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Publications Sub-Committee Chair

Written Consent is Enough in the Eleventh Circuit to be a Party Plaintiff

On April 18, 2018, in *Mickles v. Country Club Inc.*,[1] the Eleventh Circuit held that filing a written consent is sufficient for a plaintiff to opt in to a collective action filed under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 216(b). This was a case of first impression for every federal circuit.[2]

Andrea Mickles filed a complaint against Country Club Inc. in April 2014 alleging that she, along with others similarly situated, were misclassified as independent contractors and, consequently, were not properly compensated at the minimum wage or for overtime work. After suit was filed, three persons each filed a "Consent to Become a Party Plaintiff" to opt in. About a month after the close of discovery, Mickles filed a motion for conditional certification to have the collective action certified. The district court denied the motion as untimely; the court made no mention as to whether or not the opt-in plaintiffs were dismissed from the case.

Several months later, Country Club filed a motion for clarification in order to ascertain whether or not the opt-in plaintiffs were parties to the action. Country Club took the position that the opt-in plaintiffs were never officially parties to the action and that the denial of Mickles' motion for conditional certification meant that they could not proceed in the case. The district court agreed with the defendant's position and held that the opt-in plaintiffs were "never properly added" because no determination was made as to whether or not they were similarly situated to Mickles. Shortly thereafter Mickles settled her claims with Country Club.

After Mickles' settlement was reached, the opt-in plaintiffs appealed the clarification order, among other orders, to the Eleventh Circuit Court of Appeals. The appellate court looked to two requirements to determine if the opt-in plaintiffs were properly added: (1) whether the named plaintiff filed the complaint on behalf of herself and "other 'similarly situated' employees"[3]; (2) whether the opt-in employees each gave written consent and filed that consent in the court in which the action was brought.[4] In this case, there was no dispute regarding the second requirement. Therefore, the question on appeal was whether or not a separate *finding* that the opt-in plaintiffs were similarly situated was necessary in order to satisfy the first requirement.

The Eleventh Circuit held that no such finding was required and that the written consent, on its own, was sufficient to confer status as a party plaintiff: "The plain language of § 216(b) supports that those who opt in become party plaintiffs upon the filing of a consent and that nothing further, including conditional certification, is required."[5]

The Eleventh Circuit vacated and remanded the district court's clarification order so that the opt-in plaintiffs could either be dismissed without prejudice with an opportunity to file new complaints or be allowed to continue in the case filed by Mickles since discovery had already been completed. The court also held that

the opt-in employees were entitled to statutory tolling of their claims, beginning on the dates they filed their respective written consents.

Although this decision has provided some clarity on written consents, it is too early to determine the overall impact it will have on FLSA cases going forward. In addition to filing written consents, employees may still want to seek conditional certification with the district court where the case is pending. On the other hand, employers will want to be mindful of the pool of possible opt-in employees, in light of their potential to proceed in an FLSA collective action without any finding that they are, in fact, similarly situated. Finally, with respect to collective action settlements, employers must be mindful of any employees who have filed written consents and may also want to review the language in their settlement agreements to determine whether or not opt ins are taken into account.

~By Kelly M. Peña | Ogletree, Deakins, Nash, Smoak & Stewart, P.C.

Endnotes

1 --F.3d--, 2018 WL 1835316 (11th Cir. 2018).
2 *Id.* at *1.
3 *Id.* at *3 (quoting *Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208, 1217 (11th Cir. 2001)).
4 *See* 29 U.S.C. § 216(b).
5 *Mickles*, 2018 WL 1835316, at *5.

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5:00 p.m. – 6:00 p.m.
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Executive Council Meeting – JW Marriott, Marco Island

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Advanced Labor Topics 2018 (2630R)
JW Marriott, Marco Island

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2:15 p.m. – 5:15 p.m.
President's Showcase Seminar
Because Legal Practice Isn't Always a Day at the Movies: Health, Wellness, and a Welcoming Workplace for Lawyers and Their Clients (2858)
The Annual Florida Bar Convention
Hilton Orlando Bonnet Creek

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Labor & Employment Law Section
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