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

LEONARD BOSLEY, ET AL.	:	
	:	CIVIL ACTION
	:	
v.	:	
	:	NO. 04-CV-4598
	:	
CHUBB CORPORATION, ET AL.	:	

SURRICK, J. **JUNE 3, 2005**

MEMORANDUM & ORDER

Presently before the Court is Plaintiffs' Memorandum Of Law In Support Of Renewed And Amended Motion To Proceed As A Collective Action And For Approval And Facilitation Of Notice (Doc. No. 24), Defendant The Chubb Institute, Inc. ("TCI")[1]'s Memorandum Of Law In Opposition To Plaintiffs' Renewed And Amended Motion To Certify A Collective Class Of Persons "Similarly Situated" Pursuant To 29 U.S.C. § 216(b) And For Approval And Facilitation Of Notice (Doc. No. 25), and Defendant Chubb Corporation's ("Chubb") Memorandum Of Law In Support Of Its Cross-Motion To Dismiss The Complaint Filed By Plaintiffs And In Opposition To Plaintiff's Renewed And Amended Motion To Certify A Collective Action And For Approval And Facilitation Of Notice (Doc. No. 26). For the following reasons, Plaintiffs' Motion will be granted in part and denied in part and Defendant Chubb Corporation's Motion will be granted.

[1]The Chubb Institute's name has been changed to TCI Education, Inc. Defendant refers to itself as TCI throughout its Response.

I. BACKGROUND

Plaintiffs, former employees of TCI, worked for TCI's Springfield, Pennsylvania campus as Admissions Representatives. (Doc. No. 16 at 1.) Plaintiffs assert claims for unpaid overtime premiums under the Fair Labor Standards Act of 1938 ("FLSA") and the Pennsylvania Minimum Wage Act of 1968 ("PMWA"). (*Id.*) Plaintiffs allege that Defendants misclassified them as "exempt" from the FLSA's and PMWA's overtime provisions and consequently Plaintiffs claim entitlement to overtime compensation for hours worked over forty (40) in certain workweeks. (*Id*.) Plaintiffs assert that Defendants employed them as inside salepersons and that such employees are non-exempt from the FLSA and PMWA overtime provisions. (*Id*.) TCI asserts that Plaintiffs were exempt employees by virtue of the duties each Plaintiff performed as an Admissions Representative. (*Id*. at 2.) Defendant Chubb asserts that it is not a proper party to this action because it did not employ any or all of the Plaintiffs at any time. (*Id.*)

On January 13, 2004, Plaintiffs filed a Motion To Certify A Collective Class Of Persons "Similarly Situated" Pursuant To 29 U.S.C. § 216(b) And For Approval And Facilitation Of Notice. (Doc. No. 13.) After a conference with counsel on March 1, 2005, we entered an Order dated March 2, 2005, denying Plaintiffs' motion without prejudice (Doc. No. 18), and directing Plaintiffs to conduct discovery by April 5, 2005, on matters related to preliminary certification. (*Id.*) On April 21, 2005, Plaintiffs filed the instant Motion. On May 9, 2005, Defendant TCI filed its Memorandum of Law in opposition to Plaintiffs' Motion, and Defendant Chubb filed its Cross-Motion To Dismiss The Complaint Filed By Plaintiff And In Opposition To Plaintiffs' Renewed And Amended Motion To Certify A Collective Action And For Approval And Facilitation of Notice. (Doc. No. 26)

II. LEGAL STANDARD

The FLSA's collective action procedure provides:

> An action to recover the liability prescribed [by the FLSA] may be maintained against any employer . . . by any one of more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

29 U.S.C. § 216(b) (2000). 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. *Id.* The FLSA does not define the term "similarly situated." *See 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."). The FLSA also does not provide specific procedures by which claimants may opt-in. The Supreme Court has stated 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).

In the absence of guidance from the Supreme Court and the Third Circuit, district courts have developed a two-tiered test to determine whether FLSA claimants are "similarly situated" for the purposes of § 216(b). *Smith v. Sovereign Bancorp, Inc*., No. 03-2420, 2003 U.S. Dist. LEXIS 21010, at *4 (E.D. Pa. Nov. 13, 2003); *see also Goldman v. RadioShack Corp.*, No. 03-CV-0032, 2003 U.S. Dist. LEXIS 7611, at *19 (E.D. Pa. Apr. 16, 2003); *Felix de Ascencio v. Tyson Foods, Inc.*, 130 F. Supp. 2d 660, 663 (E.D. Pa. 2001). The first step in this test is conducted early in the litigation process, when the court has minimal evidence. This step is a preliminary inquiry into whether the plaintiff's proposed class is constituted of similarly-situated

employees. *Felix de Ascencio*, 130 F. Supp. 2d at 663. At this stage, the court grants only conditional certification of the class for the purpose of notice and discovery, and this is done under a comparatively liberal standard. *Mueller v. CBS, Inc.*, 201 F.R.D. 425, 428 (W.D. Pa. 2001); *Goldman*, 2003 U.S. Dist. LEXIS 7611, at *19. The second step is usually conducted after the completion of class-related discovery. *Mueller*, 201 F.R.D. at 428. During the second step, the court conducts a specific factual analysis of each employee's claim to ensure that each claimant is an appropriate party. *Id.* Plaintiffs bear the burden of showing they are similarly situated to the remainder of the proposed class. *Morisky v. Pub. Serv. Elec. & Gas. Co.*, 111 F. Supp. 2d 493, 496 (D.N.J. 2000). The instant Motion concerns the first step of the procedure.

III. DISCUSSION

Plaintiffs assert that they and other inside sales employees are similarly situated for notice stage purposes because they were employed in the same corporate department (the Admissions Department of TCI), they performed the same duties (inside sales), and they were victims of a single decision, policy, or plan (the misclassification of inside sales personnel). (Doc. No. 24 at 4-7.) Defendants respond that Plaintiffs' Motion should be denied because each Plaintiff's claim would require a highly fact-specific analysis of the duties that he or she actually performed; because Plaintiffs have not presented evidence that the other proposed class members worked in the same corporate department, division and location; and because Plaintiffs have not presented evidence that the other proposed class members performed the same duties or acted with the same level of discretion and independent judgment as the named Plaintiffs. (Doc. No. 25 at 4-8.)

While it appears that all of our courts apply the two-tier framework in determining whether potential class members are "similarly situated," courts differ in the level of proof

necessary in the first step of the inquiry. Some courts have determined that plaintiffs need merely allege that the putative class members were injured as a result of a single policy of a defendant employer. *See Goldman*, 2003 U.S. Dist. LEXIS 7611, at *27 ("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 Ascencio*, 130 F. Supp. 2d at 663 ("Courts appear to require nothing more than substantial allegations that the putative class members were together the victims of a single decision, policy or plan."); *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 have applied a stricter, although still 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, 1567-78 (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*, 201 F.R.D. at 428 (requiring plaintiff to provide "a sufficient factual basis on which a reasonable inference could be made" that potential plaintiffs are similarly situated); *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) ("Plaintiffs need merely provide some factual basis from which the court can determine if similarly situated potential plaintiffs exist."); *Briggs*, 54 Fed. Cl. at 207 (requiring "modest factual showing that [plaintiffs] are similarly-situated with other, unnamed potential

plaintiffs").

In the case of *Smith v. Sovereign Bancorp., Inc.*, the court pointed out that under the "mere allegation" approach of *Goldman* and *Felix de Ascencio*, preliminary certification is rendered automatic "as long as the Complaint contains the magic words: 'other employees similarly situated.'" *Smith*, 2003 U.S. Dist. LEXIS 21010, at *8. The court went on to observe:

> 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. 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."

Id. (quoting *Hoffman La-Roche*, 493 U.S. at 171-72.) We find this rationale compelling. We also note that while Plaintiffs are required to provide some factual showing that the proposed recipients of opt-in notices are similarly situated to the named plaintiffs, this standard is still an "extremely lenient standard." *Id*. at *10.

In our Order of March 2, 2005, we denied Plaintiffs' original motion without prejudice because, even considering the lenient standard, Plaintiffs did not provide a sufficient factual showing that the proposed opt-in recipients are similarly situated. (Doc. No. 18.) In their original motion, Plaintiffs merely provided a Declaration from one of the three named Plaintiffs. (Doc. No. 13 Ex. A.) *See Santelices v. Cable Wiring*, No. 98-7489, 2001 U.S. Dist. LEXIS 6787, at *4 (S.D. Fl. Mar. 7, 2001) ("[Plaintiff] has submitted only his own affidavit, and thus has failed to meet the evidentiary burden required [to prevail on a motion for court notification to

potential plaintiffs under § 216(b).]"). However, we permitted Plaintiffs to conduct limited discovery that would allow them to provide a more substantial factual basis. In their renewed Motion, Plaintiffs have provided the following: Plaintiff Leonard Bosley's ("Bosley") Declaration stating that TCI trains its Admissions Representatives using a standard training program (Doc. No. 24 Ex. A); a 2004 "Admission Rep. Start Report" entitled "THE FINISH LINE" showing that Plaintiffs Bosley and Angela Kleckner ("Kleckner") were two of a roughly thirty-person sales force in the Admissions Department of TCI[2] (*id*. Ex. B); the Admissions Department's job description for Admissions Representatives (*id.* Ex. C); an August 10, 2004, email from Kevin Tice, Regional Director of Admissions of TCI, congratulating Plaintiffs Kleckner, Bosley, and other Admissions Representatives for the number of their enrollments (*id.* Ex. D); a copy of the Admissions Sales Training Manual TCI uses to train all Admissions Representatives (*id.* Ex. E); a copy of the Admissions Board Reports, a TCI internal summary tracking the performance of Admissions Representatives (*id*. Ex. F); and a March 26, 2005, Internet job posting for the position of Admission Representative showing no distinction between the Admissions Representative openings at various campus locations (*id.* Ex. G).

Plaintiffs emphasize that the Admissions Training Manual provides that "[t]his manual is designed to maintain consistency in admission training." (*Id*. Ex. E at 1.) Furthermore, the Admissions Board Report uses the same criteria to evaluate the performance of Admissions Representatives. (*Id*. Ex. F.)

Defendants submit three TCI employee Declarations in support of their contention that

[2]Plaintiff Todd German is not listed.

the proposed class members did not perform the same duties as the named Plaintiffs.[3] (Doc. No. 25 Ex. 2.) While this evidence may be significant after discovery, and during step two of the process, at this stage, it does not compel us to deny preliminary certification. In *Felix de Ascencio*, the court stated:

> Defendant submits detailed declaration and information . . . to show that the potential plaintiffs are not similarly situated to the representative Plaintiffs. While this information may play a more significant role after discovery and during an analysis of the second and final similarly situated tier, Plaintiffs have advanced sufficient evidence to meet their low burden at this first tier of the similarly situated question. At this stage of the proceedings, before discovery is completed, Plaintiffs cannot counter every assertion made by the Defendant. . . . [Forcing] Plaintiffs to counter every one of Defendant's assertions concerning the similarly situated question at this early stage of the action would "condemn any large class claim under the [FLSA] to a chicken-an-egg limbo."

130 F. Supp. 2d at 663 (E.D. Pa. 2001) (quoting *Sperling*, 118 F.R.D. at 406). Under all of the circumstances, we conclude that Plaintiffs have now satisfied the lenient first tier factual showing

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[3]Defendants also assert that cases involving challenges to "exempt" classification involve "'a highly fact-specific analysis of each employee's job responsibilities'" that are not appropriate for class treatment. (Doc. No. 25 at 5 (citing *Morisky*, 111 F. Supp. 2d at 498 ("Exemption determinations are fact-intensive inquiries which frequently turn on the particular duties of specific employees."))). Defendants neglect to point out that the court in *Morisky* did not conduct a step one analysis. *Morisky*, 111 F. Supp. 2d at 498. Rather, the court pointed out:

> This case is somewhat different. It is clearly beyond the first tier of the above analysis, as over 100 potential plaintiffs have already opted into this lawsuit. Further, pursuant to the most recent scheduling order . . . discovery was to have been completed . . . well before the present motion was filed. It is appropriate, therefore, for the Court to apply a stricter standard in its analysis of the question before it.

Id. at 497-98. In the instant case, in contrast, we do apply a first tier analysis. The fact-intensive inquiry applies during a second-tier analysis. *See Evans v. Berry*, No. 03-CV-0438, 2004 U.S. Dist. LEXIS 15716, at *10 (M.D. Pa. June 17, 2004) ("The Defendant argues that a particularized factual analysis is necessary as to each Plaintiff . . . . I wish to make it clear that I am not deciding that at this point in the proceedings that Defendant is wrong. It may well be that Defendant is right.").

for pretrial certification.

A. Notice Form

In our Order of March 2, 2005, we stated that "Counsel shall meet and confer with regard to the content of the proposed notice to be sent to potential plaintiffs." (Doc. No. 18.) Plaintiffs have included a proposed Notice with their Motion. Defendants state that "Plaintiffs' counsel have totally ignored the Court's instruction that they meet and confer with TCI counsel concerning the content of any revised Notice that Plaintiffs seek to provide to putative class members." (Doc. No. 25 at 4.) Our Order provided that Counsel shall meet and confer with regard to the proposed notice and then submit the proposed notice to the Court. When counsel have complied with our Order, we will consider the proposed notice.

B. Defendant Chubb's Cross-Motion To Dismiss

Defendant Chubb has filed a Cross-Motion to Dismiss the Complaint in which it asserts that Plaintiffs were never employed by Chubb, and therefore Plaintiffs have improperly included Chubb as a Defendant. (*Id.*) During the March 1, 2004, Conference, we instructed Plaintiffs to determine whether Chubb is a viable Defendant in this case. Plaintiffs failed to even mention this issue in their Motion. Moreover, Plaintiffs have failed to respond to Defendant Chubb's Motion to Dismiss. Defendant Chubb's Motion will be granted as unopposed.[4]

IV. CONCLUSION

For the foregoing reasons, Plaintiffs' Motion will be granted in part and denied in part

[4]We note that Defendants correctly state that a parent corporation is not, under normal circumstances, liable as the employer of its subsidiaries' employees. (Doc. No. 26 at 8 (citing *Marzano v. Computer Science Corp.*, 91 F.3d 497, 513 (3d Cir. 1997) ("[W]hen a subsidiary hires employees, there is a strong presumption that the subsidiary, not the parent company, is the employer." (citation omitted)).)

and Defendant Chubb's Motion will be granted.

An appropriate Order follows.

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CHUBB CORPORATION, ET AL.	:	

ORDER

AND NOW, this 3rd day of June, 2005, it is ORDERED as follows:

1. Plaintiffs' Motion To Proceed As A Collective Action And For Approval And Facilitation Of Notice (Doc. No. 24, No. 04-CV-4598) is GRANTED in part and DENIED in part.

2. Defendant Chubb Corporation's Cross-Motion To Dismiss The Complaint Filed By Plaintiffs And In Opposition To Plaintiff's Renewed And Amended Motion To Certify A Collective Action And For Approval And Facilitation Of Notice (Doc. No. 26, No. 04-CV-4598) is GRANTED.

3. Counsel shall meet and confer with regard to the content of the proposed notice to be sent to the potential plaintiffs and re-submit the proposed notice to the Court within twenty (20) days.

IT IS SO ORDERED.

BY THE COURT:

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R. Barclay Surrick, Judge