

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
Miami Division
Case Number:10-61069-CIV-MARTINEZ

ORLANDO LAWRENCE and JOAN CIMO, on
behalf of themselves and all others similarly
situated,
Plaintiffs,

vs.

THE BERKLEY GROUP, INC., TOWER
RESORTS REALTY, INC., ALWAYS
TRAVEL WITH US, INC., AND BRUCE
POLANSKY, individually,
Defendants.

**ORDER ADOPTING IN PART MAGISTRATE JUDGE BROWN'S REPORT AND
RECOMMENDATION**

THE MATTER was referred to the Honorable Stephen T. Brown, United States Magistrate Judge for a Report and Recommendation on Plaintiffs' Motion for an Order Permitting Supervised Notice to Potential Opt-In Plaintiffs and Conditional Certification of this Case as a Collective Action (D.E. No. 67). Magistrate Judge Brown filed a Report and Recommendation (D.E. No. 94), recommending that this motion be granted and that the parties work together to draft the Notice's form and content.¹ The Court has reviewed the entire file and record and has made a *de novo* review of the issues that the objections to the Magistrate Judge Brown's Report and Recommendation present. After careful consideration and for the reasons set forth below, the Court adopts in part Magistrate Judge Brown's Report and Recommendation and grants Plaintiffs' motion to permit court supervised notice and to conditionally certify this

¹The Report and Recommendation states that if the parties are unable to reach an agreement as to the Notice's form and content an appropriate motion must be filed.

case as a collective action.

In order to grant conditional collective certification and to permit supervised notice in this FLSA action, "the district court should satisfy itself that there are other employees of the defendant-employer who desire to 'opt-in' and are 'similarly situated' with respect to their job requirements and with regard to their pay provisions." *Dybach v. Fla. Dep't of Corrections*, 942 F. 2d 1562, 1567-68 (11th Cir. 1991). Other employees are similarly situated if their "positions are similar, not identical, to the positions held by the putative class members." *Grayson v. K-Mart Corp.*, 79 F. 3d 1086, 1096 (11th Cir. 1996) (internal quotation marks omitted). Plaintiffs bear the burden of demonstrating these two requirements. *Haynes v. Singer Co.*, 696 F. 2d 884, 887 (11th Cir. 1983).

The Eleventh Circuit has recommended a two-tiered procedure to determine whether employees are similarly situated. *See Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F. 3d 1208, 1217-19 (11th Cir. 2001). In this first stage, known as the "notice stage," the court "makes a decision-usually based only on the pleadings and any affidavits which have been submitted-whether notice of the action should be given to potential class members." *Id.* at 1218. At this stage, the Court has minimal evidence and thus this is a "fairly lenient standard" that results in "conditional certification." *Id.* If the Court conditionally certifies a class, the putative class members are given notice and an opportunity to opt in. *see id.* Later, typically after the completion of discovery when the Court has more information, defendants may move to decertify the class. *Id.*

In his Report and Recommendation, Magistrate Judge Brown found that Plaintiffs met the "rudimentary showing of commonality" required by *Hipp* and recommended that this Court grant Plaintiff's motion. *See* (D.E. No. 94 at 5, 8). Defendants object, arguing that

(1) The . . . [Report and Recommendation] errs in finding that Plaintiffs made the required evidentiary proof that the putative opt-in plaintiffs were similarly situated in job requirements and pay provisions; (2) The . . . [Report and Recommendation] errs in finding that Plaintiffs made the required showing of employees of . . . [Always Travel With Us, Inc. ("ATWU"), Berkley Group, Inc. ("Berkley"), or Bruce Polansky ("Polansky")] desired to join the putative class and errs in finding support for conditional certification of a class against defendants Berkley, ATWU, and Polansky; (3) The . . . [Report and Recommendation] errs by failing to limit the applicable statute of limitations to two years and providing that the names and addresses to be produced should be from the date of the Complaint instead of the conditional certification order; (4) The . . . [Report and Recommendation] errs in finding sufficient support for conditional certification of the minimum wage claim; and (5) The . . . [Report and Recommendation] errs by failing to disapprove the improper class description.

(D.E. No. 103 at 2).

First, with regard to Magistrate Judge Brown's finding that Plaintiffs sufficiently presented similarly situated employees, Defendants object that this finding is in error because Plaintiffs did not demonstrate that the employees were similarly situated in job requirements and pay provisions. This Court disagrees. The Court finds Plaintiffs have met their burden at this stage and rejects Defendants' objection. *See* (D.E. No. 67-1, Lawrence Decl. at ¶¶ 2, 4, 10); (D.E. No. 67-1, Sherman Decl. at ¶¶ 2-7, 9-10); (D.E. No. 67-1, Soren Decl. at ¶¶ 2-7, 9-10); (D.E. No. 67-1, Ricardi Decl. at ¶¶ 2-7, 9-10); (D.E. No. 67-1, Petty Decl. at ¶¶ 2-10, 12, 13); (D.E. No. 67-1, Pepe Decl. at ¶¶ 2-7, 9-10).

Next Defendants object, arguing that Plaintiffs should not be able to conditionally certify a class as to Defendants ATWU, Berkley and Polansky because they have not demonstrated that there are other employees of these Defendants who desire to opt in. Specifically, in this case, Plaintiffs have provided declarations from five potential opt-in plaintiffs; however, Defendants argue that these potential plaintiffs state only that they were employed by Defendant Tower

Resorts Realty, Inc. ("Tower"). Thus, Defendants argue there is no basis to approve a conditional certification as to the other defendants in this case. This Court disagrees, finding that Plaintiffs have provided sufficient evidence to demonstrate that there are similarly situated employees of the other defendants interested in opting in.

First, Plaintiff Orlando Lawrence ("Lawrence") has provided a declaration stating that Defendant Berkley is the parent company of Tower and ATWU. (D.E. No. 67-1, Lawrence Decl. at ¶ 7). He also states that it is his understanding that both Tower and ATWU are wholly owned subsidiaries of Berkley. *Id.* at ¶ 9. Although he worked at various locations, Lawrence's paychecks were either in the name of Tower or ATWU and that while receiving paychecks from either entity, he was given information from Berkley about the company's stock ownership plan and told that he could obtain a beneficial equity ownership interest in the common stock of Berkley. *Id.* at ¶ 8. Lawrence also states that it was his "understanding and belief" that he was an employee of all three corporate defendants "as were all other time share staff representatives." *Id.* He also states that he observed over 285 people employed in the same manner as he was "under the same compensation system and work schedule" he described. *Id.* at ¶ 10. Finally, Lawrence also lists a number of other sales agents who wish to join this case. *Id.* at ¶ 6.

Moreover, there is also support in the declarations provided by the potential class members. In his declaration Norris Petty acknowledges that Tower is managed or owned by one or more of the Defendants Berkley and Polansky and states that he was employed by "Defendants." (D.E. No. 67-1, Petty Decl. at ¶¶ 2,3). Other employees who filed declarations note that they were employed by one or more of the defendants and state that Tower is managed, owned or operated by Berkley. (D.E. No. 67-1, Sherman Decl. at ¶¶ 2,3); (D.E. No. 67-1, Soren

Decl. at ¶¶ 2, 3); (D.E. No. 67-1, Ricardi Decl. at ¶¶ 2, 3) (D.E. No. 67-1, Pepe Decl. at ¶¶ 2, 3).

The Court finds at that this stage that this evidence is sufficient to demonstrate that there are similarly situated employees of all defendants interested in opting in.

Defendants also object in particular with regard to the minimum wage claim, arguing that there is insufficient information to determine if there are actually other similarly situated employees who did not receive minimum wage. This Court again disagrees. Plaintiff Lawrence specifically state he was not always paid the minimum wage. *See* (D.E. No. 67-1, Lawrence Decl. at ¶¶ 4). Moreover, the potential class members who have provided declarations also effectively allege that they were not always paid the minimum wage. *See* (D.E. No. 67-1, Sherman Decl. at ¶¶ 2, 5, 6, 7); (D.E. No. 67-1, Soren Decl. at ¶¶ 2, 5, 6, 7); (D.E. No. 67-1, Ricardi Decl. at ¶ 2, 5, 6, 7); (D.E. No. 67-1, Petty Decl. at ¶¶ 2, 6, 8, 9, 10); (D.E. No. 67-1, Pepe Decl. at ¶¶ 2, 5, 6, 7).

Specifically, all of these potential class members allege that they typically worked from 7:45 a.m. to 6:00 p.m. or later five days a week. (D.E. No. 67-1, Sherman Decl. at ¶¶ 6, 7); (D.E. No. 67-1, Soren Decl. at ¶¶ 6, 7); (D.E. No. 67-1, Ricardi Decl. at ¶¶ 6, 7); (D.E. No. 67-1, Petty Decl. at ¶¶ 9, 10);² (D.E. No. 67-1, Pepe Decl. at ¶¶ 6,7). This means that taking a conservative approach, these potential class members were working at least fifty hours a week. All potential class members also allege that with regard to weekly pay, they “only received . . . [their] regular

²Norris Petty actually states that they were typically required to start the workday at 7:30 a.m. or 7:45 a.m. and that they normally worked five to seven days a week. (D.E. No. 67-1, Petty Decl. at ¶¶ 9, 10).

commissions from the sales (if any)³ that . . . [they] made or the commission advance of \$300.00.” (D.E. No. 67-1, Sherman Decl. at ¶ 7); (D.E. No. 67-1, Soren Decl. at ¶ 7); (D.E. No. 67-1, Ricardi Decl. at ¶ 7); (D.E. No. 67-1, Petty Decl. at ¶ 10); (D.E. No. 67-1, Pepe Decl. at ¶¶ 7). However, any commissions from sales received that week were reduced by the \$300.00 already paid out.⁴ *See* (D.E. No. 67-1, Sherman Decl. at ¶ 5); (D.E. No. 67-1, Soren Decl. at ¶ 5); (D.E. No. 67-1, Ricardi Decl. at ¶ 5); (D.E. No. 67-1, Petty Decl. at ¶¶ 6, 8); (D.E. No. 67-1, Pepe Decl. at ¶¶ 5).

Thus, taking a conservative approach, there were some weeks where no commissions were made and the most the agents received was \$300.00. All potential plaintiffs also allege that they worked for Defendants from July 24, 2008 to a time beyond that and when the minimum wage was at least \$6.55 or higher. 29 U.S.C. § 206(a)(1) (providing that the minimum was \$5.85 from July 24, 2007 through July 23, 2008, \$6.55 from July 24, 2008 until July 23, 2009, and \$7.25 from July 24, 2009 to the present); *see also* (D.E. No. 67-1, Sherman Decl. at ¶ 2); (D.E. No. 67-1, Soren Decl. at ¶ 2); (D.E. No. 67-1, Ricardi Decl. at ¶ 2); (D.E. No. 67-1, Petty Decl. at ¶¶ 2); (D.E. No. 67-1, Pepe Decl. at ¶¶ 2). More importantly, the alleged employment of Mary Soren, Jon Ricardi, and Norris Petty was only in a time period where the minimum wage was \$6.55 or higher. (D.E. No. 67-1, Soren Decl. at ¶ 2); (D.E. No. 67-1, Ricardi Decl. at ¶ 2); (D.E. No. 67-1, Petty Decl. at ¶ 2). Thus, during these time periods where the potential plaintiffs received only

³By alleging “if any,” these potential class members are acknowledging that there were weeks when no commissions were received.

⁴The potential class members also state that this “charge-back” was for the full \$300.00 not the \$300.00 less taxes, which was the amount they actually received. *See* (D.E. No. 67-1, Sherman Decl. at ¶ 5); (D.E. No. 67-1, Soren Decl. at ¶ 5); (D.E. No. 67-1, Ricardi Decl. at ¶ 5); (D.E. No. 67-1, Petty Decl. at ¶ 6); (D.E. No. 67-1, Pepe Decl. at ¶ 5).

the \$300.00 cash advance, their pay would not have met the minimum wage requirements.⁵

Accordingly, the Court finds there is sufficient evidence in the record to support conditional certification of this claim.

Finally, Defendants appear to object to the wording of the conditionally certified class who is to receive notice. In the original motion, Plaintiffs propose to certify a class of "all current and former Time Share Sales Agents who worked for Defendants at any time within the last three (3) years, and who were subjected to Defendants' illegal practice of not paying minimum wage and full and proper overtime compensation for all overtime hours worked." (D.E. No. 67 at ¶ 4). Plaintiffs also acknowledge that their notice is limited to only those employees who worked in South Florida. *See* (D.E. No. 67 at 7). Specifically, it is limited to those agents who worked or are working in Weston, Hollywood, or Ft. Lauderdale. *Id.*

First, Defendants argue that any conditional class certified should be limited to two years from the order granting certification. The statute of limitations for a claim for unpaid wages under the FLSA is generally two years. 29 U.S.C. § 255(a). If, however, the claim is one arising out of a willful violation, the statute of limitations is extended to three years. *Id.* "To establish that the violation of the Act was willful in order to extend the limitations period, the employee must prove by a preponderance of the evidence that his employer either knew that its conduct was prohibited by the statute or showed reckless disregard about whether it was." *Alvarez Perez v. Sanford-Orlando Kennel club, Inc.*, 515 F.3d 1150, 1162-63 (11th Cir. 2008). "Reckless disregard" is defined as the "failure to make adequate inquiry into whether conduct is in compliance with the Act." 5 C.F.R. § 551.104. Upon review of Plaintiff's amended complaint,

⁵\$6.55 x 50 hours = \$327.50

which is the operative complaint, Plaintiff did not allege that Defendants either knew its conduct violated the FLSA or that Defendants failed to make adequate inquiry into whether their conduct was in compliance with the Act. *See* (D.E. No. 22, Amended Complaint). Accordingly, as no willful violation has been alleged, the appropriate statute of limitations in this action is two years.

Next, the Court considers whether the notice should be limited to two years before the filing of this order or two years before the filing of the complaint. Twenty-Nine U.S.C. § 256 provides that in the case of a collective action under the FLSA an individual claimant, who is not named in the original complaint on the date said complaint was filed, shall be considered to have commenced his or her action when his or her written consent is filed in the court where the action was commenced. Although the date this order is issued is not the appropriate date for calculating the statute of limitations, it is certainly more accurate than the date the complaint was filed under section 256.

Plaintiffs ask the Court to provide notice to individuals employed by Defendants by counting back from the filing of complaint because of the potential for equitable tolling of the statute of limitations. The doctrine of equitable tolling allows a plaintiff to file suit after a statute of limitations has expired "because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence." *Sandvik v. United States*, 177 F. 3d 1269, 1271 (11th Cir. 1999). Plaintiffs bear the burden of demonstrating equitable tolling and here, Plaintiffs have not produced any evidence that the doctrine of equitable tolling applies to this action. *See Ross v. Buckeye Cellulose Corp.*, 980 F. 2d 648, 661 (11th Cir. 1993) (stating that once the defendant raised the statute of limitations issue the plaintiff had the burden of proving that the equitable tolling doctrine applied). Accordingly, the Court shall limit notice to Time Share

Sales Agents who worked for Defendants within the two years before the date of this Order.

Next, Defendants argue that the proposed class definition is "is not objective, cannot define the class without resorting to a trial on the merits, and the definition is misleading" and thus, the class definition must be rejected. (D.E. No. 103 at 17). Specifically, Defendants argue that to determine whether each potential claimant is a member of the class this court has to consider the merits of each claim i.e. whether the potential claimant was subjected to an "illegal pay practice." Thus, with regard to each potential plaintiff, Defendants argue that the Court will be required to consider the merits of each individual claim, making the proposed class action unmanageable and destroying the reason for a class action in the first place. Defendants also argue that the language proposed by Plaintiff is misleading and conveys the message that Defendants have already been found to have engaged in wrongdoing. Defendants do not propose any alternative language, and to the extent Defendants are arguing that no workable class can be defined in an FLSA action such as this, the Court disagrees. The Court, however, agree that giving notice that the Defendants engaged in "illegal" action is premature.

After careful consideration, the Court authorizes Plaintiffs to give notice of this lawsuit to all current and former Time Share Sales Agents employed by Defendants in South Florida during the two years preceding the entry of this Order who were not paid the minimum wage by Defendants and/or did not receive full and proper overtime compensation for all overtime hours worked in accordance with the Fair Labor Standards Act. The Court includes instructions for preparing the form of the notice below. Accordingly, it is hereby:

ADJUDGED that United States Magistrate Judge Brown's Report and Recommendation (D.E. No. 94) is **AFFIRMED** and **ADOPTED in part**. Accordingly, it is

1. Plaintiffs' Motion for an Order Permitting Supervised Notice to Potential Opt-In Plaintiffs and Conditional Certification of this Case as a Collective Action (D.E. No. 67) is **GRANTED**.

2. Plaintiffs are authorized to give notice of this lawsuit to all current and former Time Share Sales Agents employed by Defendants in South Florida during the two years preceding the entry of this Order who were not paid the minimum wage by Defendants and/or did not receive full and proper overtime compensation for all overtime hours worked in accordance with the Fair Labor Standards Act.

3. The parties shall meet and confer regarding the content of the proposed Notice and Consent forms. On or before August 5, 2011, the parties shall submit to the Court a Motion to Approve their agreed-upon Notice and Consent forms. If the parties cannot agree on the form of a Notice and Consent, on or before August 5, 2011, each party may file a Motion to Approve their own proposed Notice and Consent form. On or before August 12, 2011, each party may file a 5-page⁶ response to the other side's Motion to Approve. No replies shall be permitted. In any Motion to Approve filed with the Court, the parties shall propose an appropriate deadline for the filing of consents by potential class members. Thereafter, the Court will review the parties' motions and issue the Court-authorized Notice and Consent form.

4. The Court shall reset the trial in this case after the Court issues the approved Notice and Consent form.

DONE AND ORDERED in Chambers at Miami, Florida, this 14 day of July, 2011.



JOSE E. MARTINEZ
UNITED STATES DISTRICT JUDGE

Copies provided to:
Magistrate Judge McAliley
All Counsel of Record

⁶This response shall be double-spaced in Times New Roman 12 point font.