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

ANGELO BINNO,

Plaintiff,

Honorable Denise Page Hood

-vs-

Case 2:11-cv-12247

THE AMERICAN BAR ASSOCIATION,

Defendant.

THE SAM BERNSTEIN LAW FIRM
Richard H. Bernstein (P58551)
Michael J. Blau (34834)
31731 Northwestern Hwy., Ste. 333
Farmington Hills, MI 48334
Phone: (248) 737-8400
Email: rbernstein@sambernstein.com
mblau@sambernstein.com

Attorneys for Plaintiff

DICKINSON WRIGHT PLLC
David R. Deromedi (P42093)
Allyson A. Miller (P71095)
500 Woodward Ave., Ste. 4000
Detroit, MI 48226
Phone : (313) 223-3500
Email: dderomedi@dickinsonwright.com
amiller@dickinsonwright.com

Peter H. Webster (P48783)
2600 W. Big Beaver Rd., Ste. 300
Troy, MI 48084
Phone: (248) 433-7200
Email: pwebster@dickinsonwright.com

Attorneys for Defendant

RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION TO STRIKE AND OBJECTIONS TO EVIDENCE SUBMITTED IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS OR, ALTERNATIVELY, MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

QUESTION PRESENTED

1. Should the Court deny as moot Plaintiff's objections to the reference in the ABA's brief to Plaintiff's LSAT scores and the comparative percentile rankings of applicants who took the same tests under standard testing conditions where the ABA has agreed to withdraw the reference even though those facts are relevant and supported by record evidence?

   The ABA Answers: "YES"

2. Should the Court deny Plaintiff's objections to certain statements made by Hulett Askew in the declaration filed in support of the ABA's Motion for Summary Judgment where those statements were made based on personal knowledge and Plaintiff's objections go to their weight rather than their admissibility?

   The ABA Answers: "YES"

CONTROLLING OR MOST APPROPRIATE AUTHORITY

1. FED. R. EVID. 401
2. FED. R. EVID. 402
3. FED. R. CIV. P. 56(c)(4)

I. INTRODUCTION

The Court should deny Plaintiff Angelo Binno's ("Plaintiff") Motion to Strike because (1) Defendant American Bar Association (the "ABA") is willing to withdraw the reference in its brief to Plaintiff's LSAT scores and the comparative percentile rankings of applicants who took the same tests under standard testing conditions even though those facts are relevant and supported by record evidence, and (2) the statements made by Hulett Askew in his Declaration filed in support of the ABA's Motion for Summary Judgment were made based on personal knowledge and Plaintiff's objections to them go to their weight rather than their admissibility.

II. ARGUMENT

A. The ABA Will Agree To Withdraw The Reference In Its Brief To Plaintiff's LSAT Scores And Comparative Percentile Rankings.

Plaintiff's claim that his LSAT scores and the comparative percentile rankings of applicants who took the same tests under standard testing conditions are irrelevant and inaccurate is wholly without merit. The fact that Plaintiff pleaded his own "poor performance on the LSAT" as the reason that he could not attain admission to law school, (Dkt. Entry #15 at ¶¶24, 62), cuts against this argument. Indeed, Plaintiff's entire theory of discrimination rests on his alleged inability "to competitively complete significant portions of the examination using the methods that are required of ***all*** test takers," including his sighted peers. (Dkt. Entry #15 at ¶¶52, 64) (emphasis added). Therefore, his performance on the LSAT, including reference to the performance of those who took the same test under standard testing conditions, is "of consequence to the determination of th[is] action" so as to be relevant and admissible under Rules 401 and 402. *See* FED. R. EVID. 401-402.

Moreover, the ABA's statement 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 at 3 n. 1), is accurate. In an interview with the Detroit Legal News, Plaintiff reported that he scored 133 and 136 out of 180 on the LSAT. (**Exhibit A**, 7/29/2011 Detroit Legal News Article). According to the LSAT Percentile Tables, those with a score of 133 and 136 who took the LSAT under standard testing conditions from June 2008 to February 2011 ranked in the 4th and 7th percentile, respectively. (**Exhibit B**, LSAT Percentile Tables). The ABA never claimed that Plaintiff actually received a LSAT percentile ranking; it only referenced Plaintiff's scores with those of the test takers who allegedly could competitively complete the exam.

However, because these facts are not essential for the ABA to prevail on its Motion to Dismiss or, Alternatively, Motion for Summary Judgment, the ABA will agree to strike the reference to Plaintiff's LSAT scores and the comparative percentile rankings in footnote 1 of its brief.[1]

B. The Declaration Of Mr. Askew Is Admissible Evidence.

Plaintiff's "objections" to certain statements made by Hulett H. Askew in his declaration filed in support of the ABA's motion for summary judgment are likewise without merit. Plaintiff's objection that the "Standards themselves are the best evidence," (Dkt. Entry #19 at 6-7), does not make Mr. Askew's testimony regarding the Standards inadmissible. Plaintiff also

---

[1] Prior to Plaintiff's filing of this Motion, the ABA had offered to withdraw its reference in footnote 1 to the comparative percentile rankings of applicants who took the same tests under standard testing conditions based on its counsel's understanding from a conversation with Plaintiff's counsel that this was the only fact that Plaintiff was objecting to. (**Exhibit C**, Letter from P. Webster). Plaintiff filed this Motion before the ABA's counsel could respond to Plaintiff's counsel's letter informing the ABA that its proposed solution did not entirely resolve Plaintiff's objections to footnote 1 of the ABA's brief. Counsel for Plaintiff and the ABA subsequently engaged in good faith, but ultimately unsuccessful, efforts to resolve this issue before the deadline in which to file a response to Plaintiff's Motion to Strike.

fails to explain how Mr. Askew's statements are inadmissible hearsay. None of the statements made by Mr. Askew are out-of-court statements offered to prove the truth of the matter asserted. *See* FED. R. EVID. 801(c). It appears that Plaintiff's hearsay objection is simply a restatement of his objection and claim that Mr. Askew's statements are not based on personal knowledge.

Mr. Askew, however, clearly attested in his declaration that "[t]he information contained in this affidavit is based on my personal knowledge." (Dkt. Entry #17-3 at ¶1). Mr. Askew further attested that he is familiar with the Standards for Approval of Law Schools issued by the ABA Council of the Section of Legal Education and Admissions because of his duties as Consultant on Legal Education for the ABA. (*Id.* at ¶2). As Consultant on Legal Education, Mr. Askew directs the ABA's program of accrediting law schools and, together with other persons at the ABA, is responsible for assuring that requirements relating to the accreditation process are met. (**Exhibit D**, Supplemental Affidavit of Hulett H. Askew at ¶¶7-9). Mr. Askew represents the Council of the Section of Legal Education and Admissions to the Bar when dealing with the U.S. Department of Education. (*Id.* at ¶8). He supports the Officers and Council of the Section of Legal Education and Admissions to the Bar in policy formulation, budget adoption, and the administration of the accreditation program. (*Id.*). Mr. Askew also supports the committees and projects of the Section, especially those that relate directly to accreditation matters, such as the Accreditation Committee and the Standards Review Committee. (*Id.*). Thus, contrary to Plaintiff's assumptions, Mr. Askew's position of "Consultant" is not a limited transitory role with the ABA; Mr. Askew is directly employed by the ABA as the full-time Consultant on Legal Education, (Dkt. Entry #17-3 at ¶2), and has been since 2006, (**Exhibit D** at ¶2). In that role, Mr. Askew is one of the most knowledgeable persons on ABA accreditation matters. Plaintiff's objections seem to challenge the weight to be given to Mr. Askew's statements, not their

admissibility. Accordingly, they should be disregarded, particularly in light of the fact that Plaintiff has offered no evidence to rebut the truth of Mr. Askew's statements so as to defeat summary judgment of his claims. *See, e.g., Bowers v. Burnett*, Case No. 1:08-cv-469, 2009 U.S. Dist. LEXIS 130756, at *15 n. 3 (W.D. Mich. July 27, 2009) (**Exhibit E**) (rejecting plaintiff's objection that statement made by defendant in affidavit was not based on personal knowledge where defendant was in a position to know the contested fact by virtue of his job duties and plaintiff offered no contrary evidence).

III. CONCLUSION

For all of these reasons, the ABA respectfully requests that the Court deny Plaintiff's Motion to Strike in its entirety.

Respectfully Submitted,

DICKINSON WRIGHT PLLC

By: /s/Allyson A. Miller
David R. Deromedi (P42093)
Allyson A. Miller (P71095)
500 Woodward Ave., Ste. 4000
Detroit, MI 48226
Phone : (313) 223-3500
Email: dderomedi@dickinsonwright.com
amiller@dickinsonwright.com

Peter H. Webster (P48783)
2600 W. Big Beaver Rd., Ste. 300
Troy, MI 48084
Phone: (248) 433-7200
Email: pwebster@dickinsonwright.com

Dated: October 17, 2011

Attorneys for Defendant

I hereby certify that on October 17, 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.

/s/Allyson A. Miller (P71095)
DICKINSON WRIGHT PLLC
500 Woodward Avenue, Suite 4000
Detroit, Michigan 48226
(313) 223-3500
amiller@dickinsonwright.com

DETROIT 50321-1 1221666v3