IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ASHLEY FLORENCE, on behalf of herself and all others similarly situated,

Plaintiff,

v.

DELI MANAGEMENT, INC., d/b/a Jason's Deli,

Defendant.

CIVIL ACTION FILE
No. 1:18-cv-4303-SCJ

ORDER

Before the Court in this Fair Labor Standards Act ("FLSA") action is Plaintiff's Motion for Conditional Certification and Court-Authorized Notice. Doc. No. [21]. For the reasons outlined below, Plaintiff's Motion is **GRANTED**.

I. BACKGROUND

Plaintiff Florence filed this action on behalf of herself and others similarly situated on September 11, 2018. Doc. No. [1].[1] Plaintiff worked as an Assistant

[1] Plaintiff filed an amended complaint, as a matter of right, on October 30, 2018.

Manager 3A in Defendant Deli Management, Inc.'s Atlanta-Camp Creek location from May of 2016 through December of 2017. Doc. No. [12], ¶¶5, 6. Throughout most of Plaintiff's employment, Defendant classified her position as exempt from overtime under the FLSA. Id. at ¶31. However, in August of 2017, Defendant reclassified all Assistant Manager 3A and Assistant Manager 2A positions (collectively, "the Assistant Managers") as non-exempt, hourly-paid employees. Id. at ¶37.

Plaintiff seeks overtime compensation for the time prior to Defendant's re-classification of the Assistant Manager positions. See id. at ¶¶1, 7. She alleges that during that time these positions were mis-classified as non-exempt, and the Assistant Managers were actually entitled to overtime compensation for hours worked over forty hours in a work week. Id. at ¶¶14, 15, 18–31. Plaintiff describes the work performed by the Assistant Managers as requiring little skill, not primarily comprised of managerial responsibilities, and not allowing for the exercise of meaningful independent judgment and discretion.

Doc. No. [12]. Because "[a]n amended complaint supersedes an original complaint," the remainder of the facts in this background section are cited to the amended complaint. Malowney v. Fed. Collection Deposit Grp., 193 F.3d 1342, 1345 n.1 (11th Cir. 1999).

Id. at ¶¶25–26. Rather, Plaintiff asserts, the Assistant Managers' duties primarily involved manual labor and customer service. Id. at ¶¶27–30. Plaintiff alleges she frequently worked more than forty hours in a work week without receiving overtime pay. Id. at ¶7.

Pursuant to provisions of the FLSA, Plaintiff seeks to represent a class of individuals who worked as either an Assistant Manager 3A or Assistant Manager 2A and who were classified as exempt from overtime pay by Defendant. Id. at ¶1. Plaintiff limits the proposed class to Defendant's North and East organizational regions.[2] Id. In support of her motion for conditional certification of a class, Plaintiff submits the opt-in consent forms and declarations from three additional individuals who worked as Assistant Managers and who describe similar work experiences as Plaintiff. See Doc. No. [20-1]; see also Doc. Nos. [21-7]; [21-8]; [21-9]; [21-10]. In addition, Plaintiff submits affidavits and declarations supporting her arguments that Defendant's restaurants are operated uniformly throughout all their regions, that all Assistant Manager 3A and Assistant Manager 2A positions are similarly

---

[2] Plaintiff specifically refers to restaurants located in Illinois, Maryland, and Georgia, and requests that the class be limited to whichever of Defendant's organizational regions properly include those states. Id. at ¶1.

situated, and that the general managers for Defendant truly held the managerial responsibility.

Defendant challenges the similarly-situated nature of the Assistant Manager 3A and Assistant Manager 2A positions and asserts that Plaintiff has not met her burden for conditional certification. See Doc. No. [26]. With its response, Defendant submits its description of the management duties performed by Assistant Managers, ten declarations from General Managers or 1A Assistant Managers, and forty-six declarations from current and former Assistant Managers in the North and East regions who assert that their primary duties were managerial in nature.[3] Doc. Nos. [26-4 to -60].

II. LEGAL STANDARD

The FLSA requires employers to pay their employees at least minimum wage and, if the employee works more than forty hours within a work week, overtime compensation. 29 U.S.C. § 207. Under the provisions of the FLSA, employees can bring suit for violations of the Act either individually or on behalf of employees who are "similarly situated." 29 U.S.C. § 219.

---

[3] Defendant also submits affidavits from Assistant Managers in other regions, asserting their duties were primarily managerial. Doc. No. [26-61].

Class actions under the FLSA are different from those initiated under Federal Rule of Civil Procedure 23. See LaChapelle v. Owens-Illinois, Inc., 513 F.2d 286, 288 (5th Cir. 1975)[4] (describing the opt-out approach for Rule 23 actions and the opt-in approach for FLSA actions). Most circuits, including the Eleventh Circuit, encourage use of a two-tiered approach for class certification in an FLSA case. Hipp v. Liberty Nat'l Life Ins. Co., 252 F.3d 1208, 1218 (11th Cir. 2001). At the "notice" stage, which usually occurs early in the case, a district court conditionally certifies a class if the plaintiff makes a minimal showing that there are other similarly situated employees who wish to opt in. Id. "[P]laintiffs need show only that their positions are similar, not identical, to the positions held by the putative class members." Grayson v. K Mart Corp., 79 F.3d 1086, 1096 (11th Cir. 1996) (internal quotations omitted). As long as a plaintiff provides a "reasonable basis" for her claim that other employees are similarly situated, notice should issue to other potential class members. Morgan v. Family Dollar Stores, Inc., 551 F.3d 1233, 1260 (11th Cir. 2008). Later,

---

[4] In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions rendered prior to the close of business on September 30, 1981 by the United States Court of Appeals for the Fifth Circuit.

at the "decertification" stage, the Court makes a factual determination, utilizing a stricter standard than at the notice stage, on whether or not potential class members are truly similarly situated. Id. at 1261; see also Anderson v. Cagle's, Inc., 488 F.3d 945, 953 (11th Cir. 2007).

III. DISCUSSION

A. Conditional Certification

The Court finds that Plaintiff has met her minimal burden at this stage of the litigation. Plaintiff's evidence demonstrates that the Assistant Manager 2A and Assistant Manager 3A positions are sufficiently similar to each other, and throughout the North and East regions, to potentially be represented in the same class. The 2A and 3A Assistant Manager positions shared the same job description throughout all regions. Doc. No. [21-4], p. 4, ¶10; p. 12–13. Assistant Managers performed the same duties and received the same pay regardless of how they were classified. Id. at p. 3–4, ¶¶7, 10; pp. 6–11 (checklists describing all Assistant Manager duties). The duties assigned to Assistant Managers included non-managerial duties. Id. at pp. 6–11. All Assistant Managers were subject to the same corporate-wide training, policies, and procedures. Id. at pp. 3–4, ¶¶7–12.

Furthermore, Plaintiff has demonstrated that at least three other individuals who formerly worked as Assistant Managers are interested in opting into this action. See Doc. Nos. [21-8]; [21-9]; [21-10]. Each of those individuals describe similar working conditions, including spending most of their working hours on non-managerial tasks (despite a job description that includes exempt, managerial tasks) and regularly working beyond forty hours per week without overtime compensation. See Doc. Nos. [21-8]; [21-9]; [21-10]. Thus, Plaintiff has shown the requisite similarity and interest necessary for conditional certification.

Defendant attempts to defeat conditional certification with a plethora of declarations from General Managers and Assistant Managers, who assert that Assistant Managers spent (or were supposed to spend) most of their time performing exempt work. See Doc. Nos. [26-4 to -60]. However, Defendant's arguments essentially ask the Court to employ the stricter "decertification" standard at the conditional certification stage; something this Court is not willing to do. The factual issues raised by Defendant speak to the ultimate merits of Plaintiffs case and are inappropriate for resolution at the lenient, "notice" stage. The fact that fifty-five Assistant Managers have had different experiences than Plaintiff Florence and the other opt-in plaintiffs does not

negate their showing that they were subject to policies that potentially violated the FLSA. Defendant's evidence is more appropriate for the decertification stage, after discovery has been conducted and Plaintiff faces a higher burden for showing that opt-in plaintiffs are similarly situated. Although Defendant may have established that there are at least forty-six potential class members who would not opt in, that does not mean that other potential class members should not be notified and provided the opportunity to opt in. Plaintiff's Motion for Conditional Certification is granted.

B. Notice

"A district court has discretionary authority over the form of notice provided in FLSA collective actions, but must take care to avoid the appearance of judicial endorsement." Miller v. FleetCor Techs. Operating Co., No. 1:13-cv-2403, 2014 WL 12543337, at *3 (N.D. Ga. Apr. 8, 2014) (citing Hoffmann-La Roche, Inc. v. Sperling, 493 U.S. 165, 174 (1989).

Plaintiff submits a proposed notice for approval. Doc. No. [21-5]. Plaintiff also requests approval of the same notice conditions this Court previously authorized in Miller v. FleetCor Technologies Operating Company, including a sixty-day opt-in period and an authorized reminder notice at the midpoint of that period. Doc. No. [21], p. 30. Plaintiff submits a proposed

subject line for the notice envelope and/or email, and seeks permission to maintain a notice-administrator website that allows for the submission of electronically-signed consents. Id.

Defendant seeks alterations in the manner of notice and the information it must provide. See Doc. No. [26], pp. 24–26. First, Defendant suggests the notice should only be sent via U.S. Mail, not by email. Id. at 24. Second, Defendant objects to providing business email addresses for its current Assistant Managers as intrusive to its business. Id. at 25. Finally, Defendant asserts privacy interests as a reason not to provide telephone numbers, email addresses, birth dates, and partial social security numbers for putative class members. Id. Alternatively, if such information is necessary, Defendant proposes only providing it to the administrator (rather than directly to Plaintiff's counsel) and only after initial attempts to locate class members fail, so that the process will remain "objective" and to avoid the "potential for abuse." Id. at 25–26.

The Court begins by noting that the purpose of notice is to provide potential class members "accurate and timely notice." Hoffmann, 493 U.S. at 170. Any delay in locating class members runs the risk of creating statute-of-limitations issues for potential opt-in plaintiffs. Therefore, in the interest of

timely notice, the Court finds notice by both email and U.S Mail appropriate. Notice to potential class members shall be provided by first class mail, email (if available) and/or overnight delivery. Plaintiff may issue a single email notification at the same time it sends notice by U.S. Mail.

Additionally, to facilitate timely notice to potential plaintiffs, the Court orders Defendant to produce contact information for all individuals who worked in either the Assistant Manager 2A or Assistant Manager 3A positions within the last three years prior to the date of this order. Defendant must produce each individual's name, job title, last known address, personal email address (if in Defendant's possession), telephone number, birth date, and social security number (last four digits only). The Court notes Defendant's concerns about providing current employees' business email addresses and only orders the production of personal email addresses if Defendant is in possession of such information. To protect confidential information, the Court orders the production of only the last four digits of individuals' social security numbers. Furthermore, Plaintiff must destroy all record of social security numbers produced by Defendant within thirty days of the termination of this case.

Although Defendant asserts that due to the potential for abuse it should only have to provide the information to the administrator of the notice process,

in the absence of any evidence to the contrary, the Court finds no reason to conclude that Plaintiff's counsel intends to or will abuse the notice process. Therefore, Defendant is ordered to produce the required information to Plaintiff's counsel.

Finally, the Court approves a sixty-day opt-in period[5] with one reminder notice sent at the thirty-day mark. Plaintiff's proposed subject line is approved as written, and Plaintiff may maintain a website with an online portal that allows for the submission of electronically-signed consents. Any notice regarding the lawsuit on the website must mirror the content in the mail/email notice approved by this Court. The parties are reminded that during the notice stage, they are prohibited from contacting potential class members who have not yet filed Consent to Join forms, except as otherwise outlined in this order.

IV. CONCLUSION

Plaintiff's Motion for Conditional Certification (Doc. No. [21]) is **GRANTED**. Plaintiff's Notice of Lawsuit is approved as described above. Defendant is **ORDERED** to produce the contact information described above

---

[5] This approval overrides the provision in the Court's previously entered scheduling order, which indicated a ninety-day notice period. See Doc. No. [25], p. 2. All other provisions in that scheduling order remain the same.

within **fifteen (15) days** of this order. Plaintiff is **ORDERED** to issue an initial notice via certified mail (which can be accompanied by a single email notice with the same content) to all individuals whose contact information was provided by Defendant within **twenty-five (25) days** of this order. Plaintiff is authorized to send one reminder notice by mail/email fifty-five days after entry of this order. The notice period concludes eight-five days after entry of this order. Plaintiff is **ORDERED** to file any Consent to Join forms with the Court within **two (2) business days** of receipt. All Consent to Join forms must be post-marked or time-stamped no later than eight-five (85) days from the date of this order.

IT IS SO ORDERED this 9th day of January, 2019.

s/Steve C. Jones
HONORABLE STEVE C. JONES
UNITED STATES DISTRICT JUDGE