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

ANGELO BINNO,

Plaintiff,

Hon. Denise Page Hood

-vs-

Case No. 2:11-cv-12247

THE AMERICAN BAR ASSOCIATION,

Defendant.

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REPLY BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT OR, ALTERNATIVELY, MOTION FOR SUMMARY JUDGMENT

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I. ARGUMENT

In his Response, Plaintiff Angelo Binno ("Plaintiff") attempts to distract the Court from the simple fact that he has sued the wrong entity. Plaintiff sued an entity that did not draft or publish the allegedly discriminatory content of the LSAT; did not administer the test so as to have any control over its format or how it is given; and did not review, or have the authority to grant, requests for accommodations regarding the LSAT. Plaintiff lacks both standing and a statutory basis under the ADA to bring a discrimination claim against Defendant American Bar Association (the "ABA"). Accordingly, the Court should dismiss Plaintiff's claims.

A. Plaintiff Lacks Standing To Bring His Claims Against The ABA.

The United States Supreme Court has repeatedly recognized that the causation and redressability elements of standing are "'substantially more difficult' to establish" where, as here, the plaintiff's claimed injury arises indirectly from a restriction allegedly imposed upon a third party not before the court. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992); *Allen v. Wright*, 468 U.S. 737, 758 (1984); *Warth v. Seldin*, 422 U.S. 490, 505 (1975). Plaintiff attempts to distinguish this authority by arguing that, unlike the unsuccessful plaintiffs in *Lujan* and *Warth*, Plaintiff has suffered an "actual or imminent" injury -- his inability to gain admission to an ABA-accredited law school because of the claimed requirement that he take an allegedly discriminatory test. (Dkt. Entry #21 at 6-9). This is non-sensical, though, because the ABA has not claimed that Plaintiff failed to sufficiently plead an injury in fact. The ABA challenged Plaintiff's lack of standing based on his failure to allege such facts necessary to prove either causation or redressability. For this reason, Plaintiff's reliance on *Ne. Florida Chp. of Assoc. Gen. Contractors of Am.*, 508 U.S. 656 (1993) and *Turner v. Fouche*, 396 U.S. 346 (1970) -- cases which addressed whether a plaintiff must show that he would have received the ultimate benefit in order to establish an injury in fact -- is misplaced. (Dkt. Entry #21 at 6-8).

In claiming that his alleged injury is "fairly traceable" to the ABA's admission test requirement, Plaintiff ignores that the law schools to which he applied could have sought a variance from that requirement under Standard 802 for purposes of accreditation. (**Exhibit A**, ABA Standards, Standard 802, p. 47). Neither Plaintiff's Complaint nor the affidavit submitted in support of his Response contains any allegation that a law school made such a request and was denied by the ABA. (Dkt Entry #15; Dkt. Entry #21-2). Thus, the Court cannot reasonably infer that Plaintiff's inability to gain admission to law school because of the alleged requirement that he take the LSAT is "fairly traceable" to the challenged action of the ABA, rather than the result of the law schools' decision to require that applicants take the test as a prerequisite for admission independent of any accreditation implications.

Plaintiff claims that he has met the "redressability" standing requirement because he "need not show that he will certainly gain admission to an accredited law school in the absence of the ABA's LSAT requirement." (Dkt. Entry #21 at 10-11). But, again, this is a non-sequitur. The ABA has not claimed that Plaintiff must establish that he otherwise would be admitted to law school. According to Plaintiff, his alleged injury is that he cannot gain admission to law school because he is required to take the LSAT -- an allegedly discriminatory test -- as a prerequisite to admission. (*See id*. at 7-8). To establish that this injury is "likely" to be redressed by a favorable decision against the ABA, Plaintiff must allege that, in the absence of the ABA's accreditation standard, law schools would not require applicants to take the LSAT as a prerequisite to admission. Plaintiff did not do so in either his Amended Complaint or Response because any such allegation would be speculative. Accordingly, Plaintiff also has failed to establish redressability because, even if the Court were to enjoin application of the ABA's admission test requirement, this would not remedy Plaintiff's alleged injury as law schools

would still be free to require that their applicants take the LSAT as a prerequisite to admission. *See, e.g.*, *Lujan*, 504 U.S. at 568-71.

B. Plaintiff's Title III Discrimination Claim Fails As A Matter Of Law.

Plaintiff's Title III discrimination claim fails as a matter of law because Plaintiff simply has not alleged sufficient facts to establish that the ABA "offers" the LSAT. 42 U.S.C. § 12189. Rather than "creat[ing] a new *out of thin air* test" to determine whether a person "offers" an examination within the meaning of Section 309 of the ADA, (Dkt. Entry #21 at 14), the ABA has simply followed a fundamental canon of statutory construction[1] and the lead of the Supreme Court[2] and the Sixth Circuit[3] in interpreting words according to their plain, ordinary meaning, and consulting the dictionary for guidance where no statutory definition exists. (Dkt. Entry #17 at 11) (dictionary defines the word "offer," when used in this context, as "to make available" or to "afford"). Plaintiff would have the Court ignore this well-established canon in favor of interpreting the word "offer" as broadly as possible, even to the point of rendering it meaningless.

The fact that the ABA allegedly "exercise[s] control in the requirement that the [LSAT] be given, and play[s] a central role in reviewing the contents of the examination to deem it valid and reliable" under Standard 503, (Dkt. Entry #15 at ¶ 49), does not "[s]urely" mean that the ABA exercises any control in how the LSAT is formatted and administered, as Plaintiff now baldly claims in his Response, (Dkt. Entry #21 at 13). One does not follow from the other. The

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[1] See *Franklin v. Kellogg Co.*, 619 F.3d 604, 614 (6th Cir. 2010) ("A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.").

[2] See, e.g., *Ransom v. FIA Card Servs., N.A.*, __ U.S. __, 131 S.Ct. 716, 724 (2011) (consulting dictionaries to determine the plain, ordinary meaning of "applicable").

[3] See, e.g., *Franklin*, 619 F.3d at 614 (consulting dictionaries for the plain meaning of "clothes").

Court must not accept this unwarranted factual inference when determining whether Plaintiff has stated a "plausible" claim for relief. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

Both *Bonnette v. D.C. Court of Appeals, et al.*,[4] and *Elder v. Nat'l Conf. of Bar Examiners, et al.*,[5] cases that Plaintiff relies on to argue that the question of whether the ABA "offers" the LSAT is inappropriate for resolution under Rule 12(b)(6), are inapposite. The defendant in both cases (the National Conference of Bar Examiners ("NCBE")) claimed that it did not "offer" the test at issue (the Multistate Bar Exam) simply because it did not "administer" it. Both courts denied the NCBE's motion to dismiss because the plaintiffs alleged that the NCBE develops the test and controls the format in which it is offered by test administrators by requiring them to follow certain protocols to protect the integrity of its test. Unlike in *Bonnette* and *Elder*, Plaintiff's Amended Complaint contains no allegation that the ABA has ***any*** control whatsoever over the content or format of the LSAT itself or the place or manner in which it is administered. Without such alleged facts, Plaintiff's Title III claim fails as a matter of law.

C. Plaintiff's Title V Interference Claim Fails As A Matter Of Law.

Because Plaintiff cannot establish that the ABA "offers" the LSAT or is otherwise subject to Title III with respect to the LSAT, he cannot prove that the ABA is subject to Title V, and his interference claim likewise fails as a matter of law. See *Stern v. Cal. State Archives*, 982 F. Supp. 690, 693 (E.D. Cal. 1997); *Van Hulle v. Pac. Telesis Corp., et al.*, 124 F.Supp. 2d 642, 644-47 (N.D. Cal. 2000). A plaintiff's remedies under Title V depend on whether the complained-of action occurred with respect to employment, public services, or public accommodations. *Stern*, 982 F. Supp. at 693. Plaintiff attempts to distinguish *Stern* because

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[4] No. 11-1053, 2011 U.S. Dist. LEXIS 75076 (D. D.C. July 13, 2011).

[5] No. C 11-00199 SI, 2011 U.S. Dist. LEXIS 15787 (N.D. Cal. Feb. 16, 2011).

Stern involved a Title V retaliation claim, rather than an interference claim. (Dkt. Entry #21 at 17). But Plaintiff does not explain why this difference renders *Stern*'s holding inapplicable. *Stern*'s holding was based on its statutory analysis of Section 503(c), which refers plaintiffs alleging either retaliation or interference claims to the remedial provisions of the Title that corresponds to the conduct at issue. 42 U.S.C. § 12203(c). Furthermore, although Plaintiff relies on *Shotz v. City of Plantation, Fla*., 344 F.3d 1161 (11th Cir. 2003), as authority that a "person" can still be liable under Title V even if it is not otherwise subject to Titles I, II, or III, that case is neither controlling nor persuasive. The vast majority of courts to have addressed this issue have found contrary to *Shotz*. (Dkt. Entry #21 at 17 & n. 13).

Plaintiff does not allege that the ABA acted with discriminatory animus in allegedly interfering with his rights under the ADA. Such animus, however, is an essential element of his Section 503(b) interference claim. See *Youngblood v. Prudential Ins. Co*., 706 F.Supp. 2d 831, 839-40 (M.D. Tenn. 2010); *Brown v. City of Tucson*, 336 F.3d 1181, 1191 (9th Cir. 2003). Plaintiff does not even attempt to distinguish *Youngblood* or *Brown* in any meaningful way. Instead, Plaintiff curiously discusses *Bingham v. Oregon Sch. Activities Assoc*., 24 F. Supp.2d 1110 (D. Or. 1998) -- a case that neither addressed this specific issue nor even involved a Section 503(b) interference claim, as such. Because Plaintiff did not allege that the ABA acted with discriminatory animus, his interference claim fails as a matter of law.

Respectfully Submitted,

DICKINSON WRIGHT PLLC

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Dated: October 31, 2011

Attorneys for Defendant

I hereby certify that on October 31, 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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