IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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GUSTAVO UTRERA VIVEROS
and CHRISTIAN KLING, on behalf of
themselves and others similarly situated,

OPINION and ORDER

12-cv-129-bbc

Plaintiffs,

v.

VPP GROUP, LLC, FREDERICK R. STEWART,
CORPORATE DEVELOPMENT, INC., ABC INSURANCE
COMPANY and DEF INSURANCE COMPANY,

Defendants.

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Plaintiffs Gustavo Utrera Viveros and Christian Kling are suing defendants VPP Group, LLC, Frederick R. Stewart and Corporate Development, Inc. for unpaid wages under the Fair Labor Standards Act and state law. In an order dated October 5, 2012, dkt. #86, I granted plaintiffs' motion for conditional certification of a collective action under 29 U.S.C. § 216(b). Two motions are now before the court: (1) defendant VPP's motion for judgment on the pleadings, dkt. #98; and (2) defendant Stewart's motion for summary judgment. Dkt. #95 For the reasons discussed below, I am denying VPP's motion and granting Stewart's motion.

OPINION

I. DEFENDANT VPP'S MOTION FOR JUDGMENT ON THE PLEADINGS

Defendant VPP argues in its motion that the case should be dismissed because no employees have filed consent forms to join the case, including the named plaintiffs. VPP cites 29 U.S.C. § 216(b), which states that "[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought."

"The statute is unambiguous: if you haven't given your written consent to join the suit . . . you're not a party. It makes no difference that you are named in the complaint, for you might have been named without your consent." Harkins v. Riverboat Services, Inc., 385 F.3d 1099, 1101 (7th Cir. 2004). Plaintiffs acknowledge their blunder and have filed consent forms for each of the named plaintiffs, along with dozens of other employees. Dkt. #101-02.

Defendant VPP says that it is too late for plaintiffs to fix the problem because 29 U.S.C. § 256(a) "requires the party plaintiff to file consent on the same date when the complaint is filed." Dft.'s Br., dkt. #114, at 3. However, the language of that statute does not support VPP's argument. Section 256 states that an FLSA collective action:

> shall be considered to be commenced in the case of any individual claimant—
>
> (a) on the date when the complaint is filed, if he is specifically named as a party plaintiff in the complaint and his written consent to become a party plaintiff is filed on such date in the court in which the action is brought; or
>
> (b) if such written consent was not so filed or if his name did not so appear—on the subsequent date on which such written consent is filed in the

court in which the action was commenced.

Section 256(a) establishes that an FLSA collective action "commences" for a particular plaintiff on the date the complaint is filed if that plaintiff files his consent at the same time. However, § 256(a) does not require the complaint and the consent to be filed on the same day. That much is clear from § 256(b), which allows a plaintiff to file a consent on a later date. The case VPP relies on, Frye v. Baptist Memorial Hospital, Inc., 2012 WL 3570657 (6th Cir. Aug. 21, 2012), does not support its interpretation of the statute. In Frye, the court dismissed the claims not because the complaint and the consent were filed on different days, but because the plaintiffs filed their consents after the statute of limitations had run on their claims. Id. at *6 ("[W]e agree with the district court that Frye did not file the necessary written consent within the FLSA's statute of limitations."). In this case, it is undisputed that the named plaintiffs are current employees of VPP and that the practices being challenged are still in effect, so the later filing of plaintiffs' consent forms cannot bar their claims entirely, even if it might limit their damages.

Alternatively, defendant VPP asks the court to "reset the potential recovery period under the applicable statute of limitations," Dft.'s Br., dkt. #99, at 1, but VPP never explains exactly what that means. To the extent VPP is seeking declaratory relief that limits plaintiffs' claims to a particular time period, its request is premature. VPP filed a motion for judgment on the pleadings under Fed. R. Civ. P. 12(c) and I have determined that VPP is not entitled to judgment at this time. If VPP believes that plaintiffs' damages should be limited, it will have to raise that issue in a motion for summary judgment or at trial.

II. DEFENDANT STEWART'S MOTION FOR SUMMARY JUDGMENT

Defendant Stewart says that he cannot be sued under the FLSA because he is not plaintiffs' employer. The FLSA defines "employer" to mean "any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. § 203(d).

In arguing that Stewart is their employer, plaintiffs rely primarily on Stewart's status as the owner and president of defendant VPP. Although individuals can be sued under the FLSA, Luder v. Endicott, 253 F.3d 1020, 1022 (7th Cir. 2001), a person's status or title is not sufficient to hold the person liable. Rather, courts have been uniform in interpreting § 203(d) as including a personal responsibility component, that is, plaintiffs must show that defendant Stewart was personally involved in the conduct that allegedly violated their rights, for example, by supervising their work personally or implementing the challenged policies and practices. Alvarez Perez v. Sanford-Orlando Kennel Club, Inc., 515 F.3d 1150, 1160 (11th Cir. 2008) ("[I]n order to qualify as an employer for this purpose, an officer must either be involved in the day-to-day operation or have some direct responsibility for the supervision of the employee."); Luder, 253 F.3d at1022 ("[T]he supervisor who uses his authority over the employees whom he supervises to violate their rights under the FLSA is liable for the violation."); Dole v. Elliott Travel & Tours, Inc., 942 F.2d 962, 966 (6th Cir. 1991) ("To be classified as an employer, . . . [t]he party need only have operational control of significant aspects of the corporation's day to day functions."); Brock v. Hamad, 867 F.2d 804, 809 n. 6 (4th Cir. 1989) (individual who "hired and directed the employees" was employer under FLSA); Riordan v. Kempiners, 831 F.2d 690, 694 (7th Cir. 1987)

(individual may be "employer" if he "had supervisory authority over the complaining employee and was responsible in whole or part for the alleged violation"); Patel v. Wargo, 803 F.2d 632, 638 (11th Cir. 1986) (president of corporation not employer because he did not "have operational control of significant aspects of [the company's] day-to-day functions, including compensation of employees or other matters in relation to an employee"); Donovan v. Agnew, 712 F.2d 1509, 1514 (1st Cir. 1983) (individual may be "employer" if he has "significant ownership interest [and] operational control of significant aspects of the corporation's day to day functions, including compensation of employees"); Wirtz v. Pure Ice Co., 322 F.2d 259, 263 (8th Cir. 1963) (finding that majority stockholder who "had nothing to do with the hiring of the employees or fixing their wages or hours" was not employer under FLSA); Arteaga v. Lynch, 2012 WL 3879899, *9-11 (N.D. Ill. 2012) ("[T]he degree of control an individual defendant exerted over decisions that caused an FLSA violation is of particular significance in assessing the individual's potential liability as an 'employer.'").

Plaintiffs point to defendant Stewart's testimony that he has an office at the facility and "participate[s]" in "managing" the company "when [he is] there." Stewart Dep., dkt. #46, at 19. However, plaintiffs' counsel did not ask Stewart to explain what he meant by "managing" and I am not permitted to speculate. Brown v. Advocate South Suburban Hospital, 700 F.3d 1101, 1104 (7th Cir. 2012) ("However, our favor toward the nonmoving party does not extend to drawing inferences that are supported by only speculation or conjecture."). Elsewhere in his deposition, Stewart testified that his role was limited to

buying cattle and making sales and that he had no involvement in the day-to-day operations of the facility, including payroll and personnel decisions. Stewart Dep., dkt. #46, at 20,36, 37,41-44. He testified that the business managers were responsible for the company's employment policies. Id. at 23.

Plaintiffs do not offer any evidence contradicting defendant Stewart's testimony; they argue only that his testimony is "completely incredible." Plts.' Br., dkt. #105, at 5. However, it is well established that a party may not defeat a motion for summary judgment simply by attacking the credibility of a witness. Carroll v. Lynch, 698 F.3d 561, 564-65 (7th Cir. 2012) ("[N]othing requires the district court to disbelieve defendants' proffered evidence simply because [plaintiff]—without proof—asserts it is false."); Springer v. Durflinger, 518 F.3d 479, 484 (7th Cir. 2008) ("[W]hen challenges to witness' credibility are all that a plaintiff relies on, and he has shown no independent facts—no proof—to support his claims, summary judgment in favor of the defendant is proper."). In the absence of any evidence showing that defendant Stewart was personally involved in the alleged violations, I must dismiss the complaint as to plaintiffs' FLSA claim against Stewart.

With respect to plaintiffs' state law claims, defendant Stewart argues that there are no relevant differences between Wisconsin's definition of "employer" and the FLSA definition. Wis. Stat. § 103.001(6) ("'Employer' means any person . . . having control or custody of any employment, place of employment or of any employee."); Wis. Stat. § 104.01(3)(a) ("The term 'employer' shall mean and include every person . . .having control or direction of any person employed at any labor or responsible directly or indirectly for the

wages of another."). See also Madely v. RadioShack Corp., 2007 WI App 244, ¶ 13, 306 Wis. 2d 312, 323, 742 N.W.2d 559, 564 ("Wisconsin's administrative regulations are to be interpreted in such a manner as to be consistent with the Federal Fair Labor Standards Act (FLSA) and the Code of Federal Regulations, we look to federal cases discussing the FLSA and the corresponding federal regulations to assist in our analysis."). Because plaintiffs do not develop an argument to the contrary, they have forfeited that issue. Wojtas v. Capital Guardian Trust Co., 477 F.3d 924, 926 (7th Cir. 2007).

ORDER

IT IS ORDERED that

1. Defendant VPP Group, LLC's motion for judgment on the pleadings, dkt. #98, is DENIED. Defendant Corporate Development, Inc.'s motion to join defendant VPP's motion, dkt. #110, is DENIED as moot.

2. Defendant Frederick Stewart's motion for summary judgment, dkt. #95, is GRANTED. Defendant Stewart is DISMISSED from the case.

Entered this 12th day of February, 2013.

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