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Fifth Circuit's Rejection of *Lusardi* and *Sushan* Approaches and the Establishment of New Standard in FLSA Collective Actions

In *Swales v. KLLM Transp. Servs., L.L.C.*^[1] the Fifth Circuit outright rejected the traditional *Lusardi*^[2] and *Sushan*^[3] approaches for certifying a collective action under the Fair Labor Standards Act (FLSA). In doing so, the Fifth Circuit introduced a new, more stringent standard for assessing whether future FLSA plaintiffs can obtain conditional certification. Now, a district court must rigorously scrutinize the realm of “similarly situated” at the *outset* of a case.

How Collective Actions Worked Previously in the Fifth Circuit

Section 216(b) of the FLSA allows for employees to proceed collectively when such plaintiffs are “similarly situated.” Without statutory or case law guidance for what constitutes “similarly situated,” district courts had arrived at a “loose consensus as to the proper procedure” for certifying collective actions.^[4] Generally, district courts looked to two approaches, with some variation: (1) the *Sushan* approach and (2) the *Lusardi* approach. While very few courts applied the *Sushan* approach, *Lusardi* was “the near-universal practice” of the district courts.^[5]

In *Lusardi*, the district court laid out a two-step process to determine, on an *ad hoc* case-by-case basis, whether prospective opt-in plaintiffs in a proposed collective are “similarly situated” enough to satisfy the FLSA.^[6] Step one, referred to as “conditional certification,” involved an initial notice stage determination that proposed members of a collective are similar enough to receive notice of the pending action.^[7] Step two involved a second and final determination about whether named plaintiffs and opt-ins are “similarly situated,” and may therefore proceed to trial as a collective.^[8] If opt-ins are found insufficiently similar to the named plaintiffs, the court must dismiss the opt-in employees and leave

only the named plaintiff's original claims.^[9] Until now, the Fifth Circuit had "carefully avoided adopting" *Lusardi*, cautioning lower courts that "avoidance should not be misconstrued as acquiescence."^[10] Now, the Fifth Circuit has left no room for misinterpretation as it has explicitly rejected the *Lusardi* and *Sushan* approaches.^[11]

How Collective Action Analysis Functions in the Fifth Circuit Moving Forward

In *Swales*, truck drivers brought an action under the FLSA against their employer alleging it misclassified its drivers as independent contractors when they were employees entitled to minimum wage. Despite acknowledging differences between the plaintiffs, such as different per-mile compensation rates and hours worked, the district court concluded that conditional certification was proper.^[12] The district court then *sua sponte* certified questions for the Fifth Circuit to consider and weigh in on. In analyzing the proper notice-giving standard, the Fifth Circuit concluded that *Lusardi* frustrates rather than facilitates the notice process and outright rejected the approach. The court noted that the ad-hoc test results in a multitude of approaches that provide little to no guidance for district courts applying their notice-sending authority. Further, according to the Fifth Circuit, neither the text of the FLSA nor Supreme Court precedent support the conditional certification process *Lusardi* applies.^[13]

Instead, a district court in the Fifth Circuit should identify what facts and legal considerations will be material to the FLSA's "similarly situated" requirement at the *outset* of litigation, *before* notice is sent to potential opt-ins, even if such identification addresses merit issues. Then, the court should authorize preliminary discovery accordingly, based on the specific facts of the case and the similarities and differences between the plaintiffs and opt-ins.^[14] The Fifth Circuit emphasized that the district courts have broad litigation management discretion to consider *all* available evidence. In doing so, the court may conclude plaintiffs and opt-ins are too diverse to be "similarly situated." The court may decide it needs further discovery, or it may find only certain subcategories of opt-ins should receive notice.

Moving forward, this approach enables the court to decide whether notice is even necessary, and it ensures that any notice that is sent out is only sent to potential plaintiffs. While the new approach seemingly provides more discretion to the district court, the new approach also requires that the district court scrutinize if employees are truly “similarly situated” earlier in the case.

[1] No. 19-60847, 2021 WL 98229 *1, *2 (5th Cir. Jan. 12, 2021).

[2] See *Lusardi v. Xerox Corporation* 118 F.R.D. 351 (D.N.J. 1987).

[3] See *Sushan v. University of Colorado*, 132 F.R.D. 263 (D. Colo. 1990) (interpreting § 216’s “similarly situated” inquiry to be coextensive with the class certification requirements in FRCP Rule 23: (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation).

[4] See *Campbell v. City of Los Angeles*, 903 F.3d 1090, 1111 (9th Cir. 2018).

[5] *Id.* at 1108–1109.

[6] *Lusardi*, 118 F.R.D. at 351.

[7] *Id.* This step is typically based on the pleadings and affidavits of the parties.

[8] *Id.* This step occurs at the conclusion of discovery and utilizes a stricter standard than that in step one. Factors considered include: (1) disparate factual and employment settings of individual plaintiffs; (2) various defenses available to defendant which appear to be individual to each plaintiff; and (3) fairness and procedural considerations.

[9] *Sandoz v. Cingular Wireless LLC*, 553 F.3d 913, 915 n.2 (5th Cir. 2008).

[10] See *In re JPMorgan Chase & Co.*, 916 F.3d 494, 500 n.9 (5th Cir. 2019).

[11] *Swales*, No. 19-60847, 2021 WL 98229 at *2.

[12] *Id.* at *4–5. The district court had applied a “Goldilocks” version of *Lusardi*, somewhere between lenient and strict, which required Plaintiffs and opt-ins to show “more than minimal evidence” of their

similarities to justify conditional certification.

[\[13\]](#) *Id.* at *6.

[\[14\]](#) *Id.* at *7. For example, in a donning and doffing case, notice might be justified when the pleadings and only preliminary discovery show sufficient similarity between plaintiffs' employment situations because plaintiffs all have the same job description. In a case like *Swales*, where plaintiffs have demonstrably different work experiences, more discovery is needed to determine whether notice is going out to those "similarly situated."

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