Litigation Update

by Fred P. Parker III and Brad Gilbert

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ADA

Test accommodations
Peter C. Rumbin v. Association of American Medical Colleges, 2011 WL 1085618 (D. Conn.)

Peter Charles Rumbin sought test accommodations under the ADA in order to take the Medical College Admission Test (MCAT) administered by the Association of American Medical Colleges (AAMC). The MCAT is an exam designed to predict success in the first few years of medical school. It has 4 hours and 20 minutes worth of content and since 2007 has been administered using computers with 19-inch

monitors; prior to 2007 it was administered with paper and pencil.

In June 2008, Rumbin filed suit against AAMC, Prometric, Inc., and Sylvan Learning, Inc., seeking relief under Title III of the Americans with Disabilities Act. He claimed that his accommodations requests had been denied in 2001, 2002, 2005, 2006, 2007, and 2008. He asked the United States District Court for the District of Connecticut to grant him three days to take the MCAT, submission by AAMC of his MCAT practice test results to medical schools, and $14–$15 million in damages for past and future lost earnings.

HE ASKED THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT TO GRANT HIM THREE DAYS TO TAKE THE MCAT, SUBMISSION BY AAMC OF HIS MCAT PRACTICE TEST RESULTS TO MEDICAL SCHOOLS, AND $14–$15 MILLION IN DAMAGES FOR PAST AND FUTURE LOST EARNINGS.

Rumbin's initial request for accommodations was based on glaucoma but was later modified to a visual impairment known as "convergence insufficiency." Convergence insufficiency is a visual impairment characterized by an individual's inability to turn the eyes inward, toward each other, resulting in difficulty in visually focusing on nearby objects. It can cause headaches, fatigue, eyestrain, and double vision.

Rumbin stated that he struggles with tiny, dense text. He testified that he has difficulty with everyday tasks such as grocery shopping, using ATMs, reading fine print, and distinguishing among bills of varying denominations. He also said that he avoids using computers and relies on others to send and receive e-mails on his behalf.

On March 9, 2009, the court dismissed Prometric and Sylvan as defendants. It also dismissed Rumbin's damages claim under Title III of the ADA, under which damages cannot be awarded, and Rumbin's request for an injunction requiring AAMC to accept and certify as official his practice MCAT results. The claim that remained for trial was Rumbin's ADA claim against AAMC seeking injunctive relief.

In evaluating Rumbin's ADA claim, the District Court cited the case of *Powell v. National Board of Medical Examiners,* 364 F.3d 79, 85 (2d Cir. 2004), noting that the ADA "prohibit[s] discrimination against qualified disabled individuals by requiring that they receive 'reasonable accommodations' that permit them to have access to and take a meaningful part in public services and public accommodations." The court also observed that under the ADA, "[a]ny person that offers examinations or courses related to applications . . . for secondary or post-secondary education . . . shall offer such examination[s] . . . in a place and manner accessible to persons with disabilities." 42 U.S.C. § 12189.

The District Court also cited the case of *Bragdon v. Abbott,* 524 U.S. 624 (1998), in which the Supreme Court articulated a three-step process for determining whether a plaintiff has a disability under the ADA. First, a plaintiff must show that he suffers from a physical or mental impairment. Second, he must identify the activity claimed to be impaired and establish that it constitutes a "major life activity." Third, the plaintiff must show that the impairment "substantially limits" the major life activity previously identified.

Pursuant to the first criteria, AAMC conceded that Rumbin has vision impairments, although various assessments had failed to reach a consensus as to exactly what those impairments are. AAMC further conceded point number two, that the activities that Rumbin claims to be affected by his visual impairments (seeing, learning, and reading) are major life activities. The central issue in this case involved the third requirement set forth in *Bragdon:* whether the plaintiff can show that the impairment "substantially limits" the major life activities in question.

In evaluating the "substantially limits" requirement, the court observed that Rumbin had a history of academic success without formal accommodations. He earned a B.S. in physics from Southern Connecticut State University, having previously studied at the University of Chicago and Harvard University. Following his undergraduate work, he went on to pursue graduate studies at Wesleyan College and Columbia University, and he was later a research assistant on a team at Yale University that won a 2009 Nobel Prize.

". . . THUS, IN ASSESSING WHETHER A PLAINTIFF HAS A DISABILITY, COURTS HAVE BEEN CAREFUL TO DISTINGUISH IMPAIRMENTS WHICH MERELY *AFFECT* MAJOR LIFE ACTIVITIES FROM THOSE THAT *SUBSTANTIALLY LIMIT* THOSE ACTIVITIES."

The District Court stated:

> "Although almost any impairment may, of course, in some way affect a major life activity, the ADA clearly does not consider every impaired person to be disabled. Thus, in assessing whether a plaintiff has a disability, courts have been careful to distinguish impairments which merely *affect* major life activities from those that *substantially limit* those activities." *Ryan v. Grae & Rybicki, P.C.*, 135 F.3d 867, 870 (2d Cir. 1998). "The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual." *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 483 (1999). The preamble to the Department of Justice regulations on nondiscrimination on the basis of disability in state and local government services—applied by the Second Circuit to an ADA Title III action in which a plaintiff sought testing accommodations because of vision problems, *see Bartlett v. N.Y. State Board of Law Examiners,* 226 F.3d 69, 80 (2d Cir. 2000)—provides that "[a] person is considered an individual with a disability when the individual's important life activities are restricted as to the conditions, the manner, or [the] duration under which they can be performed in comparison to most people." 28 C.F.R. § 35.104.

Based on these criteria, the court found that Rumbin was not disabled under the ADA. The court opined that Rumbin had failed to prove by a preponderance of the evidence that he was substantially limited in his ability to see, learn, and read in comparison to the general population. The court referred to evidence of Rumbin's past employment, his ability to paint, his ability to read books, and his prior education and test-taking without accommodations. The court made specific reference to Rumbin's work on a biophysics research project at Yale University that

required him to develop computer programs and read electron-density maps. In addressing Rumbin's convergence insufficiency, the court noted that eye conditions, even blindness in one eye or monocular vision, are not per se disabilities and require case-by-case determinations as to whether they constitute substantial limitations to the major life activities of seeing, reading, and learning. *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 566 (1999).

MANY COURTS HAVE FOUND NO ADA-COVERED DISABILITY WHERE PURPORTEDLY DISABLED INDIVIDUALS CAN BOTH READ BOOKS AND PERFORM THEIR JOB DUTIES WITHOUT FORMAL ACCOMMODATIONS, EVEN WHEN FACED WITH OTHER LIMITATIONS IN DAILY LIFE.

Many courts have found no ADA-covered disability where purportedly disabled individuals can both read books and perform their job duties without formal accommodations, even when faced with other limitations in daily life. *Carrereas v. Sajo, Garcia & Partners,* 596 F.3d 25, 34 (1st Cir. 2010).

The court concluded that Rumbin had failed to prove that he was substantially limited and therefore disabled within the meaning of the ADA. Thus, he was not entitled to accommodations.

CONDITIONAL ADMISSION

In re Conditional Admission of Atkinson, 929 N.E.2d 208 (Ind. 2010)

Christopher Atkinson was conditionally admitted to the Indiana Bar in May 2007 pursuant to a consent agreement that conditioned his license to practice law on, among other things, his entering into a monitoring agreement with the Judges and Lawyers Assistance Program (JLAP) and remaining in compliance with the terms of that monitoring agreement. The consent agreement was to remain in effect for two years and required Atkinson to submit quarterly reports from JLAP to the Indiana Board of Law Examiners by March 31, June 30, September 30, and December 31 of each year.

Less than three months after signing the consent agreement, Atkinson placed his law license on inactive status and notified the board that he had done so and that he planned to withdraw from JLAP monitoring based on economic necessity. The board denied Atkinson permission to be relieved from his obligation to fulfill JLAP's requirements and notified him to that effect. Nevertheless, Atkinson did not continue with his JLAP requirements or submit quarterly reports to the board. In the spring of 2008, Atkinson contacted JLAP about the possibility of reactivating his license and getting into compliance with the monitoring agreement. He wrote the board acknowledging his mistakes and seeking renewal of the consent agreement. In June 2008 the board sent Atkinson an amended consent agreement offering to continue his conditional admission for an additional two years. Atkinson never responded, nor did he ever again contact JLAP to resume the fulfillment of his monitoring agreement.

In May 2010, the board filed a petition with the Indiana Supreme Court seeking revocation of Atkinson's conditional admission and asking the Court to prohibit him from seeking admission for a period of five years. Atkinson's response to the board's petition did not contest any of the allegations but asserted that he should be permitted to withdraw permanently from the practice of law.

The Indiana Supreme Court found that Atkinson had failed to abide by the terms of his conditional admission and that therefore his conditional admission should be revoked immediately and that he shall not submit a new application for admission for a period of five years from the date of the order. The Court further found that Atkinson could not avoid the revocation of his conditional admission by submitting an affidavit of permanent withdrawal and rejected that affidavit.

MISCELLANEOUS

Rooker-Feldman doctrine

Smith v. Hon. Allison H. Eid, et al., 2010 WL 1791549, 2010 U.S. District LEXIS 52042 (D. Colo. 2010)

Kenneth Smith was denied admission to the Colorado Bar by the Colorado Board of Law Examiners, which decision was affirmed by the Colorado Supreme Court. For over a decade, in multiple federal and state lawsuits, Smith has challenged the constitutionality of the process by which he was denied admission. In this matter, he challenged the constitutionality of the state bar admission process by suing the justices of the Colorado Supreme Court, the Colorado Supreme Court itself, and the Colorado Board of Law Examiners. He raised a number of claims that he had previously raised in a case based on the same alleged set of facts and advanced under the same theories as the present action. The District Court dismissed the complaint in that earlier case because, inter alia, it lacked subject matter jurisdiction. On appeal, the Tenth Circuit affirmed, stating that each of Smith's claims was "inextricably intertwined with the state court's denial of his application for admission to the state bar; thus, under *Rooker-Feldman*, those claims may not be reviewed by the district courts." The court added that despite Smith's protests to the contrary, it was clear that his injury resulted from the state-court judgment and that his complaint in federal court sought only to upset that judgment.

IN THIS MATTER, HE CHALLENGED THE CONSTITUTIONALITY OF THE STATE BAR ADMISSION PROCESS BY SUING THE JUSTICES OF THE COLORADO SUPREME COURT, THE COLORADO SUPREME COURT ITSELF, AND THE COLORADO BOARD OF LAW EXAMINERS.

The District Court also noted that the Tenth Circuit had recently held in an earlier Smith case that he was seeking to re-litigate his federal law challenges to the Colorado Supreme Court's denial of his admission to the bar and that those

challenges were barred by the doctrines of res judicata and collateral estoppel. The court pointed out that even if it had subject matter jurisdiction, res judicata and collateral estoppel would be grounds for dismissal of Smith's complaint. The District Court ordered that Smith's complaint be dismissed due to lack of subject matter jurisdiction.

Rooker-Feldman doctrine *& Younger v. Harris*

Wilson v. Dows, 390 Fed.Appx. 174, 2010 WL 3199703, 2010 U.S. App. LEXIS 17103 (3rd Cir. 2010)

In December 2008, Tony Wilson received a letter from Mark Dows, then the Executive Director of the Pennsylvania Board of Law Examiners (PBLE), notifying him that he lacked the requisite character and fitness for admission to the Pennsylvania Bar. Shortly thereafter, Wilson filed a civil rights action alleging that although he had passed the bar examination, the PBLE had wrongfully denied him admission to the bar. Wilson alleged that the PBLE had based its denial of admission solely on prior negative evaluations of Wilson's character and fitness conducted by the Florida and Connecticut Bars. He argued that the doctrine of res judicata precludes the PBLE from basing its denial of his application upon the same alleged misbehavior that was tacitly condoned by the U.S. District Court for the Middle District of Florida when it refused to hold him in contempt. Wilson also claimed that Dows's letter was constitutionally inadequate because it failed to apprise him of the grounds for finding that he lacked the requisite character and fitness. He further claimed violations of equal protection, due process, the First Amendment, and full faith and credit. The Magistrate Judge recommended that the matter be dismissed for lack of subject matter jurisdiction pursuant to Rule 12(h)(3) of the Federal Rules of Civil Procedure and the *Rooker-Feldman* doctrine. The Magistrate Judge also found that since Wilson's bar admission proceedings were pending, the District Court should abstain from exercising its jurisdiction under *Younger v. Harris*, 401 U.S. 37 (1971). Wilson appealed.

HE ARGUED THAT THE DOCTRINE OF RES JUDICATA PRECLUDES THE PBLE FROM BASING ITS DENIAL OF HIS APPLICATION UPON THE SAME ALLEGED MISBEHAVIOR THAT WAS TACITLY CONDONED BY THE U.S. DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA WHEN IT REFUSED TO HOLD HIM IN CONTEMPT.

The Court of Appeals for the Third Circuit pointed out that the District Court was mistaken in applying the *Rooker-Feldman* doctrine to this matter since that doctrine is restricted in its application only to "cases brought by state-court losers complaining of injuries caused by state-court judgments." Here there was no state-court judgment, as there was only Dows's letter informing Wilson of the preliminary denial of admission to the bar and notifying him of his right to a hearing. Hence, Wilson was not a state-court loser. The court concluded that the *Rooker-Feldman* doctrine

did not preclude the District Court from considering Wilson's claims.

However, the court did agree with the Magistrate Judge's conclusion that since Wilson's bar admission was pending a final decision in state proceedings, the District Court should abstain under *Younger v. Harris* from exercising its jurisdiction over Wilson's claims for declaratory and injunctive relief. The judgment of the District Court was affirmed.

FRED P. PARKER III is the Executive Director of the Board of Law Examiners of the State of North Carolina.

BRAD GILBERT is Counsel and Manager of Human Resources for the National Conference of Bar Examiners.