

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
MIDLAND DIVISION**

JASON GUAJARDO, Individually	§	
And On Behalf of All Other Similarly	§	
Situated Persons	§	
	§	
Plaintiff,	§	CIVIL ACTION NO. 7:18-cv-00025-DC
	§	
v.	§	
	§	
BIRD ELECTRIC ENTERPRISES, LLC,	§	
	§	
Defendant.	§	

**DEFENDANT’S RESPONSE TO PLAINTIFF’S MOTION TO COMPEL  
COMPLIANCE WITH ORDER CERTIFYING CLASS OR, IN THE ALTERNATIVE,  
TO CONDITIONALLY CERTIFY A SECOND CLASS OF ELECTRICIANS**

Defendant Bird Electric Enterprises, LLC (“Bird Electric”) hereby responds to the Motion to Compel Compliance with Order Certifying Class or, in the Alternative, to Conditionally Certify a Second Class of Electricians [Dkt. 30] (“Motion”) filed by Plaintiff Jason Guajardo (“Plaintiff”) and all others similarly situated (“Class Members”). For the reasons explained herein, the Motion should be denied in full.

**I. INTRODUCTION**

In April 2018, Bird Electric and Plaintiff stipulated to conditional certification of employees who worked in the same job category and same department as Plaintiff—hourly-paid electricians in Department 16. Bird Electric complied with its agreement and the Court’s Order to provide information about those employees that fit this description. Now, Plaintiff attempts to add employees to this case employees with a different job, but more importantly, different pay rules. Inclusion of these dissimilar employees in this case would not be appropriate.

## II. RELEVANT FACTUAL BACKGROUND

Bird Electric provides a full-range electrical contracting services in the utility, oilfield, and storm restoration spaces. Bird Electric organizes its employees into departments based, in part, in the employees' jobs, which are represented internally with trade codes. (Declaration of Jason Morgan ("Morgan Dec."), ¶¶ 2, 5, 9, attached hereto as Exhibit A.)

Plaintiff, a former Bird Electric Electrician in Department 16, sued for alleged unpaid overtime, purporting to bring claims on behalf of other similarly situated employees. (*See* Dkt. No. 1.). Plaintiff and Bird Electric stipulated to the conditional certification of Department 16 Electricians from April 10, 2015 to present. (*See* Dkt. No. 12.) After the Court ordered notice to be sent to potential Class Members, Bird Electric provided Plaintiff's counsel a list the specified information for individuals classified as Electricians in Department 16. (*See* Dkt. No. 14.)

On May 10, 2018, Manuel Flores filed a consent in this lawsuit. (*See* Dkt. No. 17.) Flores was hired by Bird most recently on August 29, 2016. (Morgan Dec. at ¶5.) His initial trade code was 4030E, which corresponds internally at Bird to apprentice lineman. Flores started working in Department 18 at Bird. On March 13, 2017, Flores was transferred from Department 18 to Department 16 and reassigned to trade code 3040E, which corresponds internally at Bird Electric to foreman. On October 18, 2017, Manuel Flores was reassigned from Department 16 to Department 30. (*Id.*) Department 30 consists solely of linemen. (*Id.* at ¶9.)

Now, Plaintiff requests that the Court compel the production of information regarding so-called "underground linemen electricians" or to conditionally certify another class of employees comprised of "underground linemen electricians." However, Bird Electric does not have a position called "underground lineman electrician," "underground lineman," or "lineman electrician." (*Id.* at ¶6.) Instead, it has a category of electricians (*i.e.*, journeyman electrician, master electrician,

apprentice electrician) and a category of linemen (*i.e.*, journeyman lineman, apprentice lineman, etc.). (*See* Morgan Aff., ¶3 & Exh. 1 (trade code list).)

“Electricians” and “Lineman” are separate and distinct jobs. Linemen, for example, are assigned to 4-6-person teams, whereas most electricians work on smaller 2 person teams. (*Id.* at ¶¶10-11.) Teams of Linemen are assigned to large commercial trucks that are equipped to perform work on high-voltage powerlines. Because linemen are assigned to commercial trucks, they must report to Bird’s facility first so that they can load up the truck. At the end of the workday, the truck returns to Bird’s facility. (*Id.* at ¶10.) Electricians, on the other hand, are not assigned to large commercial trucks. And unless required by Bird for a specific day, Electricians are free to drive their own vehicles to the jobsites. Electricians are free to go home directly from the jobsites. Some teams of electricians decide to ride to the jobsites together. This is up to the individual team members. Unlike with linemen, Bird as a general rule does not require electricians to come to Bird’s facility before work or return to Bird’s facility after work. (*Id.* at ¶11.)

Most crucially, here, electricians and linemen are paid differently. Because linemen must report to Bird’s facility to ride to the worksite together, they are paid from the time they arrive at Bird’s facility. (*Id.* at ¶10.) Electricians, by contrast, are not typically required to report to the facility before going to the worksite. However, if there is a requirement to report to Bird’s facility before or after work, the electricians are paid for that time. (*Id.* at ¶11.) This key distinction makes the inclusion of Linemen in this lawsuit improper.

### **III. ARGUMENT AND CITATION TO AUTHORITY**

#### **A. The Motion to Compel Should Be Denied.**

Bird Electric complied with the Court’s April 16, 2018 Order by providing Plaintiff’s counsel with information for Department 16 Electricians. It neither “split hairs” or deceived

Plaintiff by failing to disclose the existence of “underground linemen electricians” in Department 16, as no such job category exists at Bird Electric. (*See* Motion, p. 2.) For that same reason, Bird Electric cannot provide information for “underground linemen electricians” now.

**B. The Court Should Not Certify a New Class of Linemen in this Case.**

**i. Relevant Legal Standard.**

Although the burden in the conditional certification stage of an FLSA proceeding “is ‘not onerous, neither is it invisible.’” *Smith v. M-I, LLC*, No. 5-17-CV-00788-FB-RBF, 2018 WL 3866624, at \*3 (W.D. Tex. Aug. 14, 2018) (report and recommendation) (citing *Songer v. Dillon Res., Inc.*, 569 F. Supp. 2d 703, 706 (N.D. Tex. 2008)). Plaintiff must show that the employees at issue—here, so-call underground linemen electricians—are similarly situated to him both in job duties and in payment policies. *Id.* “At the initial notice stage, plaintiffs must provide substantial allegations that the putative class members were together the victims of a single decision, policy, or plan.” *Songer*, 569 F. Supp. 2d at 707 (internal quotation and citation omitted).

**ii. Linemen and Electricians are Not Similarly Situated.**

Conditional certification of linemen in this action is not appropriate because Linemen are not subject to the allegedly unlawful pay policy at the heart of Guajardo’s claims—non-payment of time at Bird Electric’s facility before and after traveling to a jobsite. Linemen travel to worksites in large commercial trucks and are required to report to Bird Electric’s facility before going to the job. Given this requirement, Bird Electric pays Linemen from the time they arrive at the facility until the time they return to the facility. Electricians, on the other hand, usually can drive their own personal vehicles to the work site and are *not* required to report to the facility in the morning or evening. In other words, the key factual dispute underlying the electricians’ claims will not be

applicable to Linemen. Therefore, since linemen and electricians are not subject to the same allegedly unlawful policy, linemen should not be part of this lawsuit.

Plaintiff also fails to properly limit the request for conditional certification of a second class to Department 16 (or in any other way). Instead, he seeks conditional certification of “*all* current and former underground linemen electricians who were employed by Defendant and who were paid by the hour at any time in the last three years.” (Dkt. No. 30, p. 4) (emphasis added). Manuel Flores’s declaration, however, focuses on his purported work in Department 16 as a lineman and does not offer evidence as to Bird Electric’s broader pay policies beyond that department. (*See* Dkt. No. 30-1.) As such, Flores fails to make even a “modest factual showing” as the propriety of conditional certification of any linemen beyond Department 16. *See, e.g. Smith*, 2018 WL 3866624, at \*3 (denying nationwide certification where the court determined plaintiff’s knowledge of the employer’s practices was limited to a single location). Based on the evidence provided, it would be improper to expand the conditional certification beyond Department 16. *Id.*

### **iii. Tolling of Limitations Periods is Not Appropriate.**

In the event that the Court conditionally certifies any additional employees, which Bird Electric opposes, the limitations periods for new opt-ins should not be equitably tolled. The Fifth Circuit recently affirmed that equitable tolling is “a narrow exception . . . that should be applied sparingly” and only when a plaintiff can show diligent pursuit of rights and an extraordinary circumstance that prevented timely filing. *Sandoz v. Cingular Wireless, L.L.C.*, 700 F. App’x 317, 320 (5th Cir. 2017) (internal quotations and citations omitted). That is not the case here.

*Sandoz* is instructive. There the Court rejected plaintiff’s request for equitable tolling, citing defendant’s litigation strategy as an extraordinary circumstance causing plaintiff’s statutory deadline to expire. *Id.* However, the Court found that plaintiff had the information necessary (such

as information about her work hours and pay) to conclude that she was not paid for all hours worked. Therefore, she did not diligently exercise her rights or experience any extraordinary circumstances. Likewise, there is no evidence here that Linemen, like Manuel Flores, did not know when they were required to report to work, how many hours they worked, their method of payment, or the amount of their payment. As the Fifth Circuit has found, “[e]quitable tolling ... focuses on whether an external obstacle ‘prevented timely filing,’ not on whether an external obstacle prevented timely filing *in a specific suit.*” *Id.* at 321. Accordingly, the statutory deadline for Linemen should not be equitably tolled.

**C. If the Court Permits New Notices to be Sent, Notices Should Be Sent In the Same Form Previously Ordered.**

The Parties have already agreed to, and the Court has already approved, a form of notice and consent to join, methods of distributing notice to potential Class Members, and a timeline for the opt-in procedure. Given that and that 16 other individuals (aside from Guajardo and Flores) consented to join the lawsuit already, those forms and procedures must have been sufficient. (*See* Motion, p. 8.) Plaintiff has offered no reason why it seeks to deviate from them now.

If conditional certification is granted, Bird Electric agrees to the form of the notice and consent forms that are the same as those in the Parties’ April 4, 2018 Stipulation [Dkt. No. 10-1], except for the description of the class. Those forms were already approved by the Court on April 16, 2018 [Dkt. No. 12]. Bird Electric will also agree to notice by mail, workplace posting, and Plaintiff’s counsel maintaining a dedicated website and to the same timing and other requirements contained in the Parties’ Stipulation.

Plaintiff attempts here to expand the methods of notice by requesting notice by notice by social media and text message, but notice was not provided to Department 16 Electricians in these manners and 16 individuals still opted in. Plaintiff offers no reason why the notice methods in the

previous were inadequate. Bird Electric specifically objects to notice by social media and text message. Given the short nature of a text message, it is more likely than the 2-page mailed notice to be confusing or misleading. *See, e.g., Bewley v. Accel Logistics, Inc.*, No. 3:17-CV-0676-S-BK, 2018 WL 2422043, at \*5 (N.D. Tex. May 7, 2018), report and recommendation adopted, No. 3:17-CV-676-S-BK, 2018 WL 2416574 (N.D. Tex. May 29, 2018) (rejecting plaintiff's request to issue notice by text message, stating that plaintiff did not explain why mailed notices are insufficient); *Aguirre v. Tastee Kreme #2, Inc.*, No. CV H-16-2611, 2017 WL 2999271, at \*10 (S.D. Tex. Apr. 13, 2017), report and recommendation adopted in part, rejected in part, No. CV H-16-2611, 2017 WL 2350064 (S.D. Tex. May 31, 2017) (finding that "[t]here is a risk that, unlike an email or letter, a text message would be incomplete, not provide a potential opt-in a full picture of the nature of the lawsuit or their rights and would not convey the seriousness of the communication.") (internal citations omitted).

Social media notice raises a different concern. Unlike other forms of notice that are targeted to potential Class Members, social media posting could be accessible to others like customers and potential customers of Bird Electric, which could cause it reputational damage. Given that and that Plaintiff did not articulate any reason why notice using this method is warranted, social media notice should be denied. *See, e.g., Contreras v. Land Restoration LLC*, No. 1:16-CV-883-RP, 2017 WL 663560, at \*8 (W.D. Tex. Feb. 17, 2017) ("this court will not permit the use of social media, absent some showing that the other proposed methods of notice are insufficient"); *Lemmers v. Gary Pools, Inc.*, No. SA-15-CA-00828-OLG, 2016 WL 7508075, at \*2 (W.D. Tex. May 24, 2016) (denying a request to issue notice by social media because mailed notice would suffice); *Arceo v. Orta*, 296 F. Supp. 3d 818, 826 (N.D. Tex. 2017) (same).

#### IV. CONCLUSION

For the reasons set forth herein, Bird Electric respectfully requests that the Motion be denied in full and that the Court grant Bird Electric any and all further relief to which it may be entitled.

Date: October 3, 2018

Respectfully submitted,

/S/ Brett L. Myers

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#### **CERTIFICATE OF SERVICE**

On October 3, 2018, the foregoing document was electronically submitted with the clerk of court for the U.S. District Court, Western District of Texas, using the electronic case filing system of the court. I hereby certify that all counsel have been served electronically or by another manner authorized by Federal rule of Civil Procedure 5 (b)(2).

/S/ Brett L. Myers

Brett L. Myers