U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Office of Federal Operations

John S. Morter, Appellant, v. Mark Esper, Secretary Department of Defense, Defense Intelligence Agency, U.S. Special Operations Command, Agency.	)	OFO Docket No.: 2020005490 EEOC No.: 510-2020-00021X Agency No.: DIA-2014-00052 DATE: October 15, 2020

AGENCY'S OPPOSITION TO APPELLANT'S BRIEF IN SUPPORT OF APPEAL

The Defense Intelligence Agency ("DIA" or the "Agency"), by and through undersigned counsel, provides this Opposition to Complainant's Brief in Support of Appeal (Brief) of the Agency's Final Agency Action (FAA)[1] on this matter, issued on August 5, 2020. The FAA implemented Administrative Judge William Rodriguez's June 26, 2020 decision (Decision) granting the Agency's Motion for Summary Judgment. The Agency was served a copy of Appellant's Brief on September 24, 2020 via email.[2] The Agency now responds to Appellant's Appeal in accordance with 29 C.F.R. § 1614.403(f) and MD-110.

Procedural Background

Appellant filed this complaint of discrimination on July 23, 2014, alleging violations of

[1] Appellant indicates his appeal is of an Agency issued Final Agency Decision (FAD) in which the Agency determined it had not discriminated against Appellant. This is not correct, as the Agency only issued an FAA concurring and implementing the decision of the Administrative Judge to grant the Agency's Motion for Summary Judgment.

[2] The Agency notes that while the Agency was the defendant who issued the FAA in response to the Administrative Judge's decision, United States Special Operations Command (U.S. SOCOM) was also a defendant in this matter. There is no indication that Appellant served its appeal upon U.S. SOCOM.

the anti-discrimination provisions of the Rehabilitation Act of 1973. The Agency properly investigated these claims. Upon completion of the investigation, Complainant elected a hearing before an Administrative Judge.

Following the issuance of an Acknowledgement and Order on May 6, 2015, the Parties engaged in discovery and prepared for a hearing. On December 4, 2015, Complainant submitted his Motion for Summary Judgment. On December 15, 2015, the Agency submitted its Motion for Summary Judgment. The Administrative Judge granted the Agency's Motion on August 23, 2017, finding that the record contained no evidence to support any of Appellant's allegations of discrimination, and concluded that the Agency presented legitimate, non-discriminatory explanations for its actions. Appellant thereafter appealed that decision to the Office of Federal Operations (OFO), which reversed the decision and remanded the matter to the Administrative Judge for additional consideration and development of the record on September 30, 2019.

Following the issuance of an Initial Conference Order on October 31, 2019, the Parties again engaged in discovery and prepared for a hearing. On April 23, 2020, the Agency submitted its second Motion for Summary Judgment. The Administrative Judge granted the Agency's Motion on June 26, 2020, finding that Appellant failed to establish a *prima facie* case of disability discrimination, the record contained no evidence to support any of Appellant's allegations of discrimination, and concluded that the Agency presented legitimate, non-discriminatory explanations for its actions.

Standard of Review

The OFO review of an FAA is a *de novo* review, except that the review of the factual findings in a decision by an administrative judge issued pursuant to § 1614.109(i) shall be based

on a substantial evidence standard of review. 29 C.F.R. § 1614.405(a). The decision on appeal is based on the preponderance of the evidence contained in the complaint file.

For the reasons that follow, the Agency requests that Appellant's appeal be denied and the Agency's FAA, and the Administrative Judge's decision to grant the Agency's Motion for Summary Judgment, be affirmed.

Discussion

On appeal, Appellant makes one principle argument: that genuine issues of material fact exist. This argument is wholly without merit.

1. No genuine issues of material fact exist

As in his first appeal and in his most recent opposition to the Agency's Motion for Summary Judgment, Appellant's Brief identifies a litany of genuine facts that he argues are in dispute. However, as the Administrative Judge correctly noted:

> Complainant attempts to create the appearance that disputed material facts exist by making assertions - based on his desired application and interpretation of documents while disregarding material facts - which are not supported by all the relevant documentary evidence or undisputed material facts, and which do not sufficiently alter the material undisputed facts so as to preclude a Summary Judgment Decision.

(Decision at 4).

In his Brief, Appellant ostensibly acknowledges the Administrative Judge's determination that Appellant has not supported his assertions when he prays for a remand to conduct additional discovery and to have a hearing to obtain witness statements. Appellant has already had the original investigation and two separate and distinct discovery periods to produce the evidence he claims exists. He now seeks a fourth opportunity to attempt to have this information materialize. Appellant bore the burden of producing evidence to prove the *prima*

facie elements of his claims. He failed to do so. Instead, Appellant again simply offers unsupported allegations, assertions, and suspicions. The law requires more than bare assertions, because it requires admissible evidence. Celotex, 477 U.S. at 324.

The material facts of this case have been established, as carefully examined by the Administrative Judge. As a DIA employee, Appellant was subject to periodic polygraph examinations as a condition of continued employment. (ROI 165-6, Exhibit A to the Agency's Motion for Judgment[3] at pg. 1, Agency Ex. L at pg. 5). Appellant failed to successfully complete four periodic polygraph examinations on the subject of mishandling classified information. (ROI 251, Agency Ex. B at pg. 1). Appellant admitted to conducting extensive research on the polygraph. (ROI 347, Agency Ex. A at pg. 2, Agency Exhibit B at pg. 2-3, Agency Ex. O at pg. 3, Agency Ex. P at pg. 7-8). When unable to otherwise account for or mitigate Appellant's inability to address this matter, DIA advised USSOCOM of the situation. (Agency Ex. B). USSOCOM determined that it was not willing to bear the national security risks associated with Appellant's unresolved security issues and informed DIA that Appellant could no longer work from its spaces. (ROI 280, 357, Agency Ex. B at pg. 1). DIA attempted to identify an alternate workplace for Appellant closer to his home, but DIA lacked any facilities of its own and was unable to locate a third party willing to accept the national security risk presented by Appellant. (ROI 151, 338-40). Therefore, DIA was required to reassign Appellant to a DIA facility in order to permit Appellant to continue his DIA employment. (ROI 365).

The record clearly establishes that Appellant failed to establish a *prima facie* case of disability discrimination. Notably, the Administrative Judge found that "[h]owever, as the Agency correctly points out, Complainant's disability is irrelevant and has nothing to do with the

[3] Hereinafter, all references to Exhibits to the Agency's Motion for Summary Judgment will be cited as "Agency Ex. _."

October 8, 2013, restrictions placed on his access to USSOCOM and corresponding Top [Secret] security clearance because at the time, Complainant did not have, and the Agency was not aware of any disability." (Decision at 8-9). The Administrative Judge continued in his analysis by pointing out:

> The medical documentary evidence clearly establishes that during the time Complainant underwent the four PCAs from March 2011, through June 2012, (1) there is no evidence that Complainant had a disability; (2) the Agency was not aware of any disability; and (3) there was no medical documentation presented to the Agency in support of any disability or disability related claim associated with the PCAs.

(Decision at 9). To be sure, Appellant has not identified through citation to any evidence in the record that any of the decision makers in this matter had knowledge of Appellant's disability before any of the relevant decisions were made. Without demonstrating such knowledge of Appellant's disability by the decision makers, there can be no discrimination based on that disability.

In addition to concluding that Appellant failed to establish a *prima facie* case of disability discrimination, the Administrative Judge concluded that the evidentiary record demonstrated the Agency's actions were justified. Specifically, the Administrative Judge determined that:

> Due to Complainant's four unsuccessful attempts to complete the PCAs and Dr. Soo-Tho's evaluation of Complainant indicating that "it was unlikely" Complainant was "a suitable candidate for further polygraph testing" given his "verbalized intent and demonstrated efforts to subvert CSP examination," I find, given information Complainant was entrusted to handle at a Top-Secret level, involving national interests, Mulholland and Nilius had more than sufficient reason to lose confidence in Complainant with the handling of that information at USSOCOM because the reason Complainant was unable to successfully complete on four occasions involved at its core, "issues of mishandling classified information and unauthorized foreign contacts."

(Decision at 14). The Administrative Judge then added:

> Given the facts and circumstances of this case, McIntosh and Norton had more than sufficient reason to reassign Complainant. After his first unsuccessful PCA, Complainant had three additional opportunities to successfully complete and resolve the issues in his PCAs associated with his mishandling classified information and unauthorized foreign contacts. Complainant's restrictions to access to Top-Secret information and ultimate reassignment to the Agency's headquarters were in accordance with the foregoing Agency policies and guidance, and therefore, the Agency had sufficient justification for its actions. The anti-discrimination statutes were not intended to give the Commission the authority to substitute its judgment for that of the Agency.

(Decision at 15).

2. Appellant presents collateral attacks against the Agency's polygraph program

The vast majority of Appellant's unsupported assertions serve as nothing more than collateral attacks against the Agency's processing of matters related to his ongoing access to classified information, requirements imposed on all DIA employees. In enumerating these collateral attacks, Appellant's argument is notably lacking any citation to evidence that these alleged failures to follow these policies were connected to Appellant's disability. Rather, Appellant focuses on his belief that the Agency was simply punishing him for failing to successfully complete the polygraph. As these collateral matters are not within the scope of the EEOC's jurisdiction.

Conclusion

As the FAA and the Administrative Judge's decision properly show, Appellant did not provide any evidence that the Agency subjected him to unlawful discrimination. Upon appeal, Appellant has not added to the evidentiary record, but improperly asks OFO to take action to reopen an already adequate evidentiary record to permit Appellant a fourth opportunity to seek information to carry his evidentiary burden. Appellant also misconstrues the facts of this case,

both as to content and as to materiality, in an attempt to call the Administrative Judge's determination into question. The material facts of this case were well developed in the evidentiary record, and as properly determined by the Administrative Judge, are not in dispute. Appellant's appeal, therefore, is unfounded and the Agency's FAA and the Administrative Judge's decision should be upheld as fully supported by the evidence in this case.

Respectfully submitted,

William R. Di Iorio
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Defense Intelligence Agency

CERTIFICATE OF SERVICE

I certify that a copy of the Agency's Opposition to Appellant's Brief in Support of Appeal was served as indicated on October 15, 2020 upon the following:

***via FEDSEP*:**

U.S. Equal Employment Opportunity Commission
Office of Federal Operations

***via email*:**

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Respectfully submitted,

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