UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

TENOLA OLIVER, on behalf of herself and all others similarly situated, Plaintiff, v. RELX INC. D/B/A LEXISNEXIS, Defendant.	: : : : : : : : : :	Case No. 3:18-cv-127 Judge Thomas M. Rose

ENTRY AND ORDER GRANTING MOTION FOR CONDITIONAL CERTIFICATION, EXPEDITED OPT-IN DISCOVERY, AND COURT-SUPERVISED NOTICE TO POTENTIAL OPT-IN PLAINTIFFS (DOC. 15)

This case is before the Court on the Motion for Conditional Certification, Expedited Opt-In Discovery, and Court-Supervised Notice to Potential Opt-In Plaintiffs ("Motion for Conditional Certification") (Doc. 15) filed by Plaintiff Tenola Oliver ("Plaintiff"). Plaintiff alleges that she was denied compensation that she was owed due to Defendant RELX's practice and policy of misclassifying her and other similarly-situated employees as "exempt" and not paying them overtime compensation for the hours they worked over 40 hours each workweek. Plaintiff seeks to bring a collective action under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 216, *et seq*., and a class action under the Ohio Minimum Fair Wage Standards Act ("OMFWSA"), Ohio Rev. Code 4111.03.

Plaintiff requests an order conditionally certifying a collective action under the FLSA and authorizing notice to "[a]ll former and current telephonic account executives employed by Defendant between April 18, 2015 and the present." (Doc. 15 at 8.) Two individuals have filed notices of their intent to opt-in to this action, if the Court certifies the proposed class. Defendants

argue that conditional certification should be denied because Plaintiff has not shown that she is similarly situated to all class members or that Defendant employed an unlawful policy of undercompensating Plaintiff and other similarly situated employees. For the reasons below, the Court finds Plaintiff has made the modest showing required and therefore **GRANTS** the Motion for Conditional Certification.

I. LEGAL STANDARD

Congress enacted the FLSA "to aid the unprotected, unorganized and lowest paid of the nation's working population; that is, those employees who lacked sufficient bargaining power to secure for themselves a minimum subsistence wage." *Moran v. Al Basit LLC*, 788 F.3d 201, 204 (6th Cir. 2015) (quoting *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 707 n. 18 (1945)). The FLSA establishes not only a minimum wage, but also requires employers to pay their employees "at a rate not less than one and one-half times the regular rate" for work exceeding forty hours per week. 29 U.S.C. § 207(a)(1). In this case, Plaintiffs allege that Defendants did not calculate their overtime rate properly under the FLSA.

Section 216(b) of the FLSA allows employees to bring a collective action on behalf of themselves and other similarly situated employees to recover compensation from their employer. 29 U.S.C. § 216(b). A principal difference between a collective action and a class action certified under Fed. R. Civ. P. 23 is that class members in a collective action must "opt-in" to the litigation, whereas Rule 23 requires class members to "opt-out" if they do not want to be included.

The certification of a collective action is a two-step process: the first step, conditional certification, occurs at the beginning of discovery and the second step occurs "after all class plaintiffs have decided whether to opt-in and discovery has concluded." *White v. Baptist Mem'l Health Care Corp.*, 699 F.3d 869, 877 (6th Cir. 2012) (citing *Comer v. Wal–Mart Stores, Inc.*, 454

F.3d 544, 546 (6th Cir.2006)). To obtain conditional certification, the plaintiff must "make a modest factual showing" that the employees in the proposed class are "similarly situated." *Comer*, 454 F.3d at 546-47 (citing 29 U.S.C. § 216(b)). This is a "fairly lenient standard" that "typically results in conditional certification of a representative class." *Id.* at 547. The district court typically should "refrain from resolving factual disputes and deciding matters going to the merits" at this stage. *Dinkel v. MedStar Health, Inc.*, 880 F. Supp. 2d 49, 53 (D.D.C. 2012).

At the second stage, courts apply a "stricter standard" and more closely examine "the question of whether particular members of the class are, in fact, similarly situated." *Id.* at 547. "[P]laintiffs are similarly situated when they suffer from a single, FLSA-violating policy, and when proof of that policy or of conduct in conformity with that policy proves a violation as to all the plaintiffs." *O'Brien v. Ed Donnelly Enter., Inc.*, 575 F.3d 567, 585 (6th Cir. 2009). If the court determines at the second step that the plaintiffs are not similarly situated, it may decertify the class. At both the first and second step, the lead plaintiffs bear the burden of showing that they are similarly situated to the opt-in plaintiffs. *White*, 699 F.3d at 877.

II. ANALYSIS

The Court's inquiry at this stage is limited to whether Plaintiff has made a modest factual showing that she and the proposed class members are similarly situated. Defendant argues that conditional certification is not appropriate because Plaintiff has not shown that she is similarly situated to the class or that Defendant subjected class members to a common policy or plan in violation of the FLSA.

A. Whether Plaintiff Is Similarly Situated To Proposed Class Members

Plaintiff submitted a declaration stating she was employed by Defendant as a "Telephonic Account Executive" between September 2014 and September 2016 at its Miamisburg location.

She was paid a base salary and commissions. Her primary job duty was performing inside sales of Defendant's products at Defendant's office. She regularly worked over 40 hours per week, but was not paid overtime compensation at one and one-half times her regular rate of pay for all of the hours she worked over 40 hours per week. Plaintiff observed Defendant compensate other Telephone Account Executives in the same manner.

Plaintiff declares that she is similarly situated to the proposed opt-in class because she had the same and/or substantially similar job duties and responsibilities as other Telephone Account Executives; was subjected to the same or substantially similar policies, procedures, employee handbooks, manuals, and compensation plans; was paid a base salary, plus commissions, like other Telephone Account Executives; worked in excess of 40 hours per week; and was not paid overtime at the proper rate for hours worked in excess of 40 per week.

As mentioned, two individuals, David Koveman and Jason Ponds, have already filed notice of their intent to join this action as opt-in plaintiffs. Koveman and Ponds submitted declarations that contain substantially identical allegations as contained in Plaintiff's declaration.

Defendant argues that Plaintiff has failed to show that she is similarly situated to the proposed opt-in class because she relies on only three "fill-in-the-blank" declarations. Defendant describes the declarations as "fill-in-the-blank" because they appear to be forms that Plaintiff's counsel prepared for Plaintiff, Koveman and Ponds to complete and contain the same or very similar language—yet are lacking in details concerning the policies and practices responsible for their alleged under-compensation. Defendant also argues that the allegations suggest that Plaintiff might be subject to the exception for employees of retail sales and service establishment under the FLSA, 29 U.S.C. § 207(i).

While the declarations do not contain many details regarding the employment practices that allegedly caused them to be underpaid, they support a finding that Plaintiff and class members are similarly situated at this stage. All three employees allege that they had similar titles, duties and responsibilities; worked over 40 hours per week; and were not paid for their overtime hours in compliance with the FLSA. Requiring more from Plaintiff at this stage would defeat the purpose of having a two-step certification process. Defendant's account of the purported individual differences among the three declarants and other members of the class are better suited to the second stage of certification. *See Waggoner v. U.S. Bancorp*, 110 F. Supp. 3d 759, 769 (N.D. Ohio 2015); *Ribby v. Liberty Health Care Corp.*, Case No. 3:13-cv-613, 2013 WL 3187260, at *2 (N.D. Ohio June 20, 2013); *Zaniewski v. PRRC Inc.*, 848 F. Supp. 2d 213, 229 (D. Conn. 2012). Likewise, Defendant's argument that Plaintiff is subject to the "retail sales and service establishment" exception under § 207(i) is directed to the merits of Plaintiff's claims. It too is best reserved for the second stage of the certification process.

B. Plaintiff's Request for Expedited Discovery

To facilitate notice to the potential opt-in plaintiffs, Plaintiff asks for leave to serve discovery requests seeking the identity, contact information and employment dates for all former and current Telephone Account Executives employed by Defendant between April 18, 2015 and the present. Defendant objects to the disclosure of telephone numbers and email addresses for the potential opt-in plaintiffs on the grounds that they may lead to misleading communications outside the court-approved notice and due to privacy concerns. As Plaintiff notes in her Reply, the provision of email addresses has become a common means of facilitating notice in FLSA actions. In addition, email does not carry the same risk of improper communications or invasion of privacy as would contacting potential opt-in plaintiffs by telephone. Defendant's concern about telephone

contacts is well-founded. Plaintiff's request for leave to serve discovery is therefore granted in part. Plaintiff is not permitted to obtain the telephone numbers of potential opt-in plaintiffs.

C. Notice to Potential Opt-In Plaintiffs

"The FLSA 'grant[s] 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.'" *Heaps v. Safelite Sols., LLC*, No. 2:10-CV-729, 2011 WL 1325207, at *7 (S.D. Ohio Apr. 5, 2011) (quoting *Sperling*, 493 U.S. at 170). Courts may facilitate notice to putative class members "so long as the court avoids communicating to absent class members any encouragement to join the suit or any approval of the suit on its merits." *Sperling*, 493 U.S. at 168–69. Court-authorized notice of a collective action under the FLSA must be "timely, accurate, and informative." *Id.* at 172.

Plaintiff did not submit a proposed notice with her Motion for Conditional Certification. Instead, she proposes that the parties submit a proposed notice for the Court's review within 10 days of this Order. The Court will provide the parties 14 days to do so.

III. CONCLUSION

For the foregoing reasons, the Court **GRANTS** the Motion for Conditional Certification. However, as stated above, Defendant is not required to provide the telephone numbers of potential opt-in plaintiffs in response to Plaintiff's discovery. The parties are to submit a proposed notice for the Court's review within 14 days of this Order.

DONE and **ORDERED** in Dayton, Ohio, this Wednesday, October 24, 2018.

s/Thomas M. Rose

THOMAS M. ROSE
UNITED STATES DISTRICT JUDGE