U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

Commissioner
Constance S. Barker

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

DISSENTING OPINION

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).

131 M Street, N.E., Washington, DC 20507 Phone (202) 663-4027 TTY (202) 663-7129 FAX (202) 663-7121 CONSTANCE.BARKER@EEOC.GOV

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)[1] 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.

[1] 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.

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.