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United States District Court, D. Oregon.

Arnulfo Mario Perez–Perez, Rafael Arturo PEREZ–PEREZ, Nicolas Gonzalez–Cruz, Rafael Chavez–Lara, Pineros Y Campesinos Unidos Del Noreste and Porfirio Ramires, individually and on behalf of all those similarly situated, Plaintiffs,
v.

PROGRESSIVE FORESTRY SERVICES, INC.,
North American Labor Management, Inc., Robert Wade Zaharie, Bruce Campbell, and Efrain Valdez,
Defendants.

No. CIV. 98–1474–KI. | Jan. 19, 2000.

Attorneys and Law Firms

Nargess Shadbeh, Oregon Law Center, Portland, OR, for plaintiffs.

Michael O. Moran, Black Helterline L.L.P., Portland, OR, for defendants.

Opinion

OPINION

KING.

*1 Before the court is the motion for class certification (# 20) by plaintiffs Arnulfo Mario Perez–Perez, Rafael Arturo Perez–Perez, Nicolas Gonzalez–Cruz, Rafael Chavez–Lara, Pineros Y Campesinos Unidos Del Noreste (“PCUN”), and Porfirio Ramires. Also before the court is the motion for summary judgment (against PCUN and Porfirio Ramires) (# 85) by defendants Progressive Forestry Services, Inc. (“Progressive”), North American Labor Management, Inc. (“NALM”), Robert Wade Zaharie, Bruce Campbell, and Efrain Valdez and their related motions to strike portions of the affidavits of plaintiffs’ affiants (# 114, # 130). For the reasons set forth below, I grant the motion for class certification and motion for summary judgment. I deny the motions to strike as moot.

FACTS

I. Overview

The plaintiffs in this action consist of four migrant reforestation workers, a labor organization that works to improve working conditions for farm and reforestation workers in Oregon, and a member of that organization. Defendants are farm/forestry labor contractors. Plaintiffs bring this action on behalf of a class consisting of all migrant and seasonal workers who were recruited by defendants in 1996 to perform reforestation work in Oregon, and all those who may be recruited by defendants in the future to perform reforestation work in Oregon. Plaintiffs allege that defendants violated the federal Agricultural Migrant and Seasonal Worker Protection Act, 29 U.S.C. § 1801 et seq. (“AWPA”), and the Oregon Labor Contractors Registration Act, ORS 658.405 et seq. (“OCRA”), in their recruitment, hiring, and employment of members of the proposed class. While the four named migrant workers seek statutory damages and injunctive relief, the organization and its member seek only injunctive relief. The injunctive relief sought by plaintiffs would prohibit defendants from committing future violations of the AWPA and OCRA.

II. The Parties

Plaintiffs Arnulfo Mario Perez–Perez, Rafael Arturo Perez–Perez, Nicolas Gonzalez–Cruz, and Rafael Chavez–Lara (the “Alien Plaintiffs”) are Mexican nationals whose permanent residences are in Mexico. Plaintiff PCUN is a labor organization in Oregon whose members include Oregon reforestation workers. Plaintiff Porfirio Ramires is a reforestation worker and a member of PCUN. He resides in Oregon.

Defendant Progressive is an Idaho corporation authorized to do business in Oregon, as well as in other states. Progressive is a reforestation company. It contracts with private companies and state and federal agencies to replant areas that have been logged. Progressive asserts that it works in approximately 16 states a year, primarily in the southeast (e.g., Mississippi), the north (e.g., Minnesota), and the northwest (e.g., Oregon).

Defendant NALM is an Idaho corporation. It processes, into the United States, foreign nationals in Mexico and elsewhere to work pursuant to the guest worker program known as the H–2B program.¹ Defendant Campbell is an officer of Progressive and is a former operations manager of NALM. Defendant Zaharie is president of Progressive. Defendant Valdez is an employee of Progressive and has been, in the past, an employee of NALM.

¹ The H–2B program allows temporary nonagricultural workers to enter the United States and to work when the employer has demonstrated a temporary need that is less than one year. Reforestation workers are

considered to be nonagricultural workers.

III. Plaintiffs' Allegations

*2 The First Amended Complaint alleges a claim under the AWP and a claim under OCRA based on violations allegedly experienced by the four Alien Plaintiffs and other Mexican migrant workers. The alleged violations can be grouped into three categories: (1) recruitment violations; (2) disclosure violations; and (3) wage violations. In the first category, plaintiffs allege that defendants recruited them to work in Oregon in violation of AWP and OCRA because some of the persons and/or organizations that recruited them were unregistered under AWP and unlicensed under OCRA. In the second category, plaintiffs allege that defendants violated AWP and OCRA by not providing, at the time of recruitment, an accurate and complete written disclosure of the terms and conditions of potential employment. In the third category, plaintiffs allege that defendants violated AWP and OCRA by failing to pay the minimum guaranteed wage rate and unlawfully passing through expenses to employees.

Plaintiffs PCUN and its member, Ramires, do not claim that they suffered the violations alleged by the four Alien Plaintiffs and other class members. In fact, Ramires does not allege that he was ever recruited or employed by any of defendants and PCUN admits that none of its members has ever worked for or been recruited by any of defendants. Nevertheless, PCUN and Ramires seek to represent all members of the proposed class with regard to any future violations of the AWP and OCRA by defendants. PCUN and Ramires allege that they are aggrieved under the AWP and have Article III standing in this action due to the indirect impact that defendants' potential future violations of AWP and OCRA may have on reforestation workers who live and work in Oregon.

IV. Additional Material Facts and Assumptions

In 1996, Progressive met the requirements required for an H-2B application and received approval to bring approximately 500 workers from Mexico to the United States. The four Alien Plaintiffs were among those workers who were brought to the United States.

During trips to Mexico in 1996, Campbell and Valdez (on behalf of Progressive and/or NALM) recruited workers to work in the United States. As part of their recruiting efforts, Campbell and Valdez held public meetings and disseminated a disclosure form that listed Oregon as one of 15 states in which the workers could potentially work.

Affidavit of Robert Wade Zaharie, Exh. B. On this basis, and apparently on the basis that oral representations regarding work in Oregon were also made,² plaintiffs argue that all of the workers who were recruited in Mexico were recruited to work in Oregon. Defendants argue that, despite the listing of Oregon in the disclosure, the persons in Mexico were only being recruited to work in the southeastern United States. They further assert that, some time in 1997, after workers had begun working in the southeastern United States, a limited number of those workers were recruited to work in Oregon (by persons other than Valdez and Campbell).³ Those workers received a disclosure form specifically regarding work in the northwestern United States. Zaharie Aff., Exh. D.

² At page 8 of plaintiffs' supplemental response to defendants' motion for summary judgment, plaintiffs state that disclosure statements were not provided to all workers in the class at the time of recruitment in Mexico.

³ None of the four Alien Plaintiffs worked in Oregon or claims to have worked in Oregon. Instead, each of them worked for Progressive in December 1996, and as late as January 10, 1997, in Mississippi.

*3 The recruitment and disclosure violations alleged by plaintiffs are based entirely on the above-described events that took place in Mexico before the workers reached any part of the United States.

In regard to the wage violations alleged by plaintiffs, they are based partially on events that took place in Mexico and partially on events that took place once the workers were employed in the United States. Plaintiffs allege three ways in which defendants committed wage violations: (1) defendants failed to pay, as a minimum guaranteed floor, the hourly prevailing wage rate for each state as established by the United States Department of Labor; (2) defendants required class members to pay for certain expenses, through payroll deductions and charges, that were legally to be borne by the employer (and such deductions and charges unlawfully brought the class members' wages below the applicable required minimum rate); and (3) defendants required class members (while in Mexico and before traveling to the United States) to pay \$1,000 to cover costs that were legally to be borne by the employer. Plaintiffs' Reply to Opposition to Motion for Class Certification, pp. 10-11.

DISCUSSION

Rule 23 of the Federal Rules of Civil Procedure allows

suits to go forward as class actions only if:

[T]he class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class [and][t]he court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Fed.R.Civ.P. 23(a) and (b)(3).⁴

⁴ I acknowledge that plaintiffs have also moved for class certification under Fed.R.Civ.P. 23(b)(2). Given my treatment of plaintiffs' requested injunctive relief, as discussed *infra*, I do not view class certification to be appropriate under that provision.

A court may certify a class only if it is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied. *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 509 (9th Cir.1992). The party seeking class certification bears the burden of proving each of the elements of Rule 23.

Based on these standards, I find that plaintiffs have pleaded a case that is suitable for class certification under AWP and OCRA.⁵ Specifically, I find that the numerosity, commonality, and typicality requirements are satisfied for the events that allegedly took place in Mexico. As presented by plaintiffs, approximately 500 workers were recruited in a uniform way by a common group of people. Moreover, each of the 500 workers was allegedly required to pay \$1,000 to the recruiters.

⁵ For purposes of this opinion, I have assumed that defendants' activities in Mexico did constitute recruitment to Oregon, thus implicating OCRA. I have not concluded as a matter of law that OCRA does apply and grant leave to defendants to raise the issue in a future motion.

Consistent with these findings, the four Alien Plaintiffs

are suitable class representatives to litigate the alleged recruitment violations, disclosure violations, and the wage violations that relate to the issue of the \$1,000 payment allegedly required of the workers. However, given the limited work experience of the four Alien Plaintiffs in the United States, I decline to certify a class for the two remaining wage violation issues. Those issues relate to events that occurred once workers were in various states in the United States. Although the mechanisms used by defendants to commit those wage violations are allegedly consistent across various states (e.g., failure to pay prevailing wage rate, making deductions from paychecks), the experiences of the four Alien Plaintiffs relate only to defendants' practices in Mississippi. Thus, while they are suitable class representatives for issues related to defendants' alleged failure to pay the required hourly prevailing wage rate in Mississippi and the defendants' alleged practice of illegally making payroll deductions and charges in Mississippi, I do not view them as suitable representatives for class members who worked in other states. Based on these findings, a subclass for workers employed in Mississippi may be appropriate, but I decline to create a subclass at this time and grant leave to plaintiffs to raise the issue in a future motion.

*4 As an example of the limitations of the four Alien Plaintiffs as class representatives, I note that they would be unable to litigate effectively those issues specific to workers who did, in fact, reach Oregon and other parts of the northwestern United States.⁶ The disclosure form that those workers received includes different and additional terms of employment (when compared to the disclosure disseminated in Mexico), including language regarding withholding funds from an employee's paycheck to cover recruiting fees and cash advances. Such terms may have some bearing on defendants' liability for allegedly making deductions from workers' paychecks.

⁶ On January 19, 2000—the day that this opinion was printed for my signature—I received a letter from plaintiffs' attorneys stating that they intend to seek leave to amend the First Amended Complaint to add three additional class representatives who allegedly were recruited by defendants in Mexico in 1996 and were employed in Oregon in 1997. Assuming that I allow the motion for leave to amend (which will be filed one year after the motion for class certification was filed), plaintiffs will be given an opportunity to argue that an Oregon subclass should be created.

In addition to omitting two of plaintiffs' wage violation theories from the class action to be certified, I also wish to make explicit the relief that the four Alien Plaintiffs and the other class members may pursue. While plaintiffs' allegations warrant a class action to address the past wrongs allegedly suffered by them in Mexico in 1996, they do not justify a permanent injunction to allow

plaintiffs and this court to monitor the future actions of defendants. Moreover, it is not appropriate for a court to grant the type of broad, prophylactic injunction sought by plaintiffs which would “[p]ermanently enjoin the defendants from committing future violations of the AWPA and OCRA.” Complaint (Prayer for Relief), ¶ 4. *See Hughey v. JMS Development Corp.*, 78 F.3d 1523, 1531 (11th Cir.) (rejecting permanent injunction that prohibited “violation[s] of the Clean Water Act” and noting that “appellate courts will not countenance injunctions that merely require someone to ‘obey the law.’”), *cert. denied*, 117 S.Ct. 482 (1996).

With the prospect of permanent injunctive relief out of the picture, the question arises of what role, if any, PCUN and Ramires should have in this action. As noted above, PCUN and Ramires seek only prospective injunctive relief and they are apparently included in this action to ensure that an entity exists to monitor and enforce defendants’ compliance with such relief. In addition to the fact that this role has been eliminated, PCUN and Ramires cannot serve as class representatives because they did not experience the recruitment, disclosure, and wage violations alleged by the four Alien Plaintiffs and the other class members. In short, PCUN and Ramires do not fit into the class action to be certified and summary judgment against them is appropriate at this juncture. Given that my decision to grant defendants’ motion for summary judgment does not rely on an examination of the

evidence submitted by PCUN and Ramires to demonstrate how they are aggrieved or otherwise have suffered an injury-in-fact by the actions of defendants, defendants’ motions to strike portions of the affidavits of plaintiffs’ affiants are denied as moot.

CONCLUSION

The motion for class certification (# 20) by plaintiffs Arnulfo Mario Perez–Perez, Rafael Arturo Perez–Perez, Nicolas Gonzalez–Cruz, Rafael Chavez–Lara, Pineros Y Campesinos Unidos Del Noreste, and Porfirio Ramires is granted.

*5 The motion for summary judgment (# 85) by defendants Progressive Forestry Services, Inc., North American Labor Management, Inc., Robert Wade Zaharie, Bruce Campbell, and Efrain Valdez is granted. Plaintiffs Pineros Y Campesinos Unidos Del Noreste and Porfirio Ramires are dismissed.

Defendants’ motions to strike portions of the affidavits of plaintiffs’ affiants (# 114, # 130) are denied as moot.