

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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

**DEFENDANT’S SUPPLEMENTAL BRIEF
REGARDING ITS SUPPLEMENTAL AUTHORITY**

Pursuant to the Court’s April 27, 2020 order, Dkt. No. 45, defendant, the United States, respectfully submits this supplemental brief explaining the relevance to this case of the supplemental authority of the combined decision of the United States District Court for the District of Columbia in *National Treasury Employees Union (NTEU) v. Trump*, No. 19-cv-50, and *Hardy v. Trump*, 19-cv-51, 2020 U.S. Dist. LEXIS 45353 (D.D.C.) (March 16, 2020).¹

Two similarities between this case and the district court cases are of primary importance to this Court’s consideration: both this case and the district court cases (1) arose out of the 2018-2019 lapse in appropriations and were filed by or on behalf of employees who were “excepted” and worked during the lapse, and (2) implicate the Court’s analysis of the application of the Anti-Deficiency Act, 31 U.S.C. § 1342, during a lapse in appropriations. The district court’s decision, therefore, may aid the Court’s analysis in this case.

First, like this case, the district court cases arose solely from the 2018-2019 lapse in appropriations that began on December 22, 2018. *Compare, e.g.*, 2020 U.S. Dist. LEXIS 45353,

¹ The *NTEU* plaintiffs filed a notice of appeal to the United States Court of Appeals for the D.C. Circuit. Dispositive motions are due on May 8, 2020. *See* No. 20-5066, Document No. 1834975 (Mar. 24, 2020 D.C. Cir.)

at **6-7 *with* Dkt. No. 6 (Am. Compl.) at ¶ 16. Plaintiffs in the district court cases, as with plaintiffs in this case, were each determined by their respective agencies to be “excepted” and were “required to work without pay while the lapse in funding continued.” *Compare, e.g.*, 2020 U.S. Dist. LEXIS 45353, at *7 *with* Am. Compl. ¶¶ 17-20. Indeed, plaintiffs in this case seek to represent at least some portion of the district court plaintiffs, because they bring their lawsuit on behalf of “similarly-situated individuals” who worked and were not paid on their regularly scheduled paydays. *See, e.g.*, Am. Compl. ¶¶ 27-32.

Second, the district court cases, like this case, implicate the application of the Anti-Deficiency Act during a Federal lapse in appropriations. Plaintiffs in the district court cases argued that the Anti-Deficiency Act “violated the Appropriations Clause of the United States Constitution by authorizing Executive Branch agencies to “obligate funds without limitation.”” 2020 U.S. Dist. LEXIS 45353, at *3 (internal citation omitted). Moreover, plaintiffs argued that, even if the Anti-Deficiency Act were constitutional, the Government violated it by requiring them to work during the lapse in appropriations. *Id.*

Plaintiffs in this case do not challenge the Anti-Deficiency Act’s provisions; instead, they seek liquidated damages under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.*, because they were not paid on their regularly scheduled paydays during the lapse in appropriations. *See, e.g.*, Am. Compl. ¶ 24. The Government, however, in its motion to dismiss, explains that, pursuant to the Anti-Deficiency Act, it was not legally permitted to pay plaintiffs during the lapse in appropriations, on their regularly scheduled paydays or otherwise. Particularly, the Government explains that the provisions of the Anti-Deficiency Act supersede any implicit requirement contained within the FLSA to pay employees on any regular payday, by rendering a payment absent an appropriation a potential criminal violation. *See, e.g.*, Dkt. No. 25

at 1 (Mot.). Moreover, when Congress amended the Anti-Deficiency Act through the Government Employee Fair Treatment Act of 2019, Pub. L. No. 116-1, 133 Stat. 3, it explicitly directed that the Government pay its employees for work performed during the lapse of appropriations “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.” *Id.* (citing 31 U.S.C. § 1341(c)(2)). Because the Anti-Deficiency Act supersedes any implicit FLSA requirement for payment on a particular day, the Government did not violate the FLSA. This analysis regarding the Anti-Deficiency Act is consistent with the Supreme Court’s decision in *Maine Community Health Options v. United States*, No. 18-1023 (U.S. Apr. 27, 2020), for which we have filed a separate motion for leave to file supplemental authority. Dkt. No. 46.

Consequently, the district court’s analysis of the Anti-Deficiency Act—conducted in light of the 2018-2019 lapse in appropriations and the Government Employee Fair Treatment Act of 2019—may be beneficial to the Court’s analysis of the Government’s motion to dismiss in this case. The district court discusses appropriations law and the prohibitions that exist on Federal officers and employees from authorizing expenditures absent an appropriation, including during a lapse in appropriations, as explained in the Government’s motion to dismiss in this case. *Compare* 2020 U.S. Dist. LEXIS 45353, at **4-5 *with, e.g.*, Mot. at 3-5. The district court also reviews the guidance provided by the Department of Justice as to what activities qualify as exceptions to the Anti-Deficiency Act, and thus permit “excepted” employees to work during a lapse in appropriations, as cited in the Government’s motion to dismiss in this case. *Compare* 2020 U.S. Dist. LEXIS 45353, at **4-5 *with, e.g.*, Mot. at 4 n.1. And the district court explains that the purpose of the Government Employee Fair Treatment Act of 2019 was to ensure payment of furloughed and excepted employees, as explained in the Government’s motion to

dismiss in this case. *Compare* 2020 U.S. Dist. LEXIS 45353, at *3 n.2 and *7 n.5 with, e.g., Mot. at 7-8, 10-11. Indeed, the district court's singular consideration of the Government Employee Fair Treatment Act of 2019 may be useful to the Court for that reason alone.

To be sure, the claims brought and the relief sought by plaintiffs in this case and in the district court cases vary. The district court cases challenged the Government's decision to require them to report for work and initially sought temporary restraining orders and preliminary injunctions. Further, the *Hardy* plaintiffs also asserted that the Government's actions violated the Fifth and Thirteenth Amendments², while the *NTEU* plaintiffs also claimed that the Government's conduct violated the Administrative Procedures Act because it constituted unlawful agency actions. 2020 U.S. Dist. LEXIS 45353, at *7. Conversely, plaintiffs in this case seek FLSA liquidated damages. Further, the district court's decision focuses primarily on whether the plaintiffs' claims were capable of repetition but avoiding judicial review and whether the court thus possessed subject matter jurisdiction to hear plaintiffs' claims.

Despite these differences, the district court decision may be instructive because it both concerns the same set of facts and many of the same plaintiffs as this case, and it addresses the plaintiffs' claims in light of the Anti-Deficiency Act, including the Government Employee Fair Treatment Act of 2019. Moreover, the Government cited to *Hardy* and *NTEU* in its motion to dismiss, rendering it necessary for the Government to bring to the Court's attention the district court's decision. Mot. at 10 n.3. Consequently, the district court decision may be helpful when this Court renders its decision in this case.

² The *Hardy* plaintiffs also raised FLSA claims which they voluntarily ceased pursuing. 2020 U.S. Dist. LEXIS 45353, *3 n.1.

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

ROBERT E. KIRSCHMAN, JR.
Director

/s/ Reginald T. Blades, Jr.,
REGINALD T. BLADES, JR.
Assistant Director

/s/ Erin K. Murdock-Park
ERIN K. MURDOCK-PARK
ANN C. MOTTO
Trial Attorneys
Commercial Litigation Branch
Civil Division
Department of Justice
P.O. Box 480, Ben Franklin Station
Washington, D.C. 20044
Tel: (202) 616-3753
Fax: (202) 514-8624

Dated: May 8, 2020

Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that, on this 8th day of May, 2020, a copy of the foregoing
“DEFENDANT’S SUPPLEMENTAL BRIEF REGARDING ITS SUPPLEMENTAL
AUTHORITY” was filed electronically. This filing was served electronically to all parties by
virtue of the Court’s electronic filing system.

/s/ Erin K. Murdock-Park
ERIN K. MURDOCK-PARK