IN THE UNITED STATES COURT OF FEDERAL CLAIMS

L. KEVIN ARNOLD, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 19-59C
	)	(Judge Campbell-Smith)
UNITED STATES,	)	
	)	
Defendant.	)	

DEFENDANT'S SUPPLEMENTAL BRIEF
IN SUPPORT OF ITS MOTION TO DISMISS

Pursuant to the Court's November 26, 2019 Order, defendant, the United States respectfully submits this supplemental brief in support of its motion to dismiss plaintiffs' amended complaint, to clarify "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." Dkt. No. 35 (Order) at 2.

In most circumstances, when an employee alleges that his or her employer, including the United States, has not paid the appropriate amount of minimum wage or overtime wage, or both, in violation of the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-19, the FLSA is the controlling statute for determining liability and damages. When the allegations are made against the United States in the context of a Federal Government shutdown as a result of a lapse in appropriations, and especially when the allegations are not so much that the Government did not pay minimum or overtime wages but that the payment was not made on the employee's regularly scheduled payday, *see* Dkt. No. 6 (Am. Compl.) ¶¶ 33-54, the United States as employer is unique and the FLSA, by itself, is not the statute that controls the determination of liability and damages.

In those circumstances, the circumstances of this case, the FLSA continues to provide the requirement to pay minimum and overtime wages, and the Anti-Deficiency Act, 31 U.S.C. §§ 1341-42, not the FLSA, controls when and at what rate the Government will pay any wages due for work performed during the lapse in appropriations, including any FLSA minimum and overtime wages due. The United States as employer is unique in these circumstances because no other employer must abide by the dictates of the Anti-Deficiency Act. Case law involving other employers, necessarily in different circumstances, is inapposite. Furthermore, consideration of the proper application of the statutes in these circumstances must include the foundational backdrop of the Appropriations Clause of the United States Constitution, U.S. Const. art. 1, § 9, cl. 7, and principles of sovereign immunity. *See, e.g., Lane v. Pena*, 518 U.S. 187, 196 (1996).

Because the FLSA and the Anti-Deficiency Act properly interpreted and applied together in these circumstances do not entitle plaintiffs to the relief that they seek, plaintiffs fail to state a claim upon which relief may be granted. Rules of the United States Court of Federal Claims (RCFC) Rule 12(b)(6).

Congress enacted the Anti-Deficiency Act to vindicate its constitutional authority over appropriations. The Appropriations Clause provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const., art. I, § 9, cl. 7. This Clause provides a "straightforward and explicit command," and "means simply that no money can be paid out of the Treasury unless it has been appropriated by an Act of Congress." *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 424 (1990) (quoting *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937)). Beyond limiting disbursements from the Treasury, the Appropriations Clause also has "a more fundamental and comprehensive purpose"—namely, "to assure that public funds will be spent according to the letter of the difficult judgments reached by

Congress as to the common good and not according to the individual favor of Government agents or the individual pleas of litigants." *Id.* at 427-28. Absent some other unrestricted source of budgetary authority, a Federal agency's power to "make or authorize" payments from the Treasury expires upon exhaustion of the relevant appropriations. *See, e.g.*, *Sutton v. United States*, 256 U.S. 575, 579-80 (1921); *Bradley v. United States*, 98 U.S. 104, 113-114, 117 (1878).

The Anti-Deficiency Act broadly prohibits the United States from making or authorizing an expenditure or obligation exceeding available appropriations. 31 U.S.C. § 1341(a)(1)(A). Because of the Act, the Government indisputably cannot pay excepted employees on their regularly scheduled paydays during a lapse in appropriations; doing so would violate the Anti-Deficiency Act and subject violators to administrative discipline, including removal from office, and criminal penalties. *Id*. at §§ 1349-50.

In January 2019, Congress amended the Anti-Deficiency Act to clarify when and at what rate the United States must pay wages to excepted employees when a lapse in appropriations occurs. The Anti-Deficiency Act now requires that excepted employees shall be paid at their standard rate and at the earliest date possible after the lapse in appropriations ends, regardless of scheduled pay dates, and subject to the enactment of appropriations Acts ending the lapse. 31 U.S.C. § 1341(c)(2).

There can be no dispute that the United States complied with the Anti-Deficiency Act as amended. The Government paid plaintiffs all of the wages that they were entitled to receive as promptly as possible after appropriations were restored, and plaintiffs cannot contend otherwise. Nevertheless, plaintiffs allege that, by paying them as prescribed by Congress under the Anti-Deficiency Act, the Government violated the FLSA. As explained in our motion to dismiss and our reply in support of the motion to dismiss, this theory of liability cannot be reconciled with

traditional principles of statutory interpretation. *See* Dkt. No. 25 at 10-16; Dkt. No. 34 at 5-6. In part, the FLSA is devoid of any "timing" requirement, which is judicially created. *See, e.g., Rogers v. City of Troy, N.Y.*, 148 F.3d 52, 55-56 (2d Cir. 1998); *Calderon v. Witvoet*, 999 F.2d 1101, 1108 (7th Cir. 1993). Plaintiffs, therefore, cannot state a claim upon which relief can be granted.

Moreover, the Supreme Court made clear that, "when it comes to an award of money damages, sovereign immunity places the Federal Government on an entirely different footing than private parties." *Lane*, 518 U.S. at 196. The United States is not asserting that sovereign immunity, or the Anti-Deficiency Act, relieves the Government of its obligations under the FLSA to pay minimum and overtime wages as provided in the statute. Nor can these concepts be divorced from the merits of plaintiffs' claim. To the extent that plaintiffs' claim is that the Government did not pay the minimum and overtime wages that were due under the FLSA, that claim is moot. Plaintiffs' only surviving claim is that the Government is liable for liquidated damages because that payment was not received on plaintiffs' regularly scheduled paydays during the lapse in appropriations. *See* Am. Compl. ¶¶ 33-54. The FLSA, however, contains no express obligation that the Federal Government pay employees their minimum wages or their overtime wages on their regularly scheduled payday or be subject to liquidated damages. *See generally* 29 U.S.C. §§ 201-19. Although the United States has waived its sovereign immunity as to the express terms of the FLSA, the scope of that waiver does not extend to liability for liquidated damages when payment of wages is delayed as a result of a lapse in appropriations. Given that the Anti-Deficiency Act not only prohibits Federal agencies from paying excepted employees on their regularly scheduled paydays during a lapse in appropriations, but also specifically addresses when and at what rate wages are to be paid following a lapse in

appropriations, regardless of scheduled pay dates, the Government's waiver of sovereign immunity under the FLSA must be strictly construed against finding liability for the delayed but always forthcoming payment of wages due to the lapse in appropriations. Plaintiffs, therefore, cannot state a claim upon which relief may be granted.

The invocation of sovereign immunity in our briefs is to inform the correct interpretation and application of the FLSA to the United States when plaintiffs seek liquidated damages for delayed payment of wages as a result of a lapse in appropriations, not to challenge the Court's jurisdiction to entertain the claim. In weighing the merits of plaintiffs' claim, the inquiry into sovereign immunity is not separate from consideration of the underlying merits; rather, the two are inextricably linked. The FLSA, particularly in light of the Anti-Deficiency Act, does not impose the liability that plaintiffs assert. The FLSA does not contain any provision requiring the United States to pay employees on their regularly scheduled pay dates during a lapse in appropriations or be liable for liquidated damages. The Anti-Deficiency Act provides that excepted employees shall be paid at their standard rate and at the earliest date possible after the lapse in appropriations ends, regardless of scheduled pay dates, and subject to the enactment of appropriations Acts ending the lapse. 31 U.S.C. § 1341(c)(2). There is no separate inquiry into sovereign immunity that is not part of, or is substantively different from, the inquiry into the merits. As the Government has explained in its prior briefs, plaintiffs cannot state a claim for liquidated damages in these circumstances.

To the extent the invocation of sovereign immunity calls into question the Court's jurisdiction, the Court may properly decline to reach that issue. The United States Court of Appeals for the Federal Circuit recognizes that "Supreme Court precedent only requires federal courts to answer questions concerning their Article III jurisdiction--not necessarily their statutory

jurisdiction--before resolving other dispositive issues." *Minesen Co. v. McHugh*, 671 F.3d 1332, 1337 (Fed. Cir. 2012) (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95-97, 101 (1998); *Restoration Pres. Masonry, Inc. v. Grove Eur. Ltd.*, 325 F.3d 54, 59 (1st Cir. 2003)). "[C]ourts may 'reserve difficult questions of . . . jurisdiction when the case alternatively could be resolved on the merits in the favor of the same party.'" *Id.* (quoting *Steel Co.*, 523 U.S. at 111 (Breyer, J, concurring (citing *Norton v. Matthews*, 427 U.S. 524, 532 (1976))). In *Minesen Co.*, the court of appeals declined to decide the jurisdictional question presented, finding it "complex," and assumed jurisdiction, proceeding directly to the substance of the merits argument. *Id.*; *see also, Bowers v. Nat'l Collegiate Athletic Ass'n*, 346 F.3d 402, 415-16 (3d Cir. 2003); *cf. United States v. Caruthers*, 458 F.3d 459, 472 n.6 (6th Cir. 2006).

If the Court were to choose to address the scope of the waiver of sovereign immunity as it affects the Court's jurisdiction, the Court should find that the United States has not waived its sovereign immunity as to damages for delayed payment of wages during a lapse in appropriations. "A waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text, and will not be implied." *Lane*, 518 U.S. at 192 (internal citations omitted). "Jurisdiction over any suit against the Government requires a clear statement from the United States waiving sovereign immunity," "together with a claim falling within the terms of the waiver." *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003). As particularly relevant to this matter, "a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign." *Id.*

It is thus not sufficient to recognize that the FLSA contains a waiver of sovereign immunity as to its express terms; it is also necessary to determine whether Congress has waived immunity for the specific liquidated damages that plaintiffs seek. In other words, plaintiffs'

claim must fall within the terms of the Government's waiver of sovereign immunity under the FLSA. When undertaking that inquiry, the Court is guided by the Supreme Court's admonition that "[f]or the same reason that we refuse to enforce a waiver that is not unambiguously expressed in the statute, we also construe any ambiguities in the scope of a waiver in favor of the sovereign." *FAA v. Cooper*, 566 U.S. 284, 291 (2012). As the Supreme Court emphasized in *Cooper*, "the scope of Congress' waiver [must] be clearly discernable from the statutory text in light of traditional interpretive tools. If it is not, then we take the interpretation most favorable to the Government." *Id.* Thus, a court has no authority to infer a waiver of Federal sovereign immunity that is entirely absent from the statutory text. *See Erickson v. U.S. Postal Serv.*, 759 F.3d 1341, 1345 (Fed. Cir. 2014) ("A waiver of sovereign immunity 'must be unequivocally expressed in statutory text,' and '[a]ny ambiguities in the statutory language are to be construed in favor of immunity'" (quoting *Cooper*, 566 U.S. at 290) (quotation simplified)); *see also Cloer v. Sec'y of Health & Human Servs.*, 675 F.3d 1358, 1368 (Fed. Cir. 2012) (same), *aff'd sub nom. Sebelius v. Cloer*, 569 U.S. 369 (2013).

As explained above and in our prior briefs, the FLSA does not contain any language that can be construed as expressly and unequivocally waiving the sovereign immunity of the United States as to liquidated damages for delayed payment of wages as a result of a lapse in appropriations. This is particularly significant in light of the Anti-Deficiency Act, which criminalizes the payments that plaintiffs insist were required by the FLSA. 31 U.S.C. § 1350; *see* Dkt. No. 25 at 12-13; Dkt. No. 34 at 4. Therefore, if the Court were to choose to address this issue, the Court should find that, because the United States has not waived its sovereign immunity as to the damages that plaintiffs seek, the Court does not possess jurisdiction to

entertain plaintiffs' claims and must dismiss the amended complaint. *See* RCFC 12(b)(1) and 12(h).

CONCLUSION

For these reasons, and the reasons contained in our motion to dismiss and reply brief in support of the motion, we respectfully request that the Court dismiss plaintiffs' amended complaint because it fails to state a claim upon which relief can be granted, or in the alternative, to dismiss plaintiffs' complaint because the Court does not possess jurisdiction to entertain plaintiffs' claims.

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CERTIFICATE OF SERVICE

I hereby certify that, on this 20th day of December, 2019, a copy of the foregoing "DEFENDANT'S SUPPLEMENTAL BRIEF IN SUPPORT OF ITS MOTION TO DISMISS" was filed electronically. This filing was served electronically to all parties by virtue of the court's electronic filing system.

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