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United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24-5056 September Term, 2024
FILED ON: JULY 22, 2025

John S. Morter,
Appellant

v.

Pete Hegseth, Secretary, Department of Defense,
Appellee

Appeal from the United States District Court for the District of Columbia (No. 1:23-cv-00343)

Before: MILLETT, KATSAS, and WALKER, *Circuit Judges.*

JUDGMENT

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs and oral argument of the parties. The Court has afforded the issues full consideration and has determined that they do not warrant a published opinion. *See* FED. R. APP. P. 36; D.C. CIR. R. 36(d). For the reasons stated below, it is:

ORDERED and **ADJUDGED** that the order of the district court issued on February 26, 2024, entering judgment in favor of appellee, be **AFFIRMED**.

John Morter filed suit against the Secretary of Defense alleging discrimination under the Rehabilitation Act of 1973. Mr. Morter, who worked for an intelligence unit within the Defense Department, was reassigned after he failed multiple polygraph exams designed to identify security vulnerabilities. Mr. Morter argues that the reassignment failed to accommodate his anxiety and its effect on his exam results, in violation of the Rehabilitation Act. We affirm the district court's judgment dismissing Mr. Morter's failure to accommodate and disparate treatment claims.

I

A

The Rehabilitation Act of 1973, 29 U.S.C. §§ 701 *et seq.*, prohibits federal agencies from engaging in employment discrimination against disabled individuals. 29 U.S.C. § 791(b); *see Adams v. Rice*, 531 F.3d 936, 942–943 (D.C. Cir. 2008). The Act applies to the federal government the same standards enforced under the Americans with Disabilities Act ("ADA"), 42 U.S.C.§§ 12101 *et seq*. *See* 29 U.S.C. § 791(f); *see also* 29 C.F.R. § 1614.203(b); *Solomon v. Vilsack*, 763 F.3d 1, 5 (D.C. Cir. 2014).

The ADA, and so also the Rehabilitation Act, bars discrimination against a "qualified individual on the basis of disability[.]" 42 U.S.C. § 12112(a). A qualified individual is one who is able to carry out "the essential functions" of an employment position "with

or without reasonable accommodation." *Id.* § 12111(8). The meaning of "discriminate" includes the failure to "mak[e] reasonable accommodations to the known physical or mental limitations of an otherwise qualified [employee] with a disability," unless the employer "demonstrate[s] that the accommodation would impose an undue hardship[.]" *Id.* § 12112(b)(5)(A); *see also* 29 C.F.R. § 1630.9(a); *Rice*, 531 F.3d at 943.

The Rehabilitation Act requires individuals to exhaust administrative remedies with the employing agency prior to filing suit in court. 29 U.S.C. § 794a(a)(1); *see Doak v. Johnson*, 798 F.3d 1096, 1099 (D.C. Cir. 2015).

B

Mr. Morter worked as an Intelligence Analyst with the Defense Intelligence Agency ("DIA") for 15 years. The DIA provides military intelligence for the government and is involved in planning covert intelligence operations. During his employment with the DIA, Mr. Morter was detailed to the United States Special Operations Command ("SOCOM") in Tampa, Florida. Because of the highly secure matters and operations handled by SOCOM, Mr. Morter held Top Secret and Sensitive Compartmented Information clearances. Mr. Morter's wife worked for the DIA as an intelligence officer until, in January 2011, she failed a polygraph exam and was fired.

In March 2011, soon after his wife lost her job, the DIA had Mr. Morter take a polygraph exam, which he failed to pass on the topics of the mishandling of classified information and unauthorized foreign contacts. Over the next four years, Mr. Morter

completed four more polygraph exams, all of which resulted in unfavorable outcomes on the same topics.

After failing his third polygraph exam in January 2012, the DIA referred Mr. Morter for an investigation. During interviews with DIA investigators, Mr. Morter explained that he had historically been uncomfortable with the agency's classification guidelines and that he had often attended official functions for his wife's work that foreign nationals also attended. Mr. Morter also admitted to having anxiety while undergoing polygraph exams. He said he had "nightmares about being interrogated," he "worr[ied] that [he would] not be able to remain calm enough[,]" and his wife's termination had compounded his anxiety. J.A. 176. Mr. Morter also admitted to researching the polygraph exam and coming across ways to "beat the polygraph," but he added that he did not "take any credence in them[.]" J.A. 177. The relevant guidance issued for the Intelligence Community prohibits research into polygraph exams, especially into countermeasures. Soon thereafter, Mr. Morter failed his fourth polygraph exam.

In October 2013, Mr. Morter's doctor, Dr. Heather Magee, diagnosed him with adjustment disorder with anxiety. About a month and a half later, a DIA doctor, Dr. K.M. Soo-Tho, confirmed Dr. Magee's diagnosis and documented Morter's anxiety about polygraph exams. Dr. Soo-Tho concluded, however, that Mr. Morter's disorder should not preclude him from successfully taking polygraph exams. He added that, because Mr. Morter had investigated ways to subvert the polygraph exam, he was no longer a suitable candidate for polygraph examination.

In February 2014, the DIA's Chief of the Defense Intelligence Central Adjudication Facility granted Mr. Morter a favorable security clearance determination conditioned upon him continuing to seek mental health care and complying with treatment recommendations. Around that same time, SOCOM leadership lost confidence in Mr. Morter and barred him from its employ and premises.

After that, a DIA Insider Threat Mitigation Panel reviewed Mr. Morter's case and recommended that he be permanently reassigned from Tampa, Florida to Washington, D.C., where he could work in a less sensitive position. The DIA informed Mr. Morter of his reassignment in May 2014.

In June 2014, Mr. Morter appealed his reassignment. Two months later, the DIA provided Mr. Morter a fifth polygraph exam in an effort to resolve his appeal. Before the fifth polygraph exam, Mr. Morter received from Dr. Michael Rothburd a diagnostic impression of anxiety disorder and post-traumatic stress disorder. When asked by agents whether he had "any medical issues that [he felt] would inhibit [his] ability to successfully complete [the] * * * polygraph examination[,]" he answered, "Yes," and referenced his anxiety and post-traumatic stress disorder diagnoses. J.A. 245.

Mr. Morter's fifth polygraph exam again resulted in an unfavorable outcome on the same classified-information and foreign-contact topics. After the exam, Mr. Morter promptly underwent a psychological consultation with DIA psychologist Dr. Jill Tucillo, who reported that Mr. Morter displayed anxiety symptoms and that psychotherapy seemed "insufficient to address anxiety of this proportion."

J.A. 249–250. Two weeks later, Mr. Morter was hospitalized for a panic attack.

The DIA eventually denied Mr. Morter's appeal and maintained his reassignment having concluded that his medical diagnosis "would [not] support a medical deferment from the [polygraph] examination." J.A. 332–333. Mr. Morter chose not to accept the reassignment and instead retired from federal service.

C

After filing unsuccessful complaints with the DIA's equal employment opportunity office and then the Equal Employment Opportunity Commission, Mr. Morter timely filed suit in the United States District Court for the District of Columbia. His complaint alleges that the Secretary of Defense's reassignment of him: (i) failed to accommodate his disability, (ii) constituted disparate treatment on the basis of disability, and (iii) had a disparate impact. J.A. 4–6. The district court granted summary judgment for the Secretary.[1]

Mr. Morter appealed. A panel of this court has already affirmed the grant of summary judgment on Mr. Morter's disparate impact claim. *Morter v. Hegseth*, No. 24-5056, Per Curiam Order, ECF No. 2078965 (D.C. Cir. Oct. 8, 2024). That leaves the failure to accommodate and disparate treatment claims at issue here.

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[1] Because the relevant conduct here was taken by the DIA, which is under the authority of the Secretary of Defense, we discuss the conduct of the DIA, rather than the Secretary of Defense, in this decision.

II

This court reviews a grant of summary judgment de novo, viewing the evidence in the light most favorable to the non-movant. See *Galvin v. Eli Lilly & Co.*, 488 F.3d 1026, 1031 (D.C. Cir. 2007); *Woodruff v. Peters*, 482 F.3d 521, 526 (D.C. Cir. 2007).

A

1

On appeal, Mr. Morter first challenges the district court's determination that he failed to exhaust his failure to accommodate claim. Exhaustion of remedies under the Rehabilitation Act is not jurisdictional, unless there was a "wholesale failure to file an administrative complaint or to obtain any administrative decision at all." *Doak*, 798 F.3d at 1103–1104; *Adams*, 531 F.3d at 952–953 ("A complainant need only file a signed statement with the agency that is 'sufficiently precise to identify the aggrieved individual and the agency and to describe generally the action(s) or practice(s) that form the basis of the complaint[.]'") (quoting 29 C.F.R. § 1614.106(c)).

In this case, Mr. Morter submitted informal and formal complaints with the DIA's equal employment opportunity office, which considered and denied his claims. Mr. Morter also sought review by the Equal Employment Opportunity Commission, which similarly denied his claim but issued a right-to-sue notice. Because Mr. Morter filed administrative complaints and obtained agency rulings, any question about the sufficiency of his exhaustion is not jurisdictional. See also *Koch v. White*, 744 F.3d 162, 164–165 (D.C. Cir. 2014) (failure to participate

properly, both procedurally and substantively, in administrative review of a Rehabilitation Act claim can be "excused" by the district court, and thus is non-jurisdictional).[2] We therefore assume without deciding that Mr. Morter properly exhausted his accommodation claim, and conclude that his claim nonetheless fails on the merits.

2

For Mr. Morter's failure to accommodate claim to survive summary judgment, he had to "come forward with sufficient evidence to allow a reasonable jury to conclude" that (i) he "was disabled within the meaning of the Rehabilitation Act"; (ii) the DIA had notice of his disability; (iii) he "was able to perform the essential functions of [his] job with or without reasonable accommodation"; and (iv) the DIA denied his request for a reasonable accommodation of his disability. Solomon, 763 F.3d at 9 (internal citations omitted).

The DIA does not dispute that Mr. Morter's anxiety was a qualifying disability, Gov't Br. 27–59, so we assume that the first prong was met. And the parties agree that the DIA was on notice of his anxiety at least by the time he met with Dr. Soo-Tho. Morter

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[2] Other circuits are in accord. See *Boos v. Runyon*, 201 F.3d 178, 182 (2d Cir. 2000); *Wilson v. MVM, Inc.*, 475 F.3d 166, 175 (3d Cir. 2007); *Stewart v. Iancu*, 912 F.3d 693, 700 (4th Cir. 2019); *Sanchez v. Henderson*, 167 F.3d 537, at *2 (5th Cir. 1998); *Teal v. Potter*, 559 F.3d 687, 691 (7th Cir. 2009); *Ballard v. Rubin*, 284 F.3d 957, 964 n.6 (8th Cir. 2002); *Leong v. Potter*, 347 F.3d 1117, 1122 (9th Cir. 2003); *Hickey v. Brennan*, 969 F.3d 1113, 1118 (10th Cir. 2020); *Gaillard v. Shinseki*, 349 F. App'x 391, 392 (11th Cir. 2009) (per curiam).

Opening Br. 12–15; Gov't Br. 9–12. So the second prong was met.

Mr. Morter's claim, though, fails at the third prong because he has not come forward with evidence that would allow a reasonable jury to find that he was able to perform the essential functions of his job with or without accommodation. Mr. Morter was an Intelligence Analyst with the DIA and was located at SOCOM, where he regularly handled Top Secret and Sensitive Compartmented Information in support of SOCOM's highly sensitive military operations. J.A. 92, 100, 204–205. Because of that position, Mr. Morter was subject to polygraph examination and insider threat evaluation at any time. See J.A. 56–61, 62–70 ("[Polygraph] examinations * * * may be administered at periodic or aperiodic intervals in support of reinvestigations or continuous evaluation."), 114–115.

In addition, as a matter of settled DIA policy, the agency could reassess employment and job responsibilities if there were adverse outcomes on polygraph examinations, and could consider relocating an employee to a less sensitive position. See J.A. 115 ("DIA employees who are unable to successfully complete the [polygraph] examination * * * may be relocated to DIA Headquarters, or if already assigned to DIA Headquarters, they may be realigned to a less sensitive position commensurate with their grade.").

Here, the DIA reasonably concluded that Mr. Morter's unfavorable outcomes on five separate polygraph exam queries into the mishandling of classified information and unauthorized foreign contacts necessitated reassignment. To the extent

that Mr. Morter's anxiety caused these adverse exam results, his disability rendered him a security vulnerability in a position of such sensitivity that it left no room for error. That is shown by SOCOM leadership's "lost confidence in Mr. Morter's ability to continue serving" there and decision not to retain his services any longer. J.A. 77, 212; see also J.A. 206. So "[w]hile the polygraph and reassignment were DIA actions, the ultimate decision to bar [Mr. Morter] came from senior SOCOM leadership, not from DIA[.]" J.A. 206. That decision by SOCOM that Mr. Morter could no longer safely be allowed to perform the sensitive and often-classified work of his position left him unable to perform the essential functions of his job. Even assuming his anxiety caused the adverse polygraph results, the job necessity of being able to pass a polygraph examination designed to mitigate security threats left Mr. Morter unqualified for his position.

In short, because of (i) Mr. Morter's exam results, (ii) the sensitive position he held in a special operations command where Top Secret and other protected intelligence information was routinely handled, and (iii) SOCOM's refusal to keep him in its employ, the DIA has shown that Mr. Morter was no longer qualified for his DIA position at SOCOM.

3

Mr. Morter responds that his reassignment violates a Defense Department policy providing that "[n]o unfavorable administrative action (to include access, employment, assignment, and detail determinations) shall be taken solely on the basis of either a refusal to undergo a [polygraph] examination

or an unresolved [polygraph] examination, except as provided in sections 6 and 7 of Enclosure 4." J.A. 360 (Enclosure 3 ¶ 2(g)). That provision is of no help to Mr. Morter.

To start, Mr. Morter did not have "an" unresolved polygraph exam; he had five of them in a row, with each consistently highlighting the same two areas of vulnerability: the mishandling of classified information and unauthorized foreign contacts. He offers no evidence that the policy applies to such a long and consistent pattern of failures on the same topics. In any event, Mr. Morter's reassignment falls within the exception at Enclosure 4 paragraph 7. That exception provides that when an employee is unable to resolve all relevant questions on a polygraph exam, the Defense Department component shall afford the individual an opportunity for additional examination. J.A. 371 (Enclosure 4 ¶ 7(a)). Upon further failure, the component may initiate an investigation and come to a final determination. J.A. 371 (Enclosure 4 ¶ 7(b)); J.A. 371 (Enclosure 4 ¶ 7(d)). The parties agree that these steps were followed. Morter Opening Br. 7–19; Gov't Br. 5–18, 54–56.

Mr. Morter, though, points to the provision that says the component may, in addition to the investigation, "temporarily suspend an individual's access to controlled information and deny the individual assignment or detail that is contingent on such access." J.A. 371 (Enclosure 4 ¶ 7(c)). Mr. Morter argues that his reassignment determination was permanent, not temporary.

True enough, Mr. Morter's reassignment was permanent. But the exception provides only that temporary suspension may be used "[a]dditionally"

while an investigation is conducted. J.A. 371 (Enclosure 4 ¶ 7(c)). And investigations eventually end in final determinations. Once that final decision is made—as it was for Mr. Morter—the procedure directs only that the individual "shall be advised in writing of the determination, that the determination may be appealed to the Head of the relevant DoD Component, and that his or her final determination is conclusive," not temporary. J.A. 371 (Enclosure 4 ¶ 7(d)) (emphasis added). That is exactly what happened here.

For those reasons, Mr. Morter has failed to show that a reasonable jury could find him to be a qualified individual with a disability for his DIA work with SOCOM, and so the district court properly granted summary judgment on his failure to accommodate claim.

B

The district court also properly granted summary judgment on Mr. Morter's disparate treatment claim. Mr. Morter has identified nothing in the record that casts doubt on the sincerity of the DIA's—and thus the Defense Secretary's—reasonable belief that Mr. Morter posed a security vulnerability that needed to be mitigated.

In Rehabilitation Act cases, this court applies a three-part burden-shifting framework. See *Solomon*, 763 F.3d at 14; see also *Ali v. Regan*, 111 F.4th 1264, 1268–1269 (D.C. Cir. 2024); see generally McDonnell *Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). First, the plaintiff must prove a prima facie case of discrimination. Second, the burden of production then shifts to the defendant to articulate some legitimate,

non-discriminatory reason for the employee's rejection. Third, should the defendant carry this burden, the plaintiff must prove that the legitimate reason offered by the defendant was actually a pretext for discrimination. See *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252–253 (1981) (citation omitted); *George v. Leavitt*, 407 F.3d 405, 411 (D.C. Cir. 2005).

We assume without deciding that Mr. Morter made out a prima facie case because the DIA came forth with evidence of a legitimate non-discriminatory reason for its reassignment decision: to wit, the necessity of mitigating the security vulnerability Mr. Morter posed for having failed to resolve five different polygraph exams because of questions about the mishandling of classified information and unauthorized contact with foreign persons. District Court Op. 13–15.

At this stage, then, the only question is whether "the employee produced sufficient evidence for a reasonable jury to find that the employer's asserted non-discriminatory reason" for the adverse action "was not the actual reason and that the employer intentionally discriminated against the employee[.]" *Brady v. Office of Sergeant at Arms*, 520 F.3d 490, 494 (D.C. Cir. 2008) (citing *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507–508 (1993)).

The DIA came forward with sufficient evidence for a jury to find that it had a reasonable, sincere, and non-discriminatory reason for reassigning Mr. Morter. Mr. Morter was working for a military command that oversees the military's special operations forces, which underscores the heightened military and national security concerns associated

with his position. Mr. Morter's subsequent inability to pass five separate polygraph exams over concerns about the mishandling of classified information and unauthorized contacts with foreign persons could reasonably be found to pose a serious security threat that had to be mitigated. That, in fact, is why SOCOM refused to allow Mr. Morter to remain part of its operations. Given that, a reasonable jury could credit the DIA's explanation and find no disparate treatment.

That brings us to the question of whether Mr. Morter came forward with sufficient evidence to create a jury question as to whether disability discrimination instead was the real reason for his reassignment. Mr. Morter offers five arguments that do not, either individually or collectively, create a reasonably disputed question of fact concerning the reason for the DIA's action.

First, Mr. Morter says that we are asking the wrong question. In his view, his prima facie case for discrimination is so strong that the district court should have assumed that the DIA's proffered rationale is pretextual. Morter Opening Br. 40–43. That argument fails twice over.

For one, Mr. Morter raised this contention for the first time on appeal. His unexplained failure to present it to the district court in the first instance forfeits the argument. See *Feld v. Fireman's Fund Ins. Co.*, 909 F.3d 1186, 1197 (D.C. Cir. 2018).

For another, Mr. Morter's assumption that summary judgment can be looked at through a one-sided lens is wrong. The purpose of summary judgment is to test whether any disputed question of material fact remains for a jury to resolve. See *Feld*,

909 F.3d at 1194 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986)). With both Mr. Morter's evidence and the DIA's in the record, it would make no sense to ask at summary judgment a question the jury will never decide: could the jury—without considering the defense's evidence at all—reasonably rule for the plaintiff? So, contrary to Mr. Morter's framing, he does not seek a presumption of discrimination. He seeks a truncation of the summary judgment inquiry altogether.

Second, Mr. Morter argues that Stephen Norton, the DIA's Director of Security and the final decisionmaker as to Mr. Morter's reassignment, failed to sufficiently consider certain medical evidence, such as Dr. Rothburd's diagnostic impression of anxiety disorder and post-traumatic stress disorder. That argument does not work.

Mr. Morter, however, offers no evidence that he ever provided Dr. Rothburd's letter to the DIA prior to his reassignment. Anyhow, Mr. Norton expressly referenced the disabilities that Mr. Morter "claimed * * * [to] ha[ve] been diagnosed with," including anxiety disorder and post-traumatic stress disorder, J.A. 333, and concluded that security concerns required Mr. Morter's reassignment. Mr. Norton pointed to Dr. Soo-Tho's expert judgment that the symptoms of Morter's adjustment disorders—taking them as given—are "probably easily attenuated by [polygraph] examination procedures and should not preclude an individual's ability to successful[ly] complete [polygraph] examination[]." J.A. 191, 333.

To be sure, even if Mr. Norton had seen Dr. Rothburd's diagnostic "[i]mpression," it does not say that Mr. Morter must be excused from polygraph

exams. J.A. 181; see also J.A. 333 (Mr. Norton's conclusion that the agency did not receive or anticipate receiving "medical diagnos[es] that would support a medical deferment from the [polygraph] examination[]"). And above all, Mr. Norton emphasized the fact that nothing in any doctor's report solves the basic problem that, even if Mr. Morter qualified for a medical deferment, the acutely sensitive SOCOM program in which he worked "d[id] not have the ability to mitigate the loss of the [polygraph] tool (either by SUBJECT's inability to successfully complete the examination process, or through a medical deferment from the [polygraph] examination process)[.]" J.A. 333

Third, Mr. Morter points to evidence, including from Dr. Tucillo, to show that the DIA knew his inability to pass the polygraph exams was a result of his anxiety and not because he was a security risk. Morter Opening Br. 48–52. In Mr. Morter's view, this evidence means "a jury could find that Morter's extreme anxiety during the polygraph exams stemmed not from any actual security concern." Morter Opening Br. 48 (emphasis added).

That argument does not work either. There is no inconsistency between Mr. Morter's anxiety-induced inability to take polygraph exams and the DIA's conclusion that, without polygraph screening and with his history of exam failures, Mr. Morter posed a security vulnerability that could not be tolerated at a command of such acute military sensitivity. As the DIA explained, even if "the inability to pass the examination does not—on its own—suggest [Mr. Morter is] a risk to national security," his enduring inability to meet "a basic security requirement for all

DIA employees[] presents a security vulnerability that must be mitigated." J.A. 109.

In any case, the question at hand is only whether the DIA sincerely and reasonably believed that Mr. Morter had to be reassigned from his Tampa position because his five-time failure of polygraph exams created a security risk that had to be mitigated. And nothing in Dr. Tucillo's report speaks to that question.

Fourth, Mr. Morter argues that the DIA showed a lack of urgency by taking several years to administer five separate exams and by waiting until October 2013 to revoke his security clearance, only to reinstate it in February 2014. But that actually demonstrates the care and concern with which the DIA investigated Mr. Morter's case and its efforts to understand and address the nature and impact of his anxiety on the polygraph failures. The DIA followed the agency's own measured process; responded swiftly to each of Mr. Morter's exam failures; afforded Mr. Morter multiple attempts to pass the exam, spaced far enough apart for him to seek mental health services in the interim, see J.A. 165, 198; and then took more serious steps when SOCOM refused to work with Mr. Morter. Said another way, the DIA's effort to obtain all relevant information and provide a 15-year employee ample opportunity to succeed does not provide a reasonable basis for a jury to find pretext.

Lastly, Mr. Morter argues that the DIA's failure to follow two Department of Defense instructions shows pretext. To start, Mr. Morter points to Enclosure 3 ¶ 2(g), which provides that no unfavorable administrative action shall be taken solely on the basis of an unresolved polygraph examination. That argument fails because, as noted earlier, Mr. Morter's

case falls into an exception to the Rule that allows reassignment after a second polygraph exam and an investigation that supports that decision. See J.A. 371 (Enclosure 4 ¶ 7).

Next, Mr. Morter points to Enclosure 4 paragraph 2(h), which states that "[t]he Heads of DoD Components * * * shall establish written procedures to * * * [e]xempt or postpone examinations when individuals are considered medically, psychologically, or emotionally unfit to undergo an examination." J.A. 367. The DIA did just that, and its patience, in fact, is the very basis on which Mr. Morter argues above that the DIA's lack of urgency shows pretext. Mr. Morter cannot have it both ways. Anyhow, Enclosure 4 paragraph 2(h) merely requires component heads to develop policies allowing for exemptions. Mr. Morter does not argue that the DIA failed to develop such policies. So nothing here points to pretext.

For the foregoing reasons, we affirm the judgment of the district court.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate until seven days after resolution of any timely petition for rehearing or rehearing en banc. See FED. R. APP. P. 41(b); D.C. CIR. R. 41.

Per Curiam

FOR THE COURT:
Clifton B. Cislak, Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN S. MORTER,
Plaintiff,

v.

LLOYD J. AUSTIN III,
Defendant.

Civil Action No. 23-343 (JEB)

MEMORANDUM OPINION

Pro se Plaintiff John S. Morter — a former employee of the Defense Intelligence Agency —has sued Secretary of Defense Lloyd J. Austin for disability discrimination. The Agency reassigned him from his post in Tampa, Florida, to its headquarters here in Washington after he failed successive, routine polygraph examinations, despite his protestations that those results were caused by his anxiety and post-traumatic stress disorder. He alleges here that the Agency violated federal anti-discrimination law by failing to accommodate his ailments, employing a policy that disparately penalizes employees with his condition, and subjecting him personally to discriminatory treatment. The Secretary now moves to dismiss, or, alternatively, for summary judgment, and Morter cross-moves for summary judgment. The Court, finding no triable issue on any count, will grant summary judgment in the Secretary's favor.

I. Background

A. Factual Background

Because the Court is focusing on Defendant's Motion for Summary Judgment, it will construe the facts in the light most favorable to Plaintiff. See *Talavera v. Shah*, 638 F.3d 303, 308 (D.C. Cir. 2011).

For over a dozen years, Morter was an Intelligence Analyst for the DIA at the United States Special Operations Command (SOCOM) facility in Tampa. See ECF No. 5-2 (Def. SMF), ¶ l; ECF No. 7-21 (Supervisor Comments), ¶ 1. As a condition of his employment there, he was required to hold a Top-Secret security clearance and handle Sensitive Compartmented Information. See Def. SMF, , ¶¶ 2-3; ECF No. 7-1 (Pl. Opp.) at 2. As with all DIA employees entrusted with such information, Morter was subject to aperiodic polygraph examinations to determine whether he posed an unacceptable security risk under the Agency's Insider Threat Program. See Def. SMF, ¶ 4; ECF No. 5-5 (ITP Policy), ¶ 4.1.3; ECF No. 5-15 (Interrogatory of Steven McIntosh) at 5-6. These exams — referred to as Counterintelligence Scope Polygraphs (CSP) — measured his physiological responses under five lines of questioning, each of which could implicate a risk to national security: (1) sabotage; (2) espionage; (3) terrorism; (4) mishandling classified information; and (5) unauthorized foreign contact. See Def. SMF, ¶ 5; ECF No. 5-6 (Polygraph Policy Guidance) at 1. The examiner then issued one of the following scores: "No Deception Indicated," "No Significant Response," "No Opinion," "Significant Response," or "Deception Indicated." ECF No. 10-1 (DOD Instruction 5210.91) at 20. The last three appear to be failing scores.

Morter had, by all accounts, successfully maintained his Top-Secret clearance while working in military and civilian roles for over 30 years. See Supervisor Comments, ¶ 1. His woes began, however, on March 23, 2011, when he failed a CSP. See ECF No. 7-6 (3/23/11 CSP) at 1. Although his ratings on questions regarding sabotage, espionage, and terrorism were satisfactory, he received ratings of "No Opinion" as to his handling of classified information and foreign contacts. *Id.* at 1-2. Despite efforts to repeat and rephrase the questions, the "No Opinion" rating stuck. *Id.* at 2. Notably, in a post-test interview, Morter "expressed concerns about issues peripheral to the security questions coupled with increasing general anxiety." *Id.* He agreed to return for further testing two days later, but again scored "No Opinion" on the same two topics. See PL Opp. at 2; Def. SMF, , ¶¶ 6-7.

On January 31, 2012, Plaintiff appeared for a third CSP on all security topics. Once again, he successfully completed the test as to sabotage, espionage, and terrorism, but not as to handling classified information and foreign contacts. See ECF No. 7-9 (1/31/12 CSP) at 1. This time, he received a "Significant Response" rating on those topics. *Id.* at 2. Five months later, on June 26, 2012, Morter was ordered to meet with a Special Investigator at DIA Headquarters, who interviewed him on his inability to pass the CSP. See ECF No. 7-10 (DIA Report). Morter relayed to the investigator that he "became very anxious" when asked questions about mishandling classified information (but denied having ever done so intentionally) and affirmed that he "had made a conscious effort to report all unofficial

foreign contacts." *Id.* at 2. He also signed a voluntary sworn written statement, in which he reported experiencing "nightmares about being interrogated" and feared that he was unable "to remain calm enough" to avoid a false positive. See *id.* at 7-9. Compounding these fears, he explained, was the experience of his wife (also a former DIA contract employee at SOCOM), who had failed a polygraph exam just two months prior to his first failed CSP and had her access to classified information revoked after "be[ing] judged by this process as a liar." *Id.* at 2, 7; see ECF No. 7-17 (Report on DIA Trip) at 2. Morter further disclosed that he had "conducted considerable research on the subject [of polygraph exams] and talked with dozens of people ... in order to determine why [he was] having trouble passing." DIA Report at 7. He underwent a fourth CSP following the interview, which resulted once more in "No Opinion." Pl. Opp. at 3; Def. SMF, ¶¶ 6-7.

What came next is a matter of some dispute. The Court does not credit Plaintiffs assertion that his security clearance was revoked or that he was banished from SOCOM on October 8, 2013, see Pl. Opp. at 3, as it is not supported by any citation to the record. See Local Civ. R. 7(h); see also ECF No. 10 (Def. Reply) at 8 ("Plaintiff did not have his security clearance revoked."). Rather, it appears that the Agency- as part of an investigation into Morter's repeated CSP foibles still ongoing at that time - arranged for him to speak with an Insider Threat Program Staff Psychologist named Dr. Joe Soo-Tho "to ascertain whether there were any psychological conditions which may have impeded [his] ability to successfully complete CSP examinations" and to

"identify appropriate interventions." ECF No. 5-8 (DIA Emails) at 2. That interview took place on November 6, 2013, and a report was issued the following month. See ECF No. 5-9 (Soo-Tho Report) at 1.

The significance of Dr. Soo-Tho's evaluation to the present litigation is twofold. First, it considered a record of medical care showing that Morter was diagnosed with an anxiety disorder by a psychologist, Dr. Heather Magee, who evaluated him just a few weeks prior to the interview. See Soo-Tho Report at 2; ECF No. 5-19 (Health Record) at 2; ECF No. 5-11 (11/14/13 Magee Ltr.). Morter had disclosed the visit and diagnosis to his supervisor, Timothy Grimes, for the first time on November 14, 2013, who forwarded it to the Chief of the SOCOM Special Security Office, who in tum sent it to Dr. Soo-Tho. See Pl. Opp. at 4; Soo-Tho Report at 2. Dr. Soo-Tho concluded in his report that the symptoms associated with Morter's condition "are probably easily attenuated by CSP examination procedures and should not preclude an individual's ability to successful[ly] complete" the exam. See Soo-Tho Report at 3.

Second, the report found that Morter "inadvertently revealed that he ha[d] 'done extensive research on polygraph' examinations," gave contradictory answers regarding whether he "had ever looked into CSP countermeasures," and offered implausible responses regarding whether he had fully disclosed his research to the polygraph examiners. *Id.* Overall, Dr. Soo-Tho concluded that, given Morter's "verbalized intent and demonstrated efforts to subvert CSP examination, he is unlikely to be a suitable candidate for further polygraph testing." *Id.*

at 4. He further determined that Morter's "lack of insight, proclivity to externalize blame and lack of candor probably limits the degree to which he may be willing and/or able to cooperate with realistic threat mitigation strategies," and noted that "[c]oordination with DIA Office of Human resources (OHR) will also likely be necessary," given SOCOM's "reluctance to permit [Morter] to remain on their premises without adequate/satisfactory resolution of" those issues. *Id.*

That scalding assessment did not apparently diminish Morter's standing with the DIA. On January 31, 2014, a senior adjudicator with the DIA Office of Security Investigations Division concluded that, despite his CSP results, "there is no current information provided to cast doubt on [Morter's] judgment, reliability, or trustworthiness," especially given his three decades of experience in the intelligence business. See ECF No. 7-19 (Security Review & Evaluation Record) at 1. The adjudicator's report recommended that he receive counseling for his anxiety and another CSP no sooner than six months from his last test. *Id.* Further, on February 6, 2014, DIA issued Morter an "Advisory Letter" regarding his continued access to classified information. See ECF No. 5-12 (Advisory Ltr.). It clarified that "[t]he decision to seek mental health care" does not "adversely impact an individual's ability to obtain or maintain a national security position," and in fact "may favorably impact" eligibility for such a position. *Id.* at 1. It further stated that Morter's "decision to seek mental health care and comply with treatment recommendations" were "viewed as positive signs that [he] recognized a problem existed" and was "willing to take steps

towards resolving" it. *Id.* The Agency determined that neither his CSP results nor his diagnosis was a ground to revoke his security clearance. *Id.*

A DIA Insider Threat Mitigation Panel, nevertheless, convened on February 10, 2014, to discuss Morter's situation, and it ultimately concluded that "as an initial insider threat mitigation strategy, [he] will be returned to DIA [headquarters in Washington, D.C.] in order to discontinue the transference of risk to" SOCOM. See DIA Emails at 7. In Morter's defense, Grimes penned a memorandum explaining that his performance at SOCOM had been "exemplary" and free of "security incidents or issues" and that his difficulties completing the CSP were at least partially explained by his anxiety and the experiences his wife endured. See Supervisor Comments, 11 4-5. But that objection proved insufficient. On May 12, 2014, Colonel Shawn Nilius — a senior official at SOCOM — verbally informed Morter that he was being reassigned to DIA headquarters. See ECF No. 7-25 (Letter of Counseling). Two written letters to that effect followed on May 21 and 27. See ECF No. 5-14 (Reassignment Action Ltr.); Letter of Counseling. The latter added that, pending completion of his reassignment, he would not have access to certain sensitive facilities at SOCOM. See Letter of Counseling. Contemporaneous emails show that SOCOM's deputy commander, Lieutenant General John Mulholland, had "lost confidence in Mr. Morter's ability to continue serving" there, and that his reassignment was deemed consistent with a "foundational philosoph[y]" of the DIA Insider Threat

Program against "transferr[ing] risk" to other organizations. See DIA Emails at 1, 3.

Morter appealed the decision on June 4, 2014, ultimately to no avail. See ECF No. 5-16 (Notice to Appeal). Stephen Norton, the DIA Director of Security who reviewed the appeal, sustained the relocation decision, which he emphasized in a later interrogatory "was based solely on security concerns because of [Morter's] inability to complete multiple [CSP] examinations." ECF No. 5-17 (Norton Interrogatory) at 6-7.

On August 5, 2014, prior to his transfer date, Morter appeared for a fifth CSP this time armed with diagnoses of Anxiety Disorder and Post-Traumatic Stress Disorder. See ECF No. 7-32 (8/5/14 CSP); ECF No. 7-12 (7/31/14 Diagnosis Ltr.). He nevertheless scored a "Significant Response." 8/5/14 CSP at 3. He was instructed to meet with a DIA psychologist to manage his "distraught emotional condition" in response to this latest misfire. See ECF No. 7-33 (Dr. Jill Tucillo Report) at 1. She concluded that his condition might require psychotropic medication, and that he was "not likely to be a suitable candidate for future CSP examination." *Id.* at 2. Two weeks later, Morter was briefly hospitalized for an acute panic attack. See Pl. Opp. at 10; ECF No. 7-35 (Hospital Discharge).

As scheduled, Plaintiff reported to DIA headquarters on August 24, 2014. Rather than assume a new position there, however, he invoked sick leave under the Family Medical Leave Act (on his doctor's advice) and returned home to Tampa. See PL Opp. at 10; ECF No. 5-1 (Def. MSJ) at 7 n.3.

B. Procedural Background

Plaintiff filed a formal Equal Employment Opportunity complaint on July 23, 2014. See ECF No. 7-29 (EEO Complaint). It alleged that DIA discriminated against him because of his anxiety disorder when it allegedly revoked his access to classified information in October 2013 and again when it reassigned him to DIA headquarters on May 27, 2014. *Id.* at 1-2. The former claim was dismissed as untimely and unreviewable. See ECF No. 5-18 (Notice of Partial Acceptance) at 3-4. After exhausting administrative remedies as to the latter claim, he filed suit in this Court on February 3, 2023, alleging a failure to accommodate his disabilities, discriminatory treatment, and discriminatory impact, in violation of the Americans with Disabilities Act. See ECF No. 1 (Compl.). Secretary Austin now moves to dismiss or, in the alternative, for summary judgment, and Plaintiff cross-moves for summary judgment.

II. Legal Standard

As the Court decides this case under the summary-judgment standard, that is the only one it sets out here. Under Rule 56(a), summary judgment must be granted if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247--48 (1986); *Holcomb v. Powell*, 433 F.3d 889, 895 (D.C. Cir. 2006). A fact is "material" if it is capable of affecting the substantive outcome of the litigation. See *Liberty Lobby*, 477 U.S. at 248; *Holcomb*, 433 F.3d at 895. A dispute is "'genuine' if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Liberty Lobby, 477 U.S. at 248; see

also *Scott v. Harris*, 550 U.S. 372, 380 (2007); Holcomb, 433 F.3d at 895. "A party asserting that a fact cannot be or is genuinely disputed must support the assertion" by "citing to particular parts of materials in the record" or "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(l).

In considering a motion for summary judgment, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Liberty Lobby*, 477 U.S. at 255; see also *Mastro v. PEPCO*, 447 F.3d 843, 850 (D.C. Cir. 2006); *Aka v. Wash. Hosp. Ctr.*, 156 F.3d 1284, 1288 (D.C. Cir. 1998). The Court must "eschew making credibility determinations or weighing the evidence." *Czekalski v. Peters*, 475 F.3d 360, 363 (D.C. Cir.

2007). The non-moving party's opposition, however, must consist of more than mere unsupported allegations or denials and must be supported by affidavits, declarations, or other competent evidence, setting forth specific facts showing that there is a genuine issue for trial. See Fed. R. Civ. P. 56(e); *Celotex Corp. v. Catrett*, 477 U.S. 317,324 (1986). The non-movant, in other words, is required to provide evidence that would permit a reasonable jury to find in his favor. See *Laningham v. U.S. Navy*, 813 F.2d 1236, 1242 (D.C. Cir. 1987).

III. Analysis

As an initial matter, the Court agrees with Defendant that the ADA does not apply to the federal government. See Def. MSJ at 1 n.l; *Brown v. Paulson*, 541 F. Supp. 2d 379,382 n.1 (D.D.C. 2008). It shall,

accordingly, construe prose Plaintiffs claims as arising under the Rehabilitation Act of 1973, which does. Brown, 541 F. Supp. 2d at 382 n.l. The applicable legal standards do not differ between the two statutes. See *Alexander v. Wash. Metro. Area Transit Auth.*, 826 F.3d 544, 546 (D.C. Cir. 2016).

Defendant seeks summary judgment as to Morter's failure-to-accommodate claim on various grounds, including his failure to exhaust administrative remedies. See Def. MSJ at 13-17. As to the disparate-treatment claim, the Secretary maintains that there was a legitimate, non-discriminatory reason for Morter's transfer- namely, security concerns arising from his repeated failure to complete a routine CSP. *Id.* at 17-21. Finally, as to his disparate-impact claim, the Secretary proposes that it may be dispensed with at this stage for want of relevant statistical evidence. *Id.* at 21-24. The Court addresses these contentions in turn.

A. Failure to Accommodate

The Rehabilitation Act requires federal employers to "mak[e] reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability." *Minter v. Dist. of Columbia*, 809 F.3d 66, 69 (D.C. Cir. 2015) (quoting 42 U.S.C. § 12112(b)(5)(A) (ADA Provision). Here, Morter alleges that permitting him to remain in his duty station at SOCOM, despite his CSP results, would have been a reasonable accommodation for his anxiety disorder. See Compl. at 2, 4. The Court agrees with the government, however, that Morter never exhausted this claim in EEO proceedings.

Before filing suit under the Rehabilitation Act, an employee must first exhaust his administrative

remedies. *Huang v. Wheeler*, 215 F. Supp. 3d 100, 107-08 (D.D.C. 2016). "For claims against federal agencies, exhaustion requires submitting a claim to the employing agency itself." *Doak v. Johnson*, 798 F.3d 1096, 1099 (D.C. Cir. 2015). The employee must first "initiate contact with" an EEO Counselor "within 45 days of the date of the matter alleged to be discriminatory," and then, if that resort proves unsuccessful, file a formal administrative complaint. See 29 C.F.R. §§ 1614.105(a)(l), 1614.106.

Here, an explicit charge of failure to accommodate is absent from Morter's EEO complaint — as is any factual allegation that could be construed as a request for accommodation. See EEO Complaint at 1-2. Further, the Notice of Partial Acceptance — which details the charges that the DIA chose to investigate — shows that the Agency understood Morter's complaint to allege solely "discrimination on the basis of mental disability (anxiety disorder)" arising from three incidents: (1) on October 8, 2013, when SOCOM leadership purportedly informed him that his access to classified information was being revoked; (2) on May 12, 2014, when Colonel Nilius informed him that SOCOM would no longer retain his services; and (3) on May 27, 2014, when he received a notice of reassignment to DIA Headquarters. See Notice of Partial Acceptance at 1. There is no evidence in the record that Plaintiff ever objected to this narrow characterization of his claims. Nor does he allege in his Opposition that he did. Compare Def. MSJ at 14 (citing Notice of Partial Acceptance in support of exhaustion argument), with Pl. Opp. at 10-11 (responding without disputing Notice of Partial Acceptance or specifying where in EEO complaint a

failure-to-accommodate claim was raised); see also *Bozgoz v. James*, 2020 WL 4732085, at *7 (D.D.C. 2020) ("Since the object of the [Notice] is to summarize the issues before the agency, ... [i]n cases where the plaintiff did not object, courts have found that the plaintiff effectively abandoned any claims that were not listed, and only the events in the Notice of Acceptance letter were administratively exhausted."); *Hartzler v. Mayorkas*, 2022 WL 15419995, at *9 (D.D.C. Oct. 27, 2022) (same).

Absent evidence of exhaustion, the Court has little choice but to grant summary judgment for the Secretary on this claim without delving into its merits.

B. Disparate Treatment

Next up is Morter's disparate-treatment claim, which alleges that in reassigning him to DIA Headquarters, Defendant discriminated against him on the basis of his disabilities — i.e., anxiety disorder and PTSD. Before wading through the arguments and evidence on this count, a brief review of the applicable law is in order.

1. Legal Framework

The Supreme Court established the three-part burden-shifting framework that governs traditional claims of employment discrimination in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973). Under that framework, the plaintiff bears the initial burden of establishing a primafacie case of discrimination. In keeping with "the Supreme Court's emphasis on flexibility" in this area, our Circuit has adopted a "general version of the prima facie case requirement: the plaintiff must establish that (1) she is a member of a protected class; (2) she suffered an

adverse employment action; and (3) the unfavorable action gives rise to an inference of discrimination." *Chappell-Johnson v. Powell*, 440 F.3d 484,488 (D.C. Cir. 2006) (cleaned up). After a plaintiff makes that preliminary showing, "'[t]he burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason' for its action. If the employer succeeds, then the plaintiff must 'be afforded a fair opportunity to show that [the employer's] stated reason ... was in fact pretext' for unlawful discrimination." *Id.* at 487 (quoting McDonnell Douglas, 411 U.S. at 802, 804).

When, however, "an employee has suffered an adverse employment action and an employer has asserted a legitimate, non-discriminatory reason for the decision, the district court need not — and should not — decide whether the plaintiff actually made out a prima facie case under *McDonnell Douglas." Brady v. Off. of Sergeant at Arms*, 520 F.3d 490, 494 (D.C. Cir. 2008) (emphasis omitted). The court's task in such cases is instead to "resolve one central question: Has the employee produced sufficient evidence for a reasonable jury to find that the employer's asserted non-discriminatory reason was not the actual reason and that the employer intentionally discriminated against the employee on the basis of a protected characteristic? *Id.* The "relevant inquiry" is thus whether an employee has "produced sufficient evidence for a reasonable jury to conclude that the [defendant's] asserted nondiscriminatory reason for firing h[im] was not the actual reason, and that instead the [defendant] was intentionally discriminating." *Wheeler v. Georgetown Univ. Hosp.*, 812 F.3d 1109, 1114 (D.C. Cir. 2016). The foregoing

framework applies to Rehabilitation Act claims as well. *Webster v. United States Dep't of Energy*, 443 F. Supp. 3d 67, 80-81 (D.D.C. 2020).

Two caveats. First, the Brady "shortcut" applies only if the employer's asserted reason is supported by an "adequate evidentiary proffer." *Figueroa v. Pompeo*, 923 F.3d 1078, 1087 (D.C. Cir. 2019) (cleaned up). More specifically, before advancing to the third step of the McDonnell Douglas analysis, the court must consider "(1) whether the employer has 'produced evidence that a factfinder may consider at trial (or a summary judgment proceeding)'; (2) whether that evidence is sufficient to permit a reasonable jury 'to find that the employer's action was motivated by' a non-discriminatory reason; (3) whether the proffered, non-discriminatory reason is 'facially credible in light of the proffered evidence'; and (4) whether the evidence 'presents a clear and reasonably specific explanation.'" *Kirkland v. McAleenan*, 2019 WL 7067046, at *14 (D.D.C. Dec. 23, 2019) (quoting *Figueroa*, 923 F.3d at 1087-88). A conclusory statement that the plaintiff was not qualified for the position he sought will not suffice. *Id.*

Second, in assessing whether the employer's decision was animated by a discriminatory motive, courts apply a more stringent causal standard for Rehabilitation Act claims than, for example, for Title VII claims. Whereas under Title VII "it suffices to show that the motive to discriminate was one of the employer's motives, even if the employer also had other, lawful motives," *Kirkland*, 2019 WL 7067046, at *15 (citing *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 343 (2013) (cleaned up), under the Rehabilitation Act, "a plaintiff asserting a disparate

treatment claim must show that the alleged discriminatory conduct was the 'but-for' cause of the asserted injury." *Id.* The Act, distinctively, "bars discrimination 'solely by reason of the employee's protected status." *Id.* (quoting 29 U.S.C. § 794(a)).

2. Application

Rather than quibble with the elements of Plaintiff's primafacie case, the Secretary contends that there was a legitimate, non-discriminatory reason for his reassignment: "[E]very available position in SOCOM required Plaintiff to be trusted with handling Top Secret and Sensitive Compartmented Information - a task that SOCOM no longer trusted Plaintiff to do - and DIA believed that it could monitor the risk posed by Plaintiff in Headquarters more effectively than ifhe worked elsewhere." Def. MSJ at 19. That rationale is more than adequately borne out by the record. There is, for example, no dispute that Morter failed four CSPs prior to his reassignment. See Pl. Opp. at 2-3; Def. SMF, ,r,r 6-7. Nor is there any dispute that, as an intelligence analyst for DIA, he was required to complete such exams under the Agency's Insider Threat Program. See Def. SMF, ,r 4; ITP Policy, sec. 2.1; McIntosh Interrogatory at 5-6.

Multiple sources — including written interrogatories by the DIA officials who made the transfer decision — confirm that these facts and the attendant risk to national security were the reason why Morter was reassigned to DIA Headquarters. See, e.g., Reassignment Action Ltr. ("[Morter's] inability to successfully complete the counterintelligence-scope polygraph examination, which is a basic security requirement for all DIA

employees, presents a security vulnerability that must be mitigated.... The DIA [Insider Threat Program] has determined this vulnerability can be properly mitigated by an assignment to DIA Headquarters."); DIA Emails at 7 ("[A] DIA Insider Threat Mitigation Panel ... concurred that as an initial insider threat mitigation strategy, [Morter] will be returned to DIA HQ in order to discontinue the transference ofrisk to [SOCOM]."); McIntosh Interrogatory at 8-9 ("The decision to reassign Complainant to DIA Headquarters to mitigate the security vulnerability [was] due to Complainant's inability to successfully complete the CSP examination."); Norton Interrogatory at 7 ("The decision to relocate Mr. Morter was based solely on security concerns because of his inability to complete multiple [CSP] examinations and the need to mitigate these concerns.").

This evidence, in short, is sufficient for a reasonable jury to conclude that the reassignment decision was motivated by the perceived security risk associated with Plaintiff's failed polygraphs. See Figueroa, 923 F.3d at 1087. That rationale is not only "clear and reasonably specific," but it is also credible on its face, in view of Morter's undisputed CSP results and the applicable DIA policies. *Id.* at 1087-88; cf. id. at 89 (statement that "employment decision was based on the hiring of the 'best qualified' applicant," without more, would be too "vague and slippery" to clear the second step of McDonnell Douglas) (cleaned up). Far from demonstrating that Plaintiff's mental disabilities were the sole reason for his reassignment, the foregoing evidence suggests that it was not a reason at all.

The only question now is whether Plaintiff has adduced sufficient evidence for a jury to conclude that DIA's rationale was pretextual. The Court discerns three arguments from Plaintiff on this score. First, he claims that the DIA could not honestly have believed that he was a threat to national security because he explained to them that his disabilities were the reason he flunked his CSPs. See Pl. Opp. at 13. But this is plainly not true of his PTSD diagnosis, which (as Plaintiff admits elsewhere) he provided to "[his] leadership" for the first time on July 31, 2014 — months after the transfer decision was made. *Id.* at 8; 7/31/14 Diagnosis Ltr.; see also *Crandall v. Paralyzed Veterans of Am.*, 146 F.3d 894, 896-97 (D.C. Cir. 1998) (to be liable under the Rehabilitation Act, the employer must have "acted with an awareness of the disability itself, and not merely an awareness of some deficiency in the employee's performance that might be a product of an unknown disability").

As for Morter's anxiety-disorder diagnosis, the Secretary has more than adequately proven why the Agency was not convinced that it fully explained why he failed his polygraphs. The DIA tasked one of its staff psychologists, Dr. Soo-Tho, with evaluating whether "any psychological conditions ... may have impeded" Morter's ability to successfully complete a CSP. See DIA Emails at 2. Dr. Soo-Tho interviewed Morter and reviewed his health records, including his anxiety-disorder diagnosis, but nevertheless concluded that the symptoms associated with that condition "are probably easily attenuated by CSP examination procedures and should not preclude an individual's ability to successful[ly] complete" the exam. See Soo-Tho Report at 3.

Plaintiff has not shown that this conclusion was so obviously invalid that the Agency could not honestly have believed it. See *Morris v. McCarthy*, 825 F.3d 658, 671 (D.C. Cir. 2016) (explaining that the "objective validity" of employer's reason bears on whether it "honestly believed" it). For instance, he has presented no evidence that his anxiety disorder — or PTSD, for that matter — in fact caused his prior CSP failures. While he reported to a polygraph examiner and DIA investigator that he felt generally anxious during the exams, see, e.g., 3/23/11 CSP at 2; DIA Report at 2, he did not obtain a formal diagnosis of anxiety disorder until October 2013, after he had already failed four CSPs — failures that could have exacerbated the symptoms resulting in the anxiety-disorder diagnosis. See Health Record at 2; Dr. Jill Tucillo Report at 1 (quoting Morter as saying that his anxiety "became severe [around October 2013] when his 'clearance was taken"') (typeface altered).

Second, Morter suggests that the Agency "blatantly violated" certain "approved and relevant regulations" by reassigning him. See Pl. Opp. at 13. The argument apparently adverts to regulations mentioned elsewhere in Plaintiff's Opposition brief-specifically, DOD Instruction 5210.91, Encl. 3, sec. 2(g) and Encl. 4, sec. 2(h). There is, however, no evidence that DIA violated these regulations, so as to support an inference of pretext. See *Alford v. Def. Intel. Agency*, 908 F. Supp. 2d 164, 175 (D.D.C. 2012) (acknowledging that "[i]n certain cases, an agency's failure to follow its own regulations or established procedure can provide sufficient evidence of pretext to withstand summary judgment," but finding inadequate evidence).

Section 2(g) of Enclosure 3 provides that "[n]o unfavorable administrative action (to include access, employment, assignment, and detail determinations) shall be taken solely on the basis of .... an unresolved [personnel security screening] examination, except as provided in sections 6 and 7 of Enclosure 4." DOD Instruction 5210.91 at 10. The final clause of the rule makes clear that it is subject to "sections 6 and 7 of Enclosure 4." Section 7 provides, in part, that when DOD personnel in positions requiring security screening (including CSPs, see id. at 13) "are unable to resolve all relevant questions" of that screening, the Agency shall give that person "an opportunity to undergo additional examination," and ifhe fails, it may "temporarily suspend [his] access to controlled information and deny [him] assignment or detail that is contingent on such access." *Id.* at 21. The Agency must also advise the individual "that the [aforementioned] determination may be appealed." *Id.* Here, of course, Morter received multiple examinations, was reassigned after having flunked all of them, and appealed the reassignment (albeit without success).

Likewise, there is no evidence that the Agency violated section 2(h) of Enclosure 4. That regulation requires it to establish written procedures to "[e]xempt or postpone examinations when individuals are considered medically, psychologically, or emotionally unfit to undergo an examination." *Id.* at 17. Here, Morter was instructed to meet with Dr. Soo-Tho to address essentially that question. See DIA Emails at 2; Soo-Tho Report at 1. Soo-Tho concluded, as already noted, that, "[f]rom a personnel security vetting perspective," his anxiety symptoms are

"probably easily attenuated by CSP examination procedures" and would not preclude him from completing the exam. See Soo-Tho Report at 3. In fact, he determined that Morter was "unlikely to be a suitable candidate for further polygraph testing" only because of his "lack of candor" (and associated behavioral flaws) and alleged intent to "subvert" the exam. *Id.* at 4. Despite this determination, the Agency, in any event, ultimately praised Morter's willingness to seek psychological treatment, granted him another polygraph examination, and postponed the date of that exam by at least six months, to allow him time to receive sufficient counseling. See Advisory Ltr. at 1; Security Review & Evaluation Record at 1; see also 8/5/14 CSP. Such measures appear to be consonant with the requirements of section 2(h).

Third, Morter accuses DIA and SOCOM of "attempt[ing] to change their reasons for punishing [him] by claiming that [he] researched the polygraph then lied about it to the agency psychologist." Pl. Opp. at 13. As a general matter, "shifting and inconsistent justifications are probative of pretext." *Geleta v. Gray*, 645 F.3d 408,413 (D.C. Cir. 2011) (cleaned up). Here, however, the Agency's reason for reassigning Plaintiff has been entirely consistent: it believed, because of his failed polygraph exams, that he posed more of a security risk at SOCOM than at DIA Headquarters. See Reassignment Action Ltr.; DIA Emails at 7; McIntosh Interrogatory at 8-9; Norton Interrogatory at 7. The Agency did not cite his research into polygraphs or Soo-Tho's conclusion that he was less than forthcoming about it as a basis for reassigning him. To the extent that the Secretary highlights those

facts in his Motion for Summary Judgment, the Court construes them as supporting the ultimate conclusion that Morter posed a security risk at SOCOM (rather than as a separate justification). See Def. MSJ at 19 (stating reassignment rationale that SOCOM "no longer trusted" Plaintiff with handling Top Secret and Sensitive Compartmented Information and citing the conclusions of Dr. Soo-Tho's report as supporting "contemporaneous evidence").

No reasonable jury, in sum, could find on the present record that Defendant's reason for reassigning Morter to headquarters was a pretext for disability discrimination.

C. Disparate Impact

Plaintiff's disparate-impact claim, finally, need not long detain the Court. Such a theory targets "employment practices that are facially neutral in their treatment of different groups but ... in fact fall more harshly on one group than another and cannot be justified by business necessity." *Figueroa*, 923 F.3d at 1085 (cleaned up). The employee has an initial burden to "identify the specific employment practice allegedly causing a disparate effect" and to "make a threshold showing of a significant statistical disparity caused by that practice." *Id.* (cleaned up).

The burden then shifts to the employer to "prove the business necessity of the practice." *Id.* (cleaned up). Relying on statistics disclosed during discovery in his EEO proceedings, Plaintiff here alleges that 13.25% of all DIA polygraph examinations result in "No Opinion" and 5% result in "Significant Response." Pl. Opp. at 13. By his calculations, that amounts to, respectively, about 4,000 and 1,500 employees who received the same scores as he did. *Id.* "[Y]et there is

no record," he adds, of that many people "being punished." *Id.* at 13-14.

Without any evidence regarding the proportion of mentally disabled individuals (let alone those with an anxiety disorder specifically) in the Agency's employ versus the proportion of such individuals who failed the polygraph, there is little to be inferred from those figures. See, e.g., Figueroa, 923 F.3d at 1086 (comparing number of Hispanic and Latino candidates who were promoted with their proportion of the applicant pool and the overall promotion rate); see also *Feloni v. Mayorkas*, 2023 WL 3180313, at *7 (D.D.C. May 1, 2023) (denying motion to dismiss disparate-impact claim where plaintiff's statistics "show[ed] that female trainees fail to meet [ICE's physical-fitness] requirements at a far higher rate than do their male colleagues"). In addition, without any statistics showing that adverse actions were taken against people in Plaintiff's (still-undefined) class, no disparate impact exists. Plaintiff having made no threshold showing that a disparity exists, summary judgment for the Secretary on this count — as with the prior two — is inescapable.

IV. Conclusion

For the foregoing reasons, the Court will grant Defendant's Motion for Summary Judgment and deny Plaintiffs Cross-Motion. An Order so stating will issue this day.

[s] James E. Boasberg
JAMES E. BOASBERG
Chief Judge

Date: February 26, 2024

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN S. MORTER,
Plaintiff,

v.

LLOYD J. AUSTIN III,
Defendant.

Civil Action No. 23-343 (JEB)

ORDER

For the reasons set forth in the accompanying Memorandum Opinion, the Court ORDERS that:

1. Defendant's [5] Motion for Summary Judgment is **GRANTED**;

2. Plaintiffs [7] Motion for Summary Judgment is **DENIED**; and

3. Judgment is **ENTERED** in favor of Defendant.

[s] James E. Boasberg
JAMES E. BOASBERG
Chief Judge

Date: February 26, 2024

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24-5056 September Term, 2025
1:23-cv-00343-JEB
FILED ON: September 18, 2025

John S. Morter,
Appellant
v.
Pete Hegseth, Secretary, Department of Defense,
Appellee

Before: MILLETT, KATSAS, and WALKER, *Circuit Judges*.

ORDER

Upon consideration of appellant's petition for panel rehearing filed on September 5, 2025, that includes a motion to vacate the panel opinion, vacate the judgment, and remand for trial, it is

ORDERED that the petition be denied. It is.

FURTHER ORDERED that the motion be denied.

Per Curiam

FOR THE COURT:
Clifton B. Cislak, Clerk

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24-5056 September Term, 2025
1:23-cv-00343-JEB
FILED ON: September 26, 2025 [2137360]

John S. Morter,
Appellant
v.
Pete Hegseth, Secretary, Department of Defense,
Appellee

MANDATE

In accordance with the judgment of July 22, 2025, and pursuant to Federal Rule of Appellate Procedure 41, this constitutes the formal mandate of this court.

FOR THE COURT:
Clifton B. Cislak, Clerk

29 USC §794. Nondiscrimination under Federal grants and programs

(a) Promulgation of rules and regulations

No otherwise qualified individual with a disability in the United States, as defined in section 706(8) of this title, 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 receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

29 USC §794a. Remedies and attorney fees

(a) (1) The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), including the application of sections 706(f) through 706(k) (42 U.S.C. 2000e-5(f) through (k)), shall be available, with respect to any complaint under section 791 of this title, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on

such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy.

42 U.S.C. §12112. Discrimination

(a) General rule. No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction

As used in subsection (a) of this section, the term "discriminate" includes-

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity

29 CFR § 1630.2 Definitions.

(n) Essential functions —

(1) In general. The term essential functions means

the fundamental job duties of the employment position the individual with a disability holds or desires. The term "essential functions" does not include the marginal functions of the position.

(2) A job function may be considered essential for any of several reasons, including but not limited to the following:

(i) The function may be essential because the reason the position exists is to perform that function;

(ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or

(iii) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

(o) Reasonable accommodation.

(3) To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

DODI 5210.91 Polygraph and Credibility Assessment (PCA) Procedures

ENCLOSURE 3 - PCA PROGRAM

2. GENERAL PROGRAM PROCEDURES
   g. PCA examinations are a supplement to, not a substitute for, other methods of screening or investigation. No unfavorable administrative action (to include access, employment, assignment, and detail determinations) shall be taken solely on the basis of either a refusal to undergo a PSS examination or an unresolved PSS examination, except as provided in sections 6 and 7 of Enclosure 4.

ENCLOSURE 4 - POLYGRAPH EXAMINATIONS

2. PSS PROGRAM REQUIREMENTS AND PROCEDURES. The Heads of DoD Components approved to conduct PSS examinations or establish PSS programs to screen designated personnel shall establish written procedures to:
   h. Exempt or postpone examinations when individuals are considered medically, psychologically, or emotionally unfit to undergo an examination.

6. REFUSAL TO TAKE OR COMPLETE A PSS. DoD-affiliated personnel who refuse to take or complete a polygraph examination, and are in positions designated as requiring a PSS polygraph examination as part of determining initial eligibility for access to Top Secret, SAP, or

other sensitive intelligence or operational information or for initial assignment or detail to the CIA or other IC elements, may be denied access, assignment, or detail.

7. FAILURE TO RESOLVE A PSS. DoD-affiliated personnel in positions cited in section 6 of this enclosure who are unable to resolve all relevant questions of a PSS shall be so advised. The results of the examination shall be forwarded to the requesting agency.

   a. If, after reviewing the examination results, the requesting agency determines that they raise a significant question relevant to the individual's eligibility for a security clearance or continued access, the individual shall be given an opportunity to undergo additional examination.

   b. If the additional examination fails to resolve all relevant questions, the Head of the DoD Component may initiate a CI investigation in accordance with DoD policy.

   c. Additionally, the Head of the relevant DoD Component may temporarily suspend an individual's access to controlled information and deny the individual assignment or detail that is contingent on such access, based upon a written finding that, considering the results of the examination and the extreme sensitivity of the classified information involved, access under the circumstances poses an unacceptable risk to the national security. Such temporary suspension of access may not form the part of any basis for an adverse administrative action or an adverse personnel action.