FLSA Collective Actions: Are Courts Still Dancing The 2-Step?

By **Allison Powers** (July 26, 2023)

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In the absence of statutory amendments to the Fair Labor Standards Act, courts have filled in some of the statute's gaps and — over the decades — established the familiar two-step framework for conditional certification.

Under this two-step framework, a lenient first stage caused an exponential increase in the number of wage and hour collective actions over the years.

In what is turning out to be an active 85th birthday year for the FLSA, there are signs from recent rulings that courts are ready to hold party plaintiffs to a higher standard if they want to recruit others to join their lawsuits.

Background

On June 25, 1938, President Franklin D. Roosevelt signed the bill that became the FLSA.[1] The law set the standard for and became the barometer of prevailing attitudes toward minimum wages, overtime and child labor.

In the decades since it was enacted, the FLSA has occasionally seen significant updates, such as the passage of the Portal-to-Portal Act of 1947, which among other provisions, gave definition to the concept of "hours worked,"[2] the enactment of the Equal Pay Act of 1963, which prohibits sex discrimination in the payment of wages,[3] and more recent updates over the past 10 or 15 years to the analysis or salary thresholds to be applied to certain exemptions.

However, there have been no statutory changes to the "similarly situated" standard the FLSA imposes on collective actions, and none appear to be planned.

Under the FLSA, employees can sue for alleged violations of its minimum wage and overtime mandates on "behalf of ... themselves and other employees similarly situated."[4] But "[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought."[5]

The FLSA is silent as to both the showing of similarity that party plaintiffs looking to maintain collective actions in court must make between themselves and other employees, as well as the way the other employees learn about the existence of the lawsuit.

In the case of Lusardi v. Xerox Corp.,[6] in 1987, the U.S. District Court for the District of New Jersey described the two-step approach for conditionally certifying a class "without prejudice to the respective parties' rights to move for decertification of the action." In its opinion, the court anticipated that, in order for the case to go forward, later on the party plaintiffs would have to show that "they [had] an honest to goodness case."[7]

A couple of years later, in Hoffman-La Roche v. Sperling,[8] the U.S. Supreme Court in 1989 confirmed the district courts' discretion under Section 216(b) to "facilitat[e] notice" of FLSA suits "to potential plaintiffs."[9] In so holding, the court expressly only confirmed the

"existence of the trial court's discretion, not the details of its exercise."[10]

Perhaps ironically, the collective in Lusardi was decertified.

But, over the decades, as the two-step approach yielded to an ineffectual first stage, under which the vast majority of Section 216(b) cases were initially certified then dispositioned — likely through settlement — long before a motion to decertify.[11] The defense bar has long advocated for reform, and finally — increasingly it seems — so are some courts.

In May, in Clark v. A&L Homecare and Training Center, the U.S. Court of Appeals for the Sixth Circuit announced a new "strong likelihood" conditional certification standard that is neither a one-step nor a two-step approach.[12]

The case began in 2020 when former home health aides sued A&L Homecare and Training LLC and its owners under the FLSA and parallel Ohio law for overtime and minimum wage violations incurred during their employment.

On the plaintiffs' motion for conditional certification, the district court adopted the Lusardi approach over the objections of the defendants, who argued that the court should abandon Lusardi in favor of the more demanding single-step approach the U.S. Court of Appeals for the Fifth Circuit adopted in Swales v. KLLM Transport Services LLC in 2021.[13]

Recognizing the potential implications for its choice to break away from Lusardi, the district court certified its conditional certification decision for immediate appellate review under Title 28 of the U.S. Code, Section 1292(b).[14]

On appeal, the Sixth Circuit expressly rejected the Lusardi approach and its "borrowed" terminology from Federal Rule of Civil Procedure 23, which governs class actions that are "fundamentally different from collective actions under the FLSA."[15] The court also avoided the other end of the spectrum by rejecting a process that would essentially result in a ruling on the merits.

More analogous — the court found — is a court's decision whether to grant a preliminary injunction:

> What the notice determination undisputedly shares in common with a preliminary-injunction decision, rather, is the requirement that the movant demonstrate to a certain degree of probability that she will prevail on the underlying issue when the court renders its final decision.[16]

The court therefore adopted the relevant portion of the preliminary injunction standard — that party plaintiffs must show a "strong likelihood" that potential opt-ins are similarly situated to themselves. The strong likelihood showing is "greater than the one necessary to create a genuine issue of fact, but less than the one necessary to show a preponderance."[17]

The Sixth Circuit's decision follows closely on the heels of a Virginia district court's rejection of the Lusardi approach in April.

In Mathews v. USA Today Sports Media Group LLC[18] — an independent contractor misclassification case brought by and on behalf of "Site Editors" for one of USA Today's websites — the company defendants opposed the plaintiff's motion for conditional certification on grounds that the FLSA does not authorize district courts to "conditionally"

certify collectives.

They argued, instead, for the one-step approach, with discovery "limited to whether the named plaintiff and the proposed collective are 'similarly situated' [and] the remainder of discovery [to] occur after the court has determined whether plaintiff's proposed collective are all 'similarly situated.'"[19]

The district court agreed, finding that the Lusardi framework is flawed because

> [B]y encouraging courts to send notice to a broad group of potential collective members at step one, Lusardi frequently necessitates that notice will be sent at least to some people who are not "similarly situated" to the named plaintiffs. Such a procedure is in direct contravention of FLSA's text which authorizes notice only to those who are "similarly situated" to the named plaintiff.[20]

Instead of such a broad notice, courts must first determine, using limited discovery, whether a proposed collective is actually similarly situated to the party plaintiffs.[21]

In reaching its conclusion, the court in Mathews — unlike that in Clark — endorsed and relied on the reasoning in Swales, where a collective of drivers for a refrigerated goods transportation company was initially certified based on Lusardi, but given the lack of uniformity across the circuits, authorized interlocutory appeal.[22]

The question before the Fifth Circuit in Swales stated: "How rigorously, and how promptly, should a district court probe whether potential members are 'similarly situated' and thus entitled to court-approved notice of a pending collective action?"[23]

The Fifth Circuit declined to confine itself to Lusardi; It rejected the framework outright after finding that "Lusardi has no anchor in the FLSA's text or in Supreme Court precedent interpreting it."[24]

Relying on the text of the FLSA and language in Hoffman-La Roche that courts should not prejudge the merits of the cases during their efforts to facilitate notice to opt-ins, Swales endorses "rigorous[] scrutiny[y]" of the purportedly similarly situated workers "from the outset of the case, not after a lenient, step-one conditional certification."[25]

To meet this burden, courts "should identify, at the outset of the case, what facts and legal considerations will be material to determining whether a group of 'employees' is 'similarly situated.' And then [they] should authorize preliminary discovery accordingly," exercising their "litigation-management discretion" and varying the amount of discovery to match the requirements of the case.[26]

Not surprisingly, not every court is ready to part ways with the two-step approach; district courts outside the Fourth, Fifth, and Sixth Circuits continue to apply Lusardi and expressly reject Swales.

The U.S. District Court for the Southern District of New York in June expressly also rejected the approach from Clark in Lazaar v. Anthem Companies Inc.[27]

Yet, it is undisputable that Swales took the first brave step to bell the runaway cat that is the lenient two-stage conditional certification process, and, if nothing else, it has provided a climbing hold to defendants as they work to put teeth back into conditional certification.

If more courts sign on to heighten the requirements for a showing of similarly situated before they authorize plaintiffs to send notice to putative opt-ins, the plaintiffs would finally have more at stake; it is likely that the number of filings would decrease and the power dynamic between defendants and plaintiffs once a collective action is filed would rebalance — to everyone's benefit.

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[1] 29 U.S.C. §§ 201 et seq.

[2] See 29 U.S.C. §§ 251 et seq.

[3] 29 U.S.C. § 206(d).

[4] 29 U.S.C. § 216(b)

[5] Id.

[6] Lusardi v. Xerox Corp., 118 F.R.D. 351, 353-54 (D.N.J. 1987)

[7] Id. at 354 (citing 1983 conditional certification proceedings).

[8] Hoffman-La Roche v. Sperling, 493 U.S. 165 (1989)

[9] Id. at 169.

[10] Id. at 170.

[11] See, e.g., FLSA Turns 80: A Closer Look at Conditional Cert. Standard, available at https://www.law360.com/articles/1048705/flsa-turns-80-a-closer-look-at-conditional-cert-standard

[12] Clark v. A&L Homecare and Training Center, 68 F.4th 1003, 1011 (May 19, 2023).

[13] See Holder v. A&L Home Care & Training Ctr. LLC, 552 F. Supp. 3d 731, 742 (S.D. Ohio 2021), vacated and remanded sub nom. Clark, 68 F.4th 1003 ("Despite our circuit's apparent approval of certifying FLSA collectives in two stages, Defendants ask the Court to abandon that course in favor of the Fifth Circuit's recent Swales decision. The Court declines the invitation. Courts in this district routinely apply the two-step process in FLSA cases, albeit reaching different conclusions on the necessary evidentiary showing. This Court, absent contrary direction from the Sixth Circuit, will follow the two-step process.") (internal citations omitted). See also Swales v. KLLM Transport Services LLC, 985 F.3d 430, 441 (5th Cir. 2021).

[14] See 552 F. Supp. 3d at 742.

[15] Clark, 68 F.4th at 1009. In the court's reasoning, conditional certification and the notice process ought not change nature of the case as it is only a mechanism for sending notice to potential opt-ins. See id. ("[W]hether called "conditional certification" or otherwise — the notice determination has zero effect on the character of the underlying suit. On that point the Supreme Court has been clear.") (citing Genesis Healthcare Corp. v. Symczyk, 569 U.S. 66, 75 (2013) ("The sole consequence of conditional certification is the sending of court-approved written notice to employees.")). The court deemed it impossible to make any determination regarding the "similarly situated" status of absent employees — either under a more stringent "actually" similarly situated standard or a "modest showing" lenient standard of similarity. See id. Rather, the district court should approve notice to "employees who are in fact similarly situated." Id. at 1010.

[16] Id. at 1011.

[17] Id.

[18] See Mathews v. USA Today Sports Media Grp. LLC, No. 1:22-CV-1407, 2023 WL 3676795, *1 (E.D. Va. Apr. 14, 2023)

[19] Id. at *2.

[20] Id. at *3.

[21] Id.

[22] 985 F.3d 430, 43/1-/24. (5th Cir. 2021).

[23] Id. at 433.

[24] Id. at 434.

[25] Id. at 435.

[26] Id. at 441, 443.

[27] See, e.g., Lazaar v. Anthem Companies Inc., --- F. Supp. 3d ---, No. 22-CV-3075 (JGK), 2023 WL 4113034, at **3, 4 & n.3 (S.D.N.Y. June 22, 2023) ("There is no basis for this Court to depart from the two-step certification procedure endorsed by the Court of Appeals for the Second Circuit. By allowing potential plaintiffs to opt in early in an FLSA collective action, court-authorized notice under the two-step procedure may be essential "to prevent erosion of claims due to the running statute of limitations, as well as to promote judicial economy... . Like Swales, Clark provides no compelling reason for this Court to depart from the "modest factual showing" counseled by [Myers v. Hertz Corp., 624 F.3d 537 (2d Cir. 2010)] and applied in this Circuit."); Brant v. Schneider Nat'l Inc., No. 20-C-1049, 2023 WL 4042016, at *2 (E.D. Wis. May 4, 2023) ("The court declines Defendants' invitation to depart from the two-step process. Swales is not binding on this court, and other courts that have addressed the issue have refused to adopt Swales and continued to adhere to the two-step approach."); Gillespie v. Cracker Barrel Old Country Store Inc., No. CV-21-00940-PHX-DJH, 2023 WL 2734459, at *7 (D. Ariz. Mar. 31, 2023). See Babbitt v. Target Corp., No. CV 20-490 (DWF/ECW), 2023 WL 2540450, at *4 (D. Minn. Mar. 16, 2023) (collecting cases across jurisdictions; finding "substantial ground for difference of opinion" with Swales).