

Discovery and Summary Judgment Strategies in FLSA Collective Actions

I. INTRODUCTION

Procedural stages unique to FLSA collective actions shape litigation strategies, including the effective use of discovery and summary judgment. In most instances, the court engages in a two-step process in determining whether to allow the litigation to proceed as a collective action. First, the court makes an initial “notice stage” determination whether the named plaintiffs and potential class members are sufficiently “similarly situated” to support conditional certification and issuance of notice to putative class members. At the second stage of the process, the court evaluates the evidence obtained in discovery and otherwise in the record to determine whether the employment circumstances and possible defenses are too individualized to make collective treatment appropriate.¹

Discovery in FLSA collective actions may be conducted both before and after conditional certification of the opt-in plaintiff class. The two-step process presents defense counsel with two opportunities to show that putative class members are not sufficiently similar to allow collective treatment. During discovery, defense counsel must also keep in mind the possibility of a future summary judgment motion and the importance of gathering evidence to support the employer’s defenses should the action proceed to trial. This overall approach to discovery is essential to an effective defense. However, counsel should not assume that there is a single discovery strategy “blueprint” for success in FLSA collective actions. Rather, the approach must be customized to take into account the circumstances of the action and the changing considerations at each stage of the process.

II. DISCOVERY BEFORE CONDITIONAL CERTIFICATION

Defense counsel must make an early assessment about whether to oppose issuance of notice to prospective class members. Typically, without any or limited discovery, conditional certification of a collective action for purposes of providing notice to putative class members requires only that plaintiffs assert “substantial allegations” that putative class members were victims of a single decision, policy or plan.² Within this standard there are different levels of

¹ See *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1213-14 (5th Cir. 1995) (explaining the two-stage class certification approach); see also David Borgen & Laura L. Ho, *Litigation of Wage and Hour Collective Actions Under the Fair Labor Standards Act*, 7 EMPLOYEE RTS. & EMP. POL’Y J. 129, 134-35 (2003) (concluding that the two-step “ad hoc” approach has become the preferred method for determining whether plaintiffs are sufficiently similarly situated for class treatment).

² The burden for demonstrating that potential plaintiffs are “similarly situated” is generally low at the notice stage. Some courts require only a “modest factual showing” that the plaintiff and potential collective action members were victims of a “common policy or plan that violated the law.” *Lynch v. US Auto. Ass’n*, 491 F. Supp. 2d 357, 368-69 (S.D.N.Y. 2007) (quoting *Iglesias-Mendoza v. La Belle Farm, Inc.*, 239 F.R.D. 363, 367-68 (S.D.N.Y. 2007)).

leniency applied by the courts.³ Where the defendant intends to oppose notice, defense counsel *must* persuade the court not to apply the lenient “first stage” standard because opposing notice under this standard is difficult.

Discovery is the most important tool for convincing the court to apply a more stringent standard to conditional certification and issuance of notice. A defendant intending to oppose conditional certification should conduct early discovery with a goal of developing a sufficient record that will reveal not only dissimilarities among class members, but also lead the court to apply a stricter standard when considering conditional certification.

Although most courts apply the two-stage process with a low burden for plaintiffs at the notice stage, experience reveals a continuum of stringency, with the quantity of evidence in the record bearing proportionately on the evidentiary standard the court will apply to conditional certification. Much of the underlying rationale for application of a lower standard at the notice stage is *because* discovery is incomplete.⁴ Although some courts may rigidly adhere to the two-stage process and the lenient standard at the notice stage,⁵ other courts adopt a more pragmatic approach and consider all the evidence in the record in determining the level of scrutiny to apply when deciding whether the plaintiff’s evidence supports conditional certification. This has been referred to as a “collapsing” of the two-step process, although not all courts characterize it in this fashion.

In *Hinojos v. Home Depot, Inc.*, the extensive discovery evidence submitted by defendant was explicitly cited by the district court in its decision to skip ahead to a second stage analysis of

³ *Smith v. Sovereign Bancorp, Inc.*, No. 03-2420, 2003 U.S. Dist. LEXIS 21010, at *5-8 (E.D. Pa. Nov. 13, 2003) (comparing “mere allegation” standard with the “modest factual showing” standard and rejecting the former as “render[ing] preliminary class certification automatic as long as the Complaint contains the magic words ‘Other employees similarly situated.’”).

⁴ “Because the court has minimal evidence, this determination is made using a fairly lenient standard, and typically results in ‘conditional certification’ of a representative class.” *Mooney*, 54 F.3d at 1214; *see also Renfro v. Spartan Computer Servs., Inc.*, No. 06-2284-KHV, 2007 U.S. Dist. LEXIS 45157, at *12 n.4 (D. Kan. June 20, 2007) (“the Court is not inclined to apply the heightened second stage certification analysis on the minimal amount of discovery before it.”); *Gieseke v. First Horizon Home Loan Corp.*, 408 F. Supp. 2d 1164, 1166 (D. Kan. 2006) (“The court typically makes the determination fairly early in the litigation, before the parties complete discovery.” (citing *Brown v. Money Tree Mortgage, Inc.*, 222 F.R.D. 676, 679 (D. Kan. 2004))); *Masson v. Ecolab, Inc.*, No. 04 Civ. 4488 (MBM), 2005 U.S. Dist. LEXIS 18022, at *44 (S.D.N.Y. Aug. 17, 2005) (“At this stage, these factual issues do not bear on whether this case can proceed as a collective action. . . . Too little discovery has been taken to [determine applicability of the motor carrier exemption] now.”).

⁵ *See Renfro*, 2007 U.S. Dist. LEXIS 45157, at*12 n.4 (providing examples of courts unwilling to collapse the first and second steps of the certification process, and rejecting defense arguments that the court “should not postpone the inevitable determination that putative class members are not similarly situated and should consider all evidence produced in discovery to this point.”).

whether the lawsuit was suitable for collective action.⁶ Plaintiffs alleged off-the-clock work and time shaving. The named plaintiffs, who had worked in three of the defendant's Nevada stores, sought court-authorized notice to an exceedingly large nationwide class: all full-time current and former hourly employees at more than 1,800 stores. Defense counsel pursued early discovery and submitted in opposition to conditional certification (1) declarations from 48 employees in Nevada stores, including 23 from the stores where the plaintiffs had worked, (2) a report from a nationally-recognized public opinion research firm, which had scientifically surveyed more than 2,000 current and former employees of the defendant, and (3) the analysis of a labor economist, who had analyzed the payroll and time records of the defendant's Nevada employees. The court concluded that the defendant's evidence indicated that there was no "common policy or practice on a nationwide, or even statewide, basis" and refused to authorize issuance of notice to putative class members.⁷

In *Basco v. Wal-Mart Stores Inc.*, the plaintiffs alleged off-the-clock work and missed rest breaks and meal periods on behalf of a statewide class under state law. The district court denied class certification of the state law claims and plaintiffs amended their complaint to include FLSA claims.⁸ The district court decided, "in light of the substantial discovery that has occurred in this matter," to apply both the first and second steps standards in deciding conditional certification.⁹

[S]ubstantial discovery has occurred; the Court has heard the video deposition testimony of a substantial number of plaintiffs at the hearing on this matter and has independently reviewed written deposition testimony as well. . . . Because the aim of collective actions is to promote judicial economy, and substantial discovery has already been undertaken such that the Court can make an educated decision as to whether certifying this matter as a collective action would survive the decertification process, the ends of judicial economy . . . require the Court to make that enquiry at this stage.¹⁰

Although the *Basco* court applied each stage in turn rather than skipping to the second stage or collapsing the two procedural steps, it determined that the plaintiffs did not meet the burden for certification at either stage.¹¹ The court based its reasoning largely on the plaintiffs' deposition testimony, which highlighted that any alleged FLSA violations were occurring "on a manager-

⁶ No. 2:06-CV-00108, 2006 U.S. Dist. LEXIS 95434, at *6 (D. Nev. Dec. 1, 2006).

⁷ *Id.*; see *Smith v. T-Mobile USA, Inc.*, No. CV 05-5274 ABC (SSx), 2007 U.S. Dist. LEXIS 60729 (C.D. Cal. Aug. 15, 2007) (concluding that the court could apply "second tier" analysis where discovery on class issues was complete and notice to 10% of the 15,000 person putative class had yielded insufficient evidence of a common policy or practice for the case to continue as a collective action).

⁸ No. 00-3184, 2004 U.S. Dist. LEXIS 12441, at *1-5 (E.D. La. July 1, 2004).

⁹ *Id.* at *13.

¹⁰ *Id.* at *14.

¹¹ *Id.* at *26 (remarking that "it would be an exercise in gross mismanagement of judicial and litigant time and money to certify the class as requested given the overwhelming evidence brought before the court.").

by-manager and associate-by-associate basis involving particular circumstances and anecdotal testimony” rendering the claims and potential defenses too individualized for class treatment.¹²

Plaintiffs may inadvertently undermine their argument regarding the evidentiary standard to be applied at the notice-stage by expediting the proceedings. In *Williams v. Accredited Home Lenders, Inc.*, plaintiffs alleged time shaving and off-the-clock work on behalf of loan officers employed by the defendant nationwide.¹³ The district court found plaintiffs had “short circuited” the two-stage process by disseminating informal notice of the lawsuit thereby garnering 150 opt-in consent filings.¹⁴ The court responded by permitting discovery, including defense depositions of 20 opt-in plaintiffs, and instructed the parties to brief the certification issue. Despite plaintiffs’ requests for conditional certification and postponement of the ultimate certification decision, the court found that the parties had conducted sufficient discovery and held proposed class members insufficiently similarly situated for a nationwide collective action.¹⁵

Plaintiffs also often submit declarations from multiple putative class members early in the litigation. These declarations may be intended to ensure conditional certification, however they can serve the defendant by (1) identifying deposition targets whose testimony may prove helpful in defeating either certification or the merits of the claim, and (2) developing the record such that defense counsel can argue that the court should apply a more stringent pre-certification standard given the significant information about whether plaintiffs are “similarly situated.”

In *Morisky v. Public Service Electric and Gas Company*, the district court applied a strict standard to plaintiffs’ motion for conditional certification because over 100 plaintiffs had already filed consent forms and discovery was complete.¹⁶ Plaintiffs undercut their own collective action by soliciting over 100 questionnaires from employees, which revealed that the opt-in plaintiffs held a wide variety of positions with a wide range of job duties. While the plaintiffs’ motion did not discuss the job duties of the opt-in plaintiffs, the defendant pointed to specific dissimilarities in job duties as evidenced by the questionnaire responses, and persuaded the court that a claim alleging misclassification was not suitable for collective treatment given the variation in opt-in plaintiffs’ self-described job duties.¹⁷

In *Holt v. Rite Aid Corp.*, both parties presented declarations and other evidence obtained through discovery for the court to consider when ruling on plaintiffs’ motion to facilitate notice.¹⁸ The court noted that because of the extensive discovery conducted by the parties, it was willing to consider all the evidence presented, including defendant’s declarations by employees declining to opt in. The court noted that because the action revolved around whether the day-to-day tasks

¹² *Id.* at *21.

¹³ No. 1:05-CV-1681-TWT, 2006 U.S. Dist. LEXIS 50653, at *2-6 (N.D. Ga. July 25, 2006).

¹⁴ *Id.* at *11-12.

¹⁵ *Id.* at *12, 14.

¹⁶ 111 F. Supp. 2d 493, 497-98 (D.N.J. 2000).

¹⁷ *Id.* at 498.

¹⁸ 333 F. Supp. 2d 1265, 1273 (M.D. Ala. 2004).

of certain employees were consistent with their exempt classification, evidence from any such employees was relevant because

if this court were to allow the case to proceed past stage one of the collective action certification process, the court would have to consider this evidence in revisiting the similarly-situated inquiry on the Defendant's motion to de-certify at stage two. Because the court has the evidence before it at stage one, the court will consider it.¹⁹

As in *Morisky*, the district court ruled that determining liability would require examination of the daily tasks of each potential class member and that the discovery indicated that this would be too individualized a determination to make collective treatment appropriate.²⁰

However the evidence is developed, defense counsel must obtain sufficient evidence to undercut conditional certification by the time the court is prepared to rule on the notice issue. The pervasiveness of the two-stage approach means that many courts are unlikely to postpone ruling on a motion for conditional certification in order to accommodate defense discovery for more than a limited amount of time.²¹ As the court noted in *Iglesias-Mendoza v. La Belle Farm*, “[t]he court is not obliged to wait for the conclusion of discovery before it certifies the collective action and authorizes notice.” The court went on to state, “[i]f the fruits of full discovery reveal that plaintiffs are not, in fact, ‘similarly situated’ . . . I may later decertify the class or divide it into subclasses, if appropriate.”²² Relevant to this issue is whether defendant is willing to offer tolling of the limitations period to allow discovery before the court decides the notice question.

III. DISCOVERY AFTER CONDITIONAL CERTIFICATION

If plaintiffs succeed in obtaining conditional certification and issuance of notice, strategic use of discovery remains just as vital. Defense counsel's goals concerning discovery remain the same as those prior to conditional certification: (1) obtain evidence that putative class members are not similarly situated enough for class treatment (which will now be argued in a motion for decertification as opposed to a motion opposing conditional certification and issuance of notice); (2) obtain evidence specific to the merits of plaintiff's claims to support a motion for summary judgment as to some or all class members; and (3) identify potential adverse trial witnesses.

The discovery landscape shifts after conditional certification because the opt-in class has now formed. The size of the class obviously plays an important role in discovery strategy. The number of class members that defense counsel may depose is limited not only by cost and time

¹⁹ *Id.* at 1274 n.4.

²⁰ *Id.* at 1274-75.

²¹ “Because courts do not weigh the merits of the claim, extensive discovery is not necessary at the notice stage. . . . [A]ny factual variances that may exist between the plaintiff and the putative class do not defeat conditional certification.” *Lynch v. US Auto. Ass'n*, 491 F. Supp. 2d 357, 368-69 (S.D.N.Y. 2007) (internal citations omitted).

²² 239 F.R.D. 363, 368-69 (S.D.N.Y. 2007).

constraints, but also by the court. Defendants seeking individual discovery as to *all* named and opt-in plaintiffs are much more likely to be successful where the total class is relatively small. Thus, for example, in *Ingersoll v. Royal & SunAlliance USA, Inc.*, where the plaintiffs alleged overtime and rest period violations and sought certification of a class of all auto insurance field staff appraisers, the court permitted individual discovery because the class totaled 36 plaintiffs.²³

Where large class size makes individual discovery impracticable, courts sometimes limit discovery to a “representative sample” of opt-in plaintiffs.²⁴ In *Smith v. Lowe’s Home Centers, Inc.*, plaintiffs alleged improper application of the fluctuating workweek method to non-exempt salaried employees in violation of the FLSA and Ohio Minimum Wage Act. The district court denied the defendant’s request for individualized discovery concerning more than 1,500 opt-in plaintiffs and instead limited discovery to a representative random sample.²⁵

[L]imiting discovery to a statistically significant representative sampling, at this juncture, will both reasonably minimize the otherwise extraordinary burden imposed on the plaintiffs and their counsel and yet afford the defendant a reasonable opportunity to explore, discover, and establish an evidentiary basis for its defenses. The Court will therefore limit the discovery appropriate to the decertification and class certification proceedings to a statistically significant sample.²⁶

The *Smith* court did, however, reject the plaintiffs’ proposed sampling of 90 individuals because the sampling failed to meaningfully address either defendant’s concerns or the issues relevant to the anticipated motion to decertify. The court instead directed the parties to confer to formulate an appropriate sampling methodology for discovery purposes. The court further noted that after conducting discovery of the sample, defendants would still have an opportunity to demonstrate that the court should authorize further discovery as necessary and appropriate.²⁷

Defendants may desire to conduct their own sampling to develop evidence for both the class issue and the merits. Sampling raises a number of important issues that must be considered including methodology, sample size, and timing. Defendants must be cognizant of the argument that sampling shows that a collective action is manageable at trial.

²³ No. C05-1774-MAT, 2006 U.S. Dist. LEXIS 50912, at *7-9 (W.D. Wash. July 25, 2006) (reasoning that “discovery related to the opt-in plaintiffs is pertinent to the determination of whether or not these individuals are similarly situated within the meaning of the FLSA. . . . Defendants reasonably and appropriately request the opportunity to obtain discovery relevant to their anticipated motion to decertify.”).

²⁴ In such actions, the defendant may be forced to allow a “sample” for discovery purposes, but defense counsel should preserve the position that the potential class members are not similarly situated because their circumstances are not uniform.

²⁵ 236 F.R.D. 354, 357-58 (S.D. Ohio 2006).

²⁶ *Id.*

²⁷ *Id.*

Despite obstacles to extensive individualized discovery, defense counsel should not lose sight of the importance of discovery to the “similarly situated” issue. Discovery can provide the information needed to show that collective treatment is inappropriate. In *O’Brien v. Ed Donnelly Enterprises, Inc.*, plaintiffs alleged minimum wage and overtime violations at two McDonald’s restaurants.²⁸ The district court discussed the specific content of individual plaintiff depositions at length before finding that the “widely varied and individualized allegations” therein supported decertification.²⁹ Similarly, in *Bayles v. American Medical Response of Colorado, Inc.*, the court detailed variation in deposition testimony in ruling that individualized proof dominated plaintiffs’ claims making collective treatment inappropriate.³⁰ The court concluded that a collective action “is designed to permit the presentation of evidence regarding certain representative plaintiffs that will serve as evidence for the class as a whole. It is oxymoronic to use such a device in an action where proof regarding each individual plaintiff is required to show liability.”³¹

Plaintiffs sometimes provide evidence of the dissimilarity of putative class members in their own deposition testimony. In *Myers v. Hertz Corp.*, plaintiffs alleged that all of defendant’s station managers were misclassified and emphasized a manager’s deposition testimony that managers at different locations performed “more or less the same” duties to support their motion for conditional certification.³² However, the court instead highlighted that deponent’s testimony that managers transferred between locations “need to be assimilated,” and that “[each] operation is different[;] [e]very place is unique, I believe, in their own way” to support the court’s holding that class treatment was inappropriate.³³

Defense counsel should be careful to propose only discovery with a reasonable scope and on a good faith basis. Courts disapprove of seemingly excessive discovery as a defense tactic. In *Geer v. Challenge Financial Investors Corp.*, the court admonished the defendant for seeking depositions of all 256 plaintiffs (including 248 opt-in plaintiffs) without providing convincing arguments that this scope of discovery was necessary, or that the deposition-taking proposal was cost-effective.³⁴ The court noted with disapproval that the defendant had not shown willingness to compromise with the plaintiffs, leading the court to question the defendant’s “true intention” for its deposition proposal.³⁵

IV. SUMMARY JUDGMENT

A strategically timed and well-supported summary judgment motion is also an important litigation tool in FLSA collective actions. The strategic considerations involved include, among

²⁸ No. 2:04-CV-00085, 2006 U.S. Dist. LEXIS 86895 (S.D. Ohio Nov. 30, 2006).

²⁹ *Id.* at *13-21.

³⁰ 950 F. Supp. 1053, 1062 (D. Colo. 1996).

³¹ *Id.* at 1065.

³² No. 02-CV-4325, 2007 U.S. Dist. LEXIS 53572, at *16 (E.D.N.Y. July 24, 2007).

³³ *Id.*

³⁴ No. 05-1109-JTM, 2007 U.S. Dist. LEXIS 33499, at *13 (D. Kan. May 4, 2007).

³⁵ *Id.* at *11.

others, selecting the plaintiffs whose claims are best suited for summary judgment, and weighing the advantages of filing the motion before or after conditional certification.

Where there are only a handful of named plaintiffs with weak factual support for their claims, a well-supported motion for summary judgment before the class is formed may prevent a collective action from going forward. In *White v. Starbucks Corp.*,³⁶ pre-certification discovery revealed that the single named plaintiff had worked only for 11 days, had been paid for overtime work during that period, and admitted that his alleged off-the-clock work was performed without the knowledge or encouragement of the defendant. Summary judgment was granted on the basis of this discovery and the court then ordered that all files related to the suit be closed and pending motions dismissed.

In *Cash v. Conn Appliances*, the court determined that it should rule on the defendant's motion for summary judgment on the merits before ruling on plaintiffs' request to proceed as a collective action.³⁷ The court ultimately granted summary judgment for the defendant on the overtime compensation claims and denied plaintiffs' motion to proceed as a collective action on those claims, leaving only one possible sub-issue on regular compensation for the plaintiffs to pursue.³⁸

However, the Eleventh Circuit has criticized a district court for assuming that summary judgment against the named plaintiffs disposed of the collective action before certification. In *Martinez-Mendoza v. Champion International Corp.*, the Eleventh Circuit held that the named plaintiffs who had sued for minimum wages and overtime compensation under the FLSA and the Migrant and Seasonal Agricultural Worker Protection Act might be able to proceed as the class representative even where their individual claims were dismissed, and remanded to the district court to resolve the class certification question and the named plaintiffs' qualifications as class representatives.³⁹ However, as support of its assertion that a named plaintiff could continue as class representative even after his or her individual claim was extinguished, the Eleventh Circuit cited a string of class actions brought under Rule 23 not the FLSA.⁴⁰

Where a summary judgment motion precedes class certification, the court's examination of the merits may reveal that plaintiffs are not "similarly situated" enough for class treatment to be appropriate. Where defense counsel has conducted sufficient discovery, the defendant might be positioned to move for full or partial summary judgment on particular plaintiffs and even if

³⁶ 497 F. Supp. 2d 1080 (N.D. Cal. 2007). The plaintiff also alleged rest break and meal period violations under California state law and summary judgment was entered on these claims as well. The summary judgment considerations would also be applicable in an FLSA action.

³⁷ 2 F. Supp. 2d 884, 903 (E.D. Tex. 1997).

³⁸ *Id.* at 908.

³⁹ 340 F.3d 1200, 1215-16 (11th Cir. 2003) ("a plaintiff's capacity to act as representative of the class is not ipso facto terminated when he loses his case on the merits.").

⁴⁰ See *id.* (citing *Satterwhite v. City of Greenville*, 634 F.2d 231 (5th Cir. 1981) (en banc), *Armour v. City of Anniston*, 654 F.2d 382 (5th Cir. 1981) (per curiam), and *Armstrong v. Martin Marietta Corp.*, 138 F.3d 1374, 1383 n.16 (11th Cir. 1998)).

summary judgment is not granted, defense counsel may have successfully demonstrated to the court that the factual disputes involved require individualized determinations.

Moving for summary judgment before conditional certification triggers some preliminary considerations. Defense counsel must take care to preserve in the initial scheduling order the ability to move for summary judgment before the close of discovery. Defense counsel must also ensure that there is a sufficiently developed record to provide a good faith basis for the motion in order to avoid any potential Rule 11 issues.

With these considerations in mind, the interrelated nature of conditional certification and substantive liability in certain FLSA lawsuits make these suits good candidates for strategic use of summary judgment. For example, where plaintiff's claims base liability on misclassification, a ruling on whether the claim has sufficient merit to survive a summary judgment motion will necessarily include an examination of employee duties in the positions at issue. Determining whether plaintiffs are sufficiently similar to render collective treatment appropriate involves a similar analysis of work duties. Because these analyses are related, a court ruling on defendant's motion for summary judgment either before or at the same time as plaintiff's motion for class certification may be persuaded that class treatment is inappropriate, even if the named plaintiffs survive summary judgment.

For example, in *Myers v. Hertz Corp.*, the district court ruled on the plaintiff's motion for conditional certification following a prior decision by the same court, but a different judge, in the same action, granting defendant partial summary judgment and denying conditional certification. The court cited the earlier analysis to support its ruling against conditional certification: "This determination [to deny plaintiff's motion for nationwide notice to the putative opt-in class] rests on [the court's] extensive consideration on the summary judgment motion of the factors used in determining whether an employee's duties render her exempt under the FLSA. . . . Reading [the earlier] decisions together, it is clear [that the court] found that [the 'duties' test factors] required individualized inquiry and thus precluded certification of an opt-in class."⁴¹

Defense counsel may be able to use a summary judgment motion filed simultaneously with a motion for decertification to demonstrate the inappropriateness of class treatment. Where defense counsel has identified through discovery class members who do not have viable claims, this evidence can be presented on motions for summary judgment, potentially forcing plaintiffs to defend the entire class from the defendant's best evidence. In such instances, if defendant is entitled to summary judgment with respect to at least some class members, there is an argument that the opt-in plaintiffs are either "similarly situated" and thus their claims should be dismissed, or that they are not "similarly situated" and the action should be decertified.

In *Sharer v. Tandberg, Inc.*, the defendant asked the district court to rule on its motions for decertification and summary judgment.⁴² The plaintiffs alleged unpaid overtime and lost wages due to defendant's partial-day docking system on behalf of all of defendant's employees affected by the system. The district court granted decertification because the named and opt-in

⁴¹ No. 02-CV-4325, 2007 U.S. Dist. LEXIS 53572, at*3-4 (E.D.N.Y. July 24, 2007).

⁴² No. 1:06cv626(JCC), 2007 U.S. Dist. LEXIS 14246 (E.D. Va. Feb. 27, 2007).

plaintiffs were differently situated with respect to the alleged partial-day docking claims and as to their job titles and responsibilities.⁴³ The court denied summary judgment, but the defendant was left having only to litigate claims against the two named plaintiffs.

Once the certification issue has been finally resolved,⁴⁴ the consequences of a summary judgment motion change. There is dispute over whether a successful summary judgment motion as to named plaintiffs is binding upon opt-in plaintiffs. In *Teblum v. Eckerd Corp. of Florida, Inc.*, the district court denied the partial summary judgment motions as to the named plaintiffs, but explained in its opinion that a summary judgment ruling on the named plaintiffs would be binding on all 2,089 opt-in plaintiffs because of the language of the opt-in consent forms they had signed.⁴⁵

In contrast, in *Hogan v. Allstate Insurance Co.*, the Eleventh Circuit affirmed the district court's summary judgment in favor of the defendant as to six "test" plaintiffs in a 2,000 person nationwide class alleging misclassification, but vacated and remanded the summary judgment ruling as to all opt-in plaintiffs because they were not given sufficient notice that a ruling against the test plaintiffs would constitute a final adjudication on the merits of their claims.⁴⁶ Like the *Teblum* court, the *Hogan* court acknowledged that the plaintiffs had each asserted that they were similarly situated and had signed consent forms agreeing to be bound by any adjudication of the court, including a summary judgment order against the named plaintiffs. However, the Eleventh Circuit emphasized that the finality of the ruling required explicit notice to *all* litigants in order to comply with Rule 56(c).⁴⁷ On remand, the district court extended summary judgment to the entire opt-in class.

V. CONCLUSION

Discovery and motions for summary judgment play critical roles in collective actions. Since each action is different, defense counsel must assess how these important litigation tools can best be used to defeat or minimize the asserted collective action claims.

⁴³ *Id.* at *8-9.

⁴⁴ Collective action certification can be challenged at any time even after trial if the evidence shows that collective treatment is improper.

⁴⁵ No. 2:03-cv-495-Ftm-33DNF, 2006 U.S. Dist. LEXIS 6406, at *16 (M.D. Fla. Feb. 7, 2006).

⁴⁶ 361 F.3d 621, 628 (11th Cir. 2004).

⁴⁷ *Id.*