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Swales Has Minimal Impact in Maximus's Bid to Pause Collective Action Pending Appeal

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Court watchers following the ripple effects of groundbreaking wage and hour opinion *Swales v. KLLM Transport Services, LLC,* 985 F.3d 430 (5th Cir. 2021) ("*Swales*") may have gained their first insight into the Supreme Court's thought process following Chief Justice John Robert's refusal to pause a conditional collective action certification in *Maximus Inc. v. Thomas, et al.*, No. 22A164, currently pending in the Eastern District of Virginia and following this decision and a failed appeal from the Fourth Circuit.

As we have written about previously, *Swales* represented a significant departure from the long-standing two-step certification process established in *Lusardi v. Xerox Corp,* 118 F.R.D. 351 (N.N.J. 1987) ("*Lusardi*"), which is used by most courts in the country in certifying Fair Labor Standards Act ("FLSA") collective actions.

Under the commonly applied "two-step" certification process in "opt-in" FLSA collective actions, a district court initially ascertains whether a collective action should be "conditionally certified" early in the litigation based on a modest factual showing as to whether putative class members are "similarly situated," which often comes before discovery or following minimal, initial discovery. Because the district court typically has little information at the first step, the conditional certification standard is more lenient than typical class certification. Following conditional certification, notice will be mailed to putative plaintiffs, many of which will fail to affirmatively "opt-in" to the case, and therefore would not ultimately participate in the lawsuit. Following the notice period and significant discovery, employer-defendants may move the district court for decertification under a more stringent standard, at which point the district court will determine whether some or all of the members of the conditional collective are similarly situated enough to proceed with the litigation.

In *Swales*, the Fifth Circuit rejected *Lusardi*'s two-step process, finding that it was unsupported under the plain language of the FLSA and put undue settlement pressures on defendant-employers well before such pressures should be warranted. The *Swales* decision adopted a more stringent one-step analysis that outlines the relevant factors for identifying similarly situated workers based on the facts of the case, and then authorizes limited discovery on those specific factors, prior to granting certification.

Because the first step of the *Lusardi* process often results in costly litigation involving hundreds of potential members of a collective who are ultimately determined not to be "similarly situated" during the second-step analysis, many employers were optimistic that *Swales* would represent a cost-saving sea change in FLSA litigation that would ultimately be adopted by numerous Circuit Courts, or even by the Supreme Court. By engaging with a single certification step following limited discovery, the parties could be assured more certainty in the litigation and employers would not need to devote significant discovery costs to ultimately irrelevant current and former employees.

As a result, court-watching employers were hopeful last spring, when the Eastern District of Virginia granted conditional certification under *Lusardi* to members of a collective pursuing FLSA claims against employer Maximus Inc. ("Maximus") but concurrently granted a stay on its decision in order to certify a question to the Fourth Circuit as to whether the *Lusardi* or *Swales* standard should be utilized. But in July, the Fourth Circuit denied review of Maximus's bid for interlocutory appeal, and the district court lifted the stay.

Maximus responded by submitting an Emergency Application for a Stay to the United States Supreme Court. In the Emergency Application, Maximus foreshadowed the detailed arguments that would be used in support of a petition for certiorari to the Supreme Court on the basis that the *Swales* certification process should be used in lieu of *Lusardi* nationwide. In typical fashion for rejecting these sorts of bids, the Supreme Court denied the Emergency Application without explanation or comment.

Though the Supreme Court's ruling does not appear to bode well for proponents of the *Swales* certification standard, the significance of the stay denial (in the absence of any commentary) should not be overestimated. The Supreme Court may have based their decision to deny review on any number of factors. For example, the Court may have found the plaintiffs' arguments that Maximus did not sufficiently argue for a stay in the district court and the Fourth Circuit before filing a petition directly with the Supreme Court persuasive. The Court may also have denied the stay on the basis that the certiorari before judgement standard outlined in Supreme Court Rule 11, which requires "a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination" by the Supreme Court, was not met here.

None of this forecloses the Supreme Court from ultimately addressing these arguments in the future if they are pursued either through certiorari before judgment or through more typical channels. For example, in February, the Sixth Circuit agreed to hear an appeal on the *Swales* v. *Lusardi* issue in *In re: A&L Home Care and Training Center, et al.* (No. 21-0305); *In re: Holder, et al.,* (No. 21-0306), and that decision may be appealed to the Supreme Court as well.

In the meantime, it appears that Maximus will have to wait with the rest of us to see what future the Supreme Court may have in mind for FLSA collective action certification in the wake of *Swales.* We will continue to update the Employment and Labor Perspectives Blog as new developments on this issue continue to unfold.

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