UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LOUIS P. CANNON, *et al*.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 12-CV-133 (ESH)
DISTRICT OF COLUMBIA,	)	
Defendant.	)	

DISTRICT OF COLUMBIA'S COMBINED REPLY/OPPOSITION

Pursuant to LCvR 7(d), defendant the District of Columbia ("the District") hereby replies to plaintiffs' Memorandum of Points and Authorities in Opposition to Defendant's Partial Motion to Dismiss or For Summary Judgment.

In accordance with LCvR 7(b), this document also serves as the District's Opposition to Plaintiffs' Cross-Motion for Partial Summary Judgment. As required by LCvR 7(h), the District's Opposition to Plaintiffs' Statement of Material Facts Not in Dispute ("PSMF") has also been provided, as well as a proposed Order.

I. Introduction & Background

The Court should dismiss plaintiffs' claims, or grant summary judgment on them to the District. Plaintiffs have simply failed to distinguish the controlling cases cited by the District, and have failed to cite *any* case mandating the results they demand, nor do they ever cite their own PSMF. Plaintiffs' repeated reliance on extended block quotes from decisions from other jurisdictions on issues irrelevant to this litigation is singularly unhelpful.

Plaintiffs' entire case rests on a false premise—that the District has improperly offset their salaries because the law "distinguishes [D.C. Police and Fire Retirement System] annuity entitlements funded by the District of Columbia and those funded by the federal government." P.Mem. at 3. This is incorrect; the law does *not* make any such distinction, and plaintiffs have failed to show otherwise.

Plaintiffs, throughout their brief, repeatedly conflate distinct, related issues, muddling separate concepts in an increasingly desperate attempt to state a claim. Plaintiffs appear to contend that they cannot be deprived of discovery here, and that they need not comply with Fed. R. Civ. P. 56(f). *See* P.Mem. 2–3, 8. Not so. *See Townsend v. Mabus*, 736 F.Supp.2d 250, 253 & n.4 (D.D.C. 2010) ("Plaintiff's opposition does not include a motion pursuant to Rule 56(f), nor does it include an affidavit explaining why she cannot present facts essential to justify her opposition, as required by the rule."). *See also Convertino v. United States Dep't of Justice*, 769, F.Supp.2d 139, 155 (D.D.C. 2011) (a party seeking a Rule 56(f) continuance should state why it is "unable to present the necessary opposing material.") (quoting *Cloverleaf Standardbred Owners Ass'n, Inc. v. Nat'l Bank of Wash*., 699 F.2d 1274, 1278 n.6 (D.C. Cir. 1983)).

Here, plaintiffs fail to present any such affidavit, or explain in any detail why they need discovery to oppose the District's motion. The self-serving "affidavits" provided are rife with hearsay and innuendo and fail to controvert the facts set forth by the District.[1] Indeed, plaintiff Cannon's affidavit fails to dispute the veracity of the District's reasons for his termination, and none of the FLSA plaintiffs make any attempt to describe their job duties or explain how they are covered under that statute.

[1] The affidavits are not notarized, hence they are more properly described as declarations. *See* 28 U.S.C. § 1746.

The Court should grant summary judgment to the District on plaintiffs' claims.

II. Argument

A. Plaintiffs Are Not Entitled to Summary Judgment.

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

In considering plaintiffs' motion, all evidence and the inferences to be drawn from it must be considered in the light most favorable to the District. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Smith-Haynie v. District of Columbia*, 155 F.3d 575, 579 (D.C. Cir. 1998). Moreover, "the evidence offered by [the District] must be accepted as correct, and all justifiable inferences must be drawn in [its] favor." *Goldman v. Bequai*, 19 F.3d 666, 672 (D.C. Cir. 1994) (citing *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 255 (1986)).

All the evidence and inferences drawn from it here show that the defendant is entitled to summary judgment, as it amply demonstrated in its Motion for Summary Judgment. Plaintiffs' interpretation of the disputed law is not credible logically or legally.

There are no material facts at issue here, and plaintiffs have not identified any, hence summary judgment is appropriate for the District. Plaintiffs failed to meet their burden—to "go beyond the pleadings" and "designate specific facts showing that there is a genuine issue for trial." *Greer v. Paulson*, 505 F.3d 1306, 1315 (D.C. Cir. 2007) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (quoting Fed. R. Civ. P. 56(e)). *See also Doe v. Gates*, 981 F.2d 1316,

1323 (D.C. Cir. 1993) (on summary judgment, non-movant, having the burden at trial, must respond with a showing of "affirmative evidence.") (quoting *Anderson*, 477 U.S. at 256–57).

The relevant inquiry at summary judgment "is the threshold inquiry of determining whether there is a need for a trial—whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson*, 477 U.S. at 250.

Plaintiffs' self-serving declarations fail to identify any material fact in dispute, and are simply numbered lists of conclusory statements and hearsay, with no attempt to controvert the facts set forth by the District. The declarations also do not contain any citations to any record evidence. As such, the declarations, "unsupported by citations to accurate record evidence[,] are insufficient to create issues of material fact." *Hinson v. Merritt Ed. Center*, 579 F.Supp.2d 89, 92 (D.D.C. 2008). *See also Globalaw Ltd. v. Carmon & Carmon Law Office*, 452 F.Supp.2d 1, 28 n.11 (D.D.C. 2006) (affidavits "are entirely conclusory, supported by no evidence in the record; as such, they fall under the kind of affidavit typically insufficient to avoid summary judgment.").

None of the declarations provides any details at all about the FLSA plaintiffs' job duties, much less attempt to controvert the undisputed evidence on that topic presented by the District. Such a showing is fatally insufficient to avoid summary judgment. As the D.C. Circuit has long held, summary judgment "is most likely when a plaintiff's claim is supported solely by the plaintiff's own self-serving testimony, unsupported by corroborating evidence, and undermined by other credible evidence . . . or other persuasive evidence . . . ." *Newton v. Office of the Architect of the Capitol*, ___ F.Supp.2d ___, 2012 WL 768204, *8 (D.D.C. Mar. 12, 2012) (quoting *Arrington v. United States*, 473 F.3d 329, 342–43 (D.C. Cir. 2006) (in turn quoting *Johnson v. WMATA*, 883 F.2d 125, 128 (D.C. Cir. 1989))).

"The facts alleged in a complaint are not evidence for purposes of a motion for summary judgment." *Id.* at *10 (citing Fed. R. Civ. P. 56(c)(1), (3)). And yet plaintiffs repeatedly cite to their own pleadings. *See* P.Mem. at 15, 19, 23, 33, 48 (twice), 50, 51, 52. Plaintiffs have failed to meet their burden. *Atlantic Sea Island Group LLC v. Connaughton*, 592 F.Supp.2d 1, 8 (D.D.C. 2008) ("The burden falls on the moving party to provide a sufficient factual record that demonstrates the absence of a genuine issue of material fact.") (citations omitted). *Cf. Doe v. Gates*, 981 F.2d at 1323 (party opposing summary judgment, having the burden at trial, must respond with a showing of "affirmative evidence.").

Plaintiffs' "Response" to the SMF

Plaintiffs' Response to Defendant's Statement of Material Facts as to Which There is No Genuine Issue (Doc. No. 29-2), effectively admits *all* the facts in the District's SMF. Plaintiffs attempt to deny the indisputable amount of gross pay received by plaintiffs Neill and Weeks, *see* Doc. No. 29-2 at 13, but those denials are based on an erroneous interpretation of the FLSA's salary thresholds, as the District explains elsewhere herein. *See* Section E, *infra*. Thus, there are no material facts genuinely at issue.

Moreover, plaintiffs' Response violates the Rules of this Court. Those rules mandate that a party opposing a motion for summary judgment must provide "a separate concise statement of genuine issues setting forth *all material facts as to which it is contended there exists a genuine issue necessary to be litigated*, which shall include references to the parts of the record relied on to support the statement." *Burt v. National Republican Club of Capitol Hill*, ___ F.Supp.2d ___, 2011 WL 6097981, *1 (D.D.C. Dec. 8, 2011) (emphasis added) (quoting LCvR 7(h)).

The Response provided by plaintiffs (Doc. No. 29-2) is little more than an obvious attempt to circumvent the Court's page-limit restrictions, which plaintiffs are *already* exceeding. Plaintiffs' Response impermissibly contains more than nine (9) pages of additional argument.

> Twenty-nine pages long, the section hardly complies with the rule's requirement that statement of genuine disputed material issues be "concise." Replete with factual allegations not material to [plaintiff's] substantive claims and repeatedly blending factual assertions with legal argument, the "relevant facts" section does not satisfy the purposes of a [LCvR 7(h)] statement. In order to identify material disputed issues that would preclude the entry of summary judgment, the court would have to sift and sort through the record, that is, engage in time-consuming labor that is meant to be avoided through the parties' observance of [LCvR 7(h)].

Jackson v. Finnegan, Henderson, Farabow, Garrett & Dunner, 101 F.3d 145, 153 (D.C. Cir. 1996). *See also Himes v. Medstar-Georgetown University Med. Center*, 753 F.Supp.2d 89, n.1 (D.D.C. 2010) (the Court "strictly adheres" to the text of LCvR 7(h)) ("The district court's obligation in examining a Rule [7](h) statement of material facts in dispute, however labeled and wherever it appears in the opposition pleadings, extends [ ] only to a determination of whether the party opposing summary judgment has complied with the rule's plain requirements.") (alterations in original) (quoting *Jackson*, 101 F.3d at 153)); *Canning v. United States Dep't of Defense*, 499 F.Supp.2d 14, 16 (D.D.C. 2007) ("This Circuit demands strict compliance with this Rule.") (rejecting plaintiffs' statement "because it 'blend[s] factual assertions with legal argument [.]'") (citations omitted).

Worst of all, plaintiffs fail entirely to isolate the specific, material facts as to which they contend there exists a genuine issue necessary to be litigated. The Court should therefore assume that the facts identified in the District's SMF are admitted. *Burt*, *supra*, at *1.

Because of this violation of the Rules, the Court has the discretion to strike plaintiffs' motion. *Robertson v. American Airlines, Inc.*, 239 F.Supp. 2d 5, 8–9 (D.D.C. 2002) (citing *Jackson*, 101 F.3d at 153 n.6.

The District *itself* cannot file such a statement, however, because *there are no material facts at issue*, hence summary judgment is appropriate for the District as a matter of law. The Court can and should decide the pending motions as a legal matter. *See Stellacom, Inc. v. United States*, 783 F.Supp. 647, 654 (D.D.C. 1992) ([The party] could not file a statement of material facts in dispute as is required by the Rule because *neither* party in this case is contending that there exist genuine issues of material fact to be litigated.") (emphasis in original).

B. The Offset of Plaintiffs' Salaries is Mandated by Law.

Plaintiffs' extended disquisition on the sources of funding for the pension benefits of retired police employees, even if correct, is immaterial here. Plaintiffs assert that "[t]he law does not permit" P.Mem. at 6, the offset they complain of, but they fail to explain *how* this is so. Simply, put, plaintiffs cannot cite *any* provision of law prohibiting what the District has done.

Plaintiffs cling to their mistaken belief that they are entitled to the offset exemption provided in D.C. Official Code § 1-611.03(b) because D.C. Law 15-207 "eliminat[ed] the reduction in pay of a District of Columbia government retiree identified in 5 U.S.C. § 8331 and is subsequently rehired by the District of Columbia after December 7, 2004." P.Mem. at 7. Plaintiffs' *own* language demonstrates the error.

As plaintiffs correctly note, the purpose of this provision was "to treat former District government employees who are federal annuitants the same as former federal government

employees who are federal annuitants . . . ." *Id.* But plaintiffs are *not* "federal annuitants," despite their continuing assertions otherwise.

The exemption in D.C. Official Code § 1-611.03(b) applies *only* to D.C. retirees identified in 5 U.S.C. § 8331, *i.e.*, those employees "first employed by the government of the District of Columbia before October 1, 1987[,]" 5 U.S.C. § 8331(1)(G), but does *not* include employees "subject to another retirement system for Government employees . . . ." 5 U.S.C. § 8331(1)(L)(ii). Indeed, this provision is part of Subchapter III, "Civil Service Retirement," regulating retirement benefits under the *federal* Civil Service Retirement and Disability Fund. 5 U.S.C. § 8331(5). *Cf.* 5 U.S.C. §§ 8401 *et seq*. ("Federal Employees' Retirement System").

As the District has set forth repeatedly, retired D.C. police (like all the instant plaintiffs) receive pension benefits from a fund *separate* from other D.C. civil-service retirees; all of the plaintiffs had deductions taken from their pay and paid to their own fund since the day they were first hired. *See* D.C. Official Code § 5-706 (authorizing deductions from October 26, 1970 to be paid to "the District of Columbia Police Officers and Fire Fighters' Retirement Fund established by § 1-712"). Because plaintiffs are "subject to another retirement system," the exemption in D.C. Official Code § 1-611.03(b) does *not* apply.

The law requires the District to offset the salaries of reemployed D.C. police, firefighters, and teachers.

> *Notwithstanding any other provision of law*, the *salary* of any annuitant who first becomes entitled to an annuity under this subchapter, after November 17, 1979, and who is subsequently employed by the government of the District of Columbia *shall be reduced* by such amount as is necessary to provide that the sum of such annuitant's annuity under this subchapter and compensation for such employment is equal to the salary otherwise payable for the position held by such annuitant.

D.C. OFFICIAL CODE § 5-723(e) (emphasis added).

Plaintiffs' repeated reliance on double negatives serves only to underscore the infirmity of their position. *See* P.Mem. at 7 ("None of the language in [D.C. Official Code § 1-611.03(b)] indicates that a PFRS federal annuitant would not be entitled to this protection."); *id*. at 8 (Congress, in Pub. L. 110-161 indicated "that D.C. Act 15-489 would only not withstand 5 U.S.C. § 8344(a).").

The dichotomy on which plaintiffs fixate—federal annuitant vs. D.C. annuitant—is ultimately immaterial here even if it were correct. The issue does not turn on the *source* of the annuity funds, but on the *entity* that manages those funds, as plaintiffs' primary source makes clear. That provision regulates the pay of individuals receiving an annuity "under any District government civilian *retirement system*" subsequently rehired by the District. D.C. Official Code § 1-611.03(b) (emphasis added). The key term is the pension *system*, not the source of the funding.[2] Legislative history and case law amply demonstrate the fallacy of plaintiffs' artificial dichotomy, as demonstrated herein.[3] Because plaintiffs receive their pension benefits from a

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[2] To the extent plaintiffs argue that the District is somehow to blame for the pension-funding problems they discuss, *see* P.Mem. at 4–5, they are incorrect. *See* D.C. Official Code § 1-801.01(a)(4) (2011 Repl.) ("The Congress finds that: [T]he growth of the unfunded liabilities of the three pension funds listed above did not occur because of any action taken or failure to act that lay within the power of the District of Columbia government or the District of Columbia Retirement Board.").

[3] *See also* Pub. L. 96-122 (eff. Nov. 17, 1979), 93 Stat. 866, "District of Columbia Retirement Reform Act." That legislation created the D.C. Retirement Board ("DCRB"):

> DCRB is an independent agency of the District of Columbia government that was created by Congress in 1979 under the Retirement Reform Act (Reform Act). DCRB has *exclusive authority and discretion to manage the assets of* the District of Columbia Teacher's Retirement Plan and *the District of Columbia Police Officers and Firefighters' Retirement Plan* (collectively referred to as the Plans) and to provide participants with retirement services.
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> [I]n 1997, with the passage of the National Capital Revitalization and Self-Government Improvement Act (the Revitalization Act), the Federal Government

District retirement system, they are subject to the offset mandated by D.C. Official Code § 5-723(e).

"Supremacy"

To the extent plaintiffs make a "supremacy" argument, P.Mem. at 12 (*i.e.*, that Congress's legislative language trumps the D.C. Council's), it too fails, for the simple reason that the mandatory offset on which the District relies was itself enacted by Congress, whereas the "exemption" on which plaintiffs rely purports to authorize subsequent language of the D.C. Council. *Cf.* D.C. Official Code § 5-723(e) (codifying § 214, Pub. L. 96-122 (eff. Nov. 17, 1979) and D.C. Official Code § 1-611.03(b) (citing § 807, Pub. L. 110-161). Moreover, plaintiffs' own citation underlines the longstanding proposition that a local law only "is nullified to the extent it actually conflicts with federal law." *Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 152–53 (1982). Plaintiffs have utterly failed to show any such "conflict" here.

> assumed responsibility for the unfunded pension liabilities for retirement benefits earned as of June 30, 1997.
>
> With the passage of the District's Office of Financial Operations and Systems Reorganization Act of 2004, DCRB assumed certain benefits administration responsibilities for the Plans from the District's Office of Pay and Retirement Services (OPRS). Those responsibilities included recordkeeping, related administrative tasks, and the payment of benefits for participants hired on or after July 1, 1997, who earned benefits under the District Plans. *DCRB also assumed the same administrative responsibilities for participants hired prior to July 1, 1997 and whose benefit costs are the responsibility of the U.S. Department of the Treasury* (Treasury).

District of Columbia Retirement Board, *Comprehensive Annual Financial Report for the Fiscal Year Ended September 30, 2011*, at 7 (emphasis added) (available online at http://dcrb.dc.gov/sites/default/files/dc/sites/dcrb/publication/attachments/FY%202011%20DCRB%20CAFR.pdf (last visited April 11, 2012)).

As originally enacted, the offset provision mandated the reduction of "[t]he pay of an individual receiving an annuity under any federal or District government civilian retirement system, or any retirement system of the uniformed services of the United States" subsequently hired by the District. *Barnes v. District of Columbia*, 611 F.Supp. 130, 132 n.4 (D.D.C. 1985) (quoting D.C. Code § 1-612.3(b) (1981 ed.)).[4]

In *Barnes*, the court rejected claims brought under the Supremacy Clause and the Contract Clause by retired military personnel whose salaries were offset by the amounts of their military pensions. *Id*. at 132. Just like the instant plaintiffs, those in *Barnes* had contended that "the D.C. statute frustrates congressional intent because it does not go as far as the congressional scheme in protecting the total compensation of reemployed retired military personnel." *Id*. at 133. The court held that plaintiffs had failed to show that any law prohibited the disputed offsets: "Absent a conflict with some other provisions of federal or local law, the District of Columbia is free to fashion its compensation system as it chooses." *Id*. at 134. Moreover, notwithstanding that the plaintiffs had neither provided copies of their federal (pension) nor local (employment) "contracts," the court held that the disputed offsets do not reduce their federal *pensions* but reduce their local *salaries*. *Id*. at 136.[5] Consequently, the court declined to exercise pendent jurisdiction over the local-law claims. "The plaintiffs' claims under the D.C. Code and the

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[4] Subsequently, the word "federal" was deleted from that provision, and repealed entirely was "any retirement system of the uniformed services of the United States," further reinforcing the conclusion that the *source* of the funds is irrelevant—what matters is the entity that manages the benefits. *See* D.C. Official Code §§ 1-611.03(b), (c) (2008 Supp.).

[5] Similarly here, plaintiffs' insistence that D.C. Official Code § 1-815.02(a) provides the Court with "irrefragable" jurisdiction must be rejected. No persons' pension benefits (federal, District, or otherwise) are affected *at all* here, hence that statute is utterly inapposite.

personnel manual involve unexplored questions of state law which are best left to the local courts." *Id*.[6]

Just as in *Barnes*, this Court should reject plaintiffs' inchoate federal challenges to the offset, and decline to exercise pendent jurisdiction over the local-law claims.

C. Plaintiffs Fail to State a Due Process Claim.

Like many who sue the District, plaintiffs complain not so much about the *process* they received than the *results* of that process. Plaintiffs do not (because they cannot) complain that they did not receive sufficient notice of the imposition of the offset. Nor do plaintiffs allege that they were prohibited from responding or providing their views on the offset. What they dislike, at bottom, is the *result*—that their salaries are offset by the amounts of their pension benefits, as mandated by law. Contrary to plaintiffs' beliefs, "due process" does not mean that the government is required to decide a contested issue in their favor. *See Lightfoot v. District of Columbia*, 448 F.3d 392, 401 (D.C. Cir. 2006) (Silberman, J., concurring) ("[T]he Supreme Court's due process jurisprudence carefully distinguishes process from substance. The issue is always, in its due process cases, whether or not the claimant has had a fair opportunity—sometimes rather informal—to present his case and not whether the agency's substantive decision was reasonable."). *See also Deschamp v. District of Columbia*, 582 F.Supp.2d 14, 17 (D.D.C. 2008) (the CMPA "provides all the process [plaintiff] is entitled to.") (citing *Lightfoot*,

[6] The Council subsequently repealed the offset for those employees receiving a pension from "any retirement system of the uniformed services of the United States," *see* n.4, *supra*, suggesting that if the Council wants to eliminate the offset the instant plaintiffs complain of, it knows how to do so.

448 F.3d at 398 ("the CMPA and D.C. court of appeals decisions themselves provide ample standards that would satisfy [a] due process claim")).[7]

Plaintiffs also conflate distinct due-process concepts with common-law defamation. For instance, plaintiffs apparently assert that plaintiff Cannon has a "right" to "clear his name" in light of his termination. *See* P.Mem. at n.14. This is incorrect.

A plaintiff may be able to state a due process claim based on the allegedly defamatory actions of government officials under two theories: "reputation-plus" or "stigma or disability." *DeSousa v. Dep't of State*, ___ F.Supp. ___, 2012 WL 20477, * 14 (D.D.C. Jan. 5, 2012); *Aguirre v. SEC*, 671 F.Supp.2d 113, 119 (D.D.C. 2009). To proceed on "reputation-plus," a plaintiff must allege official defamation and some adverse employment action. *DeSousa*, *supra*, at *14 (citing *O'Donnell v. Barry*, 148 F.3d 1126, 1140 (D.C. Cir. 1998)). Although plaintiff Cannon was terminated, his defamation allegations fail to pass muster.[8]

Plaintiffs originally alleged that the reason(s) for Cannon's termination were "false," First Suppl. Compl. ¶ 28, but fail to reveal those reasons or explain *why* they are allegedly false.[9] Indeed, as noted elsewhere, Mr. Cannon refuses, in his declaration, to dispute *any* of the facts of his termination. Such failures are fatal here. To survive a motion to dismiss, a defamation claim in the District must set out "the substance of the alleged defamatory statement." *Williams v. District of Columbia*, 9 A.3d 484, 492 (D.C. 2010) (quoting *Crowley v. North Am. Telecomm.*

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[7] Plaintiffs also fail to cite a single case in support of their odd theory that plaintiffs "are not bound by [the CMPA's] grievance system . . . ." P.Mem. at 49. Worse, plaintiffs then assert that "they are completely precluded from doing so by D.C. Code § 1-815.02(a)." *Id*. at 50. Plaintiffs provide no cogent explanation or analysis for these propositions.

[8] Plaintiff Cannon has not disputed that he was "at will," hence had no property interest in his District employment. *See, e.g., Aguirre*, 671 F.Supp.2d at 118 (quoting *Hall v. Ford*, 856 F.2d 255, 265 (D.C. Cir. 1988)).

[9] A statement must be false to be defamatory. *DeSousa*, *supra*, at *14.

Ass'n, 691 A.2d 1169, 1172 (D.C. 1997)). Plaintiffs have never set out *what* the defamatory statement(s) are.

Additionally fatal to any such claim, an examination of Cannon's termination letter (Doc. No. 11-2)—which plaintiffs' counsel published here—reveals that he was terminated solely for job-related reasons. "[I]n this Circuit a reputation-plus claim cannot be based on defamation related to plaintiff's job performance." *Aguirre*, 671 F.Supp.2d at n.5 (citing, *inter alia, Harrison v. Bowen*, 815 F.2d 1505, 1518 (D.C. Cir. 1987) (publicized statements must "imply an inherent or at least a persistent personal condition, which both the general public and a potential future employer are likely to want to avoid," for example, that the employee was terminated "for having committed a serious felony, for manifest racism, for serious mental illness, or for lack of 'intellectual ability'") (quoting *Mazaleski v. Treusdell*, 562 F.2d 701, 712 (D.C. Cir. 1977)).

As the District has said before, it did not publicize any of the *reasons* for plaintiff Cannon's termination (which facts were revealed by opposing counsel), much less the fact of termination itself. *See* Alan Suderman, "D.C. Protective Services Police Department Chief Fired," WASH. CITY PAPER (Feb. 8, 2012) (city spokesman confirmed firing "but could not specify why citing privacy rules governing personnel decisions.").[10] Consequently, the District's actions here could *not* injure Cannon's reputation because the District made no "public accusations that will damage [his] standing and associations in the community." *Orange v. District of Columbia*, 59 F.3d 1267, 1274 (D.C. Cir. 1995) (quoting *Doe v. Cheney*, 885 F.2d 898, 910 (D.C. Cir. 1989)). *See also Bishop v. Wood*, 426 U.S. 341, 348 (1976) (there is no deprivation of a liberty interest in "the discharge of a public employee whose position is

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[10] *Available online at* http://www.washingtoncitypaper.com/blogs/looselips/2012/02/08/dc-protective-services-police-department-chief-fired/ (last visited April 13, 2012).

terminable at the will of the employer when there is no public disclosure of the reasons for the discharge.”).[11]

Plaintiffs also appear—for the first time—to be making some type of “takings” claim, *i.e.*, that their property was taken without “just compensation,” P.Mem. at 21, a term that does not appear in their pleadings. Plaintiffs fail to state a takings claim, because the offset of plaintiffs’ salaries was lawfully obtained under the authority of D.C. Official Code § 5-723(e). *See Tate v. District of Columbia*, 601 F.Supp.2d 132, 136 (D.D.C. 2009) (“[t]he government [is] not [ ] required to compensate an owner for property which it has already lawfully acquired under the exercise of governmental authority other than the power of eminent domain”) (alterations in original) (quoting *Bennis v. Michigan*, 516 U.S. 442, 452 (1996)), *affirmed*, 627 F.3d 904 (D.C. Cir. 2010).

D. Plaintiffs Fail to State an Equal Protection Claim.

Plaintiffs have essentially conceded that they have failed to make out an equal-protection claim. *See* P.Mem. at 16 (plaintiffs are not “part of any traditional suspect classification.”). Consequently, plaintiffs were required to show that the District’s actions (providing pay raises to certain MPD officers) were irrational. *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 83–84 (2000). Plaintiffs failed to meet this burden; plaintiffs failed to cite to (or provide) any record

[11] Even if plaintiff Cannon *could* demonstrate that the District had injured his reputation, his only remedy would be a “name-clearing hearing” before DGS. *Aguirre*, 671 F.Supp.2d at 120 (citing *Codd v. Velger*, 429 U.S. 624, 627 (1977) (“the adequacy or even the existence of reasons for [terminating plaintiff] presents no federal constitutional question. Only if the employer creates and disseminates a false and defamatory impression about the employee in connection with his termination is such a hearing required.”)).

evidence that their job duties were the same, or even similar to, those of the referenced officers. Such a failure dooms plaintiffs' equal-protection claims.

Employees of different agencies performing different functions are not "similarly situated" as a matter of law. *See, e.g., Noble v. U.S. Parol Com'n*, 194 F.3d 152, 155 (D.C. Cir. 1999) (rejecting plaintiff's contention that there exists "a constitutional right to equal treatment by the government, even where that treatment is imposed by two different agencies").[12] *See also Vandermark v. City of New York*, 391 Fed.Appx. 957, 959 (2nd Cir. 2010) ("[t]here are numerous reasonable bases on which the City of New York might decide that NYPD officers and [Environmental Police Officers] should receive different compensation and benefits, including the danger associated with the positions, [and] the physical strain of the job . . . .") (quoting and affirming *Vandermark v. City of New York*, 615 F.Supp.2d 196, 209 (S.D.N.Y. 2009)). *Cf. Haworth v. Office of Personnel Management*, 112 Fed.Appx. 406, 408 (6th Cir. 2004) (federal law requiring offset of federal retiree's retirement benefits by amounts he earned as intermittent employee was rationally related to government's goal of protecting public fisc, and thus did not violate retiree's equal protection rights); *Leheny v. City of Pittsburgh*, 183 F.3d 220, 226–27 (3rd Cir. 1999) (rejecting retired police officers' equal-protection claim that city violated their rights by offsetting their pension benefits by workers' compensation benefits, because it involved neither fundamental rights nor suspect classifications, and such classification thus would be accorded a strong presumption of validity and be subject to rational basis review); *Rogers v. District Unemployment Compensation Bd.*, 290 A.2d 586, 587 (D.C. 1972) (provision of law that unemployment benefits payable to an individual shall be reduced by any amount received as a

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[12] Plaintiffs' "tax" claims suffer from this same flaw. *See, e.g., United States v. Choen*, 733 F.2d 128, 142–44 (D.C. Cir. 1984) (*en banc*) (Mikva, J., concurring) ("[i]ndividuals within and without the District of Columbia are not similarly situated with respect to congressional legislation enacted in Congress' role as local sovereign.").

retirement pension or annuity does not violate equal protection) (citing D.C. Code § 46-307(c) (1967 ed.)).

Plaintiffs each worked at MPD for decades, and have years of experience at DGS. Their willful refusal to provide any details at all about their job duties (or those of the referenced MPD officers) does not entitle them to discovery. *See United States v. Bass*, 536 U.S. 862, 864 (2002) (*per curiam*) (because defendant alleging selective prosecution "failed to submit relevant evidence that similarly situated persons were treated differently, he was not entitled to discovery."). *Cf. Dorchy v. WMATA*, 45 F.Supp.2d 5, (D.D.C. 1999) ("where an individualized claim of disparate treatment is alleged, the discovery of information concerning other employees should be limited to employees who are similarly situated to the Plaintiff.") (citation omitted).

Plaintiffs assert that they are "entitled to discovery" to determine whether "there was some meritorious purpose for the increases in salaries" of the referenced MPD officers, because plaintiffs believe that the "sole reason" for the increases was to "circumvent" the offset. P.Mem. at 20–21. To put it bluntly, the *reasons* for the salary increases are none of plaintiffs' business; even if plaintiffs' speculative reason was the *actual* reason, it would be sufficient to meet the "rational basis" test under case law, in light of MPD's broad personnel authority. *See* Mayor's Order 97-88 ("the Chief of Police is delegated personnel and rulemaking authority vested in the Mayor over the Metropolitan Police Department under sections 404 and 406 of the District of Columbia Comprehensive Merit Personnel Act of 1978, D.C. Code §§ 1-604.4 and 1-604.6.").

> [W]e have never found the Equal Protection Clause implicated in the specific circumstance where, as here, government employers are alleged to have made an individualized, subjective personnel decision in a seemingly arbitrary or irrational manner.
>
> [W]e are guided, as in the past, by the "common-sense realization that government offices could not function if every employment decision became a constitutional matter." If, as Engquist suggests, plaintiffs need not claim

> discrimination on the *basis of membership in some class or group*, but rather may argue only that they were *treated by their employers worse than other employees similarly situated*, any personnel action in which a wronged employee can conjure up a claim of differential treatment will suddenly become the basis for a federal constitutional claim. Indeed, an allegation of arbitrary differential treatment could be made in nearly every instance of an assertedly wrongful employment action—not only hiring and firing decisions, but any personnel action, such as promotion, *salary*, or work assignments—on the theory that other employees were not treated wrongfully.

Engquist v. Oregon Dep't of Agr. 553 U.S. 591, 605–608 (2008) (citations omitted) (emphasis added).

Plaintiffs fail to state a claim for a violation of their right to equal protection.

E. Summary Judgment on Plaintiffs' FLSA Claims Should be Granted to the District.

Plaintiffs' scant two pages of argument responding to the District's FLSA analysis present no controlling cases and fail to rescue those claims. Indeed, further analysis shows that the single remaining FLSA plaintiff, Ms. Ford-Haynes, falls within another exemption to the FLSA's minimum-wage requirements, hence summary judgment on that claim is appropriate for the District.[13]

All the FLSA plaintiffs are exempt from the statute's minimum-wage requirements. *See* 29 U.S.C. § 213(a)(1). With respect to the weekly compensation thresholds set by the regulations ($455 per week for "executive" and "administrative" employees, 29 C.F.R. §§ 541.100(a)(1), 541.200(a)(1)), plaintiffs' interpretation is simply wrong. *See* P.Mem. at 13–14. The pay

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[13] The District admits that it would have been preferable to have included Ms. Ford-Haynes' FLSA claims in its previous briefing. Nonetheless, Fed. R. Civ. P. 56(b) provides that a party may move for summary judgment "at any time until 30 days after the close of all discovery." Thus, for the sake of efficiency, rather than file a separate motion just addressing that claim, the District here moves for summary judgment on the FLSA claim of Ms. Ford-Haynes. To that end, the District's Supplemental Statement of Material Facts as to Which There is No Genuine Issue ("SSMF") is attached hereto, per LCvR 7(h)(1).

threshold is determined by gross pay received *before* any deductions, as shown below. If plaintiffs' theory were correct, no FLSA minimum-wage claimant would ever lose or be exempt, because his or her *net* salary, by definition, is less than minimum wage.

The salary threshold is determined *before* any deductions. *See, e.g., Nicholson v. World Business Network, Inc.*, 105 F.3d 1361, 1365 (11th Cir. 1997) (amount is determined by reference "to what an employee was owed, not what he actually received."); *Lucas v. Koch Marketing Co.*, 361 So.2d 194, 197 (Fla. App. 1978) (FLSA "salary basis" determined by examining "gross weekly payment received by the plaintiff"), *cert. denied*, 368 So.2d 1370 (Fla. 1979). Each of the three FLSA plaintiffs here meet this threshold, as they each receive at least $455 per week prior to deductions. *See* DEx. 8 at 2 (plaintiff Neill receives $1,897.71 gross per week); DEx. 9 at 3 (plaintiff Weeks receives $1,028.63 gross per week); DEx. 13 at 2 (plaintiff Ford-Haynes receives $1,739.89 gross per week).

Also contrary to plaintiffs' implications, to be paid "on a salary basis" simply means that an employee is paid a predetermined amount "not subject to reduction because of variations in the quality or quantity of the work performed . . . ." 29 C.F.R. § 541.602(a). The amount is "not subject to reductions" based on lesser work quality or quantity, *id*., not, as apparently interpreted by plaintiffs, *see* Doc. No. 29-2 at 13, based on the instant offset.

Oddly, plaintiffs provide no details whatever about *any* plaintiff's job duties, not even in the typical self-serving declaration. Thus, as the District demonstrated in its Motion (and plaintiffs failed to rebut), plaintiffs Neill and Weeks are "executive" employees exempt from the FLSA's minimum wage requirements. Moreover, the undisputed details of Ms. Ford-Haynes' duties shows that her FLSA claims fail.

An exempt "administrative" employee under the FLSA, as defined by Department of Labor regulations, is one who is:

> (1) Compensated on a salary or fee basis at a rate of not less than $455 per week . . .;
>
> (2) Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer; and
>
> (3) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

McKinney v. United Stor-All Centers LLC, 656 F.Supp.2d 114, 121 (D.D.C. 2009) (quoting 29 C.F.R. § 541.200).[14]

Ms. Ford-Haynes meets each element of this test. As noted previously, Ms. Ford-Haynes was hired as a Management Analyst (CS-343-13/9). SSMF ¶ 13. She is paid on a salary basis, before deductions, $1,739.89 per week. *Id.*; DEx. 13. Her position description is attached as DEx. 14, and shows that Ms. Ford-Haynes is clearly an administrative employee. Her primary duty is the performance of "technical, management, and budgetary advisory duties pertaining to the procurement, development, and management of security services contracts." SSMF ¶ 14 (quoting DEx. 14 at 3). Her job description is rife with the discretion and independent judgment found in an exempt administrative employee; she "[c]onducts meetings with individual vendors . . . represent[s] the District, and discuss[es] problems and solutions needed to address them." SSMF ¶ 15 (quoting DEx. 14 at 3). She "[c]onducts audits of payment documentation . . . [and p]repares cost analyses of expenditures vs. budget to ensure that the Protective Services Division remains in budget. [She i]dentifies budgetary problems and recommends appropriate action [and]

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[14] "The Department of Labor regulations are entitled to judicial deference and are the primary source of guidance for determining the scope of exemptions to the FLSA." *Id.* (quoting *Clements v. Serco, Inc.*, 530 F.3d 1224, 1227 (10th Cir. 2008)).

conducts critical reviews and analyses of monetary expenditures." SSMF ¶ 15 (quoting DEx. 14 at 3). She "performs the assignments independently, resolving conflicts, coordinating the work of others and keeping the supervisor informed of potentially controversial situations." SSMF ¶ 15 (quoting DEx. 14 at 4). She "uses initiative, experience and resourcefulness in interpreting and adapting guidelines and developing new methods, criteria, and policies." SSMF ¶ 15 (quoting DEx. 14 at 5).

These duties clearly put plaintiff Ford-Haynes within the "administrative" exemption described by regulation and case law. She performs "work directly related to assisting with the running or servicing of" the PSD. 29 C.F.R. § 541.201(a); SSMF ¶ 16. Such work includes "finance; accounting; budgeting; auditing; . . . purchasing; [and] procurement . . . ." SSMF ¶ 16; 29 C.F.R. § 541.201(b). Additionally, exercising discretion and independent judgment "involves the comparison and evaluation of possible course of conduct, and acting or making a decision after the various possibilities have been considered." 29 C.F.R. § 541.202(a).

Factors to be evaluated to determine whether an employee exercises such discretion include "whether the employee has authority to commit the employer in matters that have significant financial impact[;] whether the employee has authority to negotiate and bind the company on significant matters[; and] whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances." *Id.*, § 541.202(b). Employees can be "administrative" for purposes of the FLSA even if their decisions or recommendations are reviewed by supervisors. *Id.*, § 541.202(c). *See also Verkuilen v. Mediabank, LLC*, 646 F.3d 979, 981 (7th Cir. 2011) (affirming finding that account manager for software company was exempt "administrative" employee under FLSA) ("Employees tasked with jobs requiring the exercise of independent judgment usually are expected to work with a minimum of supervision . . . .");

Gagnon v. Resource Technology, Inc., 19 Fed.Appx. 745, 748–49 (10th Cir. 2001) (affirming finding that office manager/bookkeeper of engineering firm was administrative employee) ("plaintiff's primary duty was to administer and carry out the office work necessary to run defendant's business. [Plaintiff] participated in and made recommendations in the areas of insurance policies, hiring and firing, and banking."); *Paul v. UPMC Health Sys.*, 2009 WL 699943, *10–*12 (W.D. Pa.) (plaintiff manager of "grants, funding, and budgets" was exempt administrative employee under FLSA) (plaintiff "had the discretion to approve or disapprove purchases and expenditures within contractual and budgetary guidelines . . . [and] she investigated and resolved matters of significance [and] exercised authority to commit the employer in matters that have significant financial impact."). *Cf. McKinney*, 656 F.Supp.2d at 129 (declining to grant summary judgment on question of whether plaintiffs exercised discretion and independent judgment) ("The Operations Manual thus greatly limited the discretion and independent judgment exercised by [plaintiffs], both by prescribing detailed procedures for the completion of nearly all day-to-day tasks and by requiring that [plaintiffs] defer to District Managers on most matters of significance to the business.").

Plaintiff Ford-Haynes is one of "the most senior members of the command staff" at the PSD, P.Mem. at 27, and easily qualifies as an "administrative employee" under FLSA, hence her claims under that statute fail.

F. Plaintiffs Fail to State a First Amendment Retaliation Claim.

Because the District has presented a legitimate, non-retaliatory reason for the decision to terminate plaintiff Cannon, *see* Doc. No. 11-2; Doc. No. 18 at 30–31, plaintiffs were required to

demonstrate that that reason is "false," or "unworthy of credence." *Newton*, 2012 WL 768204, *4 (quoting *Beyah v. Dodaro*, 666 F.Supp.2d 24, 32 (D.D.C. 2009)). This plaintiffs failed to do.

Plaintiffs have presented *no* reason to suspect that the District's proffered reason is false or unworthy of credence, beyond their own conspiratorial imaginings. "[W]hen the employer's proffered explanation is reasonable in light of the evidence, 'there ordinarily is no basis for permitting a jury to conclude that the employer is lying about the underlying facts, and summary judgment is appropriate.'" *Id.* (citations and quotations omitted). Indeed, as noted, plaintiff Cannon does not contend in his declaration that the reasons for his termination were false.

Moreover, plaintiffs' claims do not rest on matters of "public concern." Plaintiffs' arguments are *pro forma*, and fail to distinguish the cases cited by the District, or cite any other, controlling case. Plaintiffs also stumble in their attempt to discredit the District's arguments regarding *San Filippo v. Bongiovanni*, 30 F.3d 424 (3rd Cir. 1994). *See* P.Mem. at 27. That case was originally cited by plaintiffs for the proposition that "if a plaintiff files a non-frivolous lawsuit, even without public concern, Petition Clause of First Amendment is implicated[.]" Doc. No. 12 at 5. Notwithstanding that the District did not cite *San Filippo* in its motion, the Supreme Court has since abrogated that decision. *See Borough of Duryea v. Guarnieri*, __ U.S. ___, 131 S.Ct. 2488 (Jun. 20, 2011).[15]

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[15] Plaintiffs' remaining arguments, such as they are, appear to rest on the notion that a suit by *several* government employees (as opposed to an individual employee) is immune from the "public concern" test of retaliation case law. *See* P.Mem. at 28. There is no such distinction in case law. Plaintiffs' instant lawsuit was not a matter of public concern, and plaintiffs' have not shown otherwise.

> Of course in one sense the public may always be interested in how government officers are performing their duties. [T]he right of a public employee under the Petition Clause is a right to participate as a citizen, through petitioning activity, in the democratic process. It is not a right to

At bottom, because plaintiffs' claims rest on purely individual personnel disputes, they are not a matter of "public concern," even in light of the press coverage this matter has received. *Hall v. Ford*, 856 F.2d 255, 259 (D.C. Cir. 1988). Nonetheless, even if the claims *are* a matter of public concern, plaintiffs cannot meet the other elements necessary to make out a claim of retaliation.

The District has demonstrated that it had legitimate, non-retaliatory reasons for terminating plaintiff Cannon, reasons that pre-dated the filing of the instant suit by *at least* two months, hence plaintiffs cannot show causation here. *See Kanz v. Gray*, ___ F. Supp. 2d ___, 2012 WL 271308, *9 (D.D.C. Jan. 31, 2012).

Plaintiffs make no attempt to dispute or credibly challenge the District's reasons, simply asserting, without support, that they "have already demonstrated" that the reasons for Cannon's termination were pretext. P.Mem. at 29. They have not. *See Fischbach v. D.C. Dep't of Corr.*, 86 F.3d 1180, 1183 (D.C. Cir. 1996) ("Once the employer has articulated a [legitimate] explanation for its action, as did the District here, the issue is not "the correctness or desirability of [the] reasons offered . . . [but] whether the employer honestly believes in the reasons it offers.") (quoting *McCoy v. WGN Continental Broadcasting Co.*, 957 F.2d 368, 373 (7th Cir. 1992)).

For reasons unclear to the District, plaintiffs attach Doc. No. 29-4, a 71-page "Reference Guide" from the D.C. Department of Human Resources entitled "HR III—Management's Guide to Progressive Discipline." But that document applies only to "Career Service" employees, *id.* at 6, hence has no relevance to plaintiff Cannon's termination. Similarly, plaintiffs provide Doc.

> transform everyday employment disputes into matters for constitutional litigation in the federal courts.

Borough of Duryea, 131 S.Ct. at 2501.

No. 29-5, an MPD General Order PER 120.21, "Disciplinary Procedures and Processes." Because plaintiff Cannon was not an employee of MPD, this document, too, is immaterial here.

Plaintiffs' retaliation claims fail at the outset.[16]

G. Plaintiffs Fail to State a Whistleblower Claim.

Plaintiffs engage in sophistry when they declare that their complaints exposed "the existence of the allegedly illegal offsets" to the public. P.Mem. at 13.[17] Nonsense; the issue underlying the plaintiffs' claims is the viability *vel non* of plaintiffs' "double dipping," not the District's subsequent response thereto. Plaintiffs' hairsplitting is meaningless. Of course the District's *response* to the double-dipping was unknown to the public before it happened, by definition. But the District offset was implemented because of the double-dipping by plaintiffs, which was public knowledge many weeks before plaintiffs filed suit. *See, e.g.*, Doc. 1-2 (published Dec. 7, 2011).

Plaintiffs have simply failed to state a cognizable claim under the D.C. Whistleblower Protection Act. *See Williams v. District of Columbia*, 9 A.3d 484, 490 (D.C. 2010) (affirming dismissal of DCWPA claim).[18]

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[16] Plaintiffs also assert, without citation to any record evidence, that "the circumstances demonstrate an insidious motive to thwart the Plaintiffs' prosecution of their lawsuit in the withholding of their pay." P.Mem. at 30. No plaintiff even mentioned the incident in their self-serving affidavits, and such a patently unbelievable statement requires no further response from the District.

[17] In contrast, elsewhere, plaintiffs assert that the issue of "public concern" was just this double-dipping. *See* P.Mem. at 27.

[18] *See also id.* at n.5:

> Text of DCWPA "reflects the Council's focus on protecting employees or applicants who risk their job security to disclose information that might already

Moreover, even if the "disclosure" made by plaintiffs was of information not already known to the public, they would still be required to demonstrate that they disclosed information that they "'reasonably believe[d] evidence[d]' the type of unlawful activity or abuse at which the DC-WPA is directed—*i.e.*, information indicating that [the agency] committed 'such serious errors . . . that a conclusion the agency erred is not debatable among reasonable people.'" *Id.* (quoting *Wilburn v. District of Columbia*, 957 A.2d 921, 925 (D.C. 2008)). This plaintiffs cannot do.

Indeed, even if we assume that the District's (allegedly impermissible) offset of plaintiffs' salaries is the "disclosure" made by plaintiffs here, such a disclosure does *not* fall within the protection of the DCWPA. Plaintiffs' own byzantine explanation of the "source" of the retirement benefits (vs. the entity that manages/distributes those benefits) prevents them from stating a DCWPA claim. While plaintiffs need not prove an actual violation of law to succeed on a WPA claim, they must show that "a disinterested observer with knowledge of the essential facts known to and readily ascertainable by [plaintiffs] reasonably conclude . . . that a violation did occur." *Kahn v. United States Dep't of Justice*, 618 F.3d 1306, 1313 (D.C. Cir. 2010) (quoting *Drake v. Agency for Int'l Dev.*, 543 F.3d 1377, 1382 (Fed. Cir. 2008)).

Here, a disinterested observer would reasonably conclude that the text of the offset provision—D.C. Official Code § 5-723(e)—*requires* the District to offset the salaries of re-hired District police, firefighters, and teachers. Plaintiffs have not shown otherwise. Their DCWPA claims fail.

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have been disclosed by another employee or applicant, *not* on protecting employees' or applicants' conveyance of information that is the subject of discussion among, and that has already been the subject of complaints by, concerned members of the general public.

H. The Offsets Are Not an Impermissible "Tax."

Plaintiffs' tax arguments remain largely unintelligible; plaintiffs' provide several pages of block quotes on "intergovernmental tax immunity," P.Mem. at 8–12, a concept which may be interesting from an academic perspective, but which is immaterial here. Indeed, the federal law cited by plaintiffs, 4 U.S.C. § 111, has never been cited by any reported decision of this Court, the D.C. Circuit, or the D.C. Court of Appeals, which fact—alone—should demonstrate its inapplicability to the instant matter.

Soldiering on, plaintiffs claim that the District's refusal to apply the "exemption" in D.C. Official Code § 1-611.03(b) to plaintiffs "violates the principles of intergovernmental tax immunity by discriminating solely on the basis of the <u>source</u> of these retirement benefits." P.Mem. at 8 (emphasis in original). Plaintiffs' argument is wrong both logically and legally.

As discussed above, the source of plaintiffs' retirement benefits is immaterial. Further, the Supreme Court's seminal decision in *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803 (1989) "held that a State violates the constitutional doctrine of intergovernmental tax immunity when it taxes retirement benefits paid by the Federal Government but exempts from taxation all retirement benefits paid by the State or its political subdivisions." *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 89 (1993). The doctrine is inapposite here, of course, because the District is not "taxing" any federal or retirement benefits at all, merely offsetting its employees' salaries.[19]

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[19] Plaintiffs' insistence that the offsets are a "tax" is incorrect for yet another reason. A government exaction is a tax "only when its primary purpose judged in legal context is raising revenue." *Rural Telephone Coalition v. FCC*, 838 F.2d 1307, 1314 (D.C. Cir. 1988). Plaintiffs' salaries are offset here not to *raise* revenue, but to protect the public fisc from "double dipping," *i.e.* employees being paid twice for the same work. *Cf. id.* ("[t]he definition of 'tax' in the abstract is a metaphysical exercise in which courts do not have occasion to engage.") (quoting *Brock v. WMATA*, 796 F.2d 481, 489 (D.C. Cir. 1986), *cert. denied*, 481 U.S. 1013 (1987)).

Moreover, if the offset is, in fact, a tax, this Court would lack jurisdiction over plaintiffs' "tax" claims and *all the others*. The D.C. Circuit has held that the D.C. Superior Court has exclusive jurisdiction over tax challenges, "even where federal or constitutional issues are raised[.]" *Fernebok v. District of Columbia*, 534 F.Supp.2d 25, 27 (D.D.C. 2008) (citing *Jenkins v. Washington Convention Ctr.*, 236 F.3d 6, 11 (D.C. Cir. 2001) ("Congress unambiguously intended to vest in the District of Columbia courts exclusive challenges to District of Columbia taxes including those involving federal statutory or constitutional claims in lieu of (rather than concurrently with) jurisdiction in federal courts.").[20]

Plaintiffs provide a similarly fanciful treatment regarding their claims of improper taxation of non-residents. P.Mem. at 38–41. It too fails, as Congress itself has mandated the offsets applied here. *See* "Supremacy" section, *supra*. Plaintiffs' tax arguments cannot be correct.

I. Plaintiffs' Remaining Common-Law Claims Fail.

Plaintiffs' scant two pages of argument on their breach-of-contract claims is insufficient to counter the District's showing. Plaintiffs fail to allege even whether their purported contracts were oral or written, much less provide any evidence that there were any contracts at all.

Worse, the principle case cited, *Nattah v. Bush*, 605 F.3d 1052 (D.C. Cir. 2010), ultimately is plaintiffs' downfall. On remand, the trial court in *Nattah* held that the plaintiff's alleged breach of contract claim regarding his oral contract of employment must be dismissed

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[20] Plaintiffs' statement that the Tax Injunction Act, 28 U.S.C. § 1341, is "inapplicable here," P.Mem. at n.16, should be rejected out of hand. *See Fernebok*, 534 F.Supp.2d at 29 (dismissing for lack of subject matter jurisdiction; "[T]he result compelled by statute and the decision in *Jenkins* is also consistent with the Tax Injunction Act [which] precludes declaratory judgments by federal district courts on state tax matters.") (citations omitted).

because it violated Virginia's statute of frauds, which "bars enforcement of unwritten or oral employment contracts absent a defined period of employment lasting less than one year." *Nattah v. Bush*, 770 F.Supp.2d 193, 209 (D.D.C. 2011) (citing VA. CODE ANN. § 11-2 and *Graham v. Cent. Fid. Bank*, 428 S.E.2d 916, 917 (Va. 1993)). So too here. The District has a similar statute of frauds, which similarly bars enforcement of any alleged oral contracts here. *See* D.C. Official Code § 28-3502 (2011 Repl.); *Clampitt v. American Univ.*, 957 A.2d 23, 35 (D.C. 2008) (affirming dismissal of breach of contract claim of purported oral employment contract); *Railan v. Katyal*, 766 A.2d 998, 1007 (D.C. 2001) ("[t]he statute of frauds mandates that certain agreements . . . must be in writing 'to guard against perjury and protect against unfounded and fraudulent claims.'") (quoting *Tauber v. District of Columbia*, 511 A.2d 23, 27 (D.C. 1986)).

Plaintiffs similarly fail to establish the elements of detrimental reliance or promissory estoppel, or distinguish the cases cited by the District. Regardless of the representations allegedly made by District "agents," *see* P.Mem. at 53, plaintiffs have failed to show any "affirmative misconduct" by the District. *See Genesis Health Ventures, Inc. v. Sebelius*, 798 F.Supp.2d 170, 183 (D.D.C. 2011) (citing *Keating v. FERC*, 569 F.3d 427, 434 (D.C. Cir. 2009)). Moreover, it is patently *unreasonable* to rely on the alleged promises made by those agents. *See, e.g., District of Columbia v. Brookstowne Community Development Co.*, 987 A.2d 442, 450 (D.C. 2010) ("[A] party contracting with the government is 'on constructive notice of the limits of the [government agent's] authority,' and cannot reasonably rely on representations to the contrary.") (quoting *District of Columbia v. Greene*, 806 A.2d 216, 222 (D.C. 2002)); *Davis & Associates, Inc. v. District of Columbia*, 501 F.Supp.2d 77, 81 (D.D.C. 2007) (same). Even if the plaintiffs, when they were re-hired, were explicitly told that they could double-dip indefinitely, reliance on such statements was clearly unreasonable, in light of the longstanding provision of law (D.C. Official

Code § 5-723) that the plaintiffs acknowledged *and discussed* at the time of their job offers. *See* Doc. No. 29-6, ¶ 18; Doc. No. 29-7, ¶ 6; Doc. No. 29-8, ¶ 6.

Finally, plaintiffs' argument regarding the requirements of D.C. Official Code § 12-309 is incorrect. Plaintiffs insist that, because they provided a copy of the complaint here to the District before it was technically filed in Court, they have satisfied the statute. P.Mem. at 47–49. Plaintiffs—not the District—"misunderstan[d] and/or misappl[y]" *Kennedy v. District of Columbia*, 519 F.Supp.2d 50 (D.D.C. 2007). That case explicitly rejected Ms. Kennedy's assertion that her lawsuit constituted sufficient notice of her claim. *Id*. at 58–59 ("[A] complaint does not itself satisfy the notice requirements of Section 12-309. Section 12-309 makes clear that police reports are the only acceptable alternatives to a formal notice. The court is not free to go beyond the express language of the statute and authorize any additional documents to meet its requirements.") (citations and quotation marks omitted). Plaintiffs have not cited any case that holds (or even implies) that a complaint itself satisfies § 12-309.

III. Conclusion

For all the reasons cited herein and previously, the Court should dismiss all claims or, in the alternative grant summary judgment on all of plaintiffs' claims to the District.

DATE: April 19, 2012 Respectfully submitted,

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