IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FRED DODGE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No. 03-1613(RCL)**
	)	
TRUSTEES OF THE NATIONAL GALLERY OF ART, et al.,	)	
	)	
Defendants.	)	
	)	

DEFENDANT'S MOTION TO DISMISS OR,
IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

Defendants[1] respectfully move to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) or, in the alternative, for summary judgment pursuant to Fed. R. Civ. P. 56, because there are no disputed issues of material fact, and defendants are entitled to judgment as a matter of law. Attached in support of this motion are a Memorandum of Points and Authorities and a statement of material facts not in dispute, pursuant to Local Rule 7.1. This motion is being filed through the Court's electronic filing system, and plaintiff is represented by counsel; therefore, neither a proposed order, nor a certificate of service accompany this filing.

[1]In addition to the National Gallery of Art, there are several named defendants identified in the complaint who are current or former employees of the Gallery: Earl A. Powell, III, Darrell R. Willson, Michael Giamber, James Lucey, and Michael Prendergast.

Respectfully submitted,

ROSCOE C. HOWARD, JR., D.C. Bar #246470
United States Attorney

MARK E. NAGLE, D.C. Bar #416364
Assistant United States Attorney

ROBIN M. EARNEST, D.C. Bar # 458304
Assistant United States Attorney
555 Fourth Street, N.W.
Washington, D.C. 20530
(202) 514-7139

Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FRED DODGE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No. 03-1613(RCL)**
	)	
TRUSTEES OF THE NATIONAL GALLERY OF ART, et al.,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

The National Gallery of Art (Gallery) removed plaintiff, Fred Dodge, from employment and he appealed his removal to the Merit Systems Protection Board (MSPB). However, before the MSPB could render a decision, plaintiff and the Gallery entered into a Settlement Agreement and General Release (Agreement) through which the matter was resolved. Notably, the Agreement provided that– in return for the Gallery's promise to reinstate plaintiff and pay him appropriate back pay– plaintiff would resign and not seek judicial relief based upon issues related to his removal. Heedless, plaintiff now brings this action based upon defenses raised and rejected during the removal process. Specifically, plaintiff claims defendants violated the Privacy Act, and the First and Fifth Amendments to the Constitution, when they: 1) allowed his immediate supervisor to review documents related to his request for leave under the Family Medical Leave Act (FMLA); 2) retaliated against him for writing his Congressmen regarding his FMLA complaint; and 3) posted a "Security Alert" with his photograph.

Because plaintiff has previously released all of these claims, his Complaint here should be dismissed. In addition, special factors counsel against creation of a Bivens remedy. Also,

defendants all are entitled to qualified immunity, and claims against individual defendants Powell, Giamber and Lucey should be dismissed for want of proper service. Finally plaintiff's claims relating to defamation of character, as a result of defendants' Security Alert posting, are time barred.

I. FACTUAL AND PROCEDURAL BACKGROUND

The National Gallery of Art (Gallery) employed plaintiff Fred Dodge as an Electrician, WG-2805-10. On March 5, 2002, plaintiff's supervisor Brian Thomas, questioned him about allegations that he had taken a Gallery identification badge without authorization. See Notice of Proposed Removal, July 15, 2002 (Notice) at 2, attached as Exhibit 1. By letter dated March 8, plaintiff wrote Gallery Director Earl A. Powell III, complaining that the Gallery had inappropriately allowed his supervisor to review documents submitted in support of his FMLA request for leave. Letter from plaintiff (March 8 Letter), attached as Exhibit A to Plaintiff's August 6, Response to Notice of Proposed Removal (Response), attached as Defendant's Exhibit 2. Plaintiff sent copies of his letter to his Senators and Congressmen. Complaint at ¶ 18. The Gallery received only two Senatorial inquiries– from Senators Paul Sarbanes and Barbara Mikulski– regarding this matter. See March 27, response to inquiry by Senator Sabanes, attached as Exhibit 4; May 21 response to inquiry by Senator Mikulski, attached as Exhibit 5.

On March 20, Gallery Administrator, Darrell Willson, responded to Plaintiff's March 8 Letter stating that his FMLA application "consists of only two documents, a completed U.S. Department of Labor form, entitled 'Certificate of Health Care Provider,' and a memorandum, dated December 4, 2001, from [the Personnel Staffing Specialist] approving your FMLA request, effective November 26, 2001." Letter from Darrell R. Willson to Fred Dodge, March 20, 2002

(Willson Letter), attached as Exhibit 3. Administrator Willson explained that the Gallery did not provide plaintiff's supervisor with any other medical records concerning his son; and that the information was provided on a need to know basis because "your supervisor was trying to decide whether your refusal to work a mandatory overtime assignment was proper." Id.

On July 15, 2002, the Gallery issued a notice of proposed removal to the plaintiff stating, as grounds: a) unauthorized taking of a Gallery ID badge; b) making false statements; c) concealment of misappropriated Gallery property; and d) tampering with a Gallery key ring. The Notice explained that plaintiff took a defective ID badge after being told he could not have it and– when questioned about the incident on March 5th – falsely stated that he had been given it. Notice at 2. Further, that plaintiff tampered with a Gallery key ring by removing an elevator key in violation of Gallery policies and– when questioned about that removal– falsely denied any knowledge of tampering. Notice at 3-5. Finally, the Notice charged plaintiff with possessing and concealing a separate Gallery key. Notice at 5.

By letter dated August 6, 2002, plaintiff's counsel responded to the Gallery's Notice claiming that the proposed removal was "pretextual" and included a copy of plaintiff's March 8 letter complaining of the Gallery's disclosure of FMLA related documents. Response at 5. Specifically, the Response alleged that since the proposed removal followed the congressional inquiry as to plaintiff's FMLA complaint, the timing demonstrated that the "action is pretextual, and the actual bases for the proposed action are Dodge's complaints to members of Congress that the Gallery violated Dodge's FMLA rights as well as other protected activity." Response at 3. Also, that the Gallery, in retaliation for the congressional contact, "violated Mr. Dodge's right of privacy" by posting on a bulletin board in plain sight of National Gallery employees and

contractors a 'Security Alert' revealing a photo of Mr. Dodge and other identifying information." Response at 2. Finally, his attorney argued that plaintiff's proposed termination "is retaliation for Mr. Dodge's union activities and expressing his constitutional rights of seeking a redress of grievance and free speech. The First Amendment to the United States Constitution protects the right of employees to speak freely and to petition openly for redress of their grievances. The First Amendment also protects employees from retaliation for doing so." Response at 5.

The Gallery issued a decision on August 29, 2002 upholding the bases for plaintiff's removal. Letter from George-Ann Tobin to Fred Dodge, August 29, 2002 (Decision Letter), attached as Exhibit 6. The Decision Letter first addressed the charge concerning the I.D. badge, stating: "[a]s to your allegation that the charges against you were in response to your complaint to Mr. Powell about violation of your FMLA rights, I note the following. Your letter to Mr. Powell was dated March 8, 2002. Mr. Powell's office received your letter on March 11, 2002. The Gallery responded to your complaint by letter dated March 20, 2002. Since Mr. Thomas questioned you about taking the defective Gallery I.D. badge on March 5, 2002, his questioning was unrelated to your complaint to Mr. Powell, dated March 8, 2002." Decision Letter at 3.

In addition, the Decision Letter addressed plaintiff's assertion that the Gallery's actions were "in retaliation for having received letters of inquiry from Senators Paul Sarbanes dated March 13, 2002, and Barbara Mikulski, dated May 7, 2002 . . ., [which] concerned your allegations that the Gallery had violated your rights, as well as your son's rights under the FMLA." Decision Letter at 6. In so doing the deciding official found that neither letter was relevant, particularly as the investigation of the other charges justifying removal– tampering with a Gallery key ring– arose following plaintiff's April 11, 2002 call to the key shop about possible

misconduct by his supervisor. Decision Letter at 7. There was no evidence that the removal was "motivated by your exercise of free speech." Decision Letter at 12. Further, the Letter addressed plaintiff's allegation that the Gallery violated his privacy rights by posting a security alert containing information about him, stating plaintiff failed to "show that the release of the information contributed to the Gallery proposing your removal. Thus, your alleged invasion of privacy is unrelated to your proposed removal." Decision Letter at 13. Finally, the deciding official rejected plaintiff's accusation that the removal was in retaliation for union activity. Plaintiff does not raise that issue in his complaint. Id.

On September 7, 2002, plaintiff appealed "any and all actions that the National Gallery of Art has used to remove me from my job" to the MSPB. MSPB Appeal Application, Part III, attached as Exhibit 7. In his Pre-Hearing submissions, plaintiff raised "Retaliation for Union Activity" as an affirmative defense. Pre-Hearing Submissions, December 11, 2002 ("Submission") at 8, attached as Exhibit 8. Notably, plaintiff admitted that he "filed a complaint against the Director in March 2002" and that he would present testimony related to defendants' "invasion of privacy with regards" to "the Agency's handling of FMLA information." Id. at 9.

On January 30, 2003– after the MSPB hearing but before MSPB issued its decision– plaintiff and the Gallery entered into a Settlement Agreement and General Release signed by plaintiff and his Union representative.[2] Attached as Exhibit 9. The Agreement "resolves all matters arising from Appellant's removal from the Gallery; including his MSPB appeal, DC-0752-03-0011-I-1 (Appeal) of this action; and any and all claims of any nature which Appellant

[2]A Union representative, and not the private attorney who formulated his August, 2002 response to the Gallery and his Complaint here, signed the Settlement Agreement as plaintiff's representative in those proceedings. See Settlement Agreement at 5.

raised or could raise in any forum in which he could appeal, complain, grieve, or otherwise challenge said removal." Id. at ¶ 1.

Specifically, the Agreement provides as follows:

> 2. In consideration of Appellant's promise to take the actions described in paragraph 3 below, the Gallery agrees to reinstate Appellant as a Gallery and federal employee for the period covering August 31, 2002 to December 31, 2002, and to carry him on official paid status for the time he would have been regularly scheduled to work.
>
> . . .
>
> 3. In consideration of the Gallery's promise to take the actions described in paragraph 2 above, Appellant agrees to the following:
>
> . . .
>
> C. Appellant agrees that execution of this Agreement constitutes his withdrawal, with prejudice, of his Appeal before the Board and, with the exception of current unemployment compensation benefits Appellant may be receiving, that he will not initiate or continue pending actions, complaints, grievances and/or appeals of any type in any forum against the Gallery arising from his removal from the Gallery.
>
> D. Except as provided for in paragraph 2 and with the exception of current unemployment compensation benefits Appellant may be receiving, Appellant waives, abandons, and releases any and all other claims he has or may have for back pay, promotions, bonuses, awards, or any other personnel compensation, or other claim he might have against the Gallery of any kind whatsoever based on his removal from the Gallery.
>
> E. Except as provided for in paragraph 2, Appellant waives, abandons, and releases any and all claims for damages or alleged damages, which he claims or could have claimed to have sustained based on his removal from the Gallery.
>
> . . .
>
> G. As a condition of the settlement of this matter, Appellant hereby agrees that any allegations, factual or legal, concerning any aspect

> of his removal or resignation from the Gallery's employment may not be the basis for any future judicial or administrative action, suit, complaint, or grievance of any kind by Appellant, except an enforcement action authorized by law with respect to the instant Appeal.

Id. at ¶¶ 2-3.

In accordance with the terms of the parties' Agreement, plaintiff submitted his resignation effective December 31, 2002, and the Gallery reinstated and paid him $16,751.80.

On July 30, 2003, plaintiff filed this Complaint in this matter naming the following five defendants in their individual and official capacities: Earl A. Powell III, Director; Darrell R. Willson, Administrator; Michael Giamber, Deputy Chief, Facilities Management; James Lucey, Chief of the Office of Protective Services; and Michael Prendergast, Deputy Chief for Operations of the Office of Protective Services. See Complaint at 1. Plaintiff's Complaint does not assert a claim for breach of the parties' January 30, 2003 Settlement Agreement. See Complaint generally.

II. STANDARD OF REVIEW

Where a plaintiff has failed "to state a claim upon which relief can be granted," a court may grant a defendant's motion to dismiss. Fed. R. Civ. P. 12(b)(6); Sirmans v. Caldera, 138 F. Supp. 2d 14 (D.D.C. 2001). In evaluating a motion to dismiss, a court must construe the complaint in the light most favorable to the plaintiff and give the plaintiff "the benefit of all inferences that can be derived from the facts alleged." Id.

Under Fed. R. Civ. P. 56(c), a court must enter summary judgment when "there is no genuine dispute as to any material fact" and the "moving party is entitled to judgment as a matter of law." Trial courts must enter summary judgment "against any 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." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Statements made by the party opposing a motion for summary judgment must be accepted as true, except those that are "conclusory." Greene v. Dalton, 164 F.3d 671, 675 (D.C. Cir. 1999. The non-moving party defeats a motion for summary judgment only by responding with some factual showing that creates a genuine issue of material fact. Harding v. Gray, 9 F.3d 150, 154 (D.C. Cir. 1993).

III. ARGUMENT

A. The Parties' Settlement Agreement Bars Review of Plaintiff's Complaint

A party may waive and release his right to pursue even a constitutional claim and must be held to that bargain. In this case, the terms of the Settlement Agreement signed by the parties preclude plaintiff from pursuing the same claims in his Complaint. See Maceda v. Billington, Civil Action No. 01-0461 (RMC) (Janaury 17, 2003, citing, Anzueto v. WMATA, No. 89-0522, 1992 WL 613240, at 1 (D.D.C. June 8, 1992) (internal citations omitted).

It is undisputed that on January 30, 2003, the parties entered into a Settlement Agreement to resolve fully plaintiff's claims against the Gallery. By Paragraph 3 of that Agreement, plaintiff entered into an informed consent whereby he agreed to be bound as follows:

> 3. In consideration of the Gallery's promise to take the actions described in paragraph 2 above [e.g., in return for reinstatement and back pay], Appellant agrees to the following:
>
> . . .
>
> C. Appellant agrees that execution of this Agreement constitutes his withdrawal, with prejudice, of his Appeal before the Board and, with the exception of current unemployment compensation benefits Appellant may be receiving, that he will not initiate or continue

pending actions, complaints, grievances and/or appeals of any type in any forum against the Gallery arising from his removal from the Gallery.

. . .

G. As a condition of the settlement of this matter, Appellant hereby agrees that *any allegations, factual or legal*, *concerning any aspect of his removal or resignation from the Gallery's employment may not be the basis for any future judicial or administrative action, suit, complaint, or grievance of any kind by Appellant*, except an enforcement action authorized by law with respect to the instant Appeal.

Id. at ¶3 (emphasis added).

In accordance with the terms of the parties' Settlement Agreement, plaintiff submitted his resignation effective December 31, 2003, and the Gallery reinstated, and paid him $16,751.80. The plaintiff does not claim breach of this Agreement. As plaintiff's claims in his Complaint concern "aspect[s] of his removal or resignation from the Gallery's employment" (Agreement at ¶ 3.G.), their prior release under the Agreement should bar further adjudication by this Court.

Notably, plaintiff's Complaint asserts three claims clearly related to his removal from the Gallery: that defendants mishandled his request for FMLA leave; that this action was in retaliation for plaintiff's petitioning Congress about his FMLA complaints; and that the Gallery improperly posted a "Security Alert" containing his picture and other identifying information. Complaint at ¶¶ 11-18, 21. Plaintiff addressed all of these claims in his challenge to his proposed removal. In his August 6, 2002 Response, plaintiff's counsel argued that "the proposed removal action is pretextual, and the actual bases for the proposed action are Dodge's complaints to members of Congress that the Gallery violated Dodge's FMLA rights as well as other protected activity." Response at 3. In addition, he alleged that, in retaliation for the congressional contact,

the Gallery "violated Mr. Dodge's right of privacy by posting on a bulletin board which was in plain sight of National Gallery employees and contractors a 'Security Alert' revealing Fred Dodge's name, birth date, social security number, and photo." Response at 2.

All claims were thoroughly presented and rejected by the Gallery's deciding official. See generally Decision Letter at Exhibit 6. First, in determining that plaintiff's removal was not retaliation for his FMLA complaint to members of Congress, she found that there was no evidence that the removal was "motivated by [plaintiff's] exercise of free speech." Id. at 12. Rather, she concluded, "the serious charges cited against you stand on their own, separate and apart from your allegations of retaliation, which appear to be an attempt to divert attention from your misconduct." Id. at 12. Second, in addressing plaintiff's allegation that the Gallery violated his privacy by posting a security alert containing information about him, she concluded that "you have not shown that the release of the information contributed to the Gallery proposing your removal. Thus, your alleged invasion of privacy is unrelated to your proposed removal." Id.

Plaintiff raised the same FMLA allegations as a defense in his MSPB appeal challenging removal. Submission at 8. For example, in his Pre-hearing Submission, he lists retaliation as an affirmative defense. Id. He also explains on the witness list that the retaliation relates to the FMLA complaint, stating that he expected the Gallery Director "to testify as to knowledge concerning the invasion of privacy with regards to Mr. Dodge and his son, and providing testimony regarding the Agency's handling of FMLA information." Id. at 8.

Thus, it is clear that the allegations raised in the Complaint here were addressed as an aspect of plaintiff's removal and resignation in the proceedings below. Plaintiff agreed to waive

his ability to pursue judicial relief based upon those factual and legal allegations in return for the substantial benefits of reinstatement and back pay. Agreement at ¶ 3. As plaintiff has now received those benefits, he should be held to his bargain and his cause of action here deemed extinguished by his prior Settlement with the Gallery.

B. Sovereign Immunity Bars Any Claims Against The National Gallery of Art, Or The Individual Defendants In Their Official Capacities

To the extent that plaintiff seeks damages against the Gallery and individual defendants in their official capacities, his claims must be dismissed absent a waiver of sovereign immunity. Meyer v. Reno, 911 F.Supp. 11 (D.D.C. 1996); Marshall v. Reno, 915 F.Supp. 426 (D.D.C. 1996); Deutsch v. U.S. Dept. of Justice 881 F.Supp. 49 , 55 (D.D.C. 1995). The inherent sovereign immunity of the United States protects it and its agencies from suit absent express waiver. See United States v. Nordic Village, 503 U.S. 30 (1992). Sovereign immunity also bars suits for money damages against officials in their official capacities for nondiscretionary acts absent a specific waiver by the government. Clark v. Library of Congress, 750 F.2d 89, 101-02 (D.C. Cir.1984). Plaintiff's complaint does not contain any colorable basis for such a waiver. Therefore, to the extent plaintiffs assert claims for damages against the defendants in their official capacities and the Gallery itself, such claims must be dismissed for lack of subject matter jurisdiction.

1. Individual Defendants Are Entitled To Qualified Immunity With Respect To Any Constitutional Claims Asserted

The individual defendants named in the complaint are entitled to qualified immunity in their individual capacities from damages to the extent that plaintiff has asserted any colorable constitutional claim against them. See Forrester v. White, 484 U.S. 219, 230 (1988). In Bivens

v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), the Supreme Court held that federal employees could be sued in their individual capacity for money damages if their actions rose to a level of constitutional significance. A plaintiff may proceed under Bivens if he can show that the actions of the individual defendant violated a "clearly established" federal constitutional right of the plaintiff of which the defendant knew or should have known. Anderson v. Creighton, 483 U.S. 635 (1987); Harlow v. Fitzgerald, 457 U.S. 800 (1982).

However, the Court also ruled that under the doctrine of qualified immunity, "government officials performing discretionary functions are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow, 457 U.S. at 818 (1982); Anderson, supra. The purpose of qualified immunity is to shield government officials from "undue interference with their duties and from potentially disabling threats of liability." Harlow, 457 U.S. at 806. The Supreme Court has repeatedly emphasized that qualified immunity is immunity from suit, not merely a defense to liability. Hunter v. Bryant, 502 U.S. 224, 227 (1991).

Claims of qualified immunity require a two step analysis. First, the court must consider whether the facts, taken in the light most favorable to the plaintiff, show that the official's conduct violated a constitutional right. Saucier v. Katz, 533 U.S. 194, 201 (2001). In Buttera the D.C. Circuit held that where qualified immunity is raised as a defense, the court must first determine whether plaintiff has alleged deprivation of an actual constitutional right at all, identifying the constitutional deprivation with an appropriate level of specificity. Buttera v. District of Columbia, 235 F.3d 637, 646 (D.C. Cir. 2001). Second, if the allegations make out a

constitutional violation then the court must ask whether the right was clearly established– that is, whether "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." Saucier v. Katz, 533 U.S. at 202. In this matter, plaintiff cannot show that the named defendants violated such a clearly established First or Fifth Amendment right of the plaintiff.

Plaintiff only claims defendants violation of his First and Fifth Amendment rights by: allowing his immediate supervisor access to records related to his request for FMLA leave; posting a "Security Alert"; and retaliating against him for petitioning members of Congress. Complaint at ¶¶ 23, 27 and 29. As plaintiff tacitly recognizes, it is the Privacy Act, and not the Constitution, that protects him from unlawful disclosure of protected information. Complaint at ¶¶ 23 and 27. Notably, plaintiff does not claim he was denied a right to communicate (speak) regarding information in his records, as would be protected under the First Amendment. To the contrary, he argues for the withholding of such "speech" from his supervisor an act arguably protected under the Privacy Act. Complaint at ¶¶ 12, 14 and 17.

Similarly, plaintiff does not claim that he was denied any process he might be due under the Fifth Amendment in order to access his records to petition Congress concerning them. Gray v. Bell, 712 F.2d 490, 496 (D.C. Cir. 1983), cert. denied, 465 U.S. 1100, 111-12 (1984). In fact, it is undisputed that on March 8, 2002, plaintiff wrote to the Director of the Gallery complaining about the Gallery's release of records and failure to adhere to the FMLA. Complaint at ¶ 18. It is equally undisputed that plaintiff sent a copy of this letter to nine "members of Congress, including Senators Barbara A. Mikulski and Paul Sarbanes of Maryland and Congressmen Steny A. Hoyer, Robert L. Ehrlich, Wayne Gilchrest, Benjamin L. Cardin, Constance A. Morella,

Albert R. Wynn and Elijah E. Cummings." Id. Thus, there are no facts which would support a claim that plaintiff was impeded in accessing the process for petitioning members of Congress in this manner. Further, plaintiff does not identify a cognizable privacy interest clearly protected under the Fifth Amendment. See National Head Stat Assn. V. DHHS, 2004 WL 111959, *6 (D.D.C. January 20, 2004). As a result of these failures, plaintiff cannot claim that he had a Fifth Amendment right, reasonably identifiable to defendants, which they violated.

To the extent plaintiff is claiming that the Security Alert posting unlawfully defamed or libeled him in violation of his due process rights under the Fifth Amendment his claim is ill-founded. The Supreme Court has held that injury to reputation, even defamatory, does not constitute the deprivation of a liberty interest of a non-public official. Conn. Dept. of Public Safety v. Doe, 538 U.S. 1, 6-7 (2003) citing Paul v. Davis 424 U.S. 696 (1976).

Similarly, defendants should be afforded qualified immunity against plaintiff's claim that they violated the First Amendment by retaliating against him for writing to members of Congress regarding his FMLA complaint. Complaint at ¶¶ 27 and 29. Plaintiff cannot sustain a showing that defendants retaliated against him for exercising his right to petition Congress. Notably, the retaliatory act– the Gallery's inquiry leading to his proposed removal– predates his March 8 communications.

In deciding whether such speech in employment is protected under the First Amendment, the task of a court "is to seek 'a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" Connick v. Myers, 461 U.S. 138, 142 (1983) (citing Pickering v. Board of Educ., 391 U.S. 563, 568 (1968)).

A cause of action based on the First Amendment principles articulated in Pickering and Connick has four elements. Hall v. Ford, 856 F.2d 255, 258 (D.C. Cir. 1988). First, "the public employee must have been speaking on a matter of public concern." Id. Second, the court must balance the employee's interest against the employer's interest, as set forth in Pickering, to determine whether the employee's interest is outweighed by any disruption his speech may cause to the efficiency of the public enterprise. Id.; Waldau v. Coughlin, 1997 WL 161958, at *3 (D.D.C.), aff'd, 1997 WL 634539 (D.C. Cir. Sept. 25, 1997), cert. denied, 522 U.S. 1113 (1998). Third, the employee must establish that his speech was "a substantial or motivating factor" in the employer's actions. Hall v. Ford, 856 F.2d at 258. Fourth, if the employee meets his burden, the employer must prove that it would have reached the same decision even without the employee's speech.

Even assuming, *arguendo*, that plaintiff's actions involved matters of "public concern," his Complaint must be dismissed because plaintiff cannot establish that his speech was a "substantial or motivating factor" in the Gallery's decision to issue him a removal notice. Suu Hall v. Ford, 856 F.2d at 258. Further, if the plaintiff is able to make such a showing of substantial or motivating factor, the Gallery can prove that it would have reached the same decision even without plaintiff's communications to Congress. Thus, no First Amendment claim should be found.

The facts are that plaintiff's supervisor questioned him about these incidents which lead to his removal on March 5th – three days *prior to* plaintiff's March 8, letters to Congress. Further, the Gallery only received responsive inquiries from two Senators– Senators Paul Sarbanes and Barbara Mikulski– dated March 13 and May 7, 2002 respectively. See Decision

Letter at 6. By this time, the allegations which ultimately lead to plaintiff's removal had already been conveyed to him and an inquiry into them begun. Thus, it cannot be claimed that plaintiff's March 8 letters to Congress were a substantial or motivating factor of the Gallery's July 15, decision ultimately to issue him a notice of proposed removal.

Consistently, when plaintiff raised the claim of retaliation for protected speech below, the deciding official, in her August 29, 2002 decision upholding plaintiff's removal, expressly addressed plaintiff's First Amendment charge stating: "[a]s to your allegation that the charges against you were in response to your complaint to Mr. Powell [and copied to various Congressmen] about violation of your FMLA rights, I note the following. Your letter to Mr. Powell was dated March 8, 2002. Mr. Powell's office received your letter on March 11, 2002. The Gallery responded to your complaint by letter dated March 20, 2002. Since Mr. Thomas questioned you about taking the defective Gallery I.D. badge on March 5, 2002, his questioning was unrelated to your complaint to Mr. Powell, dated March 8, 2002." Decision Letter at 3. In conclusion, the deciding official found that there was no evidence that the plaintiff's removal was "motivated by your exercise of free speech." Id. at 12.

In deciding whether the Gallery's actions against the plaintiff violated the First Amendment, this Court should defer to the Gallery's reasonable findings, looking "to the facts as the employer reasonably found them to be," and not re-evaluate the facts in light of the rules of evidence applicable in federal court. Waters v Churchill, 511 U.S. 611, 676-77; Waldau v Coughlin, 1997 WL 161958, at *4. As the Gallery's decision to propose plaintiff's removal was not related to his free speech activities to Congress, defendants should be entitled to qualified immunity from plaintiff's First Amendment claim that it was.

2. Special Factors Counsel Hesitation In The Creation Of A Bivens Remedy In Light Of The Exclusive Statutory Remedies Available To Plaintiff

As established by Bivens and its progeny, an alleged violation of the Constitution will not give rise to an independent cause of action if: 1) Congress has expressly declared that no such cause of action may exist; or 2) in the absence of an expressed Congressional declaration, there are "special factors counseling hesitation." Bivens, 403 U.S. at 396; Bush v. Lucas, 462 U.S. 367 (1983) (comprehensive procedural and substantive provisions of the CSRA constitute "special factors" counseling hesitation against a Bivens remedy); Brown v. GSA, 425 U.S. 820 (1976) (Title VII is the sole remedy for federal employees complaining of job discrimination on account of sex or race). Thus, a Bivens action is defeated in either of these situations.

One of the "special factors" counseling against the creation of an alternative Bivens-type remedy includes a situation in which a comprehensive statutory scheme has been established to provide relief in a given area. See Spagnola v. Mathis, 859 F.2d 223, 229-30 (D.C. Cir. 1988) (en banc) (recognizing the exclusivity of the Civil Service Reform Act's remedies). Courts in this district have ruled that the comprehensive remedial scheme of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stst. 1111 et seq. (CSRA) constitutes the type of special factor cautioning courts against implying a Bivens remedy. See Spagnola v. Mathis, supra; Maye v. Reno, 231 F.Supp. 332 (D.D.C. November 19, 2002)(the availability of the CSRA cautions against implying a Bivens remedy); see also Dearsman v. Kurtz, 516 F. Supp. 1255, 1259-60 (D.D.C. 1981) (CSRA and Title VII constituted exclusive remedies for adverse actions and discrimination in the federal workplace, precluding plaintiff's due process claims).

In Count II, plaintiff claims defendants retaliated against him in the work place "for petitioning members of Congress regarding his FMLA complaint against the National Gallery of Art." See Complaint at ¶ 25. Thus, to the extent plaintiff is seeking to redress such alleged wrongs in the workplace, the Supreme Court and the District of Columbia Circuit have

recognized that his remedy lies in the CSRA, or not at all. See Bush v. Lucas, supra (CSRA preempts Bivens remedies– whether or not the CSRA provides a plaintiff with what he or she considers to be a remedy that is "adequate."); Spagnola v. Mathis, 859 F.2d at 228-9. Further, in Bush v. Lucas, the Supreme Court held that adverse personnel decisions do not provide federal employees with a cause of action against their supervisors for damages allegedly arising from violations of the employee's constitutional rights. Thus, any claim plaintiff would have against the named individuals in this case, should be dismissed. In the alternative, to the extent plaintiff's claim can be said to be the result of "whistleblowing" activity, his remedy would be before the Office of Special Counsel, not a Bivens claim. See Spagnola v. Mathis, 859 F.2d at 225-30.

It is not necessary that the statutory remedial scheme be capable of affording the plaintiff all of the relief he seeks in this action. The controlling factor is that Congress has created a comprehensive scheme. Spagnola v. Mathis, 859 F.2d at 228-30; see Bush v. Lucas, 462 U.S. at 388-90. Indeed it is noteworthy that plaintiff raised these same allegations before the Gallery and in his MSPB complaint– a complaint which he settled with the Gallery. Settlement Agreement at Exhibit 9. Thus, special factors counsel against the creation of a Bivens remedy for readjudication of these same claims here. Accordingly, plaintiff's Bivens claims should be dismissed under the authority of Bush v. Lucas, and other authorities cited above.

3. The Court Has No Personal Jurisdiction Over Individual Defendants Powell, Giamber and Lucey, as Required By Rule 12 (b)(2)

Plaintiff bears the burden of establishing that personal jurisdiction may be exercised over the named individual defendants. See Naartex Consulting Corp. v. Watt, 722 F.2d 779, 785 (D.C. Cir. 1983). "If his allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof. And where they are not so challenged the court may still insist that the jurisdictional facts be established or the case be

dismissed, and for that purpose the court may demand that the party alleging jurisdiction justify his allegations by a preponderance of evidence." McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 189 (1936). Plaintiff cannot provide competent proof that individual defendants Powell, Giamber, and Lucey were properly served.

In an action against a federal employee in his or her individual capacity, the individually sued defendant must be served with process in accordance with Rule 4(e) of the Federal Rules of Civil Procedure. Rule 4(e) requires that a copy of a summons and complaint be delivered to the defendant (or his appointed agent) personally, or be left "at his dwelling house or usual place of abode with some person of suitable age and discretion" who resides there. Service on the U.S. Attorney in the district where the action was brought pursuant to Fed. R. Civ. P. 4(i) "does not obviate the requirement of personal service under Fed. R. Civ. P. 4(d)(1) where the action is in substance against a federal official in his individual capacity." See Lawrence v. Acree, 79 F.R.D. 669, 670 (D. D.C. 1978). Similarly, service at a place of business does not satisfy the service rule.

Here, defendants[3] Powell, Giamber and Lucey were not personally served pursuant to Fed. R. Civ. P. 4(e). They were served at their place of employment. Actual notice will not, of course, substitute for technically proper service under Rule 4 and will not permit the Court to render a personal judgment against an individually-named defendant. Sieg v. Karnes, 693 F.2d 803 (8th Cir. 1982); see also Stafford v. Briggs, 444 U.S. 527 (1980). The service of process thus being defective as to defendants Powell, Giamber and Lucey in their individual capacities, this action cannot proceed against them personally. Micklaus v. Carlson, 632 F.2d 227, 240 (3rd Cir. 1980); Griffith v. Nixon, 518 F.2d 1195, 1196 (2d Cir. 1985), cert. denied, 423 U.S. 995 (1975).

[3]Defendant Willson was served by hand-delivery in his place of employment; the summons, however, was stamped "Service accepted in official capacity only."

Plaintiff must bear the burden of establishing the Court's personal jurisdiction over the defendant. See McNutt v. General Motors Acceptance Corporation, 298 U.S. 178, 182 (1936); Tavoulareas v. Comnas, 720 F.2d 192, 195 (D.C. Cir. 1983). Because plaintiff's action seeks relief against the personal resources of federal defendants in their individual capacities this court must be able to assert personal jurisdiction over the defendants in order to subject them to a binding judgment. Griffith, supra.

The defendants' limited appearance herein in the form of this motion does not constitute acquiescence in the manner of service, a waiver of proper service, or a voluntary entrance of appearance.

D. Plaintiff's Claims Under Count III Are Untimely

To the extent plaintiff's claim under Count III is one for defamation of character, due to defendants' actions in posting a security alert publishing information about him, his claim is untimely. Notably, the one-year statute of limitations applies to plaintiff's claims here.

> When a federal action contains no statute of limitations, courts will ordinarily look to analogous provisions in state law as a source of a federal limitations period. See, e.g., Burnett v. Grattan, 468 U.S. 468 U.S. 42, 104 S.Ct. 2924, 2929, 82 L.Ed.2d 36 (1984); Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 464, 95 S.Ct. 1716, 1722, 44 L.Ed.2d 295 (1975); Brown v. United States, 742 F.2d 1498, 1503 (D.C. Cir. 1984) (en banc). Concluding that "damage to reputation ... is central to the [plaintiff's] claim," Opinion at 2, the district court applied the District of Columbia's one year statute of limitations governing defamation actions to Doe's Bivens suit. See D.C. Code § 12-301(4). The D.C. statute of limitations reads, in relevant part: Except as otherwise specifically provided by law, actions for the following purposes may not be brought after the expiration of the period specified below from the time the right to maintain the action accrues:. . .(4) for libel, slander, assault, battery, mayhem, wounding, malicious prosecution, false arrest or false imprisonment--1 year; . . .(8) for which a limitation is not otherwise specially prescribed--3 years. D.C. Code § 12-301. We agree with the district court that the one year limitations period should be applied.

Doe v. United States Department of Justice, 753 F.2d 1092, 1114 & n.28 (D.C. Cir. 1985) (footnote

inserted into text).[4] Plaintiff's claims at Count III are, in essence, claims based on alleged libelous or slanderous actions by the individual defendants. Here, the Complaint was filed on July 30, 2003 and service on defendant federal agency was not perfected until November 5, 2003. The complained of Security Alert was posted on July 16, 2002. See "Security Alert", Response at Exhibit 5. Consistently, plaintiff admits in his Complaint that "[s]hortly after receiving a [July 15, 2002] Notice of Proposed Removal, plaintiff learned that a "Security Alert" had been posted at various points in the National Gallery of Art building in plain sight of other employees and contractors." Complaint at ¶ 21. As this event admittedly occurred more than one year prior to July 30, 2003, plaintiff's claims relating to them are time-barred and should be dismissed.

D. Plaintiff Cannot Maintain Suit Against Individual Defendants Under The Privacy Act

The proper defendant in a Privacy Act action is the agency. Privacy Act remedies preclude an action against individual employees. Classen v. Brown, No. 94-1018, 1996 WL 79490, at **3-4(D.D.C. Feb. 16, 1996)(The [Privacy] Act does not allow suits against subordinate agency officials.); Armstrong v. United States Bureau of Prisons, 976 F.Supp. 17, 23 (D.D.C. 1997) aff'd, No. 97-5208, 1998 WL 65543 (D.C.Cir. Jan 30, 1998)(Privacy Act does not allow a person to seek civil remedies against individuals.) Accordingly, to the extent that plaintiff, in Count III, is suing defendants James Lucey and Michael Prendergast in their individual capacity, this Count must be dismissed.[5]

---

[4]Some Courts have concluded that the three-year statute of limitations applies generally to Bivens actions. See, e.g., Taylor v. United States, Civil Action No. 96-102 JR (D.D.C. Jul 1, 1996) (applying Owens v. Okure, 488 U.S. 235 (1989) to Bivens actions). Defendants believe that the proper limitations period for Bivens claims that are described in D.C. Code § 12-301(4) is one year. See Doe v. United States Department of Justice, 753 F.2d at 1114.

[5]To the extent that plaintiff is seeking damages under the Privacy Act, the Act does not apply to the Gallery. Dong v. Smithsonian 524 U.S. 922 (1998) (holding that the Privacy Act does not apply to the Smithsonian). If the Privacy Act applied to the Gallery, it too would bar the Bivens claim as a special factor counseling hesitation. E.g. Chung v. Dept of Justice, 333 F.3d 272 (D.C. Cir. 2003); see also Downie v. City of Middleburg Heights, 301 F.3d 688, 698 (6th Cir. 2002).

CONCLUSION

For these reasons, plaintiff's claims against the defendants should be dismissed or summary judgment should be granted in favor of the defendants.

Respectfully submitted,

ROSCOE C. HOWARD, JR., D.C. Bar #246470
United States Attorney

MARK E. NAGLE, D.C. Bar #416364
Assistant United States Attorney

ROBIN M. EARNEST, D.C. Bar # 458304
Assistant United States Attorney
555 Fourth Street, N.W.
Washington, D.C. 20530
(202) 514-7139

Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FRED DODGE,	)	
Plaintiff,	)	
v.	)	**Civil Action No. 03-1613(RCL)**
TRUSTEES OF THE NATIONAL GALLERY OF ART, et al.,	)	
Defendants.	)	

STATEMENT OF MATERIAL FACTS NOT IN GENUINE DISPUTE

Pursuant to Local Rule 7.1(h), defendants, through counsel, submit the following statement of material facts for which there is no genuine issue.

1. Defendant National Gallery of Art (Gallery) employed plaintiff Fred Dodge as an Electrician, WG-2805-10.

2. On July 15, 2002, the Gallery issued a proposed notice of removal to the plaintiff for the following: a) unauthorized taking of a Gallery identification badge; b) making false statements; c) concealment of misappropriated Gallery property; and d) tampering with a Gallery key ring. See Notice of Proposed Removal, July 15, 2002 ("Notice") at 1, attached as Exhibit 1.

3. The Notice explained that plaintiff took a defective ID badge after being told he could not have it and– when questioned about the incident– falsely stated he had been given the badge. Notice at 2. The Notice also explained that plaintiff tampered with a Gallery key ring by removing an elevator key in violation of Gallery policies and– when questioned about the removal– falsely denied any knowledge of tampering. Notice at 3-5. The Notice also charged plaintiff with possessing and concealing a separate Gallery key. Notice at 5.

4. By letter dated August 6, 2002, plaintiff's counsel responded to the Notice claiming the "proposed termination is pretextual." Response to Notice of Proposed Removal,

August 6, 2002 ("Response") at 5, attached as Exhibit 2.

5. The Response included a March 8, 2002, letter from plaintiff to Gallery Director Earl A. Powell III, stating he had asked for leave under the Family Medical Leave Act (FMLA) for purposes pertaining to his son's health. Letter from Fred Dodge to Earl A. Powell III, March 8, 2002 ("Dodge Letter"), attached as Exhibit 3. In this letter, plaintiff complained that, although he asked that his son's medical certifications not be given to his manager– asserting that the FMLA "provides for these records to be treated with the utmost confidentiality"– the Gallery's Personnel Office provided the information to his manager. Id. at 1. Plaintiff sent copies of this letter to U. S. Senators Mikulski and Sarbanes, and to the members of the U. S. Congress from Maryland. Id. at 2.

6. The Gallery's Administrator, Darrell Willson, responded to plaintiff's March 8, 2002 letter on March 20, 2002. Letter from Darrell R. Willson to Fred Dodge, March 20, 2002 ("Willson Letter"), attached as Exhibit 4. In his letter, Mr. Willson stated that plaintiff's FMLA application "consists of only two documents, a completed U.S. Department of Labor form, entitled 'Certificate of Health Care Provider,' and a memorandum, dated December 4, 2001, from [the Personnel Staffing Specialist] approving your FMLA request, effective November 26, 2001." Id. at 1. Mr. Willson further explained that the Gallery received no other medical records or notes about plaintiff's son. Id. After investigation, Mr. Willson found that the information that the Personnel Office provided to Mr. Dodge's supervisor consisted solely of the FMLA application form and did not include other medical records. Id. at 2. He stated that since "Mr. Thomas, your supervisor, was trying to decide whether your refusal to work a mandatory overtime assignment was proper, he had every right to review this information." Id.

7. Mr. Powell sent Mr. Willson's letter to the Senators in response to their constituent inquiries about plaintiff. Letter from Earl A. Powell III to Senator Sarbanes, March 27, 2002, attached as Exhibit 4; Letter from Earl A. Powell III to Senator Mikulski, May 21,

2002, attached as Exhibit 5. Mr. Powell, thereby, assured the Senators that the Gallery treats employee medical records with appropriate confidentiality, and had shared Mr. Dodge's letter only with his immediate supervisor. Id.

8. In his Response, plaintiff's attorney asserted that the Gallery brought charges against plaintiff only after plaintiff wrote to Mr. Powell. Response at 1. He further stated that the proposed removal followed the congressional inquiry as to plaintiff's FMLA complaint. Response at 2. According to the attorney's letter, the timing demonstrated that "the proposed removal action is pretextual, and the actual bases for the proposed action are Dodge's complaints to members of Congress that the Gallery violated Dodge's FMLA rights as well as other protected activity." Response at 3.

9. Further, this Response alleged that the Gallery, in retaliation for the congressional contact, "violated Mr. Dodge's right of privacy by posting on a bulletin board which was in plain sight of National Gallery employees and contractors a 'Security Alert' revealing Fred Dodge's name, birth date, social security number, and photo." Response at 2.

10. Finally, plaintiff's Response alleged that the proposed termination "is retaliation for Mr. Dodge's union activities and expressing his constitutional rights of seeking a redress of grievance and free speech. The First Amendment to the United States Constitution protects the right of employees to speak freely and to petition openly for redress of their grievances. The First Amendment also protects employees from retaliation for doing so." Response at 5.

11. The Gallery issued a decision on August 29, 2002 upholding the bases for removal. Letter from George-Ann Tobin to Fred Dodge, August 29, 2002 ("Decision Letter"), attached as Exhibit 6. The Decision Letter first addressed the charge concerning the I.D. badge, stating: "[a]s to your allegation that the charges against you were in response to your complaint to Mr. Powell about violation of your FMLA rights, I note the following. Your letter to Mr. Powell was dated March 8, 2002. Mr. Powell's office received your letter on March 11, 2002.

The Gallery responded to your complaint by letter dated March 20, 2002. Since Mr. Thomas questioned you about taking the defective Gallery I.D. badge on March 5, 2002, his questioning was unrelated to your complaint to Mr. Powell, dated March 8, 2002." Decision Letter at 3.

12. Further, the Decision Letter addressed plaintiff's assertion that the Gallery's actions were "in retaliation for having received letters of inquiry from Senators Paul Sarbanes dated March 13, 2002, and Barbara Mikulski, dated May 7, 2002 . . ., [which] concerned your allegations that the Gallery had violated your rights, as well as your son's rights under the FMLA." Decision Letter at 6. In so doing it found that neither letter was relevant, particularly as the investigation of the other charges justifying removal– tampering with a Gallery key ring– arose following plaintiff's April 11, 2002 call to the key shop about possible misconduct by his supervisor. Decision Letter at 7. There was no evidence that the removal was "motivated by your exercise of free speech." Decision Letter at 12. Consequently, the official concluded that "the serious charges cited against you stand on their own, separate and apart from your allegations of retaliation, which appear to be an attempt to divert attention from your misconduct." Decision Letter at 12.

13. The Decision Letter also addressed plaintiff's allegation that the Gallery violated his privacy by posting a security alert containing information about him, stating plaintiff failed to "show that the release of the information contributed to the Gallery proposing your removal. Thus, your alleged invasion of privacy is unrelated to your proposed removal." Decision Letter at 13.

14. Plaintiff appealed his removal to the Merit Systems Protection Board (MSPB) stating in his application that he wished "to appeal any and all actions that the National Gallery of Art has used to remove me from my job." MSPB Appeal Application, Part III, attached as Exhibit 7.

15. The Union represented plaintiff in his MSPB appeal. MSPB Appeal Application,

Part II. Id.

16. In Pre-Hearing submissions, plaintiff raised "Retaliation for Union Activity" as an affirmative defense. Pre-Hearing Submissions, December 11, 2002 ("Submission") at 8, attached as Exhibit 8. Notably, plaintiff admitted that he "filed a complaint against the Director in March 2002. Id at 8. On the Witness List attached to the Submission, plaintiff lists Mr. Powell, and states that he "is expected to testify as to knowledge concerning the invasion of privacy with regards to Mr. Dodge and his son, and providing testimony regarding the Agency's handling of FMLA information." Id. at 9. Mr. Powell did not testify at the MSPB hearing.

17. On January 30, 2003– after the hearing but before MSPB issued its decision– plaintiff and the Gallery entered into a Settlement Agreement and General Release (Agreement) signed by plaintiff and his Union representative. Attached as Exhibit 9.

18. In the Agreement, plaintiff acknowledges that he is represented "by a representative of his choice, and that he has reviewed and consulted with his representative regarding this Agreement before signing it." Id at ¶ 10.

19. The Agreement states that it "resolves all matters arising from Appellant's removal from the Gallery; including his Merit Systems Protection Board (Board) appeal, DC-0752-03-0011-I-1 (Appeal) of this action; and any and all claims of any nature which Appellant raised or could raise in any forum in which he could appeal, complain, grieve, or otherwise challenge said removal." Id. at ¶ 1.

20. Specifically, the Agreement provides as follows:

> 2. In consideration of Appellant's promise to take the actions described in paragraph 3 below, the Gallery agrees to reinstate Appellant as a Gallery and federal employee for the period covering August 31, 2002 to December 31, 2002, and to carry him on official paid status for the time he would have been regularly scheduled to work.
>
> . . .

3. In consideration of the Gallery's promise to take the actions described in paragraph 2 above, Appellant agrees to the following:

A. Within five calendar days of Appellant's execution of this Agreement, Appellant agrees to sign and deliver to the Gallery's representative, an SF-52, Request for Personnel Action, stating that he is resigning from the Gallery, effective December 31, 2002, "for personal reasons."

. . .

C. Appellant agrees that execution of this Agreement constitutes his withdrawal, with prejudice, of his Appeal before the Board and, with the exception of current unemployment compensation benefits Appellant may be receiving, that he will not initiate or continue pending actions, complaints, grievances and/or appeals of any type in any forum against the Gallery arising from his removal from the Gallery.

D. Except as provided for in paragraph 2 and with the exception of current unemployment compensation benefits Appellant may be receiving, Appellant waives, abandons, and releases any and all other claims he has or may have for back pay, promotions, bonuses, awards, or any other personnel compensation, or other claim he might have against the Gallery of any kind whatsoever based on his removal from the Gallery.

E. Except as provided for in paragraph 2, Appellant waives, abandons, and releases any and all claims for damages or alleged damages, which he claims or could have claimed to have sustained based on his removal from the Gallery.

. . .

G. As a condition of the settlement of this matter, Appellant hereby agrees that any allegations, factual or legal, concerning any aspect of his removal or resignation from the Gallery's employment may not be the basis for any future judicial or administrative action, suit, complaint, or grievance of any kind by Appellant, except an enforcement action authorized by law with respect to the instant Appeal.

Id at ¶¶ 2-3.

21. In accordance with the terms of the parties' Agreement, plaintiff submitted his resignation effective December 31, 2002, and the Gallery reinstated plaintiff and paid him $16,751.80.

22. On July 30, 2003, plaintiff filed a complaint against the Trustees of the National Gallery of Art and named individual defendants alleging that defendants violated his right of privacy as protected by the First and Fifth Amendments and the Privacy Act (Count I); that individual defendants violated his First and Fifth Amendment right to petition government for redress of grievance by retaliating against him for his letters to Congress regarding his FMLA complaint (Count II); and that two individual defendants violated plaintiff's privacy protected by the First and Fifth Amendments and the Privacy Act by posting the "Security Alert" at the Gallery (Count III).

28. Plaintiff's complaint names the following five defendants in their individual and official capacities: Earl A. Powell III, Director; Darrell R. Willson, Administrator; Michael Giamber, Deputy Chief, Facilities Management; James Lucey, Chief of the Office of Protection Services; and Michael Prendergast, Deputy Chief for Operations of the Office of Protection Services.

29. Defendants Powell, Willson, Giamber, and Lucey have received service of the summons and complaint at the National Gallery of Art, their place of employment. None of these defendants has received service at their homes.

30. Mr. Prendergast, who is no longer employed by the Gallery, has received service of the summons and complaint at his place of residence.

Respectfully submitted,

ROSCOE C. HOWARD, JR., D.C. Bar #246470
United States Attorney

MARK E. NAGLE, D.C. Bar #416364
Assistant United States Attorney

ROBIN M. EARNEST, D.C. Bar # 458304
Assistant United States Attorney
Judiciary Center Building
555 4th Street, N.W, 10th Floor
Washington, D.C. 20530
(202) 514-7139