ALSTON+BIRD LLP

Recent Attempts to Limit or Remedy Contact by Opposing Counsel with Putative Class Members

Robert P. Riordan
Brett E. Coburn

Prepared for ACI's
11th National Forum
on Wage Hour Claims
and Class Actions

January 31 - February 1, 2011

RECENT ATTEMPTS TO LIMIT OR REMEDY CONTACT BY OPPOSING COUNSEL WITH PUTATIVE CLASS MEMBERS

Robert P. Riordan
Brett E. Coburn
Alston & Bird LLP
Atlanta, Georgia
January 24, 2011

At the outset of many putative FLSA collective actions, counsel for both the employer and the named plaintiffs have strategic reasons for contacting putative class members directly. Employers will want to investigate the allegations raised in the lawsuit by speaking with putative class members – and in particular, current employees – in order to evaluate the case, formulate a defense strategy, and assess any potential remedial actions it might need to take going forward. Employers may also attempt to obtain declarations from putative class members that will assist the company in opposing the plaintiff's motion for conditional collective action certification. Plaintiff's counsel will want to speak with putative class members in order to determine interest in the case, as well as to assess the strengths and weaknesses of the claims asserted and the likelihood of obtaining collective action certification.

Such efforts to contact putative class members sometimes result in an attempt by the opposing party to obtain sanctions to remedy the effect of communications that have already taken place or a protective order to prohibit or limit future communications. In support of such motions, the moving party will frequently argue: (1) that the communications in question were coercive or intimidating to putative class members; (2) that the communications were intended as an end run around the court-approved notice process; and (3) that the communications violated applicable rules of professional conduct or court rules (such as local rules prohibiting contact with potential class members).

Recent efforts by both plaintiffs and defendants in this regard have met with limited success. Courts evaluating such motions typically attempt to balance concerns about unfair pressure and influence against the free speech rights of litigants and the rights of employers to defend themselves against litigation. At the heart of many opinions addressing such motions is the Supreme Court's admonition that "an order

limiting communications between parties and potential class members should be based on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties." *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 101 (1981). On this basis, courts have typically been reluctant to impose limitations on a party's right to communicate with putative class members except in cases of egregious misconduct.

Recent cases granting motions for sanctions or a protective order in response to efforts to communicate with putative class members include the following:

Ojieda-Sanchez v. Bland Farms, 600 F. Supp. 2d 1373 (S.D. Ga. 2009)

Plaintiffs in this case claimed that the employer failed to pay minimum wage. They moved for conditional certification, but the court had not yet ruled on the motion at the time it addressed the plaintiffs' request for a protective order prohibiting the defendants from communicating with putative class members. The motion was based on defendants' telephone and in-person contact with two putative class members to determine if they were, in fact, represented by plaintiffs' counsel.

Despite sharply conflicting testimony regarding the communications in question, the court found that the plaintiffs had provided clear evidence of a potentially abusive situation sufficient to warrant a protective order. In reaching this conclusion, the court emphasized that: (1) the communications were unilateral and unsolicited; (2) there was a past and potential future employment relationship, which increased the risk that the communications would have a coercive effect; and (3) the communications were in-person and required the plaintiffs to make a decision under pressure about whether to sign a sworn statement provided by the defendants. The court stated that these factors did not make the communications *per se* coercive, but it concluded that the effect the communications at issue had on the plaintiffs made them inherently coercive. The court also stated that although the class had not yet been certified, the court was not prevented from issuing a protective order limiting communications with putative class members to protect the integrity of the litigation.

The court accordingly entered a protective order prohibiting the defendants from having any in-person or telephone communication with putative class members, but permitting communication in writing, as long as a copy of the communication was provided in advance to plaintiffs' counsel to afford them an opportunity to resolve any potential objections. The court also noted that if it denied class certification, the protective order would expire at that time.

Roslies-Perez v. Superior Forestry Serv., Inc., 652 F. Supp. 2d 887 (M.D. Tenn. 2009)

The court certified this case as a collective action and in prior rulings, twice held the defendants in contempt for their repeated violations of a prior protective order barring communications with putative class members, which had been entered in response to coercive and intimidating behavior by one of the employer's supervisors. Plaintiffs' third contempt motion arose from an incident involving a management employee of the employer that occurred during class counsel's meeting in Mexico with potential class members. The employee in question was defendants' recruiter and supervisor in Mexico, as well as a named defendant in the case. The employee visited class counsel's meeting location and monitored class counsel's meetings over several hours. After class counsel approached the employee to tell him that his presence was unwelcome and that he could face a contempt petition for violation of the court's order, he refused to leave. The plaintiffs contended that the supervisor's behavior and the company's failure to take any steps to prevent his conduct at the meeting violated the prior protective order and undermined the court's remedy imposed to cure defendants' prior misconduct.

The court concluded that the supervisor lacked any legitimate reason to be present in the area of class counsel's meeting, and that his behavior was an effort to intimidate and threaten potential class members and witnesses. The court found that the appropriate sanction was to preclude the defendants from offering proof to contest the plaintiffs' damages because the defendants' continuing improper conduct was designed to lower their financial exposure should the defendants be found liable on the merits.

Spoerle v. Kraft Foods Global, Inc., 253 F.R.D. 434 (W.D. Wis. 2008)

In this donning and doffing case, plaintiffs' counsel sent notice letters to putative class members (using a list obtained from the plaintiffs' union) prior to obtaining class certification, and without approval from the court or input from the defendant. In response, the defendant moved to strike the consents generated by the letter, for a protective order, and for plaintiffs' counsel to be ordered to pay defendant's attorneys' fees incurred in bringing the motion.

In the same order in which the court granted collective action certification as well as Rule 23 certification of state law claims, the court granted the defendant's motion in part, requiring that plaintiffs send curative notices and obtain new consents from those class members who had submitted consent forms in response to the original letter. Finding that the defendant had not shown the inappropriate actions of plaintiffs' counsel to be "anything other than an isolated blunder," however, the court denied defendant's request for a ban on communications by plaintiffs' counsel with putative class members, as well as defendant's request for attorneys' fees.

Recent cases denying motions for sanctions or a protective order in response to efforts to communicate with putative class members include the following:

Frye v. Baptist Mem'l Hosp., Inc., No. 07-2708 Ma/P, 2008 U.S. Dist. LEXIS 41511 (W.D. Tenn. May 20, 2008)

A former hourly nurse filed a putative collective action against a hospital employer alleging failure to compensate for "off-the-clock" work. In an effort to contact putative class members and potential witnesses for the case, plaintiff's counsel launched an internet website containing information about the case and mailed letters to all registered nurses in Shelby County, Tennessee. The defendant filed a motion asking the court to enter a cease and desist order prohibiting unauthorized communication by plaintiff's counsel with putative class members.

The defendant argued that the website posted by plaintiff's counsel was misleading and therefore violated the Tennessee Rules of Professional Conduct ("TRPC"). The defendant also argued that the letter sent by plaintiff's counsel to putative class members was a direct solicitation in violation of the TRPC. In response, the plaintiff argued that the website and letter did not contain misleading or inaccurate information and noted that counsel revised the website and sent out revised letters in response to the objections raised by the defendant. At a hearing on the motion, the defendant conceded that the revisions to the letter and website met its initial objections, and it failed to point to any harm that it suffered as a result of plaintiff's counsel's communications with putative class members. The plaintiff also informed the court that the Tennessee Board of Professional Responsibility determined that the original letter constituted a direct solicitation under the TRPC and directed plaintiff's counsel to make certain revisions to it. Plaintiffs' counsel complied with the Board's instructions.

Despite its conclusion that the initial letters constituted a violation of the TRPC, the court concluded that the violation did not justify a communications ban because the letter and website in their revised form did not contain deceptive or misleading statements, and the court accordingly denied the defendant's motion. In reaching this conclusion, the court noted that many lower courts addressing the argument made by the defendant have relied on their broad case management discretion generally to allow pre-notice communications by plaintiffs' counsel with putative class members while actively limiting misleading statements in such communications. The court cited six recent district court opinions reaching a similar conclusion. The court also noted its obligation to be mindful of the free speech rights of plaintiffs and their attorneys when making rulings regarding communications with putative class members.

McKnight v. D. Houston, Inc., No. H-09-3345, 2010 U.S. Dist. LEXIS 129634 (S.D. Tex. Dec. 8, 2010)

Shortly after the court conditionally certified a class in a case alleging improper withholding of tip income, the defendants filed an expedited motion for a protective order asking the court to forbid the plaintiffs and their attorneys from using class members'

contact information "for any purpose other than the mailing of the court-approved notice," or alternatively, to require "specific approval from the court for any mailings, emails, phone calls or communication with potential opt-in plaintiffs other than the court-approved notice." The defendants argued that a communications ban was necessary to prevent the solicitation of clients under the guise of contacting fact witnesses. In support of the motion, the defendants pointed to the original plaintiff's deposition testimony regarding her efforts to recruit her co-plaintiffs, as well as inconsistencies between the declarations the plaintiffs submitted in support of their certification motion and their subsequent deposition testimony, arguing that the dynamic between the two suggested at least some level of impropriety or inaccuracy in pre-suit solicitations and communications.

The court denied the defendants' motion, finding that the evidence fell short of the evidence of coercive, misleading, or improper communications necessary to justify the relief sought by the defendants. The court based its opinion, in part, on the Supreme Court's admonition regarding communication bans set out in *Gulf Oil*.

Hinterberger v. Catholic Health Sys., No. 08-CV-380S(F), 2010 U.S. Dist. LEXIS 96435 (W.D. N.Y. May 13, 2010)

In this action alleging failure to compensate employees properly for work performed during meal breaks, the court conditionally certified a collective action and ordered the defendants to provide the plaintiffs with contact information for all putative class members. The defendants then moved for a protective order limiting plaintiffs' counsel's communications with potential class members out of concern that plaintiffs' counsel would improperly communicate with prospective class members (based on their actions in unrelated lawsuits), to protect the privacy interests of potential class members, and to avoid conflicting communications about the nature of the lawsuit.

Relying heavily on *Gulf Oil*, the court found that defendants had not established that plaintiffs had or proposed to use the employee contact information beyond the provisions in the court's order authorizing notice, or that plaintiffs' counsel had engaged or threatened to engage in abusive or unethical conduct to justify restricting further use of

the contact information. The court thus found that the defendants had not made a sufficient showing of abuse to establish the requisite factual basis for the communications ban they were seeking and, accordingly, denied the motion.

Nogueda v. Granite Masters, Inc., No. 2:09-CV-374, 2010 U.S. Dist. LEXIS 37657 (N.D. Ind. Apr. 14, 2010)

The plaintiff claimed that the employer failed to pay him time-and-one-half for overtime hours worked, and he sought conditional collective action certification. He also sought a protective order prohibiting the defendants from communicating with potential class members.

In the same order in which it denied conditional certification, the court denied the plaintiff's request for a protective order. The court noted that the sole basis for plaintiff's request in this regard was his unsupported assertion that employees feared retaliation. The court found that this allegation fell short of the clear record and specific findings required by *Gulf Oil* to justify a ban on a party's communications with putative class members.

Howard v. Securitas Sec. Serv., USA Inc., 630 F. Supp. 2d 905 (N.D. Ill. 2009)

The court conditionally certified a collective action class in this case based on allegations of uncompensated training time and other "off-the-clock" work. Shortly after the conclusion of the opt-in period, the defendant filed an emergency motion for a protective order based on alleged misleading statements about the case posted on the websites of plaintiffs' counsel. The defendant asked the court to order plaintiffs' counsel to remove information from their websites relating to the lawsuit, invalidate all of the consents filed in the case, decertify the class, disqualify plaintiffs' counsel from representing any current or putative plaintiffs against the defendant in connection with claims asserted in the litigation, and requiring plaintiffs' counsel to pay defendant's attorneys' fees incurred in defending the case.

Other than ordering plaintiffs' counsel to correct any statements on the websites that were presented as proven facts rather than allegations, the court denied the defendant's motion. The court found no evidence that any putative class members were influenced by the misleading information on the websites. It also noted that the defendant had offered nothing more than a suspicion that putative class members had been tainted by the misinformation on the websites, based on the high number of consent filers. The court stated that, absent evidence, it would "not presume that the entire case had been tainted and [would] not impose the drastic sanctions requested."

Firm Information

Brief History of Alston & Bird LLP

Alston & Bird's unique culture and core values have been developed and maintained for more than a century. Core values that are of the utmost importance to the firm include professional excellence, collegiality, teamwork, loyalty, diversity, individual satisfaction, fairness and professional development. Our culture is the underpinning for our diverse practice capabilities, the complementary structure of our nine offices and our successes to date.

The firm's history dates back to 1893 with Alston, Miller & Gaines' predecessor firms and includes significant growth through mergers including with Jones, Bird & Howell on December 1, 1982 to form Alston & Bird. Expansion into North Carolina was by way of a merger with Bell Seltzer Park & Gibson (1997), in New York with Walter, Conston, Alexander & Green (2001), in Dallas with Crews, Shepherd & McCarty LLP (2007) and in Los Angeles and Ventura County, California with Weston Benshoof Rochefort Rubalcava & MacCuish LLP (2008). Also in 2008, Alston & Bird opened an office in Silicon Valley with the addition of a lateral group in that area.

Today, the firm has offices in Atlanta, Charlotte, Dallas, Los Angeles, New York, Research Triangle, Silicon Valley, Ventura County and Washington, D.C. Our 800 attorneys provide a full range of services to domestic and international clients conducting business around the world. Counseling clients from what was initially a local context quickly expanded to regional, then national, and now spans a global economic environment. Alston & Bird has overlaid its broad range of legal skills and business knowledge with a commitment to innovation and technology.

In the face of ever-changing local, regional, national and world events, our lawyers continue to practice law at the highest levels of visibility, excellence and ethics. One of the most significant engagements in the firm's recent history began with the appointment of our partner Neal Batson by the U.S. Bankruptcy Court for the Southern District of New York as Examiner for Enron Corp. The engagement was a unique opportunity to serve an objective role in examining one of the most visible and significant corporate failures in American history. Additionally, former U.S. Senate Majority Leader, Bob Dole and others in the Legislative & Public Policy practice, give Alston & Bird clients access to a respected statesman and experts on all aspects of public policy from both sides of the aisle.

Alston & Bird has been ranked by FORTUNE magazine as one of the "100 Best Companies to Work For" for 12 years in a row. This year, the firm is ranked number 13, the only law firm ever to make the list for 12 consecutive years. Alston & Bird is the only law firm ever named to the top five and included seven consecutive years in the top 25. The recognition speaks to the culture of the firm and the environment in which we practice law and provide service to clients. The BTI Client Relationship Scorecard named Alston & Bird among its "Power Elite" for three years in a row.