FILED
United States Court of Appeals
Tenth Circuit

March 27, 2017

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

In re: CHIPOTLE MEXICAN GRILL, INC., Petitioner.	No. 17-1028 (D.C. No. 1:14-CV-02612-JLK) (D. Colo.)

ORDER DENYING PETITION FOR MANDAMUS RELIEF

Before **LUCERO**, **O'BRIEN**, and **MATHESON**, Circuit Judges.

Chipotle Mexican Grill, Inc., petitions this court for a writ of mandamus vacating the district court's joinder of 10,000 opt-in plaintiffs to the underlying collective action brought pursuant to the Fair Labor Standards Act (FLSA). Chipotle requests we remand with instructions to dismiss all of the opt-in plaintiffs or, alternatively, remand with instructions to permit discovery (to determine which opt-in plaintiffs are similarly situated) and to give Chipotle the opportunity to decertify the collective. We deny the petition.

I. The Writ of Mandamus Standard

"Only exceptional circumstances, amounting to a judicial usurpation of power, will justify the invocation of [the] extraordinary remedy [of mandamus]." *In re Cooper Tire & Rubber Co.*, 568 F.3d 1180, 1186 (10th Cir. 2009) (internal quotation marks omitted). "Mandamus is not the same as, nor is it a substitute for, a direct appeal." *In re Motor Fuel Temperature Sales Practices Litig.*, 641 F.3d 470, 487 (10th Cir. 2011).

Therefore, "[t]here must be more than what we would typically consider to be an abuse of discretion in order for the writ to issue." *Cooper Tire*, 568 F.3d at 1186. The petitioner must show it has "no other adequate means to attain the relief [it] desires" and its "right to the writ is clear and indisputable." *Id*. at 1187 (internal quotation marks omitted). Further, this court, "in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." *Id*. (internal quotation marks omitted).

We have identified five nonconclusive factors for consideration in determining whether the writ may issue:

> (1) whether the party has alternative means to secure relief; (2) whether the party will be damaged in a way not correctable on appeal; (3) whether the district court's order constitutes an abuse of discretion; (4) whether the order represents an often repeated error and manifests a persistent disregard of federal rules; and (5) whether the order raises new and important problems or issues of law of the first impression.

Id. (internal quotation marks omitted).

II. Our FLSA Precedent

The FLSA ensures certain employers pay their employees the minimum wage and overtime compensation if earned. *See* 29 U.S.C. §§ 206–07. To enforce these laws, it creates a private right of action for "one or more employees" to bring an action against their employer to recover unpaid wages or overtime compensation on "behalf of himself or themselves and other employees similarly situated." *Id*. § 216(b). Though "similarly situated" is not defined by the FLSA, *see Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1102 (10th Cir. 2001), district courts must determine who is similarly situated in a "manner that is orderly, sensible, and not otherwise contrary to statutory commands or

the provisions of the Federal Rules of Civil Procedure." *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 170 (1989).

In *Thiessen*, we discussed three different approaches district courts use to determine who is similarly situated: the *ad hoc* approach, the Rule 23 approach, and the spurious approach. 267 F.3d at 1102–03. Under the two-step certification or "*ad hoc*" approach, a court "makes an initial notice stage determination of whether plaintiffs are similarly situated," requiring "nothing more than substantial allegations that the putative class members were together the victims of a single decision, policy, or plan." *Id*. at 1102 (internal quotation marks omitted). Then, after discovery, the court makes a second, stricter similarly-situated determination considering "(1) disparate factual and employment settings of the individual plaintiffs; (2) the various defenses available to defendant which appear to be individual to each plaintiff; (3) fairness and procedural considerations; and (4) whether plaintiffs made the filings required by the [FLSA] before instituting suit." *Id*. at 1103 (internal quotation marks omitted).

Under the Rule 23 approach, "courts have incorporated into § 216(b) the requirements of current Federal Rule of Civil Procedure 23," using "numerosity, commonality, typicality, and adequacy of representation and 23(b)(3)'s requirement that common questions of fact predominate . . . to determine whether plaintiffs are similarly situated." *Id*. (internal quotation marks omitted). Finally, under the spurious approach, courts incorporate into § 216(b) the pre-1966 requirements of Rule 23 based on the Advisory Committee notes, which are: (1) "the character of the right sought to be enforced . . . must be several," (2) "there must be a common question of law or fact

affecting the several rights," and (3) "a common relief must be sought." *Id*. (internal quotation marks omitted). We concluded the district court in *Thiessen* did not abuse its discretion in adopting the *ad hoc* approach in a case under the Age Discrimination in Employment Act. *Id*. at 1105.

III. The District Court's Approach

In this case, the district court first determined that the "'certification' rubric borrowed from Rule 23 has no place in wage claim litigation under the FLSA." *Turner v. Chipotle Mexican Grill, Inc*., 123 F. Supp. 3d 1300, 1305 (D. Colo. 2015). Instead, with heavy reliance on scholarship, the court concluded that "[j]oinder under § 216(b) is . . . even more lenient than joinder or intervention under" Rules 19, 20, and 24. *Id*. at 1306. More specifically, it noted that, for the first 50 years after enactment of the FLSA, § 216(b) actions were akin to spurious class actions under the old Rule 23(a)(3). *Id*. The certification mechanism later incorporated by the *ad hoc* approach was, according to the court, borne of the 1966 amendments to Rule 23 to protect "the right to due process for absent parties." *Id*. at 1307. The court reasoned, however, that because all parties to a FLSA action have to affirmatively opt into the suit, there is no need to involve such certification requirements for the sake of absent parties. *Id*.

Thus, the court found other courts have improperly conflated Rule 23's requirements "with the liberalized joinder device of collective actions" and concluded that the proper approach "is to presumptively allow workers bringing the same statutory claim against the same employer to join as a collective, with the understanding that individuals may be challenged and severed from the collective if the basis for their

joinder proves erroneous" under Rule 21. *Id*. at 1307, 1309. In this vein, the district court hewed closely to the spurious approach, as misjoinder under Rule 21 "occurs when there is no common question of law or fact." *See DirecTV, Inc. v. Leto*, 467 F.3d 842, 844 (3d Cir. 2006); *Thiessen*, 267 F.3d at 1103 (noting the spurious approach requires a common question of law or fact and a request for common relief).

IV. Discussion

Chipotle first alleges that the district court ignored *Thiessen* in reaching its decision. Specifically, Chipotle argues that *Thiessen* does not accord the district court discretion to choose between various approaches to conducting FLSA collective actions and, even if it did, the district court would be limited to creating certification mechanisms consistent with *Thiessen*. Nothing in *Thiessen* issues such a mandate. Though we opined that the two-step process is arguably the best of the three approaches we examined, we also noted that "there is little difference in the various approaches. All approaches allow for consideration of the same or similar factors, and generally provide a district court with discretion to deny certification for trial management reasons." 267 F.3d at 1105. Chipotle surmises our note about "the same or similar factors" acts as a sword against the district court's determination, but this reading ignores the context in which we decided *Thiessen*. Our ultimate holding on this issue was limited to finding "no error" for "adopting the *ad hoc* approach"; we did not adopt this approach as mandatory within our circuit. *Id*. Indeed, we noted "there [was] little circuit law on the subject," acknowledging the district courts' flexibility to determine whether plaintiffs are similarly situated. *Id*. at 1102. Thus, nothing in *Thiessen* proscribes the district court from

following the spurious approach consistent with § 216(b), leaving Chipotle without a "clear and indisputable" right on which to base its request for mandamus relief. *Cooper Tire*, 568 F.3d at 1187 (internal quotation marks omitted).

Chipotle next contends that the district court's orders violate its due process rights by "certifying a collective . . . without any reasoned threshold determination that a collective action is appropriate." Pet. at 18. Chipotle maintains the district court's spurious approach (requiring only opt-in plaintiffs' consent at this stage and placing the burden on Chipotle to "winnow" the collective thereafter) is contrary to § 216(b)'s "threshold requirement" that plaintiffs be similarly situated, thus depriving it of the opportunity to assert defenses. Pet. at 20–22 (internal quotation marks omitted). But Chipotle's repeated reference to a threshold determination is misplaced, as there is no statutory mandate for any initial determination; the only requirement that § 216(b) imposes is that plaintiffs be similarly situated. Chipotle identifies no authority from the Supreme Court or this court stating otherwise or prohibiting the district court's construction of the collective formation process here. It points mostly to district courts that have approached the determination differently. Chipotle thus conflates § 216(b)'s requirement with some sort of burden on the plaintiffs to prove similarity prior to formation of the collective. For our purposes, the district court's order is consistent with § 216(b).[1] We note that, despite Chipotle's protestations about the proper burden, the

[1] Just as we did in *Thiessen*, we make no definitive determination on the merits of using the spurious approach as opposed to either of the others. We merely state that, under our existing precedent, the district court's order is not such a gross abuse of

(continued)

district court has yet to formally finalize the collective. It may be cumbersome for Chipotle to winnow down the collective. But Chipotle has not established that it has a "clear and indisputable" right to escape this task. *Cooper Tire*, 568 F.3d at 1187 (internal quotation marks omitted).

Finally, Chipotle argues that the district court's orders conflict with the Supreme Court's mandate that "any process used to establish a § 216(b) collective be 'not otherwise contrary to' the [Rules]." Pet. at 24 (quoting *Hoffmann-La Roche*, 493 U.S. at 170). Chipotle asserts that the district court's approach exceeds Rule 20's requirement that the suit arise from the same "transaction, occurrence, or series of transactions or occurrences." Pet. at 24 (internal quotation marks omitted). But we have never said so, and at least one circuit has expressly approved of the district court's approach here. *See Grayson v. K Mart Corp.*, 79 F.3d 1086, 1096 (11th Cir. 1996) ("We hold that section 216(b)'s 'similarly situated' requirement is less stringent than that for joinder under Rule 20(a)."). And in any event, to the extent that *Hoffmann-La Roche* confines the scope of § 216(b) to the scope of Rule 20, the district court's joinder of the opt-in plaintiffs in this suit is not such a gross abuse of discretion to warrant mandamus in light of the flexibility inherent to Rule 20. *See Mosley v. Gen. Motors Corp.*, 497 F.2d 1330, 1333 (8th Cir. 1974) (stating "all logically related events entitling a person to institute a legal action against another generally are regarded as comprising a transaction or

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discretion as to warrant mandamus relief. We do not decide the propriety of the district court's actions in any other respect.

occurrence" (internal quotation marks omitted)); *id*. ("[A] case by case approach is generally pursued."); *id*. ("Absolute identity of all events is unnecessary.").

In *Mosley*, the Eighth Circuit held on interlocutory appeal that the district court abused its discretion severing joined actions alleging a racially discriminatory policy. *Id*. at 1334. Meanwhile, the Fifth Circuit affirmed a district court's "wide discretion to conclude that trying [FLSA] claims together would be too challenging logistically, given the divergent working conditions at each store." *Acevedo v. Allsup's Convenience Stores, Inc*., 600 F.3d 516, 522 (5th Cir. 2010). Given that the Plaintiffs have plausibly alleged an automated program clocking them out at a certain hour for each opt-in plaintiff, there is no weight of authority that clearly and indisputably removes such a policy from the realm of the district court's "wide discretion." *Id*. Mandamus is thus inappropriate.

In the end, the only potentially problematic concern Chipotle raises is the specter of thousands of opt-in plaintiffs found by the district court to be misjoined and subsequently severed into what could be an absurd number of lawsuits. Chipotle, however, has no certainty that the district court would proceed in this manner. Under Rule 21, the district court retains the flexibility to sever the actions or enter a final judgment of dismissal "in either one of the resulting two actions notwithstanding the continued existence of unresolved claims in the other." *Reinholdson v. Minnesota*, 346 F.3d 847, 850 (8th Cir. 2003) (internal quotation marks omitted). Though the district court here might be limited to severance (rather than dismissal) if the statute of limitations has expired, *see Strandlund v. Hawley*, 532 F.3d 741, 746 (8th Cir. 2008), it is still speculative to assume that each misjoined opt-in plaintiff would merit a singular

lawsuit as opposed to a grouping scheme the district court has discretion to determine. It would therefore be premature to consider mandamus relief in connection with the district court's handling of any misjoined plaintiffs.

The district court's approach to these threshold issues may be debatable, but Chipotle has not shown its "right to the writ is clear and indisputable." *Cooper Tire*, 568 F.3d at 1187 (internal quotation marks omitted). Accordingly, we deny the petition.

Entered for the Court

ELISABETH A. SHUMAKER, Clerk