IN THE UNITED STATES COURT OF FEDERAL CLAIMS

L. KEVIN ARNOLD, et al.

Plaintiffs **No.: 19-59-PEC**

v. **Judge Patricia E. Campbell-Smith**

THE UNITED STATES

Defendant.

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Jacob Y. Statman, Esq.
Snider & Associates, LLC
600 Reisterstown Road; 7th Floor
Baltimore, Maryland 21208
Counsel of Record for Plaintiffs

Michael J. Snider, Esq.
Keith A. Kauffman, Esq.
Jason I. Weisbrot, Esq.
Snider & Associates, LLC

Jefferson Friday, Esq., General Counsel
National Federation of Federal Employees, IAMAW

Richard J. Hirn, Esq., General Counsel,
National Weather Service Employees Organization

Mark Schneider, Esq., General Counsel
International Association of Aerospace Workers, AFL-CIO

Sarah Suszczyk, Esq., Deputy General Counsel
National Association of Government Employees

Dennie Rose, Esq., General Counsel
Stefan P. Sutich, Esq., Deputy General Counsel
Professional Aviation Safety Specialists, AFL-CIO

Of Counsel for Plaintiffs

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Plaintiffs, by and through their undersigned counsel hereby oppose the Defendant's Motion to Dismiss and respectfully request that the Court deny Defendant's Motion in its entirety. In support, thereof, Plaintiffs' state as follows:

Introduction

This is a case for unpaid wages pursuant to the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201 et seq. Plaintiffs allege, and Defendants do not deny, that during the government Shutdown that lasted from December 22, 2018 through January 25, 2019, Plaintiffs, who are all Federal Employees from various federal agencies, were forced to work without pay and did not receive all of the wages owed to them until after the conclusion of the more than one-month long Shutdown. Plaintiffs who worked overtime were also not timely paid for the overtime at time-and-one-half their regular hourly rate for hours worked in excess of eight in a day or 40 in a week.

This Court has already addressed the same facts and legal issues in the wake of the 2013 Shutdown, and held that government employees who are not exempt from the FLSA have a cognizable claim for untimely payment of minimum wages and overtime when they are not paid on their regularly scheduled payday. *See Martin v. United States*, 117 Fed. Cl. 611 (2014); 130 Fed. Cl. 578 (2017). Defendant's motion is nothing more than an attempt to re-litigate its unsuccessful arguments to dismiss identical claims in *Martin*.

Defendant's primary argument – that the Anti-Deficiency Act excuses the Government from its obligations under the FLSA – was squarely rejected by this Court in *Martin*. Moreover, contrary to Defendant's contention, nothing in the Government Employee Fair Treatment Act of 2019, Public Law 116-1 (hereinafter, "GEFTA" or "2019 Act") – which was enacted *after* most of the FLSA violations at issue took place – altered the Government's obligation to comply with

the FLSA during the Shutdown. Defendant's remaining arguments – most of which this Court already rejected in *Martin* - are similarly unpersuasive.

Because this case is factually and legally indistinguishable from *Martin*, there can be no dispute that Plaintiffs have stated a cause of action. Thus, Defendant's Motion should be denied in its entirety.

Factual Background

The facts of this case are fairly straight forward and are not in dispute. Plaintiffs are FLSA non-exempt employees from various federal agencies who were designated as "excepted employees" and were required to report to work and perform their duties during the partial government Shutdown which began on December 22, 2018. *See* Am. Complaint ¶¶ 1-12, 16-20. During the Shutdown, Plaintiffs were not paid on their regularly scheduled pay days. *Id.* at ¶22.

Some of the Plaintiffs performed overtime work during the course of the shutdown and did not receive overtime compensation on their regularly scheduled pay day. *Id.* at ¶¶ 1-12. Accordingly, they were not paid the minimum wage or overtime compensation on their regularly scheduled pay days for work performed between December 23, 2018 and January 25, 2019, a span of several pay-periods. *Id.*

On January 16, 2019, after the Government had already violated the FLSA by failing to pay Plaintiffs on their regularly scheduled date of pay, the President signed GEFTA into law. GEFTA was designed to ease the considerable burden the Shutdown imposed on federal employees by ensuring them payment of their missed paychecks as soon as possible after the Government reopened. *See, e.g.*, Cong. Record 165:5 (Jan. 10, 2019). Nothing in the legislative history of the 2019 Act suggests that the Act was designed to abridge other rights federal employees had, including the right to compensation in the form of liquidated damages and interest under the FLSA. Nevertheless, the Government now argues that the 2019 Act

distinguishes this case from *Martin* and operates to deprive federal employees of their rights under the FLSA. As discussed herein, Defendant's arguments are without merit.

Moreover, the Government did not conduct any analysis to determine whether its failure to pay Plaintiffs' minimum wage and overtime compensation on their regularly schedule pay day for work performed during the Shutdown complied with the FLSA and it did not rely on any authorities indicating that this failure complied with the FLSA. Accordingly, Plaintiffs allege that the Defendant willfully violated the FLSA and acted in conscious or reckless disregard of the FLSA's requirements.

Argument & Analysis

I. Applicable Standard of Review

When considering a motion to dismiss under Rules of the United States Court of Federal Claims ("RCFC") 12(b)(6) for failure to state a claim on which relief can be granted, the court "must accept as true all the factual allegations in the complaint, and must indulge all reasonable inferences in favor of the non-movant." *Martin v. United States*, 117 Fed. Cl. 611, 615 (2014) (quoting *Sommers Oil Co. v. United States*, 241 F.3d 1375, 1378 (Fed. Cir. 2001)). To survive the motion to dismiss, the factual allegations and reasonable inferences drawn from them must be sufficient to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

Affirmative defenses, such as the good-faith defense asserted by the Government in this case, are only appropriate for resolution on a motion to dismiss if the defense appears on the face of the complaint. *See, e.g., Watkins v. United States*, 128 Fed. Cl. 593, 599 n.6 (2016) (*citing* 5B Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1357 at 708 (2008 ed.)). As discussed in Section III, *supra*, that is not the case here.

To survive a motion to dismiss under RCFC 12(b)(6), "a complaint must contain factual

allegations that are 'enough to raise a right to relief above the speculative level.'" *Ga. Power Co. v. United States,* 137 Fed. Cl. 143, 146 (2018) (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 545 (2007)). This means that a plaintiff "need only assert 'sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face' . . . A claim is plausible on its face when 'the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *James M. Fogg Farms, Inc. v. United States,* 134 Fed. Cl. 363, 365 (2017) (internal citations omitted). In this case, there can be no doubt that Plaintiffs have met this standard. Accordingly, Defendant's Motion should be denied.

II. Plaintiffs have stated valid claims for minimum wage and overtime wage violations.

As in *Martin,* Plaintiffs have stated cognizable claims for: 1) unpaid minimum wages; and 2) unpaid overtime. Like the plaintiffs in *Martin*, Plaintiffs allege that they were FLSA non-exempt employees who worked for the federal government during a government shutdown and were not paid on their regularly scheduled pay dates. In *Martin*, not only did this Court find that the plaintiffs had pled a cognizable cause of action, but later granted summary judgment for the plaintiffs based on the Government's failure to pay their wages on their regularly scheduled pay date.

Because, by Defendant's own admission, the allegations in this case are virtually identical to those that were adequately pled in *Martin,* there can be no doubt that Plaintiffs have stated a cause of action. All of Defendant's other arguments prematurely address the merits of Plaintiffs' claims and the affirmative defenses Defendant plans to raise, which are inappropriate for resolution on a pre-answer motion to dismiss.

III. The Anti-Deficiency Act does not excuse Defendant's obligations under the FLSA.

Defendant's Anti-Deficiency Act Argument was flatly rejected by this Court in *Martin* and should be rejected herein as well. Defendant's primary argument is that the Anti-Deficiency Act ("ADA") operates to excuse the Government from its obligation to pay employees on time under the FLSA.

The ADA states that "an officer or employee of the United States Government … may not make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation." 31 U.S.C. § 1341(a)(1)(A). While the ADA instructs government officers not to make payments when sufficient funds have not been appropriated, it does not defeat the Government's obligation to make timely payment in accordance with other Statutes, i.e., the FLSA, nor does it prevent injured parties from seeking a remedy in this Court. Rather, "the Supreme Court has held that the ADA's requirements 'apply to the official, but they do not affect the rights in this court of the citizen honestly contracting with the [g]overnment.'" *Martin,* 130 Fed. Cl. at 583 (quoting *Salazar v. Ramah Navajo Chapter,* 567 U.S. 182, 197, 132 S.Ct. 2181, 183 L.Ed.2d 186 (2012)). This is because "[a]n appropriation *per se* merely imposes limitations upon the Government's own agents; … but its insufficiency does not pay the Government's debts, nor cancel its obligations, nor defeat the rights of other parties." *Martin,* 130 Fed. Cl. at 583 (quoting *Ferris v. United States,* 27 Ct. Cl. 542, 546 (1892). As the Court of Claims explained:

> It has long been established that the mere failure of Congress to appropriate funds, without further words modifying or repealing, expressly or by clear implication, the substantive law, does not in and of itself defeat a Government obligation created by statute. … The failure to appropriate funds to meet statutory obligations prevents the accounting officers of the Government from making disbursements, but such rights are enforceable in the Court of Claims.

New York Airways, Inc. v. United States, 369 F.2d 743, 748 (Ct. Cl. 1966); *See also Martin*, 130 Fed. Cl. at 583 ("[i]n a long line of cases it has been held that lapse of appropriation, failure of appropriation, exhaustion of appropriation, do not of themselves preclude recovery for compensation otherwise due.")(internal citations omitted).

Accordingly, where, as here, the Government failed to comply with its obligation to make payments when due because of a lapse in appropriations, the injured party may seek a remedy in this Court. *See, e.g., New York Airways*, 369 F.2d at 752 ("[T]he failure of Congress or an agency to appropriate or make available sufficient funds does not repudiate the obligation; it merely bars the accounting agents of the Government from disbursing funds and forces the carrier to a recovery in the Court of Claims."); *Collins v. United States*, 15 Ct. Cl. 22, 35 (1879) (noting that the Government's liability to pay "the compensation to which public officers are legally entitled … exists independently of the appropriation, and may be enforced by proceedings in this court."); *Common Ground Healthcare Coop. v. United States*, 142 Fed. Cl. 38, 52 (2019) ("Because plaintiff's claim arises from a statute mandating the payment of money damages in the event of its violation, the Judgment Fund is available to pay a judgment entered by the court on that claim.").

This Court already rejected Defendant's identical ADA argument in *Martin*, holding that the ADA "does not operate to cancel Defendant's obligations under the Fair Labor Standards Act," including the obligation to pay workers on their regularly scheduled payday – or to pay liquidated damages and other remedies provided by the FLSA as compensation in the event it fails to do so. 130 Fed. Cl. at 582-83; *see also Moda Health Plan, Inc. v. United States*, 892 F.3d 1311, 1322 (Fed. Cir. 2018) ("[T]he Supreme Court has rejected the notion that the Anti-Deficiency Act's requirements somehow defeat the obligations of the government. The Anti-Deficiency Act simply constrains government officials.") (*citing Salazar v. Ramah*

Navajo Chapter, 567 U.S. 182, 197 (2012)).

In *Moda*, as in *Highland Falls-Fort Montgomery Cent. Sch. District v. United States*, 48 F.3d 1166 (Fed. Cir. 1995), the Court held that a subsequent Congressional action or inaction related to the *specific program* at issue (such as appropriating a lesser amount than what was previously allocated for the program or using an appropriations rider to delay funding for the program) was interpreted as an intended Congressional modification of the Government's payment obligations under that particular program. Here, in contrast, the Government seeks to use the Anti-Deficiency Act to shield itself from liability for its FLSA violations to all excepted federal employees who worked without pay during the Shutdown. In contrast to *Moda* and *Highland Falls*, Congress' failure to appropriate funds to multiple agencies as a result of the inability of Congress and the President to reach agreement on a budget cannot possibly be interpreted as an intended modification of the Government's obligations to its workers in its capacity as a covered employer under the FLSA. Because the ADA does not serve to limit the Government's liability in the instant case, the Defendant's Motion should be denied.

IV. GEFTA Did Not Abridge Federal Employees' Rights or Alter the Government's Obligations Under the FLSA.

Despite this Court's clear holding in *Martin*, Defendant – after devoting several pages to reiterating arguments this Court already rejected - argues that this case is distinguishable from *Martin* because of GEFTA, which was enacted several weeks into the Shutdown and after Defendant had already violated the FLSA by failing to pay Plaintiffs their regularly scheduled pay on time. According to Defendant, legislation designed to ease the burden on federal employees by guaranteeing that they would receive their untimely paychecks as soon as the Shutdown ended also had the effect of depriving federal employees of other rights they previously had under the FLSA.

It is well established that in interpreting a congressional intent, the Court assumes that when Congress enacts statutes, it is aware of relevant judicial precedent. *Ryan v. Gonzales,* 568 U.S. 57, 66, 133 S. Ct. 696, 184 L.Ed.2d 528 (2013) (quoting *Merck & Co., Inc. v. Reynolds,* 559 U.S. 633, 648 (2010); *Lindahl v. Office of Personnel Management,* 470 U.S. 768, 782 n.15 (1985) (Because Congress is presumed to be aware of administrative or judicial interpretations of the statute, "the fact that Congress amended § 8347 … without explicitly repealing the established *Scroogins* doctrine itself gives rise to a presumption that Congress intended to embody *Scroogins* in the amended version of § 8347.")

There is nothing in the text or legislative history of GEFTA indicating that Congress intended to depart from the established judicial interpretation of the ADA or suggesting that Congress intended to change the interplay between the ADA and the FLSA when it enacted the GEFTA amendments. The FLSA is not mentioned in the text or legislative history of GEFTA and there is nothing in the text or legislative history indicating that Congress intended to deprive federal employees of their FLSA rights when it enacted GEFTA. Nor is there any indication that Congress intended to modify or repeal Sections 206, 207, or 216 of the FLSA when it enacted the GEFTA amendments. Rather, the legislative history indicates that Congress intended to make sure that federal employees (including those employees who were furloughed and were not entitled to wages pursuant to the FLSA) would be paid as soon as the shutdown ended rather than waiting until their next scheduled pay period to receive their back wages.

The Act, which passed both Houses of Congress with overwhelming bipartisan support, was clearly not intended to *take away* rights or remedies previously available to federal employees. *See, e.g.*, Cong. Record 165:5 (Jan. 10, 2019) (Sen. Kaine) ("[T]he best message we could send—and I am glad we are able to send it by voice vote unanimously from this body—is that they will be paid. When we reopen, they will be paid."); *Id.* (Sen. Cardin) ("[The 2019 Act]

does what I think all of us have said we want to make sure is done; that is, when we reopen government, those who have been working without pay and those who are on furlough without pay will get their backpay. I think that is at least some assurance to our government workforce that when we finally reopen government, they know they will be getting their paychecks. I think it is a very important point to give them at least that comfort."); Cong. Record 165:6 (Jan. 4, 2019) (Rep. Gianforte) ("We need to fund the government so we can make good on the promise in this bill. And let's be clear: This bill does not stop the immediate pain of missed paychecks. Under S. 24, Federal employees still do not get paid until the funding bills are passed and the government is reopened. Federal employees will still struggle to find ways to put food on the table and make ends meet."); *Id.* (Rep. Cummings) ("[E]ven while they struggle to pay these bills, furloughed employees face the stress and anxiety of not knowing whether or not they will be paid when the shutdown ends. The least we can do is to relieve that uncertainty [with the passage of the 2019 Act]."). Nothing in the Congressional Record or the statements made by the Act's sponsors and other supporters suggests any intent to modify federal employee's FLSA rights – or the Government's liabilities.

Moreover, the language in GEFTA is similar to the language in the appropriation passed after the 2013 shutdown, which did not affect the result in *Martin.* After the 2013 shutdown, Congress passed an appropriation stating that federal employees affected by the shutdown shall be paid "as soon as practicable after such lapse in appropriations ends." *See* Pub. L. No. 113-46 § 115, 127 Stat. 561 (Oct. 17, 2013). GEFTA similarly states that federal employees shall be paid "at the earliest date possible after the lapse in appropriations ends, regardless of scheduled pay dates." Government Employee Fair Treatment Act of 2019, Pub. L. No. 116-1, 133 Stat. 3. Just as the 2013 appropriation had no impact on the result in *Martin*, GEFTA does not change the analysis regarding the interplay of the ADA and FLSA here.

In addition, the 2019 Act was passed nearly two years after this Court's decision granting summary judgment to the plaintiffs in *Martin*. Congress could have amended the FLSA or included specific language in the 2019 Act to shield the Government from FLSA liability for late paychecks. However, it did not do so. Instead, the Government's attorneys ask this Court after the fact to reinterpret the 2019 Act, which was clearly designed to benefit all federal employees, not just those covered by the instant matter, as an abridgement of their rights that was never intended or even contemplated by Congress.

Finally, the GEFTA amendments should not be applied retroactively to impair vested rights. *See, e.g., Landgraf v. USI Film Products,* 511 U.S. 244, 270-71 (1994) ("Since the early days of this Court, we have declined to give retroactive effect to statutes burdening private rights unless congress had made clear its intent."). As the Supreme Court explained:

> [T]he first rule of construction is that legislation must be considered as addressed to the future, not the past. The rule is one of obvious justice, and prevents the assigning of a quality or effect to acts or conduct which they did not have or did not contemplate when they were performed. … A retrospective operation will not be given to a statute which interferes with antecedent rights … unless such be 'the unequivocal and inflexible import of the terms, and the manifest intention of the Legislature.'

Union Pac. R. Co. v. Laramie Stock Yards Co., 231 U.S. 190, 199, 34 S. Ct. 101, 58 L. Ed. 179 (1913) (citations omitted).

Accordingly, because the Plaintiffs' right to liquidated damages under the FLSA accrued when they were not paid on their regularly scheduled pay day, the subsequent GEFTA amendments should not be read to retroactively eliminate them, as Congress did not clearly express any intention to retroactively eliminate the Plaintiffs' FLSA remedies when it enacted the GEFTA amendments.

V. The Government has waived sovereign immunity for FLSA claims, including liquidated damages.

The Federal Circuit has recognized that sovereign immunity is waived for FLSA claims against the United States. *See, e.g., El-Sheikh v. United States*, 177 F.3d 1321, 1323 (Fed. Cir. 1999); *Saraco v. United States*, 61 F.3d 863, 865-66 (Fed. Cir. 1995). When the FLSA was amended in 1974 to include federal employees, 29 U.S.C. § 216(b) became applicable to most federal employees and to their employer, the United States government. *See El-Sheikh*, 177 F.3d at 1323. That section provides, "Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation … and in an additional equal amount as liquidated damages" and that "an action to recover the liability prescribed in the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated." *Id.*

As this Circuit and others have recognized, this provision contains an express waiver of sovereign immunity for claims seeking unpaid minimum wages, unpaid overtime compensation, and liquidated damages against any employer who violates the FLSA's minimum wage and overtime provisions, including the United States. *See, e.g., El-Sheikh*, 177 F.3d at 1324 ("Because the Act thus authorizes El-Sheikh to sue his 'employer,' the United States, the Act waives the United States' sovereign immunity from such suits."); *Saraco v. United States*, 61 F.3d 863, 865- 66 (Fed. Cir. 1995) (noting that the FLSA "explicitly" waived the federal government's sovereign immunity because "the FLSA conferred the right to recover money from the United States, that is, the FLSA contained the requisite waiver of sovereign immunity.")

At the time of the 1974 FLSA Amendment, the Supreme Court had already held, **thirty years earlier**, that untimely payment of wages violated the FLSA and subjected an employer to liability for liquidated damages. *See Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 707 (1945) ("[T]he liquidated damage provision is not penal in its nature but …constitutes a Congressional recognition that failure to pay the statutory minimum *on time* may be so detrimental to maintenance of the minimum standard of living…that double payment must be made in the event of delay in order to insure restoration of the worker to that minimum standard of well-being.") (*emphasis added*) (*internal citations omitted*).

Thus, the Government was on notice at the time it enacted the 1974 Amendment that the statute had been construed to require payment of liquidated damages in the event of untimely payment of regular wages. Contrary to Defendant's contention, the late payment doctrine is not an independent cause of action, but a specification of when liability for minimum wage and overtime violations accrues. As the Government has clearly waived sovereign immunity for minimum wage and overtime violations of the FLSA – including the liquidated damages remedy – it is indisputable that Congress waived sovereign immunity for the claims at issue in this case. *e.g.*, *Kirkendall v. Department of the Army*, 479 F.3d 830, 836 (Fed. Cir. 2007) (once the government has consented to be sued through a waiver of sovereign immunity, 'making the rule of equitable tolling applicable to suits against the Government, in the same way that it is applicable to private suits, amounts to little, if any, broadening of the congressional waiver.'"). Had Congress wished to exempt the Government from owing liquidated damages for untimely payment, it could have done so, but chose not to. *Supra.* Congress' decision not to exempt the Government from the liquidated damages provisions of the FLSA was indisputably a waiver of sovereign immunity with respect to liability for such damages.

Additionally, the legislative history of the 1974 Amendment to the FLSA provides

further support for the conclusion that the Amendment constituted consent by the Government to be sued for liquidated damages. The Amendment came just one year after the Supreme Court's decision in *Employees of the Department of Public Health & Welfare v. Department of Public Health and Welfare*, 411 U.S. 279 (1973). In that case, the Supreme Court held that state governments might be liable for actual damages in a suit brought by the United States Department of Labor against the state, but could not be sued directly by state employees in federal court. Part of the Court's rationale in that case was that a private suit in federal court could subject the states to liability for both actual and liquidated damages. As the Court explained, "[i]t is one thing…to make a state employee whole; it is quite another to let him recover double against a State. Recalcitrant private employers may be whipped into line in that manner. But we are reluctant to believe that Congress in pursuit of a harmonious federalism desired to treat the States so harshly." *Id.* at 286.

The following year, Congress enacted the 1974 Amendment in response to the Supreme Court's decision in *Employees*. *See, e.g., Thomas v. Louisiana*, 534 F.2d 613, 614 (5th Cir. 1976) ("[I]n April 1974, Congress amended section 16(b) of the FLSA to overturn the Supreme Court decision [in *Employees*]."); *Mueller v. Thompson*, 133 F.3d 1063, 1065 (7th Cir. 1998) ("The Court hinted in *Employees*, however, that Congress could abrogate the states' Eleventh Amendment immunity to suits under the FLSA if it made its intentions clear … and Congress did just that the next year [with the 1974 Amendment]."). In the 1974 Amendment, Congress chose to expand the definition of "employee" not only to state employees, but also to "any individual employed by the Government of the United States…" in covered positions. By passing amendments that were clearly intended to waive states' sovereign immunity from FLSA suits, and treating federal employees the same as state employees, it is clear that Congress, in passing the 1974 Amendment, waived the federal government's sovereign immunity from FLSA suits,

including suits for liquidated damages based on untimely payment of wages.

While the Government notes that "ambiguities in the scope of a waiver" will be construed in favor of the sovereign, the FLSA as it applies to federal employees is not ambiguous. It clearly waives sovereign immunity. The United States is an "employer" to whom the FLSA and Section 216(b) applies, and the failure to pay the minimum wages and overtime compensation required by Sections 206 and 207 on the employee's regularly scheduled payday is a violation of those sections. *See, e.g., Martin*, 130 Fed. Cl. at 584. Accordingly, the waiver of sovereign immunity unambiguously applies to claims by federal employees against their employer, the United States, seeking liquidated damages for the failure to pay minimum wages and overtime compensation on their regularly scheduled payday. Because the scope of the waiver is clear, the principle that ambiguity is construed in favor of the sovereign does not apply in this case. *See Griffin v. United States*, 85 Fed. Cl. 179, 187-88 (2008), *aff'd*, 590 F.3d 1291 (Fed. Cir. 2009) (quoting *Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 128 S. Ct. 2007, 2019 (2008) (noting that there is no basis to depart from the ordinary meaning where "'there is no ambiguity left for us to construe.'").

Thus, because the Plaintiffs have alleged that the United States violated the FLSA by failing to pay them minimum wages and overtime compensation on their regularly scheduled pay days, *see Martin*, 130 Fed. Cl. at 584, sovereign immunity has clearly been waived.

VI. Defendant cannot establish a good-faith defense.

Defendant next argues that even if it would otherwise be liable for liquidated damages and interest, the Court should exercise its discretion to excuse the Government from such payments because, according to Defendant, it has "show[n] to the satisfaction of the court that the act or omission giving rise" to Plaintiffs' claims "was in good faith, and that [it] had reasonable grounds for believing that [its] act or omission was not a violation of the FLSA." Def.

Mot. at p.16. *see also* 29 U.S.C. § 216(b). Defendant's argument fails for several reasons.

First, Defendant seeks a premature adjudication of whether it can establish its affirmative defense of good faith to Plaintiffs' claims for liquidated damages. As this Court correctly held in *Martin*, this issue is inappropriate for resolution on a pre-answer motion to dismiss. *Martin*, 117 Fed. Cl. at 627 ("plaintiff is correct that it would be inappropriate to determine, on motion to dismiss, whether the government had reasonable grounds and good faith."). Here, as in *Martin*, Defendant will have an opportunity to produce evidence supporting its good faith defense during discovery, if any such evidence exists.

Second, Defendant argues that the 2019 Act provided the Government with a good-faith defense that did not exist in *Martin* because, according to Defendant, "Congress explicitly instructed federal officials as to the correct date on which to pay compensation, and those officials had every objective and subjective reason to believe that they were complying with federal law." Defendant's argument conveniently ignores the fact that GEFTA, which Defendant claims "instructed" federal officials when to pay excepted employees, was signed into law on January 16, 2019 – five days *after* federal employees had missed their January 11, 2019 paycheck, and nineteen days after some federal employees had their December 28, 2018 paychecks reduced to account for work performed on December 22, 2018, the first day of the Shutdown. Thus, Defendant asks this Court to infer that federal officials relied in good faith on a law that *did not yet exist* when they reduced or failed to pay the wages Plaintiffs were due on December 28, 2018 and January 11, 2019.[1]

Additionally, Defendant cannot possibly establish that it had "reasonable grounds for

[1] To the extent Defendant argues that the 2019 Act provides a good-faith defense for the second missed paycheck on January 25, 2019, this argument is unavailing. As discussed nothing in the history of GEFTA suggests that the purpose of the Act was to absolve the Government of its FLSA obligations.

believing that its act or omission was not a violation of the FLSA" when this Court had already held in *Martin* that the same conduct – failing to timely pay federal employees who work during a shutdown – *was* a violation of the FLSA. Indeed, part of Defendant's argument in *Martin* was that "it had reasonable grounds for believing that the ADA precluded its compliance with the FLSA during the 2013 shutdown because this is an issue of first impression." *Martin,* 130 Fed. Cl. at 586. Unlike in *Martin*, the issue of the Government's FLSA obligations during a shutdown is no longer an "issue of first impression." Having already litigated – and lost – this issue in *Martin*, Defendant has not and cannot established any reasonable grounds to believe its conduct did not violate the FLSA.

Finally, in *Martin*, this Court found that Defendant had not proven its affirmative defense of good faith because it "did not consider—either prior to or during the government shutdown—whether requiring essential, non-exempt employees to work during the government shutdown without timely payment of wages would constitute a violation of the FLSA." 130 Fed. Cl. at 586. In so holding, this Court left open the possibility that Defendant could satisfy its burden by proving it had taken steps to ascertain whether failing to pay employees who worked during a shutdown violated the FLSA. Incredibly, despite the guidance provided by this Court in 2017 on how Defendant might satisfy the good faith defense in the future, Defendant once again makes no attempt to demonstrate such efforts, instead offering the excuse that doing so would have been futile because of the Anti-Deficiency Act. This argument was flatly rejected by this Court in *Martin,* and it should be rejected again.

VII. The Court should not exercise discretion to deny liquidated damages.

Defendant argues that the Anti-Deficiency Act rendered the Government unable to pay employees on time during the Shutdown, and thus, this Court should exercise its discretion to excuse the Government for its failure to do so. Defendant's argument fails for three reasons.

First, as with Defendant's good faith defense, Defendant's request for this Court to exercise discretion to deny liquidated damages is premature. No discovery has taken place, and Plaintiffs have not yet moved for a judgment. Any such discretion is properly exercised at trial or at least at the summary judgment stage, not on a pre-answer motion to dismiss. *See Martin*, 117 Fed. Cl. at 627.

Second, as discussed *supra*, with the passage of the 1974 Amendments to the FLSA, the Government clearly elected to treat itself like any other employer for purposes of liability under the Act. Courts have routinely declined to excuse private employers who pay their employees late because they are unable to pay on time. *See, e.g.*, *Picu v. Bot*, No. C14-0330RSL, 2016 U.S. Dist. LEXIS 182917, at *10 (W.D. Wash. May 26, 2016) (rejecting employer's argument that its financial condition or inability to pay was relevant to determination of liability for liquidated damages); I*srael Cables v. SMI Sec. Mgmt.*, No. 10-24613-CIV, 2012 U.S. Dist. LEXIS 198810, at *14 (S.D. Fla. Apr. 6, 2012) (rejecting employer's "impossibility" defense couched as a good faith defense). Thus, even if federal officials were unable to pay Plaintiffs on time because of the Anti-Deficiency Act, as Defendant contends, inability to pay employees on time would not excuse the Government's failure to do so nor its liability to pay liquidated damages so clearly stated in the FLSA.

Finally, Defendant's arguments rest on the faulty premise that the purpose of requiring the Government to pay liquidated damages to Plaintiffs would be to punish the Government for the untimely payment of wages. However, it is well-established that "[l]iquidated damages are not considered punitive, but are intended in part to compensate employees for the delay in payment of wages owed under the FLSA." *Chao v. Barbeque Ventures, LLC*, 547 F.3d 938, 941 (8th Cir. 2008) (*internal quotations omitted*); *see also Havrilla v. United States*, 125 Fed. Cl. 454, 466 (2016) ("Liquidated damages under the FLSA are considered compensatory rather

than punitive in nature.").

Indeed, the case for awarding compensatory liquidated damages is even stronger in this case than it was in *Martin*. The 2013 shutdown at issue in *Martin* lasted only five days, and federal employees received only one late paycheck. The 2019 Shutdown, in contrast, lasted for over a month and caused Plaintiffs to miss two regularly scheduled paychecks. In light of this Court's recognition in *Martin* that even a five-day shutdown had the potential to cause significant harm to federal employees, it is clear that the recent 35-day Shutdown was far more detrimental to Plaintiffs' financial well-being. *See, e.g.*, Cong. Record 165:6 (describing hardships faced by federal employees during the 2019 Shutdown). Thus, to the extent this Court has discretion not to award liquidated damages, the exercise of such discretion would be unwarranted in light of the considerable hardship the 2019 Shutdown – the longest in the Nation's history – imposed on federal employees such as Plaintiffs.

Conclusion

Based on the foregoing, Plaintiffs respectfully request a decision denying the Defendant's Motion to Dismiss in full.

Respectfully submitted,

/s/ JACOB Y. STATMAN
Jacob Y. Statman, Esq.
Snider & Associates, LLC
600 Reisterstown Road; 7th Floor
Baltimore, Maryland 21208
Phone: (410) 653-9060
Fax: (410) 653-9061
Email: jstatman@sniderlaw.com

Counsel of Record for Plaintiffs

CERTIFICATE OF SERVCE

I hereby certify that on this 5th day of July, 2019, a copy of the foregoing was filed via the CM/ECF filing system.

/s/ JACOB Y. STATMAN
Jacob Y. Statman, Esq.
Snider & Associates, LLC
600 Reisterstown Road; 7th Floor
Baltimore, Maryland 21208
Phone: (410) 653-9060
Fax: (410) 653-9061
Email: jstatman@sniderlaw.com

Counsel of Record for Plaintiffs