No. 21-7064

IN THE

SUPREME COURT OF THE UNITED STATES

LARRY SQUIRES

— PETITIONER

vs.

MERIT SYSTEMS PROTECTION BOARD (MSPB);

UNITED STATES DEPARTMENT OF NAVY

—RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

1. In review of MSPB mixed-case complaints (i.e. constructive removal arising from discrimination), do Federal District Court rules, processes and decisions that separate underlying factual allegations and evidence of discrimination from claims of constructive removal conflict with U.S. Supreme Court decisions in *Perry* (2017) and *Lentz* (2017)?

2. Does a forced, involuntary accommodation of a qualified, disabled Federal employee by "Permanent Reassignment as an Accommodation" rise to the level of involuntariness sufficient to support claims of constructive removal where the employee declined the reassignment as an accommodation, yet he/she was nonetheless reassigned despite having declined, and he/she therefore retired?

3. Does willing and purposeful interference with rights under the Rehab Act and FMLA, otherwise defined as coercion under the FMLA and the Rehab Act, rise to the level of involuntariness sufficient to support claims of constructive removal?

4. Under *Green* (2016), does the complaint and limitations period accrue with the MSPB, such as to allow a Federal employee to file a complaint of constructive removal with the MSPB, immediately upon notice of retirement rather than after the effective date of that retirement? That is, can a Federal employee file a complaint of constructive removal prior departing, as indicated in *Green* (2016)?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

Larry Squires v Merit Systems Protection Board; Department of the Navy, No. 4:19-CV-0005-D, U.S. District Court for the Eastern District of North Carolina Eastern Division, Order entered July 3, 2019.

Larry Squires v Merit Systems Protection Board; Department of the Navy, No. 19-1969, U.S. Court of Appeals for the Fourth Circuit, Order entered November 6, 2020.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts**:

The opinion(s) of the United States court of appeals appears at Appendix **A** to the petition and is

[ ] reported at_____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix **B** tothe petition and is

[ ] reported at_____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix_____to the petition and is

[ ] reported at_____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the_____court appears at Appendix_____to the petition and is

[ ] reported at_____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was_____.

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: December 14, 2021, and a copy of theorder denying rehearing appears at Appendix **C**.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including_____(date) on_____(date) in Application No.____A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was_____. A copy of that decision appears at Appendix_____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix_____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including_____(date) on_____(date) in Application No.____A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Section 1 of the Fourteenth Amendment to the United States Constitution provides, in pertinent part that "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. This petition questions the constitutionality of the selective and arbitrary application of the Rehab Act, FMLA, and Federal court precedent to select and arbitrary facts, without considering the totality of the circumstances.

STATEMENT OF THE CASE

Procedural history before the lower courts

On October 10, 2018, I submitted "Initial Appeal" in 'appeal of a constructive removal' before the MSPB, providing factual allegations and claims of constructive removal (i.e. involuntary retirement) based on discrimination which primarily considered the agency's "involuntary 'Permanent Reassignment as an Accommodation'" ("Initial Appeal", pg. 4, para #1 & #2, respectively; pg. 7, para 21, i.e. involuntary "Permanent Reassignment as an Accommodation", interference with entitlements under FMLA"). In the November 15, 2018, MSPB Initial Order, the MSPB dismissed my "Initial Appeal" for lack of jurisdiction over an 'appeal of a reassignment', while suggesting that I could not have accrued a claim of constructive removal because I had not effectively departed from my employment.

On January 7, 2019, I presented "Petition for Review" before the U.S. District court, in which Issue #1 asked the court whether the MSPB erred in limiting the matter under appeal to a "reassignment" (pg. 1, also pg. 4-5). My pleadings, alike my pleadings before the MSPB, expressly noted that "I was involuntarily ordered to 'Permanent Reassignment as an Accommodation', as opposed to having merely been reassigned". *Id. pg. 4, last paragraph.* My petition expressly notes: "This involuntary accommodation is a discriminatory action." The U.S. District Court issued a July 3, 2019 Order 1) affirming the MSPB decision to dismiss my claims of constructive removal, and 2) dismissing my claims of discrimination without prejudice. In doing so, the U.S. District court plainly bi-furcated my claim of constructive removal from the underlying factual allegations of discrimination that support my claim of constructive removal.

On October 24, 2019, I submitted appeal to the U.S. Court of Appeals for the Fourth Circuit (4th Circuit), painstakingly enumerating the facts of the case with specific references to the prior

pleadings ("Informal Brief", pg. 5 – 15, Statement of Facts), and laying forth the factual allegations and evidence of discrimination by "involuntary accommodation by reassignment" that supported my claim of constructive removal (i.e. involuntary retirement). The November 26, 2020 opinion of the U.S. 4th Circuit 1) affirmed "this [constructive removal] portion" of my appeal and petition for review, and 2) remanded to the District court with instructions to allow the disability discrimination claims. On December 14, 2021, the 4th Circuit denied my petition for rehearing *en banc*. Alike the U.S District court, the opinion of the U.S. 4th Circuit court plainly bi-furcated my claim of constructive removal from the underlying factual allegations of discrimination that support my claim of constructive removal.

Summary of facts material to the consideration of the question(s) presented

The record plainly demonstrates that I was an otherwise qualified, disabled employee[1] covered under the Rehab Act. The Rehab Act expressly states that agencies and other covered entities may not compel an individual with a disability to accept an accommodation.

In the present case, the agency forced me to accept an accommodation by reassignment (i.e. August 30, 2018, Agency memo: "Permanent Reassignment by Accommodation", see MSPB "Initial Appeal", pg. 83) despite the fact that I declined the accommodation on several occasions. The uncontested and irrefutable fact that I declined the accommodation on several occasions is demonstrated in the record by a preponderance of the evidence:

[1] Of note, the fact that I was a "qualified" and/or "disabled" employee is established in my prior pleadings before the MSPB and Federal courts (see "Informal Brief", pg 5, para 2; see also, *Id.* Footnote #4), in as much as they are inherent and evident in the extreme actions of my agency to involuntarily accommodate my disability by placing me in a position, as argued by the agency, with the same grade and duties (just removing my supervisory functions).

- I expressly declined, inwriting, in a September 4, 2018, email. (MSPB Tab 1, Page 102)
- I expressly declined on August 30, 3018 (MSPB Tab 1, Page 83)
- I expressly refused on August 7, 2018 (MSPB Tab 1, Page 29)

The fact that I objected to and declined the accommodation by reassignment is admitted by both the agency and the U.S. District court. ("Informal Brief", pg. 23 – 4).[2] As such, it is indisputable that I suffered an "involuntary accommodation" by reassignment.

This willful violation of the Rehab Act is a direct act of discrimination. Moreover, it is a purposeful and willful interference of my rights under the Rehab Act, and as such rises to the level of coercion. As a direct act of discrimination, and a coercive act, my "involuntary accommodation" as a reassignment rises to the level of a constructive removal, i.e. where I have declined the reassignment as an accommodation, the agency has essentially left me without a position – especially whereas I cannot be compelled or forced to accept an accommodation under the Rehab Act.

The Federal courts, however, disregard the determinative fact that I repeatedly declined the accommodation by reassignment, focusing instead on a misrepresentation of the facts to suggest that I allegedly requested the accommodation, while disingenuously acknowledging that I merely "claim that [I] had not officially requested a reassignment" (See District Court "Order", Page 4). The record provides substantial evidence otherwise, i.e. See MSPB "Initial Appeal", pg 62 – 3,

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[2] The District Court acknowledges, "On September 4, 2018, Squires e-mailed Kowalski to decline the reassignment." (See District Court "Order", Page 4) The District Court further acknowledged that I had also "objected" to the Agency's "Permanent Reassignment as an Accommodation" on August 7, 2018. (*Id.*) The District Court acknowledged the fact that I had advised the Agency as far back as July 20, 2018, in the least, that I would not be seeking accommodation. (*Id.*) At the same time, the District Court acknowledges that I "claim that [I] had not officially requested a reassignment" (*Id.* Page 4). The Agency acknowledges the fact that, on August 7, 2018, [I] did not request nor want the reassignment and [I] alleged the reassignment was 'born' of disability discrimination." (District Court "Memo in Support", Page 40).

para 6, Agency Memo "Notice of Requirements", acknowledging that "to date an official request has not been received".

Despite presenting a complaint to the MSPB, and subsequently before the Federal courts, that expressly provides factual allegations and evidence demonstrating my involuntary accommodation by reassignment that led to my constructive removal (i.e. involuntary retirement), the MSPB and the Federal courts do not acknowledge or consider factual allegations of my "involuntary accommodation" or "involuntary reassignment" in any order or decision of the courts. That is, there are zero references to my "involuntary accommodation" by reassignment, or even my "involuntary reassignment".

In the November 15, 2018, MSPB Initial Order, the MSPB provides (1) one lone reference to the reassignment being associated with an "accommodation", in which they presumptively label the reassignment a "reasonable accommodation". Yet, perhaps owing to the early dismissal of my MSPB "Initial Appeal" prior to development of the record, there were no supporting pleadings or evidence of a reasonable accommodation before the MSPB, i.e. "Larry Squires filed the instant appeal with the Board in which he alleged that the agency coerced him to retire from the GS-13 position of Supervisory Community Planner because it reassigned him as a "reasonable accommodation" to the GS-13 position of Community Planner" ("Initial Appeal", pg. 2).

The July 3, 2019, U.S. District court order dismissing my claim of constructive removal also provides zero references to my claims of "involuntary accommodation" or "involuntary reassignment". Similarly, there is merely (1) one vague and indirect reference to my allegations of coercion under FMLA, wherein the US District court misrepresents my claims of discrimination under FMLA that further support my claim of constructive removal, i.e. "The administrative record does not support Squires' claims that the Navy deceived him concerning his leave options." Herein, any reasonable review of the totality of the circumstances underlying my claim of

constructive removal would consider the factual allegations and evidence in the record that clearly demonstrates that my involuntary accommodation by reassignment was, at the same time, a discriminatory and coercive interference with my FMLA, i.e. having been removed from FMLA by virtue of the fact that I was no longer in my position of record under FMLA, and the Agency repeatedly advised that I would not be returned to my position of record once I was no longer on FMLA. (See MSPB, "Initial Appeal, pg. 155, i.e. Sept 27, 2018 email from Supervisor, expressly stating "If you are determined fit for duty under the new FMLA, you will then come back to the PD which you are currently in."; see also, *Id.* pg 127, Agency memo: "Request for FMLA Recertification").

The November 26, 2020 opinion of the U.S. 4th Circuit did not address my factual allegations and evidence of involuntary accommodation by reassignment; nor did the U.S. 4th Circuit denial of my Petition For Rehearing *En Banc*, despite my May 6, 2021 Supplemental Authorities which cited the 4th Circuit's own ruling that an employer generally refuses to accommodate its disabled employee for ADA purposes [and, thus, the Rehab Act] when it unilaterally reassigns them to a vacant position instead of reasonably accommodating them in their current position. *Wirtes v City of Newport News*, No. 19-1780 (4th Cir. 2021, pg. 17) (quotations and citations omitted). In its opinion that affirmed the U.S. District Order and MSPB Initial Decision, the U.S. 4th Circuit provided no supporting statements regarding any consideration of the impact of my factual allegations and evidence of discrimination on my claim of constructive removal (i.e. the totality of the circumstances) even though the 4th Circuit did find that the record shows that I did, in fact, state a claim of discrimination, i.e. "our review of the record indicates that the [complaint's] deficiencies could be corrected by improved pleading". (See 4th Circuit Opinion, pg. 2).

REASONS FOR GRANTING THE PETITION

This Court should grant this Petition to examine the facts and applicable law presented in the foregoing case in order to ensure equal protection and due process for disabled employees, and employers and employees in general.

This case presents questions of vital importance to the millions of disabled employees, employers and employees in general who are affected by the ADA and FMLA, as well as the millions of Federal employees and governmental agencies affected by ADA and the Rehab Act, FMLA, and the MSPB. The arbitrary and selective recognition of factual allegations and application of law, as challenged in the foregoing case, erodes the essential doctrines of our democratic form of government, such as equal protection and due process.

Failure to consider underlying factual allegations and evidence of discrimination by involuntary accommodation (i.e. totality of the circumstances) in support of claim of constructive removal infringes on equal protection and due process

The Federal court rulings in this case, alike the MSPB ruling, conflict with the principles set forth by the U.S. Supreme Court in Lentz (2017) and Perry (2017) to ensure equal treatment and due process. (See "Informal Brief, Issue #1.b, pg 19 - 22; see also, "Petition for Rehearing En Banc", pg 10 - 18, specifically, pg 12, I.b.).

The bi-furcation of my claims (constructive removal v discrimination) by the US District court is well-documented in my "Informal Brief" and "Request for Rehearing En Banc" to the 4th Circuit. *Id.* The District Court erred by improperly bi-furcating my civil service claim of constructive removal from any consideration of my claims of discrimination; in doing so, it likewise failed to consider the totality of the circumstances in determining the question of involuntariness.

The 4th Circuit followed the lead of the District Court, issuing an Order that expressly considers my claim of constructive removal separately from my claim of discrimination, as though I have petitioned for review of (2) two separate matters, i.e. we affirm the dismissal of the constructive removal, and... "turning to the dismissal of Squires' disability claims", we remand. I only filed one petition, for my claims of constructive removal arising from discrimination. Am/was I supposed to convert my claim of constructive removal to a claim of discrimination? Or am/was I supposed to file (2) two separate claims? Are Federal employees precluded from filing a Petition for Review of MSPB decisions with the District Court? If so, why wasn't I so advised?

Per order, it seems the District Court dismissed a fictitious civil rights complaint that I never filed. Then, the 4th Circuit suggested that I amend a civil rights complaint that I never filed rather than the petition for review of my constructive removal which they have, separately, dismissed. Yet, neither court considered my constructive removal and factual allegations and evidence of discrimination jointly, under the totality of the circumstances.

In doing so, the District Court plainly lays forth an erroneous legal basis for determining my mixed-case claim of constructive removal based on discrimination that separates (or, bifurcates) my MSPB nondiscrimination claim from my discrimination claim - rather than considering the mixed-case under the totality of the circumstances. The District Court notes that "[i]n exercising judicial review over a MSPB decision concerning a nondiscrimination claim, courts look to the administrative record." (U.S. District Court, Order, Page 6 – 7 of 16) "***However***," as acknowledged by the District Court, "the Court consider[ed] ***only*** .... allegation in the pleadings, ***not the administrative record***." (*Id.* Page 7 – 8 of 16, ***emphasis*** added). The District Court herein acknowledges that it did not consider the totality of the circumstances, specifically discrimination that illuminates involuntariness, in my mixed-case claim of

constructive removal. This is further evidenced in the District Courts analysis concerning my claim of constructive removal that followed in the District Court's Order, which is entirely void of any consideration or discussion of the factual allegations and claims of discrimination that I offered in support of my claims of constructive removal (See *Id.*)

The rulings in this case also conflict to the precedent established by the U.S. Federal Circuit under *Garcia* (2006) (See 4th Circuit, Opinion, pg 19 - 20). The precedent established in *Garcia* (2006) is altogether missing from the decision of the MSPB and District Court in the present case, i.e. discrimination issues may be considered in determining jurisdiction in mixed constructive adverse action cases insofar as they illuminate involuntariness. Why would I need to file a separate civil rights complaint to decide an underlying matter of fact and law under a claim of constructive removal? I was subject to a very clear act of discrimination (i.e. involuntary accommodation by reassignment) which gave rise to my constructive removal. Where the law under the Rehabilitation Act specifically states that a Federal employee cannot be forced to accept an accommodation, and a Federal employee does not accept an accommodation (even a reassignment as an accommodation, as in this case) then, there is a non-frivolous showing of involuntariness.

The fact that the decision of the MSPB and District Court plainly avoided and neglected any consideration (or discussion) of the "totality of the circumstances" demonstrates the fact that the totality of the circumstances, including numerous instances of coercion under the Rehab Act and FMLA, were not considered. In recounting the standard for review, there is one, lone passing reference to the "totality of the circumstances" in the U.S. District court order dismissing my constructive removal. Yet, the review does not follow that standard. It is evident that factual allegations and evidence of discrimination (i.e. involuntary accommodation, coercion under the Rehab Act and FMLA) supporting my claim of constructive discharge were

disregarded, where the District Court considered them as 2 separate cases (constructive removal vs discrimination, separately). It is all the more evident where the District Court refers to my claim of constructive removal as an appeal of a mere reassignment, rather than a discriminatory act of "involuntary accommodation" by reassignment.

Where the 4th Circuit finds that the record shows that I did, in fact, state a claim of discrimination, the dismissal of my claim of constructive discharge by the MSPB for lack of jurisdiction, upheld by the U.S. District Court and subsequently by the 4th Circuit, is in error. It is more than telling that the Order of the 4th Circuit affirms that its "review of the record" demonstrates that I did, in fact, state a claim of discrimination, i.e. the elements of a claim for discrimination are apparent in the record. It follows that the elements of a claim of constructive discharge based on discrimination are apparent in the record, and such discrimination illuminates involuntariness sufficient from which to have allowed for development of the record and a hearing before the MSPB. Indeed, the facts of my appeal, painstakingly laid before the 4th Circuit with citations to my "Initial Appeal" before the MSPB, clearly indicate that the record demonstrates that I did, in fact, state a claim of discrimination (e.g. enumerated on the first page of my Initial Appeal", "#2, i.e. Involuntary 'Permanent Reassignment as an Accommodation'). If the record shows that I stated a claim of discrimination, then the MSPB erred in dismissing my mixed-case claim of constructive removal based on that discrimination.

The 4th Circuit decision plainly bifurcates my claims. Again, the panel decision reflects the fact that this Court considered the matters separately by "***[t]urning to*** the dismissal of [my] disability discrimination claims" or "the remainder of the appeal" (Page 2, ***emphasis*** added). That is, there is no basis for "turning to" the matter of discrimination separately from the matter of my constructive discharge before the MSPB and U.S. District Court, as matters of discrimination are required to be considered under the totality of the circumstances in a

constructive discharge claim. And, in addition to the totality of numerous other claims of discrimination evidenced in my pleadings, it is clear and convincing that both the MSPB as well as the U.S. District Court failed to consider the fact that I was subject to an involuntary accommodation – for which no other consideration need to be made, i.e. there is direct evidence of a disability discrimination by involuntary accommodation. The violation of the Rehab

Act in this manner is an adverse act in and of itself, by which I was forced to retire (as I may not be required or forced to accept the accommodation). The 4th Circuit considers this fact separately from my claim of constructive removal, just as the MSPB and U.S. District Court have done, in direct opposition to the rulings and intent in *Lentz* (2017) and *Perry* (2017), as well as the established precedent in *Garcia* (2006).

Failure to recognize and consider my involuntary accommodation as a violation of the Rehab Act infringes on equal protection and due process

Incorporating the facts and arguments presented in the previous section above, as the legal precedents in Perry (2017), Lentz (2017) and Garcia (2006) are equally applicable in assessing the involuntariness of my constructive removal (i.e. involuntary retirement) in consideration of my "involuntary accommodation" by reassignment.

This continuous failure to recognize, acknowledge or consider the factual allegations and claims of "involuntary accommodation", or coinciding coercive acts to interfere with my rights under the Rehab Act and FMLA, which support of my claim of constructive removal was fatal to my claim of constructive removal (and seemingly fatal to any future discrimination claims brought before the lower court for which I have seemingly been precluded from obtaining remedy for the loss of employment that is a direct result of my exercising my right to decline an involuntary

accommodation by reassignment). These failures were exacerbated by the bi-furcation of my claim of constructive removal from underlying factual allegations and evidence of discrimination and coercive acts under the Rehab Act and FMLA.

In accordance with the Rehabilitation Act of 1973 ("Rehab Act") Section 12201(d); and implementing regulations at 29 CFR 1630.9(d), an individual with a disability is not required to accept an accommodation which such qualified individual chooses not to accept.[3] Yet, in the foregoing case, the MSPB and Federal courts have dismissed my appeal of a constructive removal based on my involuntary accommodation without considering these explicit statutory, regulatory, and policy requirements that state that an individual with a disability is not required to accept an accommodation. Moreover, in doing so, the MSPB and Federal courts have expressly misrepresented the factual allegations and issue under appeal as a mere reassignment, as opposed to an accommodation by reassignment. As such, the foregoing case has suffered mistake of fact and law that, if left without remedy that - not only violates my rights to equal protection under the law and due process, but - passes the burden of uncovering a clear remedy along to future unwitting disabled employees, and employers and employees in

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[3] See also, 29 CFR Appendix to Part 1630 (i.e. Section 1630.9(d), "to clarify that an employer or other covered entity may not compel an individual with a disability to accept an accommodation)"

See also, EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities, Question #11, incorporating the Rehab Act and 29 CFR 1630.9(d), at https://www.eeoc.gov/policy/docs/accommodation.html:

> (Q): May an employer require an individual with a disability to accept a reasonable accommodation that s/he does not want?
>
> (A): No. An employer may not require a qualified individual with a disability to accept an accommodation

general.

In this case, the MSPB and Federal courts not only referred to my accommodation as a mere reassignment, instead of acknowledging the reassignment as an accommodation (i.e. "Permanent Reassignment as an Accommodation"), but they were subsequently at ease, having misrepresented the facts, in misapplying the law and judicial precedent.

The U.S. District cites *Terban* to suggest that I simply "did not want" the mere reassignment without acknowledging that I specifically "did not want" the "Permanent Reassignment as an Accommodation" (i.e. "A retirement will not be deemed involuntary where the employee retires simply because he 'does not want to accept [actions] that the agency is authorized to adopt', see *Terban* (2000) (quoting *Staats v. U.S. Postal Serv.*, 99 F.3d 1120, 1124 (Fed. Cir. 1996)). Without acknowledging and recognizing the fact that my reassignment was an accommodation, the MSPB and Federal courts are equally unable to apply applicable law that states that my agency was - not only not authorized, but - expressly prohibited from adopting the action to involuntarily accommodate, as an agency may not compel an individual with a disability to accept an accommodation. In referring to my lack of "want" for the accommodation, the US District court acknowledges that I objected to and declined the "reassignment"; yet, having misrepresented the issue as a mere reassignment, the District court appears unable or unwilling to recognize that I declined an "accommodation" and equally unable or unwilling to apply the appropriate disability law prohibiting my agency from forcing me to accept an accommodation – even if it is a reassignment.[4]

[4] As noted in my appeal to the U.S. Court of Appeals for the Fourth Circuit, the Courts have established general principles for evaluating involuntariness, which, as applied to the present case, violate the Rehab Act in similar manner as the Agency.

The U.S. Court of Appeals for the Fourth Circuit, despite affirming the dismissal of my claims of constructive removal, and denying my re-hearing *en banc*, elsewhere ruled that an employer generally refuses to accommodate its disabled employee for ADA purposes [and, thus, the

Act] when it unilaterally reassigns them to a vacant position instead of reasonably accommodating them in their current position. *Wirtes*

v City of Newport News (**No. 19-1780**, 4th Circuit by Published Opinion, pg. 17)

For example, *Garcia* (Fed. Cir. 2006) suggests that resignation is not involuntary if the employee had a choice whether to resign or to stay and fight, to contest the validity of the agency action. Notwithstanding the fact that I did stay and fight (inadvertently, in as much as I was unaware that my agency was processing the reassignment after I had repeatedly declined)..... I was not obliged to stay and fight. As such, any such requirement enforced by the Courts would similarly violate the Rehab Act by requiring or forcing me to accept my otherwise involuntary accommodation/reassignment, where I am not required and cannot be required, by law, to stay.

Again, the U.S. District court cited *Terban* (Fed Cir. 2000) in evaluating involuntariness (i.e. an employee who 'decides to resign or retire because he does not want to accept actions that the agency is authorized to adopt' does not allege an involuntary retirement or resignation claim). Despite the fact that the Agency was not authorized to take actions to force my involuntary accommodation/reassignment - yet, precisely because the Agency was expressly prohibited from taking that action – whether I merely do not want, or whether I provide reasonable justification for declining, I am not required to accept (or, "want") the Agency's accommodation/reassignment; moreover, the Agency cannot compel, require or force me to accept (or, "want") the accommodation/reassignment.

Therein, the evaluation of involuntariness ends with my involuntary accommodation. I was justified in resigning or retiring from the moment the Agency effected my involuntary accommodation as a reassignment; whether or not all the additional improper actions (i.e. misinformation, false and misleading statements; denial of FMLA) taken by the Agency to deceive and coerce me to accept (or, "want") the accommodation/reassignment, are equally discriminatory, retaliatory and rise to the level of a hostile work environment that equally forced my involuntary disability retirement.

(quotations and citations omitted). In *Wirtes* (2021), the Fourth Circuit points to the unacceptable *choice* between retiring and reassignment as a justification for overturning the lower court decision, as it is "inappropriate for the City to force him to choose between retiring or accepting reassignment to a position he did not want when a reasonable accommodation would have allowed him to maintain his desired position" (*Id. pg 9*). The Fourth Circuit, then, unequivocally notes that "such unilateral transfers are generally inappropriate when other accommodations would allow an employee to remain in their current position [which must be assumed to be true under summary judgement]" *Id. pg 9*). In conclusion, the Fourth Circuit writes that because "the district court did not consider the disfavored status of involuntary reassignments, we vacate." *Id, pg* 9). In the interest of the "core values underlying the ADA [and, thus, the Rehab Act] and employment law more generally, as well as the employers, disabled employees, and their coworkers protected by the disability and employment law, I would argue that it is not merely "generally inappropriate" or "disfavored", but involuntary accommodation by reassignment is unreasonable in as much as it is expressly unlawful - a direct act of discrimination. *Id.* pg. 12. (citing *Elledge*, 979 F.3d at 1014).

Where even the 4th Circuit has ruled, in *Wirtes* (2021), that it is "inappropriate for the City to force [an employee] to choose between retiring or accepting reassignment to a position he did not want" (*Id. pg 9*), the coercion presented in the forgoing case, and the nature of the direct act of discrimination by "involuntary accommodation" by reassignment, the record provides substantial demonstration of involuntariness in my claim of constructive removal.

In conclusion, I suggest that the failure to consider, and even misrepresent, factual allegations and evidence of involuntary accommodation by reassignment that support my claim of constructive removal, as well as the lack of consideration for the applicable law under the Rehab Act [and, thus, ADA], violates due process under the MSPB and the Federal courts

Failure to consider allegations and evidence of coercion under the Rehab Act and FMLA in support of my constructive removal infringes on equal protection and due process

Incorporating the facts and arguments presented in the previous sections above, as the legal precedents in Perry

(2017), Lentz (2017) and Garcia (2006) are equally applicable in assessing the involuntariness of my constructive removal (i.e. involuntary retirement) in consideration of the coercion provisions under the both Rehab Act and FMLA. (See, respectively, 42 U.S.C 126 § 12203 - Prohibition against retaliation and coercion, incorporated by reference into the Rehab Act; and, See 29 CFR § 1630.12 - Retaliation and coercion).

The Rehab Act makes it "unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed..... any right granted or protected by [the Rehab Act]." The FMLA also makes it unlawful for an employee of an Agency "[to] directly or indirectly intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce, any other employee for the purpose of interfering with the exercise of any rights which such other employee may have under [FMLA].

The record provides a preponderance of evidence establishing my claims of discrimination manifest in knowing, purposeful and intentional violations of both the Rehab Act (e.g. involuntary accommodation) and the FMLA. Despite my earnest efforts to offer the Agency alternatives in opposition to their violations of the Rehab Act and FMLA, the Agency knowingly, willfully and intentionally acted to interfere with and deny my exercise and enjoyment of rights and protections under the Rehab Act and FMLA. Yet, in a coercive effort to preclude and interfere with my rights and entitlements under the Rehab Act and the FMLA, the Agency knowingly and purposefully advised me that they were acting in accordance to law. (See MSPB

"Initial Appeal", Page 32) The MSPB and the Federal courts have seemingly condoned the Agency's coercive behavior by disregarding it entirely or, when addressing it at all, misrepresenting facts in a light most favorable to the Agency.

The U.S District Court's interpretation, for example, of my most earnest efforts to find a lawful, non-discriminatory resolution to Agency efforts to improperly and unlawfully seek an "involuntarily accommodation" by reassignment is to falsely state that I "requested a temporary reassignment". (District Court Order, pg. 4). While I did not "request" a temporary reassignment, I did point out to the Agency that a temporary assignment would be the only lawful way to reassign me while I was under FMLA. But, a more accurate picture of the U.S. District court's err in ruling without consideration for the totality of the circumstances, including coercion under the Rehab Act and FMLA, becomes clear when one views this last statement in context:

> Squires objected to this arrangement because he believed that reassignment to a permanent position would constitute disability discrimination in violation of the FMLA. Instead, Squires requested a temporary reassignment that left him the option of returning to his current position. *Id.* [citations removed]

Herein, the U.S. District court acknowledges, as available in the preponderance of evidence in the MSPB and U.S. District Court record, that I "objected to [the permanent reassignment] because [it] would constitute disability discrimination in violation of the FMLA". That is, it was impermissible to permanently reassign me while on intermittent FMLA, although the FMLA regulations allowed for temporary reassignment.[5] Yet, the U.S. District court continues the

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[5] 5 CFR § 630.1205 – *Intermittent leave*

> (c) If an employee takes intermittent leave under in order to take care of his own serious medical condition, the agency may place the employee temporarily in an available alternative position6 for which the employee is qualified and that can better accommodate recurring periods of leave. Upon returning from leave, the

falsehood by suggesting that the reason why I presumably "requested temporary reassignment" was to maintain "the option of returning to [my] current position]." However, the preponderance of factual allegations and evidence in the record at that time demonstrated that - not only did the FMLA regulations allow for temporary reassignment, but – the Agency's efforts to force my involuntary accommodation by reassignment were indeed "discriminatory in violation of the FMLA", where they were interfering with my rights under FMLA to return to the same or equivalent position.[6] (See "Informal Brief", pg. 8 – 15, para. 5 – 21). That is, from this lone passage it is clear that at least (2) two provisions of FMLA were violated in effecting my involuntary accommodation by reassignment (i.e. prohibition on permanent reassignment while

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employee is entitled to be returned to his or her permanent position or an equivalent position, as provided in § 630.1210(a) of this part.

(e) The agency shall determine the available alternative position that hs equivalent pay and benefits consistent with Federal laws, including the Rehabilitation Act of1973 (29 U.S.C. 701) and the Pregnancy Discrimination Act of 1978 (42 U.S.C. 2000e).

[6] See FMLA implementing regulations for Title II Federal employees at 5 CFR § 630.1210 - *Protection of employment and benefits*

(a) Any employee who takes leave under § 630.1203(a) of this part shall be entitled, upon return to the agency, to be returned to

(1) The same position held by the employee when the leave commenced; or

(2) An equivalent position with equivalent benefits, pay, status, and other terms and conditions of employment.

(b) For the purpose of applying paragraph (a)(2) of this section, an equivalent position must be in the same commuting area and must carry or provide at a minimum –

(1) The same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority

on intermittent FMLA, as well as threatening and interfering with FMLA right to return to same or equivalent position). It is equally apparent that the U.S. District court erred in seemingly disregarding such evidence and factual allegations that supported my claim of constructive removal. (See also, MSPB case in *Landahl* (1999), acknowledging that a resignation or retirement procured in violation of the FMLA regulations may be coercive).

With respect to the issue of involuntariness, the failure to consider factual allegations and evidence in support of coercion under the Rehab Act and FMLA also conflicts with the doctrine of "informed decision-making" established under several Federal Circuit court cases. The Federal Circuit has found that an appellant's decision to retire made based on misinformation or a lack of information (i.e. decisions made "with blinders on") cannot be binding as a matter of fundamental fairness and due process. See *Covington* (Fed. Cir. 1984). Further, the Federal Circuit and the MSPB have also found that an Appellant's decisions to accept a reassignment was involuntary where the Agency failed to provide information that was not only correct in nature, but adequate in scope to allow the employee to make an informed decision. See *Jones* (2012). In accordance with precedent established by the Federal Circuit, the Agency is required to provide an employee with information that is not only correct in nature, but adequate in scope to allow the employee to make an informed decision. See *Miller* (2009), *aff'd*, 361 F. App'x 134 (Fed. Cir. 2010). In the foregoing case, the numerous instances of threatening and interfering behavior from the Agency (See 4th Circuit, "Informal Brief", pg 13 - 15, para 21) forged a scenario in which misinformation infringed upon fundamental fairness and due process.

Failure to consider U.S. Supreme Court precedent established in *Green* (2016) infringes on equal protection and due process

To the extent that the U.S. District Court and, subsequently, the 4th Circuit, affirm the

decision of the MSPB to dismiss my claim of constructive removal, and the MSPB's sole reason for dismissing my claims of constructive removal were owing to the fact that the MSPB did not believe that I had actually retired because I had yet to separate from federal, these decision are in conflict with *Green*

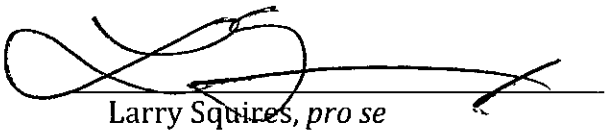
(2016). (See 4th Circuit, "Informal Brief", Issue 1.a, pg. 18 - 9; See also, 4th Circuit, "Petition for Rehearing", pg. 18)

Green (2016) holds that a constructive-discharge claim accrues—and the limitations period begins to run—when the employee gives notice of his resignation, not on the effective date of that resignation. See *Green* (2016) (See District Court, "Petition", Page 6, Issue #3). Under *Green* (2016), my claim of constructive removal began to accrue from the date of my October 10, 2018 "Letter of Notice of Resignation/Disability Retirement" (MSPB "Initial Appeal", Page 3; See also, Page 160) and October 10, 2018, "Application for Immediate Retirement" (See *Id.*). To the extent that the District Court, alike the MSPB, based its decision to dismiss my appeal of constructive removal on the suggestion that "there is no evidence that [I] retired from any position in the federal service", the record does not support such a conclusion. (See District Court "Order", Page 9, Section I.C; See also, MSPB "Initial Decision", November 15, 2018, Page 3; respectively) Again, this is the lone reason for the MSPB's dismissal of my claims of constructive removal, so when the District Court (and, subsequently, the 4th Circuit) affirm the decision of the MSPB, this is the only reason noted by the MSPB. Yet, in yet another instance of lacking due process, the District Court and the 4th Circuit do not address my appeal of this issue under *Green* (2016).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Larry Squires, *pro se*

Date: January 10, 2022