No. 15-834C
(Chief Judge Patricia Campbell-Smith)

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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

Plaintiffs,
v.

UNITED STATES,

Defendant,

DEFENDANT'S REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

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THE UNITED STATES,	)	
	)	
Defendant.	)	

DEFENDANT'S REPLY IN SUPPORT OF
CROSS-MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of the Rules of the United States Court of Federal Claims (RCFC) and this Court's order dated April 1, 2016, defendant, the United States, respectfully submits this reply in support of our cross-motion for summary judgment. As demonstrated in our motion and confirmed by plaintiffs' response, there exists no issue of material fact precluding judgment on a dispositive motion, and the Court should therefore grant the Government's motion and enter judgment in the Government's favor.

ARGUMENT

I. The Anti-Deficiency Act Precludes A Finding That The Government Violated The FLSA During the Shutdown

A. The Issue Of Whether The Anti-Deficiency Act Precludes Government Liability Under The FLSA Is Properly Before The Court

In our motion, we demonstrated that the Government did not violate the FLSA by not paying excepted employees on their next regularly scheduled payday for work performed during the first week of the shutdown because the Anti-Deficiency Act, 31 U.S.C. § 1341, *et seq.*, restricted such payments until appropriations were made for that purpose. *See* Def.'s Mot. at 7-13. In response, plaintiffs first argue that we are barred from arguing that the Anti-Deficiency

Act precludes a conclusion that the Government violated the FLSA because we did not submit a motion for reconsideration of the Court's order denying our motion to dismiss.

Pl.'s Resp. at 2-5. This assertion is incorrect. In its order, the Court invited the parties to address in a future proceeding the issue of the Anti-Deficiency Act's effect on the Court's conclusions regarding the operation of the FLSA during the shutdown. Specifically, after concluding that the Government had violated the FLSA's "prompt payment" requirement by not paying excepted employees on their regularly scheduled payday for work performed during the first week of the shutdown, the Court observed that "[n]either party has addressed in any detailed manner whether the Anti-Deficiency Act operates to relieve the government of responsibility for the legal violations that might occur in the absence of Congressional appropriations." ECF Dkt. No. 38 at p. 22 of 23. The Court then advised that "[t]he parties may elect to address this issue in further proceedings." *Id*.

Consistent with the Court's instruction, in our motion we address the issue of whether the Anti-Deficiency Act relieved the Government of any requirement under the FLSA to pay excepted employees on their next regularly scheduled payday for work performed during the first week of the shutdown. The issue is therefore properly before the Court.

B. The Anti-Deficiency Act Displaced The FLSA's "Prompt Payment" Requirement During The Shutdown And The Government Therefore Did Not Violate The FLSA

In our motion, we established that the Anti-Deficiency Act's express prohibition against making payments in the absence of an appropriation for that purpose displaced the court-crafted "prompt payment" requirement of the FLSA during a lapse in appropriations, and the Government therefore did not violate the FLSA by not paying excepted employees on their next

regularly scheduled payday during the Government shutdown. *See* Pl.'s Mot. at 7-13. In response, plaintiffs argue that "[t]he Anti-Deficiency Act does not override the Government's obligations under the FLSA" because that statute "prohibits the Government from expending money in the absence of appropriations, it does not affect claimants' right to recover compensation that the Government owes them under a separate statute." Pls.' Resp. at 6. This assertion is incorrect. As we stated in our motion,

> When plaintiffs speak of an "obligation to make timely payments," they are not using the term "obligation" consistent with its meaning in Federal appropriations law. Under Federal appropriations law, an 'obligation' is a debt and is distinct from a "payment." The Anti-Deficiency Act provides exceptions under which an agency may incur obligations during a lapse in appropriations, but it provides no exceptions for making payments during such a lapse.

Def.'s Mot. at 21-22; *see also* 31 U.S.C. § 1341 (addressing an "obligation" separately from an "expenditure"). As we have previously stated, we do not disclaim that a valid obligation was created when the Government, pursuant to section 1342 of the Anti-Deficiency Act, received the services of excepted employees during the shutdown. The issue, however, is when satisfaction of that obligation is required, and on this issue we demonstrated that the Anti-Deficiency Act's express prohibition against paying for obligations created under section 1342 until appropriations for that purpose have been made displaces the court-crafted "prompt payment" requirement under the FLSA. Simply put, it would be contrary to cannons of statutory construction to interpret the FLSA and Anti-Deficiency Act as directives to Federal agencies to, on the one hand, pay excepted employees on their regularly scheduled pay day during the shutdown, but, on the other hand, to not make any such payment in the absence of an appropriation for that purpose.

In its response, plaintiffs discuss or cite cases holding that the Anti-Deficiency Act does not relieve the Government of its validly created obligations when there are no appropriations available for those obligations. Pls.'s Resp. at 6-9. In those cases, however, the Government argued that a deficient appropriation precluded the creation of an obligation – or amount owed. *See New York Airways, Inc. v. United States*, 369 F.2d 743, 744 (Ct. Cl. 1966) (examining "whether the particular wording of the [Federal Aviation Act of 1958, 49 U.S.C. § 1301 *et seq*.] empowers the [Civil Aeronautics Board] to *obligate* the United States for the payment of an agreed subsidy in the absence or deficiency of a congressional appropriation" (emphasis added).); *Lovett v. United States*, 66 F. Supp. 142, 146 (Ct. Cl. 1945), *aff'd*, 328 U.S. 303, 66 (1946) (addressing claims by Federal officials for compensation owed for work performed, and stating 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*" (emphasis added).); *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181, 2186 (2012) ("At issue in this case is *whether the Government must pay* [contract support] costs when Congress appropriates sufficient funds to pay in full any individual contractor's contract support costs, but not enough funds to cover the aggregate amount due every contractor" (emphasis added).); *Ford Motor Co. v. United States*, 378 F.3d 1314, 1315 (Fed. Cir. 2004) (addressing contractor's claim for indemnification for the costs of environmental cleanup required by Federal and state agencies); *Wetsel-Oviatt Lumber Co. v. United States*, 38 Fed. Cl. 563, 564 (1997) (addressing complaint over "Forest Service's *refusal to compensate* plaintiff for timber deleted from two timber sale contracts" (emphasis added).).

The Court of Claims opinion in *Lovett* is instructive. In *Lovett*, three Federal officials brought suit seeking recovery of salary amounts due for services already rendered. 104 Ct. Cl. at 575-76. The Government denied compensation to these officials based upon a statute that precluded payment after a certain date unless the President appointed the officials, and the Senate ratified those appointments. *Id*. at 577. The Court ruled that the officials could recover the salary amounts owed despite the statutory restriction on payment, 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." *Id*. at 582. Unlike in *Lovett*, in this case the Government never denied that the plaintiffs were due compensation for work performed during the first week of the shutdown. Indeed, the Government paid plaintiffs for that work by the first scheduled pay day after the shutdown ended. Stipulation of Fact (SoF) ¶ 8.

The issue is not whether the Government was required to pay plaintiffs for work performed during the first week of the shutdown, but when those payments were required to be made. As we demonstrated in our motion, the FLSA does not expressly require payment on a specific day, whereas the Anti-Deficiency Act expressly states that payments cannot be made until appropriations for that purpose are made. Reconciliation of this apparent conflict requires the Court to give effect to express language over implied rules.

In their response, plaintiffs concede that the FLSA's "prompt payment" requirement is not in the statute itself but is court-constructed, and they assert that "[t]he fact that courts have had to fill in a gap in the language of the FLSA to make it effective does not make the resultant

principle any less authoritative." Pls.'s Resp. at 10. This assertion, however, does not assist plaintiffs because, when reconciling two seemingly conflicting statutes, the Court must examine whether there is a clearly expressed congressional intention that one statutory requirement should control over another. *See California ex rel. Sacramento Metropolitan Air Quality Management Dist. v. United States*, 215 F.3d 1005, 1012-15 (9th 2000) (stating that, "when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."). Section 1342 of the Anti-Deficiency Act expressly states that obligations created under section 1341 cannot be satisfied until appropriations for that purpose have been made. A "gap filler," by definition, is not a "clearly expressed congressional intention" in the FLSA that payment must occur on a specific day and, therefore, cannot displace the express proscriptions of the Anti-Deficiency Act.

Finally, plaintiffs assert that Congress intended that the FLSA's "prompt payment" requirement would apply despite the Anti-Deficiency Act because Congress made the FLSA applicable to the Federal Government. Pls.' Resp. at 11 (citing 29 U.S.C. § 203(e)). This is not correct. As we explained in our motion, although the FLSA applies to the Federal Government, it remains that there is nothing in the statute that requires payment on a specific day. Plaintiffs assert that "[t]he state analogs [to the Anti-Deficiency Act] similarly do not alter employees' rights under the FLSA because of federal preemption," and "the FLSA has the same vitality for both federal and state employees during a budget impasse." *Id.* The point that plaintiffs miss, however, is that through preemption the FLSA court-constructed "gap fillers" would displace even the clearest contrary language in a state law. Only a "clearly expressed congressional intention," however, could displace a contrary provision in another Federal statute. Plaintiffs

identify no authority, and we are aware of none, that holds that a court-constructed "gap filler" could displace a clearly expressed congressional intention in another Federal statute.

For these reasons, the Court should conclude that the Anti-Deficiency Act displaced the FLSA's "prompt payment" requirement during the shutdown and the Government therefore did not violate the FLSA.

II. In The Alternative, The Court Should Not Award Plaintiffs' Liquidated Damages

A. The Government Believed In Good Faith That The Anti-Deficiency Act Precluded Payment During The Shutdown And Would Have Complied With The FLSA If A Path To Compliance Were Available

This Court should find in its subjective examination that the Government acted in good faith and should not be liable to plaintiffs for liquidated damages. It is not disputed that, during the shutdown, the Government had no choice whether it could pay its employees without funds having been appropriated for that purpose. Had a Federal official done so, she would have been subject to criminal penalties. *See* 31 U.S.C. § 1350 ("[a]n officer or employee of the United States Government . . . knowingly and willfully violating section 1341(a) or 1342 of this title shall be fined not more than $5,000, imprisoned for not more than 2 years, or both."). Given the reality facing Federal agencies, the Government's conduct was in good faith because agencies would have acted to comply with the FLSA if a path to compliance were available, and the Government understood that the Anti-Deficiency Act prevented paying excepted employees during the shutdown.

Three facts are not disputed: (1) the Government understood that the Anti-Deficiency Act barred Federal agencies from paying excepted employees for work performed during the shutdown until funds for that purpose had been appropriated, *see* SoF ¶ 2; (2) in instances when

agencies had funds available to pay employees during the shutdown, the Government paid its employees on their regularly scheduled payday for work performed during the shutdown, *see, e.g.* Dkt. No. 54 at 2-3; and (3) the Government paid its employees as soon as the shutdown ended and appropriations became available, which included, in some instances, paying employees prior to their next regularly scheduled payday. SoF ¶ 8. Plaintiffs do not argue that the Government's good-faith belief that the Anti-Deficiency Act barred it from paying employees in the absence of appropriations for that purpose is wrong, but rather argue, in essence, that because the Government did not get a legal opinion on that point, liquidated damages are appropriate. *See* Pls.' Resp. at 11-19. Making such an inquiry, however, would not have changed the outcome that employees could not be paid on their regular payday during the shutdown. This fact distinguishes this case from those cases in which courts examined whether the employer made efforts to determine the FLSA's requirements before acting. In those cases there was an avenue to compliance. For the Government during the shutdown, there was not. Simply confirming through a formal legal opinion that the Anti-Deficiency Act precluded payment does not alter the fact, discussed below, that the Federal agencies would have complied with the FLSA if they had been able to do so.

It cannot be disputed that, had the Government been able to pay the excepted employees on their regularly scheduled payday, it would have. As stipulated, the Government in fact paid its employees on or before their regularly scheduled paydays once the shutdown ended and appropriations were available. SoF ¶ 8. Likewise, numerous agencies with separate appropriations paid their employees on their regularly scheduled paydays. *See e.g.* Dkt. No. 54, at 2-3 (listing agencies that paid employees on their regularly scheduled paydays during the

shutdown). Moreover, Government officials are presumed to act in good faith in discharging their duties. *See Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1239 (Fed. Cir. 2002). Accordingly, but for their inability to pay employees on their regularly scheduled payday due to the Anti-Deficiency Act, it can be presumed that Federal officials would have done so.

Plaintiffs assert that the Government's contention that it acted in good faith is incorrect for four reasons, two of which are what plaintiffs term the "futility rationale," *see* Pls.'s Resp. at 13, and the Government's attempt to change the standard from "good faith" to "absence of bad faith." *Id*. at 13-14. As discussed above, the Government's contention is not a "rationale" but is based upon the reality facing the Federal agencies. It cannot be disputed that the Government had an "honest intention" to abide by the FLSA by paying excepted employees on their regular payday – as evidenced by the presumption of good faith that Federal officials are entitled to and the fact that the Government paid excepted employees by their regularly scheduled payday as soon as appropriated funds were available. SoF ¶ 8. Obtaining a legal opinion stating that which was understood and is not disputed in this case – *i.e.*, that Anti-Deficiency Act prevented Federal officials from paying excepted employees during the shutdown – does not alter the fact that the Government would have complied with the FLSA if it could have. Lack of consideration of the FLSA is not inconsistent with good faith under these facts because that consideration could not have changed the outcome.

Plaintiffs' argue that the Government should have requested that Congress pass last minute legislation paying excepted employees during the shutdown, such as that passed for military employees. Pls.'s Resp. at 15. This assertion, however, is not germane to the liquidated

damages analysis, which assumes that an FLSA violation has occurred. Had Congress passed such a law, the Anti-Deficiency Act's restrictions would not have been applicable, and as explained above, one must presume that Federal agencies would have used the funds appropriated for that purpose to pay employees on their next regularly scheduled payday. The present inquiry is whether, assuming that there was a violation, was there a good faith effort by the Federal agencies to comply with the FLSA.

Moreover, the shutdown occurred because Congress could not agree on a budget in a timely fashion. Although it is possible that Congress could have passed something similar to the Pay Our Military Act for non-military government employees, there is certainly no guarantee that Congress would have taken either of the actions that plaintiffs presume. Plaintiffs' argument on this point is speculation, which enforces the fact that the agencies charged with paying their employees were without the power or authority to do so during the shutdown.

Finally, plaintiffs argue that "the agencies' failure to have the money to meet its obligations did not relieve the Government from liability," because the "Government of the United States" was not defined as "narrowly as the executive branch agencies" in the FLSA. Pls.' Resp. at 15-16. That Congress is part of the Government, however, does not mean that the affected agencies had any ability to stop the shutdown or to limit its effects. Again, if Congress had acted to provide appropriations to pay the excepted employees the Anti-Deficiency Act would not have been applicable and Federal agencies would have used the appropriated funds to pay their employees. We are at this juncture concerned with whether, assuming an FLSA violation, the Government acted in good faith to comply with the FLSA. The facts on this point are clear: Federal officials were put in an untenable position, *i.e.*, adhere to the Anti-Deficiency

Act or pay employees and face criminal penalties. The situation presented was not the making of the agencies, and was not one in which the agencies could have found a path to FLSA compliance.

Under these undisputed facts, the Court should conclude that the Government acted in good faith.

B. The Government Had A Reasonable Belief That It Could Not Pay Its Employees On Their Regularly Scheduled Payday Because Doing So Would Violate The Anti-Deficiency Act

The undisputed facts establish that the Government held a reasonable belief that the Anti-Deficiency Act precluded it from paying its employees on their regularly scheduled payday during the shutdown. In our motion, we explained that the issue of whether the FLSA displaced the Anti-Deficiency Act during a shutdown had never before been addressed by a court, administrative body, or the Department of Labor (DOL). *See* Def.'s Cross-Mot. at 19-22. Indeed, since 1976, the Government had shut down seventeen times prior to the 2013 shutdown.[1] In 1978 the Government was shut down for 17 days.[2] And, in 1995-96 –the most recent shutdown prior to 2013 – the Government was shut down for 21 days.[3] Both of those shutdowns were for longer than a two week period, meaning that—for most or all Federal employees—at least one pay period was affected. *Id*. Subsequent to those shutdowns, excepted employees did not allege that the Government violated the FLSA because it did not pay those employees during

[1] *See* Dylan Matthews, Here is every previous government shutdown, why they happened and how they ended, WASHINGTON POST, Sept. 25, 2013, *available at* https://www.washingtonpost.com/news/wonk/wp/2013/09/25/here-is-every-previous-government-shutdown-why-they-happened-and-how-they-ended/.

[2] *Id.*

[3] *Id.*

the shutdown – this is so even though the California budget impasse cases to which plaintiffs cite – *Biggs v. Wilson*, 1 F.3d 1537 (9th Cir. 1993) (*Biggs II*), and *Caldman v. California*, 852 F. Supp. 898 (E.D. Cal. 1994) – were filed, and decided, before the 1995-1996 Government shutdown.

In *Biggs v. Wilson*, 828 F. Supp. 774, 779 (E.D. Cal. 1991) (Biggs I), the district court determined that the state of California was not liable for liquidated damages when, during a state budget impasse, the state of California did not pay its employees on their regularly scheduled payday. As explained by the court:

> [T]he State had reasonable grounds for believing that its conduct complied with the Act because neither statutes, the applicable regulations nor the cases directly address the issue of prompt payment in the face of a state budget impasse. This case appears to be one of first impression. Therefore, in the exercise of its discretion the court would decline to award liquidated damages in this case.

Id. at 779.

No authority addresses the issue of whether, to comply with the FLSA, "prompt payment" must be on an excepted employee's regularly scheduled payday "in the face" of a Federal Government shutdown. Nor do the statutes or regulations instruct how Federal agencies are to handle such a situation. There is no indication that Congress intended that the FLSA would displace the Anti-Deficiency Act –which implements the Constitution's Appropriation's Clause. Moreover, the Anti-Deficiency Act is a criminal statute, a violation of which would subject an employee to possibly severe penalties. This case is thus a matter of first impression, and the Government had a reasonable belief that the Anti-Deficiency Act prohibited payment of excepted employees during a shutdown.

In light of these facts, and in addition to the fact that no court or administrative body had concluded that an FSA violation would occur during a lapse in appropriations, the Government reasonably believed that the Anti-Deficiency Act precluded on time payment of wages during the shutdown.

Plaintiffs' incorrectly argue that, because the DOL interpreted the FLSA to apply to state governments during a budget impasse, that interpretation must necessarily carry over to the Federal Government during a shutdown. Pls.' Resp. at 18. In this case, the Anti-Deficiency Act presents additional, and different, considerations than does a state anti-deficiency provision. As is necessary between state laws and a Federal statute – the FLSA – the Federal statute preempts a state statute. *See* Def.'s Mot. at 18-19. In *Biggs I*, the district court explained that if the "requirement of prompt payment under the FLSA is in conflict with California state law the FLSA must prevail." *Biggs I*, 828 F. Supp. at 778. In this case, both statutes are Federal and, consequently, there is no expectation that the FLSA automatically displaces as it does against a state law. Rather, in this case, when faced with the violation of a criminal statute versus a non-criminal statute, the Government reasonably concluded that it could not violate the Anti-Deficiency Act and could not pay employees on their regularly scheduled payday.

Plaintiffs also argue that the Government did not reasonably believe that the Anti-Deficiency Act precluded paying excepted employees during the shutdown because "[t]he legal uncertainty arising out of the intersection of the Anti-Deficiency Act and the FLSA did not 'pervade and markedly influence' the Government's belief that it was acting appropriately." Pl.'s Resp. at 16-17. In our motion, we stated that "Federal employers reasonably believed that they could not pay excepted employees on their regularly scheduled pay day in the absence of an

appropriation for that purpose." Def.s' Mot. at 22. That belief was correct. This fact distinguishes this case from the authority that plaintiffs cite in their response holding that, for there to be a reasonable belief, the legality of an employer's pay practices must have been considered. Pls.'s Resp. at 16-17 (discussing *Martin v. Cooper Elec. Supply Co.*, 940 F.2d 896, 910 (3d Cir.). The employers' beliefs in those cases were erroneous. In this case, the Federal agencies correctly, and therefore reasonably, believed that the Anti-Deficiency Act precluded payment to excepted employees during the shutdown.

III. The Plaintiffs' Are Not Entitled To Liquidated Damages For Delayed Payment Of Overtime Wages

In our motion, we demonstrated that plaintiffs are not entitled to liquidated damages for delayed payment of overtime wages because there was no FLSA violation, and the Government could not otherwise arrange for the payment of overtime wages in the absence of appropriations for that purpose. Def.'s Mot. at 23-25. In response, plaintiffs assert that "[t]he Government has not advanced any argument that Affected Employees were not paid timely because of inability to determine the amount of overtime compensation they were due until after the regularly scheduled paydays for the Affected week." Pls.'s Resp. at 20. As we explained in our motion, courts have stated that "[i]n the event of 'natural disasters or similar events wholly beyond the control of the employer,' an employer does not violate the statute when it makes late payments." *Ortega v. Due Fratelli*, Inc., 2015 WL 773186, at *7 (N.D. Ill. Dec. 1, 2015) (quoting *Dominici v. Bd. of Educ. of City of Chicago*, 881 F. Supp. 315, 320 (N.D. Ill. 1995)). The shutdown and the attendant lapse in appropriations was an event beyond the control of the Federal agencies and, therefore, there should be no liability for liquidated damages attached to the delayed payments to excepted employee's for overtime worked during the shutdown.

CONCLUSION

For these reasons, and the reasons set forth in our motion, the Court should grant our motion, deny plaintiffs' motion, and enter judgment in the Government's favor in this case.

Respectfully submitted,

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