NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 17-5092

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

SHARON REAGAN-DIAZ,
Plaintiff-Appellant,

v.

JEFF SESSIONS,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
No. 14-cv-01805-BAH, (Hon. Beryl A. Howell, U.S. District Judge)

BRIEF FOR AARP, AARP FOUNDATION, AND THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION AS AMICI CURIAE SUPPORTING PLAINTIFF-APPELLANT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Appellant make the following disclosures:

A. Parties and *Amici*

Plaintiff/Appellant was at all relevant times an employee of the Department of Justice. Defendant/Appellee is the Attorney General, who was sued in his official capacity.

AARP, AARP Foundation, and the National Employment Lawyers' Association will be filing a Brief as amici curiae in support of Appellant.

B. Rulings Under Review

1. The March 30, 2017 decision of the Honorable Beryl A. Howell granting the agency's Motion for Summary Judgment. The decision can be found at page 1972 of the Joint Appendix.

C. Related Cases

To the best of Plaintiff/Appellant's knowledge, there are no related cases pending before this Court.

Dated: February 9, 2018

/s/ Dara S. Smith
Dara S. Smith

Counsel for Amici Curiae

CORPORATE DISCLOSURE STATEMENT

The Internal Revenue Service has determined that AARP is organized and operated exclusively for the promotion of social welfare pursuant to Section 501(c)(4) of the Internal Revenue Code and is exempt from income tax. The Internal Revenue Service has determined that AARP Foundation is organized and operated exclusively for charitable purposes pursuant to Section 501(c)(3) of the Internal Revenue Code and is exempt from income tax. AARP and AARP Foundation are also organized and operated as nonprofit corporations under the District of Columbia Nonprofit Corporation Act. Other legal entities related to AARP and AARP Foundation include AARP Services, Inc., and Legal Counsel for the Elderly. Neither AARP nor AARP Foundation has a parent corporation, nor has any of these entities issued shares or securities.

The National Employment Lawyers Association (NELA) is a private, non-profit organization under Section 501(c)(6) of the Internal Revenue Code that has no parent corporation, and no publicly held corporation or other publicly-held entity owns ten percent (10%) or more of NELA.

Undersigned counsel further certifies to the belief that the certificate of interested persons filed by the appellant is complete.

Dated: February 9, 2018

/s/Dara S. Smith
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STATEMENT REGARDING CONSENT TO FILE, SEPARATE BRIEFING, AUTHORSHIP AND MONETARY CONTRIBUTIONS

Amici certify that no party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund the brief's preparation or submission, and further certifies that no person, other than amici, contributed money intended to prepare or submit this brief. FED. R. APP. P. 29(c)(5). Pursuant to FED. R. APP. P. 29(a)(2), all parties have consented to the filing of this amicus brief, though the Appellee, in granting its consent, noted that the filing of this brief may necessitate additional time for the Appellee to file its principal brief.

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GLOSSARY

AARP	American Association of Retired Persons
FBI	Federal Bureau of Investigation
FECA	Federal Employees' Compensation Act
NELA	National Employment Lawyers Association

STATUTES AND REGULATIONS AT ISSUE

Pertinent statutes, regulations, and administrative materials are reproduced in the addendum or contained in the addendum of the Brief for Plaintiff-Appellant.

STATEMENT OF INTEREST OF AMICI CURIAE

AARP is the nation's largest nonprofit, nonpartisan organization dedicated to empowering Americans 50 and older to choose how they live as they age. With nearly 38 million members and offices in every state, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, AARP works to strengthen communities and advocate for what matters most to families, with a focus on health security, financial stability, and personal fulfillment. **AARP's charitable affiliate, AARP Foundation,** works to ensure that low-income older adults have nutritious food, affordable housing, a steady income, and strong and sustaining bonds. Among other things, AARP and AARP Foundation seek to increase the availability, security, equity, and adequacy of public and private pension, health, disability and other employee benefits that countless members and older individuals receive or may be eligible to receive, including through participation as amici curiae in state and federal courts. A disproportionate number of older workers have one or more actual "disabilities," a record thereof, and/or are perceived as having a disability, and, therefore, are protected by the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101-213 (2012). Those working in the federal sector or for entities receiving federal financial assistance are protected by the Rehabilitation Act of 1973, 29

U.S.C. §§ 791-794 (2012).[1] AARP and AARP Foundation are committed to enforcing these statutes vigorously, including by ensuring that federal workers who are injured in the course of their duties have access to the full statutory panoply of protections and procedures for returning to work when seeking an accommodation for a covered disability.

NELA is the largest professional membership organization in the country, comprising lawyers who represent workers in labor, employment, and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys committed to working on behalf of those who have been treated unlawfully in the workplace. NELA's members litigate daily in every circuit, affording NELA a unique perspective on how the principles announced by the courts in employment cases actually play out on the ground. NELA strives to protect the rights of its members' clients and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace.

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[1] Section 504 of the Rehabilitation Act incorporates the substantive standards of the ADA, but applies to federal agencies and entities receiving federal funding. 29 U.S.C. § 794(d).

More specifically, Amici believe that the district court in this case improperly cut off access to the Rehabilitation Act's interactive process for seeking a reasonable accommodation. The district court's rule would unlawfully prevent injured workers with covered disabilities from finding flexible, individualized solutions for reintegrating into the workforce.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Rehabilitation Act's goal and mandate is integration. Congress passed the law and its amendments "to develop and implement . . . comprehensive and coordinated programs of vocational rehabilitation and independent living for individuals with disabilities in order to maximize their employment, independence, and integration into the workplace and the community." S. Rep. No. 102-357, at 2 (1992), reprinted in 1992 U.S.C.C.A.N. 2712, 2714. The good-faith interactive process by which employers and workers try to find reasonable accommodations for workers with disabilities is one crucial way of turning the aspirational goal of integration into a pragmatic reality. The district court's decision allows federal employers to thwart that goal by refusing to accommodate all workers currently receiving workers' compensation benefits under the Federal Employees' Compensation Act ("FECA"). This ruling has no statutory basis, and it undermines

Congress's purpose by preventing workers with disabilities, like Ms. Reagan-Diaz, from returning to work.

First, the district court misinterpreted FECA as categorically precluding all injured workers receiving FECA benefits from earning any federal salary, making it impossible for employers to accommodate those workers. While FECA forbids the concurrent receipt of workers' compensation benefits and a federal salary under *some* circumstances because of election-of-benefits rules, the statute contains a clear exception for salary earned "in return for service actually performed." 5 U.S.C. § 8116(a)(1). In ignoring this exception, the district court reached a conclusion that is contrary to the statute and entirely illogical in light of FECA as a whole, which permits and even requires workers to return to the workplace and receive some salary under certain circumstances. There is no statutory basis for excluding individuals receiving FECA benefits from the workplace.

Likewise, there is no justification for employers like the FBI to bar injured workers with disabilities from participating in the good-faith interactive process to seek reasonable accommodations. The district court treated FECA's alternative work assignment process as an acceptable substitute for the Rehabilitation Act's interactive process, but it is not. Injured workers with disabilities must have access to their civil rights under the Rehabilitation Act, and that means allowing them to

seek a reasonable accommodation that would enable them to perform the essential functions of their job, and make a choice about whether to return to work with that accommodation. The employer cannot, as the FBI did in this case, simply refuse to participate in the interactive process based on an assumption that the worker might ultimately return to work and lose FECA benefits. That choice is the worker's, not the employer's.

Moreover, the FECA alternative work assignment process and the Rehabilitation Act's interactive process are significantly different. The alternative work assignment process is a formal, rigid mechanism by which the government makes a unilateral determination about what constitutes "suitable work" pursuant to a set of specific factors, and rejecting an offer of suitable work leads to formal administrative process. By contrast, the Rehabilitation Act's interactive process is a informal, flexible back-and-forth designed to identify whether the employee is able to complete the essential functions of her job, with or without a reasonable accommodation. This involves an assessment of the employee's individual limitations and whether they align with the employer's legitimate needs to reach a negotiated solution that is functional for all involved as often as possible. That a worker is seeking an accommodation that would not be deemed "suitable work" under the alternative work assignment process is entirely irrelevant to whether the

employer can find a reasonable accommodation for the employee, and employers like the FBI may not permissibly treat the processes or the outcomes as interchangeable.

Indeed, the two are not interchangeable in part because the two statutes serve different purposes. The FECA alternative work assignment process is designed to identify conditions under which a worker *must* return to work to mitigate the employer's workers' compensation liability, whereas the Rehabilitation Act's process is designed to protect workers' civil rights. The interactive process is a crucial part of fulfilling the Act's integration mandate because it gives injured workers the maximum opportunity to rejoin the workforce after a period of leave. The district court's decision would deprive all workers receiving FECA benefits of this right, and it must be reversed.

ARGUMENT

I. The Federal Employees' Compensation Act Permits Workers to Earn a Salary for Work Actually Performed While They are Receiving Workers' Compensation Benefits.

The district court read FECA as superseding an employer's ability—let alone responsibility—to accommodate FECA recipients who wish to return to work. *Reagan-Diaz v. Sessions*, 246 F. Supp. 3d 325, 341 (D.D.C. 2017) ("even if the FBI wanted to accommodate the plaintiff, at the time she made the requested

accommodation, the plaintiff was receiving FECA worker's compensation benefits . . . and those benefits would have to stop"). This interpretation flatly misconstrues the provision on which it relies.

FECA provides workers' compensation benefits to civilian employees of the United States who are injured while in the performance of their duties. 5 U.S.C. § 8102(a). Entitled "Limitations on the right to receive compensation," section 8116 provides that FECA beneficiaries may not receive certain forms of federal compensation contemporaneously with FECA benefits:

> (a) While an employee is receiving compensation under this subchapter . . . he may not receive salary, pay, or remuneration of any type from the United States, *except*—
> (1) *in return for service actually performed.*

5 U.S.C. § 8116(a)(1) (emphasis added). The provision then outlines the circumstances under which FECA recipients who also qualify for, or are receiving, compensation from another federal agency must make an election of benefits. 5 U.S.C. § 8116(b).

Section 8116's corresponding regulations make clear that the statutory provision is focused specifically on prohibiting certain forms of "double-dipping" by workers who are eligible to receive benefits from multiple agencies, or by those who qualify for various mutually exclusive benefits. 20 C.F.R. § 10.421. For example, a beneficiary who is eligible for both wage-loss compensation and Federal retirement

"must elect the benefit that he or she wishes to receive." 20 C.F.R. § 10.421(a). Similarly, section 8116 prohibits employees from receiving both FECA benefits for total disability and severance pay. 20 C.F.R. § 10.421(c). The regulations never suggest that receiving a salary for work performed is inconsistent with receiving compensation through FECA. 20 C.F.R. § 10.421.

Nevertheless, the district court read section 8116(a) as a categorical prohibition on FECA beneficiaries' earning any salary whatsoever. In arriving at this conclusion, the court ignored the express exception section 8116(a)(1) provides for salary paid "in return for service actually performed." The plain language of this statutory exception states that FECA beneficiaries are permitted to concurrently receive FECA benefits *and* compensation for actual work, and the district court's interpretation cannot be squared with that language or the pertinent regulations.

In addition to its disregard for the express statutory exception and pertinent regulations, the district court's interpretation of section 8116(a) creates unnecessary conflicts with other provisions in FECA. In particular, the district court's reading cannot be squared with the requirement that partially disabled employees must seek suitable work in order to continue receiving FECA compensation. *See* 5 U.S.C. § 8106(c)(1) (explaining requirement that injured workers take on suitable work where possible). Under this system, workers return to work and earn a partial salary

while receiving reduced FECA compensation. FECA Practice Guide § 19:13 (explaining employee's return-to-work responsibilities under FECA). If injured workers cannot earn a federal salary *at all*, this entire portion of FECA would be superfluous.

On the other hand, a statutory construction that contemplates compensation for work performed by FECA beneficiaries who have returned to work would not invalidate or otherwise conflict with section 8116's general prohibition on the receipt of certain dual benefits. Indeed, no part of the provision's purpose—to prohibit the concurrent receipt of certain federal benefits—would be rendered superfluous by an interpretation that merely adheres to the prohibition's clearly defined exceptions. There is no reason to read out the exception in section 8116(a)(1), and the district court's contrary conclusion is plain error.

II. The Rehabilitation Act Requires Employers to Engage in the Good-Faith Interactive Process When a Worker Receiving FECA Benefits Requests an Accommodation for a Disability.

Because there is no statutory basis for barring injured workers receiving FECA benefits from returning to work for pay, federal employers must treat those workers like any other similarly-situated qualified workers with disabilities[2]—including

[2] Some, but not all, workers eligible to receive FECA compensation meet the ADA's definition of an individual with a "disability" as defined in 42 U.S.C. § 12102. Only these individuals are also covered by the Rehabilitation Act's

offering them reasonable accommodations. *Dubee v. Henderson*, 56 F. Supp. 2d 430, 434-35 (D. Vt. 1999) (employee receiving FECA compensation properly pled failure to accommodate claim under Rehabilitation Act); *see also* FECA Practice Guide § 31:18 (citing *Taylor v. Garrett*, 820 F. Supp. 933 (E.D. Pa. 1993) (explaining that when an individual receiving FECA compensation has a disability, "[t]hen the employer's obligation of reasonable accommodation begins"). Accordingly, employers must give these workers access to *both* the alternative work assignment process—the system for determining when an injured worker must return to work to retain FECA compensation benefits—*and* the good-faith interactive accommodation process mandated by the Rehabilitation Act. The FBI's refusal to do so in Ms. Reagan-Diaz's case, therefore, violates the Act.

A. Employers Cannot Refuse to Participate in the Interactive Process Because an Employee is Receiving FECA Benefits.

The FBI refused to process Ms. Reagan-Diaz's request for a reasonable accommodation because she was receiving FECA benefits, requiring her to go through the FECA alternative work assignment process "[i]nstead." *Reagan-Diaz*, 246 F. Supp. 3d at 329 ("The situation was soon clarified, however, that the plaintiff could not receive a 'reasonable accommodation' while still receiving worker's [sic]

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protections, including the reasonable accommodation and interactive process requirements.

compensation payments."). However, the alternative work assignment process is not the exclusive avenue for workers with disabilities to return to work after a workplace injury. When a worker who is receiving FECA benefits requests an accommodation under the Rehabilitation Act, the employer must engage in the good-faith interactive process to determine whether a reasonable accommodation is available. *Ward v. McDonald,* 762 F.3d 24, 31 (D.C. Cir. 2014); *see also Mogenhan v. Napolitano*, 613 F.3d 1162, 1167 & n.4 (D.C. Cir. 2010) ("employers and employees may need to engage in an 'interactive process' in order to identify and implement a workable accommodation"); 29 C.F.R. § 1630.2(o)(3) ("To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations."). The employer may not refuse to take part in that process and deny the accommodation request outright.

That is true even when the worker's proposed duties do not conform to an approved alternative work assignment that would guarantee the worker continuing

receipt of FECA benefits.[3] Under these circumstances, an injured worked with a covered disability has the right to choose to return to work with a reasonable accommodation and risk the potential loss of workers' compensation benefits. The employer may not foreclose that option by adopting a policy that forces the worker to forfeit her rights under the Rehabilitation Act.

Once an accommodation has been reached, and the worker returns to work and avails herself of that accommodation, it is possible that the Office of Workers' Compensation Programs may determine that the worker is no longer eligible for FECA benefits. *See* 20 C.F.R. §§ 10.503(d) (listing circumstances under which FECA benefits may be terminated or reduced); 10.510 (describing circumstances in which a worker's benefits are reduced after the worker accepts a temporary light-duty position with a partial salary). However, *before* the worker has returned to work, she is entitled to participate in the interactive process with her employer to determine whether such an accommodation is possible and make her choice, informed by all the options contemplated under *both* FECA *and* the Rehabilitation Act. The employer may not simply refuse to participate in the interactive process because the worker might lose FECA benefits if and when she accepts the accommodation and returns to work. Instead, the employer must first determine whether a reasonable

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[3] *See infra*, Part II.B (discussing differences between alternative work assignment process and Rehabilitation Act interactive process).

accommodation is available through the interactive process, and then allow the worker to make an informed choice, regardless of whether that choice results in a loss of FECA benefits. The Rehabilitation Act requires nothing less.

B. The FECA Alternative Work Assignment Process is Not a Substitute for Engaging in Good Faith in the Rehabilitation Act's Interactive Process.

The alternative work assignment process is neither legally nor practically a substitute for the Rehabilitation Act's good-faith interactive process. The Rehabilitation Act requires an individualized assessment and flexible approach that opens different paths back to work than FECA's alternative work assignment process. The alternative work assignment process is a rigid, structured system. 20 C.F.R. §§ 10.500-10.626 (describing process and procedures). In this process, certain factors must be considered in determining what constitutes "suitable" work, including a presumptive four-hour-per-day minimum work schedule,[4] a limit of 90 days for each assignment, and consideration of typical jobs for the worker's age. *See* FECA Practice Guide § 19:7 (explaining suitability factors fully). The federal Office of Workers' Compensation Programs identifies "suitable" work based on these

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[4] While the four-hour-per-day schedule may be presumptively valid, shorter per-day schedules that gradually increase over time have been approved. *See, e.g. Lund v. Dep't of Transp.*, Docket No. 04-898, 2004 ECAB LEXIS 800, *811-12 (Dep't. of Labor Emp. Comp Appeals Bd., Sept. 27, 2004) (approving a two-hour-per-day schedule that provided for a gradual return to full-time work).

factors with very little input from the worker, 20 C.F.R. § 10.515-16, and a worker's refusal to accept work deemed suitable leads to either vocational rehabilitation or a loss of benefits that must be formally appealed, *id.* §§ 10.517, 10.519.

Accordingly, when an injured worker also has a disability covered by the Rehabilitation Act, it is crucial that the worker have access to the interactive accommodation process as well. As this Court has explained, "[f]ew disabilities are amenable to one-size-fits-all accommodations." *Ward*, 762 F.3d at 31. Thus, the interactive process mandated by the Rehabilitation Act is "'a flexible give-and-take' between employer and employee 'so that together they can determine what accommodation would enable the employee to keep working.'" *Id.* (citing *EEOC v. Sears, Roebuck & Co.*, 417 F.3d 789, 805 (7th Cir. 2005)). Both the employer and the worker are obliged to participate in the back-and-forth process meant to "identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations." 29 C.F.R. § 1630.2(o)(3).

This obligation is ongoing until either an accommodation is reached, or it becomes clear that none is available; "neither party should be able to cause a breakdown in the process[.]" *Sears, Roebuck & Co.*, 417 F.3d at 805. To continue interacting in good faith, each party must provide the information that is solely in its

possession at the time of the accommodation request. *Ward*, 762 F.3d at 32; *see also Stewart v. St. Elizabeths Hosp.*, 589 F.3d 1305, 1309 (D.C. Cir. 2010). For example, workers must provide enough information to explain their limitations, including medical documentation where necessary. *Ward*, 762 F.3d at 32-34. In turn, employers must provide information about what it requires the worker to do (i.e., the essential functions of the job), s ask the worker at the time the accommodation is sought for any supplemental information the employer needs to evaluate the worker's request, and suggest what accommodations could potentially allow the worker to perform those functions. Both parties bear a burden to present necessary information to attempt a non-judicial resolution that gives fair opportunity to consider all plausible options:

> The interactive process would have little meaning if it was interpreted to allow employers, in the face of a request for accommodation, simply to sit back passively, offer nothing, and then, in post-termination litigation, try to knock down every specific accommodation as too burdensome. That's not the proactive process intended: it does not help avoid litigation by bringing the parties to a negotiated settlement, and it unfairly exploits the employee's comparative lack of information about what accommodations the employer might allow.

Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 315-16 (3d Cir. 1999) (cited in *Ward*, 762 F.3d at 34).

Full engagement in this process not only benefits both parties, but also avoids putting courts in the position of having to assess in the first instance, *post hoc*, what

functions were actually essential for the job and what accommodations were genuinely available. *Cf. id.* at 316 ("[I]n some cases courts may be better positioned to judge whether the employer met with the employee in good faith than to judge how burdensome a particular accommodation really is."). Had the FBI engaged in this flexible process in Ms. Reagan-Diaz's case, at minimum, the parties would have created a full factual record of their efforts to negotiate a solution, including a record of her *actual* job requirements (instead of a mere recitation of the Workers' Compensation Unit's wholly irrelevant conclusion that her proposed schedule was not approved as an alternative work assignment). At best, the parties might have been able to avoid litigation altogether—a likely outcome, given that parties later reached an accommodation, and she successfully performed her duties, eventually returning to work full-time. *Reagan-Diaz*, 246 F. Supp. 3d at 332; *see also Taylor*, 184 F.3d at 316 n.6 ("[T]he interactive process can be thought of as a less formal, less costly form of mediation . . . Mediated settlements . . . are cheaper than litigation, can help preserve confidentiality, allow the employee to stay on the job, and avoid monetary damages for an employer's initially hostile responses to requests for accommodations. The interactive process achieves these same goals even more effectively.").

C. The Alternative Work Assignment Process and the Rehabilitation Act's Interactive Process Function Differently Because the Two Statutes Have Different Purposes.

A negotiated outcome via the interactive process fulfills the Rehabilitation Act's key goal: fully integrating workers with disabilities into the workforce. The stated "purpose of the Act is to develop and implement . . . comprehensive and coordinated programs of vocational rehabilitation and independent living for individuals with disabilities in order to maximize their employment, independence, and integration into the workplace and the community." S. Rep. No. 102-357, at 2 (1992), reprinted in 1992 U.S.C.C.A.N. 2712, 2714. The flexibility and interactive dialogue is part of what Congress envisioned to fulfill this goal, urging "our most creative thinking to forge a comprehensive Act that will enable us to respond to the work preparation needs of any individual who wants to work, regardless of the severity of his or her disability." *Id.* at 6, reprinted in 1992 U.S.C.C.A.N. at 2717 (emphasis added) (quoting Justin Dart, Chair of the President's Committee on the Employment of People with Disabilities).

That goal is complementary to, but separate from, the goal of FECA and other workers' compensation systems: to provide a substitute for tort claims based on workplace injuries. *Dubee*, 56 F. Supp. 2d at 432 (citing *Tredway v. District*

of Columbia, 403 A.2d 732 (D.C.1979)). FECA does not preclude Rehabilitation Act claims precisely because it does not prohibit or provide a remedy for disability-based employment discrimination. *Id.* at 433 ("FECA does not therefore provide relief for injuries due to discrimination, nor does it compel relief for disabled employees seeking reasonable accommodations as do the broader Title VII and the Rehabilitation Act."). Consequently, while FECA's alternative work assignment process carries out the legislative and regulatory allocation of costs between employees and employers, requiring certain mitigation of the employers' liability by creating conditions under which an injured worker may—indeed, must—return to work, the Rehabilitation Act's interactive process does something different: it enforces the civil rights of workers with disabilities who want to reintegrate into the workforce. It only makes sense that the Rehabilitation Act's goal requires more flexibility, individual assessment, and negotiation to explore all options for that reintegration.

In this case, the FBI's refusal to participate in the interactive process denied Ms. Reagan-Diaz the opportunity to explore her options for returning to work, and that refusal violated the Rehabilitation Act.

CONCLUSION

For these reasons, the Court should reverse the district court's decision.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7) and Circuit Rule 32(a)(2) because: this brief contains 3,881 words, (excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii)) as determined by the word counting feature of Microsoft Office Word 2010).

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 14 point Goudy Old Style font.

Dated: February 9, 2018

/s/ Dara S. Smith
Dara S. Smith
Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on February 9, 2018, the foregoing Brief for AARP, AARP Foundation, and the National Employment Lawyers Association as Amici Curiae Supporting Plaintiff-Appellant was electronically filed with the Clerk of the Court for the United States Court of Appeals for the DC Circuit using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: February 9, 2018

/s/ Dara S. Smith
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