

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

GEORGE W. MANTOS, et al.,)
)
 Plaintiffs)
)
 v.) **Civil No. 01-229-P-H**
)
 UNITED STATES OF AMERICA,)
)
 Defendant)

**RECOMMENDED DECISION ON DEFENDANT’S
MOTION TO DISMISS**

The United States of America (“United States”) moves to dismiss the instant complaint, in which seventeen current or former Portsmouth Naval Shipyard (“Shipyard”) workers seek retroactive job reclassification, on alternative grounds of failure to state a cause of action, lack of jurisdiction and improper venue. Motion To Dismiss, etc. (“Motion”) (Docket No. 2) at 1; Complaint (Docket No. 1) ¶¶ 1-3. Inasmuch as I agree that this court lacks jurisdiction to adjudicate the Complaint, I recommend that the Motion be granted.

I. Applicable Legal Standards

When a defendant moves to dismiss pursuant to Rule 12(b)(1), the plaintiff bears the burden of demonstrating that subject-matter jurisdiction exists. *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). Both parties may rely on extra-pleading materials. 5A C. Wright & A. Miller, *Federal Practice and Procedure* § 1350 at 213 (2d ed. 1990); *see also Hawes v. Club Ecuestre el Comandante*, 598 F.2d

698, 699 (1st Cir. 1979) (question of jurisdiction decided on basis of answers to interrogatories, deposition statements and an affidavit).

II. Factual Context

The following facts gleaned from the Complaint and from a statement of facts filed by the United States and adopted by the plaintiffs, *see* Objection to Defendant's Motion To Dismiss, etc. ("Opposition") (Docket No. 5) at 2, are relevant to decision of the instant Motion:

The plaintiffs are former ship schedulers employed by the United States at the Shipyard in Kittery, Maine. Statement of Material Facts (Docket No. 3) ¶ 1.¹ Employees at the Shipyard are designated as General Schedule ("GS") or Federal Wage System ("FWS") employees for classification and pay purposes. *Id.* ¶ 3. As of 1996 the plaintiffs were designated as FWS employees who were rated as WD-8 schedulers. *Id.*

In 1996 the plaintiffs complained to their shop at the Shipyard that they should be rated and classified as GS-11 employees. *Id.* ¶ 4. Their supervisors raised the issue with the Human Resources Office ("HRO") at the Shipyard, and the HRO conducted a "desk audit" in the fall of 1996. *Id.* ¶ 5. The plaintiffs provided interviews and written materials in support of their claim for reclassification. *Id.* ¶ 6. Based on the desk audit, the Shipyard denied the requested reclassification. *Id.* The plaintiffs continued to seek reclassification. *Id.* ¶ 7.

By decision dated June 15, 2000 the Civilian Personnel Management Service of the Department of Defense determined that the plaintiffs' positions properly were covered under the General Schedule. *Id.* ¶ 8. Their appeal was referred to the Shipyard for a determination of appropriate GS series, title and grade level. *Id.* The Shipyard classified the plaintiffs as production

¹ Although this document is styled a "Statement of Material Facts," I treat it simply as the type of extra-pleading material contemplated in the context of a Rule 12(b)(1) motion to dismiss. *See Valentin v. Hospital Bella Vista*, 254 F.3d 358, 364 (1st Cir. 2001) (conversion to summary judgment inappropriate in context of Rule 12(b)(1) motion to dismiss for lack of subject-matter jurisdiction).

controllers, GS-1152-11, effective September 17, 2000. *Id.* ¶ 11. For each reclassified employee, regular compensation increased by more than \$6,000 per year. *Id.*

The plaintiffs subsequently requested that their reclassification be retroactive to November 25, 1996. *Id.* ¶ 12. This request, along with their request for back pay, interest and attorney fees, was denied. *Id.*

On September 17, 2001 the plaintiffs filed the instant Complaint. Complaint at 1. Under a section titled “Jurisdiction,” they described the dispute between the parties as concerning “the plaintiffs’ entitlement to retroactive reclassification from their position as WD-8 Schedulers to GS-1152-11 Production Controllers and commensurate back pay, interest and attorney’s fees.” *Id.* ¶ 3. They premised jurisdiction on 28 U.S.C. § 1331 and 5 U.S.C. § 5596 (the so-called “Back Pay Act”). *Id.* ¶¶ 4-5.

In a section titled “The Claim,” the plaintiffs detailed several asserted violations of federal job-classification regulations and their constitutional due-process rights. *Id.* ¶¶ 20-30. They concluded: “The Agency’s refusal and failure to provide the plaintiffs with a retroactive effective date of their reclassification is an unjustified and unwarranted personnel action entitling the plaintiffs to back pay, interest, and reasonable attorney’s fees pursuant to the Back Pay Act, 5 U.S.C. § 5596 and 5 C.F.R. § 550.801 et seq.” *Id.* ¶ 32. They requested that the court order (i) their reclassification retroactive to November 25, 1996 and (ii) their entitlement to back pay with interest and to reasonable attorney fees. *Id.* at 7.

III. Analysis

Disposition of the Motion hinges on the impact of a set of jurisdictional provisions from which the plaintiffs strive to distance themselves: the so-called “Tucker” acts. *See* Opposition at 7-8. As the First Circuit has explained:

Under the Tucker Act, 28 U.S.C. § 1491, the United States waived its sovereign immunity from nontort claims for money damages and specified which courts could hear such claims. . . . Claims against the United States exceeding \$10,000 (“Big” Tucker Act claims), founded upon the Constitution, a federal statute, a regulation, or contract, are in the jurisdiction of the Court of Federal Claims. 28 U.S.C. § 1491. The district courts and the Court of Federal Claims have concurrent jurisdiction over “Little” Tucker Act claims, *i.e.*, for money damages up to \$10,000. 28 U.S.C. § 1346(a)(2) (Little Tucker Act)

Charles v. Rice, 28 F.3d 1312, 1321 (1st Cir. 1994).

The plaintiffs concede that the amount in controversy in this case exceeds \$10,000 per plaintiff. Opposition at 7. Thus, to the extent this is a Tucker Act claim, the Court of Federal Claims has exclusive jurisdiction. *See, e.g., Schulthess v. United States*, 694 F.2d 175, 178 (9th Cir. 1982) (“In general, except for claims sounding in tort, the United States Claims Court has exclusive jurisdiction over actions against the United States in excess of \$10,000.”). However, the plaintiffs protest that their claim is not centrally about money but rather about alleged transgressions of federal regulations and due-process rights. Opposition at 7-8. In their view, they “are not asking the Court to award a specified amount of monetary damages;” rather, “any monetary entitlement resulting [from a court order favorable to them] will follow automatically as the Court’s order is administratively implemented by the defendant.” *Id.*

“Claims Court jurisdiction may not be evaded by merely disguising a monetary claim for an injunction requiring the payment of money.” *Favereau v. United States*, 44 F. Supp.2d 68, 71 (D. Me. 1999); *accord, e.g., Brazos Elec. Power Coop., Inc. v. United States*, 144 F.3d 784, 787 (Fed. Cir. 1998). The language of the Complaint itself makes clear that its primary (if not entire) object is to secure money damages, in the form of back pay, interest and attorney fees, from the federal

government. *See, e.g.*, Complaint ¶¶ 3, 32. To the extent the plaintiffs (who have already won reclassification) do seek equitable or declaratory relief via this action, it has little discernible value apart from the money damages sought and thus, in itself, does not provide a basis for jurisdiction. *See Favereau*, 44 F. Supp.2d at 71 (“Where a claim for money damages against the United States, which is governed by the Tucker Act, is joined with a claim for injunctive or declaratory relief, the test for determining whether the district court may exercise jurisdiction over the equitable claim is whether the declaratory relief a claimant seeks has significant prospective effect or considerable value apart from merely determining monetary liability of the government.”) (citations and internal quotation marks omitted). This court accordingly is without jurisdiction to hear the plaintiffs’ claims.²

A final issue remains. The plaintiffs request that, should the court find itself without jurisdiction in this matter, it transfer the case to the Court of Federal Claims pursuant to 28 U.S.C. § 1631. Opposition at 8. The United States suggests that, inasmuch as the Complaint patently fails to state a claim upon which relief can be granted, the case should instead be dismissed. Motion at 6-7. I am constrained to agree with the United States.

Section 1631 provides, in relevant part, that a court lacking jurisdiction “shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed[.]” In weighing “the interest of justice,” a court “is authorized to consider the consequences of a transfer by taking ‘a peek at the merits’ to avoid raising false hopes and wasting judicial resources that would result from transferring a case which is

² In their papers opposing the Motion, the plaintiffs rely exclusively on 28 U.S.C. § 1331 as the jurisdictional basis for this court’s consideration of their claims. *See* Opposition at 6-7 (disavowing reliance on Back Pay Act or constitutional claims to establish jurisdiction; discussing section 1331). However, inasmuch as the Complaint, properly characterized, primarily seeks money damages against the United States, this reliance is misplaced. *See, e.g., Berman v. United States*, 264 F.3d 16, 20 (1st Cir. 2001) (“General jurisdictional statutes such as 28 U.S.C. § 1331 and 28 U.S.C. § 1340 do not waive sovereign immunity and therefore cannot be the basis for jurisdiction over a civil action against the federal government.”); *Sibley v. Ball*, 924 F.2d 25, 28 (1st Cir. 1991) (section 1331 “does not by its own terms waive sovereign immunity and vest in district courts plenary jurisdiction over all, or any, suits which – by seeking a money judgment, as Sibley does – are in substance suits against the United States.”).

clearly doomed.” *Haugh v. Booker*, 210 F.3d 1147, 1150 (10th Cir. 2000) (citation omitted); *see also, e.g., Phillips v. Seiter*, 173 F.3d 609, 611 (7th Cir. 1999) (“If . . . limited review reveals that the case is a sure loser in the court that has jurisdiction (in the conventional sense) over it, then the court in which it is initially filed – the court that does not have jurisdiction – should dismiss the case rather than waste the time of another court.”); *Rice*, 28 F.3d at 1323 (declining to transfer case to Court of Federal Claims when to do so “would be to no avail”).

In this case, even assuming *arguendo* that (i) the plaintiffs rest their case on the appropriate set of job-classification regulations (those promulgated in the FWS, rather than GS, context), *see* Opposition at 4-5, and (ii) the United States did indeed transgress those regulations as asserted, the plaintiffs point to nothing within those regulations or underlying statutes entitling them to an award of back pay or any other damages as a result. *See generally* Complaint; Opposition. Indeed, the only basis identified in the Complaint for award of damages is the Back Pay Act and its implementing regulations. *See* Complaint ¶ 32. The Back Pay Act and relevant regulations expressly state that they are inapplicable to reclassification actions. *See* 5 U.S.C. § 5596(b)(3) (“This subsection [pertaining to awards of back pay] does not apply to any reclassification action[.]”); 5 C.F.R. § 550.801(b) (“This subpart [H – Back Pay] does not apply to any reclassification action.”). Accordingly, transfer in this case would be fruitless.

IV. Conclusion

For the foregoing reasons, I recommend that the Motion 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 this 7th day of February, 2002.

David M. Cohen
United States Magistrate Judge

STNDRD

U.S. District Court
District of Maine (Portland)

CIVIL DOCKET FOR CASE #: 01-CV-229

MANTOS, et al v. USA
Assigned to: JUDGE D. BROCK HORNBY
Demand: \$0,000
Lead Docket: None
Dkt# in other court: None

Filed: 09/17/01

Nature of Suit: 790
Jurisdiction: US Defendant

Cause: 05:704 Labor Litigation

GEORGE W MANTOS
 plaintiff

JAMES G. NOUCAS, JR., ESQ.
[COR LD NTC]
NOUCAS & KEENAN
NOBLE'S ISLAND
500 MARKET STREET
SUITE 8
PORTSMOUTH, NH 03801
603-431-7164

THOMAS J BROADHURST
 plaintiff

JAMES G. NOUCAS, JR., ESQ.
(See above)
[COR LD NTC]

CHARLES L ANGERS
 plaintiff

JAMES G. NOUCAS, JR., ESQ.
(See above)
[COR LD NTC]

WALLACE H BROWN
 plaintiff

JAMES G. NOUCAS, JR., ESQ.
(See above)
[COR LD NTC]

JAMES BONNER
 plaintiff

JAMES G. NOUCAS, JR., ESQ.
(See above)
[COR LD NTC]

JAMES CAMPBELL
 plaintiff

JAMES G. NOUCAS, JR., ESQ.
(See above)
[COR LD NTC]

ROBERT S CLARK
 plaintiff

JAMES G. NOUCAS, JR., ESQ.
(See above)
[COR LD NTC]

RICHARD M GERVAIS
 plaintiff

JAMES G. NOUCAS, JR., ESQ.
(See above)
[COR LD NTC]

GERALD L ST PIERRE, JR
 plaintiff

JAMES G. NOUCAS, JR., ESQ.
(See above)
[COR LD NTC]

WILLIAM H WARD
 plaintiff

JAMES G. NOUCAS, JR., ESQ.
(See above)
[COR LD NTC]

EDWARD H COLEMAN
 plaintiff

JAMES G. NOUCAS, JR., ESQ.
(See above)
[COR LD NTC]

GEORGE P GREBIN
 plaintiff

JAMES G. NOUCAS, JR., ESQ.
(See above)
[COR LD NTC]

JOSEPH H SEARLES
 plaintiff

JAMES G. NOUCAS, JR., ESQ.
(See above)
[COR LD NTC]

ROY WELCH
 plaintiff

JAMES G. NOUCAS, JR., ESQ.
(See above)
[COR LD NTC]

DAVID B CROCKETT
 plaintiff

JAMES G. NOUCAS, JR., ESQ.
(See above)
[COR LD NTC]

ROBERT D GUINARD
 plaintiff

JAMES G. NOUCAS, JR., ESQ.
(See above)
[COR LD NTC]

BRIAN C SPINNEY
 plaintiff

JAMES G. NOUCAS, JR., ESQ.
(See above)
[COR LD NTC]

v.

USA
defendant

DAVID R. COLLINS
207-780-3257
[COR LD NTC]
OFFICE OF THE U.S. ATTORNEY
P.O. BOX 9718
PORTLAND, ME 04104-5018
(207) 780-3257