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.	)	

OPPOSITION TO MOTION FOR CONDITIONAL CERTIFICATION

Defendant The George Washington University ("GWU" or the "University") hereby opposes 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). Despite the fact that Plaintiff has the burden to demonstrate that conditional certification is appropriate, he provides virtually no evidence to show that he is similarly situated to the diverse putative collective for which he seeks certification. Plaintiff relies exclusively on vague and conclusory declaration testimony from two employees (including himself) representing a tiny and atypical fraction of the putative collective and statements from the University that have no bearing on the inquiry at hand.[1] He also ignores the substantial differences that exist among the putative class members, who are spread out across the vast University, working on three campuses, in twenty

[1] Defendant uses the term "collective" in this brief because an opt-in collective action under 29 U.S.C. § 216(b) is distinct from a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure. *See Hoffmann-LaRoche Inc. v. Sperling*, 493 U.S. 165, 489 (1989) (Scalia, J., dissenting) (describing distinctions between Rule 23 class actions and collective actions under § 216(b)). Courts, however, often describe collective actions in terms borrowed from class action practice.

schools and divisions, in hundreds of departments, and for numerous supervisors at all levels within the various subdivisions of the University. Rather than address these issues, Plaintiff appears to believe that he somehow gets a "free pass" because GWU voluntarily reclassified a broad swath of job positions from exempt to non-exempt. That reclassification, however, does not change the standard applicable to Plaintiff's Motion or the fact that he must provide at least "some evidence, beyond pure speculation" that he is similarly situated to the putative collective class. *See Dinkel v. Medstar Health Inc.*, -- F. Supp. 2d --, 2012 WL 3062461, at *2 (D.D.C. 2012) (internal quotations omitted). Plaintiff's factual showing here is not sufficient to permit conditional certification of the class, and for this reason his Motion should be denied.

BACKGROUND

I. FACTUAL BACKGROUND

A. The George Washington University

GWU is the one of the largest institutions of higher education in the District of Columbia with more than 20,000 students and academic programs in a wide range of disciplines. Declaration of Reem Zaghal ("Zaghal Decl."), ¶ 3 (attached as Exhibit A). The University employs approximately 11,000 employees spread out across three campuses, two in the District of Columbia and one in Ashburn, Virginia, and graduate education centers and other centers in a number of locations, including Arlington, Alexandria, and Hampton Roads, Virginia. *Id.*

GWU's organizational structure is highly complex. At the highest level, the University is organized into several major groups, sometimes referred to as "VP Groups," which include, for example, Provost-Academic Affairs, Development and Alumni Relations, and the Executive Vice President and Treasurer. *Id.* at ¶ 4. Within the VP Groups are more than 20 diverse units, which include the University's ten schools and colleges (the Columbian College, School of

Medical and Health Sciences ("Medical School"), School of Nursing, School of Engineering, School of Public Health, Law School, College of Professional Studies, Elliott School of International Relations, School of Business, and Graduate School of Education and Human Development) (the "Schools"), as well as a number of divisions ("Divisions"), such as the Budget Office, the Division of IT, and Human Resources. *Id.* ¶¶ 5-6.

The Schools and Divisions are further divided into more than 500 sub-units, which include academic departments and other groups. *Id.* ¶ 7. In the Medical School, for example, where approximately 1,000 employees work, there are more than 50 departments, including the Department of Physician Assistant Studies. Declaration of Merica Dito ("Dito Decl."), ¶ 2 (attached as Exhibit B); Zaghal Decl., ¶¶ 7, 8. Each of the University's employees is employed within one of these sub-units. Zaghal Decl. ¶ 8.

To provide some consistency within the University pay structure, the thousands of different positions at the University are organized into job "families," referred to as "P-Classes." All of the positions within a P-Class are paid in the same pay range and in the same manner, either as salaried and exempt from legal overtime requirements ("exempt") or hourly and overtime eligible ("non-exempt"). Zaghal Decl., ¶ 10. Although positions classified within the same P-Class may perform broadly similar duties, that is not always the case. *Id.* ¶ 9. For example, an employee in a position may perform different job duties than another employee in a different position within the same P-Class, even if the positions have the same job title. *Id.* ¶ 9.

In particular, the job duties performed by employees in the Executive Assistant, Executive Coordinator, and Executive Associate P-Classes vary across the University, as does the amount of discretion and independent judgment exercised by those employees on matters of differing levels of significance. *Id.* ¶¶ 13-14. This is due in part to the fact that large numbers of

managers and supervisors supervise employees within these P-Classes, with no supervisors having more than three or four Executive Assistant, Executive Coordinator, and/or Executive Associate positions reporting to him or her. *Id.* ¶ 13. Individual managers and supervisors of the employees in a P-Class may assign work without regard to the general classification description for that P-Class. *Id.* ¶ 20.

B. Review of Executive Assistant, Executive Coordinator, and Executive Associate P-Classes

In 2011, the University undertook a project that included the review of the Executive Assistant, Executive Coordinator, and Executive Associate P-Classes.[2] *Id.* ¶12. As a result of this review, the University transitioned the Executive Assistant, Executive Coordinator, and Executive Associate P-Classes to non-exempt status ("Reclassification"). *Id.* ¶ 13. As part of the Reclassification, the University calculated and paid out additional wages to employees who became non-exempt ("Reclassified Employees") for hours they worked in excess of forty per week over the prior two years ("Additional Hours"). *Id.* ¶ 16. Recognizing the wide variety of working relationships across the University, GWU relied on the managers and supervisors of the Reclassified Employees to estimate the number of Additional Hours worked by their employees, and those managers and supervisors utilized different methods to do so. *Id.* ¶ 17.

Based on the Additional Hours reported by the managers and supervisors, the University calculated the amount of compensation to be paid to each Reclassified Employee and paid that amount either by check or direct deposit. *Id.* ¶ 18. The University also paid additional amounts

[2] The classification titles "Executive Support Assistant" and "Executive Aide" were not included in the review because they have always been paid as non-exempt. Zaghal Aff., ¶ 12. The Executive Support Assistant position was created as a non-exempt position during the same time period as the review. *Id.* For that reason, individuals in these classification titles obviously have no place in this lawsuit and need no further consideration.

to a handful of Reclassified Employees who told the University that they had worked more Additional Hours that had been reported by their manager or supervisor.

II. PROCEDURAL HISTORY

Plaintiff filed his original complaint on April 27, 2012, alleging an individual claim for retaliation under the Fair Labor Standards Act ("FLSA"), as well as claims for unpaid overtime on his own behalf and on behalf of similarly situated employees under the FLSA, D.C. Code § 32-1001, and D.C. Code § 32-1302 (docket no. 1).[3] Plaintiff amended his complaint on June 29, 2012 ("Complaint") (docket no. 8). On July 3, 2012, the University filed a motion to dismiss the Amended Complaint with prejudice (docket no. 9). Plaintiff filed an Opposition to the University's Motion to Dismiss on July 17, 2012, along with a motion to amend the Complaint further. Defendant has opposed that motion, and both the Motion to Dismiss and Motion to Amend remain pending (docket nos. 11, 12). On August 8, 2012, Plaintiff filed the instant Motion for Conditional Certification (docket no. 17).[4] For all of the reasons described herein, that Motion should be denied.

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[3] Plaintiff initially asserted his claim under § 32-1001 as a collective action, but in his Motion to Amend dated July 17, 2012, sought leave to plead a class-action claim with respect to that statute. The University has opposed that motion because § 31-1001 expressly provides for collective actions and that provision should be applied in this case.

[4] Jamie Lewis joined the case by filing an opt-in consent form on May 16, 2012 (docket no. 3). A second opt-in plaintiff, Bridgette Harkless, also filed a consent form (docket no. 2), but she has not submitted a declaration and is not mentioned in Plaintiff's Motion. In the more than four months since the lawsuit was filed, only these two individuals – Driscoll's immediate co-worker and one other former employee – have joined the lawsuit, notwithstanding the publicity that this case has attracted. *See, e.g.*, Matthew Kwiecinski, *Former employee sues, alleges unjust firing*, G.W. HATCHET, available at http://www.gwhatchet.com/2012/05/14/former-employee-alleges-unjust-firing (last visited Sept. 10, 2012); "Driscoll v George Washington University," http://www.youtube.com/watch?v=TzewdBNFCZE (describing lawsuit and seeking plaintiffs) (last visited Sept. 10, 2012). This fact clearly reveals that there is a lack of interest among putative collective members, and on this basis alone conditional certification should be denied.

ARGUMENT

I. PLAINTIFF'S MOTION RESTS ON A FAULTY LEGAL AND FACTUAL FOUNDATION

Key aspects of Plaintiff's Motion rest on improper assumptions or lack any allegations to support them. First, Plaintiff fails to define the class for which he seeks certification consistently with the claims he alleges and evidence he asserts in support of his Motion. Plaintiff argues that "this Court should conditionally certify . . . a class of all current and former Executive Aides, Executive Assistants, Executive Support Coordinators, and Executive Associates employed by the George Washington University after April 27, 2009, but [who] were not paid overtime wages during all or part of their employment." Plaintiff's Memorandum in Support of Motion for Conditional Certification ("Pl's Mem."), at 15. This definition, however, is overbroad even compared to the allegations in Plaintiff's Motion and Complaint. It includes, for example, individuals who left GWU prior to the Reclassification and thus were classified as exempt throughout their employment. In contrast, the gravamen of the Complaint is that the University allegedly failed properly to calculate back pay Plaintiff received as part of the Reclassification. *See* Pl's Mem., at 4-7, 11-12; Am. Compl., ¶¶ 1, 44-51. Individuals who were not reclassified obviously do not share such claims and could not properly be included in a collective action asserting such allegations. *See Hunter v. Sprint Corp.*, 346 F. Supp. 2d 113, 120 (D.D.C. 2004) (certifying collective class of reclassified employees but excluding employees with allegedly similar job duties who were not reclassified). Because Plaintiff cannot – and does not attempt to – support an argument for conditional certification with respect to this overbroad group,

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See, e.g., *Morgan v. Family dollar Stores, Inc.*, 551 F.3d 1233, 1261 (11th Cir. 2008); *Parker v. Rowland Express, Inc.*, 492 F. Supp. 2d 1159, 1164-65 (D. Min. 2007) (plaintiff must "proffer some evidence that other similarly situated individuals desire to opt in to the litigation"); *O'Donnell v. Robert Half Int'l Inc.*, 429 F. Supp. 2d 246, 250-51 (D. Mass. 2006) (denying conditional certification in part because "plaintiffs have failed to demonstrate that any of the putative class members are interested in joining the suit").

Defendant focuses its opposition on Plaintiff's arguments for certification of a putative collective class of Reclassified Employees in Executive Assistant, Executive Coordinator, and Executive Associate classifications.

Second, Plaintiff's arguments with respect even to a more limited group of Reclassified Employees are based on a fundamental misconception. Specifically, Plaintiff wrongly assumes throughout his Motion that the Reclassification acts as an admission of an FLSA violation. *See, e.g.*, Pl's. Mem., at 1. This, of course, is not the case. The mere fact that an employee has been reclassified and paid back overtime pay does not, by itself, mean that he or she was misclassified in violation of the FLSA. *See Wallace v. Countrywide Home Loans, Inc.*, 2009 WL 4349534, at *6 (C.D. Cal. 2009) (rejecting argument that reclassification constituted "concession" that plaintiffs were misclassified as exempt). A reclassification may represent nothing more than a business decision to pay employees on an hourly, rather than a salaried, basis. *See* 29 C.F.R. § 541.100(a)(1) (administrative employees must be paid on a salary basis to qualify for exemption from overtime). Payment of back overtime just as readily may be viewed as an attempt to resolve a *bona fide* dispute regarding the employee's correct classification rather than as an admission that the sum is due and owing to the employee. *See Wallace*, 2009 WL 4349534, at *6.

As described above, job positions within the Executive Assistant, Executive Coordinator, and Executive Associate P-Classes were transitioned to non-exempt status notwithstanding the fact that material variation existed among those positions and that at least some individual positions met the requirements for exemption. *See* Zaghal Aff., ¶¶12-14; *see also D'Camera v. District of Columbia*, 693 F. Supp. 1208, 1210-11 (D.D.C. 1988) (determining exempt status requires "fact-specific inquiry into the tasks and responsibilities of the subject employees" and

"job titles [must] be disregarded in determining an employee's status"). Indeed, the University specifically contends that at least some Reclassified Employees met the "duties test" for the administrative exemption and therefore were properly classified as exempt employees prior to the Reclassification.

For similar reasons, the fact of a reclassification is also an insufficient basis to consider all reclassified employees as similarly situated. *See, e.g., Myles v. Prosperity Mortg. Co.*, 2012 WL 1963390, at *3, 6 (D. Md. 2012) (denying conditional certification as to certain groups of loan officers even though all loan officers had been reclassified as non-exempt). Plaintiff relies on a prior case litigated by his counsel's firm, *Hunter v. Sprint Corp.*, for the proposition that, "[r]eclassification of a group of employees from exempt to non-exempt can demonstrate that the employees are similarly situated even when they have different job titles or work in different locations," but that case simply does not stand for the proposition for which it is cited. *See* Pl's Mem., at 11; *see also Hunter*, 346 F. Supp. 2d at 119. There, the court never made any finding that the reclassification was sufficient to permit conditional certification because the defendant expressly conceded that the putative class was similarly situated. *Id.* Here, the University strongly denies that the Reclassified Employees are similarly situated. Plaintiff cannot point to any other case in which a collective action has been conditionally certified based solely on the fact that the plaintiff's position was reclassified. Rather, Plaintiff must meet his burden to demonstrate that he is similarly situated to the putative class, just as he would be required to do in any other case pleaded as a collective action under 29 U.S.C. § 216(b).[5]

[5] Obviously, and as Plaintiff acknowledged in his Motion to Amend (docket no. 12), if the Court denies Plaintiff's attempt to re-plead his claim under the D.C. Minimum Wage Act as a class action, the same arguments made by Defendant for denying the present Motion would apply equally to any further attempt by Plaintiff to obtain collective treatment under the D.C. law.

II. PLAINTIFFS HAVE NOT MET THEIR BURDEN OF SHOWING THEY ARE SIMILARLY SITUATED TO THE PUTATIVE COLLECTIVE CLASS

A. Plaintiff Must Produce Factual Evidence to Demonstrate That He Is Similarly Situated to the Putative Class

While district courts "have discretion in appropriate cases" to facilitate notice to putative opt-in plaintiffs under § 216(b), that discretion "is not unfettered." *Purdham v. Fairfax Cnty. Pub. Sch.*, 629 F. Supp. 2d 544, 547 (E.D. Va. 2009) (quoting *Hoffmann-LaRoche Inc. v. Sperling*, 493 U.S. 165, 169 (1989)) (emphasis added). As Plaintiff acknowledges, a collective action may not be conditionally certified, and notice may not be authorized, unless he meets his burden of establishing that he is similarly situated to the putative collective. *Id.* at 548; *see also 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'") (quoting *Symczyk v. Genesis HealthCare Corp.*, 656 F.3d 189, 193 (3d Cir. 2011); *Syrja v. Westat, Inc.*, 756 F. Supp. 2d 682, 686 (D. Md. 2010) (court must determine "whether the plaintiffs have demonstrated that potential class members are 'similarly situated' such that court-facilitated notice to putative class members would be appropriate") (internal quotations 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); *see also* Pl's Mem., at 9 ("[P]laintiff [is required to] make a modest factual showing that potential class members are similarly situated.") (internal quotations omitted).

Plaintiff attempts to gloss over his burden by describing the conditional certification standard as "lenient" and "liberal." Pl's Mem., at 9, 10. Courts, however, have repeatedly warned that while the burden may be relatively modest, it also is "not invisible." *Purdham*, 629

F. Supp. 2d at 548. "Mere allegations will not suffice; some factual evidence is necessary." *Id.* (quoting *Bernard v. Household Int'l, Inc.*, 231 F. Supp. 2d 433, 435 (E.D. Va. 2002)); *see also Dinkel*, 2012 WL 3062461, at *5 ("[t]he Court, left only with Plaintiffs' unadorned speculation and unsupported assertions, can only conclude that Plaintiffs have not met their burden"); *Slavinski v. Columbia Ass'n, Inc.*, 2011 WL 1310256, at *5 (D. Md. 2011) (denying conditional certification because the plaintiff "provide[d] no evidence demonstrating that [other] employees performed similar functions or similar levels of function to [plaintiff]"); *Syrja*, 756 F. Supp. 2d at 688 (denying conditional certification "in the absence of any plausible showing by [plaintiff] that . . . [defendant] imposed illegal overtime policies on all [putative class members] irrespective of their individual locations and managers.") (emphasis in original).

Moreover, Plaintiff's support for his Motion must consist of more than mere conclusory statements or hearsay. As another court in this District recently explained, a plaintiff may not "make an end-run around the requisite factual showing" simply by putting into evidence declarations containing assertions that "lack the sort of factual content that would allow the Court to conclude that Plaintiffs have any personal knowledge of practices or policies outside their specific departments." *Dinkel*, 2012 WL 3062461, at *6. Courts outside this district also routinely disregard conclusory and hearsay evidence in considering conditional certification motions. *See, e.g., White v. Rick Bus Co.,* 2010 WL 3883334, at *7 (D.N.J. 2010) (declining to consider "certification" by plaintiff in addressing conditional certification motion "because it contains . . . blanket assertions without factual matter and, in any event, is based on hearsay"); *Colson v. Avnet, Inc.*, 687 F. Supp. 2d 914, 928 (D. Ariz. 2010) (denying conditional certification motion where plaintiff's affidavit was "based on nothing more than her opinions, which are vague and appear to be based on unspecified hearsay from unidentified sources"); *Wright v.*

Lehigh Valley Hosp., 2010 WL 3363992, at *2 (E.D. Pa. 2010) (refusing to consider inadmissible hearsay evidence and denying conditional certification motion where "Plaintiff offers no first-hand evidence from any other employee alleging in their own words that the[] practices [at issue] were regularly applied"); *Silverman v. SmithKline Beecham Corp.*, 2007 WL 6344674, at *2 n.4 (sustaining defendant's objection as to "testimony regarding conversations a declarant had with other sales representatives" and other "testimony for which there is no foundation"); *Harrison v. McDonald's Corp.*, 411 F. Supp. 2d 862, 870 (S.D. Ohio 2005) (denying motion for conditional certification because "[o]nce the hearsay statements are stricken from [the] affidavits [submitted by plaintiff in support of the motion], there is scant evidence that any employee, other than Plaintiff, was not fully compensated for all the hours he or she worked").

B. Plaintiff Fails to Provide Sufficient Evidence to Show That He Is Similarly Situated to the Putative Class

Here, Plaintiff's factual showing is entirely lacking. The only evidence that he presents in support of his Motion consists of two declarations, his and that of another employee, who worked in the same location, in the same school, in the same department, and for the same supervisor. *See* Declaration of David Driscoll ("Driscoll Decl."), at ¶ 2 (docket no. 17-3); Declaration of Jamie Lewis ("Lewis Decl."), at ¶ 2 (docket no. 17-2); Dito Decl., ¶¶ 3-4. Despite the complex structure of the University and the fact that Executive Assistants, Executive Coordinators, and Executive Associates work in various capacities in hundreds of different departments spread across three campuses, Plaintiff presents no first-hand evidence of any kind regarding the job duties of employees outside his specific department or the manner in which the Reclassification was implemented with respect to those employees. Rather, Plaintiff's weak attempts to support his contention that he is similarly situated to a broader putative class fall into

two categories. *See* Pl's Mem., at 11 (listing all evidence presented by Plaintiff in support of Motion).

First, Ms. Lewis and he make identical vague, conclusory statements in their affidavits that they "understand that all Executive Aides, Executive Assistants, Executive Support Assistants, Executive Coordinators, and Executive Associates preform clerical work as their primary job duty, even though their job tasks may vary" based only on unspecified "conversations with co-workers, statements and actions by GWU management and human resources, and job descriptions." Driscoll Decl., ¶ 7 (emphasis added); Lewis Decl., ¶ 7 (same). Like the declarations rejected by the court in *Dinkel*, these statements are not based on the declarants' personal knowledge and "are made in such a conclusory fashion as to be devoid of meaning." 2012 WL 3062461, at *6. Therefore they should be disregarded.

Second, Plaintiff relies on "statements from GWU confirming that the reclassification was University-wide, that it applied to everyone in certain clerical job classifications, and that GWU employed the [fluctuating workweek] method for paying back overtime wages for all the reclassified employees." Pl's. Mem., at 11. These statements are not sufficient to meet Plaintiff's burden. They do not establish, for example, that all Reclassified Employees have the same job duties or that the manner in which the Reclassification was implemented was uniform. Indeed, at least one of the GWU documents on which Plaintiff relies actually emphasizes the differences that exist within the same job classification throughout the university, stating:

> [A] department, based on its needs, may have a position-specific description that further delineates the duties and responsibilities within the department. The University classification description and department position-specific description are not intended to limit or modify the right of a supervisor to assign, direct, and control the work of employees under his or her supervision.

See Pl's Mem., at 2; Exhibit B to Affidavit of Michael J.D. Sweeney (docket no. 17-1). Consistent with this description, departments within GWU do in fact maintain specific job

descriptions for their Executive Assistants, Executive Associates, and Executive Coordinators, and managers of the individuals in these roles assign work without regard to the classification description provided by human resources. *See* Zaghal Decl., ¶ 20.

Finally, even were Plaintiff's factual showing deemed sufficient to permit conditional certification within the Medical School's Department of Physician Assistant Studies, where both Driscoll and Lewis worked, it plainly would be insufficient to permit conditional certification with respect to the hundreds of other individuals Plaintiff seeks to certify who work in other Schools and Divisions. As Plaintiff himself has acknowledged, "[i]n determining if a group is similarly situated, courts in this District consider '(1) whether [putative class members] all worked in the same corporate department, division and location; (2) whether they all advanced similar claims; and (3) whether they sought substantially the same form of relief.'" Pl's. Mem., at 8 (quoting *Encinas v. J.J. Drywall Corp.*, 265 F.R.D. 3, 6 (D.D.C. 2010)).

Courts in this district and surrounding districts routinely limit conditional certification where plaintiffs have failed to provide evidence based on personal knowledge regarding the claims of employees outside of their specific department or location. *See, e.g.*, *Dinkel*, 2012 WL 3062461, at *6 (limiting conditionally certified collective to plaintiffs' department because "Plaintiffs do not present any evidence that there was a similar practice at departments other than the two in which they work or worked"); *Myles*, 2012 WL 1963390, at *7 (limiting conditionally certified class because plaintiffs failed to meet their burden to show that employees in other types of work locations were similarly situated); *Camper v. Home Quality Mgmt., Inc.*, 200 F.R.D. 516, 520-21 (D. Md. 2000) ("[Plaintiffs] factual showing of uncompensated work is limited to the Bayside facility. Accordingly, notice is warranted only to other . . . employees at the Bayside facility."). Likewise here, where Plaintiff has provided no first-hand evidence

regarding any employees outside of his department, conditional certification should be denied at least with respect to the numerous other departments, Divisions, and Schools that employ Executive Assistants, Executive Associates, and Executive Coordinators.

III. SUBSTANTIAL DIFFERENCES AMONG THE PUTATIVE MEMBERS OF THE COLLECTIVE PRECLUDE CONDITIONAL CERTIFICATION

Even if Plaintiff had put forward sufficient evidence to meet his burden – which he has not – the Motion nonetheless would fail because the University has proffered evidence establishing that putative collective members are not, in fact, similarly situated. Substantial material differences exist among these individuals, both with respect to the issue of whether they were properly classified as exempt prior the Reclassification and with respect to the manner in which Additional Hours for Reclassified Employees were estimated. Further, these differences would require the Court to make individualized inquiries with respect to the claims of each individual who may opt in to the lawsuit, undermining the judicial efficiency justification for court facilitation of collective action notice and rendering the case unmanageable. In addition, Plaintiff's own situation distinguishes him from the other putative collective members, and conditional certification must fail for that reason as well.

A. Driscoll's Is Not Similarly Situated to the Members of the Putative Collective

Driscoll's situation is unique such that he is not similarly situated to any other Reclassified Employee. Where there are unique defenses as to the named plaintiff in a putative collective action, conditional certification should be denied. *See, e.g., Odem v. Centex Homes*, 2010 WL 424216, at *6 (N.D. Tex. 2010) (denying conditional certification because, among other things, "Defendant has shown that it has individualized defenses with respect to Plaintiff and the opt-in plaintiffs"). Here, Driscoll made a complaint regarding the University's determination of the number of hours of overtime he had worked. Dito Decl., ¶ 8-9. GWU

requested that he provide an estimate of the hours he believed he worked and informed him that he would be paid for the number of hours he provided, but Driscoll never responded to the University's requests for that information. *Id.* ¶ 9. Driscoll's failure to respond with an estimate following his complaint may constitute an admission that the hours for which he was paid were, in fact, correct.[6] This fact distinguishes Driscoll from the vast majority of putative collective members who either accepted their back pay compensation or questioned their payment and provided their own estimate, which the University then paid. *See* Zaghal Decl., ¶ 18. On this ground alone, conditional certification should be denied.

B. Putative Members of the Collective Are Not Similarly Situated Because Their Job Duties Differ

Material differences exist with respect to the job duties of the putative class members, and those differences bear directly on whether they were properly classified as exempt prior to the Reclassification. As described above, the job duties performed by employees in the Executive Associate, Executive Assistant, and Executive Coordinator P-Classes – including those performed by the Reclassified Employees – vary widely throughout the University. *See* Zaghal Decl., ¶¶ 13-15 . There is a broad range in the amount of discretion and independent judgment exercised by these employees, as well as in the significance of the matters on which they exercised that discretion and independent judgment. *See* Zaghal Decl., ¶ 14. This variation results from the wide diversity of roles that Executive Assistants, Executive Associates, and Executive Coordinators fill within the University. For example, an Executive Coordinator who has worked for a number of years with one supervisor may very well be given greater discretion

[6] Lewis also inquired about the Additional Hours for which she was paid, and she did not provide a revised estimate of the Additional Hours she worked. Dito Decl., ¶ 10.

and independence in his work and handle more significant matters than an Executive Coordinator working for a different supervisor, even in the same Department. *See id.*

Mr. Driscoll and Ms. Lewis's descriptions of their work contrast starkly with the job positions of other Reclassified Employees. *Compare* Zaghal Decl., ¶ 15 *with* Driscoll Decl., ¶ 4-5 *and* Lewis Decl., ¶ 4-5. As one specific example, among the positions that was transitioned to non-exempt was one in which an Executive Assistant functioned as an office manager. *See* Zaghal Decl., ¶ 15. In that role, she had authority to commit the University up to $10,000 per month and generally was solely responsible for the operation of an academic Department office. *Id.* That employee also served as the primary point of contact for both external and internal constituencies. *Id.*

Another position, also made non-exempt, was an Executive Assistant to an Assistant Vice President, who managed the calendar of her supervisor and maintained the ability to schedule and reschedule events based on the her own assessment of the importance of the event. *Id.* This Executive Assistant acted in the Assistant Vice President's absence on a wide variety of matters, and was the primary contact person for inquiries related to the Assistant Vice President's areas of responsibility. *Id.* In that role, she was required to assess possible solutions to incoming problems and to make decisions and/or recommendations on how a particular problem should be resolved. *Id.*

Differences of this nature require that conditional certification be denied. *See, e.g.*, *Slavinski*, 2011 WL 1310256, at *5 ("Merely because the [defendant] classified these individuals as exempt [], does not mean that they are similarly situated to [plaintiff]."); *Diaz v. Elecs. Boutique of Am., Inc.*, 2005 WL 2654270, at *4 (W.D.N.Y. 2005) ("just as a determination of [plaintiff's] exempt or nonexempt status requires a detailed factual analysis of his daily activities

and responsibilities, so does a determination of every individual [store manager's] exempt or non-exempt status"); *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); *Morisky v. Pub. Serv. Elec. & Gas Co.*, 111 F. Supp. 2d 493, 498 (D.N.J. 2000) ("To determine which employees are entitled to overtime compensation under the FLSA depends on an individual, fact-specific analysis of each employee's job responsibilities under the relevant statutory exemption criteria."); *see also D'Camera*, 693 F. Supp. at 1210-11 (exempt status determination requires "fact-specific inquiry into the tasks and responsibilities of the subject employees").

Finally, determining whether each putative collective member is entitled to overtime for any period prior to Reclassification cannot be evaluated on a collective basis, but instead would require the Court to make individualized determinations regarding each employee's job duties and whether those job duties meet the requirements for an exemption under the FLSA. Accordingly, conditional certification should be denied on this ground as well. *See Slavinski*, 2011 WL 1310256, at *5 (denying conditional certification in exempt status case where the plaintiff failed to show that her job duties were similar to those of other putative members of the collective action).

C. Putative Members of the Collective Are Not Similarly Situated Because the Manner in Which Additional Hours Were Estimated Differed Among Them

In his Motion, Plaintiff asserts that the putative collective members are similarly situated because "GWU used the same method in paying back overtime wages to reclassified employees." Pl's Mem., at 11. In contrast to Plaintiff's failure to produce any evidence to

support this core underpinning to his Motion, the University has established that substantial differences exist with respect to the manner in which the number of Additional Hours worked was estimated for each Reclassified Employee. The University provided certain guidelines for determining the number of hours worked, but individual managers utilized different methods to determine the hours worked by their individual employees. Zaghal Decl., ¶¶ 16-17. Some managers sought input directly from their employees; others did not. Zaghal Decl., ¶ 17. Following receipt of the University's estimate of their Additional Hours, some Reclassified Employees questioned the number of hours they were identified as having worked and others did not. Zaghal Decl., ¶ 18; Dito Decl., ¶ 7-10. Individuals who provided the University with the number of hours they claimed to have worked were paid for the hours they claimed. Zaghal Decl., ¶ 18. As a result, the Reclassified Employees are not similarly situated with respect to the method applied to them for estimating back pay.

Further, determining whether each member of the putative collective remains unpaid for any overtime he or she worked will require an individualized inquiry into the manner in which his or her manager calculated those hours, as well as the employee's own actions after receiving payment. Courts routinely reject conditional certification motions where individual inquiries of this type regarding the specific manner in which employees were paid are necessary. *See*, *e.g.*, *Purdham*, 629 F. Supp. 2d at 549 (denying conditional certification because "the method by which [putative class members] are paid and the amount of money they are paid vary widely among individual schools, [and thus] each FLSA claim will have to be evaluated on its own merits").

D. The Proposed Collective Action Is Not Manageable

"This Court has the responsibility to ensure that the action proceeds in a manner that is both 'orderly' and 'sensible,' and in discharging this role, it is appropriate for the Court to take

into account the 'manageability and efficiency' of proceeding as a collective action." *Dinkel*, 2012 WL 3062461, at *6. Where, as here, it is apparent that individual determinations will be required to evaluate the claims of the putative collective class, conditional certification should be denied. *See id.* at *7 (denying conditional certification where plaintiffs failed to show the existence of "a workable across-the-board approach" to evaluating the claims of the putative class); *see also Purdham*, 629 F. Supp. 2d at 551 ("where FLSA claims require significant individual determinations and considerations, they are inappropriate for conditional certification under section 216(b)") (internal quotations omitted). For the reasons described above, individual inquiries would be required both with respect to the job duties of the putative members of the collective and with respect to determination of the number of hours for which they allege they have not been paid if this case were to go forward as a collective action. Accordingly, the Court should deny Plaintiff's Motion because he has failed to establish that a collective action would be manageable and because, as demonstrated above, it would not be manageable.

IV. PLAINTIFF'S PROPOSED NOTICE AND MEANS OF DISTRIBUTION ARE IMPROPER

If this Court grants Plaintiff's Motion in any respect despite GWU's arguments to the contrary, the University respectfully requests that the parties be permitted to work together for a reasonable period of time following such a decision to develop a mutually agreeable notice form and procedures for distribution of notice and to submit alternative forms of notice and procedures in the event that any issue cannot be resolved. *See Dinkel*, 2012 WL 3062461, at *8 (ordering parties to confer to discuss appropriate written notice); *Hunter*, 346 F. Supp. 2d at 121 (ordering parties to submit to the Court "a proposed form of notice on which they have agreed"). Alternatively, this Court currently has more than sufficient grounds to reject Plaintiff's proposed form of notice and proposed notice procedures. *See* Exhibit 1 to Motion.

First, the notice is misleading in a number of respects. The first page contains the caption of the case and the name of the Court, and thus appears to be a court document. This improperly "could suggest to potential plaintiffs that the Court has lent its imprimatur to the merits of this case." *Jirak v. Abbott Labs., Inc.*, 566 F. Supp. 2d 845, 851 (N.D. Ill. 2008) (finding that proposed notice containing name of court at top of first page was inappropriate); *see also Hoffmann*, 493 U.S. at 174 ("In exercising the discretionary authority to oversee the notice-giving process, courts must be scrupulous to respect judicial neutrality. To that end, trial courts must take care to avoid even the appearance of judicial endorsement of the merits of the action."). In addition, the notice presents a one-sided account of the litigation, presenting Plaintiff's claims without describing Defendant's defenses, thereby potentially misleading putative class members with respect to the likelihood of success on the merits. The notice also improperly fails to inform putative class members that they may be required to sit for a deposition or otherwise participate in discovery. *See Salomon v. Adderley Indus. Inc.*, 2012 WL 716197, at *4 (S.D.N.Y. 2012) ("[P]otential litigants should be advised of the possibility that opt-in plaintiffs may be required to provide information, appear for a deposition, and/or testify in court.").

Second, Plaintiff has requested 60 days for potential plaintiffs to respond to the notice. This is an unnecessary and, especially in an academic environment such the University, would be unduly distracting. There is no evidence or reason to believe that the putative opt-ins are a transient population or that they may not receive their mail timely. Accordingly, a more appropriate amount of time would be 30 days, which is amply sufficient for putative collective members to consider their options and, if desired, submit a consent form or seek the assistance of

counsel in deciding whether to join the lawsuit. *See Williams v. Long*, 585 F. Supp. 2d 679, 692 (D. Md. 2008).

Third, putative class members' names, addresses, and other personal information ought not be provided to Plaintiff's counsel, particularly where less intrusive means are available to notify members of the putative collective of the pendency of the action. Specifically, any notice should be sent out through a neutral third party administrator ("TPA") rather than through Plaintiff's law firm. *See, e.g., Nehmelman v. Penn Nat'l Gaming, Inc.*, 822 F. Supp. 2d 745, 766 (N.D. Ill. 2011) (approving use of TPA for distribution of notice where requested by defendant to avoid privacy concerns and risk of undue pressure from plaintiffs' counsel); *In re RBC Dain Rauscher Overtime Litig.*, 703 F. Supp. 2d 910 (D. Minn. 2010) (requiring parties to choose TPA to effectuate notice to conditionally certified collective). Defendant agrees to bear the costs of using a TPA mutually agreed upon by the parties. If the Court does not order the parties to select a TPA, the Court should (a) limit the information provided to Plaintiff's counsel to names and last known street addresses (without social security numbers or dates of birth, as Plaintiff requests, Pl's Mem., at 12); and (b) order that Plaintiff's counsel may have no contact with the putative collective members other than through the first class mailing of notice one time, unless they file an opt-in consent form and select Plaintiff's counsel to represent them. *See Swigart v. Fifth Third Bank*, 276 F.R.D. 210, 215 (S.D. Ohio 2011) (finding plaintiffs had "failed to justify their request for employees' telephone numbers, social security numbers (last four digits), and employee identification numbers"); *Hipp v. Liberty Nat'l Life Ins. Co.*, 164 F.R.D. 574, 576 (M.D. Fla. 1996) (prohibiting contact with putative class other than via the notice itself).

Finally, Plaintiff's request that the Court order the University "to post the notice at all of GWU's worksites" should be denied. That request is unduly burdensome because putative

members of the collective work in a variety of campuses, schools, and departments at the University. *See* Zaghal Decl., at ¶ 13. It is also unnecessary and cumulative if notice is also to be individually mailed. *See, e.g., Collinge v. Intelliquick Delivery, Inc.*, 2012 WL 3108836, at *3 (D. Ariz. 2012) ("Because contact information for current employees who are potential class members will be provided to plaintiffs, the court declines to require that [defendant] post the notice and consent forms at its business locations."); *Pippins v. KPMG LLP*, 2012 WL 19379, at *15 (S.D.N.Y. 2012) (where defendant was required to provide information sufficient to mail notice, "there is no need for [defendant] to post the notice in the workplace."); *Wass v. NPC Intern., Inc.*, 2011 WL 1118774, at *12 (D. Kan. 2011) (refusing to order defendant to post notice because Plaintiffs requested posting notices in numerous locations; such posting did not account for consent forms; and such posting would not reach more potential class members than the mailed notice).

Dated: September 10, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, hereby certify that I have caused a true and correct copy of the foregoing Opposition to Motion for Conditional Certification to be served upon the following counsel via first class, U.S. mail, postage prepaid on this 10th day of September, 2012:

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