IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 1:01CV1154 CIV-GRAHAM/TURNOFF

ASOCIACION DE EMPLEADOS DEL AREA CANALERA ("ASEDAC"), *et al.*,	)
Plaintiffs,	)
v.	)
THE PANAMA CANAL COMMISSION, *et al.*,	)
Defendants.	)

REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THIRD AMENDED COMPLAINT UNDER FED. R. CIV. P. 12(b)(1) AND 12(b)(6) OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT UNDER FED. R. CIV. P. 56

The Panama Canal Treaty, 33 U.S.T. 47, makes it clear that the United States was to determine the terms on which United States agencies hired employees in Panama. Plaintiffs nevertheless assert that, retroactively to 1979, Panamanian law requires the United States to pay for a thirteenth month in every year and to make severance payments merely for doing what the Treaty required – handing over the Canal to a Panamanian agency (which, without interruption in their service, hired the employees who had worked for the Panama Canal Commission). Plaintiffs' opposition to our motion to dismiss fails to demonstrate why these extraordinary and extraordinarily belated demands have any merit or even why, with respect to the Department of Defense, there is jurisdiction to consider them.

I.. No Statutes Waive Sovereign Immunity Or Create A Cause of Action For Plaintiffs' Claims Against The Department Of Defense

We explained in our opening memorandum that no Acts of Congress waive sovereign immunity and provide a cause of action for plaintiffs' attempt to sue the Department of Defense.

Defs' Mem. at iv-viii. Plaintiffs now claim that two statutes authorize their claims, the Back Pay Act, 5 U.S.C. § 5596, and the Little Tucker Act, 28 U.S.C. § 1346(a)(2). Pls' Mem. at 2-5.

A. The Back Pay Act Does Not Provide An Independent, Self-Contained Waiver of Sovereign Immunity

As we explained, the Back Pay Act is not "a self-contained and independent waiver of sovereign immunity," but is "merely derivative in application and depends upon the existence of some other appropriate statute." Defs' Mem. at vi; *see, e.g.*, *United States v. Testan*, 424 U.S. 392, 405-07 (1976). It is a dependent provision that authorizes certain remedies where some other statute provides a waiver of sovereign immunity and cause of action.

We acknowledged in our opening brief one precedential outlier that seems to treat the Back Pay Act as if it instead operated as a self-contained, independent waiver, *Ward v. Brown*, 22 F.3d 516 (2d Cir. 1994), and explained why *Ward* was wrongly decided. Plaintiffs contend that *Brown v. Secretary of the Army*, 918 F.2d 214 (D.C. Cir. 1990), reached the same result as *Ward*. Pls' Mem. at 3. That's wrong. As then-Judge Ginsburg explained in *Brown*:

> [T]he Back Pay Act creates no alternative cause of action. . . . The Act is an auxiliary measure that operates only after an "appropriate authority" finds that, under some other provision of law, a federal employee has suffered an "unjustified or unwarranted personnel action." Thus a . . . plaintiff may not recover under the Back Pay Act unless and until he or she has . . . succeeded on the merits [under that other statute].

918 F.2d at 217-218 (emphasis supplied).

Thus, if some other statute authorized a challenge to personnel actions, the Back Pay Act might come into play to authorize certain remedies. But it cannot be pressed out of that auxiliary, remedial role to authorize the suit. The Back Pay Act presupposes that some other statute has created an "appropriate authority" to have ruled on the propriety of certain personnel actions; it does not itself provide such authority.

B. The Little Tucker Act Does Not Apply To Claims Arising Under Treaties

Plaintiffs suggest that the Little Tucker Act, 28 U.S.C. § 1346(a)(2), would supply a waiver of sovereign immunity and jurisdiction if the Court were to reject their Back Pay Act arguments, if the Court would then "deem" the Third Amended Complaint "technically amended" to assert a Tucker Act claim as to which it is now silent, and if the thousands of plaintiffs were to file a consent form waiving damages over $10,000. But even if that hypothetical Fourth Amended Complaint ever were to spring into existence accompanied by those hypothetical waivers, the Little Tucker Act would not apply here.

That Act authorizes certain suits founded upon "the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States." 28 U.S.C. § 1346(a)(2). Claims based on treaties are not included in that waiver of sovereign immunity. This language of the Little Tucker Act is in stark contrast to the general federal question statute, which provides for jurisdiction for cases arising under the "Constitution, law, or treaties of the United States." 28 U.S.C. § 1331 (emphasis supplied).[1]

The telling and contrasting omission of "treaties" from the Little Tucker Act was no mere draftsman's error. The jurisdiction of the district courts under the Little Tucker Act was expressly made "concurrent with the United States of Federal Claims," 28 U.S.C. § 1346(a). A district court can thus exercise jurisdiction in a Little Tucker Act case only to the extent that the case could be maintained in the Court of Federal Claims. *Richardson v. Morris*, 409 U.S. 464 (1973). And, "[e]xcept as otherwise provided by Act of Congress, the United States Court of Federal Claims shall not have jurisdiction of any claim growing out of or dependent upon any treaty entered into with foreign nations." 28 U.S.C. § 1502 (emphasis supplied). [2]

---

[1] The general federal jurisdiction statute is of no help to plaintiffs' suit against the Department of Defense, because it is not a waiver of sovereign immunity.

[2] Accordingly, in *De Archibold v. United States*, 57 Fed. Cl. 29 (2003), the Court of Federal Claims held that it lacked jurisdiction over claims for thirteenth month and severance pay under the Panama Canal Treaty against the Army Air Force Exchange Service. *De Archibold* did not decide whether a district court would have jurisdiction under some provision other than the

(continued...)

This Court's "concurrent" Little Tucker Act jurisdiction is equally affected by that preclusion of jurisdiction over cases dependent upon a treaty. Since plaintiffs' claims grow out of and are dependent upon a treaty (Pls' Mem. at 14-15), this Court would lack jurisdiction under the Little Tucker Act even if the pleadings were amended yet again to assert such a claim.

II. Claims Against Secretary Section?

III. Plaintiffs' Claims That Accrued Before March 22, 1995, Are Time-Barred

We explained in our opening brief why plaintiffs' claims that accrued more than six years prior to filing of the complaint are barred by the statute of limitations. Defs' Mem. at viii-ix. Plaintiffs attempt to justify seeking thirteenth-month payments for more than two decades before they filed the suit by contending that non-receipt of those payments was a "continuing violation." Pls' Mem. at 7 n.9. The "continuing violation doctrine" is one "of limited applicability" that is "usually invoked in the context" of employment discrimination claims where "it acts as a limited counterbalance to a relatively short limitations period." *Rosner v. United States*, 231 F. Supp. 2d 1202, 1207 (S.D. Fla. 2002). Even within the context of discrimination claims, the continuing violation doctrine has been reined in by a case post-dating all of the cases cited by plaintiffs, *Nat'l RR Passenger Corp. v. Morgan*, 536 U.S.101 (2002). *See LeBlanc v. City of Tallahassee*, 2003 WL 1485063 (N.D. Fla.); *Inglis v. Buena Vista Univ.*, 235 F. Supp. 2d 1009, 1023-24 (N.D. Iowa 2002). After *Morgan*, the courts have recognized that, even in discrimination cases, a plaintiff cannot recover for discriminatory paychecks prior to the statute of limitations period "merely by filing with respect to subsequent discriminatory paychecks within the period." *Hildebrant v. Illinois Dep't of Human Resources*, 347 F.3d 1014, 1028 (7th Cir. 2003); *accord*, *e.g.*, *Reese v. Ice Cream Specialties, Inc.*, 347 F.3d 1007, 1013 (7th Cir. 2003); *Quarless v. Bronx-Lebanon Hosp. Center*, 228 F. Supp. 2d 377, 382 (S.D.N.Y. 2002). Similarly, even under the standards now used in discrimination cases for determining whether there is a "continuing viola-

---

[2](...continued)
Tucker Act, and transferred the case to a district court to consider that issue in the first instance. 57 Fed. Cl. at 34.

tion," plaintiffs could not recover for thirteenth-month payments they allege to have been due in 1979 merely by also seeking to recover thirteenth-month payments allegedly due in 1999.[3]

Plaintiffs also say that the delay in bringing their thirteenth-month claims somehow does not amount to laches. Pls' Mem. at 6-7. It may be, as plaintiffs note, that laches "'typically'" and "'ordinarily'" requires factual development that precludes decision on the pleadings. Pls' Mem. at 6, *quoting Livolvsi v. City of New Castle*, 501 F. Supp. 1146, 1151 (W.D. Pa. 1980), *and Hillery v. Sumner*, 496 F. Supp. 632, 636 (E.D. Calif. 1980). But the twenty-two year delay in bringing this action is far from typical. And the harms to the government arising from that extra-ordinary delay are all too patent. Had the claims for the thirteenth-month bonuses been timely brought, the government could have restructured its pay system to allocate moneys that it spent on salary increases to pay the bonuses. By delaying until they have already pocketed the salary increases, plaintiffs seek to get both the salary increases and the bonuses, when, with a timely claim, they could have received one but not both.[4] The delay also further postpones the ability to wind up the affairs of the Panama Canal Commission ("PCC") at long last. The PCC has not operated the Canal since 1998, but by dint of plaintiffs' untimely claims it lingers as a corporate ghost that continues to incur expenses attendant to prolonged existence.

---

[3] The thirteenth-month pay claims of plaintiffs hired before March 11, 1995, are barred even with respect to payments allegedly due after that date. Because the payment schedule without a thirteenth month was applied in a non-discriminatory fashion to all employees, each employee's time to challenge application of that payment schedule began when it first affected him, and was not renewed by a new statute of limitations period by subsequent non-payments of the bonus. *See Prieto v. City of Miami,* 190 F. Supp. 2d 1348-49 (S.D. Fla. 2002). We have not sought dismissal in this motion on this ground, but we have also not waived the right to pursue this affirmative defense in the event the motion is denied.

[4] We assume *arguendo* that Panamanian law would not have permitted a decrease in salary to offset thirteenth-month "bonus" payments. But plaintiffs point to no Panamanian law that required salary increases to the extent provided by the United States. Thus, while (given the *arguendo* assumption) a prompt ruling on the thirteenth-month issue might have required increased total compensation (American salary plus Panamanian bonus) for a short period, the United States could thereafter have deferred future salary increases until the total salary plus bonus under Panamanian law was equal to the starting salary plus foregone salary increases.

IV. For Some Plaintiffs, Collective Bargaining Agreements Provided The Exclusive Remedy, And Preclude This Action

We explained in our opening memorandum that collective bargaining agreements ("CBAs") covering many plaintiffs provided grievance procedures that contained provisions, mirroring language from 5 U.S.C. § 7521 prior to its 1994 amendment that had been consistently held to have required that the grievance procedures were exclusive of any otherwise applicable administrative or judicial remedies. Defs' Mem. at xi, *citing Carter v. Gibbs*, 909 F.2d 1452, 1455-57 (Fed. Cir. 1990). Of course, as the Court of Appeals held, after its 1994 amendment section 7521 no longer requires a federal sector CBA's grievance procedure to be exclusive of judicial remedies. Plaintiffs attempt to transform that into a ruling that a CBA is no longer even permitted to be exclusive. That reading of section 7521 is unsound.

Plaintiffs' attempt to avoid giving effect to CBAs' provisions for an exclusive grievance remedy relies on principles derived from cases in the private sector that plaintiffs would apply witout change to this federal-employee case. Pls' Mem. at 11-14. That attempted transliteration overlooks two vital differences between private- and federal-sector employment. As both plaintiffs and the case on which they principally rely, *Mudge v. United States*, 57 Fed. Cl. 527 (2002) ("*Mudge II*"), acknowledge, when a union declines to grieve or arbitrate a particular dispute, private sector employees have "'no administrative recourse.'" Pls' Mem. at 13, *quoting Mudge II* at 534. But plaintiffs and *Mudge* both err in asserting (*id*.) that "'the federal-sector employee is placed on the same footing'" as a private sector employee in this vital respect. In contrast to the private sector, when a union fails to pursue a grievance, there is administrative recourse. *Karahalios v. Nat'l Fed'n of Federal Employees, Local 1263*, 489 U.S. 527 (1989). Thus, the "deprivation a federal employee" suffers when a union fails to pursue a grievance is "not comparable to the private sector predicament," *id*. at 536-37. Second, the meat-and-potatoes of private sector grievance and arbitrations are understandably the contractual rights conferred by the CBA. The courts are reluctant to read CBA grievance provisions expansively to cover disputes not arising out of rights by public Act of Congress rather than the private agreement of the CBA itself. *E.g.*, *Brisentine v. Stone & Webster Eng'g Corp*., 117 F.3d 519, 523-24 (11th Cir. 1997). That distinction between contractually conferred rights and statutory ones is of much less significance

in disputes concerning federal employee pay and benefits since those benefits are generally conferred by statute rather than contract. *See Schism v. United States*, 316 F.3d 1259, 1268 (Fed. Cir. 2002), *cert. denied*, 539 U.S. 910 (2003); *Chu v. United States*, 773 F.2d 1226, 1229 (Fed. Cir. 1985). And, in the precise context of CBA grievances, Congress rejected the statutory-contract distinction when it defined "grievance" in the federal sector to include complaints concerning "the effect or interpretation, or a claim of breach, of a collective bargaining agreement; or . . . any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment." 5 U.S.C. § 7103(a)(9)(C) (emphasis supplied).

V. The Treaty Granted To The United States The Authority To Regulate Employment With Panama Canal Commission And With The United States Forces Defending The Canal

The Panama Canal Treaty gave each signatory something it wanted: Panama was confirmed as territorial sovereign of the former Canal Zone, and for a period of twenty years the United States was assured the right to operate and defend the canal it had built. The second principle was as vital to the United States as the first was to Panama, yet plaintiffs, by creating a false conflict between those two principles, effectively subordinate the second principle to the first. There is no basis for that reading.

The treaty is unequivocal in granting to the United States the "rights to manage, operate, and maintain the Panama Canal," Treaty, art. III, ¶ 1, 33 U.S.T. at 50, and as part of those rights, the Treaty expressly empowered the United States to "[r]egulate relations with employees of the United States," *id*., art. III, ¶ 2(e), 33 U.S.T. at 51. The Agreement implementing Article IV of the Treaty similarly provided that, in discharging its duty under the Treaty to defend the canal, "as the employer" the United States would "draw up regulations which shall contain the terms, conditions, and prerequisites for all categories" of Department of Defense employees. Agreement in the Implementation of Treaty Article IV, art. VII, ¶ 1, 33 U.S.T. 307, 320.

Plaintiffs cannot avoid acknowledging these conferrals of power on the United States, Pls' Mem. at 17-18, but they then proceed to drain the substance from that power. According to plaintiffs, Panama, not the United States, retained the power to regulate the "*substance*" of the employment relationship. Pls' Mem. at 18 (emphasis plaintiffs'). On their view, the Treaty's clear statements that the United States is to "regulate" employment with employees of the United

States becomes merely a right to pass on as scrivener the actual substance of such regulation, which Panama is to provide. At most, the United States would have had under plaintiffs' fanciful version of the Treaty merely a defeasible right to fill in whatever gaps Panamanian regulators chose to leave.

Plaintiffs argue that this hollowing-out of the United States' right to regulate employment of its own employees somehow follows given the "backdrop," Pls' Mem. at 16, of the other main purpose of the Treaty, the "recognition of the "Republic of Panama's sovereignty over its territory,"' *id*. at 15, *quoting* Treaty preamble. But the right of the United States to regulate employment with its own employees in no way derogates from or conflicts with Panamanian sovereignty. To the contrary, that power of the United States to regulate employment was "grant[ed]" to it by "Panama, as territorial sovereign." Treaty, art III, ¶ 1. It is not defendants who have a quarrel with Panama's sovereignty: It is plaintiffs who disagree with Panama's decision as sovereign to grant the United States authority to regulate employment with the United States within Panama.

We do not contend, and the Treaty does not say, that the United States has the right to regulate relations with its own employees because the United States was sovereign in Panama as it is in, say, Texas. The Treaty plainly says that the United States, pursuant to a grant from Panama as the sovereign, is to regulate "as the employer" rather than as the sovereign. Treaty art. III, ¶ 2(e); *accord* Art. IV Agreement art. VII, ¶ 1. Thus "United States law" is not, as plaintiffs suppose our position implies (Pls' Mem. at 18), applicable to employment matters as a "general default choice of law" as if the United States were sovereign in Panama. The regulations that the United States eventually adopted "as the employer" with respect to employment for the United States in Panama are codified, 22 U.S.C. §§ 3641-3701, separately from the regulations it has adopted as sovereign in the United States for employment in general, and even for goverment employment in particular.[5] Plaintiffs also miss the mark when they point to two provisions of the

[5] The Panama Canal Act to some extent adopts by reference some provisions of United States law, but this does not make those provisions directly applicable by agreement of the Treaty, but only because the United States, exercising the authority as employer granted by the Treaty, decided to make them applicable. The Panama Canal Act differs in some respects from the law that would be applicable in the United States. **[pithy example, please?]**

(continued...)

Treaty that require particular applications of United States law as impossible to "square[ ]" with the notion (wrongly viewed as our position) that "United States law w[as] the general default choice of the Treaty." Pls' Mem. at 18.[6] Because the Treaty allowed the United States "as the employer" to decide whether to adopt regulations similar to existing United States law (or, for that matter, whether or not to adopt provisions similar to existing Panamanian law), where the Treaty wanted to make sure that particular provisions of United States law would be invoked, it was necessary to so specify in order to limit the discretion otherwise granted the United States. The existence of such provisions – and of other provisions imposing particular employment provisions, *e.g.*, Treaty art. IX ¶¶ 3, 5, 6 – confirms the general rule that, except as thus otherwise stated, it was open to the United States to decide the terms and conditions of employment.

Plaintiffs claim that a provision of the Article IV implementation agreement that the regulations for Defense Department employment would conform to the "general principles" of Panamanian labor laws is somehow a "logical byproduct" of a Treaty that already required those principles to apply. Pls' Mem. at 17, *quoting* Art. IV Implementation Agreement, art. VII ¶ 2. To the contrary, that the implementation agreement anticipated in "general" that the United States would adopt some principles of Panamanian law necessarily reflects the underlying Treaty provisions that it would be the United States, as the employer, ultimately deciding which particular

---

[5](...continued)

One difference between provisions adopted by the United States as employer in Panama and the provisions applicable in the United States relates to wage levels. We had indicated in our opening brief, at i-ii, that the United States generally paid employees in Panama at the higher rates they could have received for the same work in the United States rather than at prevailing Panamanian wage rates. That was an inadvertent overstatement fully applicable only to the higher-graded positions. For lower graded positions, the salaries or wages paid by the United States were intermediate between the prevailing salaries and wages in the United States and the lower salaries or wages prevailing in Panama. **[cite please?]**

[6] It is *plaintiffs'* position that has problems in this respect. In particular, art. X, ¶ 2, provided that the United States would "endeavor to ensure that the number of Panamanian nationals" employed by the Panama Canal Commission "will conform to the proportion established for foreign enterprises under the laws of the Republic of Panama." It is impossible to square that qualified undertaking to "endeavor" to conform with Panamanian labor laws in that one specific instance with plaintiffs' position that the rest of the Treaty already compelled the United States to conform to those laws.

provisions to adopt. That agreement did not by its own force make thirteenth month pay or severance pay or any other particular provision of Panamanian law applicable but left it open to the United States to decide which to adopt.[7]

Plaintiffs also argue that the treaty is "[a]t the very least, ambiguous" and cannot therefore be interpreted without looking at "extrinsic evidence." Pls' Mem. at 15. There is nothing ambiguous about the Treaty's conferring on the United States authority to regulate its relations with its own employees, but courts interpreting treaties may in any event consult materials outside the four corners of a treaty text in deciding a Rule 12 motion. *Menominee Indian Tribe v. Thompson*, 161 F.3d 449, 456 (7th Cir. 1998), *cert. denied*, 526 U.S. 1066 (1999).[8]

---

[7] As we explained in our opening memorandum (at xv-xvi), the context of this provision makes it clear that it is addressed only to hiring practices. In any event, treaties are not judicially enforceable by private parties except to the extent that they are self-executing or implemented by Act of Congress, *see, e.g., United States v. Duarte-Acero*, 296 F.3d 1277, 1283 (11th Cir.) *cert. denied*, 537 U.S. 1038 (2002). Even if the article IV agreement were wrenched out of its hiring-practices context and read as broadly as plaintiffs argue for, it would mean only that by not adopting thirteenth month and severance pay provisions of Panamanian law, the United States would not have lived up its (as construed by plaintiffs) agreement with the Panamanian government; but that would confer no judicially enforceable rights on plaintiffs, for the controlling point would remain that those specific provisions were never in fact adopted by the United States.

[8] For example, in *In re Eastern Airlines, Inc.*, 629 F. Supp. 307 (S.D. Fla. 1986), this Court granted a motion for judgment on the pleadings (governed by the same standards as a Rule 12(b)(6) motion to dismiss) that turned on construing a treaty. In reviewing and affirming that Rule 12 decision, the Supreme Court held that, though analysis begins with the text, it is also permissible to "'look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties.'" *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 535 (1991), *quoting Air France v. Saks*, 470 U.S. 392, 397 (1985). In this case, "practical construction" heavily reinforces the plain language of the Treaty. "Respect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty," *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 168 (1999), which is that severance and thirteenth month pay are not required. As for the Panamanian construction, plaintiffs suppose that Panama's continuation of the PCC's policies for its own agency that has assumed operation of the canal may represent nothing more than a judgment that those policies currently make sense. Pls' Mem. at 19 n. 24. But this misses the point that the canal-operation-specific Panamanian law indicates that, in exempting canal operations from the broader provisions of Panamanian law, it is continuing the same "rights" that employees had while the PCC ran the canal, a conclusion irreconcilable with plaintiffs contention that Panamanian law already did

(continued...)

CONCLUSION

For the reasons stated above and in the memorandum in support of defendants' motion to dismiss or, in the alternative, for summary judgment, defendants' motion to dismiss should be granted. In the alternative, defendants' alternative motion for summary judgment should be granted.

---

[8](...continued)
confer the rights they claim. *See* Defs' Mem. at xv n.20.