

No. 14-10296

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

KAWA ORTHODONTICS, LLP,

Plaintiff-Appellant,

v.

**SECRETARY, U.S. DEPARTMENT
OF THE TREASURY, *et al.*,**

Defendants-Appellees.

**ON APPEAL FROM THE U.S. DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA**

**REPLY BRIEF OF APPELLANT
KAWA ORTHODONTICS, LLP**

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ARGUMENT

To determine whether a claim is plausible, a court must “draw on its judicial experience and commonsense.” *Ashcroft v. Iqbal*, 556 U.S. 622, 679 (2009). Kawa Ortho’s standing claim is just plain commonsense. Defendants’ meek response is so halfhearted because Kawa Ortho’s claim is so obvious and its Complaint is so clearly sufficient to establish standing.

Based on the plain language of the Patient Protection and Affordable Care Act, the “employer mandate” was set to take effect on January 1, 2014. Because Kawa Ortho employs more than 50 “full-time equivalent” employees, it had to comply with the mandate by January 1, 2014 or face substantial tax penalties. Being a responsible employer, Kawa Ortho spent time and money in 2013 to comply with the mandate taking effect on January 1, 2014. It also incurred substantial opportunity costs. Defendants subsequently delayed the date for compliance until January 1, 2015. They then delayed it a second time. The mandate now takes effect in “2016.”

Being a rational employer as well as a reasonable one, Kawa Ortho would not have expended its time and money in 2013 if it was not required to comply with the mandate until “2016.” It would have spent its time on other priorities, including generating new patients and additional revenue for its practice. It would have saved its money and accrued interest on it, or put it to other uses.

“A dollar today is worth more than a dollar tomorrow.” *Atlanta Mut. Ins. Co. v. Comm’r*, 523 U.S. 382, 384 (1998) (quoting D. Herwitz & M. Barrett, *Accounting for Lawyers* 221 (2d ed. 1997)). Or, as Justice Thomas described it, “To put it simply, \$4,000 today is worth more than \$4,000 to be received 17 months from today because if received today, the \$4,000 can be invested to start earning interest immediately.” *Till v. SCS Credit Corp.*, 541 U.S. 465, 487 (2004) (Thomas, J., dissenting) (citing *Encyclopedia of Banking & Finance* 1015 (9th ed. 1991)). Delay undermines the time value of money.

Had the mandate taken effect on the date established by Congress, Kawa Ortho would have realized the full value of the time and money it spent in 2013 to comply with the mandate on January 1, 2014. Defendants’ delay of the mandate by at least two years made Kawa Ortho’s expenditures premature. Defendants’ assertion that those expenditures may still have value whenever the mandate finally takes effect demonstrates a lack of understanding of basic economic principles, if not a cavalier indifference for how businesses operate. Employers do not spend money two years before they have to. It also ignores the express allegation in Kawa Ortho’s Complaint that it lost some, if not all, of the value of the expenditures it incurred in 2013 in anticipation of the mandate taking effect on January 1, 2014. Doc. No. 1 at ¶ 16.

Kawa Ortho suffered an injury-in-fact that is directly traceable to Defendants' delay of the "employer mandate." Kawa Ortho's injury is redressable by a favorable ruling. If the delay is set aside, Kawa Ortho's efforts will not have been in vain. It will regain some, if not all, of the value of the time and resources it expended in 2013, and the opportunity costs it incurred will not have been wasted. Kawa Ortho has standing to challenge Defendants' delay of the mandate.

CONCLUSION

For the reasons set forth in its opening brief as well as the foregoing reasons, Kawa Ortho respectfully requests that the Court reverse the District Court's order granting the motion to dismiss and remand this matter for further proceedings.

Dated: April 11, 2014

Respectfully submitted,

/s/ Christopher Lunny

/s/ Paul J. Orfanedes

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 595 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010, namely, 14 point Times New Roman.

Dated: April 11, 2014

/s/ Michael Bekesha

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **REPLY BRIEF OF APPELLANT KAWA ORTHODONTICS, LLP** with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system on April 11, 2014. I also certify that I served an original and six copies of the foregoing **REPLY BRIEF OF APPELLANT KAWA ORTHODONTICS, LLP** on the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit via Federal Express, overnight delivery, on April 11, 2014.

I further certify that, on April 11, 2014, I served the foregoing **REPLY BRIEF OF APPELLANT KAWA ORTHODONTICS, LLP** via Federal Express, overnight delivery, on all counsel listed below.

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