

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

MICHELLE SMITH, et al.,	:	
Plaintiffs,	:	CIVIL ACTION
	:	
v.	:	
	:	
SOVEREIGN BANCORP, INC., et al.,	:	No. 03-2420
Defendants.	:	

MEMORANDUM AND ORDER

Schiller, J.

November 13, 2003

Plaintiffs Michelle Smith and Michelle Lyons bring suit against their employer, Sovereign Bank (“Sovereign”), alleging violations of, inter alia, the Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (“FLSA”). Specifically, Plaintiffs allege that Sovereign failed to pay its employees time-and-a-half for hours worked in excess of forty hours per week and on Saturdays. Presently before the Court is Plaintiff’s motion requesting that the Court grant preliminary class certification to their FLSA claim and approve an “opt-in” claim notice to be sent to all of Sovereign’s hourly, non-FLSA-exempt employees. For the reasons set out below, the Court will deny this motion without prejudice.

I. FACTUAL BACKGROUND

Plaintiffs have been employed at Sovereign as hourly employees since September of 1998. (Compl. ¶¶ 6-7.) Plaintiffs allege that for an unspecified period of time during their employment, they and other hourly employees were instructed by their supervisors to record a maximum of eight hours of work per day on their time cards even if they worked in excess of eight hours. In addition,

Plaintiffs allege that they and other hourly employees were required to work on certain Saturdays without appropriate compensation. Sovereign argues that it did not violate FLSA, and that even if such violations occurred, they ceased by December of 2001.

Plaintiffs, apparently recognizing some merit in Sovereign’s latter argument,¹ now raise the possibility that a two-year statute of limitations for their FLSA claim will expire in the near future.² Accordingly, Plaintiffs, who have not yet conducted class-related discovery, request that the Court preliminarily certify a class of plaintiffs that includes all of Sovereign’s non-FLSA-exempt hourly employees and approve a form notice to be sent to these employees so that they may opt-in to this suit before they are time-barred from doing so.

II. DISCUSSION

There are two requirements for FLSA group plaintiffs: (1) All plaintiffs must be “similarly situated”; and (2) All plaintiffs must consent in writing to taking part in the suit. 29 U.S.C. § 216(b). FLSA does not define the term “similarly situated,” *see id.*; *Briggs v. United States*, 54 Fed. Cl. 205, 206 (2002) (“The term ‘similarly situated’ is defined neither in the FLSA nor in its implementing regulations.”), nor does it provide specific procedures by which claimants may opt-in, but the

¹ Plaintiffs have repeatedly stated that Sovereign continues to deny its employees overtime pay in violation of FLSA. (Pl.’s Mot. for Notice to Potential Class Members ¶ 2; Compl. ¶¶ 18-20.) In light of this, it is unclear to the Court why “the claims of many, if not most [potential class members] will likely expire by the date that class certification issue [sic] is addressed by the Court.” (Pl.’s Mem. of Law in Support of Mot. for Notice to Potential Class Members, Part II.A.)

² As the parties note, the statute of limitations under FLSA is either two or three years, with the longer period applying to “willful” violations. 29 U.S.C. § 255. At this time, the Court neither addresses this issue nor decides which time period is applicable to the instant case.

Supreme Court has held that “district courts have discretion . . . to implement [§ 216(b)] . . . by facilitating notice to potential plaintiffs.” *Hoffman La-Roche Inc. v. Sperling*, 493 U.S. 165, 169 (1989).

The determination of whether FLSA claimants are “similarly situated” for the purposes of § 216(b) is a two-step procedure. *Felix de Asencio v. Tyson Foods, Inc.*, 130 F. Supp. 2d 660, 663 (E.D. Pa. 2001); *Briggs*, 54 Fed. Cl. at 206. The first step, generally conducted early in the litigation process, is a preliminary inquiry into whether the plaintiffs’ proposed class is constituted of similarly-situated employees. *Felix de Asencio*, 130 F. Supp. 2d at 663; *Briggs*, 54 Fed. Cl. at 206. The second step, usually conducted after the completion of class-related discovery, is a specific factual analysis of each employee’s claim to ensure that each actual claimant is appropriately made party to the suit. *Felix de Asencio*, 130 F. Supp. 2d at 663; *Briggs*, 54 Fed. Cl. at 206. Only the first step of this process is implicated by the present motion.

The Third Circuit has not yet determined what standard to apply in considering whether potential class members are “similarly situated” such that FLSA plaintiffs may be entitled to send them notice of the suit. In the absence of appellate guidance, the Court looks to other districts and circuits, which have applied varying standards. Some courts, including two within this District, have held that motions for preliminary certification and notice may be granted as long as the plaintiff merely alleges that the putative class members were injured as a result of a single policy of the defendant employer. *See Goldman v. RadioShack Corp.*, No. 03-CV-0032, 2003 WL 21250571, *8, 2003 U.S. Dist. LEXIS 7611, *27 (E.D. Pa. Apr. 16, 2003) (“During this first-tier inquiry, we ask only whether the plaintiff and the proposed representative class members allegedly suffered from the same scheme.”); *Felix de Asencio*, 130 F. Supp. 2d 660 at 663 (“[C]ourts appear to require

nothing more than substantial allegations that the putative class members were together the victims of a single decision, policy, or plan.” (internal quotations omitted)); *Sperling v. Hoffman-La Roche*, 118 F.R.D. 392, 407 (D.N.J. 1988)) (same), *aff’d on other grounds* 862 F.2d 439 (3d Cir. 1988), *aff’d* 493 U.S. 165 (1989). Other courts generally apply a more stringent—although nonetheless lenient—test that requires the plaintiff to make a “modest factual showing” that the similarly situated requirement is satisfied. *See Dybach v. Fla. Dep’t of Corr.*, 942 F.2d 1562, 1567-68 (11th Cir. 1991) (“Before determining to exercise [its] power [to approve notice to potential plaintiffs], the district court should satisfy itself that there are other employees . . . who desire to ‘opt-in’ and who are ‘similarly situated’”); *Mueller v. CBS, Inc.*, 201 F.R.D. 425, 428 (W.D. Pa. 2001) (requiring plaintiff to provide “a sufficient factual basis on which a reasonable inference could be made” that potential plaintiffs are similarly situated (internal quotations omitted)); *Harper v. Lovett’s Buffet, Inc.*, 185 F.R.D. 358, 362 (M.D. Ala. 1999) (“Plaintiffs have the burden of demonstrating that a reasonable basis for crediting their assertions that aggrieved individuals exist in the broad class that they propose.”); *Jackson v. New York*, 163 F.R.D. 429, 431 (S.D.N.Y. 1995) (“[P]laintiffs need merely provide some factual basis from which the court can determine if similarly situated potential plaintiffs exist.” (internal quotations omitted)); *Briggs*, 54 Fed. Cl. at 207 (requiring “modest factual showing that [plaintiffs] are . . . similarly-situated with other, un-named potential plaintiffs”).

Thus, in order to determine whether preliminary class certification should be granted, this Court must first determine the appropriate standard to apply: The “mere allegation” approach of *Goldman* and *Felix de Asencio*, or the “modest factual showing” test of *Briggs*, et al. In effect, *Goldman* and *Felix de Acensio* render preliminary class certification automatic, as long as the Complaint contains the magic words: “Other employees similarly situated.” Under this rationale,

any plaintiff who is denied overtime pay may file suit under FLSA and, as long as her complaint is well-pled, receive preliminary class certification and send court-approved notice forms to every one of her employer's hourly employees. This is, at best, an inefficient and overbroad application of the opt-in system, and at worst it places a substantial and expensive burden on a defendant to provide names and addresses of thousands of employees who would clearly be established as outside the class if the plaintiff were to conduct even minimal class-related discovery.³ More importantly, automatic preliminary class certification is at odds with the Supreme Court's recommendation to "ascertain the contours of the [§ 216] action at the outset." *Hoffman La-Roche*, 495 U.S. at 487 (discussing district court management of cases under § 216(b)), and such certification does not comport with the congressional intent behind FLSA's opt-in requirement, which was designed to limit the potentially enormous size of FLSA representative actions. *See id.* at 488. As the Supreme Court has stated, the opt-in requirement was intended to reduce "excessive litigation spawned by plaintiffs lacking a personal interest in the outcome." *Id.* If district courts do not take basic steps to ensure that opt-in notices are sent only to potential plaintiffs who "have a personal interest" in the employer's challenged policy, the congressionally-mandated line between representative actions under FLSA and class actions under Rule 23 will be substantially blurred.

Accordingly, rather than following the automatic preliminary certification route, this Court

³ The Court also notes that the cases in which the plaintiffs' allegations were deemed sufficient for preliminary certification purposes are factually distinguishable from the instant case. In *Goldman*, the plaintiff sought to provide notice only to employees who held the same title as himself, as opposed to the instant Plaintiffs, who wish to contact *all* of defendant's estimated 7,500 hourly employees. Similarly, in *Felix de Asencio*, the plaintiffs sought to provide notice to the workers at one particular plant, rather than to the entire corporate payroll. In both cases, therefore, there was a significantly greater likelihood than exists in the instant case that the employees receiving the opt-in form would be similarly situated to the plaintiffs.

will adopt the reasoning of those courts that have required plaintiffs to make a basic factual showing that the proposed recipients of opt-in notices are similarly situated to the named plaintiffs. *See, e.g., Dybach*, 942 F.2d at 1567-68; *Mueller*, 201 F.R.D. at 428; *Harper*, 185 F.R.D. at 362; *Jackson*, 163 F.R.D. at 431; *Briggs*, 54 Fed. Cl. at 207. This approach provides a more efficient and effective means of managing FLSA litigation and comports with the Supreme Court’s case-management recommendation and the Congressional intent behind FLSA. Specifically, the factual showing requirement enables a court to narrow the potential class from all of a defendant’s employees to just those employees who can possibly claim to have been denied overtime under the same policy as allegedly affected Plaintiffs.

It should be stressed that this is an extremely lenient standard. Plaintiffs need only provide some “modest” evidence, beyond pure speculation, that Defendant’s alleged policy affected other employees. Nonetheless, in light of this standard, the Court must deny Plaintiffs’ motion because Plaintiffs fail to provide any factual or evidentiary basis for the inclusion of all of Defendant’s hourly employees in the putative class. However, because Plaintiffs have not yet conducted discovery on the class certification issue, the Court will permit Plaintiffs to re-file their motion for preliminary class certification and notice when and if the discovery process has yielded facts that render such certification appropriate.⁴

For the reasons stated above, the Court denies Plaintiffs’ motion for preliminary class certification. An appropriate Order follows.

⁴ Plaintiffs may wish to consider narrowing the putative class—by geography, job title, or otherwise—to reflect the evidence that arises during discovery.

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ORDER

AND NOW, this 13th day of **November, 2003**, upon consideration of Plaintiff's Motion for Notice to Potential Class Members and for Approval of Form of Preliminary Class Notice and Defendant's response thereto, it is hereby **ORDERED** that:

Plaintiff's Motion (Document No. 7) is **DENIED without prejudice**.

BY THE COURT:

Berle M. Schiller, J.