№ 12-7064

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

LOUIS P. CANNON, *et al*.

Appellants

v.

DISTRICT OF COLUMBIA

Appellee

APPELLANTS' OPENING BRIEF

Matthew August LeFande
Attorney at Law PLLC
DC Bar #475995
4585 North 25th Road
Arlington VA 22207
Tel: (202) 657-5800
Fax: (202) 318-8019
email: matt@lefande.com
Attorney for Appellants

Table of contents

I. Certificate as to Parties, Rulings, and Related Cases iii

II. Certificate of Compliance with Rule 32(a) iii

III. Table of Authorities iv

IV. Introduction 1

V. Statement of Jurisdiction 1

VI. Statement of Facts 2

VII. Argument 7

1. Standard of Review 7

2. The District Court's summary denial of the Plaintiffs' FLSA claim is reversible error 8

3. The District of Columbia has taken private property for public use without due process or just compensation in violation of the Fifth Amendment 16

a. The District of Columbia took the Plaintiffs' retirement benefits without lawful authority 18

b. The District of Columbia took the retirement benefits without any kind of meaningful pre-deprivation due process 22

c. The Plaintiffs had no administrative remedy 25

4. The District Court improperly denied the Plaintiffs discovery and trial upon disputed factual issues 31

a. The Plaintiffs' Equal Protection Claims 31

b. The Plaintiffs' First Amendment Claims 36

5. The District Court ignored its subject matter jurisdiction regarding the Plaintiffs' claims of violations of D.C. Code § 1-206.02(a)(5) and 4 U.S.C. § 111(a)..... 41

6. The District Court improperly eschewed the exclusive federal venue provision of D.C. Code § 1-815.02(a)..... 47

VIII. Conclusion 50

Addendum of Statutes

Certificate of Service

I. Certificate as to Parties, Rulings and Related Cases

There are no corporate parties to this appeal.

The Plaintiffs were represented before the District Court by Matthew LeFande of Arlington, Virginia.

The Defendant District of Columbia was represented by its Attorney General.

The Appellants appeal the District Court's July 6, 2012 summary dismissal of their claims. ECF Docket # 40, 41. *See also* Minute Order of July 9, 2012.

There are no related cases.

II. Certificate of Compliance with Rule 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,442 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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

III. Table of Authorities

Cases

2922 Sherman Ave. Tenants' Ass'n v. District of Columbia, 444 F.3d 673 (D.C. Cir. 2006) 33
Aka v. Wash. Hosp. Ctr., 156 F.3d 1284 (D.C. Cir. 1998) 37
Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 7, 8
Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946) 15
Armstrong v. Manzo, 380 U.S. 545 (1965) 23-24
Armstrong v. United States, 364 U.S. 40, 49 (1960) 17
Arriaga v. Florida Pacific Farms, LLC, 305 F.3d 1228 (11th Cir. 2002) 12
Banner v. United States, 428 F.3d 303 (D.C. Cir. 2005) 42-43
Barlow & Haun, Inc. v. United States, 87 Fed. Cl. 428 (2009) 17
Berkeley v. Home Ins. Co., 68 F.3d 1409 (D.C. Cir. 1995) 8
Bishop v. District of Columbia, 411 A.2d 997 (D.C. 1980) 30
Board of Regents v. Roth, 408 U.S. 564 (1972) 22-23
Bolling v. Sharpe, 347 U.S. 497 (1954) 22
Bowen v. Public Agencies Opposed to Social Security Entrapment, 477 U.S. 41 (1986) 17
Brown v. Valoff, 422 F.3d 926 (9th Cir. 2005) 26
Buse Timber & Sales, Inc. v. United States, 45 Fed. Cl. 258 (1999) 16-17
Carpenter v. Fannie Mae, 165 F.3d 69 (D.C. Cir. 1999) 37
Castle v. United States, 48 Fed. Cl. 187 (2000) 17
Central Missouri Tel. Co. v. Conwell, 170 F.2d 641 (8th Cir. 1948) 11, 12
Clark v. United States, 691 F. 2d 837 (7th Cir. 1982) 46
Collector v. Day, 78 U.S. 113 (1871) 45
Confederated Salish & Kootenai Tribes etc. v. Moe, 392 F. Supp. 1297 (D. Mont. 1974) 42
Convention Center Referendum Committee v. District of Columbia Bd. of Elections & Ethics, 441 A.2d 889 (D.C. 1981) 28
* *Convertino v. United States DOJ*, 684 F.3d 93 (D.C. Cir. 2012) 8, 39
D'Acquisto v. Washington, 640 F. Supp. 594 (N.D. Ill. 1986) 23
Davis v. Mich. Dep't of Treasury, 489 U.S. 803 (1989) 45-46
Dean v. Barber, 951 F.2d 1210 (11th Cir. 1992) 8
Detroit Edison Co. v. United States, 56 Fed. Cl. 299 (2003) 17
Detroit v. Murray Corp. of America, 355 U.S. 489 (1958) 43
District of Columbia v. Hunt, 520 A.2d 300 (D.C. 1987) 26

Cases marked with asterisks are those upon which we chiefly rely.

District of Columbia v. Washington Home Ownership Council, Inc., 415 A.2d 1349 (D.C. 1980) 30
Dobbins v. Commissioners of Erie County, 41 U.S. 435 (1842)..... 45
Dunlop v. City Electric, Inc., 527 F.2d 394 (5th Cir. 1976)..... 12-13
Edmond v. U.S. Postal Serv. Gen. Counsel, 949 F.2d 415 (D.C. Cir. 1991) . 8
Edwards v. Shinseki, 582 F.3d 1351 (Fed. Cir. 2009)..... 23-24
Estate of Underwood v. National Credit Union Admin., 665 A.2d 621 (D.C. 1995) 25-26, 27
Farmer v. Brennan, 81 F.3d 1444 (7th Cir. 1996) 7
Fed. Air Marshals v. United States, 84 Fed. Cl. 585 (2008)..... 14-15
First Chicago Int'l v. United Exchange Co., 836 F.2d 1375 (D.C. Cir. 1988) 7-8
Gaxiola v. Williams Seafood of Arapahoe, Inc., 776 F. Supp. 2d 117 (E.D.N.C. 2011)..... 10, 11, 12
* *George v. Leavitt*, 407 F.3d 405 (D.C. Cir. 2005) 33, 34, 37, 39
Gilles v. Ware, 615 A.2d 533 (D.C. 1992) 27-28
Goss v. Lopez, 419 U.S. 565 (1975) 23
Graham v. Long Island R.R., 230 F.3d 34 (2d Cir. 2000)..... 33-34
Graves v. New York ex rel. O'Keefe, 306 U.S. 466 (1939)..... 46
Gunning v. Cooley, 281 U.S. 90 (1930) 33
Harris v. Dep't of Labor & Indus., 120 Wn.2d 461 (Wash. 1993)..... 49
Harrods Ltd. v. Sixty Internet Domain Names, 302 F.3d 214 (4th Cir. 2002) 7-8
Heckman v. United States, 224 U.S. 413 (1912) 41, 42
Hellstrom v. U.S. Dep't of Veterans Affairs, 201 F.3d 94 (2d Cir. 2000)..... 7
Helvering v. Gerhardt, 304 U.S. 405 (1938)..... 46
Holbrook v. Reno, 196 F.3d 255 (D.C. Cir. 1999) 34
Howard v. Commissioners of Sinking Fund, 344 U.S. 624 (1953) 44-45
Humble Oil & Refining Co. v. Calvert, 464 S.W.2d 170 (Tex. Civ. App. 1971) 43
Humble Oil & Refining Co. v. Calvert, 478 S.W.2d 926 (Tex. 1972) 45
Jefferson County v. Acker, 527 U.S. 423 (1999)..... 43
Kaemmerling v. Lappin, 553 F.3d 669 (D.C. Cir. 2008)..... 25
King v. Kidd, 640 A.2d 656 (D.C. 1993)..... 25, 26
Kizas v. Webster, 707 F. 2d 524 (D.C. Cir. 1983)..... 46
Lattisaw v. District of Columbia, 905 A.2d 790 (D.C. 2006) 28
Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982)..... 24-25
Lynch v. United States, 292 U.S. 571 (1934) 17

Cases marked with asterisks are those upon which we chiefly rely.

Mathews v. Eldridge, 424 U.S. 319 (1976) 23-24
McCulloch v. Maryland, 17 U.S. 316 (1819) 45
McKenna v. Weinberger, 729 F.2d 783 (D.C. Cir. 1984) 34
Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978) 22-23, 24
Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation, 425 U.S. 463 (1976) 42, 43
Mungin v. Katten Muchin & Zavis, 116 F.3d 1549 (D.C. Cir. 1997) 34
Murphy v. Town of Natick, 516 F. Supp. 2d 153 (D. Mass. 2007) 15
* *Orton v. Johnny's Lunch Franchise, LLC*, 668 F.3d 843 (6th Cir. 2012) 9
Parratt v. Taylor, 451 U.S. 527 (1981) 24
Patel v. Quality Inn South, 846 F.2d 700 (11th Cir. 1988) 10
Perry v. Sindermann, 408 U.S. 593 (1972) 23
Perry v. United States, 294 U.S. 330 (1935) 17
Porter v. Nussle, 534 U.S. 516 (2002) 27
Portsmouth v. Fred C. Gardner Co., 215 Va. 491 (1975) 45
Powell v. U.S. Cartridge Co., 339 U.S. 497 (1950) 10
Qwest Communs. Corp. v. City of Berkeley, 146 F. Supp. 2d 1081 (N.D. Cal. 2001) 42
Reich v. IBP, Inc., 38 F.3d 1123 (10th Cir. 1994) 11
Resolution Trust Corp. v. N. Bridge Assocs., 22 F.3d 1198 (1st Cir. 1994) ... 8
Reynolds v. Wagner, 936 F. Supp. 1216 (E.D. Pa. 1996) 24
Rogers v. District Unemployment Compensation Board, 290 A.2d 586 (D.C. 1972) 14
Romero-Ruiz v. Mukasey, 538 F.3d 1057 (9th Cir. 2008) 49
Sac & Fox Nation v. Pierce, 213 F.3d 566 (10th Cir. 2000) 41, 43
South Carolina v. Baker, 485 U.S. 505 (1988) 45
Stumbo v. Eastman Outdoors, Inc., 508 F.3d 1358 (Fed. Cir. 2007) 49
Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002) 16
Tennessee Coal, Iron & Railroad Co. v. Muscoda Local, 321 U.S. 590 (1944) 11
Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123, 135 F.2d 320 (5th Cir. 1943) 11
Trailer Marine Transport Corp. v. Rivera Vazquez, 977 F.2d 1 (1st Cir. 1992) 42
United States v. Cook, 795 F.2d 987 (Fed. Cir. 1986) 15

Cases marked with asterisks are those upon which we chiefly rely.

United States v. Lewisburg Area School Dist., 539 F.2d 301 (3d Cir. 1976) 44
United States v. Pewee Coal Co., 341 U.S. 114 (1951) 16
United States v. Ven-Fuel, Inc., 758 F.2d 741 (1st Cir. 1985) 49
United States v. Walker, 665 F.3d 212 (1st Cir. 2011) 49
Vega ex rel. Trevino v. Gasper, 36 F.3d 417 (5th Cir. 1994) 12
Velikonja v. Mueller, 362 F. Supp. 2d 1 (D.D.C. 2004) 37-38
Wilburn v. Robinson, 480 F.3d 1140 (D.C. Cir. 2007) 37
Wolff v. McDonnell, 418 U.S. 539 (1974) 24
Women Prisoners of D.C. Dep't of Corrs. v. Dist. of Columbia, 93 F.3d 910 (D.C. Cir. 1996) 30
Woodford v. Ngo, 548 U.S. 81 (2006) 27
Wright v. Riveland, 219 F.3d 905 (9th Cir. 2000) 42
Yin Hing Sum v. Holder, 602 F.3d 1092 (9th Cir. 2010) 49
Zucker v. United States, 758 F. 2d 637 (Fed. Cir. 1985) 46

Statutes

4 U.S.C. § 110 ..... 41, 44
4 U.S.C. § 111 ..... 44, 45, 46, 47
5 U.S.C. § 5545a 14
5 U.S.C. § 8101 21
5 U.S.C. § 8331 ..... 14, 21
5 U.S.C. § 8339 46
5 U.S.C. § 8344 42
28 U.S.C. § 1291 1
28 U.S.C. § 1362 43
29 U.S.C. § 203 12
29 U.S.C. § 206 ..... 9, 10, 41
29 U.S.C. § 207 ..... 9, 10, 15
42 U.S.C. § 424a 49

29 C.F.R. § 531.35 11
29 C.F.R. § 541.600 10
29 C.F.R. § 776.4 11
29 C.F.R. § 776.5 11
29 C.F.R. § 778.109 10

D.C. CODE § 1-201.01 39
D.C. CODE § 1-206.02 39

D.C. CODE § 1-207.13 ..... 28, 29
D.C. CODE § 1-611.03..... 21, 43
D.C. Code § 1-803.01 26
D.C. CODE § 1-815.01..... 48-49
D.C. CODE § 1-815.02..... 29, 47-48, 49
D.C. CODE § 5-701 21
D.C. CODE § 5-723..... 18, 19, 20, 21, 24, 32, 48, 49
D.C. CODE § 5-733 21
D.C. CODE § 51-107..... 14

Court Rules

FED. R. CIV. P. 56..... 7, 8, 32

D.D.C. LCvR. 7 32

Legislation

PUB. L. 93-198 39
PUB. L. 96-122 ..... 3, 19-20
PUB. L. 105-33 ..... 3, 20, 48
PUB. L. 110-161 48

D.C. ACT 15-489..... 1, 21

Other materials

51 D.C. REG. 8779 20-21

U.S. General Accounting Office, DISTRICT PENSIONS: FEDERAL OPTIONS FOR SHARING BURDEN TO FINANCE UNFUNDED LIABILITY (Dec. 1994) 2

Arthur Anderson & Co, REPORT TO THE U.S. SENATE COMMITTEE ON THE DISTRICT OF COLUMBIA ON THE ACCOUNTING AND FINANCIAL MANAGEMENT PRACTICES OF THE DISTRICT OF COLUMBIA GOVERNMENT (June 1976) 2

IV. Introduction

Under D.C. Act 15-489, the District of Columbia government must "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." J.A. 23. In direct conflict with this law, the Defendant relies solely on a vestige of the District of Columbia Retirement Reform Act of 1979 to offset federal pension payments to the Plaintiffs from their present salaries, even though the Plaintiffs are indisputably "former District government employees who are federal annuitants". The District Court has dismissed the Plaintiffs' claims upon improper factual determinations properly within the purview of a jury trial and refused to consider the merits of the remaining claims despite an irrefragable demonstration of federal subject matter jurisdiction.

V. Statement of Jurisdiction

On July 6, 2012, the District Court dismissed all of the Plaintiffs' claims in this case. J.A. 315. On July 16, 2012, the Plaintiffs made a timely Notice of Appeal. J.A. 341. 28 U.S.C. § 1291 confers jurisdiction upon the United States Court of Appeals for a final decision of a District Court.

VI. Statement of Facts

The District of Columbia Police and Fire Retirement System ("PFRS") was established in 1916 to replace several earlier programs which provided benefits to District of Columbia police, members of the Secret Service, and other federal police agencies operating within the District of Columbia at that time. At the time of the granting of Home Rule to the District of Columbia in 1974, there existed enormous problems within PFRS. A 1974 study by Arthur Anderson & Co. determined that the District's existing pension programs had some $2 billion in unfunded liabilities outstanding. Arthur Anderson & Co., REPORT TO THE U.S. SENATE COMMITTEE ON THE DISTRICT OF COLUMBIA ON THE ACCOUNTING AND FINANCIAL MANAGEMENT PRACTICES OF THE DISTRICT OF COLUMBIA GOVERNMENT (June 1976), Vol. 1, Exec. Summary at 8. In 1978, Congress passed a bill to provide the District of Columbia with a series of $65 million payments over twenty five years to cover the costs of entitlements of District of Columbia workers who retired prior to Home Rule. U.S. General Accounting Office, DISTRICT PENSIONS: FEDERAL OPTIONS FOR SHARING BURDEN TO FINANCE UNFUNDED LIABILITY (Dec. 1994) (GAO/HEHS-95-40) at 3. This bill was vetoed by President Carter. *Id*. at 17. By 1979, unfunded liabilities for District of Columbia retirement entitlements had grown to $2.7

billion. Congress and the Carter administration agreed to a one-time $38 million payment and a series of twenty-five annual payments of $52 million which was intended to cover 80 percent of the projected retirement benefits and some of the disability benefits of pre-Home Rule retirees. District of Columbia Retirement Reform Act of 1979, PUB. L. 96-122.

Following passage of the District of Columbia Retirement Reform Act of 1979, the District of Columbia's required contributions tripled and the District's inherited liabilities increased. The District of Columbia eventually suspended payments to these pension programs and the District was subsequently sued to restore payments to the retirement programs. As it became clear in the mid 1990's that the existing regime to fund District of Columbia pensions was untenable, Congress again moved to reform or take over District of Columbia programs including pension programs. The District of Columbia Retirement Protection Act, Title XI, Subtitle A of the Balanced Budget Act of 1997, PUB. L. 105-33, became effective in October of 1997. Of $3.9 billion in existing annuity assets in the possession of the District of Columbia to fund pension programs, $2.6 billion was sent to a new Federal Trust Fund. PUB. L. 105-33, Sec. 11033. A second fund was also created, to be funded from future federal appropriations to pay benefits after the funds of the first fund were depleted. *Id*., Sec. 11051. All

responsibility for payments of District of Columbia employees who retired before June 30, 1997 was transferred to the federal government. The act split responsibility for administration and payment for existing District of Columbia employees between the federal government and the District of Columbia. The federal government, through the Department of the Treasury, was, and is today, responsible for payment of benefits accrued by District of Columbia employees prior to June 30, 1997 and the District of Columbia pays and administers benefits accrued to District employees after that date.

Each of the named Plaintiffs was first employed by the District of Columbia government as a police officer prior to October 1, 1987 and retired from the District of Columbia government. Each Plaintiff receives federal annuity retirement benefits as described herein for their creditable service on or prior to June 30, 1997. At various times starting in 2008, the Plaintiffs became reemployed by the District of Columbia, as administrators and supervisors of the Protective Services Police Department, a small police department charged with protection of District of Columbia buildings, a similar mission to that of the Federal Protective Service.

Starting with the pay period January 1-14, 2012, the Defendant offset the salaries of each of the Plaintiffs by the amount of their retirement benefit

annuity payments. For that pay period, Plaintiff Gerald Neill was paid by the District of Columbia gross pay of $556.88, before taxes and benefit withholding, for 80 hours work as a senior police administrator, or an effective pay rate of $6.96 per hour. J.A. 117. For the pay period January 1-14, 2012, Plaintiff Sheila Ford-Haynes was paid by the District of Columbia gross pay of $479.77, before taxes and benefit withholding, for 80 hours work as a senior police administrator, or an effective pay rate of $6.00 per hour. J.A. 157-158, ¶ 59. For the pay period January 1-14, 2012, Plaintiff Harry Weeks was paid by the District of Columbia gross pay of $290.22, before taxes and benefit withholding, for 80 hours work and 6 hours overtime work as a police patrol supervisor, or an effective pay rate of $3.26 per hour straight time and $4.89 overtime. J.A. 122.

Certain other persons similarly retired from the Metropolitan Police Department were subsequently rehired by the District of Columbia and returned back to duties at the Metropolitan Police Department. However, nearly simultaneous to the offset of their salaries in the manner that the Plaintiffs' salaries were offset, these persons received raises solely for the purpose of offsetting the offset imposed, thus negating the effect of the offset on these persons. Commander Daniel Hickson received a $47,001.00 *per annum* raise in his District of Columbia pay. J.A. 27. Lieutenant Jacob

Major received a $36,050.00 *per annum* raise in his District of Columbia pay. *Id*. William Sarvis received a $27,686.00 *per annum* raise in his District of Columbia pay. *Id*.

After receiving their pay statements for the January 1-14, 2012, the Plaintiffs filed suit, pleading a class action, but later requesting leave to not move for class certification until after the dispositive motions were decided. ECF Docket # 24 at 4. The District Court denied the Plaintiffs' applications for emergency injunctive relief and on February 8, 2012, the Plaintiffs filed their First Amended Complaint. ECF Docket # 10. On that date, the Defendant terminated Plaintiff Louis Cannon from his position as Chief of the Protective Services Police Department, employing a bizarre claim that a police report from October 2011, which he did not write, contained false information. J.A. 65-66. The Plaintiffs also discovered that none of them received their pay for the second pay period of January 2012 whereas all known non-Plaintiffs employed by the agency did. The Plaintiffs filed a Supplemental Complaint, asserting new First Amendment retaliation claims and moved again for a Preliminary Injunction. J.A. 55-63, ECF Docket # 11, 12. Prior to discovery, the Defendant moved to dismiss and for summary judgment. ECF Docket # 18. The Plaintiffs made a cross motion for partial summary judgment. ECF Docket # 30. On July 6, 2012, the

District Court granted summary judgment for the Defendant on all federal claims. J.A. 315-339. The Plaintiffs filed a timely Notice of Appeal. J.A. 341.

VII. Argument

1. Standard of Review

Summary judgment is appropriate when the "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law" FED. R. CIV. P. 56(a). A fact is material if it "might affect the outcome of the suit under the governing law," and a dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

> In ruling on a motion for summary judgment, a court must draw all justifiable inferences in the nonmoving party's favor and accept the nonmoving party's evidence as true. *Anderson,* 477 U.S. at 255. Generally, a district court must refuse summary judgment "where the non-moving party has not had the opportunity to discover information that is essential to [its] opposition." *Id.* at 250 n.5. When the nonmoving party, through no fault of its own, has had little or no opportunity to conduct discovery, and when fact-intensive issues, such as intent, are involved, courts have not always insisted on a Rule 56(f) affidavit if the nonmoving party has adequately informed the district court that the motion is premature and that more discovery is necessary. *See* [*First Chicago Int'l v. United Exchange Co.*, 836 F.2d 1375, 1380-81 (D.C. Cir. 1988); *Hellstrom v. U.S. Dep't of Veterans Affairs,* 201 F.3d 94 (2d Cir. 2000); *Farmer v. Brennan,* 81 F.3d 1444,

> 1449-50 (7th Cir. 1996); *Dean v. Barber*, 951 F.2d 1210, 1214 n.3 (11th Cir. 1992)]. Specifically, if the nonmoving party's objections before the district court "served as the functional equivalent of an affidavit," *First Chicago*, 836 F.2d at 1380, and if the nonmoving party was not lax in pursuing discovery, then we may consider whether the district court granted summary judgment prematurely, even though the nonmovant did not record its concerns in the form of a Rule 56(f) affidavit.

Harrods Ltd. v. Sixty Internet Domain Names, 302 F.3d 214, 244-245 (4th Cir. 2002) (footnote omitted).

> While the district court enjoys "broad discretion in structuring discovery," *Edmond v. U.S. Postal Serv. Gen. Counsel*, 949 F.2d 415, 425 (D.C. Cir. 1991), summary judgment is premature unless all parties have "had a full opportunity to conduct discovery." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986). A Rule 56(f) motion requesting time for additional discovery should be granted "almost as a matter of course unless the non-moving party has not diligently pursued discovery of the evidence." *Berkeley v. Home Ins. Co.*, 68 F.3d 1409, 1414 (D.C. Cir. 1995); *see also Resolution Trust Corp. v. N. Bridge Assocs.*, 22 F.3d 1198, 1203 (1st Cir. 1994) ("Consistent with the salutary purposes underlying Rule 56(f), district courts should construe motions that invoke the rule generously, holding parties to the rule's spirit rather than its letter.").

Convertino v. United States DOJ, 684 F.3d 93, 99 (D.C. Cir. 2012) (parallel citations omitted).

2. The District Court's summary denial of the Plaintiffs' FLSA claim is reversible error.

The pay statements of Plaintiffs Neill, Weeks and Ford-Haynes clearly demonstrate that each of these Plaintiffs was paid less than $7.25 an

hour and less than $455.00 per week for the first pay period of 2012, in violation of the Fair Labor Standards Act. 29 U.S.C. §§ 206, 207. The District Court's attribution of the Plaintiffs' existing retirement annuity payments to their wages for the purpose of FLSA was contrary to the letter and intent of the Act.

> It is therefore undisputed that each of these plaintiffs receives a total of more than $455 per week. However, the parties disagree about whether the federal pension payments should be included in the calculation of the minimum "salary basis" necessary to be exempt from the FLSA. The District calculates the relevant "salary basis" as the amount that plaintiffs would receive before the offset is applied. (*See* Def.'s Mot. at 23.) Plaintiffs urge a narrower interpretation, insisting that the FLSA "salary basis" refers to the amount of their paychecks after they have been reduced to account for their pension payments. (*See* Pls.' Mot. at 14).
>
> Plaintiffs, however, offer no authority for the proposition that the Court should ignore the thousands of dollars in pension payments that they receive each month and look only at the money that they receive from their current paychecks. Nor can the Court find any.

J.A. 322.

> Although plaintiffs correctly argue that the Court should focus on the pay that the employee actually receives, *see Orton v. Johnny's Lunch Franchise, LLC*, 668 F.3d 843, 848 (6th Cir. 2012), they ignore the fact that they receive compensation far in excess of the FLSA threshold. Moreover, plaintiffs in fact control whether their earnings come through their paycheck or their pension checks because, as the October 12, 2011 letters explain, plaintiffs may elect to receive their full salary in their paychecks and suspend the annuity payments instead. (Def.'s Mot., Ex. 7 at 3.) Regardless of whether it comes in their paychecks or in their pension checks, they earn *and* receive between $22.09 and $43.50 per hour, which far exceeds the cut-off for coverage under the FLSA.

Id. at 323-324 (footnote omitted, emphasis *sic*).

The District Court's interpretation of FLSA was fundamentally flawed in its inclusion of pension payments, a pre-existing obligation already due from the United States Treasury to the Plaintiffs whether they continue to work for the Defendant or not, as part of its definition of "compensation" for "work" performed under FLSA. Only upon the improper inclusion of these pension payments, not "pay for work performed", could the Court find that the Plaintiffs were "compensated on a salary basis at a rate of not less than $455 per week". 29 C.F.R. § 541.600.

> The regular hourly rate of pay of an employee is determined by dividing his total remuneration ***for employment*** (except statutory exclusions) in any workweek by the total number of hours ***actually worked*** by him in that workweek ***for which such compensation was paid***.

29 C.F.R. § 778.109 (emphasis added). *See also* 29 U.S.C. § 207(e).

> Under the FLSA, an employer is required to pay each employee wages at or above the minimum wage rate for the hours worked during each workweek. *See* 29 U.S.C. § 206. The FLSA applies to all employees for whom there is not a specific exemption. 29 U.S.C. § 203(e); *See Powell v. U.S. Cartridge Co.*, 339 U.S. 497 (1950); *Patel v. Quality Inn South*, 846 F.2d 700 (11th Cir. 1988).

Gaxiola v. Williams Seafood of Arapahoe, Inc., 776 F. Supp. 2d 117, 124 (E.D.N.C. 2011) (parallel citations omitted).

"[W]hatever the basis on which the workers are paid, whether it be monthly, weekly, or on a piecework basis, they must receive at least the equivalent of the minimum hourly rate." *Id*. (quoting 29 C.F.R. § 776.5). "Compliance with the FLSA's minimum wage requirements also means that employees are entitled to minimum wage for the number of hours worked during the workweek 'free and clear' of improper deductions." *Id*. at 125 (citing 29 C.F.R. §§ 531.35, 776.4). "Work is 'physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer.'" *Reich v. IBP, Inc.*, 38 F.3d 1123, 1125 (10th Cir. 1994) (quoting *Tennessee Coal, Iron & R.R. Co. v. Muscoda Local*, 321 U.S. 590, 598 (1944)). "Generally speaking, what constitutes working time… must be determined in accordance with common sense and the general concept of work or employment." *Central Missouri Tel. Co. v. Conwell*, 170 F.2d 641, 646 (8th Cir. 1948) (citing *Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123*, 135 F.2d 320 (5th Cir. 1943)). Payment of a pre-existing obligation of pension benefits cannot be described as within any "general concept of work or employment".

The Defendant cannot be excused by the Court's claim that it is the Plaintiffs who chose to have their salaries offset by their pension amounts.

This was a *de facto* deduction where the Plaintiffs remained shortchanged by the same amount by either option.

> Additionally, failing to reimburse plaintiffs for their expenditures is equivalent to the employer paying for these expenses and then improperly deducting them from the employees' pay for the first workweek. *Id*. Known as a *de facto* deduction, "there is no legal difference between deducting a cost directly from the worker's wages and shifting a cost, which they could not deduct, for the employee to bear."

Gaxiola, 776 F. Supp. 2d at 124 (quoting *Arriaga v. Florida Pacific Farms, LLC*, 305 F.3d 1228, 1236 (11th Cir. 2002)).

> The ***only*** statutory exception to this requirement is set forth in 29 U.S.C. § 203(m), which ***allows an employer to count as wages*** the reasonable cost "of furnishing [an] employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees."

Arriaga, 305 F.3d at 1235 (emphasis added).

> Congress did not intend by the Portal Act to change the general rule that the remedial provisions of the Fair Labor Standards Act are to be given a liberal interpretation and exemptions therefrom are to be narrowly construed and limited to those who can meet the burden of showing that they come "plainly and unmistakably within the terms and spirit" of such an exemption.

Central Missouri Tel. Co., 170 F.2d at 644 (quoting an interpretive bulletin of the Administrator of the Wage and Hour Division of the United States Department of Labor). *See also Vega ex rel. Trevino v. Gasper*, 36 F.3d 417, 424 (5th Cir. 1994) (quoting *Dunlop v. City Electric, Inc.*, 527 F.2d 394, 401 (5th Cir. 1976) (defining "principal activity" compensable under Portal

Act "to include activities 'performed as part of the regular work of the employees in the ordinary course of business. . . . [the] work is necessary to the business and is performed by the employees, primarily for the benefit of the employer . . .'"

The Plaintiffs' pension payments aren't payments for work at all. They are payments of an obligation which vested upon their prior employment with the Defendant and the Plaintiffs' monetary contributions to a fund to which, by a curious legislative history, the United States Treasury is now obligated to pay them from, and such payments are intended to be received whether they work or not. These pension payments fell squarely outside the "pay for work performed" described by the FLSA and could not be considered in the calculation of whether the Defendant violated the FLSA.[1] The District Court's inclusion of the Plaintiffs' pension payments as "pay for work performed" was derogative of "the general concept of work or employment" and created solely by improper judicial fiat

[1] The District Court's claim that the Plaintiffs offered no authorities in support of this proposition, JA. 322, was particularly disingenuous where none of the parties ever espoused or argued the position that the Court eventually relied upon in dismissing the FLSA claims. Indeed, the Defendant *expressly admited* that "plaintiff Ford-Haynes was paid gross pay of $479.77 for 80 hours work…" J.A. 157-158, ¶ 59. The Court's reliance upon such a contrarian and novel position in dismissing these claims certainly deprived the Plaintiffs of any prior notice or opportunity to offer such authorities.

a new class of "pay for work performed" which was never permitted or intended by Congress.

The District Court's application of a forty year old case regarding District of Columbia unemployment benefits highlights the untenable nature of the Court's decision. J.A. 323 (citing *Rogers v. District Unemployment Compensation Board*, 290 A.2d 586, 587 (D.C. 1972)). *Rogers* speaks solely to application of District of Columbia prior unemployment benefits law and has no bearing whatsoever upon how "pay for work performed" is defined under the FLSA. Further, the present language of the law now specifically exempts pension payments from offset where the claimant made contributions to the pension or annuity, rendering this citation even more inapplicable to the present case. D.C. CODE § 51-107(c)(2).

The District Court's citation to *Fed. Air Marshals v. United States*, 84 Fed. Cl. 585 (2008), fares no better, and certainly supports the opposite result. The "availability pay" of the Air Marshals was indisputably "pay for work performed" in the manner that the Plaintiffs herein assert that their pension payments are not.

> Section 8331(3)(E)(ii) specifically addresses the basic pay of FAMs for the purpose of civil service retirement: it defines "basic pay" as including "availability pay . . . received after September 11, 2001, by a Federal air marshal of the Department of Transportation, subject to all restrictions and earning limitations imposed on criminal investigators under section 5545a."

Id. at 591 (emphasis omitted).

> In order to prevail on an FLSA overtime claim, plaintiffs must show that they "performed work for which [they were] not properly compensated." *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946), *superseded by statute on other grounds as stated in United States v. Cook*, 795 F.2d 987, 990-91 (Fed. Cir. 1986).

Id. at 592 (parallel citations omitted).

> An employee's "regular rate" includes "all ***remuneration for employment*** paid to, or on behalf of, the employee." 29 U.S.C. § 207(e). Section 207(e) goes on, however, to "list[] eight categories of remuneration that need not be included in the calculation of the regular rate."

Id. at 595 (quoting *Murphy v. Town of Natick*, 516 F. Supp. 2d 153, 157 (D. Mass. 2007) (citing 29 U.S.C. § 207(e)), emphasis added).

> Under the clear and unambiguous language of the FLSA and its regulations, FAM Availability Pay does not constitute overtime compensation. FAM Availability Pay is a twenty-five percent premium pay. FAMs are required to work an average of two hours in addition to their scheduled eight-hours per day to qualify for FAM Availability Pay; the hours are certified by the FAM Service Director on an annual basis. As defendant explains, "the two additional hours [worked per day] constitute a 25 percent increase in the number of regularly scheduled hours worked on a non-excludable day - providing the basis for the 25 percent availability payment." Moreover, under the FAM Pay Policy, FAMs receive Availability Pay ***as compensation for*** all unscheduled ***work***, not just the first two hours per day.

Id. at 596 (citations and footnote omitted, emphasis added).

Federal Air Marshals therefore also supports the Plaintiffs' contention that "pay for work performed" under FLSA does not include federal trust

fund payments paid to retirees as a pre-existing obligation separate and apart from any present employment.

Both of these highly questionable citations evince a process by wherein the District Court made its conclusion to deprive the Plaintiffs of relief under FLSA and then proceeded to search for authority, however dubious, in support thereof. The District Court's purported authorities did not stand for the propositions offered by it and the Court could not overcome the multitude of authorities on point regarding FLSA's definition of "pay for work performed" in direct conflict with the Court's conclusion.

3. The District of Columbia has taken private property for public use without due process or just compensation in violation of the Fifth Amendment.

"When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner". *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002) (citing *United States v. Pewee Coal Co.*, 341 U.S. 114, 115 (1951)). "Similarly, takings of contracts have been found where the government takes away property already acquired under the operation of the contract, deprives fruits already reduced to possession by [] lawfully made contracts, or repudiates debts to save money." *Buse Timber*

& Sales, Inc. v. United States, 45 Fed. Cl. 258, 263 (1999) (citing *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41 (1986); *Perry v. United States*, 294 U.S. 330, 350-351 (1935); *Lynch v. United States*, 292 U.S. 571, 576-577 (1934)). "Where 'the rights respecting the "taken" [property] were not reduced to writing by the parties, both takings and breach claims have been permitted.' *Buse Timber*, 45 Fed. Cl. at 262. In other words, '[i]f the right at issue is not governed by the terms of the parties' contract, plaintiff may pursue a takings remedy to vindicate that right.' *Detroit Edison Co. v. United States*, 56 Fed. Cl. 299, 302 (2003)." *Barlow & Haun, Inc. v. United States*, 87 Fed. Cl. 428, 439 (2009).

> In the oft-repeated words of *Armstrong v. United States*, 364 U.S. 40, 49 (1960), the Fifth Amendment is designed "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

Castle v. United States, 48 Fed. Cl. 187, 218 (2000) (parallel citations omitted).

a. The District of Columbia took the Plaintiffs' retirement benefits without lawful authority.

The District of Columbia incorrectly asserts that it has authority to offset retirement benefits from the PFRS. ECF Docket # 18 at 5-6 (citing D.C. CODE § 5-723(e)).[2]

> 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. The provisions of this subsection shall not apply to an annuitant employed by the District of Columbia government under the Retired Police Officer Redeployment Amendment Act of 1992 or the Detective Adviser Act of 2004. The provisions of this subsection shall not apply to an annuitant employed by the D.C. Public Schools under the Retired Police Officer Public Schools Security Personnel Deployment Amendment Act of 1994.

D.C. CODE § 5-723(e).

This code section, albeit inartfully and certainly incorrectly given the subsequent legislative history, distinguishes PFRS annuity entitlements funded by the District of Columbia and those funded by the federal government. Under the twisted legislative history of PFRS, annuitants with service prior to this date are today paid by the United States Department of

[2] As the District Court dismissed the Plaintiffs' Fifth Amendment claim on other grounds, the merits of this argument were neither discussed nor decided by the Court.

the Treasury for entitlements accrued prior to this date, and paid by the District of Columbia for entitlements accrued after this date. As the District of Columbia does not pay entitlements for service prior to June 30, 1997, it is not entitled to offset such entitlements against salaries it pays to PFRS annuitants.

The "November 17, 1979" language of D.C. Code § 5-723(e) properly reflects the state of affairs at the time of the enactment of the District of Columbia Retirement Reform Act of 1979, but was apparently never updated to reflect the change in events which subsequently transpired.[3] As of the enactment of the District of Columbia Retirement Reform Act of 1979, all retirement entitlements were intended to be funded and administered by the District of Columbia, with only additional "Federal payments to these Funds to help finance, in part, the liabilities for retirement benefits incurred by the District of Columbia prior to [Home Rule]". PUB.

[3] The language of the 1979 Retirement Reform Act which enacted this section of § 5-723 is particularly important in this regard. It does not state "the salary of any annuitant who first becomes entitled to an annuity under this subchapter, after November 17, 1979…". It states instead, "the salary of any annuitant who first becomes entitled to an annuity under this section ***after the date of the enactment of the District of Columbia Retirement Reform Act***…", the moment at which the federal government first attempted to hand off subsequent retirement liabilities to the Home Rule District of Columbia government. PUB. L. 96-122, Sec. 214 (emphasis added). Of course, it would later turn out that the District of Columbia would not be responsible for pre-1997 liabilities.

L. 96-122, Sec. 101(b)(5). As described above, this was not to be the case and responsibility for all pre-1997[4] entitlements were eventually taken over by the federal government. The District of Columbia today makes no payment and provides no administration of any of the Plaintiffs' retirement entitlements accrued prior to the 1997 enactment. The Defendant's note 9 at page 13 of its memorandum, ECF Docket # 18 at 16, completely failed to address the fact that these pre-1997 benefits are not administered under any of the District of Columbia programs cited therein.

The 1979 language of D.C. Code § 5-723(e) properly asserted (at the time) that the District of Columbia could offset post-November 17, 1979 annuity payments to District of Columbia retirees, payments the District of Columbia itself was supposed to be making. The District improperly employed § 5-723(e) ***to take an offset against annuity payments it does not pay***. The law does not permit this.

The District of Columbia Retirement Protection Act of 1997 expressly supersedes the inconsistent language of the District of Columbia Retirement Reform Act of 1979 found in D.C. Code § 5-723(e). *See* PUB. L. 105-33, Sec. 11084(a)(1). The § 5-723(e) language is completely inconsistent with

[4] For the sake of expediency, the Plaintiffs' use of "pre-1997" or "post-1997" respectively refer to "prior to June 30, 1997" and "June 30, 1997 and after", as applicable to the 1997 Act.

the 1997 Act as the § 5-723(e) language is predicated upon the fact, at the time, that responsibility of funding and administering all District of Columbia annuitants was transferred to the District of Columbia in 1979, a situation which was reversed with the 1997 Act. Any entitlement the District of Columbia had to offset annuity payments the District itself was paying was lost upon the United States Treasury's assumption of such payments in their entirety.

Properly reflecting this turn of events, on August 2, 2004, the District of Columbia City Council enacted D.C. Act 15-489, eliminating the reduction in pay of a District of Columbia government retiree identified in 5 U.S.C. § 8331[5] and is subsequently rehired by the District of Columbia after December 7, 2004. D.C. CODE § 1-611.03(b). The stated purpose of D.C. Act 15-489 was "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." 51

[5] 5 U.S.C. § 8331 defines employees to include "an individual first employed by the government of the District of Columbia before October 1, 1987"[5]. 5 U.S.C. § 8331(g). The section does not categorically exclude members of the Metropolitan Police Department. *Compare* 5 U.S.C. § 8101 (1)(E)(iv) (specifically excluding a member of the Metropolitan Police who is pensioned under (now) D.C. CODE § 5-701 *et seq.*); D.C. CODE § 5-733 (same).

D.C. REG. 8779. None of the language in D.C. Act 15-489 indicates that a PFRS federal annuitant would not be entitled to this protection. This law remains in effect today.

b. The District of Columbia took the retirement benefits without any kind of meaningful pre-deprivation due process.

By taking pay accrued to them in consideration of services rendered to the District of Columbia without lawful authority, the Defendant deprived property rights vested upon the Plaintiffs by law, including a reliance interest in continuing undiminished benefits of their respective employment. Such property interests were taken absent any due process or compensation, in violation of the Fifth and Fourteenth Amendments[6] of the U.S. Constitution.

> The Fourteenth Amendment places procedural constraints on the actions of government that work a deprivation of interests enjoying the stature of "property" within the meaning of the Due Process Clause. Although the underlying substantive interest is created by "an independent source such as state law," federal constitutional law determines whether that interest rises to the level of a "legitimate claim of entitlement" protected by the Due Process Clause.

[6] The District of Columbia is subject to the Fourteenth Amendment by, *inter alia*, reverse incorporation doctrine. *Bolling v. Sharpe*, 347 U.S. 497, 498-499 (1954).

Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 9 (1978) (quoting *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); *Perry v. Sindermann*, 408 U.S. 593, 602 (1972)).

> Property interests… are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law -- rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Roth, 408 U.S. at 577.

That the Plaintiffs have an entitlement by law to their ordinary pay for *work already performed* is axiomatic. Further, regardless of whether they were at-will employees or not, if they continue such employment, they were entitled to the undiminished benefits they were already promised. "A deprivation of constitutional dimensions occurs when the state stops the flow of benefits associated with a protected interest for any appreciable length of time." *D'Acquisto v. Washington*, 640 F. Supp. 594, 609 (N.D. Ill. 1986) (citing *Memphis Light*, 436 U.S. at 20; *Goss v. Lopez*, 419 U.S. 565, 576 (1975)).

> Procedural due process imposes constraints on governmental decisions which deprive individuals of "liberty" or "property" interests . . . . [The Supreme Court] consistently has held that some form of hearing is required before an individual is finally deprived of a property interest. . . . The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner."

Edwards v. Shinseki, 582 F.3d 1351, 1355 (Fed. Cir. 2009) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 332-33 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)) (internal citations omitted)).

The Defendant has never provided any meaningful means for the Plaintiffs to respond to its claim upon the Plaintiffs' salaries in the guise of a § 5-723(e) offset and the Plaintiffs were given no pre-deprivation forum to assert their defenses against it. *See* J.A. 106-107. The Defendant can not possibly suggest that, given its prior contemplation of the offset since October 12, 2011, *id*., that there was any need for quick action or that such a pre-deprivation hearing was impracticable. *Reynolds v. Wagner*, 936 F. Supp. 1216, 1228 (E.D. Pa. 1996) (quoting *Parratt v. Taylor*, 451 U.S. 527, 539 (1981)) *aff'd*, 128 F.3d 166 (3d Cir. 1997). Given that the Defendant had never imposed this offset previously, and the sole law that the Defendant relies upon was expressly superseded in 1997, there was no "established governmental policy" which obviated the need for a hearing. *Id*.

> The timing and nature of the required hearing "will depend on appropriate accommodation of the competing interests involved." [*Goss, supra.*]. These include the importance of the private interest and the length or finality of the deprivation, *see* [*Memphis Light, supra*], and *Mathews v. Eldridge*, 424 U.S., at 334-335; the likelihood of governmental error, *see id.*, at 335; and the magnitude of the governmental interests involved, *see ibid.*, and [*Wolff v. McDonnell*, 418 U.S. 539 (1974)].

Logan v. Zimmerman Brush Co., 455 U.S. 422, 434 (1982) (footnote omitted).[7]

c. The Plaintiffs had no administrative remedy.

The Defendant claimed, and the District Court agreed, that there was a requirement that the Plaintiffs exhaust administrative remedies under the District of Columbia Comprehensive Merit Protection Act. J.A. 325-326. The faults with this argument are manifest. First of all, no remedy was suggested or offered by the Defendant at the time of the deprivation. *See* note 7, *supra*.

If some or all of the relief sought by the Plaintiffs was beyond the authority of the purported administrative remedy, or if the District Court had exclusive jurisdiction over such relief, District of Columbia law prohibited "splitting" the claims between the judicial and the administrative processes and the Plaintiffs were compelled to pursue all of their remedies with the District Court.

> There is case law in this jurisdiction, drawn from public employment litigation, that reinforces the foregoing analysis. In *King v. Kidd* [640 A.2d 656 (D.C. 1993)], we held that a public employee's common law tort claim for intentional infliction of emotional distress, which she had joined with a statutory claim for sexual harassment, could go

[7] There certainly were no post-deprivation proceedings offered by the Defendant. *See, e.g.*, J.A. 105-114. It appears that those Plaintiffs who did attempt to contact the Deputy General Counsel in the manner suggested by the letters did not receive responses to their inquiries.

> forward in Superior Court against the hierarchy of supervisors who allegedly had harassed her, without preemption by an administrative remedy under CMPA. Specifically, we held that CMPA's personnel provisions did not preempt plaintiffs "tort claims of intentional infliction of emotional distress based on acts of sexual harassment and subsequent retaliation." *Id*., 640 A.2d at 664. We sustained the court's "jurisdiction to hear both [plaintiff's] sexual harassment claim and her interrelated or 'pendent' tort claim," *id*. (citation and footnote omitted), because plaintiff's tort claim was "fundamentally linked to her sexual harassment claim," *i.e.*, it "had an inherent 'nexus' to" that claim. *Id*.

Estate of Underwood v. National Credit Union Admin., 665 A.2d 621, 636 (D.C. 1995).

> After reviewing the purposes and text of the CMPA, we find no basis to conclude that CMPA's remedial system preempts Kidd's tort claim of intentional infliction of emotional distress based on acts of sexual harassment and subsequent retaliation.

King, 640 A.2d at 664 (citation omitted).

Herein, the Plaintiffs pled, *inter alia*, violations of the Fair Labor Standards Act and sought emergency and permanent injunctive relief from the District Court. *See* ECF Docket # 2, 3, 12 and J.A. 11, 17-18, 21. Where the District Court had indisputable federal question jurisdiction over the Plaintiffs' FLSA claims and their constitutional torts, the District Court had exclusive jurisdiction over the Plaintiffs' federal retirement benefit claims under D.C. Code § 1-803.01, and the CMPA could not provide the injunctive remedies requested, there could be no requirement of exhaustion of administrative remedies made upon them.

> Requiring an inmate to exhaust an administrative grievance process that cannot address the subject of his or her complaint would serve none of the purposes of exhaustion of administrative remedies. When the BOP cannot take any action at all in response to a complaint, it has nothing to offer that could possibly satisfy the prisoner and obviate the need for litigation. *See* [*Porter v. Nussle*, 534 U.S. 516, 525 (2002)]. Requiring exhaustion when no relief is available "is more likely to inflame than to mollify passions, and thus is unlikely to 'filter out some frivolous claims.'" *Brown v. Valoff*, 422 F.3d 926, 936 (9th Cir. 2005) (quoting *Porter*, 534 U.S. at 525) (first quotation omitted). And prison administrators are unlikely to spend resources developing an administrative record when that process cannot possibly lead to relief, nor would there be much record to develop when the prisoner is challenging, as here, the enforceability of a statute rather than the prison's method of enforcement. *See Porter*, 534 U.S. at 525; *Brown*, 422 F.3d at 936. Finally, requiring exhaustion in these circumstances is not necessary for protection of administrative agency authority from judicial interference, because no administrative program or mistake is at issue, nor can an administrative solution resolve the complaint. *See Woodford v. Ngo*, 548 U.S. 81, 89 (2006).

Kaemmerling v. Lappin, 553 F.3d 669, 676 (D.C. Cir. 2008) (footnote, parallel citations omitted).

> Granting DOES primary jurisdiction over appellant's emotional distress claim also would have a chilling impact on enforcement of the Human Rights Act policy prohibiting sexual harassment. Involvement of DOES not only would create claim-splitting problems but also would delegate jurisdiction to an administrative agency not used to dealing with sexual harassment issues, and would apply a statute that severely caps financial recovery in an area where the legislature has indicated a strong preference for compensatory and punitive damages.

Estate of Underwood, 665 A.2d at 630.

> Applying the federal definition of a "cause of action" and the rule against splitting a single cause of action to this case, plaintiff's prior civil rights action and the instant negligence action arise out of the

> same core of operative facts, . . . Since the two lawsuits involve this single core of operative facts, they constitute identical causes of action for *res judicata* purposes. Although this single group of facts may conceivably give rise to both federal claims for relief and negligence claims, under the federal definition, a single cause of action remains . . . Thus, the federal *res judicata* doctrine precludes plaintiff from litigating any matters that he could have raised in the previous lawsuit, including negligence, which were within the federal *court's* pendent jurisdiction.

Gilles v. Ware, 615 A.2d 533, 553 n.11 (D.C. 1992) WAGNER, J., *concurring*.

The District Court's assertion that the Plaintiffs, first employed by the District of Columbia prior to Home Rule, were subject to CMPA at all was incorrect.

> Plaintiffs' only response is that the CMPA does not apply to them, but that argument is factually and legally flawed. The single authority on which they rely—D.C. CODE § 1-207.13(d) (*see* Pls.' Reply at 10)—is inapposite, since that provision does not relate to the CMPA and, in any case, applies to individuals employed by the federal government before the District established its own personnel system in 1979. D.C. Code § 1-207.13(d); *see Dist. of Columbia v. Hunt*, 520 A.2d 300, 302 (D.C. 1987). It is therefore irrelevant to the plaintiffs, all of whom were hired by the District after 2004, and, as a result, their complaints are covered by the CMPA grievance process. *See Lattisaw v. District of Columbia*, 905 A.2d 790, 793 (D.C. 2006) ("[F]or the purpose of determining the CMPA's applicability, our case law has emphasized that 'grievances' are to be broadly construed.")

J.A. 326.[8]

[8] This was not the "Plaintiffs' only response" to the Defendant's failure to exhaust administrative remedies claim. *See* ECF Docket # 30 at 43-47 and ECF Docket # 35 at 10-11. The District Court simply ignored the remainder of these arguments.

> No officer or employee shall, by reason of his transfer to the District government under this chapter or his separation from service under this chapter, be deprived of any civil service rights, benefits, and privileges held by him prior to such transfer or any right of appeal or review he may have by reason of his separation from service.

D.C. CODE § 1-207.13(d).

The District Court herein simply claims that the Plaintiffs were "hired by the District after 2004", ignoring that each and all of them were instead first employed by the District of Columbia prior to October 1, 1987, J.A. 14, and that their claims herein relate directly to their retirement benefits from that employment. In addition to the exclusive jurisdiction of the District Court for:

> (1) Civil actions brought by participants or beneficiaries pursuant to this chapter, and
>
> (2) Any other action otherwise arising (in whole or part) under this chapter or the contract.

D.C. CODE § 1-815.02, the Plaintiffs were entitled to judicial review of such claims absent the CMPA grievance procedures, as their employment with the District of Columbia predates the CMPA and D.C. Code expressly provides that the Plaintiffs are entitled to such rights of review as they had prior to Home Rule.

Contrary to the District Court's citation, the applicability of the CMPA to the Plaintiffs cannot be construed so "broadly" as to defeat the evident grandfather provisions afforded pre-Home Rule employees.

> Although subject to congressional review, the Council's powers of ordinary legislation are broad; they are limited only by specified exceptions and by the general requirement that legislation be consistent with the U.S. Constitution and the Home Rule Act. *See Bishop v. District of Columbia*, D.C.App., 411 A.2d 997, 999 (*en banc*), *cert. denied*, 446 U.S. 966 (1980). In this sense, the District resembles a full "home rule" city with general powers to govern local affairs except for express limitations, in contrast with a limited "home rule" city or a municipal corporation to which a state has granted only enumerated powers. As a general rule, courts strictly construe the powers of municipal corporations, whereas they liberally read the authority of full "home rule" cities. In construing the delegation of legislative power to the Council, however, this court must pay substantial attention to the unique nature of the District's policy, always interpreting the Home Rule Act "with a central focus: the intent of Congress." [*District of Columbia v. Washington Home Ownership Council, Inc.*, 415 A.2d 1349, 1351 (D.C. 1980)] (footnote omitted).

Convention Center Referendum Committee v. District of Columbia Bd. of Elections & Ethics, 441 A.2d 889, 903-904 (D.C. 1981) (citations, footnote omitted).

The Plaintiffs have sufficiently pled that they were lawfully entitled to their salaries without offset and that the Defendant took such salaries without lawful cause, without compensation and without any mechanism for the Plaintiffs to address the Defendant's claims prior to the taking. The Plaintiffs were not required to exhaust any administrative remedies prior to

seeking injunctive relief on their federal claims. The Defendant was not entitled to any summary adjudication on these points.

4. The District Court improperly denied the Plaintiffs discovery and trial upon disputed factual issues.

By granting summary judgment to the Defendant without discovery on factual claims genuinely disputed by the Plaintiffs, the District Court bypassed the fact finding function of a jury and deprived the Plaintiffs of their Seventh Amendment right to a jury trial on all such issues so demandable.

a. The Plaintiffs' Equal Protection Claims

The District Court's denial of the Plaintiffs' equal protection claims was premised upon a stark factual conclusion by the Court.

> First, to establish an equal protection claim, plaintiffs must show that they were singled out and treated differently from others who were similarly situated. *Women Prisoners of D.C. Dep't of Corrs. v. Dist. of Columbia*, 93 F.3d 910, 924 (D.C. Cir. 1996). To meet this burden, plaintiffs allege that they were treated differently from District police officers who were given a raise to compensate for the income reduction resulting from the offset. (*See* Pls.' Mot. at 15 (relying upon Compl., Ex. 2 (*Washington City Paper* article discussing raises given to Metropolitan Police Department ("MPD") employees Hickson, Major, and Sarvis)).) However, these officers are not similarly situated.

J.A. 329.

The Plaintiffs properly alleged that they are similarly situated to Daniel Hickson, Jacob Major and William Sarvis in that each of them was employed by the Metropolitan Police Department prior to October 1, 1987, and that each of them was subsequently rehired by the District of Columbia subsequent to their respective retirements and after December 7, 2004. J.A. 46-48. These allegations alone demonstrate that these persons would be otherwise subject to the D.C. Code § 5-723(e) offset as the Defendant alleges the Plaintiffs are herein. The Defendant offered no evidence or even allegations of material facts in rebuttal of this contention. J.A. 141-144.[9]

The Plaintiffs assert they ***are entitled to equal protection of this law***, not salaries equal to persons in different jobs. What the Plaintiffs properly complain of is that the Defendant gave the MPD reemployed federal annuitants *additional* money beyond what their respective qualifications entitled them to, solely to offset the offset otherwise applied to the Plaintiffs and the members of the proposed Plaintiff Class, thus negating the effect of the law solely upon the MPD employees. This, not the amount of their initial salaries, is what the Plaintiffs assert that there is no rational basis to deny the Plaintiffs such equal protection. The only factors relevant to the

[9] Absent such allegations by the Movant on this point, no Rule 56 Motion could proceed. LCvR. 7(h)(1).

Plaintiffs' equal protection claims are those factors which determine whether the D.C. Code § 5-723 (e) offset is applicable to either the Plaintiffs or the MPD reemployed federal annuitants. If these factors determine that all parties are similarly situated under law as the Plaintiffs contend, the Defendant must put forth a rational basis why the Plaintiffs have been treated differently. The Plaintiffs are entitled to a jury trial to determine this issue, not a summary conclusion by the District Court without the benefit of discovery.

> The District also asserts that the violations at the Ayers Place and Ames Street buildings were less serious than those at the tenants' buildings, particularly 1512 Park Road, which had electrical problems and lacked an adequate fire escape. ***But making such judgments is the jury's responsibility***, and especially given the inspector's testimony that the Ames Street building was in "equally bad condition," we think a reasonable jury could find the violations at the Ayers Place and Ames Street buildings sufficiently comparable to those at the tenants' buildings to undermine the District's claim of non-discriminatory intent.

2922 Sherman Ave. Tenants' Ass'n v. District of Columbia, 444 F.3d 673, 684 (D.C. Cir. 2006) (citing *Gunning v. Cooley*, 281 U.S. 90, 94 (1930) (explaining that it is for the jury to decide the "effect or weight of evidence") emphasis added). "Whether two employees are similarly situated ordinarily presents a question of fact for the jury." *George v. Leavitt*, 407 F.3d 405, 414-415 (D.C. Cir. 2005) (quoting *Graham v. Long Island R.R.*, 230 F.3d

34, 39 (2d Cir. 2000) and citing *Mungin v. Katten Muchin & Zavis*, 116 F.3d 1549, 1555 (D.C. Cir. 1997)).

> EPA argues, however, that George and the other engineers were not similarly situated, as a matter of law, because she was a probationary employee and they were not. EPA is correct that we have held that probationary employees and permanent employees are not similarly situated, observing that, under federal regulations, probationary employees may be terminated for problems even if those problems would not be good cause for terminating a permanent employee. Here, however, the other engineers were not federal civil servants, but were participants in EPA's Senior Environmental Employment Program. George asserts that, as such, these engineers "were *de facto* 'at-will' employees . . . who could be terminated at any time, without notice and for any non-discriminatory reason," and EPA does not dispute this characterization. Under these circumstances, we think that a reasonable jury could conclude that George and the other engineers were similarly situated.

George, 407 F.3d at 415 (D.C. Cir. 2005) (citing *Holbrook v. Reno*, 196 F.3d 255, 262 (D.C. Cir. 1999); *McKenna v. Weinberger*, 729 F.2d 783, 789-90 (D.C. Cir. 1984), additional citations, internal flags omitted).

The District Court improperly denied the Plaintiffs a jury trial on the issue of whether the reemployed Metropolitan Police Department officials were similarly situated for their equal protection claims. The District Court came to its own factual conclusion on this point and employed it to dismiss this claim summarily without discovery or a trial.

The Defendant's public policy argument adopted by the District Court was disingenuous on two points. First the Defendant failed to explain why

prevention of "double dipping" is a sound fiscal policy for the Plaintiffs, but isn't for the MPD reemployed federal annuitants. This remains the crux of the equal protection issue. The Defendant cannot simply claim that it can impose an offset upon the Plaintiffs for some rational basis; it must provide a rational basis for not imposing it upon the MPD reemployed federal annuitants. Second, unlike in the cases cited by the Defendant, there was no "double dipping" herein at all. The District of Columbia simply does not pay the pensions of the pre-1997 annuitants, the United States Treasury does. The Plaintiffs were federal annuitants employed by the District of Columbia. The District of Columbia's offset of their salaries for pensions the District of Columbia does not pay made no more fiscal sense than if the District of Columbia attempted to offset pensions paid to its employees for prior employment with Ford Motor Company or Delta Airlines. Improving the public fisc is not a rational basis for stealing someone else's money. The Plaintiffs fully dispute, offer some evidence in rebuttal, and are therefore entitled to discovery thereon, this conclusory claim by the District of Columbia that there was some meritorious purpose for the increases in salaries described in paragraph 48 of their First Amended Complaint. J.A. 43. The Plaintiffs instead assert the sole reason for the pay increases was to circumvent the application of the offset to certain favored employees

without a rational basis in support. The Defendant was not entitled to any summary adjudication of this issue.

b. The Plaintiffs' First Amendment Claims

Plaintiff Cannon was terminated from his position as Chief of Police of the District of Columbia Protective Services Police Department on February 8, 2012, with no prior notice of any disciplinary action and less than two weeks after this lawsuit was filed. The Plaintiffs fully denied the Defendant's allegation that Cannon's termination was for any disciplinary reason and offered authority, some of which was premised upon their own decades of experience as police administrators, that the alleged cause was not an ordinary or reasonable basis for termination of a police officer or police official. The Plaintiffs assert that that the Defendant's alleged cause for Plaintiff Cannon's termination was entirely pretextual, and those documents offered in support thereof were likely fraudulent.

> The Plaintiffs assert that Cannon made statements and disclosures protected by the First Amendment and the District of Columbia Whistleblower Protection Act (WPA) to this Court prior to his termination, starting on January 26, 2012 with the filing of the Plaintiffs' Complaint and Motions for a Temporary Restraining Order and a Preliminary Injunction. ECF Docket # 1-3. The Plaintiffs assert that prior to February 8, 2012, no person who has appeared before this Court in this matter had any knowledge of any pending disciplinary action against Cannon. The Defendant's own representations to this Court prior to Cannon's termination support this assertion. *See* Tr. of January 31, 2012 Hr'g; ECF Docket # 6 through 8.

J.A. 168.

The authenticity of the Defendant's sole exhibit claiming the decision to terminate Cannon predated this lawsuit was properly challenged. The Defendant's claimed justification for Cannon's termination bordered on the bizarre. The Plaintiffs raised legitimate and justiciable arguments and offered affidavits in support that no police administrator would have been terminated for the stated cause given by the Defendant in Cannon's termination. The Plaintiffs were entitled to conduct discovery on this point and if factual evidence needed to be weighed, the Plaintiffs were entitled to have such evidence put before a jury, not just have the District Court accept the Defendant's representations without further inquiry. "Usually, proffering 'evidence from which a jury could find that [the employer's] stated reasons . . . were pretextual . . . will be enough to get a plaintiff's claim to a jury.'" *George*, 407 F.3d at 413 (quoting *Carpenter v. Fannie Mae*, 165 F.3d 69, 72 (D.C. Cir. 1999) (citing *Aka v. Wash. Hosp. Ctr.*, 156 F.3d 1284 (D.C. Cir. 1998) (*en banc*))).

> However, it is unnecessary to address defendant's multiple grounds for dismissal because Cannon cannot establish causation, for he cannot show that the initiation of the instant suit "was a substantial or motivating factor in prompting [his firing]." [*Wilburn v. Robinson*, 480 F.3d 1140, 1149 (D.C. Cir. 2007)]; *see Velikonja v. Mueller*, 362 F. Supp. 2d 1, 24 (D.D.C. 2004) ("Plaintiff fails to offer evidence to suggest a link between the government's conduct and [this lawsuit];

> thus, the Court need not consider whether his [initiation of this suit] was constitutionally protected."), *aff'd*, 466 F.3d 122, 124 (D.C. Cir. 2006).

J.A. 333.

The Plaintiffs could not produce this evidence because they were not for a single moment permitted to make inquires and request production of such evidence, evidence indisputably in the sole possession of the Defendant. The District Court accepted without question the self-serving evidence provided by the Defendant.

> According to the termination letter, Cannon was fired for his failure to adequately investigate an October 26, 2011 incident involving Occupy D.C. and for generating a report containing false information that he submitted to his superiors within DGS. (Cannon Termination Letter at 1.) The evidence makes clear that the disciplinary action that resulted in his firing was undertaken months before the lawsuit was filed or even contemplated (*id*), and the recommendation that he be fired, dated January 17, 2012, was also made well before there was any reason for litigation.

Id.

The District Court permitted the entirety of the Plaintiffs' case regarding Cannon's firing to be dismissed without a trial based upon a single piece of paper which the Plaintiffs were not permitted to make any inquiry as to the circumstances of its creation or its legitimacy. If the District Court conducted a murder trial in the same manner, a defendant would be summarily acquitted upon production of a letter purporting to be from his

mother saying he didn't do it. Such dismissal plainly contradicted the holding in *Convertino* that "discovery should be granted 'almost as a matter of course unless the non-moving party has not diligently pursued discovery of the evidence.'" The District Court abjectly denied the Plaintiffs access to any such evidence and the dismissal of the Plaintiffs First Amendment retaliation claims regarding Cannon's termination was predicated entirely upon a factual issue supported by a single unauthenticated document.[10] Further, the District Court improperly interjected its opinion as to another purely factual issue, the reasonableness of the termination action for the allegations made against Cannon. ECF Docket # 40 at 20.

> We think that George has proffered ample evidence by which a reasonable jury could conclude that EPA's stated reasons for her termination are "unworthy of credence." George vigorously disputes the validity of the reasons cited by EPA, creating a genuine dispute over these material facts. Although a jury may ultimately decide to credit the version of the events described by Brown and Kelly over that offered by George, this is not a basis upon which a court may rest in granting a motion for summary judgment.

George, 407 F.3d at 413.

---

[10] The Plaintiffs have never made any concession that "when the District made the decision to fire Cannon, it had no reason to retaliate against him." J.A. 334. Instead, as the Plaintiffs' filings invariably demonstrate, the Plaintiffs vigorously disputed that any such decision took place prior to the filing of the lawsuit and that the documentation to the contrary provided by the Defendant was likely a "backdated fabrication". ECF Docket # 19 at 4 n.3. *See also id*. at 2-6.

In the same vein, the District Court accepted the Defendant's allegation that salary payments due to the Plaintiffs somehow were the subject of a "clerical error" and that the Plaintiffs received paper checks instead without any further harm to them. This first misrepresented the Plaintiffs factual allegations.

> Plaintiffs' second claim of retaliation, which is based on the District's issuance of paper, rather than electronic, paychecks is also seriously flawed.

J.A. 335.

This is not what the Plaintiffs alleged. Nearly simultaneous to Cannon's termination, the Plaintiffs' direct deposits were withheld from their respective bank accounts. Only after the filing of a Supplemental Complaint, J.A. 55, were these payments claimed to have been "discovered" in the form of paper checks on the desk of a payroll administrator and provided to the Plaintiffs. The Plaintiffs asserted that the Defendant intentionally withheld each of the Plaintiffs' paychecks to intimidate them into not pursuing their claims against the Defendant, and to effectually impede them from pursuing such claims against the Defendant by cutting off their funding to pay for such litigation. *See* ECF Docket # 11-1 at 4. Only after the Plaintiffs employed the withholding of their paychecks as a new cause of action for First Amendment retaliation was the story of the "clerical

error" concocted by the Defendant and the paper checks "discovered" in the payroll administrator's office. Once again, these disputed factual issues, particularly as to intent of the Defendant's administrators, were proper issues for a jury's consideration and not the District Court's picking and choosing as to which story facilitates a quicker dismissal of the case.

5. The District Court ignored its subject matter jurisdiction regarding the Plaintiffs' claims of violations of D.C. Code § 1-206.02(a)(5) and 4 U.S.C. § 111(a).

The District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. 93-198, 87 Stat. 774 (1973) (codified as amended at D.C. Code § 1-201.01 *et seq.*), prohibits the District of Columbia government from imposing "any tax on the whole or any portion of the personal income, either directly or at the source thereof, of any individual not a resident of the District". D.C. CODE § 1-206.02. The United States Code defines an income tax as "any tax levied on, with respect to, or measured by, net income, gross income, or gross receipts." 4 U.S.C. § 110 (c).

The Defendant failed to rebut the Plaintiffs' showing that the offset against them is imposed at a direct 100% ratio against their pension payments, that the money is returned to the District's general fund and it is

not used for some narrow specific purpose. Further, the Defendant did not dispute that it was not redepositing the money withheld from the Plaintiffs into the Trust Fund to their credit for future annuities in the manner described by 5 U.S.C. § 8344(a).

"It is a question of federal law whether a municipal charge constitutes a tax." *Qwest Communs. Corp. v. City of Berkeley*, 146 F. Supp. 2d 1081, 1091 (N.D. Cal. 2001) (citing *Wright v. Riveland*, 219 F.3d 905, 911 (9th Cir. 2000); *Trailer Marine Transport Corp. v. Rivera Vazquez*, 977 F.2d 1 (1st Cir. 1992)). Herein, "immunity from state taxation is asserted on the basis of federal law with respect to persons or entities in which the United States has a real and significant interest." *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 471 (1976) (quoting *Confederated Salish & Kootenai Tribes etc. v. Moe*, 392 F. Supp. 1297, 1303 (D. Mont. 1974)).

The Plaintiffs challenged an unnamed tax imposed upon them in violation of D.C. Code § 1-206.02(a)(5). *See Banner v. United States*, 428 F.3d 303, 305 (D.C. Cir. 2005) ("[t]he local government of the District of Columbia is prohibited by Congress from imposing a 'commuter tax' -- from taxing the personal income of those who work in the District but reside elsewhere"). "The Constitution gives Congress exclusive legislative

authority in all matters pertaining to the District of Columbia." *Id*. (citing U.S. CONST. art. I, § 8, cl. 17). "Congress has delegated to the District the authority to tax the personal income of District residents; it has withheld such authority to tax non-residents who work in the District." *Id*. at 306-307. The *Moe* decision "embraced the recognition of the interest of the United States in securing immunity… from taxation conflicting with the measures it had adopted for their protection" even where the United States itself did not bring the action. *Sac & Fox Nation v. Pierce*, 213 F.3d 566, 572 (10th Cir. 2000) (quoting *Moe*, 425 U.S. at 473 (quoting *Heckman v. United States*, 224 U.S. 413, 441 (1912)), additional quotation marks omitted).

> *Moe* leads us to conclude that we have jurisdiction under 28 U.S.C. § 1362 to reach the merits of this case. Surely if an Indian tribe may maintain suit on its own behalf in federal court to enjoin collection of a state's cigarette sales tax, it may maintain a similar suit on its own behalf to enjoin collection of a state's motor fuel distribution tax. Neither the Tax Injunction Act nor the Eleventh Amendment bars the Tribes' suit in this case.

Sac & Fox Nation, 213 F.3d at 572.

Further federal subject matter jurisdiction was found where the Defendant refused to apply an exemption under D.C. Code § 1-611.03(b) to District of Columbia PFRS federal annuitants such as the Plaintiffs, but grants it to other federal annuitants such as those paid by the Civil Service

Retirement System, a system not funded from the U.S. Treasury Trust Fund. This violated the principles of intergovernmental tax immunity by discriminating solely on the basis of the source of these retirement benefits.

> The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States, a territory or possession or political subdivision thereof, the government of the District of Columbia, or an agency or instrumentality of one or more of the foregoing, by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation.

4 U.S.C. § 111(a).

Whether a state's "tax fits within the Public Salary Tax Act's allowance is a question of federal law. The practical impact, not the State's name tag, determines the answer to that question." *Jefferson County v. Acker*, 527 U.S. 423, 439 (1999) (applying Buck Act definition of tax, 4 U.S.C. § 110(c), to § 111, citing *Detroit v. Murray Corp. of America*, 355 U.S. 489, 492 (1958) ("In determining whether the tax violates the Government's constitutional immunity we must look through form and behind labels to substance.")) "[I]rrespective of what the tax is called, if its purpose is to produce revenue, it is an income or a receipts tax under the Buck Act." *Humble Oil & Refining Co. v. Calvert*, 464 S.W.2d 170, 175-176 (Tex. Civ. App. 1971). *Accord, United States v. Lewisburg Area School Dist.*, 539 F.2d 301, 309 (3d Cir. 1976) (citing *Howard v. Commissioners of*

Sinking Fund, 344 U.S. 624 (1953)); *Portsmouth v. Fred C. Gardner Co.*, 215 Va. 491, 494 (1975) ("It does not require that the tax be denominated an income tax or that it conform to the federal income tax. If the tax in question is based upon income and is measured by that income in money or money's worth, as a net income tax, gross income tax, or gross receipts tax, it is an income tax." Citing *Humble Oil & Refining Co. v. Calvert*, 478 S.W.2d 926, 930 (Tex. 1972)).

> Section 111 was enacted as part of the Public Salary Tax Act of 1939, the primary purpose of which was to impose federal income tax on the salaries of all state and local government employees. Prior to adoption of the Act, salaries of most government employees, both state and federal, generally were thought to be exempt from taxation by another sovereign under the doctrine of intergovernmental tax immunity. This doctrine had its genesis in *McCulloch v. Maryland*, 4 Wheat. 316 (1819), which held that the State of Maryland could not impose a discriminatory tax on the Bank of the United States. Chief Justice Marshall's opinion for the Court reasoned that the Bank was an instrumentality of the Federal Government used to carry into effect the Government's delegated powers, and taxation by the State would unconstitutionally interfere with the exercise of those powers. *Id*., at 425-437.
>
> For a time, *McCulloch* was read broadly to bar most taxation by one sovereign of the employees of another. *See Collector v. Day*, 11 Wall. 113, 124-128 (1871) (invalidating federal income tax on salary of state judge); *Dobbins v. Commissioners of Erie County*, 16 Pet. 435 (1842) (invalidating state tax on federal officer). This rule "was based on the rationale that any tax on income a party received under a contract with the government was a tax on the contract and thus a tax 'on' the government because it burdened the government's power to enter into the contract." *South Carolina v. Baker*, 485 U.S. 505, 518 (1988).

> In subsequent cases, however, the Court began to turn away from its more expansive applications of the immunity doctrine. Thus, in *Helvering v. Gerhardt*, 304 U.S. 405 (1938), the Court held that the Federal Government could levy nondiscriminatory taxes on the incomes of most state employees. The following year, *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 486-487 (1939), overruled the Day-Dobbins line of cases that had exempted government employees from nondiscriminatory taxation. After *Graves*, therefore, intergovernmental tax immunity barred only those taxes that were imposed directly on one sovereign by the other or that discriminated against a sovereign or those with whom it dealt.

Davis v. Mich. Dep't of Treasury, 489 U.S. 803, 810-811 (1989).

> As a threshold matter, the State argues that § 111 applies only to current employees of the Federal Government, not to retirees such as appellant. In our view, however, the plain language of the statute dictates the opposite conclusion. Section 111 by its terms applies to "the taxation of pay *or compensation for personal services as an officer or employee* of the United States." (Emphasis added). While retirement pay is not actually disbursed during the time an individual is working for the Government, the amount of benefits to be received in retirement is based and computed upon the individual's salary and years of service. 5 U.S.C. § 8339(a). We have no difficulty concluding that civil service retirement benefits are deferred compensation for past years of service rendered to the Government. *See, e. g., Zucker v. United States*, 758 F.2d 637, 639 (CA Fed.), *cert. denied*, 474 U.S. 842 (1985); *Kizas v. Webster*, 227 U. S. App. D. C. 327, 339, 707 F. 2d 524, 536, (1983), *cert. denied*, 464 U.S. 1042 (1984); *Clark v. United States*, 691 F. 2d 837, 842 (CA7 1982). And because these benefits accrue to employees on account of their service to the Government, they fall squarely within the category of compensation for services rendered "as an officer or employee of the United States." Appellant's federal retirement benefits are deferred compensation earned "as" a federal employee, and so are subject to § 111.

Id. at 808 (footnote omitted).

> Any other interpretation of the nondiscrimination clause would be implausible at best. It is difficult to imagine that Congress consented to discriminatory taxation of the pensions of retired federal civil servants while refusing to permit such taxation of current employees, and nothing in the statutory language or even in the legislative history suggests this result. While Congress could perhaps have used more precise language, the overall meaning of § 111 is unmistakable: it waives whatever immunity past and present federal employees would otherwise enjoy from state taxation of salaries, retirement benefits, and other forms of compensation paid on account of their employment with the Federal Government, except to the extent that such taxation discriminates on account of the source of the compensation.

Id. at 810.

The Plaintiffs specifically pled a cause of action for the Defendant's violation of the District of Columbia Self-Government and Governmental Reorganization Act. ECF Docket # 9 at 16. Whether pled as such, as Fifth Amendment Takings claim, or as another form of constitutional tort, the District Court had good and proper subject matter jurisdiction over these claims of illegal taxation. The Court's dismissal of such claims for lack of jurisdiction and not upon the merits was reversible error.

6. The District Court improperly eschewed the exclusive federal venue provision of D.C. Code § 1-815.02(a).

The District of Columbia Retirement Protection Act of 1997 provides that the "United States District Court for the District of Columbia shall have exclusive jurisdiction and venue, regardless of the amount in controversy…

(1) Civil actions brought by participants or beneficiaries [to federal benefit payments under District of Columbia retirement programs], and (2) Any other action otherwise arising (in whole or part) under this chapter or the contract. D.C. Code § 1-815.02 (a).

The District of Columbia Retirement Reform Act of 1979 provided that District of Columbia employee retirement benefits would be subject to an offset for post-November 17, 1979 entitlements. D.C. Code § 5-723(e). As such, any "rights to benefits" were necessarily rights ***subject to the offset***. The Plaintiffs asserted that the District of Columbia Retirement Protection Act of 1997 expressly supersedes D.C. Code § 5-723(e). PUB. L. 105-33, Sec. 11084(a)(1). The Plaintiffs further asserted the Consolidated Appropriations Act of 2008 also supersedes D.C. Code § 5-723(e). PUB. L. 110-161, Sec. 807. If the Defendant were to have, in the manner that the District Court suggested, withheld the Plaintiffs' benefits themselves, which the Defendant had no means to actually do, since such benefits are paid directly by the United States Treasury, then the Plaintiffs would in fact, be bringing a civil action only "to enforce… benefits from the Trust Fund". D.C. CODE § 1-815.01(a)(1). The District Court's construction of D.C. Code § 1-815.02(a) as applicable only when such benefits are withheld then

renders the phrase "or clarify rights" of D.C. Code § 1-815.01(a)(1) entirely superfluous, an indication that the Court's construction was incorrect.

> "[A]ll words and provisions of statutes" should "be given effect." *United States v. Ven-Fuel, Inc.*, 758 F.2d 741, 751 (1st Cir. 1985). Constructions that "would render statutory words or phrases meaningless, redundant or superfluous" should be avoided. *Id*. at 752.

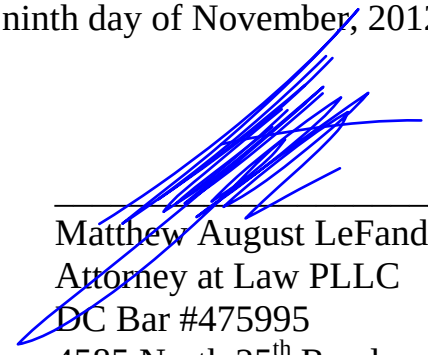
United States v. Walker, 665 F.3d 212, 225 (1st Cir. 2011). *Accord, Yin Hing Sum v. Holder*, 602 F.3d 1092, 1097 (9th Cir. 2010) (quoting *Romero-Ruiz v. Mukasey*, 538 F.3d 1057, 1062 (9th Cir. 2008) (noting that "legislative enactments should not be construed to render their provisions mere surplusage" (internal quotation marks omitted))); *Stumbo v. Eastman Outdoors, Inc.*, 508 F.3d 1358, 1362 (Fed. Cir. 2007).

The Plaintiffs herein asserted their rights to the benefits enumerated in the District of Columbia Retirement Protection Act of 1997, including the right to receive their benefit payments ***without the § 5-723(e) offset***. In doing so, the Plaintiffs asserted that the 1997 Act supersedes the District of Columbia Retirement Reform Act of 1979 with regards to the inconsistent § 5-723(e). The District Court therefore had <u>exclusive</u> jurisdiction under D.C. Code § 1-815.02(a) to hear these claims. *See also Harris v. Dep't of Labor & Indus*., 120 Wn.2d 461, 486-487 (Wash. 1993) JOHNSON, J. *dissenting* (citing 42 U.S.C. § 424a and concluding federal law does not permit states to offset federal retirement benefits).

VI. Conclusion

The District Court's July 6, 2012 Opinion and Order should be reversed with instructions for the District Court to enter summary judgment for the Plaintiffs on their FLSA claims, permit discovery upon their First Amendment and Equal Protection Claims and for the Court to consider the Plaintiffs illegal taxation claims as proper subject matter for the Court. A finding of such federal subject matter jurisdiction on any point should require reversal of the District Court's dismissal of the Plaintiffs' other claims.

Respectfully submitted, this ninth day of November, 2012,



Matthew August LeFande
Attorney at Law PLLC
DC Bar #475995
4585 North 25th Road
Arlington VA 22207
Tel: (202) 657-5800
Fax: (202) 318-8019
email: matt@lefande.com
Attorney for Appellants

4 U.S.C. § 110. Same; definitions

As used in sections 105-109 of this title [4 USCS §§ 105-109]--
…
(c) The term "income tax" means any tax levied on, with respect to, or measured by, net income, gross income, or gross receipts.
…

4 U.S.C. § 111. Same; taxation affecting Federal employees; income tax

(a) General rule. The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States, a territory or possession or political subdivision thereof, the government of the District of Columbia, or an agency or instrumentality of one or more of the foregoing, by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation.
…

5 U.S.C § 5545a. Availability pay for criminal investigators

(a) For purposes of this section--
(1) the term "available" refers to the availability of a criminal investigator and means that an investigator shall be considered generally and reasonably accessible by the agency employing such investigator to perform unscheduled duty based on the needs of an agency;
(2) the term "criminal investigator" means a law enforcement officer as defined under section 5541(3) [5 USCS § 5541(3)] (other than an officer occupying a position under title II of Public Law 99-399 [22 USCS §§ 4821 et seq.], subject to subsection (k)) who is required to--
(A) possess a knowledge of investigative techniques, laws of evidence, rules of criminal procedure, and precedent court decisions concerning admissibility of evidence, constitutional rights, search and seizure, and related issues;
(B) recognize, develop, and present evidence that reconstructs events, sequences and time elements for presentation in various legal hearings and court proceedings;
(C) demonstrate skills in applying surveillance techniques, undercover work, and advising and assisting the United States Attorney in and out of court;
(D) demonstrate the ability to apply the full range of knowledge, skills, and abilities necessary for cases which are complex and unfold over a long period of time (as distinguished from certain other occupations that require the use of some investigative techniques in short-term situations that may end in arrest or detention);
(E) possess knowledge of criminal laws and Federal rules of procedure which apply to cases involving crimes against the United States, including--
(i) knowledge of the elements of a crime;
(ii) evidence required to prove the crime;

(iii) decisions involving arrest authority;
(iv) methods of criminal operations; and
(v) availability of detection devices; and
(F) possess the ability to follow leads that indicate a crime will be committed rather than initiate an investigation after a crime is committed;
(3) the term "unscheduled duty" means hours of duty a criminal investigator works, or is determined to be available for work, that are not--
(A) part of the 40 hours in the basic work week of the investigator; or
(B) overtime hours paid under section 5542 [5 USCS § 5542]; and
(4) the term "regular work day" means each day in the investigator's basic work week during which the investigator works at least 4 hours that are not overtime hours paid under section 5542 [5 USCS § 5542] or hours considered part of section 5545a [5 USCS § 5545a].

(b) The purpose of this section is to provide premium pay to criminal investigators to ensure the availability of criminal investigators for unscheduled duty in excess of a 40 hour work week based on the needs of the employing agency.

(c) Each criminal investigator shall be paid availability pay as provided under this section. Availability pay shall be paid to ensure the availability of the investigator for unscheduled duty. The investigator is generally responsible for recognizing, without supervision, circumstances which require the investigator to be on duty or be available for unscheduled duty based on the needs of the agency. Availability pay provided to a criminal investigator for such unscheduled duty shall be paid instead of premium pay provided by other provisions of this subchapter, except premium pay for regularly scheduled overtime work as provided under section 5542 [5 USCS § 5542], night duty, Sunday duty, and holiday duty.

(d) (1) A criminal investigator shall be paid availability pay, if the average of hours described under paragraph (2) (A) and (B) is equal to or greater than 2 hours.
(2) The hours referred to under paragraph (1) are--
(A) the annual average of unscheduled duty hours worked by the investigator in excess of each regular work day; and
(B) the annual average of unscheduled duty hours such investigator is available to work on each regular work day upon request of the employing agency.
(3) Unscheduled duty hours which are worked by an investigator on days that are not regular work days shall be considered in the calculation of the annual average of unscheduled duty hours worked or available for purposes of certification.
(4) An investigator shall be considered to be available when the investigator cannot reasonably and generally be accessible due to a status or assignment which is the result of an agency direction, order, or approval as provided under subsection (f)(1).

(e) (1) Each criminal investigator receiving availability pay under this section and the appropriate supervisory officer, to be designated by the head of the agency, shall make an annual certification to the head of the agency that the investigator has met, and is expected to meet, the requirements of subsection (d). The head of a law enforcement

agency may prescribe regulations necessary to administer this subsection.
(2) Involuntary reduction in pay resulting from a denial of certification under paragraph (1) shall be a reduction in pay for purposes of section 7512(4) of this title [5 USCS § 7512(4)].

(f) (1) A criminal investigator who is eligible for availability pay shall receive such pay during any period such investigator is--
(A) attending agency sanctioned training;
(B) on agency approved sick leave or annual leave;
(C) on agency ordered travel status; or
(D) on excused absence with pay for relocation purposes.
(2) Notwithstanding paragraph (1)(A), agencies or departments may provide availability pay to investigators during training which is considered initial, basic training usually provided in the first year of service.
(3) Agencies or departments may provide availability pay to investigators when on excused absence with pay, except as provided in paragraph (1)(D).

(g) Section 5545(c) [5 USCS § 5545(c)] shall not apply to any criminal investigator who is paid availability pay under this section.

(h) Availability pay under this section shall be--
(1) 25 percent of the rate of basic pay for the position; and
(2) treated as part of the basic pay for purposes of--
(A) sections 5595(c), 8114(e), 8331(3), and 8704(c) [5 USCS §§ 5595(c), 8114(e), 8331(3), and 8704(c)]; and
(B) such other purposes as may be expressly provided for by law or as the Office of Personnel Management may by regulation prescribe.

(i) The provisions of subsections (a)-(h) providing for availability pay shall apply to a pilot employed by the United States Customs Service who is a law enforcement officer as defined under section 5541(3) [5 USCS § 5541(3)]. For the purpose of this section, section 5542(d) of this title [5 USCS § 5542(d)], and section 13(a)(16) and (b)(30) of the Fair Labor Standards Act of 1938 (29 U.S.C. 213(a)(16) and (b)(30)), such pilot shall be deemed to be a criminal investigator as defined in this section. The Office of Personnel Management may prescribe regulations to carry out this subsection.

(j) Notwithstanding any other provision of this section, any Office of Inspector General which employs fewer than 5 criminal investigators may elect not to cover such criminal investigators under this section.

(k) (1) For purposes of this section, the term "criminal investigator" includes a special agent occupying a position under title II of Public Law 99-399 [22 USCS §§ 4821 et seq.] if such special agent--
(A) meets the definition of such term under paragraph (2) of subsection (a) (applied disregarding the parenthetical matter before subparagraph (A) thereof); and
(B) such special agent satisfies the requirements of subsection (d) without taking into

account any hours described in paragraph (2)(B) thereof.
(2) In applying subsection (h) with respect to a special agent under this subsection--
(A) any reference in such subsection to "basic pay" shall be considered to include amounts designated as "salary";
(B) paragraph (2)(A) of such subsection shall be considered to include (in addition to the provisions of law specified therein) sections 609(b)(1), 805, 806, and 856 of the Foreign Service Act of 1980 [22 USCS §§ 4009(b)(1), 4045, 4046, 4071e]; and
(C) paragraph (2)(B) of such subsection shall be applied by substituting for "Office of Personnel Management" the following: "Office of Personnel Management or the Secretary of State (to the extent that matters exclusively within the jurisdiction of the Secretary are concerned)".

5 U.S.C. § 8101. Definitions

For the purpose of this subchapter [5 USCS §§ 8101 et seq.]--
(1) "employee" means--
…
(E) an individual appointed to a position on the office staff of a former President under section 1(b) of the Act of August 25, 1958 (72 Stat. 838) [3 USCS § 102 note];
but does not include--
(i) a commissioned officer of the Regular Corps of the Public Health Service;
(ii) a commissioned officer of the Reserve Corps of the Public Health Service on active duty;
(iii) a commissioned officer of the Environmental Science Services Administration; or
(iv) a member of the Metropolitan Police or the Fire Department of the District of Columbia who is pensioned or pensionable under sections 521-535 of title 4, District of Columbia Code; and
…

5 U.S.C. § 8331. Definitions

For the purpose of this subchapter [5 USCS §§ 8331 et seq.]--
(1) "employee" means--
…
(G) an individual first employed by the government of the District of Columbia before October 1, 1987;
…
(L) an employee described in section 2105(c) [5 USCS § 2105(c)] who has made an election under section 8347(q)(1) [5 USCS § 8347(q)(1)] to remain covered under this subchapter [5 USCS §§ 8331 et seq.];
but does not include--
…
(ii) an employee subject to another retirement system for Government employees (besides any employee excluded by clause (x), but including any employee who has made

an election under section 8347(q)(2) [5 USCS § 8347(q)(2)] to remain covered by a retirement system established for employees described in section 2105(c) [5 USCS § 2105(c)]);
…
(iv) an individual or group of individuals employed by the government of the District of Columbia excluded by the Office under section 8347(h) of this title [5 USCS § 8347(h)];
...
(7) "Government" means the Government of the United States, the government of the District of Columbia, Gallaudet University, and, in the case of an employee described in paragraph (1)(L), a nonappropriated fund instrumentality of the Department of Defense or the Coast Guard described in section 2105(c) [5 USCS § 2105(c)];

5 U.S.C. § 8339. Computation of annuity

(a) Except as otherwise provided by this section, the annuity of an employee retiring under this subchapter [5 USCS §§ 8331 et seq.] is--
(1) 1 1/2 percent of his average pay multiplied by so much of his total service as does not exceed 5 years; plus
(2) 1 3/4 percent of his average pay multiplied by so much of his total service as exceeds 5 years but does not exceed 10 years; plus
(3) 2 percent of his average pay multiplied by so much of his total service as exceeds 10 years.

However, when it results in a larger annuity, 1 percent of his average pay plus $ 25 is substituted for the percentage specified by paragraph (1), (2), or (3) of this subsection, or any combination thereof.
…

5 U.S.C. § 8344. Annuities and pay on reemployment

(a) If an annuitant receiving annuity from the Fund, except--
(1) a disability annuitant whose annuity is terminated because of his recovery or restoration of earning capacity;
(2) an annuitant whose annuity, based on an involuntary separation (other than an automatic separation or an involuntary separation for cause on charges of misconduct or delinquency), is terminated under subsection (b) of this section;
(3) an annuitant whose annuity is terminated under subsection (c) of this section; or
(4) a Member receiving annuity from the Fund;

becomes employed in an appointive or elective position, his service on and after the date he is so employed is covered by this subchapter [5 USCS §§ 8331 et seq.]. Deductions for the Fund may not be withheld from his pay unless the individual elects to have such deductions withheld under subparagraph (A). An amount equal to the annuity allocable to

the period of actual employment shall be deducted from his pay, except for lump-sum leave payment purposes under section 5551 of this title [5 USCS § 5551]. The amounts so deducted shall be deposited in the Treasury of the United States to the credit of the Fund. If the annuitant serves on a full-time basis, except as President, for at least 1 year, or on a part-time basis for periods equivalent to at least 1 year of full-time service, in employment not excluding him from coverage under section 8331(1)(i) or (ii) of this title [5 USCS § 8331(1)(i) or (ii)]--

(A) deductions for the Fund may be withheld from his pay (if the employee so elects), and his annuity on termination of employment is increased by an annuity computed under section 8339(a), (b), (d), (e), (h), (i), (n), (q), (r), and (s) [5 USCS § 8339(a), (b), (d), (e), (h), (i), (n), (q), (r), and (s)] as may apply based on the period of employment and the basic pay, before deduction, averaged during that employment; and

(B) his lump-sum credit may not be reduced by annuity paid during that employment.

If the annuitant is receiving a reduced annuity as provided in section 8339(j) [5 USCS § 8339(j)] or section 8339(k)(2) of this title [5 USCS § 8339(k)(2)], the increase in annuity payable under subparagraph (A) of this subsection is reduced by 10 percent and the survivor annuity payable under section 8341(b) of this title [5 USCS § 8341(b)] is increased by 55 percent of the increase in annuity payable under such subparagraph (A), unless, at the time of claiming the increase payable under such subparagraph (A), the annuitant notifies the Office of Personnel Management in writing that he does not desire the survivor annuity to be increased. If the annuitant dies while still reemployed, the survivor annuity payable is increased as though the reemployment had otherwise terminated. If the described employment of the annuitant continues for at least 5 years, or the equivalent of 5 years in the case of part-time employment, he may elect, instead of the benefit provided by subparagraph (A) of this subsection, to deposit in the Fund an amount computed under section 8334(c) of this title [5 USCS § 8334(c)] covering that employment and have his rights redetermined under this subchapter [5 USCS §§ 8331 et seq.]. If the annuitant dies while still reemployed and the described employment had continued for at least 5 years, or the equivalent of 5 years in the case of part-time employment, the person entitled to survivor annuity under section 8341(b) of this title [5 USCS § 8341(b)] may elect to deposit in the Fund (to the extent deposits or deductions have not otherwise been made) and have his rights redetermined under this subchapter [5 USCS §§ 8331 et seq.].

…

28 U.S.C. § 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title [28 USCS §§ 1292(c) and (d) and 1295].

28 U.S.C. § 1362. Indian tribes

The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

29 U.S.C. § 203. Definitions

As used in this Act--

…

(m) "Wage" paid to any employee includes the reasonable cost, as determined by the Administrator [Secretary], to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees: *Provided*, That the cost of board, lodging, or other facilities shall not be included as a part of the wage paid to any employee to the extent it is excluded therefrom under the terms of a bona fide collective-bargaining agreement applicable to the particular employee: *Provided further*, That the Secretary is authorized to determine the fair value of such board, lodging, or other facilities for defined classes of employees and in defined areas, based on average cost to the employer or to groups of employers similarly situated, or average value to groups of employees, or other appropriate measures of fair value. Such evaluations, where applicable and pertinent, shall be used in lieu of actual measure of cost in determining the wage paid to any employee. In determining the wage an employer is required to pay a tipped employee, the amount paid such employee by the employee's employer shall be an amount equal to--

(1) the cash wage paid such employee which for purposes of such determination shall be not less than the cash wage required to be paid such an employee on the date of the enactment of this paragraph [enacted August 20, 1996]; and

(2) an additional amount on account of the tips received by such employee which amount is equal to the difference between the wage specified in paragraph (1) and the wage in effect under section 6(a)(1) [29 USCS § 206(a)(1)].

The additional amount on account of tips may not exceed the value of the tips actually received by an employee. The preceding 2 sentences shall not apply with respect to any tipped employee unless such employee has been informed by the employer of the provisions of this subsection, and all tips received by such employee have been retained by the employee, except that this subsection shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips.

…

29 U.S.C. § 206. Minimum wage

(a) Employees engaged in commerce; home workers in Puerto Rico and Virgin Islands; employees in American Samoa; seamen on American vessels; agricultural employees. Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates:

(1) except as otherwise provided in this section, not less than--

(A) $ 5.85 an hour, beginning on the 60th day after the date of enactment of the Fair Minimum Wage Act of 2007 [enacted May 25, 2007];

(B) $ 6.55 an hour, beginning 12 months after that 60th day; and

(C) $ 7.25 an hour, beginning 24 months after that 60th day;

…

(b) Additional applicability to employees pursuant to subsequent amendatory provisions. Every employer shall pay to each of his employees (other than an employee to whom subsection (a)(5) applies) who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this section by the amendments made to this Act by the Fair Labor Standards Amendments of 1966 [29 USCS §§ 203, 206, 207, 213, 214, 216, 218, 255], title IX of the Education Amendments of 1972, or the Fair Labor Standards Amendments of 1974, wages at the following rate: Effective after December 31, 1977, not less than the minimum wage rate in effect under subsection (a)(1).

…

29 U.S.C. § 207. Maximum hours

(a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions.

(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(2) No employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this subsection by the amendments made to this Act [29 USCS §§ 201 et seq.] by the Fair Labor Standards Amendments of 1966--

(A) for a workweek longer than forty-four hours during the first year from the effective date of the Fair Labor Standards Amendments of 1966 [effective Feb. 1, 1967],

(B) for a workweek longer than forty-two hours during the second year from such date, or

(C) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(b) Employment pursuant to collective bargaining agreement; employment by independently owned and controlled local enterprise engaged in distribution of petroleum products…

(c), (d) [Repealed]

(e) "Regular rate" defined. As used in this section the "regular rate" at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include--

(1) sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency;

(2) payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment;

(3) Sums [sums] paid in recognition of services performed during a given period if either, (a) both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly; or (b) the payments are made pursuant to a bona fide profit-sharing plan or trust or bona fide thrift or savings plan, meeting the requirements of the Administrator [Secretary] set forth in appropriate regulations which he shall issue, having due regard among other relevant factors, to the extent to which the amounts paid to the employee are determined without regard to hours of work, production, or efficiency; or (c) the payments are talent fees…;

(4) contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees;

(5) extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or in excess of the maximum workweek applicable to such employee under subsection (a) or in excess of the employee's normal working hours or regular working hours, as the case may be;

(6) extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days;

(7) extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective-bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding the maximum workweek applicable to such employee under subsection (a)[)], where such premium rate is not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek; or

(8) any value or income derived from employer-provided grants or rights provided pursuant to a stock option, stock appreciation right, or bona fide employee stock purchase program...

(f) Employment necessitating irregular hours of work. No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under subsection (a) if such employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees, if the duties of such employee necessitate irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay of not less than the minimum hourly rate provided in subsection (a) or (b) of section 6 [29 USCS § 206(a) or (b)] (whichever may be applicable) and compensation at not less than one and one-half times such rate for all hours worked in excess of such maximum workweek, and (2) provides a weekly guaranty of pay for not more than sixty hours based on the rates so specified.

(g) Employment at piece rates. …

(h) Credit toward minimum wage or overtime compensation of amounts excluded from regular rate.

(1) Except as provided in paragraph (2), sums excluded from the regular rate pursuant to subsection (e) shall not be creditable toward wages required under section 6 [29 USCS § 206] or overtime compensation required under this section.

(2) Extra compensation paid as described in paragraphs (5), (6), and (7) of subsection (e) shall be creditable toward overtime compensation payable pursuant to this section.

(i) Employment by retail or service establishment. …

(j) Employment in hospital or establishment engaged in care of sick, aged, or mentally ill. …

(k) Employment by public agency engaged in fire protection or law enforcement activities. No public agency shall be deemed to have violated subsection (a) with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correctional institutions) if--

(1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed the lesser of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) [29 USCS § 213 note] in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975;

or

(2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days,

compensation at a rate not less than one and one-half times the regular rate at which he is employed.

(l) Employment in domestic service in one or more households. …

(m) Employment in tobacco industry. …

(n) Employment by street, suburban, or interurban electric railway, or local trolley or motorbus carrier. …

(o) Compensatory time…

(p) Special detail work for fire protection and law enforcement employees; occasional or sporadic employment; substitution…

(q) Maximum hour exemption for employees receiving remedial education. …

(r) Reasonable break time for nursing mothers…

42 U.S.C. § 424a. Reduction of disability benefits

(a) Conditions for reduction; computation. If for any month prior to the month in which an individual attains the age of 65--

(1) such individual is entitled to benefits under section 223 [42 USCS § 423], and

(2) such individual is entitled for such month to--

(A) periodic benefits on account of his or her total or partial disability (whether or not permanent) under a workmen's compensation law or plan of the United States or a State, or

(B) periodic benefits on account of his or her total or partial disability (whether or not permanent) under any other law or plan of the United States, a State, a political subdivision (as that term is used in section 218(b)(2) [42 USCS § 418(b)(2)]), or an instrumentality of two or more States (as that term is used in section 218(g) [42 USCS § 418(g)]), other than (i) benefits payable under title 38, United States Code, (ii) benefits payable under a program of assistance which is based on need, (iii) benefits based on service all or substantially all of which was included under an agreement entered into by a State and the Commissioner of Social Security under section 218 [42 USCS § 418], and (iv) benefits under a law or plan of the United States based on service all or substantially all of which is employment as defined in section 210 [42 USCS § 410],

the total of his benefits under section 223 [42 USCS § 423] for such month and of any benefits under section 202 [42 USCS § 402] for such month based on his wages and self-employment income shall be reduced (but not below zero) by the amount by which the sum of--

(3) such total of benefits under sections 223 and 202 [42 USCS §§ 423, 402] for such month, and

(4) such periodic benefits payable (and actually paid) for such month to such individual under such laws or plans,

exceeds the higher of--

(5) 80 per centum of his "average current earnings", or

(6) the total of such individual's disability insurance benefits under section 223 [42 USCS § 423] for such months and of any monthly insurance benefits under section 202 [42 USCS § 402] for such month based on his wages and self-employment income, prior to reduction under this section.

In no case shall the reduction in the total of such benefits under sections 223 and 202 [42 USCS §§ 423, 402] for a month (in a continuous period of months) reduce such total below the sum of--

(7) the total of the benefits under sections 223 and 202 [42 USCS §§ 423, 402], after reduction under this section, with respect to all persons entitled to benefits on the basis of such individual's wages and self-employment income for such month which were determined for such individual and such persons for the first month for which reduction under this section was made (or which would have been so determined if all of them had been so entitled in such first month), and

(8) any increase in such benefits with respect to such individual and such persons, before reduction under this section, which is made effective for months after the first month for which reduction under this section is made.

For purposes of clause (5), an individual's average current earnings means the largest of (A) the average monthly wage (determined under section 215(b) [42 USCS § 415(b) as in effect prior to January 1979) used for purposes of computing his benefits under section 223 [42 USCS § 423], (B) one-sixtieth of the total of his wages and self-employment income (computed without regard to the limitations specified in sections 209(a)(1) and 211(b)(1) [42 USCS §§ 409(a)(1), 411(b)(1)]) for the five consecutive calendar years after 1950 for which such wages and self-employment income were highest, or (C) one-twelfth of the total of his wages and self-employment income (computed without regard to the limitations specified in sections 209(a)(1) and 211(b)(1) [42 USCS §§ 409(a)(1), 411(b)(1)]) for the calendar year in which he had the highest such wages and income during the period consisting of the calendar year in which he became disabled (as defined in section 223(d) [42 USCS § 423(d)]) and the five years preceding that year.

(b) Reduction where benefits payable on other than monthly basis. If any periodic benefit for a total or partial disability under a law or plan described in subsection (a)(2) is payable on other than a monthly basis (excluding a benefit payable as a lump sum except

to the extent that it is a commutation of, or a substitute for, periodic payments), the reduction under this section shall be made at such time or times and in such amounts as the Commissioner of Social Security finds will approximate as nearly as practicable the reduction prescribed by subsection (a).

(c) Reductions and deductions under other provisions. Reduction of benefits under this section shall be made after any reduction under subsection (a) of section 203 [42 USCS § 403 (a)], but before deductions under such section and under section 222(b) [42 USCS § 422(b)].

(d) Exception. The reduction of benefits required by this section shall not be made if the law or plan described in subsection (a)(2) under which a periodic benefit is payable provides for the reduction thereof when anyone is entitled to benefits under this title [42 USCS §§ 401 et seq.] on the basis of the wages and self-employment income of an individual entitled to benefits under section 223 [42 USCS § 423], and such law or plan so provided on February 18, 1981.

(e) Conditions for payment. If it appears to the Commissioner of Social Security that an individual may be eligible for periodic benefits under a law or plan which would give rise to reduction under this section, the Commissioner may require, as a condition of certification for payment of any benefits under section 223 [42 USCS § 423] to any individual for any month and of any benefits under section 202 [42 USCS § 402] for such month based on such individual's wages and self-employment income, that such individual certify (i) whether he has filed or intends to file any claim for such periodic benefits, and (ii) if he has so filed, whether there has been a decision on such claim. The Commissioner of Social Security may, in the absence of evidence to the contrary, rely upon such a certification by such individual that he has not filed and does not intend to file such a claim, or that he has so filed and no final decision thereon has been made, in certifying benefits for payment pursuant to section 205(i) [42 USCS § 405(i)].

(f) Redetermination of reduction.

(1) In the second calendar year after the year in which reduction under this section in the total of an individual's benefits under section 223 [42 USCS § 423] and any benefits under section 202 [42 USCS § 402] based on his wages and self-employment income was first required (in a continuous period of months), and in each third year thereafter, the Commissioner of Social Security shall redetermine the amount of such benefits which are still subject to reduction under this section; but such redetermination shall not result in any decease in the total amount of benefits payable under this section in the total of an individual's wages and self-employment income. Such redetermined benefit shall be determined as of, and shall become effective with, the January following the year in which such redetermination was made.

(2) In making the redetermination required by paragraph (1), the individual's average current earnings (as defined in subsection (a)) shall be deemed to be the product of--

(A) his average current earnings as initially determined under subsection (a); and

(B) the ratio of (i) the national average wage index (as defined in section 209(k)(1) [42 USCS § 409(k)(1)]) for the calendar year before the year in which such

redetermination is made to (ii) the national average wage index (as so defined) for the calendar year before the year in which the reduction was first computed (but not counting any reduction made in benefits for a previous period of disability).

Any amount determined under this paragraph which is not a multiple of $ 1 shall be reduced to the next lower multiple of $ 1.

(g) Proportionate reduction; application of excess. Whenever a reduction in the total of benefits for any month based on an individual's wages and self-employment income is made under this section, each benefit, except the disability insurance benefit, shall first be proportionately decreased, and any excess of such reduction over the sum of all such benefits other than the disability insurance benefit shall then be applied to such disability insurance benefit.

(h) Furnishing of information.

(1) Notwithstanding any other provision of law, the head of any Federal agency shall provide such information within its possession as the Commissioner of Social Security may require for purposes of making a timely determination of the amount of the reduction, if any, required by this section in benefits payable under this title [42 USCS §§ 401 et seq.], or verifying other information necessary in carrying out the provisions of this section.

(2) The Commissioner of Social Security is authorized to enter into agreements with States, political subdivisions, and other organizations that administer a law or plan subject to the provisions of this section, in order to obtain such information as he may require to carry out the provisions of this section.

29 C.F.R. § 531.35 "Free and clear" payment; "kickbacks."

Whether in cash or in facilities, "wages" cannot be considered to have been paid by the employer and received by the employee unless they are paid finally and unconditionally or "free and clear." The wage requirements of the Act will not be met where the employee "kicks-back" directly or indirectly to the employer or to another person for the employer's benefit the whole or part of the wage delivered to the employee. This is true whether the "kick-back" is made in cash or in other than cash. For example, if it is a requirement of the employer that the employee must provide tools of the trade which will be used in or are specifically required for the performance of the employer's particular work, there would be a violation of the Act in any workweek when the cost of such tools purchased by the employee cuts into the minimum or overtime wages required to be paid him under the Act. See also in this connection, § 531.32(c).

29 C.F.R. § 541.600 Amount of salary required.

(a) To qualify as an exempt executive, administrative or professional employee under section 13(a)(1) of the Act, an employee must be compensated on a salary basis at a rate of not less than $ 455 per week (or $ 380 per week, if employed in American Samoa by

employers other than the Federal Government), exclusive of board, lodging or other facilities. Administrative and professional employees may also be paid on a fee basis, as defined in § 541.605.

(b) The $ 455 a week may be translated into equivalent amounts for periods longer than one week. The requirement will be met if the employee is compensated biweekly on a salary basis of $ 910, semimonthly on a salary basis of $ 985.83, or monthly on a salary basis of $ 1,971.66. However, the shortest period of payment that will meet this compensation requirement is one week.
…

29 C.F.R. § 776.4 Workweek standard.

(a) The workweek is to be taken as the standard in determining the applicability of the Act. n13 Thus, if in any workweek an employee is engaged in both covered and noncovered work he is entitled to both the wage and hours benefits of the Act for all the time worked in that week, unless exempted therefrom by some specific provision of the Act. The proportion of his time spent by the employee in each type of work is not material. If he spends any part of the workweek in covered work he will be considered on exactly the same basis as if he had engaged exclusively in such work for the entire period. Accordingly, the total number of hours which he works during the workweek at both types of work must be compensated for in accordance with the minimum wage and overtime pay provisions of the Act.

n13 See Gordon's Transports v. Walling, 162 F. 2d 203 (C.A. 6), certiorari denied 332 U.S. 774; Walling v. Fox-Pelletier Detective Agency, 4 W.H. Cases 452 (W.D. Tenn.), 8 Labor Cases 62,219; Walling v. Black Diamond Coal Mining Co., 59 F. Supp. 348 (W.D. Ky.); Fleming v. Knox, 42 F. Supp. 948 (S.D. Ga.); Roberg v. Henry Phipps Estate, 156 F. 2d 958 (C.A. 2). For a definition of the workweek, see § 778.2(c) of this chapter.

(b) It is thus recognized that an employee may be subject to the Act in one workweek and not in the next. It is likewise true that some employees of an employer may be subject to the Act and others not. But the burden of effecting segregation between covered and noncovered work as between particular workweeks for a given employee or as between different groups of employees is upon the employer. Where covered work is being regularly or recurrently performed by his employees, and the employer seeks to segregate such work and thereby relieve himself of his obligations under sections 6 and 7 with respect to particular employees in particular workweeks, he should be prepared to show, and to demonstrate from his records, that such employees in those workweeks did not engage in any activities in interstate or foreign commerce or in the production of goods for such commerce, which would necessarily include a showing that such employees did not handle or work on goods or materials shipped in commerce or used in production of goods for commerce, or engage in any other work closely related and directly essential to production of goods for commerce. n14 The Division's experience has indicated that much so-called "segregation" does not satisfy these tests and that many so-called

"segregated" employees are in fact engaged in commerce or in the production of goods for commerce.

n14 See Guess v. Montague, 140 F. 2d 500 (C.A. 4).

29 C.F.R. § 776.5 Coverage not dependent on method of compensation.

The Act's individual employee coverage is not limited to employees working on an hourly wage. The requirements of section 6 as to minimum wages are that "each" employee described therein shall be paid wages at a rate not less than a specified rate "an hour". n15 This does not mean that employees cannot be paid on a piecework basis or on a salary, commission, or other basis; it merely means that whatever the basis on which the workers are paid, whether it be monthly, weekly, or on a piecework basis, they must receive at least the equivalent of the minimum hourly rate. "Each" and "any" employee obviously and necessarily includes one compensated by a unit of time, by the piece, or by any other measurement. n16 Regulations prescribed by the Administrator (part 516 of this chapter) provide for the keeping of records in such form as to enable compensation on a piecework or other basis to be translated into an hourly rate. n17

n15 Special exceptions are made for Puerto Rico, the Virgin Islands, and American Samoa.

n16 United States v. Rosenwasser, 323 U.S. 360.

n17 For methods of translating other forms of compensation into an hourly rate for purposes of sections 6 and 7, see parts 531 and 778 of this chapter.

29 C.F.R. § 778.109 The regular rate is an hourly rate.

The "regular rate" under the Act is a rate per hour. The Act does not require employers to compensate employees on an hourly rate basis; their earnings may be determined on a piece-rate, salary, commission, or other basis, but in such case the overtime compensation due to employees must be computed on the basis of the hourly rate derived therefrom and, therefore, it is necessary to compute the regular hourly rate of such employees during each workweek, with certain statutory exceptions discussed in §§ 778.400 through 778.421. The regular hourly rate of pay of an employee is determined by dividing his total remuneration for employment (except statutory exclusions) in any workweek by the total number of hours actually worked by him in that workweek for which such compensation was paid. The following sections give some examples of the proper method of determining the regular rate of pay in particular instances: (The maximum hours standard used in these examples is 40 hours in a workweek).

D.C. Code § 1-201.01. Short title

This chapter may be cited as the "District of Columbia Home Rule Act".

D.C. Code § 1-201.02. Purposes [Formerly § 1-201]

(a) Subject to the retention by Congress of the ultimate legislative authority over the nation's capital granted by article I, § 8, of the Constitution, the intent of Congress is to delegate certain legislative powers to the government of the District of Columbia; authorize the election of certain local officials by the registered qualified electors in the District of Columbia; grant to the inhabitants of the District of Columbia powers of local self-government; modernize, reorganize, and otherwise improve the governmental structure of the District of Columbia; and, to the greatest extent possible, consistent with the constitutional mandate, relieve Congress of the burden of legislating upon essentially local District matters.

(b) Congress further intends to implement certain recommendations of the Commission on the Organization of the Government of the District of Columbia and take certain other actions irrespective of whether the charter for greater self-government provided for in subchapter IV of this chapter is accepted or rejected by the registered qualified electors of the District of Columbia.

D.C. Code § 1-206.02. Limitations on the Council [Formerly § 1-233]

(a) The Council shall have no authority to pass any act contrary to the provisions of this chapter except as specifically provided in this chapter, or to:

(1) Impose any tax on property of the United States or any of the several states;

(2) Lend the public credit for support of any private undertaking;

(3) Enact any act, or enact any act to amend or repeal any Act of Congress, which concerns the functions or property of the United States or which is not restricted in its application exclusively in or to the District;

(4) Enact any act, resolution, or rule with respect to any provision of Title 11 (relating to organization and jurisdiction of the District of Columbia courts);

(5) Impose any tax on the whole or any portion of the personal income, either directly or at the source thereof, of any individual not a resident of the District (the terms "individual" and "resident" to be understood for the purposes of this paragraph as they are defined in § 47-1801.04);

(6) Enact any act, resolution, or rule which permits the building of any structure within the District of Columbia in excess of the height limitations contained in § 6-601.05, and in effect on December 24, 1973;

(7) Enact any act, resolution, or regulation with respect to the Commission on Mental Health;

(8) Enact any act or regulation relating to the United States District Court for the District of Columbia or any other court of the United States in the District other than the District courts, or relating to the duties or powers of the United States Attorney or the United States Marshal for the District of Columbia;

(9) Enact any act, resolution, or rule with respect to any provision of Title 23 (relating to criminal procedure), or with respect to any provision of any law codified in Title 22 or Title 24 (relating to crimes and treatment of prisoners), or with respect to any criminal offense pertaining to articles subject to regulation under Chapter 45 of Title 22 during the 48 full calendar months immediately following the day on which the members of the Council first elected pursuant to this chapter take office; or

(10) Enact any act, resolution, or rule with respect to the District of Columbia Financial Responsibility and Management Assistance Authority established under § 47-391.01(a).

(b) Nothing in this chapter shall be construed as vesting in the District government any greater authority over the National Zoological Park, the National Guard of the District of Columbia, the Washington Aqueduct, the National Capital Planning Commission, or, except as otherwise specifically provided in this chapter, over any federal agency, than was vested in the Commissioner prior to January 2, 1975.

(c) (1) Except acts of the Council which are submitted to the President in accordance with Chapter 11 of Title 31, United States Code, any act which the Council determines, according to § 1-204.12(a), should take effect immediately because of emergency circumstances, and acts proposing amendments to subchapter IV of this chapter and except as provided in § 1-204.62(c) and § 1-204.72(d)(1) the Chairman of the Council shall transmit to the Speaker of the House of Representatives, and the President of the Senate, a copy of each act passed by the Council and signed by the Mayor, or vetoed by the Mayor and repassed by two-thirds of the Council present and voting, each act passed by the Council and allowed to become effective by the Mayor without his signature, and each initiated act and act subject to referendum which has been ratified by a majority of the registered qualified electors voting on the initiative or referendum. Except as provided in paragraph (2) of this subsection, such act shall take effect upon the expiration of the 30-calendar-day period (excluding Saturdays, Sundays, and holidays, and any day on which neither House is in session because of an adjournment sine die, a recess of more than 3 days, or an adjournment of more than 3 days) beginning on the day such act is transmitted by the Chairman to the Speaker of the House of Representatives and the President of the Senate, or upon the date prescribed by such act, whichever is later, unless during such 30-day period, there has been enacted into law a joint resolution

disapproving such act. In any case in which any such joint resolution disapproving such an act has, within such 30-day period, passed both Houses of Congress and has been transmitted to the President, such resolution, upon becoming law, subsequent to the expiration of such 30-day period, shall be deemed to have repealed such act, as of the date such resolution becomes law. The provisions of § 1-206.04, except subsections (d), (e), and (f) of such section, shall apply with respect to any joint resolution disapproving any act pursuant to this paragraph.

(2) In the case of any such act transmitted by the Chairman with respect to any act codified in Title 22, Title 23, or Title 24 of the District of Columbia Code, such act shall take effect at the end of the 60-day period beginning on the day such act is transmitted by the Chairman to the Speaker of the House of Representatives and the President of the Senate unless, during such 60-day period, there has been enacted into law a joint resolution disapproving such act. In any case in which any such joint resolution disapproving such an act has, within such 60-day period, passed both Houses of Congress and has been transmitted to the President, such resolution, upon becoming law subsequent to the expiration of such 60-day period shall be deemed to have repealed such act, as of the date such resolution becomes law. The provisions of § 1-206.04, relating to an expedited procedure for consideration of joint resolutions, shall apply to a joint resolution disapproving such act as specified in this paragraph.

(3) The Council shall submit with each act transmitted under this subsection an estimate of the costs which will be incurred by the District of Columbia as a result of the enactment of the act in each of the first 4 fiscal years for which the act is in effect, together with a statement of the basis for such estimate.

D.C. Code § 1-207.13. Transfer of personnel, property, and funds [Formerly § 1-212.1]

(a) In each case of the transfer, by any provision of this chapter, of functions to the Council, to the Mayor, or to any agency or officer, there are hereby authorized to be transferred (as of the time of such transfer of functions) to the Council, to the Mayor, to such agency, or to the agency of which such officer is the head, for use in the administration of the functions of the Council or such agency or officer, the personnel (except the Commissioner of the District of Columbia, the Assistant to the Commissioner, the Chairman of the District of Columbia Council, the Vice Chairman of the District of Columbia Council, the other members thereof, all of whose officers are abolished by this chapter), property, records, and unexpended balances of appropriations and other funds which relate primarily to the functions so transferred.

(b) If any question arises in connection with the carrying out of subsection (a) of this section, such questions shall be decided:

(1) In the case of functions transferred from a Federal officer or agency, by the Director of the Office of Management and Budget; and

(2) In the case of other functions (A) by the Council, or in such manner as the Council shall provide, if such functions are transferred to the Council, and (B) by the Mayor if such functions are transferred to him or to any other officer or agency.

(c) Any of the personnel authorized to be transferred to the Council, the Mayor, or any agency by this section which the Council or the head of such agency shall find to be in excess of the personnel necessary for the administration of its or his function shall, in accordance with law, be retransferred to other positions in the District or Federal Government or be separated from the service.

(d) No officer or employee shall, by reason of his transfer to the District government under this chapter or his separation from service under this chapter, be deprived of any civil service rights, benefits, and privileges held by him prior to such transfer or any right of appeal or review he may have by reason of his separation from service.

D.C. Code § 1-611.03. Compensation policy; compensatory time off; overtime pay [Formerly § 1-612.3]

(a) Compensation for all employees in the Career, Educational, Legal, Excepted, and the Management Supervisory Services shall be fixed in accordance with the following policy:

(1) Compensation shall be competitive with that provided to other public sector employees having comparable duties, responsibilities, qualifications, and working conditions by occupational groups. For the purpose of this paragraph, compensation shall be deemed to be competitive if it falls reasonably within the range of compensation prevailing in the Washington, D.C., Standard Metropolitan Statistical Area (SMSA); provided, that compensation levels may be examined for public and/or private employees outside the area and/or for federal government employees when necessary to establish a reasonably representative statistical basis for compensation comparisons, or when conditions in the local labor market require a larger sampling of prevailing compensation levels.

(2) Pay for the various occupations and groups of employees shall be, to the maximum extent practicable, interrelated and equal for substantially equal work in accordance with this principle, dental officers shall be paid on the same schedule as medical officers having comparable qualifications and experiences.

(3) Differences in pay shall be maintained in keeping with differences in level of work and quality of performance.

(4) Repealed.

(5) Repealed.

(6) Repealed.

(7) (A) Any full-time permanent, indefinite, or term District government employee who serves in a reserve component of the United States Armed Forces and who has been or will be called to active duty as a result of Operation Enduring Freedom, or in preparation for or as a result of Operation Iraqi Freedom, shall receive, upon application and approval, an amount that equals the difference in compensation between the employee's District government basic pay reduced by the employee's basic military pay. This amount shall not be considered as basic pay for any purpose and shall be paid for any period following the formal inception of Operation Enduring Freedom in 2001, any period following the beginning of the preparation for Operation Iraqi Freedom in 2002 and 2003, or for any period following the formal inception of Operation Iraqi Freedom in 2003, during which the employee is carried in a non-pay status from the time the employee is called into active duty, until the employee is released from active duty occasioned by any of these military conflicts.

(B) The Mayor shall issue rules within 30 days of March 26, 2008, to implement the provisions of this subdivision (7).

(b) The pay of an individual receiving an annuity under any District government civilian retirement system selected for employment in the District government on or after January 1, 1980, shall be reduced by the amount of annuity allocable to the period of employment as a reemployed annuitant. 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.S. § 8331, D.C. Code §§ 1-626.03 through 1-626.12, § 5-723(e), the Judges' Retirement Fund, established by § 1-714, or the Retired Police Officer Public Schools Security Personnel Deployment Amendment Act of 1994.

(c) Repealed.

(d) Notwithstanding any other provisions of law or regulation, effective April 15, 1986, any employee who is covered by the provisions of the Fair Labor Standards Act of 1938 (29 U.S.C.S. § 201 et seq.) ("FLSA"), and is eligible to earn compensatory time may receive compensatory time off at a rate not less than 1 and one-half hours for each hour of employment for which overtime compensation is required under the FLSA, in lieu of paid overtime compensation.

(1) If the work of an employee for which compensatory time off may be provided includes work in a public safety activity, an emergency response activity, or a seasonal activity, the employee may accrue not more than 480 hours of compensatory time for hours worked after April 15, 1986. If the work of an employee does not include work in a public safety activity, an emergency response activity, or a seasonal activity, the employee may accrue not more than 240 hours of compensatory time for hours worked after April 15, 1986.

(2) Any employee who, after April 15, 1986, has accrued the maximum number of hours of compensatory time off allowed under paragraph (1) of this subsection shall, for additional hours of work, be paid overtime compensation.

(e) Notwithstanding any other provision of District law or regulation, effective on the first day of the first pay period beginning one month after November 25, 1993, entitlement to and computation of overtime for all employees of the District government, except those covered by a collective bargaining agreement providing otherwise, shall be determined in accordance with, and shall not exceed, the overtime provisions of section 7 of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C.S. § 207. No person shall be entitled to overtime under this section unless that person is either entitled to overtime under the Fair Labor Standards Act or is entitled to overtime under the personnel rules of the District of Columbia as they existed at the time of enactment of this section.

(f) (1) Uniformed members of the Metropolitan Police Department at the rank of Inspector and above shall not receive overtime compensation for work performed in excess of a 40-hour administrative workweek, excluding rollcall.

(2) (A) Except as provided in subparagraph (B) of this paragraph, uniformed members of the Fire and Emergency Medical Services Department at the rank of Assistant Fire Chief and above shall not receive overtime compensation for work performed in excess of 40 hours in an administrative workweek and in excess of 48 hours in a workweek for those uniformed members of the Fire and Emergency Medical Services Department at the rank of Assistant Fire Chief and above in the Firefighting Division.

(B) For fiscal years 2011, 2012, and 2013, uniformed members of the Fire and Emergency Medical Services Department at the rank of Battalion Fire Chief and above shall not receive overtime compensation for work performed in excess of 40 hours in an administrative workweek and in excess of 48 hours in a workweek for those uniformed members of the Fire and Emergency Medical Services Department at the rank of Battalion Fire Chief and above in the Firefighting Division.

(3) Uniformed members of the Metropolitan Police Department at the rank of Inspector and above and uniformed members of the Fire and Emergency Medical Services Department at the rank of Assistant Fire Chief and above shall not be suspended for disciplinary actions for less than a full pay period.

(4) (A) For fiscal years 2011, 2012, and 2013, and except as provided in subparagraph (B) of this paragraph, no officer or member of the Fire and Emergency Medical Services Department who is authorized to receive overtime compensation under this subsection may earn overtime in excess of $ 20,000 in a fiscal year.

(B) This paragraph shall not apply to a member of the Fire and Emergency Medical Services Department who is classified as a Heavy Mobile Equipment Mechanic or a Fire Arson Investigator Armed (Canine Handler).

(C) Notwithstanding any other provision of this paragraph, the exemption to the overtime limitation for the Fire Arson Investigator Armed (Canine Handler) set forth in subparagraph (B) of this paragraph shall apply retroactively to fiscal year 2011.

D.C. Code § 1-803.01. Obligation of federal government to make benefit payments [Formerly § 1-762.1]

(a) In general. -- In accordance with the provisions of this chapter, the federal government shall make federal benefit payments associated with the pension plans for police officers, firefighters, and teachers of the District of Columbia.

(b) No reversion of federal responsibility to District. -- At no point after the effective date of this chapter may the responsibility or any part thereof assigned to the federal government under subsection (a) of this section for making federal benefit payments revert to the District of Columbia.

D.C. Code § 1-815.01. Judicial review [Formerly § 1-768.1]

(a) In general. -- A civil action may be brought:

(1) By a participant or beneficiary to enforce or clarify rights to benefits from the Trust Fund or Federal Supplemental Fund under this chapter;

(2) By the Trustee:

(A) To enforce any claim arising (in whole or in part) under this chapter or the contract; or

(B) To recover benefits improperly paid from the Trust Fund or Federal Supplemental Fund or to clarify a participant's or beneficiary's rights to benefits from the Trust Fund or Federal Supplemental Fund; and

(3) By the Secretary to enforce any provision of this chapter or the contract.

(b) Treatment of Trust Fund. -- The Trust Fund may sue and be sued as an entity.

(c) Exclusive remedy. -- This subchapter shall be the exclusive means for bringing actions against the Trust Fund, the Trustee, or the Secretary under this chapter.

D.C. Code § 1-815.02. Jurisdiction and venue [Formerly § 1-768.2]

(a) In general. -- The United States District Court for the District of Columbia shall have exclusive jurisdiction and venue, regardless of the amount in controversy, of:

(1) Civil actions brought by participants or beneficiaries pursuant to this chapter, and

(2) Any other action otherwise arising (in whole or part) under this chapter or the contract.

(b) Review by Court of Appeals. -- Notwithstanding any other provision of law, any order of the United States District Court for the District of Columbia issued pursuant to an action described in subsection (a) of this section that concerns the validity or enforceability of any provision of this chapter or seeks injunctive relief against the Secretary or Trustee under this chapter shall be reviewable only pursuant to a notice of appeal to the United States Court of Appeals for the District of Columbia Circuit.

(c) Review by Supreme Court. -- Notwithstanding any other provision of law, review by the Supreme Court of the United States of a decision of the Court of Appeals that is issued pursuant to subsection (b) of this section may be had only if the petition for relief is filed within 20 calendar days after the entry of such decision.

(d) Restrictions on declaratory or injunctive relief. -- No order of any court granting declaratory or injunctive relief against the Secretary or the Trustee shall take effect during the pendency of the action before such court, during the time an appeal may be taken, or (if an appeal is taken or petition for certiorari filed) during the period before the court has entered its final order disposing of the action.

D.C. Code § 5-701. Definitions [Formerly § 4-607]

Wherever used in this subchapter:

(1) The term "member" means any officer or member of the Metropolitan Police force, of the Fire Department of the District of Columbia, of the United States Park Police force, of the United States Secret Service Uniformed Division, and any officer or member of the United States Secret Service Division to whom this subchapter shall apply, but does not include an officer or member of the United States Park Police force, of the United States Secret Service Uniformed Division, or of the United States Secret Service Division, whose service is employment for the purposes of title II of the Social Security Act and chapter 21 of the Internal Revenue Code of 1986, and who is not excluded from coverage under chapter 84 of title 5, United States Code, by operation of § 8402 of such title.

(2) The terms "disabled" and "disability" mean disabled for useful and efficient service in the grade or class of position last occupied by the member by reason of disease or

injury, not due to vicious habits or intemperance as determined by the Board of Police and Fire Surgeons, or willful misconduct on his part as determined by the Mayor.

(3) The term "widow" means the surviving wife of a member or former member if:

(A) She was married to such member or former member:

(i) While he was a member; or

(ii) For at least 1 year immediately preceding his death; or

(B) She is the mother of issue by such marriage.

(4) The term "widower" means the surviving husband of a member or former member if, in the case of a member who was an officer or member of the United States Park Police force, the United States Secret Service Uniformed Division, or the United States Secret Service Division, or the surviving husband of a member or former member who was a member or officer of the Metropolitan Police force or the Fire Department of the District of Columbia if:

(A) He was married to such member or former member:

(i) While she was a member; or

(ii) For at least 1 year immediately preceding her death; or

(B) He is the father of issue by such marriage.

(5) (A) The term "child" means an unmarried child, including:

(i) An adopted child; and

(ii) A stepchild or recognized natural child who lives with the member in a regular parent-child relationship, under the age of 18 years; or

(iii) Such unmarried child regardless of age who, because of physical or mental disability incurred before the age of 18, is incapable of self-support.

(B) The term "student child" means an unmarried child who is a student between the ages of 18 and 22 years, inclusive, and who is regularly pursuing a full-time course of study or training in residence in a high school, trade school, technical or vocational institute, junior college, college, university, or comparable recognized educational institution.

(6) The term "basic salary" means regular salary established by law or regulation, including any differential for special occupational assignment, but shall not include

overtime, holiday, or military pay.

(7) The term "annuitant" means any former member who, on the basis of his service, has met all requirements of this subchapter for title to annuity and has filed claim therefor.

(8) The term "survivor" means a person who is entitled to annuity under this subchapter based on the service of a deceased member or of a deceased annuitant.

(9) The term "survivor annuitant" means a survivor who has filed claim for annuity.

(10) The term "police or fire service" means all honorable service in the Metropolitan Police Department, United States Secret Service Uniformed Division, Fire Department of the District of Columbia, the United States Park Police force, and the United States Secret Service Division coming under the provisions of this subchapter.

(11) The term "military service" means honorable active service in the Army, Navy, Air Force, Marine Corps, or Coast Guard of the United States, but shall not include service in the National Guard except when ordered to active duty in the service of the United States.

(12) The term "Mayor" means the Mayor of the District of Columbia or his designated agent or agents.

(13) The term "service" means employment which is creditable under § 5-704.

(14) The term "government" means the executive, judicial, and legislative branches of the United States government, including government owned or controlled corporations and Gallaudet College, and the municipal government of the District of Columbia.

(15) The term "government service" means honorable active service in the executive, judicial, or legislative branches of the United States government, including government owned or controlled corporations, and Gallaudet College, and the municipal government of the District of Columbia, and for which retirement deductions, other than social security deductions, were made.

(16) The term "department" means any part of the executive branch of the United States government, or any part of the government of the District of Columbia whose members come under this subchapter.

(17) The term "average pay" means the highest annual rate resulting from averaging the member's rates of basic salary in effect over any 36 consecutive months of police or fire service in the case of a member who is an officer or member of the Metropolitan Police force or the Fire Department of the District of Columbia and who first becomes such a member after the end of the 90-day period beginning on November 17, 1979, or over any 12 consecutive months of police or fire service in the case of any other member, with each rate weighted by the time it was in effect, except that if the member retires under §

5-710 and if on the date of his retirement under the section he has not completed 12 consecutive months or 36 consecutive months, as the case may be, of police or fire service, such term means his basic salary at the time of his retirement.

(18) The term "adjusted average pay" means the average pay of a member who was an officer or member of the United States Secret Service Uniformed Division, the United States Secret Service Division, the Metropolitan Police force or the Fire Department of the District of Columbia increased by the per centum increase (adjusted to the nearest one tenth of 1%) in the Consumer Price Index for All Urban Consumers, published by the Bureau of Labor Statistics, between the month in which such member retires and the month immediately prior to the month in which such member dies; except that in the case of members hired on or after the first day of the first pay period that begins after October 29, 1996, the increase shall not exceed 3% per annum.

(19) The term "full range of duties" means the ability of a sworn member of the Metropolitan Police Department or the Fire and Emergency Medical Services Department to perform all of the essential functions of police work or fire suppression as determined by the established policies and procedures of the Metropolitan Police Department or the Fire and Emergency Medical Services Department and to meet the physical examination and physical agility standards established under §§ 5-107.02a and 5-451.

D.C. Code § 5-723. Accruement and payment of annuities; persons who may accept payment; waiver; reduction [Formerly § 4-629]

…
(e) 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. The provisions of this subsection shall not apply to an annuitant employed by the District of Columbia government under the Retired Police Officer Redeployment Amendment Act of 1992 or the Detective Adviser Act of 2004. The provisions of this subsection shall not apply to an annuitant employed by the D.C. Public Schools under the Retired Police Officer Public Schools Security Personnel Deployment Amendment Act of 1994.

D.C. Code § 5-733. Eligibility for benefits under federal law [Formerly § 4-633]

Notwithstanding any other provision of law, no person entitled to receive any benefit under subchapter I of this chapter on account of death incurred, an injury received, or disease contracted, or an injury or disease aggravated, in the performance of duty shall be entitled, because of the same death, injury, disease, or aggravation, to benefits under subchapter I of Chapter 81 of Title 5, United States Code.

D.C. Code § 51-107. Determination of amount and duration of benefits [Formerly § 46-108]

…
(c) (1) To qualify for benefits an individual must have:

(A) Been paid wages for employment of not less than $ 1300 in 1 quarter in his base period;

(B) Been paid wages for employment of not less than $ 1950 in not less than 2 quarters in such period; and

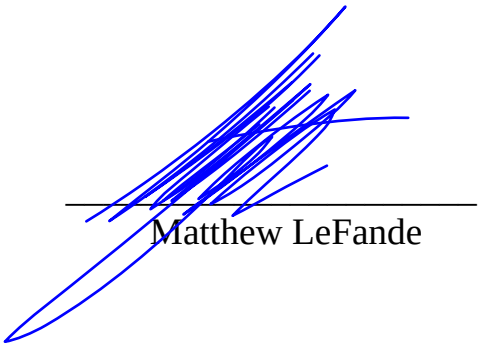
(C) Received during such period wages the total amount of which is equal to at least one and one-half times the amount of his wages actually received in the quarter in such period in which his wages were the highest.

(2) If a claimant satisfies the above except that he received wages over the amount necessary to become eligible for maximum benefits, in the quarter in which his wages were the highest, then the additional wages received in such quarter shall not be considered in determining eligibility. Notwithstanding the provisions of paragraph (1)(C) of this subsection, any otherwise qualified individual, the total amount of whose wages during such period is less than the amount required to have been received during such period under such paragraph, may qualify for benefits, if the difference between the amounts so required to have been received and the total amount of his wages during such period does not exceed $ 70, but the amount of his weekly benefit, as computed under subsection (b) of this section, shall be reduced by $ 1 if such difference does not exceed $ 35, or by $ 2 if such difference is more than $ 35. Wages received by an individual in the period intervening between the end of his last base period and the beginning of his last benefit year shall not be available for benefit purposes in a subsequent benefit year unless he has, subsequent to the commencement of such last benefit year, performed services for which he received wages for employment as defined in this subchapter, in an amount equal to at least 10 times the weekly benefit amount for which he qualifies in such last benefit year. Benefits payable to an individual with respect to a week shall be reduced, under regulations prescribed by the Board, by any amount received or applied for with respect to such week as a retirement pension or annuity under a public or private retirement plan or system provided, or contributed to, by any base period employer; except that no reduction shall be made under this sentence for any amount received under title II of the Social Security Act. For benefit years beginning on or after July 1, 2004, benefits payable to an individual who applied for or is receiving a retirement pension or annuity under a public or private retirement plan or system provided or contributed to by any base period employer shall, under duly prescribed regulations, be reduced (but not below zero) by the prorated weekly amount of such retirement pension or annuity which is reasonably attributable to such week, provided that the claimant has not made contributions to the pension or annuity. An amount received with respect to a period

other than a week shall be prorated by weeks. When an individual's weekly benefit amount is reduced by a pension, the individual's maximum weekly benefit amount shall be deducted from his total amount of benefits determined pursuant to subsection (d) of this section. Benefits payable to an individual with respect to a week shall be reduced by the amount of wages received in lieu of notice of dismissal, defined as dismissal payments that the employer is not legally required to make.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two copies of the foregoing Opening Brief and Joint Appendix were served via Appellate ECF and via United States Postal Service Priority Mail, postage prepaid, to the District of Columbia Solicitor General, this ninth day of November, 2012.



Matthew LeFande