

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Victoria Zwerin,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Case No. 2:10-cv-488
	:	
533 Short North, LLC,	:	JUDGE EDMUND A. SARGUS, JR.
et al.,	:	Magistrate Judge Kemp
	:	
Defendants.	:	

ORDER

Defendants have moved for a 90-day extension of time to respond to the pending motions to amend and to certify a collective action. Plaintiff opposes such a lengthy extension, but has consented to an extension to April 15, 2011, which the Court has granted. For the following reasons, the Court grants an additional extension, but only through May 6, 2011.

I.

By way of background, this is a Fair Labor Standards Act case in which the named plaintiff, who worked as a bartender at a restaurant owned and operated by defendants, claims that a "tip pooling" arrangement in which she was required to participate was invalid because it included management employees. If the tip pool were deemed invalid, plaintiff claims that she was not paid the required minimum wage. She also claims that she was not credited for all the hours she actually worked and that she routinely worked in excess of forty hours per week but was not paid overtime compensation. The complaint alleges that defendants employed at least one hundred other persons under similar circumstances, and it contains both collective action and class action allegations.

An initial pretrial conference was held on November 19, 2010. In the order which resulted from that conference, the Court established a deadline of March 1, 2011, for plaintiff to move either for class certification or propose a procedure for notifying class members of their right to opt in to this case under 29 U.S.C. §216(b). Since that time, eleven potential class members have filed notices of consent. Additionally, on March 1, 2011, plaintiff moved for leave to join additional defendants, alleging that they were co-employers of the plaintiff and the class she seeks to represent; to certify this case as a collective action and to direct that notice be given to all class members who were employed by the defendants within the past three years; and to certify this case as a class action under Fed.R.Civ.P. 23(a) and 23(b)(3). It is the response date to those three motions - which, under the Court's Local Civil Rules, would have originally been no later than March 25, 2011 - that defendants seek to extend for a period of an additional ninety days.

II.

As the basis for their request for a ninety-day extension, defendants state that they retained counsel to deal with the class aspects of the case only after the motion was filed, and that counsel needs additional time to become familiar with the case and to oppose the pending motions properly. Plaintiff points out that the class nature of this case has been known since it was filed, that defendants stated almost four months ago that they would be hiring additional counsel to deal with that issue, and that, to date, no such counsel has entered an appearance. Plaintiff also argues that delay at this point is prejudicial because the statute of limitations is continuing to run on individual claims so that if the Court does not certify a Rule 23 class, the longer notice of opt-in rights is delayed, the

more persons or claims will be barred by the statute of limitations. In their reply, defendants offer to waive the statute of limitations for any period of extension, and also argue that because plaintiff is unavailable for a deposition any time in the next month, an extension is needed for that reason.

Extensions of time are governed by Fed.R.Civ.P. 6(b). Rule 6(b)(1) permits an extension under these circumstances upon a showing of "good cause." At least one court has held that it can be difficult to establish good cause for delaying to respond to a motion to certify an opt-in class under the FLSA due to the potential prejudice to absent class members. See Moreno v. Poverty Point Produce, Inc., 243 F.R.D. 275, 276 (S.D. Tex. 2007). However, defendants' offer to trade the extension for a waiver of the statute of limitations appears to cut against the argument that the extension they have asked for would prejudice absent class members.

Nevertheless, the absence of prejudice to the opposing party does not equate to a showing of good cause by the moving party. The Court is not persuaded that plaintiff's unavailability for a deposition in the near term is good cause; again, based on the pretrial order, defendants have been aware for many months that a motion dealing with the class aspects of this case was going to be filed on March 1, 2011, and not only did they not attempt to take her deposition prior to that date, they appear not to have requested it until April 5, 2011. They have also not satisfactorily explained the delay in retaining class counsel or why such a lengthy extension would be necessary. The Court and the parties do have a countervailing interest in moving cases along expeditiously, and the Court agrees with plaintiff that defendants could certainly have (and probably should have) reacted to the anticipated motions with greater dispatch. In no event have they shown good cause for an extension beyond May 6,

2011, which is more than two months after the motions were filed, and six weeks after their responses were originally due. The Court conditions this grant of an additional extension beyond April 15, 2011, on defendants' willingness to extend the statute of limitations for any claims that would otherwise expire between that date and the date that the Court either certifies a class under Rule 23, in which case the waiver will be moot, or the date on which any additional class members opt into this action under 29 U.S.C. §216(b).

III.

For all of these reasons, the Court grants in part and denies in part the defendants' motion for an extension of time (#32). The new date to respond to the three motions filed by plaintiff on March 1, 2011, is May 6, 2011.

IV.

Any party may, within fourteen days after this Order is filed, file and serve on the opposing party a motion for reconsideration by a District Judge. 28 U.S.C. §636(b)(1)(A), Rule 72(a), Fed. R. Civ. P.; Eastern Division Order No. 91-3, pt. I., F., 5. The motion must specifically designate the order or part in question and the basis for any objection. Responses to objections are due fourteen days after objections are filed and replies by the objecting party are due seven days thereafter. The District Judge, upon consideration of the motion, shall set aside any part of this Order found to be clearly erroneous or contrary to law.

This order is in full force and effect, notwithstanding the filing of any objections, unless stayed by the Magistrate Judge or District Judge. S.D. Ohio L.R. 72.4.

/s/ Terence P. Kemp
United States Magistrate Judge