18-1023

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DAREK J. KITLINSKI and LISA M. KITLINSKI,

Plaintiffs - Appellants,

v.

DEPARTMENT OF JUSTICE, et al.

Defendants - Appellees.

On Appeal from the United States District Court for the
Eastern District of Virginia at Alexandria
No. 1:16-cv-00060-LO-IDD

CORRECTED
OPENING BRIEF OF APPELLANTS
DAREK J. KITLINKSI AND LISA M. KITLINKSI

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 18-1023 Caption: Darek Kitlinski v. U.S. Dept. of Justice

Pursuant to FRAP 26.1 and Local Rule 26.1,

Darek J. Kitlinski
(name of party/amicus)

who is Appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Jackie L. White, II Date: 7/23/2018

Counsel for: Darek J. Kitlinski

CERTIFICATE OF SERVICE

****

I certify that on 7/23/2018 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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/s/ Jackie L. White, II (signature)

7/23/2018 (date)

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 18-1023 Caption: Darek Kitlinski v. U.S. Dept. of Justice

Pursuant to FRAP 26.1 and Local Rule 26.1,

Lisa M. Kitlinski
(name of party/amicus)

who is Appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

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Signature: /s/ Jackie L. White, II Date: 7/23/2018

Counsel for: Lisa M. Kitlinski

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/s/ Jackie L. White, II (signature)

7/23/2018 (date)

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STATEMENT OF JURISDICTION

The District Court had subject matter jurisdiction over Plaintiffs' wrongful termination claims under 28 U.S.C. § 1331.

Plaintiffs originally filed their wrongful termination in the Merit Systems Protection Board ("MSPB"). Upon the expiration of 120 days without a judicially reviewable action from the MSPB, Plaintiffs filed a civil action, as permitted under 5 U.S.C. § 7702(e)(1)(B) for a "mixed case" appeal.

Plaintiffs brought retaliation claims under both the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), 38 U.S.C. § 4311(b), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000c. Mr. Kitlinski falls under the protection of USERRA as he serves in the U.S. Coast Guard Reserves. Mrs. Kitlinksi falls under the protection of USERRA as she has assisted or otherwise participated in an investigation brought under USERRA by Mr. Kitlinksi, her husband.

On November 9, 2017, the District Court issued its Order in which it granted Defendant's Motion for Summary Judgment and dismissed Plaintiffs' case. ECF No. 130.

On January 5, 2018, Plaintiffs filed their Notice of Appeal. Plaintiffs' appeal is from a final order or judgment in which the district court denied all Plaintiffs' claims.

This Court shall have jurisdiction "from all final decisions of the district courts" under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

(1) Whether the District Court erred when it granted the DEA summary judgment as to the Kitlinskis' wrongful termination claims – Count 10 – despite facts from which the DEA's discriminatory motivation may reasonably be inferred, thus raising a genuine dispute of a material fact.

(2) Whether the District Court erred when it granted the DEA summary judgment as to the Kitlinskis' wrongful termination claims – Count 10 – without first issuing a decision on those claims.

(3) Whether the District Court erred in not holding an evidentiary hearing on the Kitlinskis' wrongful termination claims under both Title VII and USERRA.

(4) Whether the District Court abused its discretion in precluding discovery that would have demonstrated that the Kitlinskis could establish that DEA officials' explanations, related to the surveillance of the Kitlinskis as part of the DEA's retaliation, were conflicting or dissembling and thus showed proof of motive in the terminations themselves.

STATEMENT OF THE CASE

The Kitlinskis' DEA Employment and Darek's Coast Guard Service

Darek was hired by the DEA in October 1998 as a GS-9 Special Agent, and by March 2004 had progressed to GS-13. MSJF 6.[1] As of October 2009, Darek was promoted to the competitive position of GS-14 Group Supervisor of Technical Operations Group II in San Diego, a position in which he oversaw the group that listens to court-authorized electronic interceptions, known generally as Title IIIs or wire taps. MSJF 6.

Lisa joined the DEA in September 1997 as a GS-7 Forensic Chemist, and rose to the level of GS-13 in February 2007. MSJF 7. In 2011, Lisa was selected for a competitive position as a GS-14 Program Manager in the Quality Assurance Section of the Office of Forensic Sciences at DEA Headquarters. MSJF 7(c).

Both Darek and Lisa received outstanding performance reviews during their tenure with the DEA. Neither had any history of employment discipline. JA 1130 (Factor 3); JA 1139-1140 (Factor 3).

Beginning in 2000 and at all times relevant to this matter, Darek also served with the United States Coast Guard Reserves. MSJF 6(c). From 2011 to January

[1] MSJF refers to Defendant's Undisputed Facts in support of its Motion for Summary Judgment. JA 69-85.

2015, Darek was on leave from the DEA, serving full-time on active duty with the Coast Guard.

The Kitlinskis' Prior Claims and Litigation Against the DEA

Beginning in September 2011, Darek or Lisa Kitlinski filed several Title VII Equal Employment Opportunity or USERRA claims against the DEA.

EEO Complaints

Prior to their respective terminations, Darek or Lisa filed a total of seven EEO complaints against the DEA. *See* JA 351-352 (September 1, 2011 complaint for sex discrimination by Darek); JA 358-359 (December 11, 2012 complaint for reprisal by Darek); JA 414-415 (May 13, 2013 complaint for reprisal by Darek); JA 420-425 (July 2, 2013 complaint for reprisal by Darek); JA 363-365 (September 23, 2014 complaint for sex discrimination and reprisal by Darek); JA 1012-1015 (July 16, 2015 complaint for reprisal by Lisa); JA 1008-1011 (July 17, 2015 complaint for reprisal by Darek).

Merit Systems Protection Board Appeals

Prior to their terminations, Darek or Lisa filed a total of five appeals with the MSPB based in whole or part on USERRA violations by the DEA: MSPB Dkt No. SF-4324-14-0184-I-2 (filed July 7, 2014 by Darek); SF-4324-14-0687-I-1 (filed July 8, 2014 by Darek); SF-4324-15-0088-I-1 (filed November 5, 2014 by Darek); DC-

0752-15-0823-I-1 (filed June 2, 2015 by Darek); and DC-4324-15-0889-I-1 (filed June 23, 2015 by Lisa).

The Concealment of a DEA Blackberry Device in Lisa's Vehicle

The facts that led to the wrongful termination of the Kitlinskis centered around the discovery of a blackberry telephone, issued by the DEA, in the hood of their personal vehicle, when Darek appeared for a deposition in EEO cases DEA-2012-01239 and DEA-2013-00632 on September 23, 2014. Darek drove the family vehicle, bearing the distinctive license place 1USCGR to DEA Headquarters, and after properly identifying that he would park his car at the Headquarters garage, proceeded to deposed. When he returned to the vehicle after the deposition, he drove home. Darek describes what happened next:

> On September 23, 2014 Lisa and I drove to DEA HQ together in our personal vehicle she commonly drives, ... Upon arrival to DEA HQ, Lisa parked in the DEA HQ secured parking lot; . . . I [later] drove our personal vehicle from DEA HQ to our residence. At about 1:00 pm, as I drove up my inclined driveway, I detected a faint red blinking light under the driver-side area of the hood. After I parked the car inside my garage, I investigated further to determine the source of the light. I discovered an operational and active Sprint Blackberry concealed under the hood, placed inside the weather seal, below the bottom of the windshield. To retrieve the Blackberry, I had to release and open the hood. I recognize the Blackberry as the same model currently issued to agency employees. Lisa and I have not been issued or possess [] Blackberry mobile devices. Lisa and I had not seen the Blackberry before or had any knowledge of a device being placed in our private vehicles. Lisa and I did not consent for any electronic device or equipment to be concealed in or placed on any of our personal vehicles.

> It is common knowledge [that] Blackberry devices can be used for surveillance tracking and intercept purposes. Blackberry can provide real time geo coordinates to officials who have proper Business Enterprise Server (BES) administrative rights or who have been granted access to Sprint databases. Blackberrys can also be remotely activated to overhear and record conversations that occur within close proximity to the device. Blackberrys can also be utilized as a MiFi internet access point for other surveillance and intercept tools to connect to the internet.

JA 768.

The Kitlinskis contended throughout the administrative and judicial review of the case, that the Blackberry was installed by *someone connected with the DEA.* Darek, a former wire room supervisor and subject matter expert for the DEA on such technology, repeatedly stated and testified that he located the device in a position on his vehicle that was consistent with Agency surveillance techniques. JA 1328; JA 2170-2173. He further discovered, on the blackberry itself, a DEA identification marker. JA 1329.

Darek's Complaint to DOJ – OIG About the DEA Blackberry

On September 26, 2014, Darek filed a complaint with the Department of Justice Office of Inspector General regarding the concealment of the blackberry in Lisa's vehicle. JA 769. In his complaint, Darek made it clear that he suspected the blackberry was concealed by someone at the DEA.

> Lisa and I believe the Blackberry was concealed in our personal vehicle by unknown agency employee(s) while the car was parked in the secured DEA HQ parking lot. Lisa and I believe unknown agency officials concealed the Blackberry to track our whereabouts and

> activate the device to intercept our privileged communications, especially as we travel to and from my deposition.

JA 768-769. Initially, the IG agreed to take possession of the blackberry, and tried to set up an interview with Darek. JA 735. On September 30, 2014, however, the OIG reversed itself and informed Darek that it would not investigate his complaint. JA 734-735.

The DEA Begins Investigation of the Kitlinskis' Complaint to the IG, Without the Kitlinskis' Knowledge or Approval

According to Jeffrey Keenan, Chief of the DEA Headquarters Security and Identification Unit,

> *On September 30, 2014*, I received a request from the DEA Office of Professional Responsibility ("OPR") to review and provide video surveillance footage for September 22 and 23, 2014, of the DEA Headquarters garage for any evidence or suspicious activity around a vehicle belonging to DEA employees Lisa or Darek Kitlinski or evidence suggesting the vehicle had been tampered with.

JA 2068, ¶ 3 (emphasis added). In fact, the record shows that Mr. Keenen was first contacted by his superior, Mr. Mark Mazzei, about the surveillance video on the Friday prior to September 30, which would have been September 26, 2014. JA 774. This was the same day on which Darek filed his complaint with DOJ OIG.

Mr. Keenan contended that he personally reviewed the video footage on which *Lisa's vehicle was visible for both September 22 and 23*, without detecting any suspicious activity. JA 2069 (emphasis added).

IG, SAC Ronald Powell Violates the IG ACT

The date on which Mr. Keenan received the DEA OPR's request is noteworthy. On September 30, Lisa had not yet informed anyone at the DEA about the discovery of the blackberry. Darek, however, had reported the incident to the DOJ OIG four days earlier, on September 26. Employee reports to OIG are confidential. The DOJ OIG, however, clearly violated Darek's right to make a confidential complaint against the DEA, and instead communicated his complaint to the DEA OPR.

In fact, when OIG informed Darek on September 30 that it would not investigate, it expressly told him it would maintain the confidentiality of his complaint.

> Accordingly, OIG's disposition would be to refer your concerns, as a Complainant, to the DEA Office of Professional Responsibility (OPR) for further review, *but only after obtaining your consent to make such a referral and reveal your identity as an employee Complainant*. Absent such consent, OIG would take no further action in this matter.

JA 734-735 (emphasis added).

OPR Investigation and Charges Against the Kitlinskis

On October 2, 2014, three days after the DEA began its "investigation" of the security tapes of the area around the Kitlinski vehicle, Lisa informed her direct supervisor, who she considered a friend, of the discovery of the blackberry in her vehicle and of her concern that the Agency was retaliating against her and Darek.

She also provided a photo that showed a sticker marked "DEA" affixed to the device. JA 564-566. On that same day, *at the directive of her supervisors*, Lisa telephoned DEA OPR to report the matter. JA 494. Lisa did not originally seek review; she merely followed the direction of her supervisor. *Lisa's supervisor* subsequently filed a formal referral to DEA OPR on October 7, at which point DEA OPR opened an investigation. JA 494.

During the course of the investigation, DEA OPR sought to interview both Lisa and Darek. DEA OPR scheduled Lisa to appear at interviews on October 21, 22 and 28, 2014. JA 1029-1030. Lisa appeared at an interview on October 28, 2014. JA 1031-1041. The only questions she refused to answer were those which she believed involved privilege. The Agency never responded to her claims of privilege and never re-initiated the interview after such a review. Instead, the Agency simply terminated for her lack of cooperation.

Based solely on the interview, on October 28, 2014, Lisa was added as a subject of the OPR investigation for failure to cooperate. JA 816.

Similarly, on November 20, 2014, DEA OPR ordered Darek to appear for an interview on November 21 at DEA Headquarters. JA 760. Darek did not appear for the interview, as he was then serving on active duty with the Coast Guard. Darek raised the issue of his active duty service to the DEA while protesting the request, and the DEA never responded.

On December 1, 2014, Darek was added as a subject of the OPR investigation for failure to cooperate. JA 816.

MSPB Appeal Based on the Concealment of the Blackberry

On October 7, 2014, following a deposition of Thomas Harrigan, the Deputy Administrator of the DEA, Darek attempted to amend his then-pending MSPB appeal in SF-4324-14-0184-I-2 by contending that the Agency had installed the blackberry. JA 1302-1305. After reviewing the pleading, the MSPB Administrative Judge directed Darek to file a separate appeal on the matter. Darek did so on November 5, 2014. *See* JA 1323-1333 (MSPB No. SF-4324-15-0088-I-1). The appeal was an allegation of retaliation, reprisal, and hostile work environment directed against both Darek and Lisa due to Darek's previous USERRA appeals before the MSPB.

The Kitlinskis' Terminations

On May 27, 2015, Mr. Christopher Quaglino, Chairman of the DEA Board of Professional Conduct, issued Darek a Notice of Proposed Action proposing to remove him from his position as a Supervisory Criminal Investigator. JA 960-966. The proposed removal was based on a charge of Refusal to Cooperate, with two specifications. Specification 1 was for failure to appear for an interview on November 21, 2014; and, Specification 2 was that on that same date Darek failed to produce the DEA Blackberry to OPR. JA 961.

Likewise, on May 27, 2015, Mr. Quaglino issued Lisa Kitlinski a Notice of Proposed Action proposing to remove her from her position as a Forensic Chemist. JA 968-978. The proposed removal was based on two charges, Refusal to Cooperate, with four specifications, and Insubordination, with one specification. JA 968. For the first charge, Specifications 1 and 2 were for failure to appear for an OPR interview on October 20 and 21, 2014; and Specification 3 was for asserting privilege in response to certain questions during the October 28, 2014 OPR interview. JA 971-973. Finally, Specification 4 was for refusal to produce the Blackberry to OPR on October 27 and 28, 2014. JA 973. The charge of Insubordination was based on refusal to comply with direct orders from supervisors to produce the blackberry. JA 975.

On January 11, 2016, Deciding Official Michael Bulgrin removed both Darek and Lisa from their positions, effective immediately. JA 1145-1147; JA 1149-1151.

Procedural History

Merit Systems Protection Board Appeal

On February 5, 2016, both Darek and Lisa filed separate MSPB appeals[2] seeking to reverse the DEA's termination of their employment. Both Darek and Lisa brought mixed case appeals, in which they alleged that their terminations were

[2] *Darek J. Kitlinski v. Dep't of Justice*, MSPB No. DC-0752-16-0332-I-1; *Lisa M. Kitlinski v. Dep't of Justice*, MSPB No. DC-0752-16-0331-I-1.

retaliation for prior complaints against the DEA brought by Darek under USERRA and federal EEO law. As Mrs. Kitlinski was a witness in those matters, she is also protected under both statues.

Governing statutes provide that if the MSPB has issued no judicially reviewable action within 120 days following the filing of the appeal, the employee is entitled to file a civil action. 5 U.S.C. § 7702(e)(1)(B).

At the expiration of 120 days on June 4, 2016, there was no judicially reviewable action in either Darek's or Lisa's MSBP appeal. On June 8, 2016, the Kitlinskis added wrongful termination claims – as previously filed in the MSPB – to the Amended Complaint at issue in this matter. These claims are included in Count 10.

District Court

On January 19, 2016, the Kitlinskis filed their complaint in the district court, against the DEA, and individual defendants Jose Ramon and Donna Rodriguez.

On June 8, 2016, Plaintiffs filed their Amended Complaint, with claims against the DEA and individual defendant Donna Rodriguez. JA 16-60. On June 14, 2016, Plaintiffs filed a correction to their Amended Complaint, as it related to Count 10. JA 62.

On October 7 and 11, 2016, the District Court ruled on Defendants' motions to dismiss for failure to state a claim and for summary judgment. After the District

Court's orders on Defendants' motions to dismiss, Plaintiffs' Amended Complaint included eight counts against the DEA: Counts 1, 3-7, 10 & 11. Ms. Rodriguez is no longer a defendant in this matter.

On November 7, 2016, Defendant filed its Answer to Plaintiffs' Amended Complaint.

On August 1, 2017, Defendant filed its motion for summary judgment as to Plaintiffs' Amended Complaint in its entirety. JA 64-116. Defendant filed 137 exhibits in support of its motion. On September 11, 2017, Plaintiffs filed their opposition to Defendant's motion. JA 1253-1293. Plaintiffs supported their opposition with 48 exhibits. On September 25, 2017, Defendant filed its reply. JA 2091-2128. Defendant filed an additional 6 exhibits in support of its motion.

On September 25, 2017, Plaintiffs filed a supplement to their opposition to Defendant's motion for summary judgment, together with an additional four exhibits and a request to reopen discovery. JA 2165-2168. Defendant moved to strike Plaintiffs' supplement and additional exhibits, JA 2174-2180, and to seal exhibits PEX 49 and PEX 50. Plaintiffs opposed Defendant's motion to seal.

On September 29, 2017, the District Court heard oral argument on Defendant's motion for summary judgment. During the proceeding, the District Court denied Plaintiffs' motion to add additional exhibits, and its request to reopen

discovery. JA 2245 (Tr. 4:15-18). The District Court also granted Defendant's motion to seal PEX 49 and PEX 50. JA 2246 (Tr. 5:4-5).

On October 2, 2017, the District Court granted Defendant's motion for summary judgment in its entirety, JA 2226, and on November 9, 2017, it issued a memorandum opinion & order, to accompany its October 2 order, JA 2227-2240.

Plaintiffs timely filed a notice of appeal on January 5, 2018. JA 2281.

Rulings Presented for Review

Plaintiffs present one ruling for review: the District Court's denial of Plaintiffs' September 25, 2017 request to submit additional exhibits, and reopen discovery. JA 2245 (Tr. 4:15-18).

SUMMARY OF THE ARGUMENT

The District Court erred in granting the DEA summary judgment as to the Kitlinskis' Count 10 wrongful termination claims, brought under Title VII and USERRA for retaliation. The Kitlinskis amply demonstrated a genuine dispute on a material fact – the DEA's motivation in terminating them. Under both Title VII and USERRA, such a dispute serves to defeat summary judgment. *See Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310, 318 (4th Cir. 2005) (Title VII); *Sheehan v. Dep't of the Navy*, 240 F.3d 1009, 1014 (Fed. Cir. 2001) (USERRA).

The DEA, like any federal agency, removes a federal employee only after showing that both the charges and the penalty can be supported. In this case, the record shows that the DEA engineered the circumstances that resulted in the charges against both Darek and Lisa, and then made a mockery of the requisite consideration of the penalty. The DEA removed Lisa Kitlinski for Refusal to Cooperate by not appearing at two scheduled DEA OPR interviews, appearing at a third scheduled interview but asserting privilege regarding some questions, and for not producing the Blackberry on those dates. In addition, the DEA charged Lisa with Insubordination, for refusing direct orders to produce the blackberry. Similarly, the DEA charged Darek with Refusal to Cooperate for not appearing at a November 21, 2014 DEA OPR interview and not producing the blackberry on that date.

The facts show that the OPR investigation itself was actually begun by DEA OPR on its own initiative, after the DOJ OIG tipped it off to a complaint made by Darek Kitlinksi *against the DEA*. Initiating this investigation into the Kitlinskis' retaliation complaint provided the DEA with significant power over the Kitlinskis, power that it abused.

The facts show that in the timing of its interviews, and the manner in which it compelled the Kitlinskis to appear, the DEA OPR never intended for the Kitlinskis to cooperate with investigators, thus engineering the circumstances that resulted in the charges of Refusal to Cooperate. Further, review of the Deciding Official's consideration of the requisite *Douglas* factors shows that he failed to appropriately consider the factors, instead concluding that factors weighed in favor of removal without acknowledging or discussing the facts of this case.

In addition, the District Court erred in granting Defendant summary judgment as to the Kitlinskis' Count 10 wrongful termination claims without issuing any decision on Count 10. Review of the District Court's opinion demonstrates that the District Court said nothing at all about the wrongful termination claims, instead limiting its discussion and decisions to Plaintiffs' remaining seven claims then pending in its Amended Complaint.

In addition, the District Court erred when it failed to hold a hearing on the Kitlinskis' wrongful termination claims, as they are entitled to a hearing under both the procedural posture of this case, and under USERRA.

Finally, the District Court abused its discretion in denying the Kitlinskis' request to file two supplemental exhibits in support of its opposition to Defendant's motion for summary judgment, as both documents were relevant to its wrongful termination claims and would support the Kitlinskis' claim that the DEA's motivation in terminating them was discriminatory.

ARGUMENT

I. The District Court Erred in Granting the DEA Summary Judgment on the Kitlinskis' Wrongful Termination Claims, as the Record is Replete with Facts from Which the DEA's Discriminatory Motivation May Reasonably Be Inferred – Thus Presenting a Genuine Dispute on a Material Fact

A. Standard of Review

We review a district court's grant of summary judgment de novo. *Scinto v. Stansberry*, 841 F.3d 219, 227 (4th Cir. 2016).

Motivation is a fact issue, a genuine dispute over which will defeat summary judgment. "While issues of improper motivation generally involve factual determinations properly left for a jury, '[m]ere conclusory allegations of motivation do not preclude summary judgment.' "*Francis v. Booz, Allen & Hamilton, Inc.*, 452 F.3d 299, 307 (4th Cir. 2006) (citing *Yarnevic v. Brink's, Inc.*, 102 F.3d 753, 757-58 (4th Cir. 1996)).

B. The DOJ OIG and the DEA OPR Colluded, to the Detriment of the Kitlinskis' Ability to Obtain an Independent Investigation of the Concealment of the Blackberry

Although the OIG failed initially to state why it reversed its own decision to conduct an investigation, Darek learned during discovery in his MSPB administrative complaint, filed before the District Court suit was brought, that this decision followed a telephone call between the Special Agent in Charge of the OIG's Washington Field Office, Ronald Powell, and DEA OPR Chief Herman Whaley. JA

782-783 (Tr. 90:11-91:13); JA 796-797 (Tr. 34:10-35:8). Whaley denied that the IG told him who made the complaint. However, on September 30, Whaley ordered Jeffrey Keenan to pull garage surveillance tapes of the area surrounding the Kitlinski vehicle. JA 2068, ¶ 3.

In their opposition to summary judgment, the Kitlinskis pointed out the implication of this conduct: that the DEA's repeated claim that they removed the Kitlinskis for refusal to cooperate in a complaint that Lisa Kitlinski voluntarily initiated on October 2, 2014 was patently false. *See* JA 1278-1280. The Agency had begun investigating the matter days before Lisa made a call to DEA OPR, when it was tipped off by Powell, himself a former DEA agent.

Of note in addressing these claims is the fact that both Whaley and Powell, trained investigators, kept no notes and had no actual recollection of when they actually spoke to each other or what they spoke about. JA 783 (Tr. 91:5-11); JA 798 (Tr. 36:19-21). The lack of written communication on such an explosive claim appears contrived, a fact the Kitlinskis pointed out in their brief to the District Court. *See* JA 1279. Such evidence is a powerful indicator of discriminatory and retaliatory motive on the part of the DEA.

C. Darek was Engaged in Active Litigation Before the MSPB Against the DEA Concerning the Concealment of the Blackberry in Lisa's Vehicle at the Time of Both His and Lisa's OPR Interviews

On October 7, 2014, Darek Kitlinski placed the issue of the installation of the blackberry into the context of USERRA discrimination and reprisal. JA 1302.

On November 20, 2014, undersigned counsel wrote to both OPR Inspector Jose Roman and Ms. Letitiea Pinkney, DEA counsel in the pending MSPB matter.[3]

> Given Ms. Pinkney's reply of yesterday, *in which she stated that the matters concerning the phone would be handled in a judicial forum*, it is inappropriate, sanctionable and illegal to use the OPR process to harass Mr. Kitlinski and Mrs. Kitlinski. . . .
>
> . . . .
>
> Ms. Pinkney we intend to ask the [MSPB AJ] to order the Agency not to interview the Kitlinski's and to restrict you to simply inspecting the telephone at this office, as the discovery rules allow. *You may of course send deposition notices and other demands as is necessary but it is inappropriate to use OPR to conduct discovery.*

JA 762 (emphasis added).

The Kitlinskis emphasized during oral argument before the district court that a "fundamental issue" for them when the DEA attempted to interview each of them was their MSPB litigation. JA 2258-2259 (Tr. 17:17-18:7); *see also* JA 1280-1281, 1283-1285. As the Kitlinskis explained to the District Court,

> The DEA clearly had a legally acceptable mechanism to speak to the Kitlinskis, once they filed complaints, and obtain information from

[3] If the matter were criminal in nature, the Kitlinskis would be entitled to counsel as a matter of Constitutional law. To the extent it was administrative, the question of whether 5 U.S.C. § 555, or the rights they have as litigants before the MSPB and the EEO were violated, for participating in the MSPB and EEO processes themselves, should have applied. *See* JA 1285.

> them, it's called discovery and includes depositions and other forms of information gathering. *Because taken to its extreme, the DEA is asserting the right to use OPR to question its employees on the subject matter of their complaints against the agency, outside the presence of counsel or the rules of civil or administrative procedure*.

JA 1283-1284 (emphasis added) (citing 29 C.F.R. § 1614, 5 C.F.R. § 1201 & Fed. R. Civ. P. 30-36).

D. Lisa's DEA OPR Interview Was Timed to Ensure that Neither Darek Nor Lisa's Counsel Would be Available to Assist Her, and Also to Distract Darek During His MSPB Hearing

Lisa was notified by OPR Investigator Jose Roman to appear for an interview first on October 20, 2014, and then on October 21. On both of those dates, Darek was in San Francisco, California appearing at his MSPB hearing on a USERRA appeal.[4] JA 1322. Appearing with Darek before the MSPB was his and Lisa's undersigned counsel, Mr. Kevin Byrnes.

Despite knowing that the Kitlinskis were then involved in litigation adverse to the DEA, on the same subject matter then under investigation by the DEA OPR, the DEA denied Lisa her right to appear before OPR with counsel. *See* JA 104 & JA 104 n.17.

Over objection made by Lisa's counsel to the Office of Chief Counsel of the DEA, which represented the Agency in defending against the Kitlinskis' claims, Lisa

[4] *Kitlinski v. Dep't of Justice*, No. SF-4324-14-0184-I-2, 2015 WL 1785903 (M.S.P.B. Apr. 16, 2015), *aff'd*, 123 M.S.P.R. 9 (Nov. 3, 2015) ("A hearing was held on October 20-21, 2014 in San Francisco, California.").

appeared and answered questions, except those she believed in her layman's experience violated a marital or attorney-client privilege. Lisa's counsel subsequently protested the interview and asked the Agency to identify the basis for invading privilege. The Agency neither responded to the request nor re-interviewed Mrs. Kitlinski. Instead it simply fired her for alleged refusal to cooperate.

Lisa told OPR Investigator Roman she did not possess the phone and that she was represented by Mr. Byrnes who, as the agency was fully aware, was in San Francisco for the MSPB hearing. The ability of an agency to haul a represented party, involved as a complainant against that agency in a recognized judicial forum, unrepresented, into a compelled interview and can then demand that the employee violate privilege or be fired would render privilege a nullity.

Lisa's DEA OPR interviews—October 20 and October 21—were timed to coincide with the two days scheduled for Darek's MSPB hearing on his USERRA claim against the DEA. And not just any hearing, but a hearing at which then-DEA Administrator Michele Leonhart and then-Deputy Administrator Harrigan were both called to testify. *See Kitlinski*, 2015 WL 1785903. It was certain then, that when Roman contacted Lisa and directed her to appear first on October 20, and then on October 21, that she would be alone. It would be impossible for either Darek or their counsel to be present, or to spend much, if any, time counseling Lisa.

In addition, Lisa was a named witness in Darek's MSPB hearing, and was prepared to testify via video teleconferencing from Washington, DC on either October 20 or 21, as needed. The names of the expected witnesses were relayed to the MSPB and to the DEA Chief Counsel prior to the hearing. Thus, the two OPR interviews were also scheduled on days on which it was known within the DEA that Lisa could be unavailable, due to her status as a witness.

In refusing to allow Lisa to appear with counsel despite being engaged in litigation, the DEA ensured that Lisa would be wary of the DEA's motives in pressing the interview.

E. DEA Improperly Demanded That Darek Abandon His Post and Appear for a Compelled Interview

As for Darek, the Agency directed him to simply abandon his active duty assignment with the U.S. Coast Guard and appear for questioning on less than a day's notice. The Agency did not recall Darek to civilian duty nor obtain approval from the Coast Guard for this directive. *See infra* Part II.F.

On November 20, 2014, just before 12 noon, OPR Senior Inspector (SI) Finning wrote to Coast Guard Investigative Services Washington Field Office Special Agent-in-Charge Wimer,

> Inspector Jose Roman had planned on scheduling Darek Kitlinski for an interview and wanted to coordinate through your office. We were

> hoping to complete this today or before the end of the week and *would like to give Mr. Kitlinski ample time to report*. Could you please facilitate this request?

JA 917 (emphasis added). Despite assuring SAC Wimer that he wanted to provide Darek with "ample time to report" when "scheduling" an interview, less than four hours later, OPR Inspector Roman wrote to Mr. Kitlinski regarding his "Compelled OPR Interview." As Roman wrote at 3:45 pm, "pursuant to an ongoing OPR investigation, you are hereby ordered to appear at the OPR office . . . on November 21, 2014, at 10:00 am." JA 760 (emphasis added).

During his August 2017 deposition, Roman was asked about the rush to interview Darek.

> Q Why did you need to order him to come the next day? In other words, why didn't you give him the opportunity to select a date and time to come.
> . . . .
> A We requested that he come the following day because we got authorization from the Coast Guard and there [were] no issues with him attending the following day, so it was basically we were ready to do the interview, and *we demanded to see the following day*, requested that.
> . . . .
> Q Why the following day? Why not give him the opportunity to secure his affairs at the Coast Guard and come over voluntarily when it wouldn't be disruptive.
> . . . .
> A We spoke with the Coast Guard and there was no disruption in his work schedule.

JA 908-909 (192:7-193:11) (emphasis added).

The contention that military personnel can be directed by employers to simply leave their posts and return to work, for any purpose, undermines USERRA itself and shows a certain cavalier disrespect for the military service. Thus, Darek was correct to demand some written order or directive from his command to leave his post.

F. Darek Disputed the DEA's Authority to Order Him to Appear at the November 21 Interview While on Active Duty, In Response to Which the DEA Produced No Such Authority

Necessarily implicit in the DEA's charge against Darek was that it had the authority to order him to appear for the November 21 OPR interview while he was on active duty military service. Indeed, if the DEA lacked such authority, then it was wrong to charge Darek with Refusal to Cooperate for not appearing at that interview.

Darek disputed the DEA's authority on this point immediately after the DEA served him with its memorandum directing him to appear at the "compelled" interview. Undersigned counsel wrote to OPR Inspector Roman on November 21, on Darek's behalf, on this point.

> Please identify any statutory authority you[] claim[] exists for you to contravene military orders issued to an active duty service member to demand that they be recalled from active duty back to the place of employment they held prior to activation on military service. Only the U.S. military can terminate active duty orders. Therefore, your visit and demand are both direct violations of USERRA. To threaten or take discipline based on a refusal of an active duty military member to take

> a leave of absence is also per se violation of USERRA as well as an act of retaliation and reprisal.

JA 765. OPR Inspector Roman provided no such authority, as the Kitlinskis argued to the District Court. *See* JA 1263-1264. Nor was the DEA forthcoming with authority at any time after November 21, despite repeated questioning on this point.

1. The DEA Provided No Such Authority During Numerous Depositions

OPR Inspector Roman was no more forthcoming during his March 10, 2016 deposition than he was at the time of Darek's interview. When asked whether he had any "written materials from the Coast Guard that authorize Mr. Kitlinski to come see you," Roman testified that he believed "there was authorization obtained for him to appear and it was authorized," but he was unable to identify any written authorization. JA 903-904 (187:17-188:11).

On May 20, 2016, the proposing official, Christopher Quaglino was questioned about the DEA OPR's authority to order Darek to appear at the November 21 interview. Under repeated questioning on this point, Mr. Quaglino was less than certain about the source of DEA OPR's authority. Mr. Quaglino alternately said that the source of the DEA OPR's authority was Darek's status as a DEA employee (then on leave), or that Darek's Coast Guard chain of command "facilitated" the November 21 interview, or even that Darek's military posting was "local." JA 989-993 (Tr. 32:2-36:6).

On May 31, 2017, the Kitlinskis questioned Deciding Official Michael Bulgrin about the source of the DEA OPR's authority. Twice, Bulgrin was asked for the authority "that allows the DEA to order active duty military members off their military posts," and twice, his only response was that he "based it on the fact that [Darek] was a DEA employee." JA 1064-1067 (Tr. 39:2-18, 41:18-42:3). Further, Bulgrin admitted that he never saw "any written authorization from the United States Coast Guard that stated in writing that Mr. Kitlinski could leave his post to come answer questioning with the DEA." JA 1066 (Tr. 41:13-17).

Later in his testimony, Deciding Official Bulgrin tried to find some way to say that the Coast Guard had provided the DEA OPR with authority:

> Well, I don't think that they—I think that [DEA OPR] approached the Coast Guard and tried to work it out with the Coast Guard to make Mr. Kitlinski available for an OPR interview. And, in fact, I think that they said that they would make him available for an interview. And it was scheduled for the next day and Mr. Kitlinski—there was some paperwork that was presented to him about appearing, and Mr. Kitlinski refused to sign it.

JA 1101 (Tr. 316:9-18).

2. The DEA Provided No Such Authority in Its Motion for Summary Judgment Undisputed Facts

In its Undisputed Facts, the DEA made several references to an internal manual and to their communications with various Coast Guard officials on November 20 – 21, 2014 as their purported authority. *See* JA 80, 82 (MSJF 33, 38

& 39). But the DEA never actually asserted that it *had* this authority, nor did it present any evidence in its motion *demonstrating* such authority. *See* JA 1282.

In its MSJF 33, the DEA stated that "DEA OPR Investigators have the authority to require DEA employees to respond to questions related to DEA Standards of Conduct, and to produce and/or grant access to all Government property." JA 80 (MSJF 33 citing JA 864-866). Defendant's Exhibit 81 is Section 8302 of the DEA Planning & Inspection Manual – "Authority of DEA Inspectors," review of which shows that there is no mention of OPR investigators' authority over DEA employees while they are on active duty military service.

The DEA also suggests, but never quite explicitly states, that Coast Guard officials, somehow, permitted it to order Darek to appear for the November 21 OPR interview. According to the DEA's Undisputed Facts,

> 38. During this time, Darek was on Coast Guard duty. On November 20, 2014, OPR Senior Inspector Finning contacted Coast Guard Investigative Services SAC Wimer and requested his assistance in coordinating an interview with Darek. DEX 87. Wimer then contacted Kevin Sligh, who supervised Darek at the Coast Guard at the time. DEX 88 at 3. Sligh advised that Darek was on a temporary duty assignment with Lieutenant Commander ("LCDR") McMillan. *Id*. Wimer *contacted McMillan, who in turn asked Darek's co-worker, LCDR Kevin Hill, to arrange an OPR interview with Darek.* DEX 89 at 6-7.
>
> 39. Finning also spoke with McMillan to determine Darek's availability to appear at OPR on November 21, 2014. DEX 77 at DOJ-7714. *McMillan directed Finning to Hill, who told Finning that Darek was available. Id*.

JA 82 (emphasis added). Although the DEA names four different members of the Coast Guard, it stops short of naming any one as first, possessing the authority to order Darek to leave his military duty and comply with the DEA's order, and second, ordering Darek to do so. The closest it comes is naming SAC Wimer as someone whose assistance it requested to "coordinate" the interview, and in naming LCDR Kevin Hill as someone who told the OPR investigator that "Darek was available."

But, as their deposition testimony by written questions shows, neither SAC Wimer nor LCDR Hill authorized the DEA to order Darek to leave his post on November 21. Both were directly asked about whether they realized that the DEA's intention was to have Darek leave his military post on November 21 to report for an OPR interview, to which each responded with an unequivocal "No." JA 939 (No. 16); JA 1829 (No. 16).

By their own testimony, neither SAC Wimer or LCDR Hill even realized that the DEA was trying to compel Darek to leave his post to report to the DEA on November 21. If neither realized the DEA's objective, it was obviously impossible for either to have provided authorization for Darek to comply with the DEA's order.

Further, left unexplained by the DEA is how Lieutenant Commander (O-4) Hill, an individual whom it correctly identifies as "Darek's co-worker," could authorize Darek to do anything, much less leave his military post while on active duty. Darek then also held the rank of Lieutenant Commander. Darek's

Commanding Officer in November 2014 was Captain (O-6) Joseph Gleason, the only person authorized to order or permit him to appear before the DEA. None of the individuals with whom the DEA conferred had the authority suggested by the DEA.

Thus, even if Defendant's Undisputed Facts were accepted in their entirety, they would be insufficient to show that the DEA had authority to order Darek to appear at an OPR interview on November 21, 2014. The Kitlinskis, however, contested Defendant's MSJF 39 by pointing to the Wimer deposition to show that "witnesses recall no discussion of the DEA requesting that Darek come to the DEA as opposed to the Coast Guard. Finning's claims are self-serving hearsay." JA 1258 (response to MSJF 39, citing JA 1815-16, 1829-32).

G. Deciding Official Bulgrin's Consideration of the *Douglas* Factors Had No Purpose Other Than Reaching the Result of Removal

In leveling discipline against an employee, the Agency must do more than conclude that the charge is sustained. In addition, the Agency is obliged to give wholly separate consideration to the question of whether the penalty is "appropriate." *Douglas*, 5 M.S.P.B. at 329. As the M.S.P.B. explained,

> Any disciplinary action demands the exercise of responsible judgment so that an employee will not be penalized out of proportion to the character of the offense; *this is particularly true of an employee who has a previous record of completely satisfactory service. An adverse action, such as suspension, should be ordered only after a responsible determination that a less severe penalty, such as admonition or reprimand, is inadequate.*

Douglas, 5 M.S.P.B. at 330 (emphasis added).

Under this guidance, an agency is obligated to consider twelve non-exhaustive factors, known as the *Douglas* factors, in its determination of whether a particular penalty is appropriate to the offense. Review of Deciding Official Bulgrin's written consideration of these factors shows that he did not exercise "responsible judgment," but instead said what he needed to say to decide factors against both Darek and Lisa, regardless of whether such a decision made sense under the facts. The Kitlinskis highlight only the more egregious examples of Bulgrin's sham consideration of the *Douglas* factors.

Douglas Factor 6 requires consideration of "the consistency of the penalty with those imposed upon other employees for the same or similar offenses," and provides detailed instructions on instances of prior discipline that may properly be considered as "comparators." JA 1131.

> [The agency should] consider the consistency of the penalty with those imposed upon other employees for the same or similar offenses. . . . . In order for employees to be similarly situated, the charges and circumstances must be substantially similar. *There must be a* ***great deal*** *of similarity, not only between the offenses committed by the employee and a proposed comparator(s), but as to other factors, such as whether the employees were in the same work unit, had the same supervisor and/or deciding official, and whether the events occurred relatively close in time.*

JA 1131-32 (emphasis added). In response to this factor, Deciding Official Bulgrin wrote just one word for both Darek and Lisa: "Consistent." JA 1132; JA 1141.

As support for the "consistency" of the removal penalties, the DEA provided information on nine purported comparators, cases in which the penalty imposed on the employee was removal. *See* JA 1117-1125. Review, however, demonstrates that other than the same penalty, there is no "great deal of similarity" between the facts of the DEA's comparators and the Kitlinskis' cases. The decision dates in the nine earlier cases of discipline ranged from May 7, 1998 to January 21, 2003, meaning that none of the nine comparators were "relatively close in time" to the January 11, 2016 removal decisions issued to the Kitlinskis. Nor was there the requisite "great deal of similarity" in the charges themselves. Almost without exception, the information provided for each employee showed multiple serious charges, including false statement/documents, refusal to submit to a reasonable suspicion drug test, falsification of travel voucher, inattention to duty, disruptive and threatening behavior, and conduct unbecoming a DEA employee. *See* JA 1117-25. Nor were the instances in the same "work unit," as information provided showed that employees were in offices located in New York (2), Atlanta (2), and Dallas. *See* JA 1117-25.

Douglas Factor 10 requires an assessment of the "potential for employee's rehabilitation." JA 1133. In his responses for both Darek and Lisa, Deciding Official Bulgrin wrote that each "provided a written and oral response to his proposed

removal, but continually denied having violated any DEA policy." JA 1133; JA 1142. Such a response, under the guidelines for this factor, indicated "poor rehabilitative potential." JA 1133; JA 1142.

Douglas Factor 11 asks whether there "were any mitigating circumstances surrounding the offense," which expressly includes "unusual job tension, . . . or bad faith, malice or provocation on the part of others involved in the matter." JA 1133. Bulgrin responded that Darek and Lisa in "both [their] written and oral responses [each] alleged reprisal/retaliation against [them]. In the review of this investigation and its supporting documents I found no evidence to support [such] allegation[s]." JA 1133; JA 1142. In fact, Bulgrin was openly dismissive of the subject matter of the Kitlinskis' October 2014 OPR complaint, and the possibility that they were surveilled as retaliation. In his May 31, 2017 deposition, Bulgrin frankly stated that he "thought the allegations of the DEA planting a phone in the car were ludicrous." JA 1065 (Tr. 350:5-7); *see also* JA 1259 (contesting the DEA's MSJF 48).

Finally, *Douglas* Factor 12 requires:

> the deciding official to consider the adequacy and effectiveness of alternative sanctions to deter such misconduct in the future by the employee or others. *A deciding official has a duty to make findings on lesser penalties to determine whether any of them would be adequate and effective to deter the employee or others from engaging in such conduct in the future*.

JA 1133 (emphasis added); JA 1142-1143 (emphasis added).

In response, Bulgrin wrote conclusively regarding both Darek and Lisa:

> I have considered the seriousness of [the] conduct as it relates to [his or her] responsibilities . . . . I have considered that [the] conduct was willful, intentional and detrimental to the DEA mission. I have considered alternative sanctions and have concluded removal from DEA and government services is appropriate and necessary to promote the efficiency of the agency.

JA 1134; JA 1143.

H. On the Whole, the DEA's Actions Throughout Both the OPR Investigation and Disciplinary Process Demonstrate Discriminatory Motivation

As the movant below, the DEA had the burden to prove to the district court that there is no genuine dispute on any material fact. Fed. R. Civ. P. 56(a). In a USERRA claim,

> The factual question of discriminatory motivation or intent may be proven by either direct or circumstantial evidence. . . . Discriminatory motivation under the USERRA may be reasonably inferred from a variety of factors, including 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.

Sheehan, 240 F.3d at 1014 (citations omitted).

Similarly, a Title VII plaintiff may "avert summary judgment" by "presenting direct or circumstantial evidence that raises a genuine issue of material fact as to whether an impermissible factor . . . motivated the employer's adverse employment decision." *Diamond*, 416 F.3d at 318 (citing *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277 (4th Cir. 2004) (en banc)).

Thus, whether the DEA had a discriminatory motive in terminating the Kitlinskis is clearly a material fact in their wrongful termination claims. *See Villa v. CavaMezze Grill, LLC*, 858 F.3d 896, 900 (4th Cir. 2017) (discussing necessity of employer's discriminatory motivation for adverse action in a Title VII claim); *Francis*, 452 F.3d at 307 ("[I]ssues of improper motivation generally involve factual determinations properly left for a jury. . ." in a USERRA claim.).

The Kitlinskis have amply demonstrated a genuine dispute on the DEA's motivation in terminating their employment. As such, the District Court erred in granting the DEA summary judgment on both their USERRA and Title VII wrongful termination claims. *See Francis*, 452 F.3d at 307.

The issue of the Agency's response to the reporting by the Kitlinskis of the discovery of the Blackberry is central to the entire case and the issue of termination itself. The DEA first started investigating the Kitlinskis' retaliation claims against it *on its own*, after getting tipped off by the DOJ OIG about those claims. Initiating such a complaint gave the DEA significant power over the Kitlinskis, which, as became apparent during the OPR investigation, it abused. Instead of being the subject of an OIG investigation into Darek's retaliation complaint, supported by the evidence of the DEA Blackberry, the DEA was *conducting* the investigation and would soon turn the purported complainants into *subjects* of that investigation.

The DEA then engineered the circumstances upon which it instituted the charges against both Darek and Lisa, and proceeded to make a mockery of the *Douglas* factors to reach the conclusion that removal from federal service was the *only* appropriate penalty for either.

First, the interviews themselves were contrived. OPR "scheduled" both Darek's and Lisa's interviews to make it as unlikely as possible that either could or would appear before DEA OPR. In considering the actions of DEA OPR regarding the interviews, it is critical to remember the position of the Kitlinskis in the OPR investigation. They were the targets of possible retaliation, Darek was then a litigant before the MSPB on the issue of the concealment of the blackberry in Lisa's vehicle. And, officially, Lisa was the complainant in the OPR investigation. Furthermore, they were both senior, long-time DEA employees with no disciplinary history and stellar work performance records.

With these facts in mind, the DEA OPR's actions in "scheduling" the interviews are suspect at best and pretextual at worst. If the OPR's only objective was fact-finding, as it should have been, then why press Lisa to appear when she is without the two people on whom she would most naturally rely for support and assistance—her husband and her counsel? Why seek to interview Lisa, while Darek is attending a MSPB hearing on his USERRA claim, a situation that was sure to be

distraction to him during that hearing? And, why do so while Lisa's counsel was engaged in representing her husband?

As of October 20, Darek had already initiated his USERRA retaliation claim in the MSPB against the DEA based on the concealment of the DEA blackberry in Lisa's vehicle. JA 1302. As a witness to the events that led to the USERRA claim, and as a participant in the claim itself, Lisa also claimed the protection of USERRA. *See* 38 U.S.C. § 4311(b). Lisa was thus engaged in litigation adverse to the DEA regarding the very subject matter about which Roman suddenly and conspicuously sought to interview her, without her husband, and without her counsel.

Then there was Darek's November 21 interview. It is inconceivable that any investigator simply trying to gather facts would treat a *complainant* the way OPR Investigators Roman and Finning treated Darek Kitlinski. Given Lisa's concerns about appearing for an interview less than one month earlier, Roman knew that Darek would have similar concerns. If DEA OPR just wanted to gather facts, it stands to reason that an investigator would encourage cooperation by promoting trust in the OPR investigation. For example, Roman could have provided Darek with "ample time to report," as OPR SI Finning falsely told SAC Wimer he would in "scheduling" the interview. JA 917. Instead, DEA OPR did its best to ratchet up the tension by unexpectedly issuing Darek a notice to appear for a "compelled OPR interview" and forcing him to appear within hours of the suspect notice.

Further, an investigator simply trying to gather facts would provide the basis for authority to "compel" an interview upon being asked to do so by the interviewee. Darek immediately questioned the DEA OPR's authority to order him to appear for an interview while he on active duty. But, Roman did not—because he could not—respond to this request. If DEA OPR had the authority to order an employee then on leave and serving on active duty with the uniformed services to appear for an OPR interview, it would have been able to provide that authority.

Darek returned to the DEA less than seven weeks later, on January 11, 2015. JA 392. Once Darek resumed his DEA career, the lack of authority to order him off active duty for an interview was no longer an issue. But the DEA never attempted to reschedule Darek's interview after its one attempt on November 21.

DEA OPR had almost fourteen months—from November 21, 2014 to January 11, 2016, when it terminated Darek—to consider Darek's challenge to its authority to order him to appear at an interview while he was on active duty. Presumably, an agency acting with no discriminatory or retaliatory motive would take care not to terminate a long-time, highly accomplished employee with no disciplinary history on the basis of a charge—Refusal to Cooperate—that could only be brought if the agency had the authority to compel cooperation in the first place.

The deposition responses of OPR Inspector Roman, Mr. Quaglino, and Deciding Official Bulgrin demonstrate with pristine clarity that the DEA did nothing

to investigate or even consider whether it was authorized to "compel" Darek to appear for the November 21 interview. No DEA official ever identified any authority by which the DEA OPR had the right to order Darek off military duty to appear before the OPR.

Nor was the DEA without a mechanism by which to gather facts from either Darek or Lisa. On November 20, 2014, undersigned counsel wrote to both OPR Inspector Roman and DEA counsel Ms. Pinkney to provide them appropriate access to Darek regarding the Blackberry issue, including the issue of the concealment of the Blackberry in Lisa's vehicle. JA 762-763. If the DEA OPR's true and only intent was fact-finding, then why not cooperate with DEA counsel and interview the Kitlinskis through the then-ongoing MSPB discovery process?

In both the timing and manner in which the DEA OPR attempted to interview the Kitlinskis, it unnecessarily put them in a corner under pressure. And in the end, the DEA got the result it sought—fabricated charges by which it could achieve its real objective—bringing an end to the EEO complaints, the USERRA complaints, the MSPB complaints, the DOJ OIG complaints, and all other manner of scrutiny that both Darek and Lisa continually brought to bear on the DEA's misconduct. As of November 2014, it had been almost four years since Darek filed his first EEO complaint in September 2011. JA 352. Top DEA officials had just recently been forced to get personally involved with both depositions and testifying at a hearing

for one of Darek's MSPB appeals. It was all just getting out of hand, and with Darek's discovery of the Blackberry and his latest USERAA retaliation appeal before the MSPB, it was getting worse. Three years was enough for the DEA. The Kitlinskis had to go, and setting up Refusal to Cooperate charges was the way the DEA made that happen.

But, even in this circumstance, bringing charges was not enough to secure the removal of a federal employee. In addition, the penalty must be found to be "appropriate" under the specific facts of the case. It is inconceivable that honest consideration of the *Douglas* factors would ever have resulted in the removal of either Darek or Lisa from federal service. From both his dismissive statements during his deposition and his nonsensical evaluation of the *Douglas* factors, it is clear that Deciding Official Bulgrin's approached his task to achieve a particular result—removal.

Bulgrin claimed the Kitlinskis' cases were "consistent" with those of nine other employees previously removed from federal service, in satisfaction of *Douglas* factor 6. Yet, none of the nine purported comparators possessed a "great deal of similarity" with the Kitlinskis' circumstances, rendering Bulgrin's claim that this factor counted against the Kitlinskis a sham. Bulgrin brought forward comparators more than a decade old, from employees who were charged with serious matters: false statement/documents, falsification of travel voucher, inattention to duty,

disruptive and threatening behavior, and conduct unbecoming a DEA employee. *See* JA 1116-1125. The Kitlinskis were the targets of retaliation, and they were litigants against the DEA on the very subject matter about which the DEA sought to question them. In Bulgrin's view, that made them like people who engaged in duplicity for personal gain, created disturbances, or threated others.

Nor did Bulgrin consider the Kitlinskis to be potential candidates for "rehabilitation" under *Douglas* factor 10, as they defended themselves by denying they had in fact violated DEA policy. Rehabilitation from what? Asserting and defending their rights under both Title VII and USERRA? Questioning heavy handed interviewing tactics? Questioning authority to compel an interview in the first instance? The Kitlinskis were never wrongdoers. Unless the Kitlinskis needed to be rehabilitated from their proclivity to seek transparency and propriety of conduct within the agency, the idea that they needed rehabilitation, much less that they were beyond it, is preposterous.

Nor did Bulgrin consider there to be any "mitigating circumstances surrounding the offense," under *Douglas* factor 11. He never acknowledged that Darek had challenged the DEA OPR's authority to order him to appear for an interview while on active duty, which authority it never provided. Nor did he acknowledge that both Darek and Lisa were engaged in ongoing litigation, which prompted Lisa's concerns about appearing without counsel. Nor did he

acknowledge that the Kitlinskis had relinquished the Blackberry to counsel, who said he would produce it if ordered by the MSPB AJ to do so, which he never was.

While Bulgrin acknowledged the existence of the Kitlinsks' retaliation claims in his consideration of mitigating circumstances under *Douglas* factor 11, he then dismissed the possibility that such claims were justified, and thus found no basis on which to mitigate the proposed penalty of removal. Bulgrin had no business attempting to evaluate the retaliation claims. This was the province of the MSPB.

And finally, Bulgrin determined that no lesser penalty than removal would be adequate to "deter the employee and others form engaging in such conduct in the future" under *Douglas* factor 12. To what "conduct" was Bulgrin referring? Filing and defending a USERRA retaliation claim with the MSPB?

In bringing a retaliation claim under USERRA, "[d]iscriminatory motivation under the USERRA may be reasonably inferred from a variety of factors, including 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." *Sheehan*, 240 F.3d at 1014. OPR's actions in seeking to interview both Darek and Lisa are wholly inconsistent with the actions for an investigative agency just trying to gather facts. From these actions alone, discriminatory

motivation may be inferred, thus creating a genuine dispute on a material fact. *See id*.

Further, the proximity in time between the DEA OPR's attempts to interview both Darek and Lisa with Darek's then-in progress USERRA claim against the DEA is striking. DEA OPR tried to interview Lisa on both days of Darek's MSPB hearing on his USERRA claim in San Francisco—October 21 and 22, 2014.

In determining whether a movant is entitled to summary judgment, the court must "construe the evidence in the light most favorable to [the non-movant] and draw all reasonable inferences in [its] favor." *Gordon v. CIGNA Corp.*, 890 F.3d 463, 470 (4th Cir. 2018) (quoting *Hill*, 354 F.3d at 283). The *sole basis* for the DEA's termination of both Darek and Lisa was their actions during the OPR investigation. Taken in the light most favorable to the Kitlinskis, the non-movants, reasonable inferences may be drawn from the DEA's own actions that their terminations were not for refusal to cooperate, but were instead retaliation and reprisal for their prior EEO and USERRA complaints against the DEA.

For these reasons, the Kitlinskis ask this Court to reverse the District Court's grant of summary decision to the DEA for Count 10 of their Amended Complaint.

II. The District Court Erred by Granting the DEA Summary Judgment on the Kitlinskis' Wrongful Termination Claim Despite Issuing No Decision on That Claim

This Court has previously reviewed decisions in which the District Court issued a dismissal, but without issuing an actual decision on one or more claims. In such cases, this Court has appropriately stated that the proper course of action is to vacate the decision and remand for the District Court to address the claim in the first instance. *See, e.g., Office of Strategic Servs., Inc. v. Sadeghian*, 528 F. App'x 336, 347 (4th Cir. 2013) (per curiam); *Jennings v. Univ. of N.C.*, 482 F.3d 686, 702 (4th Cir. 2007) (en banc); *Hettleman v. Bergland*, 642 F.2d 63 (4th Cir. 1981).

A. The Kitlinskis' Wrongful Termination Claims Were Fully Briefed During Summary Judgment and Addressed During Oral Argument, But the District Court Did Not Decide the Claims

In their Amended Complaint, the Kitlinskis assert their terminations were retaliation and reprisal for prior EEO protected activity, and were also retaliation, reprisal, and part of a hostile work environment under USERRA, and retaliation and reprisal for filing MSPB complaints. Am. Compl. ¶¶ 287-304. In addition, the Kitlinskis alleged that even if the DEA was justified in imposing discipline upon them, the discipline imposed was unreasonable under the *Douglas* factors. *Id.*, at ¶ 305 (referring to *Douglas*, 5 M.S.P.R. at 306).

Moreover, the Kitlinskis alleged that the DEA committed harmful procedural error during the DEA's disciplinary proceedings when it failed to provide them with

the same unredacted copies of documents provided to the Deciding Official, Mr. Michael Bulgrin. *Id.*, at ¶ 297. The Kitlinskis further alleged that their terminations were in retaliation for Mr. Kitlinksi's actions in publicly discussing his complaints with the media, for his disclosures and appeals to the U.S. Congress, and for their appeals for assistance to both the FBI and the Department of Justice – Office of Inspector General (OIG). *Id.*, at ¶¶ 299-300. Finally, the Kitlinskis alleged that the DEA violated their rights to consult with and be represented by counsel during both their MSPB and EEO actions. *Id.*, at ¶ 302.

On August 1, 2017, the DEA filed a motion for summary judgment in which it sought the dismissal of the Kitlinskis' Amended Complaint in its entirety,[5] devoting an entire section to the dismissal of Count 10. JA 67-69, 103-10. In addition, the DEA recognized the Kitlinskis' allegations regarding retaliation for appearing before the media, their disclosures and appeals to Congress, and requesting assistance from both the FBI and Department of Justice OIG. JA 103 n. 16 (citing JA 54 ¶¶ 299-301).

On September 11, 2017, the Kitlinskis filed their Opposition, in which they defended their Amended Complaint in its entirety and addressed the DEA's motion

[5] The Kitlinskis' Amended Complaint then included eight counts, Counts 1, 3 -7, 10 & 11.

regarding Count 10 in five sections. JA 1259-66, 1278-82 (Sections III, IV & VII-IX).

On September 25, 2017, the DEA completed briefing by filing its reply. JA 2091-2129.

On Friday, September 29, 2017, the District Court heard oral argument, which lasted just under thirty minutes. JA 2242, 2271 (Tr. 1:21, 30:12). Both parties argued their positions on the wrongful termination claims. JA 2249-2252 (Tr. 8:22-11:1); JA 2257-2266 (Tr. 16:22-25:4). In fact, the District Court questioned the Kitlinskis' counsel about the DEA OPR's attempt to interview Darek while he was on active duty with the Coast Guard, an issue central to Darek's wrongful termination claim. JA 2261-2262 (Tr. 20:10-21:1).

On Monday, October 2, 2017, the District Court issued an order granting the DEA's motion for summary judgment in its entirety, ECF No. 127; and, on November 9, 2017, the District Court issued its memorandum opinion, ECF No. 130. The District Court correctly recognized that the DEA had moved for summary judgment on the Kitlinskis' Amended Complaint in its entirety—"On August 1, 2017, Defendants moved for summary judgment on Counts 1, 3–7, 10, and 11," *Kitlinski*, 2017 WL 5309622, at *2—but, nonetheless failed to make any reference whatsoever to their wrongful termination claim or their reliance on USERRA or Title VII as they relate to the Kitlinskis' respective terminations.

As explained *supra* Part I, the Kitlinskis urge this Court to reverse the dismissal of Count 10 based on the ample evidence of a genuine dispute of material fact on the DEA's motivation in terminating their employment. In the event this Court declines to reverse the district court's summary judgment decision, the Kitlinskis ask this Court to vacate the district court's decision as to Count 10, and remand for further proceedings.

B. On Remand, the Kitlinskis Seek an Instruction That the District Court Should Consider Their Arguments and Evidence in its Entirety, Prior to Deeming Admitted Any of the DEA's Undisputed Material Facts

In deciding the DEA's motion for summary judgment, the District Court first considered its "Statement of Undisputed Facts," although with no great clarity. *See Kitlinski*, 2017 WL 5309622, at *2-3. The District Court included no express identification of the undisputed facts it accepted in granting the DEA's motion.

Nonetheless, the Kitlinskis infer from the District Court's opinion that the court did decide whether to accept each of the DEA's 54 proposed undisputed material facts. The DEA specifically identified Fact Numbers 22 – 50 as its support for summary judgment on the Kitlinskis' wrongful termination claims. *See* JA 78-85. As discussed *supra* Part II.A., the District Court did not address the Kitlinskis' wrongful termination claims whatsoever. As the District Court did not specify which facts—if any—it deemed admitted, it is impossible for the Kitlinskis or this

Court to discern which—if any—of the DEA's purportedly undisputed facts relative to the Kitlinskis' wrongful termination claims the District Court deemed admitted.

To the extent that, in deeming admitted any of the DEA's undisputed facts, the District Court failed to consider the Kitlinskis opposition in its entirety, including all references cited therein, the District Court erred. For the District Court to refuse to consider all of the non-movant's evidence would be to incorrectly elevate form over substance, which District Courts routinely decline to do in deciding a Rule 56 motion. *See White v. Golden Corral of Hampton, LLC*, No. 13-cv-27, 2014 WL 1050586, at *3-4 (E.D. Va. Mar. 14, 2014) (refusing to elevate form over substance, and instead considering the non-movant's disputed issues of material fact identified throughout her opposition, but not in her response to the movant's Statement of Undisputed Facts).

On remand, the Kitlinskis seek an instruction from this Court that in determining which, if any, of the DEA's proposed undisputed facts are deemed admitted, and that the District Court do so only after appropriate consideration of the Kitlinskis' entire opposition brief, including all references cited therein.

III. The District Court Erred When It Granted the DEA Summary Judgment on the Kitlinskis' Wrongful Termination Claim, as They Had a Right to an Evidentiary Hearing on Both Their Discrimination and Nondiscrimination Claims

As the Kitlinskis argued before the District Court, their wrongful termination claims may not be decided on summary judgment, as they are entitled to a hearing

on both their Title VII discrimination claims and their USERRA nondiscrimination claims. Thus, no part of their wrongful termination claims was subject to resolution on summary judgment. *See* JA 1259-1262.

A. Discrimination Claims Under Title VII

A federal employee whose claims include both an agency action appealable to the MSPB and violation of an anti-discrimination statute (a mixed case) is entitled to judicial review of the MSPB decision in a federal district court, regardless of the basis for the MSPB's disposition of the claims. *Perry v. MSPB*, 137 S. Ct. 1975, 1979 (2017). In an appeal to the District Court of such a mixed case dismissal, the District Court must decide the discrimination claims *de novo*. 5 U.S.C. § 7703(c); s*ee also Winey v. Mattis*, 17-cv-325, 2017 WL 6403114, at *2 (E.D. Va. Aug. 4, 2017).

But, this case presents a different posture, as the MSPB never addressed the merits on the underlying claim. Under 5 U.S.C. § 7701(a), a federal employee grieving an adverse action to the MSPB is entitled to a hearing on the merits. *See Crispin v. Dep't of Commerce*, 732 F.2d 919, 922 (Fed. Cir. 1984) (Congress did not authorize summary judgment in adverse action case before Board); *see also Savage v. Dep't of the Army*, 122 M.S.P.R. 612, 637 (2015) ("[T]he Board's procedures do not provide for summary judgment.").

Thus, a federal employee is entitled as a matter of law to a hearing *and* to have the case adjudicated on the merits. The fact that a plaintiff removes the case to a District Court does not extinguish the applicable rights and protections the employee has under the Civil Service Reform Act of 1978 ("CSRA"), as provided through the MSPB. *See Perry*, 137 S. Ct. at 1980-81. To rule otherwise would be to strip an employee of statutory rights based solely on the selection of a forum, when in fact, review rights exist to "secure expeditious resolution of the claims employees present." *Id.*

Given this standard, the District Court would stand in for an MSPB Administrative Judge, conduct a hearing, and apply the MSPB standards in evaluating the case on the merits. *See* JA 1260-1261.

B. Nondiscrimination Claims Under USERRA

Generally, discrimination claims in a mixed case would be reviewed by the District Court under an "arbitrary and capricious standard." 5 U.S.C. § 7703(c); s*ee also Winey*, 2017 WL 6403114, at *2. In this case, however, the Kitlinskis brought their claims under USERRA, which itself expressly provides for a hearing. *See* JA 1261 (citing *Kirkendall v. Dep't of the Army*, 479 F.3d 830, 845 (Fed. Cir. 2007)).

In *Kirkendall*, the Federal Circuit considered whether an employee bringing a USERRA claim before the MSPB was entitled to a hearing, deciding in the affirmative. As the Federal Circuit read USERRA, "the statute clearly evinces

Congress' intent to *provide veterans* with a hearing as a matter of right." *Kirkendall*, 479 F.3d at 845 (emphasis added) (citing 38 U.S.C. § 4324(c)(1)). Section 4324 provides for "Enforcement of rights with respect to Federal executive agencies." 38 U.S.C. § 4324.

Congress was also clear that it intended to provide federal employees with protections under USERRA above and beyond those provided to those employed by either private industry or states governments, in order to encourage the federal government to be a model employer. "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 § 4301(b). This Court has found that USERRA provides broad protections to members of the military. *See Hill v. Michelin N. Am.*, 252 F.3d 307, 312-13 (4th Cir. 2001).

As the Federal Circuit explained after its review, USERRA "*provide[d] veterans*" with a right to a hearing. In a case in which the veteran—or active duty service member—found it necessary to remove his USERRA claim from the MSPB to a federal district court, as permitted under 5 U.S.C. §7702(e)(1)(B), rights provided under USERRA remain attached to the veteran or active service member and their claim, regardless of forum. The Kitlinskis are thus entitled to a hearing on the merits of their USERRA claims.

IV. The District Court Abused Its Discretion in Excluding Evidence on a Question Central to the Kitlinskis' Wrongful Termination Claim – the DEA's Motivation in Terminating Them

A. Standard of Review

This Court will "review a district court's discovery rulings … for abuse of discretion." *Bresler v. Wilmington Tr. Co.*, 855 F.3d 178, 189 (4th Cir. 2017) (citing *Am. Chiropractic Ass'n v. Trigon Healthcare, Inc.*, 367 F.3d 212, 236 (4th Cir. 2004)).

B. The Kitlinskis' Attempted to Introduce Evidence Which Would Have Exposed the DEA's Prior Inaccurate Statements as Related to the Concealment of the Blackberry in Lisa's Vehicle.

On September 25, 2017, the Kitlinskis attempted to file supplemental exhibits with the district court, two DEA memoranda marked as PEX 49 and PEX 50.[6] Both memoranda detailed "the use of technology for the Agency's Cellular Abduction Tracking System (CATS), which details how a cellular telephone can be employed to track, photograph, and monitor conversations." JA 2166. Plaintiffs clearly explained the importance of this information to their wrongful termination claims.

> For three years now, the Drug Enforcement Administration . . . has contended that the Blackberry cellular telephone discovered by Darek Kitlinski on September 23, 2014, in his private vehicle, lacked the capacity to conduct monitoring, as was alleged by the Plaintiffs, in their complaints to the Federal Bureau of Investigation (FBI) and the Department of Justice, Inspector General (DOJ-IG), before the Merit

[6] As the district court struck both exhibits on September 29, 2017, they are not in the record.

> Systems Protection Board (MSPB), before the deciding official [Michael Bulgarin] in response to the Agency termination action, and in this Court in their complaints, pleadings, and arguments. The denial of the capacity of the DEA to conduct surveillance using the telephone has been a mainstay in their contentions that the Kitlinskis' contentions of Agency surveillance and abuse were fantastical in nature, and indicative of a conspiratorial mindset that led the Kitlinskis to wrongfully refuse to back up their allegations when the Agency sought to investigate their claims. . . .

JA 2165-2166.

In support of the Kitlinskis' request, Darek provided an affidavit explaining the relevant technology and why these memoranda were critical to both his and Lisa's wrongful termination claims. As Darek affirmed, he had been a DEA Special Agent for over 16 years, during which time he had "reviewed and employed surveillance technology for the DEA." JA 2171 ¶¶ 1, 3. Further, Darek affirmed that "based on [his] training that the insertion of a Blackberry telephone into [his] vehicle could be used to monitor [him] visually, audibly and positionally, as well as to intercept [his] electronic communications," and that he became aware that the DEA began developing the technology described in the two DEA memoranda between 2009 and 2014. D. Kitlinksi Aff. ¶¶ 11-12.

The DEA moved to strike the Kitlinskis' additional exhibits because, in the DEA's view, the memoranda were unrelated to the Kitlinskis' claims before the District Court and contained information "regarding technology that the DEA was *considering* deploying in *September and November 2015*—over a year *after*

Plaintiffs' alleged September 23, *2014*, discovery of a cellular Blackberry on their windshield." JA 2178.

At the start of the September 29, 2017 oral argument on summary judgment, the District Court denied the Kitlinskis' request to submit supplemental exhibits.

> I find that given the representations of the Government and DEA specifically regarding the implementation of any of that software to the case that it's entirely irrelevant. So, I'll deny the motion to add the additional exhibits, I'll deny the motion for additional discovery. And the plaintiffs' exception is noted to that ruling.

JA 2245 (Tr. 4:11-18).

The two DEA memoranda would have allowed the Kitlinskis to demonstrate that it *was* possible for a Blackberry to serve as a surveillance tool, and that the DEA knew this, because it possessed the technology. This would have allowed the Kitlinskis to show that the DEA's repeated denials on this point were conflicting or dissembling. And, evidence that the DEA was untruthful about its ability to conduct surveillance via a Blackberry would have created a genuine dispute on the DEA's motivation in terminating the Kitlinskis. Why was the DEA claiming it was *impossible* that anyone at the Agency was trying to surveil the Kitlinskis, if it *was possible?* Why, within months of the Kitlinskis' discovery of the Blackberry, had the DEA OPR added both Darek and Lisa as *subjects* in the very investigation initiated because they were *victims* of an illegal surveillance attempt?

The DEA's motivation in terminating the Kitlinskis from federal service was a critical issue for them in their wrongful termination claims. As was demonstrated *supra* Part I, there are numerous facts that raise a genuine dispute as to the DEA's motivation in terminating the Kitlinskis. The two DEA memoranda, PEX 49 and PEX 50, likewise were highly relevant to the Kitlinskis' claims. In excluding relevant evidence, the District Court abused its discretion.

V. CONCLUSION

For all the forgoing reasons, the Kitlinskis respectfully request that this Court reverse the District Court's summary decision as to Count 10 of their Amended Complaint, and remand to the District Court for further proceedings. In addition, the Kitlinskis ask that this Court find that the District Court's September 25, 2017 ruling excluding Plaintiffs' exhibits 49 and 50 was an abuse of discretion.

In the alternative, the Kitlinskis request that this Court Remand Count 10 of their Amended Complaint to the District Court for further proceedings, to include a hearing on their Title VII and USERRA wrongful termination claims. Should this Court decline to order a hearing on remand, the Kitlinskis seek an instruction to the District Court to consider their evidence in its entirety, prior to deciding which, if any, of Defendant's Undisputed Facts it deems admitted.

STATEMENT REGARDING ORAL ARGUMENT

The Kitlinskis seek Oral Argument and believe the issues raised are of such a nature that such argument may aid the Court in rendering its decision.

July 23, 2018

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on July 23, 2018 the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

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