BEVERLY LAMBERSON, as Administratrix of the Estate of Melinda Lamberson Reynolds, Deceased, **Plaintiff** **v.** **COMMONWEALTH OF PENNSYLVANIA, *et al*.,** **Defendants**	**CIVIL ACTION NO. 3:09-cv-1492** **(Judge Munley)** **Electronically Filed**

DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

COUNTERHISTORY OF THE CASE

This action was brought by a former licensed nurse claiming that her license to practice was suspended because of defendants' refusal to permit her to receive methadone maintenance treatment as accommodation to treat her drug dependency. She claimed that this refusal violated both the Americans with Disabilities Act, 42 U.S.C. §12101, et seq. (the ADA) and Section 504 of the Rehabilitation Act, 29 U.S.C. §794 (the Rehabilitation Act).

Both defendants and plaintiff have moved for summary judgment. Defendants have requested that this Court enter judgment *in toto* in their favor.

Plaintiff has moved for partial summary judgment on "with respect to" the Professional Health Monitoring Program's former standard operating procedure

addressing methadone.[1] The motion appears to seek a declaratory judgment that the policy violated the Americans with Disability Act and the Rehabilitation Act. This brief is submitted in opposition to plaintiff's motion.

COUNTER STATEMENT OF FACTS

A complete statement of facts is set forth in defendants' brief in support of their motion for summary judgment. In summary, plaintiff has a long history of addiction to opiates and benzodiazepines, much of which was never known to the defendants. Providers have attempted to detox her from benzodiazepines twice, and at one point Reynolds' methadone provider considered detoxing her from methadone.

Reynolds came to the attention of the Department of State when an employer-ordered drug screen showed that she tested positive for benzodiazepines. After attempts by the Professional Health Monitoring Program to get her to voluntarily enroll in a monitoring program were not successful, she was ordered to have an evaluation by George E. Woody, M.D. The examination found that Reynolds suffered from opioid dependence, and was currently on methadone maintenance. Dr. Woody opined that she was able to practice nursing "provided

[1] Plaintiff throughout her papers in support of partial summary judgment refers to the policy as the "Methadone Prohibition Policy." As pointed out elsewhere, there is no policy by that name in the Professional Health Monitoring Program's standard operating procedures and it is not an accurate characterization of the operating procedure.

she is monitored for a time to be determined" by the Nursing Board. Because Dr. Woody had determined that there was a need for monitoring and because an earlier attempt to have Reynolds' enrolled in the voluntary recovery program was unsuccessful, the State Department initiated formal action Reynolds in October 2006. That proceeding concluded in November 2006, when Reynolds, through her attorney, entered a consent agreement which suspended her nursing license for three years, and allowed her a three year probationary period.

In May 2007, the Commonwealth filed a petition for appropriate relief because Reynolds had not complied with the terms of the consent agreement. Following a formal hearing on July 11, 2007, the hearing examiner recommended suspending Reynolds' license for no less than three years with the suspension to be stayed when Reynolds provided the Board with an evaluation form an approved treatment provider that she was safe to practice nursing.

Reynolds never provided the Board with an evaluation. Instead, she brought this lawsuit.

ARGUMENT

I. INTRODUCTION

Title II of the ADA provides that "no 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. As plaintiff in her brief recognizes, to state a claim under Title II of the ADA, a plaintiff must plead that (1) she has a disability; (2) she was otherwise qualified to participate in the program; and (3) she was denied the benefits of the program or otherwise subjected to discrimination because of her disability. *Chambers ex rel. Chambers v. Sch. Dist. of Phila. Bd. of Educ.*, 587 F.3d 176, 189 (3d Cir.2009). Under the Rehabilitation Act, 29 U.S.C. § 794, the plaintiff must also show that the program receives "federal financial assistance." Because plaintiff has failed to establish the second and third prong of her prima facie case, her motion for partial summary judgment on liability must be denied.

II. MELINDA REYNOLDS WAS NOT OTHERWISE QUALIFIED TO PRACTICE NURSING

Defendants argued in their opening brief that, due to Reynolds' long and continued illegal use of benzodiazepines, opiates and cocaine, she was not "otherwise qualified" to hold a state nursing license. Defendants' Brief in Support of Summary Judgment at 30-34 (Document 89). Plaintiff argues in her motion, however, that, because defendants were not aware of plaintiff's illegal drug use on September 18, 2007, when the Nursing Board suspended her license, this evidence may not be used to show Reynolds' lack of qualification, citing *Bowers v. NCAA*, 475 F. 3d 524, 537 (3d Cir. 2007). While defendants recognize the holding in *Bowers,* it is not controlling in this instance.

Prior to the *Bowers* decision, the Third Circuit expressly held that that after-acquired evidence may be used to determine the issue of whether a plaintiff was otherwise qualified. *McNemar v. The Disney Store, Inc.*, 91 F.3d 610, 620-21 (3d Cir.1996), *cert. denied*, 519 U.S. 1115 (1997)). *McNemar* was an ADA employment case in which the defendant introduced after-acquired evidence to show that the plaintiff was not qualified for the position from which he was dismissed. In that case, the Court rejected the very argument plaintiff makes here. The Court found that under the ADA the elements of plaintiff's threshold prima facie case did not turn on the knowledge of the defendant at the time the relevant decision was made. That is because plaintiff's qualification is part of her prima facie case and has no bearing on defendant's motivation. Indeed, the Court observed that the argument on behalf of the plaintiff "wants to mix apples – a plaintiff's prima facie case – with oranges – a defendant's non-discriminatory-reason." *Id*. at 621. Under *McNemar*, this Court should consider the undisputed after-discovered evidence in determining whether plaintiff was otherwise qualified to be a nurse.

Not only is the issue more fully considered in *McNemar* than in *Bowers*, under the Third Circuit's Internal Operating Procedure 9.1, *McNemar* is controlling: "It is the tradition of this court that the holding of a panel in a precedential opinion is binding on subsequent panels. Thus, no subsequent panel

overrules the holding in a precedential opinion of a previous panel. Court en banc consideration is required to do so."

Moreover, *Bowers'* interpretation of the ADA is questionable. As the majority of courts addressing the issue have held, after-acquired evidence may not be used on the issue of the defendant's *motivation* because, as plaintiff correctly points out, "[d]efendants 'could not have been motivated by knowledge [they] did not have'…." *Bowers* 475 F.2d at 537. Plaintiff's Opening Brief at 15. But the issue of whether Reynolds was an otherwise qualified individual is one of the elements in plaintiff's own prima facie case unrelated to the question of defendants' motivation. It is only after plaintiff establishes a prima facie case, including the fact that he or she is qualified, that the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the its action. *See Wishkin v. Potter*, 476 F.3d 180, 184-85 (3d Cir. 2007) (applying *McDonnell Douglas* burden shifting analysis to a Rehabilitation Act claim). Indeed, if plaintiff cannot show that Reynolds was otherwise qualified, she "cannot make out a prima facie case, and the burden never shifts to the defendant." *Equal Employment Opportunity Commission v. Fargo Assembly Co*. 142 F.Supp.2d 1160, 1164 (D.N.J. 2000).

The substantial majority of other circuits have held similarly. *E.g. Anaeme v. Diagnostek, Inc*., 164 F.3d 1275 (10th Cir.1999) (after-acquired evidence "was

nonetheless admissible to show that Plaintiff's prima facie case was not supported by a preponderance of the evidence."); *Gilty v. Village of Oak Park*, 919 F.2d 1247, 1251 (7th Cir .1990) (the determination whether the plaintiff is qualified "requires an objective analysis" in which "an employer's knowledge or lack of knowledge is of no relevance."); *Mantolete v. Bolger*, 767 F.2d 1416, 1424) (9th Cir.1985) (evidence was not admissible to enlarge the basis upon which the Postal Service rejected the applicant, but it was admissible, even though after acquired, to rebut the applicant's claim that she was physically qualified for the position).

In addition, Reynolds should not be permitted to benefit from her own misconduct. The only reason that defendants were not aware of her actual drug history was her own deception. In the voluntary recovery program Personal Data Sheet that Reynolds signed on October 6, 2005, Reynolds disclosed only a single instance of taking Restoril, despite the fact that she had been in drug treatment since 1997, had been a heroin addict since approximately 1977, had an addiction to benzodiazepines and had undergone detox from benzodiazepines twice unsuccessfully. Harris Deposition Exhibit 14. This personal data sheet was forwarded to Dr. Woody and was part of the record he reviewed. Woody Record MLR 17108-17116.

Reynolds also made misrepresentations to Dr. Woody. Again, she told him only of one instance of her using Benzodiazepines. Woody Record MLR 17037.

In addition, she said nothing about her long-term heroin addiction, but claimed that her methadone treatment was for pain. Woody Record MLR 17037-17038.

She made further misrepresentations in her personal data sheet completed for the disciplinary monitoring unit signed on February 2, 2007. She (1) denied that any current or past criminal action had been taken against her; (2) did not provide information about her prior Heroin use; (3) did not provide information that her methadone maintenance began in 1997, and instead stated that she started her methadone maintenance in 2004. Reynolds PHMP File, MLR 940-948.

Finally, at the licensing hearing on July 11, 2007, she testified under oath that she had been on methadone maintenance for less than four years and was taking methadone for pain. Board Proceedings, MLR 22362-63, MLR 22365. She provides no testimony about her 20 year heroin addiction. Board Proceedings, MLR 22349-22373. She said nothing about her history of taking Benzodiazepines. Thus, it is clear that, if defendants were not aware of Reynolds' complete drug history, it was because she failed to disclose it when requested.

In *Summers v. State Farm Mutual Automobile Insurance Co*., 864 F.2d 700, 708 (10th Cir. 1988), the Court recognized the fundamental injustice of excluding after-acquired evidence which was not known earlier because of the plaintiff's deception:

> Four years later, State Farm ascertained that there had been 150 falsifications, of which occurred after Summers was brought back from

> probation. To argue, as Summers does, that this after-acquired evidence should be ignored is utterly unrealistic. The present case is akin to the hypothetical wherein a company doctor is fired because of his age, race, religion, and sex and the company, in defending a civil rights action, thereafter discovers that the discharged employee was not a "doctor." In our view, the masquerading doctor would be entitled to no relief, and Summers is in no better position.

Accordingly, this Court should permit the use of after-acquired evidence to show that Reynolds was not qualified to practice nursing. That evidence is undisputed, and alone precludes partial summary judgment in plaintiff's favor.

III. PLAINITFF HAS PRODUCED NO EVIDENCE THAT REYNOLDS WAS DENIED THE BENEFITS OF A NURSING LICENSE BECAUSE OF THE FORMER PHMP METHADONE POLICY

Plaintiff asserts with no factual support that the PHMP caused Reynolds to be excluded from the practice of nursing. With no cite to the record, plaintiff states, "Defendants did not exclude Reynolds on the basis of any other alleged drug use which is the subject of their motion. Defendants excluded Reynolds because of the Methadone Prohibition Policy." Plaintiff's Brief at 22.

Not only has plaintiff not identified any evidence suggesting that plaintiff's license was suspended due to the PHMP's former methadone maintenance policy, the undisputed evidence, as pointed out in defendants' brief in support of their motion for summary judgment, shows that the policy was not the basis for Reynolds' license suspension. In correspondence to Reynolds, Defendants' Documents, Reynolds PHMP File, MLR 890, and the Complaints Section,

Defendants' Documents, Reynolds PHMP File, MLR 890; in the Petition for Appropriate Relief, Defendants' Documents, Board Proceedings, MLR 22387-22388; and in the adjudication itself, Defendants' Documents, Reynolds PHMP file, MLR 995, there is no mention of the PHMP policy. Rather, as made clear from these documents, the issue was whether Reynolds had breached the terms of the consent agreement. *See* Defendants' Brief in Support of Summary Judgment at 17-25.

As argued in Defendants' Brief in Support of their motion for summary judgment, there is no evidence that the policy was the basis for the license suspension, and summary judgment should be entered in defendants' favor.

IV. TO THE EXTENT PLAINTIFF SEEKS A DECLARATORY JUDGMENT IN HER MOTION OFR PARTIAL SUMMARY JUDGMENT, IT SHOULD BE DENIED BECAUSE THERE IS NO LONGER ANY CASE OR CONTROVERSY REGARDING THAT ISSUE.

It appears from plaintiff's motion for partial summary judgment and supporting brief that, at this stage of the litigation, plaintiff seeks only declaratory relief – that the former PHMP methadone policy violates the ADA and the Rehabilitation Act: "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." Plaintiff's Brief at

18. Because, with Reynolds death, the parties no longer have any legally cognizable interest in the legality of the former policy, this Court may not enter the requested declaratory judgment.

Article III of the Constitution limits the "judicial Power" of the federal courts to the resolution of "Cases" or "Controversies." U.S. Const. art. III, § 2. "Courts enforce the case-or-controversy requirement through several justiciability doctrines that ... include standing, ripeness, mootness, the political-question doctrine, and the prohibition on advisory opinions." *Pittsburgh Mack Sales & Serv., Inc. v. Int'l Union of Operating Eng'rs, Local Union No. 66*, 580 F.3d 185, 190 (3d Cir.2009) (citations omitted). "[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome. The court's ability to grant effective relief lies at the heart of the mootness doctrine." *Donovan ex rel. Donovan v. Punxsutawney Area Sch. Bd.*, 336 F.3d 211, 216 (3d Cir.2003) (citations omitted) (internal quotation marks omitted). "The availability of declaratory relief depends on whether there is a live dispute between the parties." *Powell v. McCormack*, 395 U.S. 486, 517–18 (1969).

Here, due to Reynolds' unfortunate death and substitution of parties, the plaintiff does not have an interest in a declaration of whether a former policy conforms to federal law. The current plaintiff is not and never has been subject to the old methadone policy, and a declaratory judgment at this point would amount

to no more than an advisory opinion. The only live controversy remaining in this case is whether the current plaintiff's damages claim. This requested relief does not resolve that claim and should be denied.

CONCLUSION

For the foregoing reasons, plaintiff's motion for partial summary judgment should be denied.

Respectfully submitted,

LINDA L. KELLY
Attorney General

By: *s/Michael L. Harvey*
MICHAEL L. HARVEY
Senior Deputy Attorney General
Attorney I.D. #30098

GREGORY R. NEUHAUSER
Chief Deputy Attorney General
Chief, Litigation Section

Office of Attorney General
Litigation Section
15th Floor, Strawberry Square
Harrisburg, PA 17120
Phone: 717-783-6896 - Direct
Fax: 717-772-4526
Email: mharvey@attorneygeneral.gov

Date: December 18, 2012

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

MELINDA LAMBERSON REYNOLDS, **Reynolds**	**CIVIL ACTION NO. 3:09-cv-1492**
v.	**(Judge Munley)**
COMMONWEALTH OF PENNSYLVANIA, ET AL., **Defendants**	**Electronically Filed**

CERTIFICATE OF SERVICE

I, Michael L. Harvey, Senior Deputy Attorney General, Commonwealth of Pennsylvania, hereby certify that on December 18, 2012, I caused to be served a copy of the foregoing document titled Defendants' Brief in Opposition to Plaintiff's Motion for Partial Summary Judgment:

VIA ELECTRONIC FILING

Lawrence D. Berger, Esquire
Shepherd, Finkelman, Miller & Shah, LLP
35 E. State Street
Media, PA 19063
(Counsel for Plaintiff)

Michael Churchill, Esquire
Public Interest Law Center of Philadelphia
1709 Benj. Franklin Pkwy., 2d Floor
Philadelphia, PA 19103
(Counsel for Plaintiff)

s/Michael L. Harvey
MICHAEL L. HARVEY
Senior Deputy Attorney General