IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

AARON L. ESPENSCHEID,
GARY IDLER and MICHAEL CLAY,
on behalf of themselves and a class of
employees and/or former employees
similarly situated,

ORDER

09-cv-625-bbc

Plaintiffs,

v.

DIRECTSAT USA, LLC and
UNITEK USA, LLC,

Defendants.

- -

Plaintiffs Aaron Espenscheid, Gary Idler and Michael Clay are suing defendants DirectSat USA, LLC and Unitek USA, LLC for violation of the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-219, and the wage and overtime compensation laws of Wisconsin, Minnesota and Pennsylvania. Trial is scheduled for March 12, 2012 and the parties' motions in limine are now before the court.

A. Plaintiffs' Motions in Limine

1. Motion to exclude evidence and argument regarding alleged motivation for technicians'

underreporting of hours, dkt. #691

Plaintiffs have moved to preclude defendants from introducing any evidence or making any argument about plaintiffs' alleged motivation for underreporting hours worked, contending that this evidence is irrelevant to determining an employer's liability under the FLSA and would be unfairly prejudicial. Defendants object to the motion, contending that plaintiffs' motivation for underreporting hours is directly relevant to whether defendants knew or should have known that plaintiffs were underreporting hours. In particular, defendants contend that it was not their nationwide policies and practices that led to plaintiffs' underreporting of hours worked, but plaintiffs' interest in increasing their efficiency ratings in order to increase their higher piece-rate pay and a higher net wage. According to defendants, they did not know that plaintiffs were underreporting because plaintiffs deliberately concealed it.

I am denying plaintiffs' motion. As plaintiffs acknowledge, to establish liability under the FLSA they must prove that defendant knew or had reason to believe that plaintiffs were underreporting their work hours. Plts.' Br., dkt. #691, at 2 (quoting 29 C.F.R. § 785.11) ("Work not requested but suffered or permitted is work time. . . . The employer knows or has reason to believe that he is continuing to work and the time is working time."). See also id. at 3 ("The question here is whether the employee performed compensable work, *with the employers' knowledge*, without being paid.") (Emphasis added.) Because defendants have not conceded that they knew that technicians were underreporting their time, they are not

barred from exploring with plaintiffs and any technicians who may testify on plaintiffs' behalf the reasons for their underreporting of hours, but only as it relates to defendants' knowledge that plaintiffs were underreporting hours.

2. Motion to exclude evidence or argument that technicians were "paid" or "paid properly" for all "time worked or recorded," dkt. #692

During the depositions of some of the technicians involved in this case, defendants asked whether the technicians had been "correctly compensated," "paid" or "paid properly" for all of the time they worked or recorded on their time sheets. Plaintiffs contend that these questions were intended to confuse technicians and elicit admissions on the basis of the technicians' misunderstanding of what constituted "work" or proper compensation under the law. Plaintiffs have moved to preclude defendants from asking these types of questions at trial, on the basis that they are asking for legal conclusions and will confuse the jury. Defendants object to the motion, arguing that these questions are fundamental to the case because they are relevant to whether plaintiffs recorded all the time that they worked, what plaintiffs consider to be "work" in terms of recording time on their time sheets and whether they were paid in accordance with an agreement with defendants.

I am granting plaintiffs' motion. First, asking a technician whether he or she was paid at all for recorded time is irrelevant to plaintiffs' claim for unpaid overtime hours. Plaintiffs

are not asserting a claim that defendants failed to pay them for time they actually recorded on their time sheets; rather, they contend that defendants did not pay them for time that was not recorded. Thus, questions relevant to this claim include (1) what amount of time did plaintiffs record on their time sheets; (2) what type of activities are represented by the time they recorded; (3) what type of activities, if any, are not included on the time sheets. Defendants are not precluded from asking such questions. However, it is not relevant whether plaintiffs were paid for the time they recorded.

Plaintiffs are also asserting a claim that defendants used the wrong formula for calculating overtime compensation. Resolution of this issue depends on whether there was an agreement between plaintiffs and defendants that the pay for productive time also covered nonproductive work hours. Although asking plaintiffs whether they believed they were "paid properly" or "correctly compensated" for their overtime hours may have some relevance to the existence of an agreement between the parties, such questions would be confusing to both plaintiffs and the jury and would require plaintiffs to make a legal conclusion that they are not authorized to make. Fed. R. Evid. 403 (court may exclude relevant evidence that is confusing or would mislead the jury). The technicians are not in a position to know whether defendants were using the formula mandated by the FLSA regulations for calculating their overtime. Thus, defendants may not ask the technicians whether they were paid properly. That being said, defendants are not precluded from asking

the more relevant and less confusing questions on this issue, including questions about plaintiffs' understanding of how their overtime hours were being compensated and whether they understood that their piece-rate compensation covered time spent on non-productive tasks.

3. Motion to preclude defendants from introducing evidence, arguments or questions based on documents or other information that defendants failed to produce during discovery, dkt. #693

Plaintiffs have moved to preclude defendants from introducing evidence, arguments or questions based on documents or other information that defendants failed to produce during discovery. I am granting this motion as unopposed.

B. Defendants' Motions in Limine

1. Motion to exclude declarations and unauthenticated summaries, dkt. #681

Defendants have moved to preclude plaintiffs from introducing as evidence at trial plaintiffs' declarations and summaries of plaintiffs' declarations, except for the limited purposes outlined in Fed. R. Evid. 801(d). Defendants have also moved to preclude the declarations and summaries of declarations of current and former employees of defendants because they constitute inadmissible hearsay. I am granting this motion as unopposed.

2. Motion to preclude reports and testimony of Dr. Lewin, dkt. #683

Defendants contend that Dr. Lewin should be precluded from testifying or offering his expert reports because they were not prepared by him, are unreliable and are irrelevant. I am granting this motion as unopposed.

3. Motion to preclude plaintiffs from referring to and/or introducing evidence of defendants' financial condition, dkt. #687

Defendants argue that plaintiffs should be precluded from referring to defendants' financial condition and the compensation of its current or former owners, executives and managers because this information is irrelevant, prejudicial and would be used solely to appeal to the jury's sympathies. Plaintiffs object to the motion on two grounds. First, they contend that information regarding defendants' financial condition is relevant to calculating civil penalties under Minnesota law with respect to plaintiff Idler's claim. Minn. Stat. §§ 177.27, 177.30. This contention does not help them because civil penalties would be calculated by the court, not the jury. Milner v. Farmers Insurance Exchange, 748 N.W.2d 608, 619 (Minn. 2008).

Plaintiffs' second argument is that they should be allowed to introduce evidence regarding defendants' financial condition and the compensation of managers, supervisors and executives because it is relevant to defendants' knowledge of plaintiffs' underreporting. In

particular, plaintiffs point to email conversations between defendants' corporate representatives indicating that defendants wanted to cut overtime and wages in order to maximize profits. Also, plaintiffs intend to introduce evidence that some supervisor and manager bonuses were linked to technician efficiency. However, these points can be made without talking about the overall financial condition of defendants or the specific salaries of supervisors, managers and executives. Plaintiffs can introduce evidence regarding defendants' policies and discussions aimed at reducing overtime, such as the email exchanges about cutting overtime, without talking about how much defendants made last year. In addition, plaintiffs can introduce evidence about bonuses and promotions that were tied directly to the production rate of technicians without introducing evidence regarding the specific compensation packages of corporate officers. Discussion of defendants' finances would merely distract from the real issues in the case. Rush University Medical Center v. Minnesota Mining and Manufacturing. Co., 2009 WL 3229435, *3 (N.D. Ill. Oct. 1, 2009) ("[C]ourts often recognize that the issue of the finances of a party can distract the jury from the real issues in the case."). Accordingly, I am granting this motion.

4. Motion to exclude evidence of former opt-ins and former class members' employment experiences, dkt. #689

Defendants have moved to exclude evidence of the employment experiences of

employees and former employees of defendants who are no longer plaintiffs in this case, contending that such evidence would be irrelevant and prejudicial. Defendants rely on this court's decertification order, in which the court concluded that the experiences of other employees were not uniform or necessarily representative of one another. Defendants contend that only plaintiffs' own testimony regarding their specific experiences is relevant to their claims.

In decertifying the class and collective actions I did not conclude that testimony of one employee regarding his or her employment experiences would *necessarily* be irrelevant to another employee's claims. As plaintiffs point out, the testimony of technicians who performed similar work, in the same offices and under the same supervisors as plaintiffs may be relevant to the issues in this case. For example, technicians who worked with plaintiffs could provide testimony regarding the timekeeping policies and practices within plaintiffs' field offices, instructions from managers and supervisors regarding timekeeping, work responsibilities and the extent to which managers and supervisors knew that plaintiffs were working unrecorded overtime and not being paid for all hours worked. Such testimony would be relevant to plaintiffs' claims and would not be unfairly prejudicial.

It is likely true that certain testimony of non-party technicians would be irrelevant, confusing or unfairly prejudicial to defendants. However, defendants' motion to exclude testimony from all non-party technicians is simply too broad. If defendants believe that

plaintiffs should be precluded from offering *particular* testimony from a non-party technician at trial because it is irrelevant or otherwise inadmissible, defendants may object at the appropriate time. I am denying defendants' motion to exclude all testimony from non-party technicians.

5. Motion to preclude plaintiffs from referring to or introducing evidence of other lawsuits or investigations against defendants, dkt. #694

Plaintiffs seek to introduce evidence that five other class or collective actions have been filed against defendants by installation technicians contending that they are owed overtime compensation under state or federal law. Defendants have moved to preclude this evidence, contending it is inadmissible character evidence under Federal Rule of Evidence 404(b). Additionally, defendants contend that the evidence is not relevant under Rule 401 because it would not support plaintiffs' claims that *they* are owed overtime compensation. Defendants rely on this court's decertification decision, contending that the decision shows that technicians working for defendants have a wide variety of employment experiences that are not necessary representative of each other. Finally, defendants argue that, even if the evidence were relevant, its probative value would be substantially outweighed by the danger of unfair prejudice, confusion of the issues and misleading of the jury under Rule 403.

Under Rule 404(b), evidence of "other act[s] is not admissible to prove a person's

character in order to show that on a particular occasion the person acted in accordance with the character." However, evidence of prior bad acts may be admitted to establish "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Id. See also Mathis v. Phillips Chevrolet, Inc., 269 F.3d 771, 775–76 (7th Cir. 2001) (setting forth test to determine whether evidence of prior acts is admissible under Rule 404(b)).

Plaintiffs may not use the existence of other wage and hour lawsuits to argue that defendants have the propensity to deny overtime compensation to their employees. However, evidence of the other lawsuits is relevant to the issue whether defendants knew that plaintiffs were not being paid for all time worked. Because defendants deny that they knew or should have known that plaintiffs were underreporting their hours, plaintiffs must adduce evidence to prove defendants' knowledge. The allegations and claims in the other five lawsuits are similar to those in this case, including the claim that defendants' piece-rate system fails to compensate technicians for their non-productive time. As plaintiffs point out, the fact that several hundred employees in the same job position who were subject to the same timekeeping policies and piece-rate system as plaintiffs filed complaints contending that they were not being paid for all hours worked is potentially relevant to defendants' knowledge that their timekeeping and piece-rate policies resulted in their employees, including plaintiffs, not being paid for all time worked.

That being said, plaintiffs have not explained how all five lawsuits are relevant to their claims. Three of the lawsuits were filed *after* plaintiffs commenced this case on October 13, 2009. In particular, Jacks v. DirectSat USA, LLC, Case No. 1:10-cv-1707 (N.D. Ill.) was filed on March 17, 2010; Bennett v. DirectSat USA LLC, Case No. 1:10-cv-04968 (N.D. Ill.) was filed on August 6, 2010; and Butler v. DirectSat USA, LLC, Case No. 8:10-cv-02747 (D. Md.) was filed on October 4, 2010. Plaintiffs do not explain how lawsuits that were filed after this case are probative of defendants' knowledge that plaintiffs had not been compensated properly for all of their overtime hours. By the time these cases were filed, defendants were aware of plaintiffs' claims regarding the overtime policies and the parties had already begun discovery on these issues. Thus, plaintiffs cannot introduce evidence regarding these three lawsuits.

The other two lawsuits were filed before plaintiffs began this case. Specifically, Monroe v. FTS USA, LLC, Case No. 2:08-cv-2100 (W.D. Tenn.) was filed on February 14, 2008, and Farmer v. DirectSat USA, LLC, Case. No. 1:08-cv-3962 (N.D. Ill.) was filed on July 11, 2008. Thus, the claims raised by the plaintiffs in those lawsuits would be relevant to defendants' knowledge that its piece-rate and timekeeping policies caused its employees to perform uncompensated overtime work. However, although the lawsuits are relevant, any evidence plaintiffs introduce regarding these lawsuits must be otherwise admissible under the rules of evidence.

It is not clear what kind of evidence plaintiffs intend to introduce regarding these other lawsuits. Plaintiffs point out that a jury trial was held recently in the Monroe case, after which the district court found that defendants willfuly violated the FLSA. The outcome of the litigation in the Monroe case is not admissible because the decision was issued two years after plaintiffs filed this case. Thus, it is not relevant to whether defendants had reason to know that plaintiffs were owed additional overtime compensation. Additionally, the decision in Monroe is inadmissible under Rule 403 because its prejudicial effect would substantially outweigh its probative value. Fisher v. Krajewski, 873 F.2d 1057, 1061-64 (7th Cir. 1989) (affirming evidentiary ruling to exclude decision in related case because it would have "usurp[ed] the jury's function in assessing the credibility of testifying witnesses"); see also Coleman Motor Co. v. Chrysler Corp., 525 F.2d 1338, 1351 (3d Cir. 1975) (noting that "[a] jury is likely to give a prior verdict against the same defendant more weight than it warrants.").

However, the complaints that were filed in the Monroe and Farmer cases are admissible. Although defendants contend that these complaints constitute hearsay, that would be so only if they were admitted to prove the truth of the allegations contained within them. They are admissible for the limited purpose of showing the defendants had knowledge that employees were complaining about being denied overtime compensation under defendants' policies. Using the complaints for this limited purpose will not be unfairly

prejudicial to defendants.

6. Motion to exclude plaintiffs' responses to interrogatories, dkt. #695

Defendants have moved to preclude plaintiffs from introducing plaintiffs' responses to interrogatories as direct evidence, contending that the responses constitute inadmissible hearsay. Plaintiffs do not oppose the motion, with the exception that they do not want the court to foreclose the possibility of using the interrogatory responses for rebuttal, impeachment or to refresh the recollection of a witness.

I am granting the motion. Defendants have moved to preclude use of the interrogatory responses from being admitted to the jury as *direct* evidence, not for rebuttal, impeachment or to refresh the recollection of a witness.

7. Motion to exclude reference to routing and vehicle maintenance, dkt. #696

Defendants have moved to exclude evidence regarding time spent by plaintiffs receiving and mapping their routes or performing vehicle checks and maintenance on the ground that the court held that such activities are barred by the Portal-to-Portal Act and are not compensable under the FLSA. I am granting this motion as unopposed.

8. Motion to preclude plaintiffs from referring to and/or introducing evidence regarding

settlement discussions, dkt. #697

Defendants have moved to preclude evidence regarding settlement discussions under Fed. R. Evid. 408. I am granting this motion as unopposed.

9. Motion to preclude plaintiffs from introducing witnesses not previously identified and/or introducing documents not previously disclosed in discovery, dkt. #698

Defendants have moved to preclude evidence and witnesses not identified previously by plaintiffs. I am granting this motion as unopposed.

C. Defendants' Motion for Sanctions

In an order dated May 12, 2011, I struck plaintiffs' liability expert report because it did not comply with Fed. R. Civ. P. 26(a)(2)(B). Dkt. #595. In particular, plaintiffs' expert, Dr. Lewin, had failed to identify specifically the facts and data he used in reaching his conclusions. Now, nearly nine months after I struck Dr. Lewin's report, defendants have filed a motion for monetary sanctions against plaintiffs under Fed. R. Civ. P. 37 and 28 U.S.C. § 1927, contending that plaintiffs' bad faith actions related to Dr. Lewin's report caused defendants to incur substantial attorney fees and expert costs.

Defendants have not shown that plaintiffs should be subject to additional sanctions under Rule 37(c) in connection with Dr. Lewin's expert report. Under that rule, a court may

sanction a party by striking an expert report that does not comply with Rule 26(a). Because Dr. Lewin's report did not comply with the federal rules of civil procedure, I sanctioned plaintiffs by striking it. This sanction was one of the reasons that plaintiffs' class and collective action claims were ultimately decertified. Although the rule allows courts to "order payment of the reasonable expenses, including attorney's fees, caused by the failure" to comply with the discovery rules, Fed. R. Civ. P. 37(c)(1)(A), I am not persuaded that additional sanctions under this rule are necessary.

I am also not persuaded that sanctions are appropriate under 28 U.S.C. § 1927, which states that "[a]ny attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." The Court of Appeals for the Seventh Circuit has explained that a court may impose § 1927 sanctions when an attorney has acted in an "objectively unreasonable manner" by engaging in "serious and studied disregard for the orderly process of justice," Pacific Dunlop Holdings, Inc. v. Barosh, 22 F.3d 113, 119 (7th Cir. 1994); pursued a claim in bad faith that is "without a plausible legal or factual basis and lacking in justification," id.; or "pursue[d] a path that a reasonably careful attorney would have known, after appropriate inquiry, to be unsound." Kapco Manufacturing Co. v. C & O Enterprises, Inc., 886 F.2d 1485, 1491 (7th Cir. 1989). See also Jolly Group, Ltd. v. Medline Industries, Inc., 435 F.3d 717, 720 (7th Cir. 2006).

Defendants contend that plaintiffs engaged in bad faith and unnecessarily multiplied the proceedings in this case by failing to produce documents mandated by the federal rules, misrepresenting their role in creating Dr. Lewin's expert report and attempting to deceive the court. However, plaintiffs have already been sanctioned for failing to provide documents to support Dr. Lewin's expert report within the deadlines mandated by the federal rules. Additionally, defendants have pointed to no blatant misrepresentation by plaintiffs regarding the expert report. Plaintiffs' counsel admits that they collaborated closely with Dr. Lewin regarding the expert report and provided him with all of the data and some of the calculations that were used in the final report. Counsel denies that they "prepared" the report without Lewin's input. However, even if it were true that Lewin relied too heavily on data and conclusions suggested by plaintiffs' counsel, his doing so does not support a conclusion that plaintiffs acted in bad faith or in an "objectively unreasonable manner." Rather, the reliability of the report is an evidentiary issue that would go to the admissibility and weight of Lewin's conclusions and the data that supports them. Because Lewin's report has already been stricken, the reliability of the report is irrelevant. Accordingly, I will deny defendants' motion for sanctions.

ORDER

IT IS ORDERED that

1. The motion to exclude evidence and argument regarding alleged motivation for and benefit from technicians underreporting hours filed by plaintiffs Aaron Espenscheid, Gary Idler and Michael Clay, dkt. #691, is DENIED.

2. Plaintiffs' motion to exclude evidence or argument that technicians were "paid" or "paid properly" for all "time worked or recorded," dkt. #692, is GRANTED.

3. Plaintiffs' motion to preclude defendants DirectSat USA, LLC and Unitek USA, LLC from introducing evidence, arguments or questions based on documents or other information that defendants failed to produce during discovery, dkt. #693, is GRANTED as unopposed.

4. Defendants' motion to exclude declarations and unauthenticated summaries, dkt. #681, is GRANTED as unopposed.

5. Defendants' motion to preclude reports and testimony of Dr. Lewin, dkt. #683, is GRANTED as unopposed.

6. Defendants' motion to preclude plaintiffs from referring to and/or introducing evidence of defendants' financial condition, dkt. #687, is GRANTED.

7. Defendants' motion to exclude evidence of former opt-ins and former class members' employment experiences, dkt. #689, is DENIED.

8. Defendants' motion to preclude plaintiffs from referring to and/or introducing evidence of other lawsuits against defendants, dkt. #694, is DENIED IN PART. Plaintiffs may not introduce evidence of lawsuits that were filed after this lawsuit. Plaintiffs may introduce evidence of lawsuits that were filed before this case for the limited purpose of showing that defendants knew or should have known that their policies resulted in denial of overtime compensation to their installation technicians.

9. Defendants' motion to exclude plaintiffs' responses to interrogatories, dkt. #695, is GRANTED.

10. Defendants' motion to exclude reference to routing and vehicle maintenance, dkt. #696, is GRANTED as unopposed.

11. Defendants' motion to preclude plaintiffs from referring to and/or introducing evidence regarding settlement discussions, dkt. #697, is GRANTED as unopposed.

12. Defendants' motion to preclude plaintiffs from introducing witnesses not previously identified and/or introducing documents not previously disclosed in discovery, dkt. #698, is GRANTED as unopposed.

13. Defendants' motion for sanctions, dkt. #705, is DENIED.

Entered this 27th day of February, 2012.

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