



EEOC DOC 0720070014, 2013 WL 3965241 (E.E.O.C.)

U.S. Equal Employment Opportunity Commission (E.E.O.C.)

***1 JEREMY NATHAN, COMPLAINANT,**

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL, DEPARTMENT OF JUSTICE (FEDERAL BUREAU OF INVESTIGATION), AGENCY.

Appeal No.

0720070014

Hearing No. 100-2004-00391X

Agency No. F035786

July 19, 2013

DECISION

Following its October 31, 2006 final order, the Agency filed a timely appeal which the Commission accepts pursuant to [29 C.F.R. § 1614.405\(a\)](#). On appeal, the Agency requests that the Commission affirm its rejection of an EEOC Administrative Judge's (AJ) finding of discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, [29 U.S.C. § 791 et seq.](#) For the following reasons, the Commission REVERSES the final Agency order and AFFIRMS the AJ's finding of discrimination, but with a modified remedy.

ISSUE PRESENTED

The issue on appeal is whether there is substantial evidence in the record to support the AJ finding that the Agency discriminated against Complainant on the basis of disability (monocular vision) when, by letter dated December 5, 2002, the Agency rescinded Complainant's conditional offer of employment as an FBI special agent.

BACKGROUND

At the time of the events giving rise to this complaint, Complainant was a Special Agent (SA) applicant who had received a conditional offer of employment from the FBI on August 29, 2002. Complainant's employment with the FBI was conditional upon successfully passing a polygraph examination, a security clearance background investigation, and a medical examination.

The record reflects that Complainant entered the U.S. Army in 1987, started West Point in 1989, graduated in 1993, and served as an infantry officer. In or around February of 1997, Complainant visited an ophthalmologist at Walter

Reed Army Medical Center so that a retina specialist could examine his right eye. Complainant had noticed a change in his eyesight as early as 1993. The retina specialist diagnosed Complainant with a detached retina, and recommended a surgical procedure known as scleral buckling. Complainant, however, is among the 10 percent of individuals for whom the procedure is ineffective. Doctors performed a series of surgeries on Complainant's eye from June 30 until July 7, 1997. Although the surgeries were ineffective in improving Complainant's vision, they stopped the progression of the damage to Complainant's eye. As a result of a cataract which developed in response to the multiple surgeries, the doctors performed a final vitrectomy and lensectomy (placement of an artificial lens in the eye).

During his time in the Army, Complainant trained and became experienced in small unit tactics and operations, teamwork, and fired a variety of weapons. While serving in the U.S. Army, Complainant was deployed to Germany for a little under four years, serving in six different positions while there. The record reflects that Complainant's vision impairment never impacted his ability to perform the required duties of his positions, and was never grounds for discharge from the Army. Complainant acknowledged that he had to simply "adjust" his field of vision to function. Complainant testified that as a result of his impairment, the peripheral vision in his right eye is impaired. Complainant demonstrated at the hearing how his field of vision is impaired, and in so doing, he explained that if his field of vision were considered to be the face of a clock, then he cannot see anything on his right side in front of him, from approximately 1:30 pm until 3:00 pm if he were looking straight ahead. Complainant then explained that if he turns his head, he could see in the 1:30-3:00 blind spot, but that the blind spot now moves to another part of the face of the clock, or his field of vision. Complainant noted that his field of vision will permanently include a blind spot.

*2 On August 1, 1998, Complainant received an honorable discharge from the Army, and subsequently filed a disability claim. Complainant entered Tulane Law School in August 1998, and transferred to the University of Illinois in 1999, concurrently enrolling in their MBA program. Complainant graduated with a JD-MBA from the University of Illinois in December 2001. He took the Illinois Bar Exam in 2002, and has been a member of the Illinois Bar since November 2002.

In 2002, Complainant submitted his application for employment as an SA. He successfully completed Phase I and Phase II testing requirements, and by letter dated August 29, 2002, the Agency presented him with a conditional offer of employment. Complainant passed the Agency polygraph examination and the 1.5 mile run prerequisites and subsequently underwent a personnel interview and medical examination. The medical examination revealed that Complainant's vision in his right eye was 20/800. The results of the medical exam were forwarded to the Agency's Chief Medical Officer (CMO) who recommended "discontinuation of the hiring process . . . by reason of standard vision in the right eye, unacceptable for safe and efficient job performance." The Unit Chief (UC) made the ultimate decision to discontinue the hiring process of Complainant based on the CMO's recommendation. By letter dated December 23, 2002, Complainant appealed the decision to rescind his conditional offer of employment. Complainant stated that he believes that the results of his medical examination were not applicable to his capability to be a SA.

In a February 4, 2003 letter, the Agency determined that it would not reconsider its decision and explained that the decision was based on an individualized assessment of Complainant's ability to perform the essential functions of the SA position. The Agency stated that because of the nature of the SA position, it is necessary to ensure that all SA candidates can perform the essential functions of the position as the Agency sees fit. On June 23, 2003, Complainant

filed an EEO complaint alleging that he was discriminated against on the basis of disability (monocular vision) when the Agency rescinded the conditional offer of employment because he failed to meet the vision requirements.

At the conclusion of the investigation, Complainant was provided with a copy of the report of investigation and notice of his right to request a hearing before an EEOC Administrative Judge (AJ). Complainant timely requested a hearing. The AJ held a hearing on April 4-5, 2006 and issued a decision on September 26, 2006, finding that the Agency discriminated against Complainant based on his disability when it withdrew its conditional offer of employment for the SA position.

The AJ found that Complainant has a vision impairment that substantially limits the major life activity of seeing. The AJ further found that the Agency failed to establish that Complainant would be a direct threat in the position of SA, because the Agency did not perform an individualized assessment of Complainant's impairment and whether he could perform the essential functions of a SA position without causing a direct threat to himself or others.

***3** The AJ ordered the Agency to: (1) reinstate Complainant's conditional offer of employment as a FBI Special Agent; (2) commence Complainant's background investigation on a priority basis, and upon successful conclusion of the background check, advise Complainant of the reporting dates of upcoming New Agent training classes; (3) determine the appropriate amount of back pay (calculated from the first available New Agent training class that commenced after December 5, 2002), with interest, and other benefits due Complainant, pursuant to [29 C.F.R. § 1614.501](#); (4) provide EEO training on the topic of rights and responsibilities under the Rehabilitation Act to the Agency officials identified as being responsible for the discriminatory withdrawal of Complainant's offer of employment; and (5) take any necessary precautions to ensure that Complainant is not subject to retaliation for filing, prosecuting, and obtaining a favorable result on the instant complaint.

On October 31, 2006, the Agency issued a final order rejecting the AJ's decision. On November 17, 2006, the Agency submitted a brief to the Commission setting forth its analysis that it had not engaged in unlawful discrimination on the basis of disability.

CONTENTIONS ON APPEAL

On appeal, the Agency argues that substantial evidence in this record fails to establish that Complainant was discriminated against on the basis of his disability when the Agency revoked his conditional offer of employment as a SA on December 5, 2002. The Agency asserts that the AJ erred when he found that Complainant was an "individual with a disability" based on the line of cases, including cases from the U.S. Supreme Court, which conclude that monocular vision is not a *per se* disability and that the extent of an individual's compensating adjustments through visual techniques for his or her vision deficiency is an important factor in determining whether that individual's sight is substantially limited. The Agency states that based on the evidence in the record, including Complainant's testimony at the hearing, he is not an individual with a disability entitled to coverage under the Rehabilitation Act because the record is lacking in evidence to support the contention that his vision impairment substantially limits him from using his eyesight as compared to how individuals with binocular vision use their eyesight in daily life.

The Agency further submits that it did not regard Complainant as an individual with a disability. Although the

Agency acknowledges that its disqualification of Complainant indicates that his monocular vision rendered him unsuitable for a SA position, it does not mean that it considered his condition to be substantially limiting with regard to the major life activity of seeing. Citing to [Sutton v. United Airlines, 527 U.S. 471 \(1999\)](#), the Agency argues that an employer's determination that certain limiting, but not substantially limiting, impairments might make an individual less than ideally suited for a given position does not necessarily establish that the employer regarded the individual as having a substantially limiting impairment.

*4 Additionally, the Agency asserts that the AJ's finding that Complainant was a "qualified individual with a disability" is not supported by the record. Relying on the U.S. Supreme Court's decision in [Albertson's v. Kirkingburg, 527 U.S. 555 \(1999\)](#), the Agency states that employers may justify their use of qualification standards that tend to screen out or otherwise deny a job to an individual with a disability so long as those standards are job-related and consistent with business necessity, and so long as performance cannot be accomplished with reasonable accommodation. The Agency contends that the AJ's consideration of certain "skills and abilities" Complainant possessed, without consideration of the fact that Complainant had acquired many of these skills prior to his three eye surgeries, was in error.

Lastly, the Agency contends that it did establish that an individual with Complainant's level of vision loss would pose a direct threat to himself and others were he to be hired as a SA. The Program Manager for the FBI Training Academy's Law Enforcement Training for Safety and Survival Program testified that an individual with reduced peripheral vision and depth perception presents a significantly increased safety risk in a situation where a SA would have to "clear a room," an important task performed by agents. The witness testified that the FBI had conducted a study of the effect of reduced peripheral vision in a room clearing scenario, and a FBI engineer determined that such an individual would lose approximately 35-38% of his or her vision while entering the room. The Agency contends that these facts support its contention that, even assuming that the situations where Complainant's reduced vision would be a safety risk are a minor part of the duties of a SA, the potential consequences of such a risk are significant enough to satisfy that an individual with Complainant's level of vision loss would pose a direct threat to himself and others were he to be hired as a SA.

In response to the Agency's appeal, Complainant requests that the Commission affirm the AJ's finding of discrimination because: (1) his poor vision meets the legal standard for being "substantially limited" within the meaning of the Rehabilitation Act; (2) he remains disabled within the meaning of the Rehabilitation Act despite his ability to minimize the impact of his impairment; (3) the Agency also "regarded" him as being disabled; (4) the Agency failed to prove that he was a direct threat; and (5) the Agency failed to perform a proper individualized assessment of him.

ANALYSIS AND FINDINGS

Pursuant to [29 C.F.R. § 1614.405\(a\)](#), all post-hearing factual findings by an AJ will be upheld if supported by substantial evidence in the record. Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." [Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 477 \(1951\)](#) (citation omitted). A finding regarding whether or not discriminatory intent existed is a factual finding. [See Pullman-Standard Co. v. Swint, 456 U.S. 273, 293 \(1982\)](#). An AJ's conclusions of law are subject to a de novo standard of review, whether or not a hearing was held. An AJ's credibility determination based on the demeanor of a witness or on the tone of voice of a witness will be accepted unless documents or other objective evi-

dence so contradicts the testimony or the testimony so lacks in credibility that a reasonable fact finder would not credit it. See EEOC Management Directive 110, Chapter 9, § VI.B. (Nov. 9, 1999).

*5 In order to establish a prima facie case of disability discrimination under the Rehabilitation Act, a complainant must demonstrate that: (1) he is an “individual with a disability”; (2) he is “qualified” for the position held or desired, i.e., can perform the essential functions of the position with or without accommodation; (3) he was subjected to an adverse employment action because of his disability; and (4) the circumstances surrounding the adverse action give rise to an inference of discrimination. See [Heyman v. Queens Village Comm. for Mental Health for Jamaica Cmty. Adolescent Program](#), 198 F.3d 68 (2d Cir. 1999); [Swanks v. WMATA](#), 179 F.3d 929, 933-34 (D.C.Cir. 1999); [Lawson v. CSX Transp., Inc.](#), 245 F.3d 916 (7th Cir. 2001). For the reasons that follow, we find that Complainant has established a prima facie case of employment discrimination based on disability.

Complainant is an “individual with a disability”.

This case arose before January 1, 2009, the effective date of the Americans with Disabilities Act Amendments Act of 2008, which made a number of significant changes to the definition of “disability” under the Americans with Disabilities Act (ADA) and the Rehabilitation Act. Because this matter occurred in 2002, the Commission will use the analytical framework as it existed before the enactment of the ADA Amendments Act of 2008, to determine whether Complainant is an “individual with a disability.” [FN1]

The threshold question before the Commission is whether Complainant is an “individual with a disability.” Complainant bears the burden of demonstrating that he is an individual with a disability. [Ceralde v. United States Postal Service](#), EEOC Appeal No. 07A00038 (Aug. 2, 2001). Complainant must demonstrate that he (1) has a physical or mental impairment that substantially limits one or more major life activities, (2) has a record of such an impairment, or (3) is regarded as having such an impairment. 29 C.F.R. § 1630.2(g). An impairment is substantially limiting when an individual is unable to perform a major life activity that the average person in the general population can perform or is significantly restricted as to the condition, manner, or duration under which he can perform a particular major life activity as compared to the condition, manner or duration under which the average person in the general population can perform that same major life activity. 29 C.F.R. § 1630.20). Major life activities include seeing 29 C.F.R. § 1630.2(i).

While an individual with one eye has a physiological condition that ordinarily will meet the definition of disability, a determination of whether Complainant's impairment substantially limits his ability to see must necessarily include any mitigating measures used by him to reduce the impact of his impairment. See [Lovell v. Department of Justice](#), EEOC Appeal No. 01A41642 (May 26, 2006), *req. for recon. den.*, EEOC Request No. 0520060874 (Aug. 23, 2006) citing [Albertson's Inc. v. Kirkingburg](#), 527 U.S. 555, 567 (1999). Individuals with monocular vision do not bear a more onerous burden in order to claim protection under the Act, but must simply “prove a disability by offering evidence that the extent of the limitation in terms of their own experience, as in loss of visual field, is substantial.” See [Albertson's Inc.](#) at 567.

*6 In the present case the AJ concluded that the evidence in the record supports a finding that Complainant is an individual with a disability. The AJ found that Complainant's visual impairment substantially limits the major life activity of seeing. The AJ found that the hearing evidence established that Complainant has a visual impairment in

his right eye. The hearing evidence (including testimony and medical records) illustrates that: (1) Complainant has an artificial lens in his right eye; (2) his visual acuity in his right eye rated at 20/800; (3) Complainant is essentially blind in the right eye; (4) Complainant has a blind spot in his field of vision that impacts roughly 45 degrees of an average 180 degree field; (5) Complainant lacks depth perception; (6) Complainant's vision in the right eye will never improve; and (7) although he is able to compensate, Complainant has a permanent blind spot of the equivalent of approximately 45 degrees. (AJ Decision at 7-8).

The Agency argues that because Complainant is able to compensate for his vision impairment enough, the impairment can no longer be considered substantially limiting enough to qualify him as an “individual with a disability” afforded protections under the Rehabilitation Act. We find that the Agency's interpretation of the U.S. Supreme Court's holding in Albertson's is incorrect. While the Agency correctly asserts that (prior to 2009) mitigating measures must be taken into account in judging whether an individual possesses a disability [FN2], the Agency mistakenly concludes that the mitigating measures employed by Complainant in the instant matter compensate for his vision impairment enough that he cannot be considered substantially limited in the major life activity of seeing. Complainant, among other things, is essentially blind in his right eye; he lacks depth perception; he has a permanent blind spot of 45 degrees; and his condition will never improve.

Therefore, we find that there is substantial evidence in the record to support the AJ's finding that the effects of Complainant's impairment substantially limit his ability to see. While Complainant is assisted in performing visual tasks by the compensating measures he employs, his vision is not improved by them. Because Complainant has no visual abilities that help him overcome his visual limitations in peripheral vision and field of vision, we conclude that his diminished peripheral vision is not mitigated, and that Complainant's monocularly substantially limits the major life activity of seeing. See Spencer v. Dep't of the Treasury, EEOC Appeal No. 07A10035 (May 6, 2003), *req. for recon. den.*, EEOC Request No. 05A30898 (Aug. 29, 2005).

Is Complainant “qualified” for the Special Agent position?

Upon a finding that Complainant is an individual with a disability, the next inquiry is whether Complainant is a “qualified individual with a disability.” 29 C.F.R. §1630.2(m). A “qualified individual with a disability” is one who satisfies the requisite skill, experience, education, and other job-related requirements of the employment position and who, with or without reasonable accommodation, can perform the essential functions of such position. Id.

*7 A review of the record reveals that Complainant met all the Agency's job requirements [FN3] except its vision standard. Complainant passed Phases I and II of the evaluation process and was given a conditional offer of employment that reflected his achievement. Further, Complainant's medical examination report described him as in overall good health, noting only his vision impairment.

The key question then is whether the vision standard that the Complainant failed, or the manner in which the Agency applied the vision standard to Complainant, is consistent with the requirements of the Rehabilitation Act. If the standard itself fails to meet the “job-related and consistent with business necessity” requirement, or if the Agency failed to apply the standard in an appropriate way (for example, by failing to determine whether performance could be achieved through reasonable accommodation) the Complainant has a valid claim.

Is the Agency Vision Standard Job-Related and Consistent with Business Necessity?

The Rehabilitation Act prohibits a covered entity from engaging in discrimination against a qualified individual on the basis of disability in, among other things, hiring. [42 U.S.C. § 12112\(a\)](#). Such discrimination includes “using qualification standards, employment tests, or other selection criteria that screen out or tend to screen out an individual with a disability ... 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. [Id. § 12112\(b\)\(6\)](#); [see also 29 C.F.R. § 1630.10](#) (making unlawful a covered entity's use of qualification standards that screen out or tend to screen out an individual with a disability unless such standard is job related and consistent with business necessity).

The term “qualification standard” is not defined in the statute. The regulations define “qualification standard” as “the personal and professional attributes, including the skill, experience, education, physical, medical, safety, and other requirements established by a covered entity as requirements which an individual must meet in order to be eligible for the position held or desired.” [29 C.F.R. § 1630.2\(q\)](#). The regulations also note that vision standards based on uncorrected vision are acceptable under the Act if a covered entity can establish that such standards are job related and consistent with business necessity. [29 C.F.R. § 1630.10\(b\)](#).

The Agency argues on appeal that it requires that applicants for the SA position possess uncorrected vision of 20/200 in each eye, with correction to 20/20 in one eye and 20/40 in the other eye. According to the Agency, the vision standard ensures that an applicant can safely serve as a SA. In rejecting Complainant due to his inability to meet this standard, the FBI's Chief Medical Officer noted that Complainant's limited vision created a “risk of substantial harm to the health or safety of the applicant and co-workers while working in critical response tasks of raids, arrests, and reactive squad duty.” ROI Tab 12 at 3.

*8 As noted above, with regard to safety requirements that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, an employer must demonstrate that the requirement is job related and consistent with business necessity. The regulations provide that an Agency can meet this standard by showing that the requirement, as applied to the individual, satisfies the “direct threat” analysis set forth in [29 C.F.R. § 1630.2\(r\)](#). [29 C.F.R. 1630 App. 1630.15\(b\) and \(c\)](#).

A person is a “direct threat” if he or she poses a significant risk of substantial harm to the health or safety of him or herself or others which cannot be eliminated or reduced to an acceptable level by reasonable accommodation. [29 C.F.R. § 1630.2\(r\)](#). The “direct threat” evaluation must be based on an individualized assessment of the individual's present ability to perform the essential functions of the job. [Id.](#) If no such accommodation exists, the Agency may refuse to hire an applicant. [Id.](#) In the instant matter, the Agency must demonstrate that its decision to discontinue the hiring process of Complainant, due to “substandard vision in his right eye,” satisfies the “direct threat” standard. Therefore, we must analyze whether the Agency has satisfied its burden of proof to establish that Complainant posed a direct threat to safety. [See *Spencer v. Department of Treasury*, EEOC Appeal No. 07A10035 \(May 6, 2003\)](#).

In order to exclude an individual on the basis of possible future injury, the Agency bears the burden of showing there is a significant risk, for example, a high probability of substantial harm. A speculative or remote risk is insufficient. The Agency must show more than an individual with a disability seeking employment stands some slightly increased risk of harm. [See *Selix v. United States Postal Service*, EEOC Appeal No. 01970153 \(Mar. 16, 2000\)](#).

Such a finding must be based on an individualized assessment of the individual that takes into account: (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. 29 C.F.R. § 1630.2(r). See [Chevron U.S.A. Inc. v. Echazabal](#), 536 U.S. 73 (2002); [Cook v. State of Rhode Island, Department of Mental Health Retardation and Hospitals](#), 10 F.3d 17 (1st Cir. 1993). A determination of significant risk cannot be based merely on an employer's subjective evaluation, or, except in cases of a most apparent nature, merely on medical reports. Rather, the Agency must gather information and base its decision on substantial information regarding the individual's work and medical history. [Chevron U.S.A. Inc. v. Echazabal](#), *supra*; [Harrison v. Department of Justice](#), EEOC Appeal No. 01A03948 (July 30, 2003).

*9 We find that substantial evidence supports the AJ's finding that the Agency did not perform an individualized assessment of whether Complainant could perform the essential functions of a SA position without posing a direct threat to himself or others.

In its appeal, the Agency relied heavily on the testimony of the Program Manager for the FBI Training Academy's Law Enforcement Training for Safety and Survival Program to establish that Complainant would have posed a direct threat because of his vision impairment. The Program Manager testified that individuals with reduced peripheral vision and depth perception present a significantly increased safety risk in a situation where a Special Agent would have to "clear a room." Specifically, the Program Manager testified that the Agency conducted a study where it situated a target in a position which would be considered "good peripheral vision" and marked this target range on a wall in a room. As a part of the study, the Agency eliminated the use of one of the subject's eyes and marked a new target range on the same wall. [FN4] The Program Manager testified that an Agency Engineer determined that an individual in these circumstances was losing approximately 35 to 38 percent of their vision. (HT at 240). The Program Manager testified that the target range identified with the elimination of one eye represents roughly a five foot area that an individual would be unable to see. (HT at 240).

We find that the Agency's presentation of the evidence from the study alone is insufficient to establish that there would be a high probability of substantial harm to Complainant or others. The evaluation of an applicant's unique abilities and disabilities is the crux of an individualized assessment. At the minimum, such an assessment should take into account any special qualifications that might allow an applicant to successfully perform the essential functions of a position without posing a direct threat to himself or others. Examples of special qualifications include prior successful experience in a similar position and adaptive or learned behaviors that compensate for physical limitations imposed by a condition.

The Agency's study, which only looked to the range of vision lost by a typical person with monocular vision, plainly failed to examine any of the special qualifications that the Complainant allegedly possessed. Instead, the Agency summarily disqualified the Complainant based on the presumption that no individual with monocular vision can carry out the duties of an SA. (See HT at 356-360)

An appropriate assessment would have closely evaluated the Complainant's prior experience to determine if such experience indicated an ability to safely perform as an SA or, if past experience was insufficient, provided the Complainant an opportunity to demonstrate how he could safely perform the essential functions of the job because of

compensatory skills that he has developed.

***10** Here, Complainant has alleged that he possesses both applicable prior experience and special skills that enable him to safely perform the essential functions of the SA position. Complainant graduated from West Point in 1993 and rose to the rank of Captain in the U.S. Army, served tours as an infantry officer where he received specialized training in small unit tactics, and performed over seventy-five combat patrols in Bosnia. (AJ Decision, p. 16-17; Ex. AJ-1) We note, however, that some of these activities occurred prior to Complainant's unsuccessful eye surgery and, to that extent, the simple existence of such activities is not probative evidence of the Complainant's present ability. More relevant are the special skills that, according to the Complainant, enable him to execute the essential functions of the job without posing a direct threat to himself or others. These include learned behaviors, including skills obtained prior to surgery, and compensatory techniques that assist the Complainant in overcoming his vision impairment and enable him to safely perform such essential functions as clearing a room. There is no evidence in the record that the Agency took these skills into account when assessing whether the Complainant could safely perform the essential functions of a SA. An appropriate individualized assessment would have allowed the Complainant to demonstrate how those special skills enable him to perform the essential functions of the job without significant risk to himself or others.

The Agency had a legitimate concern regarding Complainant's ability to safely perform in the SA position with his visual impairment, and the Rehabilitation Act does not require that an individual who is a direct threat to himself or others be hired for a job where he poses such a threat. However, the Commission finds that the Agency did not meet its burden under the direct threat standard as required by the Rehabilitation Act.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we REVERSE the Agency's final order, AFFIRM the AJ's finding of discrimination, with a modified remedy, and REMAND the matter back to the Agency to take corrective action with this decision and the order herein.

ORDER

Within one-hundred and twenty (120) days of the date this decision becomes final, the Agency shall take the following actions:

1. Reinstate Complainant's conditional offer of employment as an FBI Special Agent. Complainant has thirty days from the date of the offer of reinstatement to accept or reject the Agency's offer.
2. Commence Complainant's background investigation. The background investigation shall be conducted on a priority basis.
3. Notify Complainant of the reporting dates of upcoming New Agent training classes. The Agency shall allow Complainant 90 days notice between the successful completion of his background investigation and the date on which he is required to report for New Agent training. Complainant may request an earlier reporting date if one is available, or a later reporting date if his Foreign Service assignment with the State Department so necessitates.

***11** 4. Provided Complainant's background investigation is successfully concluded, determine the appropriate

amount of back pay, with interest, and other benefits due Complainant, pursuant to 29 C.F.R. § 1614.501. Back pay and benefits shall be calculated from the first available New Agent training class that commenced after December 5, 2002 (the date Complainant's conditional offer of employment was revoked) up to the date on which Complainant enters on duty, or to the date on which he declines to enter on duty.

Complainant shall cooperate in the Agency's efforts to compute the amount of back pay and benefits due, and shall provide all relevant information requested by the Agency. If there is a dispute regarding the exact amount of back pay and/or benefits, the Agency shall issue a check to the Complainant for the undisputed amount. Complainant may petition the Commission for enforcement or clarification of the amount in dispute. The petition for clarification or enforcement must be filed with the Compliance Officer referenced in the statement entitled "Implementation of the Commission's Decision." [FN5]

5. Provide EEO training on the topic of rights and responsibilities under the Rehabilitation Act to Agency officials identified as being involved in the hiring process. Given the Commission's holding in Lovell and in this case, the Agency shall take appropriate steps to ensure that like violations do not occur in the future.

6. Take any necessary precautions to ensure that Complainant is not subject to retaliation for filing, prosecuting, and obtaining a favorable result on the instant complaint. To that end, the Agency shall, to the extent possible, maintain confidentiality with regard to these proceedings.

POSTING ORDER (G0610)

The Agency is ordered to post at FBI Headquarters in Washington, D.C., copies of the attached notice. Copies of the notice, after being signed by the Agency's duly authorized representative, shall be posted by the Agency within thirty (30) calendar days of the date this decision becomes final, and shall remain posted for sixty (60) consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. The Agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material. The original signed notice is to be submitted to the Compliance Officer at the address cited in the paragraph entitled "Implementation of the Commission's Decision," within ten (10) calendar days of the expiration of the posting period.

DISSENTING OPINION OF CONSTANCE S. BARKER

The Commission has now issued the above-referenced Decision instructing the Federal Bureau of Investigation to, among other things, reinstate the Complainant, Jeremy Nathan's conditional offer of employment as an FBI Special Agent and let him report to New Agent Training. In my opinion, the Decision is wrong. I voted against it and respectfully submit this dissenting opinion because of my concern for the implications it will have for not only the FBI but for other law enforcement agencies.

Mr. Nathan is a U.S. Army veteran and West Point graduate with excellent credentials, skills and experience. The FBI offered him a job as a Special Agent contingent upon his passing a medical exam. Among the medical requirements that FBI Special Agents have to meet is a vision requirement. Unfortunately, Mr. Nathan has developed significant vision impairments that caused him to fail the vision portion of the medical exam. He has only monocular vision. That is, he is essentially blind in one eye.

“ . . . [he] has an artificial lens in his right eye; . . . [he] is essentially blind in the right eye; . . . [he] has a blind spot in his field of vision that impacts roughly 45 degrees of an average 180 degree field; . . . [he] lacks depth

perception; . . . although he is able to compensate, [he] has a permanent blind spot of the equivalent of approximately 45 degrees; [and] his vision in the right eye will never improve.”(Commission Decision at 7, quoting AJ Decision at 7-8).

After the results of the vision exam were reviewed, the FBI withdrew its offer of employment. Mr. Nathan now contends that the FBI discriminated against him as a disabled individual in violation of the Rehabilitation Act of 1973, as amended, [29 U.S.C. § 791 et seq.](#)

The Rehabilitation Act protects “qualified individuals with disabilities” and prohibits federal entities like the FBI from “using qualification standards, employment tests, or other selection criteria that screen out or tend to screen out an individual with a disability . . . on the basis of disability . . .”[29 C.F.R. § 1630.10\(a\)\[FN6\]](#) The burden is on the individual to show that he is a qualified individual with a disability and thus entitled to the protections of the Rehabilitation Act. If the individual successfully establishes that he is, in fact, a qualified individual with a disability, the burden of proof then shifts to the employer to demonstrate that the standard, test, or other selections criteria used to disqualify the individual was job related to the position in question and is consistent with business necessity, [29 C.F.R. § 1630.15\(b\)\(1\)](#). Where the job standard is a safety requirement, the employer must also show that it made an “individualized assessment” of the applicant’s situation and determined that if he were offered the job he would pose a direct threat to the health or safety of himself or others in the workplace. [29 C.F.R. § 1630.15\(b\)\(2\)](#); [§ 1630.2\(r\)](#).

The Commission rests its Decision on its conclusion that the FBI did not perform “an individualized assessment of whether [Mr. Nathan] could perform the essential functions of a [Special Agent] position without posing a direct threat to himself or others.”(Commission Decision at 9). An individualized assessment is critical to ensure that an employer’s concerns about safety risks are grounded in something more objective and substantial than fears, assumptions, stereotypes or generalizations. But, nothing in the EEOC’s regulations or the Appendix to the regulations dictate one approach to undertaking an individualized assessment. The type of disability and the nature of the job at issue will dictate what an appropriate individualized assessment will look like.

I strongly disagree with the Commission Decision that the FBI failed to do an individualized assessment. As the Decision describes, the FBI conducted a detailed simulation to test the range of vision of a person with monocular vision when clearing a room of dangerous persons, an essential function of a Special Agent. (Commission Decision at 10, 1-10). An FBI Engineer determined that a person with reduced peripheral vision, such as Mr. Nathan, would lose approximately 35-38% of his or her vision when entering the room and that there would be approximately a five foot area that the individual would be unable to see. *Id.* Contrary to the Commission Decision, this type of study fulfills the requirement of [29 C.F.R. §1630.2\(r\)](#) for an individualized assessment. The FBI did not simply decide that monocular vision was incompatible with safely performing key essential functions of a Special Agent but actually created a simulation of a dangerous situation to determine precisely what the impact would be for the field of vision.

The Commission, however, dismisses the FBI simulation and study as only looking at a “typical person with monocular vision” rather than at Mr. Nathan’s specific condition and special qualifications. But, for people with monocular vision there will be reduced peripheral vision and depth perception. Indeed, the Commission Decision recognizes this is true for Mr. Nathan. (Commission Decision at 7). Furthermore, the FBI did not rely solely on its simulation in determining that Mr. Nathan poses a direct threat, but looked at Mr. Nathan’s specific condition. Mr. Nathan argued

that he could safely perform the essential functions of an FBI Special Agent because of applicable prior experience and “special skills,” which include compensating for his blind spot by turning his head until he can see what is hidden by the blind spot. (Commission Decision at 10-11). The problem with Mr. Nathan's compensation measures, as he acknowledged, is that each time he shifts his head to compensate for his blind spot, his blind spot also shifts, creating a new blind spot. (Commission Decision at 2.) Mr. Nathan's compensation measure cannot eliminate the permanent blind spot of 45 degrees out of 180.

I am not suggesting that employers may always or solely, rely on general studies to make a showing of direct threat. A general study involving simulated performance of an essential function may be inappropriate for showing direct threat in some situations for a number of reasons, including if there are too many variations in the limitations experienced by people with a particular disability or if a certain individual with a disability has specific unique qualifications. But, where, as here, the limitations of the disability do not change, then a study such as the one conducted by the FBI can produce highly relevant evidence that an applicant poses a direct threat.

The Commission states that the FBI should have taken into account any special qualifications such as prior successful experience in a similar position and adaptive or learned behaviors that compensate for physical limitations. (Commission Decision at 10). But, the Commission fails to point to any special qualifications that would negate the FBI's finding of direct threat. The Commission ignores Mr. Nathan's concession that he has a permanent blind spot and that turning his head only moves the location of that blind spot but does not eliminate it. The Commission places great emphasis on Mr. Nathan's testimony of graduating from West Point, rising to the rank of Captain in the U.S. Army, receiving training in small unit tactics as an infantry officer, and performing over 75 combat patrols in Bosnia. But, the evidence suggests that most, if not all, of these experiences occurred prior to Mr. Nathan's development of monocular vision. (Commission Decision at 1-2 and 10-11). In fact, Mr. Nathan was honorably discharged about a year after his surgeries. (Commission Decision at 2, 1-25). Indeed, the Decision concedes that “some of these activities occurred prior to [Mr. Nathan's] unsuccessful eye surgery and, to that extent, the simple existence of such activities is not probative evidence of the Complainant's present ability” to perform the FBI job safely. (Commission Decision at 10-11). So why does the Decision criticize the FBI for failing to take into account evidence that the Commission either acknowledges is not probative or if it contends it is probative, fails to explain how or why it is probative? The Commission fails to specify even one prior activity in Mr. Nathan's job history that would eliminate or even lessen the significant risk of substantial harm in clearing a room caused by his permanent visual limitations.

Next, the Commission chastises the FBI for failing to take into account “special skills” that Mr. Nathan believes would have permitted him to perform the job without posing a direct threat. But, the Commission does not identify a single special skill that would enable Mr. Nathan to overcome the irrefutable fact that he cannot see a significant portion of his field of vision. Importantly, the Decision points to no compensating behavior or reasonable accommodation that would give him the ability to clear a room quickly and accurately. As the Commission Decision notes “Complainant has no visual abilities that help him overcome his visual limitations in peripheral vision and field of vision.”(Commission Decision at 7). Yet, the Commission Decision hinges on a belief that unspecified “special skills”, “learned behaviors”, and “compensatory techniques” would eliminate the direct threat created as a consequence of having a permanent blind spot.

Nor does the Commission decision point to any evidence to explain how Mr. Nathan's prior training and experience

in the Army (from which he was honorably discharged about a year after his surgeries) would enable him, today, to perform the Special Agent job safely despite his disability. In some jobs, seconds count and this is one of them. It may be a rare occurrence where an FBI Special Agent must clear a room, but if called upon to do so Mr. Nathan must be able to do it quickly and accurately.

Finally, the Commission Decision seems to rest on the FBI's failure to permit Mr. Nathan to demonstrate whether he poses a direct threat. In many instances a demonstration is a helpful way for an employer (and applicant) to determine if a direct threat would exist. But, I disagree that the lack of such a demonstration here, or in general, fatally undermines an employer's direct threat defense. The Rehabilitation Act (and the ADA) recognizes the need for flexibility in how employers make certain decisions. It is for that reason that the Rehabilitation Act and the ADA are replete with factors to consider in making decisions rather than in prescribing one particular way to reach a legal conclusion. There is nothing in the statute or regulations that require an employer to set up a simulation involving an applicant to show the existence of a direct threat, and the absence of such a demonstration does not constitute a failure to do an individualized assessment.

I believe there is sufficient evidence to support the FBI's contention that Mr. Nathan poses a direct threat that cannot be eliminated or reduced with reasonable accommodation. The Commission Decision points to no evidence to the contrary. And that is another of my problems with this Decision. The Commission Decision finds that the FBI failed to show direct threat and therefore the Commission Decision concludes that the Agency discriminated against Mr. Nathan by revoking its job offer. But, the Decision does not affirmatively find Mr. Nathan to be qualified. Remarkably, despite the lack of this required finding the Commission orders the FBI to treat Mr. Nathan as if he had been found to be qualified, and to reinstate its job offer and admit him to its next New Agent training classes. However, such remedies would only be available if the Commission had found that Mr. Nathan is qualified -- something this Decision conspicuously fails to do.

The Decision criticizes the FBI for what it did not do in making a direct threat determination and goes to great length to detail types of evidence it believes the FBI should have explored. The Decision seems to implicitly assume that if the FBI had looked at all the evidence suggested by the Commission it (the FBI) would have concluded that Mr. Nathan is qualified. However, that is only speculation and ignores that it is at least equally possible that the result of additional evidence would be a finding that Mr. Nathan is unqualified. I am at a loss as to how the Commission can order the Agency to hire an applicant that the Commission has not even determined is qualified to do the job.

It seems to me that if the Commission believes that there is an inadequate direct threat defense, it should have remanded the case to the Administrative Judge with instructions on what the FBI was to do to complete a satisfactory direct threat analysis. After the FBI had done whatever additional steps the Commission felt were required for the individualized assessment, then the Commission should have examined the new evidence to determine if Mr. Nathan was or was not qualified. Instead, the Commission took the highly questionable position of ignoring whether or not the individual was qualified and focused only on the adequacy of the employer's affirmative defense. In essence, the Commission simply assumed that Mr. Nathan was qualified and required him to be hired. This sets the rather disturbing precedent that the Commission need not determine if an individual is qualified under the Rehabilitation Act before finding a violation of the law and ordering remedies. I find nothing in the statute or regulations that sanction

this result.

It is deeply regrettable that Mr. Nathan, with his history of service to this country, has developed vision problems that prohibit him from serving as an FBI Special Agent, but the fact remains that the law provides that if an applicant is unable to perform even one of the essential functions of a job he is not a qualified individual with a disability under the law. After performing an individualized assessment of Mr. Nathan, the FBI concluded that he could not perform at least one of the essential functions of an FBI Special Agent: "clearing a room" and in fact, would add significant risk to an already dangerous situation. It is important that we not forget that this is not the typical work environment we are discussing here. We are talking about life threatening situations where a delayed response of mere seconds could mean death. I believe that the facts clearly demonstrate that Mr. Nathan was unqualified. Thus, the FBI had no obligation to reinstate his offer of employment.

This Decision is particularly disturbing to me because of the implications it will have for other law enforcement agencies. There is nothing in the Decision that limits its applicability to the FBI. It is common knowledge that all federal law enforcement agencies, including the Secret Service, the Marshals Service (which protects federal courthouses and the flying public), and Customs and Border Patrol, have vision standards. This Decision appears to effectively raise the requirement for individualized assessments conducted to establish direct threat. There is no reason this new heightened requirement would not apply to all law enforcement agencies -- not only federal law enforcement, but also state and local law enforcement agencies.

ATTORNEY'S FEES (H0610)

If Complainant has been represented by an attorney (as defined by [29 C.F.R. § 1614.501\(e\)\(1\)\(iii\)](#)), he is entitled to an award of reasonable attorney's fees incurred in the processing of the complaint. [29 C.F.R. § 1614.501\(e\)](#). The award of attorney's fees shall be paid by the Agency. The attorney shall submit a verified statement of fees to the Agency -- **not** to the Equal Employment Opportunity Commission, Office of Federal Operations -- within thirty (30) calendar days of this decision becoming final. The Agency shall then process the claim for attorney's fees in accordance with [29 C.F.R. § 1614.501](#).

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0610)

***12** Compliance with the Commission's corrective action is mandatory. The Agency shall submit its compliance report **within thirty (30) calendar days** of the completion of all ordered corrective action. The report shall be submitted to the Compliance Officer, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington, DC 20013. The Agency's report must contain supporting documentation, and the Agency must send a copy of all submissions to the Complainant. If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. [29 C.F.R. § 1614.503\(a\)](#). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. [See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503\(g\)](#). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File A Civil Action."[29 C.F.R. §§ 1614.407 and 1614.408](#). A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in [42 U.S.C.](#)

2000e-16(c) (1994 & Supp. IV 1999). **If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated.** See 29 C.F.R. § 1614.409.

STATEMENT OF RIGHTS - ON APPEAL RECONSIDERATION (M0610)

The Commission may, in its discretion, reconsider the decision in this case if the Complainant or the Agency submits a written request containing arguments or evidence which tend to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or
2. The appellate decision will have a substantial impact on the policies, practices, or operations of the Agency.

Requests to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision or **within twenty (20) calendar days** of receipt of another party's timely request for reconsideration. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at 9-18 (November 9, 1999). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington, DC 20013. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The request or opposition must also include proof of service on the other party.

***13** Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your request for reconsideration. The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(c).

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the Agency, or filed your appeal with the Commission. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. **Filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0610)

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request from the Court that the Court appoint an attorney to represent you and that the Court also permit you to file the action without payment of fees, costs, or other security. See Title VII of the Civil Rights Act of 1964, as amended,

42 U.S.C. § 2000e *et seq.*; the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791, 794(c). **The grant or denial of the request is within the sole discretion of the Court.** Filing a request for an attorney with the Court does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above (“Right to File A Civil Action”).

FOR THE COMMISSION:

Bernadette B. Wilson
Acting Executive Officer
Executive Secretariat

FN1. A complainant bringing a claim after 2009 does not need to meet these standards. In amending the Americans with Disabilities Act (ADA) and, by proxy, the standards applicable under the Rehabilitation Act, Congress reaffirmed that “[t]he primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether an individual’s impairment substantially limits a major life activity.” 29 C.F.R. §1630.2(j)(1)(iii). As a result, a complainant now only needs to demonstrate that an impairment “substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population.” 29 C.F.R. §1630.2(j)(1)(ii). In determining whether an impairment meets this standard, “[t]he term “substantially limits” shall be construed broadly in favor of expansive coverage.” 29 C.F.R. §1630.2(j)(1)(i).

FN2. The Agency argues that Complainant is required to demonstrate that despite his ability to compensate for his vision loss through the use of monocular cues he is still substantially limited in the major life activity of seeing.

FN3. The record indicates that there are 247 “essential tasks” associated with the SA position (HT at 291). According to testimony given at the hearing, all SA’s must be capable of performing these 247 “essential tasks” (HT at 377). This standard applies even if the SA is acting solely in an administrative capacity (HT at 377). We leave to another day the question whether the Rehabilitation Act allows an agency to require so many essential functions for such a broad array of positions and assume *arguendo* for this case that it may.

FN4. The Commission notes that the record does not reflect the specific manner in which the Agency eliminated the subject’s use of one eye for purposes of the study.

FN5. The Commission notes that Complainant did not request compensatory damages.

FN6. Section 501 of the Rehabilitation Act is essentially the federal sector version of Title I of the Americans With Disabilities Act (“ADA”) and contains the same liability standards that the ADA imposes on private employers and state and local governments.

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

An Agency of the United States Government

*14 This Notice is posted pursuant to an order by the United States Equal Employment Opportunity Commission dated _____ which found that a violation of Section 501 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 791 et seq., has occurred at the Department of Justice's Headquarters facility (hereinafter this facility).

Federal law requires that there be no discrimination against any employee or applicant for employment because of the person's RACE, COLOR, RELIGION, SEX, NATIONAL ORIGIN, AGE, or DISABILITY with respect to hiring, firing, promotion, compensation, or other terms, conditions or privileges of employment.

This facility failed to conduct an individualized assessment of whether an applicant could perform the duties of a Special Agent position without posing a direct threat to himself or others. This facility has been ordered to: (1) reinstate the applicant's conditional offer of employment; (2) commence a background investigation; and (3) conduct an individualized assessment of the applicant's ability to perform the duties of the Special Agent position. This facility will ensure that officials responsible for personnel decisions and terms and conditions of employment will abide by the requirements of all federal equal employment opportunity laws and will not retaliate against employees who file EEO complaints.

This facility will comply with federal law and will not in any manner restrain, interfere, coerce, or retaliate against any individual who exercises his or her right to oppose practices made unlawful by, or who participates in proceedings pursuant to, federal equal employment opportunity law.

Agency Representative _____

29 C.F.R. Part 1614

EEOC DOC 0720070014, 2013 WL 3965241 (E.E.O.C.)

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