No. _____

In The
Supreme Court of the United States

DAREK J. KITLINSKI; LISA M. KITLINSKI,

Petitioners,

v.

UNITED STATES DEPARTMENT OF JUSTICE, DRUG ENFORCEMENT ADMINISTRATION; MERRICK B. GARLAND, ATTORNEY GENERAL,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether, to shift the burden of proof to the employer in a Uniformed Services Employment and Reemployment Rights Act (USERRA) case, the employee must prove simply that protected status or activity was a motivating factor—as provided in USERRA's text—or instead, as required by several circuits, including the Fourth Circuit, prove that the employer had hostility to military service or an undefined "discriminatory animus."

II. Whether a federal employee's right to retained counsel includes having that counsel present when that employee has pending litigation against their federal employer and when the employer conducts an interview of the employee that a reasonable person would believe related back to the pending litigation.

PARTIES TO THE PROCEEDINGS

Petitioners in this Court are Darek J. Kitlinski and Lisa M. Kitlinski, who were plaintiffs in the district court and plaintiff-appellants in the court of appeals.

Respondents in this Court are the United States Department of Justice, Drug Enforcement Administration and Merrick B. Garland, Attorney General, which were defendants in the district court and defendant-appellees in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Darek J. Kitlinski and Lisa M. Kitlinski are individuals.

STATEMENT OF RELATED CASES

This case arises from the following proceedings: *Kitlinski v. U.S. Dep't of Just.*, 123 M.S.P.R. 41 (M.S.P.B. 2015); *Kitlinski v. U.S. Dep't of Just.*, 16-CV-60, 2016 WL 10519129 (E.D. Va. May 6, 2016); *Kitlinski v. U.S. Dep't of Just.*, 16-CV-60 2016 WL 7228734 (E.D. Va. Oct. 24, 2016); *Kitlinski v. Merit Sys. Prot. Bd.*, 857 F.3d 1374 (Fed. Cir. 2017) decided by Judge Bryson who wrote the opinion in which Judge Dyk and Judge Chen joined; *Kitlinski v. Sessions*, 16-CV-60, 2017 WL 5309622 (E.D. Va. Nov. 9, 2017); *Kitlinski v. Sessions*, 16-CV-0060, 2018 WL 11267429 (E.D. Va. Jan. 11, 2018); *Kitlinski v. Barr*, 16-CV-60, 2019 WL 7816853 (E.D. Va. Apr. 10, 2019) decided by Liam O'Grady,

STATEMENT OF RELATED CASES—Continued

United States District Judge; *Kitlinski v. U.S. Dep't of Just.*, 749 F. App'x 204 (4th Cir. 2019); *Kitlinski v. U.S. Dep't of Just.*, 994 F.3d 224 (4th Cir. 2021) decided by Judge Floyd who wrote the opinion in which Judge Wilkinson and Judge Groh joined. There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of Supreme Court Rule 14.1(b)(iii).

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PETITION FOR WRIT OF CERTIORARI

Petitioners Darek J. Kitlinski and Lisa M. Kitlinski respectfully request that this Court grant certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit, entered in this case on April 8, 2021.

OPINIONS BELOW

The April 10, 2019, order of the United States District Court for the Eastern District of Virginia, Alexandria Division, *Kitlinski v. Barr*, 16-CV-60, 2019 WL 7816853 (E.D. Va. Apr. 10, 2019), is reproduced at Pet. App. 22. The April 8, 2021, opinion of the United States Court of Appeals for the Fourth Circuit, *Kitlinski v. U.S. Dep't of Just.*, 994 F.3d 224 (4th Cir. 2021), is reproduced at Pet. App. 1. The June 4, 2021, denial of rehearing and rehearing en banc of the Fourth Circuit is reproduced at Pet. App. 44.

STATEMENT OF JURISDICTION

The Fourth Circuit entered its judgment on April 8, 2021. On June 4, 2021, the Fourth Circuit denied the petition for rehearing en banc. On March 19, 2020, and April 15, 2020, the Court ordered an extension of the filing period for 150 days. These orders were rescinded on July 19, 2021. However, this case falls under the orders granting an extended filing period. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

This case involves claims of unlawful discrimination and retaliation under the United States Employment and Reemployment Rights Act (USERRA), specifically 38 U.S.C. § 4311, Discrimination against persons who serve in the uniformed services and acts of reprisal prohibited (Pub. L. 103-353, § 2(a), Oct. 13, 1994, 108 Stat. 3153).

38 U.S.C. § 4301 (Pub. L. 103-353, § 2(a), Oct. 13, 1994, 108 Stat. 3150)

(a) the purposes of this chapter are—

> (1) to encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service;
>
> (2) to minimize the disruption to the lives of persons performing service in the uniformed services as well as to their employers, their fellow employees, and their communities, by providing for the prompt reemployment of such persons upon their completion of such service; and
>
> (3) to prohibit discrimination against persons because of their service in the uniformed services.

(b) It is the sense of Congress that the Federal Government should be a model employer in carrying out the provisions of this chapter.

38 U.S.C. § 4311 (Pub. L. 103-353, § 2(a), Oct. 13, 1994, 108 Stat. 3153)

(a) A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.

(b) An employer may not discriminate in employment against or take any adverse employment action against any person because such person (1) has taken an action to enforce a protection afforded any person under this chapter, (2) has testified or otherwise made a statement in or in connection with any proceeding under this chapter, (3) has assisted or otherwise participated in an investigation under this chapter, or (4) has exercised a right provided for in this chapter. The prohibition in this subsection shall apply with respect to a person regardless of whether that person has performed service in the uniformed services.

(c) An employer shall be considered to have engaged in actions prohibited—

(1) under subsection (a), if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is a motivating factor in the employer's

action, unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service; or

(2) under subsection (b), if the person's (A) action to enforce a protection afforded any person under this chapter, (B) testimony or making of a statement in or in connection with any proceeding under this chapter, (C) assistance or other participation in an investigation under this chapter, or (D) exercise of a right provided for in this chapter, is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such person's enforcement action, testimony, statement, assistance, participation, or exercise of a right.

(d) The prohibitions in subsections (a) and (b) shall apply to any position of employment, including a position that is described in section 4312(d)(1)(C) of this title.

STATEMENT OF THE CASE

A. Overview

Congress enacted the United States Employment and Reemployment Rights Act (USERRA) to protect servicemembers' and veterans' civilian employment

rights. 38 U.S.C. § 4301. USERRA prohibits discrimination by employers based on an employee's "obligation for service in the uniformed services." 38 U.S.C. § 4311(c)(1). USERRA further states that, "an employer may not discriminate . . . against or take any adverse employment action against any person because such person . . . has exercised a right provided for in this chapter." 38 U.S.C. § 4311(b). USERRA's express language provides that once an employee shows that their status as a servicemember or prior USERRA activity was a motivating factor in an adverse employment action, the burden of proof shifts to the employer to demonstrate it would have taken the same adverse action despite consideration of the employee's military status or prior USERRA activity. The statute does not require a heightened showing of hostility or other showing of undefined animus.

Darek and Lisa Kitlinski filed claims under USERRA and Title VII, in addition to other claims, against their employer, the Drug Enforcement Administration (DEA), after the agency made various adverse employment decisions that ultimately resulted in their terminations. Pet. App. 4–5, 7–8. The district court granted summary judgment in favor of the DEA, which was affirmed by the Fourth Circuit Court of Appeals. The Fourth Circuit found that the Kitlinskis did not meet their burden because they did not show that the DEA exhibited discriminatory animus[1] or other

[1] An examination of the oral argument reinforces that the court rejected the claim because there was no showing of antimilitary hostility. *See infra*, n.24 and accompanying text.

animus, the presence of which would have shifted the burden of proof to the DEA to show a same-decision defense.

Petitioners respectfully request that this Court grant certiorari to resolve the confusion across the circuits on whether USERRA's "motivating factor" test is satisfied once a plaintiff has proven that protected status or activity was a motivating factor—or whether a higher showing is required.

Integral to the DEA's decision to terminate Darek and Lisa was the agency's infringement of Darek's and Lisa's attorney-client relationship. The DEA attempted to interview Darek and did interview Lisa while denying them the right to their retained counsel on matters that substantively related to their pending employment discrimination claims against the DEA.

Accordingly, Petitioners further request that this Court grant certiorari to determine whether a federal employee's right to retained counsel includes having that counsel present when that employee has pending litigation against their federal employer and when the employer conducts an interview of the employee that a reasonable person would believe related back to the pending litigation.

B. Factual History[2]

Darek and Lisa Kitlinski are a married couple with a combined fifty-three years of public service in the federal government. Pet. App. 3–4. Darek served eleven years in the Air Force Reserves before, in 2000, beginning his twenty years of service in the United States Coast Guard Reserves—service that included several deployments. J.A. 22:14, 1440:6–14.[3] Darek responded to multiple national crises, including but not limited to, the terrorist attacks on September 11, 2001, the Deepwater Horizon oil spill, and the Ebola virus outbreak of 2014. J.A. 1439. Darek began working for the DEA in 1998 as a Special Agent. J.A. 22:14, 1439, 1440:6–14; Pet. App. 3. In 2009, he earned the position of supervisor in the DEA's San Diego Division. Pet. App. 3. Lisa's career in public service includes nineteen years of employment with the DEA. She began in 1997 and worked diligently as a forensic scientist until she earned a promotion in 2011 to a program manager position at the DEA headquarters in

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[2] This case comes to the Court on an appeal of summary judgment. As such, all reasonable inferences are to be made in the Petitioners', here, Darek and Lisa's, favor. *See Tolan v. Cotton*, 572 U.S. 650, 656 (2014) ("[C]ourts may not resolve genuine disputes of fact in favor of the party seeking summary judgement . . . a 'judge's function' at summary judgement is not 'to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'") (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)).

[3] Citations to the Joint Appendix filed in the Fourth Circuit below are "J.A." followed by the page number.

Arlington, Virginia, the position she held when she was terminated in 2016. Pet. App. 3–4.

When Lisa was promoted, Darek requested to be transferred to DEA offices in the Washington, D.C. area in order to be with his wife and children. Pet. App. 4. Between March 2011 and June 2014, in accordance with the DEA's Married Core Series Transfer Policy, Darek submitted multiple transfer requests. *Id.* Although Darek, on multiple occasions, made the best-qualified list for these positions, the DEA denied his transfer requests because of his sex.[4] Pet. App. 23; J.A. 1473:6–8. Darek's efforts to live and work closer to his family did not stop with the denied transfer requests. When vacancies became available, he applied to various DEA positions in and around Virginia. Pet. App. 4. The DEA repeatedly denied his applications. Pet. App. 4, 23–24.

In July of 2011, Darek began active-duty service for the U.S. Coast Guard in Washington D.C., taking USERRA-protected leave from the DEA. Pet. App. 4. While on active duty, Darek challenged the DEA's adverse employment decisions, including denial of his transfer requests, by filing both formal and informal EEO complaints with the Department of Justice, one of which rose to an EEOC hearing.[5] Most crucial to this

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[4] In a March 2015 decision, the EEOC found in favor of Darek in his claim that the DEA discriminated against him on the basis of sex. EEOC Decision No. 0120123094 (2015).

[5] As noted *supra*, n.4, Darek's EEOC finding is EEOC Decision No. 0120123094 (2015), also available as *Kelley P., Complainant*, E.E.O.C. D.O.C. 0520150309 (2015).

Petition, Darek filed several USERRA complaints with the Merit Systems Protection Board (MSPB).[6] The MSPB resolves employee complaints filed under USERRA. Lisa served as a material witness in Darek's EEO complaints and USERRA claims.[7]

On September 23, 2014, Darek and Lisa traveled to the DEA headquarters together in the Kitlinskis' vehicle, which they parked in a DEA-secured parking garage. J.A. 672–73. Lisa was going to her office at the DEA headquarters, while Darek reported to the building for a deposition regarding his previous EEO complaints. Pet. App. 5. Following the completion of the brief deposition, Darek took the Kitlinskis' car and drove home, while Lisa remained at work at the DEA headquarters building. Pet. App. 25; J.A. 910.

When Darek pulled into the garage at his home, he noticed a red flashing light on the vehicle and, upon closer look, identified a BlackBerry device hidden between the hood and windshield. J.A. 300–01. Darek

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[6] The most relevant of MSPB filings were *Kitlinski, D. v. U.S. Dep't of Just.*, No. SF-4324-14-0184-I-1 etc. (Apr. 16, 2015) (initial decision), review denied at *Kitlinski v. U.S. Dep't of Just.*, 123 M.S.P.R. 9, 2015 WL 6688191, *1 (Nov. 3, 2015); *Kitlinski, D. v. U.S. Dep't of Just.*, No. SF-4324-15-0088-I-1 etc. (Feb. 13, 2015) (initial decision), review denied at 123 M.S.P.R. 41 (Nov. 16, 2015), aff'd in part, vacated in part sub nom. *Kitlinski v. Merit Sys. Prot. Bd.*, 857 F.3d 1374 (Fed. Cir. 2017); and *Kitlinski, L. v. U.S. Dep't of Just.*, No. DC-4324-15-0889-I-1, 2015 WL 4877927 (Aug. 14, 2015).

[7] Lisa Kitlinski Dep. Apr. 30, 2014, *Kitlinski, D. v. U.S. Dep't of Just.*, No. SF-4324-14-0184-I-1 etc. (Apr. 16, 2015) (initial decision), review denied at *Kitlinski v. U.S. Dep't of Just.*, 123 M.S.P.R. 9 (Nov. 3, 2015).

had familiarity with these devices because of his experience as a DEA Special Agent and his requisite knowledge of the technology that the DEA often used in conjunction with such devices; accordingly, he believed the device had tracking capabilities and was planted for the purpose of tracking him and Lisa. J.A. 2197. The Kitlinskis later discovered that the BlackBerry was a DEA-issued device assigned to Donna Rodriguez, a Section Chief for the DEA's Research and Analysis Staff of the Human Resources Division. Pet. App. 25. The Kitlinksis believed the device was being used to gain information relevant to Darek's pending claims against the DEA because the Research and Analysis Staff was responsible for the DEA's responses to internal complaints, including those filed by Darek. J.A. 840.

The next day, Darek reported this disconcerting discovery of the BlackBerry device to the FBI Northern Virginia Anti-Corruption Squad. J.A. 666, 1508. Darek then filed a complaint regarding the BlackBerry incident with the Department of Justice's Office of the Inspector General (OIG) on September 26. Pet. App. 5. Darek expressed his concern for his and Lisa's safety, given his knowledge that BlackBerry devices can be used for surveillance through global position tracking and listening. Pet. App. 19; J.A. 858–59. The OIG declined to investigate Darek's allegations. Pet. App. 5. Lisa also reported the BlackBerry incident. Pet. App. 5–6. On October 2 she contacted the DEA's Office of Professional Responsibility (OPR) and they officially opened an inquiry into the incident on October 7. Pet.

App. 5–6. The Kitlinskis' attorney notified the DEA that they believed the BlackBerry's placement on the Kitlinskis' vehicle was in retaliation for exercising their USERRA rights, as subsequently reflected in Darek's motion to amend his USERRA complaint pending before the MSPB, filed on October 7. J.A. 870.

On October 20, while Darek and the Kitlinskis' attorney were in San Francisco attending a two-day MSPB hearing (SF-4324-14-0184-I-2), OPR Inspector Jose Roman contacted Lisa's supervisor and ordered Lisa to report to him to discuss the BlackBerry device. Pet. App. 6; J.A. 1379. Lisa initially declined an interview with OPR, relaying through her supervisor that she was represented by the attorney in Darek's ongoing claims against the DEA because of her role as a material witness. J.A. 1119–20.

On October 27, Inspector Roman contacted Lisa directly and ordered her to appear and produce the BlackBerry device at a "compelled interview," notwithstanding Lisa's request to direct all questions relating to the investigation to her attorney, as well as her attorney's protestations. J.A. 38, 1401, 1121. OPR failed to notify Lisa of the subject of the October 28 interview, despite multiple requests from Lisa and her attorney. J.A. 1411. OPR, however, repeatedly informed Lisa that her counsel could not be present. J.A. 38. Although Lisa's attorney objected to the DEA and OPR compelling Lisa's participation in this interview without her counsel present, she complied with OPR's order and appeared on October 28. J.A. 1425–26, 1428.

During the interview, Lisa asserted the attorney-client and spousal privileges, declining to answer questions she believed could jeopardize Darek's pending litigation. Pet. App. 6, 25; J.A. 1121. The DEA was on notice that Lisa was represented by counsel and that the Kitlinskis asserted the BlackBerry incident was directly related to the ongoing litigation. J.A. 840, 1425.

Shortly thereafter, on November 20, Inspector Roman arrived at Darek's Coast Guard workplace without notice and demanded that Darek appear for an OPR interview. J.A. 1406. At the time, in accordance with his USERRA-protected Coast Guard assignment, Darek was on leave from the DEA. Inspector Roman presented Darek with a written notification directing him to appear at the DEA headquarters for an interview the next day. *Kitlinski v. Merit Sys. Prot. Bd.*, 857 F.3d 1374, 1376 (Fed. Cir. 2017). Inspector Roman demanded Darek sign the notice. J.A. 845. When Darek asked the OPR investigator for an opportunity to call his attorney and have him on speakerphone before signing, the OPR investigator refused his request. J.A. 1406. Because he was denied consultation with his counsel, Darek declined to sign the written notification. Pet. App. 7.

The investigators threatened Darek that failure to comply with the OPR directive to appear for the interview could result in disciplinary action. *Id.* Later that day, Darek's attorney emailed Inspector Roman, expressing willingness to schedule a mutually convenient time for OPR to interview Darek with his counsel

present. J.A. 852–53. Notwithstanding Darek's attorney's efforts to schedule an interview, Inspector Roman again demanded that Darek appear for an interview with OPR the next day. J.A. 850. Inspector Roman was aware that Darek had pending USERRA and EEO employment litigation against the DEA and that he was represented by counsel. J.A. 852–53. Despite the interview subject's close temporal relationship to a deposition regarding the pending employment litigation against the DEA, Inspector Roman ignored Darek and his attorney's repeated requests to have counsel present during the interview. J.A. 850.

On May 27, 2015, Darek and Lisa were recommended for termination by the then-Chair of the DEA's Board of Professional Conduct. Pet. App. 7. The Chair issued letters stating that Darek's and Lisa's conduct during the internal investigation was the reason for their termination. The Kitlinskis unsuccessfully contested the recommendation and were ultimately terminated from their employment with the DEA on January 11, 2016.

C. Proceedings Below

Following mixed success bringing both formal and informal discrimination and retaliation complaints before the MSPB and EEOC, Darek and Lisa filed suit in the United States District Court for the Eastern District of Virginia under USERRA and Title VII, alleging wrongful termination, sex discrimination, and retaliation claims arising out of the BlackBerry incident. Pet.

App. 8, 25. The district court granted summary judgment in favor of the government but failed to address the wrongful termination claims, causing the Fourth Circuit to remand the case on the first appeal. Pet. App. 9; *Kitlinski v. U.S. Dep't of Just.*, 749 F. App'x 204, 205 (4th Cir. 2019) (per curiam). On remand, the district court denied the Kitlinskis' motion for "an evidentiary hearing on the wrongful termination claims, or, in the alternative, to supplement their summary judgment briefing with respect to the wrongful termination claims." Pet. App. 9. The district court again granted summary judgment in favor of the government. Pet. App. 9, 43.

The Kitlinskis appealed the grant of summary judgment as to the wrongful termination claims under USERRA and Title VII. The Fourth Circuit affirmed the lower court's judgment, incorrectly stating that USERRA requires a showing of "discriminatory animus" and overlooking the material fact that OPR questioned Lisa on the same subject matter on which Darek had pending MSPB claims. Pet. App. 11–16; Pet. Mot. Reh'g at 1, 3, 4–8, 15–16. Darek and Lisa filed a motion for panel rehearing and rehearing en banc on May 24, 2021, which the Fourth Circuit denied in an order filed June 4, 2021. Pet. App. 45.

REASONS FOR GRANTING THE WRIT

I. Introduction

The questions presented are profoundly important to active-duty servicemembers and reservists, like Darek, who put their lives on the line and their civilian lives on hold to serve our country. Reserve members have evolved beyond a strategic force called upon only in times of major war or national emergency; today, reservists serve as an operational safeguard for all peacetime and combat operations and share burdens and risks with their active component counterparts.[8] The COVID-19 response operation exemplifies the increasingly important role reserve members play in American response readiness, with over 3,000 reservists serving at the height of the response—one of the largest domestic mobilizations in Army Reserve history.[9] The country must protect these individuals' returns to civilian employment in order to properly care for servicemembers after exigency ceases.

As of June 30, 2021, over 40,740 Americans actively serve our Nation through the United States Coast Guard, with another 6,236 Coast Guard members on reserve.[10] The Coast Guard represents just one

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[8] Reserve Forces Policy Board, RFPB Report FY20-01, *Improving the Total Force Using the National Guard and Reserves*, at 22 (August 14, 2020).

[9] Michael J. Keegan, *COVID-19 Response: Largest Domestic Mobilization in Army Reserve History*, The IBM Center for The Business of Government (June 22, 2020), https://bit.ly/3Gn9lev.

[10] Sandi Gohn, *What Does the Coast Guard Do and 7 Coast Guard Facts to Know*, USO (Aug. 3, 2021), https://bit.ly/3b8Ecx2.

branch of our military. Over two million people actively serve in the United States military today.[11] In addition, there are approximately nineteen million United States veterans as of 2021.[12] Each year, nearly 200,000 servicemembers separate from active duty in the United States military.[13]

With approximately 3,500 active-duty members returning from Afghanistan this year alone,[14] it is vital that servicemembers know their rights and duties regarding their civilian employment and that they do not suffer retaliation when they exercise rights afforded to them under USERRA. Recently, more than 114,000 people were airlifted from the Kabul airport during the United States' withdrawal from Afghanistan—including all American troops.[15] Our servicemembers, who leave their civilian employment and serve honorably in support of the United States military, now more than ever before, deserve the assurance that once their

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[11] *Id.*

[12] Katherine Schaeffer, *Changing Face of America's Veteran Population*, Pew Rsch. Ctr. (Apr. 5, 2021), https://pewrsr.ch/3B5HI61.

[13] Brenda Carlson, *USDA Helps Military Veterans Answer the Question, "What's Next?"*, U.S. Dep't of Agric. (Feb. 21, 2017), https://bit.ly/3G6Olsz.

[14] *The U.S. War in Afghanistan: 2021 Biden Decides on Complete U.S. Withdrawal by 9/11*, Council on Foreign Relations, https://on.cfr.org/3ppxU4s (last visited Oct. 27, 2021); *Remarks by President Biden: On the Way Forward in Afghanistan*, White House (Apr. 14, 2021, 2:29 PM), https://bit.ly/30PUIQH.

[15] Idrees Ali & David Brumstrom, *Explainer: What Happens Now that U.S. Troops Have Left Afghanistan*, Reuters (Aug. 31, 2021, 7:35 AM), https://reut.rs/3G3S75P.

service is completed, they will be able to return to their civilian careers with as little disruption as possible.

Congress intended USERRA to afford substantial protection to our Nation's servicemembers. This case presents an important question, over which federal courts of appeals are openly and intractably confused, concerning the application of USERRA's motivating factor test. Circuit courts interpreting USERRA's burden-shifting framework, specifically the statute's motivating factor test, apply conflicting standards. Additionally, this case presents a narrow question of public importance regarding the attorney-client relationship, concerning a federal employee's right to retained counsel during an internal investigation.

II. USERRA's Motivating Factor Standard Has Been Inconsistently Applied By The Circuit Courts, Some Of Which—Like The Fourth Circuit—Have Imposed Additional Requirements Beyond The Statutory Text.

Congress articulated the causation standard an employee must prove under USERRA. A servicemember must show that: (1) they engaged in a protected activity and (2) that the protected activity was "a motivating factor for the employer's action." 38 U.S.C. § 4311(c)(2). Once an employee meets their burden, the burden of proof shifts to the employer to prove a "same-decision defense"—that it would have taken the same action without considering the employee's protected status or activity. *See* 38 U.S.C. § 4311(c); 20 C.F.R.

§ 1002.22. The Court has not defined "motivating factor" in the context of USERRA, nor explicitly in the context of any other statute. The Court has, however, recognized that the motivating factor language, as it is codified in the 1991 Civil Rights Amendments to Title VII, mirrors the language used in USERRA. *Staub v. Proctor Hosp.*, 562 U.S. 411, 417 (2011). In *Staub*,[16] the Court explained USERRA is "very similar to Title VII."[17] *Id.*

While not defining what motivating factor causation requires, the Court has repeatedly explained that under Title VII, motivating factor is a less stringent standard than the heightened standard of "but-for" causation. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1740 (2020) ("[Motivating factor is a] more forgiving

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[16] *Staub* is the only case where the Court has considered the causation standard under USERRA. In *Staub*, the Court considered the cat's paw theory of liability where an actor who is not the decisionmaker influences the decisionmaker to make an adverse employment action because of the non-decisionmaker's hostility towards a protected class. *Staub*, 562 U.S. at 422. Because *Staub* involved the issue of vicarious liability and imputing liability up through the corporate structure with a more attenuated connection between the hostility and the adverse employment action, the Court discussed "*antimilitary animus*" in that special circumstance, which is not present here. *See id.*

[17] Courts have consistently interpreted USERRA similarly to Title VII. *See, e.g.*, *Beck v. Dep't of Navy*, 997 F.3d 1171, 1188 (Fed. Cir. 2021) (highlighting that courts have acknowledged the analogous relationship between Title VII and USERRA for quite some time in various employment contexts); *Lisdahl v. Mayo Found.*, 633 F.3d 712, 721 (8th Cir. 2011) (stating "[t]here is no reason to understand 'adverse employment actions' differently in the USERRA context" when being compared to Title VII cases).

standard."). The Court further recognized that Title VII's motivating factor standard is "*of course*, [] a *lessened* causation standard" when compared to but-for causation. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 348–49 (2013) (emphasis added). Like claims under Title VII's motivating factor standard, claims litigated under USERRA do not require a heightened showing. *See id.* Under a motivating factor standard, bad intent on behalf of an employer is not a prerequisite to finding that an employee's protected trait is a motivating factor in an adverse employment decision, thereby placing the burden of proof on the employer to show a same-decision defense. Further, no showing of "discriminatory animus"[18] is required by the plain language of either USERRA or Title VII.[19]

Despite USERRA's clear framework, *see* 38 U.S.C. § 4311(c), and the Court's determination that the motivating factor standard is a lower burden than the

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[18] "Discriminatory Animus" has not been defined by the Court, nor any other. Black's Law Dictionary defines animus as either "Ill Will; Animosity" or "Intention." *Animus*, Black's Law Dictionary (11th ed. 2019). Whether courts are requiring antimilitary animus or simply requiring greater intent than what is required under the motivating factor standard is unclear. However, either theory heightens the plaintiff's burden beyond USERRA's straightforward discrimination framework.

[19] For example, discriminatory animus cannot be required by the text of Title VII because Title VII applies to *any* discrimination, not only "ill will" or "intention[al]" discrimination. *See UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 211 (1991) (holding that a policy against most women in the workplace violates Title VII regardless of its well-intended purpose of protecting unborn fetuses).

but-for causation standard, *Bostock*, 140 S. Ct. at 1740, there is clearly confusion among the circuit courts regarding what is required to show that protected status or activity was a "motivating factor," which itself would be sufficient to switch the burden of proof to the employer. Several circuits apply the statutory framework as written, or at most, expand upon the statutory language to provide different ways to meet the statutorily-imposed burden. However, other circuits, like the Fourth Circuit, have added additional requirements that an employee must prove to meet its burden.

a. Several circuit courts apply USERRA's plain language.

The Second, Third, and Sixth Circuits interpret USERRA's motivating factor test by adhering to the statute's plain language.[20] The Third Circuit's succinct explanation of the motivating factor test is consistent with USERRA's plain language: "a plaintiff meets his or her initial burden simply by showing that military service was 'a substantial *or motivating factor*' in the adverse employment action."[21] *Caroll v. Del. River Port*

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[20] Notably, these circuits' approach in deferring to the statutory text has been deemed the correct one by the Court. *See Milner v. Dep't of Navy*, 562 U.S. 562, 569 (2011) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.") (quoting *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985)).

[21] Indeed, even in this framing, courts have added that a plaintiff may satisfy their burden by showing that protected status or activity was "a substantial" factor—a showing not

Auth., 843 F.3d 129, 132 (3d Cir. 2016) (emphasis added).

The Second Circuit similarly holds that a USERRA plaintiff proves a prima facie case by showing that their protected status or activity was "a substantial or motivating factor." *See Gummo v. Village of Depew*, 75 F.3d 98, 106 (2d Cir. 1996). The Second Circuit explained that once a plaintiff proves that protected status or activity was a motivating factor, the employer must prove that but for the plaintiff's protected status or activity, the employer would have taken the same action. *Id.*

Likewise, the Sixth Circuit does not impose additional requirements beyond those provided in the statutory text. *See Hickle v. Am. Multi-Cinema, Inc.*, 927 F.3d 945, 952 (6th Cir. 2019). In another case, the Sixth Circuit clarifies that protected status or activity as a motivating factor can be proven by providing evidence of the following non-exhaustive factors:

> proximity in time between the employee's military activity and the adverse employment action, inconsistencies between the proffered reason and other actions of the employer, an employer's expressed hostility towards members protected by the statute together with knowledge of the employee's military activity, and disparate treatment of certain employees

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contained in the statute. However, because this is phrased as a disjunctive, "or motivating" factor, this added language, while confusing, appears to be surplusage.

> compared to other employees with similar work records or offenses.

Savage v. Fed. Express Corp., 856 F.3d 440, 447 (6th Cir. 2017).[22] The Sixth Circuit does not require anti-military animus in order to prove that protected status or activity was a motivating factor, but, as the court explains, anti-military animus can be one way to show that protected status or activity was a motivating factor.

b. Other circuit courts, like the Fourth Circuit in the case below, have imposed additional requirements to establish a prima facie case under USERRA.

Not all circuits apply the clear burden-shifting framework provided by USERRA's plain text. The Fourth Circuit, in addition to the First, Fifth, Seventh, Eleventh, and Federal Circuits, has—in some instances[23]—interpreted USERRA to require the employee

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[22] These factors (commonly referred to as the *Sheehan* factors) were initially announced by the Federal Circuit. *Sheehan v. Dep't of Navy*, 240 F.3d 1009, 1014 (Fed. Cir. 2001). However, the factors have been adopted, at least in part, by nearly every circuit. *See Velázquez-García v. Horizon Lines of P.R., Inc.*, 473 F.3d 11, 19 (1st Cir. 2007); *Murphy v. Radnor Township*, 542 F. App'x 173, 178 (3d Cir. 2013); *Hill v. Michelin N. Am., Inc.*, 252 F.3d 307, 314 (4th Cir. 2001); *Rademacher v. HBE Corp.*, 645 F.3d 1005, 1010–11 (8th Cir. 2011); *Leisek v. Brightwood Corp.*, 278 F.3d 895, 900 (9th Cir. 2002); *Greer v. City of Wichita*, 943 F.3d 1320, 1324 (10th Cir. 2019); *Coffman v. Chugach Support Servs., Inc.*, 411 F.3d 1231, 1238 (11th Cir. 2005).

[23] Even within these circuits, the application has been inconsistent. Several of these circuits that have imposed a heightened

to make an additional, heightened showing that the employer had a "discriminatory animus" or "discriminatory motive." These circuits' heightened standards are readily distinguishable from the Sixth Circuit's approach where hostility to military service is, among other evidence, one way to prove that protected status or activity was a motivating factor.

In this case, the Fourth Circuit repeatedly purported to apply a motivating factor test, including, for example, when it stated, "[t]o succeed on [a discrimination claim under § 4311(a) and a retaliation claim under § 4311(b)], 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." Pet. App. 12. While the Fourth Circuit frequently claimed to apply the requisite motivating factor test delineated by the plain language of USERRA, the court—in effect—applied something different.

Despite the Fourth Circuit's consistent reference to USERRA's motivating factor test, the panel departed from the plain language of the statute by holding that no reasonable factfinder could conclude that either Darek's status as a servicemember or his prior

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burden for plaintiffs have also—in multiple instances—resolved USERRA claims without any discussion of a "discriminatory animus." *See, e.g.*, *Francis v. Booz, Allen & Hamilton, Inc.*, 452 F.3d 299, 309 (4th Cir. 2006); *Hill*, 252 F.3d at 312; *Gambrill v. Cullman Cnty. Bd. of Educ.*, 395 F. App'x 543, 544 (11th Cir. 2010); *Erickson v. U.S. Postal Serv.*, 571 F.3d 1364, 1368–69 (Fed. Cir. 2009).

protected activity was a "motivating factor" in his and Lisa's terminations. Pet. App. 12–13. In concluding the Kitlinskis failed to satisfy their burden, the court reasoned that § 4311 requires something more. Specifically, the Fourth Circuit reasoned that "§ 4311 . . . requires *some evidence of discriminatory animus* by a civilian employer."[24] Pet. App. 12 (emphasis added); *see also Harwood v. Am. Airlines, Inc.*, 963 F.3d 408, 415–16 (4th Cir. 2020) (requiring that "discriminatory animus" be "connected in some way to the adverse employment action"); *Bunting v. Town of Ocean City*, 409 F. App'x 693, 696 (4th Cir. 2011) (holding that the plaintiff failed to make a prima facie showing of discrimination under USERRA, reasoning that the court found "no evidence that [the defendant] harbored animus toward [the] [p]laintiff as a consequence of his military service").[25] In doing so, the Fourth Circuit departed from the plain language of USERRA.

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[24] Although the Fourth Circuit's opinion ambiguously states that there was no "discriminatory animus" present, the oral argument illuminates what the court actually required. Judge Wilkinson stated that the "complaint alleges . . . a violation of USERRA . . . but it's hard for me to connect it up to the basic allegation of the complaint if there was some antimilitary animus afoot here." *See* Oral Argument at 42:03, *Kitlinski v. U.S. Dep't of Just.*, 994 F.3d 224 (4th Cir. 2021) (No. 19-1621), https://bit.ly/3vwkDbD. *See also id.*, at 36:15 ("I wonder if we're not wandering fairly far afield from the subject of the complaint, which was that there was somehow antimilitary animus that motivated this whole thing.").

[25] *But see supra*, n.23 (citing multiple Fourth Circuit decisions that require a plaintiff to prove no more than USERRA's text requires).

As discussed in detail at pages 6–8, Darek filed several USERRA and EEO claims against the DEA that were pending and were being actively litigated at the time the BlackBerry was planted. Lisa was a material witness to Darek's already-existing claims. During this time, immediately following a deposition for one of Darek's claims, Darek found the DEA-issued BlackBerry on the Kitlinskis' vehicle. Pet. App. 5. The Kitlinskis' attorney put the DEA on notice that they believed the planting of the BlackBerry was retaliation for their earlier USERRA activity. J.A. 870.

Soon after that notice, the DEA demanded that Darek and Lisa attend interviews to discuss the DEA's alleged retaliation—the planted BlackBerry. J.A. 1379, 1406. The Kitlinskis notified the DEA that they would be willing to meet so long as their attorney was present. J.A. 852–53. The DEA denied that simple request. J.A. 38. Accordingly, because she was refused the presence of her retained counsel, Lisa declined to answer certain questions reasonably related to Darek's ongoing litigation in order to protect her attorney-client privilege and to avoid undermining the ongoing USERRA and EEO claims. Pet. App. 6. Likewise, because the DEA refused the presence of Darek's retained counsel, Darek declined to attend a meeting regarding the BlackBerry. After Lisa's interview and Darek's declined attempts to set up an interview with his counsel present, Darek filed a retaliation claim under USERRA regarding the planted BlackBerry. *Kitlinski, Darek J. v. U.S. Dep't of Just.*, No. SF-4324-15-0088-I-1 (Feb. 13, 2015) (initial decision).

Purportedly, because the Kitlinskis refrained from answering questions about the subject of possible litigation without their attorney present, they were subsequently terminated. Pet. App. 7–8.

Crucially, when viewing the facts and evidence in the light most favorable to the Kitlinskis, a reasonable factfinder—applying the motivating factor test consistent with USERRA's plain language—could have concluded that Darek's status as a servicemember or his or Lisa's prior protected activity was a motivating factor in their terminations. There is a clear causal link between the Kitlinskis' assertion of rights under USERRA and their subsequent terminations. However, because the Fourth Circuit required an additional showing of "discriminatory animus," that heightened requirement led to a finding that no reasonable factfinder could have found for the Kitlinskis, alleviating the DEA's burden of proving a same-decision defense.

The Fourth Circuit is not alone in its confusion applying USERRA's text. The First, Seventh, and Eleventh Circuits use "discriminatory animus," "discriminatory motivation," and "motivating factor" without meaningfully defining or differentiating those phrases. The First Circuit, like the Fourth Circuit, begins its USERRA analysis with the statutory text, stating that a plaintiff need only prove that protected status or activity was "a motivating factor." *See Velázquez-García v. Horizon Lines of P.R., Inc.*, 473 F.3d 11, 17–18 (1st Cir. 2007). However, the court then discusses how plaintiffs can prove "discriminatory animus." *Id.* at 18–19. In another case, the First Circuit states that the

Sheehan factors, used in other circuits as a way to show that protected status or activity was a motivating factor, can actually be used to show there was "discriminatory intent or motivation." *Angiuoni v. Town of Billerica*, 838 F.3d 34, 39 (1st Cir. 2016).

The Seventh Circuit provided—consistent with the statutory text—that "a plaintiff makes out a prima facie case by showing that his membership was a 'motivating factor.'" *Arroyo v. Volvo Grp. N. Am., LLC*, 805 F.3d 278, 284 (7th Cir. 2015). However, the Seventh Circuit then departs from the plain language of the statute by stating that "circumstantial evidence [can] create[] a 'convincing mosaic' from which a reasonable jury could infer discriminatory motive." *Id.* According to the Seventh Circuit, this circumstantial evidence can be used to infer "the employer's ill motive." *Id.*

The Eleventh Circuit also found that "[s]ection 4311 clearly mandates proof of discriminatory motive." *Coffman v. Chugach Support Servs., Inc.*, 411 F.3d 1231, 1238 (11th Cir. 2005). The inconsistent application of these terms across these circuits fails to reveal whether the terms "discriminatory animus" or "discriminatory motivation" are being used as a synonym for "motivating factor" or as a separate term of art—and an additional requirement—that does not appear in USERRA's plain text.

The Fifth and Federal Circuits' opinions suggest an even more egregious reading of USERRA's plain text—appearing to require the employee to show something closer to but-for causation before the burden

shifts to the employer to show a same-decision defense. Like the Fourth Circuit, the Fifth Circuit explicitly requires "a discriminatory or retaliatory motive [to] be shown to establish a violation of § 4311." *Bradberry v. Jefferson County*, 732 F.3d 540, 547 (5th Cir. 2013). However, the Fifth Circuit has even required a higher showing than undefined discriminatory animus, stating that the plaintiff must show but-for causation to meet their burden. Specifically, the Fifth Circuit required a plaintiff to prove that "the employer discriminated against him or her *because of*[26] the employee's [protected status or activity]." *Id.* (emphasis added). The Fifth Circuit's requirement is more burdensome than what should be required for § 4311's motivating factor test.

The Federal Circuit has also misinterpreted "a violation of USERRA to require 'discriminatory animus,' or that the veteran be treated in a harsher manner than non-veterans." *Jolley v. Merit Sys. Prot. Bd.*, 752 F. App'x 964, 968 (Fed. Cir. 2018) (quoting *Sheehan*, 240 F.3d at 1014 n.3).[27] In another case, the Federal Circuit states that "[t]he essence of a meritorious . . . USERRA claim is that a covered individual was denied a benefit

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[26] The Court's recent decision in *Bostock* shows that the phrase "because of" indicates but-for causation. *Bostock*, 140 S. Ct. at 1739.

[27] Evidence of disparate treatment or hostility *can* be evidence that military service was a motivating factor. However, these courts, including the Fourth Circuit, appear to hold that the employee *must* show this hostility to establish motivating factor, thereby adding an element to the employee's burden not contained in the statute.

because he or she served in the military." *Brasch v. Merit Sys. Prot. Bd.*, 664 F. App'x 915, 918 (Fed. Cir. 2016) (emphasis added). Despite the Supreme Court's clear statement that motivating factor is a less stringent standard than but-for causation, *Bostock*, 140 S. Ct. at 1740, these circuits are conflating the two standards.

Although several circuits require proof of discriminatory motivation, courts have also stated that the employee's protected status or activity is a motivating factor "'if the defendant relied on, took into account, considered, or conditioned its decision on that consideration.'" *Coffman*, 411 F.3d at 1238 (quoting *Brandsasse v. City of Suffolk*, 72 F. Supp. 2d 608, 617 (E.D. Va. 1999)); *Petty v. Metro. Gov't of Nashville-Davidson Cnty.*, 538 F.3d 431, 446 (6th Cir. 2008) (citing *Coffman*, 411 F.3d at 1238); *Murphy v. Radnor Township*, 542 F. App'x 173, 177 (3d Cir. 2013) (citing *Coffman*, 411 F.3d at 1238); *see also Erickson v. U.S. Postal Serv.*, 571 F.3d 1364, 1368 (Fed. Cir. 2009). The circuits' inconsistent standards beg the question: whether an employee, if their employer "considered" the employee's protected status or activity while making the decision, can meet their burden short of showing that the employer had discriminatory animus or motivation.

A short hypothetical vividly demonstrates the confusion across the circuits. Assume "Supervisor" served in the military and comes from a multi-generation military family. "Employee," who is in the United States Army Reserve, requests a military transfer to a different location that would reduce commuting costs and

give Employee an increase in salary. Supervisor explains that the position Employee seeks is very competitive. Supervisor also explains that while he always tries to help those that serve our country, Supervisor is concerned that Employee will be deployed soon and further explains that rather than transferring Employee now, Supervisor will wait until after the deployment and then explore comparable transfers.

In this hypothetical, there is no evidence that Supervisor harbors anti-military bias, but Employee's military service clearly factored into Supervisor's decision not to transfer Employee. Under the causation standard as applied in the Second, Third, and Sixth Circuits—which apply USERRA's plain language—Employee would be able to show that military service was a motivating factor in the decision not to transfer Employee, and the burden would correctly shift to the employer to show they would have made the same decision. Alternatively, in the Fourth Circuit, there would be no shift of burden because the Fourth Circuit required some showing of anti-military bias. In yet another standard, the First, Seventh, and Eleventh Circuits, in addition to showing that the service was a motivating factor, Employee would have to show some form of undefined animus in order to shift the burden of proof to the employer. In the Fifth and Federal Circuits, Employee would be required to prove that the undefined animus was a but-for cause to shift the burden. As demonstrated above, Employee's rights under USERRA are wholly dependent on where they file their claim.

Our servicemembers deserve a national standard of causation under USERRA—to be uniformly applied irrespective of where they file. This Court should grant certiorari, resolve this confusion, and articulate a standard that is consistent with the plain language of USERRA. The integrity of USERRA—a statute meant to benefit and protect those servicemembers that place their lives on the line to protect this country—requires a clear standard. The circuit courts are eradicating the line between "motivating factor" and "but-for" causation to the detriment of this Nation's servicemembers. Accordingly, Petitioners request that this Court grant certiorari and clarify what standard our servicemembers must meet to enforce their rights.

III. Whether An Employee Who Has Pending Employment Litigation Against Their Employer In Court Has The Right To Their Retained Counsel While Being Required To Appear For An Interview Initiated By The Same Employer Against Which The Litigation Is Pending.

This question is of fundamental importance to public servants, including those who, like Darek, serve our country in the military with the expectation that they may continue their civilian careers upon their return. Petitioners are not asking this Court to revisit *In re Groban*, 352 U.S. 330 (1957)[28] nor to hold there is

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[28] The Court in *Groban* noted that "[a] witness before a grand jury cannot insist, as a matter of constitutional right, on being represented by his counsel, nor can a witness before other

a right to have retained counsel present anytime a federal agency conducts an internal investigation of workplace misconduct. Rather, the question presented here is narrow: whether a federal employee's right to retained counsel is violated when they have pending employment discrimination claims against their federal employer; when the employee insists on the presence of their already-retained counsel in an interview; when that interview relates to subjects a reasonable person would believe relates to that employee's litigation; and when that employee is ultimately terminated for their insistence on their retained counsel's presence. If a federal agency can pursue such interviews and deny employees the presence of their counsel, it can effectively end-run the attorney-client relationship.

The DEA terminated Darek and Lisa after an internal investigation, which included an interview that related back to, or which a reasonable person would believe related back to, Darek's USERRA litigation. In doing so, the DEA circumvented both the purpose of the attorney-client relationship as well as the protections that relationship provides. This is at odds with the Fifth Amendment's due process guarantees, which afford individuals the right to retain counsel in civil litigation.[29] The Fourth Circuit's decision invites

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investigatory bodies." *Id.* at 333. In *Groban*, the statute at issue, § 3737.13 of the Ohio Code, specifically provided that the " 'investigation . . . may be private' and that he may 'exclude from the place where (the) investigation is held all persons other than those required to be present.' " *Id.* at 331 (alterations in original).

[29] In *Powell v. Alabama*, 287 U.S. 45 (1932), the Court observed "[i]f in any case, civil or criminal, a state or federal court

federal employers charged with employment law violations to circumvent their employees' right to be meaningfully heard in pending employment litigation against that federal employer by simply ordering employees who are party to the litigation to either comply with internal investigations—without their counsel present—or be terminated.

Protecting the attorney-client relationship is fundamental because "[l]aymen cannot be expected to know how to protect their rights when dealing with practiced and carefully counseled adversaries." *Bhd. of R.R. Trainmen v. Va. ex rel. Va. State Bar*, 377 U.S. 1, 7 (1964) (citing *Gideon v. Wainwright*, 372 U.S. 335 (1963)). Applying their special skills and knowledge of the legal system, attorneys can safeguard their clients' interests, including the attorney-client privilege and its corollary societal benefits. *See Goldberg v. Kelly*, 397 U.S. 254, 270–71 (1970). The Court's recognition of the critical role counsel plays in safeguarding due process does not change just because it is a federal agency conducting an internal investigation that could lead to

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were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense." *Id.* at 69. Petitioners note from the outset the many factual distinctions between this case and *Powell*, not least of which is the difference between the civil right, stemming from due process protections, and the explicit Sixth Amendment criminal right. However, *Powell* remains oft cited for the proposition that a right to retain (as opposed to the right to have appointed) civil counsel exists as a matter of constitutional due process. *See, e.g., Adir Int'l, LLC v. Starr Indem. and Liab. Co.*, 994 F.3d 1032, 1039 (9th Cir. 2021).

termination of employment. Because Darek's pending employment litigation was against the agency conducting the relevant interview, counsel's presence was integral to safeguard both Darek's and Lisa's legal interests.

Although the scope of the right to retain counsel in civil litigation has not been explicitly defined, the Court has recognized the attorney-client relationship's importance to the successful functioning of the legal system. *See, e.g., Upjohn Co. v. United States*, 449 U.S. 383, 389–90 (1981). Despite the attorney-client relationship's importance, the relationship was rendered meaningless here. Because of Darek's pending litigation against the DEA, the Kitlinskis were left with a Hobson's choice: either go forward with the interview and risk jeopardizing Darek's existing claims against the DEA or continue to insist that they be permitted to have their retained counsel present and be fired.

Darek and Lisa faithfully protected their attorney-client relationships—relying on the legal system to safeguard those relationships—and were fired as a result. The Fourth Circuit's decision directly undermines the attorney-client relationship. Without this Court's intervention, the Fourth Circuit's decision allows a federal agency against which an employment discrimination claim was filed to circumvent the protections that effectuate justice in the adversarial system by ordering employee-plaintiffs and employee-witnesses to appear without their counsel at interviews of nebulous scope.

Further emphasizing the importance of this question, the Court has recognized that, in certain circumstances, federal employees have a property interest in their employment. *See Gilbert v. Homar*, 520 U.S. 924, 928–29 (1997) ("[W]e have previously held that public employees who can be discharged only for cause have a constitutionally protected property interest in their tenure and cannot be fired without due process.") (citing *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 578 (1972); *Perry v. Sindermann*, 408 U.S. 593, 602–03 (1972)).

When the DEA presented Lisa with a notice that her failure to cooperate in a compelled interview could result in termination, her protected property interest in her employment hinged on a waiver of her right to have her retained counsel present. Similarly, Darek's protected property interest in his employment hinged on whether he was willing to waive his right to have his retained counsel present during an interview. Lisa and Darek were not unwilling to participate in the DEA's internal investigation. They were unwilling, however, to waive their right to have their retained counsel present during the DEA interviews. The deprivation of Darek's and Lisa's protected property interests as a result of their reliance on their due process right to their retained counsel reinforces why this Court should grant certiorari and resolve this narrow yet important question.

Protecting the attorney-client relationship naturally involves protecting the attorney-client privilege.[30] Proceeding without her attorney, Lisa appeared for the compelled interview with OPR. J.A. 38. During the interview, Lisa refused to answer questions she believed could jeopardize Darek's pending litigation, asserting the attorney-client and spousal privileges. Pet. App. 6, 25. Lisa was subsequently terminated by the DEA for her lack of cooperation in the internal investigation, specifically her refusal to—without counsel present—answer questions she believed could jeopardize Darek's pending litigation. Notably, Lisa's termination hinged not on her unwillingness to participate in the OPR investigation but rather on her unwillingness to answer questions she believed to be privileged. This highlights an essential role of an attorney in pre-trial proceedings—to clarify when it is appropriate to invoke the attorney-client privilege. The Fourth Circuit's refusal to address this issue signals a willingness to devalue the privilege itself.

Ultimately, a federal employee's right to retain counsel should include having that counsel present during any interview that reasonably relates to pending litigation against their employer. We ask that this

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[30] The Court has consistently and repeatedly affirmed the importance of protecting the attorney-client privilege because it is foundational to "the observance of law and the administration of justice" by encouraging full and frank disclosures between clients and their attorneys. *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 108 (2009); *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998); *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

Court clarify whether federal employees have the right to have retained counsel present in an interview that a reasonable person would believe relates to pending litigation when that agency-employer is the opposing party in the pending employment litigation. Otherwise, the Fourth Circuit's decision stands to destroy the attorney-client relationship, jeopardize the constitutional due process rights of our public servants, and erode their ability to seek relief under USERRA and Title VII.

IV. This Case Is A Perfect Vehicle For Addressing These Issues As Large Numbers Of Our Troops Have Recently Returned Home And Are Attempting To Rejoin Civilian Employment.

The time is now to ensure that the rights of military servicemembers and veterans across the United States are both clarified and protected. For the first time since 2001, there are no American troops in Afghanistan after the United States completed the evacuation of most of its citizens—including all American troops—and thousands of at-risk Afghans.[31] Now, more than ever, servicemembers who leave their civilian employment and serve honorably in support of the United States military deserve the assurance that once their service is completed, they will be able to return to their civilian careers with as little difficulty and disruption

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[31] Ali & Brumstrom, *supra* note 15.

as possible. This assurance, for many servicemembers, will be crucial in the months and years to come.

USERRA's purpose and legislative history support timely clarifying the rights afforded to United States servicemembers. USERRA was passed for the following purposes:

> (1) to encourage noncareer service in the uniformed services . . . ; (2) to minimize the disruption to the lives of persons performing service in the uniformed services as well as to their employers, their fellow employees, and their communities, by providing for the prompt reemployment of such persons upon completion of service; and (3) to prohibit discrimination against persons because of their service in the uniformed services.

38 U.S.C. § 4301. Because USERRA was enacted for the purpose of protecting the rights of military servicemembers, it is construed broadly and in favor of its military beneficiaries.[32] However, merely refraining from discriminating or retaliating against servicemembers is not enough for the federal government. By Congress's explicit instruction, "the Federal Government

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[32] The Department of Labor recognized that the Act is intended to "be liberally construed for the benefit of those who left private life to serve their country in its hour of great need." *See* 70 Fed. Reg. 75,246 (Dec. 19, 2005) ("The Committee intends that these anti-discrimination provisions be broadly construed and strictly enforced."). This mirrors the position taken by several circuits. *See, e.g.*, *Harwood*, 963 F.3d at 414; *Mace v. Willis*, 897 F.3d 926, 928 (8th Cir. 2018).

should be a model employer in carrying out the provisions of [USERRA]." 38 U.S.C. § 4301(b).

The facts and circumstances of this case have and will continue to affect the lives of Darek and Lisa for years to come. However, the issues presented by this case are not unique. Rather, the issues presented will affect the lives of servicemembers across the United States when asserting rights afforded to them under USERRA. Our servicemembers deserve a clear and uniform understanding of their rights—rights to be interpreted irrespective of where they file a claim.

Congress made explicit promises to those that serve our country—that their service or exercise of a right under USERRA would be protected. We ask a lot of those that serve, particularly in this volatile time. Because of what we as a Nation ask, it is critical that this Court timely clarify what must be proven to establish a violation of USERRA and act to protect the attorney-client relationship when our public servants have retained counsel to vindicate their rights.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court grant certiorari to review the judgment of the Fourth Circuit, reverse the decision of the lower courts, and remand.

Respectfully submitted this 1st day of November, 2021.

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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

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[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.

* * *

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