

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

BEVERLY LAMBERSON, AS :
ADMINISTRATRIX OF THE :
ESTATE OF MELINDA :
LAMBERSON REYNOLDS, : CIVIL ACTION
DECEASED, : NO. 09-CV-1492
Plaintiff :
 : (Judge Munley)
v. :
 : Electronically Filed
COMMONWEALTH OF :
PENNSYLVANIA, *et al.*, :
Defendants :

**PLAINTIFF'S OPENING BRIEF
IN SUPPORT OF HER
MOTION FOR PARTIAL SUMMARY JUDGMENT**

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November 20, 2012

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Plaintiff Beverly Lamberson (“plaintiff”), as Administratrix of the Estate of Melinda Lamberson Reynolds (“Reynolds”), Deceased,¹ respectfully submits this Brief in support of her motion for partial summary judgment.

Preliminary Statement

An important part of this case is beyond factual dispute: Defendants maintained a Methadone Prohibition Policy, and applied it to exclude Reynolds not only from licensing and the ability to work as a nurse, but from any opportunity to get her license back. They did so solely because she was receiving Methadone maintenance treatment. They continued to apply this discriminatory policy to Reynolds even after the policy itself had been revised. When this lawsuit was filed, they denied the existence of any such policy,² but pretrial discovery has revealed that the policy was in writing, that the policy was applied uniformly, and that the policy was applied specifically to Reynolds.

Therefore, plaintiff is moving for partial summary judgment with respect to the Methadone Prohibition Policy. By contrast, defendants’ motion contains no

¹ In this Brief, “plaintiff” refers to plaintiff Lamberson, the Administratrix, and “Reynolds” refers to her decedent, the original plaintiff, Melinda Lamberson Reynolds.

² Plaintiff’s Statement of Material Facts (“Pltfs. Statement”), ¶21.

discussion of the Methadone Prohibition Policy.³ Defendants' motion even omits any reference to their own Methadone policy expert (Dr. Ziegler) and relies instead on a different expert (Dr. Limoges) who asserts that Methadone maintenance "is not the essential issue in Ms. Reynolds' case."⁴

Plaintiff will address Dr. Limoges' report, and the other individual facts of Ms. Reynolds' case in her brief in opposition to defendants' motion. However, many of the facts alleged by defendants are in dispute. While they may be relevant to the final disposition of this case, they do not alter the **undisputed** facts about the Methadone Prohibition Policy on which plaintiff's motion rests:

- that defendants maintained such a policy (the provisions of which are set forth in Deposition Exhibit P-2) (Pltfs. Appendix F, p. 7 of 63);⁵
- that the policy excluded **anyone** receiving Methadone maintenance treatment from **any** participation in PHMP programs;

³ Since defendants' supporting Brief will be filed simultaneously with this Brief, we do not know whether or to what extent defendants will discuss the Methadone Prohibition Policy in their Brief.

⁴ Report of Richard F. Limoges ("Limoges Report"). Defendants' Summary Judgment Exhibit ("Defts. SJ Ex.") 18 at 5. Of course, the responsibility for determining the "essential issue in this case" belongs to this Court and not to Dr. Limoges.

⁵ The deposition exhibits referred to in Plaintiff's Statement of Material Facts are reproduced in Pltfs. Appendix F, and are further identified herein by the page number assigned by the ECF system.

- that the policy is contrary to the Americans with Disabilities Act and the Rehabilitation Act; and
- that defendants excluded Reynolds on the basis of the policy.

It is this discriminatory policy which is the subject of the present motion.

Procedural History

Reynolds, the original plaintiff, began this action on August 4, 2009, and filed an Amended Complaint on November 4, 2009, seeking declaratory and injunctive relief as well as damages. Defendants moved to dismiss the Amended Complaint, and on June 21, 2010, the Court issued a Memorandum and Order which generally denied the motion, except for claims for damages against individual defendants which were dismissed. Defendants moved for reconsideration or certification for interlocutory review, and the Court denied that motion on August 9, 2010. Defendants answered the Amended Complaint on August 30, 2010. The parties subsequently took extensive pretrial discovery including production of documents, answers to interrogatories, responses to requests for admissions, and depositions of two state employees.

Reynolds died on February 18, 2012, and plaintiff Lamberson, the Administratrix of Reynolds' Estate, was substituted as plaintiff on June 7, 2012. Plaintiff Lamberson now moves for partial summary judgment with respect to the

invalidity of defendants' Methadone Prohibition Policy. Defendants have moved for summary judgment on the entire case.

Statement of the Facts

The following is a brief summary of the facts which are set forth in greater detail in plaintiff's Statement of Material Facts.

Reynolds was treated for her addiction with a legal drug – Methadone – at clinics that were subject to exacting standards to assure the safety of the treatment, and to monitor its effectiveness in preventing recurrence of illegal drug use. Often, people who suffer from addiction to opioid drugs require long-term or even lifetime “maintenance” treatment with Methadone. Reynolds received such Methadone maintenance treatment. However, under the secret Methadone Prohibition Policy, defendants – the Commonwealth and the executive department, agencies and individual agents of the Commonwealth who are responsible for licensing of nurses – prevented anyone who was receiving Methadone maintenance treatment from participating in the Commonwealth's programs for licensing of nurses.

Both plaintiff's and defendants' experts on Methadone policy agree that addiction is a chronic condition for which there is no cure, whether or not the

person suffering from addiction receives Methadone treatment.⁶ The policy of barring persons suffering from addiction from working as a nurse, or even from participating in defendants' program to assist them to return to nursing –not because of their addiction but because they are receiving Methadone – stands in contrast to defendants' willingness to allow other persons suffering from addiction to participate in their programs, and to return to work, provided that they use only non-pharmacological therapies.⁷

Both parties' experts on the Methadone Prohibition Policy agree that nurses receiving Methadone maintenance treatment can practice their professions safely. Thus, plaintiff's expert, Dr. Robert E. Newman,⁸ stated in his report:

To my knowledge there is no other form of medical treatment –
for any condition – that is subject to the same broad (and yet

⁶ Pltfs. Statement, ¶2.

⁷ Deposition of Kevin Knipe (8/25/2011) (Pltfs. Appendix D) at p. 45.

⁸ Among other things, Dr. Newman directed the New York City Methadone Maintenance Program, and served as Chief Executive Officer of Beth Israel Medical Center, “the institution that in the mid-60s pioneered the clinical use of methadone in treating opioid dependence and continues to have the largest methadone program in the United States.” Newman Report (Pltfs. Appendix A) at 1-2. Defendants' expert, Dr. Ziegler, stated in her report (Pltfs. Appendix B at 8) that “Dr. Newman is an exceedingly well-qualified expert on the topic of methadone maintenance treatment and a highly experienced forensic expert witness.”

very detailed) range of rules, regulations and standards, and as stringent a monitoring system, as methadone maintenance. Thus, it must be provided exclusively by “comprehensive treatment programs” that are required to offer, along with the medication itself, a wide array of counseling services, medical screening, etc. Federal law demands on-going routine urine toxicology to identify the possible use/misuse not only of opioids, but of a number of other drugs as well. Methadone may be administered and dispensed exclusively by trained nursing personnel working in such comprehensive programs; the nurses are expected not only to hand out medicine but also to observe each patient and, if there is any reason for concern over either the physical or mental status of any patient, to alert the physician. Given the stringent rules governing the number of “take-home” doses that may be given, and the criteria that must be met before attendance can be reduced to less than 6 or 7 days per week, this provides for a degree of close and on-going direct clinical observation that is unique.

Newman Report (Pltfs. Appendix A) at 12-13.

And defendants' expert, Dr. Penelope Ziegler,⁹ stated similarly that:

Methadone maintenance treatment, by definition under federal law, is provided in the context of a structured program of group and individual counseling, ongoing support and monitoring by licensed methadone clinics. In this context the treatment can be very effective in restoring the patient to stable functioning. It has been shown in many studies to be the most effective and widely available treatment for heroin addiction. . . .

* * * *

. . . . If cognitive deficits are found via testing, suitable accommodations may be able to be made to allow the individual to work safely in some jobs within his or her profession. . . .

Ziegler Report (Pltfs. Appendix B) at 3-5 (footnote omitted).

In addition to their policy expert Dr. Ziegler, defendants had already retained George E. Woody, M.D. – who Dr. Ziegler refers to as a “nationally respected

⁹ Dr. Ziegler is Assistant Clinical Professor of Psychiatry at Virginia Commonwealth University, and Medical Director of the Virginia Health Practitioners' Monitoring Program. Ziegler Report at 1 (Pltfs. Appendix B).

addiction specialist”¹⁰ – to evaluate Reynolds in 2006, before this action was commenced. Dr. Woody reported that Reynolds had “Opioid Dependence, on Methadone maintenance with evidence of excellent treatment response,” and concluded that “she is able to practice nursing with the requisite skill and safety provided she is monitored for a time to be determined by the Board [of Nursing].”¹¹

However, instead of following the recommendation of their own “nationally respected” expert Dr. Woody, defendants barred Reynolds from working as a nurse, and defendants’ case manager sent Reynolds a letter that stated that her case was closed until such time as she “fully and completely complied and cooperated with recommendations to enter inpatient treatment to be weaned from Methadone.”¹²

Some facts, that are not required for decision of plaintiff’s motion for partial summary judgment, **are** in dispute. For example, defendants’ motion cites several occasions on which Reynolds was found to be using other drugs and assumes – without any proof – that these were illegal drugs. Defendants’ motion is also

¹⁰ Ziegler Report at 8 (Pltfs. Appendix B).

¹¹ Deposition Exhibit P-1 (Woody Report) at 5 (Pltfs. Appendix F, p. 6 of 63) (underlining in original).

¹² Pltfs. Statement, ¶¶52 and 53.

largely directed to problems that Reynolds experienced after she was excluded because of the Policy. These subsequent problems may affect the amount of damages to which Reynolds' Estate is entitled. However, plaintiff's motion is limited to the undisputed facts about the Methadone Prohibition Policy, and defendants' application of that policy to Reynolds.

Statement of Questions Involved

Defendants maintained a secret policy which excluded people receiving "maintenance treatment" with a legal drug, Methadone, from any participation in their programs relating to licensing of nurses in Pennsylvania. The question presented for decision by the present motion – plaintiff's motion for partial summary judgment – is:

Did defendants' Methadone Prohibition Policy, which excluded people receiving Methadone maintenance treatment from participation in defendants' programs relating to licensing of nurses in Pennsylvania, violate Title II of the Americans' With Disabilities Act, and Section 504 of the Rehabilitation Act?

Plaintiff will address defendants' motion in her Opposition Brief to be filed on December 18, 2012.

Argument

1. Summary Judgment Standards

As the Third Circuit has explained in an ADA case, *HIP Heightened Independence and Progress, Inc. v. Port Authority of New York and New Jersey*, 693 F.3d 345 (3d Cir. 2012):

“Summary judgment is appropriate if, viewing the record in the light most favorable to the non-moving party, there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.” [*Sulima v. Tobyhanna Army Depot*], 602 F.3d 177, 184 (3d Cir. 2010)]; accord Fed. R. Civ. P. 56(a). In considering Plaintiffs' and the Authority's motions, we must “construe[] facts and draw[] inferences in favor of the party against whom the motion under consideration is made.” *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 925 (3d Cir. 2011) (*en banc*) (internal quotation marks omitted).

693 F.3d at 351.

2. People Affected By Defendants' Methadone Prohibition Policy, Including Reynolds, Are "Qualified Individual[s] With A Disability."

"Qualified individual with a disability" is a defined term in the ADA. In Title II of the ADA, which is the portion of the ADA dealing with discrimination by public entities like the defendants in this action, the term is defined as follows:

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

42 U.S.C. §12131(2). The Rehabilitation Act and its implementing regulations use similar definitions.¹³

¹³ *See, e.g.*, 29 C.F.R. §1630.2(m): "The term 'qualified,' with respect to an individual with a disability, means that the individual satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires and, with or without reasonable accommodation, can perform the essential functions of such position."

In the present action, as in *New Directions Treatment Services v. City of Reading*, 490 F.3d 293 (3d Cir. 2007), “[t]he parties do not dispute that recovering heroin addicts are presumptively ‘qualified’ persons under the ADA and Rehabilitation Act.” 490 F.3d at 308. It is true, as the Third Circuit also wrote in *New Directions*, that there is a “carve-out” for persons who are “‘currently engaging in the illegal use of drugs’ when the ‘covered entity acts on the basis of’” such use. *Id.* at 309, and 42 U.S.C. §12210(a). However, as discussed in the following section, that “carve-out” has no application to either the Methadone Prohibition Policy in general, or to the particular application of the policy to Reynolds.

Defendants may contend that the so-called “direct threat” exception, that has evolved in employment cases under a different section of the ADA, is applicable to this case, *i.e.*, that they were entitled to exclude Methadone patients in general, and Reynolds in particular, on the theory that permitting Methadone patients to participate in the PHMP and other programs relating to licensing would present a direct threat to the health or safety of others. First, it should be noted that the Methadone Prohibition Policy was not limited to exclusion from the right to immediately practice as a nurse, but excluded Reynolds and other Methadone patients from the entire PHMP process that provided others (non-Methadone

patients) with a path to return to active practice after treatment. In defendants' words, Reynolds' file was "closed."

However, even assuming that the "direct threat" exception is to be applied here on analogy to employment cases, it is defendants' burden to establish direct threat. *See, e.g., EEOC v. Hussey Copper Ltd.*, 696 F.Supp.2d 505, 520 (W.D.Pa. 2010) (denying defendant's motion for summary judgment on claim of employment discrimination against Methadone maintenance patient), *citing School Board of Nassau County v. Arline*, 480 U.S. 273, 288 (1987). Given the statements by both plaintiff's policy expert, Dr. Newman, and defendants' policy expert, Dr. Ziegler, concerning the ability of people receiving Methadone treatment to safely practice as nurses,¹⁴ defendants simply cannot carry this burden. Any other "direct threat" issues that may be raised by defendants will be addressed in our brief in opposition to defendants' motion, or our Reply Brief, as appropriate.

¹⁴ Pltfs. Statement, ¶¶5, 23. *See also* Pltfs. Statement, ¶33, concerning Dr. Woody's finding that Reynolds was "able to practice nursing with the requisite skill and safety provided she is monitored for a time to be determined by the Board."

3. Defendants' Methadone Prohibition Policy Is Unrelated To Use Of Illegal Drugs.

The Methadone Prohibition Policy applied to anyone receiving Methadone, whether or not they were engaged in the use of illegal drugs. The policy itself¹⁵ has no carve-out for a person who is not “currently engaged in the illegal use of drugs,” and this was further confirmed by defendant PHMP’s Program Director, Mr. Knipe, when he testified at his deposition that the revised PHMP Policy adopted in 2008 also applied to persons receiving Methadone for treatment of pain.¹⁶

In defendants’ Motion, which we will address in our Opposition Brief, defendants point to various use of other drugs – mainly the class of drugs known as benzodiazepines – by Reynolds at various times. At least some of these instances of other drug use were **legal** use of prescribed drugs.¹⁷ Moreover, none of these alleged occasions of other drug use are relevant to the question of whether Reynolds herself was a “qualified person with a disability,” because defendants did

¹⁵ Pltfs. Deposition Exhibit P-2 (Pltfs. Appendix F, p. 7 of 63).

¹⁶ Knipe Deposition (11/9/2011) at pp. 129-130 (Pltfs. Appendix E).

¹⁷ *See, e.g.*, “Summary of Client’s Progress for Past 60 Days” dated 10/31/2005 (Defendants’ Exhibit 3 at p. MLR 018518): “Mrs. Reynolds continues to remain opiate free and has been approved by the medical director to take Xanax [a benzodiazepine] for her anxiety and the anxiety produced by her liver treatment that she will presently be undergoing for the next several months.”

not act on the basis of these instances, which were unknown to them at that time.

The lone exception was the one occasion in February 2005, when Reynolds was first referred to PHMP because she took a single unprescribed benzodiazepine tablet.¹⁸

Reynolds' PHMP file was not "closed" in March 2008 because of this solitary occasion of taking the benzodiazepine tablet three years before,¹⁹ but because she had not "enter[ed] inpatient treatment to be weaned from Methadone."²⁰ The only policy that excludes people from defendants' programs because of use of a legal drug is the Methadone Prohibition Policy (and the later revised policy).²¹ People using Methadone, and Methadone alone, were singled

¹⁸ Both the ADA and the Rehabilitation Act generally extend their protection to people who are disabled because of addiction, with the exception **only** of people who are "currently engaging in the use of illegal drugs, **when the covered entity acts on the basis of such use.**" 42 U.S.C. §12210(a) and 29 U.S.C. §705(20)(C)(i) (emphasis added). Thus, defendants cannot justify their actions after-the-fact on the basis of evidence that did not form the basis of their actions at the time. *See Bowers v. NCAA*, 475 F.3d 524, 537 (3d Cir. 2007): "Defendants 'could not have been motivated by knowledge [they] did not have,' . . . and thus cannot now claim that Bowers was deemed a nonqualifier because of his drug abuse." (citing *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 360 (1995) and *Mardell v. Harleysville Life Ins. Co.*, 65 F.3d 1072 (3d Cir. 1995)).

¹⁹ The 2005 incident will be discussed in plaintiff's Opposition Brief.

²⁰ Pltfs. Statement, ¶¶52 and 53.

²¹ As discussed in plaintiff's Statement of Material Facts, defendants adopted a revised Methadone policy in 2008. *See* Pltfs. Statement, ¶¶54-71. The revised policy is still discriminatory, but is not part of this motion because defendants

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out by defendants for this illegal and discriminatory treatment, and this was the operative policy here. Both the general policy, and its specific application to Reynolds, are solely and exclusively based on the fact that she was receiving a legal drug, Methadone, pursuant to a doctor's prescription.

4. Defendants Violated Title II Of The ADA, And The Rehabilitation Act, By Excluding People On Methadone Maintenance Treatment Generally, And Reynolds In Particular, From Participation In Their Programs.

This action is brought under the ADA and the Rehabilitation Act. Title II of the ADA prohibits discrimination by "public entities":

[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. §12132. The term "public entity," as defined in 42 U.S.C. §12131(1) specifically includes state governments, and "any department, agency . . . or other instrumentality of a State"

The Rehabilitation Act also applies to this case and provides:

continued to apply the original Methadone Prohibition Policy to Reynolds. *See* Pltfs. Statement ¶68.

No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . .

29 U.S.C. §794(a). It is undisputed that defendant Pennsylvania Department of State (“DoS”) receives federal financial assistance, and that the other state agency defendants are part of DoS.²² Therefore, DoS and its component agencies are subject to the Rehabilitation Act as well. *See Koslow v. Commonwealth*, 302 F.3d 161, 175-76 (3d Cir. 2002), *cert. denied, sub nom. Pa. Dept. of Corrections v. Koslow*, 537 U.S. 1232 (2003); *Haybarger v. Lawrence County Adult Probation & Parole*, 551 F.3d 193, 202 (3d Cir. 2008).

By their own words, defendants admit that their Methadone Prohibition Policy does exactly what the ADA and the Rehabilitation Act forbid: The Methadone Prohibition Policy excludes people receiving Methadone maintenance treatment from “eligibility for PHMP enrollment.” *See* Deposition Exhibit P-2 (Plaintiffs’ Appendix F, p 7 of 63). Defendants’ agent, Ms. Harris, therefore

²² Pltfs. Statement, ¶¶10 and 11.

closed Reynolds' PHMP file because Reynolds had not "complied and cooperated with recommendations to enter inpatient treatment to be weaned from methadone." Deposition Exhibit P-20 (Pltfs' Appendix F, p. 42 of 63).

Defendants did not exclude Reynolds on the basis of any of the other alleged drug use which is the subject of their motion. Defendants excluded Reynolds because of the Methadone Prohibition Policy. People using Methadone, and Methadone alone, were singled out by defendants for this irrational and discriminatory treatment. There are other issues in this case that are disputed, but they cannot be decided in the abstract or without reference to defendants' illegal Methadone Prohibition Policy. Plaintiff therefore asks the Court to decide the issue of the legality of the Methadone Prohibition Policy now.

Conclusion

For the reasons set forth in plaintiff's Motion and this Brief, and on the basis of the undisputed facts set forth in plaintiff's Statement of Material Facts, plaintiff respectfully requests that this Honorable Court enter partial summary judgment in her favor, determining that the Methadone Prohibition Policy is unlawful and contrary to Section 12132 of the Americans with Disabilities Act, 42 U.S.C. §12132, and Section 504 of the Rehabilitation Act, 29 U.S.C. §794, and that the application of the Methadone Prohibition Policy to exclude Reynolds from participation in, and from the benefits of, defendants' services, programs and activities was therefore unlawful.

Respectfully submitted,

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Dated: November 20, 2012

Certification of Word Count

I hereby certify in accordance with Rule 7.8(b)(2) of the Rules of this Court that the body of the foregoing Brief contains 3,678 words as revealed by the word count feature of the word processing program used to prepare the brief.

/s/ Lawrence D. Berger

Lawrence D. Berger

Dated: November 20, 2012

Certificate of Service

I hereby certify that Plaintiff's Opening Brief in Support of her Motion for Partial Summary Judgment, and Addendum of Authorities, were served on counsel of record through the Court's electronic docketing system (CM/ECF).

/s/ Lawrence D. Berger

Lawrence D. Berger

Dated: November 20, 2012