

**U.S EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
OFFICE OF FEDERAL OPERATIONS
P.O. Box 77960
WASHINGTON, D.C. 20013**

██████████ ██████████

Complainant

v.

**JEH JOHNSON, Secretary
U.S. Department of Homeland Security
(U.S. Secret Service)**

Agency

EEOC Case No.

████████████████████

Agency Case No.

██

April 22, 2019

**RESPONSE TO USSS OPPOSITION OF APPEAL FROM A DECISION OF
SUMMARY JUDGEMENT TO UNITED STATES SECRET SERVICE
WITHOUT A HEARING**

INTRODUCTION

On October 19, 2018 the United States Secret Service (USSS) filed an Opposition to Mr. ██████████ request for an appeal of the decision of summary judgment for the USSS without a hearing. The United States Secret Service makes three principal arguments in its opposition in favor sustaining summary judgment in its favor: (1) there was no spoliation of evidence, (2) summary judgment was correctly granted to the USSS, and (3) that Special

Agent Tignor and Mr. [REDACTED] were not similarly situated comparators. All of these arguments will be shown to be both factually and legally incorrect.

LEGAL STANDARD FOR SUMMARY JUDGEMENT

Commission regulations governing Federal Sector EEO complaints provide for issuance of a decision without a hearing when the Administrative Judge finds that there is no genuine issue of material fact. *29 C.F.R. § 1614.109(g)*. This regulation is patterned after the summary judgment procedure set forth in Rule 56 of the Federal Rules of Civil Procedure.

The Supreme Court has held that summary judgment is appropriate where a court determines that, given the substantive legal and evidentiary standards that apply to the case, there exist no genuine issue of material fact. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986)*.

In ruling on a motion for summary judgment, a court's function is not to weigh the evidence but rather to determine whether there are genuine issues for trial. *Id.* at 249. The evidence of the non-moving party must be believed at the summary judgment stage and all justifiable inferences must be drawn in the non-moving party's favor. *Id.* at 255.

An issue of fact is "genuine" if the evidence is such that a reasonable fact finder could find in favor of the non-moving party. *Celotex v. Catrett,*

477 U.S. 317, 322-23 (1986).; Oliver v. Digital Equip. Corp., 846 F.2d 103, 105 (1st Cir. 1988).

A fact is "material" if it has the potential to affect the outcome of the case. If a case can only be resolved by weighing conflicting evidence, issuing a decision without a hearing is not appropriate.

In the context of an administrative proceeding, an Administrative Judge may properly consider issuing a decision without holding a hearing only upon determination that the record has been adequately developed for summary disposition. See *Petty v. Department of Defense, EEOC Appeal No. 01A24206 (July 11, 2003)*.

In order to avoid summary judgment, the non-moving party must produce admissible factual evidence sufficient to demonstrate the existence of a genuine issue of material fact requiring resolution by the fact finder. *Celotex, 477 U.S. at 322-24*. The party opposing a properly made motion for summary judgment may not simply rest upon the allegations contained in his or her pleading, but must set forth specific facts showing that there is a genuine issue still in dispute. *Anderson v. Liberty Lobby, Inc. , 477 U.S. 242,*

SPOILIATION OF EVIDENCE IS SELF EVIDENT

The USSS states there was no spoliation of evidence. To accept this claim, the Commission must accept that a “Black Swan” event must have occurred with regard to the audio recording of Mr. [REDACTED] polygraph examination, and the USSS inability to produce the recording.

The Lafayette polygraph software contains two mechanisms to allow an examiner to monitor audio recordings of polygraph exams and prevent failures, a built-in feature that is by default enabled will warn the examiner when the audio recording level is too low, and a meter that is clearly visible to the examiner which shows the decibel (or intensity) levels of the recorded sounds in real time. Agent Ripperger stated in her deposition that she recorded the exam properly: *“On my computer screen, when we hit “record,” it shows that we're recording. Throughout the exam, it showed me that I was recording the exam, and there's a dialogue box that shows the volume being recorded.”* Deposition of Agent Ripperger, *op. cit.*, page 28, line 15 to page

¹ This is the verbatim text of a statement of legal standards issued by an EEOC administrative judge in another case.

28 line 21.

Further, we have the signatures of two USSS Special Agents: Special Agent Ed Alston, and Special Agent Thomas Christopher, who certified that they made random checks of the audio throughout Mr. [REDACTED] exam on the Quality Control Worksheet of Mr. [REDACTED] exam and that the audio was audible and intact.

The United States Secret Service is requesting the Commission to accept without any proof that the audio of Mr. [REDACTED] exam is corrupt. To accept this, the Commission must believe that not only did two failsafe's on the polygraph unit fail during recording of Mr. [REDACTED] exam, but that three USSS Special Agents were each separately and individually mistaken at distinct different times when they all stated or certified that they heard uncorrupted audio of Mr. [REDACTED] exam.

As the USSS pointed out in their opposition, the party claiming spoliation must demonstrate that the relevant evidence actually existed, not that it possibly or likely existed. See *Sova v. Peace Corps, Appeal No. 0120110359, 2013 WL 3466315, at *6 (July 5, 2013)*. If either the testimony or signatures of three (3) USSS Special Agents on documents affirming the existence of the audio of Mr. [REDACTED] polygraph exam are not sufficient to

prove that the uncorrupted audio of Mr. [REDACTED] exam did exist and was in USSS custody, then there is no threshold of proof Mr. [REDACTED] could possibly provide to the Commission that will meet this requirement.

The Commission need only look at the Affidavit of Mr. Danny Seiler, a former Supervisor Sergeant and Polygraph Examiner for the Maryland State Police, dated October 3, 2016, to determine how unlikely the proffered USSS explanation regarding the disappearance of Mr. [REDACTED] polygraph audio really is. Element number 4 of Mr. Seiler's Affidavit states "*Mr. [REDACTED] informed me that the audio files that were provided are essentially blank. Since 1991 in the approximate 2,500 polygraph examinations that I have given, the microphones have never failed to record the exam; nor have the exams not been recorded for any other reason.*"

Even with no evidence of an intent to deprive Mr. [REDACTED] of evidence during discovery, Judge Eates had the discretion to enter severe sanctions on the USSS by simply inferred intent, as was done in *O'Berry v. Turner* which reasoned:

"All of these facts, when considered together, lead the Court to conclude that the loss of the at-issue Electronically Stored Information was beyond the result of mere negligence. Such irresponsible and shiftless

behavior can only lead to one conclusion—that ADM... acted with the intent to deprive Plaintiff of the use of this information at trial.” O’Berry v. Turner, Archer Daniels Midland, Civil Action Nos. 7:15-CV-00064-HL, 7:15-CV-00075-HL, (M.D. Ga., April 27, 2016).

No reasonable person would accept the United States Secret Service’s explanation for the disappearance of the audio recording of Mr. [REDACTED] polygraph exam in this matter, and the Commission should not either.

THE SANCTIONS ORDER WAS NOT PROPERLY DECIDED

The United States Secret Service reiterates Mr. [REDACTED] claim that Judge Eates should have required the Secret Service to provide maintenance records to prove equipment failure before denying his Sanctions Motion. USSS counsel then erroneously states there is no legal support for this evidentiary standard.

In BMG Rights Management LLC v. Cox Communications, Inc., No. 1:14-cv-1611, 2016 WL 4224964 (E.D. Va. Aug. 8, 2016), the court found “That by altering the source code, deleting portions of the source code, and by overwriting portions of the source code without maintaining a record of those alterations, deletions, or overwrites, material information was intentionally destroyed and it was not lost through inadvertence or mistake.”

Further, the defendant: "made a strong showing that the deposition testimony provided by Rightscorp is a poor substitute for a documented, historical version of the Rightscorp system."

Interestingly, this appeal was a perfect opportunity for the United States Secret Service to produce affidavits under penalty of perjury from those who: (1) discovered the faulty polygraph microphone, (2) serviced the polygraph machine, (3) ordered the parts for the polygraph machine; and the records for the requisition of parts and for the servicing of Special Agent's Ripperger's polygraph machine. The Secret Service could easily have provided this information for a piece of complex national security equipment, yet they chose not to; perhaps because nobody at the agency was willing to risk their career and pension to make a false statement under oath?

The United States Secret Service then attempts to justify Judge Eates decision by stating that Administrative Judges have broad discretion in determining what evidence to admit or exclude. See *29 C.F.R. § 1614.109(e)*. Judge Eates had the inherent authority to maintain order and fairness in her courtroom and to enter discovery sanctions when parties commit the type of misconduct that clearly goes against the dictates of justice as "*the inherent power of a court can be invoked even if procedural rules exist which sanction*

the same conduct." The US Supreme Court in Chamber v. NASCO, Inc., 501 U.S. 32, 43 (1991). Unfortunately, Judge Eates simply accepted the proffered explanation from the United States Secret Service, no matter how bizarre and unlikely, without any evidence, seemingly simply because they are a law enforcement agency.

SUMMARY JUDGEMENT WAS IMPROPERLY GRANTED

As previously stated in his appeal, Mr. [REDACTED] is not challenging the validity of the polygraph examination process for job applicants, or the request that he submit to one for employment in this complaint. Mr. [REDACTED] is challenging the validity of the polygraph examination given to him by Special Agent Ellen Ripperger, and the possibility that he was deliberately “steered to fail” the exam by Special Agent Ellen Ripperger because of his disability.

The USSS correctly states the appeal argues that there are genuine issues of materials fact regarding the conduct and validity of the polygraph exam administered to Mr. [REDACTED] and so summary judgment should not have been granted. It also correctly states the only issue before the EEOC and within the Commission's jurisdiction, however, is whether the Agency discriminated against Mr. [REDACTED]

It has been Mr. [REDACTED] contention that because he has an impeccable reputation and has passed a T5 background investigation (the executive branch equivalent of Top Secret) by his own agency, that the polygraph was the only mechanism that the USSS could leverage to deny him employment, and that the USSS could do so without any oversight, in virtual secrecy. Mr. [REDACTED] is not as claimed by the USSS “attempt[ing] to generate disputes of fact by raising irrelevant issues, making arguments about immaterial facts, and misrepresenting the evidence of record” by highlighting the inconsistencies and unethical conduct of his polygraph exam. Further, such issues are not “immaterial and not probative to the legal analysis of whether disability discrimination occurred” as the USSS erroneously asserts, in fact they are critical to it.

The USSS further erroneously states that “even accepting all of his [Mr. [REDACTED] allegations as true, none of the actions evidenced discriminatory motive or disparate treatment.” If the USSS gave Mr. [REDACTED] the equivalent of a mental beating with a rubber hose during his polygraph examination over his disability; such as questioning the medication he took, calling him a liar, accusing him of drug abuse and serious crimes, and doing other actions to provoke anxiety in an individual who by definition has an

anxiety disorder; that is discriminatory and disparate treatment, unless the USSS conducts ALL of its polygraph examinations in the very same manner – which cannot be discerned without a full fact finding and hearing. To further claim that “the actual audio recording of the polygraph exam is irrelevant” in determining if such conduct occurred is simply lacking any credibility.

The USSS then asserts that “the Complainant does not offer any evidence that a fact-finder could use to conclude that his polygraph exam was invalid and not properly scored”, conveniently neglecting to mention that the only reason Mr. [REDACTED] cannot do so is because beyond any reasonable doubt the USSS either destroyed the evidence in this matter or failed to produce it as required by law during the discovery process, a crime which is still under active investigation (and has been open for over a year) by the Department of Homeland Security Office of the Inspector General (DHS-OIG).

The USSS then makes a materially false statement (which is only one of many in their opposition) that the Complainant has failed to offer any evidence, either in his Opposition to summary judgment, or now in his Appeal, to indicate that his exam was not properly evaluated. To perform a proper review or analysis of a polygraph exam requires “*at a minimum, a*

good audio recording of the exam. I would prefer to have both audio and video that would have been easily captured within the LX software, if used. The video is important as it may display facial expressions and movements of any examinee being tested. The audio and video also provides critical insight on whether the exam was properly administered.” Affidavit of Danny Seiler, Polygraph Expert hired by Complainant, Item No. 6.

The USSS then goes into great detail to assert how Mr. [REDACTED] was scored as having a significant response to a single question on his polygraph examination. However, it is irrelevant if Mr. [REDACTED] had a significant response to a question if his examiner Special Agent Ellen Ripperger was shouting at him or badgering him during his exam. If that was the type of exam administered to Mr. [REDACTED] then he did not fail his background investigation, he failed a polygraph examination that did not meet the standards of the National Center for Credibility Assessment (the governmental body for oversight, training, and regulation for DoD and federal polygraph examinations.) The question then becomes why Mr. [REDACTED] was given such an exam in the first place, and what motivation existed for giving him such an exam and not affording him a retest which has been demonstrated is routinely granted to other non-disabled employees.

The question at issue is not did Mr. [REDACTED] fail a polygraph exam, the question is did he fail an unethical polygraph exam that he was steered to fail by the examiner based on his mental disability.

USSS HAS FAILED TO DISCLOSE ADDITIONAL SIMILARLY SITUATED COMPARATORS TO THE COMPLAINANT

It has come to the attention of Mr. [REDACTED] through an anonymous message left at his attorney's office by someone who identified themselves as employed at the USSS, that the USSS has not been forthright with either the Complainant or the Court in this matter. There is a second similarly situated Comparator to Mr. [REDACTED] which was undisclosed by the USSS to either the Complainant, or to the Complainant's knowledge, the EEOC. Further, the fact that the USSS failed to disclose this fact during discovery suggests pretext on the part of the USSS; and if the USSS failed to disclose one, it no doubt hid the existence of other similarly situated comparators as well.

On knowledge and belief, another candidate for employment with the USSS, Alvario Richards, was polygraphed by Special Agent Ellen Ripperger. Alvario Richards like Mr. [REDACTED] was an outside applicant for a position with the USSS, underwent a polygraph examination by Special Agent Ellen Ripperger, but unlike Mr. [REDACTED] was not disabled and afforded

the opportunity to take an additional two polygraph examinations (for a total of three), unlike Mr. [REDACTED] who was afforded but a single polygraph examination.

**[REDACTED] AND TIGNOR ARE SIMILARLY SITUATED
COMPARATORS BY ANY REASONABLE DEFINITION**

Both Mr. Tignor and Mr. [REDACTED] were similarly situated comparators. As potential new employees, both Tignor and [REDACTED] were required to undergo the same background investigation as are all new USSS employees, and as such were equal in all relevant respects to this matter, thus making them similarly situated. The USSS argues that because Tignor had extensive prior employment with the Agency, and a prior successful polygraph examination with the USSS, that disqualifies him as a comparator. Tignor's prior employment is irrelevant to this matter because as previously articulated in the original appeal, his prior employment did not change the requirements for his background investigation to be rehired by the USSS (which were the same as Mr. [REDACTED] nor did his prior successful polygraph examination exempt him from having to take the same polygraph examination as Mr. [REDACTED] to be rehired. Tignor's background investigation would be the same as Mr. [REDACTED] whether he worked in the past for the

USSS, the FBI, or as a checkout clerk at a grocery store.

The USSS also erroneously claims that different decision makers were involved in the decision making process to offer Tignor and [REDACTED] polygraph examination retests to seek to invalidate them as similarly situated comparators. In reality there is a single security protocol at the USSS for background investigations, with a single chain of command. That protocol should have been followed identically for both Mr. Tignor and Mr. [REDACTED]. Ultimately the top of the chain of command at the USSS sets the policy that was responsible for the decisions made for both Tignor and [REDACTED] and to claim that an undisclosed differential in mid-level managers somehow invalidates Tignor and [REDACTED] as similarly situated comparators is disingenuous.

THE LACK OF A HEARING PORTENDS EEOC CREDIBILITY

The United States Secret Service has fought vigorously to prevent any hearings in this matter, and for good reason. One must recognize that even if Mr. [REDACTED] is ultimately found not to have been discriminated against, should it be discovered that Mr. [REDACTED] did in fact receive an unethical polygraph examination, or even a polygraph examination that was not conducted up to the standards of the National Center for Credibility

Assessment (the governmental body for oversight, training, and regulation for DoD and federal polygraph examinations), it presents a host of problems, potentially very expensive problems, for the United States Secret Service.

First, if Mr. [REDACTED] were not given a proper exam, then there is no reason to believe that other USSS applicants, including applicants in protected classes, were given valid exams either, and some of them MAY have been discriminated against by using the polygraph.

Second, the consequence of this is that at a minimum, every polygraph examination given by Special Agent Ellen Ripperger is potentially tainted and subject to review. If Special Agent Ellen Ripperger was taking direction from a higher authority on how this exam was conducted, it is highly likely every polygraph examination given to USSS applicants was fraudulent. The likely result of either of these scenarios would be a class action lawsuit against the USSS.

Third, the embarrassment of such an adverse finding would destroy what little credibility the United States Secret Service has left as a law enforcement agency in the wake of recent numerous scandals, perhaps subjugating it further under the Department of Homeland Security, rightly stripping it of nearly all autonomy, or perhaps even eliminating it in its

entirety.

Simply stated, the lack of a hearing will likely be seen as an attempt to bury this problem rather than resolve it, and erode what little respect many have for law enforcement which often is seen by the American people as immune from reproach or punishment, even when deservedly so. If for no other reason, a full hearing should be held to avoid the appearance of impropriety, as given the consequences to the USSS of holding a hearing, the potential exists for the public to infer (rightly or wrongly) that ex-parte communications were likely held regarding this matter with Judge Eates resulting in its dismissal without an opportunity for a fact finding.

SUMMARY

The USSS claims Mr. [REDACTED] did not successfully complete his background investigation, but the reality is the USSS never gave him the opportunity to complete his background investigation. The USSS presents the fact that Mr. [REDACTED] had a significant response to a relevant question on his polygraph examination as a legitimate nondiscriminatory reason for not hiring him. However, if Mr. [REDACTED] had a “significant response” on his polygraph because Special Agent Ellen Ripperger was yelling at him, deliberately agitating him, or otherwise molesting him during the exam

steering him to fail; that would indicate discriminatory animus toward Mr. [REDACTED] which is what is at issue here. Further, since the USSS has refused to disclose the audio recording of Mr. [REDACTED] exam, a recording which was certified as audible by no less than three USSS Special Agents, it cannot be discerned exactly what happened during Mr. [REDACTED] exam, including how his disability may have been leveraged by the USSS to deliberately fail him.

Mr. [REDACTED] has produced admissible factual evidence sufficient to demonstrate the existence of multiple genuine issues of material facts requiring resolution by the fact finder, and thus a determination of summary judgment by Judge Eates was wholly inappropriate. *Celotex*, 477 U.S. at 322-24.

Mr. [REDACTED] complaint made three primary allegations (and multiple adjuvant allegations), none of which were reduced to material fact in the USSS favor. Mr. [REDACTED] alleges (1) that he was not afforded the same due process nor were the standard best practices followed with regard to his security clearance adjudication and background check required for employment with the Secret Service, (2) that the investigative agents made inquiries about his disability that were expressly prohibited under Executive Order (E.O.) 12968 and in violation of Security Clearance Adjudication

Process, and (3) inappropriate hostile inquiries into his disability were made during his polygraph examination by Special Agent Ellen Ripperger. A review of the original appeal and the information supplied herein makes abundantly clear that none of these allegations were reduced to material fact in favor of the USSS, and it only takes a single one of them to be unresolved to invalidate the decision for summary judgment.

The entirety of the USSS Opposition is predicated on Mr. [REDACTED] failing the background check because he has a significant response to a single question on his polygraph examination. If the test was, as the evidence shows, improperly administered, the ostensible results are of no value; and it cannot be concluded that Mr. [REDACTED] failed either his polygraph examination or his background examination; and thus the USSS position that Mr. [REDACTED] was not qualified is completely devoid of any material support.

CONCLUSION

The United States Secret Service has demonstrated a consistent lack of credibility in this matter. It has beyond any reasonable doubt done most if not all of the following: destroyed evidence, withheld evidence, misstated facts, and made materially false and deceptive statements. It should not be rewarded for this behavior by the EEOC by dismissing this case without a

fact finding hearing to determine the truth of this matter, and to do so would be a gross miscarriage of justice.

For these and such other reasons as may become known, the judgment entered in this matter by Judge Antoinette Eates should be vacated and the matter remanded for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent to:

By fax and first class mail:
Equal Employment Opportunity Commission
Office of Federal Operations
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By email to:

Steven Giballa
Agency Representative
United States Secret Service
Steven.Giballa@usss.dhs.gov

on this 23rd day of April 2019.

Thomas J. Gagliardo

