№ 12-7064

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

LOUIS P. CANNON, *et al*.

Appellants

v.

DISTRICT OF COLUMBIA

Appellee

MOTION FOR SUMMARY REVERSAL

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I. Certificate as to Parties, Rulings and Related Cases

There are no corporate parties to this appeal.

The Plaintiffs were represented before the District Court by Matthew LeFande of Arlington, Virginia.

The Defendant District of Columbia was represented by its Attorney General.

The Appellants appeal the District Court's July 6, 2012 summary dismissal of their claims. ECF Docket # 40, 41. *See also* Minute Order of July 9, 2012.

There are no related cases.

II. Table of Authorities

Cases

Cases marked with asterisks are those upon which we chiefly rely.

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III. Introduction

Under D.C. Act 15-489, the District of Columbia government must "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). The Defendant relies solely on a vestige of the District of Columbia Retirement Reform Act of 1979 to offset federal pension payments to the Plaintiffs from their present salaries, even though the Plaintiffs are indisputably "former District government employees who are federal annuitants". The District Court has dismissed the Plaintiffs' claims upon improper factual determinations properly within the purview of a jury trial and refused to consider the merits of the remaining claims despite an irrefragable demonstration of federal subject matter jurisdiction.

VI. Statement of Facts

Each of the named Plaintiffs was first employed by the District of Columbia government as a police officer prior to October 1, 1987 and retired from the District of Columbia government. Each Plaintiff receives federal annuity retirement benefits for their creditable service on or prior to June 30,

1997. *See* ECF Docket # 29 at 4-13. At various times starting in 2008, the Plaintiffs became reemployed by the District of Columbia, as administrators and supervisors of the Protective Services Police Department, a small police department charged with protection of District of Columbia buildings, a similar mission to that of the Federal Protective Service.

The Defendant offset the salaries of each of the Plaintiffs by the amount of their retirement benefit annuity payments starting with the pay period January 1-14, 2012. For that pay period, Plaintiff Gerald Neill 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. ECF Docket # 18-8 at 3. For the pay period January 1-14, 2012, Plaintiff Sheila Ford-Haynes was paid by the District of Columbia gross pay of $479.77, before taxes and benefit withholding, for 80 hours work as a senior police administrator, or an effective pay rate of $6.00 per hour. Def.'s Answer to Amended Compl., ¶ 59, ECF Docket # 27 at 7. 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. ECF Docket # 18-9 at 4.

Certain other persons similarly retired from the Metropolitan Police Department were subsequently rehired by the District of Columbia and returned back to duties at the Metropolitan Police Department. However, prior to the offset of their salaries in the manner that the Plaintiffs' salaries were offset, these persons received raises solely for the purpose of offsetting the offset imposed and negating the effect of the offset on these persons. Commander Daniel Hickson received a $47,001.00 *per annum* raise in his District of Columbia. ECF Docket # 1-2 at 3. Lieutenant Jacob Major received a $36,050.00 *per annum* raise in his District of Columbia pay. *Id*. William Sarvis received a $27,686.00 *per annum* raise in his District of Columbia pay. *Id*.

After receiving their pay statements for the January 1-14, 2012, the Plaintiffs filed suit, pleading a class action, but later requesting leave to not move for class certification until after the dispositive motions were decided. ECF Docket # 24 at 4. The District Court denied the Plaintiffs' applications for emergency injunctive relief and on February 8, 2012, the Plaintiffs filed their First Amended Complaint. ECF Docket # 10. On that date, the Defendant terminated Plaintiff Louis Cannon from his position as Chief of the Protective Services Police Department, employing a bizarre claim that a police report from October 2011, which he did not write, contained false

information. ECF Docket # 11-2. The Plaintiffs also discovered that none of them received their pay for the second pay period of January 2012 whereas all known non-Plaintiffs employed by the agency did. The Plaintiffs filed a Supplemental Complaint, asserting new First Amendment retaliation claims and moved again for a Preliminary Injunction. ECF Docket # 11, 12. Prior to discovery, the Defendant moved to dismiss and for summary judgment. ECF Docket # 18. The Plaintiffs made a cross motion for partial summary judgment. ECF Docket # 30. On July 6, 2012, the District Court granted summary judgment for the Defendant on all federal claims. ECF Docket # 40. The Plaintiffs filed a timely Notice of Appeal. ECF Docket # 42.

V. Argument

1. Standard of Review

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).

> In ruling on a motion for summary judgment, a 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. 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." *Id.* at 250 n.5. 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).

> While the district court enjoys "broad discretion in structuring discovery," *Edmond v. U.S. Postal Serv. Gen. Counsel*, 949 F.2d 415, 425 (D.C. Cir. 1991), summary judgment is premature unless all parties have "had a full opportunity to conduct discovery." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986). A Rule 56(f) motion requesting time for additional discovery should be granted "almost as a matter of course unless the non-moving party has not diligently pursued discovery of the evidence." *Berkeley v. Home Ins. Co.*, 68 F.3d 1409, 1414 (D.C. Cir. 1995); *see also Resolution Trust Corp. v.*

> *N. Bridge Assocs.*, 22 F.3d 1198, 1203 (1st Cir. 1994) ("Consistent with the salutary purposes underlying Rule 56(f), district courts should construe motions that invoke the rule generously, holding parties to the rule's spirit rather than its letter.").

Convertino v. United States DOJ, 2012 U.S. App. LEXIS 12783 at 14 (D.C. Cir. June 22, 2012) (parallel citations omitted).

2. The District Court's summary denial of the Plaintiffs' FLSA claim is reversible error

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 District Court's attribution of the Plaintiffs' existing retirement annuity payments to their wages for the purpose of the Fair Labor Standards Act was contrary to the letter and intent of the Act.

> It is therefore undisputed that each of these plaintiffs receives a total of more than $455 per week. However, the parties disagree about whether the federal pension payments should be included in the calculation of the minimum "salary basis" necessary to be exempt from the FLSA. The District calculates the relevant "salary basis" as the amount that plaintiffs would receive before the offset is applied. (*See* Def.'s Mot. at 23.) Plaintiffs urge a narrower interpretation, insisting that the FLSA "salary basis" refers to the amount of their paychecks after they have been reduced to account for their pension payments. (*See* Pls.' Mot. at 14). Plaintiffs, however, offer no authority for the proposition that the Court should ignore the thousands of dollars in pension payments that they receive each month and look only at the money that they receive from their current paychecks. Nor can the Court find any.

ECF Docket # 40 at 8.

> Although plaintiffs correctly argue that the Court should focus on the pay that the employee actually receives, *see Orton v. Johnny's Lunch Franchise, LLC*, 668 F.3d 843, 848 (6th Cir. 2012), they ignore the fact that they receive compensation far in excess of the FLSA threshold. Moreover, plaintiffs in fact control whether their earnings come through their paycheck or their pension checks because, as the October 12, 2011 letters explain, plaintiffs may elect to receive their full salary in their paychecks and suspend the annuity payments instead. (Def.'s Mot., Ex. 7 at 3.) Regardless of whether it comes in their paychecks or in their pension checks, they earn *and* receive between $22.09 and $43.50 per hour, which far exceeds the cut-off for coverage under the FLSA.

Id. at 9-10 (footnote omitted, emphasis *sic*).

The District Court's interpretation of FLSA is fundamentally flawed in its inclusion of pension payments, a pre-existing obligation already due from the United States Treasury to the Plaintiffs whether they continue to work for the Defendant or not, as part of its definition of "compensation" for "work" performed under FLSA. Only upon the improper inclusion of these pension payments, not "pay for work performed", can the Court find that the Plaintiffs are "compensated on a salary basis at a rate of not less than $ 455 per week". 29 C.F.R. § 541.600.

> 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 C.F.R. § 778.109 (emphasis added). *See also* 29 U.S.C. § 207 (e).

> Under the FLSA, an employer is required to pay each employee wages at or above the minimum wage rate for the hours worked during each workweek. *See* 29 U.S.C. § 206. The FLSA applies to all employees for whom there is not a specific exemption. 29 U.S.C. § 203(e); *See Powell v. U.S. Cartridge Co.*, 339 U.S. 497 (1950); *Patel v. Quality Inn South*, 846 F.2d 700 (11th Cir. 1988).

Gaxiola v. Williams Seafood of Arapahoe, Inc., 776 F. Supp. 2d 117, 124 (E.D.N.C. 2011) (parallel citations omitted).

"[W]hatever the basis on which the workers are paid, whether it be monthly, weekly, or on a piecework basis, they must receive at least the equivalent of the minimum hourly rate." *Id*. (quoting 29 C.F.R. § 776.5). "Compliance with the FLSA's minimum wage requirements also means that employees are entitled to minimum wage for the number of hours worked during the workweek 'free and clear' of improper deductions." *Id*. at 125 (citing 29 C.F.R. §§ 531.35, 776.4). "Work is 'physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer.'" *Reich v. IBP, Inc.*, 38 F.3d 1123, 1125 (10th Cir. 1994) (quoting *Tennessee Coal, Iron & R.R. Co. v. Muscoda Local*, 321 U.S. 590, 598 (1944)). "Generally speaking, what constitutes working time… must be determined in accordance with common sense and the general concept of work or employment." *Central Missouri Tel. Co. v. Conwell*, 170 F.2d 641, 646 (8th

Cir. 1948) (citing *Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123*, 135 F.2d 320 (5th Cir. 1943)). Payment of a pre-existing obligation of pension benefits cannot be described as within any "general concept of work or employment".

The Defendant cannot be excused by the Court's claim that it is the Plaintiffs who chose to have their salaries offset by their pension amounts. This remains a *de facto* deduction where the Plaintiffs remain shortchanged by the same amount by either option.

> Additionally, failing to reimburse plaintiffs for their expenditures is equivalent to the employer paying for these expenses and then improperly deducting them from the employees' pay for the first workweek. *Id*. Known as a *de facto* deduction, "there is no legal difference between deducting a cost directly from the worker's wages and shifting a cost, which they could not deduct, for the employee to bear."

Williams Seafood, 776 F. Supp. 2d at 124 (quoting *Arriaga v. Florida Pacific Farms, LLC*, 305 F.3d 1228, 1236 (11th Cir. 2002)).

> The ***only*** statutory exception to this requirement is set forth in 29 U.S.C. § 203(m), which ***allows an employer to count as wages*** the reasonable cost "of furnishing [an] employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees."

Fla. Pac. Farms, 305 F.3d at 1235 (emphasis added).

> Congress did not intend by the Portal Act to change the general rule that the remedial provisions of the Fair Labor Standards Act are to be given a liberal interpretation and exemptions therefrom are to be narrowly construed and limited to those who can meet the burden of

> showing that they come "plainly and unmistakably within the terms and spirit" of such an exemption.

Central Missouri Tel. Co., 170 F.2d at 644 (quoting an interpretive bulletin of the Administrator of the Wage and Hour Division of the United States Department of Labor). *See also Vega ex rel. Trevino v. Gasper*, 36 F.3d 417, 424 (5th Cir. 1994) (quoting *Dunlop v. City Electric, Inc.*, 527 F.2d 394, 401 (5th Cir. 1976) (defining "principal activity" compensable under Portal Act "to include activities 'performed as part of the regular work of the employees in the ordinary course of business. . . . [the] work is necessary to the business and is performed by the employees, primarily for the benefit of the employer . . .'"

The Plaintiffs' pension payments aren't payments for work at all. They are payments of an obligation which vested upon their prior employment with the Defendant and the Plaintiffs' monetary contributions to a fund to which, by a curious legislative history, the United States Treasury is now obligated to pay them from, and such payments are intended to be received whether they work or not. These pension payments fall squarely outside the "pay for work performed" described by the FLSA and cannot be considered in the calculation of whether the Defendant has

violated the FLSA.[1] The District Court's inclusion of the Plaintiffs' pension payments as "pay for work performed" is derogative of "the general concept of work or employment" and creates solely by improper judicial fiat a new class of "pay for work performed" which was never permitted or intended by Congress.

The District Court's application of a forty year old case regarding District of Columbia unemployment benefits highlights the untenable nature of the Court's decision. ECF Docket # 40 at 9 (citing *Rogers v. District Unemployment Compensation Board*, 290 A.2d 586, 587 (D.C. 1972)). *Rogers* speaks solely to application of District of Columbia prior unemployment benefits law and has no bearing whatsoever upon how "pay for work performed" is defined under the FLSA. Further, the present language of the law now specifically exempts pension payments from offset where the claimant made contributions to the pension or annuity, rendering

[1] The District Court's claim that the Plaintiffs have offered no authorities in support of this proposition, ECF Docket # 40 at 8, is particularly disingenuous where none of the parties ever espoused or argued the position that the Court eventually relied upon in dismissing the FLSA claims. Indeed, the Defendant *expressly admits* that "plaintiff Ford-Haynes was paid gross pay of $479.77 for 80 hours work…" ECF Docket # 25-2 at 7, ¶ 59. The Court's reliance upon such a contrarian and novel position in dismissing these claims certainly deprived the Plaintiffs of any prior notice or opportunity to offer such authorities.

this citation even more inapplicable to the present case. D.C. CODE § 51-107(c)(2).

The District Court's citation to *Fed. Air Marshals v. United States*, 84 Fed. Cl. 585 (2008), fares no better, and certainly supports the opposite result. The "availability pay" of the Air Marshals was indisputably "pay for work performed" in the manner that the Plaintiffs herein assert that their pension payments are not.

> Section 8331(3)(E)(ii) specifically addresses the basic pay of FAMs for the purpose of civil service retirement: it defines "basic pay" as including "availability pay . . . received after September 11, 2001, by a Federal air marshal of the Department of Transportation, subject to all restrictions and earning limitations imposed on criminal investigators under section 5545a."

Id. at 591 (emphasis omitted).

> In order to prevail on an FLSA overtime claim, plaintiffs must show that they "performed work for which [they were] not properly compensated." *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946), *superseded by statute on other grounds as stated in United States v. Cook*, 795 F.2d 987, 990-91 (Fed. Cir. 1986).

Id. at 592 (parallel citations omitted).

> An employee's "regular rate" includes "all ***remuneration for employment*** paid to, or on behalf of, the employee." 29 U.S.C. § 207(e). Section 207(e) goes on, however, to "list[] eight categories of remuneration that need not be included in the calculation of the regular rate."

Id. at 595 (quoting *Murphy v. Town of Natick*, 516 F. Supp. 2d 153, 157 (D. Mass. 2007) (citing 29 U.S.C. § 207(e)), emphasis added).

> Under the clear and unambiguous language of the FLSA and its regulations, FAM Availability Pay does not constitute overtime compensation. FAM Availability Pay is a twenty-five percent premium pay. FAMs are required to work an average of two hours in addition to their scheduled eight-hours per day to qualify for FAM Availability Pay; the hours are certified by the FAM Service Director on an annual basis. As defendant explains, "the two additional hours [worked per day] constitute a 25 percent increase in the number of regularly scheduled hours worked on a non-excludable day - providing the basis for the 25 percent availability payment." Moreover, under the FAM Pay Policy, FAMs receive Availability Pay ***as compensation for*** all unscheduled ***work***, not just the first two hours per day.

Id. at 596 (citations and footnote omitted, emphasis added).

Federal Air Marshals therefore also supports the Plaintiffs' contention that "pay for work performed" under FLSA does not include federal trust fund payments paid to retirees as a pre-existing obligation separate and apart from any present employment.

Both of these highly questionable citations evince a process by wherein the District Court made its conclusion to deprive the Plaintiffs of relief under FLSA and then proceeded to search for authority, however dubious, in support thereof. The District Court's purported authorities do not stand for the propositions offered by it and the Court cannot overcome the multitude of authorities on point regarding FLSA's definition of "pay for work performed" in direct conflict with the Court's conclusion.

3. The District Court improperly denied the Plaintiffs discovery and trial upon disputed factual issues.

By granting summary judgment to the Defendant without discovery on factual claims genuinely disputed by the Plaintiffs, the District Court has bypassed the fact finding function of the Court and deprived the Plaintiffs of their Seventh Amendment right to a jury trial on all such issues so demandable.

a. The Plaintiffs' Equal Protection Claims

The District Court's denial of the Plaintiffs' equal protection claims is premised upon a stark factual conclusion by the Court.

> First, to establish an equal protection claim, plaintiffs must show that they were singled out and treated differently from others who were similarly situated. *Women Prisoners of D.C. Dep't of Corrs. v. Dist. of Columbia*, 93 F.3d 910, 924 (D.C. Cir. 1996). To meet this burden, plaintiffs allege that they were treated differently from District police officers who were given a raise to compensate for the income reduction resulting from the offset. (*See* Pls.' Mot. at 15 (relying upon Compl., Ex. 2 (*Washington City Paper* article discussing raises given to Metropolitan Police Department ("MPD") employees Hickson, Major, and Sarvis)).) However, these officers are not similarly situated.

ECF Docket # 40 at 15.

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 Defendant offered no evidence or even allegations of material facts in rebuttal of this contention. ECF Docket # 18-13.[2]

The Plaintiffs assert they ***are entitled to equal protection of this law***, not salaries equal to persons in different jobs. What the Plaintiffs properly complain of is that the Defendant gave the MPD 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. 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

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

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 Plaintiffs are entitled to a jury trial to determine this issue, not a summary conclusion by the District Court without the benefit of discovery.

> The District also asserts that the violations at the Ayers Place and Ames Street buildings were less serious than those at the tenants' buildings, particularly 1512 Park Road, which had electrical problems and lacked an adequate fire escape. ***But making such judgments is the jury's responsibility***, and especially given the inspector's testimony that the Ames Street building was in "equally bad condition," we think a reasonable jury could find the violations at the Ayers Place and Ames Street buildings sufficiently comparable to those at the tenants' buildings to undermine the District's claim of non-discriminatory intent.

2922 Sherman Ave. Tenants' Ass'n v. District of Columbia, 444 F.3d 673, 684 (D.C. Cir. 2006) (citing *Gunning v. Cooley*, 281 U.S. 90, 94 (1930) (explaining that it is for the jury to decide the "effect or weight of evidence") emphasis added). "Whether two employees are similarly situated ordinarily presents a question of fact for the jury." *George v. Leavitt*, 407 F.3d 405, 414-415 (D.C. Cir. 2005) (quoting *Graham v. Long Island R.R.*, 230 F.3d 34, 39 (2d Cir. 2000) and citing *Mungin v. Katten Muchin & Zavis*, 116 F.3d 1549, 1555 (D.C. Cir. 1997)).

> EPA argues, however, that George and the other engineers were not similarly situated, as a matter of law, because she was a probationary employee and they were not. EPA is correct that we have held that

> probationary employees and permanent employees are not similarly situated, observing that, under federal regulations, probationary employees may be terminated for problems even if those problems would not be good cause for terminating a permanent employee. Here, however, the other engineers were not federal civil servants, but were participants in EPA's Senior Environmental Employment Program. George asserts that, as such, these engineers "were *de facto* 'at-will' employees . . . who could be terminated at any time, without notice and for any non-discriminatory reason," and EPA does not dispute this characterization. Under these circumstances, we think that a reasonable jury could conclude that George and the other engineers were similarly situated.

George, 407 F.3d at 415 (D.C. Cir. 2005) (citing *Holbrook v. Reno*, 196 F.3d 255, 262 (D.C. Cir. 1999); *McKenna v. Weinberger*, 729 F.2d 783, 789-90 (D.C. Cir. 1984), additional citations, internal flags omitted).

The District Court improperly denied the Plaintiffs a jury trial on the issue of whether the reemployed Metropolitan Police Department officials were similarly situated for their equal protection claims. The District Court came to its own factual conclusion on this point and employed it to dismiss this claim summarily without discovery or a trial.

The Defendant's public policy argument adopted by the District Court is disingenuous on two points, first the Defendant failed 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. ECF Docket # 9 at 11. 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 was not entitled to any summary adjudication of this issue.

b. The Plaintiffs' First Amendment Claims

Plaintiff Cannon was terminated from his position as Chief of Police of the District of Columbia Protective Services Police Department on February 8, 2012, with no prior notice of any disciplinary action and less than two weeks after this lawsuit was filed. The Plaintiffs fully denied the Defendant's allegation that Cannon's termination was for any disciplinary reason and offered authority, some of which was premised upon their own decades of experience as police administrators, that the alleged cause was not an ordinary basis for termination of a police officer or police official. 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 were likely fraudulent.

> 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.

ECF Docket # 30-2 at 2.

The authenticity of the Defendant's sole exhibit claiming the decision to terminate Cannon predated this lawsuit has been properly challenged. The Defendant's claimed justification for Cannon's termination borders on the bizarre. The Plaintiffs have raised legitimate and justiciable arguments and offered affidavits in support that no police administrator would have been terminated for the stated cause given by the Defendant in Cannon's termination. The Plaintiffs were entitled to conduct discovery on this point and if factual evidence needed to be weighed, the Plaintiffs were entitled to have such evidence put before a jury, not just have the District Court accept the Defendant's representations without further inquiry. "Usually, proffering 'evidence from which a jury could find that [the employer's] stated reasons . . . were pretextual . . . will be enough to get a plaintiff's claim to a jury.'" *George*, 407 F.3d at 413 (quoting *Carpenter v. Fannie Mae*, 165 F.3d 69, 72 (D.C. Cir. 1999) (citing *Aka v. Wash. Hosp. Ctr.*, 156 F.3d 1284 (D.C. Cir. 1998) (*en banc*))).

> However, it is unnecessary to address defendant's multiple grounds for dismissal because Cannon cannot establish causation, for he cannot show that the initiation of the instant suit "was a substantial or motivating factor in prompting [his firing]." [*Wilburn v. Robinson*, 480 F.3d 1140, 1149 (D.C. Cir. 2007)]; *see Velikonja v. Mueller*, 362 F. Supp. 2d 1, 24 (D.D.C. 2004) ("Plaintiff fails to offer evidence to suggest a link between the government's conduct and [this lawsuit]; thus, the Court need not consider whether his [initiation of this suit] was constitutionally protected."), *aff'd*, 466 F.3d 122, 124 (D.C. Cir. 2006).

ECF Docket # 40 at 19.

The Plaintiffs cannot produce this evidence because they have not for a single moment been permitted to make inquires and request production of such evidence, evidence indisputably in the sole possession of the Defendant. What self-serving evidence which was provided by the Defendant, the District Court accepted without question.

> According to the termination letter, Cannon was fired for his failure to adequately investigate an October 26, 2011 incident involving Occupy D.C. and for generating a report containing false information that he submitted to his superiors within DGS. (Cannon Termination Letter at 1.) The evidence makes clear that the disciplinary action that resulted in his firing was undertaken months before the lawsuit was filed or even contemplated (*id*), and the recommendation that he be fired, dated January 17, 2012, was also made well before there was any reason for litigation.

Id.

The District Court permitted the entirety of the Plaintiffs' case regarding Cannon's firing to be dismissed without a trial based upon a single piece of paper which the Plaintiffs were not permitted to make any inquiry as to the circumstances of its creation or its legitimacy. If the District Court conducted a murder trial in the same manner, a defendant would be summarily acquitted upon production of a letter purporting to be from his mother saying he didn't do it. Such dismissal plainly contradicted the holding in *Convertino* that "discovery should be granted 'almost as a matter

of course unless the non-moving party has not diligently pursued discovery of the evidence.'" The District Court has abjectly denied the Plaintiffs access to any such evidence and the dismissal of the Plaintiffs First Amendment retaliation claims regarding Cannon's termination.[3] Further, the District Court improperly interjects its opinion as to a purely factual issue, the reasonableness of the termination action for the allegations made against Cannon. ECF Docket # 40 at 20.

> We think that George has proffered ample evidence by which a reasonable jury could conclude that EPA's stated reasons for her termination are "unworthy of credence." George vigorously disputes the validity of the reasons cited by EPA, creating a genuine dispute over these material facts. Although a jury may ultimately decide to credit the version of the events described by Brown and Kelly over that offered by George, this is not a basis upon which a court may rest in granting a motion for summary judgment.

George, 407 F.3d at 413.

In the same vein, the District Court has accepted the Defendant's allegation that salary payments due to the Plaintiffs somehow were the subject of a "clerical error" and that the Plaintiffs received paper checks

[3] The Plaintiffs have never made any sort of concession that "when the District made the decision to fire Cannon, it had no reason to retaliate against him." ECF Docket # 40 at 20. Instead, as the Plaintiffs' filings invariably demonstrate, the Plaintiffs have vigorously disputed that any such decision took place prior to the filing of this lawsuit.

instead without any further harm to them. This first misrepresents the Plaintiffs factual allegations.

> Plaintiffs' second claim of retaliation, which is based on the District's issuance of paper, rather than electronic, paychecks is also seriously flawed.

Id. at 21.

This is not what the Plaintiffs allege. Nearly simultaneous to Cannon's termination, the Plaintiffs direct deposits were withheld from their respective bank accounts. Only after the filing of a Supplemental Complaint, ECF Docket # 11, were the payments claimed to have been "discovered" in the form of paper checks on the desk of a payroll administrator and the payments provided to the Plaintiffs. The Plaintiffs assert that the Defendant intentionally withheld each of the Plaintiffs' paychecks to intimidate them into not pursuing their claims against the Defendant, and to effectually impede them from pursuing such claims against the Defendant, by cutting off their funding to pay for such litigation. *See* ECF Docket # 11-1 at 4. Only after the Plaintiffs employed the withholding of their paychecks as a new cause of action for First Amendment retaliation was the story of the "clerical error" concocted by the Defendant and the paper checks "discovered" in the payroll administrator's office. Once again, these disputed factual issues, particularly as to intent of

the Defendant's administrators, are properly issues for a jury's consideration and not the District Court's picking and choosing as to which story facilitates a quicker dismissal of the case.

4. The District Court ignores its subject matter jurisdiction regarding the Plaintiffs' claims of violations of D.C. Code § 1-206.02(a)(5) and 4 U.S.C. § 111(a).

The District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. 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 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 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." *Qwest Communs. Corp. v. City of Berkeley*, 146 F. Supp. 2d 1081, 1091 (N.D. Cal. 2001) (citing *Wright v. Riveland*, 219 F.3d 905, 911 (9th Cir. 2000); *Trailer Marine Transport Corp. v. Rivera Vazquez*, 977 F.2d 1 (1st Cir. 1992)). 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 Plaintiffs challenge an unnamed tax imposed upon them in violation of D.C. Code § 1-206.02(a)(5). *See Banner v. United States*, 428 F.3d 303, 305 (D.C. Cir. 2005) ("[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 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.

Further federal subject matter jurisdiction is found where the Defendant refuses to apply an exemption under D.C. Code § 1-611.03(b) to District of Columbia PFRS federal annuitants such as the Plaintiffs, 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.

This 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).

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.

The Plaintiffs have specifically pled a cause of action for the Defendant's violation of the District of Columbia Self-Government and Governmental Reorganization Act. ECF Docket # 9 at 16. Whether pled as such, as Fifth Amendment Takings claim, or as another form of constitutional tort, the District Court had good and proper subject matter jurisdiction over these claims of illegal taxation. The Court's dismissal of such claims for lack of jurisdiction and not upon the merits was reversible error.

5. The District Court improperly eschews the exclusive federal venue provision of D.C. Code § 1-815.02(a).

The District of Columbia Retirement Protection Act of 1997 provides that the "United States District Court for the District of Columbia shall have exclusive jurisdiction and venue, regardless of the amount in controversy… (1) Civil actions brought by participants or beneficiaries [to federal benefit

payments under District of Columbia retirement programs], and (2) Any other action otherwise arising (in whole or part) under this chapter or the contract. D.C. Code § 1-815.02 (a)

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 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 District Court suggests, withheld the Plaintiffs' benefits themselves, which the Defendant 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 District Court's 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.

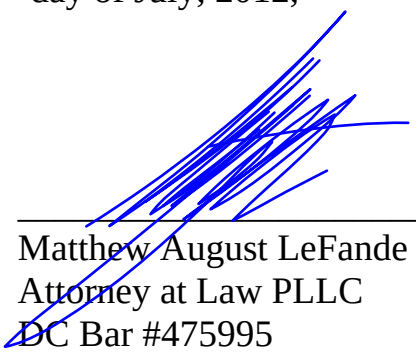
United States v. Walker, 665 F.3d 212, 225 (1st Cir. 2011). *Accord, Yin Hing Sum v. Holder*, 602 F.3d 1092, 1097 (9th Cir. 2010) (quoting *Romero-Ruiz v. Mukasey*, 538 F.3d 1057, 1062 (9th Cir. 2008) (noting that "legislative enactments should not be construed to render their provisions mere surplusage" (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). The District Court therefore has <u>exclusive</u> jurisdiction under D.C. Code § 1-815.02(a) to hear these claims. *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).

VI. Conclusion

The District Court's July 6, 2012 Opinion and Order should be summarily reversed with instructions for the District Court to enter summary judgment for the Plaintiffs on their FLSA claims, permit discovery upon their First Amendment and Equal Protection Claims and for the Court to consider the Plaintiffs illegal taxation claims as proper subject matter. A finding of such federal subject matter jurisdiction on any point should require reversal of the District Court's dismissal of the Plaintiffs' other claims.

Respectfully submitted, this 18th day of July, 2012,



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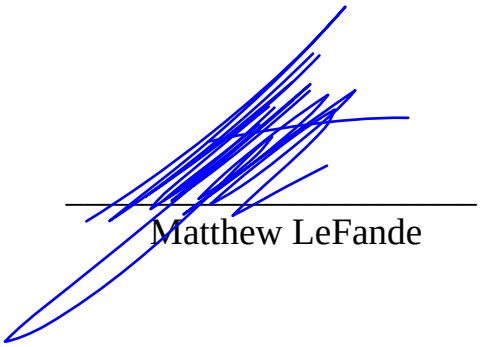
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two copies of the foregoing Motion and Attachment were served via Appellate ECF and via United States Postal Service Priority Mail, postage prepaid, to the District of Columbia Solicitor General, this 18th day of July, 2012.



Matthew LeFande

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LOUIS P. CANNON, *et al.*,	)	
Plaintiffs,	)	
v.	)	**Civil Action No. 12-0133 (ESH)**
DISTRICT OF COLUMBIA,	)	
Defendant.	)	

MEMORANDUM OPINION

Plaintiffs purport to represent a class of retired police officers who were first employed by the District of Columbia ("District" or "defendant") before 1987 and were subsequently rehired by the District after 2004. After they retired, they received federal retirement benefits and, when they were rehired, they began receiving a salary from the District. When the District began reducing their pay by the amount of their pension payments, plaintiffs filed suit, alleging violations of the Fair Labor Standards Act, the First Amendment, their Fifth Amendment rights to due process, just compensation, and equal protection, and asserting multiple claims arising under District of Columbia law. Before the Court is the District's motion to dismiss or, in the alternative, for summary judgment and plaintiff's cross-motion for partial summary judgment. For the reasons set forth below, the Court will grant defendant's motion with respect to the federal claims, remand the remaining claims to Superior Court, and deny plaintiffs' motion or partial summary judgment.

BACKGROUND

I. FACTS

Plaintiffs were first employed by the District as police officers before 1987.[1] (First Am. Compl. ¶ 35; Def.'s Opp'n to Mot. for Temporary Restraining Order, Ex. 1 ("Toliver Decl.") ¶ 5.) When they retired, they began receiving federal retirement benefits. (*Id.*) At various points after 2004, plaintiffs were rehired by the District to serve in the Department of General Services ("DGS") and, at that point, began receiving salaries from the District. (*Id.* ¶ 4; First Am. Compl. ¶ 37.) From the time that they were rehired until early 2012, plaintiffs received both their federal pension payments and their full salaries for the current positions as District employees. (*See, e.g.*, Pls.' Opp'n to Def.'s Mot./Cross-Mot. for Summ. J. ("Pls.' Mot."), Ex. 5 ("Cannon Decl.") ¶ 19.) The simultaneous receipt of federal pension and salary payments is commonly referred to as "double-dipping."

In summer 2011, the District began looking into the legality of double-dipping. (Compl., Ex. 2, at 2.) In fall 2011, it informed plaintiffs that it had mistakenly overpaid them for several years, since it had neglected to apply the offset set forth in D.C. Code § 5-723(e) to reduce their current paychecks by their pension payments. (*See* Def.'s Partial Mot. to Dismiss or, in the Alternative, for Summ. J. ("Def.'s Mot."), Ex. 7 (letters to plaintiffs dated Oct. 12, 2011).) In particular, the District notified them that although it would not recoup the thousands of dollars that it had erroneously paid in the past, it would rectify the error prospectively by offsetting their current salary payments by their monthly pension payments. (*Id.*)

January 25, 2012 was the first date that plaintiffs' paychecks were reduced to reflect their pension payments. (*See* First Am. Compl. ¶¶ 46, 50.) One day later, plaintiffs filed suit, seeking

[1] The named plaintiffs are Louis P. Cannon, Stephen R. Watkins, Eric Westbrook Gainey, Gerald G. Neill, Sheila Ford-Haynes, and Harry Louis Weeks, Jr.

a temporary restraining order ("TRO") and preliminary injunction ("PI") to enjoin the offset and claiming that double-dipping was expressly permitted by a D.C. law enacted in 2004-- the D.C. Government Reemployed Annuitant Offset Elimination Amendment Act of 2004 ("Offset Elimination Act of 2004"), Act 15-489. (*See* Compl. ¶ 32; Mot. for TRO at 6.) At a hearing on January 31, 2012, plaintiffs' motion for a TRO was denied.

Plaintiff Cannon was fired on February 8, 2012, as Chief of the Protective Services Police Department because he allegedly failed to properly investigate an incident that occurred during an Occupy D.C. protest and subsequently submitted a false investigative report to the Director of DGS. (Pls.' Mot. for Leave to File Suppl. Compl. ("Supp. Compl."), Ex. 3 ("Cannon Termination Letter"); Def.'s Opp'n to Pls.' Renewed Mot. for a Preliminary Injunction, Ex.1 ("D.C. Human Resources Decision Form").) He was terminated at the conclusion of a Human Resources Department investigation that was initiated on October 26, 2011, and ended with General Counsel Charles Tucker's recommendation that Cannon be terminated. (Def.'s Mot. for Leave to File a Sur-Reply ("Def.'s Renewed PI Sur-Reply"), Ex. 1 ("Tucker Decl.") ¶ 7.) Tucker's recommendation was made on January 17, 2012—one week before plaintiffs' paychecks were reduced by their pension payments and nine days before the instant suit was filed. (*Id*.)

On February 10, 2012, some District employees, including several of the plaintiffs, did not receive their normal direct deposit salary payments. (*See* Def.'s Opp'n to Pls.' Renewed Mot. for a PI, Ex. 2 ("Burrell Decl.") ¶ 6; Def.'s Renewed PI Sur-Reply, Ex. 2 ("Rivera Portis Decl.") ¶ 6.) Due to a clerical error, they received paper checks instead. (*Id*. ¶ 4.) Employees of DGS called each plaintiff to explain what had happened and the plaintiffs were ultimately paid in full. (Burrell Decl. ¶ 6.)

Plaintiffs subsequently amended their complaint to add claims based on these two events.[2] (*See* Supp. Compl.) They now assert claims under the Fair Labor Standards Act, 29 U.S.C. §§ 201, *et seq*. ("FLSA"), and under 42 U.S.C. § 1983 for the deprivation of due process, just compensation, and equal protection in violation of the Fifth Amendment and for retaliation in violation of the First Amendment. In addition, plaintiffs assert multiple claims under District of Columbia common law,[3] the District of Columbia Self-Government and Governmental Reorganization Act, codified as amended at D.C. Code §§ 1-201.01 *et seq*., and the District of Columbia Whistleblower Protection Act, codified as amended at D.C. Code §§ 1-615.51 *et seq*. Defendant has moved to dismiss or, in the alternative, for summary judgment, on all claims and plaintiffs have cross-moved for partial summary judgment on their FLSA claims only.

ANALYSIS

I. LEGAL STANDARD

To survive a motion to dismiss under Rule 12(b)(1), plaintiffs must demonstrate that the court has jurisdiction. *See Khadr v. United States*, 529 F.3d 1112, 1115 (D.C. Cir. 2008). Since district courts are courts of limited jurisdiction, the inquiry into "subject matter jurisdiction is, of necessity, the first issue for an Article III court." *Loughlin v. United States*, 393 F.3d 155, 170 (D.C. Cir. 2004) (internal quotation marks omitted). In "determining the question of jurisdiction, federal courts accept the factual allegations contained in the complaint as true . . . . Moreover, the Court can consider material outside of the pleadings when determining whether it has

[2] They again sought a preliminary injunction, which was denied. (*See* Pls.' Renewed Mot. for a Preliminary Injunction.)

[3] The common law claims are: breach of contract; unjust enrichment; detrimental reliance/promissory estoppel; intentional or negligent misrepresentation; and defamation (Cannon only).

jurisdiction." *Halcomb v. Office of the Senate Sergeant-At-Arms*, 563 F. Supp. 2d 228, 235 (D.D.C. 2008).

To survive a Rule 12(b)(6) motion to dismiss, a complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)). This facial plausibility standard "asks for more than a sheer possibility that a defendant has acted unlawfully." *Id*. (citing *Twombly*, 550 U.S. at 556). "[A] complaint [does not] suffice if it tenders 'naked assertions' devoid of 'further factual enhancement.'" *Id*. (quoting *Twombly*, 550 U.S. at 557) (some alteration marks omitted).

Under Rule 56, summary judgment should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *see also Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 247 (1986). There is a "genuine issue" of material fact if a "reasonable jury could return a verdict for the nonmoving party." *Galvin v. Eli Lilly & Co*., 488 F.3d 1026, 1031 (D.C. Cir. 2007) (quoting *Anderson*, 477 U.S. at 248). A moving party is thus entitled to summary judgment against "a party who fails 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." *Waterhouse v. Dist. of Columbia*, 298 F.3d 989, 992 (D.C. Cir. 2002) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)). While "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be

drawn in his favor, *Anderson*, 477 U.S. at 255, the non-moving party "may not rest upon the mere on allegations or denials of his pleading." *Id*. at 298.

II. FAIR LABOR STANDARDS ACT

Plaintiffs Ford-Haynes, Neill, and Weeks assert claims under the FLSA, arguing that they are being paid less than the minimum wage mandated by the FLSA since their paychecks have been reduced by the offset. (First Am. Compl. ¶¶ 56-61.)

Under the FLSA, employers must pay employees at least $7.25 per hour, plus time-and-a-half for overtime work. 29 U.S.C. §§ 206, 207. Exempt from the FLSA's overtime and minimum wage requirements are those "employed in a bona fide executive, administrative, or professional capacity . . . ." 29 U.S.C. § 213(a)(1). To qualify as an exempt "executive" or "administrative" employee, the person must be "[c]ompensated on a salary basis at a rate of not less than $455 per week." 29 C.F.R. §§ 541.100, 541.200.[4] This is consistent with the FLSA's

[4] In addition, to qualify as an exempt "executive," the employee must also be one

> (2) Whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;
>
> (3) Who customarily and regularly directs the work of two or more other employees; and
>
> (4) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.

Id. § 541.100. Similarly, an exempt "administrative" employee is one

> (2) Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer; and
>
> (3) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

goal of "protect[ing] low paid rank and file employees" since "[h]igher earning employees . . . are more likely to be bona fide managerial employees." *Darveau v. Detecon, Inc.*, 515 F.3d 334, 338 (4th Cir. 2008) (quoting *Counts v. S.C. Elec. & Gas Co.*, 317 F.3d 453, 456 (4th Cir. 2003)).

The District argues that Ford-Haynes, Neill, and Weeks are exempt from the FLSA because they are high-level, managerial employees. (*See* Def.'s Mot. at 22-25 (arguing that Neill and Weeks are exempt as "executive" employees); Def.'s Combined Reply/Opposition (Def.'s Reply") at 18-22 (arguing that Ford-Haynes is exempt as an "administrative" employee).) Plaintiffs do not dispute that they perform the management-related duties described in 29 C.F.R. §§ 541.100(2)-(4), 541.200(2)-(3), but they argue that they do not qualify for the FLSA exemption because they earn less than $455 per week. (*See* Pls.' Reply at 9-10.) Therefore, the sole dispute between parties is whether plaintiffs Ford-Haynes, Neill, and Weeks are "[c]ompensated on a salary basis at a rate of not less than $455 per week." 29 C.F.R. §§ 541.100, 541.200.

Ford-Haynes receives $1,739.71 gross per week for full-time work. She earns $43.50 per hour—a salary of $90,474.00 annually—as a Management Analyst employed by the District. (*See* Pls.' Reply, Ex. 4.) From her rehire in July 2011 until January 2012, she also received approximately $72,000 per year—$6,000 per month— in pension payments. (*Id*.) Since January 25, 2012, her District paychecks have been offset by her pension payments, so she now receives $239.88 gross per week from the District (Answer ¶ 59; Pl.'s Mot., Ex. 2 (Pls.' Stmt.) ¶ 5) and $1,500.00 per week from her pension. (Pls.' Reply, Ex. 4.)

Neill receives approximately $1,897.71 gross per week for full-time work. He earns $40.48 per hour—a salary of $84,202.00 annually—as a District employee. (*See* Pls.' Mot., Ex.

Id. § 541.200.

8.) From his rehire in 2009 until January 2012, he also received $77,724.96 per year— $6,477.08 per month— in pension payments. Since January 25, 2012, his District paychecks have been offset by his pension payments and now he receives $278.44 gross per week in his paycheck (Pls.' Stmt. ¶ 4) and $1,619.27 per week from his pension. (Pls.' Mot., Ex. 8 at 3.)

Weeks receives at least $883.52 per week for full-time work. He earns $22.09 per hour— a salary of $45,943.00 annually—as a Supervisory Protective Services Officer for the District. (*See* Pls.' Mot., Ex. 9 at 2-3.) From March 2010 until January 2012, he also received $42,408.96 per year—$3,534.08 per month— in pension payments. (*See id*. at 4-5.) Since January 25, 2012, his District paychecks have been offset by his pension payments, so he now receives $0 per week in his paycheck and $883.52 per week from his pension. (*Id*.)

It is therefore undisputed that each of these plaintiffs receives a total of more than $455 per week. However, the parties disagree about whether the federal pension payments should be included in the calculation of the minimum "salary basis" necessary to be exempt from the FLSA. The District calculates the relevant "salary basis" as the amount that plaintiffs would receive before the offset is applied. (*See* Def.'s Mot. at 23.) Plaintiffs urge a narrower interpretation, insisting that the FLSA "salary basis" refers to the amount of their paychecks after they have been reduced to account for their pension payments. (*See* Pls.' Mot. at 14).

Plaintiffs, however, offer no authority for the proposition that the Court should ignore the thousands of dollars in pension payments that they receive each month and look only at the money that they receive from their current paychecks. Nor can the Court find any. Rather, the Department of Labor's related administrative interpretations, *see, e.g.*, Administrator's Op.

Letter, FLSA 2006-43 (Dep't of Labor Nov. 26, 2006),[5] and the relevant case law support defendant's interpretation of the FLSA. *See Fed. Air Marshals v. United States*, 84 Fed. Cl. 585, 596-97 (2008) (explaining that, although the pilots' "Availability Pay" was not hourly compensation under the FLSA, the pilots were not entitled to a "windfall" and therefore it was properly deducted from their regular pay); *see also Rogers v. Dist. Unemployment Compensation Bd.*, 290 A.2d 586, 587 (D.C. 1972) ("[P]etitioner's annuity is deductible from his unemployment benefits because his employer contributed to it.").

Although plaintiffs correctly argue that the Court should focus on the pay that the employee actually receives, *see Orton v. Johnny's Lunch Franchise, LLC*, 668 F.3d 843, 848 (6th Cir. 2012), they ignore the fact that they receive compensation far in excess of the FLSA threshold.[6] Moreover, plaintiffs in fact control whether their earnings come through their

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[5] The Department of Labor explained that, for compensation to qualify as "free and clear" payment on a "salary basis,"

> it is immaterial what specific terms . . . an employer uses when compensating employees on a fee or commission basis. What matters is that the employee receives no less than the weekly-required amount as a guaranteed salary constituting all or part of total compensation, which amount is not subject to reduction due to the quality or quantity of the work performed, and that the employee is never required to repay any portion of that salary even if the employee fails to earn sufficient commissions or fees.

Id.

[6] An employee is considered to be paid "on a salary basis" if he receives a set amount of compensation that is not, as a general rule, subject to reduction. 29 C.F.R. § 541.602(a). There are a few permissible types of deductions set forth in the regulations, *see id*. § 541.602(b), and plaintiffs argue that the offset is unlawful because it is not one of those deductions. (Pls.' Mot. at 13-14.) However, § 541.602(b) is irrelevant to the offset at issue because it relates to deductions from the salary payment which are based upon employee absence or disciplinary penalties. The permissible deductions listed in § 541.602(b) are different because they reduce the total compensation amount. Plaintiffs, by contrast, continue to be compensated at their regular rates which are "not subject to reduction because of variations in the quality or quantity of the work performed." *Id*. § 541.602(a).

paycheck or their pension checks because, as the October 12, 2011 letters explain, plaintiffs may elect to receive their full salary in their paychecks and suspend the annuity payments instead. (Def.'s Mot., Ex. 7 at 3.) Regardless of whether it comes in their paychecks or in their pension checks, they earn *and* receive between $22.09 and $43.50 per hour, which far exceeds the cut-off for coverage under the FLSA.

Therefore, since Ford-Haynes, Neill, and Weeks meet the FLSA exemption's threshold salary requirement, and it is undisputed that they qualify as exempt executive or administrative employees, their FLSA claims fail matter of law.

III. DEPRIVATION OF PROPERTY INTEREST

Plaintiffs also claim that they were deprived of "pay accrued to them" without due process or just compensation in violation of the Fifth Amendment. (First. Am. Compl. ¶¶ 51-53.)

Under the Due Process Clause, the government must provide "notice, reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Jones v. Flowers*, 547 U.S. 220, 226 (2006).[7] Beyond these threshold requirements, the extent of procedural protections "varies with the particular situation" and the interest at stake. *See Zinermon v. Burch*, 494 U.S. 113, 127 (1990). In *Mathews v. Eldridge*, the Supreme Court articulated the three factors that govern the extent of procedural protections that are required:

> [f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest

[7] The Due Process Clause provides that "no person shall be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. "The procedural due process guarantee imposes procedural requirements on the government before it deprives individuals of protected interests." *Pearson v. Dist. of Columbia*, 644 F. Supp. 2d 23, 46 (D.D.C. 2009) (quotation marks omitted).

> through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. 319, 335 (1976).

Plaintiffs first claim that they were deprived of procedural due process when their paychecks were reduced because they were not given a pre-deprivation forum to challenge the offset. (Pls.' Mot. at 21-23; Pls.' Reply at 10.) However, this claim fails because plaintiffs were provided all that due process requires (*i.e*., notice and a forum to challenge the impending offset), but they neglected to avail themselves of it. (Def.'s Mot. at 15-17.)

As an initial matter, plaintiffs received notice of the offset months before it became effective. They were individually informed of the impending offset through letters dated October 12, 2011, and told to contact the Deputy General Counsel of Human Resources, Dwayne Toliver, with any questions. (Def.'s Mot., Ex. 7.) However, they failed to do so.[8] Instead, plaintiffs waited until the offset was applied to their paychecks and raised the issue by filing for emergency relief in federal court.

More importantly, plaintiffs had an opportunity to challenge the offset, but ignored the procedures that exist to resolve this type of dispute. (*See* Def.'s Mot. at 15-17.) Pursuant to the Comprehensive Merit Protection Act ("CMPA"), D.C. Code § 1-603.01 *et seq*., District personnel disputes are resolved through local procedures that provide for "prompt handling . . . . [and the] expeditious adjustment of [employee] grievances and complaints." D.C. Code § 1-616.53(a). As the D.C. Court of Appeals recently explained, this process "provide[s] 'the

[8] Plaintiff Cannon states that he called Shawn Stokes, the Director of Human Resources and told her that the offset was inapplicable and that he "understood . . . that the letters regarding the offset had been issued in error" (Cannon Decl. ¶ 20), but does not explain what, if any, response he was given.

exclusive remedy for a District of Columbia public employee who has a work-related complaint *of any kind*.'" *Lattisaw v. Dist. of Columbia*, 905 A.2d 790, 794 (D.C. 2006) (quoting *Robinson v. Dist. of Columbia*, 748 A.2d 409, 411 (D.C. 2000)) (emphasis added).

Plaintiffs' only response is that the CMPA does not apply to them, but that argument is factually and legally flawed. The single authority on which they rely—D.C. Code § 1-207.13(d) (*see* Pls.' Reply at 10)—is inapposite, since that provision does not relate to the CMPA and, in any case, applies to individuals employed by the federal government before the District established its own personnel system in 1979. D.C. Code § 1-207.13(d); *see Dist. of Columbia v. Hunt*, 520 A.2d 300, 302 (D.C. 1987). It is therefore irrelevant to the plaintiffs, all of whom were hired by the District after 2004, and, as a result, their complaints are covered by the CMPA grievance process. *See Lattisaw*, 905 A.2d at 793. ("[F]or the purpose of determining the CMPA's applicability, our case law has emphasized that 'grievances' are to be broadly construed.")

Plaintiffs, having chosen not to avail themselves of the available process (*see* 6 DMCR § 1636 (providing for initiation of process by filing a written grievance)), cannot now complain that they did not have the opportunity "to be heard at a meaningful time and in a meaningful manner." *Mathews*, 424 U.S. at 333; *English v. Dist. of Columbia*, 815 F.Supp.2d 254, 267 (D.D.C. 2011) ("If there is a process on the books that appears to provide due process, the plaintiff cannot skip that process and use the federal courts as a means to get back what he wants.") (quoting *Alvin v. Suzuki*, 227 F.3d 107, 116 (3d Cir. 2000)). Thus, their allegations that "[d]efendant has never provided any meaningful means for . . . respond[ing] to [the offset] and [p]laintiffs were given no pre-deprivation forum to assert their defenses against it" (Pls.' Mot. at 22) are simply wrong.

Nor can plaintiffs argue that greater procedural protection was warranted under *Mathews.* First, they have not demonstrated that the risk to their private interests is great. Even if the offsets were arguably improper, plaintiffs would risk only temporary deprivation of the offset amounts. Meanwhile, they would continue to receive their full federal pensions—thousands of dollars per month—in addition to partial salary payments (except for Weeks). Moreover, their own actions suggest that the effect on their personal finances is not dire; even with notice of the impending offset, they did not challenge the application of the offset or restructure their personal finances to account for the reduction in their income. (*See* Tr. TRO Hearing at 60, Jan 31, 2012.) Second, there is a low risk of error here where the District's decision is based on statutory interpretation and does not require a factual determination. Finally, the District has a significant interest in ensuring that its employees address personnel matters through the prescribed grievance process. Therefore, there can be no basis for plaintiffs to argue that their procedural due process rights were violated. *See Lattisaw*, 905 A.2d at 793; *see also Deschamps v. Dist. of Columbia*, 582 F. Supp. 2d 14, 17 (D.D.C. 2008) (explaining that the CMPA "provides all the process [plaintiff] is entitled to").

In addition, plaintiffs contend that the offset constitutes a "taking" under the Fifth Amendment (First Am. Compl. ¶ 52), which prohibits taking "private property . . . for public use, without just compensation." U.S. Const. amend. V. This claim fails as well.

Plaintiffs appear to have "confuse[d] a property right cognizable under the Takings Clause of the Fifth Amendment with a due process right to payment of a monetary entitlement under a compensation statute." *Adams v. United States*, 391 F.3d 1212, 1220 (Fed. Cir. 2004),

aff'g No. 00-447 C, 2003 U.S. Claims LEXIS 238 (Aug. 11, 2003).[9] In *Adams*, Judge Block rejected a similar claim for unpaid overtime wages, explaining that

> [t]his is either a standard claim for money . . . or a due process claim . . . . However, it is not a Takings Claim under the Fifth Amendment, for even if an obligation to pay money can be considered property, no property was here seized for public use. In other words, nothing was really 'taken' from plaintiffs for the [benefit] of the public - at best, [wages] simply were not paid. Accordingly, the government did not appropriate plaintiffs' money for its own purpose. Instead, it simply did not pay plaintiffs . . . overtime because it believed plaintiffs' [sic] exempt . . . .

2003 U.S. Claims LEXIS 238, at *29-30. Furthermore, this Circuit has recently explained that, if the proceeding by which property is transferred from an individual to the government does not violate due process, then "'[t]he government may not be required to compensate an owner for property which it has already lawfully acquired under the exercise of governmental authority other than the power of eminent domain.'" *Tate v. Dist.of Columbia*, 627 F.3d 904, 909 (D.C. Cir. 2010) (quoting *Bennis v. Michigan*, 516 U.S. 442, 452 (1996)). Since the Court has already found that the procedures by which the District imposed the offset did not violate due process, its action did not "constitute a taking without compensation violative of the Fifth Amendment." *See Tate*, 627 F.3d at 909-10; *Fox v. Dist. of Columbia*, No. 10-2118, 2012 U.S. Dist. LEXIS 44141, at *33-34 & n.17 (D.D.C. Mar. 30, 2012).

Therefore, plaintiffs' claims in Count I, based on the deprivation of a property interest, are dismissed.

[9] Although the Court of Appeals for the District of Columbia left open the question of whether a FLSA claim could provide the basis for a Takings Claim in *Adams v. Hinchman*, 154 F.3d 420, 425-26 (D.C. Cir. 1998), the Federal Circuit's resolution of that case provides persuasive authority here.

IV. EQUAL PROTECTION

Plaintiffs also claim that they were discriminated against in violation of their Fifth Amendment right to equal protection. They argue that defendant "enforced this offset against the [p]laintiffs . . . but [has] effectively negat[ed] the effect of the offset on other persons by simply giving them more money." (First Am. Compl. ¶¶ 64, 77.)[10] In effect, plaintiffs challenge the fact that the District gave raises to some District employees, but not to them. The District has moved to dismiss this count for failure to state a claim. (*See* Def.'s Mot. at 17-22.)

First, to establish an equal protection claim, plaintiffs must show that they were singled out and treated differently from others who were similarly situated. *Women Prisoners of D.C. Dep't of Corrs. v. Dist. of Columbia*, 93 F.3d 910, 924 (D.C. Cir. 1996). To meet this burden, plaintiffs allege that they were treated differently from District police officers who were given a raise to compensate for the income reduction resulting from the offset. (*See* Pls.' Mot. at 15 (relying upon Compl., Ex. 2 (*Washington City Paper* article discussing raises given to Metropolitan Police Department ("MPD") employees Hickson, Major, and Sarvis)).) However, these officers are not similarly situated. First, they are employed by a different agency within the District government—the MPD (*see* Compl., Ex. 2)—whereas plaintiffs work for the Department of Protective Services, which is a division of DGS. (Toliver Decl. ¶ 4; *see also* Tr. TRO Hearing at 25, Jan 31, 2012 (explaining that plaintiffs "do not perform the ordinary street patrol duties and primary criminal response to the general public that the Metropolitan Police Department

[10] At various points, plaintiffs make the conflicting assertion that they are challenging the application of the offset and not the recent raises. (*See*, *e.g.*, Pls.' Mot. at 16; Pls.' Reply at 14.) However, the offset has also been applied to the MPD officers (*see* Compl., Ex. 2 at 3), as plaintiffs recognize (First Am. Compl. ¶¶ 48, 64, 68, 72, 76) , so they cannot claim that the offset itself has been discriminatorily applied. Thus the Court must interpret the claim as set forth in the complaint and conclude that the challenge is to the salary increases that "offset the offset." (*Id*; *see also* Pls.' Mot. at 19 ("What [plaintiffs] properly complain of is that [defendant] gave these reemployed federal annuitants *additional* money . . . solely to offset the offset . . . .").)

does.").) Second, as plaintiffs appear to concede (Pls.' Mot. at 18-19), the MPD officers are not similar to plaintiffs in terms of responsibilities, background, or experience.

Given these differences, the Court cannot agree with plaintiffs' contention that the single way in which the MPD officers and plaintiffs *are* similar—that they are both subject to the offset—means that "all of the relevant aspects of [their] employment were 'nearly identical' to those of [the MPD officers]." *Royall v. Nat'l Ass'n of Letter Carriers*, 548 F.3d 137, 145 (D.C. Cir. 2008) (internal quotation omitted); *see Noble v. U.S. Parole Comm'n*, 194 F.3d 152,155 (D.C. Cir. 1999) (finding "groundless" the plaintiff's contention that there exists "a constitutional right to equal treatment under the law by the government, even where that treatment is imposed by two different agencies"); s*ee also Vandermark v. City of New York*, 391 Fed. Appx. 957, 959 (2d Cir. 2010) ("There are numerous reasonable bases on which the City of New York might decide that NYPD officers and [Environmental Police Officers] should receive different compensation and benefits, including the danger associated with the positions, [and] the physical strain of the job . . . ."); *Tumminello v. United States*, 14 Cl. Ct. 693, 697 (1988) ("[F]actual distinctions between employees in different categories and in different federal agencies preclud[ed] a finding that they are all similarly situated. . . .").

Second, even if plaintiffs could be considered to be similarly situated to the MPD officers, which they cannot, their equal protection claim would still fail because they have not shown that the District's action was irrational. *See Brandon v. Dist. of Columbia Bd. of Parole*, 823 F.2d 644, 650 (D.C. Cir. 1987) ("[T]he government may avoid violating equal protection principles if it can demonstrate that its reasons for treating an individual differently bear some rational relationship to a legitimate state purpose."). Since plaintiffs concede that they are not part of a suspect class (Pls.' Mot. at 16), the only question is whether the District's action can be

considered a reasonable way of addressing the underlying concern. *See Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 83-84 (2000); *Heller v. Doe*, 509 U.S. 312, 319-20 (1993). Under this standard, "[t]he government . . . has no obligation to produce evidence to sustain the rationality of [its determination]; instead , . . . [t]he burden is on the one attacking the [governmental] arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record." *Tate*, 627 F.3d at 910 (internal quotation marks omitted).

Plaintiffs' claim also fails because it does not violate equal protection to give raises to some employees and not to other ones. As the Supreme Court has made clear, "[t]o treat employees differently is not to classify them in a way that raises equal protection concerns. Rather, it is simply to exercise the broad discretion that typically characterizes the employer-employee relationship." *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 605 (2008) ("[W]e have never found the Equal Protection Clause implicated in the specific circumstance where, as here, government employers are alleged to have made an individualized, subjective personnel decision in a seemingly arbitrary or irrational manner.") Therefore, even if the District did raise the MPD officers' pay to offset the offset, that would not raise equal protection concerns.

Moreover, as numerous courts have recognized, the decision to apply the offset to plaintiffs' salaries is rationally related to legitimate government interests. *See, e.g.*, *Haworth v. Office of Personnel Mgmt*., 112 Fed. Appx. 406, 408 (6th Cir. 2004) ("[T]he purpose of [5 U.S.C.] § 8344(a) is to prevent retired federal employees from 'double-dipping,' *i.e.*, receiving full retirement benefits and full regular wages at the same time. Protecting the public fisc by enacting laws against double-dipping by retired employees is a rational legislative decision."); *Connolly v. McCall*, 254 F.3d 36, 43 (2d Cir. 2001) ("The default policy of preventing receipt of a public pension while also receiving a public salary reflects the notion that such simultaneous

income streams could constitute an abuse of the public fisc . . . . [W]hether sound policy or not, there is nothing irrational about [it].") (internal quotation marks omitted).

Ultimately, plaintiffs have not stated a claim because equal protection "does not require [that] all persons everywhere be treated alike,"[11] but instead only prohibits the government from "treat[ing] *similarly situated* individuals differently without a rational basis." *Noble*, 194 F.3d at 154 (emphasis in original).

V. FIRST AMENDMENT

Plaintiffs bring two claims under the First Amendment, alleging that defendant violated their right to petition the government by retaliating against them after they initiated the instant lawsuit. (Supp. Compl. ¶¶ 13-24.) Specifically, they contend that Cannon's termination and plaintiffs' receipt of paper paychecks rather than direct deposit payments were acts of retaliation designed to intimidate plaintiffs and members of the proposed plaintiff class from challenging the offset. (*Id*.)

Because plaintiffs are public employees, their speech warrants "considerable, but not unlimited, First Amendment protection." *Wilburn v. Robinson*, 480 F.3d 1140, 1149 (D.C. Cir. 2007). Therefore, their claims of retaliation are governed by a four-factor test:

> First, the public employee must have spoken as a citizen on a matter of public concern. Second, the court must consider whether the governmental interest in promoting the efficiency of the public services it performs through its employees outweighs the employee's interest, as a citizen, in commenting upon matters of public concern. Third, the employee must show that her speech was a substantial or motivating factor in prompting the retaliatory

[11] Contrary to plaintiffs' contention (Pls.' Mot. at 15-21), they are not entitled to discovery on this point because they have not provided any basis to believe that they are similarly situated to the MPD officers who received a raise. *See Dunning v. Quander*, 508 F.3d 8, 10 (D.C. Cir. 2007) (denying discovery under Rule 56(f) because"[w]ithout some reason to question the veracity of affiants, . . . [plaintiff]'s desire to test and elaborate affiants' testimony falls short.") (alterations in original) (internal quotation marks omitted).

> or punitive act. Finally, the employee must refute the government employer's showing, if made, that it would have reached the same decision in the absence of the protected speech.

Id. (internal quotation marks and citations omitted). In addition, to be actionable, the government's action must be "likely to deter a person of ordinary firmness from th[e] exercise [of protected activity]." *Toolasprashad v. Bureau of Prisons*, 286 F.3d 576, 585 (D.C. Cir. 2002) (quoting *Crawford-El v. Britton*, 93 F.3d 813, 826 (D.C. Cir. 1996)).

A. Cannon's Termination

The first claim under the First Amendment, which is based on Cannon's termination, is deficient in several respects. (*See* Supp. Compl. ¶¶ 6-10, 13-18.) However, it is unnecessary to address defendant's multiple grounds for dismissal because Cannon cannot establish causation, for he cannot show that the initiation of the instant suit "was a substantial or motivating factor in prompting [his firing]." *Wilburn*, 480 F.3d at 1149; *see Velikonja v. Mueller*, 362 F. Supp. 2d 1, 24 (D.D.C. 2004) ("Plaintiff fails to offer evidence to suggest a link between the government's conduct and [this lawsuit]; thus, the Court need not consider whether his [initiation of this suit] was constitutionally protected."), *aff'd*, 466 F.3d 122, 124 (D.C. Cir. 2006).

With respect to causation, Cannon relies solely upon the short temporal proximity between the filing of the lawsuit and his letter of termination. (Supp. Compl. ¶¶ 6-10, 13-18; *see* Pls.' Mot. at 29-30.) This asserted causal link, however, is inconsistent with the facts. According to the termination letter, Cannon was fired for his failure to adequately investigate an October 26, 2011 incident involving Occupy D.C. and for generating a report containing false information that he submitted to his superiors within DGS. (Cannon Termination Letter at 1.) The evidence makes clear that the disciplinary action that resulted in his firing was undertaken months before the lawsuit was filed or even contemplated (*id*), and the recommendation that he be fired, dated January 17, 2012, was also made well before there was any reason for litigation.

(D.C. Human Resources Decision Form.) On that date, Charles Tucker, General Counsel for the Department of Human Resources, formally recommended that Cannon, as well as another individual, be fired for the reasons stated in the termination letter. (*Id*.) Tucker's recommendation was approved on January 18, 2011 (*id*.), which was over a week before plaintiffs filed their initial complaint. Thus, as plaintiffs concede, when the District made the decision to fire Cannon, it had no reason to retaliate against him. (*See* Tr. Second PI Hearing at 15, Mar. 5, 2012 (plaintiffs' attorney agreeing that "[t]he District would not have known— the folks of HR would not have known about the lawsuit, because the cause of the lawsuit didn't occur until January 25th.").)

In the alternative, plaintiff's claim of retaliation cannot survive because he has not rebutted the District's legitimate—and well substantiated—reason for its decision.

In an attempt to refute defendant's explanation, Cannon argues that, even if the allegations against him were true, termination was such a disproportionate penalty for the offense that retaliation must be inferred. (*See* Pls.' Mot. at 19; Pl.'s Mot., Ex. 3 (Pls.' Stmt. in Response to Def.'s Stmt.) at 7-10.)[12] In his view, the penalty cannot be legitimate because it is inconsistent the District's other disciplinary policies. (*Id*.)

However, the policy that Cannon cites does not even apply to him since he was an "at will" employee who occupied a high-level position within DGS and was found to have committed a breach of trust. (*See* Pls.' Mot., Ex. 4 at 48 (progressive discipline policy applicable

[12] Plaintiffs' unfounded allegations that defendant's attorneys fabricated evidence of the decision to terminate Cannon (*see, e.g.*, Reply in Support of Renewed Mot. for a Preliminary Injunction at 4 n.3 ("[The Human Resources Decision Form] is entirely a backdated fabrication and a fraud upon this Court"); Tr. Second PI Hearing, at 15, 17-18, Mar. 5, 2012; Pls.' Mot. at 29 n. 11), have already been rejected by the Court. (*See* Tr. Second PI Hearing at 15, Mar. 5, 2012.)

only to "Career Service" employees who have completed their probationary period); *id*., Ex. 5 at 1 (penalty table applicable only to MPD officers).)

Ultimately, defendant has shown that it not only "would have reached the same decision in the absence of protected speech," *Wilburn*, 480 F.3d at 1149, but also that it *did* reach that decision before the arguably protected activity occurred. Therefore, Cannon's claim of retaliation will be dismissed.

B. Issuance of Paper Checks

Plaintiffs' second claim of retaliation, which is based on the District's issuance of paper, rather than electronic, paychecks is also seriously flawed. First, it is not cognizable under the First Amendment because it would not deter a person of ordinary firmness from exercising his or her rights. Second, plaintiffs have again failed to establish causation.

"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.'" *Toolasprashad*, 286 F.3d at 585 (quoting *Crawford-El*, 93 F.3d at 826) (alternations in original). The Circuit has explained that, in the employment context, the action taken against an employee need not be as significant as the denial of a promotion and may be satisfied by acts such as the refusal to consider someone for a new position within a department, a two-day suspension, or the transfer of a teacher to another school. *See Tao v. Freeh*, 27 F.3d 635, 639 (D.C. Cir. 1994) (describing case law and finding that requiring submission of new materials that necessitated twenty-seven hours of additional work could deter a person of ordinary firmness); *accord Crawford-El*, 93 F.3d at 826 (small pecuniary losses could deter a prisoner of ordinary firmness); *Baumann v. D.C.*, 744 F. Supp. 2d 216, 223 (D.D.C. 2010) (planting police monitors to "monitor" speech could deter a person of ordinary firmness); *Banks v. York*, 515 F. Supp. 2d 89, 111-12 (D.D.C. 2007) (placing prisoner

in solitary confinement could deter a person of ordinary firmness); *Anderson-Bey v. Dist. of Columbia*, 466 F. Supp. 2d 51, 65 (D.D.C. 2006) (imposition of restraints and denial of food and water could deter a person of ordinary firmness). By contrast, coercing a colleague into withdrawing as a co-presenter has been found to be insufficient to sustain a First Amendment retaliation claim. *Krieger v. United States Dep't of Justice*, 529 F. Supp. 2d 29, 57-58 (D.D.C. 2008)

Under this standard, plaintiffs' claims are not cognizable because receiving a single paycheck in the form of a paper check, rather than by direct deposit, would not deter a person of ordinary firmness from exercising his First Amendment rights. Indeed the plaintiffs' receipt of paper rather than electronic paychecks has not dampened their zeal for litigation since they responded to this incident by filing a supplemental complaint, renewing their motion for a preliminary injunction, and filing a cross-motion for summary judgment. *See Hatfill v. Ashcroft*, 404 F. Supp. 2d 104, 119 (D.D.C. 2005) ("[W]here a party can show no change in his behavior, he has quite plainly shown no chilling of his First Amendment right to free speech.") (quoting *Curley v. Vill. of Suffern*, 268 F.3d 65, 73 (2d Cir. 2001)); *see also Krieger*, 529 F. Supp. 2d at 57-58 (dismissing retaliation claim alleging that employer sought to impede the plaintiff's speaking engagement where the plaintiff nevertheless participated in the engagement as scheduled).

Furthermore, plaintiffs have not rebutted defendant's explanation that the issuance of paper checks was the result of a clerical error. (*See* Burrell Decl. ¶ 6; Rivera Portis Decl. ¶ 6.) Scott Burrell, the Chief Operating Officer of DGS, who is responsible for overseeing the Human Resources Division, has explained that "the Office of Payroll and Retirement Services made a mistake and plaintiffs were issued 'live,' paper checks, instead of direct deposits." (Burrell Decl.

¶ 6.) Plaintiffs baldly assert that this mistake only affected plaintiffs (*see* Pls.' Reply to Pls.' Renewed Mot. for a PI at 7), but that is not true. At least one District employee (another reemployed federal annuitant) who is not a plaintiff was affected by this same error (Rivera Portis Decl. ¶ 6), which lends further credibility to defendant's explanation. Moreover, defendant contacted all of the affected employees and explained the problem, which has not occurred again. (*See id*; Burrell Decl. ¶ 6.) Ultimately, there is *no* indication that retaliation had anything to do with this clerical error.

VI. SUPPLEMENTAL JURISDICTION

Since all of the federal claims are being dismissed, the Court will decline to exercise supplemental jurisdiction over the remaining claims pursuant to 28 U.S.C. § 1367(c)(3). *See Shekoyan v. Sibley Int'l*, 409 F.3d 414, 423-24 (D.C. Cir. 2005) (if "all federal-law claims are dismissed before trial, the balance of factors to be considered under the pendent jurisdiction doctrine—judicial economy, convenience, fairness, and comity—will point toward declining to exercise jurisdiction over the remaining state-law claims") (quoting *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7 (1988)).

Remand to Superior Court is particularly appropriate here because plaintiffs' remaining claims raise novel and complex issue[s] of [District] law." 28 U.S.C. § 1367(c)(1). Their core challenge to the offset requires interpretation of D.C. Code § 1-611.03(b), as amended by the D.C. Government Reemployed Annuitant Offset Elimination Amendment Act of 2004, Act 15-489)) and § 5-723(e), which is best resolved in the first instance by the local courts. *Barnes v. Dist. of Columbia*, 611 F. Supp. 130, 136 (D.D.C. 1985) ("The plaintiffs' claims under the D.C. Code and the personnel manual involve unexplored questions of state law which are best left to the local courts. In this situation, 'a federal District Court opinion is no substitute for an authoritative decision by the courts of the District of Columbia.'") (quoting *Doe v. Bd. on Prof'l*

Responsibility of the D.C. Court of Appeals, 717 F.2d 1424, 1428 (D.C. Cir. 1983)). Similarly, their claims of retaliation under the D.C. Whistleblower Protection Act, D.C. Code § 1-615.53(a), delve into an undeveloped body of law which is also more suitable for elaboration by the local courts. *See Lowe v. Dist. of Columbia*, 669 F. Supp. 2d 18, 31-32 (D.D.C. 2009) (remand of Whistleblower Protection Act claims is especially appropriate given the undeveloped state of the law); *see also Terrell v. Dist. of Columbia*, 703 F. Supp. 2d 17, 23 (D.D.C. 2010) (same); *Pearson v. Dist. of Columbia*, 644 F. Supp. 2d 23, 49-50 (D.D.C. 2009) (same).

Although plaintiffs insist that this Court has exclusive jurisdiction over this case pursuant to D.C. Code § 1- 815.02(a) (*see* Pls.' Reply at 10; First Am. Compl. ¶ 7), they have misread that statute. This provision of Chapter 8 of the D.C. Code ("District of Columbia Retirement Funds") provides that the district court shall have exclusive jurisdiction over cases related to the payment of federal pensions. *See* D.C. Code § 1-815.02(a) (providing jurisdiction only for actions arising under Chapter 8). However, plaintiffs make no claim regarding their pensions, nor could they, since their pensions have not been affected. Rather, they contest the fact that their salary is being reduced by their pension payments. *See Barnes*, 611 F. Supp. at 136 (explaining that the offsets did not reduce the plaintiffs' federal pensions but rather affected their local salaries). Therefore, D.C. Code § 1-815.02(a) is irrelevant.

CONCLUSION

For the foregoing reasons, the Court grants defendant's motion to dismiss or, in the alternative for summary judgment, with respect to plaintiffs' claims under the FLSA, the Fifth Amendment (due process, just compensation, and equal protection), and the First Amendment, remands the remaining claims to Superior Court, and denies plaintiffs' cross-motion for partial

summary judgment. A separate order accompanies this Memorandum Opinion.

/s/
ELLEN SEGAL HUVELLE
United States District Judge

Date: July 6, 2012