

**UNITED STATES DISTRICT COURT**  
**Western District of New York**  
**233 United States Courthouse**  
**100 State Street**  
**Rochester, New York 14614**

**Chambers of**  
**Jonathan W. Feldman**  
**Magistrate Judge**

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Re: Parks v. Dick's Sporting Goods, Inc.  
05-CV-6590CJS

Dear Counsel:

On October 6, 2006, this Court heard argument as to plaintiffs' motion for notification to affected employees pursuant to the Fair Labor Standards Act (FLSA). The parties had previously requested that this Court issue an expedited decision on the motion and I agreed to do so. At the conclusion of the hearing, and for the reasons set forth on the record, I granted plaintiff's motion and directed the parties to agree on an appropriate notice to be sent to the affected employees. Thereafter, counsel contacted my chambers and defense counsel requested that I draft and issue a written opinion because defendant intended on appealing my decision.

A motion for "stage one" notification under the FLSA is a non-dispositive matter for which a Report and Recommendation is not required. Mazur v. Olek Lejbzon & Co., 2005 WL 3240472, \*2, n.1 (S.D.N.Y. Nov. 30, 2005) (magistrate judge has the authority to

approve a collective action notice under the FLSA). In this case, the motion papers, briefs, affidavits and exhibits filed by both counsel were thorough and complete. Thus, in the interest of efficiency and because the parties specifically requested an expedited ruling, I opted not to reserve and instead announced my decision from the bench. The hearing transcript will reveal the reasons for my decision, and therefore I am not inclined to issue a detailed written Decision and Order in this matter. Pursuant to the defendant's request, however, I will summarize the factual and legal bases for my ruling in this letter. I direct that this letter be filed with the Clerk of the Court and that should the defendant decide to appeal, a transcript of the October 6, 2006 hearing also be provided to Judge Siragusa.

The standard used by trial courts in deciding conditional certification of a collective action under 29 U.S.C. §207 is not in dispute by the parties here. The first step of the two step process used by courts within this Circuit requires "nothing more than substantial allegations that the putative class members were together the victims of a single decision, policy, or plan infected by discrimination." Scholtisek v. Eldre Corporation, 229 F.R.D. 381, 387 (W.D.N.Y. 2005). Particularly because the finding of being similarly situated is only a preliminary decision that will be revisited after the parties have completed discovery, the burden on the plaintiff in stage one has been variously described as a "minimal," "modest" and "lenient" standard. See e.g. Scholtisek, 229 F.R.D. at 387; Hens v. ClientLogic Operating Corp., 2006 WL 2795620, \*3 (W.D.N.Y. September 26, 2006).

Based on the evidence presented, I determined that plaintiffs have satisfied their modest burden of demonstrating that certain proposed class members are similarly situated with respect to an alleged common policy which incorrectly classified golf professionals employed by Dick's as salaried-exempt managerial employees instead of salaried non-exempt employees. In making this decision, I have relied on several facts set forth in the record.

First, at least 13 current and former employees of defendant have already consented to become party-plaintiffs in this case and have declared that they were denied overtime pay because of the common policy to classify PGA Professionals as salaried-exempt positions. Moreover, five of the employees have provided affidavits describing their job duties in a manner that would support the contention that they should not have been classified as salaried employees exempt from the protections of the FLSA. The affidavits

are factually consistent and are from individuals who were employed by Dick's in New York, Virginia, Pennsylvania, North Carolina and Tennessee.

Second, and equally compelling to a finding that preliminary certification is appropriate, are Dick's own documents produced during discovery. For example, an internal organizational chart of Dick's "Management Structure" places the store's "PGA Golf Pro" at a level between an exempt manager and a non-exempt sales employee. Interestingly, the PGA Golf Pro position is the only position at this level and the organizational chart does not indicate that the golf pro position is responsible for managing or supervising any other position. See Exhibit "D" annexed to Docket #40. Similarly, a job posting apparently drafted by Dick's and placed in the PGA Employment Bulletin contains a job description for the PGA Golf Professional position that is consistent with plaintiffs' allegations of non-exempt job responsibilities. The job description does not mention any managerial or supervisory duties and describes the job as giving golf lessons, interacting with customers and selling golf merchandise. See Exhibits "E" and "G" annexed to Docket #40. Further, Dick's concedes that during the relevant time period, its centralized training program for PGA Golf Professionals did not include managerial or supervisory training, but did require nationwide training to prepare the Golf Professionals for their non-supervisory sales responsibilities.

Finally, it is undisputed that in March 2005, Dick's actually reclassified the PGA Golf Professional job to a non-exempt position. This reclassification applied to all stores in every state where Dick's operates. In the memorandum from its Human Resources Department announcing the policy shift, Dick's stated that the change was needed "to more accurately reflect the type of work performed in these [the PGA Golf Professional] positions." See Exhibit "I" annexed to Docket #40. Deborah Victorelli, Dick's National Vice President of Human Resources, testified in her deposition that around the time of the reclassification, Dick's conducted an internal evaluation because it believed there might be some jobs that were inappropriately categorized as exempt from the FLSA. See Victorelli Deposition at page 23, annexed as Exhibit "I" to Docket #51. Ms. Victorelli testified that as a result of the study, Dick's management "thought the prudent thing to do would be to make it [the golf professional position] a non-exempt position." Id. at pages 38-39. Significantly, although a number of jobs were evaluated on a national basis during this time period, Ms. Victorelli stated that the PGA Golf Professional Position was the

only position that corporate headquarters decided to reclassify as non-exempt. Id. at page 38.

All of the foregoing led me to conclude that plaintiffs have met their modest burden of showing that Dick's maintained a centralized policy to pay PGA Golf Professionals on an exempt basis despite the fact that such employees' job duties did not exempt them from the overtime provisions of the FLSA. Indeed, I think Ms. Victorelli's testimony that the golf pro position was reclassified in 2005 so as "to more accurately reflect the type of work performed in these positions" supports a finding that there exists a colorable claim of mis-classification based on the type of work these employees were doing on a nationwide basis.

Whether the proof will ultimately support anything more than conditional certification is not at issue at this time. Kalish v. High Tech Institute, Inc., 2005 WL 1073645, \*2 (D. Minn. April 22, 2005) (so long as a "colorable basis" for the claim exists, court need not make any credibility determinations at the initial FLSA certification stage); Heng, 2006 WL 2795620 at \*5 (court "need not" resolve factual disputes "to determine if conditional certification under the FLSA is appropriate"). Dick's claims that conditional certification is inappropriate because the golf pro's job duties varied widely from store to store and hence the employees would not be similarly situated. But the fact that there may be variation in job duties or, that upon closer inquiry, it may turn out that some golf professionals in some stores are not similarly situated for purposes of a collective action, does not mean that conditional certification must be denied at this juncture of the litigation. Austin v. CUNA Mutual Ins. Society, 232 F.R.D. 601, 606-607 (W.D. Wis. Jan. 26, 2006) (despite defendant's submissions which suggested that plaintiff's job duties "may not be identical to those of other Law Specialists," court granted conditional certification); Fortna v. OC Holdings, Inc., 2006 WL 2385303, \*10 (N.D. Okla. Aug. 17, 2006) (court found managers were entitled to conditional certification despite possibility of having differing job responsibilities); Greer v. Challenge Financial Investors Corp., 2005 WL 2648054, \*3-4 (D. Kan. Oct. 17, 2005) (court granted conditional certification despite defendant's claim that there was a "lack of consistency" between its loan officer's work habits); Pendlebury v. Starbucks Coffee Co., 2005 WL 84500, \*3 (S.D. Fla. Jan. 3, 2005) (store managers alleged they were improperly classified as exempt where they lacked supervisory discretion and primarily waited on customers; despite affidavit