IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
MILWAUKEE DIVISION

Jason Patzfahl, *On behalf of himself and those similarly situated*, Plaintiff, v. FSM ZA, LLC, *et al.*, Defendants.	Case No. 2:20-cv-1202 Judge Lynn S. Adelman

PLAINTIFF'S REPLY MEMORANDUM IN SUPPORT OF HIS RENEWED MOTION TO SEND NOTICE TO SIMILARLY SITUATED EMPLOYEES

Defendants FSM ZA, LLC, Perfect Timing, LLC, and Garrett Burns ("Defendants") have no material argument that the delivery drivers who work for them are not "similarly situated" to one another when it comes to Defendants' reimbursement and compensation policies. In fact, Defendants have admitted as much in discovery. But, in an attempt to distract the Court from this :similarly situated" inquiry, Defendants' Opposition resorts to flawed procedural arguments that several courts have previously rejected and premature arguments about the merits of Plaintiff's claims. The resultant legal standard proposed by Defendants' Opposition would require Plaintiff to prove his case at the FLSA notice stage, placing an evidentiary hurdle in front of Plaintiff that runs afoul of the FLSA.

Plaintiff has made the necessary "modest factual showing" that Defendants' delivery drivers are "similarly situated" with respect to the company's automobile expense reimbursement

policy. The Court should approve notice to be sent to Defendants' delivery drivers consistent with the weight of authority holding that conditional certification is appropriate across multiple pizza franchise stores in nearly identical cases. *See, e.g., Meetz v. Wis. Hosp. Grp. LLC*, No. 16-C-1313, 2017 U.S. Dist. LEXIS 138380, at *6-7 (E.D. Wis. Aug. 29, 2017). *Thomas v. Papa John's International, Inc.*, No. 1:17-cv-411, 2019 U.S. Dist. LEXIS 171728 (S.D. Ohio Sept. 29, 2019) (granting conditional certification of delivery drivers asserting same claims based on a single declaration); *Brandenburg v. Cousin Vinny's Pizza, LLC*, No. 3:16-cv-516, 2017 U.S. Dist. LEXIS 129955, *3 (S.D. Ohio Aug. 14, 2017) (granting conditional certification of delivery drivers asserting same claims based on a single declaration); *Waters v. Pizza to You, et al.*, No. 3:19-cv-372, 2020 U.S. Dist. LEXIS 39913 (S.D. Ohio Mar. 9, 2020) (granting conditional certification of delivery drivers asserting the same claims based on two declarations); *Brandenburg v. Cousin Vinny's Pizza, LLC*, No. 3:16-cv-516, 2018 U.S. Dist. LEXIS 189878 (S.D. Ohio Nov. 6, 2018) ("*Brandenburg* II").

1. Standard for Conditional Certification

Defendants' Opposition tries to conflate the "similarly situated" standard with a summary judgment standard. Specifically, Defendants claim Plaintiff failed to plausibly demonstrate a minimum wage violation, and therefore has not met the standard for conditional certification. *See* Doc. 13 at Page 13. In effect, Defendants argue Plaintiff must prove his case, as if Plaintiff's claims are subject to a summary judgment standard at the FLSA Notice stage.

Defendants' attempt to litigate the merits of Plaintiff's claims at this stage is inappropriate. At the conditional certification stage, "the court does not consider the merits of a plaintiff's claims,

or witness credibility." *Young v. Rolling in the Dough, Inc.*, No. 17-cv-7825, 2018 U.S. Dist. LEXIS 38533, at *2 (N.D. Ill. Mar. 8, 2018).

At this stage, the proper question is simply whether an employee is "similarly situated" to the employees he seeks to notify of the pendency of the action. *Meetz*, 2017 U.S. Dist. LEXIS 138380, at *6-7. Plaintiff need only to make a "modest showing" to prevail. *Id.* at *2.

Courts typically engage in this determination at the first of two stages in an FLSA lawsuit. At the first stage, the Court determines whether to conditionally certify the collective class and send notice of the lawsuit to putative class members. *Id.* at *2-3. At the second stage, the defendant may file a motion to decertify the class if appropriate to do so based on the individualized nature of the Plaintiff's claims. *Id.*

The widespread use of the two-stage approach is not accidental. Rather, it intentionally reflects how the FLSA is designed to function. The law operates to permit plaintiffs to cast a wide net based on a modest factual showing at the outset of the case. Then, at the second stage, the defendant may ask the court to narrow the scope of the case where appropriate based on the more complete picture of the case developed through the course of discovery.

As such, given the choice between a broad class definition and a narrower one, courts favor erring on the side of inclusion in the early stages of the case "since the purpose of an FLSA collective action is to allow 'plaintiffs the advantage of lower individual costs to vindicate rights by the pooling of resources' and facilitate the efficient resolution of common issues in one proceeding." *Rodkey v. Harry & David, LLC* No. 3:16-CV-311, 2017 WL 2463392, at *3 (S.D. Ohio June 7, 2017) (quoting *Hoffmann–La Roche, Inc. v. Sperling*, 493 U.S. 165, 170 (1989)). A narrower class definition that is potentially under-inclusive is "a more concerning issue, at this

[class certification] stage." *Id.*; *see also Pierce v. Wyndham Vacation Resorts, Inc.*, No. 3:13-CV-641-PLR-CCS, 2016 WL 11505723, at *1 (E.D. Tenn. Feb. 11, 2016) (more "inclusive notice is preferable to less inclusive notice").

The questions for the Court at this stage are simple: were Plaintiff and other delivery drivers subject to the same or similar pay policies, and do their claims arise from those pay policies? Because the answers to those questions are "Yes," as supported by the allegations set forth in Plaintiff's Complaint, his declaration, and ***Defendants' own discovery responses***, the Court should authorize notice to all current and former delivery drivers who worked for Defendants during the relevant time period.

2. Plaintiff's allegations and evidence are sufficient for conditional certification.

Plaintiff has presented sufficient factual allegations to justify notice being sent to Defendants' delivery drivers. *See, e.g., Young*, 2018 U.S. Dist. LEXIS 38533; *Meetz*, 2017 U.S. Dist. LEXIS 138380, at *6-7. *Brandenburg*, 2017 U.S. Dist. LEXIS 129955; *Thomas,* 2019 U.S. Dist. LEXIS 171728; *Waters*, 2020 WL 1129357. Plaintiff and other delivery drivers were subject to two pay policies that justify conditional certification.

First, Plaintiff alleges that all of Defendants' delivery drivers are reimbursed according to the same or similar policy or methodology. Plaintiff claims that Defendants' reimbursement policy/methodology violates the FLSA because Defendants (1) do not track and reimburse for actual expenses, and (2) Defendants do not reimburse delivery drivers at the IRS standard business mileage rate. *See Hatmaker v. PJ Ohio LLC*, 2019 WL 5725043, at *7 (S.D. Ohio Nov. 5, 2019).

Plaintiff's declaration establishes that he and other delivery drivers were subject to the same or similar automobile expense reimbursement policies. *See* Doc. 5-1, ¶¶ 9-10 (drivers were

required to use their own cars); ¶ 16-18 (Plaintiff has observed the reimbursement rates paid to other drivers). Plaintiff's evidence does not stop there, however. Defendants also state in discovery that their delivery drivers were all paid at a tipped wage rate, that they received approximately $7.25 an hour while working inside the store, and that they all received the same vehicle expense reimbursement amount. *See* Doc. 20-1, page 4.

The declaration alone establishes that Plaintiff was similarly situated to other delivery drivers because they were all subject to the same or similar automobile expense reimbursement policies. This by itself surpasses the fairly lenient standard to send notice. Courts have routinely found that a *single* declaration is sufficient evidence to justify sending notice.[1] The alternative is impractical and unrealistic—that the defendants employ many pizza delivery drivers but subject each one to an individualized (and different) compensation structure. Obviously, pizza companies do not do this. And Defendants have admitted as much. Common sense must prevail here.

Ultimately, for purposes of Plaintiff's request for conditional certification, Defendants' discovery responses are a "smoking gun." Defendants admit that there is a unified compensation and vehicle expense reimbursement policy that applies across all of Defendants' delivery driver employees. Considered alongside Plaintiff's allegations that this very compensation scheme uniformly results in FLSA violations for drivers paid at or near minimum wage, the two relevant questions at this stage of the lawsuit— were Plaintiff and other delivery drivers subject to the same

[1] *Compare Brandenburg*, 2017 U.S. Dist. LEXIS 129955, at *3 (granting conditional certification of delivery drivers at 17 stores based on one declaration); *Thomas*, 2019 U.S. Dist. LEXIS 171728, at *2 (granting conditional certification of drivers at 9 stores based on one declaration); *Ford v. Carnegie Mgmt. Services, Inc.*, No. 2:16-cv-19, 2016 WL 2729700, *2 (S.D. Ohio May 11, 2016) (granting conditional certification based on a single declaration); *Sisson v. Ohio Health Corp.*, No. 2:13-cv-517, 2013 WL 6049028, *1 (S.D. Ohio Nov 14, 2013) (granting conditional certification based on single declaration); *Pritchard v. Dent Wizard Int'l Corp.*, 210 F.R.D. 591, 595-96 (S.D. Ohio Aug. 6, 2002) ("[s]ome courts hold that a plaintiff can demonstrate that potential class members are 'similarly situated' for purposes of receiving notice based solely upon allegations in a complaint of illegal class-wide practices.").

or similar pay policies, and do their claims arise from those pay policies?—have been answered affirmatively.

Defendants make much of other FLSA cases in which additional declarations were required from other employees or in which the plaintiff was required to demonstrate a greater degree of personal knowledge relating to the alleged violations across the putative collective before the court would grant conditional certification. *See* Doc. 23, at pp. 16-17. However, "'there is no threshold requirement for a certain number of affidavits from employees to certify conditionally a collective action.'" *Thomas,* 2019 U.S. Dist. LEXIS 171728 at *2 (granting the plaintiff's motion to send FLSA notice based on a single declaration). Additionally, this case possesses something none of those cases do – an unequivocal admission by Defendants that the contested pay policies apply across the entire class of Defendants delivery driver employees. In other words, Plaintiff does not need personal knowledge or testimony from other drivers regarding the impact of the pay policy on their income. Defendants have already provided *precisely* the information that such evidence would be used to prove. The Court should not require additional information to prove what Defendants have admitted. Instead, the Court should recognize the suitability of this case for conditional certification.

Consider further that Defendants' Opposition presented them with an ideal opportunity to undercut Plaintiff's position by describing in detail any variances in pay structures or compensation policies that apply to their delivery drivers. For example, Defendants could have said some workers are paid at the IRS rate or some workers are paid for their actual expenses. Defendants could have explained that their delivery driver compensation varies on a driver-to-driver or even a store-to-store basis in material ways that would result in some workers having claims and some not. They

could have shown that they utilized 4 different reimbursement methodologies across their 4 different stores. Defendants made no such representation. Instead, Defendants remain deafeningly silent regarding any relevant differences in their pay policies applying to delivery drivers.

Because Plaintiff has presented a sufficient factual showing at this stage, notice should be sent to all delivery drivers who worked at Toppers Pizza stores owned and/or operated by Defendants.

3. Defendants apply an improper standard for sending FLSA Notice.

Defendants ask the Court to limit notice to only those delivery drivers who worked at the same Toppers Pizza store where Plaintiff worked as a delivery driver. Specifically, Defendants take issue with Plaintiff's putative class inclusive of all pizza delivery drivers employed by Defendants because Plaintiff lacks personal knowledge about any stores beyond his own and because Defendants claim Plaintiff did not work directly for Defendant Perfect Timing. This evidentiary requirement is out of step with the long line of decisions on conditional certification in similar pizza delivery driver lawsuits.

3.1. Perfect Timing is properly included as Plaintiff's employer.

Plaintiff is only required to show that he was in a similar, not identical position to other similarly situated delivery drivers. "Courts often authorize notice to employees of restaurant locations where the named plaintiff did not work at all, as long as there is sufficient evidence that those employees were subject to the same allegedly unlawful policies." *Thomas*, 2019 U.S. Dist. LEXIS 171728, at *7 (citing *Juarez v. 449 Rest., Inc.*, 29 F. Supp. 3d 363, 370 (S.D.N.Y. 2014) (collecting cases)).

Here, Plaintiff alleges that Perfect Timing was his employer, along with Garrett Burns and FSM ZA, LLC. Defendants' argument regarding Perfect Timing is arguably moot for purposes of conditional certification, as the class of Perfect Timing's employees is completely subsumed by the class of Garrett Burns' employees. Because Garrett Burns is alleged to be an individual employer, anyone belonging to the former class of drivers necessarily belongs to the latter. Defendants' arguments regarding Perfect Timing amount to improper merits arguments that have no bearing on the conditional certification question.

The employer determination is a factually extensive inquiry that can be explored with additional discovery. This is not an appropriate inquiry at this stage in the litigation, as demonstrated by the inundation of documents offered by Defendants on this issue. Utility bills, bank statements, franchise agreements, articles of incorporation, etc. Ironically, in their attempt to distinguish Perfect Timing from FSM ZA, Defendants further strengthen the apparent connection between the two. Specifically, Defendants set Garrett Burns out as the "top man" for each business entity, further solidifying their connection as employers.

However, the Court is not properly tasked with considering these merits-based arguments. Rather, for purposes of conditional certification, the focus must remain on the "similarly situated" inquiry. The question the Court must answer is not, "Has Plaintiff proven his claim against Perfect Timing?" Rather, the question is, "Has Plaintiff proven that if a claim exists against Perfect Timing as alleged, there are other delivery drivers in the same or similar situation to Plaintiff?" Because Defendants' reimbursement policies apply across the board, including at the two stores owned by Perfect Timing, conditional certification of the employees at the Perfect Timing stores is appropriate.

3.2. Plaintiff's personal knowledge is not the only mechanism for establishing facts in support of conditional certification.

Defendants argue that Plaintiff's motion for conditional certification must be supported by personal knowledge. Ordinarily, this is true. Common sense dictates that a Plaintiff's request for conditional certification cannot be based on hearsay or speculation. However, common sense further dictates that a Plaintiff need not offer testimony rooted in personal knowledge to establish a fact that is already in the record and unquestionably relevant to the question at hand. Here, Defendants have stated in discovery exactly the facts that Plaintiff needs to establish in support of his Motion—namely that Defendant's delivery driver pay structure is the same across Defendants' 4 Toppers Pizza stores.

In the same vein, as Plaintiff alludes to above, Defendants' argument suggests that they currently pay each delivery driver, or at least the delivery drivers at each store according to an individualized compensation policy. We know that not to be the case based on the discovery responses Defendants have provided.

Thus, in light of the lenient, less restrictive standard appropriate at this stage, courts do and should permit FLSA notice to be sent based on a single declaration from a plaintiff with actual knowledge limited to a single store. This recognizes that a failure to do so may negatively impact the workers' rights to bring claims within an ever-running statute of limitations. *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 170 (1989). Regardless, Plaintiff has far more than a single declaration. Plaintiff has Defendants' acknowledgement of a common pay policy that applies to all of their delivery drivers.

4. Plaintiff has properly alleged an FLSA violation.

Notably, Defendants argue Plaintiff's declaration never alleges that his average hourly rate in any given workweek fell below the tipped minimum wage or statutory minimum wage as required by Wisconsin law. This argument urges the Court to ignore Plaintiff's allegations, the math demonstrating an FLSA violation, and any context surrounding those allegations and, rather, hold that Plaintiffs must use "magic words" before being entitled to send notice of this lawsuit to similarly situated workers. Obviously, this is not the standard.

Although it is true that Plaintiff's declaration do not say the words, "my hourly wage dropped below minimum wage in each workweek that I worked," Plaintiff is not required to say those words. Instead, Plaintiff can do exactly what he did here: describe a compensation policy that results in an under-payment in *every* workweek. Plaintiff explains that he is paid a tipped wage rate. He explains that he and other delivery drivers drive their own cars for work. Next, Plaintiff explains that Defendants do not keep track of their drivers' actual expenses. Finally, Plaintiff explains that the drivers are not reimbursed at the IRS rate; the reimbursements they receive result in payments per mile of significantly less than that.

In Plaintiff's Motion, filed in conjunction with the declaration, Plaintiff explained why this set of facts results in a minimum wage violation. Plaintiff also more explicitly explained the math behind his allegations in the Complaint. Doc. 18, ¶ 104 (explaining that Plaintiff was under-reimbursed by approximately $2.87 per delivery) (*White v. MPW Indus. Servs., Inc.*, 236 F.R.D. 363, 368 (E.D. Tenn. 2006) (the allegations in the complaint are considered at conditional certification stage)). Even this, however, is more than is required at this stage because Plaintiff only

needs to show that other delivery drivers are subject to the same or similar policies or circumstances.

In an effort to argue the merits of Plaintiff's claims, Defendants seem to contend that they can retroactively claim a tip credit larger than that which Defendants claimed at the time the work was performed. Although merits determinations are not appropriate in deciding conditional certification (*Lacy*, 2011 WL 6149842 at *7), Defendants' position fails as a matter of law. Employers may not retroactively claim a larger tip credit. *See, e.g., Perrin v. Papa John's Int'l., Inc.,* 114 F.Supp.3d 707, 727-28 (E.D. Mo. Jul. 8, 2015); *see also Meetz v. Wisc. Hospitality Grp. LLC*, No. 16-cv-1313, 2017 WL 3736776, at *5 (E.D. Wisc. Aug. 29, 2017) (rejecting defendants' argument to retroactively allow for a greater "tip credit" when pizza shop claimed only $2.00 per hour as a tip credit during the drivers' employment). As a result, Defendants had no "buffer"—*any* under-reimbursement results in a minimum wage violation.

Second, pizza shops reimbursing minimum wage delivery drivers are required to either (1) keep records of and reimburse for the delivery drivers' actual expenses, or (2) reimburse at the IRS standard business mileage rate. *Hatmaker v. PJ Ohio, LLC*, No. 3:17-CV-146, 2019 WL 5725043, at *4 (S.D. Ohio Nov. 5, 2019). Since Defendants here did neither, they have violated the FLSA.[2] *Id*.

[2] Defendants argue that the *Hatmaker* standard is not the proper standard. Plaintiff disagrees, but also notes that conditional certification has historically been granted in pizza delivery driver under-reimbursement cases even where an "approximation" standard has been applied. *See, e.g., Darrow v. WKRP Mgmt. LLC*, No. 09-cv-01613, 2012 WL 638119 (D. Colo. Feb. 28, 2012) (granting conditional certification where plaintiff was advocating for reasonable approximation standard).

In sum, Defendants are wrong in two ways. First, Plaintiff is not required to articulate a violation week by week in order to prevail on conditional certification. Second, Plaintiff has described a week by week violation. In fact, he's described a violation in *every* week.

5. Resolution on a classwide basis is the most judicially efficient option.

Nearly identical pizza delivery driver lawsuits are routinely decided on a class and collective basis because of the judicial efficiencies they offer. This is true because Plaintiff's claims lend themselves to efficient resolution driven by numbers, such as mileage driven, reimbursements paid, hours worked, etc. These are precisely the types of cases that thrive under the FLSA's collective action mechanism. It is also well-established that, contrary to Defendants' arguments, the existence of individualized defenses is no bar to conditional certification. *See Meetz*, 2017 WL 3736776, at *5 ("Nor do variations between individual members of the putative class defeat conditional certification at this step, as Defendants contend they should.")

6. Plaintiffs' proposed notice is proper.

6.1. The notice is properly objective and not Court-endorsed.

Defendants claim the caption-like heading should be removed because it gives the appearance of judicial sponsorship. Nothing in this heading is misleading, prejudicial, or inflammatory. It is not in the form of a legal pleading caption. This same heading has been approved in every other pizza delivery case in which it has been sought. *See Brandenburg*, 2017 U.S. Dist. LEXIS 129955; *Thomas*, 2019 U.S. Dist. LEXIS 171728; *Waters*, 2020 WL 1129357. *Bradford*, 2020 WL 3496150.

6.2. The notice is not misleading.

When read objectively, nothing about Plaintiff's proposed notice suggests a double recovery of attorney's fees. Rather, the notice provides putative opt-in plaintiffs with clarity and transparency regarding the attorney's fee arrangement in place in this case. Further, Defendants descend into semantics regarding the distinction between "appointed" and "authorized." Plaintiff's Counsel believes "appointed" is sufficient and accurate to communicate the Court's approval of Plaintiff and his Counsel to send FLSA Notice.

6.3. Notice by electronic mail is proper.

Defendants object to sending notice via e-mail. Although there is no "one-size-fits-all" approach to notice, the ultimate goal is always the same: provide "[a]ccurate and timely notice concerning the pendency of the collective action promotes judicial economy because it...allows [putative class members] to pursue their claims in one case where the same issues of law and fact are already being addressed." *Swigart v. Fifth Third Bank*, 276 F.R.D. 210, 214 (S.D. Ohio Aug. 31, 2011), *citing Hoffmann–La Roche*, 493 U.S. at 170. Indeed, in *Hoffman-LaRoche*, the Supreme Court "confirm[ed] the existence of the trial court's discretion, not the details of its exercise." 493 U.S. at 170. With the goal of providing accurate and timely notice, any method of notice that is both cost effective and likely to reach class members should be employed. To do otherwise would be to knowingly ignore an effective mode of communication that has a good probability of providing the best notice practicable.

"[D]istrict courts routinely allow notice to be transmitted via U.S. mail and email." *Hall v. Gannett Co.*, 2021 U.S. Dist. LEXIS 12216, *14 (W.D. Ky. Jan. 22, 2021); *see also Mueller v. Chesapeake Bay Seafood House Assocs., LLC*, 2018 U.S. Dist. LEXIS 67271, *28 (D. Md. Apr. 20,

2018) (recognizing that email notice is now the "norm."). This approach is sensible because individuals often keep their email addresses longer than their home addresses.

7. **Conclusion**

Plaintiff is similarly situated to other delivery drivers at Defendants' Pizza Hut stores. For this reason, the Court should authorize notice.

Respectfully submitted,

/s/Nathan B. Spencer

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

/s/ Nathan Spencer
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