UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

MALCOLM WADE,

Plaintiff,

v.

Case No. 2:10-CV-00270
JUDGE EDMUND A. SARGUS, JR.
Magistrate Judge Mark R. Abel

WERNER TRUCKING COMPANY,

Defendant.

OPINION AND ORDER

This matter is before the Court for consideration of Plaintiff Malcolm Wade's Motion to Extend Notice. (ECF No. 75.) Additionally, the Court will consider Defendant Werner Trucking Company aka Werner Enterprises, Inc.'s Motion to Strike, or in the Alternative, For Leave to File Sur-Reply. (ECF No. 79.) For the reasons that follow, Plaintiff's Motion to Extend Notice is **GRANTED** in part and **DENIED** in part. Defendant's Motion to Strike is **GRANTED** to the extent that the Court has considered the attached Sur-Reply.

I. BACKGROUND

Plaintiff brings this action on behalf of himself and all others similarly situated as a collective action against Defendant for unpaid overtime compensation under the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.* ("FLSA").[1] Defendant is a Nebraska corporation that supplies transportation and logistics services to various entities and provides such services throughout the state of Ohio. (Am. Compl. ¶¶ 7–9, ECF No. 30.) Plaintiff worked as a fleet coordinator for Defendant, and asserts that his primary duties consisted of organizing and

[1] Wade also asserts state law violations of the Ohio Minimum Fair Wage Standards Act.

coordinating transportation for Defendant's trucks. (*Id.* at ¶ 22.) Plaintiff maintains that both he and other similarly situated individuals were not paid overtime despite working greater than forty hours in a work week in non-exempt positions. (*Id.* at ¶ 13.)

After engaging in discovery for the purposes of identifying class members, Plaintiff moved for conditional class certification pursuant to 29 U.S.C. § 216(b). In support of his Motion, Plaintiff submitted his own affidavit; affidavits of other fleet coordinators; deposition testimony; multiple job descriptions of different fleet coordinator positions; and salary information for various classes of fleet coordinators. (*See* Opinion & Order 5–6, ECF No. 65.) Upon review, the Court held that Plaintiff met the modest factual showing required for conditional class certification as to other fleet coordinators. (*Id.* at 6.) The parties subsequently submitted a Joint Proposed Notice, which the Court approved. The Notice defined the conditional class as follows:

> Any and all dedicated and non-dedicated day and night fleet coordinators employed by Defendant Werner Enterprises, Inc. from September 8, 2007, to the present and/or any and all Werner employees employed during the relevant time period who had the same job duties as Plaintiff and were paid as exempt employees under the FLSA.

(ECF No. 70-1.)

Plaintiff's counsel avers that after sending notice of the conditional class she was contacted by employees of Defendant with the job titles of fleet manger, JT coordinator, and load planner.[2] (Nacht Aff. ¶ 2, ECF No. 75-1.) According to Plaintiff's counsel, these individuals did not receive notice, but described their job duties as being similar to, or the same as, the duties of

[2] Plaintiff mailed notices to individuals within the original class definition on August 22, 2012. Accordingly, pursuant to this Court's August 17, 2012 Order, potential putative class members had until October 22, 2012 to provide Consent Forms to the Court. (*See* Order, ECF No. 71.)

fleet coordinators. (*Id.* at ¶¶ 4–5.) As a result of this information, Plaintiff requested and received job descriptions for fleet managers, JT coordinators, and load planners.[3] (*Id.* at ¶¶ 7–8.) Plaintiff's counsel further avers that Defendant refused to provide the identities and contact information for employees fitting these job descriptions.[4]

Plaintiff filed the current Motion to Extend Notice on October 3, 2012. Plaintiff maintains that fleet managers, JT coordinators, and load planners are similarly situated to fleet coordinators and, therefore, the Court should order notice to be sent to these categories of employees. In support of this Motion, Plaintiff initially produced job descriptions for the different positions as well as the Affidavit of Jared Pitts.[5] Mr. Pitts avers that he was a fleet manager for Defendant; that he performed the same basic duties as a fleet coordinator; and that he and other fleet managers did not receive overtime pay despite working more than forty hours per week. (Pitts Aff. ¶¶ 3–4, 6, ECF No. 77-1.) Defendant opposes extension of class certification to the proposed job classifications. Defendant specifically maintains that Plaintiff

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[3] Plaintiff maintains that during the initial class-membership discovery it requested that Defendant identify—and provide job descriptions for—all positions with similar job duties to fleet coordinator. (Mot. Extend Not. 2, ECF No. 75.) According to Plaintiff, Defendant did not reveal the employee classifications at issue in the instant Motion. (*Id.* at 5.)

[4] As part of a potential compromise between the parties, Defendant apparently offered to produce information regarding JT coordinators and load planners, but refused to provide the requested information for fleet managers. (*See* Nacht Aff. ¶ 10; Opp'n Mot. Extend Not. 3 n.1, ECF No. 76.) According to Defendant, Plaintiff refused this proposal. (Opp'n Mot. Extend Not. 3 n.1.) Defendant emphasizes that it has not conceded that either JT coordinators or load planners perform the same duties as Plaintiff.

[5] The Affidavit attached to Plaintiff's Motion to Extend Notice was unsigned. (Mot. Extend Not. Ex. 2, ECF No. 75-1.) Plaintiff explained, within the Motion, that he was in the process of obtaining a signed copy and that he intended to supplement the Affidavit. (Mot. Extend Not. 3 n.1.) Plaintiff submitted a signed copy of Mr. Pitts' Affidavit in conjunction with his Reply. (Pitts Aff., ECF No. 77-1.)

has failed to submit sufficient evidence that the positions in question involved the same job duties that Plaintiff performed.

Plaintiff submitted its reply briefing on October 11, 2012. On the same day, Plaintiff submitted the Affidavits of Jodi Wyman and Mark Canady. Ms. Wyman states that she was a JT coordinator for Defendant; that she performed the same job duties as a fleet coordinator; and that she and other JT coordinators worked over forty hours per week and did not receive overtime compensation. (Wyman Aff. ¶¶ 2, 4, 6, ECF No. 77-1.) Likewise, Mr. Canady avers that he was a load planner for Defendant; that he performed similar duties to those of a fleet coordinator; and that he and other load planners worked greater than forty hours per week and did not receive overtime compensation. (Canady Aff. ¶¶ 2, 4, 6, ECF No. 77-1.) Defendant subsequently moved to strike Plaintiff's newly submitted evidence filed with the Reply.

II. ANALYSIS

A. Motion to Strike or File Sur-Reply

As a preliminary matter, the Court must consider whether to strike the evidence Plaintiff submits in conjunction with his Reply. Defendant maintains that by attaching two new affidavits for the first time with his Reply, Plaintiff has deprived Defendant of the ability to adequately respond. In the alternative to striking these documents, Defendant requests leave to file the Sur-Reply that it attaches to its Motion to Strike. (ECF No. 79-1.) Plaintiff maintains that because of the time-sensitive nature of the issue, he was attempting to bring the matter before the Court as quickly as possible. Plaintiff, however, does not object to Defendant's Sur-Reply.

The Court has the inherent authority and discretion to strike filings and materials that do not comply with the Court's rules. *Ogle v. BAC Home Loans Servicing LP*, No. 2:11–cv–540,

2011 WL 3838169, at *2 (S.D. Ohio Aug. 29, 2011). Pursuant to S.D. Ohio Civ. R. 7(d) it is generally impermissible for a party to submit non-rebuttal evidence for the first time with a reply memorandum. Here, the Court does not condone the timing of Plaintiff's submissions. Moreover, the Court has already cautioned Plaintiff at least once in this action against submitting additional evidence for the first time with his reply. (*See* Order, ECF No. 56.) For these reasons, the Court will permit, and has considered, Defendant's Sur Reply.[6] (ECF No. 79-1.)

B. Conditional Certification Standard

Under the FLSA:

> An action to recover the liability . . . 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). Accordingly, "[s]ection 216(b) establishes two requirements for a representative action: 1) the plaintiffs must actually be 'similarly situated,' and 2) all plaintiffs must signal in writing their affirmative consent to participate in the action." *Comer v. Wal-Mart Stores, Inc.*, 454 F.3d 544, 546 (6th Cir. 2006). The United States Supreme Court has held that under 29 U.S.C. § 216(b) a district court may "facilitat[e] notice to potential plaintiffs." *Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165, 169 (1989). The decision whether to

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[6] Under these circumstances, the Court would be justified in striking the Affidavits of Jodi Wyman and Mark Canady. By allowing a sur-reply, however, the Court has given Defendant a chance to respond to this evidence. *Cf. Mauer v. Deloitte & Touche, LLP*, 752 F. Supp. 2d 819, 824 (S.D. Ohio 2010) (permitting a sur-reply to address new evidence that a party produced after the completion of briefing). Moreover, as described further below, even considering these Affidavits, Plaintiff fails to make a modest factual showing that JT coordinators and load planners are similarly situated to fleet coordinators.

conditionally certify a class, and therefore facilitate notice, is within the discretion of the trial court. *See id.*

The United States Court of Appeals for the Sixth Circuit has implicitly upheld a two-step procedure for determining whether an FLSA case should proceed as a collective action. *In re HCR ManorCare, Inc.*, No. 11–3866, 2011 WL 7461073, at *1 (6th Cir. Sept. 28, 2011); *see also Swigart v. Fifth Third Bank*, 276 F.R.D. 210, 213 (S.D. Ohio 2011) (applying the two-step procedure). "First, in what is referred to as the initial notice stage, the Court must determine whether to conditionally certify the collective class and whether notice of the lawsuit should be given to putative class members." *Swigart*, 276 F.R.D. at 213 (internal quotations omitted). "At the second stage of the proceedings, the defendant may file a motion to decertify the class if appropriate to do so based on the individualized nature of the plaintiff's claims." *Id.*

At the first stage, "Plaintiffs must only make a modest showing that they are similarly situated to the proposed class of employees." *Lewis v. Huntington Nat. Bank*, 789 F. Supp. 2d 863, 867 (S.D. Ohio 2011). This standard is "'fairly lenient . . . [and] typically results in conditional certification.'" *Id.* at 868 (quoting *Comer*, 454 F.3d at 547); *see Lacy v. Reddy Elec. Co.*, No. 3:11–cv–52, 2011 WL 6149842, at *2 (S.D. Ohio Dec. 9, 2011) ("[C]ollective actions have been certified based on no more than a couple of declarations and a deposition transcript."). During this stage, the Court does not generally consider the merits of the claims, resolve factual disputes, or evaluate credibility. *Swigart*, 276 F.R.D. at 214.

Neither the FLSA nor the Sixth Circuit have explicitly defined the meaning of "similarly situated." *O'Brien*, 575 F.3d at 584. This Court has emphasized that at the initial notice stage, a plaintiff "[']need only show that [his] position [is] similar, not identical, to the positions held by

the putative class members.'" *Lewis*, 789 F. Supp. 2d at 867–68 (quoting *Pritchard v. Dent Wizard Intern. Corp.*, 210 F.R.D. 591, 595 (S.D. Ohio 2002)) (alterations in original); *see also Watson v. Surf-Frac Wellhead Equipment Co., Inc.*, No. 4:11–cv–843, 2012 WL 5185869, at *2 (E.D. Ark. Oct. 18, 2012) (explaining that in misclassification cases job duties are relevant to the similarly situated inquiry because "job duties relate to whether they were correctly classified as exempt from the FLSA's overtime requirements.") (internal quotations omitted). Furthermore, "[t]he Court should consider whether potential plaintiffs were identified; whether affidavits of potential plaintiffs were submitted; whether evidence of a widespread discriminatory plan was submitted, and whether as a matter of sound class management, a manageable class exists." *Lewis*, 789 F. Supp. 2d at 868 (internal quotations omitted).

The Sixth Circuit has provided that one example of an appropriate FLSA collective action is where the potential plaintiffs are "unified by common theories of defendants' statutory violations, even if the proofs of these theories are inevitably individualized and distinct." *O'Brien*, 575 F.3d at 585. The Sixth Circuit has further explained that the Court should not apply a "Rule-23 type analysis" as to whether "individualized questions will predominate." *Id.* at 585–86.

Defendant contends that because Plaintiff has received some discovery relating to class membership the Court should apply a heightened standard in considering class certification.[7] As

[7] Defendant also implies that Plaintiff must go beyond the similarly situated requirement and demonstrate that the employees with the positions in question perform the same job duties as Plaintiff. The Court disagrees with this implication. In its August 2, 2012 Opinion and Order, this Court held that Plaintiff met its burden of showing that the potential class was similarly situated. The parties then, through joint effort, addressed a notice to fleet coordinators and other employees with the same job duties as Plaintiff. Plaintiff now seeks to expand class notice based on newly discovered information. Under these circumstances, the Court finds no reason to

Defendant notes, at least some district courts within this circuit have required a heightened factual showing for conditional certification when a plaintiff has received class-membership discovery. *See, e.g.*, *Creely v. HCR ManorCare, Inc.*, 789 F. Supp. 2d 819, 826–27 (N.D. Ohio 2011) (applying a "modest 'plus'" factual showing" standard combining "the lenient standard with some consideration of the stage-two factors" when a plaintiff had received class-membership discovery). Even assuming that such a hybrid standard is proper under certain circumstances, the Court does not find it applicable here. Although the Court has allowed some discovery, Plaintiff maintains that he did not receive information regarding the job descriptions in question during this discovery despite his requests for identification of positions that performed similar duties. Moreover, the briefing indicates that Defendant has only provided job descriptions with regard to the positions in question. Under such circumstances, the Court will only require Plaintiff to meet the modest factual showing generally required at the conditional certification stage. *Cf. Lacy,* 2011 WL 6149842, at *3–4 (holding that any heightened conditional certification standard was inapplicable where only Defendants had received the opportunity for discovery regarding certification).

C. Fleet Managers

The Court will first assess whether Plaintiff has satisfied its burden with regard to the fleet manager position. To support the assertion that fleet managers are similarly situated to fleet coordinators, Plaintiff offers detailed company job descriptions for fleet managers.[8] (Mot.

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deviate from the similarly situated requirement that generally applies to conditional certification. Of course, similarity of job duties is a relevant factor in this analysis.

[8] Plaintiff submitted job descriptions for the various fleet coordinator positions within his earlier Motion for Class Certification. (*See* Opp'n Mot. Extend Not. Ex. 2, ECF No. 76-2.)

Extend Not. Ex. 1, ECF No. 75-1.) Additionally, as noted above, Mr. Pitts, a former fleet manager for Defendant, states that he and other fleet managers worked over forty hours per week, but did not receive overtime compensation.[9] (Pitts Aff. ¶¶ 4, 6, ECF No. 77-1.)

In ultimately determining whether an employee is exempt from the FLSA the Court must focus on "the actual day-to-day activities of the employee rather than more general job descriptions contained in resumes, position descriptions, and performance evaluations." *Schaefer v. Indiana Michigan Power Co.*, 358 F.3d 394, 400 (6th Cir. 2004). This does not mean, however, that a company's own job descriptions are irrelevant in considering, at the initial notice stage, whether a potential putative class is similarly situated. Although there is conflicting case law on the topic, numerous courts have recognized the probative value of company job descriptions in considering whether employees are similarly situated for the purpose of conditional certification. *See, e.g.*, *McNelley v. ALDI, Inc.*, No. 1:09 CV 1868, 2009 WL 7630236, at *3 (N.D. Ohio Nov. 17, 2009) (approving conditional class certification in part because a job description reflected that store managers performed the same basic duties); *Titchenell v. Apria Healthcare Inc.*, No. 11–563, 2012 WL 3731341, at *4–5 (E.D. Pa. Aug. 29, 2012) (expanding conditional certification to additional job titles based largely on substantial overlap between job descriptions); *Ruffin v. Avis Budget Car Rental, LLC*, No. 11–01069, 2012 WL 2514841, at *3 (D.N.J. June 28, 2012) (noting, in granting conditional certification, that although the defendant maintained that shift managers performed differing duties, there was no evident variation in their job descriptions); *but see, Pickering v. Lorillard Tobacco Co., Inc.*, No.

[9] Mr. Pitts also states, albeit in conclusory fashion, that he performed the same job duties as fleet coordinators. (Pitts Aff. ¶ 2, ECF No. 77-1.)

2:10–CV–633, 2012 WL 314691, at *12 (M.D. Ala. Jan. 30, 2012) ("[A] standardized job description is insufficient to justify a nationwide collective action based upon a claim that the employer improperly classified a category of employees as exempt."); *Forney v. TTX Co.*, No. Civ.A. 05 C 6257, 2006 WL 1030194, at *3 (N.D. Ill. Apr. 17, 2006) ("Whether similarly situated employees exist depends on the employees' actual qualifications and day-to-day duties, rather than their job descriptions.").

In this case, the Court finds that Plaintiff has met his initial burden of demonstrating that fleet managers are similarly situated to Plaintiff and other fleet coordinators. First, the evidence before the Court reflects that fleet managers share a unified common theory of FLSA violation with fleet coordinators; the improper denial of overtime pay. Mr. Pitt's states that although fleet managers routinely worked over forty hours they did not receive overtime wages. The job descriptions before the Court also indicate that Defendant uniformly classified fleet managers as exempt employees. (*See* Mot. Extend Not. Ex. 1, ECF No. 75-1.)

Moreover, a comparison of job descriptions supports the notion that fleet managers and fleet coordinators are similar positions. The company job descriptions Plaintiff submits are relatively detailed, including both a general job summary as well as a list of essential job functions and qualification requirements. A comparison of the job descriptions reflects that the purposes and functions of fleet managers and coordinators are similar, if not the same. In particular, both categories of positions primarily manage and dispatch truck fleets. Perhaps most tellingly, the job description for "Fleet Manager 1" is nearly identical to the position of "Weekend Fleet Coordinator," a position included within the initial conditional certification. (*Compare* Mot. Extend Not. Ex. 1, ECF No. 75-1; *with* Opp'n Mot. Extend Not. Ex. 2, ECF No.

76-2.) Although worded somehwat differently, the description of "Fleet Manager" is also substantially similar to the "Weekend Fleet Coordinator" position. (*Compare* Mot. Extend Not. Ex. 1, ECF No. 75-1; *with* Opp'n Mot. Extend Not. Ex. 2, ECF No. 76-2.) Given these circumstances, and considering also the evidence Plaintiff submitted with his initial conditional certification motion, including multiple fleet coordinators descriptions of their duties, the Court finds that Plaintiff has made a modest factual showing that fleet managers and fleet coordinators are similarly situated.

D. JT Coordinators and Load Planners

Plaintiff also seeks class certification with regard to JT coordinators and load planners. As with fleet managers, Plaintiff submits job descriptions for these positions. Additionally, as detailed above, Plaintiff provides the Affidavits of Ms. Wyman, JT coordinator, and Mr Canady, a fleet manager.

The Court is not convinced, based on the evidence Plaintiff submitted, that JT coordinators and load planners are similarly situated to fleet coordinators. Like the positions of fleet coordinator and fleet manager, Plaintiff asserts that Defendants improperly classified JT coordinators and load planners as exempt from overtime pay. The current record, however, fails to show that these positions are similar enough to fleet coordinators to allow for a manageable class. Specifically, the evidence does not reflect that these positions perform the same or similar duties as fleet coordinators. Rather, the job descriptions state that the primary role of JT coordinators is to develop strategic action plans to assure on time delivery of truck loads. (Mot. Extend Not. Ex. 1, ECF No. 75-1.) In addition to developing action plans, JT coordinators monitor the pick-up and delivery of loads and perform customer service duties. (*Id.*) The main

purpose of load planners is logistical planning for assigned territories, rather than the managing of specific truck fleets. (*Id.*) Load Planners also engage in communication with customers regarding freight planning. (*Id.*) Admittedly, there is some minimal overlap between the functions of the various positions in questions. Nevertheless, a fair reading of the job descriptions indicates that JT coordinators and load planners perform different roles in comparison to fleet coordinators. Accordingly, at least based on the job descriptions alone, Plaintiff has not established that employees within these positions are similarly situated.

Moreover, the Affidavits of Ms. Wyman and Mr. Canady do not establish that JT coordinators and load planners are similarly situated to fleet coordinators. These affiants offer, in conclusory fashion, that they performed the same or similar job duties to fleet coordinators. (Wyman Aff. ¶ 2, ECF No. 77-1; Canady Aff. ¶ 2, ECF No. 77-1.) Neither Affidavit, however, contains any detail regarding the employees' actual job duties. *See Lacy*, 2011 WL 6149842, at *4 (indicating that conclusory declaration stating that other employees were similarly situated was insufficient to support conditional certification). Additionally, given the conclusory nature of the Affidavits, the record does not disclose whether either affiant has established personal knowledge of the specific duties of fleet coordinators. Accordingly, even considering job descriptions in combination with Plaintiff's submitted Affidavits, Plaintiff has not established that the positions in question are similarly situated.

III. CONCLUSION

For the foregoing reasons, Plaintiff's Motion to Extend Notice is **GRANTED** in part and **DENIED** in part. (ECF No. 75.) Defendant's Motion to Strike is **GRANTED** to the extent that the Court has considered the attached Sur-Reply. (ECF No. 79.) The parties are **DIRECTED** to

confer and submit a revised proposed notice and notice procedure within **SEVEN (7) DAYS** of this Opinion and Order.

IT IS SO ORDERED.

10-31-2012
DATE

EDMUND A. SARGUS, JR.
UNITED STATES DISTRICT JUDGE