UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

ARNELLE MORA, individually, and on behalf of all others similarly situated, Plaintiff, v. U.S. BANCORP AND U.S. BANK NATIONAL ASSOCIATION, Defendants.	Case No. 24-CV-4112 (NEB/EMB) ORDER

Plaintiff Arnelle Mora, joined by four opt-in plaintiffs, moved for conditional certification of a proposed collective pursuant to 29 U.S.C. Section 216(b), which governs collective actions under the Fair Labor Standards Act ("FLSA"). United States Magistrate Judge Dulce J. Foster granted the motion in part and conditionally certified the proposed FLSA collective. (ECF No. 52 ("Order").) Defendants U.S. Bancorp and U.S. Bank National Association object to the conditional certification. (ECF No. 57.) For the reasons below, Defendants' objection is overruled, and the Order is affirmed.

BACKGROUND

Mora and the opt-in plaintiffs are current or former call center agents[1] ("CCAs") employed by Defendants, both of which are headquartered in Minneapolis. (ECF No. 1

[1] The Order refers to Mora and the opt-in plaintiffs as customer service representatives, or CSRs, likely because they refer to their positions as call center CSRs or CSRs in their declarations. (ECF Nos. 33-5 ¶ 2, 33-6 ¶ 2, 33-7 ¶ 2, 33-8 ¶ 2, 50-3 ¶ 2, 50-4 ¶ 2, 50-5 ¶ 2.)

("Compl.") ¶¶ 2, 23–27.) Mora contends that Defendants violated the FLSA by requiring CCAs to engage in unpaid pre-shift work. To be call-ready for their shifts each day, CCAs are required to power up their computers, enter their username and password, connect to Defendants' virtual private network, and open their work programs. (*E.g.*, ECF No. 33-5 ¶ 13.) According to the complaint, Defendants had a common policy and practice of failing to compensate CCAs for time spent on this pre-shift bootup process, in willful violation of the FLSA. (Compl. ¶¶ 2–3, 7, 36–37, 39, 41, 50–53, 57, 62, 70.) This putative collective action seeks to address the alleged FLSA violation.

Mora moved for conditional certification of a proposed FLSA collective consisting of "[a]ll current and former hourly call center employees who worked for Defendants at any time in the past three years" ("FLSA Collective"). (ECF No. 32 at 1.[2]) She provided her Supporting Declaration, attesting that "Defendants instructed [CCAs] . . . to be 'call ready' (i.e. prepared to accept or make calls) at the start of our scheduled shifts but prohibited [CCAs] from clocking in before beginning the tasks we were required to perform to be 'call ready' before the start of our scheduled shifts." (*E.g.*, ECF No. 33-5 ¶ 8.) Mora asserts that she had to begin working at least ten minutes before her scheduled

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Defendants maintain that call center agents hold a different position from CSRs. (ECF No. 57 at 2–3; ECF No. 57-1 ¶¶ 9–12.) Because the complaint alleges that they are "current or former call center agents," and Mora seeks a conditional certification of a collective of "call center employees" (Compl. ¶ 2; ECF No. 32 at 1), the Court refers to these positions as "CCAs."

[2] All page citations to the record reference ECF pagination.

shift, and before clocking in, to perform start-up and log-in activities. (*Id.* ¶ 15.) She also claims that Defendants did not compensate her for this time "because Defendants prohibited [CCAs] . . . from clocking in before beginning the boot-up and login process," and that "[t]o the extent Defendants may have written policies that required their employees to be paid for all hours worked, including overtime, the reality is that Defendants did not follow these policies." (*Id.* ¶¶ 15, 20.) Three opt-in plaintiffs provided similar Supporting Declarations. (ECF Nos. 33-6 ¶¶ 8, 16, 21; ECF No. 33-7 ¶¶ 8, 15, 20; ECF No. 33-8 ¶¶ 8, 16, 21.)

Defendants opposed the conditional certification of the FLSA Collective, arguing that Mora's brief and the Supporting Declarations were copied-and-pasted from other lawsuits involving different timekeeping systems. According to Defendants, Mora and the opt-in plaintiffs misrepresented the time-recording program, which requires CCAs to input their time worked *manually*. Defendants contended that their policy and practice was to compensate CCAs for all time worked, including time spent booting up their computers. Defendants' Time and Pay Policy instructs employees to accurately report their time but also notes that employees should not work overtime without advance approval, and if they do not obtain advance approval, they "may face disciplinary action, up to and including termination of employment." (ECF No. 38-1 at 5.) Defendants' Employee Payroll Expectations Policy requires employees to log in and "be ready to handle calls, or be in production, within five minutes of your shift start time." (*Id.* at 10.)

In reply, Mora and two opt-in plaintiffs provided Supplemental Declarations attesting that they "used a manual timekeeping program that required [CCAs] to manually enter our start and end of shift times," and that Defendants did not train them to identify the time they turned on their computers as "clock in" time in the manual timekeeping program, among other averments. (ECF No. 50-3 ¶¶ 2–3; ECF No. 50-4 ¶¶ 2–3; ECF No. 50-5 ¶¶ 2–3.) Mora also attested to working before her clock-in time because (1) "Defendants' policies and procedures required [CCAs] . . . to obtain preapproval from a manager before working more than 40 hours in a workweek and a failure to obtain this approval could result in disciplinary action, including termination;" and (2) "Defendants maintained an attendance policy that would mark [CCAs] . . . as 'absent' if we were not 'call ready' as instructed." (ECF No. 50-3 ¶ 5; *see also* ECF No. 50-4 ¶ 4 (opt-in plaintiff attesting that his supervisor instructed him not to identify pre-shift boot-up time as his "clock-in" time); ECF No. 50-5 ¶¶ 4–5 (similar).)

Judge Foster conditionally certified the FLSA Collective, concluding that the Supporting and Supplemental Declarations supported the allegations, noting that Mora "point[ed] to the specific policies that Defendants acknowledge apply as additional support for her claims. This is enough for conditional certification." (Order at 12.) Defendants now object to and appeal the conditional certification. (ECF No. 57 at 1.)

ANALYSIS

I. Standard of Review

Because Defendants appeal an order from a magistrate judge on a nondispositive matter, the Court's review is limited to determining whether the Order is "clearly erroneous or is contrary to law." Fed. R. Civ. P. 72(a); D. Minn. LR 72.2(a)(3)(A); *see Holaway v. Stratasys, Inc.*, No. 12-CV-998 (PAM/JSM), 2012 WL 12895690, at *2 (D. Minn. Oct. 30, 2012) (applying this standard to a magistrate judge's order certifying a conditional collective action under the FLSA); *Roble v. Celestica Corp.*, 627 F. Supp. 2d 1008, 1014–15 (D. Minn. 2007) (similar).

Citing no supporting legal authority, Defendants assert that conditionally certifying an FLSA collective action should be treated the same as Rule 23 class certification, and thus the Court should apply a *de novo* standard. (ECF No. 57 at 6–7 & n.2.) This District's Local Rules instruct otherwise. *Compare* D. Minn. LR 7.1(b)(4)(A)(v) (nondispositive motions must be heard by the magistrate judge, including "motions to conditionally certify a case as a collective action"), *with* D. Minn. LR 7.1(c)(6)(C) (dispositive motions must be heard by the district judge, including "motions to certify a class action"). "Rule 23 actions are fundamentally different from collective actions under the FLSA." *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 74 (2013); *see Kloos v. Carter-Day Co.*, 799 F.2d 397, 400 (8th Cir. 1986) (noting that an FLSA collective action "is unlike the class action procedures of Rule 23, where parties are automatically included in the

class unless they opt out"). The Court thus declines Defendants' invitation to apply a *de novo* standard of review.

II. Conditional Certification

The FLSA authorizes aggrieved employees to bring a collective action on behalf of themselves and "other employees similarly situated." 29 U.S.C. § 216(b). "The sole consequence of conditional certification is the sending of court-approved written notice to employees, who in turn become parties to a collective action only by filing written consent with the court." *Symczyk*, 569 U.S. at 75 (citation omitted) (noting among others, 29 U.S.C. § 216(b)).

A court may grant conditional certification and authorize notice only if the named plaintiffs "show that they are 'similarly situated to the employees whom they seek to represent.'" *Vallone v. CJS Sols. Grp., LLC*, 437 F. Supp. 3d 687, 689 (D. Minn. 2020) (citing *Parker v. Rowland Express, Inc.*, 492 F. Supp. 2d 1159, 1163 (D. Minn. 2007)), *aff'd*, 9 F.4th 861 (8th Cir. 2021). In this Circuit, courts follow a two-stage process to determine whether named plaintiffs are "similarly situated" to putative class members. *Id.*; *see Parker*, 492 F. Supp. 2d at 1164.

> At the initial stage, the court determines whether the class should be conditionally certified for notification and discovery purposes. At this conditional certification stage, the plaintiffs need only come forward with evidence establishing *a colorable basis for their claim that the putative class members were together the victims of a single decision, policy, or plan* . . . . At the second stage . . . the court uses a stricter standard for determining whether the putative class members are similarly situated and reconsiders whether the trial should proceed collectively or if it should be severed.

Vallone, 437 F. Supp. 3d at 689 (emphasis added, citation omitted) (granting conditional certification of an FLSA collective action).

This action is at the initial stage, so Mora need only present "evidence establishing a colorable basis that the putative class members are the victims of a single decision, policy, or plan." *Le v. Regency Corp.*, 957 F. Supp. 2d 1079, 1092 (D. Minn. 2013) (citation omitted) (granting conditional certification of an FLSA collective action). "The plaintiffs' burden at the [initial] stage is a light one."[3] *Vallone*, 437 F. Supp. 3d at 689 (citation omitted); *see Le*, 957 F. Supp. 2d at 1092 ("The certification standard at this initial stage is low."). "Determination of class status at the [initial] stage is granted liberally because the court has minimal evidence for analyzing the class." *Chin v. Tile Shop, LLC*, 57 F. Supp. 3d 1075, 1082 (D. Minn. 2014) (granting conditional certification of an FLSA collective action).

The Order concluded that Mora had identified "specific written companywide policies" supporting her FLSA allegations, including:

> Defendants' Employee Payroll Expectations Policy that directs [CCAs] to log their time after starting their computers and be "call ready" within five

[3] Defendants argue that the standard for conditional certification of an FLSA collective action should be higher. (ECF No. 57 at 8 n.3.) They point to the Supreme Court's decision in *E.M.D. Sales, Inc. v. Carrera*, which held that "the preponderance-of-the-evidence standard applies when an employer seeks to show that an employee is exempt from the minimum-wage and overtime-pay provisions of the [FLSA]." 604 U.S. 45, 54 (2025). Judge Foster concluded that *E.M.D. Sales* did not apply here because it did not address a plaintiff's burden of proof at the initial conditional-certification stage of a collective action. (Order at 8 n.1.) This conclusion is neither clearly erroneous nor contrary to law.

> minutes (ECF No. 38-1 at 10), and Defendants' Time and Pay Policy that requires [CCAs] to log their time accurately, but threatens termination for failure to seek prior approval before logging overtime work (ECF No. 38-1 at 3-5). Taken together, these policies assume [CCAs] will need no more than five minutes of time to complete the start-up process. Otherwise, they are faced with a Hobson's choice: either start work early and exclude pre-shift work in recording their start times; or record actual pre-shift start times and risk discipline for incurring unapproved overtime.

(Order at 13.) And so, Mora "made at least a colorable claim that those same policies, when taken together, created inconsistent incentives to write off pre-shift work, and proffered declarations stating that this is what actually happened in practice." (*Id.* at 14.) Given the minimal burden at this stage of the proceedings, the Court finds that the Order granting conditional certification is neither clearly erroneous nor contrary to law.

Defendants assert several specific alleged errors:

First, Defendants contend that Judge Foster erred by permitting Mora "to present a new theory, declarations, and arguments in her Reply." (ECF No. 57 at 8–10.) Having reviewed Mora's reply and Supplemental Declarations and the context in which they were submitted, the Court finds no clear error. Declarations "may appropriately be produced with a reply brief when they respond to new issues which have arisen during briefing." *Graning v. Sherburne Cnty.*, 172 F.3d 611, 614 n.2 (8th Cir. 1999) (holding that the district court did not abuse its discretion when it considered affidavits provided with a reply brief that responded to new issues raised during summary judgment briefing); *see generally* D. Minn. LR 7.1(b)(2) 1999 advisory committee's note (explaining that, in the context of dispositive motions, Rule 7.1(b)(2) "neither permits nor prohibits the moving

party from filing affidavits or other factual material" with a reply memorandum). The Supplemental Declarations respond to Defendants' argument that Mora and the opt-in plaintiffs alleged a different type of timekeeping system; the Supplemental Declarations clarify that they entered their time manually. If Defendants had an issue with these declarations, they should have moved to strike them or moved for leave to file a sur-reply. Defendants failed to raise the issue with Judge Foster, so they (arguably) waived this objection.

Second, Defendants assert that the Order improperly relied on declarations that fail to demonstrate personal knowledge. The Supporting and Supplemental Declarations appear to reflect the declarants' personal knowledge.[4] And while Defendants challenge the declarations, the Court need "not make any credibility determinations or findings of fact with respect to contrary evidence presented by the parties" at this initial stage. *Chin*, 57 F. Supp. 3d at 1083. Arguments about "the individualized inquiries required and the merits of [Mora's] claims are inappropriate at this stage of the litigation. Such arguments may be raised at the decertification stage." *Le*, 957 F. Supp. 2d at 1092–93.

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[4] Defendants also complain that the Order "does not even mention that Plaintiffs reused briefs and declarations that did not describe the timekeeping systems or policies here." (ECF No. 57 at 9.) Not so. The Order considered Defendants' argument that Mora "simply recycled her brief and declarations from other cases," and concluded that "[w]hether similar declarations support allegations in other lawsuits does not negate the fact that Plaintiff's Supporting and Supplemental Declarations support the allegations in *this* case." (Order at 11–12.)

Third, Defendants argue that the Order granted conditional certification despite the lack of evidence of an unwritten, companywide policy to violate Defendants' lawful written policies.[5] "[T]he mere existence of written policies that comply with the FLSA is irrelevant if Plaintiffs show practices in violation of that policy." *Hussein v. Cap. Bldg. Servs. Grp., Inc.*, 152 F. Supp. 3d 1182, 1193 (D. Minn. 2015) (quotation marks and citation omitted). Mora provided declarations attesting that Defendants' written policies required preapproval for overtime and that failure to obtain it could result in termination, as well as examples of CCAs being instructed not to identify pre-shift time as clock-in time. (*See* ECF No. 50-3 ¶ 5; ECF No. 50-4 ¶ 4; ECF No. 50-5 ¶¶ 4–5.) At this initial stage, the mere fact that Defendants have a policy requiring employees to record all work time does not defeat Mora's Motion for Conditional Collective Certification given the evidence that the policies, when taken together, created incentives to write off pre-shift work, particularly when supervisors instructed CCAs to not report pre-shift work. *See Le*, 957 F. Supp. 2d at 1092; *Burch v. Qwest Commc'ns Int'l, Inc.*, 500 F. Supp. 2d 1181, 1188 (D. Minn. 2007).

Finally, Defendants contend that the Order erred in conditionally certifying the FLSA Collective because the declarations of four CCAs out of 15,500 employees, or 0.026% of the putative collective, is not representative. (ECF No. 57 at 16.) "[C]ourts in this District and the Eighth Circuit have not required a threshold percentage of opt-ins

[5] Defendants assert that the policies on which the Order is based are lawful. The Order concluded that "those same policies, *when taken together*, created inconsistent incentives to write off pre-shift work." (Order at 14 (emphasis added).)

for conditional certification." *Deutsch v. My Pillow, Inc.*, No. 20-CV-318 (SRN/ECW), 2020 WL 7351556, at *10 (D. Minn. Dec. 15, 2020) (quotation marks and citation omitted). "[T]here is no numerical baseline that plaintiffs must meet," and "whether a plaintiff has shown sufficient opt-in interest is necessarily a case-specific inquiry that will turn on case-specific facts." *Id.* (quotation marks and citation omitted). The Order relies on two cases in which large putative member collective actions were certified with two or three plaintiff declarants. (Order at 15–16 (citing *Preston v. World Travel Holdings, Inc.*, No. 1:23-CV-12389-JEK, 2024 WL 519548 (D. Mass. Feb. 9, 2024); *Padan v. W. Bus. Sols., LLC*, No. 2:15-CV-00394-GMN-CWH, 2016 WL 304303 (D. Nev. Jan. 25, 2016)).) Doing so was neither clearly erroneous nor contrary to law.

For the reasons above, the Court concludes that the Order contains no clear error and is not contrary to law.

CONCLUSION

Based on the above and on all the files, records, and proceedings here, IT IS HEREBY ORDERED THAT:

1. Defendants' objection to the June 30, 2025 Order granting in part Plaintiff's Motion for Conditional Collective Certification (ECF No. 57) is OVERRULED; and

2. The June 30, 2025 Order (ECF No. 52) is AFFIRMED.

Dated: October 27, 2025

BY THE COURT:

s/Nancy E. Brasel
Nancy E. Brasel
United States District Judge