IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JENNY SHIPTOSKI, on behalf of herself and similarly situated employees,	:	**Civil No. 3:16-CV-1216**
Plaintiffs,	:	**(Judge Mariani)**
v.	:	**(Magistrate Judge Carlson)**
SMG GROUP, LLC,	:	
Defendant.	:	

REPORT AND RECOMMENDATION

I. Introduction

This is an action to recover overtime compensation filed by Plaintiffs Jenny Shiptoski, Pamela Bush, Michele Nightingale, Brittany Schwartz, and Matthew Walter, under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-19. Now pending before the court is the Plaintiffs' motion for conditional certification of a collective action pursuant to 29 U.S.C. § 216(b). (Doc. 15.) This motion has been fully briefed and is now ripe for disposition. (Docs. 18, 23, and 27.) For the reasons stated below, it is respectfully recommended that the motion be granted.

II. Factual and Procedural Background

In her complaint, filed on June 20, 2016, Plaintiff Jenny Shiptoski, proceeding on behalf of herself and other similarly situated employees, asserts that she was employed by Defendant SMG Group, LLC ("SMG") as a store manager at

several of SMG's gas and convenience stores since approximately November of 2013. (Doc. 1, ¶¶ 4-9.) Over the course of her employment, Shiptoski states that she often worked over 40 hours per week and estimates that she regularly worked between 50-70 hours per week. (Doc. 1, ¶ 12.) Shiptoski alleges that SMG violated the FLSA and the Pennsylvania Minimum Wage Act ("PMWA"), 43 P.S. §§ 333.101-115, by failing to pay an overtime premium for her time worked in excess of 40 hours per week. (Doc. 1, ¶¶ 29-39.) As a result, Shiptoski requests that the court conditionally certify an FLSA collective encompassing individuals like herself; that is, "[a]ll individuals who, during any time within the past three years, were employed by SMG Group, LLC or any of its affiliated companies as salaried Store Managers and classified as overtime-exempt." (Doc. 15.) Since the filing of Shiptoski's complaint, four other individuals have consented to become party-plaintiffs in this lawsuit. (Docs. 6, 8, 16, and 17.)

The Plaintiffs filed the instant motion for conditional certification of a collective action pursuant to 29 U.S.C. § 216(b) on September 15, 2016, followed by a brief in support thereof the following week. (Docs. 15 and 18.) Along with the motion for conditional certification, the Plaintiffs presented declarations from Shiptoski and four other store managers, which described their duties and activities; an accommodation review form used by SMG; the store manager job description; SMG's employee handbook; and the SMG policy and procedure

manual.[1] (Doc.15.) Taken together, these declarations and documents described commonly shared terms and conditions of employment allegedly experienced by the plaintiffs and other similarly-situated SMG managers during the pertinent time period. SMG filed a brief in opposition to the motion for conditional certification on October 11, 2016, to which the Plaintiffs filed a reply brief two weeks thereafter. (Docs. 23 and 27.) On September 25, 2017, this motion was referred to the undersigned for our consideration. Accordingly, this motion is now ripe for resolution.

III. Discussion

Under the FLSA, employers must pay their employees for time worked in excess of 40 hours per week at a minimum rate of at least one and a half times their regular rate of pay. 29 U.S.C. § 207(a)(1). The FLSA further provides employees with a private right of action to be brought "by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." 29 U.S.C. § 216(b). In order to proceed on an FLSA collective action under § 216(b), two requirements must be met: "(1) plaintiff must be

[1] While declarations from Bush and Nightingale were attached to the motion for conditional certification, (Docs. 15-2 and 15-3), Walter and Schwartz submitted declarations in the body of their forms consenting to become party Plaintiffs. (Docs. 16 and 17.)

similarly situated to the collective action group; and (2) collective action group members, or 'opt-in' plaintiffs, must file a written notice of consent with the court." Stone v. Troy Constr., LLC, No. 3:14CV306, 2015 WL 7736827, at *2 (M.D. Pa. Dec. 1, 2015).[2]

The term "similarly situated" is not expressly defined in the FLSA. Ruehl v. Viacom, Inc., 500 F.3d 375, 389 n. 17 (3d Cir. 2007). Nevertheless, the common meaning of the term "contemplates individuals 'employed under the same terms and conditions.'" Woodard v. FedEx Freight E., Inc., 250 F.R.D. 178, 190–91 (M.D. Pa. 2008) (Vanaskie, J.) (quoting 2 Les A. Schneider & J. Larry Stine, Wage and Hour Law: Compliance and Practice § 20.19.50). In determining whether a prospective plaintiff is similarly situated to the proposed collective, district courts within the Third Circuit Court of Appeals have developed a two-step process. See Camesi v. Univ. of Pittsburgh Med. Ctr., 729 F.3d 239, 243 (3d Cir. 2013). This process proceeds as follows:

> First, the court must decide whether a class should be certified conditionally in order to give notice to the potential class members and to allow for pretrial discovery regarding the individual claims. After the class has been conditionally certified, notice and opportunity to opt in has been given to the potential plaintiffs, and discovery has been conducted, the court may then be asked to reconsider the conditional class certification to determine whether the "similarly situated" standard has been met. Final certification requires a higher

[2] It is this second requirement—requiring a formal notice of consent—that distinguishes the FLSA conditional certification process from the class certification framework detailed in Federal Rule of Civil Procedure 23.

> level of proof than initial conditional certification. If the final class fails meet the requirement of substantial similarity found in § 216(b), then the class is be decertified and the opt-in plaintiffs are dismissed from the action without prejudice.
>
> Craig v. Rite Aid Corp., No. 08-CV-2317, 2009 WL 4723286, at *2 (M.D. Pa. Dec. 9, 2009) (citations and quotation omitted).

At present, we are only concerned with the first step of the certification process. At this initial threshold stage of the litigation, although plaintiffs bear the burden of demonstrating that the members of the collective are similarly situated, Zavala v. Wal Mart Stores Inc., 691 F.3d 527, 534 (3d Cir. 2012), satisfying that burden initially requires only a "modest factual showing." Zavala, 691 F.3d at 536. Specifically, "[u]nder the 'modest factual showing' standard, a plaintiff must produce some evidence, beyond pure speculation, of a factual nexus between the manner in which the employer's alleged policy affected [the plaintiff] and the manner in which it affected other employees." Symczyk v. Genesis HealthCare Corp., 656 F.3d 189, 193 (3d Cir. 2011) (citation omitted), rev'd on other grounds, 569 U.S. 66 (2013). Due to the lenient factual showing required, "[t]he initial determination usually results in conditional certification." Woodard v. FedEx Freight E., Inc., 250 F.R.D. 178, 191 (M.D. Pa. 2008).

Here, the Plaintiffs propose an FLSA class consisting of "[a]ll individuals who, during any time within the past three years, were employed by SMG Group, LLC or any of its affiliated companies as salaried Store Managers and classified as

overtime-exempt." (Doc. 15.) The Plaintiffs have submitted as evidence declarations from Shiptoski and four other store managers, an accommodation review form used by SMG, the store manager job description, the SMG employee handbook, and the SMG policy and procedure manual. (Doc.15.)

In light of this evidence, we find that the Plaintiffs have met the "modest factual showing" needed to warrant conditional certification of an FLSA collective. The Plaintiffs meet the modest burden of demonstrating that the potential class members are "similarly situated" by providing evidence that all prospective class members were harmed by SMG's alleged practice of misclassifying all salaried store managers as overtime exempt. The Plaintiffs submitted the declarations of five salaried store managers, who collectively worked at eight different store locations and were each classified by SMG as overtime exempt. (Docs. 15-1, 15-2, 15-3, 16 and 17.) These declarations contain sufficient allegations of "substantial similarity" between the potential class members, as the declarations each contend that the potential class member: (1) worked for SMG as a salaried store manager; (2) regularly worked in excess of 40 hours per week; (3) was not paid extra overtime compensation for any hours worked in excess of 40 per week; (4) primarily performed non-managerial tasks; and (5) primarily worked either alone or with one other store employee. (Docs. 15-1, 15-2, 15-3, 16 and 17.) The Plaintiffs further maintain that SMG's job description for store managers,

accommodation review form describing various physical tasks regularly performed by store managers, employee handbook, and policy and procedures manual all support a conclusion that other salaried store managers were likely subject to the same policy of being classified as exempt and not paid overtime wages for hours worked in excess of forty per week. (Docs. 15-4, 15-5, 15-6, and 15-7.) Taken as a whole, the declarations, along with the other evidence submitted by the Plaintiffs, demonstrates a "factual nexus between the manner in which the employer's alleged policy affected [Shiptoski] and the manner in which it affected other employees," thus warranting conditional class certification. Symczyk, 656 F.3d at 193 (3d Cir. 2011).

In opposing the instant motion for conditional certification, SMG argues that the Plaintiffs have not marshaled sufficient evidence to establish that the collective is truly "similarly situated" because the factual allegations in the declarations were lacking in detail. (Doc. 23, at 1.) Further, SMG challenges the factual assertions made in the Plaintiffs' declarations, countering that the Plaintiffs: (1) primarily worked in managerial capacities and that any non-managerial tasks were incidental to their primary duties; (2) worked under minimal supervision and enjoyed wide discretion to run the individual stores as they saw fit; (3) supervised more than two other employees at any given time; and (4) had the authority to hire, fire, and discipline other employees. (Doc. 23, at 2.) SMG's contentions, however, go

directly to the merits of this case and therefore are more properly considered at the second final certification step of the "similarly situated" analysis. See, e.g., Galt v. Eagleville Hosp., 238 F. Supp. 3d 733, 737 (E.D. Pa. 2017) ("Defendant will have the opportunity to revisit the merits of Plaintiffs' claims at a later time, but for purposes of conditional certification, Plaintiffs have made the requisite modest factual showing that other employees are similarly situated."); see also Neal v. Air Drilling Assocs., Inc., No. 3:14CV1104, 2015 WL 225432, at *3 (M.D. Pa. Jan. 16, 2015) ("At the step-one inquiry, the court does not weigh the evidence, resolve factual disputes, or reach the merits of plaintiff's claims."). Moreover, "[w]hile the absence of certain allegations and facts in the declarations may be of import to the Court's consideration of final certification, to consider them now would impose a higher burden on [the Plaintiffs] than currently required, and Defendant's arguments are therefore premature." Chung v. Wyndham Vacation Resorts, Inc., No. 3:14·CV·00490, 2014 WL 4437638, at *2 n.1 (M.D. Pa. Sept. 9, 2014).

In calling for a fact-intensive inquiry, SMG misstates the Plaintiffs' burden at this first stage of the "similarly situated" analysis, which is to initially make a "modest factual showing" in support of conditional certification. We find that the Plaintiffs have made this showing by producing affidavits and other evidence "of a factual nexus between the manner in which the employer's alleged policy affected [Shiptoski] and the manner in which it affected other employees." Symczyk v.

Genesis HealthCare Corp., 656 F.3d 189, 193 (3d Cir. 2011), rev'd on other grounds, 569 U.S. 66 (2013); see Chung, 2014 WL 4437638, at *2 (granting conditional certification based on declarations containing similar assertions to those made by the Plaintiffs in the case at bar); Craig v. Rite Aid Corp., No. 08-CV-2317, 2009 WL 4723286, at *4 (M.D. Pa. Dec. 9, 2009) ("Contrary to Defendants' assertions, Plaintiff's allegations of substantial similarity between herself and the proposed class are not 'unsupported;' we accept the affidavits Plaintiff has submitted in support of the Motion as sufficient evidence that she is similarly situated to those current or former employees and that there are potentially more class members with the same claims.")

We therefore recommend that the Plaintiffs' motion for conditional certification (Doc. 15) be granted. Of Course, should this Report and Recommendation be adopted, SMG will still have the opportunity after further discovery to renew any arguments as to the merits of the Plaintiffs' claims at the second step of the "similarly situated" collecrt9ve action certification process.

IV. Recommendation

Accordingly, for the foregoing reasons, IT IS RECOMMENDED that the Plaintiffs' motion for conditional certification (Doc. 15) be granted, and that the following collective class be permitted notice and an opportunity to opt in to this action:

All individuals who, during any time within the past three years, were employed by SMG Group, LLC or any of its affiliated companies as salaried Store Managers and classified as overtime-exempt.

(Doc. 15.)

The Parties are further placed on notice that pursuant to Local Rule 72.3:

Any party may object to a magistrate judge's proposed findings, recommendations or report addressing a motion or matter described in 28 U.S.C. § 636 (b)(1)(B) or making a recommendation for the disposition of a prisoner case or a habeas corpus petition within fourteen (14) days after being served with a copy thereof. Such party shall file with the clerk of court, and serve on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. The briefing requirements set forth in Local Rule 72.2 shall apply. A judge shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge, however, need conduct a new hearing only in his or her discretion or where required by law, and may consider the record developed before the magistrate judge, making his or her own determination on the basis of that record. The judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate judge with instructions.

Submitted this 31st day of January, 2018.

S/Martin C. Carlson
Martin C. Carlson
United States Magistrate Judge