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.

- -

Plaintiffs Gustavo Utrera Viveros and Christian Kling are hourly employees at a beef processing plant run by defendants VPP Group, LLC, Frederick R. Stewart and Corporate Development, Inc. In this proposed collective and class action brought under the Fair Labor Standards Act, 29 U.S.C. §§ 201-219, and state law, plaintiffs allege that defendants are not compensating them for certain activities performed at the beginning and end of their shifts, such as donning and doffing personal protective equipment.

Several motions are before the court: (1) plaintiffs' motion and amended motion for conditional class certification under 29 U.S.C. § 216(b), dkt. ##37 and 82; (2) defendant Corporate Development's motion to join defendant VPP Group's opposition to plaintiffs'

motion for conditional class certification, dkt. #81; and (3) plaintiffs' motion for leave to file a second amended complaint. dkt. #34. The second and third motions require little discussion. Defendant Corporate Development's motion will be granted as unopposed. Plaintiffs' motion for leave to file an amended complaint is limited to a requested deletion of one allegation that plaintiffs are not permitted to remove safety equipment from the plant; plaintiffs do not seek to change any claims or defendants. Although defendants oppose this motion, they do not identify any prejudice they will suffer or any purpose that would be served by prohibiting plaintiffs from deleting the allegation. Accordingly, I am granting plaintiffs' motion for leave to amend their complaint.

With respect to conditional certification, I agree with defendants that the proposed classes in plaintiffs' motion and amended motion are too broad, but the problems defendants identify can be resolved by narrowing the class. Accordingly, I am conditionally certifying a class limited to employees who work in the Boning Room in the morning and the Kill Room in the afternoon because all of those employees are paid the same way.

From the proposed findings of facts submitted by the parties, I find the following facts to be undisputed for the purpose of deciding plaintiffs' motion.

UNDISPUTED FACTS

A. The Parties

Defendant VPP Group, LLC operates a beef processing plant in Norwalk, Wisconsin. Defendant Frederick R. Stewart is the sole owner of defendant VPP Group. Defendant

Corporate Development, Inc. employs the production line workers at the Norwalk plant. (Because the parties do not distinguish between the defendants for purposes of this motion, I will refer to them collectively as "defendants.") Plaintiffs Gustavo Utrera Viveros and Christian Kling are hourly employees who work at defendants' Norwalk facility.

B. The Norwalk Facility

Defendants' Norwalk facility is a full production beef packaging and processing facility. Approximately 120 to 126 individuals work in the facility's production area, which consists of several distinct departments, including the Boning Department and the Kill Department. Fifteen employees work their entire shift in the Boning Department, which includes the Boning Room and Whizard Room. Approximately 65 to 71 employees, including plaintiffs, work in the Boning Room in the morning and, after the morning meal break, transfer to the Kill Room for the remainder of the shift.

Employees in the Whizard Room, Boning Room and Kill Room all work on a production line. Individuals working in the Kill Room kill cattle; those in the Boning Room begin the deboning process; and employees in the Whizard Room remove smaller pieces of meat from the carcass. Some employees who work in the Boning Room all day operate floor jacks that move containers of meat.

Before employees begin working on the production line, defendants require them to put on personal protective equipment, which varies depending on the job duties of each employee. Plaintiff Utrera Viveros's required equipment includes a plastic apron, hard hat,

hairnet, earplugs, scabbard, arm guard, mesh gloves, cotton gloves, rubber gloves, frock and a mesh apron. Plaintiff Kling's required equipment includes a hard hat, frock, hairnet, earplugs, rubber gloves and cotton gloves. Employees working all day in the Boning Department must wear a hard hat, ear plugs, rubber gloves, cotton gloves, hair net and a frock. The majority of employees in the Whizard Room are required to wear a helmet, steel toed footwear, a white frock, ear protection, and a hair net. The Whizard Room saw operator must also wear eye protection. Additionally, some employees must go through a sanitation inspection before going onto the production line.

Utrera Viveros arrives 15 to 20 minutes before his 6:00 A.M. start time to put his equipment on and sharpen his knife. Plaintiff Kling arrives at work eight to ten minutes before his production shift starts to put his equipment on. Both plaintiffs spend time after their production line shift ends at 6:00 P.M. taking off and cleaning their equipment.

C. Defendants' Employment Policies

Defendants pay employees who work in the Boning Room in the morning and the Kill Room later in the day under a method they call "gang time" or "line time." Under that method, employees are not paid in accordance with a time clock, but for a set amount of time. In particular, employees are compensated for 11 hours of work each day, which corresponds to the time period between 6:00 A.M. and 6:00 P.M., excluding the time employees receive for two 30 minute meal breaks. The employees' actual start and stop times will vary, depending on the employees' location on the production line. The amount

of time worked by employees may also vary from day to day. Defendants use something they call "an exception report" to record instances in which employees begin or end their shift early or late and to adjust their compensation accordingly.

Employees working solely in the Boning Department are paid under a method defendants call "modified clock time." These employees are paid from 6:00 A.M. until the time they swipe out on the time clock. Whizard Room employees start deboning meat at some point after 6:03 AM and are paid until they have doffed their required gear and then swipe out.

OPINION

Plaintiffs seek conditional certification of a collective action for alleged violations of FLSA's overtime compensation, 29 U.S.C. § 207. Under 29 U.S.C. § 216(b), such an action may be maintained "by any one or more employees for and in behalf of himself or themselves and other employees similarly situated." "Although § 216(b) does not explicitly require the district court to certify a collective action under the FLSA . . . the duty is implicit in the statute and the Federal Rules of Civil Procedure." Spoerle v. Kraft Foods Global, Inc., 253 F.R.D. 434, 438 (W.D. Wis. 2008).

This court has adopted a two-step process for class certification under the FLSA. Espenscheid v. DirecStatUSA, LLC, 2010 WL 2330309, *6 (W.D. Wis. June 7, 2010); Sharpe v. APAC Customer Services, Inc., 2010 WL 135168, *4 (W.D. Wis. Jan. 11, 2010); Sjoblom v. Charter Communications, LLC, 2007 WL 4560541, *7-8 (W.D. Wis. Dec. 19,

2007); Austin v. Cuna Mutual Insurance Society, 232 F.R.D. 601, 605 (W.D. Wis. 2006). 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." Austin, 232 F.R.D. at 605. This determination does not involve adjudication of the merits of the claim. Sharpe, 2010 WL 135168, *4. Rather, plaintiffs must demonstrate only that there is some factual nexus that connects them to other potential plaintiffs as victims of an unlawful practice. Espenscheid, 2010 WL 2330309, *6. If this showing is made, the court conditionally certifies a class and authorizes notice to potential class members and the parties conduct discovery. Austin, 232 F.R.D. at 605. The requirements of conditional class certification are lenient because approval simply allows plaintiffs to provide notice to other potential class members so they can make an informed decision whether to join the case. Witteman v. Wisconsin Bell, Inc., 2010 WL 446033, *1 (W.D. Wis. Feb. 2, 2010).

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. Austin, 232 F.R.D. at 605.

Plaintiffs' theory of liability in this case is that defendants' "line time" compensation policy fails to compensate production line employees for time spent donning and doffing personal protective equipment, going through mandatory hygiene inspections and cleaning their equipment. According to plaintiffs, they are similarly situated to the proposed class of production line workers because all employees paid under the line time method are required

to don and doff personal protective equipment before they start their production line shift, but are only paid from 6:00 A.M. to 6:00 P.M. regardless how long it takes them to don and doff. In their original motion for conditional certification, plaintiffs proposed the following class definition: "All current and former hourly production employees of Corporate Development, Inc. employed at the Norwalk, Wisconsin, meat processing plant, since February 24, 2009."

Defendants objected to this definition as overbroad on the ground that employees outside the Boning Room and Kill Room are paid in accordance with a time clock, not under the "line time" method. Dfts.' Br., dkt. #57, at 2, 10. Plaintiffs responded to defendants' objection by amending their proposed class definition: "All current and former hourly production employees of Corporate Development, Inc., employed at the Norwalk, Wisconsin meat processing plant, that have worked in the Boning and/or Kill Departments since February 24, 2009." Plts.' Br., dkt. # 83, at 2.

Defendants do not deny that the proposed amendment resolves their objection regarding the initial proposed class definition. However, they object to the amended definition on other grounds. First, defendants say that the amended class definition is untimely and unfairly prejudices them. Dfts.' Br., dkt. # 84, at 2. However, all of the cases defendants cite in support of this argument involved a change to the plaintiffs' claims or theories of liability. See, e.g., Adair v. Wis. Bell, Inc., 2008 WL 4224360, *5 (E.D. Wis. Sept. 11, 2008) ("[I]t is patently unfair to expect a defendant to respond to a theory of liability that shifts with each response."). Defendants do not explain how they are

prejudiced by an amended definition that significantly *narrows* the scope of the class. Although counsel for plaintiffs should have conducted a more thorough investigation on their own before proposing their initial class definition, I am not persuaded that plaintiffs' failure on this point dooms the entire class.

Second, defendants argue that the new definition still does not comply with the "similarly situated" requirement because not all members of the class are paid the same way. In particular, employees who work all day in the Boning Room are paid from 6:00 a.m. until the time they clock out ("modified clock time") while employees who work in the Boning Room and Kill Room part of the day are paid from 6:00 a.m. to 6:00 p.m. ("line time").

Plaintiffs argue that all proposed class members are similarly situated because all of them are paid according to a set time at the beginning or end of their shift. However, I agree with defendants that there are likely to be substantial differences in determining liability for the claims of "line time" employees versus "modified clock time" employees that could make it impossible to determine liability on a class wide basis. Although one potential solution would be to divide the class into subclasses, both of the named plaintiffs are paid under the "line time" method, so neither could represent a subclass of employees paid under the "modified clock time" method, and counsel for plaintiffs do not suggest that any other employees are willing to serve as a representative for the "modified clock time" employees.

However, this does not mean that I cannot conditionally certify a collective action. Rather, the easiest resolution of the problem is to eliminate from the proposed class employees who work solely in the Boning Room. This requires only a slight adjustment to

the proposed class definition: "All current and former hourly production employees of Corporate Development, Inc., employed at the Norwalk, Wisconsin meat processing plant since February 24, 2009, who have worked in the Boning Department in the morning and in the Kill Department in the afternoon."

Defendants do not develop any other arguments in opposition to plaintiffs' proposed class definition. Defendants argue generally that "[a]nswers [about defendants' liability] will require individual analysis of how the plaintiffs spend their work time, when and what they don and doff and how they are paid," Dfts.' Br., dkt. # 57, at 20, and that proposed class members "have varying hours of work and wear different" items of personal protective equipment. Dfts.' Br., dkt. # 84, at 6, n.3. However, defendants do not explain why any of these differences are relevant for the purposes of maintaining a collective action.

The important question is whether defendants' "line time" method of paying employees is consistently depriving employees of pay to which they are entitled under the FLSA, or, more specifically for the purpose of this motion, whether the legality of that method of payment may be determined across the class. Differences among the kinds of equipment worn and the employees' actual start and stop times do not prevent classwide resolution of liability if all the employees are performing work before 6 a.m. and after 6 p.m. Plaintiffs allege that is happening and defendants do not point to any evidence that undermines that allegation.

It may well be that further factual development will show that any violations of the FLSA will need to be determined on an individual basis, but it is premature to say that now.

After the parties conduct discovery, if defendants show that any differences among class members make it too difficult to decide plaintiffs' claims on a class wide basis, defendants may ask to decertify the class.

Finally, defendants argue that conditional certification is improper because plaintiffs have failed to show that enough members of the proposed class are interested in participating in the litigation. An obvious problem with this argument is that defendants cite no language in the statute or controlling case law requiring counsel to find a certain number of named plaintiffs or proposed class members who have expressed an intent to join the lawsuit. Further, it makes little sense to require plaintiffs to make such a showing *before* the class notices have been sent out. Heckler v. DK Funding, LLC, 502 F. Supp. 2d 777, 780 (N.D. Ill. 2007) ("[T]he logic behind defendants' proposed procedure — requiring [plaintiff] to show that others want to join in order to send them notice asking if they want to join — escapes the court."). Particularly because counsel are limited in the efforts they may make to solicit more class members before notice is sent, e.g., Spoerle v. Kraft Foods Global, Inc., 253 F.R.D. 434, 443 (W.D. Wis. 2008), it would be unfair to require such a showing now. If, after the notices are sent out, defendants believe that an insufficient amount of employees agree to join the lawsuit to justify a collective action, defendants can move to decertify then.

In sum, because plaintiffs have made a modest showing that they are similarly situated to the potential class members with respect to nonpayment for donning and doffing personal protective equipment, I will grant their motion for conditional certification of the amended class defined in this opinion.

Two other issues remain. First, for reasons they do not explain, plaintiffs failed to submit a proposed class notice with their motion or amended motion for conditional class certification. Accordingly, I will give plaintiff an opportunity to prepare a proposed notice and for defendants to raise any objections to it. To save time, counsel may wish to review proposed notices approved by this court in previous cases brought under the FLSA.

Second, the deadline for filing a motion to decertify the class is November 1, 2012. Dkt. #26. In light of the fact that class notices will not be sent out for at least two weeks, that deadline is no longer realistic. Rather than simply push that deadline back and create a problem later down the road, I think the best option is to set a new schedule. Accordingly, I will direct the clerk of court to set a new scheduling conference before the magistrate judge.

ORDER

IT IS ORDERED that

1. Plaintiffs Gustavo Utrera Viveros's and Christian King's amended motion for conditional certification of a collective action under 29 U.S.C. § 216(b), dkt. # 82, is GRANTED with respect to the following class: "All current and former hourly production employees of Corporate Development, Inc., employed at the Norwalk, Wisconsin meat processing plant since February 24, 2009, who have worked in the Boning Department in the morning and in the Kill Department in the afternoon."

2. Plaintiffs' original motion for conditional class certification, dkt. #37, is DENIED as moot.

3. Defendant Corporate Development, Inc.'s motion to join the brief in opposition filed by defendants VPP Group, LLC and Frederick R. Stewart, dkt. #81, is GRANTED as unopposed.

4. Plaintiffs' motion for leave to file a second amended complaint, dkt. #34, is GRANTED. Plaintiffs' proposed second amended complaint, dkt. #27, is ACCEPTED as the operative pleading. Because the new complaint does not add any allegations, defendants may stand on their answers to plaintiffs' first amended complaint rather than file new answers.

5. Plaintiffs may have until October 9, 2012, to file a proposed notice. Defendants may have until October 12, 2012, to file any objections to the proposed notice.

6. The clerk of court is directed to set a new scheduling conference before the magistrate judge.

Entered this 5th day of October, 2012.

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