No. 13-834C

(Chief Judge Campbell-Smith)

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

DEFENDANT'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS

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MISCELLANEOUS

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DEFENDANT'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS

Pursuant to Rule 12(b)(6) of the Rules of the United States Court of Federal Claims (RCFC), and the Court's February 19, 2014 scheduling order, defendant, the United States, respectfully submits this reply in support of its motion to dismiss of the complaint of plaintiffs.

INTRODUCTION

This is indeed a case of first impression for the Court. There is no case law in this circuit that identifies any particular day as the day when a violation of the Fair Labor Standards Act (FLSA or Act) has occurred for Federal employees. Def. Br. at 15. While there are cases from other circuits that identify an employee's payday as the date of an FLSA violation, those cases are not binding on this Court. In any event, we distinguished those cases from this matter. *Id.* at 17-22. In each of those cases, (with the exception of *Biggs v. Wilson*, 1 F.3d 1537 (9th Cir.1993)), the facts were egregious. Plaintiffs had not been paid for months, and in several instances years – either minimum or overtime wages – and it was clear from the facts of those cases that defendants were deliberately trying to avoid the reach of the Act. That is not the case here where there is no dispute that Federal employees were paid in full a short time after their official paydays.

In our opening brief, we demonstrated, that there is no provision in the FLSA or any indication in its legislative history, mandating that paying wages to Federal employees a short time after their official payday is a violation of the Act. Def. Br. at 17-18. We demonstrated that there is no reference to, or definition of, "prompt payment," timely payment" or "payday" in the Act. *Id*. We further demonstrated that there is no requirement that Federal employees be paid on a particular day, or weekly, biweekly, or monthly. *Id.*

We also demonstrated that Congress, in extending the FLSA to Federal employees in 1974, authorized the Office of Personnel Management (OPM) to promulgate regulations and thereafter to administer the Act to the Federal sector. *Id*. at 16-17. Congress originally authorized the Department of Labor (DOL) to promulgate rules for the private sector, State, and local governments. However, it is the OPM regulations, and not DOL regulations, that apply to Federal employees and, thus, to the plaintiffs in this case. *See, e.g.*, *Billings v. United States*, 322 F.3d 1328, 1331 (Fed. Cir. 2003). While OPM FLSA regulations are to be read as consistent with DOL FLSA regulations, courts, in analyzing OPM regulations, look to whether they are a reasonable interpretation of the Act. *Id.* at 1330.

Moreover, the FLSA is clear that the minimum and overtime provisions of the Act do not apply to those employees who are determined to be exempt. Def. Br. at 28-29. *See* 29 U.S.C. § 213(a); 5 C.F.R. § 551.104. *See also Billings*, 322 F.3d at 1331. The OPM regulations are clear in this regard: an exempt Federal employee – including many of the Members who opted-into the collective action here – is not subject to the FLSA and consequently does not have any cause of action for a violation of the FLSA. 5 C.F.R. § 551.104. Again, the DOL regulations do not apply to Federal employees in this regard. *See Billings*, 322 F.3d at 1334.

Finally, we demonstrated that Congress passed the FLSA during the height of the Depression, to protect those workers who were not being paid, either minimum or overtime wages, by their employers. When Congress extended the reach of the FLSA to the Federal sector, it did so with the same intention – to protect those workers from employers who deliberately did not pay them the wages that were owed to them. There is no indication in the Act or legislative history that it was intended to cover the allegations that plaintiffs make here – that is, an instance when employees have actually been paid, but a few weeks beyond their payday.

Moreover, even if the Court finds that the Government violated the FLSA, there is no rationale here for imposing liquidated damages. There is no reason why the Government could assume that there would be an FLSA violation when essential employees were paid in full a short time after their official payday. There is no requirement in the Act, no OPM regulation, and no case law in this Circuit requiring the payment that plaintiffs demand. There was also no reason for Government agencies to believe that an FLSA violation would occur given past experience. When the Government shut-down in 1995-1996, for a total of 27 days, there was no lawsuit filed alleging any FLSA violation. There was no reason for Government agencies to anticipate any different response to the partial shut-down in 2013. Finally, the Government acted reasonably once the budget impasse was resolved – Federal employees were paid quickly and in some cases before the next official payday. Under the circumstances here, the Court should exercise its discretion and determine that no liquidated damages are owed.

Congress did not intend to penalize the Government, or private businesses, state or local governments, for paying employees in full but a short time after their official payday or to give

employees a windfall. The Government's motion to dismiss should be granted because under the circumstances here plaintiffs have failed to state a cause of action for an FLSA violation.

ARGUMENT

I. Plaintiffs Have Not Stated A Claim For A Violation Of The FLSA

A. The Date When An FLSA Violation Accrues Is Not Relevant To A Determination Of Whether There Has Been A Violation

Plaintiffs conflate the determination concerning when an FLSA claim accrues with the determination as to whether a violation has occurred. Pl. Br. at 9-11. They cite a number of Court of Federal Claims decisions which hold that an FLSA claim accrues on the employee's regular payday; plaintiffs reason that, if FLSA claims accrue on an employee's regular payday, then their FLSA rights were violated when they were not paid on their regular payday. *Id.* Even if this argument has an initial superficial appeal, further reflection establishes that it is essentially circular. In any event, neither the law nor the cases plaintiffs cite support their position.

The claim accrual date is the date by which a claimant must bring an action for appropriate legal or equitable relief. *Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp.*, 522 U.S. 192, 195 (1997) (citing *Rawlings v. Ray*, 312 U.S. 96, 98 (1941)). It is the date that the claimant has a "complete and present cause of action." *Id.* Claim accrual simply means that all elements necessary for a cause of action are present. *Id.* Claim accrual starts the statute of limitations clock running so it is important for determining jurisdiction. *Ladd v. United States*, 630 F.3d 1015, 1024 (Fed. Cir.2010) ("We will not divorce claim accrual and the limitations period."). "A claim first accrues for purposes of 28 U.S.C. § 2501 'when all the events have occurred which fix the liability of the Government and entitle the claimant to institute an action.'" *Alder Terrace, Inc. v. United States*, 161 F.3d 1372, 1377 (Fed. Cir. 1998)(citations omitted). Thus, in order to determine the claim accrual date, the Court must

identify the events that must occur to fix the liability of the Government. In this case, the question is whether one of those events is payment on the employee's regular payday.

Plaintiffs cite to a number of Court of Federal Claims decisions that they contend support their argument that the date of claim accrual necessarily establishes the date of the FLSA violation. *Id.* at 10-11. However, none of the cited cases involved employees who had been paid their full wages within a few days of their regular payday. Thus, none involved the issue presented in this case concerning whether payment in full a few days after the employee's regular pay date comprises a violation. Rather, in those cases, the court assumed that any FLSA payment to which the employees were entitled were owed on the employee's regular pay date and, apparently, neither party challenged that assumption.

Even though DOL regulations do not apply here, plaintiffs again point to a DOL regulation that they contend provides support for their assertions. *Id.* at 10. However, the cited DOL regulations fail to prove their point. First, 29 C.F.R. § 790.21(b) merely sets the time for an employee to bring a case; it does not establish when a violation occurs. Moreover, the DOL has not adopted any bright line test regarding when a violation of the FLSA occurs. The DOL regulations provide that: "[p]ayment may not be delayed for a period longer than is reasonably necessary for the employer to compute and arrange for payment of amount due and in no event may payment be delayed beyond the next payday after such computation can be made." 29 C.F.R. § 778.106.

Neither the law nor the cases cited assist this Court in determining if the Government violated the FLSA because plaintiffs were paid a short time after their official payday. Plaintiffs' arguments in this regard are meritless.

B. Congress Did Not Intend To Impose Liability On The Government For Paying Federal Employees In Full A Short Time After Their Official Payday

Congress did not establish in the FLSA, either in the original Act passed in 1934 in the midst of the Depression, or in any of its other amendments, including the 1974 Act that brought Federal employees within the Act, any time within which an employee must be paid either a minimum wage or overtime wage. There is no definition of "timely payment," or "payday," or "prompt payment" in the Act.

The legislative history of the 1974 amendments, increasing the minimum wage and extending the Act to state, local and Federal workers, focused primarily, as it had in the past, on the workers whom the Act was specifically designed to protect:

> Increasing inflation has continued to erode the value of the dollar, thus further aggravating the economic plight of low wage workers. In recognition of this serious situation, the General Subcommittee on Labor again initiated remedial legislation. On February 6, 1974, the subcommittee by a unanimous voice voted ordered H.R. 12435, amended, reported to the Committee on Education and Labor, and on March 13, 1974, the Committee ordered H.R. 12435 reported to the House by a roll call vote of 33-0.

H.R.Rep No. 93-913 at 2814 (1974), reprinted in 1974 U.S.C.C.A.N. at 2811, 2814.

In ruling on a challenge to the Act by local school boards who had been recently included in coverage under the Act, the Supreme Court reflected upon the original goals of Congress in enacting the FLSA:

> In this Act, the primary purpose of Congress was not to regulate interstate commerce as such. It was to eliminate, as rapidly as practicable substandard labor conditions throughout the Nation. It sought to raise living standards without substantially curtailing employment or earning power.

Powell v. United States Cartridge Co., 339 U.S. 497, 509-510 (1950). Moreover, Congress with the passage of the 1974 amendments to the Act reiterated its major purposes and goals in the

legislative history. *See* H.R.Report No. 93-913 at 2817 (1974), reprinted in 1974 U.S.C.C.A.N. at 2811, 2817. *See also* Def. Br. at 16.

The point of focusing on the original intent of the Act is not to denigrate Federal employees in any sense, as plaintiffs wrongly imply is our position.[1] Certainly, the FLSA applies to non-exempt Federal employees, like private sector employees and State and local employees. However, the intent of the FLSA from its initial passage to the inclusion of Federal employees within its purview was to protect workers who are not being properly paid. *See* Def. Br. at 15-17. The FLSA was not intended to penalize the Federal Government, or any employer, when the employee has been paid in full but a short time after his official payday. If that were not the case, Congress would have included a time limit for payment of wages. It did not do so. Nor is there any legislative history supporting plaintiffs' view. It was not the intent of Congress in passing the Act in 1938, and in amending the Act in 1974, to include as a violation a circumstance like the one before the Court now. Plaintiffs here were paid in full for the work that they did for the period October 1 - 5, 2013. Their payday was a short time after their official payday. This is not a violation of the FLSA.

C. <u>There Is No Support For A Bright Line Test Under These Circumstances</u>

Plaintiffs urge the Court to adopt a bright line test for this Circuit. Plaintiffs suggest that it makes no difference that the majority of cases that have found a violation when an employee is not paid on his payday address factual circumstances where there has been an egregious violation of the FLSA. Plaintiffs ignore these factual circumstances that are completely different from

[1] After all, the partial Government shut-down in October 2013 was difficult for all Federal employees – those deemed essential, as well as those deemed non-essential, military and civilian alike. It is unfortunate but Federal Service sometimes calls upon Federal employees to make certain sacrifices in order to ensure the safety of human life and protection of property. This was one of those instances.

those at issue here. As we demonstrated in our opening brief, and plaintiffs have not challenged, the majority of Circuits finding an FLSA violation, have done so in the context of obvious attempts by employers to thwart the FLSA by refusing to pay an employee a minimum or overtime wage for months or years after it was earned, or even not at all. *See* Def. Br. at 18-22.

The only case remotely on point is the Ninth Circuit *Biggs* case. However, *Biggs* can be distinguished: here, unlike in *Biggs*, a Federal statute – the Anti-Deficiency Act – prohibited the payment of the wages of Federal employees until after the lapse in appropriations was resolved. The Executive Branch agencies of the Government could not ignore the mandatory prohibition contained in the Anti-Deficiency Act. In *Biggs*, the State law prohibited the payment of state employees during a budget impasse. *Biggs v. Wilson,* 828 F. Supp. 774, 775 (1991). The Ninth Circuit affirmed the district court's holding that despite the state law, the state must comply with Federal legislation – the FLSA. *Biggs v. Wilson*, 1 F.3d 1537, 1538 (9th Cir. 1993) . However, despite finding a violation, the district court did not impose liquidated damages on the state, and the appellate court did not disturb that holding. *Id.* *See infra* at 14.

Plaintiffs assert that DOL regulations support their argument. Even assuming that DOL regulations applied to the Federal sector, which they do not, the regulation regarding the payment of overtime wages plaintiffs cite does <u>not</u> adopt a bright line test:

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

> payment be delayed beyond the next payday after such computation can be made.

See 29 C.F.R. § 778.106 (emphasis added). This regulation provides considerable flexibility to the private sector, state and local governments. The regulation only requires that when the correct amount of overtime cannot be computed, it must be paid as soon as possible.

Plaintiffs also contend that the DOL Fact Sheet attached to their brief supports their arguments. Pl. Br. at 13, 26, 28. First, that fact sheet is drafted for State and local governments, not the Federal Government. However, even assuming that it might be persuasive here, it hardly provides the bright line test that plaintiffs suggest. The Fact Sheet first explains the context of the advisory information:

> The following information is intended to answer some of the most frequently asked questions that have arisen when private and public employees require employees to take furloughs and to take other reductions in pay and/or hours worked as businesses and State and local governments adjust to economic challenges.

Pl. Br. Appendix App-A at 1 (emphasis added).

In response to the question: "If an employer is having trouble meeting payroll, do they need to pay non-exempt employees on the regular payday," the DOL provided reasonable guidance given the "economic challenges" faced by entities today:

> When the correct amount of overtime compensation cannot be determined until sometime after the regular pay period, however, the requirements of the FLSA will be satisfied if the employer pays the excess overtime compensation as soon after the regular pay period as is practicable.

Id. at ¶1 (emphasis added). Here, the Government was not able to compute the correct amount of compensation for Federal workers because non-essential employees, such as Human Resource employees, were not working. Moreover, there are no allegations here that the Government did not pay its employees as soon as the budget was passed.

Plaintiffs urge the Court to adopt a bright line rule here where none is needed. DOL, as we demonstrated, has not adopted a bright line rule. The trial court in *Biggs* and the dissent in the appellate decision both advocated for a more flexible approach given the "unpredictable forces" beyond an entities' control that can disrupt the normal operation of business. The *Biggs* dissent is instructive here. Recognizing that the court cannot rule in a vacuum, that real world exigencies exist for businesses and state and local government alike, the court urged a flexible approach to determining when an FLSA violation occurs:

> Congress has not spoken on this precise issue. All the law says is that employers shall pay their employees the minimum wage, period. Congress has not uttered a word about *when* this payment must be made. Yet, driven by a search for a "bright line," we read into the law an impractical requirement that creates a cause of action against an employer at midnight plus one second after the expiration of payday. The majority's holding says to employers, we don't care why you were late, we don't care what your reason was, the only issue now is whether liquidated damages shall be awarded.

Biggs, 1 F.3d at 1544. The dissent agreed with the trial court's recommended test: "in this respect, I believe the district court fashioned a workable rule for determining when a violation of the FLSA occurs, a rule I would adopt for this Court." *Id.* at 1545. The district court urged an interpretation of the FLSA that required payment which is reasonably prompt under the totality of the circumstances. *Biggs*, 828 F.Supp. at 777. Otherwise, the district court was concerned that a bright line test, requiring strict liability:

> [W]ould threaten to bring about the financial ruin of many employers, seriously impair the capital resources of many others, provide a windfall to employees, and burden the court with excessive and needless litigation, <u>all in direct contravention to the expressed intent of Congress</u>. Instead it must be interpreted to require payment which is reasonably prompt under the totality of the circumstances in the individual case.

Id. (emphasis added). *See also* John D. Calamari & Joseph M. Perillo, *Contracts* § 11-22 at 410 (2nd ed. 1977) (in the absence of a provision indicating that time is of the essence, "a party is entitled reasonable time to perform."). For example, would the court impose liquidated damages on a company destroyed during the September 11, 2003 attack, if it were impossible to meet its payroll on time. Or alternatively, had one of the Government's payroll centers been destroyed or seriously compromised during the Katrina Hurricane, so that payroll could not be met until after the official payday, would liquidated damages be appropriate in that instance.

As we demonstrated in our opening brief, the Second Circuit's decision in *Rogers v. City of Troy*, 148 F.3d 52 (2d Cir. 1998), where the Court fashioned a flexible test to determine if the defendant there had violated the FLSA, is also persuasive. *See* Def. Br. at 20-21. In determining that a flexible test was necessary under the circumstances, the Court remanded the case so that the trial court could determine if, among other things, there was an unreasonable delay in payment of wages to plaintiffs and if the change that had been effected by the city resulted in a substantive violation of the FLSA. *Id.* at 60. Plaintiffs were paid in this case, as in *Rogers*, but a short time after their official payday and for a legitimate reason. The Government could not, without violating the Anti-Deficiency Act, 31 U.S.C. § 1341(a), pay its employees during the lapse in appropriations. Moreover, the delay in payment was not an unreasonable delay. As in *Rogers*, the delay was for a valid reason, and the Court should not find any violation of the FLSA.

The *Rogers* court cited many of the same cases that plaintiffs have relied upon, and which we distinguished, finding that:

> While these cases are instructive, they arose in fundamentally different circumstances from those of the instant case. The earlier cases all involved substantial delays in payment, and – more

> important – practices disapproved of resulted in evasions of the minimum wage and overtime provisions of the FLSA.

Id. at 56 (emphasis). This case is fundamentally different. In this case, employees were required to work because they were deemed essential, and they were paid in full for their work a short time after their official payday. This is not a substantial delay nor is an evasion of the law – it is, in short, not a violation of the FLSA as contemplated by Congress.

Furthermore, when the 2013 fiscal year ended on September 30, 2013, because Congress had not passed a budget, the Government essentially had no money to run its every day functions after that date. It is not contested that Federal employees were paid for the work that they had done up to September 30, 2013. However, beginning October 1, 2013, because of the lapse in appropriations, the fiscal year began anew. With the new fiscal year, and as a result of the lapse in appropriations, the Federal employees who were deemed essential worked, were assured that they would get paid for their work, but the wages may be after what would have been, under ordinary circumstances, their official payday. Until the Government was properly funded and because these were special circumstances, the official payday shifted to a date later than had the Government continued to follow its official pay calendar. Once Congress passed a budget, the prior official paydays were reinstituted.

Under these circumstances, there can be no violation of the FLSA. Even if the Court were to find that Federal employees must be paid on their official payday or there has been an FLSA violation, the official payday shifted and Federal employees were technically actually paid on their official payday.

II. Even If The Court Finds That The Government Violated The FLSA, There Can Be No Question That Liquidated Damages Are Not Appropriate Under These Circumstances

Liquidated damages are discretionary in FLSA cases. Even if the Court were to find that the Government violated the FLSA, as we demonstrated in our opening brief, the Court may also find that liquidated damages, under the circumstances here, are not due to plaintiffs. Def. Br. at 23-26.

Plaintiffs go to great lengths to attempt to demonstrate that liquidated damages are appropriate here. Pl. Br. at 22-30. Plaintiffs contend that the Government could never prove good faith or reasonableness. Pl. Br. at 22. Without any citation, plaintiffs insist this is true because "its own regulators knew that such actions violate the FLSA." *Id.* Using circular reasoning, plaintiffs assert that the "[t]he Government could not have had reasonable grounds for believing that it was acting in conformity with the Act because the law unambiguously establishes that the United States was not acting in conformity with the FLSA when it failed to pay Plaintiffs and other essential employees." *Id.* at 24. Plaintiffs cite to the Ninth Circuit decision, *Caldman v. California*, 852 F. Supp. 898 (E.D. Cal. 1994), in which the district court imposed liquidated damages on the State for failing for a second time to pay its employees on their payday because of a budget impasse. The Court reasoned that because the State was aware of the decision in *Biggs*, it could not now claim that it did not know its actions violated the FLSA. *Id.* at 901-902. Plaintiffs assert that the Government should have known, based upon the *Biggs* case, that it was violating the FLSA when it paid its essential employees after their official payday. Pl. Br. at 25.

Plaintiffs contend that while the issue of good faith is a subjective test, and the Court cannot decide good faith without discovery, the Court should decide that liquidated damages are

appropriate here even without resort to any discovery. Defendant agrees that the Court should decide on the papers, without any discovery, but that no liquidated damages are due here.

Plaintiffs' first assertion – that the Government could never establish good faith that it acted in conformity with the FLSA because it wasn't acting in conformity, is easily refuted. As we demonstrated, there is no requirement in the Act that payment of minimum and overtime wages must be made on a date certain. There is no Federal requirement that the Government must pay its employees at a certain time after each pay period. There is no OPM regulation setting any requirement for these issues. Moreover, there has been no Federal Circuit case law on the issue of payment after an official payday because of a budget impasse.

The *Biggs* trial court faced similar facts when it turned to the issue of liquidated damages there. The court found that no liquidated damages were due there:

> Moreover, the 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 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.

Biggs, 828 F. Supp. at 779. Plaintiffs contend that Government regulators "undoubtably were aware" of the holdings of *Biggs* and *Caldman*, that payment of Federal employees after the official payday because of a budget impasse was a FLSA violation. Pl. Br. at 27. Plaintiffs offer no citations for their assertions. More importantly, however, even if the Government was aware of the Ninth Circuit cases, there is no reason to believe they would apply to Federal employees. Ninth Circuit cases are not binding on this Court. Furthermore, *Biggs* and *Caldman* involved the intersection of state and Federal law. Those cases did not involve the Anti-Deficiency Act and the Appropriations Clause of the Constitution, U. S. Const. art. I § 9, cl. 7,

which prohibit the authorization of any expenditures when appropriations are not available. 31 U.S.C. § 1341(a)(1)(A). *See* Def. Br. at 23-26. Given the restrictions of the Anti-Deficiency Act, Government agencies would have no reason to believe that paying their employees a short time after their official payday would be an FLSA violation.

When it became clear that a budget would not be passed in time to prevent a partial Government shut-down, agencies of the Executive Branch of the Government were required to determine which of their Federal employees were "essential," and, therefore, required to report to work even if there was a chance that they might not be paid for that work until after their official payday. While it was clear that essential employees would be paid, it most certainly was not certain that Federal employees who were not essential would be paid. Agencies needed to determine what functions of the Government must continue even in the face of the budget impasse. Many of these functions are obvious: Federal prisons needed to be staffed with Bureau of Prison employees; Social Security offices needed to be staffed with employees to assist the elderly with payment of checks; airports needed to be staffed with TSA and Federal Air Marshall employees to insure the safety of air traffic. The Anti-Deficiency Act provided that under emergency circumstances Government personnel can be employed during a lapse in appropriations, but cannot be paid until appropriations are available. Those circumstances include, like those examples cited above, "emergencies involving the safety of human life or the protection of property."

There is no choice provided to agencies as to whether or not to pay their essential Federal employees during a partial shut-down under the Anti-Deficiency Act. The Government may not "make or authorize" payments from the Treasury when the relevant appropriations are exhausted. 31 U.S.C. § 1341(a)(1)(A). *See* Def. Br. at 23-26. Plaintiffs essentially ignore the

Anti-Deficiency Act and insist that the Government did not act in good faith or reasonably when it was forced to pay its employees a short time after their official payday. Pl. Br. at 22-29. However, the Government never reached the issue of whether it might be violating the FLSA if it paid its employees a short time after their official payday because it is clear from the ADA that there was no way for the Government to pay its employees at all under the circumstances. The Government made a reasonable effort to maintain order during the partial shut-down and made a good faith effort to pay its employees as quickly as possible after the budget had passed.

Moreover, there was no reason for agencies to believe that an FLSA violation would occur given past experience. In 1995 - 1996, the Government was partially shut-down for a total of 27 days – from November 14 – 19, 1995, for five days, and again from December 16, 1995 to January 6, 1996, for 22 days. There were no allegations of an FLSA violation even though the second partial shut-down lasted for 22 days. Given that there were no allegations that the Government violated the FLSA when it was forced to pay its employees after the official payday in 1996, there was no reason for regulators to believe any differently in 2013.

Plaintiffs concede that under their construct the Government could never make a showing of good faith or reasonableness. According to plaintiffs, because the Government allegedly never researched whether its actions would constitute an FLSA violation, then the Government could not have acted in good faith or reasonably. However, because the ADA forbid it, the Government could never pay its employees during a partial shut-down. Plaintiffs have set up the perfect straw man here. A more reasonable test under these circumstances is to look at how quickly after the budget was passed were Federal employees paid. With respect to Department of Justice (DOJ) employees, including Bureau of Prisons employees, the Official Payday for Pay Period 19 was October 17, 2013. *See* Ex. A, U.S. Department of Justice 2013 Payroll Calendar.

The Official Payday for Pay Period 20 was October 31, 2013. The National Finance Center (the pay center for DOJ employees) made every effort to pay DOJ employees all of the wages due – from Pay Period 19 and Pay Period 20 – by October 24, 2013, a week before the official payday for Pay Period 20. This was a good faith effort to pay employees the wages that were owed to them from Pay Period 19 (October 1-5, 2013) and pay them ahead of the Official Payday for Pay Period 20.

The damages provision in the Back Pay Act is instructive in this regard. The Back Pay Act is another remedial statute addressing allegations that employees were not paid properly. 5 U.S.C. § 5596. As we demonstrated in our opening brief, the Back Pay Act provides that, in addition to pay that an employee would have received but for an unjustified or unwarranted personnel action, he may also receive interest on the amount payable. 5 U.S.C. § 5596(b)(2)(A). Def. Br. at 35. However, pursuant to OPM regulations regarding the Back Pay Act, interest is not payable if a complete back pay payment is made within 30 days after any erroneous withdrawal, reduction, or denial of a payment. 5 C.F.R. § 550.806. There is no reason why this Court may not determine that, like the Back Pay Act interest provision, liquidated damages are not due when the Government has made a good faith effort to pay Federal employees as soon after the official payday as was possible – as was the case here.

The Court should not impose strict liability upon the Government under these circumstances. Neither the Act, OPM regulations, DOL regulations, nor case law in this Circuit require it. The Government requests that even if the Court finds an FLSA violation, no liquidated damages be imposed.

III. Exempt Employees Are Not Subject To The Provisions Of The FLSA

We demonstrated in our opening brief that exempt Federal employees are not subject to the provisions of the FLSA. Def. Br. at 28-30. Despite the clear language of the Act, OPM regulations, and case law in this Circuit, plaintiffs nonetheless appear to urge the Court to engage in a rulemaking exercise. Without any valid legal support except an incomprehensible reading of *Billings*, plaintiffs essentially invite the Court to hold that Federal exempt employees are really non-exempt. Plaintiffs ask the Court to adopt an approach to the classification of Federal employees that is based not upon the Act, OPM regulations, and case law, but rather upon certain standards defined by them. Pl. Br. at 31-36. Plaintiffs cite to no support for this request because there is none.

The FLSA is clear: the minimum and overtime provisions of the Act do not apply to those employees who are designated exempt. 29 U.S.C. § 213(a); 5 C.F.R. § 551.104. *See* Def. Br. at 28-29. Neither the Act nor OPM regulations provide for any exceptions to the exempt status of Federal employees. In other words, if you are classified as an exempt employee, you are not subject to the FLSA provisions regarding minimum and overtime pay.

Moreover, after a *Chevron* analysis, the Federal Circuit in *Billings* found that the OPM regulations defining "executive" employee to be a reasonable application of the FLSA to Federal employees and, therefore, a valid exercise of the authority vested in OPM by Congress. *Id.* at 1334. While agreeing that OPM regulations should be consistent with DOL regulations applying the FLSA to the private sector, the Court found room for differences based upon the differences between private sector employment and Federal employment. *Id.* ("Because of the peculiar nature of the statutory framework surrounding Federal employment, it is reasonable for OPM's regulation to vary from the Labor Department standard.")

Plaintiffs assert that if the Court applies the DOL "salary basis" test, which *Billings* has already determined is not appropriate in the context of the Federal sector, and if the Court applies the DOL regulations regarding excepted employees during a furlough (29 C.F.R. § 541.710(b)),[2] then the exempt plaintiffs here would be eligible for overtime pay. However, *Billings* does not support any such divergence from OPM regulations. Pursuant to OPM regulations,[3] changes to exemption status are based upon duties performed not upon the criteria proposed by plaintiffs. *See* 5 C.F.R. part 551.

Plaintiffs also purport to divine, without citation to any authority, the philosophical rationale for OPM's decision not to adopt the salary test as a basis for determining exempt status. Pl. Br. at 34. They then attempt to argue that OPM did not reject the "salary basis" test as a matter of principle again without any support. *Id.* at 34-5. However, all of plaintiffs' speculations are irrelevant. The Federal Circuit has clearly established that the salary basis test does not apply to Federal employees. *Billings*, 322 F.3d at 1334. OPM's regulations regarding exempt employees are clear.[4]

[2] Plaintiffs' reference to DOL regulations do not support their argument. Pl. Br. at 34. DOL regulation 29 C.F.R. § 541.710(b) applies to furloughed workers who do not work while they are furloughed. That particular DOL regulation provides that a furloughed day does not cause a salary basis test violation. *Id.* Plaintiffs here are not furloughed workers so, even if DOL regulation were applicable to Federal employees, which we have demonstrated they are not, those regulations do not apply to these circumstances.

[3] Plaintiffs cite to OPM regulation, 5 C.F.R. § 550.403(a) and (b), which is also not applicable here. Pl. Br. at 34. First, the cited regulation is not an FLSA regulation. Moreover, this is a regulation that deals with evacuations, and in any event, it does not, as plaintiffs seek here, provide any bright line test for payment of wages. Rather, it provides for payment on a regularly scheduled payday, "when feasible."

[4] Plaintiffs also assert that OPM's regulations do not intend to deprive Federal employees of overtime pay available under DOL regulations, citing to 5 C.F.R. § 551.513. Pl. Br. at 36. This is specious at best. That OPM regulation applies to Federal employees who are

If the Court were to agree with plaintiffs' interpretation of *Billings*, apply DOL regulations here, and ignore OPM regulations, it would essentially be converting all exempt employees into non-exempt employees; basically finding that OPM regulations do not warrant *Chevron* deference. The Court would be engaging in *sua sponte* rulemaking by importing DOL regulations into the Federal sector. Plaintiffs have provided no support for such a ruling because there is none. *See Adams v. United States,* 40 Fed. Cl. 303, 306-07 (1998) ("the Court should avoid indirect rule making by importing DOL created standards into the Federal sector without any conscious rulemaking at either DOL or the OPM"). If Congress had wanted OPM regulations to be identical to DOL regulations, it would have authorized that in the text of the FLSA. Congress has not done so. If Congress had wanted DOL regulations to apply to Federal employees, it would have authorized that in the Act. Congress has not done so. In any event, plaintiffs' citations to DOL regulations are not appropriate here. Exempt employees are not subject to FLSA provisions and are not part of this lawsuit.

We respectfully respect that the Court grant our motion to dismiss plaintiffs' cause of action against the Government for a violation of the FLSA when it paid essential employees in full a short time after the official payday. Alternatively, if the Court finds a violation, no liquidated damages are appropriate.

CONCLUSION

For these reasons, the Government respectfully requests that the Court dismiss plaintiffs' first amended complaint for failure to state a claim.

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eligible for overtime pay – in other words non-exempt employees. It does not, on its face apply to exempt Federal employees.

Respectfully submitted,

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May 2, 2014

Exhibit A

ID	Inauguration Day
H	Federal Holiday
P	Official Payday
TA	Time & Attendance

U.S. DEPARTMENT OF JUSTICE 2013 PAYROLL CALENDAR

* PP 19– New Fiscal Year begins October 1.
* PP 25– Last Full Pay Period in Calendar Year, F/T Employees in 6hr. AL Category Earn an Extra 4 Hours of Annual Leave.
* PP 26– Last Pay Period of the Leave Year.
* PP 26/12 thru PP 24/13-2013 Tax Year, 26 pay days.

* DD/EFT Generally Mon. before payday.

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January

PP	SUN	MON	TUE	WED	THU	FRI	SAT
*27	30	31 TA	1 H	2	3	4	5
	6	7	8	9	10 P	11	12
1	13	14	15 TA	16	17	18	19
	20 ID	21 H	22	23	24 P	25	26
2	27	28	29 TA	30	31		

February

PP	SUN	MON	TUE	WED	THU	FRI	SAT
2						1	2
	3	4	5	6	7 P	8	9
3	10	11	12 TA	13	14	15	16
	17	18 H	19	20	21 P	22	23
4	24	25	26 TA	27	28		

March

PP	SUN	MON	TUE	WED	THU	FRI	SAT
4						1	2
	3	4	5	6	7 P	8	9
5	10	11	12 TA	13	14	15	16
	17	18	19	20	21 P	22	23
6	24	25	26	27	28	29	30
	31						

SECOND QUARTER FY 13

April

PP	SUN	MON	TUE	WED	THU	FRI	SAT
6		1	2	3	4 P	5	6
7	7	8	9 TA	10	11	12	13
	14	15	16	17	18 P	19	20
8	21	22	23 TA	24	25	26	27
	28	29	30				

May

PP	SUN	MON	TUE	WED	THU	FRI	SAT
8				1	2 P	3	4
9	5	6	7 TA	8	9	10	11
	12	13	14	15	16 P	17	18
10	19	20	21 TA	22	23	24	25
	26	27 H	28	29	30 P	31	

June

PP	SUN	MON	TUE	WED	THU	FRI	SAT
10							1
11	2	3	4 TA	5	6	7	8
	9	10	11	12	13 P	14	15
12	16	17	18 TA	19	20	21	22
	23	24	25	26	27	28	29
13	30						

THIRD QUARTER FY 13

July

PP	SUN	MON	TUE	WED	THU	FRI	SAT
13		1	2 TA	3	4 H	5	6
	7	8	9	10	11 P	12	13
14	14	15	16 TA	17	18	19	20
	21	22	23	24	25 P	26	27
15	28	29	30 TA	31			

August

PP	SUN	MON	TUE	WED	THU	FRI	SAT
15					1	2	3
	4	5	6	7	8 P	9	10
16	11	12	13 TA	14	15	16	17
	18	19	20	21	22 P	23	24
17	25	26	27 TA	28	29	30	31

September

PP	SUN	MON	TUE	WED	THU	FRI	SAT
17	1	2 H	3	4	5 P	6	7
18	8	9	10 TA	11	12	13	14
	15	16	17	18	19 P	20	21
19	22	23	24 TA	25	26	27	28
	29	30					

FOURTH QUARTER FY 13

October

PP	SUN	MON	TUE	WED	THU	FRI	SAT
*19			1	2	3 P	4	5
20	6	7	8 TA	9	10	11	12
	13	14 H	15	16	17 P	18	19
21	20	21	22 TA	23	24	25	26
	27	28	29	30	31 P		

November

PP	SUN	MON	TUE	WED	THU	FRI	SAT
21						1	2
22	3	4	5 TA	6	7	8	9
	10	11 H	12	13	14 P	15	16
23	17	18	19 TA	20	21	22	23
	24	25	26	27 P	28 H	29	30

December

PP	SUN	MON	TUE	WED	THU	FRI	SAT
24	1	2	3 TA	4	5	6	7
	8	9	10	11	12 P	13	14
*25	15	16	17 TA	18	19	20	21
	22	23	24	25 H	26 P	27	28
*26	29	30	31 TA	1 H	2	3	4

FIRST QUARTER FY 14