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,

Plaintiffs,

v.

SEARS, ROEBUCK & CO.,

Defendant.

OPINION and ORDER

11-cv-728-bbc

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In an order dated April 2, 2012, I concluded that defendant Sears, Roebuck & Co.'s compensation policy with respect to warranty work performed by technicians at the company's auto centers violates Wis. Stat. § 103.455. On June 15, plaintiffs Alejandro Lopez and Jacob Lazarz moved to certify a statewide class of technicians for the purposes of resolving the outstanding issues of liability and damages, including whether and to what extent plaintiffs and technicians performed warranty work covered by Wis. Stat. § 103.455 and the amount of unpaid commission they are owed. In an order dated August 24, 2012, I concluded that the issues of liability and damages could not be resolved on a classwide basis because there were too many individualized issues. However, I concluded that a class should be certified under Fed. R. Civ. P. 23(b)(2) solely for the purpose of issuing a declaration of the illegality of defendant's commission policy that would be binding on defendant with

respect to all members of the class. I stated that the class would include "[a]ll technicians employed within Sears Auto Center stores in Wisconsin between September 16, 2005 and the date of this order." I gave the parties an opportunity to respond to the proposed declaration and to submit a proposed notice to be issued to the class members.

Now before the court is defendant's motion for reconsideration of the August 24 order on class certification. Dkt. #59. Defendant contends that the court's certification of a class under Rule 23(b)(2) was improper for several reasons. It argues that (1) Rule 23(b)(2) does not allow for class certification of matters centered on individualized money damages; and (2) the proposed declaration is not the type of "final" relief contemplated by Rule 23(b)(2). Plaintiffs filed a brief in opposition to defendant's motion, but failed to address the specific arguments made by defendant.

After reviewing case law on this issue, I agree with defendant that this case should not have been certified under Rule 23(b)(2). A class may be certified under Rule 23(b)(2) only if "the party opposing the class has acted or refused to act on grounds that apply generally to the class" and "final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). The Court of Appeals for the Seventh Circuit has explained that the first step in determining whether certification is appropriate under Rule 23(b)(2) is to determine the nature of the plaintiffs' claims. Kartman v. State Farm Mutual Automobile Insurance Co., 634 F.3d 883, 888 (7th Cir. 2011). Rule 23(b)(2) is intended for cases in which injunctive or declaratory relief will provide "final" relief to the plaintiffs. Id. at 892. "[C]ertification under Rule 23(b)(2) 'does

not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages.'" Id. (citing Fed. R. Civ. P. 23 advisory committee's note (1966)). See also In re Allstate Insurance Co., 400 F.3d 505, 507 (7th Cir. 2005) (Rule 23(b)(2) class action is appropriate "[w]hen the main relief sought is injunctive or declaratory"). If the plaintiffs are "not really interested in final *prospective* equitable relief" and are "singularly focused on recovering a retrospective damages remedy," the case should be governed by Rule 23(b)(3), not Rule 23(b)(2). Kartman, 634 F.3d at 895.

Additionally, courts should not certify classes under Rule 23(b)(2) solely to form the basis for subsequent individualized monetary damage awards. Walmart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2557 (2011). See also Jamie S. v. Milwaukee Public School, 668 F.3d 481, 499 (7th Cir. 2012) ("[A] claim for class-wide injunctive and declaratory relief does not satisfy Rule 23(b)(2) if as a substantive matter the relief sought would merely initiate a process through which highly individualized determinations of liability and remedy are made; this kind of relief would be class-wide in name only, and it would certainly not be final."); Randall v. Rolls-Royce Corp., 637 F.3d 818, 826 (7th Cir. 2011) ("[C]alculating the amount of back pay to which the members of the class would be entitled if the plaintiffs prevailed would require 500 separate hearings . . . An injunction thus 'would not provide' relief as required by Rule 23(b)(2)."); Andrews v. Chevy Chase Bank, 545 F.3d 570, 577 (7th Cir. 2008) ("[A] declaration of a 'rescission class' would only initiate a process of individual rescission actions. Significant individual aspects of the remedy, varying with each consumer's loan transaction, would remain to be worked out before each of the transactions

could be unwound."); Bolin v. Sears, Roebuck & Co., 231 F.3d 970, 978 (5th Cir. 2000) (class certification not permitted where class members "have nothing to gain from an injunction, and the declaratory relief they seek serves only to facilitate the award of damages").

In this case, it is clear that plaintiffs' claim is for monetary damages: they want to recover the commissions they are owed for performing warranty work. Plaintiffs did not request declaratory relief and did not specify any particular injunctive relief that would remedy their injuries. The named plaintiffs are no longer employees of defendant and would receive final relief only from monetary damages. Thus, a declaration regarding the illegality of defendant's compensation policy would not be a "final remedy" for purposes of Rule 23(b)(2); it would "merely lay an evidentiary foundation for subsequent determinations of liability." Randall, 637 F.3d at 826. Therefore, I will grant defendant's motion for reconsideration and will vacate the August 24, 2012 order certifying a class under Rule 23(b)(2).

However, the question remains whether this case can be certified under Rule 23(b)(3) solely on the issue whether defendant's commission policy violates Wis. Stat. § 103.455. As I explained in the previous order, Rule 23(c)(4) allows courts to certify a class action "with respect to particular issues." The Court of Appeals for the Seventh Circuit has suggested that even in cases in which plaintiffs are seeking individualized monetary relief, class certification may be appropriate as to certain issues, particularly if the issue is the legality of a policy that applied to all class members. McReynolds v. Merrill Lynch, Pierce,

Fenner & Smith, Inc., 672 F.3d 482, 491 (7th Cir. 2012) ("[S]hould the claim of disparate impact prevail in the class-wide proceeding, hundreds of separate trials may be necessary to determine which class members were actually adversely affected by one or both of the practices and if so what loss each class member sustained . . . But at least it wouldn't be necessary in each of those trials to determine whether the challenged practices were unlawful."); Allen v. International Truck & Engine Corp., 358 F.3d 469, 472 (7th Cir. 2004) ("[I]t would be prudent for the district court to reconsider whether at least some of the issues bearing on damages—such as the existence of plant-wide racial animosity, which collectively 'constitute[s] one unlawful employment practice'—could be treated on a class basis . . . even if some other issues, such as assessment of damages for each worker, must be handled individually.") (internal citation omitted); Mejdrech v. Met-Coil Systems Corp., 319 F.3d 910, 911 (7th Cir. 2003) ("[I]t makes good sense, especially when the class is large, to resolve those issues in one fell swoop while leaving the remaining, claimant-specific issues to individual follow-on proceedings").

It may be appropriate to certify a Rule 23(b)(3) class under Rule 23(c)(4) solely on the issue of the legality of defendant's commission policy. That policy is a single, uniform policy that applied to all of defendant's employees working in Wisconsin, and it would be highly inefficient to require 180 plaintiffs to litigate the issue of the legality of the policy in separate cases. On the other hand, it makes no sense to certify any issue for classwide determination without a clear plan about what would happen next. Although the court of appeals has stated that it is possible to resolve certain issues on a classwide basis while

resolving others individually, plaintiffs in this case have not proposed any plan for resolving the individual claims. The possibility that the individual technicians would be left to file their own lawsuits in state court does not seem like a viable option. It is unlikely that the individual claims in this case are similar to those in McReynolds, 672 F.3d at 491, where "[t]he stakes in each of the plaintiffs' claims are great enough to make individual suits feasible."

Although there may be procedures by which this court could resolve individual claims within the context of this lawsuit, plaintiffs have not suggested what those procedures might be. At this stage, it is unclear how technicians will prove their individual claims for damages. According to defendant, there are factual disputes about whether each of the numerous warranty jobs performed by technicians was made necessary by defective or faulty workmanship and if so, what commission is due for the particular job. Defendant says there are no records identifying the reason for warranty work, so each inquiry would require review of defendant's records, if any exist, regarding the particular vehicle repair in question for any indication of the reason for the warranty work. If no records are available or if the records do not clarify the reason for the work, the parties might need to interview witnesses involved in the particular repairs to determine the cause. Each technician's claim would require significant fact-finding to calculate damages and could quickly become unmanageable in the context of one lawsuit.

As other courts have noted, certifying a single issue for classwide resolution may have little effect on judicial efficiency if more complicated questions must be resolved on an

individual basis. E.g., In re St. Jude Medical, Inc., 522 F.3d 836, 841 (8th Cir. 2008) ("Even courts that have approved 'issue certification' have declined to [exercise it] where the predominance of individual issues is such that limited class certification would do little to increase the efficiency of the litigation."); Farrar & Farrar Dairy, Inc. v. Miller-St. Nazianz, Inc., 254 F.R.D. 68, 77-78 (E.D.N.C. 2008) ("[S]uch a possible, speculative increase in judicial efficiency that might be gained from certifying the common issues does not merit issue certification . . . because the individual issues of causation and affirmative defenses would still predominate over the common issues even if the court were to certify the common issues."); In re Genetically Modified Rice Litigation, 251 F.R.D. 392, 400 (E.D. Mo. 2008) ("Certification of a limited issues class would lead to procedural difficulties, and a trial limited to common issues would not resolve any individual plaintiff's claims. This approach would do little if anything to increase the efficiency of this litigation."); In re Baycol Products Litigation, 218 F.R.D. 197, 209 (D. Minn. 2003) (concluding that issue certification under Rule 23(c)(4) was not appropriate because "individual trials will still be required to determine issues of causation, damages, and applicable defenses").

As the side seeking class certification, plaintiffs have the burden to show that the Rule 23 requirements are met and to propose a plan for further litigation. Steering Committee v. Exxon Mobil Corp., 461 F.3d 598, 603-04 (5th Cir. 2006) ("[W]hen the parties moving for class certification have full opportunity to present to the district court proposals for their preferred form of class treatment, the district court is under no obligation to sua sponte consider other variations not proposed by any party."); Hawkins v. Comparet-Cassani, 251

F.3d 1230, 1238 (9th Cir. 2001) ("The district court is not 'to bear the burden of constructing subclasses' or otherwise correcting Rule 23(a) problems; rather, the burden is on Plaintiffs to submit proposals to the court.") (quoting United States Parole Commission v. Geraghty, 445 U.S. 388, 408 (1980)). Without a proposal from the plaintiffs about how the court would manage individual claims, I cannot conclude that it would be appropriate to certify any particular issue for classwide resolution.

I will give plaintiffs one final opportunity to persuade the court why it would be appropriate to certify the issue of the legality of defendant's compensation plan for classwide resolution. Plaintiffs should address all relevant factors of Rule 23(a) and Rule 23(b)(3) and should explain how the individual claims for damages would be resolved. If plaintiffs do not provide a coherent plan for managing this case, I will decline to certify any issues for class resolution and the case will proceed on the claims of the named plaintiffs only.

ORDER

IT IS ORDERED that

1. Defendant Sears, Roebuck & Co.'s motion for reconsideration, dkt. #59, is GRANTED. The opinion and order dated August 24, 2012, dkt. #58, certifying a class under Fed. R. Civ. P. 23(b)(2) is VACATED.

2. Plaintiffs Alejandro Lopez and Jacob Lazarz may have until October 19, 2012 to filed a renewed motion for class certification explaining how this case would proceed in an efficient manner if the court were to certify only the issue of the legality of defendant's

commission compensation policy under Fed. R. Civ. P. 23(b)(3). In particular, plaintiffs should address how the claims of the individual technicians would be resolved. Defendant may have until October 25, 2012 to file a response. There will be no reply.

Entered this 11th day of October, 2012.

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