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MEMORANDUM* OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (APRIL 10, 2019)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VERNON WENDELL RISBY,

Plaintiff-Appellant,

v.

KIRSTJEN NIELSEN, Secretary of Homeland Security; TIMOTHY MOYNIHAN; STACY M. SMITH; and JAMES HARRIS,

Defendants-Appellees.

No. 17-56946

D.C. No. 8:16-cv-02275-AG-JCG

Appeal from the United States District Court
for the Central District of California
Andrew J. Guilford, District Judge, Presiding

Submitted April 8, 2019** Pasadena, California

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes that this case is suitable for decision without oral argument. Fed. R. App. P. 34(a)(2).

Before: GRABER and BYBEE, Circuit Judges, and ARTERTON,*** District Judge.

Plaintiff Vernon Risby timely appeals the district court's judgment in favor of Defendants Kirstjen Nielsen, Timothy Moynihan, Stacy M. Smith, and James Harris. The court dismissed one claim for failure to state a claim, and the court granted summary judgment to Defendants on another claim. Reviewing de novo both the dismissal, *Gold Medal LLC v. USA Track & Field*, 899 F.3d 712, 714 (9th Cir. 2018), and the summary judgment, *Lee v. City of Los Angeles*, 908 F.3d 1175, 1182 (9th Cir. 2018), we affirm.

1. We agree with Plaintiff that his claim against federal officials, brought under 42 U.S.C. § 1983, may be construed as a claim pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). But the district court correctly held that issue preclusion bars the *Bivens* claim.

In the complaint, Plaintiff alleged that the Law Enforcement Officers Safety Act of 2004 ("LEOSA") grants him a right to an identification card and that Defendants unlawfully denied him a LEOSA card. The Supreme Court has clarified that a claim asserting a statutory right may be brought only to the extent that the statute grants a private right of action. *Ziglar v. Abbasi*, 137 S.Ct. 1843, 1855-56 (2017). Whether Plaintiff may bring a *Bivens* claim seeking to assert a purported right under LEOSA thus hinges on whether

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*** The Honorable Janet Bond Arterton, United States District Judge for the District of Connecticut, sitting by designation.

LEOSA creates a "private right of action." *Id.* at 1856 (internal quotation marks omitted).

In Plaintiff's earlier action, the district court held that "LEOSA does not establish a private right of action." In that earlier proceeding, that identical issue was actually litigated and decided, was necessary to the decision, and was decided after a full and fair opportunity to litigate. Accordingly, in this case, the district court correctly held that issue preclusion bars Plaintiff's *Bivens* claim. *See, e.g.*, *Offshore Sportswear, Inc. v. Vuarnet Int'l, B.V.*, 114 F.3d 848, 850 (9th Cir. 1997) (describing the requirements for issue preclusion).

Plaintiff may not, on appeal, broaden the scope of the *Bivens* claim to assert employment discrimination. The complaint asserts only a right under LEOSA and nowhere ties allegations of discrimination to this claim. *See, e.g.*, *Ross v. Williams*, 896 F.3d 958, 969 (9th Cir. 2018) (holding that we may not construe a claim beyond the allegations in the complaint); *Byrd v. Maricopa Cty. Sheriff's Dep't*, 629 F.3d 1135, 1140 (9th Cir. 2011) (en banc) ("Even construing Byrd's *pro se* complaint liberally, the allegations failed to state an equal protection claim because they asserted only allegedly harmful treatment and mentioned nothing about disparate treatment, much less about the specific jail policy or gender classification in general."). In any event, Plaintiff is "barred from bringing a constitutional challenge under [*Bivens*] because Title VII provides the exclusive judicial remedy for claims of discrimination in federal employment." *Zeinali v. Raytheon Co.*, 636 F.3d 544, 549 n.3 (9th Cir. 2011) (internal quotation marks

omitted). The district court correctly dismissed this claim.

2. The district court correctly granted summary judgment to Defendants on Plaintiff's claims of disability discrimination in violation of the Rehabilitation Act of 1973, race discrimination in violation of Title VII, and retaliation for past Equal Employment Opportunity ("EEO") activity in violation of Title VII. The "familiar *McDonnell Douglas* burden-shifting framework" applies to all three legal theories. *Campbell v. Haw. Dep't of Educ.*, 892 F.3d 1005, 1012 (9th Cir. 2018) (race discrimination); *Curley v. City of North Las Vegas*, 772 F.3d 629, 632 (9th Cir. 2014) (disability[1] discrimination); *Emeldi v. Univ. of Or.*, 673 F.3d 1218, 1223 (9th Cir. 2012) (Title VII retaliation). Viewing the evidence in the light most favorable to Plaintiff, *Martin v. City of Boise*, 902 F.3d 1031, 1036 (9th Cir. 2018), even assuming that he has a prima facie case, he cannot show pretext on any of his claims.

There is no evidence that, at the relevant time, Agent Christopher Foster was aware of Plaintiff's disability or EEO activity. Nor is there any evidence that Foster acted on account of race. Plaintiff's speculation to the contrary is insufficient to defeat summary judgment. *See, e.g.*, *Loomis v. Cornish*, 836 F.3d 991, 997 (9th Cir. 2016) ("Mere allegation and speculation

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[1] The Rehabilitation Act expressly adopts the standards under Title I of the Americans with Disabilities Act of 1990. 29 U.S.C. § 794(d); *see generally Fleming v. Yuma Reg'l Med. Ctr.*, 587 F.3d 938, 940-41 (9th Cir. 2009). "[C]ases interpreting either [statute] are applicable and interchangeable." *Douglas v. Cal. Dep't of Youth Auth.*, 285 F.3d 1226, 1229 n.3 (9th Cir. 2002) (internal quotation marks omitted).

do not create a factual dispute for purposes of summary judgment." (brackets omitted)).

Similarly, no evidence suggests that Agent Alfonso Lozano was even aware of Plaintiff's disability, race, or EEO activity, let alone that he or anyone else acted on account of those attributes. Instead, the evidence in the record suggests only that the invalid database entry—which was never accessed until Plaintiff's request for information—was an accidental mistake.

Finally, Plaintiff has not introduced sufficient evidence to suggest that James Harris denied him a LEOSA card for any discriminatory or retaliatory reason. Instead, Harris stated that Plaintiff was ineligible for a card because he was medically unfit to carry a firearm. Harris' decision is entirely logical and appears to fall well within the bounds of the agency's internal policy. But even if his decision was faulty in some way, an inference of pretext does not arise solely from an honest mistake. *See Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1063 (9th Cir. 2002) (holding that summary judgment was appropriate even where the decision-maker's reason is "foolish or trivial or even baseless" (internal quotation marks omitted)); *see also Pottenger v. Potlatch Corp.*, 329 F.3d 740, 748 (9th Cir. 2003) ("[The defendant] has leeway to make subjective business decisions, even bad ones."). The unexplained statement made to Harris by Stacy Smith that Plaintiff is "crazy" does not give rise to an inference that Harris discriminated against Plaintiff because of a physical disability, race, or EEO activity. *See Nidds v. Schindler Elevator Corp.*, 113 F.3d 912, 918-19 (9th Cir. 1997) (holding that comments such as "old timers" and "we don't necessarily

like grey hair" do not necessarily defeat summary judgment in age-discrimination cases).

AFFIRMED.

JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA (NOVEMBER 27, 2017)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION–SANTA ANA

VERNON RISBY,

Plaintiff,

v.

JEH JOHNSNON ET AL.,

Defendants.

Case No. SACV 16-02275 AG (JCGx)

Before: Hon. Andrew J. GUILFORD,
United States District Judge.

The Court enters judgment for Defendants and against Plaintiff.

/s/ Andrew J. Guilford
United States District Judge

Dated: November 27, 2017

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA GRANTING MOTION FOR SUMMARY JUDGMENT (NOVEMBER 21, 2017)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

VERNON RISBY,

v.

JEH JOHNSON ET AL.

Case No. SACV 16-02275 AG (JCGx)

Before: Hon. Andrew J. GUILFORD, United States District Judge.

Proceedings: [IN CHAMBERS] ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

Plaintiff Vernon Risby, proceeding without an attorney, sued Defendants Timothy Moynihan, Stacy M. Smith, James Harris, and the Secretary for Homeland Security for discrimination and retaliation, and for denying him a Law Enforcement Officer's Safety Act ("LEOSA") card. (Second Amended Compl., Dkt. No. 46 at 4.) The Court previously dismissed Risby's claim concerning his LEOSA card due to issue and claim preclusion. (Dkt. No. 52.) The Secretary now moves for summary judgment on all Risby's remaining claims.

The Court GRANTS the Secretary's motion for summary judgment. (Dkt. No. 59.) The Court will enter a simple judgment.

1. Preliminary Matters

The Secretary asks that the Court take judicial notice of several documents, including Department of Homeland Security directives and documents from previous cases involving these parties. Under Federal Rule of Evidence 201(b), a court may "judicially notice a fact that is not subject to a reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Courts may take judicial notice of "undisputed matters of public record." *See Lee v. City of Los Angeles*, 250 F.3d 668, 690 (9th Cir. 2001). Courts may also "take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue." *See U.S. ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 970 F.2d 244, 248 (9th Cir. 1992). Putting aside whether a request for judicial notice was necessary here, the Court concludes that it may appropriately consider these documents in resolving the pending motion. *See* Fed. R. Civ. P. 56(c). Consistent with Federal Rule of Evidence 201, the Court hasn't taken notice of any disputed material fact.

2. Brief Background

The following allegations are taken from Risby's second amended complaint. (*See* Dkt. No. 46.)

Risby alleges that he is a former special agent with the Department of Homeland Security's Immigra-

tion and Customs Enforcement agency. Risby says that, before he retired from DHS in April 2012, he "prevailed on three prior [Equal Employment Opportunity Commission] charges and established that DHS retaliated against him for his EEO activity." (*Id.* at 2.) Risby alleges that, after he retired, he "was subjected to harassment, retaliation and discrimination." (*Id.*) Risby says that "Defendant denied Plaintiff a LEOSA card that would have entitled Plaintiff to carry a firearm nationwide due to Plaintiff's status as a former federal law enforcement officer." (*Id.*) And Risby alleges that "Defendant denied Plaintiff the card in retaliation for Plaintiff's prior EEO activity, and because of Defendants' perceptions of Plaintiff's disability." (*Id.*)

Risby says that, during March 2012, while he was "settling another EEO case against DHS, Defendant instituted a base less [*sic*] internal affairs investigation against Plaintiff." (*Id.*) Risby alleges that the investigation concerned "Plaintiff's contacting the subject of private small claims lawsuit [*sic*] that the Plaintiff filed in Small Claims Court against the subject." (*Id.* at 2–3.) Risby alleges that "Defendant's actions interfered with Plaintiff's ability to resolve the civil action." (*Id.*) According to Risby, the investigation continued after he retired. (*Id.* at 3.)

Risby also alleges that "Defendant's Office of Inspector General . . . also willfully, wrongly, and knowingly associated Plaintiff's social security number with an entry in Defendant's database in connection with an allegation of child pornography." (*Id.* at 3.) According to Risby, "DHS falsely identified Plaintiff as the federal official that was the subject of [a] child pornography allegation." (*Id.* at 3.) Risby alleges that

the Office of Professional Responsibility "created a false report against the Plaintiff with the intent to create a record against Plaintiff." (*Id.*)

3. Standard

Under Federal Rule of Civil Procedure 56(a), summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." A motion for summary judgment is designed to "prevent vexation and delay, improve the machinery of justice, promote the expeditious disposition of cases, and avoid unnecessary trials when no genuine issues of fact have been raised." 10A C. Wright & A. Miller, Federal Practice and Procedure § 2712, p. 236–38 (4th ed. 2016). The essential inquiry for the Court is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251–52 (1986).

At this stage, the Court must view the facts and draw all reasonable inferences "in the light most favorable to the party opposing the [summary judgment] motion." *Scott v. Harris*, 550 U.S. 372, 378 (2007) (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (per curiam)). The initial burden is on the moving party to demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). But if the moving party carries that burden, then the nonmoving party must produce enough evidence to create a genuine issue of material fact. *Id.* at 322–23.

Also, the Court recognizes that Risby represents himself in court without an attorney, meaning he is a pro se litigant. "Although we construe pleadings liberally in their favor, pro se litigants are bound by the rules of procedure." *Ghazali v. Moran*, 46 F.3d 52, 54 (9th Cir. 1995).

4. Analysis

It's difficult to *see* precisely how Risby's allegations and claims fit together. (*See* Second Amended Compl., Dkt. No. 46.) But it seems Risby's discrimination and retaliation claims concern three distinct incidents: (1) ICE's denial of the LEOSA card; (2) the Office of Professional Responsibility's investigation into a car accident involving Risby and a civilian; and (3) the Office of Inspector General mistakenly placing Risby's name in a database concerning a child pornography investigation. The Court addresses these three incidents and their relationship to Risby's claims in turn.

4.1 LEOSA Card

As the Court previously held, "the requirements for claim and issue preclusion are satisfied here, and Risby had a full and fair opportunity to litigate his claim [concerning his LEOSA card] before this Court." (Dkt. No. 52 at 4.) Risby seems to continue to pursue a claim for the unlawful denial of his LEOSA card under his discrimination and retaliation claims. As the Secretary points out, this raises serious concerns. (*See* Mot., Dkt. No. 59 at 22–23.) Although the Secretary did not originally join the motion to dismiss Risby's LEOSA card claim on issue or claim preclusion grounds, those principles continue to bar Plaintiff's litigation of his LEOSA card claims. (*See* Dkt. No. 52 at 2.)

Accordingly, considering his "full and fair opportunity to litigate [the LEOSA card claim] before this Court", the denial of Risby's LEOSA card application cannot serve as the basis for his discrimination and retaliation claims. (*See id.*)

4.2 Civil Complaint Investigation

Risby also appears to ground his retaliation and discrimination claims in the investigation by the Office of Professional Responsibility into a car accident involving Risby and a civilian. Risby argues that the agent working on the case instructed the civilian not to contact Risby. (*See* Opp'n, Dkt. No. 65 at 7.) Risby argues that this interfered with his "ability to successfully settle the private lawsuit" concerning the car accident. (*Id.*)

Under both Title VII and the Rehabilitation Act, Risby's claims rooted in the car accident investigation fail. Risby provides no connection between the investigation and any adverse effect on his employment as required for Title VII discrimination claims. *See Davis v. Team Elec. Co.*, 520 F.3d 1080, 1090–94 (9th Cir. 2008) (requiring a showing of an "adverse employment action . . . that materially affect[s] the compensation, terms, conditions, or privileges of . . . employment.") (internal quotation marks and citations omitted). Similarly, Risby can't support his discrimination claim under the Rehabilitation Act, which prohibits "discriminat[ing] against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112 (emphasis added); *see also* 29 U.S.C. § 701(d).

Risby also hasn't shown the required causal link between his prior EEOC activity and the car accident investigation, a necessary feature of his retaliation claim. *See TB ex rel. Brenneise v. San Diego Unified Sch. Dist.*, 806 F.3d 451, 473 (9th Cir. 2015). Risby argues that the agent investigating the car accident knew about Risby's previous EEOC claims. (Opp'n, Dkt. No. 65 at 7.) But there's no evidence to that effect.

Put simply, Risby cannot ground his discrimination or retaliation claims in the car accident investigation.

4.3 Child Pornography Investigation

This is, perhaps, Risby's most troubling allegation. As mentioned, Risby says that he was listed in an investigatory database as the suspect in a child pornography investigation although he was not actually a suspect in the investigation. While this allegation is difficult to stomach, especially since the Secretary doesn't dispute it, it simply cannot serve as the basis for Plaintiff's discrimination and retaliation claims.

Again, there's no connection between this allegation and Risby's employment. *See*, *Davis* 520 F.3d at 1090–94; 42 U.S.C. § 12112; 29 U.S.C. § 701(d). Indeed, Risby didn't discover that he was wrongfully associated with the investigation until more than two years after he had stopped working for ICE. Also, Risby hasn't provided any evidence showing that the agent who mistakenly entered Risby's Social Security number into the database knew who Risby was or knew of his past EEOC activity. *Brenneise*, 806 F.3d 451 at 473.

Accordingly, the facts concerning the child pornography investigation do not support Risby's discrimination or retaliation claims.

5. Disposition

Even viewing the available facts in a light favorable to Risby, there is no dispute of material fact requiring a jury's resolution. *See Scott v. Harris*, 550 U.S. at 378; *Celotex*, 477 U.S. at 323. So summary judgment is appropriate.

The Court GRANTS the Secretary's motion for summary judgment on all Risby's remaining claims. (Dkt. No. 59.) The Court will enter a simple judgment.

lmb
Initials of Preparer

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING EN BANC (JUNE 18, 2019)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VERNON WENDELL RISBY,

Plaintiff-Appellant,

v.

KIRSTJEN NIELSEN, Secretary of Homeland Security; TIMOTHY MOYNIHAN; STACY M. SMITH; and JAMES HARRIS,

Defendants-Appellees.

No. 17-56946

D.C. No. 8:16-cv-02275-AG-JCG
Central District of California, Santa Ana

Before: GRABER and BYBEE, Circuit Judges, and ARTERTON,* District Judge.

Judges Graber and Bybee have voted to deny Appellant's petition for rehearing *en banc*, and Judge Arterton has so recommended.

* The Honorable Janet Bond Arterton, United States District Judge for the District of Connecticut, sitting by designation.

The full court has been advised of the petition for rehearing *en banc*, and no judge of the court has requested a vote on it.

Appellant's petition for rehearing *en banc* is DENIED.

MOTION HEARING TRANSCRIPT
(NOVEMBER 20, 2017)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

VERNON W. RISBY,

Plaintiff,

v.

JEH JOHNSNON ET AL.,

Defendants.

Case No. SACV 16-02275 AG

Before: Hon. Andrew J. GUILFORD,
Judge Presiding.

[Transcript p. 1 to 20]

THE CLERK: SACV16-2275-AG Vernon W. Risby vs. Jeh Johnson, et al.

THE COURT: Good morning, Mr. Risby.

MR. RISBY: Good morning, sir. Vern Risby, plaintiff pro se.

THE COURT: Indeed.

MR. LASKE: Good morning, Your Honor.

Assistant United States attorney Tim Laske on behalf of the defendant.

THE COURT: All right. Mr. Risby, you've appeared in front of me numerous times. I'm always impressed by your capabilities as a pro se and the respect you showed to the process and your papers.

MR. RISBY: Thank you, sir.

THE COURT: It is, therefore, with a little reluctance I issued the tentative I issued, but I'm very open to argument. You have had some difficult times. You know at one point in the papers, I think I use the word stomach, but the—the bad database allegations are undisputed by the government. I'm wondering if the government wishes to dispute that. Mr. Risby, I See there are things in here that should have you concerned. I'm just looking for the right claim for relief for you to get a remedy. I guess there's a statement that every breach of rights has a remedy. I'm struggling to find if you set one forth.

So I'm all ears in what you have to say, Mr. Risby. Go ahead.

MR. RISBY: First of all, I'd like for the Court to keep in context the individuals that I'm dealing with within the government. I'm dealing with federal agents. These are people who are trained to clandestinely target an individual. So you're not going to have a DVD or maybe a surveillance tape of these guys sitting around saying, hey, let's go out and get Vern; we're going to do this; we're going to do that. You're not going to have that. They know how to clandestinely target someone. Okay.

There is legally a documented pattern and practice of discrimination against me by the agency. I've

won three previous EEOC cases, which is very rare. I'm sure you have been sitting on the bench a long time. That something you don't See very much, if you See it at all.

In getting to the tentative, if I may, I'd like to start in reverse order and go from the child porn case up until LEOSA. LEOSA is a little bit more complicated.

THE COURT: Yes. Okay. Let's go.

MR. RISBY: Okay. Very good, sir.

THE COURT: Child porn investigation. I'm sorry you have to be arguing that in public court. I mean, it's not a helpful thing.

MR. RISBY: No, it's not.

THE COURT: Go ahead. By the way, since there are people in the federal court, your argument is there is nothing to it. It's a mistake. You alleged it's a mistake.

MR. RISBY: I don't allege it's a mistake, sir. I allege it was purposely done.

THE COURT: Fair enough.

MR. RISBY: The Court mistakenly—

THE COURT: Hold on. Sir, I was just trying to make a record for the people—

MR. RISBY: I'm sorry.

THE COURT: I was trying to make a record for the people remaining here in court. Your position is it's absolutely untrue.

MR. RISBY: Yes, sir.

THE COURT: The government doesn't seem to be denying that.

MR. RISBY: Right.

THE COURT: Go ahead.

MR. RISBY: What had happened was my Social Security Number was placed, like I said for the purpose of the people in court, on a record that did not belong to me. It was sent up the chain, so to speak, up the system in order to be put in the OIG, the Office of the Inspector General database. Because my Social Security Number was put on it, my name populated and all my information populated on this particular record. I believe that it was done purposely in order to harass me and further prevent me from ever being in federal law enforcement or intelligence, again, should, you know, my health get better and I'm able to go back to work, or, you know, like I said, later seek a position as like maybe an intelligence analyst or even, as, you know, working for private intelligence agency that contract with the government. It was done to keep me out of law enforcement altogether or federal intelligence.

The agent who allegedly put my Social Security Number on the LAX report form that was sent up the chain, so to speak, says he doesn't give a proper reason why it happened. It's like he got caught. He's like, oh, I don't know how it happened. I don't think you can buy that in light of the fact that I won three EEO cases. It just so happens that the one person who won three EEO cases against the government who litigated against them further is now in this child pornography data-

base—or in a database with an allegation of child pornography. I just don't think that-I don't think that's something we can buy.

In regard to—I want to say that agent—it was a GS14 level special agent. As you know, GS14 is a significant number in the government as far as a grade. You know—I mean, there is an SES, which is like a 15, 16. Then there is GS14. So this is someone who knew exactly what he was doing when he did it.

In relation—you have to excuse me. I take my glasses off to read, and to look at you, I put them back on. I can't See very far in distance.

As far the as the civil complaint investigation, on page 5 of your—

THE COURT: Tentative.

MR. RISBY:—tentative, yes, sir. Forgive me.

THE COURT: That's all right.

MR. RISBY: I'm nervous.

THE COURT: You do fine.

MR. RISBY: On page 5 of the tentative, on paragraph one, you say, Risby argues that the agent investigating the car accident knew about his previous EEO claims, but there's no evidence to that effect.

Now, what I really claimed was the following: I said that agents in the OPR knew of my EEO activity because I had told a couple of agents during the time when they were investigating me previously when the accident first happened. Now, this case was not the actual accident. This was

when I was suing her for causing the accident. The actual accident—the actual—I was investigated because they said that—she had made an allegation that I was rude to her and so forth at the time of the accident.

During that time period, I had told the previous agents that were investigating me about my EEO activity with the government, and I thought that, you know, they were targeting me there. The reason why that is relevant is because within OPR, you know, they don't have that many allegations that many agents that they open up cases against on a day-to-day basis. So when they do have an agent, it's going to be pretty much all over the office of what happened. I would prove that in court because of the witnesses I would call. People like Roman Villa, (phonetic) who was the agent investigating me who I told that to. His partner, who I think Mr. David Feifel, (phonetic) I believe, who had also given a statement in this case.

I said in my opposition motion that Mr. Foster had knowledge of my race, which he clearly did, because in the exhibit, which I believe is Exhibit 4, there is a photograph of me, because when agents open a case—I can tell you this from my own experience. When you open a case on an individual, you get a photograph, whether it's a driver's license photograph, or a mug shot if that's all you have. It's in the case file so that you can further identify these individuals.

Mr. Foster had a photograph of me, which is Exhibit 4. Okay. It was dated three—March 3—26 of 2012. It was the date, I guess, he pulled it off

the computer. Whatever. So he clearly had knowledge of my race even though he says he didn't until the—until the court case in May of 2012 when I appeared in small claims court against Ms. Murphy, which I was already, you know, retired by then. I retired in April. So—or was separated, I should say, in April.

Now, also on this, what is most troubling is he instructed—he says—these are his words in his affidavit. His—I mean, Mr. Foster or Special Agent Foster. He said he instructed Ms. Murphy not to have any communication with me, personal, telephonic, or any type of communication. Those are his words in his own affidavit which he is sworn to. That was part of his case file, not just the affidavit before EEO or before this Court. So if he instructed her to do so, you know, that is clearly, I believe, a violation of procedural due process, because when—when have we in our democracy allowed governmental interference in a private lawsuit, particularly by law enforcement. So this was done further to harass me and to limit my abilities to settle the case with Ms. Murphy.

And an additionally, Exhibit 27, which I unfortunately, I had numbered it accidentally Exhibit 26. There is an e-mail of Mr. Foster conspiring with his supervisor in order to bring some perjury charges against me in July of 2012. In that e-mail he says, hey, looks like Risby is asking for more money from the Court against Ms. Murphy. You know, he says that he had to retire due to his injuries. Well, I guess if he didn't retire due to injuries, it might be perjury. I'll See you in a bit. Meaning, they were going to get

together to discuss it. Now, that's July of 2012. I left the agency in April 2012. The case of me and Ms. Murphy was in May of 2012. They had no reason to continue investigating me but to further harass me.

Now that brings us to LEOSA, which is something we talked about before. This case is unique. First of all, this is a discrimination case. The writ of mandamus was a case more on procedural, what they didn't do. They didn't give me a LEOSA card. This case is about why they didn't do it. Totally separate. This is an EEO case that derived out of the EEOC. They had not issued a ruling. Well, on all three—yeah. On all three of the issues, they hadn't issued a ruling within 180-day time frame. So I took the case to federal court, which, you know, is my right.

So I believe that this Court had previously allowed this case to go forward because I know that you had dismissed the allegations of 42 USC 1983 that I had brought forth, you know, based on Dewberry decision out of the Washington, D.C. Appellate Court. You had dismissed that one. I think at that time I said okay, so we can go forward with the rest of case? You said, yes. Even Mr. Laske, counsel for the defense, said yes, I believe this case is a Title VII related matter. That's why we decided to go forward.

I have proved via evidence in the file that Mr. James Harris and Ms. Stacy Smith committed perjury not only in their EEOC statements, but in their declarations against (sic) the Court. They said that they didn't know my race or my

EEO activities. They knew of my race because both say that they reviewed the application.

Now, the application process—when—when you make the application for LEOSA, you have to put forth a photograph. That is so they can put your photograph on a LEOSA I.D. card. In addition, there was a written statement that I had wrote (sic) in the application which—I mean, all of this is part—these are exhibits in the opposition motion. There was a statement in my application where I mention there was some EEO litigation. I mention the fact that I was on federal workers' comp. I'm still on federal workers' comp at this time. If you're on federal workers' comp, sir, that's due to on-the-job related injuries. So, therefore, they knew not only of my race, they knew of my on-the-job-related injuries and they knew of my EEO activity.

Ms. Smith and Ms. Harris (sic) both claim that part of the reason for the denial was for being medically unable to meet ICE firearm standards. Now, also in the ICE directive that Mr. Laske had quoted in his statement, there is a portion where they say—I'm not quite sure. I think 6.2, 6.3, somewhere in there. Where ICE states that it will not qualify anyone for the LEOSA card. Qualification means—I don't know if you're a firearms enthusiast or not—going to the range and actually going through a range of fire, you know, at a target to, quote, qualify. That's done by the states.

So even if I did not meet ICE firearms standards, it doesn't make any difference, okay. If you—if you are separated because of a medical condition,

obviously, you're not going to meet the firearms standards. So you don't meet the standards for the position any longer. So—and in the LEOSA statute, it clearly said if you are separated due to on-the-job injuries, you can qualify for a LEOSA. So their reasoning is just a pretext of—well, that's just plain and simple disability discrimination, I would say, right there. That's evidence of it.

Please forgive me, sir. Let me—

THE COURT: I need to know how much more time you need?

MR. RISBY: Five minutes, maybe? Three?

THE COURT: Let's—

MR. RISBY: We'll wrap it up.

Their arguments of good standing. They have no credence. I have provided overwhelming evidence of good standing. Number one, my credentials, which there is a directive I included as one of my many exhibits from the named defendant that was signed by the named defendant Ms. Duke that says the retired credentials, which I have which ICE issued to me or Homeland Security Investigations issued to me, clearly show that I retired in good standing, because in her directive, it says agents who retire in good standing will receive their retired credentials—I mean, which is evidence of retiring in good standing. I may be paraphrasing a bit. I think I did the direct quote in my opposition motion.

Also—now this is the most troubling thing. There are only three individuals that were denied LEOSA

cards, myself and an individual named—former agent named John Liska, (phonetic) a former agent named John Alvarez. All three of us have previous EEO activity in one form or another. I believe Mr. Liska actually filed an age discrimination case against the agency during his working time. Mr. Alvarez testified against the government in an actual discrimination trial. He testified in favor of another agent. Their statements are also exhibits in the opposition motion.

So, you know, I would ask that you allow this case to go to a jury so that I can put forth a letter to See these allegations. See the—what I say is misconduct. See what I say is perjury. Let them make a proper decision on this case. Let them hear the testimony of Mr. Liska. Hear the testimony of Mr. Alvarez. See their statements.

So, I guess, that's all.

THE COURT: Thank you for your argument.

Mr. Laske, Mr. Risby makes some pretty strong arguments. What have you to say to what we just heard?

MR. LASKE: Thank you, Your Honor, for the time. This is Assistant U.S. attorney Tim Laske for the record for the defendant.

I guess, first of all, before I go into any individual ones—and I'm more than happy to do that, but the overarching issue is this is an employment action. He points to a number of things that happened well after he no longer worked for the agency. Some of these were unfortunate mistakes. I've at

least expressed my apologies to him for like the database error. That error to put it in the context—

THE COURT: How can something that serious happen? Do you want to be accused by the government of molesting children?

MR. LASKE: No. The allegation was that someone took photographs of swimmers at a high school swim meet. I don't know why they classified it that way. That was the allegation. The allegation did not list his name on it. It did not list his address or telephone number. If someone were ever actually to investigate that issue, they would have pulled up not Mr. Risby's name, not Mr. Risby's address, and not Mr. Risby's telephone number. It would have had his Social Security Number. It would have had that.

The other thing is the supervisor of Mr. Lozano looked at that complaint and said to the agency we're not going to investigate this. We're not going to actually conduct an investigation. Put that in the database. Store it wherever you store it. That's it. If anyone had dusted that off, they would have not have seen Mr. Risby's name on it. Once someone entered it into the system, separately there's a national finance center. I guess those two databases somehow connect. That's where it noticed the Social Security Number. The computer changed the name, not an individual. An individual didn't go in there and change the name. The logs don't show that. We produced evidence with our motion in a declaration saying that. That was an unfortunate mistake. That is what it was.

Alfonso Lozano didn't know Mr. Risby. Mr. Risby didn't know him. He didn't work for us any more. You know, the issue is in looking at this case, there's just no legal basis for the claims he's bringing in an employment context. He didn't suffer any adverse employment consequences out of any of this. For two years—

THE COURT: So—

MR. LASKE:—he didn't know—

THE COURT: Just a moment. Sounds like you admitted a wrong. Is there a remedy for every wrong?

MR. LASKE: Unfortunately, I believe there is authority that says not necessarily, no. Sometimes there isn't, unfortunately. If there was, time may have have passed for him to bring such a claim.

THE COURT: All right. Continue.

MR. LASKE: Next for the OPR issue, a citizen, a civilian non-federal employee brought a complaint of misconduct. OPR investigated that. That's what they do. OPR didn't bring the claim against him. No other individual in the agency brought it against him, not his former supervisors, or anyone else who had ever been prior to these EEO cases. An individual who had no association with ICE, as far as I know. I think she was a photographer for the Marshal Service who happened to be coming out of the federal building at the same time Mr. Risby was.

She told agent Foster she felt she was threatened and upset. That doesn't mean that is what he was doing. That is what she said she felt was happening. Agent Foster gave her some advice

maybe in hindsight. I don't know. That didn't affect any of his employment terms. He speculates he would have settled with her. She is the one who brought a misconduct claim against him. So I don't think she was really open to the idea of settlement. She made statements to agent Foster that she thought Mr. Risby was threatening. Again, I don't know if that's true. Not really the type of conduct you would expect from someone who is willing to jump into settlement. I think that's very speculative at most.

Also, the big picture is OPR cleared him. They cleared him of the misconduct claim. Agent Foster, whether or not he knew Mr. Risby's race or not. He says he doesn't. He found Mr. Risby didn't do anything wrong. So I don't know how that could even be a basis for retaliation or discrimination when he was found to have done nothing wrong.

For the LEOSA card, I think we kind of have gone around and around on this one. For the motion to dismiss, the case was still new. I didn't know if there was a legal basis for him to bring the LEOSA card claim beyond what I had seen. Plus, I didn't know until I did discovery if there was some nuanced difference between the prior case and this one. Through discovery, I believe I confirmed it was the same. Nothing had changed. The same actor Stacy Smith. Mr. Harris. Same issues. Since we already litigated that case, I think the Court's tentative is correct on that point.

THE COURT: Okay. Folks, again, Mr. Risby, strong arguments. I appreciate what you have to say. I'm going to look at—

MR. RISBY: Can I rebut something—

THE COURT: How much time do you need?

MR. RISBY: Just two or three minutes.

THE COURT: You've got two—hold on. One at a time, please. You've got two minutes. Make it quick please.

MR. LASKE: Can I make one point?

THE COURT: I thought you were finished? Was I wrong?

MR. LASKE: I just had one thing. The agency keeps reminding that his security clearance was revoked. That negates his ability to get LEOSA card right there. His security clearance was revoked.

THE COURT: Two minutes. We need to move on.

MR. RISBY: Yes, sir. Look at Exhibit 6. It is the actual copy of the database. Clearly, my name is there. My Social Security Number is there. The city where I lived, Mission Viejo, and my Zip Code is there, as well as my date of birth. So my identifiers are there on that database. In addition, to—this is not the first time they have put information—false information in the—in a database system against me. You can See Exhibit 10 will explain that.

Furthermore, he gave—Mr. Foster gave—he instructed Ms. Murphy not to talk to me. Not that he did— he just didn't give her, quote, some advice. He says in his own statement, instructed. He wrote those words out. He swore to them. He instructed her not to have any contact with me. Ms. Murphy had also previously lied in the previous investi-

gation where she had claimed that I was rude to her. She had lied. According to Roman Villa, an OPR agent, he had told me that she had lied in her statement. Okay. Those are the things that I bring out in trial with Mr. Villa as a witness.

In addition, as far as the security clearance goes, I provided information. The head of Internal Affairs has said that my security clearance at the time was not permanently revoked. So if I had had a chance to continue on in my career, then I would have been able to probably get my security clearance back at sometime. I had to leave due to my injuries.

In addition to that, there is a document when Mr. Harris—Mr. James Harris first denied—well, when he denied my appeal on the leak internally within ICE for the LEOSA card, the appeal was written by Larry Berger of—

THE COURT: Now, I'm not understanding why you didn't bring this up in your original argument. This should be a reply. You've got one more minute.

MR. RISBY: Okay. I'm going to say as far as the argument is good standing. There is a—I got this through discovery. On that appeal letter, there's a handwritten note in the right-hand column that says, I See your point. I find that he is in good standing.

So that seems—a reasonable person would surmise that Mr. Harris sent that up the chain for advice either to legal counsel or to maybe his boss or the director himself or—I have no idea. I need to get Mr. Harris on the stand to ask him about. Somebody internally said, hey, I do find him in

good standing. So his argument about security clearance is moot.

Their argument—Harris' and Smith's argument about the good standing is—is just a pretext. Internally they had information that I retired in good standing, as well as my other evidence that I provided in my brief, sir.

THE COURT: Okay. Mr. Risby, I understand your arguments. The matter is under submission.

MR. RISBY: Thank you.

(Proceedings concluded at 11:15 a.m.)

PETITION FOR REHEARING EN BANC
(MAY 20, 2019)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VERNON WENDELL RISBY,

Plaintiff-Appellant,

v.

KIRSTJEN NIELSEN, Secretary of Homeland Security; TIMOTHY MOYNIHAN; STACY M. SMITH; and JAMES HARRIS,

Defendants-Appellees.

No. 17-56946

Appeal from the United States District Court
for the Central District of California

INTRODUCTION

Appellant Vernon W. Risby petition for rehearing and rehearing *en Banc* of the *Opinion* of April 10, 2019, entering judgment in favor of Defendants and affirming the decision of the Central District Court of California. In the judgment of Counsel, the panel's decision in this matter overlooks material points of law and does not address a resulting conflict with another decision of this Court in *Anthony V. Nigro, v. Sears Roebuck & Company. See Anthony V. Nigro, v.*

Sears Roebuck & Company, (9th Cir. 2015) No. 12-57262 (*The Ninth Circuit stated that it should not take much for an employment discrimination plaintiff to overcome a summary judgment motion. Nigro did so here. Sears might still prevail at trial, but it did not deserve to do so on summary judgment*).

Also, because of this conflict, consideration by the full court is necessary to secure and maintain uniformity of the Court's decisions. Furthermore, the panel's decision conflicts with the Supreme Court's decision in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct 1817, 36 L.Ed.2d 668 (1973) (Court recognized that limited circumstantial evidence is often necessary to afford a fair opportunity to show that reasons provided by employer is pretext for a racially discriminatory decision. Other evidence that may be relevant, depending on the circumstances, could include facts that petitioner discriminated against respondent when he was an employee). Thus, the Three judges panel's decision substantially affects a rule of national application in which there is an overriding need for national uniformity. An en banc rehearing by this Circuit is proper when (1) the panel decision conflicts with a decision of the Supreme Court or a decision of this Circuit so that consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions or (2) the case involves a question of exceptional importance because it conflicts with an opinion of another court of appeals and substantially affects a rule of national application in which there is an overriding need for national uniformity. Fed. R. App. P. 35(b); 9th Cir. R. 35-1.

The panel's decision in this matter overlooks material points of law and does not address a resulting

conflict with another decision of this Court. Also, because of this conflict, consideration by the full court is necessary to secure and maintain uniformity of the Court's decisions.

Furthermore, a large number of federal agents are impacted by the decision herein. *See Ronald Eugene Duberry, Et Al., Appellants v. District of Columbia, Et Al.*, Appellees; No. 15-7062.

ARGUMENT

Errors Made by the Three Judge Panel

The criteria for determining *Montana* case numerates whether *estoppel* applies:

> " . . . first, whether the issues presented by this litigation are, in substance, the same as those resolved against the United States in *Kiewit I* . . . "

Montana v. U.S., 440 U.S. 147 1979 at 156.

Mr. Risby's Writ of Mandamus was limited to narrow statutory parameters. The MANDAMUS action only decided the issue of whether the Agency had a statutory requirement to provide a retirement card.

1.

The first error (on page 3 of the three judge panel's opinion) is the mistaken finding that the Plaintiff was attempting to broaden the scope of BIVENS to assert employment discrimination. The BIVENS action was in keeping with the ruling of the D.C. Circuit in *Duberry v. United States of America* (*see below*) and was a separate issue from the Title

VII issues (interpreting 18 U.S.C. § 926B and 14th Amendment rights under 42 USC § 1983.

2.

The Panel's Finding (page 5 of the MEMORANDUM decision by the Ninth Circuit's three judge panel) based on the testimony of Agent Christopher Foster's testimony was that Mr. Risby speculated without relevant evidence and that there was no factual dispute for purposes of summary judgment regarding Agent Foster's knowledge of Plaintiff's prior disability or EEO activity. As an internal affairs investigator it was Foster's job to know the target he was investigating. He knew that the Plaintiff was not working and on federal workers compensation at the time he made the monitored phone call to Mr. Risby's home. Thus, he must have known, contrary to his testimony that Mr. Risby was disabled and the co record shows that Mr. Risby's photograph in the file showed that he is African American.

3. Agent Foster perjured himself

Agent Foster committed perjury damaging the EEO process and before the district corn t when he stated in sworn affidavits and declarations he only learned of Plaintiffs race when he attended the Mr. Risby's civil court case in May (after Plaintiff had been removed from the agency due to on the job medical reasons).

During discovery in the District Court case a photograph of the Plaintiff w s found in agent Fostel's case file. Agent Foster's willingness to commit perjury in federal proceedings impeaches his claim that he did not take adverse employment actions based on

discrimination. These facts raise issues as to Foster's testimony regarding Mr. Risby's race was a pretext.

Interference with Civil Accident Case. Agent Foster, according to his own case affidavit, stated under oath that he "Instructed" the defendant in the civil case involving Plaintiff not to have any contact with the Plaintiff which would impact the Plaintiffs ability to settle his civil case before trial. Foster's conduct is clear evidence of retaliation and a hostile work environment under the Title VII allegations that are properly before the court . . . The fact that the Agency allowed its employees, including federal agents, to interfere in a private civil lawsuit raises issues of harassment, discrimination and equal protection.

4. James Harris

The three-judge panel erred in its analysis of the actions of James Harris. The panel stated the Harris decision was entirely logical and appears to fall within the bounds of the agency policy and that even if the decision was faulty there was an honest mistake. This analysis is faulty for the following reasons:

A. This was not an honest mistake. The Plaintiff was one of only three applicants that were denied LEOSA ID cards from the agency (All three applicants had prior EEO activity against the agency). Other similarly situated law enforcement officers who were medically retired from the Agency but who did not make EEO claims were granted those cards. Pretext may be established "either directly by persuading the [trier of fact] that a discriminatory reason more likely motivated the employer or indirectly by showing that the

employer's proffered explanation is unworthy of credence" *Mcdonnell Douglas Corp. v Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L.Ed. 2d 688 (1973); *Todd A. White v. Baxter Healthcare Corporation, Defendant-Appellee*; No. 07-1626. *See also Texas Dept. of Comm. Affairs v. Burdine*, 450 U.S. at 256, 101 S. Ct. 1089 1981.

During discovery Plaintiff asked for information related to all other agency law enforcement officers that were medically retired or separated and applied for LEOSA ID cards and the agency's response was it did not keep those statistics.

B. James Harris committed perjury. In sworn declarations on record herein, James Harris testified under oath that he did not have knowledge of Mr. Risby's prior EEO activity, race, or disability. The LEOSA denial letter James Harris signed indicated that he had reviewed Mr. Risby's LEOSA application on page 5 where Mr. Risby discussed his prior EEO activity. Additionally, Mr. Risby discussed that he had been on Federal Worker's Compensation (OWCP) since February, 2012. Risby indicated on-the-job injuries and disability. Additionally, LEOSA applicants were required to submit a photograph of themselves via email to the LEOSA Program Office. Such a photograph would clearly indicate Mr. Risby's race. James Harris even states in his denial letter that "Your application and appeal letter has been thoroughly reviewed . . . ". Therefore, Jamos Harris' perjury clearly is evidence of

a pretext to justify discrimination and retaliation.

C. Mr. Risby, the one employee that has proven discrimination on three separate occasions against the agency, was placed in a database and listed as the subject a child pornography allegation-an accidental mistake?

The fact such a "mistake" occurred raises the issue of the whether invidious prejudice and retaliation motivated such an accident. The "accident" has never been explained other than to the extent that Agency personnel have deemed the error to be inadvertent. Such a bare assertion fails to shift the burden regarding pretext. Thus, there are material issues related to pretext presented in Mr. Risby's documentation opposing the defense Motion for Summary Judgment.

D. GS 14 level special agent Alfonso Lozano, never gave a legitimate reason for placing the Plaintiff social security number on a child porn record and submitting it up the chain of command to be placed in a database. Mr. Risby also provided evidence in the appellate brief and his previous Motion to Deny Summary Judgment that Agency Internal Affairs previously created a false report against the Plaintiff. Once again this is evidence of has assessment which is an issue under Title VII and an issue in this case.

5. The Proceeding Involves a Question of Exceptional Importance

The issues involved in this case involve a federal agent, a federal agency and the LAW ENFORCEMENT

OFFICERS SAFETY ACT. This is the only court case in the country involving a federal agent and LEOSA. The Court cannot expect Mr. Risby o have joined Title VII issues in a previous Mandamus action; Risby was required procedurally to go thru the EEO process before moving on the federal court. additionally, there is a documented previous pattern and practice of discrimination by the agency against the Plaintiff.

6. The Opinion Directly Conflicts with the Decision Other Circuits and Substantially Affects a Rule of National Application in Which There Is an Overriding Need for National Uniformity

The Court's decision here is inconsistent with the *Duberry* ruling. *Ronald Eugene Duberry, Et Al., Appellants v. District of Columbia, Et Al., Appellees* (DC Cir. 2016); No. 15-7062. The D.C. Circuit court found that LEOSA's plain text, purpose, and context show that Congress intended to create a concrete, individual right to benefit individuals like Mr. Risby and that it is within "the competence of the judiciary to enforce." *See also Golden State*, 493 U.S. at 106 (quoting *Wright*, 479 U.S. at 431-32).

CONCLUSION

Due to the opaque nature of decisions made behind the bureaucratic veil, it is doubtful whether any amount of discovery would have provided direct evidence in the form of testimony or documentation that would prove the motive to retaliate. The fact that Agency made its decision in regard to the alleged lack of good standing by means of an opaque process raises issues of material fact. The questions raised by Mr. Risby's speculation involve the above referenced

assertions of inadvertent mistakes on the Agency's part. Should such assertions be taken at face value as evidence that shifts the burden to M1 Risby? It is plain that Mr. Risby has sufficiently raised issues regarding the alleged lack of good standing at the time retirement and whether the Agency engaged in creating a pretext to justify retaliation. For the foregoing reasons, Appellant Vernon Wendell Risby, by counsel, respectfully request that this Court grant the request for a rehearing *en banc*.

Respectfully,

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Dated: May 20, 2019