

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

ROBERT COLOZZI, *et al.*,

Plaintiffs,

Civ. Action No.

5:08-CV-1220 (DNH/DEP)

vs.

ST. JOSEPH'S HOSPITAL HEALTH
CENTER, *et al.*,

Defendants.

APPEARANCES:

OF COUNSEL:

FOR PLAINTIFFS:

DOLIN, THOMAS LAW FIRM
693 East Avenue
Rochester, NY 14607

J. NELSON THOMAS, ESQ.
PATRICK SOLOMON, ESQ.
JUSTIN M. CORDELLO, ESQ.
MICHAEL J. LINGLE, ESQ.
SARA E. ROOK, ESQ.

FOR DEFENDANTS:

COSTELLO, COONEY LAW FIRM
205 South Salina Street
4th Floor
Syracuse, NY 13202

ROBERT J. SMITH, ESQ.
DENNIS P. HENNIGAN, ESQ.
EDWARD G. MELVIN, ESQ.
MICHAEL A. TREMONT, ESQ.

DAVID E. PEEBLES
U.S. MAGISTRATE JUDGE

ORDER

Currently pending before the court in connection with this action are

two matters. The first concerns a request by the defendants that plaintiffs' counsel be required to provide them, for their review in advance, with copies of any mass written communications that plaintiffs' counsel intends to send to potential collective action plaintiffs prior to the end of the opt-in period. This issue is before me as a result of District Judge David N. Hurd's decision, dated May 27, 2009, vacating my prior March 16, 2008 order containing restrictions on such communications and remanding the matter to me, *inter alia*, "to conduct appropriate proceedings so that a carefully drawn order can be entered 'that limits speech as little as possible, consistent with the rights of the parties under the circumstances.'" See Dkt. No. 140, slip op. at p. 7 (citing *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 102, 104, 101, S. Ct. 2193, 2201, 2202 (1981)).

The second concerns the question of whether individualized discovery of all opt-in plaintiffs in the case should be permitted.¹

¹ This issue was raised by the defendants in two companion actions, *Dawn Hamelin v. Faxton-St. Luke's Health Care*, No. 6:08-CV-1219 (DNH/DEP) and *Michele Fengler v. Crouse Health Foundation, Inc.*, No. 5:08-CV-1221 (DNH/DEP) by motion for a protective order brought pursuant to Rule 26(c) of the Federal Rules of Civil Procedure. Such a motion was not filed in this case based upon defendants' agreement that discovery should await the results of the opt-in process and a conference to be held by the court pursuant to Rule 16 of the Federal Rules of Civil Procedure, at which time an appropriate discovery plan can be implemented. In taking that position, defendants have made it clear that they do not waive their right to pursue individualized discovery against all of the plaintiffs in this collective action.

These two issues were the subject of a hearing conducted by the court on June 30, 2009. At the close of that hearing I issued an oral decision addressing both questions presented to the court. Based upon the foregoing and the court's bench decision, which is incorporated herein by reference, it is hereby

ORDERED as follows:

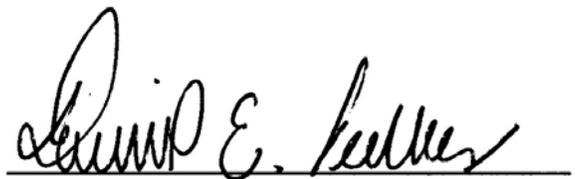
1) Defendants' request for an order directing that the text of any written communications intended to be sent by plaintiffs' attorneys to potential plaintiffs during the opt-in period be forwarded, in advance, to the defendants' attorneys for review is DENIED, based upon the court's finding that defendants have failed to satisfy their burden of demonstrating actual or potential abuses sufficient to justify any restriction on free communications between plaintiffs' counsel and potential collective action plaintiffs.

2) In keeping with the letter and spirit of section 216(b) of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 216(b), and the applicable guidelines for court supervision of the notice process during the opt-in period, however, and consistent with the court's duty under the FLSA to exercise control over that process, and in light of plaintiffs'

acknowledgment that such communications are not privileged, the court hereby DIRECTS that the contents of any mass written communications sent by either side to potential collective action plaintiffs in this action during the opt-in period be disclosed to counsel for the opposing parties, contemporaneously with dissemination of any such communication.

3) Pending further order of the court, all discovery in this action is hereby STAYED.

4) All restrictions previously issued by this court limiting free communications between any parties or their representatives and potential opt-in plaintiffs, including though not limited to that set forth in my June 8, 2009 order (Dkt. No. 143) are hereby VACATED.



David E. Peebles
U.S. Magistrate Judge

Dated: July 1, 2009
Syracuse, NY