IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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THOMAS L. COX,

Plaintiff,

v.

DONALD RUMSFELD,[1]

Defendant.

OPINION AND ORDER

02-C-500-C

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This is a very unfortunate case involving a loyal federal employee who was forced into retirement as a result of a disability he developed while working for the Defense Contract Management Agency. Plaintiff Thomas Cox became deaf in 1997 and began to suffer from bouts of vertigo after being exposed to noise caused by the test-firing of missiles at a military training site. He contends that defendant Donald Rumsfeld violated the Rehabilitation Act of 1973 by refusing to accommodate his disability in various ways. Jurisdiction is present

[1] In his complaint, plaintiff named as defendants the United States Department of Defense and the Defense Contract Management Agency, in addition to Donald Rumsfeld. However, in an order dated April 15, 2003, I dismissed these defendants from the action on the parties' stipulation. As the "head of the department, agency or unit" in which plaintiff was employed, Donald Rumsfeld is an appropriate defendant. See 42 U.S.C. § 2000e-16(c); 29 U.S.C. § 794a(a)(1).

under 28 U.S.C. § 1331.

Defendant has filed a motion summary for summary judgment, arguing that plaintiff's claims must be dismissed on two grounds: (1) he failed to "initiate contact" with an Equal Employment Opportunity Counselor within 45 days, as required by 29 C.F.R. 1614.105(a)(1); and (2) he has not shown that he can perform the essential functions of his job, even with the accommodations that he requested. I conclude that plaintiff initiated contact with a counselor in a timely manner with respect to all of his claims with the exception of his claim that defendant refused to provide him with transportation assistance. Because plaintiff has provided no evidence regarding when this request was made, he has failed to meet his burden to show that he administratively exhausted this claim. In addition, I conclude that plaintiff has failed to show that his request to work from home was a reasonable accommodation because it would eliminate traveling, which is an essential function of his job. Accordingly, I will grant defendant's motion for summary judgment with respect to these two claims. However, I will deny defendant's motion with respect to plaintiff's claims that he was denied the reasonable accommodations of modifications to his computer and assistance at training seminars. I disagree with defendant that these claims became "moot" once plaintiff was placed on administrative leave and defendant advances no other argument to support dismissal of those claims.

Before I set forth the undisputed facts, a word is required regarding their source.

Although plaintiff submitted responses to defendant's proposed findings of fact, he failed to submit any of his own. Instead, he presented his evidence in affidavit form only. As noted in this court's Procedures to Be Followed on Summary Judgment Motions, a copy of which was provided in the magistrate judge's preliminary pretrial conference order, a party must propose as findings of fact, all facts necessary to sustain its position. However, because the record in this case is slim (plaintiff relies entirely on his own affidavit) and it appears that defendant has not disputed plaintiff's averments for the purpose of its motion, I have based my determination on a view of the record as a whole.

From defendant's proposed findings of fact and the record, I find the following facts to be undisputed.

UNDISPUTED FACTS

A. Plaintiff's Employment History and Accommodation Requests

In 1986, plaintiff Thomas Cox began his employment as a quality assurance specialist with the Defense Contract Management Agency, which is part of the United States Department of Defense. Defendant Donald Rumsfeld is Secretary of the Department of Defense. At the time plaintiff was hired, he was suffering from moderate hearing loss, which he developed as the result of his active duty with the Air Force during the Vietnam War. In 1997, plaintiff was on a special training assignment in Utah, where he was exposed to noise

from the test-firing of missiles. Plaintiff was not given protection for his ears or warned of any danger. The exposure caused him to become deaf. He also suffers from occasional bouts of vertigo. At some point after this event, plaintiff was promoted to a position in Wichita, Kansas.

Plaintiff's job summary describes his duties as follows:

> Furnishes technical assistance, advice, training, mentoring and policy guidance on quality assurance issues and problems to [the Defense Contract Management Agency] personnel. Applies a comprehensive knowledge of the overall quality assurance processes in formulating recommendations, and providing solutions with regard to sensitive problem areas. Maintains a library of appropriate functional resource materials on current and emerging policies and procedures. Participates in conferences and meetings, furnishing technical assistance and expertise in quality assurance matters. Serves as technical advisor to team leaders and employees on the preparation of individual development and performance improvement plans and providing input as requested on the technical elements of employees in the same functional series.

(The parties do not explain what plaintiff was assuring the quality of, other than to state that he was a "functional advisor.") Plaintiff's job summary classifies his duties as 50% "assistance and guidance," 25% "functional management" and 25% "assessment." The summary states that "some travel is required." The job required plaintiff to be in the field to advise the quality personnel, to accompany them on contractor site visits and to provide training on both current and emerging quality assurances and processes.

After 1997, plaintiff had to rely primarily on e-mail rather than the telephone to communicate with others while he was working. As a result, plaintiff began storing greater

amounts of electronic information on the hard drive of his computer at work. When he began experiencing storage capacity problems in 1998, he notified his supervisor, Charles Cheatham, that he needed a larger hard drive. Cheatham told plaintiff to provide "justification" for his request and to get a "note from a doctor." After evaluating plaintiff's office needs, a disabilities accommodation expert informed Cheatham on May 8, 1999, that plaintiff's request was reasonable. The only response plaintiff received from Cheatham was an e-mail that Cheatham forwarded to plaintiff suggesting that he be evaluated for "fitness for duty."

On May 7, 1999, plaintiff e-mailed Cheatham regarding an upcoming conference on July 15-17, 1999, in which plaintiff was scheduled to conduct training seminars. Plaintiff requested that Cheatham provide him with a lip reader or a "real time captioning accommodation." Without one of these accommodations, plaintiff could not answer the students' questions or understand other conference speakers. Cheatham did not respond to plaintiff's request.

Plaintiff's supervisors determined that because of his disability, plaintiff would no longer be permitted to drive a government vehicle. Plaintiff made a request to his "employers" to provide him with a driver instead, but they did not respond to this request.

In July 1999, plaintiff contacted an EEO counselor in Texas and sent several e-mails to his managers requesting information about the EEO process. When plaintiff did not

receive "satisfactory" responses, he contacted the Job Accommodation Network, requesting assistance in obtaining his requested accommodations and in "processing the proper EEO forms." The network told him that his requests were outside their purview.

In November 1999, plaintiff contacted "several individuals within [his] organization" about the proper procedures for filing a EEO complaint. Plaintiff sought assistance from Georgeanna Adams, a senior functional advisor, about making contact with EEO personnel. In addition, plaintiff contacted an attorney for the agency regarding EEO procedures. Management informed plaintiff that he should stop interfering with his employer's policies.

On November 12, 1999, plaintiff filed a request to be placed in the "Flexi-Place" program, which would allow him to work from his home in Wisconsin rather than Wichita. EEO Specialist Vivian Baker reviewed and investigated plaintiff's request. In January 2000, she wrote to plaintiff asking him to explain how his medical condition affected his ability to perform his job, how it prevented him from working at his primary work site and how working from home would allow him to perform his duties. She also requested that he obtain a medical opinion to support his request.

Plaintiff's physician responded in February 2000, writing:

> It is not medically possible to predict when (or if) episodes of vertigo will subside. Attacks of vertigo can last from minutes to hours; sometimes days. **During an attack of vertigo patients are not able to perform their usual activities and generally must lie down and rest until the episode is over.**

> During the attacks of vertigo care must be taken so as to prevent injury of the patient. Attendant services of a caregiver are especially useful during these times. Normal daily activities cannot be carried out during an episode of vertigo. Assistance with walking, eating and restroom usage during these times is especially important.

(Emphasis in original.)

In response to Baker's request for additional information, plaintiff's physician provided a supplementary response a few weeks later:

> Patient's frequent episodes of vertigo (as explained in my previous statement) are a cause of very serious concern. Serious bodily injury could result due to falling while experiencing an episode of vertigo. The danger inherent in this condition cannot be overstated. During episodes of vertigo the patient must continue with prescribed medication and limit his movement, usually to the point of total bed rest. **Continuing to work in an office setting is not medically advisable.** The dangers posed to the patient, as well as others are a very serious concern. Assistance is necessary in performing daily activities such as walking, eating and restroom usage during periods of vertigo.

(Emphasis in original)

On February 22, 2000, Baker concluded that plaintiff could not perform his job and placed him on administrative leave. She continued to review his request for a Flexi-Place placement until May 25, 2000, when she denied his request. Baker believed that even with the placement, plaintiff would be unable to perform his job because he would be unable to travel safely to remote locations where he was required to work.

Plaintiff had not yet received Baker's decision on June 1, 2000, when he e-mailed his supervisor, seeking information on the status of his accommodation request and asking what

his options would be if his request was denied. She responded that medical retirement or termination would be his only options. Shortly thereafter, plaintiff received Baker's decision denying his request.

In July 2000, plaintiff sent a request to Parker for assistance in contacting the appropriate EEO representative. She did not respond. Plaintiff filed for disability retirement in the fall of 2000. On February 20, 2001, plaintiff made contact with EEO Counselor Gary Dahl through e-mail.

OPINION

The Rehabilitation Act of 1973 prohibits federal agencies from discriminating against qualified employees on the basis of a disability. 29 U.S.C. §§ 791 and 794a(a)(1); Hamm v. Runyon, 51 F.3d 721 (7th Cir. 1995). (The parties have identified as the controlling statute, 29 U.S.C. § 794, which prohibits discrimination in a "program or activity" of federal agencies, but the court of appeals has stated that it is "doubtful that [§ 794] applies to employment discrimination suits against federal agencies." Johnson v. Runyon, 47 F.3d 911, 916 n.5 (7th Cir. 1995) (internal quotations omitted). The court has applied § 791 instead, because it addresses employment discrimination expressly. E.g., Miller v. Runyon, 77 F.3d 189 (7th Cir. 1996)). Although courts have construed the act as exempting the military from the act's requirements, see, e.g., Fisher v. Peters, 249 F.3d 433 (6th Cir. 2001), the

exemption applies only when the plaintiff is a uniformed officer. The government is not immune from claims brought by civilian employees, such as plaintiff. Sherman v. Peters, 110 F. Supp. 2d 194 (W.D.N.Y. 2000); cf. Rennie v. Dalton, 3 F.3d 1100 (7th Cir. 1993) (considering merits of Title VII suit brought by civilian employee of Navy).

The refusal of a federal employer to provide an employee with a reasonable accommodation constitutes a violation of § 791. See 29 U.S.C. § 791(g) (directing courts to apply definition of discrimination under Americans with Disabilities Act); 42 U.S.C. § 12112(b)(5); 29 C.F.R. § 1614.102(a)(8). Plaintiff alleges several discriminatory actions involving defendant's failure to accommodate his disability. Specifically, plaintiff contends that defendant refused to: (1) provide him with a larger computer hard drive; (2) provide him with a lip reader or comparable accommodation at training seminars; (3) provide him with transportation; and (4) place him in the "Flexi-Place" Program.

A. Deadline under § 1614.105(a)(1)

The administrative exhaustion requirements of Title VII of the Civil Rights Act of 1964 apply to claims brought pursuant to the Rehabilitation Act. See 29 U.S.C. § 794a(a)(1). The Equal Employment Opportunity Commission has promulgated additional procedural requirements that apply to federal employees with discrimination claims. The Court of Appeals for the Seventh Circuit has held that federal employees must exhaust their

administrative remedies under both the statutes and the regulations before filing a claim for discrimination in federal court. See Rennie v. Garrett, 896 F.2d 1057, 1062-63 (7th Cir. 1990).

Defendant contends that plaintiff failed to comply with one of the requirements under the regulations, 29 C.F.R. § 1614.105(a)(1), which requires a federal employee to "initiate contact with a[n Equal Employment Opportunity] Counselor within 45 days of the date of the matter alleged to be discriminatory." Plaintiff disagrees, arguing that although he did not e-mail a counselor within 45 days of the decision to deny him placement in the Flexi-Place program, he had made previous attempts to learn the proper complaint procedures. Because the regulation requires only that an employee "initiate contact" rather than actually "make contact," defendant contends that he has satisfied the requirements of the regulation.

An initial question is which party has the burden to prove or disprove that plaintiff exhausted his administrative remedies. The Court of Appeals for the Seventh Circuit has stated that the deadline in § 1614.105(a)(1) is not a jurisdictional prerequisite and that it should be treated as a statute of limitations. Johnson, 47 F.3d at 917. This suggests that the burden is on the defendant because a statute of limitations is an affirmative defense that a defendant must prove. Law v. Medco Research, Inc., 113 F.3d 781, 786 (7th Cir. 1997). However, Rennie suggests a different result. In that case, the district court had granted the

defendant's motion to dismiss for failure to exhaust administrative remedies. The court of appeals reversed because the district court had considered information outside the pleadings without converting the motion into one for summary judgment, but it noted that on remand the *plaintiff* must prove that she satisfied the requirements of § 1614.105(a)(1). However, the court did not explain its mandate or hold expressly that plaintiffs have the burden to prove administrative exhaustion. In Gibson v. West, 201 F.3d 990 (7th Cir. 2000), the court held that the exhaustion requirements under Title VII were "conditions precedent" to the filing of a complaint. Under Fed. R. Civ. P. 9(c), a defendant has the obligation to deny that plaintiff has performed a condition precedent "specifically and with particularity." Once this is done, the burden shifts to the plaintiff to prove that the condition was met. 5 Charles Alan Wright & Arthur Miller, Federal Practice & Procedure, § 1304, at 687 (2d ed. 1990); see also 4 Lex K. Larson, Employment Discrimination, § 76.03, at 76-5 (2d ed. 2003) (suggesting that this standard applies to proving exhaustion under federal discrimination statutes). However, there is a question whether Rule 9(c) applies to exhaustion requirements, because they are procedural, not substantive. Wright & Miller, supra, at § 1303; Wyatt v. Terhune, 315 F.3d 1108, 1119 n.12 (9th Cir. 2003).

There is little discussion of this issue in the case law. Generally, courts place the burden on the plaintiff or defendant without explaining why. Compare Shaw v. Potter, No. IP01-1198-C-T/F, 2002 Wl 31427504 (S.D. Ind. Oct. 24, 2002) (burden on plaintiff) with

Costanzo v. United States Postal Service, No. 00 CIV 5044 (NRB), 2003 WL 1701998, *5 (S.D.N.Y. March 31, 2003) (burden on defendant) and Brown v. District of Columbia, 251 F. Supp.2d 152, 161 (D.D.C. 2003) (same). Because the answer to this question is unclear and neither party has briefed it, for the purpose of this motion, I will assume, as the parties appear to have done, that plaintiff has the burden of proof.

The regulations do not define the phrase "initiate contact" and the case law construing it is sparse. See Bailey v. United States Postal Service, 208 F.3d 652, 655 n.2 (8th Cir. 2000) ("[W]e are unable to locate any case defining th[e] phras[e]."). A number of federal appellate courts appear to have assumed without discussion that "initiate contact" means the same thing as "make contact." See, e.g., Lyons v. England, 307 F.3d 1092 (9th Cir. 2002); Burzynski v. Cohen, 264 F.3d 611, 617 (6th Cir. 2001). One district court relied on dicta in Bailey to conclude that "initiate contact" means a request for counseling. Nygren v. Ashcroft, No. CIV. 02-2910, 2003 WL 21356083, (D. Minn. May 30, 2003); see also Moore v. Potter, 217 F. Supp. 2d 364 (E.D.N.Y. 2002) (dismissing claim because plaintiff failed to "seek counseling" within 45 days); Eleby v. Rumsfeld, No. IP 00-1669-CH/F, 2002 WL 425429 (N.D. Ind. Feb. 19, 2002) (concluding that claim was presumptively time-barred because plaintiff "asked to see" a counselor more than 45 days after discriminatory act).

Several courts have taken a less restrictive approach. For example, in Lloyd v. Chao,

240 F. Supp. 2d 1 (D.D.C. 2002), the court noted that the purpose of the counseling requirement is to give the agency an opportunity to resolve the complaint informally. Id. at 3 (citing Brown v. Marsh, 777 F.2d 8, 14 (D.C. Cir. 1985) and Richardson v. Frank, 975 F.2d 1433, 1436 (10th Cir. 1991)). Thus, an employee has "initiated contact" when he provides notice to the agency that he believes he has been discriminated against. The court held that the plaintiff had satisfied § 1614.105(a)(1) by complaining to management about discriminatory acts within 45 days. Id. at 4; see also Briggs v. Henderson, 34 F. Supp. 2d 785 (D. Conn. 1999); Johnson v. Glickman, 155 F. Supp. 2d 1240 (D. Kan. 2001).

Defendant argues that the controlling definition is the one adopted by the EEOC, the agency that promulgated § 1614.105. Defendant cites Pauling v. Secretary of Department of Interior, 960 F. Supp. 793, 803 (S.D.N.Y. 1997), which states that, under the EEOC definition, to "initiate contact" an employee must: (1) contact an agency official "logically connected" with the EEO process (not necessarily a counselor); (2) demonstrate an intent to begin that process; and (3) make an allegation of discrimination. See also Pueschel v. Veneman, 185 F. Supp. 2d 566, 569-70 (D. Md. 2002) (adopting definition of Pauling). My own review of EEOC decisions reveals that they require only the first two elements identified in Pauling. See Gonzales v. Johnson, EEOC Request No. 01A21151, 2003 WL 1872315 (Apr. 3, 2003) ("[T]o initiate contact, complainant must express his intention to file a complaint to an official logically connected to the EEO process."); Ryan v. Potter,

EEOC Request No. 01A05508, 2002 WL 31493427 (Oct. 30, 2002) ("[I]n order to establish EEO Counselor contact, an individual must contact an agency official logically connected to the EEO process and exhibit an intent to begin the EEO process."); Harris v. Pirie, EEOC Request No. 01991170, 2001 WL 427549 (Apr. 18, 2001). However, one could argue that the second and third element are essentially the same, in that an employee makes an implied allegation of discrimination when he or she demonstrates an intent to begin the counseling process.

When a regulation is ambiguous, as it is in this case, courts should defer to an agency's interpretation of its own regulation. Christensen v. Harris County, 529 U.S. 576 (2000). Exactly how much deference should be given is not easily quantified. Luckily, in this case, precision is unnecessary. The EEOC's definition is reasonable and it is consistent with the purpose of the exhaustion requirements as well as with the definition provided in Lloyd and similar cases, even if the language employed is not identical. Thus, the question is whether plaintiff expressed his intent to begin the EEO process to an individual who was sufficiently related to that process.

In answering this question, I note that plaintiff must satisfy § 1614.105 with respect to *each* failure to provide an accommodation. Plaintiff focuses primarily on events surrounding his Flexi-Place request, suggesting that he believes that efforts he made to address one denied request for an accommodation may be used to satisfy the exhaustion

requirement regarding any other accommodation claim. This is incorrect. Generally, unless discriminatory acts are part of a "continuing violation," as in the context of a hostile work environment claim, successfully completing the administrative prerequisites with respect to one discriminatory act will not be sufficient to satisfy the exhaustion requirement for other acts. See National Railroad Passenger Corp. v. Morgan, 536 U.S. 101 (2002); see also Cherosky v. Henderson, No. 01-35254, 2003 WL 21286574 (9th Cir. June 5, 2003) (applying Morgan to a claim under Rehabilitation Act). Although plaintiff's requests all arose from the same disability, they each concerned different circumstances and accommodations. In other words, they are "discrete acts" for which plaintiff must separately satisfy the requirements of § 1614.105(a)(1). Thus, a timely complaint to a counselor regarding a denial of his Flexi-Place request would not be sufficient to preserve a claim related to plaintiff's request for a larger hard drive. Similarly, plaintiff's efforts to speak with a counselor in 1999 cannot be considered "initiating contact" for the purpose of the decision regarding the Flexi-Place program, which was not made until 2001. See Gardner v. Morris, 752 F.2d 1271, 1279 (8th Cir. 1985) (in action brought under Rehabilitation Act, when plaintiff properly exhausted his administrative remedies for events occurring in 1978 but did not seek administrative review for acts in 1981 and 1982, district court erred in considering merits of 1981 and 1982 claims).

With respect to plaintiff's request for a larger hard drive, plaintiff made the first

request in 1998. His supervisor did not reject the request, but asked for "justification." When plaintiff provided him with additional information, the supervisor did not respond. This presents an interesting question: when does the limitations period begin running when a request is not denied but ignored? The court of appeals has stated that the 45-day period does not begin until there are facts available that would give a reasonably prudent person notice that discrimination has occurred. Johnson, 47 F.3d at 920. How long would a reasonable person wait before he concluded that the silence was in fact an implicit refusal to accommodate the request? There is no straightforward answer to this question, but it is unnecessary to provide a definitive one for the purpose of this case. Plaintiff was still attempting to obtain the accommodation on May 8, 1999, when he sent his supervisor a letter from a disability expert. In July 1999, plaintiff contacted both an EEO counselor and management about initiating the EEO process. I am persuaded that these actions constituted "initiating contact" under § 1614.105(a)(1) and that they were timely. Although it appears that plaintiff did not actually engage in counseling at this time, the regulation does not impose a time limit for *completing* the counseling process, only for initiating it.

With respect to plaintiff's request for assistance at training seminars, again, plaintiff's request was not rejected expressly but rather his supervisor failed to respond. However, because the seminar for which he requested help began on July 15, 1999, that is the date that plaintiff's request was effectively denied. Thus, plaintiff's efforts to initiate the EEO

process in July 1999 are sufficient to satisfy the requirements of § 1614.105(a)(1) with respect to this claim.

Plaintiff received notice of the denial of his Flexi-Place request in early June 2000; he sent a request to his supervisor the following month for help in contacting the appropriate EEO representative. As plaintiff's supervisor, Parker was "logically connected to the EEO process." Ryan v. Potter, EEOC Request No. 01A05508, 2002 WL 31493427 (Oct. 30, 2002). By seeking aid in contacting an EEO representative one month after his request was denied, plaintiff provided notice that he wanted to initiate the EEO process and that he believed he had been the victim of discrimination. Lloyd, 240 F. Supp. 2d at 3.

Plaintiff provides no dates regarding when he made his request for transportation assistance and when this request was denied. Thus, there is no way to determine whether plaintiff initiated the EEO process in a timely manner with respect to this claim. Because I have concluded that plaintiff has the burden to show that he exhausted his administrative remedies, this claim must be dismissed.

B. Ability to Perform Essential Functions

To prevail on a claim under the Rehabilitation Act, plaintiff must demonstrate that he is disabled, that he can perform the essential functions of his job with or without reasonable accommodations and that he was discriminated against because of his disability.

Peters v. Mauston, 311 F.3d 835, 842 (7th Cir. 2002) (stating that, generally, courts look to standards under ADA to determine violation of Rehabilitation Act); Dvorak v. Mostardi Platt Associates, Inc. 289 F.3d 479, 483 (7th Cir. 2002) (setting forth elements of ADA claim). Defendant argues that plaintiff cannot prove all these elements because even if plaintiff had been accommodated as he requested, he still could not have performed all of the essential functions of his job.

I note initially that defendant is incorrect that all of plaintiff's requests for accommodation except the request for a Flexi-Place placement became "moot" for the purpose of this action once plaintiff was placed on administrative leave. At the time that plaintiff's other accommodations were refused, plaintiff's supervisors had no basis on which to conclude that plaintiff could not perform the essential functions of his job. Thus, if plaintiff's requests for these accommodations were reasonable, defendant may have violated the Rehabilitation Act by refusing to provide them. Although no adverse employment action was taken against plaintiff at the time his requests were denied, this is not required in a reasonable accommodation claim. See, e.g., Rauen v. United States Tobacco Manufacturing Limited Partnership, 319 F.3d 891 (7th Cir. 2003). If later events indicated that the accommodations were no longer necessary or feasible, this may limit the *relief* plaintiff may obtain, but it does not shield defendant from liability. Because defendant has made no other argument regarding plaintiff's claims that defendant failed to provide him with the

reasonable accommodations of a larger hard drive and assistance at training seminars, defendant's motion for summary judgment will be denied with respect to these claims.

However, I cannot reach the same conclusion with respect to plaintiff's request to work at home. Defendant justifies its decision to deny plaintiff placement in the Flexi-Place program by arguing that plaintiff would not have been qualified with the accommodation, but a more accurate characterization of defendant's argument is that plaintiff's requested accommodation was not "reasonable" because it would have eviscerated one of plaintiff's essential functions, traveling. See Ross v. Indiana State Teacher's Association Insurance Trust, 159 F.3d 1001, 1015-16 (7th Cir. 1998) (request of teacher's association director to have all teachers' meetings in his office not reasonable accommodation when essential function of job was to meet with teachers outside his office).

The parties dispute whether traveling was an essential function of plaintiff's job and whether plaintiff was able to travel. In determining whether a prescribed duty is an essential function, a court should consider the written job description, experience of others who have held the position and evidence of the judgment of the employer. Basith v. Cook County, 241 F.3d 919, 927 (7th Cir. 2001) (citing 29 C.F.R. app. § 1630.2(m)). Plaintiff's job summary states that "participat[ing] in conferences and meetings" was one of plaintiff's duties and the job description indicates that "some travel is required." In addition, plaintiff's supervisor averred that plaintiff needed to be "i[n] the field to advise the quality personnel,

to accompany them on contractor site visits, and to provide training on both current and emerging quality assurances and processes." Aff. of Thomasina Parker, dkt. #10, at 2, ¶ 4.

In disputing defendant's evidence that traveling was an essential function of his job, plaintiff cites only ¶ 23 of his affidavit in which he avers that he is able to drive and that defendant denied his request for a driver when traveling. Although plaintiff's affidavit might support a conclusion that driving was not an essential function, it fails to create a genuine dispute with respect to the issue whether plaintiff's job made it necessary for him to travel.

In support of its view that plaintiff is unable to travel, defendant relies on information submitted by plaintiff's own physician, who emphasized that plaintiff's episodes of vertigo were "a cause of very serious concern." They would leave plaintiff unable to perform his usual activities for an indefinite period of time and would confine him to bed rest until the episode subsided. Plaintiff's physician concluded, "Continuing to work in an office setting is not medically advisable." If plaintiff is unable to work in an office setting because of the unpredictable nature of his condition, it would follow that any extended period away from home would not be safe. It may be that plaintiff's physician did not mean to imply that plaintiff should always stay close to home and that traveling may be safe for him. However, plaintiff has not submitted any evidence supporting such a conclusion, such as a further opinion from his doctor clarifying what he meant. Plaintiff has the burden to show that an accommodation is reasonable and that he is able to perform the essential functions of his

job. Foster v. Arthur Andersen, LLP, 168 F.3d 1029, 1032 (7th Cir. 1999); Vande Zande v. State of Wisconsin Dept. of Administration, 44 F.3d 538, 543 (7th Cir. 1995). He has failed to do this.

When an employee is unable to perform the essential functions of his job because of his disability, a reasonable accommodation may include a transfer to a vacant position. US Airways, Inc. v. Barnett, 535 U.S. 391 (2002); Gile v. United Airlines, 95 F.3d 492 (7th Cir. 1996). The duty to find an alternative position for a disabled employee may be greater with respect to the federal government than private employers. Woodman v. Runyon, 132 F.3d 1330 (10th Cir. 1997) (noting that unlike § 794 and the ADA, 29 U.S.C. § 791, has an affirmative action component). Although it may be that defendant could have done more to provide alternative employment for plaintiff, plaintiff's failure to identify a position for which he was qualified at the time he retired is fatal to a claim that defendant violated the Rehabilitation Act by failing to transfer him. DePaoli v. Abbott Laboratories, 140 F.3d 668, 675 (7th Cir. 1998). Accordingly, I must grant defendant's motion for summary judgment with respect to plaintiff's claim that defendant denied him a reasonable accommodation of placement in the Flexi-Place program.

ORDER

IT IS ORDERED that Defendant Donald Rumsfeld's motion for summary judgment

is GRANTED with respect to plaintiff Thomas Cox's claims that defendant violated the Rehabilitation Act by refusing to grant plaintiff's request to work from home and to receive transportation assistance. Defendant's motion is DENIED with respect to plaintiff's claims that defendant violated the Rehabilitation Act by refusing to grant plaintiff's request for a larger hard drive and assistance at training seminars.

Entered this 19th day of June, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge