

FILED

DEC 07 2017

STATE OF WISCONSIN

IN SUPREME COURT

CLERK OF SUPREME COURT
OF WISCONSIN

IN THE MATTER OF PETITION
TO AMEND BOARD OF BAR
EXAMINERS RULE 6.02 (BA 6.02)

Rule Petition No. 17-10
Memorandum in Support

Aaron Jeramie Loudenslager petitions the Wisconsin Supreme Court to adopt amendments to the Board of Bar Examiners Rule 6.02 (BA 6.02). The purpose of these amendments is to bring Wisconsin's character and fitness investigations of prospective lawyers—which currently utilize questions regarding prospective lawyers' mental health—into compliance with the Americans with Disabilities Act.

I. The Americans with Disabilities Act

Congress enacted the Americans with Disabilities Act in 1990. In enacting the ADA, Congress recognized that individuals with disabilities faced discrimination in many forms, including “exclusionary qualification standards and criteria,” and “relegation to lesser services, programs, activities, benefits, jobs, or other opportunities.” 42 U.S.C. § 12101(a)(5). Therefore, the ADA's statutory purpose is “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.” *Id.* § 12101(b)(1).

As relevant here, Title II of the ADA—which applies to public entities, including state bar examiners¹—prohibits discrimination against individuals with disabilities. Specifically, the ADA states: “[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits or services, programs, or activities of a public entity, or be subjected to discrimination by such entity.” *Id.* § 12132. Under the ADA, a “qualified individual with a disability” is defined as someone who meets “the essential eligibility requirements for ... the participation in programs or activities provided by a public entity,” with “reasonable modifications to rules, policies, or practices” if required.” *Id.* § 12131(2).

The United States Department of Justice, through the use of its administrative rule-making powers, is responsible for implementing the ADA. *See id.* § 12134(a). Under the regulations promulgated by the DOJ, 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 a disability.” 28 C.F.R. § 35.130(b)(6). Additionally, a public entity may not impose “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.² *Id.* § 35.130(b)(8). In making a determination of whether

¹ *See, e.g., ACLU of Ind. v. Ind. State Bd. of Law Exam'rs*, No. 1:09-cv-842-TWP-MJD, 2011WL 4387470, at *5-6 (S.D. Ind. Sept. 20, 2011).

² Likewise, a public entity's policies that “unnecessarily impose requirements or burdens on individuals with disabilities that are not placed on others” are also prohibited. 28 C.F.R. pt. 35, app. B at 673.

particular eligibility criteria are “necessary” for the provision of a program or service, a public entity must ground its decision upon “actual risks”; that is, it may not base its decision upon “speculation, stereotypes, or generalizations about individuals with disabilities.” *Id.* § 35.130(h).

II. Wisconsin’s Character and Fitness Questionnaire and Affidavit: Question 35(a)

Wisconsin’s Character and Fitness Questionnaire and Affidavit Question 35(a) states: “Do you currently have any condition or impairment (including, but not limited to, substance abuse, alcohol abuse or a mental, emotional or nervous disorder or condition) which in any way currently affects, *or if untreated could affect*, your ability to practice law in a competent and professional manner?” (Emphasis added.) This question is not an uncommon one; other states’ bar examiners have used this question (or a close variant) in the past, and some continue to do so.³

In Wisconsin, the Board of Bar Examiners has used this question since at least 2014—and most likely has been using it for longer. An applicant’s affirmative response to this question triggers more scrutiny than other applicants—in the form of being required to describe the mental disorder and how it has been treated.⁴ The BBE also has wide discretion to access applicants’ mental health records, as applicants are generally required, as a condition of the character and fitness investigation, to consent to the BBE obtaining any relevant documents, records, or information about them from practically anyone.

It appears the BBE has been utilizing broad mental health inquiries for years, if not decades. *See, e.g., Brewer v. Wis. Bd. of Bar Exam’rs*, No. 04-C-0694, 2006 WL 3469598, at *1, *11-12. (E.D. Wis. Nov. 28, 2006) (denying the BBE’s motion for summary judgment because the BBE had not demonstrated that requiring an applicant with a history of mental illness to pay for an independent psychological evaluation was necessary for the BBE to implement its licensing functions); *In re Ripple*, 2002 WI 15, ¶¶10-11, 250 Wis. 2d 519, 639 N.W.2d 553 (applicant disclosed to the BBE that she received treatment for mild depression in law school and was subsequently required by the BBE to submit to an independent psychological evaluation).

III. Question 35(a) Violates the Americans with Disabilities Act

Wisconsin’s Character and Fitness Questionnaire and Affidavit Question 35(a) violates the Americans with Disabilities Act. The DOJ concluded, when analyzing a question used by Louisiana’s state bar examiners containing the same wording, that this question is: (1) eligibility criteria that tends to screen out individuals with disabilities (i.e., individuals with a history of mental illness); and (2) is not necessary for state bar examiners to implement their licensing functions.⁵ In concluding that this question was not *necessary* for state bar examiners to carry out their licensing duties, the DOJ determined: (1) questions related to conduct were sufficient for state bar examiners to carry out their licensing duties;⁶ (2) this question does not effectively identify unfit applicants;⁷ and (3) this question is counterproductive because it likely deters

³ See Alyssa Dragnich, *Have You Ever...? How State Bar Association Inquiries into Mental Health Violate the Americans with Disabilities Act*, 80 BROOK. L. REV. 677, 709-10 (2015).

⁴ See Wisconsin Bar Applicant Questionnaire and Affidavit, Question 35(b).

⁵ Letter from Jocelyn Samuels to C.J. Bernette & J. Johnson et al. 19 (Feb. 5, 2014) [hereinafter DOJ Letter].

⁶ *Id.* at 20.

⁷ By asking about the effect of an applicant’s mental disorder in a hypothetical form (e.g., if untreated), the BBE is inquiring into an applicant’s mental health diagnosis solely because of the applicant’s *status* of having a mental

prospective applicants (i.e., law students) from obtaining mental health treatment when they need it.⁸ The DOJ also concluded that the additional burdens imposed on applicants who provided an affirmative answer to Louisiana's version of Question 35(a) were impermissibly based on stereotypes about those with mental health diagnoses.⁹

IV. Amending BA 6.02

Board of Bar Examiners Rule 6.02 (BA 6.02) contains certain conduct or conditions that, if met by an applicant, will trigger additional scrutiny from the BBE during the character and fitness investigation. One condition that triggers additional scrutiny is "evidence of mental or emotional impairments substantial enough to affect the applicant's ability to practice law in a competent and professional manner." BA 6.02(i).

Is this condition limited to impairments affecting the applicant's current fitness and ability to practice law in a competent and ethical manner? Or does this condition encompass all mental or emotional impairments that could, if untreated at some undefined point in the future, affect the applicant's ability to practice law? In other words, does this condition permit the BBE to seek information about an applicant's past untreated disorders, regardless of an applicant's current ability to practice law? If the former, there may be no need to amend the wording of BA 6.02, as it would seem the only necessary change would be for the BBE to amend the wording of Question 35(a), as many states have already done.¹⁰ However, if the latter, then amending the text of BA 6.02—along with the text of Question 35(a)—is required to come into compliance with the ADA.¹¹

Dated: December 6, 2017

disorder—and without regard to how that mental disorder actually affects the applicant's ability to practice law. *See id.* at 22. This is an impermissible disability-status inquiry based on stereotypes about those with mental disorders. As the DOJ pointed out in its letter to the Louisiana Supreme Court, having a history of undergoing mental health treatment is not predictive of whether a person will commit future misconduct. *Id.* at 23; *see also Clark v. Va. Bd. of Bar Exam'rs*, 880 F. Supp. 430, 435 (E.D. Va. 1995) ("According to the APA, psychiatric history should not be the subject of applicant inquiry because it is not an accurate predictor of fitness.").

⁸ DOJ Letter, *supra* note 5, at 23-24. This question may also potentially result in prospective applicants (i.e., law students)—who wish to preserve their privacy—lying to state bar examiners about their mental health history if they have sought treatment in the past. *See Dragnich, supra* note 3, at 685-86; *cf. Clark*, 880 F. Supp. at 437 (noting the discrepancy between the rate of the general population with a mental disorder and the rate of the law students applying to the Virginia state bar who indicated they had been treated for a mental disorder order in the past five years).

⁹ DOJ Letter, *supra* note 5, at 25-26.

¹⁰ *See Dragnich, supra* note 3, at 704-05.

¹¹ Filing this rule petition was not my preferred course of action. *See* Aaron Loudenslager, *Broad Mental Health Questions Used by the Wisconsin Board of Bar Examiners Continue to Violate the Americans with Disabilities Act*, KINJA BLOG, (Dec. 7, 2017, 8:30 AM) (describing my previous actions prior to filing this petition). I have written to the BBE regarding this issue multiple times in the past. I first wrote to the BBE in 2015 when my character and fitness to practice law was being investigated. Most recently, I wrote the BBE in September 2017, asking it to seriously reconsider utilizing Question 35(a) in its current form, arguing that "[t]he rights—and dignity—of those with mental disorders depends on it." The BBE's response indicates that no imminent change in the wording of Question 35 is forthcoming. Thus, I have filed this rule petition.

Aaron Jeramie Loudenslager *Aaron Jeramie Loudenslager*

Aaron Jeramie Loudenslager
State Bar # 1090418
306 West Main St., Apt. 402
Madison, WI 53703
(715) 610-1032
loudenslager@uwalumni.com