IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MARYLEE ARRIGO,

Plaintiff,

12-cv-700-bbc

v.

MEMORANDUM

LINK STOP, INC., JAY E. LINK,
ASHLAND LAKE SUPERIOR LODGE, LLC,
GRANDMA LINK'S RESTAURANT AND LOUNGE, LLC
and GORDON PINES GOLF COURSE,
d/b/a LINK INTERNATIONAL INVESTMENTS, LLC,

Defendants.

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In an order dated April 25, 2014, dkt. #229, I concluded that defendants Ashland Lake Superior Lodge, LLC, Grandma Link's Restaurant and Lounge, LLC and Gordon Pines Golf Course d/b/a Link International Investments, LLC could not be held jointly liable with defendant Link Stop, Inc. and I directed plaintiff Marylee Arrigo to show cause why the companies other than Link Stop should not be dismissed from the case. Plaintiff has filed a response to the order in which she objects to dismissal of any of the defendants. Dkt. #234.

As an initial matter, plaintiff has yet to explain the practical significance of keeping the other defendants in the case. I have concluded that defendant Link Stop qualifies as an employer under 29 U.S.C. § 2611(4)(A)(I) and 29 U.S.C. § 2615(a)(1), so there is no

danger that plaintiff will forfeit her claims if she agrees to dismissal of the other defendants. Further, plaintiff does not suggest that the amount of damages she can recover is contingent on the number of defendants in this case or that defendants Link Stop and Jay Link do not have the financial resources to satisfy a potential judgment. Unless plaintiff is aware of some prejudice she may suffer if the other defendants are dismissed, she should consider whether it is worth keeping them in the case, particularly because of the possibility that the presence of so many defendants could confuse the jury.

With respect to the merits of plaintiff's objection, she repeats her assertion that all of the companies may be held jointly liable because they qualify as a "joint employer" under 29 C.F.R. § 829.106. However, plaintiff still fails to cite any language in the FMLA or related regulations that makes one company liable for another company's unlawful actions. As I explained in the April 25 order, under § 829.106, the only effect of being a joint employer is that each company involved must count the employees of all of the companies as their own for the purpose of determining whether a particular company meets the 50-employee threshold. 29 C.F.R. § 825.106(e) ("Employees jointly employed by two employers must be counted by both employers, whether or not maintained on one of the employer's payroll, in determining employer coverage and employee eligibility."). This view is supported by the fact that § 825.106(e) refers to each company as separate "employers," not as multiple companies that become one "employer" for the purpose of liability.

Further, plaintiff does not dispute the conclusion in the April 25 order that interpreting § 825.106 as imposing joint liability would lead to unfair results in many

situations because it could require companies to pay damages even when they played no part in violating the law. Although she argues that it is fair *in this case* to impose joint liability, she does not identify any textual basis in the regulation for imposing joint liability on some joint employers but not others.

In any event, I may defer a final decision on whether the other companies may be held jointly liable until after the jury renders a verdict. Even if the companies may be held jointly liable, I see no reason for including them on the verdict form. (The current draft of the verdict form identifies only Jay Link and Link Stop as defendants in the caption. The liability verdict questions focus on Jay Link as the sole decision maker.) Plaintiff did not distinguish among any of the defendants in her proposed verdict form or jury instructions and plaintiff's counsel did not raise any objections at the final pretrial conference to excluding the companies from the verdict form. If the jury finds in favor of plaintiff, the parties can argue in post judgment motions whether it is appropriate to hold the companies jointly liable. Including all of the defendants on the verdict form likely would further no purpose but to confuse the jury as to how the companies are related and how their presence should influence the jury's decision.

Plaintiff raises a brief alternative argument that the companies may be held *individually* liable, even if they cannot be held jointly liable. Plaintiff says that "each Defendant was Plaintiff's employer and does satisfy the statutory definition, as is applied in §§ 2615 and 2617. Admittedly, Plaintiff worked for each of the Defendants, and was terminated by each of the Defendants." Dkt. #234 at 5. The problem with this argument

is that defendants have not stipulated that plaintiff worked for each of the companies and that issue was not resolved at summary judgment. Although the parties have stipulated that the companies qualify as a "joint employer," as I have discussed, that issue is distinct from the issue whether each company was *plaintiff's* employer. The only issue the court resolved in the summary judgment motion was whether the companies collectively employed more than 50 people during the relevant time. Although the order portion of the summary judgment opinion states that the companies "qualify as an employer under the Family and Medical Leave Act," dkt. #127 at 30, the only issue actually in dispute at that time was the number of defendants' employees, so the imprecise wording of the order is not dispositive.

If plaintiff wishes to hold each of the companies individually liable, she is free to try, but she will have to present evidence on that issue, unless she obtains a stipulation from defendants. A threshold question is whether the court or the jury should decide whether the other companies were plaintiff's employer in addition to Link Stop. (If plaintiff was employed by one or more of the other companies, it would seem to follow that defendant Jay Link fired her from those companies because defendants do not suggest that plaintiff remained in the employ of any of the companies after January 31, 2011. Thus, it would not be necessary to include a question asking on behalf of which companies defendant Jay Link was acting when he fired plaintiff.) If it is a jury determination, the parties will have to propose a verdict form and any relevant instructions necessary to guide the jury's

decision. The court will discuss these issues with the parties on Monday during a break in the proceedings.

Entered this 4th day of May, 2014.

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