



locations. The CCRs perform a variety of customer support services. Plaintiffs Tajuana Banks and Kimberly Maloney (“Plaintiffs”) are former IBM employees who worked in IBM’s Dallas, Texas call center as members of the Cisco team beginning on November 26, 2007. Plaintiffs were employed as hourly, non-exempt, CCRs whose primary responsibility was to provide telephonic customer support. The CCRs worked in shifts and were scheduled to be taking calls eight hours a day for five days a week. As part of their job, Plaintiffs were required to be ready to accept calls as soon as their shift began. This required Plaintiffs to arrive early to begin preparing for their shift by booting up their computers, opening software applications, reviewing work-related emails, and otherwise preparing themselves and their equipment to provide support and service to customers. Plaintiffs were also required to remain working after the end of their scheduled shift or during breaks if they were still helping a customer on a call.

Plaintiffs filed suit on August 17, 2010 alleging that they were not paid for the extra time they spent working pre- and post-shift or the time during breaks spent helping customers. They contend that this time adds up to several hours of uncompensated overtime per CCR per week. Additionally, Plaintiffs contend that all CCRs regardless of job title, supervisor, location, or team were non-exempt hourly employees who were not paid for their pre- and post-shift work. Plaintiffs have requested the Court to conditionally certify a nationwide class of all CCRs employed by IBM within the past three years.

## **II. Legal Standard & Analysis**

### **A. Conditional Class Certification Legal Standard**

Section 216(b) of the Fair Labor Standards Act (“FLSA”) allows one or more employees to bring an action for overtime compensation on “behalf of himself or themselves and other employees similarly situated.” 29 U.S.C. § 216(b). A similarly situated employee may join as a

plaintiff only if “he gives consent in writing to become such a party and such consent is filed in the court in which such action is brought.” *Id.* The Fifth Circuit has declined to adopt a specific test for determining whether plaintiffs are sufficiently ‘similarly situated’ to conditionally certify as a class under § 216(b). *Acevedo v. Allsup’s Convenience Stores, Inc.*, 600 F.3d 516, 518-19 (5th Cir. 2010). However, the prevailing analysis used by federal courts, and the Northern District of Texas in particular, is the two-stage approach first propounded by the court in *Lusardi v. Xerox Corp.*, 118 F.R.D. 351 (D.N.J. 1987). *Acevedo*, 600 F.3d at 519; *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1212 (5th Cir. 1995), *overruled on other grounds by Desert Palace, Inc. v. Costa*, 539 U.S. 90, 90–91 (2003); *Clary v. Sw. Airlines*, No. 3:07-cv-0126-P, 2007 WL 4947690, at \*2 (N. D. Tex. Dec. 17, 2007) (Solis, J.); *Hall v. Burk*, No. 3:01-cv-2487-H, 2002 WL 413901, at \*2 (N.D. Tex. Mar. 11, 2002) (Sanders, J.); *Barnett v. Countrywide Credit Indus., Inc.*, No. 3:01-cv-1182-M, 2002 WL 1023161, at \*1 (N.D. Tex. May 21, 2002) (Lynn, J.); *Aguilar v. Complete Landsculpture, Inc.*, No. 3:04-0776-D, 2004 WL 2293842, at \*1 (N.D. Tex. Oct. 7, 2004) (Fitzwater, J.). *Lusardi* and its progeny do not define ‘similarly situated,’ but instead, they provide factors for the Court to consider case by case on an *ad hoc* basis. *Mooney*, 54 F.3d at 1213.

In the first, or notice, stage of the analysis, the Court inquires as to whether notice should be given to potential class members. *Id.* at 1214. At the notice stage, a court ordinarily possesses “minimal evidence” and thus applies a lenient standard in determining whether to conditionally certify. *Id.* “[C]ourts appear to require nothing more than substantial allegations that the putative class members were together the victims of a single decision, policy, or plan.” *Sperling v. Hoffman-La Roche, Inc.*, 118 F.R.D. 392, 407 (D.N.J. 1988), *aff’d*, 493 U.S. 165 (1989); *see McKnight v. D. Hous., Inc.*, 756 F.Supp.2d 794, 801 (S.D. Tex. 2010) (“A court may

deny plaintiffs' right to proceed collectively if the action arises from circumstances purely personal to the plaintiff, and not from any generally applicable rule, policy, or practice." This analysis typically results in conditional certification of a class and "putative class members are given notice and the opportunity to opt in."<sup>1</sup> *Mooney*, 54 F.3d at 1214. If the class is conditionally certified, the district court may order production of potential class members' names and addresses. *Sperling*, 493 U.S. at 169. •

At the second, or decertification, stage, the Court re-examines the class after notice, time for opting-in, and discovery have taken place. If it finds the class is no longer made up of similarly situated persons, it may decertify the class. At the decertification stage, when more evidence is available, courts typically consider three factors in determining whether potential plaintiffs are similarly situated: (1) the disparate factual and employment settings of the individual plaintiffs, (2) the various defenses available to the defendant which appear to be individual to each plaintiff, and (3) fairness and procedural considerations. *Clary*, 2007 WL 4947690, at \*3. However, where the parties have had the opportunity to conduct discovery on the issue of certification, the 'similarly situated' inquiry is more stringent. *Id.* Courts generally consider the evidence submitted and the two-step inquiry collapses into one. *Id.*

### **B. Analysis**

Plaintiffs argue that conditional certification of a national class of all CCRs who are or were employed by IBM within the past three years is proper under § 216(b). The issue in this case, at the notice stage of the *Lusardi* analysis, is how wide Plaintiffs' net should be cast. The parties have conducted three months of limited discovery pursuant to the Court's December 2,

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<sup>1</sup> The purpose of conditional certification is to preserve the Court's power to revoke certification in those cases wherein the magnitude or complexity of the litigation may eventually reveal problems not theretofore apparent. *Castano v. American Tobacco Co.*, 84 F.3d 734, 741 (5th Cir. 1996).

2010 Order but there remain significant additional discovery issues concerning certification that need to be resolved before the second or decertification stage. A more stringent standard is only appropriate “after discovery is largely complete and the matter is ready for trial,” and, therefore, the Court applies a lenient standard in determining whether to certify a class. *Mooney*, 54 F.3d at 1214. While the standard to conditionally certify a class is a lenient one, it is a standard nonetheless and one that requires at least substantial allegations. *See id.*

In support of their argument for conditional class certification, Plaintiffs first argue that they and other CCRs have received similar instructions and training regarding pre- and post-shift work requirements. Both Ms. Banks and Ms. Maloney state that they were told during their initial job training that they would have to work pre- and post-shift without being compensated. (Doc. 17 at 22, 25, 30-31, 46, 50) Both Plaintiffs also state, however, that their training classmates consisted exclusively of Cisco team members from the Dallas office. Ms. Banks goes on to state that she only worked for the Cisco team and had no interactions with other team members. Similarly, Ms. Maloney stated that she never interacted with non-Cisco team CCRs and that she only discussed the overtime situation with people in her ‘pod’ of Cisco team members. Plaintiffs also provide, in the appendix of their reply, the declaration of another Cisco team member named Catina Henry. She states that she was also required to regularly work pre- and post-shift without compensation, but she does not provide any information as to how widespread this practice was or to any policy under which it was maintained. Plaintiffs also cite to internal IBM emails from George Lambousis and Gary Kamprath in support of their argument that IBM requires CCRs to work before their scheduled start time.<sup>2</sup> While these emails may

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<sup>2</sup> These emails are from *Seward v. IBM, Corp.*, No. 7:08-cv-3976-VB (S.D.N.Y. 2008), which involved the conditional certification of a class of CCRs at a single call center.

show that Atlanta based CCRs are required to be ready at the start of their scheduled shift, and therefore begin working pre-shift, neither of the emails provide any evidence that CCRs were not compensated for this time. Additionally, these emails predate the proposed class period by three years (Lambousis email 2005) and two years (Kamprath email 2006) and they are exclusively in regard to Atlanta based CCRs.

Plaintiffs next state that they did not record the time that they worked each day and that they believed that their managers recorded their time for them. (Doc. 17 at 23-24, 29, 44-45, 52.) Both parties agree that this practice was unique to the Dallas-based Cisco team and that the usual practice in other teams was to use a computer based system called eTOTALS. When asked to identify all managers who recorded their subordinates' time, Ms. Banks could only identify Cisco team managers and she stated that she did not know how other teams recorded their time.

Plaintiffs next argue that all IBM CCRs had the same primary job duty of answering inbound calls from customers and that they were uniformly required to work pre- and post-shift without compensation. Plaintiffs themselves, however, explain that CCRs on queue sub-teams do not answer phones at all—even within the Cisco team. Plaintiffs also provide, again from the *Seward* case, the declaration of Gary Salles, an IBM CCR in the Atlanta office. Mr. Salles states that he was not compensated for his pre- and post-shift work and that “[a]ll other call center employees were subject to the same policies described above and were therefore required to work off-the-clock.” However, Mr. Salles’s employment with IBM ended in October 2007, which predates the proposed class in this case.<sup>3</sup> Additionally, Mr. Salles’s Atlanta based work conditions or overtime requirements have not been shown to be related to Plaintiffs allegations of

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<sup>3</sup> Mr. Salles’s declaration does not explain how other CCRs that record their own time, do not answer calls, or do not have to boot up their computers before their shift were required to work off-the-clock.

FLSA violations in IBM's Dallas office. Without evidence of a common scheme or generally applicable practice, the circumstances surrounding Mr. Salles, a single CCR in the Atlanta office, and Plaintiffs, two CCRs in the Dallas office, appear purely personal in nature. *See McKnight*, 756 F.Supp.2d at 801 (holding that a court may deny certification if the alleged violation is purely personal in nature).

Finally, Plaintiffs cite to other discovery from the *Seward* case. In *Seward*, the Southern District of New York court conditionally certified a class consisting of all CCRs at IBM's Atlanta call center based on:

1. testimony from five plaintiffs, from at least seven different groups, showing at least ten managers that required uncompensated pre- and post-shift work;
2. no evidence from IBM showing any distinctions among the departments or teams;
3. evidence showing that the proposed members of the class were all nonexempt hourly workers who were scheduled to work forty hours per week, and entitled to overtime work for any work in excess of the regular schedule; and
4. evidence showing that the proposed class was subject to similar time monitoring systems and policies.

Judge Karas, in granting conditional certification, stated "the court finds that plaintiff has barely, and I want to underscore that, satisfied the minimum burden of showing that he is similarly situated to the proposed class members." (Doc. 20-1 at 43-44.) Compared to the plaintiffs in the *Seward* case, Plaintiffs can only support class certification for a relatively smaller class. Plaintiffs have testimony from three CCRs all of whom worked on the Cisco team in Dallas. Additionally, both parties have presented evidence that the Cisco team was different from other teams in that they trained separately and that their time monitoring and recording was performed by their managers and not through eTOTALS. Finally, Plaintiffs have provided no evidence that other teams worked hourly, were denied compensation for pre- or post-shift work, or that other CCRs, even within the Dallas office, would be interested in opting in to this suit. *See Clark v.*

*City of Ft. Worth*, No. 4:10-cv-519-A, 2011 WL 121896, at \*3 (N.D. Tex. Jan. 11, 2011) (denying class certification because plaintiffs had shown nothing more than the mere existence of similarly situated persons).

### **C. Conditionally Certified Class and Notice**

The Court finds Plaintiffs have met their burden of showing that the Dallas based Cisco team CCRs are similarly situated and should be provided notice of this conditionally certified class. Plaintiffs attempt to extrapolate the working conditions of the Cisco team to a national class of all IBM CCRs but such a class is not supported by the evidence before the Court. Further, Plaintiffs have not provided evidence that a class including all CCRs at IBM's Dallas office would be similarly situated. The evidence before the Court regarding training instructions, manager recording of time, interactions with other CCRs by the Plaintiffs, and alleged uncompensated pre- and post-shift work is exclusive to the Dallas-based Cisco team and a class defined any larger would require team-by-team fact-finding to determine if FLSA violations occurred. *See Marshall v. EyeMasters of Tex., Ltd.*, 272 F.R.D. 447, 450 (N.D. Tex. 2011) (denying class certification because individual fact-finding for each plaintiff would be necessary). Plaintiffs have provided substantial allegations, and some evidence based on three months of discovery, that victims of a single decision, policy, or plan may in fact exist. Contrary to Plaintiffs' arguments, however, the factual circumstances only apply to the similarly situated members on the Dallas based Cisco team.<sup>4</sup>

Based on the facts provided in the record, the parties' briefing, and the applicable law, the Court finds that Plaintiffs have met their lenient burden and established a conditional class of similarly situated employees. Therefore, the Court conditionally certifies a class of: all CCRs on

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<sup>4</sup> There is some evidence that potential members of this class could number in the hundreds.

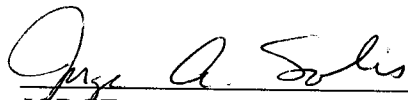
the Cisco team in the Dallas, Texas office who have worked for IBM at any time during the past three years. The class shall receive notice and a chance to opt-in to the suit. The parties shall have twenty days from the date of this order to submit a joint proposed notice to the Court. Within the same time period, IBM shall provide Plaintiffs' counsel with a computer readable data file which includes the names, current or last known addresses, and dates of employment of the members of this class. Once received and authorized by the Court, the notice will be sent via U.S. first class mail to all class members.

**III. Conclusion**

For the foregoing reasons, the Court GRANTS in part and DENIES in part Plaintiffs' Motion for Class Certification, GRANTS Defendant's Motion to File a Sur-Reply, and DENIES Defendant's Motion to Strike.

**IT IS SO ORDERED.**

Signed this 23rd day of August, 2011.

  
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JORGE A. SOLIS  
UNITED STATES DISTRICT JUDGE