

**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Baltimore Field Office**

██████████ ██████████ Complainant,)	
)	
v.)	EEOC No. ██████████
)	Agency No. ██████████
Jeh Johnson, Secretary)	
U.S. Department of Homeland Security,)	
Agency)	
)	Date: December 1, 2016

AGENCY'S MOTION FOR A JUDGMENT WITHOUT A HEARING

The United States Secret Service (Agency or Secret Service) moves to dismiss this Complaint pursuant to 29 C.F.R. § 1614.109(b).¹ This motion concerns all issues accepted for review, and should be granted for the following reasons:

- 1) Complainant ██████████ ██████████ cannot establish a prima facie case that he is a qualified individual with a disability; and
 - 2) The Agency has a legitimate, non-discriminatory reason for not hiring Complainant.
- For these reasons, the Agency is entitled to judgment as a matter of law and Complainant's request for a hearing should be dismissed.

ISSUE ACCEPTED FOR REVIEW

Whether Complainant was subjected to discrimination on the basis of disability (Obsessive Compulsive Disorder) when on or about October 28, 2014, he was not selected for the position of IT Program Manager (GS-2210-15), Announcement TEC-AS166-MP.

¹The Agency believes that Complainant opposes this motion.

STATEMENT OF MATERIAL FACTS

1. In September 2013, Complainant applied for a position as an IT Program Manager with the Agency. Report of Investigation (ROI), Ex. A-1 at 4.
2. All positions with the United States Secret Service are deemed "Critical Sensitive" and require a Top Secret security clearance. ROI, Ex. E-5; Ex. D-5, p. 2.
3. Complainant submitted a Schedule A disability letter with his application to demonstrate his eligibility for a Schedule A Excepted Service appointment. ROI, Ex. D-4b. He was included on the "Schedule A Listing of Eligibles" for the position. ROI, Ex. B-10 at 5.
4. In December 2013, Complainant interviewed with several Agency management officials for the IT Program Manager position. At that time, Complainant informed the management officials that he had Obsessive Compulsive Disorder (OCD). ROI, Ex. A-1 at 4.
5. On July 17, 2014, Complainant received a conditional offer of employment as an IT Program Manager GS-2210-15, contingent upon the successful completion of a background investigation. ROI, Ex. B-4.
6. On August 19, 2014, Complainant met with Special Agent (SA) George Stakias in the Baltimore Field Office for his security interview. During that meeting, Complainant was directed to provide a statement explaining the purpose of the mental health treatment he had listed on his SF-86, Questionnaire for National Security Purposes. ROI, Ex. A-1 at 6.
7. Successful completion of a Law Enforcement Pre-Employment Test polygraph examination is a required part of the background investigation for the IT Program Manager position. ROI, Ex. B-9 at 2; Ex. D-5, p. 3.
8. On September 18, 2014, Complainant took a Law Enforcement Pre-Employment Test (LEPET) polygraph examination administered by SA Ellen Ripperger at the Agency's Washington Field Office. *Id.*; Exhibit 1 (Polygraph scoring charts).
9. Prior to administering the polygraph examination, SA Ripperger asked Complainant which medications he took within the last 24 hours, how much, the reason he took the medications, if he was under a physician's care, which medications he had been prescribed in the last 12 months, whether he experienced a variety of medical conditions, and whether he had ever consulted a doctor about a nervous or mental condition. Exhibit 2 (Polygraph Data Sheet).
10. Complainant informed SA Ripperger that he took various medications for a variety of conditions, including OCD. *Id.*

11. SA Ripperger and the Complainant agreed that he was fit to take a polygraph examination on September 18, 2014. *Id.*; Exhibit 3 (Complainant's Deposition) at 21:1-3.
12. Complainant's polygraph examination consisted of two scored series of relevant questions. Ex. 1.
13. The first scored series consisted of four charts, each of which asked the same three relevant questions (R24, R26, and R28). *Id.*
14. The second scored series consisted of three charts, each of which asked the same two relevant questions (R4 and R6). *Id.*
15. SA Ripperger's analyses of both series were reviewed by SA Edward Alston and Sgt. William Magnuson. *Id.*
16. SA Ripperger, SA Alston, and Sgt. Magnuson all agreed that the final evaluation for the first scored series in Complainant's polygraph evaluation was inconclusive (INC). *Id.*
17. SA Ripperger, SA Alston, and Sgt. Magnuson all agreed that the final evaluation for the second scored series on Complainant's polygraph evaluation was Significant Response (SR). *Id.*
18. Pursuant to written Secret Service polygraph policy, a significant response to any relevant question will be evaluated as a significant response to the polygraph examination. Exhibit 4 (Polygraph Manual Section) at 3.
19. After Complainant's polygraph examination, the Agency's Polygraph Branch submitted a report to the Security Clearance Division containing a summary of the examination results. Ex. 5 (Polygraph Report).
20. The Polygraph Report (Ex. 5) was reviewed by the Chief of the Security Clearance Division, Robin Deprospero-Philpot. ROI, Ex. D-5 at 4.
21. Chief Deprospero-Philpot determined that because Complainant's polygraph examination included a significant response to a relevant question, and there were no mitigating circumstances, he should be discontinued from the hiring process for the IT Program Manager position. *Id.*; Ex. 8 at 21:12-19.
22. On October 16, 2014, the Security Clearance Division informed the Human Capital Division that Complainant was no longer a best qualified applicant for the position of IT Program Manager and that he was no longer being considered for a position with the Secret Service. Ex. 6.

ARGUMENT

A decision without a hearing is appropriate in the instant case because there are no genuine disputes of material fact. The Agency does not dispute that Complainant was diagnosed with and treated for Obsessive Compulsive Disorder prior to his application for employment, or that Complainant disclosed this diagnosis and treatment to the Agency at various stages of his application. Complainant's request for a hearing should be dismissed, however, because he was not qualified for the position of IT Program Manager with or without reasonable accommodation, and the Agency has a legitimate, non-discriminatory reason for withdrawing its conditional offer of employment.

I. Complainant Does Not Present a *Prima Facie* Case of Discrimination on the Basis of Disability, Because Complainant is not a "Qualified" Individual with a Disability.

Complainant alleges that he was discriminated against based on his disability, but fails to satisfy his *prima facie* burden because he has not demonstrated that he was a qualified individual with a disability. In order to make out a *prima facie* case of disability discrimination under a disparate treatment theory, a plaintiff must show: (1) that he was an individual who had a disability within the meaning of the Rehabilitation Act; (2) that he was qualified for the position; and (3) that he suffered an adverse employment action because of his disability. *Duncan v. Washington Metro. Area Transit Auth.*, 240 F.3d 1110, 1114 (D.C. Cir. 2001) (en banc). To be a "qualified individual with a disability," the Complainant must demonstrate that he was able to perform "the essential functions of his position with or without reasonable accommodation." 42 U.S.C. § 12111(8); 29 C.F.R. § 1630.2(m). Essential functions are "the fundamental job duties of the employment position the individual with a disability holds or desires." 29 C.F.R. §

1630.2(n)(1). In determining whether a task is an essential function, "consideration shall be given to the employer's judgment as to what functions of a job are essential" as well as to the employer's "written description" of the job. 42 U.S.C. § 12111(8).

The Complainant was unable to perform the essential functions of his position, with or without reasonable accommodation. The position for which Complainant applied required him to successfully complete a polygraph examination. ROI, Ex. B-9 at 2; Ex. D-5, at 3. He did not successfully complete the examination, so he was to perform the essential functions of his position, with or without reasonable accommodation. *See Complainant v. Holder*, Appeal No. 0120130689 (2015) (FBI applicant who failed polygraph examination was not a qualified individual with a disability because "the requirement to pass the polygraph examination is an essential requirement, necessary for national security reasons, which the Agency cannot be compelled to waive.") Complainant was unable to meet this qualification, and he is accordingly not a qualified individual with a disability. *See Lindsay v. Gonzalez*, Appeal No. 0120072285 (2007). Furthermore, as is discussed in more detail below, the record does not include any evidence that Complainant was subjected to discrimination or disparate treatment during his background investigation.

II. The Agency Has A Legitimate, Non-Discriminatory Reason for Not Hiring Complainant.

If the Complainant is found to have presented a *prima facie* case of discrimination on the basis of his disability, the Secret Service has still presented a legitimate, non-discriminatory reason for determining that he was not the best qualified applicant for the IT Program Manager position at issue in this Complaint. The Agency's legitimate, non-discriminatory reason for its non-selection of Complainant is that he did not successfully complete the background check for this position due to the results of his polygraph examination. *See* ROI, Ex. B-7 (Affidavit of

Chief of Security Clearance Division) (“You did not successfully complete the polygraph examination. A review of your polygraph examination was conducted, and based on that review, it was determined that no re-test is warranted.”); *see also* Ex. 5 at 2 (Complainant’s polygraph examination report, indicating a significant response and the concurrence of a Quality Control review). The Complainant was informed on October 28, 2014 that he was no longer “among the best qualified” applicants. ROI, Ex. B-6. This notification was accurate, even if it was less specific than Complainant wished it to be.² As of October 28, 2014, Complainant was no longer among the best qualified applicants for the IT Program Manager position, because he was no longer qualified for the position at all. As he was informed in his conditional offer of employment, appointment to the position was contingent on the successful completion of a background investigation (ROI, Ex. B-4), and Complainant did not successfully complete his background investigation, due to the results of his polygraph examination.

On September 18, 2014, Complainant took a polygraph examination at the Agency’s Washington Field Office. ROI, Ex. E-7. The Complainant’s examination included a significant response to a relevant question concerning past serious crimes. Ex. 5. The Complainant’s polygraph examination evaluation was first reviewed by the Agency’s quality control and then submitted to the Agency’s Chief of the Security Clearance Division, Security Officer Robin DeProspero-Philpot, who determined that Complainant “should be discontinued from the hiring process based on the results of the polygraph examination.” ROI, Ex. D-5 at 4.

The specific question in response to which Complainant had a significant response was question R4 in Series 3 (“Have you ever committed any serious crime?”). *See* Ex. 1; *see also* Ex.

² The Agency concedes that there was one irrelevant inaccuracy contained in its October 28, 2014 message to Complainant. That message contained a routine conclusion that “a better qualified applicant” was selected by the selecting official. In fact, no other applicant was selected to fill this vacancy.

10 (graphs) at 26-28.³ Complainant's own polygraph examination expert agreed with SA Ripperger's scoring of question R4 and that Complainant had a significant response to a relevant question. Ex. 7 at 31:17-22 ("Q. So, looking at the graph here of the response to question R4 – A. Mm-hmm. Q. Do you agree with Ms. Ripperger's scoring of the response to that question? A. Yes."); *see also* 33:7-8 & 38:7-11 ("Q. So Mr. Seiler, do you agree with the agency's determination that Mr. [REDACTED] had a significant response to a relevant question? A. A relevant question, yes, the one you just showed me."). All three agency polygraph examiners who reviewed Complainant's examination concurred that his response to this question was a significant response. Ex. 1. Agency policy provides that a significant response to any relevant question is a significant response to the entire examination. Ex. 4 at 3. On the basis of Complainant's significant response, and in the absence of any mitigating factors, the Agency's Chief of the Security Clearance Division determined that he should be discontinued in the hiring process. ROI, Ex. D-5 at 4.

III. The Complainant Has Failed to Show That the Agency's Legitimate, Non-Discriminatory Reasons Are Pretext for Discriminatory Animus.

The Agency has articulated its reasons for determining that Complainant was not the best qualified applicant for the IT Program Manager position at issue in this Complaint. Its burden is one of production, not of proof, and is satisfied if it simply explains what it has done or produces evidence of legitimate non-discriminatory reasons. *See St. Mary's Center v. Hicks*, 509 U.S. 502, 509 (1993). If the Agency meets its burden of production, the burden shifts back to the Complainant to present evidence that the stated reason was pretextual. *Id.* A reason cannot be proved to be pretext unless it is shown "both that the reason was false **and** that discrimination was the real reason." *Id.* at 515 (emphasis added). The Complainant has not produced or

³ The list of questions for each chart is on the page following the chart pages.

discovered any evidence in this case to show that either the Agency's stated reasons are false or that the Agency was motivated by discrimination.

When examining claims of pretext, courts should not "second-guess an employer's personnel decision absent demonstrably discriminatory motive." *Milton v. Weinberger*, 696 F.2d 94, 100 (D.C.Cir. 1982). Rather, once an employer offers a non-discriminatory reason for its decision the ultimate issue is whether, "the employer honestly believes in the reasons it offers." *Fischbach v. Dist. Of Columbia Dept. of Corrections*, 86 F.3d 1180, 1183 (D.C.Cir. 1996) (quoting citation omitted). In this case, the record does not include any evidence that the Agency employees involved in the decision not to hire Complainant do not honestly believe that the reason for this action is the result of his polygraph examination. The agency's Polygraph Operations Branch provided accurate information - that Complainant's polygraph evaluation included a significant response to a relevant question - to the Security Clearance Division. On the basis of this accurate information, the Chief of the Security Clearance Division determined that Complainant was not qualified for the IT Program Manager position.

Complainant's pretext argument rests on his allegations that the Agency's questioning of him was discriminatory in the following instances:

- 1) He was instructed by SA Stakias to write a statement⁴ about why he had seen a psychiatrist for several years (ROI, Ex. A-1 at ¶28);
- 2) After, and possibly before his polygraph examination, he was questioned by SA Ripperger about his mental health, including medications he took for his condition (*Id.* at ¶34);
- 3) After his polygraph examination, SA Ripperger "subjected [him] to what amounted to a criminal interrogation" (*Id.* at ¶35);

⁴ There is no evidence in the record to indicate that any agency employee involved in the hiring decision at issue in this Complaint reviewed or was even aware of the statement about his mental health counseling that Complainant provided to SA Stakias. Ms. DeProspero-Philpot testified that her decision that Complainant was not the best qualified applicant for the IT Program Manager position was based entirely on the result of his polygraph examination. Ex. 8 (DeProspero Deposition) at 21:8-19.

- 4) Complainant was asked if he liked to start fires (*Id.* at ¶36);
- 5) SA Ripperger suggested that it would be understandable if he had experimented with drugs, coming from a broken home with an alcoholic father (*Id.* at ¶37);
- 6) SA Ripperger accused Complainant of lying (ROI, Ex. A-1 at ¶¶38 & 39).

None of the above allegations are evidence of discriminatory motive or disparate treatment.⁵ The Complainant appears to believe that the Agency was legally prohibited from asking him any questions about his mental health treatment, even during the background investigation for national security positions. *See* Ex. 3 at 16:3-12. As is discussed in more detail below, the Agency's inquiries to Complainant regarding his mental health, treatment, and medications were routine, standard inquiries of all applicants who take a polygraph examination as part of the eligibility determination for a Top Secret security clearance.

SA Stakias' request, or instruction, for Complainant to describe the reason he sought mental health treatment is consistent with the Adjudicative Guidelines for Determining Eligibility for Access to Classified Information issued by the President of the United States, which include Guideline I: Psychological Conditions. *See* ROI, Ex. D-5a at 14. Adjudicators must know if an applicant has a condition that impairs judgment, reliability and trustworthiness, or if an applicant has failed to follow medical treatment advice. *Id.* Complainant has not identified any source of law that prohibits an agency conducting a background investigation for a Top Secret security clearance from asking applicants about their mental health treatment. Rather, Complainant incorrectly believes that Executive Order (E.O.) 12968 prohibits such inquiry. ROI, Ex. A-1 at ¶28; Ex. 3 at 16:3-12. E.O. 12968 Section 3.1(e) provides the following direction regarding applicants' mental health:

⁵ For this reason, the audio recording of Complainant's polygraph examination is not relevant for the instant Motion. The Agency's arguments on summary judgment do not rely on disputing any of Complainant's testimony regarding what took place during his polygraph examination.

No negative inference concerning the standards in this section may be raised solely on the basis of mental health counseling. Such counseling can be a positive factor in eligibility determinations. However, **mental health counseling, where relevant to the adjudication of access to classified information, may justify further inquiry to determine whether the standards of subsection (b) of this section are satisfied**, and mental health may be considered where it directly relates to those standards. (Emphasis added).

E.O. 12968 expressly authorizes “further inquiry” into applicants’ mental health counseling to determine whether an applicant is eligible for access to classified information. Therefore, not only is Complainant incorrect in asserting that the Secret Service was prohibited from inquiring into his mental health treatment, but he also ignores the clear dictates of the Executive Order and Adjudicative Guidelines, i.e., that mental health treatment is directly relevant to the ultimate determination regarding an individual’s suitability to access classified information.

SA Ripperger also did not discriminate against Complainant when she asked him questions related to his medications and mental health treatment during his polygraph examination. Plaintiff’s own expert polygraph examiner testified that it was not inappropriate for SA Ripperger to ask him about his mental health condition and medications. Ex. 7 (Seiler Deposition) at 10:10-22 (“Q. In your opinion, is it inappropriate for a polygraph examiner to ask what medications the examinee has taken? ... A. No, it’s very appropriate to ask what they’re on.”). Complainant’s expert testified further that it would have been inappropriate if SA Ripperger had not asked Complainant about his mental health condition and medications. *Id.* All of the questions SA Ripperger asked Complainant about his mental health, medications, and treatment were a required part of the examination, as reflected on Secret Service Standard Form (SSF) 3089. *See* Ex. 2.

Complainant has also generally alleged that SA Ripperger “became hostile” during his polygraph examination. Ex. 3 at 26:16-17. Complainant’s own testimony, however, includes several non-discriminatory explanations for why this could have occurred. First, Complainant

acknowledged that he confronted SA Ripperger with what he believed were inconsistent statements of hers during the examination. *Id.* at 24:15-18. Complainant noted that SA Ripperger “didn’t look happy,” and that she was aggravated by his confronting her with what he believed were her inconsistent statements. *Id.* at 25:8-18 & 26:9-12. Furthermore, Complainant described a turning point in his examination that does not appear to have anything to do with his disability or SA Ripperger’s perception of his disability:

There came a point in the examination where she became hostile, and it turned into an interrogation. You know, she came out and said, “well, you failed with respect to drugs and with respect to past serious crimes,” and started going over various scenarios where it would be plausible that I had used illegal drugs or plausible that I had committed some crime. And I kept denying them and told her that it was insulting. *Id.* at 26:16-23.

Complainant’s testimony indicates that he did not perceive SA Ripperger to become “hostile” until **after** he had “failed” relevant questions in the examination, at which point his examination “turned into an interrogation.” Complainant appears to be describing the portion of the polygraph examination known as the “post-test,” which according to Agency policy consists of an appropriate “interview **or interrogation.**” Ex. 4 (Polygraph Examination Procedures) at 3 (emphasis added).⁶ Complainant does not appear to have any evidence in support of his allegation that SA Ripperger’s interactions with him were motivated by discrimination or deviated from standard agency policy or practice.

Summary judgment is appropriate because, even taking Complainant’s record testimony in the light most favorable to him, his allegations do not indicate that any Agency employee acted with a discriminatory motive or treated him differently from other applicants. Absent any evidence of discriminatory motive, Complainant is in the same situation as the complainants in *Lindsay v. Gonzalez* and *Complainant v. Holder*. Complainant is not a qualified individual with a

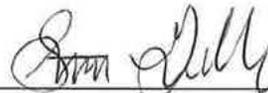
⁶ Prior to the examination, Complainant also signed a Warning of Rights and Consent to Speak, which consists of *Miranda* warnings, and which suggests that an examinee may be subjected to questioning about criminal activity. Ex. 9.

disability because he was unable to meet the successful polygraph qualification for the IT Program Manager position, which the agency cannot be compelled to waive. The evidence of record clearly establishes that Complainant's polygraph examination included a significant response to a relevant question, which constitutes an unsuccessful polygraph examination under agency policy. *See* Ex. 4. This is the legitimate reason for which Complainant was discontinued in the hiring process for the IT Program Manager position at issue in the Complaint.

CONCLUSION

The Secret Service has high national security background investigation standards for the employees entrusted with the protection of the White House Complex, the First Family, the President of the United States and critical technological infrastructure. The Complainant was not qualified for appointment to the critical sensitive position at issue in this Complaint, because he was not eligible to continue in the background investigation process as a result of his polygraph examination. Accordingly, Complainant was not qualified for the position at issue, and the Agency has proffered a legitimate, non-discriminatory reason for his non-selection. The Agency is therefore entitled to a decision in its favor without a hearing.

Respectfully submitted,



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CERTIFICATE OF SERVICE

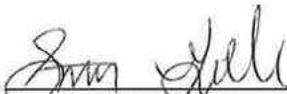
I certify that the attached document entitled "Agency's Motion for Summary Judgment" was sent on this day by electronic mail to:

Administrative Judge Antoinette Eates
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