

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

ANDREW FITCH,	)	
RICHARD D’ALESSANDRO, and	)	Consolidated Civil Action No. 2:18-cv-01534-
MICHAELLE HUTCHISON, individually	)	RJC-CRE
and on behalf of all others similarly situated,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
GIANT EAGLE, INC., d/b/a GETGO CAFÉ	)	
+ MARKET,	)	
	)	
Defendant.	)	
	)	
_____	)	
	)	
JORDAN JONES,	)	
ROBERT LEMUS, and	)	
JASON REED, individually and on behalf of	)	
all other similarly situated,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
GIANT EAGLE, INC.,	)	
	)	
Defendant.	)	

**MEMORANDUM OPINION**

Robert J. Colville, United States District Judge

Before the Court is Chief Magistrate Judge Cynthia Reed Eddy’s October 28, 2020 Report and Recommendation (ECF No. 199), which recommends that this Court grant Plaintiffs’ Motions for Conditional Certification (ECF Nos. 110 and 111) and that the court issue notice to the putative opt-in plaintiffs. Defendant Giant Eagle, Inc. (“Giant Eagle”) filed timely Objections (ECF No. 200) to Judge Eddy’s Report and Recommendation asserting that the Report and Recommendation

committed several purported errors of law and fact. Plaintiffs filed a Response in Opposition (ECF No. 203) to Giant Eagle's Objections on December 7, 2020. Giant Eagle filed a Reply in Support (ECF No. 206) of their Objections on December 16, 2020. This matter has been fully briefed, and is ripe for disposition. For the reasons discussed below, the Court will overrule Giant Eagle's Objections and will accept and adopt Judge Eddy's Report and Recommendation in its entirety as the opinion of the Court with respect to Plaintiffs' Motions for Conditional Certification.

### **I. Background**

The Court hereby accepts, adopts, and incorporates herein by reference the Report and Recommendation's recitation of the relevant background in this matter with respect to Plaintiffs' Motions for Conditional Certification. *See* Report and Recommendation 2-5, ECF No. 199. As aptly described in the Report and Recommendation:

Plaintiffs are a putative class/collective of current and former employees who allege that Giant Eagle uniformly misclassified Team Leaders ("TLs") and Team Leader Trainees ("TL Trainees") and Senior Team Leaders ("STLs") [and] Senior Team Leader Trainees ("STL Trainees") (collectively "S/TLs" and "S/TL Trainees") as salaried employees and failed to pay them overtime compensation for working above 40 hours a week in violation of the FLSA.

Report and Recommendation 2, ECF No. 199 (footnotes omitted).

### **II. Legal Standard**

A district court reviews objections to a magistrate judge's decision on non-dispositive matters to determine whether any part of the order is clearly erroneous or contrary to law. 28 U.S.C. § 636(b)(1)(A); Fed. R. Civ. P. 72(a). "This standard requires the District Court to review findings of fact for clear error and to review matters of law de novo." *Equal Employment Opportunity Comm'n v. City of Long Branch*, 866 F.3d 93, 99 (3d Cir. 2017) (citing *Haines v. Liggett Grp. Inc.*, 975 F.2d 81, 91 (3d Cir. 1992)). A district court may only modify or set aside those parts of the order on non-dispositive matters that it finds to be clearly erroneous or contrary

to law. *Id.* “A finding is ‘clearly erroneous’ when, ‘although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.’” *Pennsylvania, Dep’t of Envtl. Prot. v. Allegheny Energy, Inc.*, No. 2:05-cv-885, 2007 WL 2253554, at \*1 (W.D. Pa. Aug. 3, 2007) (quoting *Anderson v. City of Bessemer*, 470 U.S. 564, 573 (1985)). “A magistrate judge’s order is contrary to law ‘when the magistrate judge has misinterpreted or misapplied the applicable law.’” *Brandon v. Burkhardt*, No. 1:16-cv-177, 2020 WL 85494, at \*2 (W.D. Pa. Jan. 7, 2020) (quoting *Doe v. Hartford Life & Accident Ins. Co.*, 237 F.R.D. 545, 548 (D.N.J. 2006)).

### **III. Discussion**

Giant Eagle’s Objections assert three errors of law with respect to Judge Eddy’s Report and Recommendation, and specifically assert that: (1) because some discovery has been exchanged in this matter, Judge Eddy erred in not applying a heightened burden of proof with respect to Plaintiffs’ Motions for Conditional Certification, *see* Objections 2 n.1, ECF No. 200; (2) the Report and Recommendation erroneously “applied a ‘some of the employees’ standard—finding conditional certification appropriate upon a modest showing that only some of the putative class members are similarly situated,” *id.* at 2-3; and (3) that the Report and Recommendation does not sufficiently apply or address the “primary duties test,” *id.* at 3. Giant Eagle also asserts throughout its Objections that, even if the Report and Recommendation applied the correct legal standard, Judge Eddy erred in determining that Plaintiffs have set forth sufficient facts to satisfy their burden at this stage of the litigation process as to conditional certification.<sup>1</sup>

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<sup>1</sup> Such assertions involve findings of fact, and the Report and Recommendation’s findings of fact are subject to review for clear error. *City of Long Branch*, 866 F.3d at 99 (citing *Haines*, 975 F.2d at 91).

Upon review of Judge Eddy's October 28, 2020 Report and Recommendation, Giant Eagle's Objections, all relevant briefing, as well as a review of the entire record in this matter, the Court finds as follows:

Initially, with respect to Giant Eagle's assertion that the Report and Recommendation should be reversed because it applied the "modest factual showing" standard to Plaintiffs' Motions for Conditional Certification as opposed to a heightened "modest-plus" standard, the Court agrees with Judge Eddy's description of the legal standard which generally applies at the conditional certification stage and with her well-reasoned analysis respecting her determination that a heightened standard should not apply at this stage of the proceedings in this particular matter. *See* Report and Recommendation 5-8, ECF No. 199. The Report and Recommendation clearly and accurately describes the status of discovery in this case, as well as case law relevant to this issue, *id.* at 6-8, and the Court finds that Judge Eddy did not misinterpret or misapply applicable law in applying the "modest factual showing" standard, as opposed to a heightened "modest-plus" standard, to Plaintiffs' Motions for Conditional Certification. Giant Eagle's Objection which asserts otherwise is meritless, and will be overruled.

In asserting its Objection that the Report and Recommendation erroneously "applied a 'some of the employees' standard—finding conditional certification appropriate upon a modest showing that only some of the putative class members are similarly situated," Giant Eagle relies entirely on the Report and Recommendation's citation to *Vasil v. Dunham's Athleisure Corp.*, 2015 WL 7871360 (W.D. Pa. Dec. 4, 2015), and specifically on the following excerpt from the Report and Recommendation:

Plaintiffs have therefore met their burden of showing of "an identifiable class of employees within which some of the employees were subjected to an alleged unlawful policy or practice in a manner that will permit a finding that the employees were similarly situated[.]" *Vasil*, 2015 WL 7871360, at \*3[.]

Report and Recommendation 10, ECF No. 199. The Court finds that Giant Eagle's Objection asserting that the Report and Recommendation applied a more lenient standard than the appropriate "modest factual showing" standard lacks merit.

As noted above, the Court agrees with the Report and Recommendation's recitation of the legal standard which generally applies at the conditional certification stage. The Report and Recommendation clearly and accurately describes this legal standard, and goes on to apply that standard to the record before the Court. Conditional certification "requires a named plaintiff to make a 'modest factual showing' – something beyond mere speculation – to demonstrate a factual nexus between the manner in which the employer's alleged policy affected him or her and the manner in which it affected the proposed collective action members." *Halle v. W. Penn Allegheny Health Sys. Inc.*, 842 F.3d 215, 224 (3d Cir. 2016) (quoting *Zavala v. Wal Mart Stores Inc.*, 691 F.3d 527, 536 n.4 (3d Cir. 2012)). As noted by Plaintiffs, "the only evidence at the conditional certification stage demonstrating that an identifiable class of employees have been subject to an alleged unlawful policy or practice is the evidence put forward by some of the employees, namely the plaintiff and any individuals who join prior to conditional certification." Resp. in Opp'n 5, ECF No. 203 (emphasis omitted). The Report and Recommendation's citation to *Vasil* does not imply that Judge Eddy applied some lesser standard to Plaintiff's Motions for Conditional Certification, but rather acknowledges that the record before the Court at the time of conditional certification is not complete.

The Court finds that Judge Eddy applied the appropriate "modest factual showing" standard under Third Circuit precedent to Plaintiffs' Motions for Conditional Certification. For the reasons discussed above, the Court will overrule Giant Eagle's Objection which asserts that the Report and Recommendation applied a legal standard that was more lenient than the "modest

factual showing” standard. Any further Objection as to whether the Report and Recommendation erred in determining that Plaintiffs met their burden under the “modest factual showing” standard is unrelated to Giant Eagle’s assertion that Judge Eddy applied the incorrect legal standard to Plaintiffs’ Motion for Conditional Certification, and will be addressed below subject to review for clear error.<sup>2</sup>

Giant Eagle’s Objection which asserts a legal error on the basis that the Report and Recommendation does not sufficiently apply or address the “primary duties test” is also misplaced. As set forth in the Report and Recommendation, “Giant Eagle posits many arguments which would require the court to weigh evidence and resolve factual disputes and are better suited for stage two certification upon a completed record . . . .” Report and Recommendation 9, ECF No. 199. The Court again finds that this assertion of error tends to take issue with the Report and Recommendation’s factual determination that Plaintiffs have met their burden of making a “modest factual showing” that the putative collective is similarly-situated, as opposed to a legal error respecting the Report and Recommendation’s failure to entirely resolve the primary duties issue at this stage. *See* Reply 4, ECF No. 206 (arguing that Plaintiffs “have the burden at the conditional certification stage to make at least a modest factual showing that they are similarly situated as to their primary duties. . . . Plaintiffs fail to do so.”). The Court finds that Judge Eddy neither misinterpreted nor misapplied the law in not resolving Giant Eagle’s merits-based defenses at the conditional certification stage. *See Bowser v. Empyrean Servs., LLC*, 324 F.R.D. 346, 352

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<sup>2</sup> The Court notes that Giant Eagle’s primary argument in support of its “some of the employees” Objection, which purports to assert an error of law, seemingly relies on Giant Eagle’s assertion that the record does not support a finding that Plaintiffs set forth sufficient facts to satisfy their burden under the “modest factual showing” standard. *See* Reply 2, ECF No. 206 (“The Court is faced with a record establishing that the named Plaintiffs and existing opt-ins are not even similarly situated to each other.” (emphasis omitted)); *see also id.* (“Plaintiffs offer no response to the point that if ‘some of the employees’ already in the case are dissimilar, then no collective action encompassing those employees can proceed.” (emphasis omitted)). As noted above, such assertions involve findings of fact, and the Report and Recommendation’s factual determinations are subject to review for clear error. *City of Long Branch*, 866 F.3d at 99 (citing *Haines*, 975 F.2d at 91).

(W.D. Pa. 2018) (“Whether individualized determinations will predominate and render this case unsuitable for a collective action is ‘more appropriately reviewed during step two of the certification process.’” (quoting *Rocha v. Gateway Funding Diversified Mortgage Servs., L.P.*, 2016 WL 3077936, at \*9 (E.D. Pa. June 1, 2016))); *see also Stallard v. Fifth Third Bank*, No. 2:12-CV-01092, 2013 WL 12308493, at \*3 (W.D. Pa. Dec. 12, 2013) (“Defendant may turn out to be correct on the merits, but unless [it is] patently clear that Plaintiffs cannot prevail as a matter of law (which is not the case now on the record before the Court), or that the commonality of generally applicable employment and compensation policies necessarily pales in comparison to individualized determinations of liability (and in the Court’s estimation it does not, at least at this point), an examination of the merits of the claims and defenses does not occur at this stage of the proceedings.” (citing *Hively v. Allis-Chalmers Energy, Inc.*, 2013 WL 5936418, at \*7 (W.D. Pa. Nov. 5, 2013))); *Goodman v. Burlington Coat Factory*, No. CIV.A. 11-4395 JHR, 2012 WL 5944000, at \*5 (D.N.J. Nov. 20, 2012) (“At this stage, the Court’s role is not to evaluate the merits of Plaintiffs’ claim that Burlington misclassifies ASMs as ‘exempt’; rather, the Court’s role is to determine whether Mr. Goodman has made a modest factual showing of the manner in which this allegedly unlawful policy affected him and the way it affected other Burlington ASMs.”); *Frischia v. Panera Bread Co.*, No. CV163754ESSCM, 2018 WL 3122330, at \*8 (D.N.J. June 26, 2018) (“This argument is inappropriate at the notice stage, however, because it goes to Panera’s merits defenses.”).

To the extent that Giant Eagle’s Objection takes issue with the Report and Recommendation’s factual determination that Plaintiffs met their burden under the “modest factual showing” standard, the same will be addressed below. To the extent that Giant Eagle’s Objections assert that Judge Eddy should have resolved Giant Eagle’s merits-based defenses at the conditional

certification stage in this action, the Court finds that the Report and Recommendation correctly applied the applicable law and will thus overrule any such Objection raised by Giant Eagle.

Finally, with respect to Giant Eagle's Objections asserting that the Report and Recommendation erroneously determined that Plaintiffs have met their burden of making "a 'modest factual showing' – something beyond mere speculation – to demonstrate a factual nexus between the manner in which the employer's alleged policy affected him or her and the manner in which it affected the proposed collective action members," *Halle*, 842 F.3d 215, 224 (quoting *Zavala*, 691 F.3d at 536 n.4), the Court again notes that Judge Eddy's determination in this regard is subject to review for clear error, *City of Long Branch*, 866 F.3d at 99 (citing *Haines*, 975 F.2d at 91). The Report and Recommendation provides:

Turning to the substance of the conditional certification motions, Plaintiffs have made a modest factual showing that S/TLs and Trainees were subjected to the Giant Eagle policy which considered S/TLs and Trainees exempt from the FLSA under the executive exemption, were paid on a salary basis, had little or no management duties and primarily performed manual, nonexempt tasks, worked overtime and were not paid overtime wages.

Report and Recommendation 8, ECF No. 199. The Report and Recommendation further provides:

Plaintiffs have met their modest showing that their claims and circumstances of employment are similar: S/TLs and Trainees spent more than a majority of their time on manual, non-managerial tasks, had de minimis or no management responsibilities, were considered exempt employees under the executive FLSA exemption by Giant Eagle, regularly worked overtime and were not paid overtime wages. The putative collectives seek the same form of relief to be paid uncompensated overtime wages, and while their wages are not identical, they are paid using the same pay scale.

*Id.* at 10. The Court finds, upon a review of the record in this matter, that Judge Eddy's determination that Plaintiffs have set forth sufficient facts to satisfy their burden at this stage of the litigation process as to conditional certification is supported by the record, and does not constitute clear error. The Court agrees with the well-reasoned analysis and determinations set



forth in the Report and Recommendation. In light of the above, the Court will overrule the Objections raised by Giant Eagle respecting Judge Eddy's determination that Plaintiffs have satisfied their burden as to conditional certification.

**IV. Conclusion**

For the reasons discussed above, the Court will overrule Giant Eagle's Objections, and will accept and adopt Judge Eddy's Report and Recommendation in its entirety as the opinion of the Court with respect to Plaintiffs' Motions for Conditional Certification. Plaintiffs' Motions for Conditional Certification will be granted. An appropriate Order of Court follows.

BY THE COURT:

*s/Robert J. Colville*  
Robert J. Colville  
United States District Judge

DATED: February 23, 2021

cc/ecf: All counsel of record