135 Fed.Cl. 155
United States Court of Federal Claims.

Frank MARRS, et al., Plaintiffs,
v.
The UNITED STATES, Defendant.

No. 16-1297C
|
E-Filed: October 27, 2017

Attorneys and Law Firms

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OPINION

CAMPBELL-SMITH, Judge.

This matter is before the court on plaintiffs' motion for partial summary judgment, ECF No. 19, and defendant's cross-motion for partial summary judgment, ECF No. 20, filed pursuant to Rule 56 of the Rules of the United States Court of Federal Claims (RCFC). Plaintiffs filed a reply brief, ECF No. 21.

Defendant informed the court that the government did not intend to file a reply brief. See Jt. Status R., ECF No. 14, at 1. This matter is thus fully briefed and ripe for decision. For the reasons set forth below, the court denies plaintiffs' motion and grants defendant's motion.

I. Background

This is the companion case to Martin v. United States, Case No. 13-834C (Martin). These two cases were consolidated on November 2, 2016 for the determination of certain common issues of law. ECF No. 9. Consolidation of these cases ended on March 17, 2017. ECF No. 13. Familiarity with the three opinions issued in Martin, Case No. 13-834C, is presumed. See Martin v. United States, 117 Fed.Cl. 611 (2014) (Martin I) (denying in part and granting in part defendant's motion to dismiss); Martin v. United States, No. 13-834C, 2015 WL 12791601 (Fed. Cl. Oct. 15, 2015) (Martin II) (denying plaintiffs' request to apply equitable tolling to the relevant statute of limitations to permit as many as 18,300 additional plaintiffs to join that suit); Martin v. United States, 130 Fed.Cl. 578 (2017) (Martin III) (granting plaintiffs' motion for summary judgment as to liability). Only the facts pertinent to the parties' cross-motions are discussed here.

Plaintiffs in these companion cases are current or former government employees who allege that they were not timely compensated for work performed during a shutdown of the federal government in October

2013, in violation of the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. § 201 et seq. (2012). This court has found that the failure to pay these workers in a timely fashion was indeed a violation of the FLSA, and that liquidated damages provide the remedy for such a violation. See generally Martin III. This case presents one additional issue, whether the government's violation of the FLSA was willful under 29 U.S.C. § 255(a). A willful violation of the statute would extend the statute of limitations in section 255(a) from two years to three years. See id. This particular question was not litigated in Martin, but is of crucial relevance here.

Whether the statute of limitations for plaintiffs' claims is three years, not two years, is the "single legal issue . . . dispositive of this case." Jt. Status R., ECF No. 12, at 1. As plaintiffs note, the complaint in this case "was filed more than two but less than three years after Plaintiffs' claims accrued." ECF No. 19–1, at 6–7. Thus, although the parties have styled their motions as motions for partial summary judgment, a ruling in the government's favor would entirely dispose of this case. Accordingly, the viability of plaintiffs' claims turns on the court's interpretation of "willful violation," 29 U.S.C. § 255(a), as that term is applied in this particular circumstance of the government's violation of the FLSA.

II. Legal Standard for Finding a Willful Violation of the FLSA

The statutory text states in relevant part:

> Any action . . . to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended [29 U.S.C. § 201 et seq.],
>
> (a) . . . may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued[.]

29 U.S.C. § 255 (emphasis added). Some courts have interpreted the term "willful," and the test for willfulness, so broadly as to encompass all employers acting in violation of the FLSA who knew that the FLSA was "in the picture." See, e.g., Coleman v. Jiffy June Farms, Inc., 458 F.2d 1139, 1142 (5th Cir. 1971) ("Stated most simply, we think the test should be: Did the employer know the FLSA was in the picture?"). This interpretive approach, referred to here as the Jiffy June test, was rejected by the United States Supreme Court as overly broad.

In the place of the Jiffy June test, the Supreme Court announced a more restrictive definition of willfulness to establish a three year statute of limitations for FLSA violations: "The standard of willfulness [is]

that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute." McLaughlin v. Richland Shoe Co., 486 U.S. 128, 133, 108 S.Ct. 1677, 100 L.Ed.2d 115 (1988) (Richland Shoe) (citing Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 105 S.Ct. 613, 83 L.Ed.2d 523 (1985)). Under the Richland Shoe standard, even an unreasonable action in contravention of the FLSA is not enough to establish willfulness:

> If an employer acts reasonably in determining its legal obligation, its action cannot be deemed willful. . . . If an employer acts unreasonably, but not recklessly, in determining its legal obligation, . . . it should not be . . . considered [willful] under Thurston or the identical standard we approve today.

Id. at 135 n.13, 108 S.Ct. 1677; see, e.g., Bull v. United States, 479 F.3d 1365, 1379 (Fed. Cir. 2007) (same).

The Richland Shoe Court specifically rejected another proposed standard for willfulness, which it described as an "intermediate standard." 486 U.S. at 131, 108 S.Ct. 1677. Under the intermediate standard, a finding of willfulness would be proper " 'if the employer, recognizing it might be covered by the FLSA, acted without a reasonable basis for believing that it was complying with the statute.' " Id. at 134, 108 S.Ct. 1677. While the court reserves further discussion of the willfulness standard, a standard hotly debated by the parties, for the analysis section of this opinion, the court does observe that the burden is on plaintiffs to establish willfulness. See Bull, 479 F.3d at 1379; Adams v.

United States, 350 F.3d 1216, 1229 (Fed. Cir. 2003) ("Unlike good faith, the employee bears the burden of proving the willfulness of the employer's FLSA violations.") (citation omitted).

III. Standard of Review on Summary Judgment

"[S]ummary judgment is a salutary method of disposition designed to secure the just, speedy and inexpensive determination of every action." Sweats Fashions, Inc. v. Pannill Knitting Co., 833 F.2d 1560, 1562 (Fed. Cir. 1987) (internal quotations and citations omitted). The party moving for summary judgment will prevail "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." RCFC 56(a). A genuine dispute of material fact is one that could "affect the outcome" of the litigation. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). "[A]ll evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable factual inferences should be drawn in favor of the nonmoving party." Dairyland Power Coop. v. United States, 16 F.3d 1197, 1202 (Fed. Cir. 1994) (citations omitted). "With respect to cross-motions for summary judgment, each motion is evaluated on its own merits and reasonable inferences are resolved against the party whose motion is being considered." Marriott Int'l Resorts, L.P. v. United States, 586 F.3d 962, 968–69 (Fed. Cir. 2009) (citation omitted).

A summary judgment motion is properly granted against a party who fails to make a showing sufficient to establish the existence of an essential element to that party's case and for which that party bears the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). A nonmovant will not defeat a motion for summary judgment "unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Anderson, 477 U.S. at 249, 106 S.Ct. 2505 (citation omitted). "A nonmoving party's failure of proof concerning the existence of an element essential to its case on which the nonmoving party will bear the burden of proof at trial necessarily renders all other facts immaterial and entitles the moving party to summary judgment as a matter of law." Dairyland, 16 F.3d at 1202 (citing Celotex, 477 U.S. at 323, 106 S.Ct. 2548).

IV. Analysis

Defendant in its cross-motion and plaintiffs in their reply brief cite to Richland Shoe as support for their positions on the "willful violation" issue. ECF No. 20, at 13; ECF No. 21, at 3–4. Not only is Richland Shoe binding precedent, it provides the best tool for understanding the concept of willfulness, as that concept is employed in section 255(a).[1] In that case, the Supreme

[1] To the extent that plaintiffs' reply brief could be read to urge the court to conduct a de novo construction of section 255(a), see ECF No. 21, at 8, this court is bound by Richland Shoe and cannot stray from the statutory interpretation of section 255(a)

Court noted, first, that the statute of limitations for the FLSA is two-tiered. Richland Shoe, 486 U.S. at 132, 108 S.Ct. 1677. Plaintiffs are allowed two years to lodge claims for "nonwillful" violations, and three years to file claims for "willful" violations. Id. at 133, 108 S.Ct. 1677. There must, therefore, be a "significant distinction" separating willful violations from violations that are not willful. Id. at 132, 108 S.Ct. 1677.

The Supreme Court then specifically clarified its earlier decision in Thurston which could have been misread to accept the "unreasonableness" of agency action as sufficient proof of willfulness. See Richland Shoe, 486 U.S. at 135 n.13, 108 S.Ct. 1677 (citing Thurston, 469 U.S. at 126, 105 S.Ct. 613). The Supreme Court explained that, on the spectrum of agency behavior ranging from unreasonable to reckless, anything short of recklessness in an agency's determination of its legal obligations under the FLSA is not a "willful violation" under section 255(a). See id. ("If an employer acts unreasonably, but not recklessly, in determining its legal obligation, then, although its action would be considered willful under petitioner's [intermediate standard], it should not be so considered under Thurston or the identical standard we approve today.").

Although decisions have issued from this court reflecting different takes on the Richland Shoe test for willfulness, none of the formulations cited by the

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presented therein. E.g., Crowley v. United States, 398 F.3d 1329, 1335 (Fed. Cir. 2005).

parties has binding effect in this case. Hewing closely to the Supreme Court's articulation, the court requires—as the test for plaintiffs to prevail here on the "willful violation" issue—that plaintiffs show that the government agencies violating the FLSA during the October 2013 shutdown acted recklessly, i.e., more than unreasonably, when determining their liabilities under the FLSA. See Abbey v. United States, 106 Fed.Cl. 254, 283 (2012) (finding that a "negligent and unreasonable" determination of obligations under the FLSA by a federal agency did not "rise[] to the level of willfulness as defined by the Supreme Court in [Richland Shoe]").

As a threshold matter, the court notes that in Martin III the principal legal issue decided by the undersigned was whether the government's "act or omission giving rise to [the plaintiffs' FLSA claim for liquidated damages] was in good faith." 29 U.S.C. § 260. The court did not find the government's acts and omissions during the October 2013 shutdown regarding its FLSA obligations to be in good faith. Martin III, 130 Fed.Cl. at 586. That determination, however, was not informed by the applicable legal test for resolving the willfulness issue currently pending before the court, even though the factual underpinnings for the two legal issues do overlap.[2] The court now turns to the undisputed evidence in the record.

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[2] Plaintiffs err when they contend that the two legal questions are the same. See ECF No. 19-1, at 22–23 ("The Court's ruling [on the issue of good faith in Martin III] also controls the issue

A. Undisputed Evidence Regarding the FLSA Violations

Plaintiffs rely on the joint stipulations of fact acknowledged and filed by the parties in Martin. See ECF No. 19, at 1 (citing Case No. 13-834C, ECF No. 151). The government relies on the same stipulations of fact. See ECF No. 20, at 7–8. Plaintiffs assert that a willful violation of the FLSA occurred because

> the Government admittedly did not prior to or during the 2013 Government shutdown (a) consider whether requiring employees to work without paying them minimum or overtime wages on their regularly scheduled paydays for that work would violate the FLSA, or (b) seek a formal legal opinion regarding how to meet its obligations under both the Anti-Deficiency Act[3] and FLSA.

ECF No. 19-1, at 5.

The first relevant joint stipulation of fact not in dispute cited by plaintiffs is as follows:

> Based upon the information received from relevant personnel and review of the relevant documents, the agencies that advise the Federal Government on the implementation of labor law and policy did not prior to or during

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of whether the Government violated the FLSA willfully within the meaning of 29 U.S.C. § 255(a).").

[3] The Anti-Deficiency Act ("ADA") prohibits the government from spending money when specific appropriations authorizing those expenditures are not in place. See 31 U.S.C. § 1341(a)(1)(A) (2012).

> the 2013 Government shutdown consider whether requiring employees designated as "non-exempt" under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 et seq., and as "excepted" for purposes of the shutdown to work during the shutdown without paying them minimum or overtime wages on their regularly scheduled paydays for work performed during the first week of the shutdown would violate the FLSA. Based upon the information described above, defendant is not aware of any other agency that considered the issue prior to or during the 2013 Government shutdown.

Case No. 13-834C, ECF No. 151 ¶ 3. The second relevant joint stipulation of fact not in dispute cited by plaintiffs is as follows:

> The Government did not seek a formal legal opinion regarding how to meet its obligations under both the Anti-[D]eficiency Act and FLSA as to employees designated as "non-exempt" under the FLSA and as "excepted" for purposes of the shutdown who were required to work during the shutdown.

Id. ¶ 4. Based on these two undisputed facts, plaintiffs assert that they have established a willful violation of the FLSA. See ECF No. 19-1, at 24–25.

The government argues, however, that these facts do not rise to the level of a willful FLSA violation. ECF No. 20, at 14–17. A third joint stipulation of fact not in dispute is cited by the government in support of its position in this suit:

> The Government understood that during a lapse in appropriations the Anti-Deficiency Act, 31 U.S.C. § 1341(a), prohibited payment of wages for work performed during the 2013 Government shutdown until funds had been appropriated.

Case No. 13-834C, ECF No. 151 ¶ 2. The court agrees with the parties that there are no material disputes of fact in this case, because all of the relevant facts are undisputed. The court next summarizes the caselaw discussed in the parties' briefs.

B. Guidance from Caselaw Interpreting Richland Shoe

The parties cite a number of decisions that were issued by this court and which involve an examination of willfulness in the context of FLSA violations, but which do not involve a federal government shutdown. The court therefore finds the parties' interpretations of the holdings of those cases to be of limited assistance. The court also finds decisions of the United States Court of Appeals for the Federal Circuit to be similarly unhelpful here in refining the willfulness inquiry.

The discussion of willfulness in Bull, for example, is brief and is anchored in factual circumstances that are not analogous to the government shutdown that underlies this case:

> In finding that Customs had in fact acted willfully, the court below relied upon extensive testimony to establish that Customs knew the

> plaintiffs were working off duty without compensation, as well as an internal memo predicting that such work "could open Customs management to compensation issues because the [officers] are using their off duty time to meet Customs requirements." The court also found that the [agency official's] memorandum (directing that previously off-duty work was to be performed during working hours) was "an admission by defendant that it knew it had been engaging in activity in possible violation of the FLSA." This evidence is plainly sufficient to support a finding of willfulness.

Bull, 479 F.3d at 1379 (internal citations omitted). Given that the standard of review in Bull was the "clear error" standard, id. (citing Adams, 350 F.3d at 1229), and given that its discussion of willfulness does not provide any clarification of the term "willful violation," and given the difference in the factual backgrounds of this case and Bull, the holding in Bull does not aid the court in its resolution of the dispositive issue in this case.

Also of no assistance to the court here is the Federal Circuit's decision in Cook v. United States, 855 F.2d 848 (Fed. Cir. 1988), cited correctly by plaintiffs as a case distinguishable on its facts. Cook announces a per se rule that a federal agency which follows the advice of the United States Department of Labor as to the FLSA cannot have committed a willful FLSA violation. See id. at 850 (stating that when "a federal agency . . . has in good faith accepted and followed the advice of the Secretary of Labor . . . [,] any mistake in

responding to the demands of the FLSA is not willful"). But, no advice of the Secretary of Labor regarding FLSA obligations during the federal shutdown is part of the factual record of this case.[4]

C. Willfulness Not Found on These Facts

The court is faced, then, with an issue of first impression, guided primarily by Richland Shoe.[5] If the government understood that it could not obey the ADA and timely pay its excepted employees, was that a willful violation of the FLSA under section 255(a)? The court concludes that it was not for the reasons set forth below.

The court finds that the FLSA violation for these plaintiffs, which may have been caused by an unreasonable interpretation of the FLSA by federal agencies, see Martin III, 130 Fed.Cl. at 586, does not rise to the level of a willful violation. Although the government's pay actions during the shutdown did not evince good faith under the FLSA, see id., none of the undisputed

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[4] Nor are the pay practices of the Department of Labor for its own employees during the shutdown part of the record in this case.

[5] Plaintiffs rely on Salazar v. Ramah Navajo Chapter, 567 U.S. 182, 197, 132 S.Ct. 2181, 183 L.Ed.2d 186 (2012), and the Supreme Court's discussion therein of the government's contract obligations notwithstanding the ADA, as support for their position on the willfulness of the government's FLSA violation here. ECF No. 19-1, at 25–26; ECF 21, at 15 n.1. The court does not interpret the holding in Salazar as containing guidance for drawing a distinction between nonwillful and willful FLSA violations, which is the issue before the court.

evidence before the court, notwithstanding all favorable inferences accorded to plaintiffs, establishes that the federal government exhibited reckless disregard for the FLSA when it complied with the ADA and violated the FLSA.

1. Richland Shoe

As the court examines the facts underlying this suit to determine whether the federal government exhibited a reckless disregard for FLSA requirements during the 2013 shutdown, the Supreme Court's decision in Richland Shoe offers a few guideposts, in addition to the conceptual framework for willfulness described earlier in this opinion.[6] First, although not adopted with any precision, common synonyms of "willful"—"voluntary," "deliberate" and "intentional"—were cited approvingly by the Court. Richland Shoe, 486 U.S. at 133, 108 S.Ct. 1677. During the shutdown, bowing to the imperatives of the ADA, agencies did not pay excepted employees and did not inquire into their FLSA obligations. In the court's view, the agencies' compliance with the ADA and nonpayment of owed wages was more in the nature of involuntary and unintentional violations of the FLSA, rather than willful conduct. See id.

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[6] Plaintiffs do not argue that the federal government "knew" of its FLSA violations during the 2013 shutdown. Thus, only the "reckless disregard" prong of the willfulness inquiry is at issue in the parties' cross-motions for summary judgment.

Similarly, the Richland Shoe Court distinguished "merely negligent" conduct from willful violations of the FLSA. Id. As this court has found, there was no good faith inquiry into FLSA obligations by federal agencies before or during the 2013 shutdown. Martin III, 130 Fed.Cl. at 586. The court does not, however, view the agencies' focus on the ADA and not on the FLSA as going beyond "merely negligent" conduct and rising to the level of reckless disregard of the FLSA and its pay requirements.

Finally, the Richland Shoe Court clearly disfavored a test for willfulness that turned on the employer's request for legal advice before, or during, its violation of the FLSA. 486 U.S. at 134–35, 108 S.Ct. 1677. Although plaintiffs rely to a great extent on the agencies' failure to seek legal advice as to their FLSA obligations before or during the 2013 shutdown, ECF No. 19-1, at 25–26, that circumstance alone does not, according to Richland Shoe, determine willfulness. 486 U.S. at 134–35, 108 S.Ct. 1677. Plaintiffs' burden to show willfulness is not met simply by pointing out that the agencies did not obtain legal opinions regarding their FLSA obligations before violating the FLSA during the 2013 shutdown.

2. Adequate Inquiry in These Circumstances

The parties agree that 5 C.F.R. § 551.104 (2013) is the regulation that applies to the FLSA violations at issue in this suit. Section 551.104 provides two

relevant definitions. First, a willful FLSA violation "means a violation in circumstances where the agency knew that its conduct was prohibited by the [FLSA] or showed reckless disregard of the requirements of the [FLSA]. All of the facts and circumstances surrounding the violation are taken into account in determining whether a violation was willful." Id. Second, reckless disregard of the requirements of the FLSA "means failure to make adequate inquiry into whether conduct is in compliance with the [FLSA]." Id.

As this court has explained, when Richland Shoe and section 551.104 are read together, an agency's failure to make adequate inquiry into its FLSA obligations "must be more than a merely negligent or unreasonable failure" for that failure to constitute a willful violation of the FLSA. See Abbey, 106 Fed.Cl. at 282 (citations omitted). Indeed, the adequacy of an agency's inquiry into its FLSA obligations is measured not in terms of mere negligence or unreasonableness, but in the sense of reckless disregard of the FLSA that meets the definition of willfulness established by Richland Shoe. See Angelo v. United States, 57 Fed.Cl. 100, 109 (2003) (noting that section 551.104 is secondary to Richland Shoe for purposes of the willfulness inquiry (citing Bankers Trust N.Y. Corp. v. United States, 225 F.3d 1368, 1375 (Fed. Cir. 2000))). In other words, the court must reject any attempt by plaintiffs to circumvent Richland Shoe by relying on an "adequate inquiry" test that cleaves more to the Jiffy June test, described supra, or the intermediate test, described

supra, both of which were rejected in Richland Shoe. Instead, plaintiffs remain bound by Richland Shoe and cannot rely on section 551.104 to alter the Supreme Court's precedential test for willfulness.

Here, the undisputed facts show that the federal government, as a whole, understood that it could not pay excepted employees during the 2013 shutdown due to the constraints of the ADA. Case No. 13-834C, ECF No. 151 ¶ 2. The court must take these circumstances into account. See 5 C.F.R. § 551.104. Complying with the ADA and not paying excepted employees during the shutdown does not, in the court's view, mean that these federal agencies showed a reckless disregard of the FLSA. Instead, the agencies' conduct, in the context of the 2013 government shutdown governed by both the ADA and the FLSA, did not exceed a level of merely negligent or unreasonable conduct vis-à-vis the FLSA.

Although there is no case directly on point, this court has found, on at least one occasion, that a federal agency did not recklessly disregard the FLSA when it attempted to comply with a particular federal statute and, as a result, neglected its obligations under the FLSA. In Abbey, the Federal Aviation Administration (FAA) was directed to comply with a personnel management overhaul set forth in a new statute. 106 Fed.Cl. at 259. Facing a short transition deadline, the FAA decided to maintain certain pay practices which violated FLSA requirements because the agency did not understand the full implications of the statute

requiring the personnel management overhaul. Id. at 281–83. Thus, although the background facts in Abbey and this case are dissimilar, the decision in Abbey shows that federal agencies may blunder in their interpretation of a federal statute that implicates their responsibilities under the FLSA, without committing a willful violation of the FLSA.[7] As was the case in Abbey, the FLSA violation affecting these plaintiffs during the 2013 government shutdown was nonwillful, not willful.

V. Conclusion

Having considered the undisputed facts and all of the parties' arguments, the court concludes that plaintiffs have failed to meet their burden to show a willful violation of the FLSA. Plaintiffs' motion for partial summary judgment, ECF No. 19, is **DENIED**, and defendant's motion for partial summary judgment, ECF No. 20, is **GRANTED**. Because the two-year statute of limitations in 29 U.S.C. § 255(a) applies to plaintiffs' claims, and because this suit was filed more than two years after plaintiffs' claims accrued, plaintiffs' claims are barred by the statute of limitations and must be dismissed for lack of subject matter jurisdiction. The clerk's office is directed to **ENTER** judgment for

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[7] This court has also reasoned that where there was some doubt about whether the FLSA or a displacing statute applied instead, no willful violation of the relevant pay statute could be found. Blair v. United States, 15 Cl. Ct. 763, 767 n.6 (1988) (citing generally Cook, 855 F.2d at 848).

130 Fed.Cl. 578
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No. 13-834C, No. 16-1297C

(REISSUED February 24, 2017)[1]

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[1] This opinion is identical to the opinion issued on February 13, 2017, in Case No. 13-834, ECF No. 160. It is being reissued only for the purpose of correcting the caption to include Case No. 16-1297 consistent with the order consolidating the cases. See Case No. 16-1297, ECF No. 9.

OPINION AND ORDER

CAMPBELL-SMITH, Chief Judge

From October 1, 2013, through October 16, 2013, a Congressional budget impasse resulted in a partial shutdown of the federal government ("2013 shutdown"). See ECF No. 151 at 3. Plaintiffs in this case are current or former government employees who allege that they were not timely compensated for work performed during the shutdown, in violation of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 et seq. (2012). See ECF No. 29–1. The court certified plaintiffs as a class on October 16, 2014. See ECF No. 46.

Plaintiffs have amended their complaint twice in this case. See ECF Nos. 1, 13, and 29–1. Defendant filed a motion to dismiss the first amended complaint, see ECF No. 23, and before the court ruled on the motion, plaintiffs filed a second amended complaint. In their second amendment, plaintiffs added more plaintiffs and deleted the claim that defendant had violated the Back Pay Act, but did not "add any new claims or legal theories for the Government to address." ECF No. 29 at 3. See also ECF No. 37 (order granting leave to file second amended complaint and explaining points of amendment). As such, the claims set forth in the first amended complaint and analyzed in defendant's motion to dismiss were the same as those remaining claims in the second amended complaint.

In its opinion on defendant's motion to dismiss, the court concluded that the first two claims were viable,

and dismissed the third. See ECF No. 38 at 23. Accordingly, the following two claims were left before the court: (1) failure to pay minimum wages timely as required under the FLSA, and (2) failure to pay overtime to members classified as non-exempt from the FLSA overtime provisions as required under the FLSA. See ECF No. 29–1 at 13–15.

The parties now have filed cross motions for summary judgment. Plaintiffs, in their motion for partial summary judgment, ask the court to determine: (1) whether the government owes liquidated damages to certain employees for violating the FLSA during the 2013 shutdown, and (2) whether the government was legally unable to determine overtime pay during the 2013 shutdown for certain employees by their regularly scheduled paydays. See ECF No. 153–1 at 19–21. In its motion for summary judgment, defendant asks the court to determine: (1) whether the government violated the FLSA by not paying certain employees on their regularly scheduled paydays during the 2013 shutdown, (2) whether the government owes liquidated damages to certain employees for failing to pay regular wages in violation the FLSA, and (3) whether the government owes liquidated damages to certain employees for failing to pay overtime wages in violation of the FLSA. See ECF No. 154 at 8–9. For the reasons stated below, plaintiff's motion for partial summary judgment is granted and defendant's cross-motion for summary judgment is denied.

I. Background

During the 2013 shutdown, the federal government "ceased certain non-essential operations and services" due to a lapse in appropriations. See ECF No. 151 at 3. The Anti-Deficiency Act ("ADA") prohibits the government from spending money when specific appropriations are not in place. See 31 U.S.C. § 1341(a)(1)(A) (2012) (stating 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"). In such a scenario, however, employees who provide services involving "the safety of human life or the protection of property" are deemed "excepted" and are required to continue work despite the lack of funds. 31 U.S.C. § 1342 (2012); ECF No. 151 at 3. Plaintiffs in this case were all excepted employees during the 2013 shutdown. See ECF No. 46 at 2 (defining class of plaintiffs as excepted employees).

The conflict in this case arises from the intersection of these ADA provisions with the FLSA. The FLSA governs minimum wage and overtime compensation.[2] See 29 U.S.C. §§ 201–219. Although the Act applied only to the private sector when Congress enacted it in 1938, Congress extended the Act to cover public

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[2] The court explained the background of the Fair Labor Standards Act at length in its opinion resolving defendant's motion to dismiss. For brevity's sake, only the details necessary for thorough consideration of the motions currently before the court are repeated here. See generally, ECF No. 38.

employees in 1974. See FLSA of 1974, Pub. L. No. 93-259, § 6, 88 Stat. 55.

The FLSA states, in part, that the government "shall pay to each of [its] employees" a minimum wage. 29 U.S.C. § 206(a). See also 5 CFR § 551.301 (2016) (minimum wage regulation from the Office of Personnel Management). The FLSA also states that:

> no employer shall employ any of his employees . . . for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. § 207(a)(1). See also 5 C.F.R. § 551.501 (2016) (overtime regulation from the Office of Personnel Management). 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). The legislation applies to employees broadly, but contains specified exemptions, or specific categories of employees to whom the FLSA provisions do not apply. See 29 U.S.C. § 213. Plaintiffs in this litigation are all public employees who do not fall within any of the categories of employees exempted from the FLSA. See ECF No. 46 at 2 (defining class of plaintiffs as non-exempt employees).

Plaintiffs, who were both excepted under the ADA and non-exempt under the FLSA, filed the instant litigation because defendant failed to pay the wages earned during the first week of the 2013 shutdown on the plaintiffs' regularly scheduled paydays. See ECF No. 29–1 at 1–2; ECF No. 151 at 5. Plaintiffs maintained their claims for FLSA violations while acknowledging that defendant retroactively paid employees after the 2013 shutdown ended. See ECF 151 at 5.

The court certified this subset of affected employees as a class on October 16, 2014. See ECF No. 46. Specifically, the class is defined as:

> Federal employees (a) identified as of October 1, 2013 for purposes of the Fair Labor Standards Act ("FLSA") as employees, pursuant to 29 U.S.C. § 203(e)(2)(A); (b) classified as "non-exempt" under the FLSA as of October 1, 2013; (c) declared "Excepted Employees" during the October 2013 partial government shutdown; (d) worked at some time between October 1 and October 5, 2013, other than to assist with the orderly shutdown of their office; and (e) not paid on their regularly scheduled payday for that work between October 1 and October 5, 2013.

ECF No. 46 at 2. Plaintiffs purporting to meet this class definition include four of the plaintiffs who originally brought suit, and more than 24,000 others who consented to join the action. See ECF No. 137–1 (Second Am. Compl.); ECF No. 144–1 (Opt-In List). Going forward, references to plaintiffs or employees shall

mean the excepted, non-exempt employees included within this class definition, unless otherwise specified.

Plaintiffs worked during the first week of the 2013 shutdown, specifically between October 1 and October 5, 2013, but were not paid for this work on their regularly scheduled paydays because the government understood the ADA to prohibit payment until funds were appropriated for that purpose. See ECF No. 151 at 3, 5. Plaintiffs take the position that despite prohibitions in the ADA, defendant was still obligated to pay employees pursuant to the FLSA. In defendant's view, "the shutdown placed two seemingly irreconcilable requirements upon Federal agencies: pay excepted employees on their next regularly scheduled payday, and make no such expenditures in the absence of appropriations for that purpose." ECF No. 154 at 15.

On the parties' motions for summary judgment, the court now evaluates defendant's obligations to plaintiffs.

II. Legal Standard

The United States Court of Federal Claims has jurisdiction over "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) (2012). The parties do not dispute the

court's jurisdiction to hear plaintiffs' claims, and the court is satisfied that it may do so.

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." RCFC 56(a); see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247–48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Casitas Mun. Water Dist. v. United States, 543 F.3d 1276, 1283 (Fed. Cir. 2008). A genuine dispute is one that "may reasonably be resolved in favor of either party." Anderson, 477 U.S. at 250, 106 S.Ct. 2505. "A fact is material if it 'might affect the outcome of the suit under the governing law.'" Griffin & Griffin Exploration, LLC v. United States, 116 Fed.Cl. 163, 172 (2014) (quoting Anderson, 477 U.S. at 248, 106 S.Ct. 2505).

The moving party carries the burden of establishing that summary judgment in its favor is appropriate. See Celotex Corp. v. Catrett, 477 U.S. 317, 322–23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). "Once that burden is met, the onus shifts to the non-movant to identify evidence demonstrating a dispute over a material fact that would allow a reasonable finder of fact to rule in its favor." Quapaw Tribe of Oklahoma v. United States, 120 Fed.Cl. 612, 615 (2015) (citing Anderson, 477 U.S. at 256, 106 S.Ct. 2505).

In considering a motion for summary judgment, a court must draw all inferences in the light most favorable to the non-moving party. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587–88,

106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). "With respect to cross-motions for summary judgment, each motion is evaluated on its own merits and reasonable inferences are resolved against the party whose motion is being considered." Marriott Int'l Resorts, L.P. v. United States, 586 F.3d 962, 968–69 (Fed. Cir. 2009).

III. Discussion

A. The Anti-Deficiency Act Does Not Operate to Cancel Defendant's Obligations under the Fair Labor Standards Act

As an initial matter, defendant admits that it did not pay plaintiffs on their regularly scheduled pay days for work performed between October 1 and October 5, 2013. See ECF No. 151 at 3. It claims, however, that it should avoid liability under the FLSA for its failure to do so because it was barred from making such payments pursuant to the ADA. See ECF No. 154 at 14–15. Defendant neatly summarizes its view of the conflict 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 Anti-Deficiency Act 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 schedule payday, the question arises of which statutory mandate controls.

Id. at 15–16.

While the court understands why defendant frames the problem in this way, the court believes the issue is more complex than simply a choice between whether the FLSA or the ADA controls. As the court observed in its previous ruling, the Supreme Court has held that the ADA's requirements "apply to the official, but they do not affect the rights in this court of the citizen honestly contracting with the [g]overnment." Salazar v. Ramah Navajo Chapter, 567 U.S. 182, 132 S.Ct. 2181, 2193, 183 L.Ed.2d 186 (2012) (quoting Dougherty v. United States, 18 Ct.Cl. 496, 503 (1882)). In addition, the Court of Claims has stated that "[a]n appropriation per se merely imposes limitations upon the Government's own agents; . . . but its insufficiency does not pay the Government's debts, nor cancel its obligations, nor defeat the rights of other parties." Ferris v. United States, 27 Ct.Cl. 542, 546 (1892).

Plaintiffs cite to a number of cases that are in accord with the holdings in Salazar and Ferris. See New York Airways, Inc. v. United States, 177 Ct.Cl. 800, 810, 369 F.2d 743 (1966) (stating that "the mere failure of Congress to appropriate funds, without further words modifying or repealing, expressly or by clear implication, the substantive law, does not in and of itself defeat a Government obligation created by statute . . . The failure to appropriate funds to meet statutory obligations prevents the accounting officers of the Government from making disbursements, but such rights are enforceable in the Court of Claims"); Lovett v. United States, 104 Ct.Cl. 557, 582, 66 F.Supp. 142 (1945) (explaining that "[i]n a long line of cases it has been held that lapse of appropriation, failure of appropriation, exhaustion of appropriation, do not of themselves preclude recovery for compensation otherwise due"). See also Ford Motor Co. v. United States, 378 F.3d 1314, 1320 (Fed. Cir. 2004) ("[T]he Anti-Deficiency Act does not bar recovery" of costs arising from performance of a contract"); Wetsel-Oviatt Lumber Co. v. United States, 38 Fed.Cl. 563, 570 (Fed. Cl. 1997) (stating that "neither the Appropriations Clause of the Constitution, nor the Anti-Deficiency Act, shield the government from liability where the government has lawfully entered into a contract with another party").

Defendant's counter-argument to this line of cases relies on the premise that the judicially established requirement of prompt payment, see Brooklyn Savings 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), does not operate in the present circumstances, when the FLSA and the ADA are apparently in conflict. It argues that, instead, the court should look only to the bare statutory language in resolving question of its liability. See ECF Nos. 154 at 15–20, 156 at 9 (arguing that "[r]econciliation of this apparent conflict requires the Court to give effect to express language over implied rules").

After careful consideration of defendant's arguments in support of its motion for summary judgment, the court remains unpersuaded that it can entirely avoid liability based only on the superficial conflict between these statutes. The statutes at issue can be harmonized in a manner that neither party fully explains.

As the court held in its previous opinion, the first two counts of plaintiffs' complaint state legally sufficient claims for relief against defendant for its alleged violation of the Fair Labor Standards Act. See ECF No. 38 at 13. This legal conclusion does not ignore the ADA, as defendant's reasoning suggests. In addition to the sections of the FLSA that mandate the payment of certain wages, see 29 U.S.C. §§ 206–207, the statute also includes both a section on recoverable damages and a section establishing circumstances in which the employer can avoid liability for damages beyond the amount of wages earned. Section 216 states, in relevant part, that "[a]ny employer who violates the provisions of section 206 or section 207 of this title 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) (2012).

The employer, however, may be relieved of liability for the liquidated damages if it can demonstrate: "to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the [FLSA]." 29 U.S.C. § 260 (2012). In such circumstances, "the court may, in its sound discretion, award no liquidated damages or award any amount thereof." See id.

Considering this more complete view of the FLSA, it is the court's opinion that the appropriate way to reconcile the two statutes 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.

B. Defendant's Failure to Timely Pay Plaintiffs Violated the FLSA

As noted above, the FLSA states, in part, that the government "shall pay to each of [its] employees" a minimum wage. 29 U.S.C. § 206(a). The FLSA also

requires that the government pay overtime wages to its employees for time worked in excess of forty hours per week "at a rate not less than one and one-half the regular rate at which he is employed." 29 U.S.C. § 207(a)(1).

As this court noted in evaluating the legal sufficiency of plaintiffs' claims, courts have held that employers are required to pay these wages on the employee's next regularly scheduled payday. See ECF No. 38 at 12 (citing, inter alia, 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)). See also 29 C.F.R. § 778.106 (2016) (stating the general rule "that overtime compensation earned in a particular workweek must be paid on the regular pay day for the period in which such workweek ends"). Because plaintiffs alleged that defendant failed to pay wages in accordance with this rule, their claims survived defendant's motion to dismiss. See ECF No. 38 at 13.

Prior to filing the instant motions, the parties filed a document entitled Stipulation of Facts Not in Dispute. See ECF No. 151 at 3. Paragraph 7 reads as follows: "The Government did not pay employees who were designated as 'non-exempt' under the FLSA and as 'excepted' for purposes of the 2013 Government shutdown for work performed between October 1 and October 5, 2013, on their regularly scheduled paydays for that work." Id. at 5. The parties also agree that the plaintiffs were retroactively paid their earned wages. See id. But, eventual payment is not what the FLSA requires.

Thus, under the legal framework previously established by the court, together with the undisputed and material facts agreed to by the parties, defendant's failure to timely pay plaintiffs' wages is a violation of the FLSA.

C. Defendant is Liable for Liquidated Damages

Because the court has concluded that defendant violated the FLSA, it is liable for liquidated damages. Section 216 states, in relevant part, that "[a]ny employer who violates the provisions of section 206 or section 207 of this title 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). The defendant argues it should be relieved of this liability, or a portion thereof, in one of two ways.

First, defendant claims it can demonstrate that it acted "in good faith and that [it] had reasonable grounds for believing that [its] act or omission was not a violation of the [FLSA]." 29 U.S.C. § 260. In such circumstances, "the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 of this title." See id.

Second, the government argues that it should avoid liability for liquidated damages resulting from the late payment of overtime wages based on an interpretive bulletin issued by the Department of Labor

("DOL") affording employers some leniency in this regard "[w]hen the correct amount of overtime compensation cannot be determined until some time after the regular pay period." 29 C.F.R. § 778.106.

For the following reasons, the court finds neither argument persuasive.

1. Defendant has not demonstrated good faith and reasonable grounds for believing its failure to pay did not violate the FLSA

The employer bears the burden of establishing good faith and reasonable grounds for its actions. See Adams v. United States, 350 F.3d 1216, 1226 (Fed. Cir. 2003). The burden is a substantial one, consisting of both a subjective good faith showing and an objective demonstration of reasonable grounds. Bull v. United States, 68 Fed.Cl. 212, 229 (2005), clarified by 68 Fed.Cl. 276 (2005), aff'd, 479 F.3d 1365 (Fed. Cir. 2007) (citations omitted). "If . . . the employer does not show to the satisfaction of the court that he has met the two conditions mentioned above, the court is given no discretion by the statute, and it continues to be the duty of the court to award liquidated damages." 29 C.F.R. § 790.22(b).

The initial good faith inquiry is subjective in nature and requires an employer to demonstrate "an honest intention to ascertain what the [FLSA] requires and to act in accordance with it." Bull, 68 Fed.Cl. at 229 (quoting Beebe v. United States, 640 F.2d 1283, 1295 (1981)). Here, the government argues that it believed,

in good faith, that the ADA precluded timely payment of wages to plaintiffs because, in the absence of appropriations, there was no avenue for federal agencies to comply with the FLSA. See ECF No. 154 at 21. The government adds that it was precluded from complying with the FLSA, because "[i]t is a federal crime, punishable by fine and imprisonment, for any Government officer or employee to knowingly spend money in excess of that appropriated by Congress." Id. at 22 (quoting Office of Pers. Mgmt. v. Richmond, 496 U.S. 414, 430, 110 S.Ct. 2465, 110 L.Ed.2d 387 (1990)). It also notes that an officer of the government who "knowingly and willfully [violates] section 1341(a) or 1342 of [the ADA] shall be fined not more than $5,000, imprisoned for not more than 2 years, or both." Id. (quoting 31 U.S.C. § 1350).

The government's effort to establish good faith, however, elides the requirement that it "take active steps to ascertain the dictates of the FLSA and then act to comply with them." Angelo v. United States, 57 Fed.Cl. 100, 105 (2003) (quoting Herman v. RSR Sec. Services, 172 F.3d 132, 142 (2d Cir. 1999)). In Angelo v. United States, the court considered claims for overtime wages brought by federal employees. 57 Fed.Cl. at 101. In support of its good faith defense in that case, the government argued that the official, who erroneously had classified employees as exempt from overtime compensation, conducted a cursory review of the employees' job descriptions and applicable regulations. Id. at 106. The official admitted in her deposition, however, that she had not considered, or even inquired,

about the specific requirements for an exemption. Id. The court concluded "that [the official's] admittedly limited inquiry [did] not . . . meet the good faith test." Id. at 107.

Defendant attempts to distinguish this case from Angelo, which it characterizes as a "typical" FLSA case in which adherence to the law "is within the employer's control." ECF No. 154 at 21. Here, defendant argues, "no course of compliance was available to Federal agencies; it was impossible for Federal agency officials to comply with both the FLSA and Anti-Deficiency Act during the shutdown." Id. On this basis, the government asks the court to find that it acted in good faith by honoring the ADA's express prohibition against making payments in the absence of an appropriation. Id. at 26.

Contrary to the government's suggestion, its burden under the FLSA is not met so easily. In Angelo, this court was not satisfied that good faith was established by even the limited inquiry conducted by the government into whether its actions were compliant. See 57 Fed.Cl. at 107. Here, defendant made no inquiry into how to comply with the FLSA, instead relying entirely on of the primacy of the ADA. By its own admission, the government did not consider—either prior to or during the government shutdown—whether requiring essential, non-exempt employees to work during the government shutdown without timely payment of wages would constitute a violation of the FLSA. See ECF No. 151 at 4. Defendant further admits that it did not seek a legal opinion regarding how to meet the

obligations of both the ADA and FLSA during the government shutdown, see id. an action it now claims would have been futile, see ECF No. 154 at 22.

Defendant's argument, essentially, asks the court to modify the standard for establishing good faith from a requirement that the employer demonstrate "an honest intention to ascertain" its legal obligations, to the much less stringent requirement that the employer demonstrate merely an honest belief that it could not comply with the requirements of the law. The defendant's proposed inquiry contravenes the spirit of the FLSA by effectively reading out the requirement that an employer taking any action at all to determine its legal obligations. The court declines to adopt defendant's test for establishing good faith. Because the government admittedly took no steps to determine its obligations under the FLSA during the 2013 shutdown, no disputed and material facts exist, and the court cannot find that it acted in good faith.

Defendant claims that it had reasonable grounds for believing that the ADA precluded its compliance with the FLSA during the 2013 shutdown because this is an issue of first impression. See ECF No. 154 at 29. The court doubts the viability of such an argument, but will not indulge in a lengthy discussion of it in this case. The exception to liability for liquidated damages is a two-part test. Because defendant has failed to establish the first requirement of subjective good faith, the court need not determine whether it had objectively reasonable grounds for its inaction.

As such, the exception that would permit the court to award a reduced amount of liquidated damages, or no liquidated damages at all, does not apply.[3]

2. Defendant has not satisfied the conditions under which late payment of overtime wages is permissible

Despite the general rule "that overtime compensation earned in a particular workweek must be paid on the regular pay day for the period in which such workweek ends," the DOL has afforded employers some leniency from the Act's liquidated damages requirement with regard to overtime wages "[w]hen the correct amount of overtime compensation cannot be determined until some time after the regular pay period." 29 C.F.R. § 778.106. This provision is an interpretive bulletin from the DOL, and as such, does not rise to the authoritative level of a regulation, but courts have regarded it as "a reasonable construction of the FLSA." Brooks v. Vill. of Ridgefield Park, 185 F.3d 130, 135–36 (3rd Cir. 1999).

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[3] The court appreciates that the parties diligently presented evidence of factors that may have affected a discretionary award of liquidated damages, such as actions and communications surrounding passage of the Pay Our Military Act, guidance documents issued by the United States Office of Personnel Management relating to suggestions for mitigating hardships during furloughs, and the specific injuries suffered by plaintiffs in this case. Because the court has determined that it does not have discretion in the award or amount of liquidated damages, an extended discussion of this evidence is unnecessary.

Defendant argues that it should be excused from liability for liquidated damages as to overtime wages because "an event wholly beyond the control of Federal agencies," namely the 2013 shutdown, prevented it from complying with the FLSA timely payment rules. ECF No. 154 at 31. Before examining the substance of this claim, the court notes that this assertion rings hollow given certain of defendant's responses in discovery.

By way of interrogatory no. 14, plaintiffs asked defendant to:

> Identify each agency of the Government that could not determine, compute, or arrange for the payment of overtime compensation during the October 2013 partial shutdown because personnel involved in the process of determining, computing or arranging for the payment of overtime compensation were not classified as excepted employees and therefore were on furlough.

ECF 153–16 at 3. In response, the government identified the Broadcasting Board of Governors ("BBG"), the National Aeronautics and Space Administration ("NASA"), and the Peace Corps. Id at 5. These three agencies employed only thirty-eight of the more than 24,000 plaintiffs in this case. The BBG employed twenty-nine, NASA employed three, and the Peace Corps employed six. See ECF No. 153–2 at 3. By defendant's own admission, the agencies employing the vast majority of class members had staff in place during the 2013 shutdown who were capable of calculating overtime wages

due to their employees. Thus, the DOL bulletin's exception clearly does not apply to those many agencies.

The only remaining issue, then, is to determine whether defendant can avoid liability as to the thirty-eight individuals employed by the BBG, NSA, and the Peace Corps. As noted above, defendant argues that because the 2013 shutdown was "an event wholly beyond [its] control," it should have triggered the DOL bulletin's exception. See Dominici v. Bd. of Educ. of City of Chicago, 881 F.Supp. 315, 320 (N.D. Ill. 1995). This notion most comfortably fits with circumstances that involve a natural disaster, and cannot be used as an excuse for circumstances within the employer's control. See id. ("Although this Court agrees that natural disasters or similar events wholly beyond the control of the employer may in proper circumstances allow an employer to make late payments without violating the FLSA, . . . [a]n employer may not set up an inefficient accounting procedure and then claim it is not responsible for timely payment of wages due to its own incompetence.").

Defendant argues that the agencies' failure to timely pay overtime wages resulted from circumstances beyond the control of those agencies, inviting a distinction for purposes of liability in this case between the executive and legislative branches of the government. See ECF No. 154 at 30. The court declines to make such a distinction, and finds that application of the general rule requiring timely payment of overtime wages is appropriate in this case for two reasons. First, this argument is, essentially, another way of saying

that defendant was unable to meet its obligations under the FLSA because of the ADA. The court has already found that the ADA does not excuse defendant's FLSA violations, and to allow defendant to avoid liability under this exception would amount to an end run around that legal conclusion.

In addition, although neither the parties nor the court found a case involving the precise circumstances and context as the matter at bar, the Ninth Circuit's decision in Biggs v. Wilson is again instructive. 1 F.3d 1537 (9th Cir. 1993). The dispute in Biggs involved the California Department of Transportation's failure to timely pay overtime wages to certain employees during the 1990 state budget impasse. See id. at 1538. The Ninth Circuit upheld the district court's conclusion that a fifteen-day delay in payment of overtime wages violated the FLSA. See id. at 1544. In reaching this conclusion, the Ninth Circuit cites the DOL bulletin, 29 U.S.C. § 778.106. See id. at 1543. Although the court did not discuss the specific portion of the bulletin that provides for an exception to timely payment, the court did look to the section as an authority for determining when payment is considered timely. See id. As such, this court considers it a fair inference that the Ninth Circuit was aware of the stated exception, and finds it notable that the court did not apply it in the circumstance of a budget impasse. While this inference does not alone provide the basis of this court's decision, it certainly undercuts defendant's position that an agency should be permitted to wield this exception to

timely payment in the event of a budget impasse, like the one that resulted in the 2013 shutdown.

Accordingly, the court holds that the DOL bulletin's exception is unavailable in this case.

D. Calculation of Liquidated Damages

Because defendant has failed to establish the requirements for either exception to liability for liquidated damages, "it continues to be the duty of the court" to make an award. 29 C.F.R. § 790.22(b). In accordance with 29 U.S.C. § 216(b), the court finds that plaintiffs are entitled to liquidated damages in an amount equal to the minimum and overtime wages that defendant failed to timely pay.

Consistent with the conclusions in this opinion, plaintiffs shall calculate the amount due from the defendant, delineated either by individual class member or by relevant categories of class members. On or before **March 17, 2017**, plaintiffs shall submit a draft of those calculations to defendant. On or before **March 31, 2017**, the parties shall confer and discuss any disagreements as to the calculations. Following this conference, on or before **April 7, 2017**, the parties shall jointly file a statement with the court reporting the results of both the conference and the calculations so that the court may proceed to entering a judgment in this case.

IV. Conclusion

Plaintiffs' motion for partial summary judgment, see ECF No. 153, is **GRANTED**. Defendant's cross-motion for summary judgment, see ECF No. 154, is **DENIED**.

As indicated above, on or before **March 17, 2017**, plaintiffs shall submit a draft of their damages calculations to defendant. On or before **March 31, 2017**, the parties shall confer and discuss any disagreements as to the calculations. And, on or before **April 7, 2017**, the parties shall jointly file a statement with the court reporting the results of both the conference and the calculations.

IT IS SO ORDERED.

117 Fed.Cl. 611
United States Court of Federal Claims.

Donald MARTIN, Jr., et al., Plaintiffs,
v.
The UNITED STATES, Defendant.

No. 13-834C
|
Filed: July 31, 2014

Attorneys and Law Firms

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OPINION AND ORDER

CAMPBELL-SMITH, Chief Judge

This case arises from the fall 2013 budget impasse and resulting partial government shutdown. Plaintiffs are government workers who were required to work during the shutdown but were not timely paid minimum wages and overtime wages on their regularly scheduled paydays for the work performed. Plaintiffs allege that the late payment of their wages violated the Fair Labor Standards Act (FLSA or the Act), 29 U.S.C.

§§ 201–219 (2012), and for such violation they are entitled to statutory liquidated damages. Defendant moves to dismiss the action for failure to state a claim. For the reasons set forth below, defendant's motion to dismiss as to Counts One and Two is **DENIED**, and its motion as to Count Three is **GRANTED**.

I. Background

When Congress failed to appropriate funds for government work to continue after the end of fiscal year 2013, the federal government experienced a partial shutdown. *See* Def.'s Mot. to Dismiss for Failure to State a Claim (Def.'s Mot.), March 11, 2014, ECF No. 23, at 3. The partial shutdown lasted from October 1 through October 16, 2013. 2d Am. Compl., June 2, 2014, ECF No. 29–1, at ¶ 16. To maintain essential government functions during the shutdown, defendant designated its employees as either "excepted employees" or "non-excepted," and required that excepted employees continue to work and perform their normal duties. *Id.* ¶ 1. Excepted employees were not compensated for work performed on or after October 1, 2013, until the partial shutdown ended and their next scheduled payday occurred.[1] *Id.* ¶ 18.

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[1] Congress did pass special legislation on the eve of the shutdown to ensure that "troops, . . . civilian Defense Department workers[,] and employees of contractors whom the Secretary of Defense determined to be 'providing support to members of the Armed Forces'" would be paid on time. Pls.' Opp'n to Def.'s Mot. Dismiss (Pls.' Opp'n), April 11, 2014, ECF No. 26, at 29 (quoting

"For most or all [plaintiffs], the first pay period affected by the partial shutdown commenced Sunday, September 22, 2013 and ended Saturday, October 5, 2013 [(the Pay Period)]." *Id.* ¶ 21. Had the shutdown not occurred, each of these individuals presumably would have been paid, in the ordinary course, for all work he or she performed during the Pay Period on the employee's next regularly scheduled payday (Scheduled Payday). *See id.* (noting that, depending on the employee, the Scheduled Payday was Friday, October 11, 2013; Tuesday, October 15, 2013; or Thursday, October 17, 2013). The shutdown, however, took place during the course of the Pay Period. When the Scheduled Payday arrived, paychecks reflected payment for work performed only through Monday, September 30, 2013 rather than for the full Pay Period (through October 5, 2013). *Id.* ¶¶ 21–22. Compensation for work performed by excepted employees commencing Tuesday, October 1, 2013 through Saturday, October 5, 2013 (the Five Days) was not included in each employee's regular paycheck and thus, plaintiffs allege they were not paid minimum wage for the week of September 29, 2013 (the Week). *Id.* ¶ 1. The government did not issue wages for the Five Days until approximately two weeks after plaintiffs' Scheduled Paydays, after the government shutdown had ended and Congress had allocated funds to pay the wage debts. *See* Pls.' Opp'n to Def.'s Mot. to Dismiss (Pls.' Opp'n), April 11, 2014, ECF No. 26, at 2–3; Def.'s Mot. 4.

Pay Our Military Act, Pub.L. No. 113–39, 92, 127 Stat. 532 (2013)).

There is no dispute that all plaintiffs eventually were paid for all work performed during the Five Days approximately two weeks after their Scheduled Paydays. *Id.* However, plaintiffs assert that the government's failure to make payment in a timely manner—that is, on the regularly Scheduled Payday—was a violation of the FLSA. *See* 2d Am. Compl. ¶ 1.

Plaintiffs filed their initial Complaint with this court on October 24, 2013, ECF No. 1, a First Amended Complaint (Am.Compl.) on January 27, 2014, ECF No. 13, and a Second Amended Complaint (2d Am.Compl.) was deemed filed on June 2, 2014, ECF No. 29–1, *see* Order, June 2, 2014, ECF No. 37 (granting plaintiffs' motion for leave to file their Second Amended Complaint). The five plaintiffs originally named in this lawsuit were excepted employees working for the Bureau of Prisons, within the Department of Justice, at various federal prisons throughout the United States over the course of the government shutdown. *Id.* ¶¶ 6–10; *see* Def.'s Mot. 3. Plaintiffs attached to their First Amended Complaint an Appendix listing 1023 opt-in plaintiffs who were employed by various governmental agencies during the relevant pay period. *See* Am Compl. ¶ 12. In their Second Amended Complaint, plaintiffs added 911 opt-in plaintiffs.[2] 2d Am. Compl. 1.

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[2] In their Second Amended Complaint, plaintiffs also withdrew Count Four, in which they had alleged violations of the Back Pay Act, 29 U.S.C. § 5596. *See* 2d Am. Compl.; Order, June 2, 2014, ECF No. 37 (granting plaintiffs' Motion for Leave to File Second Amended Complaint). Because plaintiffs no longer wish to pursue their Back Pay Act claims, the court does not address defendant's arguments regarding dismissal of those claims.

Each proposed opt-in plaintiff allegedly was classified as excepted during the government shutdown and performed work during that time for which he or she was not timely compensated.[3] 2d Am. Compl. ¶¶ 12–13.

In Count One, plaintiffs complain that the government's failure to timely pay excepted employees for the Five Days resulted in a minimum wage violation under the FLSA. 2d Am. Compl. ¶ 1. They reason that the late payment effected an underpayment and resulted in many potential plaintiffs receiving less than minimum wage for work performed during the Week in violation of the FLSA. *Id.* ¶¶ 55–58. The applicable minimum wage is $7.25 per hour or $290 for a forty hour workweek. *Id.* ¶ 1. Plaintiffs seek liquidated damages at a rate of $7.25 per hour multiplied by the number of hours worked during the Five Days, or alternatively, in an amount equal to the difference between $290 and the amount paid on the Scheduled Payday for work performed during the Week. *Id.* ¶ 1.

In Count Two, plaintiffs claim that, in violation of the FLSA, potential plaintiffs—who were classified as

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[3] Plaintiffs also have filed a motion to conditionally certify this case as a collective action. Pls.' Mot. to Certify, Jan. 28, 2014, ECF No. 14. Plaintiffs represent that there were approximately 1.3 million excepted employees subjected to late payment of wages due to the October 2013 shutdown. 2d Am. Compl. ¶ 19. The collective action proposed by plaintiffs would include "all government employees who (a) were classified by [d]efendant as '[excepted] [e]mployees,' (b) performed work for [d]efendant at any time during the Five Days, and (c) were not paid for such work on their Scheduled Payday." *Id.* ¶ 4. Briefing on the motion for conditional certification is still under way.

FLSA non-exempt and therefore entitled to overtime under the FLSA—were not paid overtime compensation on time for work performed during the Five Days. *Id.* ¶¶ 59–63.

In Count Three, plaintiffs assert that potential plaintiffs who were classified as FLSA *exempt* are nonetheless entitled to compensation for overtime hours worked during the Five Days.[4] *See id.* ¶¶ 64–69. Plaintiffs contend that because the government chose not to compensate excepted employees on time and failed to pay them on a "salary basis" for the Week, even the exempt employees are entitled to FLSA damages at applicable rates for any overtime work performed during the Week. See Pls.' Opp'n 33–36.

Pending now before the court are Defendant's Motion to Dismiss for Failure to State a Claim[5] (Def.'s Mot.); Plaintiffs' Opposition to Defendant's Motion to Dismiss (Pls.' Opp'n); and Defendant's Reply In Support of Its Motion to Dismiss (Def.'s Reply), May 2,

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[4] Of the five originally named plaintiffs, Messrs. Martin, Manbeck, Roberts, and Sumner were classified as FLSA non-exempt, but Mr. Rojas was classified as FLSA exempt. 2d Am. Compl. ¶¶ 6–10.

[5] Defendant also filed a Motion to Transfer, ECF No. 23, which it later withdrew in light of the Court of Appeals for the Federal Circuit's decision in *Abbey et al. v. United States*, 745 F.3d 1363 (Fed.Cir.2014). *See* Def.'s Notice of Suppl. Auth., ECF No. 24. In *Abbey*, the Court of Appeals rejected defendant's argument that the Court of Federal Claims does not have jurisdiction over Fair Labor Standards Act cases. *Abbey*, 745 F.3d at 1369.

2014, ECF No. 27. The court held oral argument on May 9, 2014. Defendant's motion is ripe for review.

II. Legal Standards

A motion to dismiss for "failure to state a claim upon which relief can be granted," Rules of the United States Court of Federal Claims (RCFC) 12(b)(6), should be granted "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); *see Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (explaining that "a claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged" (citing *Bell Atl. v. Twombly*, 550 U.S. 544, 556, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007))). In deciding a motion to dismiss for failure to state a claim, the court "must accept as true all the factual allegations in the complaint, and must indulge all reasonable inferences in favor of the non-movant." *Sommers Oil Co. v. United States*, 241 F.3d 1375, 1378 (Fed.Cir.2001) (citations omitted). However, the court need not "accept as true[,] legal conclusions" asserted by the non-movant. *In re Bill of Lading Transmission & Processing Sys. Patent Litig.*, 681 F.3d 1323, 1331 (Fed.Cir.2012) (quoting *Jones v. City of Cincinnati*, 521 F.3d 555, 559 (6th Cir.2008)).

Enacted in 1938, the FLSA governs minimum wage and overtime compensation. *See* 29 U.S.C. §§ 201–219. The Department of Labor (DOL) administers the FLSA

for the private sector, and it has promulgated regulations accordingly. *See* 29 C.F.R. Ch. V. In 1974, Congress extended the reach of the FLSA to federal employees, *see* Fair Labor Standards Act of 1974, Pub.L. No. 93–259, § 6, 88 Stat. 55, and authorized the Office of Personnel Management (OPM) to administer the FLSA for federal employees in a manner consistent with the DOL's administration of the Act for the private sector, 29 U.S.C. § 204(f). In the absence of pertinent OPM regulations, the parties have relied on DOL regulations to support their various arguments.[6] Counsel also have pointed to various DOL statements of general policy found in the federal register. E.g., Interpretative Bulletin on the General Coverage of the Wage and Hours Provisions of the Fair Labor Standards Act of 1938, 29 C.F.R. § 776.4. A policy statement or interpretative regulation does not have the force of law, but is potentially instructive. *See Batterton v. Francis*, 432 U.S. 416, 425 n.9, 97 S.Ct. 2399, 53 L.Ed.2d 448 (1977).

The court notes that plaintiffs are federal workers subject to OPM regulations, and not to the DOL corollaries. *See Billings v. United States*, 322 F.3d 1328, 1331–32 (Fed.Cir.2003). However, when a DOL regulation or policy statement speaks to a matter for which there is no correlative OPM regulation, and the matter does not require a distinction between private and

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[6] The court notes that in certain instances, however, the parties have attempted to rely on DOL regulations or guidance without mention of OPM corollaries. For example, neither party cited to OPM minimum wage (5 C.F.R. § 551.301) or overtime (5 C.F.R. § 551.501) regulations in its arguments to the court.

public employees, the court may consider the DOL regulation or policy statement for constructive guidance. *See Bates v. United States*, 60 Fed.Cl. 319, 321 n. 3 (2004) ("While 'caution dictates against simply importing DOL-created standards into the federal sector without any conscious rulemaking at either DOL or OPM,' we believe it is appropriate to look to [DOL standards] for persuasive guidance where the OPM regulations are unclear.") (quoting *Adams v. United States*, 40 Fed.Cl. 303, 306–07 (1998)); *Aamold v. United States*, 39 Fed.Cl. 735, 739 n. 4 (1997) ("OPM's regulations and interpretations must be consistent with the FLSA itself and with the standards set by DOL for the private sector. While OPM regulations are controlling . . . the court can also consider DOL's regulations.") (citations omitted).

III. Discussion

The legal question squarely presented in this case is whether plaintiffs can recover under the FLSA for a short delay in the payment of their wages. The issue is one of first impression for this court. Contending that no FLSA violation has occurred, defendant urges the court to dismiss plaintiffs' minimum wage and overtime claims. The arguments for dismissal put forward by defendant may be summarized as follows: (1) the FLSA "is designed to protect low wage workers who are not paid minimum wage for their work or are not paid at all, [but is not designed to apply to] employees like plaintiffs whose pay was delayed only a short time," and (2) plaintiffs lack the requisite authority for their

claim because the FLSA and OPM regulations, by their plain language, do not require payment of wages on a particular day, and the Court of Appeals for the Federal Circuit has not addressed whether a short delay in the payment of wages constitutes a violation of the FLSA. Def.'s Mot. 6–7.

Defendant further argues that Count Three concerning FLSA exempt plaintiffs should be dismissed from this action because these exempt individuals are not subject to FLSA requirements. Def.'s Mot. 28–29. Defendant adds that even if the court were to determine that an FLSA violation occurred, no damages could be obtained because an award of liquidated damages would be unwarranted in these circumstances. Def.'s Mot. 15. The court addresses defendant's arguments in turn.

A. Plaintiffs Have Stated an FLSA Claim Based On Defendant's Failure to Pay Non-Exempt Employees Minimum Wage and Overtime Wages On Scheduled Paydays

The FLSA requires that "[e]very employer . . . pay to each of his employees who in any workweek is engaged in commerce . . . wages at the following rates . . . $7.25 an hour."[7] 29 U.S.C. § 206(a)(1)(C). The OPM minimum wage regulation provides, "[A]n agency shall pay each of its employees wages at rates not less than the minimum wage . . . for all hours of work. . . . An

[7] The minimum hourly wage in effect during the government shutdown was $7.25. *See* 29 U.S.C. § 206(a)(1)(C).

employee has been paid in compliance with the minimum wage provisions of this subpart if the employee's hourly regular rate of pay . . . for the workweek is equal to or in excess of the rate specified. . . ." 5 CFR § 551.301(a)–(b).

If the covered employee works more than forty hours in a workweek, he or she is entitled to pay that is not less than one and one-half the regular pay for the excess hours. 29 U.S.C. § 207(a); *see also* 5 C.F.R. § 551.501 ("An agency shall compensate an employee who is not exempt . . . for all hours of work in excess of 8 in a day or 40 in a workweek at a rate equal to one and one-half times the employee's hourly regular rate of pay. . . .").

The government argues that its late payment of wages to plaintiffs was not an FLSA violation when considered properly under a "totality of the circumstances" standard. Def.'s Mot. 21–22. In defendant's view, the circumstances precluding a finding of an FLSA violation are at least two-fold: (1) the legal constraint imposed by the Anti-Deficiency Act, 31 U.S.C. § 1341(a), which prohibited defendant from making payments during the lapse in appropriations; and (2) the resultant short delay in the payment of owed wages. *See* Def.'s Mot. 17–22.

Plaintiffs contend that defendant's argument cannot stand. *See generally* Pls.' Opp'n 9–15. Plaintiffs assert that the "usual rule" for a missed regular payday—as recognized by various courts—applies here. *Id.* at 10. Under the "usual rule," an FLSA claim

accrues at the time of a missed regular payday and, as plaintiffs aver, a violation occurs at that same time. *Id.*

The court agrees with plaintiffs.

1. A Violation of the FLSA Occurred When Plaintiffs Were Not Paid "On Time"

Defendant acknowledges that the FLSA requires that employers pay minimum wage and overtime wages under certain circumstances; but defendant observes that neither the Act nor the OPM regulations define "prompt payment," "timely payment" or "payday." Def.'s Mot. 15, 17. "Nor does the Act explicitly require that wages must be paid on a particular day." *Id.* at 17.

Defendant attempts to distinguish the facts of this case from other cases in which courts found that an FLSA violation occurred by pointing out that other FLSA cases have involved much longer periods of nonpayment. *Id.* at 18. Defendant asserts that in such cases, either "an employer has substantially delayed payment, amounting to months or even years, or an employer clearly attempted to evade the Act." *Id.* (citing *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 700–01, 65 S.Ct. 895, 89 L.Ed. 1296 (1945) (finding an FLSA violation where an employee was finally paid overtime over two years after he left his employment); *United States v. Klinghoffer Bros. Realty Corp.*, 285 F.2d 487, 491 (2d Cir.1960) (finding an FLSA violation where employees were required to work additional overtime with the understanding that they would be paid at

some indefinite future date and where they were not paid for up to seventeen months after they performed the work); *Calderon v. Witvoet*, 999 F.2d 1101, 1107 (7th Cir.1993) (finding an FLSA violation where farm workers were not paid their full pay until the end of the farm season, which was weeks and months after the performed work)).

Defendant insists that the delay in payment here was not as egregious as in the cited cases, and there were no "attempts by the [g]overnment to evade the provisions of the statute." Def.'s Mot. 19. Moreover, plaintiffs in this action were paid approximately two weeks after their regularly scheduled paydays.[8] *See id.*

Defendant is correct that no explicit timeline for the payment of wages is set forth either in the FLSA or in the relevant regulations. Nonetheless, the court must consider the Supreme Court's interpretive guidance regarding the FLSA in the 1945 decision, *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 707, 65 S.Ct. 895, 89 L.Ed. 1296 (1945). Observing that the FLSA minimum wage provision requires "on time" payment, the Court held, *inter alia*, that plaintiff was entitled to liquidated damages under the Act even though he had an agreement with his employer in which he waived

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[8] Defendant also offered the alternative argument that "the official payday shifted and Federal employees were technically actually paid on their official payday." Def.'s Reply 12. Without further explanation from defendant, the court cannot evaluate this bare and dubious contention, raised for the first time in a reply brief, and thus, the court does not address it any further in this ruling.

his rights to such damages. *Id.* at 707, 65 S.Ct. 895. The Supreme Court explained:

> [The FLSA] constitutes a Congressional recognition that [the] 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 in order to insure restoration of the worker to that minimum standard of well being.

Id. (emphasis added).

When applying the Supreme Court's "on time" mandate, courts have determined almost universally that an FLSA claim accrues, for limitations purposes, when an employer fails to pay workers on their regular paydays, and that a violation of the Act also occurs on that date.[9] *See, e.g., Biggs v. Wilson*, 1 F.3d 1537, 1540 (9th Cir.1993) (*Biggs II*); *Olson v. Superior Pontiac-GMC, Inc.*, 765 F.2d 1570, 1579 (11th Cir.1985), *modified*, 776 F.2d 265 (11th Cir.1985); *Atlantic Co. v. Broughton*, 146 F.2d 480, 482 (5th Cir.1944); *Birbalas*

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[9] Plaintiffs also point to a Department of Labor (DOL) policy statement reflecting the holding expressed in many FLSA cases regarding the accrual of an FLSA claim in a statute of limitations context: "The courts have held that a cause of action under the [FLSA] for unpaid minimum wages or unpaid overtime compensation and for liquidated damages 'accrues' when the employer fails to pay the required compensation for any workweek at the regular pay day for the period in which the workweek ends." 29 C.F.R. § 790.21(b).

v. Cuneo Printing Industries, 140 F.2d 826, 828 (7th Cir.1944).

To date, the Federal Circuit has not addressed the issue of when an FLSA violation occurs. However, in a decision considering when an FLSA claim accrues, the Federal Circuit acknowledged the "usual rule . . . 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) (citing *Beebe v. United States*, 640 F.2d 1283 (1981)).

In *Cook*, the Federal Circuit had ruled previously that federal civilian fire fighters were due overtime related to their "remain[ing] on call at their stations when not fighting fires." *See id.* at 849. The Circuit Court subsequently considered, *inter alia*, when the fire fighters' claims accrued for statute of limitations purposes. *Id.* The Appeals Court determined that notwithstanding the usual rule "that a claim for unpaid overtime under the FLSA accrues at the end of each pay period when it is not paid, . . . in the specific circumstances of this case, the right of fire fighters to statutory overtime depended on . . . the performance of [a study of hours of work]." *Id.* at 851. Accordingly, the fire fighters' claims were found to have accrued on the date the study was completed. *Id.*

Decisions from this court have applied the "usual rule," as acknowledged by the Federal Circuit in *Cook*, to determine the date of claim accrual for the purpose of calculating the expiration of the statute of limitations in FLSA cases. *See, e.g., Moreno v. United States*,

82 Fed.Cl. 387, 404 n. 37 (2008) ("[A] cause of action to recover those wages plus liquidated damages under the FLSA was available to plaintiffs immediately following those pay periods, when it was clear that their paychecks included neither overtime pay nor liquidated damages."); *see also Corrigan v. United States*, 68 Fed.Cl. 589, 592–93 (2005), *aff'd*, 223 Fed.Appx. 968 (Fed.Cir.2007).

Arguing that accrual and the occurrence of a violation require separate inquiries, defendant in this case seeks to distinguish the Federal Circuit's determination regarding the accrual of an FLSA claim from a determination regarding the time at which an FLSA violation is deemed to have occurred. *See* Def.'s Reply 4–5. Defendant relies on a case from the Second Circuit, finding that no FLSA violation had occurred solely by virtue of an employer gradually changing its pay schedule to implement a biweekly payroll in place of a weekly payroll that had been used previously. *Id.* at 11–12 (discussing *Rogers v. City of Troy, N.Y.*, 148 F.3d 52, 54–55 (2d Cir.1998)). The change in schedule resulted in plaintiffs' pay being delayed by one day each week for five weeks. *Rogers*, 148 F.3d at 54. The Second Circuit distinguished the case from other FLSA cases that involved "substantial delays in payment," *id.* at 56, and the court created an analytical framework that allowed its finding in that instance—that the one day delays did not reflect a violation in the substantive wage and hour provisions of the Act, absent other factors:

> We hold that the FLSA does not prohibit an employer from changing the payday of its employees for a valid business purpose, provided that: (a) the change is made for a legitimate purpose; (b) there is no unreasonable delay in the payment of wages; (c) the change is intended to be permanent; and (d) the change does not result in the violation of the substantive wage and hour requirements of the Act.

Id. at 60.

The facts of the *Rogers* case are clearly distinguishable from the facts here. In *Rogers*, the employer was implementing a permanent change in its pay schedule for administrative purposes; the regularly scheduled payday was changing for a legitimate reason. Notwithstanding the factual differences between the cases defendant asserts that the Second Circuit's decision in *Rogers* is instructive. Def.'s Mot. 20. The government claims that a test tailored to the facts of this case, like the one created by the *Rogers* court, would be appropriate, such as the totality of the circumstances approach it proposed. *Id.* at 21–22.

Plaintiffs urge the court to reject the multi-factorial totality of the circumstances test favored by defendant and to adopt instead a bright-line rule that an FLSA violation occurs at the time of the missed payday. *See* Pls.' Opp'n 11–13, 26–29. As support for their claim that a frank violation of the Act has occurred, plaintiffs cite a case from the Ninth Circuit Court of Appeals, *Biggs II*, 1 F.3d 1537, in which the court found a violation of the FLSA on facts strikingly similar to

the facts in the case at bar. In *Biggs II*, the Ninth Circuit considered whether the California state government violated the FLSA by paying state workers nearly two weeks late because of a state budgetary impasse. *Id.* at 1538. The court affirmed the district court's ruling that the state's failure to issue paychecks promptly when due constituted an FLSA violation. *Id.* The Ninth Circuit stated that "under the FLSA[,] wages are 'unpaid' unless they are paid on the employees' regular payday." *Id.*

Factually important in the *Biggs II* case was the state legislature's failure to pass a budget, and the state law prohibition against paying state employees prior to the approval of a budget. *Id.* There, the state argued that "since full compensation was never in doubt, and California was merely late in paying its employees, there was no violation of the FLSA. *Id.* at 1539. In effect, [the state's] position [was] that only nonpayment, not late payment, [was] prohibited by the Act." *Id.*

The Ninth Circuit rejected the state's arguments that no violation had occurred, reasoning:

> We start with [29 U.S.C.] § 206(b). It directs every employer to pay the minimum wage. The obligation kicks in once an employee has done covered work in any workweek. To us, "shall pay" plainly connotes shall make a payment. If a payday has passed without payment, the employer cannot have met his obligation to "pay" . . . The only logical point

> . . . [at which] 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 payday.

Biggs II, 1 F.3d at 1539–40. The court concluded that "the FLSA is violated unless the minimum wage is paid on the employee's regular payday." *Id.* at 1541.

Here, defendant would have the court ignore the Ninth Circuit's majority ruling in *Biggs II*, and rely instead on the reasoning set forth in the dissent and concurrence, which agreed with the majority's ultimate holding but adopted the district court's more flexible rationale. Def.'s Mot. 21 (citing the district court's decision in *Biggs v. Wilson*, 828 F.Supp. 774 (E.D.Cal.1991) (*Biggs I*), *aff'd Biggs II*). Urging the court to find that "payment was reasonably prompt under the totality of the circumstances," Def.'s Mot. 21, defendant points to the following excerpt from the district court in *Biggs I* for support:

> The requirement of prompt payment should not be construed to impose strict liability on an employer for every delay in payment, however slight or for whatever reason. Indeed, such a result would threaten to bring about the financial ruin of many employers, seriously impair the capital resources of many others, provide a windfall to employees, and burden the court with excessive and needless litigation, all in direct contravention to the expressed intent of Congress. Instead, it must be interpreted to require payment

> which is reasonably prompt under the totality of the circumstances in the individual case.

Id. (quoting *Biggs I*, 828 F.Supp. at 777) (citation omitted).

Defendant endorses the same totality of the circumstances test that the Ninth Circuit expressly rejected in *Biggs II*. The Ninth Circuit stated:

> State officials urge us to distinguish between late payment and nonpayment, but offer us no principled way to make such a distinction. We cannot come up with one either. We could try to create a balancing test, as the district court did when it wrote that the FLSA "require[s] payment which is reasonably prompt under the totality of the circumstances in the individual case." Any kind of sliding scale we can think of, however, would be contrary to the statute's direction that employers shall "pay" the minimum wage and that employees are entitled to recover "unpaid" minimum wages. It also would force employees, employers, and courts alike to guess 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. The due date, and with it when the employee actually gets paid, would become a moving target. Such a framework would contravene our obligation to construe the FLSA to the furthest reaches consistent with Congress's intent to protect employees, and [would] run

> counter to the purpose of the FLSA to "protect certain groups . . . from substandard wages and excessive hours."

Biggs II, 1 F.3d at 1540 (citations omitted).

Defendant argues in this case for the adoption of a totality of the circumstances test that would credit the government for factors such as: (1) the potential for the violation of the Anti-Deficiency Act if the government had paid plaintiffs; (2) the brevity of the delay in the payment of the employees' wages; and (3) the "legitimate reason" for the wage nonpayment offered by the government. *See* Def.'s Reply 11. At oral argument, defendant identified additional factors for consideration under the proposed totality of the circumstances test: (1) the employees' knowledge that they would receive payment for the work they performed, although admittedly they did not know when; (2) that there was no willful attempt to thwart the FLSA; and (3) the government's payment of their employees as quickly as possible. Tr. Oral Arg., May 9, 2014, at 58–62.

The court declines to accept the test proposed by defendant because the weight of the most analogous authority militates in favor of applying the standard known as the "usual rule," endorsed by the Federal Circuit. As the Appeals Court in *Biggs II* observed, if an FLSA claim accrues when an employee is not paid on a regularly scheduled payday, the FLSA violation also must occur on that day. *Biggs II*, 1 F.3d at 1540–41. To hold otherwise would create sufficient uncertainty as to when a violation occurs, and statutory enforcement

would prove unworkable. Thus, defendant's effort to differentiate between the time at which accrual is determined and the time at which a statutory violation occurs does not persuade.

Defendant asserted, at oral argument, that under the bright line rule for which plaintiffs advocate, any delay in payment would constitute an FLSA violation. Tr. Oral Arg. 12. Defendant offered the following hypothetical as an exemplar: "[suppose] the check gets lost in the mail, [or] the check is delivered to [a] next-door neighbor who doesn't get it to [the employee until] the next day or a couple of days later. Under plaintiffs' bright line, per se, strict liability rule, [each of these examples] would be a violation of the FLSA and the government would be held responsible for liquidated damages." *Id.* Defendant's example, however, reflects a misapprehension of how the timeliness rule applies and improperly conflates a finding of an FLSA violation with an award of liquidated damages.

Even if the employer were responsible for the delay in payment in defendant's offered hypothetical, an award of liquidated damages would not necessarily be made. As excepted under the statute, liquidated damages are not available if an employer can show that it acted in good faith and that it had a reasonable belief that it was complying with the FLSA. 29 U.S.C. § 260; *see supra* Part III.C. At this stage in the proceedings, the court does not address whether liquidated damages are appropriate: rather the court considers only—on motion by defendant—whether an FLSA violation occurred when defendant failed to pay plaintiffs their

minimum and overtime wages on their regularly scheduled paydays and thus, whether plaintiffs have stated a claim.

The FLSA requires—and the Supreme Court has recognized approvingly—that an employee receive on time payment for work performed. The court understands such timeliness to mean that an employer pays an employee on the regularly scheduled paydays.[10] As the Ninth Circuit observed in *Biggs II*, determining when late payment becomes nonpayment creates "a moving target" that has the grave potential to subvert the intended purpose of the FLSA. It is the view of the court that the government's payment to employees two weeks later than the Scheduled Paydays for work performed during the October 2013 budget impasse constituted an FLSA violation. Accordingly, plaintiffs have stated a claim for relief under Counts One and Two.

2. Finding a Violation of the FLSA In These Circumstances is Consistent With the FLSA's Purpose

Defendant argues that the FLSA was not intended to apply in circumstances such as this where government workers face a modest delay in the receipt of

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[10] Defendant asserted at oral argument "there are no regularly scheduled paydays in the [g]overnment," where there are four pay centers that operate on different schedules. Tr. Oral Arg. 8. But this argument is unavailing. Each employee has his or her regularly scheduled payday that is informed by agency practice, and is established by a course of conduct. A deviation from such practice or course constitutes a violation of the Act.

their pay.[11] *See* Def.'s Mot. 15. Placing heavy emphasis on the legislative history of the Act, the government posits that plaintiffs were not the type of low wage workers Congress intended to protect. *See id.* at 15–16. In support of its position, defendant points to two Supreme Court cases. The first of which is the Supreme Court's 1945 discussion of the FLSA in the case of *Brooklyn Savings Bank v. O'Neil.* There, the Supreme Court observed, "[t]he legislative debates indicate that the prime purpose of the [Act] was to aid the unprotected, unorganized and lowest paid of the nation's working population; that is, those employees who

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[11] Defendant also suggested at oral argument that the financial damage some plaintiffs might have suffered—in the manner of being unable to pay bills or medical expenses, and incurring fees—may have occurred not because the government failed to pay the employees on time as required under the law, but because plaintiffs may have made "poor financial management decisions." Oral Arg. Tr. 88. While not relevant to the court's inquiry into whether plaintiffs have stated a claim for relief, the court notes that at least some government employees, who may be plaintiffs herein, were working at the GS–04 or GS–05 levels, and had annual salaries starting around $28,000 in 2013. *See* Pls.' Opp'n 16 (citing OPM, Salary Table 2013-RUS, http://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/2013/general-schedule/rus.pdf (last visited April 11, 2014)). Such salaries leave families a narrow margin, particularly when-as plaintiffs in this action have described-child care expenses continue and unexpected health-related expenses arise. *See* id. at 16 n.3. Moreover, there is evidence that the government anticipated the hardships its employees might face. The OPM web site provides sample letters for employees' use in negotiating for late payment with creditors, mortgage companies, and landlords. OPM, Pay & Leave Furlough Guidance, Sample Letters for Furloughed Employees' Creditors, http://www.opm.gov/policy-data-oversight/pay-leave/furlough-guidance/#url=Shutdown-Furlough (last visited July 31, 2014).

lacked sufficient bargaining power to secure for themselves a minimum subsistence wage." *Id.* at 15 (quoting *Brooklyn Sav. Bank*, 324 U.S. at 707 n. 18, 65 S.Ct. 895 (citations omitted)).

Defendant also cited *Barrentine v. Arkansas-Best Freight Systems, Inc.*, in which the Supreme Court stated, "[t]he principal congressional purpose in enacting the [legislation] was to protect all covered workers from substandard wages and oppressive working hours, 'labor conditions [that are] detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well-being of workers.'" *Id.* at 15–16 (quoting *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739, 101 S.Ct. 1437, 67 L.Ed.2d 641 (1981)).

Plaintiffs retort that federal workers merit correlative wage protection and note that "Congress extended the protections of the FLSA to federal workers in 1974 without suggesting that its protections should be less for them than for other workers," Pls.' Opp'n 8; *see also id.* at 15–16 (quoting 29 U.S.C. § 203(e)(2)(A), which defined covered employees broadly). Plaintiffs further note that many government workers, including plaintiffs, are not highly compensated employees as defendant seems to suggest. *Id.* at 16. Rather, the "opt-in plaintiffs include many GS–04 and 05 employees, who have annual salaries ranging from about $28,000 to about $41,000." *Id.* (citing OPM Salary Table 2013-RUS, https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/2013/general-schedule/rus.pdf (last

visited April 11, 2014)). And, it is these employees who are intended to benefit from the Act.

Defendant's argument that plaintiffs are not the type of employees meant to be protected by the FLSA would appear to the court to be misguided. By extending the reach of the FLSA to include federal workers, Congress clearly intended to protect such employees. As must other employers, the government must pay minimum wages and overtime compensation to its employees, according to the plain language of the FLSA. Contrary to defendant's arguments, a ruling for plaintiffs in this instance is consistent with the purpose of the Act "to protect all covered workers from substandard wages." *Barrentine*, 450 U.S. at 739, 101 S.Ct. 1437 (citing 29 U.S.C. § 202(a)) (emphasis added).

Accordingly, the court finds that defendant's policy argument is unpersuasive and does not alter the court's view that plaintiffs have stated a claim, in Counts One and Two, for relief pursuant to the Act. However, the court does not find plaintiffs' arguments regarding the appropriate standard for determining whether plaintiffs were paid minimum wage to be persuasive. The parties' disagreement on this issue has been set forth in the briefing. To assist the parties in moving forward with greater clarity, the court addresses this issue now.

3. The Workweek Standard is the Appropriate Test For Determining Which Plaintiffs Were Paid Minimum Wage

The parties disagree about the appropriate standard for measuring whether plaintiffs were paid minimum wage on time. Defendant contends that minimum wage should be calculated according to a bi-weekly measurement. Def.'s Mot. 23. Based on defendant's proposed calculation, any potential plaintiff who was paid $580 or more in his or her bi-weekly check for the Pay Period has not stated a claim for relief. *Id.* (explaining that $7.25 per hour, multiplied by 40 hours per week, multiplied by 2 weeks, equals $580). Defendant, however, provides no authority for its proposed bi-weekly approach, just a bare assertion. Without more, defendant's position does not persuade.

In contrast, plaintiffs propose that minimum wage be analyzed on an hour-by-hour basis. Under this approach, a plaintiff's salary on an aggregate weekly or bi-weekly basis would be irrelevant. Instead, any single hour that either went unpaid or underpaid would be an FLSA violation. *Id.* Pls.' Opp'n 19–22.

In support of the hourly standard it seeks, plaintiffs point to a Wage and Hour Release issued in 1940. The release stated that "courts might hold to be a violation of the law [a circumstance] where the employer does not pay anything for hours properly considered to be hours worked, such as periods of waiting time." Pls.' Opp'n 20 (quoting *Dove v. Coupe*, 759 F.2d 167, 171

(D.C.Cir.1985), purporting to quote from Wage & Hour Release No. R–609 (Feb. 5, 1940)).

Plaintiffs also rely on the reasoning provided by the district court in *Norceide v. Cambridge Health Alliance*, 814 F.Supp.2d 17, 23–26 (D.Mass.2011), *class decertified* by 2014 WL 775453 *4 (D.Mass. Feb. 24, 2014) (acknowledging that an hour-by-hour method of calculating minimum wage is the "minority approach"). In that case, health workers complained that they had not been compensated for time worked during meal breaks, and before and after shifts, amounting to about two to four hours of work each week in violation of the FLSA. *Norceide*, 814 F.Supp.2d at 19–20. Defendant in that case argued that there was no FLSA violation because plaintiffs were never paid less than minimum wage for a workweek. *Id.* at 21. The court nonetheless ruled that the proper inquiry was whether plaintiffs were paid minimum wage for each hour of work. *Id.* at 23. In doing so, the court relied on language from the FLSA requiring a minimum *hourly* wage and considered the overarching purpose of the FLSA. *Id.*

Plaintiffs in the instant case acknowledge that the majority approach (as further explained below) is to calculate minimum wage on a workweek basis rather than on a biweekly or hour-by-hour basis. Pls.' Opp'n 20–21. However, they argue that an hourly calculation is appropriate here, as in *Norceide*, because of two unusual aspects of this case. *Id.* at 20. First, in most cases in which an hourly approach was rejected, employees were not paid for a specific period of time in the day, such as a meal break during which they were required

to work, but otherwise were paid for hours worked during a workday. *Id.* In contrast, here, employees were paid for work done on September 29 or 30, but not at all for work performed during the Five Days. Thus, plaintiffs argue, "[i]f a federal employee was paid $26.25 per hour for eight hours of work on September 20, 2013, it is fiction to regard her effective pay rate as $5.25 per hour for the entire week." *Id.* at 21.

Second, plaintiffs contend that "what happened to federal employees was especially damaging to their finances." *Id.* In contrast to the employee who is forced to work through break times but still knows in advance her total compensation, plaintiffs here were not paid on time for work performed during the Five Days, and did not know how long they would have to wait to be paid. *Id.* at 21–22.

The FLSA minimum wage provision requires employers to pay minimum wage "to each of his employees who *in any workweek* is engaged in commerce. . . ." 29 U.S.C. § 206(a) (emphasis added). The OPM minimum wage regulation provides that "an agency shall pay each of its employees wages at rates not less than the minimum wage . . . *for all hours of work*. . . ." 5 C.F.R. § 551.301(a)(1). However, in the following subpart, the regulation provides that, "[a]n employee has been paid in compliance with the minimum wage provisions of this subpart if the employee's hourly regular rate of pay . . . *for the workweek* is equal to or in excess of the rate specified. . . ." 5 C.F.R. § 551.301(b).

A DOL interpretative bulletin further supports a workweek standard:

> The workweek is to be taken as the standard in determining the applicability of the Act. Thus, if in any workweek an employee is engaged in both covered and noncovered work he is entitled to both the wage and hours benefits of the Act for all the time worked in that week.

29 C.F.R. § 776.4(a) (footnote omitted).

Because there is no binding authority on this court regarding the standard for computing minimum wage under the FLSA, the court looks to other federal courts for guidance. Of the courts that have considered this issue, an overwhelming majority have interpreted the FLSA to require a "workweek" standard for the calculation of minimum wages due. *See, e.g.*, *Morgan v. SpeakEasy, LLC*, 625 F.Supp.2d 632, 651 (N.D.Ill.2007); *Rogers v. Savings First Mortgage, LLC*, 362 F.Supp.2d 624, 631 (D.Md.2005); *see also Christofferson v. United States*, 77 Fed.Cl. 361, 364 n. 2 (2007) (noting that courts have traditionally used the workweek compliance approach such that, "so long as total pay at the end of the week divided by the number of hours worked is no less than the minimum wage rate, [29 U.S.C.] section 206 has not been violated.").

The court acknowledges that the use of a workweek measurement rather than an hourly measurement to calculate pay could be viewed as something of a "contrivance," *see Norceide*, 814 F.Supp.2d at 24,

where plaintiffs were paid their regular wage for certain hours, but were paid nothing for others. Nonetheless, the language of the Act focuses on the aggregate pay for all work performed within a workweek. Thus, the court elects to adopt the majority approach in this case and apply a workweek standard for measuring minimum wage. Based on this calculation method, any potential plaintiff who was paid more than $290 ($7.25 multiplied by 40 hours) for the Week must be dismissed from the case. This ruling also applies to limit any prospective opt-in plaintiffs.

4. Defendant's Additional Arguments Regarding Overtime Pay Are Unavailing

Plaintiffs allege in Count Two that defendant failed to pay overtime compensation to certain employees.[12] The FLSA overtime provision states:

> [N]o employer shall employ any of his employees who in any workweek is engaged in commerce . . . for a workweek longer than forty

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[12] Defendant argued in its Motion to Dismiss that plaintiffs had failed to state an overtime claim under the FLSA where the complaint contained no allegations that any of the original nonexempt plaintiffs had "worked in excess of the applicable threshold for overtime pay and was not compensated for it." Def.'s Mot. 27. Plaintiffs responded that their allegations were sufficient from which to infer that at least one nonexempt plaintiff worked overtime during the Five Days, see Pls.' Opp'n 30; however, "to forestall any justification for delay," plaintiffs have amended their complaint to state expressly that one nonexempt original plaintiff, Mr. Roberts, worked overtime for which he was not timely paid. 2d Am. Compl. ¶ 37; *see* Pls.' Opp'n 31. Plaintiffs, therefore, have addressed defendant's concern on this point.

> hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. § 207(a)(1). The OPM overtime regulation further provides that "[a]n agency shall compensate an employee who is not exempt [from the Act] for all hours of work in excess of 8 in a day or 40 in a workweek at a rate equal to one and one-half times the employee's hourly regular rate of pay. . . ." 5 C.F.R. § 551.501(a).

As with the FLSA minimum wage provision, no explicit timeline for overtime compensation is set out in the Act. A DOL interpretative bulletin states the general rule that "overtime compensation earned in a particular workweek must be paid on the regular pay day for the period in which such workweek ends." 29 C.F.R. § 778.106. While this guidance would clearly support plaintiffs' position that an FLSA overtime violation occurs at the time of a missed payday, defendant argues that the regulation actually supports its position that the FLSA provides "considerable flexibility," *see* Def.'s Reply 8–9, because it states further:

> When the correct amount of overtime compensation cannot be determined until some time after the regular pay period, however, the requirements of the Act will be satisfied if the employer pays the excess overtime compensation as soon after the regular pay period as is practicable. Payment may not be delayed for a period longer than is reasonably necessary for

> the employer to compute and arrange for payment of the amount due and in no event may payment be delayed beyond the next pay day.

29 C.F.R. § 778.106.

Pursuant to this guidance, the government alleges that its late payment of overtime wages was acceptable because defendant in this circumstance "was not able to compute the correct amount of compensation for Federal workers [while] non-[excepted] employees, such as Human Resource employees, were not working." Def.'s Reply 9.

The DOL interpretation affords employers a measure of leeway in paying employees' any overtime owed "when the correct amount of overtime compensation cannot be determined." 29 C.F.R. § 778.106. Whether the government could or could not determine, compute, or arrange for the payment of overtime compensation during the October 2013 shutdown is a factual question that might be explored further by the parties during the next phase of litigation. On a motion to dismiss, however, the court must draw all reasonable inferences in favor of plaintiffs, and accept as true plaintiffs' factual allegations. *See Sommers Oil Co.*, 241 F.3d at 1378. Plaintiffs have alleged facts sufficient for the court to find that plaintiffs have stated a claim for an FLSA violation where defendant failed to pay plaintiffs their earned overtime pay on their Scheduled Paydays.

B. Plaintiffs Have Failed to State a Claim With Respect to FLSA Exempt Employees; Count Three is Dismissed

Among the potential plaintiffs in this case are those who have managerial, professional, or administrative exemptions from FLSA protections and thus, are described as FLSA exempt employees. *See* 2d. Am. Compl. ¶ 41. The pertinent OPM regulations define "FLSA exempt" as "not covered by the minimum wage and overtime provisions of the Act." 5 C.F.R. § 551.104; *see also* 29 U.S.C. § 213(a) (enumerating positions that are exempt from the FLSA). Notwithstanding the clear regulatory definition of an FLSA exempt employee, plaintiffs put forward a contorted argument that such exempt employees *are* covered under the FLSA overtime provision in this circumstance. *See* 2d Am. Compl. ¶¶ 41–50.

In particular, plaintiffs contend that an exemption from the FLSA is dependent upon being paid on a "salary basis." *See id.* ¶ 41. They argue that "[e]mployees are not exempt from payment of overtime under the managerial, professional or administrative exemptions unless, among other requirements, they are paid on a salary basis." *Id.* According to plaintiffs, when an employer fails to pay employees on the agreed compensation schedule, as happened here, that failure to pay is inconsistent with payment on a "salary basis." *Id.* And purportedly because employees were not paid on a "salary basis," they were not exempt from payment of overtime at the rate of one and one-half times their regular rate for that week. *Id.* at ¶¶ 42–43.

Defendant argues that the plain language of the applicable regulation precludes the application of the FLSA's minimum wage or overtime requirements to FLSA exempt employees.[13] Def.'s Mot. 28 (citing 5 C.F.R. § 551.104). Quite simply, "FLSA exempt employees cannot bring a claim for a violation of the [FLSA]." *Id.* at 29. Defendant adds that plaintiffs' reliance on the "salary basis" test is misplaced because that test does not apply to federal employees according to Federal Circuit precedent. *Id.* (citing *Billings*, 322 F.3d at 1334).

In *Billings*, the Federal Circuit affirmed the trial court's summary judgment in favor of the government, dismissing a claim by FLSA exempt federal employees for FLSA overtime that is ordinarily available only to non-exempt employees. 322 F.3d at 1330, 1335. The exempt federal employees argued they were only exempt so long as the government paid them on a "salary basis," among other requirements. *Id.* at 1330. They reasoned that the government's failure to adhere to the "salary basis" standard rendered their exempt classification inappropriate. *Id.* at 1330–31. Instead, they argued, they should be treated as non-exempt

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[13] Defendant also argues that Count Three should be dismissed for failure to state a claim because no FLSA exempt original plaintiff alleged explicitly that he had worked overtime. Def.'s Mot. 28; *see also*, *supra*, n.12 (describing the same argument made by defendant as to Count Two). Plaintiffs remedied this potential shortcoming, along with the same possible problem regarding Count Two, in their Second Amended Complaint, by alleging that certain exempt plaintiffs worked overtime. *See* 2d Am. Compl. ¶ 37.

and thereby, entitled to overtime. *Id.* In support of their claims, the federal exempt employees referred to DOL regulations, which provided authority for the proposition that exempt status was dependent on the employer satisfying the salary-basis test.[14] *See id.* at 1331–32.

The Federal Circuit disagreed. OPM administers the FLSA with respect to federal sector employees. *Id.* at 1333. Therefore, OPM regulations govern federal employee exempt status so long as, *inter alia*, those regulations are: (1) reasonable; and (2) either consistent with DOL corollaries (applicable to the private sector) or different only insofar as "required to effectuate the consistency of application of the provision to both federal and non-federal employees." *Id.* at 1333–34. Here, the applicable OPM regulation defined exempt status by and through its definition of "executive" federal employees. *Id.* at 1333–35. The definition was

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[14] The relevant DOL regulation (with no OPM counterpart) that plaintiffs in *Billings*, and plaintiffs in the instant case, wish to invoke, defines salary requirements for FLSA exempt employees in the private sector as follows:

> [a]n employee will be considered to be paid on a "salary basis" within the meaning of these regulations if the employee regularly receives each pay period on a weekly . . . basis, a predetermined amount constituting all or party of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. . . . [A]n exempt employee must receive the full salary for any week in which the employee performs any work without regard to the number of days or hours worked.

29 C.F.R. § 541.602(a).

a reasonable interpretation of the FLSA and to the extent it varied with the DOL standard, "the variance . . . [was] no more than needed to accommodate the difference between private and public sector employment." *Id.* Accordingly, OPM's definition of "executive" governed the employees' exempt status, not the DOL's salary-basis test. *See id.* at 1335.

Plaintiffs' efforts to distinguish *Billings* do not persuade. *See* Pls.' Opp'n 31–36 (arguments). The Federal Circuit plainly decided that OPM regulations defining exempt status governed, rather than DOL's salary-basis test. Plaintiffs herein remain subject to the limitations of their exempt status and, accordingly, have failed to state a claim in Count Three for overtime as de facto non-exempt employees. Count Three is **DISMISSED**.

C. Whether Liquidated Damages are Appropriate Will Depend on Whether Defendant Can Demonstrate Good Faith and a Reasonable Basis for Believing it was Compliant With the FLSA

The FLSA provides for liquidated damages for violations of its minimum wage and overtime provisions. 29 U.S.C. § 216(b). "Any employer who violates the provisions of section 206 or section 207 of this title 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." *Id.* Through the use of the word "shall," Congress signaled its intent that a

presumption of a liquidated damages award follows a violation of the Act. *See id.*

However, there is a limited exception to the liquidated damages requirement:

> if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the [FLSA], the court may, in its sound discretion, award no liquidated damages or award any amount thereof.

29 U.S.C. § 260. This burden is borne by the employer. *See Adams v. United States*, 350 F.3d 1216, 1226 (Fed.Cir.2003) ("The burden rests on the government to establish its good faith and the reasonable grounds for its decision."). The burden, moreover, is a "substantial" one, consisting of a subjective good faith showing and an objective demonstration of reasonable grounds. *Bull v. United States*, 68 Fed.Cl. 212, 229 (2005), clarified by 68 Fed.Cl. 276, *aff'd*, 479 F.3d 1365 (Fed.Cir.2007) (citations omitted). To establish good faith, defendant must show "an honest intention to ascertain what the [FLSA] requires and to act in accordance with it." *Id.* (quoting *Beebe*, 640 F.2d at 1295). Demonstrating reasonable grounds could be shown by "[p]roof that the law is uncertain, ambiguous or complex." *Id.* (quoting same).

Defendant argues that if the court finds an FLSA violation, it should exercise its discretion and not

award liquidated damages. Def.'s Mot. 23–26. Defendant's arguments against the award of liquidated damages overlap with its arguments against a finding of an FLSA violation. The government argues that liquidated damages are inappropriate where the government acted reasonably by paying wages as quickly as possible after resolution of the budget impasse, and where the Anti-Deficiency Act prohibited defendant from paying plaintiffs during the lapse. *Id.*

Plaintiffs respond that "the [g]overnment cannot possibly establish on a motion to dismiss that it acted in good faith and had a reasonable basis for believing that it was acting in conformity with the FLSA." Pls.' Opp'n 22. In addition, plaintiffs contend that under the facts of this case, "it will be impossible for the [g]overnment *ever* to prove that it acted in good faith and had a reasonable basis for believing that it was acting in conformity with the FLSA" because the law clearly required on time payment. *Id.*

The Anti-Deficiency Act, upon which defendant relies, prohibits payment to employees when appropriated funds are not available. *See* 31 U.S.C. § 1341(a)(1). "An officer or employee of the United States Government . . . may not . . . make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation." *Id.*

The government required plaintiffs to work during the October 2013 shutdown, however, pursuant to an emergency exception provision of the Anti-Deficiency

Act, which states that the "government may not accept voluntary services for either [the United States Government or the District of Columbia] 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.

The employees who were required to work during the government shutdown "necessarily included prison guards, Federal air marshals, border patrols, and others," Def.'s Mot. 25, that is, those employees who were necessary for the "safety of human life or the protection of property," *id.* (quoting 31 U.S.C. § 1342). Defendant insists that its failure to pay its employees was reasonable in light of the limitations imposed by the Anti-Deficiency Act. *See* Def.'s Reply 14–16. But *whether its actions were reasonable* is not the correct inquiry. As noted previously, the exception to a liquidated damages award is available where the failure to pay was in good faith (a subjective inquiry) and the employer *had reasonable grounds for believing* the failure "was not a violation of the [FLSA]" (an objective inquiry). *See* 29 U.S.C. § 260.

Neither party has addressed in any detailed manner whether the Anti-Deficiency Act operates to relieve the government of responsibility for the legal violations that might occur in the absence of Congressional appropriations. The Supreme Court has stated that the Anti-Deficiency Act's requirements "apply to the official, but they do not affect the rights in this court of the citizen honestly contracting with the [g]overnment." *Salazar v. Ramah Navajo Chapter*, ___ U.S. ___,

132 S.Ct. 2181, 2193, 183 L.Ed.2d 186 (2012) (quoting *Dougherty v. United States*, 18 Ct.Cl. 496, 503 (1883)). Moreover, in 1892, the Court of Claims stated that "[a]n appropriation per se merely imposes limitations upon the Government's own agents; . . . but its insufficiency does not pay the Government's debts, nor cancel its obligations, nor defeat the rights of other parties." *Ferris v. United States*, 27 Ct.Cl. 542, 546 (1892). The parties may elect to address this issue in further proceedings.

Defendant has not had the opportunity to present evidence of its good faith and the reasonable grounds permitted under the FLSA. Going forward, defendant might elect to do so.[15] In any event, plaintiff is correct that it 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

[15] Defendant indicated in its Reply brief that it "agree[d] [with plaintiffs] that the [c]ourt should decide on the papers, without any discovery," the issue of liquidated damages. Def.'s Reply 14. However, given that defendant has not yet had an opportunity to present evidence at this stage of the litigation, the court offers defendant an opportunity to meet its burden, before the court makes a determination regarding the applicability of liquidated damages.

employees, if any, are entitled to recover, and damages, if any, to which those employees would be entitled.

IV. Conclusion

Defendant's motion to dismiss for failure to state a claim as to Counts One and Two is **DENIED**. Its motion as to Count Three is **GRANTED**.

IT IS SO ORDERED.

In the United States Court of Federal Claims

No. 19-95C

(E-Filed: December 1, 2020)

I.P., et al., Plaintiffs, v. THE UNITED STATES, Defendant.	Motion to Dismiss; RCFC 12(b)(6); Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-19; Anti-Deficiency Act (ADA), 31 U.S.C. §§ 1341-42; Government Employees Fair Treatment Act of 2019 (GEFTA); Pub. L. No. 116-1, 133 Stat. 3 (2019).

Laura R. Reznick, Garden City, NY, 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 can 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. 37; (4) defendant's reply in support of its motion, ECF No. 44; (5) defendant's first supplemental brief in support of its motion, ECF No. 46; (6) plaintiffs' response to defendant's first supplemental brief, ECF No. 49; (7) defendant's second supplemental brief in support of its motion, ECF No. 57; (8) plaintiffs' response to defendant's second supplemental brief, ECF No. 65; (9) defendant's third supplemental brief in support of its motion, ECF No. 67; and (10) plaintiffs' response to defendant's third supplemental brief, ECF No. 70. 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, 140 S. Ct. 1308 (2020), a case that does not involve FLSA claims, indicates that this court lacks jurisdiction

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 on December 22, 2018, the federal government partially shut down due to a lack of appropriations. See ECF No. 1 at 5. The named plaintiffs in this case were, at the time of the shutdown, employees of the Transportation Security Administration, within the Department of Homeland Security. See id. at 3-4.

In their complaint, plaintiffs allege that they are "essential employees" or "excepted employees," terms which refer to employees who "were required to report to work and perform their normal duties, but were not compensated for their work performed." Id. at 1-2, 5. Plaintiffs also allege that, in addition to being excepted

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to hear this case because the FLSA "contains its own provision for judicial review." ECF No. 67 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.").

employees required to work during a shutdown, they were also "classified as FLSA nonexempt Federal Air Marshal[s]." Id. at 3-4. As a result of being categorized as nonexempt, 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 5-7.

According to plaintiffs, defendant's failure to timely pay their minimum and overtime wages was "willful, and in conscious or reckless disregard of the requirements of the FLSA." Id. at 6, 7. In support of this allegation, plaintiffs allege that "[d]efendant conducted no analyses to determine whether its failure to pay non-exempt [plaintiffs] the minimum wage for work performed during the [shutdown] complied with the FLSA and relied on no authorities indicating that its failure to pay [plaintiffs] the minimum wage for work performed during the [shutdown] complied with the FLSA," id. at 6, and that "[d]efendant conducted no analyses to determine whether its failure to pay non-exempt [plaintiffs] overtime pay for work performed during the [shutdown] complied with the FLSA and relied on no authorities indicating that it could fail to pay overtime to nonexempt [plaintiffs] on the [s]cheduled [p]ayday," id. at 7. Plaintiffs now seek payment of wages owed, liquidated damages, pre- and post-judgment interest, and reasonable attorneys' fees. See id. at 10-11.

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 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (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

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[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).

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 Say. Bank v. O'Neil, 324 U.S. 697, 707 (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.

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[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).

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.[4] See id. at 585-86.

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. 37 at 6 (plaintiffs stating that "this case is factually and legally indistinguishable from Martin"). As plaintiffs outline in their response to defendant's motion, "by [d]efendant's own admission, the allegations in this case are virtually identical to those that were adequately pled in Martin." ECF No. 37 at 9. In addition, plaintiffs here, like the plaintiffs in Martin, have alleged that "[d]efendant conducted no analyses to determine whether its failure to pay" plaintiffs both regular and overtime pay during the shutdown "complied with the FLSA." ECF No. 1 at 6, 7.

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

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[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.

[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.[5] As it did in

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[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. 57, is likewise unhelpful. Although it involved facts that arose from the same 2018 lapse in appropriations, the decision focuses

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.

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.'"

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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. 67, ECF No. 70. 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.

ECF No. 25 at 19 (quoting Lane v. Pena, 518 U.S. 187, 192 (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). 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. 44 at 14. It argues, without citation to any authority, that:

> when the United States does not pay employees on their regularly scheduled paydays during a lapse in appropriations, a[] FLSA cause of action against the United States (1) does not accrue because the United States has not waived sovereign immunity for money damages resulting from the delayed payment of wages during a funding gap, and (2) cannot accrue because the [ADA] controls when and at what rate of pay the government must pay employees following a funding gap.

Id. at 13.

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. 37 at 6-7, 9; see also 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 Say. Bank, 324 U.S. at 707; 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 Say. Bank, 324 U.S. at 707; Biggs, 1 F.3d at 1540.

In their complaint, plaintiffs allege that during the lapse in appropriations, they and all putative class members were "[e]ssential [e]mployees" who were "classified as FLSA non-exempt Federal Air Marshal[s]" and "performed work for [d]efendant" but were

"not compensated on the [s]cheduled [p]ayday."[7] ECF No. 1 at 3-5. Plaintiffs allege specific facts demonstrating how the allegations apply to each named plaintiff. See id. at 3-4.

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

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[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 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. In the complaint, plaintiffs allege that the named individuals are TSA employees, but assert that they are "classified as FLSA non-exempt Federal Air Marshal[s]." ECF No. 1 at 3-4. Because the court's decision in Jones does not hold that all TSA employees are necessarily FLSA-exempt, and because plaintiffs have alleged to the contrary, the court will not dismiss the claims of TSA employees at this time. Plaintiffs, however, ultimately bear the burden of proving that any TSA employees asserting claims in this case are, in fact, FLSA non-exempt in order for such employees to recover any damages that may be awarded.

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. 44 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 **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.

s/Patricia E. Campbell-Smith
PATRICIA E. CAMPBELL-SMITH
Judge

In the United States Court of Federal Claims

No. 19-94C

(E-Filed: March 4, 2021)[1]

PLAINTIFF NO. 1, et al., Plaintiffs, v. THE UNITED STATES, Defendant.	Motion to Dismiss; RCFC 12(b)(6); Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-19; Anti-Deficiency Act (ADA), 31 U.S.C. §§ 1341-42; Government Employees Fair Treatment Act of 2019 (GEFTA); Pub. L. No. 116-1, 133 Stat. 3 (2019).

Jules Bernstein, Washington, DC, for plaintiff. Linda Lipsett, Daniel M. Rosenthal, and Alice Hwang, of counsel.

Erin K. Murdock-Park, Trial Attorney, with whom were Ethan P. Davis,[2] Acting Assistant Attorney General, Robert E. Kirschman, Jr., Director, Reginald T. Blades, Jr., Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of

[1] This opinion was issued under seal on December 11, 2020. See ECF No. 122. Pursuant to ¶ 4 of the ordering language, the parties were invited to inform the court as to whether any redactions were required before the court made this opinion publicly available. No redactions were proposed by the parties. See ECF No. 142 (notice). Thus, the sealed and public versions of this opinion are identical, except for the publication date and this footnote.

[2] Joseph H. Hunt was listed as Assistant Attorney General on defendant's motion to dismiss, see ECF No. 112, but was replaced with Ethan P. Davis on defendant's reply.

Justice, Washington, DC, for defendant. Ann C. Motto, Vijaya S. Surampudi, 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. 109 at 23-24 (fourth amended complaint, hereinafter referred to as the complaint). On June 4, 2020, 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. 112.

In analyzing defendant's motion, the court has considered: (1) plaintiffs' complaint, ECF No. 109; (2) defendant's motion to dismiss, ECF No. 112; (3) plaintiffs' response to defendant's motion, ECF No. 115; and (4) defendant's reply in support of its motion, ECF No. 116. The motion is now fully briefed and ripe for ruling. The 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. 112 at 12. The named plaintiffs and putative class members in this case were, at the time of the shutdown, "employed by federal agencies including but not limited to, the Federal Bureau of Investigations ('FBI'), the United States Secret Service ('USSS'), the Bureau of Alcohol, Tobacco, Firearms and Explosives ('ATF'), the Drug Enforcement Administration ('DEA') and the Federal Air Marshal Service ('FAM')."[3] ECF No. 109 at 24. Plaintiffs further allege that they were "essential and excepted employees of Defendant who are non-exempt under the [FLSA], and who worked for [d]efendant without being paid on their regular pay days, and at all, during the 2018-2019 Government shutdown, in violation of [the] FLSA." Id.

Plaintiffs assert that, at the time of the shutdown, defendant was "on express notice of this [c]ourt's decision in Martin v. United States, 117 Fed. Cl. 578 (2017), . . . in which this [c]ourt held that [d]efendant's failure to pay approximately 24,000 of its excepted employees 'on time,' in connection with a prior governmental shutdown in 2013 violated the FLSA." Id. at 25. As a

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[3] 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. 112 at 16-17 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.

result of the holding in Martin, plaintiffs allege that defendant "had express notice that its violations alleged herein were patently unlawful, and it engaged in these violations nonetheless, . . . in reckless disregard" of applicable law. Id.

Plaintiffs seek, for themselves and those similarly-situated, declaratory judgment, and an award of "liquidated damages under [the] FLSA in an amount equal to the minimum wages, or straight time wages, whichever is greater, and overtime compensation they did not receive, but were entitled [to] . . . on their regularly scheduled pay days." Id. at 28-29. Plaintiffs also see an award of reasonable attorneys' fees and costs. See id. at 29.

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

(2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (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[4] 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,

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[4] 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.[5] 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

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wages on the employee's next regularly scheduled payday. See Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 707 (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. 112 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 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.[6] See id. at 585-86.

Both parties acknowledge that the plaintiffs in Martin were "situated similarly to plaintiffs in this case." ECF No. 112 at 15 (defendant's motion to dismiss); see also ECF No. 115 at 6 (stating that "[t]he [g]overnment admits that the [p]laintiffs in this case are similarly situated to those in Martin").

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[6] 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. 112. Defendant characterizes the issue now before the court as "whether plaintiffs have stated a claim for liquidated damages under the [FLSA] in light of the provisions in 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 in this case 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.[7] As it did in

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[7] 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. 112 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

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."[8] 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

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court's view, the Federal Circuit's decision in Highland-Falls does not alter the analysis in this case.

[8] 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. 112 at 21-23; ECF No. 115 at 9, 17-18. 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. 112 at 21 (quoting Lane v. Pena, 518 U.S. 187, 192 (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). 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. 112 at 23. 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 23-24. 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 24.

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, and that it 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. 116 at 15.

The court disagrees. The claims brought by plaintiffs in this case are "straightforward" minimum wage and overtime claims under the FLSA. ECF No. 115 at 12; see also ECF No. 109 at 27. 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; 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; Biggs, 1 F.3d at 1540.

In their complaint, plaintiffs allege that during the lapse in appropriations, they were "essential and excepted employees of Defendant who are non-exempt under the [FLSA], and who worked for Defendant without being paid on their regular pay days, and at all, during the 2018-2019 Government shutdown, in violation of the FLSA." ECF No. 109 at 24.

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 for the work performed during the lapse at the earliest possible date after the lapse in appropriations ended." ECF No. 112 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 16. 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 17.

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. 116 at 17. 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 17-20. 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.[9]

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[9] The court acknowledges that the parties have a significant disagreement with regard to interpreting and applying the regulation that governs the calculation of liquidated damages under the FLSA. See ECF No. 112 at 26-30 (arguing that under the applicable regulations plaintiffs are not entitled to liquidated damages for straight time pay); ECF No. 115 at 22-27 (arguing, in response, that plaintiffs "are entitled to liquidated damages in an amount equal to their straight time [] pay for all non-overtime hours worked"). Because the court does not reach the issue of whether plaintiffs are entitled to liquidated damages at this stage in the litigation, it is premature to decide how such damages, if they are ultimately awarded, should be calculated. As such, the court reserves its ruling on this question and the parties may reurge their arguments at the appropriate time.

IV. Conclusion

Accordingly, for the foregoing reasons:

(1) Defendant's motion to dismiss, ECF No. 112, is **DENIED**;

(2) On or before **February 12, 2021**, defendant is directed to **FILE** an **answer** or otherwise respond to plaintiffs' complaint; and

(3) On or before **February 12, 2021**, the parties are directed to **CONFER and FILE** a **joint status report** informing the court as to their positions on the consolidation of this case with any other matters before the court; and

(4) On or before **February 12, 2021**, the parties are directed to **CONFER and FILE** a **notice** informing the court as to whether any redactions are required before the court makes this order publicly available, and if so, attaching an agreed-upon proposed redacted version of this opinion and order.

IT IS SO ORDERED.

s/Patricia E. Campbell-Smith
PATRICIA E. CAMPBELL-SMITH
Judge

151 Fed.Cl. 163
United States Court of Federal Claims.

Brian RICHMOND, et al., Plaintiffs,
v.
The UNITED STATES, Defendant.

No. 19-161C
|
(E-Filed: December 2, 2020)

Attorneys and Law Firms

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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 2-3 (complaint). On May 3, 2019, defendant moved to dismiss the complaint for failure to state a claim on which relief can 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. 1; (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. 30; (5) defendant's first supplemental brief in support of its motion, ECF No. 32; (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. 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. 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. 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 1363 (Fed. Cir. 2014)). The court will not review this entirely new

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 on December 22, 2018, the federal government partially shut down due to a lack of appropriations. See ECF No. 1 at 2-3. The named plaintiffs in this case were, at the time of the shutdown, employees of the Bureau of Prisons, within the United States Department of Justice. See id.

In their complaint, plaintiffs allege that they are "'[e]xcepted' employees," performing "emergency work involving the safety of human life or the protection of property," and as such "were forced to continue to perform their duties designated as essential, without the receipt of their normally scheduled wages," during the shutdown. Id. at 3 & n.1. Plaintiffs also allege that, in addition to being excepted employees required to work during a shutdown, they were also "classified as FLSA non-exempt." Id. at 4-5. Despite being required to work during the shutdown, plaintiffs allege that they were

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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.").

not paid "in accordance with the minimum wage and overtime provisions of the [FLSA]." Id. at 3.

According to plaintiffs, defendant "cannot show it acted in good faith during its violation of the FLSA and therefore, in addition to monetary damages, the [p]laintiffs are . . . entitled to liquidated damages." Id. at 9. 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 the court "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 8. Plaintiffs now seek the payment of "all regular, minimum, and overtime wages," earned by plaintiffs, "liquidated damages equal to" any overtime or minimum wages earned, as well as attorneys' fees and costs. 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[2] shall be paid for such work, at the

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[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).

> 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 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

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[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).

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. 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.[4] See id. at 585-86.

Both parties acknowledge that the plaintiffs in Martin were "situated similarly to plaintiffs here."

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[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.

ECF No. 23 at 13 (defendant's motion to dismiss); see also ECF No. 26 at 7 ("The [p]laintiffs here have pled precisely the same type of claim presented in Martin, i.e., that they were non-exempt employees who worked for the federal government during the shutdown and were not paid on their regular pay dates."). In addition, plaintiffs here, like the plaintiffs in Martin, have alleged that "[d]efendant conducted no analysis to determine whether its failure to pay" plaintiffs "on their regularly scheduled payday" during the shutdown "complied with the FLSA." ECF No. 1 at 8.

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. 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 the FLSA," but states that it "respectfully disagree[s] with that holding." Id. at 13-14.

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 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

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[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. 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. 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, 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.

[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. 51, 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

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. 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

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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 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. 30 at 13. It argues, without citation to any authority, that:

> when the United States does not pay employees on their regularly scheduled paydays during a lapse in appropriations, a[] FLSA cause

> of action against the United States (1) does not accrue because the United States has not waived sovereign immunity for money damages resulting from the delayed payment of wages during a funding gap, and (2) cannot accrue because the [ADA] controls when and at what rate of pay the government must pay employees following a funding gap.

Id.

The court disagrees. The claims brought by plaintiffs in this case are "garden variety" minimum wage and overtime claims under the FLSA. See ECF No. 26 at 16-17; 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 excepted employees "were forced to continue to perform their duties designated as essential, without the receipt of their normally scheduled wages."[7] ECF No. 1 at 3. Plaintiffs allege specific facts

[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 FLSA-exempt employees to join their collective, those claims must be dismissed." ECF No. 23 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

demonstrating how the allegations apply to each named plaintiff. See id. at 4-5.

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. 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.

(emphasis added). This case is not binding precedent, and appears to be limited in application to security screeners. Moreover, plaintiffs do not allege that any putative class member is a TSA employee. See ECF No. 1 at 10. 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.

See ECF No. 30 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. 23, is **DENIED**;

(2) On or before **February 1, 2021**, defendant is directed to **FILE** an **answer** or otherwise respond to plaintiffs' complaint; and

(3) On or before **February 1, 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.

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151 Fed.Cl. 268
United States Court of Federal Claims.

Tony ROWE, et al., Plaintiffs,
v.
The UNITED STATES, Defendant.

No. 19-67C
|
E-Filed: November 20, 2020

Attorneys and Law Firms

Marshall J. Ray, Albuquerque, NM, 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.

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. 24.

In analyzing defendant's motion, the court has considered: (1) plaintiffs' complaint, ECF No. 1; (2) defendant's motion to dismiss, ECF No. 24; (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. 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. 46; (9) defendant's third supplemental brief in support of its motion, ECF No. 53; and (10) plaintiffs' response to defendant's third supplemental brief, ECF No. 54. The motion is now fully briefed and ripe for ruling.[1] For the following reasons, defendant's motion is **DENIED**.

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[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. 24 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. 53 at 2. In the same brief, defendant acknowledges binding precedent from the United States Court of Appeals for the Federal

I. Background

In their complaint, plaintiffs define the putative class bringing this collective action as follows:

> Plaintiffs and those similarly situated are all bargaining unit employees or were bargaining unit employees of the Federal Indian Service Employees Union ("FISE"), working for the Bureau of Indian Affairs, Bureau of Indian Education, or the Office of the Secretary/Office of the Special Trustee for American Indians at all relevant times during the partial government shutdown and lapse of appropriations that began on December 22, 2018 and that is ongoing as of the date of the filing of this Complaint.

ECF No. 1 at 1-2. Plaintiffs further allege that they "are 'excepted' or 'essential' employees for purposes of the ongoing shutdown and furlough," and that they "have been required to work without timely pay and/or without overtime pay because of the lapse in appropriations since December 22, 2018." Id. at 2. Plaintiffs

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Circuit to the contrary. Id.; see also 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.").

seek "all unpaid wages and overtime, liquidated damages, and interest." Id.

Beginning at 12:01 a.m. on December 22, 2018, the federal government "partially shut down and appropriations . . . lapsed to fund various agencies," including the Bureau of Indian Affairs, the Bureau of Indian Education, and the Office of the Secretary/Office of the Special Trustee for American Indians. Id. at 5. Pursuant to the ADA, "[a]n officer or employee of the United States Government . . . may not accept voluntary services for [the] government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property." Id. at 6 (quoting 31 U.S.C. § 1342). While some employees were furloughed during the shutdown, plaintiffs were deemed "essential" or "excepted" employees under the ADA, and were required to continue work. Id. As of January 15, 2019, the date of the complaint, plaintiffs had been "required to work throughout the furlough and [had] not been paid their regular wages and/or earned overtime in a timely fashion." Id. Specifically, plaintiffs "have received a pay stub reflecting 0.00 for the pay period ending January 5, 2019, even though they have worked their regular hours in addition to overtime." Id. at 11. According to plaintiffs, defendant's failure to pay regular wages and earned overtime is a per se violation of the FLSA. Id. at 13.

Plaintiffs also allege that "there is evidence the denial of pay is willful and not the result of mere negligence or oversight." Id. at 9. In support of this

statement, plaintiffs point to a public statement by President Donald J. Trump in which he proclaimed that he was "proud to shutdown the government." Id. at 9 (quoting a transcript published by www.marketwatch.com). In addition, plaintiffs note that this court decided a FLSA case in plaintiffs' favor "under nearly identical circumstances," referring to Martin v. United States, 130 Fed. Cl. 578 (2017).[2] Id. at 10. As such, plaintiffs contend that defendant "has been on notice of its obligations as articulated in Martin v. United States but has not taken any steps to fulfill those obligations." Id. Plaintiffs allege that defendant is, as a result, liable for a penalty of liquidated damages under the FLSA. See id. at 14.

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,

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[2] Plaintiffs' complaint cites to Martin v. United States, 130 Fed. Cl. 578 (2017), but the court assumes that this citation includes a typographical error and that plaintiffs mean to reference Martin v. United States, 130 Fed. Cl. 578 (2017).

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

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[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).

> 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 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

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[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).

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. 24 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 prohibitions 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."

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[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, 130 Fed. Cl. at 586-87. 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.

ECF No. 24 at 14 (defendant's motion to dismiss). As plaintiffs outline in their response, "[l]ike in Martin v. United States, [p]laintiffs have pleaded (and will be able to prove) that they were non-exempt employees who were required to work during the shutdown (i.e., lapse in appropriations), and that they were not paid timely for actual wages or overtime." ECF No. 27 at 7. In addition, plaintiffs here, like the plaintiffs in Martin, "have pleaded that the [d]efendant has continued to fail to take steps to determine its obligations under the FLSA," as it relates to the propriety of an award of liquidated damages. Id.

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. 24. 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 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

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[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. 24 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, 444 F. Supp. 3d 108 (D.D.C. 2020), discussed by defendant it 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. 53, ECF No. 54. Maine Community Health does not address the FLSA, and only includes a limited discussion of the ADA. See Maine Community 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]

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. 24 at 18 (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. (citations omitted). 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 ECF No. 24 at 18; 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

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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.

pay date or make damages available when compensation is not received on a pay date." ECF No. 24 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 19-20. 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, without citation to any authority, that:

> when the United States does not pay employees on their regularly scheduled paydays during a lapse in appropriations, a[] FLSA cause of action against the United States (1) does not accrue because the United States has not

> waived sovereign immunity for money damages resulting from the delayed payment of wages during a funding gap, and (2) cannot accrue because the [ADA] controls when and at what rate of pay the government must pay employees following a funding gap.

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. ECF No. 27 at 9; see also ECF No. 1 at 13-16. 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 "covered employees under [FLSA] and [were] deemed 'excepted' or 'essential' pursuant to the [ADA]. As a result, they [were] required to work throughout the furlough and [were] not paid their regular wages and/or earned overtime in a timely fashion." ECF No. 1 at 6. Plaintiffs allege specific facts demonstrating how the allegations apply to each plaintiff. See id. at 7-10.

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. 24 at 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 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. 24, is **DENIED**;

(2) On or before **January 22, 2021**, defendant is directed to **FILE** an **answer** or otherwise respond to plaintiffs' complaint; and

(3) On or before **January 22, 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. 318
United States Court of Federal Claims.

Justin TAROVISKY, et al., Plaintiffs,
v.
The UNITED STATES, Defendant.

No. 19-04C
|
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Attorneys and Law Firms

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OPINION AND ORDER

PATRICIA E. 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. 17 at 2-3 (second 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 can 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. 28.

In analyzing defendant's motion, the court has considered: (1) plaintiffs' complaint, ECF No. 17; (2) defendant's motion to dismiss, ECF No. 28; (3) plaintiffs' response to defendant's motion, ECF No. 31; (4) defendant's reply in support of its motion, ECF No. 35; (5) defendant's first supplemental brief in support of its motion, ECF No. 37; (6) plaintiffs' response to defendant's first supplemental brief, ECF No. 38; (7) defendant's second supplemental brief in support of its motion, ECF No. 46; (8) plaintiffs' response to defendant's second supplemental brief, ECF No. 54; (9) defendant's third supplemental brief in support of its motion, ECF No. 56; and (10) plaintiffs' response to defendant's third supplemental brief, ECF No. 57. 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. 28 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

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. 17 at 2, 8. The named plaintiffs in this case were, at the time of the shutdown, employees of one of the following fourteen agencies: (1) the Bureau of Prisons; (2) the Federal Emergency Management Agency; (3) the United States Immigration and Customs Enforcement; (4) Voice of America; (5) the National Park Service; (6) the National Weather Service; (7) the United States Secret Service; (8) the United States Customs and Border Protection; (9) the Federal Bureau of Investigation; (10) the Bureau Alcohol, Tobacco, Firearms, and

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FLSA "contains its own provision for judicial review." ECF No. 56 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.").

Explosives; (11) the Transportation Security Administration; (12) the Drug Enforcement Administration; (13) the Food Safety Inspection Service; and (14) the Indian Health Service. See id. at 4-8.

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 2 (quoting the United States Office of Personnel Management Guidance for Government Furloughs, Section B.1 (Sept. 2015)). Plaintiffs also allege that, in addition to being excepted employees required to work during a shutdown, they were also "classified as non-exempt from the overtime requirements of the [FLSA]." Id. at 2-3. 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 2-3.

According to plaintiffs, defendant's failure to timely pay their minimum and overtime wages was "willful, and in conscious or reckless disregard of the requirements of the FLSA." Id. at 14, 15. In support of this allegation, plaintiffs cite this court's decision in Martin v. United States, 130 Fed. Cl. 578 (2017), and allege 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." Id. at 11. Plaintiffs now "seek payment of wages owed, liquidated damages, and all appropriate relief under the FLSA." Id. at 3.

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

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[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).

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 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

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[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 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. 28 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. 28 at 14 (defendant's motion to dismiss); see also ECF No. 31 at 15 (plaintiffs noting that "[i]t is undisputed that [p]laintiffs' claims in this case are nearly identical to those raised in Martin v. United States, Case No. 13-8[34]C"[5]). As plaintiffs outline in their response to defendant's motion, "[a]s in Martin, the [p]laintiffs are federal employees who were designated 'excepted' and required to perform work during the government shutdown." ECF No. 31 at 19. 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

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[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.

[5] Plaintiffs cite to Martin v. United States as case number 13-843C. The court assumes that plaintiffs' citation contained a typographical error; the correct case number is 13-834C.

failure to pay [e]xcepted [e]mployees on their regularly scheduled payday complied with the FLSA." ECF No. 17 at 11.

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. 28. 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

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[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. 28 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

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.

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. 46, 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. 56, ECF No. 57. 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. 28 at 18 (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 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. 28 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. 35 at 13-14. 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 fail to 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. 31 at 16, 34-37; see also ECF No. 17 at 14-15. 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: "(a) were classified by [d]efendant as '[e]xcepted [e]mployees," (b) performed FLSA non-exempt work for [d]efendant . . . after 12:01 a.m. on December 22, 2018,[8] and (c) were not paid for such

[8] Defendant argues that "[t]o the extent that plaintiffs claim any FLSA violation for failing to pay FLSA minimum wages or overtime wages to [Transportation Security Officers], or to other FLSA-exempt employees, those claims must be dismissed." ECF No. 28 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, on the other hand, argue that the TSA's handbook explicitly contemplates that some employees may be non-exempt from the FLSA. See ECF No. 31 at 37, 39-40 (quoting from the TSA handbook). In the complaint, plaintiffs allege that one named individual is a TSA employee, and assert that she is "classified as FLSA non-exempt," but do not identify her specific job responsibilities. ECF No. 17 at 7. Because the court's decision in Jones does not hold that all TSA employees are necessarily FLSA-exempt, and because plaintiffs have offered evidence to the contrary, the court will not dismiss the claims of all TSA employees at this time. Plaintiffs, however,

work on their [s]cheduled [p]ayday." ECF No. 17 at 4. Plaintiffs allege specific facts demonstrating how the allegations apply to each named plaintiff. See id. at 4-8.

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. 28 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.

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ultimately bear the burden of proving that any TSA employees asserting claims in this case are, in fact, FLSA non-exempt in order for such employees to recover any damages that may be awarded.

See ECF No. 35 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. 28, 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.

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

Section 206(a)(1)(C) of the Fair Labor Standards Act, 29 U.S.C. § 206(a)(1)(C), provides in pertinent part:

> (a) Employees engaged in commerce. . . .
>
> 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:
>
> (1) except as otherwise provided in this section, not less than –
>
> * * *
>
> (C) $7.25 an hour, beginning 24 months after that 60th day

Section 207(a)(1) of the Fair Labor Standards Act, 29 U.S.C. § 207(a)(1), provides:

> (a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions
>
> (1) Except as otherwise provided in this section, no employer shall employ any 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, for a workweek longer than forty hours unless such

employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

Section 255(a) of the Fair Labor Standards Act, 29 U.S.C. § 255(a), provides:

§ 255. Statute of limitations

Any action commenced on or after May 14, 1947, to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act –

(a) if the cause of action accrues on or after May 14, 1947 – may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued;

Section 260 of the Fair Labor Standards Act, 29 U.S.C. § 260, provides:

§ 260. Liquidated damages

In any action commenced prior to or on or after May 14, 1947 to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he

had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 of this title.

Section 261(b) of the Fair Labor Standards Act, 29 U.S.C. § 261(b), provides in pertinent part:

(b) Damages; right of action; attorney's fees and costs; termination of right of action

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages.

Section 1341 of Title 31 provides:

Limitations on expending and obligating amounts

(a)(1) Except as specified in this subchapter or any other provision of law, an officer or employee of the United States Government or of the District of Columbia government may not –

(A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation;

(B) involve either government in a contract or obligation for the payment of money before

an appropriation is made unless authorized by law;

(C) make or authorize an expenditure or obligation of funds required to be sequestered under section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985; or

(D) involve either government in a contract or obligation for the payment of money required to be sequestered under section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985.

(2) This subsection does not apply to a corporation getting amounts to make loans (except paid in capital amounts) without legal liability of the United States Government.

(b) An article to be used by an executive department in the District of Columbia that could be bought out of an appropriation made to a regular contingent fund of the department may not be bought out of another amount available for obligation.

(c)(1) In this subsection –

(A) the term "covered lapse in appropriations" means any lapse in appropriations that begins on or after December 22, 2018;

(B) the term "District of Columbia public employer" means –

(i) the District of Columbia Courts;

(ii) the Public Defender Service for the District of Columbia; or

(iii) the District of Columbia government;

(C) the term "employee" includes an officer; and

(D) the term "excepted employee" means an excepted employee or an employee performing emergency work, as such terms are defined by the Office of Personnel Management or the appropriate District of Columbia public employer, as applicable.

(2) Each employee of the United States Government or of a District of Columbia public employer furloughed as a result of a covered lapse in appropriations shall be paid for the period of the lapse in appropriations, and each excepted employee who is required to perform work during a covered 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, and subject to the enactment of appropriations Acts ending the lapse.

(3) During a covered lapse in appropriations, each excepted employee who is required to perform work shall be entitled to use leave under chapter 63 of title 5, or any other applicable law governing the use of leave by the excepted employee, for which compensation shall be paid at the earliest date possible after the lapse in appropriations ends, regardless of scheduled pay dates.

Section 1342 of Title 31 provides:

Limitation on voluntary services

An 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. This section does not apply to a corporation getting amounts to make loans (except paid in capital amounts) without legal liability of the United States Government. As used in this section, the term "emergencies involving the safety of human life or the protection of property" does not include ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property.

Section 778.106 of 28 C.F.R. provides:

There is no requirement in the Act that overtime compensation be paid weekly. The general rule is that overtime compensation earned in a particular workweek must be paid on the regular pay day for the period in which such workweek ends. When the correct amount of overtime compensation cannot be determined until some time after the regular pay period, however, the requirements of the Act will be satisfied if the employer pays the excess overtime compensation as soon after the regular pay period as is practicable. Payment may not be delayed for a period longer than is reasonably necessary for the employer to compute and arrange for payment of the amount due and in no

event may payment be delayed beyond the next payday after such computation can be made. Where retroactive wage increases are made, retroactive overtime compensation is due at the time the increase is paid, as discussed in § 778.303. For a discussion of overtime payments due because of increases by way of bonuses, see § 778.209.

Section 790.21 of 28 C.F.R. provides:

§ 790.21 Time for bringing employee suits.

(a) The Portal Act[128] provides a statute of limitations fixing the time limits within which actions by employees under section 16(b) of the Fair Labor Standards Act[129] may be commenced, as follows:

(1) Actions to enforce causes of action accruing on or after May 14, 1947; two years.

(2) Actions to enforce causes of action accruing before May 14, 1947.[130] Two years or period prescribed

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[128] See sections 6–8 inclusive.

[129] Sponsors of the legislation stated that the time limitations prescribed therein apply only to the statutory actions, brought under the special authority contained in section 16(b), in which liquidated damages may be recovered, and do not purport to affect the usual application of State statutes of limitation to other actions brought by employees to recover wages due them under contract, at common law, or under State statutes. Statements of Representative Gwynne, 93 Cong. Rec. 1491, 1557–1588; colloquy between Representative Robsion, Vorys, and Celler, 93 Cong. Rec. 1495.

[130] This refers to actions commenced after September 11, 1947. Such actions commenced on or between May 14, 1947 and September 11, 1947 were left subject to State statutes of limitations. As to collective and representatives actions commenced before May 14, 1947, section 8 of the Portal Act makes the period of

by applicable State statute of limitations, whichever is shorter.

These are maximum periods for bringing such actions, measured from the time the employee's cause of action accrues to the time his action is commenced.[131]

(b) The courts have held that a cause of action under the Fair Labor Standards Act for unpaid minimum wages or unpaid overtime compensation and for liquidated damages "accrues" when the employer fails to pay the required compensation for any workweek at the regular pay day for the period in which the workweek ends.[132] The Portal Act[133] provides that an action to enforce such a cause of action shall be considered to be "commenced":

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limitations stated in the text applicable to the filing, by certain individual claimants, of written consents to become parties plaintiff. See Conference Report, p. 15; § 790.20 of this part.

[131] Conference Report, pp. 13–15.

[132] Reid v. Solar Corp., 69 F. Supp. 626 (N.D. Iowa); Mid–Continent Petroleum Corp. v. Keen, 157 F. (2d) 310, 316 (C.A. 8). See also Brooklyn Savings Bank v. O'Neil, 324 U.S. 697; Rigopoulos v. Kervan, 140 F. (2d) 506 (C.A. 2). In some instances an employee may receive, as a part of his compensation, extra payments under incentive or bonus plans, based on factors which do not permit computation and payment of the sums due for a particular workweek or pay period until some time after the pay day for that period. In such cases it would seem that an employee's cause of action, insofar as it may be based on such payments, would not accrue until the time when such payment should be made. Cf. Walling v. Harnischfeger Corp., 325 U.S. 427.

[133] Section 7. See also Conference Report, p. 14.

(1) In individual actions, on the date the complaint is filed;

(2) In collective or class actions, as to an individual claimant.

(i) On the date the complaint is filed, if he is specifically named therein as a party plaintiff and his written consent to become such is filed with the court on that date, or

(ii) On the subsequent date when his written consent to become a party plaintiff is filed in the court, if it was not so filed when the complaint was filed or if he was not then named therein as a party plaintiff.[134]

(c) The statute of limitations in the Portal Act is silent as to whether or not the running of the two-year period of limitations may be suspended for any cause.[135] In this connection, attention is

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[134] This is also the rule under section 8 of the Portal Act as to individual claimants, in collective or representative actions commenced before May 14, 1947, who were not specifically named as parties plaintiff on or before September 11, 1947.

[135] A limited suspension provision was contained in section 2(d) of the House bill, but was eliminated by the Senate. Neither the Senate debates, the Senate committee report, nor the conference committee report, indicate the reason for this. While the courts have held that in a proper case, a statute of limitations may be suspended by causes not mentioned in the statute itself (Braun v. Sauerwein, 10 Wall. 218, 223; see also Richards v. Maryland Ins. Co., 8 Cranch 84, 92; Bauserman v. Blunt, 147 U.S. 647), they have also held that when the statute has once commenced to run, its operation is not suspended by a subsequent disability to sue, and that the bar of the statute cannot be postponed by the failure of the creditor (employee) to avail himself of any means within his power to prosecute or to preserve his claim.

directed to section 205 of the Soldiers' and Sailors' Civil Relief Act of 1940,[136] as amended, which provides that the period of military service shall not be included in the period limited by law for the bringing of an action or proceeding, whether the cause of action shall have accrued prior to or during the period of such service.

Bauserman v. Blunt, 147 U.S. 647, 657; Smith v. Continental Oil Co., 59 F. Supp. 91, 94.

[136] Act of October 17, 1940, ch. 888, 54 Stat. 1178, as amended by the act of October 6, 1942, ch. 581, 56 Stat. 769 (50 U.S.C.A. App. sec. 525).