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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

Robin L. Poehler,
Plaintiff,
vs.
**Debra Fenwick; Cleaning
Solution Service LLC,**
Defendants.



**2:15-cv-01161 JWS
ORDER AND OPINION
[Re: Motion at Docket 15]**

I. MOTION PRESENTED

At docket 15, Plaintiff Robin Poehler (“Plaintiff” or “Poehler”) filed a motion to conditionally certify her Fair Labor Standards Act collective action. Defendants Cleaning Solution Service LLC (“CSS”) and Debra Fenwick (“Fenwick”; collectively, “Defendants”) respond at docket 20. Plaintiff replies at docket 21. Neither party requested oral argument, and it would not be of additional assistance to the court.

II. BACKGROUND

Poehler is a former employee of CSS. She worked as a cleaner with CSS from May 2013 through April 2014. She filed a lawsuit against CSS and Fenwick in May 2015 for violations of the Fair Labor Standards Act (“FLSA”)¹ and Arizona’s minimum

¹29 U.S.C. §§ 206, 207.

1 wage law² based on her allegations that she was not paid for overtime and that
2 Defendants made illegal deductions of pay and hours worked that caused her
3 compensation to fall below minimum wage. After the case was removed to federal
4 court, Defendants filed counterclaims against Poehler for breach of contract and breach
5 of fiduciary duty. The court dismissed those claims for lack of subject matter
6 jurisdiction.³ Plaintiff now asks the court to conditionally certify her FLSA minimum
7 wage claim against Defendants as a collective action under section 16(b) of the FLSA
8 on behalf of other “similarly situated” employees.⁴ While Plaintiff raises a separate
9 individual claim under Arizona’s minimum wage law and the FLSA’s overtime
10 provisions, she is only pursuing collective action certification for her FLSA minimum
11 wage claim.

12 **III. STANDARD OF REVIEW**

13 The FLSA authorizes an employee to bring a collective action on behalf of
14 “similarly situated” employees.⁵ The FLSA requires that each employee opt-in to the
15 collective action by filing a consent to sue with the court.⁶ “In order to make certain that
16 potential collective class members are notified of the action and their right to take part,
17 the courts may authorize the issuance of notice by the named plaintiffs in an FLSA

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²Ariz. Rev. Stat. § 23-363.

25 ³Doc. 25.

26 ⁴29 U.S.C. § 216(b).

27 ⁵*Id.*

28 ⁶*Id.*

1 action to all other putative class members.”⁷ The decision to certify the class and issue
2 the notice is within the discretion of the court.⁸

3 The issue presented in a motion to certify is whether Plaintiff and the proposed
4 class members are “similarly situated” under the FLSA. What constitutes “similarly
5 situated” employees is not defined in the statute, and the Ninth Circuit has not
6 construed the term for purposes of FLSA class certification.⁹ District courts in the Ninth
7 Circuit, however, including this district, generally follow a two-step approach when
8 making such a determination. First, the court makes a preliminary “notice stage”
9 determination of whether the plaintiff and the putative class members are similarly
10 situated.¹⁰ At the notice stage, “the court ‘require[s] nothing more than substantial
11 allegations that the putative class members were together the victims of a single
12 decision, policy, or plan.’”¹¹

13 Plaintiff’s burden at the notice stage is “light.”¹² Indeed, given the easy burden,
14 motions to conditionally certify are usually granted.¹³ “The evidence must only show
15 that there is some ‘factual nexus which binds the named plaintiffs and the potential
16 class members together as victims of a particular alleged policy or practice.’”¹⁴ The
17 evidence considered during the notice stage is “based primarily on the pleadings and
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19 ⁷*Bollinger v. Residential Capital, LLC*, 761 F. Supp. 2d 1114, 1119 (W.D. Wash. 2011).

20 ⁸*Colson v. Avnet, Inc.*, 687 F. Supp. 2d 914, 925 (2010).

21 ⁹*Id.*

22 ¹⁰*Id.*

23 ¹¹*Id.* (quoting *Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1103 (10th Cir.
24 2001)).

25 ¹²*Colson v. Avnet, Inc.*, 687 F. Supp. 2d at 925.

26 ¹³*Id.*

27 ¹⁴*Id.* at 926 (quoting *Bonilla v. Las Vegas Cigar Co.*, 61 F. Supp. 2d 1129, 1138 (D. Nev.
28 1999)).

1 any affidavits submitted by the parties.”¹⁵ The court does not resolve factual disputes or
2 review the merits of the action.¹⁶

3 If the plaintiff meets its burden at the notice stage, the court will conditionally
4 certify the class and will authorize notification so that the potential class members can
5 join the lawsuit. Once the notification period ends and after discovery has produced
6 more information regarding the nature of the claims, the defendant can move for
7 decertification, and the court can reexamine whether the class members are similarly
8 situated using a more stringent standard.¹⁷

9 IV. DISCUSSION

10 Plaintiff seeks conditional certification of a class consisting of “[a]ll current and
11 former cleaning crew members and cleaning crew supervisors employed by Defendants
12 . . . in Arizona, at any point from May 22, 2013 through the present date.” In support of
13 her request, Plaintiff has relied on her complaint and Defendants’ answer, Defendants’
14 employee manual from 2011 and 2013, and an affidavit. Based on these materials, the
15 court concludes that Plaintiff has met her light burden of showing that the potential
16 member of the class are similarly situated to her. The pleadings show that during her
17 time working for Defendants she held a position as a cleaning crew member and a
18 cleaning crew supervisor. The pleadings, affidavit, and manual show that there was
19 very minimal differences between a cleaning crew member and cleaning crew
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21 ¹⁵*Foschi v. Pennella*, No. 14-cv-01253, 2014 WL 6908862, at *3 (D. Ariz. Dec. 9, 2014)
22 (quoting *Hutton v. Bank of Am.*, No. 03-cv-2262, 2007 WL 5307976 (D. Ariz. Mar. 31, 2007).

23 ¹⁶*Colson*, 687 F. Supp. 2d at 926. As part of Defendants’ opposition to Plaintiff’s
24 request, they ask that the court hold an evidentiary hearing before making any determination.
25 Defendants provide no support in this circuit for the proposition that an evidentiary hearing is
26 needed. As noted above, courts make their notice-stage determination based primarily on the
27 pleadings and affidavits submitted. Moreover, the case Defendants cite, *Grayson v. K Mart*
28 *Corp.*, 79 F.3d 1086 (11th Cir. 1996), is an Eleventh Circuit case and only stands for the
proposition that the court *may* hold a hearing. *Id.* at 1099.

¹⁷*Colson*, 687 F. Supp. 2d at 925; *Schiller v. Rite of Passage, Inc.*, No. 13-cv-0576, 2014
WL 644565, at *3 (D. Ariz. Feb. 19, 2014).

1 supervisor, with the supervisor performing the same cleaning tasks but with additional
2 responsibilities such as driving and quality control.¹⁸ Indeed, Defendants admit that all
3 cleaning employees were subject to the same policies and practices set forth in the
4 employee manual, which forms the basis of Plaintiff's minimum wage complaint.¹⁹
5 Specifically, Defendants acknowledge that all employees were subject to the pay
6 deductions outlined in the manual.

7 Defendants argue that their cleaning employees cannot be similarly situated to
8 each other because "employees perform their actual cleaning services at various
9 commercial and residential clients all over the Phoenix metropolitan area rendering
10 each job notably different from the next."²⁰ Similarly, Defendants stress that cleaning
11 crew supervisors are not similarly situated to cleaning crew members because they
12 have more job responsibilities. Defendants' positions are unavailing, because identical
13 job descriptions and tasks are not required for conditional certification.²¹ Rather, as
14 noted above, the essential factor in the "similarly situated" analysis at this first stage is
15 whether the Plaintiff has sufficiently alleged that members of the putative class were all
16 subject to an illegal policy or practice. Plaintiff has clearly done so here.

17 Defendants also set forth some objections to the specifics of Plaintiff's proposed
18 notice. They request that the proposed putative class be further limited by date.
19 Defendants stress that the employee manual, which is the subject of Plaintiff's
20 complaint, was formally rescinded as of May 22, 2015, and thus the class should not
21 include employees that started working after that time. However, as noted above, this
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23 ¹⁸Doc. 1-1 at ¶¶ 17-18; Doc. 4 at ¶¶ 17-18.

24 ¹⁹See, e.g., Doc. 4 at ¶¶ 39, 40, 41, 42, 57, 59, 61, 62, 63.

25 ²⁰Doc. 20 at p. 7.

26 ²¹See *Foschi*, 2014 WL 6908862, at * 5 (noting that at the first stage of the certification
27 process, a plaintiff does not have to show that all class members have identical employment
28 circumstances); *Taylor v. AutoZone Inc.*, No. 10-cv-8125, 2014 WL 5843522, at *1 (D. Ariz.
Nov. 10, 2014) (noting that class members do not have to hold identical jobs").

1 court does not resolve issues of fact at this initial notice stage. Plaintiff has not had an
2 opportunity to test the veracity of Defendants' assertion that they stopped relying on the
3 employee manual and to discover whether the practices complained of have ceased.

4 Defendants also propose that a third-party administrator be used to send notice
5 and receive consent forms. As noted by Plaintiff, however, there is no compelling
6 reason articulated by Defendants as to why a third-party administrator would be
7 beneficial here.²² They also argue that the notice should be sent via mail only and not
8 be posted at Defendants' office. Indeed, first class mail is typically "the best practicable
9 method of notice,"²³ but the court sees no reason to prohibit posting of the notice at
10 Defendants' principal office where employees clock in and out.²⁴ As argued by Plaintiff,
11 using "both methods can only serve to improve the prospect that those affected will
12 learn of this lawsuit and their potential to opt-in and join in seeking a remedy."²⁵
13 Defendants also request that the court reduce the response time from sixty days to
14 forty-five days. The court declines to do so.

15 Lastly, Defendants object to the statement of their position in Section II of the
16 proposed notice. They ask that it be changed to read as follows: "Defendants deny that
17 they violated the FLSA and claim that all employees were paid properly under the
18 FLSA."²⁶ Plaintiff does not oppose such a change.

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22 ²²See *Hensley v. Eppendorf N. Am., Inc.*, 14-cv-419, 2014 WL 2566144, at *9 (S.D. Cal.
23 June 5, 2014) ("Requiring a third-party administrator to send notice would likely complicate the
24 notice process and generate additional expenses.").

25 ²³*Hart v. U.S. Bank NA*, No. 12-cv-2471, 2013 WL 5965637, at * 6 (D. Ariz. Nov. 8,
26 2013).

27 ²⁴*Juvera v. Salcido*, 294 F.R.D. 516, 524 (D. Ariz. 2013) (authorizing Plaintiffs to mail
28 and post the proposed notice).

²⁵Doc. 21 at p. 11.

²⁶Doc. 20 at p. 13.

1 **V. CONCLUSION**

2 Based on the preceding discussion, Plaintiff's motion at Docket 15 to
3 conditionally certify collection action of Plaintiff's FLSA minimum wage claim pursuant to
4 29 U.S.C. § 216(b) is GRANTED. The collective certified action is certified with respect
5 to the following class:

6 All current or former cleaning crew members and cleaning crew supervisors
7 employed by Defendants, Debra Fenwick and/or The Cleaning Solution
8 Service, LLC, in Arizona, at any point from May 22, 2013, through the
9 present date.

10 Plaintiff's notice and consent forms attached as Exhibit A to the motion are
11 approved, except that in Section II of the notice Defendants' position should be revised
12 to read as follows: "Defendants deny that they violated the FLSA and claim that all
13 employees were paid properly under the FLSA."

14 Within 14 days of this order Defendants are directed to provide Plaintiff with the
15 names and last known addresses of potential class members. Plaintiff shall then mail
16 the revised notice and consent form to potential class members. Defendants are further
17 directed to post within 14 days of this order the revised notice at their office in Phoenix,
18 Arizona, in a like manner and location as other legally-mandated notices are posted.
19 The revised notice must remain posted for 60 days.

20 DATED this 18th day of December 2015.

21 /s/ JOHN W. SEDWICK
22 SENIOR UNITED STATES DISTRICT JUDGE
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