

**IN THE UNITED STATES DISTRICT COURT
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.

_____ /

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS'
RENEWED MOTION TO DISMISS PLAINTIFF'S COMPLAINT**

Defendants Eleanor Hunter, Executive Director of the Florida Board of Bar Examiners (“Hunter”), and the Florida Board of Bar Examiners (“the Board”), submit this Memorandum of Law in Support of Defendants’ Renewed Motion to Dismiss the Complaint of Michael J. Hason (“Hason” or “Plaintiff”).

I. The Bar Admission Process in Florida and Plaintiff’s Claims

This action arises out of the Board’s judicial proceeding on Plaintiff’s application for admission to The Florida Bar. (Complaint) (doc. 1). Plaintiff alleges that the Board violated his rights under the Americans with Disabilities Act, 42 U.S.C. §12131 et seq. (“ADA”) during his Bar admission proceeding. Plaintiff requests that the Court issue injunctive relief and that the Court also “adjudge that the Defendants jointly and severally are liable to Dr. Hason in the amount of \$10,000,000 and an additional \$10,000,000 in punitive damages.” (*Id.*, p. 6)(doc. 1).

A. The Bar Admission Process in Florida

The Florida Constitution provides that the “Supreme Court of Florida shall have exclusive jurisdiction to regulate the admission of persons to the practice of law” Art. V, § 15, Fla. Const. Acting under its exclusive, constitutional jurisdiction, the Florida Supreme Court has promulgated Rules Relating to Admissions to the Bar. *See* Rules of the Florida Supreme Court Relating to Admissions to the Bar (hereafter “the Rules”).

Pursuant to the Rules, the Florida Board of Bar Examiners “is an administrative arm of the Supreme Court of Florida created by the Court to handle matters relating to bar admission.” Fla. Bar Admiss. R. 1-12. The Rules provide that it is the responsibility of the Board to “ensure that each applicant has met the requirements of the Rules with regard to character and fitness, education and technical competence prior to recommending an applicant for admission.” Fla. Bar Admiss. R. 1-14.2. Because the Florida Supreme Court has “inherent and exclusive constitutional authority over its agencies who act on its behalf,” *The Florida Bar*, 398 So.2d 446, 447 (Fla. 1981), the Court has held that “[a]s an arm of this Court, the [Florida Board of Bar Examiners] is answerable solely to this tribunal.” *In re Board of Florida Bar Examiners*, 353 So.2d 98, 100 (Fla. 1977).

The attorney admission process is initiated by the filing of two separate applications: the Exam Application and the Bar Application. Fla. Bar Admiss. R. 2-21. After the filing of these applications, the process for the Bar Examination and character and fitness investigation may proceed. The Board, as an arm of the Florida Supreme Court, makes a determination regarding whether applicants have provided satisfactory evidence of good

moral character and fitness. Fla. Bar Admiss. R. 3-12. The Rules contain criteria and factors that the Board is to take into consideration when making its character and fitness determination. Fla. Bar Admiss. R. 3-10.1, 3-11 and 3-12.

In connection with the Board's function of making the character and fitness determination, the Board is authorized by Supreme Court rule to request information from the applicant and to also request the applicant to appear for an informal investigative hearing. Fla. Bar Admiss. R. 3-21 & 3-22. When an informal hearing is held, the Board may make one of several determinations, including (a) "that the applicant ... has established his or her qualifications as to character and fitness;" (b) that a "Consent Agreement be entered into with the applicant in lieu of the filing of Specifications pertaining to drug, alcohol or psychological problems [whereby] the Board shall be authorized to recommend to the Court the admission of the applicant who has agreed to abide by specified terms and conditions upon admission to The Florida Bar;" or (c) that further investigation is warranted or (d) "that Specifications be filed charging the applicant or registrant with matters which if proven would preclude a favorable finding by the Board." Fla. Bar Admiss. R. 3-22.5.

When specifications are filed, applicants have the right to answer the specifications and to have a formal hearing. At the formal hearing, the applicant has the right to representation by counsel, to introduce testimony of witnesses and exhibits in his or her behalf, to compel the appearance of witnesses by subpoena, and to conduct cross examination of witnesses. Fla. Bar Admiss. R. 3-23, 3-23.1 & 3-23.2. Following a formal hearing, the FBBE may make one of the following recommendations to the Florida Supreme

Court: (a) that the applicant has established his qualifications as to character and fitness; (b) that the applicant be “conditionally admitted” in exceptional cases on certain conditions; (c) that the applicant’s admission be withheld for a specified period of time not to exceed two years, at the end of which the Board shall recommend the applicant’s admission if the applicant has complied with all special conditions; or (d) that the applicant has not established his qualifications as to character and fitness. Fla. Bar Admiss. R. 3-23.6.

When the Board does not recommend that the applicant has established his qualifications as to character and fitness, the Board must issue written findings of fact and conclusions of law; and the applicant has the right to petition the Supreme Court of Florida for review of the adverse recommendation. Fla. Bar Admiss. R. 3-23.7 & 3-40.1. A bar applicant may raise federal constitutional claims and claims under the ADA in the Petition for Supreme Court review.¹

The Rules also provide that any applicant whose character and fitness investigation exceeds nine months from the applicant’s submission of a completed bar application may petition the Supreme Court for an order directing the Board to conclude its investigation. Fla. Bar Admiss. R. 3-40.2. Similarly, any applicant who is dissatisfied with an administrative ruling of the Board that does not relate to character and fitness matters may petition the Board for reconsideration and may also petition the Florida Supreme Court for

¹ See *Dale v. Moore*, 121 F.3d 624 (11th Cir. 1997) (Florida bar applicant could raise ADA argument in answer to specifications and petition to Florida Supreme Court for review of Board’s character and fitness determination); *Florida Board of Bar Examiners re: S.G.*, 707 So.2d 323 (Fla. 1998) (considering bar applicant’s ADA arguments); *Florida Board of Bar Examiners re: Applicant*, 443 So.2d 71 (Fla. 1984) (considering bar applicant’s federal constitutional claims).

review. Fla. Bar Admiss. R. 2-30.

B. Plaintiff's Allegations

Plaintiff applied for admission to the Florida Bar “in about August of 2001.” (Complaint, ¶5)(doc. 1). Plaintiff alleges that he has a “history of recurrent depression” (*Id.*, ¶3) and that the Board requested information and documents from his psychological and/or psychiatric treatment providers for a ten year period as part of the Board’s character and fitness investigation. (*Id.*, ¶5). The Board held an informal investigative hearing and then filed Specifications relating to Plaintiff. (*Id.*, ¶7). Plaintiff claims that these Board actions violated his rights under the ADA.²

Plaintiff filed the instant action in the United States District Court for the Southern District of Florida on or about August 8, 2005. The Defendants moved in the Southern District to dismiss the action based on several grounds, including the abstention doctrine of *Younger v. Harris*, 401 U.S. 37 (1971). After Defendants moved to dismiss the action based on *Younger*, Plaintiff notified the District Court that he was abandoning his application for admission. Specifically, in Plaintiff’s Response to the Defendants’ Motion to Dismiss, Plaintiff stated in January 2006 that “[w]ith respect to *Younger* abstention, de facto, Dr. Hason’s application to the FBBE is abandoned per his affidavit.” (doc. 19, p. 8, ¶5).³

² Plaintiff does not allege that he filed a Petition for Review with the Florida Supreme Court regarding any of these decisions of the Board; and Plaintiff, in fact, filed no such Petition.

³ In the Affidavit that Plaintiff filed with his Response to the Motion to Dismiss in the Southern District, Plaintiff stated that he “has been forced to abandon his application before the FBBE due to discrimination” and that “[t]his will become a fait accompli when his passing score on the Bar exam is deleted in March [2006].” (doc. 19, p. 5, ¶9). See Fla. Bar Admiss. R. 4-18.2 (Bar Exam result valid for 5 years).

**II. THIS ACTION SHOULD BE DISMISSED BASED ON THE
ABSTENTION DOCTRINE OF *YOUNGER V. HARRIS*.**

This action is subject to dismissal based on the abstention doctrine of *Younger v. Harris*, 401 U.S. 37 (1971). “Under *Younger v. Harris* and its progeny, federal district courts *must refrain* from enjoining pending state court proceedings except under special circumstances.” *Old Republic Union Ins. Co. v. Tillis Trucking Co.*, 124 F.3d 1258, 1261 (11th Cir. 1997) (citations omitted) (emphasis added), *cert. denied*, 523 U.S. 1047 (1998). Moreover, “the principles of *Younger* apply to declaratory judgments that would effectively enjoin state proceedings.” *Id.*

In *Middlesex County Ethics Comm. v. Garden State Bar Assoc.*, 457 U.S. 423 (1982), a bar Ethics Committee investigated an attorney, made a finding of probable cause, and then served a formal statement of charges on the attorney. Instead of filing an answer to the disciplinary complaint, the attorney filed suit in federal district court, alleging that the New Jersey Bar’s disciplinary rules violated his First Amendment free speech rights and “were facially vague and overbroad.” *Id.* at 428-29. The district court dismissed the complaint based on the *Younger* abstention doctrine, but the court of appeals reversed. *Id.* In holding that dismissal of the federal district court action was proper, the Supreme Court in *Middlesex County* set out three factors to guide the application of the *Younger* abstention doctrine:

[F]irst, do state bar disciplinary proceedings within the constitutionally prescribed jurisdiction of the State Supreme Court constitute an ongoing state judicial proceeding; *second*, do the proceedings implicate important state interests; and *third*, is there an adequate opportunity in the state proceedings to raise constitutional challenges.

Id. at 432 (emphasis in original).

A. Bar Admission Process is Judicial in Nature

The Court concluded that the New Jersey bar disciplinary proceeding was *judicial* in nature. In making its determination, the Court noted that the Ethics Committee was an “arm of the court” in performing its attorney discipline functions and that the New Jersey Supreme Court considered the attorney disciplinary proceeding to be judicial in nature. *Id.* at 433. The same is true of the Bar admission process in Florida.

It is well established under Florida law that Bar admission proceedings conducted by the Florida Board of Bar Examiners are judicial in nature. The Florida Constitution expressly provides that the Florida Supreme Court “shall have *exclusive jurisdiction* to regulate the admission of persons to the practice of law” *See* Art. V, § 15, Fla. Const. (emphasis added). The Florida Supreme Court created the Board as an agency of the Court for the express purpose of regulating the admission of applicants to The Florida Bar. Fla. Bar Admiss. R. 1-12. *See also Florida Board of Bar Examiners v. Applicant*, 443 So. 2d 71, 74 (Fla. 1983); *Florida Board of Bar Examiners v. G.W.L.*, 364 So. 2d 454, 455 n.1 (Fla. 1978); *In re Florida Board of Bar Examiners*, 353 So. 2d 98, 100 (Fla. 1977).

Acting under its exclusive, constitutional jurisdiction, the Florida Supreme Court has also promulgated its rule that clearly declares that the “admission of attorneys to the practice of the profession of law *is a judicial function.*” Fla. Bar Admiss. R. 1-11 (emphasis added). The Florida Supreme Court has therefore held that it has “inherent and exclusive constitutional authority over its agencies who act on its behalf,” *The Florida Bar*, 398 So. 2d 446, 447 (Fla. 1981), and that “[a]s an arm of this Court, the Board is answerable solely

to this tribunal.” *In re Board of Florida Bar Examiners*, 353 So. 2d at 100. Thus, actions taken by the Board in connection with an application for admission to the Florida Bar are clearly *judicial* in nature. *See, e.g., Dale v. Moore*, 121 F.3d 624, 627 (11th Cir. 1997) (referring to FBBE’s character and fitness investigatory process and determination as “judicial inquiry”).

B. Bar Admission Proceeding Implicates Important State Interests

As to the second factor, the Court determined that the State of New Jersey has “an extremely important interest in maintaining and assuring the professional conduct of attorneys it licenses” inasmuch as “the ultimate objective of such control is ‘the protection of the public, the purification of the bar, and the prevention of a re-occurrence.’” *Middlesex*, 457 U.S., at 434. The Court’s observations about new Jersey’s interest are equally applicable to the instant case: “The judiciary as well as the public is dependent upon professionally ethical conduct of attorneys and thus has a significant interest in assuring and maintaining high standards of conduct of attorneys engaged in practice.” *Id.* Likewise, the “primary purpose of the character and fitness screening before admission to The Florida Bar is to protect the public and safeguard the judicial system,” Fla. Bar Admiss. R. 1-14.1, and the State of Florida thus has a compelling interest in the attorney admission process. *See Florida Board of Bar Examiners re: Applicant*, 443 So.2d 71 (Fla. 1984) (“ensuring that only those fit to practice law are admitted to the Bar is a compelling state interest”).

C. Adequate Opportunity to Raise Constitutional Challenges

Finally, like the bar disciplinary proceedings in New Jersey, 457 U.S. at 435, Bar

applicants in Florida have the opportunity to raise constitutional challenges and other arguments in a petition to the Florida Supreme Court. *See Florida Board of Bar Examiners re: Applicant*, 443 So.2d 71, 76 (Fla. 1984) (considering federal constitutional claims of bar admission applicant, on petition to Florida Supreme Court); *Florida Board of Bar Examiners re: S.G.*, 707 So.2d 323 (Fla. 1998) (considering bar applicant's ADA arguments in connection with application for admission); *Dale v. Moore*, 121 F.3d 624, 627 (11th Cir. 1997) (bar applicant had right to raise ADA argument in petition to Supreme Court).

Plaintiff's pleadings in the instant case reflect that Plaintiff "abandoned" his application for admission in about January 2006, several months *after* this action was initially filed in August 2005. Accordingly, Plaintiff's pleadings show that Plaintiff's bar admission proceeding was "ongoing" at the time that the Complaint was initially filed. (doc. 19, p. 8, ¶5). Accordingly, the action should be dismissed under the *Younger* abstention doctrine. *See Lawrence v. Schwiep et al.*, Case No. 4:05cv14-RH/WCS (Oct. 7, 2005) (Hinkle, J.) (dismissing Bar applicant's action against Chair and Executive Director of Board based on *Younger* abstention doctrine) (copy attached at Exhibit "A"). *See also Edwards v. Illinois Bd. of Admissions to the Bar*, 2000 WL 343333 (N.D. Ill 2000) (dismissing action relating to pending application for admission to Illinois Bar, based on *Younger* abstention doctrine), *aff'd on other grounds*, 261 F.3d 723 (7th Cir. 2001) (affirming dismissal, based on *Rooker-Feldman* doctrine rather than abstention doctrine, because proceeding on application for admission had reached a final decision during pendency of appeal).

Plaintiff's statement that he has now abandoned his application for admission (during

the pendency of this civil action) does not obviate the effect of *Younger v. Harris, supra*. The *Younger* abstention analysis is determined by the status of the state judicial proceeding at the time the federal action is *filed*. Subsequent events relating to the state judicial proceeding (including its termination), which occur after the federal action is initially filed, do not obviate the principles of *Younger v. Harris, supra*. See *Lawrence v. Schwiep et al.*, Case No. 4:05cv14-RH/WCS (January 17, 2006) (Hinkle, J.) (holding that because plaintiff's bar application proceeding was pending when action was initially filed, *Younger* abstention required dismissal of action even though state judicial proceeding had subsequently terminated) (Copy of Order attached at Exhibit "B" hereto).

III. THIS ACTION MUST BE DISMISSED UNDER THE *ROOKER-FELDMAN* DOCTRINE FOR LACK OF SUBJECT MATTER JURISDICTION

For the reasons explained above, this action should be dismissed based on the *Younger* abstention doctrine. Moreover, the action should also be dismissed for the separate, and independent, reason that the Court lacks subject matter jurisdiction of this action under the *Rooker-Feldman* doctrine.

The *Rooker-Feldman* doctrine places limits on the subject matter jurisdiction of federal district courts and federal courts of appeals relating to claims arising out of State judicial decision-making, including those relating to a State's bar admission proceedings. See *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). In *Rooker, supra*, the United States Supreme Court held that the lower federal courts lack subject matter jurisdiction to review final

decisions of state courts. In *Feldman, supra*, the Court held that the doctrine applied to decisions relating to applications for admission to the Bar of a State because such proceedings are judicial in nature. *Feldman*, 460 U.S., at 477-82. Moreover, the *Rooker-Feldman* doctrine also applies to decisions of committees or boards, acting under the direct supervision and control of the State's highest court, in connection with applications for admission to the Bar of a State. See *Dale v. Moore*, 121 F.3d 624, 627 (11th Cir. 1997) (affirming dismissal of bar applicant's ADA claim under *Rooker-Feldman* doctrine); *McCready v. Michigan State Bar Standing Committee on Character and Fitness*, 926 F.Supp. 618 (W.D. Mich 1995), *aff'd*, 100 F.3d 957 (6th Cir. 1996).

As discussed above in connection with the *Younger* abstention doctrine, actions taken by the Board in connection with an application for admission to The Florida Bar are clearly *judicial* in nature. Accordingly, the *Rooker-Feldman* doctrine bars applicants for admission to The Florida Bar from filing suit in federal district courts to challenge actions taken on their applications for admission. See *Dale v. Moore*, 121 F.3d 624, 627 (11th Cir. 1997) (affirming dismissal of bar applicant's ADA claim); *Berman v. Florida Bd. of Bar Examiners*, 794 F.2d 1529 (11th Cir. 1986) (affirming dismissal of bar applicant's claim under 42 U.S.C. §1983).

In the instant case, Plaintiff alleges that his rights were violated during the course of the judicial proceeding on his application for admission to The Florida Bar. The gist of Plaintiff's Complaint is that: (i) the Board delayed taking action during Plaintiff's Bar admission proceeding; (ii) the Board obtained information and documents from Plaintiff's

psychological and/or psychiatric treatment providers during the Bar admission proceeding; (iii) the Board held an informal hearing and (iv) the Board then filed Specifications relating to Plaintiff rather than recommending him for admission to The Florida Bar. All of the Board's actions that are being challenged by Plaintiff occurred prior to the filing of the instant action. Moreover, the Plaintiff has now (during the pendency of this civil action) "abandoned" his application for admission, such that there can be no question about whether the Board's actions are final decisions.

The Court thus lacks subject matter jurisdiction of this action under the *Rooker-Feldman* doctrine. See *Dale v. Moore*, 121 F.3d 624, 627 (11th Cir. 1997) (affirming dismissal of bar applicant's ADA claim); *Berman v. Florida Bd. of Bar Examiners*, 794 F.2d 1529 (11th Cir. 1986) (affirming dismissal of bar applicant's claim under 42 U.S.C. §1983); *Stoddard v. Supreme Court of Florida et al.*, Case No. 4:02-CV-106-SPM (N.D. Fla. March 13, 2003) (Mickle, J.) (holding ADA and Section 1983 claims regarding actions taken during Bar admission proceeding were barred by *Rooker-Feldman* doctrine, where Bar Examiners had held informal hearing and filed Specifications and no further action had been taken on plaintiff's application for admission) (copy attached at Exhibit "C" hereto), *aff'd on other grounds*, *Stoddard v. Supreme Court et. al.*, No. 03-11662 (11th Cir. Oct. 24, 2003) (per curiam) (dismissal affirmed for lack of standing and ripeness because the applicant had withdrawn his application for admission) (Copy attached at Exhibit "D").⁴

⁴ Plaintiff cannot avoid the effect of the *Rooker-Feldman* doctrine by arguing that he is merely seeking to challenge the facial validity of a rule of general applicability promulgated in a nonjudicial proceeding, rather than seeking review of the Board's judicial decisions regarding his application for admission to The Florida Bar. See *Dale v. Moore*, 121 F.3d at 626-27 (*Rooker-Feldman* doctrine barred applicant's federal claim because the "claim [was]

IV. PLAINTIFF LACKS STANDING OR THE MATTER IS NOT RIPE

For the reasons explained above, this action should be dismissed under the *Younger* abstention doctrine or the *Rooker-Feldman* doctrine. Moreover, Plaintiff's claims for injunctive relief should also be dismissed for the separate and independent reasons that Plaintiff lacks standing to assert these claims and the matter is not ripe.

To establish the "irreducible minimum" for constitutional standing, the plaintiff must allege and prove that: "(1) [he] has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Dillard v. Baldwin County Com'rs*, 225 F.3d 1271, 1275 (11th Cir. 2000); *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982). Moreover, federal courts "should not speculate concerning the existence of standing or piece together support for the plaintiff." *Stoddard v. Supreme Court et. al.*, No. 03-11662, at page 12 (11th Cir. October 24, 2003) (per curiam) (copy attached at Exhibit "D").

The ripeness inquiry requires a determination of "(1) the fitness of the issues for judicial decision, and (2) the hardship to the parties of withholding court consideration." *Digital Properties, Inc. v. City of Plantation*, 121 F.3d 586, 589 (11th Cir. 1997) ("whether there is sufficient injury to meet Article III's requirement of a case or controversy and, if so,

inextricably intertwined with the state's judicial proceedings relating to his bar admission."); *Johnson v. State of Kansas*, 888 F. Supp. 1073, 1079 (D. Ka. 1995), *aff'd*, 81 F.3d 172 (10th Cir. 1996), cited with approval by the Eleventh Circuit in *Dale v. Moore*, 121 F.3d 624, 627 (11th Cir. 1997).

whether the claim is sufficiently mature, and the issues sufficiently defined and concrete, to permit effective decision making by the court”) (citations omitted). The ripeness doctrine “prevents courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements.” *Stoddard v. Supreme Court et. al., supra*, at page 12 (copy attached at Exhibit “D”). Thus, “claims are less likely to be considered fit for adjudication when they require speculation about contingent future events.” *Id.*

In the instant case, the Plaintiff merely alleges that: (i) the Board “have (sic) discriminated against and have (sic) violated” his rights, in the past (Complaint, ¶ 4); (ii) the Board’s actions “interfered” with his “motivation and desire to practice law in Florida” and caused him to move from Florida to another state (Complaint, ¶ 8); and (iii) injunctive relief should be ordered with respect to Defendant Hunter because, “[o]n information and belief,” other persons have been discriminated against by her. (Complaint, ¶ 16). Moreover, since filing his initial complaint, Plaintiff has announced that he has now “abandoned” his application for admission. (doc. 19, p. 8, ¶5).

Plaintiff does not (and cannot) allege that the Board is continuing to engage in conduct violative of his rights in connection with any pending application for admission to The Florida Bar.⁵ Thus, Plaintiff has failed to allege facts to demonstrate that he has standing to make any claim for injunctive relief or to show that any such claim is ripe for

⁵ Plaintiff states in his “Affidavit” that he “does plan to apply to the FL Bar at some time in the near future, but only after being licensed first in California and practicing safely and effectively there first, so as to allay FBBE concerns.” (doc. 19, p. 5, ¶9). This statement in Plaintiff’s affidavit does not establish standing or ripeness in the instant action which challenges past actions of the Board regarding Plaintiff’s now-abandoned application for admission. Moreover, as was true in *Stoddard*, it is entirely speculative whether Plaintiff Hason will ever refile his application for admission to The Florida Bar.

disposition. See *Stoddard v. Supreme Court et. al.*, No. 03-11662 (11th Cir. October 24, 2003) (affirming dismissal of action for declaratory relief against Florida Supreme Court, FBBE and FBBE's Executive Director, for lack of standing where plaintiff's previously-filed application for admission had been inactivated and was thus being held in abeyance) ("As [plaintiff] has no bar application pending, ... 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. This matter is therefore not ripe and [plaintiff] does not have standing to pursue this action.") (Copy attached at Exhibit "D").

V. PLAINTIFF'S CLAIMS ARE BARRED BY THE ELEVENTH AMENDMENT

In addition to the foregoing, all of Plaintiff's claims for damages and retroactive injunctive relief against the Board and Eleanor Hunter in her official capacity should be dismissed for the separate and independent reason that these claims are barred by the Eleventh Amendment.

As discussed above, the Board is an official arm of the Supreme Court of Florida. Fla. Bar Admiss. R. 1-12; *In re Board of Florida Bar Examiners*, 353 So.2d 98 (Fla. 1977). It is "well-settled that Eleventh Amendment immunity bars suits brought in federal court when the State itself is sued and when an 'arm of the State' is sued." *Manders v. Lee*, 338 F.3d 1304, 1308-09 (11th Cir. 2003) (citation omitted), *cert. denied*, 540 U.S. 1107 (2004). Additionally, "state officials sued in their official capacity are also protected by the amendment." *Harbert Intern., Inc. v. James*, 157 F.3d 1271, 1277 (11th Cir. 1998). Thus, the Eleventh Amendment applies to the claims against the Board and Executive Director Hunter

in her official capacity. *See Diaz v. Moore*, 861 F. Supp. 1041, 1049 (N.D. Fla. 1994) (holding that Eleventh Amendment applied to bar claims against the Board as an entity and the Board's Executive Director).

There has been no waiver or proper Congressional abrogation of Eleventh Amendment immunity with respect to Plaintiff's claims. *See Quern v. Jordan*, 440 U.S. 332, 99 S. Ct. 1139, 59 L. Ed. 2d 358 (1979) (no proper Congressional abrogation regarding §1983); *Miller v. King*, 384 F.3d 1248 (11th Cir. 2004) (Eleventh Amendment barred ADA Title II claim by prison inmate who alleged disability discrimination in violation of Eighth Amendment). Accordingly, Plaintiff's ADA and § 1983 claims against the Board and Defendant Hunter in her official capacity are barred by the Eleventh Amendment.

The Court's decision in *Tennessee v. Lane*, 541 U.S. 509 (2004) is inapplicable to the instant case. The decision in *Tennessee v. Lane* was limited to the issue of whether the Eleventh Amendment barred a claim under Title II of the ADA where the plaintiffs alleged that physical barriers denied disabled individuals the right of access to the courts – a right protected by the Due-Process Clause of the Fourteenth Amendment and the Confrontation Clause of the Sixth Amendment. The plaintiffs in *Tennessee v. Lane* were paraplegics who used wheelchairs for mobility. One plaintiff alleged that he was compelled to appear to answer criminal charges on the second floor of a county courthouse that had no elevator. He alleged that he had to crawl up two flights of stairs to get to the courtroom. When he returned to the courthouse for a hearing, he refused to crawl again or to be carried by officers to the courtroom. He was then arrested and jailed for failure to appear. The other plaintiff,

a certified court reporter, alleged that she had not been able to gain access to a number of county courthouses, and thus lost both work and an opportunity to participate in the judicial process. *Id.* at 513-14.

The Court in *Lane* applied the three-part “congruence and proportionality” test to determine whether Congress had validly abrogated the Eleventh Amendment with respect to the particular claims being asserted by the plaintiffs in that case. In applying this test, “a court must: (1) identify ‘with some precision the scope of the constitutional right at issue’ ...; (2) determine whether Congress identified a history and pattern of unconstitutional conduct by the States; and (3) if so, analyze whether the statute is an appropriate, congruent, and proportional response to that history and pattern of unconstitutional treatment.” *Miller v. King*, 384 F.3d 1248, 1269 (11th Cir. 2004). Given the particular constitutional rights at issue in *Tennessee v. Lane*, *supra* (namely, the right of access to the courts protected by the Due-Process Clause of the Fourteenth Amendment and the Confrontation Clause of the Sixth Amendment), the Court in *Lane* applied the “congruence and proportionality” tests and held that the Eleventh Amendment would not bar these particular claims.

However, in the instant case, the Plaintiff asserts no *constitutional* rights like the ones being asserted by the plaintiffs in *Tennessee v. Lane*; and the Plaintiff in the instant case thus cannot satisfy the “congruence and proportionality” tests that must be met to overcome Eleventh Amendment Immunity. Moreover, following the Supreme Court’s decision in *Tennessee v. Lane*, *supra*, the Eleventh Circuit has applied the Eleventh Amendment to bar claims that are much closer to the facts of *Tennessee v. Lane* than are the claims of the

Plaintiff in the instant case. For instance, in *Zabriskie v. Court Admin.*, 2006 WL 231528 (11th Cir. Feb. 1, 2006), the plaintiff sued the Ninth Judicial Circuit's Office of Court Administration and some of its employees, alleging that the defendants had violated his right of access to the courts when they denied him continuing access to the court's Self Help Center, a facility in the courthouse provided to all *pro se* litigants. Notwithstanding the Supreme Court's decision in *Tennessee v. Lane*, *supra*, the Eleventh Circuit held that the Eleventh Amendment barred the action, stating: "We conclude that the district court correctly dismissed Plaintiff's claims for money damages as barred by Eleventh Amendment immunity." *Zabriskie v. Court Admin.*, 2006 WL 231528 (11th Cir. Feb. 1, 2006). *See also Miller v. King*, 384 F.3d 1248 (11th Cir. 2004) (Eleventh Circuit holds, subsequent to the decision in *Tennessee v. Lane*, that Eleventh Amendment barred ADA claim by prison inmate who alleged disability discrimination in violation of Eighth Amendment).

VI. DEFENDANTS HAVE ABSOLUTE (JUDICIAL) IMMUNITY FROM ANY CLAIMS FOR DAMAGES.

Judges are "absolutely immune from civil liability under section 1983 for acts performed in their judicial capacity, provided such acts are not done in the 'clear absence of all jurisdiction.'" *Roland v. E.W. Phillips*, 19 F.3d 552 (11th Cir. 1994) (citation omitted). The doctrine of judicial immunity is well established as an essential way of protecting the independence of judges and other decision-makers whose decisions may have adverse effects on certain individuals. *Forrester v. White*, 484 U.S. 219 (1988). Judicial immunity has therefore long been part of federal and Florida law. *See Roland v. E.W. Phillips*, 19 F.3d 552 (11th Cir. 1994); *Office of the State Attorney, Fourth Judicial Circuit of Florida v.*

Parrotino, 628 So. 2d 1097 (Fla. 1993)("[A] strict guarantee of judicial immunity is necessary to preserve the effectiveness and impartiality of judicial and quasi-judicial offices."); *Johnson v. Harris*, 645 So. 2d 96 (Fla. 5th DCA 1994)(affirming trial court's granting of motion to dismiss, with prejudice, action against judge and judge's assistant based on absolute judicial immunity), *rev. denied*, 659 So. 2d 271 (Fla. 1995); *Rivello v. Cooper City*, 322 So. 2d 602 (Fla. 4th DCA 1975)(affirming motion to dismiss, with prejudice, action against judge for failure to place probationer on supervised probation based on judicial immunity). Acts performed within the scope of judicial capacity and within the jurisdiction of the actor enjoy absolute judicial immunity from actions for damages. *See Berry v. State*, 400 So. 2d 80 (Fla. 4th DCA 1981), *rev. denied*, 411 So. 2d 380 (Fla. 1981).

Florida's constitutional scheme, court rules and court decisions all provide that the doctrine of judicial immunity necessarily extends to actions taken during the process of admitting attorneys to the practice of law in this state. As discussed above, the activity of the Board and its officers in connection with the admission of attorneys to the practice of law is a judicial function. *See* Art. V, § 15, Fla. Const. (Supreme Court of Florida "shall have *exclusive jurisdiction* to regulate the admission of persons to the practice of law") (emphasis added); Fla. Bar Admiss. R. 1-11 ("admission of attorneys to the practice of the profession of law *is a judicial function*") (emphasis added). *See also Florida Board of Bar Examiners v. Applicant*, 443 So. 2d 71, 74 (Fla. 1983); *Florida Board of Bar Examiners v. G.W.L.*, 364 So. 2d 454, 455 n.1 (Fla. 1978); *In re Florida Board of Bar Examiners*, 353 So. 2d 98, 100 (Fla. 1977).

“Nonjudicial officers are encompassed by a judge’s absolute immunity when their official duties ‘have an integral relationship with the judicial process.’” *Roland v. E.W. Phillips*, 19 F.3d 552, 555 (11th Cir. 1994). The Board, and its officers, in all of their conduct related to Plaintiff’s application for admission carried out duties imposed on the Board by the Supreme Court of Florida. *See Fla. Bar Admiss. R. 1-12* (Florida Supreme Court created the Board as an agency of the Court for the express purpose of regulating the admission of applicants to The Florida Bar); *Dale v. Moore*, 121 F.3d 624, 627 (11th Cir. 1997) (referring to FBBE’s character and fitness investigatory process and determination as “judicial inquiry”); *Marin v. Hazelton*, 916 F.2d 716 (9th Cir. 1990) (Table, Text in Westlaw 1990 WL 157128) (“Determining whether a particular individual is suited to be a member of the bar is *inherently* a judicial function ...”), *cert. denied*, 502 U.S. 888 (1991) (emphasis added). The Board must be allowed to evaluate, investigate, consider and make decisions with regard to applicants to The Bar, free and independent of the threat of suit on the part of a disappointed applicant. Accordingly, and as discussed above, the acts complained of by Hason occurred in the course of a proceeding that is judicial in nature, for which the Defendants are entitled to absolute judicial immunity. *See Diaz v. Moore*, 861 F. Supp. 1041 (N.D. Fla. 1994) (holding that the Florida Board of Bar Examiners, its Executive Director and the Chairman of the Board, were entitled to absolute judicial immunity in connection with performance of their duties in the attorney admission process);⁶ *Sparks v. Character*

⁶ In *Diaz*, the plaintiff was an applicant to The Florida Bar who was suing the Executive Director and Chairman of the Board of Bar Examiners, in their personal and official capacities, under 42 U.S.C. §1983 for alleged constitutional violations, arising out of his application for admission to The Florida Bar. Specifically, the plaintiff alleged that his rights were violated because of the defendants’ intentional failure to act on his application to the bar,

and Fitness Committee of Kentucky, 859 F.2d 428, 431 (6th Cir. 1988), *cert. denied*, 489 U.S. 1011 (1989) (“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.”).

All of Plaintiff Hason’s claims for damages are thus clearly barred by judicial immunity.⁷

VII. PLAINTIFF FAILS TO STATE A CLAIM FOR RELIEF WITH RESPECT TO COUNTS I - V OF THE COMPLAINT

A. Count I - ADA Discrimination against the Board

Count I appears to assert a claim for ADA discrimination against the Board (Complaint, ¶1)(doc. 1).⁸ To state a claim under Title II of the ADA, a plaintiff must allege: (1) that he is a “qualified individual with a disability;” (2) that he was “excluded from participation in or ... denied the benefits of the services, programs, or activities of a public entity” or otherwise “discriminated [against] by such entity;” (3) “by reason of such disability.” 42 U.S.C. §12132; *Kornblau v. Dade County*, 86 F.3d 193, 194 (11th Cir. 1996)(“the plaintiff must show disability, the denial of a public benefit, and that such ‘denial

which was allegedly done “in a malicious attempt to financially drain him.” *Id.* at 1043 & n.1. The plaintiff also argued that the defendants’ “demand that he undergo a psychiatric evaluation by a psychiatrist of the Board’s choosing at his expense before any decision will be made on his application was made solely in an effort to harass him and stall any decision on his application.” *Id.* at 1043.

⁷ A fortiori, all of Plaintiff’s claims for damages are likewise barred by *qualified* immunity.

⁸ Plaintiff states in his “affidavit” that “[a]ll ADA and retaliation claims” are being asserted only against the Board. (doc. 19, p. 5, ¶8).

of benefits, or discrimination was by reason of the plaintiff's disability.'").

Although Plaintiff makes conclusory allegations that his ADA rights have been violated, Plaintiff simply does not make sufficient *factual* allegations to show an actual violation, nor does Plaintiff make any particular factual allegations that sufficiently show that he is an "individual with a disability" under the ADA.⁹

B. Count II - ADA Retaliation against the Board

Count II appears to assert a claim for ADA retaliation against the Board. (Complaint, ¶¶ 10-11). To state a retaliation claim under 42 U.S.C. § 12203(a) of the ADA, Plaintiff must allege facts to show that "(1) he engaged in statutorily protected expression; (2) he suffered an adverse ... action; and (3) the adverse action was causally related to the protected expression." *Shotz v. City of Plantation*, 344 F.3d 1161, 1180 (11th Cir. 2003).

Plaintiff fails to allege sufficient facts to state a claim for ADA retaliation. Plaintiff's Complaint merely includes a conclusory assertion that the Board retaliated against him for his having sued the "FBOM" under the ADA.¹⁰ Plaintiff's complaint contains no allegations of *facts* in support of this claim. Although Plaintiff states that he sued the "Florida Board of Medicine," Plaintiff does not allege any statutorily protected activity as it relates to the Florida Board of Bar Examiners.

C. Count III - ADA Retaliation against the Board

Count III suffers from the same deficiencies as Count II. Whereas Count II makes

⁹ Merely alleging "depression" is insufficient.

¹⁰ The Complaint does not identify the "FBOM." In his Memorandum of Law in response to Defendants' Motion to Dismiss filed in the Southern District, however, Plaintiff states that the "FBOM" is the Florida Board of Medicine. (doc. 19, p. 10, ¶7).

the conclusory assertion that the Florida Board of Bar Examiners retaliated against Plaintiff for suing the *Florida* Board of Medicine, Count III makes the conclusory assertion that the Board of Bar Examiners retaliated against Plaintiff for suing the *California* Board of Medicine. (Complaint, ¶13). As with Count II, Plaintiff does not allege any statutorily protected activity in Count III as it relates to the Florida Board of Bar Examiners.

D. Count IV - Section 1983 Claim against the Board

Count IV purports to assert a claim against the Board under 42 U.S.C. §1983. This Count appears to be based on the Board's having filed Specifications against the Plaintiff in his Bar admission proceeding. However, Plaintiff fails to identify any federal right allegedly violated, and Plaintiff fails to allege facts that rise to the level of a constitutional violation in any event. (Complaint, ¶15).

Significantly, the Eleventh Circuit has specifically rejected claims that the Rules of the Florida Supreme Court relating to the character and fitness requirement are facially invalid under the Privileges and Immunities Clause, Commerce Clause, Equal Protection Clause, Due Process Clause, and First Amendment Freedom of Speech provision. *See Kirkpatrick v. Shaw*, 70 F.3d 100, 102-04 (11th Cir. 1995). The Eleventh Circuit held that because the "right to practice law is not a fundamental right," the rules need only satisfy the rational basis test. The Court then held that "Florida may require bar applicants to undergo a character and fitness investigation before being allowed to practice law" and that "[t]his requirement is rationally related to Florida's interest in regulating the practice of law." *Id.* at 103 (citations omitted).

E. Count V - Section 1983 Claim against Defendant Hunter

Count V purports to assert a Section 1983 claim for damages against Defendant Eleanor Hunter in Ms. Hunter's personal capacity and a claim for injunctive relief against Ms. Hunter in her official capacity. (Complaint, ¶16).¹¹ However, Plaintiff does not allege any personal involvement by Ms. Hunter in any particular actions against Plaintiff. Plaintiff alleges only that "the FBOM acts complained about ... were approved of and/or supported by and/or coordinated by the FBOM's executive director, Ms. Hunter." (*Id.*).

Moreover, Plaintiff fails to allege that Ms. Hunter has deprived Plaintiff of any particular federally protected right cognizable under Section 1983. Plaintiff "cannot maintain a Section 1983 action in lieu of--or in addition to--a Rehabilitation Act or ADA cause of action" to the extent "the alleged deprivation is the [plaintiff's] rights created by the Rehabilitation Act and the ADA." *Badillo v. Thorpe*, 158 Fed.Appx. 208 (11th Cir. 2005), citing *Holbrook v. City of Alpharetta, Ga.*, 112 F.3d 1522, 1531 (11th Cir.1997). And Plaintiff fails to allege facts that rise to the level of a constitutional violation.

VIII. CONCLUSION

Based on the foregoing, Defendants Eleanor Hunter and the Florida Board of Bar Examiners respectfully request that the Court dismiss Plaintiff's Complaint with prejudice.

¹¹ Plaintiff states that the section 1983 claim for damages is made against Defendant Hunter only in her individual (personal) capacity. (doc. 19, p. 5, ¶8). Moreover, state officers sued for damages in their official capacity are not "persons" under § 1983. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 72. (1989). Section 1983 provides a federal forum to remedy many deprivations of civil liberties, but it does not provide a federal forum for those seeking a remedy against a State for alleged deprivations of civil liberties. *Welch v. Texas Dept. of Highways and Public Transportation*, 483 U.S. 468, 472-473 (1987).

Respectfully submitted,

s/ James J. Dean

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been furnished by United States Mail this 3rd day of April, 2006, to Michael J. Hason, 11815 Mayfield Ave., Brentwood, CA 90049-1750.

s/James J. Dean

James J. Dean