UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

REPLY MEMORANDUM IN SUPPORT OF
CROSS MOTION FOR PARTIAL SUMMARY JUDGMENT

The Plaintiffs have moved for Partial Summary Judgment. The Defendant District of Columbia has filed an Opposition. ECF Docket # 34. Within its Opposition, the District of Columbia expends an inordinate amount of time complaining about the form of the Plaintiffs' Motion, but offers no meaningful rebuttal of the numerous authorities offered in support of thereof. The Defendant repeatedly asks the Court to rule for it solely upon hyper-technical issues of pleading, particularly inappropriate upon the Defendant's present demand this case be dismissed prior to discovery. Herein, the District of Columbia endlessly claims that the Plaintiffs' multitude of Rule 56 (f) affidavits are insufficient to survive summary judgment and that the Plaintiffs' robust argumentation in support of their demands for discovery contained within their memorandum somehow cannot be considered.

> When the nonmoving party, through no fault of its own, has had little or no opportunity to conduct discovery, and when fact-intensive issues, such as intent, are involved, courts have not always insisted on a Rule 56(f) affidavit if the nonmoving party has adequately informed the district court that the motion is premature and that more discovery is necessary. *See* [*First Chicago Int'l v. United Exchange Co.*, 836 F.2d 1375, 1380-81 (D.C. Cir. 1988); *Hellstrom v. U.S. Dep't*

> *of Veterans Affairs*, 201 F.3d 94 (2d Cir. 2000); *Farmer v. Brennan*, 81 F.3d 1444, 1449-50 (7th Cir. 1996); *Dean v. Barber*, 951 F.2d 1210, 1214 n.3 (11th Cir. 1992)]. Specifically, if the nonmoving party's objections before the district court "served as the functional equivalent of an affidavit," *First Chicago*, 836 F.2d at 1380, and if the nonmoving party was not lax in pursuing discovery, then we may consider whether the district court granted summary judgment prematurely, even though the nonmovant did not record its concerns in the form of a Rule 56(f) affidavit.

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

Unlike the District of Columbia, the Plaintiffs believe the appropriate place for legal argument is within their memorandum, not buried within affidavits or in the guise of factual allegations. *See* ECF Docket # 29-2 at 10 n.2. The cases cited by the Defendant do not support its proposition. ECF Docket # 34 at 2 (citing *Townsend v. Mabus*, 736 F.Supp.2d 250, 253 & n.4 (D.D.C. 2010); *Convertino v. United States Dep't of Justice*, 769, F.Supp.2d 139, 155 (D.D.C. 2011), one involving a failure to make <u>any</u> Rule 56 (f) allegations or argument,[1] the other involving a case in which the plaintiff was unable to find evidence in support of his case after ten years of litigation). The Defendant then makes a self-defeating argument demanding that the Plaintiffs must produce "record evidence" in rebuttal of the Defendant's pre-discovery Motion for Summary Judgment. ECF Docket # 34 at 4 (citing *Hinson v. Merritt Ed. Center*, 579 F.Supp.2d 89, 92 (D.D.C. 2008) (review of an administrative decision with a developed evidentiary record); *Globalaw Ltd. v. Carmon & Carmon Law Office*, 452 F.Supp.2d 1, 28 n.11 (D.D.C. 2006) (motion for summary judgment brought "following a round of extended, highly acrimonious discovery", 452 F.Supp.2d at 5)). *See also* ECF Docket #

[1] It would seem prudent that if the Defendant is going to cite to this Judge's own prior opinions, it should not offer them for a position which they do not support.

34 at 5 (citing *Burt v. Nat'l Republican Club of Capitol Hill*, 2011 U.S. Dist. LEXIS 141387 (D.D.C. Dec. 8, 2011) (motion for summary judgment was filed after close of discovery and this Court's Opinion granting motion as quoted by Defendant relied heavily upon such discovery's deposition testimony)).

The Plaintiffs' Rule 56 (f) affidavits provide sworn declarations of fact which properly support, not present, the argument otherwise contained within their memorandum. The District of Columbia fails to offer any meaningful rebuttal of either these factual allegations or the Plaintiffs' legal argument. For the most part, the Defendant's present rebuttal of the Plaintiffs' authorities solely consists of pat recitations of prior conclusory allegations without any sort of developed argumentation.

I. The Defendant fails to rebut any of the Plaintiffs' authorities which amply demonstrate that the offset provision of D.C. Code § 5-723 (e) was only applicable at a time when the District of Columbia itself paid annuities to pre-Home Rule retirees.

In a desperate attempt to undermine the Plaintiffs' ample recital of the legislative history of the District of Columbia Police and Fire Retirement System, the Defendant dwells upon an argument that the Plaintiffs previously conceded at the first preliminary injunction hearing but was subsequently adopted by both the Defendant and the Court in contradiction to the Plaintiffs' prior concession. From the onset, the Plaintiffs' counsel acknowledged that 5 U.S.C. § 8331(l)(L)(ii) excluded the Plaintiffs from the offset exemptions of D.C. Code §1-611.03, albeit incorrectly and/or inadvertently. *See* D.C. Act 15-489 (commanding the District of Columbia government "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 (2004). It was only upon the adoption of the opposite position by the District of Columbia during the hearing, and apparent concurrence by the Court, that the Plaintiffs abandoned this argument, an argument which was ultimately, contrary to their own interests.

The Defendant now demands that the Court preserve D.C. Code § 5-723 (e) standing alone and completely out of the context in which it was created. The Plaintiffs have demonstrated that the entirety of the law which created this code section was superseded by the District of Columbia Retirement Protection Act, Title XI, Subtitle A of the Balanced Budget Act of 1997, PUB. L. 105-33 (herein, the "1997 Act"). *See id.*, Sec. 11084 (a)(1) ("[t]his subtitle supersedes any provision of the Reform Act inconsistent with this subtitle and the regulations thereunder"). D.C. Code § 5-723 (e) is plainly inconsistent with the 1997 Act. Even § 5-723(e) itself does not permit the District of Columbia to offset PFRS annuity payments other than those first subject to the 1979 Act.

> 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…

D.C. CODE § 5-723 (e) (emphasis added).

The language of § 5-723 (e) makes it clear that the intent was to prohibit any offset of reemployment salaries for any annuitant who was hired prior to the enactment of the District of Columbia Retirement Reform Act of 1979.[2] Under the 1997 Act, all prior

[2] As the District now acknowledges, "all of the plaintiffs had deductions taken from their pay and paid to their own fund since the day they were first hired." ECF Docket # 34 at 8 (citation omitted). Therefore, as to at least Plaintiffs Cannon, Watkins, Neill, Ford-Haynes and Weeks, they each became entitled to an annuity prior to November 17, 1979 and are therefore not subject to D.C. Code § 5-723 (e), even if the section was still in effect.

responsibilities for payment of retirement entitlements were removed from the District of Columbia and transferred to the Federal government.

> It is the policy of this subtitle--
>
> (1) to relieve the District of Columbia government of the responsibility for the unfunded pension liabilities transferred to it by the Federal government;
>
> (2) for ***the Federal government to assume the legal responsibility for paying certain pension benefits*** (including certain unfunded pension liabilities which existed as of the day prior to introduction of this legislation) for the retirement plans of teachers, police, and firefighters;
>
> (3) ***to provide for a responsible Federal system for payment of benefits*** accrued prior to the date of introduction of this legislation; and
>
> (4) to require the establishment of replacement plans by the District of Columbia government for the current retirement plans for teachers, and police and firefighters.

PUB. L. 105-33, Sec. 11002 (b) (emphasis added). *See also Banner v. United States*, 428 F.3d 303, 306 (D.C. Cir. 2005) ("[i]n 1997, Congress repealed the system of federal payments and ***began directly subsidizing certain District operations***, including Medicaid, the local courts, and the prison system", citing the 1997 Act, emphasis added).[3]

Thus, contrary to the Defendant's conclusory assertions, the Plaintiffs are certainly Federal annuitants. The Defendant's claim that the Plaintiffs are subject to "any District government civilian *retirement system*", ECF Docket # 34 at 9 (emphasis *sic*), is clearly wrong regarding any pre-1997 entitlements. The 1997 Act plainly states that the Plaintiffs are paid from a Federal system to which the United States government is directly responsible. Once the existence of the District's retirement system under the 1979 Act ceased to exist, the provisions of D.C. Code § 5-723 (e) became meaningless

[3] D.C. Code 5-723 (e) was enacted solely in the context, and indisputably part, of that "system of federal payments" and therefore was repealed in 1997 together with the rest of the system.

and certainly "inconsistent" with the superseding 1997 Act. No police retirement system which existed at the time of the enactment of D.C. Code § 5-723 (e) in 1979 now exists today. *See* PUB. L. 105-33, Sec. 11002 (b) (requirement for subsequent enactment of replacement plans).

The Defendant's citation to *Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 152–53 (1982), is irrelevant. ECF Docket # 34 at 10. D.C. Code § 5-723 (e) was an enactment of the United States Congress as part of the 1979 Act, and is therefore not any kind of "local law". *Barnes v. District of Columbia*, 611 F. Supp. 130, 135 (D.D.C. 1985) (citing *American Federation of Government Employees v. Barry*, 459 A.2d 1045, 1050 (D.C. 1983); *Firemen's Ins. Co. v. Washington*, 483 F.2d 1323, 1325, 1328-31 (D.C. Cir. 1973)). The Defendant's argument that the District of Columbia has the right to enact law to offset the Plaintiffs' salaries is also irrelevant, ECF Docket # 34 at 11-12, as there is no provision of District of Columbia law which purportedly permits the offsets, ***except*** D.C. Code § 5-723 (e).[4] *Compare Barnes*, 611 F. Supp. at 132 (citing D.C. CODE § 1-612.3). Unlike in *Barnes*, the Plaintiffs herein assert the exclusive jurisdiction provision of the 1997 Act which requires this Court to discern if D.C. Code §

[4] If the District of Columbia is without legal authority to take the salaries of the Plaintiffs, the Plaintiffs have been deprived of their property interests in violation of the Fifth Amendment. "When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner". *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002) (citing *United States* v. *Pewee Coal Co.*, 341 U.S. 114, 115 (1951)). "Similarly, takings of contracts have been found where the government takes away property already acquired under the operation of the contract, deprives fruits already reduced to possession by [] lawfully made contracts, or repudiates debts to save money." *Buse Timber & Sales, Inc. v. United States*, 45 Fed. Cl. 258, 263 (1999) (citing *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41 (1986); *Perry v. United States*, 294 U.S. 330, 350-351 (1935); *Lynch v. United States*, 292 U.S. 571, 576-577 (1934)). "Where 'the rights respecting the "taken" [property] were not reduced to writing by the parties, both takings and breach claims have been permitted.' *Buse Timber*, 45 Fed. Cl. at 262. In other words, '[i]f the right at issue is not governed by the terms of the parties' contract, plaintiff may pursue a takings remedy to vindicate that right.' *Detroit Edison Co. v. United States*, 56 Fed. Cl. 299, 302 (2003)." *Barlow & Haun, Inc. v. United States*, 87 Fed. Cl. 428, 439 (2009). *See* First Am. Compl. ¶ 52, ECF Docket # 9 at 12.

5-723 (e) conflicts with the 1997 Act and is therefore superseded by operation of the Act's Section 11084 (a)(1). D.C. CODE § 1-815.02 (a). There is no question of pendent jurisdiction on this point in the present case.

The Defendant argues that it was granted administrative functions of the pre-1997 annuities in 2004, but fails to explain how they could bridge the seven year gap where it had nothing to do even with the administration of such annuities, together with the United States government's present and ongoing obligation to pay the annuities, but somehow still call payments on the pre-1997 annuity liabilities it does not pay a "District retirement system". ECF Docket # 34 at 9 n.3. *See* PUB. L. 105-33, Sec. 11011 (b) ("[a]t no point after the effective date of this subtitle may the responsibility or any part thereof assigned to the Federal Government under subsection (a) for making Federal benefit payments revert to the District of Columbia"); *id.*, Sec. 11012 (a) (payments of pre-1997 entitlements under the 1997 Act called "Federal benefit payment[s]"); *id*., Sec. 11042 (c) ("the District Government is not required to pay any amount under any replacement plan under this subtitle if the amount is paid as a Federal benefit payment under this subtitle");

Under Section 11035 of the 1997 Act, the Secretary of the United States Treasury selects a Trustee to administer pre-1997 benefits.

> Notwithstanding any provision of a District Retirement Program or any other law, rule, or regulation, the Trustee--
>
> (1) shall determine whether an individual is eligible to receive a Federal benefit payment under this subtitle;
>
> (2) shall determine the amount and form of an individual's Federal benefit payment under this subtitle; and
>
> (3) may recoup or recover any amounts paid under this subtitle as a result of errors or omissions by the Trustee, the District Government, or any other person.

PUB. L. 105-33, Sec. 11021.

The payments of pre-1997 entitlements remain entirely the responsibility of the Federal government and under its control, regardless of any subsequent delegation within its discretion. *Id*., Sec. 11062 ("[t]he Comptroller General is authorized to conduct evaluations of the administration of this subtitle to ensure that the Trust Fund and Federal Supplemental Fund are being properly administered and shall report the findings of such evaluations to the Secretary and the Congress"); *id*., Sec. 11086 ("Federal obligations for benefits under this subtitle are backed by the full faith and credit of the United States").

The Defendant's allegation that "only two of the named plaintiffs retired before June 30, 1997 (plaintiffs Cannon and Watkins)", ECF Docket # 34-2 at 2, the Defendant's sole factual allegation in opposition to the Plaintiffs' cross Motion for Summary Judgment, makes a distinction largely without a difference. The Federal government, through the Department of the Treasury, is responsible for payment of benefits *accrued* by District of Columbia employees prior to June 30, 1997. Therefore, *each and all* of the Plaintiffs, and members of the proposed Plaintiff Class, receive such pre-1997 benefits[5] from the Federal government, regardless of the date of their retirement, and are therefore entitled to "clarification" of their rights to such benefits under D.C. Code § 1-815.02 (a).

[5] As previously stated, 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 District of Columbia Retirement Protection Act, Title XI, Subtitle A of the Balanced Budget Act of 1997. PUB. L. 105-33.

II. Plaintiffs Neill, Weeks, and Ford-Haynes remain entitled to summary judgment in their favor on their FLSA claims as a matter of law.

There was no point to discussing the Plaintiffs' job duties within their affidavits. *See* ECF Docket #34 at 4. The Defendant has failed to meet the first test of an executive exemption under 29 C.F.R. § 541.600, that these Plaintiffs received a minimum of $455.00 per week. "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, 847-848 (6th Cir. 2012) (citing 29 C.F.R. § 541.602 (b)).

Absent meeting this <u>initial</u> threshold, the remainder of the Defendant's argument regarding exempt executive, administrative or professional employees is moot.

> Exemptions… "are to be narrowly construed against the employers seeking to assert them." The employer bears the burden of establishing the affirmative defense by a preponderance of the evidence, and the employer satisfies this burden only by providing "clear and affirmative evidence that the employee meets every requirement of an exemption."

Orton, 668 F.3d at 847 (citing *Thomas v. Speedway SuperAmerica, LLC*, 506 F.3d 496, 501 (6th Cir. 2007) (quoting *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960)) internal flags, additional quotation marks omitted).

The Defendant's citations to *Nicholson v. World Business Network, Inc.*, 105 F.3d 1361, 1365 (11th Cir. 1997) and *Lucas v. Koch Marketing Co.*, 361 So.2d 194, 197 (Fla. App. 1978) are completely irrelevant now as they refer to the FLSA regulations ***prior to the 2004 revisions***. *See Orton*, 668 F.3d at 847 ("[t]he old version stated, in relevant part: 'An employee will be considered to be paid "on a salary basis" within the meaning of the regulations *if under his employment agreement* he regularly receives each pay period . . . .' 29 C.F.R. § 541.118(a) (1973) (emphasis added)"). Given that the Defendant's sole defense is premised entirely upon this obvious mistake of law, the Plaintiffs are indisputably entitled to summary judgment on this point.

III. The Defendant's claimed defenses against the Plaintiffs' due process claims are patently frivolous.

The Defendant summarily claims that the CMPA provides all the due process to which the Plaintiffs are entitled. ECF Docket # 34 at 12. It again makes no effort to rebut any of the authorities cited by the Plaintiffs that, as pre-Home Rule employees, they aren't even subject to the CMPA, D.C. Code § 1-207.13(d), or the Plaintiffs' demonstration that they were given no pre-deprivation forum to assert their defenses against the illegal offset. ECF Docket # 29 at 23 (ECF page number) (quoting *Edwards v. Shinseki*, 582 F.3d 1351, 1355 (Fed. Cir. 2009)).

Where, how or who would have, or should have, "decide[d] a contested issue" in (or out of) the Plaintiffs' favor remains completely unanswered by the Defendant. ECF Docket # 34 at 12. Absent its repetitive, yet vacuous, argument against the exclusive venue provision of D.C. Code § 1-815.02 (a), the Defendant offers no rebuttal whatsoever of the Plaintiffs' demonstrated supplemental jurisdiction analysis

outweighing any alleged administrative remedy exhaustion requirement and the express prohibition of claim splitting under *Gilles v. Ware*, 615 A.2d 533, 549 (D.C. 1992).

The Defendant ignores the Plaintiffs' well-founded argument that the Defendant's letter stating that Plaintiff Cannon was terminated for cause was *per se* defamatory. In support of this argument, the Plaintiffs have amply demonstrated that the alleged "cause" for Cannon's termination wasn't any kind of cause that the Defendant ever would otherwise employ to terminate a police officer. The Plaintiffs point to the Defendant's own personnel manuals, Pl.s' Ex. 4, 5, their own decades of experience as police administrators and union officials, ECF Docket # 30-5 at 4, 30-6 at 2, 30-7 at 2, 30-8 at 3, the complete absence of any primary documentation supporting the Defendant's allegations and a well-documented incident involving a Protective Services Lieutenant involving far more serious allegations which only resulted in a ten day suspension for that person, *id*., to establish a *prima facie* case that Cannon would not have been terminated for the cause alleged in his termination letter. ECF Docket # 11-2.[6]

Regardless of whatever truthful statements may have been contained within the termination letter, the imputation that Cannon was terminated for a legitimate cause was certainly false. *White v. Fraternal Order of Police*, 909 F.2d 512, 518 (D.C. Cir. 1990) (a defamatory inference can be derived from reports that "contain materially true accounts of what transpired"). If a juror can reasonably impute a lack of professional integrity or competence from a statement made in a business context, it 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).

[6] This evidence also defeats the Defendant's demand for summary judgment on the Plaintiffs' First Amendment claims. ECF Docket # 34 at 22-24.

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, supra*. "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).

> A plaintiff states a "reputation plus" claim by alleging official defamation in conjunction with a "change in status," such as termination or demotion. Some official action is necessary because "government defamation" alone is "insufficient to create a liberty interest" under the Due Process Clause. *Orange v. District of Columbia*, 59 F.3d 1267, 1274 (D.C. Cir. 1995). Courts have "presumably" allowed these types of actions because "official criticism will carry much more weight if the person criticized is at the same time demoted or fired." *O'Donnell*, 148 F.3d at 1140. A "reputation-plus" claim thus requires a "conjunction of official defamation and adverse employment action." *Id*.; *Holman v. Williams*, 436 F. Supp. 2d 68, 79 (D.D.C. 2006).

Aguirre v. SEC, 671 F. Supp. 2d 113, 119 (D.D.C. 2009) (parallel citation, footnote omitted).

The Defendant's citation to *Aguirre* ignores that Cannon's termination, purportedly for falsifying a police report, definitively fits into the definition of an actionable "reputation plus" defamation claim.

> Thus, public dismissal for "dishonesty, for having committed a serious felony, for manifest racism, for serious mental illness, or for lack of 'intellectual ability'" is sufficient to state a "reputation-plus" claim.

Id., n.5 (quoting *Harrison v. Bowen*, 815 F.2d 1505, 1518 (D.C. Cir. 1987) (quoting *Mazaleski v. Treusdell*, 562 F.2d 701, 714 (D.C. Cir. 1977))).

Termination from police employment is peculiarly stigmatic, given the great weight given to such prior terminations in consideration for future police employment, and particularly for Cannon, terminated for the first time in his career of nearly 40 years and from such a high profile position as Chief of Police. *See Alexis v. District of Columbia*, 44 F. Supp. 2d 331, 341 (D.D.C. 1999) (citing *Taylor v. Resolution Trust Corp.*, 56 F.3d 1497, 1506 (D.C. Cir. 1995) and quoting *Mazaleski*, 562 F.2d at 713). "[H]is skills were highly specialized and rendered largely unmarketable as a result of the agency's acts." *Taylor*, 56 F.3d at 1497.

> The court concludes that, in the context in which Stangl's allegation was made, plaintiff could prove that the allegation implied that he either failed to appreciate the seriousness of the situation or that he somehow condoned it. In either case, a reasonable factfinder could conclude that the implication impugned his good name and created a stigma which impaired his chances for future employment in law enforcement. *See Watson v. Sexton*, 755 F. Supp. 583, 592 (S.D.N.Y. 1991) (court inferred that plaintiff was stigmatized by employer's post-termination statement that plaintiff refused to submit to a urinalysis); *Diehl v. Albany County School District*, 694 F. Supp. 1534, 1538 (D. Wy. 1988) (section 1983 plaintiff "is entitled to all reasonable inferences from the evidence"). It is unnecessary at this stage of the proceedings for plaintiff to cite specific instances in which he lost employment opportunities as a result of the stigmatizing statement.

Esposito v. Metro-North C. R. Co., 1992 U.S. Dist. LEXIS 9907, 15-17 (N.D.N.Y July 6, 1992).

IV. Summary judgment on Plaintiffs' Equal Protection Claims remains inappropriate prior to discovery.

The Defendant continues to assert 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 Defendant repeats this allegation and offers nothing further to the debate. 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.[7]

The Plaintiffs have properly alleged that they are similarly situated to Daniel Hickson, Jacob Major and William Sarvis in that each of them was employed by the Metropolitan Police Department prior to October 1, 1987, and that each of them was subsequently rehired by the District of Columbia subsequent to their respective retirements and after December 7, 2004. ECF Docket # 10 at 14-16. These allegations alone demonstrate that these persons would be otherwise subject to the D.C. Code § 5-723 (e) offset as the Defendant alleges the Plaintiffs are herein. The Plaintiffs ***are entitled to equal protection of this law***, not salaries equal to persons in different jobs. 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

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

similarly situated under law as the Plaintiffs contend, the Defendant must put forth a rational basis why the Plaintiffs have been treated differently.

V. The Plaintiffs First Amendment Retaliation Claims are entirely a matter of factual dispute and survive any Rule 12(b)(6) challenge.

The Defendant concedes by lack of argument that Cannon's termination was by a policy-level official and that Cannon 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").

The Defendant perpetuates its prior straw man argument regarding *San Filippo v. Bongiovanni*, 30 F.3d 424 (3rd Cir. 1994), a case which the Plaintiffs have never offered as authority in support of their argument. ECF Docket # 34 at 23. While the Supreme Court may have recently abrogated *San Filippo* as stated by the Defendant, it certainly again embraced *NAACP v. Button*, 371 U.S. 415, 431 (1963) in the manner already espoused by the Plaintiffs herein. *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2500 (2011). The Supreme Court's holding in *Guarnieri* is absolutely consistent with this Circuit's prior caselaw, including *LeFande v. D.C.*, 613 F.3d 1155 (D.C. Cir. 2010), which also eschewed *San Filippo*. The Defendant fails entirely to distinguish either *LeFande* or *Button* herein and instead repeats its purely conclusory argument that the Plaintiffs' lawsuit is not a matter of public concern. In this regard, the Defendant again insists the Court simply ignore *LeFande* and revert back to pre-*LeFande* doctrine.

Offering no argument in rebuttal of the Plaintiffs' authorities, the Defendant appears to have abandoned its claim that there is a lack of a temporal relationship between Cannon's termination and the onset and prosecution of this lawsuit. The

Defendant further appears to have abandoned its claim that such termination, together with the simultaneous and inexplicable withholding of all of the Plaintiffs' pay would not have a chilling effect "likely to deter a person of ordinary firmness from" exercise of their first amendment rights. *Toolasprashad v. Bureau of Prisons*, 286 F.3d 576, 585 (D.C. Cir. 2002). These matters should also now be treated as conceded.

VI. The Plaintiffs maintain cognizable Whistleblower claims.

If the Plaintiffs have demonstrated in this case that the Defendant offset their reemployment salaries illegally, under any theory, they have made an indisputably protected disclosure under the District of Columbia Whistleblower Protection Act. There is not, and cannot be, a test which requires that a *legally correct* allegation that the Defendant violated the law must somehow otherwise relate to a legal principle so simple that it "is not debatable among reasonable people." ECF Docket # 34 at 26 (quoting *Williams v. District of Columbia*, 9 A.3d 484, 490-491 (D.C. 2010) (quoting *Wilburn v. District of Columbia*, 957 A.2d 921, 925 (D.C. 2008) (quoting *White v. Department of the Air Force*, 391 F.3d 1377, 1382 (Fed. Cir. 2004))) additional quotation marks omitted). If the Plaintiffs are correct regarding the illegally of the offset, be it a conflict with the 1997 Act, an unconstitutional taking, a violation of FLSA, a contractual violation, or an illegal tax, then they have properly disclosed a "violation of a federal, state, or local law, rule or regulation, or of a term of a contract between the District government and a District government contractor which is not of a merely technical or minimal nature". D.C. CODE § 1-615.52 (a)(6)(D).

> In [*Coons v. Secretary of the Treasury*, 383 F.3d 879 (9th Cir. 2004)], the Board found that a disclosure alleging that the Internal Revenue Service "processed a

> large, fraudulent refund for a wealthy taxpayer" under "highly irregular circumstances" was "normal disagreement between managers over a debatable matter of internal policy." *Id*. at 890. The Ninth Circuit rejected the Board's position because "Coons's disclosure cannot reasonably be characterized as a 'normal disagreement between managers over a debatable matter of internal'" policy. *Id*. The Ninth Circuit held that the actions of the agency, if true as alleged, would be considered "gross mismanagement." *Id*.

White, 391 F.3d at 1382.

> The WPA specifically requires that the employee have a reasonable belief that he or she is disclosing a violation of law, rule, or regulation. 5 U.S.C. § 2302 (b)(8)(A) (1994); *Horton v. Department of Navy*, 66 F.3d 279, 283 (Fed. Cir. 1995). The factual findings for such a reasonable belief must be supported by substantial evidence. *See* 5 U.S.C. § 7703 (c)(3) (1994). Substantial evidence consists of "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938); *see also Jacobs v. Department of Justice*, 35 F.3d 1543, 1546 (Fed. Cir. 1994). Consideration of contradictory evidence in the record is required, since "the substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

Frederick v. DOJ, 73 F.3d 349, 352 (Fed. Cir. 1996) (parallel citations omitted).

In support of their contentions that the Defendant's offset of their federally funded pensions was illegal, the Plaintiffs have presented a thoroughly annotated legal argument (which the Defendant *now complains is too lengthy*) which remains unrebutted in any meaningful manner. Even if the argument is somehow not correct, and the Defendant has abjectly failed to demonstrate such, the Plaintiffs' argument as presented buttresses a finding that they hold, to the present day, a *reasonable belief* that the Defendant's conduct is illegal.

And it is this illegality which the Plaintiffs first disclosed on January 26, 2012. ECF Docket # 1. Up to this point, all public debate was focused upon the alleged illegality of the Plaintiffs' "double dipping". *See* ECF Docket # 1-1. The only allegation against the Defendant which existed in the public domain prior to January 26, 2012 was

the Plaintiffs' equal protection claim relating to the enhanced salaries of Hickson, Major and Sarvis. *Id*. at 3. *But see id*. at 2 (non-specific allegations that "a dysfunctional city government made promises it can't keep, and is now unfairly slashing their pay").

Nowhere in any public debate or document which existed prior to January 26, 2012, is there any allegation that the Defendant "unlawfully deprived a property right vested upon the Plaintiffs… absent any due process or compensation, in violation of the Fifth Amendment of the U.S. Constitution." Compl. ¶ 40, ECF Docket # 1 at 9. Nowhere in any public debate or document which existed prior to January 26, 2012, is there any allegation that the Defendant violated the FLSA. Compl. ¶ 44, ECF Docket # 1 at 9-10.

In its Reply, the Defendant does nothing to rehabilitate the Plaintiffs' ample distinction of *Hawkins v. Boone*, 786 F. Supp. 2d 328 (D.D.C. 2011), from the present case. 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*.

VII. The Defendant fails to rebut the Plaintiffs' demonstration that the offset made against them is an illegal tax.

The Defendant again disparages the form of the Plaintiffs' arguments where it simply cannot rebut the merits thereof. ECF Docket # 34 at 27. The Defendant fails to rebut the Plaintiffs' showing that the offset against them is imposed at a direct 100% ratio against their pension payments, that the money is returned to the general fund and it is not used for some narrow specific purpose. Further, the Defendant does not dispute that it 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).

> 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 Defendant mentions the Tax Injunction Act, ECF Docket # 34 at 27, but fails to offer any meaningful argument to contradict the Plaintiffs' already stated distinction of the present circumstances to cases where that Act would be applicable. This Court has separate and independent bases for federal jurisdiction beyond the Plaintiffs' 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. 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)).

The Defendant's citation to *Fernebok v. District of Columbia*, 534 F. Supp. 2d 25 (D.D.C. 2008), is certainly inapplicable, as the case speaks solely to "an appeal from or petition for review of any assessment of tax (or civil penalty thereon) made by the District of Columbia", D.C. Code § 11-921 (a)(3)(B); D.C. Code § 11-1201; D.C. Code § 11-1202. Herein, the Plaintiffs challenge an unnamed tax imposed upon them in violation of D.C. Code § 1-206.02(a)(5). *See Banner*, 428 F.3d at 305 ("[t]he local government of the District of Columbia is prohibited by Congress from imposing a 'commuter tax' -- from taxing the personal income of those who work in the District but reside elsewhere"). The Defendant completely denies it is a tax.

"The Constitution gives Congress exclusive legislative authority in all matters pertaining to the District of Columbia." *Id*. (citing U.S. CONST. art. I, § 8, cl. 17). "Congress has delegated to the District the authority to tax the personal income of District residents; it has withheld such authority to tax non-residents who work in the District.") *Id*. at 306-307. The *Moe* decision "embraced the recognition of the interest of the United States in securing immunity… from taxation conflicting with the measures it

had adopted for their protection" even where the United States itself did not bring the action. *Sac & Fox Nation v. Pierce*, 213 F.3d 566, 572 (10th Cir. 2000) (quoting *Moe*, 425 U.S. at 473 (quoting *Heckman v. United States*, 224 U.S. 413, 441(1912)), additional quotation marks omitted).

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

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

Contrary to the Defendant's assertion, Congress certainly has not "mandated the offsets applied here". ECF Docket # 34 at 28. After the District of Columbia was unable to meet any of its obligations under the 1979 Act, Congress took away the District of Columbia's authority to administer, and therefore to offset, the pre-1997 annuity entitlements. Any "inconsistent" code provision of the 1979 Act, including D.C. Code § 5-273 (e), was expressly superseded by operation of the 1997 Act. This Court is vested with exclusive jurisdiction to "clarify" any such issue arising from the 1997 Act.

VIII. The Plaintiffs' common law claims.

a. Breach of contract.

The Defendant makes a bizarre late allegation the Plaintiffs did not have contracts (albeit, as at-will employees) with the District of Columbia government. ECF Docket # 34 at 28. Yet, the Defendant has already presented these executed contracts to the Court as *exhibits to its own Motion*. ECF Docket # 18-1, 18-2, 18-3, 18-4, 18-5, 18-6. It is indisputable that these documents reduce to writing agreements in which the Plaintiffs

agreed to provide good and valuable services in exchange for the salaries offered. In the face of the Plaintiffs' substantial authority to the contrary, the Defendant has abandoned its claim that there can be no breach of contract with an at-will employee and now simply claims that there was no written contract. The Defendant's own exhibits plainly contradict this assertion. The unambiguous words upon these papers defeat any issue of a statute of frauds and the Defendant's argument in this regard is otherwise meaningless.

> In an action upon a simple contract, an acknowledgement, or promise, by words only is not sufficient evidence of a new or continuing contract whereby to take the case out of the operation of the statute of limitations or to deprive a party of the benefit thereof unless the acknowledgement, or promise, is in writing, signed by the party chargeable thereby.

D.C. CODE § 28-3504.

The Defendant's exhibits properly identify the parties, affix the amount of compensation to be paid, specify the work to be performed and contain the signatures of both the agency representatives and each employee. The writings are contemporaneous with the respective contracts, if they are not the contracts themselves. No further written evidence is required to defeat the Defendant's spurious statute of frauds claim.

b. Detrimental Reliance/Promissory Estoppel.

The Defendant appears to abruptly change direction, raising an entirely new defense in its Reply Brief for the first time, claiming it was "patently unreasonable to rely" upon the representations of the Defendant's agents which induced the Plaintiffs into re-employment. ECF Docket # 34 at 29. *Compare* ECF Docket # 18 at 45-47 (ECF page numbers) (no mention of this claim in original motion). The Defendant's argument is without merit for two reasons. First, each of the Plaintiffs raised this specific issue at the

time of their employment offers.[8] Second, the source of the information wasn't an uninformed intermediary, it came directly from agency heads who the Plaintiffs have already amply demonstrated, and the Defendant has apparently conceded, had policy level authority. *See* ECF Docket # 29 at 24-27 (ECF page numbers).

> There is simply no requirement that the Government anticipate every problem that may arise in the administration of a complex program such as Medicare; neither can it be expected to ensure that every bit of informal advice given by its agents in the course of such a program will be sufficiently reliable to justify expenditure of sums of money as substantial as those spent by respondent. Nor was the advice given under circumstances that should have induced respondent's reliance. As a recipient of public funds well acquainted with the role of a fiscal intermediary, respondent knew Travelers only acted as a conduit; it could not resolve policy questions. The relevant statute, regulations, and Reimbursement Manual, with which respondent should have been and was acquainted, made that perfectly clear. Yet respondent made no attempt to have the question resolved by the Secretary; it was satisfied with the policy judgment of a mere conduit.

Heckler v. Community Health Servs., 467 U.S. 51, 64-65 (1984) (footnotes omitted).[9] *Accord*, *Genesis Health Ventures, Inc. v. Sebelius*, 798 F. Supp. 2d 170, 182 (D.D.C. 2011).

The Plaintiffs' reliance upon the Defendant's representations is reinforced by the complete absence of any mention of the offset within any of their offers of employment, even in the specific context of the terms of their salaries and other benefits. ECF Docket # 18-1, 18-2, 18-3, 18-4, 18-5, 18-6. *Cf. Heckler*, 467 U.S. at 65 ("[t]he appropriateness of respondent's reliance is further undermined because the advice it received from

[8] Certainly, a situation which reduced their salaries by the amount of their pensions, in some cases below minimum wage, was a "deal-breaker" for any of the Plaintiffs, particularly where other employment was available elsewhere which was not subject to any offset. Herein, unlike any of the cases cited by the Defendant regarding single instances of erroneous information provided by government agents, once the representations were made to the Plaintiffs, these representations remained the Defendant's policy for years afterwards.

[9] The Defendant now insists in nearly the same breath that it has absolute discretion to offset the offset of the reemployed MPD officials, and it is "none of the Plaintiffs' business", ECF Docket # 34 at 17, but that the Plaintiffs could not reasonably rely upon the Defendant's representations that they would not be subject to the offset.

Travelers was oral"). Unlike where "the contract by its terms defeat[ed] Conax's estoppel claim", *Conax Florida Corp. v. United States*, 824 F.2d 1124, 1131 (D.C. Cir. 1987), herein, the Plaintiffs' contracts further affirm their claims.

The Defendant claims that the Plaintiffs have failed to demonstrate "affirmative misconduct", but there appears to be no controlling authority stating what this means exactly. *Office of Pers. Management v. Richmond*, 496 U.S. 414, 422 (1990) (quoting *Schweiker v. Hansen*, 450 U.S. 785, 788 (1981) (*per curiam*) (the Court "has never decided what type of conduct by a Government employee will estop the Government from insisting upon compliance with valid regulations…"); *Heckler*, 467 U.S. at 60 ("We have left the issue open in the past, and do so again today")). The Plaintiffs herein assert that the express representations of a policy level official to induce acceptance of an employment contract, under terms the Defendant now asserts were completely within its discretion to make, rises to exactly that. The Defendant's argument in this regard is inapplicable to the Plaintiffs' Intentional/Negligent Misrepresentation claims, and the Defendant appears to have abandoned its demand for summary judgment on this count.

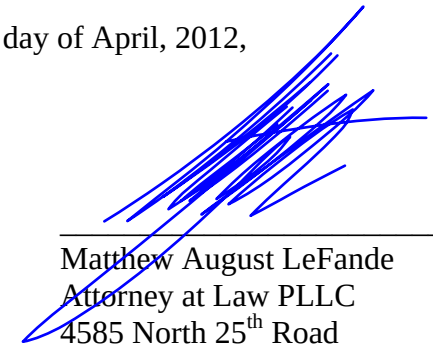
Given the highly questionable argument by the Defendant that D.C. Code § 7-523 (e) remains an operative statute, after the 1997 Act stripped nearly every other element of the 1979 Act out of existence and/or expressly superseded such language, the Defendant's present claim that the Plaintiffs' belief that the Defendant's representations to the contrary were unreasonable is particularly unfounded. 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))).

CONCLUSION

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

Respectfully submitted, this 30th day of April, 2012,



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