IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID M. DRISCOLL, individually and on behalf of all others similarly situated, **Plaintiffs,** **-against-** **THE GEORGE WASHINGTON UNIVERSITY,** **Defendant.**	**1:12-CV-00690-ESH**

PLAINTIFF'S MOTION TO CERTIFY A FED. R. CIV. P. RULE 23 CLASS ACTION

Plaintiff David Driscoll, through the undersigned counsel, hereby moves the Court to certify a Fed. R. Civ. P. Rule 23(b)(3) class action for claims pursuant to the D.C. Wage Payment and Wage Collection Law, D.C. Code § 32-1301, *et seq*. on behalf of a class of all current and former Executive Aides, Executive Assistants, Executive Support Assistants, Executive Coordinators, and Executive Associates employed by the George Washington University after April 27, 2009, who worked overtime hours but were not paid overtime wages during all or part of their employment. Driscoll also moves the Court to name him as class representative and to appoint Plaintiff's counsel as class counsel. Pursuant to LCvR 7(m), Plaintiff's counsel conferred with Defendant's counsel regarding this motion on September 24, 2012. Defendant opposes the motion.

As explained in the accompanying memorandum of points and authorities, this case meets the requirements for class certification as set forth in Fed. R. Civ. P. Rule 23(b)(3). A proposed order is submitted herewith.

Dated: October 11, 2012

Respectfully Submitted,

/s/ Michael J.D. Sweeney

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DAVID M. DRISCOLL, individually and on behalf of all others similarly situated, **Plaintiffs,** **-against-** **THE GEORGE WASHINGTON UNIVERSITY,** **Defendant.**	**1:12-CV-00690-ESH**

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION TO CERTIFY A FED. R. CIV. P. RULE 23 CLASS ACTION

Respectfully Submitted,

/s/ Michael J.D. Sweeney

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I. INTRODUCTION

In the instant action, Plaintiff David Driscoll brings individual and representative claims under the D.C. Wage Payment and Wage Collection Law ("DCWPCL"), D.C. Code § 32-1301, *et seq*. Second Amended Complaint [Doc. No. 24] at ¶ 4. He alleges that The George Washington University ("GWU" or "the University") willfully and in bad faith failed to pay him and a class of similarly situated employees overtime wages for years, claiming that they were exempt from overtime under the federal Fair Labor Standards Act ("FLSA"). Finally in 2011, GWU acknowledged that Driscoll and the class were misclassified and reclassified their positions so that they would receive overtime wages going forward. As part of the reclassification, GWU paid the reclassified employees back overtime wages for overtime worked in the two years prior to the reclassification. Rather than pay the full overtime wages owed, however, GWU calculated the back wages under a "half-time" method that resulted in class members receiving only one-third or less of the full wages owed. The University also unilaterally limited its back overtime liability to two years, even though the law imposes back wage liability going back three years. To further limit its liability, GWU used an unrealistically low estimate of hours that ignored evidence of the actual hours that class members worked. Finally, GWU's payments did not include any liquidated damages or interest for its failure to pay the overtime wages when they were due. Driscoll alleges that GWU's actions violated the DCWPCL.

Driscoll now moves the Court to certify a Fed. R. Civ. P. Rule 23 class action for the claims pursuant to the DCWPCL on behalf of a class of all current and former Executive Aides, Executive Assistants, Executive Support Assistants, Executive Coordinators, and Executive Associates employed by the George Washington University after April 27, 2009, who worked

overtime hours but were not paid overtime wages during all or part of their employment. Driscoll also moves the Court to name him as class representative and to appoint Plaintiff's counsel as class counsel.

II. STATEMENT OF THE CASE

The George Washington University has a centralized Human Resources department ("HR") that serves the entire University. See Ex. A to the Declaration of Michael J.D. Sweeney in Support of Plaintiff's Motion to Conditionally Certify a FLSA Collective Action [Doc. No. 17-1] ("*Sweeney Decl.*"). Part of HR's function is to develop job classifications, also known as position classifications, for application to jobs throughout the university. See Ex. B to *Sweeney Decl.* ("*Position Management Web Page");* Declaration of Reem Zaghal [Doc. No. 23-1] ("*Zaghal Decl.*"), at ¶9. The classifications share a job title, FLSA classification and salary grade, and apply to groups of positions with similar duties and the same level of responsibility. *Id*.; *see also* Ex. C to *Sweeney Decl.* ("*Salary Grade Ranges Web Page*") *Zaghal Decl.* at ¶10.

GWU employs people as Executive Aides, Executive Assistants, Executive Support Assistants, Executive Coordinators, and Executive Associates throughout the University to perform clerical work (the "Clerical Jobs"). Declaration of David Driscoll in Support of Plaintiff's Motion to Conditionally Certify a FLSA Collective Action [Doc. No. 17-3] ("*Driscoll Decl.*"), at ¶ 6; Declaration of Jamie Lewis in Support of Plaintiff's Motion to Conditionally Certify a FLSA Collective Action [Doc. No. 17-2] ("*Lewis Decl.*"), at ¶ 6. Although the clerical work varies from department to department, the nature of the work does not—all the Clerical Jobs perform clerical work as their primary job duty. *Driscoll Decl.* at ¶ 7; *Lewis Decl.* at ¶ 7. Each of the Clerical Jobs is a job classification. Ex. C to *Driscoll Decl*., Dec. 7, 2011 e-mail from Merica Dito, HR Client Partner in GWU's Human Resources Department, to David

Driscoll ("*Dito 12/7/11 e-mail*") ("This was a University-wide examination across all classifications. All employees within certain classifications, including Executive Coordinators, are eligible for overtime going forward."); *Zaghal Decl.* at ¶ 12 (each of the Clerical Jobs is a position classification). Within each classification, employees carry the same pay grade and FLSA classification. *Driscoll Decl*. at ¶ 6; *Lewis Decl*. at ¶ 6; *Zaghal Decl.* at ¶ 10.

For FLSA exemption purposes, GWU treated the primary work duties of everyone with the same Clerical Job as the same. Prior to 2011, GWU classified employees holding Clerical Jobs as exempt from the FLSA's overtime provisions and did not pay them overtime wages. *Driscoll Decl*. at ¶ 7; *Lewis Decl*. at ¶ 7, Ex. C to *Driscoll Decl*., *Dito 12/7/11 e-mail.*

In 2011, as part of a University–wide project, GWU reassessed its exempt classification for certain classifications and as a result reclassified all the employees within certain titles from exempt to non-exempt from overtime requirements. *Zaghal Decl.* at ¶ 12; *Driscoll Decl*. at ¶ 10; *Lewis Decl*. at ¶ 12; *Dito 12/7/11 e-mail* ("This was a University-wide examination across all classifications."); Ex. B to *Lewis Decl*., Dec. 9, 2011 e-mail from Reem Zaghal to Lewis ("*Zaghal 12/9/11 e-mail*") ("What was the reason for the university to review the misclassification of my position? It was a University wide project."); *Dito 12/7/11 e-mail*. The reclassifications were based on a "review and assessment of [each class member's] position and … job duties" and "an in-depth review of [each class member's] actual job duties." Exhibit A ("*Reclassification Letter and "Employee Frequently Asked Questions*") to *Lewis Decl.*; Exhibit B ("*Reclassification Letter and "Employee Frequently Asked Questions*") to *Driscoll Decl.*; *see also Zaghal Decl.* at ¶ 12, Declaration of Merica Dito [Doc. 23-2] ("*Dito Decl.*") at ¶ 3. The Clerical Jobs were among those reclassified. *Driscoll Decl*. at ¶ 10; *Lewis Decl*. at ¶ 12; *Dito*

12/7/11 e-mail ("All employees within certain classifications, including Executive Coordinators, are eligible for overtime going forward.").

GWU sent a form letter to reclassified employees. Ex. B to *Driscoll Decl.* and Ex. A to *Lewis Decl*. ("*Reclassification Letter*"). The letter explained that GWU was reclassifying the positions to acknowledge that the employees were eligible for overtime pay and would be paid overtime going forward. *Reclassification Letter* ("we have determined that you are eligible to receive overtime pay"). The letter further explained that "Your eligibility for overtime pay does not change in any way the nature or level of your work. … Your employment status does not change. In other words, if your current status is full-time regular, you will remain full-time regular." *Id.* The reclassification did not entail a change in employees' "base pay, pay grade, or pay structure." *Id*. *Employee Frequently Asked Questions*.

As part of the reclassification, GWU made a back overtime payment to reclassified employees. *Reclassification Letter; Zaghal Decl.* at ¶ 16. The back overtime payment was calculated using a "half-time" payment method. *Lewis Decl*. at ¶ 20; Ex. B to *Lewis Decl.*; *Driscoll Decl*. at ¶19; Ex. C to *Driscoll Decl*., ("*Dito 12/7/11 e-mail*") ("We are using a method that is sanctioned by the Department of Labor, which is the 'half-time' calculation rate. This method uses the rate based on the total hours worked per week, with the salary covering the straight-time portion, with the half-time amount being paid as retroactive payment."); Ex. H to *Driscoll Decl*, U.S. Department of Labor Opinion Letter Jan. 14, 2009 ("*DOL Opinion Letter*"); Ex. H to *Driscoll Decl*, FLSA: Overtime backpay alternatives ("*GWU Backpay Calc.*").

The "half-time" method GWU used, known as the fluctuating workweek ("FWW"), results in overtime wages of only one-third or less of those required under the FLSA's default method of calculation. Because of its drastic effect on overtime wages, the FWW has strict

prerequisites to its use, one of which is that the employer and employee have "a 'clear mutual understanding of the parties that the fixed salary' is 'compensation for however many hours the employee may work in a particular week, rather than for a fixed number of hours per week.'" *DOL Opinion Letter*. GWU's agreement with class members, however, was that their salaries were intended to cover a specific amount of hours. For example, Driscoll was hired as a full-time Executive Coordinator which GWU defined as a 40-hour work week with a schedule from 8:00 a.m. to 5:00 p.m. *Driscoll Decl*. at ¶ 8; Ex. A to *Driscoll Decl*., Job Description ("*Driscoll Job Descrip.*"). Lewis was also hired for a 40-hour workweek. *Lewis Decl*. at ¶ 8. GWU confirmed the agreement that the employees' salaries were intended to cover a set number of hours in the *Reclassification Letter*, explaining that the reclassification did not change the agreement with respect to the number of hours GWU intended employees' pay to cover. *Reclassification Letter* ("Your employment status does not change. In other words, if your current status is full-time regular, you will remain full-time regular.") The letter explained that the base pay employees received pre-reclassification is the same that they receive post-reclassification and that any hours beyond 40 are considered overtime hours. *Reclassification Letter FAQ*. The University also paid prospective overtime pay at time-and-one-half the hourly rate, not calculated under a "half-time" method. Ex. B to *Lewis Decl.*, 12/5/11 e-mail from Merica Dito to Lewis ("*Dito 12/5/11 e-mail*") ("After 12/11 hours beyond 40 in a week are compensated at time-and-a-half"); *Reclassification Letter*, FAQ. Because GWU and class members had a written agreement as to the number of hours the salaries were intended to compensate, GWU's use of the "half-time" method resulted in its paying class members one-third or less of the back wages due.

GWU also unilaterally limited its liability to two years of back overtime pay, even though the law requires three years of back wages. The University paid class members back overtime wages for a period of two years prior to the reclassification. *Zaghal Decl.* at ¶ 16; *Dito Decl.* at ¶ 5; *Dito 12/5/11 e-mail* ("The University is providing compensation to employees who have been mis-classified and whose supervisors have indicated that they have worked over forty hours in a week over the past two years."); *Reclassification Letter* (back overtime pay for overtime hours in the past two years.) The limitation on liability ignores the three-year statute of limitation provided by D.C. Code § 12-301(8) for violations of the DCWPCL, the three-year statute of limitation provided by the D.C. Minimum Wage Act ("DC MWA"), § 32-1013, and the three-year statute of limitation provided by the FLSA where an employer acts willfully, 29 U.S.C. § 255. Driscoll alleges that GWU acted willfully. Second Amended Complaint at ¶¶ 55 & 56. GWU also failed to pay class members liquidated damages as required by the law. See 29 U.S.C. § 216(b); D.C. Code §§ 32-1012 and 32-1308. Accordingly, GWU did not pay class members all the back overtime wages they were due in violation of the DCWPCL.

In calculating the back overtime wages due to reclassified employees, GWU did not make a good faith attempt to determine the actual hours the employees worked. Instead, it relied on supervisors' estimates of overtime hours. *Reclassification Letter* ("Human Resources worked with your manager to estimate your hours worked"). It did not require supervisors to provide specific information, only the supervisors' estimates. Ex. F to *Driscoll Decl.*, 1/17/12 e-mail from Merica Dito to Driscoll ("*Dito 1/17/12 e-mail*") ("The supervisors were asked to provide HR the estimated number of hours, but not the dates and number of hours per date."); *Driscoll Decl*. at ¶ 18; *Lewis Decl*. at ¶ 20.

GWU had access to objective sources of overtime hours but chose to ignore them. For example, GWU had records of overtime hours employees worked. Before GWU informed Driscoll and other employees of the reclassification project, GWU had required them to submit their work hours for a two-week period. *Driscoll Decl*. at ¶ 16. During that period, Driscoll recorded more than 50 hours of overtime in just two weeks. *Driscoll Decl*. at ¶ 16. Nevertheless, GWU paid him for only 24 overtime hours in twenty months. *Reclassification Letter (Driscoll)*. That is, the University estimated that he worked fewer overtime hours over a 20-month period than records show he had worked in a two-week period. Additionally, GWU required Driscoll to work on at least six (6) Saturdays for at least eight (8) hours each, *Driscoll Decl*. at ¶ 15, which alone equals 48 hours of overtime, again more than the 24 hours GWU estimated for the 20-month period. Like any other employer, GWU also had access to time information from electronic footprints on time stamped information such as e-mails and activity in information systems and from scheduled overtime work on weekends. *Driscoll Decl*. at ¶ 15; *Lewis Decl*. at 21. GWU also could have asked the employees themselves for estimates, but did not. *Driscoll Decl*. at ¶ 17; *Lewis Decl*. at ¶ 23. Of course, the underestimation of hours resulted in GWU paying less in back overtime wages than it owed, in violation of the DCWPCL. Driscoll alleges that GWU's failure to pay the overtime wages owed to class members was intentional, willful, and in bad faith. Second Amended Complaint at 55.

III. THE COURT SHOULD CERTIFY A FED. R. CIV. P. RULE 23 CLASS AS ALL THE REQUIREMENTS FOR CERTIFICATION ARE MET

A. Rule 23(a) Requirements Are Met

1. The Class is Sufficiently Numerous

Rule 23(a)(1) requires the prospective class to be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. Rule 23(a)(1). "While courts in this Circuit have stated that the numerosity requirement 'is generally satisfied by a proposed class of at least 40 members,' they have also noted that 'as few as 25–30 class members should raise a presumption that joinder would be impracticable, and thus the class should be certified.'" *Meijer, Inc. v. Warner Chilcott Holdings Co. III, Ltd.*, 246 F.R.D. 293, 306 (D.D.C. 2007) (certifying a class of 30 members) (internal citations omitted). Here, Driscoll alleges that the prospective class contains more than 100 members. Second Amended Complaint at ¶ 32. Thus, he has more than met the numerosity requirement of Rule 23(a)(1). Further, the reclassification that prompted GWU's common illegal pay policy was University-wide. *Driscoll Decl.* at ¶ 10; *Lewis Decl.* at ¶ 12; *Dito 12/7/11 e-mail* ("This was a University-wide examination across all classifications."); Ex. B to *Lewis Decl.*, Dec. 9, 2011 e-mail from Reem Zaghal to Lewis ("*Zaghal 12/9/11 e-mail*") ("What was the reason for the university to review the misclassification of my position? It was a University wide project."); *Dito 12/7/11 e-mail*. Therefore, the potential class may be much larger than the 100 members that are alleged. *See Encinas v. J.J. Drywall Corp.*, 265 F.R.D. 3, 8 (D.D.C. 2010) (certifying subclasses with as low as 15 members because plaintiffs alleged a company policy affecting workers at all employer's job sites and thus the number of class members was potentially much greater than forty for each sub-class).

Moreover, the nature of this action, *i.e.*, to recover back overtime wages for employees pursuant to state wage-and-hour law, supports certification of a class. *See Meijer*, 246 F.R.D. at 306-307 (certifying class of 30 members and finding that "because of this important role for class actions in the private enforcement of antitrust claims, 'courts resolve doubts in favor of certifying the class.'") (internal citation omitted). Courts around the country have recognized that requiring employees to individually vindicate their rights under wage and hour laws substantially undermines the enforcement of such rights. *See, e.g.*, *Quinonez v. Empire Today, LLC*, C 10–02049 WHA, 2010 WL 4569873, *5 (N.D. Cal. Nov. 4, 2010); *Sutherland v. Ernst & Young LLP*, 768 F. Supp. 2d 547, 554 (S.D.N.Y. 2011); *Scholtisek v. Eldre Corp.*, 229 F.R.D. 381, 394 (W.D.N.Y. 2005); *Gentry v. Superior Court*, 42 Cal. 4th 443, 457-459, 165 P.3d 556, 564-565 (Sup. Ct. Cal. 2007). Thus, the numerosity requirement of Fed. R. Civ. P. Rule 23(a) is met.

2. There Are Questions of Law and Fact Common to the Class

The second requirement of Rule 23(a) is commonality: there must be "questions of law or fact common to the class[.]" Fed. R. Civ. P. Rule 23(a)(2). "Not every issue of law or fact [need] be the same for each member." *In re Rail Freight Fuel Surcharge Antitrust Litigation*, 07–489 (PLF), 2012 WL 2870207, *25 (D.D.C. June 21, 2012), *citing Lindsay v. Government Emps. Ins. Co.*, 251 F.R.D. 51, 55 (D.D.C. 2008). "Rather, the commonality test is met when there is at least one issue ... the resolution of which will affect all or a significant number of the putative class members." *Id.*

Because the commonality requirement is satisfied "by a single common issue," courts have noted that it often is easily met. *Taylor v. District of Columbia Water & Sewer Auth.*, 241 F.R.D. 33, 37 (D.D.C. 2007). Because Plaintiffs must show under Rule 23(b)(3) that common

questions not only exist but that they predominate, the issue of common questions will be dealt with below in the discussion of Rule 23(b)(3). However, suffice it to say that the commonality requirement of Rule 23(a)(2) is easily met here where the challenged activity, *i.e.*, GWU's common illegal pay policy, was the same for all class members. *See Encinas*, 265 F.R.D. at 8-9 ("Here, the challenged activity is the same for the plaintiffs and all members of the two sub-classes: [employer's] alleged policy of withholding ten percent of its drywall employees' gross wages. This satisfies the commonality requirement."); *see also*, *Calderon v. GEICO General Ins. Co.*, 279 F.R.D. 337, 346 (D.Md.,2012) ("the Amended Complaint alleges that all class members suffered the same injury because Defendants uniformly classified all Security Investigators as exempt from overtime provisions of state and federal law. Therefore, common questions of law and fact exist."). Thus, the commonality requirement of Fed. R. Civ. P. Rule 23(a) is met.

3. The Class Representative's Claims Are Typical of Those of the Class

"Typicality requires that the claims of the representative be typical of those of the class." *Taylor*, 241 F.R.D. at 44, *citing* Fed. R. Civ. P. Rule 23(a)(3). A plaintiff's claims can be typical of those of the class even if there is some factual variation between them. *Encinas*, 265 F.R.D at 9, *citing Bynum v. District of Columbia*, 214 F.R.D. 27, 34 (D.D.C. 2003) ("*Bynum I*"). At bottom, a class representative's claims are typical of those of the class if "the named plaintiffs' injuries arise from the same course of conduct that gives rise to the other class members' claims." *Id.*, *quoting Bynum I*, 214 F.R.D. at 35.

As is made clear in the Second Amended Complaint and the declarations of Plaintiffs and Defendants, Plaintiff Driscoll's injuries arise from the same course of conduct that gave rise to other class members' claims. Specifically, Plaintiff Driscoll was subject to the same violations of the DCWPCL based on the same underlying common illegal pay policy as the members of the

class. Thus, the class representative's claims are typical of the claims of the individual members of his class. *See Encinas,* 265 F.R.D. at 9 (finding that the claims of the class representatives were typical of the claims of members of the subclasses because they all arose from the same alleged course of conduct: employer's policy of retaining ten percent of its drywall employees' gross wages). Thus, the typicality requirement of Fed. R. Civ. P. Rule 23(a) is met.

4. The Proposed Representatives Can Adequately Represent the Interests of the Class

"The fourth and final requirement of Rule 23(a) requires that the court determine whether the proposed representatives can adequately represent the interests of the class." *Encinas*, 265 F.R.D. at 9, *quoting Taylor,* 241 F.R.D. at 45. This requirement is satisfied upon a showing that 1) there is no conflict of interest between the proposed class representative and other members of the class and 2) the proposed class representative "will vigorously prosecute the interests of the class through qualified counsel." *Encinas,* 265 F.R.D. at 9, *quoting Lindsay*, 251 F.R.D. at 55. When determining whether potential class counsel is qualified, a court considers:

> "(i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class[.]"

Fed. R. Civ. P. Rule 23(g)(1)(A).

The Plaintiff in this case has shown that he will serve as an adequate representative. Driscoll has already shown that he is willing and able to vigorously prosecute the interests of the class through his persistence and thoroughness in questioning GWU's illegal pay policy and by initiating this litigation. There is no conflict of interest between the proposed class representative and other members of the class because, as was discussed in the Rule 23(a)

commonality and typicality requirements above, Plaintiff Driscoll's injuries pursuant to the DCWPCL are the same as the other members of the class and arise out of the same nucleus of operative facts. Therefore, Plaintiff Driscoll will vigorously prosecute the interests of the class because they are aligned with his own interests. Further, Driscoll understands that as class representative he assumes a responsibility to the class members to represent their interests fairly and adequately; that he must represent and consider the interests of the class members just as he would represent and consider his own interests; that in decisions regarding the conduct of the litigation and its possible settlement, he must not favor his own interests over those of the class members; and that any resolution of a class action lawsuit, including any settlement or dismissal thereof, must be in the best interests of the class members. See Second Amended Complaint at ¶ 36.

While Driscoll also brings claims for retaliation against GWU, they arise under the same statute as the wage-and-hour claims and he brings them in the same action. Because the Court will determine both claims and is obligated to approve any settlement of them, there is neither a chance nor appearance of conflict. Moreover, GWU should not benefit from retaliating against Driscoll. Standing up as a representative in wage-and-hour action requires fortitude. Many potential representatives will not take on so public a role for fear of retaliation or blackballing. *See Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960) ("it needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions"); *Kasten v. Saint-Gobain Performance Plastics, Corp.*, 131 S. Ct. 1325, 1333 (2011); *Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058 (9th Cir.2000) (permitting anonymous filings because of risks to FLSA plaintiffs). If an employer is able to disqualify a class representative by retaliating against him, it could disqualify any

potential representative, whether a current or former employee, who is brave enough to act as a representative in a wage-and-hour action. Such a rule would defeat the FLSA's goals. *Kasten*, 131 S. Ct. at 1333 (the FLSA's antiretaliation provision makes the statute's enforcement scheme effective "by preventing fear of economic retaliation from inducing workers quietly to accept substandard conditions") citations omitted.

Driscoll has also engaged qualified counsel. Plaintiff's counsel is experienced and qualified to adequately represent and protect the interests of the class. Getman & Sweeney is a firm of five lawyers, one recent law graduate, and six paralegals, with other counsel available on an "of counsel" basis. Declaration of Michael J.D. Sweeney in Support of Plaintiff's Motion to Certify a Fed. R. Civ. P. Rule 23 Class Action ("*Sweeney Decl. 2*"), at ¶¶ 13 & 14. The firm has handled numerous hybrid Rule 23 class/collective action cases on behalf of group plaintiffs. *Id*. at ¶ 17. Several courts have recognized Getman & Sweeney's representation. *See Habenicht v. KeyCorp, et al.*, 11-cv-02619, Doc. 30 (N.D. Ohio July 17, 2012) (noting Getman & Sweeney's substantial experience in the arena of complex and class action litigation); *Morangelli v. Chemed Corp.*, 1:10-cv-00876-BMC, Doc. 203, p. 33 (E.D.N.Y. June 17, 2011) ("Defendants do not challenge the adequacy of the class counsel. They would be hard-pressed to; as another court recently noted, counsel's qualifications are 'stellar' and this element is 'easily met.'"); *Bredbenner v. Liberty Travel, Inc.*, 09 Civ. 905, 09 Civ. 1248, 09 Civ. 4587, 2011 WL 1344745, at *7 (D.N.J. April 8, 2011) ("[C]lass counsel is comprised of competent and experienced class action attorneys that are readily capable of prosecuting Plaintiffs' claims. … Based on the Court's experience in supervising this litigation, class counsel has demonstrated the utmost skill and professionalism in effectively managing these consolidated actions and bringing them to a successful conclusion."). Michael J.D. Sweeney is a partner at Getman Sweeney and has

significant experience handling wage-and-hour class actions, having successfully handled many such actions over his sixteen years of legal practice and has sufficient resources to adequately represent the class. *Sweeney Decl. 2* at ¶¶ 1-11; 15-19.

Accordingly, Plaintiff satisfies the adequacy requirement. See, *Encinas,* 265 F.R.D. at 9.

B. Rule 23(b)(3) Requirements Are Met

Rule 23(b)(3) requires that common questions "predominate over any questions affecting only individual members" and that a class action is "superior to other available methods for the fair and efficient adjudication of this controversy." Plaintiffs satisfy both of these requirements.

1. Common Questions Predominate

The requirement that common questions predominate tests whether the proposed classes "are sufficiently cohesive to warrant adjudication by representation." *Amchem Products, Inc. v. Windsor,* 521 U.S. 591, 623-24 (1997). Whether "common factual and legal issues predominate over any such issues that affect only individual class members [ ] is related to the commonality requirement of Rule 23(a)." *Encinas,* 265 F.R.D. at 10, *quoting Bynum v. District of Columbia,* 217 F.R.D. 43, 49 (D.D.C. 2003) ("*Bynum II*"). If the questions of law and fact identified as common to the named plaintiffs and members of the class predominate over any non-common issues, the requirement is satisfied. *Id. See also, Lindsay,* 251 F.R.D. at 56 (where "the most crucial questions of fact and law are common to all members of the proposed class … it is clear that those questions predominate over any questions affecting only individual members.")

Here, Driscoll alleges that GWU engaged in an illegal pay method that affected the entire class. He alleges that the class members held one of the same five Clerical Jobs; that they all performed clerical work as their primary duty; after GWU reviewed class members' job duties and determined that they were non-exempt employees, it intentionally made back wage

payments that were legally insufficient because the payments were based on a half-time calculation that reduced payments to less than one-third of what they should have been; the payments excluded a year of liability; the payments did not include all the hours class members worked; and the payments did not include liquidated damages or interest. GWU applied this illegal method to Driscoll and all the class members. Accordingly, there are myriad questions of law and fact common to Driscoll and the class members.

The common questions of fact include

a. how GWU calculated class members back overtime pay;

b. how many years of uncompensated overtime work were included in GWU's back pay calculations;

c. whether GWU failed to keep true and accurate time records for all hours worked by the class members;

d. whether GWU included all the hours class members worked;

e. whether GWU paid class members liquidated damages and interest as part of the back wage payment; and

f. whether GWU used the pay practice intentionally and in bad faith.

The common legal questions include:

a. whether the evidence, including GWU's review of class members' job duties and subsequent reclassification of their positions from exempt to non-exempt, its written and oral admissions, and its payment of back overtime wages, establishes GWU misclassified the class;

b. whether GWU was entitled to use a half-time calculation to determine the back overtime wages due plaintiffs;

c. whether GWU's guidelines for estimating the overtime hours class members worked was reasonable;

d. whether GWU was required to pay back wages based on a three-year statute of limitations;

e. whether GWU was required to pay liquidated damages and interest to class members;

f. Whether GWU acted in bad faith in calculating the class members' back pay; and

g. what proof of hours worked is sufficient where an employer fails in its duty to maintain true and accurate time records;

h. the nature and extent of class-wide injury and the appropriate measure of damages for the class members.

These questions are common to the entire class and can be answered efficiently in a single proceeding.

On the other hand, the only questions solely affecting individual class members are few and are either irrelevant to the claims (*e.g.*, what department a class member worked in) or are damages issues (*e.g.*, how many overtime hours a class member worked and/or has already been compensated for). The numerous questions of law and fact that are common to Driscoll and members of the class predominate over the few immaterial non-common issues. *See Encinas*, 265 F.R.D. at 10 (finding a predominance of common questions where common issues were whether employer maintained a policy of retaining ten percent of its employees' gross wages and whether that practice violated state laws, and where the only apparent non-common factual issues involved determining at which job sites and for how many hours each member of the class worked). Thus, the predominance requirement is satisfied.

Driscoll anticipates that GWU will argue that common questions do not predominate because GWU's reclassification alone does not mean that class members were previously misclassified in violation of the FLSA and because resolution of the question of whether class members were previously misclassified will entail individual inquiries into their specific job duties, which GWU alleges varied widely.

Were GWU to make these arguments, it would be incorrect in several ways. First, Driscoll does not argue that GWU's reclassification of class members by itself establishes that

class members were previously misclassified. Rather, Driscoll argues that GWU has conceded that it previously misclassified class members because it examined class members' specific job duties, which it concedes did not change in any way, and determined that they were FLSA non-exempt duties. In other words, the fact that class members' job duties did not change and GWU reviewed those job duties, determined they are non-exempt duties, reclassified class members as non-exempt, and paid them back overtime wages for the misclassification, establishes that the previous classification as exempt was improper. While GWU made back overtime payments, it violated the FLSA by improperly calculating the back overtime payments it made to class members by using a "half-time" method, by paying class members for only a two-year period, by not accounting for all overtime hours worked, and by not paying liquidated damages or interest on the back wages.

Further, resolution of the question of whether class members were previously misclassified will not entail individual inquiries into their specific job duties because GWU itself treated the differences in class member specific job duties as irrelevant to their FLSA classification. *See Damassia v. Duane Reade, Inc.*, 250 F.R.D. 152, 159 (S.D.N.Y. 2008) ("That [employer] itself makes such a blanket determination [of exemption] is evidence that differences in the position, to the extent that there are any, are not material to the determination of whether the job is exempt from overtime requirements."). GWU admits that it classified everyone working as Executive Assistants, Executive Associates, and Executive Coordinators as a group, determining that the general job duties of these job titles were similar enough that they all merited the same FLSA classification and were thus subject to the same common pay policy. (Driscoll makes the same allegation regarding the Executive Support Assistants and Executive Aides, but GWU contests the allegation.) *See In re Wells Fargo Home Mortg. Overtime Pay*

Litigation, 571 F.3d 953, 957 (9th Cir. 2009) ("An internal policy that treats all employees alike for exemption purposes suggests that the employer believes some degree of homogeneity exists among the employees. This undercuts later arguments that the employees are too diverse for uniform treatment. Therefore, an exemption policy is a permissible factor for consideration under Rule 23(b)(3).").

GWU then reclassified the job titles based on "an in-depth review of actual job duties" *Employee Frequently Asked Questions*. Thus, even if a specific inquiry into employees' job duties was required, as GWU asserts, GWU already performed this inquiry for the class members and determined that their job duties, which had not changed, made them eligible for overtime. By examining class members' specific and unchanged job duties and determining that class members' job duties were non-exempt duties, GWU has conceded that each reclassified class member was previously misclassified.

Moreover, GWU has not contested Driscoll's allegation that class members were all clerical employees, and clerical duties are non-exempt duties. *See* 29 C.F.R. § 541.202(e) ("The exercise of discretion and independent judgment [necessary to qualify for the administrative exemption] also does not include clerical or secretarial work, recording or tabulating data, or performing other mechanical, repetitive, recurrent or routine work."); *see also In re Enterprise Rent-a-Car Wage & Hour Employment Practices*, 09–1188, 2012 WL 4048845 (W.D. Pa. Sept. 13, 2012) ("Carrying out clerical duties, on the other hand, is not sufficient for administrative exemption, even if the duties involve a small amount of discretion."), *citing Goldstein v. Dabanian*, 291 F.2d 208, 210–11 (3d Cir. 1961). GWU claims the individual job duties prevent class treatment only now that it faces liability for its illegal actions. However, GWU's admission

that it reviewed the positions and related job duties and found them sufficiently similar for FLSA classification purposes is sufficient to support class certification.

2. Class Treatment Is Superior

"Rule 23(b)(3) favors class actions where common questions of law or fact permit the court to 'consolidate otherwise identical actions into a single efficient unit.'" *Encinas*, 265 F.R.D. at 10, *quoting Bynum I*, 214 F.R.D. at 40 (other citation omitted). Rule 23(b)(3) sets out four factors bearing on the question of superiority: (1) the extent to which the class members have an interest in individually controlling the prosecution of their claims; (2) the extent and nature of any litigation concerning the controversy already begun by class members; (3) the desirability of concentrating the litigation in one forum; and (4) the likely difficulties in managing the class action. Plaintiffs will address each of these factors in turn.

(1) The class members have no interest in individually controlling the prosecution of their claims. In most cases, the amount of damages at issue is not large enough to make individual actions possible. *See, e.g.*, *Quinonez*, 2010 WL 4569873 at *5; *Sutherland*, 768 F. Supp. 2d at 554; *Scholtisek*, 229 F.R.D. at 394; *Gentry*, 42 Cal. 4th at 457-459, 165 P.3d at 564-565. Nor is individual control desirable, given the uniform nature of the claims and the need to prove GWU's common illegal policy of not compensating employees for all of their overtime hours, even in an individual action.

(2) Public Access to Court Electronic Records ("PACER") reveals no pending wage-and-hour claims against GWU and Plaintiffs are aware of no such cases. As a result, litigating the common issues raised by this case on behalf of a class will achieve the judicial economy and efficiency that Rule 23 was designed to promote. The absence of other wage-and-hour cases also

tends to confirm that individual employees have neither the interest nor the ability to bring the claims raised here as individual actions.

(3) Given the uniformity of the claims across the class, it is desirable from the standpoint of efficiency and judicial economy to concentrate all of the claims in one forum. Class adjudication is far superior to the filing of dozens if not hundreds of separate actions all raising the same questions. The superiority of class treatment from the point of view of efficiency and judicial economy is particularly great here as the Court will be resolving most of the factual and legal questions raised by the DCWPCL Rule 23 class as part of its resolution of the FLSA and DCMWA collective actions.

Specifically, because common questions of fact and law predominate, Driscoll will be able to show through common proof that 1) GWU previously classified all class members, as a group based on similar job duties, as exempt from FLSA overtime requirements; 2) GWU then examined class members' job duties, which had not changed, and determined that they were not, and thus should not previously have been, exempt from FLSA overtime requirements; 3) GWU reclassified class members as non-exempt based on its examination of class members' job duties; 4) GWU made payments to class members for the overtime hours they worked during the two years that they were misclassified prior to reclassification; and 5) GWU improperly calculated these payments in violation of the FLSA, DCMWA and DCWPCL. Thus, concentrating all of the claims in one forum is sensible.

(4) Courts in this district have made clear that there are no manageability problems inherent in litigating FLSA collective action claims and Rule 23 state law claims together where plaintiffs' state law claims are based on the same facts as their federal law claims. *See, e.g.*, *Encinas*, 265 F.R.D. at 10 fn 4; *Lindsay*, 251 F.R.D. at 57. Here, the DCWPCL claims parallel

the FLSA and DCMWA claims, and the DCWPCL claims arise out of the same nucleus of operative facts as the FLSA and DCMWA claims. Thus, a ruling on Plaintiffs' FLSA and DCMWA claims will, as a practical matter, determine their DCWPCL claims as well, making it highly efficient to consider all of those claims in the same action.

Additionally, a class action is superior to other available methods for the fair and efficient adjudication of this litigation -- particularly in the context of wage and hour litigation such as the present action, where individual plaintiffs may lack the financial resources to vigorously prosecute a lawsuit in federal court against a corporate defendant. *See, e.g., Quinonez*, 2010 WL 4569873 at *5; *Sutherland*, 768 F. Supp. 2d at 554; *Scholtisek*, 229 F.R.D. at 394; *Gentry*, 42 Cal. 4th at 457-459, 165 P.3d at 564-565. The class members have been injured and are entitled to recovery as a result of GWU's illegal common pay policy. Although the relative damages suffered by each individual class member are not *de minimis*, such damages are small compared to the expense and burden of individual prosecution of this litigation. In addition, class treatment is superior because it will obviate the need for unduly duplicative litigation that might result in inconsistent judgments about GWU's policy. *See Lindsay*, 251 F.R.D. at 57 (finding class treatment superior because it "will prevent duplicative, wasteful and inefficient litigation here and in [ ] state court," and will "eliminate the risk that the question of law common to the class will be decided differently in [separate lawsuits]") (internal citation omitted).

IV. CONCLUSION

For all of the foregoing reasons, this Court should certify this action as a Rule 23(b)(3) class action for claims pursuant to the DCWPCL on behalf of a class of all current and former Executive Aides, Executive Assistants, Executive Support Assistants, Executive Coordinators, and Executive Associates employed by the George Washington University after April 27, 2009, who

worked overtime hours but were not paid overtime wages during all or part of their employment; name David Driscoll as the class representative; and appoint Plaintiff's counsel as class counsel.

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Respectfully Submitted,

/s/ Michael J.D. Sweeney

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