

COUNTERPOINT

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PENNSYLVANIA EMPLOYMENT LAW UPDATE

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The Third Circuit holds that an employee's violation of a return to work agreement requiring the employee to refrain from consuming alcohol did not violate the Americans with Disabilities Act.

Ostrowski v. Con-Way Freight, Inc., 2013 U.S. App. LEXIS 22091 (3d. Cir. 10/30/13)

The employee was employed as a driver/sales representative for a company, which was required to maintain strict drug and alcohol screening programs for its employees in accordance with the federal motor carrier safety regulations issued by the Department of Transportation. During his employment, the employee requested a leave of absence pursuant to the Family and Medical Leave Act to seek treatment for alcoholism. The employee's request was granted, and he was not disciplined for seeking treatment. However, the employer required that the employee sign a "return to work agreement," which mandated that he remain "free of drugs and alcohol (on company time as well as off company time) for the duration of [his] employment." Within a month of executing the agreement,

the employee admitted himself into a center for treatment of alcohol abuse after he suffered a relapse. Based upon the employee's violation of the return to work agreement, the employer terminated his employment. The employee filed this lawsuit, alleging that his termination violated the ADA and the FMLA.

The Third Circuit upheld summary judgment in favor of the employer, holding that the employer did not violate the ADA and the FMLA. In so holding, the Third Circuit reasoned that "employers do not violate the ADA merely by entering into return-to-work agreements that impose employment conditions different from those of other employees," as the difference in conditions "results from the terms of [the employee's] agreement rather than disability discrimination." Significantly, the Third Circuit further noted that the employee "does not explain how the [return to work agreement], to which he voluntarily agreed, tends to discriminate against him because of his alleged disability (alcoholism), as opposed to regulating his conduct (drinking alcohol)." The return to work agreement "does not restrict the

ability of individuals who suffer from alcoholism to work at [the company]...it simply prohibits employees subject to its terms from consuming alcohol."

The Third Circuit rejects plaintiff's gender identity claim, finding that an employer's reason for selecting the plaintiff in a reduction in force was not a pretext for unlawful discrimination.

Stacy v. LSI Corp., 2013 U.S. App. LEXIS 22885 (3d. Cir. 11/13/13)

The Third Circuit held that the plaintiff failed to present evidence demonstrating that her termination through a reduction in force was a pretext for unlawful gender identity discrimination. The plaintiff filed suit, alleging that she was provided with a poor performance review from her supervisor after she had returned from a gender identity disorder surgery and had made a complaint about the performance review to her supervisor's direct supervisor. One year later, following a merger, the company engaged in a series of layoffs in response to the declining economy, which resulted in the layoff of more than 3,700 positions over an eight-month time frame. The

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plaintiff's supervisor's direct supervisor was instructed to reduce his department's staff by eight employees. In making this decision, he first determined which job positions and functions would be impacted by the reduction in force, and he then conducted a skills assessment of the individuals in those groups. The plaintiff was the lead engineer in a three-member group and was rated lowest of the three in the skills assessment. After discussing the findings with management, the plaintiff was informed of the decision to lay her off.

In rejecting the plaintiff's allegation that her layoff was motivated by unlawful gender identity discrimination, the Third Circuit reasoned that the plaintiff failed to contradict the facts of record that the supervisor was directed by his superiors to reduce his workforce, he selected several groups of employees who would be impacted, he chose the skills to be evaluated based upon those he believed would be beneficial to the employer moving forward and the plaintiff was ranked the lowest within her group. Based upon this finding, the Third Circuit upheld dismissal of the plaintiff's discrimination claims as a matter of law.

Plaintiff's admission that he failed to secure a prison control room door, thereby creating an opportunity for an inmate to gain access to the control room, mandates dismissal of plaintiff's disability discrimination claims.

Dove v. Community Education Ctrs., Inc., 2013 U.S. Dist. LEXIS 170081 (E.D. Pa. 12/2/13)

The plaintiff asserted violations of the ADA and the FMLA following his termination from employment as a prison guard. Specifically, the plaintiff alleged that he requested and took leave for depression and that, when he returned to work, he was subjected to harassment by a prison chief. Several months following

his return from leave, the plaintiff was assigned to the control room in the area of the prison that housed the "worst-of-the-worst inmates" and was involved in an incident where an inmate was able to gain access to the control room and make contact with a correctional officer—despite the prison's policy that the doors remain locked at all times. The incident was captured on the prison's surveillance system and was investigated. The investigations supervisor noted that, "Leaving a control room door unlocked, even if an officer is inside, constitutes a violation of policy that is a terminable offense." The deputy warden reviewed the investigative report and surveillance video and recommended to the warden that the plaintiff's employment be terminated.

In rejecting the plaintiff's claims of discrimination, the court noted that "[n]othing in the evidence suggests that [the chief]—who, according to plaintiff, bore him some discriminatory animus—initiated, recommended, and ultimately caused plaintiff's termination." Rather, the court determined that the decision was clearly initiated by the investigations supervisor, with a recommendation for termination by the deputy warden, "neither of whom had any demonstrable knowledge of plaintiff's impairment or request for leave." In so holding, the court further reasoned that the plaintiff "did not identify any situations where control room doors were left unlocked on the SMU, an inmate gained entry to the control room, the offending officer used force to remove that inmate, and the entire incident was captured on video." As a result, the court determined that, "given the overwhelming evidence that leaving a control room door open was itself a terminable offense" and the lack of "any mitigating circumstances to warrant a deviation from that policy," the plaintiff failed to establish a pretext of discrimination.

Court denies a doctor's request for a preliminary injunction to modify

the American Board of Pediatrics' exam pursuant to Title III of the ADA, holding that the doctor was not disabled and that the requested accommodations were not reasonable.

Rawdin v. The American Board of Pediatrics, 2013 U.S. Dist. LEXIS 159458 (E.D. Pa. 11/6/13)

The court denied a doctor's request for a preliminary injunction and his requested accommodation that he be awarded board certification without passing the multiple-choice portion of the examination or providing him with an alternative form of testing. The doctor was a pediatrician who had been unable to obtain board certification, having failed to pass the multiple-choice portion of the examination on five occasions. He argued that he suffered from a memory deficiency caused by a brain tumor and the subsequent treatment he received. Following his fifth attempt to pass the examination, his employment with a hospital was terminated based upon his failure to become board certified. As a result, the doctor requested that the court award him certification, that the test be modified so that he could take the test "open book" and/or that he be provided with an oral component to the test.

In rejecting his requests, the court first noted that the doctor was not disabled as a matter of law. In so holding, the court determined that, while "test-taking" is a major life activity, there was no evidence that the doctor's "test-taking abilities are lower than those of the average person in the general population" to be deemed "substantially limited" in that major life activity. Moreover, the court noted that, even if the court found that the doctor was disabled pursuant to the ADA, the requested accommodations were not reasonable and would have resulted in a fundamental alteration of the examination and an undue burden on the board.

