APPENDIX

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-1621

DAREK J. KITLINSKI; LISA M. KITLINSKI,

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF JUSTICE, Drug Enforcement Administration As to Privacy Act Claims; MERRICK B. GARLAND, Attorney General,

Defendants-Appellees,

and

OTHER UNNAMED EMPLOYEES OF THE U.S. DEPARTMENT OF JUSTICE, DRUG ENFORCEMENT ADMINISTRATION AND OFFICE OF THE INSPECTOR GENERAL; DONNA A. RODRIGUEZ, a/k/a Donna Ashe, Section Chief, Research and Analysis Staff of the Human Resources Division Drug Enforcement Administration,

Defendants.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Liam O'Grady, Senior District Judge. (1:16-cv-00060-LO-IDD)

Argued: December 10, 2020 Decided: April 8, 2021

Before WILKINSON and FLOYD, Circuit Judges, and Gina M. GROH, Chief United States District Judge for the Northern District of West Virginia, sitting by designation.

Affirmed by published opinion. Judge Floyd wrote the opinion in which Judge Wilkinson and Judge Groh joined.

ARGUED: Jackie Lynn White II, Kevin Edward Byrnes, FH+H, PLLC, Tysons, Virginia, for Appellants. Kimere Jane Kimball, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia, for Appellees. **ON BRIEF:** Rachel Leahey, FH+H, PLLC, Tysons, Virginia, for Appellants. G. Zachary Terwilliger, United States Attorney, Rebecca S. Levenson, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia, for Appellees.

FLOYD, Circuit Judge:

The Drug Enforcement Administration (DEA)[1] terminated the employment of Plaintiffs-Appellants Darek and Lisa Kitlinksi after they refused to

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[1] The U.S. Department of Justice (DOJ) and the U.S. Attorney General, rather than the DEA, are named as Defendants-Appellees. Because the DEA is the agency that engaged in the relevant conduct, we refer to Defendants-Appellees simply as "the DEA."

participate in an internal investigation into their own allegations of misconduct by the DEA. At the time of his termination, Darek was serving on active duty with the U.S. Coast Guard. The Kitlinskis contend that the DEA terminated Darek in violation of the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). The Kitlinskis further assert that the DEA terminated Lisa in retaliation for her support of Darek's USERRA claims against the DEA. The Kitlinskis also argue that the DEA retaliated against them for their prior protected activity in violation of Title VII of the Civil Rights Act of 1964.

The district court granted summary judgment in the DEA's favor. For the reasons set forth below, we affirm the judgment of the district court in all respects.

I.

Because the district court resolved this case in the DEA's favor on summary judgment, we view the facts in the light most favorable to the Kitlinskis. *See Wai Man Tom v. Hosp. Ventures LLC*, 980 F.3d 1027, 1036 (4th Cir. 2020).

A.

Darek Kitlinski began working for the DEA in 1998 as a special agent. In 2009, he became a supervisor in the San Diego Division, overseeing a group of agents responsible for court-authorized wire taps. Darek's spouse, Lisa Kitlinksi, joined the DEA in 1997 as a forensic chemist. In 2011, the DEA promoted

Lisa to a position at DEA headquarters in Arlington, Virginia.

Following Lisa's promotion, Darek sought to transfer within the DEA from San Diego to the District of Columbia area. Between March 2011 and June 2014, Darek submitted multiple transfer requests pursuant to the DEA's Married Core Series Transfer Policy (MCSTP). He also applied for various vacant positions within the DEA and sought a transfer based on medical hardship. The DEA denied Darek's transfer requests and selected other candidates for the vacant positions.

Meanwhile, in July 2011, Darek began serving on active duty with the U.S. Coast Guard and accordingly took a leave of absence from the DEA. He had previously served with the U.S. Coast Guard Reserves, requiring annual military commitments and several deployments. He was stationed on active duty in the District of Columbia, which allowed him to relocate to the District of Columbia area with Lisa.

Shortly after Darek was called to active duty in 2011, he began initiating various administrative proceedings challenging the DEA's adverse hiring decisions and denial of his transfer requests. He filed Equal Employment Opportunity (EEO) complaints alleging violations of Title VII.[2] He also filed several

[2] The first of Darek's formal EEO complaints resulted in a favorable March 2015 decision by the Equal Employment Opportunity Commission's Office of Federal Operations, which

USERRA appeals against the DEA with the Merit Systems Protection Board (MSPB), which adjudicates employee complaints filed under USERRA.[3]

On September 23, 2014, the Kitlinskis reported to DEA headquarters for a deposition arising out of one of Darek's EEO complaints. Upon their arrival, the Kitlinskis parked Lisa's car in the DEA's garage. Shortly after the Kitlinskis returned home from the deposition, Darek found a DEA-issued Blackberry device lodged between the windshield wipers and hood of Lisa's car. The Blackberry was later determined to belong to a DEA employee who worked in human resources. The Kitlinskis thereafter maintained that someone within the DEA planted the Blackberry in Lisa's car in order to track their whereabouts or record their conversations.

Three days later, Darek filed a complaint regarding the Blackberry incident with the Department of Justice's Office of the Inspector General (OIG), which declined to investigate Darek's allegations. OIG instead referred Darek to the Office of Professional Responsibility (OPR), which investigates allegations of misconduct by DEA employees. On October 2, 2014, Lisa reported the Blackberry incident to her

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determined that Darek had established a Title VII claim against the DEA.

[3] Darek submitted a final transfer request in December 2014. The DEA approved that request and assigned him to a vacant position in the DEA's Washington Field Division. In August 2015, the DEA reassigned Darek to a position at DEA headquarters in Arlington, Virginia.

supervisor, who also referred her to OPR. OPR opened an inquiry into the Blackberry incident on October 7, 2014.

As part of its investigation, OPR directed Lisa to appear for interviews in late October 2014. Lisa initially declined to appear for the interviews or turn over the Blackberry to OPR, citing advice from her lawyer that all matters regarding the Blackberry incident should be directed to him. Lisa eventually appeared for an interview with OPR on October 28, 2014. OPR began the interview by advising Lisa that she could be disciplined if she failed to respond to OPR's questions. Lisa declined to answer questions at various points during the interview, asserting spousal and attorney-client privileges. She also cited one of Darek's USERRA appeals against the DEA before the MSPB to explain her decision not to answer questions. Based on her conduct during the interview, OPR added Lisa as a subject of the investigation for her failure to cooperate.[4]

OPR then sought to schedule an interview with Darek, who was serving on active duty with the Coast Guard at the time. On November 20, 2014, OPR coordinated with U.S. Coast Guard Investigative

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[4] On November 5, 2014, Darek filed a complaint with the MSPB regarding the Blackberry incident and the ongoing OPR investigation. That action resulted in an appeal before the Federal Circuit, which upheld the MSPB's dismissal of three of Darek's USERRA claims but vacated and remanded for the MSPB to consider his fourth USERRA claim. *See Kitlinski v. Merit Sys. Prot. Bd.*, 857 F.3d 1374, 1379–82 (Fed. Cir. 2017).

Services to personally notify Darek of the interview. At the direction of Darek's temporary supervisor in the Coast Guard, Darek's colleague escorted OPR investigators to a conference room at his Coast Guard office to facilitate the in-person notification. Once the OPR investigators arrived at the conference room, they gave Darek a written notification directing him to appear at OPR for an interview on November 21, 2014. Darek declined to sign the written notification. The investigators informed Darek that failure to comply with the OPR directive could result in disciplinary action. OPR also sent an email to Darek's Coast Guard address directing him to appear for the scheduled interview on November 21, 2014. The email similarly advised Darek that failure to comply with the investigation could result in disciplinary action. Darek declined to attend the scheduled OPR interview. As a result, on December 1, 2014, OPR added Darek as a subject of the investigation for his failure to cooperate.

On December 12, 2014, OPR sent its investigative file to the DEA's Board of Professional Conduct. On May 27, 2015, Christopher Quaglino, the then-Chair of the Board, issued letters recommending the termination of the Kitlinskis' employment based on their conduct during the OPR investigation. The Kitlinskis submitted written and oral responses contesting this recommendation to Michael Bulgrin, a Supervisory Criminal Investigator with the DEA. In those responses, the Kitlinskis argued that OPR lacked the authority to interview Darek while he was serving on

active duty with the Coast Guard. On January 11, 2016, Bulgrin terminated the Kitlinskis' employment.

B.

The Kitlinskis filed this action against the DEA in the Eastern District of Virginia. The operative complaint asserted discrimination and retaliation claims by Darek for the denial of his transfer requests and adverse hiring decisions by the DEA, wrongful termination claims by Darek and Lisa under USERRA and Title VII, a request for attorneys' fees by Darek arising out of prior administrative proceedings, and various claims by Darek and Lisa related to the Blackberry incident.

During discovery, the Kitlinskis sought to depose Michael Horowitz, the Inspector General of the U.S. Department of Justice. The DEA moved for a protective order to preclude the deposition, which a magistrate judge granted. The Kitlinskis did not file an objection to the magistrate judge's ruling with the district court.

After the parties concluded briefing on summary judgment, the Kitlinskis filed a sur-reply brief and a motion to reopen discovery, which the district court denied. The district court subsequently granted summary judgment in the DEA's favor but did not address the Kitlinskis' wrongful termination claims. The Kitlinskis appealed.

In light of the district court's failure to rule on the Kitlinskis' wrongful termination claims, we dismissed the appeal for lack of jurisdiction and remanded for the district court to address those claims in the first instance. *Kitlinski v. DOJ*, 749 F. App'x 204, 205 (4th Cir. 2019) (per curiam).

On remand, the Kitlinskis filed a motion to forgo summary judgment proceedings on their wrongful termination claims under USERRA in favor of an evidentiary hearing or—in the alternative—to supplement their summary judgment briefing on their wrongful termination claims under both USERRA and Title VII. The district court denied the motion, declining to hold an evidentiary hearing and determining that no additional briefing was necessary.

The district court again granted summary judgment in the DEA's favor on all claims. As to the wrongful termination claims under Title VII, the court concluded that the Kitlinskis failed to offer any evidence of a causal connection between protected activity and their terminations. And as to the wrongful termination claims under USERRA, the court reasoned that "there was no military-based reason why Darek did not attend his [OPR] interview" and that Lisa could not show that the DEA terminated her employment based on any USERRA-protected activity. J.A. 2234.[5]

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[5] The Kitlinskis have abandoned the remaining claims in their complaint on appeal but raise several additional procedural challenges, which we discuss further below.

This appeal followed.

II.

The Kitlinskis argue that the district court erred in granting summary judgment on their wrongful termination claims under USERRA and Title VII. We review the district court's summary judgment ruling de novo. *Francis v. Booz, Allen & Hamilton, Inc.*, 452 F.3d 299, 302 (4th Cir. 2006). "Summary judgment is appropriate only when 'there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.'" *Evans v. Techs. Applications & Serv. Co.*, 80 F.3d 954, 958 (4th Cir. 1996) (quoting Fed. R. Civ. P. 56(c)).

A.

We begin with the Kitlinskis' wrongful termination claims under USERRA. "USERRA 'prohibit[s] discrimination against persons because of their service in the uniformed services.'" *Butts v. Prince William Cnty. Sch. Bd.*, 844 F.3d 424, 430 (4th Cir. 2016) (alteration in original) (quoting *Hill v. Michelin N. Am., Inc.*, 252 F.3d 307, 311 (4th Cir. 2001)); *see also* 38 U.S.C. § 4311. Courts "broadly construe[]" the statute "in favor of its military beneficiaries." *Francis*, 452 F.3d at 303. USERRA's anti-discrimination provision contains two distinct paths to liability.

First, § 4311(a) "broadly prohibits discrimination in the hiring, rehiring, and retaining of servicemembers."

Harwood v. Am. Airlines, Inc., 963 F.3d 408, 414 (4th Cir. 2020); *see also* 38 U.S.C. 4311(a). To succeed on a claim under § 4311(a), a servicemember must show "(1) that his employer took an adverse employment action against him; (2) that he had performed, applied to perform, or had an obligation to perform as a member in a uniformed service; and (3) that the employer's adverse action was taken 'on the basis of' that service, such that the service was 'a motivating factor' in the action." *Harwood*, 963 F.3d at 414–15 (quoting 38 U.S.C. § 431 1(a), (c)(1)).

Second, § 4311(b) "prohibits employers from 'tak[ing] any adverse employment action against any person because such person has taken an action to enforce a protection afforded any person under [USERRA], . . . or has exercised a right provided for in [USERRA].'" *Francis*, 452 F.3d at 302 (alterations in original) (quoting 38 U.S.C. § 4311(b)). To succeed on a claim under § 4311(b), an employee must show that (1) the employee engaged in protected activity under USERRA, and (2) that protected activity was "a motivating factor in the employer's action." 38 U.S.C. § 4311(c)(2).

1.

We first consider Darek's wrongful termination claims under USERRA. The Kitlinskis' complaint and briefing appear to raise a discrimination claim under § 4311(a) based on Darek's status as a servicemember and a retaliation claim under § 4311(b) based on

Darek's prior USERRA-protected activity. To succeed on those claims, the Kitlinskis must show, respectively, that either Darek's status as a servicemember or his prior protected activity was "a motivating factor" in his termination. *See* 38 U.S.C. § 4311(c). We agree with the district court that no reasonable factfinder could reach either conclusion.

On appeal, the Kitlinskis primarily argue that OPR lacked the authority to order Darek to appear for the interview while he was serving on active duty with the Coast Guard, and that USERRA protected Darek from the adverse consequences flowing from his decision not to comply with OPR's directive. In advancing that theory of liability, the Kitlinskis wander far afield of § 4311, which requires some evidence of discriminatory animus by a civilian employer. *See Harwood*, 963 F.3d at 414–15 ("Crucially, a plaintiff must prove that discrimination on the basis of service was a motivating factor in an employment action to recover under § 4311.").

The Kitlinskis offer no evidence that Darek's status as a servicemember in the Coast Guard was a motivating factor in the DEA's decision to terminate his employment. Nor can the Kitlinskis point to any evidence that Darek's prior USERRA-protected activity was a motivating factor in his termination. *See Escher v. BWXT Y-12, LLC*, 627 F.3d 1020, 1026 (6th Cir. 20 10) ("Protected status is a motivating factor if a truthful employer would list it, if asked, as one of the reasons for its decision."). Rather, any reasonable factfinder would conclude that the DEA terminated

Darek's employment because he refused to attend the OPR interview without any military-based reason for doing so. Indeed, there is no evidence that the Coast Guard ever objected to or sought to prevent Darek's participation in the investigation or that Darek's military service was ever an obstacle to his ability to attend the interview. The Kitlinskis therefore cannot claim that Darek's failure to attend the interview was at all "related to his military obligations" or "required by [his] military service." *McMillan v. DOJ*, 812 F.3d 1364, 1380–81 (Fed. Cir. 2016).

Moreover, the Coast Guard's enabling statute specifically contemplates a cooperative relationship with federal agencies. *See* 14 U.S.C. § 701(a) (providing that "[t]he Coast Guard may . . . utilize its personnel . . . to assist any Federal agency"). That cooperation becomes particularly important when a law-enforcement agency such as the DEA seeks assistance to investigate allegations of wrongdoing in its own ranks. And OPR did just that by working with the Coast Guard's investigative team to secure Darek's participation in the interview. Darek's refusal to attend the interview prevented OPR from speaking to a witness whose testimony was among the most relevant in its investigation, effectively tying the hands of the DEA to uncover wrongdoing within the agency.

Accordingly, we conclude that the Kitlinskis offer no evidence that Darek's military service or his prior USERRA-protected activity was a motivating factor in his termination. In reaching this conclusion, we

emphasize that USERRA "prohibit[s] discrimination against persons because of their service in the uniformed services." 38 U.S.C. § 4301(a)(3). It does not enable a servicemember to refuse to comply with his civilian employer's reasonable requests to participate in an internal investigation into his own allegations of wrongdoing for reasons unrelated to his military service and then claim protection from the adverse consequences flowing from that decision.

We therefore affirm the district court's grant of summary judgment to the DEA on Darek's wrongful termination claims under USERRA.

2.

We next consider Lisa's wrongful termination claim under USERRA. The Kitlinskis argue that the DEA terminated Lisa's employment in retaliation for her participation in or support of one of Darek's USERRA appeals before the MSPB. To succeed on Lisa's § 4311(b) claim, the Kitlinskis must show Lisa's USERRA-protected activity was "a motivating factor" in the DEA's decision to terminate her employment. 38 U.S.C. § 4311(c)(2).

Lisa declined to answer various questions during her OPR interview, citing marital and attorney-client privileges. She also referred to Darek's USERRA appeal before the MSPB to justify her decision not to respond to OPR's questions. The Kitlinskis therefore contend that § 4311(b) shielded Lisa from any adverse consequences resulting from her decision not to

answer OPR's questions. The district court concluded that "[a]ny USERRA-protected activities [Lisa] may have undertaken in support of Darek's USERRA claims do not excuse her disruptive and insubordinate behavior during the course of the [OPR] investigation and do not prevent DEA from taking disciplinary action against her." J.A. 2334–35. We agree.

To the extent that Lisa engaged in any protected activity under USERRA, the Kitlinskis provide no evidence showing that her activity was a motivating factor in the DEA's decision to terminate her employment. *See Escher*, 627 F.3d at 1026. The record supports only one reason behind the DEA's decision to terminate Lisa's employment: her conduct during the OPR investigation, which is not protected under USERRA. No reasonable factfinder could conclude that any USERRA-protected activity was a motivating factor in Lisa's termination.

On appeal, the Kitlinskis fault the district court for failing to apply the balancing test set forth in *Armstrong v. Index Journal Co.*, 647 F.2d 441, 448 (4th Cir. 1981). The test in *Armstrong* "is usually applied to determine whether opposition activity is protected under Title VII," and "balances the purpose of [Title VII] to protect persons engaging in reasonable activities opposing discrimination[ ] against Congress' desire not to prevent employers from legitimately disciplining their employees." *Laughlin v. Metro. Wash. Airports Auth.*, 149 F.3d 253, 257 (4th Cir. 1998). Even assuming that *Armstrong* applies here, we have little difficulty concluding that the DEA's interest in

ensuring its employees' full participation in internal investigations outweighs any interest Lisa had in promoting USERRA's nondiscriminatory purpose.

We therefore affirm the district court's grant of summary judgment to the DEA on Lisa's wrongful termination claim under USERRA.

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Accordingly, the district court properly granted summary judgment to the DEA on the Kitlinskis' wrongful termination claims under USERRA.[6]

B.

We turn to the Kitlinskis' wrongful termination claims under Title VII. The Kitlinskis contend that the DEA terminated them in retaliation for their prior protected activity under Title VII. To succeed on their retaliation claims, the Kitlinskis must show that "(1) [they] engaged in a protected activity; (2) the employer acted adversely against [them]; and (3) there was a causal connection between the protected activity and the asserted adverse action." *Strothers v. City of Laurel*, 895 F.3d 317, 327 (4th Cir. 2018) (quoting

[6] The Kitlinskis did not seek summary judgment on their wrongful termination claims under USERRA in the district court. Yet they now ask us to enter summary judgment in their favor for the first time on appeal. In light of our conclusion that the district court properly granted summary judgment in the DEA's favor on those claims, we decline to enter summary judgment for the Kitlinskis.

Ziskie v. Mineta, 547 F.3d 220, 229 (4th Cir. 2008)).[7] The district court concluded that the Kitlinskis failed to offer any evidence of a causal connection between their protected activity and their terminations.

We agree.[8] No reasonable factfinder could conclude that the DEA terminated the Kitlinskis' employment in retaliation for engaging in protected activity. As we have explained, the Kitlinskis offer no evidence showing that the DEA terminated their employment for any reason other than their conduct during the OPR investigation. And OPR initiated that investigation at Lisa's request for the nondiscriminatory purpose of investigating the Kitlinskis' own allegations of misconduct. Accordingly, we affirm the district court's grant of summary judgment to the DEA

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[7] The Supreme Court recently considered the causation standard applicable to the federal-sector provision of the Age Discrimination in Employment Act of 1967 (ADEA). *See Babb v. Wilkie*, 140 S. Ct. 1168, 1172–74 (2020); *see also* 29 U.S.C. § 633a(a). In *Babb*, the Court held that "under § 633a(a), age must be the but-for cause of *differential* treatment, not . . . a but-for cause of the *ultimate* decision." 140 S. Ct. at 1174. We need not decide *Babb*'s applicability in the Title VII context here. The Kitlinskis do not point to any evidence that they suffered any differential treatment based on their USERRA-protected activity, so their Title VII claim fails even under *Babb*'s lower causation standard.

[8] The DEA argues that the Kitlinskis waived their Title VII claim by failing to oppose summary judgment on that claim in the district court. Regardless, the claim fails even under de novo review.

on the Kitlinskis' wrongful termination claims under Title VII.[9]

III.

The Kitlinskis raise several additional arguments in this appeal, which we can quickly resolve.

First, the Kitlinskis argue that the district court erred in declining to hold an evidentiary hearing on their wrongful termination claims under USERRA. In its order denying the Kitlinskis' motion to hold an evidentiary hearing, the district court mistakenly stated that it had already ruled on the Kitlinskis' claims, citing to its pre-remand opinion granting summary judgment in DEA's favor. Shortly after issuing that order, the court issued an amended opinion addressing the USERRA claims.

The Kitlinskis contend that the district court's citation to its pre-remand decision constitutes reversible error. We review the district court's decision to rule on summary judgment without holding a hearing "only for an abuse of discretion." *Cray Commc'ns, Inc. v. Novatel Comput. Sys., Inc.*, 33 F.3d 390, 396 (4th Cir. 1994). The Federal Rules of Civil

[9] The Kitlinskis also advance the alternative theory that the OPR investigation itself amounted to retaliation in violation of USERRA and Title VII. But they do not point to any evidence showing that the DEA conducted the OPR investigation with retaliatory animus based on their prior protected activity. Instead, any reasonable factfinder would conclude that OPR opened the investigation at Lisa's request to investigate the Kitlinskis' own allegations of misconduct.

Procedure and the district court's local rules expressly authorized the court to rule without holding a hearing. *See* Fed. R. Civ. P. 78(b) ("By rule or order, the court may provide for submitting and determining motions on briefs, without oral hearings."); E.D. Va. Loc. Civ. R. 7(J) ("In accordance with Fed. R. Civ. P. 78, the Court may rule upon motions without an oral hearing."). The Kitlinskis offer no argument explaining how the district court abused its discretion, and we see none here. We affirm the district court's decision to rule on the DEA's motion for summary judgment without holding a hearing.

Second, the Kitlinskis contend that the district court improperly denied their request to reopen discovery. In their sur-reply brief, the Kitlinskis asked the district court to reopen discovery based on internal DEA memoranda that the Kitlinskis claimed to have received only several days prior. They argued that the memoranda, which described sensitive software under consideration by the DEA, supported their theory of the Blackberry incident. The district court concluded that the memoranda were "entirely irrelevant" to the case, relying on the DEA's representations that it was not using the software at the time of the incident. J.A. 2271.

"We afford substantial discretion to a district court in managing discovery and review discovery rulings only for abuse of discretion." *United States ex rel. Becker v. Westinghouse Savannah River Co.*, 305 F.3d 284, 290 (4th Cir. 2002). We see no abuse of discretion in the district court's careful consideration of the

memoranda and the parties' arguments. And given the DEA's representations to the district court that it was not using the software during the relevant time period, we decline to second-guess the court's conclusion that the memoranda were not relevant to the Kitlinskis' claims. Accordingly, we affirm the denial of the Kitlinskis' motion to reopen discovery.

Finally, the Kitlinskis challenge the magistrate judge's decision to grant the DEA's motion for a protective order precluding them from deposing Inspector General Horowitz. The Kitlinskis, however, did not file an objection to the magistrate judge's ruling with the district court. *See* Fed. R. Civ. P. 72(a) (providing that parties "may serve and file objections" to a magistrate judge's order on a nondispositive pretrial matter "within 14 days after being served with a copy"); *Wells v. Shriners Hosp.*, 109 F.3d 198, 199 (4th Cir. 1997) ("In this circuit, as in others, 'a party "may" file objections within ten days or he may not, as he chooses, but he "shall" do so if he wishes further consideration.'" (quoting *Park Motor Mart v. Ford Motor Co.*, 616 F.2d 603, 605 (1st Cir. 1980))). Because the Kitlinskis failed to object to the magistrate judge's ruling, they "ha[ve] waived [their] right to any further review." *Solis v. Malkani*, 638 F.3d 269, 274 (4th Cir. 2011). We therefore affirm the magistrate judge's decision to grant the DEA's motion for a protective order.

IV.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

DAREK KITLINSKI AND LISA KITLINSKI, *Plaintiffs*, v. WILLIAM BARR, et al., *Defendants*.	Civil No. 1:16-cv-60 Hon. Liam O'Grady Hon. Ivan D. Davis

AMENDED MEMORANDUM OPINION & ORDER

This matter comes before the Court on Defendants' Motion for Summary Judgment (Dkt. No. 101). For the following reasons, the Court granted the Motion.

I. BACKGROUND

Plaintiffs Darek and Lisa[1] Kitlinski are former employees at the Drug Enforcement Administration ("DEA"). Darek joined DEA in 1998 and Lisa joined in 1997. In 2010, Darek was a supervisory special agent in DEA's San Diego Field Office and Lisa was a supervisor and forensic chemist in the Southwest Laboratory in Vista, California. Lisa subsequently applied for

[1] Because both Plaintiffs have the surname "Kitlinski," in the interest of clarity and space, the Court will refer to Plaintiffs by their first names where appropriate.

a position as a Program Manager in the Quality Assurance Section of the Office of Forensic Sciences in DEA headquarters in Arlington, Virginia. She was selected for the position effective July 3, 2011. Shortly thereafter, Darek began to apply to DEA's Career Board for a transfer to the Washington, D.C. area pursuant to DEA's Married Core Series Transfer Policy ("MCSTP"). Darek ultimately filed a multitude of transfer requests, which have been addressed at length in the pleadings and in prior Orders of this Court. Thus the Court will not review each job application in detail here. It may be useful, however, to provide brief overview of the circumstances which gave rise to this action.

From March 1, 2011 to June 4, 2014, Darek applied for transfer to the D.C. area seven times. Darek filed his first request to transfer on March 1, 2011. The request was denied by the Career Board on April 27, 2011. Darek submitted the transfer request for reconsideration on June 20, 2011. This request was denied by the Career Board on June 29, 2011. On August 2, 2011, Darek submitted an informal Equal Employment Opportunity ("EEO") complaint, claiming that DEA had denied his first two MCSTP requests because of his gender.

On September 1, 2011, Darek filed a formal EEO complaint with DEA, again claiming that DEA had denied his transfer requests due to his gender. The DEA investigated this complaint and issued a decision on June 12, 2012 denying all Darek's claims. Darek appealed the decision to the Office of Federal Operations

("OFO"). On March 9, 2015, the OFO issued a decision finding that DEA had failed to articulate a legitimate, non-discriminatory reason for denying Darek's transfer requests under the MCSTP. OFO denied DEA's request for reconsideration on August 11, 2015.

In January, May, and September of 2012, Darek submitted his third, fourth, and fifth MCSTP requests. The DEA Career Board denied all these requests. Darek subsequently filed an informal EEO complaint, claiming that his fourth and fifth requests were denied because DEA was retaliating against him because of prior protected activity. He alleged that members of the Career Board knew of Darek's protected activity when he submitted his fourth and fifth transfer requests.

In June of 2014, Darek filed another MCSTP request for transfer to Washington, D.C. As part of this application, Darek claimed a need to be transferred under the Rehabilitation Act due to medical hardship. He claimed he had injured his Achilles tendon and needed ongoing care in Washington, D.C. DEA denied this request, concluding that comparable care could be provided for Darek in San Diego. In August 2014, Darek filed an informal complaint of gender discrimination and reprisal based on the denial of this transfer request.

On September 23, 2014, Darek went to DEA Headquarters for a deposition regarding one of his EEO claims. Darek and Lisa traveled together, and parked their car in the DEA Headquarters garage. After the

deposition, they returned to their home in Alexandria, Virginia. They claim that when they returned home, Darek discovered a Blackberry cellular telephone wedged under the hood of their vehicle. The phone was ultimately determined to belong to Human Resources Section Chief Donna Rodriguez. Lisa contacted DEA OPR to report the discovered phone. OPR asked Lisa to appear for an interview regarding the phone. Lisa initially refused to appear. When she did appear, she refused to answer questions, asserting marital communication privilege and attorney-client privilege. DEA instructed Darek to appear for an interview regarding the Blackberry, but he refused. Ultimately, the DEA terminated Plaintiffs for their refusal to cooperate with the internal investigation.

Plaintiffs brought this action before this Court in January 2016, alleging a series of violations in eleven counts. This Court previously dismissed Plaintiffs' Counts 2, 8, and 9. *See* Dkt. No. 51 (dismissing Counts 8 and 9); Dkt. No. 53 (dismissing Count 2). On August 1, 2017, Defendants moved for summary judgment on Counts 1, 3-7, 10, and 11.

II. LEGAL STANDARD

Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A genuine issue of material fact exists where, after reviewing the record as a whole, a court finds that a reasonable jury could return a verdict for

the nonmoving party." *McAirlaids, Inc. v. Kimberly-Clark Corp.*, 756 F.3d 307, 310 (4th Cir. 2010). "It is an axiom that in ruling on a motion for summary judgment, the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* (alteration omitted) (quoting *Tolan v. Cotton*, 134 S. Ct. 1861, 1863 (2014) (per curiam)) (internal quotation marks omitted). Although the Court "must draw all reasonable inferences in the light most favorable to the nonmoving party, it is ultimately the nonmovant's burden to persuade [the Court] that there is indeed a dispute of material fact." *CoreTel Va., LLC v. Verizon Va., LLC*, 752 F.3d 364, 370 (4th Cir. 2014). That showing requires "more than a scintilla of evidence – and not merely conclusory allegations or speculation – upon which a jury could properly find in its favor." *Id.*

The function of the Court at the summary judgment stage is not to determine the truth of a matter or to weigh credibility, but to determine whether there is any genuine issue of fact that can only properly be resolved by a finder of fact because it could reasonably be resolved in favor of either party. *JKC Holding Co. LLC v. Washington Sport Ventures, Inc.*, 264 F.3d 459, 465 (4th Cir. 2001) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). One of the principle purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses. *Id.* (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986)).

III. ANALYSIS

As an initial matter, Plaintiffs failed to respond sufficiently to many facts set forth in Defendants' Statement of Undisputed Material Facts. The Local Rules instruct that a party responding to a Motion for Summary Judgment "shall include a specifically captioned section listing all material facts as to which it is contended that there exists a genuine issue necessary to be litigated and *citing the parts of the record relied on to support the facts alleged to be in dispute."* Local. Civ. R. 56(B) (emphasis added). In determining a motion for summary judgment, the Court may assume that facts identified by the moving party in its listing of material facts are admitted, unless such a fact is controverted in the statement of genuine issues filed in opposition to the motion. The Fourth Circuit has explained that a party opposing a motion for summary judgment "may not rest upon the mere allegations or denials of his pleadings," but must "set forth specific facts showing there is a genuine issue for trial." *Bouchat v. Baltimore Ravens Football Club, Inc.*, 346 F.3d 514, 522 (4th Cir. 2003). Additionally, "mere speculation by the non-movant cannot create a genuine issue of material fact." *JKC Holding Co.*, 264 F.3d at 465.

Plaintiffs do not acknowledge, let alone contest, more than a dozen of the material facts identified in Defendants' motion. Facts unacknowledged are deemed admitted. Plaintiffs also superficially contest several facts in Defendants' motion, but cite no record evidence to support the alleged dispute. Facts

contested with reference only to Plaintiffs' speculation are deemed admitted. Plaintiffs also purport to contest certain of Defendants' facts, but offer only supplemental information, not contradictory information, in support of their opposition. Facts not truly contested are deemed admitted.

a. Title VII Claims

Plaintiffs state several causes of action under Title VII, alleging in various counts that Darek was subject to gender discrimination and retaliation for protected activity. Plaintiffs contend that Darek suffered adverse employment actions when he was denied transfers to different positions at the same grade level or position. Further, Plaintiffs contend that Darek was treated differently compared to similarly situated women on the basis of his gender when the DEA denied his transfer requests.

i. Title VII Gender Discrimination

To establish a prima facie case of disparate treatment based on gender, a plaintiff must establish (1) membership in a protected class; (2) satisfactory job performance; (3) an adverse employment action; and (4) that similarly situated employees outside the protected class received more favorable treatment. *See Gerner v. Cnty. of Chesterfield*, 674 F.3d 264, 266 (4th Cir. 2012). Plaintiffs cannot show that Defendants took an adverse employment action against them or that

Plaintiffs were treated differently compared to similarly situated employees.

1. Transfer as an Adverse Employment Action

To constitute an "adverse employment action," the alleged action must "adversely affect the terms, conditions, or benefits of the plaintiff's employment." *See James v. Booz-Allen & Hamilton, Inc.*, 368 F.3d 371, 375 (4th Cir. 2004). An employer's "mere refusal to grant a transfer that an employee desires does not qualify as an adverse employment action unless the decision had some significant detrimental effect on the employee." *Duong v. Bank of Am., NA.*, No. 1:15-CV-784, 2016 WL 899273, at *3 (E.D. Va. Mar. 2, 2016) (citing *Wagstaff v. City of Durham*, 233 F. Supp. 2d 739, 744 (M.D.N.C. 2002), *aff'd*, 70 Fed. App'x 725 (4th Cir. 2003)); *see also Hinton v. Virginia Union Univ.*, 185 F. Supp. 3d 807, 819 (E.D. Va. 2016) ("Title VII protects against adverse employment actions, not all workplace injustices."). Detrimental effects include reduced pay, a diminished opportunity for promotion, less responsibility, or a lower rank. *See id; see also Stewart v. Ashcroft*, 211 F. Supp. 2d 166, 174-75 (D.D.C. 2002) (holding that a refusal to transfer is not an adverse employment action when wages, promotional opportunity, and job responsibilities remain unaffected).

Here, Darek applied only for transfers, as Plaintiffs themselves admit. *See* Dkt. No. 32 at 1132 ("Mr. Kitlinski also alleged that he had been denied certain

lateral positions"); ¶ 48 ("all these positions were lateral positions"); ¶ 68 ("Mr. Kitlinski applied for this GS-14, Supervisory position as a lateral transfer"). Plaintiffs have produced no evidence that the denial of those transfers had a significant detrimental effect on Plaintiffs, other than monetary costs incurred because of Plaintiffs' own premature commitment to housing and educational opportunities in the D.C. area. *See* Dkt. No. 113 at 15-16. Although it is unfortunate that Plaintiffs were separated upon Lisa's acceptance of the Virginia position, Plaintiffs' marital status creates no right to geographically adjacent employment. The MCSTP provides that "*To the extent practical, and consistent with the needs of the Agency*, DEA will assign married couples in core occupations . . . to the same metropolitan area." *See* Dkt. 103 at 5; DEX 2 at 9. Plaintiffs were deprived of no right when Darek's transfer requests were denied, and Plaintiffs' resulting separation is not a detrimental effect for purposes of this analysis. Thus, considering the facts on the record, the refusal to transfer Darek to a position in the D.C. area was not an adverse employment action because there was no significant detrimental effect to him.

2. Similarly Situated Employees

Plaintiffs have also failed to show a genuine issue of material fact exists as to whether Darek was treated less favorably than similarly situated employees outside the protected class. As Defendants note, the relevant comparators to Darek would be female supervisory core employees, not female core employees

generally. *See*, *e.g.*, *Patterson v. Avery Dennison Corp.*, 281 F.3d 676, 680 (7th Cir. 2002) (noting that whether employees are "similarly situated" depends on whether the employees were "subject to the same standards," and had "comparable experience, education, and qualifications," and holding that two employees were not similarly situated where they had different levels of experience and job responsibilities); *see also* 45B Am. Jur. 2d Job Discrimination § 941 ("To meet the burden of demonstrating that another employee is similarly situated, a plaintiff must show that there is someone who is directly comparable to the plaintiff in all material respects."). Non-supervisory DEA employees are not similarly situated to supervisory DEA employees like Darek because transfers of supervisors are more difficult to accomplish due to the limited number of supervisory level positions within each DEA field office. *See* Dkt. 103 at 22.

In their Opposition to Defendants' Motion for Summary Judgment, Plaintiffs claim to have identified "supervisory personnel who were granted requests that were primarily if not exclusively female." Dkt. 113 at 17. However, Plaintiffs cite only PEX 17, which is Defendants' Answer & Affirmative Defenses to Plaintiffs' Amended Complaint. Plaintiffs do not explain how this document supports their assertion, and the connection is not clear to the Court. Defendants, in contrast, have provided evidence that between 2011 and 2014, no female supervisory employees received a transfer based on an MCSTP request. *See* DEX 113 at 6. Because Plaintiffs have failed to show genuine

issues of material fact as to whether Darek suffered adverse employment action, or as to whether similarly-situated female agents were treated differently, summary judgment for Defendants is appropriate.

Moreover, Plaintiffs failed to provide evidence to contradict the legitimate, non-retaliatory reasons offered by Defendants as explanation for their denial of Darek's requests: that Darek had not yet met the four year field office rotational requirement to be transferred to headquarters, and that other, better qualified candidates had also applied for those positions. *See* Dkt. No. 103 at 21-24. Plaintiffs ostensibly contest Defendants' material facts on this point, but cite only PEX 15 as support: a letter from Darek to his Congressman describing the circumstances of Darek's request for a transfer to the D.C. area. *See* Dkt. 113 at TT 7-8. Because this letter is merely Darek's recounting of his version of events, the support does not go beyond the "mere allegations" offered in the pleadings. Plaintiffs describe Defendants' explanation for the denials as "pretextual" and describe the application of general agency policy as "irrelevant" because "the whole purpose of the MCSTP is to address unique situations." *See* Dkt. No. 113 at 18-19. However, Plaintiffs offer not a shred of evidence to substantiate their claims, so a jury could not reasonably decide in Plaintiffs' favor. *Id.*

ii. Title VII Retaliation

Plaintiffs also allege that Defendants violated Title VII by denying Darek's MCSTP requests and his medical hardship transfer requests as a form of retaliation for Darek's prior protected EEO activity. *See* Dkt. 32 at ¶ 257. To establish a prima facie case of retaliation, a plaintiff must show that he (1) engaged in a protected activity under Title VII; (2) his employer acted adversely against him; and (3) there was a causal connection between the protected activity and the adverse action. *See Ziskie v. Mineta*, 547 F.3d 220, 229 (4th Cir. 2008).

Plaintiffs cannot show a causal connection between the protected activity and the allegedly adverse actions, because they have failed to provide evidence to counter Defendants' legitimate, non-retaliatory reasons for denying Darek's many transfer requests. For each vacancy, Defendants have explained why Darek's application was denied (either because the candidate who was ultimately selected had equal or superior qualifications to Darek or, in the case of the medical hardship transfer request, because DEA saw no reason why Darek could not obtain physical therapy services somewhere in California). *See* Dkt. 103 at 27-35; *see also Carrier-Tal v. McHugh*, No. 2:14cv626, 2016 WL 9016633 at *17 (E.D. Va. Apr. 15, 2016) ("[A] company's hiring decision based on an evaluation of the qualifications of competing candidates is entitled to substantial deference."). Plaintiff has failed to cite to record evidence to contest these points. Given the record as it stands, Plaintiffs have failed to show a causal

connection between Darek's protected activity and the allegedly adverse actions, and their retaliation claim must fail.

b. Violation of the Rehabilitation Act

Plaintiffs also allege that Defendants violated the Rehabilitation Act when they denied Darek's transfer request based on medical hardship. *See* Dkt. 32 at ill 260, 265. In a June 4, 2014 request, Darek requested a job transfer due to medical hardship arising from an injury to his Achilles tendon. *See id.* at ¶ 106. He requested transfer to the Washington, D.C. area to ensure "continuity of specialized medical care" with his D.C.-based orthopedic surgeon. *See* DEX 17 at 83.

To establish a Rehabilitation Act violation, a plaintiff must demonstrate that (1) he qualifies as an "individual with a disability" as defined in 29 U.S.C. § 705(20); (2) that his employer had notice of his disability; (3) that he could perform the essential functions of his job with a reasonable accommodation; and (4) that the employer refused to make any reasonable accommodation. *See* 29 U.S.C. § 794(a); *Reyazuddin v. Montgomery Cnty.*, 789 F.3d 407, 414 (4th Cir. 2015). The plaintiff bears the initial burden of proposing an accommodation and showing that the accommodation is objectively reasonable, and an employer may reasonably accommodate an employee without providing the exact accommodation that the employee requested. *Reyazuddin*, 789 F.3d at 415-16. Here, Plaintiffs have failed to show that any genuine issue of material fact

remains as to whether the denial of Darek's transfer request constituted a failure to reasonably accommodate. Darek cannot show that it would have been "objectively reasonable" for DEA to transfer him across the country to attend physical therapy. This is particularly true, as Defendants note, in light of Darek's failure to research treatment options in San Diego. *See* Dkt. 103 at 26; DEX 118 ¶ 11; DEX 5 at 167:25-168:18.

c. Wrongful Termination Claims

Plaintiffs allege that they were wrongfully terminated from their positions in DEA in retaliation for their pending EEO complaints against the Agency, and in violation of USERRA. Defendants claim that Plaintiffs were terminated for violating DEA's Standards of Conduct by failing to cooperate with DEA's internal investigation into Plaintiffs' allegations that a DEA cell phone had been planted on their vehicle.

i. Title VII Wrongful Termination Claim

A successful Title VII wrongful termination claim requires a plaintiff to demonstrate her termination was motivated by her employer's desire to retaliate against her for engaging in protected activity. *Villa v. CavaMezze Grill, LLC*, 858 F.3d 896, 903 (4th Cir. 2017). This desire to retaliate must be the "but-for cause of the challenged employment action." *Id.* at 900.

Plaintiffs here have not provided evidence that there was a causal connection between their protected

activity and their terminations. Further, they do not argue that Defendants' stated reason for terminating Plaintiffs for not cooperating with the investigation was pretextual. Therefore, Plaintiffs' Title VII wrongful termination claim is not supported by the evidence.

ii. USERRA Wrongful Termination Claim

To establish a claim of retaliation under USERRA, a plaintiff must (1) demonstrate that the employee exercised his rights under USERRA and (2) that his protected activities were a motivating factor in the adverse employment action. 38 U.S.C. § 4311(c); *Bunting v. Town of Ocean City*, 409 F. App'x 693,696 (4th Cir. 2011). The USERRA-protected activity need not be the only motivating factor for the adverse employment decision, instead it only must be "one of the factors that a truthful employer would list if asked for the reasons for its decision." *Bunting*, 409 F. App'x at 696. If the plaintiff can establish these elements, the defendant must show by a preponderance of the evidence that the employer would have taken the same action without regard to the protected activities. *Id* at 695.

Here, Defendants have stated the considerations that went into Plaintiffs' firings were their refusal to cooperate with the OPR investigation, their years of service to the agency and performance, and the fact they were in supervisory positions and thus must be role models for others. DEX 102 at 56:8-16, 213:3-218:3, 220:22-221:11; DEX 105; DEX 106. Plaintiffs argue any actions that Defendants construed as refusals

to cooperate with the OPR investigation were actually USERRA-protected activities and thus cannot rightly be motivating factors for their terminations.[2]

However, Plaintiffs have failed to show any USERRA-protected activity was a motivating factor in Darek's termination. Plaintiffs argue Darek's absence from his interview was activity protected by USERRA. In support, Plaintiffs cite *McMillan v. Department of Justice*, which states, "military service is a motivating factor for adverse employment action if the employer relied on, took into account, considered, or conditioned its decision on the employee's military-related absence or obligation." 812 F.3d 1364 (Fed. Cir. 2012). Plaintiffs claim that Darek's failure to appear for his interview was because he was on active duty with the Coast Guard. Therefore, under Plaintiffs' logic, Darek's alleged refusal to cooperate with the investigation was a military-related absence, and thus his military service was an improper motivating factor for his termination, in violation of USERRA.

However, *McMillan* is inapposite. Darek's absence cannot be fairly tied to his military service because there was no military-based reason why Darek did not attend his interview with DEA. Indeed, the record shows that Darek's Coast Guard superiors had no objection to Darek attending the DEA interview. *See* DEX

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[2] As the Federal Circuit held, the OPR investigation itself into the Blackberry incident was not retaliation under the USERRA, so this Court will not consider it as such in this analysis. *Kitlinski v. Merit Sys. Prot. Bd.*, 857 F.3d 1374, 1382 (Fed. Cir. 2017).

89 at 8. Because it was Darek's choice to refuse to attend the interview, not a military obligation or military-related absence, Darek's refusal to cooperate with the investigation is not protected activity under the USERRA.

Likewise, Plaintiffs have failed to demonstrate any USERRA-protected activity was a motivating factor in Lisa's termination. Plaintiffs allege that Lisa was terminated because of her support for Darek's USERRA claims. Defendants, on the other hand, assert Lisa was terminated for refusing to cooperate with an internal investigation as DEA policy required her to do.

Lisa refused to answer questions during her OIG interview, asserting marital privilege and attorney-client privilege. Engaging in a protected activity cannot "immunize insubordinate, disruptive, or nonproductive behavior at work. An employer must retain the power to discipline and discharge disobedient employees." *Armstrong v. Index Journal*, 647 F.2d 441, 448 (4th Cir. 1981). Participating in a protected activity does not shield a person from a reasonable request by his employer. *Wells v. Gates*, 336 F. App'x 378, 384 (4th Cir. 2009). Here, Lisa initiated the investigation and therefore it is reasonable that DEA would have expected her to cooperate fully with the investigation. Any USERRA-protected activities she may have undertaken in support of Darek's USERRA claims do not excuse her disruptive and insubordinate behavior during the course of the OIG investigation and do not

prevent DEA from taking disciplinary action against her.

Because neither Plaintiffs' Title VII wrongful termination claims nor Plaintiffs' USERRA wrongful termination claims are supported by the evidence, summary judgment on these claims are granted in favor of Defendants.

d. Privacy Act and Freedom of Information Act Claims

Plaintiffs also allege that OIG inappropriately redacted files which the agency produced in response to Plaintiffs' Privacy Act and Freedom of Information Act ("FOIA") requests for "copies of all record (sic) you have in your possession about me." *See* Dkt. 32 at 111 169-71. In this same claim, Plaintiffs contend that OIG improperly disclosed certain information about Plaintiffs to DEA, in violation of the Privacy Act. *Id.* at In 179, 318. Plaintiffs contend that OIG's disclosure prompted the DEA to fire Plaintiffs, thereby causing them to suffer a cognizable harm.

i. *Requests for Access to Files*

1. Investigative Files

The Privacy Act provides that "upon request by any individual to gain access to his record . . . permit him . . . to review the record." 5 U.S.C. § 552a(d)(1). The Privacy Act permits plaintiffs to bring a civil action to "enjoin the agency from withholding the records and

order the production . . . improperly withheld." *Id.* *§* 552a(g)(1)(B)(3)(A). Similarly, FOIA provides that "each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person." 5 U.S.C. § 552(a)(3).

The Privacy Act authorizes agencies to exempt criminal investigative record systems maintained by the agency. *See Aquino v. Stone*, 957 F.2d 139, 141-42 (4th Cir. 1992). The record systems must be maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws. *Id* Because the OIG's principal function is law enforcement, it may issue rules exempting investigatory material compiled for law enforcement purposes from disclosure pursuant to the Privacy Act. *See Seldowitz v. Office of Inspector Gen., U.S. Dep't of State*, 238 F.3d 414, 2000 WL 1742098 at *3 (4th Cir. 2000). OIG has properly exempted its investigatory files through proper notice in the Federal Register, therefore has discretion to grant access to investigatory records on a case-by-case basis. *See id.* at *4. OIG acted pursuant to that authority when it permitted Plaintiffs to access some records while redacting certain sections, and Plaintiffs cannot establish a Privacy Act violation in said redactions.

Plaintiffs also claim that Defendants' improper redactions constitute a FOIA violation; Plaintiffs assert that *any* redactions were improper because Plaintiffs

requested documents about themselves. Dkt. 32 at ¶ 317. However, courts have made clear that "the identity of the requesting party" and the "purposes for which the request for information is made" have no bearing on the merits of a FOIA request. *See Neely v. FBI*, 208 F.3d 461, 463-64 (4th Cir. 2000). Plaintiffs do not contest this point. *See* Dkt. No. 113 at 34-37. Defendants are thus entitled to summary judgment on the Privacy Act and FOIA claims arising from the allegedly improper redactions.

2. Employment Applications

Plaintiffs also seek all of Darek's prior employment records pursuant to the Privacy Act. The Act requires the disclosure of records from a "system of records," from which "information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual." *See* 5 U.S.C. § 552a(a)(5). Because Darek's applications were archived only in a file system retrievable by the vacancy number of the announcement, and not by his name, they fall outside of the scope of the Act. *See* DEX 114 at ¶¶ 3-4; *Paige v. Drug Enforcement Admin.*, 665 F.3d 1355, 1359 (D.C. Cir. 2012) ("A system of records exists only if the information contained within the body of material is both *retrievable* by personal identifier and actually *retrieved* by personal identifier."). Plaintiffs do not contest this fact, but simply suggest that Defendants should have attempted to search for Darek's records anyway. *See* Dkt.

No. 113 at 35. This is insufficient to establish a Privacy Act violation.

Moreover, any claim against Defendants for failure to provide Darek's employment applications is mooted by the fact that Plaintiffs received those employment applications as part of discovery. *See* 5 U.S.C. § 552a(g)(3)(A) (the only remedy available for a claim alleging lack of access to Privacy Act-protected records is injunctive relief providing access to the requested records).

ii. Disclosure of Investigation to DEA

Finally, Plaintiffs have alleged that OIG wrongfully disclosed to DEA Plaintiffs' complaint regarding the Blackberry phone allegedly planted in Plaintiffs' car. Plaintiffs characterize this purported transmission of information as supportive of Plaintiffs' allegations that DEA derailed OIG's efforts to independently investigate Plaintiffs' allegations. *See* Dkt. No. 32 at ¶¶ 312-13.

To state a claim of improper disclosure under the Privacy Act, a plaintiff must prove: (1) a violation of a Privacy Act provision; (2) that the agency's decision was intentional or willful; (3) that the violation caused adverse effects; and (4) that the plaintiff suffered actual damages. *See Thompson v. Dep't of State*, 400 F. Supp. 2d 1, 8 (D.D.C. 2005). Plaintiffs have failed to produce any evidence that OIG informed DEA that Plaintiffs had filed a complaint with OIG before Plaintiffs themselves contacted DEA; indeed, ample record

evidence suggests the contrary. *See* DEX 74 at 90:16-91:4; DEX 75 at 34:10-36:18; DEX 79. Because Plaintiffs have not presented any evidence other than their own speculation to support their claims of Privacy Act violations, no reasonable juror could find in Plaintiffs' favor on this issue. *See* Dkt. 113 at 38-40 (citing to not a single piece of record evidence in support of their allegations that OIG turned over Plaintiffs' Privacy Act information to DEA).

IV. CONCLUSION

For these reasons, the Court **GRANTED** Defendants' Motion for Summary Judgment (Dkt. No. 101). Judgment shall issue through a separate order.

It is **SO ORDERED**.

April 10, 2019
Alexandria, Virginia

/s/ Liam O'Grady
Liam O'Grady
United States District Judge

FILED: June 4, 2021

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-1621
(1: 16-cv-00060-LO-IDD)

DAREK J. KITLINSKI; LISA M. KITLINSKI

Plaintiffs – Appellants

v.

UNITED STATES DEPARTMENT OF JUSTICE, Drug Enforcement Administration As to Privacy Act Claims; MERRICK B. GARLAND, Attorney General

Defendants – Appellees

and

OTHER UNNAMED EMPLOYEES OF THE U.S. DEPARTMENT OF JUSTICE, DRUG ENFORCEMENT ADMINISTRATION AND OFFICE OF THE INSPECTOR GENERAL; DONNA A. RODRIGUEZ, a/k/a Donna Ashe, Section Chief, Research and Analysis Staff of the Human Resources Division Drug Enforcement Administration

Defendants

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Wilkinson, Judge Floyd, and Chief United States District Judge Groh.

For the Court

/s/ Patricia S. Connor, Clerk