

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

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DEAN KARCH, on his own behalf
and on behalf of all others
similarly situated,

29 U.S.C. § 216(b) Collective Action

Plaintiff,

v.

No. CIV-05-620 MCA/LFG

CITY OF ALBUQUERQUE,
a municipal corporation,

Defendant.

MOTION AND MEMORANDUM IN SUPPORT
FOR CONDITIONAL CERTIFICATION AND
COURT-FACILITATED NOTICE
TO SIMILARLY-SITUATED EMPLOYEES

COMES NOW Plaintiff, by and through his counsel, YOUTZ & VALDEZ, P.C. (Shane C. Youtz and Stephen Curtice), and files this memorandum in support of its motion for court-facilitated notice of this lawsuit to all M-Series employees of the City of Albuquerque.

I. Introduction

On June 6, 2003, Plaintiff filed the above-caption matter on his behalf and on behalf of all those similarly situated. [Doc. No. 1]. Plaintiff now seeks conditional certification of the following class: All current and former "M-Series" employees of the City of Albuquerque ("the City") who were either classified as "Exempt" under the FLSA or who, although classified "Nonexempt," were nonetheless deprived of overtime pay, and who worked for the City from June 3, 2002, to the present. As will be shown, those employees are "similarly situated" to the named Plaintiff, such that conditional certification of the class is appropriate. Therefore, Plaintiff respectfully requests that this Court conditionally certify the class, and approve the form of notice and notice plan proposed by Plaintiff herein.

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II. Statement of Facts

A. Plaintiff, Opt-ins, and the Complaint.

In his Complaint, Plaintiff alleged that he, and others similarly situated, were misclassified as exempt under the Fair Labor Standards Act, and that he, and others similarly situated, were owed overtime compensation at a rate of one-and-a-half times the regular rate of pay, plus liquidated damages under the FLSA. Since that time, approximately 47 individuals have opted in to the litigation. [Doc. Nos. 6, 13, 15, 21]. Those opt ins filed by this firm represent the following classifications and departments:

<u>Name</u>	<u>Department</u>	<u>Classification</u>
Dean Karch	Corrections & Detention	Corrections Lieutenant
Donald Davis	Corrections & Detention	Corrections Lieutenant
Marie Lucero	Corrections & Detention	Corrections Lieutenant
Rinda Roque	Corrections & Detention	Corrections Lieutenant
Rosario Falbo	Corrections & Detention	Corrections Lieutenant
John Chimento	Corrections & Detention	Corrections Lieutenant
Frank Valdez	Corrections & Detention	Corrections Lieutenant
Patrick Cordova	Corrections & Detention	Corrections Lieutenant
Will Bell	Corrections & Detention	Corrections Lieutenant
Jonathan Thomas	Corrections & Detention	Corrections Lieutenant
Eddie Hogan	Corrections & Detention	Corrections Lieutenant
Tommy Trujillo	Corrections & Detention	Corrections Lieutenant
Grant St. Clair	Corrections & Detention	Corrections Lieutenant
Mathew Candelaria	Corrections & Detention	Corrections Lieutenant
Charisse Cook	Corrections & Detention	Corrections Captain
Craig Fossett	Corrections & Detention	Corrections Captain
Ruben Jaramillo	Corrections & Detention	Case Management Specialist
Phillip Quintana	Corrections & Detention	Case Management Specialist
Corine M. Montoya	Family & Comm. Service	Head Teacher
Geneva Barnes	Family & Comm. Service	Head Teacher
Julia Nunez	Family & Comm. Service	Head Teacher

¹ These two Captains are not part of the Local 3022 bargaining unit. They indicated their position on a form we had them fill out when they provided this firm with the consent to join paperwork.

Abigail Atetta	Family & Comm. Service	Head Teacher ²
Alberta Bernal	Family & Comm. Service	Teacher
Marquita Baca	Family & Comm. Service	Teacher
Reyna Griego	Family & Comm. Service	Family Development Specialist
Jean La Cour	Parks & Recreation	Aquatics Program Coordinator
Mike P. Doyle	Parks & Recreation	Horticulturalist
Amalia Gallegos	Parks & Recreation	Golf Course Supervisor
Leo Padilla	Planning	Community Services Program Coordinator
Michael J. Carroll	Public Works	Traffic Program Assistant
Lee Whistle	Solid Waste	Solid Waste Code Inspector
Vicior Vega	Transit	Transit Supervisor
Andrew Montoya	Transit	Transit Supervisor
Raymond Thomas	Transit	Transit Supervisor
Johnny Pino	Transit	Transit Supervisor
Jacob Romero	Transit	Transit Supervisor
Natalie Trujillo	Transit	Transit Supervisor
Sadie Torres	Transit	Transit Supervisor
Joseph Garcia	Transit	Transit Supervisor

Compare [Doc. Nos. 6, 13, 15, 21] with list of M-Series Bargaining Unit Members, attached as Exhibit 1 to Affidavit of Andrew Padilla, which is attached hereto as Exhibit A. Plaintiff and many of those opt-in plaintiffs are classified by the city as Exempt. Others (Phillip Quintana, Alberta Bernal, Marquita Baca, Reyna Griego, and Michael J. Carroll) are not. All, however, allege that they have been deprived of overtime pay either because they have been mis-classified as exempt under the FLSA or because, despite being classified as non-exempt, they are nonetheless not paid overtime. Discovery has only begun. Indeed, although Plaintiff mailed its first round of discovery to the City on October 5, 2005, the City only served its response to the interrogatories on December 9, 2005, and the parties are still making

² Ms. Alberta is no longer employed with the City. She indicated her position on a form we had her fill out when she provided this firm with the consent to join paperwork.

arrangements for the production of documents³. Despite the paucity of discovery, the following is known about the proposed class.

B. M-Series Employees

Pursuant to NMSA 1978, § 3-13-4 (1965), a municipality such as the City of Albuquerque “may establish by ordinance a merit system for the hiring, promotion, discharge and general regulation of municipal employees.” Albuquerque has adopted such a system. See generally Abq. Ord. § 3-1-1 to 26; see also Abq. Charter, Art. X (requiring the maintenance by ordinance of a merit system). Under that Merit System Ordinance, the City’s Chief Administrative Officer has the responsibility to oversee the system and to establish Rules and Regulations to implement the Ordinance. See Abq. Ord. § 3-1-1 to -2. Under Rule 600 of the City’s Personnel Rules and Regulations, “The Human Resources Department will maintain a classification plan based on duties, authority, responsibilities and required qualifications of classified positions in the city service.” See also Abq. Ord. § 3-1-3 (requiring the Director of Human Resources to “prepare, install, and maintain a classification plan based on the duties, authority, and responsibility of positions in the city service”). Based on that authority, the City of Albuquerque has classified employees into several groups, based on type of work performed. One such group is the M-Series, made up of employees in twenty City Departments. Other such groups include blue collar and officers (the J-Series). Many, but not all, of the classifications in the M-Series are represented by a union, Local 3022 of AFSCME Council 18, AFL-CIO (“the Union”).

³ Because the City was delinquent in responding to Plaintiff’s first round of discovery, Plaintiff filed a motion to compel on December 1, 2005. [Doc. No. 26] Subsequently, the City agreed to produce the discovery by December 9, 2005, and agree to extend the deadline for discovery. [Doc. No. 28] Plaintiff, therefore, has withdrawn the motion to compel. In their discovery mailed on December 9, 2005, the City did not produce any documents, but instead made them available upon appointment. Plaintiff is currently making arrangements for the documents, and reserves the right to supplement this pleading, if necessary, or rely upon the documents in a reply brief.

Of M-Series employees, most are members of the bargaining unit. A list of all M-Series bargaining unit members is attached hereto as Exhibit A1. As that exhibit shows, the Union represents approximately 192 unique job titles in 18 City departments. Of those M-Series that are not members of the Union's bargaining unit, most are excluded on the basis that they are "confidential" employees, or high level employees (typically above M-17) who actually supervise other M-Series employees. See Exhibit A, ¶ 7. Those employees are defined by the Labor Management Relations Ordinances as "those privy to confidential information including but not limited to employees of the Personnel Department, Data Processing Department, Mayor's Office, the City Attorney's Office, secretaries to Department Heads, employees involved in payroll work and any persons privy to confidential information concerning employee relations." Abq. Ord. § 3-2-8(D).

As a condition precedent to forming the M-Series Union, the City's Labor-Management Relations Ordinance requires that the bargaining unit be "appropriate," a determination made by the City Labor Management Relations Board. See Abq. Ord. § 3-2-8(A); see also Exhibit A, ¶ 6. Such units "shall be established by vocational groupings such as blue collar, maintenance, white collar, or professional, with consideration being given as to whether they have traditionally been in these groupings." Abq. Ord. § 3-2-8(B). Specifically, the Labor Board, in making the determination of appropriateness, is directed to consider: "(1) [w]hether the city employees have the same conditions of employment which apply uniquely to them; (2) [w]hether the city employees have a mutuality of interest; and (3) [h]ow the public interest might best be served in determination of the bargaining unit." Abq. Ord. § 3-2-8(C). By ordinance, certain types of employees—including supervisors—are precluded from inclusion in a bargaining unit. See Abq. Ord. § 3-2-8(D). Supervisors are defined by the Labor-Management Relations Ordinance as "[a]ny individual having authority in the interest of the city employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other

employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action; if in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.” Abq. Ord. § 3-2-3. Thus, those M-Series employees in the bargaining unit are not true supervisors.

By regulation, the City provides that “[a]s a condition of employment, employees may be required to work overtime. Overtime work for City employees is generally discouraged, however when overtime is required for non exempt employees, compensation must be in accordance with the Fair Labor Standards Act and any applicable collective bargaining agreement.” Rule 302.2 of the City’s Personnel Rules and Regulations. The Collective Bargaining Agreement (CBA) between the City and Local 3022 contains virtually identical provisions. Compare Rule 302.2 with Excerpts from the CBA Art.14, attached hereto as Exhibit B. The Agreement also sets the standard workweek for the bargaining unit: “An FLSA non-exempt employee shall have a workweek of forty (40) hours per week, eight (8) hours or ten (10) hours per day. Although a FLSA exempt employee may have a regularly scheduled forty (40) hour workweek, a FLSA exempt employee shall not have any entitlement to additional compensation or paid leave other those set forth in this Agreement.” See Exhibit B, at Art. 11.

C. The City’s Failed FLSA Studies

Because the CBA only grants overtime rights to those considered non-exempt under the FLSA, the City and the Union agreed that FLSA classifications were extremely important. They further agreed that the current exemption determinations were inaccurate and included many people who were improperly classified as exempt. Exhibit A, ¶9. Indeed, Union President Andrew Padilla fielded many complaints from members of the Local 3022 bargaining unit that they had improperly been classified as exempt. Exhibit A, ¶ 8. To that end, the City and the Union entered into a memorandum of

understanding as part of the CBA ratified in 2001, whereby they both “recognize[d] the need for the Employer to maintain objective and current Fair Labor Standards Act (FLSA) overtime eligibility statuses for all bargaining unit positions.” As part of that MOU, the City agreed to “conduct a study of all bargaining unit positions to determine which positions need to be classified as ‘exempt’ or ‘non-exempt’ for overtime purposes by the FLSA,” and further agreed to “meet and confer with the Union on all aspects of the study.” See MOU, attached as Exhibit 2 to Exhibit A.

Despite that promise, the City failed to consult with the Union during the study, but instead presented Union President Andrew Padilla with a spreadsheet containing its final results. Exhibit A, ¶ 11. The spreadsheet listed “M I-Series Employees” by department and grade. It covered employees in 20 different departments and ranging from Grade M11 to M20. The cover memorandum indicated that the “Department of Labor Representative concurs with the determinations made as reflected in the attached report.” When Andrew Padilla went to the Department of Labor to discuss that concurrence, he was told that the person involved had retired, but that the Department of Labor did not ordinarily approve such studies, and would have fired the employee for “approving” the study, had he not already retired. Exhibit A, ¶ 14.

The result of the study is attached hereto as Exhibit 3 to Exhibit A. Additionally, the undersigned’s analysis of the study is attached hereto as Exhibit C. In that analysis, the undersigned identified “unique” job classifications (not individual employees). Those “unique” job classifications could involve classifications with the same title if they were in different departments, or had a different FLSA exemption status, either before or after the study. With that caveat concerning the understanding of “unique,” the study involved 710 unique M-Series⁴ job classifications. Prior to the study, 424 (or

⁴ The study also included some classifications with a “P” grade. See Exhibit A3 at 65. Those classifications were not included in the analysis.

59.72%) of those unique job classifications were considered exempt under the FLSA, and 286 (or 40.28%) non-exempt. After the study, 361 (or 50.85%) were classified as exempt, 199 (or 26.62%) as non-exempt, and 160 (or 22.54%) were left blank. A blank entry indicated one the people performing the study did not consider. See Exhibit A, ¶ 13. Assuming that a blank entry resulted in no change in status, the study resulted in 452 (or 63.66%) exempt classifications and 258 (or 36.34%) non-exempt. Also assuming that blank resulted in no change, 128 (or 18.03%) of the unique job classifications changed status and 582 (or 81.92%) remained the same. Thus, as the result of a study initiated because the Union expressed concern that too many employees were misclassified as exempt, the City increased the number of positions classified as exempt.

The spreadsheet indicates that the 2001 study resulted in several oddities. For example, the same title, e.g. Senior Administrative Assistant (grade M13), appears as both exempt or non-exempt in different departments, or even within the same department. See Exhibit A3, at 3, 11, 19, 42, 50, 58, 67, 75, 87, 92, 97, 102, 111, 119, 139. In the Fiscal Affairs Department, the same Accountant 2 title appears as going from exempt to exempt, non-exempt to non-exempt, and non-exempt to exempt. See Exhibit A3, at 68. Also, several titles whose status was left blank (indicating that they were not evaluated) were previously classified as both exempt and nonexempt. See Exhibit A3 at 75 (Comm. Services Prog. Spec. 2); 86 (HR Spec.); 118 (Safety Coord.); 132 (Solid Waste Code Insp.); 137 (Solid Waste Supt.). Additionally, the administrative assistant title, which was not evaluated as part of the study and in general is classified as non-exempt, is nonetheless classified as exempt in several departments. See Exhibit A3 at 18, 96, 110, 138. These are but a few examples; the spreadsheet is full of them. See generally Exhibit C. Those job titles which are classified as both exempt and nonexempt, either before or after the study, are marked on Exhibit C with an asterisk.

These oddities might have been prevented had the City consulted with the Union during the

course of the study. Not only did the City not consult the Union, it did not interview all of the employees involved. See Exhibit A, ¶ 15.

Recently, the City has commissioned a second study. As the attached agreement for services indicates, the Contractor, the Segal Company (Western States), Inc., agreed to: (1) "Evaluate the City's 2001 FLSA Self Audit and review approximately 85 positions that resulted in changes either from exempt to non-exempt or from non-exempt to exempt. The documentation will be reviewed to determine whether or not these changes are appropriate based on the Fair Labor Standards Act;" (2) "Recommend an ongoing process for reviewing job classifications to include a process for evaluating current job descriptions to ensure they accurately reflect the type and level of work performed by the incumbents in the classification[;] [r]ecommend a schedule and process for reviewing job families or other similar classifications on a cyclical basis[;] and [d]evelop template forms to be used for apply Exempt Test and determining FLSA status;" (3) "Using a Job Analysis Questionnaire determine the FLSA exemption status for approximately 76 lower level Managerial positions occupied by approximately 250 employees;" and (4) "During each phase of the project contractor will identify any collateral issues and make recommendations to the City of Albuquerque." The Segal Company is expected to perform these services in five months and for \$11,500. See Agreement, attached hereto as Exhibit D.

D. Those Classified as Non-exempt

In his various positions with the Union, Andrew Padilla has fielded complaints from members of the bargaining unit that, although they are classified as non-exempt, they have been denied overtime pay. See Exhibit A, ¶ 8. Typically, those members were instructed to alter time sheets to reflect a forty-hour week despite hours worked in excess. Id. That fact is confirmed by some of the opt-in plaintiffs already in this suit. Those opt-in plaintiffs also confirm that the City does not keep careful records of

who is treated as exempt under the FLSA, and for that reason, notice should be sent to all employees in the M-Series, regardless of their FLSA classification.

Phillip Quintana tells a typical story. He has worked as a Case Management Specialist in the Corrections Department since 2002. See Affidavit of Phillip Quintana, attached hereto as Exhibit E, ¶ 2. Although Exhibit A1 indicates that he is classified non-exempt (unlike 12 of the 16 Case Management Specialists), he has never been treated as such. See Exhibit A1, at 1-2. Instead, he turns in a time sheet used by exempt employees. See Exhibit F, ¶ 3. He was told that it was standard procedure to turn in a time sheet reflecting forty hours, no matter how many hours he worked. Id. ¶ 4. He was also told to keep track of any hours worked in excess of forty (because no official record was kept), which he could later use as compensatory time. Id. ¶¶ 4-5. The “compensatory time” he thus received was not time-and-a-half, but instead was straight one-to-one time. Id. ¶ 6. Even though there are no accurate records, he believes that over the years he has been shorted that time. Id. ¶¶ 7-8. In the first couple years of his employment, he worked excessive hours—typically between 55 and 60 and week—and would often have to come in to work on his scheduled day off. Id. ¶ 9. Although his hours have reduced since a new supervisor came in, the same policies continue to apply to him. Id. ¶ 10.

Even more troubling is the case of Alberta Bernal and Mariquita Baca. Both work as a Teacher, and like most—but not all—Teachers, both are classified as non-exempt. See Affidavit of Alberta Bernal, attached hereto as Exhibit F, ¶ 2; Affidavit of Mariquita Baca, attached hereto as Exhibit G, ¶¶ 2-3; Exhibit A1, at 11. Like Mr. Quintana and Ms. Griego, both were instructed not to turn in a time sheet indicating more than forty hours, no matter how many hours they actually worked. Exhibit F, ¶ 3; Exhibit G, ¶¶ 4-5. Indeed, Ms. Baca once tried to turn in a time sheet with more than forty hours, and was told by the time keeper that she had to correct it because she could not receive overtime or compensatory time. Exhibit G, ¶ 4. On certain occasions—such as when parents did not pick up their

children on time, when there was inadequate teacher coverage, or when there were schedule parent-teacher conferences –both would work beyond their shift and more than forty hours in that week. Exhibit F, ¶ 4; Exhibit G, ¶¶ 7-9. On those occasions, they would, as instructed, turn in a time sheet that reflected only forty hours worked. Exhibit F, ¶ 5; Exhibit G, ¶ 10. They never received any compensation or any compensatory time for hours worked in excess of forty. Exhibit F, ¶ 7; Exhibit G, ¶ 10.

As these examples show, the City does not keep accurate records of its employees exempt or non-exempt status. Furthermore, these examples show that classification by the City as non-exempt does not guarantee that an employee in the M-Series receives overtime compensation for time worked in excess of forty.

E. Need for Names and Addresses

By City Ordinance, “[t]he social security numbers, home addresses and home telephone numbers of City employees are not public records within the meaning of the New Mexico Inspection of Public Records Act, and shall not be disclosed to any person, except with the express, written consent of the employee or official.” Abq. Ord. § 2-7-6-5. Relying on this very ordinance, the City will not even produce to the Union the names and addresses of the members of the bargaining unit it is required by law to represent. Exhibit A, ¶ 16. Further, the City refused to provide those names and addresses as part of Plaintiff’s first discovery requests. See Defendant’s Response Plaintiff’s First Request for Production Number 12, attached hereto as Exhibit H. Therefore, it will require a court order for Plaintiff to obtain the names and addresses of the members of the proposed opt in class.

III. This Court Should Exercise its Discretion to Facilitate the Notice of This Lawsuit to Potential Opt-in Plaintiffs by Conditionally Certifying the Class, Approving the Form of the Class Notice, and by Requiring the City to Produce the Names and Addresses of those Members of the Class

Under guiding Tenth Circuit precedent for a § 216(b) collective action such as this one, Plaintiff

at this early stage of the litigation may petition the Court to conditionally certify an opt in class and facilitate notice to that class upon a minimal showing that the members of the class are “similarly situated.” Because all members of the M-Series of City Employees are similarly situated, and are considered so by the City itself, because they were victims of a single decision, plan, or policy, and because the City has taken the position in other litigation that their FLSA status should be determined in this litigation, Plaintiffs have more than met their burden to show that M-Series employees are similarly situated. As such, Plaintiff respectfully asks this Court to conditionally certify the class and approve the form of notice and the notice plan proposed by Plaintiff.

A. This Court has the discretion to conditionally certify the proposed class and facilitate notice, and should exercise that discretion in order to promote the principles of the FLSA.

Under Section 216(b) of the FLSA, an action to recover wages or overtime due may be maintained “by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.” 29 U.S.C. § 216(b). Congress has thus established the policy that FLSA plaintiffs may proceed collectively and thereby enjoy the advantage of lower individual costs that result from pooling resources. Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165, 170 (1989). The judicial system also benefits from collective actions, because it facilitates the efficient resolution in one proceeding of common issues of law and fact arising from the same allegedly unlawful activity. Id.

Under the collective action mechanism, each employee who wishes to pursue his claims under the federal statute must affirmatively opt in to the case in writing. See 29 U.S.C. §216(b). For the benefits of a collective action to be realized, potential plaintiffs need to obtain accurate and timely notice concerning the pendency of the collective action, so that they can make an informed decision whether to participate. Id. at 170. The district courts have a managerial responsibility to oversee the joinder of additional parties so as to assure that the task is accomplished in an efficient and proper way. Id. at 170-

71. Part of that management involves overseeing notice to potentially similarly situated employees. Early court-approved notice further removes any concern that plaintiff's counsel's communication with the potential plaintiffs concerning the action is inaccurate, or that such communication would be considered unethical solicitation or barratry. *Id.* at 171-72 (noting that court involvement in the notice process is inevitable, that the court is not limited to "waiting passively for objections about the manner in which the consents were obtained," and that "by monitoring preparation and distribution of the notice, a court can ensure that it is timely, accurate, and informative"); see also *Tucker v. Labor Leasing, Inc.*, 872 F. Supp. 941, 949-50 (M.D. Fla. 1994) (considering, but ultimately declining, to sanction plaintiff's counsel for communicating with potential plaintiffs before court-supervised notice). Finally, "Court authorization of notice serves the legitimate goal of avoiding a multiplicity of duplicative suits and setting cutoff dates to expedite disposition of the action." *Hoffmann-La Roche Inc.*, 493 U.S. at 172. For the following reasons, it is appropriate to allow M Series employees to choose to participate in this litigation, and the Court should, therefore, order that notice be sent to such employees in order to facilitate that participation.

Such collective actions operate very differently from class actions under Fed. R. Civ. Pro. 23:

In a Rule 23 class action, each person who falls within the class definition is considered to be a class member and is bound by the judgment, favorable or unfavorable, unless he has opted out. . . . By contrast, a putative plaintiff must affirmatively opt into a § 216(b) action by filing his written consent with the court in order to be considered a class member and be bound by the outcome of the action.

Hipp v. Liberty Nat'l Life Ins. Co., 252 F.3d 1208, 1216 (11th Cir. 2001). Because of this fundamental difference, the more stringent requirements of Rule 23 are inapplicable to a § 216(b) collective action. *Leyva v. Buley*, 125 F.R.D. 512, 514 (E.D. Wash. 1989). Furthermore, "The 'similarly situated' requirement of 216(b) is more elastic and less stringent than the requirements found in Rule 20 (joinder) and Rule 42 (severance)." *Hipp*, 252 F.3d at 1219 (quotation marks and citation omitted).

The decision whether to allow notice must bear in mind the purposes of the FLSA, which is “a remedial statute that ‘has been construed liberally to apply to the furthest reaches consistent with congressional direction.’” Prickett v. Dekalb County, 349 F.3d 1294, 1296 (11th Cir. 2003) (quoting Mitchell v. Lublin, McGaughy & Assoc., 358 U.S. 207, 211 (1959)). See also Reab v. Electronic Arts, Inc., 214 F.R.D. 623, 627 (D. Colo. 2002) (noting that a district court “must also consider whether certification would serve the purposes and purative benefits of a collective action under § 216(b),” and citing those benefits as identified in Hoffman La Roche). As another district court noted in an ADEA case, “Allowing notice to be sent to potential claimants serves ‘the broad remedial purpose’ of the ADEA and is likely to prevent a multiplicity of suits. It would be anomalous for Congress to provide a class action remedy, and, at the same time, require that a class action’s existence be hidden from potential class members.” Allen v. Marshall Field & Co., 93 F.R.D. 438, 442 (N.D. Ill. 1982). Indeed, as the district court noted in Jackson v. N.Y. Telephone Co., 163 F.R.D. 429, 431 (S.D.N.Y. 1995), notice, by itself, serves an important purpose under § 216: “Notice plays an important role in facilitating a collective action and furthering ADEA’s remedial purpose.”

B. This motion should be evaluated under the liberal notice-stage standard.

Under 29 U.S.C. § 216(b), the only requirement for maintaining a collective action is that the employees be “similarly situated,” a term which finds no definition in the statutory scheme. Nonetheless, various courts have offered guidance on this issue. Uniformly, such courts note that similarly situated is not a difficult burden for a plaintiff. The Tenth Circuit has endorsed an “ad hoc two-tiered approach” to determining whether parties are similarly-situated such that the case can proceed as a collective action. See Thiessen v. General Electric Capital Corp., 267 F.3d 1095, 1102-03, 1105 (10th Cir. 2001). Under this approach,

a court typically makes an initial “notice stage” determination of whether plaintiffs are “similarly situated.” . . . In doing so, a court

requires nothing more than substantial allegations that the putative class members were together the victims of a single decision, policy, or plan. . . . At the conclusion of discovery (often prompted by a motion to decertify), the court then makes a second determination, utilizing a stricter standard of "similarly situated." During this "second stage" analysis, a court reviews several factors, including (1) disparate factual and employment settings of the individual plaintiffs; (2) the various defenses available to defendant which appear to be individual to each plaintiff; (3) fairness and procedural considerations; and (4) whether plaintiffs made the filings required by the ADEA before instituting suit.⁵

Id. at 1102-03; see also id. at 1105 (noting that "[a]rguably, the *ad hoc* approach is the best of the three approaches outlined because it is not tied to the Rule 23 standards.").

Although approximately 47 employees have already opted in to this lawsuit, this motion is plainly to be evaluated under the "notice stage" standard. To date, no court-approved notice has been sent to any potential class members, and this Court has not yet determined the propriety of the proposed class. Indeed, this motion is aimed at achieving conditional class certification so that such notice may be sent. More importantly, however, discovery in this case is only in its infancy. Although Plaintiff served the City of Albuquerque with its first round of written discovery requests on October 5, 2005, the City only provided its answers to Plaintiff's first interrogatories on December 9, 2005, and did not provide documents as part of that response, but instead allowed Plaintiff to inspect those documents. No depositions have been taken, although several are currently being scheduled. Because no court-approved notice of this lawsuit has been sent, no class has been certified, and discovery has not been completed, this motion should be evaluated under the "notice stage" standard under Thiessen. Once notice has been sent to the proposed class, other employees have opted in to the lawsuit, and discovery has been completed, this Court can make an informed decision whether and how the case can

⁵ Although Thiessen (and Hoffman-LaRoche) were ADEA cases, they are recognized precedent for 216(b) collective actions under the FLSA because the ADEA simply adopted by reference the collective action procedure from § 216(b) of the FLSA. See Hoffman-LaRoche, 493 U.S. at 167-68.

proceed to trial on a collective basis.

C. At this notice stage of the proceedings, Plaintiff has made more than the requisite showing that the members of the class are similarly situated.

Plaintiff's burden to establish that other employees are "similarly situated" is a light one, particularly so at this notice stage. In Mooney v. Aramco Servs. Co., 54 F.3d 1207, 1213-14 (5th Cir. 1995), the Fifth Circuit noted that "At the notice stage, the district court makes a decision—usually based on the pleadings and any affidavits which have been submitted—whether notice of the action should be given to potential class members. Because the court has minimal evidence, this determination is made using a fairly lenient standard, and typically results in 'conditional certification' of a representative class." See also id. at 1214 n.8 ("At the notice stage, courts appear to require nothing more than substantial allegations that the putative class members were together the victims of a single decision, policy, or plan" (quotation marks and citation omitted)); Roebuck v. Hudson Valley Farms, Inc., 239 F. Supp. 2d 234, 238 (E.D.N.Y. 2002) (noting that plaintiffs need only make a "modest factual showing" of a common policy or plan, need only describe the potential class "within reasonable limits" and provide "some factual basis from which the court can determine if similarly situated potential plaintiffs exist"); Camp v. The Progressive Corp., 2002 WL 31496661, *4 (E.D. La. Nov. 8, 2002) ("The cases in which conditional certification has been granted or upheld are clear that the 'similarly situated' standard at this [notice] stage is *lenient*, plaintiff's burden is not heavy, the evidence needed is minimal, and the existence of some variations between potential claimants is *not* determinative of lack of similarity.").

At this stage, Plaintiffs are not required to conclusively prove that the proposed class is similarly situated for the court conditionally certify the class and facilitate notice. "The inquiry at the inception of the lawsuit is less stringent than the ultimate determination that the class is properly constituted. . . . Even if plaintiffs' claims turn out to be meritless, or, in fact, all the plaintiffs turn out not to be similarly

situated, notification at this stage, rather than after further discovery, may enable more efficient resolution of the underlying issues in this case.” Jackson v. N.Y. Telephone Co., 163 F.R.D. 429, 431 (S.D.N.Y. 1995) (quotation marks and citation omitted). See also id. (“noting that at the preliminary notice stage, “plaintiffs are only required to demonstrate a factual nexus that supports a finding that they and potential plaintiffs together were the victims of a common policy or plan that violated the law”).

Further, specific evidence in the form of admissible affidavits or admissions is not required. Indeed, requiring definitive proof of similarly situated plaintiffs at this stage would impose on plaintiffs the “chicken and egg limbo” rejected by the district court in Sperling, by which “the class could only notify all its members to gather together after it had gathered together all its members.” Sperling v. Hoffman-La Roche, Inc., 118 F.R.D. 392, 406 (D.N.J. 1988), aff’d, 862 F.2d 439 (3d Cir. 1988), aff’d, 493 U.S. 165 (1989). Moreover, “the Court [need] not [hold] at this time . . . that all members of the potential class who will be sent notices are, in fact, similarly situated to Plaintiffs.” Becher v. Shoney’s, Inc., 927 F. Supp. 249, 251 (M.D. Tenn. 1996) (emphasis added).

The Court is not required at this point to make a conclusive factual determination that all potential plaintiffs are, in fact, similarly situated; that inquiry under Thiessen is reserved for another day. See Brown v. Money Tree Mortgage, Inc., 222 F.R.D. 676, 682 (D. Kan. 2004) (“[T]he court will examine the individual plaintiffs’ disparate factual and employment settings, as well as the various defenses available to the defendant which appear to be individual to each plaintiff during the ‘second stage’ analysis after the close of discovery.” See also Edelen v. Shoney’s Inc., 4 WH Cases 2d (BNA) 980, 981 (M.D. Tenn. March 26, 1998) (noting that some courts allow notice “based solely upon allegations in the complaint of class-wide illegal practices,” and that the “Court is not holding at this time, however, that all members of the potential class who will be sent notices are, in fact, similarly situated to Plaintiffs”).

Further, at this stage, the Court is not to make a determination on the merits of the plaintiffs' claims. See Roebuck v. Hudson Valley Farms, Inc., 239 F. Supp. 234, 238 (E.D.N.Y. 2002) ("A court should not evaluate the merits of plaintiffs' claim in determining whether class notice is warranted."). In fact, in Perez v. Radioshack Corp., 2003 WL 21372467, * 1 (N.D. Ill. June 13, 2003), the court granted initial certification and class notice despite "grave concerns" that the potential plaintiffs were likely exempt under the FLSA. Additionally, any differences in the situation of potential plaintiffs which relate solely to their damages are not relevant at this stage of the analysis. See Reab v. Electronic Arts, Inc., 214 F.R.D. 623, 628 (D. Colo. 2002) ("Generally, damages should not be considered in issuing notice.").

Plaintiff has met its limited burden to establish that all M-Series employees currently classified as exempt are "similarly situated" to Plaintiff and should be afforded court-approved notice of this action and an opportunity to opt in. Specifically, those employees are similarly situated because the City itself treats them similarly based on their similar job duties, because those employees' exempt status was determined through one centralized study, and because City has taken the position in other litigation that its employees' exempt status should be resolved in this litigation. For those reasons, this Court should grant conditional certification of the class and facilitate notice to M-Series employees classified as exempt. Furthermore, because the experience of several opt-in plaintiffs show that the City has also deprived M-Series employees classified as non-exempt of overtime, notice should be sent to those employees as well. Granting the instant motion for court-supervised notice would benefit this Court as well, by allowing it "to control the notice procedure, the definition of the class, a cut-off date for opting in, and an orderly joinder of the parties." Bonilla v. Las Vegas Cigar Co., 61 F. Supp. 2d. 1129, 1137 (D. Nev. 1999).

I. Similarly situated with respect to job duties.

Class members are found to be similarly situated when they have the same employer, are subject to the same employer practices, and the same method of calculation of wages owed. See *Hasken v. City of Louisville*, 213 F.R.D. 280, 282 (W.D. Ky. 2003). In this case, there is no more conclusive evidence that M-Series employees are all “similarly situated” than the fact that the City of Albuquerque treats them so. As noted above, the City itself grouped these employees into the M-Series according to its unified classification plan and based on their quasi-managerial duties. Because of this quasi-managerial duty, the FLSA status of most, if not all, members of the M-Series will be determined by the regulations defining the executive white-collar exemption. See 29 C.F.R. § 541.100 (2005).

Furthermore, under City ordinances and charter, the Merit System is administered by the Chief Administrative Officer, who has delegated to the Human Resources Office the responsibility to maintain the classification system upon which all M-Series employees’ job duties are based. Under that Merit System Ordinance, the City’s Chief Administrative Officer has the responsibility to oversee the system and to establish Rules and Regulations to implement the Ordinance. See Abq. Ord. § 3-1-3 (requiring the Director of Human Resources to “prepare, install, and maintain a classification plan based on the duties, authority, and responsibility of positions in the city service”); see also Rule 600 of the City’s Personnel Rules and Regulations (“The Human Resources Department will maintain a classification plan based on duties, authority, responsibilities and required qualifications of classified positions in the city service.”). Pursuant to that directive, the City itself has determined that M-Series employees are similarly situated enough to be classified in the same employment group.

Additionally, most of the M-Series employees are members of the bargaining unit represented by Local 3022, and as such are “similarly situated” enough for the unit to be “appropriate” under Albuquerque’s Labor-Management Relations Ordinance. See Abq. Ord. § 3-2-8(B) (requiring bargaining

units to be "established by vocational groupings such as blue collar, maintenance, white collar or professional, with consideration being given as to whether they have traditionally been in these groupings"); see also Abq. Ord. § 3 2-8(C) (directing the Labor Board, in making the determination of appropriateness, is directed to consider: "(1) [w]hether the city employees have the same conditions of employment which apply uniquely to them; (2) [w]hether the city employees have a mutuality of interest; and (3) [h]ow the public interest might best be served in determination of the bargaining unit."). Also, because those employees in the bargaining unit are governed by the same Collective Bargaining Agreement, they are subject to virtually identical terms and conditions of employment. As noted, most of the M-Series employees who are not members of the bargaining unit are excluded because they are considered by the City to be "confidential" employees. Thus, the mere fact of their exclusion from the Unit does not establish that they are not "similarly situated" under the FLSA standard.

Finally, that other M-Series employees in various classifications in various departments have already opted-in to the litigation shows that other similarly situated employees within the class exist. See Jackson v. N.Y. Telephone Co., 163 F.R.D. 429, 432 (S.D.N.Y. 1995) (noting that "experiences of other employees may well be probative of the existence vel non of a discriminatory policy" quoting Frank v. Capital Cities Communications, Inc., 88 F.R.D. 674, 676 (S.D.N.Y. 1981) (Haight, J.)). Because such employees exist, this court should direct notice to all employees to permit them to opt in to this lawsuit and obtain the benefits of a collective action.

2. Victim of single decision, policy, or plan.

The similarity between M-Series employees mis-classified as exempt is particularly strong. Here, because the FLSA status of M-Series employees was determined exclusively through one poorly-managed study, those employees "were together the victims of a single decision, policy, or plan," and for that additional reason should be afforded notice of this litigation. See Barron v. Henry County

School System, 242 F. Supp. 2d 1096, 1103-04 (M.D. Ala. 2003) (noting that under Eleventh Circuit precedent, a plaintiff may rely either on a specific unified policy or a similarity in job titles or other aspects of employment in order to establish that those employees are similarly situated under the FLSA). Despite being in different departments, their FLSA status was not determined by different supervisors or department heads, but rather by this one study.

Thus, this case differs markedly from Mooney, an ADEA case where the court denied certification, in part, because “[i]n contrast to the cases relied upon by Plaintiffs, wherein the common thread unifying Plaintiffs’ claims was a company-wide action executed by a relatively small number of supervisors within a short time period, in the instant case it appears that the ‘elections for individual terminations were made by hundreds of different supervisors in separate departments with differing constraints and objectives’” 54 F.3d at 1215. If the City itself viewed the status of M-Series employees determinable in one single study, then there can be no doubt that M-Series employees misclassified as exempt under the FLSA are similarly situated enough to litigate that question in a single action.

In cases such as this one, where an employee alleges that he or she is improperly classified as exempt under the FLSA, courts often allow notice under § 216(b) to other employees also classified as exempt. See Kane v. Gage Merchandising Servs. Inc., 138 F. Supp. 2d 212, 215 (D. Mass. 2001) (“The record thus suggest that the Defendants had a policy of treating at least some of a discrete class of employees . . . as exempt from the FLSA overtime requirements. That showing is sufficient for this Court to determine that a ‘similarly situated’ group of potential employees exists given the adopted lenient standard for court-facilitated notice.”).

3. The City’s position in other litigation.

In another case currently pending against it, Chavez v. City of Albuquerque, No. 02-CV-562

[H. AC.F.], the City objected in part to the plaintiff's attempt to amend the complaint to include claims that certain employees were misclassified as exempt. As part of that argument, the City contended that "there is already litigation pending in this district which raises the issue of exempt status of several of the City's job classifications," citing to this case. See Defendant's Opposition to Minority Plaintiffs Motion to Amend Complaint [Case No. 02-CV-562; Doc. No. 148], at 5. Moreover, the City argued, "Minority Plaintiffs' rights are already being protected in this other case, which they are free to join, and amendment of the complaint in this case is not necessary to give them a forum for their claims." Id. at 6. Given that the City has taken the position in other litigation that the exempt status of its employees should not be litigated there because of this case, it should not be heard to complain that those employees be given notice and an opportunity to join this litigation.

4. Different job titles unimportant.

Given those obvious similarities between employees in the M-Series and the single decision, policy or plan to which they were subjected, the fact that the M-Series employees who are part of the potential class hold a variety of job titles does not preclude sending notice to those employees or proceeding on a collective basis. In Realire v. Ark. Restaurants Corp., 7 F. Supp. 2d 303 (S.D.N.Y. 1998), the district court authorized notice to a broad class of employees at fifteen of defendant's restaurants where the named plaintiffs worked at those restaurants which "bear different names and feature different menus and atmospheres," and where plaintiffs "have collectively held a variety of job positions at the restaurants, including waiter, porter, dishwasher, cook, backwaiter, bartender, runner, pizza maker, busboy, and security guard." Id. at 303. In so holding, the court noted that it was "certifying the proposed class only for notice and discovery purposes," and was not "holding at this time that all members of the proposed class who will be sent notices are, in fact, similarly situated to plaintiffs." Id. at 308. Should further discovery show that they are not similarly-situated, the court was

prepared to “decertify the class, or divide the class into subgroups, if appropriate.” Id.; see also Carza v. Chicago Transit Auth., 2001 WL 503036 (N.D. Ill. May 8, 2001) (granting notice to employees in various positions, including motormen, switchmen, flagmen and towermen based on a failure to pay for all of their required training because plaintiffs demonstrated “a sufficient factual nexus between their situation and the situation of other current and former rail employees”).

Similarly, in In Harrison v. Enterprise Rent-a Car, 4 WH Cases 2d (BNA) 1339 (M.D. Fla. July 1, 1998), the court granted plaintiffs’ motion to facilitate notice to a nationwide class of Management Assistants. In so doing, the court rejected the defendant’s argument that the “range of duties” performed by those employees was “too wide and too varied for the members of such a class to be similarly situated” by noting that “[i]t would seem, though that Defendants demand too much of the standard, at least at this stage.” Id. at 1341 (further noting that the standard at the notice stage is a lenient one and “the fact that subsequent discovery may prove that the original plaintiffs and the opt-in plaintiffs are not, after all, ‘similarly situated’ does not work against the original decision to facilitate notice.”). Indeed, in Moss v. Crawford & Co., 201 F.R.D. 398, 410 (W.D. Penn. 2000), the district court refused to decertify the class at the second stage based on defendant’s argument that the employees who had opted in had different “job duties, geographic assignments, and hourly billing rates,” because “each of the plaintiffs assert[ed] a common claim: i.e. that [defendant] violated the FLSA by failing to compensate them with overtime wages. . . .”

In deciding to allow notice to other employees in an FLSA exemption case, the district court in Hoffman v. Sbarro, Inc., 4 WH Cases 2d (BNA) 335, 346 (S.D.N.Y. Oct. 23, 1997), noted that in contrast to cases which denied notice “based on the total dearth of factual support for the plaintiffs’ allegations of widespread wrongdoing,” the plaintiffs in that case had established a “factual nexus” between their situation and the situation of other potential plaintiffs. Here, despite the lack of complete

discovery, Plaintiffs have produced ample facts to demonstrate a factual nexus between Plaintiff and other members of the M Series, specifically in regards to Plaintiff's claim that he has not properly been paid overtime under the FLSA. As such, Plaintiff respectfully requests that this Court conditionally certify the class of all current and former M-Series employees (either improperly classified as exempt or, although not exempt, are nonetheless illegally deprived of overtime pay).

Plaintiff expects that once employees have opted in after receiving notice the Court will need to create subclasses of employees, based either on their department, their job titles, or the specific white-collar exemption relied upon by the City. The Court may also need to create a separate group for non-exempt employees who are deprived of overtime. The fact of that later need for subdivision, however, has no bearing on the decision to conditionally certify the broader class and facilitate notice. See Balfanz v. Wacker Siltronic Corp., 2001 WL 1335809 (D. Or. Aug. 24, 2001) (emphasizing that the court was certifying the class only for notice and discovery purposes, that no determination was being made that the potential plaintiffs are, in fact, similarly situated, that should discovery reveal that they are not, the court could later decertify the class or divide the class into subgroups, and that "[p]reservation of this right to subdivide or decertify members of the class should alleviate defendant's concern . . . that the proposed notice targets too large a class").

D. Plaintiff's proposed notice and notice plan is appropriate.

Plaintiff attaches hereto as Exhibit I a proposed notice, patterned after the one approved by the Court in Reab v. Electronic Arts, Inc., 214 F.R.D. 623, 627 (D. Colo. 2002). Care was taken to avoid giving the impression that the court endorsed the Plaintiff's position, and to present the case in a neutral manner. Defendant bears the burden of establishing that Plaintiff's proposed notice is inappropriate. See Krieg v. Pell's Inc., 2001 WL 548394, 12 (S.D. Ind. 2001) (noting that the court "will not permit [defendant] to rewrite [plaintiff's] notification letter absent a colorable objection to misleading

language.”). Because of that burden, and because the proposed notice was patterned after the notice approved in Realy, Plaintiff will wait to respond to Defendant’s objections to the form of the notice.

The proposed notice defines the class as: “All current and former “M-Series” employees of the City of Albuquerque (“the City”) who were either (1) classified as “Exempt” under the FLSA or (2) who, although classified “Nonexempt,” were nonetheless deprived of overtime pay, who worked for the City from June 3, 2002, to the present, and who did, on at least one occasion during that time frame, work in excess of forty hours a week without receiving time-and-a-half compensation for all hours over forty.” Because the City has denied overtime to some opt-in plaintiffs who were classified as non-exempt, the notice should be sent to all M-Series employees, whether classified as exempt or non-exempt under the FLSA. Because Plaintiff has alleged a willful violation and because that determination is ultimately one of fact for the jury, notice should go out to all employees employed by defendant in the proposed class at any time in the three years prior to the filing of this complaint. See Bankston v. State of Illinois, 60 F.3d 1249, 1253 (7th Cir. 1995) (“It is the jury’s province to decide which limitations period, two or three years, applies in light of the plaintiffs’ evidence that the defendants acted willfully.”)

As indicated in the proposed notice, recipients of the notice would be required to return the opt-in form to counsel for Plaintiff’s in sufficient time to allow counsel to file the opt-ins within 90 days of the mailing of the notice. Through this motion, Plaintiff requests that the Court issue an order approving the form of the proposed notice and requiring the City to provide Plaintiff’s counsel a list (in electronic format) of all current and former M-Series employees who worked for the City at any point since June 3, 2002. Plaintiff’s counsel will then prepare the mailing, at its expense, and notify the Court and the parties of the date of mailing, which will then generate the deadline for filing opt-in certificates. Plaintiff respectfully submits that this procedure will allow this Court to appropriately “control the notice procedure, the definition of the class, a cut-off date for opting in, and an orderly

joinder of the parties." Bonilla v. Las Vegas Cigar Co., 61 F. Supp. 2d 1129, 1137 (D. Nev. 1999).

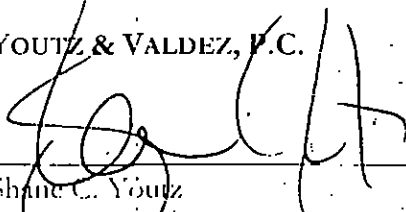
IV. Conclusion

For the foregoing reasons, Plaintiff respectfully requests that this court grant the motion, conditionally certify the class for notice and discovery purposes, approve the form of the class-notice provided, require Defendant to provide the names, address, and email address of all potential plaintiffs so identified to Plaintiff in electronic format, and approve the notice and opt-in plan suggested by Plaintiff.

Dated: December 20, 2005

Respectfully submitted,

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I hereby certify that this 20th day of December, 2005, a true and correct copy of the foregoing pleading was served upon the following via first-class U.S. mail:

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