UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

DANIELLE CURLEY,

Plaintiff,

v.

CUSTOMER CONNEXX LLC; ARCA, INC.,

Defendants.

Case No.: 2:18-cv-00233-APG-GWF

ORDER

Re: Motion for Circulation of Notice (ECF No. 19)

This matter is before the Court on Plaintiff's Motion for Circulation of Notice Pursuant to 29 U.S.C. § 216(b) (ECF No. 19), filed on February 5, 2019. Defendants filed their Opposition (ECF No. 25) on February 26, 2019, and Plaintiff filed her Reply (ECF No. 26) on March 5, 2019. The Court conducted a hearing in this matter on March 7, 2019.

BACKGROUND

Plaintiff Danielle Curley alleges that she was employed as a customer service representative at Defendants' call center in Las Vegas, Nevada from November 1, 2016 until August 1, 2017. She was an hourly paid, non-exempt employee who was paid $14.00 per hour. Plaintiff regularly worked an 8-hour shift, Monday through Friday from 8:00 A.M. until 4:30 P.M., with a half-hour unpaid lunch break. *Complaint* (ECF No. 1-1), at ¶¶ 12-14. Plaintiff alleges that prior to clocking-in at the start of her shift, she had to boot up her computer, load numerous programs to be used during the workday, and confirm that her phone was connected and ready to accept calls. She estimates that it took approximately 10 minutes to perform these activities. At the end of the workday, she had to clock-out of the timekeeping system, shut down

the various programs, power-off her computer, and then wait to confirm that all systems were powered down prior to leaving. She estimates that it took approximately 10 minutes to perform these activities after clocking-out. Plaintiff alleges that she is entitled to overtime pay for the approximately 20 minutes she worked each day off-the-clock. *Id.*, at ¶¶ 15-17.

Plaintiff alleges on information and belief that all call center employees employed by Defendants were similarly required to perform the same pre-shift and post-shift activities without compensation. *Id.* at ¶ 18. She therefore seeks to assert a collective action under the Fair Labor Standards Act ("FLSA") on behalf of the following class: "All hourly paid call center employees employed by Defendants in the United States at any time during the relevant time period." *Id.* at ¶ 22.

Plaintiff submitted a declaration in support of her motion for circulation of notice in which she states that to enter the call center facility, she had to swipe in with her employee badge. Upon arriving at a computer terminal, she would start the computer and wait for the boot-up process to complete. "On more occasions than not," she would have to call IT for assistance in booting up the computers because they were old. The IT personnel were also not experienced. It took her approximately 10 minutes from the time she sat down at her workstation until she "was able to clock in on the computer." She was not paid for this time. At the end of her workday, she clocked-out of the computer system, shut down all of her applications, and then tried to boot down the computer. She was not compensated for the time she worked after clocking-out, which was also 10 minutes. *Curley Declaration* (ECF No. 19-1), at ¶¶ 6-9.

Defendants submitted the declarations of 19 call center employees, plus the declaration of the call center Director, Betty Kamaka, in support of their opposition to the motion. *Opposition* (ECF No. 25), *Exhibits A-S, V.* These employees state that they are required to swipe in with their employee badges to enter the call center facility. Prior to November 2018, customer service representatives did not have assigned workstations and used different computers. Since then, the employees have assigned workstations and use the same computers. Upon reaching a workstation, it takes only a few seconds to open the computer timekeeping system and to "clock-

in." If the computer is turned-off, it takes a little more time, while the computer boots-up, before the employee can open the timekeeping program and clock-in. Generally, it takes no more than 30 seconds to boot up the computer, open the timekeeping system, and clock-in. Some employees state that it may take up to one minute to clock-in. The employees do not open any other work programs or log in to the telephone system before they clock-in. At the end of their shifts, the employees close their work programs and log out of the telephone system before they clock-out on the timekeeping system. Some employees leave their computers on when they leave work. Others turn the computer off, but are not required to wait to confirm that the computer has turned off before leaving the workstation. If the employees have difficulty clocking-in or clocking-out, or forget to clock-in or out, then they complete a form to correct their work hours — for which they are paid. The employees state that they have never been required to work off-the-clock.

Plaintiff submitted declarations from two employees of Defendants in support of her reply brief. Clarissa Dix states that she has been employed by Defendants since July 12, 2018. Upon arriving at the call center facility, she swipes in with her employee badge. "Once I arrive at the computer terminal, I start the computer and wait for the boot up process to complete. On more occasions than not, I have to call IT for assistance in booting up my computer because the computers are consistently broken. After my computer finally boots up, I then open up my work software applications, confirm that the phone is connected and ready to accept calls, and then clock in." *Dix Declaration* (ECF No. 26-1), at ¶ 6. Ms. Dix states that employees have to be at work at least 8 minutes before the start of their shift to be able to clock-in at their scheduled start times. If they do not, they will be marked late. Ms. Dix estimates that it takes her 10 minutes from the time she arrives at her workstation before she can clock in through the computer timekeeping system. She is not compensated for that time *Id.* at ¶ 7. At the end of her shift, it takes Ms. Dix approximately 10-15 minutes "from the time I clock out until the time I am actually free to leave my workstation after my computer programs have been closed and my computer has shut down completely. This happens every single day. I am not compensated for this time either." *Id.* at ¶ 9.

Rossalind Saxton states that she was employed by Defendants from October 23, 2017 until November 8, 2018. She was one of the supervisors, and regularly worked more than 40 hours per week. Ms. Saxton's description of the computer boot-up process is the same as that of Ms. Curley and Ms. Dix. She estimates that it took her approximately 10-15 minutes from the time she sat down at her workstation until she was able to clock-in on the computer. *Saxton Declaration* (ECF No. 26-2), at ¶¶ 4-7. Ms. Saxton states that "[a]t the end of my workday I would clock out of the computer system and then shut down all of my applications and then try and boot down the computer. I was told to wait to make sure that the computer shut down properly before I could leave my workstation." *Id.* at ¶ 8. It took her 6-8 minutes from the time she clocked-out until she was free to leave the workstation after the computer programs closed and her computer was shut down completely. She was not compensated for this time. *Id.* at ¶ 9.

Ms. Curley, Ms. Dix, and Ms. Saxton state that all other call center employees employed by Defendant have to clock-in and clock-out the same way, and none of the employees are paid for time spent working off-the-clock. They have observed other employees doing the same things they do to clock-in and out of the timekeeping system. *Dix Declaration* (ECF No. 26-1), at ¶ 12. *See also Saxton Declaration* (ECF No. 26-2), at ¶ 11; and *Curley Declaration* (ECF No. 19), at ¶ 11.

DISCUSSION

1. Whether Plaintiff Has Made A Sufficient Showing For Preliminary Certification Of An FLSA Opt-in Class.

In *Campbell v. City of Los Angeles*, 903 F.3d 1090, 1108-09 (9th Cir. 2018), the Ninth Circuit noted that district courts have arrived at a loose consensus for determining whether the collective action process under the FLSA is appropriate in a particular case. The court summarized and approved that process as follows:

> First, at or around the pleading stage, plaintiffs will typically move for preliminary certification. 1 McLaughlin on Class Actions § 2:16; 7B Fed. Prac. & Proc. Civ. § 1807. Preliminary certification, as noted, refers to the dissemination of notice to putative collective members, conditioned on a preliminary determination that the collective as defined in the complaint

> satisfies the "similarly situated" requirement of section 216(b). *Symczyk*, 569 U.S. at 75, 133 S.Ct. 1523. At this early stage of the litigation, the district court's analysis is typically focused on a review of the pleadings but may sometimes be supplemented by declarations or limited other evidence. *See, e.g.*, *Sheffield v. Orius Corp.*, 211 F.R.D. 411, 413 (D. Or. 2002). The level of consideration is "lenient," *Camesi v. Univ. of Pittsburgh Med. Ctr.*, 729 F.3d 239, 243 (3d Cir. 2013); *Anderson v. Cagle's, Inc.*, 488 F.3d 945, 953 (11th Cir. 2007)—sometimes articulated as requiring "substantial allegations," sometimes as turning on a "reasonable basis," but in any event loosely akin to a plausibility standard, commensurate with the stage of the proceedings. *See, e.g.*, *Halle*, 842 F.3d at 224; *Morgan*, 551 F.3d at 1260 n.38; *Thiessen*, 267 F.3d at 1105; *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1214 (5th Cir. 1995), *overruled on other grounds by Desert Palace, Inc. v. Costa*, 539 U.S. 90, 123 S.Ct. 2148, 156 L.Ed.2d 84 (2003); *cf.* Fed. R. Civ. P. 12(b)(6); *Ashcroft v. Iqbal*, 556 U.S. 662, 679, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009).
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> A grant of preliminary certification results in the dissemination of a court-approved notice to the putative collective action members, advising them that they must affirmatively opt in to participate in the litigation. 1 McLaughlin on Class Actions § 2:16; 7B Fed. Prac. & Proc. Civ. § 1807; *see also Hoffmann-La Roche*, 493 U.S. at 170–71, 110 S.Ct. 482. A denial of preliminary certification precludes dissemination of any such notice. Denial of preliminary certification may be without prejudice and may be revisited by the district court after further discovery. *Halle*, 842 F.3d at 225; *see, e.g.*, *D'Anna v. M/A-COM, Inc.*, 903 F.Supp. 889, 894 (D. Md. 1995). Or it may be with prejudice, in which case, if premised on the party plaintiffs' failure to satisfy the "similarly situated" requirement of section 216(b), it functions as an unfavorable adjudication of the right to proceed in a collective. *Mickles*, 887 F.3d at 1280; *see also Sandoz*, 553 F.3d at 915 n.2. In such cases, if opt-in plaintiffs have already joined, they will be dismissed without prejudice to the merits of their individual FLSA claims, and the original plaintiff will be left to litigate alone. *Mickles*, 887 F.3d at 1280 (citing examples).

The court also described the process by which a preliminarily-certified collective action may be decertified after the close of discovery. Decertification resembles a motion for summary judgment. *Id.*, at 1109.

"Although a lenient standard is applied at the initial stage, a plaintiff does not meet her burden through unsupported assertions of widespread violations." *Lewis v. Nevada Property 1, LLC*, 2013 WL 237098, at *8 (D.Nev. Jan. 22, 2013) (citing *Edwards v. City of Long Beach*, 467 F.Supp.2d 986, 990 (C.D.Cal.2006); *Bernard v. Household Intern., Inc.*, 231 F.Supp.2d 433, 435 (E.D.Va.2002) ('Mere allegations will not suffice; some factual evidence is necessary'); and *Smith v. Sovereign Bancorp., Inc.*, 2003 WL 22701017, *2 (E.D.Pa.2003) (same)). "Affidavits

in support of a motion for conditional certification must be based on the affiant's personal knowledge, which may be inferred based on what the affiant would have probably learned during the normal course of employment." *Id.* (citing *White v. MPW Industrial Services, Inc.*, 236 F.R.D. 363, 369 (E.D.Tenn.2006)). "The court, however, does not resolve factual disputes, decide substantive issues on the merits or make credibility determinations at the first stage." *Id.* (citing *Fisher v. Michigan Bell Telephone Co.*, 665 F.Supp.2d 819, 826 (E.D.Mich.2009); *Byard v. Verizon West Virginia, Inc.*, 2012 WL 5249159 at *5 (N.D.W.Va. Oct. 24. 2012)).

Most district courts do not require a plaintiff to show that other individuals within the putative class desire to opt-in to the proposed collective action. *Guy v. Casal Institute of Nevada, LLC ("Casal")*, 2014 WL 1899006, at *4 (D.Nev. May 12, 2014) (citing *Davis v. Westgate Planet Hollywood Las Vegas*, 2009 WL 102735, *12 (D.Nev.2008); *Kiser v. Pride Communications, Inc.*, 2011 WL 3841021, *2 (D.Nev.2011); *Hoffman v. Securitas Security Services*, 2008 WL 5054684, *5 (D.Idaho 2008); *Mowdy v. Beneto Bulk Transp.*, 2008 WL 901546, *7 (N.D.Cal.2008); and *Davis v. Social Service Coordinators, Inc.*, 2012 WL 5361746, *20 (E.D.Cal.2012)). As the court explained in *Heckler v. DK Funding*, 502 F.Supp.2d 777, 780 (N.D.Ill.2007), requiring a plaintiff to produce evidence that other individuals desire to opt-in "would essentially force plaintiffs or their attorneys to issue their own form of informal notice or to otherwise go out and solicit other plaintiffs. This would undermine a court's ability to provide potential plaintiffs with a fair and accurate notice and would leave significant opportunity for misleading potential plaintiffs."

Because a plaintiff's attorney generally does not have wide access to the defendants' employees, he or she is often unable to provide substantial numbers of declarations to support a motion for preliminary certification. The defendant, on the other hand, has access to its employees and may be able to submit substantially more declarations in opposition to the motion for preliminary certification than plaintiff can to support of it. The defendant's ability to obtain more employee declarations does not mean, however, that the plaintiff's claims lack factual merit. Such a determination cannot be made until after plaintiff has had the opportunity to send notice to putative class members and conduct discovery. The declarations submitted by Plaintiff

and her witnesses satisfy the "similarly situated" requirement of section 216(b) to permit this action to be preliminarily certified as a collective action.

2. Scope Of Opt-in Class.

Plaintiff's proposed opt-in class is, however, vague and overbroad. Plaintiff describes the proposed opt-in class as consisting of individuals who were employed by Defendants anywhere in the "U.S." at any time from January 3, 2015 to the present, and who were hourly paid call center employees. No evidence has been presented that Defendants operate any call centers other than the one in Las Vegas, Nevada. Assuming that Defendants operate other call centers, no showing has been made that they impose the same policies, practices, or procedures for clocking-in and clocking-out of a computer timekeeping system. The collective action will therefore be limited to hourly paid employees in Defendants' Las Vegas, Nevada call center.

Defendants argue that the class should also be limited to customer service representatives. The declarations of Plaintiff, Ms. Dix and Ms. Saxton, as well as the declarations of employees submitted by Defendants, show that hourly paid employees in other positions used the same computer timekeeping system, and, therefore, were allegedly subjected to the same policy or practice of being required to work "off-the-clock" without compensation. The description of the opt-in class in the notice to be sent to current and former employees should state that they may participate in the lawsuit if they were hourly paid employees who performed unpaid work prior to clocking into the timekeeping system, and/or after clocking out of the timekeeping system.

3. Limitations Period.

29 U.S.C. § 255(a) provides that an action may be commenced within two years after the cause of action accrued, "except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued." Defendants argue that there is no proof that they have willfully violated the FLSA, and argue that their actual policies and practices evince a good faith effort to comply with the law. They, therefore, argue that the collective action should be limited to claims for unpaid wages that accrued within two years before the complaint was filed. At this stage, the Court cannot determine whether Defendants'

alleged violations of the FLSA were willful or not. If the Plaintiff proves that Defendants intentionally required employees to perform off-the-clock work for which they were not paid, then a claim for willful violation of the statue may be established. If not, the court will decertify the opt-in class with respect to claims that accrued more than two years before the complaint was filed.

4. Equitable Tolling.

Plaintiff requests that the running of the statute of limitations be tolled from the date the motion for circulation of notice was filed through the end of the notice period. Federal courts have applied equitable tolling in two situations: (1) when the plaintiffs are prevented from asserting their claims by some wrongful conduct on the part of the defendant; or (2) when extraordinary circumstances beyond plaintiffs' control make it impossible to file the claims on time. *Davis v. Westgate Planet Hollywood*, 2009 WL 102735, *14 (D.Nev.2009) (citing *Alvarez–Machain v. United States*, 107 F.3d 696, 701 (9th Cir.1996)). Judges in this district have not tolled the running of the statute of limitations where the defendant has filed a nonfrivolous opposition to the motion for conditional certification of the FLSA class. *Casal*, 2014 WL 1899006, at *9 (citing *Davis v. Westgate Planet Hollywood*, at *14; *Phelps v. MC Communications, Inc.*, 2011 WL 3298414, *8 (D.Nev.2011) (tolling not warranted); *Williams v. Trendwest Resorts, Inc.*, 2006 WL 3690686, *8 (D.Nev.2006) (tolling not warranted); and *Lewis v. Nevada Property 1*, 2013 WL 237098, *14–15 (D.Nev.2013)). In *Phelps*, the court stated that "the fact that Defendants opposed the motion to circulate notice did not, in and of itself, preclude any potential plaintiff from asserting his or her claim." 2011 WL 3298414, at *8. Defendants' opposition to the motion in this case is not frivolous. They have raised valid objections to the scope of the class, the form of the notice, and the opt-in period. Tolling the statute of limitations from the date that Plaintiff filed her motion is therefore not warranted.

The court's delay in deciding a motion for preliminary certification, however, justifies tolling of the statute of limitations for the time period resulting from that delay. *Casal*, at *9 (citing *Lucas v. Bell Trans*, 2010 WL 3895924, *5 (D.Nev.2010) and *Small v. University Medical Center*, 2013 WL 3043454, *3–4 (D.Nev.2013)). In *Small*, the court tolled the running

of the statute of limitations from the date that the motion became ripe for decision until the date that defendant provided the employee contact information to plaintiff's counsel, or the date that an opt-in plaintiff filed his/her consent to join the action, whichever occurred earlier. The statute of limitations was not tolled as to any plaintiff whose consent to join the action was filed before the tolling period began.

Plaintiff's motion was filed on February 5, 2019, and it was ripe for decision once briefing was complete on March 5, 2019. In accordance with *Small*, the Court will toll the running of the statute of limitations from March 5, 2019 through the date that Defendants provide Plaintiff's counsel with the last known addresses of the potential class members. If a class member files his/her consent to join the action before the date that Defendants provide the address information to Plaintiffs, then the tolling of the statute of limitations with respect to that class member shall end on the date his/her consent is filed.

5. Opt-In Period.

Plaintiff's draft notice does not state the time period that potential opt-in plaintiffs have to file their consents to join the action after the notice of the action is mailed. No information has been provided regarding the number of potential class members or what impediments may exist in providing them with notice of the action. Given the reasonable likelihood that many potential class members are no longer employed by Defendants, an opt-in period of 90 day is reasonable.

6. Mailing/Emailing of Notice.

Defendants object to the notices being sent to employees by email. As stated in *Casal*, at *7, email is an efficient, reasonable, and low cost form of notice. At one time, email was an unusual method for corresponding with another person. Today, however, many people use email or other electronic media as their primary means of written communication. Defendants have not made any showing that they do not have reasonable access to the email addresses of current and former employees. Defendants are, therefore, ordered to provide Plaintiff's counsel with both the last known mailing addresses and email addresses for current and former employees within the defined class. Plaintiff shall send the court authorized notice and consent forms to potential class members by regular first class mail and/or by email. Accordingly,

IT IS HEREBY ORDERED that Plaintiff's Motion for Circulation of Notice Pursuant to 29 U.S.C. § 216(b) (ECF No. 19) is **granted** as follows:

1. The Court conditionally certifies a FLSA collective action class consisting of Defendants current and former hourly paid employees who worked in Defendants' Las Vegas, Nevada call center between January 3, 2015 and the present, and who were allegedly required to perform unpaid work prior to clocking-in on the computer timekeeping system, and/or after clocking-out of the computer timekeeping system.

2. Plaintiff is authorized to send written "Notice of the Pendency of Collective Action Lawsuit Under the Fair Labor Standards Act" (hereinafter "Notice") and "Consent to Join Pursuant to 29 U.S.C. § 216(b)" (hereinafter "Consent") to potential class members. The Notice shall include an opt-in period of ninety (90) days, and shall inform the recipients of their obligation to participate in discovery or appear at trial if they opt-in. The Notice shall not include the signature of the District Judge or Magistrate Judge. In *Guy v. Casal Institute of Nevada, LLC*, Case No. 2:13-cv-02263-RFB-GWF, ECF No. 31, the Court approved the Notice and Consent forms set forth therein. The Court will approve substantially similar Notice and Consent forms that otherwise comply with this order. Plaintiff shall file the revised Notice and Consent forms with the Court Clerk within ten (10) days of the date of this order.

3. Defendants shall provide Plaintiff's counsel with the names and last known mailing addresses and email addresses of the potential collective action class members within thirty (30) days from the date of this order. The date for providing such information may be extended by order of the Court pursuant to a stipulation between the parties, or upon motion for good cause shown.

4. Plaintiff shall send the Notice to the potential collective action class members within fourteen (14) days after receiving the address information from Defendants. Plaintiff shall also promptly file a statement with the Court Clerk certifying the date that the Notice was sent to the potential class members.

5. Plaintiff is required to file with the Court Clerk all Consents to Join Pursuant to 29 U.S.C. § 216(b) within ninety (90) days from the date that the Notice was sent to the collective

action class members. Any individual whose Consent is filed after the expiration of the deadline shall not be allowed to participate as a plaintiff in this action, unless for good cause shown, the Court enters an order permitting the individual to participate.

6. The running of the statute of limitations on the claims of potential collective action class members is tolled from March 5, 2019 until the date that Defendants provide the address information for the potential collective action class members to Plaintiff, or until the date that an individual's Consent is filed with the Court Clerk if it occurs prior to the date that Defendants' provided the address information for the potential class members.

DATED this 13th day of May, 2019.

George Foley Jr.

GEORGE FOLEY, JR.
UNITED STATES MAGISTRATE JUDGE