No. 13-3662

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BEVERLY LAMBERSON,
Administratrix of the Estate of Melinda Lamberson Reynolds, Deceased,
Plaintiff-Appellant

v.
COMMONWEALTH OF PENNSYLVANIA *et al.*,
Defendants-Appellees

On Appeal From The United States District Court
for the Middle District of Pennsylvania

REPLY BRIEF FOR PLAINTIFF-APPELLANT

LAWRENCE D. BERGER
SHEPHERD, FINKELMAN, MILLER & SHAH, LLP
35 East State Street
Media, PA 19063
(610) 891-9880
LBERGER@SFMSLAW.COM

MICHAEL CHURCHILL
BENJAMIN D. GEFFEN
PUBLIC INTEREST LAW CENTER OF PHILADELPHIA
1709 Benj. Franklin Pkwy., 2d Floor
Philadelphia, PA 19103
(215) 627-7100
MCHURCHILL@PILCOP.ORG
BGEFFEN@PILCOP.ORG

Attorneys for Appellant

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PRELIMINARY STATEMENT

Beginning in 2008, Melinda Reynolds ("Reynolds") was barred by defendants from practicing her profession as a nurse, or even from being monitored to return to licensed practice, because of defendants' methadone prohibition policy. Our opening Brief demonstrated that there are genuine issues of material fact, concerning Reynolds' exclusion, that require a trial. Appellees – seeking to avoid any discussion of their methadone policy – repeat the same error made by the Court below of largely ignoring what happened in 2008, after the September 2007 Order by the Board of Nursing ("BoN" or the "Board"). However, this case cannot be resolved without confronting what happened in 2008, and without confronting the methadone policy in the PHMP[1] Operations Manual that caused Reynolds' exclusion.

Nothing in appellees' brief establishes any other reason for the 2008 action. Defendants' monitoring agency, PHMP, maintained a non-public written policy that excluded licensed professionals, who were receiving methadone maintenance treatment, not only from returning to work but even from being monitored so that they could return to work. Appellees applied this policy to bar Ms. Reynolds even

[1] As set forth in the opening Brief for Appellant, "PHMP" is defendant Division of Professional Health Monitoring Programs, the sister agency of the BoN, and the agency that is responsible for monitoring.

after an addiction medicine specialist hired by defendants, Dr. Woody, stated in 2006 that she could safely practice nursing while receiving methadone maintenance treatment, provided that she was monitored.

When Reynolds' license was first suspended in 2007, defendants concealed the PHMP anti-methadone policy from the Hearing Examiner. When the Hearing Examiner drafted, and the Board of Nursing entered, an Order that did *not* say anything about methadone (and which Reynolds therefore did not appeal), PHMP still excluded her from the monitoring program by closing her file in 2008.

Appellees devote only a single footnote on page 44 of their Brief to what happened in 2008, after the September 2007 Order was entered by the Board. The Order did require that Reynolds be monitored by PHMP, and PHMP closed Reynolds' file – *i.e.*, refused to monitor her – because she had not been detoxed from methadone. PHMP did not refuse to monitor her for any other reason: not because of failure to sign up for additional drug screening, or failure to attend support groups, or use of other (also legal) drugs, benzodiazepines. PHMP closed her file because of methadone. At a minimum, this factual record presents genuine issues for trial.

The additional grounds for affirmance now argued by appellees – abstention and allegations of other drug use – simply ignore the record. The District Court correctly rejected the abstention argument because appellant is not trying to

relitigate or collaterally attack the September 2007 BoN Order. PHMP's Case Manager testified at the BoN hearing – falsely as it turned out – that there was no methadone prohibition unless it was specified in the Order. The Order contained no such prohibition, and restored her to probation status, so there was nothing in the Order itself for Reynolds to appeal. Yet, after the Order was entered, defendants continued to exclude Reynolds under the PHMP policy.

As for the exception to the ADA and Rehabilitation Act for people who are currently using illegal drugs, that exception applies only when the agency acts on the basis of such use, and PHMP and the Board of Nursing did not. Moreover, even assuming that defendants are permitted to exclude Reynolds on the basis of alleged facts not known at the time, those facts still leave issues to be resolved at trial. The Order of the District Court should therefore be reversed, and the case should be remanded for trial.

ARGUMENT

A. The District Court Correctly Rejected Appellees' Abstention Argument, Because Reynolds Was Not Attacking The Board of Nursing Order.

The District Court denied appellees' abstention motion because it understood that:

> [Reynolds] challenges an unwritten[2] policy of excluding methadone maintenance from approved treatment, and thus focuses on the conduct of officials, not the decision made by the Board of Nursing. This anti-methadone policy is not part of the administrative procedures, and plaintiff seeks mainly prospective relief in preventing operation of that policy in the future.

Opinion on motion to dismiss, Dist. Ct. Doc. No. 36 at p. 12 (footnote added). The essential focus of plaintiff's action never changed, and thus the Court's decision to deny abstention was correct. Reynolds, and now her Administratrix, are not challenging the 2007 Board of Nursing decision which actually restored Reynolds to probationary status and did not require her to stop methadone treatment. Rather, plaintiff is and always has been challenging the administrative actions of

[2] It was subsequently established in pretrial discovery, and is now undisputed, that the concealed policy (whose very existence was still denied in defendants' Answer to the Amended Complaint) was a written component of the PHMP Operations Manual. *See, e.g.,* Deposition of Pearl Harris (8/22/2011) at pp. 108-09 (App. 596a-597a); Ex. P-2 (App. 381a); Deposition of Kevin Knipe (8/25/2011) at pp. 34-35 (App. 210a-211a).

defendants-appellees, and particularly those of PHMP, the monitoring agency, which came after the 2007 decision.

Appellees now argue that the District Court should have abstained *after* pre-trial discovery was completed, ironically arguing that *they* established "that the order of the Nursing Board suspending Reynolds' license was based, in part, on Reynolds' failure to enter inpatient treatment and be weaned from methadone." Brief for Appellees at 29. Therefore, they argue, "the question of Reynolds' continued methadone use was in fact an issue which could have been argued before the Board," and Reynolds' claims were a "collateral attack on the decision by the Pennsylvania Board of Nursing to suspend Reynolds' license to practice." *Id.* at 30. In short, when it suits appellees' convenience, this case is about methadone!

But when Reynolds was before the Board of Nursing in 2007, and even as late as 2010 when appellees answered the Amended Complaint, appellees resolutely – and falsely – denied that there was any methadone policy. At the Board of Nursing hearing, PHMP's Harris was asked a misleading question about whether the Board of Nursing itself had a methadone policy, to which she answered no, and then further and falsely embellished her answer by claiming that PHMP did monitor nurses who were receiving methadone treatment, and that "there is no requirement" that monitored nurses "cannot practice as a nurse because they are on methadone." *See* opening Brief for Appellant at 18-20, and

BoN Transcript at p. 75 (App. 403a.) Consequently, the Hearing Examiner and Board issued an Order that did not say that Reynolds was required to discontinue methadone treatment. *See* opening Brief for Appellant at 23, and BoN Order at App. 458a-472a.

It is undisputed that information about defendants' methadone policy was not available to either Reynolds or the Hearing Examiner in 2007. Even after the Board of Nursing Order in September 2007, and after Reynolds' file was closed by Harris in March 2008, a request by Reynolds' methadone provider for a copy of the policy was refused. *See* request from New Directions Executive Director Glen Cooper in April 2008 (App. 479a) and defendants' Answer to Amended Complaint confirming that the request was refused (Answer at ¶63, App. 104a). Even then, defendants were still denying the existence of the pre-June 2008 methadone policy: "Defendants do not and *did not* maintain a methadone exclusion policy." *Id.* (emphasis added).

None of the abstention cases cited by defendants are remotely applicable. Reynolds was not contesting what happened in the Board of Nursing hearing – from which defendants withheld any information about the methadone policy – but what happened after the hearing. By contrast, all of the cases cited by appellees concern plaintiffs who deliberately failed to avail themselves of an available state forum.

For example, in *Middlesex County Ethics Committee v. Garden State Bar Ass'n.*, 457 U.S. 423 (1982), the plaintiff was charged with an ethics violation in a pending proceeding, and brought a federal court action to enjoin the administrative proceedings without even filing an answer. The Supreme Court held that *Younger* abstention was appropriate because he could litigate his constitutional claim in the administrative proceedings. *Id.* at 435-436. Reynolds never had an opportunity to litigate the post-hearing application of the methadone exclusion policy to her, as there was no pending proceeding. The Board of Nursing proceeding concluded in September 2007, six months before Reynolds' PHMP file was closed in March 2008.

Similarly, in *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975), the plaintiff filed his federal court injunction action at a time when the state court adjudication that he was protesting was still subject to appeal in the Ohio courts. *Id.* at 610. Here, as demonstrated above, there was nothing in the Board of Nursing Order from which Reynolds could have appealed. Her quarrel was with the subsequent administrative action that wrongly closed her PHMP file, and denied her both monitoring and licensing because of a concealed PHMP policy – a policy which PHMP concealed until long after the BoN Order, when it was finally disclosed in pretrial discovery in this case. Likewise, in *O'Neill v. Philadelphia*, 32 F.3d 785,

790-91 (3d Cir. 1994), the plaintiffs brought a federal court action but failed to avail themselves of an available administrative hearing.

However, the abstention issue in this case does resemble the abstention issue in *Taliaferro v. Darby Twp. Zoning Bd.*, 458 F.3d 181, 192-193 (3d Cir. 2006), the case cited by the District Court. Here as in *Taliaferro,* the state proceedings were terminated before plaintiff brought her federal court action, and plaintiffs' federal claims were not litigated in the state tribunal. Here, moreover, Reynolds was not attacking anything decided by the Hearing Examiner, from whom defendants concealed the methadone policy at issue. Therefore, as the Supreme Court recently reiterated in *Sprint Communications, Inc. v. Jacobs,* --- U.S. --- (No. 12-815, decided Dec. 10, 2013), "federal courts ordinarily *should entertain and resolve* on the merits an action within the scope of a jurisdictional grant, and *should not 'refus[e] to decide a case* in deference to the States.'" Slip Op. at 2 (emphasis added), *citing New Orleans Public Service, Inc. v. Council of City of New Orleans,* 491 U. S. 350 (1989) at 368.[3] Therefore, abstention would not have been proper.

[3] While *Sprint* is otherwise dissimilar from the case at bar, this general principle clearly applies to a case like this one in which there is no pending proceeding, and the issue raised by Reynolds concerns subsequent matters that defendants themselves excluded from the state proceeding.

B. The District Court Should Not Have Entered Summary Judgment, Because There Was At Least A Triable Issue Of Fact As To Why Reynolds Was Excluded.

The District Court granted summary judgment on the basis of the conclusion that "the decision to suspend plaintiff was premised on additional grounds aside from her failure to comply with ABT's treatment recommendations [to be "detoxified" from methadone]," specifically "failure to enroll in drug testing and attend support groups." Opinion at 34 (App. 35a). From this, the District Court concluded that "the methadone maintenance policy was not the but-for cause of Reynolds' suspension." *Id.* The District Court also erroneously concluded that "Reynolds could return to practice as a nurse even if she still received methadone maintenance treatments, so long as she received the clearance to do so by a PHMP-approved provider." Opinion at 20 (App 21a).

The fact that Reynolds did not enroll for drug screens or attend support groups in 2007, when her license was initially suspended, is not disputed. Reynolds explained at the Board of Nursing hearing that she could not afford the additional drug screens[4] because she had lost her job as a result of the license suspension, and that she was excluded from any support programs with the PHMP

[4] She was already screened at the methadone treatment center. *See* BoN Tr. at 63 (App. 400a).

evaluator, "A Better Today," because she was receiving methadone treatment. *See* opening Brief for Appellant at 17, and BoN Transcript at 72 (App. 402a).

The District Court's error, which appellees seek to have this Court repeat, was to ignore what happened after Reynolds was initially suspended. First, appellees put the PHMP Case Manager, Pearl Harris, on the stand to tell the Hearing Examiner in July 2007 that:

> If that is not written in the order from the Board that they cannot practice on methadone, there is nothing to my knowledge that the State Board of Nursing holds that a person cannot practice on methadone.

Tr. at 75 (App. 403a). In our opening Brief, we showed that this testimony was at best misleading, because PHMP itself had a methadone prohibition policy.

In August 2007, the Hearing Examiner issued a proposed Order that did *not* say that Reynolds "cannot practice on methadone." (App. 458a-472a).[5] No one filed exceptions to the Proposed Order – there was nothing for Reynolds to appeal – and it was formally issued by the Board as its Final Order in September 2007. (App. 440a.)

[5] The word "methadone" does not even appear in the Proposed Order (App. 458a-472a). Methadone is discussed in the Hearing Examiner's narrative recitation of the prior direction to Reynolds to discontinue methadone, *see, e.g.*, App. 453a-454a, but not in the Order itself which is forward-looking.

But Harris was not telling the truth. In our opening Brief, we showed what happened after the Final Order was issued in September 2007, *none of which is disputed by appellees*. Reynolds' PHMP file *was* reopened in September 2007, just as the Board ordered. However, in reopening the file, Harris listed methadone as a "drug of abuse." *See* Opening Brief at 24.[6] In November 2007, Harris directed Reynolds again to the PHMP "evaluator" A Better Today, Inc., even though Harris knew that "A Better Today" had insisted that Reynolds stop methadone treatment.[7] "A Better Today" repeated its prior action of demanding she detoxify from methadone and refusing to monitor or assist her unless she immediately discontinued use of methadone.

Reynolds' own treating physician, Dr. William Santoro, called "A Better Today" in February 2008, and was met with the same unyielding refusal to permit methadone treatment. Dr. Santoro then wrote to Harris and requested that Reynolds be referred to an evaluator who was not biased against methadone.[8] Of course, Harris did not do that, because PHMP itself was biased against methadone.

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[6] *See, e.g.*, Harris dep. (8/22/2011) at pp. 122-123 (App. 600a), and Knipe dep. (8/25/2011) at p. 35 (App. 211a). Appellees have not discussed these record citations in their Brief.

[7] *See* November 30, 2007 letter from Harris to Reynolds (App. 709a-710a).

[8] *See* Santoro Declaration, ¶¶19-21, and Ex. D thereto (App. 960a-962a, 980a-982a).

Appellees ignored Dr. Santoro – the treating physician – in 2008, and appellees continue to ignore Dr. Santoro in their Brief.[9]

Appellees cite *Olmstead v. L.C.*, 527 U.S. 581, 610 (1999) (Kennedy, J., concurring) for the proposition that "[t]he opinion of a responsible treating physician in determining the appropriate conditions for treatment ought to be given the greatest of deference." (Brief for Appellees at 39.) Plaintiff agrees with this general proposition,[10] but Dr. Santoro was that treating physician, and appellees ignored him.

Finally, after hearing from and ignoring the treating physician to whom – according to appellees' Brief – they should have "given the greatest of deference" – the Case Manager, Harris, closed Reynolds' file until she "enter[ed] inpatient treatment to be weaned from methadone."[11] Appellees ignore this too, except in a footnote at page 44 of their Brief where they argue that Harris' action in closing Reynolds' file should be ignored because:

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[9] Dr. Santoro's name does not appeal in the Brief for Appellees at all.

[10] Generally, the *Olmstead* decision relates to the obligation of states to provide services to people with disabilities in the most integrated setting. Defendants' citation of *Olmstead* is paradoxical. While plaintiff agrees that *Olmstead's* maxim of deference to a treating physician can fairly be given wider application, defendants manifestly failed to follow it.

[11] Ex. P-20, App. 416a.

- "Harris was employed by PHMP and not the Board."

But PHMP and the Board of Nursing are both part of the Department of State. Moreover, the Board Order specifically required Reynolds to "fully and completely comply and cooperate with . . . the PHMP's [Disciplinary Monitoring Unit]."[12] And it is undisputed that the Board of Nursing was on notice concerning PHMP's methadone prohibition policy.[13]

- "Even if Harris' actions were improper or went beyond her authority, the Board cannot be expected to know if its orders are being misinterpreted or misapplied without notice being provided to it."

But as we showed in our opening Brief, and again here, the Board had notice, and Harris had authority: The Order required Reynolds to "comply and cooperate with" PHMP, Harris was required to carry out PHMP's policy, and PHMP's policy required Reynolds to discontinue methadone.

Finally, appellees fall back on the District Court's own erroneous attempt to show that Harris was insignificant. Appellees quote the following:

> Harris, as a PHMP case-worker, did not define the terms of Reynolds' suspension. The terms of Reynolds suspension were exclusively controlled by the hearing examiner's findings and the [Board's] order, and Harris' letter presents no evidence that

[12] Order at paragraph (1), App. 458a.

[13] *See* our opening Brief at 23, and Ex. P-24 at App. 1104a-1105a.

> either of these were influenced primarily by PHMP's methadone maintenance policy.

Brief for Appellees at 44 n. 19, *citing* Opinion at 38 (App. 39a). While it is true that Harris did not "define the terms of" the Order, the Order required Reynolds to cooperate with PHMP, *i.e.*, Harris. It is undisputed that PHMP policy provided that methadone patients were "ineligible to participate in the PHMP," as well as "unfit to practice." Ex. P-2 at App. 381a. When Reynolds' physician, Dr. Santoro, wrote to Harris and requested that Reynolds be permitted to continue methadone therapy, Harris did just what PHMP policy dictated: She refused to consider Reynolds' and Dr. Santoro's requests, and she closed Reynolds' file.

C. Appellees' Other Arguments For Affirmance Are Without Merit.

1. Reynolds Did Request An Accommodation: She Repeatedly Expressed Her Belief And Request That She Should Be Permitted To Continue Methadone Maintenance Treatment, And The ADA And Rehabilitation Act Do Not Require Special Words Or Formality.

Appellees argued in the District Court, and again in this Court that Ms. Reynolds never requested that she be permitted to continue on methadone maintenance treatment. (The District Court did not discuss this argument.) We showed in our opening Brief that Reynolds repeatedly asked to continue methadone maintenance treatment. Among other things:

- Reynolds testified to the BoN Hearing Examiner in July 2007 that she disagreed with the conclusion (of "A Better Today") that she needed

to stop methadone treatment, and that "I feel I'm very capable of practicing safely and that the methadone does not affect me negatively." Tr. at 72 (App. 402a). When asked what she wanted the Board to do, she stated that she wanted her license restored and that she didn't understand why she couldn't work while on methadone. Tr. at 63 (App. 400a). She also testified that she would go off methadone only if "it is a state law" or "if it's a Board order to keep my license." Tr. at 45-46 (App. 396a).

- Reynolds' treating physician, Dr. Santoro, called "A Better Today," and wrote to PHMP in February 2008 and requested that she be permitted to continue on methadone. Santoro Declaration at paragraphs 19-21 and Ex. D (App. 960a-962a, 980a-982a)
- The Executive Director (Mr. Cooper) of Reynolds' methadone treatment provider wrote to and met with officials of PHMP and its parent agency from April through June of 2008, and requested that she be permitted to continue on methadone treatment. Cooper Declaration at paragraphs 5-6 (App. 987a); Cooper correspondence with Bureau of Professional and Occupational Affairs (App. 479a, 514a-516a); and defendants' internal memoranda, Ex. P-44 (App. 426a-437a).

The cases holding that "formalisms" are not required for a request for accommodation are legion. *See, e.g., Taylor v. Phoenixville School District,* 184 F.3d 296, 313 (3d Cir. 1999) (where request for accommodation was made on plaintiff's behalf by her son, Court reversed a grant of summary judgment to a defendant under the Rehabilitation Act, because of the District Court's unduly formalistic approach). The cases cited by appellees are not to the contrary. In *Gill v. Franklin Pierce Law Center,* 899 F.Supp. 850 (D.N.H. 1995), the Court found that the claimed disability of post-traumatic stress disorder had not been disclosed, and that no specific accommodation for this disability had been requested. 899 F.Supp. at 855-856. In *Nathanson v. Medical College of Pennsylvania,* 926 F.2d 1368, 1382-83 (3d Cir. 1991), this Court *reversed* a grant of summary judgment to a defendant, even though the plaintiff's requests for assistance were general in nature. And in *Oconomowoc Residential Programs, Inc. v. City of Greenfield,* 23 F.Supp.2d 941, 956, 959 (E.D.Wis. 1998), the Court held that the plaintiff's request for a zoning exception (needed to allow it to operate group homes for people with disabilities) *was* a sufficient request for accommodation, and granted the plaintiff's motion for partial summary judgment on liability.

In short, the District Court could not have concluded – and did not conclude – that Reynolds failed to communicate to defendants her desire to be permitted to remain on methadone maintenance treatment. Therefore, this Court ought not to

affirm the lower court decision on the ground that she failed to request an accommodation.

2. Whether Methadone Maintenance Treatment Was A Reasonable Accommodation Presents, At The Least, A Triable Issue Of Fact.

Appellees also trot out another argument that they made to the District Court (and which the District Court did not adopt): that methadone maintenance treatment was not a "reasonable" accommodation because her "concurrent dependence on benzodiazepines placed her at a special risk for using methadone." Brief for Appellees at 38. At most, the benzodiazepine theory is one that should be evaluated at trial, not on summary judgment. It is undisputed that benzodiazepines are legal drugs that were legally prescribed for Ms. Reynolds. Reynolds disclosed her use of benzodiazepines to Dr. Woody, defendants' evaluator, and he discussed them in his report which ended with the conclusion that she could safely practice. Woody Report, Ex. P-1, at pp. 3 and 5 (App. 378a, 380a). Benzodiazepines were also approved by Ms. Reynolds' treating physician, Dr. Santoro. Santoro Declaration at paragraphs 12-18 (App. 958a-960a). Dr. Santoro was not aware of any benzodiazepine abuse during the period from 2005 to 2010, which includes the time period during which Reynolds was unfairly prevented from working as a nurse, and for which her Administratrix seeks damages. Santoro Declaration at paragraph 24 (App. 963a).

Subsequently, after Ms. Reynolds already had been prevented from working for several years, Dr. Santoro did become concerned about her benzodiazepine usage, and recommended that she enter in-patient treatment. She did so. At the conclusion of treatment in January 2012, she was benzodiazepine-free. Santoro Declaration at paragraphs 22-23 (App. 962a-963a). Dr. Santoro cannot explain the finding of "mixed substance toxicity" including benzodiazepines, at the time of Ms. Reynolds' subsequent death, but neither can anyone else.[14] In any case, her tragic death has no bearing on her condition at earlier times. Santoro Declaration at paragraph 25 (App. 963a-964a).

3. Summary Judgment Could Not Be Granted On The Alternate Alleged Ground Of Reynolds' Use Of Illegal Drugs Or Because She Was Too Impaired To Be Otherwise Qualified.

Defendants argue that this Court should deny Reynolds any recovery because she was "not otherwise qualified" to practice nursing or participate in the

[14] Reynolds missed a methadone dose because of transportation problems on February 16, 2012, two days prior to her death. (Dist. Ct. Doc. No. 95-4 at p. 85, MLR 021019.) Perhaps she was anxious because of the missed methadone dose, and therefore took Xanax. However, at this point, she had been successfully weaned from Xanax and all benzodiazepines, *see* Santoro Declaration, ¶23 (App. 963a). Because of her success in stopping benzodiazepine use, Ms. Reynolds was no longer tolerant to benzodiazepines. *See* Newman Report, pp. 6-7, App. 150a-151a. Therefore, even if she took a legal dose of Xanax that was no greater than her former dose, she would no longer have been tolerant to that dose, and the formerly tolerated dose could have unintentionally contributed to her death.

PHMP program because her "concurrent use of benzodiazepines and methadone" rendered her unqualified, and because her "continued . . . use [of] illegal drugs" (Brief for Appellees at 26) deprived her of any rights under the ADA and Rehabilitation Act, citing 28 C.F.R. §35.104.

It is not surprising that Defendants do not provide the full language of the regulation or of the statutes from which it is derived (42 U.S.C.§12210(a) (ADA) and 29 U.S.C. §705(20)(C)(i) (Rehabilitation Act)), because the full language immediately reveals the deficiency of their argument. Section 35.104 provides "The term individual with a disability does not include an individual who is currently engaging in the illegal use of drugs, *when the public entity acts on the basis of such use*." (Italics indicate language omitted by defendants.)

Defendants have never contended – and cannot contend – that they relied on drug screens either in 2007 to suspend Reynolds' license, or in 2008 to close her PHMP file. At the time that defendants acted against Reynolds, they had no access to the records from her methadone provider on which they now exclusively rely to allege illegal use of drugs. The defendants could not have "act[ed] on the basis of" information they did not have.[15]

[15] As this Court said in the case cited by appellees, "the relevant time frame is when the covered entity took its allegedly discriminatory action." *New Directions Treatment Services v. Reading*, 490 F.3d 293, 309 (3d Cir. 2007). Here, that time frame is 2007 when Reynolds' license was suspended, and 2008 when her PHMP

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The issue of whether Reynolds was "otherwise qualified" to be a nurse also was not a basis for the summary judgment decision below for the very obvious reason that every court has stated that this is a very fact intense issue, [16] and in this case defendants' allegations were highly contested.[17]

Dr. Woody, defendants' own expert who examined Reynolds in 2006, found no sign of impairment from benzodiazepine use, or methadone, and stated explicitly that she could continue practicing nursing if she was monitored. Woody Report, Ex. P-1 at p. 5 (App. 380a). Dr. Santoro, who was Reynolds' physician supervising her methadone treatment, submitted a detailed declaration reviewing the limited approval for Reynolds to continue to take benzodiazepines while

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file was closed, and defendants did not have – or cite at the time – any of this evidence.

[16] *See School Board of Nassau County v. Arline,* 480 U.S. 273, 287-89 (1987); *Bay Area Addiction Research and Treatment Inc. v. City of Antioch*, 179 F.3d 725, 735-36 (9th Cir. 1999); *Doe v. Centre County*, 242 F.3d 437, 448-449 (3d Cir. 2001); *Gaus v. Norfolk S. Ry. Co.*, No. 09-cv-1698 (W.D.Pa. Sept. 28, 2011), 2011 U.S. Dist. Lexis 111089 at *67; *EEOC v. Hussey Copper, Ltd.*, 696 F.Supp.2d 505, 521 (W.D.Pa. 2010); and discussion in opening Brief for Appellant at 41-42.

[17] In the District Court, defendants challenged Reynolds' fitness on the basis of a contested expert report by Dr. Limoges, a physician who did not examine Reynolds himself, and whose views concerning benzodiazepines and methadone are completely at odds with those of Dr. Santoro. Hence, Dr. Limoges' report, not cited by defendants on appeal, could not possibly be the basis for summary judgment.

receiving methadone, how she was monitored, and the absence of any evidence of abuse in the 2005 to 2010 time frame. He concluded:

> 17. . . . . From at least September 2005 to July 2010 (after which her methadone treatment was interrupted for several months), Ms. Reynolds was approved for benzodiazepine use. There is no record and I have no recollection during this time period that any of the counselors or nurses, who saw Ms. Reynolds every week, reported that Ms. Reynolds appeared impaired.
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> 18. Appropriate use of benzodiazepines by a methadone patient does not render that patient unfit to work, even in a demanding job like nursing.

Santoro Declaration at ¶¶17-18 (App. 960a.)[18]

Dr. Santoro's declaration recognizes that in a subsequent period, after July 2010, he became worried about Reynolds' use of benzodiazepines.[19] Although this was long after the relevant time for establishing liability – the time that defendants acted against Reynolds in 2008 – it may be relevant in determining the time period for which Reynolds could recover damages, depending on the extent of any impairment and whether plaintiff can establish at that stage whether Reynolds'

[18] *See also* Declaration of Glen Cooper, the Executive Director of the methadone provider, New Directions, who reviewed Reynolds' records, talked to New Directions staff, and met with Reynolds herself in the spring 2008, prior to approaching defendants on Reynolds' behalf, and found "no signs of impairment which would disqualify her from any activities, including the practice of nursing." Cooper Declaration, ¶¶8-9 (App. 988a).

[19] Santoro Declaration,¶¶22-23 (App. 962a-963a).

anxiety and need for benzodiazepines were a result of defendants' actions in illegally depriving her of work as a nurse for two years.

The case law is clear that the essence of the ADA and Rehabilitation Act is an individual determination of qualification and impairment.[20] That includes the issue whether a person does not have a disability because they are "currently engaging" in illegal drug use. As the Court of Appeals for the Tenth Circuit explained in *Mauerhan v. Wagner Corporation,* 649 F.3d 1180 (10th Cir. 2011):

> Wagner attempts to persuade us that an individual could never qualify for ADA protections after only thirty drug-free days. We disagree. *No formula can determine if an individual qualifies for the safe harbor for former drug users or is "currently" using drugs,* although certainly the longer an individual refrains from drug use, the more likely he or she will qualify for ADA protection. Instead, *an individual's eligibility for the safe harbor must be determined on a case-by-case basis, examining whether the circumstances of the plaintiff's drug use and recovery justify a reasonable belief that drug use is no longer a problem.*

649 F.3d at 1188 (emphasis added). Similarly, the issue whether a person with a disability meets the requirements of being otherwise qualified cannot be singled out for a blanket rule, but must depend upon an individualized determination whether or not Reynolds could, as Dr. Woody and Dr. Santoro stated, safely

[20] *See* cases cited at p. 20 n. 16, *supra*.

practice nursing.[21] In any event, there is no evidence in the record that even suggests that if Reynolds weaned herself from benzodiazepines and stayed on methadone, she would have been permitted to stay in or be restored to the program.

Even assuming for the sake of argument that appellees should be permitted to search after-the-fact through records that they did not have at the time of Reynolds' suspension, Reynolds' regular drug screening at the methadone clinic shows that she was generally free from illegal drugs except for a few isolated instances, and those few instances were not at the time of – or the cause for – appellees' closing of her PHMP file in 2008. Benzodiazepines are legal drugs that Reynolds had approval to use from her treating physician, the Medical Director of her methadone treatment provider. From at least the time that Reynolds' file was "closed" in March 2008 through July 2010, there is no evidence of abuse of benzodiazepines.[22] Even assuming for the sake of argument that Reynolds later

[21] *See* Ex. P-1, Woody Report, at p. 5 (App. 380a) ("[i]n view of her positive response to methadone maintenance . . . . I think she is able to practice nursing with the requisite skill and safety provided she is monitored"); Santoro Declaration, ¶¶17-18 (App. 960a).

[22] The District Court did not cite any of Reynolds' alleged drug use in 2007-2012 as the basis for its ruling. From at least 2005 to 2010, Reynolds' use of benzodiazepines – legal drugs for which she had prescriptions – was approved by Dr. Santoro, the Medical Director of her methadone treatment provider. *See* App. 956a-960a, Santoro Declaration at paragraphs 6 (describing his role as

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used benzodiazepines in an inappropriate way,[23] or that this contributed to her death, there is at least a triable issue of fact as to damages for her improper exclusion between 2008 and 2010.

Given this conflict in the evidence,[24] summary judgment as to Reynolds' fitness to practice is inappropriate and the lower court correctly did not grant it on this ground. *See, e.g. Crown Packaging Tech., Inc. v. Ball Metal Bev. Container Corp.*, 635 F.3d 1373, 1384 (Fed. Cir. 2011) (summary judgment inappropriate "where there is a material dispute as to the credibility and weight that should be afforded to conflicting expert reports") (*citing Scripps Clinic & Research Found. v. Genentech, Inc.*, 927 F.2d 1565, 1578 (Fed. Cir. 1991)); *Dairy Am., Inc. v. New York Marine & Gen. Ins. Co.*, 2010 U.S. App. Lexis 26773, at *5 (9th Cir. 2010) (summary judgment not appropriate, when there are

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Medical Director), 12 and 13 (no universal rule against prescribing benzodiazepines for methadone patients), and 15-17 (Reynolds was approved for benzodiazepine use from September 2005 to July 2010, and there was no report of her being impaired during that period).

[23] *See Fowler v. Westminster College*, 2012 U.S. Dist. Lexis 133269 (D.Utah 2012) at *7 (no authority for proposition "that taking prescription drugs in excess of the amounts prescribed constitutes the 'illegal' use of drugs").

[24] *See* p. 20 n. 17, *supra,* concerning the conflict of views between defendants' expert Dr. Limoges, and Reynolds' treating physician, Dr. Santoro.

conflicting expert opinions which "involves weighing the relative probative value of the experts' opinions").

D. Partial Summary Judgment Should Have Been Granted to Plaintiff-Appellant Because There Is No Factual Dispute That The PHMP Methadone Policy Wrongfully Excluded People With Disabilities, On A Blanket Basis, From Being Monitored And From Practicing Their Professions.

As set forth in the opening Brief for Appellant at pp. 39-40, plaintiff moved for partial summary judgment determining that the PHMP methadone policy was illegal under the ADA and the Rehabilitation Act. Plaintiff carried her burden on this motion by submitting the PHMP policy, and the reports of both plaintiff's expert, Dr. Newman, and defendants' expert, Dr. Ziegler, concerning the safety and efficacy of methadone maintenance as a treatment for opioid drug dependence. Thus, both experts agreed that: opioid drug dependence is a chronic condition which often requires life-long treatment (Newman Report at 3, App. 147a, and Ziegler Report at 10, App. 169a); and some methadone patients are able to practice safely as nurses (Newman Report at 9-10, App. 153a-154a, and Ziegler Report at 10, App. 169a). The BoN prosecutor's expert witness, Dr. Woody, specifically found that Reynolds was safe to practice while receiving methadone treatment (Woody Report, Ex. P-1 at p. 5, App. 380a). Despite these facts, the PHMP policy completely prohibited nurses from any opportunity to return to work while they were receiving methadone maintenance treatment. (Ex. P-2, App. 381a.)

The only question on which plaintiff seeks summary judgment is whether defendants can lawfully exclude methadone patients from their monitoring and licensing programs on a blanket basis. This Court should direct the entry of partial summary judgment on this question, so that the Court can then determine at trial whether and to what extent Reynolds should have been permitted to practice.

CONCLUSION

For the reasons stated in appellant's opening Brief, this Court should vacate the entry of summary judgment for the defendants-appellees, and it should also direct the entry of partial summary judgment for appellant concerning the illegality of the PHMP methadone policy. Moreover, for the reasons stated in this Reply Brief: the District Court correctly rejected appellees' abstention argument; Reynolds did request an accommodation for methadone treatment; methadone treatment was a reasonable accommodation; and the exclusion for people who are "currently engaging in the use of illegal drugs" has no application to this case.

Respectfully submitted,

/s/ Lawrence D. Berger
LAWRENCE D. BERGER
SHEPHERD, FINKELMAN, MILLER & SHAH, LLP
35 East State Street
Media, PA 19063
(610) 891-9880
LBERGER@SFMSLAW.COM

/s/ Michael Churchill
MICHAEL CHURCHILL
BENJAMIN D. GEFFEN
PUBLIC INTEREST LAW CENTER OF PHILADELPHIA
1709 Benj. Franklin Pkwy., 2d Floor
Philadelphia, PA 19103
(215) 627-7100
MCHURCHILL@PILCOP.ORG
BGEFFEN@PILCOP.ORG

Attorneys for Appellant

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,976 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as determined by the word count feature of Microsoft Word 2010.

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/s/ Lawrence D. Berger
Lawrence D. Berger

Certificate of Service

I hereby certify that the foregoing Reply Brief for Plaintiff-Appellant has been served on all counsel through the CM/ECF system, and that an electronic copy (by e-mail) and paper copy (by first class mail, postage prepaid) has also been served on the following:

Howard G. Hopkirk, Esquire
Senior Deputy Attorney General
Appellate Litigation Section
Pennsylvania Office of Attorney General
15th Floor, Strawberry Square
Harrisburg, PA 17120

E-mail: hhopkirk@attorneygeneral.gov

Attorney for Defendants-Appellees

/s/ Lawrence D. Berger
Lawrence D. Berger

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