

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge R. Brooke Jackson

Civil Action No 19-cv-02938-RBJ

KRYSTAL GRAY, Individually and On Behalf of All Others Similarly Situated,

Plaintiff,

v.

DELTA COUNTY MEMORIAL HOSPITAL DISTRICT,

Defendant.

ORDER ON MOTION FOR CONDITIONAL CERTIFICATION

This matter is before the Court on plaintiff's Motion for Conditional Certification and to Facilitate Notice of Collective Action Pursuant to Section 216(b) of the Fair Labor Standards Act. ECF No. 37. The Court has jurisdiction pursuant to 28 U.S.C. § 1331. For the following reasons, plaintiff's motion is GRANTED as to conditional certification. The Court reserves ruling as to the proposed notice.

I. BACKGROUND

Defendant Delta County Memorial Hospital District ("DCMH") operates a regional hospital and various clinics in Delta, Colorado. ECF No. 37 at 6. Named plaintiff Ms. Krystal Gray is a former employee of defendant. She worked as a licensed nurse at DCMH from June 2015 through May 2019. ECF No. 37-5 at ¶2. Plaintiff alleges that DCMH denied her and similarly situated non-exempt hourly workers overtime pay under the Fair Labor Standards Act

(“FLSA”).¹ Specifically, she alleges that she and other hourly patient care workers worked during on-duty meal breaks, prior to clocking into their shift, and after clocking out of their shift, and that DCMH did not pay these employees overtime for those hours worked. Registered nurses, nursing assistants, nursing aides, technicians, and other non-FLSA exempt hourly employees are included among “patient care workers” on behalf of which plaintiff sues. Plaintiff alleges that defendant has uniform timekeeping, meal break, and overtime policies and procedures that apply to all non-exempt hourly employees. *Id.*

According to plaintiff, the following alleged facts support her argument that defendant has “a single decision, plan, or policy” that applies to all hourly patient care workers. *Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1102 (10th Cir. 2001). All the employees in question are non-exempt under the FLSA and are paid on an hourly basis—which means they are entitled to receive overtime compensation for all hours they work over forty in a given workweek. 29 U.S.C. § 207(a). DCMH uses Kronos, a timekeeping system that tracks all of the employees’ hours worked. ECF No. 37 at 8. DMCH has a “meal period policy” that became effective on July 31, 2016. It states that employees are to take one thirty-minute meal period each workday and must eat their meal in a non-work area. ECF No. 37-1 at 5. It also states, “[n]o compensation will be paid to employees who utilize the one-half hour meal period, provided they are released of all duties during that time.” *Id.* Hourly employees are to be compensated for

¹ The Court focuses its order on uncompensated overtime because plaintiff likewise refers to overtime in her motion. See ECF No. 37. However, the Court recognizes that some non-exempt hourly patient care employees may work part-time or may have worked fewer than forty hours on certain weeks, such that they are allegedly owed unpaid wages, but not overtime, for the extra time they are claiming. The Amended Complaint addresses unpaid mealtime and pre- and post- shift time that is not compensated, whether or not the addition of that time would push an employee’s total time for the week over 40 hours. Therefore, the references to “overtime” in this order does not exclude claims for mealtime and pre-and post-shift time compensation if the employee’s hours in a given week did not exceed 40.

meal periods for which they are on-duty, but they must not work during their meal periods unless required to do so by their supervisor or management, and they must report all on-duty meal periods. *Id.* Employees who take their meal period are required to clock out and then clock back in. *Id.* This meal period policy applies to all non-exempt hourly patient care employees. ECF No. 37 at 8. The current version of this policy replaced an older version on July 31, 2016. The old DCMH meal period policy automatically deducted thirty minutes from every hourly employee's timesheet for meal periods, regardless of whether the employee was completely relieved from duties during that meal period or not. *Id.* at 10.

Plaintiff alleges that patient care employees always remain responsible for patient care during these meal periods, and that they are frequently interrupted during the meal periods. DCMH trains all patient care workers to comply with its codes of ethics and patients' rights, which make employees responsible for responding to "codes" and addressing patient care needs virtually all the time. *Id.* at 8. Because of DCMH's on-call restrictions and the ethical obligations that employees owe their patients, all of these employees are actually "on duty" during meal periods. *Id.* at 9, 14–15. Thus, non-exempt hourly patient care employees at DCMH are never completely released from their duties during the meal breaks as required under the meal period policy and FLSA regulations. *Id.* This time worked, Ms. Gray argues, is therefore compensable. Plaintiff also asserts that DCMH improperly shifts the burden from itself to employees to track their work hours, including reporting which meal periods they were on-duty and thus those for which they should be compensated. *Id.* at 12–13.

In addition to the purportedly uncompensated meal periods, plaintiff alleges that she and all other non-exempt hourly patient care employees regularly do off-the-clock work for DCMH's

benefit before and after their shifts, for which they are not compensated. *Id.* at 16. This occurs because patient care staff are encouraged to arrive earlier than their scheduled shift start time to prepare for their day, while they are simultaneously discouraged from clocking in until close to the time their shift begins. *Id.* Similarly, employees are expected to clock out when their shift ends, but also to stay after their shift to complete tasks like finishing reports or transferring patients. *Id.*; ECF No. 37-2 at ¶9.

DCMH has an overtime policy that applies to all non-exempt hourly employees. It reads in part, “[e]xcessive, unapproved overtime is not permitted and will result in disciplinary action.” ECF No. 37-1 at 35. Defendant’s policy also states, “[s]upervisors must authorize an employee’s overtime in advance of the work actually being performed. It is the responsibility of the employee to monitor his/her overtime.” *Id.* As a result of this “strict” policy that threatens discipline, plaintiff argues, employees like her regularly work time before and after their shift for which they are not compensated by DCMH. ECF No. 37 at 16.

Based on these allegations Ms. Gray asks the Court to conditionally certify a collective action pursuant to section 216(b) of the Fair Labor Standards Act. That section provides

Any employer who violates the provisions of . . . section 207 of this title shall be liable to the employee or employees affected in the amount of . . . their unpaid overtime compensation . . . , and in an additional equal amount as liquidated damages. . . . An action to recover the liability prescribed in the preceding sentences may be maintained against any employer . . . in any Federal . . . court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.

29 U.S.C. § 216(b). Ms. Gray seeks conditional certification for the following individuals:

All individuals who have worked for Defendant as non-exempt, hourly paid employees with patient care responsibilities, such as nurses, nursing aides, nursing assistants, technicians, non-exempt therapists, and other similarly situated workers in the United States at any time within the three year statute of limitations period for FLSA claims

under 29 U.S.C. § 255(a).

ECF No. 38 at 1.

Plaintiff attaches four declarations in support of her motion. She and three other former DCMH employees—James Stunden, Valerie Stone, and Gail Houseweart—declare that they were frequently interrupted during their meal and rest breaks, and that they were never completely relieved of their duties during their thirty-minute meal periods. Stunden Decl. [ECF No. 37-2] at ¶¶4, 6; Stone Decl. [ECF No. 37-3] at ¶6; Houseweart Decl. [ECF No. 37-4] at ¶8; Gray Decl. [ECF No. 37-5] at ¶¶10–11, 13. All four employees report that their supervisors told them to show up early for their shifts (typically fifteen minutes or more before), while telling them to clock in only seven to fifteen minutes before their shift start time. ECF Nos. 37-2 at ¶8; 37-3 at ¶5; 37-4 at ¶6; 37-5 at ¶8. Similarly, Stunden, Houseweart, and Gray state that they were told to clock out within five minutes of their shift end-time, but that they frequently stayed in the range of fifteen to thirty minutes after their shift to transfer patient care or finish paperwork. ECF Nos. 37-2 at ¶9; 37-3 at ¶5; 37-4 at ¶7; 37-5 at ¶8.

Defendant opposes the motion for conditional certification on several grounds. It argues that plaintiff substantially relies on evidence from outside the maximum three-year statute of limitations period. ECF No. 42 at 7. DCMH also claims that plaintiff has failed to present substantial allegations of “a single decision, plan, or policy” related to lack of compensation for off-the-clock work happening before or after employees’ shift times or during meal periods. *Id.* at 9–19. Finally, defendant argues that this case is not appropriate for collective action because it will require individualized analyses of employee meal period and off-the-clock work. *Id.* at 19–24. Beyond opposing plaintiff’s motion overall, DCMH also objects to various aspects of the

proposed notice. *Id.* at 25–27.

II. CONDITIONAL CERTIFICATION

Courts analyze conditional certification under *Thiessen*. In *Thiessen* the Tenth Circuit accepted a district court’s two-step process for determining whether to certify a class under the Age Discrimination in Employment Act. *See Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1102–05 (10th Cir. 2001). The two-step process has since been applied to decide whether putative class members are “similarly situated” to named plaintiffs in FLSA actions such as this one. *E.g., Baldozier v. American Family Mut. Ins. Co.*, 375 F. Supp. 2d 1089, 1092 (D. Colo. 2005). At the first step, the district court makes an initial “notice stage” determination of whether there are others similarly situated to the named plaintiff for purposes of conditional certification. At that stage, the plaintiff must provide “nothing more than substantial allegations that the putative class members were together the victims of a single decision, policy, or plan.” *Thiessen*, 267 F.3d at 1102 (internal quotation marks and citations omitted). The plaintiff must establish a “reasonable basis” for his or her claim that there are other similarly situated employees. *Morgan v. Family Dollar Stores*, 551 F.3d 1233, 1260 (11th Cir. 2008). The standard for certification at this step is a “lenient” one, *Boldozier*, 375 F. Supp. 2d at 1092, “which typically results in conditional certification . . .” *Renfro v. Spartan Computer Services, Inc.*, 243 F.R.D. 431, 432 (D. Kan. 2007).

At step two, after the close of discovery, the district court determines whether the class is “similarly situated” under a stricter standard and may proceed as a class action. It often involves a defendant’s motion to decertify the class. *Thiessen*, 267 F.3d at 1102–03. Under the stricter standard, the court looks at several factors, including disparate factual and employment settings

of individual plaintiffs; various defenses available to defendant which appear to be individual to each plaintiff; and fairness and procedural considerations. *Id.* at 1103.

The question before the Court is whether plaintiff has met the initial notice stage requirement by substantially alleging that the putative class members were the victims of a single decision, policy, or plan by DCMH. The Court finds that she has. Defendant's codified meal period, timekeeping, and overtime policies were uniform and applied to all hourly patient care employees. The four former employees who submitted declarations also mentioned the same expectations regarding meal periods and pre- and post-shift work: that they were "on call" or "on duty" to respond to needs of patients or other staff during their meal periods, and that they were required to prepare for their shift before clocking in and to wrap up their work after clocking out. Through these declarations, plaintiff has provided substantial allegations that defendant effectively forced hourly patient care employees to work unpaid overtime while off-the-clock. Defendant appears to have achieved this outcome through a combination of formal and informal policies. But there is no question that the same practice applied across all relevant staff.

DCMH's various efforts to resist conditional certification are unconvincing. Defendant first argues that Ms. Gray's motion should be dismissed because she relies on evidence outside the statute of limitations. The maximum statute of limitations for bringing an FLSA case is three years if the plaintiff alleges willfulness. 29 U.S.C. § 255(a). DCMH claims that plaintiff's argument depends on its former policy of automatically deducting thirty-minute meal periods from employee timesheets, a policy that DCMH ended on July 31, 2016, over two months prior

to the statute of limitations start date.² ECF No. 42 at 7–8. Defendant also states that the Court should not consider the declaration of former employee Ms. Virginia Stone because she stopped working for DCMH over two years before the start of the limitations period.³ *Id.*; *see also* ECF No. 37-3 at ¶2.

The Court does not read plaintiff’s motion to rely improperly on evidence beyond the statute of limitations. First, the authority DCMH cites for this proposition is not on point. In both cases the court excluded pre-limitations period evidence on a motion in limine in advance of trial. *Bland v. PNC Bank, N.A.*, No. 15CV1042, 2016 WL 10536026, at *1 (W.D. Pa. Dec. 30, 2016); *Babin v. Plaquemines Par.*, No. CV 18-7378-WBV-DMD, 2019 WL 5540245, at *3 (E.D. La. Oct. 25, 2019). Nothing in these decisions suggests that the courts did not permit the evidence to be considered at the conditional certification stage. More importantly, defendant misreads Ms. Gray’s reliance on the policy. Ms. Gray does not contend that the automatic deduction policy remains in place. Instead she argues that defendant’s *actual practice* of not paying workers for all time worked remained the same despite DCMH’s revising its written policy. To that extent the Court considers it relevant context for plaintiff’s motion.

As for Ms. Stone’s affidavit, I agree with defendant that Ms. Stone has no personal knowledge of defendant’s overtime practices during the relevant statute of limitations period. Her statements also provide background on the nature and timeline of DCMH’s practices,

² Ms. Gray filed her original complaint on October 15, 2019, so the statute of limitations for willful violations would start to run on October 15, 2016. ECF No. 1.

³ Defendant makes the same argument as to Mr. Stunden, but in his declaration he attests that he worked for DCMH through July 2017—well within the statute of limitations period. ECF No. 37-2 at ¶2. The Court thus does not address defendant’s argument as to Mr. Stunden.

however. And even without Ms. Stone's affidavit, plaintiff has still put forth substantial allegations of a unified policy or practice by which DCMH may have denied certain employees overtime.

DCMH next contends that Ms. Gray has failed to present "a single decision, plan, or policy" related to lack of compensation for meal periods and off-the-clock work happening before and after employees' shifts. With respect to meal periods, the core of DCMH's argument is that its new meal policy undisputedly requires employees to clock out when they are fully relieved of duties and requires them to eat their meals off-campus. ECF No. 42 at 10, 14. The Court agrees insofar as defendant's written policy speaks for itself. The policy at issue in this case, however, is not merely the codified document but DMCH's overall uncoded practice that pressured Ms. Gray and others to work through their meal periods or be on call to respond to interruptions. The declarations suggest this practice applied to all hourly patient care employees.

I come to a similar conclusion with respect to the expectation that employees work before and after they clocked in and out for their shifts. DCMH attempts to undermine a finding of "a single decision, plan, or policy" by noting that the declarants differed somewhat in their descriptions of the practice or deviated by a few minutes in how early they arrived or how late they stayed. *Id.* at 16–17. I am unpersuaded. Defendant's policy need not be tied to specific wording or a precise number of minutes in order to be uniform (or illegal). Such a requirement would permit vindication of FLSA overtime rights only where an unlawful policy was publicly espoused or codified, which would severely constrain the statute's reach. The declarants amply allege a single policy—they were all expected to show up early and prepare for their shift before clocking in, and finish up patient handoff and paperwork after clocking out.

For both the meal periods and the pre- and post-shift work, DCMH urges the Court to focus on the declarants' timesheets as evidence that they were actually paid for overtime. *Id.* at 13–14, 17–19. But to do so would be inappropriate at this stage of litigation. As I said to defense counsel in the February 25, 2021 hearing, this evidence gets into the merits of the case. Furthermore, that defendant may have paid *some* overtime during the limitations period does not establish as a matter of law that it compensated putative members for *all* overtime. “Any overtime actually paid will diminish the amount of recoverable damages, but its having been paid is not a bar to collective certification.” *Murphy v. LenderLive Network, Inc.*, No. 13-CV-03135-RBJ, 2014 WL 5315023, at *3 (D. Colo. Oct. 17, 2014).

DCMH's last argument against conditional certification is that a collective action would be improper and inefficient due to the individual analyses required. Defendant asserts that each declarant (and presumably each putative collective member) was subject to different clock-in and clock-out procedures and completed different pre- and post-shift and meal period duties. As a result, “individual determinations predominate.” ECF No. 42 at 20–21. I disagree. Plaintiff has pointed to many similarities among putative members that suggest a collective action is proper (and indeed, certification is in defendant's best interest if DMCH is confident it will win on the merits). Any dissimilarities in employee duties, shift start and end times, and whether managers knew or should have known about unreported work time can be raised by DCMH at the decertification stage. The exact number of times each employee worked pre- and post-shift or during meal periods, and the precise hours of uncompensated overtime, go to individual damages and not whether conditional certification is warranted. Defendant's claim that Ms. Gray is not similarly situated to all non-exempt hourly patient care employees, *Id.* at 23, fails for the same

reasons. The Court finds that plaintiff has satisfied the minimal burden necessary to certify a collective action under 29 U.S.C. 216(b).

III. PROPOSED NOTICE

In its response defendant DCMH made several objections to plaintiff's proposed notice and asked the Court to revise the notice. ECF No. 42 at 25. During the February 25, 2021 hearing, however, defense counsel and plaintiff counsel requested a week to discuss the opt-in period so that they could attempt to stipulate to the number of days. The Court agreed. ECF No. 60. The parties are also encouraged to discuss and attempt to resolve the remaining objections to the proposed notice. The Court requests that if the parties are able to come to an agreement, they submit a joint notice no later than March 5, 2021. If the parties are unable to stipulate, they should inform the Court, and I will rule separately on defendants' other objections.

ORDER

1. Plaintiff's motion for conditional certification [ECF No. 37] is GRANTED as to conditional certification. The Court conditionally certifies a collective action of the follow individuals: "All individuals who have worked for Delta County Memorial Hospital as non-exempt, hourly paid employees with patient care responsibilities, such as nurses, nursing aides, nursing assistants, technicians, non-exempt therapists, and other similarly situated workers, with the exception of home healthcare employees, in the United States at any time after October 15, 2016."
2. The Court requests that the parties submit a joint notice by March 5, 2021. If the parties are unable to agree, they are instructed to inform the Court by that same date.

DATED this 1st day of March, 2021.

BY THE COURT:

A handwritten signature in black ink, appearing to read "R. Brooke Jackson", with a long, sweeping horizontal stroke extending to the right.

R. Brooke Jackson
United States District Judge