Circling Back to Center: The Resurgent Labor Movement's Effect on Prevailing Legal Rules

MAHNI ALIZADEH*

There has been a surge in Labor activity across the United States, with the recent success of the SAG-AFTRA and WAG strikes, and the subsequent striking of the United Auto Workers (UAW). More strikes are on the way, while others have been avoided with new collective bargaining agreements. As a result of this rise in labor disputes, many jurisdictions are reevaluating past rules to keep up with the rise in Labor & Employment litigation. One legal test that has come under scrutiny in recent years is the *Lusardi* test, wherein the courts used a 2-step confirmation to join "similarly situated" plaintiffs regarding an action under the Fair Labor Standards Act (FLSA).[1] Recently, the Fifth Circuit abandoned the *Lusardi* test, requiring district courts to take a more comprehensive approach to determine the viability of new plaintiffs,[2] rather than the minimal "conditional certification" required by *Lusardi*.[3] This year, the Sixth Circuit addressed this same question in *Clark v. A&L Homecare & Training Center*, finding a compromise between the stringent ruling of the Fifth Circuit and the lenient *Lusardi* test.[4] While the decision may imply a boon for companies and a blow to Labor, both sides of the issue are happy with the outcome for now.[5]

I. BACKGROUND AND PROCEDURAL HISTORY

The case initially started as a typical action under the FLSA, wherein the named plaintiffs, formerly employed as home caregivers, alleged that their employer withheld overtime pay and vehicle expenses.[6] The plaintiffs then filed a motion to give notice of their action to other employees who had worked for the same employer, A&L Homecare.[7] Under the *Lusardi* standard, the plaintiffs merely had to "conditionally [certify]" that the potential new plaintiffs fall under the "similarly situated" standard.[8] In order to provide notice to potential new

* Mahni Alizadeh is a J.D. candidate at The Ohio State University Moritz College of Law and writes for THE OHIO STATE LAW JOURNAL *Sixth Circuit Review*.

[1] *See* Lusardi v. Xerox Corp., 118 F.R.D. 351, 361 (D.N.J. 1987).

[2] Swales v. KLLM Transp. Servs., LLC, 985 F.3d 430, 434 (5th Cir. 2021).

[3] *Lusardi*, 118 F.R.D. at 361.

[4] *See* Clark v. A&L Homecare & Training Ctr., LLC, 68 F.4th 1003, 1009–10 (6th Cir. 2023).

[5] Khorri Atkinson, *Businesses, Workers Alike Cheer New FLSA Collective Action Test*, BLOOMBERG LAW (May 26, 2023), https://news.bloomberglaw.com/daily-labor-report/businesses-workers-alike-cheer-new-flsa-collective-action-test.

[6] *Clark*, 68 F.4th at 1008.

[7] *Id.*

[8] *Lusardi*, 118 F.R.D. at 361.

plaintiffs under the *Lusardi* standard, the named plaintiffs needed only to clear the first test, which is to provide a "modest factual showing" that they are in fact "similarly situated."[9] This standard usually encourages employers to settle before trial begins.[10] The second step occurs after the new parties have been given notice, where "the court takes a closer look" to verify that these other parties are "similarly situated."[11] The district court followed this standard, providing notice to the potential plaintiffs.[12] However, noting the recent scrutiny the *Lusardi* standard has endured, the district court submitted its order for interlocutory review by the Sixth Circuit.[13]

II. FINDING A MIDDLE GROUND

The court was asked to grapple with the two standards before it and decide whether to affirm the prevailing *Lusardi* standard, or to adapt the more stringent one coined by the Fifth Circuit.[14] It chose neither.[15] First, the court expressed concern with the use of the term "certification," noting that it stems from rules that govern class action suits.[16] To be sure, joining parties under the FLSA is markedly different from joining parties to a class. Each new plaintiff under the FLSA, if ultimately approved, becomes a named plaintiff in the action.[17] Consequently, any new parties in an FLSA action must affirmatively choose to join the collective action.[18] This contrasts the class action procedure, wherein the district court unilaterally adds parties to the suit.[19] It follows, the court reasoned, that the standard under the FLSA should be stricter than that of a class action.[20] Therefore, giving the parties notice only after a conditional certification as if they are part of a class action before they are conclusively determined to be "similarly situated" could be problematic. Further, the court noted a Supreme Court ruling that facilitation of notice cannot resemble "the solicitation of claims," something the *Lusardi* standard risked doing.[21]

After rejecting the *Lusardi* standard outright, the court then evaluated the merits of the Fifth Circuit standard.[22] Ultimately, it determined that the Fifth Circuit standard was unreasonably strict, noting that it essentially imposes a

---

[9] *Clark*, 68 F.4th at 1008 (citing Pritchard v. Dent Wizard Int'l Corp., 210 F.R.D. 591, 596 (S.D. Ohio 2002)).
[10] *See id.*
[11] *Id.* (citing Smith v. Lowe's Home Ctrs., Inc., 236 F.R.D. 354, 357 (S.D. Ohio 2006).
[12] *Id.*
[13] *Id.*
[14] *Id.* at 1009.
[15] *Clark*, 68 F.4th at 1009.
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.* at 1010.
[21] *Clark*, 68 F.4th at 1010.
[22] *Id.* at 1009–10.

finding that the new employees are "similarly situated" by a preponderance of the evidence.[23] This was simply too strict a standard for the Sixth Circuit.[24] The court noted that there are too many factors that go into determining if employees are similarly situated.[25] Not only are these factors difficult to determine, but they are also mainly fact-based.[26] The new employees themselves, along with their employers, are the best people to provide these facts.[27] Under the Fifth Circuit standard, a district court would have to determine whether new employees are "actually similarly situated" under a preponderance of the evidence standard without notifying the potential plaintiffs at all, meaning they would have to make that determination "in absentia."[28] The Sixth Circuit, therefore, resolved to find a standard that struck a balance between the two options.

Ultimately, the court came up with a "strong likelihood" standard analogous to a preliminary injunction.[29] The standard is similar to a preliminary injunction, the court reasoned, because "the court renders a final decision on the underlying issue … only after the record for that issue is fully developed."[30] Setting aside three of the four elements for a preliminary injunction as irrelevant (namely, "irreparable injury," "substantial harm to others," and "public interest"), the court adopted "the requirement that the movant demonstrate to a certain degree of probability" that they will succeed on the merits.[31] In so doing, the court was able to tighten the standards from the *Lusardi* test without rendering the practice of adding new plaintiffs to an action under the FLSA unreasonably difficult.

III. COMPROMISE IS THE BEST LAWYER

While the decision may at first glance seem to be a loss for worker-side labor and a win for employers, the reality is more complicated. In fact, some labor-side firms consider the Sixth Circuit decision a win for workers, because plaintiffs have already exceeded the *Lusardi* test with showings that would likely meet the Sixth Circuit's new standard.[32] Further, labor-side attorneys are hoping that the "equitable tolling" standard espoused by Justice John Bush's concurrence in the case will be adopted as well.[33] Justice Bush's concurrence argued that, should there be eligible plaintiffs that were not notified in the original FLSA action, they should nonetheless be given an opportunity to file

---

[23] *Id.*
[24] *Id.* at 1010.
[25] *Id.*
[26] *Id.*
[27] *Clark*, 68 F.4th at 1010.
[28] *Id.*
[29] *Id.* at 1010–11.
[30] *Id.*
[31] *Id.* at 1011.
[32] Atkinson, *supra* note 5.
[33] *Id.*

suit through a tolling of the statute of limitations.[34] In this way, the decision in *Clark* has the potential to be a win for labor-side advocates. We will not see this play out for quite some time, however, as the statute of limitations for an FLSA action is two years.[35]

Employers, for their part, are afforded a far less taxing pre-trial procedure. In the past, because of the lower *Lusardi* standard, plaintiffs were able to notify other employees with impunity, putting pressure on the employers to settle early.[36] Now, employers can be assured that any attempt to add new plaintiffs will be looked at with more scrutiny. In fact, courts that adopt the more stringent test, whether from the Fifth or Sixth Circuits, will now allow the employers to introduce evidence refuting the "similarly situated" status of the potential new plaintiffs.[37] Of course, the "strong likelihood" standard will cause pre-trial procedure to move slower, since courts will now have to review the new plaintiffs more carefully than before.

Of course, it is not all bread and roses for the labor side. While many are happy that the Fifth Circuit standard was not adopted, others are concerned that the approach undercuts the statutory purpose of the FLSA.[38] However, the new standard has already proven to be attainable for plaintiffs, as seen in the recently decided *Gifford v. Northwood Healthcare Group LLC*.[39] Ultimately, it is too early to tell whether the new standard will have a measurable effect on the frequency with which an action under the FLSA compels employers to settle, or facilitates the addition of new employees as plaintiffs.

It remains to be seen which of the two Circuit Court standards will prevail in the lower courts in other circuits. After the Fifth Circuit standard came forward, there was a split among the lower federal courts as to whether to adopt it.[40] Some outside the Fifth Circuit adopted it outright, while others denied employer requests to submit to a higher court on interlocutory appeal, effectively reaffirming the *Lusardi* standard.[41] With the "strong likelihood" standard now law in the Sixth Circuit, more lower federal courts outside the

---

[34] *Clark*, 68 F.4th at 1012–13 (Bush, C.J. concurring).

[35] *Id.*

[36] Atkinson, *supra* note 5.

[37] David R. Golder, Eric R. Magnus, Y. Jed Charner & Ashton P. Hoffman, *Chipping Away at Two-Step Conditional Certification in FLSA Collective Actions*, JACKSONLEWIS (May 17, 2023), https://www.jacksonlewis.com/insights/chipping-away-two-step-conditional-certification-flsa-collective-actions.

[38] Atkinson, *supra* note 5.

[39] *See* Gerald L. Maatman, Jr., Jennifer A. Riley & Kathryn Brown, *Ohio Federal Court Grants Conditional Certification in Wage & Hour Collective Action Under the Sixth Circuit's New "Strong Likelihood" Standard*, DUANE MORRIS (Aug. 29, 2023), https://blogs.duanemorris.com/classactiondefense/2023/08/29/ohio-federal-court-grants-conditional-certification-in-wage-hour-collective-action-under-the-sixth-circuits-new-strong-likelihood-standard/.

[40] Golder, Magnus, Charner, & Hoffman, *supra* note 37.

[41] *Id.*

Fifth and Sixth Circuits may be compelled to submit interlocutory appeals to their own higher courts, or to adopt one of these ready-made standards instead of sticking with the *Lusardi* approach.

IV. CONCLUSION

Ultimately, the implications of the Sixth Circuit's new standard in *Clark* remain to be seen. The decision is but one of many new rulings regarding Labor & Employment litigation and procedure. With the resurgence of the labor movement in the United States, we will be seeing far more new rulings and adaptations from higher courts as employers look to curtail the momentum of the rising labor movement. Just this year, the Supreme Court has made more than one watershed ruling in the Labor & Employment realm, the most notorious of which was *Glacier Northwest Inc. v. International Brotherhood of Teamsters Local 174*. Cases before the Supreme Court will get the most attention, but it is worth keeping an eye on decisions like the Sixth Circuit's here. With the rising tide of labor action in the United States, understanding decisions like *Clark* are instrumental in determining the trends in labor jurisprudence.