

LITIGATION UPDATE

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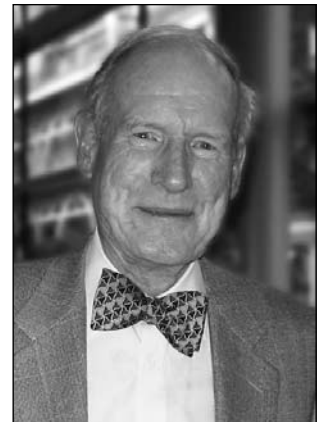
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ADA

Kelley v. West Virginia Board of Law Examiners et al.,
2:08-00933 (SDWV 2010), Unreported

Shannon Kelley sued the members of the West Virginia Board of Law Examiners for not granting the special accommodations he requested on the West Virginia Bar Examination. In May 2001 Kelley began attending the Thomas M. Cooley Law School in Michigan. During orientation, he took the Nelson-Denny Reading Test administered by the Cooley Academic Resource Center, and the test administra-

tor informed Kelley that his score was at or below the 25th percentile and expressed concern that his reading comprehension would affect his performance in law school. Kelley was referred to comprehensive psychological services. Dr. Ostien, a psychologist and director of the services, gave Kelley a number of tests and concluded that he had a permanent learning disability with severe processing deficits. Ostien

recommended that Kelley receive time and a half to complete his law school exams, and Cooley provided that accommodation.

In August 2003 Kelley transferred to Barry University School of Law in Florida. After he failed a final exam in his second semester, an academic advisor recommended that Kelley undergo a psychological assessment. The assessment was conducted by Alicia Braccia, a licensed school psychologist. Following her tests and evaluation, Braccia concluded that Kelley's processing speed had deteriorated further since Ostien's evaluation and that he should receive double time on his tests, take the exams in a separate room, be given test booklets formatted in an 18-point font, and be given breaks during major exams. Barry provided Kelley with double time. Kelley graduated from Barry University in January 2007.

The accommodations that Kelley received at Cooley and Barry were the only accommodations he had received to that point. He did not receive any accommodations as an undergraduate nor when he took the entrance exams to enter college and law school.

In April 2007, Kelley submitted a petition for special accommodations to the West Virginia Board of Law Examiners in anticipation of the July 2007 bar examination, requesting that he be given testing booklets with an 18-point font, a distraction-reduced testing environment, and double the allotted testing time. Along with his petition he submitted documentation which included the evaluation by Braccia. In the meantime, Kelley took the MPRE without receiving any additional time. Kelley was advised in May 2007 that the board would provide large-print examination booklets, a private testing room, and extended testing time of one and a half times the

normal time. Kelley took the July 2007 West Virginia Bar Examination and failed.

In November 2007 Kelley sent his second request for accommodations, requesting that he be given double time to take the July 2008 examination. The board responded to the second request and stated that it would once again provide Kelley with time and a half to take the July 2008 examination as well as the other accommodations he had received on the July 2007 examination.

On July 18, 2008, Kelley filed a complaint along with a motion for injunction, alleging that the board, by its denial of his request for double time, had violated both the ADA and his rights to due process and equal protection guaranteed by the Fifth and Fourteenth Amendments. A hearing was held on his motion for a preliminary injunction on July 23, 2008, and the motion was denied by order dated July 24, 2008. Kelley took the July 2008 examination and failed.

After failing the West Virginia Bar Examination, Kelley applied to take the July 2009 Kentucky Bar Examination and requested special accommodations including double time. The Kentucky board initially denied his request for double time, but following an appeal to the board, Kelley's request was granted in full.

A bench trial in Kelley's lawsuit against the West Virginia Board of Law Examiners was held on August 25, 2009. At the trial, West Virginia board member Ancil Ramey testified that the West Virginia Bar Examination consisted of three parts: the MPT, the MEE, and the MBE; that in using NCBE's testing products the board was required to follow strict security guidelines; and that time constraints placed on the examination were part of those guidelines.

Ramey stated, "NCBE has spent large amounts of money to develop professional tests that are valid and reliable, and being able to work under a time constraint is part of how the test measures an applicant's fitness to practice law. The fact that the examination is timed is an important component of the examination process. That part of the examination is a timed examination. It would be like giving a typing test and not timing it."

Ramey further testified that board members had received thorough training from NCBE on special testing accommodations required by the ADA and that he had attended between 10 and 15 workshops on accommodating disabilities. He stated that board members had also received training on changes and amendments to the ADA so that members would understand the board's legal obligations. Ramey also testified that the board had reviewed the documentation that Kelley submitted in support of his first request for accommodations and had considered the nature and extent of Kelley's disability and the history of the accommodations he had received in the past to arrive at their decision. "Based on the information submitted by the petitioner (Kelley), the [b]oard concluded that time and a half was a reasonable accommodation."

Ramey also testified that it was common for applicants to ask the board to reconsider its decisions and that if additional information or documentation regarding the applicant's disabilities was submitted, the board would reconsider the applicant's request. When Kelley sent his second request for double time, he stated that he was relying on the same documentation he had submitted with his first request, and the board responded to this second request stating that it would once again provide Kelley with time and a half for the July 2008 exam.

Kelley presented the testimony of an expert, Nancy Cruce, a clinical psychologist licensed in Florida, who had conducted a psychoeducational evaluation of him. Cruce stated that Kelley had obtained scores on the WAIS-III test which placed him in the superior range. She stated that even though Kelley's scores were within one standard deviation of the mean, the test showed that he had disabilities in reading and written expression and that he was severely learning disabled. She further testified that Kelley's learning disabilities substantially limited his ability to take the bar examination required for him to become a lawyer, which constituted a major life activity. She recommended extended time up to 200%, breaks at 90-minute intervals for 10 minutes, and the opportunity to mark directly on the test booklet rather than use a scantron sheet. In regard to her recommendation for double time, Cruce testified, "If he hasn't studied and doesn't know the law, he is not going to pass no matter how much time you give him. So let's give him the amount of time so that the learning disability does not come in to essentially compromise the findings . . . ; give him the time that he needs and see if he passes."

The board's expert was Dr. Bobby Miller, a board-certified forensic psychiatrist licensed in West Virginia, Kentucky, and Pennsylvania. He had completed a forensic psychiatric evaluation of Kelley. He testified that in conducting his ADA evaluation it was his practice not to repeat tests completed by other professionals when he was given results that were reliable, and that he did not feel it necessary to repeat the tests Cruce had completed. He testified that Kelly had a right-brain disorder which entitled him to reasonable testing accommodations. He further stated that contrary to Braccia's conclusion, Kelley's condition was static and would

not worsen over time. Miller testified that when evaluating whether an individual has a learning disability, comparison should be made to the average person or average population, and that while Kelley did have certain defects, those defects were not severe given that his lowest testing scores only put him in the low average range.

Miller disputed Cruce's conclusion that Kelley was severely disabled. Miller stated that in Cruce's report it appeared that she was starting with an IQ of 120, which would be the average for an individual with a postgraduate degree, rather than 100, the average IQ of the general population. This approach, he stated, was not psychologically or statistically appropriate. In considering the documentation provided by Kelley, Miller opined that Kelley had received reasonable accommodations for the July 2007 and July 2008 examinations. In addition, Miller testified that one of Kelley's greatest deficits was his inattentiveness, which could not be accommodated with extended time but only with a distraction-reduced environment.

The court stated that the question was whether Kelley's request for double time was reasonable and concluded that given the board's "valid concerns of insuring both the integrity of its testing procedures and its examination results, . . . the accommodations provided by the [b]oard were reasonable. Given this [c]ourt's conclusion that time and a half is a reasonable accommodation for a plaintiff's disability that puts him on equal footing with other applicants sitting for the [b]ar exam, [Kelley's] request for double time is not reasonable." The court further noted that Kelley had taken the ACT, the LSAT, and the MPRE without the aid of extended time. The court stated that Cruce's opinion that Kelley's learning disability was severe was undermined by her own testing. Her

concern was to make sure that Kelley had as much time as he needed to complete the exam. The court stated, "Giving the petitioner more time than is required to accommodate his disability would give him an unfair advantage over other applicants. This is not what is required under the ADA." The court found that Miller's opinion in this regard was more persuasive because it was supported by his own testing data as well as that of Cruce.

In considering the due process claim, the court found that the process used by the board met federal due process requirements. As the board has a detailed and thorough procedure for applicants requesting special accommodations, to follow that procedure comports with requirements of the ADA. The court also stated that it was not persuaded that federal due process standards require the board to implement a formal appeal procedure for applicants who are not satisfied with its decisions in regard to ADA requests, as the West Virginia rules do not prohibit an applicant from asking the board to reconsider its decisions, which is a fairly common practice. The court added that having considered the issue of whether a bar examinee is entitled to a review of a failed examination, it had concluded that due process does not require a state to hold such a hearing.

The court then discussed Kelley's equal protection claim and stated that "[s]tates are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions toward such individuals are rational. . . . If special accommodations for the disabled are to be required, they have to come from positive law and not through the equal protection clause." Since the U.S. Supreme Court has held that the disabled are not members of a suspect or quasi-suspect class entitled to special protection under the equal protection

clause, the board's decision to deny Kelley's request for double time need only be rationally related to a legitimate governmental purpose. The court stated, "In light of the [b]oard's determination that time and a half would accommodate the petitioner's disability, the decision to deny the request for double time is rational, especially when considered in light of the [b]oard's challenge to place those with disabilities on an equal footing without giving them an unfair advantage."

The court concluded that Kelley had not shown that the West Virginia Board of Law Examiners had discriminated against him in violation of the ADA and that the board had not violated any due process or equal protection rights.

The matter is currently on appeal to the Fourth Circuit Court of Appeals.

CHARACTER AND FITNESS

Failure to timely disclose

In re Application of Zatik, 934 N.E.2d 335, 2010 WL 3363029 (Oh. 2010)

Alexander Zatik applied to register as a candidate for admission to the Ohio Bar in November 2008. Because of his failure to timely disclose an adjudication of juvenile delinquency and two misdemeanor convictions in his law school application as well as his failure to disclose that omission on his application to register, the Board of Commissioners on Character and Fitness recommended that the court not approve Zatik's character, fitness, and moral qualifications at the present but permit him to reapply for the July 2012 examination.

When Zatik completed his application to register, he answered in the negative the question "Have you ever failed to answer fully and truthfully all questions on an application for admission to any educational institution?" During his interview with the admissions committee of the Toledo Bar Association, he provided greater detail about a juvenile delinquency adjudication for residential burglary, two misdemeanor convictions for underage alcohol possession, and the use of a false ID to purchase alcohol. While he had disclosed this infor-

mation on his application for bar admission, he revealed for the first time that he had not disclosed those incidents in his application for admission to law school. Based on these disclosures, the admissions committee was uncertain whether Zatik possessed the requisite character and fitness for admission and recommended further screening.

A seven-member panel of the admissions committee convened to review Zatik's application and recommended that it be approved with qualifications based on his failure to disclose prior criminal convictions on his law school application and the limited disclosure of his alcohol-related offenses to the law school. This panel found that Zatik did "not currently demonstrate the ability to exercise good judgment in his professional affairs, nor the ability to conduct himself with a high degree of honesty, integrity, and trustworthiness in his professional relationships." Accordingly, the admissions committee recommended that Zatik be required to wait two years before reapplying for admission.

Zatik appealed, and a three-member panel of the Board of Commissioners conducted a hearing to inquire into his character and fitness. The board expressed concern about Zatik's lack of candor both in disclosing past crimes and in explaining his reasons for failing to disclose them. The board recognized that Zatik's criminal conduct and juvenile adjudication had occurred while he was in his teens and likely would not interfere with his admission to the bar, but concluded that he needed a period of

maturation to develop the honesty, trustworthiness, and reliability necessary for successful admission to the bar. The board made that recommendation to the Court.

The Ohio Supreme Court reviewed and accepted the board's recommendation not to approve Zatik's pending application, but to permit him to apply to take the July 2012 bar examination provided that he submits a new application to register and is able to establish his character and fitness.

Res judicata

Dean v. Mississippi Board of Bar Admissions,
972 So. 2d 590, 2008 WL 151811 (Miss. 2008)

This case was reported in an earlier issue of the *Bar Examiner* (Vol. 77, No. 2, May 2008). The following summarizes the latest developments in the case.

In January 2001, Earl Stephen Dean graduated from Thomas Cooley Law School. He applied for admission with the Mississippi Board of Bar Admissions in March 2002. The Committee on Character and Fitness held two hearings concerning Dean's application. At the conclusion of each hearing, the committee recommended that the board deny Dean's application.

The Character and Fitness Committee recommended the denial of Dean's application because the committee found that Dean's conduct included (1) dishonesty, (2) irresponsibility in business and professional matters, (3) engagement in the unauthorized practice of law, (4) violation of the reasonable rules of conduct governing many of his activities, (5) failure to exercise substantial self-control, and (6) mental and emotional instability.

The Mississippi Board of Bar Admissions adopted the Character and Fitness Committee's recommendations and denied Dean's admission to the bar. Dean appealed the decision to the Chancery Court of Hinds County, Mississippi, on October 24, 2005. The Chancery Court upheld the board's decision on August 23, 2006. On September 18, 2006, Dean appealed the Chancery Court's decision to the Mississippi Supreme Court.

Prior to the Chancery Court's decision, Dean filed two additional suits in the Southern District of Mississippi. On February 8, 2006, he filed a complaint against the Mississippi Board of Bar Admissions and individual board members alleging violations of the ADA. On May 17, 2006, Dean filed a complaint against James Mazingo, Chairman of the Mississippi Board of Bar Admissions, seeking prospective and injunctive relief from the operation of Mississippi attorney licensing rules. The District Court dismissed both suits for lack of subject-matter jurisdiction. Dean appealed to the Fifth Circuit Court

of Appeals, which vacated and remanded for further analysis of res judicata and collateral estoppel on May 7, 2009. On remand, the District Court dismissed all of Dean's claims as barred by res judicata. Dean again appealed to the Fifth Circuit.

While Dean's initial Fifth Circuit appeal was pending, the Mississippi Supreme Court issued a final decision in *In re Dean* on January 17, 2008. The issue for the Mississippi Supreme Court was whether the board's decision to deny Dean's admission was arbitrary, capricious, or malicious. The Court found that it was not, and cited Dean's history of dishonesty, pattern of frivolous litigation, and mental and emotional instability in support of its decision.

In particular, the Court noted actions such as Dean lying to the Character and Fitness Committee about picketing the house of a dean at Thomas Cooley Law School, filing suit against a Michigan Bar official for violation of his First Amendment rights, and paying members of the public to attend a Character and Fitness Committee hearing. The Court found that Dean's repeated actions were sufficient for the board to conclude that he "'exhibited conduct substantially evidencing an inclination' that he was 'emotionally and mentally unstable to the extent that [he] was not suited for the practice of law.'" The Supreme Court affirmed the lower court's decision, and Dean was denied admission to the Mississippi Bar.

On September 10, 2010, the Fifth Circuit ruled on Dean's second appeal from the Southern District of Mississippi, which had dismissed Dean's claims as barred by res judicata. The court affirmed the judgment of the District Court and held that a dismissal under Rule 12(b)(6) on res judicata grounds may be appropriate when the elements of res judicata are apparent on the face of the pleadings.

The court noted that the doctrine of res judicata serves to "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, [prevent] inconsistent decisions, [and] encourage reliance on adjudication" by barring "further claims by parties or their privies based on the same cause of action." The court further stated that the federal courts may not "employ their own rules of res judicata in determining the effect of state judgments." Rather, "a federal court [must] accept the rules chosen by the State from which the judgment is taken."

In Mississippi, the doctrine of res judicata provides that "when a court of competent jurisdiction enters a final judgment on the merits of an action, the parties or their privies are precluded from relitigating claims that were decided or could have been raised in that action." The doctrine applies only when there has been a final judgment on the merits and when the following identities are present between the earlier and current proceedings:

1. identity of the subject matter of the action;
2. identity of the cause of action;
3. identity of the parties to the cause of action; and
4. identity of the quality or character of a person against whom the claim is made.

The Fifth Circuit found that *identity of the subject matter* was present given that the Mississippi Supreme Court rendered a final judgment on the merits of Dean's claims in *In re Dean*. Since *In re Dean* related to the board's handling of Dean's application for admission to the bar, the Fifth Circuit reasoned that this was the same subject matter that gave rise to Dean's other claims.

The court also found that there was *identity of the cause of action*. Mississippi law considers actions to be the same if they arise from the same “transaction.” However, Dean argued that the Mississippi Supreme Court’s authority was limited to reviewing the board’s administrative decision under an “arbitrary, capricious or malicious” standard and that the Court was not the appropriate forum in which to litigate his federal ADA, due process, and equal protection claims.

The court disagreed, stating that admission to the bar “is within the constitutional domain” of the Mississippi Supreme Court. In this case, the “transaction” was Dean’s application to the Mississippi Bar. The court noted that even though Dean makes ADA claims, due process claims, and equal protection claims, all these claims arise from Dean’s application for admission to the bar and that together they form a “convenient trial unit.” Therefore, the criteria for *identity of the cause of action* were satisfied.

The Fifth Circuit also found that there was *identity of the parties to the cause of action*. The question of identity of the parties arose in this case because *In re Dean* named only the Mississippi Board of Bar Admissions as a defendant, whereas Dean’s District Court actions and Fifth Circuit appeals named individual board members as defendants as well. However, the court noted that the individuals were named only in their capacity as board members and that this established privity between the individual defendants and the board.

Finally, the Fifth Circuit considered the *identity of the quality or character of a person against whom the claim is made*. The court found that since the actions of the board and the actions of its members are the same for the purposes of this litigation, the fourth requirement was met.

In an unpublished opinion, the Fifth Circuit affirmed the decision of the District Court dismissing all of Dean’s claims as barred by *res judicata*.

BAR EXAMINATION

Special admissions

In the Matter of the Application of Leslie L. Payton to the Virgin Islands Bar,
S.Ct. BA No. 2007-146, 2009 WL 763814 (V.I. 2009)

Leslie Payton petitioned the Virgin Islands Supreme Court to exercise its equitable powers to grant him regular admission to the Virgin Islands Bar or, in the alternative, allow him to take and pass only the MPRE and a character and fitness review as conditions for his admission. Between 1976 and 2006 Payton, an attorney admitted in Pennsylvania and New York, had practiced before Virgin Islands local courts pursuant to a special rule which authorized those courts, at their discretion, to specially admit into the Virgin Islands Bar employees of federal and territorial governmental agencies who were attorneys

in good standing of the bar of another United States jurisdiction. Payton had sat for the Virgin Islands Bar Examination numerous times since 1976 in order to obtain regular admission and had been unsuccessful each time. After failing the February and July 2004 examinations, he filed an appeal with the Virgin Islands Committee of Bar Examiners challenging its determination that he had not achieved the minimum passing score on the MBE and requesting that it waive that requirement for regular admission. He argued that the committee had the discretion to “upgrade” his MBE score due to his years of experi-

ence as a specially admitted attorney. The committee denied Payton's request. Payton appealed. The Superior Court rejected Payton's argument and declined to exercise its equitable powers to admit him to the Virgin Islands Bar. The Appellate Division of the District Court affirmed the Superior Court's decision, and the Third Circuit dismissed Payton's appeal of the Appellate Division's judgment for failure to prosecute.

After failing the February 2008 examination, Payton filed with the Virgin Islands Supreme Court a motion for admission, arguing that the Court should exercise its equitable powers to grant him regular admission to the Virgin Islands Bar or alternatively rule that he could receive regular admission upon passing the MPRE and a character and fitness investigation. The Court noted that while it could grant a waiver of its own rules, it would be inappropriate to exercise its power unless a "valid and extraordinary reason" existed. The Court found that Payton had not met his burden of demonstrating that the rules operated in such a manner as to deny him admission "arbitrarily and for a reason unrelated to the essential purpose of the rule." The Court recognized that Payton had been admitted in Pennsylvania and New York, but stated that "admission to the bar of another jurisdiction does not, in and of itself, constitute the 'unique or unusual circumstances' necessary to receive a waiver."

Payton also sought relief under Supreme Court Rule 202(e)(2), which permits certain specially admitted attorneys to receive regular admission after passing only the essay portion of the Virgin Islands Bar Examination, plus the MPRE and a character and fitness investigation. The Court stated that 202(e)(2) only applied to attorneys who had been specially admitted members of the Virgin Islands Bar for five

or more continuous years as of September 1, 2007. Payton's special admission terminated prior to that date. Payton then argued that the Court should waive that rule and grandfather him in so that he could obtain regular admission. The Court stated that Payton must demonstrate that unique and unusual circumstances existed that would justify dispensing with Rule 202's requirements but held that Payton had met that burden, as the record indicated that Payton had practiced as a specially admitted attorney since 1976, was continuously employed by the Office of the Territorial Defender between 1991 and 2006, and had continued to practice in the Virgin Islands courts after his retirement from government service after obtaining pro hac vice admission. The Court said that there was substantial evidence that Payton's knowledge of Virgin Islands practice had not become stale and that he presently possessed the skills equivalent to those of a specially admitted attorney of the level of experience contemplated in Rule 202.

According to the Court, the promulgation of Rule 202 constituted circumstances that were beyond Payton's control and that he could not have foreseen when he retired in 2006: that less than a year later the Court would substantially alter the former Superior Court Rule 304 and exempt attorneys who had been specially admitted for five or more years from the MBE requirement. If Payton had known that, he could have delayed his retirement. The Court held that Payton had met the burden necessary to obtain an equitable waiver of Rule 202 and authorized the admissions committee to allow Payton to obtain regular admission in the event that he passes the essay portion of the Virgin Islands Bar Examination, the MPRE, and the committee's character and fitness investigation.


Production of information about bar examination procedures

Lamb v. State Board of Law Examiners, 777 N.W.2d 343 (N.D. 2010)

Timothy Lamb failed the February 2008 North Dakota Bar Examination, and the Board of Law Examiners did not recommend that he be admitted. He requested a formal hearing and moved for discovery, requesting information about grading techniques, how raw scores are converted, whether the board performs periodic assessments of its scores, whether a report is available of psychometric procedures, how the essay scoring judges are trained, whether a content analysis has been conducted, and other related matters. In response, the board provided its annual reports for the past 10 years and information regarding selection and preparation of graders, grading guidelines given to graders, selection of test questions, how often the pass/fail policy is reviewed, where the conversion and scaling of scores are performed, and where the Multistate Performance Test and Multistate Essay Examination questions are prepared. Lamb then requested an attorney general's opinion as to whether the board had violated the open records law. The attorney general did not consider Lamb's request, because it was submitted more than 30 days after the alleged violation.

Lamb then applied for a writ of mandamus to the District Court asking the court to compel the board to provide the requested information. The District Court denied Lamb's application for a writ, stating that the board had provided Lamb with a great deal of information, including a copy of Lamb's two personal Multistate Performance Test questions

and answer booklets with the drafters' point sheet and model answer for each, a copy of Lamb's six personal Multistate Essay Examination questions and answer booklets with the analyses for those questions, and a copy of the North Dakota State Board of Law Examiners' grading guidelines. The court concluded that Lamb had failed to establish a clear legal right to this information because he could not demonstrate that the information was an exception to the confidentiality provisions of the Admission to Practice Rules or an open records exception. Lamb appealed.

Before the Supreme Court, Lamb asserted that the board's records must be open to the public absent a statutory provision making the records confidential. The Court pointed out that it had adopted the Admission to Practice Rules and that in 1990 it had adopted a rule specifically exempting board records from public disclosure with several exceptions. Under the Admission to Practice Rules, the records Lamb requested were confidential because they did not fall within any exception. The North Dakota Supreme Court affirmed the order of the District Court, concluding that it did not abuse its discretion in denying Lamb's application for a writ of mandamus because he did not have a clear legal right to the requested information. 

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