

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

MICHAEL LEITERMAN, :
1 Peace Pipe Lane :
Fredericksburg, VA 22401 :

Plaintiff, :

v. :

JANET NAPOLITANO, Secretary, :
UNITED STATES DEPARTMENT OF :
HOMELAND SECURITY, :
U.S. Department of Homeland Security :
Washington, D.C. 20528 :

Civil Action No. _____

Serve on: :
Office of the General Counsel :
U.S. Department of Homeland Security :
Washington, D.C. 20258 :

and :
:

DAVID V. AGUILAR, Deputy Commissioner, :
UNITED STATES CUSTOMS :
AND BORDER PROTECTION, :
1300 Pennsylvania Avenue, N.W. :
Washington, D.C. 20229 :

Serve on: :
Office of the General Counsel :
U.S. Department of Homeland Security :
Washington, D.C. 20258 :

Defendants. :

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COMPLAINT

Plaintiff Michael Leiterman, by and through his undersigned counsel, files this complaint against Defendant Janet Napolitano, in her official capacity as Secretary of the Department of

Homeland Security, and David Aguilar, in his official capacity as Deputy Commissioner, U.S. Customs and Border Protection, for violating federal anti-discrimination laws that require the federal government to provide equal opportunity to people with disabilities. He alleges as follows:

I. INTRODUCTION

1. Michael Leiterman is an attorney who is blind. He has worked at Customs and Border Protection (“CBP”), a division of the United States Department of Homeland Security (“DHS”), since August 2006.

2. CBP and DHS have discriminated and continue to discriminate against Mr. Leiterman and other blind employees in violation of Sections 508 and 501 of the Rehabilitation Act by purchasing, developing, and implementing inaccessible technology, using inaccessible training and testing platforms and materials, requiring Mr. Leiterman to provide accessibility testing, troubleshooting, and correction for CBP’s technology, failing to provide reasonable accommodations for his disability, and denying him a promotion because of his disability and the agency’s inaccessible technology.

3. Despite Mr. Leiterman’s repeated requests and reports of inaccessible technology, and despite his ongoing attempts to get the agency to provide accessible technology as required by the law, CBP continues to develop, procure, maintain, and use inaccessible electronic and information technology.

4. As a result of CBP’s repeated and ongoing use of inaccessible technology, CBP has denied Mr. Leiterman equal access to information related to his job, has interfered with his ability to do his job, and has discriminated against him on the basis of his disability.

5. Mr. Leiterman filed an informal complaint to this effect on June 3, 2011.

Mr. Leiterman received his Notice of Right to File a Formal Complaint on July 21, 2011. He filed his formal complaint on August 4, 2011. He amended that formal complaint on September 20, 2011. Mr. Leiterman's complaint became ripe for filing in this Court 180 days thereafter, on March 18, 2012. Mr. Leiterman received a Report of Investigation from CBP on May 30, 2012 and thereafter timely requested a final agency decision on his formal complaint. Despite the passage of more than eight months, Mr. Leiterman has never received a final agency decision.

II. JURISDICTION AND VENUE

6. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1343 for Plaintiffs' claims arising under Sections 501 and 508 of the Rehabilitation Act of 1973 ("Section 501" and "Section 508"), 29 U.S.C. §§ 791, 794.

7. Plaintiff is a resident of Fredericksburg, Virginia and is employed full time in the District of Columbia.

8. Defendant's primary place of business is in Washington, D.C, where the headquarters of the Department of Homeland Security ("DHS") is located.

9. The acts and injuries complained of herein occurred in Washington, D.C.

10. Venue in this Court is proper pursuant to 28 U.S.C. § 1391(b) because Defendant does business in this district and because acts constituting violations of Section 501 and Section 508 complained of occurred in this district.

III. THE PARTIES

11. Mr. Leiterman has worked as an attorney for CBP for more than six years. He earned his J.D. from Widener University School of Law in 2004 and his L.L.M. from Georgetown University Law Center in 2005.

12. Mr. Leiterman is blind. As a blind computer user, he uses screen access software that converts digital information to synthesized speech. The brand of screen access software Mr. Leiterman uses is called “JAWS,” which is an “assistive technology” that can read aloud information presented on a computer screen. (<http://www.freedomscientific.com/products/fs/jaws-product-page.asp>). JAWS can read text in documents, websites, e-books, and other formats.

13. DHS is an executive agency of the United States Government. It is the third largest cabinet department and has its headquarters and principal place of business in Washington, D.C. Janet Napolitano, sued in her official capacity, is its secretary.

14. CBP is a division of DHS and also has its headquarters and principal place of business in Washington, D.C. David V. Aguilar, sued in his official capacity, is the Deputy Commissioner of CBP.

IV. STATEMENT OF FACTS

15. Mr. Leiterman has worked as an attorney at CBP since August 2006.

16. In the last several years, CBP has used more and more information technology that is inaccessible and/or incompatible with screen access software. This incompatibility has limited Mr. Leiterman’s ability to telecommute, caused him difficulty in performing the functions of his job, resulted in his being denied a promotion, and caused violations of his rights to privacy and confidentiality.

17. Although JAWS reads everything that is on a computer screen, there are ways in which technology must be made compatible with it. For example, images or internet links must have alt-text “descriptions” for JAWS to be able to read them to the blind user. Unless these descriptions are included, JAWS cannot discern the content of the links or images.

18. In addition, because blind computer users cannot use a computer mouse to “click” on buttons or links, websites, web applications, and software must be designed to allow blind users to move through a document or a website and to activate links or buttons, highlight text, and perform other functions using keyboard controls, rather than a computer mouse.

19. In 2007, CBP began requiring that frequent software updates be “pushed” by the agency’s information technology (“IT”) department. These “pushes” resulted in computer “crashes” that required Mr. Leiterman to reconfigure his computer every time he received a software update. The crashes required significant amounts of time to fix, preventing Mr. Leiterman from accessing his computer for large portions of time.

20. The IT department suspended the problematic software updates for a period of time from approximately November 2009 to July 2010, which caused a decrease in new computer problems, but did not resolve the overarching technology issues that continued to cause computer instabilities.

21. In July 2010, Mr. Leiterman’s workstation again began receiving updates. After those updates were re-started, Mr. Leiterman was forced to spend a considerable amount of his scheduled office time working with the IT department to troubleshoot computer problems.

22. In the Summer of 2011, CBP switched all agency computers to the Windows 7 operating system. CBP made this decision without testing the accessibility of the operating system for compliance with Section 508 of the Rehabilitation Act.

23. Because CBP failed to conduct this testing, in advance of this roll-out, Mr. Leiterman was required to spend substantial amounts of work time testing the operating system and identifying accessibility issues, which further interfered with his ability to complete his legal work.

24. Even though Mr. Leiterman identified a number of accessibility issues, none of these issues were fixed before the roll-out. In addition, the Windows 7 instructions provided by CBP to Mr. Leiterman were inaccessible.

25. Mr. Leiterman's telephone is also inaccessible. Although the phone has many sophisticated functions, such as caller ID, a call log, a directory of CBP employees, and the ability to place people on hold or transfer calls, Mr. Leiterman can only use the phone to answer or make calls. All of the other functions rely on non-tactile icons or digital display screens, and are therefore inaccessible to blind users. Mr. Leiterman's section of CBP moved to new offices in early 2013. At that point, he was given a new telephone that is equally inaccessible to the one he used when he filed his EEO complaint.

26. In addition, many pages on the CBP intranet are inaccessible to blind users because they contain unlabeled or mis-labeled links, unlabeled graphics, unidentified Flash content, and video content that can't be navigated using a screen reader.

27. In August 2011 CBP instituted a new system for booking work-related travel called "FedTraveler". FedTraveler is incompatible with screen access software. Mr. Leiterman is therefore unable to use the system independently.

28. FedTraveler requires that the user access CBP's TPX mainframe, which is also incompatible with JAWS.

29. Because he could not use the FedTraveler system, in September 2011, Mr. Leiterman was denied an opportunity to attend a training in Philadelphia that his sighted counterparts were allowed to attend. Mr. Leiterman had inquired as to FedTraveler's accessibility features as early as April 2011, several months prior to its implementation.

Inaccessible Telecommuting Technology

30. When Mr. Leiterman began working at CBP in August 2006, he was assigned to a workstation in a cubicle. As a JAWS user, he had difficulty concentrating on his work because the noise inherent in a cubicle environment interfered with the audio output from his screen access software.

31. In 2007, Mr. Leiterman asked for and was granted permission to telecommute two days per week as a reasonable accommodation. In the spring of 2007, Mr. Leiterman began telecommuting two days a week. Telecommuting is now also an option made available to other employees with and without disabilities.

32. Although CBP approved Mr. Leiterman's telecommuting as a reasonable accommodation, the agency's deployment of inaccessible technology made telecommuting more difficult for him than for his sighted colleagues.

33. In 2009, CBP switched from using an accessible "securecard" security system for telecommuting to a system that requires telecommuting CBP employees to access the agency's network only through one of two equally inaccessible methods: a MobiKey or a key fob with an automatically refreshing code.

34. Neither device is accessible to the blind as required by Section 508 of the Rehabilitation Act.

35. CBP acknowledged that the MobiKey is inaccessible and never gave Mr. Leiterman the opportunity to use it. Instead, CBP expected Mr. Leiterman to use the key fob. The fob consists of a key chain that has a refreshing LED screen with a number that changes periodically. CBP employees cannot access the Virtual Private Network (hereinafter "VPN"), or even access the internet from their CBP laptops, without entering the code that

appears on the key fob at the time the user enters his or her password. The key fob has no audio output or other method for converting the refreshing code to a non-visual presentation.

36. For more than two years, Mr. Leiterman was unable to access any information on the CBP network when he telecommuted. He raised this issue repeatedly with his supervisors and with the IT department. A solution was only developed in early 2012.

37. Because Mr. Leiterman could not access the CBP network remotely, he could not access work-related documents or his CBP email from home. Without access to CBP email, he was cut off from his colleagues when he telecommuted.

38. As a result, he was deprived of important information until he returned to his office workstation. In addition, Mr. Leiterman was required to rely on his personal email to communicate with other CBP employees while he telecommuted, which denied him the ability to participate fully in office life and collaborate as an equal team member with his colleagues. It also denied him access to the functions and features of the CBP network system.

Inaccessible Training Modules

39. In addition to the inaccessible technology described above, which prevented Mr. Leiterman from completing his substantive legal work, CBP has failed to provide an accessible method for completing training in its Virtual Learning Center.

40. CBP requires all employees to complete periodic trainings online. The training modules are interactive, requiring employees to view images and videos and answer questions in order to progress to the next frame. Upon successfully completing the training, employees may print a certificate.

41. Because the online training is not compatible with a screen reader, Mr. Leiterman cannot access the modules. In his first two years at CBP, the trainings had fewer visual elements

and he could complete them with difficulty and with extra time. But as CBP has included more visual elements, he has been unable to complete the trainings or print the certificate.

42. The Spring 2011 training module possessed all of these problems. Mr. Leiterman was required to complete the training by June 3, 2011. He made four unsuccessful attempts to do so using JAWS. CBP provided Mr. Leiterman a PDF version of the training. The PDF version, however, provided none of the interactive features of the Virtual Learning Center training, including no method for checking the user's knowledge.

43. Mr. Leiterman and other blind users cannot certify completion online or print the certificates available to sighted users upon completion. CBP's failure to provide these trainings in an accessible format has deprived Mr. Leiterman of the training experience and knowledge afforded to sighted CBP employees.

Denied Promotion

44. As a consequence of the discrimination described above, CBP has denied Mr. Leiterman a promotion because of his disability. Despite the fact that he never received a less than satisfactory performance review, Mr. Leiterman's past supervisor, William Rosoff actively discouraged him from seeking promotions.

45. Although Mr. Leiterman applied in February 2010 for a promotion from GS 13 to GS 14, which most CBP attorneys achieve one year after receiving their GS 13, Mr. Leiterman did not receive said promotion, and was instead transferred to another division.

46. The promotion from GS 13 to GS 14 is so automatic, however, that despite CBP's failure to act on Mr. Leiterman's application, the human resources and payroll divisions of the agency gave him the salary increase associated with the promotion anyway. Mr. Leiterman received the increase in March 2010 and notified the payroll office as soon as he became aware

of it. He received the higher salary for three pay periods before the error was corrected, and since then has been required to pay back the overpayment with interest.

Confidentiality Violations

47. Mr. Leiterman has been required to troubleshoot his inaccessible technology and address reasonable accommodation needs from his cubicle, a public space where his coworkers can hear his discussions with his supervisors and IT personnel.

48. For example, he has been required to openly conduct meetings with his supervisors in his cubicle, regarding private issues involving his disability and workplace accommodations.

49. In addition the Director of the Office of Diversity and Civil Rights openly discussed the difficulties that Mr. Leiterman has experienced and the possibility that he would file an EEO complaint in at least one phone conversation with members of the IT Department.

50. The telephone conversation resulted in the CBP Section 508 Coordinator sending an email discussing the possibility that Mr. Leiterman would file an EEO complaint. The series of emails that followed was unnecessarily sent to numerous individuals within the IT department. As a result, Mr. Leiterman's coworkers and members of the IT department have come to see Mr. Leiterman as a problem employee.

History of Ignoring Complaints

51. Despite Mr. Leiterman's continual and repeated efforts to alert CBP officials to the accessibility concerns described above, the problems have continued. His requests have been repeatedly ignored or dismissed.

52. In December 2010, the IT department proposed a plan to improve accessibility, but that plan was not followed.

53. On May 4, 2011, Mr. Leiterman raised these concerns at a meeting with his supervisors and members of the IT department. Subsequent to this meeting, CBP considered installing a CBP desktop computer at his home. On May 16, however, CBP rejected this idea as “cost prohibitive” and “not practical.” As a result, the department has again failed to accommodate Mr. Leiterman or provide comparable use of information and data to that afforded sighted CBP employees.

Inaccessible Information from the Office of Diversity and Civil Rights

54. When Mr. Leiterman began to consider filing a complaint with the Office of Diversity and Civil Rights (“DCR”), he learned that that office regularly employs inaccessible technology.

55. The DCR website still is not accessible to JAWS users because buttons are labeled incorrectly and the page alignment is such that a blind user cannot tell where the links will take him.

56. In addition, when Mr. Leiterman initially made his informal complaint his EEO counselor sent a number of documents outlining the EEO complaint process, including a flow chart, that Mr. Leiterman could not access.

57. Flow charts are inherently visual, with their use of arrows and boxes. Blind users therefore cannot, without additional coding, understand how one proceeds from one part of the process to the next. Even Mr. Leiterman’s Notice of Right to File a formal complaint and the accompanying documents were inaccessible PDF documents.

58. On information and belief, CBP knew that each of the aforementioned technologies was inaccessible to the blind and still chose to develop, procure, maintain, or use the technologies.

59. On information and belief CBP has not implemented adequate and effective processes for determining the Section 508 compliance of the information technology it develops, procures, maintains, or uses.

COUNT ONE
Violations of Section 508 of the Rehabilitation Act
(29 U.S.C. § 794d)

60. Plaintiff incorporates by reference all the allegations of facts maintained in the previous paragraphs.

61. CBP has failed to ensure that the information technology it uses allows individuals with disabilities who are Federal employees to have access to and use of information and data that is comparable to the access to and use of the information and data by Federal employees who are not individuals with disabilities.

62. As a result of these actions, CBP has deprived Mr. Leiterman of the experiences and knowledge afforded to sighted CBP employees.

63. As a result of CBP's conduct, Mr. Leiterman has suffered and will continue to suffer discrimination because of his disability.

COUNT TWO
Violations of Section 501 of the Rehabilitation Act – Failure to Accommodate
29 U.S.C. § 791

64. Plaintiff incorporates by reference all the allegations of facts maintained in the previous paragraphs.

65. Because he is blind, Mr. Leiterman is an individual with a disability.

66. CBP had notice of Mr. Leiterman's disability and has, at times, provided him accommodations because of that disability.

67. Mr. Leiterman is an attorney with an advanced degree who has received satisfactory performance evaluations throughout his tenure at CPB and is therefore capable of performing the essential functions of his job.

68. By prohibiting Mr. Leiterman from accessing work documents and e-mails on his telecommuting days, by failing to provide him access to an out-of-town training, and by otherwise failing to provide Mr. Leiterman access to the information and services described above that are available to his sighted counterparts, CBP has failed to accommodate Mr. Leiterman's blindness.

COUNT THREE
Violations of Section 501 of the Rehabilitation Act – Failure to Promote
29 U.S.C. § 791

69. Plaintiff incorporates by reference all the allegations of facts maintained in the previous paragraphs.

70. CBP discriminated against Mr. Leiterman by failing to promote him to GS 14 because of his disability, and by requiring him to repay the erroneously granted raise with interest.

WHEREFORE Plaintiff demands:

- (a) CBP make all mandatory and non-mandatory trainings accessible to the blind, including all training manuals;
- (b) CBP provide him an accessible telephone;
- (c) CBP create an accessibility team of employees and experts to:
 - a. review all technology RFPS;
 - b. review VPATs of all technology CBP procures;

- c. conduct accessibility testing for both purchased and developed technology;
 - d. justify any purchases or developed technology that is inaccessible (for either internal or external use);
 - e. compensate any employees who are made part of this team;
- (d) CBP develop a Section 508 manual with checklists and training for all IT staff, which should include:
- a. an accessible technology purchase process;
 - b. regulations and responsibilities concerning employee privacy for all IT staff and supervisors;
 - c. information on how to develop accessible technology and how to test for accessibility;
 - d. a requirement for demonstrations and interactions with people with disabilities;
- (e) CBP implement a policy and related training for all staff concerning accessible formats of documents;
- (f) CBP conduct automated and user testing of all new or updated technology purchases or agency-developed technology;
- (g) CBP implement standard contract language for technology purchases requiring Section 508 compliance;
- (h) CBP test all technologies purchased, developed, or implemented in the last 2 years and those in the pipeline for Section 508 compliance and correct any problems that are discovered through the testing;

- (i) CBP conduct training for supervisors on disability rights and awareness;
- (j) CBP make orientation/onboarding forms and materials accessible;
- (k) CBP publicize process for employees and public to make 508 complaints;
- (l) economic and non-economic damages;
- (m) attorneys' fees and costs; and
- (n) all other and further relief that justice may require.

Respectfully submitted,

/s/ Joseph B. Espo

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