Casenote

It's Their Party and They Can Opt in If They Want to: How the Eleventh Circuit Classifies Party Plaintiffs in an FLSA Collective Action*

I. INTRODUCTION

Congress enacted the Fair Labor Standards Act of 1938 (FLSA)[1] to rectify labor conditions that were injurious to the health, efficiency, and general well-being of laborers in the United States.[2] The Act requires employers who are subject to the FLSA to pay their employees at a rate of at least the federal minimum wage.[3] Additionally, the Act requires employers, whose hourly employees work more than forty hours per week, to compensate their employees for overtime at a rate of at least one and one-half times the employee's hourly rate of pay.[4] This Casenote will explore actions that are brought against employers that do not comply

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1. Pub. L. No. 75-718, 52 Stat. 1060 (codified at 29 U.S.C. §§ 201 to 209 (2018)).

2. 29 U.S.C. § 202 (2018). This code section explains that Congress intended to target industries that were engaged in commerce or the production of goods for commerce. *E.g.,* United States v. Darby, 312 U.S. 100 (1941). In *Darby*, the Supreme Court determined that the purpose of the FLSA is to exclude goods that were produced under substandard labor conditions from participating in interstate commerce. *Id.* at 109–10.

3. 29 U.S.C. § 206 (2018). As of July 24, 2009, the federal minimum wage for employees who are covered under the FLSA is $7.25 per hour. 29 U.S.C. § 206(a)(1)(C) (2018).

4. 29 U.S.C. § 207(a)(1) (2018).

with the federal compensation standards. In other words, it all comes down to dollars and cents.

Under federal law, one or more employees may bring an action against their employer(s) to recover overtime pay or minimum wages if it is alleged that the employer has violated FLSA standards.[5] Employees may file the action on behalf of themselves and other employees who are similarly situated.[6] A collective action, as defined by section 216(b),[7] requires individuals who are similarly situated to consent to being included in the class.[8] The purpose of the opt-in requirement is to control the number of minimum wage and overtime compensation disputes.[9] The provision also seeks to notify each individual or employee of his or her involvement in the collective action, which, in turn, ensures that no employee's rights are being litigated without their knowledge.[10] Although the named plaintiffs in a collective action may pursue the lawsuit on a representative basis, opt-in members of the class have the right to be present in court to support their own claims.[11] Nonetheless, members of a collective action who do not file a consent to join as party plaintiffs are not bound by the outcome, nor are they able to benefit from the judgment.[12] Circuits that have adopted the view that federal courts have a discretionary authority to order notice rely on the assertion that notice is required for the FLSA claims to receive treatment as a collective under section 216(b).[13] However, the provision does not explicitly require or authorize courts to provide notice.[14]

5. 29 U.S.C. § 216(b) (2018). This code section is categorized as a penalty for employers who do not adhere to the specific provisions of sections 206 or 207 of the FLSA. *Id.*

6. *Id.* Jurisdictions differ in their approaches to defining similarly situated. Ernest F. Lidge III, *Courts' Misuse of the Similarly Situated Concept in Employment Discrimination Law*, 67 MO. L. REV. 831, 863–64 (2002). However, courts will typically consider whether the employees have the same supervisor, similar responsibilities, and similar conduct. *Id.*

7. 29 U.S.C. § 216(b).

8. *Id.*

9. *Id.* "The FLSA's opt-in provision . . . demonstrates Congress's intent to ensure that parties with wage and hour claims under the FLSA take affirmative steps to become members of a class seeking redress of those claims in federal court." McClain v. Leona's Pizzeria, Inc., 222 F.R.D. 574, 577 (N.D. Ill. 2004) (The court declined to certify the collective action because of McClain's attempt to overcome the FLSA's opt-in requirement with supplemental state claims).

10. 29 U.S.C. § 216(b).

11. *Id.*

12. *Id.*

13. *See generally* Wesley Kobylak, Annotation, *Notice to Potential Class Members of Right to "Opt-In" to Class Action, Under § 16(b) of Fair Labor Standards Act (29 U.S.C.A. §216(b))*, 67 A.L.R. Fed. 282 (1984).

14. 29 U.S.C. § 216(b).

This Casenote will discuss how the United States Court of Appeals for the Eleventh Circuit has interpreted section 216(b) of the Fair Labor Standards Act in relation to opt-in plaintiffs and conditional certification in collective actions. This Note begins with the factual background of *Mickles v. Country Club, Inc.*,[15] a dispute between an exotic dancer at Goldrush Showbar (Goldrush) and her employer, Country Club, Inc., for the company's alleged violation of the compensation requirements established by the FLSA.[16] The case became a collective action when other Goldrush dancers opted into the lawsuit.[17] In a matter of first impression, the Eleventh Circuit addressed the question of whether an employee who opts into a collective action under section 216(b) of the FLSA is required to do anything other than file a written consent to become a party plaintiff.[18] In its holding, the Eleventh Circuit decided that the provision's language does not stipulate or require any additional action on the part of the opt-in plaintiff to become a party plaintiff to the suit.[19]

Secondly, this Casenote will provide a background of legal authorities from the Supreme Court of the United States and the Eleventh Circuit to illustrate the progression of the Eleventh Circuit's interpretation and application of section 216(b). Specifically, this Note will address how this circuit determines if the opt-in plaintiffs are similarly situated in order to certify the class. Moreover, this Casenote will explore the court's rationale in *Mickles*, which details how the cases included in the legal background of this Note influenced the court's decision. Finally, this Note will conclude with a discussion of the potential implications based on the Eleventh Circuit's decision in *Mickles* regarding the settlement strategy for employers, and how those implications relate to legislative intent.

II. FACTUAL BACKGROUND

In April of 2014, Andrea Mickles filed a complaint against her employer, Country Club, Inc. The complaint alleged various substandard labor conditions. Specifically, Mickles claimed that her employer improperly classified her and other employees as independent contractors and failed to pay them minimum wage or for their overtime work.[20] In addition, the plaintiff alleged that she was proceeding with the

15. 887 F.3d 1270 (11th Cir. 2018).

16. *Id.* at 1273–74.

17. *Id.* at 1274.

18. *Id.* at 1273.

19. *Id.*

20. *Id.* at 1273–74. The FLSA does not govern the working relationship between employers and independent contracts. *See* Hart v. Rick's Cabaret Int'l, Inc., 967 F. Supp.

lawsuit on behalf of herself and all other similarly situated employees. Country Club, Inc. answered the complaint and counterclaimed for various claims including money had and received, breach of contract, and a claim for unjust enrichment.[21]

Nearly two months after Mickles filed the complaint, three other employees opted into the litigation. Lauren Houston filed written consent to opt into the action on June 11, 2014. Shana McAllister and April Lemon filed their written consent with the court to opt into the suit against Country Club, Inc. on August 26, 2014. By filing their written consents, each employee agreed to become party plaintiffs in the collective action.[22]

However, discovery for the suit began four days before McAllister and Lemon filed their written consent forms.[23] The parties, Mickles and Country Club, Inc., agreed that all motions must be filed within thirty days of the beginning of discovery unless the court expressly permitted a party to file a motion after the deadline. This agreement between the parties was pursuant to the Northern District of Georgia's Local Rule 7.1(A)(2).[24] Despite the scheduling order, the discovery period was extended twice, and it officially concluded on April 6, 2015.[25]

On May 14, 2015, Mickles filed a conditional certification of a collective action motion.[26] The district court denied the motion due to the plaintiff's untimeliness as Mickles filed the motion nearly eight months after the deadline set by the local rule.[27] However, the conditional certification

2d 901, 911–13 (S.D.N.Y. 2013). Independent contractors bid and contract with employers to perform their own work. *Id.*

21. *Mickles*, 887 F.3d at 1273–74. A claim for money had and received has the following three elements: (1) an individual has received money that in equity he or she should not be permitted to keep; (2) a demand for repayment has been made; and (3) the demand was refused. Cappuccitti v. DirecTV, Inc., 623 F.3d 1118, 1126 n.20 (11th Cir. 2010). "An action for money had and received . . . is founded on the equitable principle that no one ought to unjustly enrich himself at the expense of another, and is a substitute for a suit in equity." Fernandez v. WebSingularity, Inc., 299 Ga. App. 11, 13, 681 S.E.2d 717, 721 (2009) (quoting Gulf Life Ins. Co. v. Folsom, 256 Ga. 400, 402, 349 S.E.2d 368, 370–71 (1986)).

22. *Mickles,* 887 F.3d at 1274.

23. *Id.*

24. *Id.* Under the Northern District of Georgia's Local Rule 7.1(A)(2), all "motions must be filed within thirty days after the beginning of discovery unless the filing party" was given prior permission of the court to file at a later date. N. DIST. GA. R. 7.1(A)(2).

25. *Mickles*, 887 F.3d at 1274. "Except in categories of actions exempted by local rule, the district judge . . . when authorized by local rule must issue a scheduling order." FED. R. CIV. P. 16(b)(1).

26. *Mickles*, 887 F.3d at 1274. During the conditional certification stage, a court is concerned with whether it is appropriate to send notice of the action to the putative class. Myers v. Hertz Corp., 624 F.3d 537, 555 n.10 (2d Cir. 2010).

27. *Mickles*, 887 F.3d at 1274.

order did not specify whether the other three employees (Houston, McAllister, and Lemon) were dismissed from the suit. On October 6, 2016, Country Club, Inc. filed a motion for clarification to determine which employees remained plaintiffs in the action.[28] All four employees believed they were parties because the court did not dismiss their claims in the conditional certification order.[29] Nonetheless, Country Club, Inc. asserted that Houston, McAllister, and Lemon did not formally become plaintiffs. This assertion would mean that the three employees who consented to opt in would have been removed from the collective action when the motion for conditional certification was denied.[30]

The United States District Court for the Northern District of Georgia granted Country Club Inc.'s clarification order. The order stated that Houston, McAllister, and Lemon were not properly added to the collective action because the court never determined if the three employees were similarly situated to Mickles.[31] Following the district court's clarification order, Mickles and Country Club, Inc. reached a settlement. The settlement was intended to resolve all of the substantive claims and counterclaims. Despite the settlement, the other employees filed a notice to appeal the district court's conditional certification order and the order that approved the settlement.[32] On appeal, the Eleventh Circuit answered two questions: (1) whether Houston, McAllister, and Lemon have appellate standing, and (2) whether the appellants can appeal the final judgment.[33]

III. LEGAL BACKGROUND

A. Defining the Legal Standard for "Similarly Situated" Employees

The United States Court of Appeals for the Eleventh Circuit began to define the standard for the similarly situated requirement and to interpret the court's power to notify similarly situated employees in *Dybach v. State of Florida Department of Corrections*.[34] Dybach was a Florida probation officer who was employed by the Department of Corrections. Dybach brought the action against her employer to recover overtime compensation and an additional amount as liquidated

28. *Id.* at 1274–75.

29. *Id.* at 1275.

30. *Id.*

31. *Id.* A motion for clarification is a request for the court to explain the meaning of a prior court order. *See id.*

32. *Id.*

33. *Id.*

34. 942 F.2d 1562 (11th Cir. 1991).

damages.[35] In addition to her claim, Dybach wanted to allow other similarly situated employees to opt into the suit.[36] However, the United States District Court for the Middle District of Florida denied the plaintiff's opt-in motion.[37] The district court reasoned that it lacked the authority to issue an order that required notice to similarly situated employees.[38] On appeal, the Eleventh Circuit determined that the purpose of the FLSA is better served when district courts are able to exercise the authority to provide notice to potential members of an opt-in class.[39] The court reasoned that this authority is acceptable as long as the district court finds that there are other individuals employed by the named plaintiff's employer who wish to opt in and who are similarly situated.[40]

The legal standard for the similarly situated requirement was further illustrated in *Grayson v. K Mart Corp*.[41] In January 1992, Grayson and ten other plaintiffs from Georgia and various surrounding states filed a complaint in the United States District Court for the Northern District of Georgia.[42] In their complaint, the plaintiffs alleged that they had each been demoted or terminated at the end of K Mart's 1990 fiscal year due to age discrimination which violated the Age Discrimination in Employment Act of 1967 (ADEA).[43] The complaint also stated that the action was filed on behalf of "other employees or former employees who may be similarly situated."[44] A similar complaint was filed by Carl Helton and four others in 1992, alleging another violation of the ADEA because the plaintiffs had been demoted at the end of the 1991 fiscal year. However, Helton's complaint did not specify that it was related to Grayson's complaint, or that their case should have been treated as a collective action. Therefore, Helton's case was assigned to a different

35. *Id.* at 1563. Liquidated damages are mandatory unless the employer can show that its FLSA violation occurred in good faith, and the employer had reasonable grounds to believe that the act was not a violation. *See* 29 U.S.C. § 216(b); *e.g.*, Reeves v. Int'l Tel. & Tel. Corp., 616 F.2d 1342, 1352 (5th Cir. 1980).

36. *Dybach*, 942 F.2d at 1563.

37. *Id.* at 1564.

38. *Id.* at 1567.

39. *Id.*

40. *Id.* at 1567–68.

41. 79 F.3d 1086 (11th Cir. 1996).

42. *Id.* at 1091.

43. Pub. L. No. 90-202, 81 Stat. 602 (codified at 29 U.S.C. §§ 621–634). The ADEA protects employees who are forty years or older from employment discrimination based on their age. *Id.*

44. *Grayson*, 79 F.3d at 1092.

judge in the Northern District. Nonetheless, the plaintiffs in both cases began the discovery process.[45]

Carl Helton and the additional opt-in plaintiffs later amended their complaint. The amendment specified that the action was now being brought on behalf of themselves and others who may be similarly situated.[46] Following the amendment, a number of the plaintiffs from Grayson's initial suit opted into Helton's collective action, which led to the most prominent issue in the case: whether a district court is required to find a "unified policy, plan or scheme of discrimination by the defendant before [the] 'opt-in' class may be maintained" under the similarly situated requirement of 216(b).[47] The Eleventh Circuit held that the similarly situated standard is lenient and flexible, and it does not require a unified policy, plan, or discrimination scheme.[48]

B. The Application of the Two-Tiered Approach in Collective Actions

In *Hipp v. Liberty National Life Insurance*,[49] the Eleventh Circuit clarified the meaning of "similarly situated" and suggested which approach courts should utilize to address the issue for collective actions under section 216(b).[50] Like *Grayson*, *Hipp* arose under the ADEA.[51] Nonetheless, plaintiffs who choose to sue as a class under the ADEA must follow the opt-in procedure provided in section 216(b) as well.[52] The named plaintiffs in *Hipp*, Hipp, McKown, and Stein, alleged that Liberty National Life Insurance Company (Liberty) violated the ADEA with a pattern of age discrimination that resulted in the plaintiffs' terminations. The complaint was brought on behalf of themselves and others who were similarly situated. Liberty then removed the case to the United States District Court for the Middle District of Florida. Following the removal, the plaintiffs amended their complaint to add Stell as a named plaintiff to the action. The plaintiffs informed the court that they intended to pursue the dispute as a collective action, and they wished to notify other employees about the opt-in class.[53] However, Liberty opposed this motion. Arguing in the alternative, the company contended that the plaintiffs were not similarly situated, but that, even if they were

45. *Id.*
46. *Id.* at 1093.
47. *Id.*
48. *Id.* at 1095–96.
49. 252 F.3d 1208 (11th Cir. 2001).
50. *Id.* at 1214.
51. *Id.*
52. 29 U.S.C. § 626(b) (2018).
53. *Hipp*, 252 F.3d at 1214–15.

similarly situated, their proposed notice was defective because "it would allow opt-in individuals who could not properly piggyback into the case."[54]

On appeal, the Eleventh Circuit's first determination was whether the plaintiffs were similarly situated.[55] The court pointed to the rule stated in *Grayson,* which states that plaintiffs only have to show that their positions are similar, not that they are identical.[56] The court agreed with Liberty's assertion that the two-tiered approach was proper to determine if opt-in plaintiffs were similarly situated.[57] The two-tiered approach allows for two different standards of review based on the phases of the litigation.[58]

Specifically, in the first stage, the court may apply a lenient standard which would likely result in the certification of an opt-in class.[59] The first stage, or the notice stage, is considered more lenient because the court is making its determination with very little evidence or information. The similarly situated determination at this stage is based on the pleadings or affidavits that may be filed with the court.[60] If the court conditionally certifies the opt-in class at this stage, then the action will move forward as a collective action throughout discovery.[61] The similarly situated issue is then considered at a later stage of the trial once discovery has uncovered more information in regard to the nature of the plaintiff's claims. The court has more information to make its determination at this stage, so the court is able to make a factual finding. If the plaintiffs are found to be similarly situated based on the facts, then the class is certified and the action may proceed to trial. However, if the court finds that the plaintiffs are not similarly situated, then the class is decertified. When a class is decertified, the opt-in plaintiffs' claims will be dismissed without prejudice.[62] The court in *Hipp* determined that no representative class has survived this strict stage of review.[63]

54. *Id.* The piggybacking rule permits an individual who did not file a charge with the Equal Employment Opportunity Commission (EEOC) to opt into a class employment discrimination suit by "piggybacking" onto a timely charge that was filed by a named plaintiff. *See* Mooney v. Aramco Servs. Co., 54 F.3d 1207, 1223 (5th Cir. 1995). The majority of circuits recognize the piggybacking rule when adjudicating ADEA cases. *E.g., id.*

55. *Hipp*, 252 F.3d at 1217.

56. *Id.* (citing *Grayson*, 79 F.3d at 1096).

57. *Id.* at 1219.

58. *Id.* at 1217–18.

59. *Id.* at 1217.

60. *Id.* at 1218.

61. *Id.*

62. *Id.*

63. *Id.*

Despite the court's detailed explanation of the two-tiered approach, the court held that the section 216(b) similarly situated requirement is elastic.[64] Although the approach is an effective technique to evaluate cases of this nature, district courts are not required to follow the approach because class certification is discretionary.[65]

After identifying the preferred approach for conditional certification, the Eleventh Circuit was presented with the narrow issue of determining if opt-in plaintiffs were required to consent to each FLSA claim that was alleged on a complaint, such as when the complaint is amended to add FLSA claims after the party plaintiffs have consented to the named party's original complaint. The named plaintiffs in *Prickett v. DeKalb County*[66] were employees of the Fire Services Bureau of the DeKalb County Department of Public Safety. The plaintiffs filed two claims against the county to recover their overtime compensation. The case grew into a collective action when hundreds of additional plaintiffs opted into the suit by filing written consent forms.[67] Prickett along with the other named plaintiffs filed a motion under Federal Rules of Civil Procedure 15(d)[68] to supplement their complaint in order to add a third FLSA claim. The United Stated District Court for the Northern District of Georgia granted the motion, but later granted summary judgment to the County on each claim.[69] The Eleventh Circuit affirmed the dismissal of the first two claims, but vacated and remanded the third claim for further consideration.[70] However, on remand, the lower court found that the opt-in plaintiffs were not parties to the third claim because they did not file new consent forms after the complaint was amended. The lower court reasoned that plaintiffs who opt in to collective actions under section 216(b) are only plaintiffs to the claims that were alleged at the time they opted in.[71]

On appeal, the Eleventh Circuit looked to the legislative intent that was expressed in the language of the provision, and the court held that the provision indicates that plaintiffs consent to joining the collective action as a whole and not merely specific claims.[72] The court

64. *Id.* at 1219.

65. *Id.*

66. 349 F.3d 1294 (11th Cir. 2003).

67. *Id.* at 1295–96.

68. FED. R. CIV. P. 15(d). This federal rule allows a court to permit a party to serve a supplemental pleading setting out any "transaction, occurrence, or event that happened after the date of the pleading to be supplemented." *Id.*

69. *Prickett*, 349 F.3d at 1296.

70. *Id.*

71. *Id.*

72. *Id.* at 1297.

acknowledged that Congress sought to avoid multiple lawsuits where numerous employees have alleged violations of the FLSA, and it opined that if new consent forms were required for each claim, that would work against the legislative purpose of section 216(b).[73] The Eleventh Circuit concluded that when consent is given, it is given for the named plaintiffs to act on a representative basis in the adjudication of any and all claims under the FLSA.[74]

C. Applying the Two-Tiered Approach and Its Impact on Discovery in District Courts

Brenda Ledbetter filed a complaint in the United States District Court for the Middle District of Georgia on behalf of herself and other employees who were similarly situated alleging that her employer violated the FLSA.[75] Ledbetter argued that the Pruitt Corporation (Pruitt) had a policy that deducted a thirty-minute meal period from their employee's compensation even if the meal period was not taken. Ledbetter contended that this policy violated the FLSA, and she sought the recovery of unpaid minimum wages and overtime pay. The plaintiff filed a motion for the court to conditionally certify the case as a collective action. Specifically, the certification would authorize notice to other employees who were employed by Pruitt within the last three years and allow them to opt into the suit. After Ledbetter filed the complaint, five other employees opted in by filing their consent to become party plaintiffs. Ledbetter and the other opt-in plaintiffs were all hourly employees who were employed at two nursing home facilities that contracted with Pruitt. Specifically, Pruitt contracted with Peake Healthcare in Macon, Georgia and Hilltop Nursing Home located in Forsyth, Georgia.[76]

In her motion for conditional certification, Ledbetter requested the application of the "fairly lenient standard" from the first stage of the analysis used in *Hipp*.[77] However, the district court reasoned that this case called for a more "searching standard of review" because the named plaintiff filed the motion for certification two weeks after the expiration

73. *Id.*

74. *Id.*

75. Ledbetter v. Pruitt Corp., No. 5:05-CV-329 (CAR), 2007 U.S. Dist. LEXIS 10243, at *1 (M.D. Ga. Feb. 12, 2007).

76. *Id.* at *1–3.

77. *Id.* at *6. In the two-step analysis, courts describe the fairly lenient standard as a flexible standard that limits a district court's broad discretion when determining certification. Morgan v. Family Dollar Stores, Inc., 551 F.3d 1233, 1261 (11th Cir. 2008).

of the discovery period.[78] The court reasoned that a lenient standard cannot be applied when the plaintiff has already had the opportunity to look into the defendant's policies.[79] Therefore, the court declined to conditionally certify the case as a collective action under the notice stage of *Hipp*'s analysis.[80] The court found that when discovery is complete, the appropriate standard for conditional certification is found in the second stage of *Hipp*'s analysis.[81]

Despite Ledbetter's allegations, the court denied the motion for conditional certification because it concluded that each minimum wage and overtime compensation claim would have to be analyzed on an individual basis.[82] The opt-in plaintiffs were not permitted to move forward in the action because the court determined that despite their written consent, their claims did not warrant collective treatment.[83] The court in *Ledbetter* reasoned that the certification of a collective action was required to proceed under the FLSA.[84]

D. Understanding the Purpose of a Conditional Certification for Collective Action

The Supreme Court of the United States tackled the issue of interpreting the requirements of section 216(b) in *Genesis HealthCare Corp. v. Symczyk*.[85] Genesis Healthcare Corporation (Genesis) employed Laura Symczyk as a registered nurse for nearly eight months. Genesis had a policy that automatically deducted pay for meal periods even if the meal periods were not used. Asserting that this policy was a violation of the FLSA, Symczyk filed a collective action to recover her unpaid wages.[86] In 2010, pursuant to Federal Rule of Civil Procedure 68,[87] the corporation offered to reimburse Symczyk's unpaid wages plus attorney's fees.[88] Genesis advised the plaintiff that she had ten days to accept the offer, but the plaintiff did not respond, and it was deemed withdrawn.

78. *Ledbetter*, 2007 U.S. Dist. LEXIS 10243, at *7.
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.* at *16.
83. *Id.*
84. *Id.*
85. 569 U.S. 66 (2013).
86. *Id.* at 69.
87. FED. R. CIV. P. 68.
88. *Genesis Healthcare Corp.*, 569 U.S. at 69. A defendant may serve an offer to allow judgment on specified terms on the opposing party. FED. R. CIV. P. 68(a). However, the offer must be made at least fourteen days before the trial date. *Id.*

Genesis filed a motion to dismiss arguing that the named plaintiff did not have an interest in the outcome of the case because she did not accept its offer. The district court agreed and granted the dismissal because Symczyk did not respond to the offer of judgment provided by Genesis, and no other employee had opted into the action.[89]

On appeal, the United States Court of Appeals for the Third Circuit reversed and held that a full offer of relief would not warrant the dismissal of a collective action because the named plaintiff must be given the opportunity to seek conditional certification.[90] The Supreme Court of the United States granted certiorari to determine whether the case was justiciable when the plaintiff's claim became moot and no other plaintiffs had opted into the suit.[91] The majority concluded that the case was not justiciable.[92] However, in its explanation of justiciability the court also defined the intent and purpose of conditional certification for section 216(b) collective actions.[93]

The Supreme Court held that conditional certification is solely for notice purposes, and it will not create a class of party plaintiffs on its own because members of a collective action must affirmatively opt in.[94] Specifically, the Court reasoned that conditional certification does not create a class with an independent legal status.[95] A conditional certification merely gives a court the authority to notify other employees about the pending collective action.[96]

IV. COURT'S RATIONALE

In *Mickles v. Country Club, Inc.*,[97] Judge Susan H. Black, writing for the majority, held that, in a matter of first impression, there were no other requirements for employees who opted in to become party plaintiffs other than filing their written consents.[98] Additionally, the United States Court of Appeals for the Eleventh Circuit concluded that an order approving the settlement of a class representative's individual FLSA

89. *Genesis Healthcare Corp.*, 569 U.S. at 69–70.
90. *Id.* at 70–71.
91. *Id.* at 69.
92. *Id.*
93. *Id.* at 75.
94. *Id.*
95. *Id.*
96. *Id.*
97. 887 F.3d 1270 (11th Cir. 2018).
98. *Id.* at 1273.

collective action was an appealable final judgment; and the denial of the motion for conditional certification in the present case was warranted.[99]

To answer the first issue regarding appellate standing, the Eleventh Circuit looked at the language of the FLSA provision, 29 U.S.C. § 216(b).[100] The statutory language provides that in order for a plaintiff to be considered a class member, the plaintiff must opt into a collective action by filing written consent with the court, and by filing a written consent, a class member becomes bound by the outcome of the action.[101] The court determined that section 216(b) only contained two requirements for collective actions: (1) the named plaintiff is required to file on behalf of herself and on behalf of other similarly situated employees, and (2) employees who wish to opt into the collective action must file their consent in writing with the court.[102] In the present case, only the first requirement was in dispute between the opt-in plaintiffs and Country Club, Inc. because the district court did not find that the three opt-in plaintiffs were similarly situated to Mickles.[103] A determination of whether the opt-in plaintiffs were similarly situated was essential to decide if the employees had appellate standing.

The court explained that the suggested approach for a similarly situated determination is the *Hipp v. Liberty National Life Insurance Co.*[104] analysis.[105] This analysis is a two-tiered approach that has a notice stage and a stage which is "precipitated by a motion for decertification from the defendant."[106] The Eleventh Circuit determined that the United States District Court for the Northern District of Georgia did not employ the recommended approach because the district court denied Mickles' motion for certification due to untimeliness, and therefore, it could not have made a similarly situated determination at either stage.[107] Following this determination, the court of appeals once again considered the specific language of section 216(b).[108]

In its second look at the provision, the Eleventh Circuit concluded that the language supported the inference that those who opt into a collective

99. *Id.* at 1278–80.
100. *Id.* at 1275.
101. *Id.* at 1275–76.
102. *Id.* at 1276.
103. *Id.*
104. 252 F.3d 1208 (11th Cir. 2001).
105. *Mickles*, 887 F.3d at 1276.
106. *Id.*
107. *Id.* at 1277.
108. *Id.* at 1278.

action become parties to the action upon filing their written consent.[109] Furthermore, the court determined that conditional certification was not required under the FLSA provision.[110] Therefore, the opt-in plaintiffs will remain parties to the action until the district court properly dismisses them by finding that the plaintiffs are not similarly situated.[111] This holding gave Houston, McAllister, and Lemon appellate standing.[112]

Secondly, the court needed to determine whether the appellants could have appealed the final judgment. The court determined that the only appealable final judgment from the lower court was the order which approved the settlement agreement between Mickles and Country Club, Inc.[113] Moreover, Houston, McAllister, and Lemon would have been unable to appeal from the conditional certification order because it was not a final order that dismissed the case.[114]

The appellants argued that the district court abused its discretion by denying the conditional certification, but the Eleventh Circuit rejected this argument and held that there was not an abuse of discretion because the filing of the conditional certification motion was in fact untimely.[115] Mickles was not given prior permission as required by Local Rule 7.1(A)(2) to file the motion.[116] Nonetheless, the court agreed with the appellant's position that the lower court's conclusion that the opt-in plaintiffs were nonparties to the clarification order was virtually the same as dismissing the plaintiffs with prejudice.[117] When the conditional certification for a collective action is denied, the existing opt-in plaintiffs are "dismissed from the lawsuit without prejudice and the matter proceeds on the named plaintiff's individual claims."[118] Therefore, the district court erred in finding that the appellants were nonparties in the clarification order.[119]

V. IMPLICATIONS

When Congress originally enacted the FLSA, the Act did not include an opt-in requirement, but it allowed plaintiffs to find a representative

109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.* at 1278–79.
114. *Id.* at 1279.
115. *Id.* at 1279–80.
116. *Id.*
117. *Id.* at 1280.
118. *Id.*; *e.g.*, Fox v. Tyson Foods, Inc., 519 F.3d 1298, 1301 (11th Cir. 2008).
119. *Mickles*, 887 F.3d at 1281.

who would pursue the action against the employer on behalf of all of the similarly situated employees.[120] However, Congress amended the collective action provision with the Portal-to-Portal Act of 1947[121] due to a significant number of lawsuits that were brought by plaintiffs who did not have actual or reasonable interests in the outcome of the suit.[122] The Portal-to-Portal Act eliminated representative actions, and it required putative class members to file written consent with a federal court to become a party to a FLSA collective action.[123] The intent of the amendment was to allow employees to combine their resources during litigation and to promote judicial efficiency by allowing the courts to adjudicate the claims of all similarly situated employees in FLSA litigations.[124] When section 216(b)'s drafting history is considered, the outcome of *Mickles* aligns with the intent of the enacting Congress.

Following a district court's denial of a conditional certification, the routine procedure is to allow the former opt-in plaintiffs to refile and pursue their claims individually (as those plaintiffs were dismissed from the case without prejudice).[125] Nonetheless, following the decision in *Mickles*, employers will still have to defend claims against opt-in plaintiffs even if the court has not certified the class. A class certification essentially signified that each class member was similarly situated to the named plaintiff and that the plaintiffs' claims arose out of similar conduct by their employer. Moreover, prior to *Mickles*, a frequent occurrence in labor and employment litigation was for employers and their counsel to offer a settlement in the early stages of the lawsuit.[126] This strategy allowed employers to not only settle, but to be released of any claims (including counterclaims) that were brought by employees before other plaintiffs had the opportunity to opt in. This strategic maneuver attracted employers because most courts were reluctant to certify a class or issue notice to any additional putative members after a

120. *See generally* Scott A. Moss, *The Second-Class Action: How Courts Thwart Wage Rights by Misapplying Class Action Rules*, 61 AM. U. L. REV. 523, 543 (2012).

121. Pub. L. No. 80-49, 61 Stat. 84 (codified at 29 U.S.C. §§ 251–262 (2018)).

122. Hoffman-La Roche, Inc. v. Sperling, 493 U.S. 165, 173 (1989).

123. 29 U.S.C. § 254 (1947). The FLSA adopted the provision that "[n]o employee shall be a party plaintiff to any such action unless he 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).

124. Nerland v. Caribou Coffee Co., 564 F. Supp. 2d 1010, 1025 (D. Minn. 2007).

125. *Mickles*, 887 F.3d at 1280 (citing *Fox*, 519 F.3d at 1301). Additionally, the Eleventh Circuit instructed the lower court on remand to dismiss the appellants without prejudice, or to allow the appellants to proceed with their claims individually. *Id.* at 1281.

126. Symposium, *Employment Litigation: Emerging Trends in Wage & Hour Litigation After* Dukes v. Wal-Mart, 9 J.L. ECON. & POL'Y 347, 349 (2013).

settlement. This gave employers a clear advantage because potential classes were divided, and each member of the class would have to pursue a lawsuit on an individual basis. This result clashed with the legislative intent of section 216(b) because Congress enacted section 216(b) to allow employees to merge their resources.

However, the decision in *Mickles* eliminates this settlement tactic for employers in the Eleventh Circuit. Previously, the settlement option only applied to the opt-in plaintiffs who were already found to be similarly situated.[127] Now, there is a greater chance that if an employer offers a settlement at the early stage of an FLSA collective action, it may end up writing settlement checks to opt-in plaintiffs who have no relation or similarities to the named party plaintiff. Arguably, it would now be more reasonable for employers to wait until the second stage of the two-tiered approach before offering to settle the case. If not, the employer risks a larger payout than what may actually be necessary.

While the decision in *Mickles* may impair litigation strategies for employers, this outcome produces a greater incentive for employees to bring claims regarding FLSA violations against their employers. The FLSA is a deterrent that protects laborers from substandard working conditions and ensures fair compensation. *Mickles* exemplifies the legislative intent of section 216(b) by not dividing the class and allowing the Goldrush employees to continue their suit as a collective so that each opt-in plaintiff is able to have their claim heard in federal court.

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127. *See, e.g.*, La Parne v. Monex Deposit Co., No. SACV 08-0302 DOC (MLGx), 2010 U.S. Dist. LEXIS 131029, at *7–9 (C.D. Cal. Nov. 29, 2010); *see also* Michael W. Hawkins, *Current Trends in Class Action Employment Litigation*, 19 LAB. L. 33 (2003).