BY THE COURT:

DATE SIGNED: September 28, 2022

Electronically signed by Glenn H Yamahiro-34
Circuit Court Judge

BRANCH 34

NICOLE MCDANIEL, et al.,

Plaintiffs,

v.

Case No. 20CV4571

WISCONSIN DEPARTMENT OF CORRECTIONS,
Defendant.

DECISION AND ORDER

INTRODUCTION

On August 3, 2020, Plaintiff Nicole McDaniel ("McDaniel") filed this suit against Defendant Wisconsin Department of Corrections ("WDC"). McDaniel also brought this motion for class certification. McDaniel seeks to certify a class for claims I (violating Wis. Stat. §§ 109.01-0303, and the interpreting regulations in Wis. Admin. Code §§ DWD 272 and 274) and IV (seeking a declaratory judgment that adjudicates the Correctional Officers' right to be paid for all future compensable work). McDaniel is looking to certify a class consisting of:

> All current and former non-exempt, hourly-paid WDC employees who worked as security personnel in a correctional institution (including but not limited to Correctional Officers and Correctional Sergeants) in the State of Wisconsin at any time during the period starting two years before this action commenced through the date of judgment ("the Class Period").

The proposed class does not include "WDC executives, secretaries, or directors; judicial officers and their immediate family members; or Court staff assigned to this case."

For the following this court **GRANTS** McDaniel's motion certifies the proposed class. McDaniel has demonstrated commonality and predominance, and the arguments presented by WDC are not sufficiently persuasive to justify denying the motion.

BACKGROUND FACTS

Testimony has indicated that members of the proposed class have varying amounts of allegedly uncompensated time. Despite the fact that shifts are a hard and fast 8 hours and WDC employees are only paid for those 8 hours, some workers spend around 3 minutes a day doing pre- and post-shift activities, while others can spend up to 30 minutes a day. These variations can occur as a result of working at different facility or from working in different roles or at different posts within the same facility. It is alleged that "99%" or "the vast majority" of class members engage in these pre- and post-shift activities. McDaniel has presented testimony that confirms that it is a state policy that WDC employees are not compensated for pre- and post-shift activities. The pre-shift activities include:

> -Correctional Officers must pass bags containing their belongings through x-ray machines which scan for possible contraband that may not be brought into prisons for security reasons.
> -When Correctional Officers report for duty, their supervisors check them off on a daily duty roster and tell them their post assignments if they do not already know those.
> -Supervisors visually inspect Correctional Officers to ensure that they are fit for duty, not under the influence of intoxicants, in uniform, and displaying their ID cards.
> -Correctional Officers then proceed through gates, sometimes called "sally ports," into the security envelope at the prisons.
> -Correctional Officers obtain equipment, such as handcuffs, keys, radios, and OC pepper spray, essential to perform their principal duty to protect prison personnel and visitors, maintain security, guard and escort prisoners, respond to emergencies, communicate with prison personnel, and otherwise function as Correctional Officers.

The post shift activities include:

> -Correctional Officers may not leave their assigned posts until relieved by the Correctional Officers scheduled to work the next shift.
> -Correctional Officers provide pass-down briefings to those individuals.
> -Correctional Officers then walk to exit the security envelope through the gates or sally ports that were used to enter it. At that point, the Correctional Officers generally return

> the keys and other equipment that had been issued to them and pick up their personal belongings. Correctional Officers are responsible for that equipment until it has been returned and may be disciplined if they fail to protect it.

WDC employees are *required* to complete all pre-shift activities prior to starting their shift but are only compensated for the 8-hour shift. Similarly, employees are not compensated for post-shift times. WDC employees are also expected to be ready to respond to emergencies at any point in their shifts, as well as during these pre- and post-shift activities. Essentially, WDC employees have at least some degree of responsibility from the moment they enter a facility. Starting in 2020, some WDC facilities have been paying WDC employees for time spent participating in COVID screening, which can take as long as 30 minutes, and for all pre-shift activities performed after the screening begins.

It is alleged that WDC does not keep records of the precise amount of time that corrections officers work. There is no precise timekeeping system. Instead, WDC uses software that records the time corrections officers work. However, this software only enters the time period for officers' scheduled shifts, it does not include time for pre- or post-shift activities. Allegedly the software is capable of recording that information, WDC has just declined to do so.

McDaniel has employed William Rogers ("Rogers"), an economist, to produce a methodology to calculate the wages owed to correctional officers. Rogers's methodology would cite and use:

> -A review of the security camera videotapes made at WDC prisons that show exactly when Correctional Officers have entered and left prisons.
> -A comparison of their arrival times and shift time starts which shows the time spent by individual Correctional Officers on pre-shift activities for which they are not paid.
> -A comparison of their departure times and ends of their shifts which shows the time spent on post-shift activities by individual Correctional Officers for which they are not paid.
> -A calculation of the average amount of time spent on pre- and post-shift activities by Correctional Officers on each shift at each prison.
> -Separate analyses for each prison to account for any differences among prisons regarding the amount of time spent on pre- and post-shift activities.

-The Correctional Officers' pay rates during each shift.
-The amount of pay owed to each Correctional Officer for off-the-clock work, including for straight-time and for overtime if the officer worked more than 40 hours during a workweek.
-An accounting for other aspects of damages, such as reduction to present value, inflation, future economic damage, and assumptions if the data provided by the WDC does not cover all prisons.
-A calculation of the damages recoverable for the entire Class of Correctional Officers.
-An assessment of other damages measures for Correctional Officers who have retired, whose pensions were affected, and other damage components.

From this, Rogers would calculate the class's damages using representative samples and the averaging of data gleamed from the videos. McDaniel and Rogers have claimed that this methodology could account for differences in durations in pre- and post-shift activities for different facilities and employee postings.

LEGAL STANDARD

Wisconsin courts are permitted to look to federal law when evaluating motions for class certification. *Harwood v. Wheaton Franciscan Svcs*., 2019 WI App 53, ¶ 2, 388 Wis. 2d 546, 933 N.W.2d 654 (noting that Wis Stat. § 803.08 had been updated and adopted in 2018 "with the express purpose of harmonizing Wisconsin's class action statute with the federal class action statute and federal case law"). There are two steps for a class to be certified for a class action. *Id*. ¶¶ 23-24. First, a court may only certify a class if it finds commonality. Commonality requires that: (1) the proposed 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. Wis. Stat. § 803.08(1). If all of these requirements are met, the next step the court takes is determining whether the case complies with the requirements of Wis. Stat. § 803.08(2), which determines if there is predominance and superiority. *Harwood*, 2019 WI App ¶ 24. Predominance requires that "the trial court must find

"that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."' *Harwood*, 2019 WI App 53, ¶ 24 (citing Wis. Stat. § 803.08(1)). The considerations relevant to predominance include:

> 1. The class members' interests in individually controlling the prosecution or defense of separate actions. 2. The extent and nature of any litigation concerning the controversy already begun by or against class members. 3. The desirability or undesirability of concentrating the litigation of the claims in the particular forum. 4. The likely difficulties in managing a class action.

Wis. Stat. § 803.08(2)(c). "[P]ublic policy favors class actions especially where the amount in controversy is so small that the wronged party is unlikely ever to obtain judicial review of the alleged violation without a class action." *Parko v. Shell Oil Co.*, 739 F.3d 1083, 1085 (7th Cir. 2014); *Messner v. Northshore Univ. Health Sys.*, 669 F.3d 802, 814 (7th Cir. 2012). Analysis of predominance looks to determine whether the proposed class is "sufficiently cohesive to warrant adjudication by representation." *Parko*, 739 F.3d at 1085.

Certified classes must be manageable. *In re Wal Mart Emp. Litigation*, 2006 WI App 36, ¶ 3, 290 Wis. 2d 225, 711 N.W.2d 694. A difference in recovery does not mean that a class action cannot proceed. *Goebel v. First Fed. Sav. & Loan Assoc. of Racine*, 83 Wis. 2d 668, 266 N.W.2d 352, 360 (1978) (class members being able to recover different amounts of damages did not preclude class certification); *Schlosser v. Allis- Chalmers Corp.*, 65 Wis. 2d 153, 222 N.W.2d 156, 172-175 (1974). A class certification motion is not "dress rehearsal" for the merits of the case. *Messner*, 669 F.3d at 811; *Bell v. PNC Bank, Nat. Ass'n*, 800 F.3d 360, 373 (7th Cir. 2015); *Schilling v. PGA Inc.*, 293 F. Supp. 3d 832, 836 (W.D. Wis. 2018) (citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351-52 (2011)). However, the merits of the case are not completely off limits

because the analysis for determining class prerequisites can overlap with the merits of a claim. *Comcast Corp. v. Behrend*, 569 U.S. 27, 33-34 (2013).

DISCUSSION

I. McDaniel's motion is granted because the core legal theory is sufficiently plausible for granting a motion for class certification motion.

WDC first argues that McDaniel's core legal theory (that WDC employees should be compensated for walking to their posts) is incorrect and consequently the motion for class certification should be denied. According to WDC, case law shows that walking to a required location is not typically compensable work because it does not fall under the definition of "principal activity."

Employees are compensated for "principal activity." *Integrity Staffing Solutions, Inc. v. Busk*, 574 U.S. 27, 36 (2014). Principal activity has been defined to include all activities which are an "integral and indispensable part of the principal activities." *Id.* (citing *Steiner v. Mitchell*, 350 U.S. 247, 252–253 (1956)). "An activity is "integral and indispensable" if it is an intrinsic element of the employee's principal activities and one with which the employee cannot dispense if he is to perform his principal activities." *Id*. Federal regulations provide that:

> Among the activities included as an integral part of a principal activity are those closely related activities which are indispensable to its performance. If an employee in a chemical plant, for example, cannot perform his principal activities without putting on certain clothes, changing clothes on the employer's premises at the beginning and end of the workday would be an integral part of the employee's principal activity. On the other hand, if changing clothes is merely a convenience to the employee and not directly related to his principal activities, it would be considered as a "preliminary" or "postliminary" activity rather than a principal part of the activity. However, activities such as checking in and out and waiting in line to do so would not ordinarily be regarded as integral parts of the principal activity or activities.

29 CFR § 790.8(c). Federal regulations also provide that:

> (f) Examples of walking, riding, or traveling which may be performed outside the workday and would normally be considered "preliminary" or "postliminary" activities are (1)

> walking or riding by an employee between the plant gate and the employee's lathe, workbench or other actual place of performance of his principal activity or activities; (2) riding on buses between a town and an outlying mine or factory where the employee is employed; and (3) riding on buses or trains from a logging camp to a particular site at which the logging operations are actually being conducted.
> (g) Other types of activities which may be performed outside the workday and, when performed under the conditions normally present, would be considered "preliminary" or "postliminary" activities, include checking in and out and waiting in line to do so, changing clothes, washing up or showering, and waiting in line to receive pay checks.

29 CFR § 790.7(f)-(g). Employees are not entitled to compensation for activities performed prior to principal activities, but are entitled to compensation for acts performed after principal activities. *Kellar v. Summit Seating, Inc.*, 664 F.3d 169, 174 (7th Cir. 2011) (citing *Alvarez*, 546 U.S. 21, 29 (2005)).

The Supreme Court has held that, for warehouse workers, security screenings are not compensable principal activities. *Busk*, 574 U.S. at 33. In *Busk*, the Court had two components to their analysis: whether the employees hired to perform the task for which compensation being sought, and whether the security screening was "integral and indispensable." *Id*. at 35. Because security screenings were not "integral and indispensable," nor were warehouse workers hired to undergo them, the Court held that the workers could not recover wages. *Id*. at 36-37.

On the other hand, the Wisconsin Supreme Court has held that employees at a canning plant were entitled to compensation for putting on clothing and equipment, at least for the purposes of summary judgment. *United Food & Com. Workers Union, Local 1473 v. Hormel Foods Corp.*, 2016 WI 13, 367 Wis. 2d 131, 876 N.W.2d 99. *Hormel* was decided using state regulations, which mirror federal ones.[1] *Id*. at ¶ 42; Wis. Admin. Code § DWD 272.12(2)(e)c. As a result, Wisconsin case law has shown that activity which is comparable to the pre- and post-shift activities WDC

[1] Including using the same examples.

employees must complete is potentially compensable, even when being evaluated at a higher legal standard than what is required for class certification motions.

The analysis here turns on whether it is at least plausible that going through a security process and walking to a certain post is a principal activity for WDC employees. To determine this, the court must consider two questions: 1) whether WDC employees hired to undergo the pre- and post-shift activities, and 2) whether the tasks which WDC employees are seeking compensation for integral and indispensable. *Integrity Staffing*, 574 U.S. at 36. At this stage McDaniel has made a plausible argument that the tasks in question were integral and indispensable. It is plausible that the security checks and having to be at a certain location at a certain time are integral and indispensable to the operation of these facilities. WDC employees undoubtedly have a different relationship with the pre- and post-shift activities here compared to the workers in *Busk*. Other cases cited by WDC are also distinguishable. In *Llorca*, the appellate court ruled against claims that involved sheriffs putting on equipment at home and commuting in marked patrol vehicles. 893 F.3d 1319, 1322 (11th Cir. 2018). Similarly, In *Chagoya*, the plaintiffs tried to recover wages for time spent transporting equipment, including rifles, to and from their home, but their claims were dismissed. 992 F.3d 607, 611-14 (7th Cir. 2021). Both of these cases had plaintiffs trying to recover wages for activities that were initiated at home. Here, the proposed class is seeking compensation for time spent on the premises of its employer and after participating in what could be deemed a principal activity. As a result, *Llorca and Chagoya* are not convincing at this stage.

Meanwhile, McDaniel has an argument that is plausible at this stage. Employees are typically entitled to compensation for any activities performed after initiating a principal activity. *Kellar*, 664 F.3d at 174. Principal activities must be "integral and indispensable." *Alvarez*, 546

U.S. at 37. It is at least plausible that some combination of undergoing a security screening and being in the right place at the proper time are essential for corrections officers. There are also older cases indicating that time walking to and from a location is compensable because employees were required to be in a certain area. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 685-91 (1946)

Again, motions for class certification are not intended to be final rulings on the merits of the case. *Messner*, 669 F.3d at 811. What matters is that the plaintiff, by a preponderance of the evidence, shows that the requirements for certification are met. At this phase McDaniel is only required to make a "modest factual showing." *Young v. Cooper Cameron Corp.*, 229 F.R.D. 50, 54 (S.D.N.Y. 2005) (citations and quotations omitted). Here, McDaniel has made a plausible argument that WDC employees can be compensated for the pre- and post-shift activities. At the very least, McDaniel has cited to authority which indicate that their argument has legs, and WDC has not cited to any legal authority, persuasive or otherwise, that *mandates* dismissing the entire case. Similarly, McDaniel has made a modest factual showing that WDC employees were subject to a policy which deprived them of compensation for said activities. It is possible that WDC could prevail later on a motion to dismiss or a motion for summary judgment. However, at this stage, WDC has *not* successfully demonstrated that McDaniel's proposed class would have no chance at recovery.

At this stage, the case law cited by WDC does not indicate that McDaniel's class cannot prevail on the merits. McDaniel has, at the very least, made a plausible argument that WDC employees can be compensated for the activities detailed in the complaint and that the WDC employees engaged in those activities. As a result, WDC's argument is not sufficient to bar class certification at this stage, and McDaniel's motion cannot be denied under this argument.

II. The Rogers Report supports class certification.

WDC also contends that the Rogers report cannot provide an accurate methodology and consequently, the motion should be denied since the proposed class could not have damages accurately assessed.

First, WDC criticizes the report because it does not account for alleged disparities in "walk time." This argument is misplaced; McDaniel's argument is that corrections officers should be compensated for *all* time spent after a certain point. The difference in walking speed between employees does not impact this issue. Instead, the resolution of this issue is contingent upon whether all activity McDaniel alleges deserves compensation actually obligate WDC to pay. Thus, disparities in walking time do not impact the Rogers report's persuasiveness, nor the class certification motion.

According to McDaniel, *Bouaphakeo* supports the credibility and use of the Rogers report because it demonstrates an instance in which the Supreme Court allowed evidence similar to the Rogers report. WDC argues that *Bouaphakeo* shows that representative evidence can only be used if the evidence can prove damages for every member of the class.

Courts have allowed representative evidence to be employed in order to fill evidentiary gaps. *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 456 (2016); *Alvarez*, 546 U.S. at 24. The central principle in *Bouaphakeo* is that representative evidence can be submitted with a class action if it could also be used to establish liability for an individual member of the class. *See* 577 U.S. at 458. Here, WDC has not presented a compelling argument for why McDaniel could not employ the methodology to apply to each member of the class. According to WDC, the methodology used in the Rogers report cannot be used to calculate damages for every member of the class since there were different postings within each facility and several thousand employees. However, WDC has not demonstrated that the ranges could not be calculated to reflect the different posts within the

facility. Rogers notes that he "can and will perform separate analysis" if significant differences are revealed between each facility, so it is entirely plausible that the same could be done for each posting. While this sounds like extensive work for one expert, Rogers has indicated that he intends to get a team together to perform work on this task, and it is conceivable that a team could accurately calculate a range. Similarly, if need be, the methodology employed by Rogers is capable of calculating damages for any member of the class: if given the proper security footage one could easily calculate the deprived wages if any WDC employee, which is the exact standard *Bouaphakeo* requires. 577 U.S. at 458-459. As a result, *Bouaphakeo* indicates that Rogers should be able to analyze and provide representative evidence.

WDC also raises the argument that the Rogers report is flawed because it is conceivable (and likely) that employees did not always undergo their pre-shift activities upon entering the prison. However, in both McDaniel's initial and reply briefs an argument is made that all time employees spent in the facility is compensable. McDaniel points to federal law to argue that WDC employees can indeed be compensated for all time which they are on duty and on the premises. McDaniel writes:

> Employers must pay for all time that an employee is "suffer[ed] or permit[ted] to work." 29 U.S.C. §§ 207(a)(1), 203(g). "Compensable hours of work generally include all of the time during which an employee is on duty on the employer's premises." 29 C.F.R. § 553.221(b) (such time includes all pre-shift and post-shift activities which are an integral part of the employee's principal activity or which are closely related to the performance of the principal activity…."); 29 C.F.R. § 785.11; *Mumbower v. Callicott*, 526 F.2d 1183, 1188 (8th Cir. 1975) ("duties performed… before and after scheduled hours…must be compensated")….
>
> The Continuous Workday Rule requires that **"**[p]eriods of time between the commencement of the employee's first principal activity and the completion of his last principal activity on any workday must be included in the computation of hours worked…." 29 C.F.R. § 790.6(a); *Bouaphakeo v. Tyson Foods, Inc.*, 765 F.3d 791, 795-96 (8th Cir. 2014); *Weissman*, 350 Wis. 2d at 385; Wis. Admin. Code § 272.12(1)(a)(2).

Furthermore, because WDC employees always have a certain level of responsibility once they are on the premises, McDaniel argues that WDC employees are on the clock as soon as they enter a facility. At this stage, this is a plausible argument. As a result, since class certification motions are not intended to decide the merits of the case, McDaniel has met her burden for this stage of the case. *See Messner*, 669 F.3d at 811.

III. McDaniel has demonstrated manageability.

WDC also argues that McDaniel's proposed class is unmanageable. Manageability is a sub-requirement for predominance. Wis. Stat. § 803.08(2). According to WDC, the proposed class is unmanageable because the calculation of damages presents difficulties which would make it impossible for the court to manage the case. Ultimately, WDC's argument is not convincing.

When evaluating manageability, courts must determine "whether the benefits to be derived from such a procedure outweigh the inherent difficulties." *Goebel v. First Fed. Sav. & Loan Ass'n of Racine*, 83 Wis. 2d 668, 684, 266 N.W. 352 (1978). Wisconsin's class action mechanism is procedural and does not replace a defendant's substantive rights or defenses. *In Re Walmart,* 290 Wis. 2d at ¶ 6. Thus, a party still has the right to all "juriable issues" including the calculation of damages. *Id*.; *Rao v. WMA Securities, Inc.*, 2008 WI 73, ¶ 17, 310 Wis. 2d 623, 752 N.W.2d 220. Class actions are capable of handling suits when the amount of recovery may be different between members of a class. Classes have been certified despite differences in recovery amounts between class members, so long as other predominance requirements are met. *See Ladegaard v. Hard Rock Concrete Cutters, Inc.*, No. 00c5755, 2000 WL 1774091 *7 (N.D. Ill. Dec. 1, 2000); *see also Gaspar v. Linvatec Corp.*, 167 F.R.D. 51, 56 (N.D. Ill.1996).

McDaniel has demonstrated that the proposed class is manageable. McDaniel has provided the Rogers report, which outlines the methodology for managing the class and has cited to cases which show that this evidence should be allowed. The Rogers report provides testimony that an

expert in this very field believes the class to be manageable and outlines how damages would be calculated. Furthermore, there are reasons to believe that the benefits of class action outweigh the difficulties of managing a class this large. First, given the large number a class action prevents thousands of employees from having to navigate individual suits or administrative reviews. Second, given that McDaniel is seeking a declaratory judgment, the experiences of the large number of employees might help in determining the validity of this claim.

WDC points to the differences in the duration of the pre- and post-shift activities. But again, a difference between class members in the amount one can recover is not an automatic bar to a class action. WDC relies on cases such as *In Re Wal Mart* to argue that the class in unmanageable. *Wal Mart* is distinguishable, however. In *Wal Mart*, employees managed their own clocking in, and it was alleged that employee reporting of their own time and breaks might not have always been accurate. 2006 WI App 36, ¶ 4, 290 Wis. 2d 225, 711 N.W.2d 694. In this case, WDC employees could not have and are not alleged to have had a similar level of control over the "data" which would be analyzed for representative evidence. WDC employees are paid strictly for 8 hours, and they cannot alter timestamps on security footage which shows them entering a facility. Although Wal-Mart was ultimately entitled to "have the plaintiffs' statistical conclusions and all the underlying data tested by discovery and examination at trial," this was because there were disputes about the accuracy of the data which would be used. *Id*. ¶ 6. Here, while WDC may have arguments against the methodology to be employed by McDaniel, this is not the same as a dispute about the accuracy of the data. *See, Id*. Similarly, a dispute about the methodology employed does not present the threat of "mini-trials," since the methodology can be dealt with in a single motion or hearing. As a result, *In Re Wal Mart* does not establish that McDaniel's proposed class is unmanageable.

WDC also argues that there is the threat of "mini-trials" because they are entitled to argue that individual class members entered the facility and then engaged in personal activity, rather than compensable activity. This ignores that McDaniel has made an argument that the class should be compensated for all time after initiating certain activities. McDaniel has made a plausible enough argument that it would not be appropriate to block certification on these grounds. Again, while the merits of the case may be touched on in a motion for certification, this motion is not intended to be a dress rehearsal. *Messner*, 669 F.3d at 811. At this stage, WDC has not advanced arguments that are sufficient for dismissing the case in a class certification motion.

Ultimately, McDaniel's proposed class is manageable. McDaniel has successfully argued that representative evidence can be used and has offered testimony that indicates that representative evidence could successfully be gathered. Furthermore, WDC has not definitively proven that differences in damages or flaws with the Rogers report should result in McDaniel's motion being denied.

IV. McDaniel has successfully demonstrated predominance and superiority.

According to WDC, McDaniel's motion for class certification should be denied for several reasons concerning the predominance and commonality requirements. McDaniel presented a valid argument that they have established commonality and WDC does not argue otherwise, so this memo will not address commonality. WDC argues that the class should not be certified because, first, McDaniel's proposed class does not meet the statutory requirement of predominance. Ultimately, this court will grant McDaniel's motion and certify the proposed class. McDaniel has demonstrated that the group of WDC employees complies with the requirements for certification and WDC's arguments are not sufficient to overcome the motion.

A. McDaniel's proposed class meets the predominance requirement because the class complies with all four considerations for evaluating predominance in a class certification motion.

WDC contends that McDaniel cannot meet the predominance requirements. WDC argues that McDaniel has not demonstrated predominance because she has not presented any proof of predominance. WDC alleges that the evidence presented by McDaniel demonstrates that the employees were not similarly situated. Ultimately, McDaniel prevails since the class's claims would stem from the same policy and legal issue.

Predominance requires that the proposed class's claims stem from the same "nucleus of operative facts and legal issues." *Beaton v. Speedy PC Software*, 907 F.3d 1018, 1029 (7th Cir. 2018). Analysis of predominance looks to determine whether the proposed class is "sufficiently cohesive to warrant adjudication by representation." *Parko*, 739 F.3d at 1085. Courts have typically held that there is predominance in wage claim cases. *See Tysons Foods, Inc. v. Bouaphakeo*, 577 U.S. 442. 453-454 (2016*)*; *Guzman v. VLM, Inc*., No. 07CV1126, 2008 WL 597186, *8 (E.D.N.Y. Mar. 2, 2008) ("Predominance is satisfied… where the central issue is whether the defendants had a uniform policy or practice of denying overtime and spread-of-hours compensation to its employees"). The considerations for a finding of predominance include:

> 1. The class members' interests in individually controlling the prosecution or defense of separate actions. 2. The extent and nature of any litigation concerning the controversy already begun by or against class members. 3. The desirability or undesirability of concentrating the litigation of the claims in the particular forum. 4. The likely difficulties in managing a class action.

Wis. Stat. § 803.08(2)(c); *Ladegard*, 2000 WL 1774091 *7.

McDaniel has presented testimony which indicates that the class is comprised of individuals who were subject to the same state policy for compensation. Although WDC is correct that the evidence shows that members of the class did not spend the same amount of time on pre- and post-shift activities, this does not necessarily demonstrate that no issues predominate. Again, a difference in the amount recovery does not mean that a class action cannot proceed. *Goebel*, 83

Wis. 2d 683-685; *Schlosser*, 65 Wis. 2d 166-168. Here, the proposed class has the same employees who are denied compensation under the same policy. That is enough for predominance.

McDaniel has met the predominance requirement. It is alleged that all members of the class are subject to the same policy. This means there are a similar baseline of facts for each class member, and a fully identical legal issue. In this case, several of the relevant considerations for predominance indicate that the class should be certified. First, there does not appear to be a significant interest in members of the class controlling the prosecution of the case; the employees were subject to identical policies and have little to gain from independent litigation. WDC does not allege that another class member has begun a suit. There is an argument to be made that the court is a desirable forum for litigation (instead of an administrative claim through the Department of Workforce Development, like WDC proposes) because the state policy is being challenged in this action. Similarly, a class action is a better avenue for the declaratory judgment being sought than administrative review. Finally, as argued earlier, this class is probably manageable.

Ultimately, McDaniel has met the burden for predominance. Members of a class are still similarly situated despite potentially recovering different amounts in damages. Furthermore, the relevant considerations for Predominance can be viewed in a way that favors class certification.

B. WDC has not successfully shown that intending to use the *de minimis* doctrine should bar class certification because it typically does not automatically bar class actions and WDC has failed to demonstrate that this is a situation where it should prevent certification.

WDC argues that the doctrine of *De minimis non curat lex* ("*de minimis*") demonstrates why McDaniel has not fulfilled the predominance requirement. According to WDC, it should be able to invoke the *de minimis* defense on an employee-by-employee basis. By not allowing the WDC to apply *de minimis* to individual claims by employees, WDC alleges that it is being deprived

of its rights. Ultimately, WDC has not successfully demonstrated that the *de minimis* doctrine should automatically lead to the denial of certification.

The *de minimis* allows employers to disregard typically compensable when the work and time at issue concerns only a few seconds or minutes of work beyond the scheduled working hours. *Piper v. Jones*, 2020 WI 28, ¶ 35, 390 Wis. 2d 762, 940 N.W.2d 701. The policy behind the *de minimis* doctrine is recognizing and declining to penalize employers because of the difficulty of recording relatively small amounts of time for payroll purposes. *Id*. (quoting *Lindow v. United States*, 738 F.2d 1057, 1062 (9th Cir. 1984). Courts will consider "the practical difficulty of recording the additional time, the size of the aggregate claim, and whether the work was performed on a daily basis" when determining whether the *de minimis* doctrine applies. *Id*. The Wisconsin Supreme court has "assumed but not decided" that the *de minimis* doctrine applies to claims arising under the Wisconsin administrative code. *Id*. ¶ 38. Non-compensated activity that amounted to 4.33 minutes a day was sufficient for a claim to get past Summary Judgement. *Id*.

Courts have held that class certification should be denied because of the *de minimis* doctrine when the *entire* recovery will be minimal. *Mace v. Van Ru Credit Corp*., 109 F.3d 338, 344 (7th Cir. 1997) ("we believe that a *de minimis* recovery (in monetary terms) should not automatically bar a class action"). Following *Mace*, multiple class certifications have been granted despite *de minimis* arguments because "[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Vandehey v. Client Services, Inc.* 390 F.Supp 956, 962 (E.D. Wis. 2019) (quoting *Mace*, 109 F.3d at 344). Additionally, courts will certify a class if "a class action would be superior to the large number of individual lawsuits regarding the same legal issue and facts that would otherwise result." Wis. Stat. § 803.08(2)(c).

WDC cites *Zivali* as an instance where the court decertified a previously certified class and argues that this case shows that certification should be denied because of differences between members of the class for which the *de minimis* doctrine might apply. *Zivali* can be distinguished from this case, however. In *Zivali*, the plaintiffs were a previously certified class of employees who were required to respond to electronic messages even when they were officially clocked out. 784 F.Supp.2d 456, 464 (S.D. N.Y. 2011). However, when evaluating the motion for decertification, the court, noting that it had more facts than during the initial certification motion, was swayed by the fact that not all members of the class received electronic messages or replied to them. *Id*. at 464-65. Testimony in *Zivali* was not inconsistent about the amount of alleged non-compensation, instead it was inconsistent about whether certain members of the class engaged in the activity for which they sought compensation at all. *See Id*. While the court did find that class certification was inappropriate because of the availability of *de minimis* defenses, it held this due to "the absence of a company-wide policy or practice" and because "[t]he extent to which work was *de minimis*, however, will necessarily vary widely according to the particular situation of each individual plaintiff." *Id*. at 468. Here, there is allegedly a statewide policy that affects every member of the proposed class, unlike *Zivali*, where there was dispute about whether all members of the class fully engaged in the activity in question. As a result, WDC has not demonstrated that indicating a desire to employee the *de minimis* doctrine is a reason to deny certification.

Furthermore, Wisconsin case law has indicated that even a small portion of uncompensated time (roughly 4.33 minutes a day) is not enough for *de minimis* to be invoked. *Piper*, 2020 WI 28 at ¶ 35. While WDC has hinted that they would argue that employees who spent 3 minutes a day in pre- and post-shift activity would be barred from recovery under the *de minimis* doctrine, they have not successfully demonstrated that the *de minimis* doctrine would be applicable. 3 minutes a

day, when spread across a year seems close enough that *de minimis* is not guaranteed to apply to even the lowest recovering members of the class.

Finally, WDC has not provided a convincing explanation as to why certifying the proposed class would prevent them from raising the *de minimis* doctrine effectively. It is true that defendants in class action cases have the right to raise individual challenges and claims, and that class actions cannot deprive a defendant of this right. *See Carrera v. Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013). However, that right is only infringed when a trial court cannot identify class members "without extensive and individualized fact-finding or mini-trials." *Marcus v. BMW of North America, LLC*, 687 F.3d 583, 593 (3d Cir. 2012) (quotations and citations omitted). Here, assuming McDaniel even manages to prevail on establishing a right to compensation at a time in the case where the court must fully evaluate substantive arguments, WDC will argue that a certain baseline of uncompensated time is required for members of the proposed class to recover. The inquiry will turn to whether members meet that baseline, which WDC has not established is an "extensive" inquiry. *See Marcus*, 687 F.3d at 593.

Ultimately, the *de minimis* doctrine will not bar class certification. McDaniel's proposed class is comprised of people who all engaged in the activity. Furthermore, Wisconsin case law indicates that the *de minimis* doctrine *could* be inapplicable to even the lowest recovering members of the proposed class. While the *de minimis* doctrine could result in dismissal of some members of the class later on, it is not a bar on certification of the class itself. As a result, WDC has not shown that the class should not be certified.

CONCLUSION

For the aforementioned reasons, this court **GRANTS** McDaniel's motion to certify. McDaniel was only required to put forth a plausible legal argument and demonstrate that her proposed class fits with certain requirements. McDaniel has done so here.

THIS IS A FINAL ORDER FOR THE PURPOSES OF APPEAL.