IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Civil Division

DAVID M. DRISCOLL, individually and on behalf of all others similarly situated,	)	
Plaintiffs,	)	
v.	)	**Case No. 1:12-cv-00690-ESH**
THE GEORGE WASHINGTON UNIVERSITY,	)	
Defendant.	)	

DEFENDANT'S SURREPLY IN OPPOSITION TO MOTION FOR CONDITIONAL CERTIFICATION

Defendant The George Washington University ("GWU" or the "University") submits this surreply in further opposition to Plaintiff David M. Driscoll's ("Plaintiff") Motion for Conditional Certification of a collective action pursuant to 29 U.S.C. § 216(b) ("Motion") (docket no. 17). In his Reply (docket no. 27), Plaintiff recasts his initial arguments for conditional certification and now seeks a much broader putative collective. Plaintiff also misstates his burden and distorts the factual record.

The Court should disregard Plaintiff's attempt to broaden the scope of the case, as well as his disingenuous arguments in support of that attempt.

I. Plaintiff Has Changed the Focus of His Motion

In an apparent effort to manufacture some similarity among putative collective action members, Plaintiff's initial arguments focused almost exclusively on the manner in which GWU carried out the Reclassification, apparently seeking a collective limited to individuals who share his claims concerning the manner in which back overtime was calculated. Faced with the

evidence presented in the University's Opposition, however, Plaintiff for the first time argues that all exempt employees in the so-called "Clerical Jobs" [1] are "similarly situated." Plaintiff also argues for the first time that all individuals who were classified as exempt should be permitted to opt-in, now claiming that the basis of his claims is the alleged misclassification of positions prior to the Reclassification, rather than the Reclassification itself.[2] *See* Reply at 4. Plaintiff's attempt to expand the putative collective in this manner is improper.

First, contrary to Plaintiff's assertions, the fact that a group of employees is classified as exempt is not sufficient to make them similarly situated absent evidence that their job duties are the same. For example, in *Slavinski v. Columbia Association*, the court denied conditional certification, stating:

> Merely because the [defendant] classified these individuals as exempt, however, does not mean that they are similarly situated to [plaintiff]. [Plaintiff] provides no evidence demonstrating that these employees performed similar functions or similar levels of function to [her] at the Association. . . . Without a description of their job duties, the court cannot determine whether these employees were similarly situated to [plaintiff] . . . .

2011 WL 1310256, at *5 (D. Md. 2011). Courts across the country have reached similar conclusions, rejecting conditional certification premised on the assertion that all exempt employees are automatically similarly situated. *See*, *e.g.*, *Colson v. Avnet, Inc*., 687 F. Supp. 2d 914,927 (D. Ariz. 2010); *Young v. Cerner Corp.*, 503 F. Supp. 2d 1226, 1232 (W.D. Mo. 2007) ("certification of such a class would require the Court to entertain myriad individual analyses of

[1] "Clerical Jobs" is a moniker of Plaintiff's own invention; it is not a term used by the University and it thus does not refer to any readily ascertainable group of current or former employees. *See* Zaghal Decl., at ¶ 3 to 10 (explaining manner in which jobs are categorized at GWU).

[2] Inexplicably, although he admits that individuals who were never classified as exempt should be excluded from the collective, Plaintiff argues that Executive Aids and Executive Support Assistants – who were always classified as non-exempt – should receive notice. Reply at 4; *see also* Affidavit of Reem Zaghal at ¶ 12, attached to Opposition to Motion for conditional Certification (docket no. 23) as Exhibit A. His only argument in support of this position that the Court must ignore all facts presented by the Defendant at conditional certification. *Id.* As described below, this argument is legally – and logically – untenable.

whether employees in particular jobs were properly exempted by [defendant]"); *Freeman v. Wal-Mart Stores, Inc.*, 256 F. Supp. 2d 941, 945 (W.D. Ark. 2003) (rejecting argument that "all salaried [] employees below officer level are similarly situated no matter what the nature of their duties") *cf. Myers v. Hertz*, 624 F.3d 537, 555 (2d Cir. 2010) (at conditional certification, plaintiff must show that "there are other employees who are similarly situated with respect to their job requirements and with regard to their pay provisions") (emphasis added).

No other result would be logical because determining whether an exemption applies under the FLSA is a fact-intensive inquiry that must be performed by examining the actual job duties of the employee at issue:

> As a matter of both sound public policy and basic common sense, the mere classification of a group of employees . . . as exempt under the FLSA is not by itself sufficient to constitute the necessary evidence of a common policy, plan, or practice that renders all putative class members as "similarly situated" for § 216(b) purposes. If it were, in every instance where an employer is accused of misclassifying a large group of employees, the district court would then somehow be required to order collective action notification, irrespective of the quality or quantity of evidence that had been produced in the form of declarations and supporting exhibits. Such a rule would run counter to the long established law governing § 216(b) actions, which states that whether an employee has been properly exempted under the FLSA necessitates a fact specific inquiry.

Colson, 687 F. Supp. 2d at 927; *see also*, *e.g.*, *Mike v. Safeco Ins. Co. of Am.*, 274 F. Supp. 2d 216, 220 (D. Conn. 2003) ("Determining whether an employee is exempt is extremely individual and fact-intensive, requiring a detailed analysis of the time spent performing administrative duties and a careful analysis of the full range of the employee's job duties and responsibilities.") (internal quotations and citation omitted).[3] Plaintiff has put forward no evidence regarding the

[3] Plaintiff claims that an examination of job duties is not required at conditional certification, but virtually all of the cases he cites in the Reply concern allegations of off-the-clock work – which do not turn on the nature of work performed – rather than misclassification. *See Castillo v. P & R Enterprises, Inc*., 517 F. Supp. 2d 440 (D.D.C. 2007) (off-the-clock claim); *Braun v. Superior Industries Intern. Inc.*, 2010 WL 3879498 (D. Kan. 2010) (off-the-clock claim); *Garza v. CTA*, 2001 WL 503036 (N.D. Ill. 2001) (claim for unpaid training time); *Realite v. Ark Restaurants Corp.*, 7 F. Supp. 2d 303 (S.D.N.Y. 2008) (minimum wage and off-the clock claims).

job duties of other putative members of the collective aside from his own conclusory statement (and the identical statement of one other employee who worked with the same supervisor in the same department) that he "understands" based on unidentified hearsay that all other Executive Coordinators, Executive Associates, and Executive Assistants working for numerous departments, schools, and supervisors perform the same principal job duties and have the same level of responsibility. Accordingly, Plaintiff has not met his burden to establish that certification of the broad putative collective he seeks is appropriate.

II. Plaintiff Misunderstands and Misstates His Burden

The only response that Plaintiff makes to the specific examples of material differences among putative members of the collective placed into evidence by Defendant is that the Court should ignore them until after discovery and rely solely on his conclusory statements instead. *See* Reply at 5 ("GWU's attempts to contest the facts that Driscoll alleges are inappropriate at this stage of the litigation.") This response demonstrates Plaintiff's fundamental misunderstanding of the nature of the Court's inquiry at the conditional certification stage.

First, contrary to Plaintiff's assertions, this Court "has a responsibility to ensure that the action proceeds in a manner that is both orderly and sensible" and thus "cannot turn a blind eye" to facts that demonstrate that collective action treatment is not appropriate. *Dinkle v. Medstar Health Inc.*, --- F. Supp. 2d, 2012 WL 3062461, at *6-7 (D.D.C. 2012). "It would be a waste of the Court's and the litigants' time and resources to notify a large and diverse class only to later determine that the matter should not proceed as a collective action because the class members are not similarly situated." *Freeman*, 256 F. Supp. 2d at 945. The facts that the University has provided regarding differences among the putative class members are relevant, and the Court should consider them at this time.

Second – and more importantly – it is Plaintiff's burden to demonstrate that he is similarly situated to the putative collective, and he cannot meet that burden merely by criticizing the evidence that Defendants have provided. Rather, he must put forward at least some concrete evidence of his own. *See Dinkel*, 2012 WL 3062461, at *2 (at conditional certification, "the named plaintiffs must present some evidence, beyond pure speculation, of a nexus between the manner in which the employer's alleged actions affected them and the manner in which they affected other employees") (internal quotations and brackets omitted); *Andrade v. Aerotek, Inc.*, 2009 WL 2757099, at *3 (D. Md. 2009) ("[T]he paramount issue is whether plaintiffs have demonstrated that potential class members are similarly situated.") (internal quotations and ellipses omitted). This he has utterly failed to do. Plaintiff continues to rely on conclusory language in his affidavit, which as discussed above, is inadequate. Reply at 8 (arguing that the Court should rely on "all of the statements contained in Plaintiffs' declarations"). Plaintiff also wrongly claims that GWU has "admitted" that the putative members of the collective were, in fact, misclassified and are similarly situated. Reply at 2. That assertion, however, rests upon a strained reading of the documents that GWU issued in connection with the Reclassification. For example, Plaintiff asserts that GWU's statement, "we have determined that you are eligible to receive overtime pay," means that GWU has conceded that all employees in the so-called "Clerical Jobs" were misclassified. *See* Reply at 2; Exhibit A to Lewis Decl. Similarly, Plaintiff claims that Defendant's statement that its review of job positions was "University-wide" means that the Reclassification was implemented in the same manner and based on the same considerations for each and every employee. *See* Reply at 2; Exhibit B to Lewis Decl. Defendant in fact strongly contests those conclusions, and Plaintiff has put forward no independent evidence in support of them. Conditional certification therefore should be denied.

CONCLUSION

For the reasons stated above, as well as those described in Defendant's Opposition to Plaintiff's Motion for Conditional Certification (docket no. 17) the Court should deny Plaintiffs' Motion for Conditional Certification.

Dated: October 9, 2012

Respectfully submitted,

THE GEORGE WASHINGTON UNIVERSITY

/s/ Raymond C. Baldwin
Richard L. Alfred (*pro hac vice*)
Raymond C. Baldwin (D.C. Bar Number 461514)
Alexander J. Passantino (D.C. Bar Number 997340)
Esther Slater McDonald (to be admitted *pro hac vice*)
SEYFARTH SHAW LLP
975 F Street, N.W.
Washington, D.C. 20004
ralfred@seyfarth.com
rbaldwin@seyfarth.com
emcdonald@seyfarth.com
(202) 463-2400 (telephone)
(202) 828-5393 (facsimile)

Counsel for The George Washington University

CERTIFICATE OF SERVICE

I, hereby certify that I have caused a true and correct copy of the foregoing Surreply in Opposition to Motion for Conditional Certification to be served upon the following counsel via ECF on this ninth day of October, 2012:

Dan Charles Getman, Esq.
Michael J.D. Sweeney, Esq.
Getman & Sweeney, PLLC
9 Paradies Lane
New Paltz, NY 12561

Counsel for Plaintiff

/s/ Raymond C. Baldwin

Richard L. Alfred (*pro hac vice*)
Raymond C. Baldwin (D.C. Bar Number 461514)
Alexander J. Passantino (D.C. Bar Number 997340)
Esther Slater McDonald (to be admitted *pro hac vice*)
SEYFARTH SHAW LLP
975 F Street, N.W.
Washington, D.C. 20004
ralfred@seyfarth.com
rbaldwin@seyfarth.com
emcdonald@seyfarth.com
(202) 463-2400 (telephone)
(202) 828-5393 (facsimile)

Counsel for The George Washington University