

**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' RESPONSE IN OPPOSITION TO  
DEFENDANT'S SUPPLEMENTAL BRIEF**

Plaintiffs, by and through their undersigned counsel, hereby respond in opposition to the Defendant's Supplemental Brief concerning sovereign immunity, incorporate by reference the arguments made in its Response to 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**

On November 26, 2018, the Court ordered the Defendant to file a supplemental brief in support of its Motion to Dismiss and requested clarification concerning both the basis of its Motion, and the substance of its argument relating to the waiver of sovereign immunity as relevant to the claims in this matter. (ECF 35). On December 20, 2019, the Defendant filed its Supplemental Brief. (ECF 36). Defendant's Supplemental Brief for the most part simply re-argues much of what had already been argued in its Motion to Dismiss and its Reply Brief. *Id.*

As set forth in Plaintiffs' Opposition to the Motion to Dismiss, it is well established that this Court has jurisdiction over the Plaintiffs' claims and that the Government has waived

sovereign immunity for all of the remedial relief afforded by the FLSA, including liquidated damages. As such, Plaintiffs have stated a claim upon which relief can be granted and the Defendant's Motion must be denied.

### **Argument & Analysis**

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

In its Supplemental Brief, Defendant argues that during a government shutdown, the Anti-Deficiency Act ("ADA"), and not the FLSA "controls when and what rate the Government will pay any wages due to work performed during the lapse in appropriations, including any FLSA minimum and overtime wages due." **Supp. Brief, p. 2 (ECF 36)**. Defendant's argument was flatly rejected by this Court in *Martin* and should be rejected herein as well. *Martin v. United States*, 130 Fed. Cl. 578 (2017). 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. 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.

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)).

As such, the Defendant’s argument that the ADA supersedes the FLSA and excuses its legal obligations under the latter Statute must fail and the Defendant’s Motion must be denied.

**II. The 2019 Amendment to the ADA did not alter the Defendant’s legal obligation under the FLSA.**

In its Supplemental Brief, Defendant rehashes the same argument made in its initial Motion to Dismiss that the January 2019 amendment to the ADA somehow serves to distinguish this case from *Martin*. 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.

There is nothing in the text or legislative history of the 2019 ADA amendment 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. *See* Plaintiffs’ Opposition (ECF 30), pp. 7-10.

Indeed, the language used in the amendment 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.

As such, the Defendant’s argument that the GEFTA amendments supersedes the FLSA and excuses its legal obligations under the latter Statute must fail and the Defendant’s Motion must be denied.

**III. The Government has waived sovereign immunity for all portions of an FLSA claim, 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, the Section that provided for damages in a private cause of action - 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 the Federal 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.”)

In its Supplemental Brief, Defendant admits that sovereign immunity has been waived as to the minimum wage and overtime portion of the damages afforded by the FLSA, but argues that such waiver is not applicable to the liquidated damages portion. **Supp. Brief, p. 4.** Neither the plain language of the Act, nor any of this (or any other) Court’s decisions support such a distinction. Indeed, 29 U.S.C. § 216(b) provides that “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, as the case may be, and in an additional equal amount as liquidated damages.” 29 U.S.C. § 216(b). It also provides 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.* Accordingly, federal employees may bring claims against the United States for violations of section 206 or

section 207 of the FLSA in the Court of Federal Claims for monetary damages “in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, *and in an additional equal amount as liquidated damages.*” *Id.* (Emphasis Added); *see also Abbey*, 745 F.3d at 1369 (“Under this straight-forward logic and 30-year-old, multi-circuit, apparently unbroken precedent, the Court of Federal Claims had jurisdiction here.”)

As such, the Defendant’s argument that sovereign immunity was not waived as to the liquidated damages portion of damages provided for under the FLSA must fail and the Defendant’s Motion must be denied.

**Conclusion**

Based on the foregoing, as well as the reasons stated in Plaintiffs’ Opposition to Defendant’s Motion to Dismiss, the Plaintiffs respectfully request a decision denying the Defendant’s Motion to Dismiss in full.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 21<sup>st</sup> day of February, 2020, a copy of the foregoing was filed via the CM/ECF filing system.

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