

or even to information about known workplace risks. Moreover, we demonstrated that, even if the Court were to conclude that any of the plaintiffs' claims are cognizable under the Due Process Clause, the defendants would be entitled to qualified immunity because no procedural or substantive due process right asserted by the plaintiffs was "clearly established" at the time of the defendants' alleged conduct.

DISCUSSION

1. Available Statutory And Contractual Remedies Foreclose Creating a *Bivens* Claim On The Plaintiffs' Procedural Due Process Theory

The plaintiffs contend that their constitutional claims against the defendants are not foreclosed by available statutory and contractual remedies because their constitutional claims are premised upon the defendants' alleged interference with the plaintiffs' right to access certain allegedly available procedural remedies. *See* Opposition at 28–32. In support of this contention, the plaintiffs rely on two decisions that predate and have been overtaken by the Supreme Court's decision in *Schweiker v. Chilicky*, 487 U.S. 412 (1988), and on one district court decision that cannot be reconciled with *Schweiker*.

Two of the three cases the plaintiffs rely on, *Grichenko v. United States Postal Service*, 524 F.Supp. 672 (E.D.N.Y. 1981), and *Bishop v. Tice*, 622 F.2d 349 (8th Cir. 1980), are unpersuasive because they were decided before *Schweiker* and *Bush v. Lucas*, 462 U.S. 367 (1983), the Supreme Court decisions which established the principle that the existence of a statutory alternative remedy for the alleged constitutional harm claimed by a plaintiff precludes recognition of a *Bivens* cause of action. *See Schweiker*, 487 U.S. at 423; *Bush*, 462 U.S. at 390. In *Grichenko*, a district court held that where the defendant allegedly blocked the plaintiff's resort to available administrative remedies, the plaintiff's procedural due process claim was not foreclosed. 524 F.Supp. at 675-77. The Eighth Circuit came to a similar conclusion in *Bishop v. Tice*. 622 F.2d at 357. However, neither *Grichenko* nor *Bishop* casts any light on the viability under current law of the plaintiffs' claims for "interference with available remedies," because both decisions predate *Bush* and *Schweiker*.

Indeed, the Eighth Circuit has recognized that the rationale it relied upon in *Bishop* (the same rationale advanced in *Grichenko*) cannot be reconciled with *Schweiker* and is no longer valid. In *McIntosh v. Weinberger*, 810 F.2d 1411 (8th Cir. 1987), the Eighth Circuit addressed *Bivens* claims

brought by a group of plaintiffs that alleged an official deprived them of procedural due process by preventing them from having meaningful access to the process by which unsuccessful applicants for a promotion in the Department of the Army's civilian work force can appeal the denial of their applications. The official allegedly destroyed the records that would be used in the appeal process before the plaintiffs, unsuccessful candidates for promotion, could initiate the appeal process. *Id.* at 1419-22. The plaintiffs alleged that their due process claims were not precluded by the remedial scheme of the Civil Service Reform Act (CSRA). *Id.* The Eighth Circuit held, as it had in *Bishop*, that a constitutional claim in an area in which Congress has legislated was not precluded by an available remedial scheme provided by Congress where the constitutional claim was premised upon the defendant's interference with procedural remedies available to the plaintiff. *Id.* at 1434-35. The Eighth Circuit based its decision upon its determination that the CSRA did not provide a "meaningful" remedy for the actions the official took to prevent the plaintiffs from accessing the promotion appeal process because those actions were not covered by the CSRA. *Id.* at 1435.

The Supreme Court, however, vacated and remanded for reconsideration in light of *Schweiker, Turner v. McIntosh*, 487 U.S. 1212 (1988), and on remand the Eighth Circuit concluded that its former decision could not stand in light of *Schweiker* and the D.C. Circuit's decision in *Spagnola v. Mathis*, 859 F.2d 223 (D.C. Cir. 1988) (*per curiam*) (*en banc*). Instead, the Eighth Circuit held that the comprehensive remedial scheme of the CSRA precluded the creation of a *Bivens* remedy even where the CSRA did not provide a specific remedy for the defendant's interference with the plaintiffs' access to particular procedural remedies. *McIntosh v. Turner*, 861 F.2d 524 (1988). The Eighth Circuit's rationale for rejecting its former position is instructive and shows that *Schweiker* dooms the plaintiffs' claims for interference with procedural remedies:

The *Chilicky* Court, speaking generally, counseled the lower courts to "respond [] cautiously to suggestions that *Bivens* be extended into new contexts." And in particular when Congress has heavily regulated a certain subject -- like federal employment -- but has said nothing about a right of action for constitutional violations, no such right of action should be recognized under *Bivens* unless "congressional inaction has .. been inadvertent." ... The result is a sort of presumption against judicial recognition of direct actions for violations of the Constitution by federal officials or employees. If Congress has not explicitly created such a right of action, and if it has created other remedies to vindicate (though less completely) the particular rights being asserted in a given case, the chances are that the courts will leave the parties to the remedies Congress has expressly created for them ... It may be true that injured citizens will thus receive less than "'complete relief,'" but that is a decision that Congress has both the power and the competence to make.

Id. at 525-26 (internal citations omitted). The court concluded that the preclusive effect of the CSRA in the field of federal employment was not diminished by the fact that the CSRA did not provide for damages for the particular promotion-related claims asserted by the plaintiffs. *Id.* at 526.

After *Schweiker*, as the *McIntosh* court correctly concluded, a court may not create a *Bivens* claim for alleged interference with a plaintiff's access to procedural remedies in an area encompassed by a comprehensive remedial scheme established by Congress. Nor can the sole post-*Schweiker* decision cited by the plaintiffs -- *Rauccio v. Frank*, 750 F.Supp. 566 (D. Conn. 1990) -- be squared with the holding of *Schweiker*. In *Schweiker*, the plaintiffs, whose Social Security disability benefits had been denied without affording them access to the full panoply of administrative and judicial review provided by the Social Security Act, sought damages under the *Bivens* doctrine. *Schweiker*, 487 U.S. at 417-20. The Supreme Court characterized the plaintiffs' claim as one for "consequential damages for hardships resulting from an allegedly unconstitutional denial of a statutory right." *Id.* at 428. Citing the "comprehensive statutory schemes involved," the Court specifically declined to "separate the harm resulting from the alleged constitutional violation from the harm resulting from the denial of a statutory right" -- *i.e.*, the right to access the congressionally provided remedial scheme. *Id.* The Court held that the entirety of the plaintiffs' claim was foreclosed by the comprehensive remedial scheme enacted by Congress. *Id.* at 428-29.

As the D.C. Circuit explained in *Spagnola*, "the *Chilicky* Court made clear that it is the comprehensiveness of the statutory scheme involved, not the 'adequacy' of specific remedies extended thereunder, that counsels judicial abstention" from the creation of *Bivens* remedies. 859 F.2d at 227; *see United States v. Fausto*, 484 U.S. 439, 455 (1988) (holding that the exclusion of certain federal employees from the protections of the CSRA prevented those employees from seeking relief under other provisions of law); *Johnson v. Executive Office for United States Attorneys*, 310 F.3d 771, 777 (D.C. Cir. 2002) (holding that the Freedom of Information Act was a "comprehensive scheme to administer public rights" which precluded the creation of a *Bivens* action notwithstanding that the FOIA did not provide for damages in the plaintiffs' circumstances). In the present case, the plaintiffs do not contend that the FECA, the OSHA, or the Postal Service's employment contracts or emergency procedures are anything other than comprehensive schemes encompassing their claimed injuries. Accordingly, creation of a *Bivens* claim here is foreclosed even

if those schemes governing the plaintiffs' workplace do not make specific provision for damages due to the defendants' alleged interference with those procedural remedies.¹

2. Public Employees Have No Due Process Right To Information About Risks In The Workplace

The essence of all of the plaintiffs' claims is that they were entitled to information which they claim was in the possession of some of the defendants that the Brentwood facility was contaminated with anthrax. The plaintiffs point to no provision of the Postal Service's employment agreements which requires Postal management to provide Postal employees with such information, nor to any provision of the OSHA which imposes such a duty of disclosure. More fundamentally, even if such a provision existed, the plaintiffs' claims would still fail to state a violation of the due process clause; as the Supreme Court pointed out in *Davis v. Scherer*, 468 U.S. 183, 194 n. 12 (1984), "officials sued for violation of constitutional rights do not forfeit their immunity by violating some *other* statute or regulation." (emphasis in original). Nor do the plaintiffs' collective bargaining agreements, the Postal Service emergency procedures, or the OSHA create a private right of action for damages against the defendants. See Opening Memorandum at pp.19-20.

Whether the plaintiffs can state a substantive due process claim depends on whether the due process clause requires public employers to advise their employees about known risks in the workplace. The plaintiffs point to no decision of the Court of Appeals or of the Supreme Court which holds that the due process clause requires the disclosure of information in any circumstances, far less to a decision that due process requires disclosure to employees of known risks in the workplace. To the contrary, the Supreme Court held in *Collins v. City of Harker Heights*, 503 U.S. 115, 128 (1992), that a failure to warn employees about even "known" risks of harm did not deprive the employees of liberty without due process of law. See Opening Memorandum at 22. When the plaintiffs refer to *Collins*, on p. 42 of their Opposition, they fail to note that the Supreme Court expressly ruled *against* the "failure to warn" substantive due process theory which they urge on this Court. Nor do the plaintiffs point to any subsequent Supreme Court decision that in any way

¹ Even if this Court were to conclude that the "interference with procedural remedies" theory of *Grichenko*, *Bishop*, and *Rauccio* survives *Schweiker* and *Spagnola* in the context of a federal workplace, the defendants would be entitled to qualified immunity because it could not be said that any such conclusion was clearly established in the fall of 2001.

undermines the continuing vitality of *Collins*. Thus, the plaintiffs' claims fail at the initial stage of the qualified immunity analysis – they have failed to allege the violation of a constitutional right at all. *See Saucier v. Katz*, 533 U.S. 194, 200-201 (2001) (directing courts to resolve qualified immunity issues by deciding first whether the complaint alleges a violation of the Constitution, and only if it does, then addressing the question whether that violation was "clearly established").

The plaintiffs assert that the Court of Appeals' decision in *Butera v. District of Columbia*, 235 F.3d 637, 646-54 (D.C. Cir. 2001), recognizing that under some egregious circumstances the Constitution might compel public officials to mitigate a danger which they themselves had created, somehow trumps the Supreme Court's decision in *Collins*. Opposition at 35-42. The plaintiffs' reliance on *Butera's* "state endangerment" theory fails, however, because as the plaintiffs' complaint itself discloses, the defendants did not create the danger in the Brentwood facility; rather, the unidentified terrorist who sent the letter to Senator Daschle did. As the plaintiffs point out in their Opposition, at p. 7, the plaintiffs allege that the letter containing anthrax was processed through the Brentwood facility on October 11, 2001. Complaint, ¶¶ 36-38. The earliest the complaint alleges that Postal Service officials purportedly "knew" the Brentwood facility was contaminated was Thursday, October 17, 2001. Complaint, ¶ 57; Opposition at 12. That day Postal officials arranged for the testing of the Brentwood facility by both the Fairfax County HAZMAT Team, Complaint, ¶ 69, and by a private contractor. Complaint, ¶ 70. The facility was closed on October 21, 2001, four days after the testing. Thus, the Brentwood facility had been contaminated for six days before the defendants are alleged to have known about it. The plaintiffs allege that the defendants failed to mitigate the danger of anthrax contamination at Brentwood, and that the defendants failed to warn the plaintiffs of that danger, but the plaintiffs have not alleged that the defendants themselves affirmatively created or increased that danger. *See Butera*, 235 F.3d at 650 ("key requirement" under state endangerment theory is "affirmative conduct by the State to increase or create the danger that results in harm to the individual").

Rather than alleging facts indicating that the defendants actually caused or added to the anthrax risks at the facility, plaintiffs argue only that defendants misled the plaintiffs for four days about the seriousness of the risks in the facility. In substance, the plaintiffs apparently contend that although the Supreme Court held in *Collins* that the due process clause imposes no duty either to

provide a safe workplace or even to warn about known dangers, the due process clause nonetheless imposes a duty not to misrepresent known risks about workplace dangers. There is no support in the case law for such a proposed distinction, and it would effectively nullify the holding in *Collins*. In an industrial facility like the Brentwood plant, fast-moving machinery, noise, distractions, and the unpredictable but inevitable breakdowns that will occur all present their own risks, and perfect or absolute safety is unattainable. Recognizing a duty based in the due process clause not to mislead employees about workplace safety would mean that *any* dispute about workplace risks would raise a constitutional question – even a dispute about how far from a moving machine to paint a safety line, or how to word a warning sign, or how fast to run a production line. The Supreme Court has cautioned courts not to convert the due process clause into a font of tort law superimposed on state law. *Paul v. Davis*, 424 U.S. 693, 701 (1976); *Daniels v. Williams*, 474 U.S. 327, 332 (1986); *Collins*, 503 U.S. at 128. That caution is particularly appropriate in the context of workplace safety, where federal and state labor laws provide comprehensive regulation.

Similarly unhelpful to the plaintiffs is Judge Sullivan's recent decision in *Estate of Phillips v. District of Columbia*, 257 F.Supp.2d 69, 76-80 (D.D.C. 2003). In that case, the plaintiffs were the estates of District of Columbia firefighters who had died while fighting a fire. The plaintiffs alleged that, two years prior to the fire which cost their decedents their lives, a District of Columbia firefighter had lost his life fighting a fire; that an investigation revealed "deficiencies in training, staffing, equipment and administration" were the cause of the earlier firefighter's death; and that the same deficiencies were not corrected and caused the fatalities underlying the plaintiffs' claims in that case. Whether or not Judge Sullivan correctly described the state of the law,² the complaint in this case does not remotely allege a prior history of similar deficiencies in identifying and responding to anthrax contamination. The District's prior history of serious deficiencies causing firefighters' deaths – a "fatal pattern and practice of [standard operating procedure] violations" that the court found the defendants in *Phillips* knew about, *id.* at 79 – was the foundation of the court's conclusion

² The individual defendants in that case appealed Judge Sullivan's decision to the Court of Appeals, where the matter is stayed pending Judge Sullivan's resolution of the individual defendants' motions for relief from judgment. *See Estate of Phillips v. District of Columbia*, Nos. 03-7060 and 7061 (D.C. Cir., Order of May 8, 2003).

that the plaintiffs had stated a claim for "conscience-shocking" misconduct by the defendants there. Absent any similar allegations, the plaintiffs' substantive due process claims fail even under the analysis in *Phillips*.³

Moreover, as this Court recognized in *Fraternal Order of Police/Department of Corrections Labor Committee v. Williams*, 263 F.Supp.2d 45, 47-48 (D.D.C. 2003), the "state endangerment" theory of *Butera* cannot be applied to the plaintiffs' allegations concerning a federal workplace consistent with the Supreme Court's decision in *Collins* or the D.C. Circuit's decision in *Washington v. District of Columbia*, 802 F.2d 1478 (D.C. Cir. 1986). The plaintiffs' decision to disregard *Washington* and *Fraternal Order of Police*, which were discussed extensively at pp. 15-16 of our opening memorandum, and their failure to discuss in any substantive way the Supreme Court's decision in *Collins*, simply underline the lack of support in the law for their position. In short, as this Court concluded in *Fraternal Order of Police*, the right the plaintiffs assert simply is not recognized in the law.

The plaintiffs' argument that the right they assert was violated was "clearly established" at the time of the anthrax contamination is even farther off the mark. The plaintiffs rely on their contention that "the right to be free from conscious-shocking [*sic*] executive action is firmly established." Opposition at 44. In so arguing, the plaintiffs have committed the error identified by the Supreme Court in *Anderson v. Creighton*, 483 U.S. 635, 639-640 (1987) – they have identified the asserted "right" at too high a "level of generality." As the Supreme Court has emphasized

³ The plaintiffs also rely on *Metz v. United States*, 723 F.Supp. 1133 (D. Md. 1989), a common law claim filed against the United States under the Federal Tort Claims Act by the family of a deceased federal employee who allegedly contracted anthrax in a secret government program and was instructed not to disclose his illness. Opposition at pp. 38-39. Although the court dismissed that suit, plaintiffs argue that there is dicta in the opinion suggesting that it would have constituted the common law tort of outrage if the government had prevented the employee from learning of his exposure or getting medical treatment. The plaintiffs' reliance on *Metz* is inexplicable. *Metz* involved only a common law tort claim under the FTCA and did not involve any constitutional claim or any question of constitutional law, while the plaintiffs here have not asserted any common law tort claim under the FTCA and, instead, are asserting only constitutional tort claims under *Bivens*. In this constitutional tort action, it is beside the point whether the defendants' alleged conduct could give rise to a common law tort claim for outrage or on any other theory.

repeatedly, to overcome immunity the right must be established with such clarity and at such a level of specificity "that a reasonable official would understand that *what he is doing* would violate that right." *Id* (emphasis added); *see also Saucier*, 533 U.S. at 202; *Hope v. Pelzer*, 536 U.S. 730, 739 (2002); *Groh v. Ramirez*, 540 U.S. ___, 2004 WL 330057 (Feb. 24, 2004) slip op. at 7. As we have shown above, even after the D.C. Circuit's decision in *Butera*, the Circuit has not expressed a view on whether a "State-created danger" theory can be applied to a public workplace consistent with *Collins*. Certainly, the plaintiffs have not pointed to any decision which holds, or even suggests, that failing to warn employees about dangers in the workplace, or even offering misleading reassurances about such risks, was prohibited by the Constitution.⁴

CONCLUSION

For all the foregoing reasons, and for the reasons stated in our opening Memorandum, this Court should reject the plaintiffs' effort to transfer to the defendant Postal Service officials the liability that properly rests on the terrorist or terrorists who placed the letter containing anthrax in the mail stream. The plaintiffs' complaint should be dismissed.

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RESPECTFULLY SUBMITTED

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⁴ Judge Sullivan's decision in *Estate of Phillips* cannot help defeat the defendants' qualified immunity because it was decided long after the incidents giving rise to the plaintiffs' claims. Nor can *Metz*, an FTCA case involving no constitutional issue whatever, demonstrate that the plaintiffs' substantive due process theory here was clearly established by the fall of 2001.

/S/

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