

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

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

Plaintiffs,

vs.

CIV 05-0620 MCA/LFG

CITY OF ALBUQUERQUE,
a municipal corporation,

Defendant.

DEFENDANT CITY OF ALBUQUERQUE'S RESPONSE IN OPPOSITION TO THE YOUTZ
PLAINTIFFS' MOTION FOR CONDITIONAL CERTIFICATION AND COURT-
FACILITATED NOTICE TO SIMILARLY SITUATED EMPLOYEES

Defendant City of Albuquerque (hereinafter the city or defendant), by and through its undersigned attorney, responds in opposition to the Youtz plaintiffs' motion for conditional certification of a class of plaintiffs in this action pursuant to the Fair Labor Standards Act (hereinafter FLSA). The motion should be denied because the class sought to be certified is not appropriate for purposes of the FLSA.

I. FACTS

The following facts are relevant to the city's response to the Youtz motion:

1. Counsel Youtz represents several opt-in plaintiffs in this case and filed the original complaint.

2. The named plaintiff is employed as a Lieutenant with the Metropolitan Detention Center. According to the complaint, fourteen additional individuals have opted into the Youtz action. Several additional opt-in notices have been filed.

Complaint, ¶ 8.

3. The Youtz complaint identifies individuals who are currently classified in positions as M-11s, M-12s and M-13s, which are management level employees. Complaint, ¶ 10.

4. In response to the court's request, Attorney Youtz has clarified that the class sought to be certified consists of members of the Local 3022 bargaining unit. See Notice of Clarification filed January 13, 2006 as docket no. 51.

5. On September 16, 2005, Counsel Livingston entered his appearance on behalf of approximately seventeen additional opt-in plaintiffs. See, e.g., Docket No. 14.

6. The class sought to be certified by Counsel Livingston in the proposed amended complaint is defined as any and all misclassified city employees who have worked overtime and not been paid appropriately. Counsel Livingston has not moved to certify his proposed class. Proposed amended complaint, ¶ 4.

7. The proposed Livingston complaint expands the original complaint far beyond its initial reach and basically extends to all current and former employees of the city. The class is not limited to management employees, is not limited to M-series employees, and is not limited to employees earning overtime.

8. Counsel Livingston states that the reason for amending the complaint is to "clarify and restate the scope of the case." Motion to amend, ¶ 4.

9. Counsel Youtz and the city have opposed the Livingston motion to amend. See Docket nos. 33 & 35.

10. In 2001, the city and Local 3022 negotiated a Collective Bargaining Agreement (hereinafter the contract or CBA) providing that the city would undertake a study to determine if members of that bargaining unit were properly classified for purposes of the FLSA. The MOU provided that the union would be kept informed of

the study and information was provided during meetings of the Union-Employer Committee (hereinafter UEC). Exhibit 1, affidavit of Paul Broome, attached hereto and incorporated herein by reference.

11. The city contracted to have the study performed and it was completed in approximately November, 2002. The results were confirmed by an independent reviewer. Exhibit 1 (Broome affidavit); Youtz plaintiff's exhibit A3, p. 1.

12. The study was conducted in two phases: Phase 1 was a review of the bargaining unit positions to identify those which were to be reclassified. Phase 2 constituted further interviews with those whose status was to be changed to determine if any of those individuals were entitled to overtime. Exhibit 2, affidavit of Patricia Miller, attached hereto and incorporated herein by reference.

13. In conducting the study, the city involved the United States Department of Labor. After requesting assistance from the USDOL, Chris Roybal, Wage and Hour Investigator, was assigned. Mr. Roybal oversaw the city's study, assisting in developing the initial questionnaires, reviewing them, and determining which employees were to be studied further. Mr. Roybal then conducted several of the Phase 2 interviews to train city contractors in how to conduct the remaining interviews. Mr. Roybal approved the results of the study which the city implemented. Exhibit 1 (Broome affidavit); Exhibit 2, (Miller affidavit).

14. No further study was required in the subsequent CBA between the city and Local 3022. Exhibit 1 (Broome affidavit); Youtz plaintiffs' exhibit A3, p. 1.

15. When the study was completed, the union did not file any grievance or protest pursuant to the provisions of the CBA challenging the results of the study. Exhibit 1 (Broome affidavit).

16. Employees who were determined by the study to have been improperly classified were paid appropriate compensation for overtime worked. Exhibit 1 (Broome affidavit).

17. As of January 18, 2006, there are 1001 employees in the Local 3022 M-series bargaining unit. Exhibit 2 (Miller affidavit).

18. Only employees classified as corrections officers and M-11, M-12 and M-13 have opted in to this litigation; there are no employees in M-14 through M-20, or in the other management classifications.¹ Exhibit 2 (Miller affidavit), exhibits 2-A (chart), 2-C (list of bargaining unit employees).

19. When the city first classified its employees for purposes of the FLSA, it designated their positions as exempt or non-exempt. See Exhibit 2 (Miller affidavit).

20. Since those original designations, the study disclosed that, to conform to the requirements of the FLSA, employees' designations were to be changed. See Exhibit 2 (Miller affidavit).

21. While the FLSA designations of individual employees were changed to comply with the study, the designation of the specific position was not always changed, resulting in discrepancies between some employees' position designation and the designation of the individual. Some discrepancies may have also resulted from subsequent hirings. Exhibit 2 (Miller affidavit), exhibit 2-C (list of bargaining unit employees).

22. There are a total of 1001 M-series employees in the bargaining unit. Exhibit A (Miller affidavit); Exhibit 2-A, (chart).

23. There are 825 non-bargaining unit employees in the entire city. Exhibit A (Miller affidavit).

¹ Additional equivalent M-series employees include those listed in the legend, p. 1 of exhibit 2-A (chart) attached to Exhibit 2 (Miller affidavit).

24. Three hundred fifty-seven (357) of the bargaining unit employees are classified as exempt for purposes of the FLSA; the remaining are classified as non-exempt. Exhibit A (Miller affidavit); Exhibit 2-C, (list of bargaining unit employees).

25. There are 28 different M-series or equivalent grade levels. Of these grade levels, there are bargaining unit members in nine of the grade levels. Exhibit A (Miller affidavit).

26. There are no bargaining unit members in the remainder of the classifications. Exhibit A (Miller affidavit); Exhibit 2-A (chart).

27. In the bargaining unit, there are a total of 218 separate different job titles. Exhibit A (Miller affidavit).

28. There are a total of 1521 separate job titles in all departments. Exhibit A (Miller affidavit).

29. An employee in the same job title in one department may not be performing the same duties as an employee in the same job title in a different department. There are twenty-two separate city departments. Exhibit 2 (Miller affidavit).

30. All of the approved job descriptions are available through an electronic link specifically created for this litigation, located at: <http://alameda.cabq.gov/cityapps/http://alameda.cabq.gov/cityapps/HRDPosSpecsCopyforLegal.nsf/626E6035EADBB4CD85256499006B15A6>. Exhibit 2 (Miller affidavit).

31. In 1999 the city contracted for a study to be done by the Anderson Company to update the job classification system and develop a new compensation plan. The Anderson study reduced 1049 job classifications to 667. Exhibit 2 (Miller affidavit), exhibit 2-D (portion of Anderson Study).

32. One of the results of the Anderson Study was to group more employees in fewer job classifications, although the duties of those individuals were not changed. The result was that the employees in each of the 667 job classifications had more disparate duties than those in each of the 1049 job classifications. Exhibit 2 (Miller affidavit), exhibit 2-D (portion of Anderson Study).

33. The city contacted the United States Department of Labor (USDOL), requesting guidance and assistance to study the FLSA job classifications. According to Chris Roybal, a USDOL employee, he had “been given the assignment to conduct a Wage and Hour investigation of the City under the Fair Labor Standards Act. . . . “ Exhibit A (Miller affidavit), Exhibit 2-K (E-mail dated 8/30/2002).

34. Ms. Sanchez coordinated her efforts with USDOL representative Roybal.

35. Ms. Sanchez asked Chris Roybal whether it is possible for a position with the same job code and title to be exempt for one employee and non-exempt for another in the same department. (Miller affidavit).

36. Mr. Roybal’s response was, “yes, it is a common problem we find. In fact some people in the same dept and same classification can be different if one isn’t doing the work described in the job description, i.e., a manager, administrator or professional because of staff shortage spends most of his time doing non exempt work.” According to Mr. Roybal, “Technically we determine exempt status on a week by week basis.” Exhibit 2 (Miller affidavit), exhibit 2-G (e-mail).

37. The individuals who have opted into the litigation include employees in fourteen different job classifications. Those individuals perform their jobs in seven different departments and they perform different job duties as indicated in the attached job descriptions. Exhibit 2 (Miller affidavit), exhibit 2-H (job descriptions).

38. The complaint challenges both the city's FLSA classification of M-series employees and its compensation for overtime incurred by employees who are not exempt from the provisions of the FLSA. *E.g.*, Youtz plaintiffs' Exhibits E, F, and G; Youtz plaintiffs' motion for class, at p. 24.

39. The class sought to be certified includes both individuals who are currently classified as FLSA exempt and those who are subject to the overtime provisions of the FLSA. Exhibit 2 (Miller affidavit), exhibit 2-C (list of bargaining unit employees).

40. Librarians are classified as exempt from the overtime provisions of the FLSA. To be a librarian, senior librarian or library branch manager requires a degree in library science; employees in these positions are classified as exempt. A library paraprofessional requires an associates degree; library paraprofessionals are non-exempt. Exhibit 2 (Miller affidavit), exhibit 2-I (librarian job descriptions).

41. Forensic laboratory technicians with the police department are classified non-exempt; they are required to have an associate's degree. Forensic scientists and senior forensic scientists with the police department are required to possess bachelor's degrees with emphasis in chemistry or biology or a related field. Exhibit 2 (Miller affidavit), exhibit 2-J (forensic job description).

42. In calendar year 2005, 414 employees that are CURRENTLY in the M series bargaining unit were paid overtime. Exhibit 4, affidavit of Leslie Hall, attached hereto and incorporated herein by reference.

43. On August 3, 2005, defendants entered into an agreement with The Segal Company to, *inter alia*, "determine FLSA exemption status for approximately 76 lower level Managerial positions occupied by approximately 250 employees." Exhibit 2 (Miller affidavit).

44. Many of the positions to be addressed by The Segal Company are at issue in the litigation. Exhibit 2 (Miller affidavit).

45. Based on the findings of The Segal Company, changes may be made to the FLSA status of employees whose positions are at issue in this litigation, and appropriate overtime will be paid. Exhibit 2 (Miller affidavit).

46. The Segal Company's review was to be completed by December 31, 2005, but the time for completion has been extended partly as a result of this litigation. Exhibit 2 (Miller affidavit).

47. If the study finds that individuals were improperly classified, appropriate steps will be taken to correct the classification and in appropriate circumstances, to provide back pay as was done in prior classification studies. Exhibit 2 (Miller affidavit).

II. ARGUMENT

A. The city has appropriately classified the employees in the M-series bargaining unit.

In 2001, the city agreed in a Memorandum of Understanding with Local 3022 to study of all bargaining unit employees, meeting and conferring with the union as the study progressed. See city's fact no. 11. The city contracted with an individual, Vivian Sanchez, to conduct the study which was in two phases: Phase 1 was a review of the bargaining unit positions to identify those which needed to be reclassified. Phase 2 constituted further interviews with those whose status was to be changed to determine if any of those individuals were entitled to overtime. City's fact nos. 13, 28, 30.

In conducting the study, the city involved the United States Department of Labor. After requesting assistance from the USDOL, Chris Roybal, Wage and Hour investigator, was assigned. Mr. Roybal oversaw the city's study, assisting in

developing the initial questionnaires, reviewing them, and determining which employees were to be studied further. Mr. Roybal then conducted several of the Phase 2 interviews to train city contractors in how to conduct the remaining interviews. Mr. Roybal approved the results of the study which the city implemented. City's fact no. 14.

Among the opt-in plaintiffs identified, there are fourteen different job titles represented within seven different city departments. There are currently 14 different job classifications in the seven different city departments with bargaining unit employees. City's fact no. 27. In addition, employees with the same job titles may perform different job duties and have a different FLSA status depending in what department the individual works. City's fact no. 29. These employees are not similarly situated. If they were improperly classified it was not pursuant to a common plan or scheme of the employer and the city requests that the Youtz plaintiffs' request for certification for the class they have defined be denied.

1. All members of the bargaining unit are not similarly situated.

The Tenth Circuit has addressed when a class may be certified for purposes of the FLSA. In a case brought pursuant to the Age Discrimination in Employment which applies the same standards, the court stated:

The overriding question here is whether Thiessen and the twenty-two opt-in plaintiffs are "similarly situated" for purposes of § 216(b). Unfortunately, § 216(b) does not define the term "similarly situated," and there is little circuit law on the subject. Federal district courts have adopted or discussed at least three approaches to determining whether plaintiffs are "similarly situated" for purposes of § 216(b). *See, e.g.,* Mooney [v. Aramco Servs. Co., 54 F.3d 1207, 1213 (5th Cir. 1995)] (discussing two different approaches adopted by district courts); Bayles v. American Med. Response of Colo., Inc., 950 F. Supp. 1053, 1058 (D. Colo. 1996). Under the first approach, a court determines, on an ad hoc case-by-case basis, whether plaintiffs are "similarly situated." Mooney, 54 F.3d at 1213. In utilizing this approach, a court typically makes an initial "notice stage" determination of whether plaintiffs are "similarly

situated." Vaszlavik v. Storage Tech. Corp., 175 F.R.D. 672, 678 (D. Colo. 1997). 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." *Id.* (quoting Bayles, 950 F. Supp. at 1066). 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." *Id.* at 678. 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." *Id.* n4.

Thiessen v. GE Capital Corp., 267 F.3d 1095, 1102-1103 (10th Cir. 2001). While courts address the different approaches applied in making the decision regarding certification, "[w]hatever test is employed, the relevant inquiry is whether the members of the proposed class are similarly situated." Freeman v. Wal-Mart Stores, Inc., 265 F.Supp.2d 941, 945 (D.Ark. 2003). The required showing is not significant and may be met by detailed allegations and supporting affidavits. White v. Osmose, Inc., 204 F.Supp.2d 1309, 1313 (N.D.Ala. 2002).

The evidence the Youtz plaintiffs rely on in this motion consists of:

1. The affidavit of Andrew Padilla, plaintiffs' exhibit A;
2. Affidavits of three employees, plaintiffs' exhibits E, F, and G, who claim

that they have worked more than 40 hour weeks without compensation. The employees providing these affidavits, all of whom are classified as non-exempt and subject to the provisions of the FLSA, do not challenge their classifications; they claim only that they did not receive adequate overtime compensation. Thus the only document relevant to the assertion that the Youtz plaintiffs have been improperly classified is exhibit A. The Padilla affidavit, however, does not adequately support the Youtz plaintiffs' claim that the class sought to be certified is similarly situated.

Mr. Padilla asserts in his affidavit that he has “received numerous complaints from members of the bargaining unit that they were not properly classified as exempt under the FLSA” Plaintiffs’ exhibit A, ¶ 8. There is no other allegation in the affidavit offered to demonstrate that plaintiffs or any specific bargaining unit member has been improperly classified. “Unsupported assertions of widespread violations are not sufficient to meet Plaintiff’s burden.” Haynes v. Sincer Co., Inc., 696 F.2d 884, 887 (11th Cir. 1983). Mr. Padilla’s affidavit runs afoul of this proscription: 1) it does not identify any individual employee who has allegedly been improperly classified; 2) it provides no facts to support improper classification; 3) it does not identify any specific job title or position which is improperly classified; and 4) Mr. Padilla has made no effort to identify a common plan or scheme which led to the city’s allegedly improper classification of members of the bargaining unit.

The class sought to be identified does not meet the requirements of an FLSA class. In the class sought to be defined, the city has identified 14 different job classification held by these employees, in seven different city departments. “Even employees who hold the same job title do not necessarily perform the same work.” Morisky v. Public Service Electric and Gas Company, 111 F.Supp.2d 493, 498 (D.N.J. 2000); *see also* city’s fact no. 24. The Youtz plaintiffs have made no effort to demonstrate that any of the individuals in these myriad positions are similarly situated. To be similarly situated, the focus is on the nature of the employee’s job duties. “A collective action would only be appropriate where ‘the plaintiff[s] make[] some showing that the nature of the work performed by other claimants is at least similar to [their] own.’” Morisky, 111 F.Supp.2d at 498 (*citation omitted*). The Youtz plaintiffs have not addressed the different duties of the individuals who have opted into the litigation, let alone any of those in the bargaining unit.

The Youtz plaintiffs have made no effort whatsoever to demonstrate that all employees in the bargaining unit are similarly situated. The disparate nature of the positions those employees hold is manifest simply by reviewing the job descriptions of the employees who have opted into this litigation who are in the bargaining unit.² Attorney Youtz has clarified in response to the court's request that the class sought to be certified consists of members of the bargaining unit, not all M-series employees, yet there are bargaining unit members in many of the levels of the M-series. City's fact no. 4. Members of the bargaining unit include those employees who are currently subject to the provisions of the FLSA and those who are exempt. Presumably the Youtz plaintiffs are not challenging the classification of bargaining unit M-series employees who are covered under the FLSA yet with the broad definition of the class, exempt employees are also included in the proposed class.

Thus the class is improper because it seeks to include both exempt and non-exempt employees. A class of both exempt and non-exempt employees cannot have occurred pursuant to a common plan. Exempt employees perform administrative or supervisory duties or have professional certifications which distinguish them from non-exempt employees. A class seeking to challenge classifications consisting of both exempt and non-exempt employees is irrational. See White v. Osmose, 204 F.Supp.2d at 1314 ("The court is persuaded that since foremen may be held individually responsible for the potential claims of crewmen, there is an inherent conflict of interest

² Because the opt-in plaintiffs only represent 9 of the total of 28 different M-series grade levels represented in the bargaining unit, it is evident that including all bargaining unit members would provide an even more disparate range of job descriptions. While a job description is not necessarily dispositive as to the duties being performed or to determining the FLSA status of an employee, the deviation between the duties of, for example, a horticulturist and those of a corrections lieutenant are too substantial to permit a determination that those employees are similarly situated. See Morisky.

between the two groups).” None of the authorities cited by the Youtz plaintiffs addresses certification of a class including both exempt and non-exempt employees.³

An FLSA collective action is intended to facilitate classification of similarly situated employees. Presumably the Youtz plaintiffs are not claiming that employees who are classified as non exempt are improperly classified, but “[d]etermining whether an employee is exempt is extremely individual and fact-intensive, requiring a ‘detailed analysis of the time spent performing administrative duties’ and ‘a careful factual analysis of the full range of the employee’s job duties and responsibilities.’” See, e.g., Mike v. Safeco Ins. Co., 274 F.Supp.2d 216, 220. The same analysis would be required for each and every separate exempt employee in the M-series bargaining unit. In just the opt-in group alone, there are seven separate job titles represented and there is no evidence that individuals who are employed in the same job titles, even within the same department, perform the same job duties. E.g., City’s fact no. 29. To determine membership in the class which the Youtz plaintiffs have identified would require that “the court engage in an ad hoc inquiry for each proposed plaintiff to determine whether his or her job responsibilities were similar to [the identified plaintiffs] . . . [Plaintiffs have] not presented a firm basis for the court to identify similarly situated individuals and ha[ve] failed to meet [their] burden under the FLSA.” Mike, 274 F.Supp.2d at 221.

The same is true here. The Youtz plaintiffs have failed to demonstrate any similarity between the opt-in plaintiffs who have been identified thus far and the members of the bargaining unit. Simply because the possible class are members of the bargaining unit does not support that all of these employees are similarly situated.

³ The city recognizes that the Youtz plaintiffs are also seeking to include in their class employees who allegedly worked off the clock. Plaintiffs’ exhibits E, F, and G. As the city later argues, grouping classification claims with off-the-clock pay claims should be rejected as an appropriate opt-in class.

The jobs held by the individual bargaining unit members are so disparate that they are not similarly situated; there are material differences in their duties and responsibilities and employees are not similarly situated “simply because they claim violations of the law by the same supervisor.” Freeman v. Wal-Mart Stores, Inc., 256 F.Supp.2d 941, 845 (D.Ark. 2003). The Youtz plaintiffs’ claim for conditional certification should be rejected.

2. The Youtz plaintiffs have failed to identify a common plan.

While it is established that plaintiffs must make a showing of commonality beyond the mere facts of job duties and pay provisions, not all courts require the showing of a common plan in addition. *E.g.*, Horne v. United Services Automobile Association, 279 F.Supp.2d 1221, 1234 (N.D.Ala. 2003). If a showing of a common plan is required, the Youtz plaintiffs have failed to demonstrate that all of the opt-in plaintiffs, let alone all of the members of the bargaining unit, are similarly situated and they have likewise failed to identify an actionable common plan.

The only possible common plan or scheme identified by the Youtz plaintiffs to support their class, is the common plan that the city relied on a study conducted earlier which plaintiffs now claim was flawed. *See* Youtz plaintiffs’ memorandum, p. 20. Reliance on a study conducted under the auspices of and approved by the United States Department of Labor cannot constitute an improper policy or plan sufficient to justify class certification. *See, e.g.*, Mike, 274 F.Supp.2d 216, 221 (“The fact that Safeco decided to reclassify all Claims Representatives does not provide the necessary common thread”).

The Youtz plaintiffs’ attempt to include both exempt and non-exempt employees in the same class makes the identification of a common plan more remote. For example, the Golf Course Supervisor, Plaintiff Gallegos, who is classified as FLSA

exempt, cannot have been classified pursuant to the same improper plan as a Traffic Program Assistant, Michael Carroll, who is classified as non-exempt. An improper common plan could only occur if both employees were classified as exempt. *See, e.g.*, city's fact nos. 18, 1, 13, 39, 37. Plaintiff Gallegos' job duties as an exempt employee are "to supervise, plan and coordinate activities and operations of an assigned golf course, to supervise personnel, equipment and materials necessary for golf course operations; city's fact no. 37. In contrast, Mr. Carroll's duties as a non-exempt employee are to "perform traffic studies for the Neighborhood Traffic Management Program (NTMP), to collect data, prepare and present the results of the traffic study to community groups; to conduct research, . . ." City fact no. 37. Furthermore, Plaintiff Gallegos may be covered by the exemption in 13(a)(3). Presumably plaintiffs are not contending that Mr. Carroll is incorrectly classified because he is subject to the overtime provisions of the FLSA, and, if so, the employees in the opt-in class who are exempt are not subject to a common plan with those who are non exempt.

Because the Youtz plaintiffs have failed to identify a common plan, their request for provisional certification should be rejected. The court should not permit the Youtz plaintiffs to attempt to identify potential class members without having clarified what they are challenging.

3. If the court determines that a class should be certified, the class should be narrowly tailored to bargaining unit members whose classifications may be subject to question.

The M-series bargaining unit contains 357 members who are classified as exempt.⁴ Of these exempt bargaining unit members, there is a group whose classifications cannot be subject to serious dispute. For example, to qualify for a

⁴ These are individual employees who are classified as exempt rather than positions with an exempt designation.

position as a librarian, employees must possess a professional degree in library science.⁵ City's fact no. 40. Similarly, the curator of the Bio Park, level M-16, supervises the professional, technical and clerical staff, and must possess a professional degree. City fact no. 37.

While the city believes that it has appropriately classified its employees for purposes of the FLSA and while it also believes that the Youtz plaintiffs have not presented an adequate basis for provisional certification of a class consisting of all bargaining unit members, the city believes that there are employees whose inclusion in a collective action on a conditional basis would not be objected to in order to allow the case to proceed on a manageable basis. The city has identified these employees in its exhibit 4 to this response. If the court determines that the Youtz plaintiffs have made some threshold showing of misclassification sufficient to justify the issuance of notice, the city requests that the notice be provided to the individuals identified in exhibit 4.

In suggesting that there are some positions open to debate, the city is not conceding that its classifications are incorrect or that its classification decision was not in good faith. The city's goal in making this suggestion is to eliminate those positions about which there can be no question. If the Youtz plaintiffs believe there are any other positions which may be at issue, they should identify those positions, considering the link provided by the city to job descriptions for all city employees. See city fact no. 30. The class as currently sought to be defined by the Youtz plaintiffs is simply unmanageable, over inclusive and based on the information provided, no effort has been made by those plaintiffs to identify any specifically misclassified positions. If the court requires that notice be provided to all possible Youtz-defined class members

⁵ In contrast, library paraprofessionals are non-exempt because they are not required to possess professional qualifications.

and that all classifications be, in essence, studied by the court, the result will be unduly burdensome.

The purpose of a collective action under the FLSA class certification mechanism is to promote judicial economy. The plaintiffs bear the burden of demonstrating a "reasonable basis" for their claim that this matter warrants collective action status. Grayson v. K-Mart Corp., 79 F.3d 1086, 1097 (11th Cir. 1996). The Youtz plaintiffs' request to certify this as a collective action in the manner defined, however, will not promote judicial economy. Hoffman-La Roche, Inc. v. Sperling, 493 U.S. 165, 170 (1989). If the class defined by the Youtz plaintiffs is certified, numerous employees about whom there is no question concerning their status, *i.e.*, those who are currently classified non-exempt, will be combined with those who are challenging their classifications. A challenge to an individual's classification presents an intensive factual study of the employee's work duties which is not necessary if the individual is already classified non-exempt and is also not necessary if there is no question as to the validity of an employee's classification. Requiring that notice be given to all bargaining unit employees may cause confusion if an individual is classified non-exempt. Confusion will not promote judicial economy and including more employees in the class than can be reasonably identified as belonging to the class will burden the court unnecessarily.

- C. Notice should not be given to non-exempt employees who have allegedly not been compensated for overtime work until a determination is made whether those employees are properly classified.

The city has argued that the court should not combine both exempt and non-exempt employees in one class. An employee who is classified as exempt is not similarly situated to an employee who is non-exempt. The Youtz plaintiffs are presumably not asserting that the classifications of those who are classified as non-

exempt should be analyzed to determine if they are appropriately classified. Assuming the Youtz plaintiffs are concerned with classifications only for those employees who are classified as exempt, the court should determine which exempt employees are appropriate party of the class. The city's exhibit 4 identifies those employees about whom the city believes there could be a reasonable dispute as to their classifications. If the city's position is adopted the court should determine first whether those employees are appropriately classified. Only after the initial determination is made should the issue whether notice is to be provided to non-exempt employees who claim they have not been appropriately compensated be addressed.

Employees who are claiming that they have improperly been denied overtime are not similarly situated to employees who question their classifications. The two issues are not related and require different legal and factual analyses. The classification determination is a prerequisite to assessing whether an employee is entitled to compensation: if an employee is properly classified as exempt he or she will not be entitled to overtime. Thus to preserve judicial economy, the court should first determine if the bargaining unit employees whose classifications are questioned are properly classified and once a final decision has been made concerning classifications, the court can determine if and to whom notice should be sent concerning overtime compensation.⁶

Giving notice now to non-exempt bargaining unit members of the pendency of the litigation will result in expenditure of unnecessary judicial time and resources and may result in the city being required to provide additional notice after the court has addressed the classification question. If the court agrees that notice to non-exempt employees claiming overtime should not occur until resolution of which employees are

⁶ Non-exempt bargaining unit members have been paid overtime. City fact no. 16.

non-exempt has occurred, only one notice will be required and the potential of confusion as to multiple notices eliminated.

The city thus requests that the court decline to provide notice to potential plaintiffs who are or will be classified as non-exempt until the court has definitively resolved the identities of those individuals. Once a final decision regarding classification has been reached, the city agrees that an appropriate notice, approved by the court, should be sent.

III. CONCLUSION

For the reasons discussed, the city requests that the court deny the Youtz plaintiffs' motion for class certification and dissemination of notice to the class identified. The class is overly broad and should not be certified. If the court deems it appropriate to certify some class, the city has proposed a class which is reasonable and which could appropriately narrow the issues to be decided in a meaningful and manageable manner.

Respectfully submitted,

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