

1 HONORABLE RONALD B. LEIGHTON
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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT TACOMA

11 MILES MONAHAN; DALE HOUSDEN;
12 DAVID ROBERTS; JIM MUMFORD;
13 CALVIN LUKKEN; BRADLEY PORTER;
14 JAY EVENSON; AARON JESSOP;
15 MICHAEL SWIHART; and DARREN
16 WISHARD, individuals,
17 Plaintiff,

18 v.

19 EMERALD PERFORMANCE
20 MATERIALS, LLC, a foreign corporation,
21 Defendant.

Case No. C08-1511 RBL

ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS CERTAIN
CLAIMS UNDER FRCP 12(B)(6)

22 THIS MATTER is before the Court on Defendant's motion to dismiss certain claims under FRCP
23 12(b)(6) [Dkt. #9]. For the reasons set forth below, Defendant's motion is GRANTED.

24 **I. Introduction**

25 Defendant purchased a corporation on May 7, 2006, which included a chemical plant near
26 Kalama, Washington [Dkt. #1]. Plaintiffs were all employed by Defendant in the Kalama plant at the
27 time of purchase. *Id.* From the 2006 purchase date until May, 2008, Plaintiffs were all operating under a
28 collective bargaining agreement¹. *Id.* In part, the collective bargaining agreement denied certain

¹The collective bargaining agreement had been in place since May, 2005 [Dkt. #1].

1 employees overtime benefits due under the Fair Labor Standards Act (“FLSA”). *Id.* On May 27, 2008,
2 the Secretary of the U.S. Department of Labor (“Secretary”) filed a complaint under FLSA §217 (Case
3 No. 5:08-CV-01207SL) in the District Court for Northern District of Ohio (“Ohio Suit”). *Id.* The
4 complaint sought to enjoin both Defendant’s continued violation of the FLSA (by not providing overtime
5 compensation for hours worked over 40 hours a week) and Defendant’s withholding of overtime wages
6 due. *Id.* On July 29, 2008, the court ruled in favor of the Secretary, ordering Defendant to pay its
7 employees \$241,308.48 in unpaid compensation for the period of May 7, 2006 to June 15, 2008². *Id.*, *see*
8 *also* Dkt. #9-3. Plaintiffs were not notified of the Ohio Suit or given an opportunity to participate in it.
9 *Id.* The Plaintiffs did not accept the payment tendered to them as a result of the Ohio Suit.

12 Plaintiffs commenced this action on October 10, 2008. *Id.* Plaintiffs complaint asserts the
13 following causes of action: (1) violation of 29 U.S.C. §201 *et. seq.*, for unpaid overtime wages due under
14 the FLSA; (2) violation of 29 U.S.C. §251 *et. seq.*, for unpaid overtime wages under the Portal-to-Portal
15 Act; and (3) violation of RCW 49.46.090 *et seq.*, for unpaid overtime wages under Washington state law³.

17 Defendant argues that the Secretary’s FLSA §217 claim operates as a bar to Plaintiffs’ FLSA
18 claim [Dkt. #9]. Defendant also argues that Plaintiffs’ claim under the Portal-to-Portal Act is barred
19 because that statute does not establish an independent cause of action for unpaid wages. *Id.*

20 Plaintiffs argue that notwithstanding the statutory bar, the purpose of the FLSA was not furthered
21 by the Ohio Suit, and that the Court should interpret the statute as allowing Plaintiffs’ suit under the
22 unique circumstances presented here [Dkt. #14]. Plaintiffs argue that FLSA §217, as applied, violates
23 their constitutional right to due process. *Id.* Plaintiffs also argue for a separate cause of action under the
24 Portal-to-Portal Act. Finally, Plaintiffs argue in the alternative for liquidated damages which were not
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27 ²The judgment identified the amounts owed to each employee and provided that Defendant was responsible for paying
each employee the amount owed within 30 days. *Id.*

28 ³Specifically, Plaintiffs claim that they were not compensated for 30 extra minutes of “donning and doffing” activities
required as part of their daily job duties. *Id.*

1 awarded in the Ohio Suit. *Id.*

2 **II. Discussion**

3 A motion to dismiss under Fed. R. Civ. P. 12(b)(6) should be granted only if, accepting all of the
4 allegations of material fact as true, and construed in the light most favorable to the nonmoving party, the
5 plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Cahill v.*
6 *Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). The plaintiff, however, must plead factual
7 allegations with specificity; vague and conclusory allegations of fact fail to state a claim for relief.
8 *Colburn v. Upper Darby Township*, 838 F.2d 663, 666 (3rd Cir. 1988). Dismissal may be based on either
9 the lack of a cognizable legal theory, or the absence of sufficient facts alleged under a cognizable legal
10 theory. *Balistreri v. Pacifica Police Department*, 901 F.2d 696, 699 (9th Cir. 1990).

11 **A. Plaintiffs FLSA §216(b) Claim is barred by FLSA §217**

12 Defendant argues that the Secretary's prior §217 action bars Plaintiffs' current FLSA claim for
13 unpaid overtime wages. Plaintiffs asks the Court to look beyond the statute's clearly expressed terms and
14 to the purpose of the FLSA and allow their §216(b) claim notwithstanding the prior action and judgment.
15

16 The Secretary's prior filing of a FLSA §217 complaint clearly bars Plaintiffs' §216(b) claim as a
17 matter of law. FLSA §216(b) allows an employee to maintain an action to recover unpaid overtime
18 compensation, including an equal amount of liquidated damages, against any employer. 29 U.S.C.
19 §216(b). However, the same section of the statute goes on to terminate an employee's right to bring an
20 action against an employer once the Secretary has filed a complaint. This terminating effect is clear from
21 the language of the statute: "the right . . . shall terminate upon the filing of a complaint by the Secretary
22 of Labor in an action under 217 of this title." *Id.* Moreover, abundant case law has confirmed a clear
23 statutory bar within FLSA §216(b). *See e.g., Wirtz v. Malthor, Inc.*, 391 F.2d 1, 3 (9th Cir. 1968)
24 (employee's right to sue for unpaid overtime wages is terminated upon the Secretary's filing of a §217
25 claim); *Donovan v. University of Texas El Paso*, 643 F.2d 1201, 1204 (5th Cir.1981) (same).

1 Apparently aware of this bar, the Plaintiffs ask the Court to look beyond the express language of
2 the statute (by delving into an analysis of legislative history and the like). There is no justification for
3 doing so. Settled principles of statutory construction require that a statute be applied according to its
4 terms when those terms are unambiguous. *See e.g., Carcieri v. Salazar*, 555 U.S. ___, ___, 129 S.Ct. 1058,
5 1059 (2009). Because the Court finds no ambiguity in §216(b), and Plaintiffs fail to raise the issue of
6 ambiguity, the legislative history of the provision will not be considered here.

7
8 The Secretary of Labor filed an FLSA §217 complaint on May 27, 2008, in the Northern District
9 of Ohio. Plaintiffs did not file their complaint in this Court until October 10, 2008. Because Plaintiffs’
10 right to bring a §216(b) claim terminated on May 27, 2008, they cannot establish a cognizable legal
11 theory under FLSA §216(b), and that claim is DISMISSED under FRCP 12(b)(6).

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13 **B. FLSA §217 is not Unconstitutional As Applied to Plaintiffs**

14 Plaintiffs argue that (1) they had a vested property right in either the unpaid overtime wages or in
15 their cause of action to recover those wages, and (2) FLSA §217 is unconstitutional “as applied” to this
16 case because Plaintiffs’ property rights were deprived without due process of the law [Dkt. #14].
17 Plaintiffs’ §216(b) claim depends on a showing that Plaintiffs had a vested property right and that §217 is
18 unconstitutional as applied.

19
20 Plaintiffs do not have a vested property right in any unpaid overtime compensation. “Property
21 rights to public benefits are defined by statutes or customs that create the benefits.” *Austin v. City of*
22 *Brisbee*, 855 F.2d 1429, 1436 (9th Cir. 1988) (citing *Jones v. Reagan*, 748 F.2d 1331, 1338-39 (9th Cir.
23 1984). It is also well established that “legislation readjusting [property] rights and burdens is not
24 unlawful solely because it upsets otherwise settled expectations.” *Usery v. Turner Elkhorn Mining Co.*,
25 428 U.S. 1, 16 (1976) (citations omitted).

26
27 While Plaintiffs claim a protected property right in the unpaid overtime, their argument is
28 misplaced. The FLSA does not create a vested property right of the Plaintiffs in unpaid wages; rather, it

1 creates a terminable right to assert a claim for unpaid wages (a cause of action)⁴. The only “right”
2 referenced in §216(b) is the right to bring a cause of action. In fact, the title of the subsection reads
3 “Damages; *right of action*; attorney’s fees and costs; *termination of right of action*.” 29 U.S.C. §216(b)
4 (emphasis added). The text of the provision deals with only one right, “the right . . . to bring an action by
5 or on behalf of any employee . . . shall terminate upon the filing of a complaint by the Secretary of Labor
6 in an action under §217 of this title.” *Id.* Only after instigating a cause of action, and succeeding on the
7 merits, would Plaintiffs have a vested property right in the unpaid overtime compensation.
8

9 Plaintiffs do not have a vested property right in a cause of action under FLSA §216(b). “Causes
10 of action are a species of property protected by the Fourteenth Amendment Due Process Clause (citations
11 omitted). However, a ‘party’s property right in any cause of action does not vest until a final
12 unreviewable judgment is obtained.” *Fields v. Legacy Health Systems*, 413 F.3d 943, 956 (9th Cir. 2005).
13 Rather, a statutorily granted cause of action is “inchoate and affords no definite or enforceable property
14 right until reduced to final judgment.” *Id.* (Citing *Austin*, 855 F.2d at 1436). Only then will a cause of
15 action qualify as a constitutionally protected property right. *Jones Disposal Co., Inc. v. Jefferson Parish*,
16 603 F.Supp.1125, 1137-38 (E.D. La. 1985).
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19 Here, Plaintiffs never obtained a final non-reviewable judgment. Plaintiffs never even filed a
20 cause of action until after their inchoate right had already been foreclosed. The statute clearly terminates
21 a FLSA §216(b) cause of action upon the filing of a §217 claim by the Secretary. Only after the Secretary
22 had filed a §217 complaint and received a judgment in the Ohio Suit, did Plaintiffs file a complaint in this
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25 ⁴By way of analogy, legislatively enacted statutes of limitations produce the same result as the Secretary filing a §217 suit.
26 Statutes of limitations are provisions of statutes which limit a claimant’s ability to recover damages by *defining* a time within which
27 a claim must be brought. This limit is most often contained within the very statute which grants the claimant an ability to recover
28 initially. Upon the happening of a certain event (the passing of three years for example in many torts cases), a prospective
claimant’s expectation for recovery under the initial claim is upset. While the prospective claimant was once able to bring an action
to recover damages, upon the happening of the statutorily defined event, that ability no longer exists. After the statute of limitations
runs, the claimant would have no property interest in the damages he can no longer legally receive.

1 Court. Because Plaintiffs did not receive a final non-reviewable judgment, their interest in the §216(b)
2 cause of action never matured into a constitutionally protected property right. As such, the §217 bar
3 effectively prevents their §216(b) claim. Because Plaintiffs have failed to show a constitutionally
4 protected property right, their “as applied” constitutional challenge necessarily fails.
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6 **C. FLSA §217 does not Otherwise Violate Due Process**

7 Even if Plaintiffs could establish a vested property right and that FLSA §217 deprived them of that
8 right, they have not demonstrated that the §217 bar violates due process. “An act of Congress comes . . .
9 clothed in a presumption of constitutionality, and the burden is on the plaintiff to show that it violates due
10 process.” *In re: Consolidated U.S. Atmospheric Testing Litigation*, 820 F.2d 982, 990 (9th Cir. 1987)
11 (citing *Hammond v. United States*, 786 F.2d 8 (1st Cir. 1986)). Because Congress used its Commerce
12 Clause powers in passing the FLSA and because no fundamental rights or suspect classifications are
13 involved, the rational basis standard of due process is appropriate. *Id.*
14

15 In order for plaintiffs to prevail under the rational basis standard, they must establish that the
16 statute is “wholly arbitrary and irrational in purpose and effect, i.e., not reasonably related to the
17 legitimate congressional purpose.” *Id.* The legislative purpose for the 1961 amendments to the FLSA
18 (including the statutory bar described in §216(b)) was “to relieve courts and employers of the burden of
19 litigating a multiplicity of suits based upon the same violations of the Act by an employer⁵.” *EEOC v.*
20 *Pan American World Airways, Inc.*, 897 F.2d 1499, 1505 (9th Cir. 1990) (citing S.Rep. No. 145, 87th
21 Cong., 1st Sess. (1961), Code Cong. & Ad.News 1620, 1659). *See also, Donovan*, 643 F.2d at 1207. The
22 statutory structure contemplated by the 1961 amendments was to establish the primacy of government
23 enforcement actions over those private actions brought by employees. *EEOC*, 897 F.2d at 1505. By
24 terminating the opportunity for employees to bring private actions upon the government filing a complaint
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28 ⁵While *EEOC v. Pan Am.* deals with ADEA, the legislative purpose cited above pertains to the FLSA, after which the
ADEA was closely modeled. 897 F.2d at 1505. The Court noted that the Equal Pay Act borrows the procedure of the FLSA
including the statutory bar to a private causes of action upon the government filing a §217 claim. *See* 897 F.2d at 1504-06.

1 under FLSA §217, the statute reduces the possibility for inconsistent judgment, reduces res judicata
2 problems, and reduces pressure on courts' dockets by consolidating all plaintiffs' claims in one action.
3 Because the statute is reasonably related to the congressionally stated purpose it does not violate due
4 process⁶.

6 **D. Plaintiffs' Liquidated Damages Claim is Statutorily Barred**

7 Plaintiffs argue in the alternative for liquidated damages under FLSA §216(b) [Dkt. #14]. They
8 argue that the bar established as a result of the Ohio Suit does not prevent them from recovering full
9 liquidated damages in this Court⁷. *Id.* Plaintiffs argue that the liquidated damages provided under
10 §216(b) are not barred by the Secretary's filing of a §217 suit, and that those liquidated damages are
11 instead "mandatory under the FLSA." *Id.*

13 Liquidated damages are unavailable as a remedy in a FLSA §217 suit. *Donovan v. Brown*
14 *Equipment and Service Tools, Inc.*, 666 F.2d 148, 156 (5th Cir. 1982). FLSA §216(b) does provide
15 liquidated damages, stating "any employer . . . shall be liable . . . to the employee . . . [for] unpaid
16 overtime compensation . . . and in an additional equal amount [for] liquidated damages." 29 U.S.C.
17 §216(b). However, as is discussed above, the statutory bar created by the Secretary's §217 action
18 terminates all rights under FLSA §216(b). While liquidated damages under §216(b) are nonwaivable⁸,

21 ⁶Plaintiffs also complain that they were not provided with notice of the Ohio Suit or given the opportunity to participate
22 in the proceeding. This argument fails as a matter of law. A §217 suit by the government does not require notice to employees,
23 nor does it allow employees to participate in its proceedings. *Donovan*, 643 F.2d at 1208. "The Secretary's statutory obligation
24 to redress public wrongs is one likely explanation as to why there is no requirement under §17 that the employees request consent,
25 compromise, or otherwise affect the pending litigation by the Secretary. Logically, because there is neither opting out or in by
employees in a §17 suit, no purpose neither fundamental nor due process requirements . . . would be served by notification
procedures like those found in Rule 23." *Id.* Moreover, Plaintiffs recognize that notice and the opportunity to participate in the
proceeding are not available or required in a §217 suit [Dkt. #14, p. 9].

26 ⁷FLSA §216(b) uses the term "liquidated damages;" however, that term is somewhat misleading. Essentially, §216(b)
27 allows for double damages by allowing recovery of unpaid overtime, as well as an additional equal recovery in what the statute
refers to as "liquidated damages." This second award of damages is really an exemplary award of damages.

28 ⁸ *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 740 (1981) (holding "FLSA rights cannot be abridged
by contract or otherwise waived because that would "nullify the purposes" of the statute and thwart the legislative policies it was
designed to effectuate") (citations omitted).

1 those damages are not exempt from the statutory bar created by a §217 suit. As is discussed in Section A
2 *supra*, the Secretary’s filing of a §217 complaint terminates all employees’ rights of action under FLSA
3 216(b). There is no indication that liquidated damages were intended to remain available to employees as
4 a remedy upon the filing of a §217 suit. In fact, the contrary is expressed by looking again to the
5 legislative purpose in amending the FLSA in 1961 (noting that the legislative purpose was to “relieve
6 courts and employers of the burden of litigating a multiplicity of suits based upon the same violations”).
7 S.Rep. No. 145, at 1659. Allowing employees to bring separate liquidated damages claims after a §217
8 suit had been filed would run counter to the legislative purpose of the 1961 amendments. The waiver
9 argument relied on by Plaintiffs does not resolve the statutory bar created by filing of a §217 suit⁹.
10 Because the statutory bar applies to all of FLSA §216(b), Plaintiffs’ claim for liquidated damages under
11 that section must be denied.

14 **E. Prejudgment Interest is not Recoverable from this Court**

15 It is well established that when liquidated damages are unavailable, prejudgment interest is
16 necessary to fully compensate employees for lost wages. *Ford v. Alfaro*, 785 F.2d 835, 842 (9th Cir.
17 1986). The court in *Ford* explained the avenue for recovery of prejudgment interest stating “it is
18 ordinarily an abuse of discretion not to include prejudgment interest in a back-pay award under the
19 FLSA.” *Id.*

21 The quote from *Ford* shows the problem with Plaintiffs’ claim for prejudgment interest being
22 presented to this Court. District courts are not courts of appellate jurisdiction charged with determining if
23 abuse of discretion has occurred; rather they are trial courts. Plaintiffs’ challenge of the District Court for
24 the Northern District of Ohio’s failure to compensate for prejudgment interest fails at the most
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27 ⁹Plaintiffs argue that “the pay mandates of the FLSA are nonwaivable. They cannot be abridged by contract or otherwise
28 waived” [Dkt. #14, p. 8, n.8] (citing *Barrentine*, 450 U.S. at 740). *Barrentine* dealt with waiver resulting from provisions in a
collective bargaining agreement. *Barrentine* does not support an exemption for liquidated damages after a §217 suit has been filed
by the Secretary barring causes of actions by employees.

1 fundamental level. This Court has no authority to review a judgment entered by a District Court in Ohio.
2 Indeed the only courts with such authority are the 6th Circuit Court of Appeals, and the United States
3 Supreme Court. While Plaintiffs may have a legitimate complaint in seeking prejudgment interest, this
4 Court is the improper venue to pursue such a claim¹⁰; therefore, Plaintiffs claim for prejudgment interest
5 must be denied.
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7 **F. Plaintiffs Abandoned their Portal-to-Portal Act claim**

8 Plaintiffs stated in their response brief, “Defendant argues that the Portal-to-Portal Act does not
9 state a separate and distinct cause of action for unpaid overtime wages. Defendant is probably correct in
10 this regard. Plaintiffs’ counsel should have denominated the Portal-to-Portal Act claim as a second count
11 of the unpaid overtime claim, rather than as a separate cause of action.” *Id.*
12

13 Indeed, the Portal-to-Portal Act does not establish a separate cause of action for unpaid overtime
14 wages. Plaintiffs stated as a separate cause of action, a Portal-to-Portal Act claim under 29 U.S.C. §254
15 for unpaid overtime wages [Dkt. #1]. However, 29 U.S.C. §254 clearly relies on provisions of the FLSA
16 in determining liability and does not itself constitute a separate cause of action. 29 U.S.C. §254 states “no
17 employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938 . . .
18 on account of the failure of such employer to pay . . . overtime compensation.” Because Plaintiffs’ FLSA
19 claim is barred as discussed above, their 29 U.S.C. §254 claim must fail as it was brought as a separate
20 cause of action.
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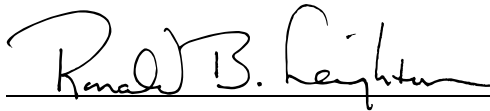
22 **III. Conclusion**

23 Plaintiffs’ §216(b) claim is dismissed because it is barred by the Secretary’s filing of the FLSA
24 §217 action. Plaintiffs’ constitutional challenge to the §217 statutory bar also fails. Plaintiffs’ alternative
25 claim for liquidated damages is also barred by the Secretary’s filing of the §217 action. Finally,
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28 ¹⁰There are other ways for Plaintiffs to pursue their prejudgment interest claim and to receive compensation for overtime hours actually worked. For example, they could request that the Secretary appeal the Ohio Suit to the 6th Circuit. They could also request that the Secretary bring a second action under §216(c) as Plaintiffs alluded to in their response brief [Dkt. #14, p. 10].

1 Plaintiffs' request that this Court award prejudgment interest fails as a matter of law. Therefore,
2 Defendant's motion to dismiss Plaintiffs' FLSA and Portal-to-Portal Act claims is hereby GRANTED.
3 Those claims are dismissed with prejudice. Plaintiffs final claim under RCW 49.46.090 *et. seq.*, survives
4 this motion and the court will exercise supplemental jurisdiction as to that claim under 28 U.S.C. §1367.
5 IT IS SO ORDERED.
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10 Dated this 22nd day of April, 2009.
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14 RONALD B. LEIGHTON
15 UNITED STATES DISTRICT JUDGE
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