.

Because this happens before the discovery stage and when the court has minimal evidence, the determination of whether potential class members are similarly situated typically results in conditional certification of a representative class.

If an employee convinces the court to grant conditional certification, notification is sent to all employees and former employees who at least preliminarily may be similarly situated.

At this stage of the proceeding, employees are at a distinct advantage. Employers are typically devastated to learn that notification of a potential wage and hour violation will be sent to past and present employees. The employer can take some comfort, however, in knowing that an employee who receives notification must affirmatively opt into the case by consenting in writing to his or her participation. For the employer, the opt-in requirement under the FLSA is more favorable to the defendant than class actions governed by Rule 23 wherein potential class members are automatically included upon notification, unless they affirmatively opt-out.

Conditional class certification, although usually granted by district courts in Florida, is not automatic. Employers have defeated conditional class certification sought on allegations not supported by affidavits; affidavits based upon conclusory allegations; and affidavits that, on their face, are contrary to a reasonable finding that similarly situated employees exist. Further, an employer can sometimes defeat preliminary certification by alleging that the plaintiff and the proposed class members work in separate departments, have separate supervisors and that no unified or company-wide policies are at issue.

Following conditional certification and notice, discovery will proceed. During the latter stages of discovery, or when discovery is concluded, an astute employer will file a motion to decertify the class.

ROUND TWO: THE DECERTIFICATION BATTLE:

At this point, the court can make a factual determination of whether the potential class members are similarly situated and if the case should indeed continue as a representative action. Because the court has far more information than it possessed when it

authorized initial notification the similarly

situated requirement at this stage is subject to a much stricter standard.

A ruling at a motion to decertify will have a significant impact on the outcome of the case, as well as on settlement posture. If the motion to decertify the class is denied, the case may proceed to trial on a representative basis. If the decertification motion is granted, and the claim is decertified, the opt-in plaintiffs are dismissed without prejudice, and the employees' leverage disappears.

Courts frequently consider a number of factors at the decertification stage to determine whether the plaintiffs are indeed similarly situated. Class members who work at the same location, with the same job titles and supervisors under a uniform policy are often deemed similarly situated. Employees with individual claims, working at different locations under different supervisors under localized policies are likely not.

No single factor is conclusive. For example, courts may find that employees with different job titles, locations and supervisors are similarly situated if other factors weigh in favor of such a finding, such as a unified policy. On the other hand, employers may be able to successfully decertify a class consisting of employees holding the same job title at the same location, if, for example, they can establish that individual issues predominate, separate defenses exist and employment decisions were made by different supervisors. The inquiry is always factually intensive and trial judges have broad discretion.

In attempting to decertify a representative action, employers are well advised to carefully review allegations of the complaint, allegations contained within the affidavits, deposition testimony, and the language in the notice sent to the opt-in plaintiffs. Differences should be highlighted. Conversely, employees must point to the common thread that binds all of their claims.

It is critical for litigants to understand the distinctions between representative actions under the FLSA and class actions pursuant to Rule 23. Defeating preliminary class certification, or successfully decertifying a class, is critical for an employer to avoid significant exposure for alleged wage and hour violations. ■

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Leonard K. Samuels is shareholder in the Dispute Resolution Team at Berger Singerman and splits his practice between employment matters, employment-related litigation and complex commercial litigation. Mr.

Samuels has developed specific areas of expertise in matters that encompass both the knowledge of an employment lawyer and the skills of a seasoned commercial litigator. In this regard, Mr. Samuels has handled significant litigation involving non compete agreements throughout Florida and the United States, as well as substantial multi-jurisdictional matters involving theft of trade secrets, breach of fiduciary duty, intellectual property rights, unfair competition and fraud. His employment law experience includes claims based upon age, religion, race and national origin, as well as alleged statutory violations of the Family Medical Leave Act and the Americans with Disabilities Act. During the recount in the 2000 presidential election, Mr. Samuels was hired as co-lead counsel in the recount effort in Broward County on behalf of Gore/Lieberman. Under his leadership, all of the ballots were manually recounted in Broward County, Florida, and made part of the certified

election results. Mr. Samuels' success was featured on a front-page article in the NATIONAL LAW JOURNAL on December 11, 2000, entitled *Florida's Chad Bar*.

Mr. Samuels received his undergraduate degree from the University of Florida in 1982, and his law degree, *magna cum laude*, from Florida State University in 1985. As a law student, he interned with Justice James C. Adkins of the Florida Supreme Court, and upon graduation from law school, he served for eighteen months as a law clerk for Justice Adkins. Mr. Samuels is an AV rated attorney admitted to practice before the United States Supreme Court, the Eleventh Circuit Court of Appeals, the United States District Court (Southern, Middle and Northern Districts of Florida), the Eleventh Circuit Court of Appeals, the United States Court of Appeals for the Federal Circuit, the Court of Claims, and all Florida state courts.

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