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

DAREK J. KITLINSKI and LISA M. KITLINSKI,

Plaintiffs,

v.

U.S. DEPARTMENT OF JUSTICE (Drug Enforcement Administration As to Privacy Act Claims),

LORETTA LYNCH, Attorney General U.S. Department of Justice 950 Pennsylvania Avenue Washington, D.C. 20530,

DONNA RODRIGUEZ AKA: Donna Ashe Section Chief, Research and Analysis Staff of the Human Resources Division Drug Enforcement Administration 830 N. Ashton Street Alexandria, VA 22312,

OTHER UNNAMED EMPLOYEES OF THE U.S. DEPARTMENT OF JUSTICE, DRUG ENFORCEMENT ADMINISTRATION, and OFFICE OF THE INSPECTOR GENERAL,

Defendants.

CIVIL ACTION NO. 1:16-CV-60

Date: June 7, 2016

PLAINTIFFS' FIRST AMENDED COMPLAINT

Summary

This is an action by Darek and Lisa Kitlinski against the Drug Enforcement Administration ("DEA" or "Agency") and its employees, containing several separate matters, all of which are related to the issues Darek Kitlinski, a Special Agent ("SA") formerly with the DEA had with his employer, when he attempted to avail himself of the Married Core Series Transfer Policy ("MCSTP") to maintain a common household, with his wife DEA Chemist Lisa Kitlinski, after was transferred by the Agency to the Headquarters Division in Washington, D.C. in February, 2011. When Darek Kitlinski's requests for a transfer were subject to unprecedented denials, Kitlinski filed a series of administrative claims against the Agency under Equal Employment Opportunity ("EEO") law contending that his denials were based on his gender as a male.

The litany of actions that follow, which detail violations of EEO law, an improper violation of the Privacy Act, the placement of a possible surveillance device in the privately owned vehicle of the Kitlinskis, coerced interviews of the Kitlinskis that circumvented protections for them as litigants and as spouses and the penultimate termination of the Kitlinskis for asserting their rights, detail a disturbing picture of an Agency of the Justice Department run amok with retaliatory animus. The Kitlinskis bring their EEO, Privacy Act, Bivens claims and their mixed case appeal that was before the Merit Systems Protection Board ("MSPB") to this court for resolution.

Jurisdiction and Venue

1. This court has jurisdiction arising under 28 U.S.C. § 1331. Federal question jurisdiction gives district courts original jurisdiction over civil actions arising under the

Constitution, laws, or treaties or the United States.

2. Jurisdiction is appropriate against the Department of Justice, and its component agency the Drug Enforcement Administration, pursuant to the Freedom of Information Act, 5 U.S.C. Section 552, the Privacy Act of 1974, 5 U.S.C. § 552a; Title VII of the Civil Rights Act of 1964, 42 U.S. Code § 2000c; and the Federal Wiretapping Act, 18 U.S.C. § 2511. Jurisdiction is also proper under 5 U.S.C. §7702(e)(1)(B) as this is a "mixed case" appeal upon which no action has been taken for 120 days.

3. Jurisdiction is appropriate against the Donna Rodriguez under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971).

4. Jurisdiction is also appropriate because the defendant is a federal agency.

5. Venue is appropriate in the Eastern District of Virginia under 28 U.S.C. §1391 as the federal defendant is headquartered there, the plaintiffs reside in Alexandria, Virginia, and the majority of acts complained of under the various statutes occurred in Alexandria, Virginia, where the DEA is headquartered. The Civil Rights Act of 1964 also posits venue in the place where the conduct complained of arose.

6. Venue is also appropriate in the Eastern District for the Privacy Act claim, although it can also be brought in the District of Columbia. Pendent Venue lies because the claim is inextricably intertwined with the other causes of action, it is convenient to litigate these matters together and it would fracture the litigation, with greater expense to the parties, to handle the matters separately.

Parties

7. **Plaintiff Darek J. Kitlinski ("Mr. Kitlinski")** was, until January 15, 2016, a Supervisory SA with the DEA and remains is a Lieutenant Commander with the United States

Coast Guard. Mr. Kitlinski resides in Alexandria, Virginia.

8. **Plaintiff Lisa Kitlinski ("Mrs. Kitlinski")** was, until January 15, 2016, a Forensic Chemist with the DEA. Mrs. Kitlinski resides in Alexandria, Virginia. At all times relevant to this complaint, she was Mr. Kitlinski's spouse.

9. **Defendant U.S. Department of Justice ("DOJ")** is a federal Agency who, under the Privacy Act, 5 U.S.C. 552a, is the properly named party for claims arising under the Act, since it was its Office of Inspector General and Office of Information Policy that denied Plaintiffs Privacy Act requests.

10. **Defendant Loretta Lynch ("AG Lynch"),** is the Attorney General of the United States and the head of the U.S. Department of Justice. She is therefore the proper party to be named and served on Darek Kitlinski's various EEO complaints. AG Lynch is a nominal party only. The actual discriminatory actors in this case are all employees of the DEA, which is a component of the Department of Justice.

11. **Defendant Donna K. Rodriguez ("Rodriguez")** is the Section Chief of the Human Resources Research and Analysis Section of the Drug Enforcement Administration. On information and belief, Ms. Rodriguez is a resident of the State of Virginia, residing in the City of Alexandria.

Facts

12. Mr. Kitlinski was a GS-14 Supervisory Special Agent with the Drug Enforcement Administration ("DEA"). Mr. Kitlinski joined the DEA in 1998. He was terminated from the DEA on January 15, 2016.

13. Mrs. Kitlinski was a GS-14 Forensic Chemist with the DEA and the wife of Darek Kitlinski. Mrs. Kitlinski joined the DEA in September 1997. She has performed chemical

analysis of controlled substances, but has recently been assigned to write policy for the DEA in the area of quality assurance. Mrs. Kitlinski was terminated from the DEA on January 15, 2016.

14. Mr. Kitlinski has been in the United States Coast Guard Reserves since January 2000. Prior to that that he had been with the United States Air Force Reserves for eleven years.

15. In late 2010, at the request of her supervisors, Mrs. Kitlinski applied for a position as a Forensic Chemist Program Manager at DEA Headquarters in Arlington, Virginia.

16. When Mrs. Kitlinski applied for her Washington, D.C. position, the Agency was aware that she was married to Mr. Kitlinski.

17. The DEA uses a "Career Board" consisting of the Deputy Administrator of the Agency as Chair and senior staff as members, to handle all transfers and promotions of "core series" employees over the grade of GS-14.

18. Both Forensic Chemists and Special Agents are defined as "Core Series" personnel.

19. In order to address the issue of disruptive transfers, re-assignments or promotions of "Core Series" employees who are married to one another, the DEA has self-designed a Married Core Series Transfer Policy ("MCSTP").

20. That policy by its terms and application is designed to promote morale, reduce expense and ensure marital and family cohesion by allowing a spouse of Core Series who has been subject to transfer, reassignment or promotion to apply to the Career Board for a transfer to or geographically near the duty station to which the DEA has promoted, transferred or reassigned. An application for a MCSTP reassignment is processed through the Career Board, apparently regardless of grade.

The Agency transfers Mrs. Kitlinski to Washington, D.C. from San Diego, California

21. On February 9, 2011, Mrs. Kitlinski was selected for a Forensic Chemist Program Manager position at DEA Headquarters in Arlington, Virginia.

22. After, Mrs. Kitlinski was selected for the Headquarters position, Mr. Kitlinski sought what was referred to as to the Agency's MCSTP.

23. The Agency then issued Permanent Change of Duty Station orders that included both Mr. and Mrs. Kitlinski on February 24, 2011.

Mr. Kitlinski's First MCSTP Request

24. On March 1, 2011, Mr. Kitlinski submitted his first MCSTP request. Mr. Kitlinski had been advised by both his supervisors and Career Board administrative personnel such transfers were automatic.

25. Mr. Kitlinski's MCSTP request was denied on April 27, 2011, without explanation.

26. Mr. Kitlinski's request was apparently the only MCSTP request that had been denied by the Agency in at least the three years prior.

27. Mr. Kitlinski resubmitted his MCSTP request for reconsideration on June 20, 2011.

28. On June 30, 2011, Mr. Kitlinski was advised his Request for Reconsideration had been denied. No explanation was provided for the denial.

29. On August 2, 2011, Mr. Kitlinski submitted an informal EEO complaint claiming that he was denied a transfer based on gender.

30. On information and belief, all core series females who had sought transfers under the MCSTP had them granted by the Agency.

Mr. Kitlinski's First EEOC Claim DEA-2011-00927

31. On September 1, 2011, Mr. Kitlinski filed EEO Complaint No. DEA-2011-

00927, alleging that he was denied a MCSTP transfer based on his gender as a male. Kitlinski argued that he was subject to disparate treatment in the denial, as all females who made similar requests were granted a transfer.

32. Mr. Kitlinski also alleged that he had been denied certain lateral positions, in the Headquarters Division of the DEA for which he had applied based on his gender and based on retaliation and reprisal for his asserting an EEO based complaint against the Agency and its Career Board.

33. Under the Federal EEO Complaint processing procedures, the Agency accepted issues that Mr. Kitlinski had been discriminated against on the basis of sex (male) when his April 28, 2011 and June 29, 2011 requests for MCSTP reassignment were rejected.

34. The Agency also accepted Kitlinski's claim that he was not selected for a position as a Group Supervisor (GS) criminal investigator om May 17, 2011 under Vacancy Announcement No. ("VAN") CMB-11-287, on the basis of his sex (male).

35. Separately, the Agency accepted that claim that Kitlinski was denied selection for Group Supervisor for VANs CMB-11-207-1 and CMB 11-224-1 on the basis of his gender as a male and on reprisal for prior EEO protected activity.

36. Mr. Kitlinski did not request a hearing on DEA-2011-00927, but instead let the matter go to a Final Agency Decision ("FAD").

37. On June 12, 2012, the Agency issued a FAD, denying Mr. Kitlinski all of his claims and any relief.

38. Mr. Kitlinski retained attorney Mark Cohen to file an appeal to the EEOC, Office of Federal Operations ("OFO"). Mr. Kitlinski paid Mark Cohen a flat fee of $7,500 for the appeal.

39. Mark Cohen submitted an appeal to the OFO.

40. On March 9, 2015, the OFO rejected the Agency's decision as to the MCSTP transfer requests and found that the Agency had, in fact, engaged in discrimination based on gender and had proffered no legitimate business justification, or any justification at all for its actions.

41. The OFO determined that Mr. Kitlinski had established discrimination and ordered relief including a determination of compensatory damages.

42. The OFO also ordered the complainant to provide a "verified statement of fees to the Agency" within thirty days.

43. The Agency then requested reconsideration of the decision.

44. Mr. Kitlinski retained counsel to oppose the Agency's request for reconsideration.

45. On August 11, 2015, the OFO denied the request for reconsideration and again ordered relief and amended its order to allow for Mr. Kitlinski to file an additional claim for fees within thirty days. That order is now final and the Agency conducted no further appeal on the issue of liability.

Mr. Kitlinski's Second Claim of Discrimination, Retaliation, and Reprisal for Denial of His MCSTP Requests DEA 2012-01239

46. On September 21, 2012, Mr. Kitlinski filed an informal complaint of discrimination against the DEA related to the denial of requests for transfer under the MCSTP and for VAN CMB-12-280 (Group Supervisor). Kitlinski also grieved the denial of two MCSTP requests on June 1, 2012 in VAN CMB-12-254, which was rejected by the Agency as untimely.

47. The EEO complaint was amended to include VANs CMB-12-249 (Country Attaché-Poland), 13-227 (Staff Coordinator), CMB-13-228 (Staff Coordinator) and CMB-13-229

(Staff Coordinator). Mr. Kitlinski claimed these denials were based on retaliation and reprisal for his prior protected EEO activity Amendments were made on March 8, 2013 and April 11, 2013.

48. All these positions were lateral positions, and with the exception of the position in Poland, were all located in the Washington, D.C. area.

49. Only on the September, 2012, denial of the MCSTP request, did the Agency claim a justification, by contending that Kitlinski had failed to complete proper time in his San Diego Field Division assignment to qualify for a transfer.

50. The whole purpose of the MCSTP, which was to allow exceptions to standard rotations and assignments to accommodate married core series agents.

VAN CMB 12-280 Technical Operations

51. VAN CMB-12-280 was a Technical Operation position. Mr. Kitlinski held a Technical Operations position as a Group Supervisor in San Diego.

52. In addition, Mr. Kitlinski military service with the U.S. Coast Guard involved Technical Operations.

53. Mr. Kitlinski had outstanding evaluations, had worked enforcement and complex investigations, had Title III written experience and had worked on major investigations against Mexican drug cartels, including that involving the notorious drug lord Joaquin "El Chapo" Guzman Loera and had participated in multi-state, multi-Agency investigations that led to federal prosecution in U.S. District Court. Mr. Kitlinski also worked on extradition requests and his efforts led to the significant seizures of narcotics and proceeds of illegal activity.

54. The employee selected for VAN CMB-12-280, Stephen Murphy, a GS-13 Special Agent with no supervisory experience and less qualifications than Mr. Kitlinski.

55. The reasons claimed reasons for selecting Mr. Murphy were mere pretext.

VAN CMB-249 Attaché Poland

56. On February 26, 2013, Mr. Kitlinski applied for a GS-14 Supervisory Special Agent position as DEA Country Attaché in Warsaw, Poland.

57. Mr. Kitlinski made the BQL for the position and was clearly qualified to serve as Country Attaché.

58. On information and belief, Mr. Kitlinski was the only native Polish speaker in the DEA and was believed to be the most senior employee of the Agency who spoke and wrote Polish fluently.

59. Mr. Kitlinski did not make the Recommendation Memorandum of Mr. Russell Benson, the Senior Executive Service Official in Rome, Italy who acted as the Recommending Official.

60. Although Mr. Benson contended in the EEO Investigation to have no knowledge of Mr. Kitlinski, Mr. Russell Benson's brother Mr. Rodney Benson sat on the Career Board that denied Mr. Kitlinski's MCSTP requests.

61. The selectee for the position was Mr. Jeffrey Kallal. Mr. Kallal did not speak Polish and was less qualified for the position than Mr. Kitlinski

62. Mr. Kitlinski alleged in his EEO complaint that the denial of the Attaché position in Poland was an act of discrimination and reprisal.

VAN CMB-13-277 SOD Staff Coordinator

63. In November, 2012, Mr. Kitlinski applied for a GS -14, Supervisory Special Agent position in the Washington D.C., Special Operations Division ("SOD"), which although part of the Headquarters component is considered a field position within the Agency.

64. The Career Board, apparently relying on the Recommendation Memorandum of SOD Special Agent in Charge ("SAC") Derek Maltz, selected Michael Malocu, a GS-13 Special Agent.

65. Mr. Kitlinski was far more qualified than the selectee. Mr. Kitlinski had extensive experience in the use of technology and Title III Wiretaps and other surveillance techniques used by SOD.

66. Mr. Kitlinski had an outstanding series of performance reviews, had worked numerous complex investigations, supervised personnel, trained junior agents, had extensive managerial case experience, contact with foreign and federal law enforcement agencies and personnel and had more time in the Agency and using technology in the performance of his duties.

67. The non-selection of Mr. Kitlinski is not supported by the record and the only justification for it was one of retaliation and reprisal.

VAN CMB-12-228 SOD, Staff Coordinator

68. Mr. Kitlinski applied for this GS-14, Supervisory position as a lateral transfer and made the BQL.

69. On February 21, 2013, the Career Board selected Mr. Jeffrie Ludwick for the position.

70. Mr. Ludwick was, at the time of his selection, a GS-13 Special Agent with less proven leadership abilities, time in grade, experience with technology, and involvement in complex investigations. Mr. Ludwick's supporting memorandum establishes he was involved in the prosecution of marijuana cases, while Mr. Kitlinski had worked far more complex cases involving well known narcotics traffickers. Mr. Ludwick's relationships were largely with local

police and in task force type operations. Mr. Kitlinski had greater technical operations skills, more and deeper management experience and had worked on more complex matters for a greater period of time than the selectee.

71. Mr. Kitlinski alleged in his administrative complaint that he was denied this position as an act of discrimination and reprisal.

VAN CMB-12-299 SOD, Staff Coordinator

72. In November 2012, Mr. Kitlinski applied for another supervisory position in Washington D.C. as a Staff Coordinator in SOD.

73. Although he again made the BQL, Mr. Kitlinski was not selected for the position.

74. The Career Board selected Herbert Bradford ("Mr. Bradford"), based on the recommendation form Darek Maltz, the SAC of the SOD.

75. Mr. Bradford, was like the other two selectees to SOD, a GS-13 Special Agent.

76. Mr. Kitlinski had a greater depth of experience, greater leadership skills, more well-rounded set of assignments within the Agency, involvement at higher levels in more complex investigations and greater technical skills than Mr. Bradford.

77. Mr. Kitlinski has alleged that the denial of this selection was based on discrimination and reprisal for prior EEO activity.

Mr. Kitlinski's Third EEOC Claim DEA-2013-0063 Denial of Selection for Telecommunications Manager, H-ST-13-72083

78. On May 13, 2013, Mr. Kitlinski submitted a third EEO complaint alleging that he had been passed over for vacancy announcement H-ST-13-720283, Telecommunications Manager, Office of Investigative Technologies (OIT) in Lorton, Virginia.

79. According to the DEA, Mr. Kitlinski made the BQL, however, was excluded from consideration when Mr. John Sinkovits "narrowed" the list to 29 applicants and excluded Mr. Kitlinski.

80. The Agency selected Mr. Corey Burden. The selection process involved an Engineer in the Global Intercept Unit rating and ranking the applicants.

81. Mr. Burden was subsequently disqualified for the position as unsuitable. The position was re-advertised and Mr. David Mc Dougall was selected.

82. Mr. Kitlinski, had all the necessary skills for the position as advertised and was superior in skills and background to the selectee. Mr. Kitlinski made the BQL list and had significant experience in supervising and addressing information technology specialists and the issues they faced. In fact, Mr. Kitlinski's position in San Diego involved nearly the same functions that he would be required to perform the3 position. Indeed, Mr. Kitlinski was a subject matter expert for the Agency on interception of telephone and internet communications

83. On information and belief, the actual selectee for the position was Mr. Burden.

84. Corey Burden was not a DEA employee and, on information and belief, had no DEA or other supervisory experience of any kind, when he was selected.

85. The selection decision was made by Joseph Gabor of the Telecommunications Section Chief of the ST Intercept Unit.

86. On information and belief, the deciding official was made aware of Mr. Kitlinski's

prior EEO activity, by Robert Dorenbush, Special Agent supervisor, who was aware of Kitlinski's complaints and had discussed matters with the management of the OIT.

87. On November 5, 2015, the Agency issued a FAD that determined no reprisal occurred.

88. Mr. Kitlinski was highly qualified for the position in question and had superior supervisory, and at least comparable technical skills to the selectee.

89. The failure to select Mr. Kitlinski was an act of discrimination and reprisal for his prior protected activity.

Third EEO Complaint DEA-2013-0868, DOJ-OIG Announcements 2012-26-MP and 2012-38-MP

90. In October, 2012, Mr. Kitlinski applied for a GS-13 positions as a Criminal Investigator VAN OIG-2012- 26-MP, a position in the Office of Inspector General.

91. The OIG is a separate component of the Department of Justice.

92. A second position opened up in the OIG, OIG-2012-38-MP. This position closed on December 10, 2012, and Mr. Kitlinski applied for the position.

93. Mr. Kitlinski made the BQL for both positions. He was interviewed by OIG SAC Gene Morrison and OIG ASAC Mary Gregorious.

94. On or about December 13, 2012, ASAC Gregorious called Mr. Kitlinski and stated it would be unlikely to be selected for the OIG 2012-26- MP position because of his multitude of complaints against the DEA. ASAC Gregorious stated that Mr. Kitlinski was seeking the position only to "run away from the problems he created by filing his complaints".

95. Kitlinski filed a third EEO complaint against the Agency for these non-selections, claiming discrimination and reprisal.

96. The matters were processed by the DEA.

97. The Agency improperly dismissed Mr. Kitlinski's first allegation on 2012-MP-26, on the grounds of timeliness, arguing that Kitlinski failed to file an EEO based complaint, within 45

days of the non-selection. But so to a hiring freeze, on information and belief, the actual selection and filling of the position did not occur until at, or near, the time Kitlinski actually filed his informal complaint in May, 2013.

98. The second position, OIG-2012-38-MP, was a similar position as a Criminal Investigator in the DOJ's OIG.

99. On April 3, 2013, following inquiry by Mr. Kitlinski, ASAC Gregorious advised Mr. Kitlinski he was not selected for the second position in OIG.

100. On May 17, 2013, Mr. Kitlinski made contact with the DOJ's EEO Counselor.

101. Kitlinski alleged that because Gregorious' husband, was a senior manager who had previously rejected him for positions in DEA, and was aware of his complaints against the Agency, that Mary Gregorious, was aware and privy to his prior protected EEO activity and that based on her own explicit statements, she failed to hire Kitlinski because of his prior protected EEO activity.

102. ASAC Mary Gregorious was, at the time of these actions, married to James Gregorious ("SAC James Gregorious"), the SAC of the DEA's Office of Training.

103. Mr. Kitlinski requested a hearing before the EEOC on the matters set forth in the complaint after the investigation was completed by the Agency hired contractor. That request occurred on December 30, 2013.

104. Mr. Kitlinski alleges that his non-selection was an act of retaliation and reprisal for prior protected activity.

105. On information and belief, Mr. Kitlinski was more qualified that the selectees for both OIG positions, and should have been selected for them.

Fourth EEO Claim DEA-2014-01057: The Agency Denies the Medical Hardship Transfer Retaliation and Reprisal and Failure to Provide Reasonable Accommodation

106. On June 4, 2014, Mr. Kitlinski was notified his requested transfer to Washington D.C. due to medical hardship, namely, Mr. Kitlinski suffered from a permanent physical impairment related to his Achilles tendon and that he was seeking reasonable accommodation to be stationed by the DEA in the Washington, D.C., in order to continue medical treatment there.

107. Mr. Kitlinski noted his wife had been transferred to D.C. by the Career Board, that he was on active duty in the Coast Guard, and that in order to maintain treatment at the same civilian doctors, he should remain in Washington, D.C. and see the same orthopedic surgeon and physical therapists.

108. The request for a medical hardship was and is a request for accommodation under the Rehabilitation Act of 1973.

109. On August 8, 2014, the Agency denied the request without explanation or any effort to engage in the interactive process. Indeed, it gave no grounds for the denial.

110. On August 23, 2014, Mr. Kitlinski filed an informal complaint of gender discrimination and reprisal. In his complaint, Mr. Kitlinski identified how, on June 4, 2014, he submitted a request under the MCSTP for a transfer from San Diego, California where he was serving as a Group Supervisor, Criminal Investigator to the Washington, D.C. Metropolitan area.

111. In his affidavit of January 3, 2015, Mr. Kitlinski clearly stated, he was amending the complaint: "Note: I am also claiming that the denial of those claims based on medical hardship was a violation of the Rehabilitation Act of 1973, in that the Agency perceived me as disabled and denied a reasonable accommodation for my condition."

112. Mr. Kitlinski also contended that he was subject to discrimination based on sex, in that similarly situated women who had sought medical hardships were granted them.

113. Mr. Kitlinski noted that the severity of his injury required him to be placed on limited duty in both the US Military and the DEA.

114. Under the more lenient standards of the American with Disabilities Act ("ADA") whose standards the Rehabilitation Act incorporates, Mr. Kitlinski rupture of his Achilles Tendon qualifies as a disabling condition.

115. Further, the condition was treated as such by both the United States Coast Guard and the DEA, which placed him on limited duty.

116. Mr. Kitlinski provided the DEA with medical records regarding his surgery on April 16, 2014. The DEA asked for additional records on October 7, 2014, which specifically sought a clinical history, a diagnosis, his course of treatment, his testing results, his functional capacity, his prognosis and any physical or duty restrictions. This was the functional equivalent to a fitness for duty examination.

117. After being given the medical records, the Agency concluded, without medical support or documentation, that comparable care could be provided in San Diego, California. This medical opinion was given by Pamela Adams M.D., the Agency Physician and Ms. Lary of the Agency's Health Services Unit.

118. Dr. Adams was the same physician who conducted a "Periodic Medical Examination" of Mr. Kitlinski in February 2013.

119. At that examination, Dr. Adams was informed that due to Mr. Kitlinski's perceived harassment at DEA, he was suffering "severe depression and anxiety."

120. On information and belief, the denial of the financial hardship was an aspect of reprisal for prior EEO protected activity.

121. Although the EEO investigator's discussion of comparators is rather confusing, it appears that Mr. Kitlinski's Financial Hardship request was the one that had been denied.

122. The denial of Mr. Kitlinski's medical hardship requests were acts of discrimination, retaliation and reprisal and a denial of de facto request for reasonable

accommodation.

123. On September 23, 2014, Mr. Kitlinski filed a formal complaint of discrimination based on gender, reprisal and he amended that matter on January 15, 2015 to include his Rehabilitation Act complaints.

The Kitlinskis Discover an Agency Surveillance Device in their Privately Owned Vehicle

124. On September 23, 2014, the very same day, Kitlinski filed his Fourth EEO complaint, he appeared at DEA Headquarters along pursuant to a previously noticed deposition in EEO Claims DEA-2013-00632 and DEA-2012-01239. Mr. Kitlinski was then deposed for two hours. At the conclusion of the deposition, Mr. Kitlinski and his counsel left the building and went outside into public property. Unknown to Mr. Kitlinski and his counsel, the DEA was videotaping their movements in public spaces.

125. Mr. Kitlinski drove home to his residence in Alexandria, Virginia. The Kitlinskis' driveway is on a rather steep grade.

126. When Mr. Kitlinski parked their car in his garage he observed a blinking light, through his dashboard. This was exposed only because of the angle of the driveway.

127. Mr. Kitlinski got out of his vehicle and looked under the hood of their vehicle. There under the driver side, strategically wedged under the hood was a Blackberry cellular telephone.

128. The telephone was on "active mode", that is the phone was powered on and a light indicating its being "on" was visible.

129. Mr. Kitlinski, as a DEA Group Supervisor with technical expertise in the installation and use of monitoring devices, recognized that the Blackberry was the type of device that the DEA has and did use to conduct electronic monitoring of both global position, visual activity, and verbal communications of individuals who the Agency seeks to track.

130. The device can also be remotely accessed to link to the internet in order to allow additional forms of monitoring.

131. Mr. Kitlinski opened the Blackberry telephone and found behind the battery a DEA property sticker and serial numbers.

132. Mr. Kitlinski used this information to determine that the device had been assigned to Human Resources Section Chief Donna Rodriguez ("Ms. Rodriguez"). Ms. Rodriguez worked for the section of the DEA that along with Chief Counsel's office, was defending against the claims of EEO discrimination brought by Mr. Kitlinski.

133. After discovering the device in his car, Mr. Kitlinski called the FBI. Mr. Kitlinski was (and remains) concerned that the senior officials in the DEA itself had approved or condoned the placement of the Blackberry. He was concerned that the installation of the device violated Federal law. He was also concerned that the device had tracked his movements and recorded his conversations with his wife and counsel.

134. On September 24, 2014, Special Agent Eric Hathaway ("Agent Hathaway") of the FBI's Northern Virginia Office responded to Mr. Kitlinski's call to the FBI.

135. Agent Hathaway stated he would speak to his supervisors and vowed to return Mr. Kitlinski's telephone call promptly.

136. When no response was forthcoming, Mr. Kitlinski contacted the DOJ's OIG to report the discover of the telephone.

137. On September 26, 2014, Mr. Kitlinski spoke to Mr. Gregory Schosser ("Mr. Schosser"), of the DOJ's OIG. He explained the circumstances concerning his recovery of the telephone, disclosed the DEA's identifying information and the apparent "owner" of the Blackberry and determined how he believed the DEA was retaliating against him for his protected EEO and USERRA activity.

138. On September 29, 2014, Mr. Kitlinski wrote an email confirming the conversation. He then provided pictures of the Blackberry and asked Mr. Schossler to take possession of the device.

139. Although Mr. Kitlinski requested confidentiality on his complaint to OIG, that confidentiality was almost immediately violated.

140. On September 29, 2015, without Mr. Kitlinski's knowledge or consent, OIG SAC Ronald Powell, contacted Mr. Herman Whaley ("Mr. Whaley"), then the Deputy Chief Inspector of DEA's Office of Professional Responsibility ("OPR") to notify him of Mr. Kitlinski's disclosure.

141. After speaking with Mr. Whaley, OIG cancelled the interview, although it would not decline the case for several weeks and declined to take the telephone as evidence of improper activity by the DEA.

142. The DEA is believed to have collected surveillance tapes. On information and belief, the Agency has confirmed to third parties that these tapes show someone putting the phone into the hood of the Kitlinskis' vehicle.

143. This evidence exists although the Agency has refused to surrender it and has maintained that Mr. Kitlinski installed the phone himself.

144. On October 2, 2014, Program Manager Eric Jordan determined that he has traced the Blackberry to Donna Rodriguez, a psychologist and GS-15 employee of the Agency's Human Resources Division.

145. Mr. Kitlinski pursued the telephone issue on separate grounds before the MSPB and the EEOC.

146. On October 7, 2014, Mr. Kitlinski filed a motion to amend the initial MSPB appeal of Mr. Kitlinski and a request for sanctions based on the placement of the Blackberry.

The Agency Investigates the Kitlinskis

147. After, the contact by the OIG with the DEA OPR, on October 2, 2014, the Agency ordered the mirroring of both Darek and his wife Lisa Kitlinski's work computers. The Agency duplicated communication that the Kitlinskis had with one another, with their counsel and with the DOJ-OIG. All this was done without notifying the Kitlinskis or taking any pre-caution not to seize potentially privileged communications.

148. On October 27, 2014, OPR officials demanded that Ms. Kitlinski appeared at a "compelled interview" and to produce the Blackberry telephone the next day. Mrs. Kitlinski's counsel immediately protested the meeting.

149. On October 28, 2014, over written objections by Ms. Kitlinski's attorney, Mrs. Kitlinski, who was an Agency employee at the time, appeared at the compelled interview.

150. In contravention of Agency policy, Mrs. Kitlinski was never informed of the basis of the investigation. She was repeatedly informed counsel could not be present though the Justice Department allows for assistance of counsel so long as counsel does not delay or interfere with the interview

151. When Mrs. Kitlinski did appear she was subject to abusive treatment by DEA OPR Inspector Roman ("Mr. Roman"), who raised his voice, threatened her with insubordination when she expressed reservations in answering what she deemed privileged questions and badgered her repeatedly during the procedure.

152. Since the Agency investigation, from the outset, was based on a premise, that the Kitlinski's essentially stole the Blackberry themselves and planted it in their own vehicle to further the EEO and USERRA cases of Mr. Kitlinski, OPR investigators never focused on the criminal or civil tort aspects of the telephone's placement.

153. Indeed, the Kitlinskis have recently learned, that the Agency has videotape

showing someone other than the Kitlinskis placing the telephone in the Kitlinskis vehicle, although the Agency never produced such materials in the administrative phases of the case.

154. During the course of the compelled interview, OPR failed to follow its own procedural manual, which distinguishes complainants from targets. Further during interview OPR inquired into the Kitlinskis discussions between husband and wife, with counsel, and with the OIG.

155. OPR also made its compelled interview during the pendency of an administrative hearing on the very issues on which OPR was raising questions. Thus the interview was an attack on and interference with that administrative process, because OPR was using a compelled interview to obtain information the Agency would otherwise have to obtain in discovery, a process in which the Kitlinskis would be protected by counsel.

OPR Orders Darek Kitlinski off Military Duty

156. On November 20, 2014, Mr. Roman went to Mr. Kitlinski's place of military employment to demand that he appear for a compelled interview the next day.

157. OPR agents signed into the military facility as members of the U.S. Coast Guard.

158. Entering the actual workspace of Mr. Kitlinski, through this ruse, Mr. Roman confronted Mr. Kitlinski, while he was in uniform and demanded he leave his post the next day and report for an OPR interview.

159. Mr. Roman became badgering and abusive during this Agency sponsored confrontation. He raised his voice and told Mr. Kitlinski, who was on active duty at the time that he could not call his attorney and ask for guidance.

160. Having only the instruction of an OPR investigator and lacking any written or other authorization from the U.S. Coast Guard or the DEA itself Mr. Kitlinski did not appear for the interview November 21, 2014.

161. On November 20, 2014, Mr. Kitlinski protested the compelled interview as illegal and through counsel requested authority to interfere with his military assignment and require him to come back to the DEA.

162. The Agency never responded to the request for authority, which included a request that the Agency pay Mr. Kitlinski for the time on which he would be required to return to the DEA.

The Agency Terminates the Kitlinskis

163. On or about May 28, 2015, the Agency presented both Mr. and Mrs. Kitlinski proposed removal notices based solely on the assertion of their rights in responding to the inquiry on the Blackberry. The Kitlinskis provided a written and oral reply asserting that they committed no misconduct and the entire action is a byproduct of retaliation and reprisal for their prior EEO and USERRA protected activity, which included appeals to Congress by Mr. Kitlinski and his appearance, twice, on national media. The Kitlinskis also cited harmful procedural error, due process violations and retaliation and reprisal for prior EEO activity and USERRA protected activity.

164. Upon notice of pending removal proceedings, both Mr. and Mrs. Kitlinski were placed on limited duty and their rights to seek promotions or pay increases were blocked while they remained under investigation.

165. On January 15, 2016, the Agency, in a single page, without any effort to address the substantive legal or factual arguments raised by the Kitlinskis, terminated them from federal employment. The Agency provided no rationale for terminations other than cite their respective proposal letters. The terminations were directly in retaliation for the Kitlinskis assertions of their legal rights, their common law rights, and their rights under the Constitution of the United States.

166. In an effort to intimidate and embarrass the Kitlinskis, the Agency repeatedly sent law

enforcement agents to the personal residence of the Kitlinski's to try to "serve" them the notice of removal, although the Agency could have simply sent an electronic mail message to the Kitlinskis, ordered them to appear to obtain the notice or sent it to their counsel, who clearly and unequivocally represented them on the matter and who as clearly had stated that he would be the point of contact for the Kitlinskis prior to these efforts.

167. The Kitlinskis filed appeals to their removals with the MSPB on February 5, 2016. The Kitlinskis contended their removals were acts of discrimination, disparate treatment, retaliation and reprisal for prior EEO and MSPB related activity and were part of a severe, pervasive and hostile work environment under both USERRA and EEO law. They also alleged the actions were retaliation for complaints filed with the, FBI, the OIG, the Office of Special Counsel and Congress, retaliation for First Amendment activity before the press, the by-product of harmful procedural error which included a failure to provide the Kitlinskis with all the materials relied upon by the decision maker and a failure by the decision maker, who was the same in both Darek and Lisa Kitlinski's, case to review the materials they provided. The Kitlinskis also alleged that they had committed no actionable misconduct, that Agency failed to properly apply the *Douglas* factors, in mitigation of the claimed offenses and that the agency relied on matters not provided to the Kitlinskis. The Kitlinskis also alleged that the Agency had used evidence that was gained in contravention of law, was subject to common law privilege, or involved a violation of Constitutional or statutory bias.

168. The case constitutes "mixed case appeal" before the MSPB, to which the Kitlinskis have the authority to file in the U.S. District Court after the passage of more than 120 days.

The DOJ OIG's Privacy Act Denials

169. On December 3, 2014, Plaintiff Mr. Kitlinski submitted a pro se request to the DOJ OIG pursuant to both the Freedom of Information Act ("FOIA") 5 §USC 552 and thePrivacy Act

("PA") 5 §USC 552a requesting "copies of all record you have in your possession about me."

170. On December 10, 2014, Plaintiff Mrs. Kitlinski submitted a similar pro se request to the DOJ OIG pursuant to both FOIA 5 USC §552 and PA 5 USC§ 552a requesting "copies of all record you have in your possession about me."

171. On March 17, 2015, some one hundred and three days after the request was submitted, OIG responded and stated "the responsive documents have been reviewed. It has been determined that certain portions of such documents and documents in their entirely be exercised pursuant to FOIA 5 USC §552(b)(6) and 7(c).

172. The OIG never identified which specific documents were being excused or withheld and cited exemptions that relate to personal privacy.

173. Exemption 6 is applicable only when the disclosure would constitute a clearly unwarranted invasion of personal privacy. The Agency never cited whose privacy was at issue or how Mr. Kitlinski's request for his own records, would invade the privacy of some

174. Similarly, Exemption 7(c) provides protection of information in law enforcement records. Like exemption 6 it requires a balancing of the individual's expectation of privacy with the FOIA presumption of the need for disclosure.

175. The Agency did not specially state responsive records sought implicated a law enforcement based investigation. Further the Agency never stated it conducted any balancing test before deciding not to make a disclosure.

176. OIG produced a heavily redacted version of the inquiry the Kitlinskis' initiated.

The Agency cited no exemption for the actual redactions, rather, it simply blackened out information, leaving the requestor to speculate as to why materials had been withheld.

177. OIG produced no records of Mr. Kitlinski's previous applications for employment with the OIG.

178. The records were by their very nature retrievable through the Kitlinski's names or identifier.

179. On information and belief OIG investigators disclosed to the DEA, information centered in the OIG's system of records. The nature and substance and identities of the Kitlinskis and their complaint, without the knowledge and permission of the Kitlinskis. This violated the Privacy Act limitations on disclosures set forth at 5 USC §552a(d).

180. On April 21, 2015, Mrs. Kitlinski, acting pro se, timely appealed the denial of her Privacy Act Request to the DOJ Office of Information Policy ("OIP").

181. Mrs. Kitlinski pointed out that FOIA Exemption (b)(6) was not applicable as he was seeking records pertaining to himself. Mrs. Kitlinski also noted that Exemption (b)(7) was not applicable because "there is no current investigation into any allegation I have raised and I am not advised there is any investigation in which I am a subject or a target."

182. On April 23, 2015, Mr. Kitlinski, acting pro se, timely appealed the denial of his Privacy Act Request to the OIP.

183. Mr. Kitlinski pointed out that FOIA Exemption (b)(6) was not applicable as he was seeking records pertaining to himself. Mr. Kitlinski also noted that Exemption (b)(7) was not applicable because "there is no current investigation into any allegation I have raised and I am not advised there is any investigation in which I am a subject or a target."

184. Mr. Kitlinski noted that this was a Privacy Act request and their FOIA exemptions would not apply.

185. The OIP has not responded to Kitlinskis' appeals and has not requested or received any extension in which to answer the appeals.

186. At this juncture, Mr. Kitlinski has fully complied with all Agency regulations regarding obtaining access to his records. To the extent a request for access to records even

requires exhaustion of administrative remedies, Mr. Kitlinski has done so.

187. At this juncture, Mrs. Kitlinski has fully complied with all Agency regulations regarding obtaining access to his records. To the extent a request for access to records even requires exhaustion of administrative remedies, Mrs. Kitlinski has done so.

CAUSES OF ACTION

COUNT ONE: DISCRIMINATION BASED ON GENDER AGAINST DAREK KITLINSKI: Denial of Transfers under MCSTP.

188. Paragraphs 1 through 45 are re-alleged and incorporated by reference herein.

189. Darek Kitlinski is a male and a member of a protected class.

190. Mr. Kitlinski was subject to adverse actions when the Agency failed to transfer him under the MCSTP on April 28, 2011 and June, 2011.

191. Mr. Kitlinski was subject to an adverse action, when on May 17, 2011, the Agency failed to select him for lateral transfers for VAN CMB-11-287 as a Supervisory Special Agent in the Washington Field Division of the DEA.

192. Mr. Kitlinski was subject to an adverse action when, on September 1, 2011, he was not selected for VANs CMB-11-207-1 and CMB-11-224-1, in the Baltimore Office of the Washington Field Division.

193. For VANs CMB-11-287, 207-1 and 224-1, Mr. Kitlinski was amply qualified, indeed more qualified than the ultimate selectee, given his supervisory experience, tie in grade, work accomplishments and superior skill sets.

194. The rejection of Mr. Kitlinski for his two MCSTP was an act of gender based discrimination. Similarly situated female “core series” personnel were all granted MCSTP transfers in the relevant comparative time period preceding the denial of Kitlinskis requests.

195. The Agency relied on sexist assumptions to make its denials concluding that a male agent who sought a transfer based on his wife's prior transfer was not a proper subject of the MCSTP.

196. The Agency provided no legitimate business justification, nor in fact any justification for its failure to grant the MCSTP during the administrative phase of the EEO case brought by Mr. Kitlinski.

197. The Agency operated under a sexist assumption that Mr. Kitlinski had engineered his wife's transfer to advance his own career.

198. The Agency operated under the sexist assumption that it was less necessary for a male to transfer to maintain a common household since it would be for a female, especially when children were part of the family unit.

199. The Agency then failed to select Mr. Kitlinski for VANs CMB 11-287, 207-1 and 224-1, in reprisal for Mr. Kitlinski complaining of discrimination in the denial of his MCSTP requests.

200. The non-selections were procured by many, if not all of the same personnel, who denied Kitlinskis MCSTP requests.

201. The denials caused Mr. Kitlinski significant emotional distress and created what would become a hostile and retaliatory work environment, at the highest levels of the Agency that permeated all future interaction.

202. To the extent the Agency argues that Mr. Kitlinski must bring his claims *de novo* and may not pursue a claim for the EEO award of fees, set forth below, Mr. Kitlinski hereby brings these claims.

COUNT TWO: ENFORCEMENT OF ATTORENYS FEES AWARD OF EEOC OFO

203. Paragraphs 1 through 45 are re-alleged and incorporated by reference herein.

204. On March 9, 2015, the EEOC OFO found that Mr. Kitlinski had established discrimination based on gender as to the denial of his MCSTP requests.

205. Specifically, the OFO found that a comparative analyses supported Mr. Kitlinski's claim that the Agency had engaged in disparate treatment and had provided no legitimate business justification for the denial of the MCST request that Mr. Kitlinski had made.

206. The Agency requested reconsider of the decision which Mr. Kitlinski opposed.

207. The EEOC confirmed its original decision on August 11, 2015, and the Agency failed to timely appeal that action to the District Court. The decision as to liability became final.

208. In accordance with the OFO directive, Mr. Kitlinski submitted three fee petitions and a request for damages.

209. Affidavits attesting to reasonable legal fees accrued in preparing and presenting the claim and in opposing Agency attempts to reconsider the EEO's decision were submitted.

210. Mr. Kitlinski had three attorneys involved in the process: Malik Cohen esq., charged Mr. Kitlinski a capped fee of $7,500.00, although he did far more work than the capped fee exhausted. Mr. Cohen did provide a sworn statement attesting to his fees.

211. Jeff Jacobsen conducted additional work on the matter, raised his inquires to the Agency and to Congress. He's submitted an affidavit for $8,010.00.

212. Attorney Kevin Byrnes reviewed an extreme volume of Pleadings and prepared a comprehensive opposition to the Agency's motion for reconsideration.

213. Mr. Byrnes prepared a fee petition for $32,292. Mr. Byrnes based his fees on the Laffey Matrix and noted he had taken the case on a lodestar rate.

214. Mr. Kitlinski submitted a claim for punitive damages in the amount of $2,129.49 and included itemized expenses. He has also sought $300,000 in compensatory damages, citing

the severe emotional distress the Agency had put him under.

215. October 27, 2015 the Agency denied Mr. Kitlinski requests for compensatory and emotional distress damages. The Department of Justice agreed to an award of a mere $2,000.00 in attorneys fees, which has not been paid.

216. The Agency's decision denied ordered by the OFO. To the extent this is a refusal to grant ordered relief, this is an action pursuant to 29 CFR §1614.503(g) and 28 USC §1361.

COUNT THREE: DISCRIMINATION BASED ON GENDER, RETALIATION AND REFUSAL FOR PROTECTED EEO ACTIVITY AS TO DENIAL OF INITIAL MCSTP REQUESTS; DAREK KITLINSKI.

217. Paragraphs 1 through 46 are re-alleged and incorporated herein.

218. The denial of Mr. Kitlinski's MCSTP request, set forth in administrative complaint 2012-01239, were acts of gender discrimination and reprisal based on prior protected EEO activity.

219. The Agency provided no legitimate non-discriminatory account for the denial of Mr. Kitlinski's the MCSTP, which occurred on September 19, 2011.

220. The Career Board that denied the request had senior members present who were aware of Mr. Kitlinski's prior protected EEO activity.

221. The denial of the request was again predicated on Mr. Kitlinski's gender as a male.

222. The DEA Career Board had overwhelmingly granted requests from female "core employees" to transfer under the MCSTP after their husbands had been promoted or reassigned by the Career Board. The Career Board was well aware at the time of their decision that Mr. Kitlinski was a male and that his wife was a female.

223. The denial was an adverse employment action

224. Mr. Kitlinski has properly exhausted the EEO administrative process before filing

this complaint.

225. The denial of Mr. Kitlinski's request was also a product of retaliation and reprisal based on prior protected activity.

COUNT FOUR: RETALIATION AND REPRISAL FOR PRIOR PROTECTED EEO ACTIVITY: DENIAL OF TRANSFER REQUESTS VAN's CMB 12-280, 249, 228, 270 and 299: DAREK KITLINSKI

226. Paragraphs 46 through 77 are re-alleged and incorporated as if fully set forth herein.

227. The denial of Mr. Kitlinski's applications for transfers for VANs CMB 12-80, 12-249, 12-228, 12-277 and 12-299 were adverse employment actions.

228. For each of these positions, Mr. Kitlinski was clearly more qualified in terms of experience, training, time in grade, skill sets, supervisory experience and overall depth of and longevity of performance than the selectee.

229. As to VAN CMB 12-280, Mr. Kitlinski was substantially more qualified than the selectee, due to his experience as a supervisor in Technical Operations and his time in the Agency and in a grade 14 supervisory position. The Career Board officials who made the decision not to select him were aware of his prior protected EEO activity.

230. On information and belief, Recommending Official Russell Benson was aware of Kitlinski's prior EEO activity and the members of the Career Board involved in the ultimate selection of Mr. Kitlinski were aware of his prior protected activity.

231. With respect to the three positions in the Special Operations Division as Staff Coordinator, VANs CMB 12-228, 12-277 and 12-299, Mr. Kitlinski, a GS-14 supervisor, had greater specific skills in the area and general skills as a supervisor, than those of the three selectees by virtue of his training, experience, specialized knowledge and past supervisory experience as well as past performance on complex matters, than the selectees for the position in

SOD. With respect to the position in Warsaw, Poland, VAN CMB-249, Mr. Kitlinski also possessed native language speaker and writer skills as well as the other attributes.

232. All three non-selections of Mr. Kitlinski were based on recommendations by the same official Darek Maltz, who, on information and belief, aware of Mr. Kitlinski's prior protected activity.

233. The Career Board involved in the selection process was also aware of Mr. Kitlinski's prior protected activity when it made the selections.

234. The non-selection of Mr. Kitlinski was based on his prior protected EEO activity and was an act of retaliation and reprisal.

235. Mr. Kitlinski has properly exhausted his EEO administrative claims on thes matters set forth in this count.

COUNT FIVE: RETALIATION AND REPRISAL, NON-SELECTION FOR H-ST-13-72083: DAREK KITLINSKI

236. Paragraphs 78 through 89 are re-alleged and incorporated as if fully set forth herein.

237. On March 28, 2013, Mr. Kitlinski was non-selected for a position in the DEA Office of Information Technology. Mr. Kitlinski by experience, training, supervisory experience, special technical experience was more qualified than the selectee.

238. Mr. Jon Sikovets was the selecting official.

239. The denial of the selection was an adverse action.

240. On information and belief Mr. Sinkovets was aware of Mr. Kitlinski's prior EEO activity through Mr. Robert Dorenbush, who Mr. Kitlinski had confided in regarding his claims and efforts to transfer to Mr. Kitlinski to Washington D.C.

241. The denial of Mr. Kitlinski for selection was a product of retaliation and

reprisal to which Mr. Kitlinski is entitled to compensatory damages, to damages for emotional distress and pain and suffering and for attorney's fees and costs associated with this action.

242. Mr. Kitlinski has properly exhausted his EEO administrative claims on the matters set forth in this count.

COUNT SIX: RETALIATION AND REPRISAL NON-SELECTION FOR DOJ-OIG POSITIONS: DAREK KITLINSKI

243. Paragraphs 90 through 104 are re-alleged and incorporated, as if fully set forth herein.

244. On April 3, 2013, Mr. Kitlinski filed a complaint of discrimination based on his non-selection to two positions in the DOJ OIG.

245. In October 2012, Mr. Kitlinski applied for a position as GS-13 investigator in the DOJ OIG, 2012-26-MP.

246. On November 8, 2012, Mr. Kitlinski was interviewed for the position.

247. The interview went favorably and Mr. Kitlinski by virtue of his training and experience was well qualified for the position. After passing the initial interview process, Mr. Kitlinski was granted a second interview with OIG SAC Gene Morrison. That interview also went favorably.

248. OIG ASAC Mary Gregorious, who lead the initial interview panel was, at the time, married to DEA Office of Training SAC James Gregorious.

249. On December 13, 2012, ASAC Gregorious informed Mr. Kitlinski she had spoken to her husband about Kitlinski's application. Based on that conversation, ASAC

Gregorious determined that the failure of the DEA Career Board to transfer Mr. Kitlinski indicated a problem with his conduct and credibility. Mr. Kitlinski applied for a second position with the DOJ OIG on January 13, 2013, 2012-38-MP.

250. On April 3, 2013, Mr. Kitlinski was notified he was not selected for this position.

251. The denial of the position was an act of retaliation and reprisal for prior protected EEO activity. his prior protected activity. Although Mr. Kitlinski was informally told he was not selected for the first position by ASAC Mary Gregorious.

252. It was only in April, 2015 that Mr. Kitlinski learned with any definitiveness that actual candidates had been selected for 2012-26-MP and 2012-38-MP.

253. Mr. Kitlinski was amply qualified for the positions in the IG's office. Indeed, he had a senior grade to the persons selected and had greater investigatory and supervisory experience, greater background in complex investigations and more well rounded qualifications than the selectees.

254. The non-selections were adverse employment actions.

255. Mr. Kitlinski has exhausted his administrative complaints before the EEO on the matters alleged in this count.

COUNT SEVEN: DENIAL OF MEDICAL HARDSHIP REQUEST, RETALIATION, REPRISAL, AND FAILURE TO ACCOMMODATE; DAREK KITLINSKI

256. Paragraphs 105 through 122 are re-alleged and incorporated as if fully set forth herein.

257. Mr. Kitlinski alleges that the denial of his medical hardship request by the Career Board, was an act of retaliation and reprisal. The Career Board officials who denied the medical hardship request were aware of Mr. Kitlinski's prior protected EEO activity. Further, the denial was also a discriminatory act in and of itself based on Mr. Kitlinski's gender as a male.

258. Comparatives established that males were far more likely to have their medical hardship requests rejected.

259. Further, Mr. Kitlinski clearly had a hardship condition that qualified for a transfer.

260. Mr. Kitlinski established a viable hardship that required consistent medical treatment. The condition also qualified as a disability under the Americans with Disabilities Act and the Rehabilitation Act of 1973.

261. Mr. Kitlinski provided appropriate medical information to support the request.

262. The failure to provide the transfer was a form of disparate treatment as females were almost universally granted such requests.

263. The failure to transfer Mr. Kitlinski for medical hardship reasons was an independent act of retaliation and reprisal since the Career Board knew of his prior protected EEO activities.

264. The failure to transfer Mr. Kitlinski due to medical hardship was not supported by any credible medical evidence. The agency never undertook any interactive process in denying Mr. Kitlinski his request.

265. The Agency denial was both a failure to accommodate a request for reasonable accommodation under the Rehabilitation Act of 1973 and a pretext for discrimination and retaliation.

COUNT EIGHT: BIVENS ACTION; DONNA RODRIGUEZ AND PARTIES UNKNOWN VIOLATION OF FOURTH AMENDMENT RIGHTS UNDER U.S. CONSTITUTION AS TO DAREK AND LISA KITLISNKI

266. Paragraphs 123 through 146 are re-alleged and incorporated as if fully set forth herein.

267. The installation of a DEA issued Blackberry telephone was a form of illegal search and seizure under the Fourth Amendment of the United States Constitution.

268. The telephone at issued belonged to Ms. Donna Rodriguez, who works for the DEA and had reason to install the device as she worked for the section of the Agency defending against Mr. Kitlinski's claims and participated in those actions.

269. The installation of the device appears to coincide with the timing of a previously scheduled deposition of Mr. Kitlinski. The Agency knew that Mr. Kitlinski would be present that day and would have been aware that he would have parked his privately owned vehicle on DEA property.

270. Ms. Rodriguez delayed reporting the telephone lost and no convincing explanation if the loss or placement of the telephone has been provided by Ms. Rodriguez.

271. On information and belief, the Agency has videotape footage that shows an individual other than Mr. Kitlinski placing the telephone in his car on September 23, 2014, at the time Kitlinski was in deposition.

272. At the time of the deposition, Kitlinski was in the Coast Guard on light duty due to the injury described in his medical hardship request.

273. On information and belief, individuals employed by the DEA hoped to monitor Mr. Kitlinski's whereabouts and perhaps physical movement to aid them in the defense against Mr. Kitlinski's claim or to gather information for use in either a DEA or Coast Guard employment action or both.

274. The Agency has refused to surrender the tapes that establish the installation of the telephone, which would undermine their theory that the Kitlinskis themselves conjured up the incident.

275. The installation of the device is a violation of the Fourth Amendment to the Constitution in that it amounts to a search and seizure of private property without a warrant or authorization under law.

276. Depending on whether communications were monitored and intercepted as the Kitlinskis believe, the actions may violate other Constitutional rights.

277. As Rodrigues is the owner of the telephone and has given no convincing explanation as for its loss, she is named party.

278. In addition, unknown and unnamed parties may have been involved in the violation of Fourth Amendment rights, indeed the installation is *res ipsa loquitur* of said violations.

COUNT NINE: VIOALTION OF FEDERAL WIRETAP ACT: DONNA RODRIGUEZ, OTHER PERSONS UNNAMED AND UNKNOWN, 18 USC §2511 et. seq.

279. For the same reasons as set forth in Count Eight, whose allegations are re-alleged and incorporated herein, the Kitlinskis allege that Donna Rodriguez and other employees of the DEA did violate the Federal Wiretap Act

280. On information and belief, the device was installed to intercept communications protected under the Act.

281. On information and belief, communications were in fact intercepted.

282. On information and belief, the Kitlinskis and possibly their agents and representatives have been subject to other forms of electronic monitoring and surveillance that has intercepted communications protected under the act, by persons employed by or known to the DEA who have acted without authorization of law.

283. On information and belief, the DEA Blackberry device was remotely triggered to intercept oral and possibly electronic communications.

284. On information and belief, persons within the Agency have monitored the communications of the Kitlinskis and their agents by the installation of the telephone and possibly other means.

285. The installation of the DEA Blackberry violated the Federal Wiretap Act.

286. On information and belief, the DEA Blackberry was placed in an "active" mode to surveille the whereabouts and communications of the Kitlinskis. This also violated the Federal Wiretap Act.

COUNT TEN: WRONGFUL TERMINATION, DISCRIMINATION, RETALIATION AND REPRISAL, HARMFUL ERROR AND FAILURE TO PROPERLY APPLY DOUGLAS FACTORS, MIXED CASE APPEAL OF DAREK KITLINSKI

287. Paragraphs 1 through 168 are re-alleged and incorporated by reference herein. The termination of Mr. and Mrs. Kitlinski were wrongful.

288. The terminations were also an act of discrimination retaliation and reprisal for prior EEO protected activity.

289. Mr. Kitlinski was had field numerous EEO complaints at the time of his termination, which are identified above in this complaint.

290. In addition, at the time of the termination, Mr. and Mrs. Kitlinski had filed EEO complaints against the Agency, for what they perceived to be a retaliatory investigation by OPR, that had resulted in their being proposed for termination. The Kitlinskis also alleged adverse actions in their duties were significantly curtailed within the Agency.

291. On July 17, 2015, the complainants filed complaints for retaliation, reprisal and hostile work environment, due to their engaging in prior EEO protected activity, with Mr. Kitlinski as a complainant and Mrs. Kitlinski as a witness in those matters.

292. The matters are pending and are more than 180 days old and are thus are ripe for adjudication in this court.

293. These allegations merge in part, with the terminations. In the termination, the Kitlinskis have alleged that are subject to retaliation, reprisal for their prior EEO claims.

294. The Kitlinskis filed these matters are part of a "mixed case appeal: before the MSPB on February 5, 2016.

295. Both matters have been pending before the MSPB for more than 120 days and thus may now be brought as a mixed case appeal before this Court. *Butler v. West*, 164 F.3d 634 (DC Cir. 1999).

296. The Kitlinskis' claims and defenses were set forth in both their oral and written replies and their appeals to the MSPB.

297. Other grounds for the mixed case appeal include a failure of the Agency to provide the Kitlinskis with all materials that were provided to the decision maker Michael Bulgrin, in the un-redacted form in which they were apparently provided. This is harmful procedural error.

298. The Kitlinskis also claimed their termination was retaliation, reprisal and part of a hostile work environment under USERRA, since Mr. Kitlinski had filed such claims before his termination.

299. The Kitlinskis also claimed the Agency engaged in retaliation and reprisal for Darek Kitlinski appearing before the media and for his disclosures and appeals to Congress.

300. The Kitlinskis also alleged the Agency was retaliating against them for requesting assistance from the FBI and the DOJ-OIG, both of whom appear to disclose the allegations the Kitlinskis raised in a fashion that either directly identified them or by implication identified them as complainants to the FBI and the OIG about actions conducted by the DEA and its employees.

301. The Kitlinskis also alleged they were being terminated for asserting their rights against the Agency when questioned by OPR and that was part of ad greater act of retaliation and reprisal for filing MSPB complaints, which is, in and of itself, a protected

activity under federal law.

302. The Kitlinskis also alleged the Agency had violated their rights to consult with and be represented by counsel in MSPB and EEO actions, both of which were pending when they were subject to interaction with and compelled interviews before OPR and that OPR had violated common law privileges as well, all while intentionally interfering with and subverting the MSPB and EEO administrative processes and protections accorded to litigants, such as the right to be represented by counsel and to have the discovery procedures of both the EEO and MSPB processes utilized for gathering information from a party opponent.

303. The Kitlinskis also argued that to the extent Agency counsel was aware of, authorized or benefitted from OPR actions, it had used agents to conduct communications with represented parties.

304. Under the mixed case appeal process, 5 USC §§7701 and 7702, the Kitlinskis are entitled to bring their EEO based claims to a jury and their MSPB claims to the U.S. District Court judge as fact finders.

305. The Kitlinskis have also argued that the punishment imposed by the Agency was excessive and ignored the analysis required under the Douglas factors, which must be utilized in every MSPB based adverse employment action.

COUNT ELEVEN; VIOLATION OF THE PRIVACY ACT 5 USC §552a (g)(1)(B) FAILURE TO PROVIDE ACCESS TO RECORDS; WRONGFUL DISCLOSURE OF RECORDS

306. Paragraphs 169 through 187 are re-alleged and incorporated by reference herein.

307. Mr. and Mrs. Kitlinski are entitled to secure records maintained in a system of records that are retrievable under their name or some other identifier specific to them. 5

USC §552a(d)(1).

308. The Agency improperly denied the Kitlinskis full access to the OIG file and the files concerning the interaction between the DOJ-OIG and the DEA-OPR and DEA in general.

309. Such records are also subject to production under the FOIA, 5 USC §552 (a)(3).

310. The DOJ-OIG instead produced a heavily redacted file that excluded key communications between the OIG and the DEA, which would reveal the extent of the unauthorized disclosure and violation of anonymity that occurred between the OIG and the DEA-OPR.

311. The Kitlinskis are entitled to full disclosure of their submissions to the OIG, how the OIG acted on those submissions and how the OIG made disclosures or received communications form the DEA.

312. The disclosure of this information would undermine the Agency defense that OPR merely acted on disclosures by Mrs. Kitlinski to her supervisors, as has been claimed and would instead establish that the Agency commenced investigating the Kitlinskis days before Mrs. Kitlinski even spoke to her supervisors on October 2, 2014, about the discovery of the DEA Blackberry device in her car.

313. The disclosure would support the Kitlinskis allegations that the Agency derailed efforts by the OIG to independently investigate the Kitlinskis allegations.

314. The disclosure, on information and belief, will establish a retaliatory motive for the investigation and possible collusion in the underlying installation of the telephone.

315. There is no valid basis at law to withhold any information in the DOJ-OIG files and it appears the OIG is merely protecting itself from disclosing its own violations of

the IG Act when it prematurely, and without authority, disclosed the Kitlinskis claims.

316. Whether the Kitlinskis have suffered actual damage for this Privacy and FOIA violation remains to be seen but they are certainly entitled to production of the full records in un-redacted form, particularly since the OIG has never identified an exemption under either act or a basis for its redactions.

317. The Kitlinskis are entitled under the Privacy Act to full access to materials that are identifiable under their name. Further, they are entitled under FOIA to records produced by the Department of Justice that detail how it handled the Kitlinskis own complaint. 5 USC §552(a)(3) and 5 U.S.C. § 552(a)(4)(B).

318. The OIG also violated the Privacy Act by wrongfully disclosing records maintained on the Kitlinskis to the DEA OPR, without notice to or the consent of the Kitlinskis. 5 USC§552a(d).

319. In fact, the OIG never notified the Kitlinskis of any disclosure and instead led the Kitlinskis to believe they had not made a disclosure at all.

320. On October 2, 2014, Mr. and Mrs. Kitlinski received an email from the DOJ-OIG that suggested she should report the matter to the DEA, but stated if she did not so the matter would be closed.

321. The OIG appears to have issued this directive to cover its own unauthorized disclosure and to intentionally mislead the Kitlinskis, since the OIG had already informed the DEA-OPR of the Kitlinskis complaints regarding the Blackberry.

322. The Privacy Act specifically prohibits such disclosures as made by the DOJ-OIG. 5 USC §552a(b) and (b)(7).

323. Based on the unauthorized disclosure by the OIG, the DEA conducted a sweeping and secretive review of all of the Kitlinskis' computer files on their office

systems. This was initiated on October 2, 2014 before the OIG notified the Kitlinskis it would decline their matter and suggested they should contact the DEA.

324. The unauthorized disclosure severely harmed the Kitlinskis who were led to believe they would be protected from retaliation and reprisal by the OIG.

325. Further, during the entire course of the subsequent events detailed in this complaint, the Kitlinskis and their counsel were left were completely unaware that evidence existed of collusion and reprisal by the DEA and the OIG which could have been brought to bear in the MSPB and EEO complaints filed administratively.

326. Indeed, the Agency persuaded the MSPB in two proceedings concerning the Blackberry that it was doing no more than investigating a complaint brought by Mrs. Kitlinski, when in fact the DEA had already acted to remove the matter form the OIG and pursue an "investigation" not into the placement of the phone, but how the Kitlinskis discovered it and who they reported it to.

327. The disclosure was intentional, willful and wrongful and was designed to harm and undermine the Kitlinskis.

328. The Kitlinskis suffered actual damages as a result of the disclosures, indeed their termination was conditioned on claims that they were not cooperative with the DEA on the Agency's investigation, when in fact the Agency was already fully aware of their complaints, had intervened to block independent avenue to investigate the and was using the investigation as a basis for trapping the Kitlinskis into allegations that could be used as a basis for termination.

Prayer for Relief

The Kitlinskis are entitled to the following:

Compensatory and exemplary damages up to the statutory maximum for each and every act of EEO based employment discrimination, retaliation and reprisal, and creation of a hostile work environment as set forth in the allegations and counts above.

Injunctive relief to preclude the Agency from further discrimination, retaliation reprisal and the creation of a hostile work environment.

For an order compelling compliance with the decision of the EEO ruling finding discrimination and for payment of full attorney's fees occurred in that action.

For damages for the Bivens violations in the amount of $5,000,000 for each plaintiff, jointly and severally against each defendant known or unknown.

For an order directing the production of records under the Privacy Act for both Mr. and Mrs. Kitlinski and for damages in the of amount of $3,000,000 for the wrongful disclosure for each plaintiff.

For an order of reinstatement, back-pay and restoration of benefits for the Kitlinskis as to those matters cited in their wrongful discharge claim currently pending before the MSPB and for injunctive relief related to that discharge, including orders that the Agency cease USERRA based retaliation and discontinue the hostile work environment it created for the Kitlinskis.

For relief as to violation of the Federal Wiretap Act and damages in the amount of $5,000,000 as to each plaintiff for each of the violation that occurred and other damages, jointly and severally against the defendants known or unknown.

For attorneys' fees and costs related to the investigation, drafting and prosecution of the allegations cited above, including for the prosecution and investigation of the administrative complaints cited herein.

For such other relief as may be considered just and proper.

Plaintiffs demand a jury trial as to their EEO complaints and portion of the mixed case appeal that deals with EEO based allegations and for all other matters in which a jury trial is authorized. Plaintiffs seek an action before the Court as to the Privacy Act complaints and all causes of action where a judge alone is required.

Respectfully Submitted,

___/S/_____

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Certificate of Service:

I hereby certify that I caused to be served by electronic mail a copy of this motion on Assistant U.S. Attorney's Joseph Sher and Kimbell Kimere on June 7, 2016

/S/

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

DAREK J. KITLINSKI and LISA KITLINSKI,	)	
	)	CIVIL ACTION NO. 1:16-CV-60
Plaintiffs,	)	
v.	)	Date: June 14, 2016
LORETTA LYNCH, et. al.	)	

CORRECTION TO AMENDED COMPLAINT

Please take notice that as to Count Ten, Plaintiffs inadvertently neglected to identify Lisa Kitlinski as a Plaintiff in the caption, although Plaintiff Lisa Kitlinski was fully identified in the substance of the cause of action for wrongful termination, and a mixed case appeal for that termination, in the body of Count Ten. To remove any doubt that the Count applies to both Plaintiffs, we respectfully request this correction to the Amended Complaint.

Respectfully Submitted,

/S/

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