

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

DONALD MARTIN, JR., et al.,	:	
	:	
Plaintiffs,	:	
v.	:	Civil Action No.: 13-834C
	:	Judge Patricia E. Campbell-Smith
THE UNITED STATES OF AMERICA	:	Collective Action
	:	
Defendant.	:	
	:	

**PLAINTIFFS’ MEMORANDUM CHALLENGING CONTENTION
IN GOVERNMENT’S STATUS REPORT THAT NOTICE SHOULD NOT BE SENT
TO THE DEPARTMENT OF DEFENSE’S EXCEPTED, NON-EXEMPT EMPLOYEES**

Pursuant to the Court’s Order dated October 16, 2014 (Dkt. No. 46), Plaintiffs challenge the Government’s contention in its Status Report of November 17, 2014 (Dkt. No. 49) that notice of conditional certification should not be sent to the excepted, non-exempt employees of the Department of Defense. The Government contends that “all civilian employees [of the DOD] who worked during the shut-down were instructed to code their time sheets so that they would be paid on time” pursuant to the Pay Our Military Act, and consequently, all of the DOD’s FLSA non-exempt excepted federal employees who worked between October 1 and October 5, 2013 were in fact paid on time. Status Report, at 2. That is not true. As described below, Plaintiffs have substantial evidence that many excepted, non-exempt employees of the DOD were not paid on their regularly scheduled paydays for work performed during that period. Accordingly, Plaintiffs request that notice be sent to all of the DOD’s excepted, non-exempt employees who worked between October 1 and October 5, 2013.¹

¹ Plaintiffs’ counsel advised the Government’s counsel on November 25, 2014 that Plaintiffs have evidence that many DOD excepted, non-exempt employees were not paid timely, and that they intended to oppose the Government’s contention that notice should not be sent to DOD employees. The Government’s counsel said that she would investigate, but to the best of Plaintiffs’ counsel’s knowledge, she has not yet been able to complete that investigation.

Fifty-one employees of the DOD already have opted into this lawsuit. Twenty-four of them worked in October 2013 as civilian police officers (or in one instance as a dispatcher) at the naval base in Mechanicsburg, Pennsylvania. Sixteen other opt-ins worked as civilian firefighters or paramedics at the Great Lakes Naval Station outside Waukegan, Illinois. Two more opt-ins worked at that time as information technology employees from the Marines' Recruiting Command, both of whom work in Florida although the Command's stations are scattered throughout the United States. The other nine DOD opt-ins were assigned to different facilities and jobs across the country. Lieder Decl., ¶ 3.

Declarations from five of these opt-ins indicate that the issue of late payments to DOD employees is much broader than just the 51 people who already have joined the lawsuit. First, they challenge the notion that DOD employees "were instructed to code their time sheets so that they would be paid on time." In fact, these employees did not code or submit their time sheets at all. Instead, their supervisors approved and submitted their time sheets. Homberg Decl., ¶ 8; Martin Decl., ¶ 8; Mullen Decl., ¶ 9; Valenza Decl., ¶ 8. If the DOD indeed adopted a means of coding time sheets that would have allowed employees to be paid on a timely basis, the department apparently was either unable even to communicate that methodology to supervisors or the supervisors did not follow the specified procedures.

Second, four declarations indicate that there are many other excepted employees in the same jobs and/or locations as the declarants who were not paid on their regularly scheduled paydays and have not yet opted in. The DOD employed about 35 civilian firefighters and paramedics at the Great Lakes Naval Station near Waukegan Illinois in October 2013. Homberg Decl., ¶ 2. Evidently, all of them were not paid on their regularly scheduled payday for work performed October 1 through 5, 2013. *Id.*, ¶ 9. This not only meant delay in receipt of minimum

wage, but for declarant Chad Homberg, delay in receipt of payment for 24 hours of overtime work, and overwithholding of taxes. *Id.*, ¶¶ 5-7. Only 16 Great Lakes firefighters and paramedics have opted in to the lawsuit, meaning that there are about 20 other firefighters or paramedics at Great Lakes who may benefit by receiving notice. But even more, there are civilian firefighters and paramedics at military bases throughout the United States, and there is no reason to believe that there was a problem in paying firefighters and paramedics at only one base. Lieder Decl., ¶ 4.

Two declarants who filled information technology positions in the Marines' Recruiting Command, one in Fort Lauderdale and the other in Orlando, similarly report that they, and to the best of their knowledge civilian employees throughout the Marines' 48 stations, were not timely paid for their work October 1-5, 2013. Martin Decl., ¶¶ 2, 5, 9; Valenza Decl., ¶¶ 2, 5, 9. They estimate that at least 96 employees were adversely affected. Martin Decl., ¶ 9; Valenza Decl., ¶ 9. Only those two civilian Recruiting Command employees have opted in. Almost 100 other Recruiting Command employees may benefit from notice.

Civilian police officers at the naval station in Mechanicsburg, Pennsylvania also were not paid timely for their regular and overtime work between October 1 and October 5. Mullen Decl., ¶¶ 7, 10. The Mechanicsburg officers evidently do not need notice – all or almost all of the approximately 25 officers have opted in, *compare* Mullen Decl., ¶ 10 (about 25 officers at Mechanicsburg) *with* Lieder Decl., ¶ 3 (24 officers have joined lawsuit) – but there are many other civilian police officers at other DOD bases who have not opted in. Lieder Decl., ¶ 5. There is no reason to think that only the police officers at a single base were not paid timely, and no justification for allowing only the Mechanicsburg officers to benefit because one employee at that base happened to hear of the lawsuit and informed the others of their right to join.

Additionally, civilian employees at that base in other job categories may similarly have been paid late.

Finally, it would be improper to send notice only to firefighters or police officers where there is evidence of widespread failure to make timely payments. As indicated by the declaration of Mr. Parker as an exemplar of the nine other DOD employees who have joined the case, the DOD for unknown reasons failed to pay an unknown number of other employees on their regularly scheduled payday for work performed October 1-5, 2013. Parker Decl., ¶¶ 4-7. The sending of notice to all essential, non-exempt employees will permit employees who were not paid timely for any reason to decide to opt in.

The Government may argue that it should not have to send notice to all DOD excepted, non-exempt employees when it failed to pay only some of them in a timely manner. The Government, however, “has the duty under § 11 (c) of the Act [29 U.S.C. § 211(c)] to keep proper records of wages, hours and other conditions and practices of employment and who is in position to know and to produce the most probative facts concerning the nature and amount of work performed.” *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946). Just as it was unfair in *Anderson* to place the burden on employees to prove damages exactly when an employer failed to maintain the required records, *id.*, so too it would be unfair in this case to deny notice to affected employees because the Government failed to maintain or produce accurate records. *See also Abbey v. United States*, 106 Fed. Cl. 254, 274 (2012), *vac’d and remanded on other grounds*, 745 F.3d 1363 (Fed. Cir. 2014). The Government either should propose a dependable means of identifying the excepted, non-exempt DOD employees who were

not paid on their regularly scheduled paydays, or it should be required to send notice to all excepted, non-exempt DOD employees of their right to join if they were not paid timely.²

November 26, 2014

Respectfully submitted,

/s/ Heidi R. Burakiewicz

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² The Government has identified 52 other departments or agencies to which notice should not be sent, because those agencies reported that no FLSA non-exempt employees worked October 1-5, 2014, the agencies themselves shut down during the shutdown, or all FLSA non-exempt excepted federal employees who worked October 1-5, 2014 were paid on time. Plaintiffs have no basis to challenge the Government's report at this time as to those 52 departments or agencies. If Plaintiffs subsequently receive information that any of those representations are inaccurate, they seek lenience in challenging the Government's designation past the deadline established in the Court's Order of October 16, 2014.

CERTIFICATE OF SERVICE

I certify that I served Plaintiffs' Memorandum Challenging Contention in Government's Status Report that Notice Should Not Be Sent to the Department of Defense's Excepted, Non-Exempt Employees, along with six supporting declarations, on November 26, 2014 through the Court of Federal Claims' ECF system on Defendant's counsel:

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