cargo, *id.* § 1(17), is an unconstitutional tax on foreign, and, in the case of cargo or freight, interstate commerce. Continental Micronesia, Inc. is granted a declaratory judgment to that effect and the defendants are enjoined from enforcing Chuuk State Law No. 10-09-13, § 1(5) and § 1(17). There being no just cause for delay, the clerk is expressly directed to enter judgment in Continental Micronesia, Inc.'s favor.

* * * *

FSM SUPREME COURT TRIAL DIVISION

CHUUK HEALTH CARE PLAN,)	CIVIL ACTION NO. 2010-1036
)	
Plaintiff,)	
)	
vs.)	
)	
PACIFIC INTERNATIONAL, INC.,)	
)	
Defendant.)	
)	

MEMORANDUM AND ORDER GRANTING PARTIAL SUMMARY JUDGMENT

Martin G. Yinug
Chief Justice

Decided: June 7, 2011

APPEARANCES:

For the Plaintiff: Johnny Meippen, Esq.
P.O. Box 705
Weno, Chuuk FM 96942

For the Defendant: Sabino Asor, Esq.
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* * * *

HEADNOTES

Civil Procedure – Summary Judgment – Procedure

Under Rule 56, the court must deny a summary judgment motion unless it, viewing the facts and inferences in the light most favorable to the nonmovant, finds that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. In order to succeed on a summary judgment motion, a movant plaintiff must also overcome all affirmative defenses that the defendant has raised. Chuuk Health Care Plan v. Pacific Int'l, Inc., 17 FSM Intrm. 535, 538 (Chk. 2011).

Equity – Laches

Laches is the passage of a nonspecific amount of time during which the plaintiff engages in

inexcusable delay or lack of diligence in bringing suit, which results in prejudice to the defendant. Chuuk Health Care Plan v. Pacific Int'l, Inc., 17 FSM Intrm. 535, 538 (Chk. 2011).

Equity – Laches

When the defendant became an employer in Chuuk sometime during 2009 and when this suit, after some initial contact and some failed negotiations between the parties during 2010, was filed in December 2010, the court can conclude that, as a matter of law, this was not an inexcusable delay. Chuuk Health Care Plan v. Pacific Int'l, Inc., 17 FSM Intrm. 535, 538 (Chk. 2011).

Equity – Laches

Since laches is an equitable defense, it is available to a defendant only when a plaintiff seeks some form of equitable relief and is not a valid defense to an action brought solely at law, such as this suit for unpaid statutory health insurance premiums which is an action at law. Chuuk Health Care Plan v. Pacific Int'l, Inc., 17 FSM Intrm. 535, 538 (Chk. 2011).

Constitutional Law – Equal Protection; Criminal Law and Procedure – Defenses

Since selective prosecution is a defense in a criminal case, when a civil defendant asserts that it was singled out for enforcement and was the only employer being sued for unpaid health insurance premiums, the court will read this as an equal protection claim. Chuuk Health Care Plan v. Pacific Int'l, Inc., 17 FSM Intrm. 535, 538-39 (Chk. 2011).

Constitutional Law – Equal Protection

The Constitution's Declaration of Rights contains two equal protection guarantees. Section 3 provides that a person may not be denied the equal protection of the laws and section 4 provides that equal protection of the laws may not be denied or impaired on account of sex, race, ancestry, national origin, language, or social status. Chuuk Health Care Plan v. Pacific Int'l, Inc., 17 FSM Intrm. 535, 539 (Chk. 2011).

Constitutional Law – Equal Protection

When no Article IV, section 4 class is at issue and no fundamental right is involved, the question is whether the classification is rationally related to a legitimate governmental purpose. The rational relationship test examines whether there is a reasonable justification for permitting the discrimination. Chuuk Health Care Plan v. Pacific Int'l, Inc., 17 FSM Intrm. 535, 539 (Chk. 2011).

Constitutional Law – Equal Protection

It is entirely rational that the Chuuk Health Care Plan first sue the largest non-complying employer before suing other non-compliant employers, especially when the others are trying to bring themselves into compliance. Someone must be first. Chuuk Health Care Plan v. Pacific Int'l, Inc., 17 FSM Intrm. 535, 539 (Chk. 2011).

Administrative Law – Administrative Procedure Act; Transition of Authority

Trust Territory Code Title 17 is retained as Chuuk state law through the Chuuk Constitution's Transition Clause. Chuuk Health Care Plan v. Pacific Int'l, Inc., 17 FSM Intrm. 535, 540 n.1 (Chk. 2011).

Administrative Law – Statutory Construction

Trust Territory Code Title 17, section 4(1) prescribes the procedure an administrative agency must follow before it adopts a rule or regulation. Chuuk State Law No. 2-94-06, section 2-17 prescribes the procedure that should be followed once the Chuuk Health Care Plan's Board has decided to adopt a regulation so that the regulation becomes valid and takes effect. Since these two state law provisions do not conflict, it is entirely likely that the Chuuk Legislature, when it enacted the Chuuk

Health Care Plan Act, intended that the notice and comment provision of the Administrative Procedure Act would also be followed by the Plan's Board before adopting a regulation to be presented to the Governor for approval. Chuuk Health Care Plan v. Pacific Int'l, Inc., 17 FSM Intrm. 535, 540 (Chk. 2011).

Administrative Law

Neither the FSM nor the Chuuk Constitutions require prior public notice before adopting a regulation. This is because as a general rule notice and hearing are not a constitutional requirement in the rule-making process or in legislation by administrative agencies. Prior public notice requirements for regulations are statutory. Chuuk Health Care Plan v. Pacific Int'l, Inc., 17 FSM Intrm. 535, 540 n.2 (Chk. 2011).

Administrative Law

Agency rules adopted pursuant to a statutory rule-making proceeding are presumed valid and the burden is on the challenging party to establish the rules' invalidity by demonstrating that the rule-making agency adopted the rules in an unconstitutional manner, or exceeded its statutory authority, or otherwise acted in manner contrary to the statutory requirements. Chuuk Health Care Plan v. Pacific Int'l, Inc., 17 FSM Intrm. 535, 540 (Chk. 2011).

Administrative Law

Generally, a regulation's validity depends on whether the administrative agency had the power to adopt the particular regulation, that is, whether the regulation was within the matter covered by the enabling statute. Chuuk Health Care Plan v. Pacific Int'l, Inc., 17 FSM Intrm. 535, 540 n.3 (Chk. 2011).

Administrative Law; Civil Procedure – Summary Judgment – Grounds – Particular Cases

When a defendant challenging a regulation's validity has not established or made a substantial showing that the regulation was invalid because the agency acted in a manner contrary to statutory requirements in adopting the regulation, the agency is entitled to summary judgment that the defendant employer ought to have been remitting to the agency the employees' and the employer's health insurance contributions as required by the regulation and the employer's cross motion for summary judgment will be denied. Chuuk Health Care Plan v. Pacific Int'l, Inc., 17 FSM Intrm. 535, 541 (Chk. 2011).

Civil Procedure – Summary Judgment – Grounds – Particular Cases

When the plaintiff's summary judgment motion asks the court to establish defendant's liability for its employees' health insurance premiums from July 1, 2009 to December 31, 2010 but the plaintiff's complaint asserts claims to premiums only from September 2009 to December 10, 2010, although it could charitably be read to include a claim for continuing liability after December 10, 2010 and when the plaintiff has not asked to amend its complaint to extend back to July 1, 2009 or forward beyond December 10, 2010, the plaintiff's motion for partial summary judgment will be granted for health insurance premiums from September 2009 through December 2010. Chuuk Health Care Plan v. Pacific Int'l, Inc., 17 FSM Intrm. 535, 541 (Chk. 2011).

* * * *

COURT'S OPINION

MARTIN G. YINUG, Chief Justice:

This comes before the court on the plaintiff's Motion for Partial Summary Judgment;

Memorandum of Points and Authorities, filed April 11, 2011; Defendant PII's Motion for Summary Judgment, filed April 25, 2011; and the Plaintiff's Response to Defendant's Motion for Summary Judgment, filed May 5, 2011. The plaintiff's motion is granted and the defendant's motion is denied. The reasons follow.

I. Background

On December 17, 2010, the plaintiff, Chuuk Health Care Plan ("the Plan"), a public corporation that administers a state-mandated health insurance scheme for Chuuk residents, filed suit against the defendant, Pacific International, Inc. ("PII"), alleging that PII, currently the largest private employer in Chuuk, was required to but had not been paying to the Plan the health insurance premiums for PII employees (which would include both the employees' contributions and PII's contribution). The Plan sued for payment of all insurance premiums unpaid since September 2009, plus interest and penalties. PII, in its December 29, 2010 answer, denied that it was required to make employee-employer contributions to the Plan and raised two affirmative defenses: 1) laches and 2) that it was the sole employer singled out for prosecution, which it asserts is a civil rights violation.

The Plan now seeks summary judgment that PII is liable for the unpaid health insurance premiums – both the employees' and the employer's matching contributions. PII seeks summary judgment that it is not liable for any health insurance premiums because the requisite regulations have not been promulgated to properly institute the health care plan and its premium schedule. It also seeks summary judgment on its affirmative defense (called a "counterclaim" in its motion) that it has been singled out for selective prosecution.

Under Rule 56, the court must deny a summary judgment motion unless it, viewing the facts and inferences in the light most favorable to the nonmovant, finds that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. Rosario v. College of Micronesia-FSM, 11 FSM Intrm. 355, 358 (App. 2003); Iriarte v. Etscheit, 8 FSM Intrm. 231, 236 (App. 1998). In order to succeed on a summary judgment motion, a movant plaintiff must also overcome all affirmative defenses that the defendant has raised. Saimon v. Wainit, 16 FSM Intrm. 143, 146 (Chk. 2008); Zion v. Nakayama, 13 FSM Intrm. 310, 312 (Chk. 2005).

II. The Motions' Merits

A. *Affirmative Defenses and "Counterclaim"*

PII raises two affirmative defenses, laches and selective prosecution, which the Plan must overcome in order to prevail.

Laches is the passage of a nonspecific amount of time during which the plaintiff engages in inexcusable delay or lack of diligence in bringing suit, which results in prejudice to the defendant. Pohnpei v. AHPW, Inc., 14 FSM Intrm. 1, 18 (App. 2006); Kosrae v. Skilling, 11 FSM Intrm. 311, 318 (App. 2003); Nahnken of Nett v. Pohnpei, 7 FSM Intrm. 485, 489 (App. 1996). PII became an employer in Chuuk sometime during 2009. This suit, after some initial contact and some failed negotiations between the parties during 2010, was filed in December 2010. The court concludes that, as a matter of law, this was not an inexcusable delay. Furthermore, since laches is an equitable defense, it is available to a defendant only when a plaintiff seeks some form of equitable relief and is not a valid defense to an action brought solely at law. FSM Dev. Bank v. Gouland, 9 FSM Intrm. 605, 607 (Chk. 2000). This suit for unpaid statutory health insurance premiums is an action at law. The Plan has overcome PII's affirmative defense of laches.

Selective prosecution is a defense in a criminal case. *See* FSM v. Fritz, 14 FSM Intrm. 548, 552 (Chk. 2007); FSM v. Wainit, 11 FSM Intrm. 1, 8 (Chk. 2002). PII asserts that it was singled out for enforcement and is thus the only employer being sued for unpaid health insurance premiums. The court reads this as an equal protection claim.

The Constitution's Declaration of Rights, FSM Const. art. IV, contains two equal protection guarantees. Section 3 provides that a person may not be denied the equal protection of the laws and section 4 provides that equal protection of the laws may not be denied or impaired on account of sex, race, ancestry, national origin, language, or social status. Berman v. College of Micronesia-FSM, 15 FSM Intrm. 582, 591 (App. 2008). PII does not assert that it was denied equal protection because of sex, race, ancestry, national origin, language, or social status or that a fundamental right is involved. When no Article IV, section 4 class is at issue and no fundamental right is involved, the question is whether the classification is rationally related to a legitimate governmental purpose. Berman, 15 FSM Intrm. at 592. The rational relationship test examines whether there is a reasonable justification for permitting the discrimination. *See id.* at 592-93.

The Plan, in its supporting affidavit, avers that PII is the largest private employer in Chuuk, that PII has not complied with the regulation requiring health insurance premium payments, and that other private employers are working with the Plan to reach compliance with the regulation and statute but that PII has not been willing to work with it to come into compliance. PII's supporting affidavit does not rebut this. The court concludes that it is entirely rational that the Plan first sue the largest non-complying employer before suing other non-compliant employers, especially when the others are trying to bring themselves into compliance. Someone must be first. The court must therefore conclude that the Plan has overcome this affirmative defense. (If this defense were considered a civil rights counterclaim, then the Plan has shown that there are no genuine material factual issues in dispute on this claim and that the Plan is entitled to judgment as a matter of law.)

The Plan having overcome PII's affirmative defenses, the court will now turn to the heart of the Plan's motion.

B. *The Plan's Claim and the Validity of Regulation*

The Plan contends that under the Chuuk Health Care Act of 1994, Chk. S.L. No. 2-94-06, PII is required to withhold the employees' health insurance contribution from their wages and salaries, to add an employer's contribution, and to remit that total to the Chuuk Health Care Plan every pay period. It is undisputed that PII is an employer as defined by the Act. Chk. S.L. No. 2-94-06, §§1-4(4), 1-4(10). The Act requires an employer to deduct and withhold the employees' balance of the premium from its employees "as specified by the Board's regulation" and to pay the Plan along with reports and returns "as specified by the Board's regulation." *Id.* § 5-4(2).

PII does not argue that the Plan's regulations, or the Act that authorized them, are unconstitutional. PII only contends that no regulations were lawfully adopted. PII contends that since the Act only makes it liable to deduct and withhold the employees' balance of the premium from its employees and to pay the Plan along with reports and returns "as specified by the Board's regulation," it cannot be liable to the Plan because the Plan's Board of Trustees has, in PII's view, never adopted any regulations, or, if it has adopted regulations, that adoption did not comply with the Administrative Procedures Act, 17 TTC §§ 1*et seq.*, and was therefore invalid.

Specifically, PII points to the requirement that before an agency can adopt a regulation or rule, it must give 30 days' notice of its intended action by posting notices in convenient places in Chuuk and in each municipal office and allow all interested persons an opportunity to submit their views and

comments on the proposal, 17 TTC 4(1),[1] and to the provision that a regulation is invalid unless there was substantial compliance with this procedure, *id.* § 4(3). The Plan responds that the Chuuk Health Care Act of 1994 authorized its rule-making power and procedure and that any regulations it promulgates are valid if it follows the procedure in that Act's provision granting it rule-making powers, Chk. S.L. No. 2-94-06, § 2-17, which simply provides that "[t]he Board shall with the approval of the Governor adopt, amend, or repeal regulations for the administration of the Plan . . . ."

Trust Territory Code Title 17, section 4(1) prescribes the procedure an administrative agency must follow before it adopts a rule or regulation. Chuuk State Law No. 2-94-06, section 2-17 prescribes the procedure that should be followed once the Plan's Board has decided to adopt a regulation so that the regulation becomes valid and takes effect. Since these two state law provisions do not conflict, it is entirely likely that the Chuuk Legislature, when it enacted the Chuuk Health Care Plan Act, intended that the notice and comment provision of the Administrative Procedure Act would also be followed by the Plan's Board before adopting a regulation to be presented to the Governor for approval. This, however, is a point which the court does not need to resolve.

That is because there is no evidence before the court that the Board, at some point before it adopted the regulation ten years ago, did not actually give the public notice and an opportunity to comment before the Board, on May 9, 2001, adopted its regulation, which was then approved by the Governor on May 16, 2001. (The Plan neither asserts that prior notice was given nor concedes that it was not given. It only contends that prior notice is not an issue because the Health Care Plan Act does not specifically require it.[2])

Agency rules adopted pursuant to a statutory rule-making proceeding are presumed valid and the burden is on the challenging party to establish the rules' invalidity by demonstrating that the rule-making agency adopted the rules in an unconstitutional manner, or exceeded its statutory authority,[3] or otherwise acted in manner contrary to the statutory requirements. *See, e.g.*, N.A.A.C.P. v. Federal Commc'ns Comm'n, 682 F.2d 993, 997 (D.C. Cir. 1982) (agency action presumed valid in absence of substantial showing to the contrary); Regular Route Common Carrier Conference v. Public Utilities Comm'n, 761 P.2d 737, 743 (Colo. 1988); McCool v. Sears, 186 P.3d 147, 151 (Colo. Ct. App. 2008).

PII has not met this burden. Its first contention was that there were no regulations and that the brochure it was provided was not valid as regulations,[4] and that therefore, under the statute requiring

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[1] Trust Territory Code Title 17 is retained as Chuuk state law through the Chuuk Constitution's Transition Clause. Chk. Const. art. XV. § 9.

[2] Neither the FSM nor the Chuuk Constitutions require prior public notice before adopting a regulation. This is because "[a]s a general rule notice and hearing are not a constitutional requirement in the rulemaking process or in legislation by administrative agencies." 2 AM. JUR. 2D *Administrative Law* § 279, at 108 (1962). Prior public notice requirements for regulations are statutory.

[3] Generally, a regulation's validity depends on whether the administrative agency had the power to adopt the particular regulation, that is, whether the regulation was within the matter covered by the enabling statute. Abraham v. Kosrae, 9 FSM Intrm. 57, 60 (Kos. S. Ct. Tr. 1999). PII, by arguing that the regulation was not adopted, or that it was adopted in an improper manner, does not challenge the Plan's statutory authority to adopt the regulation. Nor does PII contend that it was not covered by the Plan's enabling act.

[4] While PII is correct that a brochure was not a valid regulation or a copy of one, that is not a ground to fault the Plan. The court is certain that the average employer would much rather receive a brochure

regulations, PII could not be liable. The Plan attached to its May 5th response (opposition) to PII's motion a copy of the regulations setting the Chuuk Health Care Plan's contribution rates for employers and employees. PII did not reply to the Plan's opposition. It has not established or made a substantial showing that the regulation was invalid because the Plan's Board acted in a manner contrary to statutory requirements in adopting the May 2001 regulation.

Accordingly, the Plan is entitled to summary judgment that PII, as an employer, ought to have been remitting to the Plan the employees' and the employer's health insurance contributions. PII's cross motion for summary judgment is therefore denied.

The Plan's motion asks the court to establish PII's liability for its employees' health insurance premiums from July 1, 2009 to December 31, 2010. The Plan's Complaint, however, asserts claims to premiums only from September 2009 to December 10, 2010, although it could charitably be read to include a claim for continuing liability after December 10, 2010. The Plan has not asked to amend its Complaint to extend back to July 1, 2009 or forward beyond December 10, 2010. Nor has evidence been put before the court covering those times.

III. Conclusion

Accordingly, the Chuuk Health Care Plan's motion for partial summary judgment is granted and Pacific International, Inc. is liable to the Chuuk Health Care Plan for the employees' and employer's contributions to the health insurance premiums from September 2009 through December 2010. This order does not establish the dollar amount of that liability or adjudicate whether any penalties are due.

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explaining in plain English, the Plan's purpose, its coverage, its benefits, and the employer's responsibilities than be given copies of the relevant statutes and regulations and then have to wade through the legalese to try to determine the extent of their rights, responsibilities, and obligations. However, copies of the Plan's regulations, since they are public documents and records, should be available, upon request, for, at most, a nominal copying charge.