No. 12-4027

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CSG WORKFORCE PARTNERS, LLC, ET AL.,

Plaintiffs-Appellants,

v.

CYNTHIA C. WATSON,
REGIONAL ADMINISTRATOR OF THE WAGE AND HOUR DIVISION,
U.S. DEPARTMENT OF LABOR,

Defendant-Appellee.

On Appeal from the United States District Court for the
District of Utah Central Division, Honorable Ted Stewart

BRIEF FOR THE DEPARTMENT OF LABOR

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ORAL ARGUMENT
NOT REQUESTED

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STATEMENT OF RELATED CASES

Pursuant to 10th Cir. R. 28.2(C)(l), the Secretary states that an appeal is pending before this Court in Solis v. CSG Workforce Partners LLC et al., No. 12-4028 (docketed Feb. 14, 2012), a case with substantially the same issues raised in the instant case. The case arises from the same events, involves the same parties, and essentially addresses the same legal questions relating to the appropriateness of the subpoena. By Order dated March 14, 2012, this Court granted in part CSG's motion to consolidate the cases. The Court directed the cases to be separately briefed, with separate and unrelated appendices, although they will be assigned to the same panel of judges for disposition.

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BRIEF FOR THE DEPARTMENT OF LABOR

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The district court had, as a threshold matter, jurisdiction to determine whether it had the power to exercise jurisdiction over the action. See Dennis Garberg & Assocs. v. Pack-Tech Int'l Corp., 115 F.3d 767, 773 (10th Cir. 1997) (citations omitted). This Court has jurisdiction to review District Court Judge Ted Stewart's January 27, 2012 Memorandum Decision and Order granting the

Department of Labor's ("Department") Motion to Dismiss and Denying CSG Workforce Partners, LLC ("CSG") Motion to Consolidate pursuant to 28 U.S.C. 1291 (final decisions of district courts). R. 19 (App. 97-103).[1] A timely Notice of Appeal from the district court's order was filed by Plaintiffs-Appellants on February 14, 2012. R. 21 (App. 105-106).

STATEMENT OF THE ISSUE

Whether the district court correctly concluded that it did not have subject matter jurisdiction over CSG's complaint alleging that the Secretary of Labor's ("Secretary") issuance of an administrative subpoena duces tecum to CSG pursuant to the Fair Labor Standards Act ("FLSA" or "Act") is beyond the scope of the Department's authority.

STATEMENT OF THE CASE

Statement of Facts and Course of Proceedings

In June 2010, the Department of Labor's ("Department") Wage and Hour Division ("Wage and Hour" or "WHD") initiated an investigation of CSG to ensure that the company's workers are receiving the wages to which they are entitled under the FLSA, 29 U.S.C. 201 et seq. See WHD June 4, 2010 letter to CSG

[1] References to the civil docket from the district court proceedings are indicated as "R. (number corresponding to civil docket entries reprinted in Appellants' Record Appendix)"; references to Appellant's Record Appendix are cited as "App. (Record Appendix page number(s))."

(App. 15-16). The Department requested specific documents from CSG in furtherance of its investigation. See, e.g., id.; WHD December 6, 2010 letter to CSG (App. 23-26); WHD July 7, 2011 letter to CSG (App. 27-30). When CSG failed, after repeated requests, to voluntarily produce all of the records requested, the Department on August 31, 2011, served CSG with an administrative subpoena duces tecum ("subpoena") pursuant to section 9 of the FLSA, 29 U.S.C. 209, seeking among other things, documents reflecting hours worked for current or former CSG members, service agreements and contracts between CSG and other entities, work invoices, time sheets, and other documents used for billing purposes, as well as documents indicating the annual dollar volume for each LLC comprising the CSG enterprise. See Wage and Hour Subpoena (App. 31-33).

CSG filed a complaint in the U.S. District Court for the District Court of Utah on September 14, 2011. R. 2 (App. 6-9).[2] The complaint asserts that CSG and its affiliates provide "specialized construction related services on various

[2] On September 27, 2011, the Department successfully sought enforcement of its subpoena in United States District Court for the District of Utah. See Solis v. CSG Workforce Partners, LLC et al., No. 2:11-cv-00903 (D. Utah). This appeal is related to the appeal of that case to this Court, Solis v. CSG Workforce Partners, LLC et al., appeal docketed, No. 12-4028 (Feb. 14, 2012). The case arises from the same events, involves the same parties, and essentially addresses the same underlying legal questions relating to the appropriateness of the subpoena. By Order dated March 14, 2012, this Court granted in part CSG's motion to consolidate the cases. The Court directed the cases to be separately briefed, with separate and unrelated appendices, although they will be assigned to the same panel of judges for disposition. See Order, March 14, 2012.

projects to independent customers, clients or contractors entirely and exclusively through individuals who comprise the members of that LLC." Compl., ¶ 5 (App. 7). Asserting jurisdiction under 28 U.S.C. 1331, CSG asked the court to conclude that its member-partners are not "employees" but "bona fide partners" for purposes of the FLSA, and to quash the Department's subpoena because of a lack of coverage. Id. ¶¶ 3, 28, 29 (App. 7, 13). CSG asserted that compliance with the subpoena would "lead to additional . . . interviews and/or interference with Plaintiffs' customers, clients, and contractors, and will cause further loss of business to the point of effectively destroying Plaintiffs' ongoing viability as a functioning business." Id. ¶ 24. On October 14, 2011, CSG filed a Motion to Consolidate its action with the subpoena enforcement action brought by the Department. R. 6 (App. 3). On November 14, 2011, the Department filed a Motion to Dismiss for Lack of Jurisdiction. R. 12 (App. 75-85).

On January 27, 2012, District Court Judge Ted Stewart issued a Memorandum Decision and Order granting the Department's Motion to Dismiss and Denying CSG's Motion to Consolidate CSG's action with the Department's subpoena enforcement proceedings. R. 19 (App. 97-103). The district court agreed with the Department that the court did not have subject matter jurisdiction over CSG's action because CSG could not establish either that the government had waived its sovereign immunity to such a suit or that the government's actions fell

within the first of two narrow exceptions to the bar of sovereign immunity that permits jurisdiction when a government official takes an action that is not within the officer's statutory powers. Id.[3] The court rejected CSG's argument that WHD's issuance of the administrative subpoena fell into this exception because the CSG's member-partners are "bona fide partners" exempt from the FLSA, and thus the issuance of the administrative subpoena was ultra vires. Id. The court specifically noted that CSG recognized that the Department was statutorily authorized to administer and enforce the FLSA, and that the subpoena issued to CSG was done pursuant to this authority. Id. at 101-02. The district court noted precedent from this Court establishing that the ultra vires exception more properly applies when the official lacks delegated power or statutory authority, and that immunity attaches so long as the official is empowered to make the decision: "[A]n official's erroneous exercise of delegated power is insufficient to invoke the exception." Id. (citing Wyoming v. United States, 279 F.3d 1214, 1229-30 (10th Cir. 2002)). Thus, the district court concluded that it was without jurisdiction to hear the dispute and dismissed CSG's complaint. Id. at 102.

On February 14, 2012, CSG timely filed an appeal of the district court's Order granting the Department's Motion to Dismiss. R. 21 (App. 105-07).

[3] The district court noted that CSG had conceded that neither the FLSA nor the Declaratory Judgment Act provided the court with jurisdiction over the claim, and that CSG was not bringing its claim pursuant to the Administrative Procedure Act. See Mem. Decision and Order (App. 100).

SUMMARY OF ARGUMENT

It is well settled that the FLSA specifically authorizes the Secretary to issue administrative subpoenas in the course of an investigation conducted pursuant to the FLSA, and that she can do so prior to determining coverage under the Act. See Oklahoma Press Publ'g Co. v. Walling, 327 U.S. 186 (1946). The administrative subpoena issued in this case, which seeks, inter alia, specific records relevant to determining coverage under the FLSA as well as of wages paid and hours worked by CSG workers, was issued pursuant to this explicit grant of statutory authority. Because the Department's act of issuing the subpoena to CSG was statutorily authorized, CSG cannot establish that the exception to principles of sovereign immunity applicable to government officials who act outside of their delegated authority applies in this case. See Wyoming v. United States, 279 F.3d 1214 (10th Cir. 2002). Thus, the district court correctly held that it was without jurisdiction to hear this action.

ARGUMENT

THE DISTRICT COURT CORRECTLY CONCLUDED THAT CSG'S COMPLAINT IS BARRED ON SOVEREIGN IMMUNITY GROUNDS AND DOES NOT MEET THE REQUIREMENTS OF THE ULTRA VIRES EXCEPTION TO THAT DOCTRINE BECAUSE THE SECRETARY IS STATUTORILY AUTHORIZED TO ISSUE SUBPOENAS DUCES TECUM IN ORDER TO INVESTIGATE AND ENFORCE THE FLSA

A. Standard of Review

This Court reviews a district court's dismissal for lack of subject matter jurisdiction de novo. See Flying Phoenix Corp. v. Creative Packaging Mach., Inc., 681 F.3d 1198, 1200 (10th Cir. 2012) (citation omitted). This Court accepts the complaint's factual allegations as true and asks "whether the complaint, standing alone, is legally sufficient to state a claim for relief." Wyoming v. United States, 279 F.3d 1214, 1222 (10th Cir. 2002) (citation omitted); see Ruiz v. McDonnell, 299 F.3d 1173, 1180 (10th Cir. 2002).

B. The District Court Correctly Held That CSG's Complaint Against the Department Is Barred by Principles of Sovereign Immunity and Does Not Fall within the Ultra Vires Exception to that Doctrine

1. CSG does not allege any express waiver of sovereign immunity by the United States, and the FLSA does not contain such a waiver. Without such a waiver, federal courts lack jurisdiction to entertain suits against the United States and its officers acting in their official capacities. See, e.g., Atkinson v. O'Neill,

867 F.2d 589, 590 (10th Cir. 1989); Bork v. Carroll, 449 Fed. App'x 719, 2011 WL 5925579, at *1 (10th Cir. Nov. 29, 2011) (citing Wyoming, 279 F.3d at 1225). However, there are two narrow exceptions to this doctrine:

> A court may regard a government officer's conduct as so "illegal" as to permit a suit for specific relief against the officer as an individual if (1) the conduct is not within the officer's statutory powers or, (2) those powers, or their exercise in the particular case, are unconstitutional.

Wyoming, 279 F.3d at 1225 (citation omitted). CSG asserts that its action falls within the first of these two exceptions to the sovereign immunity principle. CSG specifically argues (Br. 5) that because it is well established that bona fide partners are not employees covered by the FLSA, and CSG member-partners are such bona fide partners, WHD's issuance of a subpoena to CSG to determine coverage of its member-partners is outside of its statutory authority to investigate violations of the FLSA.[4]

The first exception to the sovereign immunity doctrine applies "in a suit for specific relief against the United States where a government official acted ultra

[4] Although CSG's complaint appears to seek declaratory relief by asking the Court to determine that its "members" are partners rather than employees for purposes of the FLSA, they do not cite the Declaratory Judgment Act as a jurisdictional basis for requesting this relief. Compl. ¶ 29 (App. 13). Nor does the Declaratory Judgment Act itself confer jurisdiction in this matter. See, e.g., Wyoming, 279 F.3d at 1225. Likewise, CSG does not assert a claim under the Administrative Procedure Act (APA) on the ground that the subpoena is a final agency action. See Mobil Exploration & Prod. U.S., Inc. v. Dep't of Interior, 180 F.3d 1192, 1200-01 (10th Cir. 1999) (APA claims usually dismissed as anticipatory challenges in context of subpoena enforcement).

vires or beyond those powers Congress extended." Wyoming, 279 F.3d at 1229 (citation omitted). Application of this exception to the sovereign immunity doctrine therefore "rest[s] upon the officer's lack of delegated power, or more specifically . . . lack of statutory authority." Id. (internal quotation marks omitted). An official's "erroneous exercise of delegated power" is not enough to invoke the exception. Id. As this Court has explained:

> [T]he mere allegation that an officer acted wrongfully does not establish that the officer, in committing the alleged wrong, was not exercising the powers delegated to him by the sovereign. If the officer is exercising such powers, the suit is in fact against the sovereign and may not proceed unless the sovereign has consented. Thus, the question of whether a government official acted ultra vires is quite different from the question of whether that same official acted erroneously or incorrectly as a matter of law.

Id. at 1230 (internal quotation marks omitted). Thus, official action is not ultra vires or invalid even if it is "based on an incorrect decision as to law or fact," so long as the officer making the decision was empowered to do so. Id. at 1229-30 (citation omitted). Here, that officer was so empowered.

2. The FLSA requires covered employers to pay their non-exempt employees a minimum wage for all hours worked and a premium rate for all overtime hours worked. See 29 U.S.C. 206, 207. The Department is responsible for administering and enforcing the FLSA. See 29 U.S.C. 204, 211(a), 216(c), 217. Section 11(a) of the FLSA provides expansive authority to the Wage and Hour Administrator ("Administrator") and his or her designated representatives to:

> investigate and gather data regarding . . . conditions and practices of employment in any industry subject to this [Act], . . . enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this [Act], or which may aid in the enforcement of the provisions of this [Act].

29 U.S.C. 211(a).[5] Pursuant to this authority and in order to conduct thorough investigations into the wages, hours, and other conditions and practices of employment, the Department's investigators regularly request records from employers, review and copy employers' records (including payroll records and records of hours worked), interview employees, and collect and review other relevant data relating to FLSA compliance. See, e.g., 29 C.F.R. Part 516 (setting forth an employer's recordkeeping requirements under the FLSA).

[5] Section 11(c) states that--

> [e]very employer subject to any provision of this chapter or of any order issued under this chapter shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this chapter or the regulations or orders thereunder.

29 U.S.C. 211(c); see 29 C.F.R. 516.1 (form of records required); 29 C.F.R. 516.7 (place for keeping records and availability for inspection).

By its plain text, section 11(a)'s grant of investigative authority is broad.[6] The authority extends to "conditions and practices of employment in any industry" subject to the FLSA and expressly includes the power to inspect and copy records. 29 U.S.C. 211(a). Moreover, the Department may use its investigative authority to determine whether any person has violated the FLSA or to otherwise aid its efforts to enforce the Act. See id. Accordingly, the Department's investigation of CSG to ensure that employees are receiving the FLSA wages to which they are entitled is authorized by the Act. Section 11(a) likewise authorizes the Department's requests for documents from CSG in connection with that investigation.

Section 9 of the Act gives the Secretary authority to subpoena witnesses and documentary evidence relating to any matter under investigation. See 29 U.S.C. 209.[7] The Secretary has authorized the Administrator to issue subpoenas pursuant to section 9 of the FLSA. See Secretary's Order 5-2010, § 5.A.1 (Sept. 2, 2012),

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[6] As a general matter, the Supreme Court "has consistently construed the Act 'liberally to apply to the furthest reaches consistent with congressional direction.'" Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 296 (1985) (quoting Mitchell v. Lublin, McGaughy & Assocs., 358 U.S. 207, 211 (1959)).

[7] Section 9 states that "[f]or the purpose of any hearing or investigation provided for in this chapter, the provisions of sections 49 and 50 of Title 15 (relating to the attendance of witnesses and the production of books, papers, and documents), are made applicable to the jurisdiction, powers, and duties of the Administrator, the Secretary of Labor, and the industry committees." 29 U.S.C. 209. In turn, the Federal Trade Commission "shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation." 15 U.S.C. 49.

75 Fed. Reg. 55,352, 55,353 (Sept. 10, 2010). Although the Department prefers to avoid resorting to its subpoena authority, it has the "power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation." 15 U.S.C. 49. If the recipient of the subpoena fails to comply, the Department "may invoke the aid of any court of the United States in requiring" compliance. Id. The subpoena to CSG here –- which seeks documents that the Department has repeatedly requested in furtherance of its investigation and that CSG has refused to provide -–- has thus been issued pursuant to and is authorized by section 9 of the Act.

3. The Secretary's authority to issue administrative subpoenas duces tecum in the course of conducting investigations pursuant to the FLSA, but prior to a determination of coverage, was upheld by the Supreme Court in Oklahoma Press Publ'g Co. v. Walling, 327 U.S. 186 (1946). In that case, the Court specifically held that the FLSA provides the Secretary authority to issue a subpoena prior to determining not only whether there are any violations of the FLSA, but whether the entity is covered under the Act. Id. at 214. In other words, "[t]he very purpose of the subpoena . . . as of the authorized investigation, is to discover and procure evidence, not to prove a pending charge or complaint, but upon which to make one if, in the Administrator's judgment, the facts thus discovered should justify doing so." Id. at 201. The Court in Oklahoma Press explicitly stated that Congress was

acting within its authority when it extended these investigative powers to the Secretary of Labor:

> Congress has authorized the Administrator, rather than the District Courts in the first instance, to determine the question of coverage in the preliminary investigation of possibly existing violations; in doing so to exercise his subpoena power for securing evidence upon that question, by seeking the production of petitioners' relevant books, records and papers; and, in case of refusal to obey his subpoena, issued according to the statute's authorization, to have the aid of the District Court in enforcing it.

327 U.S. at 214 (emphasis added).

Thus, it is well settled that where Congress has properly authorized an administrative agency to conduct investigations, as it has done vis-à-vis the Department of Labor under the FLSA, the agency "is not required to establish coverage under a particular federal law when it seeks judicial enforcement of its subpoena." Donovan v. Shaw, 668 F.2d 985, 989 (8th Cir. 1982); see EEOC v. Fed. Express Corp., 558 F.3d 842, 851 n.3 (9th Cir. 2009); United States v. Sturm, Ruger & Co., 84 F.3d 1, 5-6 (1st Cir. 1996); see also Solis v. Operation Mgmt. Grp. Co. et al., No. 10-1380 (1st Cir. Feb. 3, 2011) (unpublished) (affirming a district court's orders of enforcement and civil contempt, and entering judgment for the Secretary, on the ground that her administrative subpoena issued under the FLSA "honored the constitutional and statutory limits on her subpoena authority")

(Addendum to this brief).[8] Since the agency has the duty in the first instance to determine coverage, it therefore follows that "a subpoena enforcement proceeding is not the proper forum in which to litigate the question." Shaw, 668 F.2d at 989. As the Eighth Circuit stated in Shaw, "in a subpoena enforcement action, the agency cannot be required to demonstrate that the very matter or entity it seeks to investigate under its statutory investigatory powers is covered by the enabling statute since the authority to investigate the existence of violations . . . include(s) the authority to investigate coverage." Id. (internal quotation marks omitted). Moreover, if WHD, after conducting a full investigation, concludes that CSG member-partners are employees, and are owed back wages under the FLSA, CSG has an adequate remedy at law to challenge that determination. See, e.g., Mobil Exploration & Prod. U.S., Inc. v. Dep't of Interior, 180 F.3d 1192, 1200 (10th Cir. 1999) (anticipatory challenges not suitable in subpoena enforcement action).

4. CSG's complaint presents a number of facts (App. 13) that in its view support the conclusion that its member-partners are bona fide partners for purposes of the FLSA. CSG argues (Br. 10) that because this Court must accept those factual assertions as true for purposes of this appeal, it must assume for purposes of this appeal that CSG member-partners are bona fide partners and therefore not covered by the FLSA. CSG thus argues (Br. 19-20) that the Secretary's subpoena

[8] See 10th Cir. R. 32.1(A), (B); 1st Cir. R. 36(c).

is ultra vires because her authority to issue subpoenas does not extend to situations when it is clear, as CSG argues it is in this case, that there is no coverage under the FLSA.[9] This argument, however, does not go to the Secretary's statutory authority to issue a subpoena; rather, it goes to the exercise of that authority. As such, it does not help CSG to fit within the exception to sovereign immunity it is relying upon. In other words, where the action was not based on the officer's "lack of delegated power" but, rather, on "[a] claim of error in the exercise of that power," the ultra vires doctrine does not apply. See United Tribe of Shawnee Indians v. United States, 253 F.3d 543, 548 (10th Cir. 2001) (internal quotation marks omitted). As this Court has explained:

> The mere allegation that the official acted wrongfully does not establish that the officer, in committing that wrong, is not exercising the powers delegated to him by the sovereign. If he is exercising such powers the action is the sovereign's and a suit to enjoin it may not be brought unless the sovereign has consented.

[9] CSG asserts (Br. 7-8, 20) that DOL is not even investigating the employee status of its members. This is not the case. The documents sought in the Secretary's subpoena (App. 32) seek not only hours of work but documents that could indicate joint employment relationships. Although CSG has produced some of the documents listed in the subpoena, it has not fully complied. Some of the documents that CSG has not yet produced, such as contracts, billing invoices, and work orders, could establish joint employment and thus are relevant to coverage. Of course, even if CSG fully complied with the subpoena, it does not automatically follow that its appeal is moot since CSG is also contesting the Secretary's authority to issue the subpoena, and therefore retains an interest in the case. See, e.g., United States v. Constr. Prods. Research, Inc., 73 F.3d 464, 469 (2d Cir. 1996).

Id. at 548-49 (internal quotation marks omitted). Thus, in this case, where the Department of Labor has not consented, CSG cannot show that the issuance of the subpoena was ultra vires.

CONCLUSION

For the foregoing reasons, the district court's order granting the Secretary's Motion to Dismiss should be affirmed.

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to 10th Cir. R. 28.2(C)(4), the Secretary does not believe that oral argument is necessary in this case because the issues presented herein may be resolved based on the briefs submitted.

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)

Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

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CERTIFICATE OF VIRUS CHECK

I hereby certify that a virus check, using McAfee VirusScan Enterprise and AntiSpyware Enterprise 8.8, created on August 13, 2012, was performed on the PDF version of this brief and no viruses were found.

Date: August 20, 2012

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CERTIFICATE OF SERVICE AND ECF COMPLIANCE

I hereby certify that, on this 20th day of August, 2012, the Brief for the Secretary of Labor is being filed electronically with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the Court's appellate CM/ECF system and that counsel of record listed below are registered CM/ECF users and that service to them will be accomplished by the Court's appellate CM/ECF system.

I further certify that I have complied with the privacy redaction requirements and that seven paper copies of the brief required to be submitted to the clerk's office are exact copies of the CM/ECF filing.

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