APPENDIX TABLE OF CONTENTS

Page

Opinion of the United States Court of Appeals for the Federal Circuit, Martin v. United States, November 30, 2022 ..... 1a

Opinion of the United States Court of Appeals for the Federal Circuit, Avalos v. United States, November 30, 2022 ..... 17a

Order of the Court of Appeals Denying Rehearing En Banc, Martin v. United States, March 10, 2023 ..... 47a

Order of the Court of Appeals Denying Rehearing En Banc, Avalos v. United States, March 10, 2023 ..... 50a

Opinion of the Court of Federal Claims, Anello v. United States, December 4, 2020 ..... 59a

Opinion of the Court of Federal Claims, Arnold v. United States, December 9, 2020 ..... 77a

Opinion of the Court of Federal Claims, Avalos v. United States, December 9, 2020 ..... 95a

Opinion of the Court of Federal Claims, Baca v. United States, December 4, 2020 ..... 123a

Opinion of the Court of Federal Claims, D.P. v. United States, December 1, 2020 ..... 147a

Opinion of the Court of Federal Claims, Hernandez v. United States, December 1, 2020 ..... 165a

Opinion of the Court of Federal Claims, Jones v. United States, December 1, 2020 ..... 184a

Opinion of the Court of Federal Claims, Marrs v. United States, October 27, 2017 ..... 203a

APPENDIX TABLE OF CONTENTS—Continued

Page

Opinion of the Court of Federal Claims, Martin v. United States, February 24, 2017 .....223a

Opinion of the Court of Federal Claims, Martin v. United States, July 31, 2014 .....248a

Opinion of the Court of Federal Claims, I.P. v. United States, December 1, 2020 .....290a

Opinion of the Court of Federal Claims, Plaintiff No. 1 v. United States, March 4, 2021 .....309a

Opinion of the Court of Federal Claims, Richmond v. United States, December 2, 2020.....327a

Opinion of the Court of Federal Claims, Rowe v. United States, November 20, 2020.....346a

Opinion of the Court of Federal Claims, Tarovisky v. United States, December 1, 2020 .....365a

Statutes and Regulations Involved.....385a

54 F.4th 1325
United States Court of Appeals, Federal Circuit.

Donald MARTIN, Jr., Patricia A. Manbeck, Jeff Roberts, Jose Rojas, Randall Sumner, Plaintiffs-Appellees

v.

UNITED STATES, Defendant-Appellant

Frank Marrs, Nicole Adamson, Bethany Afraid, Joel Albrecht, Jesus Arevalo, Nathan Arnold, Shawn Ashworth, Jeremiah Austin, Michael Avenali, Jose Balarezo, Ebony Baldwin, Charles Bambery, David Barraza, Gregory Barrett, Donna Barringer, David Bautista, Gary Bayes, Darrell Becton, Fraun Bellamy, Darnell Bembo, Jessica Bender, Michael Benjamin, Jr., Bryan Bentley, William Bertrand, Christopher Bijou, All Plaintiffs, Plaintiffs-Appellants

v.

United States, Defendant-Appellee

2021-2255, 2018-1354

Decided: November 30, 2022

Attorneys and Law Firms

Heidi R. Burakiewicz, Kalijarvi, Chuzi, Newman & Fitch, PC, Washington, DC, argued for all plaintiffs-appellants, plaintiffs-appellees. Patricia A. Manbeck, Donald Martin, Jr., Jeff Roberts, Jose Rojas, Randall Sumner also represented by Donald Robert DePriest; Michael Lieder, Mehri & Skalet, PLLC, Washington, DC.

Mark B. Stern, Appellate Staff, Civil Division, United States Department of Justice, Washington, DC, argued for defendant-appellant, defendant-appellee. Also represented by Brian M. Boynton, Sean Janda, Michael Shih.

Before Reyna, Linn, and Hughes, Circuit Judges.

Opinion

Dissenting opinion filed by Circuit Judge Reyna.

Hughes, Circuit Judge.

The *Martin* appeal asks whether the government violates the Fair Labor Standards Act by not paying federal employees who work during a government shutdown until after the lapse in appropriations has been resolved. The Court of Federal Claims determined that it does, even though the Anti-Deficiency Act legally bars the government from making payments during the shutdown. Because we hold today in *Avalos v. United States*, No. 21-2008, 54 F.4th 1343 (Fed. Cir. Nov. 30, 2022) that the government does not violate the FLSA's timely payment obligation as a matter of law under these circumstances, we reverse.

The *Marrs* appeal involves an additional issue about whether the government willfully violated the FLSA, thereby extending the FLSA's statute-of-limitations period to three years. Because we conclude that the government did not violate the FLSA, we need not reach the trial court's statute-of-limitations determination in *Marrs*.

I

The facts and procedural history of this appeal largely mirror those laid out in our opinion issued today in *Avalos*. In *Avalos*, federal employees who worked during the 2018-2019 partial government shutdown alleged that the government violated the Fair Labor Standards Act (FLSA) by delaying payments until after the lapse in appropriations ended. This appeal concerns a similar shutdown that occurred from October 1, 2013 to October 16, 2013.

In its summary-judgment ruling in *Martin*, the Court of Federal Claims determined that Plaintiffs-Appellees had stated a claim for an FLSA violation by alleging that the government had not compensated government employees during the shutdown. *Martin v. United States*, 130 Fed. Cl. 578, 583 (2017). Even though the Anti-Deficiency Act prohibited the government from paying these employees during the shutdown, the Court of Federal Claims reasoned that "the appropriate way to reconcile the two statutes is not to cancel [the government's] obligation to pay its employees in accordance with the manner in which the FLSA is commonly applied. Rather, the court would require that [the government] demonstrate[s] a good faith belief, based on reasonable grounds, that its actions were appropriate." *Id.* at 584. If the government were to demonstrate a good faith belief based on reasonable grounds, the trial court could exercise its discretion under 29 U.S.C. § 260 to award no liquidated damages. *Id.* But after hearing argument on this issue, the Court of Federal Claims determined that the government had

not demonstrated a good faith belief based on reasonable grounds and concluded that the *Martin* "plaintiffs are entitled to liquidated damages in an amount equal to the minimum and overtime wages that defendant failed to timely pay." *Id.* at 587–88 (citing 29 U.S.C. § 216(b)).

Because the court's liability determination in *Martin* applied to *Marrs*, the parties in *Marrs* stipulated that the only remaining issue to resolve was "whether the FLSA's two or three year statute of limitations applies to [the *Marrs*] plaintiffs." *Marrs v. United States*, No. 16-1297C (Fed. Cl. Mar. 17, 2017), ECF No. 13, at 1. The court ruled that the FLSA's two-year statute of limitations applied because the plaintiffs could not meet their burden to show willfulness and extend the statute of limitations period to three years. *Marrs v. United States*, 135 Fed. Cl. 155, 162 (2017). Because the *Marrs* plaintiffs filed suit more than two years after their claims accrued, the court concluded that the *Marrs* plaintiffs' claims are barred by the statute of limitations and thus dismissed the case for lack of subject matter jurisdiction. *Id.*

The government appeals the court's decision in *Martin*, and the *Marrs* plaintiffs appeal the court's decision in *Marrs*. We have jurisdiction under 28 U.S.C. § 1295(a)(3).

II

We review the Court of Federal Claims' legal conclusions de novo and its factual findings for clear error.

Adams v. United States, 350 F.3d 1216, 1221 (Fed. Cir. 2003).

III

The government appeals the Court of Federal Claims' decision in *Martin v. United States*, 130 Fed. Cl. 578 (2017), finding the government liable for liquidated damages under the FLSA. Our opinion today in *Avalos v. United States*, No. 21-2008, 54 F.4th 1343 (Fed. Cir. Nov. 30, 2022), resolves the same question raised in the *Martin* appeal: how the Anti-Deficiency Act's prohibition on government spending during a partial shutdown coexists with the FLSA's seemingly contradictory timely payment obligation. We hold in *Avalos* that "the FLSA's timely payment obligation considers the circumstances of payment and that, as a matter of law, the government does not violate this obligation when it complies with the Anti-Deficiency Act by withholding payment during a lapse in appropriations." *Avalos*, No. 21-2008, slip op. 15, 54 F.4th at 1349.

This holding applies equally to the *Martin* appeal, which involves substantially identical circumstances to *Avalos*. Indeed, the trial court relied on its decision in *Martin* to form the basis for its decision in *Avalos*. *See id.* at 11, 54 F.4th at 1347 ("The trial court relied on its decision in *Martin v. United States*, 130 Fed. Cl. 578 (2017), in which it determined that 'the appropriate way to reconcile [the Anti-Deficiency Act and the FLSA] is not to cancel the defendant's obligation to pay

its employees' under the FLSA, but to 'require that [the] defendant demonstrate a good faith belief, based on reasonable grounds, that its actions were appropriate' per 29 U.S.C. § 260."). For the same reasons in *Avalos*, we conclude that the government did not violate the FLSA's timely payment obligation as a matter of law.

Because the trial court's finding of a potential FLSA violation in *Marrs* depended on its decision in *Martin*, we need not reach the trial court's subsequent willfulness determination in *Marrs*.

IV

We accordingly reverse the trial court's decision in *Martin* that held the government liable for liquidated damages. We also vacate the Court of Federal Claims' decision in *Marrs* to the extent that it relied on *Martin*. We remand both cases to the Court of Federal Claims to enter judgment consistent with this opinion.

REVERSED-IN-PART, VACATED-IN-PART, AND REMANDED

COSTS

No costs.

Reyna, Circuit Judge, dissenting.

The majority decides this appeal on the basis of its interpretation of the Fair Labor Standards Act ("FLSA") and the Anti-Deficiency Act ("ADA").[1] The majority reaches a conclusion in this appeal that is contrary to the plain meaning of the statutory texts, and that is unsupported and inconsistent with the congressional purpose of the statutes. This is the same conclusion it reached in the companion case *Avalos.* In *Avalos*,[2] I lay out in greater detail the reasons for why I would uphold the judgment of the Court of Federal Claims and find that the Plaintiffs-Appellees sufficiently plead an allegation that the government violated the FLSA when it failed to timely pay excepted federal workers their earned wages during the relevant government shutdown. For purposes of economy, I adopt and submit in this appeal my full dissent in *Avalos*, as set out below:

This appeal involves two statutes. The Fair Labor Standards Act ("FLSA") requires employers, including the U.S. government, to pay workers earned wages on a regularly scheduled pay period basis. Employers that fail to pay their workers on a timely scheduled basis are subject to certain penalties, including liquidated damages. The other statute, the Anti-Deficiency Act ("ADA"), applies to government officials. It prohibits

---

[1] *Martin v. United States*, 130 Fed. Cl. 578 (2017); *Marrs v. United States*, 135 Fed. Cl. 155 (2017).

[2] *Avalos v. U.S.*, Nos. 2021-2008 through 2021-2012 and 2021-2014 through 2021-2020, ___ F.4th ___.

government officials from making expenditures, where the expenditure is not funded by duly passed appropriations. In other words, the government lacks authority to spend money it does not have.

The majority interprets the relevant provisions of the ADA and FLSA to mean that the ADA renders null the liquidated damages provision of the FLSA. I disagree. I believe that each statute stands alone and that the relevant provisions of the two statutes are not inconsistent with each other.

From December 22, 2018, to January 25, 2019, the federal government partially shutdown due to lack of appropriations (funding). *Avalos v. United States*, 151 Fed. Cl. 380, 382 (2020); J.A. 274. To keep key parts of the government functioning, the government created two categories of federal employee: "excepted" and "non-excepted." Non-excepted employees were instructed to not show-up for work and received no compensation for the period of time they did not report for work. This appeal does not involve non-excepted employees.

The "excepted" employees were required to report for work during the shutdown, to continue working and to perform normal duties. Despite working and earning wages during the shutdown, the excepted employees were not paid for their work until the first payday after the shutdown ended. *Avalos*, 151 Fed. Cl. at 382–83. This means that excepted employees received no pay on their regularly scheduled paydays during the shutdown.

At the time of the shutdown, Plaintiffs-Appellees were employed as Customs and Border Protection Officers for the U.S. Department of Homeland Security. These officers ("CBP Officers") were designated as excepted employees and were required to report for work. *Id.* at 382. They received no pay during the shutdown but were paid on the first regularly scheduled payday that came after January 25, 2019, the day the shutdown ended. *Id.*; J.A. 280–83.

On January 29, 2019, the CBP Officers filed their amended complaint in the United States Court of Federal Claims ("Court of Claims") seeking liquidated damages for the time they worked without pay during the shutdown. J.A. 288. The CBP Officers alleged that, under the FLSA, the government was liable for liquidated damages because during the shutdown it failed to pay wages on their regularly scheduled payday(s).

The government moved to dismiss the suit for failure to state a claim. The government did not dispute that the CBP Officers were not timely paid during the shutdown. The government asserted that the government shutdown was caused by a lack of general appropriation and, therefore, it was prohibited from paying the CBP Officers. According to the government, it cannot, as a matter of law, be held liable for liquidated damages that are based on wages not paid during the shutdown because the ADA prohibited it from paying the wages for which there was no funding during a shutdown. The Court of Claims denied the government's motion based largely on its decision in *Martin*, which involved issues identical to the issues in this

case. *Avalos*, 151 Fed. Cl. at 387–91 (discussing *Martin v. United States*, 130 Fed. Cl. 578 (2017)). The government appeals the judgment of the Court of Claims.

According to the majority, the "central question in this appeal is how the Anti-Deficiency Act's prohibition on government spending during a partial shutdown coexists with the FLSA's seemingly contradictory timely payment obligation." Maj. Op. 14. The majority reverses and remands to the Court of Claims, holding that the government cannot, as a matter of law, be held liable for liquidated damages under the FLSA where the failure to pay employee wages was due to a government shutdown. I disagree with my colleagues on several fronts.

First, the majority errs that as a matter of law, there is no FLSA violation in this case. The law is well-settled on the question of whether federal employees are entitled to liquidated damages under the FLSA when they are not paid on their regular payday. The FLSA makes clear that failure to pay wages on regularly scheduled paydays constitutes a FLSA violation.

The majority is also incorrect that liquidated damages cannot attach because the government was prohibited by the ADA, and presumably not of its own choosing, from paying the CBP Officers.

My sense is that the FLSA and ADA are distinct statutes with distinct purposes whose operations in this case neither intersect nor are otherwise inconsistent. Stated differently, the ADA in this instance

does not trump the FLSA and render its liquidated damages provision null.

The FLSA provides in relevant part:

> Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates . . . not less than $7.25 an hour.

29 U.S.C. § 206(a)(1)(C). The FLSA is administered to federal employees by the Office of Personnel Management ("OPM"). OPM has promulgated a regulation providing that employees must be paid "wages at rates not less than the minimum wage . . . for all hours of work." 5 CFR § 551.301(a)(1). The FLSA provides that employers who violate these provisions "shall be liable to the employee . . . affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation . . . and in an additional equal amount as liquidated damages." 29 U.S.C. § 216(b).

Again, the undisputed facts are that the government required the CBP Officers to report to work during the shutdown; and that the CBP Officers were not paid wages on their regularly scheduled paydays. These circumstances clearly apply to § 216(b) of the FLSA, and on this basis, I would find that the government's failure to pay the CBP Officers during the shutdown was a violation of the FLSA.

The majority appears to agree with the foregoing conclusion, but my colleagues take steps to avoid saying so. Namely, they engage in an unorthodox statutory interpretation that first examines whether the statutes are contradictory and whether the statutes can coexist. *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183, 124 S.Ct. 1587, 158 L.Ed.2d 338 (2004) (The statutory interpretation "inquiry begins with the statutory text, and ends there as well if the text is unambiguous."); *see also Me. Cmty. Health Options v. United States*, ___ U.S. ___, 140 S. Ct. 1308, 1321–22, 206 L.Ed.2d 764 (2020) (explaining that the ADA did not "qualify" the government's obligation to pay an amount created by the "plain terms" of a statute). In so doing, the majority concludes that the government is shielded from liquidated damages if the failure to pay is due to a shutdown. In other words, the statutes can be said to coexist because the FLSA is rendered nugatory.

There is no principled basis for the majority view. Indeed, the opposite is true. The FLSA is remedial in nature, and it acts as a shield to protect workers. Not so with the ADA. The ADA is meant to punish government officials for certain actions. The ADA neither references the FLSA nor the liquidated damages provision of § 216(b). Nothing in the statutes, or applicable caselaw, supports an argument that the ADA applies to federal workers.

The Supreme Court has recognized that the FLSA was enacted "to protect certain groups of the population from substandard wages and excessive hours which endangered the national health and well-being

and the free flow of goods in interstate commerce." *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 706, 65 S.Ct. 895, 89 L.Ed. 1296 (1945) (citing H. Rep. No. 2738, 75th Cong., 3d Sess., pp. 1, 13, 21, and 28). The FLSA recognizes that employees do not have equal bargaining power and serves to protect them. *Id.*

Similarly, the Supreme Court has explained that the FLSA liquidated damages provision is not meant as punishment for the employer, but rather, focuses on compensating the employee. *Id.* at 707, 65 S.Ct. 895 ("[T]he liquidated damages provision is not penal in its nature but constitutes compensation for the retention of a workman's pay which might result in damages too obscure and difficult of proof for estimate other than by liquidated damages.").

According to the Supreme Court, 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 Government." *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 197, 132 S.Ct. 2181, 183 L.Ed.2d 186 (2012) (citation omitted).

Here, the CBP Officers were honestly "contracting" with the government. There is no legal support for the belief that government workers forfeit their FLSA protection at a time of shutdowns. As the Supreme Court has noted, the insufficiency of an appropriation "does not pay the Government's debts, nor cancel its obligations." *Me. Cmty.*, 140 S. Ct. at 1321–22 (quoting *Ramah*, 567 U.S. at 197, 132 S.Ct. 2181). This court has recognized, "the Supreme Court has rejected the notion

that the Anti-Deficiency Act's requirements somehow defeat the obligations of the government." *Moda Health Plan, Inc. v. United States*, 892 F.3d 1311, 1322 (Fed. Cir. 2018) *rev'd on other grounds*, *Me. Cmty.*, 140 S. Ct. 1308.

The majority fails to point to legal authority for the proposition that the ADA cancels the government's obligation to protect the very federal employees that the FLSA was intended by Congress to protect. I see no congressional requirement or Supreme Court precedent that negates liquidated damages under the FLSA or the ADA. Rather, the liquidated damages provision of the FLSA "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 'necessary for health, efficiency, and general well-being of workers' and to the free flow of commerce, that double payment must be made in the event of delay." *Brooklyn Sav.*, 324 U.S. at 707, 65 S.Ct. 895 (emphasis added) (citation omitted). And as this court has explained, the "usual rule" is "that a claim for unpaid overtime under the FLSA accrues at the end of each pay period when it is not paid." *Cook v. United States*, 855 F.2d 848, 851 (Fed. Cir. 1988).

Other regional circuits have concluded that a FLSA claim accrues when an employer fails to pay employees on their regular payday, and that the FLSA violation occurs on that date. *See Atl. Co. v. Broughton*, 146 F.2d 480, 482 (5th Cir. 1944) ("[I]f an employer on any regular payment date fails to pay the full amount

. . . due an employee, there immediately arises an obligation upon the employer to pay the employee . . . liquidated damages."); *Birbalas v. Cuneo Printing Indus.*, 140 F.2d 826, 828 (7th Cir. 1944) ("[O]vertime compensation shall be paid in the course of employment and not accumulated beyond the regular pay day. . . . [T]he failure to pay it, when due, [is] a violation of [the FLSA]."); *Biggs v. Wilson*, 1 F.3d 1537, 1540 (9th Cir. 1993) ("The only logical point that wages become 'unpaid' is when they are not paid at the time work has been done, the minimum wage is due, and wages are ordinarily paid—on pay-day."); *Olson v. Superior Pontiac-GMC, Inc.*, 765 F.2d 1570, 1579 (11th Cir. 1985), *modified*, 776 F.2d 265 (11th Cir. 1985) ("The employee must *actually receive* the minimum wage each pay period.").

The majority asserts a number of other conclusions: that the ADA trumps the FLSA because it was passed first and is more specific than the FLSA; that requiring liquidated damages in this situation would lead to an "absurd result"; and that the government would be forced to "choose between a violation of the Anti-Deficiency Act or the FLSA." Maj. Op. 18–19. But we need not reach these questions because there is no justiciable conflict between the two laws. *See, e.g.*, *Epic Sys. Corp. v. Lewis*, ___ U.S. ___, 138 S. Ct. 1612, 1624, 200 L.Ed.2d 889 (2018) ("Respect for Congress as drafter counsels against too easily finding irreconcilable conflicts in its work. . . . Allowing judges to pick and choose between statutes risks transforming them from expounders of what the law *is* into policymakers

choosing what the law *should be.*"). I do agree with the majority that "where two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." Maj. Op. 19 (quoting *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984)).

Payday is important to the everyday worker. Missing a paycheck can have devastating consequences. That is what this case is about. Congress sought a remedy for such consequences by extending the potential for liquidated damages. Here, the employer should not be absolved of adherence to the FLSA, more so where the employer is the government that brought on the shutdown.

The Court of Claims correctly analyzed the statute and binding Supreme Court precedent. I would affirm the Court of Claims' decision and allow the case to continue.

54 F.4th 1343
United States Court of Appeals, Federal Circuit.

Eleazar **AVALOS**, James Davis,
Plaintiffs-Appellees
v.
UNITED STATES,
Defendant-Appellant
L. Kevin Arnold, Martin Lee, Mark Munoz,
Matthew Perry, Aaron Savage, Jennifer Taylor,
Ralph Fulvio, David Kirsh, Robert Riggs,
Plaintiffs-Appellees
v.
United States, Defendant-Appellant
Roberto Hernandez, Joseph Quintanar, Individually
and on Behalf of All Others Similarly Situated,
Plaintiffs-Appellees
v.
United States, Defendant-Appellant
Lori Anello, Karl Black, George Clary,
William Denell, Justin Grossnickle, Eric
Inkrote, Timothy McGrew, Mark Miller, David
Nalborczyk, Martin Neal, Jr., Luke Palmer,
Thomas Rhinehart, Jr., Ivan Todd,
Plaintiffs-Appellees
v.
United States, Defendant-Appellant
Brian Richmond, Adam Smith, Thomas Moore,
Chris Barrett, William Adams, Kelly Butterbaugh,
Dan Erzal, Brian W. Kline, Kevin J. Sheehan, Jason
Karlheim, Charles Pinnizzotto, Jason Dignan,
Mathew Beck, Stephen Shrift, James Bianconi,
Christopher Grafton, Jesse Carter, Michael Cruz,
Carl Warner, Brian Owens, Brian Mueller, Bryan

Bower, Corey Trammel, James Kirkland, Kimberly Bush, Bobby Marburger, Rodney Atkins, Leonel Hernandez, Joseph Augusta, Edward Watt,
Plaintiffs-Appellees
v.
United States, Defendant-Appellant
Justin Tarovisky, Grayson Sharp, Sandra Parr, Justin Bieger, James Bratton, William Frost, Steve Glaser, Aaron Hardin, Stuart Hillenbrand, Joseph Karwoski, Patrick Richoux, Derreck Root, Carlos Shannon, Shannon Swaggerty, Geoffry Wellein, Becky White, Tammy Wilson,
Plaintiffs-Appellees
v.
United States, Defendant-Appellant
Quentin Baca, Lephas Bailey, Christopher Ballester, Kevin Beine, David Bell, Richard Blam, Maximilian Crawford, Matthew Crumrine, John Dewey, Jeffrey Diamond,
Plaintiffs-Appellees
v.
United States, Defendant-Appellant
David Jones, Individually and on Behalf of All Others Similarly Situated,
Plaintiff-Appellee
v.
United States, Defendant-Appellant
Tony Rowe, Alieu Jallow, Karletta Bahe, Johnny Durant, Jesse A. McKay, III, George Demarce, Jacquie Demarce,
Plaintiffs-Appellees
v.
United States, Defendant-Appellant

D. P., T. S., J. V., Plaintiffs-Appellees
v.
United States, Defendant-Appellant
Plaintiff No. 1, Plaintiff No. 2,
Plaintiff No. 3, Plaintiff No. 4,
Plaintiffs-Appellees
v.
United States, Defendant-Appellant
I. P., A. C., S. W., D. W., P. V., M. R., R. C., K. W., B. G., R. H., Individually and on Behalf of All Others Similarly Situated,
Plaintiffs-Appellees
v.
United States, Defendant-Appellant

2021-2008, 2021-2009, 2021-2010, 2021-2011, 2021-2012, 2021-2014, 2021-2015, 2021-2016, 2021-2017, 2021-2018, 2021-2019, 2021-2020

Decided: November 30, 2022

Attorneys and Law Firms

Leon Dayan, Bredhoff & Kaiser, PLLC, Washington, DC, argued for all plaintiffs-appellees. Plaintiffs-appellees Eleazar Avalos, James Davis also represented by Joshua A. Segal; Allison Giles, Julie M. Wilson, National Treasury Employees Union, Washington, DC.

Jacob Y. Statman, Snider & Associates, LLC, Baltimore, MD, for plaintiffs-appellees L. Kevin Arnold, Ralph Fulvio, David Kirsh, Martin Lee, Mark Munoz,

Matthew Perry, Robert Riggs, Aaron Savage, Jennifer Taylor. Also represented by Jason Ian Weisbrot.

William Clifton Alexander, Anderson Alexander, PLLC, Corpus Christi, TX, for plaintiffs-appellees Roberto Hernandez, Joseph Quintanar. Also represented by Alan Clifton Gordon.

Theodore Reid Coploff, McGillivary Steele Elkin LLP, Washington, DC, for plaintiffs-appellees Lori Anello, Karl Black, George Clary, William Denell, Justin Grossnickle, Eric Inkrote, Timothy McGrew, Mark Miller, David Nalborczyk, Martin Neal, Jr., Luke Palmer, Thomas Rhinehart, Jr., Ivan Todd. Also represented by Sarah Block, Gregory K. McGillivary.

Jack K. Whitehead, JR., Whitehead Law Firm, Baton Rouge, LA, for plaintiffs-appellees William Adams, Rodney Atkins, Joseph Augusta, Chris Barrett, Mathew Beck, James Bianconi, Bryan Bower, Kimberly Bush, Kelly Butterbaugh, Jesse Carter, Michael Cruz, Jason Dignan, Dan Erzal, Christopher Grafton, Leonel Hernandez, Jason Karlheim, James Kirkland, Brian W. Kline, Bobby Marburger, Thomas Moore, Brian Mueller, Brian Owens, Charles Pinnizzotto, Brian Richmond, Kevin J. Sheehan, Stephen Shrift, Adam Smith, Corey Trammel, Carl Warner, Edward Watt.

Heidi R. Burakiewicz, Kalijarvi, Chuzi, Newman & Fitch, PC, Washington, DC, for plaintiffs-appellees Justin Bieger, James Bratton, William Frost, Steve Glaser, Aaron Hardin, Stuart Hillenbrand, Joseph Karwoski, Sandra Parr, Patrick Richoux, Derreck Root, Carlos Shannon, Grayson Sharp, Shannon Swaggerty, Justin

Tarovisky, Geoffry Wellein, Becky White, Tammy Wilson. Also represented by Donald Robert Depriest; Denise Duarte Alves, American Federation of Government Employees, Washington, DC.

Molly A. Elkin, McGillivary Steele Elkin LLP, Washington, DC, for plaintiffs-appellees Quentin Baca, Lephas Bailey, Christopher Ballester, Kevin Beine, David Bell, Richard Blam, Maximilian Crawford, Matthew Crumrine, John Dewey, Jeffrey Diamond. Also represented by Gregory K. McGillivary.

Josh Sanford, Sanford Law Firm, PLLC, Little Rock, AR, for plaintiff-appellee David Jones.

Marshall Ray, Law Offices of Marshall J. Ray, LLC, Albuquerque, NM, for plaintiffs-appellees Karletta Bahe, George Demarce, Jacquie Demarce, Johnny Durant, Alieu Jallow, Jesse A. McKay, III, Tony Rowe. Also represented by Jason Jon Lewis, Law Office of Jason J. Lewis LLC, Albuquerque, NM.

Nicholas Wieczorek, Clark Hill PLLC, Las Vegas, NV, for plaintiffs-appellees D. P., T. S., J. V.

Jules Bernstein, Bernstein & Lipsett PC, Washington, DC, for plaintiffs-appellees Plaintiff No. 1, Plaintiff No. 2, Plaintiff No. 3, Plaintiff No. 4. Also represented by Linda Lipsett; Daniel M. Rosenthal, Brita C. Zacek, James & Hoffman, P.C., Washington, DC.

Lauren Reznick, Borrelli & Associates, PLLC, Garden City, NY, for plaintiffs-appellees A. C., R. C., B. G., R. H., I. P., M. R., D. W., K. W., S. W., P. V.

Mark B. Stern, Appellate Staff, Civil Division, United States Department of Justice, Washington, DC, argued for defendant-appellant. Also represented by Brian M. Boynton, Sean Janda, Michael Shih.

Before Reyna, Linn, and Hughes, Circuit Judges.

Opinion

Dissenting opinion filed by Circuit Judge Reyna.

Hughes, Circuit Judge.

This interlocutory appeal addresses whether the government violates the Fair Labor Standards Act by not paying federal employees who work during a government shutdown until after the lapse in appropriations has been resolved. The Court of Federal Claims determined that the employees had established a prima facie case of an FLSA violation even though the Anti-Deficiency Act legally barred the government from making payments during the shutdown. Because we determine that the government did not violate the FLSA's timely payment obligation as a matter of law, we reverse.

I

From December 22, 2018 to January 25, 2019, the federal government partially shut down because of a lapse in appropriations. Plaintiffs-Appellees continued to work despite the shutdown because of their status as "excepted employees"—employees who work on

"emergencies involving the safety of human life or the protection of property" and whom the government can "require[] to perform work during a covered lapse in appropriations." 31 U.S.C. §§ 1341(c)(2), 1342. During this shutdown period, the government was barred from paying wages to excepted employees by the Anti-Deficiency Act, which prohibits the government from "authoriz[ing] an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation." 31 U.S.C. § 1341(a)(1)(A). The parties do not dispute that the government paid Plaintiffs-Appellees their accrued wages after the partial shutdown ended.

Plaintiffs-Appellees sued the government in the United States Court of Federal Claims, alleging that the government violated the Fair Labor Standards Act (FLSA) "by failing to timely pay their earned overtime and regular wages during the partial government shutdown." Appx12. Plaintiffs-Appellees sought liquidated damages under the FLSA, asserting that the government failed to make timely payments when it missed three scheduled pay dates during the partial shutdown: December 28, 2018; January 10, 2019; and January 24, 2019. Plaintiffs-Appellees' Br. 8; *see* 29 U.S.C. § 260. Under the FLSA, any employer who does not timely pay minimum or overtime wages is liable for liquidated damages equal to the amount of the untimely paid wages. *See* 29 U.S.C. § 216(b). But the Court of Federal Claims has the discretion to award no liquidated damages "if the employer shows . . . that the act or omission giving rise to [the FLSA] action was in

good faith" and was based on "reasonable grounds for believing that [the] act was not a violation of the" Act. *Id.* § 260.

The government moved to dismiss Plaintiffs-Appellees' complaint under Court of Federal Claims Rule 12(b)(6) for failing to state a claim. The government argued that it "cannot be held liable for violating its obligations under the FLSA" because the Anti-Deficiency Act prohibited the government from paying Plaintiffs-Appellees during the partial shutdown. Appx21. The Court of Federal Claims denied the government's motion to dismiss, reasoning that Plaintiffs-Appellees "had 'alleged that [the government] had failed to pay wages' on [Plaintiffs-Appellees'] 'next regularly scheduled payday'" and therefore stated a claim for relief under the FLSA. *Avalos v. United States*, 151 Fed. Cl. 380, 388 (2020) (quoting *Martin v. United States*, 130 Fed. Cl. 578, 584 (2017)). The trial court relied on its decision in *Martin*, in which it determined that "the appropriate way to reconcile [the Anti-Deficiency Act and the FLSA] is not to cancel the defendant's obligation to pay its employees" under the FLSA, but to "require that [the] defendant demonstrate a good faith belief, based on reasonable grounds, that its actions were appropriate" per 29 U.S.C. § 260. *Martin*, 130 Fed. Cl. at 584. The trial court then granted the government's motion to stay proceedings and certify an interlocutory appeal to address the question of "whether [the] defendant is liable for liquidated damages under the FLSA when [the] defendant complies with the Anti-Deficiency Act's command to defer payment of

Federal employees' wages during a lapse in appropriations." Appx297 (cleaned up). The government appeals. We have jurisdiction under 28 U.S.C. § 1292(d)(2).

II

We review the Court of Federal Claims' legal conclusions de novo and its factual findings for clear error. *Adams v. United States*, 350 F.3d 1216, 1221 (Fed. Cir. 2003).

A

Congress passed an early version of the Anti-Deficiency Act in 1870, making it unlawful "for any department of the government to expend in any one fiscal year any sum in excess of appropriations made by Congress for that fiscal year, or to involve the government in any contract for the future payment of money in excess of such appropriations." Act of July 12, 1870, ch. 251, § 7, 16 Stat. 230, 251. In 1884, Congress developed this prohibition further, mandating that "no Department or officer of the United States shall accept voluntary service for the Government or employ personal service in excess of that authorized by law except in cases of sudden emergency involving the loss of human life or the destruction of property." Act of May 1, 1884, ch. 37, 23 Stat. 15, 17.

These provisions took on more life over the subsequent years: In 1905, Congress required appropriations to be apportioned monthly "to prevent undue

expenditures in one portion of the year that may require deficiency or additional appropriations to complete the service of the fiscal year." Act of Mar. 3, 1905, ch. 1484, § 4, 33 Stat. 1214, 1257–58. And in 1906, Congress mandated that "all such apportionments shall be adhered to and shall not be waived or modified except upon the happening of some extraordinary emergency or unusual circumstance which could not be anticipated at the time of making such apportionment" and subjected any person who violated the provision to removal from office and a potential fine, imprisonment, or both. Act of Feb. 27, 1906, ch. 510, § 3, 34 Stat. 27, 49.

Congress continued to amend the Anti-Deficiency Act over the next 100 years. In its current form, the Act prohibits "an officer or employee" of the United States government from "mak[ing] or authoriz[ing] an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation." 31 U.S.C. § 1341(a)(1). The Act further prohibits officers and employees from "accept[ing] voluntary services . . . or employ[ing] personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property." *Id.* § 1342. The Anti-Deficiency Act clarifies that "each excepted employee who is required to perform work during a covered lapse in appropriations shall be paid for such work . . . 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.* § 1341(c)(2).

An officer or employee that violates these prohibitions receives "appropriate administrative discipline," which could include "suspension from duty without pay or removal from office." *Id.* § 1349. Further, if the violation is knowing and willful, the offending officer or employee is subject to a criminal fine "not more than $5,000," imprisonment "for not more than 2 years," or both. *Id.* § 1350.

B

Congress passed the FLSA in 1938 after finding "that the existence . . . of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers" causes certain undesirable outcomes. Fair Labor Standards Act of 1938, Pub. L. No. 75-718, § 2, 52 Stat. 1060, 1060. Relevant to this appeal, the 1938 version of the FLSA required "[e]very employer [to] pay to each of his employees who is engaged in commerce or in the production of goods for commerce" a minimum wage. *Id.* § 6, 52 Stat. 1062. It also required employers to pay employees one-and-a-half times the employees' regular rate "for a workweek longer than forty hours." *Id.* § 7, 52 Stat. 1063. The current version of the FLSA contains substantially identical requirements. *See* 29 U.S.C. §§ 206, 207.

Initially, the FLSA excluded the United States from its definition of "employer," Pub. L. No. 75–718, § 2, 52 Stat. 1060, and excluded individuals "employed in a bona fide executive, administrative, professional,

or local retailing capacity" from the minimum wage and overtime requirements, *id.* § 13, 52 Stat. 1067. But in 1974, Congress amended the FLSA's definition of "employer" to remove the language excluding the United States, and it amended the FLSA's definition of "employee" to expressly include "an individual employed by a public agency" of "the Government of the United States," subject to certain conditions. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 6, 88 Stat. 55, 58–60.

III

The central question in this appeal is how the Anti-Deficiency Act's prohibition on government spending during a partial shutdown coexists with the FLSA's seemingly contradictory timely payment obligation. The government argues that the FLSA's timely payment obligation "does not require the impossible" and considers what is "convenient or practicable under the circumstances." Defendant-Appellant's Br. 16 (quoting *Walling v. Harnischfeger Corp.*, 325 U.S. 427, 432–33, 65 S.Ct. 1246, 89 L.Ed. 1711 (1945)). The government therefore asserts that it did not violate the FLSA's timely payment obligation because it paid excepted employees as soon as possible and practicable under the circumstances—when the Anti-Deficiency Act legally allowed the government to make those payments. *Id.* at 15.

Plaintiffs-Appellees argue that the FLSA's timely payment obligation is more rigid, requiring "employers

to pay statutorily mandated wages *promptly*—that is, on the first regular, recurring payday after the amount due is ascertainable." Plaintiffs-Appellees' Br. 14–15. Plaintiffs-Appellees argue that the government should pay employees both wages and liquidated damages when a partial shutdown ends in recognition of "the government's own delay in meeting its obligations" under the FLSA. *Id.* at 12.

We hold that the FLSA's timely payment obligation considers the circumstances of payment and that, as a matter of law, the government does not violate this obligation when it complies with the Anti-Deficiency Act by withholding payment during a lapse in appropriations.

We begin with the text of the FLSA. *United States v. Gonzales*, 520 U.S. 1, 4, 117 S.Ct. 1032, 137 L.Ed.2d 132 (1997). The FLSA does not address whether the government violates the law by not paying employees on their regularly scheduled pay date during a partial shutdown. In fact, the FLSA does not specify at all when an employer must pay wages to its employees. It merely requires that "[e]very employer *shall pay* to each of his employees who in any workweek is engaged in commerce" a minimum wage, with no explicit mention of *when* the employer must make this payment. *See* 29 U.S.C. § 206 (emphasis added).

But an employer must still pay its employees in a timely manner. The Supreme Court has explained that the FLSA's liquidated-damages provision, 29 U.S.C. § 216(b), "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. . . ." *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 707, 65 S.Ct. 895, 89 L.Ed. 1296 (1945).

Courts have interpreted the FLSA's implicit timely payment obligation to ordinarily require employers to pay wages by "the employee's regular payday." *Biggs v. Wilson*, 1 F.3d 1537, 1541 (9th Cir. 1993); *see also, e.g.*, *Roland Elec. Co. v. Black*, 163 F.2d 417, 421 (4th Cir. 1947) ("[I]f [an employer] fails to pay overtime compensation promptly and when due on any regular payment date, the statutory action for the unpaid minimum and liquidated damages given under Section 16(b) immediately arises in favor of the aggrieved employee."); *Atl. Co. v. Broughton*, 146 F.2d 480, 482 (5th Cir. 1944) ("[I]f an employer on any regular payment date fails to pay the full amount of the minimum wages and overtime compensation due an employee, there immediately arises an obligation upon the employer to pay the employee . . . liquidated damages.").

But there are exceptions to this general rule. The Supreme Court has recognized that—at least for the overtime provision, 29 U.S.C. § 207(a)—failing to pay on a regular pay date is not a per se violation of the FLSA. *Walling*, 325 U.S. at 432–33, 65 S.Ct. 1246. For example, the employer in *Walling* did not violate the FLSA when it did not pay overtime wages on its employees' regular pay date because "the correct overtime compensation [could not] be determined until some time after the regular pay period." *Id.* at 432, 65 S.Ct.

1246. The Supreme Court clarified that the FLSA "does not require the impossible" but requires payment only "as soon as convenient or practicable under the circumstances." *Id.* at 432–33, 65 S.Ct. 1246.

The Second Circuit has also suggested that, while contractual pay dates can be relevant and probative to this inquiry, "what constitutes timely payment must be determined by objective standards—and not solely by reference to the parties' contractual arrangements." *Rogers v. City of Troy*, 148 F.3d 52, 57 & n.4 (2d Cir. 1998). Agency interpretation of the statute arrives at the same conclusion: The Department of Labor advises employers that "compensation due [to] an employee must *ordinarily* be made at the regular payday for the workweek." U.S. Dep't of Labor, Wage and Hour Div., Field Operations Handbook § 30b04 (2016) (emphasis added).[1]

Because the FLSA does not explicitly address whether paying excepted employees immediately after a lapse in appropriations ends is timely, we turn to canons of statutory construction to aid our interpretation.

---

[1] As the government notes, "Department of Labor guidance is not directly applicable to federal employees like [the] plaintiffs, for whom the FLSA is implemented by the Office of Personnel Management." Defendant-Appellant's Br. 4 n.1 (citing 5 U.S.C. 204(f); 5 C.F.R. pt. 551). But, in general, Congress has advised the Office of Personnel Management to "administer the provisions of law in such a manner as to assure consistency with the meaning, scope, and application [of] rulings, regulations, interpretations, and opinions of the Secretary of Labor which are applicable in other sectors of the economy." H.R. Rep. No. 93–913, at 28 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 2811, 2837.

See Timex V.I., Inc. v. United States, 157 F.3d 879, 882 (Fed. Cir. 1998) (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)). "When confronted with two Acts of Congress allegedly touching on the same topic, [courts are] not at 'liberty to pick and choose among congressional enactments' and must instead strive 'to give effect to both.'" *Epic Sys. Corp. v. Lewis*, ___ U.S. ___, 138 S. Ct. 1612, 1624, 200 L.Ed.2d 889 (2018) (citation omitted). Plaintiffs-Appellees suggest that we can give effect to both the Anti-Deficiency Act and the FLSA because they "do not conflict." Plaintiffs-Appellees' Br. 12. According to Plaintiffs-Appellees, "once a shutdown ends, the government can act in a way that effectuates the purposes of both the FLSA and the [Anti-Deficiency Act] by compensating its employees, pursuant to the FLSA's liquidated damages provision, for the government's own delay in meeting its obligations to them." Plaintiffs-Appellees' Br. 12. But this interpretation *would* have us create a conflict between the two statutes by holding that the Anti-Deficiency Act forbids, but the FLSA simultaneously requires, payment during a lapse in appropriations. If we were to adopt Plaintiffs-Appellees' proposed interpretation, we would be forcing the government to choose between a violation of the Anti-Deficiency Act or the FLSA. This is an absurd result that we should avoid, if possible. *See Haggar Co. v. Helvering*, 308 U.S. 389, 394, 60 S.Ct. 337, 84 L.Ed. 340 (1940).

"[I]n approaching a claimed conflict, we come armed with the 'strong[] presum[ption]' . . . that 'Congress

will specifically address' preexisting law when it wishes to suspend its normal operations in a later statute." *Epic*, 138 S. Ct. at 1624 (quoting *United States v. Fausto*, 484 U.S. 439, 453, 108 S.Ct. 668, 98 L.Ed.2d 830 (1988)). We disfavor repeals by implication, "particularly . . . when, as here, we are urged to find that a specific statute . . . has been superseded by a more general one." *Sw. Marine of S.F., Inc. v. United States*, 896 F.2d 532, 533 (Fed. Cir. 1990). Normally, "a specific statute controls over a general one." *Bulova Watch Co. v. United States*, 365 U.S. 753, 758, 81 S.Ct. 864, 6 L.Ed.2d 72 (1961).

The Anti-Deficiency Act is more specific than the FLSA. The Anti-Deficiency Act explicitly forbids the government from making expenditures during a lapse in appropriations and further specifies when the government must pay excepted employees for work performed during a partial shutdown, 31 U.S.C. § 1341(a)(1), (c)(2), whereas the FLSA discusses the much broader topic of general payment requirements for all employers, 29 U.S.C. §§ 206, 207. And the FLSA does not explicitly discuss when an employer must make these payments; it merely implies that payment must be timely under the circumstances. *See Brooklyn Sav. Bank*, 324 U.S. at 707, 65 S.Ct. 895; *Walling*, 325 U.S. at 433, 65 S.Ct. 1246.

Further, some form of the Anti-Deficiency Act had existed for nearly 70 years before Congress passed the FLSA, and for over 100 years by the time Congress extended the FLSA's protections to federal government employees. *See supra* Section II. If Congress intended

to upend or modify the Anti-Deficiency Act's long-standing prohibition on making expenditures for which Congress has not apportioned funds, it would have done so explicitly. "A party seeking to suggest that two statutes cannot be harmonized, and that one displaces the other, bears the heavy burden of showing a clearly expressed congressional intention that such a result should follow." *Epic*, 138 S. Ct. at 1624 (cleaned up). Plaintiffs-Appellees have not shown a clearly expressed intention; instead, they rely on judicial opinions that interpret an implicit obligation in the context of distinct fact patterns. *See* Plaintiffs-Appellees' Br. 16–17 (collecting and discussing cases). Plaintiffs-Appellees have not otherwise shown why a later-enacted, more general statute should supersede a long-standing, specific one.

"[W]here two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984) (internal quotation marks omitted). We conclude that Congress did not intend for the FLSA to overturn, conflict with, or supersede the Anti-Deficiency Act's prohibition on making expenditures during a lapse in appropriations. Rather, Congress intended for the two statutes to coexist in the following manner: The FLSA requires employers to pay their employees as soon as practicable under the circumstances. *Walling*, 325 U.S. at 433, 65 S.Ct. 1246. Paying federal government wages during a lapse in appropriations is not practicable

because the government would violate the Anti-Deficiency Act and could incur civil and criminal liability by making those expenditures. Therefore, the federal government timely pays wages, per the FLSA, when it pays its employees at the earliest date possible after the lapse in appropriations ends.

Our holding does not create a "moving target" as to "when the employee actually gets paid." *Biggs*, 1 F.3d at 1540. Indeed, the Anti-Deficiency Act expressly addresses when payment should be made following a lapse in appropriations: "the earliest date possible after the lapse in appropriations ends." 31 U.S.C. § 1341(c)(2). This effectuates the implicit timely payment requirement of the FLSA and relieves "employees, employers, and courts alike [from] guess[ing] when 'late payment' becomes 'nonpayment' in order to determine whether the statute of limitations has begun to run, the amount of unpaid wages and liquidated damages to be awarded, and how much prejudgment interest has been accrued." *Biggs*, 1 F.3d at 1540.

Finally, we note that the cases on which Plaintiffs-Appellees rely are distinguishable. Many of these cases "involved substantial delays in payment, and—more important[ly]—the practices disapproved of resulted in evasions of the minimum wage and overtime provisions of the FLSA." *Rogers*, 148 F.3d at 56 (discussing *Brooklyn Sav. Bank*, 324 U.S. 697, 65 S.Ct. 895, which involved a two-year delay; *Calderon v. Witvoet*, 999 F.2d 1101 (7th Cir. 1993), which involved a five-year delay; and *United States v. Klinghoffer Brothers Realty Corp.*, 285 F.2d 487 (2d Cir. 1960), which involved a

one-year delay); *see* Plaintiffs-Appellees' Br. 16–17, 29 (discussing the same cases). Here, the government paid Plaintiffs-Appellees immediately after the one-month shutdown ended.

Brooklyn Savings Bank v. O'Neil is particularly distinguishable, even beyond the substantial delays and attempts to evade the FLSA's requirements that are present in that case. The employees in *Brooklyn Savings* accepted overdue minimum and overtime wages from their employers and signed contracts releasing their employers from liability for FLSA claims. 324 U.S. at 699–702, 65 S.Ct. 895. The Supreme Court held that employees cannot waive their right to minimum wages, overtime wages, or liquidated damages under the FLSA. *Id.* at 706–07, 65 S.Ct. 895. The Court found support in the "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." *Id.* at 707, 65 S.Ct. 895.

The Court in *Brooklyn Savings* analyzed whether "a statutory right conferred on a private party, but affecting the public interest, may . . . be waived or released if such waiver or release contravenes the statutory policy." *Id.* at 704, 65 S.Ct. 895. That issue is not relevant here; this appeal does not involve contractual waiver or other similar circumstances. In fact, the hierarchy of competing legal interests in this appeal is entirely different than that in *Brooklyn*

Savings. There, the Court interpreted private contracts in light of a superior federal statute: the FLSA. In contrast, this appeal turns on how we interpret the FLSA in light of an even more established and more specific federal statute: the Anti-Deficiency Act. Our interpretation relies on well-established canons of construction to avoid a conflict between these two statutes. And we find no indication that Congress intended to create such a conflict—much less the "clearly expressed congressional intent[]" that caselaw requires, *Epic*, 138 S. Ct. at 1624.

IV

Because the government does not violate the FLSA when it pays excepted employees for work performed during a government shutdown at the earliest date possible after a lapse in appropriations ends, we reverse the Court of Federal Claims' decision denying the government's motion to dismiss for failure to state a claim, and we remand for the court to enter judgment consistent with this opinion.

REVERSED AND REMANDED

COSTS

No costs.

Reyna, Circuit Judge, dissenting.

This appeal involves two statutes. The Fair Labor Standards Act ("FLSA") requires employers, including the U.S. government, to pay workers earned wages on a regularly scheduled pay period basis. Employers that fail to pay their workers on a timely scheduled basis are subject to certain penalties, including liquidated damages. The other statute, the Anti-Deficiency Act ("ADA"), applies to government officials. It prohibits government officials from making expenditures, where the expenditure is not funded by duly passed appropriations. In other words, the government lacks authority to spend money it does not have.

The majority interprets the relevant provisions of the ADA and FLSA to mean that the ADA renders null the liquated damages provision of the FLSA. I disagree. I believe that each statute stands alone and that the relevant provisions of the two statutes are not inconsistent with each other.

From December 22, 2018, to January 25, 2019, the federal government partially shutdown due to lack of appropriations (funding). *Avalos v. United States*, 151 Fed. Cl. 380, 382 (2020); J.A. 274. To keep key parts of the government functioning, the government created two categories of federal employee: "excepted" and "non-excepted." Non-excepted employees were instructed to not show-up for work and received no compensation for the period of time they did not report for work. This appeal does not involve non-excepted employees.

The "excepted" employees were required to report for work during the shutdown, to continue working and to perform normal duties. Despite working and earning wages during the shutdown, the excepted employees were not paid for their work until the first payday after the shutdown ended. *Avalos*, 151 Fed. Cl. at 382–83. This means that excepted employees received no pay on their regularly scheduled paydays during the shutdown.

At the time of the shutdown, Plaintiffs-Appellees were employed as Customs and Border Protection Officers for the U.S. Department of Homeland Security. These officers ("CBP Officers") were designated as excepted employees and were required to report for work. *Id.* at 382. They received no pay during the shutdown but were paid on the first regularly scheduled payday that came after January 25, 2019, the day the shutdown ended. *Id.*; J.A. 280–83.

On January 29, 2019, the CBP Officers filed their amended complaint in the United States Court of Federal Claims ("Court of Claims") seeking liquidated damages for the time they worked without pay during the shutdown. J.A. 288. The CBP Officers alleged that, under the FLSA, the government was liable for liquidated damages because during the shutdown it failed to pay wages on their regularly scheduled payday(s).

The government moved to dismiss the suit for failure to state a claim. The government did not dispute that the CBP Officers were not timely paid during the shutdown. The government asserted that the

government shutdown was caused by a lack of general appropriation and, therefore, it was prohibited from paying the CBP Officers. According to the government, it cannot, as a matter of law, be held liable for liquidated damages that are based on wages not paid during the shutdown because the ADA prohibited it from paying the wages for which there was no funding during a shutdown. The Court of Claims denied the government's motion based largely on its decision in *Martin*, which involved issues identical to the issues in this case. *Avalos*, 151 Fed. Cl. at 387–91 (discussing *Martin v. United States*, 130 Fed. Cl. 578 (2017)). The government appeals the judgment of the Court of Claims.

According to the majority, the "central question in this appeal is how the Anti-Deficiency Act's prohibition on government spending during a partial shutdown coexists with the FLSA's seemingly contradictory timely payment obligation." Maj. Op. 1349. The majority reverses and remands to the Court of Claims, holding that the government cannot, as a matter of law, be held liable for liquidated damages under the FLSA where the failure to pay employee wages was due to a government shutdown. I disagree with my colleagues on several fronts.

First, the majority errs that as a matter of law, there is no FLSA violation in this case. The law is well-settled on the question of whether federal employees are entitled to liquidated damages under the FLSA when they are not paid on their regular payday. The

FLSA makes clear that failure to pay wages on regularly scheduled paydays constitutes a FLSA violation.

The majority is also incorrect that liquidated damages cannot attach because the government was prohibited by the ADA, and presumably not of its own choosing, from paying the CBP Officers.

My sense is that the FLSA and ADA are distinct statutes with distinct purposes whose operations in this case neither intersect nor are otherwise inconsistent. Stated differently, the ADA in this instance does not trump the FLSA and render its liquidated damages provision null.

The FLSA provides in relevant part:

> Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates . . . not less than $7.25 an hour.

29 U.S.C. § 206(a)(1)(C). The FLSA is administered to federal employees by the Office of Personnel Management ("OPM"). OPM has promulgated a regulation providing that employees must be paid "wages at rates not less than the minimum wage . . . for all hours of work." 5 CFR § 551.301(a)(1). The FLSA provides that employers who violate these provisions "shall be liable to the employee . . . affected in the amount of their unpaid minimum wages, or their unpaid overtime

compensation . . . and in an additional equal amount as liquidated damages." 29 U.S.C. § 216(b).

Again, the undisputed facts are that the government required the CBP Officers to report to work during the shutdown; and that the CBP Officers were not paid wages on their regularly scheduled paydays. These circumstances clearly apply to § 216(b) of the FLSA, and on this basis, I would find that the government's failure to pay the CBP Officers during the shutdown was a violation of the FLSA.

The majority appears to agree with the foregoing conclusion, but my colleagues take steps to avoid saying so. Namely, they engage in an unorthodox statutory interpretation that first examines whether the statutes are contradictory and whether the statutes can coexist. *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183, 124 S.Ct. 1587, 158 L.Ed.2d 338 (2004) (The statutory interpretation "inquiry begins with the statutory text, and ends there as well if the text is unambiguous."); *see also Me. Cmty. Health Options v. United States*, ___ U.S. ___, 140 S. Ct. 1308, 1321–22, 206 L.Ed.2d 764 (2020) (explaining that the ADA did not "qualify" the government's obligation to pay an amount created by the "plain terms" of a statute). In so doing, the majority concludes that the government is shielded from liquidated damages if the failure to pay is due to a shutdown. In other words, the statutes can be said to coexist because the FLSA is rendered nugatory.

There is no principled basis for the majority view. Indeed, the opposite is true. The FLSA is remedial in

nature, and it acts as a shield to protect workers. Not so with the ADA. The ADA is meant to punish government officials for certain actions. The ADA neither references the FLSA nor the liquidated damages provision of § 216(b). Nothing in the statutes, or applicable caselaw, supports an argument that the ADA applies to federal workers.

The Supreme Court has recognized that the FLSA was enacted "to protect certain groups of the population from substandard wages and excessive hours which endangered the national health and well-being and the free flow of goods in interstate commerce." *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 706, 65 S.Ct. 895, 89 L.Ed. 1296 (1945) (citing H. Rep. No. 2738, 75th Cong., 3d Sess., pp. 1, 13, 21, and 28). The FLSA recognizes that employees do not have equal bargaining power and serves to protect them. *Id.*

Similarly, the Supreme Court has explained that the FLSA liquidated damages provision is not meant as punishment for the employer, but rather, focuses on compensating the employee. *Id.* at 707, 65 S.Ct. 895 ("[T]he liquidated damages provision is not penal in its nature but constitutes compensation for the retention of a workman's pay which might result in damages too obscure and difficult of proof for estimate other than by liquidated damages.").

According to the Supreme Court, 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 Government." *Salazar v. Ramah Navajo*

Chapter, 567 U.S. 182, 197, 132 S.Ct. 2181, 183 L.Ed.2d 186 (2012) (citation omitted).

Here, the CBP Officers were honestly "contracting" with the government. There is no legal support for the belief that government workers forfeit their FLSA protection at a time of shutdowns. As the Supreme Court has noted, the insufficiency of an appropriation "does not pay the Government's debts, nor cancel its obligations." *Me. Cmty.*, 140 S. Ct. at 1321–22 (quoting *Ramah*, 567 U.S. at 197, 132 S.Ct. 2181). This court has recognized, "the Supreme Court has rejected the notion that the Anti-Deficiency Act's requirements somehow defeat the obligations of the government." *Moda Health Plan, Inc. v. United States*, 892 F.3d 1311, 1322 (Fed. Cir. 2018) *rev'd on other grounds, Me. Cmty.*, 140 S. Ct. 1308.

The majority fails to point to legal authority for the proposition that the ADA cancels the government's obligation to protect the very federal employees that the FLSA was intended by Congress to protect. I see no congressional requirement or Supreme Court precedent that negates liquidated damages under the FLSA or the ADA. Rather, the liquated damages provision of the FLSA "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 'necessary for health, efficiency, and general well-being of workers' and to the free flow of commerce, that double payment must be made in the event of delay." *Brooklyn Sav.*, 324 U.S. at 707, 65 S.Ct. 895 (emphasis added) (citation omitted). And as this

court has explained, the "usual rule" is "that a claim for unpaid overtime under the FLSA accrues at the end of each pay period when it is not paid." *Cook v. United States*, 855 F.2d 848, 851 (Fed. Cir. 1988).

Other regional circuits have concluded that a FLSA claim accrues when an employer fails to pay employees on their regular payday, and that the FLSA violation occurs on that date. *See Atl. Co. v. Broughton*, 146 F.2d 480, 482 (5th Cir. 1944) ("[I]f an employer on any regular payment date fails to pay the full amount . . . due an employee, there immediately arises an obligation upon the employer to pay the employee . . . liquidated damages."); *Birbalas v. Cuneo Printing Indus.*, 140 F.2d 826, 828 (7th Cir. 1944) ("[O]vertime compensation shall be paid in the course of employment and not accumulated beyond the regular pay day. . . . [T]he failure to pay it, when due, [is] a violation of [the FLSA]."); *Biggs v. Wilson*, 1 F.3d 1537, 1540 (9th Cir. 1993) ("The only logical point that wages become 'unpaid' is when they are not paid at the time work has been done, the minimum wage is due, and wages are ordinarily paid—on pay-day."); *Olson v. Superior Pontiac-GMC, Inc.*, 765 F.2d 1570, 1579 (11th Cir. 1985), *modified*, 776 F.2d 265 (11th Cir. 1985) ("The employee must *actually receive* the minimum wage each pay period.").

The majority asserts a number of other conclusions: that the ADA trumps the FLSA because it was passed first and is more specific than the FLSA; that requiring liquidated damages in this situation would lead to an "absurd result"; and that the government

would be forced to "choose between a violation of the Anti-Deficiency Act or the FLSA." Maj. Op. 1351. But we need not reach these questions because there is no justiciable conflict between the two laws. *See, e.g.*, *Epic Sys. Corp. v. Lewis*, ___ U.S. ___, 138 S. Ct. 1612, 1624, 200 L.Ed.2d 889 (2018) ("Respect for Congress as drafter counsels against too easily finding irreconcilable conflicts in its work. . . . Allowing judges to pick and choose between statutes risks transforming them from expounders of what the law *is* into policymakers choosing what the law *should be*."). I do agree with the majority that "where two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." Maj. Op. 1351 (quoting *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984)).

Payday is important to the everyday worker. Missing a paycheck can have devastating consequences. That is what this case is about. Congress sought a remedy for such consequences by extending the potential for liquidated damages. Here, the employer should not be absolved of adherence to the FLSA, more so where the employer is the government that brought on the shutdown.

The Court of Claims correctly analyzed the statute and binding Supreme Court precedent. I would affirm the Court of Claims' decision and allow the case to continue.

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

DONALD MARTIN, JR., PATRICIA A. MANBECK, JEFF ROBERTS, JOSE ROJAS, RANDALL SUMNER,
Plaintiffs-Appellees

v.

UNITED STATES,
Defendant-Appellant

2021-2255

Appeal from the United States Court of Federal Claims in No. 1:13-cv-00834-PEC, Judge Patricia E. Campbell-Smith.

FRANK MARRS, NICOLE ADAMSON, BETHANY AFRAID, JOEL ALBRECHT, JESUS AREVALO, NATHAN ARNOLD, SHAWN ASHWORTH, JEREMIAH AUSTIN, MICHAEL AVENALI, JOSE BALAREZO, EBONY BALDWIN, CHARLES BAMBERY, DAVID BARRAZA, GREGORY BARRETT, DONNA BARRINGER, DAVID BAUTISTA, GARY BAYES, DARRELL BECTON, FRAUN BELLAMY, DARNELL BEMBO, JESSICA

BENDER, MICHAEL BENJAMIN, JR., BRYAN BENTLEY, WILLIAM BERTRAND, CHRISTOPHER BIJOU, ALL PLAINTIFFS,
Plaintiffs-Appellants

v.

UNITED STATES,
Defendant-Appellee

2018-1354

Appeal from the United States Court of Federal Claims in No. 1:16-cv-01297-PEC, Judge Patricia E. Campbell-Smith.

ON PETITION FOR REHEARING EN BANC

(Filed Mar. 10, 2023)

Before MOORE, *Chief Judge*, NEWMAN, LOURIE, LINN[1], DYK, PROST, REYNA, TARANTO, CHEN, HUGHES, STOLL, CUNNINGHAM, and STARK, *Circuit Judges*.

PER CURIAM.

---

[1] Circuit Judge Linn participated only in the decision on the petition for panel rehearing.

ORDER

Appellees filed a petition for rehearing en banc. A response to the petition was invited by the court and filed by the United States.

Metropolitan Washington Employment Lawyers Association, National Employment Lawyers Association, National Employment Law Project, and The Impact Fund requested leave to file a brief as amici curiae which the court granted.

The petition was first referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

The mandate of the court will issue March 17, 2023.

FOR THE COURT

March 10, 2023
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

ELEAZAR AVALOS, JAMES DAVIS,
Plaintiffs-Appellees

v.

UNITED STATES,
Defendant-Appellant

2021-2008

Appeal from the United States Court of Federal Claims in No. 1:19-cv-00048-PEC, Judge Patricia E. Campbell-Smith.

L. KEVIN ARNOLD, MARTIN LEE, MARK MUNOZ, MATTHEW PERRY, AARON SAVAGE, JENNIFER TAYLOR, RALPH FULVIO, DAVID KIRSH, ROBERT RIGGS,
Plaintiffs-Appellees

v.

UNITED STATES,
Defendant-Appellant

2021-2009

Appeal from the United States Court of Federal Claims in No. 1:19-cv-00059-PEC, Judge Patricia E. Campbell-Smith.

ROBERTO HERNANDEZ, JOSEPH QUINTANAR, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiffs-Appellees

v.

UNITED STATES,
Defendant-Appellant

2021-2010

Appeal from the United States Court of Federal Claims in No. 1:19-cv-00063-PEC, Judge Patricia E. Campbell-Smith.

LORI ANELLO, KARL BLACK, GEORGE CLARY, WILLIAM DENELL, JUSTIN GROSSNICKLE, ERIC INKROTE, TIMOTHY MCGREW, MARK MILLER, DAVID NALBORCZYK, MARTIN NEAL, JR., LUKE PALMER, THOMAS RHINEHART, JR., IVAN TODD,
Plaintiffs-Appellees

v.

UNITED STATES,
Defendant-Appellant

2021-2011

Appeal from the United States Court of Federal Claims in No. 1:19-cv-00118-PEC, Judge Patricia E. Campbell-Smith.

BRIAN RICHMOND, ADAM SMITH, THOMAS MOORE, CHRIS BARRETT, WILLIAM ADAMS, KELLY BUTTERBAUGH, DAN ERZAL, BRIAN W. KLINE, KEVIN J. SHEEHAN, JASON KARLHEIM, CHARLES PINNIZZOTTO, JASON DIGNAN, MATHEW BECK, STEPHEN SHRIFT, JAMES BIANCONI, CHRISTOPHER GRAFTON, JESSE CARTER, MICHAEL CRUZ, CARL WARNER, BRIAN OWENS, BRIAN MUELLER, BRYAN BOWER, COREY TRAMMEL, JAMES KIRKLAND, KIMBERLY BUSH, BOBBY MARBURGER, RODNEY ATKINS, LEONEL HERNANDEZ, JOSEPH AUGUSTA, EDWARD WATT,
Plaintiffs-Appellees

v.

UNITED STATES,
Defendant-Appellant

2021-2012

Appeal from the United States Court of Federal Claims in No. 1:19-cv-00161-PEC, Judge Patricia E. Campbell-Smith.

JUSTIN TAROVISKY, GRAYSON SHARP, SANDRA PARR, JUSTIN BIEGER, JAMES BRATTON, WILLIAM FROST, STEVE GLASER, AARON HARDIN, STUART HILLENBRAND, JOSEPH KARWOSKI, PATRICK RICHOUX, DERRECK ROOT, CARLOS SHANNON, SHANNON SWAGGERTY, GEOFFRY WELLEIN, BECKY WHITE, TAMMY WILSON,
Plaintiffs-Appellees

v.

UNITED STATES,
Defendant-Appellant

2021-2014

Appeal from the United States Court of Federal Claims in No. 1:19-cv-00004-PEC, Judge Patricia E. Campbell-Smith.

QUENTIN BACA, LEPHAS BAILEY, CHRISTOPHER BALLESTER, KEVIN BEINE, DAVID BELL, RICHARD BLAM, MAXIMILIAN CRAWFORD, MATTHEW CRUMRINE, JOHN DEWEY, JEFFREY DIAMOND,
Plaintiffs-Appellees

v.

UNITED STATES,
Defendant-Appellant

2021-2015

Appeal from the United States Court of Federal Claims in No. 1:19-cv-00213-PEC, Judge Patricia E. Campbell-Smith.

DAVID JONES, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiff-Appellee

v.

UNITED STATES,
Defendant-Appellant

2021-2016

Appeal from the United States Court of Federal Claims in No. 1:19-cv-00257-PEC, Judge Patricia E. Campbell-Smith.

TONY ROWE, ALIEU JALLOW, KARLETTA BAHE, JOHNNY DURANT, JESSE A. MCKAY, III, GEORGE DEMARCE, JACQUIE DEMARCE,
Plaintiffs-Appellees

v.

UNITED STATES,
Defendant-Appellant

2021-2017

Appeal from the United States Court of Federal Claims in No. 1:19-cv-00067-PEC, Judge Patricia E. Campbell-Smith.

D. P., T. S., J. V.,
Plaintiffs-Appellees

v.

UNITED STATES,
Defendant-Appellant

2021-2018

Appeal from the United States Court of Federal Claims in No. 1:19-cv-00054-PEC, Judge Patricia E. Campbell-Smith.

PLAINTIFF NO. 1, PLAINTIFF NO. 2, PLAINTIFF NO. 3, PLAINTIFF NO. 4,
Plaintiffs-Appellees

v.

UNITED STATES,
Defendant-Appellant

2021-2019

Appeal from the United States Court of Federal Claims in No. 1:19-cv-00094-PEC, Judge Patricia E. Campbell-Smith.

I. P., A. C., S. W., D. W., P. V., M. R., R. C., K. W., B. G., R. H., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiffs-Appellees

v.

UNITED STATES,
Defendant-Appellant

2021-2020

Appeal from the United States Court of Federal Claims in No. 1:19-cv-00095-PEC, Judge Patricia E. Campbell-Smith.

ON PETITION FOR PANEL REHEARING AND REHEARING EN BANC

(Filed Mar. 10, 2023)

Before MOORE, *Chief Judge*, NEWMAN, LOURIE, LINN[1], DYK, PROST, REYNA, TARANTO, CHEN, HUGHES, STOLL, CUNNINGHAM, and STARK, *Circuit Judges*.

PER CURIAM.

ORDER

Appellees filed a combined petition for panel rehearing and rehearing en banc. A response to the petition was invited by the court and filed by the United States.

American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) requested leave to file a brief as amicus curiae which the court granted.

Metropolitan Washington Employment Lawyers Association, National Employment Lawyers Association, National Employment Law Project, and The Impact

---

[1] Circuit Judge Linn participated only in the decision on the petition for panel rehearing.

Fund also requested leave to file a brief as amici curiae which the court granted.

The petition was referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

The mandate of the court will issue March 17, 2023.

FOR THE COURT

March 10, 2023
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

151 Fed.Cl. 372
United States Court of Federal Claims.

Lori ANELLO, et al., Plaintiffs,

v.

The UNITED STATES, Defendant.

No. 19-118C

|

(E-Filed: December 4, 2020)

Attorneys and Law Firms

Theodore Reid Coploff, Washington, DC, for plaintiff. Sarah M. Block, of counsel.

Erin K. Murdock-Park, Trial Attorney, with whom were Joseph H. Hunt, Assistant Attorney General, Robert E. Kirschman, Jr., Director, Reginald T. Blades, Jr., Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for defendant. Ann C. Motto, of counsel.

OPINION AND ORDER

CAMPBELL-SMITH, Judge.

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. 1 at 1-2 (complaint).

On May 3, 2019, defendant moved to dismiss the complaint for failure to state a claim on which relief may be granted, pursuant to Rule 12(b)(6) of the Rules of the United States Court of Federal Claims (RCFC), on the basis that the Anti-Deficiency Act (ADA), 31 U.S.C. §§ 1341-42, prohibited the government from paying employees. See ECF No. 26.

In analyzing defendant's motion, the court has considered: (1) plaintiffs' complaint, ECF No. 1; (2) defendant's motion to dismiss, ECF No. 26; (3) plaintiffs' response to defendant's motion, ECF No. 27; (4) defendant's reply in support of its motion, ECF No. 31; (5) defendant's first supplemental brief in support of its motion, ECF No. 33; (6) plaintiffs' response to defendant's first supplemental brief, ECF No. 34; (7) defendant's second supplemental brief in support of its motion, ECF No. 43; (8) plaintiffs' response to defendant's second supplemental brief, ECF No. 47; (9) defendant's third supplemental brief in support of its motion, ECF No. 52; and (10) plaintiffs' response to defendant's third supplemental brief, ECF No. 53. The motion is now fully briefed and ripe for ruling.[1] The

[1] Defendant moves for dismissal of plaintiffs' complaint for only one reason—"for failure to state a claim upon which relief may be granted." ECF No. 26 at 6. In one of its supplemental briefs, defendant suggests that a recent decision issued by the Supreme Court of the United States, Maine Community Health Options v. United States, ___ U.S. ___, 140 S. Ct. 1308, 206 L.Ed.2d 764 (2020), a case that does not involve FLSA claims, indicates that this court lacks jurisdiction to hear this case because the FLSA "contains its own provision for judicial review." ECF No. 52 at 2. In the same brief, defendant acknowledges binding precedent from the United States Court of Appeals for the Federal

court has considered all of the arguments presented by the parties, and addresses the issues that are pertinent to the court's ruling in this opinion. For the following reasons, defendant's motion is **DENIED**.

I. Background

On December 22, 2018, the federal government partially shut down due to a lack of appropriations. See ECF No. 1 at 2. The named plaintiffs in this case were, at the time of the shutdown, fire fighters employed either by the United States Department of Commerce at the National Institute of Standards and Technology or the United States Department of Homeland Security at Training Center Petaluma.[2] See id. at 1-2. Plaintiffs further allege that they were "designated 'excepted' employees [and] were directed to continue working

---

Circuit to the contrary. See id. (citing Abbey v. United States, 745 F.3d 1363 (Fed. Cir. 2014)). The court will not review this entirely new basis for dismissal, which was made for the first time in defendant's third supplemental brief, and which defendant acknowledges contradicts binding precedent. If defendant believes this court lacks jurisdiction to continue exercising its authority in this case, it may file a motion properly raising the issue. See Rule 12(h)(3) of the Rules of the United States Court of Federal Claims (RCFC) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.").

[2] Defendant argues, in a footnote, that claims made by FLSA-exempt employees and employees who have asserted the same claims in another court should be dismissed from this action. See ECF No. 26 at 15 n.4. The court does not evaluate these assertions in this opinion because defendant neither identifies any such plaintiffs in this case, nor sufficiently briefs the issues to the court.

without pay by defendant." Id. at 7. Defendant's failure to timely pay plaintiffs, they allege, is a violation of the FLSA. See id. at 10-12.

Plaintiffs assert that defendant "has violated and continues to violate the provisions of the FLSA . . . in an intentional, willful, unreasonable, and bad faith manner." Id. at 10. "Plaintiffs bring this action as a collective action on behalf of themselves and all other similarly situated employees who have worked and/or are working in 'excepted' status without pay," id. at 3, and seek "monetary liquidated damages equal to any minimum wage and overtime compensation earned since December 22, 2018, as well as interest thereon," in addition to attorneys' fees and costs, id. at 13.

II. Legal Standards

When considering a motion to dismiss brought under RCFC 12(b)(6), the court "must presume that the facts are as alleged in the complaint, and make all reasonable inferences in favor of the plaintiff." Cary v. United States, 552 F.3d 1373, 1376 (Fed. Cir. 2009) (citing Gould, Inc. v. United States, 935 F.2d 1271, 1274 (Fed. Cir. 1991)). It is well-settled that a complaint should be dismissed under RCFC 12(b)(6) "when the facts asserted by the claimant do not entitle him to a legal remedy." Lindsay v. United States, 295 F.3d 1252, 1257 (Fed. Cir. 2002). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678, 129

S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)).

III. Analysis

A. Relevant Statutes

This case fundamentally concerns the intersection of two statutes, the ADA and the FLSA. The ADA states that "an officer or employee" of the federal government "may not . . . make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation." 31 U.S.C. § 1341(a)(1)(A). In addition, the ADA dictates that "[a]n officer or employee of the United States Government or of the District of Columbia government may not accept voluntary services for either government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property." 31 U.S.C. § 1342. In 2019, Congress amended the ADA, adding, in relevant part, the following:

> [E]ach excepted employee who is required to perform work during a covered lapse in appropriations[3] shall be paid for such work, at the employee's standard rate of pay, at the earliest date possible after the lapse in appropriations ends, regardless of scheduled pay dates,

---

[3] The statute defines "covered lapse in appropriations" to mean "any lapse in appropriations that begins on or after December 22, 2018." 31 U.S.C. § 1341(c)(1)(A).

> and subject to the enactment of appropriations Acts ending the lapse.

31 U.S.C. § 1341(c)(2) (footnote added). The amendment is commonly referred to as the Government Employees Fair Treatment Act of 2019 (GEFTA), Pub. L. No. 116-1, 133 Stat. 3 (2019). The knowing or willful violation of the ADA is punishable by a fine of "not more than $5,000" or imprisonment "for not more than 2 years, or both." 31 U.S.C. § 1350. And federal employees who violate the ADA "shall be subject to appropriate administrative discipline including, when circumstances warrant, suspension from duty without pay or removal from office." 31 U.S.C. § 1349(a).

Defendant separately has obligations to its employees pursuant to the FLSA, which governs minimum wage and overtime wage compensation for certain employees.[4] See 29 U.S.C. § 213 (identifying categories of exempt employees). The FLSA requires that the government "pay to each of [its] employees" a minimum wage. 29 U.S.C. § 206(a). Pursuant to the FLSA, the government also must compensate employees for hours worked in excess of a forty-hour workweek "at a rate not less than one and one-half times the regular rate at which [they are] employed." 29 U.S.C. § 207(a)(1). Although the text of the statute does not specify the date on which wages must be paid, courts have held that employers are required to pay

---

[4] The FLSA initially applied only to the private sector when enacted in 1938, but was amended to cover public employees in 1974. See Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55 (1974).

these wages on the employee's next regularly scheduled payday. See 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). If an employer violates the FLSA's pay provisions, the employer is "liable to the . . . employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be." 29 U.S.C. § 216(b). The employer may also be liable "in an additional equal amount as liquidated damages," id., unless "the employer shows to the satisfaction of the court that the act or omission . . . was in good faith, and that [the employer] had reasonable grounds for believing that his act or omission was not a violation of the [FLSA]," 29 U.S.C. § 260.

B. The Court's Reasoning in Martin Applies

In its motion to dismiss, defendant first argues that plaintiffs' complaint should be dismissed for failure to state a claim because the agencies for which appropriations lapsed on December 22, 2018, were prohibited by the ADA from paying their employees—even excepted employees who were required to work. See ECF No. 26 at 13-14. This mandate, in defendant's view, means that defendant cannot be held liable for violating its obligations under the FLSA. See id. Defendant argues:

> When Congress criminalized payments during an appropriations lapse, it plainly precluded payments on the schedule plaintiffs assert is required by the FLSA. Federal officials who

> comply with that criminal prohibition do not violate the FLSA, and Congress did not create a scheme under which compliance with the [ADA] would result in additional compensation as damages to federal employees.

Id. at 13.

The court has previously ruled on the intersection of the ADA and the FLSA in the context of a lapse in appropriations. See Martin v. United States, 130 Fed. Cl. 578 (2017). In Martin, plaintiffs were "current or former government employees who allege[d] that they were not timely compensated for work performed during the shutdown, in violation of the [FLSA]." Id. at 580 (citing 29 U.S.C. § 201 et seq.). The plaintiffs in Martin alleged the right to liquidated damages with regard to both the government's failure to timely pay minimum wages and its failure to pay overtime wages. See id. In its motion for summary judgment, the government argued that "it should avoid liability under the FLSA for its failure to [pay plaintiffs on their regularly scheduled pay days during the shutdown] because it was barred from making such payments pursuant to the ADA." See id. at 582. The government summarized its argument in Martin as follows:

> The FLSA and the Anti-Deficiency Act appear to impose two conflicting obligations upon Federal agencies: the FLSA mandates that the agencies "shall pay to each of [its] employees" a minimum wage, 29 U.S.C. § 206(a) (emphasis added), which has been interpreted by the courts to include a requirement that the

> minimum wage be paid on the employees' next regularly scheduled pay day, see Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 707 n.20, [65 S. Ct. 895, 89 L. Ed. 1296] (1945); Biggs v. Wilson, 1 F.3d 1537, 1540 (9th Cir. 1993), and the [ADA] mandates that "[a]n officer or employee of the United States Government . . . may not . . . make or authorize an expenditure . . . exceeding an amount available in an appropriation or fund for the expenditure. . . ." 31 U.S.C. § 1341(A)(1)(A) (emphasis added). Thus, when Federal agencies are faced with a lapse in appropriations and cannot pay excepted employees on their next regularly scheduled payday, the question arises of which statutory mandate controls.

Id. at 582-83 (quoting defendant's motion for summary judgment) (alterations in original).

After reviewing applicable precedent and persuasive authority, the court concluded that "the issue is more complex than simply a choice between whether the FLSA or the ADA controls." Id. at 583. In the court's view:

> the appropriate way to reconcile the [ADA and the FLSA] is not to cancel defendant's obligation to pay its employees in accordance with the manner in which the FLSA is commonly applied. Rather, the court would require that defendant demonstrate a good faith belief, based on reasonable grounds, that its actions were appropriate. As such, the court will proceed to analyze this case under the construct of the FLSA, and evaluate the existence and

> operation of the ADA as part of determining whether defendant met the statutory requirements to avoid liability for liquidated damages.

Id. at 584.

The court noted that plaintiffs' claims survived a motion to dismiss because they had "alleged that defendant had failed to pay wages" on plaintiffs' "next regularly scheduled payday." Id. at 584. On summary judgment, the court concluded that plaintiffs had proven this claim. See id. The court then concluded that the evidence supported an award of liquidated damages because the government failed to satisfy the court that it acted in good faith and on reasonable grounds when it failed to make the payments required under the FLSA.[5] See id. at 585-86.

Both parties acknowledge that the plaintiffs in Martin were "situated similarly to plaintiffs here." ECF No. 26 at 14 (defendant's motion to dismiss); see also ECF No. 27 at 11 n.3 (noting that the Martin plaintiffs' claims were "almost identical to those here").

---

[5] In Martin, the defendant also argued that it should avoid liability for liquidated damages with regard to overtime wages due to its inability to calculate the correct amounts due. See Martin v. United States, 130 Fed. Cl. 578, 586-87 (2017). This argument was based on a bulletin from the Department of Labor, and involves an issue that has not been raised in the present case. The absence of this argument, however, has no bearing on the application of the court's reasoning in Martin with regard to the structure of the proper analysis in this case.

In its motion to dismiss, defendant does not dispute plaintiffs' allegations that they were required to work during the shutdown, or that the plaintiffs were not paid during that time due to the lapse in appropriations. See ECF No. 26. Defendant characterizes the issue now before the court as "whether plaintiffs have stated a claim for liquidated damages under the [FLSA] notwithstanding the provisions of the [ADA]." Id. at 7. In arguing its position, defendant reiterates the arguments advanced in Martin, but does not present any meaningful distinction between the posture of the Martin plaintiffs and the plaintiffs here. Instead, it acknowledges that "[t]his Court in Martin v. United States concluded that plaintiffs situated similarly to plaintiffs here could recover liquidated damages under FLSA," but states that it "respectfully disagree[s] with that holding." Id. at 14.

Notwithstanding defendant's disagreement, the court continues to believe that the framework it set out in Martin is appropriate and applies here.[6] As it did in

---

[6] Defendant also argues that its obligations under the FLSA are limited by the ADA because "a congressional payment instruction to an agency must be read in light of the [ADA]." ECF No. 26 at 17. In support of this argument, defendant cites to Highland Falls-Fort Montgomery Cent. Sch. Dist. v. United States, 48 F.3d 1166, 1171 (Fed. Cir. 1995). See id. In Highland-Falls, plaintiffs challenged the Department of Education's (DOE) method for allocating funds under the Impact Aid Act. Highland-Falls, 48 F.3d at 1171. The United States Court of Appeals for the Federal Circuit found, however, that the DOE's "approach was consistent with statutory requirements." Id. The case did not address FLSA claims, and found that the DOE's approach "harmonized the requirements of the Impact Aid Act and the [ADA]." See id. In the

Martin, "the court will proceed to analyze this case under the construct of the FLSA, and evaluate the existence and operation of the ADA as part of determining whether defendant met the statutory requirements to avoid liability for liquidated damages."[7] Martin, 130 Fed. Cl. at 584. The court will, of course, consider the GEFTA amendment to the ADA as part of its analysis.

---

court's view, the Federal Circuit's decision in Highland-Falls does not alter the analysis in this case. The United States District Court for the District of Columbia's combined decision in National Treasury Employees Union v. Trump, Case No. 19-cv-50 and Hardy v. Trump, 444 F. Supp. 3d 108 (2020), discussed by defendant in one of its supplemental filings, see ECF No. 43, is likewise unhelpful. Although it involved facts that arose from the same 2018 lapse in appropriations, the decision focuses almost exclusively on an analysis of whether plaintiffs' claims were moot, rather than on the operation of the ADA.

[7] The parties both claim that the Supreme Court of the United States' decision in Maine Community Health, 140 S. Ct. 1308, supports their position in this case. See ECF No. 52, ECF No. 53. Maine Community Health does not address the FLSA, and only includes a limited discussion of the ADA. See Maine Cmty. Health, 140 S. Ct. at 1321-22. Accordingly, the decision does not dictate the outcome here. To the extent that the case informs the present discussion, however, it tends to support plaintiffs. In the opinion, the Supreme Court held that "the [ADA] confirms that Congress can create obligations without contemporaneous funding sources," and concludes that "the plain terms of the [statute at issue] created an obligation neither contingent on nor limited by the availability of appropriations or other funds." Id. at 1322, 1323. Applied here, this conclusion suggests that the defendant can incur an obligation to pay plaintiffs pursuant to the normal operation of the FLSA even when funding is not available.

C. Waiver of Sovereign Immunity

Before analyzing the sufficiency of plaintiffs' allegations, the court must address defendant's contention that plaintiffs' claims are barred by the doctrine of sovereign immunity. In its motion to dismiss, defendant correctly notes that "'[a] waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text, and will not be implied.'" ECF No. 26 at 19 (quoting Lane v. Pena, 518 U.S. 187, 192, 116 S.Ct. 2092, 135 L.Ed.2d 486 (1996)). And that waiver "'will be strictly construed, in terms of its scope, in favor of the sovereign.'" Id. (quoting Lane, 518 U.S. at 192, 116 S.Ct. 2092). Defendant concedes that the FLSA includes a waiver of sovereign immunity, but argues that the claims made by plaintiffs in this case fall outside the scope of that waiver. See id.; see also King v. United States, 112 Fed. Cl. 396, 399 (2013) (stating that "there is no question that sovereign immunity has been waived under the FLSA").

Defendant argues that the FLSA "does not require that employees be paid on their regularly scheduled pay date or make damages available when compensation is not received on a pay date." ECF No. 26 at 19-20. As a result, defendant contends, the scope of the FLSA's waiver of sovereign immunity does not extend to the category of claims alleging a FLSA violation because wages were not paid as scheduled, such as plaintiffs' claims in this case. See id. at 20-21. According to defendant, the GEFTA confirms its long-standing belief that the government's payment obligations under the FLSA are abrogated by a lack of appropriations:

> The [GEFTA] provides that "each excepted employee who is required to perform work during a . . . lapse in appropriations shall be paid for such work, at the employee's standard rate of pay, at the earliest date possible after the lapse in appropriations ends, regardless of scheduled pay dates." Pub. L. No. 116-1, 133 Stat. 3. Congress has thus spoken directly to the question of when compensation should be paid. There can be no basis for inferring that compensation made in accordance with that explicit directive subjects the United States to liquidated damages.

Id. at 21.

Defendant also asserts, without citation to any authority, as follows:

> Given that the [ADA] 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, the government's waiver of sovereign immunity under the FLSA must be strictly construed against liability for the delayed (but always forthcoming) payment of wages because of a lapse in appropriations.

ECF No. 31 at 13.

The court disagrees. The claims brought by plaintiffs in this case are straightforward minimum wage and overtime claims under the FLSA. See ECF No. 1

at 10-12; ECF No. 27 at 6-7. Because the FLSA does not specify when such claims arise, courts have interpreted the statute to include a requirement that employers make appropriate wage payments on the employee's next regularly scheduled payday. See Brooklyn Sav. Bank, 324 U.S. at 707, 65 S.Ct. 895; Biggs, 1 F.3d at 1540. Contrary to defendant's suggestion, the court is unpersuaded that this judicially-imposed timing requirement transforms ordinary FLSA claims into something analytically distinct, and beyond the scope of the statute's waiver of sovereign immunity.

Accordingly, the court finds that defendant has waived sovereign immunity as to plaintiffs' claims, as it has with all FLSA claims, and the court will review the sufficiency of plaintiffs' allegations as it would in any other FLSA case.

D. Plaintiffs State a Claim for FLSA Violations

As noted above, the FLSA requires that the government "pay to each of [its] employees" a minimum wage. 29 U.S.C. § 206(a). Pursuant to the FLSA, the government also must compensate employees for hours worked in excess of a forty-hour workweek "at a rate not less than one and one-half times the regular rate at which [they are] employed." 29 U.S.C. § 207(a)(1). And although the text of the statute does not specify the date on which wages must be paid, courts have held that employers are required to pay these wages on the employee's next regularly scheduled payday. See

Brooklyn Sav. Bank, 324 U.S. at 707, 65 S.Ct. 895; Biggs, 1 F.3d at 1540.

In their complaint, plaintiffs allege that during the lapse in appropriations, they were each "designated 'excepted' employees [and] were directed to continue working without pay by defendant." ECF No. 1 at 7. Plaintiffs allege specific facts demonstrating how the allegations apply to each plaintiff. See id. at 7-9.

Defendant does not contest any of these allegations, and in fact, concedes that "plaintiffs [were] employees of agencies affected by the lapse in appropriations," and that "plaintiffs were paid at the earliest possible date after the lapse in appropriations ended." ECF No. 26 at 12, 13. Defendant also admits that "[p]laintiffs are federal employees who performed excepted work during the most recent lapse in appropriations." Id. at 15. In short, defendant does not claim that plaintiffs are not entitled to payment under the FLSA, but instead argues that it "fully complied with its statutory obligations to plaintiffs." Id. at 16.

The court finds that, presuming the facts as alleged in the complaint and drawing all reasonable inferences in their favor, plaintiffs have stated a claim for relief under the FLSA. See Cary, 552 F.3d at 1376 (citing Gould, 935 F.2d at 1274).

E. Liquidated Damages

Defendant insists that its failure to pay plaintiffs was a decision made in good faith, in light of the ADA.

See ECF No. 31 at 14. It further urges the court to find that its good faith is so clear that the recovery of liquidated damages should be barred at this stage in the litigation. See id. at 14-17. But as the court held in Martin:

> [I]t would be inappropriate to determine, on motion to dismiss, whether the government had reasonable grounds and good faith. It may well be that the government can establish these defenses, but its opportunity to do so will come later on summary judgment or at trial. Moreover, even if the court were to decide that a liquidated damages award is warranted, additional factual determinations remain to be made as to which employees, if any, are entitled to recover, and damages, if any, to which those employees would be entitled.

Martin v. United States, 117 Fed. Cl. 611, 627 (2014). Accordingly, the court declines to rule at this time on the issue of whether defendant can establish a good faith defense against liability for liquidated damages in this case.

IV. Conclusion

Accordingly, for the foregoing reasons:

(1) Defendant's motion to dismiss, ECF No. 26, is **DENIED**;

(2) On or before **February 5, 2021**, defendant is directed to **FILE** an **answer** or otherwise respond to plaintiffs' complaint; and

(3) On or before **February 5, 2021**, the parties are directed to **CONFER** and **FILE** a **joint status report** informing the court of their positions on the consolidation of this case with any other matters before the court.

IT IS SO ORDERED.

---

151 Fed.Cl. 504
United States Court of Federal Claims.

L. Kevin ARNOLD, et al., Plaintiffs,
v.
The UNITED STATES, Defendant.

No. 19-59C
|
E-Filed: December 9, 2020

Attorneys and Law Firms

Jacob Y. Statman, Baltimore, MD, for plaintiff. Michael J. Snider, Keith A. Kauffman, Jason I. Weisbrot, Jefferson Friday, Richard J. Hirn, Mark Schneider, Sarah Suszczyk, Dennie Rose, Sefan P. Sutich, of counsel.

Erin K. Murdock-Park, Trial Attorney, with whom were Joseph H. Hunt, Assistant Attorney General, Robert E. Kirschman, Jr., Director, Reginald T. Blades, Jr., Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for defendant. Ann C. Motto, of counsel.

OPINION AND ORDER

CAMPBELL-SMITH, Judge.

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 (amended complaint, hereinafter referred to as the complaint). On May 3, 2019, defendant moved to dismiss the complaint for failure to state a claim on which relief may be granted, pursuant to Rule 12(b)(6) of the Rules of the United States Court of Federal Claims (RCFC), on the basis that the Anti-Deficiency Act (ADA), 31 U.S.C. §§ 1341-42, prohibited the government from paying employees. See ECF No. 25.

In analyzing defendant's motion, the court has considered: (1) plaintiffs' complaint, ECF No. 6; (2) defendant's motion to dismiss, ECF No. 25; (3) plaintiffs' response to defendant's motion, ECF No. 30; (4) defendant's reply in support of its motion, ECF No. 34; (5) defendant's first supplemental brief in support of its motion, ECF No. 36; (6) plaintiffs' response to defendant's first supplemental brief, ECF No. 39; (7) defendant's second supplemental brief in support of its motion, ECF No. 47; (8) plaintiffs' response to defendant's second supplemental brief, ECF No. 48; (9) defendant's third supplemental brief in support of its motion, ECF No. 55; and (10) plaintiffs' response to defendant's third supplemental brief, ECF No. 59. The motion is now fully briefed and ripe for ruling.[1] The

[1] Defendant moves for dismissal of plaintiffs' complaint for only one reason—"for failure to state a claim upon which relief may be granted." ECF No. 25 at 6. In one of its supplemental briefs, defendant suggests that a recent decision issued by the Supreme Court of the United States, Maine Community Health Options v. United States, ___ U.S. ___, 140 S. Ct. 1308, 206 L.Ed.2d 764 (2020), a case that does not involve FLSA claims, indicates

court has considered all of the arguments presented by the parties, and addresses the issues that are pertinent to the court's ruling in this opinion. For the following reasons, defendant's motion is **DENIED**.

I. Background

On December 22, 2018, the federal government partially shut down due to a lack of appropriations. See ECF No. 6 at 6. The named plaintiffs in this case were, at the time of the lapse in appropriations, employees of various agencies affected by the shutdown.[2] See id. at 2-5. Plaintiffs further allege that they were classified as FLSA non-exempt, see id., and "designated as

---

that this court lacks jurisdiction to hear this case because the FLSA "contains its own provision for judicial review." ECF No. 55 at 2. In the same brief, defendant acknowledges binding precedent from the United States Court of Appeals for the Federal Circuit to the contrary. See id. (citing Abbey v. United States, 745 F.3d 1363 (Fed. Cir. 2014)). The court will not review this entirely new basis for dismissal, which was made for the first time in defendant's third supplemental brief, and which defendant acknowledges contradicts binding precedent. If defendant believes this court lacks jurisdiction to continue exercising its authority in this case, it may file a motion properly raising the issue. See Rule 12(h)(3) of the Rules of the United States Court of Federal Claims (RCFC) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.").

[2] Defendant argues, in a footnote, that claims made by FLSA-exempt employees and employees who have asserted the same claims in another court should be dismissed from this action. See ECF No. 25 at 15-16 n.3. The court does not evaluate these assertions in this opinion because defendant neither identifies any such plaintiffs in this case, nor sufficiently briefs the issues to the court.

'excepted employees'" who were "required to perform their duties without receiving their appropriate overtime and minimum wage pursuant to [the FLSA]." Id. at 6. Defendant's failure to timely pay plaintiffs, they allege, is a violation of the FLSA. See id. at 7.

Plaintiffs assert that defendant "cannot demonstrate good faith and reasonable grounds for believing its failure to pay minimum wage did not violate the FLSA," because "[d]efendant has knowledge that it has been held liable for similar violations of the FLSA based on its past actions and/or omissions that are identical to the violations, actions and/or omissions alleged herein." Id. at 9, 10. Plaintiffs also state that "[t]he potential class is comprised of [p]laintiffs and all similarly situated employees who are FLSA non-exempt and were designated as excepted service who have performed work for [d]efendant at some time [during the shutdown] without receiving timely payment of minimum wage and/or overtime[] wages for such work." Id. at 5. Plaintiffs seek the payment of minimum and overtime wages due, liquidated damages, and attorneys' fees and costs incurred in this litigation. Id. at 11.

II. Legal Standards

When considering a motion to dismiss brought under RCFC 12(b)(6), the court "must presume that the facts are as alleged in the complaint, and make all reasonable inferences in favor of the plaintiff." Cary v. United States, 552 F.3d 1373, 1376 (Fed. Cir. 2009)

(citing Gould, Inc. v. United States, 935 F.2d 1271, 1274 (Fed. Cir. 1991)). It is well-settled that a complaint should be dismissed under RCFC 12(b)(6) "when the facts asserted by the claimant do not entitle him to a legal remedy." Lindsay v. United States, 295 F.3d 1252, 1257 (Fed. Cir. 2002). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)).

III. Analysis

A. Relevant Statutes

This case fundamentally concerns the intersection of two statutes, the ADA and the FLSA. The ADA states that "an officer or employee" of the federal government "may not . . . make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation." 31 U.S.C. § 1341(a)(1)(A). In addition, the ADA dictates that "[a]n officer or employee of the United States Government or of the District of Columbia government may not accept voluntary services for either government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property." 31 U.S.C. § 1342. In 2019, Congress amended the ADA, adding, in relevant part, the following:

> [E]ach excepted employee who is required to perform work during a covered lapse in appropriations[3] shall be paid for such work, at the employee's standard rate of pay, 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) (footnote added). The amendment is commonly referred to as the Government Employees Fair Treatment Act of 2019 (GEFTA), Pub. L. No. 116-1, 133 Stat. 3 (2019). The knowing or willful violation of the ADA is punishable by a fine of "not more than $5,000" or imprisonment "for not more than 2 years, or both." 31 U.S.C. § 1350. And federal employees who violate the ADA "shall be subject to appropriate administrative discipline including, when circumstances warrant, suspension from duty without pay or removal from office." 31 U.S.C. § 1349(a).

Defendant separately has obligations to its employees pursuant to the FLSA, which governs minimum wage and overtime wage compensation for certain employees.[4] See 29 U.S.C. § 213 (identifying categories of exempt employees). The FLSA requires that the government "pay to each of [its] employees" a minimum

---

[3] The statute defines "covered lapse in appropriations" to mean "any lapse in appropriations that begins on or after December 22, 2018." 31 U.S.C. § 1341(c)(1)(A).

[4] The FLSA initially applied only to the private sector when enacted in 1938, but was amended to cover public employees in 1974. See Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55 (1974).

wage. 29 U.S.C. § 206(a). Pursuant to the FLSA, the government also must compensate employees for hours worked in excess of a forty-hour workweek "at a rate not less than one and one-half times the regular rate at which [they are] employed." 29 U.S.C. § 207(a)(1). Although the text of the statute does not specify the date on which wages must be paid, courts have held that employers are required to pay these wages on the employee's next regularly scheduled payday. See 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). If an employer violates the FLSA's pay provisions, the employer is "liable to the . . . employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be." 29 U.S.C. § 216(b). The employer may also be liable "in an additional equal amount as liquidated damages," id., unless "the employer shows to the satisfaction of the court that the act or omission . . . was in good faith, and that [the employer] had reasonable grounds for believing that his act or omission was not a violation of the [FLSA]," 29 U.S.C. § 260.

B. The Court's Reasoning in Martin Applies

In its motion to dismiss, defendant first argues that plaintiffs' complaint should be dismissed for failure to state a claim because the agencies for which appropriations lapsed on December 22, 2018, were prohibited by the ADA from paying their employees—even excepted employees who were required to work. See

ECF No. 25 at 12-14. This mandate, in defendant's view, means that defendant cannot be held liable for violating its obligations under the FLSA. See id. Defendant argues:

> When Congress criminalized payments during an appropriations lapse, it plainly precluded payments on the schedule plaintiffs assert is required by the FLSA. Federal officials who comply with that criminal prohibition do not violate the FLSA, and Congress did not create a scheme under which compliance with the [ADA] would result in additional compensation as damages to federal employees.

Id. at 13.

The court has previously ruled on the intersection of the ADA and the FLSA in the context of a lapse in appropriations. See Martin v. United States, 130 Fed. Cl. 578 (2017). In Martin, plaintiffs were "current or former government employees who allege[d] that they were not timely compensated for work performed during the shutdown, in violation of the [FLSA]." Id. at 580 (citing 29 U.S.C. § 201 et seq.). The plaintiffs in Martin alleged the right to liquidated damages with regard to both the government's failure to timely pay minimum wages and its failure to pay overtime wages. See id. In its motion for summary judgment, the government argued that "it should avoid liability under the FLSA for its failure to [pay plaintiffs on their regularly scheduled pay days during the shutdown] because it was barred from making such payments pursuant to the

ADA." See id. at 582. The government summarized its argument in Martin as follows:

> The FLSA and the Anti-Deficiency Act appear to impose two conflicting obligations upon Federal agencies: the FLSA mandates that the agencies "shall pay to each of [its] employees" a minimum wage, 29 U.S.C. § 206(a) (emphasis added), which has been interpreted by the courts to include a requirement that the minimum wage be paid on the employees' next regularly scheduled pay day, see Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 707 n.20, [65 S. Ct. 895, 89 L. Ed. 1296] (1945); Biggs v. Wilson, 1 F.3d 1537, 1540 (9th Cir. 1993), and the [ADA] mandates that "[a]n officer or employee of the United States Government . . . may not . . . make or authorize an expenditure . . . exceeding an amount available in an appropriation or fund for the expenditure. . . ." 31 U.S.C. § 1341(A)(1)(A) (emphasis added). Thus, when Federal agencies are faced with a lapse in appropriations and cannot pay excepted employees on their next regularly scheduled payday, the question arises of which statutory mandate controls.

Id. at 582-83 (quoting defendant's motion for summary judgment) (alterations in original).

After reviewing applicable precedent and persuasive authority, the court concluded that "the issue is more complex than simply a choice between whether the FLSA or the ADA controls." Id. at 583. In the court's view:

> the appropriate way to reconcile the [ADA and the FLSA] is not to cancel defendant's obligation to pay its employees in accordance with the manner in which the FLSA is commonly applied. Rather, the court would require that defendant demonstrate a good faith belief, based on reasonable grounds, that its actions were appropriate. As such, the court will proceed to analyze this case under the construct of the FLSA, and evaluate the existence and operation of the ADA as part of determining whether defendant met the statutory requirements to avoid liability for liquidated damages.

Id. at 584.

The court noted that plaintiffs' claims survived a motion to dismiss because they had "alleged that defendant had failed to pay wages" on plaintiffs' "next regularly scheduled payday." Id. at 584. On summary judgment, the court concluded that plaintiffs had proven this claim. See id. The court then concluded that the evidence supported an award of liquidated damages because the government failed to satisfy the court that it acted in good faith and on reasonable grounds when it failed to make the payments required under the FLSA.[5] See id. at 585-86.

---

[5] In Martin, the defendant also argued that it should avoid liability for liquidated damages with regard to overtime wages due to its inability to calculate the correct amounts due. See Martin v. United States, 130 Fed. Cl. 578, 586-87 (2017). This argument was based on a bulletin from the Department of Labor, and involves an issue that has not been raised in the present case. The

Both parties acknowledge that the plaintiffs in Martin were "situated similarly to plaintiffs here." ECF No. 25 at 14 (defendant's motion to dismiss); see also ECF No. 30 at 5, 6 (plaintiffs claiming that "[d]efendant's motion is nothing more than an attempt to relitigate its unsuccessful arguments to dismiss identical claims in Martin," and stating that "this case is factually and legally indistinguishable from Martin").

In its motion to dismiss, defendant does not dispute plaintiffs' allegations that they were required to work during the shutdown, or that the plaintiffs were not paid during that time due to the lapse in appropriations. See ECF No. 25. Defendant characterizes the issue now before the court as "whether plaintiffs have stated a claim for liquidated damages under the [FLSA] notwithstanding the provisions of the [ADA]." Id. at 7. In arguing its position, defendant reiterates the arguments advanced in Martin, but does not present any meaningful distinction between the posture of the Martin plaintiffs and the plaintiffs here. Instead, it acknowledges that "[t]his Court in Martin v. United States concluded that plaintiffs situated similarly to plaintiffs here could recover liquidated damages under the FLSA," but states that it "respectfully disagree[s] with that holding." Id. at 14.

Notwithstanding defendant's disagreement, the court continues to believe that the framework it set out

---

absence of this argument, however, has no bearing on the application of the court's reasoning in Martin with regard to the structure of the proper analysis in this case.

in Martin is appropriate and applies here.[6] As it did in Martin, "the court will proceed to analyze this case under the construct of the FLSA, and evaluate the existence and operation of the ADA as part of determining whether defendant met the statutory requirements to avoid liability for liquidated damages."[7] Martin, 130

---

[6] Defendant also argues that its obligations under the FLSA are limited by the ADA because "a congressional payment instruction to an agency must be read in light of the [ADA]." ECF No. 25 at 16. In support of this argument, defendant cites to Highland Falls-Fort Montgomery Cent. Sch. Dist. v. United States, 48 F.3d 1166, 1171 (Fed. Cir. 1995). See id. at 16-17. In Highland-Falls, plaintiffs challenged the Department of Education's (DOE) method for allocating funds under the Impact Aid Act. Highland Falls, 48 F.3d at 1171. The United States Court of Appeals for the Federal Circuit found, however, that the DOE's "approach was consistent with statutory requirements." Id. The case did not address FLSA claims, and found that the DOE's approach "harmonized the requirements of the Impact Aid Act and the [ADA]." See id. In the court's view, the Federal Circuit's decision in Highland-Falls does not alter the analysis in this case. The United States District Court for the District of Columbia's combined decision in National Treasury Employees Union v. Trump, Case No. 19-cv-50 and Hardy v. Trump, Case No. 19-cv-51, 444 F. Supp. 3d 108 (D.D.C. 2020), discussed by defendant in one of its supplemental filings, see ECF No. 47, is likewise unhelpful. Although it involved facts that arose from the same 2018 lapse in appropriations, the decision focuses almost exclusively on an analysis of whether plaintiffs' claims were moot, rather than on the operation of the ADA.

[7] The parties both claim that the Supreme Court of the United States' decision in Maine Community Health, 140 S. Ct. 1308, supports their position in this case. See ECF No. 55, ECF No. 59. Maine Community Health does not address the FLSA, and only includes a limited discussion of the ADA. See Maine Cmty. Health, 140 S. Ct. at 1321-22. Accordingly, the decision does not dictate the outcome here. To the extent that the case informs the present discussion, however, it tends to support plaintiffs. In the opinion, the Supreme Court held that "the [ADA] confirms that

Fed. Cl. at 584. The court will, of course, consider the GEFTA amendment to the ADA as part of its analysis.

C. Waiver of Sovereign Immunity

Before analyzing the sufficiency of plaintiffs' allegations, the court must address defendant's contention that plaintiffs' claims are barred by the doctrine of sovereign immunity. In its motion to dismiss, defendant correctly notes that "'[a] waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text, and will not be implied.'" ECF No. 25 at 19 (quoting Lane v. Pena, 518 U.S. 187, 192, 116 S.Ct. 2092, 135 L.Ed.2d 486 (1996)). And that waiver "'will be strictly construed, in terms of its scope, in favor of the sovereign.'" Id. (quoting Lane, 518 U.S. at 192, 116 S.Ct. 2092). Defendant concedes that the FLSA includes a waiver of sovereign immunity, but argues that the claims made by plaintiffs in this case fall outside the scope of that waiver. See id.; see also King v. United States, 112 Fed. Cl. 396, 399 (2013) (stating that "there is no question that sovereign immunity has been waived under the FLSA").

Defendant argues that the FLSA "does not require that employees be paid on their regularly scheduled

---

Congress can create obligations without contemporaneous funding sources," and concludes that "the plain terms of the [statute at issue] created an obligation neither contingent on nor limited by the availability of appropriations or other funds." Id. at 1322, 1323. Applied here, this conclusion suggests that the defendant can incur an obligation to pay plaintiffs pursuant to the normal operation of the FLSA even when funding is not available.

pay date or make damages available when compensation is not received on a pay date." ECF No. 25 at 19. As a result, defendant contends, the scope of the FLSA's waiver of sovereign immunity does not extend to the category of claims alleging a FLSA violation because wages were not paid as scheduled, such as plaintiffs' claims in this case. See id. at 19-21. According to defendant, the GEFTA confirms its long-standing belief that the government's payment obligations under the FLSA are abrogated by a lack of appropriations:

> The [GEFTA] provides that "each excepted employee who is required to perform work during a . . . lapse in appropriations shall be paid for such work, at the employee's standard rate of pay, at the earliest date possible after the lapse in appropriations ends, regardless of scheduled pay dates." Pub. L. No. 116-1, 133 Stat. 3. Congress has thus spoken directly to the question of when compensation should be paid. There can be no basis for inferring that compensation made in accordance with that explicit directive subjects the United States to liquidated damages.

Id. at 21.

Defendant also asserts, without citation to any authority, as follows:

> Given that the [ADA] 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, the government's waiver of sovereign immunity under the FLSA must be strictly construed against liability for the delayed (but always forthcoming) payment of wages because of a lapse in appropriations.

ECF No. 34 at 13.

The court disagrees. The claims brought by plaintiffs in this case are straightforward minimum wage and overtime claims under the FLSA. See ECF No. 6 at 8-10; ECF No. 30 at 8. Because the FLSA does not specify when such claims arise, courts have interpreted the statute to include a requirement that employers make appropriate wage payments on the employee's next regularly scheduled payday. See Brooklyn Sav. Bank, 324 U.S. at 707, 65 S.Ct. 895; Biggs, 1 F.3d at 1540. Contrary to defendant's suggestion, the court is unpersuaded that this judicially-imposed timing requirement transforms ordinary FLSA claims into something analytically distinct, and beyond the scope of the statute's waiver of sovereign immunity.

Accordingly, the court finds that defendant has waived sovereign immunity as to plaintiffs' claims, as it has with all FLSA claims, and the court will review the sufficiency of plaintiffs' allegations as it would in any other FLSA case.

D. Plaintiffs State a Claim for FLSA Violations

As noted above, the FLSA requires that the government "pay to each of [its] employees" a minimum

wage. 29 U.S.C. § 206(a). Pursuant to the FLSA, the government also must compensate employees for hours worked in excess of a forty-hour workweek "at a rate not less than one and one-half times the regular rate at which [they are] employed." 29 U.S.C. § 207(a)(1). And although the text of the statute does not specify the date on which wages must be paid, courts have held that employers are required to pay these wages on the employee's next regularly scheduled payday. See Brooklyn Sav. Bank, 324 U.S. at 707, 65 S.Ct. 895; Biggs, 1 F.3d at 1540.

In their complaint, plaintiffs allege that they were classified as FLSA non-exempt, ECF No. 6 at 2-5, and "designated as 'excepted' employees" who were "required to perform their duties without receiving their appropriate overtime and minimum wage pursuant to [the FLSA]." Id. at 6. Plaintiffs allege specific facts demonstrating how the allegations apply to each plaintiff. See id. at 2-5.

Defendant does not contest any of these allegations, and in fact, concedes that "plaintiffs [were] employees of agencies affected by the lapse in appropriations," and that "plaintiffs were paid at the earliest possible date after the lapse in appropriations ended." ECF No. 25 at 12, 13. Defendant also admits that "[p]laintiffs are federal employees who performed excepted work during the most recent lapse in appropriations." Id. at 15. In short, defendant does not claim that plaintiffs are not entitled to payment under the FLSA, but instead argues that it "fully complied with its statutory obligations to plaintiffs." Id. at 16.

The court finds that, presuming the facts as alleged in the complaint and drawing all reasonable inferences in their favor, plaintiffs have stated a claim for relief under the FLSA. See Cary, 552 F.3d at 1376 (citing Gould, 935 F.2d at 1274).

E. Liquidated Damages

Defendant insists that its failure to pay plaintiffs was a decision made in good faith, in light of the ADA. See ECF No. 34 at 15. It further urges the court to find that its good faith is so clear that the recovery of liquidated damages should be barred at this stage in the litigation. See id. at 15-18. But as the court held in Martin:

> [I]t would be inappropriate to determine, on motion to dismiss, whether the government had reasonable grounds and good faith. It may well be that the government can establish these defenses, but its opportunity to do so will come later on summary judgment or at trial. Moreover, even if the court were to decide that a liquidated damages award is warranted, additional factual determinations remain to be made as to which employees, if any, are entitled to recover, and damages, if any, to which those employees would be entitled.

Martin v. United States, 117 Fed. Cl. 611, 627 (2014). Accordingly, the court declines to rule at this time on the issue of whether defendant can establish a good

faith defense against liability for liquidated damages in this case.

IV. Conclusion

Accordingly, for the foregoing reasons:

(1) Defendant's motion to dismiss, ECF No. 25, is **DENIED**;

(2) On or before **February 8, 2021**, defendant is directed to **FILE** an **answer** or otherwise respond to plaintiffs' complaint; and

(3) On or before **February 8, 2021**, the parties are directed to **CONFER** and **FILE** a **joint status report** informing the court of their positions on the consolidation of this case with any other matters before the court.

IT IS SO ORDERED.

---

151 Fed.Cl. 380
United States Court of Federal Claims.

Eleazar AVALOS, et al., Plaintiffs,
v.
The UNITED STATES, Defendant.

No. 19-48C
|
(E-Filed: December 9, 2020)

Attorneys and Law Firms

Gregory James O'Duden, Washington, DC, for plaintiff. Julie M. Wilson, Allison C. Giles, Leon Dayan, Abigail Carter, of counsel.

Erin K. Murdock-Park, Trial Attorney, with whom were Joseph H. Hunt, Assistant Attorney General, Robert E. Kirschman, Jr., Director, Reginald T. Blades, Jr., Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for defendant. Ann C. Motto, of counsel.

OPINION AND ORDER

CAMPBELL-SMITH, Judge.

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 (amended complaint, hereinafter referred to as the complaint). On May 3, 2019, defendant moved to dismiss the complaint for lack of jurisdiction, pursuant to Rule 12(b)(1) of the Rules of the United States Court of Federal Claims (RCFC); and in the alternative, for failure to state a claim on which relief may be granted, pursuant to RCFC 12(b)(6) on the basis that the Anti-Deficiency Act (ADA), 31 U.S.C. §§ 1341-42, prohibited the government from paying employees. See ECF No. 21.

In analyzing defendant's motion, the court has considered: (1) plaintiffs' complaint, ECF No. 6; (2) defendant's motion to dismiss, ECF No. 21; (3) plaintiffs' response to defendant's motion, ECF No. 22; (4) defendant's reply in support of its motion, ECF No. 26; (5) defendant's first supplemental brief in support of its motion, ECF No. 28; (6) plaintiffs' response to defendant's first supplemental brief, ECF No. 29; (7) defendant's second supplemental brief in support of its motion, ECF No. 37; (8) plaintiffs' response to defendant's second supplemental brief, ECF No. 41; (9) defendant's third supplemental brief in support of its motion, ECF No. 45; and (10) plaintiffs' response to defendant's third supplemental brief, ECF No. 46. The motion is now fully briefed and ripe for ruling.[1] The

[1] In one of its supplemental briefs, defendant suggests that a recent decision issued by the Supreme Court of the United States, Maine Community Health Options v. United States, ___ U.S. ___, 140 S. Ct. 1308, 206 L.Ed.2d 764 (2020), a case that does not involve FLSA claims, indicates that this court lacks jurisdiction to hear this case because the FLSA "contains its own provision for judicial review." ECF No. 45 at 2. In the same brief,

court has considered all of the arguments presented by the parties, and addresses the issues that are pertinent to the court's ruling in this opinion. For the following reasons, defendant's motion is **DENIED**.

I. Background

Beginning at 12:01 a.m. on December 22, 2018, the federal government partially shut down due to a lack of appropriations. See ECF No. 6 at 6. The named plaintiffs in this case were, at the time of the shutdown, employed as Customs and Border Protection Officers for the United States Department of Homeland Security, Customs and Board Protection (CBP). See id. at 3. Plaintiffs allege that CBP "classified them as FLSA nonexempt," and that they "were designated excepted employees [under the ADA] for the shutdown that began on December 22[, 2018]." Id. at 3, 6. As a result of being classified as exempt employees, plaintiffs were required to work during the shutdown, but

---

defendant acknowledges binding precedent from the United States Court of Appeals for the Federal Circuit to the contrary. See id. (citing Abbey v. United States, 745 F.3d 1363 (Fed. Cir. 2014)). The court will not review this entirely new basis for dismissal, which was argued for the first time in defendant's third supplemental brief, and which defendant acknowledges contradicts binding precedent. If defendant believes this court lacks jurisdiction to continue exercising its authority in this case under the authority of Maine Community Health, it may file a motion properly raising the issue. See Rule 12(h)(3) of the Rules of the United States Court of Federal Claims (RCFC) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.").

did not receive timely pay for that work. See id. at 6-8 (alleging facts specific to each named plaintiff).

Plaintiffs allege that "[t]he federal government's failure to pay timely [p]laintiffs and other FLSA non-exempt employees who performed overtime work [during the shutdown], or who performed non-overtime work [during the shutdown] violated the FLSA." Id. 8. And according to plaintiffs, "[t]he federal government was on notice, including from previous litigation, that a failure to pay FLSA nonexempt employees their overtime wages on time, or the required minimum wage on time, regardless of whether the government is shut down, is a per se FLSA violation." Id. at 8-9. In support of this allegation, plaintiffs cite to this court's ruling in Martin v. United States, 130 Fed. Cl. 578 (2017), in which the court found "that the federal government failed to ascertain its FLSA obligations in connection with the payment of FLSA nonexempt employees who were required to work during a government shutdown." Id. at 9. Plaintiffs claim that defendant likewise failed to "obtain such an opinion or analysis about its FLSA obligations" during the shutdown at issue here. Id. As a result, plaintiffs contend, defendant "neither acted in good faith, nor had reasonable grounds for believing that failing to pay FLSA nonexempt employees their overtime wages or the required minimum wage on time during the shutdown was compliant with the FLSA." Id.

Plaintiffs define the putative class to include "FLSA nonexempt employees in bargaining units represented by [the National Treasury Employees Union

(NTEU)]" during the shutdown. Id. at 4. The NTEU allegedly represents "[h]undreds of thousands of federal employees, including tens of thousands of employees in bargaining units," who "were forced to work during the partial government shutdown without pay." Id. at 1-2. Notably, however, the NTEU is not a named plaintiff in the amended complaint. See id. at 1.

Plaintiffs now seek "any overtime wages . . . and any minimum wage" earned during the shutdown, "liquidated damages in an amount equal to" those wages, and "reasonable attorneys' fees and costs incurred in this action." Id. at 14-15.

II. Legal Standards

A. Dismissal for Lack of Jurisdiction

Pursuant to the Tucker Act, the court has jurisdiction to consider "any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1). To invoke the court's jurisdiction, plaintiffs must show that their claims are based upon the Constitution, a statute, or a regulation that "can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained." United States v. Mitchell, 463 U.S. 206, 216-17, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983) (quoting United States v. Testan, 424 U.S. 392, 400, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976)).

Plaintiffs bear the burden of establishing this court's subject matter jurisdiction by a preponderance of the evidence. See Reynolds v. Army & Air Force Exch. Serv., 846 F.2d 746, 748 (Fed. Cir. 1988). In reviewing plaintiffs' allegations in support of jurisdiction, the court must presume all undisputed facts are true and construe all reasonable inferences in plaintiffs' favor. See Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974), abrogated on other grounds by Harlow v. Fitzgerald, 457 U.S. 800, 814-15, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982); Reynolds, 846 F.2d at 747 (citations omitted). If, however, a motion to dismiss "challenges the truth of the jurisdictional facts alleged in the complaint, the . . . court may consider relevant evidence in order to resolve the factual dispute." Reynolds, 846 F.2d at 747. If the court determines that it lacks subject matter jurisdiction, it must dismiss the complaint. See RCFC 12(h)(3).

B. Dismissal for Failure to State a Claim

When considering a motion to dismiss brought under RCFC 12(b)(6), the court "must presume that the facts are as alleged in the complaint, and make all reasonable inferences in favor of the plaintiff." Cary v. United States, 552 F.3d 1373, 1376 (Fed. Cir. 2009) (citing Gould, Inc. v. United States, 935 F.2d 1271, 1274 (Fed. Cir. 1991)). It is well-settled that a complaint should be dismissed under RCFC 12(b)(6) "when the facts asserted by the claimant do not entitle him to a legal remedy." Lindsay v. United States, 295 F.3d 1252, 1257 (Fed. Cir. 2002). "To survive a motion to dismiss,

a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)).

III. Analysis

A. The Court Has Jurisdiction over Plaintiffs' Claims

At the end of its motion to dismiss, defendant includes a short argument in which it takes the position that the court lacks jurisdiction to hear plaintiffs' claims pursuant to 28 U.S.C. § 1500. See ECF No. 21 at 24-26. Section 1500 states, in its entirety, as follows:

> The United States Court of Federal Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

28 U.S.C. § 1500. Of relevance here, the Court of Appeals for the Federal Circuit has held that the "question of whether another claim is 'pending' for purposes of § 1500 is determined at the time at which the suit in the Court of Federal Claims is filed, not the time at

which the Government moves to dismiss the action." Loveladies Harbor, Inc. v. United States, 27 F.3d 1545, 1548 (Fed. Cir. 1994).

According to defendant, "Section 1500 bars plaintiffs from pursuing claims in this case in the Court of Federal Claims because another claim in district court based on the same operative facts was pending on the date they filed their complaint in this Court." ECF No. 21 at 24. Defendant argues that plaintiffs' claims are "based upon the same set of operative facts" as the claims asserted in National Treasury Employees Union v. United States, Case No. 19-cv-50 (D.D.C. 2019), which was filed in the United States District Court for the District of Columbia on January 11, 2019, the same day the present action was filed. Id. at 25. Defendant explains that the NTEU "filed its suit in district court on behalf of itself and its members who were required to report to work as 'excepted employees' during the lapse in appropriations." Id. (citations omitted). Given the symmetry of claims and the fact that the district court case was "filed on the same day as this case," defendant argues, this court must dismiss the present action. Id.

As plaintiffs note in response, however, defendant's analysis elides a critical piece of the statutory text. See ECF No. 22 at 27-29. Section 1500 operates only when the same "plaintiff or his assignee" is involved with the two similar cases. 28 U.S.C. § 1500. As the Supreme Court of the United States has explained: "[Section 1500] is more straightforward than its complex wording suggests. The [Court of Federal Claims]

has no jurisdiction over a claim if the plaintiff has another suit for or in respect to that claim pending against the United States or its agents." United States v. Tohono O'Odham Nation, 563 U.S. 307, 311, 131 S.Ct. 1723, 179 L.Ed.2d 723 (2011) (emphasis added).

Here, according to plaintiffs, the parties are not the same because "[t]he plaintiffs in Avalos are individual employees and the plaintiff in NTEU v. U[nited] S[tates] is a labor union." ECF No. 22 at 27. In addition, "[n]one of the plaintiffs is an assignee of the other." Id. "Section 1500 is therefore inapplicable." Id. Defendant has offered no evidence to the contrary, but argues in its reply that the court should deem plaintiffs in the two cases to be the same for purpose of applying § 1500:

> The National Treasury Employees Union in NTEU seeks to represent all of its members, while plaintiffs in this case, four individual members of the NTEU, seek to also represent all similarly situated members of the NTEU. According to their website, the NTEU represents federal employees in 33 different agencies, including CBP. In other words, plaintiffs in this case are encompassed by the first-filed district court action. Plaintiffs in both lawsuits are only different in title; they are identical in substance.

ECF No. 26 at 21 (footnote omitted). In support of this position, defendant cites to Allensworth v. United States, 122 Fed. Cl. 45 (2015), and O'Connor v. United States, 308 F.3d 1233 (Fed. Cir. 2002), cases in which

the courts concluded that individual members of labor unions were bound by various aspects of settlement agreements negotiated by unions on behalf of their members. Neither of these cases, however, involve the application of § 1500. This authority does not compel the court to find that the NTEU's lawsuit precludes the individually named plaintiffs in this case from maintaining suit in this court, and defendant's argument fails to make a persuasive connection between § 1500 and the referenced cases.

Additional facts may be discovered, or argument made, in the course of this litigation that affect the analysis, but at this stage the court is unconvinced that § 1500 applies. In particular, the court notes the lack of discussion by the parties of the interplay between § 1500 and this court's exclusive jurisdiction over FLSA claims against the federal government that exceed $10,000. See Abbey v. United States, 745 F.3d 1363, 1368-69 (Fed. Cir. 2014).

Moreover, even assuming an identity of plaintiffs between this case and the district court case, the presently available evidence indicates that plaintiffs filed here first. The case management/electronic case filing (CM/ECF) system docket in this case states that the complaint was "entered on 1/10/2019 at 3:54 PM EST and filed on 1/9/2019." ECF No. 22 at 41. The CM/ECF docket in the district court case states that the complaint was "entered by Shah, Paras on 1/9/2019 at 3:28 PM EST and filed on 1/9/2019." Id. at 46. Plaintiffs' attached to their response, a declaration from Paras Shah, the attorney who filed both cases. See id. at 36-37. The

declaration outlines the filing process for each complaint, as follows:

> 1. My name is Paras N. Shah. I am an Assistant Counsel in the Office of General Counsel of the National Treasury Employees Union (NTEU). I have held this position since July 19, 2011. As part of my duties, I have drafted and filed numerous complaints in various federal courts.
>
> 2. As part of my duties, I filed the complaints in Avalos, et al. v. United States, 19-cv-48 (Fed. CL Jan. 9, 2019) and NTEU v. United States, 19-cv-50 (D.D.C. Jan. 9, 2019).
>
> 3. I logged into the U.S. Court of Federal Claims' Case Management/Electronic Case Files (CM/ECF) system on January 9, 2019 in order to file electronically the Avalos complaint in the Court of Federal Claims. I filed the complaint in Avalos at, or within a few minutes prior to, 2:56 p.m. on January 9, 2019.
>
> 4. As part of filing the Avalos complaint, I paid the required filing fee. I received notification from pay.gov promptly after filing the Avalos complaint at 2:56 p.m. on January 9, 2019. A true and correct copy of the pay.gov confirmation that I received (except that the last four digits of the credit card number are redacted) for the filing fee in Avalos is attached as Exhibit A to this Declaration.
>
> 5. The ECF notice for Avalos was sent to our office on January 10. That ECF notice states that the complaint was "filed on 1/9/2019" and the complaint itself has "Filed 01/09/19" on it. Avalos, (Dkt. #1). A true and correct copy of the ECF notice

> for the Avalos complaint is attached as Exhibit B to this Declaration.
>
> 6. After I filed the Avalos suit in the Court of Federal Claims, I subsequently logged into the CM/ECF system of the U.S. District Court for the District of Columbia. I filed the NTEU v. U.S. complaint in U.S. District Court at, or within a few minutes prior to, 3:27 p.m. on January 9, 2019. I also paid the required filing fee. I received notification from pay.gov promptly after filing at 3:27 p.m. on January 9, 2019. A true and correct copy of the pay.gov payment confirmation that I received (except that the last four digits of the credit card number, which is redacted) for the filing fee in NTEU v. U.S. is attached as Exhibit C to this Declaration.

Id.

Pursuant to this court's rules, "[i]nitial papers, including the complaint, may be filed in paper or electronic form." RCFC, Appendix E, ¶ 8(a). When a new complaint is electronically filed in this court, as it was in this case, the initial filing is recorded in the court's case CM/ECF system under a place-holder case number, or shell case. Once the filing has been uploaded, the system prompts payment of the filing fee. And after the filing fee has been paid, the system prompts the filer to submit the complaint. The complaint is deemed filed at the time of this submission. This procedure is explained in detail in the "Attorney Guide for Filing Complaints & Petitions in CM/ECF," found on the

court's website at www.uscfc.uscourts.gov/electronic-filing.[2]

After the case is filed under a shell case number, the clerk's office assigns the case a permanent case number and creates the formal electronic docket, on which it enters the complaint. This two-step process accounts for the explanation on the docket in this case that was "entered on 1/10/2019 at 3:54 PM EST and filed on 1/9/2019." Id. at 41. Accordingly, in this case, the time stamp indicating that the complaint was "entered on 1/10/2019 at 3:54 PM EST," does not represent the time that the complaint was filed.

The documentation attached to Paras Shah's declaration supports the assertion that the complaint in this case was filed "at, or within a few minutes prior to, 2:56 p.m. on January 9, 2019." Id. at 36, 39. The email receipt for the filing fee, which bears a tracking number that matches the number stamped on the original complaint, states that it was sent on "Wednesday, January 9, 2019 at 2:56 PM." Id. at 39; see also ECF No. 1 (complaint). The court has also confirmed that its internal records for the shell case created when this case was filed reflect the same filing time. Thus, based both on plaintiffs' evidence and the court's internal records,

---

[2] The version of the filing guide that is presently on the court's website was updated in November 2020, but the court has confirmed that the only substantive revision from the version that was on the website when this case was filed was to the amount of the filing fee.

plaintiffs' complaint in this case was filed on January 9, 2019 at 2:56 p.m., eastern time.

The only evidence of the filing time for the district court case that is before the court indicates that the district court complaint was "entered by Shah, Paras on 1/9/2019 at 3:28 PM EDT and filed on 1/9/2019," and that the filing fee was paid at 3:27 PM on the same date. Id. at 44, 46. The court has no insight into the internal processes of the district court, and will not speculate about what they might be. Further investigation may reveal that the complaint was filed before the time reflected on the district court docket, but the evidence before the court at this time indicates that the district court case was not pending at the time that plaintiffs filed in this court. See Loveladies Harbor, Inc. v. United States, 27 F.3d 1545, 1548 (Fed. Cir. 1994) (holding that the "question of whether another claim is 'pending' for purposes of § 1500 is determined at the time at which the suit in the Court of Federal Claims is filed, not the time at which the Government moves to dismiss the action"); Parker v. United States, 131 Fed. Cl. 1, 19 n.22 (2017) (noting that the "majority view recognizes as dispositive the sequence of the two complaints' filings" in determining whether § 1500 operates to abrogate this court's jurisdiction). Accordingly, the court would further decline to apply § 1500 based on the order in which it appears the cases were filed.

B. Plaintiffs Have Stated a Claim on which Relief Can Be Granted

1. Relevant Statutes

This case fundamentally concerns the intersection of two statutes, the ADA and the FLSA. The ADA states that "an officer or employee" of the federal government "may not . . . make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation." 31 U.S.C. § 1341(a)(1)(A). In addition, the ADA dictates that "[a]n officer or employee of the United States Government or of the District of Columbia government may not accept voluntary services for either government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property." 31 U.S.C. § 1342. In 2019, Congress amended the ADA, adding, in relevant part, the following:

> [E]ach excepted employee who is required to perform work during a covered lapse in appropriations[3] shall be paid for such work, at the employee's standard rate of pay, 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.

---

[3] The statute defines "covered lapse in appropriations" to mean "any lapse in appropriations that begins on or after December 22, 2018." 31 U.S.C. § 1341(c)(1)(A).

31 U.S.C. § 1341(c)(2) (footnote added). The amendment is commonly referred to as the Government Employees Fair Treatment Act of 2019 (GEFTA), Pub. L. No. 116-1, 133 Stat. 3 (2019). The knowing or willful violation of the ADA is punishable by a fine of "not more than $5,000" or imprisonment "for not more than 2 years, or both." 31 U.S.C. § 1350. And federal employees who violate the ADA "shall be subject to appropriate administrative discipline including, when circumstances warrant, suspension from duty without pay or removal from office." 31 U.S.C. § 1349(a).

Defendant separately has obligations to its employees pursuant to the FLSA, which governs minimum wage and overtime wage compensation for certain employees.[4] See 29 U.S.C. § 213 (identifying categories of exempt employees). The FLSA requires that the government "pay to each of [its] employees" a minimum wage. 29 U.S.C. § 206(a). Pursuant to the FLSA, the government also must compensate employees for hours worked in excess of a forty-hour workweek "at a rate not less than one and one-half times the regular rate at which [they are] employed." 29 U.S.C. § 207(a)(1). Although the text of the statute does not specify the date on which wages must be paid, courts have held that employers are required to pay these wages on the employee's next regularly scheduled payday. See Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 707, 65

[4] The FLSA initially applied only to the private sector when enacted in 1938, but was amended to cover public employees in 1974. See Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55 (1974).

S.Ct. 895, 89 L.Ed. 1296 (1945); Biggs v. Wilson, 1 F.3d 1537, 1540 (9th Cir. 1993). If an employer violates the FLSA's pay provisions, the employer is "liable to the . . . employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be." 29 U.S.C. § 216(b). The employer may also be liable "in an additional equal amount as liquidated damages," id., unless "the employer shows to the satisfaction of the court that the act or omission . . . was in good faith, and that [the employer] had reasonable grounds for believing that his act or omission was not a violation of the [FLSA]," 29 U.S.C. § 260.

2. The Court's Reasoning in Martin Applies

In its motion to dismiss, defendant first argues that plaintiffs' complaint should be dismissed for failure to state a claim because the agencies for which appropriations lapsed on December 22, 2018, were prohibited by the ADA from paying their employees—even excepted employees who were required to work. See ECF No. 21 at 14-15. This mandate, in defendant's view, means that defendant cannot be held liable for violating its obligations under the FLSA. See id. Defendant argues:

> When Congress criminalized payments during an appropriations lapse, it plainly precluded payments on the schedule plaintiffs assert is required by the FLSA. Federal officials who comply with that criminal prohibition do not violate the FLSA, and Congress did not create

> a scheme under which compliance with the [ADA] would result in additional compensation as damages to federal employees.

Id. at 14.

The court has previously ruled on the intersection of the ADA and the FLSA in the context of a lapse in appropriations. See Martin, 130 Fed. Cl. 578. In Martin, plaintiffs were "current or former government employees who allege[d] that they were not timely compensated for work performed during the shutdown, in violation of the [FLSA]." Id. at 580 (citing 29 U.S.C. § 201 et seq.). The plaintiffs in Martin alleged the right to liquidated damages with regard to both the government's failure to timely pay minimum wages and its failure to pay overtime wages. See id. In its motion for summary judgment, the government argued that "it should avoid liability under the FLSA for its failure to [pay plaintiffs on their regularly scheduled pay days during the shutdown] because it was barred from making such payments pursuant to the ADA." See id. at 582. The government summarized its argument in Martin as follows:

> The FLSA and the Anti-Deficiency Act appear to impose two conflicting obligations upon Federal agencies: the FLSA mandates that the agencies "shall pay to each of [its] employees" a minimum wage, 29 U.S.C. § 206(a) (emphasis added), which has been interpreted by the courts to include a requirement that the minimum wage be paid on the employees' next regularly scheduled pay day, see

> Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 707 n.20, [65 S. Ct. 895, 89 L. Ed. 1296] (1945); Biggs v. Wilson, 1 F.3d 1537, 1540 (9th Cir. 1993), and the [ADA] mandates that "[a]n officer or employee of the United States Government . . . may not . . . make or authorize an expenditure . . . exceeding an amount available in an appropriation or fund for the expenditure. . . ." 31 U.S.C. § 1341(A)(1)(A) (emphasis added). Thus, when Federal agencies are faced with a lapse in appropriations and cannot pay excepted employees on their next regularly scheduled payday, the question arises of which statutory mandate controls.

Id. at 582-83 (quoting defendant's motion for summary judgment) (alterations in original).

After reviewing applicable precedent and persuasive authority, the court concluded that "the issue is more complex than simply a choice between whether the FLSA or the ADA controls." Id. at 583. In the court's view:

> the appropriate way to reconcile the [ADA and the FLSA] is not to cancel defendant's obligation to pay its employees in accordance with the manner in which the FLSA is commonly applied. Rather, the court would require that defendant demonstrate a good faith belief, based on reasonable grounds, that its actions were appropriate. As such, the court will proceed to analyze this case under the construct of the FLSA, and evaluate the existence and operation of the ADA as part of determining whether defendant met the statutory

> requirements to avoid liability for liquidated damages.

Id. at 584.

The court noted that plaintiffs' claims survived a motion to dismiss because they had "alleged that defendant had failed to pay wages" on plaintiffs' "next regularly scheduled payday." Id. at 584. On summary judgment, the court concluded that plaintiffs had proven this claim. See id. The court then concluded that the evidence supported an award of liquidated damages because the government failed to satisfy the court that it acted in good faith and on reasonable grounds when it failed to make the payments required under the FLSA.[5] See id. at 585-86.

Both parties acknowledge that the plaintiffs in Martin were "situated similarly to plaintiffs here." ECF No. 21 at 15 (defendant's motion to dismiss); see also ECF No. 6 at 5, 9-10 (plaintiffs citing Martin in their complaint); ECF No. 22 at 15 (plaintiffs noting that defendant makes the "same argument" here as it did in Martin with regard to the intersection of the FLSA and the ADA). In addition, plaintiffs here, like

---

[5] In Martin, the defendant also argued that it should avoid liability for liquidated damages with regard to overtime wages due to its inability to calculate the correct amounts due. See Martin v. United States, 130 Fed. Cl. 578, 586-87 (2017). This argument was based on a bulletin from the Department of Labor, and involves an issue that has not been raised in the present case. The absence of this argument, however, has no bearing on the application of the court's reasoning in Martin with regard to the structure of the proper analysis in this case.

the plaintiffs in Martin, have alleged that defendant's violations of the FLSA were not in good faith. See ECF No. 6 at 9 (alleging that defendant "neither acted in good faith, nor had reasonable grounds for believing that failing to pay FLSA nonexempt employees their overtime wages or the required minimum wage on time during the shutdown was compliant with the FLSA").

In its motion to dismiss, defendant does not dispute plaintiffs' allegations that they were required to work during the shutdown, or that the plaintiffs were not paid during that time due to the lapse in appropriations. See ECF No. 21. With regard to the sufficiency of plaintiffs' allegations, defendant characterizes the issue now before the court as "whether plaintiffs have stated a claim for liquidated damages under the [FLSA] notwithstanding the provisions of the [ADA]." Id. at 8. In arguing its position, defendant reiterates the arguments advanced in Martin, but does not present any meaningful distinction between the posture of the Martin plaintiffs and the plaintiffs here. Instead, it acknowledges that "[t]his Court in Martin v. United States concluded that plaintiffs situated similarly to plaintiffs here could recover liquidated damages under the FLSA," but states that it "respectfully disagree[s] with that holding." Id. at 15.

Notwithstanding defendant's disagreement, the court continues to believe that the framework it set out

in Martin is appropriate and applies here.[6] As it did in Martin, "the court will proceed to analyze this case under the construct of the FLSA, and evaluate the existence and operation of the ADA as part of determining whether defendant met the statutory requirements to avoid liability for liquidated damages."[7] Martin, 130

---

[6] Defendant also argues that its obligations under the FLSA are limited by the ADA because "a congressional payment instruction to an agency must be read in light of the [ADA]." ECF No. 21 at 18. In support of this argument, defendant cites to Highland Falls-Fort Montgomery Cent. Sch. Dist. v. United States, 48 F.3d 1166, 1171 (Fed. Cir. 1995). See id. In Highland Falls, plaintiffs challenged the Department of Education's (DOE) method for allocating funds under the Impact Aid Act. Highland Falls, 48 F.3d at 1171. The United States Court of Appeals for the Federal Circuit found, however, that the DOE's "approach was consistent with statutory requirements." Id. The case did not address FLSA claims, and found that the DOE's approach "harmonized the requirements of the Impact Aid Act and the [ADA]." See id. In the court's view, the Federal Circuit's decision in Highland Falls does not alter the analysis in this case. The United States District Court for the District of Columbia's combined decision in National Treasury Employees Union v. Trump, Case No. 19-cv-50 and Hardy v. Trump, 444 F. Supp. 3d 108 (D.D.C. 2020), discussed by defendant in one of its supplemental filings, see ECF No. 37, is likewise unhelpful. Although it involved facts that arose from the same 2018 lapse in appropriations, the decision focuses almost exclusively on an analysis of whether plaintiffs' claims were moot, rather than on the operation of the ADA.

[7] The parties both claim that the Supreme Court of the United States' decision in Maine Community Health, ___ U.S. ___, 140 S. Ct. 1308, 206 L.Ed.2d 764, supports their position in this case. See ECF No. 45, ECF No. 46. Maine Community Health does not address the FLSA, and only includes a limited discussion of the ADA. See Maine Cmty. Health, 140 S. Ct. at 1321-22. Accordingly, the decision does not dictate the outcome here. To the extent that the case informs the present discussion, however, it tends to support plaintiffs. In the opinion, the Supreme Court

Fed. Cl. at 584. The court will, of course, consider the GEFTA amendment to the ADA as part of its analysis.

3. Waiver of Sovereign Immunity

Before analyzing the sufficiency of plaintiffs' allegations, the court must address defendant's contention that plaintiffs' claims are barred by the doctrine of sovereign immunity. In its motion to dismiss, defendant correctly notes that "'[a] waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text, and will not be implied.'" ECF No. 21 at 20 (quoting Lane v. Pena, 518 U.S. 187, 192, 116 S.Ct. 2092, 135 L.Ed.2d 486 (1996)). And that waiver "'will be strictly construed, in terms of its scope, in favor of the sovereign.'" Id. (quoting Lane, 518 U.S. at 192, 116 S.Ct. 2092). Defendant concedes that the FLSA includes a waiver of sovereign immunity, but argues that the claims made by plaintiffs in this case fall outside the scope of that waiver. See id. at 20-21; see also King v. United States, 112 Fed. Cl. 396, 399 (2013) (stating that "there is no question that sovereign immunity has been waived under the FLSA").

---

held that "the [ADA] confirms that Congress can create obligations without contemporaneous funding sources," and concludes that "the plain terms of the [statute at issue] created an obligation neither contingent on nor limited by the availability of appropriations or other funds." Id. at 1322, 1323. Applied here, this conclusion suggests that the defendant can incur an obligation to pay plaintiffs pursuant to the normal operation of the FLSA even when funding is not available.

Defendant argues that the FLSA "does not require that employees be paid on their regularly scheduled pay date or make damages available when compensation is not received on a pay date." ECF No. 21 at 21. As a result, defendant contends, the scope of the FLSA's waiver of sovereign immunity does not extend to the category of claims alleging a FLSA violation because wages were not paid as scheduled, such as plaintiffs' claims in this case. See id. at 20-23. According to defendant, the GEFTA confirms its long-standing belief that the government's payment obligations under the FLSA are abrogated by a lack of appropriations:

> The [GEFTA] provides that "each excepted employee who is required to perform work during a . . . lapse in appropriations shall be paid for such work, at the employee's standard rate of pay, at the earliest date possible after the lapse in appropriations ends, regardless of scheduled pay dates." Pub. L. No. 116-1, 133 Stat. 3. Congress has thus spoken directly to the question of when compensation should be paid. There can be no basis for inferring that compensation made in accordance with that explicit directive subjects the United States to liquidated damages.

Id. at 22-23.

Defendant also asserts that the scope of its waiver of sovereign immunity for FLSA claims does not cover the claims asserted here. See ECF No. 26 at 14. It argues, without citation to any authority, that:

> a cause of action under the FLSA cannot per se accrue against the United States when federal agencies do not pay employees on their regularly scheduled paydays during a lapse in appropriations because a federal statute expressly provides for when and at what rate federal employees will be paid under those circumstances.

Id. at 14.

The court disagrees. The claims brought by plaintiffs in this case are straightforward FLSA minimum wage and overtime claims under the FLSA. See ECF No. 6 at 12-14. Because the FLSA does not specify when such claims arise, courts have interpreted the statute to include a requirement that employers make appropriate wage payments on the employee's next regularly scheduled payday. See Brooklyn Sav. Bank, 324 U.S. at 707, 65 S.Ct. 895; Biggs, 1 F.3d at 1540. Contrary to defendant's suggestion, the court is unpersuaded that this judicially-imposed timing requirement transforms ordinary FLSA claims into something analytically distinct, and beyond the scope of the statute's waiver of sovereign immunity.

Accordingly, the court finds that defendant has waived sovereign immunity as to plaintiffs' claims, as it has with all FLSA claims, and the court will review the sufficiency of plaintiffs' allegations as it would in any other FLSA case.

4. Plaintiffs State a Claim for FLSA Violations

As noted above, the FLSA requires that the government "pay to each of [its] employees" a minimum wage. 29 U.S.C. § 206(a). Pursuant to the FLSA, the government also must compensate employees for hours worked in excess of a forty-hour workweek "at a rate not less than one and one-half times the regular rate at which [they are] employed." 29 U.S.C. § 207(a)(1). And although the text of the statute does not specify the date on which wages must be paid, courts have held that employers are required to pay these wages on the employee's next regularly scheduled payday. See Brooklyn Sav. Bank, 324 U.S. at 707, 65 S.Ct. 895; Biggs, 1 F.3d at 1540.

In their complaint, plaintiffs allege that CBP "classified them as FLSA nonexempt," and that they "were designated excepted employees [under the ADA] for the shutdown that began on December 22[, 2018]." ECF No. 6 at 3, 6. Plaintiffs also allege that as a result of being classified as exempt employees, plaintiffs were required to work during the shutdown, but did not receive timely pay for that work. See id. at 6-8.

Defendant does not contest any of these allegations, and in fact, concedes that "plaintiffs [were] employees of agencies affected by the lapse in appropriations," and that "plaintiffs were paid at the earliest possible date after the lapse in appropriations ended." ECF No. 21 at 13, 14. Defendant also admits that "[p]laintiffs are federal employees who performed excepted work

during the most recent lapse in appropriations." Id. at 17. In short, defendant does not claim that plaintiffs are not entitled to payment under the FLSA, but instead argues that it "fully complied with its statutory obligations to plaintiffs." Id. at 18.

The court finds that, presuming the facts as alleged in the complaint and drawing all reasonable inferences in their favor, plaintiffs have stated a claim for relief under the FLSA. See Cary, 552 F.3d at 1376 (citing Gould, 935 F.2d at 1274).

5. Liquidated Damages

Defendant insists that its failure to pay plaintiffs was a decision made in good faith, in light of the ADA. See ECF No. 26 at 15. It further urges the court to find that its good faith is so clear that the recovery of liquidated damages should be barred at this stage in the litigation. See id. at 14-17. But as the court held in Martin:

> [I]t would be inappropriate to determine, on motion to dismiss, whether the government had reasonable grounds and good faith. It may well be that the government can establish these defenses, but its opportunity to do so will come later on summary judgment or at trial. Moreover, even if the court were to decide that a liquidated damages award is warranted, additional factual determinations remain to be made as to which employees, if any, are entitled to recover, and damages, if

any, to which those employees would be entitled.

Martin v. United States, 117 Fed. Cl. 611, 627 (2014). Accordingly, the court declines to rule at this time on the issue of whether defendant can establish a good faith defense against liability for liquidated damages in this case.

IV. Conclusion

Accordingly, for the foregoing reasons:

(1) Defendant's motion to dismiss, ECF No. 21, is **DENIED**;

(2) On or before **February 8, 2021**, defendant is directed to **FILE** an **answer** or otherwise respond to plaintiffs' complaint; and

(3) On or before **February 8, 2021**, the parties are directed to **CONFER** and **FILE** a **joint status report** informing the court of their positions on the consolidation of this case with any other matters before the court.

IT IS SO ORDERED.

151 Fed.Cl. 478
United States Court of Federal Claims.

Quentin BACA, et al., Plaintiffs,
v.
The UNITED STATES, Defendant.

No. 19-213C
|
E-Filed: December 4, 2020

Attorneys and Law Firms

Molly Ann Elkin, Washington, DC, for plaintiff. Gregory K. McGillivary, Sarah M. Block, John W. Stewart, of counsel.

Erin K. Murdock-Park, Trial Attorney, with whom were Joseph H. Hunt, Assistant Attorney General, Robert E. Kirschman, Jr., Director, Reginald T. Blades, Jr., Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for defendant. Ann C. Motto, of counsel.

OPINION AND ORDER

CAMPBELL-SMITH, Judge.

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. 1 at 3 (complaint, filed on February 6, 2019); ECF No. 32 at 338-39 (third amended complaint, filed on April 19, 2019). On May 3, 2019, defendant moved to dismiss the complaint for lack of jurisdiction, pursuant to Rule 12(b)(1) of the Rules of the United States Court of Federal Claims (RCFC); and in the alternative, for failure to state a claim on which relief may be granted, pursuant to RCFC 12(b)(6) on the basis that the Anti-Deficiency Act (ADA), 31 U.S.C. §§ 1341-42, prohibited the government from paying employees. See ECF No. 33.

In analyzing defendant's motion, the court has considered: (1) plaintiffs' complaint, ECF No. 1; (2) plaintiffs' third amended complaint (hereinafter referred to as the complaint, unless otherwise stated), ECF No. 32; (3) defendant's motion to dismiss, ECF No. 33; (4) plaintiffs' response to defendant's motion, ECF No. 34; (5) defendant's reply in support of its motion, ECF No. 38; (6) defendant's first supplemental brief in support of its motion, ECF No. 40; (7) plaintiffs' response to defendant's first supplemental brief, ECF No. 41; (8) defendant's second supplemental brief in support of its motion, ECF No. 50; (9) plaintiffs' response to defendant's second supplemental brief, ECF No. 54; (10) defendant's third supplemental brief in support of its motion, ECF No. 59; and (11) plaintiffs' response to defendant's third supplemental brief, ECF No. 60. The motion is now fully briefed and ripe for ruling.[1] The

[1] In one of its supplemental briefs, defendant suggests that a recent decision issued by the Supreme Court of the United States, Maine Community Health Options v. United States, ___

court has considered all of the arguments presented by the parties, and addresses the issues that are pertinent to the court's ruling in this opinion. For the following reasons, defendant's motion is **DENIED**.

I. Background

Beginning at midnight on December 22, 2018, the federal government partially shut down due to a lack of appropriations. See ECF No. 32 at 339. The named plaintiffs in this case were, at the time of the shutdown, employees of the United States working as air traffic controllers for the Federal Aviation Administration (FAA). See id. at 338. Although the lapse in appropriations began on December 22, 2018, the FAA did not exhaust its appropriated funds until 12:01 a.m. on December 24, 2020. See id. at 342.

U.S. ___, 140 S. Ct. 1308, 206 L.Ed.2d 764 (2020), a case that does not involve FLSA claims, indicates that this court lacks jurisdiction to hear this case because the FLSA "contains its own provision for judicial review." ECF No. 59 at 2. In the same brief, defendant acknowledges binding precedent from the United States Court of Appeals for the Federal Circuit to the contrary. See id. (citing Abbey v. United States, 745 F.3d 1363 (Fed. Cir. 2014)). The court will not review this entirely new basis for dismissal, which was argued for the first time in defendant's third supplemental brief, and which defendant acknowledges contradicts binding precedent. If defendant believes this court lacks jurisdiction to continue exercising its authority in this case under the authority of Maine Community Health, it may file a motion properly raising the issue. See Rule 12(h)(3) of the Rules of the United States Court of Federal Claims (RCFC) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.").

In their complaint, plaintiffs allege that they were categorized as excepted employees, and "compelled to continue to work through the shutdown." Id. at 339. Plaintiffs did not receive timely minimum or overtime wages for work performed during the shutdown. See id. at 344-45. Plaintiffs also allege that some air traffic controllers did not receive timely minimum or overtime wages for work performed between December 19 and December 23, 2018, even though the FAA had not yet exhausted its appropriated funds. See id. at 345-48. In addition, plaintiffs claim that defendant's "violations of the FLSA as alleged herein have been done in an intentional, willful, and bad faith manner." Id. at 349, 353, 354; see also id. at 350, 351. Plaintiffs now seek "backpay as well as monetary liquidated damages equal to any unpaid or untimely paid minimum wage and overtime compensation earned since December 19, 2018, as well as interest thereon," and attorneys' fees and costs. See id. at 355.

II. Legal Standards

A. Dismissal for Lack of Jurisdiction

Pursuant to the Tucker Act, the court has jurisdiction to consider "any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1). To invoke the court's jurisdiction, plaintiffs must show

that their claims are based upon the Constitution, a statute, or a regulation that "'can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained.'" United States v. Mitchell, 463 U.S. 206, 217, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983) (quoting United States v. Testan, 424 U.S. 392, 400, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976)).

Plaintiffs bear the burden of establishing this court's subject matter jurisdiction by a preponderance of the evidence. See Reynolds v. Army & Air Force Exch. Serv., 846 F.2d 746, 748 (Fed. Cir. 1988). In reviewing plaintiffs' allegations in support of jurisdiction, the court must presume all undisputed facts are true and construe all reasonable inferences in plaintiffs' favor. See Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974), abrogated on other grounds by Harlow v. Fitzgerald, 457 U.S. 800, 814-15, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982); Reynolds, 846 F.2d at 747 (citations omitted). If, however, a motion to dismiss "challenges the truth of the jurisdictional facts alleged in the complaint, the . . . court may consider relevant evidence in order to resolve the factual dispute." Reynolds, 846 F.2d at 747. If the court determines that it lacks subject matter jurisdiction, it must dismiss the complaint. See RCFC 12(h)(3).

B. Dismissal for Failure to State a Claim

When considering a motion to dismiss brought under RCFC 12(b)(6), the court "must presume that the facts are as alleged in the complaint, and make all

reasonable inferences in favor of the plaintiff." Cary v. United States, 552 F.3d 1373, 1376 (Fed. Cir. 2009) (citing Gould, Inc. v. United States, 935 F.2d 1271, 1274 (Fed. Cir. 1991)). It is well-settled that a complaint should be dismissed under RCFC 12(b)(6) "when the facts asserted by the claimant do not entitle him to a legal remedy." Lindsay v. United States, 295 F.3d 1252, 1257 (Fed. Cir. 2002). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)).

III. Analysis

A. The Court Has Jurisdiction over Plaintiffs' Claims

At the end of its motion to dismiss, defendant includes a short argument in which it takes the position that the court lacks jurisdiction to hear plaintiffs' claims pursuant to 28 U.S.C. § 1500. See ECF No. 33 at 24-25. Section 1500 states, in its entirety, as follows:

> The United States Court of Federal Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act,

> directly or indirectly under the authority of the United States.

28 U.S.C. § 1500. Of relevance here, the United States Court of Appeals for the Federal Circuit has held that the "question of whether another claim is 'pending' for purposes of § 1500 is determined at the time at which the suit in the Court of Federal Claims is filed, not the time at which the Government moves to dismiss the action." Loveladies Harbor, Inc. v. United States, 27 F.3d 1545, 1548 (Fed. Cir. 1994).

According to defendant, "Section 1500 bars plaintiffs from pursuing claims in the Court of Federal Claims because another claim in district court based on the same operative facts was pending on the date they filed their complaint in the Court of Federal Claims." ECF No. 33 at 24. Defendant argues that plaintiffs' claims are "based upon the same operative facts" as the claims asserted in National Air Traffic Controllers Association, AFL-CIO v. United States, Case No. 19-62 (D.D.C. 2019), which was filed in the United States District Court for the District of Columbia on January 11, 2019. Id. Defendant explains the operative facts of National Air Traffic Controllers, as follows: "NATCA filed its suit on behalf of 'similarly situated employees at the FAA working in 'excepted' status in accordance with the minimum wage and overtime provisions of the' FLSA, who asserted untimely payment of wages for their work performed during the lapse in appropriations." Id. Given the symmetry of claims and the fact that the district court case

was filed first, defendant argues, this court must dismiss the present action. See id. at 25.

As plaintiffs note in response, however, defendant's analysis elides a critical piece of the statutory text. See ECF No. 34 at 11-14. Section 1500 operates only when the same "plaintiff or his assignee" is involved with the two similar cases. 28 U.S.C. § 1500. As the Supreme Court of the United States has explained: "[Section 1500] is more straightforward than its complex wording suggests. The [Court of Federal Claims] has no jurisdiction over a claim if the plaintiff has another suit for or in respect to that claim pending against the United States or its agents." United States v. Tohono O'Odham Nation, 563 U.S. 307, 311, 131 S.Ct. 1723, 179 L.Ed.2d 723 (2011) (emphasis added).

Here, according to plaintiffs, none of the named plaintiffs in the district court case when it was filed on January 11, 2019, were named plaintiffs in this case when it was filed on February 6, 2019. See ECF No. 34 at 12 (stating that "at the time the original [c]omplaint was filed on February 6, 2019, none of the individual plaintiffs in the instant case were plaintiffs in the then-pending district court case"). Defendant has offered no evidence to the contrary, but argues in its reply that the court should deem plaintiffs in this case to be "encompassed by the first-filed district court action," because the plaintiffs in the district court case "sought to represent all air traffic controllers." ECF No. 38 at 21-22. This position, however, is discordant with requirements for maintaining a claim under the FLSA. The FLSA requires individuals to consent in writing to

become a party to a case. See 29 U.S.C. § 216(b) (stating that "[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought"). As such, the theoretically overlapping classes of plaintiffs between the two cases is not enough to establish an identity of plaintiffs for purposes of § 1500.

Defendant also insists that plaintiffs' reading of § 1500 "is based on a very narrow reading of § 1500's statutory text, which contradicts the Federal Circuit's determination that § 1500 is not to be interpreted narrowly," and criticizes plaintiffs for urging the court to adopt a "literal" reading of the statute. ECF No. 38 at 19, 20. The court disagrees with defendant. As an initial matter, defendant's reliance on Trusted Integration, Inc. v. United States, 659 F.3d. 1159, 1164 (Fed. Cir. 2011), in arguing against a narrow construction of Section 1500 is misleading. See id. at 20. While the Federal Circuit did indeed counsel against a narrow view of the statute, that admonition was clearly made in reference to determining whether two cases involved the same set of operative facts. See Trusted Integration, 659 F.3d at 1164. The court did not address the identity of plaintiffs in Trusted Integration, because Trusted Integration, Inc. was clearly the named plaintiff in both cases at issue. See id. at 1162. And, even assuming that the proper construction of all parts of the statute is broad, defendant asks the court to read the term "plaintiff or his assignee" so broadly that it

would lose all meaning. 28 U.S.C. § 1500. The court declines to do so.

Moreover, applying the statutory text as written cannot fairly be viewed as overly restrictive. In the words of the Supreme Court, under § 1500, this court "has no jurisdiction over a claim if the plaintiff has another suit for or in respect to that claim pending against the United States or its agents." Tohono, 563 U.S. at 311, 131 S.Ct. 1723 (emphasis added). Because defendant has not demonstrated any overlap of plaintiffs between this case and National Air Traffic Controllers Association, Case No. 19-62 (D.D.C. 2019), § 1500 does not abrogate this court's jurisdiction. As plaintiffs state: "[p]ut simply, 28 U.S.C. § 1500 is not implicated here because the two cases at issue were brought by different plaintiffs; whether this case involves the same operative facts as the then-pending district court case is entirely irrelevant." ECF No. 34 at 12.

B. Plaintiffs Have Stated a Claim on which Relief Can Be Granted

1. Relevant Statutes

This case fundamentally concerns the intersection of two statutes, the ADA and the FLSA. The ADA states that "an officer or employee" of the federal government "may not . . . make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation." 31 U.S.C. § 1341(a)(1)(A). In addition, the ADA

dictates that "[a]n officer or employee of the United States Government or of the District of Columbia government may not accept voluntary services for either government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property." 31 U.S.C. § 1342. In 2019, Congress amended the ADA, adding, in relevant part, the following:

> [E]ach excepted employee who is required to perform work during a covered lapse in appropriations[2] shall be paid for such work, at the employee's standard rate of pay, 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) (footnote added). The amendment is commonly referred to as the Government Employees Fair Treatment Act of 2019 (GEFTA), Pub. L. No. 116-1, 133 Stat. 3 (2019). The knowing or willful violation of the ADA is punishable by a fine of "not more than $5,000" or imprisonment "for not more than 2 years, or both." 31 U.S.C. § 1350. And federal employees who violate the ADA "shall be subject to appropriate administrative discipline including, when circumstances warrant, suspension from duty without pay or removal from office." 31 U.S.C. § 1349(a).

---

[2] The statute defines "covered lapse in appropriations" to mean "any lapse in appropriations that begins on or after December 22, 2018." 31 U.S.C. § 1341(c)(1)(A).

Defendant separately has obligations to its employees pursuant to the FLSA, which governs minimum wage and overtime wage compensation for certain employees.[3] See 29 U.S.C. § 213 (identifying categories of exempt employees). The FLSA requires that the government "pay to each of [its] employees" a minimum wage. 29 U.S.C. § 206(a). Pursuant to the FLSA, the government also must compensate employees for hours worked in excess of a forty-hour workweek "at a rate not less than one and one-half times the regular rate at which [they are] employed." 29 U.S.C. § 207(a)(1). Although the text of the statute does not specify the date on which wages must be paid, courts have held that employers are required to pay these wages on the employee's next regularly scheduled payday. See 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). If an employer violates the FLSA's pay provisions, the employer is "liable to the . . . employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be." 29 U.S.C. § 216(b). The employer may also be liable "in an additional equal amount as liquidated damages," id., unless "the employer shows to the satisfaction of the court that the act or omission . . . was in good faith, and that [the employer] had reasonable grounds for believing that his

---

[3] The FLSA initially applied only to the private sector when enacted in 1938, but was amended to cover public employees in 1974. See Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55 (1974).

act or omission was not a violation of the [FLSA]," 29 U.S.C. § 260.

2. The Court's Reasoning in Martin Applies

In its motion to dismiss, defendant first argues that plaintiffs' complaint should be dismissed for failure to state a claim because the agencies for which appropriations lapsed on December 22, 2018, were prohibited by the ADA from paying their employees—even excepted employees who were required to work. See ECF No. 33 at 14-16. This mandate, in defendant's view, means that defendant cannot be held liable for violating its obligations under the FLSA. See id. Defendant argues:

> When Congress criminalized payments during an appropriations lapse, it plainly precluded payments on the schedule plaintiffs assert is required by the FLSA. Federal officials who comply with that criminal prohibition do not violate the FLSA, and Congress did not create a scheme under which compliance with the [ADA] would result in additional compensation as damages to federal employees.

Id. at 14-15.

The court has previously ruled on the intersection of the ADA and the FLSA in the context of a lapse in appropriations. See Martin, 130 Fed. Cl. 578 (2017). In Martin, plaintiffs were "current or former government employees who allege[d] that they were not timely

compensated for work performed during the shutdown, in violation of the [FLSA]." Id. at 580 (citing 29 U.S.C. § 201 et seq.). The plaintiffs in Martin alleged the right to liquidated damages with regard to both the government's failure to timely pay minimum wages and its failure to pay overtime wages. See id. In its motion for summary judgment, the government argued that "it should avoid liability under the FLSA for its failure to [pay plaintiffs on their regularly scheduled pay days during the shutdown] because it was barred from making such payments pursuant to the ADA." See id. at 582. The government summarized its argument in Martin as follows:

> The FLSA and the Anti-Deficiency Act appear to impose two conflicting obligations upon Federal agencies: the FLSA mandates that the agencies "shall pay to each of [its] employees" a minimum wage, 29 U.S.C. § 206(a) (emphasis added), which has been interpreted by the courts to include a requirement that the minimum wage be paid on the employees' next regularly scheduled pay day, see Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 707 n.20, [65 S. Ct. 895, 89 L. Ed. 1296] (1945); Biggs v. Wilson, 1 F.3d 1537, 1540 (9th Cir. 1993), and the [ADA] mandates that "[a]n officer or employee of the United States Government . . . may not . . . make or authorize an expenditure . . . exceeding an amount available in an appropriation or fund for the expenditure. . . ." 31 U.S.C. § 1341(A)(1)(A) (emphasis added). Thus, when Federal agencies are faced with a lapse in appropriations

> and cannot pay excepted employees on their next regularly scheduled payday, the question arises of which statutory mandate controls.

Id. at 582-83 (quoting defendant's motion for summary judgment) (alterations in original).

After reviewing applicable precedent and persuasive authority, the court concluded that "the issue is more complex than simply a choice between whether the FLSA or the ADA controls." Id. at 583. In the court's view:

> the appropriate way to reconcile the [ADA and the FLSA] is not to cancel defendant's obligation to pay its employees in accordance with the manner in which the FLSA is commonly applied. Rather, the court would require that defendant demonstrate a good faith belief, based on reasonable grounds, that its actions were appropriate. As such, the court will proceed to analyze this case under the construct of the FLSA, and evaluate the existence and operation of the ADA as part of determining whether defendant met the statutory requirements to avoid liability for liquidated damages.

Id. at 584.

The court noted that plaintiffs' claims survived a motion to dismiss because they had "alleged that defendant had failed to pay wages" on plaintiffs' "next regularly scheduled payday." Id. at 584. On summary judgment, the court concluded that plaintiffs had proven this claim. See id. The court then concluded

that the evidence supported an award of liquidated damages because the government failed to satisfy the court that it acted in good faith and on reasonable grounds when it failed to make the payments required under the FLSA.[4] See id. at 585-86.

Both parties acknowledge that the plaintiffs in Martin were "situated similarly to plaintiffs here." ECF No. 33 at 15 (defendant's motion to dismiss); see also ECF No. 32 at 341 (plaintiffs citing Martin in their complaint); ECF No. 34 at 16 (plaintiffs noting that defendant makes the "exact same argument" here as it did in Martin with regard to the intersection of the FLSA and the ADA). In addition, plaintiffs here, like the plaintiffs in Martin, have alleged that defendant's violations of the FLSA were willful. See ECF No. 32 at 349, 350, 351, 353, 354.

In its motion to dismiss, defendant does not dispute plaintiffs' allegations that they were required to work during the shutdown, or that the plaintiffs were not paid during that time due to the lapse in appropriations. See ECF No. 33. With regard to the sufficiency of plaintiffs' allegations, defendant characterizes the issue now before the court as "whether plaintiffs have

---

[4] In Martin, the defendant also argued that it should avoid liability for liquidated damages with regard to overtime wages due to its inability to calculate the correct amounts due. See Martin v. United States, 130 Fed. Cl. 578, 586-87 (2017). This argument was based on a bulletin from the Department of Labor, and involves an issue that has not been raised in the present case. The absence of this argument, however, has no bearing on the application of the court's reasoning in Martin with regard to the structure of the proper analysis in this case.

stated a claim for liquidated damages under the [FLSA] notwithstanding the provisions of the [ADA]." Id. at 8. In arguing its position, defendant reiterates the arguments advanced in Martin, but does not present any meaningful distinction between the posture of the Martin plaintiffs and the plaintiffs here. Instead, it acknowledges that "[t]his Court in Martin v. United States concluded that plaintiffs situated similarly to plaintiffs here could recover liquidated damages under the FLSA," but states that it "respectfully disagree[s] with that holding." Id. at 15.

Notwithstanding defendant's disagreement, the court continues to believe that the framework it set out in Martin is appropriate and applies here.[5] As it did in

---

[5] Defendant also argues that its obligations under the FLSA are limited by the ADA because "a congressional payment instruction to an agency must be read in light of the [ADA]." ECF No. 33 at 18. In support of this argument, defendant cites to Highland Falls-Fort Montgomery Cent. Sch. Dist. v. United States, 48 F.3d 1166, 1171 (Fed. Cir. 1995). See id. In Highland-Falls, plaintiffs challenged the Department of Education's (DOE) method for allocating funds under the Impact Aid Act. Highland Falls, 48 F.3d at 1171. The United States Court of Appeals for the Federal Circuit found, however, that the DOE's "approach was consistent with statutory requirements." Id. The case did not address FLSA claims, and found that the DOE's approach "harmonized the requirements of the Impact Aid Act and the [ADA]." See id. In the court's view, the Federal Circuit's decision in Highland Falls does not alter the analysis in this case. The United States District Court for the District of Columbia's combined decision in National Treasury Employees Union v. Trump, Case No. 19-cv-50 and Hardy v. Trump, Case No. 19-cv-51, 444 F. Supp. 3d 108 (D.D.C. 2020), discussed by defendant in one of its supplemental filings, see ECF No. 50, is likewise unhelpful. Although it involved facts that arose from the same 2018 lapse in appropriations, the

Martin, "the court will proceed to analyze this case under the construct of the FLSA, and evaluate the existence and operation of the ADA as part of determining whether defendant met the statutory requirements to avoid liability for liquidated damages."[6] Martin, 130 Fed. Cl. at 584. The court will, of course, consider the GEFTA amendment to the ADA as part of its analysis.

3. Waiver of Sovereign Immunity

Before analyzing the sufficiency of plaintiffs' allegations, the court must address defendant's contention that plaintiffs' claims are barred by the doctrine of sovereign immunity. In its motion to dismiss, defendant correctly notes that "'[a] waiver of the Federal Government's sovereign immunity must be unequivocally

---

decision focuses almost exclusively on an analysis of whether plaintiffs' claims were moot, rather than on the operation of the ADA.

[6] The parties both claim that the Supreme Court of the United States' decision in Maine Community Health, 140 S. Ct. 1308, supports their position in this case. See ECF No. 59, ECF No. 60. Maine Community Health does not address the FLSA, and only includes a limited discussion of the ADA. See Maine Cmty. Health, 140 S. Ct. at 1321-22. Accordingly, the decision does not dictate the outcome here. To the extent that the case informs the present discussion, however, it tends to support plaintiffs. In the opinion, the Supreme Court held that "the [ADA] confirms that Congress can create obligations without contemporaneous funding sources," and concludes that "the plain terms of the [statute at issue] created an obligation neither contingent on nor limited by the availability of appropriations or other funds." Id. at 1322, 1323. Applied here, this conclusion suggests that the defendant can incur an obligation to pay plaintiffs pursuant to the normal operation of the FLSA even when funding is not available.

expressed in statutory text, and will not be implied.'" ECF No. 33 at 20-21 (quoting Lane v. Pena, 518 U.S. 187, 192, 116 S.Ct. 2092, 135 L.Ed.2d 486 (1996)). And that waiver "'will be strictly construed, in terms of its scope, in favor of the sovereign.'" Id. at 21 (quoting Lane, 518 U.S. at 192, 116 S.Ct. 2092). Defendant concedes that the FLSA includes a waiver of sovereign immunity, but argues that the claims made by plaintiffs in this case fall outside the scope of that waiver. See id.; see also King v. United States, 112 Fed. Cl. 396, 399 (2013) (stating that "there is no question that sovereign immunity has been waived under the FLSA").

Defendant argues that the FLSA "does not require that employees be paid on their regularly scheduled pay date or make damages available when compensation is not received on a pay date." ECF No. 33 at 21. As a result, defendant contends, the scope of the FLSA's waiver of sovereign immunity does not extend to the category of claims alleging a FLSA violation because wages were not paid as scheduled, such as plaintiffs' claims in this case. See id. at 20-23. According to defendant, the GEFTA confirms its long-standing belief that the government's payment obligations under the FLSA are abrogated by a lack of appropriations:

> The [GEFTA] provides that "each excepted employee who is required to perform work during a . . . lapse in appropriations shall be paid for such work, at the employee's standard rate of pay, at the earliest date possible after the lapse in appropriations ends, regardless of scheduled pay dates." Pub. L. No.

> 116-1, 133 Stat. 3. Congress has thus spoken directly to the question of when compensation should be paid. There can be no basis for inferring that compensation made in accordance with that explicit directive subjects the United States to liquidated damages.

Id. at 22-23.

Defendant also asserts that the scope of its waiver of sovereign immunity for FLSA claims does not cover the claims asserted here. See ECF No. 38 at 14. It argues, without citation to any authority, that:

> a cause of action under the FLSA cannot per se accrue against the United States when federal agencies do not pay employees on their regularly scheduled paydays during a lapse in appropriations because a federal statute expressly provides for when and at what rate federal employees will be paid under those circumstances.

Id. at 14-15.

The court disagrees. The claims brought by plaintiffs in this case are straightforward FLSA minimum wage and overtime claims under the FLSA. See ECF No. 32 at 348-55. Because the FLSA does not specify when such claims arise, courts have interpreted the statute to include a requirement that employers make appropriate wage payments on the employee's next regularly scheduled payday. See Brooklyn Sav. Bank, 324 U.S. at 707, 65 S.Ct. 895; Biggs, 1 F.3d at 1540. Contrary to defendant's suggestion, the court is

unpersuaded that this judicially-imposed timing requirement transforms ordinary FLSA claims into something analytically distinct, and beyond the scope of the statute's waiver of sovereign immunity.

Accordingly, the court finds that defendant has waived sovereign immunity as to plaintiffs' claims, as it has with all FLSA claims, and the court will review the sufficiency of plaintiffs' allegations as it would in any other FLSA case.

4. Plaintiffs State a Claim for FLSA Violations

As noted above, the FLSA requires that the government "pay to each of [its] employees" a minimum wage. 29 U.S.C. § 206(a). Pursuant to the FLSA, the government also must compensate employees for hours worked in excess of a forty-hour workweek "at a rate not less than one and one-half times the regular rate at which [they are] employed." 29 U.S.C. § 207(a)(1). And although the text of the statute does not specify the date on which wages must be paid, courts have held that employers are required to pay these wages on the employee's next regularly scheduled payday. See Brooklyn Sav. Bank, 324 U.S. at 707, 65 S.Ct. 895; Biggs, 1 F.3d at 1540.

In their complaint, plaintiffs allege that during the lapse in appropriations, they were categorized as excepted employees, and "compelled to continue to work through the shutdown." ECF No. 32 at 339.

Plaintiffs also allege that they did not receive timely minimum or overtime wages for work performed during the shutdown. Id. at 344-48.

Defendant does not contest any of these allegations, and in fact, concedes that "plaintiffs, air traffic controllers, [were] employees of the [FAA], an agency that was affected by the lapse in appropriations," and that "plaintiffs were paid at the earliest possible date after the lapse in appropriations ended." ECF No. 33 at 13, 14. Defendant also admits that "[p]laintiffs are federal employees who performed excepted work during the most recent lapse in appropriations." Id. at 17. In short, defendant does not claim that plaintiffs are not entitled to payment under the FLSA, but instead argues that it "fully complied with its statutory obligations to plaintiffs." Id. at 18.

The court finds that, presuming the facts as alleged in the complaint and drawing all reasonable inferences in their favor, plaintiffs have stated a claim for relief under the FLSA. See Cary, 552 F.3d at 1376 (citing Gould, 935 F.2d at 1274).

5. Liquidated Damages

Defendant insists that its failure to pay plaintiffs was a decision made in good faith, in light of the ADA. See ECF No. 38 at 15. It further urges the court to find that its good faith is so clear that the recovery of liquidated damages should be barred at this stage in the

litigation. See id. at 15-18. But as the court held in Martin:

> [I]t would be inappropriate to determine, on motion to dismiss, whether the government had reasonable grounds and good faith. It may well be that the government can establish these defenses, but its opportunity to do so will come later on summary judgment or at trial. Moreover, even if the court were to decide that a liquidated damages award is warranted, additional factual determinations remain to be made as to which employees, if any, are entitled to recover, and damages, if any, to which those employees would be entitled.

Martin v. United States, 117 Fed. Cl. 611, 627 (2014). Accordingly, the court declines to rule at this time on the issue of whether defendant can establish a good faith defense against liability for liquidated damages in this case.

IV. Conclusion

Accordingly, for the foregoing reasons:

(1) Defendant's motion to dismiss, ECF No. 33, is **DENIED**;

(2) On or before **February 5, 2021**, defendant is directed to **FILE** an **answer** or otherwise respond to plaintiffs' complaint; and

(3) On or before **February 5, 2021**, the parties are directed to **CONFER** and **FILE** a **joint**

151 Fed.Cl. 148
United States Court of Federal Claims.

D.P., et al., Plaintiffs,
v.
The UNITED STATES, Defendant.

No. 19-54C
|
(E-Filed: December 1, 2020)

Attorneys and Law Firms

Nicholas M. Wieczorek, Las Vegas, NV, for plaintiff.

Erin K. Murdock-Park, Trial Attorney, with whom were Joseph H. Hunt, Assistant Attorney General, Robert E. Kirschman, Jr., Director, Reginald T. Blades, Jr., Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for defendant. Ann C. Motto, of counsel.

OPINION AND ORDER

CAMPBELL-SMITH, Judge.

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. 4 at 1, 4-5 (amended complaint, hereinafter referred to as the complaint).

On May 3, 2019, defendant moved to dismiss the complaint for failure to state a claim on which relief may be granted, pursuant to Rule 12(b)(6) of the Rules of the United States Court of Federal Claims (RCFC), on the basis that the Anti-Deficiency Act (ADA), 31 U.S.C. §§ 1341-42, prohibited the government from paying employees. See ECF No. 23.

In analyzing defendant's motion, the court has considered: (1) plaintiffs' complaint, ECF No. 4; (2) defendant's motion to dismiss, ECF No. 23; (3) plaintiffs' response to defendant's motion, ECF No. 26; (4) defendant's reply in support of its motion, ECF No. 34; (5) defendant's first supplemental brief in support of its motion, ECF No. 36; (6) plaintiffs' response to defendant's first supplemental brief, ECF No. 39; (7) defendant's second supplemental brief in support of its motion, ECF No. 47; (8) plaintiffs' response to defendant's second supplemental brief, ECF No. 51; (9) defendant's third supplemental brief in support of its motion, ECF No. 55; and (10) plaintiffs' response to defendant's third supplemental brief, ECF No. 56. The motion is now fully briefed and ripe for ruling.[1] The

[1] Defendant moves for dismissal of plaintiffs' complaint for only one reason—"for failure to state a claim upon which relief may be granted." ECF No. 23 at 6. In one of its supplemental briefs, defendant suggests that a recent decision issued by the Supreme Court of the United States, Maine Community Health Options v. United States, ___ U.S. ___, 140 S. Ct. 1308, 206 L.Ed.2d 764 (2020), a case that does not involve FLSA claims, indicates that this court lacks jurisdiction to hear this case because the FLSA "contains its own provision for judicial review." ECF No. 55 at 2. In the same brief, defendant acknowledges binding precedent from the United States Court of Appeals for the Federal

court has considered all of the arguments presented by the parties, and addresses the issues that are pertinent to the court's ruling in this opinion. For the following reasons, defendant's motion is **DENIED**.

I. Background

Beginning at 12:01 a.m. on December 22, 2018, the federal government partially shut down due to a lack of appropriations. See ECF No. 4 at 1, 3. The named plaintiffs in this case were, at the time of the shutdown, employees of "the Federal Air Marshal Service, which is a component of the Transportation Security Administration, which is a component of the Department of Homeland Security."[2] Id. at 2. Plaintiffs further allege that they were "directed to work" during the shutdown without pay, because "they were classified as

---

Circuit to the contrary. See id. (citing Abbey v. United States, 745 F.3d 1363 (Fed. Cir. 2014)). The court will not review this entirely new basis for dismissal, which was made for the first time in defendant's third supplemental brief, and which defendant acknowledges contradicts binding precedent. If defendant believes this court lacks jurisdiction to continue exercising its authority in this case, it may file a motion properly raising the issue. See Rule 12(h)(3) of the Rules of the United States Court of Federal Claims (RCFC) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.").

[2] Defendant argues, in a footnote, that claims made by FLSA-exempt employees and employees who have asserted the same claims in another court should be dismissed from this action. See ECF No. 23 at 15 n.4. The court does not evaluate these assertions in this opinion because defendant neither identifies any such plaintiffs in this case, nor sufficiently briefs the issue to the court.

'essential employees' or 'excepted employees.'" Id. at 1, 3. Defendant's failure to timely pay plaintiffs, they allege, is a violation of the FLSA. See id. at 3.

Plaintiffs assert that defendant "did not act in good faith and did not have reasonable grounds to violate the FLSA," and "[a]s a result, [d]efendant willfully violated the FLSA." Id. at 5. "Plaintiffs bring this action on behalf of the themselves, all similarly situated Federal Air Marshals, and all other similarly situated Transportation Security Administration employees, and/or other federal employees," id. at 2, and seek "all available relief under [the FLSA], including payment of wages lost and an additional amount as liquidated damages," id. at 5.

II. Legal Standards

When considering a motion to dismiss brought under RCFC 12(b)(6), the court "must presume that the facts are as alleged in the complaint, and make all reasonable inferences in favor of the plaintiff." Cary v. United States, 552 F.3d 1373, 1376 (Fed. Cir. 2009) (citing Gould, Inc. v. United States, 935 F.2d 1271, 1274 (Fed. Cir. 1991)). It is well-settled that a complaint should be dismissed under RCFC 12(b)(6) "when the facts asserted by the claimant do not entitle him to a legal remedy." Lindsay v. United States, 295 F.3d 1252, 1257 (Fed. Cir. 2002). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678, 129

S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)).

III. Analysis

A. Relevant Statutes

This case fundamentally concerns the intersection of two statutes, the ADA and the FLSA. The ADA states that "an officer or employee" of the federal government "may not . . . make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation." 31 U.S.C. § 1341(a)(1)(A). In addition, the ADA dictates that "[a]n officer or employee of the United States Government or of the District of Columbia government may not accept voluntary services for either government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property." 31 U.S.C. § 1342. In 2019, Congress amended the ADA, adding, in relevant part, the following:

> [E]ach excepted employee who is required to perform work during a covered lapse in appropriations[3] shall be paid for such work, at the employee's standard rate of pay, at the earliest date possible after the lapse in appropriations ends, regardless of scheduled pay dates,

---

[3] The statute defines "covered lapse in appropriations" to mean "any lapse in appropriations that begins on or after December 22, 2018." 31 U.S.C. § 1341(c)(1)(A).

> and subject to the enactment of appropriations Acts ending the lapse.

31 U.S.C. § 1341(c)(2) (footnote added). The amendment is commonly referred to as the Government Employees Fair Treatment Act of 2019 (GEFTA), Pub. L. No. 116-1, 133 Stat. 3 (2019). The knowing or willful violation of the ADA is punishable by a fine of "not more than $5,000" or imprisonment "for not more than 2 years, or both." 31 U.S.C. § 1350. And federal employees who violate the ADA "shall be subject to appropriate administrative discipline including, when circumstances warrant, suspension from duty without pay or removal from office." 31 U.S.C. § 1349(a).

Defendant separately has obligations to its employees pursuant to the FLSA, which governs minimum wage and overtime wage compensation for certain employees.[4] See 29 U.S.C. § 213 (identifying categories of exempt employees). The FLSA requires that the government "pay to each of [its] employees" a minimum wage. 29 U.S.C. § 206(a). Pursuant to the FLSA, the government also must compensate employees for hours worked in excess of a forty-hour workweek "at a rate not less than one and one-half times the regular rate at which [they are] employed." 29 U.S.C. § 207(a)(1). Although the text of the statute does not specify the date on which wages must be paid, courts have held that employers are required to pay these wages on the

---

[4] The FLSA initially applied only to the private sector when enacted in 1938, but was amended to cover public employees in 1974. See Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55 (1974).

employee's next regularly scheduled payday. See 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). If an employer violates the FLSA's pay provisions, the employer is "liable to the . . . employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be." 29 U.S.C. § 216(b). The employer may also be liable "in an additional equal amount as liquidated damages," id., unless "the employer shows to the satisfaction of the court that the act or omission . . . was in good faith, and that [the employer] had reasonable grounds for believing that his act or omission was not a violation of the [FLSA]," 29 U.S.C. § 260.

B. The Court's Reasoning in Martin Applies

In its motion to dismiss, defendant first argues that plaintiffs' complaint should be dismissed for failure to state a claim because the agencies for which appropriations lapsed on December 22, 2018, were prohibited by the ADA from paying their employees – even excepted employees who were required to work. See ECF No. 23 at 12-14. This mandate, in defendant's view, means that defendant cannot be held liable for violating its obligations under the FLSA. See id. Defendant argues:

> When Congress criminalized payments during an appropriations lapse, it plainly precluded payments on the schedule plaintiffs assert is required by the FLSA. Federal officials who comply with that criminal prohibition do

> not violate the FLSA, and Congress did not create a scheme under which compliance with the [ADA] would result in additional compensation as damages to federal employees.

Id. at 13.

The court has previously ruled on the intersection of the ADA and the FLSA in the context of a lapse in appropriations. See Martin v. United States, 130 Fed. Cl. 578 (2017). In Martin, plaintiffs were "current or former government employees who allege[d] that they were not timely compensated for work performed during the shutdown, in violation of the [FLSA]." Id. at 580 (citing 29 U.S.C. § 201 et seq.). The plaintiffs in Martin alleged the right to liquidated damages with regard to both the government's failure to timely pay minimum wages and its failure to pay overtime wages. See id. In its motion for summary judgment, the government argued that "it should avoid liability under the FLSA for its failure to [pay plaintiffs on their regularly scheduled pay days during the shutdown] because it was barred from making such payments pursuant to the ADA." See id. at 582. The government summarized its argument in Martin as follows:

> The FLSA and the Anti-Deficiency Act appear to impose two conflicting obligations upon Federal agencies: the FLSA mandates that the agencies "shall pay to each of [its] employees" a minimum wage, 29 U.S.C. § 206(a) (emphasis added), which has been interpreted by the courts to include a requirement that the minimum wage be paid on the employees'

> next regularly scheduled pay day, see Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 707 n.20, [65 S. Ct. 895, 89 L. Ed. 1296] (1945); Biggs v. Wilson, 1 F.3d 1537, 1540 (9th Cir. 1993), and the [ADA] mandates that "[a]n officer or employee of the United States Government . . . may not . . . make or authorize an expenditure . . . exceeding an amount available in an appropriation or fund for the expenditure. . . ." 31 U.S.C. § 1341(A)(1)(A) (emphasis added). Thus, when Federal agencies are faced with a lapse in appropriations and cannot pay excepted employees on their next regularly scheduled payday, the question arises of which statutory mandate controls.

Id. at 582-83 (quoting defendant's motion for summary judgment) (alterations in original).

After reviewing applicable precedent and persuasive authority, the court concluded that "the issue is more complex than simply a choice between whether the FLSA or the ADA controls." Id. at 583. In the court's view:

> the appropriate way to reconcile the [ADA and the FLSA] is not to cancel defendant's obligation to pay its employees in accordance with the manner in which the FLSA is commonly applied. Rather, the court would require that defendant demonstrate a good faith belief, based on reasonable grounds, that its actions were appropriate. As such, the court will proceed to analyze this case under the construct of the FLSA, and evaluate the existence and operation of the ADA as part of determining

> whether defendant met the statutory requirements to avoid liability for liquidated damages.

Id. at 584.

The court noted that plaintiffs' claims survived a motion to dismiss because they had "alleged that defendant had failed to pay wages" on plaintiffs' "next regularly scheduled payday." Id. at 584. On summary judgment, the court concluded that plaintiffs had proven this claim. See id. The court then concluded that the evidence supported an award of liquidated damages because the government failed to satisfy the court that it acted in good faith and on reasonable grounds when it failed to make the payments required under the FLSA.[5] See id. at 585-86.

Both parties acknowledge that the plaintiffs in Martin were "situated similarly to plaintiffs here." ECF No. 23 at 14 (defendant's motion to dismiss); see also ECF No. 26 at 9-13 (plaintiff's response urging the court to follow its reasoning in the Martin decision). In its motion to dismiss, defendant does not dispute plaintiffs' allegations that they were required to work

---

[5] In Martin, the defendant also argued that it should avoid liability for liquidated damages with regard to overtime wages due to its inability to calculate the correct amounts due. See Martin v. United States, 130 Fed. Cl. 578, 586-87 (2017). This argument was based on a bulletin from the Department of Labor, and involves an issue that has not been raised in the present case. The absence of this argument, however, has no bearing on the application of the court's reasoning in Martin with regard to the structure of the proper analysis in this case.

during the shutdown, or that the plaintiffs were not paid during that time due to the lapse in appropriations. See ECF No. 23. Defendant characterizes the issue now before the court as "whether plaintiffs have stated a claim for liquidated damages under the [FLSA] notwithstanding the provisions of the [ADA]." Id. at 7. In arguing its position, defendant reiterates the arguments advanced in Martin, but does not present any meaningful distinction between the posture of the Martin plaintiffs and the plaintiffs here. Instead, it acknowledges that "[t]his Court in Martin v. United States concluded that plaintiffs situated similarly to plaintiffs here could recover liquidated damages under FLSA," but states that it "respectfully disagree[s] with that holding." Id. at 14.

Notwithstanding defendant's disagreement, the court continues to believe that the framework it set out in Martin is appropriate and applies here.[6] As it did in

---

[6] Defendant also argues that its obligations under the FLSA are limited by the ADA because "a congressional payment instruction to an agency must be read in light of the [ADA]." ECF No. 23 at 16. In support of this argument, defendant cites to Highland Falls-Fort Montgomery Cent. Sch. Dist. v. United States, 48 F.3d 1166, 1171 (Fed. Cir. 1995). See id. In Highland-Falls, plaintiffs challenged the Department of Education's (DOE) method for allocating funds under the Impact Aid Act. Highland Falls, 48 F.3d at 1171. The United States Court of Appeals for the Federal Circuit found, however, that the DOE's "approach was consistent with statutory requirements." Id. The case did not address FLSA claims, and found that the DOE's approach "harmonized the requirements of the Impact Aid Act and the [ADA]." See id. In the court's view, the Federal Circuit's decision in Highland-Falls does not alter the analysis in this case. The United States District Court for the District of Columbia's combined decision in National

Martin, "the court will proceed to analyze this case under the construct of the FLSA, and evaluate the existence and operation of the ADA as part of determining whether defendant met the statutory requirements to avoid liability for liquidated damages."[7] Martin, 130 Fed. Cl. at 584. The court will, of course, consider the GEFTA amendment to the ADA as part of its analysis.

C. Waiver of Sovereign Immunity

Before analyzing the sufficiency of plaintiffs' allegations, the court must address defendant's contention

---

Treasury Employees Union v. Trump, Case No. 19-cv-50 and Hardy v. Trump, Case No. 19-cv-51, 444 F. Supp. 3d 108 (2020), discussed by defendant in one of its supplemental filings, see ECF No. 47, is likewise unhelpful. Although it involved facts that arose from the same 2018 lapse in appropriations, the decision focuses almost exclusively on an analysis of whether plaintiffs' claims were moot, rather than on the operation of the ADA.

[7] The parties both claim that the Supreme Court of the United States' decision in Maine Community Health, ___ U.S. ___, 140 S. Ct. 1308, 206 L.Ed.2d 764, supports their position in this case. See ECF No. 55, ECF No. 56. Maine Community Health does not address the FLSA, and only includes a limited discussion of the ADA. See Maine Cmty. Health, 140 S. Ct. at 1321-22. Accordingly, the decision does not dictate the outcome here. To the extent that the case informs the present discussion, however, it tends to support plaintiffs. In the opinion, the Supreme Court held that "the [ADA] confirms that Congress can create obligations without contemporaneous funding sources," and concludes that "the plain terms of the [statute at issue] created an obligation neither contingent on nor limited by the availability of appropriations or other funds." Id. at 1322, 1323. Applied here, this conclusion suggests that the defendant can incur an obligation to pay plaintiffs pursuant to the normal operation of the FLSA even when funding is not available.

that plaintiffs' claims are barred by the doctrine of sovereign immunity. In its motion to dismiss, defendant correctly notes that "'[a] waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text, and will not be implied.'" ECF No. 23 at 19 (quoting Lane v. Pena, 518 U.S. 187, 192, 116 S.Ct. 2092, 135 L.Ed.2d 486 (1996)). And that waiver "'will be strictly construed, in terms of its scope, in favor of the sovereign.'" Id. (quoting Lane, 518 U.S. at 192, 116 S.Ct. 2092). Defendant concedes that the FLSA includes a waiver of sovereign immunity, but argues that the claims made by plaintiffs in this case fall outside the scope of that waiver. See id.; see also King v. United States, 112 Fed. Cl. 396, 399 (2013) (stating that "there is no question that sovereign immunity has been waived under the FLSA").

Defendant argues that the FLSA "does not require that employees be paid on their regularly scheduled pay date or make damages available when compensation is not received on a pay date." ECF No. 23 at 19. As a result, defendant contends, the scope of the FLSA's waiver of sovereign immunity does not extend to the category of claims alleging a FLSA violation because wages were not paid as scheduled, such as plaintiffs' claims in this case. See id. at 20-21. According to defendant, the GEFTA confirms its long-standing belief that the government's payment obligations under the FLSA are abrogated by a lack of appropriations:

> The [GEFTA] provides that "each excepted employee who is required to perform work during a . . . lapse in appropriations shall be

> paid for such work, at the employee's standard rate of pay, at the earliest date possible after the lapse in appropriations ends, regardless of scheduled pay dates." Pub. L. No. 116-1, 133 Stat. 3. Congress has thus spoken directly to the question of when compensation should be paid. There can be no basis for inferring that compensation made in accordance with that explicit directive subjects the United States to liquidated damages.

Id. at 21.

Defendant also asserts, without citation to any authority, as follows:

> Given that the [ADA] 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, the government's waiver of sovereign immunity under the FLSA must be strictly construed against liability for the delayed (but always forthcoming) payment of wages because of a lapse in appropriations.

ECF No. 34 at 12-13.

The court disagrees. The claims brought by plaintiffs in this case are straightforward minimum wage and overtime claims under the FLSA. See ECF No. 26 at 5; ECF No. 4 at 4-5. Because the FLSA does not specify when such claims arise, courts have interpreted the statute to include a requirement that employers make

appropriate wage payments on the employee's next regularly scheduled payday. See Brooklyn Sav. Bank, 324 U.S. at 707, 65 S.Ct. 895; Biggs, 1 F.3d at 1540. Contrary to defendant's suggestion, the court is unpersuaded that this judicially-imposed timing requirement transforms ordinary FLSA claims into something analytically distinct, and beyond the scope of the statute's waiver of sovereign immunity.

Accordingly, the court finds that defendant has waived sovereign immunity as to plaintiffs' claims, as it has with all FLSA claims, and the court will review the sufficiency of plaintiffs' allegations as it would in any other FLSA case.

D. Plaintiffs State a Claim for FLSA Violations

As noted above, the FLSA requires that the government "pay to each of [its] employees" a minimum wage. 29 U.S.C. § 206(a). Pursuant to the FLSA, the government also must compensate employees for hours worked in excess of a forty-hour workweek "at a rate not less than one and one-half times the regular rate at which [they are] employed." 29 U.S.C. § 207(a)(1). And although the text of the statute does not specify the date on which wages must be paid, courts have held that employers are required to pay these wages on the employee's next regularly scheduled payday. See Brooklyn Sav. Bank, 324 U.S. at 707, 65 S.Ct. 895; Biggs, 1 F.3d at 1540.

In their complaint, plaintiffs allege that during the lapse in appropriations, they were each "classified

as FLSA non-exempt" and "as an [e]xcepted [e]mployee and performed work during the partial government shutdown for which [they were] not compensated on the scheduled paydays." ECF No. 4 at 2. Plaintiffs allege specific facts demonstrating how the allegations apply to each plaintiff. See id.

Defendant does not contest any of these allegations, and in fact, concedes that "plaintiffs [were] employees of agencies affected by the lapse in appropriations," and that "plaintiffs were paid at the earliest possible date after the lapse in appropriations ended." ECF No. 23 at 12, 13. Defendant also admits that "[p]laintiffs are federal employees who performed excepted work during the most recent lapse in appropriations." Id. at 15. In short, defendant does not claim that plaintiffs are not entitled to payment under the FLSA, but instead argues that it "fully complied with its statutory obligations to plaintiffs." Id. at 16.

The court finds that, presuming the facts as alleged in the complaint and drawing all reasonable inferences in their favor, plaintiffs have stated a claim for relief under the FLSA. See Cary, 552 F.3d at 1376 (citing Gould, 935 F.2d at 1274).

E. Liquidated Damages

Defendant insists that its failure to pay plaintiffs was a decision made in good faith, in light of the ADA. See ECF No. 34 at 13. It further urges the court to find that its good faith is so clear that the recovery of liquidated damages should be barred at this stage in the

litigation. See id. at 13-15. But as the court held in Martin:

> [I]t would be inappropriate to determine, on motion to dismiss, whether the government had reasonable grounds and good faith. It may well be that the government can establish these defenses, but its opportunity to do so will come later on summary judgment or at trial. Moreover, even if the court were to decide that a liquidated damages award is warranted, additional factual determinations remain to be made as to which employees, if any, are entitled to recover, and damages, if any, to which those employees would be entitled.

Martin v. United States, 117 Fed. Cl. 611, 627 (2014). Accordingly, the court declines to rule at this time on the issue of whether defendant can establish a good faith defense against liability for liquidated damages in this case.

IV. Conclusion

Accordingly, for the foregoing reasons:

(1) Defendant's motion to dismiss, ECF No. 23, is **DENIED**;

(2) On or before **January 29, 2021**, defendant is directed to **FILE** an **answer** or otherwise respond to plaintiffs' complaint; and

(3) On or before **January 29, 2021**, the parties are directed to **CONFER** and **FILE** a **joint**

151 Fed.Cl. 156
United States Court of Federal Claims.

Roberto HERNANDEZ, et al., Plaintiffs,
v.
The UNITED STATES, Defendant.

No. 19-63C
|
(E-Filed: December 1, 2020)

Attorneys and Law Firms

William Clifton Alexander, Corpus Christi, TX, for plaintiff.

Erin K. Murdock-Park, Trial Attorney, with whom were Joseph H. Hunt, Assistant Attorney General, Robert E. Kirschman, Jr., Director, Reginald T. Blades, Jr., Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for defendant. Ann C. Motto, of counsel.

OPINION AND ORDER

CAMPBELL-SMITH, Judge.

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. 1 at 1-2 (complaint). On May 3, 2019, defendant moved to dismiss the

complaint for failure to state a claim on which relief may be granted, pursuant to Rule 12(b)(6) of the Rules of the United States Court of Federal Claims (RCFC), on the basis that the Anti-Deficiency Act (ADA), 31 U.S.C. §§ 1341-42, prohibited the government from paying employees. See ECF No. 25.

In analyzing defendant's motion, the court has considered: (1) plaintiffs' complaint, ECF No. 1; (2) defendant's motion to dismiss, ECF No. 25; (3) plaintiffs' response to defendant's motion, ECF No. 28; (4) defendant's reply in support of its motion, ECF No. 32; (5) defendant's first supplemental brief in support of its motion, ECF No. 34; (6) plaintiffs' response to defendant's first supplemental brief, ECF No. 35; (7) defendant's second supplemental brief in support of its motion, ECF No. 43; (8) plaintiffs' response to defendant's second supplemental brief, ECF No. 47; (9) defendant's third supplemental brief in support of its motion, ECF No. 51; and (10) plaintiffs' response to defendant's third supplemental brief, ECF No. 52. The motion is now fully briefed and ripe for ruling.[1] The

[1] Defendant moves for dismissal of plaintiffs' complaint for only one reason—"for failure to state a claim upon which relief may be granted." ECF No. 25 at 6. In one of its supplemental briefs, defendant suggests that a recent decision issued by the Supreme Court of the United States, Maine Community Health Options v. United States, ___ U.S. ___, 140 S. Ct. 1308, 206 L.Ed.2d 764 (2020), a case that does not involve FLSA claims, indicates that this court lacks jurisdiction to hear this case because the FLSA "contains its own provision for judicial review." ECF No. 51 at 2. In the same brief, defendant acknowledges binding precedent from the United States Court of Appeals for the Federal Circuit to the contrary. See id. (citing Abbey v. United States, 745 F.3d

court has considered all of the arguments presented by the parties, and addresses the issues that are pertinent to the court's ruling in this opinion. For the following reasons, defendant's motion is **DENIED**.

I. Background

Beginning at 12:01 a.m. on December 22, 2018, the federal government partially shut down due to a lack of appropriations. See ECF No. 1 at 1. The named plaintiffs in this case were, at the time of the shutdown, employees of the United States Immigration and Customs Enforcement, within the Department of Homeland Security. See id. at 3.

In their complaint, plaintiffs allege that they are "excepted employees," a term which refers to "'employees who are funded through annual appropriations who are nonetheless excepted from the furlough because they are performing work that, by law, may continue to be performed during a lapse in appropriations.'" Id. at 1-2 (quoting the United States Office of Personnel Management Guidance for Government Furloughs, Section B.1, https://www.opm.gov/policy-data-

---

1363 (Fed. Cir. 2014)). The court will not review this entirely new basis for dismissal, which was made for the first time in defendant's third supplemental brief, and which defendant acknowledges contradicts binding precedent. If defendant believes this court lacks jurisdiction to continue exercising its authority in this case, it may file a motion properly raising the issue. See Rule 12(h)(3) of the Rules of the United States Court of Federal Claims (RCFC) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.").

oversight/pay-leave/furlough-guidance/guidance-for-shutdown-furloughs.pdf (Sept. 2015)). Plaintiffs also allege that, in addition to being excepted employees required to work during a shutdown, they were also "classified as [] FLSA non-exempt employee[s]." Id. at 3. As a result of being categorized as non-exempt, excepted employees, plaintiffs were required to work during the shutdown, but were not paid minimum or overtime wages on their regularly scheduled paydays in violation of the FLSA. See id. at 4-5.

According to plaintiffs, defendant "conducted no analyses to determine whether its failure to pay [e]xcepted [e]mployees on their regularly scheduled payday complied with the FLSA." Id. at 5. In support of this allegation, plaintiffs cite this court's decision in Martin v. United States, 130 Fed. Cl. 578 (2017), a case in which this court "has found that the federal government's failure to timely pay similarly-situated plaintiffs violates the FLSA and that the government is liable for liquidated damages for committing such violations." Id. at 5. Plaintiffs now seek payment of "unpaid back wages due to [p]laintiffs, . . . civil penalties, and . . . liquidated damages equal in amount to the unpaid compensation found due to [p]laintiffs." Id. at 10.

II. Legal Standards

When considering a motion to dismiss brought under RCFC 12(b)(6), the court "must presume that the facts are as alleged in the complaint, and make all reasonable inferences in favor of the plaintiff." Cary v.

United States, 552 F.3d 1373, 1376 (Fed. Cir. 2009) (citing Gould, Inc. v. United States, 935 F.2d 1271, 1274 (Fed. Cir. 1991)). It is well-settled that a complaint should be dismissed under RCFC 12(b)(6) "when the facts asserted by the claimant do not entitle him to a legal remedy." Lindsay v. United States, 295 F.3d 1252, 1257 (Fed. Cir. 2002). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)).

III. Analysis

A. Relevant Statutes

This case fundamentally concerns the intersection of two statutes, the ADA and the FLSA. The ADA states that "an officer or employee" of the federal government "may not . . . make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation." 31 U.S.C. § 1341(a)(1)(A). In addition, the ADA dictates that "[a]n officer or employee of the United States Government or of the District of Columbia government may not accept voluntary services for either government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of

property." 31 U.S.C. § 1342. In 2019, Congress amended the ADA, adding, in relevant part, the following:

> [E]ach excepted employee who is required to perform work during a covered lapse in appropriations[2] shall be paid for such work, at the employee's standard rate of pay, 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) (footnote added). The amendment is commonly referred to as the Government Employees Fair Treatment Act of 2019 (GEFTA), Pub. L. No. 116-1, 133 Stat. 3 (2019). The knowing or willful violation of the ADA is punishable by a fine of "not more than $5,000" or imprisonment "for not more than 2 years, or both." 31 U.S.C. § 1350. And federal employees who violate the ADA "shall be subject to appropriate administrative discipline including, when circumstances warrant, suspension from duty without pay or removal from office." 31 U.S.C. § 1349(a).

Defendant separately has obligations to its employees pursuant to the FLSA, which governs minimum wage and overtime wage compensation for certain employees.[3] See 29 U.S.C. § 213 (identifying

---

[2] The statute defines "covered lapse in appropriations" to mean "any lapse in appropriations that begins on or after December 22, 2018." 31 U.S.C. § 1341(c)(1)(A).

[3] The FLSA initially applied only to the private sector when enacted in 1938, but was amended to cover public employees in

categories of exempt employees). The FLSA requires that the government "pay to each of [its] employees" a minimum wage. 29 U.S.C. § 206(a). Pursuant to the FLSA, the government also must compensate employees for hours worked in excess of a forty-hour workweek "at a rate not less than one and one-half times the regular rate at which [they are] employed." 29 U.S.C. § 207(a)(1). Although the text of the statute does not specify the date on which wages must be paid, courts have held that employers are required to pay these wages on the employee's next regularly scheduled payday. See 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). If an employer violates the FLSA's pay provisions, the employer is "liable to the . . . employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be." 29 U.S.C. § 216(b). The employer may also be liable "in an additional equal amount as liquidated damages," id., unless "the employer shows to the satisfaction of the court that the act or omission . . . was in good faith, and that [the employer] had reasonable grounds for believing that his act or omission was not a violation of the [FLSA]," 29 U.S.C. § 260.

1974. See Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55 (1974).

B. The Court's Reasoning in Martin Applies

In its motion to dismiss, defendant first argues that plaintiffs' complaint should be dismissed for failure to state a claim because the agencies for which appropriations lapsed on December 22, 2018, were prohibited by the ADA from paying their employees – even excepted employees who were required to work. See ECF No. 25 at 12-14. This mandate, in defendant's view, means that defendant cannot be held liable for violating its obligations under the FLSA. See id. Defendant argues:

> When Congress criminalized payments during an appropriations lapse, it plainly precluded payments on the schedule plaintiffs assert is required by the FLSA. Federal officials who comply with that criminal prohibition do not violate the FLSA, and Congress did not create a scheme under which compliance with the [ADA] would result in additional compensation as damages to federal employees.

Id. at 13.

The court has previously ruled on the intersection of the ADA and the FLSA in the context of a lapse in appropriations. See Martin, 130 Fed. Cl. 578. In Martin, plaintiffs were "current or former government employees who allege[d] that they were not timely compensated for work performed during the shutdown, in violation of the [FLSA]." Id. at 580 (citing 29 U.S.C. § 201 et seq.). The plaintiffs in Martin alleged the right to liquidated damages with regard to both the

government's failure to timely pay minimum wages and its failure to pay overtime wages. See id. In its motion for summary judgment, the government argued that "it should avoid liability under the FLSA for its failure to [pay plaintiffs on their regularly scheduled pay days during the shutdown] because it was barred from making such payments pursuant to the ADA." See id. at 582. The government summarized its argument in Martin as follows:

> The FLSA and the Anti-Deficiency Act appear to impose two conflicting obligations upon Federal agencies: the FLSA mandates that the agencies "shall pay to each of [its] employees" a minimum wage, 29 U.S.C. § 206(a) (emphasis added), which has been interpreted by the courts to include a requirement that the minimum wage be paid on the employees' next regularly scheduled pay day, see Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 707 n.20, [65 S. Ct. 895, 89 L. Ed. 1296] (1945); Biggs v. Wilson, 1 F.3d 1537, 1540 (9th Cir. 1993), and the [ADA] mandates that "[a]n officer or employee of the United States Government . . . may not . . . make or authorize an expenditure . . . exceeding an amount available in an appropriation or fund for the expenditure. . . ." 31 U.S.C. § 1341(A)(1)(A) (emphasis added). Thus, when Federal agencies are faced with a lapse in appropriations and cannot pay excepted employees on their next regularly scheduled payday, the question arises of which statutory mandate controls.

Id. at 582-83 (quoting defendant's motion for summary judgment) (alterations in original).

After reviewing applicable precedent and persuasive authority, the court concluded that "the issue is more complex than simply a choice between whether the FLSA or the ADA controls." Id. at 583. In the court's view:

> the appropriate way to reconcile the [ADA and the FLSA] is not to cancel defendant's obligation to pay its employees in accordance with the manner in which the FLSA is commonly applied. Rather, the court would require that defendant demonstrate a good faith belief, based on reasonable grounds, that its actions were appropriate. As such, the court will proceed to analyze this case under the construct of the FLSA, and evaluate the existence and operation of the ADA as part of determining whether defendant met the statutory requirements to avoid liability for liquidated damages.

Id. at 584.

The court noted that plaintiffs' claims survived a motion to dismiss because they had "alleged that defendant had failed to pay wages" on plaintiffs' "next regularly scheduled payday." Id. at 584. On summary judgment, the court concluded that plaintiffs had proven this claim. See id. The court then concluded that the evidence supported an award of liquidated damages because the government failed to satisfy the court that it acted in good faith and on reasonable

grounds when it failed to make the payments required under the FLSA.[4] See id. at 585-86.

Both parties acknowledge that the plaintiffs in Martin were "situated similarly to plaintiffs here." ECF No. 25 at 13 (defendant's motion to dismiss); see also ECF No. 1 at 5 (plaintiffs citing Martin in their complaint); ECF No. 28 at 14-15 (plaintiffs reviewing and favorably comparing the arguments made in Martin). In addition, plaintiffs here, like the plaintiffs in Martin, have alleged that "[u]pon information and belief, [d]efendant conducted no analyses to determine whether its failure to pay [e]xcepted [e]mployees on their regularly scheduled payday complied with the FLSA." ECF No. 1 at 5.

In its motion to dismiss, defendant does not dispute plaintiffs' allegations that they were required to work during the shutdown, or that the plaintiffs were not paid during that time due to the lapse in appropriations. See ECF No. 25. Defendant characterizes the issue now before the court as "whether plaintiffs have stated a claim for liquidated damages under the [FLSA] notwithstanding the provisions of the [ADA]." Id. at 7. In arguing its position, defendant reiterates

---

[4] In Martin, the defendant also argued that it should avoid liability for liquidated damages with regard to overtime wages due to its inability to calculate the correct amounts due. See Martin v. United States, 130 Fed. Cl. 578, 586-87 (2017). This argument was based on a bulletin from the Department of Labor, and involves an issue that has not been raised in the present case. The absence of this argument, however, has no bearing on the application of the court's reasoning in Martin with regard to the structure of the proper analysis in this case.

the arguments advanced in Martin, but does not present any meaningful distinction between the posture of the Martin plaintiffs and the plaintiffs here. Instead, it acknowledges that "[t]his Court in Martin v. United States concluded that plaintiffs situated similarly to plaintiffs here could recover liquidated damages under the FLSA," but states that it "respectfully disagree[s] with that holding." Id. at 13.

Notwithstanding defendant's disagreement, the court continues to believe that the framework it set out in Martin is appropriate and applies here.[5] As it did in Martin, "the court will proceed to analyze this case

---

[5] Defendant also argues that its obligations under the FLSA are limited by the ADA because "a congressional payment instruction to an agency must be read in light of the [ADA]." ECF No. 25 at 16. In support of this argument, defendant cites to Highland Falls-Fort Montgomery Cent. Sch. Dist. v. United States, 48 F.3d 1166, 1171 (Fed. Cir. 1995). See id. In Highland-Falls, plaintiffs challenged the Department of Education's (DOE) method for allocating funds under the Impact Aid Act. Highland Falls, 48 F.3d at 1171. The United States Court of Appeals for the Federal Circuit found, however, that the DOE's "approach was consistent with statutory requirements." Id. The case did not address FLSA claims, and found that the DOE's approach "harmonized the requirements of the Impact Aid Act and the [ADA]." See id. In the court's view, the Federal Circuit's decision in Highland-Falls does not alter the analysis in this case. The United States District Court for the District of Columbia's combined decision in National Treasury Employees Union v. Trump, Case No. 19-cv-50 and Hardy v. Trump, Case No. 19-cv-51, 444 F. Supp. 3d 108 (2020), discussed by defendant in one of its supplemental filings, see ECF No. 43, is likewise unhelpful. Although it involved facts that arose from the same 2018 lapse in appropriations, the decision focuses almost exclusively on an analysis of whether plaintiffs' claims were moot, rather than on the operation of the ADA.

under the construct of the FLSA, and evaluate the existence and operation of the ADA as part of determining whether defendant met the statutory requirements to avoid liability for liquidated damages."[6] Martin, 130 Fed. Cl. at 584. The court will, of course, consider the GEFTA amendment to the ADA as part of its analysis.

C. Waiver of Sovereign Immunity

Before analyzing the sufficiency of plaintiffs' allegations, the court must address defendant's contention that plaintiffs' claims are barred by the doctrine of sovereign immunity. In its motion to dismiss, defendant correctly notes that "'[a] waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text, and will not be implied.'" ECF No. 25 at 18 (quoting Lane v. Pena, 518 U.S. 187, 192, 116 S.Ct. 2092, 135 L.Ed.2d 486 (1996)). And that

---

[6] The parties both claim that the Supreme Court of the United States' decision in Maine Community Health, ___ U.S. ___, 140 S. Ct. 1308, 206 L.Ed.2d 764, supports their position in this case. See ECF No. 51, ECF No. 52. Maine Community Health does not address the FLSA, and only includes a limited discussion of the ADA. See Maine Cmty. Health, 140 S. Ct. at 1321-22. Accordingly, the decision does not dictate the outcome here. To the extent that the case informs the present discussion, however, it tends to support plaintiffs. In the opinion, the Supreme Court held that "the [ADA] confirms that Congress can create obligations without contemporaneous funding sources," and concludes that "the plain terms of the [statute at issue] created an obligation neither contingent on nor limited by the availability of appropriations or other funds." Id. at 1322, 1323. Applied here, this conclusion suggests that the defendant can incur an obligation to pay plaintiffs pursuant to the normal operation of the FLSA even when funding is not available.

waiver " 'will be strictly construed, in terms of its scope, in favor of the sovereign.' " Id. at 19 (quoting Lane, 518 U.S. at 192, 116 S.Ct. 2092). Defendant concedes that the FLSA includes a waiver of sovereign immunity, but argues that the claims made by plaintiffs in this case fall outside the scope of that waiver. See id.; see also King v. United States, 112 Fed. Cl. 396, 399 (2013) (stating that "there is no question that sovereign immunity has been waived under the FLSA").

Defendant argues that the FLSA "does not require that employees be paid on their regularly scheduled pay date or make damages available when compensation is not received on a pay date." ECF No. 25 at 19. As a result, defendant contends, the scope of the FLSA's waiver of sovereign immunity does not extend to the category of claims alleging a FLSA violation because wages were not paid as scheduled, such as plaintiffs' claims in this case. See id. at 19-21. According to defendant, the GEFTA confirms its long-standing belief that the government's payment obligations under the FLSA are abrogated by a lack of appropriations:

> The [GEFTA] provides that "each excepted employee who is required to perform work during a . . . lapse in appropriations shall be paid for such work, at the employee's standard rate of pay, at the earliest date possible after the lapse in appropriations ends, regardless of scheduled pay dates." Pub. L. No. 116-1, 133 Stat. 3. Congress has thus spoken directly to the question of when compensation should be paid. There can be no basis for inferring that compensation made in

> accordance with that explicit directive subjects the United States to liquidated damages.

Id. at 20-21.

Defendant also asserts that the scope of its waiver of sovereign immunity for FLSA claims does not cover the claims asserted here. See ECF No. 32 at 14. It argues, without citation to any authority, that:

> a cause of action under the FLSA cannot per se accrue against the United States when federal agencies do not pay employees on their regularly scheduled paydays during a lapse in appropriations because a federal statute expressly provides for when and at what rate federal employees will be paid under those circumstances.

Id.

The court disagrees. The claims brought by plaintiffs in this case are straightforward FLSA minimum wage and overtime claims under the FLSA. See ECF No. 28 at 6, 12-14; see also ECF No. 1 at 7-10. Because the FLSA does not specify when such claims arise, courts have interpreted the statute to include a requirement that employers make appropriate wage payments on the employee's next regularly scheduled payday. See Brooklyn Sav. Bank, 324 U.S. at 707, 65 S.Ct. 895; Biggs, 1 F.3d at 1540. Contrary to defendant's suggestion, the court is unpersuaded that this judicially-imposed timing requirement transforms ordinary FLSA claims into something analytically

distinct, and beyond the scope of the statute's waiver of sovereign immunity.

Accordingly, the court finds that defendant has waived sovereign immunity as to plaintiffs' claims, as it has with all FLSA claims, and the court will review the sufficiency of plaintiffs' allegations as it would in any other FLSA case.

D. Plaintiffs State a Claim for FLSA Violations

As noted above, the FLSA requires that the government "pay to each of [its] employees" a minimum wage. 29 U.S.C. § 206(a). Pursuant to the FLSA, the government also must compensate employees for hours worked in excess of a forty-hour workweek "at a rate not less than one and one-half times the regular rate at which [they are] employed." 29 U.S.C. § 207(a)(1). And although the text of the statute does not specify the date on which wages must be paid, courts have held that employers are required to pay these wages on the employee's next regularly scheduled payday. See Brooklyn Sav. Bank, 324 U.S. at 707, 65 S.Ct. 895; Biggs, 1 F.3d at 1540.

In their complaint, plaintiffs allege that during the lapse in appropriations, they and all putative class members were classified as excepted employees who "perform[ed] work for [d]efendant without pay" on their regularly scheduled pay days.[7] ECF No. 1 at 4-6.

[7] Defendant argues that "[t]o the extent that plaintiffs (1) claim any FLSA violation for failing to pay FLSA minimum wages or overtime wages to FLSA-exempt employees, or (2) welcome

Plaintiffs allege specific facts demonstrating how the allegations apply to the named plaintiffs. See id.

Defendant does not contest any of these allegations, and in fact, concedes that "plaintiffs [were] employees of agencies affected by the lapse in appropriations," and that "plaintiffs were paid at the earliest possible date after the lapse in appropriations ended." ECF No. 25 at 12, 13. Defendant also admits that "[p]laintiffs are federal employees who performed excepted work during the most recent lapse in appropriations." Id. at 15. In short, defendant does not claim that plaintiffs are not entitled to payment under the

---

FLSA-exempt employees . . . to join their collective, those claims must be dismissed." ECF No. 25 at 15 n.3. In support of this statement, defendant cites to Jones v. United States, 88 Fed. Cl. 789 (2009). See id. In Jones, the court stated: "The 'precise question at issue' is whether Section 111(d) of the [Aviation and Transportation Security Act] exempts [Transportation Security Administration (TSA)] from compliance with the FLSA when establishing overtime compensation for security screeners. Because we find that the plain language of Section 111(d) is unambiguous, we conclude that TSA need not comply with the FLSA." 88 Fed. Cl. at 792 (emphasis added). This case is not binding precedent, and appears to be limited in application to security screeners. Plaintiffs note that defendant "does not appear to seek relief on these arguments at this time" and therefore plaintiffs choose to "not further respond to them except to state that granting any relief on these arguments would constitute an improper advisory opinion." ECF No. 28 at 7 n.1. (citing Gen. Mills, Inc. v. United States, 123 Fed. Cl. 576, 594 (2015)). In the complaint, plaintiffs do not allege that any putative class member is a TSA employee. See ECF No. 1 at 3. Because the court's decision in Jones does not hold that all TSA employees are necessarily FLSA-exempt, and because neither plaintiffs nor defendant has alleged that any putative class member is a TSA employee, the court will not address this argument at this time.

FLSA, but instead argues that it "fully complied with its statutory obligations to plaintiffs." Id. at 16.

The court finds that, presuming the facts as alleged in the complaint and drawing all reasonable inferences in their favor, plaintiffs have stated a claim for relief under the FLSA. See Cary, 552 F.3d at 1376 (citing Gould, 935 F.2d at 1274).

E. Liquidated Damages

Defendant insists that its failure to pay plaintiffs was a decision made in good faith, in light of the ADA. See ECF No. 32 at 14-15. It further urges the court to find that its good faith is so clear that the recovery of liquidated damages should be barred at this stage in the litigation. See id. at 14-18. But as the court held in Martin:

> [I]t would be inappropriate to determine, on motion to dismiss, whether the government had reasonable grounds and good faith. It may well be that the government can establish these defenses, but its opportunity to do so will come later on summary judgment or at trial. Moreover, even if the court were to decide that a liquidated damages award is warranted, additional factual determinations remain to be made as to which employees, if any, are entitled to recover, and damages, if any, to which those employees would be entitled.

Martin v. United States, 117 Fed. Cl. 611, 627 (2014). Accordingly, the court declines to rule at this time on the issue of whether defendant can establish a good faith defense against liability for liquidated damages in this case.

IV. Conclusion

Accordingly, for the foregoing reasons:

(1) Defendant's motion to dismiss, ECF No. 25, is **DENIED**;

(2) On or before **January 29, 2021**, defendant is directed to **FILE** an **answer** or otherwise respond to plaintiffs' complaint; and

(3) On or before **January 29, 2021**, the parties are directed to **CONFER** and **FILE** a **joint status report** informing the court of their positions on the consolidation of this case with any other matters before the court.

IT IS SO ORDERED.

151 Fed.Cl. 140
United States Court of Federal Claims.

David JONES, et al., Plaintiffs,
v.
The UNITED STATES, Defendant.

No. 19-257C
|
(E-Filed: December 1, 2020)

Attorneys and Law Firms

Joshua Sanford, Little Rock, AR, for plaintiff.

Erin K. Murdock-Park, Trial Attorney, with whom were Joseph H. Hunt, Assistant Attorney General, Robert E. Kirschman, Jr., Director, Reginald T. Blades, Jr., Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for defendant. Ann C. Motto, of counsel.

OPINION AND ORDER

CAMPBELL-SMITH, Judge.

Plaintiffs in this putative collective action allege that the government, through the United States Department of Agriculture, Food Safety and Inspection Service (FSIS), 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. 1 at 1-3, 5 (complaint). On May 3, 2019, defendant moved

to dismiss the complaint for failure to state a claim on which relief may be granted, pursuant to Rule 12(b)(6) of the Rules of the United States Court of Federal Claims (RCFC), on the basis that the Anti-Deficiency Act (ADA), 31 U.S.C. §§ 1341-42, prohibited the government from paying employees. See ECF No. 15.

In analyzing defendant's motion, the court has considered: (1) plaintiffs' complaint, ECF No. 1; (2) defendant's motion to dismiss, ECF No. 15; (3) plaintiffs' response to defendant's motion, ECF No. 16; (4) defendant's reply in support of its motion, ECF No. 20; (5) defendant's first supplemental brief in support of its motion, ECF No. 22; (6) plaintiffs' response to defendant's first supplemental brief, ECF No. 23; (7) defendant's second supplemental brief in support of its motion, ECF No. 31;[1] (8) defendant's third supplemental brief in support of its motion, ECF No. 39; and (9) plaintiffs' response to defendant's third supplemental brief, ECF No. 41. The motion is now fully briefed and ripe for ruling.[2] The court has considered

---

[1] Plaintiffs did not file a response to defendant's second supplemental brief.

[2] Defendant moves for dismissal of plaintiffs' complaint for only one reason—"for failure to state a claim upon which relief may be granted." ECF No. 15 at 6. In one of its supplemental briefs, defendant suggests that a recent decision issued by the Supreme Court of the United States, Maine Community Health Options v. United States, ___ U.S. ___, 140 S. Ct. 1308, 206 L.Ed.2d 764 (2020), a case that does not involve FLSA claims, indicates that this court lacks jurisdiction to hear this case because the FLSA "contains its own provision for judicial review." ECF No. 39 at 2. In the same brief, defendant acknowledges binding precedent from the United States Court of Appeals for the Federal Circuit

all of the arguments presented by the parties, and addresses the issues that are pertinent to the court's ruling in this opinion. For the following reasons, defendant's motion is **DENIED**.

I. Background

In their complaint, plaintiffs define the putative class bringing this collective action as "employees who are or were Food Safety and Inspection Service food inspectors for [d]efendant, who, during the applicable time period, work/worked for [d]efendant and are/were denied their rights under applicable federal wage and hour laws." ECF No. 1 at 2. Plaintiffs further allege that they are "excepted employees" and that they "like 2,400 other FSIS food inspectors, [were] retained for the shutdown," which began on December 22, 2018. Id. at 5-6. Plaintiffs seek "declaratory judgment, monetary damages, liquidated damages, prejudgment interest, and costs, including reasonable attorney's fees." Id. at 3.

Beginning at 12:01 a.m. on December 22, 2018, "a partial government shutdown began," affecting the

---

to the contrary. Id. (citing Abbey v. United States, 745 F.3d 1363 (Fed. Cir. 2014)). The court will not review this entirely new basis for dismissal, which was made for the first time in defendant's third supplemental brief, and which defendant acknowledges contradicts binding precedent. If defendant believes this court lacks jurisdiction to continue exercising its authority in this case, it may file a motion properly raising the issue. See Rule 12(h)(3) of the Rules of the United States Court of Federal Claims (RCFC) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.").

FSIS, among other agencies. Id. at 5. The ADA "authorizes the executive branch to require employees to work, without pay, during a lapse in appropriated funds, if their work relates to 'the safety [of] human life or the protection of property.'" Id. at 5 (quoting 31 U.S.C. § 1342). While some employees were furloughed during the shutdown, plaintiffs were deemed "excepted" employees under the ADA, and were required to continue work. Id. at 5-6. As of February 15, 2019, the date of the complaint, plaintiffs had been required to work throughout the shutdown and defendant "ha[d] not paid its [FSIS] food inspectors minimum or overtime wages as required by the FLSA." Id. at 2. Specifically, plaintiffs have not received "a lawful minimum wage for all hours worked up to forty (40) in one week or one and one-half (1.5) times their regular rate for all hours in excess of forty (40) in a week." Id. at 6. According to plaintiffs, defendant's failure to pay regular wages and earned overtime is a per se violation of the FLSA. Id. at 7.

Plaintiffs also allege that defendant "neither acted in good faith, nor had reasonable grounds for believing that failing to pay FLSA nonexempt employees their overtime wages on time was compliant with the FLSA." Id. In support of this statement, plaintiffs note that this court decided a FLSA case in plaintiffs' favor in a similar case, referring to Martin v. United States, 130 Fed. Cl. 578 (2017). See id. at 7-8. As such, plaintiffs contend that defendant "was on notice . . . that a failure to pay FLSA nonexempt employees their overtime wages on time" constituted "bad faith." Id. at 7,

11. Plaintiffs allege that defendant is, as a result, liable for a penalty of liquidated damages under the FLSA. See id. at 8.

II. Legal Standards

When considering a motion to dismiss brought under RCFC 12(b)(6), the court "must presume that the facts are as alleged in the complaint, and make all reasonable inferences in favor of the plaintiff." Cary v. United States, 552 F.3d 1373, 1376 (Fed. Cir. 2009) (citing Gould, Inc. v. United States, 935 F.2d 1271, 1274 (Fed. Cir. 1991)). It is well-settled that a complaint should be dismissed under RCFC 12(b)(6) "when the facts asserted by the claimant do not entitle him to a legal remedy." Lindsay v. United States, 295 F.3d 1252, 1257 (Fed. Cir. 2002). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)).

III. Analysis

A. Relevant Statutes

This case fundamentally concerns the intersection of two statutes, the ADA and the FLSA. The ADA states that "an officer or employee" of the federal government "may not . . . make or authorize an expenditure or obligation exceeding an amount available in an

appropriation or fund for the expenditure or obligation." 31 U.S.C. § 1341(a)(1)(A). In addition, the ADA dictates that "[a]n officer or employee of the United States Government or of the District of Columbia government may not accept voluntary services for either government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property." 31 U.S.C. § 1342. In 2019, Congress amended the ADA, adding, in relevant part, the following:

> [E]ach excepted employee who is required to perform work during a covered lapse in appropriations[3] shall be paid for such work, at the employee's standard rate of pay, 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) (footnote added). The amendment is commonly referred to as the Government Employees Fair Treatment Act of 2019 (GEFTA), Pub. L. No. 116-1, 133 Stat. 3 (2019). The knowing or willful violation of the ADA is punishable by a fine of "not more than $5,000" or imprisonment "for not more than 2 years, or both." 31 U.S.C. § 1350. And federal employees who violate the ADA "shall be subject to appropriate administrative discipline including, when

---

[3] The statute defines "covered lapse in appropriations" to mean "any lapse in appropriations that begins on or after December 22, 2018." 31 U.S.C. § 1341(c)(1)(A).

circumstances warrant, suspension from duty without pay or removal from office." 31 U.S.C. § 1349(a).

Defendant separately has obligations to its employees pursuant to the FLSA, which governs minimum wage and overtime wage compensation for certain employees.[4] See 29 U.S.C. § 213 (identifying categories of exempt employees). The FLSA requires that the government "pay to each of [its] employees" a minimum wage. 29 U.S.C. § 206(a). Pursuant to the FLSA, the government also must compensate employees for hours worked in excess of a forty-hour workweek "at a rate not less than one and one-half times the regular rate at which [they are] employed." 29 U.S.C. § 207(a)(1). Although the text of the statute does not specify the date on which wages must be paid, courts have held that employers are required to pay these wages on the employee's next regularly scheduled payday. See 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). If an employer violates the FLSA's pay provisions, the employer is "liable to the . . . employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be." 29 U.S.C. § 216(b). The employer may also be liable "in an additional equal amount as liquidated damages," id., unless "the employer shows to the satisfaction of the

[4] The FLSA initially applied only to the private sector when enacted in 1938, but was amended to cover public employees in 1974. See Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55 (1974).

court that the act or omission . . . was in good faith, and that [the employer] had reasonable grounds for believing that his act or omission was not a violation of the [FLSA]," 29 U.S.C. § 260.

B. The Court's Reasoning in Martin Applies

In its motion to dismiss, defendant first argues that plaintiffs' complaint should be dismissed for failure to state a claim because the agencies for which appropriations lapsed on December 22, 2018, were prohibited by the ADA from paying their employees – even excepted employees who were required to work. See ECF No. 15 at 13-14. This mandate, in defendant's view, means that defendant cannot be held liable for violating its obligations under the FLSA. See id. Defendant argues:

> When Congress criminalized payments during an appropriations lapse, it plainly precluded payments on the schedule plaintiffs assert is required by the FLSA. Federal officials who comply with that criminal prohibition do not violate the FLSA, and Congress did not create a scheme under which compliance with the [ADA] Act would result in additional compensation as damages to federal employees.

Id. at 13.

The court has previously ruled on the intersection of the ADA and the FLSA in the context of a lapse in appropriations. See Martin, 130 Fed. Cl. 578. In

Martin, plaintiffs were "current or former government employees who allege[d] that they were not timely compensated for work performed during the shutdown, in violation of the [FLSA]." Id. at 580 (citing 29 U.S.C. § 201 et seq.). The plaintiffs in Martin alleged the right to liquidated damages with regard to both the government's failure to timely pay minimum wages and its failure to pay overtime wages. See id. In its motion for summary judgment, the government argued that "it should avoid liability under the FLSA for its failure to [pay plaintiffs on their regularly scheduled pay days during the shutdown] because it was barred from making such payments pursuant to the ADA." See id. at 582. The government summarized its argument in Martin as follows:

> The FLSA and the Anti-Deficiency Act appear to impose two conflicting obligations upon Federal agencies: the FLSA mandates that the agencies "shall pay to each of [its] employees" a minimum wage, 29 U.S.C. § 206(a) (emphasis added), which has been interpreted by the courts to include a requirement that the minimum wage be paid on the employees' next regularly scheduled pay day, see Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 707 n.20 [65 S. Ct. 895, 89 L. Ed. 1296] (1945); Biggs v. Wilson, 1 F.3d 1537, 1540 (9th Cir. 1993), and the [ADA] mandates that "[a]n officer or employee of the United States Government . . . may not . . . make or authorize an expenditure . . . exceeding an amount available in an appropriation or fund for the expenditure. . . ." 31 U.S.C. § 1341(A)(1)(A)

> (emphasis added). Thus, when Federal agencies are faced with a lapse in appropriations and cannot pay excepted employees on their next regularly scheduled payday, the question arises of which statutory mandate controls.

Id. at 582-83 (quoting defendant's motion for summary judgment) (alterations in original).

After reviewing applicable precedent and persuasive authority, the court concluded that "the issue is more complex than simply a choice between whether the FLSA or the ADA controls." Id. at 583. In the court's view:

> the appropriate way to reconcile the [ADA and the FLSA] is not to cancel defendant's obligation to pay its employees in accordance with the manner in which the FLSA is commonly applied. Rather, the court would require that defendant demonstrate a good faith belief, based on reasonable grounds, that its actions were appropriate. As such, the court will proceed to analyze this case under the construct of the FLSA, and evaluate the existence and operation of the ADA as part of determining whether defendant met the statutory requirements to avoid liability for liquidated damages.

Id. at 584.

The court noted that plaintiffs' claims survived a motion to dismiss because they had "alleged that defendant had failed to pay wages" on plaintiffs' "next regularly scheduled payday." Id. at 584. On summary

judgment, the court concluded that plaintiffs had proven this claim. See id. The court then concluded that the evidence supported an award of liquidated damages because the government failed to satisfy the court that it acted in good faith and on reasonable grounds when it failed to make the payments required under the FLSA.[5] See id. at 585-86.

Both parties acknowledge that the plaintiffs in Martin were "situated similarly to plaintiffs here." ECF No. 15 at 14 (defendant's motion to dismiss). Plaintiffs plead in their complaint that, like the plaintiffs in Martin, "[a]s a result of the shutdown, [d]efendant did not pay [plaintiffs] a lawful minimum wage for all hours worked." ECF No. 1 at 6. And, as plaintiffs note in their response, "prior case law has already established that the [ADA] does not alleviate [d]efendant from its obligation to timely pay its employees under the FLSA." ECF No. 16 at 1. In addition, plaintiffs here, like the plaintiffs in Martin, have "alleged that [d]efendant was on notice, both through previous case law and the [defendant's] own previous liability, that its failure to pay [plaintiffs] violated the FLSA," as it

[5] In Martin, the defendant also argued that it should avoid liability for liquidated damages with regard to overtime wages due to its inability to calculate the correct amounts due. See Martin v. United States, 130 Fed. Cl. 578, 586-87 (2017). This argument was based on a bulletin from the Department of Labor, and involves an issue that has not been raised in the present case. The absence of this argument, however, has no bearing on the application of the court's reasoning in Martin with regard to the structure of the proper analysis in this case.

relates to the propriety of an award of liquidated damages. Id. at 17-18.

In its motion to dismiss, defendant does not dispute plaintiffs' allegations that they were required to work during the shutdown, or that the plaintiffs were not paid during that time due to the lapse in appropriations. See ECF No. 15. Defendant characterizes the issue now before the court as "whether plaintiffs have stated a claim for liquidated damages under the [FLSA] notwithstanding the provisions of the [ADA]." Id. at 7. In arguing its position, defendant reiterates the arguments advanced in Martin, but does not present any meaningful distinction between the posture of the Martin plaintiffs and the plaintiffs here. Instead, it acknowledges that "[t]his Court in Martin v. United States concluded that plaintiffs situated similarly to plaintiffs here could recover liquidated damages under the FLSA," but states that it "respectfully disagree[s] with that holding." Id. at 14.

Notwithstanding defendant's disagreement, the court continues to believe that the framework it set out in Martin is appropriate and applies here.[6] As it did in

---

[6] Defendant also argues that its obligations under the FLSA are limited by the ADA because "a congressional payment instruction to an agency must be read in light of the [ADA]." ECF No. 15 at 17. In support of this argument, defendant cites to Highland Falls-Fort Montgomery Cent. Sch. Dist. v. United States, 48 F.3d 1166, 1171 (Fed. Cir. 1995). See id. In Highland Falls, plaintiffs challenged the Department of Education's (DOE) method for allocating funds under the Impact Aid Act. Highland Falls, 48 F.3d at 1171. The United States Court of Appeals for the Federal Circuit found, however, that the DOE's "approach was consistent with

Martin, "the court will proceed to analyze this case under the construct of the FLSA, and evaluate the existence and operation of the ADA as part of determining whether defendant met the statutory requirements to avoid liability for liquidated damages."[7] Martin, 130 Fed. Cl. at 584. The court will, of course, consider the GEFTA amendment to the ADA as part of its analysis.

---

statutory requirements." Id. The case did not address FLSA claims, and found that the DOE's approach "harmonized the requirements of the Impact Aid Act and the [ADA]." See id. In the court's view, the Federal Circuit's decision in Highland Falls does not alter the analysis in this case. The United States District Court for the District of Columbia's combined decision in National Treasury Employees Union v. Trump, Case No. 19-cv-50 and Hardy v. Trump, Case No. 19-cv-51, 444 F. Supp. 3d 108 (2020), discussed by defendant in one of its supplemental filings, see ECF No. 31, is likewise unhelpful. Although it involved facts that arose from the same 2018 lapse in appropriations, the decision focuses almost exclusively on an analysis of whether plaintiffs' claims were moot, rather than on the operation of the ADA.

[7] The parties both claim that the Supreme Court of the United States' decision in Maine Community Health, 140 S. Ct. 1308, supports their position in this case. See ECF No. 39, ECF No. 41. Maine Community Health does not address the FLSA, and only includes a limited discussion of the ADA. See Maine Cmty. Health, 140 S. Ct. at 1321-22. Accordingly, the decision does not dictate the outcome here. To the extent that the case informs the present discussion, however, it tends to support plaintiffs. In the opinion, the Supreme Court held that "the [ADA] confirms that Congress can create obligations without contemporaneous funding sources," and concludes that "the plain terms of the [statute at issue] created an obligation neither contingent on nor limited by the availability of appropriations or other funds." Id. at 1322, 1323. Applied here, this conclusion suggests that the defendant can incur an obligation to pay plaintiffs pursuant to the normal operation of the FLSA even when funding is not available.

C. Waiver of Sovereign Immunity

Before analyzing the sufficiency of plaintiffs' allegations, the court must address defendant's contention that plaintiffs' claims are barred by the doctrine of sovereign immunity. In its motion to dismiss, defendant correctly notes that "'[a] waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text, and will not be implied.'" ECF No. 15 at 19 (quoting Lane v. Pena, 518 U.S. 187, 196, 116 S.Ct. 2092, 135 L.Ed.2d 486 (1996)). And that waiver "'will be strictly construed, in terms of its scope, in favor of the sovereign.'" Id. (quoting Lane, 518 U.S. at 192, 116 S.Ct. 2092). Defendant concedes that the FLSA includes a waiver of sovereign immunity, but argues that the claims made by plaintiffs in this case fall outside the scope of that waiver. See id.; see also King v. United States, 112 Fed. Cl. 396, 399 (2013) (stating that "there is no question that sovereign immunity has been waived under the FLSA").

Defendant argues that the FLSA "does not require that employees be paid on their regularly scheduled pay date or make damages available when compensation is not received on a pay date." ECF No. 15 at 19-20. As a result, defendant contends, the scope of the FLSA's waiver of sovereign immunity does not extend to the category of claims alleging a FLSA violation because wages were not paid as scheduled, such as plaintiffs' claims in this case. See id. According to defendant, the GEFTA confirms its long-standing belief that the government's payment obligations under the FLSA are abrogated by a lack of appropriations:

> The [GEFTA] provides that "each excepted employee who is required to perform work during a . . . lapse in appropriations shall be paid for such work, at the employee's standard rate of pay, at the earliest date possible after the lapse in appropriations ends, regardless of scheduled pay dates." Pub. L. No. 116-1, 133 Stat. 3. Congress has thus spoken directly to the question of when compensation should be paid. There can be no basis for inferring that compensation made in accordance with that explicit directive subjects the United States to liquidated damages.

Id. at 21.

Defendant also asserts, without citation to any authority, that:

> 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, the government's waiver of sovereign immunity under the FLSA must be strictly construed against liability for the delayed (but always forthcoming) payment of wages because of a lapse in appropriations.

ECF No. 20 at 13.

The court disagrees. The claims brought by plaintiffs in this case are straightforward minimum wage

and overtime claims under the FLSA.[8] See ECF No. 1 at 8-10. Because the FLSA does not specify when such claims arise, courts have interpreted the statute to include a requirement that employers make appropriate wage payments on the employee's next regularly scheduled payday. See Brooklyn Sav. Bank, 324 U.S. at 707, 65 S.Ct. 895; Biggs, 1 F.3d at 1540. Contrary to defendant's suggestion, the court is unpersuaded that this judicially-imposed timing requirement transforms ordinary FLSA claims into something analytically distinct, and beyond the scope of the statute's waiver of sovereign immunity.

Accordingly, the court finds that defendant has waived sovereign immunity as to plaintiffs' claims, as it has with all FLSA claims, and the court will review the sufficiency of plaintiffs' allegations as it would in any other FLSA case.

D. Plaintiffs State a Claim for FLSA Violations

As noted above, the FLSA requires that the government "pay to each of [its] employees" a minimum wage. 29 U.S.C. § 206(a). Pursuant to the FLSA, the

[8] Plaintiffs assert in their response to defendant's motion to dismiss, that "there are circumstances [here] that create issues regarding when [p]laintiffs should have been paid that extend beyond the [ADA] and its GEFTA amendment." ECF No. 16 at 15. Plaintiffs note that "meat and poultry establishments" are required to reimburse the FSIS for inspection services that take place on federal holidays and for services extending beyond the standard eight-hour work day or forty hour work week. Id. These allegations are not included in plaintiffs' complaint, therefore the court does not address them here.

government also must compensate employees for hours worked in excess of a forty-hour workweek "at a rate not less than one and one-half times the regular rate at which [they are] employed." 29 U.S.C. § 207(a)(1). And although the text of the statute does not specify the date on which wages must be paid, courts have held that employers are required to pay these wages on the employee's next regularly scheduled payday. See Brooklyn Sav. Bank, 324 U.S. at 707, 65 S.Ct. 895; Biggs, 1 F.3d at 1540.

In their complaint, plaintiffs allege that during the lapse in appropriations, they were each covered employees under the FLSA and were "designated [] 'excepted' employee[s] and . . . retained for the shutdown." ECF No. 1 at 6. As a result, they were required to work throughout the shutdown but "[d]efendant did not pay [plaintiffs] a lawful minimum wage for all hours worked." Id. Plaintiffs allege specific facts demonstrating how the allegations apply. See id. at 6-10.

Defendant does not contest any of these allegations, and in fact, concedes that "plaintiffs [were] employees of an agency affected by the lapse in appropriations," and that "plaintiffs were paid at the earliest possible date after the lapse in appropriations ended." ECF No. 15 at 12-13. Defendant also admits that "[p]laintiffs are federal employees who performed excepted work during the most recent lapse in appropriations." Id. at 15. In short, defendant does not claim that plaintiffs are not entitled to payment under the

FLSA, but instead argues that it "fully complied with its statutory obligations to plaintiffs." Id. at 16.

The court finds that, presuming the facts as alleged in the complaint and drawing all reasonable inferences in their favor, plaintiffs have stated a claim for relief under the FLSA. See Cary, 552 F.3d at 1376 (citing Gould, 935 F.2d at 1274).

E. Liquidated Damages

Defendant insists that its failure to pay plaintiffs was a decision made in good faith, in light of the ADA. See ECF No. 20 at 15. It further urges the court to find that its good faith is so clear that the recovery of liquidated damages should be barred at this stage in the litigation. See id. at 15-18. But as the court held in Martin:

> [I]t would be inappropriate to determine, on motion to dismiss, whether the government had reasonable grounds and good faith. It may well be that the government can establish these defenses, but its opportunity to do so will come later on summary judgment or at trial. Moreover, even if the court were to decide that a liquidated damages award is warranted, additional factual determinations remain to be made as to which employees, if any, are entitled to recover, and damages, if any, to which those employees would be entitled.

Martin v. United States, 117 Fed. Cl. 611, 627 (2014). Accordingly, the court declines to rule at this time on the issue of whether defendant can establish a good faith defense against liability for liquidated damages in this case.

IV. Conclusion

Accordingly, for the foregoing reasons:

(1) Defendant's motion to dismiss, ECF No. 15, is **DENIED**;

(2) On or before **January 29, 2021**, defendant is directed to **FILE** an **answer** or otherwise respond to plaintiffs' complaint; and

(3) On or before **January 29, 2021**, the parties are directed to **CONFER** and **FILE** a **joint status report** informing the court of their positions on the consolidation of this case with any other matters before the court.

IT IS SO ORDERED.