IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
MILWAUKEE DIVISION

Jason Patzfahl, *On behalf of himself and those similarly situated*, Plaintiff, v. FSM ZA, LLC, *et al.*, Defendants.	Case No. 2:20-cv-1202 Judge Lynn S. Adelman

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' L.R. 7(H) EXPEDITED MOTION TO COMPEL DISCOVERY (DOC. 56)

Preliminarily, Plaintiff notes that Defendants attempt to use "expedited briefing" to gloss over multiple complex issues, which warrant substantive briefing. Plaintiff's relevancy objection alone requires determining a disputed legal standard involving the FLSA, its regulations, agency guidance, and divergent case law. Defendants should not be advantaged by their effort to avoid proper briefing. Defendants fail to justify their request, so the Court "[should] deny relief, as [courts have] done in other cases." *Terry v. Cty. of Milwaukee*, 2018 U.S. Dist. LEXIS 40522, at *7 (E.D. Wis. Mar. 13, 2018).

Discovery is assessed on a case-by-case basis because Rule 26 examines requests' relevance and proportionality. FLSA cases also require consideration of its remedial purposes and dangers of excessive costs preventing the vindication of claims. *Johnson v. Int'l Steel & Counterweights LLC*, 2021 U.S. Dist. LEXIS 221274, at *4–20 (N.D. Ohio Nov. 17, 2021).

In a delivery driver under-reimbursement case "[a]ll necessary information is in Defendants' possession." *Hatmaker v. PJ Ohio, LLC*, 2020 U.S. Dist. LEXIS 39715, at *8 (S.D. Ohio Mar. 6, 2020); *see also Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946) ("Employees seldom keep[] records themselves; even if they do, the records may be and frequently are untrustworthy."). Defendants' records prove or disprove Plaintiff's case, not individual drivers' records or testimony, so they are irrelevant. *See* Doc. 14 at 2.

"Defendants [should] not be permitted," as they now request, "to put Plaintiffs through the trouble, effort, and expense required by demanding that drivers produce information the drivers likely no longer have and had no reason or duty to keep." *Hatmaker*, 2020 U.S. Dist. LEXIS 39715, at *11. Especially when Plaintiff offered to prove this by a sample (Ex. 1 at 6–7) and when Defendants' failure to keep and reimburse actual expenses[1] requires them to reimburse at the IRS business mileage rate. *Waters v. Pizza to You, L.L.C*, 2021 U.S. Dist. LEXIS 87604, at *27 (S.D. Ohio May 7, 2021); *Parker v. Battle Creek Pizza*, 2022 U.S. Dist. LEXIS 76990 (W.D. Mich. April 28, 2022).

Defendants' discovery demands are not "routine." Defendants seek information that should already be in their possession, making the requests pointlessly burdensome.[2] Other requests have been found improper by other courts (tax information, purchase information, and bankruptcies). *Edwards v. PJ Ops Idaho*, 2020 U.S. Dist. LEXIS 240167, at *26, *27, *30 (D. Idaho Dec. 21, 2020). Defendants also make intrusive requests for all social media accounts for the last 10 years, convictions, and failures to properly report income, which are irrelevant and likely to "chill plaintiffs' ability to pursue their FLSA claims." *See, e.g., Hernandez v. City Wide*

[1] Ex. 2 at 6, Request for Admission 3; Ex. 3 at Request for Admission 3.
[2] For example, Defendants' communications with Plaintiffs and proof that Plaintiffs drove a vehicle.

Insulation of Madison, Inc., 2005 U.S. Dist. LEXIS 52961, at *5 (E.D. Wis. Oct. 12, 2005) (Adelman, J.) (denying discovery into immigration status).

Moreover, responding to Defendants' requests is an expensive proposition, particularly in light of the limited—if any—value of the possible responses. The written requests will require one-on-one calls with each plaintiff. For example, in *Edwards*, it took 538 hours of work to obtain responses from 105 workers to a five-question questionnaire. Ex. 1 at 4 n.4. Ultimately, it produced exactly what the *Edwards* court was concerned about: very little.[3]

The depositions are similarly disproportionate. Depositions *may* only go for two hours, or they *may* go for seven. The costs of preparing for five minimum wage workers' depositions are not insignificant. It will require *at least* four hours per plaintiff (including scheduling, attorney preparation, deposition preparation with the client). Defendants provide no justification for wanting to take depositions on Plaintiffs' conditions of employment—which Defendants already know. *See Johnson*, 2021 U.S. Dist. LEXIS 221274, at *19.

Even if any of the discovery requests were relevant, courts routinely find that "permitting full-scale, individualized discovery of all opt-in plaintiffs would frequently undermine the purpose and usefulness of collective actions." *Smith v. Family Video Movie Club, Inc.*, No. 11 C 1773, 2012 U.S. Dist. LEXIS 142827, at *5 (N.D. Ill. Sep. 27, 2012). None of the cases Defendants cite hold otherwise. Here, Plaintiff's claims "can be determined simply by looking at [Defendants]'s payroll [and mileage] records" and Defendants' testimony about their pay practices. *Williams v. Sweet Home Healthcare, LLC*, 325 F.R.D. 113, 130 (E.D. Pa. 2018).

Defendants similarly misstate the rulings from pizza delivery driver cases. *Edwards*, which

[3] "Now, the Court has expressed concerns about certain questions and/or the overall effectiveness of the above questionnaire." *Edwards*, at *31.

ordered a five-question informal discovery questionnaire be sent—not responses to 37 formal requests per plaintiff—supports Plaintiff's position. In *Branning*, three Plaintiffs were ordered to respond to three interrogatories and three requests for production—a much smaller burden. Both *Kennedy* and *Blose* were summary judgment motions—not motions to compel, making them irrelevant. And, on April 28, 2022, another court rejected their theory that defendants can "approximate" expenses. *Parker*, 2022 U.S. LEXIS 76990, at *11.

Defendants falsely claim that Plaintiff refused to participate in discovery. Plaintiff sent a detailed letter explaining the same concerns raised in this brief and offed compromises. Ex. 1. Defendants ignored it. *See* Ex 4; Ex 5. Defendants' Motion likewise ignores the applicable law and discovery standards. For all these reasons, the Court should deny Defendants' Motion.

Respectfully submitted,

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Certificate of Service

I hereby certify that a copy of the foregoing was filed electronically on April 29, 2022. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

/s/ *Riley Kane*
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