Nos. 2021-2255 & 2018-1354

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 REPLY BRIEF FOR APPELLANTS IN NO. 2018-1354

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I. INTRODUCTION AND SUMMARY

The parties agree that to demonstrate the Government willfully violated the Fair Labor Standards Act ("FLSA") when it failed to pay Plaintiffs on their regularly scheduled pay day for work it required them to perform during the October 2013 lapse in appropriations, Plaintiffs must show that the Government "knew that its conduct was prohibited by the Act or showed reckless disregard of the requirements of the Act." 5 C.F.R. § 551.104; *see also McLaughlin v. Richland Shoe Co*., 486 U.S. 128, 135 n.13 (1988). The Government acknowledges that OPM defines "reckless disregard" in its regulations as "failure to make adequate inquiry into whether conduct is in compliance with the Act." 5 C.F.R. § 551.104. And, the Government has stipulated that it failed to make any inquiry about its FLSA obligations during the October 2013 lapse in appropriations. No. 21-2255, Appx044. Apparently left with no other option, the Government makes the impossible argument that, when it partially shuts down because of a budget impasse, no inquiry is an "adequate inquiry." For the reasons set forth in Plaintiffs' opening brief and below, this exception should not be made.

Perhaps more telling than what the Government argues in support of its position that it did not willfully violate the FLSA, is what it fails to address. The Government remains silent regarding the point that it disregarded the possibility that it was violating the FLSA in face of extensive precedent holding that the ADA does

not extinguish the Government's obligations once incurred and the Department of Labor's determination in a July 20, 1998 Opinion Letter that state governments violate the FLSA when they require employees to work during budget impasses without receiving minimum or overtime wages even though those officials might be constrained by state law from making those wage payments. No. 21-2255, Appx174-175 (citing in agreement holdings in *Biggs v. Wilson*, 1 F.3d 1537 (1993) and *Caldman v. State of California*, 852 F. Supp. 898, 902 (E.D. Cal. 1994) that state government violates the FLSA if they fail to pay wages on regularly scheduled payday even when state law prohibits payment of non-appropriated funds).

Moreover, Defendant artificially conflates the individual government officials who were confined by the ADA with the Government as an entity that caused the budget impasse, and completely fails to address the possibility that Congress could have taken steps to ensure compliance with the FLSA such as by passing legislation similar to the Pay Our Military Act ("POMA"), which ensured timely payment of wages for the military and the civilians who supported them during the October 2013 lapse in appropriations. Actions Overview: H.R.3210 — 113th Congress (2013-2014), at https://www.congress.gov/bill/113th-congress/house-bill/3210/actions; P.L. 113-39.16.

OPM's regulation clearly indicates that the Government's failure to make any inquiry about actions that violate the FLSA is always reckless. But even if there can

be situations where no inquiry might be merely negligent or unreasonable, here, the facts that the Government had experts on hand, that those experts had considered this very issue, and that POMA pointed to at least one action that could have been taken to avoid an FLSA violation, took the failure to inquire beyond mere negligence or unreasonableness to recklessness warranting the extension of the statute of limitations from two to three years.

II. ARGUMENT

A. Under the Governing Regulation, the Government Must Make an Adequate Inquiry into Whether It Is Violating the FLSA to be Entitled to the Shorter Two-Year Limitations Period

"Adequate inquiry" requires some inquiry otherwise 5 C.F.R. § 551.104's definition of "reckless disregard" would be superfluous and unnecessary. Even in cases in which the Government is not the employer and OPM's regulation does not apply, courts recognize the distinction between no inquiry, which is reckless, and an inquiry that may or may not be adequate, depending on the circumstances. *See, e.g.*, *Morgan v. Family Dollar Stores*, 551 F.3d 1233, 1280 (11th Cir. 2008) (holding employer acted willfully because "it never studied whether the store managers were exempt executives"); *Hernandez v. Tadala's Nursery, Inc*., 34 F. Supp. 3d 1229, 1245 (S.D. Fla. 2014) (holding that the three year limitation period applied because "Defendant acted in 'reckless disregard' of the FLSA, as it failed to make an adequate inquiry — indeed, any inquiry — into whether its practices comported

with the overtime provisions of the FLSA."); *Flores v. City of San Gabriel*, 824 F.3d 890, 906-07 (9th Cir. 2016) (reversing district court's finding of no willful conduct when the state of the law was unsettled in the Circuit but the City put on no evidence it ever investigated the state of the law, the ambiguity of which would not be dispositive of willfulness in any event).

Here, the stipulated facts establish that 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." No. 21-2255, Appx044. The Government also "admits that it did not seek a legal opinion regarding how to meet the obligations of both the ADA and the FLSA during the government shutdown."[1] *Id.* The Government has not cited a single statute, regulation, or decision that supports a holding that it has acted less than recklessly

[1] Plaintiffs are not suggesting any deviation from *Richland* Shoe. Defendant correctly states that the Supreme Court in *Richland Shoe* explicitly rejected a proposed standard that would have made "the issue in most cases turn on whether the employer sought legal advice concerning its pay practices." 486 U.S. at 134-35. Plaintiffs agree that there are circumstances where an employer could potentially make an adequate inquiry absent seeking legal advice. But recklessness should take into account the knowledge of and resources and expertise available to the United States Government, including that it had legal experts on hand who had considered this very issue, and that POMA pointed to at least one action that it could have taken. Under these circumstances, not consulting with those legal experts took the failure to inquire beyond mere negligence or unreasonableness to recklessness within the meaning of 5 C.F.R. § 551.104.

even though it did not consider whether an intended action toward its employees violates its duties under the FLSA.

Even if the Court thought recklessness could have been defined differently, OPM's regulations are entitled to deference. *See Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 165 (2007) (citing *Chevron U.S.A. v. NRDC*, 467 U.S. 837, 843 (1984)) (finding that where an administrative agency makes rules to fill gaps left, implicitly or explicitly, by Congress, and where the Agency fills the gap "reasonably, and in accordance with other applicable (e.g., procedural) requirements, the courts accept the result as legally binding."). Indeed, the regulation at issue, 5 C.F.R. § 551.104, was implemented by the Government's own agency charged with administering federal employee pay issues, specifically to deal with disputes between Defendant and its employees. The Government has given no reason not to defer to OPM's regulations in this case.

B. The Government Has Presented No Reason to Support a Determination that Failing to Make Any Inquiry Is Adequate Even During a Lapse in Appropriations

The Government, without any authority, argues that under the circumstances of a partial shutdown caused by a lapse in appropriations, no inquiry should be adequate inquiry. The Government is wrong for at least four reasons.

First, 5 C.F.R. § 551.104, which deals specifically with the Government and its employees, does not create such an exception even though OPM was quite aware

of the possibility of a budget impasse following the 21-day shutdown that took place from December 16, 1995 to January 16, 1996. Steve Hendrix, *The government shutdown: We've been here before, and it lasted weeks.*, Wash. Post. (Jan. 20, 2018), https://www.washingtonpost.com/news/retropolis/wp/2018/01/19/a-government-shutdown-weve-been-here-before-and-it-lasted-weeks/.

Second, in arguing that its conduct was "dictated by the specific terms of a statute," Defendant again artificially conflates the limitations on individual government officials with the full authority of the United States Government as an entity. Plaintiffs do not dispute that the ADA restricted individual government employees from processing payroll. It is also undisputed that the Government as an entity was solely responsible for the budget impasse and made no inquiry regarding whether its failure to pay wages on the regular pay dates violated the FLSA. No. 21-2255, Appx044. The inability of individual payroll officials to pay wages on time does not cancel the Government's statutory obligations to compensate public servants on their regularly scheduled pay day or absolve it from paying the remedy owed as a result of its failure to do so.

In addition to failing to address the point that Congress is one of the three branches of the United States Government as opposed to a separate entity from the executive agencies, Defendant is silent about the steps Congress could have taken to ensure compliance with the FLSA in light of the ADA such as passing legislation

similar to the Pay Our Military Act ("POMA"). Actions Overview: H.R.3210 — 113th Congress (2013-2014), at https://www.congress.gov/bill/113th-congress/house-bill/3210/actions; P.L. 113-39.16. *See* Pls' Br. 14 (discussing legislation appropriating funds to pay members of the Armed Forces and civilian personnel of the Department of Defense and the Coast Guard, and even to pay contractors whom the Secretary determined were providing support to members of the Armed Forces during the October 2013 shutdown).

Third, without acknowledging Plaintiffs' arguments about the impropriety of doing so, the Government continues to substitute "[statute]" for the "Fair Labor Standards Act of 1938" in its discussion of willfulness as it did in its opening brief in *Martin* regarding the good faith inquiry. Gov't Br. 17-18. Section 255(a) does not refer to the ADA or even to federal law in general. Rather, section 255(a) extends the limitations period from two to three years when an employer's violation of the FLSA is willful.

Fourth, the Government's disregard for the very possibility that it was violating the FLSA when it required public servants to work during the lapse in appropriations without any provision to pay them on their regularly scheduled pay dates was especially reckless given the over a century of applicable precedent and guidance from its own experts on the FLSA. The Government's continued silence regarding that precedent holding that the ADA does not extinguish the

Government's obligations once incurred is deafening. *See* Pl. Br. 34; n. 7 (discussing *Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1319 (2020); *United States v. Langston*, 118 U.S. 389, 394 (1886); *In re Aiken Cty.*, 725 F.3d 255, 260 (D.C. Cir. 2013); *Ferris v. United States*, 27 Ct. Cl. 542, 546 (1892)). *See also Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 197 (2012) (cleaned up) (reaffirming the principle that the ADA does not "cancel [the Government's] obligations" or reduce the rights of "citizen[s] honestly contracting with the Government" in a case handled by Defendant's attorneys at the Department of Justice).

In addition to *Biggs v. Wilson*, 1 F.3d 1537 (1993) and *Caldman v. State of California*, 852 F. Supp. 898, 902 (E.D. Cal. 1994), decided twenty years earlier, the Government's own experts on the interpretation and application of the FLSA at the Department of Labor opined in a July 20, 1998 Opinion Letter that state governments violate the FLSA when they require employees to work during budget impasses without receiving minimum or overtime wages even though those officials might be constrained by state law from making those wage payments.[2] *See* Pl. Br. 11-12.

[2] It was not necessary that the facts of the October 2013 was identical with other budget impasses of which the Government was aware. Rather, the situations were sufficiently similar that the Government should have recognized leading up to the 2013 budget impasse the need to at least consider its obligations under the FLSA.

Despite this knowledge, it is undisputed that the government made no inquiry. *Id.* at 57-58.

To be clear, the Government would have "recklessly disregarded" its obligations under the FLSA even if it did not employ leading experts on the FLSA and the ADA. Rather, the Government's employment of those individuals makes its failure to consider the FLSA even more inexplicable than it otherwise would be. Given the Government's position that a state law ban on payments does not negate a state government employer's obligation to pay wages on the regularly scheduled pay day, it disregarded the very possibility that it too was violating the FLSA.

Just as the Government cannot defeat the strong presumption in favor of liquidated damages by showing that it both acted in good faith and had reasonable grounds for believing its actions did not violate the FLSA, 29 U.S.C. § 260, the Government cannot defeat Plaintiffs' showing that its FLSA violation was willful.

III. CONCLUSION

For the foregoing reasons, the decision in *Marrs* should be reversed and the case should be remanded for further proceedings.

Dated: February 25, 2022

Respectfully Submitted,

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