U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington Field Office

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[redacted] Complainant,	)	
v.	)	EEOC No. [redacted]
	)	Agency No. [redacted]
Jeh Johnson, Secretary U.S. Department of Homeland Security (Secret Service), Agency	)	Date: August 10, 2016

ORDER DENYING AGENCY'S MOTION TO DISMISS AND GRANTING COMPLAINANT'S MOTION TO COMPEL

Agency Motion to Dismiss

On March 18, 2016, the Agency filed a Motion to Dismiss and Request for Stay of Discovery[1] asserting: 1) that the Agency's decision to terminate Complainant's security background check is not subject to judicial review; and 2) that Complainant cannot establish a *prima facie* case that he is a qualified individual with a disability. On March 28, 2016, Complainant filed his Opposition to Agency Motion to Dismiss. On April 1, 2016, the Agency filed a Reply in Support of its Motion to Dismiss.[2] After consideration of the Agency's motion and Complainant's opposition, I DENY the Agency Motion to Dismiss.

As an initial matter, I find that the Agency's motion to dismiss on the grounds of Complainant's inability to establish a *prima facie* case is premature and better suited for inclusion in a Motion for Summary Judgment after discovery has concluded. Complainant is not required at the motion to dismiss stage to establish a *prima facie* case. *See Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 511-512 (2002). Here, Complainant has made an allegation sufficient to survive the Agency's motion to dismiss. *See Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009); *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 563, 570 (2007)); *Swierkiewicz,* 534 U.S. at 514.

[1] By e-mail dated April 1, 2016, I stayed discovery in this case pending resolution of the instant motions.

[2] The Case Management Order dated February 1, 2016, provides that the "[p]arties shall not file multiple submissions concerning the same matter (e.g., motions for reconsideration, **replies to responses by opposing party,** etc.) without prior approval from the Administrative Judge." (Emphasis added). Here, the Agency did not request prior approval before filing its reply to Complainant's opposition; therefore, the Agency's reply will not be considered.

Next, I turn to the Agency's argument that its decision to terminate Complainant's security background check is not subject to judicial review. In this case, Complainant, a Schedule A applicant based on his psychiatric disability, received a conditional offer of employment with the Agency as an IT Program Manager, contingent on his successful completion of a background investigation. Complainant's offer of employment was rescinded by the Agency after he failed his polygraph examination. He was not permitted to re-take the polygraph. Complainant then filed an EEO complaint alleging that he was subjected to discrimination based on his disability arising from questions asked during an initial background interview with Special Agent George Stakias and during the polygraph exam conducted by Special Agency Ellen Ripperger. *See* Report of Investigation (ROI) Ex. D1. The Agency argues in its Motion to Dismiss that the EEOC lacks jurisdiction to review the Agency's actions, citing *Department of the Navy v. Egan*, 484 U.S. 518 (1988), in which the Supreme Court held that discrimination claims that require courts and administrative bodies to evaluate the merits of security clearance determinations are non-justiciable.

I find that the Agency relies on an overbroad reading of *Egan.* In this case, it is not the Agency's ultimate security clearance determination that is at issue, but rather the process by which the initial security interview and the polygraph examination were conducted. In fact, the Agency affirmatively states that it did not make a final security clearance determination with respect to Complainant. *See* e-mail from Theresa Keith, Deputy Division Chief, Human Capital Division, dated November 5, 2014, in which Keith states that "no final decision was made regarding [Complainant's] eligibility to access classified information." ROI Ex. B7. *Egan* does not insulate from the anti-discrimination laws *all* decisions that might bear upon an employee's eligibility to access classified information. *See Rattigan v. Holder*, 689 F.3d 764 (D.C. Cir. 2012); *see also Ames v. Johnson*, 121 F.Supp 3d 126 (D.D.C. 2015). Rather, it covers those decisions that require an adjudicator to exercise the "predictive judgment" that "must be made by those with the necessary expertise in protecting classified information." *Egan*, 484 U.S. at 529. Here, contrary to *Egan* and *Foote v. Moniz*, 751 F.3d 656 (D.C. Cir.2014), also relied upon by the Agency, I find that reviewing Complainant's allegations will not require me to exercise predictive judgment about access to classified information in order to assess whether the initial security interview and polygraph examination were conducted in a manner that runs afoul of the Rehabilitation Act. I find further that the Agency personnel who are the subject of Complainant's claims did not exercise any such predictive judgment about Complainant's eligibility to access classified information. Thus, a review of actions in the initial security interview and polygraph examination will not require me to second-guess an assessment that is prohibited by *Egan*.

Finally, I note that the EEOC decisions cited by the Agency in support of its motion to dismiss, in fact, lend support to the conclusion that this complaint is reviewable by EEOC. They show that I may conduct an assessment of whether there was pretext or discriminatory motive in the questioning of Complainant and in the administration of the polygraph examination in the instant case. *Complainant v. Holder*, EEOC Appeal No. 0120130689 (March 9, 2015) (affirming Administrative Judge's review of a complainant's failure to pass a polygraph examination and noting that "the record is devoid of evidence of pretext or discriminatory motive on the part of SA1 during the administration of the polygraph exam or on the part of the officials who made the decision not to re-administer the polygraph."); *Lindsay v. DOJ*, EEOC Appeal No. 0120072285

(September 7, 2007) (affirming AJ's decision, which included a determination by the AJ that issues related to Complainant's failure of the polygraph examination were reviewable). Moreover, the EEOC has consistently held that although a revocation of a security clearance cannot be reviewed, the Commission may review whether the revocation process itself was discriminatory. *See e.g. Baker v. Attorney General*, EEOC Appeal No. 01A02583 (April 11, 2002); *Schroeder v. Department of Defense*, EEOC Request No. 05930248 (April 14, 1994); *Lyons v. Department of the Navy*, EEOC Request No. 05890839 (March 22, 1990). Here, Complainant's allegations, including that the initial interview and polygraph examiner's questions evidenced discrimination based on his psychiatric disability and that there was disparate treatment based on his disability in not allowing him to re-test, are reviewable by the EEOC.

For these reasons, the Agency's Motion to Dismiss is **DENIED.**

Complainant's Motion to Compel

Complainant filed a Motion to Compel on March 17, 2016, and the Agency filed its Response to Complainant's Motion to Compel on March 28, 2016. In its motion to compel, Complainant seeks production of the following:

- the audio and/or video recording that was made of his polygraph examination (discovery request No. 5);
- all documents related to Complainant's polygraph examination, including polygraph charts, polygraph scoring charts and quality control (QC) documents and quality control notes (requests No. 6 and 7); and,
- the polygraph exam questions from Complainant's polygraph exam (request No. 16).

Complainant argues that the information sought is "necessary to determine whether the polygraph examination was properly conducted and the results properly interpreted or whether the reported results were no more than a pretext for discrimination." Complainant states that he intends to have an "independent expert" review the materials requested to determine the validity of the conduct and evaluation of his polygraph examination. The Agency argues in response that the information sought is not relevant and that it may not be produced because it falls within the national security privilege and the law enforcement privilege.

Relevance

First, with regard to relevance, the Agency argues that the only information relevant to the discrimination inquiry in this case is the polygraph examination report that it provided to Complainant, because that was the only information reviewed by the Chief of the Security Clearance Division, Robin DeProspero Philpot, in making the decision to terminate Complainant's background investigation. This argument, however, ignores Complainant's allegations, which turn on whether the polygraph examination itself, and to a lesser extent the initial security interview, was conducted in a manner that discriminated against him based on his disability. He claims that the questions asked by the polygraph examiner, Ripperger, and the

interviewer, Stakias, demonstrated bias against him based on his psychiatric disability and that the biased examination resulted in his failing the polygraph, which resulted in the decision to terminate his background investigation. In addition, the Agency's response to the motion to compel itself demonstrates the relevance of the Quality Control information that is being sought by Complainant. Specifically, the Agency asserts in its response that all Agency polygraph examinations are subject to a Quality Control review. Moreover, the ROI contains information indicating that Complainant's polygraph examination was subjected to a Quality Control review by two evaluators. Thus, I find that the information sought in the motion to compel is relevant to Complainant's claims.

National Security Privilege

Next, the Agency asserts that the national security privilege prevents it from producing the desired information. It fails, however, to provide sufficient support for application of this privilege to the matters at hand. Rather, much of the Agency's argument on this point repeats the same argument made in its Motion to Dismiss related application of *Egan*, which I have addressed above. Contrary to the Agency's argument, my determination of whether discrimination occurred in the administration of the polygraph examination in this case will not require a review of the "*validity* of the Agency's polygraph examination evaluations" [emphasis in original], but rather will require a determination as to whether there was evidence of disability discrimination in the initial security interview and in the administration of Complainant's polygraph examination, including any evidence of disparate treatment based on Complainant's disability. Moreover, unlike in *Croddy, et al. v. Federal Bureau of Investigation, et al.*, 2006 WL 284426125 (D.D.C. 2006), relied upon by the Agency, my review will not focus on a broad challenge to the use of polygraph examinations by the Agency. To the extent that the information sought by Complainant implicates "the science of the polygraph," it will be irrelevant to an analysis of whether disability discrimination occurred and will not be permitted. The Agency's arguments regarding application of the national security privilege are therefore unavailing.

Law Enforcement Privilege

The Agency asserts further that the law enforcement privilege applies to prevent it from providing the "charts, graphs, data and questions related to polygraph examinations." It relies on *Shah v. DOJ*, 89 F.Supp. 3d 1074 (D.Nev. 2015), a case in which a District Court judge upheld DOJ's decision to withhold the raw data, charts and graphs underlying a polygraph examination conducted on a criminal defendant. The judge in *Shah* found that the law enforcement privilege, which is usually applied only to ongoing investigations, may be asserted to preserve the future effectiveness of an investigative technique and that releasing the polygraph materials could jeopardize future investigations. In balancing the defendant's interests against the law enforcement privilege asserted by DOJ, the judge found that the plaintiff failed to show that the polygraph data was relevant to his defense.

I find the *Shah* case to be distinguishable from the case at hand. The *Shah* case arose in the context of a criminal matter in federal court and involved the application of the Administrative Procedures Act (APA) "arbitrary and capricious" standard, which is highly

deferential to government agency decisions. The law enforcement privilege is not absolute and requires a balancing of interests on a case by case basis. The judge in *Shah* found that in that case, the balance tipped toward the government in asserting the privilege both because of the highly deferential APA standard and also because the plaintiff had failed to show the relevance of the information being sought. In the instant case, however, I find that the balance favors Complainant. Here, the evidence being sought is clearly relevant to Complainant's claims, and the government's interest in confidentiality is less pronounced given that we are in a confidential administrative process. Moreover, the information being sought can be protected via protective order as set forth below. I find that in this case, where the agency has taken the adverse action precisely because of the polygraph examination, Complainant has an especially compelling need for the information being sought. To preclude Complainant from receiving the information would seriously handicap his ability to challenge the alleged discrimination. Thus, I find that the asserted law enforcement privilege does not preclude the agency from providing the requested information to Complainant.

The Complainant's Motion to Compel is **GRANTED.** The Agency is **ORDERED** to provide the information listed at the bullets above to Complainant on or before **August 24, 2016.**

Protective Order

Pursuant to a joint motion from the parties, I approved a Protective Order in this case, dated March 1, 2016, which may apply to the information ordered herein. If the parties wish to amend the Protective Order to ensure confidentiality of the ordered information, they may do so, preferably by joint motion.

Revised Deadlines

The discovery deadline, including completion of all depositions, is **September 21, 2016.**[3]

Motions for summary judgment, if any, shall be filed no later than **October 6, 2016.** Any opposition shall be filed no later than **October 21, 2016**, and any reply briefs shall be filed no later than **October 28, 2016**. All other instructions in the Case Management Order remain the same.

[3] I note that the Agency attached to its Motion to Dismiss Notices of Deposition from Complainant, for Ellen Ripperger, George Stakias, and Robin Despero, and stated that it would oppose the depositions for the reasons put forth in the Motion to Dismiss. Given that the Motion to Dismiss has been denied, I assume that these depositions will occur without delay and within the time frame provided herein. In the event of a discovery dispute, the parties need not file a formal motion to compel. Rather, the moving party shall notify the undersigned by e-mail within **five (5) calendar days** of the dispute or **within five (5) calendar days** of no response after the discovery response was due, whichever occurs first. The notification shall advise the undersigned that a discovery dispute has arisen and specify the efforts undertaken to resolve the dispute, and shall propose **three (3) dates/times** when both parties are available for a teleconference with the undersigned to address the dispute(s). The notification need not go into detail about the disputes. The failure to timely file objections to discovery may result in the objections being deemed waived.

Sanctions

Failure to adhere to this Order may be grounds for sanctions, including adverse inferences against the Agency, and dismissal of the Complainant's request for a hearing. 29 C.F.R. § 1614.109(g)(3)(2015).

It is so ORDERED.

For the Commission:

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