

the remedies were “plain, speedy, and effective,” and satisfied federal minimum standards. In effect, this stance allowed the courts to decide whether exhaustion was appropriate and in “the interest of justice.” Ultimately, this opened the door to continued law suits by inmates, thus proving ineffective.

The Court then highlighted the unambiguous language of the PLRA that no action “shall be brought” without the exhaustion of available administrative remedies. Congress intentionally chose the word “shall” to make mandatory exhaustion obligatory and impenetrable to judge-made exceptions. If administrative remedies are unavailable, however, the prisoner cannot be held to the standard mandated by the PLRA. The Court subsequently identified three different circumstances in which administrative remedy may not be available to prisoners, the only exceptions to the mandatory requirement of the PLRA. The first occurs when officers are unable or unwilling to provide any relief to aggrieved inmates. The second occurs when no ordinary prisoner can discern or navigate an administrative mechanism. The third occurs when prison administrators deflect an inmate from utilizing a grievance process through “machination, misrepresentation, or intimidation.”

In remanding the case, the Supreme Court enjoined the district court to assess whether any of the aforementioned circumstances were present and at play during Mr. Blake’s pursuit for redress of his grievances.

#### *Concurring Opinions*

Justice Thomas concurred with the majority opinion but cautioned the Court against admitting new evidence that was not part of the certified record. Justice Breyer, on the other hand, opined that the term “exhausted” as intended by Congress, is not as narrow, as construed in this case, but rather, includes “administrative law’s well established exceptions to exhaustion” (*Ross*, p 1862).

#### *Discussion*

In the 13 years preceding the establishment of the PLRA in 1997, the volume of prisoner lawsuits increased 10-fold (Jones J, Ciccone RJ: Right to refuse treatment. *J Am Acad Psychiatry Law* 35:260–62, 2007). Medical treatment, physical security, and physical conditions represent three of the five most common complaints raised in inmates’ § 1983 lawsuits (Hanson RA, Daley HWK: Challenging the Conditions of Prisons and Jails: A Report on Section

1983 Litigation. Washington, DC: U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, 1994).

The PLRA managed to curtail the number of frivolous *pro se* law suits by requiring inmates to exhaust available administrative remedies before filing a law suit, limiting waivers for the requirement that inmates pay filing fees, and restricting attorney’s fees. From 2000 to 2007 the number of federal claims based on deficient prison conditions dropped by 31 percent (Jones and Ciccone, 2007), despite the state and federal prison population’s growth by 15 percent from 2000 to 2007 (West H: Prisoners in 2009. Bureau of Justice Statistics, 2010). However, it is conceivable that the implementation of the PLRA has had a disproportionate effect on inmates with mental illness or other disabilities limiting their ability to cope with the exhaustion of available remedies.

In the case reviewed herein, the Supreme Court opined that an administrative remedy that is so confusing that no ordinary prisoner can understand or navigate it is, in effect, not available to the prisoner. This ruling is particularly relevant to prisoners with mental disease or intellectual disability whose mental impairment could strip them of the skills needed to effectively advocate for themselves around concerns for safety in their environment and the treatment of their medical and psychiatric illnesses. Psychiatrists should be alert to these problems and opportunities to help patients access advocacy services for protection of their rights.

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## **Mental Disorders and Addiction under the Americans with Disabilities Act and Rehabilitation Act**

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**For Coverage Under the ADA Title III or Section 504 of the Rehabilitation Act, a Claim Must Show that Discrimination Occurred Solely Due to Disability in an Otherwise Qualified Individual Who Has Been Given Opportunity at Reasonable Accommodation, but Not at the Institution's Expense**

In *J.A.M. v. Nova Southeastern University*, 2016 U.S. App. Lexis 6290 (11th Cir. 2016), the United States Court of Appeals for the Eleventh Circuit affirmed the district court's decision to dismiss a medical student with a history of mood disorder and alcohol use for violation of an agreement that required abstinence from alcohol.

*Facts of the Case*

In the fall of 2010, J.A.M. enrolled at Nova Southeastern University College of Osteopathic Medicine (Nova), and successfully completed the first semester. In April 2011, he experienced a depressive episode during which he consumed alcohol and was hospitalized for psychiatric stabilization. Upon his return to Nova, J.A.M. was granted a retroactive medical leave and referred to the school's student assistance program. As conditions, he agreed to abstain from alcohol and participate in random toxicology screening. He was also ordered to undergo a psychiatric evaluation. A psychiatrist, selected by J.A.M. and approved by Nova, medically cleared him for resuming educational activities following a two-hour interview.

In the fall of 2011, J.A.M. experienced recurrence of depressive symptoms with alcohol consumption. His academic performance deteriorated, and he failed 14 credits. Following hospitalization, he took seven months' leave. Given the amount of credits he failed, the university required him to take medical leave and obtain approval from the Student Progress Committee before resuming his studies. In the fall of 2012, J.A.M. re-enrolled at Nova. He passed all of the examinations that he had previously failed, but returned to alcohol use in the context of a depressive episode later that semester. Before the end of 2012, he was twice hospitalized, then enrolled in a dual-diagnosis treatment program.

J.A.M. returned to Nova in January 2013. Although he passed his first block classes, he relapsed into alcohol use in April, leading to yet another hospitalization. After school officials discovered that alcohol had played a role in this hospitalization, he was disqualified from taking further examinations for

breaching his agreement with Nova to abstain from alcohol. Nova officially informed J.A.M. that he would have to take another medical leave of absence and appear again before the Student Progress Committee before resuming his studies. In May 2013, J.A.M. admitted himself to a 45-day partial-hospitalization program, after which he received three additional months of outpatient therapy.

At the end of 2013, J.A.M. was evaluated by his psychotherapist and psychiatrist, who medically cleared him for resuming educational activities. On Nova's request, an additional evaluation was performed by a Nova-employed psychiatrist who also approved return to Nova, with monitoring. Before formally resuming his studies, J.A.M. was required to appear before the Student Progress Committee. At the conclusion of the hearing, the committee voted to dismiss J.A.M. from the medical school for breach of the agreement to abstain from alcohol use. This decision was accepted by the dean and affirmed by the internal appeals mechanism.

In April 2015, J.A.M. sued Nova for violation of his federal disability rights, alleging disability discrimination under Title III of the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act (RA). Under Title III of the ADA, J.A.M. argued that he was expelled from Nova because of his mental disability, namely, a mood and anxiety disorder "that interferes with the major life activities of learning, reading, concentrating and thinking, or because it regards him as suffering such a disability" (Amended Complaint & Demand for Jury Trial, *J.A.M. v. Nova Southeastern University, Inc.*, No. 15-cv-60248-KMM (S.D. Fla. 2015)). Under the RA, J.A.M. asserted that Nova violated Section 504, which prohibits discrimination against individuals with disabilities who are otherwise qualified (that is, capable of satisfying the academic and technical requirements) by recipients of federal assistance. He contended that his status of "otherwise qualified" was demonstrated in his successfully completing studies between his hospitalizations.

Nova filed a counter-motion to dismiss the complaint for failure to state a claim under either the ADA or RA. In August 2015, the district court ruled in favor of Nova, finding that J.A.M. had failed to state causes of action for disparate treatment and failure to accommodate under both statutes. The district court held that J.A.M. was not qualified to par-

ticipate in Nova's medical program and therefore not covered under either the ADA or RA.

J.A.M. appealed to the U.S. Court of Appeals for the Eleventh Circuit.

*Ruling and Reasoning*

The U.S. Court of Appeals for the Eleventh Circuit reviewed *de novo* the district court's granting a motion to dismiss for failure to state a claim.

The court of appeals first addressed claims under Title III of the ADA, ruling that contrary to J.A.M.'s allegations, Nova's actions did not fall under Title III definitions of discrimination. The court held that although Nova's alcohol agreement screens out individuals with alcohol-related problems, this practice is necessary for the provision of its academic services. Nova's conditions on J.A.M. were necessary to facilitate successful completion of his coursework. The court additionally opined that Nova was under no obligation to provide J.A.M.'s requested accommodations (repeated medical leaves of absence for extended periods, examination rescheduling, and excusing his misconduct) as these would fundamentally alter the course of its medical program. The court held that academic institutions are not required to lower or modify their academic or technical standards.

The court next addressed J.A.M.'s allegations under the RA. Given that he was unable to complete a single full semester of medical school between 2011 and 2014 without relapse, despite multiple inpatient and outpatient treatments for mood disorder and alcohol use, the court reasoned that he was incapable of meeting the required academic and technical standards to participate in Nova's medicine program. He, therefore, did not satisfy the "otherwise qualified" requirement of RA.

The court did not dispute that J.A.M. had a mental illness. However, he was not dismissed for his mental illness, but for his alcohol-related behavioral misconduct, which was a breach of the agreement with Nova to abstain from alcohol use. The court noted that Nova was not required to excuse misconduct, even if it was related to the student's mental disability.

*Discussion*

Although cases involving addiction to alcohol account for a minority of ADA litigations, they are becoming increasingly more common (Westreich LM: Addiction and the Americans with Disabilities

Act. *J Am Acad Psychiatry Law* 30:355–63, 2002). Alcoholism is considered a covered disability if a major life activity is impaired by an individual's addiction. At the same time, an individual must be otherwise qualified to perform the necessary duties of the job: to meet legitimate education, experience, and skill requirements of the position. Problematic behaviors stemming from alcohol abuse, however, are differentiated as misconduct and not afforded the same coverage (*Flynn v. Raytheon Co.*, 868 F. Supp. 383 (D. Mass. 1994)). Employers are permitted to take necessary disciplinary actions, including employment termination, if an individual's use of alcohol interferes with professional duties or jeopardizes the safety of others. However, employers must not discipline those with alcoholism differently than other employees for alcohol-related misconduct (Substance Abuse under the ADA. Available at: <http://www.usccr.gov/pubs/ada/ch4.htm>. Accessed November 10, 2016).

Providing reasonable accommodations to qualified individuals with disabilities is an integral part of the ADA and RA. In cases of alcohol addiction, an employer may be required to allow use of paid or unpaid leave for medical treatment, flexible scheduling for counseling, or adaptation of daily schedule. The court has also viewed "Last Chance," or alcohol abstinence agreements, signed between employee and employer, to address concerns stemming from alcohol abuse as valid contracts entered into by choice and has reasoned that such an agreement constitutes a reasonable accommodation (*Golson-El v. Runyon*, 812 F. Supp. 558 (E.D. Pa. 1993)). However, if the prognosis for recovery from alcohol is poor or "futile," the employer does not have a duty to require repeated leaves or work place modifications (*Schmidt v. Safeway Inc.*, 864 F. Supp. 991 (D. Or. 1994)).

Given the above, determining when and under which circumstances an individual suspended from work or educational activity because of alcohol use may resume previous activities presents a significant challenge. The assessment of the appropriate timing of return and accommodating conditions must take into account a broad range of functional capacities and personality traits of an individual (rather than rely on diagnosis *per se*), balanced against the circumstances of the entity from which accommodation is requested. Such assessments are often conducted by the individual's treating clinician or mental health professionals

employed by his workplace. This practice can represent significant clinical and ethics-related challenges that can be avoided through independent medical evaluation, routinely performed by a forensic psychiatrist. Forensic training in fitness for duty and risk assessment can facilitate the development of appropriate accommodation protocols for maintaining progress with an adequate level of monitoring. Thus, in cases involving the ADA and RA, a forensic evaluation may assist in the balancing of the essential demands of work or school and the reasonable accommodations due an otherwise qualified ill and recovering student or employee.

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## Jury Instructions on the Consequences of an Insanity Verdict

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### **Burden of Proof in an Insanity Defense Is on the Defendant; Punishment Should Not Be a Consideration in a Jury's Determination of Guilt or Innocence; Use of Nontestimonial Statements in Trial Do Not Violate the Sixth Amendment**

In *United States v. Brown*, 635 F. App'x 574 (11th Cir. 2015), Korrigan Brown appealed his convictions arguing that the trial court erred by refusing his proposed jury instructions which included consequences of the verdict. The court reasoned that except in certain circumstances, the jury should not be instructed on the consequences of a verdict of not guilty by reason of insanity (NGRI). In the current case, Mr. Brown argued that he fell under this exception.

#### *Facts of the Case*

On December 14, 2012, Mr. Brown met with his childhood friend Lamel Lattimore who agreed to drive the car while they committed a robbery. They

then met up with Nathan Holmes, who had committed armed robberies with Mr. Brown before. The trio first attempted an armed robbery at a Chevron station in Miami Beach, but had to flee when an employee called the police. The three men tried again at a Wendy's restaurant. As they pulled away with the stolen cash, a witness called 911, and they were apprehended. Both robberies were caught on surveillance video. Mr. Brown was charged with one count of conspiracy to commit robbery, two counts of robbery, and two counts of use of a firearm during a crime of violence.

At the trial, Mr. Brown's witnesses included two mental health experts, both of whom diagnosed bipolar disorder. The government's expert disagreed, noting that, among other things, according to prison medical records, Mr. Brown did not volunteer a history of mental illness during the intake process.

During the trial, Mr. Brown argued that since he had produced "some evidence" to support his insanity defense, the government should have the burden of proving beyond a reasonable doubt that he was not insane when he committed the crimes. He also requested that the jurors be informed of the outcome of their verdict and the mandatory minimum sentence he faced if convicted. Mr. Brown conceded that punishment should not be a consideration in the determination of guilt of a defendant. However, he requested that the jury instructions include language that if he were found guilty, "any punishment, aside from any mandatory minimum, is for the Judge alone to decide later" (*Brown*, p 579), and if he is found not guilty by reason of insanity, "he will be committed to a suitable facility until such time as he is eligible for release" (*Brown*, p 579). The trial court denied these requests, reasoning that the consequences of a verdict should not be a consideration in determining the verdict itself.

Mr. Brown was convicted on all counts and was sentenced to 435 months in prison. He appealed his verdict and argued that the district court had erred by refusing to instruct jurors on the mandatory minimum sentences and the burden of proof for proving insanity. He argued that the testimony of the mental health expert made instructions on the consequence of a guilty verdict necessary, as it was an "exception" to the rule. Mr. Brown also contended that the district court erred in limiting his ability to cross-examine the government's mental