UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

RICHARD LUPARDUS,

Plaintiff,

v. Civil Action No. 2:19-cv-00529

ELK ENERGY SERVICES, LLC,

Defendant.

MEMORANDUM OPINION AND ORDER

Pending is the plaintiff's motion for conditional certification of the above-styled action as a collective action under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 et seq., filed February 4, 2020.

I. Background

The defendant, Elk Energy Services, LLC ("Elk Energy"), provides pipeline inspection services, environmental compliance management, and project staffing, among other services, in the construction and inspection industry. ECF No. 1 ("Compl.") ¶¶ 14-15. Elk Energy employs a variety of inspectors, such as utility inspectors, trenching inspectors, coating inspectors, welding inspectors, environmental inspectors, and testing inspectors. Id. ¶ 24. Inspectors are

not guaranteed a set number of days to work each week or a set weekly payment. See id. ¶¶ 31-32. The inspectors commonly work more than 12 hours each day for five to six days each week, totaling over 40 hours each week. See id. ¶¶ 26-27. Elk Energy does not pay inspectors a salary but instead pays inspectors a flat day rate regardless of the number of hours worked. See id. ¶¶ 28, 33. Elk Energy allegedly does not pay its inspectors overtime. See id. ¶ 28.

The plaintiff alleges that all inspectors have the same basic job duties. Id. ¶ 25. Inspectors do not supervise other employees, do not have the authority to hire or fire other employees, and do not manage "a customarily recognized department" of Elk Energy. See id. ¶¶ 39-40. Inspectors are not "office" employees and their work does not relate to the management of the company's operations. See id. ¶ 41. The primary duty of an inspector does not require independent judgment or discretion. See id. ¶ 43. Instead, inspectors perform extensive physical labor as "field" employees in accordance with detailed step-by-step procedures promulgated by Elk Energy or Elk Energy's customers. See id. ¶¶ 41-43.

The plaintiff, Richard Lupardus, worked for Elk Energy as a pipeline inspector from approximately 2010 until approximately August 2018. Id. ¶ 16. The plaintiff was

responsible for performing visual and non-destructive testing on pipelines, pipeline coating, and facilities owned and operated by Elk Energy customers. Id. ¶ 19. Elk Energy classified the plaintiff as an "employee" and, like other inspectors, paid him on a day rate basis, not on a salary basis, but did not pay him overtime when he worked in excess of 40 hours in a given week. See id. ¶¶ 18-23, 33-36.

The plaintiff alleges that Elk Energy misclassified him and other inspectors as exempt from overtime pay.[1] See id. ¶¶ 20, 22, 46. As a result of this misclassification, the plaintiff alleges that he and other inspectors were denied overtime pay. See id. ¶ 47. The plaintiff further alleges that inspectors complained to Elk Energy about the lack of overtime pay and that Elk Energy either knew or showed reckless disregard for whether the plaintiff and other inspectors were entitled to overtime pay. See id. ¶¶ 48-49.

The plaintiff filed this suit on July 18, 2019, alleging a violation of the FLSA, 29 U.S.C. § 207, for failure to pay the plaintiff overtime pay of time-and-a-half for all

[1] The plaintiff alleges that none of the exemptions in the FLSA regulating the duty of employers to pay overtime apply to the plaintiff, the other inspectors, or Elk Energy. See Compl. ¶ 52; see also id. ¶ 38 (citing 29 C.F.R. §§ 541.100, 541.200, 541.300); id. ¶ 44 (citing 29 C.F.R. § 541.203(g)).

hours worked in excess of 40 hours per workweek. See id. ¶¶ 50-52. The plaintiff brings suit "[o]n behalf of himself and all other similarly situated employees" as a collective action under the FLSA, 29 U.S.C. § 216(b). See id. ¶¶ 1-2. The plaintiff filed a motion for conditional certification on February 4, 2020 to grant conditional certification of the collective action under the FLSA. See ECF No. 17. The plaintiff defines the class of employees to be conditionally certified as: "All inspectors employed by Defendant Elk Energy Services, LCC in the last three years." Id. at 1. The motion is fully briefed.

II. Discussion

A. Conditional Certification of the Collective Action

The FLSA requires that employers pay overtime for each hour that employees work in excess of forty (40) hours per week, but the statute exempts "any employee employed in a bona fide executive, administrative, or professional capacity" (i.e., an "exempt" employee). See 29 U.S.C. § 213(a)(1). The FLSA permits private plaintiffs to bring collective action suits on behalf of themselves and all other employees who are "similarly situated" for violations of the statute. Id. § 216(b); see also Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165, 169-170 (1989). "No 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." 29 U.S.C. § 216(b). The Supreme Court has authorized courts to facilitate notice to potential plaintiffs in such collective actions, emphasizing the importance of "employees receiving accurate and timely notice concerning the pendency of the collective action" and observing that "[c]ourt authorization of notice serves the legitimate goal of avoiding a multiplicity of duplicative suits." Hoffman-La Roche, 493 U.S. at 170-72.

Many courts have chosen to adopt a two-stage approach to managing collective actions under the FLSA, a practice that originates in Lusardi v. Xerox Corp., 118 F.R.D. 351 (D.N.J. 1987). The first stage involves conditional certification to give notice to potential class members early in the litigation, before much of the discovery. At this stage, the court requires only that the plaintiffs "make a 'modest factual showing sufficient to demonstrate that they and potential plaintiffs together were victims of a common policy or plan that violated the law.'" Encinas v. J.J. Drywall Corp., 265 F.R.D. 3, 6 (D.D.C. 2010) (quoting Castillo v. P&R Enters., Inc., 517 F. Supp. 2d 440, 445 (D.D.C. 2007)); see also McLaurin v. Prestage Foods, Inc., 271 F.R.D. 465, 469 (E.D.N.C. 2010) (requiring only "substantial allegations that the putative class members were

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