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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

JAMES SCOTT,

Plaintiff,

v.

JANET A. NAPOLITANO, SECRETARY,
DEPARTMENT OF HOMELAND
SECURITY,

Defendant.

CASE NO. 08cv0735 BTM(JMA)

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT AND GRANTING IN
PART AND DENYING IN PART
PLAINTIFF'S MOTION FOR
PARTIAL SUMMARY JUDGMENT**

Defendant has filed a motion for summary judgment. Plaintiff has filed a cross-motion for partial summary judgment. For the reasons discussed below, Defendant's motion for summary judgment is **GRANTED IN PART** and **DENIED IN PART** and Plaintiff's cross-motion for partial summary judgment is **GRANTED IN PART** and **DENIED IN PART**.

I. FACTUAL BACKGROUND

A. General Employment History

In 1991, Plaintiff James Scott ("Plaintiff") was hired by the Federal Protective Service ("FPS") as a uniformed federal protective officer in Los Angeles, California. (Scott Decl. of

1 9/15/09, ¶ 3.)¹ In 1992, Plaintiff was promoted to the position of Special Agent/Criminal
2 Investigator. (Id. at ¶ 4.) In 1993, Plaintiff transferred to San Diego to open a criminal
3 investigative office for FPS. (Id. at ¶ 5.) In or about 2003, Plaintiff was again promoted and
4 was detailed to the FBI's Joint Terrorism Task Force. (Id. at ¶ 7.)

5
6 **B. Plaintiff's Health Issues**

7 In November 1998, Plaintiff was diagnosed with having an adjustment disorder with
8 mixed depression and anxiety and was placed on work stress disability for several months.
9 (Def. Ex. 82, 485:2-9.) Plaintiff was placed on long-term disability from approximately July
10 31, 2000 to February 2, 2002. (Id. at 490:16-491:9.) On or about August 23, 2000, Plaintiff
11 filed a Workers' Compensation claim for his adjustment disorder. (Id. at 490:7-12.) Plaintiff
12 underwent an independent psychological evaluation in or about January 2001, and was
13 diagnosed as suffering from an adjustment disorder with mixed depression and anxiety with
14 a corroborating diagnosis of "chronic work-related adjustment disorder to include a stress-
15 related physiological response affecting medical condition." (Id. at 491:17-492:10.)

16 In the Spring of 2004, Plaintiff filed a Workers' Compensation claim for
17 sinusitis/rhinitis. Plaintiff's sinus problems were exacerbated by wildfires and construction
18 work at Plaintiff's office. (Def. Ex. 88, 202-05; Def. Ex. 10.) John P. Morgan, Plaintiff's
19 supervisor, authorized Plaintiff to work at home for a period of time so that he could avoid
20 the excessive dust and airborne particles at his office. (Def. Ex. 10.)

21 On September 17, 2004, Plaintiff reported that he had been diagnosed with work-
22 related tendonitis of the upper right arm and shoulder area. (Def. Ex. 11.) A medical
23 impairment form ("DMI") from Kaiser Permanente indicated that Plaintiff was restricted for
24 a period of seven calendar days from grasping, hand motion, pushing, pulling, reaching
25 above his shoulder, or lifting with his right hand. (Def. Ex. 12.)

26 On September 21, 2004, Mr. Morgan told Plaintiff that based on the medical

27
28 ¹ The FPS "is a federal law enforcement agency that provides integrated security and
law enforcement services to federally owned and leased buildings, facilities, properties and
other assets." http://www.dhs.gov/xabout/structure/gc_1253889058003.shtm

1 impairment documentation from Kaiser, "I believe it prudent that you NOT carry a FPS duty
2 firearm at this time until your condition improves and you are no longer under doctor's care.
3 Please assure me that you will secure your weapon until such time as you are able to
4 proceed with your full range of duties and responsibilities." (Def. Ex. 13.) Two days later,
5 Plaintiff informed Mr. Morgan that Kaiser had confirmed the existence of a work-related
6 "repetitive motion injury" involving his upper right arm and shoulder and had recommended
7 an "ergonomic evaluation." (Def. Ex. 14.) Plaintiff also explained, "Carrying a firearm is
8 authorized, and no work restrictions have been imposed. However, 5 minute rests of the
9 injured area every 30 minutes have been directed, along with continued training/usage of the
10 left arm/hand as much as possible until further notice." (Id.) Plaintiff submitted a new DMI
11 to this effect. (Def. Ex. 15.)

12 On October 8, 2004, Plaintiff submitted a Workers' Compensation claim for repetitive
13 motion injury causing pain in his upper arm, shoulder, and neck. (Def. Ex. 16.) In an e-mail
14 dated October 18, 2004, Mr. Morgan expressed surprise that Plaintiff was still conducting the
15 same work activities that caused Plaintiff's injuries. (Def. Ex. 17.) Mr. Morgan requested
16 more information from Plaintiff regarding his work activities and what he was doing to care
17 for his condition. (Id.)

18 A DMI dated October 21, 2004, did not indicate any work restrictions but
19 recommended 5 minutes of rest for every 30 minutes worked. (Def. Ex. 19.) DMIs dated
20 December 13, 2004 and January 10, 2005 also did not indicate any work restrictions.

21 22 **C. Revocation of Plaintiff's Law Enforcement Authority**

23 In early 2005, Plaintiff was scheduled to attend two separate training courses, an
24 "ALERT 504" law enforcement training course scheduled for February 7, and a VIP
25 Protection Course scheduled for January 31.

26 The notification for the "ALERT 504" training course stated: "This is a rigorous
27 program containing advanced training in the areas of arrest techniques, defensive tactics
28 and firearms designed to emulate the physical stresses of the field. Therefore, it is the FPS

1 National Academy's expectation that all attendees have a baseline fitness level required for
2 FPS law enforcement positions." (Def. Ex. 28.)

3 Based on written materials Plaintiff received regarding the "ALERT 504" training
4 regimen, Plaintiff mistakenly believed that the course would require him to (1) demonstrate
5 the maximum weight he could bench press in a single lift and (2) complete a U.S. Border
6 Patrol obstacle course that required rigorous upper body strength. (Pl. Ex. 25 in Opp. to
7 MSJ, ¶ 10; Pl. Ex. 31 in Opp. to MSJ.) According to Plaintiff, although he had largely
8 concluded his rehabilitation with Kaiser, he was precluded from participating in any general
9 weight training and was concerned about the maximum bench press and obstacle course
10 requirements. (Pl. Ex. 25 in Opp. to MSJ, ¶ 11.) On January 27, 2005, Plaintiff saw his
11 Kaiser physician who placed him on a 20 pound weight restriction. (Def. Ex. 29.)

12 In an e-mail dated January 27, 2005, Plaintiff advised Mr. Morgan that he developed
13 another upper respiratory infection due to construction work at his office that released dust
14 that had been trapped in the ceiling. Plaintiff noted, "I'll file another DOL/OWCP Claim later
15 this month." (Def. Ex. 30.) Mr. Morgan expressed concern regarding Plaintiff's ability to
16 perform his full range of duties and discussed his concern with Branch Chief Don Meyerhoff.
17 (Def. Ex. 30.) Mr. Morgan recommended that Plaintiff's law enforcement authority be
18 removed (Def. Ex. 87 at 66:21-22.) Mr. Meyerhoff agreed and made the final decision to
19 remove Plaintiff's law enforcement authority. (*Id.* at 75:21-78:4.)

20 On January 31, 2005, before the VIP training started, Mr. Morgan excused Plaintiff
21 from participating in the training and revoked his law enforcement authority, securing
22 Plaintiff's vehicle and weapon. (Def. Ex. 87 at 86:1-16.)

23 On February 22, 2005, Plaintiff submitted a DMI which did not indicate any weight-
24 lifting restriction or any other restriction. (Def. Ex. 34.)

25
26 **D. Physical and Psychiatric Exams Ordered by FPS**

27 On March 1, 2005, Mr. Meyerhoff directed Plaintiff to submit to a fit-for-duty physical
28 examination and informed him that he would remain in non-law enforcement status until he

1 successfully passed the physical. (Def. Ex. 37.)

2 On March 4, 2005, Martha Montano, the FPS staff employee who coordinated
3 medical examinations for Region 9, contacted Plaintiff to schedule a fitness-for-duty (“FFD”)
4 examination. (Def. Ex. 38.)

5 On March 31, 2005, Ms. Montano sent Plaintiff two “Return to Work Clearance” forms,
6 which asked Plaintiff to list his medical condition and release medical records to
7 Comprehensive Health Services (“CHS”), the medical contracting service retained by FPS
8 to evaluate agency employees. (Def. Exs. 24-25, 82 at 361:14-25.) Plaintiff refused to sign
9 and return the forms. (Def. Ex. 42.)

10 On April 13, 2005, Ms. Montano requested that CHS schedule an Independent
11 Medical Examination (“IME”) for Plaintiff to evaluate him for fitness-for-duty. (Def. Ex. 45.)
12 Ms. Montano requested that a psychiatrist be available to examine Plaintiff. She described
13 Plaintiff’s physical ailments as consisting of pain in his arm, including his shoulder due to
14 excessive use of a computer mouse, and recurrent sinusitis and upper respiratory infection.
15 (Id.) Ms. Montano also described Plaintiff as suffering from “mental health issues”:

16 Mr. Scott appears to be apprehensive with heightened states of anxiety and
17 we are concerned with a potential of hostile encounters with the public.

18 There is a concern with his emotional stability as he has had a vexation about
19 an “FPS management conspiracy against him.” Mr. Scott expresses his
agitation, both, verbally and in writing, through various emails.

20 (Id.)

21 In response to Ms. Montano’s request, Dr. Lawrence Saladino, FPS’s Medical Review
22 Officer at CHS, recommended an “Incumbent Medical Exam and Psych IME.” (Def. Ex. 47.)

23 In a letter dated April 22, 2005, Mr. Morgan stated that there was insufficient
24 information to determine whether Plaintiff could perform full unrestricted work as an FPS
25 Criminal Investigator in light of his medical conditions, including recurring sinusitis, upper
26 respiratory infection, and injury to the upper arm. (Def. Ex. 49.) Mr. Morgan also expressed
27 concern regarding statements allegedly made by Plaintiff referring to a management
28 conspiracy: “These continued references bring to question your mental health status and
your ability to perform the full range of duties required for the position of an FPS Criminal

1 Investigator . . . due to what appears to be unresolved mental health problems.” (Id.) Mr.
2 Morgan stated that he was exercising FPS’s authority under 5 CFR 339.301 to require that
3 Plaintiff undergo a medical/psychological fitness-for-duty examination to be performed at
4 FPS’s expense by a doctor(s) selected by FPS in consultation with CHS.² (Id.)

5 Plaintiff was initially scheduled for the physical examination on May 6, 2005.
6 Beforehand, Plaintiff received copies of CHS examination request forms for an “Incumbent
7 Exam Age 45 and Older.” The examination did not take place due to a disagreement as to
8 the scope of the examination. Plaintiff communicated that he would not submit to a
9 comprehensive physical examination, but, rather, would only permit an examination
10 regarding his recurring sinusitis or rhinitis and repetitive motion injury to the upper right arm
11 and shoulder. (Def. Ex. 52; 81, 166:8-167:7.) It appears that Plaintiff took the position that
12 under FPS’s Periodic Medical Examination Program, his periodic comprehensive
13 examination was not due until his birthday. (Def. Ex. 86, 140:9-24; Ex. 50.)³

14 Plaintiff’s examination was rescheduled to May 24, 2005, however, once again,
15 Plaintiff refused to submit to a comprehensive physical examination. (Id.) No examination
16 was conducted. Shortly thereafter, Plaintiff’s psychiatric examination was canceled.

20 ² 5 C.F.R. § 339.103(b) provides that an agency may require an individual who
21 occupies a position which has medical standards or physical requirements to report for a
22 medical examination (1) prior to appointment or selection; (2) on a regularly, recurring,
23 periodic basis after appointment; or (3) whenever there is a direct question about an
24 employee’s continued capacity to meet the physical or medical requirements of a position.
The regulation also explains that an agency may order a psychiatric examination only when
... “[t]he result of a current general medical examination which the agency has the authority
to order under this section indicates no physical explanation for behavior or actions which
may affect the safe and efficient performance of the individual or others”

25 ³ Under the Periodic Medical Examination Program, implemented in 2000, FPS law
26 enforcement officers were supposed to be subjected to periodic medical examinations to
27 ensure that they met a “level of medical and psychological fitness commensurate with the
28 essential functions of their positions.” (Def. Ex. 6.) Under the Program, the frequency of the
medical exams was tied to the age of the employee. Employees 35 and under were to be
tested every 3 years, employees 36-44 years old were to be tested every 2 years, and
employees 45 and above were to be tested every year. Examinations were to be completed
within 30 days following the employee’s month of birth.

1 **E. Birth-Month Examination and Release**

2 On November 9, 2005, Plaintiff appeared for his birth-month examination at
3 Healthworks' San Diego facility. Plaintiff underwent a full physical examination. (Scott Decl.
4 ¶ 13.) Plaintiff was also provided with a medical questionnaire form ("GSA/FPS Pre-
5 Placement and Incumbent Medical Exam Form"). (Pl. Ex. 5.) Although Plaintiff completed
6 most of the questionnaire, he refused to answer the following questions and indicated that
7 they violated the ADA/Rehabilitation Act.

- 8 • Have you ever been treated for a mental condition? (If yes, specify when,
9 where, and give details)
- 10 • Have you ever had any illness, injury, or other condition (including learning
11 disability, attention deficit disorder, etc.) other than those already noted? (If
12 yes, specify when, where and give details)
- 13 • Have you consulted or been treated by clinics, physicians, healers, or other
14 practitioners within the past years for other than minor illness? (If yes, give
15 complete address of doctor, hospital, clinic, and details.)
- 16 • Have you ever received, is there pending, or have you applied for pension or
17 compensation for existing disability? (If yes, specify what kind, granted by
18 whom, and what amount, when, why)
- 19 • Have you or do you currently experience any of the following:
20 psychiatric/psychological consult, episodes of depression, periods of
21 nervousness? Please specify.
- 22 • List all medication (prescription and non-prescription) you are currently taking
23 with dosage and [f]requency, and reason below.

24 (Pl. Ex. 5 at 2, 4.) In response to the last question about his medication, Plaintiff noted: "I
25 am not taking any medications that would impair my ability to perform my position." (Pl. Ex.
26 5 at 4.)

27 The form also included the following release language:

28 I certify that I have reviewed the foregoing information supplied by me and that
it is true and complete to the best of my knowledge. I authorize any of the
doctors, hospitals, or clinics mentioned on these forms to furnish the
Government a complete transcript of my medical record for purposes of
processing my application for this employment or service. I authorize the
release of all medical information to the designated Agency Physician and on
a need to know basis, the designated Regional POC, Director Management
Analysis Division, Central Office POC, designated physician at FLET and HR
POC.

(P. Ex. 5 at 5.) Plaintiff crossed out this language and wrote: "I only authorize the release

1 of the results of this exam to authorized agency medical personnel. I do not authorize the
2 release of any other personal medical records.” (Id.)

3 In an e-mail dated November 28, 2005, Dr. Saladino stated that due to Plaintiff’s
4 failure to complete the questionnaire and the release, “the information available to me at the
5 present time will not be sufficient . . . to provide a medical determination letter.” (Def. Ex.
6 58.)

7
8 **F. 2006 Suspension**

9 On December 8, 2005, Rudy Negrete, Plaintiff’s new Branch Chief, directed Plaintiff
10 to complete a request for additional medical records and documentation by CHS. (Def. Ex.
11 59; 62.) Mr. Negrete directed Plaintiff to comply within 14 calendar days and warned him
12 that failure to comply may result in disciplinary action. (Id.) Plaintiff did not comply.

13 On April 17, 2006, Mr. Negrete advised Plaintiff that he was proposing a fourteen-day
14 suspension for failure to carry out his instructions regarding the unanswered questions and
15 release. (Def. Ex. 63.) On April 28, 2006, Plaintiff responded in writing to the proposed
16 suspension, explaining that the “FPS Incumbent Exam pursues confidential medical
17 information that is beyond the reasonable scope permitted by Equal Employment &
18 Opportunity Commission enforcement guidelines.” (Pl. Ex. 7.) On May 8, 2006, Joyce
19 Nesbitt-Simon, Region 9’s new Acting Deputy Director suspended Plaintiff from May 15 to
20 May 27, 2006, for failing to carry out instructions of a superior. (Def. Ex. 64.)

21
22 **G. 2007 Termination**

23 In November 2006, the FPS transferred to Region 10 (located in Seattle, Washington)
24 the authority to handle Plaintiff’s fitness for duty issues. (Def. Exs. 65-67.) On December
25 21, 2006, Tamra Hirano, Region 10’s Chief of Mission Support, ordered Plaintiff to respond
26 to the following questions, which were based on the questions Plaintiff had previously
27 refused to answer:

- 28 1. Have you ever had a learning disability or attention deficit disorder?

- 1 2. Have you ever been treated for a mental condition? (If yes, specify when, where
2 and give details)
- 3 3. Have you consulted or been treated by clinic, physicians, healers, or other
4 practitioners for other than minor illness? (If yes, give complete address of doctor,
5 hospital, clinic, and details)
- 6 4. Have you ever received, is there pending, or have you applied for pension or
7 compensation for existing disability? (If yes, specify what kind, granted by whom,
8 what amount, when and why)
- 9 5. Have you had a psychiatric/psychologic consult?
- 10 6. Have you had episodes of depression?
- 11 7. Have you had problems with anxiety?
- 12 8. Describe all medication (prescription and non-prescription) you are currently taking
13 with dosages, frequency, and reason for taking the medication.

14 (Def. Ex. 68.) Ms. Hirano ordered Plaintiff to respond to the questions no later than January
15 5, 2006.

16 Ms. Hirano also ordered Plaintiff to sign a release of information to Dr. Saladino. The
17 release stated:

18 I authorize the following individuals to receive the medical records described below:
19 Dr. Larry Saladino, his agents, employees and representatives

20 Information to be Released:

21 I authorize FPS Chief, Mission Support Tamra Hirano to release all medical records
22 in her possession pertaining to my workers' compensation injury that occurred on or
23 about September 8, 2004, relating to the right side of my neck, my right upper arm
24 and shoulder area.

25 Purpose:

26 To release records necessary to determine my fitness for duty as a Criminal
27 Investigator.

28 (Def. Ex. 68.)

Ms. Hirano explained that she was informed that Plaintiff's responses and release of
information were necessary in order for Dr. Saladino to make a medical determination about
Plaintiff's ability to perform the essential functions of his law enforcement position. (Def. Ex.
68.)

Plaintiff did not respond to the questions or sign the release. Accordingly, on January
25, 2007, Ms. Hirano proposed that he be removed from his position with the FPS as a

1 Criminal Investigator. (Def. Ex. 70.) On March 5, 2007, Stephen Slagowski, Region 10's
2 Acting Regional Director, agreed with Ms. Hirano's proposal and terminated Plaintiff. (Def.
3 Ex. 71.)

4 5 **II. STANDARD**

6 Summary judgment is appropriate under Rule 56 of the Federal Rules of Civil
7 Procedure if the moving party demonstrates the absence of a genuine issue of material fact
8 and entitlement to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322
9 (1986). A fact is material when, under the governing substantive law, it could affect the
10 outcome of the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Freeman
11 v. Arpaio, 125 F.3d 732, 735 (9th Cir. 1997). A dispute is genuine if a reasonable jury could
12 return a verdict for the nonmoving party. Anderson, 477 U.S. at 248.

13 A party seeking summary judgment always bears the initial burden of establishing the
14 absence of a genuine issue of material fact. Celotex, 477 U.S. at 323. The moving party
15 can satisfy this burden in two ways: (1) by presenting evidence that negates an essential
16 element of the nonmoving party's case; or (2) by demonstrating that the nonmoving party
17 failed to establish an essential element of the nonmoving party's case on which the
18 nonmoving party bears the burden of proving at trial. Id. at 322-23. "Disputes over irrelevant
19 or unnecessary facts will not preclude a grant of summary judgment." T.W. Elec. Serv., Inc.
20 v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987).

21 Once the moving party establishes the absence of genuine issues of material fact, the
22 burden shifts to the nonmoving party to set forth facts showing that a genuine issue of
23 disputed fact remains. Celotex, 477 U.S. at 314. The nonmoving party cannot oppose a
24 properly supported summary judgment motion by "rest[ing] on mere allegations or denials
25 of his pleadings." Anderson, 477 U.S. at 256. When ruling on a summary judgment motion,
26 the court must view all inferences drawn from the underlying facts in the light most favorable
27 to the nonmoving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,
28 587 (1986).

1 **III. DISCUSSION**

2 Plaintiff has sued Defendant for (1) disability discrimination in violation of the
3 Rehabilitation Act of 1973, 29 U.S.C. § 794(a); (2) retaliation; and (3) age discrimination in
4 violation of the Age Discrimination in Employment Act of 1967 (“ADEA”), 29 U.S.C. § 633a.
5 Defendant moves for summary judgment on all of the claims. Plaintiff moves for partial
6 summary judgment on the following issues: (1) whether Defendant violated the Rehabilitation
7 Act/Americans With Disabilities Act (“ADA”) by making impermissible disability-related
8 inquiries; (2) whether Defendant retaliated against Plaintiff in violation of the Rehabilitation
9 Act/ADA by suspending him and terminating him for opposing Defendant’s impermissible
10 disability-related inquiries; and (3) whether FPS’s Periodic Medical Examination Program
11 violated the ADEA. The Court will analyze each of Plaintiff’s claims below.

12
13 **A. Impermissible Disability-Related Inquiries**

14 Plaintiff contends that the questions he refused to answer on the medical exam form
15 and the questions posed by Ms. Hirano, which were modeled on the questions he had
16 previously refused to answer, were impermissible disability-related inquiries that ran afoul
17 of the Rehabilitation Act and ADA. The Court agrees with Plaintiff.

18 The ADA provides:

19 Examination and inquiry

20 (A) Prohibited examinations and inquiries

21 A covered entity shall not require a medical examination
22 and shall not make inquiries of an employee as to whether such
23 employee is an individual with a disability or as to the nature or
severity of the disability, unless such examination or inquiry is
shown to be job-related and consistent with business necessity.

24 (B) Acceptable examinations and inquiries

25 A covered entity may conduct voluntary medical
26 examinations, including voluntary medical histories, which are
27 part of an employee health program available to employees at
that work site. A covered entity may make inquiries into the
ability of an employee to perform job-related functions.

28

1 42 U.S.C. § 12112(d)(4).⁴

2 Under Ninth Circuit law, an individual does not have to be a “qualified individual with
3 a disability,” as defined in 42 U.S.C. § 12111(8), to have standing to invoke the ADA’s
4 protection against improper medical examinations and inquiries. Fredenburg v. Contra
5 Costa County Dept. of Health Serv., 172 F.3d 1176, 1181-82 (9th Cir. 1999).

6 Plaintiff spends much of his brief arguing that his exam was a “periodic exam” as
7 opposed to a “fitness-for-duty” exam.⁵ However, the Court is unable to conclude that the
8 exam was one type of exam and not the other. Although the exam was a “birth-month
9 exam,” it is unclear whether it would have been scheduled absent Plaintiff’s medical issues,
10 Defendant’s concerns regarding Plaintiff’s fitness for duty, and the difficulties Defendant
11 encountered in attempting to have Plaintiff examined. Prior to November 2005, Plaintiff did
12 not undergo a birth-month examination even though, under the Program guidelines, he
13 would have been due for an examination in November 2003 and November 2004. (See Def.
14 Mem. of P & A in support of MSJ at 23-24.) Thus, the Court cannot say that the exam was
15 a “periodic exam” and not a “fitness-for-duty” exam.

16 At any rate, in this case, the characterization of the exam as a “periodic exam” or
17 “fitness-for-duty” exam makes no difference to the outcome of the case. Both periodic
18 physicals and fitness-for-duty exams are permissible as long as they are “job related and
19 consistent with business necessity.” 29 C.F.R. Pt. 1630, App., § 1630.14(c) (emphasis
20 added). The Ninth Circuit has stated that “[t]he business necessity standard is quite high,
21 and is not [to be] confused with mere expediency.” Cripe v. City of San Jose, 261 F.3d 877,
22 890 (9th Cir. 2001). The burden of establishing “business necessity” rests on the employer.

24 ⁴ The Rehabilitation Act, which governs here due to the federal defendant,
25 incorporates by reference the ADA provisions regarding medical examinations and inquiries.
26 29 U.S.C. §§ 791(g), 794(d). See also Greer v. O’Neill, 2003 WL 25653036 (D.D.C. Sept.
25, 2003).

27 ⁵ In early 2005, the FPS clarified the procedures for a “return-to-duty” exam, a type
28 of “fitness-for-duty” exam. (Def. Ex. 23.) Under the procedures, a return-to-duty exam
should be scheduled through CHS when an employee returns to work after an extended
illness or injury. Dr. Saladino then reviews the available information, contacts the
employee’s physician, and determines whether an IME is necessary.

1 Fredenburg, 172 F.3d at 1182.

2 The Second Circuit has held that in proving “business necessity,” an employer must
3 first show that the asserted “business necessity” is vital to the business. Conroy v. New York
4 State Dept. of Correctional Serv., 33 F.3d 88, 97 (2d Cir. 2003). Business necessities may
5 include ensuring workplace safety or curbing egregious absenteeism. The employer must
6 then show that “the examination or inquiry genuinely serves the asserted business necessity
7 and that the request is no broader or more intrusive than necessary.” Id. at 98. “The
8 employer need not show that the examination or inquiry is the only way of achieving a
9 business necessity, but the examination or inquiry must be a reasonably effective method
10 of achieving the employer’s goal.” Id.

11 There is no question that ensuring that an armed officer can perform his job properly
12 and safely is a business necessity. See, e.g., Watson v. City of Miami Beach, 117 F.3d 932
13 (11th Cir. 1999) (holding that City acted properly in ordering a fitness-for-duty examination
14 where a department reasonably perceived plaintiff, an armed police officer, to be mildly
15 paranoid, hostile, and oppositional); Pennsylvania State Troopers Ass’n v. Miller, 621 F.
16 Supp. 2d 246 (M.D. Pa. 2008) (police asserted business necessity of detecting latent injuries
17 that could impair members’ job performance). The issue in this case is whether the
18 challenged questions were a reasonably effective method of achieving this goal.

19 In discussing return-to-duty examinations and periodic examinations, the EEOC’s
20 Compliance Manual stresses that the scope of the exams be limited in scope to determining
21 whether the employee *is currently able to perform the essential functions of his or her job*.
22 The EEOC explains that if an employer has a reasonable belief that an employee’s present
23 ability to perform essential job functions will be impaired by a medical condition or that s/he
24 will pose a direct threat due to a medical condition, the employer may make disability-related
25 inquiries or require the employee to submit to a medical exam. “Any inquiries or
26 examination, however, must be limited in scope to what is needed to make an assessment
27 of the employee’s ability to work. Usually, inquiries or examinations related to the specific
28 medical condition for which the employee took leave will be all that is warranted. The

1 employer may not use the employee's leave as a justification for making far-ranging
2 disability-related inquiries or requiring an unrelated medical examination." EEOC
3 Compliance Man. (BNA), 902:0190 (November, 2002).

4 Similarly, periodic medical examinations of employees in positions affecting public
5 safety are permissible *if narrowly tailored to address specific job-related concerns.* Id. at
6 902:0190. A fire department could require its employees to have a comprehensive visual
7 examination every two years and to have an annual electrocardiogram because visual acuity
8 and a healthy heart are necessary for firefighters to perform their job without posing a threat.
9 Id. In contrast, a police department may not periodically test all of its officers to determine
10 whether they are HIV-positive, because "a diagnosis of that condition alone is not likely to
11 result in an inability or impaired ability to perform essential functions that would result in a
12 direct threat." Id.

13 Whether Plaintiff's exam is properly characterized as a "periodic exam" or "fitness-for-
14 duty exam," the exam went beyond its proper scope in requiring Plaintiff to answer the
15 questions at issue. Upon review of the questions, the Court concludes that the questions
16 were disability-related inquiries that were not narrowly tailored to assessing whether Plaintiff
17 could perform the essential functions of his job. The questions Plaintiff refused to answer
18 on the medical exam form (which are substantially the same as those posed by Ms. Hirano)
19 are:

- 20 • Have you ever been treated for a mental condition? (If yes, specify when, where, and give details)
- 21 • Have you ever had any illness, injury, or other condition (including learning disability, attention deficit disorder, etc.) other than those already noted? (If
22 yes, specify when, where and give details)
- 23 • Have you consulted or been treated by clinics, physicians, healers, or other
24 practitioners within the past years for other than minor illness? (If yes, give complete address of doctor, hospital, clinic, and details.)
- 25 • Have you ever received, is there pending, or have you applied for pension or
26 compensation for existing disability? (If yes, specify what kind, granted by whom, and what amount, when, why)
- 27 • Have you or do you currently experience any of the following:
28 psychiatric/psychological consult, episodes of depression, periods of nervousness? Please specify.
- List all medication (prescription and non-prescription) you are currently taking with dosage and [f]requency, and reason below.

1 These questions clearly qualify as “disability-related inquiries” because they are likely
2 to elicit information about a disability.⁶ All of the questions broadly seek information about
3 illnesses, mental conditions, or other impairments Plaintiff has or had in the past.

4 The questions were not narrowly tailored to address Plaintiff’s current ability to work.
5 The first question, which asked if Plaintiff had ever been treated for a mental condition, was
6 not limited in time and would include, for example, a childhood phobia or a long-resolved
7 eating disorder. The second and third questions are even broader because they are not
8 limited to mental conditions and would include, for example, a past episode of appendicitis
9 or a bad bout of eczema. The fourth question is ambiguous and overbroad in that it does
10 not define “disability” and does not distinguish between job-related and non-job-related
11 “disabilities.” The fifth question is not limited in time, does not address the severity of the
12 “nervousness” or “depression,” and extends to any type of psychiatric/ psychological consult,
13 such as grief counseling. The sixth question, which asks about all types of drugs, including
14 prescription and non-prescription, is intrusive and not tailored to determining whether an
15 employee is using a drug that may affect his ability to do his job.⁷ In answering this question,
16 a person would have to reveal whether they were taking *any* medication, including Advil, birth
17 control, or Viagra. Given the scope of these questions, Defendant cannot satisfy its burden
18 of establishing that the inquiries were “no broader or more intrusive than necessary” to
19 accomplish its goal of ensuring that Plaintiff could still safely do his job.

20 Defendant claims that it had cause to be concerned about Plaintiff’s mental condition
21 as a result of statements Plaintiff made suggesting his belief in an FPS management
22 conspiracy against him, and acts of insubordination. (Def. Mem. of P & A in Support of MSJ
23 at 39-40.) Even if this is so, the broad questions regarding whether Plaintiff has at any time

24 ⁶ The Compliance Manual gives as examples of “disability-related inquiries,” asking
25 an employee whether he is taking prescription drugs or medication, asking about an
26 employee’s prior workers’ compensation history, and asking an employee a broad question
27 about his impairments such as “What impairments do you have?” EEOC Compliance Man.
902:0183.

28 ⁷ The EEOC Compliance Manual explains that although a police department could
require armed officers to report when they are taking medications *that may affect their ability*
to use a firearm or to perform other essential functions of their job, an employer generally
may not ask employees what prescription medications they are taking. EEOC Compliance
Man. 902:0187-88.

1 received treatment for any mental conditions and whether Plaintiff has at any time
2 experience(d) anxiety or depression would not assist Defendant in determining whether
3 Plaintiff was capable of performing his job. A properly tailored mental examination may have
4 been permissible if Defendant had a reasonable concern about Plaintiff's mental health.
5 However, Defendant did not require Plaintiff to submit to a mental exam upon returning from
6 leave for his adjustment disorder with mixed depression and anxiety, canceled its request
7 for a psychiatric exam in 2005, and did not further pursue its request for a mental exam.

8 Relying on Conrad v. Bd. of Johnson County Comm'rs, 237 F. Supp. 2d 1204 (D.
9 Kan. 2002), Defendant argues that it cannot be held liable for inquiries made by medical
10 contractors. However, Conrad is distinguishable. In Conrad, the plaintiff objected to
11 questions regarding assault and alcoholism that were asked as part of the MMPI-2 test.
12 Outside health professionals chose to administer the test and there was no evidence that
13 the county defendant had any idea that such questions would be asked. Here, the questions
14 were part of a form titled "GSA/FPS Pre-placement and Incumbent Medical Exam Form."
15 It is unlikely that FPS had no knowledge of this form. Moreover, in this case, after Plaintiff
16 refused to answer the questions, FPS insisted that he answer the questions or be subjected
17 to discipline and even paraphrased the questions for him. Defendant cannot use CHS to
18 shield itself from liability.

19 The Court emphasizes that it does not hold that a law enforcement agency can not
20 make inquiries regarding an employee's mental health or subject the employee to a mental
21 examination. The Court's holding is limited to the questions on the medical exam form and
22 the questions posed by Ms. Hirano, which were overbroad in scope and in time. These
23 disability-related inquiries were not narrowly tailored to evaluate whether Plaintiff could
24 perform the essential functions of the job and violated 42 U.S.C. § 12112(d)(4)(A) and the
25 Rehabilitation Act. Therefore, Plaintiff's motion for summary judgment is granted as to this
26 claim.

27

28

1 **B. Disability Discrimination**

2 Plaintiff claims that he suffered disability discrimination in violation of the
3 Rehabilitation Act. The adverse employment actions he claims he suffered as a result of the
4 disability discrimination include the loss of his law enforcement authority, his suspension,
5 and his termination. Defendant is entitled to summary judgment on this claim because
6 Plaintiff has not shown that he was “disabled” within the meaning of the Rehabilitation Act.

7 The standards used to determine liability for discrimination under the ADA are
8 incorporated in the Rehabilitation Act. 29 U.S.C. § 749(d); 29 C.F.R. § 1614.203. To state
9 a prima facie case of disability discrimination under the Rehabilitation Act, the plaintiff must
10 demonstrate that (1) he is a person with a disability; (2) who is otherwise qualified for
11 employment; and (3) suffered discrimination because of his disability. Walton v. U.S.
12 Marshals Serv., 492 F.3d 998, 1005 (9th Cir. 2007).

13 The ADA provides:

14 (1) Disability

15 The term “disability” means, with respect to an individual--

16 (A) a physical or mental impairment that substantially limits one
17 or more major life activities of such individual;

18 (B) a record of such an impairment; or

19 (C) being regarded as having such an impairment (as described in
20 paragraph (3)).

21 (2) Major life activities

22 (A) In general

23 For purposes of paragraph (1), major life activities include, but
24 are not limited to, caring for oneself, performing manual tasks,
25 seeing, hearing, eating, sleeping, walking, standing, lifting,
26 bending, speaking, breathing, learning, reading, concentrating,
27 thinking, communicating, and working.

28 42 U.S.C. § 12102.

Plaintiff does not claim that he is disabled, but, rather, that the FPS regarded him as
disabled. A person is “regarded as” having a disability “if the individual establishes that he
or she has been subjected to an action prohibited under this chapter because of an actual

1 or perceived physical or mental impairment whether or not the impairment limits or is
2 perceived to limit a major life activity.” 42 U.S.C. § 12102(3)(A).

3 The EEOC’s regulations explain:

4 Is regarded as having such an impairment means:

5 (1) Has a physical or mental impairment that does not substantially limit major
6 life activities but is treated by a covered entity as constituting such limitation;

7 (2) Has a physical or mental impairment that substantially limits major life
8 activities only as a result of the attitudes of others toward such impairment; or

9 (3) Has none of the impairments defined in paragraph (h) (1) or (2) of this
10 section but is treated by a covered entity as having a substantially limiting
11 impairment.

12 29 C.F.R. § 1630.2(l).

13 The Supreme Court explained, “[I]t is necessary that a covered entity entertain
14 misperceptions about the individual – it must believe either that one has a substantially
15 limiting impairment that one does not have or that one has a substantially limiting impairment
16 when, in fact, the impairment is not so limiting.” Sutton v. United Air Lines, Inc., 527 U.S.
17 471, 489 (1999). The Ninth Circuit requires that a plaintiff alleging a “regarded as” claim
18 “provide evidence of the employer’s ‘misperception,’ or subjective belief that the plaintiff is
19 substantially impaired.” Walton, 492 F.3d at 1006. A plaintiff who does not have direct
20 evidence of the employer’s subjective belief that the plaintiff is substantially limited in a major
21 life activity must provide evidence that the impairment imputed to the plaintiff is, objectively,
22 a substantially limiting impairment. Id. at 1006.

23 Plaintiff’s main argument in support of his “regarded as” claim is that Mr. Morgan
24 “initiated all of the salient activities targeting Agent Scott” and “orchestrat[ed] a grossly
25 disingenuous campaign to discredit Agent Scott with loose and unsubstantiated allegations
26 about Agent Scott’s mental health.” (Pl. Opp. to MSJ at 2.) According to Ruben Ballestros,
27 who was a Senior Special Agent/Criminal Investigator and Firearms Instructor with FPS in
28 2005, prior to the VIP Protection training, Ballestros talked to Morgan to obtain a head count.
(Pl. Ex. 27 in Opp. to MSJ, ¶ 23.) Morgan told Ballestros that he did not want Plaintiff to be
included in the training, explaining, “I don’t want him there because he’s a f___ nut, he’s

1 crazy. He's got some mental issues, and I don't want a crazy man running around with a
2 machine gun, getting in and out of a helicopter, getting us all killed. The guy is a ticking time
3 bomb, waiting to go off." (Id. at ¶ 24.) When Ballestros asked Morgan why he would say
4 such a thing, Morgan indicated that he wanted to get back at Plaintiff for personal reasons.
5 (Id. at ¶ 25.) On the Friday before the VIP training commenced, Ballestros asked Morgan
6 if there was a genuine safety issue with respect to Plaintiff. (Id. at ¶ 26.) Morgan did not say
7 that Plaintiff actually presented a danger, but, rather, reiterated that he didn't want Plaintiff
8 around because of a personal grudge. (Id.) Morgan explained that Plaintiff had humiliated
9 the Morgan family by not taking a deal negotiated by Morgan's brother-in-law during an
10 MSPB proceeding several years earlier. (Id. at ¶¶ 25, 26, 41, 43, 44.)

11 Agent John Hartman also recalls Morgan using the word "crazy" in reference to
12 Plaintiff. (Pl. Ex. 14 in Opp. to MSJ at 84:14-15.) Morgan did not elaborate on what he
13 meant by calling Plaintiff crazy, but Hartman inferred that it had something to do with
14 Morgan's brother-in-law. (Id. at 84:19-24.)

15 The problem with Plaintiff's theory of liability is that Morgan apparently did not actually
16 *believe* that Plaintiff was disabled as a result of a mental condition. Plaintiff's own papers
17 explain that although Morgan called Plaintiff "crazy" and "nuts," "he didn't actually believe it."
18 (Pl. Opp. to MSJ at 30:4-5.) In Sullivan v. River Valley School Dist., 197 F.3d 804 (6th Cir.
19 1999), the Sixth Circuit explained:

20 The ADA simply does not protect an employee from an employer's knowingly
21 false accusation of having a disability. Rather, it protects employees from
22 employers who mistakenly treat them as if they have a disability. An
23 employee's lack of a disability does not shield an employer from liability for
24 discriminatory conduct based on a mistaken but genuine belief that an
25 employee is disabled, *but the ADA does not proscribe deliberately fostering a
false impression of disability. It only protects an employee who actually has or
is actually believed to have a disability. As another court has put it recently:
"The ADA prohibits discrimination, not action taken using discrimination as a
pretext."* Taylor v. Pathmark Stores, Inc., 177 F.3d 180, 195 n. 10 (3d
Cir.1999).

26 Id. at 814.

27 According to Plaintiff's evidence and argument, Morgan had a personal vendetta
28 against Plaintiff and, as a result, disparaged him by making comments about his mental

1 health. Morgan's alleged actions, while reprehensible, do not violate the ADA.

2 Plaintiff argues that Morgan's "poisonous gospel" that Plaintiff was a "nut" spread as
3 far as FPS Headquarters in Washington, D.C. Ballestros recalls how in early 2006, he met
4 with Mr. Negrete and Regional Director Dean Hunter to request that Plaintiff's law
5 enforcement authority be reinstated. (Pl. Ex. 27 in Opp. to MSJ, ¶ 62.) Hunter responded,
6 "I've heard about Scott, I don't see why he can't be reinstated. But this goes all the way back
7 to D.C. He's f____, and I'm too close to the top. I have plans. I'm not going to be the one
8 to un-f____ him." (*Id.* at ¶ 63.) When Ballestros asked Hunter why Plaintiff was "f____,"
9 Hunter responded that he had heard from D.C., Mr. Morgan, and Russ Oase, that Plaintiff
10 was a "nut." (*Id.* at 64-65.)

11 Hunter's vague statement that he heard from "D.C." that Plaintiff was a "nut" is
12 insufficient to establish that the decision-makers in this case were motivated by a belief that
13 Plaintiff is disabled. There is no evidence that Mr. Negrete, Ms. Nesbitt-Simon, Ms. Hirano,
14 or Mr. Slagowski had heard any rumors about Plaintiff being mentally unstable.

15 Plaintiff argues that Region 10 was aware that Plaintiff had not been medically-
16 cleared to return to duty, and contends, "Every action taken related to the basic question of
17 find[ing] out if Scott could be qualified to return him to work, or to remove him from federal
18 service." (Pl. Opp. to MSJ at 20:9-14.) However, the fact that an employer questions
19 whether an individual can perform a specific job does not mean that the employer regards
20 the individual as disabled. The term "substantially limits" with respect to the major life activity
21 of "working" means "significantly restricted in the ability to perform either a class of jobs or
22 a broad range of jobs in various classes as compared to the average person having
23 comparable training, skills, and abilities. The inability to perform a single, particular job does
24 not constitute a substantial limitation in the major life activity of working." 29 C.F.R. §
25 1630.2(j)(3)(i).

26 An employer's perception that health problems *may* be adversely affecting an
27 employee's job performance, resulting in a request that an employee obtain a medical exam,
28 does not in and of itself prove perception of a disability. Sullivan, 197 F.3d at 811. "Doubts

1 alone do not demonstrate that the employee was held in any particular regard.” Tice v.
2 Centre Area Transp. Auth., 247 F.3d 506, 516 (3d Cir. 2001). “[E]ven an improper IME
3 request, without more, might not be sufficient to demonstrate that an employee was
4 ‘regarded as’ disabled.” Id. at 515.

5 By the time Mr. Negrete, Ms. Nesbitt-Simon, Ms. Hirano, and Mr. Slagowski became
6 involved in the events at issue, crucial decisions had already been made regarding the
7 removal of Plaintiff’s law enforcement authority and the necessity of Plaintiff submitting to
8 a medical examination. As Plaintiff explains, the initial actions of Morgan set the stage for
9 all subsequent agency actions and decisions, and restricted the choices of all subsequent
10 decision makers. (Pl. Opp. to MSJ at 20:27-21:6.) Mr. Negrete, Ms. Nesbitt-Simon, Ms.
11 Hirano, and Mr. Slagowski made their decisions based on their knowledge that Plaintiff
12 submitted to a medical examination, Plaintiff refused to answer certain questions in
13 connection with the exam, and Dr. Saladino opined that he was unable to make a medical
14 determination about Plaintiff’s ability to perform his job without the information. Based on
15 these facts, these decision-makers directed Plaintiff to comply and disciplined him for failing
16 to do so. There is no evidence that they believed that Plaintiff was in fact significantly
17 restricted in his ability to perform a class of jobs or a broad range of jobs in various classes.

18 Plaintiff has failed to raise a genuine issue of material fact with respect to whether he
19 was “regarded as” disabled by the decision-makers at FPS. Plaintiff is not a “person with a
20 disability.” Therefore, Defendant’s motion for summary judgment is granted as to Plaintiff’s
21 disability discrimination claim.

22

23 **C. Retaliation**

24 1. ADA/Rehabilitation Act

25 Plaintiff contends that he was disciplined and ultimately terminated in retaliation for
26 the exercise of his rights under the ADA/Rehabilitation Act. The Court finds that there are
27 triable issues with respect to this claim that preclude summary judgment either in favor or
28 against Plaintiff.

1 The Rehabilitation Act incorporates the ADA's prohibition against retaliation. 29
2 U.S.C. § 794(d). The pertinent provision of the ADA provides: "No person shall discriminate
3 against any individual because such individual has opposed any act or practice made
4 unlawful by this chapter or because such individual made a charge, testified, assisted, or
5 participated in any manner in an investigation, proceeding, or hearing under this chapter."
6 42 U.S.C. § 12203(a).

7 To establish a prima facie case of retaliation under the ADA, the employee must
8 establish that: (1) he or she engaged in a protected activity; (2) suffered an adverse
9 employment action; and (3) there was a causal link between the two. Pardi v. Kaiser
10 Foundation Hospitals, 389 F.3d 840, 849 (9th Cir. 2004).

11 Here, Plaintiff asserted his rights under the ADA/Rehabilitation Act by refusing to
12 answer the disability-related inquiries on the medical exam form. Plaintiff's valid assertion
13 of his rights was a protected activity. Plaintiff was suspended and ultimately terminated
14 because he refused to answer the questions and sign the releases provided to him.
15 Therefore, there was a causal link between his protected activity and the adverse
16 employment actions.

17 Defendant counters that Plaintiff would have been suspended and terminated even
18 if he had answered the questions because he refused to sign the releases. In retaliation
19 cases under the ADA as well as under Title VII, the employer can assert a mixed-motive
20 defense. See Metoyer v. Chassman, 504 F.3d 919, 939-40 (9th Cir. 2007); McNutt v. Bd.
21 or Trs. of the Univ. of Ill., 141 F.3d 706, 708-09 (7th Cir. 1998); Roberts v. Rayonier, Inc.,
22 135 Fed. Appx. 351 (11th Cir. 2005); Milner v. Lee County, Alabama, 2006 WL 1361147
23 (M.D. Ala., May 16, 2006). Under this defense, an employer can avoid liability for retaliation
24 by showing that it would have made the same decision absent any impermissible motivation.
25 Metoyer, 141 F.3d at 939-40.

26 Defendant contends that Plaintiff would have been suspended and terminated for
27 failure to sign the releases alone. Prior to his suspension and termination, Plaintiff was
28

1 ordered to respond to the unanswered questions and sign the releases.⁸ Ms. Hirano states
2 that she would have recommended Plaintiff's termination for failure to release the medical
3 records as ordered even if he had complied with the order to answer the questions. (Def.
4 Ex. 84, 96:18-97:6.) Mr. Slagowski confirms that one of the direct orders was to release the
5 medical records. (Def. Ex. 93, 39:11-17.)

6 The Court finds that Defendant has not presented sufficient evidence to support
7 summary judgment based on the mixed-motive defense. "[S]ince the defendant bears the
8 burden of proof on the mixed-motive defense, 'the defendant [] must vault a very high
9 hurdle' to obtain judgment as a matter of law." Metoyer, 504 F.3d at 940 (quoting
10 Settlegoode v. Portland Public Schools, 371 F.3d 503, 512 (9th Cir. 2004)). Although Ms.
11 Hirano states she would have recommended Plaintiff's termination for failure to release the
12 medical records alone, it is unclear whether the matter would have ever been transferred to
13 Region 10 absent the dispute over Plaintiff's refusal to answer the questions. It is possible
14 that Plaintiff's protected activity of refusing to answer the questions was pivotal in driving the
15 issue of Plaintiff's failure to comply with requests/orders forward. The Court questions
16 whether the situation would have ever snowballed to the point of disciplinary action if Plaintiff
17 had answered the questions in the first instance and modification of the release was the only
18 issue raised in relation to the examination.

19 Accordingly, the Court denies Plaintiff's motion for partial summary judgment and
20 _____

21 ⁸ Plaintiff suggests that the releases were overbroad and violated his privacy rights.
22 The Court does not agree. The release on the medical form provided, "I authorize any of the
23 doctors, hospitals, or clinics mentioned on these forms to furnish the Government a
24 complete transcript of my medical record for purposes of processing my application for this
25 employment or service. I authorize the release of all medical information to the designated
26 Agency Physician" Plaintiff did not mention any doctors, hospitals, or clinics on the
27 form, therefore, Plaintiff's signing of the release would not have authorized Defendant to
28 obtain medical records from any of Plaintiff's medical providers. As for the second part of
the release, the medical information would have been limited to the information already in
Defendant's possession - i.e., medical records previously submitted in connection with
medical work restrictions or medical leave. The release Ms. Hirano ordered Plaintiff to sign
was even narrower - "I authorize FPS Chief, Mission Support Tamra Hirano to release all
medical records in her possession pertaining to my workers' compensation injury that
occurred on or about September 8, 2004, relating to the right side of my neck, my right upper
arm and shoulder area." Plaintiff argues that it was unclear to him what medical records
were in Ms. Hirano's possession. However, this is an issue Plaintiff could have clarified with
Ms. Hirano.

1 Defendant's motion for summary judgment on Plaintiff's claim for retaliation under the
2 Rehabilitation Act/ADA. Whether Plaintiff would have been suspended and terminated even
3 if he had answered the disability-related inquiries is for the trier of fact to decide.

4
5 2. Title VII

6 It appears that Plaintiff also alleges retaliation in violation of Title VII based on the
7 actions of Arthur Clabby. During his deposition, Clabby admitted that he authored the April
8 22, 2005 letter, in which Mr. Morgan required that Plaintiff undergo a psychological
9 examination (Clabby was Region 9 Chief of Staff at the time). (Pl. Ex. 28 in Opp. to MSJ,
10 96:13-24.) Several years earlier, Clabby was investigated by the Office of the Inspector
11 General ("OIG") for possessing an unauthorized badge and credentials. (Id. at 23:19-26:25)
12 Clabby later heard that Plaintiff had filed a complaint with the OIG regarding unauthorized
13 badges and credentials. (Id. at 45:2-46:20.) Sometime after the OIG investigation, Plaintiff
14 filed a complaint that FPS management had retaliated against him by, among other things,
15 boarding up his office door. (Pl. Ex. 25, ¶¶ 6, 7.) The Office of Special Counsel investigated
16 Plaintiff's complaint and verified the substance of Plaintiff's allegation. (Pl. Ex. 26.) In his
17 deposition, Clabby stated that he believed that Scott filed an "EEO complaint" for retaliation
18 stemming from the unauthorized credential incident. (Pl. Ex. 28 in Opp. to MSJ, 125:15-20.)

19 Plaintiff contends that Clabby became involved in FPS's attempt to subject him to a
20 psychological examination to retaliate against him for being involved in *perceived* EEO
21 activity. (Pl. Opp. to MSJ at 21:15.) The Court finds that the facts presented by Plaintiff do
22 not support a claim for retaliation under Title VII.

23 Title VII provides that "[i]t shall be an unlawful employment practice for an employer
24 to discriminate against any of his employees . . . because he has opposed any practice
25 made an unlawful employment practice by this subchapter." 42 U.S.C. § 2000e-3(a). To
26 establish a prima facie case of retaliation, an employee must show that (1) he has engaged
27 in statutorily protected expression; (2) he has suffered an adverse employment action; and
28 (3) there is a causal link between the protected expression and the adverse action. EEOC

1 v. Dinuba Medical Clinic, 222 F.3d 580, 586 (9th Cir. 2000). This provision “protects only
2 those employees who oppose what they reasonably perceive as discrimination *under the*
3 *Act.*” Learned v. City of Bellevue, 860 F.2d 928, 932 (9th Cir. 1988). See also Silver v. KCA,
4 Inc., 586 F.2d 138, 142 (9th Cir.1978) (“under the clear language of the ‘opposition’ clause
5 of [section] 704(a), a case of retaliation has not been made out unless the ‘retaliation’ relates
6 to the employee's opposition to a [section] 703 violation”).

7 Here, Plaintiff does not allege that he opposed discrimination based upon race, color,
8 religion, sex, or national origin. If Clabby mistakenly thought Plaintiff was opposing
9 discrimination prohibited by Title VII, Plaintiff arguably would have a retaliation claim under
10 Title VII. Cf. Fogelman v. Mercy Hopsital, Inc., 283 F.3d 561 (3d Cir. 2002) (holding that
11 plaintiff could bring an ADA retaliation claim based on the theory that the defendant
12 employer mistakenly believed that plaintiff was assisting his father in connection with the
13 father’s ADA claims against the employer). However, there is no evidence that Clabby
14 believed Plaintiff was opposing discrimination prohibited by Title VII. Clabby simply appears
15 to be confused as to what an “EEO Complaint” is. Clabby’s misunderstanding regarding the
16 definition of an “EEO Complaint” does not support a claim for retaliation under Title VII.

17 Plaintiff has not presented any other evidence in support of a retaliation claim in
18 violation of Title VII. Therefore, to the extent Plaintiff claims retaliation in violation of Title
19 VII, Defendant’s motion for summary judgment is granted as to this claim.

20
21 **D. ADEA**

22 Plaintiff contends that Defendant’s Periodic Medical Examination Program violated the
23 ADEA because, under the program’s guidelines, the frequency of the exams was tied to the
24 age of the incumbent employee. Under the guidelines, the frequency of the examinations
25 was to be every 3 years for employees 35 and under, every 2 years for employees 36-44,
26 and every year for employees 45 and above. (Def. Ex. 6.)

27 However, Plaintiff has not established that the allegedly discriminatory policy
28 regarding the frequency of exams was applied to him or that he was subjected to a birth-

1 month examination on account of his age. Under the guidelines, Plaintiff, who was 48 when
2 he was promoted in May 2003, should have been examined in November 2003, November
3 2004, and November 2005. (Def. Ex. 6 at 2.) However, Plaintiff did not submit to an initial
4 examination until November 2005. (Def. Ex. 81,135:5-14, 169:7-16; 170:22-171:6.)

5 Indeed, it is questionable whether the guidelines' frequency schedule was followed
6 at all. Ruben Ballestros explained that Plaintiff's birth-month exam in November 2005, "was
7 the first time I had heard any reference to an FPS incumbent medical exam since the
8 program's inception in 2000. . . . I had never been asked to submit to an Incumbent exam
9 up to that point, and I was not aware of any other eligible agent or officer who had either."
10 (Pl. Ex. 27 in Opp. to MSJ ¶ 42.)

11 There is no evidence that employees 45 and above were being examined more
12 frequently than employees under 45. There is also no evidence that Plaintiff in particular
13 was directed to submit to a birth-month exam in 2005 because of his age. The evidence
14 before the Court indicates that Plaintiff was singled out for a birth-month exam in 2005
15 because of the issues pertaining to his fitness for duty. It seems that Defendant would have
16 required Plaintiff to submit to a birth-month examination even if he had been 35 years old
17 (the examination arguably would have been permissible under the guidelines because it was
18 Plaintiff's third birthday after his promotion and Plaintiff had not yet submitted to an exam).

19 Plaintiff has not established that he was required to submit to his birth-month exam
20 as part of the age-based frequency schedule set forth under the guidelines or was otherwise
21 discriminated against based on his age. Therefore, the Court grants Defendant's motion for
22 summary judgment as to this claim.

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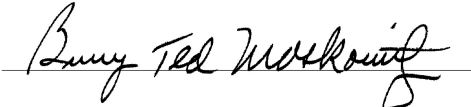
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IV. CONCLUSION

For the reasons discussed above, Defendant’s Motion for Partial Summary Judgment is **GRANTED IN PART** and **DENIED IN PART**, and Plaintiff’s Motion for Partial Summary Judgment is **GRANTED IN PART** and **DENIED IN PART**. The Court **GRANTS** summary judgment in favor of Defendant on Plaintiff’s claims for disability discrimination under the Rehabilitation Act/ADA, retaliation under Title VII, and violation of the ADEA. The Court **GRANTS** summary judgment in favor of Plaintiff on Plaintiff’s claim for violation of the Rehabilitation Act/ADA based on disability-related inquiries. Plaintiff’s and Defendant’s motions are **DENIED** as to Plaintiff’s claim for retaliation under the Rehabilitation Act/ADA. **IT IS SO ORDERED.**

DATED: May 3, 2010


Honorable Barry Ted Moskowitz
United States District Judge