No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

LARRY SQUIRES

— PETITIONER

vs.

MERIT SYSTEMS PROTECTION BOARD (MSPB);

UNITED STATES DEPARTMENT OF NAVY (Agency)

—RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION TO STAY MANDATE

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LIST OF AUTHORITIES

Rehabilitation Act of 1973, 29 U.S.C. § 791 ("Rehab Act")

Civil Service Reform Act of 1978, Pub.L. 95–454, 92 Stat. 1111 ("CSRA")

Family Medical Leave Act ("FMLA" – Tier II)

Other Statutes, Regulations and Policy

5 U.S. Code § 7703

29 CFR 1630.9(d), See also, 29 CFR Appendix to Part 1630

MSPB - *https://www.mspb.gov/studies/adverse_action_report/15_limitedpowers.htm#_ftn2*

EEOC "Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities" at https://www.eeoc.gov/policy/docs/accommodation.html

Case Precedent

Lentz v. Merit Sys. Prot Bd., 876 F .3d 1380, 1384 (Fed. Cir. 2017) (noting error in improperly bifurcating the proceeding; thus, error in failing to consider the totality of the evidence in determining the question of voluntariness)

Perry v. Merit Sys. Prot. Bd., 137 S. Ct 1975, 1979 (2017) (the proper review forum when the

MSPB dismisses a "mixed-case" involving claims of discrimination is District Court to serve "[the] objective of creating an integrated scheme of review [which] would be seriously undermined" by "parallel litigation regarding the same agency action.").

Garcia v. Department of Homeland Security, 437 F.3d 1322, 1341 (Fed. Cir. 2006) (en banc) (under 5 U.S.C. §§ 7701 and 7512, a claimant must first make non-frivolous claims of Board jurisdiction in order to establish jurisdiction; AND, discrimination issues may be considered in determining jurisdiction in mixed constructive adverse action cases insofar as they illuminate involuntariness; emphasizing an objective standard one that is based on the totality of the circumstances)

Burgess v. Merit Systems Protection Board, 758 F.2d 641 , 643-44 (Fed. Cir. 1985) An appellant must receive explicit information on what is required to establish an appealable jurisdictional issue.

Green v Brennan, Postmaster General, 578, U.S.C. ____ (2016) (No. 14-613) (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)

Shoaf v. Department of Agriculture, 260 F.3d 1336, 1341 (Fed. Cir. 2001) (the proper test in evaluating involuntariness is one that "consider[s] the totality of the circumstances")

Landahl v. Department of Commerce, 83 M.S.P.R. 40, **,i,i** 7-11, 1999) (finding a nonfrivolous allegation of involuntariness based on the Plaintiffs claim that the agency coerced his resignation by violating the regulations for granting leave under the Family and Medical Leave Act of 1993).

Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983) (he petitioner must demonstrate that the issues are debatable among jurists of reason.)

Pursuant to Rule 23 of the Rules of the Supreme Court of the United States, I respectfully move for a stay of the mandate issued by the U.S. Court of Appeals for the Fourth Circuit (Case No. 19-1969) pending disposition of my petition for writ of certiorari before the Supreme Court of the United States submitted January 10, 2022.[1]

Compelling and good cause exists for a stay. Petitioner and millions of disabled employees, employers and employees in general, would be irreparably harmed absent an immediate stay, and the balance of equities favors the granting of a stay. This motion is meritorious and not for the purposes of delay.

INTRODUCTION

After going on Agency-approved intermittent leave under the Family Medical Leave Act (FMLA) on June 28, 2018 (Appendix C, pg2, i.e. "Squires requested and received the Family Medical Leave Act".), the Agency presented me with orders to "Permanent Reassignment as an Accommodation" on Friday, August 31, 2018 (*Id* pg 4, i.e. "On August 30, 2018, defendants reassigned Squires to the newly-created Community Planner"). Having previously declined the accommodation on multiple occasions, I again declined. (*Id.* pg. 3-4, i.e. "Squires objected to this arrangement because he believed that reassignment to a permanent position would constitute disability discrimination [and a] violation of the FMLA... Squires also claimed that he had not officially requested a reassignment or reasonable accommodation.") Upon returning to work the following Tuesday, September 4, 2018, I declined once again, in writing, via email. (*Id.* pg. 4, i.e. "On September, 4, 2018, Squires e-mailed Kowalski to decline the reassignment because he believed that the

[1] As of the date of this request to stay enforcement of judgement to be reviewed, no case number has been assigned.

reassignment was "unreasonable as well as discriminatory- and, probably violates a few prohibited personnel practices and merit system principles.") Around September 24, 2018, I received an automated personnel message advising me that the Agency executed the "Permanent Reassignment as an Accommodation" despite the fact that I declined on multiple occasions. (*Id.*, i.e. "On September 24, 2018, Squires emailed Kowalski and claimed that Navy personnel had "exercised an obscene amount of discretion" in reassigning Squires to a new position) This "involuntary accommodation" by reassignment was a direct act of discrimination under the Rehabilitation Act of 1973, 29U.S.C. § 791[2], leading to my October 10, 2018, "Letter of Notice of Resignation/Disability Retirement" and October 10, 2018, "Application for Immediate Retirement" (*Id.* pg. 4, i.e. "On October 10, 2018, Squires submitted a notice of his resignation and applied for immediate retirement.")

On October 10, 2018, I filed an MSPB appeal of constructive removal based on my "involuntary accommodation" by reassignment (See Appendix C, pg. 3, i.e. "Squires filed appeal of constructive removal"), which the MSPB erroneously considered an appeal of a mere reassignment and dismissed for lack of jurisdiction over a mere reassignment on November 15, 2018. (Petition for Writ of Certiorari, Appendix D, pg. 3, i.e. "Here, the appellant has not demonstrated or even alleged that the agency's reassignment action

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[2] Rehabilitation Act of 1973 ("Rehab Act") Section 12201(d); and implementing regulations at 29 CFR 1630.9(d), state that an individual with a disability is not required to accept an accommodation which such qualified individual chooses not to accept.

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)"

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

resulted in a reduction in his grade or pay. Consequently, absent any such documentation I find the agency has not taken an appealable adverse action against the appellant. Thus, the Board lacks jurisdiction over this claim.") After having found a lack of jurisdiction over a mere reassignment, the MSPB Decision addressed my appeal of constructive removal as an afterthought:

> Moreover, the appellant claims that the agency[] has forced him to retire from his position, yet he remains employed with the agency and there is no evidence that he has retired from any position in the federal service.[3]

As demonstrated, the MSPB entirely disregarded my appeal of a constructive removal, egregiously substituting an appeal of a mere reassignment (a non-appealable action) for my appeal of a constructive removal (an otherwise appealable action). Despite multiple attempts to clarify that the issue on appeal for the MSPB was a constructive removal and an otherwise appealable action, the MSPB continued to erroneously request that I provide evidence that I exhausted my administrative remedies (See Appendix C, pg. 5, i.e. "Squires responded.... clarifying that his complaint was for constructive removal.") The MSPB never issued notice and instructions on the standard for review for claims of constructive removal. See *Burgess v. Merit Systems Protection Board*, 758 F.2d 641 , 643-44 (Fed. Cir. 1985) (An appellant must receive explicit information on what is required to establish an appealable jurisdictional issue). The MSPB never referenced or mentioned "the totality of the circumstances" or "involuntariness". See *Shoaf v. Department of Agriculture*, 260 F.3d 1336, 1341 (Fed. Cir. 2001) (the proper test in evaluating involuntariness is one that

[3] While employment status may or may not be an appropriate consideration at a hearing phase, it was inappropriate to refuse to consider my claim of constructive removal or to dismiss my claim of constructive removal for lack of jurisdiction where my claim accrues —and the limitations period begins to run— when I submitted my resignation on October 10, 2018 rather than on the effective date of that resignation. See *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).

"consider[s] the totality of the circumstances"). Upon dismissing a fictitious appeal of reassignment, the MSPB Decision provided "Notice of Appeal Rights" advising that mixed-case claims involving discrimination are to be filed with the U.S. District Court, accordingly:

> This option applies to you only if you have claimed that you were affected by an action that is appealable to the Board and that such action was based, in whole or in part, on unlawful discrimination. If so, ***you may obtain judicial review of this decision—including a disposition of your discrimination claims—by filing a civil action with an appropriate U.S. district court*** (*not* the U.S. Court of Appeals for the Federal Circuit), within 30 calendar days after this decision becomes final under the rules set out in the Notice to Appellant section, above. 5 U.S.C. § 7703(b)(2); *see Perry v. Merit Systems Protection Board*, 582 U.S.___ , 137 S. Ct. 1975 (2017).

On January 3, 2019, I filed timely "Notice of Appeal" with the U.S. District Court and, subsequently, I supplanted "Appeal" with January 7, 2019, "Petition for Review".[4] The MSPB did not provide instruction on the proper procedures or title to file under, or what is required to establish an appealable jurisdictional issue as in *Burgess* (1985). Similarly, the U.S. District Court refused to provide any assistance, i.e. "we cannot provide advice." Moreover, the Federal Rules provide no guidance for CSRA employees seeking judicial review of MSPB judgements.

On July 3, 2019, the District Court Order, in pertinent part, affirmed the MSPB's decision 1) to dismiss my "appeal of *reassignment*" due to lack of jurisdiction (Appendix C, pg. 8, Section II.A) and 2) to dismiss my appeal of constructive removal due to lack of jurisdiction (See *Id.* Page 9 - 10, Section II. C) despite, respectively, 1) the fact that I did not submit an "appeal of a reassignment" with the MSPB and 2) the fact that the MSPB did not even consider, much less dismiss, my claim of constructive removal for lack of jurisdiction,

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[4] See Perry (2017) Dissent of Justice Gorsuch, pg. 11. List of questions from Justice Gorsuch, in which even Justice Gorsuch questions what exactly "filed under" means. How should a *pro se* appellant/petitioner/plaintiff know what to file, when a Supreme Court Justice is even unclear? Justice Gorsuch's dissent in *Perry* (2017) anticipates the majority of issues arising in the foregoing case, e.g. "*de novo* review is poorly adapted to review of administrative civil service disputes" – but, it's even worse when *de novo* review excludes a review of underlying facts and evidence of discrimination within the record.

i.e. the MSPB simply commented, mistakenly, that I could not have retired because I was still employed with the Agency.

Separately, the July 3, 2019, Order of the U.S. District Court also granted the Agency motion to dismiss my claims of discrimination, without prejudice, for failure to state a claim because "[I had] not filed any document that contains factual allegations that render his discrimination claims plausible." (See *Id.* pg. 15, Section III. B).

On October 24, 2019, I timely submitted my "Informal Brief" with the 4th Circuit. On November 6, 2020, the 4th Circuit issued an unpublished opinion affirming the "portion" of the U.S. District Court Order dismissing my claims of constructive removal (Appendix A, pg. 2, i.e. "we affirm this portion of the district court's order for the reasons stated by the district court"), and, separately, remanding to the District Court with instructions to allow me to amend the complaint related to disability discrimination claims" (Appendix A, pg. 2 – 3, i.e. "***Turning to***..... ***the remainder of the appeal*** [we] remand to the district court with instructions to allow Squires to amend the complaint related to the disability discrimination claims." [***emphasis*** added]) On December 14, 2021, the fourth Circuit denied my petitioner for re-hearing and, on December 22, 2021, the mandate issued.

On January 12, 2022, I submitted writ of certiorari before the Supreme Court of the United States questioning:

1) Whether or not the decisions of the Federal Courts' judgments separate and bifurcate my claim of constructive removal from facts and evidence of involuntary accommodation (i.e. discrimination) in conflict with Lentz (2017)
2) Whether or not the decisions of the Federal Courts' judgements conflict with the Integrated Scheme of Review for CSRA "mixed-case" Claims required by *Perry*

(2017)

3) Whether or not the Federal Courts' judgements fail to consider claims of discrimination (i.e. involuntary accommodation) illuminating involuntariness as considered in *Garcia* (2008);

4) Whether or not the Federal Courts' judgements conflict with the 4th Circuits' own published opinion condemning "involuntary accommodation" in *Wirtes* (2021)

5) Whether or not the Federal Courts' judgements Departs so Far from the Accepted and Usual Course of Judicial Proceedings by Allowing for the Involuntary Accommodation of Disabled Employees

On January 21, 2022, the U.S. Court of Appeals for the Fourth Circuit (4th Circuit) denied my motion to stay the mandate (See attached, Appendix B)

ARGUMENT

In consideration of the conditions established in *Planned Parenthood of Southeastern Pa. v. Casey*, 510 U.S. 1309, 1310 (1994) (Souter, J., in chambers), an application to stay the enforcement of a judgment or mandate must show 1) a likelihood of irreparable injury; and 2) a reasonable probability that the Court will grant certiorari; and 3) a fair prospect that the applicant will ultimately prevail on the merits. With respect to #2 and #3, this Court (Rule 10) grants a petition for a writ of certiorari only for compelling reasons, including:

- a decision in conflict with a United States court of appeals on the same important matter or so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an

exercise of this Court's supervisory power; or,

- an important federal question in conflict with relevant decisions of this Court.

Compelling Reason

The following offers compelling reason why the 4th Circuit remand to amend my discrimination claim should have included a remand to amend my claim of constructive removal – especially whereas the record clearly shows that I did not submit a civil action for a claim of discrimination but, instead, I submitted a petition for review of my appeal of constructive removal. The following provides substantial reason why the remand of the 4th Circuit bifurcates my claims in conflict with *Lentz* (2017) and fails to consider my claim(s) of discrimination illuminating involuntariness in my claim of constructive removal in contrast with *Lentz* (2017), *Perry* (2017), *Garcia* (2008), *Wirtes* (2017) and the Rehab At. This is harmful and injurious to disabled employees, end employers and employees in general, who rely on fundamental fairness, equal protection and due process, in review of mixed-case claims under §7703(c) and *Perry* (2017).

<u>The 4th Circuit Opinion Conflicts with Supreme Court Precedent Regarding Bifurcation of "mixed-case" Claims in *Lentz* (2017)</u>

For whatever reason, the MSPB decision and, subsequently, the Federal Courts' judgements plainly separate or bifurcate 1) my claim of constructive removal from 2) my underlying facts and evidence of discrimination illuminating involuntariness in support of my claim of constructive removal. Therefore, the totality of the circumstances illuminating involuntariness in my claim of constructive removal were not considered. This bifurcation,

and failure to consider the totality of the circumstances, is in direct conflict with the Supreme Court decision in *Lentz* (2017).

MSPB

It seems unnecessary to discuss a mixed-case MSPB decision which, throughout the entire process, failed to consider either claim of my "mixed-case" (i.e. either my "constructive removal", or underlying facts and evidence of "discrimination" in support thereof). (See above, Introduction) The MSPB simply failed to consider, and did NOT rule on, my "appeal of constructive removal". In addition, the MSPB simply failed to consider the totality of circumstances, including facts and evidence of discrimination illuminating involuntariness supporting my appeal of constructive removal. Instead, the MSPB egregiously turned my "appeal of a constructive removal" into an "appeal of a reassignment", plainly misconstruing and misrepresenting my "involuntary accommodation" as a mere reassignment. Yet, the MSPB laid the foundation for the Federal Courts' bifurcation of my claims in affirming the MSPB (misguided) decision.

U.S. District Court

The U.S. District Court order plainly strips my claim of constructive removal of supporting facts and evidence of discrimination by suggesting that I failed to state of claim of discrimination either 1) because I presumably failed to submit a separate discrimination complaint as argued by the Agency and/or 2) because I allegedly failed to plead them anew in the pleadings. Whatever the flaw in the process, the U.S. District Court judgement considers my appeal of constructive removal separate from supporting facts and evidence of discrimination (in the least, my "involuntary accommodation" by reassignment), plainly bifurcating my claim of constructive removal from underlying facts and evidence, or the

totality of the circumstances, illuminating involuntariness in my constructive removal.

Again, this is largely owing to the flawed review of the MSPB process and judgement. The U.S. District Court simply affirmed the MSPB dismissal of the same fictitious "appeal of a reassignment" in the MSPB decision, despite the fact that I did not submit an "appeal of a reassignment". From there, the U.S. District Court proceeded to couch my "constructive removal" in terms of the same fictitious "appeal of a reassignment", suggesting that I simply "did not want to accept a permanent reassignment that reduced his responsibilities but not his pay or grade." (Appendix C, pg. 10, II.C) Yet, I did NOT go to the MSPB with an appeal of a mere reassignment. Further, I did NOT plead that my constructive removal was somehow made involuntary because of a mere reassignment.

I made express claims of "involuntary accommodation" that illuminated involuntariness in mt claim of constructive removal. The U.S District Court never considers my reassignment as an "involuntary accommodation", and seemingly purposefully avoids referring to my "involuntary accommodation" despite acknowledging throughout its re-statement of the case that I objected to and declined the accommodation. (*Id.* pg. 4, i.e. "Squires objected to this arrangement because he believed that reassignment to a permanent position would constitute disability discrimination."; See also, *Id.* "Squires e-mailed Kowalski to decline the reassignment.") The U.S. District Court conjures the mistaken and misleading findings of the MSPB, using judgement of an otherwise non-appealable "reassignment" to delegitimize my claim of constructive removal rather than considering the actual facts and evidence showing that I actually suffered an "involuntary accommodation" by reassignment that illuminates involuntariness.

In general, the U.S. District Court's finding that I failed to state a claim is a departure

from the accepted and usual course of judicial proceedings in *de novo* review of mixed-case MSPB appeals such as my claim of constructive removal, which call for a strict adherence to the record[5]. The U.S. District Court notes that "[i]n exercising judicial review over a MSPB decision concerning a nondiscrimination claim, courts look to the administrative record." (Appendix C, pg. 6 – 7) "***However***," in declining to consider the facts and evidence of discrimination that support my non-discrimination claim of constructive removal, the Court states that "[it] considered ***only*** .... allegations in the pleadings, ***not the administrative record***." (*Id.* pg. 7 – 8, ***emphasis*** added). Thus, the Court admits that it did not consider the totality of the circumstances in review of my claim of constructive removal.

The U.S. District Court's seeming reliance on Rule 26 contravenes the express "right to have a trial *de novo* by the reviewing court" under §7703(b)(2), where the courts expressly and inherently look to the administrative record. I was required to plead separately from the record, where the record is implicitly incorporated into my Petition for Review. This is a bifurcation of my claims of constructive removal.

The U.S. District Court even refers to my claims of discrimination in the MSPB record in recounting the case (Appendix C, pg. 4 – 5, i.e. "Squires filed an "appeal of constructive removal and violation of prohibited personnel practices, discrimination, retaliation, and harassment ..... Squires alleged that Navy personnel had [ ] **discriminated against** him based on his medical disabilities, failed to accommodate his medical needs, retaliated against him, and created a hostile work environment."). The U.S. District Court acknowledges, however inadvertently, that I alleged a claim of discrimination - namely, my

[5] See Perry (2017), i.e. "(preserving "right to have the facts subject to trial de novo by the reviewing court" in any "case of discrimination" brought under §7703(b)(2))

"involuntary accommodation" by reassignment that I had declined on several occasion, i.e. "Squires objected to this arrangement because he believed that reassignment to a permanent position would constitute disability discrimination" (U.S. District Court Order, pg. 4). While the U.S. District Court painstakingly attempts to avoid referring overtly to my "involuntary accommodation" by reassignment, 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.* The record and pleadings provide substantial facts and evidence of discrimination illuminating involuntariness

In addition, the record and pleadings demonstrate that I did plead anew before the U.S. District Court sufficient to sustain a motion to dismiss, both in my Petition for Review and in my Response to the Agency's Motion to Affirm/Dismiss. (See respectively, Case#: 4:19-cv-00005-D, Doc. #4; and *Id.* Doc. #11, Doc. #12, & Doc 13, & Doc. 17) My petition expressly notes: "This involuntary accommodation is a discriminatory action." (See U.S. District Court Case#: 4:19-cv-00005-D, Doc. #4, pg. 4 – 5) The pleadings before the U.S. District Court provide facts and evidence of discrimination (in the least, my "involuntary accommodation" by reassignment) in support of my claim for constructive removal.

For the sole purpose of seeking review of the MSPB's egregious mistake of fact and law that allowed for equally egregious procedural and jurisdictional errors which never considered the merits, I petitioned for review with the U.S. District Court. In doing so, my petition summoned the merits sufficient to demonstrate that I provided more than non-frivolous allegations supporting my claim of constructive removal:

> The MSPB AJ seemingly never considered the matter under appeal (i.e. constructive adverse action, to wit: involuntary retirement) which requires instruction and a

> standard of review on the merits of the case. The ID's 'Analysis and Findings: Background' (Tab 9, Page 2) further evidences the narrow focus on review. For example, **from a substantive standpoint that drives at the merits of the involuntary retirement, [my] pleadings expressly note that [I] was involuntarily ordered to "Permanent Reassignment as an Accommodation", as opposed to the undisputed fact that he had merely been reassigned** (Tab 9, Page 2). ***This involuntary accommodation is a discriminatory action***. Discrimination issues alone may be considered in determining jurisdiction in mixed constructive adverse action cases insofar as they illuminate involuntariness, See Garcia v Department of Homeland Security, 437 F.3d 1322, 1341 (Fed. Cir. 2006) See U.S. District Court Case#: 4:19-cv-00005-D, Doc. #4, pg. 4 - 5 [***emphasis*** added]

When the Agency submitted Motion to Affirm/Dismiss (Case#: 4:19-cv-00005-D, Doc. #11, Doc. #12, & Doc 13, & Doc. 17), I responded once again by asserting the same plausible claims of discrimination that were previously contained in my initial Petition for Review:

> The Plaintiffs retirement is not to be deemed involuntary merely because he does not want to accept actions the Agency is authorized to adopt. The Agency was not authorized to adopt the actions which it has taken. They violate discrimination law (***involuntary accommodation***; failure to conduct interactive process; unreasonable accommodation. *Id.* Doc. #19, pg. 7, #7.

> The Agency did more than merely accommodate. ***The Agency forced involuntary accommodation upon the Plaintiff in violation of EEOC***. See also, *Id.* pg. 8.

> Where the Agency/MSPB now seems to consider the totality of the circumstances and raises issues of discrimination and retaliation which were previously ignored in dismissing the Plaintiffs case, the Plaintiff is compelled to respond address to the totality of the circumstances raised by the Agency/MSPB in their combined motions, especially to the extent that the record (however undeveloped in MSPB proceedings - which issues is uncontested by the Agency/MSPB in their current Motions) raises numerous incidents of discrimination and retaliation, e.g. ***involuntary accommodation***; failure to conduct interactive process; permanent reassignment while on FMLA; failure to reinstate upon return from FMLA; interference access to FMLA. *Id.* pg. 11.

Moreover, in pleadings responding to Motion to Affirm/Dismiss, I begged the U.S. District Court to incorporate and consider the claims if discrimination contained in my MSPB appeal of constructive removal (*Id.* Doc. 19):

> The Plaintiff begs this court to ***examine those instances of discrimination and retaliation laid out in the Plaintiffs "Appeal of Constructive Discharge",*** in which the direct evidence (even in an undeveloped record) demonstrates discriminatory and retaliatory acts against the Plaintiff, leading to the Plaintiffs constructive discharge.

The U.S. District Court acknowledges that "when evaluating a motion to dismiss, a court considers the pleadings and any materials "attached ***or incorporated*** into the complaint." (Appendix C, pg. 14, citing *E.I. du Pont de Nemours* & Co. (2011); Fed.R. Civ. P. lO(c); *Ooinesv. ValleyCmty. Servs. Bd.* (2016); and, *Greene* (2005))

Again, the entire concept of a petition for review, and the entre basis of an integrated review under *Perry* (2017), of an MSPB mixed-case complaint is based on *de novo* review of the record, i.e. the incorporation of facts and evidence in the MSPB record. My "Petition for Review" calls for the incorporation of facts from the record, which contains a litany (perhaps, superfluous) of claims of discrimination with detailed elements in support thereof. The U.S. District Court decision restates them throughout, though it fails to consider them under the totality of circumstances illuminating involuntariness in my claim of constructive removal. To fail to do so is a clear bifurcation of my claims.

The U.S. District Court plainly lays forth a legal basis for determining my mixed-case claim of constructive removal based on discrimination that separates (or, bifurcates) my MSPB claim of constructive removal from underlying facts and evidence of discrimination that supports my claim of constructive removal. The U.S. District Court resorted to the MSPB's egregious misrepresentation of the facts and evidence that otherwise support my claims of constructive removal, turning my appeal of a constructive removal into an appeal of a mere reassignment. Even though the U.S. District Court addresses my claim of constructive removal, it does so under the mistaken pretext of the MSPB's decision to

dismiss my "appeal of a reassignment". This approach fails to consider the totality of the circumstances.

The U.S. District Court simply does not consider the totality of the circumstances, specifically discrimination ("involuntary accommodation" by reassignment) that illuminates involuntariness, in my mixed-case claim of constructive removal.

4th Circuit

The 4th Circuit's judgement and mandate further strips my claim of constructive removal of supporting facts and evidence of discrimination illuminating involuntariness, without ever considering the "totality of the circumstances" and/or "involuntariness". The mandate does not find that the underlying facts and evidence of discrimination do not support a finding of involuntariness (nor do the judgments of the MSPB or the U.S. District Court). Similarly, the mandate is silent on the standard for determining involuntariness (similar to the judgments of the MSPB and the U.S. District Court). The mandate, alike the judgements of the MSPB and U.S. District Court, simply disregards facts and evidence of discrimination (i.e. the totality of the circumstances) in support of my claim of constructive removal, contrary to the precedent established under *Garcia* (2006) (discrimination issues may be considered in determining jurisdiction in mixed constructive adverse action cases insofar as they illuminate involuntariness; AND emphasizing an objective standard one that is based on the totality of the circumstances). The result is a bifurcation of my claim of constructive removal, exemplified throughout the text of the 4th Circuit Opinion.

The 4th Circuit's opinion and mandate dismissing my claim of constructive removal, merely affirms the mistakes, discussed above, of the U.S. District Court order. (Appendix A, pg. 2, i.e. "for the reasons stated by the district court") Then, "***[t]urning to*** the dismissal of

[my] disability discrimination claims" or "the remainder of the appeal" (Appendix A, pg. 2, ***emphasis*** added), the 4th Circuit judgement separates my claims, following the mistaken path of the MSPB and U.S. District Court discussed above. Yet, I only submitted one claim: an appeal of constructive removal. There is no cause for "turning to.... the remainder of the appeal" – except to separate or bifurcate my claims. The facts and evidence of discrimination are part of the analysis of my claim of constructive removal.

The 4th Circuit further bifurcates my claims by remanding the "discrimination claims" while simultaneously affirming the dismissal of my claim of constructive removal. Moreover, the 4th Circuit asks me to proceed back to the lower court with my claims of discrimination while having seemingly precluded the issue of my constructive discharge. The 4th Circuit leaves me without any remedy for the injury of my constructive removal that is the direct result of the very claims of discrimination (e.g. "involuntary accommodation") that the 4th Circuit notes are evident in its "review of the record". And where there is evidence of discrimination, there is a non-frivolous demonstration of involuntariness sufficient to warrant a hearing on the merits before the MSPB in accordance with *Garcia* (2006).

The bifurcation of my claim of constructive removal is all the more apparent in the 4th Circuit's recognition that its "review of the record" demonstrates that I did, in fact, state a recognizable claim of discrimination sufficient to "indicate that the [complaint's] deficiencies could be corrected by improved pleading", 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 that may illuminate involuntariness are apparent in the record, sufficient from which to have allowed for development of the

record and a hearing before the MSPB or the U.S. District Court. Where this Appellate Court finds that the record shows that I did, in fact, state a recognizable or identifiable claim of discrimination, which deficiencies may be corrected by further pleadings, the dismissal of my claim of constructive removal by the U.S. District Court and 4th Circuit is a departure from the accepted and usual course of judicial proceedings in *de novo* review of MSPB non-discrimination claims such as my claim of constructive removal - which call for a strict adherence to the record. While the U.S District Court was not required to hear my case for discrimination, if I failed to submit a separate claim, the U.S. District Court was obliged to review my claims of constructive removal and offer suitable remedy, such as remand back to the MSPB. There was no cause for turning a Motion to affirm into a Summary Judgement, and dismissing my claim of constructive removal

Lastly, the 4th Circuit opinion and mandate substantially diverges and conflicts with its own published opinion in *Wirtes v City of Newport News*, No. 19-1780 (4th Circuit, 2021), which holds 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 when a reasonable accommodation would have allowed him to maintain his desired position .... which must be assumed to be true under summary judgement" (*Id.* pg. 9, brackets excluded)

<u>The 4th Circuit Opinion Conflicts with Supreme Court Precedent Regarding an Integrated Scheme of Review for CSRA "mixed-case" Claims in *Perry* (2017)</u>

This case offers multiple examples that demonstrate that the Federal Courts' judgements drastically diverge from – not only precedent established within the Federal Circuits, but – the precedent established under *Perry* (2017) that is intended to provide an

integrated scheme that ensures fundamental fairness, equal protection and due process. These examples demonstrate that I never obtained "judicial ***review***" of the MSPB decision or a "a disposition of [my] discrimination claims" by judicial review required by §7703(c) [***emphasis*** added]. Even though the findings are flawed, in as much as they follow the findings of the MSPB and U.S. District Court, the 4th Circuit remand should constitute a remand of my appeal of constructive removal - rather than a split (or separation or bifurcation) of my claim of constructive removal from underlying discrimination that the 4th Circuit asks me to now file before the lower court. If, as the 4th Circuit remand suggests, "[discrimination] **deficiencies could be corrected by improved pleading", then the same holds true for** my claim of constructive removal – and, to allow one and not the other is to bifurcate my claims.

First, as described above, the Federal Courts' allowed a Rule 26 "Motion to Affirm" my constructive removal to masquerade as Summary Judgement; yet, the Federal Courts' do not provide the benefit of a review of the record (presumably, facts and evidence "outside the pleadings") that plainly shows that I made non-frivolous discrimination claims before the MSPB, that if true, demonstrate involuntariness rising to the level of a constructive removal. In doing so, under review *de novo*, the Federal Courts' judgement fails to recognize much less consider the impact of plausible facts and evidence demonstrating involuntariness, i.e. my "involuntary accommodation". Moreover, the Federal Courts' fail to hold the MSPB to any standard of review previously expected by the Federal Circuit and this Court alike, e.g. notice and opportunity under *Burgess* (1985), consideration of the totality of the circumstances under *Shoaf* (2001), allowing for

consideration of discrimination that illuminates involuntariness when determining frivolous vs non-frivolous claims under *Garcia* (2006).

Second, as noted above, the Federal Courts' judgements *de novo* review requires, inherently and admittedly, a look at the record; yet, here the Federal Courts' decision-making, admittedly, did not include discrimination in the administrative record, i.e. "[i]n exercising judicial review over a MSPB decision concerning a nondiscrimination claim, courts look to the administrative record..... ***However***, [it] considered ***only*** .... allegations in the pleadings, ***not the administrative record***." (Appendix C, pg. 6 – 8, ***emphasis*** added). Yet, the U.S. District Court otherwise suggests that when evaluating a motion to dismiss, a court considers the pleadings and any materials "attached or *incorporated* into the complaint." (Appendix C, pg. 14)

To the extent my claims were bifurcated due to mistake of fact or mistake of law, or simply due to an inherent flaw in the system, my case exemplifies a process that does not allow for an "integrated" scheme of review of MSPB mixed-case complaints, i.e. we'll look at the record to review your MSPB mixed-case claim of constructive removal, but we won't consider facts and evidence of discrimination that support your MSPB mixed-case claim of constructive removal..... unless you submit a separate civil rights complaint. The legal arguments from the Agency that swayed the U.S. District Court judgement affirm the inherent bifurcation in the process that deprived me of a consideration of the totality of the circumstances:

> Discrimination claims brought to MSPB as a mixed case appeal, which are subsequently appealed to district court for *de novo* review, ***must be alleged as a separate cause of action*** (Agency Memo in Support of Motion to Affirm/Dismiss, pg. 26, II.C [***emphasis*** added])

Of course, there is no "integrated" scheme of review where a CSRA employee seeking review of a mixed-case MSPB judgement must file a separate civil rights complaint of discrimination; or, where a claim of constructive removal is stripped of supporting facts and evidence that is in the record and pleadings simply because a CSRA employee does not file a separate complaint.

Although the MSPB decision ignores my claims of discrimination entirely, and, in doing so, fails to consider the totality of the circumstances illuminating involuntariness as well as my appeal of constructive removal, I nonetheless provided plausible facts and evidence of discrimination in discussing the merits, despite my focus on procedural and jurisdictional errors. That is, I recognize that the MSPB's jurisdiction and the merits of an alleged involuntary separation are inextricably intertwined, as this Court has recognized in *Shoaf* (2001) i.e. "as the proper characterization of a question as jurisdictional rather than procedural can be slippery, the distinction between jurisdictional and merits issues is not inevitably sharp, for the two inquiries may overlap. See also, *Perry*, pg.14 (2017)

The U.S. District Court judgement, affirmed by the 4th Circuit, suggests that "[even under the liberal rules of construction applicable to pro se litigants, [I] have not plausibly alleged any discrimination claim" (Appendix C, pg.15). For this reason, it seems the U.S. District Court refused to consider facts and evidence of discrimination under the totality of the evidence that illuminates involuntariness in support of my claim of constructive removal. This is not only an erroneous decision, but substantially deviates and conflicts with the precedents established by the Federal Courts and infringes on fundamental fairness, equal protection and due process pursuant to review under § 7703.

The 4th Circuit Opinion Conflicts with Federal Circuit Precedent Regarding Discrimination Illuminating Involuntariness in *Garcia* (2008)

As demonstrated above, my pleadings before the MSPB, the U.S. District Court, and the 4th Circuit, clearly show that I was subject to an "involuntary accommodation" – an accommodation that I declined on multiple occasions, i.e. Agency Order: "Permanent Reassignment as an Accommodation" (Case#: 4:19-cv-00005-D, Doc. #4, pg. 4, i.e. "..... from a substantive standpoint that drives at the merits of the involuntary retirement, the Appellant's pleadings expressly note that he was involuntarily ordered to "Permanent Reassignment as an Accommodation", as opposed to the undisputed fact that he had merely been reassigned... This involuntary accommodation is a discriminatory action"). It speaks volumes that the U.S. District Court Order does NOT refer to the Agency's "Permanent Reassignment as an Accommodation", anywhere. One is required to piece together statements from the U.S. District Court Order to more accurately discern that it was an "involuntary accommodation", which reference is also entirely absent from the Order. (See Appendix C) So, although the MSPB may have suggested (but, did not opine) that an "involuntary accommodation", if true, does not illuminate involuntariness, the U.S. District Court is obligated under review pursuant to § 7703 to consider whether or not "involuntary accommodation" illuminates involuntariness in my claim of constructive removal. Instead, the U.S. District Court simply followed the lead of the MSPB, re-evaluating whether or not a mere reassignment illuminates involuntariness, This neither in keeping with the requirement to consider the totality of the circumstances as restated in *Lentz* (2017) nor with the precedent established under *Garcia* (2006) that states that when evaluating non-frivolous claims under the totality of the circumstances discrimination

issues may be considered in determining jurisdiction insofar as they illuminate involuntariness).

The 4th Circuit Opinion Conflicts with its Own 4th Circuit Precedent Regarding an Involuntary Accommodation by Reassignment in *Wirtes* (2021)

In failing to consider my "involuntary accommodation" in review of my claim of constructive removal the Federal Courts' judgements conflict with the 4th Circuits own decision in *Wirtes* (2021) which states that it is "inappropriate for the City to force [an employee] to choose between retiring or accepting reassignment". This again is neither in keeping with the requirement to consider the totality of the circumstances as restated in *Lentz* (2017) and *Garcia* (2006), but also with the requirement handed down in Perry (2017) to provide an integrated scheme of review in order to ensure fundamental fairness, equal protection and due process for CSRA employees seeking review of mixed-case MSPB claims.

The 4th Circuit Opinion Sanction Judgement that Departs so Far from the Accepted and Usual Course of Judicial Proceedings by Allowing for Involuntary Accommodation of Disabled Employees

Allowing an Agency, followed by the MSPB and the Federal Courts, to order a qualified, disabled employee to "involuntary accommodation", is a clear departure from the accepted and usual course of judicial proceedings in *de novo* review of the record pursuant to § 7703, and in consideration of precedent established by the Federal Courts (including this Court). The Rehab Act plainly sets forth legislation, regulations and policy that makes it

unlawful to force an individual with a disability to accept an accommodation. (See the "Rehab Act" Section 12201(d); and implementing regulations at 29 CFR 1630.9(d), that state that an individual with a disability is not required to accept an accommodation which such qualified individual chooses not to accept; 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

Permitting violation of the Rehab Act in this manner demonstrates a clear departure from doctrines of fundamental fairness, equal protection and due process.

Irreparable Harm and Injury

The 4th Circuit's mandate, alike the MSPB and U.S. District Court, strips my claim of constructive removal of supporting facts and evidence of discrimination, without ever considering the involuntariness of my retirement under the totality of the circumstances. (See attached, Appendix A) Then, the 4th Circuit's mandate sends me back to the U.S. District Court "to amend the complaint related to the disability discrimination claims" while, at once, dismissing the "portion" of my petition for review related to my overarching

claims of constructive removal. (*Id.* pg. 3 and pg. 1, respectively) As such, the mandate causes irreparable harm and injury by bifurcating my claims, and leaving me without remedy for the injury of a constructive removal resulting from direct acts of discrimination, e.g. involuntary accommodation by reassignment that I declined. As I address this motion, the Agency has already implemented action to proceed in U.S. District Court.

The greater harm and injury lies in allowing the MSPB and U.S. Federal courts to continue to proceed in a manner contrary to precedent established by U.S. Supreme Court decisions which intended to do away with the bifurcation of judicial review (*Lentz*, 2017) by placing MSPB "mixed-case" appeals involving discrimination before the U.S. District Court (*Perry*, 2017) to ensure fundamental fairness, equal protection and due process.[6] This harm is injurious to disabled employees, and employees and employers in general, especially the millions of Federal employees covered under the CSRA who rely on the MSPB to provide due process in adjudicating mixed-case employment disputes yet, between the MSPB decision and Supreme Court, have no prevailing authority where the MSPB is beholden to the authority of the Federal Circuit and Supreme Court alone.

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[6] Please see, *Lentz v. Merit Sys. Prot Bd.*, 876 F .3d 1380, 1384 (Fed. Cir. 2017) (noting error in improperly bifurcating the proceeding; thus, error in failing to consider the totality of the evidence in determining the question of voluntariness); See also, *Perry v. Merit Sys. Prot. Bd.*, 137 S. Ct 1975, 1979 (2017) (the proper review forum when the MSPB dismisses a "mixed-case" involving claims of discrimination is District Court to serve "[the] objective of creating an integrated scheme of review [which] would be seriously undermined" by "parallel litigation regarding the same agency action.").

CONCLUSION

For the reason stated herein, I believe that I have demonstrated compelling reason, reasonable probability that my petition for writ of certiorari will be granted and fair prospect that I will prevail on the merits. In the least, my pleadings have demonstrated, and the record provides a preponderance of evidence to demonstrate, "that the issues are debatable among jurists of reason." *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983). Moreover, I have shown that I will suffer irreparable harm and injury and balance of equities requires stay of the mandate.

- The 4th Circuit's opinion and mandate concerns an important federal question and conflicts with the relevant decision of this Court raised in *Lentz* (2017)
- The 4th Circuit's opinion and mandate concerns an important federal question and conflicts with the relevant decision of this Court raised in *Perry* (2017)
- The 4th Circuit opinion and mandate conflicts with a United States court of appeals in *Garcia* (2006) on the same important matter
- The 4th Circuit opinion and mandate conflicts with the 4th Circuit's own published opinion in *Wirtes* (2021), which is a significant departure from the accepted and usual course of judicial proceedings

This request for mandate is of substantial interest to ensure that findings of this Court are not applied selectively or arbitrarily, but in keeping with fundamental fairness, equal protection and due process.

RELIEF SOUGHT

I respectfully ask this Court for the following relief, as the 4th Circuit has denied my Motion for Stay (See Appendix B). Additionally, this relief is not available from the lower courts, who have declined to act to correct clear violations of the Rehab Act and conflicts in Federal Court precedent, while allowing the foregoing to linger on the appellate docket for over 2 years.

- Stay "involuntary accommodation" by employers or other covered entities under the ADA and Rehab Act, including involuntary accommodation by reassignment
- Stay U.S. District Court requirements for CSRA employees to file Civil Rights complaints in otherwise *de novo* review of MSPB "mixed-use" complaints, where a review of the record is sufficient; or, until such time as explicit information on what is required to establish an appealable jurisdictional issue under *Burgess* (2001) are available from the MSPB and/or U.S. District courts
- Stay all actions in the U.S District Court related to Case#: 4:19-cv-00005-D

I, Larry Squires, do hereby declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on:

January 26, 2022

(Date)

(Signature) Larry Squires

CERTIFICATE OF SERVICE

I certify that the foregoing document(s) was (were) sent as indicated this day to each of the following:

Rudy E. Renfer
Asst. U.S. Attorney
150 Fayetteville Street
Suite 2100
Raleigh, NC 27601

E-mail: rudy.e.renfer@usdoj.gov

January 26, 2022
(Date)

(Signature) Larry Squires

APPENDIX A
U.S. Court of Appeals for the Fourth Circuit
Opinion
entered November 6, 2020

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-1969

LARRY SQUIRES,

Plaintiff - Appellant,

v.

MERIT SYSTEMS PROTECTION BOARD; UNITED STATES DEPARTMENT OF NAVY,

Defendants - Appellees.

Appeal from the United States District Court for the Eastern District of North Carolina, at Greenville. James C. Dever III, District Judge. (4:19-cv-00005-D)

Submitted: July 30, 2020 Decided: November 6, 2020

Before DIAZ and QUATTLEBAUM, Circuit Judges, and SHEDD, Senior Circuit Judge.

Affirmed in part, dismissed in part, and remanded by unpublished per curiam opinion.

Larry Squires, Appellant Pro Se. Rudy E. Renfer, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Raleigh, North Carolina, for Appellees.

PER CURIAM:

Larry Squires appeals the district court's order affirming the final decision of the Merit Systems Protection Board (MSPB) and dismissing without prejudice his disability discrimination claims for failure to state a claim under Fed. R. Civ. P. 12(b)(6). Squires argues that the district court erred in affirming the MSPB's decision that it lacked jurisdiction over his involuntary retirement claim. Finding no reversible error, we affirm this portion of the district court's order for the reasons stated by the district court. *Squires v. Merit Sys. Prot. Bd.*, No. 4:19-cv-00005-D (E.D.N.C. July 3, 2019).

Turning to the dismissal of Squires' disability discrimination claims, this court may exercise jurisdiction only over final orders, 28 U.S.C. § 1291 (2018), and certain interlocutory and collateral orders, 28 U.S.C. § 1292 (2018); Fed. R. Civ. P. 54(b); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545-46 (1949). "[D]ismissals without prejudice generally are not appealable 'unless the grounds for dismissal clearly indicate that no amendment in the complaint could cure the defects in the plaintiff's case.'" *Bing v. Brivo Sys., LLC*, 959 F.3d 605, 610 (4th Cir. 2020) (quoting *Domino Sugar Corp. v. Sugar Workers Local Union 392*, 10 F.3d 1064, 1067 (4th Cir. 1993)). Because the grounds for the district court's dismissal and our review of the record "indicat[e] that the [complaint's] deficiencies could be corrected by improved pleading," we conclude that the district court's order is neither a final order nor an appealable interlocutory or collateral order. *Bing*, 959 F.3d at 611. Accordingly, although we grant leave to proceed in forma pauperis, we dismiss the remainder of the appeal for lack of jurisdiction and remand to the

district court with instructions to allow Squires to amend the complaint related to the disability discrimination claims.

We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED IN PART, DISMISSED IN PART, AND REMANDED

APPENDIX B
U.S. District Court for the Eastern District of North Carolina Eastern Division Denial of Motion to Stay Mandate entered January 21, 2022

FILED: January 21, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-1969
(4:19-cv-00005-D)

LARRY SQUIRES

Plaintiff - Appellant

v.

MERIT SYSTEMS PROTECTION BOARD; UNITED STATES DEPARTMENT OF NAVY

Defendants - Appellees

O R D E R

Upon consideration of the motion to stay mandate, the court denies the motion.

For the Court--By Direction

/s/ Patricia S. Connor, Clerk

APPENDIX C
U.S. District Court for the Eastern District of North Carolina Eastern Division
Order
entered July 3, 2019

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
EASTERN DIVISION
No. 4:19-CV-5-D

LARRY SQUIRES, Plaintiff, v. MERIT SYSTEMS PROTECTION BOARD, et al., Defendants.	)	ORDER

On January 3, 2019, Larry Squires ("Squires" or "plaintiff"), proceeding pro se, filed a notice of appeal from a final decision of the Merit Systems Protection Board (the "MSPB") [D.E. 1-1], which dismissed his mixed-case appeal for lack of jurisdiction. On January 7, 2019, Squires filed a petition for review of the MSPB's decision [D.E. 4] and a copy of the MSPB's decision [D.E. 4-1]. On January 22, 2019, Squires refiled his notice of appeal from the MSPB's decision [D.E. 7]. On April 1, 2019, the MSPB and the United States Department of Navy (the "Navy"; collectively, "defendants") moved to affirm the MSPB's decision [D.E. 11], moved to dismiss Squires's discrimination and retaliation claims for lack of subject-matter jurisdiction and failure to state a claim [D.E. 12], filed a memorandum in support of both motions [D.E. 14], and filed the administrative record [D.E. 15-1]. On the same date, the court notified Squires about the motions, the consequences of failure to respond, and the response deadlines [D.E. 16]. See Roseboro v. Garrison, 528 F.2d 309, 310 (4th Cir. 1975) (per curiam). On April 24, 2019, defendants filed a supplemental memorandum in support [D.E. 17]. On April 26, 2019, Squires responded in opposition [D.E. 19]. On May 9, 2019, defendants replied [D.E. 20]. As explained below, the court

affirms the MSPB's decision, denies defendants' motion to dismiss for lack of subject-matter jurisdiction, grants defendants' motion to dismiss for failure to state a claim, and dismisses Squires's discrimination claims without prejudice.

I.

On December 10, 2017, Squires accepted the position of Director, Community Plans and Liaison Office, a GS-0020-13 step 6 position (Supervisory Community Planner), with the Department of Navy, United States Marine Corps. See [D.E. 15-1] 7, 103. On June 22, 2018, Squires e-mailed his commanding officer, Lieutenant Colonel Todd W. Ferry ("Ferry"), and the Director of Manpower Andrew Kowalski ("Kowalski") and stated that he suffered from various medical conditions and that these conditions had become more acute in recent months. See id. at 23–24, 39. For example, Squires told Ferry and Kowalski that he could not use his computer effectively, attend meetings or gatherings, or establish and maintain effective relationships. See id. Squires admitted that his conditions prevented him from fulfilling his duties, and he requested a reasonable accommodation for his current position or assistance in obtaining a new position at the same grade or pay level. See id. at 24, 39.

On June 25, 2018, Kowalski put Squires in contact with Equal Employment Opportunity ("EEO") personnel to discuss Squires's request for a reasonable accommodation or reassignment. See id. at 24. Mike Arkin ("Arkin"), an EEO Manager, met with Squires and informed Squires that finding an accommodation or reassignment would be difficult due to Squires's responsibilities. See id. On June 28, 2018, Squires requested and received the Family Medical Leave Act ("FMLA") forms required to request medical leave. See id. On the same day, Squires sent Arkin written questions concerning disability retirement and the reasonable accommodation process. See id.

On June 29, 2018, Squires claims that Rhonda Murray ("Murray"), a Navy Community Plans

and Liaison Officer for the Mid-Atlantic region and later Squires's immediate supervisor, "reached out to [Squires] under the pretext of discussing [Department of Transportation] funding sources available to the [Department of Defense]." Id.; see [D.E. 14-1]. Squires claims that Murray did so because he had significant experience with transportation programs and projects. See [D.E. 15-1] 24. Squires also claims that Murray had been considered for the same position that Squires accepted. See id. On July 20, 2018, Kowalski told Squires that defendants wished to replace Squires with Murray as soon as possible. See id. at 26–27. Squires told Kowalski that he planned to take FMLA leave while awaiting more information from his doctors concerning his medical conditions. See id. at 27.

On July 26, 2018, Squires told Lieutenant Colonel Spangenberger ("Spangenberger") that he believed that any efforts to replace him with Murray constituted discrimination based on his perceived disability. See id. On or about the same day, Squires met with Kowalski and an EEO official to discuss FMLA leave options. See id. at 28. Squires alleges that he told Kowalski about a time when Squires's commanding officer laughed at Squires's medical conditions and stated that, having learned more about Squires's medical history, his commanding officer understood Squires better. See id. Squires told Kowalski that he wanted a transfer to a temporary position under the FMLA while he sought treatment for his medical conditions. See id.

On August 5, 2018, Squires received a step increase. See id. at 29. On August 7, 2018, Squires's doctor faxed the medical certification for his FMLA to defendants. See id. On the same day, Kowalski and Spangenberger met with Squires. See id. At the meeting, they informed Squires that they had created a new position for Squires. See id. The position had the same grade, same pay, and many of the same duties, but it left out supervisory duties that Squires had said that he could not fulfill. See id. Furthermore, they told Squires that, if he came back from medical leave, he would

return to the newly-created position and Murray would take Squires's former position. See id. Squires objected to this arrangement because he believed that reassignment to a permanent position would constitute disability discrimination in violation of the FMLA. See id. Instead, Squires requested a temporary reassignment that left him the option of returning to his current position. See id. Kowalski told Squires that a temporary reassignment was not possible because it would prevent defendants from filling Squires's old position while he was away on medical leave. See id. Squires also claimed that he had not officially requested a reassignment or reasonable accommodation. See id. at 29–30.

On August 30, 2018, defendants reassigned Squires to the newly-created Community Planner position at the same grade and pay[1] effective September 4, 2018. See id. at 83, 103. On September 4, 2018, Squires e-mailed Kowalski to decline the reassignment because he believed that the reassignment was "unreasonable as well as discriminatory—and, probably violates a few prohibited personnel practices and merit system principles." Id. at 102. On September 24, 2018, Squires e-mailed Kowalski and claimed that Navy personnel had "exercised an obscene amount of discretion" in reassigning Squires to a new position to fill his former position with Murray and that he wished to file a complaint alleging retaliation and discrimination. Id. at 106–07. Squires also asked to be placed on paid medical leave while his discrimination complaints were resolved. See id. at 107. On September 25, 2018, Squires met with Navy officials. See id. at 113–14. At the conclusion of the meeting, Navy officials refused to reconsider the decision to reassign Squires. See id. at 113.

On October 10, 2018, Squires submitted a notice of his resignation and applied for immediate retirement. See id. at 7. On the same date, Squires filed an "appeal of constructive removal and

[1] Squires remained a GS-0020-13, step 6, with an adjusted salary of $101,794.00. See [D.E. 15-1] 103.

violation of prohibited personnel practices, discrimination, retaliation, and harassment with motion to stay" with the MSPB. Id. at 4. Liberally construed, Squires alleged that Navy personnel had deceived him concerning his leave options and discriminated against him based on his medical disabilities, failed to accommodate his medical needs, retaliated against him, and created a hostile work environment. See id.

On October 15, 2018, the MSPB instructed Squires to produce evidence that showed it had jurisdiction over his claims. See id. at 167–68. On October 18, 2018, Squires responded, adding a claim under the Whistleblower Protection Act of 1989 ("WPA") and clarifying that his complaint was for constructive removal resulting in his involuntary retirement. See id. at 190–91. On October 24, 2018, the MSPB ordered Squires to produce evidence that he exhausted administrative remedies before the Office of Special Counsel ("OSC"). See id. at 201–03.

On November 15, 2018, an administrative law judge ("ALJ") issued an initial decision dismissing Squires's appeal for lack of jurisdiction. See [D.E. 4-1] 1–2. After recounting the undisputed facts, the ALJ found that Squires had "not demonstrated or even alleged that the agency's reassignment action resulted in a reduction in his grade or pay." Id. at 3. Moreover, the ALJ found that Squires had not alleged or produced any evidence that he exhausted his administrative remedies concerning his WPA claim. See id. After denying Squires's motion to stay, the ALJ denied Squires's motion to certify interlocutory review to the MSPB. See id. at 3–4. On December 20, 2018, the decision became the MSPB's final decision. See id. at 5. On January 3, 2019, Squires appealed [D.E. 1-1].

II.

Defendants argue that the court should affirm the MSPB's dismissal of Squires's claims for lack of jurisdiction. The Civil Service Reform Act of 1978 ("CSRA"), 5 U.S.C. § 1101 et seq.,

permits a federal employee subjected to an adverse personnel action to appeal the relevant agency's decision to the MSPB in some circumstances. See 5 U.S.C. §§ 1221(a), 7512, 7701; Kloeckner v. Solis, 568 U.S. 41, 43–44 (2012). The CSRA provides a statutory framework for administrative and judicial review of employment decisions involving certain federal employees. See Chin-Young v. United States, No. 17-2013, 2019 WL 2114737, at *4 (4th Cir. May 14, 2019) (unpublished). Although generally judicial review of MSPB decisions is only possible in the United States Court of Appeals for the Federal Circuit, a federal employee who "claims that an agency action appealable to the MSPB violates an antidiscrimination statute listed in [5 U.S.C.] § 7702(a)(1) should seek judicial review in district court." Kloeckner, 568 U.S. at 45–46, 56; see Chin-Young, 2019 WL 2114737, at *4; Winey v. Mattis, 712 F. App'x 284, 284 (4th Cir. 2018) (per curiam) (unpublished); Bonds v. Leavitt, 629 F.3d 369, 378 (4th Cir. 2011); Peterik v. United States, No. 7:16-CV-41-FL, 2017 WL 1102617, at *3 (E.D.N.C. Mar. 24, 2017) (unpublished); Alford v. Leonhart, No. 7:14-CV-196-F, 2016 WL 816777, at *1 (E.D.N.C. Feb. 25, 2016) (unpublished). In that case, the federal employee has alleged a mixed-case. See 29 C.F.R. § 1614.302; Kloeckner, 568 U.S. at 44.

To the extent that Squires alleges a disability discrimination claim under the Rehabilitation Act of 1973, 29 U.S.C. § 791, Squires may seek judicial review of the MSPB's decision to dismiss his mixed-case appeal in this court. See 5 U.S.C. § 7702(a)(1)(B)(i), (iii); Kloeckner, 568 U.S. at 43–46; Furey v. Mnuchin, 334 F. Supp. 3d 148, 156–57 (D.D.C. 2018). The court has jurisdiction over Squires's mixed-case appeal even though the MSPB determined it lacked jurisdiction over his claims and did not reach the merits. See Perry v. Merit Sys. Prot. Bd., 137 S. Ct. 1975, 1979 (2017); Kloeckner, 568 U.S. at 50; Chin-Young, 2019 WL 2114737, at *5; Alford, 2016 WL 816777, at *1.

In exercising judicial review over a MSPB decision concerning a nondiscrimination claim, courts look to the administrative record. See Young v. West, 149 F.3d 1172, at *5 (4th Cir. 1998)

(per curiam) (unpublished table decision); Romero v. Dep't of the Army, 708 F.2d 1561, 1563 (10th Cir. 1983); Doe v. Hampton, 566 F.2d 265, 272 (D.C. Cir. 1983); Twyman v. Berry, No. 2:08cv519, 2009 WL 10676561, at *4 (E.D. Va. Dec. 14, 2009) (unpublished), aff'd, 447 F. App'x 482 (4th Cir. 2011) (per curiam) (unpublished). Squires bears the burden to show that, based on the record, the MSPB erred. See Twyman, 447 F. App'x at 484; Harris v. Dep't of Veterans Affairs, 142 F.3d 1463, 1467 (Fed. Cir. 1998). The court reviews the MSPB's decision concerning any nondiscrimination claim deferentially and can set such a decision aside only if the MSPB's findings or conclusions are "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence." 5 U.S.C. § 7703(c); see Hooven-Lewis v. Caldera, 249 F.3d 259, 266 (4th Cir. 2001); Alford, 2016 WL 816777, at *1.

In exercising judicial review over a mixed case, the court reviews de novo the MSPB's decision concerning any discrimination claim. See, e.g., 5 U.S.C. § 7703(c); Hooven-Lewis, 249 F.3d at 266; Alford, 2016 WL 816777, at *1; Lucas v. Brownlee, No. 5:04-CV-127-BO(1), 2005 WL 8159195, at *3 (E.D.N.C. Apr. 22, 2005) (unpublished). Courts reviewing discrimination claims de novo may consider the administrative record developed before the MSPB as evidence. See Rana v. United States, 812 F.2d 887, 890 (4th Cir. 1987); Butler v. Bair, No. 1:10-cv-817 (AJT/TRJ), 2010 WL 4623951, at *3 (E.D. Va. Nov. 4, 2010) (unpublished); Monk v. Potter, 723 F. Supp. 2d 860, 872 (E.D. Va. 2010), aff'd sub nomen Monk v. Donahoe, 407 F. App'x 675 (4th Cir. 2011) (per curiam) (unpublished). However, a court deciding a motion to dismiss for failure to state a claim may not consider evidence outside the pleadings without transforming the motion into one for summary judgment. Fed. R. Civ. P. 12(d). Thus, in deciding defendants' motion to dismiss Squires's discrimination claims under Rule 12(b)(6), the court considers only the plausibility of

Squires's factual allegations in the pleadings, not the administrative record.

A.

As for the MSPB's decision to dismiss Squires's appeal of his reassignment for lack of jurisdiction, the MSPB reasoned that it lacked jurisdiction because Squires's reassignment did not reduce his grade or pay. See [D.E. 4-1] 1–3. Generally, the MSPB has jurisdiction over appeals concerning an agency's reassignment decision only "if the agency's action resulted in a reduction in grade or pay." Tsungu v. Merit Sys. Prot. Bd., 513 F. App'x 942, 945 (Fed. Cir. 2013) (per curiam) (unpublished) (quotation omitted); see Phillips v. Merit Sys. Prot. Bd., No. 2008-3251, 2009 WL 82720, at *1 (Fed. Cir. Jan. 14, 2009) (per curiam) (unpublished); Walker v. Dep't of the Navy, 106 F.3d 1582, 1584 (Fed. Cir. 1997); cf. 5 U.S.C. § 7512(3), (4); 5 C.F.R. § 1201.3(a)(1). This jurisdictional rule applies even if a reassignment reduces job responsibilities. See Tsungu, 513 F. App'x at 945–46; Wilson v. Merit Sys. Prot. Bd., 807 F.2d 1577, 1580–81 (Fed. Cir. 1986). Moreover, Squires had the burden to show that the MSPB had jurisdiction over his appeal. See Perez v. Merit Sys. Prot. Bd., 85 F.3d 591, 593 (Fed. Cir. 1996); 5 C.F.R. § 1201.56(b)(2)(i)(A).

Squires's reassignment did not reduce his grade or pay. See [D.E. 15-1] 103. That the reassignment reduced Squires's supervisory responsibilities is irrelevant to whether the MSPB had jurisdiction over his appeal. See Tsungu, 513 F. App'x at 945–46; Wilson, 807 F.3d at 1580–81. Thus, substantial evidence supported the MSPB's factual finding that it lacked jurisdiction over Squires's appeal. Accordingly, the court affirms the MSPB's decision that it lacked jurisdiction over Squires's appeal of his reassignment.

B.

As for Squires's claim under the WPA, the MSPB had jurisdiction only if Squires exhausted his administrative remedies before the OSC and made nonfrivolous allegations that (1) he engaged

in whistleblowing activity by making a protected disclosure under section 2302(b)(8), and (2) the disclosure was a contributing factor in the agency's decision to take or fail to take a personnel action under section 2302(a). See Yeh v. Merit Sys. Prot. Bd., 527 F. App'x 896, 899–900 (Fed. Cir. 2013) (per curiam) (unpublished); Yunus v. Dep't of Veterans Affairs, 242 F.3d 1367, 1371 (Fed. Cir. 2001); cf. 5 U.S.C. § 2302(a), (b)(8). Although Squires alleged a WPA claim, the MSPB did not adjudicate that claim because Squires provided no evidence that he exhausted administrative remedies with the OSC. See [D.E. 4-1] 3 n.2. Squires had the burden to establish that the MSPB had jurisdiction over his WPA claim. See Kahn v. Dep't of Justice, 528 F.3d 1336, 1341 (Fed. Cir. 2008); Perez, 85 F.3d at 593. Thus, to the extent that Squires seeks judicial review of the MSPB's decision that it lacked jurisdiction over his WPA claim, the court affirms the decision.

C.

As for Squires's constructive removal or involuntary retirement claim, the MSPB found that Squires had not retired from the Navy. See [D.E. 4-1] 3. The court reviews the MSPB's factual findings for "support by substantial evidence in the record." Lentz v. Merit Sys. Prot. Bd., 876 F.3d 1380, 1384 (Fed. Cir. 2017). Substantial evidence is such evidence "as a reasonable mind might accept as adequate to support a conclusion." Id. (quotation omitted); see Consol. Edison Co. of N.Y. v. Nat'l Labor Relations Bd., 305 U.S. 197, 229 (1938).

To establish jurisdiction over an involuntary retirement claim before the MSPB, an appellant must make nonfrivolous allegations that his retirement or resignation was involuntary (i.e., that "the agency effectively imposed the terms of the employee's resignation, the employee had no realistic alternative but to resign or retire, and the employee's resignation or retirement was the result of improper acts by the agency"). Trinkl v. Merit Sys. Prot. Bd., 727 F. App'x 1007, 1009 (Fed. Cir. 2018) (unpublished); see Sweeney v. Merit Sys. Prot. Bd., No. 18-1458, 2019 WL 2484682, at *6

(4th Cir. June 19, 2019) (per curiam) (unpublished); Shoaf v. Dep't of Agric., 260 F.3d 1336, 1341 (Fed. Cir. 2001). A nonfrivolous allegation is one that, if established at a jurisdictional hearing by a preponderance of the evidence, would be sufficient for the MSPB to have jurisdiction. See Garcia v. Dep't of Homeland Sec., 437 F.3d 1322, 1325, 1330 (Fed. Cir. 2006) (en banc). "To objectively determine whether a reasonable person in the employee's position would have felt compelled to resign, the tribunal must consider the totality of the circumstances." Trinkl, 727 F. App'x at 1009. Notably, 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. Terban v. Dep't of Energy, 216 F.3d 1021, 1025 (Fed. Cir. 2000) (alteration and quotation omitted); see Staats v. U.S. Postal Serv., 99 F.3d 1120, 1124 (Fed. Cir. 1996). Resignation or retirement decisions are presumed voluntary. See Trinkl, 727 F. App'x at 1009; Terban, 216 F.3d at 1024; Cruz v. Dep't of the Navy, 934 F.2d 1240, 1244 (Fed. Cir. 1991).

The MSPB had substantial evidence to conclude that Squires failed to overcome the presumption that his retirement was voluntary. Squires voluntarily decided to retire because he did not want to accept a permanent reassignment that reduced his responsibilities but not his pay or grade. See Terban, 216 F.3d at 1025; Staats, 99 F.3d at 1124; Cruz, 934 F.2d at 1244. The administrative record does not support Squires's claims that the Navy deceived him concerning his leave options. Moreover, Squires initially requested a reassignment as a reasonable accommodation, and the Navy attempted to comply with that request by creating a new position for Squires. Thus, Squires failed to make nonfrivolous allegations that the MSPB had jurisdiction over his involuntary retirement claim. See Trinkl, 727 F. App'x at 1009. Accordingly, the court affirms the MSPB's decision to dismiss Squires's involuntary retirement or constructive resignation claim for lack of jurisdiction.

D.

As for the MSPB's decision to deny Squires's motion to stay the reassignment under the WPA, an employee may request a stay of a proposed or threatened personnel action under the WPA only after seeking corrective action from the OSC and exhausting those proceedings. Lozada v. Equal Emp't Opportunity Comm'n, 45 M.S.P.B. 310, 312–13 (1990). Squires did not meet his burden before the MSPB to demonstrate that he had exhausted his remedies before the OSC. Thus, the MSPB lacked jurisdiction, and the court affirms the MSPB's decision to deny Squires's motion to stay.

E.

As for the MSPB's decision to decline to certify its initial order for interlocutory appeal, an interlocutory appeal is "an appeal to the [MSPB] of a ruling made by a judge during a proceeding." 5 C.F.R. § 1201.91. An ALJ may certify an interlocutory appeal only if (1) the ruling "involves an important question of law or policy about which there is substantial ground for difference of opinion," and (2) an "immediate ruling will materially advance the completion of the proceeding, or the denial of an immediate ruling will cause undue harm to a party or the public." Id. § 1201.92. An ALJ has substantial discretion in ruling on a motion to certify an interlocutory appeal. See Schoenrogge v. Dep't of Justice, 148 F. App'x 941, 945 (Fed. Cir. 2005) (unpublished); Keefer v. Dep't of Agric., 92 M.S.P.B. 476, 480 (2002); Robinson v. Dep't of the Army, 50 M.S.P.B. 412, 418 (1991).

The administrative law judge did not abuse her discretion in declining to certify the initial decision for interlocutory appeal to the MSPB. The initial decision involved straightforward factual and legal questions concerning the basis of the MSPB's jurisdiction over Squires's claims, and Squires did not show why a denial of an immediate ruling would cause him undue harm. Thus, the

court affirms the MSPB's decision denying Squires's motion for certification for interlocutory appeal.

III.

As for Squires's disability discrimination claims, defendants move to dismiss the claims for lack of subject-matter jurisdiction and for failure to state a claim.

A.

A motion to dismiss under Rule 12(b)(1) of the Federal Rules of Civil Procedure tests subject-matter jurisdiction, which is the court's "statutory or constitutional power to adjudicate the case." Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 89 (1998) (emphasis omitted); see Holloway v. Pagan River Dockside Seafood, Inc., 669 F.3d 448, 453 (4th Cir. 2012); Constantine v. Rectors & Visitors of George Mason Univ., 411 F.3d 474, 479–80 (4th Cir. 2005). A federal court "must determine that it has subject-matter jurisdiction over the case before it can pass on the merits of that case." Constantine, 411 F.3d at 479–80. As the party invoking federal jurisdiction, Squires bears the burden of establishing that this court has subject-matter jurisdiction. See, e.g., Steel Co., 523 U.S. at 104; Evans v. B.F. Perkins Co., 166 F.3d 642, 647 (4th Cir. 1999); Richmond, Fredericksburg & Potomac R.R. v. United States, 945 F.2d 765, 768 (4th Cir. 1991). In considering a motion to dismiss for lack of subject-matter jurisdiction, the court may consider evidence outside the pleadings without converting the motion into one for summary judgment. See, e.g., Evans, 166 F.3d at 647. A court should grant a motion to dismiss pursuant to Rule 12(b)(1) "only if the material jurisdictional facts are not in dispute and the moving party is entitled to judgment as a matter of law." Id. (quotation omitted).

Defendants argue that this court lacks subject-matter jurisdiction because Squires failed to exhaust administrative remedies. See [D.E. 14] 23–26. In support, defendants note that the MSPB

held that it lacked jurisdiction over the merits of Squire's claims. See id.

The court rejects this argument. First, the "key to district court review [is] the employee's claim that an agency action appealable to the MSPB violates an antidiscrimination statute" listed in the CSRA. Perry, 137 S. Ct. at 1984 (emphasis, alteration, and quotation omitted). Defendants' argument ignores the Supreme Court's holding in Perry that a district court can review mixed-case appeals under the CSRA even if the MSPB determines that it lacked jurisdiction over an appeal. See id. at 1985–88. Moreover, although a person's failure to cooperate with the MSPB can constitute a failure to exhaust administrative remedies, see Austin v. Winter, 286 F. App'x 31, 37 (4th Cir. 2008) (per curiam) (unpublished), Squires did not fail to cooperate with the MSPB or to complete the MSPB's appeals process. Rather, he merely failed to meet his burden to show that the MSPB had jurisdiction over his claims. Thus, the court has subject-matter jurisdiction over Squires's discrimination claims and denies defendants' motion to dismiss for lack of subject-matter jurisdiction.

B.

A motion to dismiss under Rule 12(b)(6) tests the complaint's legal and factual sufficiency. See Ashcroft v. Iqbal, 556 U.S. 662, 677–80 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 554–63 (2007); Coleman v. Md. Court of Appeals, 626 F.3d 187, 190 (4th Cir. 2010), aff'd, 566 U.S. 30 (2012); Giarratano v. Johnson, 521 F.3d 298, 302 (4th Cir. 2008). To withstand a Rule 12(b)(6) motion, a pleading "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Iqbal, 556 U.S. at 678 (quotation omitted); see Twombly, 550 U.S. at 570; Giarratano, 521 F.3d at 302. In considering the motion, the court must construe the facts and reasonable inferences "in the light most favorable to the [nonmoving party]." Massey v. Ojaniit, 759 F.3d 343, 352 (4th Cir. 2014) (quotation omitted); see Clatterbuck v. City of Charlottesville, 708

F.3d 549, 557 (4th Cir. 2013), abrogated on other grounds by Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015). A court need not accept as true a complaint's legal conclusions, "unwarranted inferences, unreasonable conclusions, or arguments." Giarratano, 521 F.3d at 302 (quotation omitted); see Iqbal, 556 U.S. at 678–79. Rather, a plaintiff's allegations must "nudge[ ] [his] claims," Twombly, 550 U.S. at 570, beyond the realm of "mere possibility" into "plausibility." Iqbal, 556 U.S. at 678–79.

The standard used to evaluate the sufficiency of a pleading is flexible, "and a pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." Erickson v. Pardus, 551 U.S. 89, 94 (2007) (per curiam) (quotation omitted). Erickson, however, does not "undermine [the] requirement that a pleading contain 'more than labels and conclusions.'" Giarratano, 521 F.3d at 304 n.5 (quoting Twombly, 550 U.S. at 555); see Iqbal, 556 U.S. at 677–83; Coleman, 626 F.3d at 190; Nemet Chevrolet Ltd. v. Consumeraffairs.com, Inc., 591 F.3d 250, 255–56 (4th Cir. 2009); Francis v. Giacomelli, 588 F.3d 186, 193 (4th Cir. 2009). Although a court must liberally construe a pro se plaintiff's allegations, it "cannot ignore a clear failure to allege facts" that set forth a cognizable claim. Johnson v. BAC Home Loans Servicing, LP, 867 F. Supp. 2d 766, 776 (E.D.N.C. 2011); see Giarratano, 521 F.3d at 304 n.5.

When evaluating a motion to dismiss, a court considers the pleadings and any materials "attached or incorporated into the complaint." E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc., 637 F.3d 435, 448 (4th Cir. 2011); see Fed. R. Civ. P. 10(c); Goines v. Valley Cmty. Servs. Bd., 822 F.3d 159, 165–66 (4th Cir. 2016); Thompson v. Greene, 427 F.3d 263, 268 (4th Cir. 2005). A court may also consider a document submitted by a moving party if it is "integral to the complaint and there is no dispute about the document's authenticity" without converting the motion into one for summary judgment. Goines, 822 F.3d at 166. Additionally, a court may take judicial notice of

public records when evaluating a motion to dismiss for failure to state a claim. See, e.g., Fed. R. Evid. 201(d); Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322 (2007); Philips v. Pitt Cty. Mem'l Hosp., 572 F.3d 176, 180 (4th Cir. 2009).

The CSRA's statutory framework for judicial review of MSPB decisions does not change the normal rules of civil litigation established by the Federal Rules of Civil Procedure. Thus, in ruling on defendants' motion to dismiss Squires's discrimination claims, the court does not consider evidence outside the pleadings, including the administrative record that was developed before the MSPB.

Squires has not filed any document that contains factual allegations that render his discrimination claims plausible. One document, docketed as a complaint, is a single page that states that Squires appeals the MSPB's final decision. See Compl. [D.E. 7]. A second document, docketed as a motion for review of the MSPB's final decision with the final decision attached, contains several arguments detailing how the MSPB erred in dismissing Squires's claims for lack of jurisdiction but lacks any factual allegations supporting Squires's discrimination claims. See [D.E. 4]. Thus, even under the liberal rules of construction applicable to pro se litigants, Squires has not plausibly alleged any discrimination claim. Accordingly, having reviewed Squires's discrimination claims de novo, the court grants defendants' motion to dismiss any discrimination claims for failure to state a claim.

IV.

In sum, the court GRANTS defendants' motion to affirm the MSPB's final decision [D.E. 11], AFFIRMS the MSPB's final decision, and DENIES Squires's motion for review of the MSPB's final decision [D.E. 4]. The court DENIES defendants' motion to dismiss for lack of subject-matter jurisdiction [D.E. 12], GRANTS defendants' alternative motion to dismiss for failure to state a claim

upon which relief can be granted [D.E. 12], and DISMISSES without prejudice Squires's discrimination claims. The clerk shall close the case.

SO ORDERED. This 3 day of July 2019.

I certify the foregoing to be a true and correct
copy of the original.
Peter A. Moore, Jr., Clerk
United States District Court
Eastern District of North Carolina

By: Nicole Sellers
Deputy Clerk

J. Dever
JAMES C. DEVER III
United States District Judge