

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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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

decision, holding that the district court's finding that Ms. Bowling was malingering was not clearly erroneous and that there was no reason to upset the district court's finding that she deliberately exaggerated her symptoms and remained mute to unnecessarily delay the proceedings.

Facts of the Case

Ms. Bowling was the second-ranking network administrator in the city of Gary, Indiana's, information technology (IT) department. As a result, she was authorized to place orders on the city's credit accounts. In May 2013, Ms. Bowling began ordering Apple products, seemingly for the city, which she then sold for cash. By April 2015, she had purchased over \$1.3 million worth of computer equipment using Indiana's vendor accounts. To conceal her behavior, Ms. Bowling submitted duplicate invoices from legitimate purchases. As her orders grew larger and more frequent, she could not maintain submission of legitimate invoices and the city's debt grew. Consequently, one of the city's vendors, CDW, froze the account and turned it over to Vida Krug, a senior recovery analyst. Ms. Krug then reached out to Celita Green, city controller, who requested copies be sent of all outstanding invoices. Ms. Bowling intercepted the package upon arrival. Thereafter, Ms. Bowling accessed Ms. Green's email account and sent a fabricated message to Ms. Krug, reassuring her about the city's credit account and stating the outstanding balances would be resolved. Ms. Krug questioned the legitimacy of the email. Eventually, Ms. Bowling's behavior was uncovered, and she was terminated. She was charged with one count of theft from a local government that received federal funds.

Three weeks before trial, Ms. Bowling's defense attorney requested a competency evaluation. He reported Ms. Bowling's husband informed him that she had been mute for approximately six months. She was evaluated at the Federal Medical Center – Carswell by Dr. Amor Correa, who opined that Ms. Bowling was malingering. Ms. Bowling was subsequently adjudicated competent to stand trial and subsequently convicted. During the sentencing phase, the probation office recommended a two-level sentence enhancement for obstruction of justice based on Ms. Bowling's malingering. The charge of malingering may be used when a defendant

intentionally obstructs or impedes, or tries to obstruct or impede, the legal process with regard to the investigation, prosecution, or sentencing. This can include witness intimidation, destroying evidence, perjury, and escaping custody. In this case, Ms. Bowling's deliberate exaggeration of symptoms caused the trial to be delayed for one year.

Ms. Bowling objected and introduced testimony from Dr. Robert Coyle. He evaluated her after the conclusion of the trial and opined she was not malingering. By then, Ms. Bowling was verbally communicating. The district court overruled Ms. Bowling's objection and held that her "conduct was obstructive in nature" and "unnecessarily and unduly prolonged" the proceedings (*Bowling*, p 866). On the basis of the sentencing guidelines and her two-level obstruction of justice enhancement, she was sentenced to 63 months' imprisonment. On appeal, Ms. Bowling argued that the district court erred in enhancing her sentence for obstructing justice by malingering. While she did not ask the court to overrule the precedent set in *U.S. v. Wilbourn*, 778 F.3d 682 (7th Cir. 2015), she asked the court to depart from *Wilbourn's* holding, arguing that there were factual differences between the two cases. Defense counsel for Ms. Bowling also argued that if the court of appeals held that feigning incompetence is an obstruction of justice, it would deter lawyers from seeking competency evaluations for their clients in the first place. In addition, Ms. Bowling presented two secondary contentions involving jurisdiction and the admission of certain testimony.

Ruling and Reasoning

The Seventh Circuit Court of Appeals affirmed the district court's decision regarding sentencing enhancement. In making its decision, the appeals court placed greater weight on the report provided by Dr. Correa, compared with the testimony of Dr. Coyle. The court found that Dr. Correa's report was "very, very persuasive" (*Bowling*, p 870); given that she evaluated Ms. Bowling over the course of two months, administered several psychological tests to support her findings, and noted inconsistencies in Ms. Bowling's level of functioning. Dr. Coyle, on the other hand, evaluated Ms. Bowling after the trial ended and over a much shorter time period. In conclusion, the appeals court held that Ms. Bowling deliberately exaggerated symptoms of mutism to unnecessarily delay the proceedings. Moreover, the

court noted, “Whatever factual differences may exist, they are irrelevant here” (*Bowling*, p 870).

The court further said that psychiatric evaluations addressing competency ensure that defendants’ constitutional rights are not violated. More specifically, forensic experts conduct examinations to determine whether defendants have adequate knowledge of criminal proceedings and if they can effectively assist counsel and participate in their defense. Moreover, the sentencing enhancement should not punish a defendant for exercising a constitutional right. Indeed, the court specified that it is “only an obstruction of justice to intentionally feign incompetence for the purpose of delaying or attempting to avoid the criminal proceedings” (*Bowling*, p 871). Moreover, “defendants who deliberately exaggerate their symptoms do so at their own peril and risk receiving an enhanced sentence” (*Bowling*, p 871). Simply requesting a competency evaluation does not constitute an obstruction of justice. Defense attorneys are responsible for acting in their clients’ best interest, especially when legitimate mental health concerns have been raised. Furthermore, *Wilbourn* was decided several years prior, yet there was little evidence to suggest that defense attorneys had been deterred from requesting competency evaluations because of the possibility that their clients may malingering. Malingering is, in fact, a choice to intentionally deceive the legal system, and in doing so a defendant is at risk for receiving an enhanced sentence. The appeals court also affirmed the district court’s decision concerning subject-matter jurisdiction and the admission of specific testimony.

Discussion

In *U.S. v. Bowling*, the court of appeals addressed sentencing guidelines in the context of obstruction of justice. In its decision, the court of appeals relied upon the ruling in *U.S. v. Nygren*, 933 F.3d 76 (1st Cir. 2019) and *Wilbourn*. The courts in both of these cases affirmed sentencing enhancements for defendants who thwarted the justice system by malingering. In both cases, the defendants were evaluated using performance validity measures designed to detect the presence of feigned symptomology. Both

defendants performed extremely poorly on these measures, which highlighted their intent to purposefully exaggerate mental deficits and ultimately led to similar outcomes, but in different judicial districts. *Wilbourn* was decided several years prior to *Bowling* but in the same district. In *Bowling*, the appeals court reiterated that intentionally feigning incompetency in an effort to delay or evade criminal proceedings is an obstruction of justice. Thus, decisions made in different jurisdictions and at different times all held that sentence enhancement is appropriate in those circumstances. The holding in *Bowling* cannot be applied to jurisdictions outside of the Seventh Circuit. Nonetheless, it falls closely in line with the decision made in *U.S. v. Greer*, 158 F.3d 228 (5th Cir. 1998), which was a Fifth Circuit case in which malingering constituted an obstruction of justice that may qualify for sentence enhancement. In *Greer*, it was noted that the obstruction requires a *mens rea* component, such that there needs to be a deliberate attempt by the defendant to obstruct justice.

In summation, the judicial system appears to be consistent in coming to the same conclusion in cases involving malingering and sentence enhancement. The notions of due process and the constitutional right to a competency evaluation are especially salient in these cases. Protecting these rights is paramount because it ensures a defendant’s right to be treated fairly and with dignity by the justice system. It also promotes accurate and just legal proceedings, preserves the integrity of the justice system, and protects the interests of both the state and the defendant. These holdings underscore how seriously the court responds to those who purposefully prolong criminal proceedings or otherwise attempt to interfere with or manipulate the outcome. By clearly attempting to exploit the judicial system, defendants are, in a sense, defrauding it. Furthermore, it threatens to undermine the protections put in place for those who are truly unfit to stand trial. As a result, the notion that these defendants should be subjected to a lengthier punishment has become uniformly imposed by the courts.