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Schmidt v. Bell
E.D.Pa. 1983.

United States District Court; E.D. Pennsylvania.

Robert L. Schmidt, Plaintiff

v.

Terrel H. Bell, Defendant.

Civil Action No. 82-1758

September 9, 1983

VAN ARTSDALEN, J.

I. Introduction

*1 Plaintiff Robert L. Schmidt is a former employee of the Office of Education of the Department of Health, Education and Welfare. Defendant Terrel H. Bell is the Secretary of the United States Department of Education, which is the successor to the Office of Education of the Department of Health, Education and Welfare. Mr. Schmidt is a Vietnam Veteran. He served in active duty in the United States Marine Corps in Vietnam during the year 1965. As a result of his Vietnam experience, Mr. Schmidt suffers both physical and mental disabilities.

In this action, Mr. Schmidt alleges that his termination from his GS-301-7 grade position with the Department of Education was in violation of the Rehabilitation Act of 1973, as amended, (the Act), 29 U. S. C. §§ 791 and 794, which prohibits discrimination against “otherwise qualified” handicapped individuals. Federal regulations require federal agencies and departments to make reasonable accommodation to the known physical or mental limitations of qualified handicapped individuals. Mr. Schmidt alleges in this action that the defendant's failure to make reasonable accommodation for his handicap constituted a violation of this statute as well as a violation of the Vietnam Era Veterans Readjustment Act of 1974, 38 U. S. C. § 2014(c). Plaintiff seeks reinstatement and back pay.

The matter was heard by the court, sitting without a jury, on June 29, 1983 and June 30, 1983. On August 5, 1983, the record was reopened for the submission of additional testimony. Upon consideration of the evidence presented at trial, the exhibits and the joint stipulation of uncontested facts, I make the following findings of fact and conclusions of law in accordance with [Federal Rule of Civil Procedure 52\(a\)](#).

II. Findings of Fact

1. On January 14, 1979, plaintiff was appointed to the position of student loan collector, grade level GS-301-7, with the Office of Student Financial Assistance of the Office of Education of the United States Department of Health, Education and Welfare. The term of plaintiff's appointment was not to exceed four years. The authority to appoint plaintiff to the position was made pursuant to 5 C.F.R. § 316.301 *et seq.* in accordance with the conditions published in the Federal Personnel Manual. See Joint Exhibit 1, Administrative Complaint File at 126-27 (hereinafter referred to as Complaint File). At the time of his appointment, plaintiff had a ten-point disabled veteran preference for purposes of the Civil Service register. Mr. Schmidt also had a 60% disability rating at the time of his appointment. However, his selection for employment at the Office of Education was unrelated to his status as a “disabled” veteran. Plaintiff was hired by the Office of Student Financial Assistance as part of a concentrated effort by the federal government to collect student loans that were in default.

2. While on a combat mission in Vietnam, plaintiff was injured by an exploding land mine. Mr. Schmidt was evacuated to a hospital at Chu Lai and then to another hospital outside of Danang. Ultimately, plaintiff was evacuated to the Philadelphia Naval Hospital for treatment of his injuries. He was hospitalized at the Philadelphia Naval Hospital from November 24, 1965 to April 13, 1966. He was

discharged to full-time duty on April 15, 1966, but was readmitted to the hospital on June 21, 1966. He remained hospitalized until October 13, 1966 when he was discharged to full-time duty. On June 21, 1968, Mr. Schmidt was honorably discharged as a private. He was awarded the Purple Heart based upon his combat wounds.

*2 3. Upon discharge, plaintiff was awarded disability compensation based on a rating of 40% disability attributable to a fracture of the left tibia with healed osteomyelitis and retained foreign bodies (20%) and peroneal palsy, left tibia (20%). On September 24, 1970, Mr. Schmidt's disability rating was increased to 50% with the addition of a 10% disability rating attributable to a residual flesh wound of the right leg with retained foreign bodies. On December 6, 1974, plaintiff was given a 60% disability rating based upon the following: fracture, left tibia with osteomyelitis and retained foreign bodies 20%; peroneal palsy, tibial, left 20%; residual wound right leg with sural neuropathy, 20%; and chronic lumbosacral strain, 10%.^{FNI}

^{FNI} Although the total percentages equals 70%, the total rating was a 60% disability. The record does not give an explanation as to the procedures utilized in determining the disability rating, and the percentage amount is immaterial to any factual issue in this case.

4. Plaintiff's duties and responsibilities at the Office of Student Financial Assistance of the Office of Education involved the collection of outstanding, defaulted, student loans. His first assignment involved a special project aimed at collecting defaulted student loans from federal employees. After this program was terminated, plaintiff was assigned to the general collection of student loan accounts in default. The job encompassed, inter alia, locating the defaulted student borrower, making telephone contact, procuring, in some cases, a credit check and setting up a repayment schedule.

5. The collection of delinquent student loans had a

very high priority in the Department of Health, Education and Welfare. There was great pressure upon the collectors. The job was very stressful and, at times, very frustrating.

6. At all relevant times, Robert Smallwood was the Regional Administrator for the Office of Student Financial Assistance in the Office of Education. The Division of Claims and Collections, to which plaintiff was assigned, was headed by James Houston, the Assistant Regional Administrator. Under the Assistant Regional Administrator there was a Collection Supervisor, Marion Pavletich. The Collection Supervisor had the responsibility of overseeing the various collection teams. Each team of telephone collectors had a team leader as the immediate control person that was responsible to the collection supervisor. During the relevant time period, there were four team leaders: Mary Jones, Arthur Weiss, John Hargadon and Phillip Ross. Each collector within a team was assigned a box of alphabetical listings of borrowers whose accounts were past due.

7. The team leader was the immediate management level contact in the collections operation. The team leader's responsibilities included reviewing the collectors' work, monitoring the collectors' progress and instructing the collectors in the proper collection techniques. This included monitoring individual collector's telephone contacts and carefully reviewing the accuracy of the collector's card files. The collectors were responsible for the direct telephone contacts with the delinquent borrowers. They were not permitted to contact educational institutions, banks or other agencies without specific and express approval of a team leader or collection supervisor.

*3 8. Mary Jones was considered by her superiors to be the most effective team leader in the office. According to Mr. Houston, she was the best supervisor he had worked with in his twenty-three years of experience. She was direct, well organized, followed instructions carefully and gave instructions clearly. She was well respected by her superiors

and known for her ability to get the job done. She treated her subordinates even-handedly and did not let personal relationships interfere with her office responsibilities.

9. Mr. Schmidt was assigned to the collection team directed by Mary Jones. Mr. Schmidt was considered by his superiors to need close supervision.

10. Mr. Schmidt consistently and repeatedly rebuked direct supervision and insisted upon doing things his own way. He resented review of his work by his team leader, Mary Jones. Ms. Jones identified several areas where Mr. Schmidt's work was deficient or not in accordance with established procedures. For example, collection cards were required to be kept in alphabetical order in the card boxes to enable others to obtain access to borrower data, if needed. Mr. Schmidt insisted upon keeping the cards in packets, often in his desk drawer. The cards were required to be notated to reflect information obtained by contact with the borrower. Mr. Schmidt frequently failed to enter the proper notations. Mr. Schmidt repeatedly made oral compromises with borrowers as to the amount of indebtedness, a practice which was not within a collector's responsibility absent express approval of a team leader. Mr. Schmidt was considered by Mary Jones to lack professionalism in his telephone contacts with the borrowers. On more than one occasion, Ms. Jones found, by making telephone calls herself, that borrowers were at home and available where Mr. Schmidt had marked "no answer" on the collection cards. When Mr. Schmidt was criticized for or questioned about these various practices, it would provoke anger and strong resentment on his behalf.

11. Three more serious incidents precipitated Mr. Schmidt's discharge. In one incident, Mr. Schmidt approached his team leader to obtain authority to contact a bank to reconcile a matter involving a bad credit reference given by the bank concerning one of the defaulted student borrowers. Mr. Schmidt was of the opinion that because the bank had been reimbursed by the federal government under the

federal guarantee program, it was improper for the bank to give the borrower an unfavorable credit rating. Mr. Schmidt was specifically instructed by his team leader not to contact the bank. In direct violation of this instruction, Mr. Schmidt contacted the bank. Mr. Schmidt's team leader made a written report of the incident. On another occasion, Mr. Schmidt contacted an educational institution on behalf of a borrower in contravention of the policy of the office which did not authorize the collectors to make such contacts. As to both of these incidents, written complaints were received by the Office of Education from the respective institutions contacted by Mr. Schmidt. In both cases, plaintiff's supervisors were required to apologize for Mr. Schmidt's conduct. Finally, an incident occurred between Mr. Schmidt and a coworker, Mrs. Margaret Catalina, concerning the proper procedure for handling a request for computer information from the data-support department. The system established by Mr. Houston required requests for computer data to be channeled through the collector's team leader. All collectors were informed of this procedure. Mr. Schmidt attempted to by-pass his team leader and contact the data-support personnel directly. It was Mr. Schmidt's opinion that he was hampered in the performance of his job because access to the computer was very slow. When Mrs. Catalina refused to deal directly with Mr. Schmidt, he became angry, loud and abusive. Mr. Schmidt described the incident as a "total high-tension-type of explosion from all the frustration." Mrs. Catalina, who was pregnant at that time, became distraught and began to cry. Written reports of the incident were prepared by Mary Jones and Margaret Catalina. *See* Complaint File at 177-180. As a result of this incident, and Mr. Schmidt's previous performance, Messrs. Houston and Pavletich decided that Mr. Schmidt should be terminated.

*4 12. On December 7, 1979, plaintiff received notice that he was being terminated from his position. The reasons for the termination were set forth therein and included: (1) an argument with an official at Girard Bank over plaintiff's professed dis-

agreement with the procedures used in the administration of student loan accounts; (2) a complaint lodged by an official of the University of Pennsylvania concerning plaintiff's rudeness and use of vulgar language in a conversation with a university staff member; (3) repeated difficulties in accepting guidance and direction from plaintiff's supervisors; and (4) a major disturbance involving one of plaintiff's co-workers. The notice of termination concluded that plaintiff's failure to conduct himself in a decorous and reasonable manner, despite repeated warnings from his team leader and the collection supervisor, necessitated his termination.

13. Plaintiff made an emotional appeal to the Regional Administrator, Dr. Smallwood, to reverse the termination decision. Plaintiff assured Dr. Smallwood that he would behave himself and would comply with the expectations of his supervisors. After some deliberation, Dr. Smallwood decided to reinstate plaintiff subject to various conditions which were set forth in a memorandum. Dr. Smallwood stated in the memorandum that he fully supported the decision to terminate the plaintiff based upon the facts that had been presented to him. However, he stated that his decision to set aside the action to terminate the plaintiff was based solely upon plaintiff's emotional appeal. Dr. Smallwood set forth the following conditions to plaintiff's reinstatement as a requirement to plaintiff's continued employment:

1. You will continue to carry out the duties of the GS-7 Collector maintaining full productivity levels as required.
2. You must, without disagreement and negative reactions, accept assignments from your supervisor and team leader. In addition, you must accept the reality of the supervisory process of review of your work and the status of your accounts also without disagreement and negative reactions.
3. You are required to interact and interface with fellow employees devoid of the negativism and argumentation that has characterized your behavior in

the past.

4. You will follow all procedures and policies of the Collections Branch, working through your team leader and supervisor rather than pursuing your own solutions through unilateral actions.

5. You must conduct yourself in a professional manner when in contact with our clients when carrying out your job duties.

6. I recommend to you to seek personal counseling for your attitudinal and behavioral problems through the HEW Employee Assistance Center directed by Dr. John Ivers, Regional Personnel Office, or through some private counseling agency. The litany of negative experiences you have suffered as a result of your negative behavior as you outlined to me during our conversation of Friday, December 7, 1979, clearly indicates to me the need for you to consider counseling. It is important for you to understand, however, that your positive reaction to this recommendation will in no way deter future termination action by this office if your behavior or job performance mandates such action.

*5 Plaintiff signed the memorandum acknowledging that a deviation from the conditions set forth therein would result in his immediate dismissal. At no time did plaintiff request Dr. Smallwood to assign him to a different team leader other than Mary Jones. At no time did Mr. Schmidt advise Dr. Smallwood that his behavioral problems were in any way attributable to a mental or physical disability.

14. Dr. Smallwood considered the alternative of demoting Mr. Schmidt to a lower graded position with different responsibilities but rejected this notion because there were no available positions in the office which he considered would have satisfied the particular situation. The possibility of transferring Mr. Schmidt to another team leader was not considered because Dr. Smallwood was of the opinion that Mr. Schmidt needed close supervision and Mary Jones was the best team leader in the office for that task.

15. Pursuant to Dr. Smallwood's recommendation, plaintiff visited the staff psychologist, Dr. Ivers. Dr. Smallwood received notice that plaintiff had sought counselling with Dr. Ivers, but was not informed of the substance of the conversations between plaintiff and Dr. Ivers.

16. Plaintiff was terminated from his position on January 10, 1980 pursuant to a memorandum from Dr. Smallwood. The reason given as "a resumption by [plaintiff] of the negativism and argumentation" which plaintiff had demonstrated in his interaction with Mary Jones, plaintiff's team leader. The incident which precipitated plaintiff's final termination involved a confrontation with Mary Jones concerning the proper handling of credit bureau reports. Ms. Jones was of the opinion that the plaintiff was ordering too many credit bureau reports and, when this subject was broached with the plaintiff, he became angry and raised his voice to her. Plaintiff then took a number of internal office requests for credit reports and tore them up in front of Ms. Jones and threw them into the waste paper basket. Dr. Smallwood considered this action to be a breach of the conditions and stipulations of his continued employment, not merely because plaintiff had torn up the internal office credit requests, but because of the defiant manner in which plaintiff had done so and plaintiff's argumentative attitude towards his team leader.

17. Mr. Schmidt requested a new team leader just prior to his final termination. Mr. Pavletich refused plaintiff's request because he was of the opinion that no other supervisor could effectively supervise Mr. Schmidt. Mr. Pavletich opined that the plaintiff "would have wanted to do what he wanted to do, no matter who his supervisor was." Mr. Schmidt's insistence upon doing things his own way would have been a problem regardless of his supervisor. Mr. Schmidt did not inform Mr. Pavletich that the reason for his request for a new team leader was because of a mental handicap which rendered him incapable of working under Mary Jones. His only stated reason was that he had a personality conflict

with Ms. Jones.

*6 18. Mr. Schmidt's co-workers generally considered Mr. Schmidt to be very professional and a good collector. Although Mr. Schmidt was considered to be "highstrung," his co-workers perceived no problems in working with him. However, none of these persons had supervisory responsibilities over Mr. Schmidt. The only supervisor who commented favorably about Mr. Schmidt's job performance was John Hargadon. Mr. Hargadon supervised Mr. Schmidt on two separate occasions, one involving "phone dunnings" and the other involving "skip-locating." Mr. Hargadon had no complaints about plaintiff's performance.

19. On July 7, 1980, almost six months after Mr. Schmidt was terminated from his position, plaintiff sought a disability rating from the Veterans Administration based upon post-traumatic stress disorder. On May 6, 1981, the Veterans Administration rated Mr. Schmidt 30% disabled due to posttraumatic stress disorder arising from his combat service in Vietnam. This increased Mr. Schmidt's overall disability rating to 70%.

III. Discussion

Section 504 of the Rehabilitation Act of 1973, as amended, provides, in part, that:

No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978.

29 U. S. C. § 794. Section 501(b) of the Act re-

quires each department, agency, and instrumentality in the executive branch to submit an affirmative action program plan for the hiring, placement and advancement of handicapped individuals. 29 U. S. C. § 791(b). Pursuant to this section, federal regulations have been promulgated to assure nondiscrimination on account of a physical or mental handicap. See 29 C.F.R. §§ 1613.701-1613.709. These regulations require a federal agency to make reasonable accommodation to the known physical or mental limitations of a qualified handicapped applicant or employee unless the agency can demonstrate that the accommodation would impose an undue hardship on the operation of its program. *Id.* § 1613.704(a). The regulations define a “reasonable accommodation” to include job restructuring and modification of work schedules. *Id.* § 1613.704(b)(2).

Section 504 prohibits discrimination only against “otherwise qualified” handicapped individuals. The legislative history of the Act is silent as to what Congress intended by the phrase “otherwise qualified.” However, the Supreme Court has provided some guidance in the landmark decision of *South-eastern Community College v. Davis*, [20 EPD P 30,003] 442 U. S. 397 (1979). In *Davis*, the Court held that in a case decided under section 504 of the Act, “[a]n otherwise qualified person is one who is able to meet *all* of a program's requirements *in spite of* his handicap.” *Id.* at 406 (emphasis added). The plaintiff in *Davis* was an aspiring nursing student who was refused entry into a nursing program because of a physical disability—a serious hearing disorder. The district court in *Davis* focused upon the potential problem presented by the plaintiff's inability to quickly respond to a patient or doctor in a medical emergency. Because the plaintiff was unable to perform *all* of the program's requirements *in spite of* her handicap, she was not an “otherwise qualified” handicapped individual. The Court went on to consider whether the program requirements could have been modified to accommodate the plaintiff's handicap. The Court rejected this consideration noting the distinction between section

501(b) of the Act, which imposes a duty upon federal employers to implement affirmative action programs, and section 501(c) of the Act which merely encourages state agencies, such as the defendant in the *Davis* case, to adopt and implement such policies and procedures. The Court concluded that section 504 “impose[d] no requirement upon an educational institution to lower or to effect substantial modifications of standards to accommodate a handicapped person.” *Id.* at 413.

*7 The *Davis* decision was carefully analyzed in a recent decision from this district, *Nelson v. Thornburgh*, [32 EPD P 33,857] No. 81-5115 (E.D. Pa. July 12, 1983). In *Nelson*, Judge Pollak noted that the *Davis* case presented an example of an “insurmountable employment barrier,” that is, one in which the handicap itself prevents the individual from fulfilling the essential requirements of the position. The *Nelson* court cited *Davis* for two propositions. First, an individual facing an insurmountable barrier is not “otherwise qualified” within the meaning of section 504. See also *Strathie v. Department of Transportation*, 547 F. Supp. 1367 (E.D. Pa. 1982) (hearing impaired bus driver not otherwise qualified); *Bey v. Bolger*, [33 EPD P 33,96 7] 540 F. Supp. 910 (E.D. Pa. 1982) (postal service employee with uncontrolled hypertension and cardiovascular disease not otherwise qualified). Second, an individual facing a surmountable employment barrier, that is, one in which the barrier to job performance can be overcome by accommodation, is not “otherwise qualified” if accommodation would require a substantial modification in the requirements of the position or would result in an undue administrative or financial burden upon the federally assisted program.

The interpretation and application of the phrase “otherwise qualified” in the context of a claimed mental disability has been addressed in two appellate court decisions. In *Doe v. New York University*, 666 F. 2d 761 (2d Cir. 1981), a medical student filed an action under section 504 of the Rehabilitation Act to gain readmission to medical school. Al-

though the plaintiff was gifted academically, she suffered for many years from serious psychiatric and mental disorders, which were manifested in the form of numerous self-destructive acts and attacks upon others. She alleged that the denial of her readmission to the school (a recipient of federal funds) on the basis of her mental disability, violated section 504 of the Act. The district court issued a preliminary injunction directing that the plaintiff be readmitted.

In discussing the merits of the plaintiff's claims, the Second Circuit Court of Appeals first acknowledged that an institution is not required to disregard the disabilities of a handicapped applicant provided the handicap is relevant to reasonable qualifications for acceptance. The applicant must be qualified in spite of the handicap. In view of this, the court discussed the respective burdens of proof in a section 504 action.

[I]n the more typical suit under § 504, the defendant acknowledges reliance on the plaintiff's handicap and since the plaintiff's handicap may be a permissible factor to be taken into account in determining whether he is qualified, the order of presentation of proof in such cases cannot be framed in terms of permissible versus impermissible factors. The pivotal issue is not whether the handicap was considered but whether under all of the circumstances it provides a reasonable basis for finding the plaintiff not to be qualified or not as well qualified as other applicants. Accordingly, we hold that in a suit under § 504 the plaintiff may make out a prima facie case by showing that he is a handicapped person under the Act and that, although he is qualified apart from his handicap, he was denied admission or employment because of his handicap. The burden then shifts to the institution or employer to rebut the inference that the handicap was improperly taken into account by going forward with evidence that the handicap is relevant to qualifications for the position sought. The plaintiff must then bear the ultimate burden of showing by a preponderance of the evidence that in spite of the han-

dicap he is qualified. . . .

*8 *Id.* at 776-77 (citation omitted). The court found that the plaintiff had established that she was a handicapped person and that she was denied readmission because of her handicap. The court further determined that the school had come forward with evidence that the handicap was relevant to her qualifications for readmission. The plaintiff therefore had the ultimate burden of proving that despite her handicap, she was qualified. On the critical question of whether the plaintiff was otherwise qualified, the court considered the substantiality of the risk that her mental disturbances would recur, resulting in behavior harmful to herself and others. The Court of Appeals for the Second Circuit reversed the district court's grant of injunctive relief finding that the plaintiff had failed to show threatened irreparable injury and that the plaintiff had failed to establish the likelihood of proving that despite her handicap she was qualified for acceptance as a medical student or to engage in the practice of medicine. The court found that there was a significant risk of recurrence of plaintiff's self-destructive and harmful conduct.

More recently, the Fifth Circuit has considered a claim under section 504 based upon an alleged discriminatory dismissal because of psychiatric problems. In *Doe v. Region 13 Mental Health-Mental Retardation Comm'n*, [32 EPD P 33,624] 704 F. 2d 1402 (5th Cir. 1983), the plaintiff was an employee of a state mental health center which was funded through a mixture of federal, state and local financing. By all accounts, the plaintiff was an outstanding employee up to the time of her termination. However, during the entire course of her employment, the plaintiff suffered from a serious psychological disorder. Those familiar with her condition, including her co-workers, were concerned that she was suicidal. Just prior to her termination, the plaintiff was hospitalized involuntarily after she threatened to commit suicide.

This information was relayed to the administrator at the mental health center where the plaintiff was em-

ployed. The administrator ordered that the plaintiff not see any more patients and gave her the option to resign or to take a long-term leave for hospitalization. The plaintiff refused the administrator's recommendation and ultimately the plaintiff was terminated. The plaintiff brought suit alleging that her termination violated section 504 of the Act. A jury awarded her \$25,000 in damages, but the judgment was set aside by the trial court upon defendants' motion for judgment notwithstanding the verdict.

On appeal, the Fifth Circuit Court of Appeals affirmed the entry of the judgment notwithstanding the verdict. The court considered the fact that despite the plaintiff's exemplary work record, the evidence disclosed that the plaintiff had serious suicidal tendencies over a long period of time. According to the hospital administrator, the plaintiff posed a threat to herself and it was in the best interest of her patients to terminate her or have her take an extended leave of absence with psychiatric therapy.

*9 In determining whether the plaintiff was otherwise qualified, the Court stated that, in the absence of any evidence of discriminatory animus, the issue must be analyzed in terms of whether there was a substantial basis for the decision by the plaintiff's employer. The court interpreted *Davis*, supra, "to support a reasonable deference to the decisions made by administrators of federally funded programs so long as no evidence is presented of discriminatory intent with regard to the handicapped person." The court concluded that where there is uncontroverted evidence of a chronic, deteriorating situation which is reasonably interpreted to pose a threat to the patients with whom the employee must work, no violation of section 504 could reasonably be found.

In both of these cases, the plaintiffs had the functional skills to perform the essential requirements of the positions. Nevertheless, it was determined in each case that the mental illness constituted an insurmountable barrier to employment. The handicap itself prevented the plaintiff in each case from fulfilling the essential requirements of the position. In

the *New York University* decision, the court cautioned that a mental illness should not routinely be regarded as a disqualification for a particular position. However, the essential requirements of the position must be considered in view of the actual or potential manifestations of the individual's mental handicap. Deference must be given to the decision of those persons who are in the best position to evaluate whether the individual is able to fulfill the essential functions of the position in spite of the handicap.

The plaintiff in this action has a difficult burden of proof. He must demonstrate that he has a handicap as that term is used in the Act, but simultaneously he must establish that he is not so handicapped as to be unqualified for the position. The distinction is subtle but critical to the plaintiff's case. Mr. Schmidt contends that he has both physical and mental disabilities as a result of his Vietnam experience. It is Mr. Schmidt's position that with reasonable accommodation, that is, a reassignment to a new team leader, he could successfully perform the necessary functions of a student loan collector.

It is the defendant's position that the regulations promulgated under the Act require accommodation only of "known" physical or mental limitations of a qualified handicap. The defendant contends that Mr. Schmidt's mental handicap, ultimately diagnosed as post-traumatic stress disorder, was not known to Mr. Schmidt's supervisors. For purposes of this discussion, I do not think that this dispute is material.^{FN2} Even assuming that the supervisory personnel at the Office of Education knew of Mr. Schmidt's mental handicap, the issue boils down to a narrow one—could Mr. Schmidt, with reasonable accommodation, meet all of the position's requirements in spite of his handicap. The answer to that question is a resounding "no."

^{FN2} It is clear from the evidence presented that the defendant knew of Mr. Schmidt's physical disability. However, the defendant was under no duty to accommodate this handicap since it is unrelated to Mr.

Schmidt's ability to perform the essential functions of a student loan collector. The evidence of the defendant's knowledge of Mr. Schmidt's mental handicap is equivocal, at best. Mr. Schmidt testified that Dr. Ivers diagnosed his emotional and behavioral problems as relating to his post-traumatic stress disorder. However, this is not reflected in Dr. Ivers' office notes. In addition, to the extent that a resolution of this issue is dependent upon Mr. Schmidt's credibility, I would not give his testimony much weight. Mr. Schmidt's testimony was rife with inconsistencies, particularly as to his Marine Corps service records. For example, Mr. Schmidt testified that he had been awarded a Silver Star and five Purple Hearts, although he was wounded only on the one occasion when he stepped on a land mine which undoubtedly caused multiple wounds from that one incident. However, the testimony established that the DD-214 discharge record introduced by Mr. Schmidt was an unauthorized alteration of Mr. Schmidt's official DD-214 discharge record. In fact, Mr. Schmidt's official record reveals that he received only one Purple Heart and had never received the Silver Star. Other claimed awards and service do not appear in his official records and he has not established by a preponderance of the evidence that the official records are in error. Unfortunately, much of the trial testimony and evidence centered around issues concerning his combat service which, at best, is of limited relevance except as to credibility. For purposes of this decision, it is clear that he is a disabled Vietnam veteran, wounded in combat, and that he suffers a mental handicap frequently named as the Vietnam Veterans' Syndrome, a delayed post-traumatic stress disorder.

***10** Mr. Schmidt suffers from a mental handicap

which has been identified as post-traumatic stress disorder (PTSD) or post-Vietnam syndrome. This disorder is described in the Diagnostic and Statistical Manual of The American Psychiatric Association as a formal reaction to a severely traumatic stressful condition. The trauma in Mr. Schmidt's case was from his experience in Vietnam.

Dr. Howard Cohen, a psychologist who has counseled numerous Vietnam veterans suffering from PTSD, testified on plaintiff's behalf. He examined and evaluated Mr. Schmidt for purposes of this litigation. He described the symptoms of PTSD as including withdrawal, lack of motivation, feelings of apathy, irritability and explosiveness. It was Dr. Cohen's opinion that Mr. Schmidt suffered from chronic PTSD, that is, "the kind that weaves into the fabric of a person's life." According to Dr. Cohen, the predominant symptoms of the disorder are manifested in stressful situations. In Dr. Cohen's interview with Mr. Schmidt, he placed Mr. Schmidt in a stressful setting and found him to be extremely anxious and a bit argumentative, but not dangerous. Although Dr. Cohen concluded that Mr. Schmidt did not suffer from paranoia, he agreed that the application of stress could create the appearance of a paranoid state. Nonetheless, Dr. Cohen was of the opinion that Mr. Schmidt was "employable," that is, he could function in a position that requires contact with other people. As to Mr. Schmidt's continued employment at the Department of Education, Dr. Cohen hypothesized that Mr. Schmidt would be "cocky" and "a bit on the arrogant side" but that he would not hurt anyone. Finally, as to whether Mr. Schmidt's mental disability could be eliminated, Dr. Cohen opined that the focus was not upon a "cure" but whether the adverse reaction from the PTSD could be controlled.

Dr. Jonas Rappeport, an eminent psychiatrist, testified on behalf of the defendant. Dr. Rappeport agreed that Mr. Schmidt suffered from PTSD. His testimony was consistent with Dr. Cohen's testimony that the symptomology of the disorder included isolation, irritability, explosiveness, as well

as difficulty in relationships with others. Dr. Rappeport found all of these symptoms in Mr. Schmidt and further agreed that a person suffering from PTSD would manifest abnormal behavior under stressful situations. Dr. Rappeport opined that the prognosis for persons suffering from chronic PTSD was very poor.

Dr. Rappeport's diagnosis went one-step beyond Dr. Cohen's diagnosis. Dr. Rappeport was of the opinion that Mr. Schmidt suffered from a paranoid personality disorder which is characterized by elements of grandiosity, suspiciousness, argumentativeness, litigiousness, a tendency to manipulate facts and an unwillingness to admit that one is wrong. Dr. Rappeport found these traits in Mr. Schmidt during his examination of the plaintiff and also found that Mr. Schmidt's job history was consistent with this diagnosis. He admitted, however, that there is an overlap between PTSD and a paranoid personality disorder such that a person suffering from PTSD may exhibit what appears to be a paranoid state. Dr. Rappeport concluded that a person with a paranoid personality disorder would have difficulty functioning in a position where one was required to follow policy and procedure established by someone else. I do not find this conclusion to be inconsistent with Dr. Cohen's conclusions as to the employability of a person suffering from PTSD.

*11 During the course of his employment at the Office of Education, Mr. Schmidt was examined by another psychologist, Dr. Ivers. Dr. Ivers died on September 22, 1980. However, his handwritten notes were retained in the records of the Office of Education. See Plaintiff's Exhibit 3. These records disclose a history presented by Mr. Schmidt to Dr. Ivers together with various notations concerning the plaintiff's mental state. The notes of Dr. Ivers' interview with Mr. Schmidt state, in part, "supervisor suggested that he come. They see me as overpowering, aggressive, obnoxious-don't like authority, especially when it's petty." Mr. Schmidt further informed Dr. Ivers that his position as a student loan

collector was his 409th job. These notes were examined by both Dr. Cohen and Dr. Rappeport in the course of their evaluation of Mr. Schmidt.

The conclusions of Dr. Cohen and Dr. Rappeport on Mr. Schmidt's ability to interact with others are confirmed by other earlier medical evaluations of Mr. Schmidt's mental impairments. In October, 1967, plaintiff was examined at the Bethesda Naval Hospital and was diagnosed at that time as having a "passive-aggressive personality, aggressive type." This disorder was "manifested by acting out in an aggressive, belligerent and rebellious manner against authority when frustrated in his demands." Joint Exhibit 2C at 165. In August of 1967, Mr. Schmidt was examined by Dr. Joseph Ross, a psychiatrist with the United States Navy. Dr. Ross stated:

Psychiatric examination revealed no evidence of psychosis or mental deficiency. There was evidence of an emotional disorder of sufficient severity (Passive Aggressive Character 3212 EPTE) as to preclude the performance of duty. This man complains that he gets too much harassment and has been treated unfairly. He is an irritable individual who (possibly unconsciously) provokes the kind of treatment he gets. He is obstructionistic, stubborn about wanting his own way, and not cooperative. He asserts that he will never stay on in the military even though he has only about six months to go. This man will continue to be an administrative problem to his command. He is eligible for administrative separation from the service if his command so wishes.

Joint Exhibit 2C at 159.

Mr. Schmidt's behavioral and attitudinal problems are clearly an insurmountable barrier to his employment at the Office of Education. By all accounts, and on the evidence presented, the position of student loan collector is a very stressful job. There is constant pressure from the entire chain of command in the supervisory staff to produce and there is an inherent adversarial relationship between the col-

lector and the defaulted borrower. According to all of the medical testimony, the symptomology of Mr. Schmidt's post-traumatic stress disorder is manifested and increased under stress. The potential for "explosiveness" described by Dr. Cohen is clearly identifiable in Mr. Schmidt's employment history at the Office of Education. He had confrontations with both Mary Jones and Margaret Catalina. The latter incident Mr. Schmidt himself described as a "total, high-tension-type explosion." These outbursts pose a significant threat to the efficient operation of the functions of the office. The position of collector requires close supervision and close contact with others. Although Mr. Schmidt's mental handicap may not impair his ability to work *with* others, it clearly prevents him from working *for* others. Simply stated, Mr. Schmidt cannot, and did not, accept supervision, particularly when, in his opinion, he could perform the job much better his own way. Mr. Schmidt's handicap directly impairs his ability to perform the functions of student loan collector. His own trial testimony confirmed that he felt much of the supervision needless, petty and inefficient.

*12 Mr. Schmidt's contention that an accommodation of his mental handicap, in the form of a transfer to a different team leader, would enable him to perform the essential functions of the position is spurious. Mr. Schmidt's explosiveness was not limited to his inability to work under Mary Jones' supervision. His volatile personality was ignited by anyone who disagreed with him. The incident involving Margaret Catalina was a paradigm example. Mrs. Catalina refused to accept Mr. Schmidt's request for computer data information in circumvention of the established office procedure which required such requests to be channeled through the team leader. This incident sparked an outburst by Mr. Schmidt which rendered Mrs. Catalina hysterical. To the extent that this incident was a further manifestation of Mr. Schmidt's mental handicap, it is clear that Mr. Schmidt's handicap could not be accommodated simply by assigning him to another team leader. Mr. Schmidt's aggressive behavior is manifested against any form of au-

thority whenever he is frustrated in his demands. The medical testimony disclosed that Mr. Schmidt's mental disorder is a chronic disability, with no identifiable "cure." Assigning Mr. Schmidt to a new team leader would not assure prevention of a recurrence of Mr. Schmidt's explosiveness. There is a substantial likelihood that Mr. Schmidt's post-traumatic stress disorder would manifest itself in a harmful and seriously disruptive manner anytime that Mr. Schmidt is confronted by authority, or placed in a frustrating stressful occupational situation. Frustration, stress and high pressure, according to all the evidence, "goes with the job" of a telephone collector held by Mr. Schmidt.

Mr. Schmidt's contention that he can perform the functions of his job "in spite of" his handicap is further belied by his employment history. In March, 1982, Mr. Schmidt appeared before the Veterans Administration Rating Board Panel seeking to increase his rating disability to 100% unemployability. Mr. Schmidt testified under oath at that hearing as to his inability to obtain employment. *See* Defendant's Exhibit 4. Mr. Schmidt stated at that hearing, *inter alia*, that he had in excess of 400 different jobs since his discharge from military service in 1968, *id.* at 1; that during the incident at the Office of Education involving Margaret Catalina, he had blacked out in a fit of rage and never remembered it happening, *id.* at 4; that he had difficulties with employers, three of which he "told plain to go to hell because they had misrepresented themselves," *id.* at 9; and that he has the potential to go into uncontrollable fits of rage if something is said that he does not like, *id.* at 14-15. The fact that Mr. Schmidt has been unable to maintain a job in the past is not determinative of the issue of whether Mr. Schmidt is otherwise qualified for the particular position at issue here. However, this evidence is corroborative of the medical testimony in this case suggesting that a person such as Mr. Schmidt who suffers from PTSD is explosive and has difficulty in relationships with others. In addition, of course, in his testimony seeking a 100% veterans disability rating, he emphasized that he was, in practical effect, totally

unemployable.

***13** Although Mr. Schmidt has presented evidence that he is qualified to be a student loan collector, in the sense that he has the appropriate educational background and technical skills, he has offered no evidence to rebut the evidence presented by the defendant which clearly discloses that Mr. Schmidt repeatedly failed to adhere to routine office policy and procedure. Mr. Schmidt made unauthorized contacts with an educational institution and a bank, the latter contact made in direct defiance of his team leader's instructions. Mr. Schmidt made unauthorized compromises with borrowers. He also failed to make proper notations on the borrower information cards or to keep his card file in proper order. These infractions in and of themselves would be sufficient justification for discharging Mr. Schmidt from his term employment. These aspects of Mr. Schmidt's job performance are entirely unrelated to any handicap, mental or physical, that he may have.

Mr. Schmidt argues that "when stress was applied to [him] by Ms. Jones through criticism of his work, his condition of post-traumatic delayed stress syndrome began to operate resulting in behavior symptomatic of explosiveness and dissassociative like reactions." Plaintiff's Post-Trial Brief at 21. Under Mr. Schmidt's theory, the defendant was obliged to transfer him to a new team leader, presumed one that would not be critical of his work, and that would overlook his job deficiencies. The fallacy of Mr. Schmidt's argument is apparent. Mr. Schmidt's job performance was deficient. His team leader criticized that performance. As a result of Mr. Schmidt's mental handicap, this criticism touched off his explosive behavior. Mr. Schmidt contends that the Rehabilitation Act requires this handicap to be accommodated. However, even with such accommodation, plaintiff is not otherwise qualified-his job performance will be no less deficient even if "accommodated" by being assigned another team leader. I find nothing in the Rehabilitation Act, the regulations, or the case law thereun-

der which would preclude legitimate criticism of an employee's work.

In addition to his claim under the Rehabilitation Act, Mr. Schmidt has also asserted a cause of action under the Vietnam Era Veterans Readjustment Act of 1974, [38 U. S. C. § 2014\(c\)](#). This statute provides that:

Each department, agency, and instrumentality in the executive branch shall include in its affirmative action plan for the hiring, placement, and advancement of handicapped individuals in such department, agency, or instrumentality as required by section 501(b) of the Rehabilitation Act of 1973 ([29 U. S. C. 791\(b\)](#)), a separate specification of plans (in accordance with regulations which the Office of Personnel Management shall prescribe in consultation with the Administrator, the Secretary of Labor, and the Secretary of Health and Human Services, consistent with the purposes, provisions, and priorities of such Act) to promote and carry out such affirmative action with respect to disabled veterans in order to achieve the purpose of this section.

***14** This statute, in effect, supplements the affirmative action requirements of section 501(b) of the Rehabilitation Act by requiring a discrete plan of affirmative action for disabled veterans. The statute further provides extensive procedures for review and evaluation by the Civil Service Commission of the extent of the affirmative action plans implemented pursuant to this section.

The defendant persuasively argues that the Vietnam Era Veterans Readjustment Act does not create a private cause of action. Although the defendant may be correct in this contention, I do not think it is necessary for me to decide this issue. Mr. Schmidt's claim under the Rehabilitation Act is essentially the same as his claim under the Vietnam Era Veterans Readjustment Act. In each instance, he argues that the defendant was obligated to reasonably accommodate his handicap. My conclusion is that even with the accommodation sought by Mr. Schmidt, he would not be otherwise qualified for the job. This

conclusion applies with equal force to any claim under the Vietnam Era Veterans Readjustment Act. Even if that statute creates a private right of action, plaintiff has not established a right to recover.

IV. Summary

The evidence presented in this action overwhelmingly supports the defendant's contention that Mr. Schmidt is not an "otherwise qualified" handicapped person. He could not perform the essential requirements of the position, with or without reasonable accommodation. Mr. Schmidt refused to follow policies and procedures which were part of the functions of a student loan collector. His handicap made criticism of his job performance by anyone, not just Mary Jones, an impossibility. Mr. Schmidt's post-traumatic stress disorder is manifested by his resentment of any type of authority, not just that of a single team leader. His volatile, explosive personality is exacerbated under stress and the position of student loan collector is inherently stressful. His handicap presents an insurmountable barrier to his employment as a student loan collector at the Office of Education.

To the extent that the Discussion or Summary sections contain findings of fact or conclusions of law not specifically set forth under those respective headings in this opinion, the same shall be deemed as additional findings of fact and conclusions of law.

V. Conclusions of Law

1. This court has jurisdiction over the parties and the subject matter of this action and venue is proper in the Eastern District of Pennsylvania.

2. Plaintiff Robert L. Schmidt has failed to prove by a preponderance of evidence that he is an "otherwise qualified handicapped individual." He is unable to meet all of the requirements of the position of student loan collector in spite of his handicap.

3. Defendant did not violate the Rehabilitation Act of 1973, as amended, 29 U. S. C. §§ 791 and 794, or the regulations promulgated thereunder, 29 C.F.R. §§ 1613.701-1613.709, by failing to accommodate Mr. Schmidt's handicap.

*15 4. Defendant did not violate the Vietnam Era Readjustment Act of 1974, 38 U. S. C. § 2014(c) by failing to accommodate Mr. Schmidt's handicap.

Order

It is Ordered, upon the Findings of Fact, Discussion, Summary, and Conclusions of Law set forth in the opinion filed contemporaneously herewith, that judgment is entered in favor of the defendant Terrel H. Bell and against the plaintiff Robert L. Schmidt on all claims set forth by the plaintiff in Civil Action 82-1758.

E.D.Pa. 1983.

Schmidt v. Bell

Not Reported in F.Supp., 1983 WL 631 (E.D.Pa.), 33 Fair Empl.Prac.Cas. (BNA) 839, 33 Empl. Prac. Dec. P 34,244, 1 A.D. Cases 491

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