UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MORRIS BIVINGS, on behalf of himself and others similarly situated, Plaintiff, v. EURAMEX MANAGEMENT GROUP, LLC; WESLEY APARTMENT HOMES GROUP, LLC; IGNACIO DIEGO; and JAMIN HARKNESS, Defendants.	CIVIL ACTION NO. 1:12-CV-3591-CAP

ORDER

This matter is currently before the court on the plaintiff's motion for conditional certification of this case as a collective action and issuance of court-approved notice to the collective action class members [Doc. No. 19] and the defendants' motion for leave to file a surreply [Doc. No. 31]. As an initial matter, the motion for leave to file a surreply [Doc. No. 31] is GRANTED. The surreply was considered in the adjudication of the plaintiff's motion for conditional certification.

I. Factual and Procedural Background

The defendants own 18 apartment complexes throughout metro-Atlanta. The plaintiff was employed by the defendants as a maintenance technician for an apartment complex and was paid on an hourly basis. The

primary duty of maintenance technicians for the defendants is to repair apartments, which includes electrical work, plumbing, drywall repairs, painting, appliance repairs, and repairs to heating, ventilation and air conditioning systems. Maintenance technicians receive assignments through work orders issued by the supervisor at apartment complex; the technicians are required to complete a minimum of ten work orders per day or face disciplinary action. In addition to the primary duty of making repairs to apartments, maintenance technicians are required to perform ongoing grounds keeping duties at the apartment complexes.

Maintenance technicians are required to rotate for week-long on-call periods every several weeks. During a technician's on-call week, he must be available by phone or pager 24-hours per day. Additionally, the on-call technician is required to work a four-hour shift on each weekend day of the on-call week.

Maintenance technicians typically report to one apartment complex but can be assigned to report to any of the 18 properties owned by the defendants. When they arrive on a property, maintenance technicians clock in using a computer timekeeping system located in the apartment complex's main office. Generally, the technicians clock out and back in for a one-hour

lunch break and then clock out for the day after completing their work orders.

The plaintiff claims that he and other maintenance technicians regularly worked more than 40 hours per week but were not paid overtime. According to the plaintiff, in order to avoid paying overtime, the managers regularly modified timesheets to reflect biweekly totals of less than 80 hours. The technicians learn of the changes to their timesheets when they meet with their managers at the main office of their respective apartment complexes in order to sign timesheets for payroll. Managers inform the technicians that they cannot be paid for all the time recorded on the timesheets and that they should arrange time off with the supervisors in compensation for the hours cut from their timesheets.

The Fair Labor Standards Act ("FLSA") requires that employers pay time-and-a-half for hours a non-exempt employee works in excess of forty. 29 U.S.C. § 207(a)(1). Private employers are not allowed to compensate employees with time off in lieu of overtime pay. *See* 29 U.S.C. § 207(o)(A)(2) (a state or local government agency may give compensatory time off instead of overtime pay.).

The plaintiff, on behalf of himself and others similarly situated, is seeking overtime compensation, liquidated damages, reasonable attorney

fees, and costs pursuant to the FLSA, 29 U.S.C. § 201, *et seq*. The class that the plaintiff seeks to represent is composed of all individuals who:

> (a) work or have worked for Euramex Management Group, LLC d/b/a Wesley Apartment homes ("Euramex") as Maintenance Technicians during the time that they worked for Euramex ("Maintenance Technicians") from October 15, 2009, through the close of opt-in period, and
> (b) who were not paid for all hours worked from October 15, 2009, through the close of opt-in period.

The plaintiff seeks to have the class conditionally certified and court-supervised notice sent to putative class members.

II. Analysis

The FLSA authorizes collective actions, stating:

> An action . . . may be maintained against any employer . . . by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed with the court in which such action is brought.

29 U.S.C. § 216(b). This court has discretion to authorize the sending of notice to potential class members in a collective action. *Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165, 169-170 (1989); *Hipp v. Liberty National Life Insurance Co.*, 252 F.3d 1208, 1219 (11th Cir. 2001); *Haynes v. Singer Co.*, 696 F.2d 884, 886-87 (11th Cir. 1983).

The Eleventh Circuit suggests a two-tiered approach to class certification in FLSA cases.

> The first determination is made at the so-called 'notice stage.' At the notice stage, the district court makes a decision -- usually based only on the pleadings and any affidavits which have been submitted -- whether notice of the action should be given to potential class members.

Hipp, 252 F. 3d at 1218. "The second determination is typically precipitated by a motion for 'decertification' by the defendant usually filed after discovery is largely complete and the matter is ready for trial." *Id.* This case is before the court for the "first determination" of class certification. At this stage, the "determination is made using a fairly lenient standard, and typically results in 'conditional certification' of a representative class." *Id.* "[P]laintiffs need show only that their positions are similar, not identical, to the positions held by the putative class members." *Id.* (quoting *Grayson v. K Mart Corp.*, 79 F.3d 1086, 1096 (11th Cir. 1996)). Before granting conditional certification, the court should determine: (1) whether employees sought to be included in the putative class are similarly situated with respect to their job requirements and pay provisions; and (2) whether there are other employees who wish to opt-in to the action. *Dybach v. State of Florida Department of Corrections*, 942 F.2d 1562, 1567-68 (11th Cir. 1991).

A. Similarity of employment positions of putative class members.

The plaintiff bears the burden of establishing that he is similarly situated with the group of employees he wishes to represent. *Grayson*, 79 F. 3d at 1096. The burden on the plaintiff, however, is a light one. As noted above, the standard is fairly lenient, and the plaintiff is not required to prove

that he and the putative class members held identical positions, only similar positions. *See Hipp*, 252 F.3d at 1217; *Grayson*, 79 F.3d at 1095-96 ("the 'similarly situated' requirement of § 216(b) is more elastic and less stringent than the requirements" for joinder and severance).

The plaintiff asserts that putative class members are similarly situated in regards to their primary job responsibilities and were subject to the common practice of not receiving overtime pay for hours worked over 40 in a week in violation of the FLSA. The plaintiff supports this assertion through the declarations of himself and two other opt-in plaintiffs.

In response to the motion for conditional certification, the defendants argue that the plaintiff has not met his burden of demonstrating that he and the proposed class members are similarly situated. Specifically, the defendants contend that the plaintiff has shown only that maintenance technicians performed similar work for which they were paid an hourly rate. This contention simply ignores key statements in the plaintiff's declaration that he and other technicians were not always paid for overtime worked and were promised comp time in lieu of overtime pay. Bivings Dec. ¶¶ 16, 17 [Doc. No. 19-3]. The declarations of the opt-in plaintiffs lend further support to the plaintiff's assertion of similarity. *See* Robinson Dec. ¶¶ 7, 9 [Doc. No. 19-4]; Emfinger Dec. ¶¶ 8, 9 [Doc. No. 19-5] .

In further response in opposition to the plaintiff's motion, the defendants argue that the plaintiff's allegations that he was required to work "off-the-clock" and that his time records were improperly altered are not suitable for class treatment. Rather, the defendants assert that the plaintiff's allegations are nothing more than a single supervisor at a single complex acting in direct contravention to Euramex's established policies and procedures. The defendants have again overlooked the details set forth the declarations filed by the plaintiff: at least three of the plaintiff's superiors at two different complexes promised the plaintiff comp time for overtime hours worked. Bivings Dec. ¶ 16 [Doc. No. 19-3].

The defendants have cited a case from this court in which conditional certification was denied where the plaintiffs alleged that managers violated company policy to require subordinates to work "off-the-clock." *Williams v. Accredited Home Lenders Inc.,* No. 1:05-CV-1681-TWT, 2006 U.S.Dist. LEXIS 50653. In *Williams*, however, the plaintiff had conducted extensive discovery prior to seeking conditional certification. In the instant case, the plaintiff has had no opportunity to conduct discovery to learn whether the factual scenarios he has described were widespread such that they became de facto company policy, albeit unwritten. Likewise, this court's order in *Beecher v. Steak N Shake Operations, Inc.*, No. 1:11-CV-4102-ODE (N.D. Ga. Sept. 27,

2012) is not persuasive because of the early stage of the current litigation; the plaintiff has not had the opportunity to seek declarations from putative class members under the protection of a court-issued notice. Therefore, the extent similarity of the practices alleged by the plaintiff are unknown at this time. Accordingly, the court will not conclude at this early stage that the claims are not suitable for class treatment. This is an argument that may be raised by the defendants at the conclusion of discovery via a motion for decertification.

Under the lenient standard appropriate at the notice stage, the court finds that the plaintiff is similarly situated to other maintenance technicians employed by the defendants.

B. Sufficiency of interest by other employees in the lawsuit

Next, the plaintiff must demonstrate that other employees wish to opt in to the action before this court may grant conditional certification. *Dybach*, 942 F.2d at 1567-68. So far, two opt-in plaintiffs have joined the plaintiff in this suit. The estimated class size is 40 to 50 members. The plaintiff contends that the two opt-ins at this early stage is sufficient to demonstrate the desire of other maintenance technicians to join this lawsuit.

In response, the defendants have submitted twenty-three declarations of current maintenance technicians who deny that Euramex failed to compensate them properly and state that they do not wish to join the lawsuit.

However, technicians who have been properly compensated for overtime do not meet the class definition in this case. Therefore, the twenty-three technicians identified by the defendants are irrelevant.

Through the declarations of Robinson and Emfinger, the plaintiff has demonstrated, for purposes of conditional certification, that other maintenance technicians employed (or formerly employed) by the defendants wish to opt in to the case. *See Dybach*, 942 F.2d at 1567-68.

C. Limitation of the Proposed Class

The defendants argue that if the court does find that conditional certification is warranted that the proposed class be limited to maintenance technicians who worked at the same apartment complex and under the same supervisor as the plaintiff. However, as set forth above, the plaintiff has not had the opportunity to conduct discovery in this matter. Therefore, the court is unwilling to restrict the putative class so severely at this point in the litigation. The defendants may raise this argument in a motion to decertify at the proper time.

D. Proposed Notice

The plaintiff submitted a Notice of Lawsuit [Doc. No. 19-2] to be sent to potential members of the class. The defendants argue the notice is deficient in several respects.

First, the defendants argue that Paragraph Two of the notice contains misleading and incomplete information because it states that the complaint seeks liquidated damages "for workers not paid the minimum wage and/or overtime correctly." In response, the plaintiff contends that the challenged phrase is contained in the definition of "liquidated damages," as it is used in 29 U.S.C. § 216(b).

The court agrees with the defendants in that the reference to failure to pay "minimum wage" is confusing since there are no allegations regarding a failure to pay minimum wage in this lawsuit. That phrase should be stricken.

Second, the defendants argue that Paragraph Two is unbalanced in that it contains a detailed theory of the plaintiff's case, but states only that the defendants "deny that they are liable to the Maintenance Technicians for any unpaid wages." The defendants propose a more detailed summary of their position. *See* Defs.' Resp. in Opp. to P.'s Mot. for Conditional Certification at pp. 19-20 [Doc. No. 26]. The court agrees with the defendant that the more detailed explanation of the defendants' stance in this matter is necessary.

Third, the defendants argue that Paragraph Three fails to set forth accurate requirements for those eligible to join the collective action.

Specifically, the defendants contend that the suit is not about those "who were not paid for all hours worked;" rather, the suit is about overtime. The plaintiff's reply does not address the alleged discrepancy directly. Instead the plaintiff takes issue with the proposed language offered by the defendants. The court finds that a notice that specifies that maintenance technicians who were not paid for overtime work would be a more accurate description of those eligible to join the suit. However, the language proposed by the defendant is confusing. Therefore, Paragraph Three shall be altered to identify those maintenance technicians who were not paid for overtime work.

Finally, the defendants argue that the proposed notice and consent do not allow potential opt-in plaintiffs to make an informed decision because the they do not include information and acknowledgement of all obligations (discovery) and liabilities (defendants' costs) that current and future plaintiffs may be forced to bear. In response, the plaintiff merely contends that the statement offered by the defendants is inaccurrate because it is "highly unlikely" that a single plaintiff will be responsible for all of the defendants' costs. The court finds that the notice should contain information regarding the potential liabilities and obligations for which opt-in plaintiffs may be responsible. However, it should be made clear that, as to costs, the individual plaintiffs will be responsible for a proportionate amount of costs.

The court finds that a Notice of Lawsuit should be sent to prospective class members and posted at all the defendants' locations. However the notice shall be amended to reflect the determinations made above. The parties are encouraged to work together to arrive at a product that is satisfactory to all parties. The plaintiff is ORDERED to submit the proposed amended notice (including the consent form) to the court no later than April 15, 2012. The defendants shall have 5 days to file any objection to the proposed amended notice. (If the parties are in agreement as to the notice content, the plaintiff shall note that fact in his notice of filing the proposed amended notice.)

Meanwhile, the defendants are ORDERED to provide the plaintiff, within 21 days, a list of all putative class members that contains the last known contact information including name, address, telephone number, dates of employment, job title location of employment, and dates of birth.

III. Conclusion

The certification of collective actions in an FLSA case is based on a theory of judicial economy by which "[t]he judicial system benefits by efficient resolution in one proceeding of common issues of law and fact arising from the same alleged . . . activity." *Barten v. KTK & Associates, Inc.*, No. 8:06-CV-1574-T-27-EAJ, 2007 WL 2176203, at *1 (M.D. Fla. July 26, 2007)

(quoting *Hoffmann-La Roche, Inc.*, 493 U.S. at 170). In this case, these efficiencies can be realized through a collective action even if a final resolution on the merits requires some factual determinations individual to each opt-in plaintiff. Should the defendants move for decertification following discovery, the court will revisit the certification issue and make a final determination as to whether all requirements have been met. At this stage, however, the court will permit the plaintiff to send notice of opt-in rights to potential members of the class.

The plaintiff's motion for conditional certification [Doc. No. 19] is hereby GRANTED. The court will set forth the precise class definition after approval of the proposed amended notice.

The defendants' motion for leave to file a surreply [Doc. No. 31] is GRANTED. The surreply was considered in adjudicating the motion for conditional certification.

SO ORDERED this 5th day of April, 2013.

/s/ Charles A. Pannell, Jr.
CHARLES A. PANNELL, JR.
United States District Judge