--- F.3d ----, 2012 WL 3217522 (C.A.3 (N.J.))
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ZAVALA v. WAL MART STORES INC.
--- F.3d ----, 2012 WL 3217522 (C.A.3 (N.J.))
Filed Aug. 9, 2012.

Before: FUENTES, SMITH, and JORDAN, Circuit Judges.

SMITH, Circuit Judge.

I. Introduction

This suit was brought in the U.S. District Court for the District of New Jersey by Wal–Mart cleaning crew members who are seeking compensation for unpaid overtime and certification of a collective action under the Fair Labor Standards Act (FLSA), civil damages under RICO, and damages for false imprisonment. The workers—illegal immigrants who took jobs with contractors and subcontractors Wal–Mart engaged to clean its stores—allege: (1) Wal–Mart had hiring and firing authority over them and closely directed their actions such that Wal–Mart was their employer under the FLSA; (2) Wal–Mart took part in a RICO enterprise with predicate acts of transporting illegal immigrants, harboring illegal immigrants, encouraging illegal immigration, conspiracy to commit money laundering, and involuntary servitude; (3) Wal–Mart's practice of locking some stores at night and on weekends—without always having a manager available with a key—constituted false imprisonment.

Over the course of eight years and a minimum of four opinions, the District Court rejected final certification of an FLSA class, rejected the RICO claim on several grounds, and rejected the false imprisonment claim on the merits. We will affirm.

II. Facts

This case has been pending for over eight years and ultimately comes to us from a grant of summary judgment. Not surprisingly, it carries with it a substantial record.[FN1] To help organize the relevant facts in a useful manner, we have divided them into groups corresponding to Plaintiffs' claims. We focus only on the facts relevant to our bases for deciding the appeal.

A. RICO [OMITTED]

B. Certification of the FLSA Collective Action

The District Court's decision to decertify the collective action followed substantial discovery into the potential class plaintiffs, their employment history, their work hours, their working conditions, and other relevant factors. Magistrate Judge Arleo, to whom some of the proceedings below were assigned, required each opt-in plaintiff to file a questionnaire in a specific format detailing his/her personal information, working conditions, compensation, etc. Over one hundred individuals filed this questionnaire before the deadline. The questionnaires demonstrate that the opt-in plaintiffs worked at dozens of different stores, for numerous different contractors, with various pay amounts and methods. Though most worked every evening from roughly 11pm—7am, their hours sometimes varied.

In an effort to demonstrate that the proposed class is similarly situated, Plaintiffs proffer a Wal–Mart Maintenance Manual (and a translation of that manual into Polish), which appears to establish uniform standards and procedures for cleaning Wal–Mart stores. The manual is comprehensive.

Among other things, it specifies the products and methods to be used, as well as the procedure for obtaining new supplies or equipment. In a similar vein, Plaintiffs provide declarations and deposition testimony establishing that Wal–Mart provided the cleaning materials used by the crew, though at least one Wal–Mart store manager asserts that contractors provided their own equipment.

In an effort to demonstrate that Wal–Mart exercised control over the proposed class and that this control was common across Wal–Mart stores, Plaintiffs provide declarations and deposition testimony supporting their contention that Wal–Mart managers directed them where and how to clean and often scrutinized their work, requiring them to clean an area more thoroughly before leaving. Wal–Mart provides declarations from store managers insisting that their interactions with crews were limited to general instructions. They insist that they did not supervise the cleaners and that issues were usually raised with the crew chief or the contracting company. Plaintiffs concede in their own deposition testimony that cleaners did not receive training from Wal–Mart staff. Generally, cleaners were trained by other members of the work crew or learned simply by observing.

Plaintiffs also claim that Wal–Mart asserted and exercised the right to hire and fire the cleaning crews. Plaintiffs point first to a form contract distributed to Wal Mart stores to be used in hiring cleaning crews. The letter accompanying the contract and the contract itself specify that the Wal–Mart store manager shall have final authority to approve or disapprove members of the cleaning crew. In addition, Plaintiffs provide declarations and deposition testimony establishing that Wal–Mart management would occasionally fire individual workers or whole work crews. Multiple Wal–Mart managers provide declarations asserting that they did not have the authority to hire and fire crew members.

C. False Imprisonment [OMITTED]

III. Procedural Timeline

*** On October 7, 2005, ruling on a motion to dismiss, the District Court concluded that: (1) Plaintiffs failed to state a claim for any of their alleged RICO predicates; (2) Plaintiffs were not members of a class protected by 42 U.S.C. § 1985; and (3) Plaintiffs' FLSA and false imprisonment claims could proceed. *** On March 10, 2010, this case was reassigned to then-Chief District Judge Garrett E. Brown, Jr. On June 25, 2010, the District Court granted Wal–Mart's motion to decertify Plaintiffs' provisionally-certified FLSA collective action. The District Court concluded that the breadth of factual circumstances underlying each individual's claim did not permit trial of the case as a collective action. On December 1, 2010, the District Court denied Plaintiffs' motion for summary judgment on their FLSA and false imprisonment claims. The District Court concluded that the motion was procedurally improper because it was filed well beyond the deadline provided by the federal rules. The District Court also concluded that the motion failed on the merits because material facts remained in contention on both claims.

On April 7, 2011, the District Court granted Wal–Mart's motion for partial summary judgment on the false imprisonment claim. It first concluded that Wal–Mart had shown adequate grounds for seeking summary judgment beyond the time limit provided by the federal rules. It then held that Plaintiffs' false imprisonment claims failed on the merits because Wal–Mart had adequately demonstrated the availability of emergency exits and Plaintiffs failed to rebut this evidence. Following that decision, Wal–Mart resolved the individual FLSA claims of named Plaintiffs through a series of settlements and an offer of judgment.

This appeal followed. Plaintiffs challenge the District Court's dismissal of their RICO claims, its decertification of the conditionally-certified FLSA action, and its grant of summary judgment for

Wal–Mart on Plaintiffs' false imprisonment claims. The District Court had jurisdiction under 28 U.S.C. § 1331, 29 U.S.C. § 216(b), 18 U.S.C. § 1964(c), and 28 U.S.C. § 1367(a). We have appellate jurisdiction under 28 U.S.C. § 1291.

IV. Analysis

A. Certification of the FLSA Collective Action

The District Court conditionally certified this as a collective action under the FLSA. Following discovery, a "motion for decertification" was brought, and the District Court "decertified" [FN2] the class. As the District Court explained, two different standards apply for certification under the FLSA, one for conditional certification, and another for final certification. While we have made clear that the standard for final certification is more stringent than the standard for conditional certification, the exact test to be applied has been left specifically unresolved by our Court. We decide today that to certify an FLSA collective action for trial, the District Court—after considering the claims and defenses of the parties and all the relevant evidence—must make a finding of fact that the members of the collective action are "similarly situated." The burden of demonstrating that members of the collective action are similarly situated is to be borne by the plaintiffs, who must show by a preponderance of the evidence that they are similarly situated.

1. Standard of Review

We must first address the appropriate standard of review. The standard of review for FLSA decertification has not been previously addressed by our Court. Other circuits have applied an abuse of discretion standard to the ultimate decision on whether to certify the collective action. *See, e.g.,* *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1260 (11th Cir.2008) ("[W]e review a district court's § 216(b) certification for abuse of discretion."); *Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1105 (10th Cir.2001) (same in ADEA context).[FN3]

[1][2] We agree that an abuse of discretion standard is appropriate. But we note that this is not the type of abuse of discretion review afforded matters that are "committed to the discretion of the trial court[.]" *United States v. Criden*, 648 F.2d 814, 817 (3d Cir.1981). In those situations, we will reverse only if the district court's decision is "arbitrary, fanciful or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the local court." *Lindy Bros. Builders, Inc. v. Am. Radiator, Etc.*, 540 F.2d 102, 115 (3d Cir.1976) (en banc) (quoting *Delno v. Market St. Ry. Co.*, 124 F.2d 965, 967 (9th Cir.1942)). Here, however, we will find an abuse of discretion "if the district court's decision 'rests upon a clearly erroneous finding of fact, an errant conclusion of law or an improper application of law to fact.' " *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 312 (3d Cir.2008) (quoting *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 165 (3d Cir.2001)).

[3][4] This type of review is appropriate because the final certification of an FLSA collective action is composed of two underlying components: (1) determining the legal standard to be applied in concluding whether proposed plaintiffs are similarly situated; and (2) applying the legal standard to conclude whether the proposed plaintiffs actually are similarly situated. The former has been recognized as a legal question, subject to *de novo* review. *See* *Thiessen*, 267 F.3d at 1105 ("The initial question, which we address *de novo,* is whether it was proper for the district court to adopt the *ad hoc* approach in determining whether plaintiffs were 'similarly situated' for purposes of § 216(b)."). The latter has been recognized as a factual question, subject to review for clear error. *See* *Morgan*, 551 F.3d at 1260 ("A court's determination that the evidence shows a particular group of opt-in plaintiffs are similarly situated is a finding of fact.... We will reverse the district court's fact-finding that plain-

tiffs are similarly situated only if it is clearly erroneous."); *Mooney v. Aramco Servs.*, 54 F.3d 1207, 1214 (5th Cir.1995) ("At [the second] stage, the court ... makes a factual determination on the similarly situated question."), *overruled on other grounds by* *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 123 S.Ct. 2148, 156 L.Ed.2d 84 (2003).

Once it has been determined that the plaintiffs are similarly situated (a factual question reviewed for clear error), there is no further work to be done. We do not believe that the statute gives the district court discretion to deny certification after it has determined that plaintiffs are similarly situated. Accordingly, no exercise of discretion actually takes place. Nonetheless, such multi-part reviews of District Court decisions have been routinely labeled with the "abuse of discretion" standard under our precedent and the precedent of our sister circuits, though we have made clear that each part of the review should proceed under the appropriate standard for that component. *See, e.g.*, *Gates v. Rohm & Haas Co.*, 655 F.3d 255, 262 (3d Cir.2011); *Morgan v. Perry*, 142 F.3d 670, 682–83 (3d Cir.1998).

[5] Because we are examining the underlying legal rule for certification, we exercise plenary review over the District Court's decision to not finally certify the collective action here. Going forward, however, because district courts will be applying the standard we announce today, we anticipate that certification decisions will typically be subject to review under the clear-error prong of this type of abuse of discretion review, as only fact-finding should be at issue.

2. Standard for Certification of an FLSA Collective Action

In "decertifying" this collective action, the District Court explained that two different standards for certification applied. It noted that a "fairly lenient standard" applied for conditional certification, and noted that some courts "require nothing more than substantial allegations that the putative class members were together the victims of a single decision, policy, or plan [.]" ***Zavala*** *v. Wal–Mart Stores, Inc.*, No. 03–5309, 2010 WL 2652510, at *2 (D.N.J. June 25, 2010) (quoting *Morisky v. Pub. Serv. Elec. & Gas Co.*, 111 F.Supp.2d 493, 495 (D.N.J.2000)). The District Court then held that a "stricter standard" applied on final certification, in which the court actually determines whether the plaintiffs are similarly situated. And it held that plaintiffs bear the burden of demonstrating that they are similarly situated. Without precisely quantifying the burden borne by the plaintiffs, the District Court then concluded that, under the disparate factual circumstances applicable here, Plaintiffs were not similarly situated, and "decertification" was appropriate.

In *Symczyk v. Genesis HealthCare Corp.*, 656 F.3d 189 (3d Cir.2011), we noted that this two-tier approach, while "nowhere mandated, ... appears to have garnered wide acceptance." *Id.* at 193 n. 5. We implicitly embraced this two-step approach, and we affirm its use here. But we also explained that the "conditional certification" is not really a certification. It is actually " 'the district court's exercise of [its] discretionary power, upheld in *Hoffmann–La Roche* [*Inc. v. Sperling*, 493 U.S. 165, 110 S.Ct. 482, 107 L.Ed.2d 480 (1989)], to facilitate the sending of notice to potential class members,' and 'is neither necessary nor sufficient for the existence of a representative action under [the] FLSA.' " *Id.* at 194 (quoting *Myers v. Hertz Corp.*, 624 F.3d 537, 555 n. 10 (2d Cir.2010)). In articulating the standard to be applied at this initial stage,[FN4] we left open the question of the standard to be applied on final certification. *Id.* at 193 n. 6 ("Because only the notice stage is implicated in this appeal, we need not directly address the level of proof required to satisfy the similarly situated requirement at the post-discovery stage.").

[6] It is clear from the statutory text of the FLSA that the standard to be applied on final certification is whether the proposed collective plaintiffs are "similarly situated." [FN5] Courts have adopted three different approaches for determining whether this is the case. *See* *Thiessen*, 267 F.3d at 1102–

03. The first is the ad-hoc approach, which considers all the relevant factors and makes a factual determination on a case-by-case basis. To our knowledge, this is the only approach approved by other Courts of Appeals. *See, e.g.,* *Morgan*, 551 F.3d at 1259–62 (11th Cir.2008); *Thiessen*, 267 F.3d at 1105 (10th Cir.2001). The other two approaches are derived from Rule 23 and have only been adopted by district courts. *See* *Thiessen*, 267 F.3d at 1103. We have already repeatedly approved the ad-hoc approach, and we do so again today. *See, e.g.,* *Symczyk*, 656 F.3d at 193 n. 6; *Ruehl v. Viacom, Inc.*, 500 F.3d 375, 388 n. 17 (3d Cir.2007); *Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43, 51 (3d Cir.1989), *overruled on other grounds by* *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993).

Our Court and the other Courts of Appeals to address the issue have identified many factors to be considered as part of the ad-hoc analysis. Relevant factors include (but are not limited to): whether the plaintiffs are employed in the same corporate department, division, and location; whether they advance similar claims; whether they seek substantially the same form of relief; and whether they have similar salaries and circumstances of employment. Plaintiffs may also be found dissimilar based on the existence of individualized defenses. *See* *Ruehl*, 500 F.3d at 388 n. 17. This list is not exhaustive, and many relevant factors have been identified. *See* 45C Am.Jur.2d Job Discrimination § 2184 (listing 14 factors to be considered in determining whether proposed collective action plaintiffs are "similarly situated" under the ADEA).

Finally, we conclude that the burden is on the plaintiffs to establish that they satisfy the similarly situated requirement. *See* *Symczyk*, 656 F.3d at 193 ("Should the plaintiff satisfy her burden at [the second] stage, the case may proceed to trial as a collective action."); *see also* *O'Brien v. Ed Donnelly Enters.*, 575 F.3d 567, 584 (6th Cir.2009) ("The lead plaintiffs bear the burden of showing that the opt-in plaintiffs are similarly situated to the lead plaintiffs.").

What remains unresolved is the level of proof the plaintiffs must satisfy. In *Symczyk*, we specifically declined to answer this question. *Symczyk*, 656 F.3d at 193 n. 6 ("Because only the notice stage is implicated in this appeal, we need not directly address the level of proof required at the post-discovery stage."). To our knowledge, no other Court of Appeals has directly answered this question.

We now hold that plaintiffs must satisfy their burden at this second stage by a preponderance of the evidence.[FN6] As the Second Circuit observed, the task on final certification is determining "whether the plaintiffs who have opted in are in fact 'similarly situated' to the named plaintiffs." *Myers*, 624 F.3d at 555. That seems impossible unless Plaintiffs can at least get over the line of "more likely than not." At the same time, a stricter standard would be inconsistent with Congress' intent that the FLSA should be liberally construed. *See* *Morgan*, 551 F.3d at 1265 ("We also bear in mind that the FLSA is a remedial statute that should be liberally construed.").

Our conclusion that preponderance of the evidence is the appropriate standard to apply is buttressed by the Supreme Court's presumption "that this standard is applicable in civil actions between private litigants unless 'particularly important individual interests or rights are at stake.' " *Grogan v. Garner*, 498 U.S. 279, 286, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991). And we have said that "[w]e see no reason to deviate from the traditional preponderance of the evidence standard in the absence of express direction from Congress." *United States v. Himler*, 797 F.2d 156, 161 (3d Cir.1986).

We hold that plaintiffs must demonstrate by a preponderance of the evidence that members of a proposed collective action are similarly situated in order to obtain final certification and proceed with the case as a collective action.

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3. Application of the FLSA Certification Standard

[7] Plaintiffs have failed to satisfy the "similarly situated" standard. The similarities among the proposed plaintiffs are too few, and the differences among the proposed plaintiffs are too many.

Plaintiffs' theory is that Wal–Mart wanted clean stores "on the cheap." FN7 To that end, Wal–Mart distributed a maintenance manual that went into exacting detail about how to clean floors, shelves, bathrooms, and other parts of the store. This manual mandated procedures that all employees and contractors were to use. Store managers also received a form contract for use with outside cleaning contractors, and were instructed that they had final authority to approve or disapprove members of cleaning crews. There is evidence that store managers fired members of cleaning crews and that Wal–Mart employees regularly directed cleaning crews in conducting their work in the store. There is also evidence that Wal–Mart store managers and corporate officers knew and approved of contractors' widespread hiring of illegal immigrants.

Being similarly situated does not mean simply sharing a common status, like being an illegal immigrant. Rather, it means that one is subjected to some common employer practice that, if proved, would help demonstrate a violation of the FLSA. And, indeed, Plaintiffs' allegation of a common scheme to hire and underpay illegal immigrant workers provides some common link among the proposed class. Plaintiffs' evidence with regard to the maintenance manual, the authority of store managers, and the supervision by store employees is relevant to demonstrating whether Wal–Mart employed the proposed plaintiffs. And such a scheme potentially demonstrates Wal–Mart's willfulness in violating the FLSA. But these common links are of minimal utility in streamlining resolution of these cases. Liability and damages still need to be individually proven.

While the District Court noted the commonalities among the proposed plaintiffs, it was ultimately convinced that the class should not be certified for trial. "In all," it found, "the putative class members worked in 180 different stores in 33 states throughout the country and for 70 different contractors and subcontractors. The individuals worked varying hours and for different wages depending on the contractor." ***Zavala***, No. 03–5309, 2010 WL 2652510, at *3 (internal citations omitted). These factors convinced the District Court that there were "significant differences in the factual and employment settings of the individual claimants." *Id.* The District Court also noted that different defenses might be available to Wal–Mart with respect to each proposed plaintiff, including that individual cleaners were not Wal–Mart employees, as that term is defined by the FLSA, and that it paid some of its contractors an adequate amount to support an appropriate wage for the cleaners. *See* *id.* at *4–*5.

We agree with the District Court. Considering the numerous differences among members of the proposed class in light of the alleged common scheme's minimal utility in streamlining resolution of the claims, we conclude that the Plaintiffs have not met their burden of demonstrating that they are similarly situated. We will therefore affirm the District Court's decision to deny final certification.

*** ***B. Civil RICO Claims [OMITTED]***

FN2. This terminology is misleading, as we will demonstrate.

FN3. *Thiessen* is an ADEA case. Throughout this section, we will use FLSA and ADEA cases interchangeably, as the ADEA imports by reference the collective action provision and "similarly situated" standard of the FLSA. *See* 29 U.S.C. § 626(b).

FN4. We adopted the "modest factual showing" standard, under which "a plaintiff must produce some evidence, 'beyond pure speculation,' of a factual nexus between the manner in which the employer's alleged policy affected her and the manner in which it affected other employees." *Symczyk*, 656 F.3d at 193 (citing *Smith v. Sovereign Bancorp, Inc.*, No. 03–2420, 2003 WL 22701017, at *3 (E.D.Pa. Nov. 13, 2003)). The Second Circuit has described this initial step as "determin[ing] *whether* 'similarly situated' plaintiffs do in fact exist," while at the second stage, the District Court determines "whether the plaintiffs who have opted in are in fact 'similarly situated' to the named plaintiffs." *Myers*, 624 F.3d at 555.

FN5. 29 U.S.C. § 216(b) ("An action to recover the liability prescribed [by this statute] ... may be maintained ... by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.").

FN6. Because this issue is necessary to our decision and was not directly addressed in the original briefs, we requested supplemental briefing. Wal–Mart asserted that a preponderance standard applied. In their brief, the Plaintiffs did not articulate a precise burden. But at oral argument, both parties agreed that a preponderance of the evidence standard was appropriate.