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	

RESPONSE TO DEFENDANT'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

In accordance with Local Rule 7 (h)(1), the Plaintiffs hereby respond to the Defendant's Statement of Material Facts as to which it contends there is no genuine issue. The Plaintiffs herein make their statement of genuine issues setting forth all material facts, as well as matters proper for further discovery, as to which it is contended there exists a genuine issue necessary to be litigated.

1. Plaintiffs are District employees who retired from service with the Metropolitan Police Department and began receiving retirement benefits, but who were subsequently re-hired. Except for plaintiff Cannon, the Plaintiffs are currently employed by the District's Department of General Services ("DGS").

Admit, except for any imputation by the Defendant that Plaintiff Cannon's termination was lawful and that Plaintiff Cannon is not presently entitled to be returned to employment with DGS as fully set forth in the Plaintiffs' Opposition.

2. Plaintiff Cannon was terminated from District employment on February 8, 2012 for disciplinary reasons stemming from an investigation dating back to October 26,

2011. Doc. No. 11-2, at 1. Mr. Cannon will continue to receive his salary until February 24, 2012. Id. at 2.

The Plaintiffs admit that Plaintiff Cannon was terminated from District employment on or about February 8, 2012. The Plaintiffs fully deny the Defendant's allegation that such termination was for any disciplinary reason. The Plaintiffs assert that that the Defendant's alleged cause for Plaintiff Cannon's termination was entirely pretextual, and those documents offered in support thereof are likely fraudulent, or at a minimum are offered to mislead the Court away from the actual causes for Cannon's termination.

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

> The WPA requires an employee to demonstrate "by a preponderance of the evidence that an activity proscribed by § 1-615.53 was a contributing factor in the alleged prohibited personnel action against [the] employee." D.C. CODE § 1-615.54 (b).

Zirkle v. District of Columbia, 830 A.2d 1250, 1260 (D.C. 2003).

The Plaintiffs assert that Cannon's participation in this lawsuit was in fact, a "contributing factor" to his termination. The Plaintiffs first point to the complete lack of a substantive allegation made against him.

> An investigation on October 26, 2011, which resulted in the removal of the DC Government Flag from the flagpole and was replaced with an Occupy DC Flag, revealed that you failed to properly interview the on-scene supervisors (Lieutenant Jackson and Sergeant Weeks) before generating an investigative report which contained false information that was subsequently presented to Brian Hanlon, Interim Director, Department of General Services after the protest at the Wilson Building.

ECF Docket # 11-2 at 1.

As previously stated, aside from the twisted sentence structure rendering the statement nearly incomprehensible, there appear to be a distinct lack of allegations of misconduct by any party among a host of innuendos. First, the statement fails to explain why Plaintiff Cannon, as Chief of Police, would have <u>any</u> responsibility for personally investigating any incident involving patrol supervisors five and six levels below him in the chain of command. This investigation was the responsibility of the direct supervisors of Jackson and Weeks, not the Chief of Police. *See, e.g.* Pl.s' Ex. 4 at 13 ("first line supervisor is responsible for conducting the investigation to determine whether the employee is subject to discipline"); Pl.s' Ex. 5 at 5, § V., A. (police <u>supervisors</u> conduct such investigations). Second, the statement fails to allege that Plaintiff Cannon did not interview Jackson and Weeks whatsoever, it claims that Cannon did not interview them "properly", an entirely subjective term offered with no further explanation whatsoever. Third, the statement fails to allege, but most markedly insinuates, that Plaintiff Cannon falsified any document. Instead, the statement pointedly asserts that the investigative report "contained false information". In total, the statement offers no specification of any

violation of any rule, regulation or law and the conclusion that Cannon's "actions in this matter interfered with the efficiency and integrity of government operations and constituted a breach of trust that render you ineligible to continue in your current position" is a *non sequitur* given the complete absence of substance to the limited factual allegations provided.

> The D.C. Court of Appeals has explained that claims brought under the DCWPA are subject to familiar burden-shifting framework established in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973). *Crawford v. District of Columbia*, 891 A.2d 216, 221 (D.C. 2006); *Johnson v. District of Columbia*, 935 A.2d 1113, 1118 (D.C. 2007). Under this framework, a DCWPA plaintiff must establish a *prima facie* case of retaliation by producing evidence sufficient for a jury to conclude that his protected activity was a contributing factor in the alleged prohibited personnel action. *Johnson*, 935 A.2d at 1118; D.C. CODE § 1-615.54(b). Once a *prima facie* case is established, the burden shifts to the employing agency "to prove by clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons even if the employee had not engaged in [protected activities]." D.C. CODE § 1-615.54(b). If the employer provides such evidence, the burden is on the plaintiff to prove that the employer's explanation was pretextual. *Johnson*, 935 A.2d at 1118-19. If a plaintiff fails to produce evidence to support a finding that the proffered explanation is pretextual, summary judgment is appropriate for the employer. *See id*. at 1121-22.

Payne v. District of Columbia, 741 F. Supp. 2d 196, 213 (D.D.C. 2010) (parallel citations omitted).

The Plaintiffs properly assert that the context of Cannon's termination, entirely simultaneous to the onset and prosecution of the Plaintiffs' lawsuit against the Defendant, with no notice whatsoever prior to the onset of the litigation of any intended disciplinary action, presents a *prima facie* case of retaliation forcing a shift of the burden upon the Defendant to demonstrate "the alleged action would have occurred for legitimate, independent reasons". Given the Defendant's burden in demonstrating that Cannon's termination would have taken place regardless of the pending litigation, this flimsy

pretext for termination of a Chief of Police with no disciplinary history in his present position and some 39 years of service cannot withstand judicial scrutiny.

> The more valid a reason appears upon evaluation, the less likely a court will be to find that reason pretextual; the converse is also true. Even when the court faces independent evidence of a discriminatory motive, it is still necessary to weigh the validity of the defendant's proffered reasons when deciding if they are pretextual. In short, the merit of such decisions simply cannot be wholly divorced from a determination of whether they are legitimate or pretextual.

Ryan v. Reno, 168 F.3d 520, 524 (D.C. Cir. 1999) (quoting *Brazil v. United States Dep't of the Navy*, 66 F.3d 193, 197 (9th Cir. 1995)).

> [T]he employer ha[s] "the burden of showing that it *would have* discharged the employee because of the misconduct, not simply that it *could have* done so" [] (emphasis in original).

Watkins v. District of Columbia, 944 A.2d 1077, 1085 (D.C. 2008) (quoting *Frazier Indus. Co., Inc. v. National Labor Relations Bd.*, 213 F.3d 750, 760 (D.C. Cir. 2000) (citing *McKennon v. Nashville Banner Publ. Co.*, 513 U.S. 352 (1995))).

> Because direct evidence, such as an explicit admission, rarely is available, the Board has accurately noted, "in almost all situations [the causal connection] must be inferred from circumstantial evidence." *McClellan v. United States Postal Serv.*, 19 M.S.P.R. 237, 239 (1984); *see* [*In re Frazier*, 1 M.S.P.R. 163, 194 (1979)]. If, for example, Webster had offered evidence of other employees at his postal facility who engaged in comparable conduct but received more lenient sanctions, the AJ could have found nexus was established. *See* [*Stromfeld v. DOJ*, 21 M.S.P.R. 428, 432 (1984)] (Employee attempted to show that other employees "committed more serious acts of misconduct than he and were either not disciplined or less severely disciplined.")

Webster v. Department of Army, 911 F.2d 679, 689-690 (Fed. Cir. 1990).

Properly for a jury's consideration, the Plaintiffs rely upon the Defendant's own stated standards for police and other employee discipline and easily demonstrate that the misconduct alleged by the Defendant did not justify Cannon's termination.

> In [*Douglas v. VA*, 5 M.S.P.B. 313 (1981)] the Merit Systems Protection Board listed twelve factors to be considered when a reviewing tribunal is called upon to

> decide whether the penalty imposed by an agency is merited. *Douglas*, 5 M.S.P.B. at 332, 5 M.S.P.R. at 305-306.

Brown v. D.C. Pub. Emple. Rels. Bd., 19 A.3d 351, 358 (D.C. 2011) (applying the *Douglas* factors to District of Columbia employee discipline).

These factors are:

> (1) The nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
>
> (2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
>
> (3) the employee's past disciplinary record;
>
> (4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
>
> (5) the effect of the offense upon employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties;
>
> (6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;
>
> (7) consistency of the penalty with any applicable agency table of penalties;
>
> (8) the notoriety of the offense or its impact upon the reputation of the agency;
>
> (9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
>
> (10) the potential for the employee's rehabilitation;
>
> (11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
>
> (12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

D.C. Dep't of Pub. Works v. Colbert, 874 A.2d 353, 357 n.4 (D.C. 2005) (quoting *Douglas*, 5 M.S.P.B. at 305-306).

The Plaintiff relies on two of the Defendant's documents, which offer recurring and concurring themes on employee discipline which together are wholly inconsistent with the cause offered for Cannon's termination. First is the District of Columbia Department of Human Resources' "HRIII – Management's Guide to Progressive Discipline". Pl.s' Ex. 4. The second is the District of Columbia Metropolitan Police Department's General Order 120.21, "Disciplinary Procedures and Processes". Pl.s' Ex. 5.

The first theme which conflicts with Cannon's termination is the concept of progressive discipline.

> Progressive discipline is the process of handling job related behavior that does not meet expectations or communicated standards. The primary purpose of progressive discipline is to assist the employee in understanding that a problem exists, and to afford the employee an opportunity to address the problem (i.e., improve or correct the behavior). The underlying principle of sound progressive discipline is to use the least [severe] action believed to necessary to correct the undesirable situation, and increase the severity of the action only if the condition is not corrected.

Pl.s' Ex. 4 at 4. *See also* Pl.s' Ex. 5 at 1 ("the Department shall utilize progressive discipline as appropriate").

The claimed cause for Cannon's termination conflicts with the Defendant's policy of Progressive Discipline, as well as the *Douglas* factors, in several regards. First, the Defendant has failed to either thoroughly investigate Cannon's claimed misconduct, or it has failed to produce any documentation that demonstrates that such an investigation was done. The sole document in support, ECF Docket # 17-1, neither attaches nor references any supporting documentation whatsoever. As set forth in Cannon's attached affidavit,

he and the other Plaintiffs have no documentation regarding these allegations. The Plaintiffs are fully entitled to complete discovery on this issue and to receive whatever documentation the Defendant possesses in support of its claim that it had "legitimate, independent reasons" for Cannon's termination.

> If a party opposing the motion [for summary judgment] shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) deny the motion; (2) order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken; or (3) issue any just order.

Ikossi v. Dep't of Navy, 516 F.3d 1037, 1045 (D.C. Cir. 2008) (quoting Fed. R. Civ. P. 56(f), holding that appellant failed to demonstrate need for discovery where there was already, in distinction to the instant case, a well-developed evidentiary record in the administrative proceedings below).

Second, there is no suggestion of any prior misconduct, and therefore no record of any lesser disciplinary action employed upon Cannon without the desired result, that is, to alert the employee of a problem and providing the employee with an opportunity to correct it.

> It is the goal of the District government to inform employees of work expectations and on the job standards of conduct. Managers have a responsibility to ensure that employees under their supervision understand expectations, that performance/conduct issues are first addressed through non-punitive measures such as counseling and training, and that improvements in employee performance/conduct are acknowledged. To this end, before disciplinary action is considered, managers should determine whether appropriate steps have been taken to inform the employee of agency expectations and to address performance/conduct issues, and whether there is tangible evidence that demonstrates that employees have not met those expectations. Thus, the need for "progressive discipline".

Pl.s' Ex. 4 at 4.

Third, the Defendant's penalty of termination is wholly inconsistent with its own stated tables of penalties for nature of the misconduct alleged. As best as can be discerned from the very limited and unclear allegations presented, the specification of misconduct for a District of Columbia employee would be in this case, "[a] non-intentional false statement as a result of negligence", Pl.s' Ex. 4 at 29, although the allegations really don't state that Cannon made any statement. There are no aggravating factors here, listed as "whether as a result of the falsification the employee received financial gain, misused government property or jeopardized the safety of others. Examples: Falsification of time and attendance records, travel vouchers or other documents related to entitlements." *Id*. For this violation, the Defendant's Table of Penalties in Exhibit 4 states a "[s]uspension for 5-15 days" as a first offense, a "[s]uspension for 30 days to Removal" for a second offense and "Removal" for a third offense. *Id*. Given there is no allegation of any prior offense, the District's Table of Penalties in Exhibit 4 dictates a maximum penalty of a suspension for fifteen days, even if aggravating circumstances are present. *Id*. The Metropolitan Police Department ***makes no provision whatsoever*** for punishment of a negligent untruthful statement. Such a violation requires the element that the statement be made "[w]illfully and knowingly", Pl.s' Ex. 6, an allegation which does not appear anywhere in this record. Therefore, the conduct alleged to be cause for Plaintiff Cannon's termination does not even amount to a violation under the Metropolitan Police Department's regulations. The imposition of a penalty of termination for Cannon's alleged conduct is completely inconsistent with the Defendant's own stated policy of progressive discipline and in

violation of *Douglas* factors 1, 3, 5, 6, 7 and 9.[1]

> It may be, of course, that Ms. Washington's allegations will not be sustained at trial. On Guest Services' motion for summary judgment, however, we view the record in the light most favorable to Ms. Washington, and we must treat her sworn affidavit and deposition testimony as true. *See, e.g.*, *Graff v. Malawer*, 592 A.2d 1038, 1040 (D.C. 1991). If the events occurred as Ms. Washington has alleged, then an impartial trier of fact could reasonably conclude that Ms. Washington was discharged for conduct protected by a public policy exception to the employment at-will doctrine, and that her termination was therefore wrongful.

Washington v. Guest Servs., 718 A.2d 1071, 1081 (D.C. 1998).[2]

The issue of whether Plaintiff Cannon will continue to receive his salary until February 24, 2012 is entirely inappropriate to include in the Defendant's Statement of Material Facts, as these events have not yet occurred and there cannot be either an uncontested or a contested issue as to these facts until such time as they have occurred or not occurred.

3. Plaintiffs Cannon, Watkins, Gainey, and Neill are or were "at will" employees. See Doc. No. 11-2 at 1; Defendant's Exhibit No. ("DEx.") 1, at 1; DEx. 2 at 1; DEx. 3 at 1. PlaintiffFord-Haynes was appointed to a "term" appointment, expiring on August 2, 2012. DEx. 4 at 1. Plaintiff Weeks's position is within the collective bargaining unit represented by the Fraternal Order of Police. DEx. 5 at 1.

Admit, except that Plaintiff Weeks is not within any collective bargaining unit represented by the Fraternal Order of Police.

[1] As set forth by Plaintiffs Cannon and Neill's affidavits attached herein, the Plaintiffs will present evidence at trial that another reemployed retired Metropolitan Police Department Officer was found after an extensive and well-documented investigation to have knowingly falsified her time and attendance records to her own benefit. The employee was given a ten day suspension consistent with the Table of Penalties in Exhibit 4.

[2] The Plaintiffs ask the Court's indulgence regarding the length of their response to the Defendant's alleged Material Fact #2. However, the Defendant's assertion of an alleged "fact" so fraught with contested dispositive legal issues necessarily requires thorough elucidation herein of the Plaintiffs' argument in rebuttal and the evidentiary issues therein.

4. Plaintiff Cannon served, until his termination, as the Chief of the Protective Services Division. See DEx. 1. Plaintiff Watkins is a Protective Services Division Manager (MS-0301-15). See DEx. 2. Plaintiff Gainey is a Supervisory Protective Services Officer (MS-0083-12). See DEx. 3. Plaintiff Neill is also a Supervisory Protective Services Officer (MS-0083-11). See DEx. 4. Plaintiff Ford-Haynes is a Management Analyst (CS-343-13/9). See DEx. 5. Plaintiff Weeks is a Protective Services Officer (CS-0083-05/8). See DEx. 6.

Admit.

5. On October 12, 2011, the Plaintiffs were notified, in writing, that because they were being paid retirement benefits from the D.C. Police and Fire Retirement System ("PFRS"), D.C. OFFICIAL CODE § 5-723(e) applied, and hence the amounts of their salaries must be "offset" by the amounts of their respective annuity benefits. See DEx. 7.

The Plaintiffs admit that they received notices similar to Defendant's MSJ Exhibit 7. The Plaintiffs further note that the asserted offset did not occur as set forth in the notices and the Plaintiffs continued to provide services to the Defendant upon an understanding that the disputed issue had be settled in their favor and such offsets would not occur in the future. As to the legal conclusions contained within the Defendant's alleged Material Fact #5, they are entirely inappropriate for a Local Rule 7 (h)(1) Statement and such legal issues are discussed within the Plaintiffs' Memorandum in Opposition.

6. The letters advised that the District would not seek to apply the offsets retroactively, but would begin applying the offset as of November 20, 2011. Id. In fact, the District did not apply the offset to Plaintiffs' salaries until the first pay period of 2012. FAC ¶ 50.

Admit, as to the text of the letters without any implication or concession as to the propriety of the legal reasoning contained therein. The Plaintiffs further admit that the

illegal offset did not occur until the first pay period of 2012. The Defendant's repeated assertion that it does not intend to try to recover prior non-offset salary payments should be afforded no special indulgence, it is simply a matter of equity and any act to the contrary could not withstand judicial scrutiny regardless of the legal authority of the offset.

> Indeed, the Social Security Act itself recognizes the critical importance of protecting an individual's expectation of benefits even in circumstances where payment is contrary to current law. The Act forbids recovery of such overpayments when the recipient is not at fault and recapture "would be against equity and good conscience." 42 U. S. C. § 404(b).

Heckler v. Mathews, 465 U.S. 728, 748 n.14 (1984).

7. Plaintiffs filed their original complaint, and motions for a temporary restraining order and preliminary injunction, on or about January 26, 2012, alleging various federal, local, and constitutional causes of action. A hearing on Plaintiffs' emergency motion was scheduled for January 31, 2012. On that day, after hearing from the parties, the Court denied Plaintiffs' motions, and set the matter on an expedited briefing schedule. See Docket.

The Plaintiffs admit that the Court's Docket accurately states the dates of the events described.

8. Plaintiffs filed their FAC on February 8, 2012, and on that same day, plaintiff Cannon was terminated from District employment. See Doc. No. 11-2.

The Plaintiffs admit that they filled their First Amended Complaint on February 8, 2012 and that Plaintiff Cannon was unlawfully terminated on that date.

9. Plaintiff Neill is paid biweekly at the same rate ($40.48 per hour) both before and after the complained-of offset, which amount "is not subject to reduction because of variations in the quality or quantity of the work performed." Cf. DEx. 8 at 1 and DEx. 8 at 2.

Deny. Plaintiff Neill's first pay period statement of 2012 demonstrates that for the pay period January 1-14, 2012, he was paid by the District of Columbia gross pay of $556.88, before taxes and benefit withholding, for 80 hours work as a senior police administrator, or an effective pay rate of $6.96 per hour. First Amend. Compl. ¶ 58. ECF Docket # 10 at 13; ECF Docket # 18-8 at 2. Plaintiff Neill's subsequent pay statements reflect a similar amount of hourly pay.

10. Plaintiff Weeks is paid biweekly at the same rate ($22.09 per hour) both before and after the complained-of offset, which amount is not subject to reductions. Cf. DEx. 9 at 1 and DEx. 9 at 2.

Deny. For the pay period January 1-14, 2012, Plaintiff Harry Weeks was paid by the District of Columbia gross pay of $290.22, before taxes and benefit withholding, for 80 hours work and 6 hours overtime work as a police patrol supervisor, or an effective pay rate of $3.26 per hour straight time and $4.89 overtime. First Amend. Compl. ¶ 60; ECF Docket # 10 at 13; ECF Docket # 18-9. Plaintiff Weeks' subsequent pay statements reflect a similar amount of hourly pay.

11. Plaintiff Neill reports directly to the Chief of the PSD and is responsible for managing "a group of subordinate supervisors" and is "directly responsible for the day-to-day operation of assigned shift." DEx. 10, at 1–2. He also, among his other duties, "[i]nterviews candidates for position vacancies, and recommends selection/non-selection of supervisory and non-supervisory personnel" and "[e]valuates work performance of subordinate supervisory and non-supervisory personnel . . ." Id. at 3.

The Plaintiffs admit that prior to February 8, 2012, Plaintiff Neill reported directly to the Chief of the District of Columbia Protective Services Police Department, Plaintiff Cannon. Plaintiff Cannon was unlawfully terminated on that date, and the person who

now claims to hold the position as Chief of the Protective Services Police Department does so without lawful authority. The Plaintiffs admit the allegations contained in the second sentence of this paragraph.

12. Plaintiff Weeks, a "police patrol supervisor," FAC ¶ 60, reports directly to the Chief and is responsible, among other duties, for "supervising a squad of police officers" and "consult[ing] with superior when selecting applicants for vacancies, promotions, outstanding awards and reassignments." DEx. 11 at 2–3.

Deny as to, as a police patrol supervisor, Weeks' chain of command is attenuated from the Chief by a Lieutenant, a Captain, a Commander, and an Assistant Chief of Police. The Plaintiffs admit that Weeks supervises a squad of police officers, but cannot respond to the remainder of the allegations in the last quoted section as there is no noun or noun phrase which the adjective "superior" modifies therein.

Respectfully submitted, this second day of April, 2012.

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