Docket No. 12320

FILED
OCT 31 2006
CAROL G. GREEN
CLERK OF APPELLATE COURTS

IN THE SUPREME COURT OF KANSAS
BEFORE
THE KANSAS BOARD OF LAW EXAMINERS

IN THE MATTER OF
IAN B. JOHNSON,
Petitioner

ADMISSIONS ATTORNEYS' BRIEF

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[At pp. 3-5:]

In connection with Johnson's application to take the 1992 Kansas Bar Exam, Dr. Leonel Urdaneta issued a report stating that Johnson suffered from "Bipolar Affective Disorder" that was in remission. (Petition for Admission, 145). Dr. Urdaneta testified before the Kansas Board of Law Examiners at that time that recurrence of the bipolar disorder would be more likely when Johnson was placed under stress, and that bipolar disorder is chronic and tends to worsen with age. (Petition for Admission, 145).

Dr. Urdaneta issued a second report in connection with Johnson's current application. In the report, Dr. Urdaneta states that he believes Johnson has never suffered from Bipolar Disorder, but instead suffers from Asperger's Syndrome Disorder and Attention Deficit Disorder.

Johnson has also been evaluated by Dr. George Hough. (Psychological Evaluation of George Hough). Dr. Hough's diagnosis includes: mild to moderate Asperger's Disorder; Breathing-related Sleep Disorder; Male Erectile Disorder; a history of Voyeurism; a history of Frotterism; a history of Exhibitionism; Attention Deficit Disorder; Bipolar Disorder with no symptoms currently in evidence; and Avoidant Personality Disorder. (Psychological Evaluation of George Hough, 23-24). Dr. Hough identified several protective factors that would decrease the likelihood of Johnson sexually reoffending, such as: 1) supportive family system; 2) supportive faith community; 3) a belief in spirituality and religious practices to help maintain; 4) a past history of positive response to psychiatric care; 5) Johnson's arranging the computer to the center of the living room to avoid Internet pornography; 6) Johnson's use of a C-PAP device to help him sleep; 7) ongoing treatment support from Dr. Urdaneta; 8) Johnson's self-report of no sexual

acting- out for 21 years; 9) Johnson's avoidance of strip bars and other over-stimulating environments; 10) Johnson's highly intellectualized sublimation skills; 11) Johnson's supportive work environment; 12) Johnson's avoidance of drugs and alcohol; 13) Johnson's lack of a history of gross physical violence or use of a weapon in sexual acts; and 14) Johnson's age. (Psychological evaluation of George Hough, 30).

However, Dr. Hough also identified several risk factors for reoffending. These include: 1) Johnson's core sexual fantasy system that has led to past acting out; 2) Johnson's continued interest in adult pornography, including a month-long relapse; 3) Johnson's vulnerability to misconstruing social cues as a result of his Asperger's disorder; 4) Johnson's Avoidant Personality Disorder, which limits opportunities for new social learning; 5) Johnson's past history of sexual transgressions; 6) Johnson's life-long compulsive nature to act out fantasies; and 7) Johnson's vulnerability to lowered inhibition to sexually act out under conditions of impaired sleep and high stress. (Psychological Evaluation of George Hough, 30-31).

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[At p. 8:]

Several courts have recognized that the principles involved in disciplinary proceedings and those in admission proceedings are similar, especially with regard to their evaluation of moral character, and thus disciplinary cases may provide guidance in deciding admissions cases. *See Matter of Prager*, 422 Mass. 86, 95, 661 N.E.2d 84 (1996) (treating the moral character requirements for admissions and disciplinary cases as identical); *Application of Peterman*, 134 N.J. 201 207-09, 632 A.2d 271, 273-75 (1993) (considering whether practicing attorney would have been disbarred for similar conduct as applicant); *In re Buckalew*, 731 P.2d 48, 55 (Alaska 1986) (applying the same moral character standards to both admissions and disciplinary cases); *see also* Michael K. McChrystal, *A Structural Analysis of the Good Moral Character Requirement for Bar Admission*, 60 Notre Dame L. Rev. 67, 73 (1984) (arguing that when addressing the question of whether to admit an applicant who has engaged in misconduct, bar admission authorities and courts should be 'substantially guided by the treatment afforded admitted lawyers who engage in similar misconduct').

This is especially true where the rules relating to attorney discipline and the rules relating to admissions use the same language. Both Kansas Supreme Court Rule 219(a) regarding reinstatement of an attorney who has been disbarred or suspended, and Kansas Supreme Court Rule 704(k) regarding applicant's whose petitions have been denied for lack of good moral character require that the applicant prove he or she has been "rehabilitated." In deciding whether or not rehabilitation has occurred, disciplinary cases regarding rehabilitation would appear to be particularly relevant.

Thus, while the Board is not bound to apply the same standards for admissions cases as are applied in disciplinary cases, it may use disciplinary cases as guidance in determining whether an applicant has met the standards required for admission. This is particularly

true with regard to the question of rehabilitation, as the rules relating to reinstatement of suspended or disbarred attorneys and to admission of attorneys after a previous denial on grounds of failure to prove good moral character both require the applicant to prove that he or she has been rehabilitated.

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[At p. 21:]

Kansas has not articulated standards for when an applicant is to be considered to be "mentally and emotionally fit." Those states that have done so have linked this requirement to whether the applicant has the sufficient capability to discharge his or her obligations to provide adequate representation of clients and to comply with the rules of professional responsibility. *See, e.g., In re Covington,* 334 Or. 376, 382, 50 P.3d 233 (2002).

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[At p. 22:]

As Johnson notes in his brief, every court that has examined the issue has concluded that a board of bar examiners is a "public entity" under Title II of the ADA. *See, Clark V. Va. Bd. of Bar Exam'rs,* 880 F.Supp. 430, 441 (E.D Va. 1995); *In re Petition & Questionnaire for Admission to the R.I. Bar,* 683 A.2d 1333, 1336 (R.I. 1996); *Petition of Rubenstein,* 637 A.2d 1131, 1136 (Del 1994); *Ellen S. v. Fla. Bd. of Bar Examiners,* 859 F.Supp. 1489, 1492-93 (S.D. Fla. 1994). Title II of the ADA prohibits public entities from administering a licensing program in a manner that subjects qualified individuals with disabilities to discrimination. 28 C.F.R. § 35.130(b)(6).

In order for the ADA to apply to Johnson, he must demonstrate that he 1) has a disability; and 2) is a "qualified individual with a disability." See, 42 U.S.C. § 12132(2) (defining qualified individual). A "disability" under ADA is a "physical or mental impairment that substantially limits one or more of the major life activities of such an individual." 42 U.S.C. § 12102(2)(A). It also includes a record of such impairment, or "being regarded as having such impairment." 42 U.S.C. § 12102(2)(B), (C). Generally speaking, any diagnosable mental disorder is a physical or mental impairment. *See* 28 C.F.R. § 35.104 (defining physical or mental impairment to include "[a]ny mental or psychological disorder"); *see also* Jon Bauer, *The Character of the Questions and the Fitness of the Process: mental Health, Bar Admissions and the Americans with Disabilities Act,* 49 U.C.L.A. L. Rev. 93, 132 (2001). Further, the one court to address the issue has held that being excluded from the practice of law because of a disability constitutes substantial limitation on a major life activity; that is, the ability to work. *See, Bartlett v. New York State Board of Bar Examiners,* 226 F.3d 69, 82-84 (2nd Cir. 2000).

The ADA prohibits discrimination against qualified bar applicants because of disability. However, it does not apply to applicants who are not qualified by reason of their

disability. *** Such a determination of Johnson's mental qualification must be based on an individualized assessment of his capabilities. *See Weigel v. Target Stores*, 122 F.3d 461, 466 (7th Cir. 1997) (holding that the ADA requires and "individualized assessment of the individual and position").

Further, Title II of the ADA does not apply where the person's mental condition poses a "direct threat" to the health and safety of others. 28 C.F.R. 35.104, App. A at 446. Such a determination may not be based on generalizations or stereotypes, but must instead be an:

> Individualized assessment, based on reasonable judgment that relies on current medical evidence or on the best available objective evidence to determine: the nature, duration and severity of the risk; the probability that potential injury will actually occur; and whether reasonable modification of policies, practices and procedures will mitigate the risk.

Id. at 446.

Thus, it is still appropriate to inquire as to the mental health of Johnson. *See, Clark v. Va. Bd. of Bar Exam'rs*, 880 F.Supp. at 436. However, this inquiry must be limited to whether his mental or emotional health is sufficient to allow him to discharge his responsibilities as a lawyer, or whether he poses a "direct threat" to the health and safety of others. *See, In re Covington*, 334 Or. at 382.

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[At p. 25:]

As noted above, the test that must be applied by the Board in determining whether Johnson has the required mental and emotional competence for admission is whether his mental and emotional health is sufficient to allow him to discharge his responsibilities as a lawyer. There is no requirement, as there is for moral character, that an applicant for the Kansas Bar show that his mental and emotional health has been "rehabilitated." *See* Kan. Sup. Ct. R. 704(k). Such a rule would probably contravene the ADA in any event. Courts interpreting ADA have found that a "must be cured" or "100% healed" policy is a *per se* violation of the ADA because it does not allow a case-by-case assessment of an individual's ability to perform essential functions of the job. *See McGregor v. National R.R. Passenger Corp.*, 187 F.3d 1113 (9th Cir. 1999); *Henderson v. Ardco, Inc.*, 247 F.3d 645, 654 (6th Cir. 2001).

Thus, the only relevance that Johnson's prior treatment has is its impact on his current ability to perform the essential functions of a lawyer.

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