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 REPLY IN SUPPORT OF RULE 23 CLASS CERTIFICATION (DOC. 60)

INTRODUCTION

When reading Defendants' Opposition, it is easy to forget that this case is simply about Defendants' company-wide practice of under-reimbursing pizza delivery drivers for the drivers' vehicle expenses. Defendants want to make this case about anything other than under-reimbursement—because Defendants cannot credibly deny that their own records and testimony confirm that they applied the same employment policies to all the delivery drivers who have worked for them.

Whether Defendants' reimbursement policies violate the law is answerable on a class-wide basis. It will be done so by first determining what reimbursement amount Defendants *should have* paid and then comparing that to what Defendants *did* pay. The rest is math that is applied on a class-wide basis.

Because vehicle under-reimbursement claims are wells-suited to class adjudication, courts routinely and consistently certify Rule 23 classes of delivery drivers asserting under-reimbursement claims. *See* Doc. 61 at Page 1 n.1 (citing cases); *Edwards v. PJ Ops Idaho, LLC*, No. 1:17-cv-00283-DCN, 2022 U.S. Dist. LEXIS 102861, at *1–24 (D. Idaho June 7, 2022). The consistent judicial decisions granting class certification in nearly identical circumstances provide compelling support for certification in this case.

ARGUMENT

Defendants offer a grab-bag of arguments against class certification. Other defendants, in similar cases, have tried variations of most of these arguments (often focused, as here, on claiming that each delivery driver is somehow unique). Having considered those arguments, courts have consistently rejected them and granted class certification in cases raising the same claims. *Edwards*, 2022 U.S. Dist. LEXIS 102861, at *1–24; *Branning v. Romeo's Pizza, Inc.*, No. 1:19 CV 2092, 2022 U.S. Dist. LEXIS 59262, at *12–24 (N.D. Ohio Mar. 29, 2022); *Waters v. Pizza to You, L.L.C.*, 2021 U.S. Dist. LEXIS 11743, at *7–27 (S.D. Ohio Jan. 22, 2021); *Brandenburg v. Cousin Vinny's Pizza*, 2018 U.S. Dist. LEXIS 189878, at *6–20 (S.D. Ohio Nov. 6, 2018); *McFarlin v. The Word Enterprises, LLC*, 2017 U.S. Dist. LEXIS 164968, at *3–13 (E.D. Mich. Oct. 5, 2017); *Perrin v. Papa John's Int'l, Inc.*, No. 4:09CV01335 AGF, 2013 U.S. Dist. LEXIS 181749, at *15–27 (E.D. Mo. Dec. 31, 2013); *Bass v. PJ COMN Acq. Corp.*, 2011 U.S. Dist. LEXIS 58352, at *1–12 (D. Colo. Jun. 1, 2011).

Thus, the Court's work in this case has largely been done by those prior cases examining driver under-reimbursement claims. This consistent precedent provides a shortcut through

Defendants' arguments. This case presents no unique circumstances that would justify a different outcome.

1. **The case law in this area is well-established: class certification is appropriate in cases raising delivery driver under-reimbursement claims.**

This type of case is not new. Over the past decade or so, pizza delivery drivers around the country have challenged companies' reimbursement practices.

In those cases, like this one, most of the facts are not in dispute and are usually available from the company's records: what the company paid the drivers in terms of wages and reimbursements and how many miles the driver drove.[1] The dispute generally centers on a single issue: what *should* the company have reimbursed? Once answered—which is done on a class-wide basis[2]—simple arithmetic is performed to calculate whether a shortfall exists and the amount of the shortfall.

As a matter of common sense, the claim is appropriate for class certification. After all, companies reimburse delivery drivers according to a policy applied to all of them. And, the case

[1] Here, Defendants claim to have not kept proper records of the miles driven. Defendants cannot, however, benefit from their failure to keep records. *Anderson v. Mt. Clemens Pottery Co.*, 328 U. S. 680, 687 (1946). ("Such a result would place a premium on an employer's failure to keep proper records…"). Rather, the drivers will be able to prove their miles driven based on a "just and reasonable inference." *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 443 (2016) (quoting *Mt. Clemens*, 328 U.S. at 687.

[2] *Perrin*, 2013 U.S. Dist. LEXIS 181749, at *17–18 ("Here the Court believes that the commonality requirement is met, despite the fact that there will be a need for individualized calculation of damages. The issues facing the class arise from common questions involving Defendants' policies regarding the calculation and payment of reimbursement for delivery expenses. [*18] This is sufficient to satisfy the commonality requirement."); *Waters*, 2021 U.S. Dist. LEXIS 11743, at *24 ("Most notably, Defendants subjected all of their delivery drivers to the same reimbursement rate. Liability turns on what the proper reimbursement rate is for pizza delivery drivers and whether Defendants paid that rate. These issues would be determined based on common proof, and common questions predominate in this case.").

law that has developed around these claims backs that up, with courts consistently granting class certification. *See* Doc. 61 at Page 1 n.1 (citing cases); *Edwards*, 2022 U.S. Dist. LEXIS 102861, at *1–24.

Defendants are unable to offer any rebuttal to the well-established case law in this area. Instead, in a footnote, Defendants claim that two courts rejected class certification in similar cases. Doc 76 at Page 2 n.1. The cases, however, are not similar. While their first case involves pizza delivery drivers, class certification was denied because of complexities involved in plaintiffs' 80-20 Regulation claim.[3] The second case also involves delivery drivers, but those drivers argued that they had to participate in an unlawful tip pool.[4] Neither of those claims are alleged in this case. *See* Doc. 18 at ¶¶ 136–59 (Amended Complaint). The Defendants' failure to cite an on-point case rejecting class certification of an under-reimbursement claim speaks volumes.

Since Plaintiff's original Motion, the Federal District Court for the District of Idaho certified five state law subclasses of pizza delivery drivers asserting the same under-reimbursement claim. *Edwards*, 2022 U.S. Dist. LEXIS 102861, at *1–24; *see also* Doc. 64. And on August 19, 2022, the Ninth Circuit denied the defendants' motion for interlocutory appeal. *Edwards v. PJ Ops Idaho, LLC*, 22-80056, Dkt. 9 (9th Cir. Aug. 19, 2022) (order denying interlocutory appeal) (attached as Exhibit 1).

[3] *Frazier v. PJ Iowa, L.C.*, 337 F. Supp. 3d 848, 867 (S.D. Iowa 2018) (discussing how, in that case, job duty documents "show local discretion and individual preferences of restaurant managers, rather than a common policy by PJ Iowa to use delivery drivers for non-tipped duties in the restaurants).

[4] *Wilson v. Wings Over Happy Valley MDF, LLC*, 2020 U.S. Dist. LEXIS 30207, *12–18 (M.D. PA Feb 21, 2020).

2. As in other cases raising the same claims, Rule 23's commonality and typicality requirements are met here.

Like other cases that raise under-reimbursement claims, Defendants point to superficial, irrelevant, or artificial differences to try to argue against commonality and typicality. *Edwards*, 2022 U.S. Dist. LEXIS 102861, at *8–14 (rejecting similar arguments and finding, "[t]o summarize, while the ultimate outcome for any individual class member may vary by state and/or by store—not to mention years worked, individual salary, and numerous other variables—there are still 'common questions' at issue in this case. Specifically… whether Defendants under-reimbursed their employees under the FLSA and, if so, how that reimbursement rate should be calculated."). Defendants focus on commonality, with a brief conclusion that typicality fails for the same reasons.[5] As a result, Plaintiff addresses Defendants' arguments against commonality and typicality together.

2.1. Defendants mischaracterize Plaintiff's claims.

Preliminarily, much of Defendants' Opposition is not based Plaintiff's actual claim, but, instead, arguing against a mischaracterized version of that claim. Plaintiff will start by clarifying the claim itself.

Plaintiff's Motion explains that the failure to fully reimburse a pizza delivery driver for the expense of providing a vehicle for their employer's benefit results in a "kick-back," reducing the driver's wages. If that driver is making "at or near the minimum wage," then *any* under-reimbursement will almost certainly cause them to earn below the statutory minimum. *Id.* at Page 6–10 (citing cases applying both the IRS rate and "reasonably approximate" rates).

[5] Defendants appear to concede that numerosity and adequacy are met.

Defendants do not dispute that Defendants subjected all of the drivers to the same job requirements and duties, paid the drivers hourly rates that were at or near the minimum wage, claimed a tip credit toward those wages, required the drivers to use personal vehicles to perform Defendants' deliveries, reimbursed the drivers at the same per-order rate ($1.00 before January 1, 2020 and $2.00 after January 1, 2020), and did not collect physical signed tip declarations from their drivers. *See* Doc. 61 at Pages 3–5.

Only the cost of the "tools" (the drivers' vehicles) is unknown. *Id.* at Pages 6–7. Plaintiff argues it is assessed at the IRS business milage rate, while Defendants argue that their reimbursements were sufficient. *Id.* at Page 8 (citing authorities). Either way, it is answerable on a class-wide basis, from which Defendants liability and damages will be determined. *Waters*, 2021 U.S. Dist. LEXIS 11743, at *13–14 ("But, even in cases where courts utilized the 'reasonable approximation' standard, the courts still granted Rule 23 class certification.")

The fact that Defendants also subjected all delivery drivers to the same POS system instead of collecting signed tip declarations presents another common legal question appropriately decided on a class-wide basis. *See id.* at Pages 10–11. This provides another independent, though unnecessary, basis for class certification.

Defendants appear to misinterpret Plaintiff's claim that he and the other drivers were paid "at or near the minimum wage." *See* Doc. 67 at Pages 17–18. This is a shorthand way for saying that the drivers were paid at seemingly-valid hourly payrates of $7.25 ("at") and $7.26+ or $7.24–$2.13 ("near"). A driver's damages calculation starts with their rate, then subtracts the under-reimbursement, leaving their damages. Plaintiff's claim (and those of the drivers he seeks to represent) are determined based on this simple formula:

Is [driver's wage while making deliveries] – [cost of tools] + [reimbursements] equal to, less than, or greater than the statutory minimum wage?

Varying payrates is common. This is not a basis to deny class certification. *See e.g. Edwards*, 2022 U.S. Dist. LEXIS 102861, at *9 ("'While "damages determinations are individual in nearly all wage-and-hour class actions," this fact "does not defeat class action treatment."'"). Rather, this is just a variation in damages, which is not fatal to certifying a class. *Id.*

2.2. Defendants' other arguments against commonality and typicality fail.

2.2.1. Defendants' allegedly inconsistently-enforced tip disclosure policy does not defeat class certification.

Defendants attempt to create an artificial difference between class members by claiming some signed a tip disclosure form while some did not. *See* Doc. 67 at Pages 6–8. This argument fails for two reasons.

First, although Defendants claim they have a defense based on the tip credit disclosure forms, Plaintiff disputes such a defense. The determination of the availability and applicability of the "defense" will be determinable on a class-wide basis. Defendants to class actions cannot create artificial differences based on novel defenses to some claims. Moreover, it is unclear whether Defendants believe this "defense" applies to all of the claims. It seems clear that it cannot, thus, at least some claims (like under-reimbursement) are appropriate for class certification, even under Defendants' theory.

Second, even if this "difference" was material, it is easily resolved by simply creating two sub-classes. If needed, one of the individuals who signed the form can represent that sub-class. The remedy is not to simply deny class certification.

2.2.2. Defendants' claims about their Point-of-Sale system supports class-wide adjudication.

Defendants argue that their Point of Sale (POS) system complies with Wisc. Admin. Code § DWD 272.03(2)(b). This *supports* class certification because this issue needs to be decided on a class-wide basis.

Plaintiff claims that Defendants failed to comply with the requirements of Section DWD 272.03(2)(b) based on its plain text and this Court's previous holding in *Hussein v. Jun-Yan, LLC*, 502 F. Supp. 3d 1366, 1371–72 (E.D. Wis. 2020). Defendants claim that their POS system is sufficiently consistent with the POS system found acceptable in *Bruske v. Capitol Watertown Sprechers, LLC*, No. 19-cv-851, 2021 U.S. Dist. LEXIS 159562, at *31 (W.D. Wis. Aug. 23, 2021).

The parties simply disagree on the standard for assessing compliance with the regulation, which is fine, but a class is needed so the Court can adjudicate this dispute as it regards *all* Defendants' delivery drivers instead of having each driver separately ask different judges to interpret this regulation.

2.2.3. Defendants' arguments about drivers working at tipped rates while doing non-tipped work is irrelevant.

Defendants argue that commonality is defeated because some Opt-in Plaintiffs testified at their depositions that they were paid a tipped wage rate for non-tipped work. This "difference" is irrelevant.

This case is about Defendants' failure to properly reimburse them *while making deliveries*. While making deliveries, drivers were paid a tipped minimum wage. That means any under-reimbursement results in a violation. The fact that Defendants may have also broke the law in another way is not a reason to deny class certification for the under-reimbursement claim.

3. A class action is the superior method to adjudicate Defendants' class-wide, illegal pay practices.

Defendants invite the court to improperly add a requirement to Rule 23(b)(3): producing a trial schedule. This should be rejected as premature and contrary to Rule 23.

First, there is no requirement to "propose a trial plan" to answer the "manageability issue" hypotheticals that Defendants throw out. Doc. 67 at Pages 19–20. Rule 23(b)(3) merely lists factors for courts to consider when assessing predominance and superiority.

Deceptively, Defendants assert, "Courts have consistently required plaintiffs to prove manageability of Rule 23 classes or risk denial of certification or class decertification." Doc. 67 at Page 20. The cases Defendants cite deal only with decertification of a class and collective action *less than one month* before the trial was scheduled—saying nothing of a detailed trial plan being a prerequisite for class certification.

Such a requirement, at the certification stage, would be inconsistent with Rule 23(c)(1)(A)'s mandate that "At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action." At "an early practicable time" is generally before discovery is complete, a full witnesses list is created, and issues are narrowed through motions practice (like summary judgment motions). It would be premature and a wasted exercise to create the type of "trial schedule" Defendants demand. A quick review of class certification decisions shows no discussion of a "trial schedule" because such a requirement does not exist. *See, e.g., Dokey v. Spancrete, Inc.*, No. 19-CV-921-JPS, 2021 U.S. Dist. LEXIS 27715, at *13–15 (E.D. Wis. Feb. 12, 2021) (granting class certification without reference to needing a proposed trial plan); *Fond du Lac Bumper Exch., Inc. v. Jui Li Enter. Co.*, No. 09-cv-0852, 2016 U.S. Dist. LEXIS 82434, at *42 (E.D. Wis. June 24, 2016) (Adleman,

J.) ("Where there are many class members and common issues predominate, the superiority requirement is usually met." And not discussing a trial plan).

Regardless, Plaintiff can lay out the course of this case going forward (although, of course, the contours will depend future decisions of the Court). If the Court grants class certification, (1) the parties will send notice to the class, (2) shortly thereafter or during the notice period, the parties can brief partial summary judgment motions on the legal standard for employee vehicle expense reimbursement, (3) the parties will conduct any needed discovery based on the partial summary judgment order, (4) the parties can then move for summary judgment on the legal standard for complying with Section DWD 272.03(2)(b). The answer to those questions sets the stage for additional (if any) discovery, expert discovery, and then motions for summary judgment on various issues, such damages or employer liability—depending on what disputed and undisputed facts remain. A trial will likely be necessary to determine damages, since Defendants failure to maintain milage records makes the issue a disputed fact. Of course, much of this could change as the case progresses—which is precisely why such a detailed plan is not part of Rule 23(b)(3). Class certification is a preliminary procedural mechanism that allows the litigation to begin in earnest, with all parties present. *See* Fed. R. Civ. P. 23(c)(1)(A).

Defendants close with an irrelevant argument against superiority because not all putative FLSA collective members opted into this lawsuit. Doc. 67 at Pages 25–26. Rule 23 contains no requirement for participation beyond that of the class representative, and especially not the participation of potential FLSA collective members.

Embracing such a requirement would (again) improperly add to Rule 23's requirements. The FLSA collective and the Rule 23 class are created by different mechanisms, for different

claims, from different statutes, governed by different standards. *See, e.g., Ervin v. OS Rest. Servs.*, 632 F.3d 971, 976–79 (7th Cir. 2011) (discussing differences between an FLSA collective action and a Rule 23 class action). Further, it commits a logical fallacy by asserting that the non-occurrence of an event is evidence of it—but that is not so. *See, e.g.*, *Ellis v. Edward D. Jones & Co., L.P.*, 527 F. Supp. 2d 439, 444 (W.D. Pa. 2007).[6]

4. Courts routinely exercise supplemental jurisdiction and certify hybrid class/collective actions, like this one.

Defendants ask the Court to decline supplemental jurisdiction over Plaintiff's state law claims. The effect would be to take the claims, arising from the same factual nexus (and, largely, adjudicated under the same or similar standards as under federal law), move them from this Court, and adjudicate the claims through two separate lawsuits.

This proposal creates a high level of judicial inefficiency, the possibility of inconsistent judgments, and drastically increased costs on the parties. For those reasons, courts routinely hear hybrid FLSA class/collective actions like this. *See, e.g., Waters*, 2021 U.S. Dist. LEXIS 11743, at *26 ("Adjudicating this matter as a class action is the most efficient manner of resolving these claims."); *see also Ervin*, 632 F.3d at 973–74 ("[C]onclud[ing] that there is no categorical rule against certifying a Rule 23(b)(3) state-law class action in a proceeding that also includes a

[6] *Ellis* discusses how "[t]he opt-in rate in a FLSA collective action not backed by a union is generally between 15 and 30 percent… Although a variety of reasons for failure to opt in have been posited, the strongest, at least among comparatively well-educated English-speaking parties, is likely 'inertia': the view that the notice received in the mail is just another piece of junk that the recipient has neither the time nor the interest to read, let alone act on." *Ellis*, 527 F. Supp. 2d at 444 (citing law review articles and agency publications). The court did not mention the possibility that the recipient had moved, and an accurate address was no longer available. Further, in this case approximately 27% (24/89) of the possible FLSA collective members joined, so Defendants' argument additionally fails by its own improper standard. *See id.*

collective action brought under the FLSA.…[T]he question whether a class should be certified under Rule 23(b)(3) will turn—as it always does—on the application of the criteria set forth in the rule…").

Relatedly, Defendants raise a fairly strange argument—Defendants complain that there would be more class members than FLSA collective members. Of course there are. This is always the case; the opt-ins are a subset of the total class. Accordingly, Rule 23 classes are "much larger than the corresponding § 216(b) [FLSA] collective action groups; they may even be 'exponentially greater' and 'number[] in the millions.'" *Ellis v. Edward D. Jones & Co., L.P.*, 527 F. Supp. 2d 439, 445 (W.D. Pa. 2007) (quoting *De Asencio v. Tyson Foods, Inc.*, 342 F.3d 301, 310 (3d Cir. 2003)). This is no reason to deny class certification—if it were, a hybrid class/collective action would never exist.

Defendants also deceptively claim to cite Wisconsin cases declining jurisdiction "under circumstances almost identical to this case." Doc. 67 at Page 23. Neither case cited by defendants involves delivery drivers or under-reimbursement claims, and they both involve plaintiffs who attempted to *abandon* their FLSA cases mid-litigation,[7] so none of these courts' analyses offer any guidance on the facts, law, or procedural circumstances of this case.

In contrast, the pizza delivery driver cases cited by Plaintiff, show that courts routinely certify state law classes of equal or greater complexity than that presented here. *See, e.g.*, *Edwards*,

[7] *Wicke v. L&C Insulation, Inc.*, No. 12-cv-638, 2013 U.S. Dist. LEXIS 133251, at *12 (W.D. Wis. Sep. 18, 2013) (alleging unpaid training time claims); *Kneipp v. Re-Vi Design, LLC*, No. 17-cv-857, 2019 U.S. Dist. LEXIS 43185, at *5 (W.D. Wis. Mar. 15, 2019) (alleging lunch break and overtime violations); *Morgan v. Crush City Constr., LLC*, No. 19-cv-27, 2022 U.S. Dist. LEXIS 124596, at *14 (W.D. Wis. July 13, 2022) (alleging improperly work hour tracking, travel time, and overtime claims).

2022 U.S. Dist. LEXIS 102861, at *22 (certifying five state law subclasses because "the common question of Defendants' reimbursement practices is a predominant matter in this case warranting certification" and that "the Court will address any state-specific nuances if they arise.")

Finally, Defendants claim that Plaintiff's Section DWD 272.03(2)(b) claim presents a novel question of law. This question has already been decided by this Court in *Hussein*. Interestingly, in making a different argument, Defendants claim that the issue was decided in *Bruske*. One way or the other, this claim does not present a novel issue.

5. The damages in this case are substantial and determinable on a class-wide basis.

After arguing that the class members are so different as to warrant individual trials, Defendants claim that they have calculated the damages and those damages are *de minimis*. Doc. 67 at Page 22 n.2. Putting aside the paradox these contradictory arguments present, the Court will be unsurprised to learn that Plaintiff has calculated damages as well, and believes the damages are substantial.

Defendants appear to be basing their *de minimis* claim on their theory that they can count tips—beyond what the law allows them to count as a credit—toward their minimum wage obligations. In other words, Defendants assert they have no wage obligation if an employee earns tips. As an initial matter, Defendants are wrong on the law. *See Jimenez v. GLK Foods LLC*, No. 12-CV-209, 2016 U.S. Dist. LEXIS 69007, at *90–93 (E.D. Wis. May 23, 2016); 29 C.F.R. § 531.35. Defendants must always pay their wage obligation, be it full or tipped minimum wage, "free and clear." *Jimenez*, 2016 U.S. Dist. LEXIS 69007, at *90–93. If Defendants were correct, no case of this type would be certified or get past an early motion to dismiss.

But, even if Defendants were correct, wage claims are *de minimis* only in a very specific circumstance—when employees are not paid for "only a few seconds or minutes" of otherwise compensable work. *Kellar v. Summit Seating Inc.*, 664 F.3d 169, 176 (7th Cir. 2011); *see also Chambers v. Sears Roebuck & Co.*, 428 F. App'x 400, 414 (5th Cir. 2011) ("The de minimis rule provides that an employer, in recording working time, may disregard 'insubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes.'"). Wage claims, particularly for minimum wage workers, are never "too small to matter."

Further, the Seventh Circuit has recently instructed courts that otherwise-valid classes should be certified "even if it is sure to fail on the merits" or, "[p]ut another way, properly certified classes can lose as well as win." *Simpson*, 23 F.4th at 711 (citing cases).

Finally, Defendants *de minimis* theory is irrelevant at this point because, as they argue, it applies to the entire class.

Conclusion

As the Seventh Circuit recently found "if a class plaintiff satisfies all the requirements of Rule 23(a) and Rule 23(b), the class *must* be certified." Doc. 61 at Page 12 (quoting *Simpson v. Dart*, 23 F.4th 706, 711 (7th Cir. 2022)). Plaintiff's original Motion demonstrated that the requirements for class certification are met. It is the next appropriate procedural step in this case. Nothing in Defendants' Opposition changes that or distinguishes this case from the numerous other cases of this type where courts have certified classes. Therefore, Plaintiff asks the Court to certify a class as outlined in his Motion.

Respectfully submitted,

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Certificate of Service

I hereby certify that a copy of the foregoing was filed electronically on August 24, 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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