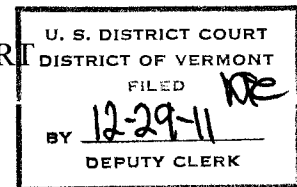


UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT



DEANNA L. JONES,

Plaintiff,

v.

NATIONAL CONFERENCE OF BAR
EXAMINERS,

Defendant.

Civil Action

Docket No. 5:11-CV-00174-CR

AMENDED COMPLAINT

INTRODUCTION

1. Plaintiff Deanna L. Jones brings this action against the National Conference of Bar Examiners (“NCBE”), which owns, develops, and offers the Multistate Professional Responsibility Examination (“MPRE”), the Multistate Performance Test (“MPT”), and the Multistate Bar Examination (“MBE”). Plaintiff brings this action for violations of the Americans with Disabilities Act of 1990, as amended (“ADA”), 42 U.S.C. § 12101, *et seq.*

2. The Vermont Board of Bar Examiners (“VBBE”) requires applicants for admission to the bar successfully pass the MPRE and the Vermont Bar Examination, unless they are attorneys licensed in other jurisdictions who possess the qualifications for admission by motion. The Vermont Bar Exam consists of (1) the MBE, a 200-item, six-hour multiple choice test, (2) the MPT, a two-question, three-hour essay test, and (3) the Vermont Essay Exam, a four-question, four-hour essay test.

3. The MPRE, MPT, and MBE are developed, owned, and disseminated by NCBE. NCBE contracts with ACT, Inc. (“ACT”) to administer the MPRE three times annually, as

well as to evaluate requests for accommodations on the MPRE. VBBE administers the Vermont Bar Exam twice each year, in July and February. VBBE contracts with NCBE to use the MBE and MPT as parts of the Vermont Bar Exam, and conducts its own evaluation of requests for accommodations from examinees.

4. Ms. Jones is a legally blind and learning-disabled law school student who registered to take the August 2011 MPRE and is in the process of seeking accommodations for the July 2012 Vermont Bar Exam. To accommodate her disabilities on the MPRE, Ms. Jones timely asked ACT, NCBE, and VBBE to allow her to take the required examinations on a computer equipped with Kurzweil 3000 (“K3000”) and ZoomText screen access software. Screen access software programs, also called “screen readers,” magnify and/or vocalize text, offer a variety of features that allow easy navigation within a text, and enable the speed, volume and timbre of vocalization to be controlled by the user for maximum comprehension and retentive effect. For blind individuals who have not mastered braille, screen access software is the principal method for gaining access to textual information. Ms. Jones uses these auxiliary aids in combination as her primary reading method. She has taken all her law school exams, and completed all her law school reading assignments, using K3000 and ZoomText in combination.

5. On or about June 17, 2011, Ms. Jones applied to take the August 2011 administration of the MPRE and requested that ACT and NCBE accommodate her blindness and learning disability by permitting her to use K3000 and ZoomText screen access software on the test. Absent a court order, ACT and NCBE refused to allow Ms. Jones to take the MPRE on a computer equipped with K3000 and ZoomText, and other auxiliary aids, for the August 2011 administration.

6. Ms. Jones filed suit and sought a preliminary injunction requiring ACT and NCBE to permit her to take the MPRE using K3000 and ZoomText. ACT was subsequently dismissed from the lawsuit, having agreed to obey any injunction addressed to NCBE. On August 2, 2011, Ms. Jones was granted a preliminary injunction requiring NCBE to provide the MPRE to her with K3000 and ZoomText as accommodations. Ms. Jones then took and passed the examination. NCBE has appealed the court's order granting the preliminary injunction.

7. On or about September 7, 2011, Ms. Jones applied to take the July 2012 administration of the Vermont Bar Exam. She requested that VBBE accommodate her blindness and learning disability by permitting her to take the Vermont Bar Exam using K3000 and ZoomText screen access software, as well as Microsoft Word.

8. On or about December 15, 2011, VBBE advised Ms. Jones that it granted all of her requested accommodations for the July administration of the MBE.

9. On or about December 19, 2011, VBBE notified NCBE of its determination that "the requested accommodation is reasonable and that the use of a computer with the [K3000, ZoomText, and Microsoft Word] is necessary to make all portions of the bar exam accessible to Ms. Jones." VBBE requested that NCBE provide a computer loaded with an electronic copy of the MBE, Microsoft Word, ZoomText, and K3000. Without waiving its right to contest the charge, VBBE agreed to pay what it understood to be the \$5,000 fee that NCBE charges states for providing the MBE in electronic format. Ms. Jones is now in the process of submitting the materials NCBE requires for applicants seeking accommodations on the MBE.

10. Typically, NCBE does not make the MBE available in an electronic format

absent a court order. In light of NCBE's pending appeal, the parties filed a stipulation to partial stay on September 8, 2011. In this stipulation, NCBE agreed that if, prior to May 1, 2012, its appeal either has not been decided or Ms. Jones has prevailed, it would stipulate to a preliminary injunction permitting her to take the MBE in July 2012 on a laptop equipped with K3000 v. 11.05 (or later version), ZoomText v. 9.19.1.33 (or later version), and Microsoft Word 2003 (or later version). In the event that NCBE prevails on appeal, the parties agreed to an expedited hearing on any issues remaining after appeal, as well as on any motion for preliminary injunction filed by Ms. Jones regarding the July 2012 MBE.

11. NCBE's refusal to allow Ms. Jones her requested accommodations absent a court order violates her rights under the ADA and threatens her with irreparable harm to her career, to her professional development, and to her right to take the MPRE and MBE without being subjected to unlawful discrimination and the stigma and humiliation that result from such discrimination. Without injunctive relief from the Court, Ms. Jones could only take the MPRE and MBE at a competitive disadvantage to her peers that would unlawfully burden her attempt to obtain her license to practice law. Ms. Jones has no adequate remedy at law.

12. Ms. Jones seeks declaratory and injunctive relief to compel NCBE to provide the MPRE and MBE in a format that allows her to use her primary reading method, to wit, in electronic format on a computer equipped with K3000 and ZoomText screen access software. Provision of the exams in this format is necessary to best ensure that Ms. Jones' results on the MPRE and MBE will accurately reflect her knowledge and understanding of established standards related to a lawyer's professional conduct rather than reflect her sensory disability. The alternative accommodations that NCBE routinely offer, such as an audio CD or a human reader, are insufficient in that they would deny Ms. Jones the opportunity to compete on an

equal basis.

JURISDICTION

13. This is an action for declaratory and injunctive relief brought pursuant to the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.* This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1343.

14. This Court has jurisdiction to issue injunctive relief and a declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202.

VENUE

15. Pursuant to 28 U.S.C. §§ 1391(b)(2) and 1391(c), venue is proper in the District in which this Complaint is filed because NCBE's discriminatory conduct is taking place within Vermont and because the events and omissions giving rise to this claim have occurred and are occurring within Vermont.

PARTIES

16. Plaintiff Deanna L. Jones, a resident of Middlesex, Vermont, is a student in her fourth and final year of the J.D. program at Vermont Law School. Like many of her peers, Ms. Jones planned to take the MPRE in August 2011, which allowed her to prepare for the exam without neglecting her school work during the semester or her preparation for the Vermont Bar Exam, which she plans to take in July 2012. Ms. Jones has been legally blind since she was five years old. Her blindness is caused by atypical retinitis pigmentosa with macular degeneration. This condition causes a degeneration of central vision, coupled with the loss of peripheral vision and night vision, and will eventually result in total blindness. Ms. Jones has also been diagnosed with a learning disability that significantly compromises the rate at which she reads and writes. She faces irreparable harm because NCBE refuses to

administer the MPRE and the MBE in a manner that will ensure that the results accurately reflect her aptitude and achievement level rather than her disability. Passing the MPRE and MBE is a requirement to secure a license to practice law in Vermont for anyone who, like Ms. Jones, is not licensed elsewhere.

17. Defendant National Conference of Bar Examiners is a multimillion-dollar corporation that owns, develops, and controls various tests relating to the licensing of law school students and graduates seeking admission to the bar. Its mission includes assisting bar admission authorities by providing standardized examinations for the testing of applicants for admission to the practice of law. NCBE is headquartered in Madison, Wisconsin, but offers the MPRE and MBE in most jurisdictions, including Vermont. NCBE determines the formats (print, braille, electronic document, etc.) in which the MPRE and MBE are offered and the accommodations that are available to examinees with disabilities. NCBE currently offers two examinations in electronic format to examinees with disabilities, the MPT and the Multistate Essay Examination, but it will not provide the MPRE or MBE in an electronic format absent a court order.

FACTUAL ALLEGATIONS

18. Plaintiff Deanna L. Jones has been legally blind since she was five years old. She is blind as a result of atypical retinitis pigmentosa with macular degeneration. Because of this condition, Ms. Jones cannot read standard print. She retains some residual vision, which enables her to see greatly magnified text, but cannot read enlarged text for a sustained period without suffering motion sickness and eye fatigue.

19. In 2000, Ms. Jones first had a learning evaluation, which led her clinician to conclude that she has a learning disability. This diagnosis was confirmed in March 2011.

Due to her learning disability, Ms. Jones has information processing weaknesses specific to visual processing speed and auditory attention and memory systems, as well as weaknesses in phonological decoding/encoding, grammar, and some aspects of higher level verbal reasoning. In combination, the characteristics of her learning disability significantly compromise her listening comprehension and reading comprehension, as well as the rate at which she reads and writes.

20. Since 2003, Ms. Jones has used the screen access software Kurzweil 3000 and ZoomText in combination to perform all academic and complex reading tasks. She developed this primary reading method in consultation with an assistive technology specialist, on the recommendation of her clinicians. K3000 reads aloud the text of an electronic document while highlighting the word and paragraph of text being read. While K3000 vocalizes the text, Ms. Jones uses ZoomText to magnify the text display onscreen to understand organizational elements, locate specific phrases or words she needs to repeat, and to place the text in a visual context. This reading method enables Ms. Jones to read fluently, independently and with automaticity, much as a sighted person reads print.

21. Ms. Jones completed one year of undergraduate education at Kutztown University in Kutztown, Pennsylvania. But she left this program in 1986 because her then-undiagnosed auditory memory deficiency, coupled with her blindness, made reading and retaining printed text too difficult to keep up in an academic program.

22. In 2003, after Ms. Jones was armed with assistive technology that made printed text accessible to her, Ms. Jones began her undergraduate studies at Vermont College of Union Institute & University. In college, Ms. Jones used her primary reading method, K3000 together with ZoomText, to complete all reading assignment and papers required by

the curriculum. The program did not require students to take examinations. Ms. Jones obtained her Bachelor of Arts degree in April 2007.

23. In 2008, Ms. Jones entered Vermont Law School. At Vermont Law School, Ms. Jones uses her primary reading method, K3000 and ZoomText, to take all examinations and complete all reading assignments. She is also permitted to take timed examinations with triple time and breaks every four hours. To date, Ms. Jones has completed 63 out of the required 87 semester hours, has a cumulative grade point average of 3.208, and is on schedule to graduate in May 2012.

24. Ms. Jones' rudimentary ability to read Braille materials falls far short of the Braille skills necessary to read complex legal materials, much less take an examination that tests her legal knowledge. She has also never used an audio CD to take an examination. Ms. Jones' experience with a human reader on the LSAT established that a human reader provides her with a reading facility substantially inferior to that which she can achieve with K3000 and ZoomText.

25. Using a human reader or audio CD to read the complex passages of text that comprise the MPRE would significantly decrease Ms. Jones' ability to read and comprehend that material. Those accommodations would not have the visual input that she requires to comprehend complex material and would not provide her with the automaticity, independent ability to navigate a document, controlled reading speed, visual context, and reading fluency that she relies upon when using K3000 and ZoomText.

26. On or about June 17, 2011, Ms. Jones timely submitted to ACT a request for accommodations for the August 2011 administration of the MPRE. Among other accommodations, Ms. Jones requested the use of a computer equipped with K3000 and

ZoomText screen access software to take the MPRE. Ms. Jones submitted all required documentation supporting her need for these accommodations.

27. On or about June 17, 2011, counsel for Ms. Jones, knowing that NCBE does not authorize ACT to make the MPRE available in an electronic format, inquired of counsel for NCBE whether it would undertake an individualized inquiry regarding the suitability of the accommodations requested by Ms. Jones, or whether NCBE planned to deny Ms. Jones' requested accommodations for the MPRE, following its established practice of denying requests to take the test with screen access software. On June 20, counsel for NCBE responded, and would not agree that NCBE would undertake an individualized inquiry as to Ms. Jones' accommodations request. Instead, NCBE's counsel indicated that ACT would handle Ms. Jones' request for accommodations. On June 27, 2011, counsel for Ms. Jones inquired of counsel for NCBE whether NCBE would authorize ACT to make available the accommodations Ms. Jones has requested. Counsel for NCBE replied that NCBE would not involve itself in ACT's response to Ms. Jones' request for accommodations.

28. On June 29, 2011, ACT denied Ms. Jones' request to take the MPRE on a computer equipped with K3000 and ZoomText and suggested that she consider unspecified alternative accommodations. Ms. Jones promptly replied, explaining that the alternatives that ACT routinely offers – Braille, magnified print, CCTV, human reader and audio CD – would not adequately address her disabilities, but that if ACT was proposing any other accommodations to respond before the close of business on June 30, 2011.

29. Ms. Jones filed suit and sought a preliminary injunction requiring ACT and NCBE to permit her to take the MPRE using K3000 and ZoomText. ACT was subsequently dismissed from the lawsuit, having agreed to obey any injunction addressed to NCBE. On

August 2, 2011, Ms. Jones was granted a preliminary injunction requiring NCBE to provide the MPRE to her with K3000 and ZoomText as accommodations. Ms. Jones then took and passed the examination. NCBE has appealed the court's order granting the preliminary injunction.

30. On or about September 7, 2011, Ms. Jones timely submitted a request for accommodations on the July 2012 administration of the Vermont Bar Exam to VBBE. She supplemented her application with supporting documentation from Vermont Law School and her treating professionals.

31. Ms. Jones requested to use a laptop computer equipped with WindowsXP, Word 2003 or later, ZoomText 9.19.1.33 Magnifier/Reader or later, and Kurzweil 3000 v. 11.05 or later, and various laptop peripherals. She also requested the opportunity to test the laptop with sample questions prior to the exam to ensure it is configured and functioning properly.

32. On or about December 15, 2011, VBBE granted all of the accommodations that Ms. Jones requested for the July administration of the MBE. It advised that it would inform NCBE of its determination that the use of a laptop with the requested software is a reasonable accommodation and necessary in order to make the Vermont Bar Examination accessible to Ms. Jones. Although it agreed to request an electronic copy of the MBE from the NCBE, it noted that the MBE is not currently available in an electronic format.

33. On or about December 19, 2011, VBBE notified NCBE of its determination that Ms. Jones's requested accommodations were reasonable and "that the use of a computer with [K3000, ZoomText, and Microsoft Word] is necessary to make all portions of the bar exam accessible to Ms. Jones." VBBE requested NCBE provide a computer loaded with an

electronic version of the MBE questions, Microsoft Word, ZoomText, and K3000. It also requested sample question so that the software can be tested prior to the exam. As it understood NCBE charges jurisdictions \$5,000 to provide this accommodation, without waiving any rights as to the propriety of the charge, VBBE agreed to pay the \$5,000 fee.

34. NCBE typically does not make the MBE available in an electronic format absent a court order. In light of NCBE's pending appeal, the parties filed a stipulation to partial stay on September 8, 2011. In this stipulation, NCBE agreed that if, prior to May 1, 2012, its appeal either has not been decided or Ms. Jones has prevailed, it would stipulate to a preliminary injunction permitting her to take the MBE in July 2012 on a laptop equipped with K3000 v. 11.05 (or later version), ZoomText v. 9.19.1.33 (or later version), and Microsoft Word 2003 (or later version). In the event that NCBE prevails on appeal, the parties agreed to an expedited hearing on any issues remaining after appeal, as well as on any motion for preliminary injunction filed by Ms. Jones regarding the July 2012 MBE.

35. Ms. Jones is and will continue to be significantly harmed by NCBE's refusal to offer her the MPRE and MBE so as to best ensure that the test results reflect that which the test is designed to measure rather than Ms. Jones' visual impairment and learning disability.

FIRST CAUSE OF ACTION

VIOLATION OF THE ADA

Plaintiff re-alleges and incorporates herein all previously alleged paragraphs of the complaint.

36. The term "disability" includes, with respect to an individual, a physical or mental impairment that substantially limits one or more of the major life activities of such individual. 42 U.S.C. § 12102(2)(A). Plaintiff Deanna L. Jones is an individual with a

disability within the meaning of 42 U.S.C. § 12102(2) and 28 C.F.R. §§ 35.104 and 36.104.

37. The ADA prohibits discrimination by private entities, including those that offer professional licensing examinations, such as NCBE.

38. The ADA requires private entities that offer standardized examinations “related to . . . applications, licensing, certification, or credentialing for . . . postsecondary education [or] professional . . . purposes” to do so in a “place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals.” 42 U.S.C. § 12189; 28 C.F.R. §36.309(a). NCBE is such an entity and the MPRE and MBE are examinations subject to this statute and regulation.

39. The regulation implementing this section of the ADA provides, *inter alia*, that a private entity that offers such examinations

must assure that . . . [t]he examination is selected and administered so as to best ensure that, when the examination is administered to an individual with a disability that impairs sensory, manual, or speaking skills, the examination results accurately reflect the individual’s aptitude or achievement level or whatever other factor the examination purports to measure, rather than reflecting the individual’s impaired sensory, manual, or speaking skills

28 C.F.R. § 36.309(b)(1)(i).

40. The ADA regulations covering examinations such as the MPRE and MBE require, *inter alia*, “adaptation of the manner in which the examination is given.” 28 C.F.R. § 36.309(b)(2). The entity offering the examination must, among other things, “provide appropriate auxiliary aids” unless the entity “can demonstrate that offering a particular auxiliary aid would fundamentally alter the measurement of the skills or knowledge the examination is intended to test or would result in an undue burden.” 28 C.F.R.

§ 36.309(b)(3).

41. Unless Ms. Jones takes the MPRE and MBE in an electronic format with Kurzweil 3000 and ZoomText screen access software, her results will not accurately reflect what the examination purports to measure, but will instead reflect her impaired sensory and processing skills.

42. NCBE's conduct constitutes an ongoing and continuous violation of the ADA and its supporting regulations. Unless restrained from doing so, NCBE will continue to violate the ADA. Unless enjoined, NCBE's conduct will continue to inflict injuries for which Plaintiff has no adequate remedy at law.

43. Unless the requested relief is granted, Ms. Jones will suffer irreparable harm in that she will be discriminated against and denied equal access to the MPRE and MBE, and be unlawfully burdened in seeking admission to the legal profession in Vermont.

44. The ADA authorizes injunctive relief as appropriate to remedy acts of discrimination against persons with disabilities. 42 U.S.C. § 12188(a)(1).

45. Ms. Jones is entitled to injunctive relief, as well as reasonable attorney's fees and costs.

WHEREFORE, Plaintiff request relief as set forth below.

RELIEF REQUESTED

Plaintiff prays for judgment as follows:

1. A declaration that Ms. Jones is entitled to take the MPRE and MBE using a computer equipped with screen access software and that NCBE, by denying this accommodation, offers the MPRE and MBE in a manner that discriminates against Ms. Jones as a person with a disability;

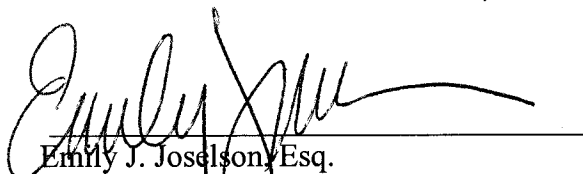
2. Preliminary and final injunctive relief requiring NCBE to provide Ms. Jones

the opportunity to take the August 2011 administration of the MPRE and the July 2012 administration of the MBE in an electronic format on a computer equipped with Kurzweil 3000 and ZoomText screen access software, as she has requested and to which she is entitled;

3. An award of Plaintiff's reasonable attorneys' fees and costs; and
4. Such other and further relief as the Court deems just and proper.

Dated at Middlebury, Vermont, this 27th day of December, 2011.

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