UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

ISAAC TRUJILLO, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,	§	
	§	
PLAINTIFF	§	
	§	
v.	§	**CA NO. 3:18-cv-141-DCG**
	§	
TIRE CLUB USA, INC., TIRES AUTO SERVICE, LLC, AND FERNANDO AGUIRRE, JR., INDIVIDUALLY,	§	
	§	
DEFENDANTS		

PLAINTIFF'S MOTION FOR CONDITIONAL CERTIFICATION

TO THE HONORABLE UNITED STATES DISTRICT COURT:

COMES NOW Isaac Trujillo, on behalf of himself and all others similarly situated ("Plaintiff") and files this Motion for Conditional Certification, and in support thereof would show as follows:

I. INTRODUCTION

Plaintiff Isaac Trujillo brought this action on behalf of himself and all similarly situated employees to recover unlawfully withheld overtime wages and related damages based on Defendants Tire Club USA, Inc., Tires Auto Service, LLC, and Fernando Aguirre, Jr.'s violation of the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. § 216(b), *et seq.*

The FLSA permits an employee to bring an action to recover wages owed to "himself . . . and other employees similarly situated." 29 U.S.C. § 216(b). With this Motion, Plaintiff seeks conditional certification of a collective action consisting of: All current or former sales clerks who

worked for Defendants within the past three years who sold Defendants' tires to the public ("the "FLSA Class") who were not paid overtime premiums for hours worked over forty.

Conditional certification is appropriate here because the sales clerks that Plaintiff seeks to represent performed similar job duties and were all subject to the same company-wide pay policies (regardless of any allegedly individualized factors) and are thus similarly situated.

Because, as will be shown in greater detail below, Plaintiff has met the lenient standard for conditional certification, he respectfully requests that this Court conditionally certify this case as a collective action and authorize notice to the class of current and former sales clerks who are owed overtime wages.

Notice at this stage is critical so that these sales clerks can make an informed decision about whether to join this suit and stop the statute of limitations from running on their claims for unpaid overtime compensation.[1]

II. PROCEDURAL AND FACTUAL BACKGROUND

Plaintiff filed his Complaint on May 2, 2018, alleging Defendants violated the FLSA by failing to pay him and other employees overtime premiums when they worked over 40 hours per week. *See* Complaint (ECF No. 1) ¶¶ 1.1, 1.6, 5.3.

Defendants filed their Answer on June 14, 2018. (ECF No. 8.).

[1] Unlike Rule 23 class actions in which the statute of limitations is tolled for all potential class members with the filing of the complaint, the statute of limitations under the FLSA is not tolled with the commencement of the action or even with an order granting conditional certification. *Fisher v. Michigan Bell Tele. Co*., C.A. 2:09-cv-10802, 2009 WL 3427048, at *8 (E.D. Mich. Oct. 22, 2009). Rather, the statute of limitations continues to run on each individual's claim until they file their written consent to join the action with the court. *Id.*; *see also* 29 U.S.C. § 216(b) ("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.")

Defendants sell tires to the public in El Paso, Texas. *See* Compl. ¶¶ 1.1, 5.1. To provide this service, Defendants employed numerous sales clerks, all of whom make up the putative FLSA Class. *See* Compl. ¶¶ 1.1, 6.1, 6.2. While exact job titles may differ, these sales clerks were subjected to the same or similar illegal pay practices for similar work. *See* Compl. ¶¶ 6.1-6.8; *see also* Exhibit A, Declaration of Plaintiff Isaac Trujillo (hereinafter Exh. A). Specifically, Plaintiff and the FLSA Class (1) were paid the same way, on an hourly basis with commissions; (2) performed the same or similar job duties; (3) worked the same or similar hours each week; and, (4) did not receive overtime premiums for any hours worked over 40 each week. *See* Compl. ¶¶ 6.1-6.8; *see also* Exh. A.

Plaintiff therefore seeks certification of a putative class of all current and former sales clerks who were not fully compensated for all hours worked in excess of forty (40) in each week. *See* Compl. ¶¶ 6.1-6.8. None of these individuals received overtime premiums for working over forty hours per week. Compl. ¶¶ 5.3, 6.3; Exh. A.

Plaintiff and the Class Members all performed the same duties, which was selling Defendants' tires to the public. Compl. ¶¶ 1.1, 5.1, 6.1, 6.5. No exemption relieved Defendants from their obligations to Plaintiff or the putative class under the FLSA, nor have Defendants credibly asserted that their sales clerks were in any way exempt.

Finally, Plaintiff believes that his former co-workers would opt into this lawsuit were they to receive notice that they could opt into this suit. Exh. A.

III. ARGUMENT

A. Legal Standard for Section 216(b) Notice to Putative Class Members

The FLSA's "collective action" provision allows one or more employees to bring an action for overtime compensation on "behalf of himself or themselves and other employees similarly

situated." 29 U.S.C. § 216(b). District courts have broad discretion to allow a party asserting FLSA claims on behalf of others to notify potential plaintiffs that they may choose to "opt-in" to the suit. *See Hoffman-La Roche, Inc. v. Sperling*, 493 U.S. 165, 169 (1989). Court-authorized notice protects against "misleading communications" by the parties, resolves the parties' disputes regarding the content of any notice, prevents the proliferation of multiple individual lawsuits, assures joinder of additional parties is accomplished properly and efficiently, and expedites resolution of the dispute. *Id.* at 170–72.

The method adopted by Courts in this district for determining whether to certify a collective action under § 216(b) -- the *Lusardi* two-tiered approach -- involves a preliminary decision regarding notice to putative class members. *See Sims v. Hous. Auth. City of El Paso*, No. EP-10-CV-109-KC, 2010 WL 2900429, at *2 (W.D. Tex. July 19, 2010); *Wilson v. Anderson Perforating, Ltd.*, No. SA–13–CV–148–XR, 2013 WL 3356046, at *1 (W.D. Tex. July 3, 2013) (citing *Lusardi v. Xerox Corp*., 118 F.R.D. 351, 359 (D.N.J. 1987)).

In the first stage, called the notice stage, the district court makes an initial determination whether notice of the action should be sent to potential class members. *Wilson v. Anderson Perforating, Ltd.*, No. SA–13–CV–148–XR, 2013 WL 3356046, at *1 (W.D. Tex. July 3, 2013). This determination is based solely on the pleadings and affidavits, and the standard is a lenient one typically resulting in conditional certification of a representative class to whom notice is sent and who receive an opportunity to "opt in." *Id.*

The second step typically occurs after the parties have largely completed discovery and the defendant moves to decertify the conditionally certified class. *Flowers v. MGTI, LLC*, No. CIV.A. H-11-1235, 2012 WL 1941755, at *3 (S.D. Tex. May 29, 2012). The court then must make a factual determination as to whether the claimant employees are indeed similarly situated. *Id.* At

this step, courts generally consider the following factors when determining whether a lawsuit should proceed collectively: (1) the disparate factual and employment settings of the individual plaintiffs; (2) the various defenses available to defendant which appear to be individual to each plaintiff; and (3) fairness and procedural considerations. *Id.*

In applying the lenient standard of the first step, the Court inquires as to whether the plaintiff has provided sufficient evidence that the class member representatives are "similarly situated in terms of job requirements and similarly situated in terms of payment provisions" or whether the plaintiff substantially alleged that the potential class members were "together the victims or a single decision, policy, or plan." *Mooney v. Aramco Servs. Co*., 54 F.3d 1207, 1214, n. 8 (5th Cir. 1995); *Mateos v. Select Energy Servs., LLC*, 977 F. Supp. 2d 640, 643 (W.D. Tex. 2013); *Pedigo v. 3003 S. Lamar, LLP*, 666 F. Supp. 2d 693, 698 (W.D. Tex. 2009) (same). As one District Court in the Fifth Circuit has noted:

> [T]he court need not find uniformity in each and every aspect of employment to determine [that] a class of employees is similarly situated. The remedial nature of the FLSA and § 216 militate strongly in favor of allowing cases to proceed collectively.

Tolentino v. C&J Spec-Rent Servs., Inc., C.A. 2:09-cv-00326, 2010 WL 2196261, at *4 (S.D. Tex. May 26, 2010) (citing *Albanil v. Coast 2 Coast, Inc.*, C.A. 4:08-cv-00486, 2008 WL 4937565, at *3 (S.D. Tex. Nov. 17, 2008)).

Further, the plaintiff need only demonstrate "a reasonable basis" for the allegation that a class of similarly situated persons exists. *See Pacheco v. Aldeeb*, No. 5:14-cv-121-DAE, 2015 WL 1509570, at *3 (W.D. Tex. Mar. 31, 2015) (citing *Casanova v. Gold's Tex. Holdings Grp., Inc.*, No. 5:13-cv-1161-DAE, 2014 WL 6606573, at *2 (W.D. Tex. Nov. 19, 2014)).

B. Notice Is Appropriate on the Facts Presented Because the Putative Class Members are Similarly Situated

At the notice stage, courts determine whether plaintiff and potential opt-ins are "similarly situated" based upon allegations in a complaint supported by affidavits. *Mooney*, 54 F.3d at 1213–16; *Pacheco*, 2015 WL 1509570 at *3. To be similarly situated, each class member's situation need not be identical, but merely similar. *Snively v. Peak Pressure Control, LLC*, 174 F. Supp. 3d 953, 959 (W.D. Tex. Feb. 29, 2016) (citing *Tolentino*, 716 F. Supp. 2d at 647); *Riojas v. Seal Prod., Inc.*, 82 F.R.D. 613, 616 (S.D. Tex. 1979).

Courts in this district "require nothing more than substantial allegations that the putative class members were together the victims of a single decision, policy, or plan." *Snively*, 174 F. Supp. 3d at 957 (quoting *Mooney*, 54 F.3d at 1214 n.8) (emphasis added); *Dreyer v. Baker Hughes Oilfield Operations, Inc.*, No. H-08-1212, 2008 WL 5204149, at *3 (S.D. Tex. Dec. 11, 2008). Proof of such a single practice can be provided through declarations of potential plaintiffs, identification of potential plaintiffs, and/or evidence of a widespread plan. *Id*. (citations omitted).

1. A reasonable basis exists to believe aggrieved individuals exist

Plaintiff's Complaint alleges Defendants failed to comply with the FLSA by failing to pay Plaintiff and other sales clerks overtime premiums for all hours worked in excess of 40 per week. *See* Compl. ¶¶ 1.1, 1.4, 1.6, 5.3. The Complaint also alleges that other sales clerks performed duties similar to Plaintiff. *See* Compl. ¶¶ 6.1-6.8. The allegations in the Complaint have been substantiated by the sworn declaration of Isaac Trujillo. Exh. A. This evidence demonstrates that Plaintiff performed similar duties and worked under the same illegal pay provisions as other individuals who have not yet been notified of the case.

2. The aggrieved individuals are similarly situated to Plaintiff in relevant respects

The relevant inquiry is whether the potential class members performed 1) the same basic tasks and 2) were subject to the same pay practices. *Vassallo v. Goodman Networks, Inc.*, No. 4:15-CV-97, 2015 WL 3793208, at *2-8 (E.D. Tex. June 17, 2015).

The primary duty of Defendants' sales clerks was to sell Defendants' tires to the general public. *See* Compl. ¶¶ 1.1, 5.1, 6.1, 6.5; Exh. A. Accordingly, Plaintiff and the class members' duties at all times were both similar and were those of non-exempt employees. As such, if Plaintiffs and the proposed class worked over forty hours in a week, which they did, *see* Compl. ¶¶ 6.3-6.5, Exh. A., Defendants have violated the FLSA by refusing to pay their sales clerks overtime premiums.

The evidence developed thus far demonstrates that Defendants 1) employed sales clerks that worked more than forty hours per week and 2) did not pay overtime premiums to their sales clerks, in spite of the fact that they worked more than forty hours per week on a regular basis. This failure to pay overtime supports Plaintiff's claim that both he and the putative class were subject to the same illegal pay practices.

3. Similarly situated potential plaintiffs exist

Many courts have determined that plaintiffs do not need to present evidence that potential opt-in plaintiffs desire to opt-in at all. *Walker v. Honghua Am., LLC*, 870 F. Supp. 2d 462, 471–72 (S.D. Tex. 2012); *Jesiek v. Fire Pros, Inc.*, 275 F.R.D. 242, 247 (W.D. Mich. 2011) ("Plaintiff's failure to provide evidence that potential opt-in plaintiffs' desire to opt-in is not fatal to their motion."); *Villarreal v. St. Luke's Episcopal Hospital,* 751 F.Supp.2d 902, 915 (S.D.Tex.2010) ("The court agrees that a plaintiff need not present evidence at this stage of the third element, that aggrieved individuals actually want to opt in to the lawsuit."); *Long v. Wehner Multifamily, LLC*,

No. 3:17-CV-01258-N, 2017 WL 8780155, at *3 (N.D. Tex. Sept. 28, 2017) (granting conditional certification based on a single declaration by the plaintiff).

See also Zapata v. Canine Friendly Coal., Inc., No. EP-17-CV-131-PRM, 2018 WL 774461, at *4 (W.D. Tex. Jan. 16, 2018) ("For purposes of conditional certification, it is only necessary that Plaintiff make substantial allegations that other similarly situated plaintiffs exist" citing to *Yair Granados v. Hinojosa*, 219 F. Supp. 3d 582, 585 (W.D. Tex. 2016) ("At th[e conditional certification] stage, courts generally refuse to consider a defendant's arguments on the merits.")).

Plaintiff's Complaint and his Declaration support the fact that similarly situated sales clerks exist. *See* Compl. ¶¶ 6.1-6.8; *see also* Exh. A.

Also, as demonstrated by Plaintiff's personal knowledge, belief, and declaration, these other similarly situated sales clerks would opt into this lawsuit if they were to receive notice that they could opt into the lawsuit. Exh. A.

IV. RELIEF SOUGHT

Plaintiff seeks the issuance of notice to all putative plaintiffs and the disclosure of the names and contact information (including the addresses, e-mail addresses and telephone numbers) of all sales clerks who worked for Defendants at any time during the past three years.

A. Plaintiff's Proposed Schedule and Notice/Consent Form

To facilitate the notice process and preserve the rights of those who have not yet opted-in (or learned of this lawsuit), Plaintiff has attached a proposed Notice as Exhibit B and a proposed Consent as Exhibit C, both to be approved by the Court. These forms are based on various Notice and Consent forms previously approved by Texas federal courts though they have been modified for this particular case.

Additionally, Plaintiff seeks an Order from this Court adopting the following schedule:

Deadline	**Subject**
14 Days from Order Approving Notice to FLSA Class	Defendants to disclose the names, addresses, e-mail addresses, and mobile telephone numbers of the Putative Class Members in a usable electronic format.
21 Days from Order Approving Notice to the FLSA Class	Plaintiff's Counsel shall send by mail, e-mail and text the Court-approved Notice and Consent Form to the FLSA Class. Defendants shall post a copy of the Notice and Consent Form at all office locations.
60 Days from date Notice is Mailed to the FLSA Class	The FLSA Class Members shall have 60 days to return their signed Consent forms for filing with the Court. Defendants may take down the posted Notice and Consent Form.
30 Days from date Notice is Mailed to Putative Class	Plaintiff's Counsel is authorized to send by mail, e-mail and text a second identical copy of the Members Notice/Consent Form to the FLSA Class Members reminding them of the deadline for the submission of the Consent forms. Plaintiff's Counsel is authorized to call FLSA Class Members to ensure the Consent forms were received. FLSA Class Members may return their notice via mail, email, fax, or an electronic signature service to be established by Plaintiff's counsel.

V. CONCLUSION

Isaac Trujillo has shown that there are a number of other sales clerks that were employed by Defendants that performed the same duties he did, that worked over forty hours per week and who were not paid overtime compensation for such hours. *See* Compl. ¶¶ 6.1-6.8; Exh. A.

By establishing that Plaintiff and other sales clerks were similarly situated, were subject to the same pay practices, and by establishing that a putative class does exist, Plaintiff has provided sufficient evidence supporting his request for conditional certification in this matter and has more than met the lenient standard of showing that notice to the putative class is appropriate.

Respectfully submitted,

/s/ Douglas B. Welmaker
Douglas B. Welmaker
Attorney-in-Charge
State Bar No. 00788641
DUNHAM & JONES, P.C.
1800 Guadalupe Street
Austin, Texas 78701
Tel: (512) 777-7777
Fax: (512) 340-4051
E-Mail: doug@dunhamlaw.com

ATTORNEYS FOR PLAINTIFF

OF COUNSEL

David L. Kern
State Bar No. 11334450
Kern Law Firm, PC
309 East Robinson Avenue
El Paso, Texas 79902
Phone (915) 542-1900
Fax (915) 242-0000,
dkern@KernLawFirm.com

CERTIFICATE OF CONFERENCE

I certify that I attempted in good faith to confer with Defendant in an effort to resolve this dispute without court action. I emailed and spoke to defense counsel about whether he opposed this motion, but I was unable to get an answer. As such, it must be assumed that this motion is opposed.

/s/ Douglas B. Welmaker
Douglas B. Welmaker

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion for Conditional Certification has been electronically served on all counsel of record via Notice of Electronic Filing on a known Filing User through the CM/ECF system on October 15, 2018.

/s/ Douglas B. Welmaker
Douglas B. Welmaker