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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. SACV 05-1103 CJC (ANx)

Date: February 12, 2007

Title: MARGARET REED v. COUNTY OF ORANGE, et al.

PRESENT:

HONORABLE CORMAC J. CARNEY, UNITED STATES DISTRICT JUDGE

Steve Chung
Deputy Clerk

N/A
Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFF: ATTORNEYS PRESENT FOR DEFENDANT:

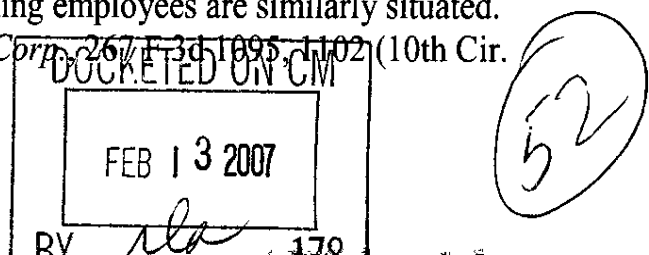
None Present

None Present

PROCEEDINGS: (IN CHAMBERS) ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR CERTIFICATION OF COLLECTIVE ACTION [filed 01/08/07]

Plaintiff Margaret Reed, an Orange County Deputy Sheriff, brings this action against Defendant County of Orange (the "County") alleging various violations of the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* ("FLSA"). Ms. Reed seeks to represent a class of allegedly similarly situated employees pursuant to 29 U.S.C. § 216(b), which permits collective actions under the FLSA. At this stage, the Court concludes that Ms. Reed has made a sufficient showing on some of her claims to warrant distribution of notice to the class. However, Ms. Reed has failed to show that certain members of the class are similarly situated with regard to all claims, and that any proposed members of the class are similarly situated with regard to one specific claim. In addition, the content of her proposed notice raises concerns about the appearance of judicial impartiality regarding the merits of the case, and thus distribution of the proposed notice would be improper. Accordingly, Ms. Reed's motion is GRANTED in part and DENIED in part.

District courts have discretion, in appropriate cases, to implement the collective action provisions of § 216(b) by facilitating notice to potential plaintiffs. *Hoffman-LaRoche, Inc. v. Sperling*, 493 U.S. 165, 169 (1989). Under § 216(b), a plaintiff may proceed with a collective action where the complaining employees are similarly situated. 29 U.S.C. § 216(b); *Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1102 (10th Cir.



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2001). The FLSA does not define “similarly situated,” and there is little circuit case law on the subject. *Thiessen*, 267 F.3d at 1102; *Pfohl v. Farmers Ins. Group*, No. CV 03-3080 DT (RCx), 2004 WL 554834 at *2 (C.D. Cal. Mar. 1, 2004). In determining whether employees are similarly situated, courts have typically proceeded on an *ad hoc* case-by-case basis utilizing a two-stage inquiry. *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1213 (5th Cir. 1995). The court first makes an initial “notice stage” determination of whether plaintiffs are similarly situated. *Thiessen*, 267 F.3d at 1102. “In doing so, a court requires nothing more than substantial allegations that the putative class members were together the victims of a single decision, policy, or plan.” *Id.* (internal quotations omitted). However, unsupported assertions of widespread violations will not suffice to satisfy the plaintiff’s burden of showing substantial similarity. *Freeman v. Wal-Mart Stores, Inc.*, 256 F. Supp. 2d 941, 945 (W.D. Ark. 2003). Given the limited amount of evidence generally available at this stage, the court will generally apply a fairly lenient standard. *Edwards v. City of Long Beach*, --- F. Supp. 2d ---, 2006 WL 3775941 at *3 (C.D. Cal. Dec. 12, 2006). At the notice stage, conditional certification is commonly granted. *Id.*

After a plaintiff has made an initial showing that the proposed class consists of similarly situated individuals and the class is conditionally certified, the court directs the distribution of notice to potential class members. After the opt-in period is closed and discovery has been concluded, the court then makes a second determination employing a stricter similarly situated standard. *Thiessen*, 267 F.3d at 1102-03. During this “second stage” analysis, a court reviews several factors, including (1) disparate factual and employment settings of the individual plaintiffs; (2) the various defenses available to defendant which appear to be individual to each plaintiff; and (3) fairness and other procedural considerations. *Id.* at 1103.

The County argues that Ms. Reed is required to show more at the notice stage than that the members of the proposed class are similarly situated. Relying on case law from the Eleventh Circuit, the County argues that conditional certification is not available unless a plaintiff makes an affirmative showing that there are other individuals who desire to opt in to the class. *See Dybach v. Fla. Dep’t of Corr.*, 942 F.2d 1562, 1567-68 (11th Cir. 1991); *MacKenzie v. Kindred Hosps. E., LLC*, 276 F. Supp. 2d 1211 (M.D. Fla. 2003); *Davis v. Charoen Pokphand (USA), Inc.*, 303 F. Supp. 2d 1272 (M.D. Ala. 2004). However, this additional requirement at the notice stage has not been applied in the Ninth Circuit, or indeed in any court outside of the Eleventh Circuit. *See, e.g., Edwards, supra*

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(only discussing similarly situated requirement); *Leuthold v. Destination Am., Inc.*, 224 F.R.D. 462 (N.D. Cal. 2004) (same). Indeed, at least one district court has identified the language in *Dybach* as “dicta” and criticized it for “conflict[ing] with [the] United States Supreme Court’s position that the [FLSA] should be liberally ‘applied to the furthest reaches consistent with congressional direction.’” *Reab v. Elec. Arts, Inc.*, 214 F.R.D. 623, 629 (D. Colo. 2002) (quoting *Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 296 (1985)). The *Dybach* court provided no explanation for requiring plaintiffs to show that other class members desire to opt in, nor does the County indicate why this Court should adopt such a rule. The Court finds the *Dybach* rule inappropriate at the “notice stage.” Conditional certification at this stage is designed to provide notice to potential plaintiffs specifically because they might not yet be informed of the action or their ability to participate in it. Accordingly, the Court will not require Ms. Reed to demonstrate at this stage that other employees in the County Sheriff’s Department seek to participate in this action.

Ms. Reed’s first amended complaint seeks relief based on four policies or practices of the County that allegedly violate the FLSA: (1) first allegation is related to uncompensated pre- and post-shift activities, such as maintaining and cleaning equipment and uniforms; (2) time spent getting into and out of uniform before and after each shift; (3) time spent walking to and from pre- and post-shift activities; and (4) time spent working during meal and rest periods. With respect to Ms. Reed’s first three claims, she has made a satisfactory showing that other employees at the Sheriff’s Department are similarly situated, and equally affected by a policy, custom, or practice of the County. Karen Kiddy, Human Resources Manager for the Sheriff’s Department, testified that all deputies “are expected to report to their duty station for briefing at the beginning of their shift, dressed with all of their required equipment and ready to go to work.” Karen Kiddy Dep. 36:11-14. She agreed that there is a department-wide policy requiring employees to be dressed and ready to work when their shift begins, and they are not compensated for the time it takes to get into full uniform. Kiddy Dep. 37:1-11. Similarly, Ms. Kiddy admits that officers are expected to maintain their uniform in professional working order, including laundering, maintaining shoes and belts, and generally cleaning and inspecting equipment. Kiddy Dep. 48:21-49:4. Officers are not compensated for any of this maintenance that takes place during off-duty hours. Kiddy Dep. 49:6-15. Finally, Ms. Kiddy admitted that any pre- or post-shift time an employee spends getting to and from her car, or walking from the locker rooms to the briefing rooms, is not compensated. Kiddy Dep. 52:12-53:21. At this stage, Ms. Reed has made a sufficient showing that all

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deputy Sheriffs are treated similarly under the Department's policies regarding compensation for job-related pre- and post-shift activities, including donning and doffing uniforms, cleaning and maintaining uniforms and equipment, and walking from the locker room to the briefing room to begin work. She has also made a sufficient showing that all deputies are required to present themselves in uniform at the briefing, that their shift does not begin until the briefing begins, and that they are required to maintain their uniform and equipment on their own time. This is sufficient similarity of job duties to warrant conditional certification on these claims.

With regard to Ms. Reed's fourth claim, she has not made a sufficient showing that she and the other deputy Sheriffs are similarly situated with regard to meal periods. The County has a clear and well-established policy that all employees are to receive an uninterrupted thirty minute meal period. Kiddy Dep. 54:11-56:8. Ms. Reed alleges that there is no standard procedure for when and how employees are to take this meal period. Ms. Kiddy agrees. The record indicates that employees schedule their own meal breaks at a convenient time, given their job duties. Kiddy Dep. 61:11-17. Ms. Kiddy noted that "different assignments have different workload demands at different times during the shift, and the employee can use their judgment to fit in their meal break where it best works for them and their partners and their work location." Kiddy Dep. 61:25-62:4. Ms. Reed does not present anything more than unsubstantiated allegations to dispute the fact that employees' meal periods vary on account of their varying job duties. She presents no evidence that would allow the Court to conclude, even on a conditional basis, that all deputies are similarly situated with regard to meal periods. For example, there is nothing in the record that would allow the Court to find Ms. Reed's job at the Intake Release Center similar in daily duties to positions in court security or on patrol. Nor has Ms. Reed presented anything more than a mere allegation that all deputies are unable to take adequate meal breaks, or do not get proper overtime compensation for meal periods that are not fully uninterrupted. Ms. Reed cannot satisfy her burden of proving that the putative class members are similarly situated with such unsupported allegations. See *Freeman*, 256 F. Supp. 2d at 945. The Court will not certify, even conditionally, an FLSA class regarding Ms. Reed's allegations of meal period violations.

The County argues further against the scope of Ms. Reed's class, alleging that it cannot include both ordinary officers and sergeants, because the sergeants play a role in enforcing the County's overtime policies. See *White v. Osmose, Inc.*, 204 F. Supp. 2d 1309 (M.D. Ala. 2002). In *White*, the court declined to certify a class representing both

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foremen and crewmen because of an inherent conflict of interest between the two groups. *Id.* at 1314. The *White* court reasoned that because the foremen were responsible for supervising the crewmen's hours, and reporting those hours, the foremen faced potential liability for under-reporting the hours that crewmen worked. *Id.* Here, Ms. Reed claims that sergeants have discouraged deputies from claiming overtime, and are responsible for monitoring and controlling the use of overtime as part of their job responsibilities. Ms. Reed responds that in cases such as *Edwards v. City of Long Beach, supra*, courts have granted notice stage certification to classes including officers, sergeants, and even lieutenants. In *Edwards*, the defendants apparently did not object to certification based on *White*, and there is no indication that the court considered the merit of conditional certification in light of the supervisory role of some of the class members. This Court thus finds Ms. Reed's reliance on *Edwards* unpersuasive. Ms. Reed cannot show that she and other deputies are similarly situated to sergeants regarding overtime compensation for pre- and post-shift activities when she alleges that the sergeants are complicit in preventing deputies from obtaining such overtime compensation. Accordingly, the Court will only certify a class of all deputies, county-wide, below the rank of sergeant.

Finally, the County disputes the content of Ms. Reed's notice, arguing that it does not adequately impart judicial neutrality. At the outset, the Court notes that the proposed notice must be amended in light of this order. The notice shall no longer contain any reference to Ms. Reed's meal period claims, nor shall it indicate that sergeants are eligible to participate in the class. The Court also shares the County's concern regarding a lack of judicial neutrality in the proposed notice. In holding that district courts could facilitate notice in FLSA cases, the Supreme Court was careful to instruct that "courts must be scrupulous to respect judicial neutrality" and "must take care to avoid even the appearance of judicial endorsement of the merits of this action." *Hoffman-LaRoche*, 493 U.S. at 174. The notice should state clearly and conspicuously that the Court takes no position on the merits of Ms. Reed's claim. It should also state that certification at this stage is only conditional. Finally, any notice should give equal attention to each party's claims and contentions in the action. The parties are directed to meet and confer on a proposed notice, and submit such notice to the Court within 20 days of this order.

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