IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

WILLIAM DOUGLAS FULGHUM, et al.,	)	
	)	
Individually and on behalf of all others similarly situated,	)	
	)	
Plaintiffs,	)	CIVIL ACTION
	)	CASE NO. 07-cv-2602
v.	)	
	)	
EMBARQ CORPORATION et al.,	)	
	)	
Defendants.	)	

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION FOR APPROVAL OF A COLLECTIVE ACTION UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT, AND FOR AN ORDER REQUIRING DEFENDANTS TO PROVIDE CONTACT INFORMATION FOR THE POTENTIAL MEMBERS OF THE COLLECTIVE ACTION, AND ITS ASSISTANCE IN PROVIDING THE NOTICE

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A. Introduction

Defendants' Memorandum in Opposition to Plaintiffs' Motions for Class Action Certification and for Approval of an ADEA Collective Action (Doc. #106) responds both to Plaintiffs' Motion for Class Action Certification (Doc. # 55) and its supporting Memorandum (Doc. # 56), and to Plaintiffs' Motion for Approval of a Collective Action under the Age Discrimination in Employment Act, and for an Order Requiring Defendants to Provide Contact Information for the Potential Members of the Collective Action, and its Assistance in Providing the Notice (Doc. # 57) and its supporting Memorandum (Doc. # 58).

Defendants have conflated their Opposition to both Motions into one document. This Reply responds to the arguments against an ADEA collective action defendants set forth in Part III of their Memorandum, which is the only part discussing a collective action.

B. Defendants Have Filed an Extremely Narrow Opposition

Defendants' Memorandum challenged only the approval of the collective action discussed in Part C of Plaintiffs' Memorandum in Support of their Motion for Approval of a Collective Action under the Age Discrimination in Employment Act, and for an Order Requiring Defendants to Provide Contact Information for the Potential Members of the Collective Action, and its Assistance in Providing the Notice (Doc. # 58).

Defendants have not challenged the similarity of the representative ADEA plaintiffs to any of the 756 ADEA charging parties and plaintiffs who have already joined in this action.

Defendants have not challenged the similarity of the representative ADEA plaintiffs to any of the thousands of retirees in the proposed collective action.

Defendants have not challenged plaintiffs' need for the contact information for potential members of the collective action discussed in Part D of plaintiffs' Memorandum.

Defendants have not challenged plaintiffs' proposal for developing the text of the Notice

to potential members of the collective action discussed in Part E of plaintiffs' Memorandum.

Defendants have not challenged any of the provisions of the draft Order plaintiffs sought in their Motion (Doc. # 57).

C. Defendants' Arguments that Proposed Members of the Collective Action Are Not "Similarly Situated"

Defendants have not made a cohesive argument why all retirees subject to either of two common uniform companywide or subsidiary-wide policies should not be considered similarly situated.

1. Defendants' Argument that, Despite the Unchallenged Existence of Uniform Policies Raising the Same Legal Issues, They Should Gain Advantages from Their Failure to Provide Timely Discovery

Plaintiffs attached to their opening Memorandum (Doc. # 58) the announcements defendants themselves made to all of the potential members of the collective action. *See* Exhibits A and B thereto. Nowhere in defendants' brief do they dispute that they issued these announcements, or argue that some potential members were subject to different announcements, or argue that the different announcements had a different meaning to retirees in different plans.

Instead, defendants argue that their own failures to provide timely discovery should protect defendants from the certification of a collective action. Defendants' Memorandum at 25 ("In light of Plaintiffs' own position that they do not know which plans existed or to whom the plans applied (see supra at 11-15), Plaintiffs cannot now demonstrate that all putative class members were subject to the same plans or plan terms or any alleged discrimination related to these plans. Such unsupported allegations are insufficient to justify even conditional collective action certification.").

It is difficult for plaintiffs to accept the argument that defendants' failure to provide discovery should somehow insulate defendants from the conditional approval of a collective

action. If such a rule were accepted in any case, it would encourage defendants to play games with their discovery responses to gain improper advantages unavailable to defendants that comply with the rules. Such an incentive system would drive up the costs of litigation and multiply the need for constant judicial intervention.

2. Defendants' Internal Contradiction in Their Arguments

Defendants admit that there is a two-stage collective-action certification procedure in which "similarly situated" status is evaluated under a "stricter standard" in the second stage, in light of individual facts "[u]pon the close of discovery." Defendants' Memorandum at 23.

However, defendants' entire argument is predicated on a presumed need for plaintiffs to show individual circumstances and differences between plans at the initial stage of approval of a collective action. Defendants' own arguments conflict with each other.

3. Uniform Policies Support a Finding that Potential Members of a Collective Action Are Similarly Situated

Defendants' position that a uniform policy applicable to all members of a proposed collective action is insufficient to support initial approval of a collective action was rejected in *McCaffrey v. Mortgage Services Corp.*, 2009 WL 2778085 (D. Kan. Aug. 27, 2009) (No. CIV.A. 08-2660-KHV), a case decided almost four weeks prior to their Memorandum but not mentioned in their Memorandum.[1] In that decision, Judge Vratil approved an ADEA collective action based on a uniform policy of the employer not to pay overtime to the group of employees in question:

> Plaintiffs argue that the potential class members are similarly situated because they all performed substantially similar loan origination duties and pursuant to company policy, MSC treated them the same way by paying them on a commission basis without paying straight time and overtime. Generally, where putative class members are employed in similar positions, the allegation that defendants engaged in a pattern or practice of not paying overtime is sufficient to allege that plaintiffs were together the

[1] A copy is attached hereto as Attachment 1.

> victims of a single decision, policy or plan. . . . The allegations in the complaint and supporting declarations suggest that plaintiffs held similar positions at MSC and received neither straight time nor over-time. Plaintiffs have satisfied the low threshold required to demonstrate at the notice state that putative class members are similarly situated for purposes of conditional collective action certification under Section 216(b) of the FLSA. . . .

Id. at *3. Due to the defenses of exempt status commonly raised by employers (and raised by the defendant there) similar jobs are obviously an important factor in an FLSA overtime case. No such requirement is relevant herein, where the identical policies applied to janitors and managers alike, and to everyone in between.

Defendants' position was also rejected in another collective-action and class action decision handed down this year in this District, but cited by defendants only in conjunction with an unrelated argument.[2] *Garcia v. Tyson Foods, Inc.*, 255 F.R.D. 678 (D. Kan. 2009), was a donning-and-doffing overtime case in which Judge Lungstrum approved a collective action under the FLSA and certified a Rule 23 class under the Kansas Wage Payment Act. Tyson Foods made the same argument of hypothetical individual differences as defendants do here, and added an argument not made by defendants: that the limited discovery that had taken place thus far meant that the stricter second-stage end-of-discovery test for "similarly situated" status should be applied to initial approval of the collective action. The court gave the argument short shrift:

> In their motion for conditional certification of their FLSA claims as a collective action, plaintiffs highlight the lenient standard for certification applicable at the "notice" stage and assert that they are similarly situated to each other and to potential opt-in plaintiffs in that the vast majority of hourly production workers were paid on a "gang time" basis and/or were paid for their donning and doffing activities on a "average time" basis. Stated another way, plaintiffs assert that Tyson failed to compensate the potential members of the collective action for all time spent performing compensable activities. As a threshold argument, Tyson contends that this case is well beyond the "notice stage"

[2] *Garcia* was cited on pp. 20-21 of Defendants' Memorandum for an unexceptional Rule 23 proposition that a party must make more than a threshold showing that each requirement of Rule 23 is met.

> for purposes of certification in light of the "significant" discovery that has occurred and urges the court to apply the more rigorous standard for certification applicable at the "second stage" described by the Tenth Circuit in *Thiessen*. According to Tyson, plaintiffs cannot establish that they are "similarly situated" under the second stage analysis because of the disparate factual circumstances surrounding the compensation and job requirements of each individual plaintiff. Specifically, Tyson contends that the factual evidence varies widely with respect to the particular clothing donned and doffed by each plaintiff, the specific equipment used by each plaintiff and the washing and sanitizing activities performed by each plaintiff (resulting in a wide divergence in the amount of time spent by each individual plaintiff related to these activities). Tyson also contends that the factual evidence varies widely with respect to the compensation paid to each potential plaintiff in light of individual supervisors exercising their discretion to pay some employees beyond "gang time" pay.
>
> The court rejects Tyson's argument that the "similarly situated" determination should be made utilizing the stricter standard applicable at the "second stage" described by the Circuit in *Thiessen*. Notably, the *Thiessen* court described the second stage analysis as occurring "[a]t the conclusion of discovery." 267 F.3d at 1102. Of course, discovery has not concluded in this case. Indeed, no scheduling order concerning merits discovery has been entered and no trial date has been set. In similar circumstances, courts have declined to bypass the initial stage determination. . . . This case, then, is at the "notice stage" for purposes of determining whether plaintiffs are similarly situated.
>
> The court concludes that conditional certification of this action is appropriate for purposes of sending notice to potential class members because plaintiffs have come forward with substantial allegations that the putative class members were "together the victims of a single decision, policy, or plan." See *Thiessen*, 267 F.3d at 1102. . . .
>
> Plaintiffs' evidence, then, is more than sufficient to support conditional certification on the theory that all putative class members were denied compensation for time spent performing work activities. While the court does not discount entirely the differences that may exist among employees in terms of each employee's donning, doffing and washing activities and the compensation individual employees may have received in light of supervisory discretion, those differences are more properly analyzed at the close of discovery and, at this stage, "do not diminish [the] predominant relevant similarity" asserted by plaintiffs-Tyson's practice of requiring employees to perform uncompensated work activities. . . .

Id. at 686-87 (footnotes and citations omitted). *Accord, Renfro v. Spartan Computer Services, Inc.*, 243 F.R.D. 431, 434 n.4 (D. Kan. 2007), a decision defendants did not cite, rejecting the use of second-stage standards at the initial stage, and *Underwood v. NMC Mortg. Corp.*, 245 F.R.D. 720 (D. Kan. 2007) (same).[3]

[3] Plaintiffs cited *Underwood* and *Renfro* in their opening brief at pp. 4-6, but defendants

4. Defendants' Citation to *Thiessen* and Two Citations from this District

Defendants accurately cited *Thiessen v. General Electric Capital Corp.*, 267 F.3d 1095, 1102-03 (10th Cir. 2001), *cert. denied*, 536 U.S. 934 (2002), for the proposition that approval of a collective action is a two-stage process, and that the fruits of discovery are used for a more detailed inquiry of "similarly situated" status in the second stage, usually after a decertification motion, but did not mention that *Thiessen* held that pattern-and-practice claims based on employer policies—like the case at bar—are often more amenable to "similarly situated" status. *Id.* at 1106-07.

Defendants cited *Williams v. Sprint/United Management Co.*, 222 F.R.D. 483, 484-85 (D. Kan. 2004), for descriptions of the two-phase model, but failed to mention that the defendants here made precisely the same arguments in *Williams* and that *Williams* rejected their arguments:

> Sprint also contends that conditional certification is inappropriate because plaintiff cannot establish that she is "similarly situated" to the opt-in plaintiffs or to any potential opt-in plaintiffs. In support of this argument, Sprint focuses on the dissimilarities between plaintiff and any present or potential opt-in plaintiffs. According to Sprint, plaintiffs and the opt-ins have vastly different lengths of service and performance ratings, come from different business units, held different positions and worked under different managers. Sprint also highlights that plaintiff and the opt-ins were terminated by different decisionmakers and that the termination decisions were made for a variety of different reasons. While any differences between and among plaintiff and the opt-ins may be relevant after discovery is completed and the court makes a conclusive determination of whether the plaintiffs are "similarly situated" upon revisiting the certification issue, such differences are simply not relevant at the notice stage when plaintiff, as here, has set forth substantial allegations that all plaintiffs were subjected to a pattern and practice of age discrimination. *See Thiessen*, 267 F.3d at 1103, 1105 (disparate factual and employment settings of individual plaintiffs and various defenses available to defendant are considered by court after discovery has been completed and court is analyzing the "similarly situated" requirement under a stricter standard). Thus, the differences between and among plaintiff and the opt-ins as described by Sprint are not fatal to plaintiff's motion for provisional certification. *See Vaszlavik*, 175 F.R.D. at 678-79 (rejecting defendant's argument that plaintiffs were not similarly situated because plaintiffs worked in markedly different circumstances and positions; concluding that despite any differences, plaintiffs were "similarly situated" for notice

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still did not discuss them.

> purposes in light of substantial allegations that they were all victims of a pattern and practice of age discrimination).

Id. at 487-88.

Defendants cited *Stubbs v. McDonald's Corp.*, 227 F.R.D. 661, 666 (D. Kan. 2004), for the unexceptionable proposition that plaintiffs must present more than speculation to support a collective action. Defs. Mem. at 23-24. There, plaintiff provided no information about his own job duties or knowledge of the job duties of others in his own job classification, and made only conclusory allegations. The court held that this was enough to create a presumption that employees in his job category were similarly situated, but that defendants had rebutted the presumption by specific evidence. *Id.* at 666-67. Here plaintiffs have shown an unchallenged *policy*, and defendants have shown nothing to indicate lack of similarity.

Defendants failed to mention in their brief the sharp criticism of *Stubbs* leveled by Judge Lungstrum in *Pivonka v. Board of County Com'rs of Johnson County*, 2005 WL 1799208, 152 Lab.Cas. P 35,085, 10 Wage & Hour Cas.2d (BNA) 1345 (D. Kan. July 27, 2005) (No. 04-2598-JWL) at p. *4.[4]

These are all of the authorities defendants cited from the Court of Appeals for the Tenth Circuit or from district courts in this Circuit, and none of them support defendants' opposition.

5. <u>Defendants' String-Cites of Cases from Other Jurisdictions</u>

Defendants have not presented a single case in which uniform benefits policies were not held sufficient to establish that members of a collective action were similarly situated.

Instead of discussing the above cases from this jurisdiction squarely rejecting their arguments, they have ignored this adverse authority and have instead simply strung together statements from isolated courts from around the country, totally lacking in context or any evident

[4] A copy of the *Pivonka* decision is attached hereto as Attachment 2.

application to this case.

Camper v. Home Quality Management Inc., 200 F.R.D. 516 (D. Md. 2000), was cited in defendants' memorandum at p. 23. The court granted a provisional FLSA collective action, but limited it to the one location for which plaintiff had made a showing that supervisors were aware of employees' work off-the-clock. "While the plaintiffs have preliminarily established the existence of a company-wide policy regarding the use of time clocks, their factual showing of uncompensated work known to HQM supervisors is limited to the Bayside facility. Accordingly, notice is warranted only to other HQM employees or former employees at the Bayside facility." *Id.* at 520-21. Putting aside the fact that Camper rested on evidentiary showings not required in this Circuit, plaintiffs have made a nationwide showing here and there is no requirement of supervisory awareness.

Freeman v. Wal-Mart Stores, Inc., 256 F.Supp.2d 941, 945 (W.D. Ark. 2003), denied conditional approval of an FLSA collective action. The decision is inapposite because *Thiessen* is the controlling law of this Circuit, and required a two-step *ad hoc* procedure in which it described with approval the lower court's application of a "fairly lenient" analysis of "similar situated" status in the first stage. 267 F.3d at 1103. By contrast, the district court in *Freeman* disclaimed any decision between the two-stage and "everything at once" approaches, but squarely came down in favor of the "everything at once" approach for which defendants wrongly argue. "It would be a waste of the Court's and the litigants' time and resources to notify a large and diverse class only to later determine that the matter should not proceed as a collective action because the class members are not similarly situated." 256 F. Supp.2d at 945.

Hoffmann v. Sbarro, Inc., 982 F. Supp. 249, 261-62 (S.D.N.Y. 1997), held that evidence of a uniform company-wide policy was sufficient to support provisional approval of an FLSA collective action, and therefore supports plaintiffs, not defendants.

Bond v. National City Bank of Pennsylvania, 2006 WL 1744474, 2006 U.S. Dist. LEXIS 41876 (W.D. Pa. June 22, 2006) (No. 05CV0681),[5] is inapposite. Defendants cited the part of the decision that merely described the decision of a Special Master that the court was reviewing. The Special Master had decided that only a "modest factual showing" was necessary to support provisional certification of an FLSA collective action, but plaintiffs had failed to make it. They were all paid overtime and were aware of the time-reporting rules, and were thus different from the class they sought to represent. *Id.* at *4. There was no evidence of a *policy* that was being challenged.

Defendants went back 26 years and to the Eleventh Circuit for their next authority—a journey in time and distance much greater than if they had looked at the law of this District and Circuit. *Haynes v. Singer Co., Inc.*, 696 F.2d 884, 887 (11th Cir. 1983), held that notice—even if allowed by the FLSA, a point it did not decide—was inappropriate where the only information about the existence of a similarly situated group came from the unsupported assertions of counsel. Even *Hoffmann v. Sbarro, Inc.*, another of defendants' cases, found this completely inapposite because *Haynes* was based on a complete lack of evidence by plaintiffs. 982 F. Supp. at 262. *Haynes* also held: "As a preliminary matter, it is not disputed that plaintiffs have the burden of demonstrating a reasonable basis for crediting their assertions that aggrieved individuals existed in the broad class that they proposed." *Id.* This approach has been expressly rejected in *McCaffrey*:

> MSC argues that conditional certification is improper because plaintiffs have not shown that other putative class members exist. Only the Eleventh Circuit and some district courts have imposed this additional requirement, and at least two district courts in the Tenth Circuit have considered and expressly rejected it. *See e.g. Courtright v. Bd. of County Comm'rs of Payne County, Okla.*, No. CIV-08-230-D, 2009 WL 1076778, *3 (W.D. Okla., Apr. 21, 2009); *Reab v. Elec. Arts, Inc.*, 214 F.R.D. 623, 629 (D. Colo. 2002). MSC has presented no compelling evidence or argument why this Court should

[5] A copy of the decision is attached as Attachment 3.

follow Eleventh Circuit precedent, and it declines to do so.

2009 WL 2778085, Attachment 1, at *4. Defendants did not cite any of these three cases rejecting the approach taken by the Eleventh Circuit in *Haynes* or other cases.

Bernard v. Household Int'l, Inc., 231 F. Supp.2d 433, 435 (E.D. Va. 2002), rested on the same proposition of law as *Haynes*. The court held that plaintiffs had shown that there were similarly situated employees at two offices in Virginia, but not outside the state. Despite the inapposite law on which *Bernard* rests, plaintiffs here have shown similarly situated retirees nationwide.

H & R Block, Ltd. v. Housden, 186 F.R.D. 399 (E.D. Tex. 1999), like *Bernard* and *Haynes*, also rested on the same rejected proposition of law, but in any case plaintiffs there made no showing that there was a broad policy. The case is inapposite.

Finally, *Barfield v. New York City Health and Hospitals Corp.*, 2005 WL 3098730, 151 Lab.Cas. ¶ 35,065 (S.D.N.Y. Nov. 18, 2005) (No. 05 CIV. 6319 (JSR),[6] held that where there was no evidence of a policy and only unsupported hearsay that others were affected by the failure to pay overtime, conditional certification would be denied. The case is inapposite.

D. Initial Certification of a Collective Action Is Not Moot

Defendants' September 22, 2009 Memorandum argues that certification of a collective action is moot. Their argument is simply a resurrection of their argument in support of their Expedited Motion to Defer Class Action Proceedings (Doc. # 62) and their Motion for Summary Judgment (Doc. # 67) on these questions, and even cites their summary-judgment Memorandum (Doc. # 68). Defendants' Memorandum at p. 25. Defendants do not even mention that the Court denied its Motion to Expedite and granted plaintiffs' Motion to Deny or Continue defendants' summary-judgment motion pending discovery (Doc. # 78). August 25, 2009 Memorandum and

[6] A copy of the decision is attached as Attachment 4.

Order (Doc. # 104).

This is simply another instance of defendants' unwillingness to abide by the Scheduling Order and rulings of the Court, and their insistence on doing everything their own way simply adds to the time and expense of this litigation.

To avoid burdening further the record in this action, plaintiffs incorporate by reference their April 7, 2009 Opposition to Defendants' Motion for Partial Summary Judgment (Doc. # 82), and the Statutory and Regulatory Appendix to that Opposition (Doc. # 82-2).

Finally, the law of this jurisdiction is clear: the court does not address the merits of the action in the course of deciding whether to grant conditional certification of a collective action. *McCaffrey* (Attachment 1) stated at *3:

> Furthermore, the Court will not address the underlying merits of plaintiffs' claims during this first stage. *See Gieseke*, 408 F. Supp.2d at 1165 (D. Kan.2006); *Hammond v. Lowe's Home Ctrs., Inc.*, No. 02-2509-CM, 2005 WL 2122642, at *3 (D. Kan.2005); *Brown*, 222 F.R.D. at 680 (until completion of discovery, only first stage analysis proper).

Plaintiffs cited *Gieseke v. First Horizon Home Loan Corp.*, 408 F. Supp. 2d 1164 (D. Kan. 2006), in their opening Memorandum. Defendants' Memorandum did not discuss any of these decisions when advancing their contrary argument.

E. Conclusion

Plaintiffs pray that their Motion be granted.

October 20, 2009

Respectfully submitted,

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Certificate of Service

I certify that on this 20th day of October, 2009, I electronically filed the foregoing Reply Memorandum in Support of Plaintiffs' Motion for Approval of a Collective Action under the Age Discrimination in Employment Act, and for an Order Requiring Defendants to Provide Contact Information for the Potential Members of the Collective Action, and its Assistance in Providing the Notice, with attachments, using the CM/ECF system, which will send notice of electronic filing to the following counsel:

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