IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MAURICE JAMES SJOBLOM,
on behalf of himself and a class of employees
and/or former employees similarly situated,

Plaintiff,

v.

CHARTER COMMUNICATIONS, LLC,
CHARTER COMMUNICATIONS (CCI),
INC. and CHARTER COMMUNICATIONS,
INC.

Defendants.

OPINION AND ORDER

3:07-cv-0451-bbc

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This is a civil action for monetary, declaratory and injunctive relief under the Fair Labor Standards Act, 29 U.S.C. §§ 201-219, and Wisconsin wage and hour laws, Wis. Stat. chs. 103 and 104 and §§ 109.01-109.11. On October 5, 2007, plaintiff moved for conditional certification of a collective action under the Fair Labor Standards Act. 29 U.S.C. § 216(b). In response, defendants filed several affidavits from their current employees in support of their argument that plaintiff is not similarly situated to potential class members. Sixty-two affidavits were signed by potential class members. Dkt. #s 47-108. Before the court is plaintiff's motion for a protective order restricting communications between

defendants and potential class members. Plaintiff contends that defendants improperly interviewed their employees about the lawsuit under the pretext of a training session and failed to inform the employees of their potential interest in the current lawsuit as opt-in plaintiffs. Plaintiff also asserts that the court should strike the affidavits at issue, order defendants to send corrective notice to potential class members nationwide and award him reasonable costs and fees for bringing the motion.

Because I agree that defendants acted improperly in questioning their employees and by failing to inform them of their potential interests in this lawsuit, I am granting plaintiff's motion in part. I am striking the 62 affidavits of potential class members submitted by defendants. Defendants may not contact potential class members without seeking prior consent of this court and without fully disclosing the nature of the lawsuit and the class member's potential interest in it. I also agree that if a collective action is conditionally certified, it will be necessary to send some form of a corrective notice to the 62 potential class members who made declarations. The court will address the specific content of the notice if and when the class is certified. Finally, I am denying plaintiff's requests for fees and costs because there is no basis for such an award under Fed. R. Civ. P. 37.

Before I address the parties' arguments, I will summarize the relevant allegations contained in the affidavits submitted in support of the motion for a protective order and the documents attached to the parties' briefs.

ALLEGATIONS OF FACT

David Zrout and Matthew Tuescher are broadband technicians for defendant Charter Communications, LLC in Janesville, Wisconsin. Zrout averred that on October 16, 2007, his employer told him to go to Lake Lawn Lodge in Delavan, Wisconsin for training. Tuescher was told the same in mid-October 2007. Other technicians from Janesville, Walworth and Beloit were present at the training. After 15 minutes of training, Zrout and Tuescher were asked to meet individually with Charter attorneys. Both men were told that an employee had filed a lawsuit against Charter and were asked to answer some questions. Zrout was questioned for an hour and a half to two hours, and Tuescher was questioned for one hour. Both men were asked the same questions repeatedly.

Zrout and Tuescher averred that the attorney interviewing them did not have them sign a consent form or tell them that the lawsuit involved a potential class action; they possibly could be a class member based on the issues for which they were being interviewed; they may have the right to collect money in the future if the lawsuit was successful; or signing the statement could waive their right to participate in the lawsuit or receive money from defendants. Plaintiff later learned, see dkt. # 148, that both men actually did sign a witness disclosure form, which informed them of the following:

> 1. Our law firm represents Charter in a lawsuit, which is styled as a class and collective action, brought against it by a technician working out of one of Charter's locations. . . . If you choose to speak with us today the information

> you provide may be used by the Company to show that you are not similarly situated to the employee who has filed this action. In the lawsuit, the employee claims that he and other similarly situated employees have not been properly paid for all his working time, including overtime.
>
> . . .
>
> 3. You have no obligation to talk to me. Your job will not be affected in any way whether you talk to me or not. Regardless of your decision, you will not be penalized in any way, nor will you receive any benefit from Charter based on any information you do or do not provide me. If I ask you a question that you do not wish to answer, just say so. You are free to end our discussion at any time.
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> 4. Please let me know if you are represented by an attorney in any way related to your employment. If you are, we should not speak further.
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> 5. The information that you provide will be compiled with information from other interviews, and will be used by our firm to provide legal advice to the Company and to assist in its defense of the lawsuit. We believe that this makes our discussion confidential and privileged, and it is important that you do not repeat our discussion. However, if you are asked by an attorney representing the employee bringing the lawsuit to provide information about your job, you are free to do so or decline to do so. You are, of course, also free to retain your own attorney to advise you on these issues. . . .

Dkt. #150, Attachments 1 and 2. Each of the other employees who made a declaration after being interviewed by defendants at the October 2007 training session signed a similar consent form.

During his interview, Tuescher told Charter's attorney that he spent about 15 minutes every night at home organizing and securing his equipment but that he did not take the equipment into his house. Tuescher also told the Charter attorney that he usually came

in about 30 minutes early every day to do paperwork, organize his truck, clean out and restock equipment and reconcile equipment before starting work on the clock. No one had ever required Tuescher to do this, but a few months ago, Charter told its employees not to do any work whatsoever before they were on the clock in the morning. Neither Tuescher nor Zrout used the word "nominal" during his interview and the term was not explained to them. Zrout told the Charter attorney that he was not represented by an attorney.

After interviewing them, the Charter attorneys gave Zrout and Tuescher statements to sign. Both men looked quickly at the declaration prepared for them, assuming that it was accurate. Zrout and Tuescher averred that they would not have signed the declaration had they been told that there was a potential class action from which they could collect money or that signing the declaration might constitute a waiver of their right to participate in the class action.

Defendants' attorney Jacqueline Kalk and other members of her law firm wrote a treatise entitled Littler Mendelson on Employment Law Class Actions (Lexis Nexis 2007). Appendix O of that treatise contains a sample witness consent form to use in employment law class actions when conducting a "'blitz' campaign of affidavit gathering." Dkt. #137, Exh. D. The sample form states in part: "The lawsuit is a class action and you are a potential class member." It does not contain a provision requesting the witness to keep the discussion confidential and privileged. Id.

DISCUSSION

Given that class actions present "opportunities for abuse as well as problems for courts and counsel in the management of cases," the Supreme Court has recognized the duty and broad authority that a district court has "to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties." Gulf Oil Company v. Bernard, 452 U.S. 89, 100 (1981). However, a district court's discretion is not unlimited. Any discovery limitations should be carefully drawn and balance the potential for abuse with the right of the parties to contact potential class members. Id. at 101 (requiring decision to be based on clear record and specific findings); Williams v. Chartwell Financial Services, Ltd., 204 F.3d 748, 759 (7th Cir. 2000). Abusive practices that district courts have considered sufficient to warrant a protective order include communications that coerce prospective class members into excluding themselves from the litigation; contain false, misleading or confusing statements; and undermine cooperation with or confidence in class counsel. Cox Nuclear Medicine v. Gold Cup Coffee Services, Inc., 214 F.R.D. 696, 698 (S.D. Ala. 2003) (collecting cases).

Plaintiff asserts that defendants questioned and obtained declarations from potential class members under the pretext of an employer-required training session. Defendants contend that they brought their employees to Lake Lawn for an actual training. This may be true, but defendants certainly had another purpose in mind and did not inform their

employees of their intentions. Although the manner in which the employees were solicited for defendants' "blitz campaign of affidavit gathering" is cause for some concern, it alone would not justify limiting discovery. Similarly, the mere fact that the employment relationship is inherently coercive does not justify restricting defendants' communications with their employees. McLaughlin v. Liberty Mutual Insurance Company, 224 F.R.D. 294, 298 (D. Mass. 2004). However, considering these factors along with defendants' less than full disclosure of the affiants' potential interest in this lawsuit, I am persuaded that a limitation on defendants' communication with potential class members is necessary.

Although they apparently do not recall doing so, Zrout and Tuescher signed a consent form provided by defendants. The witness consent form appropriately informed employees of the lawsuit and that they were not represented by defendants' attorneys, had the right to refuse to be interviewed and could not be retaliated against for not participating in the interview. However, as plaintiff asserts, the consent form has two significant problems. First, although it advised potential class members that the lawsuit at issue was a class action, it did not notify them that they might be entitled to become a part of the lawsuit. It is not reasonable to infer that the mere mention of a class action would alert an employee to the possibility that he or she may be a class member entitled to recover money from defendants. Further, the notice did not mention that signing an affidavit might waive the affiant's right to become a named class member. Second, the statements concerning the privileged and

confidential nature of the discussions are also misleading and somewhat coercive. Defendants have not asserted any basis for such assertions or for their request for confidentiality of potential class members, although confidentiality impedes fair and open discovery. I am persuaded that defendants did not merely overlook these issues. The sample consent form included in Littler Mendelson on Employment Law Class Actions states clearly that witnesses should be informed that they may be potential class members and it does not include a statement concerning confidentiality or privilege.

After balancing the potential for abuse with defendants' right to contact potential class members, I find justification for some limitations on defendants' communications with potential class members. Until the court reaches a final decision on certification and any resulting opt-in period is completed, defendants are to obtain prior consent of this court if they wish to communicate with potential class members. They should be prepared to inform the court of the method and content of their desired communications. Whether plaintiff will be entitled to have a representative present is a decision the court will make on a case-by-case basis. The court may be satisfied that defendants' proposed communication is not coercive and sufficiently informs potential class members of their rights. For example, defendants might choose to present potential class members with a written questionnaire that has been pre-approved by the court.

Because the affidavits at issue were not executed in a proper manner and with full disclosure to the affiants, I am striking them. See dkt. #s 47-108. I also agree that if the court conditionally certifies a collective action, at a minimum some form of a corrective notice will have to be sent to the 62 potential class members who made declarations. The court will address the specific content of the notice if and when the class is certified.

Finally, I am not awarding plaintiff attorneys' fees or costs for bringing the motion. Rule 37 supports only the reimbursement of fees and costs resulting from a failure to disclose, admit or obey a court order related to discovery; it does not support a grant of fees and costs for bringing a motion for sanctions based on pre-filing activity. Fed. R. Civ. P. 37(a)(5), (b) and (c); Maynard v. Nygren, 332 F.3d 462, 470-71 (7th Cir. 2003). Further, I do not find it necessary to impose sanctions under this court's inherent powers. Maynard, 332 F.3d at 470-71. The relief ordered by the court should be sufficient to address plaintiff's concerns.

ORDER

IT IS ORDERED that plaintiff's motion for a protective order is GRANTED in part and DENIED in part:

1. Before contacting or communicating with potential class members in this action, defendants shall obtain this court's approval of the method and content of the proposed communication;

2. Plaintiff's request that the court strike the 62 affidavits submitted by defendants in support of their opposition to the motion for conditional certification is GRANTED. The clerk is directed to strike docket numbers 47 through 108 from the court record;

3. Ruling on plaintiff's request for corrective notice is RESERVED until a final decision is made on conditional certification; and

4. Plaintiff's request for fees and costs is DENIED.

Entered this 26th day of December, 2007.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge