UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DISTRICT OF COLUMBIA'S REPLY

Pursuant to LCvR 7(d), defendant the District of Columbia ("the District") hereby briefly replies to plaintiffs' Opposition to Defendant's Motion to Dismiss.

I. Introduction & Background

The Court should dismiss plaintiffs' claims. Plaintiffs' penchant for extended block quotes from old cases or those from other jurisdictions—or both—remains profoundly unhelpful, and does not substitute for effective legal argument.

Plaintiffs fail to distinguish (and in most cases fail even to cite) the controlling cases cited by the District in its dispositive motion. Worse, plaintiffs fail to address several major arguments in the District's motion (those addressing the FLSA calculations, the D.C. Whistleblower Protection Act, and defamation), hence plaintiffs have waived their opposition to them.

II. Argument

A. Plaintiffs Have Waived Their Arguments Regarding the FLSA, the D.C. Whistleblower Protection Act, and Defamation.

In its Motion, the District made a number of arguments on plaintiffs' surviving FLSA claims, and filed concurrently a Notice of its Calculation of FLSA Back Pay for the three affected plaintiffs.[1] Plaintiffs failed to address—or even mention—these arguments or amounts in their Opposition, hence they are conceded. *See, e.g.*, *FDIC v. Bender*, 127 F.3d 58, 67–68 (D.C. Cir. 1997) ("It is well understood in this Circuit that when a plaintiff files an opposition to a motion to dismiss addressing only certain arguments raised by the defendant, a court may treat those arguments that the plaintiff failed to address as conceded."); *Henneghan v. District of Columbia*, 916 F.Supp.2d 5, 9 (D.D.C. 2013) (granting motion to dismiss where plaintiff failed to address the substantive arguments made by the District) (citing *Rosenblatt v. Fenty*, 734 F.Supp.2d 21, 22 (D.D.C. 2010) (granting motion to dismiss as conceded where plaintiff failed to address defendant's arguments) and *Elkins v. District of Columbia*, 610 F.Supp.2d 52, 59 (D.D.C. 2009) (same)).

Similarly, plaintiffs fail to address the arguments advanced by the District concerning their D.C. Whistleblower Protection Act claims and plaintiff Cannon's defamation claim. As such, these, too, are conceded, for the same reasons.

[1] That Notice of Calculation (Doc. No. 52) stated that "[o]nce this Court enters judgment on the FLSA claim, plaintiff Ford-Haynes will be owed back pay totaling $12,408.38; plaintiff Neill will be owed $1,412.48; and plaintiff Weeks will be owed $6,715.04."

B. The Court Should Not Exercise Jurisdiction.

Plaintiffs argue that the Court's jurisdiction here is somehow "mandatory" and that the District has "waived" certain arguments on jurisdiction. *See* Opp. at 1 & n.1. Plaintiffs are incorrect. Supplemental jurisdiction "is a doctrine of discretion, not a plaintiff's right." *Shekoyan v. Sibley Int'l*, 409 F.3d 414, 423 (D.C. Cir. 2005) (quoting *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966)).

It is hornbook law, of course, that "a party does not waive a jurisdictional objection by failing to raise it," just as parties cannot confer jurisdiction by consent. *In re Lorazepam & Clorazepate Antitrust Litig.*, 631 F.3d 537, 540 (D.C. Cir. 2011) (citing *Capron v. Van Noorden*, 6 U.S. (2 Cranch) 126 (1804) and *Ins. Corp. of Ireland v. Compagnie de Bauxites de Guinee*, 456 U.S. 694, 702 (1982)). *See also, e.g., M.R. v. District of Columbia*, 841 F.Supp.2d 262, 267 (D.D.C. 2012) ("[P]arties cannot waive or concede subject matter jurisdiction.") (citing *Gardner v. United States*, 211 F.3d 1305, 1310 (D.C. Cir. 2000)).

As plaintiffs correctly note, the Court may decline to exercise supplemental jurisdiction over a local-law claim if

> (1) the claim raises a novel or complex issue of State law,
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
> (3) the district court has dismissed all claims over which it has original jurisdiction, or
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C. § 1367(c).

Each of these reasons is sufficient for the Court to decline to exercise supplemental jurisdiction. Here, at least two—and soon three—of the four possible reasons to decline exist. There can be little question that the interpretation of D.C. Official Code § 5-723 raises a "novel

or complex" issue of District law, as it has never before been interpreted by a local court. 28 U.S.C. § 1367(c)(1). Moreover, only six of the 15 counts of the Second Amended Complaint ("SAC") are federal or constitutional claims, hence the local-law claims "substantially predominate" over them, by sheer numbers if nothing else. *Id*., § 1367(c)(2). Finally, once the Court determines the appropriate amount of FLSA damages for the three affected plaintiffs, there will be no extant federal claims. *Id*., § 1367(c)(3).

Of course, even if the Court *were* to decide to exercise supplemental jurisdiction, the Court should dismiss all remaining claims herein, based on the arguments presented by the District.

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

Plaintiffs' tax arguments remain largely unintelligible, and presented at great length. The Supreme Court's decision in *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803 (1989) remains irrelevant for purposes of this case. There, the Supreme Court did *not* (as plaintiffs argue) hold that "annuity payments are compensation subject to the Public Tax Act," *see* Opp. at 9 n.2, but that Michigan could not exempt its own retirement benefits from state taxation, and also continue to tax federal retirement benefits. *Davis*, 489 U.S. at 817. Even if plaintiffs are correct that their retirement benefits are "federal," the offset here does not "tax" those benefits, but merely reduces their *District* salaries. That the offset is measured by the amount of the respective pension benefit is neither here nor there. *See Cannon v. District of Columbia*, 717 F.3d 200, 205 (D.C. Cir. 2013) ("There is no connection between their pensions and the work they currently perform for the District . . . ."). Hence *Davis* remains irrelevant.

As discussed at great length previously, the *source* of plaintiffs' retirement benefits is immaterial. Plaintiffs continue to cling to the mistaken belief that because some portion of their retirement benefits are "federal," they are entitled to invoke D.C. Official Code § 1-815.02(a) as a basis for this Court's "exclusive" jurisdiction. Opp. at 11. Here, too, plaintiffs are incorrect.

As the District has argued (repeatedly), that section simply provides that the United States District Court for the District of Columbia has jurisdiction over civil actions by participants or beneficiaries of the federally-funded District retirement funds, as to any disputes over amounts due or claims made regarding those annuity payments. The law references the procedures for determining the eligibility for, and amounts of claims, and how to resolve disputes. *See id*., §§ 1-805.01,1-805.02. Here, the plaintiffs' annuities have not been changed or threatened in any way, at any point in these proceedings, hence plaintiffs' claims plainly do not fall within the ambit of that statute, and thus the Court does not have jurisdiction over plaintiffs' claims. The disputed actions taken by the District applied *only* to District funds (*i.e.*, plaintiffs' salaries), not to any federal (or other) annuity earned as a result of previous District service. That provision of law is simply inapplicable here, no matter how many times plaintiffs cite it.

Plaintiffs' assertion that "the District of Columbia is imposing the offset against annuity payments paid from the United States Treasury's Trust Fund, not funds paid for or administered by the District of Columbia[,]" Opp. at 16, remains incorrect as a matter of law. The District has not touched (and could not touch) the plaintiffs' annuity payments. *Cf. id*. at 17 (discussing the District's hypothetical withholding of plaintiffs' annuity benefits; "which the District has no means to actually do, since such benefits are paid directly by the United States Treasury"). The offsets here were applied *only* to plaintiffs' salaries, which were (and are) paid from District

funds. The District is "withholding its own money," hence the offset is not a "tax" on plaintiffs' annuity payments, federal or otherwise.

D. The CMPA Preempts Plaintiffs' Claims.

Plaintiffs argue, apparently, that the District's Comprehensive Merit Personnel Act ("CMPA") does not apply here, as they are "prohibited" from "claim splitting." *See* Opp at 18–20.[2] This nonsensical assertion is wrong, and fails to address the District's arguments.

Indeed, plaintiffs fail to cite or distinguish the cases referenced by the District.[3] Plaintiffs assert that "[t]he D.C. Circuit has never asserted that the CMPA deprives the federal courts of jurisdiction for CMPA claims[.]" Opp. at 20 (citing *Johnson v. District of Columbia*, 552 F.3d 806, 811 n.2, 814 n.8 (D.C. Cir. 2008)). But the Circuit, in that case, said that such a question did not need to be answered: "Without resolving whether this D.C. exhaustion requirement is better understood as jurisdictional or nonjurisdictional in federal court, we have no trouble concluding that it applies here." *Johnson*, 552 F.3d at n.2. The Circuit then affirmed the trial court's *dismissal* of plaintiffs' claims of a violation of due process, wrongful termination, defamation, and intentional infliction of emotional distress, for failure to exhaust the administrative remedies provided in the CMPA. *Id*. at 814. These same results should follow here.

Plaintiffs also argue:

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[2] Plaintiffs cite *Gilles v. Ware*, 615 A.2d 533, 549 (D.C. 1992) for this proposition. Notwithstanding that that case is not controlling (or even persuasive) here, plaintiffs do not cite the court's opinion, but the concurring opinion of one panel member (Wagner, J.).

[3] *See, e.g., Audrick Payne v. District of Columbia*, 592 F.Supp.2d 29, 35 (D.D.C. 2008) ("'[F]ederalism and comity considerations' favor the application of exhaustion requirements regardless of how they are characterized.") (quoting *Washington v. District of Columbia*, 538 F.Supp.2d 269, 275 (D.D.C. 2008) (citing *Moore v. City of East Cleveland*, 431 U.S. 494, 540 (1977)).

> The circumstances of this case dictate the exact opposite result demanded by the District of Columbia herein. See *Lightfoot v. Dist. of Columbia*, 2006 U.S. Dist. LEXIS 1358 at 29 n.8 (D.D.C. 2006) [2006 WL 54430 (D.D.C. Jan. 10, 2006)] (applying supplemental jurisdiction analysis to what the Court had already identified as claims subject to CMPA).

Opp. at 19.

But the *Lightfoot* court *granted* the defendant's motion for judgment on the pleadings and dismissed, because plaintiff had failed to exhaust his administrative remedies under the CMPA. *See Lightfoot*, 2006 WL 54430, at *9 & n.8 ("[P]laintiff does not allege that he has made any effort to have his breach of contract claims addressed by the [administrative agency] before coming to this Court. Accordingly, the claim cannot be sustained. [E]ven if this Court could conclude that the plaintiff's breach of contract claims were ripe for judicial review, it is doubtful that this Court would have jurisdiction over these claims."). *See also Powell v. American Fed'n of Teachers*, 883 F.Supp.2d 183, 187 (D.D.C. 2012) (holding that "the Complaint must be dismissed for lack of jurisdiction" because plaintiff failed to exhaust his administrative remedies under the CMPA) (citing, *inter alia*, *Lightfoot*, 2006 WL 54430, at *8).

Plaintiffs argue that they can maintain a breach-of-contract claim despite the CMPA, but ignore the case law to the contrary. *See, e.g.*, *AFGE v. DCWASA*, 942 A.2d 1108, 1113 (D.C. 2007) ("a plaintiff cannot 'bypass' the [CMPA's administrative remedies] by arguing that the complaint also asserts a common law cause of action such as breach of contract.") (quoting *Feaster v. Vance*, 832 A.2d 1277, 1282 (D.C. 2003)); *Moss v. Stockard*, 706 A.2d 561, 564–65 (D.C. 1997) (affirming dismissal of breach-of-contract claim based on "exclusive remedies" of CMPA).

E. The Law of the Case Doctrine Mandates Dismissal.

Plaintiffs argue that their breach of contract and other common-law claims survive, but (as discussed above) fail to overcome the CMPA's preemption of those claims.[4] Plaintiffs also assert that the law of the case doctrine is not applicable here, but fail to cite or distinguish *any* of the numerous, controlling and persuasive cases cited by the District. *See, e.g., Sherley v. Sebelius*, 689 F.3d 776, 780–81 (D.C. Cir. 2012); *LaShawn A. v. Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996) (*en banc*); *Larsen v. U.S. Navy*, 887 F.Supp.2d 247, 251 (D.D.C. 2012).

Plaintiffs urge that the law-of-the-case doctrine "only applies to the prior rulings of a different judge in the same case." Opp. at 30. This is incorrect and, not surprisingly, plaintiffs cannot present any controlling case in support of the proposition. *Cf., e.g., United States v. Science Applications Int'l Corp. ("SAIC")*, ___ F.Supp.2d ___, 2013 WL 3791423, *4 (D.D.C. July 22, 2013) ("The law of the case "'doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.'") (quoting *Pepper v. United States*, ___ U.S. ___, 131 S.Ct. 1229, 1250 (2011) (in turn quoting *Arizona v. California*, 460 U.S. 605, 618 (1983)).

Oddly, plaintiffs apparently urge this Court to ignore or overrule the Circuit's affirmance of this Court's grant of summary judgment to the District on plaintiffs' "heavily fact-based retaliation claims[.]" Opp. at 33. But not only is the Court obviously prohibited from taking that action, "[i]f an attempt is made to press the same fact issue for a second time on an unchanged

[4] As to constructive termination, *see, e.g., Allard v. Holder*, 840 F.Supp.2d 269, 277 (D.D.C. 2012) (to show involuntary resignation, plaintiff must show "[1] an agency imposes the terms of an employee's resignation, [2] the employee's circumstances permit no alternative but to accept, and [3] those circumstances were the result of improper acts of the agency.") (quoting *Keyes v. District of Columbia*, 372 F.3d 434, 439 (D.C. Cir. 2004)). The District avers that plaintiffs cannot meet all the elements of this test, even assuming that the claim was not preempted by the CMPA. *See id*. ("These three plaintiffs may have faced difficult decisions, but not coercion.").

record, law-of-the-case reluctance approaches maximum force." *SAIC*, *supra*, at *4 (quoting 18B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, FED. PRAC. & PROC. § 4478.5 at 808 (2d ed. 2002)). The "factual issues" resolved in the District's favor by this Court (and affirmed by the Circuit) underpin *all* of plaintiffs' retaliation, defamation, and D.C. Whistleblower Act claims, and should not be revisited. *See Mpoy v. Fenty*, 901 F.Supp.2d 144, 150 (D.D.C. 2012) ("Under the law-of-the-case doctrine, 'a court involved in later phases of a lawsuit should not re-open questions decided . . . by that court or a higher one in earlier phases.'") (quoting *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 739 (D.C. Cir. 1995)).

Plaintiffs also argue that their common-law claims are based on allegations that "they were promised that no offset would be applied to them if re-employed by the District of Columbia and that the Plaintiffs each reasonably relied upon such promise in entering into re-employment with the District." Opp. at 25 (citing First Amended Complaint). But the First Amended Complaint is no longer operative here.

Plaintiffs argue that they have, in fact, made the "definite representations" required by case law to state a claim for detrimental reliance/promissory estoppel. *Id*. at 26 ("The Plaintiffs specifically inquired and the District's agents specifically stated that the Plaintiffs would not be subject to any offset if they were re-employed with the District of Columbia."); *id*. at 28 (as to intentional/negligent misrepresentation). These allegations, however, are not before the Court. As "proof" of these assertions, plaintiffs cite not to the Second Amended Complaint, but to "ECF Docket # 18" and the exhibits thereto. *Id*. But that document is *the District's* original Motion to Dismiss, and neither it nor the attached exhibits actually contain the allegations put forth by plaintiffs. Plaintiffs thus fail to state a claim for detrimental reliance/promissory estoppel or for intentional/negligent misrepresentation.

F. Plaintiffs Failed to Give Proper Notice.

Finally, plaintiffs' argument regarding the requirements of D.C. Official Code § 12-309 remains incorrect. Plaintiffs continue to insist that, because they provided a copy of the complaint here (to the District's agent authorized to accept service) before it was technically filed in Court, they have satisfied the statute. Opp. at 23. Plaintiffs argue that a copy of an imminent complaint is sufficient here, because it was a "condition precedent" to filing suit, *id*., but this is an irrelevant distinction that does not exist in the case law.

Plaintiffs' claims for unliquidated damages remain barred, for failure to provide the statutorily mandated notice. *See, e.g., Motley-Ivey v. District of Columbia*, 923 F.Supp.2d 222, 229 (D.D.C. 2013) (Section 12-309 notice requirement must be "strictly construed") (citations omitted); *Gaskins v. District of Columbia Housing Auth.*, 904 A.2d 360, 366 (D.C. 2006) ("strict compliance" with section 12-309 is "mandatory").

"Only two types of notice can satisfy the requirements of Section 12-309, however: (1) a written notice to the Mayor of the District of Columbia, or (2) a police report prepared in the regular course of duty." *Blocker-Burnette v. District of Columbia*, 730 F.Supp.2d 200, 204 (D.D.C. 2010). The Court in *Blocker-Burnette* rejected an argument similar to the one made by the instant plaintiffs. There, the Court said service of a complaint is *not* the same as the required written notice to the Mayor, and found that Section 12-309 barred plaintiffs' claims for unliquidated damages. Ms. Blocker-Burnette argued that she had complied with Section 12-309 because she had filed a complaint, and invoked Mayor's Order 2009-91, which designates certain officers to accept service of process on behalf of the Mayor). *Id*. at 204. The Court rejected the argument: "That Order deals with service of process in cases where the Mayor or

District of Columbia has been sued. [P]laintiff has confused Section 12-309's mandatory notice requirements with the requirements of service of process on the Mayor after a suit has been filed." *Id.*

Section 12-309 requires written notice *to the Mayor*, and service of a complaint (either before or after it has been filed) on the Mayor's designated agent is insufficient for purposes of that statutory provision. *Id*. *But cf. Enders v. District of Columbia*, 4 A.3d 457, 468 (D.C. 2010) (notice under section 12-309 was sufficient where plaintiff "sent a letter to the Mayor" five months after the incident).

III. Conclusion

For all the reasons cited herein and previously, the Court should dismiss all claims.

DATE: November 22, 2013

Respectfully submitted,

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