

show that the Eleventh Amendment issue cannot be reached.

In its analysis of Title II, the court clarified the nature of protections offered by the ADA. While the ADA protects against discrimination on the basis of disability in the provision of services, it does not mandate the services provided, nor specify a standard of care. A plaintiff claiming inadequate, rather than discriminatory, care, thus fails to state a Title II violation. This finding further stratifies the legal tests that are to apply in cases such as *Buchanan v. Maine*, where the grievance more properly arises from tort liability related to outcome than from procedure that is found to be discriminatory on the basis of class.

Amnesia and Competence to Stand Trial

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Amnesia for the Time of the Alleged Crime Is Not a Bar to Competence to Stand Trial and Does Not Require a Separate Finding of Fact of Competence at the Termination of the Trial

In *U.S. v. Andrews*, 469 F.3d 1113 (7th Cir. 2006), Rodney Andrews appealed his conviction to the Seventh Circuit Court of Appeals based on his claim that his amnesia for the time surrounding the crime rendered him incompetent to stand trial based on his inability to assist his attorney in preparing his defense. Mr. Andrews also claimed that the court erred in denying his request for a second competency assessment and a hearing to determine the impact of his amnesia on his fitness to stand trial.

Facts of the Case

On May 11, 2001, the Anchor Bank in Madison, Wisconsin, was robbed by a man claiming to have a gun. Before the alleged robbery, a witness saw an individual fitting the description of the bank robber smoking outside the bank. Three years later, cigarette butts found at the scene of the crime were sent for

DNA analysis. The profile matched that of convicted bank robber and long-time drug addict, Rodney Andrews. Mr. Andrews was indicted by grand jury on one count of robbing the Anchor Bank and was informed that he was suspected in four other bank robberies that occurred in 2001. His counsel understood that the government intended to charge Mr. Andrews on all five counts of bank robbery, which would result in his classification as a career offender, if he did not plead guilty to the original charge and stipulate to culpability in the other four incidents.

Because of his heavy use of heroin and alcohol at the time of the alleged robberies, Mr. Andrews claimed to have no memory of “where he was, or what he was doing, during the early to middle part of 2001.” As a result, a motion was filed by Mr. Andrews’ counsel for a psychiatric and psychological examination of his “present competency and his sanity at the time of the alleged bank robbery.” The examination was ordered without opposition by the government.

A psychologist opined that Mr. Andrews was competent to stand trial based on his “rational and factual understanding of the proceedings against him” and that “he is capable of assisting counsel in his defense.” The psychologist went on to opine that he “did not have a mental illness impairing his ability to appreciate the wrongfulness of his conduct” at the time of his alleged offenses.

Mr. Andrews then filed a second motion requesting an additional psychological evaluation based on his belief that the psychologist did not specifically address the effect of his alleged lack of memory on his ability to assist counsel. The government cited Seventh Circuit precedent in their opposition to his request. On September 28, 2005, Magistrate Judge Crocker denied the motion stating, “Given the law of this circuit, it does not appear anything useful would be obtained by attempting to pinpoint more precisely any organic basis for Mr. Andrews’ amnesia” (*Andrews*, p 1116).

Mr. Andrews was found guilty of robbing the Anchor Bank in a bench trial. He appealed based on his claim that his amnesia for the relevant period of the robbery rendered him unable to assist in his own defense at trial and that as such he should have been declared incompetent. He further claimed that the district court “erred in denying his request for a second competency examination and hearing to evalu-

ate the impact” of his alleged amnesia on his competence to stand trial.

Ruling

The U.S. Court of Appeals for the Seventh Circuit affirmed Mr. Andrews’ conviction. The court found that the district court did not err in its finding that Mr. Andrews was competent to stand trial, its denial of his motion for a second competence evaluation, or in not conducting a second hearing to address the impact of his alleged amnesia on his competence to stand trial.

Reasoning

The Seventh Circuit Court of Appeals relied heavily on the precedent set in *U.S. v. Stevens*, 461 F.2d 317 (7th Cir. 1972), which states that “amnesia is not a bar to prosecution of an otherwise competent defendant.” While the court acknowledged the importance of not trying individuals who are incompetent and that it is possible that amnesia could impair competence, it emphasized that the underlying issue in making the determination is the same as in any other nonamnesic defendant—that is, whether the individual is able to “satisfy the ordinary competency standard.” Here, the appeals court cited the standard laid out in *Dusky v. U.S.*, 362 U.S. 402 (1960): is the defendant able to “consult with his lawyer with a reasonable degree of rational understanding and . . . [have] a rational as well as factual understanding of the proceeding against him.”

The Seventh Circuit identified several factors that can be used to guide a court in applying the *Dusky* standard to an amnesic defendant with the ultimate decision left squarely in the hands of the district court. These factors include: (1) whether the defendant has any ability to participate in his defense; (2) whether the amnesia is temporary or permanent; (3) whether the crime and the defendant’s whereabouts at the time of the crime can be reconstructed without the defendant’s testimony; (4) whether access to government files would aid in preparing a defense; and (5) the strength of the government’s case.

The court of appeals addressed Mr. Andrews’ assertion that the government should adopt a two-step approach to the determination of the effect of the defendant’s amnesia on competence to stand trial as laid out in *Wilson v. U.S.*, 391 F.2d 460 (D.C. Cir. 1968). The Seventh Circuit declined to take the *Wilson* approach of making an initial determination of competence to stand trial before the initiation of trial

followed by a second finding of fact at the trial’s close, to determine whether the defendant had in fact demonstrated his competency during the trial. They cited both the fact that no other circuit has chosen to adopt this approach and the adequacy of the Seventh Circuit’s current approach of constant mindfulness for signs of incompetence throughout the trial to support their decision not to implement a formal finding of fact at the conclusion of the trial of an amnesiac defendant.

Finally, the Seventh Circuit addressed the finding of Mr. Andrews’ competency to stand trial and the denial of a second competency evaluation. They indicated that findings of competence of a defendant are reviewed only for clear error. Based on the facts afforded to them, they concluded that there was no commission of clear error. They cited Mr. Andrews’ ability to understand his charges, discuss the case with counsel, and evaluate the evidence, including the overwhelming scientific evidence against him. The court of appeals concluded that there was no indication that Mr. Andrews and his counsel would be unable to reconstruct the events of the alleged crime or to raise any possible defenses to the evidence against him. Similarly, the Seventh Circuit stated that the decision to hold a competency hearing or evaluation was reviewed for abuse of discretion based on *U.S. v. Wilbourn*, 336 F.3d 558 (7th Cir. 2003). They found no evidence that Magistrate Judge Crocker abused his discretion in denying the motion for a second competence examination, as Mr. Andrews provided no evidence that his alleged amnesia would impair his ability to defend himself, participate in his trial, or avail himself of any defenses.

Discussion

Defendants claiming amnesia are frequently regarded with skepticism in the courtroom. Recently, Cima and colleagues found that 23 percent of male forensic inpatients charged with serious crimes had claimed either partial or total amnesia for their crimes (Cima M, Nijman H, Merckelbach H, *et al*: Claims of crime-related amnesia in forensic patients. *Int J Law Psychiatry* 27:215–21, 2004). Courts have taken different approaches to handling claims of amnesia at the time of the crime; none have considered amnesia to be a *per se* bar to competence to stand trial.

One of the approaches forensic psychiatrists consider is that taken by the D.C. Circuit Court of Ap-

peals in *Wilson v. U.S.* The court in *Andrews* utilized many of the same factors as were used in *Wilson* to help in determining whether a defendant's amnesia renders him incompetent to stand trial. The Seventh Circuit did not, however, require the post-trial review of the effect the defendant's amnesia had on his trial as *Wilson* does.

While forensic psychiatrists study *Wilson* as a landmark case, *U.S. v. Andrews* emphasizes that the remainder of the U.S. courts of appeal do not follow the approach taken by the D.C. Circuit Court of Appeals on this matter. The D.C. Circuit Court of Appeals is the only circuit to require a post-trial review for the competency of individuals with amnesia at the time of their alleged crimes. In contrast to *Wilson*, the Seventh Circuit took the approach that the ordinary attention paid by judges to a defendant's competence throughout the course of a trial is sufficient.

Parsing Mental Illness and Substance Abuse in Determining Social Security Disability Benefits

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An Individual With Bipolar Disorder and History of Substance Abuse May Not Be Denied Social Security Disability Benefits When Evidence Indicates That the Individual's Bipolar Disorder Is Disabling

In *Kangail v. Barnhart*, 454 F.3d 627 (7th Cir. 2006), petitioner Tina Kangail sought review by the U.S. Seventh Circuit Court of Appeals of a decision by the U.S. District Court for the Northern District of Illinois, Eastern Division, upholding the denial of her application for social security disability benefits. Ms. Kangail applied for social security disability due to bipolar disorder. A social security administrative law judge (ALJ) denied her application, believing that Ms. Kangail's bipolar disorder was caused by chronic abuse of alcohol and cocaine. The key issue

before the Seventh Circuit was whether an individual with both bipolar disorder and a history of substance abuse qualifies for social security disability benefits, if medical evidence suggests that the individual's bipolar disorder is disabling. Ms. Kangail contended that her bipolar disorder prevented her from holding gainful employment, independent of the effects of substance abuse.

Facts of the Case

Ms. Kangail received a diagnosis of bipolar disorder when in her twenties. She had a comorbid history of alcohol and cocaine abuse. Her bipolar disorder was characterized by severe depression with moderate to severe manic episodes, coupled with employment instability. Despite achieving sobriety from alcohol and drugs in 2000, she was employed in 10 different jobs during the next 3 years, working as a cashier, telemarketer, and waitress. Her longest period of employment was 8 months working as a cashier, earning \$9,900.

Ms. Kangail applied for social security disability benefits in 1999 on the grounds that she could not sustain employment due to her bipolar disorder. Her final hearing before a social security ALJ was in February 2003. She testified that she had left most of her jobs because of her "blowing up" and having confrontations with customers and supervisors. She testified that her ability to function at work was affected by her "racing thoughts, insomnia, inability to concentrate, feeling overwhelmed" and depressive symptoms.

The ALJ denied Ms. Kangail social security disability benefits because her mood symptoms improved and she was able to work at different jobs after she stopped her substance abuse in 2000. The ALJ reasoned that because her symptoms improved after cessation of substance abuse, the symptoms of her bipolar disorder were most likely caused by the substance abuse. The ALJ refused to give weight to the testimony of medical experts who examined her because of "contradictions" in their testimony. The specific contradiction relied on by the ALJ was that, although the various medical experts reported that she suffered from a severe mental illness, they observed that she behaved normally while in their office.

Ms. Kangail appealed the denial of social security disability benefits to the U.S. District Court for the Northern District of Illinois, Eastern Division. The