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APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-11419

D.C. No. 6:14-cv-
00106-ACC-KRS

JOSEPH COONEY,

Plaintiff-Appellant,

versus

BARRY SCHOOL OF LAW,

a.k.a. Dwayne O. Andreas School of Law,

Defendant-Appellee.

Appeal from the United States District Court for the
Middle District of Florida

(January 9, 2018)

Before TJOFLAT, MARTIN, and ANDERSON,
Circuit Judges.

PER CURIAM:

Plaintiff Cooney appeals from the district court's grant of summary judgment in favor of Defendant, Barry Law School. The district court rejected all of plaintiff's claims under both the Americans with Disabilities Act (ADA) and the Rehabilitation Act (Rehab Act) for two alternative reasons: first, that plaintiff was not disabled; and second, even assuming plaintiff was disabled, he failed to adduce evidence creating issues of fact that Barry's actions violated the ADA or Rehab Act.

I. THE DISTRICT COURT'S HOLDING
THAT PLAINTIFF WAS NOT
DISABLED WAS ERRONEOUS

As an initial matter, we agree with plaintiff that the district court erred in its holding that plaintiff was not disabled. The district court's primary error was its application of the law prior to the 2008 Amendments which modified the definition of the term "disability." In particular, the district court – in holding that plaintiff was not disabled – relied particularly on the fact that plaintiff's eye problem could be mitigated by corrective surgery. See D.C. Doc. 143 at 9 (holding that "mitigating measures must be taken into account in judging whether an individual possess a disability" and holding that the "death knell to plaintiff's claim of having a disability is the extent that his impairment can be corrected.") The 2008 Amendments expressly changed the law with respect to mitigation. See 42 U.S.C. §12102(4)(E)(i) ("The determination of whether an

impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures.”). The district court’s failure to apply the 2008 Amendments may also have led to other errors in its holding that plaintiff was not disabled. For example, see 42 U.S.C. §12102(4)(C) (“An impairment that limits one major life activity need not limit other major life activities in order to be considered a disability.”). In any event, in our resolution of this case, we assume arguendo that plaintiff did satisfy the definition of disabled; we proceed to address plaintiff’s argument that the district court’s alternative holdings were erroneous.

II. THE DISTRICT COURT’S ALTERNATIVE HOLDINGS

The plaintiff mounts two primary arguments supporting his position that the district court also erred in its alternative holdings: first, plaintiff argues that the district court erred in rejecting his claim that Barry violated the ADA when Professor Megale refused to grant his request for additional time to file his appellate brief in the legal writing class; and second, plaintiff argues that the district court erred when it rejected plaintiff’s claim of violation when Barry refused to grant his request for extended probation and dismissed him from the school.

We note that we have had the benefit of oral argument and have carefully reviewed the record and the briefs of the parties (including not only

plaintiff's pro se brief but also the brief of his appointed attorney). We also note that we issue this unpublished opinion only for the benefit of the parties, and because they are familiar with the facts, we set out only those facts necessary for an understanding of our resolution of this case.

A. Plaintiff's argument that Barry violated the ADA when Professor Megale refused to grant his request for an accommodation for an extension of time to turn in his appellate brief in the legal writing course

The schedule in the legal writing course for the briefs and oral argument was clear. The briefs of all class members were to be turned in on Monday, April 4, 2011, no later than 7:00 p.m. The instructions made clear that the deadline was of utmost importance, and severe penalties would be imposed for failure to meet the deadline (10% reduction in the grade if 1-15 minutes late; 20% reduction if 16 minutes to 24 hours late; and a grade of zero for the assignment if 24 hours or more late). Oral arguments were scheduled for Friday April 8, Saturday April 9, and Sunday April 10.

Plaintiff's eye problem occurred on March 12, 2011. Pl's. Dep. 139.

Thereafter, plaintiff contacted an appropriate office and made several requests to accommodate for his eye disability, including additional time for taking examinations, additional time to turn in his brief in his legal writing class, and use of sunglasses during the oral argument for that class. His requested accommodations were granted, except that those

relating to the legal writing class with respect to which plaintiff was told that he must ask his legal writing professor, Professor Megale. Later, when the brief was "almost due" (i.e., shortly before April 4, 2011, at 7:00 p.m.), plaintiff first approached Professor Megale to ask her for additional time to file his brief. Under the particular circumstances of this case and for the following reasons, we cannot¹ conclude that the district court erred in its alternative holding that the Act was not violated when Professor Megale declined to grant plaintiff's request for additional time to turn in his brief. Plaintiff's request for additional time was very belated. He approached Professor Megale, at the earliest,¹ shortly before the deadline (i.e., shortly before April 4, 2011), notwithstanding the fact that his eye problem occurred on March 12. Professor Megale's immediate response was that she "couldn't do that" ... [because] there was a certain date [for the oral argument] and she couldn't delay it." Pl's. Dep. 36. Obviously, the time before the scheduled

¹Plaintiff's testimony in deposition is inconsistent as to the precise timing of this first approach to Professor Megale to ask for additional time for filing his brief. At several points in the deposition, he expressly states that he first approached the Professor after he emailed her seeking an accommodation for permission to wear sunglasses at oral argument, and that his approach was an in person, oral request. That email was dated April 8, 2011, which of course would mean that there was virtually no extended briefing deadline that would not substantially alter the oral argument schedule. In the summary judgment posture of this case, we give plaintiff the benefit of the doubt and deem that his request was first made when the brief was "almost due" – i.e., shortly before the Monday April 4, 2011, deadline.

arguments was extremely short – from April 4 at 7:00 p.m. there were less than four full days before the first oral argument on April 8 and six days before the last argument on April 10. And of course, the student whom plaintiff would face in the oral Plaintiff's testimony in deposition is inconsistent as to the precise timing of this first approach to Professor Megale to ask for additional time for filing his brief. At several points in the deposition, he expressly states that he first approached the professor after he emailed her seeking an accommodation for permission to wear sunglasses at oral argument; and that his approach was an in person, oral request. That email was dated April 8, 2011, which of course would mean that there was virtually no extended briefing deadline that would not substantially alter the oral argument schedule. In the summary judgment posture of this case, we give plaintiff the benefit of the doubt and deem that his request was first made when the brief was "almost due" – i.e., shortly before the Monday April 4, 2011, deadline.

argument would have to have at least a few days beforehand to prepare for the oral argument, thus further reducing any remotely feasible opportunity for extending plaintiff's briefing deadline. Although plaintiff acknowledges that Professor Megale's immediate response was that she could not grant the delay because of the fixed oral argument date, plaintiff did not suggest to the professor that only a day or two would have been helpful. Moreover, plaintiff later testified in deposition: "I was thinking at least a week [extension], maybe longer, maybe ten days" would've been necessary. Pl's. Dep. 66.

Under the particular circumstances here, we conclude that no reasonable jury could find that plaintiff's belated request for additional time to turn in his brief was a reasonable request for accommodation that would not cause a substantial alteration of the legal writing program. Given the short time period between the briefs' due date and oral arguments, plaintiff's belated request, and the fact that plaintiff did not inform Professor Megale that a one-day extension would be sufficient, an accommodation would have placed an undue burden on the program. Accordingly, with respect to this first argument of plaintiff, we cannot conclude that the district court's alternate holding rejecting the argument was erroneous.

A. Plaintiff's argument that Barry violated the Acts by refusing to grant plaintiff extended probation and consequently dismissing him from the school

The district court, in its alternative holding, held that plaintiff was not "otherwise qualified," and thus there was no violation even if plaintiff was disabled. Plaintiff's appointed attorney acknowledges that the "otherwise qualified" issue is dependent upon our resolution of the foregoing issue – i.e. extension of time for the appellate brief. We agree that the two issues are intertwined.

It is undisputed that Barry's rules provide that a student who fails to maintain a 2.0 grade point average (GPA) should be academically dismissed from the school. The rule provides that a student who has 1.750 to 1.990 GPA receives only

“restricted advancement” to the next semester – i.e., mandatory probation.

Although plaintiff had received a 2.0 GPA in his first semester (Fall 2010), he received a 1.809 for the Spring 2011 semester (a cumulative GPA of 1.8789). Because this was less than a 2.0 GPA, plaintiff was granted restricted advancement to (i.e., placed on mandatory probation for) the next semester (Fall 2011).

However, notwithstanding that plaintiff was granted every accommodation he requested for that Fall 2011 semester, he nevertheless achieved only a 1.883 (cumulative GPA of 1.879). The Barry rules mandated academic dismissal, unless the Academic Standards Committee granted extended probation.

The Student

Handbook provided that a student petitioning for such extended probation must overcome a presumption of dismissal by clear and convincing evidence that, inter alia, the student had achieved substantial improvement in scholastic achievement during the period of mandatory probation, and also that there is a likelihood that an additional semester of probation will result in a cumulative GPA of 2.0 or greater.

Plaintiff petitioned for extended probation, but the Academic Standards Committee denied same, and consequently plaintiff was dismissed from the school for failure to satisfy the 2.0 GPA requirement. In the district court and on appeal, plaintiff challenges the Committee’s decision to deny extended probation and his consequent dismissal from the school. In its alternative holding,

the district court held that plaintiff was not "otherwise qualified" and therefore rejected plaintiff's challenge. The plaintiff argues on appeal that, if Barry violated the law when Professor Megale refused to grant plaintiff's request for additional time for the brief, then the Committee's reliance on plaintiff's poor grade for that Spring 2011 semester was also a violation, thus tainting the Committee's decision. The plaintiff also argues that there is evidence that the Committee denied extended probation in part because of his disability – i.e., his eye problem.

It is true that the initial draft of the Committee's reasons for denial suggested that the Committee believed that plaintiff, suffering as he did with the eye problem, would not be likely to achieve a 2.0 GPA if given the opportunity of another semester. However, because we have already held that there was no violation when Professor Megale declined to allow an extended briefing deadline, the predicate underlying plaintiff's argument falls away²y. The GPA figures relied upon by the Committee were not tainted. And the initial draft of the Committee's rationale is a mere statement of the obvious fact that plaintiff's GPA does in fact indicate that there is little likelihood that an additional semester of probation would result in plaintiff's achieving a cumulative GPA of 2.0 or greater.

In other words, the Committee's initial draft is a mere recognition that plaintiff was not "otherwise qualified." Indeed, plaintiff's deposition testimony

reveals that plaintiff purposely avoided telling the Committee that he had requested an accommodation which was not granted, but which he thought should have been granted. Thus, operating under the perception that plaintiff had been afforded all the accommodations he requested, the Committee's belief that he could not achieve the required 2.0 GPA with or without accommodations constitutes merely a belief that plaintiff was not "otherwise qualified"; by itself, it is not evidence of discrimination. We cannot conclude that the district court erred in its alternative holding rejecting plaintiff's argument challenging the decision to deny extended probation and the consequent dismissal from the school. the foregoing reasons,² the judgment of the district court is AFFIRMED.

² We have carefully considered plaintiff's pro se brief on appeal, in addition to the brief filed by his appointed attorney. Although it raises a few issues not raised by plaintiff's appointed attorney, and although we have carefully considered them, we cannot conclude that they indicate reversal of the district court decision or that they warrant further discussion

APPENDIX B

**UNITED STATES COURT OF APPEALS
OF THE ELEVENTH CIRCUIT**

**ELBERT PARR TUTTLE COURT OF APPEALS
BUILDING 56 Forsyth Street, N.W.
Atlanta, Georgia 30303**

March 13, 2018

**David J. Smith
Clerk of Court**

MEMORANDUM TO COUNSEL OR PARTIES

**Appeal Number:16-11419-EE
Case Style: Joseph Cooney v. Barry School of Law
District Court Docket No. 6:14-cv-00106-ACC-KRS**

**The enclosed order has been entered on petition(s)
for rehearing.**

**See Rule 41, Federal Rules of Appellate Procedure,
and Eleventh Circuit Rule 41-1 for information
issuance and stay regarding issuance and stay of
mandate.**

**Sincerely,
DAVID J. SMITH, Clerk of Court
Reply to: Elora Jackson,
EE/lt Phone # (404) 335-6173
REHG-1 Ltr Order Petition Rehearing**

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-11419-EE

JOSEPH COONEY,

Plaintiff - Appellant.

versus

BARRY SCHOOL OF LAW,
a.k.a, Dwayne O. Andreas School of Law,

Defendant - Appellee,

Appeal from the United States District Court
for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

BEFORE: TJOFIAT MARTIN and ANDERSON
Circuit Judges.

PERCURIAM:

The Petition(s) for Rehearing are DENIED and no
Judge in regular active service on the Court having
requested that the Court be polled on rehearing en
bane (Rule 35, Federal Rules of Appellate
Procedure), the Petition(s) for Rehearing En Banc
are DENIED.

ENTERED FOR THE COURT:

s/ Wilson

UNITED STATES CIRCUIT JUDGE

ORD-42 March 13, 2018

APPENDIX C

Joseph Cooney
Redacted
Bayside NY 11361
Redacted

June 17, 2017

Transmitted Via: Certified Mail

Attn: Clerk of Court
U.S. Court of Appeals 11th Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

RE: Cooney v. Barry School of Law Appeal No. 16-11419 Oral Argument Participation Request

To Clerk of the Court,

I am requesting to participate at oral argument along with appointed counsel in support of my Appeal.

Note: My count two claim and direct evidence argument have not been waived by appellant and appellant is not in agreement with the lower court ruling on these issues and I wish this court to make the rulings on count two as well as counts one, three, and four, and my direct evidence of discrimination argument.

Very Truly Yours,

Joseph Cooney
Appellant

UNITED STATES COURT OF APPEALS
OF THE ELEVENTH CIRCUIT

No. 16-11419-V

JOSEPH COONEY,
Plaintiff - Appellant,

versus

BARRY SCHOOL OF LAW,
a.k.a. Dwayne O. Andreas School of Law,

Defendant - Appellee.

Appeal from the United States District Court for
the Middle District of Florida

ORDER:

Appellant's motion requesting to
participate at oral argument along with
appointed counsel in support of appeal is
GRANTED.

DAVID J. SMITH
Clerk of the United States Court of Appeals
Eleventh Circuit
ENTERED FOR THE COURT - BY DIRECTION

APPENDIX D

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT
OF FLORIDA ORLANDO DIVISION

JOSEPH COONEY,

Plaintiff,

BARRY SCHOOL OF LAW

Defendants.

ORDER

This cause comes before the Court on Barry University, Inc.'s ("Defendant") Motion for Summary Judgment (Doc. No. 126) filed on November 17, 2015. Plaintiff Joseph Cooney ("Plaintiff") filed his Response in Opposition (Doc. No. 130) on December 18, 2015. Defendant filed its Amended Reply on January 6, 2016. (Doc. No. 133). For the following reasons, this Court grants Defendant's Motion.

I. BACKGROUND

Plaintiff filed this action after being academically dismissed from law school. He claims this decision resulted

from discrimination against him as an individual with a disability. Plaintiff was admitted to Defendant's institution to begin classes in the fall of 2010. (Doc. No. 77 ¶ 2). Upon matriculation, Plaintiff received a copy of Defendant's 2010-11 "Student Handbook."¹ (Doc. No. 126-16 p. 115:14-16). The Student Handbook requires academic dismissal of students receiving a first semester grade point average ("GPA") below 1.750. (Doc. No. 126-19 p. 41). It also outlines procedures for students with disabilities to request accommodations. (*Id.* at p. 11).

¹ Defendant's Motion attaches both the 2010-11 and 2011-12 versions of the Student Handbook. The provisions cited in this Order are identical in both versions and therefore this Court only cites the 2011-12 version (Doc. No. 126-19), the most recent version at the time Plaintiff was academically dismissed.

Plaintiff has been wearing an interior ocular eye implant since 2003. (Doc. No. 126-16 p. 22:16-17). This condition stemmed from being struck in his right eye with a cone at a softball game. (*Id.* at p. 22:23-24). In March 2011, he rubbed the eye containing the implant and from then on could no longer see out of that eye. (*Id.* at p. 22:3-6). He later discovered that the implant had been disengaged and was floating in his vitreous. (*Id.* at p. 22:15-20).

On January 11, 2011, Plaintiff was notified that he received a 1.500 GPA for the fall 2010 semester, resulting in academic dismissal. (Doc. No. 126-17 p. 2). Within a week, two of Plaintiff's professors made requests to change the grades he received in their respective courses. (*Id.* at pp. 3-4). This increased his fall 2010 term GPA to 2.000. (Doc. No. 126-15 p. 1). During the spring 2011 semester, after the implant was disengaged, he requested and received a curriculum variance for extended time on final exams. (Doc. No. 126-17 p. 7). Plaintiff also asked for extended time to turn in an appellate brief for his legal research and writing course but Defendant's Office for Disability Services directed him to ask his professor because the brief was not

an exam. (Doc No. 126-16 p. 31-14:23). His professor denied the extension, reasoning that it was not possible because the assignment involved an oral argument against another student. (*Id.* at pp. 35- 23:25 and 36-1:7).

On June 8, 2011, Plaintiff was placed on academic probation for failing to maintain a 2.000 GPA. (Doc. No 126-17 p. 8). In the same correspondence, he was also notified that it was mandatory to meet with the Director of Academic Success to identify measures to improve his performance. (*Id.*). The two scheduled a meeting on September 6, 2011 and a follow-up meeting on September 15, 2011. (Doc. No. 130-1 p. 82). He requested and was granted another variance for extended time on exams in the spring 2011 semester. (Doc. No. 126-17 p. 12).

On January 19, 2012, Plaintiff was again academically dismissed for failing to maintain a 2.000 GPA. (Doc. No. 126-18 p. 3). On January 24, 2012, he petitioned for discretionary probation in lieu of academic dismissal to have an opportunity to increase his GPA by the end of the spring 2012 semester. (*Id.* at p. 6). This request was denied on February 6, 2012. (Doc. No. 126-31 p. 18).

II. LEGAL STANDARD

Granting a motion for summary judgment is proper if the moving party “shows that there is no genuine dispute as to any material fact.” Fed. R. Civ. P. 56(a). A dispute of material fact exists “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Therefore, “the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.” *Id.* at 248-49. “[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Successfully demonstrating the absence of a genuine dispute entitles the moving party to judgment as a matter of law. Fed. R. Civ. P. 56(a).

Assertions for or against a motion for summary judgment must be supported by materials in the record to be deemed proper. *Id.* at (c). The moving party bears the initial burden in providing the basis for its motion. *Celotex*, 477 U.S. at 323. The nonmoving party must then properly

address the moving party's assertions of fact or the motion will be granted. *Anderson*, 477 U.S. at 248 ("A party opposing a properly supported motion for summary judgment may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial.") (internal quotation marks omitted). Thus, the principal inquiry in ruling on a motion for summary judgment is whether a trial is necessary. There is no issue for trial without "sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Id.* at 249. The outcome of a summary judgment motion therefore boils down to two scenarios: either "the evidence presents a sufficient disagreement to require submission to a jury or . . . it is so one-sided that one party must prevail as a matter of law." *Id.* at 251-52. In making this determination, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255 (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970)); *Allmond v. Akal Sec., Inc.*, 558 F.3d 1312, 1316 (11th Cir. 2009).

III.DISCUSSION

As a preliminary matter, it is important to note that Plaintiff is, and

has been, proceeding *pro se*. A *pro se* litigant's pleadings "are held to a less stringent standard than pleadings drafted by attorneys and are liberally construed." *Bingham v. Thomas*, 654 F.3d 1171, 1175 (11th Cir. 2011). Plaintiff mistakenly alleges discrimination under 42 U.S.C. § 12131,² the subchapter of the Americans with Disabilities Act ("ADA") relating to public services, despite referring to Defendant as a private institution. (See Doc. No. 77 ¶ 36). Liberally construing Plaintiff's pleadings, this Court interprets Plaintiff's ADA claim as one for discrimination under § 12182 of the ADA which pertains to private entities providing public accommodations.

*A. The Purpose and Applicability of
the Rehabilitation Act of 1973 and
the ADA*

The Rehabilitation Act of 1973 (the "Rehab Act") stands to empower individuals that have disabilities to participate in society with the same level of opportunity as individuals that do not. See 29 U.S.C. § 701(b)(1). Though the Rehab Act is primarily targeted toward increasing employment prospects for the disabled, § 794 (better known as "Section 504")

of the statute expands its reach to ensure that all programs, projects, and activities receiving funds from the United States government equally include individuals with disabilities. The Rehab Act shares many of the same public policy concerns as the ADA.

Congress intends the ADA to provide "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). This in part rests on its finding that "physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination." *Id.* at §12101(a)(1).

² Defendant raised this point in its Motion to Dismiss (Doc. No. 51) but was denied because it failed to state this argument in its initial 12(b) motion made to the Eastern District of New York before the case was transferred to this Court. (Doc. No. 66).

It further found that “historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem.” *Id.* at § 12101(a)(2); *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 674-75 (2001). The ADA was enacted to provide legal recourse for discrimination against individuals with disabilities, similar to that afforded to “individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age. . . .” 42 U.S.C. § 12101(a)(4).

Both the ADA and Section 504 apply to the present case. The ADA provides that “[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation” *Id.* at § 12182(a). Defendant is a private institution of higher education. Places of public accommodation include postgraduate private schools. *Id.* at §12181(7)(J). Section 504 provides that “[n]o otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the

participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance” 29 U.S.C. § 794(a). Defendant conceded that it receives Federal financial assistance (Doc. No. 126 p. 14) and is thus covered by Section 504. As a result, the remaining issue is whether Defendant discriminated against Plaintiff on the basis of a disability.

B. *McDonnell Douglas Burden-Shifting Framework*

The burden-shifting framework under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), applies to discrimination cases based on circumstantial evidence. *Wascara v. City of South Miami*, 257 F.3d 1238, 1242 (11th Cir. 2001).

This framework applies here because Plaintiff has not offered direct evidence of discrimination. Plaintiff’s reference to a faculty member’s email (Doc. No. 130 Ex. 8) stating that Plaintiff’s blindness was one of the reasons his petition for discretionary probation was denied is not sufficient. This is because an inference is required to determine that this was the sole reason for the denial. *See Denney v. City of Albany*, 247 F.3d 1172, 1182 (11th Cir. 2001) (noting that direct

evidence establishes discriminatory intent without any inference or presumption). Such determination is not possible as, with the exception of fall 2010, Plaintiff consistently performed poorly enough to be placed on academic probation each semester at Defendant's institution. Analysis as to whether the faculty member's comment in the email was a stray remark is nil. Therefore, the *McDonnell Douglas* burden-shifting framework requires, in this order, the plaintiff to first establish a *prima facie* case of discrimination,³ then the defendant to offer a non-discriminatory justification, and lastly for the plaintiff to show that the defendant's justification is mere pretext. *See* 411 U.S. at 802-04. The subsequent discussion begins at step one—assessing Plaintiff's arguments in establishing a *prima facie* case of discrimination.

*C. Plaintiff's Claims of Discrimination
and Failure to Accommodate*

The parties have agreed that the present action consists of four claims involving either the ADA or the Rehab Act:

Count I alleges a violation of the ADA
by Plaintiff having his
request for an extension on

his appellate brief denied;

Count II alleges a violation of the Rehab Act based on Plaintiff being denied access to Defendant's Director of Academic Success;

Count III alleges another violation of the Rehab Act by Defendant denying Plaintiff extended probation and withholding the basis for denial; and

Count IV alleges the final violation of the Rehab Act by Defendant arbitrarily dismissing Plaintiff from Barry School of Law.(Doc. No. 142 p. 1-2).

Count I pertains to an alleged failure to provide a reasonable accommodation. Counts II-IV pertain solely to discrimination. In sum, Defendant rebuts these claims by asserting that Plaintiff was not disabled, was not denied any reasonable accommodation, and was not qualified to attend its institution. (Doc. No. 126 p. 2).

a. Count I

An extension on the appellate brief was not warranted. The parties

agreed that establishing a violation of the ADA requires Plaintiff to show that (1) he is a qualified individual with a disability; and (2) he was unlawfully discriminated against because of his disability. *Waddell v. Valley Forge Dental Assocs., Inc.*, 276 F. 3d 1275, 1279 (11th Cir. 2001); *Cash v. Smith*, 231 F. 3d 1301, 1305 (11th Cir. 2000). Under the ADA, the “term disability means, with respect to an individual . . . (1) a physical or mental impairment that substantially limits one or more major life activities of such individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment.” 42 U.S.C. § 12102(1)(A)-(C). Plaintiff argues that he could not see out of his right eye and was actually disabled under the first prong, § 12102(1)(A), or alternatively that Defendant regarded him as disabled under the third prong, § 12102(1)(C), by providing him accommodations based on this impairment. (Doc. No. 130 p. 23).

Plaintiff was not actually disabled as defined in the ADA. The key terms in the first prong are “major life activities” and “substantially limits.” Major life activities “include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending,

speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.” 42 U.S.C. §12101(2). An impairment is a disability “if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population.” 29 C.F.R. § 1630.2(j)(ii). In his deposition, Plaintiff states that he had a hard time reading, he struggled keeping balance while walking, and he had to drive slower than he did before the implant became disengaged. (Doc. No. 126 p. 25: 9:17 Although these are major life activities, his impairment did not substantially limit him from participating in them. Determining that an individual is substantially limited in a major life activity must be done on a case-by-case basis and is hinged upon the effect the impairment has on the individuals life, not its name or diagnosis. *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 566 (1999) (deciding, amongst other things that an individual with monocular vision was not disabled).

³ The standard for establishing *prima facie* discrimination is similar under the ADA and Section 504. *Forbes v. St. Thomas University, Inc.*, 768 F. Supp. 2d 1222, 1227 (S.D. Fla. 2010).

In *Phillips v. Wal-Mart Stores, Inc.*, an employee alleged discrimination under the ADA against his employer asserting that he was fired because of various impairments caused by a traumatic brain injury. 78 F. Supp. 2d 1274 (S.D. Ala. 1999), *aff'd*, 220 F.3d 593 (11th Cir. 2000). One of his impairments was blurred vision. *Phillips*, 78 F. Supp. 2d at 1284. In determining that his impairment did not substantially limit his ability to see, the court noted that a “visual impairment which hinders or makes it more difficult for an individual to function at a full visual capacity, does not amount to a substantial limitation on one's ability to see where the evidence suggests the individual can otherwise conduct activities requiring visual acuity.” *Id.*

Plaintiff was still able to drive—a quintessential major life activity that by law demands visual acuity. Although Plaintiff purports that he had difficulty keeping balance and reading, the fact that he was able to operate a motor vehicle is quite telling of the limitation that the impairment imposed on his ability to see. Moreover, the “mere fact that [a] plaintiff's ability to see ‘differs’ from [an] average person in [the] general population” is not alone sufficient to constitute a disability under the ADA. *Id.* (citing *Kirkingburg*, 527 U.S. at 565). The death knell to Plaintiff's claim of having a disability is the extent that his impairment can be corrected. *Id.* (mitigating measures must be taken into account in judging whether an individual

possesses a disability). Plaintiff's impairment was corrected before the implant became disengaged and was corrected once again following the surgery. His ability to mitigate the impairment fully indicates that it is not a disability according to the ADA. Plaintiff was therefore not actually disabled. Furthermore, he has not made any arguments regarding a record of his impairment under the second prong.

Even if he did, he still lacks a showing that the impairment substantially limited a major life activity. Analysis under the third prong, however, warrants further discussion. Despite not being actually disabled, Defendant regarded Plaintiff as such by granting him two variances for extended time that cited his impairment. (Doc. No. 126-17 pp. 7 and 12). A person is "regarded as having such an impairment if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity." *Id.* at §12102(3)(A). Impairments that are transitory or minor, lasting for six or fewer months, are not covered. *Id.* at §12102(3)(B). Plaintiff's alleged discrimination claims survived a motion to dismiss. (Doc. No. 66). His impairment was not transitory, as he did not get corrective surgery until eleven months after he began experiencing vision loss. (Doc. 126-16 pp. 22:3-6 and 27:4-6). Defendant allotted Plaintiff

extra time on final exams because of the vision impairment stated in his petitions for variance, and thus had regarded him as disabled when he made the request for an extension to turn in the appellate brief. *See* 29 C.F.R. § 1630.2(l); *see also Hilburn v. Murata Elecs. N. Amer. Inc.*, 181 F.3d 1220, 1230 (11th Cir. 1999) (stating that, amongst other indications, one is regarded as disabled if the person has an impairment that does not substantially limit a major life activity, but is treated as though it does). As a result, for analysis under 42 U.S.C. § 12102(1)(C), it is immaterial as to whether the impairment substantially limited a major life activity because Defendant treated him as if it did.

Since Plaintiff was regarded as disabled, it must be determined if he was qualified to attend Defendant's law school. A "qualified individual with a disability" is one "who, with or without reasonable accommodation, can perform the essential functions or meet the essential requirements of the program in which such individual participates or in which such individual desires to participate." *Forbes*, 768 F. Supp. 2d at 1228 (quoting *Meisenhelder v. Fla. Coastal School of Law, Inc.*, 2010 WL 2028089, at *3 (M.D. Fla. 2010). When he requested the extension in the spring 2011 semester, his GPA was 2.000—the exact minimum to be in good

academic standing. (Doc. No. 129-19 p. 41). He obtained that GPA before receiving any accommodation. Therefore, he was qualified to attend Defendant's institution during that time.

Despite Plaintiff being regarded as disabled and being qualified, Defendant was not required to provide him any accommodation. Regardless of the sufficiency of Plaintiff's request, "[a] covered entity . . . is not required to provide a reasonable accommodation to an individual who meets the definition of disability solely under the 'regarded as' prong" 29 C.F.R. § 1630.9(e). Accordingly, Defendant was under no obligation to accommodate Plaintiff. Even if Defendant was required to provide accommodations, Plaintiff's claim asks the Court to review the substance of an academic decision made by a member of Defendant's faculty. Such review requires "great respect for the faculty's professional judgment." *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985); *Haberle v. Univ. of Ala.*, 803 F.2d 1536, 1539 (11th Cir. 1986).

Plaintiff's professor did not see fit to allow Plaintiff extra time on the appellate brief because he had to argue against another student on a date that

was already set. (Doc. No. 126-16 p. 36:2-6). Deferring to the professor's judgment, it makes sense to deny the extension. Not only would it have altered the oral argument schedule, it would have given extra time to another student that presumably did not need any accommodation which is contrary to the ADA's purpose.

b. Count II

Plaintiff met with the Director of Academic Success as required. *Prima facie* discrimination under Section 504 requires Plaintiff to demonstrate that "(1) he has a disability; (2) he is otherwise qualified for the position; and (3) he was subjected to unlawful discrimination as the result of his disability." *Sutton v. Lader*, 185 F.3d 1203, 1207-08 (11th Cir. 1999). Section 504 borrows the definition of "disability" from the ADA. 29 U.S.C. § 705(9)(B). A person that is "otherwise qualified" is also one that meets the requirements of the program with or without reasonable accommodations. *See* 29 C.F.R. § 1630.2(m). The analysis here is the same as Count I.

Plaintiff is not actually disabled but Defendant regarded him as such. He also was provisionally qualified to

attend the school because he was on academic probation during the fall 2011 semester. However, Plaintiff has not sufficiently shown discrimination because he met with the Director as required. The terms of probation in the Student Handbook are clear. Once a student receives notice that he is on mandated or discretionary academic probation, he “must meet promptly with the Director of the Academic Success Program, who shall determine what measures may improve the student’s academic performance.” (Doc. No. 126-19 p. 47). On June 8, 2011, Plaintiff received notice that he was on academic probation. (Doc. No. 126-17 p. 8). On August 29, 2011, the Director contacted Plaintiff to meet. (*Id.* at p. 9). Plaintiff specifically stated, “I saw her [the Director] very promptly when I returned to Orlando for the fall 2011 semester” (*Id.* at p. 50:17-20). The two met twice. Once on September 6, 2011, in which they reviewed an assessment Plaintiff filled out to facilitate a plan for improvement, and a second time on September 15, 2011. (Doc. No. 130-1 p. 82). For the September 15, 2011 meeting, he was instructed to bring his course outlines for review but came to the meeting without them. (*Id.*). Consequently, Defendant followed the Student Handbook, rendering the

other facts immaterial to a claim under Section 504.

c. Counts III and IV

Plaintiff's allegations pertaining to the denial of his petition for discretionary probation (Count III) and his academic dismissal (Count IV) are intertwined via their relation to him being qualified to attend Defendant's institution. Plaintiff falls short of establishing a *prima facie* case of discrimination under Section 504 on these Counts as well. He was not actually disabled but even with Defendant regarding him as such, he was not otherwise qualified. Once his fall 2012 semester grades arrived—the event triggering his dismissal—he failed to meet the requirements to be a student at Barry School of Law.

The Student Handbook outlines the requirements to remain in good academic standing. In general, “the minimum standard for unrestricted advancement to the second semester, and any subsequent semester and/or summer term of study, shall be a cumulative GPA of 2.000.” (Doc. No. 126-19 p. 41). For students that do not attain a 2.000 GPA, “the standard for restricted advancement is 1.75 to 1.99” (*Id.*). Plaintiff was allowed

unrestricted advancement in fall 2010 only after having two first semester grades changed that raised his GPA from a 1.500 to exactly a 2.000.

Plaintiff failed to meet the standard for restricted or unrestricted advancement after fall 2012.⁴ The Student Handbook requires a student subject to restricted advancement to be placed on mandated academic probation for one semester. (Doc. No. 126-19 p. 41). After the probationary semester, “if the student’s cumulative GPA remains below 2.000, the Associate Dean for Academic Affairs . . . shall issue a Notice of Academic Dismissal.” (*Id.*). Plaintiff’s GPA fell and remained below the minimum for both semesters after fall 2010, warranting dismissal according to the Student Handbook.

Students that are dismissed, however, can petition for discretionary probation in lieu of academic dismissal.” (*Id.* at p. 42). In relevant part, the Student Handbook states that a student’s petition “must overcome the presumption of dismissal by clear and convincing evidence of . . . substantial improvement in scholastic achievement during the period of mandatory academic probation and the likelihood that an additional semester of probation will result in a cumulative GPA of 2.000 or greater.” (*Id.*). The

Student Handbook does not define “clear and convincing evidence.” Black’s Law Dictionary, nonetheless, defines it as “[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.” *Clear and Convincing Evidence*, *Black’s Law Dictionary*, 674 (10th ed. 2014). Plaintiff had shown no substantial improvement in his cumulative GPA from 1.876 in spring 2011 to 1.879 in fall 2011. (Doc. No. 126-15 p. 1).

Based on this performance, it is neither highly probable nor reasonably certain that another semester of probation would raise his cumulative GPA of 1.879 to 2.000—especially since he has already completed nearly half of the part-time curriculum.

4 His two subsequent semesters—with the accommodation of one hour and thirty minutes of extra time on final exams—were worse than the fall 2010 semester: his semester GPA in spring 2011 was 1.809, and in fall 2012 it was 1.883. (Doc. No. 126-15 p. 1).

Consequently, Plaintiff has failed to establish a *prima facie* case of discrimination on all four Counts. Thus, “the plain language of [Federal Rules of Civil Procedure] Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case” *Celotex*, 477 U.S. at 322. Allowing Plaintiff's claims to proceed would also usurp the public policy interest of providing an avenue to judicial relief from discrimination against those with impairments that substantially limit major life activities. Because Plaintiff has not met his burden, it does not shift to Defendant to provide a non-discriminatory justification for its actions, and all other facts are immaterial.

CONCLUSION

Therefore, based on the foregoing, it is **ORDERED** as follows:

1. Defendant's Motion for Summary Judgment (Doc. No. 126) filed on November 17, 2015 is **GRANTED**.
2. The Clerk is directed to enter judgment providing that Plaintiff recover nothing

on his claims and that Defendant
recover costs from Plaintiff.

3. The Clerk is directed to **CLOSE** this file.

DONE and **ORDERED** in Chambers, in
Orlando, Florida on March 9, 2016.

s/ Anne C. Conway

United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
JOSEPH COONEY,

Plaintiff,

MEMORANDUM

13 Civ. 5662
(BMC)(LB)

BARRY SCHOOL OF LAW,
also known as
Dwayne O. Andreas School of Law, :
Defendant.

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DECISION AND ORDER

COGAN, District Judge.

Plaintiff *pro se* brings this action against his former law school, alleging claims under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*, and the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.* Defendant has moved to dismiss on the ground of insufficient service of process;

lack of personal jurisdiction, and improper venue. Alternatively, defendant seeks to transfer this action to the Middle District of Florida for the convenience of parties and witnesses and in the interest of justice. I hold that service of process was insufficient and venue is improper in this district. Plaintiff will be given an opportunity to advise the Court whether he wants the case dismissed or transferred.

BACKGROUND

The allegations of the complaint arise from plaintiff's enrollment at defendant's law school. Plaintiff is a New York resident, defendant is a Florida corporation, and plaintiff enrolled as a student in 2010. In 2011, presumably when plaintiff was a second-year student, he suffered a condition that resulted in blindness in his right eye. He asked one of his professors for an extension of time to submit an assignment. The Professor said that she wished there was something she could do for plaintiff, but she never offered any extra time to complete the assignment or other accommodation. As a result, plaintiff could not submit the assignment, and he was placed on academic probation.

Defendant maintains a student support

program called the "Academic Success Program." Plaintiff alleges that the director of that program is prejudiced against the disabled and would not consider plaintiff for participation. Participation either facilitates or is a prerequisite for an extended period of academic probation. Thus, by excluding plaintiff, he effectively lost his chance for an extension of his period of academic probation. Nevertheless, plaintiff requested an extension of his academic probation for the Spring, 2012 semester, after he narrowly missed the cut-off (2.0 grade point average). Defendant convened an administrative hearing, but a member of the hearing panel told plaintiff that since he was still blind in one eye, extending probation would not do him any good since his partial blindness would preclude him from succeeding in law school. The hearing panel therefore denied the application for extended probation, and defendant terminated plaintiff's enrollment.

Plaintiff asserts that defendant denied extended probation to three out of four disabled students who had applied for it. Plaintiff seeks an injunction requiring defendant to readmit him as a student and for damages caused by the termination of his enrollment.

DISCUSSION

I. Insufficient Service of Process

Plaintiff effected service of the summons and complaint on Charlene Ford, defendant's Director of Student Life and Interim Director of Admissions, when she attended a law student recruiting fair in New York City. Defendant claims that service was insufficient because Ms. Ford does not qualify as a person who may be served under applicable law. Federal Rule of Civil Procedure 4(h)(1) provides alternative methods for serving a corporation, or a partnership or other unincorporated association, within the United States. Under Rule 4(h)(1)(B), a business entity may be served "by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or any other agent authorized by law to receive service of process" Under Rule 4(h)(1)(A), a business entity may be served "in the same manner as an individual" as provided by Rule 4(e)(1). Rule 4(e)(1), in turn, allows service in accordance with state law. In this case, the applicable state law is N.Y. C.P.L.R. § 311(a)(1), which authorizes service upon "an officer, director, managing, or general agent" This provision circles back to Rule 4 as C.P.L.R. § 311(a) is

based on the same language in Rule 4, see N.Y. C.P.L.R. § 311 (McKinney 2013) (historical and statutory notes), and it is therefore appropriate to construe the provisions *in pari materia*.

Although Ms. Ford bears the title of “director” or “interim director,” both sides appear to recognize that “director” refers to a member of a corporation’s board of directors. See 3B Carmody-Wait New York Practice §24:125 (2d ed. 2013) (“service is not effective where it is made upon a person who is only an ex-officio member of the board of directors and of standing committees, with no right to vote or in any way conduct the business affairs of or to manage the corporation.”). The argument here, instead, is whether Ms. Ford qualifies as a “managing or general agent” as defined either under Rule 4(h)(1)(B) or, through Rule 4(h)(1)(A), C.P.L.R. § 311(a)(1).

There are not as many cases construing these terms, either state or federal, as one might think, and those that have been decided are very fact-specific. The closest case to our facts appears to be Popkin v. Xerox Corp., 204 A.D.2d 704, 612 N.Y.S.2d 250 (2d Dep’t 1994).

There, the plaintiff served as the “financial control manager” of one of the defendant’s district offices. The financial

control manager supervised eight or nine people. Despite her supervisory role, the Appellate Division held that "it was not reasonable for the process server to conclude that [the financial control manager] was a 'managing agent'", id. at 705, 612 N.Y.S.2d 250, and it found that service was invalid. See also Fernandez v. Town of Babylon, 104 A.D.3d 643, 961 N.Y.S.2d 223 (2d Dep't 2013) ("Project Manager" did not qualify as managing or general agent). Popkin demonstrates that the phrase "managing or general agent" does not refer to any agent of the corporation, but one who operates at its highest levels, or at least has overall authority to make high-level decisions on the part of the enterprise. This defeats plaintiff's argument that as a representative, Ms. Ford is an "agent." She is, of course, but so is any employee who takes authorized action on behalf of defendant. "Managing or general agent" is a term of art with a narrower meaning than just "agent." This narrower construction is consistent with the other listed categories of authorized persons to receive service, such as officers and directors. Indeed, the reference in C.P.L.R. § 311(a)(1) to "cashier or assistant cashier" refers to "a financial official within the ranks of the managerial hierarchy, not a check-out clerk at the counter of a retail store."

N.Y. C.P.L.R. § 311(a) (McKinney 2013) (Official Commentary C311:1, citing Oustecky v. Farmingdale Lanes, Inc., 41 Misc.2d 979, 246 N.Y.S.2d 859 (Sup.Ct. Nassau Co. 1964)).

This limitation to the higher end of the corporate hierarchy is particularly applicable here because plaintiff has misnamed the corporate defendant. He has purported to sue “Barry School of Law a/k/a Dwayne O. Andreas School of Law,” but defendant has advised that the corporation is actually Barry University, Inc. One of its colleges appears to be the Dwayne O. Andreas School of Law, which is the college that plaintiff attended, but as a college within the university, it has no separate corporate existence, and plaintiff’s suit is therefore properly against Barry University, Inc. What this means is that Ms. Ford has a relatively small role to play within the corporation – she handles admissions at one of a number of colleges (defendant’s website reflects at least nine). That does not invest her with the kind of senior corporate authority that the term “managing or general agent,” as defined in Rule 4 and its incorporation of state law, contemplates.

Accordingly, plaintiff has failed to effect proper service on defendant. In such circumstances, the Court has discretion to either dismiss the case with leave to refile,

or to quash service so that a plaintiff can again attempt proper service. 5B Wright & Miller, Federal Practice and Procedure §1354, n. 4-9 (3d ed. 2013). The Second Circuit has suggested that when it is likely that the plaintiff will be able to effect proper service, the proper remedy may be to quash service rather than dismiss the case, see Alexander v. Unification Church of America, 634 F.2d 673, 675 (2d Cir. 1980), abrogated on other grounds by PSI Metals, Inc. v. Firemen's Ins. Co. of Newark, N.J., 839 F.2d 42 (2d Cir. 1988); Grammenos v. Lemos, 457 F.2d 1067, 1071 (2d Cir. 1972), although the matter remains committed to the Court's discretion, see Montalbano v. Easco Hand Tools, Inc., 766 F.2d 737, 739-40 (2d Cir. 1985). Since defendant, as a Florida corporation, should not be difficult to serve, service is quashed, and the case will continue.

When venue is improper, it is within the Court's discretion to either dismiss the case or transfer it to a proper venue under 28 U.S.C. § 1406. Daniel v. American Board of Emergency Medicine, 428 F.3d 408, 435 (2d Cir. 2005). Here, plaintiff has indicated that he lacks sufficient resources to prosecute the action outside of his home forum. That is a factor that would weigh against a transfer on convenience grounds, but it cannot solve plaintiff's problem that venue in this district is

prohibited. Based on plaintiff's indication that he cannot prosecute the action in the Middle District of Florida, the

II. Improper Venue

The permissible venue for non-employee claims under the ADA, 42 U.S.C. § 12182, and the Rehabilitation Act of 1973, 29 U.S.C. § 794, is determined by the general venue provision for federal question cases, 28 U.S.C. § 1391(b). That statute allows venue in either (1) the district of the defendant's residence; (2) the district where "a substantial part of the events giving rise to the claim occurred"; or, (3) if neither of those can be applied, any district where a defendant is subject to personal jurisdiction. This third grant has no applicability because defendant resides in the Middle District of Florida and that is where the events giving rise to this action occurred. Venue is therefore improper in this district. Case will be dismissed, unless plaintiff advises the Court within 14 days that he prefers to have the action transferred.

III. Other issues

Since venue is improper in this

district, the Court need not determine whether venue should be transferred for the convenience of witnesses and in the interests of justice under 28 U.S.C. § 1404(a). Similarly, since service of process has been quashed and the action will proceed, if at all, in the Middle District of Florida where defendant is present, the Court need not determine whether defendant is subject to personal jurisdiction in New York. See Montalbano, 766 F.2d at 740.¹

Defendant's motion to dismiss is granted to the extent that service is quashed. Plaintiff shall advise the Court within 14 days whether he wishes to have this action transferred to the Middle District of Florida; in the absence of such advice, the action will be dismissed for improper venue.

SO ORDERED.

S/ M. COGAN

U.S.D.J.

Dated: January 20, 2014

¹ Although the Court is not reaching these issues, the treatment of the venue-related issues by defendant's attorneys is disconcerting. First, defendant came dangerously close to waiving its improper venue argument. Although its moving memorandum contained a heading entitled "Improper Venue," and it cited to Rule 12(b)(3) and 28 U.S.C. § 1406 as well as § 1404(a), its argument was entirely based on a convenience transfer, not improper venue. It never cited 28 U.S.C. § 1391(b) to establish that venue was improper here until its reply brief. However, since it did request dismissal for improper venue in its moving memorandum, albeit perfunctorily, and the absence of venue is clear so that plaintiff was not prejudiced, the Court has entertained the argument. In addition, in arguing lack of personal jurisdiction and for a convenience transfer, defendant's attorneys seem to have forgotten which court they were in. First, citing Holey Soles Holdings, Ltd. v. Foam Creations, Inc., No. 05 cv 6939, 2006 WL 1147963 at *4 (S.D.N.Y. May 1, 2006), defendant asserted that "[a]t least one court in this District noted the dangers of conferring general jurisdiction over a company simply because it has a website that 'allows anyone with an Internet connection around the globe' to learn about the company's products" But the Holey court is not within *this* district. This was no isolated oversight. In arguing that venue should be transferred, defendant asserted that "[t]he S.D.N.Y. is regarded as one of the busiest courts in the nation and should not be

APPENDIX F

m. STUDENTS WITH A DISABILITY

Under applicable law, accommodation plans are individually tailored to the needs of each person. Thus, persons with similar disabilities may be accommodated differently. Accommodations will be acted on only at the request of the affected individual and will be evaluated on a case-by-case basis for the appropriated and reasonable accommodation.

The current procedure is to refer the individual who requests accommodations to the Office of disability Services on Barry's main campus in Miami Shores. This office coordinates accommodations for eligible persons on a case by case basis each semester in compliance with Federal and State laws. The person seeking accommodation must provide that office with the appropriate documentation of each disability that demonstrates an accompanying substantial limitation to one or more major life activities.

Once appropriate documentation has been received by the Office of disability Services, the Associate Dean for Student Affairs is notified of the necessary accommodations and they are implemented.

Students should contact the Office of Disability Services to arrange accommodations.

EQUAL OPPORTUNITY POLICY

The School of Law hires qualified employees and admits qualified students without consideration of any race, color, creed, gender, religion, sexual

orientation, national or ethnic origin, or disability. It does not discriminate on the basis of race color, creed, gender, religion, sexual orientation, national or ethnic origin, or disability in the administration of its hiring policies, education policies, hiring policies, scholarship and loan programs, or other school administered programs.

APPENDIX G

TO: DEAN LETICIA DIAZ
FROM: PROFESSOR FRANK L. SCHIAVO
CHAIR, ACADEMIC STANDARDS
COMMITTEE
DATE: FEBRUARY 9, 2012
RE : JOSEPH COONEY

THE ACADEMIC STADARDS COMMITTEE(ASC) MET WEDNESDAY, FEBRUARY 1, 2012, TO CONSIDER MR. COONEY'S PETITION. THE COMMITTEE DECIDED UNANIMOUSLY TO DENY THE PETITION. MR. COONEY'S PETITION DID NOT MEET THE REQUIREMENTS ENUMERATED IN THE STUDENT HANDBOOK. IT DID NOT OVERCOME THE PRESUMPTION OF DISMISSAL BECAUSE IT FAILED TO PRESENT CLEAR AND CONVINCING EVIDENCE OF COMPLIANCE WITH THE TERMS OF PROBATION AS WELL AS SUBSTANTIAL IMPROVEMENT IN SCHOLASTIC ACHIEVEMENT DURING PROBATION THAT WOULD LIKELY RESULT IN A CUMULATIVE GPA OF 2.00 OR GREATER IN THE EVENT AN ADDITIONAL SEMESTER OF PROBATION WERE GRANTED.

MR. COONEY HAD EYE SURGERY RESULTING IN AN INTEROCULAR IMPLANT. UNFORTUNATELY, THE IMPLANT BECAME DISLOCATED AND HE HAS BEEN SUFFERING FROM BLINDNESS IN HIS RIGHT EYE SINCE MARCH, 2011. BETWEEN AN UNCOOPERATIVE SURGEON AND NO INSURANCE, THE PROBLEM STILL EXISTS. HE HAS FOUND

INSURANCE AND THE PROBLEM WILL BE FIXED DURING THE SUMMER WHICH WOULD ALLOW FOR SEVERAL WEEKS OF RECOVERY. MR. COONEY WAS PLACED ON PROBATION AFTER THE SPRING 2011 SEMESTER. DURING THE FALL 2011 SEMESTER HIS CUMULATIVE GPA ROSE FROM 1.809 TO 1.883, LEADING TO HIS DISMISSAL. ALTHOUGH HE DID MEET WITH THE PRIOR DIRECTOR OF ACADEMIC SUCCESS, HE DID NOT FOLLOW THROUGH WITH HER ADVICE.

BECAUSE HIS PHYSICAL DIFFICULTIES WILL CONTINUE DURING THIS SEMESTER, THE DEFICIENCIES IN HIS PETITION, AND HIS LACK OF CONCERN ABOUT ADVICE FOR SUCCEEDING, THE COMMITTEE DID NOT APPROVE HIS PETITION.

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SUCCESS, HE FAILED TO FOLLOW THROUGH WITH HER ADVICE. BECAUSE OF THE DEFICIENCIES IN HIS PETITION, HIS LACK OF CONCERN ABOUT ADVICE FOR SUCCEEDING, AND HIS FAILURE TO FOLLOW THROUGH WITH THE ADVICE RECEIVED FROM THE PRIOR DIRECTOR OF ACADEMIC SUCCESS, THE COMMITTEE DID NOT APPROVE HIS PETITION.

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DATE: FEBRUARY 9, 2012
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APPENDIX H

From: Schiavo Frank L
To: Diaz Leticia M
Subject: Hearing
Date: Wednesday, February 08, 2012 4:59:37 PM

Thanks. Now I know what to say if he comes to see me.

From: Diaz, Leticia M.
To: Schiavo Frank L
Subject: Hearing
Date: Wednesday, February 08, 2012 4:33 PM

No, it clearly states that there is no appeal (I think).
It is no different than the usual application process.
No reason is given if one is denied.

On Feb 8, 2012, at 4:31 PM, "Schiavo, Frank L.
" <fsc_redacted@barry.edu>
wrote:

Leticia: Is there any process that would allow him to know the reason(s) for not granting the petition? (I don't know of any.)

FLS

From: Cooney, Joseph (law student)
mailto:[redacted@mymail.barry.edu]
Sent: Thursday, February 08, 2012 4:23 PM
To: Schiavo, Frank L
Subject: RE: Hearing

That doesn't seem very fair. Doesn't the practice of law represent justice? Isn't it justifiable for one to know the reason why an adverse decision is made against someone? That is like going to court and told you lost your case but you don't have a right to know why.

From: Schiavo, Frank L. {redacted@mail.barry.edu}
Sent: Thursday, February 08, 2012 3:50 PM
To: Cooney, Joseph (law student)
Subject: RE: Hearing

Mr. Cooney I will not be able to explain those reasons as the proceedings are confidential.

From: Cooney, Joseph (law student)mailto:[redacted@my mail.barry.edu]
Sent: Thursday, February 08, 2012 4:23 PM
To: Schiavo, Frank L.
Subject: RE: Hearing

Hi Professor,

I wanted to inquire about what was the reason that my petition for extended probation was denied.
Thanks, Joseph Cooney

From: Schiavo, Frank L
Sent: Monday, February 06, 2012 2:15 PM
To: Aschenbrenner, Katherine L; Bittakis, Megan L; Envall, Amy D; Glynn, Gerard; Rooks, Marvin E; Schiavo, Frank L.; Witherspoon, Ruth A
Subject: Petitions

Megan: You are absolutely right about mentioning Mr. Cooney's physical disability. Helia Hull agrees with you. As a result I have completely revised Mr. Cooney's report and attach it. Thanks for saving us from a law suit

From: Bittakis, Megan L
Sent: Monday, February 06, 2012 1:30 PM
To: Envall, Amy D; Schiavo, Frank
L.; Aschenbrenner, Katherine L;
Glynn, Gerard; Rooks, Marvin E;
Witherspoon, Ruth A
Subject: RE: Petitions

I'm uncomfortable with the portion of Cooney's petition stating, one of the reasons his petition was denied was because of his physical difficulties. Also, I thought that he stated he would have the eye surgery this summer, rather than during the academic year, because of the amount of rest his eye would need following surgery. Instead of going into specifics, what do you think about putting the reasons for denying the petitions as the students did not meet the burden of presenting clear and convincing evidence of meeting the standard for granting the petition? Otherwise, I'm worried that it looks as though we considered things outside the standard.

Megan

Megan Bittakis
Assistant
Professor of Law

From: Envall, Amy
Sent: Monday, February 06, 2012 11:00 AM
To: Schiavo, Frank L.; Aschenbrenner, Katherine L;
Bittakis, Megan L; Glynn,
Gerard; Rooks, Marvin E; Witherspoon, Ruth
Subject RE:Petitions

Hello,

Attached are some edits from me. I think that whatever program I used to open the memos created some formatting issues. As a non-voting member please feel free to take or leave my edits (my feelings will not be hurt).

Thanks@Amy

From: Schiavo, Frank L.
Sent: Monday, February 06, 2012 10:16 AM
To: Aschenbrenner, Katherine L;
Bittakis, Megan L; Envall, Amy D;
Glynn, Gerard; Rooks, Marvin E;
Schiavo, Frank L.; Witherspoon,
Ruth A
Subject: Petitions

Colleagues: I have drafted memos to the dean not granting the petitions we heard last week. They are attached. Please review them and feel free to make any changes, additions to them. I would like to have responses today as I will be absent tomorrow. Thank You

APPENDIX I

Megale, Elizabeth B [redacted@ mail.barry.edu]

The boxes have been set up in the administrative assistant's office in FAC. Please place your bound brief in the box marked Megale for your section. If you are arguing twice, you need to turn in 3 bound copies so that each of your opponents has a copy of your brief to prepare for oral arguments. Please let me know if you have any questions.

Thank you,
Prof. Megale

APPENDIX J

From: Cooney, Joseph (Student)
Sent: Monday, February 07, 2011 11:17 AM
To: redacted@mail.barry.edu
Subject:

I am meeting Prof. Koons tonight at 9:40 pm for exam review. Do I pick up the exam from you?

Joseph Cooney exam no.
597993

From: Cooney, Joseph
(Student)
[redacted@mymail.barry.edu]
Sent: Thursday, June 02, 2011 11:49 AM
To: Schiavo, Frank L.
Subject:

Hi Professor,

Are you available to review the exam this week?

From: Schiavo, Frank L.
Date: Fri 3 Jun 2011 5:33:33
To: Cooney, Joseph W
(STUDENT)
Subject: RE:

APP'67

Mr. Cooney: I'll be glad to review your exam with you. However, the third floor offices are being recarpeted today. The glue odor should be gone by Monday so can you meet late afternoon? My class is at 6PM.

Prof. Schiavo

From: Frakt David J
[redacted@mail.barry.edu]
Date: Tuesday May 31, 2011
7:53 AM
To: Cooney, Joseph W
(student)
Subject: RE: Exam Review

Fine.

From: Frakt David J
[redacted@mail.barry.edu]
Date: Saturday May 28, 2011
9:04 PM
To: Cooney, Joseph W
(student)
Subject: RE: Exam Review

You need to pick a time if you want me to be there. If those don't work, let me know.

From: Cooney, Joseph W

(student)

Date: Saturday May 28, 2011

8:20 AM

To: Frakt David J [redacted]
@mail.barry.edu]

Subject: RE: Exam Review

Ok, Thanks

From: Frakt David J

[redacted @mail.barry.edu]

Date: Saturday May 28, 2011

8:01 AM

To: Cooney, Joseph W
(student)

Subject: RE: Exam Review

Next Wed, Thurs, or Fri 9-12

From: Cooney, Joseph W

(student)

Date: Saturday May 27, 2011

3:08 PM

To: Frakt David J
[redacted@mail.barry.edu]

Subject: RE: Exam Review

Hi Professor,

When are you available to review my exam?

Thanks, Joseph Cooney

APP'69.

From: Megale Elizabeth B
[redacted@mail.barry.edu]
Date: Saturday May 31, 2011
10:45 AM
To: Cooney, Joseph W
(student)
Subject: RE: Message from
Career Services
Yes. I can see you at 10 am.

From: Cooney, Joseph W
(student)
Date: Monday May 27, 2011
3:08 PM
To: Megale Elizabeth B
redacted@mail.barry.edu]
Subject: Message from
Career Services
Can I make an appointment for this Thursday,
June 2?

From: Megale Elizabeth B
redacted@mail.barry.edu]
Date: Saturday May 25, 2011
2:01P M
To: Cooney, Joseph W
(student)
Subject: RE: Message from
Career Services

You can make an appointment next week starting
on Wednesday. I am available starting at 10 a.m.
From: Cooney, Joseph W

(student)

Date: Tuesday January 17,
2012 12:04 AM

To: Pedrioli Carlo A
redacted@mail.barry.edu]

Subject: Exam Review

I will meet with you tomorrow at 6:15.

From: Pedrioli Carlo A
redacted@mail.barry.edu]
Date: Tuesday January 10,
2012 10:50 PM
To: Cooney, Joseph W
(student)
Subject: Exam Review

Mr. Cooney,

I can meet the evening of January 17 in
my office (bookstore modular). I have a
half-hour slot open at 6: 15 PM. Will that
work for you?

Cooney, Joseph (Law Student)
Sent Items Wednesday, January 18, 2012 11:07
AM

I got a C+ on the exam.

From: Linda Coco

Sure. What grade did you receive? I am
doing the "D" first. LC On Tue, Jan 17, 2012
at 7:53 PM, Cooney, Joseph (Law Student)
<joseph.cooney@mymail.barry.edu> wrote:

Hi Professor, I just wanted to know when there would be an opportunity to review my exam. Thank You

From: Cooney, Joseph (Law student)

Date: Tuesday January 17, 2012 10:53 PM

To:[redacted@mail.barry.edu]

Subject: Exam Review

Hi Professor,

I just wanted to know when there would be an opportunity to review my exam.

Thank You,
Joseph Cooney

From: Ahlers, Glen-Peters
[redacted@mail.barry.edu]
Sent: Friday, January 13,
2012 3:51 PM
To: Student Joseph
Cooney Property Exam
Review
When: Tuesday January 17,
2012 10:30-11:00 AM
Where: GPA's Office

Joseph,

In case I have an opportunity to
review your exam before
Tuesday, what is your exam
number? GPA.

From: Cooney, Joseph (Law
student)
Sent: Tuesday, January 10,
2012 2:13 PM
To: Ahlers, Glen-Peters
[redacted@mail.barry.edu]
RE: Grades Today

Hi Professor, when could I review my exam?

Thanks,

Joseph Cooney

APPENDIX K

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

-----X
JOSEPH COONEY,
Plaintiff,

CIVIL ACTION NO.

6:14-civ-106-Orl

-against-

BARRY SCHOOL OF LAW *A/K/A*
DWAYNE O. ANDREAS SCHOOL OF LAW

Defendant.

-----X
AFFIDAVIT OF SUPPORT

I, Joshua Erwin, having been duly sworn,
state:

1. I, Joshua Erwin, attended
Barry School of Law,
located in Orlando, Florida,
from August 2010 to
December 2013.
2. I was placed on academic
probation during the
Spring 2011 Semester,

while attending Barry School of Law.

3. I, Joshua Erwin, was required to see the director of the academic success program, Lisa Kirscht, while on academic probation during the Spring 2011 semester.
4. Lisa Kirscht was aware that I, Joshua Erwin, was a student with a disability while attending Barry School of Law.
5. Lisa Kirscht was very rude and unprofessional every time I met with her.
6. While meeting with Lisa Kirscht in the spring of 2011, Lisa Kirscht stated to I, Joshua Erwin, that students with disabilities are bound for failure as law students and disabled students do not belong in law school.
7. Lisa Kirscht falsely conveyed to me that, I, Joshua Erwin, had missed seeing her during my

scheduled meeting time. I immediately conveyed to her that I was present at all scheduled and required meetings with her.

8. I, Joshua Erwin, as a result of these egregiously demeaning and discriminatory comments, made three formal complaints with Susan Bendlin, the Associate Dean of academic affairs. These complaints were made against Lisa Kirscht during the Spring 2011 semester, while I was enrolled in Barry School of Law. Susan Bendlin also stated that other disabled students had made complaints to her about Lisa Kirscht.
9. Barry School of Law was made aware of Lisa Kirscht's discriminatory remarks conveyed directly to I, Joshua Erwin, during the Spring 2011 semester.
10. Lisa Kirscht was later replaced as director of the

Academic Success Program
and was not employed by
Barry School of Law anymore.

11. Joshua Erwin, remained
in good standing
following the Spring
2011 semester and
graduated from Barry
School of Law at the
conclusion of the 2013
Fall semester.

I hereby declare that the facts
stated in this affidavit are personally
known to me, and t
hat they are true.

s/Joshua Erwin
Redacted
Kansas City, Mo., 64127