

U.S. MERIT SYSTEMS PROTECTION BOARD
Denver Field Office

Robert L. Wilson, Complainant, v. Department of Veterans Affairs, Agency.	DOCKET No: DE-0432-12-0130-I-1 AJ: Patricia M. Miller Date: February 9, 2012
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**APPELLANT'S RESPONSE TO THE ORDER
REGARDING AFFIRMATIVE DEFENSE**

COMES NOW Complainant and through his representative hereby responds to the Order dated January 25, 2012 regarding the affirmative defense raised by Appellant.

1. Appellant is not invoking disparate impact theory of discrimination. No policy per se is challenged as adversely impacting the protected groups to which Appellant belongs.
2. Appellant is not invoking direct evidence theory of discrimination. No decision makers in the case stated or suggested to the effect that he was removed based on his age, race, sex, disability, or due to his prior EEO activities. Discrimination or discriminatory animus in this case will be established by way of inference, by examining and laying out the circumstantial evidence by which management's treatments of others will be shown to be more favorable than that of Appellant under similar circumstances.
3. Appellant is not alleging retaliation based on Whistleblowing disclosure.

Appellant's Disability

4. Appellant is alleging denied accommodation based on his disability: Severe Major Depressive Disorder and Generalized Anxiety Disorder. Exh.

A (Dr. Sahgal ltr, December 13, 2010).

5. Appellant is a person with disability within the meaning of Rehabilitation Act and ADAAA, in that he is not able to do house chores such as cleaning up the broken glasses or checking mail daily, to do grocery shopping, to go out to meet people, due to depression and anxiety caused by Agency's March 4, 2010 involuntary re-assignment order to physically report to work in Salt Lake City, Utah. Exh. B (Appellant EEO Interview transcript, January 18, 2012) at pp. 39-41. Exh C (Appellant Affidavit, February 5, 2012).

Reasonable Accommodation Requested

6. Requests for reasonable accommodation were made on July 8, 2010; July 20, 2010; December 13, 2010; January 6, 2011.
 - a. Accommodations requested were: To transfer to another position locally within California. Exh. D (Dr. Sahgal ltr, July 8, 2010). To be stationed within a reasonable commuting distance from Appellant's current home address in Albany, CA. Exh. E (Wilson email to Dunlap and DeHoll, July 20, 2010). To telework from home. Exh. F (Wilson email to Jesse, Jan. 6, 2011).
 - b. These requests for accommodations were known to the decision makers relevant to this case such as Ms. Melinda DeHoll (Appellant's first line supervisor) and Ms. Nancy Donovan (his second line supervisor).
 - c. Agency's purported undue hardship in denying the requested accommodations flies in the face of the fact that for approximately 12 years Appellant had been working from a distanced location near home in Mare Island, California and of the fact that the purported need for daily, in person, face-to-face supervision was never proven (as Appellant had excellent job performance records) and was never materialized even after the forced reassignment to Salt Lake City, Utah, where the so called daily face-to-face, even during the period of PIP, took place only three or four times for about 30 minutes or less each.

Exh. B at p. 10; Exh H at p. 1, par 2. In short, Agency's reason for denial is as groundless as its purported reason for physically reassigning him to Salk Lake City, for placing him on the PIP, and for removing him from employment on the pretext of failing the PIP.

Exh. G (Directed Reassignment, March 4, 2010), H (PIP Notice, July 21, 2011), I (Proposed Removal, Nov. 9, 2011), J (Removal, Dec. 20, 2011), K1-6 (Performance ratings and awards, May 7, 2007; Nov. 30, 2007; June 4, 2008; Feb. 2, 2009; May 12, 2009; Dec. 7, 2009). The performance rating for 2010 was never issued, as Appellant was out on sick leave for almost entire year after receiving, and being traumatized by, the Directed Reassignment Order on March 4, 2010 which ordered him to report to work physically in Salt Lake City, Utah, for daily up close, face-to-face supervision. Exh. B at p. 5. Exh. G.

- d. Appellant avers that he was able to perform the essential functions of his job as Project Manager despite his disability, despite lack of support from a Program Support Assistant, and despite Agency's denial of the requested accommodation. Exhs K. C. However, due to denial of accommodation, and being uprooted from his 22 years of residence in Albany, California, Appellant's mental condition deteriorated after reporting to work in Salk Lake City. Exh B at pp. 37-38. (Medical records to be provided once obtained.)

Disparate Treatment

7. Appellant is alleging disparate treatment based on his sex, Male; age, 57 (DOB Oct. 11, 1954); disability; and in retaliation for engaging in the prior EEO activities as follows: Formal EEO Complaint filed on May 17, 2010 in Agency case 200P-0777-2010102534; Formal EEO Complaint filed on June 24, 2011 in Agency case 200J-0777-2011-101987; and requests for reasonable accommodation made on July 8, 2010; July 20, 2010; December 13, 2010; January 6, 2011. Exhs. B and C.
8. Upon discovery, Appellant intends to prove that there was no uniform or

objective standards of performance measure to assess critical areas such as measurement for quality, timeliness, poor/incomplete content. Errors cited in the Proposed Removal were common errors most Project Managers experience and were largely due to lack of support from assigned Program Support Assistant. Positive client assessments were ignored and un-documented; while documenting minor, largely clerical errors common to all other Project Managers were highlighted, accentuated, and presented as if they were inherent to the essential job functions. Exh I. (Date on other Project Managers will be provided upon engaging and receiving discovery items.)

9. Between March 21, 2011 and November 9, 2011 (the last day of work) Appellant successfully completed 8 to 9 projects to which he was assigned. Exh. C at par. 2. During the PIP period, Appellant successfully completed approximately 4 projects. Id. at par. 3. (The supporting documents will be provided upon engaging in and receiving relevant discovery items.)
10. The Clients Appellant served as a Project Manager were happy with his performance. They were: Jill Bormann, Ph.D. who managed the Mantram Meditation training program. Tam Nguyen, Ph.D., who co-managed the PTSD Updates 2011 program. Each of these clients and others asked if they could ask for Appellant to work with them on future projects. Exh. C at par. 6. Appellant was able to carry out these projects despite the demotion he faced once arriving at Salt Lake City on March 21, 2011, despite the lack of support from a Program Assistant Support staff, and despite being assigned to lower grade duties involving project management such as brochure creation, booking hotels and training rooms, etc. Exh C at par. 5 and 12.
11. Appellant's accomplishment prior to and during the PIP period was not highlighted or recognized so as to be given credit, as other similar situated Project Managers' accomplishments were. (Supporting data will be provided upon engaging and receiving discovery items.)
12. There were no difference in assignments Appellant received during or prior to the PIP period in comparison to assignments other Project Managers

received. (Supporting data will be provided upon engaging and receiving discovery items.) Cf., Exh. I at p. 8.

13. Appellant compares himself to the following similarly situated individuals who were likewise Project Managers under Ms. DeHoll as Appellant was:

- a. Ted McCalebb, Male, age early 40's with no known disability or prior EEO activities.
- b. Eric Esplin, Male, mid 30's with no known disability or prior EEO activities.
- c. Jan Wong, Female, late 40's with no known disability or prior EEO activities.
- d. Kristine Palazzolo, Female, in her 30's with no known disability or prior EEO activities.

Exh. B at pp. 31, 40.

(Date on their performance will be requested in discovery.)

Comparative analysis will be provided upon receipt of requested items.)

Respectfully submitted,



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