IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DIANNA RUIZ and MARTHA VIDUSKI,
on behalf of themselves and a class of
employees and/or former employees
similarly situated,

OPINION and ORDER

10-cv-394-bbc

Plaintiffs,

v.

SERCO, INC.,

Defendant.

- -

This is a proposed class action under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-219. Plaintiffs Dianna Ruiz and Martha Viduski contend that defendant Serco, Inc. violated the FLSA by failing to pay them overtime compensation for all hours worked over forty in a workweek. Now before the court is plaintiffs' motion to toll the statute of limitations, dkt. #43, in which they contend that defendant's delay tactics and refusal to participate in meaningful discovery will inhibit the putative plaintiffs' ability to opt in to the case. (The motion also contains a request to amend the scheduling order; however, Magistrate Judge Crocker has already amended the scheduling order, dkt. #54, so that part

of the motion is moot.) I will deny plaintiffs' motion because they have failed to show that equitable tolling is necessary or appropriate at this stage of the proceedings.

Also before the court is defendant's motion for leave to file a sur-reply to plaintiffs' motion, dkt. #52. In the sur-reply, defendant purports to clarify the record regarding the progress of discovery in the case. Because the sur-reply is unnecessary for resolution of plaintiffs' motion, I will deny defendant's request to file it. On a related note, the parties and their counsel would be well advised to focus on the legal issues in the case and not spend their time criticizing opposing counsel. The briefs filed by both sides contain unnecessarily dramatic language regarding opposing counsel's alleged deficiencies.

DISCUSSION

Plaintiffs' motion arises out of several discovery-related disputes between the parties, the details of which need no elaboration. The sum of plaintiffs' argument is that because defendants have failed to participate in discovery related to potential opt-in plaintiffs, the court should toll the statute of limitations for all putative class members. Plaintiffs seek tolling for the longer of (a) the period of time between when defendant's responses to plaintiffs' interrogatories and document requests were due (December 13, 2010) and when they are ultimately provided; or (b) the period of time between the date plaintiffs served their notice of deposition for the Fed. R. Civ. P. 30(b)(6) deposition (October 22, 2010) and

the date such deposition actually takes place.

As an initial matter, plaintiffs' motion to toll the statute of limitations is premature. Plaintiffs have not yet filed a motion for conditional certification and therefore, it is not certain whether collective treatment is appropriate in this case. Plaintiffs have sought equitable tolling for the benefit of an unknown group of potential class members who may, in the future, choose to opt into this collective action, if it is certified, and whose claims may be adversely affected by the normal running of the FLSA limitations period. In sum, the plaintiffs are seeking an impermissible advisory opinion regarding the rights of non-parties. Socha v. Pollard, 621 F.3d 667, 670 (7th Cir. 2010) ("If [an] order represents a mere advisory opinion not addressed to resolving a 'case or controversy,' then it marks an attempted exercise of judicial authority beyond constitutional bounds. U.S. Const. art. III, § 2.").

Even if the motion were properly before the court, plaintiffs have not shown that equitable tolling is appropriate. Under the FLSA, the statute of limitations continues to run for potential opt-in plaintiffs until they file a written consent to join the action. 29 U.S.C. § 256(b). However, equitable tolling may apply to toll a statute of limitations in extraordinary situations where "despite all due diligence, a plaintiff cannot obtain the information necessary to realize that he may possibly have a claim." Jones v. Res-Care, Inc., 613 F.3d 665, 670 (7th Cir. 2010) (quoting Beamon v. Marshall & Ilsley Trust Co., 411

F.3d 854, 860 (7th Cir. 2005)); Soignier v. American Bd. of Plastic Surgery, 92 F.3d 547, 553 (7th Cir. 1996) ("Equitable tolling applies when a plaintiff, despite the exercise of due diligence and through no fault of his own, cannot determine information essential to bringing a complaint."). Because plaintiffs are seeking to toll the statute of limitations, they bear the burden of establishing that they have acted diligently but have been prevented from asserting their rights through no fault of their own. Cada v. Baxter Healthcare Corp., 920 F.2d 446, 451 (7th Cir. 1990).

Plaintiffs have not met this burden. In fact, they fail to cite the applicable legal standard for equitable tolling or any controlling precedent for the propositions they advance. Instead, they cite several district court cases in support of their motion that either do not support plaintiffs' arguments or are distinguished easily based on their facts or procedural posture. E.g., Adams v. Inter-Con Security Systems, Inc., 242 F.R.D. 530, 542-43 (N.D. Cal. 2007) (considering equitable tolling issue in context of motion for certification of collective action); Sims v. Housing Authority of the City of El Paso, 2010 WL 3221790, *3 (W.D. Tex. Aug. 13, 2010) (denying plaintiff's motion for equitable tolling); Woodward v. FedEx Freight East, Inc., 250 F.R.D. 178, 194 (M.D. Pa. 2008) (same); Weinandt v. Kraft Pizza Co., 217 F. Supp. 2d 923, 928-31 (E.D. Wis. 2002) (considering equitable tolling in context of individual claim under Americans with Disabilities Act); Reich v. Southern New England Telecommunications Corp., 892 F. Supp. 389, 404 (D. Conn. 1995) (considering

equitable tolling issue post-trial).

In addition, plaintiffs have presented no evidence that any putative plaintiff who has exercised due diligence will be barred from filing suit because he or she has been unable to "obtain the information necessary to realize that he [or she] may possibly have a claim." Jones, 613 F.3d at 670. Although the parties' discovery disputes may be inhibiting plaintiffs' ability to discover potential opt-in plaintiffs or preventing potential opt-in plaintiffs from learning of this action, there is no reason to believe that the parties' discovery disputes would prevent potential plaintiffs from discovering FLSA violations or from asserting FLSA claims. Schultz v. American Family Mutual Insurance Co., 2005 WL 5909003 (N.D. Ill. Nov. 5, 2005) ("Ignorance of a lawsuit, however, is not the same as ignorance of a claim. Because [plaintiff] does not contend that the prospective plaintiffs were unable to discover [defendant's] alleged FLSA violations, there is no basis for tolling.") Accordingly, plaintiffs' motion to toll the statute of limitations will be denied.

ORDER

IT IS ORDERED that

1. Defendant Serco, Inc.'s motion for leave to file an instanter sur-reply, dkt. #52, is DENIED.

2. The motion to toll the statute of limitations filed by plaintiffs Dianna Ruiz and

Martha Viduski, dkt. #43, is DENIED.

3. Plaintiffs' motion to amend the scheduling order, dkt. #43, is DENIED as moot.

Entered this 15th day of February, 2011.

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