ORAL ARGUMENT REQUESTED
No. 24-3041

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant

v.

KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
The Honorable Judge Toby Crouse, No. 2:22-CV-02250-TC

BRIEF FOR THE UNITED STATES AS APPELLANT

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STATEMENT OF PRIOR OR RELATED CASES

There have been no prior or related appeals in this case.

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GLOSSARY

CDC	Centers for Disease Control and Prevention
DIS	Disease Intervention Specialist
USERRA	Uniformed Services Employment and Reemployment Rights Act

STATEMENT OF JURISDICTION

This appeal is from a final judgment in a civil case. The district court had jurisdiction under 28 U.S.C. 1331 and 38 U.S.C. 4323(b). That court entered final judgment on January 9, 2024. A. Vol. III at 725.[1] The United States filed a timely notice of appeal. A. Vol. III at 726-728. This Court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

The United States sued the Kansas Department of Health and Environment (Kansas or the State), alleging that it violated the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. 4311(a), when it terminated funding for a position filled by Stacy Gonzales based on her obligation to serve in the United States Army National Guard. A. Vol. I at 9-18. The parties filed cross-motions for summary judgment, both asking the district court to determine whether Kansas was Gonzales's "employer" under USERRA. A. Vol. I at 48-50, 359. The district court concluded as a matter of law that Kansas was not Gonzales's employer and entered judgment for Kansas. A. Vol. III at 709-725.

[1] "A. Vol. __ at __" refers to the appendix filed with this brief by volume and page number.

The issues on appeal are:

1. Whether the district court improperly applied USERRA's broad definition of "employer" when it determined that Kansas could not be Gonzales's employer because it lacked complete and formal authority over her.

2. Whether the district court improperly applied the summary judgment standard when it viewed the evidence and resolved genuine disputes of material facts in the light most favorable to Kansas, the moving party.

STATEMENT OF THE CASE

A. Statutory Background

Over the past 80 years, Congress has enacted a series of statutes reflecting a "national policy to encourage service in the United States Armed Forces" by giving servicemembers "the right to return to civilian employment without adverse effect on their career progress." H.R. Rep. No. 448, 105th Cong., 2d Sess. 2 (1998). USERRA, which Congress enacted in 1994, is a continuation of this policy. *See ibid.*

USERRA prohibits "an employer" from denying "initial employment, reemployment, retention in employment, promotion, or any benefit of employment" to a current, prospective, or past member of the uniformed service on the basis of that member's military service. 38 U.S.C. 4311(a) and (c)(1). The statute defines "employer" as "any person, institution, organization, or other entity

that pays salary or wages for work performed or that has control over employment opportunities." 38 U.S.C. 4303(4)(A). "[E]mployer" includes persons or entities "to whom the employer has delegated the performance of employment-related responsibilities," except where the delegated functions "are purely ministerial in nature." 38 U.S.C. 4303(4)(A)(i); 20 C.F.R. 1002.5(d)(1)(i).

Consistent with the statute's text, the Department of Labor's implementing regulation confirms that, under USERRA, an employee can "be employed in one job by more than one employer." 20 C.F.R. 1002.37. The regulation also provides an example of two employers who share control over employment opportunities and employment-related responsibilities with respect to a single employee. *See ibid.* ("For example, if the employee is a security guard hired by a security company and he or she is assigned to a work site, the employee may report both to the security company and to the site owner [and] both employers share responsibility for compliance with USERRA.").

Finally, the legislative history confirms that USERRA's definition of "employer" is "to be broadly construed," including more than the "'traditional' single employer relationship." H.R. Rep. No. 65(I), 103d Cong., 1st Sess. 21 (1993) (1993 House Report) (citation omitted). Congress intended "employer" to include those entities who "may exercise control over different aspects of the employment relationship." *Ibid.*

B. Factual Background

1. Kansas employs Gonzales as a local Disease Intervention Specialist.

The Centers for Disease Control and Prevention (CDC) awarded Kansas a grant to track and prevent the spread of the human immunodeficiency virus and other sexually transmitted infections. A. Vol. I at 24-25. In turn, Kansas operates a disease intervention program to carry out the mission of the CDC grant. A. Vol. II at 554-555.

Kansas executes this mission in two ways: it directly hires some Disease Intervention Specialists (DISs) to provide disease intervention services, and it awards some of its CDC grant to counties for the specific purpose of funding local DIS employees who provide the same services on Kansas's behalf. A. Vol. I at 53.

In 1998, Kansas awarded Finney County Health Department (Finney County) such a grant. A. Vol. I at 59. In 2001, Kansas interviewed Stacy Gonzales for the sole Finney County DIS position, and the County decided to hire her.[2] A. Vol. I at 59-60; A. Vol. II at 560. Kansas's grant funded approximately 86% of Gonzales's salary, and the County funded the remaining 14%. A. Vol. I at 59-60.

[2] Kansas's Field Manager Derek Coppedge, who oversaw county DISs, was a member of the panel who interviewed Gonzales. A. Vol. I at 53; A. Vol. II at 560. It is unclear who else—and whether they were State or County employees—was on the interview panel. A. Vol. II at 560.

As it does for its directly-employed DISs, Kansas managed Gonzales's work. A. Vol. III at 590. For example, Kansas set many of the terms of her employment. It assigned her to work in an area in Western Kansas that it designated as Region E, requiring her to provide disease intervention services in counties in addition to Finney County. A. Vol. I at 60. Kansas also established Gonzales's job requirements (which are the same as those for Kansas's directly-employed DISs); determined how she would fulfill those requirements; and directly assigned her cases to work on by sending her field reports that Kansas required her to investigate. A. Vol. I at 55-56; A. Vol. III at 588-590. Kansas trained Gonzales on how to satisfy her job as a DIS; mandated that she organize her files in a particular fashion; required her to submit her work-product directly to Kansas; audited her interviews, records, and field performance; completed substantive performance reviews for her; and attempted to speak with her daily about her progress. A. Vol. I at 61; A. Vol. III at 588-592.

In contrast, Finney County's role in employing Gonzales was largely administrative. While Gonzales reported to a county office two mornings a week, Gonzales had no Finney County-specific responsibilities. A. Vol. I at 60; A. Vol. III at 584. Her sole purpose was to provide disease intervention services on Kansas's behalf. A. Vol. I at 60; A. Vol. III at 592. Although Finney County did not direct or oversee Gonzales's substantive responsibilities, it oversaw Gonzales's

general office deportment, such as interpersonal skills and professionalism. A. Vol. III at 593-594. Finney County also served as a go-between for Kansas and Gonzales. Kansas told Finney County how well Gonzales was doing her job, and Finney County used that information when it evaluated Gonzales's performance. A. Vol. I at 63; A. Vol. II at 558, 560, 562-564; A. Vol. III at 584, 593-594.

2. Kansas causes Gonzales to be terminated based on her obligation to serve in the United States Army National Guard.

Throughout her time as a DIS, Gonzales was an active member of the United States Army National Guard. A. Vol. I at 30. Gonzales was therefore periodically required to leave her work as a DIS to fulfill military obligations. A. Vol. I at 30. During her tenure as a DIS, Gonzales deployed for a total of 32 months, in addition to multiple instances when she was unavailable to do her DIS work due to shorter military exercises. A. Vol. I at 26; A. Vol. III at 596-597. Particularly relevant here, on April 9, 2010, Gonzales received orders that she would deploy for more than a year starting in October 2010. A. Vol. II at 564. Gonzales informed her Kansas supervisors of her scheduled deployment. A. Vol. III at 596.

For the first seven years of Gonzales's tenure as a DIS, Derek Coppedge (the Kansas official who interviewed her) was Gonzales's supervisor, and he gave her exclusively positive feedback for her work. A. Vol. I at 53; A. Vol. III at 592, 594-595. However, in June 2008, Coppedge accepted a promotion and Jennifer

VandeVelde became Gonzales's new Kansas supervisor. A. Vol. I at 53. VandeVelde criticized Gonzales's work; commented on an injury Gonzales suffered while in active military service; and, in the first few months of 2010, twice told Gonzales that she needed to choose between her military service and her career as a DIS when Gonzales alerted VandeVelde of upcoming military duties. A. Vol. III at 592, 596-597.

Two weeks after Gonzales informed Kansas of her upcoming deployment, Kansas told Finney County that Gonzales was not meeting her professional obligations. A. Vol. II at 385. Kansas told the County that if Gonzales's productivity did not improve, Kansas would discontinue its grant funding the local DIS position. A. Vol. II at 385. Kansas stated that it would re-evaluate Gonzales's performance on July 15, 2010. A. Vol. II at 385.

Despite this, on June 7, 2010, Kansas informed Finney County that it would not renew its grant and that as of July 1, 2010, Kansas would no longer fund Gonzales's DIS position. A. Vol. III at 596-597. A week later, Finney County informed Gonzales that it was eliminating her position because the State withdrew its funding. A. Vol. II at 565; A. Vol. III at 594. Thereafter, Kansas redistributed Gonzales's work to local DISs in other counties. A. Vol. I at 59; A. Vol. II at 525.

C. Procedural Background

On June 27, 2022, the United States filed its complaint alleging that Kansas violated Gonzales's USERRA rights by eliminating her position on the basis of her military service obligations.[3] A. Vol. I at 9-18. Both parties filed motions for summary judgment. The United States filed a motion for partial summary judgment seeking, in part, a ruling that Kansas was Gonzales's employer. A. Vol. I at 48-49. Kansas filed a motion seeking resolution on the entire case, arguing, as relevant here, that Kansas was not Gonzales's employer. A. Vol. II at 359, 553-554.

The district court granted Kansas's motion on the grounds that, "[w]hile a close call, the facts here demonstrate that Kansas was not Gonzales's 'employer' under USERRA." A. Vol. III at 717. It did not address any of the parties' other arguments. A. Vol. III at 716.

The court began its analysis by considering USERRA's textual definition of "employer" as one who "has control over employment opportunities" and one "to whom the employer has delegated the performance of employment-related responsibilities." A. Vol. III at 717. The court recognized that inherent in that definition was the conclusion that "more than one entity may be an 'employer' of

[3] USERRA has no statute of limitations. *See* 38 U.S.C. 4327(b).

an employee in a single job." A. Vol. III at 717. Next, focusing on dictionary definitions of "control" and "over," the court determined that the relevant definition of "control" was the "power or authority to guide or manage" and that, in combination with "over," "an entity must have power or authority regarding the servicemember's employment opportunities" to be a USERRA employer. A. Vol. III at 718. The court then identified certain factors as indicative of the level of control necessary to qualify as a USERRA employer. A. Vol. III at 718-720. Specifically, the court stated that whether an entity could hire, fire, promote, supervise, or pay the employee were persuasive signs of the requisite level of control. A. Vol. III at 718-720.

Applying these factors to the evidence, the court found that Kansas had "no authority to hire or fire Gonzales, no authority to supervise her, and no input regarding her pay or benefits." A. Vol. III at 720. The court held that the County, not Kansas, was Gonzales's employer, because the County formally hired and fired her, prepared her annual performance review, and issued her paychecks. A. Vol. III at 720-721. The court attributed Kansas's involvement in Gonzales's employment to the nature of its grant award to Finney County, finding that it was "little more than an outcome-based renewable contract between Kansas and the County" that was neither "dependent on [n]or for the benefit of Gonzales." A. Vol. III at 720. The court therefore interpreted Kansas's critiques of Gonzales's work

as evidencing a concern about "Finney County's ability to satisfy the grant, not Gonzales's personal performance." A. Vol. III at 721.

The court then considered three additional factors that the United States discussed in its affirmative and oppositional briefing: Kansas's prescribed protocols and training, its practice of disallowing Finney County access to patient reports, and its "substantive review over Gonzales's work." A. Vol. III at 722. As to the first two factors, the court dismissed them, concluding that they were evidence of Kansas's commitment to "generally applicable operating standards common to public health researchers" and to respecting the privacy of its patients. A. Vol. III at 722-723. As to the third factor, the court found that the United States's inference that Kansas's performance evaluations of Gonzales demonstrated that it supervised her was "not the obvious conclusion here." A. Vol. III at 723. Instead, the court found that the performance reviews were "consistent with the proposition that Kansas measured its grant deliverables and enforced the grant's terms on its grantee—not on its grantee's employee." A. Vol. III at 723.

SUMMARY OF ARGUMENT

The United States presented sufficient evidence of Kansas's control over Gonzales's employment opportunities and responsibilities to survive Kansas's motion for summary judgment. The district court, however, granted Kansas's motion by too narrowly applying USERRA's definition of "employer" and by

distorting the summary judgment standard. Each error—independently or jointly—warrants reversal.

First, the district court erred by applying USERRA's definition of "employer" in a formalistic, rather than functional, way. The court constructively restricted USERRA's definition of the term by concluding that it required evidence of complete authority over certain formal aspects of employment. This misapplication ignores the statute's text, implementing regulations, and legislative history, and cannot be sustained.

Second, the district court erred by misapplying the summary judgment standard. Contrary to the well-established summary judgment procedure, the trial court resolved genuine disputes of material fact, viewed the evidence, and made inferences therefrom, all in favor of Kansas, the moving party. Because doing so thwarts the purpose of a summary judgment motion—that is, to determine if there is a triable issue of fact, and not to decide that issue—this Court should reverse.

ARGUMENT

The district court erred when it determined as a matter of law that Kansas could not be Gonzales's "employer" under USERRA.

A. Standard of review

This Court reviews "a district court's grant of summary judgment *de novo*, applying the same legal standard as the district court." *Rowell v. Board of Cnty. Comm'rs*, 978 F.3d 1165, 1170 (10th Cir. 2020) (quoting *Twigg v. Hawker*

Beechcraft Corp., 659 F.3d 987, 997 (10th Cir. 2011)). "The court shall grant summary judgment if *the movant* shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a) (emphasis added). "In applying this standard, [this Court] view[s] the evidence and the reasonable inferences to be drawn from the evidence in the light most favorable to the nonmoving party." *Rowell*, 978 F.3d at 1171 (quoting *Twigg*, 659 F.3d at 997). "Cross-motions for summary judgment are to be treated separately; the denial of one does not require the grant of another." *Buell Cabinet Co. v. Sudduth*, 608 F.2d 431, 433 (10th Cir. 1979).

B. USERRA broadly defines "employer" to include any entity with control over employment opportunities or employment-related responsibilities.

USERRA's definition of "employer" requires consideration of the functional role a person or entity plays in relation to a servicemember employee. As set forth above, USERRA defines "employer" as any person or entity "that pays salary or wages for work performed or that has control over employment opportunities" and includes an entity "to whom the employer has delegated the performance of employment-related responsibilities." 38 U.S.C. 4303(4)(A) and (4)(A)(i). This text is broad on its face and is not limited to entities with formal employment authority.

USERRA's implementing regulations and legislative history further confirm that under the relevant statutory text, an employee can have more than one "employer" while working in a single job, and that an "employer" is not limited to an entity who pays, hires, fires, or promotes an employee. In particular, the implementing regulations' security guard example, *see* p. 3, *supra*, instructs that an entity to whom the employee "report[s]" and who has the ability to "cause[] the employee's removal from the job position" is an employer, even if another employer has hiring and assignment authority. 20 C.F.R. 1002.37; *see also* 1993 House Report 21 (explaining that an "employer" is an entity who "may exercise control over different aspects of the employment relationship").

Courts interpret USERRA broadly. The Supreme Court has instructed that statutes such as USERRA should be "liberally construed for the benefit of those who left private life to serve their country." *Alabama Power Co. v. Davis*, 431 U.S. 581, 584-585 (1977) (quoting *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946)); *see also Imel v. Laborers Pension Tr. Fund*, 904 F.2d 1327, 1331 (9th Cir. 1990) ("Congress has manifested extreme solicitude for the returning veteran and made clear that claims under [USERRA's precursor, the Veteran's Readjustment Act] are to be governed by principles of equity." (internal quotation marks and citations omitted)); *Baker v. United Parcel Serv. Inc.*, 596 F. Supp. 3d 1251, 1256 (E.D. Wash. 2022) (same as to USERRA).

Accordingly, courts determine whether an entity is an "employer" by considering the entity's practical involvement in the employee's job. This highly fact-bound inquiry involves consideration of various factors, including whether the entity:

- has the authority to hire or fire, *see Brandsasse v. City of Suffolk*, 72 F. Supp. 2d 608, 618 (E.D. Va. 1999); *Coulson v. Town of Kearny*, No. 07-5893, 2010 WL 331347, at *7 (D.N.J. Jan. 19, 2010) (unpublished);

- provides input on hiring and firing decisions, *see Carter v. Siemens Bus. Servs., LLC*, No. 10 C 1000, 2010 WL 3522949, at *9 (N.D. Ill. Sept. 2, 2010) (unpublished); *O'Connell v. Town of Bedford*, No. 21 Civ. 170, 2022 WL 4134466 (S.D.N.Y. Sept. 12, 2022) (unpublished);

- sets the terms of the employment, *see White v. United Airlines, Inc.*, 987 F.3d 616, 626 (7th Cir. 2021); *O'Connell*, 2022 WL 4134466, at *8; *Cooper v. WellStar Health Sys., Inc.*, No. 1:18-CV-05357, 2019 WL 13268106, at *3 (N.D. Ga. Apr. 30, 2019) (unpublished);

- pays or funds the employee's salary, *see Bailey v. Forrest Cnty.*, No. 2:20-CV-16, 2021 WL 518330, at *2-3 (S.D. Miss. Feb. 11, 2021) (unpublished); *United States v. Nevada*, 817 F. Supp. 2d 1230, 1238 (D. Nev. 2011);

- supervises the employee, *see Bailey*, 2021 WL 518330, at *2-3; *Baldwin v. City of Greensboro*, No. 1:09CV742, 2010 WL 3211055, at *4 (M.D.N.C. Aug. 12, 2010) (unpublished), *rev'd in part on other grounds*, No. 1:09CV742, 2010 WL 9904879 (M.D.N.C. Oct. 15, 2010) (unpublished); *Novak v. Mackintosh*, 919 F. Supp. 870, 878 (D.S.D. 1996);

- conducts performance reviews, *see Baldwin*, 2010 WL 3211055, at *4; and

- is involved in the allegedly discriminatory employment action, *see White*, 987 F.3d at 626; *Baldwin*, 2010 WL 3211055, at *4.

Except for an entity's payment of an employee's salary or wages, which standing alone can render it a USERRA employer, *see* 38 U.S.C. 4303(4)(A), none of these factors is dispositive. Instead, courts should consider the totality of the circumstances when determining which entity or entities may qualify as an employer. *See, e.g.*, *Baldwin*, 2010 WL 3211055, at *3-4 (recommending denial of a motion to dismiss where a USERRA complaint alleged that defendants "were in Plaintiff's supervisory chain of command, were involved in preparing Plaintiff's performance evaluations, were involved in Plaintiff's daily supervision, and were involved in the 'pretextual' RIF that caused Plaintiff's termination").

C. The United States presented evidence from which a reasonable jury could find that Kansas was one of Gonzales's "employers."

Evidence of Kansas's involvement in the creation, management, and termination of Gonzales's job was sufficient to create, at the least, a triable issue as to whether Kansas had enough control over Gonzales's employment opportunities and responsibilities to meet USERRA's definition of an "employer."

1. Involvement in hiring someone or funding their employment are factors that weigh in favor of the conclusion that an entity is a USERRA employer. For example, entities that "have authority *or input* over hiring," *O'Connell*, 2022 WL 4134466, at *7-8 (emphasis added), or fund a servicemember's salary, *Nevada*, 817 F. Supp. 2d at 1238, may have sufficient control over the employee's employment opportunities to qualify as an "employer" under USERRA.

Here, the United States presented evidence of Kansas's involvement in prompting the creation of Gonzales's job, interviewing her, and funding her salary. Gonzales's DIS job would not have existed but for Kansas's say-so. A. Vol. II at 560-561. Kansas decided to award Finney County a grant so that it could hire and pay a local DIS who would perform disease intervention services on the State's behalf. A. Vol. I at 58-59; A. Vol. III at 631. Kansas's grant funded 86% of the salary for the County's DIS position. A. Vol. I at 60. And, critically, Kansas exercised an unusual amount of control over how the grant funding was spent, as illustrated by the fact that the Kansas official who oversaw the State's disease intervention work interviewed Gonzales for the Finney County DIS position. A. Vol. II at 560. These facts, together with the facts discussed below, create a triable issue of whether Kansas had sufficient control over Gonzales's employment opportunities to qualify as her "employer" under USERRA.

2. Courts have also found that evidence that an entity set the terms of an employee's work counsels in favor of classifying that entity as a USERRA employer. As the Seventh Circuit determined in *White* when it reversed a district court's grant of a motion to dismiss, an entity's "active participation" in setting the terms of someone's employment (there, in determining the terms of the collective bargaining agreement) "may suggest some measure of control" sufficient to be a USERRA employer. *White*, 987 F.3d at 626-627; *see also id.* at 627

(distinguishing between entities that "exercise control over . . . employment opportunities" and those whose "role [is] purely formal and unrelated to the critical issues").

Additionally, an entity's direct supervision over a servicemember—including confirming for itself that the employee was complying with the terms that the entity set—is strong evidence that the entity has the requisite control over the employee's employment opportunities and responsibilities. *See, e.g.*, *O'Connell*, 2022 WL 4134466, at *7-8 (listing defendants' role in supervising servicemember as a factor supporting the conclusion that defendants were USERRA employers); *Bailey*, 2021 WL 518330, at *2-3 (denying defendant's motion for summary judgment and concluding that defendant was an employer in part because plaintiff "answered to" defendant); *Baldwin*, 2010 WL 3211055, at *4 (rejecting claim that employer must have "ultimate authority to hire or fire" and finding that city officials are employers because they were in plaintiff's supervisory chain of command, were involved in his performance evaluations, and supervised him daily).

Here, the United States presented evidence that Kansas dictated and supervised every substantive aspect of Gonzales's work, just as it did for those DISs working directly for Kansas. *See, e.g.*, A. Vol. III at 590. Kansas told her where to work, requiring her to meet the State's burden of providing disease

intervention services to people in regions where Finney County had no jurisdiction. A. Vol. I at 60. And Kansas not only established Gonzales's job requirements and trained her thereon, but it also directly supervised her performance. *See, e.g.*, A. Vol. I at 55, 62; A. Vol. III at 584. In particular, Coppedge, who served as Gonzales's Kansas supervisor for seven of her nine years as a DIS, aimed to have daily communication with Gonzales about her work. A. Vol. III at 592. Kansas's involvement in Gonzales's work thus went beyond formalities; Kansas was involved in the critical decisions of how and whether Gonzales succeeded at her job. Such evidence strongly supports the conclusion that Kansas was one of her "employers" under USERRA.

3. Finally, although courts have held that a plaintiff need not prove that the defendant was involved in the alleged discrimination to establish that the defendant was a USERRA employer, *see, e.g.*, *White*, 987 F.3d at 626, where such evidence *does* exist, it supports a finding that the defendant likely was operating as one of the plaintiff's employers, *see, e.g.*, *Baldwin*, 2010 WL 3211055, at *4 (finding that allegations, including that defendant was involved in the pretextual reduction in force that caused plaintiff's termination, is sufficient to allege that defendant was an "employer"). Thus, evidence that Kansas functionally eliminated Gonzales's position based on VandeVelde's discriminatory views strongly suggests that Kansas was one of Gonzales's employers. VandeVelde became Gonzales's new

Kansas supervisor after Coppedge accepted a promotion and, upon assuming that role, VandeVelde questioned Gonzales's ability to do her job due to her military service. VandeVelde also repeatedly told Gonzales that she needed to choose between her work and her military obligations. A. Vol. III at 596-597. VandeVelde then complained to Coppedge (who was VandeVelde's supervisor) and to Gonzales's Finney County supervisor about Gonzales's performance, citing deficiencies that Gonzales disputes. A. Vol. II at 563-564; A. Vol. III at 584, 592. Ultimately, Kansas reneged on the promise to give Gonzales support and time to improve, and instead declined to renew its grant thereby leading Finney County to fire her. A. Vol. II at 385, 565; A. Vol. III at 594, 596-597. This evidence suggests that Kansas was operating as Gonzales's employer. *See, e.g.*, 20 C.F.R. 1002.37.

In combination, these factors—including Kansas's involvement in creating Gonzales's position, setting the terms of her employment, and supervising her work—create a triable issue of whether Kansas was one of Gonzales's "employers" under USERRA.

D. The district court erred in granting Kansas's motion for summary judgment.

Despite the evidence described above establishing a triable issue regarding whether Kansas was Gonzales's "employer" under USERRA, the district court granted Kansas's motion for summary judgment and held, as a matter of law, that

Kansas could *not* be Gonzales's employer under that statute. In doing so, the court committed two related errors. First, it too narrowly applied USERRA's broad definition of "employer." And second, it improperly resolved genuine issues of material fact by viewing the evidence and drawing all inferences in favor of Kansas, the moving party.

1. The district court misapplied USERRA's "employer" definition by requiring proof of complete and formal control over Gonzales.

While the district court set forth the proper definition of an "employer" under USERRA, it erred in applying the definition to the facts of this case, in two ways. *See* A. Vol. III at 717-720.

a. First, the court improperly construed USERRA's "control over employment opportunities" language as a requirement for absolute control over certain formal aspects of employment. *See* A. Vol. III at 720-721. Despite reciting a definition of control that included "[the] authority to guide or manage," the court refused to consider evidence that Kansas exercised such authority with respect to Gonzales's employment opportunities, finding that evidence insufficient as a matter of law.[4] A. Vol. III at 718-722.

[4] As discussed below, the court also erroneously applied the summary judgment standard. *See* pp. 25-30, *infra*.

For example, the court found immaterial the evidence that Kansas participated in Gonzales's interview and thus had some authority to guide Finney County toward or against hiring her. *See* A. Vol. III at 720. Instead, the court found that Kansas could not be Gonzales's employer because Finney County officially hired her. *See ibid.* The court likewise found that only Finney County, not Kansas, supervised Gonzales because the County "gave Gonzales her annual performance review," even though "representatives of Finney County and Kansas met to discuss Gonzales's performance as a Specialist." A. Vol. III at 721. And the court discounted the evidence that Kansas funded most of Gonzales's salary and that Kansas's decision not to renew the grant caused Finney County to eliminate Gonzales's position and fire her. *See ibid.* The court determined that this evidence did not matter because Finney County retained the authority to "set Gonzales's salary and benefits according to its own pay and benefits scale," and "Kansas ha[d] no direct authority to fire" Gonzales. A. Vol. III at 720-721. Finally, the court reasoned that financial involvement is not dispositive of whether an entity is an employer under USERRA. *See* A. Vol. III at 721. While that is true, that truth does not mean the factor should be ignored.

In each instance, the court ignored its own recitation of USERRA's broad, function-based definition of employer and instead required proof of an employer

with complete authority over the official hiring, firing, and payment of Gonzales. This was error.

This error would serve to strip USERRA of one of the tenets that all courts agree it includes: an employee may have more than one employer while working a single job. In most situations, two entities cannot each have complete or absolute authority over a single employee; one entity will likely need to be the ultimate or formal decision-maker. And, under the district court's formalistic view of "employer," the employer without the final say over hiring, firing, and payment methods could not be an "employer," regardless of its control over other employment opportunities and responsibilities.

This cannot be. It is counter to the statute's text, regulations, and legislative history, as well as various court decisions that have considered USERRA's "employer" definition. *See, e.g.*, *O'Connell*, 2022 WL 4134466, at *8 (finding that police chief and lieutenant are plaintiff police officer's employers because plaintiff reports to them, they set terms of his employment, and they recommend promotions to ultimate decision-maker); *Siemens Bus. Servs., LLC*, 2010 WL 3522949, at *9 (human resources consultant is an employer because he "makes recommendations to managers regarding discipline and termination" and "influenced company's decision to terminate employment" (citation omitted)); *Baldwin*, 2010 WL 3211055, at *4 (rejecting claim that employer must have

"ultimate authority to hire or fire" and finding that city officials are employers because they were in plaintiff's supervisory chain of command and were involved in his performance evaluations, daily supervision, and in the allegedly pretextual conduct resulting in the plaintiff's termination).

b. Second, after improperly narrowing what it means to have control over employment opportunities, the court then ignored the part of USERRA's text that instructs that an "employer" includes an entity that has "employment-related responsibilities." 38 U.S.C. 4303(4)(A)(i).[5] As explained above, the court disregarded evidence that Kansas exercised authority over Gonzales's employment opportunities: it interviewed her, it reviewed her work (both directly and through the County), it provided the funds that enabled Finney County to employ and pay her, and its decision to stop giving those funds caused Finney County to eliminate Gonzales's job and terminate her employment. But when conducting its analysis, the court also failed to consider the United States's evidence that Kansas had other employment-related responsibilities.

[5] Section 4303(4)(A)(i) states that an "employer" includes "a person, institution, organization, or other entity to whom the employer has delegated the performance of employment-related responsibilities[.]" Kansas satisfies this definition either as the delegator of formal employment-related responsibilities to Finney County, or as the delegatee to whom Finney County has delegated the responsibility to substantively control Gonzales.

In particular, the court did not consider evidence that Kansas not only tasked its officials with supervising Gonzales but at least one of those supervisors did so by attempting to speak with her on a daily basis; that Kansas determined where Gonzales would work (and that her assigned region included counties other than Finney County); and that it was a Kansas official (VandeVelde) who, in the course of supervising Gonzales, linked purported concerns about Gonzales's work performance to her military service, therefore providing the strongest evidence of discrimination. A. Vol. I at 60; A. Vol. III at 584, 592, 596-597. Kansas's actions in assigning, supervising, and evaluating the substance of Gonzales's work—as well as its involvement in the alleged discrimination—are factors that demonstrate that Kansas had employment-related responsibilities, and the court erred by disregarding evidence of all these factors.[6]

[6] Although it likely did not affect the district court's ultimate decision, the court also erred when it looked to Section 4319(c) of the Act to confirm its understanding of the level of control required to make an entity an "employer" under USERRA. *See* A. Vol. III at 718. Section 4319(c) governs servicemembers' employment and reemployment rights in foreign countries and sets forth a test for determining when an American employer controls a foreign entity, similar to the common law integrated enterprise test. That test, however, is expressly "[f]or the purpose of [Section 4319]," and therefore irrelevant to Section 4303's definition of an employer. 38 U.S.C. 4319(c). This makes sense because Section 4319 is concerned with an employer's control over another employer, whereas Section 4303 is concerned with an employer's control over an employee. *Compare* 38 U.S.C. 4303(4)(A)(i), *with* 38 U.S.C. 4319(c). Additionally, Congress was explicit when it wanted its definitions in Section 4303 to rely on terms in other sections.

2. The district court erred in resolving genuine disputes of material fact by viewing evidence and making inferences in Kansas's favor.

The district court improperly applied the summary judgment standard when it determined that Kansas could not, as a matter of law, be one of Gonzales's "employers" under USERRA. At the summary judgment stage, courts are tasked with determining whether there is a "genuine dispute as to any material fact and [whether] the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "[M]ost importantly," in making this determination, "a court views the facts and their reasonable inferences in the light most favorable to the nonmovant." *Lazy S Ranch Props. v. Valero Terminaling & Distrib. Co.*, 92 F.4th 1189, 1199 (10th Cir. 2024). "[A]t the summary judgment stage[,] the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). This is so even when there are cross motions for summary judgment. *See, e.g.*, *Buell*, 608 F.2d at 433.

Thus, when considering the United States' motion, it was proper to view all the evidence in Kansas's favor. However, before granting Kansas's motion, the district court had to reverse its perspective to view all the evidence, and make all

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See, e.g., 38 U.S.C. 4303(3) (defining "employee" with reference to Section 4319(c)). It did not do so in its definition of "employer."

reasonable inferences, in the light most favorable to the United States. That shift in perspective is necessary to ensure that the denial of the United States's motion does not automatically result in the grant of Kansas's. *See, e.g.*, *Buell*, 608 F.2d at 433.

The district court did not do this. Instead, the court resolved genuine disputes of material fact by viewing the evidence and drawing inferences therefrom in Kansas's favor.

a. Throughout its analysis, the court consistently viewed the evidence and made all inferences in Kansas's—the moving party's—favor. The court explained away Kansas's control over the substantive and logistical requirements of Gonzales's job as simply the nature of grantmaking. *Compare* A. Vol. I at 55-57, 60-62 (detailing the United States' evidence), *with, e.g.*, A. Vol. III at 720-721 (capturing the district court's reasoning). And this view permeated the court's order: the court repeatedly returned to its finding that Kansas's control over Gonzales's employment was a necessary consequence of its oversight over the grant that it awarded to the County. *See, e.g.*, A. Vol. III at 720-723. But as discussed above, the district court's approach ignored many unusual features of the grantmaking approach here, including Kansas's participation in Gonzales's hiring and supervision.

This error is particularly stark, because in making the inference favorable to Kansas—*i.e.*, that the United States' evidence of Kansas's involvement in Gonzales's work was "consistent with the proposition that Kansas measured its grant deliverables and enforced the grant's terms on its grantee—not on the grantee's employee" (A. Vol. III at 723)—the court disregarded the evidence and corresponding inferences that Kansas, in fact, *did* "enforce[] the grant's terms" "on the grantee's employee." *See* A. Vol. I at 55-58, 60-63; A. Vol. III at 588-591 (chronicling how Kansas directly instructed Gonzales on the how, when, and where of her job, mirroring how Kansas instructed its directly-employed DISs).

The district court also interpreted evidence that Kansas spoke to Finney County about its concerns about "the grant" as evidence that Kansas's focus was on the County satisfying the grant's terms rather than on Gonzales's job performance. *See* A. Vol. III at 715-716, 721. This interpretation in Kansas's favor overlooks the fact that, despite some of the language used, Kansas's complaints were still specific to Gonzales. In its summary of the April 1, 2010, meeting with Gonzales and her County supervisor, Kansas made clear that its purpose was to "discuss the performance review of contractual employee Stacy Gonzales." A. Vol. II at 379. The summary listed issues that Kansas identified (*i.e.*, Gonzales's purported failure to perform her job well) and issues the County identified (*i.e.*, Gonzales's professionalism in the County's office). *See ibid.* The

summary continued that "if the person in the position does not perform effectively, [Kansas] would have difficulty keeping the contract with them." *Ibid.*

The district court is correct that Kansas stated in this meeting that Finney County "would be responsible for performing specific supervisory duties of Ms. Gonzales." A. Vol. III at 379. However, given the evidence that, until that point, Kansas had exclusively performed those duties, and the summary's next sentence is that a Kansas employee would travel to Finney County to "provide [Gonzales's County supervisor] with the information needed to perform these functions," a reasonable jury could infer that this was a reallocation of responsibilities previously held by the State. *Ibid.* Even though Kansas's later letter referenced "this person" instead of identifying Gonzales by name (A. Vol. II at 385), it is undisputed that there were no other Finney County DISs, and no other Finney County employees who were otherwise doing this work. The court's disregard of this evidence at the summary judgment stage was improper.

The court thus repeatedly viewed the evidence and made inferences in the movant's, rather than the non-movant's, favor. This "reflects a clear misapprehension of summary judgment standards" and warrants reversal. *Tolan v. Cotton*, 572 U.S. 650, 659 (2014) (per curiam).

b. Additionally, the court improperly acted as the ultimate factfinder. As stated above, the trial court's role at summary judgment is "not himself to weigh

the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249.

Nonetheless, in determining that Kansas did not exercise sufficient control to be Gonzales's employer, the court concluded that Kansas did not supervise or otherwise work closely with Gonzales. In particular, the court adopted the State's narrative that "Finney County, not Kansas, supervised Gonzales" (A. Vol. II at 572; A. Vol. III at 721), despite the United States' evidence that both entities supervised Gonzales, and that in the delegation of duties, Kansas alone managed her substantive work performance, just as it did its directly-employed DISs (*see* A. Vol. I at 60-63; A. Vol. III at 584, 588-594). The court similarly adopted Kansas's view that "Gonzales interacted with [her county supervisor] at least twice per week, but she had much less regular interaction with Kansas's staff" (A. Vol. III at 721; *see also* A. Vol. II at 571), while ignoring the United States' evidence to the contrary that Gonzales spent only Monday and Friday mornings in the county office, but had regular contact with her Kansas supervisors, especially Coppedge, to whom she reported during the initial seven years of her tenure and who aimed to have "daily telephone contact" with her (A. Vol. III at 584).

These errors—resolving genuine disputes of material fact on summary judgment and accepting the movant's narrative as true—warrant reversal. *See, e.g.*, *Tolan*, 572 U.S. at 659 (reversing court's grant of summary judgment because

it improperly "credited the evidence of the party seeking summary judgment and failed properly to acknowledge key evidence offered by the party opposing that motion"); *Brown v. Parker-Hannifin Corp.*, 746 F.2d 1407, 1411-1413 (10th Cir. 1984) (reversing grant of summary judgment because the trial court made a "factual" determination that "should not have been made as a basis for summary judgment"); *Foster v. Alliedsignal, Inc.*, 293 F.3d 1187, 1195-1196 (10th Cir. 2002) (same).

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment and remand this case for additional proceedings.

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

The United States requests oral argument. This appeal raises an issue of first impression in this circuit regarding the proper application of USERRA's "employer" definition. Oral argument is likely to assist the Court in understanding the record and in resolving the issue presented.

CERTIFICATE OF DIGITAL SUBMISSION

I certify that the electronic version of the foregoing BRIEF FOR THE UNITED STATES AS APPELLANT, prepared for submission via ECF, complies with the following requirements.

1. All required privacy redactions have been made under Federal Rule of Appellate Procedure 25(a)(5) and Tenth Circuit Rule 25.5;

2. With the exception of any redactions, every document submitted in digital form or scanned PDF format is an exact copy of the written document filed with the clerk; and

3. The ECF submission has been scanned for viruses with the most recent version of Crowdstrike Endpoint Detection and Response (Version 7.14.18408.0) and is virus-free according to that program.

s/ Janea L. Lamar
JANEA L. LAMAR
Attorney

Date: July 5, 2024

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because it contains 6829 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it was prepared in Times New Roman 14-point font using Microsoft Word for Microsoft 365.

s/ Janea L. Lamar
JANEA L. LAMAR
Attorney

Date: July 5, 2024

ATTACHMENT 1

In the United States District Court
for the District of Kansas

Case No. 22-cv-02250-TC

UNITED STATES OF AMERICA,

Plaintiff

v.

STATE OF KANSAS
(DEPARTMENT OF HEALTH & ENVIRONMENT),

Defendant

MEMORANDUM AND ORDER

The United States sued the State of Kansas, alleging the Kansas Department of Health and Environment violated the Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. § 4301 *et seq.* (USERRA). The parties each filed motions for summary judgment. Docs. 47 and 49. For the following reasons, the United States' motion is denied and Kansas's is granted.

I

A

Summary judgment is proper when the moving party demonstrates "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is "material" when it is essential to a claim's resolution. *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998). And disputes over those material facts are "genuine" if the competing evidence would permit a reasonable jury to decide the issue in either party's favor. *Id.* Disputes—even hotly contested ones—over facts that are not essential to the claims are irrelevant. *Id.* Indeed, belaboring such disputes undermines the efficiency Rule 56 seeks to promote.

At the summary judgment stage, material facts "must be identified by reference to affidavits, deposition transcripts, or specific exhibits incorporated therein." *Adler*, 144 F.3d at 671; *see also* D. Kan. R. 56.1(d). To determine whether a genuine issue of fact exists, a court views all evidence, and draws all reasonable inferences, in the light most favorable to the nonmoving party. *Carter v. Pathfinder Energy Servs., Inc.*, 662 F.3d 1134, 1138 (10th Cir. 2011). That said, the nonmoving party cannot create a genuine factual dispute by making allegations that are purely conclusory, *Adler*, 144 F.3d at 671–72, 674, or unsupported by the record as a whole, *see Scott v. Harris*, 550 U.S. 372, 380 (2007).

The moving party bears the initial burden of showing the absence of any genuine issue of material fact and entitlement to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Georgelas v. Desert Hill Ventures, Inc.*, 45 F.4th 1193, 1197 (10th Cir. 2022). Once the moving party meets its burden, the burden shifts to the nonmoving party to demonstrate that genuine issues remain for trial as to those dispositive matters. *Savant Homes, Inc. v. Collins*, 809 F.3d 1133, 1137–38 (10th Cir. 2016); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986).

The filing of cross-motions for summary judgment does not alter this standard. Each motion—and its material facts—must "be treated separately," meaning that "the denial of one does not require the grant of another." *Atl. Richfield Co. v. Farm Credit Bank Wichita*, 226 F.3d 1138, 1148 (10th Cir. 2000). For each motion, the moving party bears the initial burden of showing the absence of any genuine issue of material fact and entitlement to judgment as a matter of law. *Celotex*, 477 U.S. at 323; *Hicks v. City of Watonga*, 942 F.2d 737, 743 (10th Cir. 1991). Once the moving party meets its burden, the burden shifts to the nonmoving party to demonstrate that genuine issues remain for trial as to those dispositive matters. *Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc.*, 912 F.2d 1238, 1241 (10th Cir. 1990); *see Matsushita*, 475 U.S. at 586–87; *Bacchus Indus., Inc. v. Arvin Indus., Inc.*, 939 F.2d 887, 891 (10th Cir. 1991).

B

The legal question can be simply stated: whether the State of Kansas, in addition to Finney County, is an "employer" as that term is used in 38 U.S.C. § 4301 *et seq.* The answer to that question is made difficult by the involved factual chain connecting these parties. There are at least four relationships between and among the United States, the State

of Kansas's Department of Health & Environment, the Finney County Health Department, and servicemember Stacy Gonzales.[1]

Beginning at a high level of generality, the federal government gave a grant to Kansas for specified work, Kansas discharged its obligations by, among other things, selecting the Finney County Health Department as one of its sub-granteees to complete the specified work in Garden City and the surrounding area. Finney County hired Gonzales to help it satisfy the sub-grant.

The origin of this dispute concerns Kansas's decision not to renew Finney County's sub-grant in 2010. Without Kansas's grant, Finney County neither had work to perform under the sub-grant nor money to pay Gonzales's salary. The United States now claims that Kansas's decision not to renew Finney County's annual sub-grant violated USERRA because Kansas knew that Gonzales was preparing for deployment at or near the time that Kansas declined to renew Finney County's grant. These general facts lay the groundwork for the following, more specific facts and legal dispute between the United States and Kansas. The following provides more details of the grant to Kansas, the implementation of the sub-grant from Kansas to Finney County, and the path this litigation has taken to this point.

1. The United States, through the Centers for Disease Control (CDC), provides grants, called Sexually Transmitted Disease Prevention Awards, to states in exchange for their reporting, tracking, and preventing the spread of communicable diseases, like gonorrhea, chlamydia, and AIDS. *See* Doc. 42 at ¶ 2.a.viii, 11. As a condition of funding, the CDC requires recipient states to follow certain reporting and tracking protocols. *See* Doc. 42 at ¶ 2.a.viii, Doc. 53 at ¶ 7. The CDC awarded Kansas a Prevention Award. *See* Doc. 42 at ¶ 2.a.viii, 12.

Kansas discharges its Prevention Award oligations to the CDC in at least two ways. It hires staff directly and, in other circumstances relevant here, it provides annual, renewable sub-grants to county health

[1] The material facts in this section are drawn from the Pretrial Order, Doc. 42, the United States' memorandum in support of partial summary judgment, Doc. 47, and/or Kansas's memorandum in support of summary judgment, Doc. 49. Occasionally, the opposing party's objection, Docs. 52 or 53, or an exhibit is directly cited. Immaterial facts and the parties' disputes concerning them have generally been omitted, but some remain purely for contextualizing the litigation. *See generally Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (recognizing that disputes over facts that are irrelevant or unnecessary to resolving the claim can be ignored).

agencies to meet its CDC data collection obligations. *See* Doc. 49 at ¶¶ 5, 7, 11; Doc. 53 at ¶ 7, 9. When Kansas selects a county health agency as a sub-grantee, it requires the sub-grantee to meet the same objectives and deliverables imposed on Kansas by its CDC Prevention Award. *See id.* No state general funds are spent on the sub-grants, known as Disease Intervention ATL grants. Doc. 42 at ¶ 2.a.vii; Doc. 49 at ¶¶ 5–10. In other words, Kansas transfers federal money to the sub-grantees and then holds them accountable for their performance.

When Kansas awards one of these grants to a county, the Notice of Award outlines the requirements imposed on the county in exchange for the grant. Doc. 42 at ¶ 2.a.xxiii; Doc. 47 at ¶¶ 21, 23–24, 26–27, 29, 31–34, 47; Doc. 49 at ¶¶ 25, 29, 30-31, 34, 36-39; Doc. 53 at 7, ¶ 18. These requirements include quantitative objectives and detailed investigative protocols and procedures for obtaining and managing data about patients' sexually transmitted infections. Doc. 49 at ¶¶ 10, 29, 34. Kansas provides these protocols in its Field Services Manual, which includes protocols from Kansas and the CDC. Doc. 47 at ¶¶ 23–24, 26–27, Doc. 53 at 7, ¶ 18. Some protocols are quite detailed; for example, grantees are required to organize reports in a precise manner. Doc. 47 at ¶¶ 23–24, 26–27, 31– 34, 43; Doc. 49 at ¶¶ 29–30. Kansas also requires grantees to meet specified training requirements, such as attendance at quarterly meetings. Doc. 49 at ¶¶ 25, 29–31, 33–34.

To protect patient privacy, the person who collects the sensitive health data is required to relay this information directly to Kansas's Department of Health and Environment. Doc. 47 at ¶¶ 18, 21, 29, 62. No sub-grantee, including Finney County, can access individual reports. Doc. 47 at ¶ 34, Doc. 49 at ¶ 37. Instead, Kansas reports only aggregate statistics to its grantees on a monthly basis so each sub-grantee can monitor its own sub-grant performance. Doc. 49 at ¶¶ 52, 81.

Several Kansas staff members have administered Kansas's ATL grants over the years. Two are relevant in this litigation. Derek Coppedge was a consistent presence from 2000 through 2013, first as Manager of Field Operations/Deputy Director, and subsequently as STD Section Director. Doc. 42 at ¶¶ 2.a.iii–iv, vi, xv. Once Coppedge was promoted in June 2008, Jennifer VandeVelde succeeded him as Deputy Director. Doc. 42 at ¶ 2.a.vi.

2. From July 1998 through June 2010, Kansas awarded one-year ATL sub-grants to Finney County. Doc. 42 at ¶ 2.a.xi.–xiv. To discharge its grant obligations to Kansas, Finney County decided to hire a Disease Intervention Specialist. Kansas has no power to directly hire or fire a county-level Specialist. Doc. 49 at ¶¶ 18–21, 39, 41–43. Finney County staff interviewed Gonzales for the Specialist job; Coppedge was also present in her interview. Doc. 49 at ¶¶ 18–20, 59. When Gonzales interviewed for the Specialist role, she was already working at Finney County as a victim witness coordinator in the County Attorney's Office. Doc. 49 at ¶¶ 56, 57.

Finney County hired Gonzales and she served as Finney County's Disease Intervention Specialist from May 2001 through June 30, 2010. Doc. 42 at ¶¶ 2.a.xx. During that time, Gonzales also served in the military. Doc. 42 at ¶ 2.a.xxviii. She was periodically absent to fulfill her military obligations, including active deployments from March 11, 2003 through July 28, 2004, and May 4, 2006 through September 21, 2007. Doc. 42 at ¶ 2.a.xxviii–xxxiii. No one filled her position during these deployments. Doc. 48-12 at 15. There is no indication how or whether Finney County performed its obligations during this time.

Finney County tasked Gonzales with performing its obligations under the grant, including interviewing patients in Finney County and beyond. Doc. 47 at ¶ 18, 21, 29, 58, 62. Finney County did not add any requirements to Gonzales's Specialist duties beyond those necessary to meet its sub-grant obligations. Doc. 47 at ¶ 75. Gonzales understood her job depended on Finney County obtaining grant funding from Kansas but was not familiar with the grant's specific objectives, nor was she involved in the grant renewal process. Doc. 49 at ¶¶ 60, 62–63.

Finney County set Gonzales's salary and benefits using its own pay scales. Doc. 49 at ¶ 47. And it paid Gonzales directly. Doc. 49 at ¶¶ 47, 64–65. Finney County relied on the funds from Kansas's grant to pay for much—but not all—of Gonzales's salary. Doc. 49 at ¶¶ 14–15, 46, 107. Kansas never issued any payment to Gonzales. Doc. 49 at ¶ 66.

The Finney County Health Department Director supervised Gonzales. The Director prepared her position description, hired her, provided annual performance evaluations, approved her leave, handled disciplinary action, and addressed complaints. Doc. 49 at ¶¶ 49, 58–67, 69–73, 77, 81. At the time Kansas chose not to renew Finney County's grant, Ashley Goss was the Director and Gonzales's direct supervisor.

Doc. 49 at ¶ 58, 69, 70, 72. Goss interacted with Gonzales regularly (usually twice a week), but she did not travel with Gonzales when Gonzales conducted interviews required by the County's grant. Doc. 49 at ¶¶ 75, 79; Doc. 53 at 3, ¶ 14.

Gonzales had sporadic—certainly quarterly, perhaps more frequent—contact with Kansas's grant administrators. Doc. 49 at ¶¶ 29–31; Doc. 48-12 at 11. One administrator, Coppedge, conducted field audits of Gonzales's patient interviews while he was Kansas's Deputy Director, but his successor, VandeVelde, did not. Doc. 48-12 at 11. VandeVelde, did, however, have other contact with Gonzales. For example, she provided Gonzales with feedback about the quality and quantity of Gonzales's interview reports. *See* Doc. 48-12 at 10–11.

Gonzales chafed under VandeVelde's supervision. She felt that VandeVelde "harassed" her about "dotting I's and crossing T's," told her she was "not doing enough interviews," and complained about Gonzales's military service. Doc. 48-12 at 8, 10–11. Specifically, Gonzales alleged that VandeVelde made three anti-military comments that are the impetus of this suit. First, Gonzales says, at some point between 2008 and 2010, VandeVelde urged her to follow-up on a service-related injury in a manner that "mock[ed] [her] regarding [her] military service." Doc. 56 at ¶¶ 17–19. Then, Gonzales alleges, VandeVelde twice told her in early 2010 to choose between "[her] military service and [her] career." *Id.*[2]

[2] Kansas suggests these statements should be discredited as part of a sham affidavit. Doc. 58 at 10–12. But sham affidavit analysis requires first proving that a statement contradicts sworn testimony. *See L. Co. v. Mohawk Const. & Supply Co.*, 577 F.3d 1164, 1169–70 (10th Cir. 2009). Unlike other statements from Gonzales's affidavit, Kansas does not allege that these statements contradict Gonzales's prior testimony. *See* Doc. 58 at 10–12. Nor could it, since Gonzales previously testified that she believed VandeVelde was "harassing" her. Doc. 48-12 at 8, 10–11. The statements in the affidavit provide specific instances to further explain how Gonzales believed she was being harassed and therefore are not subject to sham affidavit analysis. *See Hernandez v. Valley View Hosp. Ass'n*, 684 F.3d 950, n.3 (10th Cir. 2012) (explaining that additional discriminatory statements did not contradict the affiant's deposition, where she testified that such statements were "many"). Accordingly, the United States' motion for a surreply to address Kansas's sham affidavit argument, Doc. 59, is denied.

Finney County provided Gonzales with annual performance evaluations and personnel correction plans. Doc. 49 at ¶ 67, 70; Doc. 48-5. Specifically, when nurses complained about Gonzales's conduct, Goss addressed their concerns with her. Doc. 49 at ¶ 77 (referencing Goss's testimony that nurses reported that Gonzales had been making inappropriate sexual comments). Goss also relied on Kansas's aggregated monthly reports regarding the County's processed interviews and data collection as a factor in Gonzales's performance evaluations. Doc. 49 at ¶ 81. There are two unsigned performance reviews of Gonzales from 2008 and 2009 that were memorialized on a form that was created by Kansas. Docs. 47-7, 47-8. Gonzales testified she had not seen these forms before her deposition. Doc. 48-12 at 9, 10. The record does not identify who wrote these reviews or for what purpose.

3. On April 1, 2010, Kansas notified Finney County in a meeting and follow-up letter that it was failing to meet grant requirements.[3] Doc. 48-6; Doc. 49 at ¶¶ 86–87. Kansas stated that Gonzales submitted only nine reports per week and conducted fewer than one interview per week for the first three months of 2010. *Id.* Kansas offered to support Goss in remediating Finney County's grant deficiencies. Doc. 48-6; Doc. 48-13 at 18. Goss does not recall if Kansas provided additional training or support after the April 1 meeting. Doc. 48-13 at 18.

Three weeks later, Kansas followed up with Goss. It noted that only 11 of the 107 positive infection cases assigned to Finney County had been interviewed. Doc. 49 at ¶ 91; Doc. 48-8. It also informed Goss that Finney County's grant would not be renewed if performance did not "dramatically improve to the levels required by the enclosed contract." Doc. 48-8.

Kansas was determining whether to renew Finney County's grant for another year while documenting these performance deficiencies. *See* Doc. 42 at ¶ 2.a.xix. One factor Kansas considered was whether the grant money was being spent judiciously, or whether another use would better achieve the grant objectives. Doc. 53-2 at 30. Given

[3] Although the grant is not part of the summary judgment record, it evidently listed 22 specific quantitative objectives for interviews, investigations, surveillance, and data management depending on the type of sexually transmitted infection. Doc. 47-6. For example, the grant expected Finney County to conduct an intervention interview for 80 percent of all syphilis cases within 7 days of initiation to the field. *Id.* at 2.

Finney County's documented performance problems, this factor was a key component of Kansas's discussion regarding Finney County's 2010 renewal application. *Id.* at 33–37. An administrator testified that Kansas had to make sure it did not have "money just sitting there going nowhere." *Id.*

On April 9, 2010, Gonzales received orders for a 400-day deployment beginning on October 20, 2010. Doc. 42 at ¶ 2.a.xxxii; Doc. 49 at ¶ 90. Kansas became aware of her deployment around that same time. Doc. 53 at 15, ¶¶ 61–62.

On or about June 13, 2010, Kansas notified Finney County that it would not renew the County's grant. *See* Doc. 49 at ¶¶ 103–04. Goss thereafter notified Gonzales that, as a result, her employment with Finney County would end on June 30, 2010. Doc. 42 at ¶ 2.a.xx; Doc. 47 at ¶ 78.

On November 28, 2018, Gonzales filed a complaint against Kansas and Finney County with the U.S. Department of Labor's Veterans' Employment and Training Service alleging that her termination violated USERRA. Doc. 47 at ¶¶ 85–86. In July 2019, the Department made a finding substantiating her claim against Kansas and referred Gonzales's complaint to the United States' Attorney General. Doc. 47 at ¶¶ 90–91.[4]

The United States filed this suit against Kansas on June 27, 2022.[5] Doc. 47 at ¶ 92; *see also Torres v. Texas Dep't of Pub. Safety*, 597 U.S. 580, 594-95 (2022) (holding that USERRA claim against state was not precluded by sovereign immunity). Both parties have now filed cross

[4] The record does not indicate what, if any, resolution occurred regarding the charge that Finney County violated USERRA.

[5] USERRA has no statute of limitations. 38 U.S.C. § 4327(b). Nonetheless, Kansas asserts that the claim is barred by the doctrine of laches and, in any event, that its decision not to renew the grant to Finney County did not violate USERRA. Doc. 49 at 23–28. Given the resolution of the statutory question in Part II, there is no need to decide whether Kansas preserved the equitable defense of laches, *see* Doc. 42 at n.1., and, if it did, whether it is available when asserted against the United States, *Ute Indian Tribe of the Uintah v. Myton*, 835 F.3d 1255, 1263 (10th Cir. 2016), or whetherKansas's decision not to renew the grant violated USERRA.

motions for summary judgment on whether Kansas was Gonzales's "employer" under USERRA. Doc. 47; Doc. 49.

II

While a close call, the facts here demonstrate that Kansas was not Gonzales's "employer" under USERRA. As a result, it cannot be held liable for the alleged discrimination. Accordingly, Kansas's motion for summary judgment is granted and the United States' is denied.

A

Congress has broad and sweeping powers to raise and support armies through variety of means. *Torres v. Texas Dep't of Pub. Safety*, 597 U.S. 580, 585 (2022). One of the ways it has done so is to promote ways for citizens to serve in the military without sacrificing their civilian employment opportunities. *Id.* In 1994, Congress passed the Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. § 4301, *et seq*., (USERRA), to "prohibit discrimination against persons because of their service in the uniformed services." 38 U.S.C. § 4301(a)(3). USERRA guarantees active servicemembers certain rights, including protection from termination because of their military status and protection in reemployment following service. 38 U.S.C. §§ 4311–12, 4316.

As noted, the parties' legal dispute is focused. There is no argument that a state cannot be sued under USERRA following *Torres*. Nor is there any doubt that USERRA contemplates that a servicemember may have more than one "employer." *See generally White v. United Airlines, Inc.*, 987 F.3d 616, 627 (7th Cir. 2021). Instead, the parties dispute only whether Kansas was Gonzales's "employer" as that term is used in USERRA. Doc. 47 at 18–27; Doc. 49 at 14–21.

To determine whether Kansas was Gonzales's "employer," "[w]e begin with the text[.]" *Facebook, Inc. v. Duguid*, 592 U.S. 395, 402 (2021). USERRA defines "employer" as "any person, institution, organization, or other entity that pays salary or wages for work performed or that has control over employment opportunities, including ... a person, institution, organization, or other entity to whom the employer has delegated the performance of employment-related responsibilities." 38 U.S.C. § 4303(4)(A)(i). This language confirms that more than one entity may be an "employer" of an employee in a single job. *See White*, 987 F.3d at 626–27 (explaining that "delegate" suggests that

USERRA's definition of "employer" encompasses "direct employers and indirect employers, including parent corporations"); *see also* 20 C.F.R. § 1002.37 (stating that a servicemember in a single job may have more than one employer).

An entity may be an employer if it "has control over employment opportunities." 38 U.S.C. § 4303(4)(A)(i); *see also White*, 987 F.3d at 626–27 (concluding USERRA's text suggests coverage for both direct and indirect employers). But what "control" means, USERRA does not say. Still, the plain meaning of the text at the time it was passed is instructive. *See Taniguchi v. Kan Pacific Saipan, Ltd.*, 566 U.S. 560, 566 (2012) (construing the Court Interpreters Act). The prevailing definition of "control" at the time USERRA was enacted was the "power or authority to guide or manage." Merriam-Webster Dictionary (10th ed. 1993). And "over," as a preposition, was and is "used as a function word to indicate the possession or enjoyment of authority, power, or jurisdiction in regard to some thing or person." *Id.*; *see also* Collins English Disctionary (8th ed. 2019) (similar). Thus, to be an employer under USERRA, an entity must have power or authority regarding the servicemember's employment opportunities.

This understanding of control fits within the larger Act, satisfying the whole-text canon. *See Henson v. Santander Consumer USA Inc.*, 582 U.S. 79, 85 (2017) (considering other usage of a word in the Act at issue); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 170–73 (2012) (discussing the presumption of consistent usage). In particular, 38 U.S.C § 4319 concerns when employment and reemployment rights arise under USERRA in connection with entities in foreign jurisdictions. Subsection (c) states, in material part, that "the determination of whether an employer controls an entity shall be based upon the interrelations of operations, common management, centralized control of labor relations, and common ownership or financial control of the employer and the entity." 38 U.S.C. § 4319(c). So the plain meaning of "control" in the text of Section 4303 is consistent with that term's operation in Section 4319(c).

Other federal courts implicitly concur and have recognized that determining whether an entity exercises the requisite degree of control over a servicemember's employment opportunities is a fact-intensive investigation. *E.g.*, *Estes v. Merit Sys. Prot. Bd.*, 658 F. App'x 1029, 1031–32 (Fed. Cir. 2016); *White*, 987 F.3d at 627. Several courts have found that the most persuasive sign of control is authority to hire, fire, and promote the servicemember. *See Garcia v. Spring Indep. Sch. Dist.*, No.

4:19-CV-1847, 2020 WL 8299810, at *1 (S.D. Tex. Mar. 17, 2020); *see also Estes*, 658 F. App'x at 1031–32 (accepting that an entity with sufficient coercive power over the termination decision may be a co-employer); *O'Connell v. Town of Bedford*, No. 21 CIV. 170 (NSR), 2022 WL 4134466, at *8 (S.D.N.Y. Sept. 12, 2022) (input over hiring and firing is sufficient to be an employer); *Croft v. Vill. of Newark*, 35 F. Supp. 3d 359, 368 (W.D.N.Y. 2014) (collecting federal cases from Ohio, Virginia, and North Carolina); *Jones v. Wolf Camera, Inc.*, Civ.A. No. 3:96-CV-2578-D, 1997 WL 22678, at *2 (N.D. Tex. Jan. 10, 1997) (holding that when two individuals "were delegated absolute authority with respect to hiring and firing employees" they meet USERRA's definition of "employer"). But where such power is lacking, an entity does not have the requisite degree of "control" to be an employer. *See Mace v. Willis*, 259 F. Supp. 3d 1007, 1023 (D.S.D. 2017), *aff'd*, 897 F.3d 926 (8th Cir. 2018) (holding that an individual without power to fire could not be an "employer").

Another indicium of control is a high degree of supervision of an employee's work. An entity that provides instruction, correction, or daily supervision of job performance is often an employer. *See Baker v. United Parcel Serv. Inc.*, 596 F. Supp. 3d 1251 (E.D. Wash. 2022) (a parent organization may be an "employer" under USERRA if the parent's acts are more than "purely formal" oversight); *Baldwin v. City of Greensboro*, No. 1:09CV742, 2010 WL 3211055, at *4 (M.D.N.C. Aug. 12, 2010), adopted in relevant part, 2010 WL 9904879 (M.D.N.C. Oct. 15, 2010) (holding that individuals involved in preparing performance evaluations and daily supervision were "employers" under USERRA); *Estes*, 658 F. App'x at 1032 (expressing mere "dissatisfaction with the performance of a contractor employee" does not create a co-employer relationship); *Dees v. Hyundai Motor Mfg. Alabama, LLC*, 605 F. Supp. 2d 1220, 1224 (M.D. Ala. 2009), *aff'd*, 368 F. App'x 49 (11th Cir. 2010) (explaining that a related company without involvement in the servicemember's personnel decisions is not an employer under USERRA).

Whether an entity determines the employee's salary or method of payment and benefits is also relevant. So, for example, processing paychecks and funding an entire salary suggests that an entity has sufficient "control" over the servicemember to be an employer. *United States v. Nevada*, 817 F. Supp. 2d 1230, 1238 (D. Nev. 2011) (holding the State, not just its agency, was an employer because the State processed the paychecks and funded the salary for the agency's employee);

see also 38 U.S.C. § 4303 (defining employers as entities that pay "salary or wages for work performed").

B

The facts here demonstrate that Kansas was not Gonzales's "employer" under USERRA. Kansas had no authority to hire or fire Gonzales, no authority to supervise her, and no input regarding her pay or benefits—including how much she was paid or the method by which she was paid. Kansas's annual grant to Finney County created Finney County's need to hire her, but that does not convert Kansas into an employer of its sub-grantee's employee.

1

Finney County alone possessed the authority to hire and fire Gonzales. In fact, Gonzales was an internal hire who had begun working for Finney County six years before the County hired her for the Specialist job with the Finney County Heath Department. Although a Kansas representative was present during the interview, the parties agree that Finney County hired Gonzales. The parties also agree that Finney County prepared the Specialist job description. And Goss—not anyone from Kansas—terminated Gonzales when Finney County lost its grant. The uncontroverted facts confirm that Kansas has no direct authority to fire any County-level Specialist, including Gonzales.

Nor did Kansas exercise sufficient indirect control over Gonzales's endeavors through its grant to Finney County. The grant funded Finney County's effort to meet specified disease intervention objectives, not a position. The grant was little more than an outcome-based renewable contract between Kansas and the County. *See Henke v. U.S. Dep't of Com.*, 83 F.3d 1445, 1450–51 (D.C. Cir. 1996) (explaining that a federal grant is a contract when the grant provides funds to a grantee in exchange for performance of certain conditions); *cf. Planned Parenthood of Indiana, Inc. v. Comm'r of Indiana State Dep't Health*, 699 F.3d 962, 981–82 (7th Cir. 2012) (explaining that States are authorized to make sub-grants using federal disease intervention funds). The contractual relationship between Kansas and Finney County was not dependent on or for the benefit of Gonzales. Rather, the grant furthered Kansas's commitment to the federal government to satisfy the CDC's Prevention Award. In essence, Finney County was one vendor that Kansas used to meet its obligations under the federal grant. That

vendor began to underperform, so Kansas terminated its contractual relationship.

Finney County terminated Gonzales when its sub-grant was not renewed. But the facts confirm that Finney County did so in its capacity as Gonzales's employer, not at Kansas's direction. Finney County, not Kansas, supervised Gonzales. Gonzales interacted with Goss at least twice per week, but she had much less regular interaction with Kansas's staff. Goss, not Kansas, gave Gonzales her annual performance review. Likewise, Goss—not Kansas's staff—took disciplinary action to address workplace complaints that Finney County—not Kansas—received about Gonzales's unprofessional conduct and inappropriate sexual comments. Yes, representatives of Finney County and Kansas met to discuss Gonzales's performance as a Specialist. But Kansas continued to emphasize that Finney County was responsible for meeting the grant objectives (i.e., timely completion of interviews and data collection). Kansas's April 23 letter to Finney County underscored that Kansas was focused on Finney County's ability to satisfy the grant, not Gonzales's personal performance. *See Estes v. Merit Sys. Prot. Bd.*, 658 F. App'x 1029, 1032 (Fed. Cir. 2016) (concluding the Army was not an "employer" of a military contractor under USERRA even though the Army expressed "dissatisfaction with the performance of a contractor employee" and that led to the employee losing his job).

Finney County maintained its exclusive authority over Gonzales's salary, method of payment, and benefits, too. Gonzales's paychecks and benefits came from Finney County, not the State. Gonzales's rate of pay was set by Finney County, not the State. The parties dispute how much of the grant funded Gonzales's salary, but the precise amount matters not. Finney County set Gonzales's salary and benefits according to its own pay and benefits scale. The Kansas grant money did not cover her full salary, so Finney County paid the remainder. And the existence of a financial relationship between contracting parties is simply not dispositive as to whether the parties are both employers under USERRA. *See Silva v. Dep't of Homeland Sec.*, No. DC-4324-08-0776-I-1, 2009 WL 3047237, at *369 (M.S.P.B. Sept. 23, 2009) (explaining that an entity is not always the employer of a contractor's employees under USERRA simply because the entity provides a funding mechanism that supports salaries).

The United States says three additional facts suggest that Kansas exercised de facto supervision over Gonzales. These include that Kansas prescribed detailed protocols and training that affected how Gonzales performed her Specialist duties, that Kansas withheld Gonzales's patient reports from Finney County's Director, and that Kansas exercised substantive review over Gonzales's work, including filling out performance reviews for Gonzales in 2008 and 2009. Doc. 47 at 22–25; Doc. 53 at 23–25, n.10. But the particulars of these actions suggest that Kansas remained focused on ensuring that its sub-grantee, Finney County, was meeting the objectives of its contractual obligations under the sub-grant. Put simply, Kansas managed its grant, and Finney County managed its grant performance, including the employee it selected to do the work, Gonzales.[6] *Cf. Brug v. Nat'l Coal. for Homeless*, 45 F. Supp. 2d 33, 39 (D.D.C. 1999) (explaining in a Title VII context that a grantor's "active and integral role in overseeing the project" does not necessarily "transend[] the bounds of the grantor-grantee relationship as to become plaintiff's employer.").

That Kansas imposed detailed reporting requirements, protocols, and ongoing training on its sub-grantees does not suggest that it controlled Gonzales. *Contra* Doc. 47 at 23–25. Finney County accepted Kansas's conditions, and, in turn, tasked Gonzales with completing them. Yet the specific requirements and protocols appear to be generally applicable operating standards common to public health researchers and all of Kansas's sub-grantees, rather than specific directions to

[6] It is a familiar concept that grant monies, especially over time, can have a coercive impact on the priorities and independence of the entity that becomes accustomed to receiving the funding and the superstructure that inevitably springs from that funding. *See*, *e.g.*, *Nat'l Fed. of Indep. Bus. v. Sebelius*, 567 U.S. 519, 577-78 (2012) (citing *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937), and recognizing that federal monies may become coercive to state powers and priorities). But the fact of funding is not enough. Kansas does not "control" Gonzales simply because, at some level, her job can be traced to the grant money that flowed from the United States, to Kansas, and ultimately to Finney County.

Gonzales.[7] *Cf. Lepkowski v. Telatron Mktg. Grp., Inc.*, 766 F. Supp. 2d 572 (W.D. Pa. 2011) (explaining that detailed instructions and close monitoring are quality control mechanisms common in contracts, not indications an entity is a co-employer under the Fair Labor Standards Act).

Nor is control of Gonzales established by patient privacy protocols. *Contra* Doc. 47 at 24–25; Doc. 53 at 24–25. Kansas's requirement that individual patient data be submitted directly to Kansas's Department of Health and Environment (and not to the sub-grantee) does not subject employees of sub-grantees to Kansas's "control." Kansas needed the precise patient data. But Finney County did not. Finney County could adequately supervise its employee's work product and its grant obligations through the Kansas-provided, monthly reports of de-identified data that Gonzales submitted. This attempt to balance patient privacy concerns against Finney County's obligations as an employer and sub-grantee did not establish Kansas's control over Gonazles.

The United States also points to 2008 and 2009 reviews of Gonzales that were unsigned but memorialized on Kansas's performance review forms. Doc. 53 at 24. The United States asserts that the use of these forms shows Kansas supervised Gonzales, even if Gonzales was never actually given the forms. Doc. 53 at n.10. But that's not the obvious conclusion here. Rather, the forms suggest a focus on the quantative question of whether Gonzales performed Finney County's assigned interviews and tracing on time. That is consistent with the proposition that Kansas measured its grant deliverables and enforced the grant's terms on its grantee—not on its grantee's employee. As already noted, a government agency expressing its displeasure with a

[7] The parties contest the level of the CDC's involvement with the Finney County sub-grant, but agree that some of the detailed protocols mirror those required of Kansas by the CDC Award. The CDC is the nation's leading public health agency, so Kansas's repetition of detailed protocols and training from the CDC bolsters the conclusion that the detailed protocols and requirements are simply how public health research is done. And to the extent that Kansas passed its CDC grant obligations to Finney County, Kansas's actions were consistent with its vested financial obligation to carefully manage its grant to Finney County. *Cf. Siebert v. Gene Sec. Network, Inc.*, 75 F. Supp. 3d 1108, 1111–12 (N.D. Cal. 2014) (implying that the National Institute of Health does not transform itself into an employer of grantees simply because it provided a grant to a specific research organization).

sub-grantee's employee's performance of the grant obligations does not make the agency an employer under USERRA. *See Estes v. Merit Sys. Prot. Bd.*, 658 F. App'x 1029, 1031–32 (Fed. Cir. 2016).

III

For the foregoing reasons, the United States' Motion for Partial Summary Judgment, Doc. 46, is DENIED and its motion to file a sur-reply, Doc. 59, is DENIED as moot. The State of Kansas's Motion for Summary Judgment, Doc. 48, is GRANTED.

It is so ordered.

Date: January 9, 2024

s/ Toby Crouse
Toby Crouse
United States District Judge

ATTACHMENT 2

In the United States District Court
for the District of Kansas

Case No. 22-cv-02250-TC

UNITED STATES OF AMERICA,

Plaintiff

v.

STATE OF KANSAS
(DEPARTMENT OF HEALTH & ENVIRONMENT),

Defendant

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court for a jury trial. The issues have been tried and the jury has rendered its verdict.

☒ Decision by the Court. This action came before the Court. The issues have been considered and a decision has been rendered.

Pursuant to the Court's Memorandum and Order filed on January 9, 2024, this case is dismissed without prejudice in favor of Defendant State of Kansas Department of Health & Environment.

Date: January 9, 2024

SKYLER B. O'HARA
CLERK OF THE DISTRICT COURT

By: s/ Traci Anderson
Deputy Clerk