IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ALISSA M. JUSTISON and JOSEPH M. CAPITANI, JR., on behalf of themselves and all others similarly situated	:	
Plaintiffs,	:	
v.	:	C.A. No. 08-448-JJF
MCDONALD'S CORPORATION,	:	
Defendant.	:	

MEMORANDUM ORDER

Presently before the Court is a Motion To Compel Compliance With Discovery Requests filed by Plaintiffs Alissa M. Justison and Joseph M. Capitani, Jr., on behalf of themselves and all others similarly situated ("Plaintiffs"). (D.I. 64.)

I. BACKGROUND

On July 17, 2008, Plaintiffs filed this suit as a purported collective action against Defendant McDonald's Corporation ("Defendant") pursuant to Section 216(b) of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 216(b). In their First Amended Complaint, Plaintiffs allege violations of the FLSA, 29 U.S.C. § 201, et seq., and seek past wages owed in the nature of unpaid overtime pay, and other damages. (D.I. 3 ¶ 1.) Specifically, Plaintiffs allege that the corporate-owned McDonald's stores in the United States hire individuals to work as assistant managers, and that the assistant managers are

required to undergo a mandatory one to three month training period. (Id. ¶¶ 4-5.) During this period, Plaintiffs allege that it is Defendant's policy to classify assistant manager trainees as salaried exempt managerial employees. (Id. ¶ 3.) However, according to Plaintiffs, assistant manager trainees do not perform managerial duties, but rather, perform the same non-exempt duties as non-managerial employees, such as working at the cash register and taking and filling orders. (Id. ¶ 6.) Moreover, Plaintiffs allege that it is Defendant's policy to require or permit assistant manager trainees to work more than forty hours per week. (Id. ¶ 9.) Because they are wrongly classified as exempt employees during the training period, Plaintiffs allege that Defendant does not compensate assistant manager trainees for overtime worked in violation of the FLSA. (Id. ¶¶ 8-10.)

II. PARTIES' CONTENTIONS

By their Motion, Plaintiffs seek to compel Defendant to produce information responsive to Interrogatory Nos. 1 and 2 and Requests for Production Nos. 14 and 17 from Plaintiffs' First Set of Interrogatories and Requests for Production.[1] (D.I. 66, at

[1] Plaintiffs also initially sought to compel Defendant to produce information responsive to Interrogatory Nos. 12 and 13 and Requests for Production Nos. 9, 10, and 11. Based on Defendant's representations that they have no responsive information and that any responsive documents have been produced, respectively, Plaintiffs withdrew their Motion with respect to these items.

6.) Specifically, Plaintiffs seek two categories of information: (1) a list of potential class members, along with their contact information, and (2) a list of all corporate-owned stores in the United States that have been in operation since July 18, 2005. (Id. at 6, 11.) With respect to the class list, Plaintiffs contend that this information is necessary to interview witnesses, and to show that there is a group of similarly situated individuals for their motion for conditional certification. (Id. at 6-7.) Further, Plaintiffs contend that this information is relevant, and that courts frequently permit production of class member contact information in wage and hour disputes. (Id. at 7.) With respect to the list of corporate-owned stores, Plaintiffs contend that this information is necessary to identify stores where potential witnesses have worked, and to determine the geographic scope of the class in order to prepare their motion for conditional certification. (Id. at 11.) In addition, Plaintiffs note that Defendant has indicated its willingness to produce a list of all corporate-owned stores currently in operation, but that there is no logic in refusing to also list those stores that were in operation back to July 2005. (Id.)

Defendant objects to producing both categories of information. Defendant contends that the issue at this stage of proceedings is whether Defendant has a policy of treating

assistant manager trainees as exempt employees, that the class list is not relevant to that issue, and moreover, that Plaintiffs have already obtained sufficient discovery to address that issue. (D.I. 68, at 8.) Defendant contends that in cases where similar types of information have been produced, courts routinely deny discovery of a class list prior to conditional certification. (Id. at 9.) Even if the Court deems the class list relevant at this stage, Defendant contends that production is inappropriate because the individuals on the list have a reasonable expectation of privacy in their personal information, and the harm of production outweighs Plaintiffs' potential need for the information. (Id. at 13.) Additionally, Defendant contends that ordering production of the list would allow Plaintiffs to solicit participation in a class before conditional certification, and would effectively serve to notify the putative class of this action. (Id. at 14-15.) With respect to the list of corporate-owned stores, Defendant contends the information is irrelevant because not all corporate-owned stores had assistant manager trainees during the relevant period, because it would contain stores in California and Alaska where assistant manager trainees were paid differently, and because Defendant does not dispute that it has trained assistant managers nationwide. (Id. at 15.)

Finally, Defendant generally contends that Plaintiffs' Motion represents an abuse of the discovery process because

Plaintiffs did not file it until October 9, 2009, three and a half months after learning Defendant was disputing this discovery. (Id. at 2.) According to Defendant, the present Motion is an attempt to delay filing of the motion for conditional certification, which would have been due on October 26, 2009. (Id.)

III. DISCUSSION

In relevant part, Section 216(b) of the FLSA provides

> An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or 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)(emphasis added). Thus, the FLSA permits collective action where (1) the employees are "similarly situated," and (2) they consent in writing to opt-in, or to participate in, the action. E.g., Marrero v. KRA Corp., C.A. No. 09-cv-2516-JF, 2010 WL 678123, at *1 (E.D. Pa. Feb. 23, 2010); Krstic v. J.R. Contracting and Envtl. Consulting, C.A. No. 09-cv-2459(PGS), 2010 WL 395953, at *1 (D.N.J. Feb. 4, 2010). In determining whether the "similarly situated" requirement is met, district courts in the Third Circuit have developed a two-stage test. Villanueva-Bazaldua v. TruGreen Ltd. Partners, 479 F. Supp. 2d 411, 414 (D. Del. 2007)(citing Morisky v. Public Serv.

Elec. & Gas. Co., 111 F. Supp. 2d 493 (D.N.J. 2000)). During the first stage, the notice stage, courts generally examine the pleadings and affidavits of the parties to determine whether notice should be given to potential class members. Id. at 414-15. Where some discovery has taken place before a decision on conditional certification is made,[2] district courts in the Third Circuit have required a modest "factual showing" that the similarly situated requirement is satisfied. Id. at 415; see also Bamgbose v. Delta-T Group, Inc., 684 F. Supp. 2d 660, 667-68 (Ed. Pa. 2010)("Courts typically require a 'modest factual showing' that the putative class members are similarly situated, particularly when the parties have engaged in some discovery."); Bishop v. AT & T Corp., 256 F.R.D. 503, 507 (W.D. Pa. 2009). At the second stage, after class-related discovery has concluded, courts require a higher level of proof that the parties are "similarly situated," and may decertify the class. Bamgbose, 2010 WL 431711, at *5; see also Villanueva, 479 F. Supp. 2d at 415.

After a collective action has been conditionally certified, it is appropriate for a district court to permit discovery of a class list. See Felix De Ascencio v. Tyson Foods, Inc., 130 F. Supp. 2d 660, 662-63 (E.D. Pa. 2001)(citing Hoffman-La Roche,

[2] The parties agreed to engage in a preliminary stage of discovery relating to conditional certification issues. (D.I. 33, at 3.)

Inc. v. Sperling, 493 U.S. 165, 170 (1989))(finding that if the district court conditionally certifies a class in a FLSA action, "[t]he district court may facilitate this notice by allowing discovery of the names and addresses of potential plaintiffs"). However, district courts are divided as to the appropriateness of discovery of a class list prior to conditional certification. Compare Crawford v. Dothan City Bd. Of Educ., 214 F.R.D. 694, 695 (M.D. Ala. 2003)(finding discovery of a class list premature where no collective action was conditionally certified) with Sjoblom v. Charter Commc'ns, LLC, No. 3:07-cv-0451-bbc, 2008 WL 4276928, at *2-3 (W.D. Wis. Jan. 4, 2008)(granting motion to compel and ordering defendant to produce discovery related to prospective class members prior to conditional certification) and Acevedo v. Ace Coffee Bar, Inc., 248 F.R.D. 550, 553-54 (N.D. Ill. 2008)(ordering defendants to produce contact information of similarly situated employees because "'provisional certification is not necessarily a prerequisite for conducting limited discovery' for defining the proposed class").

In the United States District Court for the District of New Jersey, in the case of Stillman v. Staples, Inc., C.A. No. 07-849(KSH), 2007 U.S. Dist. LEXIS 58873, the defendant was ordered to produce the names, addresses, positions and titles of employees with the same or similar job duties as the plaintiff prior to conditional certification. Stillman, 2007 U.S. Dist.

LEXIS at *4. The court reasoned that disclosure of this information would allow the plaintiff to identify individuals who might be similarly situated employees, and to see if these individuals had any discoverable information about the defendant's practices. Id. Further, the court noted that "[t]he focus is whether or not the employees were impacted by a common policy," and that "discovery aimed to gather information about this subject is relevant and the proper topic for an interrogatory even before the collective action is certified." Id. at *2 (citations omitted).

Similarly, in this action, the Court concludes that a list containing the names and contact information of potential class members "appears reasonably calculated to lead to the discovery of admissible evidence" on the claim that Defendant engages in a policy of wrongly classifying assistant manager trainees. See Fed. R. Civ. P. 26(b)(1). Accordingly, under the liberal discovery standards of Rule 26, Defendant will be ordered to provide such a list to Plaintiffs.[3] Likewise, the Court concludes that a list of all corporate-owned stores in operation since July 2005 is relevant to identifying where potential witnesses may have worked, and Defendant will also be ordered to

[3] Defendant need only provide such contact information as it has available. The Court accepts Defendant's representation that it does not maintain the personal email addresses of its employees in the regular course of business. (D.I. 68, Ex. D. Hegarty Decl. ¶¶ 5-6.)

produce that information.

NOW THEREFORE, IT IS HEREBY ORDERED that Plaintiffs' Motion To Compel Compliance With Discovery Requests (D.I. 64) is **GRANTED**.

June 11, 2010
DATE

UNITED STATES DISTRICT JUDGE