

## **Coast Guard Reservist Alleges USERRA Violations by Drug Enforcement Administration**

By Captain Samuel F. Wright, JAGC, USN (Ret.)<sup>2</sup>

- 1.1.1.8—USERRA applies to Federal Government
- 1.2—USERRA forbids discrimination
- 1.4—USERRA enforcement

***Kitlinski v. Department of Justice*, 2015 WL 6688191 (Merit Systems Protection Board Nov. 3, 2015).**

***Kitlinski v. Department of Justice*, 2015 MSPB 60 (Merit Systems Protection Board Nov. 16, 2015).**

Darek J. Kitlinski is a Lieutenant Commander in the Coast Guard Reserve and a member of the Reserve Officers Association (ROA). He is currently on active duty with the Coast Guard here in the Washington metropolitan area. He is on military leave from his civilian job as a Special Agent of the Drug Enforcement Agency (DEA), a federal law enforcement agency in the United

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<sup>1</sup> We invite the reader's attention to [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). You will find more than 1,400 "Law Review" articles about laws that are especially pertinent to those who serve our country in uniform, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. The Reserve Officers Association (ROA) initiated this column in 1997.

<sup>2</sup> Captain Wright is the author or co-author of more than 1,200 of the more than 1,400 "Law Review" articles available at [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). He has been dealing with the federal reemployment statute for 33 years and has made it the focus of his legal career. He developed the interest and expertise in this law during the decade (1982-92) that he worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), he largely drafted the interagency task force work product that President George H.W. Bush presented to Congress (as his proposal) in February 1991. On October 13, 1994, President Bill Clinton signed into law the Uniformed Services Employment and Reemployment Rights Act (USERRA), Public Law 103-353. The version that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. Wright has also dealt with the VRRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), and as an attorney in private practice, at Tully Rinckey PLLC. For the last six years (June 2009 through May 2015), he was the Director of ROA's Service Members Law Center (SMLC), as a full-time employee of ROA. In June 2015, he returned to Tully Rinckey PLLC, this time in an "of counsel" relationship. To schedule a consultation with Samuel F. Wright or another Tully Rinckey PLLC attorney concerning USERRA or other legal issues, please call Mr. Zachary Merriman of the firm's Client Relations Department at (518) 640-3538. Please mention Captain Wright when you call.

States Department of Justice (DOJ). His most recent civilian assignment was as a DEA Supervisory Criminal Investigator in San Diego, California.

Kitlinski's wife is also employed by DEA. In February 2011, she was selected for a DEA position in Arlington, Virginia. At the time, Kitlinski was on Coast Guard active duty here in Washington. Kitlinski applied six times for DEA transfers to the Washington area, so that he can continue living with his wife after he leaves active duty and returns to his DEA job, but DEA denied all six requests. Kitlinski appealed to the MSPB, asserting that the denial of his transfer requests was motivated by animus against him based on his Coast Guard service.

The Uniformed Services Employment and Reemployment Rights Act (USERRA) applies to federal executive agencies like DEA, just as it applies to state and local governments and private employers, but USERRA provides for a separate enforcement mechanism with respect to federal executive agencies as employers. I describe that mechanism in great detail in Law Review 15064 (July 2015). The forum for a USERRA case against a federal executive agency is the Merit Systems Protection Board (MSPB), a quasi-judicial federal executive agency located here in Washington. All MSPB cases, including USERRA cases, start out before an Administrative Judge (AJ) of the MSPB, and the complaining employee or the agency can appeal to the MSPB itself.<sup>3</sup> Decisions of the MSPB can be appealed to the United States Court of Appeals for the Federal Circuit.<sup>4</sup>

Kitlinski claimed that the denial of his DEA transfer requests violated section 4311 of USERRA, which provides as follows:

§ 4311. Discrimination against persons who serve in the uniformed services and acts of reprisal prohibited

(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

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<sup>3</sup> The MSPB has three members, each of whom is appointed by the President with Senate confirmation.

<sup>4</sup> The Federal Circuit is a specialized federal appellate court that sits here in Washington. It has nationwide jurisdiction over appeals in certain kinds of cases, including appeals from MSPB decisions.

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.<sup>5</sup>

After a hearing, the MSPB AJ held that Kitlinski had not established that his Coast Guard service was *a motivating factor* in the denial of his transfer requests and that (alternatively) DEA had proved that it would have made the same decision (denying his requests) even if Kitlinski had not served in the Coast Guard Reserve. Kitlinski appealed to the MSPB itself, which affirmed the AJ's decision.

The DEA Career Board (consisting of senior DEA officials) met several times to discuss Kitlinski's transfer requests. Kitlinski presented evidence that at two of these meetings DEA senior officials made negative comments about Kitlinski's Coast Guard service. The AJ and the MSPB attached little probative value to those statements, because the speakers did not directly tie their negative comments about the Coast Guard to the decision to deny Kitlinski's transfer requests. I think that this purported distinction makes no sense. We should not expect the comment to be "I hate Kitlinski because he serves in the Coast Guard, and that is exactly why we should turn down his transfer request." These negative comments were made during meetings to discuss Kitlinski's transfer requests. That should be sufficient to establish that

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<sup>5</sup> 38 U.S.C. 4311 (emphasis supplied).

animus against Kitlinski based on his service was at least *a motivating factor* in the employer's decision to turn down his requests.

The second cited *Kitlinski* case belongs in the “truly weird” file. Kitlinski drove his personally owned vehicle to DEA headquarters for a deposition about one of his pending cases against DEA. Upon arriving home, he found a Blackberry device concealed under the hood of his vehicle. Kitlinski reports that it is the same model of device that DEA employees routinely use for recording and electronic tracking and monitoring purposes. Kitlinski alleged that a DEA employee planted the device in his vehicle to harass him for his Coast Guard service and his USERRA complaints.

The MSPB AJ dismissed the case for want of jurisdiction—planting a tracking device in a federal employee's vehicle is not a personnel action that is appealable to the MSPB. The MSPB affirmed the dismissal.

We will keep the readers informed of developments in this interesting and important case.

### **UPDATE—APRIL 2018**

On appeal, the United States Court of Appeals for the Federal Circuit affirmed the MSPB decision that planting a Blackberry tracking device in Mr. Kitlinski's personal automobile was not a personnel action that the MSPB has the authority to review. *See Kitlinski v. Merit Systems Protection Board*, 857 F.3d 1374 (Fed. Cir. 2017).

### **UPDATE—APRIL 2023**

The Federal Circuit remanded this case to the Merit Systems Protection Board (MSPB) in 2017. The MSPB finally got around to considering this case on remand on 3/23/2023.<sup>6</sup> The MSPB held:

As the Federal Circuit found in this case, 38 U.S.C. § 4311(b) is limited to barring acts of discrimination in employment and adverse employment actions. *Kitlinski*, 857 F.3d at 1381. The appellant's retaliatory hostile work environment claim is grounded in two agency actions--the alleged planting of the Blackberry device in his vehicle and the OPR

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<sup>6</sup> The MSPB consists of three members, each of whom is nominated by the President and confirmed by the Senate. The members serve staggered seven-year terms. When the term of a confirmed member expires, he or she can serve on overtime for one additional year or until a replacement is nominated and confirmed, whichever comes first. The MSPB needs a quorum of at least two members to act on appeals from MSPB Administrative Judge (AJ) decisions or remands from the Federal Circuit. The MSPB was without a quorum for more than four years, from January 2017 until May 2021. President Trump nominated three highly qualified persons for the three MSPB vacancies, but the Senate never acted on those nominations. After he was inaugurated on 1/20/2021, President Biden nominated persons for these vacancies, and the Senate confirmed those nominations in May 2021. After a quorum was finally restored, the MSPB started addressing its backlog. That explains why it took six years for the MSPB to act on this remand.

investigators summoning him to an interview. IAF, Tab 12 at 12-13. However, the Federal Circuit in its remand decision already concluded that these two actions did not constitute "adverse employment actions" or "discrimination in employment," as they did not deny the appellant "a benefit that inures to him by virtue of his employment with the agency." *Kitlinski*, 857 F.3d at 1382. Concerning the interview, the court's finding was at least in part due to the fact that, at the time of the investigation in question, the appellant had been on long-term leave from his employing agency and was serving with the Coast Guard. *Id.* Aggregating these two events in an effort to establish a hostile work environment claim under 38 U.S.C. § 4311(b) is unavailing--the two actions still had no bearing on the appellant's employment. Thus, we find that the appellant has not made a nonfrivolous allegation that the agency discriminated in employment or took an adverse employment action against him, as required to establish jurisdiction over his retaliatory hostile work environment claim.<sup>7</sup>

The Office of Professional Responsibility (OPR) of the Drug Enforcement Administration (DEA) ordered Darek Kitlinski and his wife (Lisa Kitlinski, also a DEA employee) to turn in the Blackberry device and to submit to OPR interviews. Both Kitlinskis refused to comply with these orders, and DEA fired both of them. They filed suit against DEA in the United States District Court for the Eastern District of Virginia, but the judge granted the defendants' motion for summary judgment.<sup>8</sup>

The Kitlinskis appealed to the United States Court of Appeals for the 4<sup>th</sup> Circuit.<sup>9</sup> A three-judge panel of the 4<sup>th</sup> Circuit affirmed the district court, and the 4<sup>th</sup> Circuit denied the Kitlinskis' request for rehearing en banc, and the United States Supreme Court denied certiorari (discretionary review).<sup>10</sup>

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<sup>7</sup> *Kitlinski v. DOJ*, 2023 M.S.P.B. 13, P15, 2023 MSPB LEXIS 1596, \*14-15 (M.S.P.B. March 23, 2023).

<sup>8</sup> *Kitlinski v. Barr*, 2019 U.S. Dist. LEXIS 226313 (E.D. Va. April 10, 2019).

<sup>9</sup> The 4<sup>th</sup> Circuit is the intermediate federal appellate court that sits in Richmond and hears appeals from district courts in Maryland, Virginia, West Virginia, North Carolina, and South Carolina.

<sup>10</sup> See *Kitlinski v. United States DOJ*, 994 F.3d 224 (4<sup>th</sup> Cir. 2021), *rehearing en banc denied*, 2021 U.S. App. LEXIS 16785 (4<sup>th</sup> Cir. June 4, 2021), *cert. denied*, 142 S. Ct. 581 (December 6, 2021).