

IN THE UNITED STATES COURT OF FEDERAL CLAIMS
No. 08-499C
(NOT TO BE PUBLISHED)
(Filed: May 23, 2012)

MARIO A. MENDOZA, *et al.*,)
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)
 Plaintiffs,)
)
 v.)
)
 UNITED STATES,)
)
 Defendant.)

Edward P. Fahey, Jr., Laredo, Texas, for plaintiffs.

Douglas G. Edelschick, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, D.C., for defendant. With him on the submissions were Stuart F. Delery, Acting Assistant Attorney General, Civil Division, and Jeanne E. Davidson, Director, and Patricia M. McCarthy, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, D.C.

ORDER FOR JUDGMENT

LETTOW, Judge.

On April 30, 2012, the court issued an order requiring plaintiffs to show cause why the complaint should not be dismissed for failure to state a claim upon which relief could be granted. Plaintiffs responded on May 23, 2012, contending that their claims, each of which is jurisdictionally premised on the Tucker Act, 28 U.S.C. § 1491(a), remain viable notwithstanding adverse decisions rendered by the Office of Personnel Management (“OPM”) and the Merit Systems Protection Board (“MSPB”), on remand from this court.

Plaintiffs’ claims are based upon their work at a warehouse in Laredo, Texas, for the Mexican-United States Commission for the Eradication of Screwworms (“the Commission”). In 2005, the warehouse was closed, and plaintiffs’ employment was terminated. *See Mendoza v. United States*, 87 Fed. Cl. 331, 332 (2009). In essence, plaintiffs claim that they were “federal employees” but that they were not provided pay and benefits, including retirement benefits, commensurate with their status as federal employees. *Id.* at 335.

On remand, in December 2009, OPM issued initial decisions that denied plaintiffs' claims because their work for the Commission did not involve federal service. After administrative appeals, those initial decisions were affirmed and OPM issued final decisions in June 2010. Plaintiffs sought review by an MSPB administrative judge but were denied relief on October 22, 2010. The plaintiffs then appealed to the United States Court of Appeals for the Federal Circuit, which dismissed the appeals as untimely on July 12, 2011. Motions for reconsideration were denied on October 26, 2011. Thereafter, the Supreme Court denied a petition for writ of certiorari on April 30, 2012.

The crux of the OPM decisions denying plaintiffs' claims is that plaintiffs were not in federal service during their tenure with the Commission. That factual predicate constitutes a bar to any claims which the plaintiffs put forward under the Tucker Act. Consequently, plaintiffs fail to state a claim upon which relief can be granted, and their complaint shall be DISMISSED under Rule 12(b)(6) of the Rules of the Court of Federal Claims. The clerk shall enter judgment in accord with this disposition.

No costs.

It is so ORDERED.

s/ Charles F. Lettow
Charles F. Lettow
Judge