UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

TAMARA BARRUS, on behalf of herself
and others similarly situated, et al

Plaintiffs,

DECISION AND ORDER
05-CV-6253 CJS

vs.

DICK'S SPORTING GOODS, INC.
and GALYAN'S TRADING COMPANY,
INC.,

Defendants.

This Fair Labor Standards Act ("FLSA") matter is before the Court on defendants' objections (# 60) to U.S. Magistrate Judge Jonathan Feldman's Decision and Order (# 59) granting plaintiffs' motions to (1) amend the complaint to add two additional classes of plaintiffs (# 13), (2) compel defendants to produce identifying information on individuals who meet the class descriptions set forth in the amended complaint (# 30), and (3) provide court-authorized notice to all potential members of the class pursuant to the "opt-in" provisions of the FLSA. Additionally, as the Magistrate Judge noted in his Decision and Order, "[a]ll parties agree that the result of granting plaintiffs' motions would be conditional certification of a collective action under 29 U.S.C. § 216(b)." (Dec. & Ord., at 9.) For the reasons stated below, the Magistrate Judge's Decision and Order is affirmed.

FACTUAL BACKGROUND

The Magistrate Judge set out the factual background of this matter in his Decision and Order, and the Court will not repeat the information in detail here. However, where necessary for its analysis, the Court will reference certain facts.

STANDARDS OF LAW

The Court referred this case to the Magistrate Judge pursuant to 28 U.S.C. § 636 in an Order (# 10) filed on September 16, 2005. Pursuant to that section, and Western District of Civil Procedure Rule 72.3,

> (2) All orders of the Magistrate Judge issued pursuant to these rules, as authorized by 28 U.S.C. § 636(b)(1)(A), shall be final unless within ten days after being served with a copy of the Magistrate Judge's order, a party files with the Clerk and serves upon opposing counsel a written statement specifying the party's objections to the Magistrate Judge's order. The specific matters to which the party objects and the manner in which it is claimed that the order is clearly erroneous or contrary to law shall be clearly set out.

Further, the statue itself provides that, "[a] judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's [magistrate judge's] order is clearly erroneous or contrary to law." 28 U.S.C. § 636(b)(1)(A).

Plaintiffs' motion sought conditional certification of this action as a collective action for purposes of notice and discovery, allowing potential plaintiffs to opt-in to the case. As explained by the Court in *Scholtisek v. Eldre Corp.*, 229 F.R.D. 381, 387 (W.D.N.Y. 2005) (Larimer, J.):

> The Second Circuit has held that a district court has the power to order that notice be given to other potential members of a plaintiff class under the opt-in provisions of the FLSA. *See Braunstein v. Eastern Photographic Labs., Inc.*, 600 F.2d 335 (2d Cir.1978) (*per curiam*), *cert. denied*, 441 U.S.

> 944 (1979); *Gjurovich v. Emmanuel's Marketplace, Inc.*, 282 F. Supp. 2d 101, 104 (S.D.N.Y. Sept. 19, 2003). Although the FLSA does not contain a class certification requirement, *see Taillon v. Kohler Rental Power, Inc. ex rel. Kohler Co.*, No. 02 C 8882, 2003 WL 2006593, at *1 (N.D. Ill. Apr. 29, 2003), such orders are often referred to in terms of "certifying a class." *See, e.g., Hunter v. Sprint Corp.*, 346 F. Supp. 2d 113, 117 (D.D.C. 2004); *De Luna-Guerrero v. North Carolina Grower's Ass'n, Inc.*, 338 F. Supp. 2d 649, 654 (E.D.N.C. 2004). The analysis is in some respects similar to that used in class actions, however, in that the court has to decide whether there is a sufficient showing of "similarly situated" employees, and to whom the notice should be sent.

Scholtisek, 229 F.R.D. at 387. Further, as Judge Larimer explained in *Scholtisek*:

> In this early phase, courts employ a relatively lenient evidentiary standard in determining whether a collective action is appropriate. "At the notice stage, courts appear to require nothing more than substantial allegations that the putative class members were together the victims of a single decision, policy, or plan infected by discrimination." [*Mooney v. Aramco Services Co.*, 54 F.3d 1207, 1213-14 (5th Cir.1995)] at 1213. To demonstrate that other potential plaintiffs are similarly situated to him, then, a plaintiff must make only a "modest factual showing sufficient to demonstrate that [he] and potential plaintiffs together were victims of a common policy or plan that violated the law." *Hoffmann v. Sbarro, Inc.*, 982 F. Supp. 249, 261 (S.D.N.Y. 1997) (citations omitted). "A plaintiff's burden [at this stage] is minimal, especially since the 'determination that potential plaintiffs are similarly situated' is merely a 'preliminary' one." *Gjurovich v. Emmanuel's Marketplace, Inc.*, 282 F. Supp. 2d at 104 (*quoting Hoffmann*, 982 F. Supp. at 261).

Scholtisek v. Eldre Corp., 229 F.R.D. 381, 387 (W.D.N.Y. 2005).

DEFENDANTS' OBJECTIONS

First, as to the Magistrate Judge's decision granting amendment of the complaint to add two additional classes of plaintiffs, defendants maintain it should have been properly denied. In that regard, they argue that since it was error to conditionally certify *any* of the three classes of plaintiffs, the motion to amend should have been denied as futile.

Second, as to the Magistrate Judge's determination granting plaintiffs' application to compel discovery to produce identifying information on individuals who meet the class descriptions set forth in the amended complaint, the defendants maintain that

> 12. The Court erred by granting plaintiffs' motion to compel discovery since at the time plaintiffs brought their motion, no discovery demand for the information had been made. Thus, the motion to compel was premature. *See* Federal Rule of Civil Proc. 37. Therefore, the portion of the Court's Decision granting the motion to compel is contrary to established law.
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> 13. The Court erred by granting plaintiffs' motion to compel discovery since, had the conditional certification motion been properly denied, plaintiffs would not be entitled to the broad discovery granted by the Court's Decision. Therefore, the portion of the Court's Decision granting the motion to compel is erroneous and contrary to established law since the conditional certification motion should have been denied.

(Def.s' Statement of Objections to the Decision and Order of the Magistrate Judge, at 8.)

Third, as to the Magistrate Judge's decision granting plaintiffs' application to provide court-authorized notice to all potential members of the class pursuant to the "opt-in" provisions of the FLSA, defendants maintain that,

> assuming for purposes of argument that the Decision on conditional certification was correct, the portion of the Court's Decision approving the proposed notice to affected employees prepared by plaintiffs' counsel is nevertheless erroneous. The proper form of the notice should have been subject to discussion among the parties in a discovery conference with the Court after the motion to conditionally certify the class was granted.

(Def.s' Statement of Objections to the Decision and Order of the Magistrate Judge, at 8-9.)

ANALYSIS

The Court will first consider defendants' argument that it was error to conditionally certify any of the three classes of plaintiffs and, consequently, the motion to amend the complaint should have been denied as futile. With regard to the first class of plaintiffs, who

allege that a lunch hour was automatically deducted from their pay, regardless of whether it was actually taken, defendants contend that the Magistrate Judge: (1) ignored case law holding that an automatic meal break deduction is not a *per se* FLSA violation (*citing Enright v. CGH Medical Center*, No. 96 C 50224, 1999 WL 24683, 1999 U.S. Dist. LEXIS 370, *16-*18 (N.D. Ill. Jan. 12, 1999)); (2) erred in determining that the alleged practice of defendant, Dick's Sporting Goods ("Dick's"), of reducing compensation for time worked by manipulating hours, was maintainable as a collective action, in the absence of a showing that the practice occurred on a nationwide basis; (3) further erred in finding that Dick's had a practice of reducing compensation for time worked by manipulating employee hours, since plaintiffs' only evidence consisted of two affidavits from employees of one Rochester, New York store, which, even if true, would have been in clear violation of Dick's national practices; (4) erred in finding that the Kronos computer system for employee time-keeping, used by both defendants, made plaintiffs "similarly situated" since defendants submitted affidavits indicating that only employees of Galyan's had an automatic meal deduction applied to them, and only prior to the merger of the two defendants; and (5) erred by finding evidence of a policy or practice whereby Dick's and Galyan's condoned, accepted, or encouraged managers and employees to illegally reduce compensation for time spent working, since the evidence produced would, at best, only apply to other employees in the plaintiffs' own locations or stores, and not throughout defendants' 255 stores in 34 states with approximately 16,000 non-exempt employees.

At this early stage, plaintiffs are required only to make a "modest factual showing sufficient to demonstrate that [they] and potential plaintiffs together were victims of a common policy or plan that violated the law," *Hoffmann*, 982 F. Supp. at 261. In that

regard, after reviewing the Magistrate Judge's decision and defendants' specific objections, the Court determines that the Magistrate Judge's Decision and Order is not "clearly erroneous or contrary to law." 28 U.S.C. § 636(b)(1)(A). The Magistrate Judge did not rule, as defendants maintain, that an automatic meal deduction was a *per se* violation of the FLSA. Rather, he stated that plaintiffs made a modest factual showing that it was defendants' policy to apply the automatic meal time deduction to employees who did not take a lunch break, or to adjust a short lunch break to a longer one, and that defendants failed to inform employees about how they could correct the automatic deduction when it was not appropriately applied. (Decision and Order, at 2-3.) The Court likewise rejects, as did the Magistrate Judge, defendants' argument that mini-trials over damages, that is, whether the individual employee plaintiff worked during a lunch break, or did not take a lunch break, or took a shorter lunch break than was automatically deducted from his or her time, disqualified the case from conditional certification. *See Scholtisek*, 229 F.R.D. at 392-93 (rejecting argument that class action would require "hundreds of mini-trials to resolve each particular employee's claims," on ground that "the fact that the various class members may have had different types of job duties has little or no bearing on" the issue of whether deductions made from their salaries were permissible). Plaintiffs contend that defendants had a policy, applied nationally, to automatically deduct a lunch period, regardless of whether the employee took a lunch period, and that they failed to train employees about the automatic deductions and how to add time back in for lunches missed. This issue does not require hundreds of individual factual determinations. As the Magistrate Judge correctly pointed out in his Decision and Order, at 14, the question of

factual hearings for damages is separate from certification of the class for liability purposes.

The remaining objections to the Magistrate Judge's conditional certification of the Class 1 plaintiffs pertain primarily to factual disputes defendants raise over plaintiffs' allegations that: (1) time sheet manipulation was performed on a nationwide basis; (2) Dick's had a nationwide practice of reducing compensation for time worked by manipulating employee hours in clear violation of its national practices; (3) the Kronos computer system operated similarly[1] for both defendants; (4) nationally, defendants condoned, accepted, or encouraged managers and employees to illegally reduce compensation for time spent working. As the Magistrate Judge pointed out in his Decision and Order, at 13, it is not the Court's role at this early stage to resolve factual disputes. In this regard, the discussion of the district court in the District of Massachusetts in *Trezvant v. Fid. Emplr. Servs. Corp.*, 434 F. Supp. 2d 40, 43 (D. Mass. 2006), is instructive:

> Usually, the initial stage determination is based "only on the pleadings and any affidavits which have been submitted." *Kane* [*v. Gage Merchandising Services, Inc.*], 138 F. Supp. 2d [212] at 214. As a result of the minimal evidence available, this determination is made using a fairly lenient standard, which typically results in conditional certification of the representative class. Id. At this stage, courts do not need "to make any findings of fact with respect to contradictory evidence presented by the parties or make any credibility determinations with respect to the evidence presented." *Kalish v. High Tech Inst., Inc.*, No. 04-1440, 2005 U.S. Dist. LEXIS 8238, at *7 (D.

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[1]The Court also agrees with the Magistrate Judge's finding that the potential plaintiffs are similarly situated, in part, because all used defendants' Kronos computer system for timekeeping, notwithstanding that only defendant Galyan's employees had an automatic meal deduction and that policy was only in effect prior to defendants' merger. Tamara Barrus, who submitted an affidavit in support of plaintiffs' motion, stated that she was employed by both defendant stores, and that, "[w]hile I was a salaried manager, I learned that Defendants maintained a policy which required that employees have time deducted for a lunch break when the employees did not clock out." (Barrus Aff. ¶ 8. (emphasis added)) The Court finds that defendants' contention raises a factual issue, but does not preclude consideration of the shared payroll system for the purpose of conditionally certifying this as a collective action.

Minn. Apr. 22, 2005) (internal quotation marks omitted).

Trezvant, 434 F. Supp. 2d at 43.

Turning to the second class of potential plaintiffs, defendants object to the Magistrate Judge's conclusion that employees' meal times were interrupted by work and, consequently, they worked during lunch hours without appropriate compensation, "ignored uncontested evidence submitted by defendants demonstrating that employee meal breaks are handled at the local store level by each individual department manager." (Statement of Objections to Decision and Order of the Magistrate Judge, at 6.) On this point, defendants rely, in part, on *Dudley v. Tex. Waste Sys.*, Civil Action No: SA-05-CA-0078-XR, 2005 WL 1140605, 2005 U.S. Dist. LEXIS 9168, *6-*8 (W.D. Tex. May 16, 2005). There, the district court held that,

> Defendant responds that it has a policy requiring that all employees should take a half-hour lunch break. If employees work more than 12 hours in one day, they are required to take a one hour lunch break. Drivers are informed that if they work through their lunch period, they are to advise management of that fact so they can be compensated for that working time. See Affidavit of Mel Kemp....

Id. However, in *Dudley*, the district court found that,

> Plaintiff presents no evidence refuting Defendant's written policy that employees were admonished to take their lunch breaks. Further, Plaintiff presents no evidence refuting the General Manager's testimony that drivers are informed that if they work through their lunch period, they are to advise management of that fact so they can be compensated for that working time.

Id. Here, plaintiff Barrus, in her Affidavit ¶¶ 17-25, specifically alleges that she, and other employees of defendants whom she observed, suffered interrupted lunches, for which they did not receive compensation. Therefore, the Magistrate Judge's decision to conditionally

certify the Class 2 potential plaintiffs for a collective action is not clearly erroneous or contrary to law.

The Court now turns its attention to the third class of potential plaintiffs in the amended complaint. Plaintiffs allege that its members received "comp time"[2] or straight hourly pay for time worked over forty hours per week, in violation of the FLSA. However, as to amendment with respect to this class, defendants contend that the Magistrate Judge erred, since the only two affidavits submitted, from Michael T. D'Agostino and Carolyn Caulkins, "do not support certification of this class." (Statement of Objections to Decision and Order of the Magistrate Judge, at 6.) Defendants contend "that neither affiant worked any overtime hours in the two-year FLSA statute of limitations period." (*Id.*) Further, defendants maintain that "both affiants' payroll records confirm that both employees were paid properly on occasions that they worked overtime and that their allegations of 'comp time' or 'retro pay' are simply wrong." (*Id.*, at 7.)

The Court disagrees with defendants' position and finds that the determination of the Magistrate Judge is not clearly erroneous or contrary to law. In his affirmation, Michael T. D'Agostino, who worked as a manager at two of Dick's locations, stated that "[e]mployees often worked over forty hours in a week. Instead of paying overtime for hours over 40, Defendants would often pay the person retro pay or offer comp time in the following week. Once or twice per month, I saw this happen." (D'Agostino Aff. ¶¶ 24-25.) Additionally, Ms. Caulkins stated in her affidavit:

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[2]It is apparent that the term refers to the practice of compensating an employee by giving him or her time off rather than overtime pay.

> 21. When I was an hourly employee, on some occasions I worked over forty hours in a week.
>
> 22. Instead of paying overtime for hours over 40, Defendant would often pay me retro pay at straight time rates in the following week.

(Caulkins Aff. ¶¶ 21-22.) Taken together, the affidavits of Mr. D'Agostino and Ms. Caulkins support plaintiffs' contentions as to Class 3.

Turning to the Magistrate Judge's decision granting of plaintiffs' motion (# 30) to compel, defendants contend that, pursuant to Federal Rule of Civil Procedure 37, it was premature. However, in his affidavit in support of the motion, Patrick J. Solomon, Esq., states that during a Rule 16(b) conference held before the Magistrate Judge, "defendants' counsel made clear that they intend to object to plaintiffs' discovery demands seeking the names and addresses of affected putative class members, should plaintiffs make such discovery demands. We discussed the issue in good faith and were unable to come to a resolution." (Solomon Aff. (Nov. 4, 2005) ¶ 4.) Rule 37 provides in pertinent part as follows:

> (A) If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action.

FED. R. CIV. P. 37(a)(2)(A). Defendants fail to set forth in particularity the basis for their objection, other than the argument that the motion was premature, and that it should be denied on the further ground that conditional certification should not have been granted. Since the Court has determined that conditional certification is appropriate, and since plaintiffs' counsel alleged in his application that defendants refused discovery after a good faith attempt to confer, the Court finds the Magistrate Judge properly granted the motion to compel.

Finally, defendants object to the proposed Notice. However, since the Magistrate Judge adopted it on the basis that defendants did not object to its contents, his decision is not clearly erroneous or contrary to law.

CONCLUSION

Defendants' objections (# 60) to the Magistrate Judge's Decision and Order (# 59) are denied. The Court affirms the Decision and Order (# 59) in all respects. This matter is remanded to the Magistrate Judge pursuant to the Court's earlier referral order.

DATED: November 3, 2006
Rochester, New York

ENTER.

/s/ Charles J. Siragusa
CHARLES J. SIRAGUSA
United States District Judge