

Fourth, Ms. James argued that the government had not proved that the proposed medication was medically appropriate. To do this, the government must show that medication is in the defendant's long-term medical interest and not just the government's short-term interest of bringing the defendant to trial. Ms. James argued that the government provided no evidence as to how the proposed medication would be in her long-term interest as her treatment was expected to be short, and that there was no distinction between any short-term medical benefit and the nonmedical interest to resolve her case. The court disagreed, noting this incorrectly assumed that the government's interest in restoring competency was separate from Ms. James's medical interest as restoring her competence would also be to her own benefit.

Discussion

In *U.S. v. James*, 959 F.3d 660 (5th Cir. 2020), Ms. James directly challenged all four *Sell* factors. As outlined in *Sell*, the government must meet four factors before it may involuntarily administer antipsychotic medications to restore a defendant's competency to stand trial: that important government interests are at stake, e.g., bringing a criminal defendant to trial; that involuntary medication will significantly further those interests by rendering the defendant competent to stand trial without side effects that would hinder the defendant's ability to assist in the defense; that involuntary medication is necessary to further those interests and that less intrusive treatments would be unlikely to achieve the same results; and that administration of the medication is medically appropriate. Psychiatrists should consider these factors when approaching restoration of competency and documenting their rationale for treatment over objection.

Evidentiary burden was not addressed in *Sell*. In both *U.S. v. James* cases, the Fifth Circuit Court of Appeals joined nine other circuit courts in establishing clear and convincing evidence as the required standard under *Sell*. In *U.S. v. James*, 959 F.3d 660 (5th Cir. 2020), the court found that the government had presented detailed evidence of Ms. James' interests in the treatment plan and, consequently, it was not clear error for the district court to find it met the clear and convincing threshold. This underscored the

importance of due process in restoration of competency to stand trial and reduced the likelihood of the U.S. Supreme Court revisiting *Sell*.

Law School Applicants Disability Discrimination Claim Rejected

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Eighth Circuit Upholds Law Schools Summary Judgment Because Applicant Failed to Show the School Rejected His Application Because of Discrimination Based on Mental Illness

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Key words: ADA; disability;; law school; pretextuality; mental illness

In *Power v. University of North Dakota School of Law*, 954 F.3d 1047 (8th Cir. 2020), Padraic Power sued the University of North Dakota School of Law (UND Law) under Title II of the Americans with Disabilities Act of 1990 (ADA, 42 U.S.C. § 12101 (2008)), arguing his law school application was rejected based on mental illness. The district court granted summary judgment to UND Law because Mr. Power failed to show that the law school's legitimate, nondiscriminatory reason for rejecting his application was pretext for discrimination. Mr. Power appealed to the Eighth Circuit Court of Appeals, which affirmed the district court's judgment.

Facts of the Case

In the 2015–2016 academic year, UND Law received 300 applications, offered 204 positions, and enrolled 85 students. Associate Dean Bradley Myers and Professor Alexandra Sickler composed UND Law's admission committee. They consider several

factors when deciding to offer admission to applicants, taking a holistic approach and gauging students' likely success at UND Law (e.g., LSAT score and writing samples, undergraduate grade point average (GPA), previous undergraduate and graduate schools, prior law school attempts, and reference letters).

Mr. Power applied in July 2015 for the 2015–2016 academic year, with an LSAT score of 153. His undergraduate GPA from the University of Connecticut from 1994 was 2.645. He had an additional 22 hours of credit from Capital Community College from 2012 to 2014 with a 3.90 GPA. He submitted two dated recommendation letters, along with a short personal statement that mentioned withdrawal from two prior law schools. He also had worked at 18 different jobs between 2005 and 2014.

The admissions committee received the application on July 16, 2015, but noted the file was missing required information about his prior law school enrollments. The following day, Professor Sickler voted to reject the application. Dean Myers received a letter from Mr. Power on July 27, 2015, explaining the prior law school withdrawals. The letter stated, "There's only one consistent fact in my withdrawals from law school: my bipolar disorder" (*Power*, p 1051). But, he explained, in the past few years he had stabilized psychiatrically with medication and psychological intervention. Both Dean Myers and Professor Sickler agreed to reject his application, notifying Mr. Powers of this decision on July 30, 2015.

Mr. Power emailed Dean Kathryn Rand on August 7, 2015, alleging his application was rejected due to his bipolar disorder. An internal email exchange occurred between Dean Rand, Dean Myers, and the Director of Admissions and Records, Ben Hoffman. The latter noted Mr. Power may think that his mental illness was the reason for the rejection, but his two unsuccessful attempts at other law schools and low undergraduate GPA over several years were "most likely important factors" (*Power*, p 1051). Dean Rand then explained these factors to Mr. Power, adding that LSAT and GPA do not guarantee admission. She assured him that his experience with mental illness would be a positive attribute, making him more compassionate in his advocacy for the appropriate treatment of those with mental illness. Mr. Power also alleged Dean Rand yelled at him during a telephone call, telling him to attend

another law school. Mr. Power again applied in February 2016 with a longer personal statement detailing his mental illness and history in law school, among other statements. His application was otherwise quite similar, and he was again not accepted.

Mr. Power then filed the present case, purporting UND Law discriminated against him due to his disability. UND Law filed for summary judgment, arguing Mr. Power did not establish a Title II claim and UND Law was entitled to sovereign immunity. The district court granted the school summary judgment, noting Mr. Power failed to show sufficient evidence that the school's purported legitimate reasons for rejecting the application were pretextual. The district court did not decide the school's sovereign immunity because Mr. Power failed to establish a Title II claim. Mr. Power then appealed.

Ruling and Reasoning

The Eighth Circuit Court of Appeals noted there was no direct evidence of discrimination, so the court analyzed the arguments under the burden-shifting framework cited in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). That framework required Mr. Power to establish a *prima facie* case that he was discriminated against (i.e., he had a statutorily defined disability, was qualified for the position, and his exclusion from the position stemmed from discrimination due to said disability). The burden then switches to UND Law to "articulate a legitimate, nondiscriminatory reason for rejecting [the] application" (*Power*, p 1052). UND Law justified the rejection of the application by stating the school admits students who show the potential to finish the program and did not believe Mr. Power was a good fit under that presumption, based on his overall application materials. Per UND Law, Mr. Power's 2015 application contained two dated letters of recommendation and did not include information about previous withdrawals from law school. His undergraduate GPA was also an important factor of consideration. When Mr. Power reapplied to UND Law in February 2016, his application was similar but included a longer personal statement. The application was again declined on the basis of the totality of the application. UND Law explained this process to the court, highlighted how multiple factors are considered, and noted how Mr. Power's application suggested he was not a good candidate to complete the program. The appeals court found the school

satisfied the burden of showing his application rejection was legitimate and nondiscriminatory. Finally, Mr. Power then must show UND Law's stated explanation was pretextual. Mr. Power argued the admission process was so subjective that it would allow a reasonable factfinder to conclude that UND's Law's decision was more likely motivated by a discriminatory reason than it was by UND Law's stated reasons. The court noted they "give deference to academic matters" (*Power*, p 1053) and subjectivity in the admissions process alone does not give rise to an inference of discrimination as long as objective data are also considered. The deference pertains to a school's academic decisions about who is a good fit and may or may not be successful in graduate education. The court further indicated subjectivity in evaluations cannot in and of itself be the basis for a claim of discrimination in the evaluation. It was noted UND Law incorporated both objective and subjective criteria in application decisions. Although Mr. Power's disability may have affected these factors, UND Law's reliance on them, without more, did not show discriminatory intent. As a result, that argument failed. Mr. Power's second argument was that students with lower index scores were admitted into UND Law and this represented pretextuality. The Eighth Circuit noted Mr. Power can at best show his index score was in the range of accepted and rejected applicants. While his LSAT score was higher than others, his GPA was lower, and applicants who had higher index scores were also rejected. The second argument thereby failed because Mr. Power did not show UND Law's reasons for denying his application were pretextual.

Regarding Mr. Power's assertion the phone call between him and Dean Rand showed discriminatory animus, it was established Dean Rand did not say anything pertaining to Mr. Power's mental illness. The school evidenced they did not consider his disability in their decision-making because they denied admission before learning of the mental illness and used points of objective data to arrive at a decision (e.g., his GPA, previous failed law school attempts).

Discussion

In *Power v. University of North Dakota School of Law*, Mr. Power was identified as a person with a disability (i.e., bipolar disorder) but that his application was not rejected due to pretextuality. The ADA was established to protect individuals with disabilities

from discrimination and exclusion from civic and public life, and universities are public entities. Even though the law school ultimately demonstrated sufficiently they had not discriminated against Mr. Power based on his disability, it is important to consider how decisions about applicants in educational and other contexts (e.g., employment) are made. While application decisions are made by humans, with their own biases and opinions, application materials need to be considered in their totality, without taking potential disability into account. The conclusions may be particularly relevant for clinicians involved in preemployment or disability evaluations, because bipolar disorder is classified as a disability and conclusions should be based on objective data points excluding consideration of such ADA-defined disabilities. This case further made it clear that ADA-covered entities have latitude in making decisions but should use a variety of objective data points in evaluating an applicant's materials to be fair and nondiscriminatory, as well as compliant with ADA.

Malingering and Sentence Enhancement

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Sentencing Enhancement Is Permitted When a Defendant Obstructs Justice by Malingering

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Key words: competency; feigning; malingering; obstruction of justice; sentence enhancement

In *U.S. v. Bowling*, 952 F.3d 861 (7th Cir. 2020), Monique Bowling argued (in part) that the district court erred when enhancing her sentence for obstructing justice by malingering. The Seventh Circuit Court of Appeals affirmed the lower court's