IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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ALEJANDRO LOPEZ and
JACOB LAZARZ, on behalf of themselves
and others similarly situated,

OPINION and ORDER

Plaintiffs,

11-cv-728-bbc

v.

SEARS, ROEBUCK & CO.,

Defendant.

- -

In this proposed class action for monetary relief, plaintiffs Alejandro Lopez and Jacob Lazarz contend that defendant Sears, Roebuck & Co. violated Wis. Stat. § 103.455 by failing to pay commissions to its technicians for warranty work performed at defendant's auto centers. On December 1, 2012, defendant filed a motion for summary judgment on the claim, contending that its compensation policy did not violate the plain meaning and intent of the statute. I denied the motion on April 2, 2012, concluding "that defendant's compensation policy contravenes § 103.455 because it impermissibly shifts business losses to defendant's employees without giving them an opportunity to contest their liability for the losses." Dkt. #37 at 2.

Now before the court is plaintiffs' amended motion for class certification under Fed. R. Civ. P. 23. Dkt. #46. Defendant objects to class certification, challenging plaintiffs'

ability to satisfy any element of Rule 23. After reviewing the parties' arguments, I conclude that a class should be certified under Rule 23(b)(2) solely on the issue whether defendant's commission policy violates Wis. Stat. § 103.455. In other words, I will grant plaintiffs' motion in part and certify a class for the purpose of issuing a declaration on the illegality of defendant's commission policy that will be binding on defendant with respect to all members of the class. For the purpose of clarity, I have modified plaintiffs' class definition to include the following class members:

> All technicians employed within Sears Auto Center stores in Wisconsin between September 16, 2005 and the date of this order.

I am prepared to issue a declaration that defendant's commission policy regarding warranty work violates Wis. Stat. § 103.455. However, before I do so, I will give the parties an opportunity to respond. Additionally, the parties must submit a proposed notice to be issued to the class members that explains the court's declaration and their right to file lawsuits to recover commissions owed to them for warranty work covered by Wis. Stat. § 103.455.

Plaintiffs have not shown that a class may be maintained for purposes of resolving the outstanding issues of liability and damages, including whether and to what extent plaintiffs and technicians performed warranty work covered by Wis. Stat. § 103.455 and the amount of unpaid commission they are owed. There are too many individualized questions related to these issues that would make a class action unmanageable. Therefore, after the class notice has been distributed, this case will proceed with plaintiffs' individual claims only.

I find the following facts to be undisputed for the purpose of deciding plaintiffs'

motion for class certification.

FACTS

Defendant Sears, Roebuck & Co. is a national retailer that operates stores and auto centers throughout the United States, including 15 auto centers in Wisconsin. Auto centers provide automotive maintenance and repair services, as well as sales of auto parts and accessories. The workforce at the auto centers typically includes managers, service supervisors, customer service advisors and technicians. Technicians are mechanics who perform automotive services and repairs on vehicles. Each auto center has an average of 8 to 12 technicians. Plaintiffs Lopez and Lazarz worked as technicians for defendant at an auto center in Madison, Wisconsin.

Technicians employed at the auto centers in Wisconsin are classified as either Level I, II, III and IV, depending on their level of skill and experience. However, regardless of their classification, all technicians are paid under the same compensation system. They are paid an hourly rate for all hours worked on all jobs performed. For some jobs, including brake repair and belt replacement, technicians are also paid a commission calculated from a fixed percentage of labor costs for the particular type of job or a set dollar amount for the job. Technicians earn commissions at the same rate regardless of their level. They do not receive commissions for certain services for which customers do not pay, including steering evaluations, suspension checks, multi-point inspections and most "warranty work." Warranty work includes jobs for which defendant provides a specific warranty, as well as re-

work required as a result of poor workmanship by a technician.

It is defendant's policy that if warranty work is required because of a technician's faulty workmanship, the technician who performed the initial work should do the re-work, if that technician is available. The technician responsible for the initial job keeps any commission that was paid for the initial work and receives an hourly wage for time spent performing the warranty work. In other words, defendant does not deduct any portion of the commission that was paid previously to the technician for the job, but also does not pay an additional commission for the warranty work. If the technician who performed the initial job is not available to perform the warranty work, the manager or shop supervisor will assign the warranty work to another technician. In such cases, the technician who performs the warranty work is paid his hourly wage but does not receive a commission for the work.

The number of warranty jobs performed by technicians varies each week. Sometimes, warranty work is the only type of work available for technicians. On average, plaintiff Lopez handled between eight and ten warranty jobs each week and plaintiff Lazarz worked on approximately six warranty jobs each week. (Plaintiffs do not identify how many of their jobs were necessitated by alleged defective or faulty workmanship and how many were other types of warranty jobs.)

Warranty work is assigned various unique codes. For example, there is a unique code for alignment work covered under defendant's warranty. Defendant does not maintain any "sub-codes" that categorize warranty work based on the underlying reason for the warranty work. In other words, there is no coding system or electronic database that allows defendant

to distinguish warranty work resulting from defective or faulty workmanship from other causes such as a defective part, normal wear and tear or customer accident.

Defendant maintains some paper records related to warranty work completed by technicians. The paper records typically generated for each vehicle serviced include a work order and a completed invoice. The work orders may contain the employee identification number of the original technician who performed work on the vehicle. For many repairs, a quality service evaluation form is also completed and sometimes other diagnostic print-outs. Some of the documents contain notes indicating the suspected reason a vehicle is returning for warranty service.

OPINION

I have concluded already that defendant's compensation policy with respect to warranty work violates Wis. Stat. § 103.455 because it punishes technicians for faulty workmanship without giving them an opportunity to dispute whether they should be held responsible for it. The statute provides that

> No employer may make any deduction from the wages due or earned by any employee . . . for defective or faulty workmanship, lost or stolen property or damage to property, unless the employee authorizes the employer in writing to make that deduction or unless the employer and a representative designated by the employee determine that the defective or faulty workmanship, loss, theft or damage is due to the employee's negligence, carelessness, or willful and intentional conduct, or unless the employee is found guilty or held liable in a court of competent jurisdiction by reason of that negligence, carelessness, or willful and intentional conduct. If any deduction is made or credit taken by any employer that is not in accordance with this section, the employer shall be liable for twice the amount of the deduction or credit taken in a civil action brought by the employee. Any agreement entered into between an employer

and employee that is contrary to this section shall be void. . . ."

Wis. Stat. § 103.455.

Plaintiffs seek to certify a class of technicians working at defendant's auto centers in Wisconsin. In their original motion for class certification, plaintiffs sought certification of a class composed of:

> All technicians employed within Sears Auto Center stores located throughout Wisconsin who in violation of Wis. Stat. § 103.455 have not been paid for commissions related to warranty work during the class period (Or as the Court may otherwise define).
>
> The class period is from six years immediately preceding the filing of the complaint on September 16, 2011, to the time of the payment of judgment.
>
> Excluded from the class are claims for personal injuries and any individuals from the class who opt out of the class.

Plts.' Mtn., dkt. #46, at 1. After defendant objected to the proposed class definition on several grounds, including its lack of objectivity and its requirement that the parties make a preliminary determination whether defendant violated the technician's rights under § 103.455, plaintiffs modified the first paragraph of the definition to state:

> All technicians employed within Sears Auto Center stores located throughout Wisconsin during the class period. (Or as the Court may otherwise define).

Plts.' Supp. Mtn., dkt. #54, at 1. The remainder of the proposed class remains the same. Plaintiffs state that there are 180 technicians falling within the class definition.

Before the court may certify a class, plaintiffs must satisfy the requirements of both Rule 23(a) and (b). Rosario v. Livaditis, 963 F.2d 1013, 1017 (7th Cir. 1992). First, plaintiffs must show that they can sue as a representative party on behalf of others by

meeting the four prerequisites laid out in Rule 23(a): (1) numerosity, that "the class is so numerous that joinder of all members is impracticable"; (2) commonality, that "there are questions of law or fact common to the class"; (3) typicality, that "the claims or defenses of the representative parties are typical of the claims or defenses of the class"; and (4) adequacy, that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a). Next, plaintiffs must show that the proposed class action "may be maintained" as one of the four types of class actions permitted under Rule 23(b). In this case, plaintiffs contend that class should proceed under Rule 23(b)(3), which imposes the additional requirements of "predominance" and "superiority."

Also, this court makes an initial assessment whether proposed class representatives have standing and whether the proposed class is "precise, objective and presently ascertainable," an implicit requirement in determining whether a class may be certified. E.g., Ruppert v. Alliant Energy Cash Balance Pension Plan, 255 F.R.D. 628, 633 (W.D. Wis. 2009); Blihovde v. St. Croix County, 219 F.R.D. 607, 616 (W.D. Wis. 2003).

Defendant makes several arguments against class certification, contending that individualized issues regarding the types of warranty work that technicians performed and how much commission they are owed make it impossible for plaintiffs to satisfy the elements of commonality and typicality under Rule 23(a) and predominance and superiority under Rule 23(b)(3). In response, plaintiffs contend that many of defendant's arguments relate to the calculation of damages, an issue that can be resolved later. Plaintiffs argue that there is an obvious common question relating to the proposed class, namely, whether defendant's

commission policy violates Wis. Stat. § 103.455, that this question predominates and that a class action is the superior method for resolving it.

Both parties make valid points. Defendant has identified no reason why this case should not be certified with respect to the issue of the legality of defendant's commission policy. Under Fed. R. Civ. P. 23(c)(4), courts may certify a class action "with respect to particular issues." In this case, all members of plaintiffs' proposed amended class perform warranty work, are subject to defendant's compensation policy and have a common interest in its legality. Further, plaintiffs have satisfied the requirements of Rule 23(a) with respect to certification of a class on the issue of defendant's policy. The requirement of numerosity is satisfied, because joinder of 180 technicians would be impractical, and commonality is satisfied, because the question of the legality of defendant's policy is amenable to classwide resolution. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011). As I have explained in multiple cases, challenges to a uniform policy are well-suited for class or collective resolution. Spoerle v. Kraft Foods Global, Inc., 253F.R.D. 434, 440 (W.D. Wis. 2008) ("When the plaintiffs are challenging a 'uniform policy,' class certification is likely to be appropriate because it is more efficient to determine the validity of that policy in the context of a single lawsuit."). See also Witteman v. Wisconsin Bell, Inc., 2010 WL 446033, *2-3 (W.D. Wis. Feb. 2, 2010); Kelly v. Bluegreen Corp., 256 F.R.D. 626, 629-30 (W.D. Wis. 2009); Austin v. CUNA Mutual Insurance Society, 232 F.R.D. 601, 605 (W.D. Wis. 2006). Plaintiffs have also shown typicality and adequacy, because the representative plaintiffs' claims regarding the legality of defendant's policy are typical of those of the other

members, there are no conflicts of interest between class members on this issue and counsel is adequate to represent the class on this issue. Rosario, 963 F.2d at 1018.

Defendant's objections focus on the challenges of determining whether individual class members performed certain types of warranty work, how long it took them to perform it and how much commission they are owed. None of these issues has any affect on my conclusion that defendant's commission policy with regards to warranty work is unlawful.

That being said, plaintiffs have not shown that it would be appropriate to certify a class for any purpose beyond issuing a declaration that defendant's commission policy violates Wis. Stat. § 103.455. The other issues remaining to be resolved in this case are whether plaintiffs performed warranty work allegedly necessitated by their own or another technician's poor workmanship for which they did not receive commissions and what commission they are owed. As defendant points out, technicians performed a different number of warranty jobs each week, only some of which were necessitated by their own or someone else's defective or poor workmanship. The other warranty jobs may have involved steering evaluations, suspension checks and multi-point inspections that are offered free to customers. As I explained in the previous opinion, § 103.455 does not prohibit defendant from declining to pay commissions for those tasks.

Defendant intends to dispute whether each of the numerous warranty jobs at issue was made necessary by defective or faulty workmanship and if so, what commission is due for the particular job. Defendant points out that there are no records identifying clearly the reason for warranty work, so each inquiry will require review of defendant's records regarding

the particular vehicle repair in question for any indication of the reason for the warranty work. If no records are available or if the records do not clarify the reason for the work, the parties may need to interview witnesses involved in the particular repairs to determine the cause. Evaluating several hundred or thousand warranty jobs for 180 technicians at 15 different auto centers would quickly overwhelm any common issues remaining in this case. Plaintiffs have not suggested any way in which these disputes could be resolved on a classwide basis. Thus, plaintiffs have failed to show that any issue except the legality of defendant's policy can and should be certified.

The next question is what type of class under Rule 23(b) should be certified. Because I am certifying the case solely for the purpose of issuing a declaration that defendant's policy violates § 103.455, a Rule 23(b)(2) class is appropriate. Jamie S. v. Milwaukee Public Schools, 668 F.3d 481, 498-99 (7th Cir. 2012) (certification of Rule 23(b)(2) class proper if "final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole"). Additionally, I see no reason why the court should not issue a declaration regarding the illegality of defendant's policy at this stage of the case. However, because neither side has had an opportunity to address this issue, I will give the parties a chance to present their positions regarding the declaration. Additionally, although notice to the class members is not required under Rule 23(b)(2), I conclude that it would be appropriate to notify class members, after the declaration is issued, that the court has concluded that defendant's commission policy violates Wis. Stat. § 103.455, that that they have the right to file individual lawsuits to seek compensation if they believe they have been injured by the

policy and that the time for filing is no longer tolled. I will give the parties an opportunity to submit a proposed notice for the court's approval. After the notice is distributed to the class members, this case will proceed with the claims of plaintiffs Lopez and Lazarz only.

One final issue relevant to plaintiffs' claims should be addressed in this order. In its brief in opposition to plaintiffs' motion for class certification, defendant argued that if plaintiffs show that they are owed a commission for warranty work necessitated by defective workmanship, defendant will attempt to prove that the defective workmanship was caused by plaintiffs' own "negligence, carelessness, or willful and intentional conduct," within the meaning of the statute. Defendant contends that if it makes that showing it will be entitled to a set-off for any damages that plaintiffs are owed.

Although defendant made this argument as a challenge to plaintiffs' ability to satisfy the requirements of Rule 23, defendant's set-off argument applies to plaintiffs' individual claims as well. Defendant assumes that § 103.455 allows an employer to prove that deductions it made previously were justified under § 103.455. This is incorrect. Under § 103.455, employers can make deductions or credits for defective workmanship only if (1) the "employee authorizes the employer in writing to make that deduction"; (2) "the employer and a representative designated by the employee determine that the defective or faulty workmanship, loss, theft or damage is due to the employee's negligence, carelessness, or willful and intentional conduct"; or (3) "the employee is found guilty or held liable in a court of competent jurisdiction by reason of that negligence, carelessness, or willful and intentional conduct." Wis. Stat. § 103.455. It is undisputed that defendant did not follow

any of these procedures before denying commission for warranty work. Further, no reasonable interpretation of the statute would allow defendant to use one of the three authorized procedures to justify deductions after the fact. Such an interpretation would be contrary to the purpose of the statute, which is to "prevent[] employers from using coercive economic power to shift the burden of a work related loss from the employer to the employee," Wandry v. Bull's Eye Credit Union, 129 Wis. 2d 37, 45-46, 384 N.W.2d 325, 329 (1986), and "preclude any deduction for losses until the employee has an opportunity to show his lack of fault." Donovan v. Schlesner, 72 Wis. 2d 74, 82, 240 N.W.2d 135, 139 (1976). Under defendant's interpretation, defendant would be allowed to assume that warranty work was caused by an employee's defective workmanship and the burden would fall to the employee to file a lawsuit challenging the employer's assumption. This is not what the statute contemplates. In the absence of any authority that would support such an interpretation, defendant will not be permitted to make arguments about set-offs as a defense to plaintiffs' claims.

ORDER

IT IS ORDERED that

1. The motion for certification of a class action under Fed. R. Civ. P. 23 filed by plaintiffs Alejandro Lopez and Jacob Lazarz, dkt. #46, is GRANTED IN PART and DENIED IN PART. A class is certified under Fed. R. Civ. P. 23(a) and 23(b)(2) on the limited issue whether defendant Sears, Roebuck & Co.'s policy denying commission for

warranty work caused by alleged faulty or defective workmanship violates Wis. Stat. § 103.455. The class is defined as follows:

> All technicians employed within Sears Auto Center stores in Wisconsin between September 16, 2005 and the date of this order.

The motion is DENIED in all other respects.

2. Defendant may have until August 31, 2012, to show cause why the court should not issue a classwide declaration stating that defendant's policy denying commission to auto center technicians for warranty work caused by alleged faulty or defective workmanship violates Wis. Stat. § 103.455. Plaintiffs may have until September 7, 2012 to respond. There will be no reply.

3. The parties may have until September 4, 2012 to consult and file a joint proposed notice with the court to be issued to the class. If they cannot agree, both parties should provide the court an explanation of their disagreements and respective positions on September 4, 2012.

4. Douglas J. Phebus and Victor M. Arellano are appointed class counsel under Fed. R. Civ. P. 23(g) for the limited purpose of issuing notice to class members.

5. The case will proceed with plaintiffs Lopez's and Lazarz's individual claims for liability and damages.

Entered this 24th day of August, 2012.

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