UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

PAULA CRANE and LINDA BREWSTER, on behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	
vs.	)	1:05-cv-1883-JDT-TAB
RESIDENTIAL CRF, INC., and CRF FIRST CHOICE, INC.,	)	
Defendants.	)	

Entry on Motion for Distribution of Notice of Collective Action Under the Fair Labor Standards Act and Motion to Submit Omitted Exhibits (Doc. Nos. 32 & 58)[1]

Plaintiffs Paula Crane and Linda Brewster, on behalf of themselves and others similarly situated, bring this action against Defendants Residential CRF, Inc. and CRF First Choice, Inc., seeking, *inter alia*, unpaid overtime pay. Plaintiffs allege violations of the Fair Labor Standards Act (the "FLSA"), 29 U.S.C. §§ 207 and 213, and state law. Plaintiffs have requested the court to designate this as a collective action and seek distribution of notice to potential plaintiffs. Defendants oppose their motion. Having carefully considered the parties' filings, the court rules as follows.

[1] This Entry is a matter of public record and will be made available on the court's web site. However, the discussion contained herein is not sufficiently novel to justify commercial publication.

I. Background[2]

Defendant Residential CRF, Inc. ("Residential") provides services at numerous group homes located throughout Indiana. Before spring 2002, Residential also provided services at Medicaid waiver or "med-waiver" homes, which received compensation from the Indiana Medicaid program for the services provided clients. In April 2002, Residential transferred its operations of "med-waiver" homes to Defendant CRF First Choice, Inc. ("First Choice"), which was created for this purpose. Some officers of Residential also have positions with First Choice, and the Defendants share some similarities in payroll policies. Defendants have Direct Care Staff, Levels I and II, at both the group and "med-waiver" homes. Level I Direct Care Staff are sometimes referred to as 24/7 staff because they typically work 24 hours per day (with 8 hours allotted for sleep/rest) for 7 straight calendar days and then have the next 7 calendar days off. Level II Direct Care Staff are sometimes referred to as 12/7 staff because they normally work 12 hours a day for 7 straight calendar days, and then have the next 7 calendar days off. Plaintiffs have some evidence that suggests that the job requirements, duties, and responsibilities are the same for all Direct Care Staff regardless of where the staff works.

In Indiana Residential employs less than 100 employees as Direct Care Staff in a total of approximately 15 homes. In Indiana First Choice employs approximately 370 Direct Care Staff, approximately 90 of whom are 12/7 employees, and serves a total of

[2] These facts are taken from the parties' submissions in support of or in opposition to certification, viewed favorably to the Plaintiffs.

approximately 75 med-waiver homes and a total of approximately 180 clients or consumers.

Plaintiff Paula Crane was hired by Residential in 1989 and held various positions until 2001. From 2001 to 2006, Ms. Crane worked in the New Castle med-waiver home, working for both Residential and First Choice. In 2004 First Choice changed her title to Direct Care Staff, although her duties did not change. Ms. Crane no longer works for First Choice. Plaintiff Linda Brewster was hired by Residential in 1989. Since August 1997, she has worked in med-waiver homes for both Residential and First Choice. Prior to June 3, 2004, the Plaintiffs' normal schedule was 24/7. (Crane's Resp. Defs.' First Req. Admission 6; Brewster's Resp. Defs.' First Req. Admission 6.) During this time, both Plaintiffs had occasion to work extra hours in addition to their normal scheduled hours, for either Defendant. After June 3, 2004, both Plaintiffs' normal work schedule was 12/7. (Crane's Resp. Defs.' First Req. Admission 7; Brewster's Resp. Defs.' First Req. Admission 7.)

Though any given Direct Care Staff's duties may vary based on the location where she worked, the shift worked, and the client assisted, Defendants have only one job description for the Direct Care Staff, Levels I and II positions. Defendants concede that the written job descriptions for their Direct Care Staff "are very similar." (Defs.' Resp. 9; *see also id.* at 11 ("Direct Care Staff job descriptions for Residential and First Choice are nearly identical").) The nature of the services provided by Defendants' Direct Care Staff are described by state regulation, Defendants' job descriptions, and have been described by the Plaintiffs. State regulations of the med-wavier services

provided by First Choice include the following: personal care; homemaker; chore; attendant care; companion; medication oversight; and therapeutic, social and recreational programming. *See* 460 Ind. Admin. Code § 8-1-6(a) (2006). Similarly, Residential's services are described by regulation as being "designed to ensure the health, safety, and welfare of an individual, and assist in the acquisition, improvement, and retention of skills necessary for the individual to live successfully in the individual's own home." 460 Ind. Admin. Code § 6-3-46 (2006). The job descriptions states that Direct Care Staff, Level II are to aid and assist the consumer in training situations, including: cleaning of all types; food preparation; activities; and personal hygiene. It also indicates that Level II staff are also responsible for "all other duties required for the safety, health and habilitation of the consumers." (Pls.' Exs. Supp. Pls.' Mem. Supp. Mot. Distribution Notice, Exs. E & F at 2.) The job descriptions state that the major emphasis of the Level I's duties are "in administering those portions of each consumer's daily living skills program . . . [including] personal hygiene, care of personal possessions, nutrition, care of home and grounds . . . ." (*Id.*)

Plaintiffs allege that during their employment with Defendants they were on the job site for at least 84 hours each seven day work period (12 hours per day x 7 days), during which they worked continuously for seven days. However, they claim that each pay period Defendants only compensated them for 80 hours at their regular rate of pay and 4 hours of overtime pay. Thus, Plaintiffs allege that Defendants failed to pay time and a half for all hours worked per week, in excess of 40. In addition, they claim that as house managers or Level I Direct Care Staff they worked at least 168 hours (24 hours

per day x 7 days) in one week, and even subtracting time spent sleeping, were not paid overtime pay for all hours worked over 40 in one week. They aver that Defendants uniformly applied its payroll policies and overtime payment, and thus also failed to properly pay the rest of their Direct Care Staff. Residential has admitted that it uniformly applies its payroll policies and procedures to all of its Indiana locations and intends to apply and implement its payroll procedures the same at all of its Indiana locations. (Pls.' Ex. EE, Defs.' Resp. Pls.' Second Req. Admissions, Req. Nos. 1, 6.) First Choice also has admitted that it uniformly applies its payroll policies to all of its Indiana locations and intends to apply and implement its payroll procedures the same at all of its Indiana locations. (*Id.*)

Defendants use a time frame of Monday to Sunday for scheduling Direct Care Staff, for reporting hours worked on employee time records and for the pay period used to issue pay checks (a two week period from Monday to Sunday). Defendants claim that in June of 2003, First Choice adopted a policy for Level II 12/7 Direct Care Staff to utilize a Thursday to Thursday work week and that this policy has remained unchanged. According to Defendants, only 12/7 Level II First Choice Direct Care Staff have this Thursday to Thursday workweek.

II. FLSA Standard for Collective Action

The FLSA provides that an action may be maintained "by any . . . employee[] for and in behalf of himself . . . and other employees similarly situated" for damages from an employer who has failed to pay overtime as required under the Act. 29 U.S.C. §

216(b). Such an action is known as a collective action. *See Harkins v. Riverboat Servs., Inc.*, 385 F.3d 1099, 1101 (7th Cir. 2004). A collective action furthers the legitimate goals of avoiding a multiplicity of duplicative actions and promoting the FLSA's broad remedial goals. *See generally Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 172-74 (1989). A collective action differs from a Rule 23 class action. Potential plaintiffs in a collective action must join the action by "opting in," whereas, a class action includes any potential plaintiff who does not "opt out." 29 U.S.C. § 216(b) ("No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought."); Fed. R. Civ. P. 23(a) (requiring numerosity, commonality, typicality, and fair representation).

To implement the opt-in provision, the district court has discretion to facilitate notice to potential plaintiffs to a FLSA collective action. *See Hoffmann-LaRoche*, 493 U.S. at 169; *Woods v. N.Y. Life Ins. Co.*, 686 F.2d 578, 580 (7th Cir. 1982) (stating that the court in a FLSA collective action has a "modest duty and power" "to regulate the content and distribution of the notice to potential class members"). Authorization of notice serves the interests noted above as well as serves to promote the efficient resolution of the case. *Hoffmann-LaRoche*, 493 U.S. at 172-74.

In deciding whether to certify a collective action, the court considers the evidence to determine whether the representative plaintiff has made an initial threshold showing that she is similarly situated to the employees whom she seeks to represent. *Coan v. Nightingale Home Healthcare, Inc.*, No. 1:05-cv-0101-DFH-TAB, 2005 WL 1799454, at

*1 (S.D. Ind. June 29, 2005); *Carter v. Indianapolis Power & Light*, No. 1-02-cv-1812-SEB-VSS, 2003 WL 23142183, at *3 (S.D. Ind. Dec. 23, 2003). This showing has been described as "relatively modest." *Coan*, 2005 WL 1799454, at *1; *see also Carter*, 2003 WL 23142183, at *3. Neither the FLSA, the Supreme Court, nor the Seventh Circuit has provided guidance on how the court is to determine whether potential plaintiffs are "similarly situated" to the representative plaintiff.

Courts in the Seventh Circuit have adopted a two-step approach for determining whether a FLSA action can proceed as a collective action. *See, e.g.*, *Austin v. CUNA Mut. Ins. Soc'y*, 232 F.R.D. 601, 605 (W.D. Wis. 2006); *Veerkamp v. U.S. Sec. Assocs., Inc.*, No. 1:04-cv-0049-DFH-TAB, 2005 WL 775931, at *2 (S.D. Ind. Mar. 15, 2005). This approach is as follows:

> In the first step . . . the plaintiff must demonstrate a reasonable basis for believing that she is similarly situated to potential class members. If the plaintiff makes this showing, the court conditionally certifies a class, authorizes notice and the parties conduct discovery. At the close of discovery, the defendant may make a motion for decertification, at which point the court examines in detail the evidence and arguments submitted by the parties on the question of similar situation. If the court finds that any of the opt-in plaintiffs are not similarly situated to the representative plaintiff, it may dismiss them without prejudice. Also, the court may decertify the entire class if none of the class members are similarly situated. However, if the plaintiff demonstrates that the class members are similarly situated, the case proceeds to trial as a class action.

Austin, 232 F.R.D. at 605.

III. Whether Certification is Appropriate

Plaintiffs request the conditional certification of a FLSA collective action and seek notice to "all individuals employed in Indiana by either of the Defendants as Direct Care Staff . . . either Levels I and/or II, who worked a 24/7 shift any time from December 20, 2002, until the present, excluding facilities in Fort Wayne . . . ." (Pls.' Reply Mem. 1-2).[3] Defendants oppose Plaintiffs' efforts to obtain certification, first on the ground that certification is inappropriate because the defense will be based in part on the companionship services exemption to the FLSA's overtime requirements. This, they say, will requiring individualized discovery and analysis as to each potential class member. Defendants also contend argue that if this case is certified, the class should be limited to 12/7 Direct Care Staff of First Choice in the last two years, which they maintain are those employees potentially similarly situated to Plaintiffs.

Defendants first urge the court to follow *Reich v. Homier Distributing Company, Inc.*, 362 F. Supp. 2d 1009 (N.D. Ind. 2005), where the court denied FLSA collective action certification. The plaintiff in *Reich* had been employed as a sales partner by Homier, who allegedly failed to properly pay her for overtime. Homier opposed certification on the ground that its sales partners were exempt from overtime pay requirements under the "loader exemption." The court indicated that whether Reich and

[3] Plaintiffs initially requested notice to "all individuals employed in Indiana by either of the Defendants as Direct Care Staff, Levels I and/or II, from December 20, 2002, until the present, excluding facilities in Fort Wayne" (Pl.'s Mot. 1-2), but modified their request based on discovery. They use a three-year time frame because 3 years is the maximum limitations period, which applies when a FLSA violation is willful. 29 U.S.C. § 255(a).

other sales partners fell under that exemption would depend on whether they spent "a substantial part" of their time performing duties that affected the safety of operation. *Id.* at 1013. The court denied the motion for certification holding that Reich failed to show that she and the other sales partners were similarly situated, because whether any sales partner fell under the exemption would turn on "a highly individualized, fact-specific inquiry" into each partner's specific duties *Id.* The court reasoned that the individual discovery needed to determine those duties "would destroy the economy of scale" intended to be gained by certification. *Id.* at 1015.

Defendants contend that the Direct Care Staff are exempt from FLSA's overtime requirements under the companionship services exemption, 29 U.S.C. § 213(a)(15); 29 C.F.R. § 552.6. Defendants argue that just as with the loader exemption in *Reich*, the highly individualized and fact-specific discovery and analysis required here will eliminate the economy of scale envisioned by the FLSA collective action procedure. While this court considers *Reich*, that decision, which is by another district judge, is not controlling. The plaintiff in *Reich* sought to bring a collective action on behalf of herself and 1,171 other sales partners, a much bigger potential class than that sought here.[4] Thus, the potential impact that individual issues would have on the economy of scale envisioned by the collective action would be much greater in those cases than here where the

[4] Other cases relied on by Defendants are similar in the potential unwieldy size of the collective action. *See, e.g.*, *Holt v. Rite Aid Corp.*, 333 F. Supp. 2d 1265, 1269 (nationwide action requested); *Morisky v. Public Serv. Elec. & Gas Co.*, 111 F. Supp. 2d 493, 498 (D.N.J. 2000) (seeking collective action including all non-supervisory, non-professional employees spanning several salary grades; 100 plaintiffs had already opted-in when motion for certification was under consideration).

Plaintiffs seek an action encompassing no more than a few hundred employees. Moreover, the concern over the need for individualized discovery and analysis as to each plaintiff's duties would seem to exist in almost every case in which a defendant employer asserts the potential plaintiffs are exempt from the FLSA requirements. So it would seem that that concern would frustrate the availability of the collective action procedure.

Defendants also rely on the decertification in *Threatt v. Residential CRF, Inc.*, No. 1:05CV117 WCL, 2005 WL 4631399 (N.D. Ind. Aug. 31, 2005), which involved the same defendant as here, to support their position that certification is inappropriate. As they acknowledge, however, consistent with the minimum burden at the initial step of the collective action inquiry, the *Threatt* court had granted provisional certification earlier in the case. It was only at the second step of the process, following discovery, the passage of the opt-in bar date, and eleven months from provisional certification that the court decertified the class. *Threatt*, 2206 WL 2054372, at *1. While some discovery has been conducted in the instant case, it seems that much more remains to be done, and the deadline for discovery pertaining to FLSA certification is a ways off. (The CMP sets this deadline at three months after the bar date for opting-in, which in turn, is sixty days after the date of the court's approval of collective action notice.) Fifty-seven opt-in plaintiffs had joined *Threatt* when Judge Lee considered the motion to decertify; it is unknown now how many employees may opt-in to this action. It could be much less. This uncertainty gives this court pause before reaching a conclusion that a collective

action would necessarily be completely unworkable, as was concluded in *Threatt*, see *id.* at *14.[5]

The companionship services exemption presents two basic inquiries: (1) whether the services were performed in a "private home," 29 C.F.R. § 552.3, and (2) whether the household work performed by the employee exceeded twenty percent of the total weekly hours worked, 29 C.F.R. § 552.6. In *Welding v. Bios Corp*., 353 F.3d 1214 (10th Cir. 2004), the court held that whether companionship services are provided in a private home is a fact-specific analysis, to be made on a case-by-case analysis of the living unit of the person receiving services. *Id.* at 1218. The court reversed the denial of summary judgment to the employer, concluding that the court improperly evaluated the living units as a whole, rather than individually. *Id.* at 1218-19. Importantly, though, the *Bios* court did not address the precise question presented here – whether conditional certification of a collective action was appropriate. Rather, the issues were considered under a very different posture – following the grant of summary judgment. The decision does not address head on the issue before this court, that is, whether certification is appropriate. Thus, the case's usefulness at this stage is not as great as Defendants would like.

Plaintiffs' evidence suffices to make the modest threshold showing required under the FLSA and persuades the court that certification of a collective action is proper here. Ms. Crane and Ms. Brewster allege that they routinely worked over 40 hours a

[5] The *Morisky* court had cause for greater concern over the potential size of the collective action – the plaintiff cast a wider certification net and 100 plaintiffs had opted-in at the time the motion to certify was under consideration. 111 F. Supp. 2d at 497.

workweek and did not receive proper overtime pay. Each Defendant has admitted that it uniformly applies its payroll policies and procedures to all of its Indiana locations and intends to apply and implement its payroll procedures in the same way same at all of its Indiana locations. Defendants suggest that Plaintiffs do not allege that they were inappropriately paid overtime for any hours worked for Residential. This is incorrect. Further, the fact that Plaintiffs worked primarily for First Choice rather than Residential does not result in the conclusion that only First Choice might owe Plaintiffs overtime.

While the court has considered the evidence submitted by Defendants, it is not convincing enough to outweigh the Plaintiffs' evidence when considered that their burden at this point is quite modest. Depending on the number of potential plaintiffs who opt-in, the defense concerns over unwieldy discovery and analysis may not materialize. And the applicability of the companionship services exemption is not as clear as Defendants might have it. It is possible that the availability of the exemption as a defense may be resolved on the basis of the percentage of time spent doing general household duties.[6]

Defendants' response contends that if provisional certification is granted, then the action should be limited to Direct Care Staff of First Choice in the last two years because Plaintiffs normally worked for First Choice and have not shown that any alleged FLSA violation was willful. The Plaintiffs have offered enough to keep

[6] Defendants make what seems like a novel argument that the percentage of time spent on general household duties should not count against the exemption because Direct Care Staff employees do this work with the consumers. (*See* Def.'s Resp. Opp'n Pls.' Mot. 30.)

Residential in this case. Though Plaintiffs may have worked primarily for First Choice, they also worked for Residential and there is enough of a question regarding the interrelationship between the two Defendants and between Residential and the Plaintiffs to encompass Direct Care Staff who worked shifts for Residential.

Defendants maintain that if there was any FLSA violation, the evidence strongly shows it was not willful. They point to the Department of Labor investigation from August 2002 to August 2004 which found that First Choice was in compliance and had no violations. The Compliance Report, however, is dated November 30, 2004. Even if First Choice could rely on this to show any violation after that date was not willful, it would be hard pressed to maintain that it could have relied on the report before it existed, that is, before November 30, 2004. Moreover, it is simply too early to tell whether any FLSA violation was or was not willful. Limiting Plaintiffs to a two-year period approaches a substantive decision regarding willfulness, a decision which would be inappropriate at this certification stage. *See Hoffmann-La Roche*, 493 U.S. at 174 (indicating that courts considering certification "must be scrupulous to respect judicial neutrality . . . [and] must take care to avoid even the appearance of judicial endorsement of the merits of the action").

Defendants' surreply argues that the action should be limited to individuals employed as 24/7 Direct Care Staff employed by Residential before December 1, 2004, or First Choice before February 9, 2005. This argument rests on Defendants' view that Plaintiffs have testified that when a 12/7 employee filled in for a 24/7 shift, that employee was compensated for all extra hours worked on the 24/7 shift at his or her

12/7 overtime rate. The cited pages of the depositions do not support this view, however. Plaintiffs testified that when they were 12/7 employees and picked up extra hours in their off week, they were paid overtime or time and a half for those extra hours. They do not, however, state that the extra hours were worked on a 24/7 shift. (*See* Crane Dep. 63-64; Brewster Dep. 63.) Further, to decide that any FLSA violation ceased upon the change in the way payroll was entered in Defendants' software is getting too close to deciding part of the case on the merits. The court refrains from this. *See Hoffmann-La Roche*, 493 U.S. at 174 (courts "must take care to avoid even the appearance of judicial endorsement of the merits of the action").

Finally, Defendants seem to suggest that the limitations period for potential plaintiffs' would be calculated backward from the date they opt into this case. (Def.'s Resp. 33, 35.) The case cited for support, *Harkins v. Riverboat Services, Inc.*, 385 F.3d 1099, 1101 (7th Cir. 2004), does not establish this.[7] Generally, a cause of action accrues from the time a plaintiff knows or reasonably should have known that he or she has been injured. It seems the relevant date would be the date of the filing of the complaint which commenced the action. 29 U.S.C. § 255 ("Any action commenced . . . to enforce any cause of action for . . . unpaid overtime compensation . . . may be commenced within two years after the cause of action accrued, and every such action

[7] That might be the case had the Secretary of Labor brought this action. 29 U.S.C. § 216(c) ("In determining when an action is commenced by the Secretary of Labor under this subsection for purposes of the statutes of limitations provided in section 255(a) . . . it shall be considered to be commenced in the case of any individual claimant . . . if his name did not . . . appear [in the complaint], on the subsequent date on which his name is added as a party plaintiff in such action.").

shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued . . . .").

Plaintiffs' filings with respect to the motion for distribution of notice do not appear to contain any proposed language for the notice. They will be afforded an opportunity to provide a proposed notice and Defendants will be afforded an opportunity to make any objection thereto.

IV. Conclusion

The Plaintiffs' Motion for Distribution of Notice of Collective Action Under the FLSA (Doc. No. 32) is **GRANTED**. The court **ORDERS** that this action shall proceed as a FLSA collective action pursuant to 29 U.S.C. § 216(b) and notice shall be sent to all individuals employed in Indiana by Residential CRF, Inc. or CRF First Choice, Inc. as Direct Care Staff, either Levels I and/or II, who worked a 24/7 shift any time from December 20, 2002, until the present, excluding those individuals who only worked at facilities in Fort Wayne, Indiana.

Plaintiffs have until **January 2, 2007**, within which to file a proposed Notice of FLSA Collective Action. Defendants have until **January 16, 2007**, within which to file any objection.

The Plaintiffs' Motion to Submit Omitted Exhibits is **DENIED**.[8]

ALL OF WHICH IS ORDERED this 22nd day of December 2006.

John Daniel Tinder, Judge
United States District Court

Copies to:

Magistrate Judge Tim A. Baker

Amy Ficklin DeBrota
The DeBrota Law Firm LLC
amy@debrotalaw.com

Kevin Joseph Gfell
Hall Render Killian Heath & Lyman
kgfell@hallrender.com

John Patrick Ryan
Hall Render Killian Heath & Lyman
jpryan@hallrender.com

Kathleen M. Sweeney
ksween@gmail.com

Craig M. Williams
Hall Render Killian Heath & Lyman
cwilliams@HallRender.com

[8] Plaintiffs seek leave to file omitted exhibits from their motion for leave to file sur-reply and their sur-reply. The exhibits were to be filed in support of the sur-reply. Magistrate Judge Tim A. Baker has denied their motions for leave to file sur-reply. There would be little to gain by allowing the filing of the omitted exhibits when the court has already decided not to allow the sur-reply. Therefore, the motion for leave to file omitted exhibits is likewise **denied**.