IN THE UNITED STATES COURT OF FEDERAL CLAIMS

L. KEVIN ARNOLD, et al.

Plaintiffs **No.: 19-59-PEC**

v. **Judge Patricia E. Campbell-Smith**

THE UNITED STATES

Defendant.

PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION FOR LEAVE TO FILE NOTICE OF SUPPLEMENTAL AUTHORITY

Plaintiffs, by and through their undersigned counsel, hereby timely respond to the Defendant's Motion for Leave to File Supplemental Authority (ECF 46). Plaintiffs agree that the Supreme Court's holding in *Maine Community Health Options v. United States*, No. 18–1023 (U.S. Apr. 27, 2020) ("*Maine Community*") is relevant in the instant matter, but not for the reasons argued by Defendant in its Motion. Rather, the Court should find that *Maine Community* supports Plaintiffs' position, because the Supreme Court rejected the same argument being made by Defendant in the instant matter; namely, that the Anti Deficiency Act excuses the Government from payment obligations created by other statutes. Additionally, the Supreme Court in *Maine Community* reiterated the longstanding principal that "repeals by implication," such as the implicit repeal urged by the Government in its original Motion to Dismiss - are disfavored. In support thereof, Plaintiffs state as follows:

The *Maine Community* decision held that the "Risk Corridors" program set forth in Section 1342 of the Patient Protection and Affordable Care Act ("ACA") obligated the federal Government to make certain payments to unprofitable insurers who participated in the health

exchanges created by the ACA, notwithstanding the absence of appropriations for those payments. *See Maine Community*, No. 18–1023, slip op. at 13–16. In *Maine Community*, the Government made the same argument it made in support of its motion to dismiss the instant matter - that a statute directing the Government to pay money, when read together with the Anti-Deficiency Act, can only permit that money to be paid where Congress provides the necessary appropriations. *See* Respondent's Br., *Maine Community*, No. 18–1023, at 22. The Supreme Court rejected that argument. *Maine Community* at 13-14. It held that the Anti-Deficiency Act does not speak to "whether Congress itself can create or incur an obligation directly by statute," but instead "constrain[s] how federal employees and officers may make or authorize payments without appropriations." *Id.* at 13.

In seeking dismissal of this case, the Government made an argument similar to that it made in *Maine Community*: that, in light of the Anti-Deficiency Act, its obligations to comply with the FLSA are limited by appropriations made by Congress. *See* Def.'s Motion to Dismiss at 11–15. As described above, the Supreme Court rejected that argument. The Government tries to portray *Maine Community* as supporting its position in this case, but it cannot sidestep the Court's core holding in *Maine Community* that the Anti-Deficiency Act has no bearing on the Government's statutorily-created obligations.

The reasoning of *Maine Community* strongly supports Plaintiffs' position in this case. The FLSA provides that an employer who violates the statute "*shall be* liable" to the affected employee in the amount of their unpaid wages plus an additional equal amount as liquidated damages. 29 U.S.C. § 216(b) (emphasis added). The *Maine Community* decision, in assessing Section 1342 of the ACA, held that a statute which contains this type of mandatory language creates an obligation that must be fulfilled regardless of appropriations. *See Maine Community*,

slip op. at 12. Thus, under the reasoning of *Maine Community*, the language of the FLSA creates on obligation to pay damages to employees affected by violations of the statute.

The Government, argues the reasoning of *Maine Community* supports its position because Plaintiffs are bringing a "late payment" claim, while the FLSA does not contain an express language requiring payment on an employee's regularly scheduled payday. *See* Def.'s Motion for Leave at 4. But Plaintiffs are bringing a claim that the Government failed to pay them legally-required wages during the shutdown—*i.e.,* wages that an employer "shall" pay under the FLSA—and that the Government owes liquidated damages—which, again, an employer "shall" pay under the FLSA. *See* 29 U.S.C. § 216(b). To be sure, Plaintiffs rely on precedent from this Court and others that such a claim accrues on the employee's pay date – an interpretation of the FLSA that was already established when Congress amended the FLSA in 1974 to apply the statute to the federal government, with no special limitations or carveouts treating the Government differently from any other employer. *See Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 707 (1945){ TA \l "Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697 (1945)" \s "Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 707 (1945)" \c 1 } ("[T]he liquidated damage provision is not penal in its nature but …constitutes a Congressional recognition that failure to pay the statutory minimum *on time* may be so detrimental to maintenance of the minimum standard of living…that double payment must be made in the event of delay in order to insure restoration of the worker to that minimum standard of well-being.") (*emphasis added*) (*internal citations omitted*); *see also* Public Law 93-259.{ TA \l "Public Law 93-259" \s "Public Law 93-259" \c 2 }

But that is a different question from whether the Government had a statutory obligation to pay Plaintiffs wages during the shutdown. It did; and as a result of its failure, it also has an obligation to pay liquidated damages, unless it demonstrates good faith and reasonable grounds.

Further, contrary to the Government's suggestion, *Maine Community* does not address the question of what precise statutory language is needed to create a payment obligation (including whether explicit language on timing is required). No such issue was raised in *Maine Community.* Instead, the Supreme Court simply determined that a statutory obligation arose in the circumstances presented in *Maine Community*.

Resting on the incorrect assumption that the FLSA does not require payment on a specific date, the Government contends that the Anti-Deficiency Act does. *See* Def.'s Motion for Leave at 5. Specifically, the Government believes that this requirement is set forth in the 2019 amendments to the Anti-Deficiency Act, which, according to the Government, "eclipses" any FLSA obligation. *Id.*

Here, again, the Government's argument runs aground on the reasoning of *Maine Community.* There, the Supreme Court held that the Anti-Deficiency Act does not revoke the Government's statutorily-created obligations but rather "constrain[s] how federal employees and officers may make or authorize payments without appropriations." *Maine Community*, slip op. at 13. Accordingly, the Anti-Deficiency Act's 2019 amendments do not establish an obligation to pay employees on a certain date (or reprieve for missed payments before that date), but rather alter the constraints placed upon federal employees and officers by the Anti-Deficiency Act.

Even if the 2019 amendments created an obligation to pay federal employees as soon as appropriations were in place, this obligation cannot "eclipse" the Government's obligation to pay liquidated damage to employees affected by violations of the FLSA because it is not a proper abrogation of that requirement. As reiterated in *Maine Community*, "repeals by implication are not favored." *Maine Community*, slip op. at 16 (quoting *Morton v. Mancari*, 417 U. S. 535, 549 (1974)). And neither the text of the original Anti Deficiency Act nor the 2019 amendments

mention or refer to the FLSA, let alone expresses any intent to repeal it. *Id*. (explaining that intent to repeal must be "clear and manifest"). Nor are the two laws irreconcilable: the Government can pay its employees at the earliest date possible after appropriations are in place while at the same time being liable for liquidated damages due to the resulting FLSA violation.

In short, *Maine Community* is squarely at odds with the Government's position in this case and support Plaintiffs arguments. Accordingly, the Court should consider the *Maine Community* decision and deny the Government's motion to dismiss.

Respectfully submitted,

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CERTIFICATE OF SERVCE

I hereby certify that on this 14th day of May, 2020, a copy of the foregoing was filed via the CM/ECF filing system.

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