

In the United States Court of Federal Claims

No. 19-59C

(E-Filed: November 26, 2019)

_____)
L. KEVIN ARNOLD, <u>et al.</u> ,)
)
Plaintiffs,)
)
v.)
)
THE UNITED STATES,)
)
Defendant.)
_____)

ORDER

Plaintiffs in this putative collective action allege that the government, through several agencies, violated the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201-19, by failing to timely pay their earned overtime and regular wages during the partial government shutdown and lapse of appropriations that began on December 22, 2018. See ECF No. 6 at 6-7 (amended complaint). Three motions are currently pending before the court: (1) defendant’s motion to consolidate eleven similar cases with this matter, ECF No. 10;¹ (2) defendant’s motion to consolidate one additional case with this matter, ECF No. 14;² and (3) defendant’s motion to dismiss plaintiffs’ complaint for failure to state a claim on which relief can be granted, pursuant to Rule 12(b)(6) of the Rules of the United States Court of Federal Claims (RCFC), ECF No. 25.

¹ Defendant’s first motion to consolidate identifies the following cases as directly-related: Tarovsky, et al. v. United States, No. 19-4C; Avalos, et al. v. United States, No. 19-48C; D.P., et al. v. United States, 19-54C; Arnold, et al. v. United States, No. 19-59C; Hernandez, et al. v. United States, No. 19-63C; Rowe, et al. v. United States, No. 19-67C; Plaintiff No. 1, et al. v. United States, No. 19-94C; I.P., et al. v. United States, No. 19-95C; Anello, et al. v. United States, No. 19-118C; Abrantes, et al. v. United States, No. 19-129C; Richmond, et al. v. United States, No. 19-161C; and Baca, et al. v. United States, No. 19-213C. See ECF No. 10 at 1-2.

² Defendant’s second motion to consolidate identifies one additional directly-related case: Jones v. United States, No. 19-257C. See ECF No. 14 at 1.

Upon review of the motion to dismiss filed in this case, as well as the motions to dismiss filed in each of the cases proposed for consolidation, the court has concluded as follows:

(1) The group of cases proposed for consolidation do not present sufficiently synonymous arguments for the court's consideration such that wholesale consolidation is justified. As such, defendant's motions to consolidate, ECF No. 10 and ECF No. 14, are **DENIED**. The parties may re-urge consolidation following the court's ruling on the motions to dismiss if they deem consolidation appropriate at a later time.

(2) In its motion to dismiss, ECF No. 25, defendant argues that, in light of recent amendments to the Anti-Deficiency Act, 31 U.S.C. § 1341-42, the federal government cannot be held liable for liquidated damages in this case. See ECF No. 25 at 18-21. Defendant's argument is not a model of clarity, but as the court understands it, defendant takes the position that no operative waiver of sovereign immunity allows plaintiffs to sue the federal government for the claims asserted. Such an argument speaks to the court's jurisdiction, not the sufficiency of plaintiffs' allegations. See, e.g., Delano Farms Co. v. California Table Grape Comm'n, 655 F.3d 1337, 1343 (Fed. Cir. 2011) ("It is a fundamental principle that the United States and its agencies may not be sued in federal court unless Congress has waived sovereign immunity; if Congress has not waived the federal government's immunity for a particular claim, courts lack jurisdiction over that claim and must dismiss it.") (citing United States v. Dalm, 494 U.S. 596, 608 (1990)). Motions challenging the court's jurisdiction are properly raised pursuant to RCFC 12(b)(1), rather than RCFC 12(b)(6) as defendant has done in this case. Because the court must determine whether it has jurisdiction in this case before proceeding, the court will allow defendant the opportunity to supplement—and amend as necessary—its motion to dismiss to clarify its argument with regard to sovereign immunity. Defendant is directed to focus narrowly on this issue, but to provide a complete and coherent argument that will allow the court to evaluate its jurisdiction to proceed in this matter. Plaintiffs will have the opportunity to respond.

Accordingly, defendant shall **FILE**, on or before, **December 20, 2019**, a **supplemental brief** in support of its motion to dismiss clarifying both the basis of its motion and the substance of its argument relating to the waiver of sovereign immunity as relevant to the claims asserted in this case. Plaintiffs shall **FILE** a **response** to defendant's supplemental brief, on or before **January 24, 2020**.

IT IS SO ORDERED.

s/Patricia E. Campbell-Smith
PATRICIA E. CAMPBELL-SMITH
Judge