

APPENDIX A

MANDATE

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 26th day of May, two thousand twenty-two.

PRESENT:
REENA RAGGI,

RICHARD C. WESLEY,
SUSAN L. CARNEY,
Circuit Judges.

Adam Bruzzese,
Plaintiff-Appellant,

v.

21-1448

Merrick B. Garland, Attorney General of the
United States,
Defendant-Appellee.

FOR PLAINTIFF-APPELLANT:
ADAM BRUZZESE, pro se,
Farmingdale, New York.

FOR DEFENDANT-APPELLEE:
DAVID A. COOPER, (Varuni
Nelson, *on the brief*),
Assistant United States
Attorneys, for Breon Peace,
United States Attorney for
the Eastern District of New
York, Brooklyn, New York.

Appeal from orders of the United States District
Court for the Eastern District of New York (Johnson,
J.).

**UPON DUE CONSIDERATION, IT IS
HEREBY ORDERED, ADJUDGED, AND
DECREEED** that the orders of the district court dated

May 14, 2021, and filed May 17, 2021, are
AFFIRMED.

Appellant Adam Bruzzese, proceeding *pro se*, appeals from the district court orders (1) construing his motions to unseal records and for a hearing as motions to reconsider the district court's 2016 award of summary judgment, and (2) denying that relief. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal, to which we refer only as necessary to explain our decision to affirm.

As an initial matter, Bruzzese's motions were properly construed as motions under Federal Rule of Civil Procedure 60(b). Bruzzese previously sued the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") under the Rehabilitation Act, challenging the 2009 decision by the ATF to reassign him to a non-law enforcement position. *See Bruzzese v. Sessions*, 725 F. App'x 68 (2d Cir. 2018) (summary order). The district court granted summary judgment to the ATF, a decision that we affirmed. *See id.* The motions and other letters Bruzzese filed with the district court after judgment was entered sought to raise new due process arguments regarding his 2009 reassignment at the ATF, the same event animating his Rehabilitation Act claim. Bruzzese's motions were essentially a post-judgment attempt either to amend his original complaint so as to add a new claim or to set aside the award of summary judgment based on a new legal theory. Either construction would require the district court to vacate or to set aside the judgment under Rule

60(b). *See Ruotolo v. City of New York*, 514 F.3d 184, 191 (2d Cir. 2008) (stating that amending complaint after entry of final judgment first requires that judgment be vacated or set aside under Rule 60(b)); *Nat'l Petrochemical Co. of Iran v. M/T Stolt Sheaf*, 930 F.2d 240, 245 (2d Cir. 1991) ("Unless there is a valid basis to vacate the previously entered judgment, it would be contradictory to entertain a motion to amend the complaint.").

The denial of a Rule 60(b) motion is generally reviewed for abuse of discretion; denial of a Rule 60(b)(4) motion, however, is reviewed *de novo*. *See Meilleur v. Strong*, 682 F.3d 56, 64 (2d Cir. 2012); *Cent. Vt. Pub. Serv. Corp. v. Herbert*, 341 F.3d 186, 189 (2d Cir. 2003). Though Bruzzese argues in his principal brief that the *de novo* standard applies, his motions did not raise an issue falling under Rule 60(b)(4) because he provides no basis to conclude that the district court's judgment is "void" under that rule. *See United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 270-71 (2010) (explaining that Rule 60(b)(4) applies only when the court violated the party's due process rights or acted without jurisdiction, rendering the judgment "void"). In any event, his claims fail under either standard of review.

Rule 60(b) provides "a mechanism for 'extraordinary judicial relief' and may be "invoked only if the moving party demonstrates 'exceptional circumstances.'" *Ruotolo*, 514 F.3d at 191 (quoting *Paddington Partners v. Bouchard*, 34 F.3d 1132, 1142 (2d Cir. 1994)). Construing his *pro se* submissions to

raise the strongest arguments that they suggest, *see Bertin v. United States*, 478 F.3d 489, 491 (2d Cir. 2007), Bruzzese argues that he could not have raised a due process claim until after the culmination of his Rehabilitation Act action. Thus, we will consider Bruzzese's motions as arising under Rule 60(b)(2), which allows a party to seek relief from final judgment on the ground of "newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)." Fed. R. Civ. P. 60(b)(2).

In order to succeed on a Rule 60(b)(2) motion, a movant must show that:

- (1) the newly discovered evidence was of facts that existed at the time of trial or other dispositive proceeding, (2) the movant [was] justifiably ignorant of them despite due diligence, (3) the evidence [is] admissible and of such importance that it probably would have changed the outcome, and (4) the evidence [is] not ... merely cumulative or impeaching.

United States v. Int'l Bhd. of Teamsters, 247 F.3d 370, 392 (2d Cir. 2001) (citation omitted). Here, much of the information on which Bruzzese relies is not "newly discovered" within the meaning of Rule 60(b)(2). Indeed, Bruzzese asserts that "the evidence needed for the Due Process claim [was] under seal" in the current case, which means it was known to him before his case was dismissed. Appellant's Br. at 7-8. Most of the

evidence he relies upon was produced during discovery in early phases of this case. He therefore could have requested leave to amend his complaint and have alleged a due process claim before judgment was first entered. To the extent any relevant evidence can be deemed newly discovered insofar as Bruzzese learned of it post-judgment, Bruzzese points to none that materially affects the viability of his due process arguments based on his 2009 reassignment. Thus, Bruzzese has made no showing that such evidence—as opposed to evidence available before the district court awarded summary judgment—would have changed the outcome of his due process claim.¹ Accordingly, we cannot conclude that the district court abused its discretion when it declined to grant Bruzzese relief from the judgment to allow him to assert a new claim.

We have considered all of Bruzzese's remaining arguments and find in them no basis for reversal. Accordingly, we **AFFIRM** the orders of the district court.

FOR THE COURT:

¹ Bruzzese argues that he could not have known before this Court's decision in his prior appeal that he would be unable to succeed on his Rehabilitation Act claim, but this does not constitute newly discovered evidence that would support his due process claim or relieve him of the duty to present that claim earlier in the proceedings to avoid piecemeal litigation. Bruzzese provides no basis upon which to conclude that he was unable to pursue his due process claim until after his Rehabilitation Act claim was dismissed.

Catherine O'Hagan Wolfe, Clerk of Court
[Seal and Signature]

A True Copy
Catherine O'Hagan Wolfe - Clerk
United States Court of Appeals, Second Circuit
[Seal and Signature]

APPENDIX B

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

ADAM BRUZZESE,
Plaintiff,

-against-

13 CV 5733 (SJ)

MERRICK B. GARLAND,
ATTORNEY GENERAL OF THE
UNITED STATES,
Defendant.

APPEARANCES

ADAM BRUZZESE, *PRO SE*
48 Weiden Street
Farmingdale, New York 11735

MERRICK B. GARLAND
Attorney General
Eastern District of New York
271 Cadman Plaza East
Brooklyn, NY 11201
By: James R. Cho
Timothy D. Lynch
David Cooper
Attorneys for Defendant

MEMORANDUM & ORDER

JOHNSON, Senior District Judge:

Presently before the Court is Plaintiff Adam Bruzzese's "Motion to Unseal Document." (Dkt. No. 90). Based on parties' submissions for the reasons stated below, the motion is DENIED.

BACKGROUND

In 2013 Plaintiff Adam Bruzzese ("Plaintiff") brought a claim of unlawful discrimination pursuant to the Rehabilitation Act of 1973 ("Rehabilitation Act"), 29 U.S.C. § 701 *et seq.*, against the Attorney General of the United States ("Defendant"). Defendant challenged his reassignment as a Special Agent for the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") to a non-law enforcement position.

Plaintiff worked as an ATF Special Agent from May 2000 to June 2009. His job involved extensive field work and carrying a firearm. In June 2009 Plaintiff's supervisor ATF Special Agent in Charge Ronald Turk ("SAC Turk") reassigned him to a non-law enforcement job. Plaintiff argued that SAC Turk reassigned him because SAC Turk believed Plaintiff suffered from a mental impairment. By contrast, Defendant claimed that Plaintiff was reassigned due to concerns about Plaintiff's mental health and emotional stability.

In response to his reassignment, Plaintiff filed

an administrative complaint with the Equal Employment Opportunity Commission ("EEOC") alleging that ATF discriminated against him based on a perceived mental disability. An EEOC Administrative Judge found that Plaintiff failed to show discrimination, ATF adopted the EEOC's decision, and the EEOC Office of Federal Operations affirmed.

On October 18, 2013 Plaintiff brought suit in the United States District Court for the Eastern District of New York challenging his reassignment. (Dkt. No. 1). On November 16, 2015 Defendant moved for summary judgment in front of Judge Weinstein. (Dkt. No. 49). Judge Weinstein granted Defendant's motion, finding that Plaintiff was not qualified to be a Special Agent, was not an individual with a disability (nor was he regarded as individual with a disability by his supervisors), was not discriminated against because of a disability, and that Plaintiff offered non-discriminatory reasons for the reassignment that were not pretextual on June 8, 2016. (Dkt. No. 80).

On June 9, 2016 Plaintiff appealed the judgment (Dkt. No. 81) and on July 3, 2018 the Second Circuit affirmed the judgment. (Dkt. No. 86). On March 10, 2020 the case was reassigned to this court. And on March 13, 2020 Plaintiff filed this motion to unseal. (Dkt. No. 90).

DISCUSSION

The Court construes *pro se* litigants pleadings

and briefs "liberally ... reading such submissions to raise the strongest arguments they suggest." *McLeod v. Jewish Guild for the Blind*, 864 F.3d 154, 156 (2d Cir. 2017) (per curiam) (internal quotation marks omitted); *see also Pabon v. Wright*, 459 F.3d 241, 248 (2d Cir. 2006); *Sharpe v. Conole*, 386 F.3d 482, 484 (2d Cir. 2004). Courts will look to *pro se* applicants' allegations to determine their claims. *See McLeod*, 864 F.3d at 156 (finding that, based on plaintiff's allegations, the district court should have construed the complaint to contain state law claims).

Construing Plaintiff's briefing "liberally" and "interpret[ing] [so as] to raise the strongest arguments that they suggest," the Court concludes that Plaintiff's briefing should be construed as a motion for reconsideration (not a motion to unseal). *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 472 (2d Cir. 2006). Looking at Plaintiff's briefing, it is clear that he seeks a new hearing, not access to unsealed documents.

As the government points out, Plaintiff makes a half-hearted, unclear argument to unseal "documents." Plaintiff does not even specify what documents he wishes to unseal or why he could not obtain the original documents through his attorney. (Dkt. No. 92). Then, Plaintiff abandons the request. He suggests that the Court should instead hear his new due process claim. (Dkt. No. 93). Defendant then filed additional documents in support of his request that the Court to hear his claim. (Dkt. No. 95). Taken together, it appears to the Court that Plaintiff actually seeks

reconsideration. Accordingly, the Court will construe Plaintiff's motion as a motion for reconsideration pursuant to Fed. R. Civ. P. 60(b).

Rule 60(b) provides that a court may relieve a party from a final judgment or order. The decision to grant relief is at the Court's discretion and is generally disfavored. *Stevens v. Miller*, 676 F.3d 62, 67 (2d Cir. 2012). "Since [Rule] 60(b) allows extraordinary judicial relief, it is invoked only upon a showing of exceptional circumstances." *Nemaizer v. Baker*, 793 F.2d 58, 61 (2d Cir. 1986). A Rule 60(b) motion is properly denied where it seeks only to relitigate issues already decided." *Maldonado v. Local 803 I.B. of Tr. Health & Welfare Fund*, 490 Fed.Appx. 405, 406 (2d Cir. 2013).

Here, Plaintiff improperly attempts to relitigate his claim. Plaintiff argues that his reassignment to a non-law enforcement position constituted a Fifth Amendment Due Process violation, and this Court should adjudicate his claim (Dkt. No. 93). The invention of a new argument is not an extraordinary circumstance. *See Pelzcar v. Kelly*, 2019 WL 2304651, at *1 (E.D.N.Y. May 29, 2019). It is an improper attempt at a second bite at the apple. *Id.* Plaintiff brought suit, the district court granted summary judgment, and the Second Circuit affirmed. Plaintiff does not get a second try under a new theory of the case. *See Analytical Surveys, Inc. v. Tonga Partners, L.P.*, 684 F.3d 36, 52 (2d Cir. 2012), as amended (July 13, 2012); *see also Zerman v. Jacobs*, 751 F.2d 82, 84-85 (2d Cir. 1984) (affirming district court's denial of plaintiff's motion for reconsideration based on a new

legal argument).

CONCLUSION

For the foregoing reasons, Plaintiff's Motion for Reconsideration is DENIED.

SO ORDERED.

STERLING JOHNSON, JR.
Senior United States District Judge

Dated: May 14, 2021
Brooklyn, NY

APPENDIX C

MANDATE

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 30th day of March, two thousand eighteen.

PRESENT: BARRINGTON D. PARKER,
RICHARD C. WESLEY,

CHRISTOPHER F. DRONEY,
Circuit Judges,

ADAM BRUZZESE,
Plaintiff-Appellant,

v.

No. 16-2775-cv

JEFFERSON B. SESSIONS III,
ATTORNEY GENERAL OF THE
UNITED STATES,
Defendant-Appellee.

FOR PLAINTIFF-APPELLANT:
HOWARD B. ZAKAI, Granger & Associates,
LLC, New York, New York.

FOR DEFENDANT-APPELLEE:
JAMES R. CHO, Assistant United States
Attorney (Varuni Nelson, Assistant United
States Attorney, *on the brief*), for Richard
P. Donoghue, United States Attorney for
the Eastern District of New York,
Brooklyn, New York.

Appeal from a June 9, 2016, judgment of the
United States District Court for the Eastern District of
New York (Weinstein, J.).

* Pursuant to Federal Rule of Appellate Procedure 43(c)(2),
Attorney General Jefferson B. Sessions III is automatically
substituted for former Attorney General Loretta E. Lynch as the
Defendant-Appellee in this case.

UPON DUE CONSIDERATION, IT IS
HEREBY ORDERED, ADJUDGED, AND
DECREEED that the judgment of the district court is
AFFIRMED.

Plaintiff-Appellant Adam Bruzzese appeals from a judgment of the district court granting Defendant-Appellee's motion for summary judgment.¹ Bruzzese challenges the dismissal of his claim of unlawful discrimination pursuant to the Rehabilitation Act of 1973 ("Rehabilitation Act"), 29 U.S.C. § 701 *et seq.* We assume the parties' familiarity with the underlying facts, the record of the prior proceedings, and issues on appeal, and repeat them here only as necessary to explain our decision to affirm.

Bruzzese worked as a Special Agent for the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") from May 2000 until June 2009. Bruzzese's position required him to carry a firearm. This appeal arises out of the decision of Bruzzese's supervisor, ATF Special Agent in Charge Ronald Turk ("SAC Turk" or "Turk"), to reassign him to a non-law-enforcement position within the ATF in June 2009. Bruzzese contends SAC Turk reassigned him because Turk regarded Bruzzese as suffering from a mental impairment.

SAC Turk based his decision to reassign

¹ The Defendant-Appellee is the Attorney General of the United States. The Department of Justice administers the Bureau of Alcohol, Tobacco, Firearms and Explosives.

Bruzzese on the following: (1) reports of Bruzzese's behavior from Bruzzese's supervisors and other agents, particularly Group Supervisor Eric Immesberger ("Supervisor Immesberger" or "Immiesberger") and Assistant Special Agent in Charge Delano Reid ("ASAC Reid" or "Reid"); and (2) a Fitness for Duty Evaluation Report ("FFD Report" or "Report") prepared by Dr. Haviva Goldhagen of the Federal Occupational Health Services branch of the Department of Health & Human Services ("FOH").

SAC Turk learned from ASAC Reid and Supervisor Immesberger that they were concerned about Bruzzese's "mental and emotional stability" and that Bruzzese had made "homicidal and suicidal comments." Joint App. at 2657. At his deposition, Turk acknowledged that he was "worried about ... Bruzzese's mental and emotional stability" based on what Reid and Immesberger told him. Joint App. at 1406. Among other examples, Reid told Turk that Bruzzese had become "exceedingly excited" and "openly irate" with his supervisor when an undercover gun purchase had been delayed, and that on another occasion, Bruzzese had locked himself inside his car during an enforcement operation after having an argument with his supervisor. Joint App. at 2657.

Dr. Goldhagen's FFD Report was based on her review of medical, psychological, and psychiatric evaluations of Bruzzese that other professionals conducted. The FFD Report includes both the findings of those evaluations and accounts of incidents ASAC Reid and Supervisor Immesberger reported to SAC

Turk. The Report concludes, consistent with the psychological and psychiatric evaluations, that Bruzzese did not have a mental health condition or a personality disorder, but that Bruzzese's reported behavior evinced histrionic and narcissistic personality traits.² The Report indicates that the psychological and the psychiatric evaluations concluded that Bruzzese's behavior could support an administrative decision by the ATF to restrict him from carrying a weapon and performing certain law enforcement duties. Moreover, the Report concludes that, based on the presence of these personality traits, Bruzzese's "suitability for a law enforcement job is questionable," Joint App. at 797, and "management is strongly encouraged to continue to restrict SA Bruzzese's arming authority pending further training and other measures designed to improve [his] ability to effect more reasoned, thoughtful, and appropriate decisions[.]" Joint App. at 798.

Following SAC Turk's decision to reassign him, Bruzzese filed an administrative complaint with the Equal Employment Opportunity Commission ("EEOC") on August 20, 2009, alleging the ATF discriminated against him based on a perceived mental

² The FFD report's summary of the psychological evaluation clarifies that "histrionic" personality characteristics include "proneness to react more easily, often[,] and extremely to challenges than is normally the case[.]" while "narcissistic" characteristics include "the tendency to be self-centered, to see things only from [one's own] perspective and accordingly, to feel (easily) justified in defending [one's own] stance." Joint App. at 792.

disability. An EEOC Administrative Judge found that Bruzzese had failed to show discrimination, the ATF adopted this finding, and the EEOC's Office of Federal Operations affirmed the ATF's decision.

Bruzzese filed suit in the United States District Court for the Eastern District of New York on October 18, 2013, bringing employment discrimination claims under the Rehabilitation Act.³ On November 16, 2015, Defendant-Appellee moved for summary judgment. On June 8, 2016, the district court granted Defendant-Appellee's motion, concluding that Bruzzese's diagnosed personality traits rendered him unqualified to be a Special Agent with a firearm; that Bruzzese was not disabled and SAC Turk did not regard him as such; that as a result, his transfer was not motivated by a disability or the perception of a disability; and that, in any event, defendant had offered legitimate, non-discriminatory reasons for the transfer. On appeal, Bruzzese argues that the district court erred on all four grounds, and the grant of summary judgment should be reversed.

We review the district court's grant of summary judgment *de novo*. *Wright v. N.Y. State Dep't of Corr.*, 831 F.3d 64, 71 (2d Cir. 2016). We "resolve all ambiguities and draw all permissible factual inferences in favor of the non-moving party, and will

³ Bruzzese initially challenged both his initial temporary reassignment and his permanent reassignment, but did not pursue the former before the district court. Thus, only the permanent reassignment is challenged on appeal.

affirm summary judgment only if the moving party shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Id.* at 71-72 (internal quotation marks, citations, and alterations omitted). However, "[t]he mere existence of a scintilla of evidence in support of the [non-movant's] position will be insufficient" to defeat summary judgment. *Lyons v. Lancer Ins. Co.*, 681 F.3d 50, 56 (2d Cir. 2012) (quoting *Anderson v. Liberty lobby, Inc.*, 477 U.S. 242, 252 (1986)).

In evaluating an employment discrimination claim under the Rehabilitation Act, we apply the relevant standards set forth in the Americans with Disabilities Act of 1990 ("ADA"). 29 U.S.C. §§ 791 (f), 794(d) (specifying that, in employment discrimination cases, the standards for determining whether these sections of the Rehabilitation Act have been violated are "the standards applied under title I" and "sections 501 through 504, and 510" of the ADA). The elements of a *prima facie* case are: .. (1) the employer is subject to the [Rehabilitation Act]; (2) the plaintiff is disabled within the meaning of the ADA or perceived to be so by her employer; (3) she was otherwise qualified to perform the essential functions of the job with or without reasonable accommodation; (4) she suffered an adverse employment action; and (5) the adverse action was imposed because of her disability." *Davis v. N.Y.C. Dep't of Educ.*, 804 F.3d 231, 235 (2d Cir. 2015) (per curiam) (setting forth elements of *prima facie* ADA case).

"Disability" is defined in the ADA as "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment" 42 U.S.C. § 12102(1). An individual is "regarded as" disabled if she has an "actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity." 42 U.S.C. § 12102(3)(A). Under regulations promulgated by the EEOC,⁴ mental impairment is defined as "[a]ny mental or psychological disorder," including "emotional or mental illness ..." 29 C.F.R. § 1630.2(h)(2) (2012). By contrast, "common personality traits such as poor judgment or a quick temper" are not themselves impairments if they are not "symptoms of a mental or psychological disorder." 29 C.F.R. Pt. 1630, App. § 1630.2(h) (2016).

To determine whether a plaintiff's employer regards her as disabled, we look primarily to the views of the person who made the decision to take adverse employment actions, rather than those of other supervisors or employees. *See Stephan v. W. Irondequoit Cent. Sch. Dist.*, 450 F. App'x 77, 80 (2d Cir. 2011) (summary order); *EEOC v. J.B. Hunt Transp., Inc.*, 321 F.3d 69, 76 (2d Cir. 2003) (*superseded by statute on other grounds as stated in*

⁴ "We accord great deference to the EEOC's interpretation of the ADA, since it is charged with administering the statute." *Francis v. City of Meriden*, 129 F.3d 281, 283 n.1 (2d Cir. 1997) (internal quotation marks omitted).

Wegner v. Upstate Farms Coop, Inc., 560 F. App'x 22, 23 (2d Cir. 2014) (summary order)).

Having reviewed the record on appeal, we agree with the district court that summary judgment was warranted because Bruzzese did not raise a genuine dispute of material fact as to whether SAC Turk, the decisionmaker in this case, regarded him as disabled.

First, none of the FOH professionals whose findings were detailed in the FFD Report, upon which SAC Turk relied, concluded Bruzzese suffered from a mental, emotional, or personality disorder, or a mental illness. Rather, the psychological and psychiatric evaluations, as well as Dr. Goldhagen's overall evaluation, attributed Bruzzese's behavior to personality traits that likely would compromise Bruzzese's ability to perform all of the duties as an armed ATF agent. Personality traits are not, by themselves, a mental impairment. 29 C.F.R. Pt. 1630, App. § 1630.2(h). There is no evidence Turk disagreed with, rejected, or misunderstood these conclusions.

Second, to the extent ASAC Reid's or Supervisor Immesberger's opinions about Bruzzese's mental condition or behavior may have differed from those expressed in the FFD Report, the record does not support the inference that SAC Turk adopted these opinions, even if he did rely on Reid and Immesberger for factual information. Substantially all of the behavior that Reid and Immesberger reported to Turk (including Bruzzese's "homicidal and suicidal comments") was also described in the FFD Report as

having been considered and accounted for by the FOH professionals. Thus, there is no evidence Turk regarded Bruzzese as disabled based on any additional information from Reid and Immesberger.

Finally, we find that SAC Turk's acknowledgement that he was "worried about ... Bruzzese's mental and emotional stability," Joint App. at 1406, is not more than a mere "scintilla" of evidence that Turk regarded Bruzzese as disabled. *See Lyons*, 681 F.3d at 56. Viewed in context with all the other evidence in the record, even in the light most favorable to Bruzzese, a reasonable fact-finder would not understand Turk's comment to refer to any mental disability, or to disagree with the FFD Report's conclusion that Bruzzese was not disabled, but rather to express Turk's concerns about Bruzzese's behavior and how it affected his ability to be a safe and effective armed law-enforcement officer.

* * *

We have considered Bruzzese's remaining arguments and conclude that they are without merit.⁵ Accordingly, we **AFFIRM** the judgment of the district court.

FOR THE COURT:

⁵ Because summary judgment was warranted on the "regarded-as-disabled" element of Bruzzese's claim, we need not consider the other grounds on which the district court granted summary judgment.

Catherine O'Hagan Wolfe, Clerk of Court
[Seal and Signature]

A True Copy
Catherine O'Hagan Wolfe - Clerk
United States Court of Appeals, Second Circuit
[Seal and Signature]

APPENDIX D

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

**ADAM BRUZZESE,
Plaintiff,**

- against -

13-CV-5733

**LORETTA E. LYNCH, ATTORNEY
GENERAL OF THE UNITED STATES,
Defendant.**

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MEMORANDUM AND ORDER

Table of Contents

I.	Introduction	2
II.	Facts	3
III	Procedural Background	8
IV.	Law	10
	A. Summary Judgment	10
	B. Rehabilitation Act of 1973	10
	1. Qualified Individual	11
	2. Individual with a disability	13
V.	Application of Law to Facts	14
	A. Plaintiff cannot make out a <i>prima facie</i> case	14
	1. Plaintiff is not a "qualified individual"	14
	2. Plaintiff is not an "individual with a disability"	16
	3. Plaintiff was not discriminated against because of a disability	17
	B. Defendant offered non-discriminatory reasons which are not pretextual ..	19
VI.	Conclusion	19

I. Introduction

This case demonstrates the necessity of granting substantial deference to supervisors of employees who

may endanger the public by their control of firearms or other dangerous instruments. When firearms or other dangerous instruments are involved, an employer must have complete confidence in the ability of its employees to safely and properly perform his or her duties, and be able to remove that employee when that confidence is absent. A supervisor in an organization issuing firearms to its employees has a special obligation to the public to take precautions against their misuse.

As law enforcement officers, federal Special Agents are given the right to use deadly force in complex, emergency situations. Plaintiff gave his supervisors good reason to question his judgment. They appropriately took away his firearm after conducting a thorough investigation. If plaintiff had retained his firearm and had inappropriately injured or killed someone, not only would there be the loss of innocent life, but his supervisors and employer would face significant public criticism, and liability.

Adam Bruzzese sues Attorney General Loretta Lynch in her capacity as head of the Department of Justice, which administers the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"). He alleges discrimination in violation of the Rehabilitation Act of 1973, 29 U.S.C. § 791 *et seq.* Plaintiff's claims stem from his re-assignment from the position of Special Agent with the ATF to that of Technical Surveillance Specialist – in his view due to his mental health condition.

Defendant moves for summary judgment. A hearing was held on June 1, 2016. *See Hr'g Tr.*, June 1, 2016. The motion is granted.

II. Facts

Plaintiff joined the ATF in 2000 as a Special Agent. Pl.'s Counterstatement of Material Facts in Response to Def.'s Statement of Undisputed Material Facts Pursuant to Local Civ. R. 56.1, Feb. 20, 2016, ECF No. 58-1 ("56.1 Response"), at ¶ 1. The Special Agent job description prescribes the use of "tact and discretion in investigative assignments which are typically of a sensitive nature." *Id.* at ¶ 13. Carrying a firearm is an essential function of a Special Agent's job. *Id.* at ¶ 5.

From October 2002 to June 2009, plaintiff was assigned to Group IV in the New York Field Division office in Brooklyn. *Id.* at ¶¶ 2, 6. The Special Agents in Group IV, of which there are generally 8-10, focus on firearms trafficking cases. *Id.* at ¶¶ 3, 10. From time to time their work is integrated with that of officers from the New York Police Department and New York State Police. *Id.* at ¶ 11. While a member of Group IV, plaintiff's immediate supervisor was Group Supervisor Eric Immesberger. His second-level supervisor was Assistant Special Agent in Charge Delano Reid. His third-level supervisor was Special Agent in Charge Ronald Turk. *Id.* at ¶¶ 7-9.

Plaintiff's immediate supervisor became concerned about plaintiff's mental health after

incidents including:

- an interaction between plaintiff and Group Supervisor Immesberger following a failed undercover drug purchase operation in the Summer of 2005;
- an arrest of a wanted fugitive in 2006 at a Manhattan office building without submitting a tactical plan before-hand;
- plaintiff's reaction to his fatal shooting of a suspect during an undercover operation, including comments he purportedly made afterwards and his participation in support and counseling groups;
- a joke made during a pre-operation briefing in August 2008 that, if there were a robbery attempt, other agents would hear a gunshot;
- acting "hyper" in front of Assistant Special Agent in Charge Reid when discussing a potential undercover operation, and arguing with Group Supervisor Immesberger upon his arrival at the staging area for the operation;
- plaintiff's failure to obtain an arrest warrant following an undercover operation;
- plaintiff's alleged making suicidal comments; and
- reports of plaintiff's hand shaking uncontrollably.

Plaintiff disputes only the details of each of these incidents. He argues that the context in which they occurred show that he did nothing wrong or, at worst, acted inappropriately at times and later apologized appropriately for his behavior.

On September 4, 2008, Reid met with plaintiff and told him that based on his concern over safety issues, he wanted plaintiff to surrender his firearm. 56.1 Response at ¶¶ 137, 140. Plaintiff was informed that he was being temporarily reassigned to ATF's Tactical Operations Office where he would not participate in law enforcement operations in the field. *Id.* at 141. He kept his status as Special Agent, salary, overtime rate, and government-owned vehicle privileges. *Id.* at ¶ 142.

Between December 2008 and March 2009, plaintiff underwent a Fitness-for-Duty evaluation ("FFD"). *Id.* at 145. The FFD consisted of (I) an independent medical examination performed on December 3, 2008, by Robert Boesch, M.D.; (ii) an independent psychological evaluation conducted on February 25, 2009, by Marc Janoson, Ph.D.; (iii) a report dated March 9, 2009, interpreting the psychological findings of Dr. Janoson by Dr. Janoson and Neil S. Hibler, Ph.D.; (iv) an independent psychiatric evaluation conducted on March 11, 2009, by Samoon Ahmad, M.D.; (v) a discussion of the case with Drs. Hibler and Ahmad by telephone on April 16, 2009; and (vi) a review of documentation provided by ATF and the medical reports and records by Haviva Goldhagen, M.D. *Id.* at ¶ 146.

Dr. Boesch's examination reflected normal results with "[n]o history of neurologic or psychiatric symptoms." *Id.* at ¶ 147. Dr. Ahmad's evaluation concluded that plaintiff's "behavior and actions . . . are a function of his personality and style . . . [T]hough these traits do not rise to the level of personality disorder they seem to validate the presence of *personality factors that could result in future over-reactions.*" Decl. of Howard B. Zakai in Supp. of Pl.'s Opp'n to Def.'s Mot. for Summ. J., Feb. 19, 2016, ECF No. 57-1 ("Zakai Decl."), at Ex. 25 (emphasis added).

Dr. Goldhagen, who reviewed the reports of Drs. Boesch, Janoson, Hibler, Ahmad, and ATF records, reached the following conclusion with respect to serious job safety issues caused by plaintiff's "personality characteristics" rather than his "mental condition":

Based on the independent medical and psychiatric evaluations, the documents provided by ATF, and my knowledge of the essential functions of the job, *it is my professional opinion that SA Bruzzese does not have a medical condition that would adversely impact his ability to perform the full functions of his job safely and effectively. However, he does have personality characteristics that appear to increase the safety risks for himself and others in the performance of the job, leading me to question his suitability for the job of ATF Special Agent. All conduct,*

behavior or performance deficits should be dealt with administratively, including the continued suspension of arming authority should management continue to have significant safety concerns.

SA Bruzzese's personality characteristics appear to play a significant role in his conduct and behavior at work and his style of interacting, and do raise *significant concern regarding his ability to perform the full functions of his job safely and effectively.*

Based on SA Bruzzese's personality characteristics, *his suitability for a law enforcement job is questionable.*

Based on the results of the independent psychological and psychiatric evaluations, SA Bruzzese does not currently evidence a mental health condition that would prevent him from performing the essential functions of his job safely and effectively. He does, however, have demonstrated personality characteristics that explain his

behavioral style at work. Personality characteristics are not clinical disorders. Any problems arising out of personality characteristics may affect suitability for a particular job and are considered administrative, not medical, issues. However, based on the information supplied by management and the independent examination results, *management is strongly encouraged to continue to restrict SA Bruzzese's arming authority* pending further training and other measures designed to improve SA Bruzzese's ability to effect more reasoned, thoughtful, and appropriate decisions, particularly under stressful and safety sensitive conditions.

Cho Decl. at Ex. 16 (emphasis added).

In the fall of 2008, plaintiff had several counseling sessions with Lawrence Florek, a licensed clinical social worker. 56.1 Response at ¶ 159. On April 27, 2009, Mr. Florek completed an evaluation form reporting that plaintiff had an excellent prognosis with "no static medical or psychiatric condition to report" and "a stable and cohesive personality structure." Cho Decl. at Ex. 17. Mr. Florek diagnosed plaintiff with DSMIV Axis I 309.28 (anxiety and depressed mood). *Id.*

After receiving the results from the FFD, and based on input from plaintiff's supervisors, on June 4,

2009 Special Agent in Charge Turk permanently reassigned plaintiff to the non-law enforcement position of Technical Surveillance Specialist. 56.1 Response at ¶¶ 167, 171; Hrg Tr., June 1, 2016, at 33:17-34:4. Special Agent Turk concluded: "when I made my assessment, with the totality of all the issues that I could read . . . and gather, risk and safety were my greatest concerns, absolutely." Hrg Tr., June 1, 2016, at 39:9-11. Turk informed plaintiff of the reassignment at a meeting on June 4, 2009; during the meeting, Turk did not explicitly raise any concerns about plaintiff's mental health or fitness. 56.1 Response at ¶¶ 170, 180. Plaintiff's letter of reassignment does not mention any perceived mental illness or disability. *Id.* at ¶ 183.

In his new position, plaintiff no longer is considered a Special Agent but he receives the same pay as one, and he continues to receive equivalent step increases in his pay. *Id.* at ¶¶ 185, 186. He also has retained his government-owned vehicle privileges and the same work hours. *Id.* at ¶¶ 188, 189.

Bruzze contends that his promotion potential is limited because there are no jobs above a GS-13 pay grade in his new position, whereas there are jobs for Special Agents at the GS-14 and GS-15 pay grades. He also argues that his benefits at retirement will be different than they would have been before reassignment. *Id.* at ¶¶ 186, 187.

III. Procedural Background

On August 20, 2009, plaintiff filed an Equal Employment Opportunity complaint with the Department of Justice. Cho Decl. at Ex. 20. In his complaint, he alleged "I was transferred from an 1811 special agent position to a non-law enforcement position due to a perceived mental disability which I say is false. It was improper for ATF to transfer me and they discriminated against me by doing so." *Id.*

The Department of Justice acknowledged receipt of plaintiff's claim on August 28, 2009. It described the allegation of the complaint as "discriminat[ion] against [plaintiff] on the basis of a perceived mental disability, when effective June 7, 2009, you were reassigned from a GS-1811 Special Agent New York Group IV position, to a GS-1801 Technical Surveillance Specialist position in the Red Hook, New York office." *Id.* at Ex. 22. On March 30, 2010, plaintiff requested a hearing before an Equal Employment Opportunity Commission Administrative Law Judge. *Id.* at Ex. 23. Administrative Judge Erin M. Stilp issued a Decision Without A Hearing (apparently the functional equivalent of summary judgment) on May 19, 2011, finding no evidence of discrimination. The Department of Justice adopted the Administrative Judge's conclusions in a Final Order on June 22, 2011. *Id.* at Ex. 24.

Plaintiff appealed the Department of Justice's findings to the United States Equal Employment Opportunity Commission. Office of Federal Operations. On July 19, 2013, the Office of Federal Operations affirmed the Department of Justice's Final

Order and issued to plaintiff a right to sue notice. *Id.* at Ex. 25.

The present action was commenced on October 18, 2013. *See* Compl., ECF No. 1. Plaintiff asserted two counts in his complaint, both asserting discrimination in violation of the Rehabilitation Act of 1973, 29 U.S.C. § 791 *et seq.* The first is based on plaintiff's temporary reassignment to a non-law-enforcement capacity and removal of his firearm. *Id.* at ¶ 44. The second is predicated on his permanent reassignment to a non-law-enforcement job. *Id.* at ¶ 45.

Defendant's answer was a general denial. *See* Answer, Feb. 11, 2014, ECF No. 9. Following discovery, on November 16, 2015, defendant moved for summary judgment. *See* Mot. for Summ. J., Nov. 16, 2015, ECF No. 49.

In its motion for summary judgment, defendant argues that plaintiff failed to exhaust his administrative remedies after his temporary reassignment as alleged in the first cause of action. *See* Mem. of L. in Supp. of Def.'s Mot. for Summ. J., Nov. 16, 2015, ECF No. 49-2 ("Def.'s Mem."), at 4-10. Plaintiff then withdrew this cause of action based on that temporary reassignment. *See* Pl.'s Mem. of L. in Opp'n to Def.'s Mot. for Summ. J., Feb. 20, 2016, ECF No. 59 ("Pl.'s Opp'n"), at 1 n.1.

The only remaining issue is whether defendant is entitled to summary judgment on plaintiff's claim that his permanent re-assignment was discriminatory.

IV. Law

A. Summary Judgment

"Summary judgment is appropriate where admissible evidence in the form of affidavits, deposition transcripts, or other documentation demonstrates the absence of a genuine issue of material fact and one party's entitlement to judgment as a matter of law." *Allstate Ins. Co. v. Sidakis*, No. 13-CV-7211, 2016 WL 556869, at *6 (E.D.N.Y. Feb. 10, 2016). "The relevant governing law in each case determines which facts are material; '[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.'" *Bank of Am., N.A. v. Fischer*, 927 F. Supp. 2d 15, 25 (E.D.N.Y. 2013) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). "No genuinely triable factual issue exists when the moving party demonstrates, on the basis of the pleadings and submitted evidence, and after drawing all inferences and resolving all ambiguities in favor of the non-movant, that no rational jury could find in the non-movant's favor." *Id.* (citing *Chertkova v. Conn. Gen. life Ins. Co.*, 92 F.3d 81, 86 (2d Cir. 1996)).

B. Rehabilitation Act of 1973

Section 794 of Title 29 of the United States Code provides, in relevant part,

No otherwise qualified individual with a disability in the United States ... shall,

solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination ... under any program or activity conducted by any Executive agency

29 U.S.C. § 794.

The burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), applies to Rehabilitation Act cases. *See Kinsella v. Rumsfeld*, 320 F.3d 309, 314 (2d Cir. 2003). Under this framework, the plaintiff bears the initial burden of showing a *prima facie* case of discrimination. This requires demonstrating "(1) that [he is a 'qualified individual' with a disability; (2) that the defendants are subject to one of the anti-discrimination Acts; and (3) that [he was 'denied the opportunity to participate in or benefit from defendants' services, programs, or activities, or was otherwise discriminated against by defendants, by reason of h[is] disability.'" *Dean v. Univ. at Buffalo Sch. of Med & Biomedical Scis.*, 804 F.3d 178, 187 (2d Cir. 2015) (quoting *Powell v. Nat'l Bd. of Med. Exam'rs*, 364 F.3d 79, 85 (2d Cir. 2004), opinion corrected, 511 F.3d 238 (2d Cir. 2004)). Upon such a showing, the burden shifts to the defendant, who must offer legitimate, non-discriminatory reasons for its actions. In the final step, the burden shifts back to the plaintiff who must show that the proffered reasons are pretextual. *Kinsella*, 320 F.3d at 314.

1. Qualified Individual

To satisfy the first element of the *prima facie* case, a plaintiff must show that he is a "qualified individual with a disability." 29 U.S.C. § 794. For purposes of this statute, "'qualified individual' means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). To satisfy this requirement on summary judgment, a plaintiff must only show that he "possesses the basic skills necessary for performance of [the] job." *Robinson v. Concentra Health Servs., Inc.*, 781 F.3d 42, 45 (2d Cir. 2015) (quoting *Slattery v. Swiss Reinsurance Am. Corp.*, 248 F.3d 87, 92 (2d Cir. 2001)). "In approaching this inquiry, '[a] court must give considerable deference to an employer's judgment regarding what functions are essential for service in a particular position.'" *Shannon v. New York City Transit Auth.*, 332 F.3d 95, 100 (2d Cir. 2003) (quoting *D'Amico v. City of New York*, 132 F.3d 145, 151 (2d Cir. 1998)). Significant deference is especially appropriate in a situation involving a law enforcement agency, where a mistake may contribute to an erosion in the public's trust in government, cost the state a significant amount of money in *post hoc* litigation, and result in the loss of innocent life.

The relevant inquiry is not whether plaintiff had previously been qualified for the Special Agent position, but whether he is qualified now and will, with a substantial probability, present a risk in the future. *Shannon*, 332 F.3d 100 ("the 'otherwise qualified' inquiry asks whether the plaintiff *will be able* to do the job") (emphasis added); *see also Brower v. Cont'l*

Airlines, Inc., 62 F. Supp. 2d 896, 906 (E.D.N.Y. 1999) ("a prior positive performance review will not establish that a later unsatisfactory evaluation was a pretext for unlawful discrimination"). In a case such as the instant one, involving a law enforcement position that requires the carrying of a firearm, this inquiry "blends into," at least in part, the statutory "direct threat" defense. *Nelson v. City of N.Y.*, No. 11-CV-2732, 2013 WL 4437224, *9 (S.D.N.Y. Aug. 19, 2013). That defense permits an employer to impose a "qualification standard" which "may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." 42 U.S.C. § 12113(b).

"Direct threat" is defined in the Code of Federal Regulations as "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation." 29 C.F.R. § 1630.2(r).

The determination that an individual poses a "direct threat" shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. In determining whether an individual would pose a direct threat, the factors to be considered include:

- (1) The duration of the risk;
- (2) *The nature and severity of the potential harm;*
- (3) The likelihood that the potential harm will occur; and
- (4) The imminence of the potential harm.

Id. (emphasis added); *Sista v. CDC Ixis N. Am., Inc.*, 445 F.3d 161, 170 (2d Cir. 2006) (listing factors).

The EEOC's interpretive guidance explains that "[a]n employer ... is not permitted to deny an employment opportunity to an individual with a disability merely because of a slightly increased risk. The risk can only be considered when it poses a *significant risk, i.e., high probability, of substantial harm*; a speculative or remote risk is insufficient." 29 C.F.R. § Pt. 1630, App. § 1630.2(r) (emphasis added). In performing this analysis, "the courts quite properly accord a significant measure of deference to a [law enforcement agency]'s determination that an officer poses too great a risk to [him]self and the public." *Nelson*, 2013 WL 4437224, at *11 .

2. Individual with a disability

The term "individual with a disability" means an individual who has "a physical or mental impairment that substantially limits one or more major life activities" or who is "regarded as having

such an impairment." 29 U.S.C. § 705(20)(8); 42 U.S.C. § 12102(1). The "regarded as" clause requires a plaintiff to establish "that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity." 42 U.S.C. § 12102(3)(A). The "regarded as" clause does not apply "to impairments that are transitory and minor." A "transitory impairment" is one "with an actual or expected duration of 6 months or less." 42 U.S.C. § 12102(3)(B).

"The definition of an impairment ... does not include common personality traits such as poor judgment or a quick temper where these are not symptoms of a mental or psychological disorder." 29 C.F.R. § Pt. 1630, App'x; *see also Daley v. Koch*, 892 F.2d 212, 215 (2d Cir. 1989) ("poor judgment, irresponsible behavior and poor impulse control do not amount to a mental condition that Congress intended to be considered an impairment which substantially limits a major life activity"); *Greenberg v. New York State*, 919 F. Supp. 637, 643 (E.D.N.Y. 1996) (individual applying to be a correction officer with state department of correctional services could be rejected without violating anti-discrimination laws where psychologist concluded he had exercised poor judgment in some non-dispositive situations; "such personality character traits do not amount to a disability").

V. Application of Law to Facts

A. Plaintiff cannot make out a *prima facie* case

Defendant concedes that it is an employer subject to the Rehabilitation Act. Def.'s Mem. at 11. It correctly argues that plaintiff is unable to satisfy either the first or third requirements of the *prima facie* case.

1. Plaintiff is not a "qualified individual"

To be qualified as a special agent, one must have the ability to use "tact and discretion in investigative assignments which are typically of a sensitive nature," and to carry a firearm. 56.1 Response at ¶¶ 5, 13.

Defendant takes the position that plaintiff is not qualified because he cannot be trusted to carry a firearm or engage in dangerous law enforcement activities, essential elements of the Special Agent job. Def.'s Mem. at 25-26; Reply Mem. of Law in further support of Def.'s Mot. for Summ. J., May 5, 2016, ECF No. 72 ("Reply Br."), at 12-13. Dr. Goldhagen's report, upon which Special Agent Turk relied in part in reassigning plaintiff, concluded that plaintiff's *personality characteristics make him unfit* to hold a law enforcement position, and "strongly" encourages continuing the restrictions on his firearms privileges. Cho Decl. at Ex. 8 (Jan. 16, 2015 Dep. of Ronald Turk), at 221:7-15, and Ex. 16 (Goldhagen Report) (emphasis added); *see also* Hr'g Tr., June 1, 2016, at 33:17-34:2.

Plaintiff argues that the record reflects that he possesses all of the basic qualifications for the Special Agent job. He points to his history of ATF promotions, performance reviews, salary increases, and firearms certifications. Opp'n Mem. at 20-22. In opposition to Dr. Goldhagen's report, plaintiff submitted his own psychiatric report which concluded that he "is competent and fit for duty, [and] who does not pose a danger to himself, others, or the public." Zakai Decl. at Ex. 38 (June 8, 2015 Report of Dr. Mark J. Mills), at 26-27. He further contends that he can only be found unqualified if it is determined, through the required procedure, that he poses a "direct threat." Hr'g Tr., June 1, 2016, at 21:14-22:5; Opp'n Br. at 24-28. Plaintiff argues that defendant cannot show that he posed a direct threat because he "never threatened anyone and was not terminated or disciplined" and "the FFD evaluation found no evidence that plaintiff bore suicidal or homicidal ideation or was otherwise violent or dangerous." Opp'n Br. at 27.

As a matter of law, Turk's permanent reassignment of plaintiff did not constitute illegal discrimination because plaintiff has reasonably been determined to be not "qualified" to be a special agent carrying a gun. While it is true that the question of qualification is often blended with the question of whether an individual poses a "direct threat," because an individual does not constitute a "direct threat" does not render that individual qualified. Here, in addition to the carrying of a firearm, the job of a special agent requires vital exercise of great discretion – a mistake under stressful circumstances may mean sudden

death. 56.1 Response at ¶ 5.

The personality traits plaintiff demonstrated to his supervisors, and those reported in the FFD, indicate that a supervisor could find it probable that plaintiff lacks the personality to react responsibly to sudden psychological stress or emotional trauma. Cho Decl. at Ex. 16.

Plaintiff's own medical expert states that plaintiff "may display an undiplomatic style of interacting with his supervisors in the workplace." Zakai Decl. at Ex. 38. At the critical point of a dangerous armed mission, smooth interaction with superiors and associates is essential.

2. Plaintiff is not an "individual with a disability"

The parties agree plaintiff does not have an actual medical disability. Plaintiff argues, however, that he satisfies the requirement for someone who was "regarded as" having such a disability. Opp'n Br. at 7-17; Hr'g Tr., June 1, 2016, at 19:23-20:11. This position is not sustainable.

First, plaintiff is not correct that histrionic and narcissistic personality traits may meet the definition of "emotional or mental illness." *See* Opp'n Br. at 15-17 (citing EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities). The EEOC Enforcement Guidance upon which plaintiff relies does not support his position:

Traits or behaviors are not, in themselves, mental impairments. For example, stress, in itself, is not automatically a mental impairment. Stress, however, may be shown to be related to a mental or physical impairment. Similarly, *traits like irritability, chronic lateness, and poor judgment are not, in themselves, mental impairments*, although they may be linked to mental impairments.

EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities, EEOC Notice No. 915.002 (Mar. 25, 1997), available at <https://www.eeoc.gov/policy/docs/psych.html> (emphasis added); *see also* Reply Br. at 5-6.

The personality traits plaintiff demonstrated could reasonably be construed by plaintiff's supervisors as reflecting only poor judgment. None of the medical professionals who evaluated him concluded that he suffered from anything different than poor judgment. Plaintiff's own medical expert concluded that he has "an undiplomatic style of interacting." Zakai Decl. at Ex. 38, at 26-27. Such a personality trait by itself does not qualify as a disability. *See* 29 C.F.R. § Pt. 1630, App'x; *Daley*, 892 F.2d at 215; *Greenberg*, 919 F. Supp. at 643.

Second, the fact that Special Agent Turk expressed concern for plaintiff's mental and emotional health does not mean he regarded plaintiff as having

a disability protected under the law. Special Agent Turk's permanent reassignment of plaintiff was supported by the medical diagnoses in the FFD that plaintiff did not have a mental disorder. *See, e.g.*, Cho Decl. at Ex. 16; *id.* at Ex. 8 at 216:6-9. Turk appropriately could conclude that plaintiff did not suffer from a disability. His concern for plaintiff's mental and emotional stability could then properly relate to the personality traits plaintiff exhibited and the FFD diagnosed.

Because plaintiff does not have a protected disability under the law, and because Special Agent Turk could reasonably concluded that plaintiff did not have such a disability when he permanently reassigned plaintiff, plaintiff does not qualify as an "individual with a disability" under the law.

3. Plaintiff was not discriminated against because of a disability

The third factor plaintiff must show to make a *prima facie* case is that he suffered an adverse employment action as a result of having or being perceived as having a disability.

Defendant concedes that, for the purpose of summary judgment, plaintiff's permanent reassignment may constitute an adverse employment action. *See* Def.'s Mem. at 12, 28. Defendant argues, however, that plaintiff cannot show any direct or inferential evidence of discrimination through examples of others who were similarly situated but

treated differently. *Id.* at 28-29.

Plaintiff points to evidence showing that Special Agent in Charge Turk reassigned him specifically because he had concerns about plaintiff's probable future behavior, arguing this evidence establishes the requisite causal nexus. Opp'n Br. at 18. He is correct that the evidence shows he was reassigned because of concerns about his behavior. But, because his behavior was caused by personality traits which do not qualify as a disability under the law, adverse actions taken because of these traits do not constitute discrimination "by reason of . . . his disability." Plaintiff cannot satisfy the third requirement for a *prima facie* case.

Nelson v. City of New York, upon which plaintiff relied at oral argument, is distinguishable. In that case, the plaintiff had been diagnosed with actual mental disorders in the past. *Nelson*, 2013 WL 4437224, at *1-2 (diagnoses of chronic post-traumatic stress disorder, personality disorder NOS, major depressive disorder, anxiety disorder, and pain associated with medical condition and psychological factors). The history of the plaintiff's mental health diagnoses was used as a basis to deny her reinstatement to the police department. *Id.* at *7. Reliance on the history of these disorders, which do qualify as disabilities, to conclude that the plaintiff was still disabled, did satisfy the requirements of a "regarded as" claim. *Id.*

Here, in contrast, plaintiff was never diagnosed with a mental disorder that qualifies as a disability.

He was denied a position because of unprotected personality traits which caused his supervisors to have concern for his ability to be an armed special agent. The *Nelson* Court's denial of summary judgment is unpersuasive.

B. Defendant offered non-discriminatory reasons which are not pretextual

If plaintiff is assumed to have made out a *prima facie* case, the court finds that the second and third steps under the *McDonnell Douglas* framework are satisfied.

Turk had legitimate, non-discriminatory reasons for reassigning plaintiff. Def.'s Br. at 31-32. An official carrying a loaded weapon must be steady and reliable. The danger to the public and other federal officials – and the weapon carrier himself – requires extreme care in authorizing the carrying of a loaded weapon. Sudden emergencies require exquisite discipline and control to prevent panicking and firing of unnecessary lethal shots.

Plaintiff responds that the reasons defendant offered for the reassignment were merely pretextual to allow for intentional discrimination. Opp'n Br. at 50-67. He points to his history as a successful Special Agent and his certification as a firearms instructor. He also argues that the FFD evaluation recommended only temporarily disarming plaintiff pending further training to enhance his decision-making skills. *Id.*

The critical question is whether there is evidence showing that the decision to reassign was made because it was believed plaintiff had a protected mental disability. There does not appear to be such evidence. Rather, all of the evidence indicates that the decision to reassign was made because of plaintiff's personality characteristics, which do not rise to the level of a clinical disorder, but were sufficient to cause serious concern amongst plaintiff's supervisors.

VI. Conclusion

Documentary evidence in the form of medical reports and the unrebutted testimony of Special Agent in Charge Turk show that plaintiff was reasonably believed to have personality traits which rendered him unsuitable for a law enforcement gun-carrying position. These personality traits are not protected mental disabilities under the law in circumstances such as the present one.

As the various medical reports note, with counseling, plaintiff may learn to temper his problematic personality traits and regain his ability to hold a gun-carrying law enforcement position. A decision on the instant motion is a finding that Special Agent Turk did not violate anti-discrimination laws when he concluded that, in his reasonable professional judgment, at the time of the reassignment, plaintiff should not be carrying a gun.

The motion for summary judgment is granted. No costs or disbursements are awarded.

SO ORDERED

/s/

Jack B. Weinstein
Senior United States District Judge

June 8, 2016
Brooklyn, New York

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

**ADAM BRUZZESE,
Plaintiff,**

-against- 13-CV- 5733 (JBW)

**LORETTA E. LYNCH, ATTORNEY
GENERAL OF THE UNITED STATES
Defendant.**

JUDGMENT

A Memorandum and Order of Honorable Jack B. Weinstein, United States District Judge, having been filed on June 8, 2016, granting Defendant's motion for summary judgment; and ordering that no costs or disbursements are awarded; it is

ORDERED and ADJUDGED that Defendant's motion for summary judgment is granted; and that no costs or disbursements are awarded.

Dated: Brooklyn, New York
June 08, 2016

Douglas C. Palmer
Clerk of Court
by:
/s/ Janet Hamilton
Deputy Clerk

APPENDIX E

[LETTERHEAD OF U.S. DEPARTMENT OF
JUSTICE, BUREAU OF ALCOHOL, TOBACCO,
FIREARMS AND EXPLOSIVES]

June 04, 2009
www.atf.gov

765000:DAR
2302

Memorandum To: Special Agent Adam Bruzzese
New York Group IV

From: Assistant Special Agent in Charge
New York Field Division

Subject: Reassignment

This memorandum is forwarded to advise you that as of the upcoming pay period (June 07, 2009), you will be reassigned from your current GS-1811 Special Agent New York Group IV position, to a GS-1801 Technical Surveillance Specialist (TSS) position, in the Red Hook, New York Office.

PD number: 002117, Title: Technical Surveillance Specialist Pay Plan, Occupational Series & Grade: GS-1801-13, Organization Position Title: Technical Surveillance Specialist. The major duties of this position concern being able to function as a Bureau's technical investigative electronics expert, planner,

representative, coordinator, and advisor for the Bureau.

Specific duties include the following:

Serves as an expert source of technical electronics program knowledge and support for assigned field division. He/she interprets and adapts broad Field Operations-wide policy for the division, taking into account his/her knowledge of local conditions and specific enforcement operations. Develops operating guidance and maintenance procedures for field offices throughout the field division and at times throughout the Field Operations Directorate. Coordinates with Bureau management officials on projected covert electronics systems, current and planned capabilities, cost/benefit questions, etc.; furnishes technical leadership, review, and problem solving assistance to surveillance system users, the Special Agent in Charge (SAC), Tactical Operations Officers (TOOs), and counterparts and representatives of other Federal, State, local and foreign law enforcement agencies. Directly participates with special agents in utilizing technical surveillance techniques to gather evidence in support of criminal investigations and other enforcement operations. Attends and receives briefings concerning the objectives of specific investigations, available intelligence on the identified suspects, and the evidence collection requirements for the activity, which must be documented. At briefings provides options and recommendations pertaining to technical electronics support. Reviews affidavits and court orders prior to conducting technical surveillance activities to ensure

appropriateness of techniques being used. Assists Assistant United States Attorneys in the preparation of applications and court orders in order to maximize the effectiveness of electronic surveillance measures.

You have the right to grieve this action in accordance with the provisions contained in ATF Order 2770.1 C, Employee Grievances, dated August 10, 1988. Such a grievance must be submitted in writing and must include the personal relief requested. Any grievance must be submitted within fifteen (15) days of your receipt of this notice to Lisa Boykin, Chief Employee & Labor Relations Team, ATF Headquarters. You may contact Robin Hall-Evans of the Employee and Labor Relations Team at (202) 648-7488 to obtain a copy of ATF O 2770.1C.

If you believe that this action was taken in whole or in part on the basis of prohibited discrimination due to race, color, religion, sex, national origin, handicap, or age, you may wish to contact the Office of Equal Opportunity, Donna A. Vaughan, New York Regional Office, (718) 650-4000, to initiate a complaint of discrimination. Should you elect to pursue a discrimination complaint, it must be initiated within 30 calendar days after your receipt of this notice.

Should you have any questions concerning this reassignment, you can contact the undersigned directly at (718) 552-1503.

/s/
Delano A. Reid