

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

MELVIN BANKS et al.,	:	CIVIL ACTION
<i>On behalf of themselves individually</i>	:	
<i>and all others similarly situated</i>	:	
	:	
Plaintiff,	:	
v.	:	
	:	
RADIOSHACK CORPORATION,	:	NO. 13-0685
	:	
Defendant.	:	

**ORDER**

**AND NOW**, this 25th day of April, 2014, upon consideration of the Plaintiffs’ Second Motion for Conditional Certification pursuant to 29 U.S.C. § 216(b) (Doc. 23), Defendant’s response (Doc. 25), Plaintiffs’ reply (Doc. 30), and the supplemental briefing requested by the Court (Docs. 36 & 37), and after oral argument, it is hereby **ORDERED** that the motion (Doc. 23) is **DENIED** without prejudice, for the reasons that follow.

1. Plaintiffs Melvin Banks, Jonice M. Wilson and Rashad Foley allege that Defendant RadioShack Corporation (“RS”), their former employer, failed to pay them minimum wage and overtime in violation of the Fair Labor Standards Act (“FLSA”), 29 U.S.C. §§ 206-207. Specifically, the plaintiffs allege that the manager of RS’ Philadelphia district (District No. 321), Benjamin Lieberman, instituted a policy whereby he directed store managers to falsely modify employees’ time records in order to reduce the hours for which they would be paid. *See* Am. Compl. (Doc. 16) ¶¶ 13-15, 22, 29-31. They allege that four store managers, as well as the District-Manager-in-Training and Lieberman himself, falsely reduced employees’ recorded hours by deducting “breaks” they had not actually taken and adjusting clock-out times. Doc. 23, 7-8. As a result, employees were not paid “for all hours that they worked.” Am. Compl. ¶ 30.

Plaintiffs now propose to mail notice of this lawsuit, pursuant to 29 U.S.C. § 216(b), to all those who worked as RS Sales Associates in District 321 (twenty-three stores) after January 1, 2011. Doc. 23, 1; Am. Compl. ¶ 14.

2. In support of the motion, each plaintiff has submitted an affidavit and his or her time records, which show the modifications made. *See* Doc. 23, Exs. 1-3. The plaintiffs claim that most of the modifications were entirely inaccurate, and some were partly inaccurate. *See, e.g.*, Foley Decl. ¶ 12 (stating that some modifications “wrongly extended my breaks, making them longer than they actually were”). According to the plaintiffs, “there were at least 49 hours and 52 minutes of total cuts to Ms. Wilson’s time records,” “at least 20 hours and 50 minutes of total cuts to Banks’ time records,” and “substantial cuts to Mr. Foley’s time records which have not yet been assessed.” Doc. 23 at 11-12. The plaintiffs allege that they complained to their managers about the false modifications and were told that Lieberman had ordered the cuts. *Id.* 12. They assert that other sales associates in their store “suffered similar unwarranted cuts by management in the hours that they worked,” and that an employee of another RS store reported a similar practice at his location. *Id.* 14.

3. RS answers that the modifications were accurate, and that it was RS policy for managers to adjust employee time records to reflect breaks taken when employees neglected to do so themselves. In support, RS has submitted the statement and statistical analysis of an expert, Dr. Stefan Boedeker, which concludes that RS store managers made modifications to time records throughout District 321 at a store-average rate of between 22% and 92% (of daily records) during the relevant time. *See* Doc. 25-2, 9-15. Most of the modifications were the additions of breaks. Doc. 25-2, 6. RS has also submitted declarations from Lieberman (Doc. 25-7), Belizaire (one of the store managers alleged to have made the false modifications) (Doc. 25-1), and a

handful of other managers and employees (Docs. 25-3, 4, 5, 6, 8, 9, 10, 11), all denying a policy or practice of false modifications; as well as a plethora of RS written policies (Docs. 25-12, 13, 14, 15, 16, 17 – Notices of Lodgment, Exs. 1-21). The plaintiffs, in reply, argue that the sheer number of modifications is evidence that they are false. *See* Doc. 30, 9-10.<sup>1</sup>

4. The Third Circuit has endorsed a two-step process for determining whether an FLSA suit may proceed as a collective action:

Applying a “fairly lenient standard” at the first step, the court makes a preliminary determination as to whether the named plaintiffs have made a “modest factual showing” that the employees identified in their complaint are “similarly situated.” If the plaintiffs have satisfied their burden, the court will “conditionally certify” the collective action for the purpose of facilitating notice to potential opt-in plaintiffs and conducting pre-trial discovery. At the second stage, with the benefit of discovery, “a court following this approach then makes a conclusive determination as to whether each plaintiff who has opted in to the collective action is in fact similarly situated to the named plaintiff.”

*Camesi v. Univ. of Pittsburgh Med. Ctr.*, 729 F.3d 239, 243 (3d Cir. 2013) (citing *Zavala v. Wal-Mart Stores Inc.*, 691 F.3d 527, 535-37 (3d Cir. 2012) and *Symczyk v. Genesis Healthcare Corp.*, 656 F.3d 189, 193 (3d Cir. 2011), *rev'd on other grounds*, *Symczyk*, 133 S.Ct. at 1526)).

5. To make a modest factual showing, “a plaintiff must produce some evidence, ‘beyond pure speculation,’ of a factual nexus between the manner in which the employer's alleged policy affected her and the manner in which it affected other employees.” *Zavala*, 691 F.3d at 545 n.4 (citing *Symczyk*, 656 F.3d at 193). The underlying question is the extent to which the claims of the putative class can be proven through common evidence, versus individualized testimony. *See, e.g., Bamgbose v. Delta-T Group, Inc.*, 684 F. Supp. 2d 660 (E.D. Pa. 2010) (at conditional certification stage, analyzing “whether the proof to demonstrate [the disputed element of the claim] can be applied to the class as a whole”); *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S.

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<sup>1</sup> The plaintiffs also argue that the modifications were contrary to Pennsylvania law, but this is irrelevant to whether they inaccurately reduced employees’ hours.

165, 170 (1989) (noting that collective actions allow “efficient resolution in one proceeding of common issues of law and fact arising from the same alleged” violation).

6. As an initial matter, it is unclear whether the plaintiffs have stated a cognizable FLSA overtime or minimum-wage claim. As to overtime, the Amended Complaint asserts that the plaintiffs “intermittently” worked more than forty hours a week and, because of the false modifications, were not paid for all of the overtime actually worked. *Id.* ¶ 21. At oral argument, however, Plaintiffs’ counsel represented that he had not determined whether any plaintiff had performed uncompensated overtime work. As to minimum wage, Plaintiffs’ counsel has now clarified that the minimum-wage claim is a “gap-time” claim that the plaintiffs were not paid for the specific hours falsely deducted from their time sheets, not that their average hourly wage in any workweek fell below the minimum threshold. *See* Doc. 36. This Court has previously held that gap-time claims are “outside the purview of the FLSA,” *Lopez v. Tri-State Drywall, Inc.*, 861 F. Supp. 2d 533, 536 (E.D. Pa. 2012), as have the majority of other federal courts. *See, e.g., Sandoz v. Cingular Wireless, LLC*, No. 07-1308, 2013 WL 1290204 (W.D. La. 2013) (noting that “the vast majority of cases to have examined this issue have determined that the purpose of the minimum wage provisions is met by the ‘workweek standard’”).

7. Assuming *arguendo* for purposes of this motion that the plaintiffs have stated a cognizable FLSA claim, it does not appear to be subject to common proof. Even if the district manager did instruct store managers to falsely deduct breaks from employee timesheets, the plaintiffs have made no showing that this alleged “policy” had uniform effect across the RS workforce. It would have affected each member of the putative class only through the discrete actions of individual store managers, and would thus have affected each employee differently. Absent some method for identifying false entries in a systematic way, the plaintiffs’ claim will

require separate adjudication of each modification (and RS has expressed its intent to defend the accuracy of each modification with particularized evidence). At this point, the Court is skeptical that collective proof is possible. Furthermore, once false modifications are identified, an individualized calculation will still be necessary to determine whether they resulted in a FLSA overtime or minimum-wage violation for each employee, and potentially for each workweek. Given these obstacles, and given the uncertainty as to the parameters of Plaintiffs' claims, Plaintiffs have not shown that there is a sufficient "factual nexus between the manner in which the employer's alleged policy affected [the named plaintiffs] and the manner in which it affected other employees" to warrant collective action. *Zavala*, 691 F.3d at 545 n.4.

**WHEREFORE**, Plaintiffs' Second Motion for Conditional Certification (Doc. 23) is hereby **DENIED** without prejudice. Plaintiffs may renew the motion at a later stage in the litigation should it become appropriate.

BY THE COURT:

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L. FELIPE RESTREPO  
UNITED STATES DISTRICT JUDGE

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FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MELVIN BANKS et al.,	:	CIVIL ACTION
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	:	
Plaintiff,	:	
v.	:	
	:	
RADIOSHACK CORPORATION,	:	NO. 13-0685
	:	
Defendant.	:	

**ORDER**

**AND NOW**, this 25th day of April, 2014, upon consideration of the supplemental briefing requested by the Court regarding the Plaintiffs’ motion for conditional certification (Docs. 36 & 37), it is hereby **ORDERED** that, to the extent the Defendant contends that Plaintiffs’ “gap-time” minimum-wage claim is not cognizable pursuant to the Fair Labor Standards Act, 29 U.S.C. §§ 206 & 216(b), it shall file a motion for judgment on the pleadings by **May 9, 2014**. *See* Fed. R. Civ. P. 12(c). Plaintiffs shall submit any response by **May 16, 2014**.<sup>2</sup>

BY THE COURT:

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L. FELIPE RESTREPO  
UNITED STATES DISTRICT JUDGE

<sup>2</sup> “[A] district court may *sua sponte* raise the issue of the deficiency of a complaint under [Federal Rule of Civil Procedure] 12(b)(6), so long as the plaintiff is accorded an opportunity to respond.” *Travelers Indem. Co. v. Dammann & Co., Inc.*, 594 F.3d 238, 256 n.14 (3d Cir. 2010) (internal citations and quotation marks omitted).