UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ANTHONY MORANGELLI et al.,

Plaintiffs,

-against-

CHEMED CORPORATION et al.,

Defendants.

MEMORANDUM DECISION AND ORDER

10 Civ. 0876 (BMC)

COGAN, District Judge.

Before the Court is [17] plaintiffs' motion for an order conditionally certifying a collective action pursuant to 29 U.S.C. § 216(b) (2006) of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, *et. seq*. Plaintiffs also move for court authorized notice to all individuals who are similarly situated in the potential class and, to facilitate such notice and identification of class members, the production by defendants of the last known addresses, telephone numbers, dates of birth and last four digits of social security numbers of class members. For the reasons set forth below, plaintiffs' motion for conditional certification as well as court authorized notice is **GRANTED**. However, the scope of such notice shall be limited to only those individuals who are "similarly situated" to the named plaintiffs as set forth in this Memorandum Decision and Order. The parties are to jointly submit a modified notice which conforms to the limitations outlined in this decision for Court approval within fourteen (14) days.

BACKGROUND

1. Facts

Plaintiffs Anthony Morangelli and Frank Ercole commenced this action on behalf of themselves and others similarly situated seeking unpaid minimum wages and overtime compensation from their employers, defendants Chemed Corporation ("Chemed") and Roto-Rooter Services Company ("Roto-Rooter") (together, "defendants").[1] Roto-Rooter provides drain cleaning and plumbing services to residential and commercial customers. Morangelli and Ercole are service technicians who provide plumbing repair and maintenance services to Roto-Rooter customers. Morangelli worked out of the Staten Island branch on a commission basis from September 30, 2008 until December 11, 2009 and Ercole worked out of both the Staten Island Branch and the Middlesex Branch on a commission basis from May 29, 2007 until September 29, 2009. To date, the opt-in plaintiffs are Roto-Rooter technicians paid on commission who worked or work in the Middlesex, Norristown, Boston and Cincinnati branches. There are 1,600 Roto-Rooter technicians nationwide. There are 50 Roto-Rooter branches.

Plaintiffs' claims can be classified into two general categories. They allege that: (1) Roto-Rooter's written policies are illegal because by allowing certain improper deductions and by requiring technicians to bear the expense of certain business supplies, defendants failed to pay minimum wage for all regular and overtime hours worked; and (2) Roto-Rooter had unwritten, supervisor implemented policies that required plaintiffs to work "off-the clock," notwithstanding Roto-Rooter's written policies that they be compensated for such work.

a. Policy Claims

Morangelli and Ercole and the opt-in plaintiffs, like all Roto-Rooter technicians, were subject to nationwide Roto-Rooter policies while employed by the company. Specifically,

[1] Chemed is the parent company of Roto-Rooter's parent company, Roto-Rooter Group, Inc.

technicians at Roto-Rooter are responsible for paying for their own vans to travel to customers and for business expenses related to the van, such as insurance, repairs, maintenance, gas, tolls, supplies and tools. When not purchased by the technicians themselves, Roto-Rooter pays the expenses and then deducts the expenses from employees' paychecks. Plaintiffs allege that the deductions cause wages to fall below the minimum wage. Additionally, plaintiffs complain that the time spent by technicians maintaining their vans is not considered paid work time. Moreover, plaintiffs have submitted time sheets reflecting a line itemization entitled "carry over substantiated expenses." Plaintiffs argue, and defendants at this stage do not substantially dispute that the "carrying over" of expenses to other pay periods is a policy designed to disperse expense deductions in order to avoid minimum wage violations.[2]

b. Off-the-Clock Claims

Plaintiffs allege other class-wide purported illegal policies that do not appear in the company handbook. They assert that despite Roto-Rooter's written policies, (i) technicians were required to work hours for which did not count towards their work hours and (ii) technicians were discouraged from reporting overtime on their timesheets. With respect to the first allegation, plaintiffs aver that despite the company policy of paying technicians for their weekly "Turn-In" meetings and for performing inventory on their vans, defendants do not allow the time to be recorded as work time. With respect to the second, plaintiffs maintain that company supervisors encourage technicians to consent to changing the hours on their timesheet before signing in, so that the overtime will be reduced or eliminated.

[2] At oral argument, defendants' counsel disagreed that Roto-Rooter's deductions for "substantiated expenses" resulted in minimum wage violations nationwide. Despite his assertions, however, defendants have provided no supporting evidence demonstrating that the plaintiffs are two of a small exceptional group of employees with disproportionately high expenses which result in minimum wage violations.

c. Arbitration Clauses

Of the first 18 opt-in technicians in the action, eleven have entered into binding arbitration agreements which preclude them from pursuing FLSA claims in this Court. The agreement states:

> as a condition of employment of my employment with Roto-Rooter Services Company, I hereby agree that I will settle any and all claims, disputes or controversies arising out of or relating in any way to my application for employment, employment and/or cessation of employment exclusively by final and binding arbitration before the American Arbitration Association under its Employment Dispute Resolution Rules, and I agree that judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

Defendants have not moved to compel arbitration, though they have expressed their intention to do so depending on the outcome of plaintiffs' certification motion.

DISCUSSION

1. FLSA Legal Framework

Because it is a remedial statute, federal courts give the FLSA a liberal construction. See e.g., Braunstein v. E. Photographic Labs, Inc., 600 F.2d 335 (2d Cir. 1979). To maintain a collective action under the FLSA, a named plaintiff "bears the burden of showing that she is sufficiently 'similarly situated' to the opt-in plaintiffs such that the case may proceed as a collective action. The test is whether there is a 'factual nexus' between the claims of the named plaintiff and those who have chosen to opt-in to the action." Davis v. Lenox Hill Hosp., No. 03 Civ. 3746, 2004 WL 1926086 at *7 (S.D.N.Y. Aug. 31, 2004) (citation omitted). In making the conditional certification decision, district courts in the Second Circuit generally look to the "(1) disparate factual and employment settings of the individual plaintiffs; (2) defenses available to defendants which appear to be individual to each plaintiff; and (3) fairness and procedural

considerations counseling for or against notification to the class." Guzman v. VLM, Inc., No. 07-CV-1127, 2007 WL 2994278 at *3 (E.D.N.Y. Oct. 11, 2007) (citation omitted).

At this pre-discovery stage, plaintiffs can satisfy their burden "by making a modest factual showing sufficient to demonstrate that they and potential plaintiffs together were victims of a common policy or plan that violated the law." Hoffman v. Sbarro, Inc., 982 F. Supp. 249, 261 (S.D.N.Y. 1997); see Gjurovich v. Emmanuel's Marketplace, Inc., 282 F. Supp. 2d 101, 104 (S.D.N.Y. 2003) ("A plaintiff's burden is minimal, especially since the determination that potential plaintiffs are similarly situated is merely a preliminary one."); Rodolico v. Unisys Corp., 199 F.R.D. 468, 480 (E.D.N.Y. 2001) ("Generally at the notice stage, courts require nothing more than substantial allegations that the putative class members were together the victims of a single decision, policy or plan."). The burden is significantly less exacting than the factors which must be satisfied to sustain certification of a class under Federal Rule of Civil Procedure 23 – numerosity, commonality, typicality, and adequate representation. Patton v. Thomson Corp., 364 F. Supp. 2d 263, 267 (E.D.N.Y. 2005). Once discovery is completed, the court applies a more "heightened scrutiny to [the similarly situated] inquiry as compared to pre-discovery." Torres v. Gristede's Operating Corp., No. 04-Civ-3316, 2006 WL 2819730 at *9 (S.D.N.Y. Sept. 29, 2006).

2. Application

a. Conditional Certification

With respect to the written policy clams, plaintiffs have sufficiently satisfied the minimal pre-discovery showing. They have made substantial allegations, both in the complaint and supporting affidavits, that Roto-Rooter's technicians were subject to reductions in their compensation as a result of a uniform company-wide policy requiring them to pay for their

employment expenses. And they have submitted defendants' Employee Handbook and declarations from seven plaintiffs at five branches, who state their similar experiences with Roto-Rooter's expense policy. These submissions satisfy the "modest factual showing" necessary to obtain authorization to circulate notice of an FLSA collective action. Plaintiffs' jobs are identical to the ones held by the other putative class members and they perform similar, if not identical job duties. See Ayers v. SGS Control Servs., No. 03 Civ. 9078, 2007 WL 646326, at *4 (S.D.N.Y. Feb. 26, 2007) ("plaintiffs need show only that their positions are similar, not identical, to the positions held by the putative class members."). However, because plaintiffs have submitted no evidence demonstrating that hourly employees are similarly situated to technicians paid by commission and because Roto-Rooter has different pay practices and policies for hourly technicians, the class is limited to technicians paid on commission.

It is a closer question whether plaintiffs have made the requisite showing with respect to the off-the-clock claims. As an initial matter, I disagree with defendants that plaintiffs' claims of altering timesheets and discouraging overtime are too individualized to certify *any* class. Second Circuit case law does not support that position. See Domino's Pizza, LLC v. Laroque, 557 F. Supp. 2d 346, 354 ("Domino's also argues that claims of 'off-the-clock' work and altered time sheets inherently are too individualized o be pursued collectively. The Court disagrees. District courts in this circuit regularly grant certification under similar circumstances.").

That said, I am not completely satisfied by plaintiffs' proffer that the off-the-clock claims justify a national class. The fact that Roto-Rooter supervisors in five of 50 Roto-Rooter branches violated company policy does not necessarily demonstrate a generalized, companywide practice. It certainly shows more than one rogue supervisor. See Seever v. Carrols Corp., 528 F. Supp. 2d 159, 174 (W.D.N.Y. 2007) (dismissing FLSA claims since "despite significant discovery

spanning the course of several years, there is little indication in the record that the FLSA violations alleged by plaintiffs were anything other than unilateral acts by a few 'rogue' managers"). But it may be a regional-wide rather than companywide illegal practice. However, in this case fairness and procedural considerations counsel for notification to a national class.

In determining "fairness and procedural considerations" courts consider whether a collective action would "lower costs to the plaintiffs through the pooling of resources," "efficiently resolve common issues of law and fact" and "coherently manage the class in a manner that will not prejudice any party." Ayers, 2007 WL 646326 at *22 (citing Moss v. Crawford & Co., 201 F.R.D. 398, 410 (W.D. Pa. 2000)). The primary question is whether the Court finds that "on balance, the policy objectives of reducing cost and increasing efficiency are best furthered by granting collective action without undue prejudice to any party." Torres, 2006 WL 2819730 at *11.

On balance, here, reducing cost and increasing efficiency are best furthered by granting plaintiffs' motion to certify with respect to all claims. Plaintiffs will already be circulating notice of an FLSA collective action to technicians employed by Roto-Rooter (subject to the limitation discussed *infra*) in its 50 branches. It makes little sense to conditionally certify two classes – one nationwide class for policy claims and one regional class for the five implicated branches – at this point, without the aid of any discovery. The more prudent course is to send generalized notice to a nationwide conditionally certified class now and decertify or sub-class later, after discovery.

b. Scope of the Class

While plaintiffs may circulate class-wide notice to Roto-Rooter technicians nationwide, the Court will exclude from the class those technicians who have signed the Roto-Rooter binding arbitration agreement. The same procedural and fairness consideration that counsel toward including off-the-clock claims counsel against including workers with arbitration agreements. The workers who signed arbitration agreements are subject to unique defenses that cannot be bifurcated or sub-classed away. Defendants are certain to file a motion to compel arbitration. And from a preliminary look at the plain language of the arbitration agreement, they have a strong chance of succeeding. It would be a disservice to judicial efficiency to certify all technicians, when those with arbitration agreements are subject to additional, prolonging motion practice which will likely disqualify them from the class. See Barnett v. Countrywide Credit Indus., 03–CV–1182, 2002 WL 1023161 at *2 (N.D. Tex. May 21, 2002) (permitting notice to class members regardless of whether they signed arbitration agreements, but allowing opt-ins only by those who did not sign the agreements). Opt-in plaintiffs who cannot bring suit in federal court are simply not similarly situated with those who can.

3. Notice

The parties dispute whether the posting of notices at Roto-Rooter's branches is necessary. It is not necessary. Plaintiffs have not shown that other forms of class member notification, primarily first class mail, are insufficient. See Romero v. Producers Dairy Foods, Inc., 235 F.R.D. 474, 481 (E.D. Cal. 2006) ("[f]irst class mail is ordinarily sufficient to notify class members who have been identified."); Mowdy v. Beneto Bulk Transp., No. 06-05682, 2008 WL 901546, at *4 (N.D. Cal. Mar. 31, 2008) (posting of notice unnecessary where there was no concern about that most of the contact information had been provided prior to notice and

defendants were willing to work with plaintiffs to remedy any inaccuracies). At the present time, the Court will authorize mailing only.

Additionally, the parties appear to have reached an agreement regarding the disclosure of social security numbers and birth dates but differ only on whether the information will be provided within three days of receiving written notice of return by the United States Postal Service or five business days. The Court trusts that the parties can work this detail out themselves.

CONCLUSION

For the forgoing reasons, plaintiffs' motion to conditionally certify a collective action is **GRANTED**. The parties are to jointly submit a modified notice which conforms to the limitations outlined in this decision for Court approval within fourteen (14) days of this Order.

SO ORDERED.

/s/(BMC)

U.S.D.J.

Dated: Brooklyn, New York
June 15, 2010