

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

JON MILLS, ET AL.,)	
)	
PLAINTIFFS)	
)	
v.)	CIVIL No. 92-410-P-H
)	
STATE OF MAINE,)	
)	
DEFENDANT)	

ORDER

In light of Seminole Tribe of Fla. v. Florida, 116 S. Ct. 1114 (1996), it appears that on the eve of final judgment and after years of litigation this Court no longer has federal jurisdiction over the State’s violation of federal wage and hour laws. Accord Adams v. Kansas, 919 F. Supp. 1496 (D. Kan. 1996); Moad v. Arkansas State Police Dep’t, No. LR-C-94-450 (E.D. Ark. May 14, 1996); Raper v. Iowa, No. 4-94-CV-10237 (S.D. Iowa June 21, 1996). Nor do I have the authority to remand the case to the state courts, because the lawsuit was filed initially in federal court. The plaintiffs’ arguments that jurisdiction can be sustained under Section 5 of the Fourteenth Amendment or that the Supreme Court’s holding in Seminole Tribe on subject matter jurisdiction is prospective only and not applicable to this case are wholly unpersuasive. See Harper v. Virginia Dep’t of Taxation, 509 U.S. 86, 97 (1993). The plaintiffs have likewise failed to make a persuasive case for discovery; there is no reason to conclude that discovery would turn up a consent to jurisdiction or waiver of the Eleventh Amendment.

The plaintiffs' motion to certify the constitutional question to the United States Attorney General under 28 U.S.C. § 2403(a) is **GRANTED**. See also Local Rule 13. The Clerk's Office shall notify the Attorney General that the State's motion to dismiss the complaint has called into question the constitutionality of 29 U.S.C. § 216(b) (Actions to recover for violations of the Fair Labor Standards Act "may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction.") Because the constitutional issue is so clear following the Supreme Court's ruling in Seminole Tribe, however, I see no reason to await the outcome of the certification. If there is anything to be done here, it can be pursued on appeal.

I observe that after months of proceedings the Special Master filed his final report on April 17, 1996. Both parties have objected to the report. The plaintiffs have articulated their objections, whereas the State simply filed an objection and requested a briefing schedule, a transparent attempt to delay the articulation of their objections that I would not ordinarily countenance. Because I lack jurisdiction at this stage, however, there is nothing to be done on the Special Master's report. There is likewise nothing to be gained by oral argument on the State's motion to dismiss. It is unfortunately a tragic consequence of the Supreme Court's inability to maintain the status of its own precedents that all this time and effort has been wasted. Compare Seminole Tribe (holding that Congress lacks power) with Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989) (upholding Congress's power).

Accordingly, the Complaint is **DISMISSED** for lack of subject matter jurisdiction inasmuch as the State has not waived its Eleventh Amendment rights. The Clerk is directed to certify the constitutional question to the United States Attorney General.

SO ORDERED.

DATED THIS 3RD DAY OF JULY, 1996.

D. BROCK HORNBY
UNITED STATES DISTRICT JUDGE