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NYS Assembly

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Collateral impacts of Covid-19

Standardized testing – exploring heretofore unthinkable approaches to test administration

- Widespread cancelling/postponement of tests
- LSAT-Flex: https://www.lsac.org/update-coronavirus-and-lsat/lsat-flex
- Remote AP exams – problematic software issues, leading students to have to re-take the exams; College Board went back to the drawing board and is now not offering a remote SAT, has added two dates in the fall for when students can take the SAT during the school day.
- ACT is offering extra dates in the fall and gave a socially distant ACT in June and will on July 18 in test centers in 45 states.
- USMLE as testing centers open/remain open. Competition for slots for all test center based tests will be more protracted as testing centers will have to operate at half capacity or less in order to socially distance.
- Bar Exams – Normally in July. NY is doing an in-person bar exam and law school grads are freaking out. NY has 19 states it requires 14-day advance quarantine before testing. Nationally, graduates are seeking diploma privilege, common in some other states.

1) Work study and on campus jobs
2) Local hiring in college towns – without students many local businesses- especially bars and restaurants – will close.
3) Lack of internships –many are now closed or under strict limitations, especially schools, medical facilities, event spaces, commercial offices, such as lawyers and accountants and architects, etc.
4) Impacts on mental health will be pervasive.
5) Overall economic impacts are already severe. Primary impacts:

- jobs – many industries will not be able to open for a year;
- rent – how can you pay your rent if your work is shut down and your boss can't pay salaries?;
- food insecurity is becoming protracted;
- health insurance – 4.5 million Americans lost health insurance because they lost their jobs.

SCOTUS: Title VII protects LGBTQ workers

Bostock v. Clayton County, Georgia, 2020 WL 3146686 (June 15, 2020) combined three cases;

- Bostock,
- Zarda v Altitude Express
- Stephens v RG and GR Harris Funeral Homes

Facts:

Nationally recognized child welfare advocate Gerald Bostock was fired by the County for “conduct unbecoming” after he joined a gay softball league.

Skydiving instructor Don Zarda was fired when he sought to calm a nervous female customer concerned about being strapped to a male skydiving instructor that he was gay.

Funeral home worker Aimee Stephens resented as a male when hired. 6 years later, she told her boss she planned to live and work full-time as a woman. She was fired.

Fired “because of sex”

- Each alleged they had been fired in violation of Title VII of the Civil Rights Act of 1964 which forbids discrimination because of, among other things, sex,
- 6-3 Opinion by Justice Gorsuch.
- Employers argued that “sex” means what it meant in 1964, in their words, “either male or female as determined by reproductive biology.”
- Employees argued that even in 1964, the term was broader, capturing more than anatomy, including norms regarding gender identity and sexual orientation.

Does “but for” mean “solely?’

- NO. Justice Gorsuch makes clear that there may be multiple “but for” causes.

- This means that a defendant cannot avoid liability just by citing to some other factor that contributed to the adverse employment action, so long as sex was one but for cause.

- Congress could have said “solely”. It did not. It amended the Civil Rights Act in 1991 to allow plaintiffs to prevail by showing that a protected trait was a “motivating factor” in the challenged employment action.

Categorical vs Individual discrimination

- Sometimes discrimination can be categorical, i.e., against a group (Frontiero, for example, discriminated against the military women by providing spouses with fewer dependent benefits than male servicemembers; in another case, women workers were forced to make larger pension fund contributions than men)

- But under Title VII must we consider whether the employer treats all members of a group less favorably?

No, the statute is clear…

According to the Court,

"The statute answers that question directly. It tells us three times—including immediately after the words "discriminate against"—that our focus should be on individuals, not groups: Employers may not "fail or refuse to hire or . . . discharge any *individual*, or otherwise . . . discriminate against any *individual* with respect to his compensation, terms, conditions, or privileges of employment, because of such *individual's* . . . sex." §2000e–2(a)(1) (emphasis added). And the meaning of "individual" was as uncontroversial in 1964 as it is today"

The bottom line

"The statute's message for our cases is equally simple and momentous: **An individual's homosexuality or transgender status is not relevant to employment decisions.** That's because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."

The Court won’t debate what Congress was thinking in 1964

“***But because nothing in our approach to these cases turns on the outcome of the parties’ debate***…” the court stated that “The question isn’t just what “sex” meant, but what Title VII says about it. Most notably, the statute prohibits employers from taking certain actions “because of ” sex.”

In other words, “the ordinary meaning of ‘because of ’ is ‘by reason of ’ or ‘on account of.’

“this means that Title VII’s “because of ” test incorporates the “ ‘simple’ ” and “traditional” standard of but-for causation,” which is established “whenever a particular outcome would not have happened “but for” the purported cause.”

“In other words, a but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause.”

Implications for disability cases

- 1. it's irrelevant what the employer might call its discriminatory practice or how they rationalize it – you can dress it up and put lipstick on it, but…
- 2. plaintiff's sex need not be the sole or primary cause for the employer's adverse action.
- 3. employer cannot escape liability by demonstrating that it treats males and females comparably as groups
- 4. multiple "but for" causes are perfectly possible, and common. This is critical in disability discrimination and retaliation cases.

Further implications

Equal Protection and sovereign immunity

- What equal protection category are people with disabilities? When accessing courts, intermediate or heightened, per Lane v Tennessee
- But everything else is cases by case basis, for employment, we know rational basis prevails.
- This is key in cases objected to on the basis of sovereign immunity because the classification relates to the whether the relief sought is congruent and proportional to the harm being redressed.
- In all likelihood, LGBTQ plaintiffs will be more protected that people with disabilities.

Still further…

Rehabilitation Act of 1974 requires that the discrimination be "solely by reason of" disability. I have argued that was not meant in a strict sense. But that is now somewhat muddied …

It seems likely that any person with a disability who was also gay or transgender would likely proceed on that basis and not on a disability (e.g.: gender dysphoria) analysis.

SCOTUS: DACA recipients will not be deported – at least for now.

This case came to the court from cases filed in three circuits challenging t he recission of DACA on Constitutional grounds and under the Administrative Procedure Act (APA), the 9th , the 2nd and the D.C. Circuit which were joined by the Supreme Court and heard together,

Regents of University of California v. Department of Homeland Security

NAACP v DHS

Martin Batalla Vidal, et al v DHS

Recap of Facts

In 2012, DHS announced an immigration program called Deferred Action for Childhood Arrivals (DACA), by which certain undocumented immigrants who entered the U.S. as children could apply for forbearance of removal. Those granted such relief were also eligible for work authorization and various federal benefits.

In 2014, DHS issued a Memorandum announcing an expansion of DACA to include Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA)

In June 2017, DHS rescinded the DAPA Memorandum (which had never gone into effect) and in September 2017, DHS Acting Secretary Elaine Duke issued a memorandum (Duke Memorandum) rescinding DACA and winding down the program over a period of 2 – 3 years.

Attorney General Jeff Sessions the issued a letter the day before the Duke Memorandum saying his thought DACA should suffer the same fate because in his opinion it was illegal.

The Duke Memorandum summarized the history of DACA and relied on the Sessions letter opining as to its illegality.

Within days, there were several lawsuits filed challenging the legality of the Duke Memorandum. 2 months later Sec'y Kirstjen Nielsen responded with a new memorandum (Neilson Memorandum)

Duke Memorandum

In 2014 a case was filed by 26 states led by Texas opposing DAPA and the expansion of DACA. A preliminary injunction barring implementation of both DAPA and the expansion of DACA was issued. The 5th Circuit affirmed.

The Duke Memorandum relied on the 5th Circuit decision and Sessions' letter.

Each District Court ruled for the plaintiffs; the DC District Court deferred ruling on the equal protection challenge holding that Duke's statements were conclusory. Nielsen's Memorandum followed.

Nielsen Memorandum

Neilson's Memorandum

Declined to disturb Duke's, and added her "understanding" of Duke's Memorandum and identified three reasons why the decision to rescind DACA remained sound

1) Per Sessions letter, DACA was illegal
2) DHS has serious doubts about DACA's legality and wanted to avoid "legally questionable" policies for law enforcement purposes
3) Identified policy reasons **(a)** class-based immigration relief should come from Congress not Executive non-enforcement, **(b)** DHS preferred to exercise prosecutorial discretion on a "truly individualized" basis and **(c)** the importance of "projecting a message" that immigration laws should be enforced equally against all groups and categories of aliens.

DC Circuit declined to accept this explanation

…because it failed to elaborate meaningfully on the agency's illegality rationale, still did not provide an adequate explanation for the September 2017 recission.

The Gov't appealed each decision to the Circuit courts, then while pending, sought certiorari from the Supreme Court.

Administrative Procedure Act

Sets forth the procedures by which federal agencies are accountable to the public and their actions are subject to review by the courts

It requires agencies to engage in “reasoned decisionmaking” and directs agency actions be “set aside” if they are “arbitrary and capricious”

US Government assertions

-Some agency decisions are not reviewable, such as decisions not to institute enforcement proceedings

-DHS argued that because DACA is a non-enforcement policy, it is therefore unreviewable by the courts.

Court disagreed

- DACA is not simply a non-enforcement policy. For starters, the DACA Memorandum did not merely "refus[e] to institute proceedings" against a particular entity or even a particular class.

- "In short, the DACA Memorandum does not announce a passive non- enforcement policy; it created a program for conferring affirmative immigration relief. The creation of that program —and its rescission—is an "action [that] provides a focus for judicial review."

Under the APA, an agency has two options

Foundational principle of administrative law is that judicial review is limited to "the grounds that the agency invoked when it took the action," so…

1. DHS could offer a fuller explanation of the agency's reasoning *at the time of the action.*
2. The agency can "deal with the problem afresh" by taking *new* agency action.

Nielsen chose Door #1.

This failed because

Nielsen's reasoning bore little relationship to that of her predecessor, Acting Sec'y Duke.

In particular, the policy reasons offered by Nielsen could only be viewed at post-hoc rationalizations and thus were not properly before the Supreme Court.

Procedural requirements promote important values, such as agency accountability and allow those involved to have confidence in relying on agency decisions.

Quoting Oliver Wendall Holmes…

- "[m]en must turn square corners when they deal with the Government." *Rock Island, A. & L. R. Co. v. United States*, 254 U.S. 141, 143 (1920) . But it is also true, particularly when so much is at stake, that "the Government should turn square corners in dealing with the people." *St. Regis Paper Co. v. United States*, 368 U.S. 208, 229 (1961) (Black, J., dissenting)."
- "The basic rule here is clear: An agency must defend its actions based on the reasons it gave when it acted. This is not the case for cutting corners to allow DHS to rely upon reasons absent from its original decision."

The issue was forbearance

- “Here forbearance was not simply “within the ambit of the existing [policy],” it was the centerpiece of the policy: DACA, after all, stands for “ *Deferred Action* for Childhood Arrivals.” App. to Pet. for Cert. 111a (emphasis added). But the rescission memorandum contains no discussion of forbearance or the option of retaining forbearance without benefits. Duke “entirely failed to consider [that] important aspect of the problem.” *State Farm*, 463 U.S. at 43, 103 S.Ct. 2856 .

- That omission alone renders Acting Secretary Duke's decision arbitrary and capricious.

“But it is not the only defect. Duke also failed to address whether there was “legitimate reliance” on the DACA Memorandum. *Smiley v. Citibank (South Dakota), N. A.*, 517 U.S. 735, 742 (1996).When an agency changes course, as DHS did here, it must “be cognizant that longstanding policies may have ‘engendered serious reliance interests that must be taken into account.’ ” *Encino Motorcars, LLC* v. *Navarro*, 579 U.S. ——, (2016) (quoting *Fox Television*, 556 U.S. at 515, 129 S.Ct. 1800). “It would be arbitrary and capricious to ignore such matters.” *Id.*, at 515, 129 S.Ct. 1800 . Yet that is what the Duke Memorandum did.”

The court rejected the equal protection claims.

Sotomayor would have left them for further findings upon trial on the merits.

Matters are all remanded to the District Courts for further finding consistent with the opinion

Binno v LSAC – Settlement
You can't always get what you want

Angelo Binno and Shalesha Taylor sued the LSAC in 2017 for a waiver of the Analytical Reasoning – a/k/a "Logic Games" section of the LSAT arguing that as a low vision person, he could not diagram or mentally manipulate questions that required visual cortical functioning to analyze.

- Note: Binno had previously sued the American Bar Association for this waiver, but his case was dismissed because the ABA does not have any role in administering the LSAT, so improper party.

October 2019, the parties announce a settlement whereby the LSAC will find a way to assess analytical reasoning in a more universally designed manner and the plaintiffs will work closely with LSDAC over the next 4 years to develop this new LSAT.

Plaintiffs did not get what they wanted, but they got what we needed – an LSAT that will be accessible to all examinees, including blind examinees.

Who has a Disability?
Two Case Against the NBME
Demonstrating its Failure to Implement
"Condition, Manner, or Duration" Analyses ©

Berger v. Nat'l Bd. of Med. Examiners, No. 1:19-CV-99, 2019 WL 4040576 (S.D. Ohio Aug. 27, 2019), appeal to the 6th Cir. filed (September 19, 2019)

Ramsay v. Nat'l Bd. of Med. Examiners, No. 19-CV-2002, 2019 WL 7372508 (E.D. Pa. Dec. 31, 2019), appeal to the 3rd Cir. filed (January 9, 2020)

How We Got Here

- Ever since the adoption of Section 504 of the Rehabilitation Act **of 1973**, codified at 29 U.S.C. § 701 et seq., as amended in 1974 (December 7, 1974), under Federal Law addressing discrimination on the basis of disability, individuals with disabilities have been defined as:

  "Any person who (a) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (b) has a record of such an impairment, or (c) is regarded as having such an impairment"

- Though the words have been constant, as Federal disability anti-discrimination protections have expanded, the rules for "construing" (interpreting and applying) these words have changed; consequently, so has their meaning and application

Restoration of the ADA (and Section 504) by Congress by Reconstruction of the Definition of Disability

- **Americans with Disabilities Act of 1990 [ADA]**, 42 U.S.C. § 12101
  - ***Effective July 26, 1990***
  - ***https://www.ada.gov/pubs/ada.htm***
- ***Americans with Disabilities Act, Amendments Act of 2008 (ADAAA)=ADA, as amended***
  - Effective January 1, 2009
  - https://www.eeoc.gov/laws/statutes/adaaa.cfm
  - EEOC, ***Regulations and Guidance implementing the ADAAA***
    - 29 CFR Part 1630 [employment]
    - Effective September 15, 2011, published in the Federal Register on March, 25, 2011
    - http://www.eeoc.gov/laws/statutes/adaaa_info.cfm; https://www.gpo.gov/fdsys/pkg/FR-2011-03-25/pdf/2011-6056.pdf
  - DOJ, ***Title II & III Regulations and Guidance implementing the ADAAA***, focusing on the testing and higher education industries
    - 28 CFR Parts 35 & 36 [testing and higher education]
    - Effective October/11/2016, published in the Federal Register on August 11, 2016
    - https://www.federalregister.gov/documents/2016/08/11/2016-17417/amendment-of-americans-with-disabilities-act-title-ii-and-title-iii-regulations-to-implement-ada
    - Most important guidance for DSS providers

For Higher Education, An Important Example in the EEOC *Regulations Implementing the ADAAA*

- An impairment may substantially limit the ‘‘condition’’ or ‘‘manner’’ or “duration” under which a major life activity can be performed in a number of ways.
  - “…the condition or manner under which a major life activity can be performed may refer to the ***way*** an individual performs a major life activity.”
  - “Condition or manner may also describe ***how performance of a major life activity affects the individual with an impairment***.”
  - “…condition or manner may refer to ***the extent to which a major life activity*** … ***can be performed***.”
- “Condition, manner, or duration may also suggest ***the amount of time or effort an individual has to expend when performing a major life activity*** because of the effects of an impairment, even if the individual is able to achieve the same or similar result as someone without the impairment.”

DOJ 2016

Regulations implementing the ADAAA with Regard to Title II and Title III of the ADA and DOJ Analysis

- **http://federalregister.gov/a/2016-17417**
- The purpose of these new regulations was to explicitly ensure that the ADAAA definition of disability is implemented in entities covered by Titles II and III with regard to all claims of disability
- The focus is on two “entities”, higher education and the standardized testing industry and on two kinds of impairment, learning disabilities (including Dyslexia) and ADHD
- Content is common to both sets of regulations
- *All quotations in the slides that follow are attributable to the DOJ section-by-section analysis, not the regulations, except when a regulation cite is given immediately following the quotation*

2016 DOJ Rules and Guidance Pertinent to the Case Study Plaintiffs, *Berger* and *Ramsay* (1)

- The list of impairments, found at 28 CFR §§ 35.108(b)(2) and 36.105(b)(2), has never been exclusive ("nonexhaustive") but explicit inclusion in the list is helpful to plaintiffs with a listed impairment---the list has been amended to include:
  - Attention Deficit Hyperactivity Disorder (ADHD)
  - "Dyslexia and other specific learning disabilities"
- The list of major life activities, found at 28 CFR §§ 35.108(c) and 36.105(c), has never been exclusive but the list has been amended to explicitly include:
  - Writing
  - The list continues to include, in part, "learning, reading, concentrating, thinking, writing, communicating"

2016 DOJ Rules and Guidance Pertinent to the Case Study Plaintiffs, *Berger* and *Ramsay* (2)

- Analysis should emphasize consideration of “limits” rather than “outcomes” “For example, someone with a learning disability may achieve a high level of academic success, but may nevertheless be substantially limited in one or more of the major life activities of reading, writing, speaking, or learning because of the additional time or effort he or she must spend to read, speak, write, or learn compared to most people in the general population”
- During the public comment period, prior to issuance of the final version this regulation, it was opposed in the written comments prepared by counsel for the NMBE

Berger and Ramsay Share a Lot of Challenges (1)

- Both Brendan Berger and Jessica Ramsay attend medical school; respectively, private (American University of the Caribbean School of Medicine) and public (School of Medicine of Western Michigan University)
- Both must pass all three Steps of the USMLE (United States Medical Licensing Exam) in order to become practicing physicians
- The USMLE is developed and administered by the NBME (the National Board of Medical Examiners)
- Berger and Ramsay have been denied by the NBME accommodations on the USMLE, including requests for extra time, breaks, and a low distraction testing environment

Berger and Ramsay Share a Lot of Challenges (2)

- Both Berger and Ramsay are intelligent individuals who have strong academic records, and ***without accommodations***, have done as well as the average person in the general population on some demanding high stakes standardized exams such as the MCAT and, in Berger's case, a passing grade on Step 1 of the USMLE
- Both received informal and formal accommodations in high school, college and formal accommodations throughout medical school
- Both individuals have provided the NBME extensive expert-prepared objective, observational, and self-narrative documentation supporting that, despite high IQs, they are substantially impaired with regard to reading, writing, and mathematical fluency (below the 10^{th} percentile), as well as with regard to concentration
- The performance of both individuals is substantially improved on standardized reading achievement test when he/she receives extra time to complete the test
- Both individuals have provided direct observation, expert-based, diagnoses of dyslexia and ADHD

Berger and Ramsay Seek Preliminary Injunctions

- Both individuals, despite extensive preparation, report being unable to complete important standardized exams including one or more USMLE Step Exam
- Without passing all USMLE Step Exams neither Berger nor Ramsay will become a doctor
- They are both concerned that, even if they could pass the Step Exams without accommodations, their scores would be so low as to preclude desirable residency placements
- Under Title III of the ADA, in different Federal district courts, Berger and Ramsay, sought preliminary injunctions against the NBME for disability discrimination through the denial of exam accommodations
  - Section 504 claims were made but set aside due to a lack of information about Federal financial assistance to the NMBE and was unnecessary to the PI motion.

Following Similar Reasoning, Both Federal District Courts Grant the Requested Preliminary Injunctions (1)

- The NMBE's review standards are not consistent with several provisions of the ADAAA as implemented through DOJ regulations and guidance
  - "[A]lthough NBME may not have liked the terminology used in the implementing regulations, despite its registered objections, the foregoing language is what was enacted and it is this language which must be followed in assessing accommodations requests under the ADA. It [the NBME] decidedly did not do so in this case." ***Ramsay*** at 17.
- Without any persuasive reason, and contrary to DOJ guidance, the NMBE granted greater weight to the judgment and conclusions of its own experts, who had never met with either Plaintiff, than those experts who had observed them directly
  - Both Plaintiffs were evaluated by qualified experts
  - Both Plaintiffs were evaluated with a variety of instruments
  - The reports submitted by both Plaintiffs were prepared following direct observation not just of outcomes, including observed self-accommodative practices, including ones that bear on fluency or the condition, manner, or duration of test-taking

Following Similar Reasoning, Both Federal District Courts Grant the Requested Preliminary Injunctions (2)

- As to both Plaintiffs, the NMBE followed a bottom line/outcome based analysis rather than a condition, manner or duration analysis:
  - "[The] NBME either discounted or disregarded entirely the admonition to focus on 'how a major life activity is substantially limited, and not on what outcomes an individual can achieve' and apparently ignored the example that 'someone with a learning disability may achieve a high level of academic success, but may nevertheless be substantially limited in the major life activity of learning because of the additional time or effort he or she must spend to read, write, or learn compared to most people in the general population.' 29 C.F.R. § 1630.2(j)(4)(iii). NBME's exclusive focus on Plaintiff's prior academic successes and her performance on the ACT and MCAT standardized examinations without accommodations was therefore improper …." ***Ramsay*** at 18.
  - "[T]he Court also recognizes that '[a] definition of disability based on outcomes alone, particularly in the context of learning disabilities, would prevent a court from finding a disability in the case of any individual . . . who is extremely bright and hardworking, and who uses alternative routes to achieve academic success," a result that would be inconsistent with the goals of the ADA.' ***Bartlett v. New York State Bd. of Law Examiners***" ***Berger*** at 45.
  - The inability of Berger to finish exams, ones for which he had prepared to an exceptional degree, should have been given considerable weight as appropriate to a condition or manner or duration analysis. ***Berger*** at 29-30 and 46-47.

Following Similar Reasoning, Both Federal District Courts Grant the Requested Preliminary Injunctions (3)

- Though neither student received a formal diagnosis of a disability prior to high school, both had extensive histories of informal and formal accommodations, including in medical school; histories given little weight by the NBME:

  "[W]e also find that Defendant ran afoul of 28 C.F.R. § 36.309(b)(v) which requires that '[w]hen considering requests for ... accommodations ... the [testing]entity give[ ]considerable weight to documentation of past modifications, accommodations, or auxiliary aids or services received in similar testing situations ...' Again, it does not appear from the record that NBME gave any consideration, much less the 'considerable weight' required to Ms. Ramsay's past record of having received accommodations." ***Ramsay*** at 18.

Following Similar Reasoning, Both Federal District Courts Grant the Requested Preliminary Injunctions (4)

- Some of the conclusions of the NMBE, were simply unreliable and without persuasive support:
  - Berger was accused of malingering on assessment exams contrary to the clear evidence in his personal statement that he had taken exceptional steps to pass unaccommodated exams; such as, studying for the MCAT for 8 hours a day for a year
  - One NBME expert opined that Berger's lack of fluency was due to the fact that he was raised in a bilingual (French and English) environment, but to the court this conclusion appeared to be without any support and was not relied upon by any other NBME expert

One difference in case presentation/ receptivity of Court

- Berger court discussed at length the condition, manner and duration in which Berger performed major life activities and the discussion in the court's opinion paralleled the analysis and discussion in Bartlett.
- Ramsay court was presented with and gave credence to the submissions by NBME's attorney on behalf of NBME & 7 other standardized testing companies in opposition to ADAAA in 2008 industry; and 2012 submitted comments to proposed regulations on behalf of NBME & 3 others, taking issue with key provisions of the ADAAA.

What did the testing companies object to?

- “the primary objective” of the ADA should be on whether entities have complained and not whether the individual has a disability
- Determining whether an individual has a disability “should not demand extensive analysis”
- “substantially limits is not meant to be a demanding standard”
- Inclusion of in the rules of examples like “self mitigating measures or undocumented modifications or accommodations for students that affect learning, reading or concentrating” might include “devoting a larger portion of the day, weekends or holidays to study than students without disabilities.”
- BUT argued for a new regulation that mitigating measure should be considered in analyzing whether accommodations were needed.

In other words….

- They objected to the ADA Amendments Act!
- Because they had objected to these very same points in 2008 and again in 2012, it was clear they knew the law. They just didn't like it.

- The court said: "Indeed, although NBME may not have liked the terminology used in the implementing regulations, despite its registered objections, the foregoing language is what was enacted and it is this language which must be followed in assessing accommodations requests under the ADA. It decidedly did not do so in this case."

Relief Granted Common to Both Berger and Ramsay

- Both Plaintiffs demonstrated to their respective courts a strong likelihood that he or she will succeed on the merits of the claims
- Plaintiffs' primary relief includes:
  - Extra-time
  - Exam breaks
  - Exams in low-distraction environments

The NMBE Has Appealed both Decisions

- ***Berger v. Nat'l Bd. of Med. Examiners,*** No. 1:19-CV-99, 2019 WL 4040576 (S.D. Ohio Aug. 27, 2019), appeal to the 6th Federal Circuit filed September 19, 2019, No. 3885, 2019 WL 4040576. Oral argument is scheduled in August.
- ***Ramsay v. Nat'l Bd. of Med. Examiners,*** No. 19-CV-2002, 2019 WL 7372508 (E.D. Pa. Dec. 31, 2019), appeal to the 3rd Federal Circuit filed January 9, 2020, No. 20-1058, 2019 WL 7372508. Oral argument was July 1st.