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 RESPONSE TO DEFENDANT'S SURREPLY IN OPPOSITION TO MOTION FOR CONDITIONAL CERTIFICATION

Driscoll has met his first-stage burden to show that he and other class members were subject to GWU's common illegal pay policy and thus are similarly situated. He has made the required modest factual showing that 1) GWU previously classified the Clerical Jobs as exempt from FLSA overtime requirements on a group based on similar primary job duties; 2) GWU then examined the Clerical Job duties, which had not changed, and determined that the Clerical Jobs were not exempt from FLSA overtime requirements; 3) GWU reclassified the Clerical Jobs as non-exempt based on its examination of job duties; and 4) GWU made back overtime wage payments but did not pay class members the overtime wages required by D.C. and federal law.

Contrary to GWU's assertion, neither Driscoll's definition of the putative class nor his allegations of an illegal pay policy has changed. Driscoll asserts that the Clerical Jobs included in the proposed class definition were reclassified after GWU examined their unchanged job duties and determined they were non-exempt positions, and were therefore, by definition, previously misclassified. Driscoll does not claim that the reclassification was illegal, rather he alleges that the common illegal policy is that after acknowledging that it had improperly classified the Clerical Jobs for years, GWU failed to pay the back overtime wages due to the class under the law. Thus, whether the focus is on the prior misclassification or the subsequent reclassification, the class definition and alleged common illegal policy remain the same.

Also contrary to GWU's assertion, Driscoll does not argue that the mere fact that GWU misclassified the Clerical Jobs establishes that the class is similarly situated. Rather, it is the totality of the occurrences enumerated above that shows the class was subject to a common illegal policy. In addition to testimony, Driscoll has provided ample evidence, comprised mainly of GWU admissions, that supports a preliminary finding that the class is similarly situated. For example, GWU admits that the reclassification was university wide and across job titles and was

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." *Lewis Decl.* Ex. A & *Driscoll Decl.* Ex. B (Reclassification Letter and "Employee Frequently Asked Questions"); *see also Zaghal Decl.* at ¶ 12, *Dito Decl.* [Doc. 23-2] at ¶ 3. GWU has not contested that the people working in the Clerical Jobs performed clerical work as their primary work duty. It admits that it made back wage payments to class members for past overtime work, and it admits that it calculated the back wages in the same way for each class member. Where, like here, reclassification is accompanied by other indicia that the class is similarly situated, plaintiffs' initial stage burden is met. *See, e.g.*, *Ibea v. Rite Aid Corp.*, 11 Civ. 5260, 2012 WL 75426, 2 -3 (S.D.N.Y. Jan. 9, 2012) (reclassification is a relevant consideration for conditional certification) *citing Raniere v. Citigroup Inc.,* 11 Civ. 2448, 2011 WL 5881926 at *24 (S.D.N.Y. Nov. 22, 2011); *Parks v. Dick's Sporting Goods, Inc.*, 05 Civ. 6590, 2007 WL 913927, 4 (W.D.N.Y.) (W.D.N.Y. Mar. 23, 2007) (granting conditional certification despite employer's claim that its reclassification was a "conservative approach" and not all the reclassified employees were non-exempt, and finding that the employer's showing that a few class members "performed tasks that might qualify them as exempt under the FLSA" does not support denial of conditional certification.).

GWU attempts to avoid conditional certification by mischaracterizing its own documents. For example, it claims that Driscoll cannot rely on GWU's admission to the class that "we have determined that you are eligible to receive overtime pay" to show that class members were actually non-exempt. But GWU quotes only part of the language included in the Reclassification Letter sent to class members. The full quote from the Letter is "During a recent review and assessment of your position and job duties, we have determined that you are eligible to receive overtime pay." Moreover, in the FAQ section of the letter, GWU states:

> GW's primary goal is to ensure compliance with federal and state wage and hour laws. The FLSA regulations set forth requirements for a position to be exempt from the minimum wage and overtime requirements. … The reclassification of your position is the result of an in-depth review of your actual job duties.

This admission that GWU performed an in-depth review of the actual job duties and determined the class members were non-exempt is sufficient at the conditional certification stage to show that the class members were due back overtime wages under the FLSA and DC Code. See, e.g., *Cunningham v. Electronic Data Systems Corp.*, 754 F.Supp.2d 638, 649 -652 (S.D.N.Y. 2010) (finding that a job classification system intended to comply with FLSA exemption rules is sufficient to establish that job duties are similar for exemption purposes at the conditional certification stage). GWU further admits that it used the same method to calculate back wages for the class, a method that Driscoll challenges as illegal. Thus, all the class members were subject to the same illegal practice—they were not paid the overtime wages required by law.

GWU's assertion that all class members must have the same job duties is simply wrong. In a wage-and-hour class, it is not uncommon that class members' job duties differ. The relevant inquiry is whether the differences matter to the FLSA classification. *See Castillo v. P & R Enterprises, Inc.*, 517 F. Supp. 2d 440, 446 (D.D.C. 2007) (conditionally certifying collective action despite Defendant's arguments that class members have "different duties" and different "job titles" because plaintiffs had made an initial showing that they and potential plaintiffs were allegedly "victims of a common policy or plan that violated the law"); *see also, Zaniewski v. PRRC Inc.*, 848 F. Supp. 2d 213, 224 (D. Conn. 2012) ("The fact that the employees in the putative class performed different functions does not bar conditional certification. All of the employees who performed different functions were subjected to the same alleged unlawful policy that violated the FLSA."). Both in its original classification of the jobs as exempt and in

the reclassification, GWU treated any differences as irrelevant to FLSA classification. GWU claims the individual job duties prevent class treatment only now that it faces liability for its illegal actions. It has provided no evidence other than a self-serving declaration from its Director of Compensation that any job differences are relevant to the FLSA classification. The declaration pales in the face of GWU's admissions and its consistent positions over several years. In any case, resolving disputed facts is properly addressed at the second stage of the certification process, after discovery is complete. *Dinkel v. MedStar Health, Inc.*, --- F. Supp. 2d ----, 11–00998 (CKK), 2012 WL 3062461, *3 (D.D.C. July 29, 2012) ("At [the first] stage, district courts should ordinarily refrain from resolving factual disputes.")

As GWU notes, a collective action is intended to ensure that the action proceeds in a manner that is efficient. Here, a collective action is efficient because the class was all subject to the same illegal pay policy and the Court can determine liability for the entire class by resolving questions common to the class, *i.e.*, did GWU determine that class members were non-exempt, was it entitled to use a half-time calculation for paying overtime wages, was GWU required to use a three-year statute of limitations in calculating back pay, was it required to pay liquidated damages and/or interest, and did GWU use a reasonable method for determining the overtime hours that class members worked. Damage calculation will be determined largely through electronic payroll records. While how many hours of overtime each class member worked is a factual issue, it is not a reason to deny conditional certification. *See Myles v. Prosperity Mortg. Co.*, CCB–11–1234, 2012 WL 1963390, *6 fn 7 (D. Md. May 31, 2012) (conditionally certifying class despite individualized questions regarding the number of hours worked and how much each employee was entitled to be paid, finding those differences went to damages rather than defendants' liability). Not only is a collective action efficient in this case, it also promotes the

Congressional policy of allowing all the affected class members to pool resources and have the protection of concerted activity in vindicating their rights. *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 170, (1989).[1]

Driscoll has presented sufficient evidence to show that the class is similarly situated, i.e., they were all subject to the same illegal pay policy. Accordingly, the Court should order notice to the class of the opportunity to join this FLSA and D.C. MWA collective action.

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Respectfully Submitted,

/s/ Michael J.D. Sweeney

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[1] It is also efficient to include Executive Aides and Executive Support Assistants who were not paid overtime wages in the class description. If, as GWU claims, no one fits that description, "logic tells us that no such individuals will join the lawsuit." *Masson v. Ecolab, Inc.*, 04 Civ. 4488, 2005 WL 2000133, 16 (S.D.N.Y. Aug. 17, 2005) (J. Mukasey).