IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - -

AARON L. ESPENSCHEID,
GARY IDLER and MICHAEL CLAY,

ORDER

09-cv-625-bbc

Plaintiffs,

v.

DIRECTSAT USA, LLC and
UNITEK USA, LLC,

Defendants.

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - -

This wage and hour action was filed originally as a class and collective action under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-219, and the wage and overtime compensation laws of Wisconsin, Minnesota and Pennsylvania. However, on May 23, 2011, I decertified the case as a collective and class action, dismissing the claims of the opt-in plaintiffs and class members without prejudice. Only the individual claims of plaintiffs Aaron Espenscheid, Gary Idler and Michael Clay remain. Trial is scheduled for March 12, 2012.

Now before the court is plaintiffs' motion for reconsideration of the court's May 23

order decertifying the class and collective actions. Dkt. #708. Plaintiffs make two arguments in their motion. First, they contend that the Court of Appeals for the Seventh Circuit's recent decision in Ross v. RBS Citizens, N.A., — F.3d —, 2012 WL 251927 (7th Cir. Jan. 27, 2012) requires the court to reconsider its decertification decision. Second, they contend that a recent jury verdict against defendants in a wage and hour action in Tennessee establishes that their claims should be allowed to proceed to trial on a collective basis. Because neither of these arguments is persuasive, I will deny plaintiffs' motion.

The court of appeals' decision in Ross does not change my decision that this case cannot proceed as a class or collective action. In Ross, the plaintiffs were current and former employees of Charter One who were asserting claims for uncompensated overtime wages. Id. at *1. After the district court certified a class of hourly workers under Fed. R. Civ. P. 23(b)(3), Charter One filed an interlocutory appeal, arguing that the district court's certification order did not comply with the requirement under Rule 23(c)(1)(B) that a certification order clearly "define the class and the class claims, issues, or defenses." Id. The court of appeals asked the parties to brief the additional issue whether the classes satisfied the commonality requirement of Rule 23(a) as set forth by the Supreme Court in Wal–Mart Stores, Inc. v. Dukes, — U.S. —, 131 S.Ct. 2541 (2011). Id.

The court of appeals concluded that the district court's certification order satisfied the requirements of Rule 23(c)(1)(B) because the class definition was sufficiently clear and

the class claims were readily discernible. Id. at *5. With respect to commonality, the court concluded that although there were slight variations in the way Charter One enforced its allegedly unlawful overtime policy, the existence of an unofficial policy that applied to all class members satisfied Rule 23(a)'s commonality requirement. Id. at *7.

The court's discussion in Ross regarding Rule 23(c)(1)(B) is irrelevant to the certification issues in this case. Rule 23(c)(1)(B) has never been an issue in this case and I did not rely on that rule when decertifying the class and collection actions. Similarly, the court's discussion of commonality in Ross does not alter my conclusion that this case cannot proceed on a collective basis, at least under the trial plan proposed by plaintiffs. I did not decertify the case because plaintiffs had not satisfied Rule 23(a)'s commonality requirement. Rather, as I explained in the decertification decision, plaintiffs had not shown that the employment experiences of individual employees were sufficiently similar so as to satisfy the requirement in 29 U.S.C. § 216(b) that opt-in plaintiffs be "similarly situated." This requirement takes into consideration "whether fairness and procedural considerations support proceeding as a collective action." Thiessen v. General Electric Capital Corp., 267 F.3d 1095, 1103 (10th Cir. 2001); Russell v. Illinois Bell Telephone Co., 721 F. Supp. 2d 804, 811 (N.D. Ill. 2010). Additionally, plaintiffs had not shown that common questions would predominate or that a class action was a superior method for adjudicating their claims, as is required by Rule 23(b)(3). Dkt. #643, at 9-10. In particular, Rule 23(b)(3) mandates

consideration of "the likely difficulties in managing a class action." Fed. R. Civ. P. 23(b)(3)(D).

By the time the class and collective actions were decertified in this case, it was at a much more advanced stage than the case in Ross, and defendants had presented a significant amount of evidence suggesting that individual issues would overwhelm the common issues and that plaintiffs' proposed "representative proof" was not actually representative. Plaintiffs had multiple opportunities to explain to the court how they planned to prove their claims on a collective basis and achieve a fair result for all class members and opt-in plaintiffs, as well as for defendants, but they failed to do so. As I explained in the decertification order:

> Under either of their proposed plans, plaintiffs would present the testimony of 42 "representative" technicians, as well as other declarations and documentary evidence, to prove the claims of 2,300 individuals. Plaintiffs have not explained how the 42 technicians are representative of the whole class or how counsel could extrapolate the findings from a small sub-set of individuals to an absent class, particularly without the use of an expert. The idea of representative proof is that plaintiffs could provide testimony from a sample of technicians who can provide detailed information regarding their experiences, which can then be extrapolated to the remainder of the group without significant error. Without an expert, it is not clear who would testify as to whether extrapolating from the 42 technicians is scientifically or statistically appropriate.
>
> The single fact that all technicians were subject to the same policies, practices and job descriptions does not permit a conclusion that a small sub-set would automatically be representative of the whole. If it were the case that technicians had relatively uniform experiences, then the reported experiences

> of representative technicians would closely resemble the experiences of absent technicians who have not provided detailed information. In this case, however, there are many complicating factors that undermine the conclusion that one technician's testimony is representative of an absent technician's experiences. Thus, there is too great a chance that the determination by a jury of the "average" number of uncompensated hours worked by class members each week would be unreliable and would result in rewarding some technicians who have already been compensated fully and, simultaneously reducing the awards to which others are entitled.

Id. at 12-13.

Despite this clear language in the decertification order, plaintiffs argue in their motion for reconsideration that they should be allowed to proceed to trial on their collective and class claims using the trial plan that I rejected previously. To justify their position, plaintiffs point to a court in the Western District of Tennessee that recently allowed former cable installation technicians employed by defendants to proceed to trial on behalf of 300 class members "using non-scientific representative proof of the average number of hours for which a sample of employees were not paid overtime." Plts.' Br., dkt. #709, at 4 (citing Monroe v. FTS, USA, Case No. 2:08-cv-2100 (W.D. Tenn. Oct. 25, 2011)). Plaintiffs say that they are prepared to use similar "representative proof" to prove their wage and hour claims in this case.

Plaintiffs are missing the point. The problem with plaintiffs' trial plan was not that they proposed using representative proof to establish their claims. The problem was that plaintiffs did not explain why their proof was actually "representative" of all 2,300 class

members. Plaintiffs failed to adequately address the undisputed differences in the quantity of work each technician performed, the methods by which they recorded their time and the types of work activities in which they engaged. Plaintiffs had no expert witness and no other support for their assertion that their proof was representative. Plaintiffs do not address these shortcomings in their motion for reconsideration.

Plaintiffs' attempt to revive their class and collective action at this stage will be denied.

ORDER

IT IS ORDERED that the motion for reconsideration filed by plaintiffs Aaron Espenscheid, Gary Idler and Michael Clay, dkt. #708, is DENIED.

Entered this 16th day of February, 2012.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge