No. 04-1712C

(Filed July 29, 2005)

UNPUBLISHED

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ROZELLE, LARRY J.,	*	Motion to Dismiss; RCFC
	*	12(b)(6); Failure to State a Claim;
	*	FLSA, 29 U.S.C. § 216 *et seq.*;
Plaintiff,	*	Overtime Pay; Work Performed
	*	in Foreign Countries; Waiver of
v.	*	Sovereign Immunity; Equitable
	*	Estoppel
THE UNITED STATES,	*	
	*	
Defendant.		
* * * * * * * * * * * * * * * *	*	

Minnette Burges, Tucson, Arizona, for plaintiff.

Dawn S. Conrad, Trial Attorney, United States Department of Justice, with whom were *Peter D. Keisler*, Assistant Attorney General, *David M. Cohen*, Director, and *Mark A. Melnick*, Assistant Director, Washington, D.C., for defendant. *William F. Sayegh*, Associate General Counsel, Army & Air Force Exchange Service, Dallas, Texas, of counsel.

OPINION

BUSH, *Judge*

This case is before the court on defendant's motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6) of the Rules of

the United States Court of Federal Claims (RCFC). Defendant contends the Fair Labor Standards Act (FLSA), 29 U.S.C. § 216 *et seq*. (2000), does not apply abroad. Therefore, because plaintiff asserts a claim for overtime allegedly worked while in Uzbekistan, the defendant argues this claim must be dismissed. For the reasons set forth herein, defendant's motion to dismiss is granted.

BACKGROUND

On November 29, 2004, plaintiff Larry J. Rozelle filed a complaint in this court against defendant. Mr. Rozelle alleges that the government failed to compensate him for overtime earned while employed as a civilian retail sales manager at the Army & Air Force Exchange Service (AAFES) in Uzbekistan. Compl. ¶ 8. Specifically, plaintiff claims that, during the period from October 12, 2002 to October 10, 2003, defendant employed him for workweeks longer than forty hours per week, and willfully failed to compensate him for overtime that was worked in excess of forty hours regular time and twenty hours overtime per week. *Id*. ¶ 10. In total, Mr. Rozelle alleges he worked 1360 hours for which he was not compensated, and is therefore owed $35,307.48, pursuant to 29 U.S.C. § 207(a). *Id*. ¶ 11. In addition, plaintiff claims that he is entitled to liquidated damages in the amount of $35,307.48 and attorney's fees and costs, as provided in 29 U.S.C. § 216(b). *Id*. ¶¶ 12-13.

Defendant filed a motion to dismiss for failure to state a claim upon which relief may be granted on January 28, 2005. Plaintiff subsequently filed Plaintiff's Response to Defendant's Motion to Dismiss on March 24, 2005. Defendant's Reply in Support of Motion to Dismiss was filed on April 6, 2005.

In his response, plaintiff provided this court with a copy of a document titled "Statement of Understanding." *See* Pl.'s Resp. Ex. 2. The parties do not dispute that this memorandum governed his employment, and neither party has alleged a breach of this agreement. However, the parties disagree as to whether plaintiff may assert a FLSA claim for overtime work not covered by the agreement. Because FLSA does not apply to United States citizens working abroad, defendant's motion to dismiss must be granted.

DISCUSSION

I. Standard of Review

A. Subject Matter Jurisdiction under RCFC 12(b)(1)

When in doubt, a court has the power to raise the question of its jurisdiction *sua sponte*. *See* RCFC 12(h)(3) ("Whenever it appears by suggestion of the parties *or otherwise* that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.") (emphasis added); *see also Arctic Corner, Inc. v. United States*, 845 F.2d 999, 1000 (Fed. Cir. 1988) ("A court may and should raise the question of its jurisdiction *sua sponte* at any time it appears in doubt."). A court is always responsible for its own jurisdiction. *Fisher v. United States*, 402 F.3d 1167, 1173 (Fed. Cir. 2005) (*en banc*) (stating that "the trial court at the outset shall determine, either in response to a motion by the Government or *sua sponte* . . . whether the Constitutional provision, statute, or regulation is one that is money-mandating"). Accordingly, this court deems it necessary to address the question of its jurisdiction over plaintiff's lawsuit.

This court's jurisdiction is founded in the Tucker Act, 28 U.S.C. § 1491(a)(1) (2000). Pursuant to that statute, this court possesses jurisdiction to entertain any claim against the United States that is founded upon (1) the Constitution, (2) an act of Congress, (3) a regulation of an executive department, (4) any express or implied contract with the United States, or (5) for liquidated or unliquidated damages not sounding in tort. 28 U.S.C. § 1491(a)(1). The Tucker Act is a jurisdictional statute and does not grant a substantive right of action. *United States v. Testan*, 424 U.S. 392, 400 (1976). Accordingly, a substantive right must arise out of a specific source of law. *Id.* The United States Supreme Court has held, with limited exceptions, that this court may entertain a suit only if it is founded upon a claim for money allegedly due to the plaintiff from the government. *Id*. at 397-98. Thus, a jurisdictional inquiry must be made as to whether a plaintiff has alleged a claim for money damages founded upon the Constitution, an act of Congress, a regulation of an executive department, or arising out of an express or implied-in-fact contract with the United States, or for damages not sounding in tort. 28 U.S.C. § 1491(a)(1).

Non-appropriated fund instrumentalities (NAFIs) are federal government entities whose "monies do not come from congressional appropriation but rather from [their] own activities, services, and product sales." *El-Sheikh v. United States*, 177 F.3d 1321, 1322 (Fed. Cir. 1999) (citing *Cosme Nieves v. Deshler*, 786 F.2d 445, 446 (1st Cir. 1986)). For an employee of a NAFI to maintain a suit against the federal government in this court there must be an express waiver of sovereign immunity. *Id.* at 1323. The appropriate inquiry is whether the United States has waived sovereign immunity with regard to a suit under the particular statute. *Id.* (citing *Saraco v. United States*, 61 F.3d 863, 864 (Fed. Cir. 1995)). Such waiver exists under the 1974 amendments to FLSA. *Id.*

In 1974, Congress expanded the definition of "employee" to include any individual employed by the government of the United States in a NAFI under the jurisdiction of the Armed Forces. *Id.* (citing 29 U.S.C. § 203(e)(2)(A)(iv) (2000)); *see also* H.R. Rep. No. 93-913, at 26 (1974), *reprinted in* 1974 U.S.C.C.A.N. 2837. This change granted NAFI employees the right to sue for FLSA violations. Moreover, for the purposes of FLSA, a NAFI employee is considered an employee of the government of the United States. *El-Sheikh*, 177 F.3d at 1323-24 (citing *Cosme Nieves*, 786 F.2d at 448; *United States v. Hopkins*, 427 U.S. 123, 128 (1976)). Under 29 U.S.C. § 216(b), "[a]ny employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages." *Id.* at 1323.

Thus, FLSA authorizes NAFI employees to sue the United States as their employer in a court of competent jurisdiction. *Id.* at 1324. The United States has waived its sovereign immunity with regard to such a suit. *See Hopkins*, 427 U.S. at 128 (acknowledging that congressional reports explicitly recognize "that employees of non-appropriated-fund activities, when performing their official duties, are employees of the United States"); *Cosme Nieves*, 786 F.2d at 449 (stating that "FLSA waives the sovereign immunity of the United States to suit by its employees and . . . NAFI employees are described in the FLSA as being employed by the United States government"). "Since the statute waives sovereign immunity, the Court of Claims is a 'court of competent jurisdiction' under the FLSA because the Tucker Act gives that court jurisdiction over claims 'against the United States' that are 'founded . . . upon' an 'Act of Congress.'" *El-Sheikh*, 177 F.3d at 1324

(citing *Saraco*, 61 F.3d at 865).

AAFES is a NAFI of the United States. *See* 10 U.S.C. §§ 4779(c), 9779(c) (2000). As explained in *Saraco*, FLSA contains the requisite waiver of sovereign immunity and the Tucker Act provides this court with jurisdiction over the case. 61 F.3d at 865-66 (stating that FLSA does not confer jurisdiction, it only waives sovereign immunity; jurisdiction must be found within the Tucker Act and "jurisdiction of cases under the FLSA [is] provided only under the Tucker Act"). Therefore, Mr. Rozelle's FLSA claim is properly before this court with respect to subject matter jurisdiction.

B. Failure to State a Claim Upon Which Relief Can Be Granted

Once a court has taken jurisdiction as the result of a money-mandating source, it will consider whether the plaintiff has established the elements of the cause of action. *Fisher*, 402 F.3d at 1175. Should the court determine that the claim fails to fit within the scope of the source, the plaintiff will lose on the merits of the case for failure to state a claim upon which relief can be granted. *Id.* at 1176. In this instance, the government maintains that Mr. Rozelle has failed to state a legal claim under FLSA, and that the complaint should be dismissed under RCFC 12(b)(6).

A motion to dismiss under RCFC 12(b)(6) for failure to state a claim upon which relief can be granted is appropriate when the facts asserted by the plaintiff do not entitle the plaintiff to a legal remedy. *N.Y. Life Ins. Co. v. United States*, 190 F.3d 1372, 1377 (Fed. Cir. 1999). In resolving a motion to dismiss for failure to state a claim, the court must assume the facts in the complaint to be true and "indulge in all reasonable inferences in favor of the nonmovant." *Sommers Oil Co. v. United States*, 241 F.3d 1375, 1378 (Fed. Cir. 2001). A complaint should not be dismissed unless it is "beyond doubt that a plaintiff could prove no set of facts which would entitle him to relief." *Id.* at 1378 (quoting *Hamlet v. United States*, 873 F.2d 1414, 1416 (Fed. Cir. 1989)). In the instant case, plaintiff has failed to allege all of the elements of a FLSA claim and therefore the complaint must be dismissed.

II. Analysis

A. "Statement of Understanding" Conditions Have Been Met

Plaintiff included a copy of a "Statement of Understanding" with his response and the parties do not dispute that this memorandum governed his employment. *See* Pl.'s Resp. Ex. 2. The "Statement of Understanding" provides that plaintiff was entitled to overtime pay "up to a weekly maximum number of 20 hours." *Id.* Mr. Rozelle does not claim that the government failed to pay him the overtime guaranteed under this statement. Rather, plaintiff's pleadings admit that Mr. Rozelle was paid twenty hours of overtime each week. *Id.* Ex. 3. Moreover, the "Statement of Understanding" does not contain any additional provisions dealing with overtime. Therefore, the government has complied with the overtime provisions of the "Statement of Understanding" and plaintiff has failed to assert any contractual claims.

B. Plaintiff's Basis for Recovery

1. No Extraterritorial Jurisdiction

Turning now to the statutory basis for plaintiff's claim for relief, Mr. Rozelle has failed to state a legal claim because FLSA does not apply to overtime worked in a foreign country. Although plaintiff avers that he is entitled to overtime pay under FLSA, federal statutes are presumed to lack extraterritorial application. *Pfeiffer v. Wm. Wrigley Jr. Co.*, 755 F.2d 554, 557 (7th Cir. 1985) (citing *Foley Bros. Inc. v. Filardo*, 336 U.S. 281, 285 (1949)). Moreover, Congress overruled an attempt to extend FLSA to workers at an American military base abroad by the implementation of 29 U.S.C. § 213(f) (2000).[1] *See id.* at 558-59 (citing *Vermilya-Brown Co. v. Connell*, 335 U.S. 337 (1948); S. Rep. No. 987, 85th Cong., 1st

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[1]/ Section 213(f) provides: "The provisions of sections 206, 207, 211, and 212 of this title shall not apply with respect to any employee whose services during the workweek are performed in a workplace within a foreign country or within territory under the jurisdiction of the United States other than the following: a State of the United States; the District of Columbia; Puerto Rico; the Virgin Islands; outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act (ch. 345, 67 Stat. 462) [43 U.S.C.A. § 1331 et seq.]; American Samoa; Guam; Wake Island; Eniwetok Atoll; Kwajalein Atoll; and Johnston Island." 29 U.S.C. § 213(f).

Sess. (1957)). Once Congress fully appreciated FLSA's possible scope, it added Section 213(f) to specifically exclude work performed by employees in a foreign country from any possible FLSA coverage. *Id.* at 555 (citing 29 U.S.C. § 213(f)).

Section 213(f), with exceptions not applicable here, explicitly states that the provisions of FLSA requiring payment for overtime, 29 U.S.C. § 207, do not apply to services performed in a foreign country. 29 U.S.C. § 213(f). Uzbekistan is a foreign country encompassed within the provisions of the statute. Accordingly, Mr. Rozelle cannot enforce the provisions of FLSA for work performed in Uzbekistan.[2] *See Asplundh Tree Expert Co. v. NLRB*, 365 F.3d 168, 179 (3d Cir. 2004) (recognizing that FLSA excludes work performed in foreign countries); *Cleary v. U.S. Lines, Inc.*, 555 F. Supp. 1251, 1259 (D.N.J. 1983) (confirming that "a United States citizen working abroad cannot enforce the provisions of the FLSA"). Mr. Rozelle has failed to fulfill the legal elements of a FLSA claim because it is "beyond doubt that [he] can prove no set of facts in support of [his] claim which would entitle [him] to relief." *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 654 (1999) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). As a result, his complaint must be dismissed.

2. No Reasonable Inference of Waiver of Section 213(f)

Plaintiff argues that because defendant agreed to pay overtime of up to twenty hours per week that this agreement constitutes a waiver of Section 213(f). This argument is not supported by any factual allegations. The "Statement of Understanding" does not refer to FLSA coverage or limitations on FLSA coverage. The fact that plaintiff's employment agreement included a provision for overtime pay has no relevance to a supposed waiver of Section 213(f).

"A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *see also*

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[2]/ The court acknowledges plaintiff's argument that FLSA should be expanded, as the Age Discrimination in Employment Act has been, to cover citizens of the United States who are employed by an American employer in a workplace in a foreign country. *See* 29 U.S.C. § 630(f) (2000). However, this is a public policy argument that would be more appropriately presented to Congress than to this court.

Cherokee Nation v. United States, 355 F.2d 945, 950 (Ct. Cl. 1966) ("Waiver consists of a voluntary and intentional relinquishment of a known right."). A party waiving a defense to suit must know of the likely consequences of that waiver. *See Reliance Ins. Co. v. United States*, 20 Cl. Ct. 715, 723 (1990) ("[I]t is a well-established rule of law that '[w]aivers of rights must be voluntary, knowing, and intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.'") (citations omitted). The elements of waiver are: "'(1) the existence at the time of the waiver a right, privilege, advantage or benefit that may be waived; (2) the actual or constructive knowledge thereof; and (3) an intention to relinquish such right, privilege, advantage or benefit.'" *Youngdale & Sons Constr. Co. v. United States*, 22 Cl. Ct. 345, 347 (1991) (quoting *Matter of Garfinkle*, 672 F.2d 1340, 1347 (11th Cir. 1982)).

At least one of these three elements is absent here. There is nothing in the "Statement of Understanding," or indeed in any part of the record before the court, to indicate an intention on the part of the United States to waive Section 213(f) and its bar on suits under FLSA for overtime worked in foreign countries. This absence of alleged facts that would support an inference of the intent of the United States to waive Section 213(f) is fatal to plaintiff's waiver defense. The court thus need not reach the issue of whether Section 213(f) may ever be waived, or, if indeed Section 213(f) is waivable, whether the author of the "Statement of Understanding" had the authority to waive Section 213(f).[3]

Because the court cannot reasonably infer that the United States waived Section 213(f) as a defense against plaintiff's FLSA claim, the court rejects

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[3]/ The court has not found an example of a waiver of a statute by an officer of the United States, but has not conducted an extensive review of this topic. *See Millmaster Int'l Inc. v. United States*, 427 F.2d 811, 814 (C.C.P.A. 1970) ("A party may not waive a right granted to further a legislative policy in the public interest as manifested in the statute or its legislative history if the waiver would thwart that statutory purpose."); *see also Finn v. United States*, 123 U.S. 227, 233 (1887) (finding that waiver of a statute of limitations is impossible because "the government has not expressly or by implication conferred authority upon any of its officers to waive the limitation imposed by statute upon suits against the United States in the [C]ourt of [C]laims"); *United States ex rel. Lapides v. Watkins*, 165 F.2d 1017, 1019 (2d Cir. 1948) (stating that "no United States consul has any power to waive the provisions of the immigration laws") (citations omitted); *cf. United States v. Fitch*, 185 F.2d 471, 473 (10th Cir. 1950) (stating that agents of the United States may not "waive the rights of the United States by their unauthorized acts") (citations omitted).

plaintiff's waiver argument.

3. Liquidated Damages Are Not Available

Plaintiff also contends that he is entitled to liquidated damages, pursuant to 29 U.S.C. § 207(a) (2000). Compl. ¶ 12. As previously discussed, the FLSA provisions set forth in section 207(a) do not apply to work performed in a foreign country. *Id.* § 213(f). Therefore, Mr. Rozelle is not entitled to liquidated damages.

4. Attorney's Fees Are Not Available

Finally, Mr. Rozelle claims he is owed reasonable attorney's fees and costs incurred in his action, pursuant to 29 U.S.C. § 216(b).[4] Compl. ¶ 13. Again, as stated, FLSA does not apply to work performed in a foreign country. As a result, Mr. Rozelle cannot be awarded a judgment under Section 207, and he is not entitled to attorney's fees and costs incurred in this action inasmuch as Mr. Rozelle is not the prevailing party.

CONCLUSION

For the foregoing reasons, it is hereby **ORDERED** that:

(1) Defendant's Motion to Dismiss, filed January 28, 2005, is **GRANTED**;

(2) The Clerk's office is directed to **ENTER** judgment for defendant, **DISMISSING** plaintiff's complaint, filed November 29, 2004, with prejudice; and

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[4]/ Section 216(b) reads, in relevant part: "Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. . . . The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." 29 U.S.C. § 216(b).

(3) Each party shall bear its own costs.

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Lynn J. Bush
Judge