

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ANGELO BINNO,)	
)	
Plaintiff,)	
)	Honorable Denise Page Hood
v.)	
)	Case No.: 2:11-cv-12247
THE AMERICAN BAR ASSOCIATION,)	
)	
Defendant.)	<u>ORAL ARGUMENT</u>
)	<u>REQUESTED</u>
	/	

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**PLAINTIFF'S MOTION TO STRIKE AND OBJECTIONS TO EVIDENCE
 SUBMITTED IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS, OR IN
THE ALTERNATIVE MOTION FOR SUMMARY JUDGMENT**

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Plaintiff Angelo Binno (“Plaintiff” or “Binno”), by and through his undersigned attorneys, THE SAM BERNSTEIN LAW FIRM, respectfully moves to strike and objects to evidence proffered in Defendant American Bar Association’s Motion to Dismiss, or alternatively Motion for Summary Judgment (Dkt. Entry #17).

In support of its motion, Plaintiff relies on the law and arguments set forth in the attached brief and exhibits, as well as the pleadings on file with the Court.

Plaintiff’s counsel sought Defendant’s concurrence in the relief requested herein; however such concurrence was not forthcoming.

WHEREFORE, Plaintiff respectfully requests that this Honorable Court grant its Motion to Strike Evidence and sustains objections to evidence proffered in Defendant American Bar Association’s Motion to Dismiss, or alternatively Motion for Summary Judgment (Dkt. Entry #17), and grant such further relief as may be just and proper.

Respectfully submitted,

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Dated: October 3, 2011

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**BRIEF IN SUPPORT OF PLAINTIFF'S MOTION TO STRIKE AND OBJECTIONS
TO EVIDENCE SUBMITTED IN SUPPORT OF DEFENDANT'S MOTION TO
DISMISS, OR IN THE ALTERNATIVE MOTION FOR SUMMARY JUDGMENT**

I. Introduction

Plaintiff objects to, and moves to strike, evidence submitted in support of Defendant's Motion to Dismiss or alternatively, Motion for Summary Judgment ("Defendant's Motion") (Dkt. Entry #17), as identified below.

Plaintiff objects to two pieces of evidence proffered by Defendant. First, Plaintiff objects to and seeks to strike evidence of Plaintiff's LSAT performance articulated in a reference to his "percentile" score on the exam, which lacks relevance under Fed. R. Evid. 401 and 402 and is submitted without reference to "particular parts of materials in the record" as required under Fed. R. Civ. Proc. 56(c)(1)(A).

Second, Plaintiff objects that certain conclusory statements contained in Defendant's Supporting Affidavit constitute hearsay, and are not based on the personal knowledge of the declarant and/or lack foundation, in violation of Fed. R. Civ. Proc. 56(e) and Fed. R. Evid. 801, 802.

II. Argument

A Plaintiff opposing a Defendant's motion for summary judgment may move to strike inadmissible evidence in connection with its opposition. Wiley v. United States, 1993 U.S. Dist. LEXIS 3805 (S.D. Ohio Mar. 12, 1993) (*Citing Klingman v. Nat. Indem. Co.*, 317 F.2d 850, 854 (7th Cir. 1963) ("[a] party must move to strike an affidavit that violates Rule 56(e); if he fails to do so, he will waive his objection and in the absence of 'a gross miscarriage of justice,' the court may consider the defective affidavit.")).

Alternatively, a party may simply object to the evidence and seek a ruling on such objections at the hearing on the motion for summary judgment. Fed. R. Civ. Proc.

56(c)(2). Plaintiff hereby moves to strike certain evidence as inadmissible, or alternatively, requests that the Court sustain its objections to the evidence.

A. ASSERTIONS IN THE DEFENDANT'S MOTION THAT PLAINTIFF SCORED IN THE 4th AND 7th PERCENTILE ON THE LAW SCHOOL ADMISSION TEST (LSAT) SHOULD BE STRICKEN

Defendant argues in their Motion that Plaintiff scored in the 4th and 7th Percentile on the Law School Admission Test (LSAT) (Dkt. Entry #17, ¶3). This evidence is inaccurate, irrelevant, and inadmissible --- and furthermore was offered for an improper purpose to harass, embarrass, or cause emotional distress to Plaintiff. The claim in the instant matter relates to whether or not the LSAT discriminates against the blind and visually impaired. (Dkt. Entry #15, ¶9) (“In Short the American Bar Association mandates that law schools force blind and visually impaired applicants to take a discriminatory test in violation of the Americans with Disabilities Act. The idea that a blind applicant be forced to draw pictures as a condition of applying to law school is absurd, unwarranted, and at variance with long-standing law.”).

Fed. R. Evid. 401 defines relevant evidence as evidence “[h]aving any tendency to make the existence of any fact that is of **consequence to the determination of the action** more probable or less probable than it would be without the evidence.” (emphasis added). Evidence which is not “relevant” under Fed. R. Evid. 401 is deemed inadmissible. Fed R. Evid. 402. The question is therefore whether the Plaintiff’s LSAT score and percentile (albeit inaccurately reported) are of consequence to the determination of the action. Because the instant matter asserts that the test is discriminatory on its face to the blind and visually impaired, the Plaintiffs individual performance on the examination is not relevant to the inquiry of whether forcing blind and visually impaired applicant’s to

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draw pictures is a discriminatory act. Because evidence of the Plaintiff's performance on the examination is not of "consequence to the determination of the action," evidence of his performance on the exam, both as a numerical score and percentile ranking should be stricken from the record.

Additionally, Defendant's Motion contains an assertion that "Plaintiff admittedly scored 133 and 136 out of 180 on the LSAT, which would place his performance in the bottom 4th and 7th percentile, respectively, of all applicants who took the LSAT under standard testing conditions from June 2008 to February 2011." (Dkt. Entry #17, ¶ 3). Conspicuously lacking from the Defendant's Motion is a reference to such information contained in the record or attached to their motion or brief. A party moving under Fed. R. Civ. Proc. 56 for summary judgment must cite "[t]o particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials;..." Fed R. Civ. Proc. 56(c)(1)(A). Here no such supporting information is cited to and thus the evidence is not admissible and must be stricken.

As we will now see, Fed R. Civ Proc. 56(c)(1)(A) provides an essential safeguard against the court erroneously considering incorrect information in connection with a motion for summary judgment. The reason Defendant has failed to cite supporting information in the record verifying that the Plaintiff scored in the 4th and 7th Percentile is because the Defendant cannot support such an assertion. Plaintiff did not receive an LSAT percentile as he was administered the LSAT in an accommodated setting under non-standard time conditions and thus was informed by the Law School Admission

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Council that “percentile ranks of nonstandard-time scores are not available and will not be reported.” (**Exhibit A**, Declaration of Plaintiff Angelo Binno, ¶ 2). Furthermore, even the LSAC website, which is public and thus available to the Defendant, clearly indicates that percentile scores for applicants such as the Plaintiff do not exist. (**Exhibit B**, Printout from the LSAC Website, ¶ 2).

Given that the creator of the LSAT feels it improper to assign a percentile ranking to applicants such as the Plaintiff, it is questionable why the Defendant would chose to superimpose the Plaintiff’s performance on a percentile scale that is made up of people, who unlike the Plaintiff, can see when being asked to draw pictures on the exam. Perhaps the Defendant, given their unique and integral role in offering the LSAT, had some undisclosed manner of ascertaining the Plaintiff’s percentile ranking which is unknown to the Plaintiff; however, absent such a disclosure as is required under Fed R. Civ. Proc. 56(c)(I)(A), information that inaccurately characterizes Plaintiff’s LSAT score as being in the 4th and 7th percentile, when in fact no such percentile score existed, must be stricken.

B. PORTIONS OF THE AFFIDAVIT SUBMITTED IN SUPPORT OF DEFENDANT’S MOTION ARE NOT BASED ON PERSONAL KNOWLEDGE OR LACK FOUNDATION AND SHOULD BE STRICKEN

Federal Rule of Civil Procedure 56(c)(4) requires that “An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.” However, once a declarant strays from his “personal knowledge,” his testimony is subject to being stricken in whole or in part. Siple v. Sullivan, 1999 U.S. App. LEXIS 26472 (6th Cir. Ohio Oct. 14, 1999) (“Rule 56(e)

requires that affidavits that are used in support of summary judgment must be based on personal knowledge, set forth admissible evidence, and show that the affiant is competent to testify. Furthermore, we may not consider hearsay evidence on summary judgment.”

Plaintiffs object to the following assertions in the declarations submitted in support of the Defendant’s Motion for the reasons set forth below:

Declaration of ABA Consultant Hulett H. Askew in support of Defendant’s Motion to Dismiss or in the alternative Motion for Summary Judgment (Dkt. Entry #17):

1. Page 2, Para. 5: Askew testifies to the history of the examination requirement imposed by the ABA Council of the Section of Legal Education and Admission to the Bar (“the council”). Askew does not testify to any facts which indicate he is a member of the Council or has knowledge of its actions beyond his role as a “consultant” to the ABA, and thus his testimony is not based on his personal knowledge and is also hearsay. Fed. R. Civ. Pro. 56(e); Fed. R. Evid. 602, 801, 802.
2. Page 3, Para. 6: Askew testifies that the Standards published by the Council prohibit admission policies which preclude admission based on disability. The Standards themselves are the best evidence, not the testimony of a “consultant.”
3. Page 3, Para 7: Askew testifies to the application of the Standards by ABA approved law schools and further testifies to specific admissions policies at unnamed law schools. Askew testifies to no facts to suggest he has personal knowledge of these policies as a “consultant” to the ABA. Furthermore, the testimony is hearsay. Fed. R. Civ. Pro. 56(e); Fed. R. Evid. 602, 801, 802.

4. Page 3, Para 8: Askew testifies that the Standards published by the Council do not “prescribe the weight” that schools must place on the examination score of an applicant. The Standards themselves are the best evidence, not the testimony of a “consultant.”
5. Page 4, Para 9: Askew testifies that the LSAT is published by a separate entity, the Law School Admission Council (“LSAC”) and that there is no affiliation between the LSAC and the ABA. Askew testifies to no facts to demonstrate that he has personal knowledge of the relationship between the LSAC and ABA and the testimony is also hearsay. Fed. R. Civ. Pro. 56(e); Fed. R. Evid. 602, 801, 802.
6. Page 4, Para 10: Askew testifies that neither the ABA nor the Council publishes an admission test for law school applicants nor do they establish any specific requirements for the content of an admission test. Askew testifies to no facts to demonstrate that he has personal knowledge of the ABA or Council’s actions in reviewing admission tests and the testimony is also hearsay. Fed. R. Civ. Pro. 56(e); Fed. R. Evid. 602, 801, 802.
7. Page 4, Para 11: Askew testifies that the Council has no role in processing applications to take the LSAT. Askew testifies to no facts to demonstrate that he has personal knowledge of the ABA or Council’s involvement in the LSAT registration process and the testimony is also hearsay. Fed. R. Civ. Pro. 56(e); Fed. R. Evid. 602, 801, 802.
8. Page 4, Para 11: Askew testifies that the LSAC is the sole entity responsible for the administration and scoring of the exam and that the Council is not involved.

Askew testifies to no facts to demonstrate that he has personal knowledge of the scoring or administration of the LSAT and the testimony is also hearsay. Fed. R. Civ. Pro. 56(e); Fed. R. Evid. 602, 801, 802.

9. Page 4, Para. 12: Askew testifies that the LSAC is the sole entity responsible for reviewing and granting requests for accommodations on the LSAT and that the Council is not involved. Askew testifies to no facts to demonstrate that he has personal knowledge of the review process for granting accommodations on the LSAT and the testimony is also hearsay. Fed. R. Civ. Pro. 56(e); Fed. R. Evid. 602, 801, 802.

III. Conclusion

WHEREFORE, Plaintiff prays that this Honorable Court sustain the above objections, strike the related evidence from the record, and grant such further relief as the Court deems just and proper.

Respectfully submitted,



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Dated: October 3, 2011

I hereby certify that on October 3, 2011, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system, which will send notice of such filing to all counsel of record.

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