UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SHANELL HODGES,

Plaintiff,

v.

Case No. 1:19-cv-81
Hon. Paul L. Maloney

77 GRANDVILLE, INC., *et al.*,

Defendants.
_____/

ORDER GRANTING, IN PART, PLAINTIFF'S MOTION FOR CONDITIONAL CERTIFICATION OF A COLLECTIVE ACTION PURSUANT TO 29 U.S.C. § 216(b)

Plaintiff, Shanell Hodges, has filed a "Class and Collective Action Complaint and Jury Demand" against defendants 77 Grandville, Inc., Kris Elliott and Dax Hylarides for alleged violations of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq*. and M.C.L. § 408.414 (minimum hourly wage rate). Compl. (ECF. No. 1). This matter is now before the Court on plaintiff's "Motion for expedited consideration" (ECF No. 16) and "Motion for conditional class certification and to send notice to similarly situated employees" (ECF No. 18). These motions have been referred to the undersigned for decision pursuant to 28 U.S.C. § 636(b)(1)(A).

I. The Amended Complaint

Plaintiff filed an amended complaint which set forth the following allegations. Defendants operate the Grand Woods Lounge, a restaurant and bar located in Grand Rapids, Michigan. Amend Compl. at PageID.91. Plaintiff and the similarly-situated persons she seeks to represent are current and former bartenders and servers employed by defendants at Grand Woods Lounge. *Id.* at PageID.91. Plaintiff alleged that "[a]ll bartenders and servers at defendants'

business, including plaintiff, have been subject to the same employment policies and practices, including policies and practices with respect to wages, tips, and overtime. *Id.*

Plaintiff began her employment at Grand Woods Lounge on or about March 8, 2017. PageID.100. She was hired as a server and paid the Michigan tipped minimum wage. *Id.* In 2017, when working as a server, defendants required plaintiff to "tip out" a percentage of her *total* sales to the bartenders (3%), security staff (2%), bar backs (2%), and hostesses (2%), and a percentage of her *food* sales to kitchen staff (2%). *Id.* In 2018, when working as a server, defendants required plaintiff to "tip out" a percentage of her *total* sales to security staff (2%), bar backs (2%), and hostesses (2%), and a percentage of her *food* sales to kitchen staff (2%). *Id.*

Plaintiff also worked shifts as a bartender. *Id.* at PageID.101. She alleged that, "Bartenders were required to pool their tips. Managers participated in the tip pool in equal shares to bartenders." *Id.* When plaintiff worked as a bartender, defendants required her to share her tips with the managers. *Id.* Defendants did not provide plaintiff with an opportunity to correctly report her tipped earnings; rather "[d]efendants reported an arbitrary amount of tips each shift for plaintiff and similarly situated bartenders and servers." *Id.*

After her shift, plaintiff was required to stay and clean the restaurant. *Id.* When plaintiff was assigned to a closing shift, she was paid until 3:00 a.m. *Id.* She was not permitted to report the actual end time of her shift and frequently worked until 4:30 or later. *Id.* She did not have an opportunity to earn tips after 2:30 a.m., but was paid only the minimum tipped wage from 2:30 a.m. to 3:00 a.m. for time spent cleaning the restaurant. *Id.*

For the pay period of April 23 to May 6, 2018, plaintiff worked 82.5 hours, but was only paid for 73.25 hours. *Id.* She was not paid for all hours worked or paid overtime for working more than 40 hours per week. *Id.* For the pay period of May 7 to May 20, 2018, plaintiff worked

88.5 hours, but was only paid for 81.5 hours. *Id.* at PageID.102. Once again, she was not paid for all hours worked or paid overtime for working more than 40 hours per week. *Id.* Plaintiff states that she worked an average of 4.16 hours per week without compensation. *Id.* Although it is not entirely clear from the complaint, it appears that this pay deficit arose from March 17 until December 1, 2018.[1]

Plaintiff stated that on or about August 28, 2018, she was required to work a two-hour cleaning shift without pay. *Id.* Plaintiff also stated that she was required to attend a 2.5 hour training session at the Grand Woods Lounge on October 16, 2018. *Id.* She was not paid to attend the training, told that if she did not complete the training she would be terminated, and stated that she was required to pay defendants $35.00 to attend the training. *Id.*

Plaintiff has alleged three counts. Counts I and II involve the FLSA claims. In ¶108, plaintiff set forth "Collective Action Allegations" involving other employees as follows:

> 108. Plaintiff brings Count I and II on behalf of herself and all similarly situated current and former bartenders and servers employed at the Grand Woods Lounge, operated, and controlled by defendants, during the three years prior to the filing of this Class Action Complaint and the date of final judgment in this matter, who elect to opt-in to this action (the "FLSA Collective").

PageID.102. In Count I, plaintiff alleged on behalf of herself and the FLSA Collective that defendants failed to pay them minimum wages in violation of FLSA. *Id.* at PageID.107-109. In Count II, plaintiff alleged on behalf of herself and the FLSA collective that defendants failed to pay them overtime wages in violation of the FLSA. *Id.* at PageID.109.

Count III involves Michigan's minimum wage act. In ¶ 118, plaintiff set forth the Class action allegations involving other employees as follows:

[1] Plaintiff stated that she attached a copy of her hours worked from March 17 until December 1, 2018 as Exhibit 2 to the amended complaint. Amend. Compl. (ECF No. 15, PageID.102). However, there is no Exhibit 2 attached. Plaintiff did attach an Exhibit 2 to the original complaint. Exhibit (ECF No. 1-2, PageID.32).

> 118. Plaintiff brings Count III under Federal Rule of Civil Procedure 23, on behalf of herself and a class of persons consisting of:
>
> > All current and former bartenders and servers employed by defendants at the Grand Woods Lounge in the State of Michigan between the date three years prior to the filing of this action and the date of final judgment in this matter ("Rule 23 Class").

PageID.104. In Count III, plaintiff alleged on behalf of herself and Rule 23 Class Members that defendants failed to pay them minimum wage in violation of M.C.L. § 408.414. *Id.* at PageID.109-111. Plaintiff seeks damages and injunctive relief.

II. Plaintiff's motion for expedited consideration

Plaintiff has moved to expedite consideration of her motion for conditional certification (ECF No. 16). W.D. Mich. LCivR 7.1(e) provides that a party may request expedited consideration "[w]here the relief requested by a motion may be rendered moot before the motion is briefed in accordance with the schedules set forth herein." Plaintiff's motion for conditional certification was not subject to expedited consideration under this rule. Accordingly, plaintiff's motion (ECF No. 16) is **DENIED**.[2]

III. Plaintiff's motion for conditional certification

A. Legal Standard

This Court previously set forth the standard of review for conditional certification of a collective action under the FLSA in *Jesiek v. Fire Pros, Inc.*, 275 F.R.D. 242 (W.D. Mich. 2011), which provides in pertinent part:

> The FLSA requires covered employers to pay their nonexempt employees at a rate of time-and-a-half for all hours worked each week over forty hours. 29 U.S.C. § 207(a)(1); *Whisman v. Ford Motor Co.*, 157 Fed.Appx. 792, 796 (6th Cir. 2005) (unpublished). When an employer violates this provision, the FLSA authorizes an employee to sue his or her employer "for and in behalf of himself or themselves and other employees similarly situated." 29 U.S.C. § 216(b). A suit

[2] The Court has addressed plaintiff's motion in the regular course of business, based upon the other civil and criminal matters pending on its docket.

> brought under § 216(b) is called a "collective action" and is distinct from a "class action" suit brought under Fed. R. Civ. P. 23. *Comer v. Wal–Mart Stores, Inc.*, 454 F.3d 544, 546 (6th Cir. 2006). FLSA collective action suits are not subject to the numerosity, commonality, typicality, and representativeness requirements of class action suits. *See O'Brien v. Ed Donnelly Enters., Inc.*, 575 F.3d 567, 584 (6th Cir. 2009). Also, unlike class actions where plaintiffs may opt out of the suit, in a collective action, putative plaintiffs must opt into the suit. *Id*. at 583. "These opt-in employees are party plaintiffs, unlike absent class members in a Rule 23 class action." *Id*.

Jesiek, 275 F.R.D. at 244.

For an action to proceed as a collective action under §216(b), the court must be satisfied that all the plaintiffs are "similarly situated." *Id.* "Federal courts typically follow a two-stage certification process for determining whether all plaintiffs are similarly situated." *Id.* at 244-45. The first stage has been referred to as the "notice stage" or "conditional certification stage" and takes place at the beginning of discovery. *Id.* at 245. "The purpose of the first stage, or conditional certification, is to provide notice to potential plaintiffs and to present them with an opportunity to opt in." *Id.* (internal quotation marks omitted). The second stage occurs after all the opt-in forms have been received and discovery has closed, and is sometimes referred to as "final certification." *Id.* "In determining whether to grant a motion at the first stage, a court does not resolve factual disputes, decide substantive issues going to the ultimate merits, or make credibility determinations. Rather, those tasks are addressed at the second stage." *Id.* at 246 (internal citation and quotation marks omitted).

Here, there has been no discovery. Plaintiff has filed an affidavit to establish the factual basis for conditional certification (ECF No. 19-2). In their response, defendants state that "at this early stage of litigation, Defendants do not oppose Plaintiff's Motion for Conditional Collective Class Certification." Defendants' Response (ECF No. 24, PageID.192). Accordingly,

plaintiff's motion for conditional certification as to the class identified in the opt-in notice will be granted in part. *See* discussion, *infra*.

B. Objections to the form of the notice

While defendants do not object to the conditional collective class certification, they object to portions of the opt-in notice:

> (1) the exclusion from Plaintiff's proposed notice of certain factual information because it does not provide potential members of the collective action with a full and complete understanding of the litigation process;
>
> (2) Plaintiff's proposed posting of a notice of the collective action in Defendant's place of business because it is unnecessary, punitive, and misleading; and
>
> (3) Plaintiff's proposal that her counsel be allowed to contact the potential members of the collective action up to four times, because such multiple contacts are "encouragement" that are contrary to the purpose of granting conditional certification.

Id. Defendants ask that the Court amend plaintiff's proposed notice because "it is inconsistent with the purpose of FLSA Collective Actions Notices." *Id.* Plaintiff has submitted a counter-proposal to the litigation process portion of the brief, but "continues to seek notice via workplace posting, first class mail, email, and plaintiff contends that a phone call is a reasonable, effective means of notifying the putative class", and contends that "[d]efendants' objections to plaintiff's means of notice is merely an attempt to limit the class size and the defendants' liability." Plaintiff's Reply (ECF No. 26, PageID.206-207).

1. The members of the collective action

Plaintiff's amended complaint does not set forth a comprehensive definition of the collective class. As discussed, ¶ 108 of the amended complaint refers to "all similarly situated current and former bartenders and servers employed at the Grand Woods Lounge, operated, and controlled by defendants, during the three years prior to the filing of this Class Action Complaint

and the date of final judgment in this matter, who elect to opt-in to this action (the "FLSA Collective")." This is the group identified in plaintiff's brief. *See* Plaintiff's Brief (ECF No. 19, PageID.124).

However, a more comprehensive definition of the collective class is set forth in the proposed notice as follows:

> You may join this lawsuit if you were employed by The Grand Woods Lounge in the last three years and meet any of the following requirements:
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> (1) you were employed as a server, paid the tipped minimum wage [FN 1], and you were required to tip out a portion of your tips to kitchen staff, security, and hosts, or
>
> (2) you were employed as a bartender, paid the tipped minimum wage, and you were required to share your tips with managers, or
>
> (3) you were employed as a server or bartender, paid the tipped minimum wage, and were not informed that your employer was claiming a tip credit in order to pay you the tipped minimum wage and were not told that you had the right to keep all tips you received, or
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> (4) you were employed as a server or bartender at The Grand Woods Lounge and were not paid overtime, or
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> (5) you were employed as a server or bartender who was required to work hours beyond closing time, but only received pay until 3:00 a.m.
> [FN 1] The Michigan minimum wage:
>
> January 1, 2016 was $8.50 per hour and $3.23 per hour for tipped employees
> January 1, 2017 was $8.90 per hour and $3.38 per hour for tipped employees
> January 1, 2018 was $9.25 per hour and $3.52 per hour for tipped employees
> March 29, 2019 was $9.45 per hour and $3.59 for tipped employees.
>
> The federal minimum wage from 2015 to present was $7.25 per hour and $2.13 for tipped employees.

Notice (ECF No. 19-5, PageID.143-144). This comprehensive definition of the collective class set forth in the notice is a fair summary of the class of employees described in the first 137 paragraphs of the amended complaint. Based on the parties' filings, the Court will adopt this definition as set forth in the notice.

2. Factual information about the litigation process

Plaintiff's proposed notice provides the following language with respect to the litigation process:

> If you choose to join this lawsuit, you will be bound by any judgment on any claim you may have under the FLSA, whether favorable or unfavorable. While the lawsuit is proceeding, you may be required to respond to discovery requests.

Proposed Notice (ECF No. 19-5, PageID.143). Defendants contend that the second sentence regarding "discovery requests" may be misleading or meaningless to potential plaintiffs, and suggest the following substitute language:

> While the lawsuit is proceeding, you may be required to respond under oath to interrogatories (written questions), to produce documents, to have your deposition taken, and/or to testify in court at a hearing or trial.

Defendants' Response (ECF No. 24, PageID.193). Plaintiff has submitted the following counter-proposal for the litigation process language:

> While the lawsuit is proceeding, you may be required to respond to written questions, sit for a deposition, and testify in court.

Plaintiff's Reply Brief (ECF No. 26, PageID.207).

The Court has approved language similar to that proposed by defendants.[3] Such language advises potential plaintiffs of their responsibilities in future proceedings, and makes it

[3] *See Neibarger v. The Auto Club Group*, 1:16-cv-1196 (Notice) (ECF No. 6-2) (notice as modified in Orders (ECF Nos. 34 and 45) ("While the lawsuit is proceeding, you may be required to respond under oath to written questions, to have your deposition taken, to produce documents, and/or to testify in court at a trial or hearing at the United States federal courthouse in Kalamazoo, Michigan or Grand Rapids, Michigan.").

clear that they are not passive observers. *See Cameron-Grant v. Maxim Healthcare Services, Inc.*, 347 F.3d 1240, 1249 (11th Cir. 2003) ("[I]n contrast to Rule 23 class actions, the existence of a collective action under §216(b) does depend on the active participation of other plaintiffs. In other words, under §216(b), the named plaintiff does not have the right to act in a role analogous to the private attorney general concept."). Accordingly, plaintiff is directed to delete the second sentence of her litigation process paragraph and insert the sentence proposed by defendants.

3. Workplace Notice

Defendants ask that the Court deny plaintiff's request to post a workplace notice at Grand Woods Lounge because it is unnecessary and punitive. In *McKinstry v. Developmental Essential Services, Inc.*, No. 2:16-CV-12565, 2017 WL 815666 at *3 (E.D. Mich. March 2, 2017), the court pointed out that requiring defendants to post an FLSA opt-in notice in a location where it can be seen by current workers "is unnecessary and punitive given the other channels of notice available." The Court agrees. For that reason, plaintiff's request to post the notice in defendants' business is denied.

4. Email and telephone contacts

In her motion, plaintiff proposes "that the notice be disseminated once by mail, a first attempt by email, with a second attempt after 60 days, and once by phone, if mail and email are unsuccessful." Plaintiff's Brief (ECF No. 19, PageID.127-128). Defendants do not object to plaintiff disseminating one copy of the notice by mail and email. Defendants' Response (ECF No. 24, PageID.197). However, defendants ask the Court to deny plaintiff's request for a second email and a phone call "because they are unnecessary reminders that are contrary to the purpose of granting conditional certification." *Id.* Based on this record, the Court concludes that sending the notice by first class mail and email is adequate. "In FLSA cases, first-class mail is generally

considered to be the 'best notice practicable' to ensure that proper notice is received by potential class members." *Lindberg v. UHS of Lakeside, LLC*, 761 F. Supp. 2d 752, 765 (W.D. Tenn. 2011). However, the Court reserves the right to address an alternative method of notice if plaintiff demonstrates that notice has been ineffective with respect to a specific individual, *e.g.*, if defendants fail to produce the contact information, fail to provide complete contact information, or fail to provide accurate contact information.

C. Conclusion

Accordingly, plaintiff's motion for conditional certification of a collective action (ECF No. 18) is **GRANTED IN PART** as follows:

First, the Court conditionally certifies a collective action for failure to pay minimum wages and failure to pay overtime wages pursuant to 29 U.S.C. § 216(b) as follows:

> You may join this lawsuit if you were employed by The Grand Woods Lounge in the last three years and meet any of the following requirements:
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> (1) you were employed as a server, paid the tipped minimum wage [FN 1], and you were required to tip out a portion of your tips to kitchen staff, security, and hosts, or
>
> (2) you were employed as a bartender, paid the tipped minimum wage, and you were required to share your tips with managers, or
>
> (3) you were employed as a server or bartender, paid the tipped minimum wage, and were not informed that your employer was claiming a tip credit in order to pay you the tipped minimum wage and were not told that you had the right to keep all tips you received, or
>
> (4) you were employed as a server or bartender at The Grand Woods Lounge and were not paid overtime, or
>
> (5) you were employed as a server or bartender who was required to work hours beyond closing time, but only received pay until 3:00 a.m.
>
> [FN 1] The Michigan minimum wage:

> January 1, 2016 was $8.50 per hour and $3.23 per hour for tipped employees
> January 1, 2017 was $8.90 per hour and $3.38 per hour for tipped employees
> January 1, 2018 was $9.25 per hour and $3.52 per hour for tipped employees
> March 29, 2019 was $9.45 per hour and $3.59 for tipped employees.
>
> The federal minimum wage from 2015 to present was $7.25 per hour and $2.13 for tipped employees.

Second, defendants are directed to provide plaintiffs with the name and contact information for all potential class members within 14 days after entry of this order.

Third, the potential class members shall have a 90-day opt-in period.

Fourth, the proposed notice shall delete the sentence:

> "While the lawsuit is proceeding, you may be required to respond to discovery requests."

and insert the following sentence in its place:

> "While the lawsuit is proceeding, you may be required to respond under oath to interrogatories (written questions), to produce documents, to have your deposition taken, and/or to testify in court at a hearing or trial."

Fifth, plaintiff is authorized to disseminate the notice **ONLY** via first class mail and one (1) email. The Court may allow an alternative method of notice to a particular class member if defendants fail to produce the contact information, fail to provide incomplete contact information, or fail to provide accurate contact information.

IT IS SO ORDERED.

Dated: October 18, 2019

/s/ Ray Kent
United States Magistrate Judge