

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 REGARDING ITS SUPPLEMENTAL
AUTHORITY**

Plaintiffs, by and through their undersigned counsel, hereby respond in opposition to the Defendant's Supplemental Brief Regarding its Supplemental Authority concerning the recent decision by the United States Supreme Court in *Maine Community Health Options v. United States*, 140 S. Ct. 1308 (2020) (*Maine Community*). Plaintiffs agree that the Supreme Court's holding in *Maine Community* is relevant in the instant matter, but not for the reasons argued by Defendant in its Motion. Rather, the Court should find that *Maine Community* supports Plaintiffs' position because the Supreme Court rejected the same argument being made by Defendant in the instant matter - namely, that the Anti-Deficiency Act excuses the Government from payment obligations created by statute. Additionally, the Supreme Court in *Maine Community* reiterated the longstanding principal that "repeals by implication," such as the implicit repeal urged by the Government in its original Motion to Dismiss - are disfavored. Lastly, the Defendant's argument that the FLSA displaces Tucker Act jurisdiction is without merit. In support thereof, Plaintiffs state as follows:

ARGUMENT AND ANALYSIS

I. The Government is Obligated Pursuant to the FLSA to Timely Pay Overtime Pay and, in the Event it Fails to do so, Liquidated Damages Regardless of Whether Congress Appropriated Funds for Such Payments.

In its most recent Supplemental Brief regarding the supplemental authority provided for in *Maine Community*, the Government contends that it is not liable to pay liquidated damages because though the FLSA provides for payments of minimum and overtime wages, it is the Anti-Deficiency Act, as amended by GEFTA, that controls when such payments are due. The Government argues that *Maine Community* supports its position that the due date for minimum and overtime wage payments is not provided for by statute, but rather is a rule created by the judiciary, and that the Anti-Deficiency Act, as amended by GEFTA, supplants the FLSA with regard to when such payments are due. The Government's arguments; however, are not supported by *Maine Community* and must fail.

In *Maine Community*, the Court addressed whether the Government was relieved of its statutory obligations provided for by the Patient Protection and Affordable Care Act (ACA) where Congress failed to simultaneously appropriate funds for such payments. *Maine Community*, 140 S. Ct. at 1315-1316. Under the ACA, certain insurers were statutorily entitled to such payments because as the Court concluded, the statutory language of the ACA created an obligation, which is defined as a "definite commitment that creates a legal liability of the government for the payment of goods and services ordered or received, or a legal duty . . . that could mature into a legal liability by virtue of actions on the part of the other party beyond the control of the United States." *Id.* at 1319. It is in that regard that the Court discusses the difference between an obligation and appropriation, and highlights the fact that the Anti-

Deficiency Act does not address obligations, rather merely proscribes how federal employees may make or authorize payments without appropriations. *Id.* at 1321.

As with the ACA, it is undisputed that the FLSA, the statute at issue in the case *sub judice*, obligates the Government by creating a legal liability to pay overtime pay for certain hours of work. 29 U.S.C. § 207(a). The FLSA uses the same mandatory language as addressed in *Maine Community* – “shall.” As part of the Government’s obligation, per Section 216, is the provision entitling employees to liquidated damages in the event the Government violates the provisions of Sections 206 and 207 and fails to properly pay its obligation. 29 U.S.C. § 216(b). Thus, it is clear that the FLSA creates an obligation – a legal liability – to timely pay overtime pay and to incur liquidated damages in the event that the Government fails to do so. The foregoing points are ceded by the Government.

It is further undisputed that this Court, and others, have held that the payments required by Sections 206 and 207 must be made on the employee’s regularly scheduled payday. *See Martin*, 130 Fed. Cl. at 584 (citing *Brooklyn Sav. Bank v. O’Neil*, 324 U.S. 697, 707, 65 S.Ct. 895, 89 L.Ed. 1296 (1945); *Biggs v. Wilson*, 1 F.3d 1537, 1540 (9th Cir. 1993) and 29 C.F.R. § 778.106 (2016)). The Government cedes the foregoing point, too, yet argues that it is relieved of its obligation to pay liquidated damages because the Anti-Deficiency Act, as amended by GEFTA, controls when payments without appropriation can be made. As such, the Government argues that pursuant to *Maine Community*, it is not obligated to pay liquidated damages because it did not fail to timely issue payments pursuant to Sections 206 and 207 of the FLSA. To that end, the Government contends that the statute – the FLSA – does not explicitly provide for when payments are due; rather, the “regularly scheduled payday” requirement was judicially created. The Government, therefore, contends that because the due date for payment is not explicitly

provided for in the statute then pursuant to *Maine Community*, the Government is not obligated to make such payments by any date certain provided for by the FLSA and does not violate the statute nor is it liable for liquidated damages during a lapse in appropriations.

However, the Government's arguments are not only a reiteration of its previously made and rejected arguments in *Martin*, but also a strained interpretation of *Maine Community*. See *Martin v. U.S.*, 117 Fed. Cl. 611 (2014). The Court in *Maine Community*, for that matter, did not address whether the Government's statutory obligation could be impacted by judicial requirements of the statutory language. Nor is it clear that the precedent from this Court and others that FLSA payments are due on the employee's regularly scheduled pay date – an interpretation of the FLSA that was already established when Congress amended the FLSA in 1974 to apply the statute to the federal government with no special limitations or carve outs treating the Government differently from any other employer – is not part of the obligation created by statute. 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*); see also Public Law 93-259.

The *Maine Community* decision does not, as the Government argues, support its position that the obligation to pay minimum and overtime wages per Sections 206 and 207 was not subject to any date certain provided for by the FLSA. Resting on the incorrect assumption that the FLSA does not require payment on a specific date, the Government contends that the Anti-Deficiency Act, as amended by GEFTA, creates the statutory time frame for when FLSA

payments are due, which, according to the Government, “eclipses” any FLSA obligation. Here, again, the Government’s argument runs aground when faced with the plain wording of *Maine Community*. The Court noted that the Anti-Deficiency Act does not revoke the Government’s statutorily-created obligations, even where appropriations are not available to satisfy such liabilities, but rather only “constrain[s] how federal employees and officers may make or authorize payments without appropriations.” *Maine Community*, 140 S. Ct. at 1321. There is nothing in the Anti-Deficiency Act that prevents Congress from creating a statutory obligation during a lapse in appropriations, nor that cancels a previously created statutory obligation. *Id.* at 1322.

Accordingly, the Anti-Deficiency Act, even as amended by GEFTA, does not establish an obligation to pay employees on a date certain (or reprieve for missed payments before that date), but rather alters the constraints placed upon federal employees and officers by the Anti-Deficiency Act, by permitting payments at the earliest date possible after the lapse in appropriations, i.e., on any date as early as possible rather than on a scheduled pay date. In other words, the Anti-Deficiency Act, as amended by GEFTA, does not relieve the Government of its legal obligations to make timely FLSA payments during the lapse in appropriations, but rather permits employees or officers to make such payments at any time, and in fact at the earliest date possible, after the lapse in appropriations.

Even if the Anti-Deficiency Act, as amended by GEFTA, created an obligation to pay federal employees as soon as appropriations were in place, this obligation cannot “eclipse” the Government’s obligation to properly pay employees pursuant to Sections 206 and 207, or to pay liquidated damages to employees affected by violations of the FLSA per Section 216(b), because it is not a proper revocation or abrogation of that statutory obligation. As reiterated in *Maine*

Community, “repeals by implication are not favored...and are a ‘rarity.’” *Maine Community*, 140 S. Ct. 1323 (quoting *Morton v. Mancari*, 417 U. S. 535, 549 (1974)). The Government has failed to establish that Congress expressed a clear and manifest intent to modify or repeal the statutory provisions in the FLSA creating the legal obligation when it amended the Anti-Deficiency Act via GEFTA. Neither the text of the original Anti Deficiency Act, nor the GEFTA, mention or refer to the FLSA, let alone expresses any intent to repeal it. *Id.* (explaining that intent to repeal must be “clear and manifest”). There are no words in the Anti Deficiency Act, as amended by GEFTA, that expressly or by clear implication repealed the legal obligation of the Government to timely pay minimum and overtime wages, and liquidated damages in the event it failed to do so, during the lapse in appropriations, even as Congress granted authority for federal employees and officials to timely correct the violations at the earliest date possible after the lapse in appropriations ends. Nor are the two laws irreconcilable; the Government can pay its employees at the earliest date possible after appropriations are in place while at the same time being liable for liquidated damages due to the resulting FLSA violation by failing to timely make payments during the lapse in appropriations. If Congress intended for a different result, then it could have explicitly provided for the waiver of the obligation to make timely FLSA payments and liquidated damages during the lapse in appropriations; this is especially so considering Congress was aware of the *Martin* holding at the time GEFTA was passed.

In *Maine Community*, the Court rejected the Government’s argument that the statutory obligation was impliedly repealed by the subsequent enactment. *Maine Community*, 140 S. Ct. at 1325. The Court did so because it held that a subsequent enactment could only impliedly repeal a statutory obligation where there is language “completely revoking or suspending the underlying obligation before the Government began incurring it” or irreconcilably changing the underlying

statutory obligation. *Id.* The Court noted that such language must be explicit in cancelling or revoking the statutory obligation. *Id.* The subsequent enactments in *Maine Community* did not repeal the statutory obligation because there was no such language nor did they even reference the payment formula provided for in the ACA or irreconcilably change the underlying statutory obligation. *Id.* at 1326.

As was the case in *Maine Community*, the subsequent statutory language in this case, i.e., GEFTA, did not contain any explicit language cancelling or revoking the statutory obligation per the FLSA. Furthermore, the subsequent enactment did not even reference, let alone irreconcilably change, the minimum and overtime wage payments due per Sections 206 and 207, nor the liquidated damages owed per Section 216(b) of the FLSA. As noted above, all GEFTA did was permit certain individuals to make certain payments that the Government already had a legal obligation to make at a certain period of time after the lapse in appropriation. There is nothing in GEFTA that relieved the Government of its obligation to pay liquidated damages for not having made such timely payments during the lapse in appropriation.

In short, *Maine Community* is squarely at odds with the Government's position in this case and supports Plaintiffs' arguments. Accordingly, the Court should consider the *Maine Community* decision and deny the Government's Motion to Dismiss.

II. This Court has Jurisdiction over FLSA Claims Pursuant to the Tucker Act.

This Court has jurisdiction over FLSA claims pursuant to the Tucker Act. This fact and well-established Federal Circuit precedent is conceded by the Government. *See Abbey v. United States*, 745 F.3d 1363 (Fed. Cir. 2014). Yet, the Government attempts to expand the scope of the holding in *Maine Community* and requests that this Court reconsider its jurisdiction by arguing that the FLSA displaces Tucker Act jurisdiction.

Despite making such an argument and request, the Government concedes that the federal government has waived sovereign immunity for the types of damages alleged by Plaintiffs, which fall *expressly* under the FLSA. In addition to the explanations provided for in the well-established precedent identified above, Plaintiffs are not aware of any rule or court precedent, and the Government points to none, that supports the contention that jurisdiction pursuant to the Tucker Act is displaced by the judicial remedies provided for in the FLSA. To that end, *Maine Community* supports Plaintiffs' position; the Court therein held that plaintiffs properly relied on the Tucker Act to sue for damages. *Maine Community*, 140 S. Ct. at 1327–28. Thus, *Maine Community* provides no support for the Government's position. In fact, to the contrary, the holding in *Maine Community* makes clear that a statute which provides that the Government “shall” pay compensation, as in the FLSA, falls within the scope of the Tucker Act's waiver of sovereign immunity because that mandatory language reflects congressional intent “to create both a right and a remedy” under the Tucker Act. *Maine Community*, 140 S. Ct. at 1329 (citing *Bowen*, 487 U. S., at 906, n. 42).

So, too, where the plaintiffs in *Maine Community* could seek damages via an action in this Court, the Plaintiffs in the case *sub judice* have similarly provided for jurisdiction in this Court, where the FLSA contains the same “shall” pay language that demonstrated that Congress intended to create both a right and a remedy under the Tucker Act. 29 U.S.C. §§ 206, 207, 216(b). The foregoing Sections of the FLSA explicitly provide for a private cause of action in any Federal or State court of competent jurisdiction. *Id.* It is clear, therefore, that the Government has waived sovereign immunity for claims arising under Sections 206, 207 and 216(b) of the FLSA, and there is nothing in the *Maine Community* decision that would alter that precedent.

CONCLUSION

Based on the foregoing, as well as the reasons stated in Plaintiffs' Opposition to Defendant's Motion to Dismiss, and Plaintiff's Response in Opposition to the Defendant's Supplemental Brief, 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 15th day of July 2020, a copy of the foregoing was filed via the CM/ECF filing system.

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