Human Rights Brief

Volume 6 | Issue 2 Article 5

1999

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*by Edwin R. Hazen and Robert D. Dinerstein**

The basic rights of people with mental and physical disabilities are of increasing importance in the areas of human and civil rights, both in the United States and internationally. Internationally, the UN Declaration on the Rights of Disabled Persons states that people with disabilities have the "same fundamental rights as their fellow-citizens" and are entitled to facilities that permit them to "develop their capacities and skills to the maximum." Additionally, the UN Standard Rules on the Equalization of Opportunities for Persons with Disabilities sets out pragmatic steps for governments to follow in order to promote equal opportunities for people with disabilities. The rights of people with disabilities are further protected by general human rights treaties such as the Universal Declaration of Human Rights (UDHR), which protects rights such as the freedom of movement and equal access to public services.

In addition to international activity in this area, legal developments in the United States also present enormous potential for human rights advocacy. The most important development in U.S. disability law in recent years was the passage of the Americans with Disabilities Act of 1990 (ADA). The ADA is a broad-based civil rights statute that proscribes discrimination against people with disabilities in the areas of employment, state and local governmental services (including transportation), public accommodations, and communications. The statute, modeled on the Civil Rights Act of 1964 and Section 504 of the Rehabilitation Act of 1973, represents a coming of age for people with a wide range of physical and mental disabilities. Yet, as with any complex statute, the meaning of statutory and associated regulatory terms is far from clear, and courts are struggling with interpreting these provisions in ways that are faithful to both the letter and spirit of the law.

One area within the ADA that has drawn particular attention lately is the process of certifying that a person seeking professional licensure meets appropriate standards without discriminating against the individual on impermissible grounds of disability. This issue may have particular resonance because it seems to suggest the need to balance the rights of a professional applicant with a disability against the rights of the people whom the professional would seek to serve. Not surprisingly, certification officials, such as bar examination authorities, focus on the needs of the latter, seeing their role as gatekeepers whose responsibility is to prevent unqualified people from inappropriately obtaining professional status. Just as unsurprisingly, applicants with disabilities and their advocates argue that professional examiners must make special efforts—called making "reasonable accommodations"—to assure that the examination and certification processes do not deny access to fully qualified applicants whose inability to pass an examination administered in a conventional way does not accurately reflect their ability to practice their profession competently.

The recent U.S. Court of Appeals case of *Bartlett v. New York Board of Law Examiners* provides strong endorsement for a capacious view of determining who is a qualified individual with a disability within the bar examination context. In *Bartlett*, the court concluded that the New York Board of Law Examiners violated the plaintiff's rights under Title II of the ADA (and Section 504 of the Rehabilitation Act) by failing to provide her with reasonable accommodations to take the bar examination. To understand the importance of this decision, some background is in order.

Protection Under the ADA

To be protected under the ADA, a person must demonstrate that he or she is a qualified individual with a disability. That is, a person must show that he or she has a physical or mental impairment that "substantially limits" the person's ability to engage in one or more "major life activities." According to the ADA, major life activities include (but are not limited to) walking, seeing, hearing, learning, reading, and working. A substantial limitation exists when a person cannot engage in a major life activity at all or in the same manner or condition as the average person in the general population. If determined to be an individual with a disability for ADA purposes, the person is covered by the statute and thus protected against discrimination on the basis of her disability if she is qualified for the position or service in question. Crucially, qualification can be established with or without a reasonable accommodation.

Litigation against bar examiners typically centers on those cases in which examiners refuse to accept that a particular examination applicant has a disability within the meaning of the ADA. Therefore, the examiners fail to provide that person with the reasonable accommodations and auxiliary aids and services necessary to allow the individual's examination performance to reflect her actual abilities and knowledge, rather than her disability. Persons with learning disabilities usually bring this litigation. These types of disabilities are not visible and restrict the manner in which the brain processes information. For example, some learning disabilities impair a person's ability to read printed text as quickly as persons without the disability, with the result that the individual requires significantly more time to read examination questions than does a person without this disability. A reasonable accommodation for this disability might be extra time in which to take the examination. The existence of the disability is demonstrated by comparing the scores on well-known diagnostic tests of a person suspected of having this disability with scores on the same tests generated by persons without the disability. If the scores are significantly lower to a generally accepted degree (1.5 to 2.0 standard deviations) than the mean scores of the average person without the disability in the comparison group, a disability is considered to exist. For the major life activity of reading, the comparison group considered to represent the average person in the general population is a mix of high school, community college, and lower division four year college students, not college seniors or law students.

The Case of *Bartlett v. New York State Bar Examiners*

In *Bartlett*, the plaintiff had a learning disability, diagnosed through clinical tests and observations, that manifested itself as a lack of automaticity in her reading (*i.e.*, she had difficulty in recognizing a printed word immediately without thinking). She requested the accommodations of unlimited or extended time to take the test and permission to tape record her essay answers and circle her multiple choice answers directly on the test booklet. The New York Board of Law Examiners, relying on its expert consultant in learning disabilities, concluded that she did not have a disability within the meaning of the ADA and was therefore not entitled to the requested accommodations. The expert based his denial of the applicant's disability claim on her performance on an untimed reading mastery diagnostic test, in which her grade fell above an arbitrary cut-off score for determining disability. The plaintiff sued for injunctive relief and damages under Title II of the ADA and Section 504 of the Rehabilitation Act.

The district court held for the plaintiff in a wide-ranging opinion, granting injunctive relief to require provision of reasonable accommodations and award-

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United States, have enacted state civil rights legislation banning discrimination against gays and lesbians. Compliance with the amendment, therefore, requires that law schools in these states directly contravene their own state law. As Representative Solomon opines, however, these laws are of little importance. These states, he reasons, can merely amend their legislation to allow for military recruitment. Amendment opponents do not find this a palatable option, however, and continue to hope that the Supreme Court will eventually overturn the military policy.

Although the amendment's future remains unclear, protests against it are likely to continue in courts and at law schools. The AALS, for example, has indicated that it will file *amicus curiae* briefs in litigation brought by law schools concerning the amendment. At individual law schools, both faculty members and students are also demonstrating a tenacious desire to overturn the military's discriminatory policy, which is widely denounced as unjust and unconstitutional. At the University of Oregon School of Law, for example, roughly 150 students protested the presence of military personnel who had come to the school for recruitment purposes. Similarly, WCL faculty and students distributed protest ribbons and reading material concerning the military's policy of discrimination against lesbian and gay members when the military was conducting on-campus recruitment there. Reports indicate that the issue continues to resonate strongly with law students across the country, who persevere in their work towards the amendment's repeal and the end of the U.S. military's discriminatory policy against gays and lesbians.

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ing compensatory damages of $12,500 (the cost of her unaccommodated bar examinations), but the basis for its decision was somewhat unusual. The court concluded that the plaintiff was not substantially impaired in the major life activities of reading and learning—the most obviously affected major life activities—because her performance of these activities was not demonstrably worse than that of the average person without a disability. The plaintiff was able to read and learn at the level of the average person in the general population because she had developed "self-accommodating" strategies and techniques that compensated for her learning disability. However, the court held that she was impaired in the major life activity of working because the ADA regulations look to a different comparison group (persons of comparable training, experience, and ability, *i.e.*, bar applicants without reading disabilities), not the average person in the general population, when examining the major life activity of working. This reading of the statute was creative but not unproblematic, because (1) the regulations prevent courts from reaching the major life activity of working until they have examined all other major life activities, and (2) the court had to construe the bar examination to be, in essence, an employment test, failure on which would prevent the plaintiff from ever working as a lawyer. This statutory interpretation was intriguing but far from obviously correct.

On appeal, the U.S. Court of Appeals for the Second Circuit affirmed the trial court's judgment that the defendants had violated the ADA and Section 504 of the Rehabilitation Act, but employed a different rationale. It held that it was unnecessary for the trial court to reach the issue of whether the plaintiff was substantially limited in the major life activity of working because she was substantially limited in the major life activities of reading and learning. Relying on legislative history, a related Equal Employment Opportunity Commission (EEOC) interpretive guidance, and judicial precedent from other federal courts, the appellate panel held that the trial court should not have considered the mitigating effect of the plaintiff's "self-accommodation" reading techniques when determining whether she had a disability. Although there was jurisprudential support for the court's determination, other courts have refused to follow the EEOC guidance and legislative history that discount the role of mitigating measures in the determination of disability. It is likely that the Supreme Court will be faced with this issue in the next few years.

The Second Circuit also rejected the board's policy of using the plaintiff's scores on an *untimed* diagnostic test to determine if she had a disability that would impair her performance on a *timed* bar examination. It ruled that the expert's cut-off score was not supported by the evidence, which showed that one-third of adults with the same disability scored above the cut-off score on similar diagnostic tests. The court concluded that the defendant's policy of using its expert's diagnostic methodology "constituted deliberate indifference to a strong likelihood of violating [the plaintiff's] federally protected rights" and affirmed the order of injunctive relief, while remanding for a recalculation of compensatory damages.

The plaintiff did not pass the New York bar examination despite receiving the requested accommodations and plans to re-take it. If she is again unsuccessful after getting appropriate accommodations, it could be fairly said that she has not demonstrated her qualifications to practice law in New York. This outcome, while unfortunate for the plaintiff, would at least belie the criticism that the ADA supposedly and inevitably results in the lowering of academic, professional licensing, and employment standards. For, as the Second Circuit wrote in *Bartlett*, "The ADA and the Rehabilitation Act do not guarantee [the plaintiff] conditions that will enable her to pass the bar examination—that she must achieve on her own. What Congress did provide for, and what the Board has previously denied her, is the opportunity to take the examination on a level playing field with other applicants."

Conclusion

Despite the legal victory in *Bartlett*, plaintiffs with disabilities are still caught between the rock of their disability and the hard place of qualification. If their disabilities are not considered substantial enough, as the board of law examiners, expert in *Bartlett* originally determined, the ADA does not protect them. On the other hand, if their disability is substantial, they may not be able to meet the necessary qualifications for the position or status they seek. More broadly, however, professional licensing cases like *Bartlett* compel society to take seriously the obligation to grant to all its members the opportunity to participate fully in the activities of daily life for which they are qualified. Denial of such opportunities represents the denial of basic human rights protected in international instruments like the UDHR and the UN Declaration on the Rights of Disabled Persons. *Bartlett* stands for the proposition that, in the United States, such a denial is not only unwise, but is also illegal.

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