

**UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE**

**JEFFERSON N. SCHAFFNER,** )  
 )  
 **Plaintiff** )  
 )  
 v. )  
 )  
 **JO ANNE B. BARNHART,** )  
 **Commissioner of Social Security,** )  
 )  
 **Defendant** )  
 )

**Docket No. 03-266-P-S**

**SECOND RECOMMENDED DECISION ON DEFENDANT’S  
MOTION TO DISMISS OR, IN THE ALTERNATIVE,  
FOR SUMMARY JUDGMENT**

For a second time, the motion of defendant Commissioner of Social Security Jo Anne B. Barnhart (“Commissioner”) to dismiss plaintiff Jefferson N. Schaffner’s claims pursuant to Federal Rule of Civil Procedure 12(b)(6) or, alternatively, for summary judgment in her favor, *see* Motion To Dismiss or in the Alternative, for Summary Judgment, etc. (“Commissioner’s Motion”) (Docket No. 9), is before me for a recommended decision.

On June 17, 2004 I issued a decision recommending that the Commissioner’s Motion be denied insofar as it sought dismissal pursuant to Rule 12(b)(6) and granted insofar as it sought summary judgment. *See* Recommended Decision on Defendant’s Motion To Dismiss or, in the Alternative, for Summary Judgment (“Recommended Decision”) Docket No. 11 at 2. I noted that Schaffner, a *pro se* plaintiff, had

not responded to the Commissioner's Motion but that in accordance with relevant precedent I had nonetheless weighed its merits. *See id.* at 1-2.

On July 2, 2004 Schaffner filed a combined motion for entry of default and objection to the Recommended Decision. *See* Plaintiff's Motion for Default and Response to Magistrate's Recommend[ed]ations ("Motion for Default") (Docket No. 12). On July 26, 2004, following the filing of a response by the Commissioner, *see* Docket Nos. 13-14, I issued an order granting the Motion for Default as construed as a motion for additional time, stating:

Treating the within motion as a motion for additional time within which to respond to the defendant's Motion to Dismiss or in the Alternative, For Summary Judgment (Docket Item 9), and, without objection, the plaintiff shall have until August 23, 2004 within which to file a written response to said pending motion to dismiss/for summary judgment. In light of this order, I hereby withdraw the Report and Recommended Decision I filed in this matter on June 17, 2004 (Docket Item 11).

Order (Docket No. 15). On August 24, 2004 Schaffner filed an objection to that order, *see* Response to Action of United States Magistrate Judge Construing Plaintiff's Motion for Default As Being a Motion for Additional (Enlarged) Time (Docket No. 17), which Chief Judge Singal denied by order dated August 27, 2004, *see* Order (Docket No. 18). Schaffner having filed no response to the Commissioner's Motion within the enlarged time period set forth in my order of July 26, 2004, the Commissioner's Motion was again referred to me. *See* Docket (entries of Aug. 27, 2004). I now reissue my previous Recommended Decision, recommending for the reasons that follow that the Commissioner's Motion be denied insofar as it seeks dismissal pursuant to Rule 12(b)(6) and granted insofar as it seeks summary judgment.

## **I. Dismissal for Failure To State a Claim**

### **A. Applicable Legal Standards**

“In ruling on a motion to dismiss [under Rule 12(b)(6)], a court must accept as true all the factual allegations in the complaint and construe all reasonable inferences in favor of the plaintiffs.” *Alternative Energy, Inc. v. St. Paul Fire & Marine Ins. Co.*, 267 F.3d 30, 33 (1st Cir. 2001). A defendant is entitled to dismissal for failure to state a claim only if “it appears to a certainty that the plaintiff would be unable to recover under any set of facts.” *State St. Bank & Trust Co. v. Denman Tire Corp.*, 240 F.3d 83, 87 (1st Cir. 2001); *see also Wall v. Dion*, 257 F. Supp.2d 316, 318 (D. Me. 2003).

### **B. Factual Context**

For purposes of that portion of the Commissioner’s Motion seeking dismissal pursuant to Rule 12(b)(6), I accept the following relevant facts as true:

Schaffner was hired in July 2001 to serve as an attorney-advisor, GS-12, in the Social Security Administration’s Office of Hearings and Appeals in Portland, Maine (“Portland OHA”). Complaint Under the Rehabilitation Act of 1973 (“Complaint”) (Docket No. 1) ¶¶ 7, 11(b). He was regarded by his employer, consisting of one or more members of the management of the Portland OHA, including its director Robert Fiorentino and his immediate supervisor Donna Brown, as being a “qualified individual with a disability” as that term is defined in 42 U.S.C. § 12111(8). *Id.* ¶ 7.

The Commissioner discriminated against Schaffner in violation of the Rehabilitation Act by causing him to suffer an adverse employment action, specifically, by terminating his employment as an attorney-advisor on November 2, 2001. *Id.* ¶ 11(a). On or about October 25, 2001, unbeknownst to Schaffner, Fiorentino incorrectly identified a piece of incoming mail as being suspicious for the presence of anthrax. *Id.* ¶ 11(c). When the other employees working with Fiorentino in handling this piece of mail (none of whom had a mental disability or was perceived to have such a disability) were informed of the incorrect

identification, they stopped handling it. *Id.* No disciplinary action was taken against any of these individuals. *Id.*

Fiorentino or another employee placed the suspicious mail into a sandwich-sized plastic bag that Fiorentino incorrectly took into his office. *Id.* The door to his office was open as on any regular business day. *Id.* At an office staff meeting that morning Fiorentino had informed the staff, including Schaffner, that no mail of such a suspicious character had been found in Maine or New England but that if such mail were to arrive at the Portland OHA, whoever discovered it should dial the office intercom on “69” and say, “Code Mail.” *Id.*

At about 4 p.m. Schaffner, who had never heard such an announcement on the office intercom, entered Fiorentino’s office. *Id.* While Fiorentino was on the telephone Schaffner handled the plastic bag. *Id.* When he heard Fiorentino speaking to him, he immediately dropped it. *Id.* He never saw any recognizable letter therein. *Id.* Fiorentino then informed Schaffner that the bag contained a letter he suspected contained anthrax and that he was calling the Portland police. *Id.* He orally counseled Schaffner that from then on he should give all such mail to the director or dial “69” on the office intercom and say, “Code Mail.” *Id.*

On or about October 25 or 26, 2001 Fiorentino incorrectly identified a second letter as suspicious for the presence of anthrax. *Id.* ¶ 11(d). He also took this letter into his office, where he allowed the Portland OHA union steward to handle it. *Id.* The union steward, who neither had a mental disability nor was perceived to have one, was not disciplined for having handled the piece of mail in question. *Id.*

On the afternoon of November 2, 2001 Fiorentino handed Schaffner a letter of termination in which he wrote: “Your actions in this situation [the incident of October 25, 2001] lacked any degree of common sense and good judgment and potentially put yourself, the entire office, and myself at risk. . . . Your actions

on October 25, 2001, constitute a complete disregard for your own safety and the safety of other employees in this office.” *Id.* ¶¶ 11(e)-(f). As reflected in a United States Supreme Court case, *O’Connor v. Donaldson*, 422 U.S. 563 (1975), the criteria for involuntary commitment of the insane include danger to oneself or others. *Id.* Prior to October 25, 2001 Fiorentino had characterized Schaffner as “eccentric.” *Id.* ¶ 11(f)(1).

Following November 2, 2001 Fiorentino changed the cipher locks to the office prior to Schaffner’s formal departure as a federal employee on November 16, 2001. *Id.* ¶ 11(f)(2). He did not give Schaffner a copy of the new combination, although Schaffner technically was a federal employee until November 16, 2001. *Id.* At least nine other employees had departed the office prior to November 16, 2001 and had not been denied a combination to cipher locks. *Id.* Also, in an officewide e-mail sent on November 5, 2001 Fiorentino requested that all employees notify management in the event Schaffner even telephoned the office. *Id.* ¶ 11(f)(3).

Schaffner has never suffered any mental disability or told the Commissioner he had any such disability or disorder. *Id.* ¶ 11(f)(9). The Commissioner incorrectly regarded him as having a mental disability or disorder and as being substantially mentally impaired in conducting not only his major life activity of working as an attorney but also a wide range of jobs. *Id.* ¶ 11(g). Schaffner performed his job at a level that met the Commissioner’s legitimate expectations. *Id.* ¶ 11(g)(2). The offense for which Schaffner was discharged appears to be insubordination. *Id.* ¶ 11(h). Schaffner did not commit insubordination on the afternoon of October 25, 2001 in handling the plastic bag in Fiorentino’s office. *Id.*

### **C. Analysis**

Schaffner, a former federal employee, brings a Rehabilitation Act claim for employment discrimination based on perceived mental disability. *See generally* Complaint; *see also, e.g., Calero-*

*Cerezo v. United States Dep't of Justice*, 355 F.3d 6, 19 (1st Cir. 2004) (“The Rehabilitation Act, the precursor to the ADA [Americans with Disabilities Act], applies to federal agencies, contractors and recipients of federal financial assistance, while the ADA applies to private employers with over 15 employees and state and local governments.”).

In Rehabilitation Act employment-discrimination cases, as in their ADA counterparts, a plaintiff bears the burden of establishing “(1) that he was disabled, (2) that despite his disability, he was able to perform the essential functions of the job, either with or without reasonable accommodation, and (3) that his employer discharged him because of that disability.” *Velazquez-Rivera v. Danzig*, 234 F.3d 790, 792, 795 (1st Cir. 2000) (Rehabilitation Act); *see also, e.g., Bailey v. Georgia-Pacific Corp.*, 306 F.3d 1162, 1166 (1st Cir. 2002) (ADA). For purposes of both the Rehabilitation Act and the ADA, “disability” is defined as “(A) a physical or mental impairment that substantially limits one or more of the major life activities of an individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.” *Bailey*, 306 F.3d at 1166-67 (ADA); *Tardie v. Rehabilitation Hosp. of Rhode Island*, 168 F.3d 538, 542 (1st Cir. 1999) (“‘Disability’ is defined identically under the ADA and the Rehabilitation Act.”)

The Commissioner does not contest that the Complaint adequately sketches out the second and third of the three requisite elements. *See* Commissioner’s Motion at 5-6. She focuses instead on the first, arguing that the Complaint fails to state a claim inasmuch as (i) Schaffner merely alleges in conclusory terms that he was regarded as having a mental disability, without even specifying the type of mental disability, and (ii) his two concrete examples of perceived disability likewise fail to show that he was regarded as disabled (namely, that Fiorentino regarded him as “eccentric” and used language in his termination letter suggestive of the criteria for involuntary commitment). *See id.*

As the First Circuit recently underscored in overruling prior circuit caselaw that established heightened pleading standards in civil-rights actions:

The handwriting is on the wall. *Swierkiewicz* [*v. Sorema N. A.*, 534 U.S. 506 (2002)] has sounded the death knell for the imposition of a heightened pleading standard except in cases in which either a federal statute or specific Civil Rule requires that result. In all other cases, courts faced with the task of adjudicating motions to dismiss under Rule 12(b)(6) must apply the notice pleading requirements of Rule 8(a)(2). Under that rule, a complaint need only include “a short and plain statement of the claim showing that the pleader is entitled to relief.” This statement must give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests. State of mind, including motive and intent, may be averred generally.

*Educadores Puertorriqueños en Acción v. Hernández*, 367 F.3d 61, 66 (1st Cir. 2004) (footnote, citations and internal quotation marks omitted). The court further instructed:

[I]n a civil rights action as in any other action subject to notice pleading standards, the complaint should at least set forth minimal facts as to who did what to whom, when, where and why – although why, when why means the actor’s state of mind, can be averred generally. . . .

Second, in considering motions to dismiss courts should continue to eschew any reliance on bald assertions, unsupported conclusions, and opprobrious epithets. Such eschewal is merely an application of Rule 8(a)(2), not a heightened pleading standard uniquely applicable to civil rights claims.

*Id.* at 68 (citations and internal quotation marks omitted).

Guided by these principles, I determine that the Commissioner fails to demonstrate entitlement to dismissal of the Complaint for failure to state a claim. Schaffner’s assertion that members of the Portland OHA management perceived him as disabled is indeed conclusory; however, it speaks to state of mind, delving into the “why” that “can be averred generally.” *Id.* To the extent Schaffner provides concrete examples, he offers more than is necessary for purposes of Rule 8(a)(2). I decline to evaluate whether, as a matter of law, the two examples given suffice to show that Schaffner was regarded as having a mental

disability when it is possible that a set of facts (perhaps entirely different facts) could have been proven that would have permitted him to prevail on his claim.

The Commissioner's Motion should be denied insofar as it seeks dismissal pursuant to Rule 12(b)(6) for failure to state a claim as to which relief can be granted.

## **II. Summary Judgment**

### **A. Applicable Legal Standards**

Summary judgment is appropriate only if the record shows “that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). “In this regard, ‘material’ means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant . . . . By like token, ‘genuine’ means that ‘the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .’” *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, “the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue.” *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). “This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof.”

*International Ass'n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

## **B. Factual Context**

Given the absence of any response from Schaffner to the Commissioner's statement of material facts, her facts are deemed admitted to the extent supported by record citations as required by Local Rule 56. *See* Loc. R. 56(e). The cognizable facts are as follows:

In 2001 Schaffner was an employee of the Social Security Administration ("SSA") in the Portland OHA. Statement of Undisputed Material Facts ("Defendant's SMF") (Docket No. 10) ¶ 1; Declaration of Robert Fiorentino ("Fiorentino Decl."), Attachment #2 to Defendant's SMF, ¶ 4. In 2001 Fiorentino was one of Schaffner's supervisors and was responsible for the operation of the Portland OHA as well as for any decision to terminate Schaffner's employment. Defendant's SMF ¶ 2; Fiorentino Decl. ¶¶ 3-4. In 2001 Brown was also one of Schaffner's supervisors. Defendant's SMF ¶ 3; Declaration of Donna S. Brown, Esquire ("Brown Decl."), Attachment #1 to Defendant's SMF, ¶ 4.

Neither Fiorentino nor Brown considered Schaffner to be disabled. Defendant's SMF ¶ 4; Fiorentino Decl. ¶¶ 8-10; Brown Decl. ¶¶ 7-9. SSA fired Schaffner because of his conduct on October 25, 2001, which is described in a November 2, 2001 memorandum from Fiorentino to Schaffner terminating Schaffner's employment. Defendant's SMF ¶ 5; Fiorentino Decl. ¶¶ 5, 7; Brown Decl. ¶¶ 5-6; Memorandum dated November 2, 2001 from Robert D. Fiorentino to Jefferson Nathaniel Schaffner ("Termination Letter"), Attachment #3 to Defendant's SMF. The Termination Letter accurately describes Schaffner's conduct as follows:

On October 25, 2001 I [Fiorentino] had identified a suspicious looking piece of mail and placed it in a sealed plastic envelope on top of my briefcase on a chair in my office. As you know, all offices within the Social Security Administration have been notified to beware of certain types of mail that may contain harmful materials such as anthrax spores. You have been at several staff meetings and office training sessions concerning the urgency of careful handling of suspicious mail. I was in the process of calling the police at 4:00 p.m. when you came into my office. You noticed the sealed plastic bag and envelope on my briefcase and started to go directly toward it. I told you in a clear firm tone 'Don't touch it'. You continued to walk toward the bag as if you were going to pick it up. I said in an even louder firmer tone 'Don't touch that envelope, leave it alone'. You picked up the plastic bag with the envelope and examined it. I told you in a clear, loud and firm voice to 'Put it down.' You did not. I told you clearly, loudly and firmly to 'Put the envelope down'. You looked at me, crumpled up the plastic bag and envelope, put the bag in your mouth, and made it look as if you were eating the bag. This time I yelled at you to 'Put that down now, what do you think you are doing'. You looked up and laughed. At this point you put down the envelope.

Defendant's SMF ¶ 6; Fiorentino Decl. ¶¶ 5, 7; Termination Letter.

As explained in the Termination Letter, SSA terminated Schaffner's employment for the following reasons:

Your actions in this situation lacked any degree of common sense and good judgment and potentially put yourself, the entire office, and myself at risk. You deliberately ignored a direct order I gave you and your action could have caused obstruction of a potential investigation. You have had at least four office training sessions about the threat of anthrax and the caution that must be exercised when handling suspicious looking mail. We had such a session the morning of October 25, 2001 that you attended. I have distributed to all staff including yourself several fliers about the potential risks of contracting and spreading anthrax through the mail. I gave you four direct orders that you failed to follow or acknowledge.

Your actions on October 25, 2001 constitute a complete disregard for your own safety and the safety of other employees in this office and for my authority as Hearing Office Director.

I have concluded that the only appropriate course of action is to terminate your employment. Accordingly, you are hereby notified that your employment with the Social Security Administration will terminate at the close of business November 16, 2001.

Defendant's SMF ¶ 7; Fiorentino Decl. ¶¶ 5, 7; Termination Letter.

At the time of the October 25 conduct, Schaffner had worked for SSA for less than one year. Defendant's SMF ¶ 8; Fiorentino Decl. ¶ 6.

### C. Analysis

The Commissioner seeks summary judgment on three successive grounds: (i) that Schaffner fails to make out a *prima facie* case of disability discrimination, (ii) that even if he does make out such a case, the Commissioner has stated a legitimate, non-discriminatory reason for his termination that is not pretextual, and (iii) even if he does make out such a case, the evidence does not establish that the SSA fired him because of a perceived disability or that he meets the definition of being disabled under the statute. *See* Commissioner's Motion at 6-8. I do not reach the latter two points inasmuch as I agree that there is no triable issue whether Schaffner makes out even a *prima facie* case.

To establish a *prima facie* case of disability discrimination under the Rehabilitation Act, a plaintiff must show "that (1) he is a disabled person within the meaning of the Act, (2) he is otherwise qualified for the job, and (3) he was discriminated against because of his disability." *Vidacak v. Potter*, 81 Fed. Appx. 721, 723 (10th Cir. 2003); *see also, e.g., Lebron-Torres v. Whitehall Laboratories*, 251 F.3d 236, 239 (1st Cir. 2001) (holding, in context of parallel ADA claim, that *prima facie* case entails showing "(1) that [plaintiff] suffers from a 'disability' within the meaning of the Act; (2) that she was able to perform the essential functions of the job, either with or without reasonable accommodation; and (3) that the employer discharged her in whole or in part because of that disability.>").

As the Commissioner suggests, *see* Commissioner's Motion at 7, Schaffner has generated no evidence to anchor the first or third prongs of a *prima facie* case. There is no cognizable evidence that he (i) actually was disabled, (ii) had a record of being disabled, (iii) was regarded as disabled (in fact,

Fiorentino and Brown both aver that they did not regard him as disabled) or (iv) was fired for any reason other than the episode of misconduct described in the Termination Letter.

The Commissioner accordingly is entitled to summary judgment with respect to Schaffner's complaint.

**III. Conclusion**

For the foregoing reasons, I recommend that the Commissioner's Motion be **DENIED** insofar as it seeks dismissal predicated on failure to state a claim and **GRANTED** insofar as it seeks summary judgment.

**NOTICE**

*A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.*

*Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.*

Dated this 31st day of August, 2004.

/s/ David M. Cohen  
David M. Cohen  
United States Magistrate Judge

**Plaintiff**  
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**JEFFERSON N SCHAFFNER**

represented by **JEFFERSON N SCHAFFNER**

P.O. BOX 423  
PATASKALA, OH 43062  
(614) 237-2600  
PRO SE

V.

**Defendant**

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**SOCIAL SECURITY  
ADMINISTRATION  
COMMISSIONER**

represented by **EVAN J. ROTH**  
OFFICE OF THE U.S. ATTORNEY  
DISTRICT OF MAINE  
P.O. BOX 9718  
PORTLAND, ME 04104-5018  
(207) 780-3257  
Email: [evan.roth@usdoj.gov](mailto:evan.roth@usdoj.gov)  
*ATTORNEY TO BE NOTICED*