

Nos. 2021-2255 & 2018-1354

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

DONALD MARTIN, JR., PATRICIA A. MANBECK, JEFF ROBERTS, JOSE ROJAS,
RANDALL SUMNER,
Plaintiffs-Appellees,
v.
UNITED STATES,
Defendant-Appellant.

2021-2255

Appeal from the United States Court of Federal Claims in No. 1:13-cv-834, Judge Patricia E.
Campbell-Smith.

FRANK MARRS, NICOLE ADAMSON, BETHANY AFRAID, JOEL ALBRECHT, JESUS
AREVALO, NATHAN ARNOLD, SHAWN ASHWORTH, JEREMIAH AUSTIN, MICHAEL
AVENALI, JOSE BALAREZO, EBONY BALDWIN, CHARLES BAMBERY, DAVID
BARRAZA, GREGORY BARRETT, DONNA BARRINGER, DAVID BAUTISTA, GARY
BAYES, DARRELL BECTON, FRAUN BELLAMY, DARNELL BEMBO, JESSICA BENDER,
MICHAEL BENJAMIN, JR., BRYAN BENTLEY, WILLIAM BERTRAND, CHRISTOPHER
BIJOU, ALL PLAINTIFFS,
Plaintiffs-Appellants,
v.
UNITED STATES,
Defendant-Appellee.

2018-1354

Appeal from the United States Court of Federal Claims in No. 1:16-cv-1297, Judge Patricia E.
Campbell-Smith.

CORRECTED PRINCIPAL BRIEF FOR APPELLANT IN NO. 2021-2255

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STATEMENT OF RELATED CASES

No other appeal in or from the present civil action has previously been before this or any other appellate court. The government is not aware of any related cases within the meaning of Federal Circuit Rule 47.5(b).

STATEMENT OF JURISDICTION

This is an appeal in a case arising from the delay in paying wages during the 2013 lapse in appropriations. The Court of Federal Claims had jurisdiction over plaintiffs' complaints under 28 U.S.C. § 1491(a). The court denied the government's motion to dismiss, granted plaintiffs' motion for partial summary judgment as to liability, and entered a Rule 54(b) partial final judgment as to 157 plaintiffs on June 16, 2021. *See* Appx007-011. The government filed a timely notice of appeal on August 13, 2021, *see* Appx283, and this Court has jurisdiction over the appeals under 28 U.S.C. § 1295(a)(3). The Court has designated this case as a companion case to thirteen other pending appeals that involve similar claims arising out of the 2018-19 lapse in appropriations, and has consolidated this case with *Marrs v. United States*, No. 18-1354, for purposes of briefing in the nature of cross-appeals.

STATEMENT OF THE ISSUE

Between October 1 and October 16, 2013, several government agencies were affected by a lapse in appropriations. Plaintiffs in this case are employees of affected agencies who performed work during that lapse as so-called "excepted employees"—those whose work relates to "emergencies involving the safety of human life or the protection of property," 31 U.S.C. § 1342. The express terms of the Anti-Deficiency Act barred agencies from paying plaintiffs' wages during the appropriations lapse.

The Court of Federal Claims held, however, that in adhering to the directives of the Anti-Deficiency Act, the government incurred liability under the Fair Labor

Standards Act (FLSA). The court concluded that the FLSA contains an implicit requirement that wages generally be paid on the employee's regularly scheduled payday. The court further concluded that the government violated that requirement in making payments in accordance with the Anti-Deficiency Act, that the government's violation was not in good faith, and that plaintiffs should therefore be awarded liquidated damages.

The question presented is whether the payments in accordance with the Anti-Deficiency Act's commands subjected the government to liability for liquidated damages under the FLSA.

STATEMENT OF THE CASE

A. Legal Background

1. Anti-Deficiency Act

The Anti-Deficiency Act, 31 U.S.C. § 1341 *et seq.*, provides that, with certain exceptions not relevant here, no officer or employee of the United States may “make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation.” *Id.* § 1341(a)(1). The statute further provides that an officer or employee of the United States “may not accept voluntary services . . . or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property.” *Id.* § 1342. Violations of either provision may give rise to administrative discipline, and willful violations are punishable as felonies. *Id.* §§ 1349(a), 1350.

Although the statute generally prohibits employees from continuing to work (and agencies from allowing their employees to work) during a lapse in appropriations, that prohibition does not extend to so-called “excepted employees.” Those employees may continue to perform work in certain circumstances, including during “emergencies involving the safety of human life or the protection of property.” *Id.* § 1342.

During a lapse in appropriations that occurred in 2018-2019, Congress amended the statute to confirm its understanding that employees may not be paid during a lapse in appropriations. The amendment to the Anti-Deficiency Act provides: “[E]ach 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.” 31 U.S.C. § 1341(c)(2); *see* Government Employee Fair Treatment Act of 2019, Pub. L. No. 116-1, § 2, 133 Stat. 3, 3-4; Further Additional Continuing Appropriations Act, 2019, Pub. L. No. 116-5, § 103, 133 Stat. 10, 11.

2. Fair Labor Standards Act

With exceptions not relevant here, the Fair Labor Standards Act requires that every worker who works “in any workweek” receive a minimum wage for that workweek, 29 U.S.C. § 206(a), and that certain workers receive additional overtime wages if their workweek exceeds 40 hours, *id.* § 207(a)(1). An employer who violates

either of those provisions is liable both for the unpaid wages and for “an additional equal amount as liquidated damages,” as well as for reasonable attorney’s fees. *Id.* § 216(b).

The FLSA does not specify when wages must be paid. Department of Labor guidance recognizes, however, that minimum and overtime wages should “ordinarily” be paid on the employee’s “regular payday for the period in which the particular workweek ends.” Wage & Hour Div., U.S. Dep’t of Labor, *Field Operations Handbook* § 30b04 (2016), <https://go.usa.gov/xFeA4>.¹ And in some cases, the failure to make required wage payments in a timely fashion may constitute a violation of the statute giving rise to damages liability. As the Supreme Court has explained, the statute’s liquidated damages provision “constitute[d] a Congressional recognition that failure to pay the statutory minimum on time may be so detrimental to maintenance of the minimum standard of living . . . that double payment must be made in the event of delay.” *Brooklyn Sav. Bank v. O’Neil*, 324 U.S. 697, 707 (1945) (holding that FLSA claims for overtime compensation cannot be waived in a case involving pay withheld for more than two years); *see also, e.g., Rigopoulos v. Kervan*, 140 F.2d 506 (2d Cir. 1943) (holding an employer liable when it paid accrued overtime wages in monthly installments between three years and six months late); *Calderon v. Witvoet*, 999 F.2d

¹ Department of Labor guidance is not directly applicable to federal employees like plaintiffs, for whom the FLSA is implemented by the Office of Personnel Management. *See* 29 U.S.C. § 204(f); 5 C.F.R. pt. 551.

1101, 1107-08 (7th Cir. 1993) (concluding an employer violated the FLSA when it withheld a portion of each agricultural employee's minimum wage until the employee left the employment, often at the end of the harvest season).

The implicit requirement has never been regarded as absolute, however, and the Supreme Court and the Department of Labor have recognized that it is sometimes infeasible to make wage payments on an employee's regularly scheduled payday because an employer is unable to calculate the payments due by the regularly scheduled payday. In those circumstances, the FLSA "does not require the impossible" but requires instead that payment be made "as soon as convenient or practicable under the circumstances." *Walling v. Harnischfeger Corp.*, 325 U.S. 427, 432-33 (1945); *cf.* 29 C.F.R. § 778.106 (similar).

Even when a delayed payment is properly deemed a violation of some implicit prompt payment requirement, it does not automatically follow that an award of liquidated damages is appropriate. Instead, the FLSA provides that a court may withhold, or reduce the amount of, liquidated damages "if the employer shows . . . 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.

B. Factual and Procedural Background

1. Between October 1 and October 16, 2013, several government agencies were affected by a lapse in appropriations. Pursuant to the Anti-Deficiency Act provisions

described above, excepted employees at those agencies continued to perform work during the lapse. All excepted employees received their accrued wages after the lapse ended. Appx114.

Plaintiffs are excepted employees who performed work during the lapse. They seek liquidated damages under the FLSA in the amount of any minimum and overtime wages that had accrued but were not paid on the plaintiffs' regularly scheduled paydays during the lapse. *See* Appx107-108.

2. The government moved to dismiss the complaint, explaining, among other things, that its payment of wages in accordance with the Anti-Deficiency Act's instructions does not subject it to liability for liquidated damages under the FLSA. The Court of Federal Claims denied that motion, relying primarily on case law developed in other circumstances to conclude that the FLSA implicitly obliges employers to pay minimum and overtime wages on the employee's next "regularly scheduled payday[]." Appx024. Therefore, without discussing the Anti-Deficiency Act's prohibitions, the court held that the government's deferral of plaintiffs' wages during the lapse in appropriations "constituted an FLSA violation." *Id.* The court also declined to determine on the motion to dismiss whether plaintiffs were entitled to liquidated damages, stating that the government had failed to establish as a matter of law that its compliance with the Anti-Deficiency Act's prohibitions constituted the requisite good faith but suggesting that the statute's requirements might be relevant to that inquiry. *See* Appx032-034.

Following the denial of the government's motion to dismiss, the parties engaged in discovery, after which the plaintiffs moved for partial summary judgment on the issue of liability and the government cross-moved for summary judgment. The court granted plaintiffs' motion and denied the government's, concluding that the government's failure to pay plaintiffs' wages during the lapse in appropriations violated the FLSA and that the plaintiffs were entitled to liquidated damages in the amount of the minimum and overtime wages that were paid after plaintiffs' regularly scheduled pay date.

The court recognized that the Anti-Deficiency Act speaks directly to payments made in the absence of appropriations. The court stated, however, that "the appropriate way to reconcile the [Anti-Deficiency Act 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." Appx041. The court thus concluded that the Anti-Deficiency Act did not alter any obligation under the FLSA to make payments on the regularly scheduled payday. And, based on "the legal framework previously established by the court" in denying the government's motion to dismiss, the court further determined that "defendant's failure to timely pay plaintiffs' wages" on their regularly scheduled pay date "is a violation of the FLSA." Appx042.

At the same time, the court stated that it would consider the impact of the Anti-Deficiency Act insofar as it would be relevant to determining whether it could properly order payment of liquidated damages for the asserted violations under 29

U.S.C. § 260. The court declared that it “would require that defendant demonstrate a good faith belief, based on reasonable grounds, that its actions were appropriate.”

Appx041. It would thus “evaluate the existence and operation of the [Anti-Deficiency Act] as part of determining whether defendant met the statutory requirements to avoid liability for liquidated damages.” Appx041-042.

Notwithstanding this statement, the court immediately proceeded to conclude—without serious engagement with the Anti-Deficiency Act’s requirements—that “Defendant has not demonstrated good faith and reasonable grounds for believing its failure to pay did not violate the FLSA.” Appx043. That Executive Branch officials believed that they were required to comply with the unambiguous terms of a criminal statute was not, in the court’s view, sufficient to establish subjective good faith. The court did not explain why this was the case and did not suggest that officials could reasonably be expected to subject themselves to criminal penalties on the theory that the violations of the Anti-Deficiency Act would be excused by the need to comply with an implicit requirement of the FLSA. Instead, the court established a bright-line rule that an employer may only act in good faith when it takes “active steps to ascertain the dictates of the FLSA.” Appx044 (quotation omitted). And because the government had “rel[ie]d entirely” on “the primacy of the” Anti-Deficiency Act when deferring plaintiffs’ wages—rather than making an “inquiry into how to comply with the FLSA” or “seek[ing] a legal opinion regarding how to meet the obligations of both” statutes—the court concluded that the government had

not acted in good faith. *Id.* Therefore, the court granted plaintiffs’ motion for partial summary judgment on the issue of liability for liquidated damages and ordered the parties to calculate the appropriate damages “in an amount equal to the minimum and overtime wages that defendant failed to timely pay.” Appx047.

In the wake of the court’s decision, the government and the plaintiffs have endeavored to calculate the appropriate damages to which each plaintiff is entitled under the Court of Federal Claims’ ruling. On June 16, 2021, pursuant to a stipulation from the parties, the trial court entered partial final judgment in the amount of approximately \$31,000 under Rule 54(b) in favor of the first 157 plaintiffs whose damages the parties have been able to calculate. *See* Appx001-011. This appeal followed.

SUMMARY OF ARGUMENT

A. Congress has addressed in the clearest possible terms the payment of federal employees who, as a result of their “excepted” status, perform work during a lapse in appropriations. The Anti-Deficiency Act provides that, with certain exceptions not relevant here, no officer or employee of the United States may “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). Recognizing the impact of the unambiguous restrictions of the Anti-Deficiency Act, Congress, during a later lapse in appropriations, specified that excepted employees should be paid “at the earliest date possible after the lapse in appropriations ends,

regardless of scheduled pay dates, and subject to the enactment of appropriations Acts ending the lapse.” *Id.* § 1341(c)(2).

It is not controverted that the government acted in accordance with the statutory requirements of the Anti-Deficiency Act. Plaintiffs assert, however, that when Congress enacted the FLSA, it subjected the treasury to damages claims for compliance with the Anti-Deficiency Act. A court could not properly infer an intent to waive immunity for such claims absent a clear indication that Congress intended that improbable result, and no such indication exists. Even if the FLSA explicitly provided that payments must be made on a regularly scheduled pay date, that general requirement could not properly be construed to expose the fisc to damages actions when agency officials adhere to the requirements—backed by threat of administrative discipline and possible criminal penalties—of a statute specifically directed to the circumstances of a lapse in appropriations. Indeed, the Court of Federal Claims identified no instance in which Congress has made an agency’s compliance with a specific statutory mandate the basis of a damages action under a different statute.

The Court of Federal Claims’ ruling is particularly anomalous because the FLSA does not explicitly establish a specific date by which payments must be made to ensure compliance with the statute. And the Supreme Court has long recognized that the statute does not compel payments on an employee’s usual schedule when doing so would be impossible because of an employer’s inability to calculate the payments due by that date. Whatever the scope of any implicit requirement of timely payments, it

does not entitle plaintiffs to recover for the delay that resulted from the appropriations lapse.

The Court of Federal Claims' ruling is also anomalous because it disregards the bedrock principle, emphasized repeatedly by the Supreme Court and this Court, that "a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign." *Athey v. United States*, 908 F.3d 696, 702-03 (Fed. Cir. 2018) (quoting *Lane v. Pena*, 518 U.S. 187, 192 (1996)). There is no indication whatsoever that Congress waived the government's immunity when payments are delayed as a result of the unambiguous requirements of the Anti-Deficiency Act, and the implied requirement of the FLSA plainly does not constitute such a waiver.

B. Even assuming that the FLSA could properly be read to authorize damages actions against the United States in these circumstances, federal officials, in complying with the Anti-Deficiency Act, plainly did so "in good faith" and with "reasonable grounds" for believing that compliance with the law did not violate the FLSA. 29 U.S.C. § 260. The court's award of damages rests on a clear error of law. The court cited no plausible rationale for concluding that officials did not act in good faith when they complied with the Anti-Deficiency Act. Indeed, the court nowhere suggested that agency officials could have lawfully chosen to violate the Anti-Deficiency Act or that they could expect that their violations would be excused on the ground that they believed they were complying with implicit requirements of the

FLSA. At an absolute minimum, the government officials certainly acted in good faith in believing that their actions were compelled by law.

ARGUMENT

A. The Government Does Not Violate the FLSA when It Pays Employees in Accordance with the Anti-Deficiency Act

This Court reviews de novo the Court of Federal Claims' grant of summary judgment on the issue of liability. *See Shell Oil Co. v. United States*, 7 F.4th 1165, 1171 (Fed Cir. 2021).

The core of plaintiffs' FLSA claims, accepted by the Court of Federal Claims, is that the government's failure to pay their wages on the regularly scheduled pay date violated § 216(b) of the statute and that they are entitled to liquidated damages.

As an initial matter, there can be no serious dispute that government officials complied with the dictates of the Anti-Deficiency Act, and that violations of that statute would have exposed them to civil and criminal sanctions. The Anti-Deficiency Act prohibits officials from "mak[ing] or authoriz[ing] an expenditure," 31 U.S.C. § 1341(a)(1), in the absence of a supporting appropriation. Plaintiffs do not dispute that that prohibition barred the payment of their wages during the lapse in appropriation, nor do they argue that the government unreasonably delayed in paying their wages following the restoration of appropriations.

Plaintiffs urge, however, that they are entitled to damages because of the FLSA's asserted implicit requirement that employees must be paid on their regularly

scheduled pay date (as the government does when the Anti-Deficiency Act does not dictate otherwise). But as the Supreme Court has acknowledged, the FLSA “does not require the impossible.” *Walling v. Harnischfeger Corp.*, 325 U.S. 427, 432-33 (1945). Thus, the Court has recognized that when it is infeasible to make payments on an employee’s regularly scheduled payday because proper overtime compensation cannot be computed until “weeks or even months” later, delayed payment does not necessarily violate the statute. *Id.* Instead, in that circumstance, employers properly comply with the FLSA when they make the required payments “as soon as convenient or practicable under the circumstances.” *Id.* at 433; *see also* 29 C.F.R. § 778.106 (similar).

In this case, payment of plaintiffs’ wages on their regularly scheduled payday would have been not merely impracticable but plainly illegal. We are unaware of any case finding a violation of the FLSA when a delay is required by another federal statute. And it would be remarkable if Congress, in enacting the FLSA, implicitly exposed the treasury to damages based on officials’ compliance with the long-established principles codified in the Anti-Deficiency Act, first enacted more than a century ago. *See, e.g.*, Act of July 12, 1870, ch. 251, § 7, 16 Stat. 230, 251 (“[I]t shall not be lawful for any department of the government to expend in any one fiscal year any sum in excess of appropriations made by Congress for that fiscal year, or to involve the government in any contract for the future payment of money in excess of such appropriations.”); Act of Mar. 3, 1905, ch. 1484, § 4, 33 Stat. 1214, 1257-58 (similar).

Those considerations should be dispositive. But other principles of construction all require the same result. First, it is axiomatic that an explicit textual requirement cannot be altered by court-created requirements based on statutory purpose. That canon, generally applied in interpreting a single statute, applies with equal force here in discerning the proper application of two statutes addressing payment of wages. *Cf. Bartels Tr. for Benefit of Cornell Univ. ex rel. Bartels v. United States*, 617 F.3d 1357, 1361 (Fed. Cir. 2010) (stating that arguments derived from atextual sources such as legislative purposes and history cannot “trump[] the statutory text”); *see also Kloeckner v. Solis*, 568 U.S. 41, 55 n.4 (2012) (“[E]ven the most formidable argument concerning [a] statute’s purposes could not overcome” a clear requirement found “in the statute’s text.”).

Second, as the Supreme Court has explained, “the specific governs the general”; that is, where a “general” statutory requirement “is contradicted by a specific prohibition,” the “specific provision is construed as an exception to the general one.” *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (quotation omitted). That rule ensures that “a statute dealing with a narrow, precise, and specific subject”—which reflects Congress’s solution to “particularized problems”—“is not submerged” by a different “statute covering a more generalized spectrum.” *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976). Thus, the Anti-Deficiency Act’s specific provisions addressing the precise question of payments

during and after a lapse in appropriations would prevail even if the FLSA explicitly made failure to pay on a regularly scheduled pay date a statutory violation.

Third, even if plaintiffs' position were not so clearly mistaken, principles of sovereign immunity would preclude their assertions. As the Supreme Court and this Court have repeatedly recognized, "a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign." *Athey v. United States*, 908 F.3d 696, 702-03 (Fed. Cir. 2018) (quoting *Lane v. Pena*, 518 U.S. 187, 192 (1996)). Accordingly, "[a]ny ambiguities in the statutory language are to be construed in favor of immunity, so that the Government's consent to be sued is never enlarged beyond what a fair reading of the text requires." *FAA v. Cooper*, 566 U.S. 284, 290 (2012) (citation omitted) (citing *United States v. Williams*, 514 U.S. 527, 531 (1995), and *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685-86 (1983)). As the Supreme Court stressed in *Cooper*, "[a]mbiguity exists if there is a plausible interpretation of the statute that would not authorize money damages against the Government." *Id.* at 290-91 (citing *United States v. Nordic Vill., Inc.*, 503 U.S. 30 (1992)).

A court must therefore consider not only whether Congress has waived immunity in a particular statute but also whether the waiver extends to particular forms of relief. *See Athey*, 908 F.3d at 703. In *Cooper*, the Supreme Court applied those principles in interpreting the civil remedies provision of the Privacy Act, which authorizes "actual damages" in some circumstances but does not define the term. Applying the particular principles of interpretation applicable to a waiver of immunity,

the Court concluded that “the Privacy Act does not unequivocally authorize an award of damages for mental or emotional distress” and, “[a]ccordingly, the Act does not waive the Federal Government’s sovereign immunity from liability for such harms.” *Cooper*, 566 U.S. at 304. As the Court emphasized, “the scope”—and not merely the existence—“of Congress’ waiver [must] be clearly discernable from the statutory text in light of traditional interpretive tools.” *Id.* at 291. If not, courts must “take the interpretation most favorable to the Government.” *Id.*

These principles leave no doubt that Congress, in amending the FLSA to incorporate a waiver of sovereign immunity, did not implicitly waive immunity for liquidated damages under the FLSA when government officials comply with the specific terms of the Anti-Deficiency Act. The Court of Federal Claims addressed none of these considerations, either in its denial of the government’s motion to dismiss or in its later grant of summary judgment (which incorporated by reference the court’s conclusions from the motion to dismiss stage). Instead, the court concluded without analysis that “the appropriate way to reconcile the [Anti-Deficiency Act 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.” Appx041. Thus, without significant explanation, the court simply concluded that compliance with the specific commands of the Anti-Deficiency Act constituted a violation of the FLSA, which does not explicitly establish mandatory pay dates or

define when a delay should be deemed a violation of the statute. For the reasons discussed, that conclusion is without foundation.

B. Plaintiffs Would Not Be Entitled to Liquidated Damages Under the FLSA Even Assuming that the Delay in Payment Violated that Statute’s Implicit Requirements

This Court reviews de novo the Court of Federal Claims’s grant of summary judgment on the issue of liability for liquidated damages. *See Shell Oil Co.*, 7 F.4th at 1171.

Even if it were the case that the timing of the payments here constituted a violation of the FLSA, plaintiffs’ claims for liquidated damages should be rejected as a matter of law. The FLSA provides that if an “employer shows to the satisfaction of the court that the act or omission giving rise” to liability “was in good faith” and that the employer “had reasonable grounds for believing that his act or omission was not a violation of the [statute], the court may, in its sound discretion, award no liquidated damages or award any amount thereof.” 29 U.S.C. § 260; *see Shea v. United States*, 976 F.3d 1292, 1297 (Fed. Cir. 2020) (The “court must determine that the employer acted in good faith and with reasonable belief as § 260 requires.”); *see also id.* at 1300 (“The ‘good faith’ of the statute requires, we think, only an honest intention to ascertain what the [FLSA] requires and to act in accordance with it.” (alteration in original) (quoting *Addison v. Huron Stevedoring Corp.*, 204 F.2d 88, 93 (2d Cir. 1953))).

There could be no clearer case of good faith than that presented here. Government officials did not act negligently, much less in bad faith. They did not

make payments during the appropriations lapse because doing so would have violated an express statutory prohibition. It is implausible to construe their conduct as outside the intended reach of § 260: Congress plainly would not have regarded compliance with the law as anything other than good faith.

The Court of Federal Claims thus had no basis for concluding that government officials did not act in good faith. The court's declaration that the government cannot have acted in good faith because it "took no steps to determine its obligations under the FLSA during the 2013 shutdown," Appx044—has no basis in the statute or in common sense. The court never suggested that government officials would have been free to violate the Anti-Deficiency Act, or that their violations would be excused on the ground that officials believed the violations of the statute's explicit commands were authorized by the implicit requirements of the Fair Labor Standards Act. At a minimum, it was entirely reasonable for officials to conclude that the FLSA did not rescind their obligation to make payments as directed by the Anti-Deficiency Act. In some cases an employer's failure to explore relevant factual or legal considerations might be relevant to its good faith, as in cases cited by the Court of Federal Claims, *see id.* Here, however, officials acted in both subjective and objective good faith in recognizing that they were bound by the plain terms and uniform understanding of the Anti-Deficiency Act.

The court's error is underscored by the fact that its mistaken holding can have no impact on future conduct. The Court of Federal Claims did not conclude that

payments could have been made during the appropriations lapse consistent with the Anti-Deficiency Act. And government officials will continue to be bound by the terms of that statute. Insofar as the trial court's order could be said to have a deterrent effect, it would be an attempt to deter officials from complying with the law, which is not an available option or one that a court should endorse.

CONCLUSION

For the foregoing reasons, the decision of the Court of Federal Claims should be reversed.

Respectfully submitted,

BRIAN M. BOYNTON
Acting Assistant Attorney General

MARK B. STERN
MICHAEL SHIH

/s/ Sean Janda

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 4,615 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

/s/ Sean Janda

Sean Janda

STATUTORY ADDENDUM

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§ 216. Penalties

...

(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. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. Any employer who violates section 203(m)(2)(B) of this title shall be liable to the employee or employees affected in the amount of the sum of any tip credit taken by the employer and all such tips unlawfully kept by the employer, and in an additional equal amount as liquidated damages. An action to recover the liability prescribed in the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

29 U.S.C. § 260

§ 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 [29 U.S.C. 201 et seq.], 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.

31 U.S.C. § 1341

§ 1341. 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.

31 U.S.C. § 1341 (2012)

§ 1341. Limitations on expending and obligating amounts

(a) (1) 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.

31 U.S.C. § 1342

§ 1342. 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.

APPELLANT'S ADDENDUM

In the United States Court of Federal Claims

No. 13-834C

(E-Filed: June 16, 2021)

| | |
|-------------------------------------|---|
| _____ |) |
| DONALD MARTIN, JR., <u>et al.</u> , |) |
| |) |
| Plaintiffs, |) |
| |) |
| v. |) |
| |) |
| THE UNITED STATES, |) |
| |) |
| Defendant. |) |
| _____ |) |

ENTRY OF PARTIAL JUDGMENT ORDER

On June 11, 2021, the parties filed a joint motion for entry of judgment under Rule 54(b) of the Rules of the United States Court of Federal Claims (RCFC), in favor of 157 plaintiffs in this matter. See ECF No. 271. Therein, the parties report that “based upon the [c]ourt’s prior finding of [g]overnment liability,” the parties have stipulated to an entry of a partial judgment in favor of 157 plaintiffs in the total amount of \$31,453.35 in damages. See id. at 1. The parties’ motion contained an attached exhibit identifying the 157 plaintiffs and the specific amount owed to each plaintiff. See id. at 7-10.

Accordingly, the parties’ joint motion, ECF No. 271, is **GRANTED**. Pursuant to RCFC 54(b), there being no just reason for delay, the clerk’s office is directed to **ENTER** partial judgment in favor of the 157 plaintiffs in the total amount of **\$31,453.35** in damages. The parties’ exhibit identifying the 157 plaintiffs is attached to this order for reference.

Furthermore, pursuant to the court’s April 7, 2021 order, this case shall remain **STAYED** until further order of the court; and, the parties are directed to **FILE** a **joint status report** within **thirty days** of the United States Court of Appeals for the Federal Circuit’s ruling on the interlocutory appeal in Avalos v. United States, Case No. 19-48C. See ECF No. 264.

IT IS SO ORDERED.

s/Patricia E. Campbell-Smith

PATRICIA E. CAMPBELL-SMITH
Judge

Attachment

| | Agency-SubAgency | Name | Liquidated Damages One (Minimum Wage) | Liquidated Damages Two (Overtime) | Total Damages |
|----|------------------|------------------------|---------------------------------------|-----------------------------------|---------------|
| 1 | DOJ-DEA | ALAMPI, MELINA | \$41.69 | \$0.00 | \$41.69 |
| 2 | DOD | ALLARD, ZACHARIAH L | \$91.44 | \$0.00 | \$91.44 |
| 3 | DOI | ARCHER, WILLIAM B | \$290.00 | \$0.00 | \$290.00 |
| 4 | DOJ-BOP | ARELLANO, SERGIO | \$40.16 | \$0.00 | \$40.16 |
| 5 | BBG | BAGNALL, THOMAS JAMES | \$0.00 | \$290.59 | \$290.59 |
| 6 | DOJ-BOP | BAKER, PATRICK | \$290.00 | \$0.00 | \$290.00 |
| 7 | DOD | BARNARD, ROY A | \$74.72 | \$0.00 | \$74.72 |
| 8 | DOJ-BOP | BASLER, LARRY | \$290.00 | \$376.72 | \$666.72 |
| 9 | DOJ-USAO | BAUTISTA, SANDY | \$107.84 | \$0.00 | \$107.84 |
| 10 | DOJ-BOP | BECERRA, LIONEL | \$86.88 | \$95.23 | \$182.11 |
| 11 | SSA | BELL, EUBECITA J | \$290.00 | \$0.00 | \$290.00 |
| 12 | DHS-TSA | BEN DOR, ELDAD | \$0.00 | \$196.21 | \$196.21 |
| 13 | HHS | BENALLY, HARLIN | \$89.04 | \$0.00 | \$89.04 |
| 14 | DOJ-BOP | BENZENHAFFER, TEDDY | \$0.00 | \$250.90 | \$250.90 |
| 15 | SSA | BOKAR, DEBRA A. | \$290.00 | \$0.00 | \$290.00 |
| 16 | DOJ-BOP | BOONE, JAMES | \$64.96 | \$0.00 | \$64.96 |
| 17 | DOJ-BOP | BOULTON, ESSIE | \$290.00 | \$0.00 | \$290.00 |
| 18 | SSA | BROWN, LUTRICIA | \$108.88 | \$0.00 | \$108.88 |
| 19 | DOJ-USAO | BUTLER, DIANA | \$117.11 | \$0.00 | \$117.11 |
| 20 | DHS-CBP | CAIRNS, THOMAS A | \$290.00 | \$0.00 | \$290.00 |
| 21 | TREASURY-IRS | CAMPBELL, ALENA | \$172.00 | \$0.00 | \$172.00 |
| 22 | USDA-FSIS | CAPERS, LESLEY | \$111.52 | \$167.38 | \$278.90 |
| 23 | SSA | CARLSON, JONATHAN C | \$83.60 | \$0.00 | \$83.60 |
| 24 | DOD | CARPENTER, KELVIN | \$107.76 | \$410.04 | \$517.80 |
| 25 | TREASURY-IRS | CARRICATO, MELANIE | \$290.00 | \$0.00 | \$290.00 |
| 26 | TREASURY-IRS | CARRICATO, ROBIE R | \$290.00 | \$0.00 | \$290.00 |
| 27 | DHS-TSA | CHWALISZEWSKI, JOHN | \$0.00 | \$434.43 | \$434.43 |
| 28 | DOJ-BOP | CINTORA, THEODORE | \$45.44 | \$0.00 | \$45.44 |
| 29 | DOD | CLARK, PAUL R | \$77.84 | \$0.00 | \$77.84 |
| 30 | SSA | CLINE, CATHY A | \$54.48 | \$0.00 | \$54.48 |
| 31 | DOJ-BOP | COLLINS, TRAVIS B | \$290.00 | \$0.00 | \$290.00 |
| 32 | DOJ-FBI | COMBS, BETH A | \$103.36 | \$0.00 | \$103.36 |
| 33 | DOD | CORTEZ, GILBERT L | \$117.84 | \$0.00 | \$117.84 |
| 34 | SSA | COWAN, JEAN L | \$1.68 | \$0.00 | \$1.68 |
| 35 | DOJ-BOP | COX, MORALES | \$47.52 | \$0.00 | \$47.52 |
| 36 | DOJ-BOP | CRUZ, MARIA | \$30.24 | \$0.00 | \$30.24 |
| 37 | SSA | CURTO, ANTOINETTE | \$90.08 | \$0.00 | \$90.08 |
| 38 | DHS-TSA | DAVIS, MITCHELL | \$0.00 | \$297.90 | \$297.90 |
| 39 | SSA | DECLERICO, CHRISTOPHER | \$42.56 | \$0.00 | \$42.56 |
| 40 | SSA | DELLAPINA, TERRI | \$86.24 | \$0.00 | \$86.24 |
| 41 | USDA-FSIS | DEVAN, ANDREW B | \$36.61 | \$726.64 | \$763.25 |
| 42 | TREASURY-IRS | DEWITT, KESHA | \$89.75 | \$0.00 | \$89.75 |
| 43 | DOD | DIAS, NELIA N | \$125.48 | \$0.00 | \$125.48 |
| 44 | DOJ-FBI | DUBOIS, TIMOTHY | \$92.00 | \$0.00 | \$92.00 |
| 45 | DOD | DUFF, KEYON | \$99.10 | \$0.00 | \$99.10 |
| 46 | DOJ-BOP | ESPINOSA, ALONSO | \$290.00 | \$20.58 | \$310.58 |
| 47 | DHS-CBP | ESPINOZA-GARZA, ZAYRA | \$0.00 | \$166.95 | \$166.95 |
| 48 | DOJ-BOP | FEIER, GHEORGHE | \$77.20 | \$0.00 | \$77.20 |
| 49 | DHS-CBP | FLETCHER, DAVID | \$290.00 | \$0.00 | \$290.00 |
| 50 | DOJ-BOP | FLOWERS, LAJUAN | \$0.00 | \$383.87 | \$383.87 |

| | Agency-SubAgency | Name | Liquidated Damages One (Minimum Wage) | Liquidated Damages Two (Overtime) | Total Damages |
|-----|---------------------|-----------------------|---------------------------------------|-----------------------------------|---------------|
| 51 | DOD | FONTAINE, LAUREN L | \$55.28 | \$0.00 | \$55.28 |
| 52 | DOJ-BOP | FRIBERG, KATHY | \$50.24 | \$0.00 | \$50.24 |
| 53 | DOJ-BOP | FULTZ, DONALD | \$64.95 | \$422.43 | \$487.38 |
| 54 | DOJ-BOP | FULTZ, RENEE | \$93.76 | \$0.00 | \$93.76 |
| 55 | DOJ-BOP | GARBER, CHRISTINE | \$290.00 | \$0.00 | \$290.00 |
| 56 | DOJ-BOP | GASKILL, WILLIAM A | \$49.92 | \$0.00 | \$49.92 |
| 57 | SSA | GAYE, THERESA | \$67.36 | \$0.00 | \$67.36 |
| 58 | DOD | GONZALEZ, MARGARITA | \$85.12 | \$0.00 | \$85.12 |
| 59 | DOD | GREEN, SHAWN C | \$42.32 | \$432.00 | \$474.32 |
| 60 | DOJ-BOP | GREGORY, ROGER | \$111.20 | \$268.24 | \$379.44 |
| 61 | DOD | HARRISON, GLORIA D | \$88.31 | \$0.00 | \$88.31 |
| 62 | DOJ-BOP | HENLEY, LURLEEN | \$44.70 | \$0.00 | \$44.70 |
| 63 | DOJ-BOP | HERNANDEZ, LINDA M | \$68.71 | \$0.00 | \$68.71 |
| 64 | DHS-TSA | HERREN, CHRISTOPHER T | \$0.00 | \$863.27 | \$863.27 |
| 65 | DOJ-BOP | HINNERSHITZ, TIM | \$81.84 | \$637.92 | \$719.76 |
| 66 | SSA | HOBODY, CHERYL | \$150.80 | \$0.00 | \$150.80 |
| 67 | SSA | HODGE, DIANA A. | \$92.72 | \$0.00 | \$92.72 |
| 68 | DOD | HOLLOWAY, GWENDOLYN H | \$110.65 | \$0.00 | \$110.65 |
| 69 | DOJ-BOP | HOLM, TRISHA | \$42.20 | \$0.00 | \$42.20 |
| 70 | SSA | HOOKER, CLIFTON K | \$90.72 | \$0.00 | \$90.72 |
| 71 | DOJ-BOP | HUNTER, OLIVIA | \$91.36 | \$0.00 | \$91.36 |
| 72 | DOJ-BOP | JACKSON, KATHRYN | \$46.40 | \$0.00 | \$46.40 |
| 73 | DOD | JACKSON, STEPHEN T | \$170.00 | \$0.00 | \$170.00 |
| 74 | DOI | JANSING, ROBERT L | \$169.44 | \$0.00 | \$169.44 |
| 75 | DOJ-BOP | JOHNSON III, PETER J | \$54.95 | \$352.56 | \$407.51 |
| 76 | DOJ-BOP | JOHNSON, ARTHUR | \$0.00 | \$916.29 | \$916.29 |
| 77 | SSA | JOHNSON, IBRAHIM X | \$131.36 | \$0.00 | \$131.36 |
| 78 | USDA-FOREST SERVICE | JOHNSON, ROB | \$170.00 | \$0.00 | \$170.00 |
| 79 | DOD | JONES, TERRESA | \$290.00 | \$0.00 | \$290.00 |
| 80 | DOJ-BOP | KEESLER, DAVID | \$64.96 | \$0.00 | \$64.96 |
| 81 | DOD | KELLEY, LOTINA D | \$196.24 | | \$196.24 |
| 82 | DOJ-DEA | KORNEGAY, CARLA | \$63.04 | \$0.00 | \$63.04 |
| 83 | DOJ-BOP | LAMBERT, KYLE | \$120.55 | \$0.00 | \$120.55 |
| 84 | DOD | LATHREM, JANET ANN | \$72.56 | \$0.00 | \$72.56 |
| 85 | DOJ-BOP | LEWIS, JAYME | \$290.00 | \$111.33 | \$401.33 |
| 86 | DOD | LEWIS, WILLIAM B | \$144.88 | \$0.00 | \$144.88 |
| 87 | DOJ-BOP | LOWRY, TONY | \$13.20 | \$0.00 | \$13.20 |
| 88 | DHS-CBP | MADDALONI, GIANCARLO | \$290.00 | \$0.00 | \$290.00 |
| 89 | DOJ-BOP | MANCHA, BEN | \$290.00 | \$422.00 | \$712.00 |
| 90 | DOJ-BOP | MANCINI, PATRICK | \$64.96 | \$0.00 | \$64.96 |
| 91 | DOJ-BOP | MARTIN JR, DONALD | \$63.99 | \$0.00 | \$63.99 |
| 92 | DOD | MARTIN, MARYROSE | \$290.00 | \$0.00 | \$290.00 |
| 93 | DHS-TSA | MAYNARD, NEAL | \$124.40 | \$0.00 | \$124.40 |
| 94 | SSA | MAYNARD, SARA | \$19.76 | \$0.00 | \$19.76 |
| 95 | DOJ-USAO | MCELWEE, CLAYESHA | \$113.36 | \$0.00 | \$113.36 |
| 96 | USDA-FSIS | MCKOY, BEVERLY DENISE | \$126.40 | \$92.12 | \$218.52 |
| 97 | DOJ-BOP | MCLAUGHLIN, MICHAEL | \$0.00 | \$315.44 | \$315.44 |
| 98 | DHS-TSA | MCLAUGHLIN, MICHAEL T | \$0.00 | \$633.20 | \$633.20 |
| 99 | DOJ-BOP | MCLELLAN, MARC | \$290.00 | \$696.96 | \$986.96 |
| 100 | DOD | MERRITT, RALPH | \$53.44 | \$0.00 | \$53.44 |

| | Agency-SubAgency | Name | Liquidated Damages One (Minimum Wage) | Liquidated Damages Two (Overtime) | Total Damages |
|-----|---------------------|-------------------------|---------------------------------------|-----------------------------------|---------------|
| 101 | SSA | MERRIWEATHER, SONYA | \$290.00 | \$0.00 | \$290.00 |
| 102 | DHS-CBP | MONAHAN, MARK | \$290.00 | \$0.00 | \$290.00 |
| 103 | DHS-CBP | MOROU, FATAOU | \$290.00 | \$0.00 | \$290.00 |
| 104 | COMMERCE-NIST | MURRAY, BRUCE | \$0.00 | \$92.43 | \$92.43 |
| 105 | DOJ-BOP | NEWMAN, TIMOTHY | \$30.99 | \$0.00 | \$30.99 |
| 106 | SSA | O'NEIL, TERI M | \$41.59 | \$0.00 | \$41.59 |
| 107 | DHS-ICE | PESOLA, VINCENT | \$109.68 | \$0.00 | \$109.68 |
| 108 | DHS-CBP | QUILES, CARMEN | \$290.00 | \$0.00 | \$290.00 |
| 109 | DOJ-BOP | RASINGER, WILLIAM D | \$141.99 | \$0.00 | \$141.99 |
| 110 | DHS-TSA | REDLIN, CURT C | \$0.00 | \$297.75 | \$297.75 |
| 111 | DOJ-BOP | REESE, ROBERT ERIC | \$290.00 | \$0.00 | \$290.00 |
| 112 | DOD | REW, JANIE | \$106.64 | \$0.00 | \$106.64 |
| 113 | DHS-TSA | ROBBINS, SAMUEL C | \$0.00 | \$540.79 | \$540.79 |
| 114 | DOD | RODRIGUEZ, HECTOR L | \$166.32 | \$0.00 | \$166.32 |
| 115 | SSA | RUGGIERO, ROBERT | \$85.04 | \$0.00 | \$85.04 |
| 116 | USDA-FSIS | RUPE, MELVIN | \$82.83 | \$83.54 | \$166.37 |
| 117 | DOJ-BOP | RUSSELL, CHARLES | \$64.96 | \$0.00 | \$64.96 |
| 118 | DOJ-BOP | SALGADO, JACQUELINE | \$68.72 | \$0.00 | \$68.72 |
| 119 | EPA | SAMIEI, LAYLA | \$158.48 | \$0.00 | \$158.48 |
| 120 | DOD | SANFORD, ERIC W | \$168.40 | \$0.00 | \$168.40 |
| 121 | DOJ-FBI | SATTERFIELD, TAMMIE S | \$290.00 | \$0.00 | \$290.00 |
| 122 | DOD | SCALES, BARBARA J | \$39.68 | \$0.00 | \$39.68 |
| 123 | USDA-FSIS | SCHMIDT, JEREMY | \$61.42 | \$700.57 | \$761.99 |
| 124 | DHS-CBP | SCHWARTZ, STEVEN | \$41.02 | \$0.00 | \$41.02 |
| 125 | DOJ-BOP | SEWAK, NICOLE | \$23.60 | \$0.00 | \$23.60 |
| 126 | DOD | SIMMONS, LASHELL T | \$290.00 | \$0.00 | \$290.00 |
| 127 | DOJ-BOP | SIMS, KATHERINE A | \$0.00 | \$314.99 | \$314.99 |
| 128 | DHS-TSA | SINCLAIR, CHRISTOPHER S | \$0.00 | \$691.79 | \$691.79 |
| 129 | DOJ-BOP | SKARIAH, LEENA | \$106.44 | \$0.00 | \$106.44 |
| 130 | DOJ-BOP | SMILEY, JESSE | \$142.00 | \$0.00 | \$142.00 |
| 131 | DHS-TSA | SMITH, JOHN M | \$0.00 | \$667.15 | \$667.15 |
| 132 | DOJ-BOP | SMITLEY, LINDA JO | \$129.44 | \$0.00 | \$129.44 |
| 133 | DOJ-BOP | SMOGONOVICH, JOHN | \$142.00 | \$0.00 | \$142.00 |
| 134 | DOJ-FBI | SOUTHERLAND, BETTY | \$59.60 | \$0.00 | \$59.60 |
| 135 | DOD | STULL, JOHN | \$290.00 | \$0.00 | \$290.00 |
| 136 | DOJ-BOP | TARRIO, GLENN C | \$106.64 | \$0.00 | \$106.64 |
| 137 | DOJ-BOP | TETERS, KENNETH | \$52.16 | \$0.00 | \$52.16 |
| 138 | DOJ-FBI | THOLL, CHASTITY | \$100.96 | \$0.00 | \$100.96 |
| 139 | DOJ-BOP | THRASHER, SAMANTHA | \$9.02 | \$0.00 | \$9.02 |
| 140 | SSA | TODD, GABRIELLE M | \$133.60 | \$0.00 | \$133.60 |
| 141 | DHS-ICE | TORRES, SAMUEL | \$55.10 | \$0.00 | \$55.10 |
| 142 | DOJ-BOP | TOWER, MATTHEW | \$64.96 | \$0.00 | \$64.96 |
| 143 | DOT | TOYOSATO, BOB | \$0.00 | \$9.81 | \$9.81 |
| 144 | DHS-ICE | UCCELLO, NICHOLAS | \$22.70 | \$0.00 | \$22.70 |
| 145 | DOJ-BOP | VAN-ALLEN, FRANCIS | \$36.24 | \$0.00 | \$36.24 |
| 146 | USDA-FOREST SERVICE | VANDERHEUEL, WARNER | \$103.89 | \$0.00 | \$103.89 |
| 147 | DHS-TSA | VANDERMARK, ROBERT M | \$0.00 | \$317.97 | \$317.97 |
| 148 | DHS-CBP | VICK, ROBERT | \$11.28 | \$0.00 | \$11.28 |
| 149 | DOJ-BOP | WALKER-TYLER, JASMINE | \$290.00 | \$0.00 | \$290.00 |
| 150 | DOD | WARREN, RHODA | \$101.68 | \$0.00 | \$101.68 |

| | Agency-SubAgency | Name | Liquidated Damages One (Minimum Wage) | Liquidated Damages Two (Overtime) | Total Damages |
|-----|------------------|--------------------|---------------------------------------|-----------------------------------|---------------|
| 151 | SSA | WATERFORD, KANDICE | \$72.19 | \$0.00 | \$72.19 |
| 152 | DOJ-BOP | WATSON, DANA | \$13.40 | \$0.00 | \$13.40 |
| 153 | DOD | WATTS, JACK J II | \$59.60 | \$0.00 | \$59.60 |
| 154 | DOJ-BOP | WILLIAMSON, DAVID | \$0.00 | \$496.75 | \$496.75 |
| 155 | DOJ-BOP | WOODS, MONA L | \$50.24 | \$0.00 | \$50.24 |
| 156 | HHS | ZIGA, ANGELA | \$125.12 | \$0.00 | \$125.12 |
| 157 | DHS-CBP | ZUNO, FRANCISCO | \$67.92 | \$0.00 | \$67.92 |

In the United States Court of Federal Claims

No. 13-834 C

Filed: June 16, 2021

**DONALD MARTIN, JR.,
et al.**

v.

**RULE 54(b)
JUDGMENT**

THE UNITED STATES

Pursuant to the court's Order, filed June 16, 2021, granting the parties' motion for entry of judgment, and directing the entry of judgment pursuant to Rule 54(b), there being no just reason for delay,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the 157 plaintiffs listed in the attached exhibit recover of and from the United States the total amount of \$31,453.35, to be distributed as set forth in said exhibit.

Lisa L. Reyes
Clerk of Court

By: s/ Debra L. Samler

Deputy Clerk

NOTE: As to appeal to the United States Court of Appeals for the Federal Circuit, 60 days from this date, see RCFC 58.1, re number of copies and listing of all plaintiffs. Filing fee is \$505.00.

| | Agency-SubAgency | Name | Liquidated Damages One (Minimum Wage) | Liquidated Damages Two (Overtime) | Total Damages |
|----|------------------|------------------------|---------------------------------------|-----------------------------------|---------------|
| 1 | DOJ-DEA | ALAMPI, MELINA | \$41.69 | \$0.00 | \$41.69 |
| 2 | DOD | ALLARD, ZACHARIAH L | \$91.44 | \$0.00 | \$91.44 |
| 3 | DOI | ARCHER, WILLIAM B | \$290.00 | \$0.00 | \$290.00 |
| 4 | DOJ-BOP | ARELLANO, SERGIO | \$40.16 | \$0.00 | \$40.16 |
| 5 | BBG | BAGNALL, THOMAS JAMES | \$0.00 | \$290.59 | \$290.59 |
| 6 | DOJ-BOP | BAKER, PATRICK | \$290.00 | \$0.00 | \$290.00 |
| 7 | DOD | BARNARD, ROY A | \$74.72 | \$0.00 | \$74.72 |
| 8 | DOJ-BOP | BASLER, LARRY | \$290.00 | \$376.72 | \$666.72 |
| 9 | DOJ-USAO | BAUTISTA, SANDY | \$107.84 | \$0.00 | \$107.84 |
| 10 | DOJ-BOP | BECERRA, LIONEL | \$86.88 | \$95.23 | \$182.11 |
| 11 | SSA | BELL, EUBECITA J | \$290.00 | \$0.00 | \$290.00 |
| 12 | DHS-TSA | BEN DOR, ELDAD | \$0.00 | \$196.21 | \$196.21 |
| 13 | HHS | BENALLY, HARLIN | \$89.04 | \$0.00 | \$89.04 |
| 14 | DOJ-BOP | BENZENHAFFER, TEDDY | \$0.00 | \$250.90 | \$250.90 |
| 15 | SSA | BOKAR, DEBRA A. | \$290.00 | \$0.00 | \$290.00 |
| 16 | DOJ-BOP | BOONE, JAMES | \$64.96 | \$0.00 | \$64.96 |
| 17 | DOJ-BOP | BOULTON, ESSIE | \$290.00 | \$0.00 | \$290.00 |
| 18 | SSA | BROWN, LUTRICIA | \$108.88 | \$0.00 | \$108.88 |
| 19 | DOJ-USAO | BUTLER, DIANA | \$117.11 | \$0.00 | \$117.11 |
| 20 | DHS-CBP | CAIRNS, THOMAS A | \$290.00 | \$0.00 | \$290.00 |
| 21 | TREASURY-IRS | CAMPBELL, ALENA | \$172.00 | \$0.00 | \$172.00 |
| 22 | USDA-FSIS | CAPERS, LESLEY | \$111.52 | \$167.38 | \$278.90 |
| 23 | SSA | CARLSON, JONATHAN C | \$83.60 | \$0.00 | \$83.60 |
| 24 | DOD | CARPENTER, KELVIN | \$107.76 | \$410.04 | \$517.80 |
| 25 | TREASURY-IRS | CARRICATO, MELANIE | \$290.00 | \$0.00 | \$290.00 |
| 26 | TREASURY-IRS | CARRICATO, ROBIE R | \$290.00 | \$0.00 | \$290.00 |
| 27 | DHS-TSA | CHWALISZEWSKI, JOHN | \$0.00 | \$434.43 | \$434.43 |
| 28 | DOJ-BOP | CINTORA, THEODORE | \$45.44 | \$0.00 | \$45.44 |
| 29 | DOD | CLARK, PAUL R | \$77.84 | \$0.00 | \$77.84 |
| 30 | SSA | CLINE, CATHY A | \$54.48 | \$0.00 | \$54.48 |
| 31 | DOJ-BOP | COLLINS, TRAVIS B | \$290.00 | \$0.00 | \$290.00 |
| 32 | DOJ-FBI | COMBS, BETH A | \$103.36 | \$0.00 | \$103.36 |
| 33 | DOD | CORTEZ, GILBERT L | \$117.84 | \$0.00 | \$117.84 |
| 34 | SSA | COWAN, JEAN L | \$1.68 | \$0.00 | \$1.68 |
| 35 | DOJ-BOP | COX, MORALES | \$47.52 | \$0.00 | \$47.52 |
| 36 | DOJ-BOP | CRUZ, MARIA | \$30.24 | \$0.00 | \$30.24 |
| 37 | SSA | CURTO, ANTOINETTE | \$90.08 | \$0.00 | \$90.08 |
| 38 | DHS-TSA | DAVIS, MITCHELL | \$0.00 | \$297.90 | \$297.90 |
| 39 | SSA | DECLERICO, CHRISTOPHER | \$42.56 | \$0.00 | \$42.56 |
| 40 | SSA | DELLAPINA, TERRI | \$86.24 | \$0.00 | \$86.24 |
| 41 | USDA-FSIS | DEVAN, ANDREW B | \$36.61 | \$726.64 | \$763.25 |
| 42 | TREASURY-IRS | DEWITT, KESHA | \$89.75 | \$0.00 | \$89.75 |
| 43 | DOD | DIAS, NELIA N | \$125.48 | \$0.00 | \$125.48 |
| 44 | DOJ-FBI | DUBOIS, TIMOTHY | \$92.00 | \$0.00 | \$92.00 |
| 45 | DOD | DUFF, KEYON | \$99.10 | \$0.00 | \$99.10 |
| 46 | DOJ-BOP | ESPINOSA, ALONSO | \$290.00 | \$20.58 | \$310.58 |
| 47 | DHS-CBP | ESPINOZA-GARZA, ZAYRA | \$0.00 | \$166.95 | \$166.95 |
| 48 | DOJ-BOP | FEIER, GHEORGHE | \$77.20 | \$0.00 | \$77.20 |
| 49 | DHS-CBP | FLETCHER, DAVID | \$290.00 | \$0.00 | \$290.00 |
| 50 | DOJ-BOP | FLOWERS, LAJUAN | \$0.00 | \$383.87 | \$383.87 |

| | Agency-SubAgency | Name | Liquidated Damages One (Minimum Wage) | Liquidated Damages Two (Overtime) | Total Damages |
|-----|---------------------|-----------------------|---------------------------------------|-----------------------------------|---------------|
| 51 | DOD | FONTAINE, LAUREN L | \$55.28 | \$0.00 | \$55.28 |
| 52 | DOJ-BOP | FRIBERG, KATHY | \$50.24 | \$0.00 | \$50.24 |
| 53 | DOJ-BOP | FULTZ, DONALD | \$64.95 | \$422.43 | \$487.38 |
| 54 | DOJ-BOP | FULTZ, RENEE | \$93.76 | \$0.00 | \$93.76 |
| 55 | DOJ-BOP | GARBER, CHRISTINE | \$290.00 | \$0.00 | \$290.00 |
| 56 | DOJ-BOP | GASKILL, WILLIAM A | \$49.92 | \$0.00 | \$49.92 |
| 57 | SSA | GAYE, THERESA | \$67.36 | \$0.00 | \$67.36 |
| 58 | DOD | GONZALEZ, MARGARITA | \$85.12 | \$0.00 | \$85.12 |
| 59 | DOD | GREEN, SHAWN C | \$42.32 | \$432.00 | \$474.32 |
| 60 | DOJ-BOP | GREGORY, ROGER | \$111.20 | \$268.24 | \$379.44 |
| 61 | DOD | HARRISON, GLORIA D | \$88.31 | \$0.00 | \$88.31 |
| 62 | DOJ-BOP | HENLEY, LURLEEN | \$44.70 | \$0.00 | \$44.70 |
| 63 | DOJ-BOP | HERNANDEZ, LINDA M | \$68.71 | \$0.00 | \$68.71 |
| 64 | DHS-TSA | HERREN, CHRISTOPHER T | \$0.00 | \$863.27 | \$863.27 |
| 65 | DOJ-BOP | HINNERSHITZ, TIM | \$81.84 | \$637.92 | \$719.76 |
| 66 | SSA | HOBODY, CHERYL | \$150.80 | \$0.00 | \$150.80 |
| 67 | SSA | HODGE, DIANA A. | \$92.72 | \$0.00 | \$92.72 |
| 68 | DOD | HOLLOWAY, GWENDOLYN H | \$110.65 | \$0.00 | \$110.65 |
| 69 | DOJ-BOP | HOLM, TRISHA | \$42.20 | \$0.00 | \$42.20 |
| 70 | SSA | HOOVER, CLIFTON K | \$90.72 | \$0.00 | \$90.72 |
| 71 | DOJ-BOP | HUNTER, OLIVIA | \$91.36 | \$0.00 | \$91.36 |
| 72 | DOJ-BOP | JACKSON, KATHRYN | \$46.40 | \$0.00 | \$46.40 |
| 73 | DOD | JACKSON, STEPHEN T | \$170.00 | \$0.00 | \$170.00 |
| 74 | DOI | JANSING, ROBERT L | \$169.44 | \$0.00 | \$169.44 |
| 75 | DOJ-BOP | JOHNSON III, PETER J | \$54.95 | \$352.56 | \$407.51 |
| 76 | DOJ-BOP | JOHNSON, ARTHUR | \$0.00 | \$916.29 | \$916.29 |
| 77 | SSA | JOHNSON, IBRAHIM X | \$131.36 | \$0.00 | \$131.36 |
| 78 | USDA-FOREST SERVICE | JOHNSON, ROB | \$170.00 | \$0.00 | \$170.00 |
| 79 | DOD | JONES, TERRESA | \$290.00 | \$0.00 | \$290.00 |
| 80 | DOJ-BOP | KEESLER, DAVID | \$64.96 | \$0.00 | \$64.96 |
| 81 | DOD | KELLEY, LOTINA D | \$196.24 | | \$196.24 |
| 82 | DOJ-DEA | KORNEGAY, CARLA | \$63.04 | \$0.00 | \$63.04 |
| 83 | DOJ-BOP | LAMBERT, KYLE | \$120.55 | \$0.00 | \$120.55 |
| 84 | DOD | LATHREM, JANET ANN | \$72.56 | \$0.00 | \$72.56 |
| 85 | DOJ-BOP | LEWIS, JAYME | \$290.00 | \$111.33 | \$401.33 |
| 86 | DOD | LEWIS, WILLIAM B | \$144.88 | \$0.00 | \$144.88 |
| 87 | DOJ-BOP | LOWRY, TONY | \$13.20 | \$0.00 | \$13.20 |
| 88 | DHS-CBP | MADDALONI, GIANCARLO | \$290.00 | \$0.00 | \$290.00 |
| 89 | DOJ-BOP | MANCHA, BEN | \$290.00 | \$422.00 | \$712.00 |
| 90 | DOJ-BOP | MANCINI, PATRICK | \$64.96 | \$0.00 | \$64.96 |
| 91 | DOJ-BOP | MARTIN JR, DONALD | \$63.99 | \$0.00 | \$63.99 |
| 92 | DOD | MARTIN, MARYROSE | \$290.00 | \$0.00 | \$290.00 |
| 93 | DHS-TSA | MAYNARD, NEAL | \$124.40 | \$0.00 | \$124.40 |
| 94 | SSA | MAYNARD, SARA | \$19.76 | \$0.00 | \$19.76 |
| 95 | DOJ-USAO | MCELWEE, CLAYESHA | \$113.36 | \$0.00 | \$113.36 |
| 96 | USDA-FSIS | MCKOY, BEVERLY DENISE | \$126.40 | \$92.12 | \$218.52 |
| 97 | DOJ-BOP | MCLAUGHLIN, MICHAEL | \$0.00 | \$315.44 | \$315.44 |
| 98 | DHS-TSA | MCLAUGHLIN, MICHAEL T | \$0.00 | \$633.20 | \$633.20 |
| 99 | DOJ-BOP | MCLELLAN, MARC | \$290.00 | \$696.96 | \$986.96 |
| 100 | DOD | MERRITT, RALPH | \$53.44 | \$0.00 | \$53.44 |

| | Agency-SubAgency | Name | Liquidated Damages One (Minimum Wage) | Liquidated Damages Two (Overtime) | Total Damages |
|-----|---------------------|-------------------------|---------------------------------------|-----------------------------------|---------------|
| 101 | SSA | MERRIWEATHER, SONYA | \$290.00 | \$0.00 | \$290.00 |
| 102 | DHS-CBP | MONAHAN, MARK | \$290.00 | \$0.00 | \$290.00 |
| 103 | DHS-CBP | MOROU, FATAOU | \$290.00 | \$0.00 | \$290.00 |
| 104 | COMMERCE-NIST | MURRAY, BRUCE | \$0.00 | \$92.43 | \$92.43 |
| 105 | DOJ-BOP | NEWMAN, TIMOTHY | \$30.99 | \$0.00 | \$30.99 |
| 106 | SSA | O'NEIL, TERI M | \$41.59 | \$0.00 | \$41.59 |
| 107 | DHS-ICE | PESOLA, VINCENT | \$109.68 | \$0.00 | \$109.68 |
| 108 | DHS-CBP | QUILES, CARMEN | \$290.00 | \$0.00 | \$290.00 |
| 109 | DOJ-BOP | RASINGER, WILLIAM D | \$141.99 | \$0.00 | \$141.99 |
| 110 | DHS-TSA | REDLIN, CURT C | \$0.00 | \$297.75 | \$297.75 |
| 111 | DOJ-BOP | REESE, ROBERT ERIC | \$290.00 | \$0.00 | \$290.00 |
| 112 | DOD | REW, JANIE | \$106.64 | \$0.00 | \$106.64 |
| 113 | DHS-TSA | ROBBINS, SAMUEL C | \$0.00 | \$540.79 | \$540.79 |
| 114 | DOD | RODRIGUEZ, HECTOR L | \$166.32 | \$0.00 | \$166.32 |
| 115 | SSA | RUGGIERO, ROBERT | \$85.04 | \$0.00 | \$85.04 |
| 116 | USDA-FSIS | RUPE, MELVIN | \$82.83 | \$83.54 | \$166.37 |
| 117 | DOJ-BOP | RUSSELL, CHARLES | \$64.96 | \$0.00 | \$64.96 |
| 118 | DOJ-BOP | SALGADO, JACQUELINE | \$68.72 | \$0.00 | \$68.72 |
| 119 | EPA | SAMIEI, LAYLA | \$158.48 | \$0.00 | \$158.48 |
| 120 | DOD | SANFORD, ERIC W | \$168.40 | \$0.00 | \$168.40 |
| 121 | DOJ-FBI | SATTERFIELD, TAMMIE S | \$290.00 | \$0.00 | \$290.00 |
| 122 | DOD | SCALES, BARBARA J | \$39.68 | \$0.00 | \$39.68 |
| 123 | USDA-FSIS | SCHMIDT, JEREMY | \$61.42 | \$700.57 | \$761.99 |
| 124 | DHS-CBP | SCHWARTZ, STEVEN | \$41.02 | \$0.00 | \$41.02 |
| 125 | DOJ-BOP | SEWAK, NICOLE | \$23.60 | \$0.00 | \$23.60 |
| 126 | DOD | SIMMONS, LASHELL T | \$290.00 | \$0.00 | \$290.00 |
| 127 | DOJ-BOP | SIMS, KATHERINE A | \$0.00 | \$314.99 | \$314.99 |
| 128 | DHS-TSA | SINCLAIR, CHRISTOPHER S | \$0.00 | \$691.79 | \$691.79 |
| 129 | DOJ-BOP | SKARIAH, LEENA | \$106.44 | \$0.00 | \$106.44 |
| 130 | DOJ-BOP | SMILEY, JESSE | \$142.00 | \$0.00 | \$142.00 |
| 131 | DHS-TSA | SMITH, JOHN M | \$0.00 | \$667.15 | \$667.15 |
| 132 | DOJ-BOP | SMITLEY, LINDA JO | \$129.44 | \$0.00 | \$129.44 |
| 133 | DOJ-BOP | SMOGONOVICH, JOHN | \$142.00 | \$0.00 | \$142.00 |
| 134 | DOJ-FBI | SOUTHERLAND, BETTY | \$59.60 | \$0.00 | \$59.60 |
| 135 | DOD | STULL, JOHN | \$290.00 | \$0.00 | \$290.00 |
| 136 | DOJ-BOP | TARRIO, GLENN C | \$106.64 | \$0.00 | \$106.64 |
| 137 | DOJ-BOP | TETERS, KENNETH | \$52.16 | \$0.00 | \$52.16 |
| 138 | DOJ-FBI | THOLL, CHASTITY | \$100.96 | \$0.00 | \$100.96 |
| 139 | DOJ-BOP | THRASHER, SAMANTHA | \$9.02 | \$0.00 | \$9.02 |
| 140 | SSA | TODD, GABRIELLE M | \$133.60 | \$0.00 | \$133.60 |
| 141 | DHS-ICE | TORRES, SAMUEL | \$55.10 | \$0.00 | \$55.10 |
| 142 | DOJ-BOP | TOWER, MATTHEW | \$64.96 | \$0.00 | \$64.96 |
| 143 | DOT | TOYOSATO, BOB | \$0.00 | \$9.81 | \$9.81 |
| 144 | DHS-ICE | UCCELLO, NICHOLAS | \$22.70 | \$0.00 | \$22.70 |
| 145 | DOJ-BOP | VAN-ALLEN, FRANCIS | \$36.24 | \$0.00 | \$36.24 |
| 146 | USDA-FOREST SERVICE | VANDERHEUEL, WARNER | \$103.89 | \$0.00 | \$103.89 |
| 147 | DHS-TSA | VANDERMARK, ROBERT M | \$0.00 | \$317.97 | \$317.97 |
| 148 | DHS-CBP | VICK, ROBERT | \$11.28 | \$0.00 | \$11.28 |
| 149 | DOJ-BOP | WALKER-TYLER, JASMINE | \$290.00 | \$0.00 | \$290.00 |
| 150 | DOD | WARREN, RHODA | \$101.68 | \$0.00 | \$101.68 |

| | Agency-SubAgency | Name | Liquidated Damages One (Minimum Wage) | Liquidated Damages Two (Overtime) | Total Damages |
|-----|------------------|--------------------|---------------------------------------|-----------------------------------|---------------|
| 151 | SSA | WATERFORD, KANDICE | \$72.19 | \$0.00 | \$72.19 |
| 152 | DOJ-BOP | WATSON, DANA | \$13.40 | \$0.00 | \$13.40 |
| 153 | DOD | WATTS, JACK J II | \$59.60 | \$0.00 | \$59.60 |
| 154 | DOJ-BOP | WILLIAMSON, DAVID | \$0.00 | \$496.75 | \$496.75 |
| 155 | DOJ-BOP | WOODS, MONA L | \$50.24 | \$0.00 | \$50.24 |
| 156 | HHS | ZIGA, ANGELA | \$125.12 | \$0.00 | \$125.12 |
| 157 | DHS-CBP | ZUNO, FRANCISCO | \$67.92 | \$0.00 | \$67.92 |

In the United States Court of Federal Claims

No. 13-834C
No. 16-1297C

(REISSUED February 24, 2017)¹

| | | |
|----------------------------|---|-------------------------------------|
| |) | |
| DONALD MARTIN, JR., et al, |) | |
| |) | |
| Plaintiffs, |) | Cross-Motions for Summary |
| |) | Judgment; RCFC 56(a); Fair Labor |
| v. |) | Standards Act, 29 U.S.C. §§ 201-219 |
| |) | (2012); Award of Liquidated Damages |
| THE UNITED STATES, |) | for Violation of the Fair Labor |
| |) | Standards Act |
| Defendant. |) | |
| |) | |
| FRANK MARRS, et al, |) | |
| |) | |
| Plaintiffs, |) | |
| |) | |
| v. |) | |
| |) | |
| THE UNITED STATES, |) | |
| |) | |
| Defendant. |) | |
| |) | |

Heidi R. Burakiewicz, Washington, DC, for plaintiffs.

Joseph E. Ashman, Trial Attorney, with whom were Benjamin C. Mizer, Principal Deputy Assistant Attorney General, Robert E. Kirschman, Jr., Director, and Reginald T. Blades, Jr., Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for defendant.

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 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 (1945); Biggs v. Wilson, 1 F.3d 1537, 1540 (9th Cir. 1993). The legislation applies to employees broadly, but contains specified exemptions,

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.

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 (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. “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).

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 (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).

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 (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 (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, 132 S. Ct. 2181, 2193 (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 (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 (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 (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 (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, 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 (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).

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

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.

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.

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