EMPLOYMENT & LABOR RELATIONS LAW
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# Third Circuit Clarifies Standards for FLSA Collective Actions

The Third Circuit Court of Appeals addressed several important issues of first impression in *Zavala v. Walmart Stores, Inc.*, 691 F.3d 527 (3d Cir. 2012), further clarifying the two-step process for whether claims can be pursued as a Fair Labor Standards Act (FLSA) collective action.

The *Zavala* decision represents the culmination of eight years of hard-fought litigation between a group of undocumented workers and Walmart. The plaintiffs alleged that they were recruited to work for Walmart to provide janitorial services and that, in the process, they were subjected to many improper actions by Walmart, including failure to pay wages and overtime. The plaintiffs sought to proceed as a collective action under FLSA. The plaintiffs included myriad other claims in their complaint, such as allegations that Walmart violated Racketeer Influenced and Corrupt Organizations Act (RICO) laws and falsely imprisoned them when they were locked in at night to clean stores for Walmart.

After years of motion practice, the district court dismissed the RICO and false-imprisonment claims, and ultimately refused to permit the action to continue as a collective action. The individually named plaintiffs resolved their claims with Walmart and the case proceeded on appeal to the Third Circuit to decide, among other things, the appropriateness of the district court's decision to deny collective-action status.

*Zavala* is helpful for two reasons. First, the court addressed the three standards applied by courts at the second step of certification to determine whether proposed collective plaintiffs are "similarly situated." 29 U.S.C. § 216(b). The court recognized that it has approved the use of the "ad hoc approach" that "considers all the relevant factors and makes a factual determination on a case-by-case basis." 691 F.3d at 536. The court went on to describe a number of factors that should be considered in the ad hoc approach, and cited pertinent case and secondary authorities it viewed as helpful in making that determination.

Second, the court addressed an issue that apparently has not been squarely addressed by any other court of appeals—the level of proof the plaintiffs must satisfy to clear the second-stage hurdle. The court held that plaintiffs must establish the factors by a preponderance of the evidence: "That seems impossible unless Plaintiffs can at least get over the line of 'more likely than not.'" *Id.* at 537. The court further observed that "[b]eing similarly situated does not mean simply sharing a common status, like being an illegal immigrant. Rather, it means that one is subjected to some common employer practice that, if proved, would help demonstrate a violation of the FLSA."

Applying the standard in the case before it, the court in *Zavala* held that collective-action certification was properly denied because the workers were too widely dispersed throughout the

country and at many different stores, working for 70 different contractors and subcontractors, and working varying hours. These significant differences in their working conditions rendered the proposed class too unwieldy, and the district court was therefore correct in denying final certification.

The court's decision in *Zavala* is a welcome one in that it provides guidance to employees and employers alike in litigating proposed collective actions. The decision undoubtedly shows the uphill battle that exists for employees seeking to certify a broad FLSA collective action of employees who are widely dispersed and arguably subjected to different working conditions.

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