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Eleventh Circuit: Consent to Join Doesn't Entitle a Putative Plaintiff to Discovery in a Suit Filed as an FLSA Collective Action

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Does this scenario sound familiar? A plaintiff in a Fair Labor Standards Act case, 29 U.S.C. §§ 201 *et seq*. ("FLSA" or the "Act"), files a complaint as a "collective action" on behalf of himself/herself "and others similarly situated." In the answer, the defendant denies that there are other persons who may become plaintiffs in the action. Plaintiff never moves to create an opt-in class under § 216(b). Non-parties begin filing consents to join the action. Plaintiff's counsel then makes discovery requests on behalf of these potential plaintiffs.

Plaintiff's counsel should expect defense counsel to refuse to respond to such discovery requests of potential plaintiffs because these non-parties are not properly joined as party plaintiffs to the matter and entitled to discovery from the defendant. Permitting discovery of potential plaintiffs would allow a named plaintiff to probe through a defendant's documents regarding almost any former or current employee he/she desires, even though an opt-in joinder class may never be created by the court. These discovery requests do not comply with binding Eleventh Circuit law.

The Eleventh Circuit has held that 29 U.S.C. § 216(b) does not grant an unconditional right to intervene in an action, even if an individual has filed a consent to join an FLSA action. *Mitchell v. McCorstin*, 728 F.2d 1422, 1423 (11th Cir. 1984). Although, 29 U.S.C. § 216(b) requires an employee to give his consent in writing as a condition to becoming a party to an FLSA action,[1] *Mitchell* instructs that filing such consent does not automatically render the employee a party plaintiff.

In *Mitchell*, the district court refused to allow the potential plaintiff to intervene in a collective action. The potential plaintiff argued that 29 U.S.C. § 216 grants an unconditional right to intervene. The district court and the Eleventh Circuit squarely rejected that argument. The Eleventh Circuit reasoned that "it is entirely possible that McCorstin [the potential plaintiff] is not similarly situated to the parties in the Mitchell case, and is thus not a party contemplated as an intervenor by 29 U.S.C. § 216." *Mitchell*, 728 F.2d at 1423. That is, the potential plaintiff does not become a party unless and until the court determines that he/she is similarly situated to the original plaintiff.[2]

The Middle District has also recognized this principle. In *Becker*, the court explained that its order would adopt the "moniker 'Plaintiffs' to refer to these individuals," who have filed Consent to Join out of "convenience" in drafting the order, but that opt-in "plaintiffs" are "not yet plaintiffs in this action." *See Becker v. Southern SOILS, Turf Mgmt Inc.*, 2006 WL 3359687 * 1, n.1. (M.D.Fla. Nov. 20 2006). The Court explained:

The filing of a consent to join in the litigation does not operate as an automatic joinder in the action or amendment of the complaint. Rather, the consent filed pursuant to 29 U.S.C. § 216(b) must be read in conjunction with Fed.R.Civ.P. 8.
Becker, 2006 WL 3359687 * 1, n.1.[3]

Any other rule would fail to prevent the addition of improper plaintiffs in FLSA actions:

If a bare notice of consent filing was sufficient to allow the joinder of plaintiffs, *defendant would have no meaningful opportunity to oppose the continued addition of plaintiffs who might not be 'similarly situated.' Nor would the court have any discretion regarding such additions*.

Canfield v. United States, 14 Cl.Ct. 687, 690 (Cl.Ct. 1984) (emphasis added) (ultimately treating the notices of consent as valid joinders under a local rule permitting waiver where there was no dispute as to the propriety of the potential plaintiffs).

By analogy, for example, in *Indianapolis School Comm'rs v. Jacobs*, 420 U.S. 128, 130 (1975), the plaintiff declared the case a class action (under Rule 23) in the complaint, but no order was entered certifying it as a class action. The plaintiff prevailed both in the district court and in the court of appeals as if it were a class action. While pending review in the Supreme Court, it came to light that the action was moot as to the individual plaintiff. In the absence of actual certification as a class action, the action remained an individual action and the Supreme Court dismissed the case. *Id*. It held:

Because the class action was never properly certified nor the class properly identified by the District Court, the judgment of the Court of Appeals is vacated and the case is remanded to that court with instructions to order the District Court to vacate its judgment and to dismiss the complaint.

Id.

Like in a class action, a plaintiff's action designated as a "collective action" is a single plaintiff action unless and until the plaintiff requests and receives conditional certification of a collective action. *See, e.g., Grayson v. K Mart Corp.*, 79 F.3d 1086, 1097 (11th Cir. 1996) (threshold showing required before Plaintiff can request "an opt-in joinder class under §216(b)."). Until such condition precedent occurs, defense counsel should be aware of this discovery pitfall posed by potential plaintiffs and recognize that the discovery sought by that putative plaintiff is premature.[4]

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[1]The statute provides, in pertinent part: "No employee shall be a party plaintiff to any such action unless he/she gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." 29 U.S.C. § 216(b).

[2]To maintain a collective action under § 216(b), the named plaintiff must first establish that the potential plaintiffs are "similarly situated" employees. See *Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208, 1217 (11th Cir. 2001); *Dybach v. State of Fla. Dept. of Corr.*, 942 F.2d 1562, 1567-68 (11th Cir. 1991). Plaintiffs must make initial showing by "detailed allegations supported by affidavits" that an opt-in class should be created. Hipp, 252 F.3d at 1219 (quoting *Grayson v. K Mart Corp.*, 79 F.3d 1086, 1097 (11th Cir. 1996)).

[3]The issue for consideration in *Becker* was whether to certify a collective action. The court went on to find that "Plaintiffs failed to make even a minimal showing that the potential plaintiffs are similarly situated employees." *Becker*, 2006 WL 3359687 * 3 (emphasis added).

[4]Because these potential plaintiffs are not yet parties to the action, discovery requests are premature. Federal Rules of Civil Procedure 33 and 34 only allow parties to seek discovery. See Fed. R. Civ. P. 33 ("... any party may serve upon any other party written interrogatories"); Fed. R. Civ. P. 34 ("Any party may serve on any other party a request (1) to produce....").

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