IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ERIC SCHILLING and BLAINE KROHN,

Plaintiffs,

v.

PGA INC.,

Defendant.

OPINION AND ORDER

16-cv-202-wmc

This case involves yet another proposed hybrid, FLSA collective and Wisconsin state labor law class action. Plaintiffs Eric Schilling and Blaine Krohn on behalf of themselves and other similarly-situated employees seek payment for overtime work from their employer defendant PGA Inc. There are a number of motions pending before the court at this time, the most pressing of which concern plaintiffs' serial motions to amend their complaint and defendant's separate motions to amend briefing on the Rule 23 class certification and decertification of the FLSA collective action. For the reasons explained below, the court will allow some, but not all, of plaintiffs' proposed amendments to their complaint. In light of those amendments, the court will move back the deadlines for responding to the parties' motions on certification / decertification, as well as slightly extend the dispositive motion deadline as set forth in the order below.

BACKGROUND

Plaintiffs filed the present lawsuit on April 1, 2016, asserting claims under the FLSA and Wisconsin labor law for failure to pay for overtime.[1] (Compl. (dkt. #1).) Plaintiffs also sought certification of a collective action for their FLSA claims and a Rule 23 class action for the state law claims on behalf of other employees of defendant PGA that are similarly situated. The defendant PGA Inc. answered the original complaint. (Answ. (dkt. #7).)

At the preliminary pretrial conference that followed, this court set August 1, 2016, as the deadline for amending pleadings without leave of court. (Prelim. Pretrial Conf. Order (dkt. #12) ¶ 2.) Plaintiffs filed their first amended complaint the day before that deadline, to which defendant again promptly answered. (Dkt. ##13, 14.) On August 30, 2016, however, plaintiffs then filed a *second* amended complaint, without moving for leave of court, but indicated that defendant did not object. (Dkt. ##15, 16.) As best as the court can discern, this second amended complaint dropped their claim for travel time, and again defendant timely answered. (Dkt. #17.)

On September 23, 2016, plaintiffs filed a motion for conditional certification of an FLSA collective action. (Dkt. #18.) Defendant subsequently stipulated to conditional certification, which the court accepted. (Dkt. ##23, 24.) In response to the conditional certification notice, two additional individuals -- Erik Sinclair and David Krall -- each signed consent forms: one joining the FLSA claim and one joining a

[1] In their original complaint, plaintiffs also sought compensation for travel time, but have since dropped that claim.

Wisconsin prevailing wage action. (Dkt. ##25-28.) Unfortunately, the notice approved by the court only provided information about an FLSA claim, without mentioning a Wisconsin prevailing wage action, which is not a claim asserted in this case.

Soon after filing Sinclair's and Krall's notices of consent to join lawsuit, plaintiffs filed a motion for leave to amend their complaint for the *third* time, along with a proposed third amended complaint. (Dkt. ##29, 29-1.) In addition to seeking to add Sinclair and Krall as named plaintiffs, plaintiffs seek to add two individual claims: (1) that PGA Inc. violated Wisconsin law by computing overtime pay using the rate for the type of work performed during the overtime hours, rather than the often higher average wage rate earned by the employee during that workweek; and (2) that defendant violated Wisconsin prevailing wage laws by paying them the rate of general laborer rather than the sheetmetal worker rate. (Pls.' Mot. (dkt. #29) ¶ 1.) Defendant's opposition to that motion and plaintiffs' reply triggered additional filings, all of which the court will address below.

On February 1, 2017, the day after the parties filed their respective motions for decertification of the FLSA collective action and certification of a Rule 23 class, plaintiffs filed yet *another* motion for leave to amend their complaint and a proposed *fourth* amended complaint. (Dkt. ##56, 56-1.) In their motion, plaintiffs now represent that they seek to add a single claim to the complaint that Sinclair worked without compensation on the weekends at the Harvey Hall Project.

OPINION

Rule 15(a)(2) governs amendment of pleadings that fall outside the deadline for amendments as a matter of course. That rule states that "a party may amend its pleading only with the opposing party's written consent or the court's leave." Fed. R. Civ. P. 15(a)(2). The Rule also states that "[t]he court should freely give leave when justice so requires." *Id.* Whether to grant or deny leave to amend rests within the sound discretion of the district court. *Foman v. Davis*, 371 U.S. 178, 182 (1962). "In the absence of any apparent or declared reason . . . the leave sought should, as the rule requires, be 'freely given.'" *Id.* Even so, courts should not automatically grant leave to amend: "a court may deny a motion to amend because of 'undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of the allowance of the amendment, futility of amendment, etc.'" *Johnson v. Methodist Med. Ctr. of Ill.*, 10 F.3d 1300, 1303 (7th Cir. 1993) (quoting *Foman*, 371 U.S. at 182).

As discussed above, plaintiffs seek to pursue two, so-called "individual" claims. *First*, plaintiffs seek leave to add a claim that PGA Inc. violated Wisconsin law by computing overtime pay using the rate for the type of work performed at that time, rather than using the often higher average wage rate earned by the employee during that workweek. Plaintiffs acknowledge in their proposed pleading and in their reply brief, that this claim concerns how the overtime pay was calculated as part of their overall class claim. (Pls.' Reply (dkt. #37) 4.) For its part, defendant complains about the lack of clarity around the proposed amendment, and argues that defendant would be prejudiced

by this amendment given that it has already deposed Schilling and Krohn and did not question them about these new allegations.

Contrary to plaintiffs' attempt to minimize the import of their proposed new claims, the court agrees with defendant that the proposed amendment would impact the Rule 23 class claim. Even if the class definition need not change, plaintiffs' challenge to the appropriate base rate to be used in an overtime calculation adds another set of issues to consider both in opposing certification and defending on the merits. The court is also sympathetic to defendant's confusion about the proposed amendment as described in the initial motion. However, plaintiffs' complaint and subsequent explanation in their reply brief in support of the motion sufficiently clarifies plaintiffs' position. Plus, plaintiffs only learned of this claim after Sinclair and Krall responded to the FLSA conditional certification notice. As a result, plaintiffs cannot be accused of delay in seeking leave to amend once they learned of this claim. Accordingly, the court will grant plaintiffs' motion to add this claim, as well as add Sinclair and Krall as named plaintiffs.

Second, plaintiffs seek to add a claim that defendant violated Wisconsin prevailing wage laws by paying Sinclair and Krall the general laborer rate rather than that of a sheetmetal worker. Plaintiffs again described this as an "individual" claim in their motion, but then explain in reply that they seek to assert a claim "with respect to other sheetmetal workers employed by PGA." Plaintiffs further assert that a prevailing wage law claim does not require "formal class certification procedure," because similarly-

situated employees may instead opt-in by filing a simply consent form. (Pls.' Reply (dkt. #37) 5.)[2]

In sole support of their argument that a prevailing wage claim need not extend beyond the named plaintiffs to comply with Rule 23, plaintiffs point to a Wisconsin Supreme Court case that considered such a claim under Wisconsin Civil Rules of Procedure. *See Strong v. C.I.R., Inc.*, 184 Wis. 2d 619, 629-30, 516 N.W.2d 719, 724 (1994). Whatever relevance that decision may have in state court, however, this case is governed by the *Federal* Rules of Civil Procedure, and in particular by Rule 23, which sets forth various requirements for pursuing a claim as a representative party on behalf of other individuals. *See, e.g., Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 400, 130 S. Ct. 1431, 1438, 176 L. Ed. 2d 311 (2010) (discussing reach of Rule 23).[3]

In this case, plaintiffs have until now pursued a claim for overtime pay under the FLSA and state law. To add an unrelated claim to this action would unduly prejudice defendant, in light of its discovery efforts to date and preparations to move for decertification of the FLSA collective action and to oppose the recently-filed motion for class certification. It is simply too late to add an unrelated class claim to this lawsuit. Of

[2] In response to this new argument, defendant filed a motion for leave to file a sur-reply (dkt. #40), which will be granted over plaintiffs' opposition. The court has, therefore, reviewed and considered the sur-reply.

[3] To the extent a state procedure for certifying a class action may be applied in the federal court context, the court would decline to exercise its supplemental jurisdiction over this state law claim in any event, finding it unrelated to the core overtime pay claims and further finding that adjudication of this late-filed claim would require the court to significantly amend the pretrial schedule and push back the trial date.

course, the individual plaintiffs Sinclair and Krall are free to assert a prevailing wage claim in a separate lawsuit to the extent not time barred, but not in this suit. Accordingly, plaintiffs' motion to add a proposed prevailing wage class claim is denied.[4]

In the second motion for leave to amend, plaintiffs again seek to add an "individual claim," only this time it appears to be just that. Plaintiff Sinclair claims that PGA failed to pay him for weekend work on one project. Unlike the prevailing wage claim, this claim *appears* to be straight-forward, and it would not implicate the parties' briefing as to decertification of the FLSA collective action and certification of a Rule 23 class action. Still, the court is reluctant to grant leave. First, this claim is also unrelated to the overtime pay claims. Second, it creates a possible conflict for Sinclair to act as a class representative in the present lawsuit, and complicates the representation for putative class counsel. Third, while appearing to be straightforward, this claim could unnecessarily complicate discovery and is sufficiently unique as to distract from the central dispute here -- a systematic failure to pay for overtime. Accordingly, the court will deny plaintiffs leave to add an individual claim on the part of plaintiff Sinclair, though again he is free to pursue such a claim separately to the extent not time barred.

Finally, in addition to these motions to amend, defendant filed a motion to extend the deadline for moving to decertify the FLSA collective action and certify a class action,

[4] As described above, and as described in defendant's sur-reply, plaintiffs' counsel included an opt-in form for a prevailing wage claim in the FLSA conditional certification notice. The court did *not* grant plaintiffs permission to include this consent form. It appears from defendant's sur-reply that the parties are working to address this issue through a corrective letter. In light of the court's ruling, denying plaintiffs leave to pursue a prevailing wage class claim, the court assumes that the parties will be able to reach an agreement on that corrective letter. If not, the court would be open to a motion by defendant, including a motion for sanctions.

which under the preliminary pretrial conference order were both due January 31, 2017. (Dkt. #43.) Because the parties ultimately filed their submissions timely, this motion is moot. On February 7, 2017, however, defendant filed a renewed motion to stay briefing on certification/decertification of class pending rulings on the motions for leave to amend. The court will grant that motion to provide time for defendant to depose newly-added plaintiffs Sinclair and Krall. Accordingly, the court will extend the deadline for defendant's opposition to plaintiffs' Rule 23 motion and plaintiffs' opposition to defendant's motion to decertify the FLSA collection action to March 31, 2017; replies, if any, will be due on or before April 14, 2017. In light of this extension, the court will also extend the deadline for filing dispositive motions to May 22, 2017. All other pretrial deadlines and the trial date remain in place.

ORDER

IT IS ORDERED that:

1) Plaintiffs' motion for leave to amend (dkt. #29) is GRANTED IN PART AND DENIED IN PART. Plaintiffs are granted leave to add Erik Sinclair and David Krall as named plaintiffs and to assert a claim that PGA Inc. violated Wisconsin law by computing overtime pay using the rate for the type of work performed during the overtime hours rather than the often higher average wage rate earned by the employee during that workweek as part of their overarching denial of overtime class action claim. Plaintiffs are denied leave to add a prevailing wage claim.

2) Plaintiffs' motion for leave to amend (dkt. #56) is DENIED.

3) The clerk of court is directed to amend the caption to add plaintiffs Erik Sinclair and David Krall.

4) By February 23, 2017, plaintiffs are directed to file a third amended complaint consistent with these rulings. Defendant may answer, move or otherwise respond to this amended pleading on or before March 9, 2107.

5) Defendant PGA Inc.'s amended motion to file a sur-reply (dkt. #40) is GRANTED. Defendant's original motion to file a sur-reply (dkt. #39) is DENIED AS MOOT.

6) Defendant's motion to amend briefing schedule (dkt. #43) is DENIED AS MOOT.

7) Defendant's renewed motion to amend briefing schedule (dkt. #59) is GRANTED. Defendant's opposition to plaintiffs' Rule 23 motion (dkt. #45) and plaintiffs' opposition to defendant's motion to decertify the FLSA collection action (dkt. #53) are now due March 31, 2017 optional; replies to each are due April 14, 2017. The deadline for filing dispositive motions is extended to May 22, 2017.

Entered this 16th day of February, 2017.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge