UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ESCOLASTICO DE LEON-GRANADOS, ISAIAS PROFETA DE LEON-GRANADOS, and ARMENIO PABLO-CALMO on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

ELLER & SONS TREES, INC. and JERRY ELLER

Defendants.

Case 1:05-cv-1473-CC

ORDER

This case is presently before the Court on Defendants' Motion for Interlocutory Appeal Under 28 U.S.C.A. § 1292(b) [Doc. No. 343]; on Plaintiffs' Motion for Partial Summary Judgment Finding Violations of AWPA Recordkeeping Requirements [Doc. No. 208]; and on Defendants' cross-motion for summary judgment seeking a determination that their payroll information meets the requirements of 29 U.S.C. § 1821(d)(2) [Doc. Nos. 190 & 195].

I. Background

Plaintiffs Escolastico De Leon-Granados, Isaias Profeta De Leon-Granados, and Armenio Pablo-Calmo filed this class action lawsuit against Defendants Eller & Sons Trees, Inc. (hereinafter referred to as "Eller and Sons" or "Eller and Sons Trees") and Jerry Eller. Eller and Sons Trees is a business located in Franklin, Georgia, that provides reforestation (tree planting) and other forestry services such as brush clearing, boundary marking, and chemical spraying. Most of its employees are engaged in tree planting, predominantly in the southern United States during the months of December, January, and February. This is arduous work, and Eller and Sons Trees cannot find enough employees in the United States to perform the work. As a result, most of the workers come from outside of the United States. The vast majority come from Guatemala, although some come from Mexico, Honduras, and Colombia. Eller and Sons Trees obtains employees through the H-2B visa program, which allows the legal, temporary or seasonal employment of alien, nonimmigrant employees. Jerry Eller is the president, sole corporate officer, and owner of Eller and Sons Trees.

The named Plaintiffs are three migrant farmworkers who were employed in Defendants' forestry operations at various times since June 1,

1999. Plaintiffs contend that they were denied protections due them under the Fair Labor Standards Act, 29 U.S.C. §§ 201-19 ("FLSA"), and under the Migrant Seasonal Agricultural Worker Protection Act, 29 U.S.C. §§ 1801-71 (1999) ("AWPA"), during the various times they were employed by Eller and Sons Trees.

The Court certified the Plaintiffs' Count II FLSA claims as an opt-in collective action under 29 U.S.C. § 216(b) on October 18, 2005. [Doc. No. 43]. On September 28, 2006, the Court certified the Plaintiffs' Count I AWPA claims as a Rule 23(b)(3) class action. [Doc. No. 100]. The Eleventh Circuit Court of Appeals affirmed this Court's certification of the Plaintiffs' AWPA claims for Rule 23 class action treatment on August 31, 2007. *DeLeon-Granados v. Eller & Sons Trees, Inc.*, 497 F.3d 1214 (11th Cir. 2007).

On November 15, 2007, the parties filed cross motions for summary judgment on various issues, many of which the Court decided in its October 8, 2008 Order. *De Leon-Granados v. Eller & Sons Trees, Inc.*, 581 F. Supp. 2d 1295 (N.D. Ga. 2008). The Defendants have moved for certification of an interlocutory appeal of that Order granting and denying the parties' various motions for summary judgment. [Doc. No. 341].

The parties' cross motions for partial summary judgment regarding Defendants' compliance with AWPA recordkeeping requirements could not be decided in the Court's omnibus summary judgment Order because Defendants' objections to the admission of the Plaintiffs' expert witness report had not been resolved. *De Leon-Granados*, 581 F. Supp. 2d at 1322-23. Because no adequate showing of classwide recordkeeping violations was made without reference to the report of Plaintiffs' expert witness Jorge Rivero, the cross motions concerning Defendants' recordkeeping were denied without prejudice, pending an evidentiary hearing pursuant to *Daubert v. Merell Dow Pharms.*, 509 U.S. 579 (1993). The Court scheduled a *Daubert* hearing [Doc. No. 338] but that hearing was cancelled when Defendants withdrew their objection to the admission of Plaintiffs' expert witness report. [Doc. No. 341 at 1]. By Order dated October 30, 2008 the Court renewed its consideration of Plaintiffs' Motion for Partial Summary Judgment Finding Violations of AWPA Recordkeeping and Defendants' cross-motion, considering the report of Plaintiffs' expert witness as a part of the record. [Doc. No. 341].

II. Defendants' Motion for Certification of Interlocutory Appeal

Defendants move the Court to certify numerous aspects of its October 8, 2008 summary judgment order for interlocutory appeal pursuant to 28

U.S.C. § 1292(b). [Doc. No. 343]. Specifically, Defendants ask that the Court certify for interlocutory appeal its holdings that the FLSA and the AWPA require reimbursement of the pre-employment travel, visa and passport expenses Plaintiffs bore; and that the work hours information submitted on Defendants' ETA-750 application for guestworker visas was incorporated into the Plaintiffs' AWPA working arrangement as an enforceable guarantee. *De Leon-Granados*, 581 F. Supp. 2d at 1308-25.

Interlocutory review is appropriate under § 1292(b) only where the district judge:

> shall be of the opinion that such order involves a controlling question of law, as to which there is substantial ground for difference of opinion and that an immediate appeal from the order will materially advance the ultimate termination of the litigation.

28 U.S.C. § 1292(b). All three conditions must be met for § 1292(b) certification to issue. *McFarlin v. Conseco Servs.*, 381 F.3d 1251, 1259 (11th Cir. 2004).

Because the certification Defendants seek would not materially advance the ultimate termination of this litigation, Defendants' motion is due to be denied. Even if the Court of Appeals were to reverse the portions of the Order for which Defendants seek review, numerous significant aspects of this case would remain for trial. Interlocutory review petitions fail to satisfy § 1292(b)'s material advancement requirement where trial on significant

issues would be required regardless of the success or failure of the requested appeal. *McFarlin*, 381 F.3d at 1262 ("Resolution of one claim out of seven would do little if anything to 'materially advance the ultimate termination of the litigation.'").

In the alternative, Plaintiffs have suggested that this case may be ripe for entry of final judgment following a damages hearing concerning the claims on which summary judgment has been granted. If so, the Defendants will soon be afforded an appeal from a final judgment. In either event, an interlocutory appeal from the Court's partial summary judgment order will not materially advance the ultimate termination of this litigation. Defendants' motion is **DENIED**.

III. Motions for Partial Summary Judgment Regarding AWPA Recordkeeping Requirements

As set forth above, Defendants have moved for partial summary judgment seeking a determination that their payroll information meets the AWPA's requirements as to 29 U.S.C. § 1821(d). [Doc. Nos. 190 & 195]. Specifically, Defendants move for summary judgment as to the requirement that the employer provide to each employee an itemized pay stub each pay period reflecting information required by 29 U.S.C. § 1821(d)(1). Plaintiffs cross-move for partial summary judgment that Defendants failed to make, keep, and preserve accurate and complete records regarding Plaintiffs' and

other class members' employment, in violation of the AWPA and its attendant regulations. 29 U.S.C. § 1821(d)(1); 29 C.F.R. § 500.80(a). [Doc. No. 208]. For the reasons stated below, the Court denies Defendants' motion and grants the Plaintiffs' motion for partial summary judgment.

AWPA Section 1821(d) imposes on agricultural employers and associations who employ migrant workers a reasonable standard of quality business and record keeping practices that requires them to:

> (1) with respect to each such worker, make, keep and preserve records for three years of the following information:
>
> > (A) the basis on which wages are paid;
> >
> > (B) the number of piecework units earned, if paid on a piece work basis;
> >
> > (C) the number of hours worked;
> >
> > (D) the total pay period earnings;
> >
> > (E) the specific sums withheld and the purpose of each sum withheld; and
> >
> > (F) the net pay; and
>
> (2) provide to each such worker for each pay period, an itemized written statement of the information required by paragraph (1) of this subsection.

See 29 U.S.C. § 1821(d); *see also* 29 C.F.R. § 500.80(d). The record keeping provisions "are core protections offered by the Act," and all violations are punishable "'to prevent minimum wage violations and other departures from

[the Act] [,]'" even if the offenses are "mere technical violations." *Sanchez v. Overmyer*, 891 F. Supp. 1253, 1261 (N.D. Ohio 1995) (citations omitted); *see also Castillo v. Case Farms of Ohio, Inc.*, 96 F. Supp. 2d 578, 632 (W.D. Tex. 1999) ("The AWPA was designed not only to punish, but also prevent such behavior."). A party violates § 1821(d) if the records kept and preserved and/or statements provided to the workers are not accurate. *See, Sanchez v. Overmyer*, 845 F. Supp. 1183, 1190 (N.D. Ohio 1993) (finding on summary judgment that employer had intentionally violated the AWPA by, *inter alia*, failing to keep accurate wage records and failing to provide plaintiffs with accurate wage statements); *Sanchez*, 891 F. Supp. at 1255 (summarizing the summary judgment ruling regarding the inaccuracy of the wage records and wage statements).

In order for Plaintiffs to recover for violations of the AWPA, Defendants' violations must have been intentional. 29 U.S.C. § 1854(c)(1). In the context of the AWPA, "intentional" does not require a specific intent to violate the law, but merely "conscious or deliberate" acts. *Alvarez v. Joan of Arc, Inc.*, 658 F.2d 1217, 1224 (7th Cir. 1981); *Maldonado v. Lucca*, 636 F. Supp. 621, 625 (D.N.J. 1986). Plaintiffs thus must establish that Defendants deliberately engaged in the action that led to the violation. *Wales v. Jack M. Berry*, 192 F. Supp. 2d 1269, 1288 (M.D. Fla. 1999).

In the case at bar, Defendants provide workers with a detailed pay document on an 8 1/2 by 11 sheet. The document shows (a) the basis on which wages are paid; (b) the number of piecework units earned, if paid on a piecework basis; (c) the number of hours worked; (d) the total pay period earnings; (e) the specific sums withheld and the purpose of each sum withheld; and (f) the net pay received. Defendants contend that the pay documents demonstrate compliance with the AWPA.

Plaintiffs maintain, pointing to evidence in the record, that the payroll documents fail to show an accurate number of piecework units completed by Eller and Sons workers in the corresponding workweek. Plaintiffs specifically point to the following errors in this regard: (1) although planting workers were normally paid by the tree planted, Eller and Sons supervisors estimated the number of trees that were in the seedling bundles the workers planted, using educated guesses to derive piece rate totals; (2) some supervisors awarded trees workers did not actually plant to those workers' piece rate accounts as a form of bonus; (3) supervisors attributed trees a worker planted on one work day to that worker's piece rate tally for the following work day; and (4) Eller and Sons supervisors compensated the performance of non-planting work -- properly compensable on an hourly

basis -- not by recording hours worked but by adding fictitious trees, not actually planted, to the piece rate totals of workers performing this work.

Plaintiffs also maintain, pointing to evidence in the record, that the payroll documents fail to show an accurate number of hours worked by Defendants' workers. The specific errors with respect to work hours include the following: (1) Eller and Sons supervisors sometimes maintained no record at all of hours worked and merely noted piece rate production; (2) Defendants failed to credit their tree planting workers for compensable preliminary work, by declining to record work Plaintiffs did loading trees prior to the planting day; (3) Defendants recorded longer lunch breaks than the workers actually took; (4) Defendants deducted from Plaintiffs' work hours time spent traveling from one work location to another, after the commencement of the work day; and (5) Defendants falsely reported reduced work hours for slower planters, in order to evade wage payment obligations.

There is substantial evidence in the record demonstrating that the violations alleged by Plaintiffs occurred and that the violations were "intentional" within the meaning of the AWPA. Plaintiffs submit approximately 100 daily field work records ("daily sheets") demonstrating these violations. Plaintiffs move for entry of partial summary judgment also

based, in part, on the deposition testimony of 15 of the 16 crew leaders who were deposed in the action. Some crew leaders or field supervisors did admit to making mistakes in record keeping, on occasion, and to taking actions that would run afoul of the AWPA's record keeping provisions, such as compensating workers who helped load seedlings for planting by adding trees, which those workers did not actually plant, to their piece rate records of trees planted on the daily sheets.

The Court has held, however, that without reference to the report of their expert witness, Jorge J. Rivero, a veteran wage and hour investigator who undertook a comprehensive review of Defendants' "daily sheet" field records for indicia of inaccuracy, the Plaintiffs can show only anecdotal violations, and not a classwide violation of the AWPA. *De Leon-Granados*, 581 F.Supp. 2d at 1323. The Court denied the parties' cross motions without prejudice, pending a *Daubert* admissibility determination regarding Mr. Rivero's study. *Id.*

Defendants withdrew their Motion to Strike Jorge Rivero's expert testimony before the Court could hold a scheduled *Daubert* hearing, however, and the Court has renewed its consideration of the cross motions for summary judgment, considering Mr. Rivero's report as part of the record. [Doc. 341].

Mr. Rivero served in the Wage and Hour Division of the U.S. Department of Labor for twenty-six years and investigated more than 1,000 allegations of violations of wage and hour law. [Doc. No. 194-3 at 1-2, 6, 27]. His investigations "involved the review of payroll documents for credibility, completeness and accuracy." *Id* at 2. Many of Mr. Rivero's investigations involved "agricultural operations that paid workers on a piece rate basis." *Id* at 6. Mr. Rivero served as an Assistant District Director in the Department of Labor's Wage and Hour Division, in which capacity he "reviewed the AWPA and FLSA findings of investigators under [his] supervision, trained new investigators and assisted investigators in the completion of difficult FLSA and AWPA investigations." [Doc. 194-3 at 6]. Mr. Rivero was ultimately promoted to become the District Director of the Wage and Hour Division's South Florida District, reviewing all cases involving serious violations of the FLSA and the AWPA. *Id.*

Mr. Rivero reviewed a random sample of the 20,073 "daily sheet" records of field work Defendants made available in discovery [Doc. 296 at 3-6], identifying seven unusual patterns or practices which in his experience indicated inaccuracy, and calculating the percentages of the sample which bore each indicia of inaccuracy he detected. [Doc. 194-3 at 25-27]. The methodology Mr. Rivero "used to evaluate the Defendants wage and hour

records are consistent with those methods [he] used to investigate wage violations during [his] work at the U.S. Department of Labor." *Id* at 2.

Mr. Rivero based his assessment of Defendants' records on his review of daily sheets made by eighty-one different Eller and Sons Trees supervisors over the course of seven different forestry seasons. [Doc. No. 194-3 at 56-67]. In reviewing Defendants' payroll records, Mr. Rivero looked at a random sample of crews performing seedling planting operations which included both crews on which named Plaintiffs worked and those on which they did not. [Doc. No. 194-3 at 25].

Mr. Rivero's study confirms that the anecdotal instances of work record inaccuracy the Plaintiffs proved through documentary exhibits, and the deposition testimony of 15 crew leaders were widespread across the class and the seven forestry seasons considered in this case. [Doc. No. 194-3 at 25-26]. Across Mr. Rivero's sample, 73% of crews exhibited a pattern of wide variation in hours recorded for crew members whom the record indicates worked together. *Id.* Seventy-five percent (75%) of crews on which named or opt-in Plaintiffs worked showed evidence of record inaccuracy in every workweek Mr. Rivero examined. *Id.*

Based upon careful consideration of Mr. Rivero's report, of Defendants' daily sheet work records, and of Defendants' crew leaders'

deposition testimony, the Court concludes that there is no genuine issue of material fact and the Plaintiffs are entitled to summary judgment finding classwide violations of AWPA recordkeeping requirements. Defendants failed to make, keep and preserve complete and accurate records of the Plaintiffs' work hours and piece rate production as a normal part of their business practices. Defendants' violation of 29 U.S.C. § 1821(d) was a conscious or deliberate act "intentional" within the meaning of the AWPA 29 U.S.C. § 1854(c)(1). *Alvarez*, 658 F.2d at 1224.

The Plaintiffs have carried their burden and there is insufficient record evidence favoring Eller and Sons to support a jury verdict that Defendants did keep the complete and accurate records required by the AWPA. Plaintiffs' Motion for Partial Summary Judgment Finding Violations of AWPA Recordkeeping Requirements [Doc. No. 208] is **GRANTED**. The portion of Defendants' Motion for Partial Summary Judgment seeking a determination that Defendants complied with 28 U.S.C. Sub/Sec.1821(d)(2) [Doc. Nos. 190 & 195] is **DENIED**.

SO ORDERED, this 29th day of September, 2009.

Clarence Cooper
Senior United States District Judge