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U.S. COURTS

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Attorneys for Plaintiffs

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO**

KIMBERLEY SMITH, MICHAEL)
B. HINCKLEY, JACQUELINE T.)
HLADUN, MARILYN J. CRAIG,)
JEFFERY P. CLEVINGER, and)
TIMOTHY C. KAUFMANN,)
individually and on behalf)
of those similarly situated,)

Case No. CIV 01-0244-S

PLAINTIFFS' REPLY BRIEF

Plaintiffs,)

vs.)

MICRON ELECTRONICS, INC., a)
Minnesota corporation,)

Defendant.)

144

ARGUMENT

Defendant Micron Electronics, Inc., (“MEI”) should address its arguments to “Senator” Winmill, because fundamentally MEI is asking this Court to repeal the Fair Labor Standards Act (“FLSA”). Defendant’s chief argument, made in various guises, is that MEI employees are so dissimilarly situated that they have only individual claims against MEI. And, so the argument goes, these claims are so diverse as to be ill-suited for class treatment.¹ This argument contravenes the letter and spirit of the FLSA, which provides a specific mechanism for individuals to press their claims collectively. As the court noted in the early case of *Shain v. Armour & Co.*, 40 F.Supp. 488, 490 (W.D. 1941):

The evident purpose of the Act is to provide one lawsuit in which the claims of different employecs, different in amount but all arising out of the same character of employment, can be presented and adjudicated, regardless of the fact that they are separate and independent of each other.

The class for which Plaintiffs seek to be representatives arises out of the same character of employment and is easily defined: it is the class of employees who were subjected to a common *de facto* policy of encouraging off-the-clock work, as well as a common policy of inaccurately calculating the premium rate for payment of overtime.

Defendant MEI then attempts to disprove Plaintiffs’ evidence of these policies, asking the Court to make factual determinations it could not make on summary judgment, much less on a motion for conditional certification. Defendant’s discussion of Plaintiffs’ alleged “failure to establish” various propositions begs the question of what showing Plaintiffs must make in order

¹ See, e.g., Defendant’s Brief In Response to Plaintiffs’ Motion for Conditional Certification, p. 1 (“Plaintiffs’ claims in this action are not suitable for collective treatment under Section 216(b). . . Extensive discovery in this action has plainly revealed the individualized nature of the claims. It has shown the dissimilar status of the plaintiffs with respect to each other, as well as among the claimants.”). Subsequent references to this filing are cited to “Defendant’s Brief” by page number.

to prevail on a motion for conditional certification. The answer Defendant wishes to avoid is that Plaintiffs are subject to a very lenient standard at this stage in the proceedings.

1. **An FLSA class need only be similarly situated, not identically situated.**

Throughout its briefing, MEI admits that a “similarly situated” standard applies to class actions under the FLSA, but it cannot bring itself to employ that standard even in the context of conditional certification for the purpose of providing notice. Instead, Defendant continually argues that the most insignificant differences between its three “subsidiaries” and among its various employees render Plaintiffs’ proposed class impossibly diverse. Defendant even argues, contrary to clear authority, that because individual damage calculations may be different, then the parties are not similarly situated even as among themselves (Defendant’s Brief: 34). In so doing, MEI hopes that this Court will not just lose the forest for the trees, but also lose the forest for the needles on the trees. Although it cites the correct standard, MEI wants to apply it in such a way as to require that a proposed class be “identically situated.” Any fair reading of the FLSA and relevant authority reveals that such a cramped interpretation of the “similarly situated” standard is unjustified.

In the following discussion Plaintiffs identify the correct showing that must be made, identify the policies rendering them “similarly situated,” and examine Defendant’s claims that they are not so situated.

A. **At most, Plaintiffs need only show a ‘reasonable basis’ for their class-wide claim at the discovery and notice stage.**

Without acknowledgment and throughout its materials, Defendant continues to urge this Court to apply legal standards that are only appropriate at the final certification or a later stage,

rather than the discovery and notice stage.² Many of the other cases cited by Defendant, however, support Plaintiffs' proposition that only a minimal showing need be made to allow discovery of names and provision of notice. See, e.g., *Bonilla v. Las Vegas Cigar Company*, 61 F.R.D. 1129, 1138 at n.6 (D.Nev. 1999), citing *Harper v. Lovett's Buffet, Inc.*, 185 F.R.D. 358, 361 (M.D.Ala. 1999) (showing of similarly situated "is a lenient burden for plaintiffs to meet, and can be supported by affidavits.").

Defendant does not address or even cite the seminal case of *Sperling v. Hoffman-LaRoche, Inc.*, 118 F.R.D. 392 (D.N.J. 1988), *aff'd*, 493 U.S. 165, 110 S.Ct. 482, 107 L.Ed.2d 480 (1989). MEI chooses to ignore *Sperling*, even though it was relied on by Judge Lodge for the proposition that only "substantial allegations" are required in a motion for conditional certification.³ In *Sperling* the court considered the standard to be imposed on the Title VII plaintiff and warned of the very danger threatened by MEI's argument:

I find, however, that notice to absent class members need not await a conclusive finding of 'similar situations.' To impose such a requirement would condemn any large class claim under the ADEA to a chicken-and-egg limbo in which the class could only notify all its members to gather together after it had gathered together all its members, and from which the class could escape only by refusing entry after some unpublicized cutoff date to additional class members who thereafter stumble upon the case by themselves. Such a scheme would of course violate the twin policies which I earlier found to support court participation in ADEA-class notice in the first place: broad ADEA remediation and judicial economy. In addition, to allow notice before the 'similarly situated' issue is decided would insure that all possible class members who are interested are present, and thereby assure that the full 'similarly situated' decision is informed, efficiently reached, and conclusive.

The question remains whether the record in this case on the 'similarly situated' issue is sufficiently developed at this time to allow court-facilitated class notice. I find that it is. Plaintiffs have made detailed allegations in their pleadings, and have supported those allegations with affidavits which successfully engage

² For instance, Defendant cites *Lusardi v. Xerox Corp.*, 118 F.R.D. 351 (D.N.J. 1987) without informing the Court that it involves the standard to be used at final certification.

³ See, Order on Report and Recommendation of Judge Edward J. Lodge, *Bristow v. Fleetwood Enterprises, Inc.*, p. 2-3, Docket #115.

defendant's affidavits to the contrary. Plaintiffs' allegations, as supported, describe a single decision, policy, or plan of defendant's, infected by a discriminatory aspect which led to the termination or demotion of every member of the class plaintiffs wish to represent, and the reallocation of responsibilities among the remaining, generally younger workers. I find that with these allegations, plaintiffs set forth with some factual support all the necessary elements of an ADEA class claim. See *Berndt v. Kaiser Aluminum & Chemical Sales, Inc.*, 789 F.2d 253, 256-57 (3d Cir. 1986). Whatever the minimum requirements may be for alleging that class members are similarly situated so as to merit court-facilitated notice, I find that the case at hand meets those requirements.

In reaching less than a final decision on the "similarly situated" issue, I do not mean to intimate that the ultimate burdens plaintiffs must sustain on that issue are heavy, or that significant discovery must be undertaken to sustain them. Without pre-judging my eventual decision I wish to point out what I have perceived so far regarding the standards governing a conclusive finding of 'similar situations.'

118 F.R.D. at 406. Contrary to this analysis, MEI argues that the Court should impose a heightened burden on Plaintiffs in order to trap them in the same "chicken-and-egg" limbo about which the *Sperling* court warned.

In two paragraphs Defendant argues explicitly for a different, intermediate standard, claiming that a great deal of discovery has been completed (Defendant's Brief: 13). Defendant notes that certain courts have utilized a more burdensome "intermediate" standard when sufficient discovery has taken place. What MEI fails to disclose is that only MEI has enjoyed relatively extensive discovery. Plaintiffs have accommodated MEI's request to depose named Plaintiffs and many of the individuals who have opted in to the litigation. On the other hand, Plaintiffs have conducted only the depositions of certain first level supervisors, two MEI managers, and, finally, on August 30, 2002, a Rule 30(b)(6) designee regarding MEI's calculation of the overtime premium rate. Left for much further factual development are issues relating to each aspect of this case, including the calculation of the overtime rate, upper management's approval/knowledge of off-the-clock work, questions relating to "integrated enterprise," and wilfulness.

For several months recently while this case has been pending, a stay on discovery was in effect at Defendant's request so as to allow the parties to conduct a mediation. After the mediation proved worthless, Plaintiffs conducted some further discovery in the time remaining prior to the upcoming hearing on conditional certification. Although Plaintiffs have accumulated certain information in a relatively short time, discovery is far from complete regarding MEI's corporate structure, operations, policies, procedures and practices.⁴ For instance, MEI just produced a Rule 30(b)(6) witness on August 30, 2002, after multiple requests and deposition settings, regarding its calculation of the overtime premium rate. Further discovery is necessary regarding the documents that still exist so as to run the calculation on further plaintiffs and opt-ins.⁵ Additional discovery has always been contemplated by the Court and the parties, since the Court clearly indicated during its first scheduling conference that the parties should conduct discovery in a two-stage process.

Thus, there is no legitimate reason to employ any different burden than the lenient one described in the cases above. Plaintiffs next examine the substance of the lenient burden.

⁴ For instance, Plaintiffs have yet to depose any of MEI's top-level executives regarding off-the-clock practices and the issue of wilfulness. In addition, although MEI has yet to raise the issue in its briefing, MEI has asserted an affirmative defense based on the argument that its "subsidiaries" were wholly independent so as not to constitute an "integrated enterprise" for purposes of FLSA liability. The most senior executive deposed thus far, Mr. David McCauley, an area vice president, did not know whether or not his purported employer, Micron PC, Inc., even had a president or a board of directors. He referred to its reported president as the "general manager," explaining that "Micron PC, Inc., was a part of Micron Electronics." Deposition of David McCauley of August 13, 2002, p. 129-30. The "integrated enterprise" defense requires Plaintiffs to examine the entire operations of the three purported subsidiaries.

⁵ On August 30, 2002, the Rule 30(b)(6) deponent testified that prior to January, 2000, MEI outsourced the payroll function to Micron Technology, Inc. (Deposition of Robert Griffard of August 30, 2002, p. 24). After January, 2000, when MEI took over the payroll function (Affidavit of Robert Griffard, p. 7, ¶ 24), the calculation of the overtime premium rate (including commission) went awry. Many more documents, already requested, are necessary to calculate the damages suffered by plaintiffs and the class as a result of the miscalculation.

B. Plaintiffs' need only show that they are bound with the class as victims of a particular alleged policy or practice.

MEI's own cases demonstrate that a proposed class is similarly situated when there is a similarity among the individual situations. *See, e.g., Bonilla v. Las Vegas Cigar Co.*, 61 F.Supp.2d 1129, 1138 at n.6 (D.Nev. 1999), *citing, Crain v. Helmerich and Payne Int'l. Drilling Co.*, 1992 WL 91946 (E.D.Ia. 1992), *quoting, Heagney v. European American Bank*, 122 F.R.D. 125, 127 (E.D.N.Y. 1988) (similarly situated "when there is 'a demonstrated similarity among the individual situations. . . some factual nexus which binds the named plaintiffs and the potential class members together as victims of a particular alleged [policy or practice].'"") (emphasis added). In *Wertheim v. State of Arizona*, 1993 U.S. Dist. LEXIS 21293, (D.Ariz. 1993), the district court held that the requisite showing

is considerably less stringent than the requisite showing under Rule 23 of the Federal Rules of Civil Procedure. . . All that need be shown by the plaintiff is that some identifiable factual or legal nexus binds together the various claims of the class members in a way that hearing the claims together promotes judicial efficiency and comports with the broad remedial policies underlying the FLSA.

On the other hand, in order to be similarly situated, the alleged "action must not be distinct and specific to individual plaintiffs; rather, there must be some general policy or practice." *Bonilla*, 61 F.Supp.2d at 1138-39, n.6, *citing, Crain*, 1992 WL 91946 (emphasis added). Although the Ninth Circuit has not adopted this or any other test for the "similarly situated" standard, as noted above, this District has adopted the "substantial allegations" test of *Sperling* in another FLSA action. Regardless of the exact test, Plaintiffs have demonstrated by their detailed allegations, affidavits, deposition testimony and other citations to the record that their claims are not "distinct and specific to individual plaintiffs" and have shown a "general policy or practice."

In the instant case, MEI subjected Plaintiffs and the class to at least two common policies or practices throughout its inside computer sales functions: 1) a common *de facto* policy of encouraging off-the-clock work; and 2) a common practice of inaccurately calculating the overtime premium rate.

I) The off-the-clock policy. Responding to Plaintiffs' argument that MEI had an unstated *de facto* policy of permitting off-the-clock work, MEI counters only with bald denials and dubious factual arguments. Defendant's entire factual argument is founded on a misguided assumption – that if MEI challenges Plaintiffs' testimony, then Plaintiffs lose the argument. On the contrary, however, as explained in *Sperling, supra*, all Plaintiffs need do is engage Defendant's affidavits to the contrary to prevail at the conditional certification stage.⁶

For instance, Defendant produced the affidavit testimony of several inside sales representatives, who asserted in remarkably similar language that they were aware of a written policy statement at MEI that required them to write down all of their time and that they followed that written policy.⁷ Even if accepted as wholly true, these affidavits do not disprove Plaintiffs' chief allegation – that, while having a written policy that says all the right things, MEI had an unwritten *de facto* policy of permitting off-the-clock work *by those who would give it to them*. Clearly, not every employee was willing to work off-the-clock, but MEI suffered and permitted such work from those who could be encouraged to do so. Defendant places great emphasis on the fact that neither Plaintiffs nor the class were *told* to work off-the-clock (*see, e.g.*, Defendant's

⁶ Indeed, Defendant could not prevail under a Rule 56 motion for summary judgment simply by disputing Plaintiffs' offered testimony. Needless to say, Defendant's denials cannot defeat Plaintiffs' motion for conditional certification under a far more lenient standard.

⁷ Plaintiffs have moved to strike these Affidavits and do not concede that the Court should consider them by the discussion of them here.

Brief: 29), but MEI misses the point. A policy of permitting off-the-clock work is just as illegal as a policy of telling employees that they have to work off-the-clock.⁸

MEI does not even attempt to dispute the testimony of former supervisor Tawni Weaver, because Defendant cannot rebut the substance of her testimony. Instead, Defendant suggests that the Court simply “disregard” the sworn affidavit of Tawni Weaver. Instead of trying to show how Ms. Weaver’s testimony might be inaccurate, MEI asks the Court to pretend that her testimony does not exist, either because Ms. Weaver has her own retaliation claim against MEI or because she has a conflict with the class given her role in disapproving overtime as a supervisor (Defendant’s Brief: p. 25-26 & n.39). Simply because Ms. Weaver pointed out MEI’s violations of the FLSA to her managers and was fired in retaliation does not invalidate her testimony. Neither does it invalidate her testimony that, prior to the FLSA meeting Ms. Weaver describes in her Affidavit, she followed MEI’s policy of accepting off-the-clock work on the part of her sales team.

Ms. Weaver testified clearly that MEI supervisors were accepting off-the-clock work from their sales teams, at least prior to learning that such a practice was illegal. Since Plaintiffs’ original motion for conditional certification was filed, MEI has deposed additional named plaintiffs, including Tracy Scott Wells and Timothy Kaufman. Contrary to MEI’s misleading synopses of their testimony, both Mr. Wells and Mr. Kaufman confirmed in their depositions what all the rest of Plaintiffs’ witnesses have described. All of the witnesses from MEI’s three subsidiaries described similarly:

If you want a specific example, one of the reps – what’s his name. I’ll

⁸ The FLSA mandates that an employer pay its employees while they are in its “employ,” which is defined as time in which the employer is held “to suffer or permit” the employee to work. 29 U.S.C. §203(g).

think of his name. I can't think of it right now. But he was a newer rep. He started – I believe it was summer of 2000. He was there all the time, all the time. And he even came in on weekends he told me when we were selling to businesses. And I said, what are you doing on weekends? He was going through the databases finding new prospects in the database.

And then I don't remember exactly how it came up, but he was telling me, no, I'm just claiming the 40 hours a week. And I'm saying, you know, you really can't do that. And he just shrugged it off, so I just left it at that. That's one specific example.

Other examples would be people that you're seeing there all the time, arriving earlier yourself, and they're there before you. And you leave late, and they're still there, and they worked through their lunch too. And that happening also when there's a no-overtime limitation. That was commonplace.⁹

Plaintiff Timothy Kaufman testified that he was told by his supervisor, Mr. Dominic Casey, not to include all of his hours on his time sheet:

Q. At what point did you decide to not report hours?

A. When I knew that Dominic may have – Mr. Casey may have difficulty getting those other hours approved.

Q. And how did you know that?

A. Just a general rule of thumb. Just verbal conversations with Mr. Casey.

Q. Tell me about what verbal conversations you're referring to.

A. You know, Mr. Casey would have a meeting, say, you know, 'Up to 45 hours is fine, you know, five hours of overtime a week, but you guys need to work more than that, it's going to be on your own time.

* * *

Q. Did you respond to this comment by Mr. Casey?

A. No, because it wasn't out of the ordinary.¹⁰

⁹ Deposition of Tracy Scott Wells of August 9, 2002, pp. 173-74.

¹⁰ Deposition of Timothy C. Kaufman of July 18, 2002, p. 57.

Mr. Kaufman's testimony is similar to that of Plaintiff Kim Smith:

- Q. In the weeks that you did not record all of the overtime you worked, what was your reason for not recording it?
- A. It was excessive. There was a lot of it. My management, Jaime Nava, had specifically in one instance told us in a meeting that we could only write down a certain number, but that the majority of our business came – our pay came from commission. And so it would be better to work it and not write it down because it's like treating it like your own business. You're trying to build your own business up.
- Q. When you say it was excessive, what do you mean?
- A. It was more than 47 hours in a week.
- Q. What made that excessive?
- A. Jaime Nava in that particular meeting – and I don't remember the month – Jamie Nava told us 47 hours was really all we were supposed to record.
- Q. Did he tell you that was all the hours you were supposed to record or that was all the hours of overtime you were allowed to work?
- A. That we were supposed to record.¹¹

Moreover, according to Plaintiff Tracy Scott Wells, it was impossible that MEI supervisors and managers were not aware of the off-the-clock work:

- Q. . . . Shouldn't have Ms. Weaver been able to assume that before you submitted your time sheet that you had reviewed it to ensure it was accurate?
- A. I don't know. I think that's a stretch simply because there's no way that a supervisor could not have known of the off-the-clock hours people were working. There's just no way. It's just impossible.
- Q. BY MR. DOCKSTADER: What do you mean?
- A. Well, first of all, if they had maintained – I don't know if they

¹¹ Deposition of Kimberly Smith of February 15, 2002, vol. I, pp. 245-46.

have. Maybe they have. Maybe you can produce it. Did they maintain those records on the call volumes and the call times, the call history, the centerview data? Did they take that into account? Did they look at those data? Because there were people that were reporting apparently 40 hours a week, and they're centerview time was easily up over 50. How could a supervisor overlook that?¹²

A fair review of the deposition and affidavit testimony indicates that Plaintiffs could certainly prevail at trial on the issue of whether MEI had a *de facto* policy of permitting off-the-clock work.

ii) MEI had a common practice of miscalculating the overtime premium rate for all its inside sales representatives.

According to the FLSA, commissions must be included within base pay for purposes of determining the overtime premium rate of 1 ½ times base pay.¹³ According to the Affidavit of Robert Griffard, who was also MEI's Rule 30(b)(6) designee at the deposition of August 30, 2002, the Sales Compensation group at MEI administered the sales commission programs and calculated the overtime pay for all inside sales representatives working for MEI or any of its subsidiaries.¹⁴ Mr. Griffard testified that his group followed roman numeral ii of 29 C.F.R. §778.120 of the possible overtime calculation methodologies set forth in that section. When Plaintiffs run the computations, however, there is an underpayment.

For example, taking the case of Plaintiff Kim Smith, during the month of February, 2001,

¹² Deposition of Tracy Scott Wells of August 9, 2002, pp.168-69. This deposition is attached to the Second Affidavit of Gregory C. Tollefson of August 21, 2002. The Rule 30(b)(6) Deposition of Robert Griffard of August 30, 2002 is attached to the Second Affidavit of Daniel E. Williams filed concurrently.

¹³ 29 C.F.R. §778.117.

¹⁴ Affidavit of Robert Griffard, p. 2, ¶ 3.

she received commissions for a four week period of \$2,034.49.¹⁵ Dividing this commission amount by four gives a weekly amount of \$508.62 (which is “A” in the CFR formula). According to MEI records, during the same 4 week period Plaintiff Kim Smith logged 46.75, 54.25, 40 and 46 hours worked in the respective weeks.¹⁶ Thus, Plaintiff Kim Smith was due additional compensation of \$37.00 for the first week ($A / \text{hrs worked} = B/2 = C \times \text{OT hrs} = D$), \$66.80 for the second week, and zero for the third week and \$33.00 for the fourth week. The total of these amounts is \$136.69 that should have been paid to Plaintiff Kim Smith during the time period. Yet, according to MEI’s payroll records, Plaintiff Kim Smith was actually paid \$37.00 for the first week, \$14.00 for the second week, zero for the third week, \$33.00 for the fourth week for a total of \$83.00.¹⁷ Thus, Plaintiff Kim Smith was shorted \$53.69 for the month.

Because MEI has provided only limited documents for certain of the named Plaintiffs, it is not possible for Plaintiffs to aggregate the shortfall for the entire class. Plaintiffs can assert, however, that similar shortfalls have been encountered with other named Plaintiffs.¹⁸ Accordingly, as a secondary basis, Plaintiffs seek conditional certification of the same class of inside sales representatives for MEI’s miscalculation of the overtime premium rate.

¹⁵ According to Document M000499, a business record of MEI, attached to the Affidavit of Daniel E. Williams, filed concurrently.

¹⁶ See M003099, attached to the Affidavit of Daniel E. Williams.

¹⁷ See M004802, attached to the Affidavit of Daniel E. Williams.

¹⁸ See Affidavit of Jason Shaw, ¶ 12.

C. Plaintiffs are not identically situated, only similarly situated.

Defendant even goes so far as to argue that Plaintiffs and the class must have the exact same motivation for working off the clock to be similarly situated (Defendant's Brief: 26-29). Such is simply not the case, for the class is similarly situated in that they were subject to the same policy of MEI suffering and permitting their off-the-clock work, regardless of motivation. MEI even argues that because individual damages may vary, no conditional class should be certified for notice purposes (Defendant's Brief: 34). The argument that individual damage calculations are different and therefore a class is not similarly situated ignores well settled FLSA authority. *See, e.g., Brzychnalski v. Unesco, Inc.*, 35 F.Supp2d 351, 353 (S.D.N.Y. 1999) ("Although there may be some differences in the calculation of damages. . . , those differences are not sufficient to preclude joining the claims in one action.")

Many other cases confirm that a class need not be identically situated. *See, e.g., Burt v. Manville Sales Corp.*, 116 F.R.D. 276, 277 (D.Co. 1987) ("Defendant argues no persons similarly situated to plaintiffs exist, as plaintiffs held different job assignments, worked in different departments, and had different supervisors. We find the issues in this action should not be so narrowly confined. Potential plaintiffs need only show their positions are similar, not identical. . .").

MEI points out a few cases in which courts have imposed a "similarly situated" standard that more closely approximated an "identically situated" standard urged by MEI. For instance, Defendant cites *Ray v. Motel 6*, 1996 U.S. Dist. LEXIS 22565 (D.Minn 1996), a case never cited as authority for any proposition by any court. In fact, the reviewing district court refused to adopt the magistrate's recommendation that the claims of the plaintiffs be dismissed, an issue not properly before the magistrate. 1996 U.S. Dist. LEXIS 22564, (D. Minn 1996).

Moreover, in *Ray*, the magistrate relied principally on the fact that, unlike in the instant case, the plaintiffs had been unable to show that common policies caused the injury. She also believed that she was following binding authority for her district, represented by *Ulvin v. Northwestern National Life Ins. Co.*, 141 F.R.D. 130 (D.Minn. 1991). As the Court noted in *Severtson v. Phillips Beverage Co.*, 137 F.R.D. 264 (D.Minn. 1991) (“*Severtson I*”), the holding in *Ulvin* could be extended too far. The Court criticized a defendant’s reliance on both *Ulvin* and *Lusardi*, *supra*, saying:

Although the defendants are correct in asserting that to be similarly situated, plaintiffs must share common issues of law and fact arising from the alleged discriminatory activity, the defendants’ reliance on *Ulvin* and *Lusardi* as setting the standard for showing a colorable basis that a class of similarly situated plaintiffs exist is too exacting. In *Ulvin*, the court decided that the opt-in claims should be tried separately following completion of discovery when the clearest picture of the plaintiffs claims had been assembled. Only then the court concluded that given the disparities among the plaintiffs, the cases were unsuited for class action. Memorandum and Order, p. 3. In *Lusardi*, the court did not allow a class due to the vast diversity of the potential plaintiffs. The court noted that without regard to departmental differences, members of the sample group of plaintiffs (64 out of possibly 1,300 plaintiffs) were employed by 17 different Xerox groups or organizations in 34 cities or towns in 16 different states. In the absence of a single company-wide reduction in force, the court found that the potential plaintiffs presented an unmanageable class. 122 F.R.D. at 465. Unlike *Lusardi*, the potential plaintiffs in the present case do not appear to be so diverse as to render them unmanageable as a class.

141 F.R.D. 279, n.1 (emphasis added). The ADEA class certified for notice purposes in *Severtson I* was represented by 5 former employees and the class consisted of all employees employed by the defendant and its wholly-owned subsidiaries. *See also, Mahaffey v. Amoco Corp.*, 1997 U.S. Dist. LEXIS 680, *2 (N.D.Ill. 1997) (“In any event, plaintiffs need not demonstrate that they are identically situated to potential class members. They need only show that their positions are similar. . . . Class treatment under the ADEA is not defeated simply because, as here, plaintiffs performed a variety of jobs in a number of subdepartments at different

locations”).

The *Severtson I* court also noted that the “key dispute” over “centralized control is a factual dispute which this court need not resolve here but is more properly resolved at the motion for certification of collective action.” 141 F.R.D. at 280. The Court said that the plaintiffs had demonstrated a “common thread” that tied their alleged pattern of age discrimination running through all of defendant’s subsidiaries. 141 F.R.D. at 279. The MEI Plaintiffs have made the same showing through the common policies discussed above.

Similarly, Defendant’s reliance on *Harper v. Lovett’s Buffett, Inc.*, 185 F.R.D. 358 (M.D. Ala. 1999), is misplaced. In *Harper* plaintiffs submitted 15 affidavits from a single location and attempted to obtain conditional certification of a multi-state class. Unlike this case, in *Harper* there was a “total dearth of factual support for Plaintiffs’ allegations of widespread wrongdoing at Defendant’s other [locations].” 185 F.R.D. at 363.

Finally, the Court should refuse MEI’s invitation to consider its *ad hominem* attacks against its employees as any reason whatsoever to deny notice to all similarly-situated employees who have been encouraged to work off-the-clock. Whenever a group of Plaintiffs has the temerity to challenge an employer’s violations of the law, that group suddenly becomes “lazy,” “inefficient” or just plain greedy (Defendant’s Brief: 17). Obviously, the Court cannot draw such conclusions in the context of a pretrial motion.

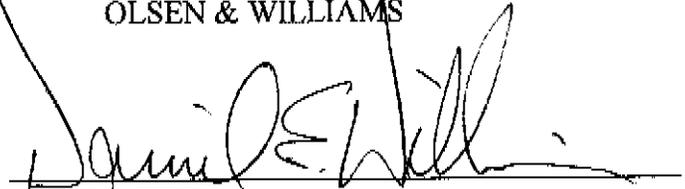
Thus, although Plaintiffs and the class are not identically situated, they are similarly situated as victims of common policies and practices.

CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request that the Court require discovery of names and identifying information for and authorize notice to the class as identified above.

DATED this 6th day of September, 2002.

HUNTLEY, PARK, THOMAS, BURKETT,
OLSEN & WILLIAMS

A handwritten signature in black ink, appearing to read "Daniel E. Williams", written over a horizontal line.

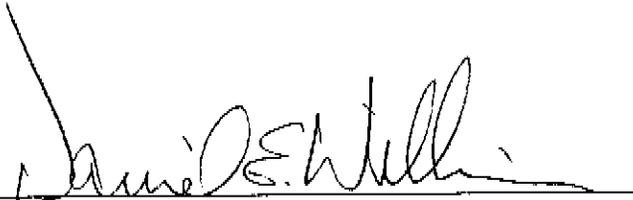
Daniel E. Williams
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of September, 2002, a true and correct copy of the foregoing instrument was served upon opposing counsel as indicated below:

Kim J. Dockstader
Gregory C. Tollefson
STOEL RIVES LLP
101 S. Capitol Blvd., Suite 1900
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Via Hand Delivery
 Via Facsimile 389-9040
 Via U. S. Mail



Daniel E. Williams