

LITIGATION UPDATE

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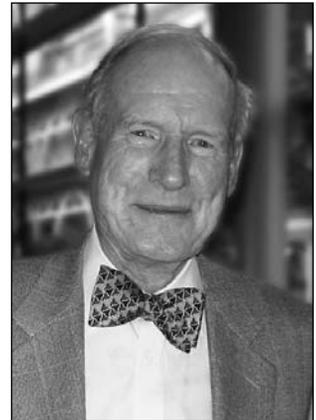
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ADA

Reasonable accommodations

Stephanie Enyart v. National Conference of Bar Examiners, 630 F.3d 1153 (9th Cir. Cal. 2011)

Stephanie Enyart suffers from Stargardt's Disease, a form of macular degeneration that caused her to become legally blind by the age of 15. In 2009, Enyart graduated from UCLA School of Law.

Enyart applied to take the July 2009 California Bar Exam. Due to her visual impairment, she

requested a number of accommodations: extra time; a private room; hourly breaks; permission to use her own lamp, digital clock, sunglasses, yoga mat, and medication during the exam; and permission to take the exam on a laptop equipped with JAWS and ZoomText software. JAWS is an assistive screen-

reader program that reads text aloud. ZoomText is a screen-magnification program.

The California Committee of Bar Examiners granted most of Enyart's requested accommodations but would not allow her to take the MBE portion of the exam using a computer equipped with JAWS and ZoomText. The request was denied because the National Conference of Bar Examiners (NCBE) does not make the MBE available to jurisdictions in an electronic format. As a result, Enyart canceled her registration for the July 2009 bar exam.

Enyart then registered for the November 2009 MPRE and requested the same accommodations. As it had done when Enyart registered for the March 2009 MPRE, NCBE declined to make the exam available on a computer equipped with JAWS and ZoomText. NCBE offered Enyart numerous accommodations and auxiliary aids, including double the standard testing time, a private testing room, and all the physical accommodations she had requested. She was also offered several alternative exam formats: a qualified human reader, a large-print version of the examination (with her requested font size), a closed-circuit television (CCTV) to magnify the text of the test questions, an auditory CD version of the examination, a Brailled examination, and a scribe to record her answers.

Given the denial of her request to take the exam on a computer equipped with JAWS and ZoomText, Enyart canceled her registration for the November 2009 MPRE and filed suit in the United States District Court for the Northern District of California against NCBE, ACT, and the State Bar of California alleging violations of the ADA and California civil rights law (Enyart later stipulated to the dismissal of ACT and the State Bar as defendants). She sought declaratory and injunctive relief compelling NCBE, ACT,

and the State Bar to provide all of her requested accommodations.

The district court granted Enyart's request for a preliminary injunction allowing her to use JAWS and ZoomText on the February 2010 MBE and March 2010 MPRE. The court concluded that "the accommodations provided by NCBE will not permit Enyart to take the exam without severe discomfort and disadvantage." Therefore, "the test is not 'accessible' to her, and . . . the accommodations . . . are not 'reasonable.'" NCBE appealed.

While the NCBE appeal was pending, Enyart was advised that she had failed to pass the March 2010 MPRE and the February 2010 California Bar Exam. Therefore, she moved for, and obtained, a second preliminary injunction allowing her to take the July 2010 MBE and August 2010 MPRE on a computer equipped with JAWS and ZoomText. NCBE again appealed.

The United States Court of Appeals for the Ninth Circuit consolidated both appeals. The issue on appeal was whether the district court had abused its discretion by entering a mandatory preliminary injunction that required NCBE to administer the MBE and MPRE to Enyart on a computer equipped with JAWS and ZoomText software.

A plaintiff seeking a preliminary injunction must show that (1) she is likely to succeed on the merits, (2) she is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in her favor, and (4) an injunction is in the public interest.

NCBE argued that Enyart's case failed to meet these criteria, particularly the requirements of irreparable harm and likelihood of success on the merits. However, the Ninth Circuit disagreed with NCBE and ruled in Enyart's favor. In doing so, the court

rejected a “reasonableness” standard for providing accommodations under the ADA and instead adopted a “best ensure” standard.

On appeal, NCBE argued, among other things, that a party should not be found to have violated the ADA if it offered to provide all the auxiliary aids that the ADA and the Department of Justice’s implementing regulations expressly identify as reasonable and appropriate for a particular disability. NCBE cited 28 C.F.R. § 36.309(b)(2009), which states that a testing organization may need to provide appropriate “auxiliary aids” to make its exams accessible and that these auxiliary aids may include “Brailled or large print texts or qualified readers for individuals with visual impairments.” The ADA similarly states that, in the case of “individuals with visual impairments,” the term “auxiliary aids and services” includes “qualified readers, taped texts, or other effective methods of making visually delivered materials available.”

The Ninth Circuit noted that the case was governed by 42 U.S.C. § 12189, which falls within Title III of the ADA. This section requires entities that offer examinations “related to applications, licensing, certification, or credentialing for . . . professional . . . or trade purposes” to “offer such examinations . . . in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals.” The Ninth Circuit concluded that the word “accessible” was ambiguous in this context. It therefore looked to 28 C.F.R. § 36.309(b) as a guide to interpreting § 12189. This regulation, promulgated by the U.S. Department of Justice, provides as follows:

Any private entity offering an examination covered by this section must assure that . . . [t]he examination is selected and administered so

as to best ensure that, when the examination is administered to an individual with a disability that impairs sensory, manual, or speaking skills, the examination results accurately reflect the individual’s aptitude or achievement level or whatever other factor the examination purports to measure, rather than reflecting the individual’s impaired sensory, manual, or speaking skills . . . [.]

Applying 28 C.F.R. §36.309’s “best ensure” language, the Ninth Circuit opined that a reasonable reading of the ADA’s requirement that entities make licensing exams “accessible” is that exams must be administered “so as to best ensure” that exam results accurately reflect aptitude rather than disabilities. The court stated that the “issue in this case is not what might or might not accommodate other people with vision impairments, but what is necessary to make the MPRE and MBE accessible to Enyart given her specific impairment and the specific nature of these exams.”

The Ninth Circuit concluded that the district court did not abuse its discretion by holding that Enyart demonstrated a likelihood of success on the merits. The court cited evidence that Enyart would suffer eye fatigue, disorientation, and nausea if she used a CCTV. The court also noted that, although Enyart did well on the LSAT using a reader, there was evidence that auditory input alone is insufficient to allow Enyart to effectively comprehend and retain the language used on the exam, and that the combination of ZoomText and JAWS is the only way she could fully comprehend the material she reads.

The Ninth Circuit found that the district court’s finding of irreparable harm did not constitute an abuse of discretion, and that the district court did not abuse its discretion in holding that the balance

of equities favored Enyart and that the issuance of the preliminary injunctions served the public's interest in eliminating discrimination on the basis of disability.

The court affirmed the district court's orders issuing preliminary injunctions requiring NCBE to make the MBE and MPRE available for Enyart's use on a laptop equipped with JAWS and ZoomText software.

CHARACTER AND FITNESS

Criminal convictions; financial irresponsibility; fraud and deceit

Application of G.W., 161 N.H. 401, 13 A.3d 194, 2011 N.H. LEXIS 5 (NH 2011)

Between 1991 and 2007, G.W. applied to sit for the New Hampshire Bar Examination seven times. During this period, he reported several criminal convictions: a reckless conduct conviction stemming from an incident in which he "pretended to be a robber" of a store, six convictions for violating the conditions of a restraining order, a 2001 criminal threatening conviction, and a 2004 conviction for driving while intoxicated (DWI). G.W. also disclosed various financial obligations. On the first application he filed, he listed approximately \$40,000 in student loan debt. By the time of his 2007 application the debt had increased to \$138,471. G.W. finally passed the February 2008 bar examination. The Standing Committee on Character and Fitness of the Supreme Court of New Hampshire interviewed G.W. and submitted a report recommending that he not be admitted to the bar. G.W. requested a hearing to address the committee's concerns, and that hearing was conducted in January 2009. The committee then submitted a second negative report citing G.W.'s history of criminal acts, his financial irresponsibility, and his demonstrated inability to handle his own affairs.

The committee found that G.W. had used the fact that he was injured in an automobile accident as an excuse for his failure to pass the bar over the past

17 years and his failure to pay off his student loans. At the time of the hearing, G.W. was living in his mother's house and had been working in her motel part-time in lieu of rent, but the motel had gone into foreclosure. In 2008 he held two positions as a bartender, which he quit, explaining to the committee, "I didn't enjoy the service business. I felt it was beneath me." Other than these positions and a job as a waiter in 1996, he had not held gainful employment since graduating from law school. When asked why he had not sought other employment in order to make payment on his loans, G.W. testified that he was trained to practice law, was not trained to do anything else, and had no desire to do anything else. He also argued that only employment as a lawyer would allow him to earn sufficient income to pay off his loans.

G.W. brought copies of three credit reports to the hearing. He admitted that he had handwritten "AAA perf. credit" on one of them and asked the committee to "skip that little superficial aspect of the report" and to concentrate on the fact that he had been "extremely responsible" and had not "even been late with any credit card debt." However, on his July 2002 petition and questionnaire he had reported \$15,000 in delinquent credit card debt. When asked

about this, he replied that the statute of limitations had run, that it was a long time ago, and that he didn't currently remember the details.

When questioned about his criminal record in regard to the reckless conduct conviction, G.W. stated that he was "pretending to be a robber" and that the incident, which happened on April Fools' Day, was "a bad joke." In an earlier interview he had stated that he was writing a book at the time and wanted to see the store clerk's reaction when he showed her a knife with a blade between six and seven inches in length. His response to the six convictions for violating a restraining order was that he had been "framed." He showed the committee a motion to dismiss the restraining order, but he then admitted that he had written the motion and had had the complainant sign it. G.W. made no statement regarding his 2004 DWI conviction.

The committee concluded that "[G.W.'s] inability to responsibly deal with his personal financial obligations, his inability to accept responsibility for his criminal conduct, and his practice of placing blame on other individuals or events for his conduct . . . are all indicative of his inability to responsibly deal with his own affairs." The committee also stated that it did "not believe that [G.W. had] made any type of sincere attempt to find employment during the last 20 years that would allow him to make payments" on his loan obligations.

The New Hampshire Supreme Court ordered G.W. to show cause why his application should not be denied. G.W. filed a responsive pleading in April 2009, and in May 2009 he filed a notice of appeal of a superior court decision affirming the administrative suspension of his driver's license following his October 2008 arrest for DWI Second Offense, a charge of which the committee was previously unaware.

The Court remanded the matter to the committee for consideration of this new information. G.W.'s counsel informed the committee that G.W. had also been charged with driving after suspension and with violation of a bail condition and requested that the committee defer any further hearings until these matters were resolved. The committee assented.

At the request of G.W.'s counsel, the committee scheduled a hearing in 2010 and asked that G.W. update any relevant matters in regard to his character and fitness. G.W. stated that in December 2009 he had been charged with attempted fraudulent handling of recordable writings and false swearing. He stated that he had filed a *lis pendens* with the county Register of Deeds claiming a tenancy-in-common interest in his mother's foreclosed house, in which he was living. In regard to the false swearing charge, G.W. stated that it stemmed from a hearing in superior court in August 2009 during which he had sworn that he had no interest in real estate. The committee found that these charges involved fraud, dishonesty, deceit, or misrepresentation.

G.W. was also questioned about his DWI and driving-after-suspension convictions. To show his rehabilitation, G.W. pointed to the counseling sessions he had attended about his alcohol consumption and to his court-ordered seven-day alcohol treatment program. He did admit that he would not have entered the program willingly. In regard to his lack of candor in failing to report his recent criminal charges, G.W. claimed that it was not done intentionally and that he had just assumed it did not matter because he had already been rejected by the committee. The committee's April 2010 report concluded that the committee remained "even more persuaded that [G.W.] does not possess the neces-

sary character and fitness for admission to the Bar of New Hampshire.”

The New Hampshire Supreme Court, in reviewing the committee’s report, found that the evidence presented suggested G.W.’s failure to accept the responsibilities placed upon him and a lack of mature respect for the law. The Court was concerned about G.W.’s outstanding debt, noting that 90 percent of his student loan debt was interest and that there was no evidence that he had ever made significant efforts to repay. The Court stated, “His argument that only employment as a lawyer will allow him to earn sufficient income to pay off these loans is unavailing. As the applicant admitted, he would have been able to repay the original amount in less remunerative employment. It is the applicant’s neglect of his obligations that has allowed his debts to grow to unmanageable proportions. The applicant fails to recognize that the duty to pay one’s debts is not contingent upon finding the employment of one’s choice.” The Court concluded that “the record demonstrates the applicant’s inability to handle his own affairs” and stated that “[t]he inability of an applicant to handle his/her own affairs in a responsible manner may be grounds for finding that such an applicant does not possess the requisite fitness to engage in the practice of law.” The Court also found that G.W. lacked candor in his interactions with the committee, as he had

failed to update his petition in a timely fashion on several occasions.

The Court then considered whether G.W. had demonstrated sufficient rehabilitation. At the hearing, G.W. was asked what positive characteristics he could point to that would support his admission. He cited his ability to pass the bar examination nearly 20 years after graduating from law school, describing this as “an amazing accomplishment.” He also cited the counseling sessions concerning his alcohol use and his participation in a court-ordered alcohol treatment program. However, the Court found that in light of G.W.’s continuing pattern of irresponsibility, it could not conclude that he had demonstrated a genuine change of attitude. During argument, G.W., through his attorney, proposed that he be admitted on a probationary status with several conditions. The committee’s counsel pointed out that any doubt about an applicant’s character and fitness must be resolved in favor of protecting the public and denying admission. The Court found that “the record reflects an individual with a long history of evading his financial obligations as well as failing to accept responsibility for the consequences of his poor judgment and criminal behavior. We see no evidence that, as an attorney, the applicant would conduct himself any differently.”

G.W.’s application was denied.

Financial irresponsibility

In re Application of Griffin, Slip Opinion No. 2011-Ohio-20, 2011 Ohio LEXIS 22 (OH 2011)

Hassan Jonathan Griffin registered as a candidate for admission to the Ohio Bar on January 15, 2008. After

unsuccessfully taking the Ohio Bar Examination in July 2008, February 2009, and July 2009, Griffin

applied to take the February 2010 bar exam. However, the Board of Commissioners on Character and Fitness denied Griffin's application for February 2010 due to Griffin's excessive debt and lack of a plan to meet his financial obligations.

Griffin worked full-time as a stockbroker for five years before attending The Ohio State University Moritz College of Law. After completing his first year of law school, Griffin began working part-time at the Franklin County Public Defender's Office, earning \$12 per hour. When he graduated from law school in 2008, he owed approximately \$170,000 in student loans and had incurred approximately \$16,500 in credit card debt. Despite the fact that Griffin was living with his nine-year-old daughter and her mother in the mother's home and contributing only minimally toward the household expenses, he had been unable to make any payments on his student loans, which began to come due in July 2009. He had also been unable to meet his credit card obligations since approximately December 2008, and one creditor had obtained a default judgment against him.

On May 27, 2010, a three-member panel of the Board of Commissioners conducted a hearing to investigate Griffin's personal finances. The panel reviewed Griffin's student loan debt, credit card debt, part-time employment, and plans for making payment pursuant to the following criteria:

An applicant to the Ohio bar must prove by clear and convincing evidence that he or she "possesses the requisite character, fitness, and moral qualifications for admission to the practice of law." *Gov.Bar R. I(11)(D)(1)*. The applicant's record must justify "the trust of clients, adversaries, courts, and others with respect to the professional duties owed to them." *Gov.Bar R. I(11)(D)(3)*. Necessarily, "[a] record mani-

festing a significant deficiency in the honesty, trustworthiness, diligence, or reliability of an applicant may constitute a basis for disapproval of the applicant." *Id.*

Griffin testified to the panel that he intended to file a bankruptcy petition under Chapter 13. He advised the panel that during the pendency of the bankruptcy proceeding, his student loan payments would be reduced, and that this strategy would give him time to obtain full-time employment once he passed the bar. However, the panel noted that Griffin had not actually filed the bankruptcy petition as of the hearing date and that bankruptcy would only discharge the \$16,500 credit card debt, not Griffin's \$170,000 in student loans.

Since Griffin appeared to have no plan or ability to pay his existing debts, the panel recommended that the application for the February 2010 bar examination be disapproved and that Griffin be permitted to reapply for the February 2011 exam.

The Supreme Court of Ohio agreed with the panel and accepted its recommendation. The Court found that Griffin had neglected his personal financial obligations by electing to maintain his part-time employment with the Public Defender's Office on the chance that it would lead to a full-time position upon his passage of the bar exam. The Court surmised that Griffin should have sought full-time employment, which Griffin himself acknowledged would have given him a better opportunity to pay his obligations and possibly qualify him for an additional deferment of his student loan obligation.

The Court stated:

Based upon the foregoing, we agree that the applicant has failed to prove that he possesses the requisite character, fitness, and moral quali-

fications for admission to the practice of law. Accordingly, we accept the board's recommendation to disapprove the applicant's pending application at this time. However, we will permit

him to apply to take the February 2011 or a later bar exam, provided that he submit[s] a new re-examination application and is able to establish his character, fitness, and other qualifications.

Lack of honesty and candor

In re Application of Ferguson, Slip Opinion No. 2011-Ohio-552, 2011 Ohio LEXIS 322 (OH 2011)

James Ferguson graduated from Capital University Law School in May 2009 and applied to take the July 2009 Ohio bar examination. He appeared before the Admissions Committee of the Fairfield County Bar Association and was given provisional approval. However, his supplemental character questionnaire revealed an October 2008 incident with the Columbus Police Department, so an additional hearing was held. Following this hearing, the committee recommended that his application not be approved. Ferguson appealed to the Board of Commissioners on Character and Fitness, and a panel conducted a hearing in January, April, and May 2010.

The panel reviewed the facts of the incident with the Columbus Police Department, in which Ferguson was belligerent and disrespectful to Columbus police officers who had arrested his friend and falsely claimed that he was a lawyer or an Assistant Attorney General. The panel noted that Ferguson had been offered a job as an Assistant Attorney General conditioned upon passage of the bar exam; however, when he received notice that he would not be permitted to sit for the July 2009 examination, he did not disclose this to the Attorney General's Office.

Ferguson claimed to have notified the Solicitor General, but the Solicitor General testified that Ferguson was a friend and had made the disclosure while they played tennis together, and that he had instructed Ferguson to immediately report the matter to a specific individual in the human resources department. Ferguson testified that he notified a different person in human resources, but that person testified that such a discussion never took place. The panel recommended that Ferguson not be approved, and the board adopted the panel's finding of fact and recommendation but also recommended that Ferguson be permitted to reapply to take the July 2012 examination.

The Ohio Supreme Court on review stated that the board had expressed concern regarding Ferguson's lack of honesty and candor in explaining his conduct during the police encounter and in failing to report the resulting character and fitness disapproval to his future employer. Ferguson's application to take the bar examination was denied, but the Court added that he could apply to take the July 2012 examination and submit to a full character and fitness investigation.

Substance abuse

In re Application of Tilson, Slip Opinion No. 2011-Ohio-551, 2011 Ohio LEXIS 321 (OH 2011)

After receiving an M.B.A. from The Ohio State University Fisher College of Business in June 2008

and a J.D. from Moritz College of Law in June 2009, Jason Tilson registered as a candidate for

admission to the Ohio Bar and applied to take the February 2010 examination. In January 2010 the Admissions Committee of the Columbus Bar Association recommended that Tilson's character and fitness be approved. However, he was not permitted to take that examination because the Board of Commissioners on Character and Fitness did not submit final approval of his character and fitness. Instead, the board exercised its investigatory authority sua sponte to review several matters of concern: Tilson's 2007 honor code violation in an M.B.A. class, his neglect of his financial obligations and 2008 bankruptcy, and his alcohol abuse.

At a hearing conducted by a panel of the board, Tilson testified that he had entered into an Ohio Lawyers Assistance Program (OLAP) contract following his 2008 arrest for operating a vehicle under the influence of alcohol (OVI). The OLAP contract required him to refrain from using alcohol or drugs, to attend 90 Alcoholics Anonymous (AA) meetings within 90 days, and to attend at least three meetings per week for the remainder of the two-year contract. Tilson attended about one meeting per week after the first 90 days and failed to keep a log of his attendance. He claimed that he stopped attending meetings because he was "not getting anything out of it." Realizing that noncompliance with his OLAP contract could affect his application for admission, Tilson agreed to extend the contract for an additional

year, but he made no effort to comply with its terms and continued to consume alcohol. The panel, citing Tilson's 2006 and 2008 convictions for OVI and his failure to comply with his OLAP contract, recommended that his character and fitness be disapproved; the board agreed and recommended that he be permitted to apply for the July 2011 examination.

The Ohio Supreme Court, in reviewing the board's recommendation, pointed out that Tilson had had two OVI convictions in the past five years. While he had entered into an OLAP contract, he had not complied with even the most basic terms of the contract. Even though he attended AA meetings for a period of time, he did not keep a regular log and failed to achieve his attendance goals after the first 90 days. The Court stated that "in light of the applicant's failure to follow through with his commitment to the OLAP program and prove that he has overcome his problems with alcohol, his claims that he has 'grown up' and learned from his mistakes ring hollow." The Court disapproved Tilson's application to take the bar examination but stated that he may apply to take the July 2011 examination and submit to a full character and fitness investigation. ■

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