Gassel v. American Pizza Partners LP et al Doc. 110

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Philip A. Brimmer

Civil Action No. 14-cv-00291-PAB-NYW

MIKE GASSEL, individually and on behalf of similarly situated persons,

Plaintiff,

v.

AMERICAN PIZZA PARTNERS, L.P.,
AMERICAN RESTAURANT PARTNERS, L.P.,
RMC AMERICAN MANAGEMENT, INC., and
HEART OF TEXAS PIZZA LP,

Defendants.

ORDER

This matter is before the Court on the Unopposed Motion to Approve Collective Action Settlement [Docket No. 96] and the Application for Fees, Costs and Expenses [Docket No. 98 (public entry at Docket No. 100)] filed by named plaintiff Mike Gassel.[1] Plaintiff requests Court approval of a collective action settlement pursuant to the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*

I. BACKGROUND

Defendants jointly operate a chain of 130 Pizza Hut stores in eight states. Docket No. 26 at 3, ¶ 9. Defendants employ delivery drivers, who use their own vehicles to deliver food to defendants' customers. *Id.* at 1, ¶ 1. Between July 2009 and September 2012, plaintiff worked for defendants as a delivery driver at their Pizza Hut

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[1]This order adopts the definitions set forth in the Agreement. Docket No. 99 at 6-16.

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store in Greeley, Colorado. *Id.* at 3, ¶ 13. Plaintiff's duties involved delivering pizzas and other food items to customers' homes or workplaces. *Id.* at 4, ¶ 15. Plaintiff alleges that he averaged five miles per delivery and three deliveries per hour. *Id.* at 7, ¶¶ 30, 34. Plaintiff alleges that defendants' delivery drivers incur costs for gasoline, vehicle parts and fluids, repair and maintenance services, insurance, depreciation, and other automobile expenses while making such deliveries. *Id.* at 4, ¶ 17. Plaintiff claims that the driving conditions associated with pizza delivery result in above average automobile expenses and rapid vehicle depreciation. *Id.* at 5, ¶ 21.

Plaintiff alleges that defendants reimburse their delivery drivers on a per delivery basis. *Id.* at 4, ¶ 18. Plaintiff claims that defendants' delivery reimbursement policy does not accurately reflect the costs delivery drivers incur because the policy fails to account for the miles actually driven. *Id.* at 4, ¶ 19. Further, plaintiff claims that defendants' delivery reimbursement policy equates to an unreasonably low per mile reimbursement rate, *id.* at 5, ¶ 22, and results in an effective reimbursement rate of approximately $0.172 per mile, which falls below the IRS business mileage reimbursement rate. *Id.* at 4-5, 7, ¶¶ 19-20, 31.

Plaintiff asserts that a reimbursement range of between $0.42 and $0.565 is a reasonable approximation of the actual costs incurred. *Id.* at 7, ¶¶ 32-33. Plaintiff states that he bore costs associated with delivering pizzas and consistently "kicked back" to defendants between $3.75 and $5.925 per hour for such costs. *Id.* at 8, ¶ 35. Plaintiff argues that the "kick backs" effectively lowered delivery drivers' net hourly wage to between $1.69 and $3.61. *Id.* These rates are below the federal minimum wage of

$7.25 per hour. 29 U.S.C. § 206.

On January 31, 2014, plaintiff filed this case against defendants, bringing a claim for violation of the FLSA and a claim for violation of the Colorado Minimum Wage of Workers Act ("CMWWA"), Colo. Rev. Stat. § 8-6-101. Docket No. 1 at 1-2, ¶ 2. On April 30, 2014, plaintiff filed an amended complaint deleting the CMWWA claim. Docket No. 26. Plaintiff brings this case as a collective action pursuant to 29 U.S.C. § 216(b). *Id.* at 9, ¶¶ 41-42. Plaintiff alleges that he and defendants' other delivery drivers are similarly situated in multiple respects. *See id.* at 9-10, ¶ 44.

On May 14, 2014, the Court conditionally certified this case as a collective action pursuant to the parties' Joint Motion to Approve Stipulated Form of Notice of Collective Action. Docket No. 28. Defendants produced to plaintiff's counsel contact information for all delivery drivers who worked for defendants on or after December 14, 2011, which included: the name(s), the last known address(es), the telephone number(s), the last four digits of the employee's social security number, the dates of employment, the store location, and the store number for each driver. Docket No. 27 at 2, ¶ 3(c). Plaintiff's counsel mailed notice to those persons defendants identified. Docket No. 99 at 2, ¶ 3; *see also* Docket No. 27-1. Excluding plaintiff, 519 individuals responded to opt into the Class. Docket No. 99 at 6. Individuals who opted in were required to sign a consent form that delegated to Mr. Gassel the right "to make all decisions on [the Class Member's] behalf concerning the method and manner of conducting the case including settlement, the entering of an agreement with Plaintiffs' counsel regarding payment of attorneys' fees and court costs, and all other matters pertaining to this lawsuit." *Id.* at 3, ¶ 5. The consent form also stated that the individual agreed to be represented by

plaintiff's counsel and "other attorneys with whom they may associate." *Id.*

On October 1, 2014, after a day-long in-person settlement meeting, the parties agreed to a collective action settlement. Docket No. 96 at 2. The Agreement provides that defendants will pay $975,000 towards the creation of the Settlement Fund. Docket No. 99 at 7, ¶ 1. Plaintiff's counsel seeks "33 1/3% of the Settlement Fund" (approximately $324,967), *id.* at 9, and $15,681.78 in expenses and costs related to litigation. Docket No. 98 at 1. Plaintiff's counsel also requests a service payment to Mr. Gassel of not more than $5,000. Docket No. 99 at 8, ¶ 3. The remaining funds will be distributed to the Class Members pro rata pursuant to what the Agreement describes as an "equitable formula" based on the number of deliveries driven, the wage rate earned, and the reimbursement rate paid compared with other Class Members during the relevant time period. *Id.* at 8, ¶ 4. Payments in the form of a check will be mailed by plaintiff's counsel to each Class Member at his or her last known address. *Id.* at 8, ¶ 5. In exchange, each Class Member agrees to release defendants from his or her FLSA claims as well as any other wage and hour claims that relate to, were asserted by, or could have been asserted by the Named Plaintiff. *Id.* at 10, ¶¶ 1-2. If any check is not negotiated within 180 days of issue, unclaimed funds will go to the unclaimed property division of the state where the Class Member in question was last known to reside. *Id.* at 9, ¶ 7. On November 5, 2014, Mr. Gassel executed the Agreement on behalf of himself and the Class Members. *Id.* at 16.

On November 11, 2014, plaintiff filed the present motion, seeking Court approval of the Agreement. Docket No. 96.

II. ANALYSIS

The "prime purpose" in enacting the FLSA "was to aid the unprotected, unorganized and lowest paid . . . employees who lack[] sufficient bargaining power to secure for themselves a minimum subsistence wage." *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 707, n.18 (1945). In suits filed directly by employees against their employer under the FLSA for back wages, the parties must present any proposed settlement agreement to the court for assessment of whether such settlement is fair and reasonable. *Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350, 1353 (11th Cir. 1982).

A. FLSA Collective Action Certification

1. Final Collective Action Certification

The FLSA provides that an employee or multiple employees may bring an action "[on] behalf of himself or themselves and other employees similarly situated." 29 U.S.C. § 216(b). There is a two-step approach to determining whether plaintiffs are "similarly situated" for purposes of FLSA collective action certification. *Thiessen v. GE Capital Corp.*, 267 F.3d 1095, 1105 (10th Cir. 2001).[2] A court's initial certification comes at the notice stage, where courts use a fairly lenient standard to determine whether plaintiffs are similarly situated for purposes of sending notice to putative class members. *Id.* at 1102. After discovery, a court makes a final class certification using a

[2] *Thiessen* involved a collective action under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.* Because the ADEA adopts the collective action mechanism set forth in FLSA § 216(b), courts apply *Thiessen* to FLSA collective actions. *See Kaiser v. at the Beach, Inc.*, 2010 WL 5114729, at *4 n.9 (N.D. Okla. Dec. 9, 2010); *see also Brown v. Money Tree Mortg., Inc.*, 222 F.R.D. 676, 679 (D. Kan. 2004).

stricter standard. *See id.* at 1102-03. In deciding whether to certify a collective action, courts consider several factors, including: (1) the disparate factual and employment settings of individual plaintiffs; (2) various defenses available to defendant which appear to be individual to each plaintiff; and (3) fairness and procedural considerations.[3] *See id.* at 1103. Courts generally make a final certification ruling before approving a collective action settlement. *See Whittington v. Taco Bell of Am., Inc.*, No. 10-cv-01884-KMT-MEH, 2013 WL 6022972, at *2 (D. Colo. Nov. 13, 2013); *see also Tommey v. Computer Scis. Corp.*, 2015 WL 1623025, at *1 (D. Kan. Apr. 13, 2015); *Barbosa v. Nat'l Beef Packing Co.*, LLC, 2014 WL 5099423, at *5 (D. Kan. Oct. 10, 2014) (citing 29 U.S.C. § 216(b)); *Goldsby v. Renosol Seating, LLC*, 2013 WL 6535253, at *4 (S.D. Ala. Dec. 13, 2013); *Gambrell v. Weber Carpet, Inc.*, 2012 WL 5306273, at *3 (D. Kan. Oct. 29, 2012); *Burton v. Utility Design, Inc.*, 2008 WL 2856983, at *2 (M.D. Fla. July 22, 2008) (citing *Anderson v. Cagle's, Inc.*, 488 F.3d 945, 953 (11th Cir. 2007)).

The parties fail to address this issue and have not otherwise moved for final collective action certification. The fact that the Court conditionally certified the collective action for notice purposes is insufficient to satisfy this requirement. *See Thiessen*, 267 F.3d at 1102, 1105. Although plaintiff's complaint contains allegations concerning how defendants' delivery drivers are "similarly situated," defendants have not admitted such allegations are true, Docket No. 33 at 7, ¶ 44, and the allegations are not specific to the

[3] *Thiessen* lists a fourth factor, i.e. whether plaintiffs made the filings required by the ADEA before instituting suit. *See Theissen*, 267 F.3d at 1103. That factor does not apply in FLSA cases. *See Kaiser*, 2010 WL 5114729, at *3 n.6.

519 opt-in Class Members. Thus, there is no basis for the Court to issue a final certification ruling, which is by itself a sufficient basis for denying the present motion.

Should the parties wish to reapply for Court approval of the Agreement, any renewed motion for approval of the Agreement should also address the issues discussed below.

B. Notice

Although § 216(b) may not require that a court hold a fairness hearing before approving a collective action settlement, courts generally require, at minimum, that opt-in plaintiffs be given notice of any settlement and an opportunity to object. *Tommey*, 2015 WL 1623025, at *1; *see also Goldsby*, 2013 WL 6535253, at *10 ("[T]he majority of the courts approve [an FLSA collective action] settlement only after notice has been provided to the opt-in plaintiffs and a fairness hearing conducted, or at the least, what is required is a statement to the Court that the opt-in plaintiffs have had notice of the settlement and an opportunity to object.").

Plaintiff has not provided any indication that the Class Members were given notice of the Agreement and an opportunity to object. *Cf. Lazarin v. Pro Unlimited, Inc.*, 2013 WL 3541217, at *4 (N.D. Cal. July 11, 2013) ("One hundred percent of all Class Members have received notice [of the Settlement Agreement.]"); *In re Am. Family Mut. Ins. Co. Overtime Pay Litig.*, No. 06-cv-17430-WYD-CBS, 2010 WL 9593848, at *1 (D. Colo. Oct. 6, 2010) (providing for notice of settlement and opportunity to object or withdraw consent); *Moore v. Ackerman Inv. Co.*, 2009 WL 2848858, at *1 (N.D. Iowa Sept. 1, 2009) ("The plaintiffs' attorney notified each plaintiff of the proposed settlement

by letter, including notice of each plaintiff's potential maximum recovery and the amount that each plaintiff would receive pursuant to the settlement."). Moreover, plaintiff does not indicate whether Class Members have been apprised of the formula class counsel will use to calculate each Class Member's share of the Settlement Fund. Docket No. 99 at 12-28. Plaintiff's failure to address this issue is, like the lack of final collective action certification, a sufficient basis to deny the present motion. *Cf. Tommey*, 2015 WL 1623025, at *1 (directing the parties to provide plaintiffs notice of the settlement and an opportunity to object).

C. The Settlement

To approve an FLSA settlement, a court must find that: (1) the agreement is the result of a bona fide dispute, (2) the proposed settlement is a fair and reasonable resolution to all parties involved, and (3) the proposed settlement contains a reasonable award of attorneys' fees and costs. *Lynn's Food Stores*, 679 at 1355; *Baker v. Vail Resorts Mgmt. Co.*, No. 13-cv-01649-PAB-CBS, 2014 WL 700096, at *1 (D. Colo. Feb. 24, 2014).

Turning to the second factor, an FLSA settlement must provide adequate compensation to the employees and must not frustrate the FLSA's policy rationales. *See Dees v. Hydradry, Inc.*, 706 F. Supp. 2d 1227, 1245-46 (M.D. Fla. 2010); *see also Felix v. Thai Basil at Thornton, Inc.*, No. 14-cv-02567-MSK-CBS, 2015 WL 2265177, at *1 (D. Colo. May 6, 2015); *Hartley v. Time Warner NY Cable LLC*, No. 13-cv-00158-RM-MJW, 2014 WL 4437282, at *2 (D. Colo. Sept. 9, 2014). To determine the fairness of a proposed collective settlement, courts regularly apply the same fairness factors

used for evaluating proposed class action settlements under Fed. R. Civ. P. 23(e), which are: (1) whether the parties fairly and honestly negotiated the settlement, (2) whether serious questions of law and fact exist which place the ultimate outcome of the litigation in doubt, (3) whether the value of an immediate recovery outweighs the mere possibility of future relief after protracted litigation, and (4) the judgment of the parties that the settlement is fair and reasonable. *Baker*, 2014 WL 700096, at *2 (citing *Rutter & Wilbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180, 1188 (10th Cir. 2002)).

The Court must also determine whether the settlement agreement undermines the purpose of the FLSA, which is to protect employees' rights from employers who generally wield superior bargaining power. *Baker*, 2014 WL 700096, at *2; *see also Castorena v. El Trompito, Inc.*, No. 14-cv-00326-KLM, 2014 WL 5564339, at *2 (D. Colo. Nov. 3, 2014); *Hartley*, 2014 WL 4437282, at *2. To determine whether a settlement agreement is consistent with the purpose of the FLSA, courts look at the following factors: (1) presence of other similarly situated employees; (2) a likelihood that plaintiffs' circumstances will recur; and (3) whether defendants had a history of non-compliance with the FLSA. *Dees*, 706 F. Supp. 2d at 1244.

Plaintiff fails to provide sufficient facts upon which to conclude that the settlement award will be distributed in a fair and reasonable manner. Plaintiff states that, after payment of attorneys' fees and expenses and any service award, the remainder of the Settlement Fund will be distributed pro rata to class members according to an "equitable formula" based primarily on: (1) the total number of deliveries made by each class member; (2) the wage rate earned by each class member; and (3)

the reimbursement rate paid to each class member who worked during the applicable class period. Docket No. 99 at 8, ¶ 4. Plaintiff does not, however, further define or explain the "equitable formula." *See id.* Although plaintiff attaches a chart showing the amount each Class Member will receive, plaintiff does not explain how those numbers were calculated or why such amounts reflect a fair and reasonable distribution of the Settlement Fund. *Id.* at 17-28. Thus, the Court lacks a sufficient basis upon which to find that the distribution is fair and reasonable. *Cf. McCaffrey v. Mortg. Sources Corp.*, 2011 WL 32436, at *4 (D. Kan. Jan. 5, 2011) (denying approval because plaintiff provided insufficient facts to assess the equatability of the pro rata calculation for plaintiffs' awards).

D. Placing the Settlement Agreement Under a Filing Restriction

In order to promote the goals of the FLSA, many courts give FLSA settlements a presumption in favor of public access:

> [A]n agreement settling an FLSA claim that is submitted for court approval is indisputably a document that is relevant to the performance of the judicial function and useful in the judicial process, and thus a "judicial document" subject to the presumption of access. Further, insofar as such an agreement goes to the heart of the matter being adjudicated–and implicates the underlying policies of the FLSA– the presumption of public access that attaches to judicial documents is at its strongest.

Alewel v. Dex One Serv., Inc., 2013 WL 6858504, at *3 (D. Kan. Dec. 30, 2013) (internal citations omitted) (citing *Wolinsky v. Scholastic Inc.*, 900 F. Supp. 2d 332, 337-38 (S.D.N.Y. 2012)); *see also Dees*, 706 F. Supp. 2d at 1244-45; *Tran v. Thai*, 2009 WL 2477653, at *1 (S.D. Tex. Aug. 12, 2009). Limitation on public access "contravenes the legislative purpose of the FLSA and undermines the Department of Labor's regulatory

effort to notify employees of their FLSA rights." *Dees*, 706 F. Supp. 2d at 1242; *see also Blockin v. Black Pepper Pho*, *LLC*, No. 14-cv-1252-WJM-KLM, 2014 WL 6819894, at *3 (D. Colo. Dec. 3, 2014) (finding fair and reasonable a public FLSA settlement agreement because it gives notice to future plaintiffs of prior allegations of defendant's improper conduct); *Castorena*, 2014 WL 5564339, at *2 (same); *Hartley*, 2014 WL 4437282, at *2 (noting importance of public access to FLSA settlement agreements). Thus, parties seeking to restrict access to an FLSA settlement agreement bear the burden of "articulat[ing] a real and substantial interest that justifies depriving the public of access to the records." *Helm v. Kansas*, 656 F.3d 1277, 1292 (10th Cir. 2011); *see also Dees*, 706 F. Supp. 2d at 1245-46 (judicial seal of an FLSA settlement is "warranted only under 'extraordinary circumstances' typically absent in an FLSA case."); *Tran*, 2009 WL 2477653, at *1 ("The presumption of public access to settlements of FLSA actions is particularly strong . . . Absent an 'extraordinary reason,' the court cannot seal such records.").

The parties filed a Joint Motion to File Settlement Agreement and Supporting Declarations and Motion for Attorneys' Fees Under Seal [Docket No. 97], seeking leave to file the Agreement and motion for attorneys' fees under a filing restriction. The magistrate judge granted the motion, concluding that the parties satisfied D.C.COLO.LCivR 7.2. Docket No. 103. However, satisfaction of D.C.COLO.LCivR 7.2 does not mean that the parties have overcome the presumption that FLSA settlements should be made public. In fact, none of the justifications for placing the Agreement under restriction are sound. The motion to restrict speculates that public disclosure of the Agreement will encourage or foment additional lawsuits against defendants. Docket

No. 97 at 2. The parties do not, however, provide any evidence in support of such an assertion. The Agreement prohibits the parties from disclosing details of the settlement to third parties, Docket No. 99 at 11, ¶ G, but provides no rationale for doing so other than that "[defendants] could incur and sustain significant and substantial damage if any of the confidentiality provisions of this Agreement are breached." Docket No. 99 at 11, ¶ 2. This statement is conclusory and insufficiently specific. *See Alewel*, 2013 WL 6858504, at *5 (denying parties request to seal FLSA settlement "when presented with only generic confidentiality concerns."). The parties also contend that the public policy encouraging settlement merits maintaining the Agreement under seal, but the Court is not convinced that this concern is, by itself, a sufficient basis for maintaining the Agreement under restriction or approving a settlement agreement containing a confidentiality provision. *See Dees*, 706 F. Supp. 2d at 1242 ("A confidentiality provision in an FLSA settlement agreement both contravenes the legislative purpose of the FLSA and undermines the Department of Labor's regulatory effort to notify employees of their FLSA rights."). Privacy concerns may weigh in favor of redacting certain information from the settlement documents, *see, e.g.*, Docket No. 99 at 17-28, but any renewed motion for approval of the Agreement should address these concerns with a full justification for a proposed redaction.[4]

[4]Plaintiff's counsel state that they have been involved in settling at least six pizza delivery driver class or collective actions, and plaintiff's attorney Mark Potashnick further claims that he is currently involved in at least eight other actions. Docket No. 98-1 at 3-4, ¶ 4; Docket No. 98-2 at 3-8, ¶¶ 10-11. Plaintiff's counsel also contends that "pizza delivery drivers across the country [] are oppressed by the pizza delivery industry's unreasonably low vehicle reimbursements." Docket No. 98 at 1. This suggests the

E. Attorneys' Fees

Pursuant to 29 U.S.C. § 216(b), "[t]he court in [an FLSA action] shall . . . allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." In the context of a collective action, the Court must determine the reasonableness of attorneys' fees. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 454 (10th Cir. 1988). Because defendants do not oppose the award of attorneys' fees, the proposed fee award must be carefully examined. *Barbosa*, 2014 WL 5099423, at *9 ("[Because] defendant has no incentive to bargain for lower fees . . . the Court intends to skeptically examine and analyze the fee and cost proposal.").

Here, plaintiff's counsel has not provided sufficient information regarding how attorneys' fees were negotiated, including whether those fees were negotiated separately from the Class' recovery. *See Goldsby v. Renosol Seating, LLC*, 294 F.R.D. 649, 655 (S.D. Ala. 2013) (expressing concern whether attorneys' fees were negotiated separately from plaintiffs' recovery in FLSA collective action settlement); *see also Vogenberger v. ATC Fitness Cape Coral, LLC*, 2015 WL 1883537, at *1 n.2 (M.D. Fla. Apr. 24, 2015) (stating that parties' first motion for FLSA collective action settlement approval was denied because the parties failed to state whether attorneys' fees were

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possibility that other pizza franchisers may be engaging in conduct similar to that alleged in plaintiff's complaint, which would seem to weigh in favor of ensuring that the Agreement is a public document. *See Dees*, 706 F. Supp. 2d at 1242 ("[T]he employer thwarts the informational objective of the notice requirement by silencing the employee who has vindicated a disputed FLSA right.").

negotiated separately); *King v. Raineri Constr., LLC*, 2015 WL 631253, at *4 (E.D. Mo. Feb. 12, 2015) (noting that attorneys' fees were separately negotiated from plaintiffs' award in holding such fees reasonable in FLSA collective action settlement approval); *Moore*, 2009 WL 2848858, at *3 (denying attorneys' fees in FLSA collective action settlement as counsel did not provide information concerning how such fees were determined). Any renewed motion for approval of the Agreement should provide additional information on this issue.

III. CONCLUSION

The above-identified deficiencies preclude approval of the Agreement at this time. The Court will deny the present motion without prejudice should the parties wish to reapply for approval of the current Agreement. *See* Docket No. 99 at 12, ¶ H. For the foregoing reasons, it is

ORDERED that plaintiff's Unopposed Motion to Approve Collective Action Settlement [Docket No. 96] and Application for Fees, Costs and Expenses [Docket No. 98 (public entry at Docket No. 100)] are **DENIED** without prejudice.

DATED September 8, 2015.

BY THE COURT:

s/Philip A. Brimmer
PHILIP A. BRIMMER
United States District Judge