

## Learning-Disabled Woman Wins on Bar Exam Timing

### *Will Be Allowed Use of Aids and Four Days to Finish Test*

BY MARK HAMBLETT

A LEARNING-DISABLED woman will be given twice the normal two days to take the New York State bar exam, a federal judge ruled yesterday.

Marilyn Bartlett, whose eight-year fight with the New York State Board of Law Examiners has included an appeal to the U.S. Supreme Court and two appearances before the U.S. Court of Appeals for the Second Circuit, convinced Judge Sonia Sotomayor that she has a disability that should be accommodated under the Americans with Disabilities Act.

The ruling in *Bartlett v. New York State Board of Law Examiners*, 93 Civ. 4986, came after a second trial in February before Judge Sotomayor, who presided over a first trial in the case four years ago, before she was elevated to the Second Circuit.

Sitting by designation in the Southern District solely for the trial, Judge Sotomayor yesterday found that Ms. Bartlett "is substantially limited in the major life activity of reading when compared to most people."

Judge Sotomayor said that the Board, in its effort to defeat Ms. Bartlett's request for extra time to take the exam, showed a "preoccupation with test scores," and a "distrust of clinical judgments," that seemed to be driven, in part, "by misperceptions and stereotypes about learning disabilities."

"While the Board's concern with protecting the integrity of the bar is laudable, the Board cannot turn this legitimate concern into a bias against learning disabled applicants," she said. "Plaintiff's experts have convinced me that the extra time provided to learning disabled applicants merely levels the playing field and allows these individuals to be tested on their knowledge; it does not provide them with an unfair advantage."

While the severely dyslexic Ms. Bartlett has failed the bar exam five times, once with some accommodations by the State Board, she performed reasonably well on the LSAT, obtained college and law degrees, and can speak, but not read, German. She completed her education with the assistance of study groups, dictation, people who read to her, and courses that were graded based on written papers and not time-limited exams.

In her 99-page opinion, Judge Sotomayor noted that the Board members, during the original trial in 1997, seemed to view applicants claiming to be learning disabled with "suspicion."

"[T]his same attitude was evidenced at the remand trial," in February, she said, "when defendants and their experts implied on numerous occasions that plaintiff might be 'faking' her reading problems or contriving her errors."

Following the 1997 trial, Judge Sotomayor found that Ms. Bartlett was entitled to reasonable accommodations because she was a disabled individual within the meaning of the Americans with Disabilities Act, 42 U.S.C. §12101, in that she had a "physical or mental impairment that substantially limits one or more of the major life activities," as well as §504 of the federal Rehabilitation Act.

After the first trial, the judge awarded Ms. Bartlett injunctive relief and \$2,500 for each of the five bar exams she had taken.

### Affirmed and Vacated

The Second Circuit affirmed that decision in part and vacated it in part, remanding the case for further proceedings. The U.S. Supreme Court granted certiorari, vacated the Second Circuit's judgment, and remanded the case for the Second Circuit to reconsider in light of a series of U.S.

Supreme Court decisions holding that corrective devices and mitigating measures must be considered in determining whether an individual is disabled under the ADA.

Last year, the Second Circuit again remanded the case to Judge Sotomayor, first asking her to consider whether Ms. Bartlett's reading skills were below average on any measure so that her ability to read could be considered "substantially limited."

The Second Circuit also asked Judge Sotomayor, should she find that Ms. Bartlett was not substantially limited in reading, to make further findings as to whether Ms. Bartlett was substantially limited in the major life activity of working.

If necessary, the Second Circuit said, Judge Sotomayor should determine, "whether plaintiff has shown that it is her impairment, rather than factors such as her education, experience, or innate ability, that 'substantially limits' her ability to work."

But following the four-day remand trial in February, Judge Sotomayor said she remained convinced that "the effect of plaintiff's reading impairment on her life, even with all of her self-accommodations, is profound."

In yesterday's opinion, Judge Sotomayor said that lawyers for the two sides during the remand trial fought over the criteria used to determine whether she was disabled.

"After considering the additional evidence presented to me in the remand trial, I conclude — as I did at the original trial — that a reading disability cannot be diagnosed by test scores alone," she said. "Rather, diagnosing a learning disability requires clinical judgment."

Judge Sotomayor said that the difference between her findings following the first trial and her findings yesterday was that the Supreme Court had changed the "legal landscape," in the interim.

"In light of new case law," she said, it was now up to the court to distinguish "between mitigating measures plaintiff uses that affect her ability to read and those that merely assist her in functioning in her daily life."

Judge Sotomayor said that the use of dictation, study groups and Ms. Bartlett's preference for written papers over time-limited exams merely help her function but do not mitigate her reading problems.



LESLIE BARBOUR

### 'Coping Strategies'

In order to read, she said, Ms. Barlett employs "coping strategies," such as "using her fingers or a card to move from line to line, using an index card with a hole cut out when reading more difficult text, re-reading text multiple times, subvocalizing (i.e. sounding out words), and highlighting important words in the text."

"While many of these measures increase plaintiff's decoding accuracy, they do so at the cost of speed and cognitive energy," she said. "Defendants' argue that no matter how differently plaintiff reads, she is not substantially limited in reading because she has performed within the average range on tasks involving reading."

Unconvinced by that argument, Judge Sotomayor said, "[i]n sum, I reject defendants' argument that plaintiff's scores on the psychometric measures administered to her are necessarily inconsistent with a finding of disability."

She also rejected the State Board's contention that any evaluation of Ms. Barlett beyond simple reading tests should be disregarded because clinical tests are subjective.

"This court is not unsympathetic to the Board's desire to have a clear standard by which to determine whether an applicant claiming to be learning disabled is entitled to accommodations on the bar exam under the ADA and Section 504," Judge Sotomayor said. "It is clear to me, however, that such a standard must take into consideration an applicant's evaluation report in toto, rather than focusing exclusively on psychometric test scores."

Judge Sotomayor went on to find that the Board's denial of accommodations was a "significant factor" in Ms. Bartlett's failing to pass the bar, and said she was confident that Ms. Bartlett had the knowledge to pass the bar exam.

In addition to being given four days to take the test, Ms. Bartlett will be allowed to use a computer and has permission to circle multiple choice answers in the examination booklet. Both the New York State and Multistate Bar Examinations will be presented to her in large print.

Judge Sotomayor also modified her earlier damages award, reducing it to \$2,500 each for only three of the five exams in question.

Jo Ann Simon, a solo practitioner in Brooklyn, and Roberta Mueller and Marianne L. Engelman Lado of New York Lawyers for the Public Interest represented Ms. Bartlett. Assistant Attorneys General Judith T. Kramer and Rebecca Durden represented the State Board.

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