UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EDDY IBEA, et al.,	:	
Plaintiffs,	:	11 Civ. 5260 (JSR)(HBP)
-v-	:	MEMORANDUM ORDER
RITE AID CORPORATION,	:	
Defendant.	:	

JED S. RAKOFF, U.S.D.J.

On December 9, 2011, Magistrate Judge Pitman orally granted plaintiff's motion to conditionally certify a class under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 216(b). On December 14, 2011, Judge Pitman issued a written order clarifying his reasons for conditional certification. Thereafter, on December 22, 2011, Rite Aid filed no fewer than nine objections to Judge Pitman's order. See Fed. R. Civ. P. 72(a). Having now fully reviewed Judge Pitman's order and the parties' written submissions, the Court hereby rejects all of Rite Aid's objections and affirms Judge Pitman's order in its entirety.

When deciding whether to certify under 29 U.S.C. § 216(b), courts employ a "two-step method." Myers v. Hertz Corp., 624 F.3d 537, 555 (2d Cir. 2010). Judge Pitman's order addressed only the first step of this inquiry. "The first step involves the court making an initial determination to send notice to potential opt-in plaintiffs who may be 'similarly situated' to the named plaintiffs with respect to whether a FLSA violation has occurred." Id. As the Second Circuit noted, the

term "certification" does not accurately describe the determination a court makes at the first step because a court exercises only its "discretionary power . . . to facilitate the sending of notice to potential class members." Id. at 555 n.10. Accordingly, to prevail on the first step of the certification inquiry, plaintiffs must make only "a 'modest factual showing' that they and potential opt-in plaintiffs 'together were victims of a common policy or plan that violated the law.'" Id. at 555 (quoting Hoffmann v. Sbarro, Inc., 982 F.Supp. 249, 261 (S.D.N.Y. 1997)). While unsupported assertions will not satisfy a plaintiff's burden, the Second Circuit has emphasized that the standard of proof should remain "low . . . because the purpose of the first stage is merely to determine whether 'similarly situated' plaintiffs do in fact exist." Id. Only at the second step of the inquiry will a court, "on a fuller record, determine whether a so-called 'collective action' may go forward by determining whether the plaintiffs who have opted-in are in fact 'similarly situated' to the named plaintiff." Id.

Under Fed. R. Civ. P. 72(a), a "district judge . . . must consider timely objections [to a non-dispositive order] and modify or set aside any part of the order that is clearly erroneous or is contrary to law." "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake

has been committed." United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948). "An order may be deemed contrary to law when it fails to apply or misapplies relevant statutes, case law or rules of procedure." Catskill Dev., L.L.C. v. Park Place Entm't Corp., 206 F.R.D. 78, 86 (S.D.N.Y. 2002) (citation and internal quotation marks omitted).

Initially, at the end of a telephonic (but transcribed) conference on December 9, 2011, Judge Pitman orally granted Ibea's application for conditional certification of a class, allowing Ibea to notify potential class members of their ability to opt into this lawsuit. Judge Pitman concluded that Ibea had made a modest showing that Rite Aid co-managers ("CMs") were victims of a common and unlawful policy or plan. He based this conclusion on "the common job description, the testimony of Ibea and the opt ins that we currently have that they perform the same duties, uniform job requirements set by Rite Aid, uniform training materials, the same compensation and the same work rules and the fact that no co-managers were paid overtime during the class period." Transcript, 12/9/11 ("Tr.") at 25:14-20. In the subsequent written Order issued on December 14, 2011, Judge Pitman further clarified that he relied on Ibea's evidence "that during the relevant time period, all CMs worked under the same job description, plaintiff and the six opt-ins performed the same primary duties, all CMs had to meet uniform job requirements, uniform training materials were prepared for all CMs, all CMs were paid in the same manner, were

not paid overtime and were all subject to the same work rules." Doc. #77 ("Order") at 3-4. As noted above, the defendants raise nine objections to Judge Pitman's order.

In its first objection, Rite Aid argues that Judge Pitman erred by finding that Rite Aid's counsel admitted during oral argument "that Rite Aid initially determined that CMs were exempt and subsequently reclassified them as non-exempt without regard to the duties actually performed by each of its CMs." Order at 4-5. Similarly, in its seventh objection, Rite Aid argues that Judge Pitman erred by relying on that alleged admission. The objection is without merit, however, because even assuming arguendo that Judge Pitman erred in concluding that Rite Aid's counsel admitted Rite Aid treated CMs as a group, evidence in the record more than supported that proposition, rendering Judge Pitman's error harmless on the modest standard applicable here. For example, a witness testified that Rite Aid terminated the CM position, which it had classified as exempt, and then offered all former CMs non-exempt work. See Doc. #73-14 at 159:8-160:2 (Rite Aid "offered people an hourly position, hourly co-manager/assistant manager position, because at that time we deemed that we wanted to pay those people, pay people in those roles on an hourly basis"). Moreover, Judge Pitman could rely on such evidence. See Raniere v. Citigroup Inc., 2011 WL 5881926 at *24 (S.D.N.Y. 2011) ("While [common treatment] alone is insufficient to justify conditional certification, the evidence to this effect does lend

support to conditional certification in so far as it supports that Defendants treated Plaintiffs and potential opt-in plaintiffs with uniform pay and employment-related policies."). Defendant's citation to Myers for the proposition that common treatment "does not establish whether all plaintiffs were actually entitled to overtime pay," 624 F.3d at 549, is not to the contrary because plaintiffs need not prove their entitlement on the merits to satisfy a court that other, similarly situated individuals likely exist. Thus, Judge Pitman did not err, and his opinion is upheld against these objections.

Turning to the defendant's fourth, fifth, sixth, and eighth objections, the Court finds that these objections all mischaracterize the applicable standard, arguing that Judge Pitman should have considered defendant's evidence that Ibea is not similarly situated to other Rite Aid CMs. Defendant's arguments misconstrue the standard in two respects. First, courts do not address whether a plaintiff is similarly situated to a class until the second stage of the certification inquiry, which Judge Pitman has not yet reached. Myers, 624 F.3d at 555. At the first stage, courts consider only whether other, similarly situated plaintiffs likely exist, something Ibea has amply demonstrated. Second, at the second stage of the certification inquiry, courts consider whether the plaintiffs who actually opt in are similarly situated, not whether all members of a certain profession are similarly situated. Thus, Ibea's similarities to other CMs become relevant only when those CMs actually join the class, just

as Judge Pitman found. Accordingly, Judge Pitman did not clearly err, and the Court rejects the fourth, fifth, sixth, and eighth objections.

Finally, the second and third objections argue that Judge Pitman should not have considered the CM job description and training materials as evidence supporting conditional certification. Nonetheless, Judge Pitman's reliance on this evidence was completely reasonable. Even though Ibea acknowledged that he did not perform many of the tasks included in Rite Aid's job description, he also produced testimony, cited by Judge Pitman, that other opt-ins performed the same duties as Ibea. Thus, Ibea's case was stronger than those of other plaintiffs who have succeeded at this stage of the certification process. See Neary v. Metropolitan Property & Cas. Ins. Co., 517 F. Supp. 2d 606, 621 (D. Conn. 2007) (concluding that, because plaintiff did not "completely disavow the description" and "there is no evidence that plaintiff's clarifications do not similarly apply to the other proposed class members," plaintiff had successfully claimed that the class members "were injured by the same . . . policy"). Similarly, while Rite Aid may not have used precisely uniform materials to train CMs, Judge Pitman could rely on plaintiff's evidence that Rite Aid centrally prepared training materials to support his conclusion that many CMs were "similarly, even if not identically, situated." Damassia v. Duane Reade, Inc., 2006 WL 2853971 at *6 (S.D.N.Y. 2006). Accordingly, Judge Pitman did not clearly err in relying on this evidence, and the Court rejects the second and third objections.

Rite Aid's ninth objection merely relies on the cumulative force of its other objections to urge that the Court set aside Judge Pitman's decision to conditionally certify Ibea's class. Having rejected Rite Aid's other objections, the Court rejects the ninth objection for the same reasons. Accordingly, the Court affirms Judge Pitman's order in its entirety.[1]

SO ORDERED.

JED S. RAKOFF, U.S.D.J.

Dated: New York, New York
January 6, 2011

[1]To take account of this motion practice, however, the Court extends the remaining case management deadlines by four weeks, the amount of time between when Judge Pitman granted Ibea's motion and the resolution of Rite Aid's objections under Rule 72(a). Thus, for example, the final, pre-trial conference previously scheduled for April 23, 2012 is now scheduled for May 21, 2012.