UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 1:19-CV-24706-DLG

Lindsay Rafferty, on behalf of herself and all others similarly situated,

Plaintiff,

v.

Denny's Inc., a Florida Corporation,

Defendant.
_____/

ORDER

THIS CAUSE came before the Court on Plaintiff's Motion for Conditional Certification of FLSA Collective Action and to Permit Notice and Equitable Tolling [D.E. 58].

The Court has reviewed the Motion, pertinent portions of the record, and is otherwise fully advised in the premises. For the reasons that follow, Plaintiff's Motion is **DENIED.**

I. Background

Plaintiff Lindsay Rafferty worked as a server at a corporate-owned Denny's restaurant located in Akron, Ohio from February 1, 2012, until October 31, 2018. On November 13, 2019, Plaintiff initiated the instant lawsuit against Defendant Denny's Incorporated ("Denny's"), alleging violations of the Fair Labor Standards Act of 1938, as amended 29 U.S.C. §§201 *et seq.* ("FLSA")[D.E 1]. More specifically, Plaintiff alleges that Denny's

paid its employee servers sub-minimum hourly wages under the tip-credit provisions of the FLSA [D.E.1]. Plaintiff also alleges that Denny's failed to comply with the strict notification requirements of Section 203(m) of the FLSA, which are a prerequisite to an employer taking a "tip credit" against the servers' wages [D.E. 58]. Finally, Plaintiff alleges that Denny's requires its servers to perform non-tipped labor, or "sidework," related and unrelated, to their tipped occupation while paying them at the tip credit rate. [D.E. 58].

In her Motion for Class Certification, Plaintiff identifies six additional servers with similar claims, who worked for Denny's in Vermont, Virginia, Massachusetts, California, and Hawaii [D.E. 70]. Each former server has provided an affidavit stating they: 1) undertook similar duties; 2)received compensation under the same pay plan; and 3) were paid at a tip credit rate for the performance of non-tipped labor, or "sidework" [D.E. 58].

Based on this showing, Plaintiff argues conditional certification of this FLSA action should be granted, and the Court should authorized the dissemination of notice to all potential plaintiffs who were employed by a corporate-owned Denny's from November 12, 2016 to the present. Additionally, Plaintiff requests that the statute of limitations for any claims by individuals opting into this lawsuit be tolled for 60 days [D.E.58].

In response, Denny's contends that class certification should be denied because Plaintiff is not similarly situated to each member of her proposed class [D.E. 63]. Moreover, Defendant argues Plaintiff cannot identify a uniform Denny's policy that violates the FLSA because all work, including "sidework", is assigned by each location's manager, creating a significant variation across the proposed class [D.E. 63].

II. Analysis

The decision to conditionally certify a collective FLSA action under 216(b) lies within the sound discretion of the district court. Hipp v. Liberty Nat'l Life Ins. Co., 252 F.3d 1208,1219 (11th Cir. 2001). A district court deciding a motion to certify a class should determine (1) whether there are other employees who desire to opt-in and; (2) if the employees who desire to opt-in are similarly situated with respect to their job requirements and pay provisions. Dybach v. State of Florida Dep't of Corr., 942 F.2d 1562, 1567-68 (11th Cir. 1991).

A. The Plaintiff has provided an insufficient showing of other employees who desire to opt-in to the proposed class.

A plaintiff seeking class certification has the burden of showing the existence of other potential opt-in plaintiffs. Dybach, 942 F.2d at 1568 (1tth Cir. 1991). In addition, the plaintiff must show that there are similarly situated employees

who desire to opt-in. Rojas v. Uber Techs., Inc., No. CV 16-23670-CIV, 2017 WL 2790543, at *3 (S.D. Fla. June 27, 2017)(emphasis in original).

Here, Plaintiff has submitted six consent forms from servers who worked or currently work at a corporate-owned Denny's [D.E 70]. The Court finds that seven plaintiffs is insufficient to conditionally certify a nationwide class of approximately 8,400 employees. As noted by Defendant in its Response to Plaintiff's Motion, "federal courts across the Middle and Southern Districts of Florida have routinely denied requests for conditional certification where . . . the plaintiff attempts to conditionally certify a broad group based only on the conclusory and unsupported allegations of a few employees." [D.E. 63]. See Zuliani v. Santa Ana, LLC, No. 17-62080-CIV, 2018 WL 1894723, at *4 (S.D. Fla. Mar. 14, 2018), report and recommendation adopted, No. 17-62080-CIV, 2018 WL 3730192 (S.D. Fla. Apr. 5, 2018) (holding, three out of a total 15 to 35 potential opt-in plaintiffs was insufficient to show that that additional similarly situated employees were willing to join the litigation); Sanders v. Drainfield Doctor. Inc., 6:06CV1216ORL28JGG, 2007 WL 1362723 (M.D. Fla. May 7, 2007) (finding, a class of twelve employees was insufficient to justify class treatment); Mackenzie v. Kindred Hosps. E., L.L.C., 276 F.Supp.2d 1211, 1220 (M.D.Fla.2003) (finding, unsupported

expectations that additional plaintiffs will subsequently come forward are insufficient to justify class treatment).

Plaintiff originally filed this suit on November 13, 2019. Within nine months, only six additional servers have filed consent forms to opt-in [D.E.70]. These servers, along with the Plaintiff, represent only seven of Denny's 170 corporate-owned restaurants [D.E. 58]. In support of her Motion, Plaintiff cites Campbell v. Pincher's Bar Grill Inc., a case in which the Middle District of Florida conditionally certified a class with only two opt-in plaintiffs. No.2:15-cv-695, 2016 WL 3626219 at *6 (M.D.Fla. July 7, 2016). However, in Campbell, the putative class was limited to servers and bartenders at a single restaurant. Id. Here, Plaintiff seeks certification of a nationwide class of 8400 servers from 170 different Denny's restaurants, based on the consent forms and affidavits of seven servers from seven restaurant locations. Taking into consideration the small number of class members provided by the Plaintiff, and the large size of the class Plaintiff seeks to certify, the Court finds that Plaintiff has made an insufficient showing of willingness from others to join the suit.

B. The Plaintiff is Not Similarly Situated to Other Denny's Servers.

Notwithstanding Plaintiff's inability to show that other servers wish to opt in, Plaintiff has failed to show that she is

similarly situated to servers at other Denny's restaurants. Courts in this District consider the following five factors to determine whether the putative opt-in plaintiffs are similarly situated: 1) whether the plaintiffs all held the same job title; 2) whether they worked in the same geographical location; 3) whether the alleged violation occurred during the same time period; 4) whether the plaintiffs were subject to the same policies and practices, and whether these policies and practices were established in the same manner and by the same decision-maker; 5)the extent to which the actions which constitute the violations claimed by the plaintiffs are similar. Montes de Oca v. Gus Machado Ford of Kendall, LLC., No. 10-23610, 2011 WL 13223702 (S.D.Fla. Apr. 18,2011).

Plaintiff seeks to certify a class of servers who were employed by corporate-owned Denny's restaurants across the nation from November 13, 2016 to the present. Each of the prospective class members was subject to different policies and practices, established by different location managers. Therefore, it is unlikely that servers at every Denny's restaurant were subject to the same type or amount of "sidework". Evaluating how much "sidework" each employee conducted, and determining the compensation each server is entitled to, would require an individualized analysis in each of Denny's 170 restaurants and each policy established by the various location managers.

The Court finds that Plaintiff is not similarly situated to the members of the proposed nationwide class of 8400 Denny's servers. Plaintiff does not identify a uniform corporate-wide policy that violates FLSA. Instead, the class of employees which Plaintiff seeks to represent contains individual employees who have worked at different restaurants, in different states, for different managers, and, most likely, in quite different working conditions. Granting Plaintiff's Motion would defeat the aim of judicial efficiency that class action suits were created to promote. Klay v. Humana,Inc., 382 F.3d 1241,1251 (11th Cir. 2004). Therefore, this Court denies Plaintiff's Motion.

III. Conclusion

It is hereby, **ORDERED AND ADJUDGED** that Plaintiff's Motion for Conditional Certification of FLSA Collective Action and to Permit Notice and Equitable Tolling [D.E. 58] is hereby **DENIED.**

DONE AND ORDERED in Chambers at Miami, Florida, this 3rd day of August, 2020.

s/ Donald L. Graham
DONALD L. GRAHAM
UNITED STATES DISTRICT JUDGE

Cc: All counsel of record