IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

MEDFORD DIVISION

JENNIFER HARRISON, on behalf of herself and others similarly situated,

Plaintiff,

v.

HARRY & DAVID OPERATIONS, INC., and HARRY AND DAVID, LLC,

Defendants.

Case No. 1:18-cv-00410-CL

REPORT & RECOMMENDATION

CLARKE, Magistrate Judge.

This case comes before the Court on Plaintiff's motion for conditional certification of a collective class and issuance of court-supervised notice (#45). Plaintiffs allege that Defendants engage in a common practice of only paying their call center customer service employees for time actually logged onto the telephone systems, resulting in the performance of unpaid, off-the-

clock work in violation of the federal Fair Labor Standards Act (FLSA) and Oregon law. For the reasons discussed below, Plaintiff's motion should be GRANTED with conditions.

BACKGROUND

Plaintiff filed this action on March 8, 2018 to recover allegedly unpaid regular and overtime wages on behalf of herself and other similarly situated employees of Defendants who handle calls for the 1-800-Flowers.com, Inc. Family of Brands. Plf.'s Mot., p. 3 (#45). Plaintiff challenges Defendants' alleged practice of paying their customer service employees only for the time they are actually logged onto the internal customer service telephone systems. *Id.* at 2. Plaintiff alleges that as a result of this practice, she and Defendants' other call center employees were not compensated for work performed prior to the start of each shift, during the beginning and end of each meal period, and after the end of each shift. *Id.* Plaintiff seeks to notify other employees who handled calls for Defendants of their right to join this action to assert their claims for wages pursuant to Section 216(b) of the FLSA.

LEGAL STANDARD

Section 216(b) of the FLSA authorizes an employee to maintain an action against an employer for violations of the Act on behalf of the employee and "other employees similarly situated." 29 U.S.C. § 216(b). Members of a FLSA collective action must "opt-in" to the action by filing written consent with the court in order to be bound by the judgment. *Id.*; *Busk v. Integrity Staffing Solutions, Inc.*, 713 F.3d 525, 528 (9th Cir. 2013) ("Under FLSA, a potential plaintiff does not benefit from (and is not bound by) a judgment unless he or she affirmatively opts in to the lawsuit." (citation omitted) (internal quotation marks omitted)). This distinguishes FLSA collective actions from class actions under Federal Rule of Civil Procedure 23, which requires class members to opt out or be bound by the result of the action. *Busk*, 713 F.3d at 528.

The district court has discretion to determine whether a collective action is appropriate. *Hargrove*, 1999 WL 1279651, at *3; *see also Adams v. Inter-Con Sec. Sys., Inc.*, 242 F.R.D. 530, 535 (N.D. Cal. 2007) ("The court's determination of whether a collective action is appropriate is discretionary"). Moreover, in *Hoffmann-La Roche v. Sperling*, the United States Supreme Court held that district courts have the discretion to facilitate the process of notifying potential collective-action members. 493 U.S. 165, 171 (1989). In appropriate cases, a district court may (1) authorize the named plaintiffs to send notice to prospective collective-action members; (2) settle disputes about the content of the notice; and (3) set deadlines by which opt-in plaintiffs must file their consent-to-join forms. *Id.* at 171-72. A district court's involvement in the notification process can "ensure that [notice] is timely, accurate, and informative" and, moreover, "serves the legitimate goal of avoiding multiplicity of duplicative suits and setting cutoff dates to expedite the disposition of the action." *Id.* at 172.

In evaluating FLSA collective action certification motions and determining when a district court should exercise its discretion to become involved in the notification process, courts in this District use a two-step process set forth in *Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208 (11th Cir. 2001). *See Goudie*, 2008 WL 4628394, at *3.

> The first determination is made at the so-called "notice stage." At the notice stage, the district court makes a decision—usually based only on the pleadings and any affidavits which have been submitted—whether notice of the action should be given to potential class members.
>
> Because the court has minimal evidence, this determination is made using a fairly lenient standard, and typically results in "conditional certification" of a representative class. If the district court "conditionally certifies" the class, putative class members are given notice and the opportunity to "opt-in." The action proceeds as a representative action throughout discovery.
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> The second determination is typically precipitated by a motion for "decertification" by the defendant usually filed after discovery is largely complete and the matter is ready for trial. At this stage, the court has much

> more information on which to base its decision, and makes a factual determination on the similarly situated question. If the claimants are similarly situated, the district court allows the representative action to proceed to trial. If the claimants are not similarly situated, the district court decertifies the class, and the opt-in plaintiffs are dismissed without prejudice. The class representatives—i.e. the original plaintiffs—proceed to trial on their individual claims.

Hipp, 252 F.3d at 1218 (quoting *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1213-14 (5th Cir. 1995)).

DISCUSSION

Plaintiff requests that the court conditionally certify the action as a collective action pursuant to 29 U.S.C. § 216(b). Specifically, Plaintiff requests that the collective be defined as follows:

> All current and former hourly-paid call center workers at Defendants' Medford, Oregon call center who at any time since March 8, 2015[1] have worked in positions in which employees handle telephone calls on behalf of the 1-800-Flowers.com, Inc. Family of Brands (for example, Harry & David, Fruitbouquests.com, The Popcorn Factory, etc.).

Based on the two-step legal standard described above, the core inquiry in determining whether to certify a collective action is whether the putative class members are "similarly situated." *Sheffield v. Orius Corp.*, 211 F.R.D. 411, 413 (D. Or. 2002) (internal citation omitted). This is a "less stringent" standard than a class action motion governed by Federal Rule of Civil Procedure 23. *Hargrove v. Sykes Enters., Inc.*, No. Civ. 99-110-HA, 1999 WL 1279651, at *3 (D. Or. June 30, 1999). Therefore, a plaintiff need only demonstrate a reasonable basis for a claim that the employer acted on a class-wide basis. *Grayson v. K Mart Corp*, 79 F.3d 1086, 1097 (11th Cir. 1996). This burden can be satisfied by a "'modest factual showing'" that plaintiffs "'and potential plaintiffs were victims of a common policy or plan that violated the

[1] Plaintiff conceded at oral argument that the correct year should be 2015, rather than 2012 as originally stated in Plaintiff's brief.

law.'" *Ballaris v. Wacker Silttronic Corp.*, No. 00-1627-KI, 2001 WL 1335809, at *2 (D. Or. Aug. 24, 2001) (quoting *Realite v. Ark Rests. Corp.*, 7 F. Supp. 2d 303, 306 (S.D.N.Y. 1998)).

Here, Plaintiff has satisfied the minimal burden of showing that all current and former employees of Defendants that used the internal customer service telephone system to perform their jobs handling customer phone calls were similarly situated to the named plaintiff. Defendants contend that Harry & David Operations, Inc. operates a call center, but Harry & David, LLC does not, even though some employees may use telephones to perform their jobs. This technicality may require revisions to be made to the proposed collective definition, but this detail does not render the proposed class fatally vague and overbroad as to prohibit this Court from granting conditional certification. First, Defendants do not dispute that Plaintiff worked for both companies and was subject to the same or similar policies and procedures at both companies. Second, both companies utilize a timekeeping system that requires these similarly situated employees to have their computers powered on and logged into before it is possible to clock into the timekeeping system. Ultimately, Defendants' arguments against certification may prove fruitful in the second stage of the two-step analysis, but at this stage of the litigation, it does not matter if the employees held different job titles. Nor should the Court consider the declarations submitted by Defendants, as doing so at this stage would "constitute a premature examination of the merits of the FLSA claims." *Myers v. Marietta Mem. Hosp.*, 201 F. Supp. 3d 884, 891 (S.D. Ohio 2016) (declining to consider defense affidavits at conditional-certification stage). Plaintiff has met the minimal burden of showing that Plaintiff and the potential plaintiffs are all in a position to collectively challenge Defendants' alleged practice of beginning the compensable work day at the time when employees are ready to take their first phone call, rather than when they turn on their computers.

Although the Court ultimately agrees that conditional certification is appropriate, the Court declines to define the collective as proposed above. Considering Defendants' argument that only one of the two defendants operates a "call center," the Court recommends that Plaintiff and Defendants meet and confer regarding the proper collective definition considering this opinion and submit a joint proposed definition for Court approval within 14 days of the Court's final ruling on this motion.

Finally, finding no objections to Plaintiff's additional requests regarding the method and form of notice, the Court recommends that these additional requests set out in Plaintiff's motion be granted. After approval of the joint proposed definition of the collective, the Court should order the following:

(1) Defendants are ordered to produce a list of all collective members that fall under the above definition, including names, last known mailing addresses, email addresses, and telephone numbers within 14 days of the Court's approval of the collective definition;

(2) The parties shall confer regarding the form of notice to be sent to potential collective members and to submit a joint proposed notice for Court approval within 14 days of the Court's approval of the collective definition;

(3) Notice via U.S. Mail and email to the potential collective members shall be authorized; and

(4) Consent forms to join this action are required to be postmarked or otherwise received by Plaintiff's counsel within 90 days of the date notice is sent.

RECOMMENDATION

For the reasons stated above, Plaintiff's motion to certify (#45) should be GRANTED with the condition that Plaintiff and Defendant meet and confer regarding the proper collective

definition considering this opinion and submit a joint proposed definition for Court approval within 14 days of the Court's final ruling on this motion.

This Report and Recommendation will be referred to a district judge. Objections, if any, are due no later than fourteen (14) days after the date this recommendation is filed. If objections are filed, any response is due within fourteen (14) days after the date the objections are filed. *See* Fed. R. Civ. P. 72, 6.

Parties are advised that the failure to file objections within the specified time may waive the right to appeal the District Court's order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

DATED this 13 day of December, 2018.

MARK D. CLARKE
United States Magistrate Judge