IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

KENT DOUGLAS,	)	CASE NO. 1:07CV077
	)	
Plaintiff,	)	
	)	MAGISTRATE JUDGE HEMANN
v.	)	
	)	
GE ENERGY REUTER STOKES,	)	**MEMORANDUM OF OPINION**
	)	Docket #18
Defendants.	)	

This case is before the magistrate judge on consent. Pending is the motion of plaintiff, Kent Douglas ("Douglas"), for conditional certification, expedited opt-in discovery, and court-supervised notice to potential opt-in plaintiffs ("Pl. mot."; Docket #18). Defendant, GE Energy Reuter Stokes ("GE Energy") opposes plaintiff's motion ("Def. opp."; Docket #24). For the reasons given below the court overrules Douglas's motion in part and grants it in part.

I.

Douglas alleges the following facts. Douglas worked for GE Energy for about 36 years until his termination in September 2006. From about 1998 through 2004 Douglas' position was "Planner." Beginning January 2005, Douglas became a "Functional Planner." Douglas avers that his job responsibilities as a "Planner" and a "Functional Planner" were identical. GE Energy classified the positions of both Planner and Functional Planner as exempt from the overtime requirements of the Fair Labor Standards Act ("FLSA") and the Ohio Minimum Wage Act ("OMWA").

Douglas also alleges the following facts about his jobs as Planner and Functional Planner. He earned a salary of more than $250.00 per week. He did not customarily or regularly exercise discretion or independent judgment in performing his jobs, and most of his responsibilities were non-managerial. He did not perform work that required highly specialized knowledge or that was intellectual or varied. Douglas further alleges that he regularly worked more than 40 hours per week and sometimes worked as many as 50 hours per week.

Douglas contends that GE Energy improperly failed to pay him and others situated similarly to him overtime compensation for hours worked in excess of 40 hours in a week. On January 11, 2007 Douglas filed this action against GE Energy, alleging violations of the FLSA and OMWA. Douglas now moves for conditional certification, expedited opt-in discovery, and court-supervised notice to potential opt-in plaintiffs.

II.

Title 29 U.S.C.A. § 216(b) ("§ 216(b)") of the Fair Labor Standards Act ("FLSA") provides in full as follows:

> (b) Any employer who violates the provisions of section 6 or section 7 of this Act [29 U.S.C. §§ 206 or 207] shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 15(a)(3) of this Act [29 U.S.C. § 215(a)(3)] shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 15(a)(3) [29 U.S.C. § 215(a)(3)], including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. **An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction 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 in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 17 [29 U.S.C. § 217] in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 6 or section 7 of this Act [29 U.S.C. §§ 206 or 207] by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 15(a)(3) [29 U.S.C. § 215(a) (3)].

(Emphasis added). Actions filed pursuant to § 216(b) are properly termed "collective actions" or "class actions." *See* 29 U.S.C.A. § 256. The term "class action" is misleading, however, as a collective action pursuant to § 216(b) bears little resemblance to a class action pursuant to the current version of Rule 23:

> There is a fundamental, irreconcilable difference between the class action described by Rule 23 and that provided for by FLSA § 16(b). In a Rule 23 proceeding a class is described; if the action is maintainable as a class action, each person within the description is considered to be a class member and, as such, is bound by judgment, whether favorable or unfavorable, unless he has "opted out" of the suit. Under § 16(b) of FLSA, on the other hand, no person can become a party plaintiff and no person will be bound by or may benefit from judgment unless he has affirmatively "opted into" the class; that is, given his written, filed consent. It is crystal clear that 16(b) precludes pure Rule 23 class actions in FLSA suits.

LaChappelle v. Owens-Illinois, Inc., 513 F.2d 286, 288 (5th Cir. 1975) (footnote and citations omitted). For this reason actions pursuant to § 216(b) are sometimes called "spurious" class actions.[1] *See, e.g., Equal Employment Opportunity Comm'n v. Sandia Corp.*, 639 F.2d 600, 602 (10th Cir. 1980). An action pursuant to § 216(b) is the exclusive

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[1] Note that this term is used because of the action's similarities to the "spurious" class action permitted by the version of R. 23(a)(3) in effect from 1938 through 1966. *See* Wright & Miller, 7A FED. PRAC. & PROC. CIV.3d §§ 1752, 1753 (2005).

means by which plaintiffs may collectively enforce the provisions of the FLSA. Parties may not seek to enforce the FLSA by filing a true class action pursuant to R. 23. *See Paddison v. Fidelity Bank*, 60 F.R.D. 695, 700 (E.D. Pa. 1973); *Sims v. Parke Davis & Co.*, 334 F. Supp. 774 (E.D. Mich.1971), *aff'd* 453 F.2d 1259 (6th Cir. 1971).[2]

Once an employee has filed an action against an employer for and on behalf of that employee and other employees similarly situated, the plain text of § 216(b) requires, at most, two predicates to the initiation of a collective action pursuant to that section: (1) that another employee file in the court in which the action is brought a written consent to become a party to the action and (2) that a latter-filing employee be similarly situated to the first. *See Sperling*, 862 F.2d 439, 444 (3d Cir. 1988) ("[T]he twin requirements for a class action to proceed under the ADEA [pursuant to § 216(b)] are that the employees in the class must be "similarly situated" and that each class member must file an individual consent.") The statute does not require a minimum number of plaintiffs or class certification for the collective action to proceed.[3]

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[2] The cases cited in this memorandum include cases brought under the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 621 *et seq*, and the Equal Pay Act of 1963 ("EPA"). The ADEA incorporates the enforcement provisions of § 216(b) of the FLSA. *See Hoffman-LaRoche Inc. v. Sperling*, 493 U.S. 165, 167-68 (1989). The EPA was passed in 1963 as an amendment to the FLSA and shares its enforcement mechanism. *See Thompson v. Sawyer*, 678 F.2d 257, 263 (D.C.C. 1982); *Donovan v. University of Texas at El Paso*, 643 F.2d 1201, 1202 (5th Cir. 1981). Thus, caselaw regarding enforcement of the ADEA and EPA is applicable to § 216(b). *See Sperling*, 493 U.S. at 167-68; *Thompson*, 678 F.2d at 263. *See also discussion at* Spahn, "Resurrecting the Spurious Class: Opting-In to the Age Discrimination in Employment Act and the Equal Pay Act through the Fair Labor Standards Act." 71 GEORGETOWN LJ 119 (1982).

[3] Plaintiffs must also file their actions within the appropriate statutory period:

> Any action commenced on or after May 14, 1947, to enforce any cause of action for . . . unpaid overtime compensation . . . under the Fair Labor Standards Act of 1938,

Courts differ, however, as to whether a collective action pursuant to § 216(b) should be guided by requirements of Rule 23. A line of cases following *Shushan v. University of Colo.,* 132 F.R.D. 263 (D. Colo. 1990), contends that courts should import Rule 23(a)'s prerequisites of numerosity, commonality, typicality, and adequacy of representation and 23(b)(3)'s requirement that common questions of fact predominate in determining whether a collective action may be maintained pursuant to § 216(b). Other cases have used the requirements of the pre-1966 version of Rule 23, which allowed for "spurious" class actions, in deciding whether to permit a collective action pursuant to § 216(b) to proceed. *See Bayles v. American Med. Response of Colo., Inc.,* 950 F. Supp. 1053, 1064 (D.Colo. 1996) (holding that "if Rule 23's standards apply . . . at all, it must be through Rule 23 as it existed prior to 1966").[4]

Most courts agree, however, that collective actions pursuant to § 216 should not be guided by Rule 23. *See, e.g., Jackson v. New York Tel. Co.,* 163 F.R.D. 429, 432 (S.D.N.Y. 1995) ("[A]pplication of the Rule 23 requirements to the question of whether potential plaintiffs are similarly situated is at odds with the well-reasoned conclusions of

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> as amended . . . may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued . . . .

Title 29 USCA § 255.

[4] Under the earlier version of Rule 23, the "character of the right sought to be enforced for" the group of plaintiffs must be "several," there must be "a common question of law or fact affecting the several rights," and "a common relief" must be sought. *Bayles*, 950 F. Supp. at 1064. In addition, a court would have "inherent authority to refuse to proceed collectively where it would waste judicial resources or unfairly prejudice the party opposing the proposed class." *Id.* at 1065

other courts, the remedial purposes of ADEA, and the prompt and efficient resolution of similar claims."); *Church v. Consolidated Freightways, Inc.*, 137 F.R.D. 294, 306 (N.D. Cal. 1991) (explicitly rejecting *Shushan*); *Groshek v. Babcock & Wilcox Tubular Prods. Div.*, 425 F. Supp. 232, 234 (D. Wis. 1977) ("This court has no authority under the FLSA to adopt portions of Rule 23 procedures and apply them to an action brought under the Act . . . ."); *McGinley v. Burroughs*, 407 F. Supp. 903 (E.D. Pa. 1975); *Cooke v. Reynolds Metals Co.*, 65 F.R.D. 539 (E.D. Va. 1975); *Hull v. Continental Oil Co.*, 58 F.R.D. 636 (S.D. Tex. 1973); *Burgett v. Cudahy Co.*, 361 F. Supp. 617 (D. Kan. 1973). This includes rejection of the requirement of class certification as provided by Rule 23. *Donovan v. University of Texas at El Paso*, 643 F.2d 1201 (5th Cir. 1981) (holding that the provisions of Rule 23 are not applicable to § 216(b) actions and that no class certification is required in such actions). As the court observed in *Montalto v. Morgan Guar. Trust Co.*:

> it appears altogether inappropriate for the court to "order" that the action be maintained as a class action. To the extent that the plaintiff may hereafter secure filed written consents of eligible plaintiffs pursuant to the provisions of 29 U.S.C. § 216(b) a class or quasi-class action may come into being de facto and the assistance of the court will be unnecessary. Without the procurement of such consents, the matter cannot be maintained as a class action and the court has no authority to order that it should be.

83 F.R.D. 150, 152 (S.D.N.Y. 1979). Consequently, plaintiffs seeking to maintain a collective action need not seek class certification of the sort described in Rule 23.

Although courts should not heedlessly import the requirements Rule 23 in managing collective actions, courts may impose requirements on plaintiffs not described by § 216(b) before allowing such actions to proceed. These additional requirements are necessary because § 216(b) is an "opt-in" collective action, unlike the "opt-out" class action brought

pursuant to R. 23:

> Congress has stated its policy that ADEA plaintiffs should have the opportunity to proceed collectively. A collective action allows . . . plaintiffs the advantage of lower individual costs to vindicate rights by the pooling of resources. The judicial system benefits by efficient resolution in one proceeding of common issues of law and fact arising from the same alleged discriminatory activity.
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> These benefits, however, depend on employees receiving accurate and timely notice concerning the pendency of the collective action, so that they can make informed decisions about whether to participate. Section 216(b)'s affirmative permission for employees to proceed on behalf of those similarly situated must grant the court the requisite procedural authority to manage the process of joining multiple parties in a manner that is orderly, sensible, and not otherwise contrary to statutory commands or the provisions of the Federal Rules of Civil Procedure. *See* Fed. Rule Civ. Proc. 83. It follows that, once an . . . action is filed, the court has a managerial responsibility to oversee the joinder of additional parties to assure that the task is accomplished in an efficient and proper way.

Sperling, 493 U.S. at 170-71. The court's managerial responsibility allows a court, therefore, to impose such requirements on plaintiffs as may be necessary to manage the conduct of a § 216(b) collective action in an efficient way.

Courts have considerable discretion in crafting procedures through which to exercise their managerial responsibilities pursuant to § 216(b). Unlike the requirement in Rule 23(c)(2) that notice be given to all members identified in the class to allow them to "opt out" of the class if they choose, § 216(b) provides no procedural mechanism for allowing the notification of potential plaintiffs of their right to "opt-in" to a suit. *See Baker v Michie Co.*, 93 F.R.D. 494 (W.D. Va. 1982). Thus, courts may require court approval of the notice sent to potential plaintiffs and the imposition of a deadline for potential plaintiffs to join the action. *See Hoffman-LaRoche*, 493 U.S. at 168-72. But "it lies within the discretion of a district court to begin its involvement early, at the point of the initial notice, rather than at some later time." *Id.* at 171. Generally, "courts . . . have . . . considerable authority 'to

manage their own affairs so as to achieve the orderly and expeditious disposition of cases.'" *Hoffman-LaRoche*, 493 U.S. at 172-73 (quoting *Link v. Wabash R. Co.,* 370 U.S. 626, 630-631 (1962)).

One course for ensuring efficient litigation while minimizing the burdens imposed on defendants is a two-tiered approach to determining whether any plaintiffs filing actions subsequent to the initiation of the action are "similarly situated" to the first plaintiff:

> 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.
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> Because the court has minimal evidence, this determination is made using a fairly lenient standard, and typically results in "conditional certification"[5] of a representative class. If the district court "conditionally certifies" the class, putative class members are given notice and the opportunity to "opt-in." The action proceeds as a representative action throughout discovery.
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> 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. At this stage, the court has much more information on which to base its decision, and makes a factual determination on the similarly situated question. If the claimants are similarly situated, the district court allows the representative action to proceed to trial. If the claimants are not similarly situated, the district court decertifies the class, and the opt-in plaintiffs are dismissed without prejudice. The class representatives--i.e. the original plaintiffs--proceed to trial on their individual claims.

Hipp v. Liberty Nat'l Life Ins. Co., 252 F.3d 1208, 1218 (11th Cir. 2001) (quoting *Mooney*

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[5] The court here is using "certification" and "decertification" as signifying only whether a court regarded latter-filing plaintiffs as being similarly situated to the first-filing plaintiff. The court does not use the term to suggest that courts should grant or withhold certification of the type provided by Rule 23. The use of "certification" here is misleading, given other courts' use of the term to mean certification after considering some or all of the requirements of Rule 23.

v. Aramco Servs. Co., 54 F.3d 1207, 1213-14 (5th Cir. 1995) (internal footnote omitted));[6] *see also Comer v. Wal-Mart Stores, Inc.*, 454 F.3d 544 (6th Cir. 2006); *Cameron-Grant v. Maxim Health Care Servs.*, 347 F.3d 1240, 1243 (11th Cir. 2003).

As the court in *Hipp* noted, the standard for determining whether it is appropriate to send notice to potential plaintiffs of the ongoing action is lenient. Courts do not agree, however, regarding precisely what the standard should be before allowing notification of potential litigants. Some courts allow notice on the basis of the allegations of the complaint alone. *See, e.g., Jackson,* 163 F.R.D. at 432; *Behr v. Drake Hotel*, 586 F. Supp. 427, 430-31 (N.D. Ill. 1984); *Allen v. Marshall Field & Co.*, 93 F.R.D. 438, 442-45 (N.D. Ill 1982); *Sussman v. Vornado, Inc.*, 90 F.R.D. 680, 684 (D.N.J. 1981). Others require a showing of some factual basis for the allegations of the complaint. *See, e.g., Sperling v. Hoffman LaRoche, Inc.*, 118 F.R.D. 392, 406 (D.N.J. 1988), *aff'd in part, rev'd in part on other grounds*, 862 F.2d 439 (3d Cir.), *aff'd and remanded*, 493 U.S. 165 (1989); *Haynes v. Singer Co., Inc.*, 696 F.2d 884 (11th Cir. 1983). Such courts variously describe the standard required to allow notice to be sent as a "colorable basis," a "reasonable basis," or a "modest basis" for believing that there may be other persons similarly situated to

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[6] The Eleventh Circuit suggested that courts in the circuit use the two-tiered approach but did not require it:

> The two-tiered approach to certification of § 216(b) opt-in classes described above appears to be an effective tool for district courts to use in managing these often complex cases, and we suggest that district courts in this circuit adopt it in future cases. Nothing in our circuit precedent, however, requires district courts to utilize this approach. The decision to create an opt-in class under § 216(b), like the decision on class certification under Rule 23, remains soundly within the discretion of the district court.

Hipp, 252 F.3d at 1219.

plaintiff. *See, e.g., Brooks v. Bellsouth Telecomms., Inc.*, 164 F.R.D. 561 (N.D. Ala. 1995); *Severtson v. Phillips Beverage Co.*, 141 F.R.D. 276, 279-80 (D. Minn. 1992); *H & R Block, Ltd. v. Housden,* 186 F.R.D. 399, 400 (E.D. Tex. 1999).

Notices sent to class members must "be scrupulous to respect judicial neutrality . . . [and] . . . take care to avoid even the appearance of judicial endorsement of the merits of the action." *Hoffman-LaRoche*, 493 U.S. at 174. Certain elements of notices sent to class plaintiffs in Rule 23 actions are appropriate in sending notices to potential plaintiffs in § 216 collective actions, such as the allegations of the complaint, the right to opt in, the right to appear through one's own counsel, entitlement to individual relief, and time limits for exercise of the right to opt in. *See, e.g., Neloms v. Southwestern Elec. Power Co.*, 72 F.R.D. 128 (W.D. La. 1976); *Women's Comm. for Equal Employment Opportunity v. National Broad. Co.*, 71 F.R.D. 666 (S.D.N.Y. 1976); *Hoston v. U.S. Gypsum Co.*, 67 F.R.D. 650 (E.D. La. 1975); *Kolta v. Tuck Indus., Inc.*, 11 Fair Empl. Prac. Cas. (BNA) 161 (S.D.N.Y. 1975); *Freeman v. Motor Convoy, Inc.*, 68 F.R.D. 196 (N.D. Ga. 1974); *Meadows v. Ford Motor Co.*, 62 F.R.D. 98 (W.D. Ky. 1973).

As a practical matter notification of potential plaintiffs suggests allowing discovery of the names of persons similarly situated to the first-filing plaintiff, and a number of courts permit such discovery. *See, e.g., United States v. Cook*, 795 F.2d 987 (Fed. Cir. 1986); *Braunstein v. Eastern Photographic Labs., Inc.*, 600 F.2d 335 (2d Cir. 1979); *Pines v. State Farm Gen. Ins. Co.*, Fair Empl. Prac. Cas. (BNA) 387 (C.D. Cal. 1992); *Lusardi v. Xerox Corp.*, 99 F.R.D. 89, 93 (D.N.J. 1983); *Riojas v. Seal Produce, Inc.*, 82 F.R.D. 613 (S.D. Tx. 1979). The Supreme Court has made it clear, moreover, that such discovery is

permissible. *Hoffman-LaRoche*, 493 U.S. at 170.

In the instant case, Douglas alleges in an affidavit that his position was non-managerial and that his duties were the same as those of other Planners and Functional Planners with whom he worked. *See* Affidavit of Consent of Douglas to Be a Representative Plaintiff ("Douglas Aff."), Complaint, Exh. 2. A second individual, George McElderry ("McElderry"), who was employed as a Planner and Functional Planner by GE Energy for about two and a half years until September 2004, also asserts that his position was essentially non-managerial and that his duties were the same as those of other Planners and Functional Planners with whom he worked. *See* Affidavit of McElderry ("McElderry Aff."), Complaint, Exh. 3. Both persons assert that they were not paid overtime for hours worked over 40 hours per week. These allegations and affidavits are sufficient to warrant conditional treatment of the case as a collective action.

GE Energy argues that Douglas has failed to show that he is similarly situated to other potential class members. GE Energy errs. Both Douglas and McElderry represent to the court not only that their job responsibilities were substantially identical to one another but also to the responsibilities of other Planners and Functional Planners with whom they worked. Douglas's and McElderry's first-hand experience with the work of other Planners and Functional Planners and the small size of the potential class distinguishes this case from other cases cited by GE Energy. *Compare, e.g., Severtson*, 137 F.R.D. at 267 (finding that plaintiffs offered only unsupported allegations or anecdotal evidence regarding the claim that others were similarly situated to them); *Levinson v. Primedia, Inc.*, 2003 WL 11533428, at *2 (S.D.N.Y. Nov. 6, 2003) (finding that plaintiffs offered no evidence that

other persons were similarly situated to them); *Harrison v. McDonald's Corp.*, 411 F. Supp. 2d 862, 864-65 (S.D. Ohio 2005) (striking as hearsay evidence regarding whether others were similarly situated to plaintiffs); *Haynes*, 696 F.2d at 887 (affirming the district court's refusal to permit notice of a collective action where plaintiffs presented no evidence that others were similarly situated); and *Bernard v. Household Int'l, Inc.*, 231 F. Supp. 2d 433, 435 (E.D. Va. 2002) (finding that plaintiffs had presented sufficient evidence that employees in two Virginia offices were similarly situated to them but failed to provide any evidence that parties in other offices were also similarly situated). The present case is easily distinguishable from the cited cases in that plaintiffs assert that they had first-hand experience in working with other, similarly-situated persons and that the potential class is so small that Douglas and McElderry alone comprise a substantial portion of the class.[7] The evidence provided by plaintiff is sufficient to meet the lenient standard for sending notice to potential class members.

GE Energy also argues that the case should not be treated as a collective action because doing so would require the court to make individual findings inappropriate to adjudication of a collective action. Douglas correctly responds that making such individual findings is appropriate to the second stage of adjudication, upon motion by GE Energy to "decertify" the class. *See Hipp,* 252 F.3d at 1219 (finding that plaintiffs may meet their burden at the first stage merely by making substantial allegations supported by affidavits

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[7] GE Energy's descriptions of the "different work" done by various planners cannot be dispositive of the question. *See* Def. opp. at 8-9. Whether work is the same or different may well depend upon the level of generality used in describing it. Thus, two persons' work might be differently described as "counting fittings" or "monitoring hardware supplies" or similarly described as "assessing inventory."

of class-wide discrimination). Moreover, as consideration of individual cases is impractical prior to an opt-in period, such consideration is not appropriate to the first stage of adjudication.[8]

GE Energy's argument that Douglas has failed to demonstrate an unlawful policy that violates the FLSA is also not well taken. First, it is inappropriate to import into the requirement that plaintiffs be "similarly situated" an additional requirement that they all have been affected by a single, unitary policy. *See Hipp,* 252 F.3d at 1219; *Grayson v. K Mart Corp.*, 79 F.3d 1086, 1095 (11th Cir. 1996). Second, even if such a requirement were appropriate, the cases cited by GE Energy as instances in which other plaintiffs failed to provide evidence that alleged violations might be widespread differ from the instant case in one important respect: Douglas and McElderry alone constitute more than 22% of the potential class. Thus, if plaintiff's allegations are true, it is certain that the alleged policy affects more than one-fifth of the potential class. Third, GE Energy could have ended any uncertainty as to whether the alleged policy is widespread merely by attesting by way of affidavit that other Planners and Functional Planners do not work more than 40 hours per week or are paid the equivalent of time and a half when they do work more than 40 hours per week. The absence of any such attestation in the record speaks volumes.

GE Energy also argues that Douglas has not shown that treating the present case as a collective action would achieve judicial efficiency. GE Energy cites no mandatory or persuasive authority that plaintiffs must make such a showing before proceeding with a

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[8] A similar response could be made to GE Energy's contention that plaintiff's proposed classes are overbroad. The court also notes that it is difficult to take seriously an argument that two proposed classes consisting of a total of nine persons is overbroad.

collective action, and the court declines to manufacture such a requirement.

GE Energy further contends that this case should not be treated as a collective action because Douglas has not shown that any other persons would seek to join the litigation. Douglas properly responds that no court outside the Eleventh Circuit has imposed such a requirement on plaintiffs. *Kautsch v. Premier Communications*, 2007 WL 188480, at *5 (W.D. Mo. Jan. 23, 2007). As the great weight of circuit authority is against imposing such a requirement, the court declines to do so.

Finally, GE argues that the case should not be treated as a collective action because it would be prejudiced thereby, citing *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1004 (11th Cir. 1997), for the propriety of considering this factor. *Jackson* warned courts that "[a]n order authorizing class communications prior to class certification is likely to be an abuse of discretion when (1) the communication authorized by the order is widespread and clearly injurious and (2) the certification decision is not imminent or it is unlikely that the class will be in fact certified." *Id.* Even if this court were convinced that *Jackson* is persuasive authority, GE Energy's argument is not well-taken. As already noted, this court declines to "certify" a class; any communications among potential plaintiffs would reach only nine persons; and the court will not permit "clearly injurious" communications. GE Energy's argument, therefore, is unavailing.

III.

For the reasons given above the court grants Douglas's motion for conditional certification as understood in *Hipp*. The court adopts the two-tiered approach described in *Hipp* for proceeding in the instant action. The court finds that the record before the court

provides a factual basis for believing that there may be other persons similarly situated to Douglas with regard to the allegations of the complaint sufficient to allow this action to go forward as a collective action pursuant to § 216(b). For these reasons the court orders the following:

1. Defendants will produce the names, last-known addresses, and hours worked for all individuals who worked for GE Energy as a Planner or Functional Planner on a salaried basis at any of its facilities for three years prior to January 11, 2007.[9] GE Energy shall make this production on or before May 2, 2007.

2. On or before May 9, 2007 Douglas shall produce to the court and to counsel for GE Energy a proposed notice to potential plaintiffs about the instant action. The contents of this notice shall be consistent with the contents of such notices described in the discussion above. Defendants may file objections to the proposed notice on or before May 16, 2007. The court shall promptly approve or require modifications in the notice.

3. The court will close the action to opt-in plaintiffs on June 16, 2007.

4. At the close of discovery the court will entertain a motion to dismiss any or all latter-filing plaintiffs as not similarly situated to Douglas or as asserting claims barred by the relevant statute of limitations.

The court cautions Douglas that this action is limited to the persons and allegation described in his Amended Complaint at 2-3. The court will not entertain allegations other than the failure to pay overtime.

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[9] The court notes that GE Energy represents that it has already produced the names and addresses of all potential plaintiffs to Douglas.

IT IS SO ORDERED.

Date: April 30, 2007

/s/Patricia A. Hemann
Patricia A. Hemann
United States Magistrate Judge