IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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ALEJANDRO LOPEZ and
JACOB LAZARZ, on behalf of themselves
and others similarly situated,

OPINION and ORDER

Plaintiffs,

11-cv-728-bbc

v.

SEARS, ROEBUCK & CO.,

Defendant.

- -

In this proposed class action for monetary relief, plaintiffs Alejandro Lopez and Jacob Lazarz contend that defendant Sears, Roebuck & Co. violated Wis. Stat. § 103.455 by failing to pay commissions to its technicians for warranty work performed at defendant's auto centers. Jurisdiction is present under 28 U.S.C. § 1332 because plaintiffs are completely diverse from defendant and the amount in controversy exceeds $75,000. In particular, plaintiffs are citizens of Wisconsin and defendant is a New York corporation with its principal place of business in Illinois. Dft.'s Supp. PFOF, dkt. #36, ¶¶ 31, 32. Also, plaintiff Lopez's claim for damages is approximately $149,760. Dkt. #34 at ¶ 15. Pfizer, Inc. v. Lott, 417 F.3d 725, 726 (7th Cir. 2005) (at least one member of proposed class must satisfy $75,000 amount in controversy requirement).

Now before the court is defendant's motion for summary judgment. Defendant contends that plaintiffs cannot state a claim under § 103.455 because they are not entitled to commissions for warranty work and they suffered no deduction in earned or promised wages. After reviewing the undisputed facts and relevant law, I conclude that defendant's compensation policy contravenes § 103.455 because it impermissibly shifts business losses to defendant's employees without giving them an opportunity to contest their liability for the losses. Therefore, I am denying defendant's motion for summary judgment.

From the parties' proposed findings of fact, I find the following facts to be material and undisputed.

UNDISPUTED FACTS

Defendant Sears, Roebuck & Co. is a national retailer that operates stores and auto centers throughout the United States, including 15 auto centers in Wisconsin. Auto centers provide automotive maintenance and repair services, as well as sales of auto parts and accessories. The workforce at the auto centers typically includes managers, service supervisors, customer service advisors and technicians. Technicians are mechanics who perform automotive services and repairs on vehicles. Plaintiffs Lopez and Lazarz worked as technicians for defendant at auto centers in Wisconsin.

All technicians employed at the auto centers in Wisconsin are paid under the same compensation system. They are paid an hourly rate for all hours worked on all jobs

performed. For some jobs, including brake repair and belt replacement, technicians are also paid a commission calculated from a fixed percentage of labor costs for the particular type of job. Technicians do not receive commissions for certain services for which customers do not pay, including steering evaluations, suspension checks, multi-point inspections and "warranty work." Warranty work includes jobs for which defendant provides a specific warranty, including lifetime rotation and balance for tires purchased from defendant, as well as re-work required as a result of poor workmanship by a technician.

It is defendant's policy that if warranty work is required because of a technician's faulty workmanship, the technician who performed the initial work should do the re-work, if that technician is available. The technician responsible for the initial job keeps any commission that was paid for the initial work and receives an hourly wage for time spent performing the warranty work. In other words, defendant does not deduct any portion of the commission that was paid previously to the technician for the job, but also does not pay additional commission for the warranty work. If the technician who performed the initial job is not available to perform the warranty work, the manager or shop supervisor will assign the warranty work to another technician. In such cases, the technician who performs the warranty work is paid his hourly wage but does not receive a commission for the work.

The number of warranty jobs performed by technicians varied each week. On average, plaintiff Lopez handled between eight and ten warranty jobs each week and plaintiff Lazarz worked on approximately six warranty jobs each week. Of the warranty jobs they

performed each week, plaintiffs were the original technicians for only one or two of them.

OPINION

Plaintiffs contend that defendant's compensation system with respect to warranty work is unlawful because it punishes technicians for faulty workmanship without giving them an opportunity to dispute whether they should be held responsible for it. Plaintiffs bring their claims under Wis. Stat. § 103.455, which prohibits employers from making deductions from an employee's wages for certain types of work-related losses. Specifically, the statute provides that

> No employer may make any deduction from the wages due or earned by any employee . . . for defective or faulty workmanship, lost or stolen property or damage to property, unless the employee authorizes the employer in writing to make that deduction or unless the employer and a representative designated by the employee determine that the defective or faulty workmanship, loss, theft or damage is due to the employee's negligence, carelessness, or willful and intentional conduct, or unless the employee is found guilty or held liable in a court of competent jurisdiction by reason of that negligence, carelessness, or willful and intentional conduct. If any deduction is made or credit taken by any employer that is not in accordance with this section, the employer shall be liable for twice the amount of the deduction or credit taken in a civil action brought by the employee. Any agreement entered into between an employer and employee that is contrary to this section shall be void. . . ."

Wis. Stat. § 103.455. Plaintiffs contend that by depriving technicians of the opportunity to earn commissions for warranty work that arises from faulty workmanship, defendant deducts from, or takes a credit against, the wages of technicians who perform warranty work.

Defendant has moved for summary judgment on plaintiffs' claims, contending that

its commission policy does not implicate § 103.455. Defendant relies on Farady–Sultze v. Aurora Medical Center of Oshkosh, Inc., 2010 WI App 99, ¶¶ 1, 10, 327 Wis. 2d 110, 787 N.W.2d 433, for the proposition that § 103.455 protects employees from losing only those wages that actually have been earned. In Farady-Sultze, the plaintiff had been terminated after her employer realized it had paid her for hours she did not work and that she had failed to return the overpayments. Id. at ¶ 1. The plaintiff sued, contending that her termination was contrary to § 103.455. The court affirmed dismissal of her claim, holding that the statute was inapplicable because it "protect[s] *earned* wages" only. Id. at ¶ 10 (emphasis in original). Because the plaintiff never "earned" and was not legally entitled to the extra payments, the statute did not protect her. Id. See also Batteries Plus, LLC v. Mohr, 2001 WI 80, ¶ 35, 244 Wis. 2d 559, 628 N.W.2d 364 (employer's termination of employee who refused to reimburse employer for $11,500 in overpayments did not violate public policy of § 103.455). Defendant points out that under its compensation policy, it does not deduct commissions that technicians have earned on initial jobs, even if their faulty workmanship creates the need for warranty re-work.

It is true that § 103.455 applies only in situations in which an employer has taken deductions or credits from wages to which the employee is legally entitled. Plaintiffs do not dispute this. However, the question in this case is whether defendant's policy of denying commissions for warranty work had the effect of deducting from, or taking a credit against, wages to which plaintiffs were owed. Neither Farady-Sultze nor Batteries Plus is particularly

helpful in resolving this question because neither defines the scope of the terms "wages due or earned," "deduction" or "credit" as they are used in the statute. Additionally, in those cases, the courts did not consider whether a particular compensation system violated the statute.

The parties have cited no cases in which a court has applied § 103.455 to a compensation system similar to defendants, and I have found none. However, Wisconsin courts have provided significant guidance concerning the purpose and scope of § 103.455. The purpose of the statute is to "prevent[] employers from using coercive economic power to shift the burden of a work related loss from the employer to the employee, without giving the employee an opportunity to establish that the loss was not caused by the employee's carelessness, negligence or wilful misconduct." Wandry v. Bull's Eye Credit Union, 129 Wis. 2d 37, 45-46, 384 N.W.2d 325, 329 (1986). See also Donovan v. Schlesner, 72 Wis. 2d 74, 82, 240 N.W.2d 135, 139 (1976) ("The entire purpose of the statute is to preclude any deduction for losses until the employee has an opportunity to show his lack of fault."); Erdman v. Jovoco, Inc., 181 Wis. 2d 736, 754, 512 N.W.2d 487 (1994) (§ 103.455 is intended to "protect employees from arbitrary assumptions that faulty work, or lost, stolen or damaged property are attributable to their own deficient performance"); Wolnak v. Cardiovascular & Thoracic Surgeons of Central Wisconsin, 2005 WI App 217, n.10, 287 Wis. 2d 560, 706 N.W.2d 667 (§ 103.455 exists to prevent wrongful deduction meant "to shift the burden of a work related loss" from employer to employee) (citation omitted). If

a loss is not the employee's fault, the employer cannot deduct money from an employee's wages. Wandry, 129 Wis. 2d at 46.

Additionally, the Wisconsin Supreme Court has explained that the phrase "wages due or earned" should be interpreted broadly; employers cannot circumvent the limitations of § 103.455 by applying formalistic labels to their compensation systems. Erdman, 181 Wis. 2d at 753-54. For example, in Erdman, 181 Wis. 2d 736, the court considered whether § 103.455 barred an employer's deductions from a store manager's commission for such items as cash shortages, returned checks or damaged and returned merchandise. The store manager received a fixed salary and was also eligible to receive a commission on the basis of a percentage of the store's monthly gross sales. Id. at 745-47. In each pay period, the employer would perform an audit and deduct any shortages of merchandise or cash or damaged goods from the manager's commission. Id.

The court concluded that § 103.455 prohibited the deductions, even though the employer's reduction applied only to the manager's commission and not to his fixed salary and even though his employment agreement stated that his commission would be reduced for certain losses. Id. at 768. The court explained that "a broad interpretation of the word 'wages' is [] appropriate" and the manager's commission was part of his wages. Id. at 754. Moreover, the manager "earned" and was "owed" his commission at the time sales were completed in the store. Id. at 753. Thus, § 103.455 prohibited the employer from making deductions from the manager's commission for shortages or damaged goods without giving

him the opportunity to contest his liability for the losses. Otherwise, the employer would be unfairly shifting the burden of business losses to the manager. Id. at 756. Cf. Hudgins v. Neiman Marcus Group, Inc., 41 Cal. Rptr. 2d 46 (Cal. Ct. App. 1995) (holding that department store's policy of deducting from earned commissions of individual employees to reimburse employer for commissions wrongly paid to others violated California's law prohibiting deductions from wages for business losses without establishing that loss was caused by willful act or by culpable negligence of employee).

Similarly, in Zarnott v. Timken–Detroit Axle Co., 244 Wis. 596, 13 N.W. 53 (1944), the Supreme Court held that an employer violated § 103.455 by making deductions from a machine operator's earnings in reliance on the unilateral determination by a foreman that certain pieces manufactured by the employee were defective and that the defects were the result of the employee's negligence. Id. at 598. The machine operator was paid on a piecework basis, but he was also guaranteed a minimum hourly rate. Id. The employer contended that the employee earned payment for piecework only after the pieces were approved by the foreman, so the deductions were not taken from "wages due and earned." Id. at 601. The court rejected that argument, explaining that "[t]he statute must be read in its entirety in order to determine what is meant by 'wages due or earned.'" Id. The court held that allowing the employer to decide arbitrarily that an employee "earned" wages only after the a piece was approved "would leave the statute with no meaning or effect; the employee's wages were earned at the time the piecework was completed and the employer

could not make deductions for faulty work without following the procedures set forth in § 103.455. Id.

In this case, defendant argues that it did not deduct from or plaintiff's wages or take a credit against them for warranty work caused by faulty workmanship because plaintiffs never "earned" and were never "due" anything more than their base hourly rate for tasks that qualified as "warranty work." The problem with this argument (and with defendant's compensation scheme) is that it would allow defendant to pass on the costs of faulty or defective workmanship to technicians who may or may not be responsible for the problem. Additionally, the effect of the system deprives technicians of commissions they otherwise would earn for the same tasks. For example, if a technician performs brake work that is not labeled "warranty work," he earns a commission rate that is a percentage of the labor charged for the brake work. On the other hand, if he performs exactly the same brake work, but it is labeled "warranty work," he earns no commission. The only difference between the two tasks is that the "warranty work" was required allegedly because of faulty workmanship by that or another technician.

Allowing employers to pass on business-related losses to their employees by adopting compensation systems like defendant's would undermine the purpose of § 103.455. Under defendant's narrow interpretation of the statute, the employer in Zarnott could have decided that instead of deducting from an employee's piece-rate wages for defective pieces, it would require that employee or another one to remake the pieces without any piece-rate

compensation. However, labeling something as "non-piece-rate re-work" would not change the fact that the employer would be paying the employee a lower wage for alleged defective work without giving the employee the opportunity to show that it was not his fault that the piece was defective. In effect, the employer would be deducting from wages "due" to the employee. Such a system would contravene § 103.455.

Similarly, the employer in Erdman could not avoid the prohibition in § 103.455 against "deductions" by arguing that the manager did not "earn" a commission until the end of each pay period. As the Wisconsin Supreme Court explained, "[t]he manner in which the income is calculated is irrelevant to the legislative purpose" of § 103.455. Erdman, 181 Wis. 2d at 754. Thus, an employer cannot work around § 103.455 by using a compensation system that narrowly defines what wages an employee is owed. Cf. Quillian v. Lion Oil Company, 157 Cal. Rptr. 740, 744 (Cal. Ct. App. 1979) (holding that employer's attempt to pass on losses to employee was unlawful under California law and noting that, "Rather than call this incentive payment a commission and then deduct for shortages . . ., appellant deducts shortages from the payment and calls the final result a bonus. Appellant then self-righteously proclaims that no deductions were made from the bonus. Unfortunately, the result is the same. The manager carries the burden of losses from the station.").

Under defendant's compensation policy, plaintiffs and other technicians who worked in defendant's auto centers were entitled to earn commissions when they performed certain tasks. Those commissions amounted to wages "due" the technicians within the meaning of

§ 103.455. Defendant attempted to avoid paying technicians the commissions to which they were entitled by labeling certain tasks as "warranty work" and paying technicians a lower rate for those tasks. However, defendant cannot avoid § 103.455 by attaching a different label and pay scale to "warranty work" made necessary by alleged faulty workmanship. The statute prohibits an employer from recouping its business-related losses by deducting from an employee's wages for faulty workmanship, unless the employer gives the employee the opportunity to contest his or her liability for the loss.

Further, I conclude that defendant's system violates § 103.455 regardless whether the warranty work is assigned to the technician who performed the original work or to a different technician. In other words, defendant cannot avoid the application of the statute by assigning warranty work to technicians who did not perform the original work and then arguing that the original technician is not being punished for defective work. By refusing to pay commission to the technician who performs the warranty work, defendant is making a "deduction from the wages due or earned" by that technician "for defective or faulty workmanship," as prohibited by the statute. Like the employer in Erdman, 181 Wis. 2d at 753-54, who deducted from the store manager's commission for damaged, stolen or lost goods over which the manager may have had no control, defendant's system "deducts" commissions from the wages of technicians who perform warranty work caused by another's faulty workmanship. See also Hudgins, 41 Cal. Rptr. 2d at 54 (applying California statute similar to Wis. Stat. § 103.455 and stating that employer's policy violated the statute by

punishing "all employees for the sins of a few"). By failing to give technicians the opportunity to dispute their responsibility for re-work, defendant contravenes the policy codified in § 103.455 against shifting the burden of business-related losses to employees. Accordingly, I am denying defendant's motion for summary judgment.

Although I have concluded that defendant's commission system violates Wis. Stat. § 103.455, several issues remain that bear on defendant's liability. In particular, there are disputed issues of fact related to the amount and types of warranty work that plaintiffs and other technicians performed. It is important to note that § 103.455 applies only to warranty work consisting of re-work made necessary by alleged defective or faulty workmanship. Thus, the statute does not prohibit defendant from declining to pay commissions to technicians for other types of warranty work, including steering evaluations, suspension checks and multi-point inspections that are offered free to defendant's customers. At this stage, the parties have not attempted to distinguish between the various types of warranty work that plaintiffs and other technicians performed. In fact, there has been no preliminary pretrial conference or scheduling order in this case and the parties have not conducted any discovery. I will direct the clerk of court to set a scheduling conference with Magistrate Judge Crocker so that the parties may begin discovery regarding class certification and the merits of plaintiffs' claims.

ORDER

IT IS ORDERED that

1. Defendant Sears, Roebuck & Co.'s motion for summary judgment, dkt. #15, is DENIED.

2. The clerk of court is directed to set a preliminary pretrial conference for this case before Magistrate Judge Crocker.

Entered this 2d day of April, 2012.

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