

**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT
OF FLORIDA**

MICHAEL J. HASON,

Plaintiff,

Case No. 4:06cv105-RH/WCS

Vs.

**THE FLORIDA BOARD OF
BAR EXAMINERS, et al.,**

Defendants.

_____ /

**INTERVENOR, PHILIP J. STODDARD'S, MEMORANDUM OF OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS**

INTERVENOR, PHILIP J. STODDARD, with leave of Court, opposes the defendants' motion and shows the court:

PROCEDURAL POSTURE

Plaintiff originally filed this suit in the Southern District of Florida in August, 2005, alleging that the defendants violated his rights under Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131 et seq. ("ADA" or "Title II") during his Bar admission proceeding. The Complaint requests injunctive relief and damages, including punitive damages for the ADA and Fourteenth Amendment due process violations actionable under 42 U.S.C. § 1983. This case was transferred to this district on or about February 27, 2006. The defendants have filed a motion to dismiss under various sub-parts of Rule 12(B) asserting 11th Amendment Immunity, Absolute Judicial Immunity, Failure to State a Cause of Action and various other pleading defects. The Court, by order extending the time for filing this response has extended the filing deadline to June 20, 2006. The Intervenor, PHILIP J. STODDARD, by motion filed

concurrently herewith requests leave of Court to docket this Memorandum as supplementary to the "Affidavit" and "Memorandum" the Plaintiff filed on June 2, 2006.

MEMORANDUM OF LAW

I. SUMMARY OF THE COMPLAINT

The complaint shows the following facts and reasonable inferences:

(a) Dr. Hason is a qualified bar applicant with a disability who is protected under Title II of the ADA because Dr. Hason has satisfied all of the requirements for membership in the Florida Bar and has a treatable disability that does not impair his ability to do the work of a lawyer;

(b) The defendants have given notice that they intend to deny Dr. Hason a "certificate of good moral character" basing that decision on Dr. Hason's history of treatment for mental illness;

(c) In retaliation for Dr. Hason's Ninth Circuit victory, Hason v. Medical Board of California, 279 F.3d 1167 (9th Cir. 2002), and his courageous challenges to other licensing authorities, the defendants have invidiously discriminated against Dr. Hason and unreasonably and maliciously delayed processing Dr. Hason's application;

(d) Because of his truthful answers to the questions on his bar application and his other disclosures, the defendants punished Dr. Hason with unreasonable delay and imposed other burdens on Dr. Hason;

(e) The defendants have not alleged that Dr. Hason is unfit to practice law because of his disability;

(f) The defendants have delayed or denied Dr. Hason licensing and are claiming that Dr. Hason is morally unfit to practice law because of a mere dispute with a creditor over a bill;

(f) The defendants have delayed or denied Dr. Hason licensing and are claiming that he is morally unfit or implying that he is technically incompetent¹ because they subjectively disapprove of his pro-se litigation style;

(g) Dr. Hason filed this suit as a response to the specifications served on him and the defendants have unreasonably withheld mandatory final agency action on his application for frivolous and unconstitutional reasons.

POINTS AND AUTHORITIES

INTRODUCTION

When faced with a motion to dismiss for failure to state a cause of action, the court must construe the factual allegations in the complaint in the light most favorable to plaintiff. A complaint may not be dismissed for failure to state a claim under Rule 12(b)(6) "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Magluta v. Samples, 256 F.3d 1282, 1283-84 (11th Cir. 2001) (per curiam) (quoting Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102 (1957)). The Rule 12(b)(1) defenses will be extensively discussed.

I. THE MEMBERS OF THE FLORIDA BOARD OF BAR EXAMINERS AND THEIR EMPLOYEES DO NOT ENJOY ABSOLUTE IMMUNITY FROM SUITS BROUGHT PURSUANT TO SEC. 1983.

¹ The "technical competence" issue is not properly considered in a moral character review because "technical competence is established by passing the bar examination.

Defendants rely primarily on Roland vs. Philips, 19 F.3d 552 (11th Circ. 1994) which held that law enforcement officers had absolute immunity when carrying out a direct court order (such as enforcing a restraining order or executing on a judgment). The immunity recognized in Roland, like the witness immunity at issue in Briscoe vs. Lahue, 460 U.S. 325 (1983), is simply not applicable to administrative officials enforcing licensing rules. The Roland case does manifest a proper "functional analysis" pursuant to the mandates of Butz vs. Economou, 438 U.S. 478, 508 (1978) and Forrester vs. White, 484 U.S. 219 (1988).

Conspicuously absent from the FBBE's brief is any discussion of a functional analysis of the individual defendants' roles in the admissions process. The FBBE has advanced arguments about who the defendants are, rather than what they do. In doing so, the FBBE advances the wrong test. Once this Court conducts a *functional analysis* of the defendants' roles, it will be abundantly clear that, at most, they are entitled to assert a defense of qualified immunity.

The defendants' reliance on this Court's decision in Diaz vs. Moore, 861 F. Supp. 1041 (N.D.Fla. 1994) is also misplaced: Diaz was based on the rationale of Sparks v. Character & Fitness Committee of Ky., 859 F.2d 428 (6th Cir. 1988)(Sparks II), also cited by the defendants as support for their position.

There are three glaring problems with the Sparks case. First, neither of the Sparks cases have ever been cited in any federal appellate court outside of the Sixth Circuit. Second, Sparks conflicts with Sixth Circuit precedent established in Manion vs. Michigan Bd. of Medicine, 765 F.2d 590 (6th Cir. 1985). It is well settled in the Sixth Circuit that one panel may not overrule the controlling precedent of another panel of the court. "Only the court sitting en banc can overrule a prior decision." Timmreck v. United States, 577 F.2d 372, 376 n.15 (6th Cir.

1978), rev'd other grounds, 441 U.S. 780 (1979); see also United States v. Rigsby, 943 F.2d 631 (6th Cir. 1990) (panel is compelled to affirm the district court even though it strongly disagrees with this circuit's controlling precedent because it is bound by the precedent). Therefore, Sparks has no precedential value in the Sixth Circuit and cannot reasonably be persuasive elsewhere.

Third, Sparks did not engage in a proper functional analysis and the Sixth Circuit has recently issued two decisions wherein Bar applicants sued licensing officials for money damages and the Sixth Circuit declined to apply Sparks. See, Dean v. Byerley, 354 F.3d 540 (6th Cir. 2004)(bar licensing official could be liable for First Amendment violations); Lawrence vs. Chabot², File 06a0347n.06 (6th Circuit 2006 unpublished) ([The state licensing officials] are entitled to qualified immunity as to Lawrence's claims against them).

The proponent of a claim to absolute immunity bears the burden of establishing the justification for such immunity. In determining which officials perform functions that might justify a full exemption from liability the court inquires into the immunity historically accorded the relevant official at common law and the interests behind it." Butz v. Economou, 438 U.S. 478, 508 (1978) (quoting Imbler v. Pachtman, 424 U.S. 409, 421 (1976)); see also Burns v. Reed, 500 U.S. 478, 485 (1991)

Processing an application has always been and still is, fundamentally, a personnel decision (whether a person is fit to be an officer of the court). There is no indication that,

² On May 22, 2006, James Dean, Esq., attorney for the Florida Board of Bar Examiners, filed a notice of supplemental authority pursuant to Fed. R. App. 28(j) purporting that the Lawrence vs. Chabot case is persuasive authority in an appeal pending in the Eleventh Circuit. Qualified immunity is the proper consideration in suits for damages against licensing officials.

considering the non-adversarial nature of attorney admission³ and regulation, a state judge would have been immune from a damages suit brought against him in federal court for "wrongful refusal to enroll" under Sec. 1983⁴.

Sec. 1983's very purpose was to provide a federal forum for plaintiff's seeking to enforce their federal rights where state remedies were inadequate. Monroe v. Pape, 365 U.S. 167 (1961). Historically, the only available state remedy for abuse of a lower state court's discretionary power in attorney admission or regulation matters was equitable: the discretionary writ of mandamus. The Court in Garland, however, suggests that the Supreme Court recognized the existence of a "Bivens⁵" type action in Federal Court to enforce Art. I, Sec. 10, Const. U.S..

The overwhelming weight of decisions, including two Sixth Circuit Decisions since Butz and Forrester show that the sweeping exception to the rule of those cases carved out by

³ Attorney admission in Florida, in relevant part, is a paradigmatic licensing proceeding similar to that established under Florida's Administrative Procedures Act, Sec. 120.60, Fla. Stat. (2004), but devoid of certain procedural safeguards (such as adequate notice of the reasons for the proposed license denial, the rules of civil procedure, reasonable time constraints, and non-liability for costs). Being entirely administrative, attorney admission cannot be said to be a "judicial proceeding." A challenge to a licensing decision under Sec. 120.60 is pursuant to Sec. 120.569 and 120.57. Judicial review is pursuant to Sec. 120.68, Fla. Stat. (2004).

⁴ In Ex Parte Garland, a case that preceded the enactment of Sec. 1983, attorneys for the petitioner argued: The petitioner's right to practice in this court is property. In Wammack v. Halloway it was held by the court unanimously, that "the right to exercise an office is as much a species of property as any other thing capable of possession; and to wrongfully deprive one of it, or **unjustly withhold it**, is an injury which the law can redress in as ample a manner as any other wrong . . ." Ex Parte Garland, at 347 (Emphasis supplied).

The court, interpreting Art. I, Sec. 9, Const. U.S. (prohibition against bills of attainder and ex-post facto laws) agreed with this argument and stated:

The admitted power of Congress to prescribe qualifications for the office of attorney and counsellor in the Federal courts cannot be exercised as a means for the infliction of punishment for the past conduct of such officers, against the inhibition of the Constitution.

⁵ "[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." (citing Bell v. Hood, 327 U.S., 678 at 684 (1946)) . Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971).

the Sixth Circuit in Sparks is not warranted: Schopler v Bliss, 903 F.2d 1373 (11th Cir. 1990); Hafer v. Melo, 502 U.S. 21 (1991); Buckley v. Fitzsimmons, 509 U.S. 259 (1993); Antoine v. Byers & Anderson, Inc., 508 U.S. 429 (1993); Moore v. Gunnison Valley Hosp. 310 F.3d 1315 (10th Cir. 2002); Harris v. Victoria Indep. Sch. Dist., 168 F.3d 216 (5th Cir. 2003); Diblasio vs. Novello, 344 F.3d 292 (2nd Cir. 2003); Dean v. Byerley, 354 F.3d 540 (6th Cir. 2004)(bar licensing official could be liable for damages for First Amendment violations); Lawrence vs. Chabot, File 06a0347n.06 (6th Circuit 2006 unpublished) ([The state licensing officials] are entitled to qualified immunity as to Lawrence's claims against them). In Stoddard vs. Supreme Court, No. 03-11662 (11th Cir. 2003 unpublished) the court said:

Stoddard admitted in his amended complaint that he did not have a bar application currently pending. He concedes in his appellate brief that he is not seeking *money damages, which is the only real remedy he might have for any past injury that might have been done to him to by the defendants.* He seeks only declaratory relief, finding certain of the Florida Bar Rules unconstitutional, and injunctive relief, requiring the defendants to treat him in a different manner than they have in the past. As Stoddard has no bar application pending, however, any injury to him requiring equitable relief is conjectural and hypothetical, not actual and imminent. We can only speculate as to whether he will resubmit his application and the final outcome. (Emphasis supplied)

In Hafer v. Melo, 502 U.S. 21, 29 (1991) the Court observed, "In several instances, moreover, we have concluded that no more than a qualified immunity attaches to administrative employment decisions, even if the same official has absolute immunity when performing other functions."

Under the "functional approach" to the immunities issue, Jones vs. Cannon, 174 F.3d 1271 (11th Cir. 1999)⁶ (citing Forrester vs. White, 484 U.S. 219 (1988)) and Supreme Court of

⁶ If the function is similar to a function which would have been immune when Congress enacted § 1983, and if a court determines that § 1983's history or purposes support special protection for the activity, then the court will recognize the absolute immunity of the official from damages liability.

Virginia v. Consumers Union of United States, Inc., 446 U.S. 719 (1980) (Judicial officers are not absolutely immune when engaged in rule enforcement activities), it must necessarily follow that the members and employees of The Florida Board of Bar Examiners may not conduct their affairs shielded from liability for willful official misconduct⁷ when their function is entirely administrative. The admission of attorneys as "officers of the court" is functionally indistinguishable from the personnel decision made by Judge Harvey Lee White in Forrester. The defendants should be denied absolute immunity.

II. THE PLAINTIFF HAS STANDING TO SEEK DAMAGES AND APPROPRIATE INJUNCTIVE RELIEF.

If this court agrees with the defendants' argument on the standing issue, such agreement will result in a conflict in the Circuits concerning the rights of bar applicants to prospectively challenge bar licensing rules and practices. This court should not create a conflict.

The defendants cannot reasonably distinguish Stoddard vs. Supreme Court, No. 03-11662 (11th Circ. 2003 unpublished) from a Tenth Circuit published decision directly on point: Roe No. 2 v. Ogden, 253 F.3d 1225 (10th Cir. 2001) (a person who is qualified or in the process of qualifying to apply for a license has standing to attack the licensing rules whether or not he has actually applied for the license).

Stoddard vs. Supreme Court, No. 03-11662 (11th Circ. 2003 unpublished) involved a facial attack on the bar admission rules after Stoddard abandoned his damage claims for appeal purposes. Stoddard's pursuit of a fair licensing procedure to the point of suing the bar

⁷ This is the essence of the "constitutional stripping doctrine":

If the act which the state attorney general seeks to enforce be a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The state has no power to impart to him any immunity from responsibility to the supreme authority of the United States. Ex Parte Young, 209 U.S.123, 159—60 (1908).

admission authorities and taking an appeal arguably defeated any question of speculation as to Stoddard's plans for aggressively pursuing a license.

The defendants cannot reasonably be heard arguing that they have authority to stonewall an application and then claim it is no longer pending because it has "gone stale" or that they have "deemed it withdrawn."

III. THE ISSUES ARE RIPE FOR ADJUDICATION.

The complaint shows that the plaintiff has been harmed by FBBE's conduct and that the damages are ongoing. The issues are mature and ripe for adjudication under the same rationale as that set forth in Roe No. 2 v. Ogden, 253 F.3d 1225 (10th Cir. 2001).

IV. YOUNGER VS. HARRIS IS INAPPLICABLE TO STATE REMEDIAL PROCEEDINGS EVEN IF THE PLAINTIFF HAD COMMENCED ONE.

The Supreme Court has never, not even once, affirmed abstention where the plaintiff initiated the State action. Abstention is only appropriate when, at the moment the federal complaint is filed, relief would "interfere" or "enjoin" pending state proceedings. Wexler v. Lepore, 385 F.3d 1336, 1341, fn. 7 (11th Cir. 2004) ("if there is no interference, then abstention is not required.") Bar application formal hearings are remedial in that the applicant seeks to vindicate himself. The defendants have failed to show, let alone discuss, how an adjudication of this complaint is creating undue interference with pending state proceedings, an absolute prerequisite for a claim of Younger abstention.

Moreover, Younger does not permit dismissal of claims for damages; a court may issue a stay order in appropriate cases. For Your Eyes Alone V. City Of Columbus, 281 F.3d 1209 (11th Cir. 2002)(Citing Deakins V. Monaghan, 484 U.S. 193 (1988)). Here, the injunctive relief pled for is simply the general injunctive relief inherently available in any case where the

Court finds that the plaintiff has no adequate legal remedy. Such relief is particularly appropriate in cases such as this, where the damages are ongoing.

Younger can only be applied where the state proceedings are “coercive” and not merely “remedial.” Smolow v. Hafer, 353 F. Supp. 2d 561, 571-572 (E. D. Penn. 2005) (and cases cited therein). In Smolow, it was stated:

In this case plaintiff brought his state suit to remedy nearly the same “wrongs inflicted by the state” as are asserted in his federal action, i.e., the state's continued refusal to pay members of his putative class interest under the DAUPA. These state proceedings do not resemble those coercive proceedings in which the Supreme Court has upheld Younger abstention. To the contrary, plaintiff's state action falls squarely in the remedial category, and the Court will not abstain under Younger. Smolow, 353 F. Supp. 2d at 572.

It is doubtful whether any court can find a "coercive element" in Florida's bar application process. In application, as the discovery in this case will prove, "formal hearings" under the Bar Admission Rules are anything but adversarial. These hearings are inquisitorial, summary in nature, and must be requested by the applicant to avoid a default denial of a license. The defendants must affirmatively allege that the Board has required Dr. Hason to appear at some kind of adjudicative hearing before the court can reach the issue of whether there is any "coercive" element in the Florida Bar admission process. The defendants have not made such an allegation.

The "wrongs inflicted by the state" in this case are the state's refusal to certify the applicant as being "of good moral character" and delaying his application for more than five years for unconstitutional reasons. Since the plaintiff is not seeking declaratory relief that might interfere with a state coercive criminal or disciplinary proceeding. The case of Middlesex County Ethics Comm. vs Garden State Bar Assoc., 457 U.S. 423 (1982), has no application at all to the facts of this case. All Middlesex stands for is the principle that under

Younger, a Federal Court can not intrude into a coercive and ongoing bar disciplinary proceeding. Coerciveness is not now, and never has been at issue in this case.

Unlike the criminal proceedings in Younger and the Bar disciplinary proceedings in Middlesex, the plaintiff has the choice of dropping his application. The so-called specifications, standing alone, are nothing more than non-final agency action (notice of intent to deny character certification) on the Plaintiff's application for admission to the Bar.

V. THE ELEVENTH AMENDMENT DOES NOT SHIELD STATE AGENCIES FROM LIABILITY FOR ADA TITLE II VIOLATIONS INVOLVING SUBSTANTIVE FOURTEENTH AMENDMENT VIOLATIONS.

The defendants' argument that the Eleventh Amendment bars the plaintiff's claims against defendant Hunter in her official capacity and against FBBE flies in the face of Tennessee vs. Lane, 541 U.S. 509 (2004) and United States vs. Georgia, 126 S.Ct. 877 (2006) which read together establish: (a) that Title II of the Americans with Disabilities Act is valid 14th Amendment legislation where it provides for abrogation of State immunity from suit based in the Eleventh Amendment; and (b) where a proper ADA plaintiff shows a substantive violation of Sec. 1 of the Fourteenth Amendment, the "Congruence and Proportionality Test" of City of Boerne v. Flores, 521 U.S. 507 (1997) is satisfied. Board of Trustees of the University of Alabama vs. Garrett, 531 U.S. 356 (2001), as the defendants admit, was a Title I case. Garrett is not arguable in a Title II case since Lane.

VI. THE ROOKER-FELDMAN DOCTRINE DOES NOT DEPRIVE THE COURT OF JURISDICTION IN THIS CASE.

The defendants have failed to allege, and cannot prove, a state court judgment adverse to the plaintiff. Exxon Mobil Corp. vs. Saudi Basic Industries Corp., 544 U.S. 280 (2005) (Rooker-Feldman doctrine to be applied only to "state court losers"). Dale vs. Moore, 121 F.3d

624, 627 (11th Cir. 1997), heavily relied upon by the defendants, has been over-ruled by Exxon. This court is not well served by the defendants citing obsolete law.

VII. THE ELEVENTH AMENDMENT DOES NOT SHIELD THE DEFENDANTS FROM PERSONAL LIABILITY FOR ARBITRARY ACTION.

In holding that the Governor of Ohio could be sued for damages in his individual capacity for his part in the "Kent State Massacre", Scheuer v. Rhodes, 416 U.S. 232 (1974), the Court stated a general rule with an eloquent explanation thusly:

The Eleventh Amendment provides no shield for a state official confronted by a claim that he had deprived another of a federal right under the color of state law. Ex parte Young teaches that when a state officer acts under a state law in a manner violative of the Federal Constitution, he "comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States." *Id.*, at 159-160. (Emphasis supplied.)

Ex parte Young, like Sterling v. Constantin, 287 U.S. 378 (1932), involved a question of the federal courts' injunctive power, not, as here, a claim for monetary damages. While it is clear that the doctrine of Ex parte Young is of no aid to a plaintiff seeking damages from the public treasury, Edelman v. Jordan, *supra*; Kennecott Copper Corp. v. State Tax Comm'n, 327 U.S. 573 (1946); Ford Motor Co. v. Dept. of Treasury, 323 U.S. 459 (1945); Great Northern Life Insurance Co. v. Read, 322 U.S. 47 (1944), damages against individual defendants are a permissible remedy in some circumstances notwithstanding the fact that they hold public office. Myers v. Anderson, 238 U.S. 368 (1915). See generally Monroe v. Pape, 365 U.S. 167 (1961); Moor v. County of Alameda, 411 U.S. 693 (1973). In some situations a damage remedy can be as effective a redress for the infringement of a constitutional right as injunctive relief might be in another.

Florida's Governor is not immune for arbitrary acts under mere color of official authority: neither are administrative and executive employees of the Florida Supreme Court and similarly situated employees of Florida's legislative branch.

VIII. THE COMPLAINT ALLEGES FACTS SHOWING DELAY AND DENIAL OF PROFESSIONAL LICENSING AS PUNISHMENT FOR THE EXERCISE OF FIRST AMENDMENT PROTECTED FREE SPEECH RIGHTS AND THE DUE PROCESS

CLAUSE OF THE 14TH AMENDMENT. THE COMPLAINT STATES A CAUSE OF ACTION UNDER 42 U.S.C. § 1983.

Defendants pompously state that Florida's "important interest" in regulating its own Bar justifies eliminating federal review of its licensing process. What the defendants fail to mention, however, is the "equally important" and strong **federal substantive interest** involved:

We recognize the importance of leaving States free to select their own bars, but it is equally important that the State not exercise this power in an arbitrary or discriminatory manner nor in such way as to impinge on the freedom of political expression or association. A bar composed of lawyers of good character is a worthy objective but it is unnecessary to sacrifice vital freedoms in order to obtain that goal. It is also important both to society and the bar itself that lawyers be unintimidated -- free to think, speak, and act as members of an Independent Bar.

Konigsberg v. State Bar of California, 353 U.S. 252, 273; 77 S. Ct. 722; 1 L. Ed. 2d 810 (1957) (emphasis added)

Plaintiff's complaint alleges, inter alia, that Defendants use their disapproval of an applicant's protected First Amendment activities as a basis for licensure denial. Those allegations must be accepted as true with regard to Defendants' motions to dismiss. The Defendants assert that Plaintiff's complaint fails to state a claim. In Perry v. Sindermann, 408 U.S. 593, 597; 33 L. Ed. 2d 570; 92 S. Ct. 2694 (1972), the Supreme Court of the United States stated:

For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests -- especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly." Speiser v. Randall, 357 U.S. 513, 526. Such interference with constitutional rights is impermissible.

Although in Perry the Court was discussing a “benefit,” the federal interest here is much stronger because the right to admission to the practice law is not a matter of the states’ “grace and favor,” Willner v. Committee on Character & Fitness, 373 US 96, 102; 83 S Ct 1175; 10 LEd2d 224 (1963), and the substantive predicates used in the Rules create federal liberty/property interests.

Pursuant to 28 U.S.C. § 1331, district courts have jurisdiction over all civil actions arising under federal laws or the Constitution. Clearly, a federal court has jurisdiction over a properly asserted First Amendment or Due Process claim because it involves the infringement of a constitutional right. In Dubuc v. Mich. Bd. of Law Examiners, 342 F.3d 610 (6th Cir. 2003) the Sixth Circuit Court of Appeals remanded the case to the district court to decide whether the manner in which the licensing defendants handled the plaintiff’s first application warranted prospective relief regarding his future reapplication. In Centifanti v. Nix, 865 F.2d 1422, 1429-30 (3d Cir. 1989) the Third Circuit Court of Appeals remanded the case to the district court to decide whether court-promulgated procedural rules governing bar admission violate the Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution. In Dean v. Byerley, 354 F.3d 540, 545 (6th Cir. 2004), the Sixth Circuit remanded the case to the trial court to decide a plaintiff’s claim for “equitable relief in the form of an order from the district court that [a Michigan character and fitness official] refrain from interfering with Plaintiff’s rights of free speech.” Clearly, Plaintiff’s challenges to the licensing rules as applied in the matter sub judice state a cognizable constitutional claim.

Since the punishment is for conduct that FBBE has subjectively "deemed" disqualifying, the act of issuing the "specifications" falls within that category of legislative acts

prohibited by Art. I, Sec. 10 of the United States Constitution. The specifications, being a "bill of attainder" are void: the parties responsible for the plaintiff's harm can and must be held personally answerable in damages under 42 U.S.C. § 1983 if further such abuse is to be effectively prevented.

IX. THE COMPLAINT ALLEGES FACTS SHOWING THAT PUNISHMENT FOR INNOCENT PAST ACTS HAS BEEN IMPOSED UPON AN INDIVIDUAL CITIZEN: THIS VIOLATES THE BILL OF ATTAINDER CLAUSE - THE COMPLAINT STATES A CAUSE OF ACTION DIRECTLY UNDER THE CONSTITUTION FOR ENFORCEMENT OF ART I, SEC. 10.

In Schwartz vs. Board of Bar Examiners, 353 U.S. 232 (1957)), the Supreme Court laid down the rule which was supposed to guide bar admissions and all state licensing authorities in processing applications. The rule is stated thus:

A State cannot exclude a person from the practice of law or from any other occupation in a **manner** or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment.*fn5 Dent v. West Virginia, 129 U.S. 114. Cf. Slochower v. Board of Education, 350 U.S. 551; Wieman v. Updegraff, 344 U.S. 183. And see Ex parte Secombe, 19 How. 9, 13. A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law. Douglas v. Noble, 261 U.S. 165; **Cummings v. Missouri**, 4 Wall. 277, 319-320. Cf. Nebbia v. New York, 291 U.S. 502. (emphasis supplied)

The Court, by citing Cummings declared that these rules apply to all state licensing decisions and they are here restated, for purposes of reviewing the pending motion to dismiss:

1. Under the form of creating a qualification or attaching a condition, the States cannot in effect inflict a punishment for a past act which was not punishable at the time it was committed.
2. Deprivation or suspension of any civil rights for past conduct is punishment for such conduct.
3. A bill of attainder is a legislative act which inflicts punishment without a judicial trial. If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution bills of attainder include bills of pains and penalties.

4. These bills, though generally directed against individuals by name, may be directed against a whole class, and they may inflict punishment absolutely, or may inflict it conditionally.

5. The clauses of the second article of the constitution of Missouri (set forth at length in the statement of the case, *infra*, pp. 279—281), which require priests and clergymen, in order that they may continue in the exercise of their professions, and be allowed to preach and teach, to take and subscribe an oath that they have not committed certain designated acts, some of which were at the time offences with heavy penalties attached, and some of which were at the time acts innocent in themselves, constitute a bill of attainder within the meaning of the provision in the Federal Constitution prohibiting the States from passing bills of that character.

6. These clauses presume that the priests and clergymen are guilty of the acts specified, and adjudge the deprivation of their right to preach or teach unless the presumption be first removed by their expurgatory oath: they assume the guilt and adjudge the punishment conditionally.

7. There is no practical difference between assuming the guilt and declaring it. The deprivation is effected with equal certainty in the one case as in the other. The legal result is the same, on the principle that what cannot be done directly cannot be done indirectly.

8. The prohibition of the Constitution was intended to secure the rights of the citizen against deprivation for past conduct by legislative enactment, under any form, however disguised.

9. An *ex post facto* law is one which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed; or changes the rules of evidence by which less or different testimony is sufficient to convict than was then required.

10. The clauses of the second article of the constitution of Missouri, already referred to, in depriving priests and clergymen of the right to preach and teach, impose a penalty for some acts which were innocent at the time they were committed, and increase the penalty prescribed for such of the acts specified as at the time constituted public offences, and in both particulars violate the provision of the Federal Constitution prohibiting the passage by the States of an *ex post facto* law. They further violate that provision in altering the rules of evidence with respect to the proof of the acts specified — thus in assuming the guilt instead of the innocence of the parties; in requiring them to establish their innocence, instead of requiring the government to prove their guilt; and in declaring that their innocence can be shown only in one way, by an expurgatory oath.

11. Although the prohibition of the Constitution to pass an *ex post facto* law is aimed at criminal cases, it cannot be evaded by giving a civil form to that which is in substance criminal.

Cummings vs. Missouri, 71 U.S. 277 (1866).

The same day it issued Cummings, the court issued the frequently cited opinion in Ex Parte Garland, 71 U.S. 333 (1866), a case where Congress passed a law which had the effect of

excluding Mr. Garland from practice in the Federal Court system under a law that the court found was a "bill of pains and penalties." In that case the Court said, in broad sweeping language, "Exclusion from the practice of the law in the Federal courts or from any of the ordinary avocations of life for past conduct is punishment for such conduct." and *specifically included bar applicants* within the rule:

In the matter of Dorsey, a motion was made for the admission of Dorsey as an attorney, and to dispense with administering to him an oath in relation to duelling, required by an act of 1826. This act provided that "all members of the general assembly, all officers and public functionaries, elected or appointed under the constitution or laws of the State, and all counsellors and attorneys at law," before entering upon their office, should take an oath that they had never been engaged in any duel, and that they never would be.

The report of the case occupies about two hundred pages, and is an able and elaborate discussion of this subject, and a full authority for the position we take in this case. It was there held:

1. That in that case the law prescribed a qualification for holding office, which an individual never could comply with, and that such act, as to him, was a disqualification.
2. That such disqualification was punishment.
3. That the retrospective part of the oath was unconstitutional.
4. That as a part of the oath was unconstitutional, and the court could not separate it, the whole oath was unconstitutional, and the petitioner was entitled to be admitted without taking it.

Goldthwaite, J., says: "I have omitted any argument to show that disqualification from office, or from the pursuits of a lawful avocation, is a punishment; that it is so, is too evident to require any illustration; indeed, it may be questioned whether any ingenuity could devise any penalty which would operate more forcibly on society."

The "filing of specifications" in the Plaintiff's case is easily identified as evidence that "legislative punishment" has been imposed upon the Plaintiff. As the discovery in this case will show, FBBE imposes the necessity of showing "rehabilitation" from admitted specified

prior conduct that was not criminally-punishable at the relevant time as a condition for overcoming the presumption of disqualification⁸ noticed in the specifications. Rehabilitation has been a penal⁹ concept since the time of the framers.

The fundamental procedural due process rights violation was as manifest on the record in Schwartz, as it is in the challenged complaint. Implicit in Art. I, Sec. 10, is the fundamental right of every United States citizen to be free of prosecution under bills of attainder and ex-post facto laws, however cleverly disguised. James Madison stated it thus:

"Bills of attainder, ex post facto laws, and laws impairing the obligations of contracts, are contrary to the first principles of the social compact, and to every principle of sound legislation. ... The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and indignation that sudden changes and legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators, and snares to the more-industrious and less-informed part of the community." **James Madison**, Federalist Number 44, 1788.

The Supreme Court affirmed that reasoning modernly where it said:

"The Bill of Attainder Clause was intended not as a narrow, technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function or more simply - trial by legislature." U.S. v. Brown, 381 U.S. 437, 440 (1965).

SUMMARY

In this case the plaintiff alleged a cause of action for violation of his rights under the Americans with Disabilities act, 42 U.S.C. § 12332, et. seq. which provides, in pertinent part that "[N]o qualified individual with a disability shall, by reason of such disability, be excluded

⁸ In preparing and proceeding on specifications, FBBE is limited to considering only those matters which "if proven would preclude a favorable finding by the Board." Fla. Bar Admiss. R. 3-22.5(d)

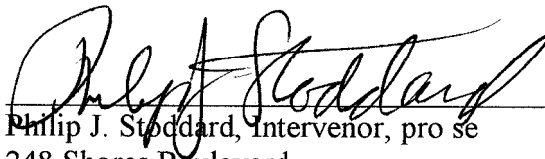
⁹ REHABILITATION. The act by which a man is restored to his former ability, of which he had been deprived by a conviction, sentence or judgment of a competent tribunal. Bouvier's Law Dictionary, Sixth Edition (1856).

from participation or denied the benefits of the services, programs or activities of a public entity," because he has alleged: (a) that he is a qualified person with a disability who is able to perform the essential functions of an attorney; and (b), that the defendants have intentionally discriminated against him by arbitrarily denying him a license to engage in the practice of law. Therefore, the complaint states a claim under Title II of the Americans with Disabilities Act and the Eleventh Amendment does not bar the award of damages or appropriate equitable relief.

Further, the plaintiff has alleged that he has been deprived of rights and protections guaranteed to him under the Constitution of the United States by persons acting under color of the laws of Florida. The complaint states a cause of action under 42 U.S.C. § 1983 and directly under the Constitution for a violation of his immunity from prosecution or punishment under bills of attainder and ex post facto laws. The Defendants are properly on notice of the charges against them, and the 11th Amendment does not bar an award of damages against the defendants sued in their personal capacities or equitable relief against the defendants sued in their official capacities.

Any pleading defects can be cured with an amendment to conform to the discovery: the defendants are properly on notice of the charges against them.

WHEREFORE, INTERVENOR asks the court to deny defendants' motion to dismiss.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail
to:

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James J. Dean, Esq.
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on this 14th day of JUNE 2006.


Philip J. Stoddard