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 collective 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 willfully misclassifying its employees as "exempt" from the FLSA's overtime requirements and consequently failing to comply with those requirements. Plaintiffs brought this lawsuit on behalf of a class composed of defendant's current and former employees who provide support or advocacy services to members of the armed services and their families. Now plaintiffs have moved for conditional certification of an opt-in nationwide collective action under 29 U.S.C. § 216(b) and for authorization to notify potential class members of their right to join this case. Dkt. #56.

I conclude that plaintiffs' claims cannot be adjudicated collectively using the class definition that they have proposed. In particular, plaintiffs have not made even a modest factual showing that they are similarly situated to the individuals who are covered by the class definition. It is simply too broad. Additionally, plaintiffs have not identified a specific common policy or practice of defendant that caused the alleged FLSA violations at issue. Therefore, I will deny plaintiffs' motion for conditional certification. However, I will give them an opportunity to supplement their motion for conditional certification and to propose a more narrowly defined class.

In determining whether the class should be conditionally certified, I considered the allegations in the complaint and the affidavits and depositions that have been submitted. Sharpe v. APAC Customer Services, Inc., 2010 WL 135168, *1 (W.D. Wis. Jan. 11, 2010); Sjoblom v. Charter Communications, LLC, 571 F. Supp. 2d 961, 964 (W.D. Wis. 2008).

FACTS

A. Defendant Serco's Business

Defendant Serco is a professional services company that provides a wide range of service to a variety of clients, including the United States Department of Defense, and in particular, the United States Army and Army Reserve, Navy, Marine Corps and Air Force. Defendant has entered into many different contracts with these branches of government to provide a variety of support services to members of the military and their families. These

services range from clinical and financial counseling to workforce analysis and childcare. Defendant's provision of services to the military are subject to different contractual requirements, different client demands and varying degrees of supervision.

Defendant does not have a single policy that classifies particular positions or employees as exempt or nonexempt from the FLSA's overtime compensation requirements. Instead, each employee's project manager or project director determines whether to classify an employee as exempt or non-exempt. Defendant has created several labor categories by which it organizes its employees. At the time the employee is hired, the manager or director assigns the employee the pre-existing labor category title that he or she believes best describes the requirements of the position. The manager or director then determines whether the employee meets the requirements for an exemption under the FLSA on the basis of the expected duties the individual will actually perform. The manager or director is supposed to consult with defendant's human resources department to insure that the position is classified properly as exempt or nonexempt under the FLSA.

B. Defendant's Contracts at Issue in this Case

Plaintiffs' proposed class includes all persons employed within the last three years by defendant in the United States who were classified as FLSA exempt and who assisted members of the armed services and their families to make the transition into and out of active deployment. The proposed class includes hundreds of employees who worked across

the country under approximately 12 different contracts or task orders in approximately 25 different positions. The class includes, but is not limited to, employees working under the following contracts:

- **The Army Family Readiness Staff and Support Services contract** (employing Family Program Assistants, Outreach and Support Specialists, Army Family Action Plan/Army Family Team Building Specialists, Education and Training Specialists, Operations Specialists and Well-Being Specialists at more than 40 locations);
- **The Child, Youth and School Services contract** (employing Community Outreach Specialists and School Support Services Specialists at more than 30 locations);
- **The Army Community Services Survivor Outreach Program contract** (employing Financial Counselors, Outreach Service Support Coordinators and Unit Service Coordinators at 26 locations);
- **The Army Wounded Warrior Program contract** (employing Advocates at more than 50 locations);
- **The Army Wounded Warrior Call Center Contract** (employing Customer Care Representatives at one location);
- **The Commander, Naval Installations Command Fleet and Family Services Program Global Services contract** (employing Work and Family Life Consultants, Education Service Coordinators, Ombudsman Coordinators, Personal Financial Counselors, Sexual Assault Response Coordinators, Victim Advocates, Clinical

Counselors and New Parent Support Specialists at 5 locations in the United States);

- **The Fort Polk Task Order; Fort Sam Houston Task Orders and Fort Bragg Task Orders** (employing Relocation Assistants, Troop Trainers, Community Education and Marketing Specialists, New Parent Support Home Visitors, Parent Trainers, Lab Technicians and Mobilization Deployment Specialists at 3 locations); and
- **The Yellow Ribbon Reintegration Program Contract** (employing Yellow Ribbon Program Coordinators at 5 locations).

All of the employees working under these contracts are involved in providing support or advocacy services to members of the armed services and their families. (However, as discussed in more detail below, plaintiffs do not seek to represent all of the employees who worked under these contracts.) The services range from helping soldiers and their families gain practical life skills such as finding jobs, balancing checkbooks, getting out of debt, relocating to new cities, finding schools and childcare for their children and learning computer skills, to counseling and therapeutic services such as providing military families with coping skills, identifying and reporting domestic abuse and teaching new parents about child rearing.

Many of defendant's employees working under the contracts with the United States military are classified as exempt, although there are certain employees, including some administrative employees and part-time employees, who are classified as non-exempt. All of defendant's employees are covered by the same time-recording policies and procedures,

the same 40-hour work week, the same pay period and the same policies covering vacation, sick leave, leaves of absence and unpaid leave.

C. Experience of Named Plaintiffs, Sue Warneke and Martha Obondi

Named plaintiffs Diana Ruiz and Martha Viduski worked under the Army Reserves Family Readiness Staff and Support Services Contract. The contract's purpose was to provide services in support of the Army Reserve's mission readiness program and to enhance the Reserve's recruiting and retention programs. Sue Warneke and Martha Obondi worked under the same contract. (Plaintiffs state that Warneke and Obondi have opted into the lawsuit as plaintiffs, pointing to dkt. #8 and #20 as their respective consent forms. These "consent" forms merely state that Warneke and Obondi consent to join the lawsuit. However, the court has not certified or conditionally certified this case as a collective action and has not approved notice or opt-in forms. Thus, it is not clear what plaintiffs mean when they refer to Warneke and Obondi as "plaintiffs." If Warneke and Obondi seek to be named plaintiffs in this case, plaintiffs Ruiz and Viduski must file an amended complaint with an amended caption including them as plaintiffs. Warneke and Obondi cannot opt in to this case unless and until the court conditionally certifies it as a collective action and approves a notice form. However, Warneke's and Obondi's employment experiences are relevant to conditional certification and I will consider them for this purpose.)

1. Plaintiff Ruiz

Plaintiff Ruiz worked on the contract as a Family Program Assistant and an Army Family Team Building/Army Family Action Plan Program Specialist in Fort McCoy, Wisconsin. Her main duties as a Family Program Assistant were calling families of deployed soldiers to listen to their concerns and provide them with information addressing those concerns or refer them to a more specialized resource; providing mobilization briefings to soldiers and their families; assisting family readiness groups; and delivering training to family readiness groups. Ruiz received specific directions from her supervisor for carrying out these tasks and communicated with her supervisor every day. In her other position, Ruiz briefed soldiers and families regarding available resources; assisted soldiers and their families on budget matters and job searches by referring them to specialists; instructed team building classes; solicited and researched questions from soldiers and their families; staffed resource tables at "Yellow Ribbon events"; and tracked hours worked by volunteers. (The Yellow Ribbon program provides information and assistance to soldiers and their families during pre-deployment, deployment and post-deployment.) All of the material Ruiz provided to soldiers and their families was created by someone else.

2. Plaintiff Viduski

Plaintiff Viduski worked on the contract as a Well Being Specialist and Operations Specialist in Fort McCoy. Her duties in both positions consisted of data entry, performing registrations for Yellow Ribbon events and coordinating and attending the events. She

described her positions as "party planner" and "answering service." She did not work directly with families and soldiers on a regular basis but sometimes assisted families by providing information on financial assistance and health insurance. She had no independent authority in either position.

3. Martha Obondi

Martha Obondi worked on the contract as a Family Program Assistant in Fort Snelling, Minnesota. Obondi performed data entry and clerical functions; drafted newsletters and website postings publicizing family program initiatives; established relationships with civilian and military agencies as advocates for Army Reserve Families; assisted soldiers and their family members with job search activities; and referred soldiers and their families to resources that could assist them with their problems. Obondi followed the directions of her supervisors and did not exercise independent authority.

4. Sue Warneke

Sue Warneke worked on the contract as a Family Program Assistant in Fort Sheridan, Illinois. Among other responsibilities, she attended briefings with a military mobilization officer regarding units that were being deployed; gave presentations at Yellow Ribbon events held for families before and during deployment; coordinated speakers, facilities and childcare; assisted with training related to family readiness issues; assisted families in finding resources

for a variety of problems; and discussed applicable military regulations with commanders.

OPINION

A. Conditional Certification of FLSA Collective Class Action

The FLSA states that "no employer shall employ any of his employees . . . for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." 29 U.S.C. § 207(a)(1). This overtime pay requirement does not apply to "any employee employed in a bona fide executive, administrative, or professional capacity." 29 U.S.C. § 213(a)(1). Plaintiffs seek conditional certification of a collective action for alleged violations of FLSA's overtime compensation provision resulting from their being misclassified as administrative, executive or professional employees exempt from FLSA requirements. Under 29 U.S.C. § 216(b), such an action may be maintained "by any one or more employees for and [o]n behalf of himself or themselves and other employees similarly situated."

This court has adopted a two-step process for class certification under the FLSA. Espenscheid v. DirectSat USA, LLC, 2010 WL 2330309, *6 (W.D. Wis. June, 7, 2010); Kelly v. Bluegreen Corp., 256 F.R.D. 626, 628-89 (W.D. Wis. 2009). At the first step, plaintiffs must make "a modest factual showing" that they are similarly situated to potential class members and that they and potential class members were "victims of a common policy

or plan that violated the law." Kelly, 256 F.R.D. at 629-30. If this showing is made, the court conditionally certifies a class and authorizes notice to potential class members and the parties conduct discovery. Austin v. CUNA Mutual Insurance Society, 232 F.R.D. 601, 605 (W.D. Wis. 2006). The second step occurs at the close of discovery upon a motion for decertification from the defendant. At that point the court determines whether the plaintiffs are in fact similarly situated to those who have opted in. Id.

This case has reached the first stage of the process, with plaintiffs seeking conditional certification of the following class:

> [A]ll persons formerly and/or presently employed by Defendant Serco, Inc. in the United States who Defendant classified as FLSA exempt and who provided support services to members of any branch of the armed services, including but not limited to the United States Army Reserve, and/or their families during the different phases of deployment and/or reintegration.

Plts.' Motion, dkt. #56, at 3.

Plaintiffs' theory of liability is that defendant misclassifies nearly all of its employees as exempt from the FLSA's overtime compensation requirements even though the employees exercise no independent authority or discretion. According to plaintiffs, they are similarly situated to the proposed class of defendant's employees because all of them (1) were classified as exempt; (2) were denied proper overtime pay; (3) performed similar work providing support or advocacy services to members of the military; and (4) are covered by the same time-recording and personnel policies.

Defendant challenges plaintiffs' motion for conditional certification on two main

grounds. First, defendant contends that plaintiffs have not shown that their job duties were similar to those of other potential class members and that unless the class members have similar job responsibilities, it will be impossible to determine whether they were classified correctly. I agree. Plaintiffs' proposed class definition is so broad that is impossible to determine whether plaintiffs are similarly situated to potential opt-in class members. According to plaintiffs, their proposed class includes, but is not limited to, individuals who worked in the following job positions: Army Family Action Plan/Army Family Team Building Specialist; Education and Training Specialist; Education Service Facilitator; Family Program Assistant; Family Program Coordinator; Family Program Coordinator I; Family Program Specialist II; Family Program Specialist, Sr.; Family Programs Operations Specialist; Family Programs Well Being Specialist; Family Readiness Assistant; Family Well Being Specialist; Financial Coordinators; Lab Technicians; Marketing and Advertising Specialists; Mobilization Deployment Specialist; Mobilization Support Specialist; Ombudsman Coordinator; Outreach Specialist; Personal Financial Counselor; Relocation Assistant; School Support Service Specialist; Troop Trainer; Unit Coordinator; Work Family Life; and those who work in the Army Wounded Warrior Program, the Army Wounded Warrior Call Center and the Yellow Ribbon programs. Plfs.' Proposed Notice, dkt. #58-1, at 1-2.

Plaintiffs contend that individuals in these positions fall under the proposed class definition because they all provided support and advocacy to members of the military and their families. Although plaintiffs devote much of their briefs to discussing the duties of

these positions, they do little to highlight whatever similarities the positions share. More important, plaintiffs do not respond adequately to defendant's objections regarding the large number of job positions at issue, the variation in level of experience, responsibility and discretion each position entails and the variation in the day-to-day activities of the potential class members.

For example, plaintiffs respond to some of defendant's challenges by stating that they are not seeking to include supervisors or other individuals who exercised independent authority or whose positions required specific higher education or discretion. Thus, according to plaintiffs, individuals are excluded from the class who worked as Program Management Supporters, Family Program Assistant Supervisors, Outreach and Support Supervisors, New Parent Support Specialists, Options Counselors, Clinical Counselors, Site Managers or Court Advocates at Fort Polk, Regional Supervisors or on-site Project Managers at Fort Sam Houston, Victim Advocates, Sexual Assault Response Coordinators, New Parent Home Visitors and Yellow Ribbon Program Coordinators who work at headquarters level. Plts.' Br., dkt. #58, at 18, n.14; 24, n.17; 27, n.19; Plts.' Reply Br., dkt. #69, at 22, n.20.

However, plaintiffs do not explain why these particular positions and not others are excluded from the class. More important, plaintiffs do not explain how their proposed class definition necessarily excludes these positions. Under plaintiffs' proposed class definition, nearly every person employed by defendant, including its chief executive officer, could be included in the class because they all provide support services to the military, whether

directly or indirectly. Plaintiffs have not shown that their job duties or level of discretion were similar enough to those of all of the individuals who could opt in under the present definition that it would be possible to determine on a collective basis whether the class members are classified properly.

Plaintiffs' second problem is that they have failed to show that they and potential class members were victims of a common policy or plan. It is not enough to allege that all employees were subject to the same time-keeping, vacation and sick leave policies, because those policies had no apparent effect on whether an employee is classified as exempt or non-exempt. With respect to classification, plaintiffs do not allege that defendant made a single decision to classify all employees or certain job categories as exempt or that it has a practice of classifying employees working under certain contracts as exempt automatically. Rather, the allegations in the current record suggest that exemption determinations are made by individual project managers either on the basis of the employee's job title or on the basis of the individual's job duties. To the extent that plaintiffs believe that classification is actually based on a company-wide policy, they have not explained clearly what that company-wide policy or practice is and how it applies to all of the positions covered by their proposed class.

For these reasons, plaintiffs' allegations fall short of the allegations presented by the plaintiffs in previous cases on which they rely and in which I have certified misclassification claims for collective treatment. For example, in Kelly, 256 F.R.D. at 629, I conditionally certified a nationwide class of sales representatives because the plaintiffs had made a modest

factual showing that the defendant had a company-wide policy of paying all sales representatives on a "commission-only" basis. In addition, the plaintiffs had made a modest showing that all sales representatives had the same general job duties. Id. Similarly, in Witteman v. Wisconsin Bell, Inc., 2010 WL 446033, *2-3 (W.D. Wis. Feb. 2, 2010), I conditionally certified a nationwide class of plant engineers who were paid a salary and were not paid for time worked in excess of 40 hours a week. In that case, the plaintiffs had made a modest factual showing that the defendant had made a single decision to classify all outside plant engineers as exempt from the FLSA. Id. In addition, the plaintiffs had made a modest showing that all outside plant engineers had substantially similar job responsibilities. Id.; see also Austin, 232 F.R.D. at 607 (granting conditional certification where company made single decision to classify all Law Specialists as exempt); Nerland v. Caribou Coffee Co., 564 F. Supp. 2d 1010, 1022-24 (D. Minn. 2007) (relying on fact that employer "collectively and generally decide[d] that all [potential class members] are exempt from overtime compensation" in concluding that class members were similarly situated).

In sum, although "[t]he requirements of conditional certification are lenient," Witteman, 2010 WL 446033, *1, I cannot ignore the significant problems presented by plaintiffs' proposed class. Cf. Purdham v. Fairfax County Public Schools, 629 F. Supp. 2d 544, 552 (E.D. Va. 2009) ("Even though Plaintiffs have an admittedly low hurdle at the conditional certification stage, the Court cannot ignore salient facts that suggest that this case, as presented here, is not a suitable vehicle for a collective action."). Thus, I will deny

plaintiffs' motion for conditional certification.

In denying plaintiffs' motion, I am not concluding that it would be impossible for plaintiffs to proceed with their claims on a collective basis. Rather, I conclude that plaintiffs' proposed class is ill-defined and that they have failed to articulate clearly the common policy or practice that led to the alleged injuries. In their reply brief, plaintiffs suggest that if the court finds their requested class to be overbroad, the court should certify a class that it deems appropriate. However, at this stage in the case, plaintiffs are in a better position than the court to identify an appropriate class and to set forth the facts necessary to support conditional certification. Because it may be possible for plaintiffs to proceed under a more narrowly defined class, I will give them an opportunity to amend their proposed class definition and file a renewed motion for conditional certification.

ORDER

IT IS ORDERED that

1. The motion for conditional certification, dkt. #56, filed by plaintiffs Dianna Ruiz and Martha Viduski is DENIED.

2. Plaintiffs may have until June 21, 2011 to propose a new class definition and file a renewed motion for conditional certification that addresses the concerns raised in this opinion. Defendant may have until July 1, 2011 to respond and plaintiffs may have until July 8, 2011 to reply. If plaintiffs do not file a renewed motion for conditional certification

by June 21, the case will proceed under the current schedule with the named plaintiffs' claims.

Entered this 8th day of June, 2011.

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