United States Court of Federal Claims

NOT FOR PUBLICATION
No. 95-285 C
August 16, 2005

Jackie Huggins, *et al.*,

***Plaintiff*,**

v.

United States of America,

Defendant.

OPINION AND ORDER

Block, *Judge*.

Plaintiffs in this case are a number of persons formerly or presently employed by the United States Department of Agriculture ("USDA") as Supervisory Agricultural Commodity Graders, commonly referred to in this litigation as "Shift Supervisors." The case is currently before the court under the Fair Labor Standards Act ("FLSA") for a determination of the proper quantum of damages to which the plaintiffs are entitled. In an earlier opinion, the court determined that plaintiffs were improperly classified by USDA as "supervisors" exempt from the overtime-pay provisions of the FLSA. *Huggins v. United States*, No. 95-285C, unpublished Opinion and Order (Mar. 24, 1999) (hereinafter "*Huggins I*"). In that opinion, the court recognized that while the plaintiffs did perform some limited supervisory functions, their actual job responsibilities were not primarily supervisory in nature and they should not have been exempted from FLSA overtime-pay requirements. *Id.* at 6. Familiarity with *Huggins I* is presumed for the purposes of this Opinion and Order.

Liability established, the parties now seek to resolve the remaining issue of damages and have filed cross-motions for partial summary judgment. Under the FLSA, an employer's exposure to damages for failure to properly pay an employee's overtime compensation is constrained by two provisions that are at issue here.

First, 29 U.S.C. § 255(a) (2000) imposes a two-year limitations period on any cause of action brought under the FLSA. In this case, the two-year limitation would render the government liable

only for improperly withholding overtime payments dating from June 7, 1992[1] to July 17, 1999.[2] Alternatively, § 255(a) includes an exception to the two-year limitations period in those cases where the cause of action arises "out of a willful violation;" in such cases, the period of limitations is three years, instead of two. 29 U.S.C. § 255(a). The crux of this case is the parties' dispute over whether the government's actions here constitute a "willful violation" of the FLSA and, therefore, which attendant period of limitations is appropriate. Relatedly, plaintiffs argue that even for those improperly withheld payments that lie outside of the applicable § 255(a) limitations period, the facts of this case warrant an equitable tolling, and therefore they should be entitled to collect damages dating all the way back to 1986 when defendant first mis-classified the Shift Supervisors as exempt.

The second relevant provision under the FLSA entitles an employee to "liquidated damages"—equal to the total of improperly withheld payments (in addition to the past wages due)—essentially, double damages. *See* 29 U.S.C. § 216(b) (2000). However, where the employer is able to demonstrate that it acted reasonably and in good faith, the court may choose either to not award "liquidated damages" at all or to award less than the full "double damages" provided by § 216(b). *See* 29 U.S.C. § 260 (2000). The parties here dispute whether the government has sufficiently demonstrated reasonableness and good faith when it mis-classified the plaintiffs as exempt from the FLSA overtime provisions and thereafter denied a formal administrative challenge to plaintiffs' "exempt" classification.

The parties filed their cross-motions for partial summary judgment on these damage issues in March and September of 2000. The case was then stayed pending settlement negotiations. In a November 2004 Joint Status Report, the parties reported that settlement was not then practical and asked the court to treat the cross-motions for partial summary judgment on damages as ripe for decision. The court subsequently instructed the parties to file supplemental briefing on this issue to address any developments in the law that had occurred in the five years during which this case was stayed. For the reasons that follow, the court concludes that equitable tolling is inappropriate here. On the remaining issues, some material issues of fact remain regarding defendant's willfulness and good faith that render those issues inappropriate for complete summary judgment, but some issues are ripe for judgment in defendant's favor. Accordingly, plaintiffs' motion for partial summary judgment will be denied, and defendant's motion for partial summary judgment will be granted-in-part and denied-in-part...

I. Background

Shift Supervisors in the New Orleans field office have a number of responsibilities related to grading and weighing grain. *Huggins I*, No. 95-285 at 3. "They perform on-line duties such as grading samples of grain and filling in for crew members as needed." *Id.* While the Shift Supervisors perform a limited number of supervisory-type duties, the majority of their time is spent on non-supervisory duties. *Id.* Despite this fact, in 1986, Shift Supervisors were classified by the

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[1] The original complaint in this case was filed June 7, 1994.

[2] Defendant began paying appropriate overtime in accordance with this court's liability decision on July, 17 1999. *See* Pl.'s Mot. for Part. Summ. J. at 7.

USDA as "executives" performing primarily supervisory duties and therefore exempt from FLSA overtime-pay provisions. To be sure, this court ruled that this classification was not accurate because the Shift Supervisors do not in fact perform duties that are primarily supervisory in nature. *See id.* at 4, 13; 29 U.S.C. § 213(a)(1) (2000).

Under the FLSA overtime provisions, employers are required to pay "compensation for . . . employment in excess of [40 hours per week] at a rate not less than one and one-half times the regular rate [of pay]." 29 U.S.C. § 207(a)(1) (2000). Since plaintiffs were incorrectly classified by USDA as exempt from the FLSA provisions, their overtime pay was instead calculated under the Federal Employment Pay Act ("FEPA") rate set forth in 5 U.S.C. § 5542(a) (2000). That FEPA provision establishes overtime guidelines for federal employees, but does not apply to a federal employee that is subject to the provisions of the FLSA. *See* 5 U.S.C. § 5542(c) (noting that individuals subject to the FLSA overtime provisions are excluded from coverage by FEPA overtime provisions). Under FEPA, the overtime hourly rate of pay for "an employee whose basic pay is at a rate which exceeds the minimum rate of basic pay for GS-10" is only "equal to one and one-half times the hourly rate of the minimum rate of basic pay for GS-10." 5 U.S.C. § 5542(a)(2).

Plaintiffs were all rated at the GS-11 pay rate. Under the FEPA overtime provisions, plaintiffs received one and one-half times the lower GS-10 hourly rate for each overtime hour they worked. By contrast, under the FLSA calculation of overtime pay that this court determined plaintiffs should have been entitled to, they would have received one and one-half times the higher GS-11 hourly pay rate (their regular rate). *Huggins I*, No. 95-285 at 4.

One issue in the parties' instant cross-motions for partial summary judgment is the process by which plaintiffs were uniformly mis-classified as exempt from the FLSA provisions in 1986. Through the early 1980s, plaintiffs allege that Shift Supervisors primarily performed supervisory duties. *See* Pl.'s Proposed Findings of Uncontroverted Fact ("PPFUF") ¶ 7; Pl.'s Mot. for Partial Summ. J. App. 43[3] (Aff. of Jimmie Wright). However, between 1982 and 1986, the Shift Supervisor position allegedly evolved to include more "on-line" responsibilities and fewer "supervisory" duties. *See* PPFUF ¶ 7; Pl.'s Mot. for Partial Summ. J. App. 23 at 1-2, 3 and App. 24 at 2 and App. 43.

Despite the fact that by 1986 plaintiffs' actual job responsibilities involved primarily on-line duties and only limited supervisory duties, Mr. John Marshall, then Director of the Federal Grain Inspection Service ("FGIS") Field Management Office, certified a job description of the Shift Supervisor position ("Form SJ-23") that indicated the position primarily involved supervisory-type responsibilities. PPFUF ¶ 8; Def.'s Proposed Findings of Uncontroverted Facts ("DPFUF") ¶ 3 and Ex. 1 at 4-8. While this court previously noted that "[t]here is no doubt that plaintiffs performed

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[3] Plaintiffs' several attachments to the Motion for Partial Summary Judgment, in several bound volumes, are self-styled as "Exhibits" and include, among others, deposition transcripts and affidavits. However, within some of these individual "exhibits" are other exhibits, such as documents reviewed during depositions or attachments to affidavits. So as to avoid confusion, the plaintiffs' individual attachments to the Motion for Partial Summary Judgment are referred to throughout this opinion as "Appendices" and abbreviated "App." The exhibits that are attached to an individual "Appendix" are referred to as "Exhibits" and abbreviated "Ex."

some job duties which were distinctly supervisory"—which indeed may have been partially consistent with the Form SJ-23 job description—the court concluded that "those duties do not exhibit enough of the characteristics of a supervisor . . . to justify classifying them as exempt from FLSA overtime requirements." *Huggins I*, No. 95-285 at 13.

The crux of both the good faith and willfulness issues is whether or not Mr. Marshall knew of the inconsistency between the actual responsibilities of the Shift Supervisor (which were primarily non-supervisory) and those outlined in the Form SJ-23 job description (which are primarily supervisory). The plaintiffs answer yes, alleging that Mr. Marshall was personally responsible for the transition in the Shift Supervisors' actual job responsibilities in the mid-1980s (*i.e.*, the gradual performance of more on-line duties and fewer supervisory duties) and imply that he had actual knowledge that Form SJ-23 subsequently filed in 1986 erroneously described plaintiffs' actual job responsibilities. *See* PPFUF ¶ 7-8; Pl.'s Mot. for Partial Summ. J. App. 23 at 2-3 (Affidavit of M. Russelburg) ("Mr. Marshall made frequent visits to all of the Field Offices after 1982 and observed us performing our on-line duties on many occassions. Because he had changed our duties, I cannot see how he could certify that those set forth in SJ23 . . . were correct."). On the other hand, defendant counters this allegation by claiming that Mr. Marshall's certification of Form SJ-23 presumptively demonstrated good faith because, according to his own signed statement contained in Form SJ-23, he obviously believed that the job description was an accurate statement of the major duties and responsibilities of the Shift Supervisor position. DPFUF ¶ 3 and Ex. A at 4.

Mr. Marshall's actions in conjunction with Form SJ-23 are critical because that job description was subsequently relied upon by John Schneider, the Deputy Director of Human Resources Division for the USDA Animal and Plant Health Inspection Service ("APHIS"), to classify plaintiffs' position under the FLSA and determine that they should be exempt from the FLSA provisions. *See id.* at 4-6. This classification, according to Mr. Schneider, was made in accordance with then-prevailing Office of Personnel Management ("OPM") regulations and FLSA guidelines. *See* DPFUF App. A (Decl. of John E. Schneider). Mr. Schneider certified this classification on Dec. 18, 1986. *Id.*

After they had been classified as "exempt" from the FLSA provisions, several of the plaintiffs allegedly raised complaints with various Field Office Managers who supervised the Shift Supervisor position. *See* Pl.'s Mot. for Partial Summ. J. Apps. 23-30 (Affidavits of M. Russelburg, L. Giles, N. Licciardi, J. Holmes, W. Shilling, C. Brinkley, H. Robinson, and L. Smith). With one exception, plaintiffs have not provided the court with any detailed information regarding these "complaints," such as when they were made, to whom they were raised, or the nature of the complaints.[4] The plaintiffs allege that, in response to the various complaints, they were uniformly "told the same thing, that the Regulations prohibited [them] from getting full FLSA overtime." *See, e.g.*, Pl.'s Mot. for Partial Summ. J. App. 23 at 2. The plaintiffs contend that they did not file a formal grievance to challenge their exempt classification because they feared reprisals from Mr. Marshall. *Id.*

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[4] The one exception was plaintiff Russelburg's allegation that the FLSA exemption had been raised specifically with David Shipman "at a conference in 1990," but Mr. Shipman advised that "Shift Supervisors were not receiving full FLSA overtime because that was prohibited by the Regulations." Pl.'s Mot. for Partial Summ. J. App. 23 at 3-4. In 1990, Mr. Shipman was the Assistant to Mr. Marshall.

In 1993, plaintiff Jackie Huggins consulted an attorney who noted that "several cases" might tend to support any challenge the Shift Supervisors would raise regarding their exempt status. *Id.* at 3. That attorney advised Mr. Huggins that a case could be made under the FLSA "where an exemption was based solely on a job description (classification) and not the work the Federal employee actually performed." *Id.* Shortly thereafter, plaintiffs challenged their "exempt" classification in a formal grievance filed with USDA. *Id.* at 3-4; DPFUF ¶ 7.

This grievance was initially reviewed by Daniel Schatzlein, a Position Classification Specialist with the Human Resources Division. DPFUF ¶ 8. Mr. Schatzlein determined that the plaintiffs were correctly classified as exempt from the FLSA provisions and recommended that their exemption be upheld. DPFUF ¶¶ 8-9. His recommendation was based primarily on the "official position descriptions" for the Shift Supervisor position, presumably Form SJ-23 certified by Mr. Marshall and Mr. Schneider. *See* Pl.'s Mot. for Partial Summ. J. App. 19, Ex. 3 (Letter from D. Schatzlein).

After being briefed on Mr. Schatzlein's recommendation, David Shipman—then Director, Field Management Division, FGIS—denied plaintiffs' grievance and upheld the FLSA exemption. *Id.* at Ex. 5; DPFUF ¶ 9-10. While Mr. Shipman noted that Shift Supervisors did regularly perform "on-line"-type work, he concluded that "the shift supervisor's primary duties are of a supervisory nature and are expected to occupy a substantial part of the job." Pl.'s Mot. for Partial Summ. J. App. 19, Ex. 5 at 2. He cited the supervisory responsibilities as the primary reason that Shift Supervisors were graded as GS-11 employees instead of GS-9, which was the maximum pay grade for the Shift Supervisors' on-line counterparts. *Id.* In denying the grievance, Mr. Shipman invited the Shift Supervisors to initiate an administrative review of the Shift Supervisor position description (Form SJ-23) and have that new description reviewed by a classification specialist. *Id.*

Mr. Shipman did not conduct a formal, in-person or on-site fact-finding investigation in connection with the plaintiffs' grievance. Pl.'s Mot. for Partial Summ. J. App. 18 at 16 (Deposition of Mr. Shipman). Instead, he relied on his own personal, day-to-day experience interacting with the Field Office Managers (who supervised the Shift Supervisors), which left him with "no question . . . that the reason [the Shift Supervisor positions] existed is that they were supervisors, and they were supervising the employees that were on the shift." *Id.* at 16, 18. Mr. Shipman also relied upon his own observations of the Shift Supervisor duties, which he made during regular visits to the field operation locations each year. *Id.* at 21-24. He also took into consideration the Form SJ-23 job description and consulted with his staff, the Human Resource staff, and Labor-Relations Specialist John Good. *Id.* at 13-14, 15, 21-22, 25-27. Mr. Good conducted an inquiry on behalf of Mr. Shipman about the Shift Supervisors' tasks; while he did not recall contacting any of the plaintiffs directly, he did consult with each of the Field Office Managers that directly oversaw plaintiffs' position. Pl.'s Mot. for Partial Summ. J. App. 19 at 28-29 (Good Deposition). He shared the information he learned with Mr. Shipman. *Id.* at 30

Plaintiffs appealed Mr. Shipman's decision to Dave Galliart, the Acting Administrator of the FGIS. DPFUF ¶ 15. Gary Schmidt, a Grievance Examiner with the Office of Personnel, was assigned to perform fact-finding and provide a recommendation on appeal. DPFUF ¶ 16. Mr. Schmidt advised the plaintiffs that his review and fact-finding would be based upon documentary evidence, and he offered them the opportunity to supplement the record with additional comments,

documents, or other evidence that they might wish considered in the appeal. *Id.* ¶ 17; Pl.'s Mot. for Partial Summ. J. App. 18, Ex. 1 at 2. Plaintiffs did not offer additional evidence to supplement the record. DPFUF ¶ 17.

Basing his factual findings solely on the job descriptions of record in Form SJ-23, Mr. Schmidt recommended upholding the "exempt" classification of the Shift Supervisor position, because Form SJ-23 described substantial supervisory responsibilities. Pl.'s Mot. for Partial Summ. J. App. 18, Ex. 1 at 5-6. In turn, Mr. Galliart relied on this fact-finding report and confirmed to plaintiffs that the Shift Supervisor was, in the opinion of the agency, properly classified as exempt from FLSA overtime provisions. Pl.'s Mot. for Partial Summ. J. App. 18, Ex. 2. In reaching this conclusion, Mr. Galliart also consulted with Kevin McGrath, who served as a Supervisory Employee-Relations Specialist with APHIS[5] and had previously worked for USDA as a Shift Supervisor, himself. *See* DPFUF ¶¶ 21-24. Based on his experience as a Shift Supervisor, Mr. McGrath believed that the agency's classification of the position complied with the FLSA. *See* Pl.'s Mot. for Partial Summ. J. App. 20 at 49.

After the grievance was denied, the plaintiffs filed their instant claim in the U.S. District Court for the Eastern District of Louisiana in 1994. The case was ultimately transferred to this court, and plaintiffs filed their proper amended complaint on May 26, 1995.

II. Discussion

A. Standard of Review

Under Rule 56(c) of the Rules of the Court of Federal Claims ("RCFC"), the court should grant a motion for summary judgment if it determines that no genuine issues of material fact exist and that the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987); *Paxson Elec. Co. v. United States*, 14 Cl. Ct. 634, 642 (Cl. Ct. 1988). Any reasonable inferences of fact that the court draws must be construed in the light most favorable to the nonmoving party. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Factual disputes that are merely tangential will not be regarded by the court in determining whether to grant summary judgment. *Anderson*, 477 U.S. at 247. A fact is tangential if it has no bearing on the ultimate outcome of the case. *Id.* If, however, the nonmoving party produces sufficient evidence demonstrating a disagreement of material fact, the motion for summary judgment should be denied. *Big Chief Drilling Co. v. United States*, 15 Cl. Ct. 295, 299 (Cl. Ct. 1988).

To aid the court in making these determinations, the moving party bears the burden of identifying both the legal and factual bases for its motions and the portions of the record that demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The nonmoving party may oppose a motion for summary judgment by showing an

[5] According to Mr. McGrath's deposition testimony, APHIS provided human resources support to FGIS at the time that plaintiffs' grievance was filed. *See* Pl.'s Mot. for Partial Summ. J. App. 20 at 11.

evidentiary conflict on the record, but mere denials or conclusory statements by the nonmoving party are insufficient to create an issue of fact that will preclude summary judgment. *Mingus*, 812 F.2d at 1387.

Where both parties have moved for summary judgment, the court is not obligated to grant judgment in favor of either party and may deny both motions if disputes of material fact remain. *Id*. In these circumstances, the court must evaluate each party's motion on its own merits, taking care to "draw all reasonable inferences against the party whose motion is under consideration." *Id.* at 1391.

B. Plaintiffs' Allegations Do Not Merit Equitable Tolling

Plaintiffs first argue that any applicable period of limitations in this case should be tolled because USDA officials allegedly "misled" the plaintiffs to believe that the plaintiffs had been properly classified under the FLSA and "that they had no redress" for their grievances. *See* Pl.'s Supp. Br., filed Mar. 3, 2005, at 2, 3. The gist of plaintiffs' tolling claim focuses on two key facts they have alleged. First, they claim that "during their employment with FGIS, [the plaintiffs] never saw a Notice of Coverage posted in any of the offices in which they work." Pl.'s Mot. for Partial Summ. J. at 8. According to the plaintiffs, the Department of Labor's (DOL) implementing regulations under the FLSA require employers to post a notice of the Act's coverage that explains where employees may seek information and guidance concerning FLSA complaints. The second fact upon which plaintiffs rely is the allegations made by several plaintiffs that frequent complaints to Field Office Managers and Mr. Shipman about plaintiffs' FLSA exemption were "invariably" answered with a reassertion by agency officials that plaintiffs were properly classified and that "the Regulations" prohibited them from receiving FLSA overtime pay. *Id.* According to the plaintiffs, it was not until 1992 or 1993, when one of the plaintiffs finally consulted a private attorney, "that Plaintiffs knew that they were wrongfully classified as exempt and entitled to full FLSA overtime." *Id.*

Summary judgment in favor of defendant on the equitable tolling issue is appropriate here because, even if the above facts were true, they would not satisfy the legal requirements for equitable tolling in a FLSA claim. This court finds persuasive the analysis recently set forth in *Christofferson v. United States*, 64 Fed. Cl. 316 (2005). There the court opined that while the weight of authority favors equitable tolling of FLSA claims, it is justified in only limited circumstances. *Id.* at 326. Indeed, as the Supreme Court has noted,

> Federal Courts have typically extended equitable relief only sparingly. We have allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass. We have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights.

Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 96 (1990).

Where, as here, the plaintiff claims to have been misled into allowing the filing deadline to pass by the government's statements or actions, the plaintiff bears the burden to "either show that [the government] has concealed its acts with the result that plaintiff[s] w[ere] unaware of their existence or [they] must show that [their] injury was 'inherently unknowable' at the accrual date." *Christofferson*, 64 Fed. Cl. at 326 (quoting *Japanese War Notes Claimants Ass'n v. United States*, 178 Ct. Cl. 630, 634 (1967); *Udvari v. United States*, 28 Fed. Cl. 137, 139 (1993)) (alterations in original).

In support of their argument, plaintiffs first posit the lack of a posted "Notice of Coverage" that is required by the DOL's implementing regulations (*see* 29 C.F.R. § 516.4) as evidence of defendant's concealment of the plaintiffs' rights under the FLSA. They point to three cases tending to suggest that failure to post a required Notice of Coverage could be evidence of misleading behavior that might justify equitable tolling. *See* Pl.'s Mot. for Partial Summ. J. at 9 (citing *Ott v. Midland-Ross Corp.*, 600 F.2d 24 (6th Cir. 1979); *Slenkamp v. Borough of Brentwood*, 603 F. Supp. 1298 (W.D. Pa 1985); *Kamers v. Summit Stainless, Inc.*, 586 F. Supp. 324, 328 (E.D. Pa. 1984)). Nevertheless, these cases stand for the proposition that the DOL's implementing regulations on notice apply to private sector employers.

Accordingly, plaintiff's argument is off the mark because it fails to consider the hard fact that the DOL does not administer the FLSA to federal employees, but rather the Office of Personnel Management (OPM) is charged with that task. *See* 29 U.S.C. § 204(f) (2000). As plaintiffs concede, unlike the DOL, the OPM implementing regulations "contain no provisions requiring posting of Notice of Coverage." Pl.'s Mot. for Partial Summ. J. at 7. Simply put, whatever the merits of the OPM's regulations that do not require a Notice of Coverage like its DOL counterpart, defendant can not be deemed to have concealed information from the plaintiffs by failing to comply with a regulatory requirement that did not apply to it. *See Doyle v. United States*, 20 Cl. Ct. 495, 501 (1990) ("OPM's decision to withdraw the requirement for agencies to display the [Notice of Coverage] poster was consistent with its authority to administer the FLSA . . . .").

Plaintiffs' second argument, that they were misled by defendant's repeated assertions that Shift Supervisors were properly classified and not entitled to greater overtime pay under the FLSA, is also deficient. According to plaintiffs, the fact that they repeatedly complained to superiors about their FLSA classification and were routinely—if inaccurately—informed that there was no redress for their complaints is sufficient grounds to justify equitable tolling. This identical argument was persuasively rejected in *Christofferson*:

> Even viewing the allegations in the light most favorable to plaintiffs, it is clear that they are not sufficient to justify equitable tolling. There is no evidence of concealment or secretive conduct which prevented plaintiffs from becoming aware of the alleged injury. *Japanese War Notes*, 178 Ct. Cl. at 634; *Udvari*, 28 Fed. Cl. at 139. It was plainly not inherently unknowable that the government would refuse to pay overtime. To the contrary, the facts alleged show that the government gave plaintiffs notice that it would not do so. The confusion lay in whether plaintiffs were legally entitled to overtime. The "[i]gnorance of rights which should be known," however, is not enough. *Japanese War Notes*, 373F.2d at 359. The fact that the agency took (and still takes) a different legal position on entitlement to overtime pay is not enough to warrant tolling.

Christofferson, 64 Fed. Cl. at 327. This analysis is consistent with other cases in which the mere assertion by an employer that the employee was being properly compensated under relevant FLSA provisions did not give rise to equitable tolling. *See e.g.*, *Doyle v. United States*, 931 F.2d 1546, 1549 (Fed. Cir. 1991); *Ewer v. United* States, 63 Fed. Cl. 396 (2005); *Udvari v. United States*, 28 Fed. Cl. 137, 140 (1993); *Nerseth v. United States*, 17 Ct. Cl. 660 (1989); *Moore v. Fairfield County Sheriff's Dep't*, No. C-2-02-748, 2004 U.S. Dist. LEXIS 27633 (S.D. Ohio Jan. 6, 2004); *Jacobsen v. Stop & Shop Supermarket Co.*, No. 02 Civ 5915 (DLC), 2004 U.S. Dist. LEXIS 17031 (S.D.N.Y. Aug. 27, 2004); *Kelly v. Eckerd Corp.*, No. 03-4087, 2004 U.S. Dist. LEXIS 4381 (E.D. Pa. Mar. 10, 2004); *Claeys v. Gandalf Ltd.*, 303 F.Supp. 2d 890 (S.D. Ohio 2004); *Patraker v. Council on the Env't*, No. 02 Civ. 7382 (LAK), 2003 U.S. Dist. LEXIS 20519 (S.D.N.Y. Nov. 17, 2003); *Russell v. Easter Seals Soc'y*, No. 96-384-SD, 1997 U.S. Dist. LEXIS 22221 (D.N.H. Nov. 20, 1997); *Aly v. Butts County*, 841 F. Supp. 1199 (M.D. Ga. 1994); *Allison v. Frito-Lay, Inc.*, No. 91-4193-C, 1992 U.S. Dist. LEXIS 8758 (D. Kan. Mar. 26, 1992); *Griffin v. Leaseway Deliveries, Inc.*, No. 02 Civ. 5915 (DLC), 1990 U.S. Dist. LEXIS 12389 (E.D. Pa. Sep. 17, 1990). *But see Hency v. City of Absecon*, 148 F. Supp. 2d 435, 439 (D.N.J. 2001).

Here, the plaintiffs knew that they had been classified as exempt from the FLSA overtime provisions and that the FEPA overtime provisions provided them less overtime pay. Indeed, as the plaintiffs readily concede, they "frequently complained" about this perceived inequity. Pl.'s Mot. for Partial Summ. J. at 8. Their acts are clear evidence that the plaintiffs were aware of the damage they were incurring, and the only ambiguity was the agency's legal classification of the Shift Supervisor position.

As *Christofferson* noted, however, the mere fact that the agency took a legal position—even though it later proved to be the wrong position—does not in law rise to conduct amounting to "detrimental reliance" justifying tolling. *See Christofferson*, 64 Fed. Cl. at 327. Instead, "plaintiffs here were clearly on notice that the government would not pay them [full FLSA] overtime. They therefore knew the underlying facts concerning the cause of action." *Id.*; *see also Doyle*, 931 F.2d at 1449 (noting that plaintiffs "had adequate opportunity to know of their claims against defendants and the opportunity, within a reasonable time, to file such claims"). Moreover, it is of no consequence here that plaintiffs only "knew they were wrongfully classified as exempt and entitled to full FLSA overtime" after consulting a private attorney in 1992 or 1993. Pl.'s Mot. for Partial Summ. J. at 8. It is enough in this case that the plaintiffs' actual knowledge that they were classified as exempt from FLSA overtime provisions reasonably should have alerted them to their cause of action. *See Christofferson*, 64 Fed. Cl. at 327; *Udvari*, 28 Fed. Cl. at 140. Accordingly, equitable tolling is inappropriate in this case and partial summary judgment in defendant's favor must be granted.

C. Summary Judgment on Statutory Period of Limitations and Liquidated Damages Issues

The two remaining issues taken up in the cross-motions for partial summary judgment are whether the plaintiffs should benefit from a two- or a three-year limitations period[6] and whether

[6] The plaintiffs have also raised an ancillary argument that instead of applying the two- or three-year limitations period called for in the FLSA this court should apply the six-year statutory limitations

defendant is liable for liquidated damages. Each of these issues involve related concepts of "willfulness," "good faith," and "reasonableness," but each are governed by distinct legal standards and require separate analyses.

1. The Applicable Period of Limitations under 29 U.S.C. § 255(a)

The default statutory period of limitations for a cause of action for unpaid overtime compensation under the FLSA is two years. 29 U.S.C. § 255(a). However, the two-year limitations period may be extended to three-years if the "cause of action aris[es] out of a willful violation" by the employer. *Id.* The plaintiff bears the burden of proving the employer willfully violated the FLSA. *Adams v. United States*, 350 F.3d 1216, 1229 (Fed. Cir. 2004). The legal standard of willfulness under the FLSA is a lofty one, because the Supreme Court has instructed that the plaintiff must prove "that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute." *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988).

In evaluating whether an agency has shown "reckless disregard" for the FLSA requirements, OPM regulations are instructive. They focus the court's inquiry on the *process* the agency follows to comply with the statute. *See* 5 C.F.R § 551.104 (2005) (defining reckless disregard as the "failure to make adequate inquiry into whether conduct is in compliance with the [FLSA]"); *Adams v. United States*, 46 Fed. Cl. 616, 621 (2000).

The actual interpretation of this standard in the courts has been less rigid, however. As this court has noted, "[t]he OPM regulations are secondary to the actual prescription of the Supreme

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period contained in the Little Tucker Act. *See* 28 U.S.C. § 2501 (2000); Pl.'s Mot. for Partial Summ. J. at 10-11. Plaintiffs have failed to present the court with any cogent argument for why the FLSA limitations period should be ignored and supplanted by the general jurisdictional limitation of § 2501. Instead, they have only presented the court with persuasive authority to the contrary. *See Ewer v. United States*, 63 Fed. Cl. 396, 398-400 (2005). The plaintiffs have articulated no rationale for why the six-year limitations period should be applied, and the court can think of none on its own. Indeed, the thorough analysis in the *Ewer* opinion, which clearly states that the Court of Federal Claims' six year period of limitations outlined in § 2501 is a *non sequitur* in FLSA cases, conclusively refutes the plaintiffs' argument.

The plaintiffs' brief does point the court to the case of *Lowry v. United States*, 125 Ct. Cl. 598 (1954) for the premise that "[i]t has been held that [28 U.S.C. § 2501] covers actions for overtime compensation under FLSA." Pl.'s Mot. for Partial Summ. J. at 11. That statement, however, is not true. *Lowry* took up the issue of the appropriate period of limitations for an overtime-pay claim that was brought under a Joint Senate Resolution and the War Overtime Pay Act of 1943. *See Lowry*, 125 Ct. Cl. at 598. That case had nothing to do with, nor made mention of, the FLSA and is inapposite to this case.

This court adopts the rationale espoused by *Ewer* and, to the extent that this particular issue was ever really in dispute between the parties here, partial summary judgment in favor of the defendant is granted.

Court in *McLaughlin*." *Angelo v. United States*, 57 Fed. Cl. 100, 109 (2003) (Damich, C.J.) (citing *Bankers Trust New York Corp. v. United States*, 225 F.3d 1368, 1375 (Fed. Cir. 2000) (noting the Supreme Court's "interpretation of a statutory provision trumps a subsequent agency interpretation that is inconsistent with the Court's precedent")). In *McLaughlin*, the Court deliberately distinguished between "ordinary violations" of the FLSA, which might fall within the OPM's more rigid standard of "reckless disregard," and those the Court deemed "willful:"

> In common usage the word "willful" is considered synonymous with such words as "voluntary," "deliberate," and "intentional" . . . . The word "willful" is widely used in the law, and, although it has not by any means been given a perfectly consistent interpretation, it is generally understood to refer to conduct that is not merely negligent.

McLaughlin, 486 U.S. at 134 (internal citations to Roget's Int'l Thesaurus omitted).

Therefore, not every mistake in applying the FLSA is a "willful" one. "If an employer acts unreasonably, but not recklessly, in determining its legal obligation" under the FLSA, this action should *not* be considered willful. *McLaughlin*, 486 U.S. at 135. Furthermore, there are circumstances in which an agency may shield itself from a willful violation of the FLSA by relying in good faith on the advice of the Secretary of Labor, *Cook v. United States*, 855 F.2d 848, 850 (Fed. Cir. 1988), or show that it relied on the advice of counsel as evidence that its violation was not willful. *See*, *e.g.*, *Bankston v. State of Illinois*, 60 F.3d 1249, 1254 (7th Cir. 1995); *Quirk v. Baltimore County*, 895 F. Supp. 773, 788 (D. Md. 1995).

a. Issues of Fact Remain Regarding Form SJ-23

Here, plaintiffs—in an effort to establish that the mis-classification of the Shift Supervisor position was willful—point to the alleged fact that Mr. Marshall certified the standard Shift Supervisor job description, Form SJ-23, to be accurate when in fact he had personal knowledge that the Shift Supervisors performed more on-line duties and fewer supervisory responsibilities than Form SJ-23 reflected. They claim that by 1986 Mr. Marshall knew that the Shift Supervisors no longer performed supervisory duties as their "primary duty" and therefore did not meet the OPM's criteria for an "executive" exemption under the FLSA. *See* 5 C.F.R. § 551.204 (1997). The role of Form SJ-23 in this case cannot be overlooked, because it was later relied upon by Mr. Schneider when he classified plaintiffs' position as exempt in 1986. Form SJ-23 was also relied upon, in primary part, during the review of plaintiffs' formal grievance in 1993. Accordingly, if Mr. Marshall did act against the plaintiffs' interest "willfully" by certifying SJ-23, that would be a factor for the court to consider in determining whether the three-year period of limitations was appropriate in this case.

In response to this allegation, defendant argues that there is an absence of evidence in the record that supports plaintiffs' claims. According to defendant, "plaintiffs have baldly asserted the self-serving proposition that Mr. Marshall's certification of plaintiffs' position description in 1986 was 'knowing, willful, and detrimental.' But . . . plaintiffs cannot cite to any evidence to support this untenable position." Def.'s Resp. and Cross-Mot. for Partial Summ. J. at 24. Instead, defendant points to Form SJ-23, itself, to establish as a matter of fact that Mr. Marshall acted in good faith when he certified the plaintiffs' job description. The certification that Mr. Marshall signed states:

> I certify that this is an accurate statement of the major duties and responsibilities of the position and its organizational relationships and that the position is necessary to carry out Government functions for which I am responsible. This certification is made with the knowledge that this information is to be used for statutory purposes related to appointment and payment of public funds and that false or misleading statements may constitute violations of such statute or their implementing regulations.

Pl.'s Mot. for Partial Summ. J. App. 19, Ex. 6 at 1. Buttressed by the "presumption of regularity" that attaches to the actions of government agencies and employees, *see Adams*, 350 F.3d at 1228 (citing *United States Postal Serv. v. Gregory*, 534 U.S. 1, 10 (2001)), defendant argues that this certification belies the plaintiffs' allegations of willfulness and contends that plaintiffs have failed to carry their burden of production on this issue.

Defendant's claims set up a classic *Celotex* issue. Plaintiffs bear the burden of proving defendant's willfulness. Defendant, however, has challenged that plaintiffs have "fail[ed] to make a showing sufficient to establish the existence of an element essential to [plaintiffs'] case." *Celotex*, 477 U.S. at 322. Accordingly, the burden at the summary judgment stage shifts to plaintiffs to demonstrate the kind of evidence contemplated by RCFC 56 that at least creates an issue of fact on the issue of willfulness, so as to ward off defendant's cross-motion for summary judgment. *See id.* at 324.

To meet this burden and demonstrate that Mr. Marshall knew that Form SJ-23 was not representative of the Shift Supervisors' actual job responsibilities or primary duties, plaintiffs rely upon the deposition testimony and affidavits of several plaintiff-employees. *See, e.g.*, Pl.'s Mot. for Partial Summ. J. App. 21-23. According to this evidence, plaintiffs allege that Mr. Marshall frequently visited the locations where the various plaintiffs worked and often observed them performing their on-line, non-supervisory duties. *Id.* Taken in a light most favorable to plaintiffs, proof of these allegations might permit the court to conclude that Mr. Marshall acted willfully or showed reckless disregard for the legality of his actions when he certified SJ-23, if he did indeed create and certify the form despite some actual knowledge that Form SJ-23 did not accurately reflect the plaintiffs' actual primary job responsibilities.

These competing allegations by the parties, bolstered by references to evidence in the record before the court, are sufficient to create an issue of fact regarding the integrity of Form SJ-23 that renders each party's cross-motion for summary judgment on this issue improper at this time. For the court to determine more, it would have to engage in a weighing of conflicting evidence that is inappropriate at this stage in litigation. Accordingly, the parties' cross-motions for summary judgment with respect to this limited issue shall each be denied.

b. Summary Judgment is Appropriate Regarding the Grievance Process

Plaintiffs also claim that defendant willfully violated the FLSA when it reviewed the plaintiffs' grievance in 1993. As this court did in *Huggins I*, the agency officials then were required to determine whether the Shift Supervisors customarily and regularly satisfied the "primary duty test" as outlined in OPM regulations. *See Huggins I*, 95-285C at 5 (citing 5 C.F.R. § 551.205). According to the regulations, the primary duty test would be satisfied if the Shift Supervisor position:

> (1) Has authority to make personnel changes that include, but are not limited to, selecting, removing, advancing in pay, or promoting subordinate employees, or has authority to suggest or recommend such actions with particular consideration given to these suggestions and recommendations; and
>
> (2) Customarily and regularly exercises discretion and independent judgment in such activities as work planning and organization; work assignment, direction, review, and evaluation; and other aspects of management of subordinates, including personnel administration.

5 C.F.R. § 551.205(a).[7] Here, "[t]here is no doubt that plaintiffs perform some supervisory duties. The issue is whether these duties constitute enough of their duties and are significant enough to classify plaintiffs as exempt executives." *Huggins I*, 95-285C at 6.

In light of the above standard, the important decisions that the agency officials were required to make in this case were really ones of degrees. Since the Shift Supervisor position is acknowledged to include a host of supervisory responsibilities, and the plaintiffs actually performed those duties to some degree in the course of their routine work, it was incumbent on the agency officials to weigh both the relative importance and extent of those supervisory duties during the grievance review process. *See, e.g.*, Pl.'s Mot. for Partial Summ. J. App. 19 at 27-28 (Good Deposition) ("In reading [the grievance], there was an acknowledgment that some of the nonsupervisory work was being done [by the Shift Supervisors]. I don't believe that that was ever ignored. . . . It was always known that it was done. It was more a matter of degree that was the issue."). However, there did not appear to be any bright-line rule that the agency officials could rely upon to simplify that evaluation. Even though the Shift Supervisors routinely spent less than 25% of their time on supervisory duties, *see Huggins I*, 95-285C at 7, this court noted that such a measure is not dispositive of the issues:

> We recognize that the general rule-of-thumb—that an employee's primary duty is that to which he devotes more than 50% of his time—may be varied. *See Dalheim v. KDFW-TV*, 918 F.2d 1220, 1227 (5th Cir. 1990). Thus, a primary duty may be a duty that is most important to an employer, even if more time is spent on collateral duties. *Smith v. City of Jackson, Miss*., 954 F.2d 296, 299 (5th Cir. 1992). We will look at the totality of plaintiffs' actual job performance to determine plaintiffs' most important, or primary, duty.

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[7] Sub-paragraph (b) of 5 C.F.R. § 551.205 imposes an additional burden on the employer, who must demonstrate that the employee satisfies the "80-percent test" in addition to the "primary duty test." Under the 80-percent test, "employees must spend 80 percent or more of the worktime in a representative workwee on supervisory and closely related work." 5 C.F.R. § 551.205(b). The 80-percent test only applies to a narrowly defined class of employees, however, and that class does not include plaintiffs here. *See id.* (extending sub-paragraph (b) to GS-5 or GS-6 employees, certain firefighters and law enforcement employees, and certain employees classified under the Federal Wage System); *Huggins I*, No. 95-285C at 7 n.4 ("None of the plaintiffs in this action are within any of the employee groups to which the 80% test applies."). As a result, the 80-percent test is not at issue in this case.

Id.

Accordingly, the standard that the agency officials were required to apply in reviewing plaintiffs' grievance was certainly open to subjective interpretation. "Proof that the law is uncertain, ambiguous or complex may provide reasonable grounds for an employer's belief that he is in conformity with the Act, even though his belief is erroneous." *Beebe v. United States*, 226 Ct. Cl. 308, 640 F.2d 1283 (1981); *Angelo*, 57 Fed. Cl. at 105. Furthermore, in general the courts have done little to clear up any of this ambiguity; indeed, they may in part contribute to some of the gray area that seems to surround FLSA overtime classifications: "[The Court of Claims] has taken almost every conceivable position with regard to overtime. Consequently, an employee seeking overtime can likely find an opinion of this court that fits his situation regardless of what it may be." *Anderson v. United States*, 201 Ct. Cl. 660, 675 (1973) (Skelton, J., dissenting); *Doe v. United States*, 54 Fed. Cl. 404, 410 (2002).

It is against this framework that defendant's actions here must be viewed on the "willfulness" issue. Coupled with the allocation of the burden of proof, the presumption of regularity that attaches to the actions of government officials, and the Supreme Court's counsel that not every mistake in applying the FLSA is a "willful" one, it is a heavy burden plaintiffs must bear to obtain the benefit of the three-year limitations period. Defendant has challenged that plaintiffs have not demonstrated any facts that would support their burden of proof, and unless plaintiffs come forward with facts that support their position and create an issue of material fact, summary judgment is appropriate. *See Celotex*, 477 U.S. at 324.

To support their position, plaintiffs assert three key arguments that the grievance review process was legally deficient and that agency officials therefore recklessly disregarded the FLSA requirements. First, plaintiffs challenge defendant's repeated reliance on the job description in Form SJ-23 as a basis for upholding the FLSA exemption. Second, they point out that no on-site assessment of the Shift Supervisor position was ever performed and that agency officials instead relied on their own personal familiarity with the position to evaluate the Shift Supervisors' actual duties. Third, plaintiffs allege that none of the agency officials solicited the opinion or advice of an agency attorney at any point during the grievance review process.

For the reasons discussed below, the court finds no error with any of these individual alleged procedural flaws. When viewed in the context of the entire grievance review process that defendant employed, the individual steps appear consistent with the scheme of the FLSA.

The primary thrust of plaintiffs' argument is the allegation that throughout the grievance process agency officials relied primarily on the "job classification" embodied in Form SJ-23 and that such reliance implicitly contravenes established caselaw with which defendant should have been familiar. *See* Pl. Mot. for Partial Summ. J. at 21-24, 30-31. Plaintiffs place great weight on the case of *American Federation of Government Employees v. Office of Personnel Management*, 821 F.2d 761 (D.C. Cir. 1987) (hereinafter "*AFGE*"), which invalidated an OPM regulation that established a "presumption" that federal employees classified as GS-11 or higher on the federal pay scale are "executives" that are exempt from FLSA overtime provisions. *See AFGE*, 821 F.2d at 770-72.

As plaintiffs would make it seem, defendant's reliance on the job description in Form SJ-23 to determine a FLSA exemption is akin to the prohibited practice of exempting an employee from the FLSA merely because of his payscale classification (*i.e.*, GS-11 or higher). The connections that plaintiffs draw between Form SJ-23 and the *AFGE* case are not entirely clear. Plaintiffs divine from *AFGE* a rule that "exemption by classification only" is prohibited under the FLSA. In turn, they seem to imply that in this case defendant has adhered to an "exemption by classification only" approach because the agency officials relied on the job description during the grievance process.

Plaintiffs' argument about the role of Form SJ-23 in this case seems to misapply the cited *AFGE* "rule." Clearly, as stated in *AFGE*, a federal employer may not rely upon an employee's pay classification to create a presumption that the employee is an executive and therefore exempt from the FLSA. *AFGE*, 821 F.2d at 770-71. Here, though, there is no indication that the plaintiffs' pay scale was used to create any kind of a "presumption" of exempt status in the grievance review process. At best, agency officials at times relied on the plaintiffs' GS-11 classification to buttress their conclusions that plaintiffs were, in theory if not practice, performing primarily supervisory duties. The officials relied upon the fact that plaintiffs were paid on the GS-11 scale as additional evidence that plaintiffs did perform supervisory duties because the employees that the Shift Supervisors managed were only paid at the GS-9 rate. *See, e.g.*, Pl. Mot. for Summ. J. App. 18, Ex. 1 at 6 (Feb. 4, 1994 Findings and Recommendation from Gary Schmidt) ("If the grievants do not perform supervisory duties at a level sufficient to exempt them from the FLSA, the GS-11 classification level of their positions may be in question as there may be nothing to set them apart from the GS-9 employees which their position descriptions indicate they supervise.").

Indeed, rather than relying on plaintiffs' pay scale classification, the agency officials at each step in the grievance review process seemed to rely heavily on SJ-23 as an accurate statement of what the plaintiffs' actual job responsibilities were. To the extent that SJ-23 inaccurately captured what the Shift Supervisors did in practice, rather than in theory, the grievance review process would of course be tainted by the same inaccuracies. The court sees no reason, however, why the Shift Supervisor job description could not or should not have been a viable source of information for agency officials reviewing plaintiffs' grievance. While plaintiffs imply that relying on the job description is somehow synonymous with a practice invalidated by *AFGE*, this court can discern no parallel between the two and rejects the plaintiffs' implicit argument that the job description cannot or should not be relied upon in making FLSA classification decisions. *See*, *e.g.*, *Statham v. United States*, No. 00-699C, 2002 WL 31292278 at *9 (Fed. Cl. Sept. 11, 2002) (concluding that plaintiff had not succeeded in proving willfulness based on evidence that the classification specialist relied primarily on an updated position description).

The job description cannot, however, be the sole basis for any FLSA decision. As plaintiffs rightly point out, an FLSA exemption must be based upon the duties an employee actually performs, rather than those he is expected to perform—*i.e.*, those that might be contained in a job description. *See* Pl. Mot. for Partial Summ. J. at 24; 5 C.F.R. § 551.202. While the job description is certainly appropriate evidence of the duties an employee performs, it alone may not be sufficient evidence on which to base a FLSA classification decision, depending on the circumstances. *See Statham*, 2002 WL 31292278 at *4 (citing an April 1998 OPM training manual that instructed classification specialists to "[v]erify the accuracy of position descriptions" and noting that plaintiff in that case had requested a revision to the position description at issue).

In turn, the plaintiffs' second main argument challenges the fact-finding procedures defendant used to verify the accuracy of the Form SJ-23 job description because no agency officials ever visited directly with plaintiffs or evaluated them performing their jobs as part of the grievance review. *See* Pl. Mot. for Partial Summ. J. at 27-30. As the argument goes, without conducting any in-person inquiry about the Shift Supervisor's actual job responsibilities, the agency officials lacked any foundation to determine what the position's *actual* responsibilities entailed.

The first flaw in plaintiffs' argument is that it fails to take into consideration the fact that a number of officials involved in the grievance review had personal familiarity with the Shift Supervisor position and were able to bring that familiarity to bear on any evaluation of the job description in Form SJ-23 to assess its accuracy. While this reliance on personal familiarity with the Shift Supervisor position was ultimately faulty, it cuts against the plaintiffs' argument that the grievance review was conducted in a reckless manner. So, while *some* agency officials did rely *solely* on Form SJ-23 in making their classification decisions, the process was not undermined because, collectively, the review process benefitted from the personal familiarity that some evaluators brought to the table.

Mr. Shipman, the Director of the Field Management Division, FGIS, was the first to rule on plaintiffs' grievance and he conceded that he conducted no formal fact-finding investigation. Pl. Mot. for Summ. J. App. 18 at 17-18. In Mr. Shipman's opinion, he had personally interacted with the Shift Supervisors and observed them performing their responsibilities and was comfortable that the job description was an accurate reflection of those responsibilities. Mr. Shipman actively went out in the "field" and observed operations involving the Shift Supervisors. *Id.* at 22-23. His decision-making in the grievance process was driven in-part by his "day-to-day experience and working with the field office managers who do work with [the Shift Supervisors] on a day-to-day basis" and his own "firsthand knowledge of shift supervisors." *Id.* at 18, 21. Based on his personal observations, Mr. Shipman "felt very confident that [he] knew what the Shift Supervisors' duties were" and "under[stood] what the shift supervisors do;" it was "clear" to him that the Shift Supervisors performed in a supervisory role. *Id.* at 16-18, 22. Mr. Shipman also understood that the Shift Supervisors performed some on-line duties, but this did not upset his ultimate conclusion that the *primary* duties of the Shift Supervisor were supervisory in nature. *Id.* at 2. Moreover, he relied in part on the advice of John Good, a labor relations specialist who had made direct inquiries with the Field Office Managers who supervised the plaintiffs.

Mr. Shipman approached the plaintiffs' FLSA classification from the perspective of the agency employer and he seemed to focus on the *raison d'etre* of the Shift Supervisor position *vis-a-vis* the other on-line commodity-grader positions that the Shift Supervisors oversaw. As noted above, "a primary duty [under the FLSA] *may* be a duty that is *most important to an employer*, even if more time is spent on *collateral duties*." *Huggins I*, 95-285C at 7 (emphasis added) (citing *Smith*, 954 F.2d at 299). According to Mr. Shipman, from the perspective of the employer-agency, "there was no question in my mind that the reason [the Shift Supervisors'] positions existed is that they were supervisors, and they were supervising the employees that were on the shift." Pl.'s Mot. for Partial Summ. J. App. 19, Ex. 5 at 16. In his opinion, and based on his observations and familiarity with the organizational structure, "primarily their responsibility, the reason they were there, the reason they were on that shift was to supervise the crew." *Id.* at 20.

Mr. Shipman's opinion regarding the Shift Supervisors' primary duty from the employer's perspective was also buttressed by the fact that Shift Supervisors were paid at the GS-11 scale instead of the GS-9 scale. Again, while this fact is not alone enough to support the plaintiffs' FLSA exemption, it *is* relevant evidence that the employer placed substantial value on those duties that the Shift Supervisors performed that their GS-9 on-line counterparts did not—namely, the supervisory duties.

Furthermore, when plaintiffs appealed the initial denial of the grievance, agency officials consulted with Kevin McGrath, an Employee-Relations Specialist who had personally served as a Shift Supervisor earlier in his career. As a labor specialist, Mr. McGrath was familiar with employment issues and the FLSA. Nonetheless, there was nothing in the agency's decision or handling of the grievance process that raised concern with Mr. McGrath. He was comfortable that the agency's decision was consistent with both the FLSA requirements and the actual primary responsibilities of the Shift Supervisor position. *See* Pl.'s Mot. for Partial Summ. J. App. 20 at 49.[8]

The second flaw in plaintiffs' argument that the fact-finding in the grievance process was deficient is that it overlooks the fact that the plaintiffs never requested a review or reevaluation of the job description contained in SJ-23. *Cf. Statham*, No. 00-699C, 2002 WL 31292278 at *4 (plaintiff

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[8] At Mr. McGrath's deposition, the following exchange took place:

> Q: And you also, I believe, testified that you held the position of Supervisory Agricultural Commodity Grader, FGIS, for two years, from January 1984 to January 1986. Is that correct?
>
> A: That's correct.
>
> Q: And is that the position that is the subject of this litigation?
>
> A: Yes.
>
> Q: Now, based on your 22 years' experience with the Department of Agriculture and your two years' experience holding this exact position and your knowledge of this case, did you believe that the agency decision was in compliance with the Fair Labor Standards Act?
>
> A: Yes, I did.
>
> . . . .
>
> Q: Did you have any reason to believe that the agency willfully violated the Fair labor Standards Act?
>
> A: No.

Pl.'s Mot. for Partial Summ. J. App. 20 at 49. Later in his deposition, Mr. McGrath was asked whether his "experience working [as a Shift Supervisor] [had] anything to do with the way [he] made up [his] mind, or was that based solely on the record of the grievance?" Mr. McGrath answered that he based his approach to the grievance "[s]olely on the record." *Id.* at 52-53.

met with classification specialist and specifically "discussed the fact that he believed his position description did not accurately reflect the work he actually performed"). Here, plaintiffs did not request a formal review of Form SJ-23, even though they were provided two separate opportunities to do so. Mr. Shipman's initial denial of the grievance apprised plaintiffs of the opportunity to have the job description re-evaluated and, if need be, updated. *See* Pl.'s Mot. for Partial Summ. J. App. 19, Ex. 5 at 2. Plaintiffs did not avail themselves of this opportunity. Similarly, plaintiffs were specifically placed on notice that their appeal of Mr. Shipman's grievance decision would be based solely on documentary evidence in the record, but did not supply any additional information. *See* Pl.'s Mot. for Partial Summ. J. App. 18, Ex. 1 at 2 (letter from Mr. Schmidt).

Given the circumstances, the court cannot conclude that it was a manifest error, or "reckless disregard" for the FLSA standards, for defendant to evaluate plaintiffs' grievance without conducting a formal fact-finding review. The agency officials had before them record evidence of what the Shift Supervisor position entailed (Form SJ-23), as well as an institutional familiarity with the position's responsibilities that came in the form of individuals that either personally held the Shift Supervisor position (Mr. McGrath) or routinely interacted with or evaluated Shift Supervisors in the context of his regular job responsibilities (Mr. Shipman). Plaintiffs were provided an opportunity to formally call into question the accuracy of Form SJ-23 or develop the record, but they failed to take advantage of either.

Finally, plaintiffs challenge the grievance review process on the ground that defendant did not at any point seek the advice or opinion of an attorney familiar with FLSA standards. Plaintiffs have not cited to any authority that requires such a consultation, and this court can find none. While good faith compliance with an opinion from an attorney may be affirmative evidence that the employer acted in compliance with the FLSA, the opposite is not the case. Failure to consult an attorney is not, in and of itself, any indication that the employer proceeded with "reckless disregard" for the FLSA standards.

Here, the agency officials consulted various materials and employee relations experts to reach their ultimate conclusions. Mr. Schatzlein, on whose opinion Mr. Shipman relied in part, consulted a half-dozen official sources of FLSA information, including a Classifiers' Column (a professional periodical that tracks developments in federal employment law), relevant federal regulations and statutory provisions, and Federal Personnel Manual letters. *See* DPFUF ¶¶ 8, 9. Mr. Shipman himself consulted with his Human Resources staff and labor-relations specialist, John Good. Pl.'s Mot. for Partial Summ. J. App. 19, Ex. 5 at 13-14, 15, 21-22, 25-27. During the appeal, Mr. Galliart consulted with Mr. McGrath, a Supervisory Employee-Relations Specialist. Given the professional experience these officials had dealing with FLSA and other labor issues, as well as the relevant literature, regulatory and statutory provisions that they reviewed, the court finds no error in the fact that an attorney's opinion was not solicited. Indeed, a review of relevant caselaw in this Circuit reveals no such requirement and plaintiffs have not demonstrated any particular usage of the labor-relations profession that would counsel such a step.

Ultimately, then, the court finds no legal error in the alleged procedural deficiencies that plaintiffs point to in the grievance process. None of them would cause the court to determine that defendant's violation of the FLSA here was "willful." Furthermore, plaintiffs have failed to point to

the type of evidence contemplated by RCFC 56 that creates any questions of material fact on this issue. Accordingly, plaintiffs' motion for summary judgment on these issues will be denied, and defendant's cross-motion for summary judgment on these limited issues shall be granted.

2. Liquidated Damages under 29 U.S.C. §§ 216(b) and 260

The second key issue yet in dispute is the amount of statutory damages to which plaintiffs are entitled. Since this court has already determined that plaintiffs were wrongfully denied proper overtime compensation, they are entitled to an amount of liquidated damages under 29 U.S.C. § 216(b) equal to, and in addition to, the amount of overtime pay already due to them. This is, in effect, a "double damages" recovery that is mandated by statute. *See Angelo*, 57 Fed. Cl. at 104. There is a carve-out exception to this rule, though, in those cases where the employer can show "to the satisfaction of the court that the act or omission giving rise to [wrongful denial of overtime payments] was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the [FLSA]." 29 U.S.C. § 260. The burden of proving "good faith" and "reasonable grounds" lies squarely on the employer defendant. *Id.*; *Angelo*, 57 Fed. Cl. at 104.

Even if the defendant succeeds in demonstrating good faith and reasonable grounds for the FLSA violation, the liquidated damages award does not automatically vanish, but instead falls within the discretion of the court which may award some amount of liquidated damages less than the full "double damages" or, alternatively, no liquidated damages at all.[9] 29 U.S.C. § 260. As this court has

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[9] *But see Doyle v. United States*, 931 F.2d 1546, 1550-51 (Fed. Cir. 1991) (citing *Library of Congress v. Shaw*, 478 U.S. 310 (1986)). The "discretion" that this court has under § 260 appears to be constrained when the defendant is the United States government. An implication of the limited waiver of sovereign immunity, the court does not have discretion to make an award of liquidated damages that is premised on the concepts of interest or "delay damages"—a consideration that might be particularly inviting in a case like this, where the plaintiffs were improperly denied full FLSA overtime compensation for nearly twenty years. As the Federal Circuit noted:

> This discretion to award liquidated damages, however, does not extend to a liquidated damages award for interest or delay damages against the United States. In *Shaw*, the Supreme Court held that Congress must expressly waive the Government's sovereign immunity from suits for interest payments before claimants can recover interest or delay damages. Neither § 216 nor § 260 expressly waives the Government's sovereign immunity against interest. Sections 216 and 260 do not refer to interest. These sections authorize payment of liquidated damages, not interest.
>
> . . . .
>
> To the extent plaintiffs seek damages for delay, *Shaw* bars recovery. In *Shaw*, the Supreme Court drew no distinction between interest and delay damages. . . . "Interest and a delay factor share an identical function. They are designed to compensate for the belated receipt of money. The no-interest rule has been applied to prevent parties

noted, "there is a 'strong presumption under the statute in favor of doubling.'" *Angelo*, 57 Fed. Cl. at 104 (quoting *Shea v. Galaxie Lumber*, 152 F.3d 729, 733 (7th Cir. 1998)). "[D]ouble damages [are] the norm and single damages the exception." *Id.* (quoting *Herman v. RSR Sec. Servs.*, 172 F.3d 132, 142 (2d Cir. 1999)) (alterations in original).

In this case, defendant argues that its officials acted in good faith and had reasonable grounds for concluding that plaintiffs were exempt from the FLSA overtime provisions.[10] It has filed a cross-motion for summary judgment on this issue and maintains that plaintiffs are not entitled to § 216(b) liquidated damages. Plaintiffs, on the other hand, argue that defendant's actions demonstrate a manifest *lack* of good faith and seek summary judgment awarding them § 216(b) liquidated damages.

> from holding the United States liable on claims grounded on the belated receipt of funds, even when characterized as compensation for delay."

Doyle, 931 F.2d at 1550 (quoting *Shaw*, 478 U.S. at 321-22) (internal citations to *Shaw* omitted).

[10] Plaintiffs initially argue that the provisions of § 260 are an affirmative defense that defendant was required—and failed—to plead in its answer under RCFC 8(c). RCFC 8(c) sets out a nonexclusive list of affirmative defenses, including "any other matter constituting an avoidance or affirmative defense." RCFC 8(c). "[I]n determining what defenses other than those listed in Rule 8(c) must be pleaded affirmatively, resort often must be had to considerations of policy, fairness [and] whether plaintiff will be taken by surprise by the assertion . . . of a defense not pleaded affirmatively by the defendant." *Statham*, 2002 WL 31292278 at *10 (quoting 5 WRIGHT AND MILLER, FEDERAL PRACTICE AND PROCEDURE, § 1271 at 80 (2002 Supp.)).

The court does not view the § 260 "defense" as an affirmative one. There is no reason here to suggest that plaintiffs are caught by surprise that defendant seeks the cover of § 260, nor is there any inherent unfairness in defendant retreating to that position now that liability has been established. Moreover, in its answer defendant made a general denial to the specific allegations contained in paragraph 9 of plaintiffs' complaint, which alleged that defendant's FLSA violations had been "willful, knowing and without due regard for Plaintiffs' rights" and that "each Plaintiff is entitled to recover liquidated damages . . . under the provisions of 29 U.S.C. § 216(b)." Compl. at ¶ 9 (filed May 26, 1995); Answer at ¶ 9 (filed Sept. 5, 1995). Defendant's denial that plaintiffs were entitled to liquidated damages under § 260, coupled with the denial that its actions were willful is "certainly enough to put plaintiff on notice that it would utilize the good faith defense." *Statham*, 2002 WL 31292278 at *10.

In addition, RCFC 15(a) permits the pleadings to be amended by leave of the court "when justice so requires." Since this is not a case where the court believes that plaintiffs have in any way been prejudiced by defendant's failure to specifically plead good faith as an affirmative defense in its answer—if that were required—the court would not have opposed such an amendment in this case. The instant cross-motions for partial summary judgment and the issues raised in them were filed nearly five years ago, and the parties have had ample opportunity to supplement their briefs. Accordingly, defendant's invocation of § 260 will be treated as having been properly plead. *See id.*

The inquiry the court must make under 29 U.S.C. § 260 involves a two-part analysis that focuses on both subjective and objective standards. To determine whether agency officials acted in "good faith"—a seemingly amorphous concept—the court must engage in a subjective evaluation of whether the officials had "an honest intention to ascertain what the Fair Labor Standards Act requires and to act in accordance with it." *Beebe v. United States*, 640 F.2d 1283, 1295 (Ct. Cl. 1981); *Angelo*, 57 Fed. Cl. at 105. By contrast, to determine if they "had reasonable grounds for believing that [the] act or omission was not a violation of the [FLSA]" the court must make an objective inquiry. *Beebe*, 640 F.2d at 1295. To claim the § 260 exception, the defendant employer must satisfy both prongs of the analysis because they are conjunctive. 29 U.S.C. § 260 ("[i]f the employer shows . . . such action was in good faith *and* that he had reasonable grounds . . .") (emphasis added).

"The burden of proving good faith is substantial." *Angelo*, 57 Fed. Cl. at 105 (citing *Vega v. Gasper*, 36 F.3d 417, 427 (5th Cir. 1994)). As this court has noted, "[t]o establish good faith, the employer must take active steps to ascertain the dictates of the FLSA and then act to comply with them." *Id.* (quoting *Herman*, 172 F.3d at 142). In the context of a § 260 review, defendant may not fall back on the "presumption of good faith" that often attaches to the actions of government officials (and, indeed, was cited by the court above) because

> the normal presumption of good faith runs squarely counter to the operation of Sections 216(b) and 260. The net effect of those provisions is that the employer is presumed to be liable for liquidated damages unless it can establish a defense based on good faith and reasonable conduct. No exception is set out in the code for a government defendant.

Adams, 46 Fed. Cl. at 620. Furthermore, the issue of whether an employer acts with subjective good faith is inherently fact-intensive. Most often, such an evaluation requires the presentation of testimony, but "testimony" is not limited only to statements made at trial and may encompass other types of statements offered under oath. *Angelo*, 57 Fed. Cl. at 105 & n. 6 (citing BLACK'S LAW DICTIONARY 1485 (7th ed. 1999)).

a. Issues of Fact Remain Regarding Form SJ-23

The same concerns regarding the certification of Form SJ-23 and the Shift Supervisor job description that were discussed above must be echoed here. Form SJ-23 was the driving force behind the initial exempt classification plaintiffs received in 1986, and was an integral piece to the reviews of plaintiffs' subsequent grievance in 1993-1994. For the very same reasons that the court is unable to conclude whether Mr. Marshall willfully violated the FLSA when he certified the job description, it is unable to determine whether that form was certified in good faith. Accordingly, the parties cross-motions for summary judgment on this issue will both be denied because genuine issues of material fact remain.

b. The Grievance Review Process

First, as some evidence that it was not acting in *bad faith*, defendant points to the fact that plaintiffs were not denied overtime pay in the entirety, but were instead compensated under the FEPA provisions (albeit at a slightly lower rate than the FLSA provides). According to defendant, this

shows some degree of good will on the part of defendant to fully compensate plaintiffs under the provisions that defendant thought best applied to them. Def.'s Mot. for Partial Summ. J. at 9-10 (citing *Rau v. Darling's Drug Store, Inc.*, 388 F. Supp. 877, 887 (W.D. Pa. 1975) ("Additionally, the bonuses that were paid, although not found by this Court to be credits toward overtime, are, nevertheless, further evidence of the good will that was present during most of the period in question. Of course, the existence of good will does not necessarily comport with good faith compliance with the [FLSA], but, taken in consideration with all the evidence in the case, the Court is satisfied that [the employer] desired [the employee] to receive adequate compensation for her very valuable services . . . .")).

As for the grievance review process itself, defendant maintains that the review was conducted with all due care and that the actions of the agency officials and the thoroughness of the review process implicitly demonstrate both good faith and reasonableness. According to defendant, the undisputed facts before the court demonstrate that agency officials did take affirmative steps to ascertain the dictates of the FLSA and those officials believed that they were making decisions consistent with those requirements when they classified the Shift Supervisors as "executives."

Defendant notes that in making the initial grievance decision, Mr. Shipman consulted an array of personnel authorities to develop his understanding of the FLSA requirements. He reviewed the Form SJ-23 job description, and reviewed the OPM regulations that guided the "executive" FLSA exemption. Pl.'s Mot. for Summ. J. App. 18 at 27. He had the initial recommendation of Mr. Schatzlein, a Position Classification Specialist with the Human Resources Division, before him. Mr. Schatzlein had himself reviewed the statutory and regulatory provisions governing FLSA exemptions and other personnel literature. Mr. Shipman sought input from his Human Resource staff, including Mr. Good, which was the agency department responsible for providing advice on such personnel matters. *Id.* at 13-14. In Mr. Shipman's opinion, he "had received guidance from the experts in this area telling [him] that [the Shift Supervisor] job was properly classified" as exempt. *Id.* at 40. He was "confident that the guidance [he] was receiving from [the] human resource staff was correct." *Id.* at 15. Both Mr. Shipman and Mr. Good acknowledged that plaintiffs were performing a mix of supervisory and "on-line" duties, but interpreted the primary duties of the Shift Supervisors to be sufficiently supervisory in nature to justify an "executive" exemption. Def.'s Cross Mot. for Partial Summ. J. at 18-21.

Similarly, the plaintiffs' appeal of Mr. Shipman's grievance decision was handled by the agency in a manner that suggests input from multiple professionals who drew on professional knowledge and personal familiarity with the Shift Supervisor position. Mr. Schmidt conducted a record based review of the appeal and recommended that the classification be upheld. His recommended decision referenced the appropriate "primary duty" test in 5 C.F.R. § 551 and he evaluated plaintiffs' responsibilities regarding both personnel decision-making (*see* 5 C.F.R. § 551.205(a)(1)) and customary managerial-type tasks (*see* 5 C.F.R. § 551.202(a)(2)). Pl.'s Mot. for Partial Summ. J. App. 18, Ex. 1 at 2-7 (Recommendation of Mr. Schmidt). This recommendation was passed along to Mr. Galliart, who made the ultimate agency decision after consulting with his Employee-Relations staff. This staff included the aforementioned Mr. McGrath, who had personally served as a Shift Supervisor before he became an employment specialist.

At the very least, the facts that defendant points to create a *prima facie* showing of good faith and reasonableness on the part of defendant in reviewing plaintiffs' grievance. The individuals involved in the grievance review appear to have taken affirmative steps to determine what the scope of the FLSA was and what the statutory and regulatory guidelines required of the agency. The officials reviewed relevant material, evaluated the facts before them in light of that material, and appear to have made a quintessential *judgment call* in trying to balance the agency's view that Shift Supervisors existed primarily so that they could supervise their on-line counterparts with the fact that Shift Supervisors actually performed a host of on-line functions themselves. Deposition testimony from Mr. Shipman, Mr. Good, and Mr. McGrath reveals that none thought the exempt classification was in violation of the FLSA.

As noted above, under RCFC 56(c), summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the nonmoving party is entitled to a judgment as a matter of law." RCFC 56(c). If the moving party succeeds in showing an absence of material facts and entitlement to judgment as a matter of law, the *prima facie* showing, this court's rules require the nonmoving party—here the plaintiffs—to come forward with affirmative evidence to at least create a triable issue of fact:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not respond, summary judgment, if appropriate, shall be entered against the adverse party.

RCFC 56(e). This is so because "[o]ne of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses." *Celotex*, 477 U.S. at 323-34.

Here, defendant moved for summary judgment on an issue upon which it bears the burden of proof. Based upon deposition testimony and related exhibits, defendant has borne the "initial responsibility of informing the . . . court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Id.* at 323. The parties have conducted discovery, and plaintiffs have had an adequate opportunity to develop their case. *See id.* at 326. Accordingly, RCFC 56(e) imposes upon plaintiffs the duty to rebut defendant's motion for summary judgment with affirmative evidence contemplated by RCFC 56 that at least creates a triable issue of fact.

For their part, plaintiffs' response lies largely in the alleged procedural infirmities that were the foundation of the willfulness argument discussed above. They point to the fact that agency officials relied primarily on Form SJ-23 for their factual information, did not conduct an on-site or in-person review of the Shift Supervisor's actual job duties, and failed to consult an attorney throughout the grievance process as affirmative evidence of defendant's lack of good faith.

As discussed above, the problem with this argument is that none of the alleged infirmities that plaintiffs point to necessarily undermine defendant's handling of the grievance process or the integrity of the officials involved in that process. When taken as a whole, the steps that the agency officials took to evaluate the plaintiffs' FLSA exemption were adequate. They consulted relevant regulatory and statutory provisions as well as secondary sources that labor-relations professionals routinely rely on to make FLSA-type decisions. Individuals in the grievance review process that were tasked with rendering final opinions, including Mr. Shipman and Mr. Galliart, consulted members of their agency's human resources staff and labor-relations experts to ascertain the proper bases upon which their ultimate decision should be based. Throughout this entire "team" process, there did not appear to be any internal opinion or recommendation that contradicted the final decision, and all of the professionals consulted throughout the grievance review process appear to have agreed on the agency's final decision. Taken either individually or as a whole, none of these alleged infirmities create an issue of fact that rebuts the *prima facie* showing of good faith and reasonableness that defendant has presented to the court.

Simply put, plaintiffs were required to show more in response to defendant's motion for summary judgment. Instead, they have rested primarily on mixed arguments of fact and law that this court does not find persuasive. To the extent that plaintiffs rely instead on mere allegations of bad faith or unreasonableness in their briefs, that is not the type of response contemplated by RCFC 56 that is sufficient to defeat a summary judgment motion. *See* Pl.'s Response to Def.'s Mot. for Partial Summ. J. at 22-29. Accordingly, defendant's cross-motion for summary judgment on this issue will be granted.

D. Adverse Inferences

Finally, plaintiffs raise an argument that adverse inferences should be drawn in their favor in this case, based upon defendant's assertion of the attorney-client privilege with respect to certain deposition testimony that plaintiffs sought. In 1999, plaintiffs noticed the depositions of two government attorneys, Mr. Raymond Sheehan and Mr. Albert Berry, but those depositions were precluded by a court protective order. *See Order Memorializing and Implementing Telephone Conference*, No. 95-285C (filed Dec. 8, 1999). In their Motion for Partial Summary Judgment, plaintiffs maintained that they "are entitled to an inference that if depositions had been taken and documents produced, they would have contained relevant evidence adverse to all Defendant's defenses." Pl.'s Mot. for Partial Summ. J. at 32. According to plaintiffs, defendant's attempt to shield its agency attorneys from deposition makes it "obvious that Defendant is hiding adverse opinions and evidence, relevant and material to the damage issues in this case, under its claim of privilege." *Id.* at 33.

Plaintiffs' position on this issue is, in a word, untenable. The Supreme Court has identified the attorney-client privilege as "the oldest of the privileges for confidential communications known to common law." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). "Recognition of the attorney-client privilege for governmental entities encourages more open communication between governmental officials and their lawyers, thereby enhancing the quality of governmental decisionmaking." CHRISTOPHER MUELLER & LAIRD KIRKPATRICK, EVIDENCE § 5.18 at 396 (2nd ed. 1999). Especially in this case, where the depositions in question were avoided under the protection of a court order, drawing adverse inferences in favor of plaintiffs would be particularly inappropriate.

In support of their argument, plaintiffs note that where an employer receives an opinion from counsel regarding its duties under the FLSA but then acts contrary to that advice, it is evidence of a willful FLSA violation. Pl.'s Mot. for Partial Summ. J. at 33. According to plaintiffs, if such a favorable opinion had been offered here by defendant's attorneys, then defendant would have been forthcoming with that opinion; the absence of such evidence therefore must be a sign that instead a detrimental opinion was offered by defendant's attorneys, so the argument goes. Moreover, according to plaintiffs, if they are unable to depose the attorneys, they will be unable to determine whether relevant, contrary legal opinions were ever provided to defendant.

The Federal Circuit recently took up this very same issue in the context of patent infringement cases in *Knorr-Bremse Systeme Fuer Nutzfahrzeuge GmbH v. Dana Corp.*, 383 F.3d 1337 (Fed. Cir. 2004) (en banc). In that case, the court emphatically rejected the availability of adverse inferences in the face of a party's decision to assert a valid attorney-client privilege. *See Knorr-Bremse*, 383 F.3d at 1344-45. The *en banc* panel decided to overturn what had been a narrow exception, limited to patent infringement cases, to the general judicial practice of refusing to draw adverse inferences from a validly asserted attorney-client privilege. The court's decision sought to bring patent cases more in line with the prevailing policy concerning the overriding importance of the attorney-client privilege. *Id.* In light of the Federal Circuit's clear statement in *Knorr-Bremse*, it is even more clear that no adverse inferences are appropriate in this case.

III. Conclusion

For the foregoing reasons, defendant's cross-motion for partial summary judgment on the issues of equitable tolling and the six year period of limitations is **GRANTED**. On the remaining issues of the applicable period of limitations under 29 U.S.C. § 255 and the applicability of liquidated damages, the plaintiff's motion for partial summary judgment is **DENIED**. Defendant's cross-motion for partial summary judgment is **DENIED-IN-PART** with respect to the creation of Form SJ-23 because questions of fact remain on that issue. Defendant's cross-motion for summary judgment is **GRANTED-IN-PART** on remaining issues of willfulness, good faith and reasonableness is.

In closing, the court notes that this case has been mired in litigation for more than a decade. Neither the parties nor justice is served by lengthy litigation in a case like this. Accordingly, the parties are **ORDERED** to engage once again in substantive settlement discussions, with an eye towards negotiating a mutually agreeable figure that would finally provide the plaintiffs the compensation that has long been withheld from them. The parties shall file a joint status report with the court no later than Friday, September 30, 2005 to apprise the court of the progress of the settlement discussions.

s/ *Lawrence J. Block*

Lawrence J. Block

Judge