

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

<i>DENNIS J. ABBOTT, III, et al.,</i>)	
)	
<i>Plaintiffs</i>)	
)	
<i>v.</i>)	<i>Civil No. 96-55-P-C</i>
)	
<i>UNITED STATES OF AMERICA, et al.,</i>)	
)	
<i>Defendants</i>)	

RECOMMENDED DECISION ON DEFENDANTS’ MOTIONS TO DISMISS

The defendants, the United States of America and the International Federation of Professional and Technical Engineers, Local 4 (the “Union”), have moved separately pursuant to Fed. R. Civ. P. 12(b)(1) and (6) for dismissal of the amended complaint in this action brought against them by current and former members of the Union. The amended complaint (Docket No. 13) alleges a breach of the collective bargaining agreement between the defendants and violations of federal statute and the United States Constitution. The plaintiffs seek back pay, liquidated damages and attorney fees, as well as a declaration that a memorandum of understanding between the defendants dated November 12, 1993 is illegal and invalid. The plaintiffs are current or former employees of the Portsmouth Naval Shipyard in Kittery, Maine. I recommend that the motions be granted.

Standard for Reviewing Motion to Dismiss

When a defendant moves to dismiss pursuant to Rule 12(b)(1), the plaintiff has the burden of demonstrating that the court has jurisdiction. *Lundquist v. Precision Valley Aviation, Inc.*, 946

F.2d 8, 10 (1st Cir. 1991); *Lord v. Casco Bay Weekly, Inc.*, 789 F. Supp. 32, 33 (D. Me. 1992). However, when the basis of the defendant's 12(b)(1) motion is the plaintiff's alleged failure to state a federal claim, a court should assume jurisdiction and rule on the Rule 12(b)(6) motion, unless the claim is "entirely frivolous," because "federal question jurisdiction exists once plaintiff has alleged even a colorable federal claim." *Northeast Erectors Ass'n v. Secretary of Labor*, 62 F.3d 37, 39 n.1 (1st Cir. 1995) (citing *Bell v. Hood*, 327 U.S. 678, 682-83 (1945)). Finding the plaintiffs to have alleged at least a colorable federal claim, I assume that this court has jurisdiction and treat the motions as ones to dismiss for failure to state a claim.

"When evaluating a motion to dismiss under Rule 12(b)(6), [the court] take[s] the well-pleaded facts as they appear in the complaint, extending the plaintiff every reasonable inference in his favor." *Pihl v. Massachusetts Dep't of Educ.*, 9 F.3d 184, 187 (1st Cir. 1993). The defendant is entitled to dismissal for failure to state a claim "only if it clearly appears, according to the facts alleged, that the plaintiff cannot recover on any viable theory." *Correa-Martinez v. Arrillaga-Belendez*, 903 F.2d 49, 52 (1st Cir. 1990); *see also Jackson v. Faber*, 834 F. Supp. 471, 473 (D. Me. 1993).

Factual Allegations

At all relevant times the 115 plaintiffs were employed by the United States, through the Department of the Navy, at the Portsmouth Naval Shipyard ("Shipyard") in Kittery, Maine and were members of the Union. Amended Complaint ¶¶ 1, 3. The Union is the exclusive bargaining agent for certain professional and technical employees in engineering fields at the Shipyard. *Id.* ¶ 2. Each of the plaintiffs either filed a grievance based on the events following the filing of a grievance by the Union in 1990, filed a related unfair labor practice claim against the defendants, or was listed as a

grievant on the 1990 grievance. *Id.* ¶ 1.

The Union sued the Navy for back overtime pay assertedly due its members under the Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 201 *et seq.*, resulting in a decision requiring the Union to pursue the back-pay claims through the negotiated grievance process provided for in the collective bargaining agreement between the defendants. *Id.* ¶ 8. On or about September 14, 1990 the Union filed a grievance challenging the Shipyard’s classification of its bargaining unit employees as exempt under the FLSA. *Id.* ¶ 9. During the summer of 1992 a bulletin issued by the Union advised, *inter alia*: “This is also a ‘last call’ for all who have not filed a grievance and would like to join in. If you do not file at this time, you will not be considered in this case. Another grievance will have to be filed at a later date.” *Id.* ¶ 10(a). A letter from the Union to its members dated June 4, 1993 stated: “The grievance shall apply to members of the bargaining unit on the date of filing.” *Id.* ¶ 10(b). The plaintiffs did not join in the filing of this grievance.

On or about November 12, 1993 the Union and the United States entered into a Memorandum of Understanding (“MOU”) resolving the pending grievance, in pertinent part, by classifying listed grievants as non-exempt and awarding them back pay for overtime for up to six years and classifying employees not listed as grievants as non-exempt but precluding them “from being added to the grievances resolved by the Memorandum of Understanding, or from filing new grievances in an attempt to receive FLSA overtime back pay for the time period preceding the date of the Memorandum of Understanding.” *Id.* ¶ 12. Thereafter, the plaintiffs, or at least some of them, filed grievances concerning their exclusion under the MOU; these grievances were denied. *Id.* ¶ 15(b). Likewise, some or all of the plaintiffs sought to be included in a “global settlement” of FLSA issues negotiated between the defendants at the national level, which resulted in a

memorandum of understanding dated December 6 and 7, 1995, but were denied inclusion on the basis of the terms of the MOU. *Id.* ¶¶ 17-18. The amended complaint does not specify when any unfair labor practice complaint was filed against the Union in connection with these events, nor does it mention the outcome of any such complaint.

The plaintiffs seek declaratory relief finding the MOU “illegal and invalid to the extent it precludes the plaintiffs from seeking overtime back pay under the Fair Labor Standards Act and the Back Pay Act,” *id.* pp. 9-10, and monetary relief, including overtime back pay with interest within the terms of the MOU as applied to listed grievants, statutory liquidated damages, and attorney fees under the Fair Labor Standards Act and Back Pay Act, *id.* p. 10.

The plaintiffs allege jurisdiction under the FLSA, 29 U.S.C. § 216(b); the Back Pay Act, 5 U.S.C. § 5596; 28 U.S.C. § 2201; and 28 U.S.C. § 1331, as an action arising under the laws or Constitution of the United States. *Id.* ¶ 5. The constitutional right alleged to be implicated is a property right to overtime pay. *Id.* ¶ 29(b). This action was filed on March 13, 1996. Docket No. 1.

The Union moved to dismiss the complaint on May 6, 1996 (Docket No. 5), pursuant to Rule 12(b)(1) and (6), contending that the complaint fails to establish subject matter jurisdiction or to state a claim upon which relief may be granted. The United States moved to dismiss on May 17, 1996 (Docket No. 7), alleging that the plaintiffs have failed to establish subject matter jurisdiction and proper venue, and have raised claims that are barred by the applicable statute of limitations. Following amendment of the complaint to add an additional plaintiff and to add an allegation of jurisdiction under 28 U.S.C. § 1331 (Docket No. 13), the United States renewed and expanded its motion to dismiss (Docket No. 17) to include an argument that the addition of section 1331 did not

provide the court with subject matter jurisdiction.

The Union's Motion

The claims for monetary relief in the amended complaint are addressed to the United States. Therefore, only the claim for declaratory relief is asserted against the Union. The Union contends that the allegations against it all arise out of its actions as the exclusive bargaining representative for the plaintiffs and other member employees, that plaintiffs therefore have no private right of action against it, and that the Civil Service Reform Act ("CSRA"), 5 U.S.C. § 7101 *et seq.*, provides that the exclusive remedy under the circumstances of this case is an unfair labor practices complaint filed with the Federal Labor Relations Authority.

The plaintiffs respond that their complaint does not allege a breach of the Union's duty of fair representation but rather seeks to enforce their rights to individual arbitration or to "otherwise enforce their entitlement to back pay based on violations of those rights under the Fair Labor Standards Act." Plaintiffs' Memorandum in Support of Objection to Defendant Union's Motion to Dismiss Complaint (Docket No. 11) at 2. "The essence of the plaintiffs' claim is that [the Shipyard] and the Union have wrongfully and illegally waived and/or precluded their right to grieve and arbitrate the violation of their FLSA rights." *Id.* at 4. Essentially, the plaintiffs argue that their rights to overtime pay cannot be abridged or waived, and that the MOU purports to do so. The plaintiffs also contend that the Union is an indispensable party to this action, relying primarily on *Eldredge v. Carpenters 46 Northern California Counties Joint Apprenticeship & Training Comm.*, 440 F.

Supp. 506 (N.D. Cal. 1977).¹ *Id.* at 11-12.

None of the parties has provided the court with a copy of the collective bargaining agreement at issue. Unless FLSA claims are explicitly excluded from the grievance procedure by the collective bargaining agreement, the grievance procedure is the exclusive route available to resolve FLSA claims. 5 U.S.C. § 7121(a); *Carter v. Gibbs*, 909 F.2d 1452, 1458 (Fed. Cir.), *cert. denied sub nom. Carter v. Goldberg*, 498 U.S. 811 (1990). The Union asserts, and the plaintiffs do not deny, that by virtue of *Aamodt v. United States*, 976 F.2d 691 (Fed. Cir. 1992), the collective bargaining agreement at issue here has been found to be the exclusive procedure for resolving FLSA disputes involving members of the Union.

The plaintiffs attempt to avoid the effect of this holding by arguing that they have individual rights to arbitrate FLSA claims which the MOU illegally purported to waive. However, it is clear that the plaintiffs were given the opportunity to join in the grievance that preceded the MOU and chose not to do so. While the Union may have misled them about their opportunity to file another grievance later on the same issue, they were not deprived of the right to arbitrate their claims. Further, the plaintiffs' reliance on *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981), to support their claim to an absolute right to grieve and arbitrate claims under the FLSA is misplaced.

In *Barrentine* a private-sector employee was allowed to bring a claim alleging violation of the minimum-wage provisions of the FLSA in the federal courts after having unsuccessfully pursued the same claim through a grievance under his union's collective bargaining agreement. *Id.* at 729-30,

¹ The plaintiffs' counsel is apparently unaware that this decision was reversed on appeal. *Eldredge v. Carpenters 46 Northern California Counties Joint Apprenticeship & Training Comm.*, 662 F.2d 534 (9th Cir. 1981).

745. Noting that the FLSA was designed “to give specific minimum protections to *individual* workers,” *id.* at 739 (emphasis in original), the Supreme Court stated that “FLSA rights cannot be abridged by contract or otherwise waived because this would ‘nullify the purposes’ of the statute and thwart the legislative policies it was designed to effectuate,” *id.* at 740. *Barrantine* did not involve the Civil Service Reform Act, 5 U.S.C. §§ 7101-35. When the Supreme Court addressed the CSRA directly, it recognized that the CSRA “comprehensively overhauled the civil service system,” creating an elaborate “new framework for evaluating adverse personnel actions against [federal employees].” *Lindahl v. Office of Personnel Management*, 470 U.S. 768, 773-74 (1985). The CSRA “prescribes in great detail the protections and remedies applicable to such action, including the availability of administrative and judicial review.” *United States v. Fausto*, 484 U.S. 439, 443 (1988). A federal employee does not enjoy a private cause of action under the CSRA to vindicate a breach by his union of its statutory duty of fair representation. *Karahalios v. National Fed’n of Fed. Employees*, 489 U.S. 527, 536-37 (1989).

In *O’Connell v. Hove*, 22 F.3d 465 (2d Cir. 1994), the plaintiffs asserted a claim for overtime pay under the FLSA, rather than pursuing grievances under the collective bargaining agreement between the union of which they were members and the FDIC, their employer. After a careful review of the legislative history of the CSRA, the Second Circuit rejected the plaintiffs’ claims, based on *Barrantine*, that the FLSA granted them “an unfettered, non-waivable right to judicially enforce their overtime claims.” 22 F.3d at 471 (other citations omitted).

“Under the CSRA, however, the rights of a unionized federal employee are consolidated within the four corners of the collective agreement: Congress defined a ‘grievance’ to include contractual disputes and ‘any claimed violation . . . of any law.’” *Carter [v. Gibbs]*, 909 F.2d [1452], 1457 [Fed.Cir. 1990] (quoting 5 U.S.C. § 7103(a)(9)(C)). Congress -- for

whatever reason -- chose not to exclude FLSA claims from the scope of the contractual grievance procedures. Congress did, however, leave it to the Union to negotiate for exclusion of FLSA claims from the grievance process; the Union, implicitly if not explicitly, chose not to do so. Having made that choice, its members must now abide by the terms of their collective bargaining agreement, as informed by the CSRA.

Id. The reasoning of the Second Circuit is persuasive. The plaintiffs offer no authority to support their argument that they are entitled to individual enforcement of the right to overtime pay under the FLSA, unlike the plaintiffs in *O'Connell*, merely because they are not claiming that they are exempt from the CSRA, and I discern no basis for differentiating between the two groups of plaintiffs.

If the plaintiffs believe that the Union has wrongfully deprived them of their right to grieve or arbitrate FLSA claims under the circumstances, their recourse is an unfair labor practice charge under 5 U.S.C. §§ 7114(a)(1), 7116(b)(8) and 7118. *Karahalios*, 489 U.S. at 531-32. The plaintiffs allege in their amended complaint that they have filed such a claim. Amended Complaint ¶¶ 1, 15. The General Counsel to the Federal Labor Relations Authority may decide not to issue a complaint, 5 U.S.C. § 7118(a)(1), and that decision is final under the statutory scheme.² *American Fed'n of Gov't Employees v. Federal Labor Relations Auth.*, 842 F.2d 102, 105 (5th Cir. 1988); *see Saez v. Goslee*, 463 F.2d 214, 215 (1st Cir. 1972) (National Labor Relations Board); *but see Montana Air Chapter No. 29 v. Federal Labor Relations Auth.*, 898 F.2d 753, 756 (9th Cir. 1990) (exception to presumption of unreviewability for decision based on jurisdiction). If the General Counsel issues

² Counsel for the plaintiffs represents in Plaintiffs' Memorandum in Support of Objection to Defendant United States' Motion to Dismiss Complaint and Amended Complaint (Docket No. 18) at page 17 that "the plaintiffs' timely filed unfair labor practice complaints were finally denied by the Office of General Counsel of the Federal Labor Relations Authority by letter dated May 31, 1995." This action is not mentioned in the amended complaint and no copy of the letter has been provided. The unsworn statement in the memorandum, which is information outside the pleadings, could not serve as the basis for any decision on the motion to dismiss in any event. Fed. R. Civ. P. 12(b); *Dempsey v. National Enquirer*, 702 F. Supp. 934, 935 n.1 (D. Me. 1989).

a complaint, further statutory proceedings are available, with back pay one of the potential remedies. 5 U.S.C. § 7118(a)(7). In such circumstances, subsequent judicial review is available. *Department of the Navy v. Federal Labor Relations Auth.*, 815 F.2d 797, 798 (1st Cir. 1987). Casting their complaint in terms of an individual right to arbitration will not serve the purpose of permitting the plaintiffs to avoid the operation of the terms of the CSRA. *Montplaisir v. Leighton*, 875 F.2d 1, 4 (1st Cir. 1989) (“That appellants chose not to couch their complaint as an unfair labor practice cuts no mustard. Where labor-law preemption is an issue, creative labelling cannot carry the day.”) Their amended complaint fails to state a claim against the Union upon which relief may be granted.

Due to the resolution of the United States’ motion to dismiss discussed below, it is not necessary to address the plaintiffs’ claim that the Union is a necessary or indispensable party to this action, even in the absence of any direct claim against it.

The Motion of the United States

The United States moves to dismiss on several grounds: the lack of subject matter jurisdiction, improper venue and the two-year statute of limitations under the FLSA. 29 U.S.C. § 255(a). The plaintiffs’ response is initially identical to their response to the Union’s motion to dismiss, which is discussed above. In responding directly to the arguments of the United States, the plaintiffs rely on *Bowen v. Massachusetts*, 487 U.S. 879 (1988), to support their contention that this action is not brought primarily for money damages and therefore need not be brought under the Tucker Act, 28 U.S.C. § 1491(a)(1), or the Little Tucker Act, 28 U.S.C. § 1346(a)(2). They also argue that their FLSA claims did not accrue until their grievances were denied on a date not specified in the amended complaint or until December 26, 1995, when their requests to be included in the

“Global Settlements” were denied by the United States, Amended Complaint ¶ 18, so that the statute of limitations has not run.³

The statute of limitations is dispositive. Section 255(a) applies to actions for unpaid overtime compensation and liquidated damages under the FLSA, the Walsh-Healey Act, 41 U.S.C. § 35 *et seq.*, and the Bacon-Davis Act, 40 U.S.C. § 276a *et seq.* The Supreme Court determined in a claim brought under the Walsh-Healey Act that the cause of action to which section 255(a) applies accrues when the breach of duty to the plaintiff occurs. *Unexcelled Chem. Corp. v. United States*, 345 U.S. 59, 65 (1953). The fact that administrative proceedings arising from the same alleged breach were pending has no relevance to a determination of the date from which the statute of limitations runs. *Id.* at 66. “The filing of an administrative claim does not toll or otherwise affect the 2-year limitations period imposed by § 255(a) on seeking judicial relief for violations of the Fair Labor Standards Act.” *Nerseth v. United States*, 17 Cl.Ct. 660, 664 (1989). Other courts that have addressed this issue directly concur. *Hartt v. United Constr. Co.*, 655 F. Supp. 937, 938 (W.D. Mo. 1987), *aff’d* 909 F.2d 508 (8th Cir. 1990); *Aguilar v. Clayton*, 452 F. Supp. 896, 899 (E.D. Okla. 1978). The plaintiffs rely on *United States v. Meyer*, 808 F.2d 912 (1st Cir. 1987), dealing with the statute of limitations imposed by 28 U.S.C. § 2462 on actions to enforce civil penalties, and *Crown Coat Front Co. v. United States*, 386 U.S. 503 (1967), dealing with the statute of limitations imposed by 28 U.S.C. § 2401(a) on actions founded on contracts with the United States. Neither is applicable here, where the specific statute of limitations at issue has been interpreted by the Supreme Court to foreclose the claims raised by the plaintiffs without regard to the status or existence of administrative

³ The plaintiffs do not allege that any violation of the FLSA by the United States was willful; therefore, the three-year statute of limitations provided by 29 U.S.C. § 255(a) for willful violations is not at issue here.

proceedings. The applicable statute of limitations bars the plaintiffs' claims under the FLSA, all of which accrued more than two years before this action was filed.

Because the FLSA claims are time-barred, the claim for declaratory judgment concerning the MOU must also be dismissed. An action for declaratory judgment must present a real and substantial controversy admitting of specific relief through a decree of conclusive character. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937); *see State v. Narragansett Indian Tribe*, 19 F.3d 685, 693 (1st Cir. 1994) (court must evaluate whether grant of declaratory relief would serve useful purpose). Here, any declaratory judgment concerning the MOU could provide no relief to the plaintiffs in the absence of any recovery under the FLSA. Therefore, no independent claim for declaratory judgment may be pursued under the amended complaint.

Conclusion

For the foregoing reasons, I recommend that the motions to dismiss filed by both defendants be **GRANTED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 3rd day of January, 1997.

David M. Cohen
United States Magistrate Judge