

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

Karen Susan Engel, *et al.*,

Plaintiffs,

v.

Burlington Coat Factory
Direct Corporation, *et al.*

Defendants.

Case No. 1:11cv759

Judge Michael R. Barrett

ORDER & OPINION

This matter is before the Court upon Plaintiffs' Motion to Toll the Statute of Limitations. (Doc. 37). Defendants filed a Memorandum in Opposition (Doc. 38) and Plaintiffs filed a Reply (Doc. 39).

I. BACKGROUND

On October 27, 2011, Plaintiffs filed their complaint, claiming that Defendants improperly classified Area Managers as exempt and denied the payment of overtime required by the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 207(a). The parties engaged in settlement discussions which were unsuccessful. However, the parties entered into a Tolling Agreement which stopped the running of the statute of limitations for a 76-day period between May 7, 2012 and July 22, 2012. On October 9, 2012, Plaintiffs filed their Motion for Conditional Certification. After extended briefing of the Motion, the Court granted Plaintiffs' Motion on June 3, 2013.

Plaintiffs ask this Court to toll the statute of limitations on the FLSA claims of prospective opt-in plaintiffs from October 9, 2012 until sixty days after the opt-in

plaintiffs receive notice of this lawsuit. This tolling would be in addition to the seventy-six days in the parties' Tolling Agreement.

II. ANALYSIS

Plaintiffs maintain that tolling the statute of limitations is proper under the doctrine of equitable tolling.

"The propriety of equitable tolling must necessarily be determined on a case-by-case basis." *Truitt v. Cnty. of Wayne*, 148 F.3d 644, 648 (6th Cir. 1998) (citing *Jarrett v. U.S. Sprint Communications Co.*, 22 F.3d 256, 259-60 (10th Cir. 1994)). However, courts have extended equitable tolling only sparingly. *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96, (1990). "Typically, equitable tolling applies only when a litigant's failure to meet a legally-mandated deadline unavoidably arose from circumstances beyond that litigant's control." *Graham–Humphreys v. Memphis Brooks Museum of Art, Inc.*, 209 F.3d 552, 561-62 (6th Cir. 2000) (citing *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 151 (1984)).

The Sixth Circuit has established the following factors to be considered in determining whether equitable tolling should apply:

(1) the petitioner's lack of notice of the filing requirement; (2) the petitioner's lack of constructive knowledge of the filing requirement; (3) diligence in pursuing one's rights; (4) absence of prejudice to the respondent; and (5) the petitioner's reasonableness in remaining ignorant of the legal requirement for filing his claim.

Allen v. Yukins, 366 F.3d 396, 401 (6th Cir. 2004) (quoting *Dunlap v. United States*, 250 F.3d 1001, 1007 (6th Cir.), *cert. denied*, 534 U.S. 1057 (2001)).

As one federal district court has noted:

Several courts have allowed equitable tolling of FLSA claims where the case's litigation posture has delayed the court's consideration of the

motion for conditional certification and notice. See, e.g., *Stickle v. SCIWestern Market Support Center, L.P.*, No. CV 08–083–PHX–MHM, 2008 WL 4446539, at 21–22 (D.Ariz. Sep. 30, 2008) (equitably tolling the FLSA statute of limitations where court delayed ruling on the plaintiffs' collective action pending determination of defendant's motion to dismiss); *Adams v. Tyson Foods, Inc.*, No. 07–CV–4019, 2007 WL 1539325, at *2 (W.D.Ark. May 25, 2007) (tolling the statute of limitations pending a decision by the MDL panel whether to transfer the case); *Beauperthuy v. 24 Hour Fitness USA, Inc.*, 06–0715 SC, 2007 WL 707475 at *8 (N.D.Cal. Mar. 6, 2007) (equitably tolling FLSA statute of limitations because of factors outside plaintiffs' control, including litigation and the competition between attorneys that occurred during the settlement of related action).

Perez v. Comcast, 10 C 1127, 2011 WL 5979769 (N.D. Ill. Nov. 29, 2011); see also *Helton v. Factor 5, Inc.*, 2011 WL 5925078, *2 (N.D.Cal. Nov. 28, 2011) (equitably tolling FLSA statute of limitations pending decision on plaintiffs' motion for conditional certification). This Court has done the same. See, e.g., *Baden-Winterwood v. Life Time Fitness*, 484 F. Supp. 2d 822, 828 (S.D. Ohio 2007) (equitably tolling FLSA statute of limitations where parties were unable inability to reach an agreement on how to best provide notice to potential plaintiffs); *Struck v. PNC Bank N.A.*, 2:11-CV-00982, 2013 WL 1142708, *6 (S.D. Ohio Mar. 19, 2013) (equitably tolling FLSA statute of limitations from date plaintiffs sought to notify putative class members of pending action).

The Court finds that equitable tolling is applicable here. There is no evidence in this case that the potential opt-in plaintiffs had actual notice of the filing requirement. This Court has previously acknowledged that the Sixth Circuit has recognized in an unpublished decision that the mere existence of the FLSA statute provides plaintiffs with constructive notice of their rights under the FLSA and the filing deadlines. *Baden-Winterwood*, 484 F. Supp.2d at 828 (citing *Archer v. Sullivan County Tenn.*, 1997 WL 720406 at *4 (6th Cir. 1997)). However, as this Court explained:

If the mere existence of a law suffices to impart constructive notice, an inquiry into the notice factors would be meaningless. A court would always find that every plaintiff had constructive notice of the filing requirement. Such a finding also questions why notice is required to be sent to all potential opt-in plaintiffs to inform them of their rights and statutory deadlines.

Id. With regards to diligence in pursuing one's rights, after the parties' early attempt at mediation failed, Plaintiffs filed their Motion for Conditional Certification in less than three months. As to the absence of prejudice to the respondent, the Court recognizes that Defendant has a right to raise its statute of limitations defense, however, Defendants were notified of the potential liability of these claims when Plaintiffs filed this action. See *Baden–Winterwood*, 484 F.Supp.2d at 828-29 (explaining no prejudice because defendant “had full knowledge that the named Plaintiff brought the suit as a collective action on the date of the filing” and “was fully aware of its scope of potential liability.”). Finally, the Court finds that it was reasonable for potential opt-in plaintiffs to remain ignorant of the filing requirement. The two named plaintiffs in this case are no longer employed by Defendants, and Defendants have eliminated the Area Manager position.

Therefore, Plaintiffs' Motion to Toll the Statute of Limitations (Doc. 37) is **GRANTED**. The Court tolls the statute of limitations for the period of time between the filing of the Motion for Conditional Certification on October 9, 2012 until sixty days after the opt-in plaintiffs receive notice of this lawsuit.

IT IS SO ORDERED.

/s/ Michael R. Barrett
JUDGE MICHAEL R. BARRETT