No. 97-9162

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MARILYN BARTLETT,

Plaintiff-Appellee

v.

NEW YORK STATE BOARD OF LAW EXAMINERS, et al.,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

SUPPLEMENTAL BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE

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On June 24, 1999, the Supreme Court granted the petition for a writ of certiorari in New York State Board of Law Examiners v. Bartlett, No. 98-1285, vacated this Court's September 14, 1998, decision, and remanded the case to this Court for reconsideration in light of Sutton v. United Air Lines, Inc., 119 S. Ct. 2139 (1999), Murphy v. United Parcel Service, Inc., 119 S. Ct. 2133 (1999), and Albertsons, Inc. v. Kirkingburg, 119 S. Ct. 2162 (1999). On July 30, 1999, this Court issued an order directing the parties to file supplemental briefs to consider the effect of those three decisions. Having previously filed a brief as amicus curiae in this appeal, the United States hereby submits this supplemental brief to address the issue presented by the Supreme Court's remand.

ARGUMENT

THIS COURT CORRECTLY CONCLUDED THAT BARTLETT IS AN INDIVIDUAL WITH A DISABILITY UNDER TITLE II OF THE ADA

The Supreme Court determined in Sutton that "if a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures -- both positive and negative -- must be taken into account when judging whether that person is 'substantially limited' in a major life activity and thus 'disabled' under the [Americans with Disabilities] Act." 119 S. Ct. at 2146.[1/] In so holding, the Court relied in part upon the fact that the ADA requires an individualized inquiry into the question whether an individual has a disability. Id. at 2147.

In its September 14, 1998, decision, this Court held that plaintiff Marilyn Bartlett is an individual with a disability protected by Title II of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12131, et seq. Bartlett v. New York State Bd. of Law Exam'rs, 156 F.3d 321 (2d Cir. 1998).[2/] In reaching that conclusion, this Court stated that a disability should be assessed without regard to the availability of mitigating measures. Id. at 329. As a result, the Supreme Court granted the Board's petition, vacated this Court's decision, and remanded

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[1/] Plaintiffs in Sutton had severe myopia, but with the use of corrective lenses, their vision was 20/20 or better. 119 S. Ct. at 2143.

[2/] As relevant to this case, the statutory definition of disability is "a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual." 42 U.S.C. 12102(2)(A).

the case to this Court for reconsideration under the legal standard announced in Sutton, Murphy, and Albertsons.

Although in reaching its decision in this case this Court endorsed a principle that has subsequently been rejected by the Supreme Court, the Court's conclusion that Bartlett is an individual with a disability remains correct. Following Sutton and the related cases, the appropriate inquiry in determining whether an individual has a disability within the meaning of the ADA is whether, notwithstanding the use of a corrective device or mitigating measures, the "limitations an individual with an impairment actually faces are in fact substantially limiting." 119 S. Ct. at 2149. As discussed below, the record in this case demonstrates that, despite her efforts at self-accommodation, Bartlett is substantially limited in the major life activity of reading. 156 F.3d at 329. The self-accommodation techniques used by Bartlett do not mitigate the crucial element of her dyslexia: her lack of automaticity in reading. Accordingly, even when taking her attempts at self-accommodation into account, Bartlett is substantially limited in the major life activity of reading. Because that is the only conclusion that can be drawn from the record, together with the district court's findings, the district court's judgment should be affirmed on that basis.

A. The Record Is Clear That Bartlett Lacks Automaticity In Her Reading

Experts recognize that the skill of reading has at least two major components[3]: accuracy of word identification and "automaticity"--the ability to "recognize[] a printed word and [be] able to read it accurately, and immediately; in other words, automatically and without [conscious effort]." Bartlett v. New York State Bd. of Law Exam'rs, 970 F. Supp. 1094, 1107, 1113 (S.D.N.Y. 1997). The Board of Law Examiners took the position in the district court that Bartlett's scores on the Word Attack and Word Identification subtests of the Woodcock Reading Mastery Test (Woodcock subtests) were alone sufficient to determine whether Bartlett has a learning disability. The Woodcock subtests used by the Board's expert, however, measure only one of the components of reading, i.e., the ability to identify words accurately and not the major component underlying adult reading, i.e., automaticity. Automaticity has to be assessed by a reading measure that includes time; the scores on the Woodcock subtests did not measure Bartlett's lack of automaticity because those tests are untimed and do not reflect the great difficulty she has in deciphering each word. As the district court recognized, the principal problem with using the scores on psychometric testing as the sole determinant of whether an individual has a learning

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[3] See, e.g., Pl.'s Ex. 129, Jeanne S. Chall, Stages of Reading Development 119 (1983), citing Patricia R. Dahl, A mastery based experimental program for teaching high speed word recognition skills (abstract), 11 Reading Res. Q. 203, 209 (1975-1976).

disability is the fact that "no test measures automaticity directly." 970 F. Supp. at 1113. The Board's complete reliance on Bartlett's scores on the Woodcock subtests to determine whether she has a learning disability therefore presents an incomplete and misleading picture. Accordingly, the district court properly rejected the Board's position that the Woodcock subtests scores should be determinative, finding that "[b]y its very nature, diagnosing a learning disability requires clinical judgment," and "is not quantifiable merely in test scores." Id. at 1114.

Recognizing the importance of clinical judgment, the district court relied on the experts' clinical observations of Bartlett when she read aloud. The opinion of all three experts who observed her noted her "stark lack of automaticity" under those circumstances. 970 F. Supp. at 1113. In his trial affidavit, Dr. Richard Heath testified that Bartlett "reads aloud in a hesitant manner, slowly and without automaticity." Id. at 1107. He stated that, "[i]n particular, [Bartlett] had a great deal of difficulty reading polysyllabic words, vowels (especially diphthongs, digraphs and in ascertaining differences between long and short vowels), consonant blends and silent consonant conventions." Ibid. He reported (ibid.) that

> on the more complex reading passages, Dr. Bartlett typically read the passages over two or three times before she could respond to that test item. She uses contextual cues to facilitate her decoding. She reads very slowly. She will reread a phrase or sentence to make sure she gets it. You can often see her lips move or hear her read quietly to herself and when she does this, you can hear the mispronunciations. When she is

> faced with an unfamiliar polysyllabic word she is very slow to break down the word to different parts and she will mispronounce parts of the word. She is slow to synthesize the morphemes into a word.

Dr. Heath administered the same Woodcock subtests used by the Board, and his opinion was that the results of that testing confirmed Dr. Phillip Massad's earlier diagnosis of learning disability. 970 F. Supp. at 1107. His clinical observation of Bartlett revealed her difficulties in arriving at answers. Dr. Heath described the fact that Bartlett "had to make several attempts to sound out words which should have been second nature to her," and her "reading was full of hesitations, and self corrections." Ibid. (quoting Heath affidavit). As an example, Dr. Heath stated (ibid.):

> [P]laintiff will attempt to read a word such as "instigator" as "investigator." Since she will hear that it sounds incorrect she will start over and often corrects her reading of the word after several attempts. On the Woodcock, this would be credited as a correct response, even though it took her three attempts to get it right and took more time than it would have taken a person who did not have to read in this fashion.

Dr. Heath also stated that, although "[w]ord attack skills are generally well formed by junior high school age," Bartlett's "pattern of word attack is indicative of someone whose decoding skills are not fully formed," and that she "decodes pseudo-words at a fourth grade level." Id. at 1107-1108.[4]

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[4] The district court also credited the studies of adult dyslexics conducted by Dr. Maggie Bruck, on which the Board's experts relied to support their testimony. Dr. Bruck stated, and

(continued...)

During the hearing, the district court also directly observed the condition and manner used by Bartlett to read and write, including using her fingers to keep her place in the text, spelling errors, and mirror writing. She read aloud, "haltingly and laboriously," at 40 words per minute and took approximately ten minutes to write a 48-word passage that was dictated to her. 970 F. Supp. at 1110.[5/]

This Court agreed with the district court in rejecting the Board's argument that scores on the Woodcock subtests are the "dispositive measure" of whether an adult has a learning disability, 156 F.3d at 329, and nothing in the Supreme Court's decisions in Sutton and the related cases calls that conclusion into question.

B. Bartlett Is Substantially Limited In Reading Even When Taking Into Account Her Self-Accommodation Techniques

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[4/] (...continued)
the district court found, that the Woodcock subtests are "poor discriminators" for measuring whether an adult has a learning disability "unless the subject's reaction time [i]s measured." 970 F. Supp. at 1113-1114. In addition, Dr. Rosa Hagin testified that, because the Woodcock subtests do not test automaticity or reading rate, "they are poor indicators of a decoding problem in individuals like plaintiff who function at higher cognitive levels." Id. at 1110.

[5/] The record also contains test data from the Diagnostic Reading Test (DRT). 970 F. Supp. at 1108. Bartlett's reading rate was compared with the highest grade norm for that test, which is college freshmen. Ibid. (table). The test results show that Bartlett's slow reading rate is comparable to the 4th percentile of college freshmen when timed, while her comprehension was at the 50th percentile. When she took the test untimed, her comprehension was at the 98th percentile, but, at the same time, that required her to read at an even slower rate, comparable to the 1st percentile of college freshmen. Ibid.

The Board does not appear to dispute the finding that Bartlett reads without automaticity.[6/] Rather, the Board's principal argument here (Defendants-Appellants' Supplemental Br. 6-7) is that Bartlett's "self-accommodation permits her to read at an average level compared to the average person in the general population," and thus that she "does not have a reading or learning disability that would entitle her to accommodations" for taking the New York bar examination. That argument is based upon the district court's finding that, when compared to the general population, Bartlett has achieved "roughly average reading skills (on some measures)." 970 F. Supp. at 1120.

The Board's reliance on this aspect of the district court's finding is at odds with this Court's clear rejection of the Board's argument that scores on the Woodcock subtests are the "dispositive measure" of whether an adult has a learning disability. 156 F.3d at 329. The district court's finding was specifically qualified by the court as being based on "some measures." Those measures were the Woodcock Word Attack and Word Identification subtests. As noted above, this Court clearly found that those measures were not adequate to judge whether Bartlett has a learning disability. Since the Woodcock subtests measure only her ability to identify words, without regard to the time it takes or the mistakes she makes before arriving at the correct answer, Bartlett's average scores on those subtests do

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[6/] Indeed, as the district court noted, the Board's expert "acknowledge[d] the Woodcock's weakness with regard to discriminating for lack of automaticity." 970 F. Supp. at 1114.

not identify the substantial limitations she experiences in the reading process. As discussed below, Bartlett's self-accommodation techniques provide a degree of mitigation with respect to the word identification component of the reading process; they do not, however, provide mitigation with respect to Bartlett's lack of automaticity in her reading.

Dr. Rosa Hagin, an expert who testified during the hearing in the district court, described the "set of personal skills" that Bartlett has "evolved * * * to compensate for her disability." 970 F. Supp. at 1109. The "cues" Bartlett used to assist her were "slowing down the rate of response, verbal rehearsal of rote sequencing items, [and] pointing cues to assist in keeping her place on visual text." Ibid. She "use[d] her finger to keep her place," and read the more complex passages over several times as a means of obtaining "contextual cues to facilitate her decoding." Id. at 1107 (internal quotation marks omitted). She "had to sound out the words repeatedly before coming to an answer." Id. at 1113. Dr. Hagin credited Bartlett's "earlier work as a school teacher where phonics were stressed" in allowing her to attempt to develop "self-accommodations." Id. at 1109. Significantly, however, Dr. Hagin noted that those self-accommodations, which permit her to decode words if she has a sufficient amount of time, "account for her ability to spell better and to perform better on [the untimed Woodcock] word identity and word attack tests than would be expected of a reading disabled person," ibid., because, as this

Court noted, 156 F.3d at 329, both of those subtests allow Bartlett unlimited time to identify a word. They do not measure the fact that she reads without automaticity. Ibid. Thus, although Bartlett has developed methods that permit her, with additional time, to decipher the written words, the record shows that the essential component of automaticity continues to be absent in her reading.

Accepting the district court's subsidiary findings, this Court found, in essence, that Bartlett's barely average scores on the Woodcock subtests are only a part of the picture and that lack of automaticity is the crucial element in her dyslexia. This Court therefore rejected the district court’s conclusion that Bartlett was not substantially limited in the major life activity of reading, Bartlett v. New York State Bd. of Law Exam'rs, 2 F. Supp. 2d 388, 392 (S.D.N.Y. 1997), making a legal determination that the district court’s finding concerning Bartlett’s average scores on the Woodcock subtests was not a sufficient basis for that conclusion. Instead, this Court properly relied upon the record and subsidiary findings made by the district court in concluding that Bartlett was substantially limited in the major life activity of reading, and her impairment significantly restricts the condition and manner of her reading “as compared to the manner and conditions under which the average person in the general population can read or learn.” 156 F.3d at 329.

C. This Court’s Determination That Barlett Has A Disability That Causes Substantial

Limitations In The Major Life Activity Of Reading Is Consistent With The Supreme Court's Decisions In Sutton, Murphy, And Albertsons

Nothing in the Supreme Court's decisions in Sutton, Murphy, or Albertsons calls into question this Court's conclusion that Bartlett is a person with a disability. Bartlett's "history of self-accommodations" does not foreclose a finding that she has a disability. 156 F.3d at 329. In Sutton, the Supreme Court made clear that the "use or nonuse of a corrective device does not determine whether an individual is disabled; that determination depends on whether the limitations an individual with an impairment actually faces are in fact substantially limiting." 119 S. Ct. at 2149 (emphasis added). Because, with the use of corrective measures, the plaintiffs in Sutton reached 20/20 visual acuity and could "function identically to individuals without a similar impairment," ibid., the Court held that they were not substantially limited in any major life activity. Thereafter, in Murphy, the Supreme Court accepted the Tenth Circuit's conclusion that "when medicated, petitioner's high blood pressure does not substantially limit him in any major life activity." 119 S. Ct. at 2137. In Murphy, the Court was presented solely with the question whether mitigating measures should be considered in determining whether an individual's impairment substantially limits a major life activity; the Court was not presented with the question whether the Tenth Circuit's conclusion as to substantial limitation was correct. Specifically, the Supreme Court in Murphy had "no occasion * * *

to consider whether petitioner is 'disabled' due to limitations that persist despite his medication." Ibid. (emphasis added).

Finally, in Albertsons, the Supreme Court amplified its ruling in Sutton, holding that mitigating measures undertaken within the body's own systems, just as those undertaken with the use of artificial aids like medications and devices, must be considered in determining whether an individual is disabled under the ADA. 119 S. Ct. at 2169. The Supreme Court did not consider whether plaintiff, who had monocular vision, was disabled under the ADA, but merely held that the statute requires "monocular individuals, like others claiming the Act's protection, to prove a disability by offering evidence that the extent of the limitation in terms of their own experience * * * is substantial." Ibid.

The Supreme Court's holdings in Sutton, Murphy, and Albertsons do not, therefore, compel a different conclusion than the conclusion reached by the Court in this case: that Bartlett is substantially limited in the major life activity of reading. The record in this case amply demonstrates that the limitations Bartlett "actually faces are in fact substantially limiting." Sutton, 119 S. Ct. at 2149. As discussed above, on the basis of the district court's findings concerning (1) the shortcomings of reliance on the Woodcock subtest scores alone, and (2) the extensive expert testimony, based upon clinical observation, concerning the manner in which Bartlett reads, this Court concluded (156 F.3d at 329):

> In this case, Dr. Bartlett suffers from a lack of automaticity and a phonological processing defect that significantly restricts her ability to identify timely and decode the written word, that is, to read as compared to the manner and conditions under which the average person in the general population can read or learn.

Accordingly, the "extent of the limitation in terms of" Bartlett's "own experience * * * is substantial." Albertsons, 119 S. Ct. at 2169.

Nor do the attempted self-accommodation techniques employed by Bartlett change this result: reading remains slow, effortful, and extremely time-consuming. The record in this case is clear that the self-accommodations that Bartlett has developed do not mitigate the crucial element in her dyslexia: her lack of automaticity in reading. Unlike the situation in Sutton, where corrective lenses brought the plaintiffs' eyesight to 20/20, there is no medication or corrective device that can permit Bartlett to read with automaticity. As this Court found, individuals with dyslexia suffer a persistent, chronic deficit in their ability to "decode the written word." 156 F.3d at 329. As a result of that impairment, Bartlett always experiences a lack of automaticity when she reads. Without automaticity, Bartlett will never be able to read at a rate and in a manner that approaches the norm, even with her attempts at using the self-accommodation techniques she has learned. Deciphering words without automaticity requires an enormous amount of conscious effort. As the district court noted, Bartlett reads "slowly, haltingly, and laboriously." 970 F. Supp. at 1099. "She simply

does not read in the manner of an average person." Ibid. Accordingly, Bartlett experiences substantial "limitations that persist despite [the mitigating measure]." Murphy, 119 S. Ct. at 2137.

Bartlett's situation is analogous to the individuals described by the Court in Sutton who use a prosthetic limb or a wheelchair for mobility. The Court noted that such individuals "may be mobile and capable of functioning in society but still be disabled because of a substantial limitation on their ability to walk or run." 119 S. Ct. at 2149. The ADA "addresses substantial limitations on major life activities, not utter inabilities." Bragdon v. Abbott, 524 U.S. 624, 641 (1998).[7]

The fact that an individual such as Bartlett has succeeded in obtaining advanced educational degrees in other fields and has completed law school does not prevent her from being an individual with a disability within the meaning of the ADA. Although individuals with dyslexia such as Bartlett have a deficit in phonological processing impairing the manner and ease with which they are able to decipher words, the "higher-order cognitive and linguistic functions involved in comprehension, such as general intelligence and reasoning, vocabulary, and syntax, are generally intact." Sally E. Shaywitz, Current Concepts: Dyslexia, 338 New Eng. J. Med. 307, 308 (1998)

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[7] See Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 309 (3d Cir. 1999) (individual with bipolar disorder who takes lithium to control most severe aspects of disorder can still be substantially limited in major life activity of thinking because of effect of uncontrolled symptoms and side effects of the drug).

(footnotes omitted). This "pattern" helps to explain the "paradox of otherwise intelligent people who experience great difficulty in reading." Ibid.

One of the chief purposes of the ADA is to remove barriers that prevent persons with disabilities from reaching their full potential and to allow them to participate fully in society. See 135 Cong. Rec. 8519 (1989) (remarks of Sen. Cranston). In order for Bartlett to access her higher-order cognitive abilities, she needs more time than an individual without a phonological processing deficit to decode and identify the printed word and she needs other accommodations that would help to compensate for the effects of that deficit. Just as a person in a wheelchair can use an above-ground entrance to gain access to a building if a ramp is available, an individual with a learning disability can draw meaning from high level text if she is allowed the time she requires to slowly decipher each word. To such an individual, time is her ramp. The record demonstrates that Bartlett's achievements thus far have come as a result of extraordinary efforts not required by individuals without disabilities. She should not be excluded from the protections of the Act because of accomplishments made despite her disability.

As we have argued, the record is sufficient for this Court to reaffirm its earlier decision. The fact that Bartlett's lack of automaticity is not susceptible to self-accommodation means that this Court's conclusion that she is substantially limited in the major life activity of reading is correct, even when she is

compared with the average person in the general population. 29 C.F.R. 1630.2(j)(3)(i). The Supreme Court's remand does not compel this Court to reach a different conclusion because Bartlett's lack of automaticity is not improved by any self-accommodation or mitigation.[8/]

CONCLUSION

For the foregoing reasons, this Court should reinstate its earlier determination that Bartlett is an individual with a disability who is entitled to accommodations for taking the New York bar examination. Alternatively, if this Court believes that further findings by the district court are necessary, it can

[8/] Since the record demonstrates that Bartlett is substantially limited in reading, we agree with this Court's determination, see 156 F.3d at 329, that it is unnecessary to decide whether she is substantially limited in the major life activity of working.

remand the case to the district court for a determination whether Bartlett's lack of automaticity results in a substantial limitation in reading.

Respectfully submitted,

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