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

REPLY BRIEF FOR THE UNITED STATES AS APPELLANT

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INTRODUCTION

The United States brought this case alleging that the Kansas Department of Health and Environment (Kansas) violated the Uniformed Services Employment and Reemployment Rights Act (USERRA) when it withdrew funding for Stacy Gonzales's position as a local Disease Intervention Specialist (DIS) based on her obligation to serve in the United States Army National Guard. U.S. Br. 4-7.[1] In its response brief, Kansas repeats the same errors the district court committed in its summary judgment order and obfuscates the straightforward and important issue that underlies this appeal—whether Kansas exercised sufficient control over Gonzales's employment to be considered one of her "employers" under USERRA. Though the court correctly set forth USERRA's statutory text defining an "employer," it wrongly concluded that Kansas was entitled to judgment as a matter of law because 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.

This Court should reverse and remand. The district court erred in concluding, as a matter of law, that Kansas was not one of Gonzales's employers under USERRA. Though the district court acknowledged that, under USERRA, an

[1] "U.S. Br. __" refers to the United States' opening brief. "Kansas Br. __" refers to the defendant's response brief. "A. Vol. __ at __" refers to the appendix filed with the United States' opening brief by volume and page number.

employee can have more than one employer in a single job, it applied an overly formalistic analysis that rendered certain employer responsibilities dispositive—like hiring, firing, or setting salary—while discounting other ways in which an entity may guide and manage a servicemember's employment.

Furthermore, the district court selectively described the evidence demonstrating that Finney County was Gonzales's employer—which the United States has never disputed—while disregarding the substantial evidence demonstrating that Kansas was *also* her employer. For example, the United States introduced evidence that Kansas funded 86% of Gonzales's position through its grant to Finney County, and a representative of Kansas participated in selecting Gonzales to fill the position. A. Vol. I at 59-60. The United States also offered evidence that after she was hired, Kansas determined where Gonzales worked, including requiring her to work in counties other than Finney County; dictated how she was to complete her work, ranging from providing trainings on the performance of her duties to mandating how she kept her files; supervised her on a near daily basis for the majority of her employment; and reviewed her performance both for Kansas's records and to share with Finney County. A. Vol. I at 55-56, 60-61; A. Vol. III at 588-592. Finally, the United States provided evidence that Gonzales's position was ultimately terminated when, after Gonzales's Kansas supervisor criticized her military service, Kansas informed Finney County that it

would not renew the grant that funded the vast majority of her salary. A. Vol. II at 565; A. Vol. III at 592-597.

Because the record makes clear, viewing the evidence in the light most favorable to the United States, that Kansas controlled significant aspects of Gonzales's employment opportunities and responsibilities, granting summary judgment for Kansas was error. *See Rowell v. Board of Cnty. Comm'rs*, 978 F.3d 1165, 1171 (10th Cir. 2020) ("In applying [the summary judgment] 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.") (citation omitted). Extensive case law bears out that where an entity provides input on hiring and firing decisions, sets terms of employment, funds the employee's salary, supervises the employee, conducts performance reviews, and participates in the alleged discriminatory action, as Kansas did here, that entity is considered a servicemember's "employer" under USERRA.

ARGUMENT

I. The district court misapplied USERRA's definition of "employer" to effectively preclude a finding that more than one entity may be a servicemember's "employer" under USERRA.

Despite acknowledging that "USERRA contemplates that a servicemember may have more than one 'employer'" in a single job (A. Vol. III at 717 (citing *White v. United Airlines, Inc.*, 987 F.3d 616, 627 (7th Cir. 2021)), the district court

improperly focused on the evidence showing that Finney County was Gonzales's employer, while disregarding evidence that Kansas also performed significant employment functions with respect to Gonzales. In doing so, the district court made an improper finding as a matter of law that Kansas could not be Gonzales's "employer" despite its assumption of employment-related responsibilities and its control over her employment opportunities.

1. USERRA defines an "employer" as "any person, institution, organization, or other entity that pays salary or wages for work performed," any entity that "has control over employment opportunities," and any entity to whom another employer "has delegated the performance of employment-related responsibilities." A. Vol. III at 717 (quoting 38 U.S.C. 4303(4)(A)(i)); *see also* U.S. Br. 12-15. The parties agree that an entity has "control over" a person's "employment opportunities" when it has "the power or authority to guide or manage" that employee's work. U.S. Br. 12-13; Kansas Br. 17. In contrast, an entity lacks the requisite "control" when its "role [is] purely formal and unrelated to critical issues." *White*, 987 F.3d at 627.

As the United States explained in its opening brief (at 20-24), the district court misapplied USERRA's definition of employment. Rather than consider the United States' evidence that Kansas had—and used—the authority to "guide or manage" Gonzales's employment, or otherwise maintained employment-related

responsibilities as to her work, the court engaged in a cramped analysis that would afford "employer" status only to entities with the final say over hiring, firing, and payment methods. *Compare* A. Vol. III at 717, *with* A. Vol. III at 720.

Courts have repeatedly found entities to be "employers" under USERRA despite not having complete or ultimate decision-making authority. In *Carter v. Siemens Business Services, LLC*, a district court denied summary judgment where the plaintiff put forth evidence that a human resources consultant "influenced the company's decision to terminate [the plaintiff's] employment" by "provid[ing] advice and mak[ing] recommendations to managers regarding discipline and termination" and specifically "recommend[ing] that [the company] terminate" the plaintiff. *Carter*, No. 10 C 1000, 2010 WL 3522949, at *9 (N.D. Ill. Sept. 2, 2010) (unpublished).

Similarly, in *O'Connell v. Town of Bedford*, a court found that an "employer" under USERRA includes those who "have authority or *input* over hiring and firing or promotion." *O'Connell*, No. 21 Civ. 170 (NSR), 2022 WL 4134466, at *7-8 (S.D.N.Y. Sept. 12, 2022) (unpublished) (emphasis added) (listing cases). The *O'Connell* court denied a motion to dismiss where the plaintiff alleged that a chief of police and lieutenant decided when the plaintiff worked and recommended promotions to the police department, which was the plaintiff's "ultimate supervisor." *Id.* at *8, *16. The court held that these allegations sufficed

to show that the chief and lieutenant each met USERRA's definition of "employer." *Id.* at *8.

As in *Carter* and *O'Connell*, the United States pointed to evidence that Kansas participated in the decision to hire Gonzales and later influenced Finney County's decision to terminate her. U.S. Br. 4-7. In particular, Kansas's Manager of Field Operations actively participated in Gonzales's interview, including asking her questions and ranking her candidacy alongside the rest of the interview committee. A. Vol. I at 132-134. Kansas also influenced Gonzales's termination by threatening and ultimately deciding to discontinue the grant that made her position possible and funded the majority of her salary. A. Vol. I at 59-60; A. Vol. II at 379; A. Vol. III at 592, 594-597. And, similar to the defendants in *O'Connell*, Kansas determined where Gonzales worked, reviewed her work performance, and shared their view of her performance with her County supervisors. A. Vol. I at 60, 128-132, 146-147, 151, 186-187, 273-277; A. Vol. II at 369, 374, 507, 513-515. This evidence, combined with additional facts the United States has identified, shows that Kansas was one of Gonzales's employers under USERRA.

The district court relied on *Estes v. Merit Systems Protection Board*, where the Federal Circuit held that an agency voicing its "dissatisfaction with the performance of a contractor employee" generally does not render that agency an "employer" under USERRA. *Estes*, 658 F. App'x 1029, 1032 (Fed. Cir. 2016)

(citation omitted). But the *Estes* court further held that when "an expression of dissatisfaction by an agency [is] so powerful and controlling that it forces the third party company to terminate the employee's status at the company," the agency may qualify as an employer. *Ibid.* A reasonable jury could find that Kansas had and used the power *Estes* identified in its hypothetical. Kansas's actions leading to Gonzales's termination did not amount to a mere expression of dissatisfaction; Kansas functionally eliminated Gonzales's job by terminating its funding and grant of authority to conduct local disease intervention work. U.S. Br. 7.

Ultimately, despite acknowledging that an entity has "control" for purposes of USERRA's definition of "employer" when it has "[the] authority to guide or manage" the servicemember's employment, the district court failed to consider evidence that Kansas exercised just such authority with respect to Gonzales. *See* A. Vol. III at 718-722 (citation omitted). Instead, as discussed in the United States' opening brief (at 20-24), the district court held that Kansas could not be Gonzales's employer because Finney County had decision-making authority over some formal aspects of her employment, such as hiring, firing, and setting her salary and benefits. A. Vol. III at 720-721. But the fact that one entity has final decision-making authority over certain facets of employment does not preclude another entity, who also has authority to guide or manage the servicemember, from also being an employer.

2. Kansas's arguments to the contrary are meritless.

a. Kansas urges that an entity is an employer only if it has the power to "dictate[] an individual's ability to progress, through financial benefits, by assigning responsibility or authority." Kansas Br. 18. But the word "dictate" does not appear anywhere in USERRA's text or regulations. On the contrary, the implementing regulations belie the idea that such strict control is required: they expressly state that a servicemember may have more than one employer in a single job. 20 C.F.R. 1002.37. The regulation offers by way of example a security guard who is managed by both a security company and the owner of the guard's assigned worksite. *Ibid*. In that example, it is unlikely that both employers would simultaneously have the authority to "dictate" the security guard's "progress, through financial benefits, by assigning responsibility or authority." Rather, each employer entity would have some degree of control over various aspects of the servicemember's employment. Nonetheless, where "the employee . . . report[s] [to] both" entities, those entities "share responsibility for compliance with USERRA." *Ibid.*

Kansas relies on several district court orders finding that an entity was not an employer where it lacked authority to hire, fire, or promote an individual. *See* Kansas Br. 30-31. But most of these cases did *not* hold that such authority was *necessary*; rather they held that the defendants in those cases had insufficient

control—and in some instances had no control at all—over the servicemember's employment. *See Mace v. Willis*, 259 F. Supp. 3d 1007, 1023 (D.S.D. 2017) (holding that individual was not a servicemember's employer where its *only* authority over the servicemember was to create schedules); *Dees v. Hyundai Motor Mfg. Ala., LLC*, 605 F. Supp. 2d 1220, 1224 (M.D. Ala. 2009) (declining to consider company an employer under USERRA where it performed no employment related duties at all with respect to the servicemember); *Satterfield v. Borough of Schuylkill Haven*, 12 F. Supp. 2d 423, 438 (E.D. Pa. 1998) (declining to find individual members of borough council to be "employers" under USERRA where they exercised "no" power over the plaintiff and the plaintiff "was not required to report to any of them individually"); *Bailey v. Forrest Cnty.*, No. 2:20-CV-16-KS-MTP, 2021 WL 518330, at *2-3 (S.D. Miss. Feb. 11, 2021) (unpublished) (finding that a county *was* one of a servicemember's employers where it supervised and paid the servicemember).

Only one of the cases Kansas cites, *Kassel v. City of Middletown*, 272 F. Supp. 3d 516, 531 (S.D.N.Y. 2017), considered the ability to hire, fire, and promote to be dispositive, stating that "based on the express definitions in the statute, only those individuals who have authority or input over hiring and firing or promotion can have liability as 'employers' under USERRA." That holding contradicts USERRA's text, which makes clear that an entity is an "employer"

where it "has control over employment opportunities," along with the statute's regulations, and legislative history. *See* U.S. Br. 20-23. Though such control over these formal aspects of employment such as hiring and firing may be *sufficient* to qualify as an "employer" under USERRA, that does not mean that it is *necessary*. And in any case, *Kassel* nonetheless recognizes that an entity that has the authority to offer "input" over such decisions can be considered an employer under USERRA, counter to Kansas's insistence (Kansas Br. 18) that an entity must have the authority to "dictate." *Kassel*, 272 F. Supp. 3d at 531.

b. Failing to offer any justification for the district court's cramped, formalistic construction of what it means to be an "employer" under USERRA, Kansas instead highlights various irrelevant limitations built into USERRA, such as the statute's exclusion of independent contractors and the lack of a private right of action against individual supervisors. *See* Kansas Br. 18-19. These limitations, however, have nothing to do with whether Kansas exercised sufficient control over Gonzales's employment to be considered her "employer" under USERRA. Nor is it apparent what relevance the definition of "employee" in the Fair Labor Standards Act (FLSA), 29 U.S.C. 203, has to the issue at hand (*see* Kansas Br. 19-21).[2] Congress has specifically defined the term "employer" in USERRA itself,

[2] Kansas's cited cases (Kansas Br. 20-21) stand for the point that the FLSA is instructive on the issues of (1) whether USERRA permits individual liability, *see*

see 38 U.S.C. 4303(4), and Kansas appears to agree (Kansas Br. 20) that the key question is the degree of control an entity exercises over the servicemember employee.

3. In a final detour, Kansas spills considerable ink arguing that Gonzales was not a grant recipient, and that not all grant-providing entities are "employers" under USERRA. Kansas Br. 21-25. These red-herring arguments have no relevance to the question at hand, that is, whether Kansas should be considered Gonzales's "employer" under USERRA.

First, the United States has never suggested that Gonzales was a "recipient" of a grant by the Centers for Disease Control (CDC), by Kansas, or by Finney County. But the fact that Gonzales was not a grant recipient has no bearing whatsoever on whether Kansas was her employer. Again, that question is determined by the degree that an entity holds control over a servicemember's employment opportunities or assumes employment-related responsibilities as to that servicemember. *See* 38 U.S.C. 4303(4)(A) and (4)(A)(i); *see also* pp. 3-6, *supra*; U.S. Br. 12-15.

Mace, 259 F. Supp. 3d at 1023, and (2) whether an employee is an independent contractor, *see Evans v. MassMutual Fin. Grp.*, 856 F. Supp. 2d 606, 609 (W.D.N.Y. 2012) and *Murphy v. Tuality Healthcare*, 157 F. Supp. 3d 921, 925 (D. Or. 2016). Those points have no bearing on the issue at hand, which is whether Kansas exercised sufficient control over Gonzales's employment to be considered one of her employers under USERRA.

Second, the United States has not argued that an entity becomes a USERRA employer solely because it awards a grant.[3] Rather, the provision of funds is but one factor that a court should consider in determining if a defendant has sufficient control over a servicemember's employment opportunities or employment related responsibilities. *See* U.S. Br. 14 (listing seven factors that courts have identified as relevant to whether an entity is a USERRA employer).

Importantly, the United States has offered evidence that Kansas did much more than simply provide the funds that paid for the majority of Gonzales's salary. It played a role in hiring her, with its Manager of Field Operations participating in her interview and providing input on her and other candidates. A. Vol. I at 132-134. It decided where she worked, including requiring her to work outside of Finney County's jurisdiction. A. Vol. I at 60. It determined how she worked, mandating not only that she meet certain big-picture requirements, but also micromanaging how she asked questions, what routes she took to locate subjects, and how she stored and organized her files. A. Vol. I at 128-132, 146-147, 151, 186-187. It supervised her work, for years aiming for daily communication and

[3] USERRA names only one factor that *by itself* creates an employer: "pay[ing] salary or wages for work performed." 38 U.S.C. 4303(4)(A). The other factors require an examination of the functional role the defendant plays in a servicemember's employment to determine whether the defendant has "control over employment opportunities" or has been "delegated the performance of employment-related responsibilities." 38 U.S.C. 4303(4)(A) and (i).

feedback. A. Vol. I at 160. It conducted its own performance reviews of her work at least twice. A. Vol. II at 507, 513-515. It provided feedback on the substance of her performance to Finney County, which the County then incorporated without alteration (and expressly cited Kansas as the source of such feedback) in their performance reviews. A. Vol. I at 273-277; A. Vol. II at 369, 374. It critiqued her work product both directly to her and to her Finney County supervisors, and during those direct critiques instructed her to choose between her work for them and her service to the military. A. Vol. III at 666. And, in the end, it decided not to renew the grant for reasons specific to Gonzales—whether because of animus towards her military service or due to her purported deficiencies—causing Finney County to terminate her. A. Vol. I at 291; A. Vol. II at 429-430. This is more than enough evidence for a reasonable factfinder to determine that Kansas was one of Gonzales's "employers" for purposes of USERRA.

Not all providers of grant funding take such an active, hands-on role in supervising individuals whose employment they fund. Where such entities only provide funding (and perform routine grant management), they likely will not be considered to be employers under USERRA because they will lack the requisite "control" over the servicemember. But as set forth above, Kansas did much more than just provide most of the funding for Gonzales's job; it held and used its authority to guide and manage Gonzales's employment. Evidence of that authority

demonstrates that Kansas was one of Gonzales's employers and is more than sufficient to defeat Kansas's motion for summary judgment.

II. The district court erred in disregarding the United States' evidence that Kansas was one of Gonzales's employers.

As the United States explained in its opening brief (at 25-30), the district court erred in applying the summary judgment standard when it held that, as a matter of law, Kansas was not one of Gonzales's "employers" under USERRA. To grant Kansas's summary judgment motion, it was not enough for the district court to find that there was evidence to support *Kansas's* position. Rather, Federal Rule of Civil Procedure Rule 56 permits a district court to grant summary judgment only when "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). The district court must make this assessment "view[ing] 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), The district court failed to do that here, and that failure constitutes reversible error.

1. In its response brief (at 28), Kansas repeats the district court's summary judgment error by cataloguing only those facts that support its position. While Kansas correctly sets forth facts to which the parties stipulated, it neglects to acknowledge that the United States presented evidence of *additional material facts* that the district court either dismissed or failed to consider in the light most

favorable to the United States and that, if credited by a factfinder, could support a finding that Kansas was one of Gonzales's employers. These facts are not "speculation" as Kansas argues (Kansas Br. 35), and are not irrelevant simply because Kansas disputes them.

For example, the United States offered that Kansas's Manager of Field Operations, whose job was to oversee all of the counties' local DISs, interviewed Gonzales and gave his opinion on her candidacy. A. Vol. I at 132-134. The district court dismissed his presence in the interview (and made no mention of his active participation). A. Vol. III at 720. The United States also presented evidence that Kansas dictated where Gonzales worked, including requiring her to work outside of Finney County's jurisdiction. A. Vol. I at 60. The district court ignored this as well. The United States introduced evidence that Kansas's grant covered 86% of Gonzales's salary. A. Vol. I at 59-60. The court dismissed this because the grant did not cover her entire salary. A. Vol. III at 721, 724.

The United States also offered significant evidence showing that Kansas supervised significant aspects of Gonzales's employment. The United States provided evidence that, for the majority of Gonzales's time as a local DIS, Kansas employee Derek Coppedge aimed to interact with her to give her feedback on a daily basis. A. Vol. I at 61; A. Vol. III at 588-592. The court does not appear to have considered this important evidence at all in concluding that Kansas did not

supervise her. A. Vol. III at 721. The United States demonstrated that Kansas completed its own performance evaluation of Gonzales on two occasions, and that the Finney County's performance reviews of Gonzales's substantive work simply repeated the information that Kansas provided to the County. A. Vol. II at 369, 374 (Finney County evaluations citing "per State" or "per KDHE evaluation" as source of information); A. Vol. II at 507, 513-515 (Kansas officials discussing KDHE's evaluations of Gonzales). The court disregarded this evidence, holding that the United States' interpretation of it was "not the obvious conclusion." A. Vol. III at 723.

Importantly, the United States argued that Finney County fired Gonzales because Gonzales's final Kansas supervisor, Jennifer VandeVelde, found fault in her work only after telling her she had to choose between her job and her military duties. A. Vol. III at 592, 594-597. The court dismissed this evidence because Finney County made the ultimate decision to fire Gonzales after Kansas terminated the grant that provided most of the funding for her position. A. Vol. III at 720.

This evidence is of the same sort that courts repeatedly have found to support a finding of "employer" status under USERRA. *See, e.g.*, *Carter v. Siemens Bus. Servs., LLC*, No. 10 C 1000, 2010 WL 3522949, at *9 (N.D. Ill. Sept. 2, 2010) (unpublished) (discussing input on hiring and firing decisions); *O'Connell v. Town of Bedford*, No. 21 Civ. 170 (NSR), 2022 WL 4134466, at *7-8 (S.D.N.Y.

Sept. 12, 2022) (unpublished) (discussing input on hiring and firing decisions and setting the terms of employment); *Cooper v. WellStar Health Sys., Inc.*, No. 1:18-CV-05357-ELR, 2019 WL 13268106, at *3 (N.D. Ga. Apr. 30, 2019) (unpublished) (discussing setting the terms of employment); *White v. United Airlines, Inc.*, 987 F.3d 616, 626 (7th Cir. 2021) (discussing setting the terms of employment and involvement in the allegedly discriminatory employment action); *Bailey v. Forrest Cnty.*, No. 2:20-CV-16-KS-MTP, 2021 WL 518330, at *2-3 (S.D. Miss. Feb. 11, 2021) (unpublished) (discussing paying or funding the servicemember's salary and supervising the servicemember); *United States v. Nevada*, 817 F. Supp. 2d 1230, 1238 (D. Nev. 2011) (discussing paying or funding the servicemember's salary); *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) (discussing supervising the servicemember, conducting performance reviews, and involvement in the allegedly discriminatory employment action); *Novak v. Mackintosh*, 919 F. Supp. 870, 878 (D.S.D. 1996) (discussing supervising the servicemember).

In all, Kansas's defense of the district court's order is a recitation of facts and inferences that favor its position. *See* Kansas Br. 27-35. But accepting the *movant's* facts and inferences is not how summary judgment works. In repeatedly

viewing the evidence in the light most favorable to Kansas or ignoring the United States' evidence wholesale, Kansas's brief repeats the same errors made by the district court.

2. Finally, Kansas challenges the relevance of the defendant's involvement in the allegedly discriminatory employment practice to the defendant's status as an "employer." *See* Kansas Br. 35-37. Kansas attempts to distinguish the cases the United States relies on for this point, without success. Kansas Br. 36-37.

First, Kansas attempts to distinguish *White* on the grounds that the defendant there "active[ly] participat[ed]" in the challenged decision not to pay for military leave and the defendant's executives worked both for the defendant and the plaintiff's primary employer. Kansas Br. 36 (quoting *White*, 987 F.3d at 620, 626-627. But this is a distinction without a difference. Here, the United States has presented evidence that VandeVelde, a Kansas employee and Gonzales's Kansas supervisor, made discriminatory remarks about Gonzales's military service and ultimately instigated the decision to withdraw grant funding from Finney County. A. Vol. III at 592, 594-597. *White* thus solidly supports the United States' position that involvement in the allegedly discriminatory conduct is relevant to whether a defendant exercises the requisite control over a servicemember employee to be considered to be one of that servicemember's "employers."

As to *Baldwin*, Kansas distinguishes that case on the ground that it involved a motion to dismiss rather than a motion for summary judgment. Kansas Br. 36-37. In *Baldwin*, the court held that the plaintiff had sufficiently alleged the defendants' status as employers because the defendants were "in [p]laintiff's supervisory chain of command, were involved in preparing [p]laintiff's performance evaluations, were involved in [p]laintiff's daily supervision, and were involved in the 'pretextual' [reduction in force] that caused [p]laintiff's termination." *Baldwin*, 2010 WL 3211055, at *4. The court held that "these facts sufficiently allege that [d]efendants . . . were employers within the meaning of USERRA." *Ibid.*

The differences in procedural posture do not distinguish *Baldwin* from this case. Here, the United States has not only *alleged* every factor that *Baldwin* found relevant to the defendants' status as employers; the United States has offered *evidence* of each of those facts. This evidence includes that Kansas employees supervised Gonzales—for years aiming to do so on a daily basis; Kansas employees prepared performance evaluations for Gonzales and contributed to Finney County's evaluations of her; and it was a Kansas employee who, for the first time, reported deficiencies in Gonzales's work after making disparaging comments about her military service. *See* A. Vol. I at 61; A. Vol. II at 369, 374, 507, 513-515; A. Vol. III at 588-592, 594-597.

The district court's failure to properly consider this evidence and its repeated errors in resolving genuine disputes of material fact on summary judgment and accepting Kansas's narrative as true warrant reversal. *See, e.g.*, *Tolan v. Cotton*, 572 U.S. 650, 659 (2014) (per curiam) (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").

CONCLUSION

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

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CERTIFICATE OF DIGITAL SUBMISSION

I certify that the electronic version of the foregoing REPLY 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 7.16.18613.0) and is virus-free according to that program.

s/ Janea L. Lamar
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Date: October 25, 2024

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B)(ii) because it contains 4602 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 (a)(6) because it was prepared in Times New Roman 14-point font using Microsoft Word for Microsoft 365.

s/ Janea L. Lamar
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Date: October 25, 2024