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.	)	

DEFENDANT THE DISTRICT OF COLUMBIA'S PARTIAL MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

Pursuant to FED. R. CIV. P. 12(b)(1), 12(b)(6), and 56, defendant the District of Columbia ("the District") hereby moves this Court to Dismiss the Complaint based, in part, on the Court's lack of subject matter jurisdiction and on Plaintiffs' failure to state a cause of action for which relief can be granted. As grounds for its motion, the District states:

- The Court lacks subject matter jurisdiction over most of Plaintiffs' claims as they have failed to state a cause of action under federal law and, thus, pendent jurisdiction is not appropriate here.[1]

- D.C. OFFICIAL CODE § 1-803.01 does not apply to a reduction in Plaintiffs' current D.C. salaries; and Plaintiffs have failed to comply with D.C. OFFICIAL CODE § 12-309.

- Plaintiffs are not exempt from the offset at issue and, accordingly, application of this offset does not violate their right to due process.

- Plaintiffs have neither stated a cause of action implicating their right to constitutional equal protection nor can they show that the District violated this right. Plaintiffs are not similarly situated to employees of a wholly different District agency. Moreover, the District's employment decisions are rationally related to its interest in addressing employment matters.

[1] As discussed below and herein, only one Plaintiff (and certainly not the putative class) may have sufficient allegations to state a claim for a violation of the Fair Labor Standards Act. While the District does not concede the merits of this argument, at best the Court would be in the position of dismissing all other claims and all other Plaintiffs, and the case would proceed on behalf of one individual (Plaintiff Ford-Haynes) for one claim.

- Plaintiffs now backtrack and assert claims under the Fair Labor Standards Act for only three Plaintiffs. Those claims fail for two of the three Plaintiffs.

- Plaintiffs have failed to properly allege a violation of the First Amendment, a violation of the District's Whistleblower Protection Act, or a defamation claim.

- Plaintiffs' assertions that the offsets applied here are the equivalent of a forbidden "non-resident tax" are simply specious.

- Plaintiffs' common law claims are preempted by the CMPA or otherwise fail on the merits.

For these reasons, Plaintiffs' claims against the District cannot survive and their Complaint (encompassing both the First Amended Complaint and the First Supplemental Complaint) should be dismissed in its entirety. In the alternative, as Plaintiffs cannot prevail on their claims as a matter of law, judgment should be entered in favor of the District.

A Memorandum of Points and Authorities in support hereof, a statement of material facts as to which there is no genuine issue, and alternative proposed orders are attached hereto.

Dated: February 23, 2012

Respectfully submitted,

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FOR THE DISTRICT OF COLUMBIA

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Plaintiffs,	)	
v.	)	Civil Action No. 12-CV-133 (ESH)
DISTRICT OF COLUMBIA	)	
Defendant.	)	

MEMORANDUM IN SUPPORT OF DEFENDANT THE DISTRICT OF COLUMBIA'S PARTIAL MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

Defendant the District of Columbia ("the District") hereby respectfully submits this memorandum in support of its partial motion to dismiss or, in the alternative, for summary judgment ("Motion"). Attached also are alternative proposed orders and, pursuant to LCvR 56.1, the District's Statement of Material Facts as to Which There is No Genuine Issue ("SMF").

The Court should dismiss most of the Complaint because Plaintiffs have failed to state a claim upon which relief may be granted. The actions of which they complain—where they are not required by District law—are within the District's broad personnel discretion and easily withstand constitutional scrutiny.

INTRODUCTION AND BACKGROUND

Plaintiffs are District employees who retired from service with the Metropolitan Police Department ("MPD") and began receiving retirement benefits, but who were subsequently re-hired. First Amended Complaint ("FAC") at ¶ 1; Doc. No. 6-1, ¶ 5; SMF ¶ 1. Except for plaintiff

Cannon, the Plaintiffs are currently employed by the District's Department of General Services ("DGS"). *See* Doc. No. 6-1, ¶ 4; SMF ¶ 1.[2]

Plaintiffs Cannon, Watkins, Gainey, and Neill are or were "at will" employees. *See* Doc. No. 11-2 at 1; Defendant's Exhibit No. ("DEx.") 1, at 1; DEx. 2 at 1; DEx. 3 at 1; SMF ¶ 3. Plaintiff Ford-Haynes was appointed to a "term" appointment, expiring on August 2, 2012. DEx. 4 at 1; SMF ¶ 3. Plaintiff Weeks's position is within the collective bargaining unit represented by the Fraternal Order of Police. DEx. 5 at 1; SMF ¶ 3.

Plaintiff Cannon served, until his termination, as the Chief of the Protective Services Division. *See* DEx. 1; SMF ¶ 4. Plaintiff Watkins is a Protective Services Division Manager (MS-0301-15). *See* DEx. 2; SMF ¶ 4. Plaintiff Gainey is a Supervisory Protective Services Officer (MS-0083-12). *See* DEx. 3; SMF ¶ 4. Plaintiff Neill is also a Supervisory Protective Services Officer (MS-0083-11).[3] *See* DEx. 4; SMF ¶ 4. Plaintiff Ford-Haynes is a Management Analyst (CS-343-13/9). *See* DEx. 5; SMF ¶ 4. Plaintiff Weeks is a Protective Services Officer (CS-0083-05/8). *See* DEx. 6; SMF ¶ 4.[4]

On October 12, 2011, the Plaintiffs were notified, in writing, that because they were being paid retirement benefits from the D.C. Police and Fire Retirement System ("PFRS"), D.C. OFFICIAL CODE § 5-723(e) applied, and hence the amounts of their salaries must be "offset" by

[2] Plaintiff Cannon was terminated from District employment on February 8, 2012 for disciplinary reasons stemming from an investigation dating back to October 26, 2011. Doc. No. 11-2, at 1; SMF ¶ 2. Mr. Cannon will continue to receive his salary until February 24, 2012. *Id*.

[3] "MS" or "MSS" is an acronym for Management Supervisory Service. *See* D.C. Official Code §§ 1-609.51 *et seq*. (2008 Suppl.). Employees appointed to the MSS are "at will." *Id*. at § 1-609.54(a). *See also Ekwem v. Fenty*, 666 F.Supp.2d 71, 78 (D.D.C. 2009) ("[M]anagement Supervisory Service members are specifically excluded from the Career Service, D.C. Code § 1-608.01(a), and thus are not protected by the CMPA.").

[4] "CS" is an acronym for "Career Service." *See* D.C. Official Code §§ 1-608.01 *et seq.* (2011 Supp.).

the amounts of their respective annuity benefits. *See* DEx. 7; SMF ¶ 5.[5] The letters advised that the District would not seek to apply the offsets retroactively, but would begin applying the offset as of November 20, 2011. SMF ¶ 6. In fact, the District did not apply the offset to Plaintiffs' salaries until the first pay period of 2012. FAC ¶ 50; SMF ¶ 6.

Plaintiffs filed their original complaint, and motions for a temporary restraining order and preliminary injunction, on or about January 26, 2012, alleging various federal, local, and constitutional causes of action. A hearing on Plaintiffs' emergency motion was scheduled for January 31, 2012. On that day, after hearing from the parties, the Court denied Plaintiffs' motions, and set the matter on an expedited briefing schedule. SMF ¶ 7.

Plaintiffs filed their FAC on February 8, 2012, and on that same day, plaintiff Cannon was terminated from District employment. SMF ¶ 8; *see* n.2, *supra*. Plaintiffs then filed their "First Supplemental Complaint" ("FSC") and a Renewed Motion for a Preliminary Injunction on February 14, 2012, adding five additional causes of action and alleging, *inter alia*, that plaintiff Cannon's termination, and the "withholding" of Plaintiffs' paychecks constituted impermissible retaliation under the First Amendment and violations of the D.C. Whistleblower Protection Act.[6]

The District duly opposed the Renewed Motion for a Preliminary Injunction, and a hearing on the motion is scheduled for March 5, 2012, at 9:30 a.m.

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[5] D.C. Official Code § 5-723(e) reads, in pertinent part:

> 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.

Id. (emphasis added).

[6] Plaintiffs alleged, in their Renewed Motion for a Preliminary Injunction and their FSC, that their paychecks were entirely "withheld" for the pay period of January 16–28, 2012. FSC ¶¶ 11–12. This allegation was subsequently refuted, as each of the Plaintiffs was paid for the referenced period. *See* Doc. No. 17-2 at ¶ 6.

LEGAL STANDARDS

To avoid dismissal under Rule 12(b)(1), Plaintiffs bear the burden to demonstrate that the court has jurisdiction, which must be established by a preponderance of the evidence. *See Khadr v. United States*, 529 F.3d 1112, 1115 (D.C. Cir. 2008). Federal district courts are courts of limited jurisdiction, and "subject matter jurisdiction is, of necessity, the first issue for an Article III court." *Loughlin v. United States*, 393 F.3d 155, 170 (D.C. Cir. 2004) (discussing *Tuck v. Pan Am. Health Organization*, 668 F.2d 547 (D.C. Cir 1981)). In "determining the question of jurisdiction, federal courts accept the factual allegations contained in the complaint as true . . . . Moreover, the Court can consider material outside of the pleadings when determining whether it has jurisdiction." *Halcomb v. Office of the Senate Sergeant-At-Arms*, 563 F. Supp. 2d 228, 235 (D.D.C. 2008).

Under the Federal Rules of Civil Procedure, the complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). This pleading standard "does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Id.* (quoting *Twombly*, 550 U.S. at 555). "Nor does a complaint suffice if it tenders 'naked assertions' devoid of 'further factual enhancement.'" *Id.* (quoting *Twombly*, 550 U.S. at 557) (alteration marks omitted).

To survive a Rule 12(b)(6) motion to dismiss, a complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads

factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). This facial plausibility standard "asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (citing *Twombly*, 550 U.S. at 556). "Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Id.* (quoting *Twombly*, 550 U.S. at 557) (internal quotation marks omitted).

Although the allegations in the complaint must be taken as true, the Court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Twombly*, 550 U.S. at 555 (internal quotation marks omitted); *see also Iqbal*, 129 S. Ct. at 1949 ("the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions"). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not 'shown' – 'that the pleader is entitled to relief.'" *Iqbal*, 129 S. Ct. at 1950 (quoting Fed. R. Civ. P. 8(a)(2)) (alteration marks omitted). Under this standard, the instant complaint must be dismissed.

On the other hand, summary judgment is appropriate "where there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." *Briggs v. Washington Metro. Area Transit Auth.*, 481 F.3d 839, 843 (D.C. Cir. 2007) (ellipsis omitted) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986)). It is "regarded not as disfavored procedural shortcut, but rather as an integral part" of the overall scheme of the rules of civil procedure, "which are designed to secure the just, speedy and inexpensive determination of every action." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (internal quotation omitted).

The party moving for summary judgment bears the initial responsibility of informing the trial court of the basis for its motion and identifying those portions of the record that it believes

demonstrate the absence of a genuine issue of material fact. *See Celotex Corp.*, 477 U.S. at 323; *see also Frito-Lay, Inc. v. Willoughby*, 863 F.2d 1029, 1032 (D.C. Cir. 1988). The moving party has no burden, however, of introducing evidence that negates the nonmovant's claim. *See Celotex Corp.*, 477 U.S. at 323; *Frito-Lay, Inc.*, at 1032. Instead, the moving party need only assert that there is a lack of necessary evidence to support the plaintiff's case. At that point, the burden shifts to the nonmoving party to show the existence of a genuine issue of material fact. *See Celotex Corp.*, 477 U.S. at 323. A trial court should enter summary judgment against a nonmoving party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which the party will bear the burden of proof at trial." *Celotex Corp.*, 477 U.S. at 322.

By any standard, and as set forth below, Plaintiffs' claims against the District cannot stand. As such, the District is entitled to dismissal with prejudice and/or judgment entered in its favor as a matter of law.

ARGUMENT

I. THIS COURT LACKS SUBJECT MATTER JURISDICTION OVER THE MAJORITY OF PLAINTIFFS' CLAIMS

As a preliminary matter, this Court lacks subject matter jurisdiction to hear Plaintiffs' claims. Plaintiffs assert that the Court has subject matter jurisdiction over its claims pursuant to D.C. OFFICIAL CODE § 1-815.02(a), FAC ¶ 7, which confers exclusive jurisdiction in this Court over claims brought by participants in PFRS and the D.C. Teachers Retirement Fund.[7] D.C.

[7] Plaintiffs' claims are predicated upon their misunderstanding of D.C. OFFICIAL CODE § 1-611.03(b). As discussed below, this statute is applicable to participants in the federal Civil Service Retirement System only, *not* to participants in the Police Officers and Fire Fighter's Retirement Fund. In pursuit of this claim, Plaintiffs incorrectly assert that they participate in the Civil Service Retirement Fund. Doc. No. 1 at 28. Yet, directly contrary to this assertion, they then invoke D.C. OFFICIAL CODE § 1-815.02(a) as a basis for this Court's jurisdiction, notwithstanding that this statute applies to lawsuits involving claims by participants in the Police Officers and Fire Fighters Retirement Fund and *not* claims regarding the Civil Service Retirement Fund. Plaintiffs cannot claim to be

OFFICIAL CODE §§ 1-801.02(5), 1-815.01(a)(1), and 1-815.02(a). Specifically, this statute confers jurisdiction over claims by participants or beneficiaries of this fund "to enforce or clarify rights to benefits from the Trust Fund." D.C. OFFICIAL CODE § 1-815.02(a). But Plaintiffs do not allege that the District's action affect their retirement benefits. Rather, Plaintiffs allege that the District "*reduced the pay* of each of their respective first pay periods of 2012 by such amount *to offset such annuitant's annuity from the salary otherwise payable for their positions*." FAC, ¶ 50 (emphasis added). Because Plaintiffs do not seek to enforce or clarify their rights regarding their pensions, the Court cannot exercise jurisdiction over Plaintiffs' claims pursuant to D.C. OFFICIAL CODE § 1-815.02(a).

Plaintiffs also assert that the Court has subject-matter jurisdiction over their claims pursuant to 28 U.S.C. § 1331, or federal question jurisdiction; 28 U.S.C. § 1367, which permits the Court to exercise supplemental jurisdiction over state or common law claims; and 28 U.S.C. § 2201, the Declaratory Judgment Act. FAC, ¶¶ 13, 15, 20. As discussed herein, however, with the exception of Plaintiff Ford-Haynes, Plaintiffs have not stated a federal cause of action alleging a violation of any federal right or statute. Without a federal claim, Plaintiffs lack a claim that confers subject matter jurisdiction on the Court and, as a result, the Court cannot exercise supplemental jurisdiction over Plaintiffs' state or common law claims. *Loughlin*, 393 F.3d at 170.

Likewise, the Declaratory Judgment Act "creates a remedy in cases otherwise within the Court's jurisdiction, but does not constitute an independent basis for jurisdiction." *Neighbors of Casino San Pablo v. Salazar*, 773 F.Supp.2d 141, 149 (D.D.C. 2011) (internal quotations omitted). The Declaratory Judgment Act thus does not allow the Court to exercise jurisdiction over Plaintiffs' state law or common law causes of action in the absence of any surviving federal claims.

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participants in one retirement system to invoke this Court's jurisdiction, but participants in a wholly separate retirement system for the purposes of pursuing their substantive claims against the District.

Finally, even if the Court could exercise jurisdiction over Plaintiffs' common law tort claims, they have utterly failed to comply with the notice requirements of D.C. OFFICIAL CODE § 12-309. *See Candido v. District of Columbia,* 242 F.R.D. 151, 158 n.6 (D.D.C. 2007). As the District explained in its Opposition to Plaintiffs' Motion for a Temporary Restraining order, at 12–13, a party may not maintain an action contrary to the terms of that provision. Compliance with this provision, requiring written notice that "disclose(s) both the factual cause of the injury and a reasonable basis for anticipating legal action as a consequence," is a mandatory condition precedent to filing a lawsuit against the District. *Kennedy v. District of Columbia,* 519 F.Supp.2d 50, 58 (D.D.C. 2007). *See also*, D.C. OFFICIAL CODE § 12-309. Plaintiffs incorrectly claim that they have provided the statutorily-required notice by serving their Complaint upon the District. (FAC, ¶ 21.) But a complaint does not satisfy the notice requirements of Section 12-309. *Kennedy*, 519 F.Supp.2d at 58. As Plaintiffs have failed to provide the required written notice to the Mayor of the District of Columbia prior to filing this lawsuit for unliquidated damages, they cannot succeed on their common-law claims.

II. PLAINTIFFS HAVE NOT, AND CANNOT, SHOW THE APPLICATION OF A STATUTORILY REQUIRED OFFSET VIOLATES THEIR RIGHT TO DUE PROCESS OR EQUAL PROTECTION

Plaintiffs have failed to allege, and cannot establish, municipal liability on the part of the District. Title 42 U.S.C. § 1983 provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or cause to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Monell v. Dept. of Soc. Servs. further obligates a civil-rights plaintiff suing a municipal entity under 42 U.S.C. § 1983 to plead sufficient facts to support municipal liability. 436 U.S. 658 (1978).

To state a claim for municipal liability under *Monell*, Plaintiffs first must show a predicate constitutional violation. *Baker v. District of Columbia*, 326 F.3d 1302, 1306 (D.C. Cir. 2003). Only then must the Court determine whether the Complaint states, or Plaintiffs can show, that a municipal policy or custom caused the violation. *Id.*; *see also Feirson v. District of Columbia*, 506 F.3d 1063, 1066 (D.C. Cir. 2007) ("To impose liability on the District under 42 U.S.C. § 1983, [plaintiff] must show 'not only a violation of [her] rights under the Constitution or federal law, but also that the [District's] custom or policy caused the violation.'") (citing *Warren v. District of Columbia*, 353 F.3d 36, 38 (D.C. Cir. 2004)). Plaintiffs have failed to allege facts sufficient to support elements necessary to prevail on their claims.

The irrefutable evidence, as discussed below, shows only that Plaintiffs are all retired MPD police officers receiving annuities from the PFR Fund. As such, they are not subject to D.C. OFFICIAL CODE § 1-611.03(b) and the offset exemption set forth therein, which applies only to the CSRS Fund, but rather are subject to D.C. OFFICIAL CODE § 5-723(e). In addition, Plaintiffs currently are employed by DGS, not MPD. Plaintiffs therefore cannot establish that the District has treated them differently than other, similarly situated individuals. Plaintiffs thus cannot "make a showing sufficient to establish the existence of an element essential to that party's case, and on which the party will bear the burden of proof at trial." *Celotex Corp.*, 477 U.S. at 322, and judgment in the District's favor therefore is proper. *See also, e.g., Ivey v. Fenty*, 789 F.Supp.2d 65, 71 (D.D.C. 2011) ("[p]roof of a single incident of unconstitutional activity is insufficient to impose liability [under section 1983] unless there was proof that there was a

policy in place that was unconstitutional.") (quoting *Sanders v. District of Columbia*, 522 F.Supp.2d 83, 88 (D.D.C. 2007)); *Ekwem*, 666 F.Supp.2d at 79 (same).

a. The District Has Not Violated Plaintiffs' Right To Due Process By Applying The Offset

Due process requires "notice, reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Jones v. Flowers*, 547 U.S. 220, 226 (2006) (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). The first step in any due process analysis, however, is "to determine whether constitutional safeguards apply at all, *i.e.*, whether a private party has a property or liberty interest that triggers Fifth Amendment due process protection." *Reeve Aleutian Airways, Inc. v. United States*, 982 F.2d 594 (D.C. Cir. 1993) (citing *Cleveland Bd. of Education v Loudermill*, 470 U.S. 532, 538–41 (1985)). Due process "protect[s] a substantive interest to which the individual has a legitimate claim of entitlement." *Olim v. Wakinekona*, 461 U.S. 238, 250 (1983).

Despite their assertions, Plaintiffs simply are not entitled to simultaneously collect a full annuity and a full salary from the District. Even accepting Plaintiffs' allegations as true, the fact that another District agency "offset this offset," FAC ¶ 64, for other re-employed annuitants, or that the District did not consistently enforce the offset "merely bolsters the conclusion that Plaintiffs could not have formed a settled, legitimate expectation regarding their ability" to collect double payments. *Adams v. United States*, 796 F.Supp.2d 67, 75–76 (D.D.C. 2011).

Thus, Plaintiffs have neither a property interest in such double payments, nor have they been denied due process by the offset to their current District salaries. *See Collins v. City of Harker Heights*, 503 U.S. 115, 128 (1992) (concept of due process recognizes the "presumption that the administration of government programs" and "[d]ecisions concerning the allocation of

resources" are "based on a rational decisionmaking process that takes account of competing social, political, and economic forces."). *See also id.* at 129 ("The Due Process Clause 'is not a guarantee against incorrect or ill-advised personnel decisions.'") (quoting *Bishop v. Wood*, 426 U.S. 341, 350 (1976) ("The United States Constitution cannot feasibly be construed to require federal judicial review for every . . . error" involving "the multitude of personnel decisions that are made daily by public agencies.").

i. The Police Officer And Fire Fighter Retirement Fund, From Which Plaintiffs Receive Their Annuities, Is Not The Civil Service Retirement Fund

Plaintiffs appear to believe that D.C. OFFICIAL CODE § 1-611.03(b), which states that "no reduction shall be made to the pay of a reemployed individual for any retirement benefits received by the reemployed individual pursuant to 5 U.S.C. § 8331, §§ 1-626.03 through 1-626.12, [or]§ 5-723(e)" renders them exempt from the offset of their annuity from their District salary. *See* FAC, ¶¶ 40–46. Plaintiffs have made much of the allegation that they receive "federal annuity retirement benefits," *see, e.g.* FAC ¶ 36, but this argument, while incorrect, ultimately is irrelevant to their claims against the District. The dispositive factor is the annuity fund in which Plaintiffs participate. It is undeniable that the exemption upon which Plaintiffs rely applies *only* to retired D.C. employees receiving payments from the CSR Fund and that Plaintiffs, as retired MPD police officers, receive their retirement benefits from the PFRS.[8]

Plaintiffs suggest that they are entitled to the exemption provided in D.C. OFFICIAL CODE § 1-611.03(b) because they were "first employed by the government of the District of Columbia

[8] Plaintiffs have effectively admitted in the FAC that they all are retired MPD police officers who receive annuities from the PFR Fund. *See* FAC, ¶ 36 (citing to Pub. L. 108-489 establishing the PFD Fund "for payment of federal benefit payments to District of Columbia teachers, police officers, and fire fighters") and ¶ 39 (citing D.C. Official Code § 5-723(e), which applies to "Police and Firefighters Retirement and Disability.") In addition, at the January 31, 2012 preliminary injunction hearing, they conceded that they retired from their previous employment with the District as MPD police officers. *See also* Doc. No. 6-1, ¶ 5.

before October 1, 1987," FAC ¶ 36, and 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(1)(G) and is subsequently rehired by the District of Columbia after December 7, 2004," FAC ¶ 40. To support their position, Plaintiffs assert that 5 U.S.C. § 8331(g) "defines employees to include an individual first employed by the government of the District of Columbia before October 1, 1987 [but] does not categorically exclude members of the Metropolitan Police Department." FAC ¶ 41. Inexplicably, however, Plaintiffs continue to disregard the inescapable fact that D.C. OFFICIAL CODE § 1-611.03(b) applies to *Civil Service* Retirement and the CRS Fund and *not* the PFR Fund. Moreover, belying Plaintiffs' argument here, 5 U.S.C. § 8331(5) defines "the Fund" to which that statute and subsequent provisions refer as "the Civil Service Retirement and Disability Fund." Accordingly, that 5 U.S.C. § 8331 does not categorically exclude retired MPD police officers or that other "contemporaneous federal policies" to D.C. Law 15-207 support Plaintiffs position, *see* FAC ¶ 43, is immaterial to whether Plaintiffs are exempt from the offset as provided in D.C. OFFICIAL CODE § 1-611.03(b), or are subject to D.C. OFFICIAL CODE § 5-723(e).

The express language of § 1-611.03(b) does not apply to Plaintiffs. The CSR Fund is separate and distinct from the PFR Fund pursuant to federal statute. Pub. L. No. 96-122, Sec. 122, incorporated verbatim into D.C. OFFICIAL CODE § 1-712, establishes "a fund to be known as the District of Columbia Police Officers and Fire Fighters' Retirement Fund." This law further states that:

> [a]fter September 30, 1979, or after the end of the thirty-day period beginning on the date on which funds are first appropriated to the District of Columbia Police Officers and Fire Fighters' Retirement Fund, whichever is later, *all payments of annuities and other retirement and disability benefits (including refunds and lump-sum*

> *payments) under the Policemen and Firemen's Retirement and Disability Act shall be made from the Fund.*

(emphasis added). As of Oct. 26, 1970, deductions from police officers' salaries for retirement have been deposited in the PFR Fund. D.C. OFFICIAL CODE § 5-706.[9]

As retired police officers who receive their annuities from the PFR Fund, Plaintiffs' retirement benefits are governed by D.C. OFFICIAL CODE § 5-723 and *not* D.C. OFFICIAL CODE § 1-611.03(b). Chapter 7 of D.C. OFFICIAL CODE Title 5 is entitled "Police and Firefighters Retirement and Disability." *See* D.C. OFFICIAL CODE §§ 5-701 *et seq*. (2011 Supp.). More specifically:

> *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 are participants in the PFR Fund and, accordingly, are subject to the offset set forth in D.C. OFFICIAL CODE § 5-723(e).

ii. Plaintiffs Cannot Avoid The Express Language Of Statutes Actually Applicable To Them, Or The Statutes On Which They Rely

[9] The statement of annuity payments Plaintiffs proffered during the January 30, 2012 hearing, a copy of which is attached hereto as DEx. 12, also demonstrates that Plaintiffs are participants in the PFR Fund and not the CSR Fund. It is unclear to the District why the proffered statement is not from any of the named Plaintiffs. In any event, the statement comes from the D.C. Retirement Board ("DCRB"), the mission of which "is to prudently invest the assets of the Police Officers, Firefighters, and Teachers of the District of Columbia, while providing those employees with total retirement services. DCRB manages the Teachers' Retirement Fund and Police Officers and Firefighters' Retirement Fund (the "Funds")." *See* DCRB home page, *available at: http://dcrb.dc.gov/page/about-dcrb* (as of February 22, 2012). The District of Columbia District Personnel Manual likewise recognizes that the PFR System is separate and distinct from the federal Civil Service Retirement System. *See, e.g.*, DPM § 2600.1, "Section 2602 of the District of Columbia Government Comprehensive Merit Personnel Act of 1978 (CMPA), effective March 3, 1979 (D.C. Law 2-139; D.C. Official Code § 1-626.02) (2001) provides that the existing retirement systems, which include the Civil Service Retirement System (CSRS) (Chapter 83 of 5 U.S.C.), Teachers' Retirement System, Police and Fire Retirement System, Teachers Insurance and Annuity Association programs, and the Judges' Retirement System, continue to apply to all employees of the District government, except that the CSRS shall not be applicable to individuals first employed by the District government after September 30, 1987."

Undaunted by the lack of support for their claims in the actual language of the statute on which they rely, Plaintiff attempted to argue during the January 30 hearing that D.C. OFFICIAL CODE § 5-723(e) "has been repealed by implication" and is an "ineffective codification." Plaintiffs asserted that, for D.C. Law 15-207 to have the effect intended in its preamble[10], this law not only amended D.C. OFFICIAL CODE §1-611.03(b) but the D.C. Council must *also* have intended to repeal D.C. OFFICIAL CODE § 5-723(e), despite including no language that does so.[11] Plaintiffs also argue that Section 807 of Public Law 110-161 "superseded or repealed D.C. Official Code § 5-723(e)."[12] FAC ¶ 44. Plaintiffs' attempt to evade these statutes cannot succeed.

As much as Plaintiffs would like to avoid the express language of D.C. OFFICIAL CODE §§ 1-611.03 and 5-723(e), and the other statues on which they rely, this language, and not what Plaintiffs believe the D.C. Council and Congress intended these statutes to say, controls. *Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004) ("Statutory construction must begin with the language employed . . . and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose"). Statutory construction "begins with the language of the statute . . . . [a]nd where the statutory language provides a clear answer, it ends there as well." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999).

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[10] The preamble of D.C. Law 15-207 states, "AN ACT to amend the District of Columbia Government Comprehensive Merit Personnel Act of 1978 to treat former District government employees who are federal annuitants the same as former federal government employees who are federal annuitants by eliminating the reduction in pay of a former District government employee who is a reemployed federal annuitant."

[11] Indeed, the D.C. Council was aware that the amendment of § 1-611.03(b) via D.C. Law 15-207 would *not* change the offset applicable to retired police officers through § 5-723(e). As the Committee Report on D.C. Law 15-207 notes, the DCHR Director at the time testified that "There are also several employees . . . as well as law enforcement personnel and teachers would remain subject to the offset." Doc. No. 7-1.

[12] Pub. L. 110-161, § 807 states that, notwithstanding the offset discussed in 5 U.S.C. § 8344(a), "individuals employed in an appointive or elective position with the District are exempt from any offset of their annuity from their salary."

Plaintiffs' attempt to avoid the effect of the plain language of the relevant statutory provisions should be rejected.

b. Even If Plaintiffs Arguably Are Subject to D.C. Official Code § 1-611.03(b), A Process Exists To Address Their Grievances

Even if Plaintiffs were entitled to double payment as they contend, there are local procedures that allow Plaintiffs to challenge any reduction via the offset. This is sufficient to satisfy due process requirements, for which "[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner."[13] *See, e.g., Mathews v. Eldridge*, 424 U.S. 319, 323 (1976).

"Due process is flexible and calls for such procedural protection as the particular situation demands." *Greenholtz v. Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1, 12–13 (1979). In *Mathews*, the Supreme Court specified three distinct factors to be considered in evaluating what procedural protections are required:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. at 335.

Pursuant to the Comprehensive Merit Personnel Act ("CMPA"), D.C. OFFICIAL CODE § 1-603.01 *et seq.*, grievances[14] of District employees related to personnel matters are addressed by

[13] Nowhere in the FAC do Plaintiffs allege the District failed to notify them that it would begin to apply the offset applicable to them. Indeed, as indicated by the letters attached hereto as DEx. 7, Plaintiffs were aware that the offset could be applied as early as November 20, 2011.

[14] The CMPA defines a "grievance" as "any matter under the control of the District government which impairs or adversely affects the interest, concern, or welfare of employees, but does not include adverse actions resulting in removals, suspension of 10 days or more, or reductions in grade, reductions in force or classification matters." D.C. Official Code § 1-603.01(10). The "offsets" complained of here qualify as grievances.

presenting them to an "official . . . who has the authority to grant the relief sought . . . ." 6 DCMR § 1636.2; 6 DCMR § 1635.1. *See also* D.C. OFFICIAL CODE § 1-616.53. Thus, if Plaintiffs disagreed with the District of Columbia Department of Human Resources' ("DCHR") determination that they were subject to the offset required by D.C. OFFICIAL CODE § 5-723(e), the CMPA provides a mechanism to file a grievance with that agency. Significantly, Plaintiffs do not allege that they filed a grievance with DCHR challenging the application of the offset at issue or responded in any way short of filing the instant suit. *See generally*, Doc. No. 10.[15]

Although Plaintiffs chose not to avail themselves of the CMPA's grievance procedures, these procedures do exist and satisfy the requirement of due process. Here, Plaintiffs complain generally about their precarious financial situation but have presented no concrete allegations, much less evidentiary support, to show that any one of them is at risk of financial ruin. Indeed, as Plaintiffs conceded during the January 31 hearing, they continue to receive their annuities without reduction and thus have not been deprived of all of their income or otherwise rendered destitute. Accordingly, pre-deprivation process is not required. *See Mathews*, 424 U.S. at 349.

Under the second factor of the *Mathews* test, the procedures used subjected Plaintiffs to very little risk of erroneous deprivation. There is very little subjectivity involved in evaluating whether Plaintiffs are exempt from the offset at issue. Plaintiffs are former MPD police officers receiving annuities from the PFR Fund and, accordingly, are subject to D.C. OFFICIAL CODE § 5-723(e) and not D.C. OFFICIAL CODE § 1-611.03(b). This is a simple inquiry, as is the deduction of the amount each plaintiff receives in his or her annuity to be deducted from his or her current salary. Similarly, the third factor of the *Mathews* test, which evaluates the administrative burdens

[15] The CMPA was "'plainly intended' to create a mechanism for addressing virtually every conceivable personnel issue [between] the District [and] its employees . . . ." *Lattisaw v. District of Columbia*, 905 A.2d 790, 793 (D.C. 2006) (alterations in original) (quoting *District of Columbia v. Thompson*, 593 A.2d 621, 634 (D.C.), *cert. denied*, 502 U.S. 942 (1991)).

that additional procedures would entail, also supports the procedures available to Plaintiffs. The District has a substantial and compelling interest in complying with duly-enacted statutes. Requiring the District to provide a pre-deprivation hearing prior to rectifying overpayments to retired D.C. employees who are subject to the offset would do nothing more than impose an unreasonable burden on the ability of the District to comply with the law.

An application of the three *Mathews* factors clearly demonstrates that the grievance procedures of the CMPA provide Plaintiffs adequate process to challenge the alleged deprivation. Accordingly, even if Plaintiffs were exempt from the offset, the District has not violated their right to due process.

c. Plaintiffs Have Not, And Cannot, Establish That The District Has Violated Their Fifth Amendment Right to Equal Protection

In addition to their due process claim, Plaintiffs complain that the District has violated their constitutional right to equal protection by "enforcing this offset against the Plaintiffs . . . but effectively negating the effect of the offset on other persons by simply giving them more money." Doc. No. 10, ¶ 77.

Plaintiffs do not allege that the District has utilized a suspect classification or deprived them of a fundamental right, hence they bear the burden of demonstrating that the District's actions are not rationally related to any legitimate state interest. *See, e.g., Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 83–84 (2000) (under rational-basis review, a court "will not overturn such [government action] unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the [government's] actions were irrational."). *See also Heller v. Doe*, 509 U.S. 312, 320 (1993) (court asks whether "there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.").

Because Plaintiffs do not assert a fundamental right or claim to be members of a suspect class, their "as applied" equal protection challenge requires them first to prove that similarly situated individuals were treated differently. *See Steffan v. Perry*, 41 F.3d 677, 695 (D.C. Cir. 1994) (*en banc*) ("[I]n making an as-applied challenge, it is [plaintiff's] burden . . . to show exactly how the [regulations] were applied against him illegally."). Even if Plaintiffs make this showing, "the government may avoid violating equal protection principles if it can demonstrate that its reasons for treating an individual differently bear some rational relationship to a legitimate state purpose." *Brandon v. District of Columbia Bd. of Parole*, 823 F.2d 644, 650 (D.C. Cir. 1987).

The concept of equal protection "does not require all persons everywhere be treated alike . . . [but rather] that the government not treat *similarly situated* individuals differently without a rational basis." *Noble v. U.S. Parol Com'n*, 194 F.3d 152, 154 (D.C. Cir. 1999) (emphasis in original) (citing *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985)). "[T]he threshold inquiry in evaluating an equal protection claim is, therefore, to determine whether a person is similarly situated to those persons who allegedly received favorable treatment." *Women's Prisoners of District of Columbia Dep't of Corrections v. District of Columbia*, 93 F.3d 910, 924 (D.C. Cir. 1996) (internal citations omitted).

Notwithstanding this bedrock principle, however, Plaintiffs have alleged no facts that, if true, would show that they are similarly situated to the current MPD employees they claim were provided salary increases in anticipation of the application of the offset at issue. *See* FAC ¶ 48. Nor can they establish this threshold element of their equal protection claim in light of the irrefutable facts and evidence.

Plaintiffs rely on the conclusory assertion that the District "has offset this offset for other similarly situated persons without a rational basis under law." FAC ¶ 64. Plaintiffs then list the alleged raises paid to current MPD employees allegedly "solely to offset the federal annuity offset otherwise imposed upon the similarly situated Plaintiffs." FAC ¶¶ 65–76. Significantly, this position is completely incompatible with their arguments in support of their due process claim—that they are exempt from this offset altogether. To be similarly situated to these MPD employees, Plaintiffs must also be subject to an offset of their current salaries. By adopting these inconsistent and incompatible positions, Plaintiffs effectively have pled themselves out of court by alleging facts that contradict their asserted claims. *Browning v. Clinton*, 292 F.3d 235, 243 (D.C. Cir. 2002) (citing 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1357, at 347-48 (2d ed.1990)).

Furthermore, Plaintiffs do not, because they cannot, allege that they currently are employed by the *same* agency that allegedly gave its employees raises to account for income lost as a result of the application of the offset at issue. Although the FAC is silent as to the Plaintiffs' current positions with the District—information that is fundamental to the analysis of whether they are similarly situated to the MPD employees—each Plaintiff was reemployed by the D.C. Department of General Services at the time of the offset.[16] As evidenced by the newspaper article Plaintiffs attached to their Complaint, the individuals Plaintiffs believe were given raises to account for the offset all are employed by a different agency, MPD. Doc. No. 1-2. As a matter of law, employees of different agencies, and particularly employees of different agencies who perform different functions and shoulder different responsibilities, are *not* similarly situated. *See Noble*, 194 F.3d at 155 (finding "groundless" the plaintiff's contention that there exists "a

[16] Plaintiffs are all employed by the District's Protective Services Police Department, which is a part of the Department of General Services ("DGS").

constitutioanl right to equal treatment by the government, even where that treatment is imposed by two different agencies"). *See also Tumminello v. United States*, 14 Cl. Ct. 693, 697 (Cl. Ct. 1988) (holding, in the context of class certification, that "factual distinctions between employees in different categories and in different federal agencies precluding a finding that they are all similarly situated. . . ."). Plaintiffs further have not alleged, and cannot prove, that they perform the same functions, have the same duties and responsibilities, or the same background or experience, as these MPD employees. Accordingly, the District may increase salaries of some of its employees but not others who are not similarly situated without implicating the constitutional right to equal protection. *See, e.g., 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)).

Finally, even if Plaintiffs could show that they were somehow similarly situated to employees of a wholly different agency performing wholly different functions and thus entitled to the same salary considerations, which the District vigorously disputes, the government action at issue need only bear a rational relationship to a legitimate government interest. The rational basis inquiry is "highly deferential," *Calloway v. District of Columbi*a, 216 F.3d 1, 9 (D.C. Cir. 2000), and "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *Heller*, 509 U.S. at 320.

Preventing "double dipping" is an eminently rational method for protecting the public fisc. *See, e.g., Haworth v. Office of Personnel Management*, 112 Fed.Appx. 406, 408 (6th Cir.

2004) ("[T]he purpose of [5 U.S.C.] § 8344(a) is to prevent retired federal employees from "double-dipping," *i.e.*, receiving full retirement benefits and full regular wages at the same time. Protecting the public fisc by enacting laws against double-dipping by retired employees is a rational legislative decision.") (citing *Connolly v. McCall*, 254 F.3d 36, 42–43 (2nd Cir. 2001) ("The default policy of preventing receipt of a public pension while also receiving a public salary reflects the notion that such simultaneous income streams 'could constitute an abuse of the public fisc.' [W]hether sound policy or no, there is nothing irrational about [it].")).

Plaintiffs simply cannot meet their "heavy burden of proof" to succeed on their equal protection claim. *United States v. Grace*, 778 F.2d 818, 822 & n.7 (D.C. Cir. 1985). Plaintiffs do not allege that they are members of a suspect class or that the District was motivated by Plaintiffs' membership in a protected class. Rather, Plaintiffs allege nothing more than that they were treated differently than other District employees who are subject to the offset from which they claim they are exempt.

District employees are not a suspect class for the purposes of equal protection. As the United States Supreme Court noted in *Engquist v. Oregon Dep't. of Ag.*, "[t]o treat employees differently is not to classify them in a way that raises equal protection concerns. Rather, it is simply to exercise the broad discretion that typically characterizes the employer-employee relationship." 553 U.S. 591, 603 (2008).

Furthermore, MPD unquestionably has the authority to make personnel decisions regarding its employees, including how to compensate its employees, without considering or otherwise affecting the rights of non-MPD District employees. *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."). Accepting Plaintiffs' bare allegations as true for the purposes of this motion, MPD's action amounted to nothing more than the rational determination by that agency that the services provided by certain MPD employees merited an increase in their compensation.

For these reasons, Plaintiffs have failed to state a claim for violation of their right to equal protection.

III. PLAINTIFFS HAVE NOT STATED A CLAIM, AND CANNOT PREVAIL ON THEIR CLAIM, UNDER THE FAIR LABOR STANDARDS ACT

Plaintiffs allege that, because of the offset, Mr. Neill, Ms. Ford-Haynes, and Mr. Weeks were paid less than the statutory minimum wage in violation of the FLSA. FAC ¶¶ 56–61.[17]

The federal FLSA requires, *inter alia*, that employers must pay their employees a mandated minimum wage ($7.25 per hour) and time-and-a-half for overtime work. *See* 29 U.S.C. §§ 206, 207. *See also, generally, Kinney v. District of Columbia*, 994 F.2d 6, 8–9 (D.C. Cir. 1993). However, Section 213(a)(1) of the FLSA exempts from the overtime and minimum wage requirements workers "employed in a bona fide executive, administrative, or professional capacity . . . ." 29 U.S.C. § 213(a)(1). The "FLSA was meant to protect low paid rank and file employees" and "[h]igher earning employees . . . are more likely to be bona fide managerial employees." *Darveau v. Detecon, Inc.*, 515 F.3d 334, 338 (4th Cir. 2008) (quoting *Counts v. South Carolina Elec. & Gas Co.*, 317 F.3d 453, 456 (4th Cir.2003)).

The United States Department of Labor has promulgated regulations defining the employees that fall within the "executive" exemption. *Kinney*, 994 F.2d at 8 (citing 29 C.F.R. § 541.1(f)). The regulations define an exempt "executive" employee as any employee:

[17] Plaintiffs have not asserted FLSA claims on behalf of Mr. Cannon, Mr. Watkins, or Mr. Gainey. Plaintiff employees have "the burden of proving that [they] performed work for which [they were] not properly compensated." *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946).

> (1) Compensated on a salary basis at a rate of not less than $455 per week . . .
> (2) Whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;
> (3) Who customarily and regularly directs the work of two or more other employees; and
> (4) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.

29 C.F.R. 541.100.

Under this test, at least two of the three FLSA Plaintiffs are exempt from that law's minimum-wage requirements.[18]

To be paid on a "salary basis" means that an employee "regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed." 29 C.R.F. 541.602(a). Plaintiff Neill is paid biweekly at the same rate ($40.48 per hour) both before and after the complained-of offset, which amount "is not subject to reduction because of variations in the quality or quantity of the work performed." SMF ¶ 9. *Cf.* DEx. 8 at 1 and DEx. 8 at 2. Similarly, plaintiff Weeks is paid biweekly at the same rate ($22.09 per hour) both before and after the complained-of offset, which amount is not subject to reductions. SMF ¶ 10. *Cf.* DEx. 9 at 1 and DEx. 9 at 2.

Moreover, the position descriptions of these Plaintiffs also demonstrate that they each meet the remaining elements of 29 C.F.R. 541.100. Plaintiff Neill, described as a "senior police administrator," FAC ¶ 58, reports directly to the Chief of the PSD, is responsible for managing "a group of subordinate supervisors" and is "directly responsible for the day-to-day operation of assigned shift." DEx. 10, at 1–2; SMF ¶ 11. He also, among his other duties, "[i]nterviews candidates for position vacancies, and recommends selection/non-selection of supervisory and

[18] Plaintiff Ford-Haynes does not appear to supervise two or more other employees.

non-supervisory personnel" and "[e]valuates work performance of subordinate supervisory and non-supervisory personnel . . ." DEx. 10 at 3; SMF ¶ 11. Likewise, plaintiff Weeks, a "police patrol supervisor," FAC ¶ 60, reports directly to the Chief and is responsible, among other duties, for "supervising a squad of police officers" and "consult[ing] with superior when selecting applicants for vacancies, promotions, outstanding awards and reassignments." DEx. 11 at 2–3; SMF ¶ 12.

Thus, because Plaintiffs Neill and Weeks are paid on a salary basis and have as their primary duty "the management of 'a recognized department or subdivision'" of the PSD, they are exempt from the minimum-wage requirements of the FLSA. *See White v. San Mateo County*, 37 Fed.Appx. 280, 283 (9th Cir. 2002) (affirming exemption from overtime requirements of FLSA of police officer who "oversaw the daily activities of the patrol officers" and "was part of and oversaw the K-9 explosive detection team."). *See also, e.g., West v. Anne Arundel County, Md.*, 137 F.3d 752, 761–62 (4th Cir. 1998) (some emergency medical technicians were "executives" exempt under FLSA where they were paid on salary basis, spent most of their time managing personnel and performing related management tasks, and customarily supervised either one fire station or entire shift of officers), *cert. denied*, 525 U.S. 1048 (1998); *Barner v. City of Novato*, 17 F.3d 1256, 1260–61 (9th Cir. 1994) (police officers were each exempt executive employees under FLSA where their primary duty was to manage and operate a police-department subdivision, even though some of the officers performed the same tasks as subordinates); *Michigan Ass'n of Gov't Employees v. Michigan Dep't of Corrections*, 992 F.2d 82, 84 (6th Cir. 1993) (state corrections supervisors were exempt executives per FLSA, even though they were paid at regular hourly rate for work in excess of 80 hours per two-week period). *See also* Wage & Hour Division, United States Dep't of Labor, *Opinion Letter No.*

FLSA 2005-40, (Oct. 14, 2005), 2005 WL 3308611 (high-ranking police officers may be exempt from minimum-wage requirements of FLSA, where job duties include "supervising a group of Police Officers and Sergeants assigned to patrol duties; deploying patrol units in accordance with needs of the workload; planning, directing, and coordinating activities of any of the special units" and "performing employee appraisals on subordinates; and disciplining subordinates when required.").[19]

Because Plaintiffs Neill and Weeks are paid on a salary basis and their primary duties include the management of a recognized subdivision of the PSD, they are exempt from the minimum-wage requirements of the FLSA.

IV. PLAINTIFFS' FIRST AMENDMENT RETALIATION CLAIMS MUST BE DISMISSED

As an initial matter, Plaintiffs cannot state a claim for a violation of the First Amendment under 42 U.S.C. § 1983 because they fail to plausibly allege the existence of a municipal policy that caused the violations. *See* discussion of *Monell*, *infra*. Specifically, Plaintiffs' First Amendment claims must be dismissed due to their failure adequately to plead that the alleged instances of retaliation were the product of a District-wide policy. Generally speaking, isolated instances of alleged misconduct are not sufficient to give rise to an inference that the violations were conducted pursuant to a municipal policy. *See Jones v. Quintana*, 658 F. Supp. 2d 183, 197 (D.D.C. 2009); *Tabb v. District of Columbia*, 605 F. Supp. 2d 89, 96 (D.D.C. 2009) ("The policy or custom must be pervasive to support municipal liability.")

Plaintiffs make only the most token of efforts to show that a municipal policy caused the constitutional violations they allege. Indeed, the only paragraphs in the FSC that are relevant to

[19] Interpretations contained in DOL opinion letters are not controlling, but may be cited as persuasive authority. *See Christensen v. Harris Cty*., 529 U.S. 576, 587 (2000); *Public Citizen, Inc. v. United States Dep't of Health & Human Servs*, 332 F.3d 654, 660 (D.C. Cir. 2003).

the discussion are paragraphs 18 and 24, both of which allege: "Such conduct was, or was the direct and proximate cause of, an official policy of the Defendant." This conclusory assertion, bereft of further detail, is woefully insufficient to comply with the pleading standards set forth in *Twombly* and *Iqbal.*

Indeed, the Seventh Circuit recently upheld the dismissal of a more detailed pleading in the municipal liability context in *McCauley v. City of Chicago*, ___ F.3d ___, 2011 WL 4975644 (7th Cir. Oct. 20, 2011). The *McCauley* plaintiff's equal protection claim asserted that the City of Chicago "has an unwritten custom, practice and policy to afford lesser protection or none at all to victims of domestic violence." *Id.* at *5.[20] The Seventh Circuit held that such an allegation was "not [a] factual allegation[ ] and as such contribute[s] nothing to the plausibility analysis under *Twombly*/*Iqbal*." *Id.* at *6.

Similarly, this Court should disregard the conclusory assertions in paragraphs 18 and 24 of the FSC. *See Iqbal*, 129 S. Ct. at 1951 (conclusory assertions need not be presumed as true for purposes of a motion to dismiss). Because there are literally no remaining allegations that even relate to the existence of a municipal policy, Plaintiffs' First Amendment claims brought pursuant to § 1983 must be dismissed.

Even if Plaintiffs' First Amendment claim survived the application of Rule 12(b)(6), Plaintiffs simply cannot establish a violation of their rights. In order for government employees to demonstrate a First Amendment retaliation claim, five elements must be met. First, the employee must have spoken out on a matter of public concern. *See Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006). Second, the Court must consider whether the government's interest in achieving efficiency through its personnel outweighs the employee's interest as a citizen to speak

on matters of public concern. *See O'Donnell v. Barry*, 148 F.3d 1126, 1133 (D.C. Cir. 1988). Third, the employee must demonstrate that the protected speech was a substantial and motivating factor in the allegedly retaliatory act. *Wilburn v. Robinson*, 480 F.3d 1140, 1149 (D.C. Cir. 2007) (citations omitted). Fourth, the employee must be able to "refute the government employer's showing, if made, that it would have reached the same decision in the absence of the protected speech." *Id.* Lastly, to be actionable, the alleged retaliation must be "likely to deter a person of ordinary firmness from th[e] exercise [of protected activity]." *Toolasprashad v. Bureau of Prisons*, 286 F.3d 576 (D.C. Cir. 2002). Plaintiffs cannot satisfy the first, third, fourth or fifth elements of a First Amendment retaliation claim and therefore, such claims must be dismissed.

A. Plaintiffs Did Not Speak on a Matter of Public Concern

Initially, it appears that Plaintiffs base their First Amendment retaliation claims on the petition clause, which guarantees citizens the right to petition the government for redress of their grievances, as opposed to the expression clause. *See* FSC ¶¶ 19, 23. Yet whatever distinction lies between First Amendment claims premised upon those clauses has no bearing on the outcome here. Plaintiffs must still speak on a matter of public concern to be entitled to First Amendment protection. Indeed, this Court has applied the "public concern" requirement to retaliation claims arising from a former employee's filing of a lawsuit. *See Pearson v. District of Columbia*, 644 F. Supp. 2d 23, 45 (D.D.C. 2009) ("Because plaintiff's lawsuit did not involve a matter of public concern, his prosecution of the private lawsuit cannot constitute protected activity under the First Amendment as a matter of law.") (Huvelle, J.), *aff'd*, 377 Fed. Appx. 34 (D.C. Cir. 2010). Although the D.C. Circuit expressly declined to decide the issue in *LeFande v. District of Columbia*, 613 F.3d 1555, 1160 n.4 (D.C. Cir. 2010), a majority of Circuits have found that claims premised on the petition clause nevertheless require a plaintiff to meet the public concern

test. *See Kirby v. City of Elizabeth City*, 388 F.3d 440 (4th Cir. 2004); *Jones v. Union County*, 286 F.3d 417, 426 (6th Cir. 2002); *Martin v. City of Del City*, 179 F.3d 882, 887–89 (10th Cir. 1999)*; Grigley v. City of Atlanta*, 136 F.3d 752, 755–56 (11th Cir. 1998); *Rendish v. City of Tacoma*, 123 F.3d 1216, 1222 (9th Cir. 1997); *Valot v. Southeast Local Sch. Dist. Bd. of Educ.*, 107 F.3d 1220 (6th Cir.1997); *White Plains Towing Corp. v. Patterson*, 991 F.2d 1049 (2d Cir. 1993); *Day v. South Park Indep. Sch. Dist.*, 768 F.2d 696 (5th Cir. 1985).

In contrast to the types of speech courts have held to constitute matters of public concern, *see, e.g.*, *Pickering v. Bd. of Educ.*, 391 U.S. 563, 569-71 (1968) (speech concerning allocation of funds between school's education and athletic programs was matter of public concern); *O'Donnell*, 148 F.3d at 1133-34 (reform to police department's law-enforcement priorities and police chief's fitness were matters of public concern); *Spiegla v. Hull*, 371 F.3d 928, 935-36 (7th Cir. 2004) (holding that "issues of prison security, public safety, and official corruption are matters of" public concern), Plaintiffs' gripes here consist of the quintessential personnel dispute: the compensation of a handful of employees. *See Hall v. Ford*, 856 F.2d 255, 259 (D.C. Cir. 1988) (Speech is not of public concern "when it is clear that such speech deals with individual personnel disputes and grievances and that the information would be of no relevance to the public's evaluation of the performance of governmental agencies.") (quoting *McKinley v. City of Eloy*, 705 F.2d 1110, 1114 (9th Cir. 1983)). Indeed, disputes "of purely individual economic importance" such as the instant one are emphatically outside of the realm of public concern. *Balton v. City of Milwaukee*, 133 F.3d 1036 (7th Cir. 1998) (speech concerning employee's compensation is not a matter of public concern); *see also Snider v. Belvedere Township*, 216 F.3d 616, 620 (7th Cir. 2000) (complaint regarding fairness of employee's salary, "while personally important, does not address a matter of public concern, and thus does not merit

First Amendment protection"); *Ayoub v. Texas A & M University*, 927 F.2d 834, 837 (5th Cir.) (complaint about a discriminatory pay scale was not a matter of public concern where the complaint focused on individual compensation), *cert. denied*, 502 U.S. 817 (1991).

The D.C. Circuit's decision in *LeFande* does not require a different result. While the Circuit in *LeFande* held that personnel matters that "may seriously affect the public welfare" are not uniformly outside the realm of public concern, 613 F.3d at 1161, this is not such a case. Unlike the speech at issue in *LeFande*, concerning allegedly unlawful, across-the-board changes to policies that allowed the Police Chief to fire "an integral part" of MPD personnel without notice, 613 F.3d at 1160, Plaintiffs' speech benefits no one but themselves and is not the type of "issue[] about which information is needed or appropriate to enable the members of society to make informed decisions about the operation of their government." *Hall v. Ford*, 856 F.2d at 259.

B. Plaintiffs Cannot Demonstrate That Their Speech was a Substantial and Motivating Factor in the Allegedly Retaliatory Action

Additionally, Plaintiffs cannot demonstrate that the acts they allege to be retaliatory were substantially motivated by their speech. Instead, Plaintiffs rely exclusively on the temporal proximity between their speech and the adverse action in an attempt to prove causation, averring that Plaintiff Cannon was terminated on February 8, 2012, the same day that Plaintiffs filed their Amended Complaint, and that all Plaintiffs did not receive direct deposits of their salary two days later. *See* FSC ¶¶ 7, 11.

But the law is clear that where Plaintiffs in retaliation cases rely upon temporal proximity for causation, proximity "is measured from the date of the 'employer's knowledge of [the] protected activity." *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001) (*per curiam*). Despite Plaintiffs' transparent and self-serving reliance upon the date the Amended Complaint

was filed, the District was on notice of Plaintiffs' lawsuit two weeks earlier on January 26, 2012, the date the action was commenced. Nor is the content of the Amended Complaint such a radical departure from the original Complaint such as to materially alter the content of the speech. *Compare* Doc. No. 1 *with* FAC. Proximity, therefore, should be measured from January 26, 2012.

This is not an irrelevant distinction. For example, "the Third Circuit Court of Appeals has suggested that a temporal proximity of two days is sufficient to establish causation, whereas a temporal proximity of ten days is sufficient to establish causation only when accompanied by other evidence of . . . wrongdoing." *Conklin v. Warrington Tp.*, No. 06–2245, 2009 WL 1227950, *3 (M.D. Pa. April 30, 2009) (citing *Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 279 & n.5 (3d Cir. 2000)). While this Circuit has not developed a bright-line rule to determine when temporal proximity alone is sufficient to demonstrate causation, s*ee Hamilton v. Geithner*, ___ F.3d ___, No. 10–5419, 2012 WL 119134, *11 (D.C. Cir. Jan. 17, 2012), Plaintiffs should not be permitted to rely solely upon a 13-day interval between Plaintiffs' speech and the challenged conduct, without further evidence of causation.

Moreover, additional evidence beyond temporal proximity is necessary for the independent reason that the District, as demonstrated below, has legitimate business reasons for the challenged conduct. *See Kanz v. Gray*, ___ F. Supp. 2d ___, No. 09 Civ. 2043 (ESH), 2012 WL 271308, *9 (D.D.C. Jan. 31, 2012) (Huvelle, J.) (citing cases). Because they lack any additional evidence beyond temporal proximity, Plaintiffs cannot establish causation.

C. Plaintiffs Cannot Rebut the Legitimate, Non-Retaliatory Justifications for the Actions at Issue

Plaintiff Cannon was terminated as a result of an investigation ongoing since October 26, 2011. *See* Doc. No. 11-2. On or about January 18, 2012, DCHR approved his dismissal as a

result of the investigation, over a week *before* Plaintiffs brought this action. *See* Doc. No. 17-1. As his termination letter clearly reflects, Plaintiff Cannon's employment was terminable at will, meaning it could be terminated at any time. *See* Doc. No. 11-2, at 1; *see also* 6-B DCMR 3813.1. Moreover, the letter indicates that Plaintiff Cannon generated a report containing false information and failed to properly interview on-the-scene subordinates.[21] *See* Doc. No. 11-2, at 1. It should go without saying that falsifying documents is a serious charge and one that certainly would "interfere[] with the efficiency and integrity of government operations and constitute[] a breach of trust . . . ." *Id.*

Moreover, the issuance of paper checks to Plaintiffs for a single payment cycle was the result of a simple processing error, which was expeditiously remedied. Doc. No. 17-2, ¶ 6. There was no invidious motive attached to this error and all Plaintiffs have received their payroll payment for the relevant payroll cycle. *Id.*

The evidence of genuine, non-retaliatory reasons for Plaintiff Cannon's termination and the issuance of paper checks, in contrast to the complete lack of evidence in support of causation, is a sufficient basis for the Court to grant the District's Motion. In this Circuit, "[i]t is not enough for the plaintiff to show that a reason given for a job action is not just, or fair, or sensible. He must show that the explanation given is a phony reason." *Fischbach v. D.C. Dep't of Corr.*, 86 F.3d 1180, 1183 (D.C. Cir. 1996) (quoting *Pignato v. Am. Trans Air, Inc.*, 14 F.3d 342, 349 (7th Cir. 1994)). Plaintiffs have not done so here, and their First Amendment retaliation claims should accordingly be dismissed.

D. The Issuance of a Paper Check in Lieu of a Direct Deposit Would Not Deter a Person of Reasonable Firmness From Exercising First Amendment Rights

[21] Because Plaintiffs reference the termination letter in the pleadings, FSC ¶ 10, the Court may consider its contents regardless of whether it decides this motion pursuant to Fed. R. Civ. P. 12(b)(6) or 56, as the termination letter has effectively been incorporated into the FSC by reference. *See Howard R.L. Cook & Tommy Shaw Found. v. Billington*, 802 F. Supp. 2d 65, 71 n.4 (D.D.C. 2011).

Count X of the FSC, which alleges First Amendment retaliation premised upon the issuance of paper checks to Plaintiffs for one pay cycle, must be dismissed for the independent reason that such harm is *de minimis* and not cognizable under the First Amendment. "It would trivialize the First Amendment to hold that harassment for exercising the right of free speech was always actionable no matter how unlikely to deter a person of ordinary firmness from that exercise." *Bart v. Telford*, 677 F.2d 622, 625 (7th Cir. 1982); *accord*, *Crawford-El v. Britton*, 93 F.3d 813, 826 (D.C. Cir. 1996) (*en banc*), *vacated on other grounds*, 523 U.S. 574 (1998). Here, the simple clerical error that caused Plaintiffs to be issued paper checks would not deter persons of ordinary firmness from exercising their constitutional rights and therefore no retaliation claim may be based thereupon.

Indeed, this conclusion is bolstered by the fact that Plaintiffs continue in this lawsuit, undeterred by such allegedly retaliatory conduct. *See Hatfill v. Ashcroft*, 404 F. Supp. 2d 104, 119 (D.D.C. 2005) ("[W]here a party can show no change in his behavior, he has quite plainly shown no chilling of his First Amendment right to free speech.") (quoting *Curley v. Village of Suffern*, 268 F.3d 65, 73 (2d Cir. 2001)). Their persistence in this regard is fatal to their retaliation claim. *See Krieger v. United States Dep't of Justice*, 529 F. Supp. 2d 29, 57-58 (D.D.C. 2008) (dismissing retaliation claim alleging that employer sought to impede the plaintiff's speaking engagement where the plaintiff nevertheless participated in the engagement as scheduled).

V. PLAINTIFFS' CLAIMS ARISING UNDER THE DISTRICT OF COLUMBIA WHISTLEBLOWER PROTECTION ACT MUST BE DISMISSED

Plaintiffs' WPA claims are similarly deficient and must be dismissed. To establish a *prima facie* case under the WPA, "an aggrieved employee must show by a preponderance of the

evidence: (1) a protected disclosure, as defined in [D.C. Code] § 1–615.52(6); (2) a prohibited personnel action, as defined in [D.C. Code] § 1–615.52(5); and (3) that the protected disclosure was a 'contributing factor' or causally connected to the prohibited personnel action, as defined in [D.C. Code] § 1–615.52(2). *Hawkins v. Boone*, 786 F. Supp. 2d 328, 333 (D.D.C. 2011) (citing D.C. OFFICIAL CODE § 1–615.54(b)). Further, if a plaintiff demonstrates a *prima facie* case, the District can nevertheless prevail by showing clear and convincing evidence of a legitimate reason for the personnel action independent of the disclosure. D.C. OFFICIAL CODE § 1-615.54(b).

Initially, there was no "protected disclosure" here. The WPA is designed to provide protection for employees who "blow the whistle" *i.e.*, report "waste, fraud, abuse of authority, violations of law, or threats to public health or safety" by the District or its employees. *See* D.C. Code § 1-615.51. The WPA "was enacted to 'protect employees who risk their own personal job security for the benefit of the public.'" *Williams v. District of Columbia*, 9 A.3d 484, 490 (D.C. 2010) (quoting *Willis v. Dep't of Agric.*, 141 F.3d 1139, 1143 (Fed. Cir. 1998)). Plaintiffs' "disclosure" here, the filing of a lawsuit to recoup money allegedly owed to them specifically, has no public benefit. Plaintiffs did not bring this action to expose government corruption or fraud, but to vindicate their private interests in avoiding application of a set off to their salaries. Plaintiffs' attempt to cast their filing of this lawsuit as whistleblower activity is plainly inconsistent with the types of activities the WPA was designed to remedy and should be rejected.

Furthermore, the public was well aware of the dispute concerning the perceived "double dipping" by Plaintiffs weeks before they filed this lawsuit. *See* Alan Suderman, "Disaster Pay," *Washington City Paper*, Dec. 7, 2011 (Doc. No. 1-2); Alan Suderman, "Should D.C. Try to Get Double Dipping Money Back?," *Washington City Paper*, Dec. 8, 2011 (Doc. No. 17-4); Alan

Suderman, "Last Post on Double Dipping Cops," *Washington City Paper*, Dec. 9, 2011 (Doc. No. 17-5). While an employee need not demonstrate that "no one in the general public is aware of the abuse" in order to prevail, the District of Columbia Court of Appeals has held that where there is "not only public knowledge but also vocalized public concern about the very information that [the plaintiff] conveyed," the protections afforded by the WPA do *not* apply. *Williams v. District of Columbia*, 9 A.3d at 489; *see also Hawkins*, 786 F. Supp. 2d at 334 ("In sum, because the [contents of the disclosures] had already sparked public debate long before [Plaintiff's] alleged disclosure, he cannot be said to have blown the whistle by speaking to the press on these issues."). The articles published by the *Washington City Paper* pre-dated this lawsuit by approximately six weeks and generated public debate, as evidenced in the "Comments" section of those articles. Although it is true that Plaintiffs' lawsuit arguably brought additional detail about the allegations to light, "it cannot be said that the particulars . . . were of such great import to the citizenry of the District of Columbia as to bring the information disclosed by [Plaintiffs] under the protection of the WPA." *Hawkins*, 786 F. Supp. 2d at 334.

Even assuming their filing of this lawsuit could properly be characterized as a "protected disclosure," Plaintiffs will be unable to prove a "direct causal link" between their alleged disclosure and the adverse action. *See Crawford v. District of Columbia*, 891 A.2d 216, 222 (D.C. 2006) ("while an employee makes a *prima facie* case by showing that the 'protected disclosure' was a 'contributing factor' to the disciplinary action, a jury must find a *direct causal link* in order for there to be liability under § 1–615.53) (emphasis added). As the District of Columbia Court of Appeals has held, "liability under the Whistleblower Protection Act is measured under a 'but for' analysis." *Johnson v. District of Columbia*, 935 A.2d 1113, 1119

(D.C. 2007) (citing *Crawford*, 891 A.2d at 222). For the reasons set forth above, Plaintiffs cannot demonstrate a direct causal link here.

Furthermore, for reasons set forth elsewhere herein, the District's non-retaliatory reasons for the personnel action at issue are sufficient to defeat Plaintiffs' WPA claim, even assuming Plaintiffs are able to demonstrate a *prima facie* case. *See* D.C. OFFICIAL CODE § 1-615.54(b).

Additionally, with respect to their claims premised upon the issuance of paper checks during one pay cycle, Plaintiffs fail adequately to allege that the District took a "prohibited personnel action" against them as required by the WPA. *See* D.C. OFFICIAL CODE § 1-615.52(a)(5)(A).[22] As with retaliation claims under the First Amendment, not all instances of harassment, even if shown to be retaliatory, are actionable under the WPA. *See Williams v. District of Columbia*, ___ F. Supp. 2d ___, No. 06-02076 (CKK), 2011 WL 4959475, at *7–9 (D.D.C. Oct. 19, 2011) ("[A]n employee may recover under the DC–WPA only for those personnel actions that 'might well have dissuaded a reasonable worker' from making a protected disclosure.") (quoting *Burlington N. and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 58 (2006)). For the reasons set forth herein, Plaintiffs cannot demonstrate that receipt of a paper check would deter a person of reasonable firmness from engaging in future protected conduct. Accordingly, Plaintiffs' WPA claims should be dismissed.

VI. PLAINTIFF CANNON'S DEFAMATION CLAIM MUST BE DISMISSED

[22] The definition of "prohibited personnel action:"

> includes but is not limited to: recommended, threatened, or actual termination, demotion, suspension, or reprimand; involuntary transfer, reassignment, or detail; referral for psychiatric or psychological counseling; failure to promote or hire or take other favorable personnel action; or retaliating in any other manner against an employee because that employee makes a protected disclosure or refuses to comply with an illegal order, as those terms are defined in this section.

Id.

Plaintiff Cannon's defamation claim, premised upon the District's allegedly false statements concerning the basis for his termination, is similarly deficient and must be dismissed. To prevail on a claim of defamation in the District of Columbia, a plaintiff must establish the following:

> "(1) that the defendant made a false or defamatory statement concerning the plaintiff; (2) that the defendant published the statement without privilege to a third party; (3) that the defendant's fault in publishing the statement amounted to at least negligence; and (4) either that the statement was actionable as a matter of law irrespective of special harm or that its publication caused the plaintiff special harm."

Blodgett v. The University Club, 930 A.2d 210, 222 (D.C. 2007) (citations omitted).

Initially, the FSC fails to allege that *the District* itself actually published any alleged defamatory statements. Nor could Plaintiff Cannon make such a showing, as the District did not do so. To the contrary, it was Plaintiffs' counsel that relayed the reasons for Plaintiff Cannon's termination to the press.

> Cannon's lawyer, Matt LeFande, was able to shed a little bit of light on the situation. LeFande says Cannon was given a letter today telling him he was fired. LeFande has not seen the letter, but says it's his understanding that the letter said Cannon's firing was related to an incident in October involving Occupy D.C. protestors taking down the District of Columbia flag from the Wilson Building. LeFande says the letter says there was something wrong with how Cannon's agency handled and reported the incident.

Alan Suderman, "D.C. Protective Services Police Department Chief Fired," *Washington City Paper*, Feb. 8, 2012.[23]

And it was Plaintiff Cannon who elected to publicly file on this Court's docket the termination letter he now apparently claims defamed him. *See* Doc. No. 11-2. Simply put, the District cannot be liable where it was not responsible for the allegedly defamatory statement's

[23] Available online at *http://www.washingtoncitypaper.com/blogs/looselips/2012/02/08/dc-protective-services-police-department-chief-fired/* (as of Feb. 22, 2012).

publication. *See Global Van Lines, Inc.*, 411 A.2d 62, 63 (D.C. 1980) (no liability for defamation where the defendant was not the entity responsible for publicizing the allegedly defamatory statement); *see also Farrington v. Bureau of Nat. Affairs, Inc.*, 596 A.2d 58, 59 (D.C. 1991) ("A person who consents to the publication of comments about himself has no cause of action for defamation.").

Evidently recognizing this fundamental flaw in his defamation claim, Plaintiff Cannon appears to base liability on two equally defective premises. First, Plaintiff Cannon contends that the District's publishing the mere fact of his termination amounts to defamation. FSC ¶ 28. But the fact that Plaintiff Cannon's employment was terminated by the District is obviously truthful and undisputed—it is only the facts that gave rise to the decision to terminate Plaintiff Cannon that are claimed to be untruthful. *Id.* ¶ 10.

Second, Plaintiff Cannon contends that because the District allegedly has placed records concerning the basis for his termination into his internal personnel jacket, the District has somehow "publicized" such records. *Id.* ¶ 28. But the contents of Plaintiff Cannon's personnel files are considered private and confidential, *see* D.C. Code § 1-631.03, and, thus, generally not accessible by members of the public. In any event, the contents of Plaintiff Cannon's personnel records, including the allegations concerning Cannon's misconduct that led to his termination, were not divulged by the District. Again, Plaintiff Cannon and his counsel were responsible for publicizing these allegations.

Moreover, the District's "publication of the termination letter to plaintiff's file was protected by a qualified privilege because the law has long recognized a privilege for anything said or written by a master in giving the character of a servant who has been in his or her employment." *Miller v. Health Servs. for Children Foundation*, 630 F. Supp. 2d 44, 51 (D.D.C.

2009) (internal quotation marks omitted) (quoting *Turner v. Federal Express Corp.*, 539 F. Supp. 2d 404, 409 (D.D.C. 2008)). Even where such statements are false, a plaintiff seeking to overcome this privilege can only do so by demonstrating that the statement was published with malicious intent. *Turner*, 539 F. Supp. 2d at 409 (citing *Wallace v. Skadden, Arps, Slate, Meagher & Flom*, 715 A.2d 873, 879 (D.C. 1998)). Malice in this context requires proof that the allegedly defamatory statement "be published at least with reckless or callous disregard for its effect upon the reputation of the plaintiff." *Moss v. Stockard*, 580 A.2d 1011, 1025 (D.C. 1990). The FSC does not allege that the District generated its internal memoranda to impair Plaintiff Cannon's reputation; indeed, documentation concerning the basis for Plaintiff Cannon's termination was not designed to be disseminated outside the District. *See* D.C. Code § 1-631.03. Plaintiff Cannon's failure to plead the existence of malicious intent is fatal to his claim. *See Turner*, 539 F. Supp. 2d at 409–10 (dismissing complaint pursuant to Fed. R. Civ. P. 12(b)(6) where the plaintiff failed to adequately plead malice to overcome qualified privilege).

For the reasons set forth above, the Court should dismiss Plaintiff Cannon's defamation claim.

VII. PLAINTIFFS' CLAIM THAT THE OFFSET AMOUNTS TO A TAX CANNOT SUCCEED

In Count IV of the FAC, Plaintiffs offer the conclusory statement that the offset applicable to any former District employee receiving a retirement annuity from the PFR Fund, among other funds, is a "direct tax upon non-residents of the District of Columbia." FAC ¶ 81. This claim is nothing more than a desperate attempt to manufacture a cause of action against the District and should not be countenanced.

First, Plaintiffs provide nothing more than conclusory statements and legal conclusions in support of this claim, which is patently insufficient under *Iqbal* and *Twombly*. *Iqbal*, 129 S. Ct. at

1949, *Twombly*, 550 U.S. at 555. *Second*, the statutory offset is not a "tax" merely because Plaintiffs would like to characterize it as such. A tax is "a governmental assessment (charge) upon property value, transactions (transfers and sales), licenses granting a right and/or income." *See* Law.com, defining "tax," *available at*: http://dictionary.law.com/ Default.aspx?selected=2091. The offset about which Plaintiffs complain simply is not a government assessment upon the value of anything. *Third*, even if by some stretch of the imagination the offset could be considered a "tax," as described above it is applicable to every current D.C. employee who also receives an annuity from the PFR Fund, regardless of where these individuals reside. That all of the individuals who chose to join this action as Plaintiffs reside outside the District of Columbia does not establish that this offset is applicable only to non-residents of the District of Columbia.

This claim is, at best, nonsensical, and should be dismissed.

VIII. PLAINTIFFS' COMMON LAW CLAIMS ARE PRECLUDED BY THE D.C. COMPREHENSIVE MERIT PERSONNEL ACT

Plaintiffs' common law claims are pre-empted by the CMPA. As this Court recognized in *Bowers v. District of Columbia*, the CMPA:

> was enacted to provide employees of the District of Columbia an impartial and comprehensive administrative scheme for resolving employee grievances.' Further, '[t]he District of Columbia Court of Appeals consistently has held that, with only one exception [sexual-harassment claims] the CMPA is the exclusive avenue for aggrieved employees of the District of Columbia to pursue work-related complaints.

___ F.Supp.2d ___, 2011 WL 2160945, *7 (Jun. 2, 2011) (quoting *Holman v. Williams*, 436 F.Supp.2d 68, 74 (D.D.C. 2006)) (additional citations omitted).

The Court need do little more than follow the logic of *Holman*, and subsequent cases like *Bowers*, to dismiss this matter. "Preemption by the CMPA divests the trial court—whether it be

the Superior Court *or this Court*—of subject matter jurisdiction." *Eric Payne v. District of Columbia*, 773 F.Supp.2d 89, 101 (D.D.C. 2011) (emphasis added) (quoting *Holman*, 436 F.Supp.2d at 74).

District employees, and thus Plaintiffs, may not circumvent the CMPA this way. *See, e.g., English v. District of Columbia*, ___ F.Supp.2d ____, 2011 WL 4527288, *10 (D.D.C. Sept. 30, 2011) ("If there is a process on the books that appears to provide due process, the plaintiff cannot skip that process and use the federal courts as a means to get back what he wants.") (quoting *Alvin v. Suzuki*, 227 F. 3d 107, 116 (3rd Cir. 2000).

For these reasons, and those that follow, this Court thus lacks subject-matter jurisdiction, and should dismiss all claims against the District.

Breach of Contract

As shown above, Plaintiffs Cannon, Watkins, Gainey, and Neill are "at will" employees "and so do not have employment contracts." *Carter v. District of Columbia*, 980 A.2d 1217, 1224 (D.C. 2009) (affirming grant of summary judgment to District on terminated supervisor's breach of contract claim). Thus, Plaintiffs' breach of contract claims as to Plaintiffs Cannon, Watkins, Gainey, and Neill must be dismissed.

To the extent Plaintiffs Ford-Haynes and Weeks have "contracts" with the District, they are Career Service employees covered by the CMPA, *see* n.14 and accompanying text, and so are required to exhaust their administrative remedies.[24] Under the CMPA, an employee who is a member of a union may either appeal a termination to the OEA, or use a grievance procedure set out in an applicable collective-bargaining agreement, "but not both . . . ." *Johnson v. District of*

[24] Notwithstanding the CMPA, all claims relating to District contracts must be submitted to the D.C. Contract Appeals Board ("CAB"). D.C. Official Code § 2-309.03 provides, in pertinent part, that the CAB shall be the *exclusive hearing tribunal* for, and shall have jurisdiction to review and determine a claim by a contractor, when such claim arises under or relates to a contract with the District. *See also* D.C. Official Code § 2-308.05 (claims by a contractor against the District government).

Columbia, 552 F.2d 806, 810 (D.C. Cir. 2008) (quoting D.C. OFFICIAL CODE § 1-616.52(e)). An employee contesting an adverse action "must exhaust the remedies prescribed either by the [CMPA]" or their CBA. *Id*.

Here, Plaintiffs Ford-Haynes and Weeks were "free to choose either the statutory appeal process to the OEA or the [CBA grievance procedure] and only *then*, by either procedure, to court. Under District case law, in either event, [they] are bound to follow the chosen procedure to its conclusion . . . ." *Id*. at 812 (emphasis in original). *Cf. Audrick Payne v. District of Columbia*, 592 F.Supp.2d 29, 35 (D.D.C. 2008) ("Although the D.C. Circuit has reserved judgment as to whether federal courts must treat the CMPA as jurisdictional, 'federalism and comity considerations' favor the application of exhaustion requirements regardless of how they are characterized.") (citing *Johnson*, 552 F.3d at 809) (additional citations omitted).

Plaintiffs have no excuse for their failure to exhaust. That Plaintiffs now purport to bring "independent" constitutional claims does not change this analysis. *See id*. at n.8 ("The fact that [the due process] claim is couched in constitutional terms is of no moment for the exhaustion inquiry.") (alteration in original) (quoting *Johnson v. District of Columbia*, 368 F.Supp.2d 30, 42 (D.D.C. 2005)).

Similarly, the fact that Plaintiffs seek relief that the administrative agencies cannot award is unavailing. *See Audrick Payne*, 592 F.Supp.2d at 38 ("The unavailability under the CMPA of relief that may be awarded in constitutional or tort litigation is . . . essentially irrelevant. [A]n exclusive remedy does not lose its exclusivity upon a showing that an alternative remedy might be more generous.") (quoting *White v. District of Columbia*, 852 A.2d 922, 926 (D.C. 2004)). *See also id*. at 39 ("the D.C. Circuit has also held that available administrative relief need not be

co-extensive with other judicial remedies; it need only be adequate to 'right the wrong.'") (quoting *Randolph-Sheppard Vendors of Am. v. Weinberger*, 795 F.2d 90, 107 (D.C. Cir. 1986)).

Because Plaintiffs Ford-Haynes and Weeks have failed to exhaust their administrative remedies, their claims should be dismissed.

Detrimental Reliance/Promissory Estoppel

Plaintiffs' conclusory detrimental reliance/promissory estoppel claim may be dismissed out of hand. *See* FAC ¶¶ 96–99.

As this Court well knows, "[e]stoppel against the government, while theoretically permissible, is rarely justified." *Genesis Health Ventures, Inc. v. Sebelius*, 798 F.Supp.2d 170, 183 (D.D.C. 2011) (quoting *Hecker v. Community Health Servs. of Crawford County, Inc.*, 467 U.S. 51, 59 (1984)). At a minimum, to estop the government, a party must show (1) a "definite representation" by the government, (2) the party relied on the government's conduct to change its position for the worse, (3) the party's reliance was "reasonable," and (4) the government engaged in "affirmative misconduct." *Id*. (citing *Keating v. FERC*, 569 F.3d 427, 434 (D.C. Cir. 2009)). *Cf. Plesha v. Ferguson*, 725 F.Supp.2d 106, 112 (D.D.C. 2010) (to find a party liable on a promissory estoppel theory, the claimant must demonstrate that it reasonably relied upon a promise to its detriment) (citing *Simard v. Resolution Trust Corp.*, 639 A.2d 540, 552 (D.C. 1994)); *Bowman v. District of Columbia*, 496 F.Supp.2d 160, 163 (D.D.C. 2007) (to estop government, party must show "traditional" elements of estoppel and that the government has engaged "in conduct that can be characterized as misrepresentation or concealment, or at least [have] behave[d] in ways that have or will cause an egregiously unfair result.") (alteration in original) (quoting *Smith v. United States*, 277 F.Supp.2d 100, 107 (D.D.C. 2003)).

Plaintiffs cannot fulfill each element of this test. Not only do Plaintiffs fail entirely to allege any sort of "definite representation" by the District that the Plaintiffs could "double dip" indefinitely or that the District would never apply the offset to them, they have not alleged (nor can they prove) any sort of affirmative government misconduct. It is simply of no moment that the District has purportedly failed to enforce the offset until just recently. *See Washington Tour Guides, Inc. v. National Park Serv.*, 808 F.Supp. 877, 882 (D.D.C. 1992) ("[T]he government may not be estopped from enforcing the law, even following an extended period of no enforcement or underenforcement.") (citations omitted).

Moreover, even if true, Plaintiffs' allegations that unnamed "agents" of the District "failed to disclose" the offset, FAC ¶ 101, is insufficient to demonstrate affirmative government misconduct. *See Bowman*, 496 F.Supp.2d at 164 (citing *Gibson v. West*, 201 F.3d 990, 994 (7th Cir. 2000) (a "failure to advise," even when the government has an "affirmative obligation" to do so, "is not the same as engaging in 'affirmative misconduct.'")).

Unjust Enrichment

Plaintiffs' unjust enrichment claims fair no better. As Plaintiffs correctly imply, a claim of unjust enrichment cannot be asserted if there is an express contract between the parties. *Cf.* FAC ¶ 92; *Plesha*, 725 F.Supp.2d at 112 (citing *Vila v. Inter-Am. Inv. Corp.*, 570 F.3d 274, 279 (D.C. Cir. 2009)). Notwithstanding this, for Plaintiffs to succeed on an unjust enrichment claim, they must allege and prove that they conferred a benefit on the District which the District retained, under circumstances which render the District's retention of such benefit "unjust." *Id.* (citing *News World Communications, Inc. v. Thompsen*, 878 A.2d 1218, 1222 (D.C. 2005)).

Plaintiffs cannot clear this hurdle, as they were on notice of this statutory offset at the time they were re-employed with the District. Moreover, for all the reasons discussed herein, it is

patently unreasonable for Plaintiffs to assume the offset would never be applied to them, and eminently reasonable for the District to prevent such "double dipping" to protect the public fisc.

Intentional/Negligent Misrepresentation

Similarly, Plaintiffs fail to state a claim of intentional or negligent misrepresentation. To state such a claim in the District, Plaintiffs must allege that the defendant made a false statement or omission of a fact on a "material issue," in violation of a duty to exercise reasonable care, and that the Plaintiffs reasonably relied to their detriment on the falsity, which caused them injury. *Simms v. District of Columbia*, 699 F.Supp.2d 217, 226 (D.D.C. 2010) (citations omitted). Here, regardless of Plaintiffs' ability or inability to meet these elements of their claim, Plaintiffs have failed to plead misrepresentation with the "particularity" required. *Id*. at 226–27 ("The circumstances that the claimant must plead with particularity include matters such as the time, place, and content of the false misrepresentations, the misrepresented fact, and what the opponent retained or the claimant lost as a consequence of the alleged fraud.") (quoting *United States ex rel. Totten v. Bombardier Corp*., 286 F.3d 542, 551–52 (D.C. Cir. 2002)). Plaintiffs have not come close to meeting this threshold, failing to allege when or where such a "misrepresentation" occurred. Such a lack of detail dooms the claim. *Id*. at 227 ("dismissing claim of negligent misrepresentation where plaintiff presents no facts other than general statements as to the who, what, where, and when of the statements allegedly made by [defendant]."). *Cf. White*, 852 A.2d at 925 (holding that federal retiree's sole recourse for alleged "fraudulent misrepresentation" regarding the offset of his federal pension from his District salary was "to seek administrative relief pursuant to the CMPA.").

Finally, even if Plaintiffs *had* been able to state a claim under local statutory or common law, because Plaintiffs fail to state a federal claim, it would be inappropriate for this Court to

retain jurisdiction over those local claims. *See, e.g., Decatur Liquors, Inc. v. District of Columbia*, 478 F.3d 360, 362 (D.C. Cir. 2007) ("A federal court has jurisdiction over substantial federal claims, together with local law claims that are part of a common nucleus of operative fact. But a federal court lacks jurisdiction altogether if the federal claims are insubstantial."); *Doe v. District of Columbia*, 445 F.3d 460, 466 & n.13 (D.C. Cir. 2006) (complaint should be dismissed for failure to state a claim "[b]ecause there are no allegations of federal constitutional violations independent of the purported violations of District of Columbia law . . . .") (discussing *Barwood, Inc. v. District of Columbia*, 202 F.3d 290, 292 (D.C. Cir. 2000)); *Ekwem*, 666 F.Supp.2d at 81 ("When the federal-law claims providing the Court with original jurisdiction have been dismissed, the Court 'may decline to exercise supplemental jurisdiction' over the remaining state-law claims.") (quoting 28 U.S.C. § 1367(c)(3)). *See also United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966) ("Certainly, if the federal claims are dismissed before trial, . . . the state claims should be dismissed as well.").[25]

CONCLUSION

For all of the foregoing reasons, Plaintiffs' Complaint must be dismissed or, in the alternative, summary judgment on all claims should be granted to the District.

Dated: February 23, 2012

Respectfully submitted,

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[25] The single claim remaining here is Plaintiff Ford-Haynes' FLSA claim. While the District argues that all local-law claims should be dismissed, if any survive, the Court should decline to exercise supplemental jurisdiction over Plaintiff Ford-Haynes' claims because it would be most efficient to treat such claims as a group.

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