UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CANDICE HOFF, *on behalf of herself and all others similarly situated*,	)	Case No.: 1:19 CV 1849
Plaintiffs	)	
v.	)	JUDGE SOLOMON OLIVER, JR.
MSAB PARK CREEK, LLC,	)	
Defendant	)	ORDER

Currently pending before the court in the above-captioned case is Plaintiff Candice Hoff's ("Plaintiff") Motion for Conditional Class Certification. (ECF No. 15.) For the following reasons, the court grants Plaintiff's Motion.

I. BACKGROUND

Plaintiff commenced this purported collective and class action on August 14, 2019, against Defendant MSAB Park Creek, LLC ("Defendant") for alleged violations of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201, *et seq.*, and the Ohio Minimum Fair Wage Standards Act ("OMFWSA"), O.R.C. §§ 4111.15, *et seq.* (Compl., ECF No. 1; *see also* Am. Compl., ECF No. 7.) Specifically, Plaintiff asserts that Defendant engaged "in a pattern and practice of failing to pay its employees, including Plaintiff, overtime compensation for all hours worked over forty (40) each workweek." (Am. Compl. ¶ 2, ECF No. 7.) In addition to herself, Plaintiff seeks to bring this collective action on behalf of an opt-in class consisting of

> [a]ll former and current individuals employed by MSAB Park Creek, LLC and who were paid on an hourly basis at any time between August 14, 2016 and the present.

(Am. Compl. ¶ 22, ECF No. 7.)

On January 15, 2020, Plaintiff filed this Motion for Conditional Class Certification. (ECF No. 15.) Plaintiff seeks to certify the class identified in the Amended Complaint, alleging "that Defendant failed to pay her and the class she seeks to represent legally-required overtime compensation for the hours they worked over 40 per workweek." (*Id.* at PageID #83.) Defendant filed an Opposition on February 12, 2020 (ECF No. 17), and Plaintiff filed a Reply on February 17, 2020 (ECF No. 18).

II. LAW AND ANALYSIS

A. Relevant Law

Under 29 U.S.C. § 216(b) of the FLSA, an employee may bring an action on behalf of herself and others "similarly situated." 29 U.S.C. § 216(b). Each employee wishing to join the collective action must affirmatively "opt-in" by filing written consent. *Id*. District courts have discretion to facilitate notice to potential plaintiffs. *Douglas v. J & K Subway, Inc.*, No. 4:14-CV-2621, 2015 WL 770388, at *1 (N.D. Ohio Feb. 23, 2015) (citing *Hoffman-La Roche, Inc. v. Sperling,* 493 U.S. 165, 169 (1989)). Before facilitating notice, however, courts must determine whether the potential class members are similarly situated under § 216(b). *Douglas*, 2015 WL 770388, at *1.

The Sixth Circuit has expressed approval of the two-phase test developed by the district courts in this Circuit for determining whether an FLSA case should proceed as a collective action. *See Comer v. Wal-Mart Stores, Inc*., 454 F.3d 544, 547 (6th Cir. 2006). The first phase takes place at the beginning of discovery when the court has minimal evidence. *Id*. at 546. In this phase, courts may grant conditional class certification based on a modest factual showing sufficient to demonstrate that the putative class members were the victims of a single decision, policy, or plan. *Id.* at 547. A plaintiff's position must be "similar, *not identical*, to the positions held by the putative class members." *Id.* at 546–47 (emphasis added). This can be demonstrated by the existence of a "factual

nexus" between the plaintiff and the potential class members. *Harrison v. McDonald's Corp.*, 411 F. Supp. 2d 862, 868 (S.D. Ohio 2005).

The second phase occurs after "all of the opt-in forms have been received and discovery has concluded." *Comer*, 454 F.3d at 546. During this phase, courts have discretion to make a more thorough finding regarding the "similarly situated" requirement. *Id.* at 547. Should the court determine "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." *Douglas v. GE Energy Reuter Stokes*, No. 1:07-CV-077, 2007 WL 1341779, at *4 (N.D. Ohio Apr. 30, 2007).

The evidentiary burden to satisfy the "similarly situated" requirement at the conditional certification stage is a lenient one. *See Comer*, 454 F.3d at 547. This is due, in part, to the fact that, given the early stage of the proceedings, a plaintiff typically has little evidence to support his or her claims. Further, because a defendant has the opportunity to file for decertification later, conditional certification is "by no means final." *Id.* Thus, the standard for allowing class certification is significantly lower than the one used in class actions—it requires only that a plaintiff put forth "minimal evidence," and a court's determination will "typically result[] in conditional certification." *Id.* Conditional class certification can be appropriate where the class members' claims are unified only by "common theories of defendants' statutory violations, even if the proofs of those theories are inevitably individualized and distinct." *Douglas*, 2014 WL 770388, at *3 (quoting *O'Brien v. Ed Donnelly Enter.*, 575 F.3d 567, 584 (6th Cir. 2009)).

Importantly, at the conditional certification stage, the court does not typically "consider the merits of the plaintiff's claims, resolve factual disputes, make credibility determinations, or decide substantive issues." *Lawrence v. Maxim Healthcare Servs., Inc.*, No. 1:12-CV-2600, 2013 WL

5566668, at *3 (N.D. Ohio Oct. 9, 2013); *see also Struck v. PNC Bank N.A.*, No. 2:11-CV-00982, 2013 WL 571849, at *3 (S.D. Ohio Feb. 13, 2013). Nor does the court consider arguments on possible exemptions under the FLSA. *Lawrence*, 2013 WL 5566668, at *3. Persuasive authority suggests that courts generally grant conditional certification where the plaintiff identifies other potential class members who submit affidavits regarding their compensation and employment that indicate a common policy or plan with respect to their job duties and responsibilities. *See Bifulco v. Mortg. Zone*, 262 F.R.D. 209, 214 (E.D.N.Y. 2009) (collecting cases).

B. Application

Although the parties agree that "the burden on a plaintiff to establish that she is similarly situated to the proposed class is not onerous," Defendant maintains that Plaintiff fails to clear even this low hurdle. (Opp'n at PageID #161, ECF No. 17.) First, Defendant points out that all of its current employees—who make up roughly half of the estimated potential class—have signed sworn declarations stating that Plaintiff's allegations do not apply to them. (*Id.* at PageID #162.) Given these declarations, Defendant argues that "it defies reason" to say Plaintiff and the current employees are similarly situated. (*Id.*) Second, Defendant faults the Complaint for being too vague. At the Case Management Conference, Plaintiff raised specific allegations that Defendant intentionally violated the FLSA. (*Id.* at PageID #164.) But those allegations do not appear in the Complaint, which simply asserts that employees did not receive overtime pay when they worked over 40 hours per week. (*Id.*) Defendant argues that this discrepancy shows Plaintiff's "claims [are] dissimilar to those of the other potential class members." (*Id.*)

Plaintiff, however, argues that she has made the modest showing necessary for conditional certification. She points out that four other plaintiffs have filed consent forms to join this suit arguing that "they observed that the other putative class members worked more than 40 hours per workweek

without overtime pay as well." (Reply at PageID #197, ECF No. 18; *see also* ECF Nos. 4, 14.) Plaintiff maintains that these opt-in declarations, which corroborate the allegations in the Complaint, warrant "notice to be issued to the other putative class members who are otherwise unaware of this action or their right to participate in it." (Reply at PageID #197, ECF No. 18.) Plaintiff also takes issue with the declarations Defendant collected from its current employees. According to Plaintiff, the fact Defendant had its employees sign these "happy camper" declarations shows that "Defendant itself viewed the putative class as similarly situated." (*Id.* at PageID #199.) She also claims that Defendant coerced its employees into signing the declarations. (*Id.* at PageID #202–03.) And, indeed, one opt-in plaintiff submitted an affidavit suggesting as much. (*See* Hamulak Decl. ¶¶ 5–10, ECF No. 15-3.)

The court finds Plaintiff's arguments well-taken. The fact that other potential class members have filed consent forms to join Plaintiff's lawsuit supports conditional class certification. *See McNelley v. ALDI, Inc.*, No. 1:09-CV-1868, 2009 WL 7630236, at *3–5 (N.D. Ohio Nov. 17, 2009). Although the allegations regarding FLSA violations are vague, the opt-in declarations are consistent with, and supportive of, the claims in Plaintiff's Complaint. Further, the court agrees that Defendant's collection of "identical, fill-in-the-blank" form declarations from current employees can be read to suggest that these employees share a commonality and similarity with the class Plaintiff asserts. (Reply at PageID #199–200, ECF No. 18.) While courts typically do not interrogate the veracity of sworn declarations, courts are not bound to accept one affidavit when it is contradicted by another affidavit in the record. *See Tate v. Williams*, No. 2:06-CV-0047, 2007 WL 2302613, at *3 (S.D. Ohio Aug. 8, 2007). Here, the opt-in plaintiff's affidavit challenges Defendant's arguments and purports to undermine the declarations from its current employees. Weighing these conflicting assertions would require the court to conduct an "an individualized fact-specific analysis" into "the

factual and employment settings of individual plaintiffs." In the Sixth Circuit, such issues "are generally considered in a final certification decision." *McNelley*, 2009 WL 7630236, at *5 (citing *O'Brien*, 575 F.3d at 584). Because the court finds that Plaintiff has made the requisite "modest factual showing" required at this initial stage, conditional class certification is appropriate. *Comer*, 454 F.3d at 547. Accordingly, Plaintiff's Motion for Conditional Class Certification (ECF No. 15) is granted.

III. CONCLUSION

For the foregoing reasons, the court grants Plaintiff's Motion for Conditional Class Certification. (ECF No. 15.) Accordingly, the court conditionally certifies the following class: all former and current individuals who were employed by MSAB Park Creek, LLC and paid on an hourly basis at any time between August 14, 2016 and the present.

The parties are hereby ordered to meet and confer, through counsel, regarding the content and form of notice to be given to the proposed class members and to submit, within ten (10) days of the date of this Order, a joint proposed judicial notice apprising potential plaintiff of their rights under the FLSA to opt-in as parties to this litigation. The joint proposed judicial notice shall include a specific opt-in period not to exceed ninety (90) days. The joint proposed notice shall be neutral in language and no proposed reminder or "follow-up" notice should be submitted. Defendant shall, within fifteen (15) days of the date of this Order, provide Plaintiff with a list of the full name and last known home address of each current and former employee fitting the class description, their last known telephone number and personal email address, and their dates of employment.

IT IS SO ORDERED.

/s/ SOLOMON OLIVER, JR.
UNITED STATES DISTRICT JUDGE

June 22, 2020