UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

Alexandria Division

JULIE ANN CLARK Plaintiff, v. VIRGINIA BOARD OF BAR EXAMINERS and W. SCOTT STREET, III, Secretary Virginia Board of Bar Examiners Defendants.	C.A. # 94-211-A

MEMORANDUM OF THE UNITED STATES AS AMICUS CURIAE
IN SUPPORT OF PLAINTIFF'S NOTICE AND MOTION
TO ALTER JUDGMENT

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES: PAGE

STATUTES AND REGULATIONS:

LEGISLATIVE MATERIALS:

MISCELLANEOUS

I. Introduction

This action was filed by Julie Ann Clark against the Virginia Board of Bar Examiners under title II of the Americans with Disabilities Act (ADA).[1] Clark, an applicant to the Virginia bar with a history of treatment for a mental health condition, alleged that the Board violates the ADA by requiring applicants for admission to the bar to disclose information about their history of treatment for mental health conditions and by subjecting applicants who admit to such treatment to additional disclosure requirements and investigation not uniformly required of all applicants.

Clark's suit sought two distinct and separate forms of relief. First, it sought an injunction requiring the Board to grant her a license. Second, it sought an order prohibiting the Board generally from inquiring into the mental health history of applicants unless there is evidence that an applicant has mental health problems which demonstrate he or she is unfit to practice law.

The parties filed cross motions for summary judgment. On July 11, 1994, this Court denied plaintiff's motion, granted defendant's motion, and dismissed the case. The Court ruled that it lacked subject matter jurisdiction over all of plaintiff's claims--- including those seeking to prohibit the Board from making certain inquiries on the basis of disability. The Court also stated that even if it did have jurisdiction, the plaintiff

---

[1] 42 U.S.C. §§ 12101-12213 (Supp. II 1990).

had no standing to bring suit "because she is not a disabled person within the meaning of the ADA." Opinion at 12.

On July 25, 1994, plaintiff Clark filed a Notice and Motion to Alter Judgment, requesting that the Court reconsider its Order of July 11, 1994, granting summary judgment in favor of defendant bar examiners. The United States supports plaintiff's contention that the Court's decision of July 11 is in error and should be reconsidered and altered.

II. Argument

A. This Court Has Jurisdiction Because Plaintiff Clark Challenges General Rules And Regulations Governing Admission To The Bar

In ruling that it lacked subject matter jurisdiction, the Court correctly cited the Supreme Court's decision in District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983), for the proposition that federal courts have jurisdiction over challenges brought against a state bar's "general rules and regulations governing admission," but not "where review of a state court's adjudication of a particular application is sought." Feldman, 460 U.S. at 485 (quoting Doe v. Pringle, 550 F.2d 596, 597 (10th Cir. 1976)). The United States agrees that the doctrine described in Feldman governs jurisdiction. The United States disagrees, however, with the Court's application of Feldman. Instead of limiting jurisdiction, Feldman supports it.

Although the Court is correct in stating that, "[t]he Board has no general rule or regulation that prohibits a person with a mental disability from obtaining a license to practice law," Opinion at 8, the plaintiff alleges a different form of discrimination. The violation of title II of the ADA alleged is the Board's requirement that candidates answer Question 20(b) and the Board's subsequent screening out of persons who answer in the affirmative for additional burdens of disclosure and investigation.[2] Specifically, Ms. Clark is challenging the following "general rules and regulations governing admissions" to the Virginia Bar:

> (1) the general rule requiring applicants to answer Question 20(b) regarding treatment or counseling received in the past five years for any mental, emotional or nervous disorders;
>
> (2) the general rule requiring all applicants who answer yes to Question 20(b) to provide information about dates of treatment, name and address of physician, counselor, or other health care provider, and name, address, and telephone number of hospital or institution;
>
> (3) the general rule requiring the applicant to "[d]escribe completely the diagnosis, the treatment, and the prognosis, and provide any other relevant facts" regarding such mental, emotional or nervous disorders;
>
> (4) the general rule requiring applicants to sign a form authorizing release of all medical records, including all documents or records concerning advice, care or treatment for any mental, emotional or nervous disorders; and

---

[2] As discussed below, these additional burdens create distinct injuries to persons who have sought treatment for mental disorders, regardless of whether the injured party is granted a license to practice law.

> (5) the general practice of subjecting applicants who answer Question 20(b) in the affirmative to more rigorous scrutiny than other applicants, including additional investigation in some cases.

The fact that the plaintiff's challenge is to the general rules and regulations of the Virginia Board is also supported by the relief requested in her complaint:

> Wherefore, Ms. Clark seeks:...(2) A declaration that the board's preliminary inquiry into the mental health history of bar applicants violates the ADA, (3) A permanent injunction barring defendants and their agents from inquiring into the mental health history of bar applicants, except when and to the extent occasioned by independent evidence of an applicant's having mental problems which fairly suggest unfitness to practice law.

Complaint at 7, paragraphs 2 and 3.

To hear this claim, the Court need not review a state court judicial decision. Plaintiff's complaint instead "asks the district court to assess the validity of the rule promulgated in a nonjudicial setting." Feldman, 460 U.S. at 486. Plaintiff is requesting that the statutory validity of question 20(b) be assessed and the defendants be barred from asking such discriminatory questions. Because this challenge to the Board's general rule is not "inextricably intertwined" with plaintiff's application to the Board, Nordgren v. Hafter, 789 F.2d 334, 337 (5th Cir.)(quoting Feldman, 460 U.S. at 483 n. 16 and holding that plaintiff's equal protection challenge to the state bar's rule not to admit graduates of out-of-state unaccredited law schools supported federal subject matter jurisdiction under

Feldman), cert. denied, 479 U.S. 850 (1986), this Court has jurisdiction over plaintiff's claim.[3]

In Ellen S. v. Florida Board of Bar Examiners, the District Court for the Southern District of Florida recently questioned this Court's interpretation of Feldman and its decision regarding lack of jurisdiction over Ms. Clark's claims. The court held that, although the facts of Ellen S. and the case at presently bar are similar, this Court's opinion was not persuasive. Instead, the court, citing Feldman, held that it had jurisdiction to hear a case under title II of the ADA challenging the rules of a state bar that are similar to those challenged in this case and found that the plaintiffs' challenges fell within this category.[4]

---

[3] Plaintiff's complaint also requests that the Court order the Board to grant her a license to practice law. Complaint at 7, paragraph 1. While Feldman suggests that the Court may not have jurisdiction over that specific claim for relief, the Court improperly concluded that there exist no claims for relief over which the Court may exercise jurisdiction.

The Court also cites Woodard v. Virginia Board of Bar Examiners, 454 F. Supp. 4 (E.D. Va. 1978), aff'd, 598 F.2d 1345 (4th Cir. 1979), in support of its ruling. The plaintiff in Woodard, however, was seeking to challenge the Virginia Board of Bar Examiners' denial of her admission to the bar for allegedly discriminatory reasons. In contrast, here -- as the Court itself points out -- "the Board has made no decision on Clark's fitness to practice law." Opinion at 8. Unlike Woodard, plaintiff's challenge to the Board's general rules does not require this Court to review a state court's adjudication of an applicant's fitness for the bar.

[4] In Ellen S., the plaintiffs challenged general rules strikingly similar to those challenged in this case.

1) the general rule that all applicants must answer Question 29 in order for their applications to be processed;

(continued...)

Jurisdiction to review bar admission rules for statutory or constitutional violations has also been upheld by other courts. In Barnard v. Thorstenn, 489 U.S. 546 (1989), the two plaintiffs, who resided in New York and New Jersey, applied for membership to the bar of the Virgin Islands. Their applications were denied because they failed to meet the bar's strict residency requirements. The Court held that these residency requirements were unconstitutional because they violated the Privileges and Immunities Clause of the Constitution. On remand, the Third Circuit noted that, because plaintiffs' challenge to the generally applied residency requirement raised a federal question, the district court had jurisdiction over the issue under 28 U.S.C. § 1331. Thorstenn v. Barnard, 883 F.2d 217 (3rd Cir. 1989).[5]

---

[4](...continued)

> 2) the general rule that law school deans and references will be asked about every applicant's mental health disability;
>
> 3) the universal practice of requiring all applicants answering yes to Question 29 to waive confidentiality of their treatment records and history, and
>
> 4) the universal followup inquiry of treatment professionals with multiple detailed questions about an applicant's treatment history.

Ellen S. v. Florida Board of Bar Examiners, No. 94-0429-CIV-KING, slip op. at 14 n. 9 (S.D. Fla. Aug. 1, 1994)(order denying defendants' motion to dismiss)(quoting Pls.' Resp. Notice of Supplemental Authority at 2)(a copy of the opinion is attached to this memorandum as Exhibit A).

[5] Specifically, the plaintiffs in Barnard asserted a violation of the Constitution and a federal statute--- the Revised Organic Act, 48 U.S.C. § 1561, which extended the Constitution to the Virgin Islands.

Similarly, the reasoning of the Court in Younger v. Colorado State Board of Bar Examiners, 482 F. Supp. 1244 (D. Colo. 1980), rev'd on other grounds, 625 F.2d 372 (10th Cir. 1980), strongly supports plaintiff's case. In Younger, the plaintiff failed the Colorado Bar Exam three times and was denied permission to take the exam again. The plaintiff argued that the state's rule prohibiting applicants from taking the bar exam more than three times without good cause violated the Equal Protection Clause of the Fourteenth Amendment. As in this case, the defendant state licensing authorities argued that plaintiff's claims of deprivations of federally protected rights could only be considered by the United States Supreme Court on appeal from the state court because the denial of plaintiff's application was a judicial act of the state supreme court. The Tenth Circuit held that, while the plaintiff was seeking individual relief, his challenge to a generally applicable rule could be heard by the district court. Specifically, the court noted that,

> [Plaintiff's] complaint challenges the validity of ... any ... limitation on the number of times an otherwise qualified applicant may attempt to pass the Colorado Bar Exam. The denial of his request for re-examination is the result of the application of that rule.... Accordingly, the plaintiff here is not seeking a review of the judicial determination made as to his application; he is contesting the Court's administrative act in adopting a rule limiting the opportunity for re-examination.

Id. at 1246. Similarly, Ms. Clark's challenge to the Board's inquiries does not seek review of the Board's determination of her fitness to practice law; indeed, as the Court recognizes, the Board has never made such a determination. Therefore, although

the Court may lack "jurisdiction to interfere in the Board's proceedings to determine Clark's fitness to practice law," Opinion at 9, it does have jurisdiction to address the alleged discriminatory rules being challenged by the plaintiff prior to any judicial determination of her fitness to practice law.[6]

B. This Case Should Not Be Dismissed For Lack Of Standing

In addition to improperly finding no subject matter jurisdiction over Ms. Clark's claims, this Court also held that she did not have a disability, as defined under title II of the ADA. Implicit within this holding is the Court's belief that Ms. Clark must actually have a disability in order to have standing to sue. Both the Court's holding and the premise upon which it is based are incorrect. Anyone forced to respond to the Board's inquiries about treatment for mental health conditions has standing to bring this case, regardless of whether they actually

---

[6] This distinction between general and "applicant-specific" challenges has also been used in other cases to establish subject matter jurisdiction over the review of state bar rules. Rosenfeld v. Clark, 586 F. Supp. 1332, 1336 (D. Vt. 1984)(citing Feldman for the holding that a district court had subject matter jurisdiction for reviewing alleged improprieties in the appeal process for bar admissions, although it lacked jurisdiction to review the merits of the Board's decision); Bailey v. Board of Law Examiners, 508 F. Supp. 106, 108 (W.D. Tex. 1980)(quoting Brown v. Board of Examiners, 623 F.2d 605, 609-10 (9th Cir. 1980) for the proposition that, although the district court did not have jurisdiction to review decisions by bar examiners on the plaintiff's test results, it did have jurisdiction to determine whether "generally applicable rules and procedures for admission to the Bar impinge upon constitutionally protected rights").

have a disability. Furthermore, Ms. Clark's evidence clearly supports her claim that she has a disability.

1. Ms. Clark Has Standing To Sue Even If She Does Not Have A Disability

Anyone who responds affirmatively to the Board's inquiries about a history of treatment for mental health conditions must provide detailed information about such treatment, authorize release of their private medical records, and be subjected to greater scrutiny than other applicants.

In order to determine whether a party has standing, a court must examine constitutional and prudential considerations. Warth v. Seldin, 422 U.S. 490 (1975). At an "irreducible constitutional minimum," plaintiffs must show three elements. First, the plaintiff must have suffered an injury in fact, which is (a) concrete and particularized and (b) actual or imminent. Second, the injury must be traceable to the alleged unlawful conduct. Third, it must be likely that the injury will be redressed by a favorable decision. Lujan v. Defenders of Wildlife, 112 S.Ct 2130, 2136; Chesapeake and Potomac Telephone Company of Virginia v. United States, 830 F. Supp. 909, 916 (E.D. Va. 1993). Prudential considerations related to standing are (1) whether the asserted harm is particular to the plaintiff, rather than a generalized grievance shared by all or a large class of citizens and (2) whether plaintiffs are asserting their own rights or interests and not those of third parties. Warth, 422 U.S. at 499; Hoffman v. Hunt, 845 F. Supp. 340 (W.D.N.C. 1994).

Plaintiff has met the constitutional requirements for standing. She has suffered an injury in fact traceable to the defendants' inquiries because the additional burdens placed on applicants who answer question 20(b) affirmatively are substantial. In a similar case, Medical Society of New Jersey v. Jacobs, the court found that investigations into the mental health history of an applicant for a medical license constituted "invidious discrimination under title II regulations" because of the additional burden placed on those applicants. Medical Society of New Jersey v. Jacobs, 1993 WL 413016, *7-8 (D.N.J. Oct. 5, 1993). The court in Ellen S., citing Jacobs, also held that inquiries into the applicants' mental health histories placed additional burdens on the applicants. Ellen S., at 10. The court also found that the title II regulation makes clear that the question on the Florida Bar application asking about past mental health treatment in itself, as well as the subsequent investigations, "discriminate against plaintiffs by subjecting them to additional burdens based on their disability." Id. at 10.[7]

---

[7] In Jacobs, the court held that the questions themselves were not discriminatory, but, in the context of the background investigations, were used "as a screening out device to decide on whom the Board will place additional burdens." Jacobs at * 7. The court in Ellen S. broadened the Jacobs ruling and held that the questions themselves were discriminatory because they automatically triggered subsequent questions and possible subsequent possible investigation. Ellen S., at 10 n. 7.

Similarly, in this case, an affirmative answer to question 20(b) is discriminatory because it automatically triggers additional questions and possible investigations.

The Board's inquiry is burdensome and invasive not only because it requires persons who answer the question in the affirmative to provide detailed information, but because it also requires them to disclose details about what is arguably the most private part of human existence -- a person's inner mental and emotional state. Of potentially even more harm is the Board's attempt to obtain information about the person's fitness from other individuals; the Board's investigators may potentially engage in a full-fledged exploration of an applicant's condition with the person's physicians, counselors, colleagues, and associates and may ask questions regarding the person's diagnosis or treatment for mental, emotional or nervous disorders. It is not difficult to imagine the attendant potential damage to an individual's reputation.

The inquiries are also injurious because of the stigma which still attaches to treatment for mental or emotional illness. The Supreme Court has recognized that individuals have a substantial liberty interest under the Due Process Clause of the Constitution in avoiding the social stigma of being known to have been treated for a mental illness. Parham v. J.R., 442 U.S. 584, 600 (1979); Addington v. Texas, 441 U.S. 418, 426 (1979); see also Smith v. Schlesinger, 513 F.2d 462, 477 (D.C. Cir. 1975) ("[m]ental illness is unfortunately seen as a stigma. The enlightened view is that mental illness is a disease...but we cannot blind ourselves to the fact that at present, despite lip service to the

contrary, this enlightened view is not always observed in practice").[8]

Plaintiff's injury, which also includes the imminent denial of her bar application, may be redressed by the relief sought.[9] Invalidating question 20(b) would allow Ms. Clark to continue in

---

[8] In addition, the Board's inquiries into a person's mental health treatment can have a more insidious discriminatory effect. Concern over the Board's inquiries about diagnosis and treatment for mental illness or substance dependency may deter law students or other applicants to the bar from seeking counseling for mental or emotional problems. In re Petition of Frickey, No. C5-84-2139 (Minn. Apr. 28, 1994)(Minnesota Supreme Court ordering deletion of questions regarding mental health history from bar admissions application on grounds that the questions deterred law students from seeking needed counseling); see Stephen T. Maher and Lori Blum, A Strategy for Increasing the Mental and Emotional Fitness of Bar Applicants, 23 Ind. L. Rev. 821, 830-33 (1990)(detailed discussion of how such inquiries have deterrent effect). Even when treatment is sought, its effectiveness may be compromised, because knowledge of the Board's potential investigation of issues surrounding treatment is likely to undermine the trust and frank disclosure on which successful counseling depends. See id. at 824, 833-46. Thus, rather than improving the quality of the character and fitness of members of the bar, the Board's inquiries may have the perverse effect of deterring those who could benefit from treatment from obtaining it, while penalizing those who enhance their ability to practice law by seeking counseling.

[9] Aside from plaintiff's refusal to respond to question 20(b) and to cooperate with the consequent investigations into her mental health history, defendants have raised no other impediment to her admission to the bar. However, the possibility that plaintiff's application may be denied on other grounds does not diminish her standing here. It is not essential that the challenged question be the sole obstacle to plaintiffs' ultimate goal. Arlington Heights v. Metropolis Housing Development Corp., 429 U.S. 252, 261 (plaintiff had standing where challenged statute was "absolute barrier" to end goal, despite the fact that invalidation of the statute would not guarantee achievement of that goal); See also Chesapeake and Potomac Telephone Co. of Virginia v. United States, 830 F. Supp. at 916 (standing found where invalidation of statute in question would simply allow plaintiff to pursue regulatory approval of cable franchise on same footing as other applicants).

the bar application process, undistinguished from other applicants who have not sought mental health treatment in the past. It would relieve her of the additional burdens of investigation and would remove the mental illness stigma from the bar application.

In addition to the basic constitutional requirements for standing, plaintiff has also satisfied the necessary prudential considerations. The burdens and attendant stigma described above, are particular to the plaintiff and the limited class of people who have sought previous mental health treatment. Question 20(b) is designed to screen out a relatively small class of individuals for different treatment, leaving the larger, generalized class of bar applicants unaffected.

Finally, in determining standing, courts should also look into the policy underlying the statute to determine the scope of the statute's zone of interest. Nasser v. City of Homewood, 671 F.2d 434 (11th Cir. 1982). As with other civil rights statutes, standing under the ADA should be interpreted as broadly as permissible under the Constitution. In Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972), a white plaintiff alleged that he was injured by his landlord's racial discrimination against prospective minority tenants. Although the plaintiff was not directly a victim of the landlord's discrimination, the Court held that section 810 of the Civil Rights Act of 1968 (Fair Housing Act) should be broadly construed as a civil rights act to provide plaintiff with standing. The

Court went on to hold that the plaintiff had standing because he was denied the opportunity for interracial association. See also Gladstone Realtors v. Village of Bellwood, 441 U.S. 91 (1979).[10]

Similarly, in this case, Ms. Clark is being injured by discriminatory conduct that the ADA statute was intended to prevent. Even if the plaintiff did not have a disability, she still faces discrimination and is injured by the Board's intrusive inquiries. These injuries are indistinguishable from the types of injuries encountered by other persons whose mental impairments are severe enough to qualify them as persons with disabilities under title II. Any applicant who answers question 20(b) affirmatively, regardless of whether that person has a disability, is within the zone of interest of the ADA's protection and shares "common bonds" with the statute's intended protected class. Branch Bank and Trust Co. v. National Credit Union Admin. Bd., 786 F.2d 621 (4th Cir. 1986) (denying standing to a plaintiff whose interests were the opposite of those Congress was trying to protect), cert. denied, 479 U.S. 1063 (1987).[11] In particular, bar applicants who do not have a disability, but who sought mental health treatment in the past,

---

[10] Under the ADA as under the Fair Housing Act, suits by "private attorney generals" are critical to successful enforcement of the law where federal enforcement resources are limited. Trafficante, 409 U.S. at 211 (fewer than 24 attorneys dedicated to Fair Housing Act enforcement). The Department of Justice currently has 20 attorneys responsible for ADA litigation.

[11] See also Clarke v. Securities Industry Ass'n, 479 U.S. 388 (1987), denying zone of interest and standing because plaintiff had goals contrary to those Congress sought to protect.

may share the common goal of ridding the bar application process of inquiries into mental health status. Such an applicant, therefore, may be considered to be within the same zone of interest as someone with a mental disability. Therefore, Ms. Clark has standing to sue regardless of whether she has a disability.

2. This Court Incorrectly Concluded That Ms. Clark Is Not A Person With A Disability

This Court erroneously concluded that plaintiff is not a person with a disability. The Court concluded that plaintiff's mental impairments did not substantially limit a major life activity and that the Board did not regard her as having a disability.[12]

Title II of the ADA and its implementing regulation define the term "disability" as:

> (A) a physical or mental impairment that substantially limits one or more major life activities...

---

[12] The United States agrees with plaintiff's contention that summary judgment in this case is premature. Obviously, there are genuine issues of material fact essential to the determination of the plaintiff's status as a person with a disability under the ADA. As the plaintiff asserts in her Notice and Motion to Alter Judgment, summary judgment is appropriate only where there is "no disagreement as to the inferences which may be drawn from the undisputed facts." Federal Sav. and Loan Ins. Corp. v. Heidrick, 774 F. Supp. 352, 356 (D. Md. 1991)(quoting Steinberg v. Elkins, 470 F. Supp. 1024, 1030 (D. Md. 1979)). Further, dispute over facts or inferences of facts must be resolved in favor of the non-moving party if there are any "reasonable doubts" concerning their existence. Boyett Coffee Co. v. United States, 775 F. Supp 1001, 1002 (W.D. Tex 1991).

(B) a record of such impairment; or

(C) being regarded as having such an impairment.

42 U.S.C. § 12102 (2); 28 C.F.R. § 35.102 (1992). The title II regulation provides that a "physical or mental impairment" includes [a]ny mental or psychological disorder such as...emotional or mental illness...." 28 C.F.R. § 35.104 (1992) (emphasis added).[13] The record raises triable issues under both the second and third prongs of the ADA's definition of disability.

---

[13] These regulations, which were published by United States Department of Justice, should be given substantial deference by the Court. Where, as here, Congress expressly delegates authority to an agency to issue legislative regulations, 42 U.S.C. § 12134, the regulations, "are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." Chevron, U.S., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984). See also Petersen v. University of Wis. Bd. Regents, No. 93-C-46-C, 2 Americans with Disabilities Act Cases (BNA) 735, 738, 1993 U.S. Dist. LEXIS 5427 (W.D. Wis. Apr. 20, 1993) (applying Chevron to give controlling weight to Department of Justice interpretations of title II of the ADA).

Agencies are also afforded substantial deference in interpreting their own regulations. The Supreme Court has stated that "provided that an agency's interpretation of its own regulations does not violate the Constitution of a federal statute, it must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" Stinson v. United States, 113 S. Ct., 1913, 1919 (1993) (quoting Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945)). See Lyng v. Payne, 476 U.S. 926, 939 (1986); United States v. Larionoff, 431 U.S. 864, 872-873 (1977); Udall v. Tallman, 380 U.S. 1, 16-17 (1965).

a. The Evidence Supports Ms. Clark's Claim That She Has A Record of a Disability

Plaintiff Clark had been diagnosed as having recurrent major depression. The Court acknowledged that this condition manifested itself in her losing "much of [her] ability to concentrate, act decisively, sleep correctly, orient [her]self, and maintain ordinary social relationships" over a period lasting approximately thirteen months. Opinion at 2. Nevertheless, the Court concluded that, because this diagnosed impairment did not substantially impair plaintiff Clark's ability to perform a major life function, she did not qualify as a person with a disability under the ADA.

The evidence before this Court, however, supports plaintiff's claim that she had a mental impairment that substantially limited a major life activity. Ms. Clark had been diagnosed with "major depression, recurrent," which lasted for thirteen months. Because mental impairments are intended to broadly encompass many conditions and diagnoses, her condition may well fall within the scope of the ADA's coverage.

These impairments may substantially limit one or more of Ms. Clark's "major life activities." The title II regulation describes major life activities as functions "such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 28 C.F.R. § 35.104

(emphasis added).[14] This list of major life activities is not intended to be exhaustive, but to instead provide examples of major life activities. The activities affected by Ms. Clark's disability are within the scope of the term "major life activities," as defined under the ADA and under Section 504 of the Rehabilitation Act of 1973 ("Section 504").[15] At a minimum, sleeping and maintaining ordinary social relationships are major

---

[14] The use of the term "such as" in the regulation reflects Congressional intent not to provide an exhaustive list. The regulation utilizes verbatim the language used in the Senate and House Committee reports regarding the definition of a major life activity. See H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. II at 52 (1990) [hereinafter cited as Education and Labor Report]; S. Rep. No. 116, 101st Cong., 1st Sess. at 23 (1989)[hereinafter cited as Senate Report].

The Department's interpretive guidance accompanying the regulation further supports this interpretation by stating generally that a person satisfies the definition of disability "when the individual's important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people." 28 C.F.R. pt. 35, App. A, at 445 (1993).

[15] Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, prohibits discrimination against individuals with handicaps in federal programs and in programs receiving federal financial assistance. In the ADA, Congress adopted a definition of "disability" that is essentially identical to the Section 504 definition of "handicap." Moreover, the ADA statute, legislative history, and Department of Justice regulations clearly indicate that title II of the ADA is intended to provide protections that are at least as broad those available under the Rehabilitation Act and its implementing regulations. See 42 U.S.C. § 12202(a); Education and Labor Report at 84; 28 C.F.R. § 35.103(a) (1992). See also Doe v. New York University, 666 F.2d 761, 775 (2nd Cir. 1981) (discussing the "wide scope" of the definition of disability under Section 504, and concluding that the legislative history indicated that "the definition is not be construed in a niggardly fashion.") (citing S.Rep. No. 93-1297, 93 Cong., 2d Sess. (1974)).

life activities similar to the types of activities listed as examples in the regulation.

Courts have similarly construed the scope of major life activity not to be limited to the list of examples. In Perez v. Philadelphia Housing Authority, the court held that the plaintiff was a "handicapped" individual within the coverage of the Rehabilitation Act because the pain from her injury "not only affected her ability to work but also her ability to walk, sit, stand, drive, care for her home and child, and engage in leisure pastimes." Perez v. Philadelphia Housing Authority, 677 F. Supp. 357, 360 (E.D. Pa., 1987), aff'd 841 F.2d 1120 (3rd Cir. 1988); see also, Doe v. New York University, 666 F.2d 761 (2d Cir. 1981)(the ability to handle situations presented by plaintiff's work environment constituted major life activity).

Individuals eligible for the protection of the ADA do not have to demonstrate an absolute inability to work or to lead a successful life in order to prove themselves individuals with disabilities. Ms. Clark's successful completion of law school and her career performance do not automatically disqualify her from being an individual with a disability.

The Court also erred in equating Ms. Clark's condition to symptoms encountered by a large portion of law students without undertaking the kind of individualized assessment contemplated by the ADA, which requires that disability be evaluated on a case-by-case basis. Indeed the Fourth Circuit has found -- in a case cited in this Court's Opinion -- that this "definitional task

cannot be accomplished merely through abstract lists and categories of impairments." Forrisi v. Bowen, 794 F.2d 931, 932 (4th Cir. 1986) (stating that the determination of handicapped status under Section 504 should be made on a case-by-case basis); Perez v. Philadelphia Housing Authority, 677 F. Supp. at 360 (court noting that a case-by-case approach is essential to determining an individual's disability status). In holding that Ms. Clark's depression does not amount to a disability for ADA purposes without the benefit of additional information or discovery by the parties, the Court contravenes this mandate of case-by-case assessment. Without the facts that will be revealed through discovery, the Court is not able to accurately assess the severity of Ms. Clark's symptoms and their effect on her life. Instead, the Court equates her condition with symptoms of depression common to many law students.[16] Ms. Clark, however, was diagnosed with "major depression, recurrent," a disorder classified in the American Psychiatric Association Diagnostic and

---

[16] The studies cited by the defendants that state that a large percentage of law students suffer from "significantly elevated depression levels," and "significant depression symptoms," are not pertinent to this case. Defendant's Ex. C, p. 46-47.

As the Department's regulation makes clear, however, a person may have a disability while also displaying symptoms or traits that are relatively common. 28 C.F.R. pt. 35, App. A, at 445 (1993). The fact that a significant number of law students display symptoms of elevated depression does not mean that they automatically become persons with disabilities under the ADA. Conversely, the fact that many law students have elevated symptoms of depression does not automatically mean that Ms. Clark's condition cannot qualify her as a person with a disability.

Statistical Manual of Mental Disorders III-R.[17] The plaintiff's condition did not involve merely minor, transient, or commonplace inconveniences. As discussed above, these mental impairments may have substantially limited her ability to perform several basic life activities. Such evidence raises issues of triable fact as to whether Ms. Clark has a record of being an individual with a disability under the ADA. Therefore, the granting of summary judgment to the defendants was in error.[18]

---

[17] In Guice-Mills v. Derwinski, the court held that "a major depressive episode as described in the American Psychiatric Association Diagnostic and Statistical Manual of Mental Disorders III-R constitutes a 'mental impairment' within the purview of [the Rehabilitation Act]." Guice-Mills v. Derwinski, 772 F. Supp. 188, 197 (S.D.N.Y. 1991). The American Psychiatric Association Diagnostic and Statistical Manual of Mental Disorders III-R classifies Major Depression, Single Episode (DSM-III 296.2x) and Major Depression, Recurrent (DSM-III 296.3x) as depressive disorders differentiated only by the frequency of their occurrence.

[18] It should also be noted that the legislative history of the ADA also reveals Congress's intent that the law extend particular protection to individuals with a record of mental or emotional illness. The legislative history states that the second prong of the definition of disability was included in the law,

> in part to protect individuals who have recovered from a physical or mental impairment which previously substantially limited them in a major life activity. Discrimination on the basis of such a past impairment would be prohibited under this legislation. Frequently occurring examples of [this] group...are persons with histories of mental or emotional illness...

Education and Labor Report at 52; Senate Report at 23 (emphasis added).

b. The Record Supports The Conclusion That The Board Regards Ms. Clark As Disabled

This Court also concluded that the Board did not regard the plaintiff as being disabled, stating that, "[i]f the defendants regarded Julie Ann Clark as disabled and unable to practice law, they would have denied her application." Opinion at 12.[19] We believe that, by singling out persons with histories of treatment for mental, emotional, or nervous disorders and subjecting them to special review and possible denial of professional licensure, the Board indeed is regarding such persons as having disabilities and discriminating against them on that basis. Ellen S. at 9-10. As discussed above, these inquiries into mental health treatment pose serious threats to an applicant's privacy and reputation. While the Board never made a determination of plaintiff Clark's fitness to practice law, it does subject her to the additional burdens and inquiries on the basis of her mental condition and not on any behavior or conduct suggesting an inability to practice law. As such, the Board's practice reflects exactly the sort of prejudices and stereotypes that the ADA was designed to combat.[20]

---

[19] As the Ellen S. court recognized, however, a licensing board, "can discriminate against qualified disabled applicants by placing additional burdens on them and this discrimination can occur even if these applicants are subsequently granted licenses to practice law." Ellen S. at 10.

[20] The ADA does not prevent the Board from disqualifying applicants on the more relevant basis of behavior that reflects their ability to practice law, even if the behavior results from a mental impairment.

Due to misconceptions concerning individuals who have sought mental health treatment, such persons are often regarded as emotionally disabled or mentally ill although their past and/or current capability or stability might not be affected. As the Supreme Court observed in School Board of Nassau County v. Arline, 480 U.S. 273, 284 (1987), in enacting the "regarded as" provision of the definition of handicap under the Rehabilitation Act (a similar definition to a person with a disability under title II of the ADA), Congress "acknowledged that society's accumulated myths and fears about disability...are as handicapping as are the physical limitations that flow from actual impairment." Here, the defendant's broad inquiries on the bar application form into the applicant's mental health history reflect an assumption that past diagnosis of or treatment for mental or emotional conditions renders the applicant more likely than other candidates to be substantially impaired in his or her ability to perform as a lawyer. Accordingly, granting summary judgment in favor of the defendants was in error.

III. Conclusion

This Court should vacate its Order Granting Defendant's Motion for Summary Judgment.

Dated: Washington, D.C.

August 9, 1994

Respectfully submitted,

DEVAL L. PATRICK
Assistant Attorney
General
Civil Rights Division

By:
JOHN L. WODATCH
JOAN A. MAGAGNA
SHEILA K. DELANEY (Va. Bar No. 13757)
SHEILA M. FORAN
KEN S. NAKATA
Attorneys
U.S. Department of Justice
Civil Rights Division
Public Access Section
P.O. Box 66738
Washington, D.C. 20035-6738
Tel: (202) 307-6309

CERTIFICATE OF SERVICE

I, the undersigned, attorney for the United States of America, do hereby certify that I have this date served upon the persons listed below, by overnight delivery, true and correct copies of the foregoing Memorandum of the United States as Amicus Curiae in Support of Plaintiff's Notice and Motion to Alter Judgment.

Victor M. Glasberg, Esq.
Victor M. Glasberg & Associates
121 S. Columbus Street
Alexandria, VA 22314

Peter R. Messitt
Assistant Attorney General
Office of the Attorney General
101 North Eighth Street
Richmond, VA 23219

SO CERTIFIED this 9th day of August, 1994.

_____

KEN S. NAKATA
Trial Attorney
United States Department of Justice
Civil Rights Division
Public Access Section
P.O. Box 66738
Washington, D.C. 20035-6738
(202) 307-2232