

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

STEVEN BERNDT, ERIC HOLEVATZ,
MIKE HARMON, RYAN STEERE, and
RAYMOND PETERSON,

Plaintiffs,

v.

OPINION AND ORDER

11-cv-791-wmc

CLEARY BUILDING CORP.,

Defendant.

On behalf of themselves individually and others similarly situated, plaintiffs Steven Berndt, Eric Holevatz, Mike Harmon, Ryan Steere, and Raymond Peterson bring this action alleging that defendant Clearly Building Corp. denied plaintiffs and other employees base and overtime wages in violation of the Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 216, and Iowa, Wisconsin, Illinois, and Minnesota state law. (Am. Compl. (dkt. #34).) Presently before the court is the parties’ joint motion for preliminary approval of their settlement agreement and for class certification under Federal Rule of Civil Procedure 23. (Dkt. #414.) In a telephonic conference with the parties on October 3, 2013, the court addressed the issues raised in its September 19, 2013, order, granted the motion, and now issues this written opinion to ensure completeness of the record.¹ In that hearing, the court also set a fairness hearing for December 4, 2013, at 1:00 p.m.

¹ As explained in the call, the court approves the motion conditioned on (1) amending the language in the notices to explain that an individual who did not consent to join the FLSA settlement and does not opt out of the class action will not be releasing his or her

BACKGROUND

Plaintiffs filed this class and collective action on November 23, 2011, (Compl. (dkt. #1)), and most recently amended the complaint on May 20, 2013, to add claims under Minnesota, Iowa and Illinois state law. (3d Am. Compl. (dkt. #172).) Plaintiffs allege that Cleary maintained an illegal policy requiring foreman and non-foreman field employees to perform pre- and post-shift work, such as attending meetings and loading and unloading trucks, as well as traveling between the branch office and job sites, all without compensation. Cleary denies these allegations.

On January 24, 2013, the court granted plaintiffs' motion for conditional collective action certification under the FLSA. (Dkt. #114.) Plaintiffs have since filed a motion for class certification for classes of non-foreman field employees in Iowa, Wisconsin, Illinois and Minnesota (dkt. #191), and defendant also moved for decertification of the collective class (dkt. #292). While these motions were pending, and after extensive discovery, and the retaining of experts by both sides to create damages models, the parties reached an agreement.

The Agreement provides for a \$925,000 settlement fund. As part of the settlement, the parties have stipulated to Rule 23 certification of classes in each of the four states at issue. There is no claims process; rather, all class members (both the FLSA opt-in plaintiffs and those who did not opt in) will receive payments from the settlement fund unless they exclude themselves from the settlement. If class members exclude

FLSA claims; and (2) correct the language in the settlement agreement addressing liquidated damages and overtime pay.

themselves, those amounts will revert and be allocated pro rata to the class. Also, plaintiffs' counsel intends to petition the court for attorney's fees and costs from this settlement fund. The Agreement and brief in support of the motion also describes the process for determining individual awards, explaining amount of time to be compensated, rate of payment and whether liquidated damages apply.

ORDER

I. Preliminary Settlement Approval

1. Based upon the court's review of the parties' joint motion for preliminary approval of settlement agreement (dkt. #414), and all corresponding exhibits and papers submitted in connection with the motion, preliminary approval of the settlement is GRANTED.

2. The court concludes that at this preliminary stage, the proposed settlement "is within the range of possible approval." *Armstrong v. Bd. of Sch. Dirs. of City of Milwaukee*, 616 F.2d 305, 314 (7th Cir. 1980), *overruled on other grounds by Felzen v. Andreas*, 134 F.3d 873 (7th Cir. 1998).

3. The court finds that the proposed settlement appears to be the result of extensive, arm's-length negotiations by counsel well-versed in the prosecution and defense of wage-and-hour class action lawsuits.

4. While the court is satisfied that the settlement is facially reasonable, it intends to scrutinize plaintiff counsel's application for attorneys' fees when the time

comes for final approval of the settlement. Specifically, the court may use counsel's hourly billing records and rates as a factor in determining an appropriate fee award.

II. Certification of the Rule 23 Class

5. For settlement purposes only, the court certifies the following classes under Fed. R. Civ. P. 23(e) (the "Rule 23 Classes"):

All persons who have been or are employed by Cleary Building Corp. in Wisconsin as field crew employees, and who were not compensated for time spent working before arriving at the worksite and for time spent working after leaving the worksite during the period from November 23, 2009, to February 4, 2013.

All persons who have been or are employed by Cleary Building Corp. in Illinois as field crew employees, and who were not compensated for time spent working before arriving at the worksite and for time spent working after leaving the worksite during the period from May 20, 2010, to February 4, 2013.

All persons who have been or are employed by Cleary Building Corp. in Iowa as field crew employees, and who were not compensated for time spent working before arriving at the worksite and for time spent working after leaving the worksite during the period from May 20, 2011, to February 4, 2013.

All persons who have been or are employed by Cleary Building Corp. in Minnesota as field crew employees, and who were not compensated for time spent working before arriving at the worksite and for time spent working after leaving the worksite during the period from May 20, 2011, to February 4, 2013.

6. The Rule 23 Class meets all of the requirements for settlement class certification under Fed. R. Civ. P. 23(a) because:

- a) there are more than 164 non-foreman field employee putative class members in Iowa, 237 in Illinois, 115 in Minnesota, and 282 in Wisconsin.
- b) the class members share common alleged issues of fact and law, including:
 - i. whether defendant failed to pay overtime compensation to the named plaintiffs and members of the putative classes for time spent performing work in violation of Wis. Stat. § 103.03 and Wis. Adm. Code DWD 274.03, Ill. Stat. 820 § 105/4a, and Minn. Stat. § 177.25;
 - ii. whether defendant failed to pay wages to the named plaintiffs and members of the putative classes for time spent performing work in violation of Wis. Stat. § 109.03, Ill. Stat. § 115/3, Ill. Adm. Code 56:I:b:210.110, Minn. Stat. § 181.101, Minn. Adm. Code § 5200.0120(1), Iowa Stat. § 875-215.1, and Iowa Adm. Code § 215.3(13);
 - iii. whether defendant failed to pay plaintiffs and the class members proper overtime and minimum wages as required under Wis. Stat. § 103.03, Wis. Adm. Code DWD 274.03, and Ill. Stat 820 § 104/5a;
 - iv. the nature and amount of the allegedly compensable work performed by the named plaintiffs and members of the putative classes; and
 - v. the proper measure of damages, if any, sustained by the named plaintiffs and members of the putative classes.

- c) the named plaintiffs' claims arise from the same factual and legal circumstances as the class members;
- d) class counsel are qualified, experienced, and able to conduct the litigation;
and
- e) the named plaintiffs' interests are not antagonistic to the class members' interests.

7. The Rule 23 Class satisfies Fed. R. Civ. P. 23(b)(3) for purposes of a settlement class because common factual allegations and a common legal theory predominate over any factual or legal variations among class members. Class adjudication of this case is superior to individual adjudication because it will conserve judicial resources and is more efficient for class members, particularly those who lack the resources to bring their claims individually.

III. Appointment of Plaintiff's Counsel as Class Counsel and the Named Plaintiff as Class Representative.

8. The court appoints Hawks Quindel, S.C. and Habush Habush & Rottier, S.C. as class counsel because they meet all of the requirements of Fed. R. Civ. P. 23(g).

9. Class counsel did substantial work identifying, investigating, prosecuting, and settling FLSA and the Rule 23 Class members' claims.

10. Class counsel's attorneys have substantial experience prosecuting and settling employment class actions, including wage-and-hour class actions, and are well-versed in class action and wage-and-hour law. The Western and Eastern Districts of Wisconsin have both found both law firms to be adequate class counsel in employment law class actions in the past.

11. The work that class counsel has performed in litigating and settling this case demonstrates their commitment to the class and to representing the class's interests.

12. The court appoints plaintiffs Steven Berndt and Eric Holevatz as the class representatives of the Wisconsin Rule 23 class; Mike Harmon as the class representative of the Illinois Rule 23 class; Ryan Steere as the class representative of the Iowa Rule 23 class; and Raymond Peterson as the class representative of the Minnesota Rule 23 class.

IV. Class Notice and Settlement Procedure

13. The court approves the Proposed Settlement Notices (dkt. #416-2), subject to the modifications discussed during today's conference call. The court directs the distribution of the Notices.

14. Pursuant to Fed. R. Civ. P. 23(c)(2)(B), a notice must provide:

the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must concisely and clearly state in plain, easily understood language: the nature of the action; the definition of the class certified; the class claims, issues, or defenses; that a class member may enter an appearance through counsel if the member so desires; that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded; and the binding effect of a class judgment on class members under Rule 23(c)(3).

Fed. R. Civ. P. 23(c)(2)(B).

15. The Notices satisfy each of these requirements and adequately put the Rule 23 class members on notice of the proposed settlement.

16. The court approves the following settlement procedure and timeline:

- a) no later than October 14, 2013, class counsel will mail the Notice of Settlement to the class members;
- b) class members will have 42 days from the date of the mailing to review the terms of the Notice and submit a request to be excluded or any objections;
- a) no later than November 13, 2013, class counsel shall file a petition for attorneys' fees and costs; and
- b) the court will hold a fairness hearing on December 4, 2013, at 1:00 p.m.

17. The court preliminarily approves the settlement and finds that it was reached as a result of vigorously-contested litigation to resolve bona fide disputes. *See Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350, 1353 n.8 (11th Cir. 1982).

Entered this 4th day of October, 2013.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge