UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

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ORBIN COVACHUELA, individually and on behalf of all others similarly situated,

Plaintiff,

3:20-cv-08806-AET-TJB

-against-

JERSEY FIRESTOP, LLC, DANIEL HINOJOSA, and DAVID HINOJOSA,

Defendants.

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DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO THE PLAINTIFF'S MOTION FOR CONDITIONAL CERTIFICATION PURSUANT TO THE FAIR LABOR STANDARDS ACT

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PRELIMINARY STATEMENT

Defendants, Jersey Firestop, LLC, Daniel Hinojosa, and David Hinojosa, ("Defendants") submit this Memorandum of Law in Opposition to the Plaintiff's Motion for Conditional Certification under the Fair Labor Standards Act. The motion should be denied because the Plaintiff does not meet the standard for conditional certification.

STATEMENT OF FACTS

For purposes of the Plaintiff's motion only, the Defendants respectfully refer the Court to the Complaint and the Declaration of the Plaintiff for a recitation of the alleged facts.

ARGUMENT

POINT I

THE PLAINTIFF HAS FAILED TO MEET HIS BURDEN FOR CONDITIONAL CERTIFICATION

The standard used to decide a motion for conditional certification is well known. While the standard is not demanding, it does require more than is offered here. Once the boilerplate is filtered away, the sediment offers little to stand on.

A. Plaintiff's Declaration Is Insufficient To Show Similarly Situated Employees

The only support for the motion is the Plaintiff's Declaration. The first 27 paragraphs of the Declaration parrot the Complaint and are limited to how the Plaintiff alleges he was paid. These paragraphs are silent on how other persons may be similarly situated. However, Plaintiff does admit that the Defendants paid him the proper minimum wage during his entire employment. (Covachuela Decl., paras. 21-22). Plaintiff also admits the Defendants paid him the proper overtime rate for Saturday work. (Covachuela Decl., para. 23).

Finally, in paragraph 28, the Plaintiff states that he has "personal knowledge" based on "conversations" with other employees and, therefore, he asserts that these employees were treated like him. (Covachuela Decl., para. 28).

In paragraph 29, Plaintiff states that he is "aware of several other individuals with whom I worked within the last three years" and he identifies them as Ivan Cruz, Jorge Espinoza, and Diego Bautista, and he refers to the others as Julio, Oscar, Jaime, and Andres. (Covachuela Decl., para. 29). He claims these employees were laborers like him and had similar schedules. (Covachuela Decl., paras. 30-35). Despite not even knowing the full names of all of these persons, he claims to know all of their schedules and how they were paid.

The Plaintiff alleges these persons were, like him, required to arrive at the office in the morning to load the company vehicle and return to the office after work to unload the vehicle. (Covachuela Decl., para. 33). Plaintiff claims these persons told him that they were not paid for hours over forty. (Covachuela Decl., paras. 37, 39). Plaintiff does not state when or where these alleged conversations happened.

Plaintiff also claims his uncle, Carlos Rivera, previously worked for the Defendants and that Mr. Rivera told him that the Defendants did not pay for the morning vehicle-loading time and afternoon vehicle-unloading time. (Covachuela Decl., para. 43). But, most important, the Plaintiff does not allege that Mr. Rivera is similarly situated. Plaintiff does not allege that Mr. Rivera claims he (Mr. Rivera) was not paid properly or that Mr. Rivera was a laborer or driver. Thus, even accepting the Plaintiff's hearsay statement about his uncle Mr. Rivera, the Plaintiff does not even suggest that Mr. Rivera was similarly situated to the Plaintiff or anyone else.

Moreover, since the Plaintiff does not allege that Mr. Rivera was similarly situated, the Plaintiff never explains how Mr. Rivera would know how other persons (presumably like the Plaintiff) were paid. In hearsay fashion, Plaintiff states that Mr. Rivera told him that the Defendants did not pay for certain hours. Plaintiff does not state where or when this conversation occurred, just that it was "before" his employment started. (Covachuela Decl., para. 43). "Before" April 2018 encompasses a vast time period. One would think the Plaintiff could be more specific to give the hearsay a trace of reliability and truthfulness. But he does not.

Also undercutting the reliability of the hearsay, Plaintiff does explain how Mr. Rivera allegedly obtained this information. Plaintiff does not state that Mr. Rivera had communications with any particular persons about how they were paid. Plaintiff does not state that Mr. Rivera had any particular observations as to how others were paid. Plaintiff does not even state how long Mr. Rivera supposedly worked for the Defendants or what his job was. All we know about Mr. Rivera is that he is an alleged former employee of the Defendants and Plaintiff's uncle—and that he did not provide an affidavit for his supposed nephew. For all of these reasons, the statements that the Plaintiff attributes to Mr. Rivera are completely unreliable, inadmissible, irrelevant, i.e., legally worthless.

This is all Plaintiff offers to support conditional certification. It is not enough. Plaintiff's statements about what these persons supposedly told him are inadmissible hearsay. But even if the court were to consider the hearsay statements, they still are not enough to sustain his burden.

Plaintiff repeats how low the standard is: "low standard" (Pl.Mem. 2); "low burden" (Pl.Mem. 5); "lenient standard" (Pl.Mem. 6); "minimal" (Pl.Mem. 7), as if aware how close

he is to it. In fact, he cites to Purnamasidi v. Ichiban Japanese Rest., 2010 WL 382707 (D.N.J. 2010), yet his parenthetical avoids the critical part of that case. There the court granted conditional certification because the plaintiff *included* a supporting affidavit from another employee. Id. at *4. Even with the additional affidavit, however, the court stated that the plaintiff met his burden but "only by the smallest margin." Id. Without that other affidavit, it appears the motion would have been denied.

Here, unlike Purnamasidi, Plaintiff has no supporting affidavits—not even from his uncle. While the standard is a "modest factual showing," Halle v. W.Penn Allegheny Health Sys. Inc., 842 F.3d 215, 224 (3d Cir. 2016), Purnamasidi instructs that something more is needed when a plaintiff's statement is so thin.

In addition, in Gui Hua Ding v. Baumgart Restaurant, Inc., 2020 WL 487135 (D.N.J. 2020), the court denied conditional certification. The plaintiff identified other employees that he claims were not paid properly, just like him, based on his observations. Id. at *5. Critically missing was the pay rates of the other employees. Id. at 6. The same is true here. A careful review of the Plaintiff's hearsay statements about how others were paid demonstrates that the Plaintiff has not met his burden.

The Plaintiff generally refers to conversations but does not identify when or where they allegedly occurred in order to give the hearsay even a hint of reliability. Moreover, if these conversations really did occur, then the Plaintiff should know the pay rates of these other employees because his motion claims these other persons were paid the same as he was. But he never provides their hourly rates, despite providing his own hourly rates. (Covachuela Decl., paras. 21-22). His inability to provide any details about these conversations or the

hourly rate of even just one of his comparators undercuts the reliability of the statements he attributes to them.

In fact, the Plaintiff does not attribute any particular statement to any particular person. Other than identifying three employees by first and last names and four employees by first names only in paragraph 29, all of his remaining attributions to them for comparison purposes are general. For example, in paragraph 37, Plaintiff states, "they told me," without giving specific attribution to any one of them. (Covachuela Decl., para. 37). The same is true in paragraph 39 where the Plaintiff states that, "Through these conversations, I learned that other employees . . ." but without specific attribution to any one person. (Covachuela Decl., para. 39). Paragraph 38 suffers from the same elusiveness when the Plaintiff states that, "the other employees and I often complained to each other that we were not paid enough." (Covachuela Decl., para. 38). The lack of specificity (who said what, when, where) makes the hearsay even more unreliable.

Paragraph 42 maintains the ambiguity: the Plaintiff states, "It is my understanding that Defendants' pay practices have been the same since before I began my employment with them in April 2018, and that before April 2018 they also did not pay employees for all overtime worked." (Covachuela Decl., para. 42). Plaintiff does not provide the basis for his understanding.

"Although the modest factual showing is a lenient standard, it does not compel automatic certification at the notice stage." Mitchell v. Covance, Inc., 438 F.Supp.3d 341, 346 (E.D.Pa. 2020). But, here, granting certification on this record would lower the standard to an unacceptable level that would be incapable of not being met. Not only would a plaintiff's self-serving hearsay be enough, but a peculiar type of hearsay that does not provide any details

(locations, times, attribution, rates of pay of the comparators) in order to give the hearsay even a dash of reliability would suffice. The standard should not be that low, which would be unfairly prejudicial to a defendant because there would be no viable defense to this type of motion.

B. Plaintiff Fails To Provide The Morning and Afternoon Times He Was Allegedly Required To Work

The root of this case is what the Plaintiff calls Preparation Hours. (Covachuela para. 10). Preparation Hours is the Plaintiff's phrase for when he claims he was required to be at the office in the morning to load the vehicle and then in the afternoon to unload.[1] The material element of this claim is the specific time: what time in the morning and what time in the afternoon was the Plaintiff supposedly required to be there for loading and unloading. Exacerbating the lack of specificity explained above, the Plaintiff never identifies a morning or afternoon time. (Covachuela Decl., paras. 5, 7, 8, 9, 13, 14, 26, 33, 34, 40). The omission is fatal to this motion and the entire case.

By contrast, Plaintiff states that his scheduled hours at the worksite were 7:15 a.m. to 3:00 p.m.—and he admits being paid for them. (Covachuela Decl., paras. 21-23). Not once does he state what time in the morning he claims he arrived at the office. Not once does he state what time in the afternoon he left the office to go home. Not once does he state what time the alleged comparators arrived in the morning to load or left in the afternoon to unload. These missing times are essential, both for the Plaintiff and the alleged comparators. But the Plaintiff never provides them. If the Plaintiff cannot identify what time he arrived and left,

[1] Plaintiff admits he was paid properly while at the worksite. (Covachuela paras. 21-23).

then he cannot identify what time others did so too. In Mitchell, similar material information was missing that prevented the court from determining whether others were comparators:

> Although the declaration names several individuals, aside from Nickerson, Mitchell provides no indication of what locations these individuals worked at, nor any indication of whether they were paid on a salaried or hourly basis. Mitchell's conclusory statements, totally lacking in detail, that the assertions "are based on numerous direct communications [she] had with other Startup Specialists" does not provide evidence that Mitchell has any personal knowledge that these individuals were subject to unfair payment of wages. Further, because the declaration does not explain who, if any, of the listed individuals were payed (sic) on a salaried basis, the Court is unable to determine if the individuals would even fit Mitchell's proposed collective as amended.

See Mitchell v. Covance, Inc., 438 F.Supp.3d 341, 346-47 (E.D.Pa. 2020) (denying motion for conditional certification). The same lack of specificity is present here.

Plaintiff asserts he and others were not paid for Preparation Hours, but he omits the times for himself and the others. There is no way for the court to evaluate whether others were similarly situated without this information. The essential part of the Plaintiff's claim is his assertion that he is similarly situated to others because they ***all were required***—by company policy—to be at the office in the morning at a *time certain* to load the vehicle. But he never states what time for himself or anyone else. The same is true for the afternoon. He never gives the times for himself or anyone else—not for one single day. Thus, he never adequately describes the alleged company policy applicable to himself and certainly not for others. That leaves his burden unmet.

C. Plaintiff's Failure To Identify The Times Of The Preparation Hours Is Unfairly Prejudicial To The Defendants

This failure is highly and unfairly prejudicial to the Defendants. The exact morning and afternoon times are critical because their length, if any, materially affects defenses available to the Defendants. For example, certain alleged work time can be deemed *de minimis* under the FLSA and not compensable. The Plaintiff's refusal or inability to provide the time of the alleged Preparation Hours unfairly prejudices the Defendants' ability to explore the viability of this defense. This is especially true if the alleged time is different for the Plaintiff and the alleged comparators.

In Singh v. City of New York, 524 F.3d 361 (2d Cir. 2008), the court held as follows:

> The point is that, under either approach, when an employee is minimally restricted by an employer during a commute, such that his or her use of commuting time is materially unaltered, the commuting time will generally not be compensable under the FLSA.

Id. at 369.

> The *de minimis* doctrine permits employers to disregard, for purposes of the FLSA, otherwise compensable work "[w]hen the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours." Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 692, 66 S.Ct. 1187, 90 L.Ed. 1515 (1946).

Id. at 370-71.

Moreover, in IBP, Inc. v. Alvarez, 546 U.S. 21, 42 (2005), the Supreme Court held that the time spent putting on protective gear was not compensable. More recently, in Integrity Staffing Solutions, Inc. v. Busk, 574 U.S. 27 (2014), the Supreme Court held that time spent waiting in line for security screenings was not compensable.

Following Integrity, the point was driven home more forcefully in Balestrieri v. Menlo Park Fire Protection Dist., 800 F.3d 1094 (9th Cir. 2015):

> Applying *Integrity Staffing* to the present case, the correctness of the district court's decision is plain. When the firefighter has put his name on the list for overtime calls, he is free to take his gear home, and if he gets a call, he can go to the visiting station for the assigned shift without even stopping by his home station. Thus, driving to the home station first is not "indispensable" to the firefighters' principal activities. If the firefighter has come to work early, as plaintiffs' evidence suggests they sometimes do, and then ***must*** spend what was expected to be leisure time before the shift, ***gathering and transporting turnout gear to a visiting station***, that activity is "preliminary" because it is not "intrinsic" to the firefighting activity that he is employed to perform.

Id. at 1101 (emphasis added).

Without the Plaintiff identifying the exact times constituting the Preparation Hours for himself and the alleged comparators, the Defendants are unfairly deprived of fair notice of his claims and the applicability of this and possibly other defenses.

Accordingly, the Plaintiff has not met his burden for conditional certification and the motion should be denied.

POINT II

THE PROPOSED NOTICE FAILS TO STATE THAT OPT-IN PLAINTIFFS MAY HAVE TO PAY COSTS IF THEY LOSE

The proposed Notice at paragraph 11 states that if there is no recovery, the opt-in plaintiffs "pay nothing." However, a prevailing defendant may recover costs in an FLSA case. Camesi v. University of Pittsburgh Medical Center, 753 Fed.Appx. 135, 141 (3d Cir. 2018). Thus, the proposed Notice should include a statement that, "If the Defendants prevail, You may have to pay the costs of the Defendants in defending against this lawsuit."

POINT III

THE PROPOSED NOTICE FAILS TO IDENTIFY DEFENDANTS' COUNSEL

Paragraph 9 of the proposed Notice identifies only the Plaintiff's lawyer. Counsel for the Defendants should also be identified. The potential opt-in plaintiffs are equally free to contact defense counsel to learn what the case is about.

POINT IV

THE PROPOSED NOTICE IS CONFUSING ON THE TYPE OF OVERTIME

Paragraph 2 of the proposed Notice states that the Defendants did not pay their employees "premium overtime pay." Defendants object to the word "premium" because it implies a different type of overtime pay beyond 1.5 times the regular rate or minimum wage rate. The word "premium" is superfluous and confusing, and should be removed.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court deny the Plaintiff's motion in all respects and for such other and further relief as this Court deems just and proper.

Dated: Hackensack, New Jersey
January 22, 2021

Respectfully submitted,

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