

Café Managers’ Second Attempt At Conditional Certification Fails



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The U.S. District Court for the Southern District of New York recently foiled the second attempt by a group of Barnes & Noble café managers’ seeking conditional certification of their proposed collective action under the Fair Labor Standards Act (FLSA).

In [Brown v. Barnes & Noble, Inc.](#), the plaintiff employees alleged they were misclassified as exempt and improperly denied overtime for hours worked in excess of 40 hours per week. They sought conditional certification of a collective action under FLSA Section 216(b) on behalf of all café managers.

The plaintiff employees had moved for conditional certification earlier in the litigation, and that motion was denied. The parties then engaged in substantial discovery regarding conditional certification, including document production and depositions. The plaintiff employees again sought conditional certification, and the court again denied their renewed motion. In denying conditional certification, the court applied the “so-called ‘modest plus’ approach to conditional certification articulated in [Korenblum v. Citigroup, Inc.](#)” The district court upheld the [magistrate judge’s denial](#) of the plaintiff employees’ second motion for conditional certification.

The plaintiff employees argued that they should have been required to make only the more lenient “modest factual showing” typically required to obtain first-stage of

conditional certification. The court disagreed, finding the more demanding “modest plus” approach appropriate, given the “‘unique procedural position’ of this case—namely, that ‘the parties completed six months of discovery targeted to conditional certification,’” including “fourteen depositions and tens of thousands of pages in document discovery.” The court explained that conditional certification is a discretionary case management tool, and in light of the developed record, the court found that the use of the “modest plus” framework “made eminent sense.”

The key takeaway from the *Brown* decision is that, given the heightened showing that courts may require when considering a more-developed record, employers defending collective actions under Section 216(b) of the FLSA may derive strategic advantages by pursuing more fulsome discovery before conditional certification. That discovery may provide evidence and arguments that affirmatively demonstrate a lack of cohesion among the parties to the putative collective action, in which case the plaintiff seeking conditional certification may carry a higher burden.

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