NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 14-7014

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

LOUIS P. CANNON, *et al.*,
APPELLANTS,

V.

DISTRICT OF COLUMBIA,
APPELLEE.

ON APPEAL FROM AN ORDER OF THE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION OF APPELLEE DISTRICT OF COLUMBIA FOR SUMMARY AFFIRMANCE

Appellants appeal from the district court's dismissal of their constitutional and Public Tax Act claims and the remand of their remaining claims to the Superior Court of the District of Columbia. The District of Columbia moves for summary affirmance of the district court's order. It properly dismissed appellants' constitutional claims because their dismissal was previously affirmed by this Court in *Cannon v. District of Columbia*, 717 F.3d 200, 206, 208 (D.C. Cir.). The Public Tax Act claim was dismissed because the salary offset that appellants complain about was not a tax on their pension benefits and, even if it was, the alleged tax did not discriminate based on

the source of their pay. And the court properly remanded appellants' remaining claims to the Superior Court because none conferred exclusive jurisdiction in the district court and there were several bases for refusing to exercise supplemental jurisdiction. The claims against the District are plainly without merit and present no issue worthy of a published decision. *See Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam); *Walker v. Washington*, 627 F.2d 541, 545 (D.C. Cir. 1980) (per curiam).

BACKGROUND

Appellants are six current and former District of Columbia employees whose salaries were offset by pension payments they were receiving as a result of their retirements from the District's Metropolitan Police Department ("MPD"), as required by D.C. Code § 5-723. Doc. 10 ¶¶ 1, 46, 50. On January 26, 2012, they sued for damages, raising a number of constitutional, federal statutory, and District law claims. Doc. 10. On July 6, the district court dismissed their constitutional and federal claims and remanded the remaining District law claims to the Superior Court. Doc. 40. In a prior appeal, this Court affirmed the dismissal of the constitutional claims but remanded the claim brought by three plaintiffs under the Fair Labor Standards Act ("FLSA"). *Cannon*, 717 F.3d at 208. This Court also vacated the dismissal of the District law claims because their dismissal had been based on the absence of any

federal claims, and the Court was remanding the federal FLSA claim. 717 F.3d at 208-09.

Upon remand, on September 24, 2014, appellants filed an amended complaint that reasserted their previous claims and added a claim under the Public Tax Act, 4 U.S.C. § 111(a). Doc. 50. On October 18, the District filed a motion to dismiss all but the FLSA claim. Doc. 51. On January 6, 2014, the district court dismissed appellants' constitutional and Public Tax Act claims and, again, remanded the District law claims to the Superior Court. Doc. 57, 58. On January 27, the court entered an order and judgment amount in favor of the three appellants who had brought claims under the FLSA. Doc. 61.

DISCUSSION

I. Appellants May Not Seek Reconsideration Of Claims Whose Dismissal Has Already Been Affirmed By This Court.

Summary affirmance is warranted on appellants' constitutional claims because this Court has previously affirmed their dismissal, and the doctrine of law of the case precluded appellants from reasserting them in their amended complaint. As the district court found, appellants "misconstrue both the Court of Appeals opinion and the relevant standard for the reconsideration of issues previously decided by a district court and affirmed on appeal." Doc. 57 at 7. The district court directly considered and dismissed all of appellants' constitutional claims, *Cannon v. District of Columbia*, 873 F. Supp. 2d 272, 280-87 (D.D.C. 2012), and on appeal this Court affirmed that

dismissal. *Cannon*, 717 F.3d at 206 ("The district court found the plaintiffs' constitutional claims meritless, and we agree."); *see also id*. at 208 ("We affirm the district court's judgment on the constitutional claims . . . ."). "[L]aw of the case doctrine holds that decisions rendered on the first appeal should not be revisited on later trips to the appellate court." *Crocker v. Piedmont Aviation Inc.*, 49 F.3d 735, 739 (D.C. Cir. 1995). Accordingly, because appellants' constitutional claims are barred by law of the case, the district court's order rejecting appellants' "unjustified attempt to reopen these claims" should be summarily affirmed. Doc. 57 at 7.

II. The Offset Of Appellants' Salaries Was Not A Tax And, Even If It Was, It Did Not Discriminate Based On The Source Of Pay.

The Public Tax Act ("Act"), in relevant part, provides:

> the United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States, . . . 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).

Appellants complained that the District's offset of their salaries by the amount of their pensions violated the anti-discrimination provision of the Public Tax Act. Doc. 50 ¶¶ 98-106. In their view, the offset was a tax on their pensions (funded in part by the United States Treasury) that those receiving pensions from the District of

Columbia Civil Service Retirement System did not incur. Doc. 50 at ¶¶ 99-102. Not so.

First, as the district court found, the offset "does not constitute a tax on plaintiffs' pension benefits earned for work done during the course of their prior employment with the MPD" but, at most, "represents a tax on plaintiffs' current salaries earned for work done at" the District agency that hired them after their retirement. Doc. 57 at 9. Since the offset is applied to the salary, it cannot be a tax against any pension funds (federally funded or otherwise). Doc. 57 at 9 ("[B]ecause plaintiffs' pension benefits were never reduced, they cannot constitute a tax in violation of the Public Tax Act."). Indeed, the district court found that this conclusion was supported, if not compelled, by this Court's holding in the previous appeal that the offset applied to their new salaries for purposes of determining their compensation and thus appellants were trying to have it both ways. Doc. 57 at 10 ("For purposes of the FLSA, [appellants] argued (and the Court of Appeals agreed) that the offset applied to their new salaries such that they were not paid the minimum wage to which they were entitled . . . therefore, plaintiffs cannot not now claim that the offset constitutes a tax on their pension benefits and not a reduction of their [new District] salaries.").

Second, and again as the district court held, even if the offsets were considered taxes on appellants' pension benefits, the alleged taxation does not constitute source

discrimination because the offset applies to police and firefighters' pension benefits regardless of whether they are paid for by federal funds (as pensions for work done on or before June 30, 1997 are) or by District funds (as pensions for work done on or after July 1, 1997 are). Doc. 57 at 10 (explaining that the offset required by D.C. Code § 5-723 "does not differentiate between pre-and post-1997 benefits"). Thus "even under [appellants'] view, non-federal pension benefits—benefits paid for work done after 1997 by the District—are taxed and the alleged discrimination is not based on the federal or non-federal source of the funds." Doc. 57 at 10-11.

For both of those reasons, the district court's dismissal of the Public Tax Act claim was plainly correct and warrants summary affirmance.

III. The District Court Did Not Have Exclusive Jurisdiction Over Any Remaining Claim And Properly Exercised Its Discretion To Decline To Exercise Supplemental Jurisdiction.

Appellants argued that the district court should exercise jurisdiction over the remaining District law claims either because it had exclusive jurisdiction of their claim brought under D.C. Code § 1-815.02(a) or because the Court should exercise supplemental jurisdiction because it had jurisdiction over the FLSA claim on which this Court had directed the entry of judgment in favor of certain appellants. The district court concluded, as it had in the previous iteration of the case, that it did not have exclusive jurisdiction over any District law claim, and it declined appellants'

invitation to exercise supplemental jurisdiction. Those holdings should be summarily affirmed.

Because appellants challenge the reduction of their salaries, as opposed to any reduction in their pensions, the district court properly found that D.C. Code § 1-815.02(a), which vests exclusive jurisdiction in the district court over cases related to federal pension payments, is irrelevant. Doc. 57 at 14. That holding is plainly correct because no appellant's pension benefits (federal, District, or otherwise) are affected at all here. The district court also found that appellants did not provide any reason why it should reconsider its earlier decision (Doc. 40), which also held that D.C. Code § 1-815.02(a) is inapplicable. Doc. 57 at 14.

Having dismissed appellants' federal claims, the district court properly exercised its discretion to again decline to consider their remaining District law claims and to instead remand them to the Superior Court. Doc. 57 at 14-16. That was an appropriate exercise of discretion. First, the district court correctly found "that several of the remaining claims raise novel issues of D.C. law best suited to adjudication in the D.C. Superior Court." Doc. 57 at 15. Next, it appropriately found that the District law claims substantially predominated over the only remaining federal claim—the FLSA claim, on which this Court had directed entry of judgment and for which the only remaining issue at the time was the calculation of damages—such that it would be "imprudent" to exercise supplemental jurisdiction over the District law claims.

Doc. 57 at 16. Accordingly, the district court correctly found that two of the exceptions for exercising supplemental jurisdiction under 28 U.S.C. § 1367 are applicable here, and summary affirmance is appropriate. 28 U.S.C. § 1367(c)(1) & (2).

CONCLUSION

This Court should summarily affirm the order of the district court.

Respectfully submitted,

IRVIN B. NATHAN
Attorney General for the District of Columbia

TODD S. KIM
Solicitor General

LOREN L. ALIKHAN
Deputy Solicitor General

/s/ RICHARD S. LOVE
RICHARD S. LOVE
Senior Assistant Attorney General
Office of the Solicitor General

Office of the Attorney General
441 4th Street, NW, Suite 600S
Washington, D.C. 20001
(202) 724-6635

March 2014

CERTIFICATE OF SERVICE

I certify that on March 24, 2014, an electronic copy of this motion for summary affirmance was served through the Court's ECF system, to:

Matthew August LeFande
4585 North 25th Road
Arlington, VA 22207

/s/ RICHARD S. LOVE
RICHARD S. LOVE