IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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ROB BOELK, JERRY SEGER,
DAVE JACAK, GREG CONGDON,
DAVID MOFFITT and JEFF SOPEL,
on behalf of themselves and all others
similarly situated,

OPINION AND ORDER

Plaintiffs,

12-cv-40-bbc

v.

AT&T TELEHOLDINGS, INC.,
WISCONSIN BELL, INC., AMERITECH
SERVICES, INC. and AT&T SERVICES, INC.,

Defendants.

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Plaintiffs Rob Boelk, Jerry Seger, Dave Jacak, Greg Congdon, David Moffitt and Jeff Sopel contend that defendants AT&T Teleholdings, Inc., Wisconsin Bell, Inc., Ameritech Services, Inc. and AT&T Services, Inc. violated the Fair Labor Standards Act (FLSA) and Wisconsin wage laws by failing to pay wages for meal breaks during which plaintiffs worked. In an order entered on January 10, 2013, I denied plaintiffs' motion to certify a class action under Fed. R. Civ. P. 23 and a collective action under the FLSA. Dkt. #112. I concluded that plaintiffs had failed to identify a common issue of law or fact central to their claims that could be resolved on a classwide basis and that individual issues would predominate in this case, making it unmanageable.

Plaintiffs have moved for reconsideration of the order, dkt. #113, contending that the court erred in failing to certify their claim that they worked during their meal breaks without reporting their time or being paid for it. Plaintiffs filed an unauthorized reply brief, dkt. #116, to which defendants responded by filing a motion for leave to file a sur-reply. Dkt. #119. Plaintiffs also filed a motion for leave to address supplemental authority. Dkt. #121.

The parties' motions to file supplemental briefing will be granted, but plaintiffs' motion for reconsideration will be denied. Plaintiffs have not shown that there are common questions of law or fact central to their claim that can be resolved on a classwide basis or that would not be overwhelmed by individualized issues.

OPINION

Initially, plaintiffs sought certification of a class and collective action for two claims: (1) companywide restrictions on where technicians could take their lunch breaks and what they could do during the breaks rendered the breaks not bona fide and therefore, compensable work; and (2) the combination of the meal break restrictions and defendants' productivity and efficiency ranking system caused technicians to work during their meal breaks without pay. Plaintiffs seek reconsideration only with respect to the second claim. In rejecting plaintiffs' motion for class certification of that claim, I concluded that plaintiffs had failed to identify common questions central to the claim that could be resolved with common proof. Dkt. #112, at 20-24. Additionally, I concluded that individualized issues

regarding technicians' day-to-day experiences would predominate over common questions of law and fact. Id. at 24. I explained that

> [a]lthough plaintiffs and other technicians submitted declarations stating that they often worked through meal breaks because of the meal break restrictions, the productivity rating system or a combination of both, it is clear from the deposition testimony of plaintiffs and other technicians that the reason for doing so depended on the circumstances, which varied on a day-to-day basis . . . [W]hether technicians decided to work through meal breaks because of the meal break restrictions depended on the day, the volume of work, the route, the supervisor and the technician's individual needs and desires.
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> Similarly, whether a technician felt rushed in completing jobs or pressure from the performance scoring and ranking system depended on the size of the territory to which the technician was assigned, the number of technicians available to cover the territory, the type of job assigned, the technicians' experience and supervisors' varying expectations.

Id. at 21.

Plaintiffs' primary argument in support of their motion for reconsideration is that the court failed to recognize the importance of their contention that defendants' management knew or should have known that technicians worked through their lunch breaks without reporting or being paid for the work. They contend that defendants' knowledge of the unpaid work is dispositive of defendants' liability for the entire class and makes it immaterial that "particular technicians skipped or shortened their lunch break on any given day." Plts.' Br., dkt. #114, at 2, 3; Plts.' Reply Br., dkt. #116, at 1 (defendants "knowledge is the key and controlling element of plaintiffs' claim, gives rise to common and *predominate* questions, and renders immaterial the Court's concerns about 'why' each technician used the unpaid lunch time for work"). Plaintiffs cite Keller v. Summit Seating, 664 F.3d 169, 177 (7th Cir. 2011) for the well-established proposition that employers must pay their employees for

overtime work of which they had actual or constructive knowledge, regardless whether the employer asked explicitly for the work to be performed.

Although plaintiffs now criticize the court for failing to realize that their second claim is premised on "company knowledge" of their underreporting, they acknowledge that their focus on defendants' alleged knowledge took "a quantum leap" during the briefing of their motion for class certification. Plts.' Br., dkt. #114, at 3. Plaintiffs' motion for reconsideration highlights the extent to which their legal theory has shifted throughout the class certification briefing. In their initial brief in support of their motion for certification, plaintiffs argued that certification was appropriate because they were challenging the effect of companywide policies common to the class. Plts.'s Br., dkt. #37, at 14 ("plaintiffs challenge the effect of company-wide policies: the lunch break restrictions and productivity measurement policies . . . result in pervasive under-reporting of unpaid lunch time used for work"). They did not cite Keller, instead focusing on cases involving class certification in which companywide policies were at issue. Id. (citing Ross v. RBS Citizens, N.A., 667 F.3d 900, 908 (7th Cir. 2012), and McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482, 484 (7th Cir. 2012)). I denied their request for class certification in part because plaintiffs' evidence showed that they worked through all or part of their lunch break for a variety of reasons, not just because of the policies plaintiffs had identified. Additionally, the evidence showed that the company policies affected technicians differently, depending on the day, their location and their supervisor.

Now plaintiffs take the position that whether the companywide policies caused

technicians to work through their lunch breaks is "immaterial," and that their claim is *not* that defendants' policies "compelled" technicians to skip their breaks. Plts.' Supp. Br., dkt. #121-1, at 3-4 (arguing that "technicians' reasons for working the unpaid time are 'immaterial'" because "plaintiffs' claim in the present case does not depend on proof that the work was compelled"). Plaintiffs contend that their claim actually is that defendants knew technicians were working through their lunch breaks without recording their time and that it is irrelevant why technicians worked through lunch, so long as defendants knew about it.

Plaintiffs' new legal theory has come too late. They did not develop this theory at all until their reply brief and have developed it even more fully in their motion for reconsideration. Nationwide Ins. Co. v. Central Laborers' Pension Fund, 704 F.3d 522, 527 (7th Cir. 2013) ("[I]t is well established that arguments raised for the first time in a reply brief are waived.") (citation omitted); Mungo v. Taylor, 355 F.3d 969, 978 (7th Cir. 2004) ("Arguments raised for the first time in connection with a motion for reconsideration . . . are generally deemed to be waived."). However, even if I overlook plaintiffs' shifting legal theories and failure to develop their argument adequately during class certification briefing, I would deny plaintiffs' motion for reconsideration because they have not shown that defendants' alleged knowledge of underreporting is a common question of fact that would predominate over individualized issues.

Class certification is appropriate only if there are "questions of law or fact common to the class" that will resolve an essential fact or issue of the plaintiffs' claim. Fed. R. Civ. P. 23(a)(2); Wal–Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551-52 (2011); Ross v. RBS

Citizens, N.A., 667 F.3d 900, 908 (7th Cir. 2012) (what matters for class certification is whether claim rests on factual and legal questions that are common to class and whether resolution of one or more of these questions is "apt to drive the resolution of the litigation"). Additionally, under Rule 23(b)(3), "the questions of law or fact common to the members of the class [must] predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3); Amchem Products, Inc. v. Windsor, 521 U.S. 591, 615-16 (1997). Similar standards apply to motions for certification of a collective action under the FLSA. Espenscheid v. DirectSat USA, LLC, 705 F.3d 770, 772 (7th Cir. 2013) ("there isn't a good reason to have different standards for the certification of [Rule 23 and FLSA actions]").

Plaintiffs were required to submit evidence sufficient to show that certification was appropriate under Rule 23 and the FLSA. As the Supreme Court explained in Dukes, "Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* . . . common questions of law or fact." Dukes, 131 S. Ct. at 2253 (emphasis in original). In that case, the plaintiffs brought a sex discrimination claim against Wal-Mart under Title VII of the Civil Rights Act. The Court explained that because Wal-Mart did not have a centralized employment system or official policy of discrimination, the plaintiffs were required to submit "'significant proof' that Wal-Mart 'operated under a general policy of discrimination'" to satisfy the requirements of Rule 23. Id. The Court concluded that class certification was not proper because the plaintiffs' evidence was "worlds away" from the "significant proof" required. Id. at 2254.

In this case, plaintiffs have adduced no evidence that defendants have an official policy of requiring technicians to work through their lunch breaks, and there is significant evidence that whether technicians did so depended on their location, supervisor and daily assignments. Thus, unless there is some evidence of company-level actions related to the wage and hour violations, plaintiffs' claims will require significant individualized proof. Under the Court's opinion in Dukes, such a situation requires the plaintiffs to submit "significant proof" of commonality to satisfy the requirements of Rule 23. In their motion for reconsideration, plaintiffs point to four pieces of evidence that they say are sufficient to establish commonality by showing that defendants' knew technicians underreported their hours:

- defendants had the ability through their GPS system to track whether technicians were working during their lunch breaks;
- data from the technician dispatch system purportedly shows that technicians did not take lunch on the majority of days for which data was produced;
- in mid-2010, plaintiff Boelk told Peggy Texeira, defendants' labor relations manager for Wisconsin, that defendants' efficiency ranking system was causing technicians to work through their lunch breaks, Boelk Dec., dkt. #29, at ¶ 18; and
- on September 11, 2012, Texeira allegedly told Boelk that a technician had been fired for working through lunches and breaks and that the technician had done so to improve his efficiency rating. When Boelk responded that "This was exactly what I told you was going to happen two years ago," Texeira said, "Yeah, this is nothing new. All the union presidents told me that two years ago." Boelk Supp. Dec., dkt. #99, at ¶ 2.

Plaintiffs contend that this evidence establishes that defendants knew or should have known that technicians were working through their lunch breaks without reporting their time and

that this evidence shows that there is a common question of law or fact that can be resolved on a classwide basis.

Plaintiffs cite no case in which a court relied on similar evidence of "company knowledge" to certify a class or collective action. Notably, Kellar, the case on which plaintiffs rely most heavily, was not a class or collective action and the court of appeals had no reason to consider whether class certification would be appropriate in a case with facts similar to those in this case. However, even if I assume that class certification may be appropriate in some cases in which the plaintiffs submit significant proof that the employer had knowledge of wage violations, plaintiffs' evidence in this case is insufficient to justify certification.

With respect to the GPS system, there is no evidence that defendants used their GPS system to track whether technicians were taking lunch breaks, and defendants' failure to use the system to track their employees is not sufficient to establish defendants' knowledge of underreporting. Similarly, the reports produced by the job dispatch system do not establish that defendants had knowledge of underreporting. Defendants have explained that the reports do not record whether a technician took a lunch break on any particular day. Rather, the system was intended to allow a technician to indicate whether he took a lunch break after he finished working on a job but before closing it on the dispatch system. Kuss Dec., dkt. #85, at ¶ 10. For example, if a technician opened a job that was expected to take two hours and then took a 45-minute lunch break before closing the job on the system, he could enter the lunch break on the system so that his manager would understand the additional

time. Id. The fact that a technician does not enter a lunch break on the job dispatch system does not necessarily indicate whether he took a lunch break sometime during the day because the technician may have taken a break before or after a job was opened and closed. Plaintiffs produced no evidence to dispute defendants' explanation of the system. Thus, this evidence does not establish whether defendants knew or had reason to know that technicians were working through their lunch breaks.

The conversations between Texeira and Boelk provide some support for plaintiffs' argument that defendants had knowledge of underreporting. However, the evidence does not rise to the level of "significant proof" sufficient to satisfy commonality. First, defendants dispute the content of those conversations. Although Texeira admits that Boelk told her at some point that the efficiency ranking system caused technicians to work through their lunch breaks, Texeira says that she asked Boelk for details about his assertions and that Boelk gave her none. Boelk could not identify any specific technician who had worked through his lunch break because of the efficiency ranking system and she was never aware of any technician working through lunch to boost his efficiency scores or for any other reason. Texeira Dec., dkt. #105, at ¶¶ 6-8. Additionally, Texeira denies telling Boelk that a technician had been terminated for working through his lunch or for any reason related to the efficiency ranking system. Id. at ¶ 6. She also denies stating that union leaders told her about technicians working through their lunch breaks. Id.

Second, even under plaintiffs' version of these conversations, the conversations show only that one official responsible for administering a collective bargaining agreement received

complaints from union leaders that defendants' efficiency system caused some technicians to work through their lunch without recording it. Plaintiffs make no persuasive arguments about why Texeira's knowledge is sufficient to establish "companywide knowledge" of underreporting, and in particular, why her knowledge would have given defendants reason to suspect that technicians throughout the company were skipping their lunch breaks for a variety of reasons unrelated to the efficiency system. There is ample evidence in the record showing that some technicians were motivated to work through their lunch break for reasons other than the efficiency system, including that their supervisors told them to, they had several assignments to complete or they just did not like sitting around. Op. & Order, dkt. #112, at 7-9. Although plaintiffs argue repeatedly that the reason technicians worked through their lunch breaks were irrelevant because of defendants' knowledge, plaintiffs make no attempt to explain how the reasons can be separated from defendants' alleged knowledge of underreporting. As the court of appeals explained recently, the fact that employees had a variety of motivations for underreporting is relevant, even in cases in which the employer is accused of pressuring employees to underreport their hours. Espenscheid, 705 F.3d at 774 ("Consider the further complication presented by a worker who underreported his time, but did so . . . not under pressure by DirectSat but because he wanted to impress the company with his efficiency in the hope of obtaining a promotion or maybe a better job elsewhere—or just to avoid being laid off. The plaintiffs have not explained how their representative proof would distinguish such benign underreporting from unlawful conduct by DirectSat."). Thus, Texeira's knowledge of potential underreporting is not sufficient to show that the question

of defendants' knowledge could be resolved on a classwide basis using common proof.

Finally, even if I agreed with plaintiffs that Texeira's knowledge constituted "significant proof" sufficient to satisfy the commonality requirement of Rule 23(a), I remain convinced that individualized issues would predominate over the common issues in this case. Plaintiffs contend that once defendants' knowledge is proven, "the only remaining question will be how much work went unpaid," Plts.' Br, dkt. #114, at 7, and that this question could be resolved through estimates, averages, surveys, sampling and other methods created by their damages expert. Plaintiffs are incorrect. Regardless whether defendants had actual or constructive knowledge that technicians were working during their lunch breaks, plaintiffs are still required to prove that they were, in fact, working during their lunch breaks without reporting it. As I have explained already, this will require individualized inquiries regarding whether the technicians actually performed activities that constituted compensable work and whether they were compensated for it. Op. & Order, dkt. #112, at 24. For example, some technicians left early when they worked through lunch and others were paid overtime for their work. Such differences would be relevant to liability and damages. Id. See also Espenscheid v. DirectSat USA, Case No. 09-cv-625-bbc, 2011 WL 2009967, *5 (W.D. Wis. May 23, 2011) (decertifying Rule 23 class action and FLSA collective action because "the evidence shows that opt-in plaintiffs and class members have different work experiences and were affected by defendants' policies in different ways"); York v. Starbucks Corp., Case No. 08-07919, 2011 WL 8199987, *26 (C.D. Cal. Nov. 23, 2011) ("[A]n evaluation of a meal break claim as to any individual would involve a variety of particularized factors that would

not necessarily impact any other company employee.").

In sum, the evidence in the record shows that whether and why technicians underreported their time depended on their individual circumstances and particular supervisor. Additionally, although defendants may have had reason to believe that some technicians were underreporting as a result of the efficiency ranking system, plaintiffs have not submitted proof sufficient to show that defendants knew or should have known that there was widespread underreporting caused by a variety of factors or that this issue could be resolved on a classwide basis. Plaintiffs have also not shown that defendants' knowledge that some technicians were underreporting would predominate over other individualized issues in this case. Therefore, plaintiffs have not satisfied their burden under Rule 23 or the FLSA. Their motion for reconsideration will be denied.

ORDER

IT IS ORDERED that

1. The motion to file a sur-reply filed by defendants AT&T Teleholdings, Inc., Wisconsin Bell, Inc., Ameritech Services, Inc. and AT&T Services, Inc., dkt. #119, is GRANTED.

2. The motion for leave to address supplemental authority filed by plaintiffs Rob Boelk, Jerry Seger, Dave Jacak, Greg Congdon, David Moffitt and Jeff Sopel, dkt. #121, is GRANTED.

3. Plaintiffs' motion for reconsideration of the court's denial of class certification

under Fed. R. Civ. P. 23 and conditional certification under § 216(b) of the Fair Labor Standards Act, dkt. #113, is DENIED.

Entered this 11th day of March, 2013.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge