

1 30, 2007, granting Davis leave to amend his complaint as to Section 504 (hereinafter “March
2 30, 2007 Order”).

3 2. In compliance with the March 30, 2007 Order, Davis filed his Second Amended
4 Complaint (hereinafter “SAC”) on April 23, 2007. By Order dated July 18, 2007, the Court
5 took jurisdiction of Davis’s Section 504 claims but struck his claims under the Due Process
6 Clause, the FOIA, and alleging ‘bad faith¹.’ See Doc. No. 42.

7 3. Defendant filed its Answer to the SAC on July 30, 2007. Doc. No. 47.

8 4. On July 24, 2007, Davis filed an *Ex Parte* Application for an Emergency Restraining
9 Order, an Order Shortening Time, and Memorandum in Support Thereof requesting
10 maintenance of the status quo where Defendant had initiated recoupment of overpayment and
11 threatened termination of Davis’s August 2007 monthly benefit check without a required due
12 process hearing. Davis submitted that he had suffered severe anxiety attacks, requiring medical
13 intervention as a direct result of Defendant’s actions, and argued, moreover, that he would
14 suffer irreparable harm if his Social Security benefits were interrupted. See Doc. No. 45.

15 5. By Stipulated Order filed August 16, 2007, this Court enjoined Defendant from
16 taking any further action on its efforts at recoupment until an SSA Administrative Law Judge
17 (hereinafter “ALJ”) rendered a decision on the matter. In addition, the Court enjoined
18 Defendant from serving any SSA notices on Davis directly, requiring that all notices be served
19 on Davis’s attorney of record. Doc. No. 51.

20 6. On December 19, 2007, Davis sought leave to amend the SAC to:

- 21 (i) Add John Doe² and Timothy Gibler as additional named plaintiffs,
22 (ii) Address additional violations of Section 504 and its implementing
23 regulations at 45 C.F.R., Part 85, and
24 (iii) Re-allege violations of FOIA based on Davis’s having exhausted
25 administrative remedies since the initial filing of this lawsuit.

27 ¹ Objections regarding ‘bad faith’ claims were filed on July 25, 2007. See Doc. No. 46.

28 ² See Order filed December 19, 2007, wherein Doe’s identity is sealed by court order.

1 7. In its Memorandum and Order filed May 2, 2008 (hereinafter “May 2, 2008 Order”),
2 finding that Davis had in fact exhausted his administrative remedies as to his FOIA claims, the
3 Court granted Davis’s motion for leave to amend with respect to his FOIA claims and denied
4 the motion in all other respects.

5 8. The original deadlines imposed by the May 2, 2008 Order to file an amended
6 complaint in the Davis action have been extended by successive stipulations of the parties,
7 suspending litigation for purposes of pending good faith settlement negotiations. Most recently,
8 on December 12, 2008, the parties filed a Stipulation for Further Suspending Litigation for
9 Defendant’s Review of Plaintiff’s Offer of Settlement, extending the deadline for amending the
10 SAC to February 19, 2009. *See* Doc. No. 85.

11 9. Davis hereby submits his Fourth Amended Complaint, which, in accordance with the
12 May 2, 2008 Order, amends the SAC with respect to the FOIA claims and now alleges an
13 individual rather than a putative class action.³

14 **II**

15 **PRELIMINARY ALLEGATIONS**

16 Davis hereby alleges the following:

17 10. At all times relevant to this action, Davis is and has been a resident of San Francisco,
18 California.

19 11. Defendant Michael J. Astrue is the duly appointed Commissioner of the Social
20 Security Administration and, at all times relevant to this action, was exercising his duties as
21 such.

22 ///

23
24 ³ The Court denied Davis’s motion for class certification pursuant to Rule 23 of the Federal
25 Rules of Civil Procedure but granted leave to (1) re-file the motion if Davis could set forth
26 sufficient evidence to satisfy the numerosity requirement; (2) associate an experienced class
27 action attorney; and (3) either bring forth representative plaintiffs from other parts of the country
28 who have suffered similar harm resulting from their respective SSA office policies or bring forth
admissible evidence that the policies applied by the San Francisco office are applied by all SSA
district offices nationwide. Because Davis does not currently have an experienced federal class
action attorney as required by the Court’s Order, Davis is hereby amending the SAC to assert an
individual, rather than putative class, action.

1 12. Davis has chronic schizophrenia. He has been disabled within the meaning of Titles
2 II and/or XVI of the Social Security Act, 42 U.S.C. §§ 301 *et seq.*, since 1985, when SSA found
3 Davis disabled for purposes of receiving SSA benefits based on his severe mental disability.

4 13. On April 2, 2005, SSA issued Davis a *Notice of Disability Cessation* based on a
5 work continuing disability review (hereinafter “work CDR”). *See* Defendant’s Ex. 5, Doc.
6 No. 14. Based on its work CDR, SSA determined that, as of August 1999, Davis no longer
7 qualified for benefits; based on this determination, moreover, SSA assessed an overpayment of
8 \$66,694 (which SSA subsequently reduced to \$47,044).

9 14. Davis was not given a meaningful opportunity to appeal this initial decision before
10 termination. Before Davis had an opportunity to appeal to SSA’s erroneous determination, his
11 claims file was sent to SSA’s Payment Center in Baltimore, Maryland, to be processed for
12 termination instead of staying at the local field office (hereinafter “FO”), where an appeal or an
13 alternative remedy such as benefits-pending appeal would need to be processed.

14 15. Moreover, Davis was not afforded meaningful access to the programs in the work
15 CDR process, wherein the FO conducts a comprehensive review of the case by ascertaining and
16 weighing factors pertaining to his ability to maintain sustained employment.

17 16. Without his Social Security benefits, Davis cannot afford the ordinary necessities of
18 life, including food, shelter, medication, and clothing.

19 17. After SSA reviewed medical and/or other records available to it, SSA conceded it
20 had denied Davis meaningful access to Social Security benefits when it determined that Davis
21 should not have been terminated from Social Security benefits from 1999 and continuing, as
22 stated in their October 15, 2004 ten-day letter (hereinafter “October 15, 2004 Notice of
23 Termination”). *See* Defendant’s Ex. 1, Doc. No. 14. Specifically, by letter dated October 15,
24 2005, SSA stated that Davis had been disabled since 2003 as opposed to only prior to August
25 1999, due to medical and/or other factors.

26 18. Davis is subject to future work CDRs and may have additional relevant employment
27 factors in future work CDRs, such as employer subsidies or a plan to achieve self-support.
28

1 19. When presented with mental disabilities, because of the invisible nature of the
2 disability and lack of knowledge of the associated symptomatology, Defendant is more likely
3 than not to ignore necessary components of the disability to make a cessation determination.

4 20. If a treating source opines that an individual cannot work, SSA is required to seek a
5 medical review or otherwise stay the cessation process instead of applying the mechanical
6 formula used to determine continuation of benefits.

7 **III**

8 **JURISDICTION AND VENUE**

9 21. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1361.

10 22. Venue is proper in the Northern District of California pursuant to 28 U.S.C. §
11 1391(b). Davis resides within this District, a substantial part of the events giving rise to Davis's
12 claims occurred in this District, and Defendant maintains several offices and operates in this
13 District.

14 **IV**

15 **EXHAUSTION OF ADMINISTRATIVE REMEDIES**

16 23. As this Court has ruled in its March 20, 2007 Order (relating to Section 504 claims)
17 and its May 2, 2008 Order (relating to FOIA claims), Davis has exhausted his administrative
18 remedies as to all claims alleged in this Fourth Amended Complaint.

19 **V**

20 **VIOLATIONS OF SECTION 504 OF THE REHABILITATION ACT OF 1973**

21 24. Paragraphs 1 through 23 are each re-alleged and incorporated as if fully set forth
22 herein.

23 25. Section 504, as amended, provides that:

24 No otherwise qualified individual with a disability in the United
25 States . . . shall, solely by reason of his or her disability, be excluded
26 from the participation in, be denied the benefits of, or be subjected to
27 discrimination under any program or activity receiving Federal
financial assistance or activity conducted by any Executive agency[.]

28 29 U.S.C. § 794 (as amended).

1 26. By virtue of the fact that Defendant is a federal agency, under Section 504,
2 Defendant is prohibited from excluding and denying benefits to any person on the basis of
3 his/her disability.

4 27. Defendant has violated Davis's rights under Section 504 by failing to apply
5 appropriate training to Claim Representatives (hereinafter "CRs") on primary components of
6 mental disorders and the effect(s) of antipsychotic medications equivalent to those persons with
7 non-mental disabilities and, consequently, denying them meaningful access to Social Security
8 benefits under Section 504.

9 28. Defendant discriminates against Davis and other persons with mental disabilities
10 through its methods of administration, by systematically failing to apply factors equivalent to
11 those for persons with non-mental disabilities and terminating the benefits of people with
12 mental disabilities based upon work CDR determinations as described more fully herein.

13 29. Defendant failed to equalize the psychiatric nature of a disability as opposed to a
14 physical disability by authorizing 'low level' CRs to cease Social Security benefits without
15 available professional input, including, but not limited to, medical, legal, and/or vocational
16 input.

17 30. When conducting the work CDR, Defendant discriminated against Davis by
18 evaluating whether he has been engaged in both substantial and gainful activity (hereinafter
19 "SGA") retroactively for a period of approximately fourteen (14) years – from 2004 to 1990 –
20 without considering available medical evidence of Davis's chronic psychosis (in this case,
21 chronic schizophrenia).

22 31. Davis and others with primarily mental disabilities are denied meaningful access to
23 Social Security benefits under SSA's present scheme. CRs, who are not trained in
24 understanding work CDR factors medically or legally, have mechanically applied a month-by-
25 month look-back formula to assess if an individual in a work CDR earned a gross income over
26 approximately \$500 per month (presently about \$900 per month). This mechanical assessment
27 denies people with severe mental disabilities meaningful and equal access to the program in that
28

1 the formula does not take into account other required factors in order to find ‘substantial’ and
2 ‘gainful’ work activity.

3 32. The strict application of the regulatory analysis, including the inclusion of medical,
4 legal, and/or vocational input, will not be overly burdensome because it will not require great
5 modifications of the program. On balance, the benefits to people with mental disabilities will
6 outweigh costs, if any, to SSA.

7 33. On information and belief, a CR is bound by an internal SSA manual (referred to by
8 SSA as “POMS”) and internal memoranda to apply a mechanical formula without taking into
9 account the mental status or effect of medications on a person’s ability to comply with a ten-day
10 notice of cessation letter. In this case, the October 15, 2004 Notice of Termination was
11 confusing to Davis due to his mental impairment. This confusion was due, in part, to the
12 complexity of the formula applied: *I.e.*, a rebuttable presumptive SGA dollar amount, from
13 which is subtracted two (2) categories – impairment-related work expenses (hereinafter
14 “IRWEs”) (by dollar amounts), employer subsidies (by dollar amounts), applications of
15 Defendant’s policies on unsuccessful work attempts, and/or other relevant work CDR factors.

16 34. A CR is not trained in medical, vocational, or legal analyses and therefore does not
17 and is not permitted by Defendant to take into account the alternating cycles of chronic mental
18 disability, whereby people like Davis are alternatively in remission or in the midst of a
19 ‘psychotic episode.’

20 35. In the present case, about a year after the October 15, 2004 Notice of Termination
21 was sent to Davis, Defendant changed the termination period of time (*see* ¶ 18) because a CR is
22 not permitted to take into account factors outside of their mechanical formula. SSA
23 subsequently reduced the alleged overpayment from approximately \$67,000 to \$47,000.

24 36. SSA fails to identify significant barriers for people, like Davis, with mental
25 disabilities, especially where the process of termination often exacerbates the individual’s
26 disability by causing severe anxiety attacks and other psychotic-like symptomatology,
27 precluding sufficient participation in the work CDR process.

1 37. As a direct and proximate result of SSA's improper and discriminatory termination
2 and the termination process, Davis's anxiety and stress increased to a level that required medical
3 intervention from his therapist and psychiatrist. Before October 2004, Davis was seeing his
4 psychotherapist, Coleman Wong, LCSW, and his psychiatrist, Edward Lee, M.D., once a month
5 each. After receiving the termination letter from SSA, Davis started seeing Mr. Wong once a
6 week.

7 38. Defendant has not promulgated its own regulations as required by Section 504 but,
8 rather, applies the regulations promulgated by the Department of Health and Human Services
9 (hereinafter "DHHS"). 45 C.F.R., Part 85; *see also* Doc. No. 11, note 11.

10 39. Defendant refers all discrimination complaints to SSA's Office of General Counsel
11 (hereinafter "OGC") instead of to its own OCR.

12 **VI**

13 **DISPARATE IMPACT**

14 40. Paragraphs 1 through 39 are each re-alleged and incorporated as if fully set forth
15 herein.

16 41. Defendant violated Section 504 regulations at 45 C.F.R., Part 85, in that the methods
17 of administration used by Defendant in work CDRs have a disparate impact on meaningful
18 program access for people with mental disabilities. Because of the very nature of a severe
19 psychiatric disability, people with mental disabilities cannot engage in sustained and/or full-
20 time work activities as do people with physical disabilities.

21 42. The CR making the initial adjudication of termination during a work CDR disregards
22 material factors relating to 'substantial' in addition to 'gainful' activity, resulting in the
23 disparate termination of benefits for individuals with mental disabilities, in violation of
24 45 C.F.R., Part 85, as compared to the termination of benefits for individuals with non-mental
25 disabilities. The application of a legal SGA standard, which, by definition, requires sustained or
26 full-time work, has a disparate impact on people with mental disabilities. The mechanical
27 month-by-month comparison determines only a particular dollar amount per month minus
28 IRWEs (such as prescriptions for medication or taxi costs required for transportation), as

1 supported by the production of receipts, and evidence of employer subsidies, showing that an
2 individual is being paid more than others for doing the same job (such as in a subsidized or
3 sheltered workshop).

4 43. The methods of administration used by Defendant result in a disparate effect on
5 Davis's ability and the ability of people like him with mental disabilities to remain in the
6 program, where they receive a monthly check and Medicare and/or Medicaid benefits.

7 44. In addition to the termination, the alleged overpayment, which is subject to
8 recoupment before an SSA ALJ hearing, constitutes harm to Davis, who suffered from
9 additional severe anxiety and therefore required increased antipsychotic medication and/or
10 psychotherapy.

11 45. Since on or about 2004, Defendant has changed its POMS so that Defendant's CRs,
12 who work at local (neighborhood) Social Security FOs are now instructed to ignore available
13 medical and/or other evidence required by law and regulation in their termination assessment.
14 Prior thereto, CRs were instructed not to ignore medical evidence by their internal operations
15 manual POMS, No. DI 13010.015. This change in SSA's methods of administration violates
16 Section 504 regulations.

17 46. SSA, intentionally and in bad faith, ignores a Congressional mandate, Public Law
18 98-460 (also known as the Social Security Reform Act of 1984), and its own internal policies
19 (DI 11065.050⁴), which do not permit a CR to terminate an individual who has a mental
20 disability without a medical evaluation.

21 DI 11065.050 Return to Work Cases

22 A. Exception to Field Office (FO) SGA Denial

23 Some individuals may have returned to work since our last denial and
24 within one year of the alleged onset; however, the law requires us to
25 rereview these mental impairment claims regardless of whether or not
26 the individual is engaging in SGA. (Note that these mental
27 impairment claims are exceptions to the requirement that the FO
complete an SGA initial denial (DI 11010.050, DI 11020.050, and DI
11010.250). Undertake any necessary work development (e.g.,

28 ⁴ Since the original filing of this lawsuit, this POMS policy has been removed or rendered
nonpublic, but, to Davis's information and belief, was in effect at least through December 20,
2007. See Doc. No. 60 (redacted).

1 completing an SSA-821-F4, or SSA-820-F4, and other appropriate
2 forms). Do not prepare an SGA denial. If the work is or was SGA,
3 make a recommendation to the DDS as to whether or not the period of
4 work may be considered an unsuccessful work attempt (UWA) per DI
5 11010.205. Since these mental impairment claims require a medical
6 decision under the statute, the final responsibility for how the SGA
7 affects the decision lies with the DDS.

8 **B. Prior Cessations -- Work Activity Involved**

9 Automatic review cessation cases (those where an appeal was pending
10 on June 7, 1983, or later) require a review under the new mental
11 impairment criteria as well as under the new medical improvement
12 standard. Therefore, regardless of work activity since the cessation
13 decision, the claim must be forwarded to the DDS for a medical
14 decision. If the DDS reverses the prior cessation to a continuance,
15 undertake all the necessary work activity development. See DI
16 13010.015.

17 POMS DI 11065.050, as published December 20, 2007, on SSA's policy website

18 (<https://s044a90.ssa.gov/apps10/poms.nsf/partlist!OpenView>).

19 47. Defendant has published statistical evidence showing a disparate access to the
20 disability programs: Specifically, in that approximately 28.3% of all individuals with disability
21 have a primary mental component, whereas approximately 45% of these individuals are
22 terminated. Plaintiff's Ex. 3, Doc. No. 23. Defendant has, however, refused to explain the
23 disparity in the underlying administrative class action or in the district court proceedings, in
24 violation of 45 C.F.R. § 85.61(g), *Compliance Procedures*.

25 48. Davis, as a precondition of remaining in the program and continuing to receive the
26 benefits necessary to sustain him, was given a ten-day notice requiring him to remember exact
27 monetary details, including providing receipts for IRWEs and employment subsidies for about
28 168 months, meaning each and every month out of the fourteen-year (back to 1990) look-back
period.

49. Davis not only suffers from severe mental disabilities but also suffers from the side
effects of powerful anti-psychotic medications. Individuals like Davis are thus at a distinct
disadvantage in remaining in the Social Security disability program due to SSA's methods of

1 administration, in violation of 45 C.F.R. §§ 85.21(b)(1)(i)-(iv) and (vi), *General prohibition*
2 *against discrimination.*

3 50. Defendant's methods of administration (specifically, the aforementioned policies),
4 changed policies, and procedures are in violation of 45 C.F.R. § 85.21(b)(3), *General*
5 *prohibition against discrimination.*

6 51. Defendant had current psychiatric treating source opinions, who had reported past
7 and recent inability to work. Plaintiff's Ex. 4, Doc. No. 23. Yet this material factor needed
8 prior to cessation adjudication was ignored in Davis's work CDR process. SSA did not correct
9 this almost one (1) year later.

10 52. In order to prevent Defendant from continuing to violate Section 504, Defendant
11 should be enjoined and prohibited from the unlawful and invidiously discriminatory practice of
12 failing and/or refusing to provide meaningful access to its benefits for people with mental
13 disabilities.

14 VII

15 **NONCOMPLIANCE WITH THE REGULATIONS IMPLEMENTING SECTION 504**

16 53. Paragraphs 1 through 52 are each re-alleged and incorporated as if fully set forth
17 herein.

18 54. SSA's own statistics demonstrate the disparate treatment of Social Security
19 beneficiaries who have primarily mental or 'invisible' disabilities as compared to those who
20 have primarily physical disabilities. From 1998 through 2005, the percentage of ceased
21 beneficiaries with primarily mental disabilities is much higher (about 45%) than would be
22 expected, given the representation of mentally-disabled beneficiaries in the entire population of
23 disabled beneficiaries (about 28.3%).

24 VIII

25 **FREEDOM OF INFORMATION ACT VIOLATIONS**

26 55. Paragraphs 1 through 54 are each re-alleged and incorporated as if fully set forth
27 herein.

1 56. Defendant has violated FOIA by refusing to respond to two (2) separate requests for
2 information by Plaintiffs under FOIA.

3 57. On information and belief, Davis alleges that Defendant has engaged in a pattern and
4 practice of discrimination against persons with mental disabilities. Davis bases this contention
5 in part on statistical analysis. When, pursuant to FOIA, Davis sought to obtain from Defendant
6 additional statistical information, Defendant repeatedly avoided compliance by asserting that
7 SSA did not understand what was being requested. Davis's requests were clear. Defendant's
8 assertions to the contrary constituted violations of FOIA.

9 58. In a separate FOIA request by Davis, Defendant ignored repeated requests for the
10 independent investigative reports relating to the underlying administrative class action
11 complaint. When the reports were finally furnished with a letter dated August 31, 2007,
12 Defendant stated that approximately 115 pages had been withheld due to "attorney client and
13 work-product privileges." Davis is entitled to these reports.

14 59. In two (2) letters, one dated July 17, 2006, and one dated August 31, 2007, SSA
15 informed Davis that they had reached final decisions regarding Davis's FOIA requests. *See*
16 *Plaintiff's Exs. 11 and 12, respectively, Doc. No. 57.*

17 **X**

18 **DEMAND FOR JURY**

19 60. Davis hereby demands a trial by jury, pursuant to Rule 38 of the Federal Rules of
20 Civil Procedure. The issues for which Davis demands a jury trial are as follows:

- 21 a. Whether Defendant failed to provide Davis with meaningful access to SSA's
22 program benefits;
- 23 b. Whether Defendant discriminated against Davis based upon the invisible nature of
24 his disabilities, in violation of Section 504, by not affording him meaningful
25 access to the same procedures for challenging cessations as those afforded to
26 beneficiaries with primarily physical disabilities who are subject to work reviews;
27 and
28

- 1 c. Whether Defendant was maliciously and intentionally seeking to deny relevant
2 information to Davis when Defendant claimed not to understand Davis's request
3 for statistical information under FOIA.

4 **XI**

5 **PRAYER FOR RELIEF**

6 WHEREFORE, Davis prays for judgment as follows:

- 7 1. A determination that Defendant has violated Section 504 by failing to allow Davis
8 meaningful access to the same procedures for challenging cessations as those given to
9 beneficiaries with disabilities that are primarily physical and who are subject to work CDRs, thus
10 depriving Davis of equal and meaningful access to Social Security benefits;
- 11 2. A determination as to what steps are required of, and an order requiring, SSA to bring
12 it into compliance under Section 504 so that people with mental disabilities have meaningful
13 access to SSA programs in work CDRs;
- 14 3. A determination that Defendant violated FOIA in denying Davis's requests for
15 information;
- 16 4. An Order enjoining SSA from continuing the unlawful conduct described herein and
17 ordering SSA to produce the information requested in Davis's FOIA requests;
- 18 5. Costs;
- 19 6. Reasonable attorney's fees, including, if appropriate, Equal Access to Justice Act
20 fees; and
- 21 7. Such other relief as the Court deems just and proper.
- 22
23

24 Dated: February 19, 2009

25 Steven Bruce
26 Attorney for Plaintiff