

**IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
EL DORADO DIVISION**

**IN RE:
PILGRIM'S PRIDE FAIR LABOR
STANDARDS ACT LITIGATION**

**MDL DOCKET NO. 1:07-cv-1832
ALL CASES**

MEMORANDUM OPINION and ORDER

Before the Court is Plaintiffs' Consolidated Motion for Certification of a Collective Action and Court-Supervised Notice to Potential Collective Action Members. (Doc. 28). Defendant has responded. (Doc. 37). Plaintiffs have filed a reply. (Doc. 41-1). The Court finds the matter ripe for consideration.

I. BACKGROUND

In this lawsuit, Plaintiffs allege that Defendant Pilgrim's Pride Corporation (Pilgrim's) refuses to compensate its chicken processing employees for all the time they spend putting on, taking off, and cleaning the safety and sanitary gear that they must wear while working on or near the chicken-processing line.¹ Plaintiffs move this Court to certify a collective action for unpaid overtime wages under the Fair Labor Standards Act (FLSA) and to authorize notice to potential collective action members.

A. Duties of the Employees and their Required Safety and Sanitary Gear

The named Plaintiffs in this action seek to represent similarly situated or current or former employees from twenty-one (21) Pilgrim's facilities in ten states. The Plaintiffs and members of the proposed class are or were engaged in processing chicken at a Pilgrim's facility.

¹Chicken processing workers employed by Pilgrim's have filed a number of similar cases alleging that the company refuses to pay its workers for all time spent donning and doffing. The Judicial Panel on Multidistrict Litigation transferred all related actions against Pilgrim's to this Court for pretrial proceedings, pursuant to 28 U.S.C. § 1407.

Plaintiffs performed tasks on the chicken processing line, such as slaughtering, cutting, deboning, cleaning, and packaging. Pilgrim's provides to its employees a variety of required safety and sanitary gear, generally worn over the street clothes. However, the exact combination of protective and sanitary items worn by the employees varies by facility, department, production line, position, and individual. The purposes of this safety and sanitary gear are to protect workers from environmental conditions and possible injury and to protect the chicken from contamination.

B. The Alleged Unpaid Time

Plaintiffs allege that Pilgrim's has implemented an unlawful compensation practice by refusing to pay non-exempt employees for all time spent donning, doffing, and cleaning the protective gear, essentially requiring the employees to work unpaid overtime. Pilgrim's implements various timekeeping systems for its employees who work on the chicken processing line, so that the method for timekeeping varies from facility to facility.

One system is known as "line time," whereby the employees' paid time is limited to the period that Pilgrim's considers the chicken processing line to be in operation. Under this line time system, Pilgrim's records the same amount of work time for each group of workers on the production line. For example, the line time begins at a pre-determined start time and ends when the last bird reaches a particular position on the line. However, Pilgrim's maintains that there are variations in the way that line time is calculated and recorded. In contrast, in some facilities, employees are paid based on individualized time, pursuant to a manual clock that records individual clock times while others are paid based on pre-set shifts. Plaintiffs allege that Pilgrim's fails to pay chicken processing line employees for a significant amount of time worked

prior to their paid shift, including time spent obtaining and putting on the required equipment and then walking to work stations.

In addition to the donning and walking time, Plaintiffs allege that Pilgrim's does not pay its employees for all the time spent working during unpaid break time. This alleged "unpaid time" includes the time it takes employees to remove, clean, store, and put on the required safety and sanitary equipment at the beginning and end of the break. Moreover, Plaintiffs allege that Pilgrim's timekeeping system fails to pay line employees for time worked at the end of the shift when the employees' time is clocked out. According to Plaintiffs, it is during this time that employees must remove and clean their safety and sanitary equipment and put the individual items away.

C. Motion for Certification of a Collective Action

The general, overlying issue in this case is whether Pilgrim's pay practices violate the Fair Labor Standards Act by failing to pay employees' for unpaid overtime wages. However, today Plaintiffs ask the Court to certify this case to proceed as a collective action and to authorize the issuance of Plaintiffs' proposed notice to all current and former Pilgrim's employees who have held non-exempt positions working on or near the chicken processing line in Pilgrim's chicken processing plants at any time during the last three years.

II. COLLECTIVE ACTION CERTIFICATION UNDER FLSA

Section 216(b) of the FLSA provides that any one or more employees may maintain an action to recover the liability prescribed in the section against any employer on "behalf of himself or themselves and other employees similarly situated." 29 U.S.C. § 216(b). These collective actions are intended to serve the interests of judicial economy and to aid in the vindication of

plaintiffs' rights. *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 110 S. Ct. 482 (1989).² Unlike Federal Rule of Civil Procedure 23, a collective action maintained under the FLSA is pursued as an opt-in class. *Compare* 29 U.S.C. § 216(b) (stating that “[n]o 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 the action is brought.”) *with* Fed. R. Civ. P. 23(c) (requiring that the notice to class members include a statement “that the court will exclude from the class any member who requests exclusion ...”).

The district courts have discretion, in appropriate cases, to facilitate notice to potential members of the class on whose behalf the collective action has been brought. *Hoffman-La Roche*, 493 U.S. at 169, 110 S. Ct. at 486. Once the FLSA action has been filed, the court has a managerial responsibility to oversee the joinder of additional parties to assure that the task is accomplished in an efficient and proper way. *Id.* at 170-71, 110 S. Ct. at 486.

The prevailing approach among federal courts for determining what “similarly situated” means in a collective action context under section 216(b) is the two-stage certification process described in *Mooney v. Aramco Services Co.*, 54 F.3d 1207, 1212 (5th Cir. 1995). *See, e.g., Comer v. Wal-Mart Stores, Inc.*, 454 F.3d 544, 546 (6th Cir. 2006) (applying two-stage approach as that “typically used by the courts” in cases filed under 29 U.S.C. § 216(b)); *Thiessen v. General Electric Capital Corp.*, 267 F.3d 1095 (10th Cir. 2001); *Grayson v. K Mart Corp.*, 79 F.3d 1086 (11th Cir. 1996); *Allen v. McWane, Inc.*, 2006 WL 3246531, *2 (E.D. Tex. 2006)

² *Hoffman-La Roche* involved the Age Discrimination in Employment Act (ADEA). However, the ADEA incorporates section 216(b) of the FLSA in its enforcement scheme. *See* 29 U.S.C. § 626(b). Thus, courts have applied the holdings and analysis in ADEA collective action cases to FLSA collective action cases. *See Schmidt v. Fuller Brush Co.*, 527 F.2d 532, 536 (8th Cir. 1975).

(applying the two-stage approach as the “prevailing test among federal courts” in cases filed under 29 U.S.C. § 216(b)). Under this approach, certification for collective action is divided into two stages: (1) the notice stage and (2) the opt-in or merits stage. *Mooney*, at 1213-1214. During the notice stage, the court makes a decision—usually based only on the pleadings and affidavits which have been submitted—whether notice should be given to potential class members. *Id.* at 1213. If the court allows for notification, the court typically creates conditional certification of a representative class and allows notice to be sent to the potential opt-in plaintiffs. *Id.* at 1214.

At the second stage of the two-stage process, the court determines whether the class should be maintained through trial. Typically, the second stage is precipitated by a motion to decertify by the defendant, which is usually filed when discovery is largely complete. *Id.* If the court decides to decertify the class, the opt-in class members are dismissed from the suit without prejudice and the case proceeds only for the class representatives in their individual capacities. *Id.*

Here, the Plaintiffs move the Court to conditionally certify their class under the two-stage approach, and Defendants have not indicated any opposition to this approach. The Eight Circuit has not yet declared which approach it favors in deciding whether plaintiffs are similarly situated under 29 U.S.C. § 216(b), but the district courts in this circuit use the two-stage analysis. *Schleipfer v. Mitek Corp.*, 2007 WL 2485007 (E.D. Mo. 2007) (citing *Parker v. Rowland Express, Inc.*, 492 F. Supp. 2d 1159 (D. Minn. 2007)); *Davis v. Novastar Mortgage, Inc.*, 408 F. Supp. 2d 811 (W.D. Mo. 2005); *Dietrich v. Liberty Square L.L.C.*, 230 F.R.D. 574 (N.D. Iowa 2005); *McQuay v. American Int'l Group, Inc.*, 2002 WL 31475212 (E.D. Ark. 2002)). Thus, this

Court adopts the two-stage certification analysis that is used by a majority of courts, including a majority of district courts in the Eighth Circuit.

III. DISCUSSION

A. Certification

During this first stage of certification, the Court does not make findings on legal issues or focus on whether there has been an actual violation of the law. *See Thiessen*, 267 F.3d at 1106-07. Further, at this stage, the Court does not make credibility determinations or resolve contradictory evidence presented by the parties. *See Grayson v. K Mart Corp.*, 79 F.3d 1086, 1099 n.17 (11th Cir. 1996). Instead, the Court determines whether, under the lenient standard of the notice stage, the named Plaintiffs, through their pleadings and affidavits, have demonstrated that they are “similarly situated” to the potential collective action members. *See* 29 U.S.C. § 216(b); *Thiessen*, 267 F.3d at 1106-07. Although the FLSA does not define the term “similarly situated,” it typically requires a showing that the plaintiffs and potential class members were victims of a common decision, policy, or plan of the employer that affected all class members in a similar fashion. *See Thiessen*, 267 F.3d at 1106-08; *Kautsch v. Premier Communications*, 504 F. Supp. 2d 685 (W.D. Mo. 2007). Further, the “similarly situated” determination requires only a modest factual showing; it does not require the plaintiff and the potential class members to show that they are identically situated. *See Kautsch*, 504 F. Supp. 2d at 689.

Plaintiffs maintain that they have more than satisfied their burden to provide a factual basis to demonstrate that they and potential members of the class are similarly situated. Over 3000 workers from twenty (20) Pilgrim’s facilities have filed opt-in consents with the Court. The thirty-seven declarations from workers at eighteen facilities indicate that they are all hourly-paid chicken-processing employees who have similar job duties and are subject to the common

practice of Pilgrim's requiring them to don, doff, and clean safety and sanitary equipment.

Plaintiffs allege that they were similarly deprived of compensation for time spent donning and doffing.

Pilgrim's asserts that this case cannot be effectively managed as a collective action because significant differences exist between the facilities and workers. According to Pilgrim's, there are differences in the safety and sanitary clothing worn by employees even within the same departments and variations in the amounts of time it takes different employees to don and doff the protective gear. Pilgrim's also raises the issue that differences exist in the union status³ of the employees as well as the time-keeping methods of the facilities.

Pilgrim's primary objections to certification are premature at this initial certification stage. Plaintiffs have shown that the hourly employees perform similar basic tasks, including the donning and doffing of protective gear. Moreover, Plaintiffs sufficiently allege that they are all the victims of a single decision, policy, or plan. The single policy in this case is Pilgrim's failing to pay workers for all time spent donning and doffing. Thus, under the "fairly lenient" standard employed in this stage of the litigation, the Court finds that there are numerous employees similarly situated to the named Plaintiffs with respect to their job duties, requirements, and pay provisions, who are together in a similar fashion affected by a common policy. Furthermore, at this stage, the Court is satisfied that this case is manageable as a collective action. If, at a later stage in the litigation, the Court finds that the case is not

³One of Pilgrim's defenses is that 29 U.S.C. § 203(o) excludes time spent changing clothes and washing from the compensable workday based on the existence of a collective-bargaining agreement.

manageable as a collective action, the Court has the discretion to create subclasses or to dismantle the collective action. *See Thiessen*, 267 F.3d at 1103.

B. Notice

Once the Court has determined that potential opt-in plaintiffs may be similarly situated for the purposes of authorizing notice, the court certifies the collective action, and plaintiffs send court-approved notice to potential class members. *See Kautsch*, 504 F. Supp. 2d at 689. Plaintiffs have submitted a proposed notice to be sent to potential opt-in plaintiffs. In its response to Plaintiffs' certification motion, Pilgrim's states that it has several objections to Plaintiffs' proposed notice. If it wishes, Pilgrim's will have until March 23, 2008, to supplement these objections. Plaintiffs will have until April 2, 2008, to respond to the objections. After review, the Court will then issue a separate order authorizing the issuance of the notice.

IV. CONCLUSION

Based on the reasons presented above, Plaintiffs' Consolidated Motion for Certification of a Collective Action and Court-Supervised Notice to Potential Collective Action Members is **GRANTED IN PART**. The Court certifies this action as a collective action. The Court will issue a separate order authorizing notice.

IT IS SO ORDERED, this 13th day of March, 2008.

/s/ Harry F. Barnes
Hon. Harry F. Barnes
United States District Judge