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NOT RECOMMENDED FOR PUBLICATION

No. 22-5440

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JEFFRY THUL, Plaintiff-Appellant, v. DEBORAH HAALAND, in her official capacity, et al., Defendants-Appellees.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE

ORDER

(Filed Mar. 1, 2023)

Before: BOGGS, GRIFFIN, and MATHIS, Circuit Judges.

Jeffry Thul, a pro se Tennessee plaintiff, appeals the district court's judgment dismissing his federal civil rights complaint without prejudice under Federal Rule of Civil Procedure 4(m) for failure to effect timely service of the summons and complaint on the defendants. Thul moves the court to supplement the record on appeal and for an order reinstating him to his former position. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

Thul was employed by the Department of the Interior (DOI) as a supervisory facility operations specialist at the Chickamauga and Chattanooga National Military Park until he was terminated in September 2019. On December 23, 2020, Thul paid the district-court filing fee and filed a pro se complaint against the Acting Secretary of the Interior and numerous other federal officers, employees, and contractors, asserting claims for constitutional violations and violations of various employment-discrimination statutes. On March 19, 2021, Thul filed an amended complaint that added the United States, Equal Employment Opportunity Commission (EEOC) Chair Charlotte Burrows, and other individuals as new defendants, expanded the number of claims, and added his wife as a plaintiff. Except for the Acting Secretary and Chair Burrows, Thul sued the individually named defendants in both their official and individual capacities.

On April 19, 2021, the defendants moved to dismiss Thul's amended complaint under Federal Rule of Civil Procedure 12(b)(5) for insufficient service of process.

On June 28, 2021, the district court ordered Thul to show cause why the amended complaint should not be dismissed for failure to effect proper service of the summons and complaint on the defendants within 90 days of filing, as required by Rule 4(m). The court found that Thul had not complied with all of Rule 4(i)'s requirements for serving process on the United States and its agencies, officers, and employees and that he had made no attempt at all to serve process on the

individually named defendants in their individual capacities. The court gave Thul 30 days to show cause for failing to serve the unserved defendants and to correct other deficiencies in service, cautioning Thul that failure to comply with its order would result in dismissal of the amended complaint without prejudice for failure to prosecute.

On July 26, 2021, Thul answered the show-cause order, contending that he had corrected service deficiencies as to the United States, Interior Secretary Deborah Haaland (who in the interim had been substituted as a party for the Acting Secretary under Rule 25(d)), and EEOC Chair Burrows and that his email service of the summons and complaint on the DOI's Office of Civil Rights was sufficient service as to all of the remaining unserved individual defendants. Secretary Haaland responded that that the DOI and nonparty employees were not authorized to accept service on behalf of any of the individual defendants. In reply, Thul argued that he had exercised diligence in attempting to effect service, and he reiterated his contention that his email service of the summons and complaint on the DOI was sufficient. Thul then filed a supplemental brief in which he argued that he had meritorious claims and that he should therefore receive an extension of time to effect service because a re-filed complaint would be barred by the statute of limitations.

The district court found, however, that Thul had not cured the original service deficiencies as to the

United States and Secretary Haaland[1] and that he still had made no attempt to effect service on the individual defendants. In reaching the latter conclusion, the court found that service of the summons and complaint on the DOI was insufficient as to the individual defendants. Moreover, the court found that Thul had not filed proof of service on the individual defendants, as required by Rule 4(l)(1). The district court thus concluded that Thul had not shown good cause under Rule 4(m) for failing to effect timely service on the defendants. The court therefore granted the defendants' motion to dismiss and dismissed Thul's amended complaint without prejudice. Even though Thul had not shown good cause, the court did not consider whether he was entitled to a discretionary extension of time to effect proper service on the defendants.

On appeal, Thul argues that he failed to complete service because he was unable to understand and then implement the controlling rules due to the emotional trauma he suffers as a result of the defendants' allegedly discriminatory and retaliatory conduct. Thul contends that he exercised reasonable diligence in attempting to effect service under the circumstances and therefore that his failure to strictly comply with Rule 4 should be excused. He also seeks a lenient application of Rule 4 because his claims are now time-barred.

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[1] In the interim, Thul voluntarily dismissed his claims against Chair Burrows and other individual employees of the EEOC that he had sued.

He otherwise argues the merits of his underlying claims.

The defendants respond that Thul never accomplished proper service on any of the defendants, arguing that (a) Thul did not complete all of the steps for service on the United States and the government employees that he had sued in their official capacities, and (b) he could not simultaneously serve all of the individual defendants by simply emailing his summons and complaint to the DOI because there is no evidence that the DOI was authorized to accept service on behalf of those defendants. The defendants argue that Thul's efforts to accomplish service were invalid for another reason—he attempted to serve the defendants himself, which is prohibited by Rule 4(c)(2). *See* Fed. R. Civ. P. 4(c)(2) ("Any person who is at least 18 years old and not a party may serve a summons and complaint."). Further, the defendants argue that Thul's contention that his mental disorders prevented him from understanding the procedures for proper service is contradicted by the lengthy and citation-filled pleadings that he filed in the district court.

We review a district court's judgment dismissing a complaint for failure to effect timely service of process for an abuse of discretion. *Byrd v. Stone*, 94 F.3d 217, 219 (6th Cir. 1996). "An abuse of discretion exists when the reviewing court is firmly convinced that a mistake has been made." *Romstadt v. Allstate Ins. Co.*, 59 F.3d 608, 615 (6th Cir. 1995). Rule 4(c) states:

> If a defendant is not served within 90 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period . . .

Fed. R. Civ. P. 4(m). If the plaintiff shows good cause for not effecting timely service of process, then extending the time for service is mandatory. *United States v. Oakland Physicians Med. Ctr., LLC*, 44 F.4th 565, 568 (6th Cir. 2022).

We have defined "good cause" as "a reasonable, diligent effort to timely effect service of process." *Johnson v. Smith*, 835 F. App'x 114, 115 (6th Cir. 2021) (quoting *Pearison v. Pinkerton's Inc.*, 90 F. App'x 811, 813 (6th Cir. 2004)). But "lack of prejudice and actual notice are insufficient" to establish good cause, as are "mistake of counsel or ignorance of the rules." *Id.* (cleaned up). We have identified three scenarios constituting good cause under Rule 4(m): (1) when the defendant has intentionally evaded service; (2) when the district court has committed an error; and (3) when a pro se plaintiff suffers from a serious illness. *See Savoie v. City of East Lansing*, No. 21-2684, 2022 WL 3643339, at *4 (6th Cir. Aug. 24, 2022). The common denominator in these situations "is that something outside the plaintiff's control prevents timely service." *Id.*

Here, Thul concedes that he did not properly serve any of the defendants with the summons and amended complaint within 90 days.[2] And we find that the district court did not abuse its discretion in concluding that Thul did not establish good cause for his failure to do so.

Although Thul argues that he made a diligent effort to serve the defendants, the record does not support that contention. Most pointedly, Thul made no effort to serve any of the individual defendants with the summons and complaint, despite being advised that the DOI was not authorized to accept service on behalf of any the defendants. Nor do we find that Thul's mental disorders excused his failure to effect timely service. As the defendants argue, Thul's mental disorders did not preclude him from filing voluminous pleadings in the district court that required extensive legal research. So we are unpersuaded that these same mental disorders were an external impediment to Thul's ability to effect proper and timely service of process. Thul's case is therefore distinguishable from *Habib v. General Motors Corp.*, 15 F.3d 72 (6th Cir. 1994), where the pro se plaintiff's "paralysis, severe muscle spasms, a bladder infection and numerous trips to the Cleveland Clinic for neurological and physical

[2] Even if there were some dispute as to whether any of the defendants actually had received a copy of the summons and complaint, service was invalid because Thul served or tried to serve the defendants himself, which is prohibited by Rule 4(c)(2). *Cf. Constien v. United States*, 628 F.3d 1207, 1215 (10th Cir. 2010) ("[E]ven when service by mail is proper, it cannot be a party who mails it.").

therapy kept him from properly serving defendant." *Id.* at 73. Otherwise, Thul's misunderstanding of the governing rules did not constitute good cause. *See Smith*, 835 F. App'x at 115.

Although the district court did not abuse its discretion in concluding that Thul had not shown good cause under Rule 4(m), it retains discretion to grant an extension to effect service even if the plaintiff does not show good cause. *Oakland Physicians*, 44 F.4th 568; *see also Savoie*, 2022 WL 3643339, at *2. In deciding whether to grant a discretionary extension of time, the district court should consider:

> (1) whether an extenstion.of time would be well beyond the timely service of process; (2) whether an extension of time would prejudice the defendant other than the inherent prejudice in having to defend the suit; (3) whether the defendant had actual notice of the lawsuit; (4) whether the court's refusal to extend time for service substantially prejudices the plaintiff, i.e., would the plaintiff's lawsuit be time-barred; (5) whether the plaintiff had made any good faith efforts to effect proper service of process or was diligent in correcting any deficiencies; (6) whether the plaintiff is a pro se litigant deserving of additional latitude to correct defects in service of process; and (7) whether any equitable factors exist that might be relevant to the unique circumstances of the case.

Oakland Physicians, 44 F.4th at 569.

The district court did not have the benefit of our decision in *Oakland Physicians* when it ruled and therefore did not specifically consider by name and number the seven factors that should be considered in deciding whether to grant a discretionary extension of time. But the district court did take due consideration of those factors when, for example, it made allowance for the fact that the appellant is pro se (factor 6), that the extension would be well beyond the time for timely service of process (factor 1), and that the appellant had not made good faith efforts to effect proper service and was not diligent in correcting deficiencies (factor 5). Although Thul argues that his claims are not time-barred, he had plenty of opportunity to cure the original service deficiencies but made no attempt to effect service on the individual defendants.

For these reasons, remanding for rote consideration of the numbered factors as set forth in *Oakland Physicians* would not change the outcome, would be a waste of resources, and is not required by a fair reading of *Oakland Physicians* as binding precedent.

For these reasons, we **AFFIRM** the district court's judgment. We **DENY** all other pending motions as moot.

ENTERED BY ORDER
OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

JEFFRY THUL AND SUSAN THUL,	)	
Plaintiffs,	)	Case No. 1:20-cv-354
v.	)	Judge Travis R. McDonough
DEB HAALAND, Secretary, Department of Interior, *et al.*,	)	Magistrate Judge Christopher H. Steger
Defendants.	)	

MEMORANDUM OPINION

(Filed Mar. 24, 2022)

Before the Court is the United States of America and Secretary of the Department of the Interior Deb Haaland's ("the Secretary") motion to dismiss. (Doc. 13.) For the following reasons, the motion will be **GRANTED**.

I. PROCEDURAL BACKGROUND

Plaintiff Jeffrey Thul filed this action *pro se* on December 23, 2020. (Doc. 1.) Pursuant to the Court's order governing motions to dismiss (Doc. 5), the parties met and conferred about the possibility of Thul filing an amended complaint. (Doc. 8.) Thul agreed to amend certain matters in his complaint in lieu of the Secretary filing a motion to dismiss as to certain claims and

parties. (*Id.*) Thul filed an amended complaint *prose* on March 19, 2021. (Doc. 11.) However, instead of removing claims and defendants as discussed between the parties, the amended complaint added new legal theories, named twenty-nine different defendants, and named his wife as an additional plaintiff. (Doc. 11). These defendants include: (1) the United States of America; (2) the Secretary;[1] (3) Charlotte Burrows, Chair, Equal Employment Opportunity Commission ("EEOC"); (4) Paul Daniel Smith; (5) Rose Blankenship; (6) three unknown EEOC employees;[2] (7) Amy Risley, owner of Resolution; (8) four or more unknown Resolution employees; (9) Nhien Tony Nguyen; (10) Ken Brodie; (11) Dave Davies; (12) John Esworthy; (13) Robert Vogel; (14) Sara Craighead; (15) Stan Austin; (16) Ed Buskirk; (17) Lynda Glover; (18) Sherri Fields; (19) Lance Hatten; (20) Buffy Bryant; (21) Greg Robinson; (22) Brad Bennett; (23) Ronald Hayes, and (24) Reggie Tiller.[3] Because the amended complaint did

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[1] Thul's amended complaint named Scott de la Vega as the Acting Secretary of the Department of Interior. Secretary Haaland has been substituted as a party pursuant to Fed. R. Civ. P. 25(d).

[2] On September 1, 2021, Thul stipulated to the dismissal of the EEOC Defendants-Charlotte Burrows and all employees of the EEOC. (Doc. 26.) Accordingly, they have already been dismissed and the claims against them will not be considered on this motion to dismiss.

[3] All defendants except for the United States and the Secretary have been sued in their individual capacities. (Doc. 11, at 1, 8–25; Doc. 11-1, at 1–5.) Defendants Smith, Blankenship, Hayes, Nguyen, Brodie, Davies, Esworthy, Vogel, Craighead, Austin, Glover, Buskirk, Hatten, Fields, Bryant, Robinson, Bennett, and

not resolve the deficiencies that the parties discussed when they conferred, the United States of America and the Secretary (collectively, "the Appeared Defendants") moved to dismiss Thul's amended complaint for failure to serve and failure to state a claim. (Doc. 13.) The motion is now ripe for the Court's review.

II. STANDARD OF LAW

Under the Federal Rules of Civil Procedure, the procedure for service of process is as follows:

> (1) *In General.* A summons must be served with a copy of the complaint. The plaintiff is responsible for having the summons and com plaint served within the time allowed by Rule 4(m) and must furnish the necessary copies to the person who makes service.
>
> (2) *By Whom.* Any person who is at least 18 years old and not a party may serve a summons and complaint.
>
> (3) *By a Marshal or Someone Specially Appointed.* At the plaintiff's request, the court may order that service be made by a United States marshal or deputy marshal or by a person specially appointed by the court. The court must so order if the plaintiff is authorized to proceed in forma pauperis under 28 U.S.C. § 1915 or as a seaman under 28 U.S.C. § 1916.

Tiller have also been sued in their official capacities. (Doc. 11 at 11–25; Doc. 11–1, at 1–5.)

Fed. R. Civ. P. 4(c). The following methods may be used to serve an individual within the United States:

> Unless federal law provides otherwise, an individual – other than a minor, an incompetent person, or a person whose waiver has been filed – may be served in a judicial district of the United States by:
>
> (1) following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made; or
>
> (2) doing any of the following:
>
> (A) delivering a copy of the summons and of the complaint to the individual personally;
>
> (B) leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; or
>
> (C) delivering a copy of each to an agent authorized by appointment or by law to receive service of process.

Fed. R. Civ. P. 4(e).

Service of the United States or its agencies, corporations, officers, and employees, is governed by Fed. R. Civ. P. 4(i). To serve the United States, a party must:

> (A)(i) deliver a copy of the summons and of the complaint to the United States attorney

> for the district where the action is brought – or to an assistant United States attorney or clerical employee whom the United States attorney designates in a writing filed with the court clerk – or
>
> > (ii) send a copy of each by registered or certified mail to the civil-process clerk at the United States attorney's office;
> >
> > (B) send a copy of each by registered or certified mail to the Attorney General of the United States at Washington, D.C.; and
> >
> > (C) if the action challenges an order of a nonparty agency or officer of the United States, send a copy of each by registered or certified mail to the agency or officer.

Fed. R. Civ. P. 4(i)(1)(A)–(C). To serve an officer or employee of the United States sued in their official capacity, "a party must serve the United States and also send a copy of the summons and of the complaint by registered or certified mail to the . . . officer, or employee." Fed. R. Civ. P. 4(i)(2). Similarly, "[t]o serve a United States officer or employee sued in an individual capacity . . . a party must serve the United States and also serve the officer or employee under Rule 4(e), (f), or (g)." Fed. R. Civ. P. 4(i)(3).

The plaintiff has the burden of establishing that proper service of process has occurred. *Shires v. Magnavox Co.*, 74 F.R.D. 373, 377 (E.D. Tenn. 1977). Additionally, Federal Rule of Civil Procedure 4(1) provides that, "[unless service is waived, proof of service must be made to the court," and "[e]xcept for service by a

United States marshal or deputy marshal, proof must be by the server's affidavit." Federal Rule of Civil Procedure 4(m) provides the timeline for service:

> If a defendant is not served within 90 days after the complaint is filed, the court – on motion or on its own after notice to the plaintiff – must dismiss the action without prejudice against that defendant or order that service he made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period.

The Court notes that Thul is proceeding in this action *pro se*. The Court is mindful that *pro se* pleadings are liberally construed and are held to less stringent standards than those prepared by attorneys. *Bridge v. Oewen Fed. Bank*, 681 F.3d 355, 358 (6th Cir. 2012). However, those who proceed without counsel must still comply with the procedural rules that govern civil cases. *Lewis v. Hawkins*, No. 3:16-CV-315-TAV-HBG, 2017 WL 4322825, at *4 (E.D. Term. Sept. 28, 2017); *see also Durante v. Fairlane Town Ctr.*, 201 F. App'x 338, 344 (6th Cir. 2006); *Whitson v. Union Boiler Co.*, 47 F. App'x 757, 759 (6th Cir. 2002). The United States Supreme Court has "never suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel." *McNeil v. United States*, 508 U.S. 106, 113 (1993). Instead, the Supreme Court counsels that "strict adherence to the procedural requirements specified by

the legislature is the best guarantee of evenhanded administration of the law." *Id.*

III. ANALYSIS

The Appeared Defendants moved to dismiss the amended complaint, in part, for insufficient service of process under Federal Rule of Civil Procedure 12(b)(5). (Doc. 14, at 8–10.) At the time the Appeared Defendants filed their motion, there was no evidence in the record to suggest that Thul had even attempted to timely serve Paul Daniel Smith, Rose Blankenship, Nhien Tony Nguyen, Ken Brodie, Dave Davies, John Esworthy, Robert Vogel, Sara Craighead, Stan Austin, Ed Buskirk, Lynda Glover, Sherri Fields, Lance Hatten, Buffy Bryant, Greg Robinson, Brad Bennett, Ronald Hayes, or Reggie Tiller in either their individual or official capacities, Amy Risley, or the four or more unknown Resolution employees in their individual capacities. In fact, Thul has not filed summonses for any Unserved Individual Defendants,[4] and a summons *must* be served with a copy of the complaint under Fed. R. Civ. P. 4(c) to effectuate service. He filed summonses for the Appeared Defendants but did not specifically address them to any individual authorized to accept service on their behalf. (Doc. 7.) Pursuant to Federal Rule of Civil Procedure 4(m), the Court

[4] "Unserved Individual Defendants" means all defendants sued in their individual capacity in this action, regardless of whether they were also served in their official capacity. The Unserved Individual Defendants include all defendants except for the United States and the Secretary.

ordered Thul to file a response showing good cause as to why the action should not have been dismissed without prejudice for his failure to serve Defendants in a timely manner. (Doc. 18.)

Thul responded to the show-cause order by stating he believed he effectuated service on all the Unserved Individual Defendants and the Secretary by emailing DOICivilRights@ios.doi.gov on July 23, 2021. (Doc. 20, at 2, 5–7.) As to the United States, Thul represented that a summons and complaint were sent to the Civil-Process Clerk for the U.S. Attorney for the Eastern District of Tennessee, and an Assistant United States Attorney acknowledged receipt. (*Id.* at 2.) The Appeared Defendants then replied that sending an email to that address is not a proper means of service and that Thul would have to deliver a copy of the summons and the complaint to each of the Unserved Individual Defendants personally or pursue another method in compliance with Federal Rule of Civil Procedure 4(i). (Doc. 21.)

Thul did not thereafter effectuate or attempt to effectuate service on the Unserved Individual Defendants. (*See generally* Doc. 23.) Thul also did not submit proof of service by the server's affidavit for any defendant, as required by Federal Rule of Civil Procedure 4(1)(1) and as ordered by the Court (Doc. 18, at 5–6). He appears to fault the Department of the Interior ("DOI") for this failure, stating, "the Agency will, at some point, have to notify the Plaintiff who the Agency has designated 'as authorized by appointment or by law to receive service of process' so he can effectuate

service on the Defendants." (Doc. 23, at 7.) DOI, however, is not required under Rule 4 to notify Thul of any authorized agents, and the plaintiff has the burden of establishing that proper service of process has occurred. *Shires v. Magnavox Co.*, 74 F.R.D. 373, 377 (E.D. Tenn. 1977).

"[W]ithout proper service of process, consent, waiver, or forfeiture, a court may not exercise personal jurisdiction over a named defendant." *King v. Taylor*, 694 F.3d 650, 655 (6th Cir. 2012). Despite notice that his service was ineffective and unproven, a Court order to show cause, further notice that his service was ineffective, and months to cure the deficiencies, Thul has not served or proven service as to any defendant in this case. Accordingly, the Appeared Defendants' motion to dismiss for failure to serve will be **GRANTED** (Doc. 13). Because Thul's failure to serve the defendants disposes of the case, the Court will not consider the remaining arguments in the Appeared Defendants' motion to dismiss.

IV. CONCLUSION

For the foregoing reasons, the Appeared Defendants' motion to dismiss (Doc. 13) is **GRANTED**. Accordingly, pursuant to Federal Rules of Civil Procedure 4(m), Plaintiffs' claims against all Defendants are hereby **DISMISSED WITHOUT PREJUDICE**.

AN APPROPRIATE JUDGMENT SHALL ENTER.

/s/ Travis R. McDonough
TRAVIS R. MCDONOUGH
UNITED STATES
DISTRICT JUDGE

No. 22-5440

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JEFFRY THUL,
Plaintiff-Appellant,
v.
DEBORAH HAALAND, in her official capacity, et al.,
Defendants-Appellees.

ORDER

(Filed Mar. 23, 2023)

Before: BOGGS, GRIFFIN, and MATHIS, Circuit Judges.

Jeffry Thul, a pro se Tennessee plaintiff, petitions the court for a panel rehearing of our order of March 1, 2023, affirming the district court's judgment dismissing his federal civil rights complaint without prejudice under Federal Rule of Civil Procedure 4(m) for failure to effect timely service of the summons and complaint on the defendants. Thul moves the court for an expedited decision on his petition and for leave to submit updated medical evidence.

Upon consideration, we **DENY** the petition because Thul has not cited any misapprehension of law or fact that would alter our prior decision. *See* Fed. R.

App. P. 40(a)(2). We **DENY** all other pending motions as moot.

ENTERED BY ORDER
OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

[SEAL] United States Department of the Interior
OFFICE OF THE SECRETARY
OFFICE OF DIVERSITY, INCLUSION
AND CIVIL RIGHTS
Washington, D.C. 20240

TRANSMITTAL VIA ELECTRONIC MAIL

JeffryThul@gmail.com

Jeffry Thul
9509 Balata Drive
Ooltewah, Tennessee, 37363

Subject: Final Agency Decision
Jeffry Thul v. David Bernhardt, Secretary, U.S. Department of the Interior
Agency Case No. DOI-NPS-20-0382

Dear Jeffry Thul:

After careful review and analysis of your Equal Employment Opportunity (EEO) complaint and the Report of Investigation (ROI), the U.S. Department of the Interior (DOI or Agency), Office of Diversity, Inclusion and Civil Rights (ODICR) takes final action on your complaint by issuing this Final Agency Decision (FAD).

ODICR finds that you **have not** been subjected to disparate treatment based on reprisal (Agency Case Nos. DOI-NPS-18-0033, DOI-NPS-18-057 I) as alleged under Title WI of the Civil Rights Act of 1964.

ODICR finds that you **have** been subjected to disparate treatment and denial of reasonable accommodation

based only on disability (mental), in violation of the Rehabilitation Act.

I. Statement of the Claims

Whether Jeffry Thul (Complainant) has been subjected to disparate treatment on the bases of disability (mental) and reprisal (Agency Case Nos. DOI-NPS-18-0033, DOI-NPS-18-0571) when on September 17, 2019,[1] the Assistant Regional Director, Administration (RMO2) issued to Complainant a non-disciplinary removal for inability to perform the duties of his position.

II. Procedural History

On September 23, 2019, Complainant made initial contact with the EEO Counselor. ROI, Ex. B, p. 65. On December 18, 2019, Complainant participated in an initial interview with the EEO Counselor. ROI, Ex. B, p. 65. The EEO Counselor sought to resolve Complainant's allegations to no avail. ROI, Ex. B, p. 70. On May 13, 2020, the EEO Counselor issued to Complainant a Notice of Final Interview and a Notice of Right to File a Formal Complaint of Discrimination (NORTF). RO1, Ex. B, p. 80. On May 22, 2020, Complainant acknowledged receipt of the NORTF via signature. RO1, Ex. B,

[1] The Notice of Acceptance originally misidentified the date of Complainant's removal as September 13, 2019. ROI, Ex. C-1, p. 107. However, September 13, 2019, is the date that Complainant received the Non-disciplinary Removal Decision for Inability to Perform Duties of Your Position ("Removal Decision"), which became effective on September 17, 2019. ROI, Ex. F-9, p. 218.

p. 82. On May 22, 2020, Complainant filed this formal complaint, pursuant to the Rehabilitation Act and Title VII of the Civil Rights Act of 1964. ROI, Ex. A, p. 16.

On June 3, 2020, the Agency acknowledged receipt of Complainant's formal complaint in a Notice of Acknowledgement. ROI, Ex. C-1, p. 104. On June 5, 2020, the Agency accepted Complainant's claims in a Notice of Acceptance, pursuant to the Equal Employment Opportunity Commission's (EEOC's) Regulations found in Title 29 Code of Federal Regulations (29 C.F.R.), § 1614. ROI, Ex. C-1, p. 107.

On June 19, 2020, the Agency ordered a formal investigation, which was conducted through July 28, 2020. ROI, Ex. G-3, p. 282.

On September 8, 2020, the Agency emailed Complainant the ROI, which included the investigative summary and a notice of rights. The Agency notified Complainant that there is no right to request a hearing before the EEOC, as this case is a "Mixed Case complaint" appealable to the Merit Systems Protection Board (MSPB). This FAD thus issues in accordance with 29 C.F.R. § 1614.302(d)(2).

III. Statement of the Facts

Whether Complainant has been subjected to disparate treatment on the bases of disability (mental) and reprisal (Agency Case Nos, DOI-NPS-18-0033, DOI-NPS-18-0571) when:

1. For the five years[2] leading up until September 17, 2019, Complainant was a GS-1640-12 Supervisory Facility Operations Specialist with the Chickamauga and Chattanooga Military Park ("Park") in Chattanooga, Tennessee. ROI, Ex. F-1, p. 114.

2. In his role as Supervisory Facility Operations Specialist, Complainant was responsible for making and implementing decisions affecting the Park's management, policy, and operations; complying with federal and state regulations, including building codes; and managing a comprehensive safety and training program. ROI, Ex. F-1, p. 115. The essential functions of his position also included monitoring and evaluating maintenance programs; performing and maintaining asset inventories and condition assessments; developing and implementing projects, including facility modifications; and managing construction processes. ROI, Ex. F-7, p. 206.

3. Complainant self-identified as being disabled due to his Chronic Post-Traumatic Stress Disorder (PTSD) and Unspecified Depressive Disorder ("depression"). ROI, Ex. F-1, p. 116. Complainant's psychological impairments included: reduced object recall, a short attention span, limited concentration, decreased focus on tasks, psychomotor retardation, hyperdistractability and hyperactivity, avoidance, hyperarousal, depressed mood, moderate anxiety, and passive suicidal ideation, ROI, Ex. F-1, p. 117. Complainant's physical

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[2] The ROI does not contain Complainant's exact start date for his position of record.

impairments included: symptoms of tiredness, decreased energy, occasional crying spells, and significant weight loss of 30 pounds in four months. ROI, Ex. F-1, p. 117.

4. Complainant's prior EEO activity included Agency Case Nos. DOI-NPS-18-0033 (formal complaint filed December 11, 2017), and DOI-NPS-18-0571 (formal complaint filed October 18, 2018), as well as his reasonable accommodation requests related to his PTSD and depression. ROI, Ex. F-1, p. 118.

5. At all times relevant to this complaint, Complainant's first-level supervisor was the GS-14 Superintendent (RMO1) at the Park. ROI, Ex. F-1, p. 116. RMO1 learned of Complainant's medical conditions in August[3] of 2017, when Complainant' provided Park management with medical documentation of his diagnosis. ROI, Ex. F-3, p. 164. RMO1 learned of Complainant's prior EEO activity when he was interviewed as a witness and RMO for Complainant's previous EEO complaints in October of 2017, February of 2018, and April of 2019. ROI, Ex. F-3, p. 166.

6. The deciding official on Complainant's removal was the Associate Regional Director, Administration (RMO2), in Atlanta, Georgia. ROI, Ex. F-2, p. 144. RMO2 claimed that he learned of Complainant's medical conditions in spring of 2019. ROI, Ex. F-2, pp.

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[3] There is evidence that Complainant provided the Agency with medical documentation related to his diagnoses in July of 2017, but it is unclear when RMO1 received that documentation. ROI, Ex. G-4, pp. 305-306; Ex. F-3, p. 167; Ex. F-9, p. 219.

145-146. Although RMO2 was not in Complainant's chain of command, his supervisor was RMO3, Complainant's third-level supervisor. ROI, Ex. F-2, p. 145. In his prior formal EEO complaints, Complainant had accused RMO2 of committing misconduct, mismanagement, and unethical behavior. ROI, Ex. F-1, p. 123. RMO2 stated that he learned of Complainant's prior EEO activity in spring of 2019, when he was interviewed as a witness regarding a separate denial of reasonable accommodation claim. ROI, Ex. F-2, p. 147.

7. On January 26, 2017, Complainant was the first responder in a January 2017 active shooting where a visitor committed suicide in the men's restroom at the Park. ROI, Ex. F-1, p. 116; Ex. G-4, p. 305. Complainant submitted extensive medical documentation stating that the January 2017 active shooting incident directly caused his PTSD and depression, although he did not receive official diagnoses until July 2017. ROI, Ex. F-1, p. 116; Ex, F-10, p, 236.

8. Complainant stated that on July 21, 2017, he "left the Park in extreme psychological distress" after experiencing a PTSD-related breakdown. ROI, Ex. G-4, p. 305. The next business day, July 24, 2017, was the last day that Complainant worked in an on-duty status. ROI, Ex, F-9, p. 219; Ex. G-4, p. 305.

9. On July 25, 2017, Complainant received an official diagnosis of PTSD and depression, and provided the Agency with that documentation. ROI, Ex. G-4, pp. 305-306; Ex. F-3, p. 167. On August 7, 2017, Complainant submitted a Family and Medical Leave Act

(FMLA) request to the Agency requesting short-term disability leave from July 25, 2017 through September 15, 2017. ROI, Ex. G-4, p. 306. On November 16, 2017, Complainant also provided the Agency with documentation for his Department of Labor Office of Worker Compensation Programs (OWCP) claim for PTSD. ROI, Ex. G-4, p. 309.

10. Complainant submitted additional FMLA documentation requesting extensions to his short-term disability leave on: September 11, 2017; October 13, 2017; December 8, 2017; January 25, 2018; March 14, 2018; April 4, 2018; and April 13, 2018. ROI, Ex, G-4, pp. 307-314.

11. During this time, Park management filled Complainant's position on a temporary basis. ROI, Ex. F-3, p. 166.

12. In May of 2018,[4] Complainant provided the Agency with updated medical documentation affirming his continued medical inability to return to his position at the Park and requesting reassignment to a different position as a reasonable accommodation.

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[4] Although there is evidence that on November 8, 2017, and April 16, 2018, Complainant received medical evaluations recommending his transfer to work at a different park for four hours a day, there is no indication that he provided this documentation to the Agency before May of 2018. ROI, Ex. F-10, p. 235. There is also evidence of a conflicting January 25, 2018 medical evaluation advising Complainant not to return to work. ROI, Ex. F-10, p. 235.

ROI, Ex. F-10, p. 229; Ex. F-3, p. 167. RMO I recalled receiving this request. ROI, Ex. F-3, p. 167.

13. The ROI for Complainant's previous EEO complaint, Agency Case No. DOI-NPS-18-0571 (PROI) contained a May II, 2018 Medical Documentation Employee Questionnaire for Reassignment from Complainant, PROI, Ex. F-10, p. 525-527. According to the Questionnaire, Complainant sought to be reassigned into an equivalent position at another park within the local commuting area of his home in Chattanooga, Tennessee. PROI, Ex. F-10, p. 525-527; ROI, Ex. F-10, p. 229; Ex, F-3, p. 167; Ex. G-4, p, 314.

14. At RMO1's direction, an Employee Relations Specialist received Complainant's Questionnaire and forwarded it and Complainant's reassignment request to NPS's Human Resources (HR) Staffing Office assigned to the Park. PROI, Ex. F-4, pp. 440-441. There is no information in the ROI regarding how or if NPS's HR Staffing Office responded to Complainant's May 2018 request for reassignment. However, Agency records indicate that NPS's HR Staffing Office may have been under the impression that in August of 2018, OWCP had notified Complainant that he needed to provide additional information to support his reassignment request. PROI, Ex. F-6, p. 450. Complainant provided additional information in support of his reassignment request in September of 2018 and in December of 2018, PROI, Ex. F-6, p. 450.

15. On January 29, 2019, Complainant provided the Agency with a December 17, 2018 evaluation from

an OWCP doctor which confirmed that Complainant continued to experience symptoms of PTSD and depression. ROI, Ex. F-10, pp. 236-241. The OWCP doctor noted that Complainant is unable to drive to the park where the shooting took place," and that Complainant "attempted to go to the park, [but] he was unable to enter the park due to excessive anxiety and thoughts of past trauma, and had symptoms of increased scary thoughts." ROI, Ex. F-10, pp. 237, 240. Based on this, the OWCP doctor concluded that Complainant "is not able to perform the date of injury job." ROI, Ex. F-10, p. 240.

16. However, the OWCP doctor also observed that Complainant was "very eager to go back to work for any National Park Service," and that Complainant "may benefit from working in a different park to heal him from the past trauma." ROI, Ex. F-10, p. 240. Complainant also informed the Agency that he could work up to four hours per day, or 20 hours per week, at another location. ROI, Ex. F-3, p. 167; Ex. F-10, p. 229.

17. On February 12, 2019, NPS Human Resources (HR) initiated a reassignment job search as a reasonable accommodation for Complainant. ROI, Ex. F-9, pp. 225, 227; Ex. F-10, p. 230. Complainant allegedly informed the Agency that he would not accept a reassignment position outside of his local commuting area of Fort Oglethorpe, Georgia. ROI, Ex. F-9, p. 227; Ex. F-10, p. 230. As there are no NPS sites other than the Park within the local commuting area, NPS expanded the reassignment job search to other DOI bureaus. ROI, Ex. F-9, p. 227. Based on Complainant's

resume and position description, the Agency determined that Complainant would be qualified for positions in the facilities, maintenance, administrative, and acquisition series. ROI, Ex. F-9, p. 227.

18. On March 18, 2019, an NPS RR Assistant informed the Agency that HR had "received 2 negative responses from [DOI] bureaus and have not heard back from any others" regarding Complainant's reassignment job search. ROI, Ex. F-9, p. 226.

19. There is no information in the ROI regarding the methodology that NPS HR and the other DOI bureaus used to conduct Complainant's reassignment job search, which DOI bureaus provided negative responses, and whether and how the remaining DOI bureaus responded to NPS HR's inquiry regarding Complainant's reassignment job search.

20. On April 1, 2019, the NPS OWCP Coordinator concluded that NPS's reassignment job search had been unsuccessful. ROI, Ex. F-9, p. 225; Ex. F-3, p. 167-1.68. The NPS OWCP Coordinator stated that there were no available positions meeting Complainant's work restrictions at other locations within NPS and other DOI bureaus. ROI, Ex. F-9, p. 225. Additionally, there were no telework-eligible positions available in the Park. ROI, Ex. F-9, p. 225. There is no information in the ROI regarding whether Complainant's reassignment job search included telework-eligible positions at other Parks, other NPS locations, or other DOI bureaus.

21. RMO2 stated that upon receiving the notification that the reassignment job search had been unsuccessful, Complainant did not vary the criteria for the reassignment job search. ROI, Ex. F-2, p. 148. There is no information in the ROI regarding whether the Agency had any available positions outside of Complainant's criteria that would have otherwise been suitable for reassignment; whether the Agency ever offered Complainant reassignment into such positions; or whether the Agency ever informed Complainant that his failure to vary the criteria for the reassignment job search could result in his removal.

22. On June 5, 2019, RMO1 issued to Complainant a Proposed Non-disciplinary Removal for Inability to Perform Duties of Your Position ("Proposed Removal"). ROI, Ex. F-10, p. 229. In the Proposed Removal, RMO1 stated his belief that removing Complainant would "promote the efficiency of the service." ROI, Ex. F-10, pp. 229-234. In the Proposed Removal, RMO1 applied the *Douglas*[5] factors to Complainant's situation, despite repeatedly noting that the Proposed Removal was non-disciplinary in nature, and that no offense had been charged. ROI, Ex. F-10, pp. 229-234. In the Proposed Removal, RMO1 also stated that "[Complainant's] inability to return to the park due to [his] medical condition has affected my

[5] In *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981), the MSPB established a non-inclusive list of criteria that supervisors must consider in determining an appropriate penalty to impose for an act of employee misconduct.

confidence in [his] inability to perform any of the essential duties of [his] position." ROI, Ex. F-10, p. 231.

23. RMO1 stated that by the time he proposed the removal on June 5, 2019, Complainant had been out of the Park for more than two years due to his medical conditions. ROI, Ex. F-3, p. 166; Ex. F-9, p. 219; Ex. G-4, pp. 305-314. Park management had been filling his position on a temporary basis in that time. ROI, Ex. F-3, p. 166. RMO1 stated that the position required "someone to be physically present in the Park for at least 40 hours a week, sometimes more to supervise employees in the Facilities and Maintenance Division, manage a division budget of over [$1 million], interact with other Park Division Chiefs, and occasionally [perform the duties of] Acting Superintendent." ROI, Ex. F-3, pp. 166-167; Ex. F-10, p. 230. RMO1 further stated that the position required varying contact with Park visitors and partners, the news media, and other members of the public. ROI, Ex. F-3, p. 167; Ex. F-10, p. 230. Based on this, RMO1 proposed Complainant's removal due to his inability to perform the essential functions of the position, so that the NPS could fill the role on a permanent basis. ROI, Ex. F-3, p. 167.

24. The Proposed Removal did not include any information regarding whether the Agency had considered alternative reasonable accommodations which would have allowed Complainant to perform the essential functions of his position. ROI, Ex. F-10, pp. 229-234. Nor did the Proposed Removal contain any analysis regarding whether any of the requested or

considered accommodations would have posed an undue hardship to the Agency. ROI, Ex. F-10, pp. 229-234.

25. On June 21, 2019, Complainant notified RMO3, who was both his third-line supervisor and RMO1's first-line supervisor, that he felt that RMO1 and RMO2 were harassing him.[6] ROI, Ex. A, p. 54; Ex. F-1A, p. 123; Ex. F-2, pp. 158-159. The ROI does not contain a response from RMO3.

26. On July 8, 2019, Complainant emailed RMO2 to ask for an extension on his deadline to respond to the Proposed Removal. ROI, Ex. F-2, p. 157. On July 8, 2019, RMO2 extended Complainant's response deadline to July 23, 2019. ROI, Ex. F-2, p. 157. On July 23, 2019, Complainant emailed RMO2 his rebuttal to the Proposed Removal.[7] ROI, Ex. F-1, p. 121.

27. On August 2, 2019, Complainant requested to return to duty. ROI, Ex. A, p. 58. On August 9, 2019, the NPS OWCP Coordinator determined that Complainant could not return to duty. ROI, Ex, A, p. 58. The ROI does not contain either Complainant's request to return to duty, or the NPS OWCP Coordinator's determination that Complainant could not return to duty.

28. On September 13, 2019, RMO2 issued to Complainant a Non-disciplinary Removal Decision for

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[6] As this is a mixed case complaint concerning only Complainant's removal, this FAD will not address any other allegations of disparate treatment and/or harassment raised by Complainant.

[7] The ROI does not include Complainant's rebuttal to the Proposed Removal.

Inability to Perform Duties of Your Position ("Removal Decision"). ROI, Ex. F-9, p. 218. The Removal Decision sustained RMO1's reasoning in the Proposed Removal. ROI, Ex. F-9, p. 218. The Removal Decision also noted that Complainant "did not respond nor reply to the substance of the proposed removal," and that Complainant did not "speak directly to the basis for the proposed removal, the factors that were considered, [Complainant's] health, or willingness to change [his] search criteria." ROI, Ex, F-9, p. 218.

29. When asked if Complainant's disability limited his ability to carry out the essential functions of his position, RMO2 responded: "no, it didn't have a permanent impact on his ability to do work," citing Complainant's request for NPS to carry out a job search for a similar position. ROI, Ex. F-2, p. 147.

30. Like the Proposed Removal, the final Removal Decision did not include any information regarding whether the Agency had considered alternative reasonable accommodations which would have allowed Complainant to perform the essential functions of his position, or whether any of the requested or considered accommodations would have posed an undue hardship to the Agency. ROI, Ex, F-9, pp. 218-224.

31. On September 17, 2019, Complainant's removal became effective. ROI, Ex. F-8, p. 217; Ex, F-9, pp. 218-224.

IV. Legal Analysis

LEGAL AUTHORITY

Disparate treatment based on disability (mental) and reprisal (Agency Case Nos. DOI-NPS-18-0033, DOI-NPS-18-0571) is prohibited by the Rehabilitation Act and Title VII of the Civil Rights Act of 1964. Federal sector EEO regulations are set out in 29 C.F.R. § 1614.

Disparate Treatment

Where, as here, there is no direct evidence of discrimination, a claim of disparate treatment on the basis of reprisal is examined under the three-part analysis originally enunciated in *McDonnell Douglas Corp. v. Green.* 411 U.S. 792 (1973). A complainant must first establish a *prima facie* case of discrimination by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination, *i.e.*, that a prohibited reason was a factor in the adverse employment action. *McDonnell Douglas*, 411 U.S. at 802; *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978).

The agency must then articulate a legitimate, nondiscriminatory reason for its action(s). *Texas Dept of Community Affairs v. Burdine*, 450 U.S. 248 (1981). After the agency has offered the reason for its action, the burden of production returns to the complainant to prove, by a preponderance of the evidence, that the agency's reason was pretextual, that is, it was not the true reason or the action was influenced by legally impermissible criteria. *Burdine*, 450 U.S. at 253; *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).

"Pretext means more than a mistake on the part of the employer; [pretext] 'means a lie, specifically a phony reason for some action.'" *Wolf v. Buss (America) Inc.*, 77 F. 3d 914, 919 (7th Cir. 1996). At all times, the complainant bears the ultimate responsibility to persuade the fact finder by a preponderance of the evidence that the agency acted on the basis of a prohibited reason. *Id.* It is not sufficient "to *disbelieve* the employer; the fact finder must *believe* the plaintiff's explanation of intentional discrimination." *St. Mary's Honor Center*, 509 U.S. at 519 (emphasis in original).

Qualified Individual with a Disability

The Rehabilitation Act prohibits employment discrimination against otherwise qualified federal employees on the basis of a disability. 29 U.S.C. § 794(a). The standards for determining a violation of the Rehabilitation Act, as amended, are the same as those for a violation of the Americans with Disabilities Act (ADA). 29 U.S.C. § 794(d); 29 C.F.R. § 1614.203(b); *see also* 42 U.S.C. § 12101, *et seq.*[8] The Rehabilitation Act "constitutes the exclusive remedy for a federal employee

[8] In September 2008, Congress amended the Americans with Disabilities Act (ADA) by enacting the Americans with Disabilities Act Amendments Act of 2008 (ADAAA), effective as of January 1, 2009, "to restore the intent and protections of the Americans with Disabilities Act of 1990." Pub. L. No. 110-325, 122 Stat. 3553 (2008). The ADAAA was the legislative response to a series of Supreme Court cases that had narrowed the class of individuals protected by the ADA. Thus, among other things, the ADAAA expanded the class of individuals to be protected by providing a more expansive definition of "disability."

alleging disability-based discrimination." *Jones v. Potter*, 488 F.3d 397, 403 (6th Cir. 2007).

As a threshold matter, a complainant must establish that he is an individual with a disability. An individual with a disability is one who: (1) has a physical or mental impairment that substantially limits a major life activity; (2) has a record of such an impairment; or (3) is regarded as having such an impairment. 29 C.F.R. § 1630.2(g)(1).

Next, a complainant must show that he is "qualified" with regard to the requisite skill, experience, education, and other job-related requirements of the position at issue. 29 C.F.R. § 1630.2(m). In order to be considered "qualified," a complainant must also show that he can perform the essential functions of the position at issue. "Essential functions" are the fundamental job duties of a position, which are distinct from the methods employees may use to perform those functions. 29 C.F.R. § 1630.2(n)(2). For example, time and attendance are considered the methods by which an employee accomplishes the duties of a position, and thus are not considered essential functions of a position. *See Gilberto S. v. Dept of Homeland Security*, EEOC-Appeal No. 03201 10053 (July 10, 2014).

Failure to Accommodate

When an employee demonstrates that he is a qualified individual with a disability, an agency is required to provide reasonable accommodations necessary to perform the essential functions of that employee's

position. 29 C.F.R. § 1630.2(o)(4). In addressing reasonable accommodations, the parties should engage in an informal and flexible interactive process to identify the precise limitations of the individual and what accommodations could overcome those limitations. 29 C.F.R. § 1630.2(o)(3). Agencies retain the discretion to provide any accommodations which would be effective. *Goodman v. U.S. Postal Serv.*, EEOC Appeal No. 0120044371 (May 2, 2007).

If a disability and/or the need for an accommodation is not obvious, an employer may ask an individual who requests an accommodation for reasonable documentation about his disability and functional limitations. EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, EEOC No. 915.002 ("RA Enforcement Guidance"), Question 6 (2002). An agency may request additional information in order to evaluate a complainant's proposed accommodation in comparison to his or her current medical needs, in order to determine what accommodation would best serve the needs of the agency and the complainant. *Carlton T. v. Dep't of the Navy*, EEOC Appeal No. 0120151566 (Feb. 7, 2018).

Agencies are not required to provide reasonable accommodations which would create an undue hardship. 29 C.F.R. § 1630.2(o)(4). An undue hardship is a significant difficulty or expense incurred by the provision of an accommodation. 29 C.F.R. § 1630.2(p)(1). Factors to consider in assessing undue hardship include the overall size of the agency's program with respect to number

of employees; the type and number of facilities; size of the budget; the type of agency operation, composition, and structure of the agency's workforce; and the nature and cost of the accommodation. 29 C.F.R. § 1630.2(p)(2).

DISCUSSION

The Notice of Acceptance originally identified the accepted claim regarding Complainant's removal as a claim of disparate treatment based on disability and reprisal. ROI, Ex. C-1, p. 107. Because the Agency's stated reasoning for Complainant's termination relies, in part, on the undisputed fact that the Complainant's medical conditions prevent him from returning to the Park, this FAD will also analyze whether the Complainant's removal constituted a denial of a reasonable accommodation. *See e.g. Harvey G. v. Dep't of the Interior*, EEOC Appeal No. 0120132052 (Feb. 4, 2016) (restating agency's formulation of claims, in part, as "whether Complainant established that he was denied reasonable accommodation for his disability when he was not allowed to telework, and was subsequently terminated from employment with the Agency"). This FAD will then analyze the issue of whether Complainant was subjected to disparate treatment on the basis of reprisal with regard to his removal.

Failure to Accommodate

Factual Deficiencies in Investigative Record

Although the ROI contains sufficient information to adjudicate the ultimate issue in this case, the ROI also contains relevant factual deficiencies regarding the Agency's response to Complainant's initial reassignment request, as well as its reassignment job search. Agencies have a legal obligation under 29 C.F.R. § 1614.108(b) to conduct an adequate investigation into formal EEO complaints. An adequate investigation is one which is developed impartially, and which contains an appropriate factual record that would allow a reasonable fact finder to draw conclusions as to whether discrimination occurred. EEO MD-110, 6(I); 29 C.F.R. § 1614.108(b). If the Agency fails to conduct an adequate investigation, the decisionmaker may draw an adverse factual inference against the Agency or consider the pertinent matters to be established in the Complainant's favor. *See* 29 C.F.R. § 1614.108(c)(3). Factual deficiencies are noted in the Statement of Facts, *supra*, as well as in the following analysis. To the extent that the factual deficiencies arise from inadequate documentation by the Agency, all inferences will be drawn in Complainant's favor. *See Macready v. Dep't of Justice*, EEOC Appeal No. 01990453 (Apr. 4, 2002) ("when a party fails to produce relevant evidence within its control, the failure to produce such evidence raises an inference that the evidence, if produced, would prove unfavorable to that party").

Individual with a Disability

It is undisputed that Complainant is an individual with a disability. Complainant's diagnoses of PTSD and depression are among those listed in the EEOC's regulations as impairments which "virtually always be found to impose a substantial limitation on a major life activity." 29 C.F.R. § 1630.2(j)(3)(iii).

Qualified for the Position

Despite medical limitations which prevented him from performing certain essential functions of his original Supervisory Facility Operations Specialist position, Complainant was "qualified" within the meaning of the Rehabilitation Act.

After his PTSD-related breakdown at the Park in July of 2017, Complainant repeatedly submitted medical documentation stating that he could no longer perform the essential functions of his original Supervisory Facility Operations Specialist position. ROI, Ex. F-10, p. 229; Ex. F-3, p. 167; Ex. G-4, pp. 305-314. Complainant's PTSD made him "unable to drive to the park where the shooting took place." ROI, Ex. F-10, pp. 237, 240. Although physical presence at a worksite is not itself an essential function, it can be a necessary condition to perform certain essential functions. *Gilberto S. v. Dep't of Homeland Security*, EEOC Appeal No. 0320110053 (July 10, 2014) ("Performing certain job functions sometimes requires a person's presence at the worksite"). Some essential functions of Complainant's position required his physical presence at the

Park, including: supervising employees in the Facilities and Maintenance Division; performing the duties of Acting Superintendent; monitoring and evaluating maintenance programs; performing and maintaining asset inventories and condition assessments; developing and implementing projects, including facility modifications; and managing construction processes. ROI, Ex. F-3, pp. 166-167; Ex. F-7, p. 206.

However, Complainant was still "qualified" to perform other positions which he could have been reassigned into as a reasonable accommodation. The analysis of whether a complainant was "qualified" also extends to whether the complainant was qualified for positions that he *could have* held as a result of reassignment. *Mirla Z. v. Dep't of Homeland Sec.*, EEOC Appeal No. 0120170095 (Apr. 6, 2018) ("in determining whether an employee is "qualified," an agency must look beyond the position which the employee presently encumbers"). Complainant provided medical documentation that he could work up to four hours per day, or 20 hours per week, at another location, and included documentation of an OWCP doctor's observation that he might even "benefit from working in a different park to heal him from the past trauma." ROI, Ex. F-3, p. 167; Ex. F-10, pp. 229, 240. Upon reviewing his resume and position description, the Agency determined that Complainant would be qualified for positions in the facilities, maintenance, administrative, and acquisition series. ROI, Ex. F-9, p. 227. RMO2, the deciding official on Complainant's Removal Decision, also stated his opinion that Complainant's medical

conditions "didn't have a permanent impact on his ability to do work." ROI, Ex. F-2, p. 147.

Therefore, Complainant was a "qualified" individual with a disability in accordance with the Rehabilitation Act. Agencies have an affirmative obligation to provide qualified employees with disabilities, such as Complainant, with reasonable accommodations necessary to perform the essential functions of their position. 29 C.F.R. § 1630.2(o)(4).

Indefinite Leave Not a Reasonable Accommodation

The Agency was not obligated to indefinitely extend Complainant's leave as a reasonable accommodation. "Although leave is permitted as an accommodation, [leave without pay] for an indefinite period of time with no indication that one will or could return is not an accommodation contemplated under the Rehabilitation Act." *Valente v. U.S. Postal Serv.*, EEOC Appeal No. 01A34243 (Nov. 24, 2004). Here, Complainant submitted multiple FMLA requests for short-term disability leave from July 25, 2017 through his termination on September 17, 2019. ROI, Ex. G-4, pp. 306-314. While some of these requests provided theoretical end dates for Complainant's leave, the record reveals that Complainant never returned to work at any point in the two years prior to his termination. ROI, Ex. G-4, pp. 306-314; Ex. F-3, p. 166; Ex. F-9, p. 219. Despite Complainant's contentions that he only needed leave temporarily, there was no indication that Complainant could or would return to his prior position.

Complainant's continued inability to provide and adhere to an estimated return date, his repeated requests for additional leave, and his ultimate request for reassignment, when taken as a whole, constituted a request for indefinite leave. The Agency thus had no obligation to allow Complainant to retain his position of record on indefinite leave as a reasonable accommodation.

Reassignment as a Reasonable Accommodation

When no reasonable accommodations could allow an employee to perform the essential functions of their position, the agency's affirmative obligation extends to reassigning employees to other open positions for which they are qualified. 29 C.F.R. § 1630.2(o)(2)(ii). Although reassignment is typically considered to be the reasonable accommodation of last resort, where, as here, "both the agency and the employee voluntarily agree that reassignment is preferable to remaining in the current position with some form of accommodation . . . the agency may transfer the employee." *Reina D. v. Soc. Sec. Admin.*, EEOC Appeal No. 0120150410 (Nov. 29, 2017). Both the Agency and Complainant agreed that Complainant's reassignment would be preferable to attempting to accommodate Complainant in his original position. ROI, Ex. F-9, p. 225; Ex. F-10, p. 229; Ex. F-3, p. 167; Ex. G-4, p. 314.

Delay of Reassignment Job Search

However, the Agency unnecessarily delayed its efforts to reasonably accommodate Complainant via reassignment. When an individual with a disability requests a reasonable accommodation, the agency should respond and/or begin the interactive process as quickly as possible, because unnecessary delays in responding to requests or providing accommodations can result in a violation of the Rehabilitation Act. *See e.g. Ruben T. v. Dep't of Justice*, EEOC Appeal No. 0120171405 (Mar. 22, 2019). In determining whether there has been an unnecessary delay in responding to a request for reasonable accommodation, relevant factors would include: (1) the reason(s) for the delay, (2) the length of the delay, (3) how much the individual with a disability and the employer each contributed to the delay, (4) what the employer was doing during the delay, and (5) whether the required accommodation was simple or complex to provide. *Id.*

Regarding the first factor, the record contains no explanation for why the Agency waited approximately nine months after Complainant's May 2018 request for reassignment to initiate its job search. ROI, Ex. F-10, p. 229; Ex. F-3, p. 167. Although NPS's HR Staffing Office may have been under the impression that in August of 2018, OWCP had notified Complainant that he needed to provide additional information to support his reassignment request, the OWCP process is conducted through the Department of Labor, and is distinct from the reassignment job search process. PROI, Ex. F-6, p. 450. This would not explain the delay.

Regarding the second factor, it is undisputed that the Agency waited approximately nine months after Complainant's request for reassignment to initiate its job search, ROI, Ex, F-10, p. 229; Ex. F-3, p. 167. The EEOC has found even shorter agency delays to have violated the Rehabilitation Act. *See Chara S. v. Dep't of Veterans Affairs*, EEOC Appeal No. 2019001100 (July 16, 2020) (finding that the agency violated the Rehabilitation Act "when it delayed approval of Complainant's part-time telework request by approximately four months"). Complainant provided medical documentation in support of his request for reassignment in May of 2018, and the Agency did not initiate the reassignment job search until February 12, 2019. ROI, Ex. F-10, pp. 229, 230; Ex. F-9, pp. 219, 225, 227.

Regarding the third factor, there is no evidence that the delay occurred on Complainant's part, Both RMO1's Proposed Removal and RMO2's Removal Decision noted that in May of 2018, Complainant submitted medical documentation stating that he could no longer work at the Park and requesting reassignment to another park. ROI, Ex. F-10, p. 229; Ex. F-9, p. 219. The timeline of events set forth by both the Proposed Removal and the Removal Decision does not suggest that the Agency found this documentation inadequate to support Complainant's request, or that the Agency needed any additional documentation from Complainant in order to begin the interactive process. ROI, Ex. F-10, p. 229; Ex. F-9, p. 219. Nor is there any such contention in either RMO1's or RMO2's affidavits. ROI, Ex. F-2, pp. 143-152; Ex. F-3, pp. 161-170.

Additionally, even assuming that Complainant's May 2018 reassignment request had not contained sufficient information, Complainant provided the requested information in support of his reassignment request in September of 2018 and in December of 2018, well before the Agency finally initiated the reassignment job search on February 12, 2019. PROI, Ex. F-6, p. 450.

Regarding the fourth factor, there is no evidence that the Agency took any actions at all on Complainant's reassignment request – much less engaged in the interactive process – until February 12, 2019. ROI, Ex, F-10, p. 229; Ex. F-9, p. 219.

Regarding the fifth factor, there is substantial evidence that the requested reassignment was complex to provide. Complainant allegedly informed the Agency that he would not accept a reassignment position outside of his local commuting area of Fort Oglethorpe, Georgia. ROI, Ex. F-9, p. 227; Ex. F-10, p. 230. As there are no NPS sites other than the Park within the local commuting area, NPS had to expand the reassignment job search to other DOI bureaus, which required each DOI bureau to conduct a separate search. ROI, Ex. F-9, p. 227. However, the complexity of providing reassignment does not explain the Agency's delay in *starting* the reassignment job search.

Taken as a whole, these five factors establish that the Agency unduly delayed the reasonable accommodation process when it waited nine months to even begin the reassignment job search for Complainant.

Delay of Reassignment Job Search Resulted in Failure to Reasonably Accommodate

Although Complainant has established that the Agency delayed in providing him with reasonable accommodations, "the allegation that the Agency failed to properly engage in the interactive process, does not, by itself, demand a finding that Complainant was denied a reasonable accommodation. Rather, to establish a denial of a reasonable accommodation, Complainant must establish that the failure to engage in the interactive process *resulted in* the Agency's failure to provide a reasonable accommodation." *Mandy B. v. Dep't of Veterans Aff.*, EEOC Appeal No. 0120170313 (Mar. 26, 2019) (emphasis added).

In reassignment cases, Complainant typically has the evidentiary burden of establishing by a preponderance of the evidence that "there were vacancies during the relevant time period into which [] he could have been reassigned. Complainant can establish this by producing evidence of particular vacancies. However, this is not the only way of meeting Complainant's evidentiary burden. In the alternative, Complainant could show that: (1) [] he was qualified to perform a job or jobs which existed at the agency, and (2) there were trends or patterns of turnover in the relevant jobs so as to make a vacancy likely during the time period." *Mirta Z. v. Dep't of Homeland Sec.*, EEOC Appeal No. 0120170095 (Apr. 6, 2018). For reassignment purposes, "'vacant' means that the position is available when the employee asks for reasonable accommodation, or that the employer knows that it will become available

within a reasonable amount of time," RA Enforcement Guidance.

Complainant did not provide any evidence of vacancies into which he could have been reassigned in between his May 2018 request for reassignment and the Agency's February 13, 2019 reassignment job search. But "[w]hile the burden of establishing the existence of such a vacant funded position lies with Complainant, he must be given the opportunity to present the evidence necessary to establish that a position exists." *Ruben P. v. Soc. Sec. Admin.*, EEOC Appeal No. 0720130013 (Aug. 14, 2014). In *Ruben P.*, an agency argued that it should not have been liable for failing to reassign a complainant as a reasonable accommodation because the complainant had not shown that there was a vacant funded position to which he could have been reassigned. *Id.* The EEOC declined to address this argument on procedural grounds, but also noted that "the Agency's failure to engage Complainant in the interactive process, once he requested reassignment, resulted in his being denied a reasonable accommodation. If there was an interactive process, Complainant would have had the opportunity to present evidence regarding vacant, funded positions to which he could have been reassigned." *Id.* Here, as in *Ruben P.*, the Agency failed to engage in the interactive process with Complainant. The Agency waited nine months after Complainant's May 2018 request for reassignment to initiate its job search. ROI, Ex. F-10, pp. 229, 230; Ex. F-9, pp. 219, 225, 227. There is no evidence that the Agency ever informed Complainant

that he could or should seek vacant, funded positions for his own reassignment from May 2018 until the Agency began its job search on February 12, 2019. This resulted in Complainant not being given any opportunity to present the evidence necessary to establish that such a position existed.

Additionally, the discovery that there were no vacant funded positions within Complainant's requested criteria only arose after the Agency had already delayed initiating the reassignment job search by nine months. On April 1, 2019, the Agency concluded that its February 12, 2019 reassignment job search for Complainant had been unsuccessful, and that there were no vacant, funded positions within the requested criteria into which Complainant could be reassigned. ROI, Ex. F-9, p. 225. Nine months is a significant period of time, during which a suitable position could have become vacant and subsequently been filled. As Complainant was never afforded the opportunity to establish whether such a position existed in part because of the Agency's failure to conduct an adequate investigation,[9] it is appropriate to draw the inference in Complainant's favor that such a position likely became vacant at some point during the Agency's nine-month delay. *See* 29 C.F.R. § 1614.108(c)(3); *Macready v. Dep of' Justice*, EEOC

[9] The investigator did not ask Complainant to provide any evidence of vacant, funded positions which he could have been reassigned into. ROI, Ex. F-1, pp. 113-127. The ROI does not contain any evidence regarding whether the Agency searched for vacant, funded positions in the period between Complainant's May 2018 request for reassignment and its February 13, 2018 reassignment job search.

Appeal No. 01990453 (Apr. 4, 2002) ("when a party fails to produce relevant evidence within its control, the failure to produce such evidence raises an inference that the evidence, if produced, would prove unfavorable to that party"); *Mirta Z. v. Dep't of Homeland Sec.*, EEOC Appeal No. 0120170095 (Apr. 6, 2018) (noting that complainant can establish denial of reassignment as a reasonable accommodation without establishing a *specific* vacancy, by establishing "there were trends or patterns of turnover in the relevant jobs so as to make a vacancy likely during the time period").

Moreover, any lack of evidence regarding whether Complainant's requested criteria prevented a successful job search arises directly from the Agency's continued failure to engage in the interactive process. "[T]he Agency is in the best position to know which jobs are vacant or will become vacant within a reasonable period of time and it is obligated to inform an employee about vacant positions for which a complainant may be eligible as a reassignment." *Felton A. v. Dep't of Homeland Sec.*, EEOC Appeal No. 2019005820 (May 14, 2020). Here, the Agency did not provide evidence of any available positions outside of Complainant's criteria that would have otherwise been suitable for reassignment. If such positions existed, the Agency could have engaged in the interactive process with Complainant to discuss whether Complainant was willing and medically able to modify his requested criteria. Nor is there evidence that the Agency ever informed Complainant that his failure to vary the criteria for the reassignment job search could result in his removal.

Therefore, the Agency's nine-month delay in initiating the reassignment job search for Complainant likely resulted in its ultimate failure to reasonably accommodate Complainant.

Complainant's Requested Criteria for Reassignment Job Search Not Undue Hardship

Once a Complainant has established a denial of reasonable accommodation, an Agency may raise an affirmative defense by providing "case-specific evidence proving that providing reasonable accommodation would cause an undue hardship." *See e.g. Julius C. v. Dep't of the Air Force*, EEOC Appeal No. 0120151295 (June 16, 2017). The Agency has not met that burden here.

There is no evidence that the Agency's delay in initiating Complainant's reassignment job search was due to any undue hardship. RMO1 and RMO2 did not raise any undue hardship issues in their reasoning for terminating Complainant. ROI, Ex. F-3, pp. 161-178; Ex. F-2, pp. 143-152. Nor did the Agency assert at any point in either the Proposed Removal or the Removal Decision that Complainant's reassignment would cause the Agency an undue hardship. ROI, Ex. F-9, pp. 218-224; Ex. F-10, pp. 229-234. At most, the Agency explained that its job search did not find any vacant funded positions within Complainant's requested criteria. RMO1 and RMO2 stated that Complainant had requested reassignment into a similar position at another park within commuting distance of his home in

Chattanooga, Tennessee, and cited the lack of positions within Complainant's requested criteria as a reason for his removal.[10] ROI, Ex. F-9, pp. 218-224; Ex. F-10, pp. 230, 232; Ex. F-2, pp. 148-149; Ex. F-3, p. 167.

Since the Agency failed to engage in the interactive process with Complainant to discuss whether Complainant was willing and medically able to modify his requested job search criteria, it does not have the necessary information to establish that reassigning Complainant would have caused an undue hardship. Therefore, the Agency is liable for its failure to reasonably accommodate Complainant.

Insufficient Evidence Regarding Whether Agency Acted in Good Faith

An agency may be found to have violated the Rehabilitation Act by failing in its affirmative duty to accommodate a disability even if the agency made a good faith effort to provide an accommodation. *See, e.g., Schauer v. Soc. Sec. Admin.*, EEOC Appeal No. 01970854 (July 13, 2001). However, "[a]n agency is not liable for compensatory damages under the

[10] Although the Rehabilitation Act does not mandate the creation of a new position for qualified individuals with disabilities in need of reassignment, ODICR notes that Agencies always have the discretion to go above and beyond the bare requirements of the law in order to provide a model workplace for individuals with disabilities. Creating a new position for Complainant here would thus have been an appropriate solution as a reasonable accommodation, especially as Complainant was only seeking to work part-time for 20 hours a week.

Rehabilitation Act where it has consulted with complainant and engaged in good faith efforts to provide a reasonable accommodation but has fallen short of what is legally required." *Don F. v. Soc. See. Admin.*, EEOC Appeal No. 2019002029 (Sep. 22, 2020). "A good faith effort can be demonstrated by proof that the agency, in consultation with the disabled individual, attempted to identify and make a reasonable accommodation." *Guilbeaux v. U.S. Postal Serv.*, EEOC Appeal No. 0720050094 (Aug. 6, 2008).

Here, the Agency failed in its duty to reasonably accommodate Complainant's disability when it delayed initiating its job search for nine months, when it failed to engage in the interactive process with Complainant after its job search did not yield results within Complainant's requested criteria, and when it removed Complainant from his position due to his medical inability to perform. However, there is insufficient evidence in the ROI to determine if these failures occurred despite good faith efforts on the Agency's part. The record indicates that the Agency did make some efforts to reasonably accommodate Complainant. For example, the Agency repeatedly extended the Complainant's leave as requested for nearly two years. ROI, Ex. F-3, p. 166; Ex. F-9, p. 219; Ex. G-4, pp. 305-314. The Agency also granted Complainant extended time to respond to the Proposed Removal. ROI, Ex. F-2, p. 157. Whether these efforts would be sufficient to rise to the level of "good faith" needed to avoid liability for

compensatory damages is thus a question that must be answered in a supplemental investigation.[11]

Denial of Reasonable Accommodation Conclusion

The Agency failed in its duty to reasonably accommodate Complainant. Complainant has established that he is a qualified individual with a disability under the Rehabilitation Act. As he could no longer perform the essential functions of his position of record, and indefinite FMLA leave was not a reasonable accommodation, Complainant was entitled to the reasonable accommodation of reassignment. Although Complainant requested reassignment in May of 2018, the Agency delayed initiating the reassignment job search until February 12, 2019, which resulted in a denial of reasonable accommodations. The Agency's failure to continue the interactive process following the unsuccessful job search based on Complainant's requested criteria also constituted a denial of reasonable accommodations, which ultimately resulted in Complainant's removal. Additionally, the Agency has not met its burden of establishing an affirmative defense of undue hardship with regard to its delay and denial of reasonable accommodations. Therefore, the Agency failed in its duty to reasonably accommodate the Complainant.

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[11] *See* Statement of Relief, *infra*.

Disparate Treatment on the Basis of Reprisal

Prima Facie Case

Where, as here, there is no direct evidence of discrimination, a complainant may proceed using circumstantial evidence of discrimination by satisfying the three-part evidentiary scheme articulated by the Supreme Court in *McDonnell Douglas*. To establish *a prima facie* case of retaliation, a complainant must show that: (1) he engaged in a protected activity; (2) management was aware of the protected activity; (3) he suffered a materially adverse action; and (4) there is a causal connection between his protected activity and the materially adverse action. *Whitmire v. Dep't of the Air Force*, EEOC Appeal No. 01A00340 (Sept. 25, 2000).

Complainant has established a *prima facie* case of discrimination on reprisal. Complainant engaged in protected activity when he filed formal EEO complaints including Agency Case Nos. DOI-NPS-18-0033 and DOI-NPS-18-0571, as well as this complaint. ROI, Ex. F-1, p. 118. Both RMO1 and RMO2 were aware of Complainant's protected activity before the adverse action at issue. ROI, Ex. F-3, p. 166; Ex. F-2, p. 147. Complainant suffered a materially adverse action when RMO1 proposed Complainant's removal on June 5, 2019, which RMO2 sustained on September 13, 2019, resulting in Complainant's September 17, 2019 removal. ROI, Ex. F-8, p. 217; Ex. F-9, pp. 218-224.

There is sufficient evidence to establish an inference of a causal connection between Complainant's protected activity and his removal because RMO1 and RMO2

were named as responsible management officials in Complainant's previous EEO complaints, and because of the temporal proximity between RMO1 and RMO2's spring 2019 interviews regarding a different EEO complaint and the June 5, 2019 Proposed Removal. *See Breeden*, 532 U.S. at 273-74 (holding that, in retaliation cases relying solely on temporal proximity to establish causation, "the temporal proximity must be 'very close'"); *Moss v. Dep't of Def.*, EEOC Appeal No. 01913531 (Jan. 27, 1992) (stating that the complainant was able to establish a *prima facie* case of retaliation despite a two-year gap between the complainant's prior EEO activity and her non-selection because the selecting official was continuously closely involved with the complainant's prior protected activity).

Complainant has thus established his *prima facie* case of discrimination on reprisal.

Management's Articulation

Because Complainant has established *his prima facie* case of discrimination based on reprisal, the Agency must now articulate legitimate, non-discriminatory, and non-retaliatory reasoning for its actions in this case. *Burdine*, 450 U.S. 248. In order to meet its burden, Management need only show that it based its decision on a legitimate consideration and not on an illegitimate one. *Furnco*, 438 U.S. 567, 577. The defendant need not "prove absence of discriminatory motive." *Bd. Of Trustees of Keene State College v. Sweeney*, 439 U.S. 24, 25 (1978). Rather, the defendant need only

"articulate some legitimate, nondiscriminatory reason for its action." *Id.* In *Burdine*, the Supreme Court held that the burden on the employer is to "produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus." 450 U.S. at 257. The evidence presented by management need not establish management's actual motivation. If management meets this burden of production, the presumption of discrimination raised by the *prima facie* case is rebutted and drops from the case altogether. *Id.*

Management's articulated reason for removing Complainant was due to his medical inability to perform the duties of his position, and due to the lack of vacant funded positions within Complainant's requested criteria for reassignment. ROI, Ex. F-9, pp. 219-224. The foregoing reasons are sufficiently clear and specific to afford Complainant a full and fair opportunity to demonstrate pretext. *See e.g. Lino L. v. Dep't of the Navy*, EEOC Appeal No. 0320170013 (Feb. 15, 2017) ("the Agency provided legitimate, non-discriminatory reasons for [Complainant's] removal – namely that he was medically unable to perform the duties of his position"). Management has thus met its burden of production.

Pretext

Because the Agency has articulated a legitimate, nondiscriminatory reason for its conduct, in order to prevail, Complainant must demonstrate, by a

preponderance of the evidence, that the stated reasons are a pretext for discrimination. *See Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Burdine, supra; McDonnell Douglas, supra.* A complainant may show pretext by evidence that a discriminatory reason more likely than not motivated management; that management's articulated reasons are unworthy of belief; that management has a policy or practice disfavoring Complainant's protected class; that management has discriminated against Complainant in the past; or that management has traditionally reacted improperly to legitimate civil rights activities. *See McDonnell Douglas, supra.*

Here, Complainant submitted documentation stating that he was no longer medically able to return to the Park due to his PTSD and depression from July 24, 2017, through his September 17, 2019 removal. Ex. F-3, p. 166; Ex. F-9, p. 219; Ex. G-4, pp. 305-314. It is undisputed that the Agency's job search did not yield any vacant funded positions within Complainant's requested criteria. ROI, Ex. F-9, p. 225. Although the Agency's deficiencies in its efforts to reassign Complainant may have fallen short of its Rehabilitation Act obligations, there is no evidence that such deficiencies resulted from retaliatory intent on the part of any management officials. In fact, RMO1 promptly forwarded Complainant's reassignment request to the appropriate NPS HR personnel in May of 2018. PROI, Ex, F-2, p. 425; Ex. F-4, pp. 440-441.

RMO1 consistently stated his belief that Complainant's position required "someone to be physically

present in the Park," and that removing Complainant would "promote the efficiency of the service." ROI, Ex. F-3, pp. 166-167; Ex. F-10, pp. 229-234. RMO2 agreed with RMO1's reasoning, and noted that Complainant "did not respond nor reply to the substance of the proposed removal," and that Complainant did not "speak directly to the basis for the proposed removal, the factors that were considered, [Complainant's] health, or willingness to change [his] search criteria." ROI, Ex. F-9, p. 218.

Complainant's disagreement with management's assessment of his medical ability to perform is not enough to disprove the Agency's reasoning, or to establish pretext. *Alex L. v. Dep't of Transp.*, EEOC Appeal No. 0120140970 (Jun. 1, 2016) ("Pretext analysis is not concerned with whether the Agency's action was unfair or erroneous but whether it was motivated by discriminatory animus"). And agencies may even make unwise or mistaken business decisions, so long as those decisions are not a pretext for unlawful discrimination. *See e.g. Robinson v. Dep't of Veterans Aff.*, EEOC Appeal No. 01A22253 (Sep. 22, 2003) (finding no pretext even where complainants had conclusively shown that management's articulated reasoning had relied on incorrect cost-benefit analyses).

In sum, Complainant did not establish that Management's articulated reasons were false or that Management's actions were based on Complainant's EEO activity. Complainant retains the burden of proof to establish discrimination by a preponderance of the evidence. It is not sufficient "to *dis*believe the employer;

the fact finder must *believe* the plaintiff's explanation of intentional discrimination." *St. Mary's Honor Center, supra* at 519 (emphasis in original). Complainant's subjective belief, however genuine, does not constitute evidence of pretext or provide a basis for remedial relief. *See Anonymous v. Office of Personnel Management*, EEOC Appeal No. 0120122901 (Jan. 23, 2014) (no pretext when "Complainant simply offers a different interpretation of the supervisor's actions"). ODICR thus finds that Complainant failed to meet his burden to demonstrate that management's articulated reasons were pretext.

As he has not met his burden of demonstrating that management's articulated reasons were pretextual, Complainant cannot establish that he was subjected to disparate treatment in reprisal for his prior EEO activity with regard to his termination.

V. Statement of Conclusion

Based on a review of the record and the above analysis, ODICR finds that the preponderance of the evidence supports Complainant's claim of unlawful discrimination. Accordingly, ODICR finds that Complainant has proven that he was subjected to disparate treatment based on disability (mental) as alleged, in violation of the Rehabilitation Act.

VI. Statement of Relief

Corrective Actions

1. The Agency shall post copies of the attached notice at the Chickamauga and Chattanooga Military Park ("Park") in Chattanooga, Tennessee. Copies of the notice, after being signed by the Agency's duly authorized representative, shall be posted by the Agency within thirty (30) calendar days of the date this decision becomes final, and shall remain posted for sixty (60) consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. The Agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material. The original signed notice is to be submitted to ODICR within ten (10) calendar days of the expiration of the posting period.
2. Within thirty (30) calendar days, the Agency shall reinstate Complainant to his original position at a location within his local commuting area of Chattanooga, Tennessee, other than the Chickamauga and Chattanooga Military Park ("Park").
3. The Agency shall initiate another reassignment job search for Complainant within thirty (30) calendar days of receiving this decision, in accordance with the below specifications.
    a. The Agency must notify Complainant that:

i. The Agency is conducting this search;

ii. Complainant has the opportunity to submit updated information regarding any relevant medical limitations or needed reasonable accommodations;

iii. Complainant has the opportunity to assist the agency's efforts by suggesting open positions for which he believes he is qualified, including positions posted publicly on USAJOBS.

b. The search must include, but is not limited to:

i. All DOI positions at a GS-12 (or equivalent) within the following occupational series:

- 1601: Facility Management Specialist
- 1640: Facility Operations Specialist
- 0343: Management Analyst (administrative, budget, and/or procurement)
- 0341: Administrative Officer (administrative, budget, and/or procurement)
- 4749: Maintenance Supervisor
- 1173: Housing Manager

- 1176: Building Manager
- 1101: Business Manager/Acquisition Program Manager (facilities)

ii. All DOI positions outside of the above-listed occupational series for which Complainant could be considered "qualified," including positions which Complainant could perform with reasonable accommodations.

iii. Any DOI positions which are not officially designated as remote, but which could be performed remotely as a reasonable accommodation.

iv. Any DOT positions which are not currently vacant, but which will become vacant within one hundred and twenty (120) calendar days of receiving this decision.

c. The Agency must document:

i. Its methodology of searching for suitable positions;

ii. The outcomes of its search, including null outcomes, for each of its bureaus;

iii. Each position it offers to Complainant as a result of the search, and Complainant's response to each offered position.

d. If a search based on Complainant's requested criteria does not yield any results, the Agency must expand its search to positions outside of Complainant's requested criteria.

e. If the Agency finds vacant funded positions for which Complainant would be qualified, with or without reasonable accommodations, the Agency must offer any such positions to Complainant in writing, regardless of whether those positions fit within Complainant's requested criteria.

f. If this search does not yield any DOI positions for which Complainant would be qualified within the specified deadline, the Agency may conclude this search, and notify Complainant of its findings.

4. The Agency shall provide a minimum of eight (8) hour(s) of EEO training to RMO1 and RMO2 within one hundred and twenty (120) calendar days of receiving this order. The training should include detailed information regarding the Rehabilitation Act, reasonable accommodations, the interactive process, and record-keeping obligations and best practices related to the reasonable accommodation process.

5. The Agency shall provide a minimum of four (4) hour(s) of EEO training to all NPS Human Resources personnel involved in reassignment job searches within one hundred and

twenty (120) calendar days of receiving this order. The training should include detailed information regarding the Rehabilitation Act, the scope of Agencies' obligations to provide reassignment as a reasonable accommodation, the interactive process, and record-keeping obligations and best practices related to the reasonable accommodation process.

6. The Agency shall consider taking disciplinary action against the individual or individuals, still working for the Agency, who were responsible for denying complainant a reasonable accommodation within sixty (60) calendar days of receiving this decision. I.e., RMO1 and RMO2. If the Agency decides to take disciplinary action, it shall identify to ODICR the action taken. If the Agency decides not to take disciplinary action, it shall set forth to ODICR the reason(s) for its decision not to impose discipline.

7. The Agency shall conduct a supplemental investigation into damages within sixty (60) calendar days of receiving this decision. Upon completion of the supplemental investigation, the Agency shall issue to Complainant the Supplemental Report of Investigation (SROI).

8. The Agency is directed to submit a Compliance Report to ODICR every thirty (30) calendar days of receiving this decision until full compliance has been attained. The Compliance Report shall include supporting documentation of the Agency's implementation of all above-listed corrective actions.

9. The Complainant may submit a full accounting of his claimed compensatory damages to ODICR. This full accounting should include documentary evidence supporting his accounting, as well as documentary evidence of any attempts to mitigate his damages. The Complainant must submit this accounting to ODICR by email within sixty (60) calendar days of receiving this decision. If more time is needed, the Complainant may request an extension from ODICR at doicivilrights@ios.doi.gov.
10. ODICR will issue its decision on damages within sixty (60) calendar days of receiving the latest of the above-listed submissions.

Supplemental Investigation into Good Faith and Compensatory Damages

The Agency's supplemental investigation into the issue of whether the Agency's failure to reasonably accommodate Complainant occurred despite its good faith efforts and whether Complainant is entitled to compensatory damages must provide sufficient evidence to allow a factfinder to answer the following questions:

Good Faith (All questions are for the Agency unless otherwise indicated)

1. Did the Agency receive Complainant's May 2018 request for reassignment? If so, when? The Agency must document the exact date and method by which it received Complainant's May 2018 request for reassignment and

provide the names of all Agency personnel who received Complainant's request.

2. Ask Complainant AND the Agency: What specific documentation did Complainant submit to the Agency in May of 2018 as part of his request for reassignment? All relevant documentation submitted by Complainant must be included in the Supplemental ROI, with submission dates indicated.

3. Did Complainant's May 2018 request for reassignment contain sufficient information to substantiate the medical need for reassignment? If not:

    a. What additional information was needed?

    b. Why was this information needed?

    c. Did the Agency have other medical documentation from Complainant from previous reasonable accommodation requests which would have substantiated the medical need for reassignment? If so, when did it receive this information? All relevant documentation submitted by Complainant must be included in the Supplemental ROI, with submission dates indicated.

    d. Did the Agency notify Complainant that it needed more information to begin the reassignment process? If so, who notified the Complainant, and when? All of the Agency's notifications to Complainant must be included in the

Supplemental ROI, with notification dates indicated.

e. Did the Complainant ultimately provide sufficient information to substantiate the medical need for reassignment? If so, when? All relevant documentation submitted by Complainant must be included in the Supplemental ROI, with submission dates indicated.

4. Ask Complainant AND the Agency: Did the Agency ever inform Complainant that he had the option to suggest existing vacant funded positions for his own reassignment? If so, when? Provide documentation. If not, why?

5. Ask Complainant AND the Agency: Did the Agency respond to Complainant's May 2018 request for reassignment as a reasonable accommodation?

   a. If so:

      i. When did the Agency respond?

      ii. What was the Agency's response?

      iii. Which Agency personnel responded?

      iv. All of the Agency's responses to Complainant's May 2018 request for reassignment must be included in the Supplemental ROI, with dates indicated.

   b. If not:

      i. Why not?

ii. Which Agency personnel were responsible for handling Complainant's May 2018 request for reassignment as a reasonable accommodation?

6. Were there other factors contributing to the Agency's May 2018 to February 12, 2019 delay in initiating the Complainant's reassignment job search? If so, what were these factors? Any relevant documentation of these factors, including contemporaneous emails and notes regarding these factors, must be included in the Supplemental ROI, with dates indicated.

7. Ask Complainant AND the Agency: Did the Agency consider interim accommodations other than reassignment for Complainant from May 2018 to February 12, 2019? If so:

   a. What accommodations were considered for Complainant? For each considered accommodation:

   b. When was this accommodation considered?

   c. Was this accommodation offered to Complainant? If not, why? If so, provide documentation.

   d. Did Complainant respond to the offered accommodation? If so, what was the response? Provide documentation.

   e. Was this accommodation implemented? If not, why? If so, when? Provide documentation.

8. Ask Complainant AND the Agency: Did the Complainant request any interim accommodations other than reassignment from May 2018 to February 12, 2019?
    a. What other accommodations did Complainant request? For each requested accommodation:
    b. When did Complainant request this accommodation? Provide documentation.
    c. How would this accommodation help the Complainant perform the essential functions of his position?
    d. What medical documentation, if any, did Complainant submit in support of his request for accommodation? Provide copies, with submission dates indicated.
    e. Did the Agency respond to this request? If so, what was the Agency's response? When did the Agency respond? Provide documentation, with dates indicated.
    f. Did the Agency grant the requested accommodation? If not, what was the Agency's reasoning for the denial? Provide documentation, with dates indicated.
9. Did the Agency fill any vacancies for which Complainant would have been qualified in between May 1, 2018 and February 12, 2019?
    a. Identify all GS-12 (or equivalent) vacancies filled in all DOI bureaus between May 1, 2018 and February 12,

2019 within the following occupational series:

i. 1601: Facility Management Specialist

ii. 1640: Facility Operations Specialist

iii. 0343: Management Analyst (administrative, budget, and/or procurement)

iv. 0341: Administrative Officer (administrative, budget, and/or procurement)

v. 4749: Maintenance Supervisor

vi. 1173: Housing Manager

vii. 1176: Building Manager

viii. 1101: Business Manager/Acquisition Program Manager (facilities)

b. For each position identified:

i. Ask Complainant:

1. Could Complainant have performed this position within his medical limitations, with or without a reasonable accommodation?

2. Would Complainant have accepted this position as a reassignment?

ii. Ask the Agency:

1. When did this position become vacant?
2. Was this position offered to Complainant? If not, why was this position not offered to Complainant?
3. Would the Agency have been able to reasonably accommodate Complainant in this position?
4. Would reassigning Complainant into this position have caused the Agency an undue hardship?

10. Ask Complainant AND the Agency:
    a. What were the specific restrictions and criteria that the Complainant identified for his reassignment job search?
    b. When did Complainant identify these restrictions and criteria?
    c. All relevant documentation regarding Complainant's identified restrictions and criteria must be included in the Supplemental ROI, with dates indicated.
11. Did the Complainant's February 2019 reassignment job search include telework-eligible positions at other NPS or DOI locations? If not, why not?

12. Did the Agency fill any vacancies for which Complainant would have been qualified in between February 12, 2019 and September 17, 2019?

    a. Identify all GS-12 (or equivalent) vacancies filled in all DOI bureaus between February 12, 2019 and September 17, 2019 within the following occupational series:

        i. 1601: Facility Management Specialist

        ii. 1640: Facility Operations Specialist

        iii. 0343: Management Analyst (administrative, budget, and/or procurement)

        iv. 0341: Administrative Officer (administrative, budget, and/or procurement)

        v. 4749: Maintenance Supervisor

        vi. 1173: Housing Manager

        vii. 1176: Building Manager

        viii. 1101: Business Manager/Acquisition Program Manager (facilities)

    b. For each position identified:

        i. Ask Complainant:

            1. Was Complainant offered this position?

            2. Could Complainant have performed this position

within his medical limitations, with or without a reasonable accommodation?

3. Would Complainant have accepted this position as a reassignment?

ii. Ask the Agency:

1. When did this position become vacant?

2. Was this position offered to Complainant? If not, why was this position not offered to Complainant?

3. Would the Agency have been able to reasonably accommodate Complainant in this position?

4. Would reassigning Complainant into this position have caused the Agency an undue hardship?

13. Ask the Agency's Human Resources (HR) personnel involved with Complainant's original reassignment job search:

a. What is the typical process for a reassignment job search? All relevant documentation regarding the Agency's reassignment job search practices and procedures must be included in the Supplemental ROI.

b. What methodology did the Agency use to conduct Complainant's reassignment job search in February of 2019? All relevant documentation regarding Complainant's reassignment job search must be included in the Supplemental ROI, with dates indicated. This includes informal documentation, such as emails and instant messages.

c. Which bureaus did the Agency reach out to for Complainant's reassignment job search? All relevant communications between HR and the bureaus regarding Complainant's reassignment job search must be included in the Supplemental ROI, with dates indicated. This includes informal communications, such as emails and instant messages. For each bureau:

   i. What method did this bureau use to conduct Complainant's job search?

   ii. Who was the point of contact at this bureau responsible for conducting Complainant's job search?

   iii. When did this bureau respond? Provide documentation.

   iv. What was this bureau's response? Provide documentation.

d. Which two bureaus identified in ROI, Ex. F-9, p. 226 returned negative responses regarding Complainant's reassignment job search?

14. Ask Complainant AND the Agency: Did the Agency ever inform Complainant that he had the option of modifying his requested criteria if the reassignment job search was unsuccessful? If so:

    a. When did the Agency inform Complainant about this option? Provide documentation.

    b. Who informed Complainant about this option?

    c. What exactly did this individual tell Complainant? Provide documentation.

    d. Did Complainant respond? If so, when? What was Complainant's response? Provide documentation.

15. Ask Complainant AND the Agency: Did the Agency ever inform Complainant that his failure to modify the criteria for the reassignment job search could result in his removal for a medical inability to perform the essential functions of his position? If so:

    a. When did the Agency inform Complainant about this possibility? Provide documentation.

    b. Who informed Complainant about this possibility?

    c. What exactly did this individual tell Complainant? Provide documentation.

    d. Did Complainant respond? If so, when? What was Complainant's response? Provide documentation.

16. Ask Complainant AND the Agency: Did Complainant request to return to duty after receiving the Proposed Removal? If so:

    a. What was the exact substance of Complainant's request? Provide documentation.

    b. When did Complainant make this request? Provide documentation.

    c. To whom did Complainant make this request?

    d. Did Complainant receive a response to his request? If so, when? What was the response? Provide documentation.

    e. Was Complainant's request to return to duty denied? If so, when? Why was Complainant's request to return to duty denied? Provide documentation.

VII. Statement of Notice and Rights

APPEAL RIGHTS TO THE MERIT SYSTEMS PROTECTION BOARD

29 C.F.R. § 1614.302(d)(3) states that an appeal of the Agency's final decision on a mixed case complaint to the Merit Systems Protection Board (MSPB) must be filed by an Appellant within thirty (30) calendar days after receiving this decision and, in connection with that Appeal, a hearing may be requested. Alternatively, in light of the fact that more than 120 days have elapsed since the filing of this complaint, Appellant

may, pursuant to 29 C.F.R. § 1614.302(d)(1)(i), file an MSPB appeal prior to the issuance of this letter.

A Petition for Appeal shall be deemed filed on the date it is postmarked or, in the absence of a postmark, five days prior to receipt by the MSPB. If a Petition for Appeal is filed outside of the time limits provided, the Petition should include a Motion for Waiver of the Time Limit. This motion must contain evidence and argument showing good cause for the untimely filing.

If a hearing is desired, a request for a hearing must be filed with the Petition for Appeal. Failure to make a timely request for a hearing will result in a waiver of the right to a hearing. Failure to appear for a scheduled hearing without good cause will result in adjudication on the record.

An appeal should be addressed to the appropriate MSPB Regional or Field Office:

Regional Director and Chief Administrative Judge
Atlanta Regional Office
401 West Peachtree Street, NW., 10th Floor
Atlanta, GA 30308-3519
(AL, FL, GA, MS, SC, TN)

Regional Director and Chief Administrative Judge
Central Regional Office
230 South Dearborn Street, 31st Floor
Chicago, IL 60604-1669
(IL, IN, IA, KS [Kansas City], KY, MI, MO, OH, WI)

Regional Director and Chief Administrative Judge
Northeastern Regional Office
1601 Market Street, Suite 1700
Philadelphia, PA 19103
(CT, DE, ME, MD [except the counties of Montgomery and Prince George's], MA, NH, NJ [except counties of Bergen, Essex, Hudson, and Union], PA, RI, VT, WV)

Regional Director and Chief Administrative Judge
New York Field Office
26 Federal Plaza, Room 3137-A
New York, NY 10278-0022
(NJ [counties of Bergen, Essex, Hudson, and Union], NY, PR, and Virgin Islands)

Regional Director and Chief Administrative Judge
Washington, DC Regional Office
1901 S. Bell Street
Suite 950
Arlington, VA 22202
(MD [counties of Montgomery and Prince George's], NC, VA, DC, and all overseas areas not otherwise covered)

Regional Director and Chief Administrative Judge
Western Regional Office
1301 Clay Street, Suite 1380N
Oakland, CA 94612-5217 (AK, CA, HI, ID, NV, OR, WA, and Pacific overseas areas)

Regional Director and Chief Administrative Judge
Denver Field Office
165 South Union Blvd., Suite 318
Lakewood, CO 80228-2211
(AZ, CO, KS [except Kansas City], MT, NE, NM, ND, SD, UT, WY)

Regional Director and Chief Administrative
Judge Dallas Regional Office
1100 Commerce Street, Suite 620
Dallas, TX 75242-9979
(AR, LA, OK, TX)

A copy of the MSPB appeal form is attached.

At the same time the Appellant files an appeal with the MSPB, he must also furnish a copy of the appeal to

Erica White-Dunston, Director
U.S. Department of the Interior
Office of Diversity, Inclusion and Civil Rights
1849 C Street, N.W., Suite 4353
Washington, DC 20240

In or attached to the appeal to the MSPB, Appellant must certify the date and method by which service was made on the Agency.

CIVIL ACTIONS

Instead of an Appeal to the MSPB, Appellant may file a civil action in an appropriate U.S. District Court within thirty (30) calendar days of receipt of this decision. If Appellant elects to file a civil action under Title VII of the Civil Rights Act of 1964, as amended, he must file with the appropriate United States District Court. If a civil action is filed, **Appellant must name as the defendant, Scott A. de la Vela, Assistant Secretary of the U.S. Department of the Interior, as the Defendant.** Failure to do so may result in the loss of any judicial redress to which the Appellant may be entitled.

If the Appellant decides to file a civil action and is unable to afford counsel, the Civil Rights Act gives the Court discretionary authority to appoint counsel without payment of fees or costs by the Appellant. The granting or the denial of the request is within the sole discretion of the Court. The request and the civil action must be filed within ninety (90) days of the date the final decision is received.

Please note that, "filing a civil action under 29 C.F.R. §1614.408 or 29 C.F.R. §1614.409 shall terminate the Administrative processing of your complaint. If private suit is filed subsequent to the filing of an appeal, the parties are requested to notify the MSPR and/or EEOC in writing."

Sincerely,

/s/ Erica D. White-Dunston 03/11/2021
Erica D. White-Dunston, Esq. Date
Director and Chief Diversity Officer
Office of Diversity, Inclusion and
Civil Rights

End.: 2020 COVID-19 Processing Information for EEO Directors, dated April 6, 2020.
2020 COVID-19 Processing information for EEO Directors, dated July 26, 2020.
Posting Order

CC: Rose Blankenship, EEO Director, NPS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

JEFFREY THUL, *Plaintiff*, v. UNITED STATES OF AMERICA, *Defendant.*	)	Case No. 1:22-cv-96 Judge Travis R. McDonough Magistrate Judge Christopher H. Steger

ORDER

This matter is before the Court for case-management purposes. In March 2022, this Court dismissed a case brought by Jeffrey Thul, proceeding *pro se*, against various defendants, including the United States. (*See* Doc. 27 in Case No. 1:20-cv-354.) The Court dismissed that case without prejudice for failure to serve. (*Id.*) The Court had ordered Thul to show cause for his failure to serve, and, while he responded to the show-cause order, he did not show that he had effectuated service on any defendant. (Docs. 20-24 in Case No. 1:20-cv-354.) Therefore, the Court dismissed the action. (*See* Doc. 27 in Case No. 1:20-cv-354.) Plaintiff Jeffrey Thul now brings the instant action against the United States, based on the same events as his previous action. (*See* Doc. 1; Doc. 11 in Case No. 1:20-cv-354.) On May 16, 2022, Plaintiff filed various "proof of service documents." (Doc. 8.) These documents include certified mail return receipts and servers' affidavits. (*Id.*) Service of

the United States or its agencies, corporations, officers, and employees, is governed by Federal Rule of Civil Procedure 4(i). To serve the United States, a party must:

> (A)(i) deliver a copy of the summons and of the complaint to the United States attorney for the district where the action is brought—or to an assistant United States attorney or clerical employee whom the United States attorney designates in a writing filed with the court clerk—or
>
> > (ii) send a copy of each by registered or certified mail to the civil-process clerk at the United States attorney's office;
>
> (B) send a copy of each by registered or certified mail to the Attorney General of the United States at Washington, D.C.; and
>
> (C) if the action challenges an order of a nonparty agency or officer of the United States, send a copy of each by registered or certified mail to the agency or officer,

Fed. R. Civ. P. 4(i).

The return receipts reflect that Thul did, in fact, send a copy of the summons and the complaint to the civil-process clerk at the United States attorney's office, the Attorney General of the United States at Washington, D.C., and the Department of the Interior, as prescribed by Rule 4(i). (*See* Doc. 8.) However, Thul himself signed each of the affidavits of service as the server. (*Id.* at 3, 8, 14.) Rule 4(c) provides that service,

in any form, may be effected by "[a]ny person who is at least 18 years old and *not a party*." Fed. R. Civ. P. 4(c)(2) (emphasis added). Thul, as a party to this action, cannot act as the process server, even where service is effectuated by certified mail. *See e.g.*, *Reading v. United States*, 506 F. Supp. 2d 13, 19 (D.D.C. 2007) ("Rule 4 is not so wide in scope as to [allow] a plaintiff (even one proceeding pro se) [to effectuate ']service by Certified Mail via the Post Master General,' as the plaintiffs here argue," (cleaned up)); *Wilson v. Suntrust Bank, Inc.*, No. 3:10-CV-573-FDW-DCK, 2011 WL 1706763, at *1 (W.D.N.C. May 4, 2011) ("It is well-established that this rule prohibits service of process by a party in all forms. Thus a plaintiff herself may not effectuate service by sending a copy of the summons and complaint through certified mail.") (citations omitted); *Davis v. Cnty. of Dallas*, No. 3:19-CV-1494-B-BK, 2020 WL 1259143, at *1 (N.D. Tex. Feb. 18, 2020), *report and recommendation adopted*, No. 3:19-CV-1494-B, 2020 WL 1249636 (N.D. Tex. Mar. 13, 2020) (finding the plaintiff's attempt to serve the defendants by sending the summons and complaint himself via certified mail to be invalid).

"The plaintiff generally bears responsibility for appointing an appropriate person to serve a copy of his complaint and the summons upon a defendant," who "is usually a commercial process server plaintiff has contracted with to effectuate service for a fee." *Byrd v. Stone*, 94 F.3d 217, 219 (6th Cir. 1996). When a plaintiff proceeds in forma pauperis, 28 U.S.C. § 1915(c) provides that the court must appoint a U.S. Marshal to

serve plaintiff's process. *Id.* In any event, a party to the action, even one proceeding pro se, may not effectuate service himself. *See* Fed. R. Civ. P. 4(c)(2). Accordingly, Thul has not properly effectuated service in this matter. (*See* Doc. 8.) To do so, he must either hire a process server to effectuate service on the United States, who must be the one to fill and sign the server's affidavit to prove service or apply to proceed in forma pauperis to have the court appoint a process server. Additionally, the Court notes that it appears none of the servers' affidavits that Thul submitted were notarized.

For these reasons, the Court hereby puts Thul **ON NOTICE** that if he does not properly effectuate service in accordance with these rules by the service deadline, July 18, 2022, the Court will order him to show cause for why his complaint should not be dismissed for failure to serve. Thul can comply with Rule 4(c)(2) by appointing an appropriate *nonparty* to serve his complaint and summons on the United States and thereafter having such a server sign a notarized server's affidavit. Alternatively, he may apply to proceed in forma pauperis, and if his application is accepted, the Court will appoint a U.S. Marshal to serve his process on the United States.

SO ORDERED.

/s/ Travis R. McDonough
TRAVIS R. MCDONOUGH
UNITED STATES DISTRICT JUDGE

Additional material from this filing is available in the Clerk's Office.