



## RELATED PRACTICE AREAS

Class and Collective Actions  
Labor and Employment

## RELATED TOPICS

Fair Labor Standards Act (FLSA)  
Class Action Lawsuit

## Third Circuit Schools District Court On Workplace Class Certification

January 8, 2020 | [Fair Labor Standards Act](#), [Labor And Employment](#)



**Mark Wallin**  
Partner

The U.S. Court of Appeals for the Third Circuit recently found that a district court improperly granted Rule 23 class certification by applying the wrong standard. The Third Circuit determined that the U.S. District Court for the District of New Jersey failed to conduct the “rigorous analysis” required by Rule 23 of the Federal Rules of Civil Procedure, and impermissibly certified a class on what amounted to a “conditional” basis similar to the standard under Section 216 of the Fair Labor Standards Act (FLSA).

In *Ferreras v. American Airlines, Inc.*, the plaintiffs sought to represent a putative class of hourly employees working at the Newark airport, who alleged they were not paid for all of their compensable time, in violation of New Jersey law. Regardless of when the employees clocked in and out, the defendant employer’s timekeeping system was programmed to calculate pay for the duration of certain hourly employees’ shifts only, less a 30-minute meal break. If an employee worked beyond his or her shift (or during a lunch break), the employee was required to notify his or her supervisor of the additional time worked. The plaintiffs alleged that this timekeeping system resulted in the defendant failing to pay them for all time worked. Further, the plaintiffs alleged that supervisors regularly refused to authorize pay for time worked beyond their designated shifts.

Near the end of discovery, the plaintiffs moved for class certification under Rule 23, which the district court granted. Relying on case law concerning

conditional certification under the FLSA, the district court held that the plaintiffs had presented sufficient allegations and initial evidence to certify Rule 23 classes at that juncture. In addition, the court declined to resolve an evidentiary issue raised by the defendant relating to whether an individualized inquiry would be necessary, stating that the issue would be addressed during discovery and did not require denial of certification.

The defendant appealed the certification order to the Third Circuit, arguing that that district court applied the wrong standard, and that under the proper standard, the plaintiffs had failed to demonstrate commonality or predominance. The Court of Appeals agreed.

Procedurally, the Third Circuit held that the district court erred in three principal ways:

**1. The district court improperly imported the standard for conditional certification under the FLSA.**

The Third Circuit drew a distinction between the differing standards to be applied under Rule 23 and the FLSA. As the Third Circuit explained, under the FLSA, a plaintiff has [only a minimal burden](#) to show that he or she is similarly situated with the collective he or she seeks to represent, because the defendant can later move to [decertify conditional certification](#).

Under Rule 23, on the other hand, the court must be satisfied at the time of the certification decision that the plaintiff has proven each Rule 23 element by the preponderance of the evidence. The Third Circuit found that the lower court's reliance on FLSA conditional certification case law, and its assertion that the plaintiffs had met their burden "at this juncture," demonstrated that the lower court inappropriately certified a conditional Rule 23 class.

**2. The district trial court applied the wrong evidentiary standard, by relying upon mere "pleadings and initial evidence," rather than proof by the preponderance of the evidence.**

Rule 23 does not set forth a mere pleading standard or demand a "threshold showing," according to the Third Circuit. Unlike the FLSA, Rule 23 allows no deference or presumption on behalf of the moving party. Thus, the Third Circuit found that Rule 23 certification could not be supported by the "pleadings and initial evidence" relied upon by the district court.

**3. The lower court improperly failed to resolve conflicts in the evidence.**

The district court "did not engage with" the defendant's argument concerning the necessity of individualized proof – instead suggesting that such a dispute could be addressed after further discovery. The Third Circuit rejected this approach, explaining that the "rigorous analysis demanded by Rule 23 requires a court to resolve such disputes relevant to class certification."

Instead of remanding the case for further examination, however, the Third Circuit determined that class certification would be inappropriate and reversed the lower court's decision outright. Based on its review of the record, the Third Circuit wrote, "it is clear that commonality and predominance cannot be met," and the plaintiffs stated that they'd need no further discovery to turn up more evidence to support their motion.

Citing *Dukes*, the Court of Appeals reiterated the need for a class to have common answers – rather than just common questions – that would drive the litigation to resolution. The Third Circuit found that the common questions set forth by the district court did not have common answers, because the employees "will have to offer individualized proof to show that they were actually working during the various time periods at issue, the main point of dispute in this case." And because Rule 23's requirement for predominance is even more stringent than commonality, the Third Circuit held that the district court's determination that the plaintiffs satisfied predominance was likewise in error.

The Third Circuit's decision provides important reminders about the standard courts are required to apply when determining whether to grant class certification under Rule 23. Importantly, it also highlights how that standard differs dramatically from the standard for determining whether to grant conditional certification under Section 216(b) of the FLSA. Whereas FLSA conditional certification occurs early in the litigation, and carries only a minimal burden that can be supported by mere allegations, Rule 23 certification occurs toward the end of discovery, and is based upon evidence established throughout discovery.

As the Circuit Courts of Appeal and Supreme Court of the United States have consistently made clear, Rule 23 certification requires a courts to conduct a "rigorous analysis" based upon hard evidence. Employers would be wise to keep this distinction in mind when faced with Rule 23 class action and hybrid class and FLSA collective action lawsuits. Moreover, the decision stands as a useful example of how variation in employees' day-to-day work experiences can defeat class and collective action treatment.