

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 99-M-967

JOHN ROE #2 and THE RALPH TIMOTHY POTTER CHAPTER OF THE AMERICAN
CIVIL LIBERTIES UNION at THE UNIVERSITY OF DENVER COLLEGE OF LAW,

Plaintiffs,

v.

ALAN OGDEN, in his official capacity as the EXECUTIVE DIRECTOR OF THE
COLORADO STATE BOARD OF LAW EXAMINERS, and MELANIE BACKES,
DEBORAH BIANCO, SHERRY A. CALOIA, DAVID DIFFEE, JAY E. FERNANDEZ,
SHARI FRAUSTO, SUSAN M. HARGLEROAD, STEVEN J. HENSEN, GARY
JACKSON, DORIS G. KAPLAN, and HELEN STONE, in their official capacities as
MEMBERS OF THE BAR COMMITTEE OF THE COLORADO STATE BOARD OF
LAW EXAMINERS,

Defendants.

SECOND AMENDED COMPLAINT

Plaintiffs, for their Second Amended Complaint against defendants, state and
allege as follows:

INTRODUCTION

1. This is an action for injunctive and declaratory relief under the Americans
with Disabilities Act, 42 U.S.C. § 12101 *et seq.* (“ADA”) and 42 U.S.C. § 1983, brought
by prospective applicants to the Colorado Bar and the Ralph Timothy Potter Chapter of
the American Civil Liberties Union at the University of Denver College of Law.

2. Plaintiffs challenge defendants’ inquiries and investigations into bar
applicants’ histories of alcohol and drug addiction, treatment for use of alcohol and

drugs, and voluntary or involuntary hospitalization for treatment of an emotional or mental disability. These inquiries and investigations include Questions 37, 39 and 40 on the Colorado Bar Application (the “Application”); a requirement that if a candidate answers “yes” to any of these questions, the candidate submit further information, including relevant circumstances, dates, names and addresses of doctors consulted, nature of prescribed treatment, etc.; letters of inquiry to past treatment professionals; and follow-up investigations and hearings.

3. Plaintiffs contend that these inquiries and investigations violate the ADA’s prohibition of discrimination against individuals who are disabled, have a history of disability, or are perceived to be disabled. Plaintiffs further contend that these inquiries and investigations violate their constitutional right to privacy.

JURISDICTION AND VENUE

4. This action arises under the law of the United States, including Title II of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* (“ADA”) and 42 U.S.C. § 1983. Jurisdiction is proper pursuant to 28 U.S.C. §§ 1331 and 1343.

5. This Court has jurisdiction to grant the requested declaratory relief pursuant to the Declaratory Relief Act, 28 U.S.C. §§ 2201 and 2202.

6. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b).

PARTIES

7. Plaintiff John Roe #2 has completed his second year of law school and is a student in good standing at the University of Denver College of Law in Denver, Colorado. He also is a member of the Ralph Timothy Potter Chapter of the American

Civil Liberties Union at the University of Denver College of Law. He has completed his second year classes and examinations. He expects to graduate in May 2001 and to take the Colorado Bar Examination in July 2001. Due to a past history of treatment, he is required to answer “yes” to question 37 on the Colorado Bar Application. He refuses to do so on the grounds that it violates his rights under the ADA and the Constitution.

8. John Roe #2 brings this action under a pseudonym to safeguard the confidentiality of his status as a person with a disability, a past history of a disability, or a person regarded as having a disability.

9. Plaintiff Ralph Timothy Potter Chapter of the American Civil Liberties Union at the University of Denver College of Law (the “Chapter”) is a student chapter of the American Civil Liberties Union of Colorado. The purpose of the Chapter is to further understanding, protection, and respect for the civil liberties of all people. The Chapter works to enforce the principles of all laws forbidding discrimination, including discrimination against persons with disabilities. The Chapter is an unincorporated association filing suit to enforce substantive rights, including rights protected by the ADA and the United States Constitution.

10. The Chapter has standing to assert the rights of its members.

a. Chapter members would otherwise have standing to sue in their own right. These members include students at the University of Denver College of Law who have submitted or plan to submit the Colorado Bar Application, who will be required to answer all questions on the Application, and who object to answering questions 37, 39, and 40. Some of these members have histories of treatment that would

require them to answer affirmatively to Questions 37, 39, and 40 on the Application, and therefore they would be subject to further investigation. These members, including plaintiff John Roe #2, are suffering immediate or threatened injury because they must disclose their history of treatment in order to obtain a license to practice law in the State of Colorado, a requirement that violates the ADA and 42 U.S.C. § 1983.

b. The interests that the Chapter seeks to protect in this lawsuit—its members’ interests in freedom from discrimination on the basis of disability and their constitutionally protected interest in privacy—are germane to the Chapter’s purpose of enforcing the principles of all laws prohibiting discrimination.

c. The participation of individual Chapter members in this lawsuit is not necessary with respect to the claims asserted or relief requested. In this lawsuit, plaintiffs seek only declaratory and injunctive relief, not damages.

11. Plaintiffs are “qualified individuals with a disability” within the meaning of the ADA. Plaintiffs cannot be admitted to the Colorado Bar unless they answer the above-referenced questions on their respective applications. Their applications, therefore, pose a hardship and/or direct and immediate dilemma—the requirement that they disclose their past history of treatment in order to obtain a license to practice law in the State of Colorado.

12. Defendant Alan Ogden is the Executive Director of the Colorado State Board of Law Examiners (the “Board”). He is charged with performing and executing the policies of the Board. He is sued in his official capacity. Alan Ogden is a “public entity” within the meaning of Title II of the ADA. See 42 U.S.C. § 12131(1).

13. Defendants Melanie Backes, Deborah Bianco, Sherry A. Caloia, David Diffie, Jay E. Fernandez, Shari Frausto, Susan M. Hargleroad, Steven J. Hensen, Gary Jackson, Doris G. Kaplan, and Helen Stone are Members of the Bar Committee of the Colorado State Board of Law Examiners. The Members of the Bar Committee formulate and execute the policies of the Board and the Colorado Supreme Court. The Members of the Bar Committee are sued in their official capacities. The Members of the Bar Committee are a “public entity” within the meaning of Title II of the ADA. See 42 U.S.C. § 12131(1).

14. All subsequent references to “defendants” will refer collectively to Alan Ogden in his official capacity as Executive Director of the Board and to the Members of the Bar Committee of the Board in their official capacities.

FACTUAL BACKGROUND

15. Defendants are charged with determining whether candidates to the Colorado Bar are “mentally stable and morally and ethically qualified for admission.” See C.R.C.P. 201.6, 201.7.

16. In fulfilling this function, defendants ask over forty questions on the Bar Application, and require an applicant to supply complete and detailed accounts of all circumstances where explanations to the answers are required. Additionally, any explanation must be substantiated by appropriate documentation.

17. Throughout 1998, and for at least the first two full months of 1999, Questions 37, 38, and 40 of the Application stated as follows:

37. Have you ever been addicted to or dependent upon the use of **narcotics, drugs or intoxicating liquors** or; have you

ever been accused of being addicted to or dependent upon such substances? If YES, describe in detail, all relevant circumstances, including dates. (Emphasis in the original.)

38. During the last ten years, have you undergone any treatment for or consulted any doctor about the **use of drugs, narcotics or alcohol**? If YES, describe all relevant circumstances including, the dates, names and addresses of the doctors consulted. (Emphasis in the original.)

40. During the last five years, have you at any time been **admitted as a patient to a hospital**, either on a voluntary or involuntary basis, for treatment of any **emotional or mental disability or disorder**? If YES, describe in detail, all relevant circumstances for each such episode including, the nature of the disability or disorder, the dates and place(s) of hospitalization, the names and address of the treating medical practitioner(s), and the prescribed treatment. (Emphasis in the original.)

18. On February 27, 1998, the American Civil Liberties Union Foundation of Colorado (“ACLU”) wrote to the Ogden, explained its position that these three questions violate the ADA, and requested that the Board eliminate these questions. (See Exhibit A). In response, the Bar Committee of the Board proposed to combine questions 37 and 38 into one question (a revised question 37) that would state as follows:

37. Within the past ten years, have you undergone any treatment for or consulted any person about the use of drugs, narcotics, or alcohol, or have you been addicted to or dependent upon their use? **IF YES**, describe all relevant circumstances including, the dates, names and addresses of the doctors consulted.

(Exhibit B, emphasis in the original). The ACLU pointed out the continuing deficiencies in this revised question (see Exhibit C), but the Bar Committee of the

Board refused to consider any further revision of questions 37, 38, or 40. (See Exhibit D).

19. In the current version of the Bar Application, former questions 37 and 38 have been combined and replaced by revised question 37—an apparent implementation of the change the Bar Committee proposed in response to the ACLU’s letter. In addition, one new mental health question (a revised question 39) has been added. The Application now contains the following three questions:

37. Within the past ten years, have you undergone any treatment for or consulted any person about the use of drugs, narcotics, or alcohol, or have you been addicted to or dependent upon their use? **IF YES**, describe all relevant circumstances including, the dates, names and addresses of the doctors consulted.

39. Within the past five years, have you been diagnosed with or have you been treated for any of the following: schizophrenia or any other psychotic disorder, delusional disorder, bipolar or manic depressive mood disorder, major depression, antisocial personality disorder, or any other condition which significantly impaired your behavior, judgment, understanding, capacity to recognize reality, or ability to function in school work, or other important life activities? (If you are uncertain of a diagnosis, it is your responsibility to check with your treating health care professional.)

40. During the last five years, have you at any time been **admitted as a patient to a hospital**, either on a voluntary or involuntary basis, for treatment of any **emotional or mental disability or disorder**? If YES, describe in detail, all relevant circumstances for each such episode including, the nature of the disability or disorder, the dates and place(s) of hospitalization, the names and address of the treating medical practitioner(s), and the prescribed treatment. (Emphasis in the original.)

20. Defendants also require applicants to sign an “Authorization and Release” form which authorizes every “person, firm, company, corporation, governmental agency, court, association or institution having control of any documents, records and other information” to permit the Board or any of its agents or representatives to inspect and make copies of such documents, records and other information.

21. On information and belief, if an applicant answers “yes” to Questions 37, 39, or 40, a letter is sent by defendants to all persons identified through answers to the questions. This letter asks questions relating to the applicant’s treatment.

22. On information and belief, defendants require an applicant to give up all rights to confidentiality with his or her treatment professional.

23. Defendants also have the authority to hold a hearing and require the applicant to attend and respond to further questions about his or her history of drug and alcohol dependency, history of treatment for drug or alcohol problems, or hospitalization for a mental health issue.

24. On information and belief, if plaintiffs refuse to answer Questions 37, 39, or 40, refuse to fill out and return the authorization form, refuse to comply with defendants’ demands for additional information, or refuse to attend an investigatory hearing, they will not be admitted to the Colorado Bar. Thus, defendants force plaintiffs to sacrifice their rights under the ADA and the Constitution or suffer the consequence of not becoming members of the Colorado Bar.

25. Plaintiffs have no objection to informing defendants that their ability to function as a lawyer is not impaired. They have no objection to defendants making

inquiry of their law school, undergraduate, and business and professional associates and personal references about character, behavior, performance, and current ability to practice law. They have no objection to any question about their conduct that has raised doubts about their character or current ability to practice law. They also do not object to answering any of the questions on the Application other than questions 37, 39, and 40.

26. Defendants cannot show that Questions 37, 39 and 40 and the information obtained through subsequent investigation are necessary to defendants' function in determining whether applicants are morally and ethically qualified to become members of the Bar.

THE ADA AND ITS IMPLEMENTING REGULATIONS

27. The Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* ("ADA") defines the term "disability" to mean, with respect to an individual,

- (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
- (B) a record of such impairment; or
- (C) being regarded as having such an impairment.

Id. § 12102(2).

28. The ADA defines a "qualified individual with a disability" as "an individual with a disability who . . . meets the essential eligibility requirements for . . . participation in programs or activities provided by a public entity." Id. § 12131.

29. The ADA's protection is available to an individual with a disability who is no longer engaging in the illegal use of drugs and who:

- (1) has successfully completed a supervised drug rehabilitation program or has otherwise been rehabilitated successfully;
- (2) is participating in a supervised drug rehabilitation program; or
- (3) is erroneously regarded as engaging in such use.

Id. § 12210(b).

30. Title II of the ADA, known as “Public Services,” provides the standard of public services which must be made available to disabled persons. Id. § 12131 *et seq.*

31. “Public entity” is defined under Title II to mean “any State or local government” or “any department, agency . . . or other instrumentality of a State or States or local government.” Id. § 12131(1)(A) & (B). Defendants are a public entity.

32. Title II provides that no qualified person with a 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 such entity.” Id. § 12132 (emphasis added).

33. The regulations promulgated by the United States Department of Justice implementing the prohibition of discrimination by a public entity read as follows:

A public entity may not . . . utilize criteria . . . [t]hat have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability.

28 C.F.R. § 35.130(b)(3)(i).

A public entity may not administer a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability, nor may a public entity establish requirements for the programs or activities of licensees . . . that subject qualified individuals with disabilities to discrimination on the basis of disability.

Id. § 35.130(b)(6).

A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

Id. § 35.130(b)(7).

A public entity shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program or activity being offered.

Id. § 35.130(b)(8).

FIRST CLAIM FOR RELIEF

(Violation Of Title II Of The Americans With Disabilities Act)

34. The allegations of paragraphs 1 through 33 are incorporated as though fully set forth below.

35. Defendants have discriminated and are continuing to discriminate against plaintiffs in violation of Title II of the ADA and its implementing regulations. These violations include the following:

a. Defendants compel applicants to answer Questions 37, 39 and 40 on the Colorado Bar Application. These questions single out persons with histories of drug or alcohol addiction/dependence, perceived drug or alcohol addiction/dependence, drug or alcohol treatment, or treatment or hospitalization for a mental disability.

b. Defendants require applicants who answer affirmatively to Questions 37, 39 and 40 to submit further information and relevant documentation, and to consent to release of medical and psychiatric records and any inquiry of their treatment professionals.

c. Defendants make detailed inquiries and have the authority to conduct hearings into mental health histories of persons who answer yes to Questions 37, 39 and 40.

36. These questions and follow-up activities constitute requirements or burdens on individuals with disabilities that are not imposed on individuals without disabilities, in violation of the ADA.

37. An actual and immediate controversy exists between plaintiffs and defendants.

38. Plaintiffs are entitled to a declaration of rights with respect to this controversy. Without such a declaration, plaintiffs will be uncertain of their rights and responsibilities under the law.

39. Defendants have acted and are threatening to act to deprive plaintiffs of their rights under the laws of the United States. Plaintiffs are suffering and will continue to suffer a real and immediate threat of irreparable injury as a result of the policies and practices of defendants. Plaintiffs have no plain, adequate or speedy remedy at law.

40. In light of the above, plaintiffs are entitled to the following relief:

a. Pursuant to 42 U.S.C. § 12133 and Fed. R. Civ. P. 57, plaintiffs are entitled to a declaratory judgment which declares that defendants have violated the ADA and its implementing regulations, in that defendants require Bar applicants to answer Questions 37, 39 and 40 and subject applicants who answer “yes” to these questions to further investigation.

b. Pursuant to 42 U.S.C. § 12133 and Fed. R. Civ. P. 65, plaintiffs are further entitled to a preliminary injunction and a permanent injunction which enjoin defendants from requiring applicants to answer Questions 37, 39 and 40 and from subjecting applicants who answer “yes” to these questions to further investigation.

c. Pursuant to 42 U.S.C. § 12205 and all applicable law, plaintiffs are further entitled to an award of reasonable attorneys’ fees and expenses.

SECOND CLAIM FOR RELIEF

(Violation Of Constitutional Right To Privacy)

41. The allegations of paragraphs 1 through 40 are incorporated as though fully set forth below.

42. Under the Fourteenth Amendment and other provisions of the United States Constitution, plaintiffs have a right of privacy which protects the confidentiality of personal matters and vests plaintiffs with a constitutionally protected interest in avoiding the disclosure of such personal matters.

43. This right of privacy extends to plaintiffs’ status of having had an addiction/dependence on drugs or alcohol or a perceived addiction/dependence on drugs

or alcohol; having sought treatment for drug or alcohol difficulties; and having been treated or hospitalized for a mental disability.

44. Defendants, under color of state law, ordinance, regulation, custom, or usage, are denying plaintiffs their rights, privileges, or immunities secured by the United States Constitution, in violation of 42 U.S.C. § 1983. Specifically, defendants are violating plaintiffs' right to privacy by requiring them to answer Questions 37, 39 and 40 and, if they answer yes, to submit further information and relevant documentation, and to consent to release of medical and psychiatric records and any inquiry of their treatment professionals.

45. An actual and immediate controversy exists between plaintiffs and defendants.

46. Plaintiffs are entitled to a declaration of rights with respect to this controversy. Without such a declaration, plaintiffs will be uncertain of their rights and responsibilities under the law.

47. Defendants have acted and are threatening to act to deprive plaintiffs of their rights under the laws of the United States. Plaintiffs are suffering and will continue to suffer a real and immediate threat of irreparable injury as a result of defendants' policies and practices. Plaintiffs have no plain, adequate or speedy remedy at law.

48. In light of the above, plaintiffs are entitled to the following relief:

a. Pursuant to 42 U.S.C. § 1983 and Fed. R. Civ. P. 57, plaintiffs are entitled to a declaratory judgment which declares that defendants are in violation of the plaintiffs' constitutional right to privacy, in that they require Bar applicants to answer Questions 37, 39 and 40 and subject applicants who answer "yes" to these questions to further investigation.

b. Pursuant to 42 U.S.C. § 1983 and Fed. R. Civ. P. 65, plaintiffs are further entitled to a preliminary injunction and a permanent injunction which enjoin defendants from requiring applicants to answer Questions 37, 39 and 40 and from subjecting applicants who answer "yes" to these questions to further investigation.

c. Pursuant to 42 U.S.C. § 1988 and all applicable law, plaintiffs are further entitled to an award of reasonable attorneys' fees and expenses.

WHEREFORE, plaintiffs request the Court to grant them relief including, but not limited to, declaratory relief, a preliminary injunction, a permanent injunction, attorney fees, costs, and such other and further relief as the Court deems just and proper.