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The Wrong Way To Assert that your Employer Violated USERRA

By Captain Samuel F. Wright, JAGC, USN (Ret.)[2]

1.1.1.8—USERRA applies to the Federal Government.
1.2—USERRA forbids discrimination.
1.4—USERRA enforcement
1.8—Relationship between USERRA and other laws/policies

***Kitlinski v. United States DOJ,* 994 F.3d 224 (4th Cir. 2021), *rehearing en banc denied,* 2021 U.S. App. LEXIS 16785 (4th Cir. June 4, 2021), *certiorari denied,* 142 S. Ct. 581 (December 6, 2021).[3]**

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[1] I invite the reader's attention to www.roa.org/lawcenter. You will find more than 2,000 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouses' Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. I am the author of more than 90% of the articles, but we are always looking for "other than Sam" articles by other lawyers.

[2] BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General's Corps officer and retired in 2007. I am a life member of ROA. For 45 years, I have collaborated with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans' Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 38 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. §§ 4301-35). I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at mailto:swright@roa.org.

[3] This is a decision by a three-judge panel of the United States Court of Appeals for the 4th Circuit, 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. "Rehearing en banc denied" means that the plaintiffs and appellants (the Kitlinskis) applied to the 4th Circuit for a rehearing en banc, before all the active judges of the 4th Circuit, but the 4th Circuit denied that request. "Certiorari denied" means that the Kitlinskis applied to the United States

The opinion of the three-judge panel of the 4th Circuit set forth the facts[4] of this case as follows:

> Darek Kitlinski began working for the DEA in 1998 as a special agent. In 2009, he became a supervisor in the San Diego Division, overseeing a group of agents responsible for court-authorized wire taps. Darek's spouse, Lisa Kitlinksi, joined the DEA in 1997 as a forensic chemist. In 2011, the DEA promoted Lisa to a position at DEA headquarters in Arlington, Virginia.
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> Following Lisa's promotion, Darek sought to transfer within the DEA from San Diego to the District of Columbia area. Between March 2011 and June 2014, Darek submitted multiple transfer requests pursuant to the DEA's Married Core Series Transfer Policy (MCSTP). He also applied for various vacant positions within the DEA and sought a transfer based on medical hardship. The DEA denied Darek's transfer requests and selected other candidates for the vacant positions.
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> Meanwhile, in July 2011, Darek began serving on active duty with the U.S. Coast Guard and accordingly took a leave of absence from the DEA. He had previously served with the U.S. Coast Guard Reserves, requiring annual military commitments and several deployments. He was stationed on active duty in the District of Columbia, which allowed him to relocate to the District of Columbia area with Lisa.
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> Shortly after Darek was called to active duty in 2011, he began initiating various administrative proceedings challenging the DEA's adverse hiring decisions and denial of his transfer requests. He filed Equal Employment Opportunity (EEO) complaints alleging violations of Title VII. He also filed several USERRA appeals against the DEA with the Merit Systems Protection Board (MSPB), which adjudicates employee complaints filed under USERRA.
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> On September 23, 2014, the Kitlinskis reported to DEA headquarters for a deposition arising out of one of Darek's EEO complaints. Upon their arrival, the Kitlinskis parked Lisa's car in the DEA's garage. Shortly after the Kitlinskis returned home from the deposition, Darek found a DEA-issued Blackberry device lodged between the windshield wipers and hood of Lisa's car. The Blackberry was later determined to belong to a DEA employee who worked in human resources. The Kitlinskis thereafter maintained that someone within the DEA planted the Blackberry in Lisa's car in order to track their whereabouts or record their conversations.

Supreme Court for certiorari (discretionary review) and the Supreme Court denied the application. This case became final on 12/6/2021 when the Supreme Court denied certiorari.

[4] Because the district court granted the defendants' motion for summary judgment, the 4th Circuit set forth the facts in the form most favorable to the non-moving parties, the Kitlinskis.

Three days later, Darek filed a complaint regarding the Blackberry incident with the Department of Justice's Office of the Inspector General (OIG), which declined to investigate Darek's allegations. OIG instead referred Darek to the Office of Professional Responsibility (OPR), which investigates allegations of misconduct by DEA employees. On October 2, 2014, Lisa reported the Blackberry incident to her supervisor, who also referred her to OPR. OPR opened an inquiry into the Blackberry incident on October 7, 2014.

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

OPR then sought to schedule an interview with Darek, who was serving on active duty with the Coast Guard at the time. On November 20, 2014, OPR coordinated with U.S. Coast Guard Investigative Services to personally notify Darek of the interview. At the direction of Darek's temporary supervisor in the Coast Guard, Darek's colleague escorted OPR investigators to a conference room at his Coast Guard office to facilitate the in-person notification. Once the OPR investigators arrived at the conference room, they gave Darek a written notification directing him to appear at OPR for an interview on November 21, 2014. Darek declined to sign the written notification. The investigators informed Darek that failure to comply with the OPR directive could result in disciplinary action. OPR also sent an email to Darek's Coast Guard address directing him to appear for the scheduled interview on November 21, 2014. The email similarly advised Darek that failure to comply with the investigation could result in disciplinary action. Darek declined to attend the scheduled OPR interview. As a result, on December 1, 2014, OPR added Darek as a subject of the investigation for his failure to cooperate.

On December 12, 2014, OPR sent its investigative file to the DEA's Board of Professional Conduct. On May 27, 2015, Christopher Quaglino, the then-Chair of the Board, issued letters recommending the termination of the Kitlinskis' employment based on their conduct during the OPR investigation. The Kitlinskis submitted written and oral responses contesting this recommendation to Michael Bulgrin, a Supervisory Criminal Investigator with the DEA. In those responses, the Kitlinskis argued that OPR lacked the authority to interview Darek while he was serving on active duty with the Coast Guard. On January 11, 2016, Bulgrin terminated the Kitlinskis' employment.

> The Kitlinskis filed this action against the DEA in the Eastern District of Virginia. The operative complaint asserted discrimination and retaliation claims by Darek for the denial of his transfer requests and adverse hiring decisions by the DEA, wrongful termination claims by Darek and Lisa under USERRA and Title VII, a request for attorneys' fees by Darek arising out of prior administrative proceedings, and various claims by Darek and Lisa related to the Blackberry incident.
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> During discovery, the Kitlinskis sought to depose Michael Horowitz, the Inspector General of the U.S. Department of Justice. The DEA moved for a protective order to preclude the deposition, which a magistrate judge granted. The Kitlinskis did not file an objection to the magistrate judge's ruling with the district court.
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> After the parties concluded briefing on summary judgment, the Kitlinskis filed a sur-reply brief and a motion to reopen discovery, which the district court denied. The district court subsequently granted summary judgment in the DEA's favor but did not address the Kitlinskis' wrongful termination claims. The Kitlinskis appealed.
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> In light of the district court's failure to rule on the Kitlinskis' wrongful termination claims, we dismissed the appeal for lack of jurisdiction and remanded for the district court to address those claims in the first instance. *Kitlinski v. DOJ*, 749 F. App'x 204, 205 (4th Cir. 2019) (per curiam).
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> On remand, the Kitlinskis filed a motion to forgo summary judgment proceedings on their wrongful termination claims under USERRA in favor of an evidentiary hearing or—in the alternative—to supplement their summary judgment briefing on their wrongful termination claims under both USERRA and Title VII. The district court denied the motion, declining to hold an evidentiary hearing and determining that no additional briefing was necessary.
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> The district court again granted summary judgment in the DEA's favor on all claims. As to the wrongful termination claims under Title VII, the court concluded that the Kitlinskis failed to offer any evidence of a causal connection between protected activity and their terminations. And as to the wrongful termination claims under USERRA, the court reasoned that "there was no military-based reason why Darek did not attend his [OPR] interview" and that Lisa could not show that the DEA terminated her employment based on any USERRA-protected activity. J.A. 2234.
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> This appeal followed.[5]

This case, involving a claim that a federal executive agency had violated USERRA, should not have been filed in the United States District Court for the Eastern District of Virginia. USERRA cases against state and local governments and private employers should be filed in the

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[5] *Kitlinski v. United States DOJ,* 994 F.3d 224, 226-229 (4th Cir. 2021).

appropriate federal district court.[6] USERRA cases against federal executive agencies should be filed in the Merit Systems Protection Board (MSPB).[7]

The United States District Court for the Eastern District of Virginia should not have adjudicated the Kitlinskis' USERRA claims against DEA, but the court did so. The Kitlinskis appealed to the 4th Circuit, which affirmed the district court's grant of the defendants' motion for summary judgment. The 4th Circuit panel held:

> The Kitlinskis argue that the district court erred in granting summary judgment on their wrongful termination claims under USERRA and Title VII. We review the district court's summary judgment ruling de novo. *Francis v. Booz, Allen & Hamilton, Inc.*, 452 F.3d 299, 302 (4th Cir. 2006). "Summary judgment is appropriate only when 'there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.'" *Evans v. Techs. Applications & Serv. Co.*, 80 F.3d 954, 958 (4th Cir. 1996) (quoting Fed. R. Civ. P. 56(c)).
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> We begin with the Kitlinskis' wrongful termination claims under USERRA. "USERRA 'prohibit[s] discrimination against persons because of their service in the uniformed services.'" *Butts v. Prince William Cnty. Sch. Bd.*, 844 F.3d 424, 430 (4th Cir. 2016) (alteration in original) (quoting *Hill v. Michelin N. Am., Inc.*, 252 F.3d 307, 311 (4th Cir. 2001)); *see also* 38 U.S.C. § 4311. Court "broadly construe[]" the statute "in favor of its military beneficiaries." *Francis*, 452 F.3d at 303. USERRA's anti-discrimination provision contains two distinct paths to liability.
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> First, § 4311(a) "broadly prohibits discrimination in the hiring, rehiring, and retaining of servicemembers." *Harwood v. Am. Airlines, Inc.*, 963 F.3d 408, 414 (4th Cir. 2020); *see also* 38 U.S.C. 4311(a). To succeed on a claim under § 4311(a), a servicemember must show "(1) that his employer took an adverse employment action against him; (2) that he had performed, applied to perform, or had an obligation to perform as a member in a uniformed service; and (3) that the employer's adverse action was taken 'on the basis of that service, such that the service was 'a motivating factor' in the action." *Harwood*, 963 F.3d at 414-15 (quoting 38 U.S.C. § 4311(a),(c)(1)).
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> Second, § 4311(b) prohibits employers from 'tak[ing] any adverse employment action against any person because such person has taken an action to enforce a protection afforded any person under [USERRA], . . . or has exercised a right provided for in [USERRA].'" *Francis*, 452 F.3d at 302 (alterations in original) (quoting 38 U.S.C. § 4311(b)). To succeed on a claim under § 4311(b), an employee must show that (1) the employee engaged in protected activity under USERRA, and (2) that protected activity was "a motivating factor in the employer's action." 38 U.S.C. § 4311(c)(2).

[6] 38 U.S.C. § 4323(b).
[7] 38 U.S.C. § 4324.

We first consider Darek's wrongful termination claims under USERRA. The Kitlinskis' complaint and briefing appear to raise a discrimination claim under § 4311(a) based on Darek's status as a servicemember and a retaliation claim under § 4311(b) based on Darek's prior USERRA-protected activity. To succeed on those claims, the Kitlinskis must show, respectively, that either Darek's status as a servicemember or his prior protected activity was "a motivating factor" in his termination. *See* 38 U.S.C. § 4311(c). We agree with the district court that no reasonable factfinder could reach either conclusion.

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

The Kitlinskis offer no evidence that Darek's status as a servicemember in the Coast Guard was a motivating factor in the DEA's decision to terminate his employment. Nor can the Kitlinskis point to any evidence that Darek's prior USERRA-protected activity was a motivating factor in his termination. *See Escher v. BWXT Y-12, LLC*, 627 F.3d 1020, 1026 (6th Cir. 2010) ("Protected status is a motivating factor if a truthful employer would list it, if asked, as one of the reasons for its decision."). *Rather, any reasonable factfinder would conclude that the DEA terminated Darek's employment because he refused to attend the OPR interview without any military-based reason for doing so. Indeed, there is no evidence that the Coast Guard ever objected to or sought to prevent Darek's participation in the investigation or that Darek's military service was ever an obstacle to his ability to attend the interview.* The Kitlinskis therefore cannot claim that Darek's failure to attend the interview was at all "related to his military obligations" or "required by [his] military service." *McMillan v. DOJ*, 812 F.3d 1364, 1380-81 (Fed. Cir. 2016).

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

> Accordingly, we conclude that the Kitlinskis offer no evidence that Darek's military service or his prior USERRA-protected activity was a motivating factor in his termination. In reaching this conclusion, we emphasize that USERRA "prohibit[s] discrimination against persons because of their service in the uniformed services." 38 U.S.C. § 4301(a)(3). It does not enable a servicemember to refuse to comply with his civilian employer's reasonable requests to participate in an internal investigation into his own allegations of wrongdoing for reasons unrelated to his military service and then claim protection from the adverse consequences flowing from that decision.
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> We therefore affirm the district court's grant of summary judgment to the DEA on Darek's wrongful termination claims under USERRA.[8]

I agree with the district court and the 4th Circuit that the Kitlinskis were fired because of their insubordinate violation of the lawful order that they turn in the DEA tracking device and that they answer OPR's questions about how the tracking device came to be placed on Lisa's automobile.

It appears that the Kitlinskis were given bad legal advice, or they may have received good advice and have chosen to ignore it for whatever reason. In any case, this sad case is a good illustration that Reserve Component service members need access to timely and correct information about USERRA and other laws.

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[8] *Kitlinski,* 994 F.3d at 229-230 (emphasis supplied).

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[9] Congress recently established the United States Space Force as the 8th uniformed service.
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