

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

STEPHEN ADAMS, <u>et al.</u> ,)	
)	
Plaintiffs,)	
)	
v.)	No. 90-162C
)	and Consolidated Cases
THE UNITED STATES,)	(Judge Lynn J. Bush)
)	
Defendant.)	

JOINT STATUS REPORT

Pursuant to the Court’s Order of June 28, 2010, defendant respectfully submits the following joint status report on behalf of all parties. Counsel for the parties have conferred regarding the filing of this document, and counsel for plaintiffs have authorized counsel for defendant to state that plaintiffs concur in the contents of this status report.

1. The parties have conferred and continue to confer with regard to various remaining matters in this litigation.
2. Concerning criminal investigators whose claims have not yet been litigated or settled, settlement has not yet been achieved with regard to GS-9 through GS-13 criminal investigators at the following agencies:

Department of the Treasury, Social Security Administration, Small Business Administration, Resolution Trust Corporation, Railroad Retirement Board, National Aeronautics and Space Administration, General Services Administration, Federal Deposit Insurance Corporation, Department of Transportation, Federal Aviation Administration, Department of the Navy, Department of Labor, Department of Justice, Department of Defense, General Accounting Office, Federal Emergency Management Agency, Equal Employment

Opportunity Commission, Department of Education, Naval Criminal Investigative Service, Defense Criminal Investigative Service, Federal Bureau of Investigation, Department of Health and Human Service, United States Marshals Service, and others.

Settlements have been achieved at the GS-9-12 levels but not at the GS-13 level at the following agencies:

Department of Commerce (including National Oceanic Atmospheric Administration, the Bureau of Export Administration, and the Office of Export Enforcement), Department of the Interior (including the Fish and Wildlife Service), Department of Veterans Affairs, Environmental Protection Agency, Food and Drug Administration, Immigration and Naturalization Service, and others.

3. (a) As stated in the parties' joint status report of June 22, 2010, counsel for the parties have continued their efforts to achieve a settlement that would resolve the majority of claims of the plaintiffs employed by the agencies above as well as plaintiffs employed by the Office of Inspector General ("OIG") of the Department of Health and Human Services ("HHS") and the OIG of the Department of Housing and Urban Development ("HUD"). Plaintiffs' counsel have reviewed spreadsheets prepared by the Government setting forth employment history data and proposed back pay amounts for almost all of the outstanding criminal investigator claims, and forwarded the relevant calculations and a draft of a proposed settlement agreement to affected plaintiffs for their review. By letter of March 10, 2010, plaintiffs' counsel informed the Government that as of that date they had been authorized to settle the claims of 1,357 plaintiffs based upon the terms of the draft settlement agreement and the amounts specified in a list

attached to the letter. Subsequently, additional plaintiffs agreed to their proposed settlement amounts. Accordingly, by letters of April 23, June 3, August 11, and September 2, 2010, plaintiffs' counsel forwarded offers to settle the claims of additional plaintiffs. The Government is in the process of reviewing these proposals. As part of this process, Government counsel has forwarded these letters to the various affected agencies, together with the portions of the referenced lists relevant to the agency in question. Government counsel has received responses from substantially all of the affected agencies, and plaintiffs' offers are currently under consideration within the Department of Justice.

(b) Plaintiffs believe that the settlement process has reached an impasse. By e-mails dated August 12 and August 13, 2010, the Government advised plaintiffs' counsel that as to certain plaintiffs who had been employed by the Naval Criminal Investigative Service, back pay calculations previously provided to them for plaintiffs' approval should be reduced, and in some cases withdrawn, to account for time when these plaintiffs' work was performed within a foreign country, because such work was exempt from the FLSA under 29 U.S.C. § 213(f), regardless of the primary duty involved. Attached to the August 12 e-mail was a spreadsheet indicating the dates when each affected plaintiff was in a foreign workplace within the period that would be covered by the settlement, and the locations of the foreign workplaces. Attached to the August 13 e-mail were spreadsheets containing revised back pay calculations for the affected plaintiffs. Thereafter, plaintiffs' counsel advised the Government that they disagreed with the recalculation of such claims in that, from plaintiffs' perspective, the negotiated formula for ascertaining the amount of back pay due the plaintiffs employed by all of the above-named agencies took into account time spent by all plaintiffs in a foreign workplace as well as all of the other FLSA exemption defenses that the Government might have relied upon in individual

cases. Additionally, by e-mail dated August 31, 2010, plaintiffs' counsel withdrew the settlement offers of certain plaintiffs who had been employed by the Food and Drug Administration, and requested revised calculations increasing their back pay amounts because of an error in a factual premise underlying the original calculation. The Government agreed and provided the requested revised calculations.

(c) In 2008, as a condition to settling the claims, the Government advised plaintiffs that it would not agree to settle the claims of plaintiffs based upon an agreed formula and include in the settlement a procedure allowing plaintiffs to appeal any errors in their calculation. Rather, the Government insisted that the amount due each plaintiff must be calculated and included in the settlement agreement, eliminating the procedure for correcting the calculation after settlement. Plaintiffs reluctantly agreed to this condition. In 2009, after the terms of the current back pay settlement were tentatively agreed to and the Government provided the calculations referenced in paragraph 3.a, plaintiffs' counsel provided plaintiffs with the Government's calculations. Further, each plaintiff was requested by plaintiffs' counsel to approve their calculation, and, in 2010, lists of such individual approvals were submitted to the Government for the purpose of initiating the approval process within the Department of Justice. On September 7, 2010, the Government advised counsel for plaintiffs that settlement of the claims of the plaintiffs employed by the agencies above would be contingent on additional terms: namely, that a settlement agreement would be conditioned on an agreement by the parties on the amount of attorneys' fees and costs for the entire case, and that each plaintiff who has a remaining claim in the case must be identified with specificity along with the nature of their claim. These issues were not raised by the Government prior to September 7, 2010, as a precondition to settling the claims of the plaintiffs employed by the above-described agencies. Plaintiffs assert that such

preconditions are contrary to the course of settlements achieved in this case in its 20-year history, that they go beyond the claims of the plaintiffs covered by the proposed settlement, and that belatedly asserting these issues as a precondition to settlement of these plaintiffs' claims will substantially delay if not prevent their resolution. Defendant asserts that, in view of the 20-year history of this case and the various partial settlements achieved during that period, an effort to reach closure concerning remaining claims is reasonable, whether through the course of negotiations or in the course of the settlement authorization process.

4. As stated in previous joint status reports, plaintiffs' counsel provided Government counsel a list of GM-13 plaintiffs who they believe should not have been classified as FLSA-exempt, and Government counsel forwarded the list to the agencies involved to ascertain whether, despite these plaintiffs' GM designation, they were non-managerial and did not perform exempt duties. The Government believes, based upon the information developed thus far, that these plaintiffs were properly treated as exempt while in GM-13 positions, based upon the duties of these positions. Prior to the filing of the parties' last joint status report, the Government had provided plaintiffs' counsel with an explanation and certain documents underlying this conclusion, particularly with respect to approximately 80 of these plaintiffs. The parties continue to discuss this issue.

6. As preciously reported, by letter of April 28, 2010, plaintiffs' counsel proposed terms for settling claims for alleged underpayment of Administratively Uncontrollable Overtime ("AUO") by the Defense Criminal Investigative Service ("DCIS"), and the Government counsel responded to this proposal by letter dated June 3, 2010. With few exceptions, these claims have since been subsumed under the pending settlement proposals pertaining to the FLSA claims of the plaintiffs in question.

7. Other claims and issues that are under discussion between the parties include the following:

- a. Technicians and other plaintiffs in non-1811 positions at various agencies, including the Department of Homeland Security
- b. USCS Operational Enforcement Officers
- c. Sunday premium
- d. Opa Locka claim which was added by way of an amendment as a result of Hurricane Andrew
- e. USSS1802 (Randy Espinoza, John P. Connelly, Scott Curtis, and Tom Radtke).
- f. Michael Banas - Defense Security Service Background Investigator and Customs Import Specialist
- g. Erroneous withholdings from deceased plaintiffs
- h. Attorneys' fees and expenses.

8. Insofar as the dismissal of any claims are concerned, because of the fact that there may be plaintiffs whose employment by defendant was with more than one agency, one of which has not yet been settled, and because plaintiffs' claims for attorneys' fees and expenses have not been resolved, plaintiffs believe it not to be practical or appropriate to dismiss any of the pending claims. Defendant believes that it is appropriate to dismiss all plaintiffs who do not possess any identifiable unadjudicated claims pending in this case.

9. The parties propose that they submit a joint status report on or before November 17, 2010, to apprise the Court of the status of the resolution of the above-discussed matters.

Respectfully submitted,

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September 8, 2010

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of September 2010, a copy of the foregoing “JOINT STATUS REPORT” was filed electronically. I understand that notice of this filing will be sent to all parties by operation of the Court’s electronic filing system. Parties may access this filing through the Court’s system.

s/Shalom Brilliant