Campbell et al v. City of New York Doc. 37

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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Henry Campbell *et al.*,

Plaintiffs,

–v–

City Of New York,

Defendant.

16-cv-08719 (AJN)

MEMORANDUM & ORDER

ALISON J. NATHAN, District Judge:

Pending before the Court in this Fair Labor Standards Act ("FLSA") case is both a partial motion to dismiss and a motion for conditional certification. For the following reasons, the Court grants in part and denies in part the motion to dismiss. The Court also grants in part the motion for conditional certification and orders the parties to meet and confer regarding remaining certification issues.

I. Facts

The following facts are derived from Plaintiffs' complaint and are assumed to be true for purposes of this motion. *See DPWN Holdings (USA), Inc. v. United Air Lines, Inc.*, 747 F.3d 145, 147 (2d Cir. 2014).

This is a FLSA action against the City of New York. The five plaintiffs named in the complaint are all employees of the City of New York's Department of Homeless Services ("DHS"). Compl. ¶ 4 (Dkt No. 1). Four of the named plaintiffs — Henry Campbell, Edwin Rosario, Jessica Maniotis, and Sheri Silver — are employed as peace officers. Compl. ¶¶ 16, 18, 19, 20. The fifth plaintiff, Jermaine Abraham, is a sergeant. Compl. ¶ 17. The plaintiffs work at different homeless shelters around New York City, including the Flatlands Family

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Residence, the Jack Ryan Residence, the Prevention Assistance and Temporary Housing Center ("PATH"), and the Franklin Women's Shelter. Compl. ¶¶ 16, 17, 18, 19, 20. At base, Plaintiffs' jobs involve security. Their job duties include, *inter alia*, guarding DHS personnel and property, investigating suspicious activity, responding to hazards, preventing theft and destruction, and making arrests as necessary. Compl. ¶¶ 9-10.

According to the complaint, the City's approach to compensating DHS peace officers and sergeants for overtime work violates the FLSA in four particular ways. First, Plaintiffs contend that the City fails to pay them for hours routinely worked in excess of forty hours a week. According to the complaint, DHS peace officers and sergeants are scheduled to work 42.5 hours a week, with one half-hour automatically deducted from each shift for a meal period, meaning that Plaintiffs are paid for forty hours of work each week. Compl. ¶ 11. The complaint further alleges that Plaintiffs routinely work both before and after their scheduled shifts and during meal periods. For example, the complaint alleges that the plaintiffs often work before their shifts begin, as they must prepare for roll call and change into their uniforms, as DHS requires them to change on site. Compl. ¶¶ 11-12, 16. Plaintiffs also allegedly routinely work after their shifts end and during their designated meal periods, as they are not permitted to leave their posts until they are properly relieved by another officer, and the relieving officers are frequently late. Compl. ¶¶ 12-13. Additionally, the complaint alleges that peace officers and sergeants assigned to the Franklin Women's Shelter were required to travel to PATH once a week to input their hours for the week, as the Franklin Women's Shelter did not have timekeeping capabilities. Compl. ¶ 20. Plaintiffs represent that they are not compensated for any of this extra work conducted outside of their officially assigned forty hours a week. *See* Compl. ¶¶ 22-23.

The complaint's second claim involves an alleged miscalculation of the rate of overtime pay. When peace officers and sergeants work in the evenings between the hours of 6:00 pm and 6:00 am, they receive "night shift differential pay," equal to ten percent of their basic rate of pay. Compl. ¶ 24. The complaint alleges that, when calculating overtime payments for peace officers and sergeants, the City fails to take into consideration night shift differential pay, thus resulting in under-compensation. Compl. ¶¶ 24-25.

Third, the complaint alleges that the City miscalculated compensatory time. DHS peace officers and sergeants who work "approved overtime" can be compensated in either compensatory time or cash. Compl. ¶ 26. According to the complaint, when the City pays peace officers and sergeants in compensatory time for overtime work, it pays them "on an hour-for-hour, or straight time, basis." Compl. ¶ 27. This is unlawful, according to Plaintiffs, because overtime hours should be compensated at a rate of one and one-half hour for every hour worked.

Fourth and finally, Plaintiffs allege that the City makes untimely overtime payments. According to the complaint, the City "delays the payment of overtime beyond the next pay period," frequently more than two pay periods after the plaintiffs earned the overtime compensation. Compl. ¶¶ 28-29. Plaintiffs do not know why the City delays overtime payment, but the complaint suggests that the reason may be "because the defendant's managerial staff has simply failed to transmit purportedly necessary information to payroll" or "because defendant simply does not want to incur the cost for budgetary reasons in that particular financial quarter." Compl. ¶¶ 28.

Plaintiffs filed their complaint on November 9, 2016. Dkt No. 1. On January 19, 2017, the plaintiffs filed a motion to certify this case as a collective action and to send notice to putative plaintiffs. Dkt No. 17. The City opposed the motion, arguing that {laintiffs failed to

show that they were similarly situated to the potential opt-in plaintiffs. Dkt No. 29. The City also lodged a number of objections to Plaintiffs' proposed notice.

On January 20, 2017, the City of New York filed a motion to partially dismiss the complaint. Dkt No. 19. The Court *sua sponte* provided Plaintiffs an opportunity to amend their complaint in response to the City's motion to dismiss. Dkt No. 22. The Court's order explicitly warned the Plaintiffs "that declining to amend their pleadings to timely respond to a fully briefed argument in the Defendant's January 20, 2017 motion to dismiss may well constitute a waiver of the Plaintiffs' right to use the amendment process to cure any defects that have been made apparent by the Defendant's briefing." *Id.* (citing *Loreley Fin. (Jersey) No. 3 Ltd. v. Wells Fargo Sec., LLC.*, 797 F.3d 160 (2d Cir. 2015)). The plaintiffs declined to amend their complaint. Dkt No. 24.

II. Discussion

This Memorandum & Order will resolve both the motion to dismiss and the motion for conditional certification. As explained below, the Court grants the City's motion to dismiss in part, as Plaintiffs fail to plausibly allege three of their claims as to some of the named plaintiffs. Additionally, the Court grants the motion for conditional certification, at least as to the plaintiffs' first claim.

A. The City's Motion to Dismiss

The City has moved to dismiss only some of Plaintiffs' claims. In the motion, the City does not challenge the sufficiency of the plaintiffs' allegations with regards to the first purported FLSA violation, that the City failed to compensate peace officers and sergeants for overtime work performed before and after their shifts and during meal periods. Reply at 1 (Dkt No. 28).

The City, however, moves to dismiss the other three claims on the ground that the allegations in the complaint are too conclusory to state plausible claims for relief. The Court agrees in part.

The basic pleading standards are familiar. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "Threadbare recitals of the elements of a cause of action" and "mere conclusory statements" are insufficient to state a claim, and "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Id.* In short, a complaint must contain at least some factual content to survive a motion to dismiss.

The Second Circuit has addressed how the *Twombly/Iqbal* pleading standards apply in the particular context of FLSA complaints. *See Dejesus v. HF Mgmt. Servs., LLC*, 726 F.3d 85 (2d Cir. 2013); *Nakahata v. New York-Presbyterian Healthcare System, Inc.*, 723 F.3d 192 (2d Cir. 2013); *Lundy v. Catholic Health Sys. Of Long Island*, 711 F.3d 106 (2d Cir. 2013). In *Lundy*, the Second Circuit held "that in order to state a plausible FLSA overtime claim, a plaintiff must sufficiently allege 40 hours of work in a given workweek as well as some uncompensated time in excess of the 40 hours." 711 F.3d at 114. As applied to the facts of that case, the Second Circuit held that the plaintiffs had failed to plausibly allege a FLSA overtime claim because, no matter how the court combined the hours allegedly worked by the plaintiffs, "the hours alleged did not add up to a claim that over forty hours had been worked in any particular week." *Dejesus*, 726 F.3d at 88; *see also Lundy*, 711 F.3d at 114-15. In other words, the complaint in *Lundy* "failed because of arithmetic: tallying the plausible factual allegations, [the Court] could not get beyond

forty hours in any given week, and therefore to a plausible claim for overtime." *Dejesus*, 726 F.3d at 89.

In subsequent cases, the Second Circuit clarified that arithmetic problems are not the only way a FLSA complaint may fail to state a claim. Specifically, the Second Circuit has clarified that, in accordance with the principles outlined in *Iqbal* and *Twombly*, a complaint alleging FLSA violations must contain at least some factual content to survive a motion to dismiss. For example, in *Dejesus*, the Second Circuit held that a complaint "devoid of any numbers to consider beyond those plucked from the statute" was insufficient to state a claim. 726 F.3d at 89. Accordingly, the Court affirmed the dismissal of the complaint in that case, which failed to "estimate [the plaintiff's] hours in any or all weeks or provide any other factual context or content." *Id.* The Court explained that plaintiffs alleging FLSA violations must "provide some factual context that will 'nudge' their claim 'from conceivable to plausible.'" *Id.* at 90 (quoting *Twombly*, 550 U.S. at 570). Similarly, in *Nakahata*, the Court stated that "Plaintiffs must provide sufficient detail about the length and frequency of their unpaid work to support a reasonable inference that they worked more than forty hours in a given week." 723 F.3d at 201.

Plaintiffs' allegations related to the City's failure to compensate them for certain overtime work clearly satisfy these standards. The Court recognizes that the City has not moved to dismiss this particular claim, presumably because the complaint is adequate. Nonetheless, the Court finds it worthwhile to outline why this claim is sufficiently pled in order to contrast it with Plaintiffs' other, deficient allegations. In *Nakahata*, the Second Circuit suggested that an "allegation that Plaintiffs were scheduled to work forty hours in a given week" combined with allegations "that Plaintiffs were not compensated for work performed during meal breaks, before and after shifts, or during required trainings" would be sufficient to state a FLSA overtime claim.

Id. These are precisely the allegations made in this case. For example, the complaint here alleges that each of the five plaintiffs was scheduled to work exactly forty hours a week. Compl. ¶ 11; *cf. Lundy*, 711 F.3d at 114-15 (affirming dismissal of a complaint where plaintiffs failed to plausibly allege they worked at least forty hours a week). Specifically, the complaint states that the plaintiffs are scheduled to work 42.5 hours a week, with one half-hour period deducted each day for a meal period. Compl. ¶ 11. The complaint then alleges that Plaintiffs routinely worked more than their scheduled forty hours because DHS peace officers and sergeants had to work before their shifts began (in order to change into their uniforms on site, as required, and to prepare for roll call), after their shift ended (because they could not leave until relieved by the next shift's officer), and during meal periods (again, because they could not leave until relieved by another officer). Compl. ¶¶ 12-13. The complaint also alleges that some of the peace officers had to travel to another worksite in order to input their hours and that this time, like the extra work just described, was also uncompensated. Compl. ¶ 20. In addition to these general allegations, the complaint provides examples of particular weeks in which the plaintiffs worked more than forty hours. Compl. ¶¶ 16, 17, 18, 19. In sum, the allegations related to the failure to pay for overtime worked are sufficient to survive a motion to dismiss because the complaint "estimate[s] [the] hours" each plaintiff worked and provides "factual context" to explain why and how each plaintiff was working uncompensated overtime. *Dejesus*, 726 F.3d at 89.

In addition to this claim related to failure to pay overtime, Plaintiffs bring three other claims, purportedly on behalf of all five named plaintiffs. But the detail provided for these three claims stands in stark contrast with Plaintiffs' allegations regarding the failure to pay for certain overtime. As explained below, for each of these three claims, the Court concludes that the complaint satisfies the pleading standards only as to some, but not all, of the five plaintiffs.

For example, the allegations related to "night shift differential pay" are sufficient only as to two of the named plaintiffs. According to the complaint, when a peace officer or sergeant works between the hours of 6:00 pm and 6:00 am, he is entitled to "night shift differential pay" of ten percent of the basic rate of pay. Compl. ¶ 24. The complaint alleges that the City violated the FLSA because, when calculating Plaintiffs' overtime pay, the City did not take into account night shift differential pay. *Id.* The complaint, however, never alleges that each of the five plaintiffs was entitled to night shift differential pay. Specifically, the complaint only alleges that Plaintiffs Maniotis and Rosario worked hours that made them entitled to night shift differential pay. *See* Compl. ¶ 24 ("[R]epresentative plaintiff Maniotis worked 50 hours in the work-week ending on March 19, 2016 and earned night differential for hours worked between 6:00 PM and 6:00 AM, but the night shift differential pay was not included in the rate at which overtime was paid for that period."); *id.* ("[R]epresentative plaintiff Rosario worked 48 hours and 15 minutes in the work-week ending on May 7, 2016 and earned night differential for hours worked between 6:00 PM and 6:00 AM, but the night shift differential pay he received was not included in the rate at which overtime compensation was paid for that period."). There are *zero* factual allegations specific to Plaintiffs Campbell, Abraham, and Silver establishing that they ever worked hours entitling them to night shift differential pay, let alone that the City failed to take into consideration this pay when calculating their overtime pay. *See* Compl. ¶¶ 24-25. For this reason, the Court agrees with the City that this particular FLSA violation must be dismissed as to Plaintiffs Campbell, Abraham, and Silver.

Plaintiffs' claim related to the failure to correctly calculate compensatory time suffers from the same deficiency. According to the complaint, when paying peace officers and sergeants with compensatory time (as opposed to cash) for approved overtime, the City would provide

plaintiffs with one hour of compensatory time for every hour of work. The complaint alleges that this violated the FLSA because when Plaintiffs worked overtime, they should have received one and one-half hour of compensatory time for every hour worked. *See* Compl. ¶¶ 26-27. As was true in the context of Plaintiffs' night shift differential pay allegations, the complaint only provides specific factual content for two of the five plaintiffs. Specifically, only Plaintiffs Abraham and Rosario are alleged to have worked approved overtime that was undercompensated in compensatory time. *See* Compl. ¶¶ 26-27. There are absolutely no facts suggesting that Plaintiffs Campbell, Silver, and Maniotis ever worked approved overtime or that the City miscalculated the compensatory time rate when compensating them for this work. *See id.* The Court therefore must dismiss this particular claim as to Plaintiffs Campbell, Silver, and Maniotis.

Finally, the complaint's claim related to the failure to timely pay overtime suffers from the same pleading problems. The complaint alleges that the City "delays the payment of overtime beyond the next pay period for which the plaintiffs are paid for their regular work hours and in compensatory time for their overtime hours." Compl. ¶ 28. The complaint, however, alleges that this occurred only to Plaintiff Campbell. While the complaint alleges that "representative plaintiff Campbell earned overtime compensation on February 28, 2016, but did not receive the payment for those hours until April 8, 2016," there are simply no comparable factual allegations as to the other four defendants. *Id.* The Court therefore dismisses the late payment of overtime claim as to Plaintiffs Abraham, Maniotis, Rosario, and Silver.

In response to the City's motion to dismiss, Plaintiffs make two primary arguments. First, they argue that their complaint is sufficient as long as they allege that they worked over forty hours a week and were not compensated for their overtime work. Dismissal Opp. at 6-10 (Dkt No. 27). In other words, plaintiffs contend that, because they made sufficient allegations as

to the first claim in their complaint (that the City failed to compensate the five named plaintiffs for certain overtime), their complaint is necessarily sufficient as to the other three claims as well.

Plaintiffs' argument undermines the purpose of the pleading standard. Taking the plaintiffs' argument to its logical conclusion, as long as a plaintiff in a FLSA case alleges that he worked more than forty hours a week and was not properly compensated, he can subsequently advance any theory or claim of a FLSA overtime violation, even if it was not even hinted at in the complaint. In fact, under the plaintiffs' view, the sections of their complaint discussing night differential pay, failure to properly calculate compensatory time, and untimely payment of overtime, are unnecessary and superfluous. This argument subverts the purpose of the pleading standard, which is to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Twombly*, 550 U.S. at 555 (ellipsis in original) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). Alleging generally that the City of New York failed to properly pay plaintiffs for time worked over forty hours a week is a different claim than, and does not give the City fair notice of, the three other claims alleged here, namely that the City improperly calculated overtime compensation (by failing to include night shift differential pay or failing to properly calculate compensatory time) and that the City delayed overtime payments.

Second, Plaintiffs contend that requiring them to provide more factual context is unfair and "illogical." Dismissal Opp. at 14. Plaintiffs point out that they do not yet have access to the City's employment records, which contain the best evidence of the City's purported FLSA violations. *Id.* They accordingly contend that the Court should not require more particularity from them.

This argument misconstrues the level of specificity required of the plaintiffs. The law does not require Plaintiffs to "plead specific damages," *see* Dismissal Opp. at 14, or perhaps

even specify all weeks and hours in which the purported FLSA violations occurred, although such information would certainly be helpful in "nudg[ing]' their claim 'from conceivable to plausible.'" *Dejesus*, 726 F.3d at 90 (quoting *Twombly*, 550 U.S. at 570). Rather, Plaintiffs must allege that each of the four alleged FLSA violations happened to each of the five named plaintiffs. *See Sampson v. Medisys Health Network*, No. 10–CV–1342 (SJF)(ARL), 2011 WL 579155, at *4 (E.D.N.Y. Feb. 8, 2011) (noting that a FLSA complaint must contain factual allegations for "the named plaintiff[s] at a minimum" in order to give "defendants fair notice of the basis of the FLSA overtime claim as is required by *Twombly* and *Iqbal*"). For the last three claims, Plaintiffs' complaint alleges that the identified FLSA violations happened to only some, but not all, of the plaintiffs. This is the shortcoming of Plaintiffs' complaint, not that they failed to provide detailed hourly estimations.

The Court concludes that these dismissals shall be with prejudice. Plaintiffs' opposition brief does not seek an opportunity to amend. It is "not . . . an abuse of the district court's discretion to order a case closed when leave to amend has not been sought." *Dejesus*, 726 F.3d at 90 n.6 (quoting *Nakahata*, 723 F.3d at 198). Furthermore, the pleading deficiencies outlined above were clearly identified in the City's motion to dismiss. The City's motion repeatedly highlights the sparsity of factual content in Plaintiffs' complaint. The Court *sua sponte* gave Plaintiffs an opportunity to amend their complaint in response to the City's motion, even explicitly warning Plaintiffs that declining to amend their pleadings may constitute a waiver of the right to amend in the future. Dkt No. 22. Yet, Plaintiffs' strategically chose not to amend. Dkt No. 24. The Court finds the refusal to amend, especially in the face of a clear argument for dismissal by the City and the seeming ease with which amendment could be made, particularly problematic. *See Dejesus*, 726 F.3d at 90 (noting a "concern about the failure of the plaintiff,

through counsel, at least to attempt to amend her complaint to add specifics while the district court kept the door open for her to do so").

In sum, the Court has concluded that Plaintiffs plausibly states a claim under Count II (failure to properly calculate the overtime regular rate of pay) as to Plaintiffs Maniotis and Rosario, under Count III (untimely pay of overtime) as to Plaintiff Campbell, and under Court IV (failure to properly calculate compensatory time) as to Plaintiffs Abraham and Rosario. The Court accordingly dismisses Count II as to Plaintiffs Abraham, Campbell, and Silver, Count III as to Plaintiffs Abraham, Maniotis, Rosario, and Silver, and Count IV as to Plaintiffs Campbell, Maniotis, and Silver.

B. Plaintiffs' Motion for Conditional Certification

Around the same time the City moved to partially dismiss the complaint, the plaintiffs filed a motion to conditionally certify this action and send notice to putative plaintiffs. Dkt No. 17. The City opposes the conditional certification motion, and it also objects to several components of Plaintiffs' proposed notice. Dkt No. 29. As explained below, the Court concludes that conditional certification is warranted at least with respect to Plaintiffs' first claim, that the City failed to pay them for hours worked above and beyond their scheduled forty hours of week, and the Court orders the parties to meet and confer to resolve certain remaining issues.

"The FLSA authorizes workers to sue on behalf of both themselves and 'other employees similarly situated.'" *Mark v. Gawker Media LLC*, No. 13–cv–4347 (AJN), 2014 WL 4058417, at *2 (S.D.N.Y. Aug. 15, 2014) (quoting 29 U.S.C. § 216(b)). Although FLSA does not require it, district courts "'have discretion, in appropriate cases, to implement [§ 216(b) of the Fair Labor Standards Act] . . . by facilitating notice to potential plaintiffs' of the pendency of the action and of their opportunity to opt-in as represented plaintiffs.'" *Myers v. Hertz Corp.*, 624 F.3d 537,

554 (2d Cir. 2010) (quoting *Hoffmann–La Roche Inc. v. Sperling*, 493 U.S. 165, 169 (1989)). The resulting lawsuit "is known as a 'collective action.'" *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1527 (2013). "The sole consequence of conditional certification is the sending of court-approved written notice to employees, who in turn become parties to a collective action only by filing written consent with the court." *Symczyk*, 133 S. Ct. at 1530 (citations omitted). In other words, certification is an "exercise of the [district court's] discretionary power . . . to facilitate the sending of notice to potential class members." *Myers*, 624 F.3d at 555 n.10.

A two-step approach applies to a determining whether to conditionally certify an action. *Myers*, 624 F.3d at 554-55. First, the Court makes "an initial determination to send notice to potential opt-in plaintiffs who may be 'similarly situated' to the named plaintiffs with respect to whether a FLSA violation has occurred." *Id.* at 555. Second, after notice is sent and potential plaintiffs opt-in, "the district court will, on a fuller record, determine whether a so-called 'collective action' may go forward by determining whether the plaintiffs who have opted in are in fact 'similarly situated' to the named plaintiffs." *Id.* The district court may "de-certify" the action if the record reveals that the opt-in plaintiffs are not similarly situated to the named plaintiffs, and the opt-in plaintiffs' claims may be dismissed without prejudice. *Id.*

This case implicates the first step of the certification question. To obtain conditional certification at the first step, Plaintiffs need only "make a modest factual showing that they and potential opt-in plaintiffs together were victims of a common policy or plan that violated the law." *Id.* (citation and quotation marks omitted). This "modest factual showing" standard is "a low standard of proof." *Id.*; *see also Kassman v. KPMG LLP*, No. 11 Civ. 03743(LGS), 2014 WL 3298884, at *8 (S.D.N.Y. July 8, 2014); *Lynch v. United Servs. Auto. Ass'n,* 491 F. Supp. 2d

357, 368 (S.D.N.Y. 2007) (noting that a plaintiff's burden at the first step of conditional certification is "very low" and "minimal").

Here, Plaintiffs seek to certify a collective of all peace officers and sergeants who work or have worked at the City of New York's Department of Homeless Services since November 9, 2013. Conditional Cert. Mot. at 1 (Dkt No. 18). The Court concludes that Plaintiffs have met the burden for conditional certification as to their first claim, that the City failed to compensate DHS peace officers and sergeants for certain overtime worked. Plaintiffs have met this burden through affidavits provided by each of the five named plaintiffs. In these affidavits, the named plaintiffs sufficiently allege that they were subject to a "policy or plan that violated the law," *see Myers*, 624 F.3d at 555, as they allege that they were "regularly" required to perform certain "unpaid pre-shift and post-shift tasks" above and beyond their scheduled forty hours each work in violation of the FLSA's overtime provisions. Rosario Decl. ¶ 10 (Dkt No. 18-2); Campbell Decl. ¶ 10; Abraham Decl. ¶ 10; Maniotis Decl. ¶ 10; Silver Decl. ¶ 10. The Court also concludes that Plaintiffs have made a "modest factual showing" that this policy was "common," such that they are similarly situated to the potential opt-in plaintiffs. In their affidavits, the five plaintiffs allege that they know that other sergeants and peace officers were subjected to the same unlawful failure to pay overtime. Rosario Decl. ¶ 9; Campbell Decl. ¶ 9; Abraham Decl. ¶ 9; Maniotis Decl. ¶ 9; Silver Decl. ¶ 9. While the City argues that Plaintiffs "do not explain the basis" for this belief, *see* Conditional Cert. Opp. at 11, this is simply not true. Each of the five named plaintiffs avers that he or she has talked with other DHS peace officers or sergeants, and through those conversations learned other DHS employees were subject to the same purported violation. *See, e,g.*, Campbell Decl. ¶ 9. Additionally, "it is reasonable to infer that [DHS] employees would have first-hand knowledge of [DHS] employee policies and practices by virtue

of their tenure at the [shelters]." *Lujan v. Cabana Mgmt., Inc.*, 284 F.R.D. 50, 65 (E.D.N.Y. 2012). Furthermore, Plaintiffs aver that the City uses a single timekeeping and payroll system, known as "CityTime," across all DHS facilities. Rosario ¶ 10; Compl. ¶ 14; Conditional Cert. Reply at 4 (Dkt No. 30). According to Plaintiffs, this system automatically prevents them from seeking compensation for hours worked beyond forty hours each week, even when those hours were in fact worked. Rosario ¶ 10; Conditional Cert. Reply at 4. Because this system is partly what helps perpetuate the alleged FLSA violation, the fact that this system is used by all DHS peace officers and sergeants further supports Plaintiffs' affirmations that all DHS peace officers and sergeants are subject to the same unlawful practice of failure to pay overtime. *See Gregory v. Stewart's Shops Corp.*, No. 7:14-CV-33 (TJM/ATB), 2016 WL 8290648, at *16 (N.D.N.Y. July 8, 2016) (report and recommendation), *adopted by* 2016 WL 5409326 (N.D.N.Y. Sept. 28, 2016) (noting that the fact that "evidence shows that all [Defendant's] employees were uniformly subject to a single, centralized telephonic timekeeping system" would support denying a motion to decertify an FLSA collective (citation omitted)).

The City opposes Plaintiffs' motion for conditional certification, but none of the City's arguments are persuasive. For example, the City contends that the motion for conditional certification should be denied because the named plaintiffs and potential opt-in plaintiffs "are not similarly situated with respect to job duties." Conditional Cert. Opp. at 7. The thrust of the City's argument appears to be that peace officers and sergeants cannot be similarly situated, as the two positions have different job titles and because sergeants "are higher ranked than Peace Officers." Conditional Cert. Opp. at 7. There are two problems with this argument. First, Plaintiffs' complaint and declarations allege that sergeants and peace officers do in fact have similar job duties, namely, ensuring the security of DHS personnel and property. Compl. ¶¶ 9-

10; *compare* Abraham Decl. ¶ 3 (describing job duties of a DHS Sergeant), *with* Rosario Decl. ¶ 3 (describing job duties of a DHS Peace Officer). Second, even assuming the City is correct that sergeants and peace officers have dissimilar jobs, this fact alone does not defeat Plaintiffs' conditional certification motion. "[C]ourts 'routinely grant conditional certification of multiple-job-title classes.'" *Kassman*, 2014 WL 3298884, at *7 (quoting *Cunningham v. Elec. Data Sys. Corp.*, 754 F. Supp. 2d 638, 651 (S.D.N.Y. 2010)); *see also Amador v. Morgan Stanley & Co. LLC*, No. 11 Civ. 4326(RJS), 2013 WL 494020, at *5 n.5 (S.D.N.Y. Feb. 7, 2013) ("The fact that the employees held different positions at different locations does not prevent conditional certification. Courts have found employees 'similarly situated' for purposes of the FLSA where they performed different job functions or worked at different locations, as long as they were subject to the same allegedly unlawful policy.") (alteration omitted) (quoting *Harhash v. Infinity W. Shoes, Inc.*, No. 10 Civ. 8285(DAB), 2011 WL 4001072, at *3 (S.D.N.Y. Aug. 25, 2011)). This is because the certification question is not whether the named and potential opt-in plaintiffs are similarly situated in all factual respects, but rather whether they "are similarly situated *with respect to their allegations that the law has been violated.*" *Kassman*, 2014 WL 3298884, at *7 (quoting *Diaz v. S & H Bondi's Dept. Store*, No. 10 Civ. 7676, 2012 WL 137460, at *5 (S.D.N.Y. Jan. 18, 2012)); *see also Mark*, 2014 WL 4058417, at *6. Here, Plaintiffs have made a modest factual showing that sergeants and peace officers are similarly situated with respect to the claim that the City failed to compensate them for certain overtime worked. Specifically, Plaintiffs allege that both peace officers and sergeants were assigned to work 42.5 hours a week, with one-half hour automatically deducted each shift for a meal period, but that both groups of plaintiffs routinely worked more than forty hours a week because they had to change into their uniforms, prepare for roll call, and wait for their replacements outside of their scheduled hours.

Compl. ¶¶ 11-13, 31; Rosario Decl. ¶¶ 6-7; Campbell Decl. ¶¶ 6-7; Abraham Decl. ¶¶ 6-7; Maniotis Decl. ¶¶ 6-7; Silver Decl. ¶¶ 6-7. Even if it is true, as the City argues, that "the[] functional job duties vary considerably between" peace officers and sergeants, *see* Conditional Cert. Opp. at 7, this does not defeat Plaintiffs' motion for conditional certification given that peace officers and sergeants are similarly situated in the ways that matter, namely, in how they are scheduled to work and the ways in which they are allegedly required to unlawfully work beyond their scheduled forty hours a week.

The City also contends that the conditional certification motion should be denied because Plaintiffs have failed to demonstrate a "common policy" in violation of the FLSA. Conditional Cert. Opp. at 9-11. As to Plaintiffs' first claim, that sergeants and peace officers routinely worked over forty hours a week but were not compensated for this excess time, the City contends that Plaintiffs fail to demonstrate a "common policy" because "the Representative Plaintiffs . . . do not point to any specific weeks in which they worked over 40 hours and were specifically denied the overtime associated with their pre-shift, post-shift or meal-period work." Conditional Cert. Opp. at 10. This argument suffers from two problems. First, in both the complaint and the declarations, Plaintiffs identify particular weeks, as examples, in which they were required to work more than forty hours but were not paid for this work. *See* Compl. ¶¶ 16, 17, 18, 19; Rosario Decl. ¶ 12; Campbell Decl. ¶ 12; Abraham Decl. ¶ 12; Maniotis Decl. ¶ 12. Second, the City's argument ignores the nature of Plaintiffs' overtime allegations. Plaintiffs' allege that they "*routinely* work over 40 hours a week and do not receive overtime compensation." Compl. ¶ 11 (emphasis added). Their allegation appears to be that they were unlawfully required to work uncompensated overtime nearly every week. Rosario Decl. ¶¶ 6-7, 11; Campbell Decl. ¶¶ 6-7, 11; Abraham Decl. ¶¶ 6-7, 11; Maniotis Decl. ¶¶ 6-7, 11; Silver Decl. ¶¶ 6-7, 11. Because the

alleged FLSA violation was so routine and regular, the Court disagrees with Defendants that Plaintiffs must identify every single week in which the violations occurred in order to obtain conditional certification. For all of these reasons, the Court grants the conditional certification motion with respect to Plaintiffs' claim that peace officers and sergeants at DHS shelters routinely work beyond their scheduled forty hours a week but are not compensated for this time.

A question remains regarding how to handle the remaining three claims, related to night shift differential pay, miscalculated compensatory time, and untimely overtime payments. As detailed above, the Court has dismissed these claims with respect to some, but not all, of the five named plaintiffs. The parties are hereby ordered to meet and confer to discuss how the Court's rulings in the motion to dismiss context impact Plaintiffs' request for conditional certification and, more specifically, to discuss what the proposed notice should look like in light of these rulings. The parties are also ordered to attempt to resolve any remaining disputes related to the text of the proposed notice. By August 25, 2017, the parties shall submit a new proposed notice revised in light of the Court's rulings on the City's motion to dismiss and the Court's partial ruling on Plaintiffs' conditional certification motion. For any aspects of the notice on which the parties cannot agree, each party should clearly set forth its proposed language, as well as the grounds on which the Court should adopt that language, and each party should include citations to supporting case law sufficient to enable the Court to render a decision.

III. Conclusion

For the aforementioned reasons, the Court grants in part the City's partial motion to dismiss. Count II (failure to properly calculate overtime regular rate of pay) is dismissed as to Plaintiffs Abraham, Campbell, and Silver, Count III (untimely payment of overtime) is dismissed as to Plaintiffs Abraham, Maniotis, Rosario, and Silver, and Count IV (failure to properly calculate compensatory time) is dismissed as to Plaintiffs Campbell, Maniotis, and Silver. These

dismissals are with prejudice. The Court also grants the motion for conditional certification insofar as it seeks to certify a class with respect to Count I of Plaintiffs' complaint. As noted, by August 25, 2017 the parties shall meet and confer and submit a new proposed notice revised in light of the Court's rulings and the parties' conference regarding any remaining disputes.

An initial pretrial conference shall be scheduled in a separate order.

This resolves Docket Numbers 17 and 19.

SO ORDERED.

Dated: July 25, 2017
New York, New York

ALISON J. NATHAN
United States District Judge