

SDNY Denies Approval in FLSA Settlement Based In Part on Overly Broad Non-Disparagement Clause

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In its November 17, 2017 opinion in *Galindo v. East County Louth, Inc.* (No. 16 Civ. 9149), the Southern District of New York denied a motion to approve an individual FLSA settlement, including on the ground that the settlement agreement contained what the Court deemed to be an overly broad non-disparagement provision.

In the settlement agreement submitted for the Court's approval, the parties "mutually agree[d] that they will not disparage each other and will say or do nothing to bring discredit upon the other." The Court held that the provision was "overly restrictive," noting that:

Although not every non-disparagement clause in an FLSA settlement is objectionable, clauses that effectively bar plaintiffs from making any negative statements about the defendants cannot stand. Such clauses "must [at least] include a carve-out for truthful statements about plaintiffs' experience litigating their case." [citing *Lopez v. Nights of Cabiria, LLC*, 96 F. Supp. 3d 170, 180 (S.D.N.Y. 2015).] The non-disparagement clause in the proposed settlement agreement provides no such carve-out and is contrary to public policy "because it inhibits one of FLSA's primary goals—to ensure 'that all workers are aware of their rights.'"

In an earlier stage of the litigation, the Court had denied the plaintiff's motion for conditional certification of a collective under the FLSA, noting that the plaintiff's "allegations regarding whether the two corporate defendants operate as a single integrated enterprise and whether there was a common policy that violated the FLSA are textbook examples of the [conclusory] assertions that district courts in this circuit have repeatedly found to be insufficient."

In denying approval of the individual settlement, the Court also held that the fees sought by the plaintiff's counsel—85% of the total settlement amount—were not fair and reasonable. The Court noted, among other considerations, that "Plaintiff's counsel filed [a] motion to conditionally certify quite a broad class, one that encompassed 'all non-exempt employees ... employed by Defendants at each of their restaurants within the last six (6) years' Yet the motion was doomed from the start, as counsel provided patently insufficient details concerning any observation of, or conversation with, any other employee within the putative collective action: no dates, places, or descriptions akin to what has been accepted by courts in similar instances." Citing earlier decisions by the Southern District of New York, the Court noted that "conclusory statements by plaintiffs averring that other employees did not receive compensation do not meet the required level of detail" and that the "consensus in this district [is] that where a plaintiff bases an assertion of a common policy on observations of coworkers or conversations with them, he must provide a minimum level of detail regarding the contents of those conversations or observations."

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