

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

MICHAEL J. HASON,

Plaintiff,

vs.

Case No. 4:06cv105-RH/WCS

FLORIDA BOARD OF BAR
EXAMINERS, et al.,

Defendants.

_____ /

SECOND REPORT AND RECOMMENDATION

Plaintiff initiated this action on August 8, 2005, in the Southern District of Florida.

Doc. 1. Plaintiff sues the Florida Board of Bar Examiners and Eleanor Hunter, in her official and individual capacities. *Id.* Plaintiff seeks monetary damages and injunctive relief. *Id.*

The case was transferred to this Court in late February, 2006. Doc. 27.

Defendants filed a renewed motion to dismiss, doc. 30, with a supporting memorandum of law, doc. 31, containing four exhibits,¹ marked A through D, which are copies of court

¹ As previously advised, there is no need to construe the motion to dismiss as one for summary judgment in this instance as the Court may take judicial notice of judicially noticed facts under Fed. R. Evid. 201(b),(d); see Bryant v. Avado Brands, Inc., 187 F.3d 1271, 1276-77 (11th Cir. 1999). Doc. 33.

orders. Plaintiff, who is *pro se*, was directed to submit opposition to the motion, doc. 33, and he has now filed a response, doc. 42, and an amended response, doc. 48.

Standard of Review

Dismissal of a complaint, or a portion thereof, pursuant to Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief can be granted should not be ordered unless it appears beyond doubt that Plaintiff can prove no set of facts in support of his claims which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957). A court must accept the factual allegations of the complaint as true. Shotz v. American Airlines, Inc., 420 F.3d 1332, 1334-35 (11th Cir. 2005). "*Pro se* pleadings are held to a less stringent standard than pleadings drafted by attorneys and will, therefore, be liberally construed." Tannenbaum v. United States, 148 F.3d 1262, 1263 (11th Cir. 1998).

Claims of the Plaintiff

In the first cause of action, Plaintiff alleges that he applied for admission to The Florida Bar in August, 2001. Doc. 1, p. 2. The complaint was filed on February 27, 2006. Plaintiff did not allege whether or not his application was still pending on the date he filed his complaint, but since he seeks injunctive relief, a reasonable assumption would be that his application was then still pending. On February 27, 2006, however, in an affidavit, Plaintiff stated that he had abandoned his application. Doc. 27, ¶ 9. He states he plans to apply again for admission to The Florida Bar "in the near future." *Id.*²

² Plaintiff also states that after his application to the Bar had been pending approximately three years, "the FBBE served the specifications on" Plaintiff. Doc. 48. Plaintiff "concluded that he had suffered enough discrimination at the hands of the Bar and was not interesting [sic] in a formal hearing" Doc. 48, p. 7. Plaintiff states that his "application was more or less de facto terminated." *Id.* Sometime afterwards, while

Plaintiff alleges he is disabled, as defined by the Americans with Disabilities Act (hereinafter "ADA"), and "he has a history of recurrent depression that has interfered with work and his career in medicine and/or he has been treated as disable [sic] by numerous govt. agencies, including the Medical Board of California and/or the N.Y. Office of Professional Medical Conduct and/or the Florida Board of Medicine and/or the Florida Board of Bar Examiners." Doc. 1, p. 2. Plaintiff contends the Defendants have discriminated against him and violated the ADA. *Id.*

Specifically, Plaintiff contends that in reviewing his application for admission to the Florida Bar, Defendants required Plaintiff to "report any history of psychological and/or psychiatric treatment and" and submit "copies of all records of such therapy" to the Board of Bar Examiners (hereinafter "FBBE"). *Id.*, at 2-3. Plaintiff protested and the FBBE consented to limit the request to 10 years. *Id.*, at 3. Plaintiff then asserts that the FBBE delayed acting on his "application in a timely fashion and also failed to inform him that after three years his application would be deemed stale." *Id.* During this delay, several "charges" were asserted against Plaintiff "(1) concerning the quality of his civil rights litigation and (2) concerning his disputes with several creditors." *Id.* Plaintiff attempted to argue to the FBBE "that his litigation was not proper subject for extensive Board inquiry" and he claimed he "could have paid the creditors, but was holding out based on principles that needed to be vindicated" *Id.*, at 3-4.

Plaintiff alleges that the Defendants "interfered with and delayed [Plaintiff's] right to licensure as a Florida attorney in a timely fashion" *Id.*, at 4. The Defendants

there was "the lack of an active application," Plaintiff "did sue." He further states that his passing grade on the bar examination is now a nullity. *Id.*

behavior allegedly "interfered" with Plaintiff's "motivation and desire to practice law in Florida and exposed him to sanctions of other govt. licensing agencies who would review the FBBE's reluctance to license Dr. Hason and go slow in licensing him elsewhere." *Id.* Plaintiff complains that Defendants' actions caused him "great and persisting distress, loss of hope for fair play and honesty in government, emotional suffering [sic], great loss of income and contributed greatly to decrease [Plaintiff's] chances to live a normal and happy life, fulfill his potential as an attorney and contribute to society." *Id.*

In the second and third causes of action, plaintiff also asserts that Defendants discriminated against him "to retaliate" for Plaintiff having sued medical boards under the ADA and § 1983. *Id.*, at 5.³ Finally, in the fourth and fifth causes of action, Plaintiff alleges that Defendant Hunter "approved of and/or supported . . . and/or coordinated" the actions of "the FBOM." *Id.*, at 6. He contends that, based on "information and belief," Defendant Hunter has treated other disabled individuals "in a similar and/or otherwise discriminatory manner" and request that Defendant Hunter "be enjoined from any further discriminatory behavior" *Id.*⁴

³ Plaintiff actually brings two counts in the complaint for discrimination due to retaliation. The first count, which is presented as the second cause of action, is due to his suing the Florida Board of Medicine. Doc. 1, pp. 4-5. The second count, listed as the third cause of action, is for suing the Medical Board of California. *Id.*, at 5.

⁴ Plaintiff is unclear in identifying Defendant Hunter's position. In the complaint, Plaintiff alleges she is the Executive Director of FBOM, the Florida Board of Medicine. Doc. 1. In the amended opposition to the motion to dismiss, doc. 48, Plaintiff indicates that Defendant Hunter is the Executive Director of the FBBE, the Florida Board of Bar Examiners. Doc. 48, p. 3. Defendants' renewed motion to dismiss the complaint, however, clarifies that she is the Executive Director of the FBBE. Doc. 30.

The Bar Admission Process in Florida

Understanding the Florida Bar admission process is necessary to rule on the motion to dismiss. These procedures are a matter of law and may be judicially noticed.

Defendants have explained that pursuant to "its exclusive, constitutional jurisdiction, the Florida Supreme Court has promulgated Rules Relating to Admissions to the Bar." Doc. 31, p. 2. The FBBE is the administrative arm of Florida's Supreme Court and handles matters relating to bar admission. *Id.* The FBBE is "answerable solely to" the Florida Supreme Court. *Id.*, citing In re Board of Florida Bar Examiners, 353 So.2d 98, 100 (Fla. 1977).

An applicant must submit both a Bar Exam application and a Bar application, which triggers the Board to begin the process for determining whether an applicant demonstrates good moral character and fitness. *Id.*, at 2-3. The Rules provide criteria for making that determination and the Board may request information from the applicant and hold an information investigative hearing. Following the hearing, the Board will either (1) conclude the applicant sufficiently established his qualifications as to character and fitness, (2) enter a Consent Agreement regarding a conditional admission to the Bar, (3) find that further investigation is warranted, or (4) file Specifications "charging the applicant or registrant with matters which if proven would preclude a favorable finding by the Board." *Id.*, at 3, quoting Fla. Bar Admiss. R. 3-22.5. If Specifications are filed, an applicant has "the right to answer the specifications and to have a formal hearing." *Id.*, at 3. An applicant may be represented by counsel at the formal hearing, compel witnesses to attend by issuing subpoenas, and cross-examine witnesses. *Id.* After the formal hearing, the Board will either recommend to the Florida

Supreme Court that (1) the applicant has established his qualifications, (2) he be "conditionally admitted" in exceptional circumstances, (3) admission be withheld for a specified period of time; or (4) the applicant has not established his qualifications. *Id.*, at 3-4.

Should the Board determine that the applicant should not be recommended for admission to the Bar, the Board must issue written findings of fact and conclusions of law. *Id.*, at 4. The applicant then has the right to petition the Florida Supreme Court for review. *Id.* In that judicial review process, an applicant may raise federal constitutional claims and claims under the ADA. *Id.*

Analysis

Defendant argue that the complaint should be dismissed based on Younger v. Harris, 401 U.S. 37 (1971), the *Rooker-Feldman* doctrine, because Plaintiff lacks standing, and because the Eleventh Amendment is a bar to these claims. Doc. 30, p. 2. Additionally, in the supporting memorandum, Defendants also raise absolute immunity and qualified immunity, and argue the complaint fails to state a claim upon which relief may be granted. Docs. 31.

Injunctive relief

If Plaintiff still had a pending application for admission to The Florida Bar, Plaintiff's claims for injunctive and declaratory relief would be barred by Younger v. Harris, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971). Middlesex County Ethics Comm. v. Garden State Bar Assoc., 457 U.S. 423, 102 S.Ct. 2515, 73 L. Ed. 2d 116 (1982); see *also* doc. 31, ex. A (decision of Chief District Judge Robert Hinkle,

Lawrence v. Schwiep, et al., 4:05cv14-RH/WCS).⁵ Plaintiff's remedy would be to present his claims to the Florida Supreme Court. However, since Plaintiff does not have an application pending, abstention is no longer the primary issue.⁶

The more fundamental issue is Article III jurisdiction. Plaintiff no longer has any proceeding pending with Defendants. Therefore, he lacks standing to seek injunctive or declaratory relief in this court and the controversy is not ripe. Stoddard v. Supreme Court of Florida, et al., N.D. Fla. Case No. 4:02cv106-SPM, doc. 62 (decision of the Eleventh Circuit); doc. 31, ex. D.⁷

Article III of the United States Constitution requires there be a live "case or controversy" when a federal court decides a case; "it is not enough that there may have

⁵ The Plaintiff in Lawrence v. Schwiep sued Defendants in their official capacities only, and sought only injunctive and declaratory relief.

⁶ This case is distinguished from Lawrence v. Schwiep, for there, the state bar proceedings remained pending until this court entered final judgment and the plaintiff had taken an appeal. As Chief Judge Hinkle noted there, ruling on a Rule 60 motion for relief from judgment:

[W]hen a federal action is dismissed under *Younger* based on the pendency of a state enforcement action, the unfavorable termination of the enforcement action does not allow the resumption of the federal challenge to the state proceeding. To the contrary, the whole point of *Younger* is that defenses to a state enforcement proceeding of this type must be presented in the state enforcement proceeding, not in a separate federal action challenging the state procedures.

Doc. 31, ex. B (Lawrence v. Schwiep, et al., 4:05cv14-RH/WCS, doc. 56). This is but the implementation of the obvious rule that a judgment correctly entered when it was entered stays entered.

⁷ The plaintiff in this case was in the same position as Plaintiff here. He applied for admission to The Florida Bar, but withdrew his application during the pendency of his suit in district court. Unlike Plaintiff in the case at bar, however, he sought only injunctive and declaratory relief.

been a live case or controversy when the case" was filed. Burke v. Barnes, 479 U.S. 361, 363, 107 S.Ct. 734, 736, 93 L.Ed.2d 732 (1987), *quoted in* Tanner Advertising Group, L.L.C. v. Fayette County, GA, 451 F.3d 777, 785 (11th Cir. 2006). Plaintiff bears the burden of showing (1) an injury in fact, one that is concrete, particularized, actual or imminent, (2) a causal connection between the injury and the challenged conduct, and (3) the likelihood that the injury will be redressed by a favorable decision. Tanner Advertising Group, L.L.C., 451 F.3d at 791 (citations omitted).

To have standing to obtain prospective relief, Plaintiff must show that his injury is "actual or imminent, not conjectural or hypothetical." Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 211, 115 S.Ct. 2097, 2104, 132 L.Ed.2d 158 (1995); Church v. City of Huntsville, 30 F.3d 1332, 1337 (11th Cir. 1994). "[T]he fact of past injury, 'while presumably affording [the plaintiff] standing to claim damages . . . , does nothing to establish a real and immediate threat that he would again' suffer similar injury in the future." Adarand, quoting Los Angeles v. Lyons, 461 U.S. 95, 105, 103 S.Ct. 1660, 1667, 75 L.Ed.2d 675 (1983). The claimant must show "a sufficient likelihood that he will again be wronged in a similar way." Lyons, 461 U.S. at 111, 103 S.Ct. at 1670. "In ADA cases, courts have held that a plaintiff lacks standing to seek injunctive relief unless he alleges facts giving rise to an inference that he will suffer future discrimination by the defendant." Shotz v. Cates, 256 F.3d 1077, 1081 (11th Cir. 2001).

Plaintiff has not made this showing. It is purely speculative that he will again apply to become a member of The Florida Bar, especially since he states he must take the bar examination again. Doc. 48, p. 7. Plaintiff's claims for injunctive and declaratory relief should be dismissed.

Monetary damages

Defendants argue that the claims in this case are precluded by the *Rooker-Feldman* doctrine. The *Rooker-Feldman* doctrine does not apply because there is no state court final judgment causing injury to Plaintiff. Amos v. Glynn County Bd. of Tax Assessors, 347 F.3d 1249, 1266 (11th Cir. 2003); Coles v. Granville, 448 F.3d 853, 859 (6th Cir. 2006) ("*Rooker-Feldman* applies only when a plaintiff asserts injury from the state court judgment.>").

The *Rooker-Feldman* doctrine . . . is confined to cases of the kind from which the doctrine acquired its name: cases brought by state-court losers complaining of injuries *caused by state-court judgments* rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments.

Exxon Mobil Corp. v. Saudi Basic Industries Corp., 544 U.S. 280, 284, 125 S.Ct. 1517, 1521-1522, 161 L.Ed.2d 454 (2005) (emphasis added). Because Plaintiff abandoned his Bar application, there is no final judgment.

Plaintiff has, however, alleged past injury in the Bar application process and seeks monetary damages. It is well established that the Florida Bar is an arm of the State of Florida and occupies the same position as a state agency. See Kaimowitz v. Fla. Bar, 996 F.2d 1151, 1152-53, 1155 (11th Cir. 1993) (affirming dismissal of a claim for monetary damages against The Florida Bar and adopting the district court's finding that the Bar was a state agency for purposes of Eleventh Amendment immunity). The Eleventh Amendment prohibits an action against the State and to agencies or other arms of the State. Welch v. State Dept. of Highways and Public Transportation, 483 U.S. 468, 472, 107 S.Ct. 2941, 2945, 97 L.Ed.2d 389 (1985), *cited in* Schopler v. Bliss, 903 F.2d 1373, 1378 (11th Cir. 1990) (citations omitted). The Florida Bar is, thus,

protected by the Eleventh Amendment from claims for monetary damages for alleged violations of civil rights. See Rules Regulating the Florida Bar, 494 So.2d 977, 979 (Fla. 1986), *cited in* Kaimowitz, 996 F.2d at 1155. Accordingly, Plaintiff's § 1983 claims for damages against the Florida Board of Bar Examiners, and Eleanore Hunter in her official capacity are barred by the Eleventh Amendment.⁸

As for Plaintiff's claim for damages against Defendant Hunter in her individual capacity, this Defendant is entitled to absolute judicial immunity and, accordingly, these claims cannot proceed. See Diaz v. Moore, 861 F.Supp. 1041, 1048-1049 (N.D. Fla. 1994). In Diaz v. Moore, Judge Collier of this District adopted the reasoning of the Sixth Circuit in finding it appropriate to grant judicial immunity when a Defendant is sued for monetary damages because of actions taken in performing his or her duties as an officer of The Florida Bar. Diaz v. Moore, 861 F.Supp. 1041, 1048-1049 (N.D. Fla. 1994), *relying on* Sparks v. Character and Fitness Committee of Kentucky, 859 F.2d 428 (6th Cir. 1988), *cert. denied*, 489 U.S. 1011 (1989). The Sixth Circuit concluded in Sparks:

The act of considering an application to the bar is a judicial act. And it is no less a judicial act simply because it is performed by nonjudicial officers in whom the responsibility for the performance of such duties is lawfully delegated by the judiciary. Therefore, those who perform those duties on behalf of the judiciary are entitled to the same judicial immunity as would be enjoyed by judicial officers performing the same act.

⁸ "The only exception to the Florida Bar's Eleventh Amendment immunity arises in cases involving declaratory or injunctive relief to protect a federal constitutional right." Otworth v. The Florida Bar, 71 F.Supp.2d 1209, 1221 (M.D. Fla. 1999), *citing* Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974). However, as noted above, Plaintiff lacks standing to pursue those claims.

Diaz, 861 F.Supp. at 1049, *quoting Sparks*, 859 F.2d at 431-432 (other citations omitted). To the degree Plaintiff has brought claims for damages against Defendant Hunter for her involvement in his Bar admission process, she is protected by judicial immunity.

ADA Claims

Plaintiff's allegations in the complaint concerning his ADA claims fall short in identifying which specific provision of the ADA is allegedly violated. Plaintiff does not identify whether this case is brought pursuant to Title I, II, III, or IV of the ADA, and he fails to cite *any* statute of the ADA which has allegedly been violated. Nevertheless, his claims will be broadly construed as is required of *pro se* litigants.

Congress did not "abrogate the States' sovereign immunity from suit by private individuals for money damages under Title I" of the ADA. Board of Trustees of University of Alabama v. Garrett, 531 U.S. 356, 374, 121 S.Ct. 955, 968, 148 L.Ed.2d 866 (2001). Thus, any claim Plaintiff *might* have brought under Title I of the ADA, which prohibits employment discrimination against the disabled, would be barred by the Eleventh Amendment. However, the Supreme Court has recently held that Congress did abrogate sovereign immunity under Title II of the ADA. United States v. Georgia, 126 S.Ct. 877, 163 L.Ed.2d 650 (2006). Plaintiff's claims, although not alleged with any specificity in the complaint, doc. 1, would appear to be premised upon Title II of the ADA and, thus, the Eleventh Amendment would not bar Plaintiff's ADA claims in this case.

Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." § 12132 (2000 ed.). A "qualified individual with a disability" is defined as "an

individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." § 12131(2).

United States v. Georgia, 126 S.Ct. at 878-879. Plaintiff alleged the Florida Board of Bar Examiners is a "covered entity" under the ADA and that Plaintiff is "disabled." Plaintiff has not, however, alleged that he is a "qualified individual," although his passing score on the bar examination is relevant to that determination. It is assumed, nevertheless, that if given the opportunity to do so, Plaintiff would allege that he is "qualified," and Plaintiff's allegation of passing the Bar examination provides support for this assumption.

Plaintiff has broadly alleged discrimination under the ADA in "its handling of his application for admission to the Bar." Doc. 1, p. 2. Yet, the only factual statements Plaintiff provides are his assertions that in the admission process, the FBBE requested documents concerning Plaintiff's mental health status and treatments for a ten-year period of time, and that the FBBE has taken a lengthy period of time (approximately three years) to evaluate Plaintiff's fitness for the practice of law. *Id.*, at 3. These allegations do not show that Plaintiff has been "discriminated" under the ADA. While Plaintiff makes the conclusory allegations that he has been "subjected to discrimination by" the FBBE, Plaintiff has not provided any facts which show that he has been treated any differently than any other applicant, that other applicants were not requested to provide such information, or that the FBBE has scrutinized Plaintiff's application to a

higher degree than others. Plaintiff has not alleged that he has been treated differently than other bar applicants or that this treatment was due to a perceived disability.

Ripeness

Moreover, Plaintiff's complaint falls short of alleging that he has been "excluded" or "denied" any benefit, service, program, or activity. Indeed, Plaintiff has not been denied or excluded because he did not complete the Bar admission process. The FBBE has not made any determination on Plaintiff's application for admission to the Florida Bar because Plaintiff prematurely withdrew his application. In reality, Plaintiff's claims are not ripe because he has not yet been denied or excluded due to disability. To proceed in this case in the current posture, Plaintiff having withdrawn his application, would provide a "premature adjudication" because there has not yet been an injury to Plaintiff. See Lawrence v. Chabot, 2006 WL 1342316, at 2, 11 (6th Cir. May 16, 2006) (dismissing the case on ripeness grounds because the plaintiff had withdrawn his Bar application when the Bar's Committee on Character and Fitness requested an interview with plaintiff concerning his litigation history and financial difficulties). Although the Sixth Circuit opinion in Lawrence is unpublished, it is useful for noting that when a Bar applicant withdraws his application, any claim concerning injury is unripe and speculative because the injury has not yet taken place:

The mere delay of his application is not sufficient to make this controversy ripe. First, future admission or denial could have a great effect on this litigation and require supplementing the record. Second, the cost of having his application delayed is not very severe when compared to Michigan's interest in having moral members of its bar. As previously noted in this opinion, the Michigan Bar has a reasonable interest in determining the moral fitness of its applicants, and delaying action on an application during the pendency of a criminal action is logical and expected.

Lawrence v. Chabot, 2006 WL 1342316, at 11. Just as is the case here, the Florida Board of Bar Examiners acts on the front line to protect "Florida's interest in regulating the practice of law." Kirkpatrick v. Shaw, 70 F.3d 100, 103 (11th Cir. 1995), *citing* Goldfarb v. Virginia State Bar, 421 U.S. 773, 792, 95 S.Ct. 2004, 2016, 44 L.Ed.2d 572 (1975). The regulation of lawyers and the admitting of persons to the Bar is important in protecting the rights of citizens and administering justice. States may "require high standards of qualification, such as good moral character or proficiency in its law," prior to admitting Bar applicants, and a State Bar process may also "required bar applicants to undergo a character and fitness investigation before being allowed to practice law." Kirkpatrick, 70 F.3d at 103, *citing* Schwartz v. Board of Bar Examiners of New Mexico, 353 U.S. 232, 239, 77 S.Ct. 752, 756, 1 L.Ed.2d 796 (1957). Plaintiff has alleged nothing more than dissatisfaction with the delay in careful review of his Bar application, and his allegations fail to present injury. Thus, this case should also be dismissed because the claims are not ripe and not fit for judicial review.

In light of the foregoing, it is respectfully **RECOMMENDED** that Defendants' motion to dismiss, doc. 30, be **GRANTED**, and this complaint be **DISMISSED**.

IN CHAMBERS at Tallahassee, Florida, on September 7, 2006.

s/ William C. Sherrill, Jr.
WILLIAM C. SHERRILL, JR.
UNITED STATES MAGISTRATE JUDGE

NOTICE TO THE PARTIES

A party may file specific, written objections to the proposed findings and recommendations within 15 days after being served with a copy of this report and recommendation. A party may respond to another party's objections within 10 days after being served with a copy thereof. Failure to file specific objections limits the scope of review of proposed factual findings and recommendations.