UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LOUIS P. CANNON, *et al*. **Plaintiffs** **v.** **DISTRICT OF COLUMBIA** **Defendant**	**Case Number** **1:12-cv-00133** **Judge Ellen S. Huvelle**

OPPOSITION TO DEFENDANT'S PARTIAL MOTION TO DISMISS OR FOR SUMMARY JUDGMENT

CROSS MOTION FOR PARTIAL SUMMARY JUDGMENT

The Plaintiffs hereby oppose the Defendant's Partial Motion to Dismiss or for Summary Judgment. In support, the Plaintiffs offer the attached Response to the Defendant's Statement of Material Facts, a Memorandum of Points and Authorities in Support, the attendant Exhibits and Affidavits and the entire record herein.

Respectfully submitted, this second day of April, 2012.

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LOUIS P. CANNON, *et al.* **Plaintiffs** **v.** **DISTRICT OF COLUMBIA** **Defendant**	**Case Number** **1:12-cv-00133** **Judge Ellen S. Huvelle**

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF

OPPOSITION TO DEFENDANT'S PARTIAL MOTION TO DISMISS OR FOR SUMMARY JUDGMENT
AND
CROSS MOTION FOR PARTIAL SUMMARY JUDGMENT

The Plaintiffs have opposed the Defendant's Partial Motion to Dismiss or for Summary Judgment and moved for Partial Summary Judgment. 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).

> A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:
>
> (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

> (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

FED. R. CIV. P. 56(c).

In ruling on a motion for summary judgment, the 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. A nonmoving party, however, must establish more than "the mere existence of a scintilla of evidence" in support of its position. *Id*. at 252. To prevail on a motion for summary judgment, the moving party must show that the nonmoving party "fail[ed] to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). By pointing to the absence of evidence proffered by the nonmoving party, a moving party may succeed on summary judgment. *Id*. at 325. In addition, the nonmoving party may not rely solely on allegations or conclusory statements. *Greene v. Dalton*, 164 F.3d 671, 675 (D.C. Cir. 1999); *Harding v. Gray*, 9 F.3d 150, 154 (D.C. Cir. 1993). Rather, the nonmoving party must present specific facts that would enable a reasonable jury to find in its favor. *Greene*, 164 F.3d at 675-76. If the evidence "is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249-50 (internal citations omitted).

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." *Anderson*, 477 U.S. at 250 n.5. Strict compliance with Rule 56(f) affidavits may not be necessary where the circumstances are such that "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," provided that "the nonmoving party has adequately informed the district court that the motion is pre-mature and that more discovery is necessary." *Harrods Ltd. v. Sixty Internet Domain Names*, 302 F.3d 214, 244 (4th Cir. 2002).

I. The Defendant District of Columbia has improperly offset annuity payments it does not make to the Plaintiffs.

The District of Columbia incorrectly asserts that it has authority to offset retirement benefits from the D.C. Police and Fire Retirement System ("PFRS"). ECF Docket # 18 at 5-6 (citing D.C. CODE § 5-723 (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 § 5-723 (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 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.

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. 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, Arthur Anderson & Co. (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.

Therefore, 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.[1] 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. L. 96-122, Sec. 101 (b)(5). As described above, this was not to be the case and responsibility for all pre-1997[2] 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 fails 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 today improperly employs § 5-723 (e) ***to take an offset against annuity payments it does not pay***. The law does not permit this.

[1] 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.

[2] 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 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 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[3] 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 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.

[3] 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"[3]. 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).

The District asserts that the language "[n]otwithstanding any other provision of law" of § 5-723 (e) gives superior effect to the section over D.C. Code § 1-611.03 (b). This is not the case. By action of the Consolidated Appropriations Act of 2008, the United States Congress legislated a superior federal effect to D.C. Act 15-489, stating that D.C. Act 15-489 would only not withstand 5 U.S.C. § 8344 (a).[4] PUB. L. 110-161, Sec. 807, 121 STAT. 1844. Such legislation was consistent with other contemporaneous federal policies removing unnecessary economic disadvantages to reemployed annuitants. *See* PUB. L. 106-65, 113 STAT. 512, Sec. 651 (similar federal legislation repealing offset provisions for military annuitants); 5 U.S.C. § 8344 (i) (waiver of offsets permitted under federal law) and § 8468 (offsets not applicable to positions with a different retirement system).

If the District refuses to apply this exemption to PFRS federal annuitants, 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, it violates 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).

[4] 5 U.S.C. § 8344 (a) refers to reemployment in a federal appointive or elective position and is therefore not applicable to the named Plaintiffs or members of the proposed Plaintiff Class.

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, 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.

While the District of Columbia Retirement Protection Act of 1997 expressly superseded inconsistent language of the District of Columbia Retirement Reform Act of 1979 now found in D.C. Code § 5-723 (e), Section 807 of the Consolidated Appropriations Act of 2008 effectively repealed it insofar as it was applicable to "an individual first employed by the government of the District of Columbia before October 1, 1987". The sole claimed authority for the Defendant's offset is without legal effect today.

The Defendant's present employment of the 1979 language of § 5-723 (e) where such language was not reenacted (or even mentioned) in the District of Columbia Retirement Protection Act of 1997, which amounted to a complete reversal of the entirety of the 1979 Act, now acts as an obstacle to the accomplishment of Congressional objectives in the 1997 Act.

> The pre-emption doctrine, which has its roots in the Supremacy Clause, U.S. Const., Art. VI, cl. 2, requires us to examine congressional intent. Pre-emption may be either express or implied, and "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). Absent explicit pre-emptive language, Congress' intent to supersede state law altogether may be inferred because "[the] scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," because "the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," or because "the object sought to

> be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).
>
> Even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963), or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). *See also Jones v. Rath Packing Co.*, 430 U.S., at 526; *Bethlehem Steel Co. v. New York Labor Relations Bd.*, 330 U.S. 767, 773 (1947).

Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 152-153 (1982).

Where the intent of the District of Columbia Retirement Protection Act of 1997 was to take back over the administration and funding of retirement benefits by the federal government after the District of Columbia abjectly failed in its own responsibilities to administer such programs, the Defendant cannot now point to one remaining vestige of the prior Act to claim its authority to offset salaries against retirement benefits paid solely by the federal government. *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).

Where there is no material fact in dispute regarding the offsets and the Plaintiffs demonstrate that the Defendant was without authority to make them as a matter of law, they are now entitled to summary judgment and the return of their withheld wages.

II. Three Plaintiffs and an unknown number of the proposed Plaintiff Class have justiciable FLSA claims. Plaintiffs Neill, Weeks, and Ford-Haynes are now entitled to summary judgment in their favor as a matter of law.

The Defendant makes a shameless argument entirely predicated upon multiple false statements of Orwellian magnitude to attempt to avoid liability on the Plaintiffs' FLSA claims. 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. The Defendant simply claims that they were not. The pay statements speak for themselves.

> 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 CFR 778.109. *See also* 29 U.S.C. § 207 (e).

The Plaintiffs cannot meet the executive exemptions of FLSA because they do not reach the first threshold of 29 C.F.R. § 541.600, since the illegal offset gutted their salaries. "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…" *Id*.

> The new regulation now "focus[es] on pay received," rather than the terms of the employment agreement, but the regulation still requires that a defendant show that the plaintiff was paid: "(1) a predetermined amount, which (2) was not subject to reduction (3) based on quality or quantity of work performed." [*Baden-Winterwood v. Life Time Fitness*, 566 F.3d 618, 627 (6th Cir. 2009)] at 627. The list of deductions that are excepted from this requirement are provided in subsection (b), and include deductions in pay based on absences for personal reasons or sickness in certain circumstances.

Orton v. Johnny's Lunch Franchise, LLC, 668 F.3d 843 at 10 (6th Cir. 2012) (citing 29 C.F.R. § 541.602 (b)). No deduction excepted under subsection (b) describes anything

similar to the §5-723 (e) offset. Absent meeting this initial threshold, the remainder of the Defendant's argument regarding exempt executive, administrative or professional employees is moot.

By deducting the § 5-723 (e) offset from the pay of Plaintiffs Neill, Weeks and Ford-Haynes such that their "free and clear" pay dropped below minimum wage, the Defendant violated the FLSA and the Plaintiffs are entitled to summary judgment on this issue.

> 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.

29 CFR 531.35.

> In *Brennan v. Veterans Cleaning Service, Inc.*, 5 Cir. 1973, 482 F.2d 1362, this Court held that payroll deductions to compensate for debts owed by an employee to his employer were impermissible if they operated to reduce income below the wage floor prescribed by the FLSA. Congress' express purpose in passing the Act had been to enable a substantial portion of the American work force to maintain a minimum standard of living, *see Brooklyn Savings Bank v. O'Neil*, [324 U.S. 697, 706-707 (1945)]; and we recognized in *Veterans Cleaning* that to accomplish this end, "the minimum wage required must normally be paid 'free and clear' . . . ." 482 F.2d at 1369.

Brennan v. Heard, 491 F.2d 1, 3 (5th Cir. 1974) *rev'd on other grounds by McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 130 n.10 (1988). *Accord, Martinez-Bautista v. D&S Produce*, 447 F. Supp. 2d 954, 963 (E.D. Ark. 2006)*; Mullins v. Howard County*, 730 F. Supp. 667, 673 (D. Md. 1990).

Where there is no genuine dispute of the amount pay actually rendered to Plaintiffs Neill, Weeks and Ford-Haynes, and such pay violates the FLSA as a matter of

law, they are now entitled to summary judgment on this issue, payment of such minimum wages, and an injunction against future withholding bringing their "free and clear" wages below the lawful minimum.

III. The Defendant's defenses against the Plaintiffs' Equal Protection Claims are entirely fact-driven. The Defendant fails to make a justiciable Rule 12(b)(6) defense and fails to offer any Material Facts supporting a Rule 56 summary judgment. Any Rule 56 disposition is inappropriate prior to discovery.

The Defendant asserts that the Plaintiffs' equal protection claims must be thrown out without the benefit of discovery, largely in part upon its false claim that the "Plaintiffs have alleged no facts that, if true, would show that they are similarly situated to the current MPD employees they claim were provided salary increases in anticipation of the application of the offset at issue. *See* FAC ¶ 48." The Plaintiffs have made several allegations that the MPD reemployed annuitants are similarly situated and the Defendant offers no evidence in rebuttal. Indeed, the Defendant does not offer any alleged Material Facts not in Dispute in support of this contention. ECF Docket # 18-13.[5]

Paragraphs 63 through 76 of the Plaintiffs' First Amended Complaint properly assert that Daniel Hickson, Jacob Major and William Sarvis are similarly situated to the Plaintiffs 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. ECF Docket # 10 at 14-16. These allegations alone demonstrate that these persons would be subject to the D.C. Code § 5-723 (e) offset as the Defendant alleges the Plaintiffs are

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

herein.[6] The Defendant offers no rebuttal whatsoever of these allegations or the Plaintiffs' conclusion in this regard.

At this stage of this litigation, the Plaintiffs concede that they do no appear to be part of any traditional suspect classification. What they do assert is that reemployed federal annuitants who are not part of MPD are being subject to the § 5-723 (e) offset while it appears that categorically identical federal annuitants reemployed by MPD are not. Even at the lowest level of scrutiny as asserted by the Defendant, the Defendant fails to offer even a cursory allegation that its "reasons for treating an individual differently bear some rational relationship to a legitimate state purpose." ECF Docket # 18 at 21 (citing *Brandon v. District of Columbia Bd. of Parole*, 823 F.2d 644, 650 (D.C. Cir. 1987)).

Throughout its Memorandum in Support, the Defendant repeatedly fails to identify whether it is entitled to relief under Rule 12 (b)(1), Rule 12 (b)(6) or Rule 56 for the issue at hand. The Defendant further repeatedly fails to make any attempt to apply the standards of these Rules to their argument. Instead, as with the equal protection argument herein, the Defendant only asserts the standard the Plaintiff must meet *at trial*, not to survive a Motion to Dismiss or for Summary Judgment prior to discovery. ECF Docket # 18 at 21-22 (citing *Steffan v. Perry*, 41 F.3d 677, 695 (D.C. Cir. 1994) (*en banc*); *Brandon, supra*; *Noble v. U.S. Parole Com'n*, 194 F.3d 152, 154 (D.C. Cir. 1999); *Women's Prisoners of District of Columbia Dep't of Corrections v. District of Columbia,*

[6] There is no distinction in § 5-723 (e) between annuitants reemployed by MPD and annuitants reemployed by any other District of Columbia agency, other than "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" or "an annuitant employed by the D.C. Public Schools under the Retired Police Officer Public Schools Security Personnel Deployment Amendment Act of 1994", none of which are applicable herein.

93 F.3d 910, 924 (D.C. Cir. 1996)). Not a single one of these cases discusses a plaintiff's pleading requirements to survive Motion to Dismiss or for Summary Judgment without the benefit of discovery. This kind of argumentation at this point in the litigation is vexatious, misleading, unfounded and highly inappropriate.

> When a Rule 12(b)(6) motion is filed, the plaintiff is put on notice that the legal sufficiency of the complaint is being challenged and is often given some insight into the theory upon which that challenge is made. The plaintiff then has an opportunity to develop his claim further by filing an opposition to the Rule 12(b)(6) motion. Alternatively, the plaintiff may seek to show that decision on the motion would be premature before the facts were further drawn out through discovery.

Brandon v. District of Columbia Bd. of Parole, 734 F.2d 56, 59 (D.C. Cir. 1984) (earlier decision in *Brandon*, *supra*, vacating District Court's *sua sponte* dismissal of inmate's claim).

The Defendant fails entirely to provide notice as to what about the Plaintiffs' claims is legally insufficient. The argument offered instead speaks solely to what the Plaintiffs must prove at trial. Absent some notice of a deficiency, the Plaintiffs cannot now attempt to develop their claims further in this Opposition.[7] To do so renders them

[7] The Defendant's claim that the "Plaintiffs effectively have pled themselves out of court by alleging facts that contradict their asserted claims", ECF Docket #18 at 18, is ridiculous. The Plaintiffs are completely entitled to plead causes of action in the alternative. *See* FED. R. CIV. P. 8 (d)(2). The Plaintiffs assert the offset applied to them is illegal and invalid. If it so turns out the offset is valid, the Plaintiffs have been deprived of equal protection of the laws by the Defendant's application of the law to them but not other similarly situated persons. In this regard, Plaintiffs do assert that an illegal offset has been applied to them unequally. The Defendant demonstrates no inconsistency whatsoever in the Plaintiffs' factual allegations. The Defendant's citations offer nothing to contradict the express provisions of Rule 8 and certainly do not support the proposition the Defendant suggests they do. *See Cooley v. Salopian Industries, Ltd.*, 383 F. Supp. 1114, 1116 (D.S.C. 1974) ("[t]he mischievousness that grew up around the doctrine concerning the election of inconsistent remedies was jettisoned with the adoption of the Federal Rules of Civil Procedure on January 3, 1938"); *Midland Forge, Inc. v. Letts Industries, Inc.*, 395 F. Supp. 506, 513 (N.D. Iowa 1975) ("[d]ifferent and inconsistent legal theories for recovery may be plead together with respect to the set of operative facts giving rise to a cause of action, and jurisdiction over the defendant based on one theory allows the court to adjudicate the remaining theories"); *Manhattan Fuel Co. v. New England Petroleum Corp.*, 422 F. Supp. 797, 802 (S.D.N.Y. 1976) ("a party may properly allege alternative or even inconsistent claims or legal theories").

fruitlessly arguing against themselves.

The Defendant's citation to *Tumminello v. United States*, 14 Cl. Ct. 693 (1988) proves the Plaintiffs' need for discovery if in fact, as the Defendant claims, the retired federal annuitants reemployed by DGS are somehow distinguished from the retired federal annuitants reemployed by MPD. "The determination of whether an exemption applies to a given individual, however, is a very fact-specific exercise." *Id*. at 697 (citing *Walling v. General Indus. Co.*, 155 F.2d 711, 713 (6th Cir. 1946) *aff'd* 330 U.S. 545 (1947); *Cervino v. Matthews*, No. 76-1384 (E.D. Pa. July 13, 1978) (bench opinion by BECKER, J.); *Phillips v. Federal Cartridge Corp.*, 69 F. Supp. 522, 524 (D. Minn. 1947) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)); *Wright v. United States Rubber Co.*, 69 F. Supp. 621, 623 (S.D. Iowa 1946)). The Defendant's citation to *Noble*, 194 F.3d 155, fares no better, as *Noble* cites *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985) and asserts the "requirement that government not treat *similarly situated* individuals differently without a rational basis" (emphasis in original). This premise brings us right back to the need for discovery upon the Plaintiffs' equal protection claims and again, the Defendant's citation supports this proposition.

In *Vandermark v. City of New York*, 391 Fed. Appx. 957 (2d Cir. 2010), the Plaintiffs were Environmental Police Officers who had completely different job responsibilities from New York City Police Officers who they complained were paid more. In the instant case, all persons involved are retired Metropolitan Police Officers who were first hired prior to October 1, 1987. The Defendant is correct that the Plaintiffs do not allege entirely "that they perform the same functions, have the same duties and

responsibilities, or the same background or experience, as these MPD employees". ECF Docket # 18 at 23. However, any discrepancy in these qualifying factors is already reflected in the initial salaries paid to the MPD employees. *See* First Amended Complaint at ¶ 48, ECF Docket # 10 at 11 (Hickson paid $129,000, Major paid $100,000 and Sarvis paid $125,000 prior to raises to offset the § 5-723 (e) offset). What the Plaintiffs properly complain of is that the Defendant gave these 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. *Vandermark* is wholly distinguished on this point.

> In *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796 (6th Cir. 1994), this court explained that the plaintiff was simply "required to prove that all of the *relevant* aspects of his employment situation were 'nearly identical' to those of [the non-minority's] employment situation." *Id*. at 802 (emphasis added); *see also Holifield v. Reno*, 115 F.3d 1555, 1562 (11th Cir. 1997) (citing [*Mitchell v. Toledo Hosp*., 964 F.2d 577 (6th Cir. 1992)] in support of the proposition that "to make a comparison of the plaintiff's treatment to that of non-minority employees, the plaintiff must show that he and the employees are similarly situated in all *relevant* respects" (emphasis added)); *Neuren v. Adduci, Mastriani, Meeks & Schill*, 43 F.3d 1507, 1514 (D.C. Cir. 1995) (quoting *Pierce*); *Byrd v. Ronayne*, 61 F.3d 1026, 1032 (1st Cir. 1995) ("A disparate treatment claimant bears the burden of proving that she was subjected to different treatment than persons similarly situated in all relevant aspects." (quotation omitted)). *Mitchell* itself only relied on those factors relevant to the factual context in which the *Mitchell* case arose -- an allegedly discriminatory disciplinary action resulting in the termination of the plaintiff's employment.

Ercegovich v. Goodyear Tire & Rubber Co., 154 F.3d 344, 352 (6th Cir. 1998) (parallel citation omitted).

The only factors relevant to the 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 Defendant's public policy argument is disingenuous on two points, first the Defendant fails 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 is 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 are federal annuitants now employed by the District of Columbia. The District of Columbia's offset of their salaries for pensions the District of Columbia does not pay makes 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. 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 is not entitled to any summary adjudication of this issue.

IV. For the reasons set forth in Section I *supra*, the District of Columbia has taken private property for public use without due process or just compensation in violation of the Fifth Amendment.

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 have been taken absent any due process or compensation, in violation of the Fifth and Fourteenth Amendments[8] 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.

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.

[8] 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).

That the Plaintiffs have an entitlement by law to their ordinary pay for *work already performed* is axiomatic. Further, regardless of whether they are at-will employees or not, if they continue such employment, they are 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* ECF Docket # 18-7. 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. 319 (1976)]; 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).

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 Defendant is not entitled to any summary adjudication on this point.

V. The Plaintiffs First Amendment Retaliation Claims are entirely a matter of factual dispute and survive any Rule 12(b)(6) challenge. Where an agency head was expressly terminated by another agency head, there can be no claim that the termination was not the result of an official policy of the Defendant.

a. Cannon's termination was by a policy-level official.

The Plaintiffs allege that Plaintiff Cannon was terminated on February 8, 2012 and that such termination was in retaliation for the filing of the instant lawsuit. Supp. Compl. at ¶¶ 7, 14-18, ECF Docket # 16 at 2, 3. In support of their allegation that Cannon was terminated was the result of an official policy of the Defendant, the Plaintiffs have produced a letter signed by Brian Hanlon, Interim Director of DGS, a cabinet-level position in the District government. ECF Docket # 11-2. Where the Interim Director of

DGS directly signed off on Cannon's termination (and the Defendant now claims the Department of Human Resources attorneys deliberated over it beforehand), the Defendant cannot now claim that Cannon's termination was not a direct result of an official policy decision of the District of Columbia government.

> Where a plaintiff claims that a particular municipal action itself violates federal law, or directs an employee to do so, resolving these issues of fault and causation is straightforward. Section 1983 itself "contains no state-of-mind requirement independent of that necessary to state a violation" of the underlying federal right. *Daniels v. Williams*, 474 U.S. 327, 330 (1986). In any § 1983 suit, however, the plaintiff must establish the state of mind required to prove the underlying violation. Accordingly, proof that a municipality's legislative body or authorized decisionmaker has intentionally deprived a plaintiff of a federally protected right necessarily establishes that the municipality acted culpably. Similarly, the conclusion that the action taken or directed by the municipality or its authorized decisionmaker itself violates federal law will also determine that the municipal action was the moving force behind the injury of which the plaintiff complains.

Bd. of the County Comm'rs v. Brown, 520 U.S. 397, 404-405 (1997) (parallel citations omitted).

> To the extent that we have recognized a cause of action under § 1983 based on a single decision attributable to a municipality, we have done so only where the evidence that the municipality had acted and that the plaintiff had suffered a deprivation of federal rights also proved fault and causation. For example, *Owen v. Independence*, 445 U.S. 622 (1980), and *Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), involved formal decisions of municipal legislative bodies. In *Owen*, the city council allegedly censured and discharged an employee without a hearing. 445 U.S. at 627-629, 633, and n.13. In *Fact Concerts*, the city council canceled a license permitting a concert following a dispute over the performance's content. 453 U.S. at 252. Neither decision reflected implementation of a generally applicable rule. But we did not question that each decision, duly promulgated by city lawmakers, could trigger municipal liability if the decision itself were found to be unconstitutional. Because fault and causation were obvious in each case, proof that the municipality's decision was unconstitutional would suffice to establish that the municipality itself was liable for the plaintiff's constitutional injury.
>
> Similarly, *Pembaur v. Cincinnati* [475 U.S. 469, 485 (1986)] concerned a decision by a county prosecutor, acting as the county's final decisionmaker, 475 U.S. at 485, to direct county deputies to forcibly enter petitioner's place of business to serve capiases upon third parties. Relying on *Owen* and *Newport*, we

> concluded that a final decisionmaker's adoption of a course of action "tailored to a particular situation and not intended to control decisions in later situations" may, in some circumstances, give rise to municipal liability under § 1983. 475 U.S. at 481. In *Pembaur*, it was not disputed that the prosecutor had specifically directed the action resulting in the deprivation of petitioner's rights. The conclusion that the decision was that of a final municipal decisionmaker and was therefore properly attributable to the municipality established municipal liability.

Id. at 405-406 (parallel citations omitted).

> [O]ur inquiry is dependent on an analysis of state law. *Cf.* [*Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989)] ("'Whether a particular official has "final policymaking authority" is a question of *state law*'" (quoting, with original emphasis, [*St. Louis v. Praprotnik*, 485 U.S. 112 at 123 (1988)] (plurality opinion))); *Pembaur v. Cincinnati*, 475 U.S. 469, 483 (1986) (plurality opinion) (same). This is not to say that state law can answer the question for us by, for example, simply labeling as a state official an official who clearly makes county policy. But our understanding of the actual function of a governmental official, in a particular area, will necessarily be dependent on the definition of the official's functions under relevant state law. *Cf.* [*Regents of University of California v. Doe*, 519 U.S. 425, 430 n.5 (1997)] ("[The] federal question can be answered only after considering the provisions of state law that define the agency's character").

McMillian v. Monroe County, 520 U.S. 781, 786 (1997) (parallel citations omitted).

The Director of DGS's policymaking authority within the District of Columbia government is unambiguous.

> The Director shall manage and administer the Department and all functions and personnel assigned thereto, including the power to redelegate to other employees and officials of the Department powers and authority as in the judgment of the Director are warranted in the interests of efficiency and sound administration.

D.C. CODE § 10-551.03 (a). *See also* D.C. ACT 19-98 (2011), 58 D.C. Reg. 6226, 6230 (establishing DGS "as a separate, cabinet-level agency").

> In determining whether a particular position is that of a policymaker, "[a]n employee with responsibilities that are not well defined or are of broad scope" is more likely to be a policymaker, and "consideration should also be given to whether the employee acts as an advisor or formulates plans for the implementation of broad goals." [*Elrod v. Burns*, 427 U.S. 347, 368 (1976)]. Other relevant factors in distinguishing a policymaker from a non-policymaker include: "relative pay, technical competence, power to control others, authority to speak in

> the name of policymakers, public perception, influence on programs, contact with elected officials and responsiveness to partisan politics and political leaders."

Nader v. Blair, 549 F.3d 953, 959-960 (4th Cir. 2008) (quoting *Jimenez Fuentes v. Torres Gaztambide*, 807 F.2d 236, 242 (1st Cir. 1986) (internal quotations omitted)).

> [T]he cases limit municipal liability under section 1983 to situations in which the official who commits the alleged violation of the plaintiff's rights has authority that is final in the special sense that there is no higher authority. *Partee v. Metropolitan School District*, 954 F.2d 454, 456 (7th Cir. 1992); *Beattie v. Madison County School District*, 254 F.3d 595, 603 (5th Cir. 2001)... Delegation is not direction; authorization is not command; permission does not constitute the permittee the final policymaking authority. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 126 (1988) (plurality opinion); *Brown v. Neumann*, 188 F.3d 1289, 1290 (11th Cir. 1999) (per curiam).

Gernetzke v. Kenosha Unified Sch. Dist. No. 1, 274 F.3d 464, 469 (7th Cir. 2001) (parallel citations omitted).

As fully set forth in Hanlon's letter, Cannon's termination had no right of appeal, no higher authority to which Cannon could seek reconsideration. ECF Docket # 11-2 at 1 ("this termination action is neither grievable nor appealable"). *Compare Jones v. Fulton County*, 446 Fed. Appx. 187, 190 (11th Cir. 2011) ("Jones could have appealed her non-selection through the County's grievance review process"); *Codd v. Velger*, 429 U.S. 624, 627 (1977) (even a nontenured employee is entitled to a hearing "to clear his name").

b. The Plaintiffs' lawsuit is a matter of public concern. Their right of petition is further implicated by the class action pled.

The Defendant offers a purely conclusory argument that the Plaintiffs' lawsuit is not a matter of public concern. In this regard, in the guise of complaining of the Plaintiffs' overly broad reading of *LeFande v. District of Columbia*, 613 F.3d 1155, 1161 (D.C. Cir. 2010), the Defendant insists the Court simply ignore *LeFande* and revert back

to pre-*LeFande* doctrine. The Defendant offers no substantive analysis or meaningful rebuttal of the Plaintiffs' application of *LeFande* to the present case. Instead, the Defendant falsely ascribes to Plaintiffs' counsel an avocation of *San Filippo v. Bongiovanni*, 30 F.3d 424 (3d Cir. 1994) which simply does not exist within either the present motion or the *LeFande* proceedings before the D.C. Circuit. ECF Docket # 17 at 12 (asserting "Plaintiffs' reliance" on *San Filippo*).

> LeFande's speech is in the form of a civil complaint in federal court. Both parties correctly observe that we have not adopted the Third Circuit's position that a non-frivolous lawsuit by a public employee against his employer warrants First Amendment protection whether or not the suit relates to a matter of public concern. *See San Filippo v. Bongiovanni*, 30 F.3d 424, 443 (3d Cir. 1994). And *neither party asks that we adopt that position*.

LeFande, 613 F.3d at 1160 n.4 (emphasis added). *See also* ECF Docket # 12 at 7 n.1 (citing same). Instead,

> The Plaintiffs herein have been publically accused of illegally "double dipping", that is, accepting a full salary from the District of Columbia government after retiring on a full pension from the District of Columbia, albeit a federally funded one. There has been significant public outcry and press coverage regarding these allegations. *See*, *e.g.*, ECF Docket # 1-2 and the comments attached thereto. The Plaintiffs assert that their conduct in this regard is specifically authorized by law, and where their pensions are in fact, federally funded, the District of Columbia government has no interest thereto, or any right or obligation to offset their salaries. The circumstances herein far exceed the necessary *LeFande* criteria for a finding of public concern.

ECF Docket # 12 at 9.

The Defendant completely fails to explain how a rebuttal of multiple public allegations of illegal conduct supposedly committed by the most senior members of the command staff of a police department does not amount to a matter of public concern. If the Defendant acknowledges that the allegations were of sufficient public concern for much ink (or pixels) to be spilled by the Washington City Paper, how is it then that their

claims of innocence in response aren't a matter of public concern? The Defendant never explains itself in this regard and the argument in its entirety is nonsensical.

Neither *San Filippo* nor *Pearson v. District of Columbia*, 644 F. Supp. 2d 23 (D.D.C. 2009) as cited by the Defendant speak to the inherently public nature of a class action suit intended to benefit a class of similarly situated employees.

> The Supreme Court has held that there is a "basic right to group legal action." *United Transp. Union v. State Bar of Mich.*, 401 U.S. 576, 585 (1971) ("Collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment."); *United Mine Workers of America, Dist. 12 v. Ill. State Bar*, 389 U.S. 217, 224-25 (1967) (holding that the freedom of speech, assembly and petition guaranteed by the First Amendment gave the union "the right to hire attorneys on a salary basis to assist its members in the assertion of their legal rights."); *Brotherhood of R.R. Trainmen v. Va. ex rel. Va. State Bar*, 377 U.S. 1, 8 (1964) (holding the First Amendment protected the union's right "to maintain and carry out their plan for advising workers who are injured to obtain legal advice and for recommending specific lawyers"); *Nat'l Ass'n for Advancement of Colored People v. Button*, 371 U.S. 415, 431 (1963) (holding that the NAACP could advise litigants to seek the assistance of certain attorneys and even pay for that assistance because "association for litigation may be the most effective form of political association.")

Neuberger v. Gordon, 567 F. Supp. 2d 622, 634-635 (D. Del. 2008) (parallel citations omitted).[9]

While a lawsuit by an *individual* may not meet the public concern test absent this Circuit's adoption of *San Filippo*, this Circuit cannot, and does not, eschew the well-established Supreme Court precedent of *Button, et al*. implicating the First Amendment in *collective* legal action.

[9] While LeFande's claim was regarding retaliation for his licensed legal representation of a class of police officers in a civil rights case in this Court, Pearson's case involved a *pro se* lawsuit against a dry cleaning business for a lost pair of pants. LeFande prevailed in his D.C. Circuit appeal, Pearson did not. *Pearson v. Dist. of Columbia*, 377 Fed. Appx. 34 (D.C. Cir. 2010).

c. The Plaintiffs have sufficiently pled a *prima facie* case of retaliation.

The Plaintiffs do not rely solely on the close temporal relationship to demonstrate retaliation.[10]

> A plaintiff can establish pretext by showing that the reasons: (1) have no basis in fact; (2) did not motivate the decision; or (3) are insufficient to explain the adverse action.

Lentz v. City of Cleveland, 333 Fed. Appx. 42, 46 (6th Cir. 2009) (unpublished decision citing *Carter v. Univ. of Toledo*, 349 F.3d 269, 274 (6th Cir. 2003)). As the Plaintiffs have already demonstrated that the "cause" for Cannon's termination certainly is "phony" under any reasonable standard of discipline the Defendant employs, ECF Docket # 18 at 34 (quoting *Fischbach v. District of Columbia Dep't of Corrections*, 86 F.3d 1180, 1183 (D.C. Cir. 1996) (quoting *Pignato v. American Trans Air, Inc.*, 14 F.3d 342, 349 (7th Cir. 1994))), the Plaintiffs have made a *prima facie* case to which they have, at a minimum, a Seventh Amendment right to have such factual issues be decided to by a jury, including the authenticity of the Defendant's claimed documents in support. *See* Pl.s' Response to Def.s' alleged Material Facts at 1-10.[11] *See Thompson v. District of Columbia*, 428 F.3d 283, 287 (D.C. Cir. 2005) ("[t]he Board cannot prevail in a balancing test with no record evidence on its side of the scale… the Board has offered no evidence that Thompson performed poorly. Accordingly, we will reverse the judgment on Thompson's First

[10] The Defendant's claim that Cannon's termination and the withholding of paychecks immediately after the onset of this litigation does not amount to a temporal relationship is so unfounded as to not warrant rebuttal of the noncontrolling authority offered in support. Certainly the thirteen days acknowledged by the Defendant is far inside the three months suggested by *Hamilton v. Geithner*, 666 F.3d 1344, 1357 (D.C. Cir. 2012). The Plaintiffs need not rebut a Pennsylvania District Court case when our own Circuit has said as much within the last three months.

[11] The Defendant's attorneys further aggravate the injuries to Cannon by claiming that Cannon himself generated any report or that Cannon falsified any document. ECF Docket # 18 at 34. He did not, none of the documents regarding his termination say otherwise and this allegation is not otherwise supported by any evidence on the record. The Defendant's attorneys have themselves now made completely false allegations against Cannon.

Amendment claim and remand for the district court to develop a record sufficient to allow the 'individualized and searching review' required by our case law.")

Equally so, the Plaintiffs are entitled to a jury's determination as to whether the sudden inexplicable withholding of each of the Plaintiffs' pay at the onset of this litigation would "deter persons of ordinary firmness from exercising their constitutional rights". ECF Docket # 18 at 35. This again is entirely a factual issue to which, unless this Court can somehow demonstrate that no reasonable juror could find for the Plaintiffs on this issue, must be brought to trial. *Garcia v. D.C.*, 56 F. Supp. 2d 1, 14 (D.D.C. 1999) ("These allegations are sufficient to withstand a pre-discovery dispositive motion. It is a factual issue whether the Defendants' actions would be sufficient to chill a reasonable person in the exercise of First Amendment rights" (footnote omitted)). The Plaintiffs assert that the circumstances demonstrate an insidious motive to thwart the Plaintiffs' prosecution of their lawsuit in the withholding of their pay. They have received no discovery on the Defendant's bald claim that it was a mistake and the matter simply cannot be disposed of at this time with summary adjudication. The Defendant's citation to *Hatfill v. Ashcroft*, 404 F. Supp. 2d. 104, 119 (D.D.C. 2005) (quoting *Curley v. Village of Suffern*, 268 F.3d 65, 73 (2d Cir. 2001)) is plainly antagonistic to the D.C. Circuit case quoted in the same passage, *Toolasprashad v. Bureau of Prisons*, 286 F.3d 576, 585 (D.C. Cir. 2002) ("The widely accepted standard for assessing whether harassment for exercising the right of free speech [is] . . . actionable ' . . . depends on whether the harassment is []likely to deter a person of ordinary firmness from that exercise.'" (citations omitted)). D.C. Police Officers with some thirty years of service or more each certainly are not "person[s] of ordinary firmness", they are hard as nails,

having suffered decades of the slings and arrows of employment with the District of Columbia government. That the Plaintiffs face the fire and proceed with their lawsuit (with the benefit of counsel) makes the Defendant's conduct no less illegal and no less actionable.

> The Bureau offers several counter-arguments, none of which is convincing. For example, it notes that Toolasprashad's "ability to exercise his First Amendment rights has not been impaired by his transfer." Appellees' Br. at 24. This fact, though undisputed, is immaterial. The relevant question is not whether a transfer actually interferes with a particular prisoner's ability to exercise his rights but whether the threat of a transfer would, in the first instance, inhibit an ordinary person from speaking. *See* [*Crawford-El v. Britton*, 93 F.3d 813, 826 (D.C. Cir. 1996) (*en banc*), *vacated on other grounds*, 523 U.S. 574 (1998)]. Equally irrelevant is the Bureau's long-recognized discretion to decide where to house prisoners. *See, e.g., Olim v. Wakinekona*, 461 U.S. 238, 245 (1983) (holding that inmates have no "justifiable expectation" of being "incarcerated in any particular prison"). "An ordinarily permissible" exercise of discretion "may become a constitutional deprivation if performed in retaliation for the exercise of a First Amendment right." *Crawford-El*, 93 F.3d at 846 (HENDERSON, J., concurring). " 'Despite the fact that prisoners generally have no constitutionally-protected liberty interest in being held at, or remaining at, a given facility,' " therefore, the Bureau may not transfer an inmate "to a new prison in retaliation for exercising his or her First Amendment rights." *Vignolo v. Miller*, 120 F.3d 1075, 1077-78 (9th Cir. 1997) (quoting *Pratt v. Rowland*, 65 F.3d 802, 806 (9th Cir. 1995)). Finally, we are unpersuaded by the Bureau's argument that because the transfer memorandum was not binding, the document cannot form the basis of an "adverse determination" under the Privacy Act. The Bureau relies on a question posed in [*Deters v. United States Parole Comm'n*, 85 F.3d 655, 659 (D.C. Cir. 1996)]: "If [a preliminary parole assessment] is not binding on the hearing panel, can it really be deemed an 'adverse determination,' *i.e.*, one affecting the inmate's rights …?" 85 F.3d at 659. Here, though, because the Bureau transferred Toolasprashad in reliance on the transfer memorandum, *see supra* at 8, it cannot reasonably argue the memorandum had no effect on his rights.

Toolasprashad, 286 F.3d at 585-586.

The Defendant cannot cite to the District Court's later deviance from this clear instruction from the Circuit Court as any kind of competent authority while simply ignoring cases from the same Court that remain in conformance with this decision. *Baumann v. D.C.*, 744 F. Supp. 2d 216, 223 (D.D.C. 2010) (quoting *Crawford-El*, 93

F.3d at 826 ("Courts have generally recognized that there may be actionable harm where a government official takes actions that 'would chill or silence a person of ordinary firmness from future First Amendment activities'"; *Thaddeus-X v. Blatter*, 175 F.3d 378, 397 (6th Cir. 1999) ("We agree with the reasoning in [*Crawford-El*] and conclude that it is the appropriate standard by which to determine what type of action is sufficiently adverse to be cognizable in a retaliation claim under § 1983.")); *Banks v. York*, 515 F. Supp. 2d 89, 111 (D.D.C. 2007) (citing *Crawford-El*; *Toolasprashad; Rauser v. Horn*, 241 F.3d 330, 333 (3d Cir. 2001); *Friedl v. City of New York*, 210 F.3d 79, 85 (2d Cir. 2000)).

VI. The Plaintiffs maintain cognizable Whistleblower claims.

The Defendant improperly attempts to undermine the express language of the D.C. Whistleblower Protection Act while at the same time failing to rebut or acknowledge the Plaintiffs' evident satisfaction of the elements thereof.

The Defendant states, "[a]though it is true that Plaintiffs' lawsuit arguably brought additional detail about the allegations to light, 'it cannot be said that the particulars… were of such great import to the citizenry of the District of Columbia as to bring the information disclosed by [Plaintiffs] under the protection of the WPA." ECF Docket # 17 at 17 (quoting *Hawkins v. Boone*, 786 F. Supp. 2d 328, 334 (D.D.C. 2011)). The Defendant fails to elaborate, and for good reason. In *Hawkins*, that plaintiff claimed to be making disclosures regarding the Metropolitan Police Department "All Hands on Deck" policy. The District Court found first, correctly, that "Hawkins was entering a debate about a controversial issue long discussed by both sides." *Id.*, 786 F. Supp. at 334.

And second, that "the information he conveyed was new because it pertained to the impact of AHOD on his investigation of the specific June burglary, rather than to the broader effects of the policy." *Id.*

The present case is distinguished in both instances. First, the pre-litigation press about the Plaintiffs' "double-dipping" was distinctly one-sided; there was almost no rebuttal by any of the Plaintiffs regarding the allegations. *See* ECF Docket # 1-2 at 2-3 (Plaintiff Cannon quoted as saying "[w]e were told we were okay"). The Plaintiffs' speech (by their attorney) at the time of the filing of the first Complaint and the first hearing on January 31, 2012 was markedly different. The first Complaint comprises of seven different counts of illegal conduct by the Defendant, and requests for declaratory and injunctive relief. ECF Docket # 1 at 9-13. Indeed, the underlying action complained of was an offset of the Plaintiffs' salaries which was unknown to any of the Plaintiffs and certainly not the public prior to January 25, 2012, ***one day*** before the Complaint was filed. It simply had not occurred yet. *See id*. at 8, ¶ 38. As the offsets were not implemented prior to January 25, 2012, and therefore, not known to any of the Plaintiffs or to any member of the public prior to that date, it was solely the Plaintiffs' filing of the lawsuit the following day which brought the existence of the allegedly illegal offsets to the Court's, and then the public's, attention. This completely undermines the Defendant's claim that the Plaintiffs' Whistleblower claims should be dismissed as in *Hawkins*. *See Williams v. District of Columbia,* 9 A.3d 484, 490 (D.C. 2010) (quoting

Meuwissen v. DOI, 234 F.3d 9, 14 (Fed. Cir. 2000) ("disclosing what [was] already known")).[12]

Second, the disclosures made by the Plaintiffs were far broader reaching than Hawkins' concerns regarding his investigation of one burglary. The allegedly illegal offset of any reemployed federal annuitant's salary for the first time on January 25, 2012 had broad implications for all similarly situated persons and, as in *LeFande*, the matter was pled as a class action seeking relief for all such annuitants. *See LeFande*, 613 F.3d at 1161 n.5; *Neuberger*, *supra*.

In this regard, the Plaintiffs have necessarily satisfied all of the elements required for Whistleblower protection. It is undisputed that the Plaintiffs are or were employees for the purpose of D.C. Code § 1-615.52 (a)(3). It is undisputed that Plaintiff Cannon was subjected to a personnel action as described in *id*. (a)(5)(A) (actual termination). It has been demonstrated that the Plaintiffs made "any disclosure of information" of "[a] violation of a federal, state, or local law, rule, or regulation…", *id*. (a)(6), to this Court, a public body as described in *id*. (a)(7)(B) (the federal judiciary). As the offset complained of did not exist at the time of any of the public debate described by the Defendant, such disclosure was of information not known to the public, was regarding an issue potentially affecting all District of Columbia federal annuitants, and cannot now be disregarded as in *Hawkins*.

[12] The May 23, 2011 Order in *Hawkins* only dismissed certain counts of Hawkins' Complaint as to certain defendants. The matter remains pending today and the Court's decisions regarding Hawkins' Whistleblower claims have not reached appellate review.

VII. Plaintiff Cannon maintains a cognizable claim for Defamation.

The District claim that it did not publish any alleged defamatory statement is undermined by the express statement by Brian Hanlon that Cannon's termination letter would be put in his official personnel folder. Docket # 11-2 at 2. This attorney did not report to the press that Cannon had been terminated, that had already been leaked to the press by unknown persons. The Defendant has no evidence to the contrary.

> Defamation claims require a showing of publication by the defendant to a third party. An exception to the rule applies if the plaintiff is "compelled to publish a defamatory statement to a third person" and "it was foreseeable to the defendant that the plaintiff would be so compelled." *Lewis v. Equitable Life Assurance Soc'y*, 389 N.W.2d 876, 888 (Minn. 1986). Under this exception, which must be cautiously applied, plaintiffs have a duty to mitigate and are required "to take all reasonable steps to attempt to explain the true nature of the situation and to contradict the defamatory statement." *Id*.

MSK EyES Ltd. v. Wells Fargo Bank, 546 F.3d 533, 542 (8th Cir. 2008). *See also Mandelblatt v. Perelman*, 683 F. Supp. 379, 386 (S.D.N.Y. 1988) (citing *Lewis; McKinney v. County of Santa Clara*, 168 Cal. Rptr. 89, 93-94 (Cal. App. 1980); *First State Bank of Corpus Christi v. Ake*, 606 S.W.2d 696, 701-02 (Tex. Civ. App. 1980); *Grist v. Upjohn Co.*, 168 N.W.2d 389, 406 (Mich. App. 1969); *Colonial Stores v. Barrett*, 38 S.E.2d 306, 308 (Ga. App. 1946); *Church of Scientology of Calif., Inc. v. Green*, 354 F. Supp. 800, 804 (S.D.N.Y. 1973); RESTATEMENT (Second) TORTS, § 577(1)).[13]

LeFande's statements to the press as recited by the Defendant were obviously made to mitigate the outrageous allegations already made by Hanlon in Cannon's

[13] *But see El-Hadad v. Embassy of the U.A.E.*, 2006 U.S. Dist. LEXIS 21491, 55-56 (D.D.C. 2006) (the question of self-publication theory in the District of Columbia "apparently remains open"). The D.C. Circuit later affirmed the District Court's finding in *El-Hadad* that the defendant therein was "liable for defamation *per se* and El-Hadad's recovery would be the same even if this jurisdiction recognized the theory of compelled self-publication". *El-Hadad v. United Arab Emirates*, 496 F.3d 658, 669 (D.C. Cir. 2007) *cert. denied* 552 U.S. 1310 (2008).

termination. To state that LeFande somehow made Cannon's termination public by litigating against it days after it was reported in the press is nonsensical. A "defamed party is under no duty to mitigate its damages by refraining to self-publish known defamatory statements." *Estate of Martineau v. ARCO Chem. Co.*, 203 F.3d 904, 914 (5th Cir. Tex. 2000) (quoting *Doe v. Smithkline Beecham Corp.*, 855 S.W.2d 248, 259 (Tex. App. 1993) *aff'd as modified on other grounds* 903 S.W.2d 347, 356 (Tex. 1995)). As stated by the Defendant, the fact of Cannon's termination was obviously truthful, and was already a matter of public knowledge apparently before LeFande made any statement. The press contacted LeFande; LeFande did not contact the press. What was patently untruthful was that Cannon was terminated for any just cause. Cannon had an absolute right to defend himself in this forum and in any other public forum against the false claims against him.

Under District of Columbia law, statements that prejudice a party in his or her trade, profession or business are considered actionable *per se* and give rise to a cause of action for defamation without a showing of special damages. A statement that falls within the actionable *per se* category is considered so obviously and materially harmful that injury to reputation may be presumed. *Moss v. Stockard*, 580 A.2d 1011, 1033 (D.C. 1990) (citing RESTATEMENT (Second) OF TORTS, § 570; *Afro-American Publishing Co. v. Jaffe*, 366 F.2d 649, 660 n.32 (D.C. Cir. 1966) (*en banc*); *Gertz v. Robert Welch*, 418 U.S. 323; 349 (1974); *Washington Times Co. v. Bonner*, 86 F.2d 836, 844 (D.C. Cir. 1936); *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 759-760 (1985)).

If a juror can reasonably impute a lack of professional integrity or competence from a statement made in a business context, it often can be construed as defamatory.

Marsh v. Hollander, 339 F. Supp. 2d 1, 9-10 (D.D.C. 2004); *Armenian Assembly of Am., Inc. v. Cafesjian*, 597 F. Supp. 2d 128, 140-141 (D.D.C. 2009). Whether a reader understood a statement as being defamatory is a question for a jury. *Marsh*, (citing *Klayman v. Segal*, 783 A.2d 607, 613 n.6 (D.C., 2001) (quoting RESTATEMENT 2nd OF TORTS § 614)). "If, at the summary judgment stage, the court determines that the publication is capable of bearing a defamatory meaning, a jury must determine whether such meaning was attributed in fact." *White v. Fraternal Order of Police*, 909 F.2d 512, 518 (D.C. Cir. 1990). "It is only when the court can say that the publication is not reasonably capable of any defamatory meaning and cannot be reasonably understood in any defamatory sense that it can rule as a matter of law, that it was not libelous." *Id*. (quoting *Levy v. American Mutual Ins. Co.*, 196 A.2d 475, 476 (D.C. 1964)). "If the communication, by the particular manner or language in which the true facts are conveyed, supplies additional, affirmative evidence suggesting that the defendant *intends* or *endorses* the defamatory inference, the communication will be deemed capable of bearing that meaning." *Id*. (emphasis in the original).

Cannon immediately overcomes the claimed master and servant privilege claimed by the Defendant. For the reasons already stated, the Defendant's termination of Cannon lacked any legitimate purpose and was entirely malicious. The Defendant terminated Cannon solely to retaliate for Cannon's reporting of the illegal offsets and of the illegal reimbursements of such offsets to the Defendant's favorites. The Defendant cannot reasonably begin to assert that after terminating him, a letter placed in his personnel

jacket[14], solely for the purpose of insinuating to future potential employers that Cannon had committed some malfeasance, was put there for any other purpose other than to effect his reputation. The Plaintiffs' Complaints are thoroughly saturated with claims of malicious intent and the Defendant's claims otherwise fail entirely.

> Widespread publicity is one of the ways a defamatory charge can deprive an individual of his liberty to pursue his occupation, see *Owen*, 445 U.S. at 633-634 n.13, and [*Bishop v. Wood*, 426 U.S. 341, 348 (1976)], but it is not the only way. Several courts have held that placing the information in files to which other employers might have access at least creates a fact question on the likelihood of impact on employment opportunities.

D'Acquisto, 640 F. Supp. at 611 (citing *Perry v. FBI*, 759 F.2d 1271, 1278 (7th Cir. 1985); *Burris v. Willis Independent School District*, 713 F.2d 1087, 1092 (5th Cir. 1983); *Velger v. Cawley*, 525 F.2d 334, 336 (2d Cir. 1975), *rev'd on other grounds sub nom. Codd v. Velger*, 429 U.S. 624 (1977); *Click v. Board of Police Comm'rs*, 609 F. Supp. 1199, 1205 (W.D. Mo. 1985); *Doe v. United States Civil Service Commission*, 483 F. Supp. 539, 570-571 (S.D.N.Y. 1980)).

VIII. The offset made against the Plaintiffs is an illegal tax. It is taken at a 100% ratio against the Plaintiffs' annuity payments and returned to the general fund of the District of Columbia. Non-residents of the District of Columbia are entitled under law to protection from such taxes regardless of whether such taxes may be imposed upon residents.

The District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 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

[14] *See Codd*, 429 U.S. at 628 (even a nontenured employee has a right "to clear his name" where "the employer creates and disseminates a false and defamatory impression about the employee in connection with his termination"). Contrary to the Defendant's contentions, even a report in a personnel file such as herein may be sufficiently stigmatizing to implicate an employee's property rights. *Roth*, 408 U.S. at 573-574.

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 Buck Act, 4 U.S.C. §§ 105-110, speaks to the authority of a state to impose income taxes upon federal employees residing within a federal enclave within that state. *Id*. § 106 (a).

> The purpose of the Buck Act was to equalize the liability for income tax between the officers and employees of the United States who reside within federal areas and those officers and employees, otherwise identically situated, who reside outside a federal area and who had become liable for state tax by the passage of the Public Salary Tax Act of 1939. A further reason was to equalize the position between federal employees who were residents of federal enclaves over which the United States had been granted exclusive jurisdiction and those residing in federal areas over which the granting state had retained concurrent jurisdiction, a practice which had been upheld by the Supreme Court in *James v. Dravo Contracting Co.*, [302 U.S. 134 (1937)].

United States v. Lewisburg Area School Dist., 539 F.2d 301, 309 (3d Cir. 1976) (footnotes omitted).

Given the specific purpose of the Buck Act in regulating state taxation of federal employees, and the broad scope of "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" of D.C. Code § 1-206.02, it cannot be said that the Buck Act's definition of income tax is not an appropriate definition to employ in analysis of a state's taxation of federal annuitants.

> The Senate Report on the bill stresses that the definition of income tax in the Act is designed "to cover a broad field because of the great variation to be found between the different state laws" and that the intent of the committee was "to include therein any State tax (whether known as a corporate franchise tax, a business-privilege tax, or any other name) if it is levied on, with respect to, or

> measured by net income, gross income or gross receipts."
>
> In view of the purpose of the act and the broad definition of "income tax" found therein, many state taxes which are not denominated as income taxes and which do not conform to the federal income tax have been held to be income taxes for the purposes of the Buck Act. In *Howard v. Commissioners of the Sinking Fund, supra*, the Supreme Court held that a Kentucky business privilege tax based on the net profits of businesses, professions or occupations, which did not reach other forms of income such as capital gains and dividends, was an income tax within the meaning of the Buck Act.

Lewisburg Area School Dist., 539 F.2d at 309 (footnotes omitted).

> It is a question of federal law whether a municipal charge constitutes a tax. *Wright v. Riveland*, 219 F.3d 905, 911 (9th Cir. 2000); *see also Trailer Marine Transport Corp. v. Rivera Vazquez*, 977 F.2d 1, (1st Cir. 1992) (label placed on assessment by state may be pertinent in deciding whether assessment is "tax," but label is not determinative). The Ninth Circuit relies on three considerations in making this determination: (1) the entity that imposes the charge; (2) the parties on whom the charge is imposed; and (3) whether the funds collected for the charge are expended for general public purposes, or used for the regulation or benefit of the parties on whom the charge is imposed. *Bidart Bros. v. California Apple Comm'n*, 73 F.3d 925, 931 (9th Cir. 1996); *see also San Juan Cellular Tel. Co. v. Public Serv. Comm'n of Puerto Rico*, 967 F.2d 683, 685 (1st Cir. 1992) (describing classic tax as "imposed . . . upon many, or all, citizens [and] raises money, contributed to a general fund, and spent for the benefit of the entire community," whereas classic regulatory fee was imposed upon narrow class to serve "regulatory purposes . . . [by] raising money placed in a special fund to help defray the agency's regulation-related expenses").

Qwest Communs. Corp. v. City of Berkeley, 146 F. Supp. 2d 1081, 1091 (N.D. Cal. 2001).

> The City Council of Berkeley (a legislating body) imposes the exactions, but the parties subject to the charges (service providers seeking installation of telecommunications equipment and conduits) are a narrowly defined target class. *See Hexom v. Oregon Dept. of Transp.*, 177 F.3d 1134, 1136 (9th Cir. 1999) ("Classic 'tax' is imposed by a legislature upon many, or all, citizens."); *Bidart Bros.*, 73 F.3d at 931 ("An assessment imposed upon a broad class of parties is more likely to be a tax than an assessment imposed upon a narrow class.") In cases like this, where the first two factors are not dispositive, courts examining whether an assessment is a tax "have tended . . . to emphasize the revenue's ultimate use." *Bidart Bros.*, 73 F.3d at 932 (citation omitted); *see also Hexom*, 177 F.3d at 1136 ("Courts facing cases that lie near the middle of this spectrum have tended to emphasize the revenue's ultimate use, asking whether it provides a

> general benefit to the public, of a sort often financed by a general tax, or whether it provides more narrow benefits to regulated companies or defrays the agency's costs of regulation."

Id.

While the District may have imposed the § 5-723 (e) offset on a narrow class of persons, District of Columbia retirees with federal retirement annuities reemployed by the District of Columbia, there is no regulatory purpose to the offset, it is imposed purely for revenue generation. As stated above, 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. The District is 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) ("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. The amounts so deducted shall be deposited in the Treasury of the United States to the credit of the Fund.") Such funds apparently are being returned to the general fund as any other tax would be.[15] Contrary to the plainly false claim of the Defendant that the offset "simply is not a government assessment upon the value of anything", ECF Docket # 18-42, such offset clearly amounts to a tax on their respective incomes at a specific rate of 100% of the Plaintiffs' annuity payments and is therefore illegal under D.C. Code § 1-206.02 as it

[15] Of course, there is no provision for the return of such funds to the Trust Fund under the District of Columbia Retirement Protection Act of 1997, as the 1997 Act makes no provision for the District's offset of annuities now paid solely by the federal government and expressly supersedes such inconsistent provisions contained in the 1979 Act.

applies to non-residents.[16]

IX. This Court's jurisdiction to hear the entirety of the Plaintiffs' claims is irrefragable.

a. The issue of the offset comprises almost entirely of a construction of the District of Columbia Retirement Protection Act of 1997. This Court holds exclusive jurisdiction to clarify rights to benefits under the Act.

As set forth above (and the history of these entitlements is offered to the Court first in this argument for this very reason), 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 herein assert 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 assert 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 Court suggested, withheld the Plaintiffs' benefits themselves, which the Defendant

[16] The Tax Injunction Act, 28 U.S.C. §1341, is inapplicable here, as the District Court has separate and independent bases for federal jurisdiction beyond this tax claim, none of which include diversity jurisdiction. 29 U.S.C. § 217; 28 U.S.C. § 1331. In at least one instance, this Court has exclusive jurisdiction over the Plaintiffs' claims. *See e.g*, D.C. CODE § 1-815.02(a). Further, the Tax Injunction Act is inapplicable where, as 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)). *See Banner v. United States*, 428 F.3d 303, 305 (D.C. Cir. 2005) ("The 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 *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).

has 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 Court's present 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 is 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 assert their rights to the benefits enumerated in the District of Columbia Retirement Protection Act of 1997 include the right to receive their benefit payments ***without the § 5-723 (e) offset***. In doing so, the Plaintiffs assert that the 1997 Act supersedes the District of Columbia Retirement Reform Act of 1979 with regards to the inconsistent § 5-723 (e). This Court has <u>exclusive</u> jurisdiction under D.C. Code § 1-815.02 (a) to hear these claims.

b. The Court retains proper federal question and supplemental jurisdiction over this case.

The United States District Court for the District of Columbia has exclusive jurisdiction and venue, regardless of the amount in controversy, of civil actions brought

by the Plaintiffs, who are beneficiaries pursuant to the District of Columbia Retirement Protection Act of 1997, as the Plaintiffs seek to clarify their rights under the Act. D.C. CODE § 1-815.02(a). The Plaintiffs have additional causes of action arising under the FLSA, including prayers for injunctive relief. The Plaintiffs offer additional causes of action arising under 42 U.S.C. § 1983 for being subjected to a deprivation of their rights, privileges, and/or immunities secured by the Constitution and applicable law, by persons acting under color of the authority of the government of the District of Columbia. The Plaintiffs offer an additional cause of action for the Defendant's violation of the District of Columbia Self-Government and Governmental Reorganization Act, PUB. L. No. 93-198, 87 STAT. 774 (1973) (codified as amended at D.C. CODE § 1-201.01 *et seq.*). Under 28 U.S.C. § 1331, the United States District Court shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States, including 42 U.S.C. § 1983 and the District of Columbia Self-Government and Governmental Reorganization Act of 1973. Absent the dismissal of these claims, the Court must hear this case, including other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. 28 U.S.C. § 1367. The Plaintiffs' District of Columbia law or common law claims, factually interrelated and essentially pled in the alternative of their federal claims, offer no novel or complex issue of District of Columbia law, the claims certainly do not predominate over the federal claims and there are no other compelling reasons for declining jurisdiction. *Id*. (c).

> As part of the Judicial Improvements Act of 1990, P.L. No. 101-650, 104 Stat. 5089 (Dec. 1, 1990) (the "JIA"), Congress combined the doctrines of pendent and ancillary jurisdiction under the rubric "supplemental jurisdiction." *James v. Sun Glass Hut of California*, 799 F. Supp. 1083, 1084 (D. Colo. 1992) (BABCOCK, J.);

> *see LaSorella v. Penrose*, 818 F. Supp. 1413, 1415 (D. Colo. 1993) (KANE, J.). Applying to all cases filed after December 1, 1990, the new statute states in part, "district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within [the courts'] original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367 (a). District courts may decline to exercise supplemental jurisdiction over a state law claim only 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).

Gard v. Teletronics Pacing Sys., 859 F. Supp. 1349, 1351 (D. Colo. 1994)

"The inevitable incompleteness presented by all legislation means that interstitial federal lawmaking is a basic responsibility of the federal courts." *United States v. Little Lake Misere Land Co., Inc.*, 412 U.S. 580, 593 (1973). The United States District Court therefore has 28 U.S.C. § 1331 federal question jurisdiction for such federal common law questions herein.

The Defendant's suggestion that the Plaintiffs must separate their District of Columbia law or common law claims and proceed through a grievance process is wholly inconsistent with the criteria codified in the JIA and prohibited by District of Columbia claim splitting doctrine. *Gilles v. Ware*, 615 A.2d 533, 549 (D.C. 1992). The District Court should decline to accept these claims only when "(1) considerations of judicial economy, convenience and fairness to litigants [are] not present; (2) a surer-footed reading of state law could be obtained in the state court; (3) state issues predominate[] in terms of proof, scope of issues raised or comprehensiveness of remedies sought; or (4) divergent legal theories of relief [would likely] cause jury confusion." *Gard*, 859 F. Supp. at 1351-1352 (citing *United Mine Workers v. Gibbs*, 383 U.S. 715, 726-27 (1966); *Walter Fuller Aircraft v. Republic of Philippines*, 965 F.2d 1375, 1389 n.13 (5th Cir.

1992); *Promisel v. First American Artificial Flowers*, 943 F.2d 251, 254 (2d Cir. 1991; *La Sorella v. Penrose St. Francis Healthcare Sys.*, 818 F. Supp. 1413, 1415-1416 (D. Colo. 1993) (citing *York Research Corp. v. Landgarten*, 1992 U.S. Dist. LEXIS 18321, 1992 WL 373268 *3 (S.D.N.Y. 1992); *ITT Commercial Finance Corp. v. Unlimited Automotive, Inc.*, 814 F. Supp. 664, 666 (N.D.Ill. 1992))). The circumstances of this case dictate the exact opposite result demanded by the Defendant herein. *See Lightfoot v. Dist. of Columbia*, 2006 U.S. Dist. LEXIS 1358 at 29 n.8 (D.D.C. 2006) (applying supplemental jurisdiction analysis to what the Court had already identified as claims subject to CMPA). *See also* section d, *infra*.

> The District is mistaken, however, in asserting that appellant's failure to exhaust his administrative remedies deprives the court of jurisdiction. While the exhaustion doctrine is well established and of long standing, both in CMPA cases and generally, that doctrine is simply a "rule of judicial administration" rather than a jurisdictional requirement.

Burton v. District of Columbia, 835 A.2d 1076, 1079 (D.C. 2003) (citing *Barnett v. District of Columbia Dep't of Employment Services*, 491 A.2d 1156, 1160 (D.C. 1985) (citation omitted)) (footnote omitted). *See also King v. Kidd*, 640 A.2d 656, 663 (D.C. 1993) ("[w]e did not hold, however, that the CMPA preempts tort claims in general").

The D.C. Circuit has not asserted that the CMPA deprives the federal courts of jurisdiction for CMPA claims, but instead also reverts back to some form of supplemental jurisdiction analysis. *Johnson v. District of Columbia*, 552 F.3d 806, 811 n.2, 814 n.8 (D.C. Cir. 2008). Of course, the Plaintiffs' First Amendment retaliation claims and their claims under the D.C. Whistleblower Protection Act are separate from those claims the Defendant asserts are subject to the CMPA. The Defendant fails entirely to explain how the CMPA overrides or interrelates to the declaration of exclusive jurisdiction and venue

under D.C. Code § 1-815.02(a), or the election of remedies provision in the D.C. WPA. D.C. CODE § 1-615.56 (a) ("The institution of a civil action pursuant to § 1-615.54 shall preclude an employee from pursuing any administrative remedy for the same cause of action from the Office of Employee Appeals"). Under *Gilles, supra*, a plaintiff in the District of Columbia is plainly prohibited from "simultaneous prosecution of separate actions based on the same factual transaction." *Id.*, 615 A.2d at 550 (citing *Rennie v. Freeway Transport*, 656 P.2d 919, 924 (Or. 1982)). If the Plaintiffs have the right to be heard in this Court on some of their claims, the Court must hear the entirety of their claims arising from the same "factual transaction".

c. The Plaintiffs have no further need to comply with the notice requirements of D.C. Code § 12-309 as the Defendant has good and sufficient notice of their claims.

The Defendant repeats a profoundly frivolous argument that the Plaintiffs have not complied with the notice requirements of D.C. Code § 12-309. ECF Docket # 18 at 11.

> This court has long held that "although strict compliance with § 12-309's requirement that timely notice be given to the District is mandatory, greater liberality is appropriate with respect to the content of the notice." *Wharton v. District of Columbia*, 666 A.2d 1227, 1230 (D.C. 1995); *see also Washington v. District of Columbia*, 429 A.2d 1362, 1365 (D.C. 1981) (*en banc*) ("with respect to the details of the statement giving notice, precise exactness is not absolutely essential") (citations and quotation marks omitted); *Doe by Fein v. District of Columbia*, 697 A.2d 23, 27 (D.C. 1997) (content requirements are to be interpreted liberally, and "in close cases doubts are to be resolved in favor of compliance"). We have observed that "[t]he degree of specificity required under the statute . . . is the same whether the claimant provides written notice to the District or relies instead on an official police report." *Washington*, 429 A.2d at 1365.

Enders v. D.C., 4 A.3d 457, 468 (D.C. 2010).

> This court has held in subsequent cases that where the District is given facts that would allow it to comprehend through a reasonable investigation the

> circumstances underlying the claim, the notice is sufficient. *See* [*Gaskins v. District of Columbia*], 579 A.2d 719, 722 (D.C. 1990) (notice sufficient where it identified location of fall as somewhere on a 150-foot stretch of sidewalk); *Dixon v. District of Columbia*, 168 A.2d 905, 907 (D.C. 1961) (letter sufficient where it indicated fall occurred on sidewalk rather than in gutter); *Romer v. District of Columbia*, 449 A.2d 1097, 1101 (D.C. 1982) (plaintiff did not need to include loss of consortium claim in notice letter where investigation by District could disclose plaintiff's marital status and thus existence of possible claim). In *Allen v. District of Columbia*, 533 A.2d 1259 (D.C. 1987), we held that a letter to the Mayor's office provided adequate notice under § 12-309 when it gave the District enough information to "enable [] the District to initiate its investigation by obtaining police reports and other prosecution records concerning the criminal case." *Id*. at 1264. This was so because it "provid[ed] the District with the details necessary for it to go directly to the governmental departments involved in the injuring event and receive additional information about the basis for the claim." *Id*. Given these precedents, and given that a police report in itself can suffice to provide adequate notice to the District, we hold the notice given in this case was sufficient to satisfy § 12-309.

Id. at 468-469.

The Defendant's attorneys conveniently forget or ignore that, prior to the filing of the lawsuit in this case, the Plaintiffs personally served Darlene Fields, the designated agent for service of process upon the Mayor of the District of Columbia with a complete copy of the Complaint, the Plaintiffs' Motion for a Temporary Restraining Order, their Motion for a Preliminary Injunction and the attendant Exhibits. ECF Docket # 2-3. These documents comprise, even today, nearly the entirety of the Plaintiffs' knowledge of the "approximate time, place, cause, and circumstances of the injury or damage" and such documents were given to the Mayor's designated agent ***prior to the start of the litigation***. *See Powell v. District of Columbia*, 645 F. Supp. 66, 69 (D.D.C. 1986) ("There must be sufficient notice *before* the complaint is filed" (emphasis in original)). *But see* First Amend. Compl. at ¶ 21 n.1, ECF Docket # 10 at 5 (notice as to a "place" cannot be presently "discerned with specificity regarding computerized deductions by unknown persons of an improper offset to salary payments made by electronic transfer.").

The Plaintiffs' notice herein fully complied with D.C. Code §12-309, as applied by the D.C. Court of Appeals in *Enders, supra*.

Under *Enders*, notice is not infirm simply because it is the form of a Complaint; certainly a Complaint in a civil case is usually a well-detailed explanation of a claim. But service of an *already filed* Complaint fails as § 12-309 notice because the notice is given after the claim has been filed and fails as "a mandatory condition precedent to filing suit against the District." *Powell*, 645 F. Supp. at 69 (citing *Gwinn v. District of Columbia*, 434 A.2d 1376, 1378 (D.C. 1981); *Breen v. District of Columbia*, 400 A.2d 1058, 1062 (D.C. 1979); *Hill v. District of Columbia*, 345 A.2d 867, 869 (D.C. 1975)).

Unfortunately for the District in this case, service of the Complaint and the emergency motions upon the District were required prior to filing suit under this Court's Local Rule 65.1. The Plaintiffs accomplished such service upon the Mayor's designated agent before the lawsuit was filed and the certification thereof was made at the time of filing of the lawsuit. All notice requirements of § 12-309 were fully satisfied prior to the filing, even if some or all of the notice was in the form of a Complaint. The District misunderstands and/or misapplies *Kennedy v. District of Columbia*, 519 F.Supp.2d 50, 58 (D.D.C. 2007), in this regard.

d. The Defendant's vague claim the Plaintiffs have not exhausted their administrative remedies fails for several reasons.

The Defendant claims that the Plaintiffs should now avail themselves of the grievance system described in D.C. Code § 1-603.1 *et seq.* ECF Docket # 18 at 18. First, the Plaintiffs and the members of the proposed Plaintiff Class are not bound by this grievance system, as they are all employees who pre-date the Comprehensive Merit Personnel Act. *See, e.g.,* D.C. CODE § 1-207.13(d). Even though this code section was

specifically referenced in the Plaintiffs' First Amended Complaint at ¶ 27, ECF Docket # 10 at 6, the Defendant fails to address this issue whatsoever when claiming that the Plaintiffs failed to utilize the post-CMPA grievance system.

The deduction of all or a majority of the pay of the Plaintiffs and the members of the proposed Plaintiff Class is not a matter falling within the definition of D.C. Code § 1-603.01 and amounts to an "adverse action" or a classification matter beyond the scope of the section. The Plaintiffs assert that the exhaustion of any administrative remedy which may be available to them is futile or inadequate as a legal or practical matter. Where, as herein, the Plaintiffs challenge the enforceability of a statute (or even the present efficacy of D.C. Code § 5-723 (e), given the enactment of the District of Columbia Retirement Protection Act of 1997 and its specific language superseding the 1979 Act), rather than the method of enforcement, an administrative remedy is inappropriate. *See* ECF Docket # 18 at 19 (the Defendant's erroneous claim that the application of § 5-723 (e) to the Plaintiffs is "a simple inquiry"). No administrative program or mistake is at issue. This is a complicated issue of statutory construction and legislative intent, and an administrative proceeding alone cannot resolve the Plaintiffs' Complaint.

Given the Plaintiffs' assertion that the District of Columbia Retirement Protection Act of 1997 supersedes §5-723 (e), this Court has exclusive jurisdiction to "clarify" their rights to receive their federal retirement benefits without any offset. D.C. CODE § 1-815.01 (a)(1). Not only are the Plaintiffs not required to employ the administrative procedures suggested by the Defendant, they are completely precluded from doing so by D.C. Code § 1-815.02 (a). Also, as the Plaintiffs have made claims arising under the District of Columbia Whistleblower Protection Act as part of this lawsuit, ECF Docket #

16 at 5-8, District of Columbia law precludes the Plaintiffs from pursuing any type of administrative remedy for the same cause of action. D.C. CODE § 1-615.56 (a).

X. The Plaintiffs' other common law claims.

The inapplicability of the CMPA is already thoroughly addressed *supra*.

a. Breach of contract.

The Plaintiffs, and the members of the proposed Plaintiff Class, entered into contracts of re-employment with the District of Columbia government in which they agreed to provide good and valuable services in exchange for the salaries offered. The Plaintiffs, and the members of the proposed Plaintiff Class, completed all of their obligations of the bargain, yet were deprived of such promised pay after they had provided their services. The failure of the District of Columbia to pay the Plaintiffs, and the members of the proposed Plaintiff Class, for their services breached the express and implied provisions of their respective contracts of re-employment with the District of Columbia as well as implied covenants of good faith and fair dealing.

The Defendant now claims without any authority offered in support that there can be no breach of contract with an at-will employee. ECF Docket # 18 at 43. This is incorrect and the Plaintiffs maintain an action for breach of contract regardless of any at-will employment status. "[A]n at-will employer does not possess a unilateral right to retroactively reduce or revoke contractually agreed-upon benefits that have already vested." *Nattah v. Bush*, 605 F.3d 1052, 1057 (D.C. Cir. 2010) (citing 19 Richard A.

Lord, WILLISTON ON CONTRACTS § 54:36 (4th ed. 2010) (at-will employer may not retroactively deprive employee of vested rights, including employee benefits)).[17]

> Nattah alleges "[a]gents of defendant [L-3]" conveyed to him the terms of the oral contract, which included luxury apartment accommodations in Kuwait and assurances he would not be sent to Iraq. L-3 attempts to use [*Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)] and [*Ashcroft v. Iqbal*, 556 U.S. 662 (2009)], to enunciate a blanket rule that requires a plaintiff to plead every conceivable fact or face dismissal of his claim. L-3, however, points to no language in *Twombly* or *Iqbal* requiring a plaintiff to identify by name which employee(s) made the agreement when pleading a breach of contract claim. *See Iqbal*, 129 S. Ct. at 1949 (stating "Rule 8 . . . does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation" (quoting *Twombly*, 550 U.S. at 555)). Moreover, Nattah alleges with specificity the several terms of the oral contract and how L-3 breached those terms. Accordingly, we conclude Nattah's complaint states a claim against L-3 for breach of its oral contract with Nattah.

Nattah v. Bush, 605 F.3d 1052, 1058 (D.C. Cir. 2010) (citations omitted).

Herein, the Plaintiffs assert that they were promised that no offset would be applied to them if re-employed by the Defendant and that the Plaintiffs each reasonably relied upon such promise in entering into re-employment with the Defendant. *See* First Amend. Compl. ¶¶ 85, 96-97, 101-102, ECF Docket # 10 at 17, 19. After the Plaintiffs already performed their services and their rights to their salaries vested, the Defendant failed to pay them, in breach of their contracts. Nothing within the documents relied upon by the Defendant rebuts any of the Plaintiffs' allegations in this regard. *See* ECF Docket # 18-1, 18-2, 18-3, 18-4, 18-5, 18-6.[18]

[17] The Defendant's claimed defenses against the Plaintiffs' unjust enrichment claims fail for the same reason. ECF Docket # 18 at 43.

b. Detrimental Reliance/Promissory Estoppel.

The Defendant's claim that the Plaintiffs' claims for detrimental reliance and promissory estoppel "may be dismissed out of hand", ECF Docket # 18 at 45, again fails to meet either a Rule 12 (b)(6) or a Rule 56 standard for summary adjudication and the Defendant's attorneys again fail to even specify upon which Rule they rely.

First, the Plaintiffs unequivocally assert "definite representation[s]", ECF Docket # 18 at 45 (citing *Genesis Health Ventures, Inc. v. Sebelius*, 798 F.Supp.2d 170, 183 (D.D.C. 2011)), by the Defendant's agents at the time they entered into their respective re-employment. The Plaintiffs specifically inquired and the Defendant's agents specifically stated the Plaintiffs would not be subject to any offset if they were re-employed with the Defendant. The Plaintiffs further gave up other employment opportunities to become re-employed. Given that a fast food job would now pay more than some of their respective salaries with the offset applied, pretty much any type of employment foregone in reliance upon the representations of the Defendant's agents would "change its position for the worse". ECF Docket # 18 at 45 (citing *Genesis Health Ventures, supra).* Given that the representations were being made by senior executives with the District of Columbia government, including the Director of the Office of Property Management, ECF Docket # 18-1, the Chief Operating Officer of the Department of Real Estate Services, ECF Docket # 18-2, 18-6, the Chief of Staff of the Office of Property Management, ECF Docket # 18-3, the Chief Operating Officer of the

[18] The Defendant appears to concede the breach of contract claims of Plaintiffs Ford-Haynes and Weeks. ECF Docket # 18 at 44. If this Court finds proper jurisdiction contrary to the Defendant's allegations, then these Plaintiffs are certainly entitled to summary judgment.

Office of Property Management, ECF Docket # 18-4[19], and that information that was received was consistent between each of the Plaintiffs, they reasonably relied upon such representations. ECF Docket # 18 at 45 (citing *Genesis Health Ventures, supra).* To permit the Plaintiffs to rely upon these representations and then forego other employment opportunities irrefutably "cause[d] an egregiously unfair result." ECF Docket # 18 at 45 (quoting *Bowman v. District of Columbia,* 496 F.Supp.2d 160, 163 (D.D.C. 2007) (quoting *Smith v. United States*, 277 F.Supp.2d 100, 107 (D.D.C. 2003))).

> In short, particularly in the years immediately preceding retirement, individuals make spending, savings, and investment decisions based on assumptions regarding the amount of income they expect to receive after they stop working. For such individuals reliance on the law in effect during those years may be critically important. In recognition of this fact, the offset exception, in the words of the Conference Report, protects "people who are already retired, or close to retirement, from public employment and who cannot be expected to readjust their retirement plans to take account of the 'offset' provision that will apply in the future." H. R. CONF. REP. No. 95-837, p. 72 (1977); S. CONF. REP. No. 95-612, p. 72 (1977). That purpose, consistent with the principle that "'[great] nations, like great men, should keep their word,'" *Astrup v. INS*, 402 U.S. 509, 514, n. 4 (1971), quoting *FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (BLACK, J., dissenting)…

Heckler v. Mathews, 465 U.S. 728, 748 (1984) (footnote omitted).

> We have recognized, in a number of contexts, the legitimacy of protecting reasonable reliance on prior law even when that requires allowing an unconstitutional statute to remain in effect for a limited period of time. *See, e. g., Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87-89 (1982) (plurality opinion); *Buckley v. Valeo*, 424 U.S. 1, 142-143 (1976) (*per curiam*); *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-107 (1971). *See also Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 718-723 (1978). Although an unconstitutional scheme could not be retained for an unduly prolonged period in the name of protecting reliance interests, or even for a brief period if the expectations sought to be protected were themselves unreasonable or illegitimate, there is no indication that the offset exception suffers from either of these flaws. The duration of the exception is closely related to its goal of protecting only individuals who had planned their retirements in reliance on prior law, *see infra*, at 748-749, and appellee does not suggest that the expectations of

[19] These appeared to be the same person in some instances, with unexplained changes to their title or agency name.

> those individuals, who hardly could have anticipated the adoption of the offset requirement, were unreasonable or illegitimate.

Id., 465 U.S. at 746.

Once again, the Defendant recites merely what the Plaintiffs must prove at trial, not what they must prove now to survive either a Motion to Dismiss or a Motion for Summary Judgment.

c. Intentional/Negligent Misrepresentation.

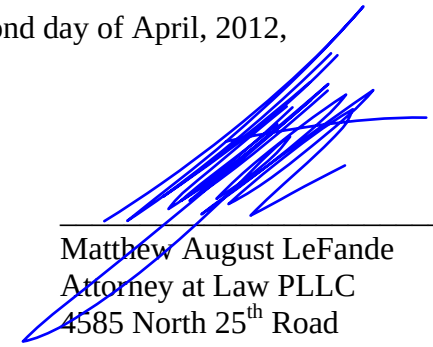
Again, the Defendant's claimed defenses enter the realm of patently frivolous. The Plaintiffs properly and sufficiently allege that at the time of their respective offers of employment, they received representations from the Defendant's agents that no offset would be applied against their re-employment salaries as a result of their existing retirement annuities. They further assert that they forewent other employment opportunities as a result of these misrepresentations.[20] No further pleading of these allegations is required at this stage of the litigation, the Defendant fails to explain how, if any, the Plaintiffs failed to plead a cause of action for which relief could be granted, and the Defendant offers no Material Fact upon which it relies to assert that there are no material facts in dispute and it is somehow entitled to summary judgment on this issue.

[20] The Defendant's citation to *White v. District of Columbia*, 852 A.2d 922, 925 (D.C. 2004), ECF Docket # 18 at 47, is inapplicable to the issue of CMPA as an exclusive remedy, as the plaintiff in *White* appears to have been a CSRS annuitant, not a PFRS annuitant. Therefore the exclusive venue provision of the District of Columbia Retirement Protection Act of 1997 was inapplicable to *White*. D.C. CODE § 1-815.02(a).

CONCLUSION

For these reasons, and for such other reasons as the Court finds to be good and sufficient cause, the Defendant's Motion to Dismiss or for Partial Summary Judgment should be DENIED entirely. For such reasons, the Plaintiffs' cross Motion for Partial Summary Judgment should be GRANTED.

Respectfully submitted, this second day of April, 2012,



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