

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT PIKEVILLE

DAVID PAUL BROWN,	)	
	)	
Plaintiff	)	
	)	
v.	)	CIVIL ACTION NO. 82-318
	)	
LEES JUNIOR COLLEGE, et al.	)	
	)	
Defendants	)	

MOTION TO COMPEL DISCOVERY

Come the Defendants, Lees Junior College and Troy Eslinger, by counsel, and move the Court to enter the attached Order compelling the Plaintiff to answer Defendants' Interrogatories, which were propounded to Plaintiff on October 28, 1982. In support thereof, the Defendants offer the attached Memorandum.

Kevin L. Murphy

Edwin S. Hopson
Kevin L. Murphy
WYATT, TARRANT & COMBS
Citizens Plaza
Louisville, KY 40202
(502) 589-5235

Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Defendants' Motion to Compel Discovery and attached Order was hand delivered to Paul D. Deaton, Esq., P.O. Box 448, Paintsville, Kentucky 41240, counsel for Plaintiff, this 28 day of March, 1982.

Kevin L. Murphy

Counsel for Defendants

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT PIKEVILLE

DAVID PAUL BROWN,	)	
	)	
Plaintiff	)	
	)	
v.	)	CIVIL ACTION NO. 82-318
	)	
LEES JUNIOR COLLEGE, et al.	)	
	)	
Defendants	)	

ORDER

On Motion by the Defendants, Lees Jr. College and Troy Eslinger, by counsel, and the Court being sufficiently advised,

IT IS HEREBY ORDERED that Plaintiff submit complete Answers to Defendants' Interrogatories Numbers 3, 4, 9, and 14, and Request for Production of Documents Number 7 within fifteen (15) days of this Order, and

IT IS FURTHER ORDERED that Plaintiff, pursuant to Rule 37(a)(4), F.R.Civ.P., pay the reasonable sum of Four Hundred Ninety-five Dollars (\$495) in attorney's fees for costs incurred by Defendants in submitting the Motion to Compel with attached Memorandum, and for time spent in Defendants' attempts to settle this discovery dispute.

Date

Judge, U.S. District Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT PIKEVILLE

DAVID PAUL BROWN,	)	
	)	
Plaintiff	)	
	)	
v.	)	CIVIL ACTION NO. 82-318
	)	
LEES JUNIOR COLLEGE, et al.	)	
	)	
Defendants	)	

MEMORANDUM IN SUPPORT
OF MOTION TO COMPEL DISCOVERY

Defendants, Lees Junior College and Troy Eslinger, submit the following Memorandum in support of their Motion to Compel Discovery.

STATEMENT OF FACTS

Plaintiff seeks damages and a permanent injunction against Lees Junior College and its President, Troy Eslinger, for failure to admit him as a student to the College. Seemingly, Plaintiff is claiming that he is a handicapped individual due to a "mental defect." Evidently, Plaintiff believes that his denial results from an unexplained mental defect, and brings this action under Title 29 U.S.C. 794, which states that an otherwise qualified handicapped individual cannot be excluded solely by reason of a handicap from participation in programs or activities receiving federal financial assistance.

On October 28, 1982, Defendants, pursuant to Rule 33, F.R.Civ.P., propounded Interrogatories to the Plaintiff [see attached Interrogatories -- Ex. A]. Plaintiff responded with inadequate and non-responsive answers to said Interrogatories [see attached Answers -- Ex. B]. On December 17, 1982, the undersigned wrote to Paul D. Deaton, counsel for Plaintiff, informing him that certain responses to the Interrogatories and to the Request for Production of Documents were inadequate and not responsive to the questions asked, and requested that they be answered completely [Ex. C].

On January 13, 1983, counsel for Plaintiff responded to several items by letter [Ex. D]; as can be seen, most of the responses were completely inadequate. Further, this "supplemental" information was not filed with the Court.

On January 26, 1983, the undersigned wrote Mr. Deaton and requested that the additional information contained in the January 13, 1983 letter be filed with the Court [Ex. E]. No response was received. On March 2, 1983, by letter, the undersigned renewed the request to have the additional information filed with the Court [Ex. F], and, once again, no response was received. Finally, on March 11, 1983, the undersigned tried unsuccessfully to reach Plaintiff's counsel by phone to discuss the issue. A request for a return phone call was ignored.

Therefore, Defendants have made numerous attempts to settle this matter without Court intervention, but have received no cooperation from Plaintiff in this regard.

ARGUMENT

As stated in Defendants' Pre-Trial Memorandum, in order for Plaintiff to prevail he must prove that his denial was based solely by reason of his handicap. To date, after requesting relevant information regarding his alleged handicap in both Interrogatories and Request for Production of Documents, Plaintiff still has not informed Defendants as to the kind of physical or mental handicap from which he suffers.

Specifically, in Interrogatory #3 Defendants asked Plaintiff to describe in full all reasons for his discharge from the United States Marine Corps, including the date of discharge. Plaintiff's response to said Interrogatory was "Honorable Discharge - Medical. See Exhibit 3." This document [Ex. G] simply states that the reason for discharge was unsuitability. When asked to expand on this vague Answer, Plaintiff's counsel stated, by letter, that he was "discharged from the United States Military Service because of a mental defect and/or disease, which caused him to be a person with extreme emotional instability." Again, this conclusory response provides no more information than is contained in Plaintiff's Complaint.

In Interrogatory #9, Defendants requested that Plaintiff state all facts upon which he relied in support of his allegation that he has been denied admission to Lees Junior College on account of mental defect, including specification as to what the mental defect is and the date or dates on which Lees Junior College notified Plaintiff that his alleged mental defect constituted the basis for their denying him admission. Plaintiff answered by attaching three exhibits which do not state what, if any, mental defect Plaintiff suffers from. Since this apparently is the crux of the lawsuit, it is essential that Plaintiff disclose such information, if any exists.

Further, in Defendants' Request for Production of Documents, #7, the Defendants requested all documents of whatever kind or nature which in any way evidenced certification that Plaintiff is a disabled veteran or in any way relate to or substantiate the mental defect of Plaintiff. In answer to that Request, Plaintiff attached a document showing how much money he received per month from the Veterans Administration [See Ex. H]. Since this sheet was silent regarding any mental defect, the undersigned asked Plaintiff's counsel by letter dated December 17, 1982 [Ex. C], how it related to a mental defect or disability. Plaintiff's response in his letter dated January 13, 1983 [Ex. D], stated:

The document itself, although not so stating on it's [sic] face is a direct result of the

plaintiff's mental defect and the disability is awarded him, which can be varified [sic] by the veterans administration; because of a disability of a mental nature and nothing else.

Clearly, Plaintiff's responses are totally inadequate, sometimes incoherent, and at all times unresponsive.

Finally, Plaintiff's answers to Defendants' Interrogatories #4 and #14, and Request for Production of Documents #7, are either incomplete or unanswered. In Interrogatory #4, Defendants requested that Plaintiff set forth all his arrests for any alleged criminal offense by any duly constituted authority indicating the date, nature of offense charged, disposition, current status of the case, and jurisdiction or governmental entity involved. Plaintiff's Answer does not include the governmental entity involved, nor does it state whether this was Plaintiff's only arrest and conviction.

In Interrogatory #14, Defendants requested that Plaintiff set out all facts in support of the allegation that Plaintiff has suffered damages as a result of his denial of admission to Lees Junior College as alleged in Paragraphs 13, 14 and 15 of the Complaint, specifying the nature of such injuries; the basis for any monetary calculation of damages; the amount of any monetary damages; and the name, address, and qualifications of any lay or expert witness who may be called to testify by Plaintiff to establish such damages. To date Plaintiff has not given Defendants his basis for monetary damages, nor any breakdown

and/or calculations. Plaintiff claims Two Million Dollars (\$2,000,000) in "actual damages," and Five Hundred Thousand Dollars (\$500,000) in punitive damages. Defendants' request for a basis for the damages is reasonable and relevant, especially in light of the magnitude of each amount listed.

As stated above, Plaintiff's response to Defendants' Request for Production of Documents #7 is incomplete. Defendants respectfully request that the Court order Plaintiff to fully respond to the above-mentioned inquiries.

Rule 37 of the Federal Rules of Civil Procedure states as follows:

FAILURE TO MAKE OR COOPERATE IN DISCOVERY:
SANCTIONS

(a) MOTION FOR ORDER COMPELLING DISCOVERY. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(3) EVASIVE OR INCOMPLETE ANSWERS. For purposes of this subdivision, an evasive or incomplete answer is to be treated as a failure to answer.

(4) AWARD OF EXPENSES OF MOTION. If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party their reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearings require the moving party or the attorney advising the motion or both of them, to pay to the party or deponent who opposed the motion the reasonable expenses

incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the Motion among the parties and persons in a just manner.

When Interrogatories are served under Rule 33, the party on whom the Interrogatories are served is required to answer them unless he serves objections. Plaintiff did not serve any objections to the Interrogatories, and by writing the January 13 letter [Ex. D] he waived any argument of substantial justification for not answering the Interrogatories. Also, little justification can be shown for not supplementing his answers after receiving two letters and a phone call requesting him to do so.

The Advisory Committee Notes to this Rule states that the change in wording in 1970 was intended to encourage wider use of award of expenses to discourage unnecessary recourse to the courts. In SCM Societa Commerciale S.P.A. v. Industrial and Commercial Research Corporation, 72 F.R.D. 110 (N.D. Tex. 1976), the Court, in footnote 3, stated as follows:

If a party is forced to make a motion under Rule 37(a) for an order compelling discovery and I find that opposition to the motion was not substantially justified, I will award costs. Put another way, if the party opposing discovery has acted unreasonably he will pay for it. Likewise if the party seeking discovery has his motion denied he runs the risk of having costs imposed

absent a showing of substantial justification....
The 1970 amendment to Rule 37(a) was "intended to encourage wider use of award of expenses to discourage unnecessary recourse to the courts."
4 A.J. Moore, Federal Practice, §37.02.

Id., at 112.

In SCM Societa, the court awarded \$500 to the plaintiff. In the case at bar, since Plaintiff has not made any objections, and in fact drafted a letter in an attempt to supplement his Answers, it is doubtful whether he can justify his actions for not providing the Court with the additional information, as well as curing the original inadequacies.

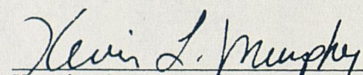
CONCLUSION

Defendants opted not to file this Motion for nearly five months, primarily to save the Court and the litigants time, and also to keep Defendants' legal fees to a minimum. Lees Junior College is a small institution that cannot readily afford the cost of legal fees for unnecessary motions; therefore, Defendants made several attempts to settle this dispute short of seeking the Court's intervention. Plaintiff was given a considerable amount of time to supplement his Answers with the Court, something he failed to do. Two letters and a telephone call have gone unanswered, and Plaintiff's total lack of cooperation has caused Defendants much time and expense. To categorize Plaintiff's Answers as inadequate is an understatement; to prove mental disability by sending the undersigned a sheet

of paper noting that the Plaintiff receives a Veterans Administration Benefit Award of \$90.28 per month without any reason stated on the document is clear evidence in that regard.

Therefore, Defendants respectfully request that their Motion to Compel Discovery be granted, with attorney's fees. One need only look to Plaintiff's Answers to Defendants' Interrogatories and Request for Production of Documents, and to Plaintiff's own set of Interrogatories propounded to Defendants, to understand the frustration that Defendants have incurred in trying to defend a lawsuit wherein counsel for the Plaintiff exhibits a total disregard for opposing counsel and the Federal Rules of Civil Procedure. Therefore, an award of attorneys' fees is completely justifiable in this instance, and Defendants respectfully request that the Court enter the attached order.

Respectfully submitted,


Kevin L. Murphy
WYATT, TARRANT & COMBS
Citizens Plaza
Louisville, Kentucky 40202
(502) 589-5235

Counsel for Defendants
Lees Junior College and
Troy Eslinger

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Defendants' Motion to Compel Discovery was hand delivered to Paul D. Deaton, Esq., P.O. Box 448, Paintsville, Kentucky 41240, by U.S. Mail, counsel for Plaintiff, this 28 day of March, 1983.

Kevin L. Murphy

Ex A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT PIKEVILLE

DAVID PAUL BROWN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 82-318
	)	
LEES JUNIOR COLLEGE,	)	
et al.,	)	
	)	
Defendants.	)	

DEFENDANTS' INTERROGATORIES

Defendants, Lees Junior College and Troy Eslinger, by counsel, pursuant to Rule 33, F.R.Civ.P., herewith propound Interrogatories to Plaintiff and his counsel which are to be answered separately and under oath, within thirty (30) days after service hereof.

1. With respect to the general educational development test for high school level taken by Plaintiff, state the approximate date on which the test was taken, the scores attained on each test, and the average standard score for all five tests.
2. In further response to Interrogatory 1, state whether Plaintiff ever received a high school equivalency certificate or high school diploma, and if so, the date on which said certificate or diploma was received and from what entity.
3. Describe in full all reasons for Plaintiff's discharge from the United States Marine Corps., indicating the date of discharge.

4. Set forth all arrests of Plaintiff for any alleged criminal offense by any duly constituted authority indicating the date, nature of offense charged, disposition, current status of case, and jurisdiction or governmental entity involved.

5. State whether Plaintiff, prior to June 12, 1974, had bought and sold drugs or controlled substances, indicating in what locality such drugs or controlled substances were sold and in what quantities.

6. In further response to Interrogatory 5, please state the approximate date of such transactions and whether or not students at Lees Junior College were ever approached prior to June 12, 1974, as potential customers for said drugs or controlled substances by Plaintiff.

7. In further response to Interrogatories 5 and 6, please furnish the identical information as to any transactions in drugs or controlled substances after June 12, 1974, and up to the present.

8. Set forth the date of each application for admission to Lees Junior College Plaintiff claims was unlawfully denied as alleged in Paragraph 6 of the Complaint.

9. State all facts upon which Plaintiff relies in support of his allegation that he has been denied admission to Lees Junior College on account of mental defect, including specifying what the mental defect is and the date or dates on which Lees Junior College officials notified Plaintiff that his alleged mental defect constituted the basis for their denying him admission.

10. In further response to Interrogatory 9, please state the name of each Lees Junior College official or employee who made any statement, oral or written, to Plaintiff or anyone else, indicating that the College was denying or had denied Plaintiff admission on account of a mental defect, and setting forth the entire content of each such statement.

11. State whether Plaintiff has filed a charge or complaint with the U. S. Department of Labor or any other governmental entity alleging discrimination on account of handicap with respect to the denial of his applications for admission to Lees Junior College.

12. In further response to Interrogatory 11, set forth the date, government agency, by name, and disposition of any charge filed.

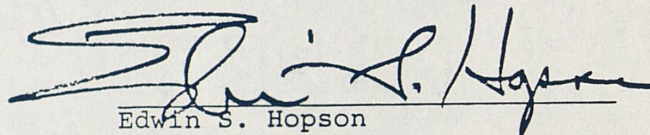
13. Set forth by name all colleges, schools, or other post-high school institutions to which Plaintiff has applied since June 12, 1974, indicating the disposition of such application and its current status.

14. Set out all facts in support of the allegation that Plaintiff has suffered damages as a result of his denial of admission to Lees Junior College as alleged in Paragraphs 13, 14, and 15 of the Complaint, specifying the nature of such injuries; the basis for any monetary calculation of damages; the amount of any monetary damages; and the name, address, and qualifications of any lay or expert witness who may be called to testify by Plaintiff to establish such damages.

15. Since June 12, 1974, set forth by calendar year the gross amount of wages, income, or other monies received from any source by Plaintiff arising out of the performance of services; the sale of any goods (including drugs or controlled substances); or work of any kind performed by Plaintiff, indicating as to each year the source of such monies and the amount derived from said source.

16. State whether or not Plaintiff was barred from the campus and buildings of Lees Junior College, indicating the date on which Plaintiff was so notified and the basis for such restriction or the events leading up to such decision, to Plaintiff's knowledge.

WYATT, TARRANT & COMBS

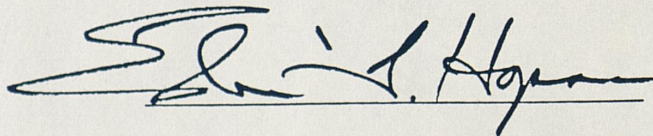


Edwin S. Hopson
Citizens Plaza
Louisville, Kentucky 40202
(502) 589-5235

Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that a copy of Defendants' Interrogatories was served upon Paul D. Deaton, Esq., P. O. Box 448, Paintsville, Kentucky, 41240, by U. S. mail, postage prepaid, this 28th day of October, 1982.



ex B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT PIKEVILLE

CIVIL ACTION: 82-318

DAVID PAUL BROWN,

PLAINTIFF,

VS:

ANSWER TO DEFENDANTS'
INTERROGATORIES

LEES JUNIOR COLLEGE,
et al.,

DEFENDANTS.

* * * *

Pursuant to Civil Rule 33, Plaintiff answers the following
interrogatories to the Defendant in this action:

1. Answer: See Exhibit "1", date November 1966; Satisfactor
2. Answer: See Exhibit "2", date November, 1966; U. S. Arm
Yes.
3. Answer: Honorable Discharge - Medical. See Exhibit "3"
4. Answer: Conviction March 8, 1972, Probated five (5) year
on September 15, 1972; See Exhibit "4".
5. Answer: None - Never
6. Answer: None - Never
7. Answer: None - Never
8. Answer: 6/12/74; 9/5/75; 12/31/75; 8/24/76; 1/4/77;
9/1/77; 9/8/78; 1/26/79; 9/4/79; 1/16/80; 9/3/80
9/17/81; 1/26/82.
9. Answer: Letter from Defendant Troy Eslinger of 8/21/74,
wherein he stated a deep seated emotional probl.
See Exhibits "5", "6", and "7".

10. Answer: Fred Landrum, stated that the college had no facilities for mental defective people; Dean Smith at Hearing dated July 17, 1974, stated that they would help David get into either Alice Lloyd or Morehead.
11. Answer: Complained to Congressman Carl Perkins by letter and contacted Department of Higher Education at Frankfort by telephone.
12. Answer: Department of Higher Education, approximately January 1, 1978; U.S. Congressman Carl Perkins August 1974; and Veterans Administration many an numerous times.
13. Answer: None.
14. Answer: Loss of Veteran's Administration Educational Benefits; Employment; Right to earn a living; Mental pain and suffering; Slander and liable; future earnings; lack of education. (Will provide names of Expert Witnesses later).
15. Answer: None because of defendant's action.
16. Answer: Yes: October 13, 1975 - Reason not given.

I, David Paul Brown, state that I have read the foregoing statements and examined same, and they are true as I verily believe.

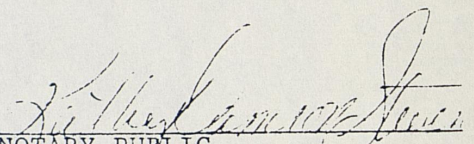
David Paul Brown
DAVID PAUL BROWN

STATE OF KENTUCKY)

COUNTY OF JOHNSON)

SUBSCRIBED and SWORN to before me by DAVID PAUL BROWN this
the 23rd day of November, 1982.

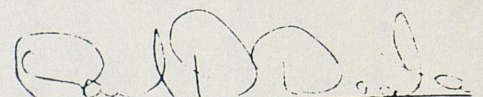
My Commission Expires: May 12, 1985.


NOTARY PUBLIC
STATE OF KENTUCKY AT LARGE


HON. PAUL D. DEATON
ATTORNEY FOR PLAINTIFF
P O BOX 448
PAINTSVILLE, KENTUCKY 41240
606-789-1200

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing
instrument was this day mailed to Hon. Edwin S. Hopson, Citizens Plaza,
Louisville, Kentucky, 41240, this the 23rd day of November, 1982.


HON. PAUL D. DEATON
ATTORNEY FOR PLAINTIFF
P O BOX 448
PAINTSVILLE, KENTUCKY 41240
606-789-1200

UNITED STATES ARMED FORCES INSTITUTE
Madison, Wisconsin 53703

MILITARY TEST REPORT

Exhibit no. 1

Ref: Intern. Q. (no. 1)

Q. no. 1 under document
Q. no. 2
Q. no. 5

EXHIBIT "1"

COMMANDING OFFICER
SUP CU SUP BN 3 FSR
EPD SE 96602

66345

NAME. SERVICE NO. Br. of Service BROWN DAVID P 2211825 M C

has completed the following USAFI tests with achievement as indicated. For an explanation of test scores, percentile ranks, and USAFI retest policies, see the reverse side of this report and the current USAFI Catalog.

TESTS OF GENERAL EDUCATIONAL DEVELOPMENT, HIGH SCHOOL LEVEL

TESTS OF GENERAL EDUCATIONAL DEVELOPMENT HIGH SCHOOL LEVEL																	
DATE TEST COMPLETED		TEST ONE			TEST TWO			TEST THREE			TEST FOUR			TEST FIVE			RATING CODE
MO	YR	STD SCORE	PCTL RANK	GRADE	STD SCORE	PCTL RANK	GRADE	STD SCORE	PCTL RANK	GRADE	STD SCORE	PCTL RANK	GRADE	STD SCORE	PCTL RANK	ENTRY RATING	
11	66	0	43	24	46	34		37	10		47	38		45	31	S	HIGH SCHOOL GRD
LAST ENTRY																	
S - SATISFACTORY																	
U - UNSATISFACTORY																	
I - INCOMPLETE																	
COLLEGE TESTS																	
A rating of																	
S - SATISFACTORY																	
U - UNSATISFACTORY																	
follows each test score																	

END OF COURSE TESTS — USA 11 SUBJECT STANDARDIZED TESTS

STATE TEST COMPLETED MCJ	NUMBER AND TITLE OF COURSE OR TEST				DATE	RETEST
	NC ENTRY					
METHOD OF STUDY		CORRESPONDENCE	GROUP STUDY		BY EXAMINATION	

RATING CODES: D—With Distinction S—Satisfactory U—Unsatisfactory 01-99 Percentile rank

2-2.2 RITEST, etc

See reverse side for distribution of this report. Also, please review carefully the other information on the reverse side concerning USAFI tests.

COPIES INCLOSED

- (1) Examined
- (2) Army Personnel Records Section
- (3) Air Force - Civil Liberties Base Personnel Office (CBPO)
- (4) Air Force - Personnel File
- (5) Civil Liberties Personnel File (1)
- (6) Commandant of the Marine Corps
- (7) Commandant of the Guard (PTP 1)

FD-302 (Rev. 5-22-64)

C. L. Menden
C. L. MENDEN
DIRECTOR

DISTRIBUTION

ARMY - Blue original and two copies to Army Education Center. Blue original for Army Education Center.
Black copy for Personnel Records Section.
Green copy for examinee.

NAVY - Blue original and green copy to the Commanding Officer.
Black copy for Chief of Naval Personnel (PC-11).

AIR FORCE - Blue original and two copies to Education Services Office. Blue original for Education Services Office records.
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MARINE CORPS - Blue original and green copy forwarded to the Commanding Officer.
Black copy for Commandant of the Marine Corps.

COAST GUARD - Blue original and green copy to the Commanding Officer. ATTN: Education Officer.
Black copy for Commandant Coast Guard (EIP-1).

USAFI TEST INFORMATION

1. TYPES OF TESTS

- a. Tests of General Educational Development (GED) - High School Level. The high school battery consists of five standardized tests: (1) Correctness and Effectiveness of Expression, (2) Interpretation of Reading Materials in the Social Studies, (3) Interpretation of Reading Materials in the Natural Sciences, (4) Interpretation of Literary Materials, (5) General Mathematical Ability.
- b. Comprehensive College Tests - General Examinations. This battery consists of five standardized tests: (1) English Composition, (2) Social Sciences - History, (3) Natural Sciences, (4) Humanities, (5) Mathematics.
- c. End of Course (EOC) Tests. These tests are of the objective type and are based on the text used in the USAFI course.
- d. USAFI Subject Standardized Tests (USST). These tests are designed to be general in their treatment of a subject matter, rather than being pertinent to a single text. However, they parallel the content covered within specific USAFI courses.

2. SCORES AND RATINGS

- a. Standard Score. Standard score is a conversion of the raw score (the number of correct answers), which permits direct comparison between tests within a battery.
- b. Percentile Score. Percentile score indicates the percentage of examinees in the standardization group who achieved a lower score.
- c. High School Level GED Tests. One rating is assigned to the battery. A standard score of 35 or above on each test or an average standard score of 45 or above on all five tests is required for satisfactory completion of the tests for military purposes. However, many civilian accrediting agencies require higher scores.
- d. Comprehensive College Tests - General Examinations. Each of the five tests is rated independently. A percentile rank of 25 or above is required for satisfactory completion of each of the tests for military purposes. However, many civilian accrediting agencies require higher scores.
- e. End of Course (EOC) Tests. The rating for an end of course test is expressed as D - With Distinction, S - Satisfactory, U - Unsatisfactory.
- f. USAFI Subject Standardized Tests (USST). The rating for a USAFI Subject Standardized Test is expressed as a percentile rank. A percentile rank of 20 or above is required for satisfactory completion of the tests for military purposes. However, many civilian accrediting agencies require higher scores.

3. RETESTING

- a. Authority. Retesting may be authorized only by a USAFI upon receipt of DD Form 179, Application for USAFI Test Retest (2-67), and a Commanding Officer.
- b. Specific Policies. Retesting may be permitted according to the specific policies indicated in the current edition of the USAFI Catalog. Marine Corps personnel should refer to applicable Marine Corps directives concerning each type of test: (1) When an unsatisfactory result has been obtained on the GED, EOC, or Comprehensive College Tests - General Examinations, (2) When the examinee has failed to meet a percentile of 20 on the USST's, or (3) When the examinee must meet a special military or civilian requirement. The USAFI Test Control Officer who certifies the retest application is responsible for the detailed information required and the accuracy and completeness of this information.

4. ACCREDITATION

- a. Granting Credit. USAFI is not authorized to grant academic credit. Such credit can be obtained only from a civilian high school, state department of education, college, or university.
- b. Reporting Service. USAFI is authorized to forward official reports of USAFI educational achievement to civilian schools at the request of the examinee, the civilian school or agency, or the military. Details on requesting such an official report and limitations on reporting will be found in the current edition of the USAFI Catalog.

Exhibit No. 2
Refer: Inter. (No. 2)

EXHIBIT "2"



United States Armed Forces Institute
MADISON, WISCONSIN

This report certifies that

DAVID P BROWN

has achieved scores on the

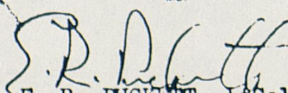
TESTS OF GENERAL EDUCATIONAL DEVELOPMENT, HIGH SCHOOL LEVEL

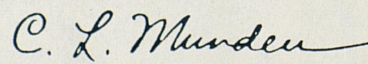
in accordance with the national standards of the
American Council on Education

this date 11 / 66
MO. YE

Service Number 2211825

Br of M
Service


E. R. PUCKETT, LtCol, USMC
COMMANDING OFFICER


C. L. MUNDEN
DIRECTOR

THIS REPORT IS NOT A HIGH SCHOOL DIPLOMA OR EQUIVALENCY CERTIFICATE
(see reverse side for explanation)

Exhibit No. 4 - (a)

Under Documents

Q (No. 4)

RESTORATION TO CIVIL RIGHTS

TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETINGS:

WHEREAS, it is represented to me, as Governor of Kentucky, that
David Paul Brown, #006641, was tried on the charge of
Unlawful Possession of Narcotic Drugs for Own Use (2 counts) at the
March 8, 19 72 term of the Fayette Circuit Court
 and was sentenced by a judgment of said court to serve a term of _____
two (2) years, probated for five (5) years; and

WHEREAS, the said David Paul Brown was placed on _____
September 15, 19 72 and period of probation was terminated on
September 15, 19 77; and

WHEREAS, the said David Paul Brown has made
 application to have his civil rights restored and available evidence indicates he has
 complied with the necessary requirements:

NOW, THEREFORE, in consideration of the foregoing and by virtue of the
 authority vested in me by Section 145 and 150 of the Constitution of the Commonwealth
 of Kentucky, I, Julian M. Carroll, Governor of said Commonwealth, do hereby and now
 restore the civil rights denied by judgment of conviction aforesaid and any prior
 conviction, to the said David Paul Brown and direct that
 all officials of this Commonwealth be governed accordingly.

IN TESTIMONY WHEREOF, I have caused these
 letters to be made patent, and the seal
 of the Commonwealth of Kentucky to be
 hereto attached.

DONE AT FRANKFORT, this 17th day of
March in the year of our
 Lord one thousand nine hundred and
seventy-eight and in the year of
 this Commonwealth the one hundred and
eighty-sixth

ATTEST:

Julian M. Carroll
 JULIAN M. CARROLL, Governor
 Commonwealth of Kentucky

Dwight P. Davis
 Secretary of State

IN THE NAME AND BY THE AUTHORITY OF THE



JULIAN M. CARROLL

GOVERNOR OF THE COMMONWEALTH OF KENTUCKY

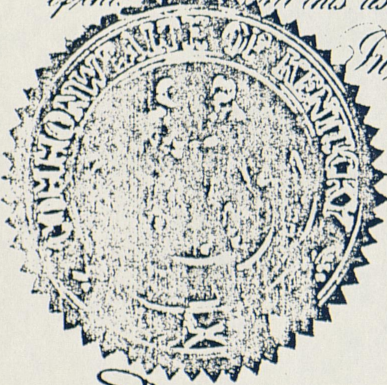
To all to Whom These Presents Shall Come, Greeting:

Whereas, It is represented to me that the conduct of DAVID PAUL BROWN
has been of an exemplary nature and merits the restoration of all civil rights lost by reason
of conviction of a felony.

Now, Know Ye, That in consideration of the promises and by virtue of the power
vested in me by the Constitution, I do hereby grant unto the said
DAVID PAUL BROWN

ALL THE RIGHTS OF CITIZENSHIP

denial him in consequence of said judgment of conviction; and I direct that all officers
of this State put this restoration.



In testimony whereof, I have caused these letters to be made
patent, and the seal of the Commonwealth, to be hereunto af-
fixed. Done at Frankfort, the 17TH day of MARCH
in the year of our Lord one thousand nine hundred and 78
and of the one hundred and 86TH year of the Commonwealth.

By the Governor

Dwight L. Davis

Secretary of State

By

Assistant Secretary of State

CARL D. PERKINS
7TH DIST., KENTUCKY

Exhibit no. 5

Refer: Inter. A.M. 11

Under Document

Q. no. 5

Q. no. 9

Q. no. 11

COMMITTEE:
EDUCATION AND LABOR
para. 13+14+15 of Con

Congress of the United States

House of Representatives

Washington, D.C. 20515

EXHIBIT "5"

August 2, 1974

Mr. David P. Brown
Box 15
Noctor, Kentucky

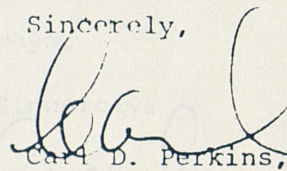
Dear David:

Thank you for sending me your file. I just want you to know that I have communicated with Dr. Elsing and hope that he will give your problem favorable consideration.

As soon as I receive any information, you will hear from me again.

With best wishes always,

Sincerely,


Carl D. Perkins, M. C.

CDP/eb

2 Copies
CARL D. PERKINS
7TH DIST., KENTUCKY

Exhibit no-6
Refer: Inter. Q. No. 11

under Documents

Q. No. 5

Q. No. 9

Q. No. 11 para. 13 + 14 + 15 of complex

COMMITTEE
EDUCATION AND LABOR

Congress of the United States

House of Representatives

Washington, D.C. 20515

EXHIBIT "6"

August 23, 1974

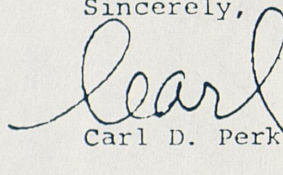
Mr. David P. Brown
Box 15
Noctor, Kentucky

Dear David:

No one regrets more than I do that the enclosed letter from Lees Junior College is not more favorable. I assure you that I did everything I could to be helpful. In the event you feel there is something more I can do, please do not hesitate to let me know.

With best wishes always,

Sincerely,



Carl D. Perkins, M. C.

CDP/eb



Lees Junior College

TELEPHONE 606 666-7521

August 21, 1974

EXHIBIT "7"

under Documents

Q no. 5 Q no. 7

Q no. 8

Q no. 9

Q no. 11 para. 13+14+15
of Comps

JACKSON, KENTUCKY 41339

The Honorable Carl D. Perkins
House of Representatives
Congress of the United States
Washington, D. C. 20515

Dear Carl:

RE: David P. Brown, Noctor, Kentucky

I have checked with our Admissions Committee in reference to David Brown's application for admission to Lees. I am convinced that they did a very serious analysis of his application and did not reach their decision to deny admission lightly. There is considerable evidence that David has emotional problems that are very deep seated. And the simple fact is that our counseling services are not adequate to meet his needs. ~~There is no doubt that David is a very capable student and we would like to have him at Lees.~~

See
June 22-82
letter to
Sub-Section

I want you to know, Carl, that the position of Lees is to serve the needs of the people of this region. And we bend over backwards in our efforts to do that. But we have learned through experience that there are some instances where both the student and the College are better served by the denial of admission. This was our honest decision in David's case.

We have offered to try to help in his admission at an institution more adequately staffed to meet his kind of needs. And we are sincere in that offer.

Your interest in this matter is deeply appreciated and I hope that something can be worked out to David's best interest.

Sincerely yours

Troy R. Eslinger
President

TRE:hb

Exc

JOHN E. TARRANT
WILSON W. WYATT, SR.
STUART E. LAMPE
ARTHUR W. GRAFTON
ROBERT L. S
BERT T. C
THOMAS V. LTT
C. KILMER COMBS
JOHN S. OSBORN, JR.
ROBERT L. MADDOX
WILLIAM E. SCENT
EDGAR A. ZINGMAN
GORDON B. DAVIDSON
LAWRENCE L. JONES, III
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SAMUEL G. BRIDGE, JR.
H. ALEXANDER CAMPBELL
STEWART E. CONNER
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MARK STEPHEN PITT
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THOMAS J. LUBER
KENNETH S. MATHEIS
RICHARD NORTHERN
STEWART L. PRATHER
MERRILL S. SCHELL
RAYMOND M. BURSE
KEVIN J. HABLE
JANET G. MARCUM
A. GEORGE MASON, JR.
JAMES R. HIGGINS, JR.
TERENCE A. MARTIN
TANDY C. PATRICK
SUSAN T. BARNETT
PAUL J. COX
MARIANNA GORDON
SARA WALTER GROSS
KIMBERLY K. GREENE
ANDREW S. GOOD
G. ALEXANDER HAMILTON
PATRICK W. MATTINGLY
CHAUNCEY S. R. CURTZ
PARKER W. EADS
RANDALL L. GARDNER
JOHN S. OSBORN, III
JOHN R. RHODER, JR.
SHARON CONYER SPIEGEL

WYATT, TARRANT & COMBS

CITIZENS PLAZA

LOUISVILLE, KENTUCKY 40202

AREA CODE 502

559-5235

COPY

SUCCESSOR TO
TARRANT, COMBS & BULLITT
WYATT, GRAFTON & SLOSS

LEXINGTON OFFICE
1100 KINCAID TOWERS
LEXINGTON, KENTUCKY 40507
AREA CODE 606 233-2012

ROBERT K. CULLEN
COUNSEL

December 17, 1982

Paul D. Deaton, Esq.
P.O. Box 448
Paintsville, KY 41240

Re: David Paul Brown v. Lees Junior College

Dear Mr. Deaton:

This letter concerns your recent answers to interrogatories and request for production of documents, portions of which, in our opinion, are quite inadequate. Rather than file a motion to compel at this time, I thought that, given the opportunity, you might wish to cure some of the answers in order to save us both time in the future.

First, I would direct your attention to the interrogatories. In Interrogatory No. 3, we asked you to describe in full all reasons for plaintiff's discharge from the United States Marine Corps. In your answer, you referred us to Exhibit 3. My question regarding this interrogatory is two-fold. First, what is this document? Second, please expound on the section "reason in authority" listed on this document. What were his reasons for unsuitability, and what is meant by MCP13265.1C?

Interrogatory No. 4 requests that you set forth all arrests of plaintiff for any alleged criminal offense by any duly constituted authority indicating the date, nature of the offense charged, disposition, current status of the case, and jurisdiction or governmental entity involved. Your answer listed one charge of unlawful possession of narcotic drugs, date, the sentence, and his restoration of rights. However, you did not state whether this was

Mr. Deaton
December 17, 1982
Page Two

WYATT, TARRANT & COMBS

the only arrest. We would like to know if there were other arrests, and if so, a responsive answer is requested detailing the items listed in Interrogatory No. 4.

In Interrogatory No. 11, we asked if the plaintiff had filed a charge or complaint with the United States Department of Labor or any other governmental entity alleging discrimination on account of handicap with respect to the denial of his applications for admission to Lees Junior College. Your answer stated that you complained to Congressman Carl Perkins and contacted the Department of Higher Education in Frankfort. Did you or did you not file a charge with the United States Department of Labor?

In Interrogatory No. 14, we asked for the basis of any money calculation of damages and the amount of any monetary damages. You did not answer that question.

In Interrogatory No. 15, are you stating that the plaintiff has not done any work of any kind whatsoever since June 12, 1974, that amounted to wages, income or other moneys received?

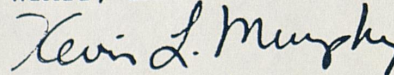
Regarding the production of documents, your answer to No. 7 is not responsive. You have attached a sheet which states that plaintiff has been awarded a non-service connected disability, coupled with a sheet showing the amount of his monthly rate. This does not tell us how this relates to the mental defect of the plaintiff nor does it tell whether the disability is of a mental nature.

On No. 11, we asked for all documents which in any way substantiate plaintiff's claims contained in Paragraphs 13, 14 and 15 of the complaint that he has suffered damages as a result of his not being admitted as a student at Lees Junior College. Your answer to that request was "not relevant." Should we presume that your damages are nonexistent and thus not relevant to this lawsuit?

I hope that we can resolve this matter short of a motion to compel. Your cooperation will save us both a lot of time and expense.

Sincerely,

WYATT, TARRANT & COMBS



Kevin L. Murphy

KLM/baj

Ex D.
LAW OFFICES

Paul D. Deaton
P. O. BOX 448
PAINTSVILLE, KENTUCKY 41240
PHONE 606/789-1200

January 13, 1983

Hon. Kevin Murphy
Wyatt, Tarrant & Combs
Citizens Plaza
Louisville, Ky. 40202

Dear Kevin:

In response to your inquiry of December 17, 1982, with regard to the answers to the interrogatories and production of documents, I will attempt to clarify certain questions which you have propounded to me if possible.

The first with regard to interrogatory number three, the exhibit referred to as exhibit three is what is commonly known as a DD-214, which is a separation statement from armed services which is attached to a discharge. The only reason I know this, is from my past experiences as attorney for the Veterans Administration.

With regard to the reason in authority listed on the document other than unsuitability and/or mental capacity, I have no idea what is meant by MCP-13265.1C. It is my understanding from discussing the situation with my client that he was discharged from the United States Military Service because of a mental defect and/or disease; which caused him to be a person with extreme emotional instability.

With regard to your interrogatory number four, the plaintiff has no arrest nor prior record other than the answer listed as unlawful possession of a narcotic drug. This is the only arrest he has had and there are no other criminal records of a felony or misdemeanor type other than the one possession charge. The most correct information regarding that charge and conviction was submitted to you

Hon. Kevin Murphy
Page 2

by referring you to the documents in question.

With regard to interrogatory number eleven, the plaintiff did not, as far as I know, file a charge or complaint with the United States Department of Labor or any governmental entity alleging discrimination on account of handicapp with respect to the denial of his application for admission to Lee's Junior College, other than many and numerous oral complaints and a letter written to Congressman Carl Perkins, and a contact with the Department of Education, in Frankfort. No complaint was filed with the United States Department of Labor since my client, the Plaintiff, in this action was unaware of the necessity of doing so, since he had made his primary complaint with Congressman Carl B. Perkins.

With regard to interrogatory number fourteen, the basis for the money calculation of damages is not available at this time and will be submitted to you as quickly as possible.

With regard to interrogatory number fifteen, the plaintiff has not worked at all since June 12, 1974, do to mental incapacity and disability.

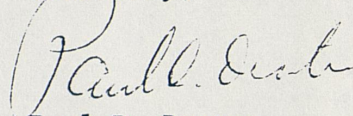
Regarding your inquiry concerning production of document, specifically request number seven, which states that the plaintiff has been awarded a non-service connected disability, coupled with a sheet showing the amount of his monthly rate. The document itself, although not so stating on it's face is a direct result of the plaintiff's mental defect and the disability is awarded him, which can be varified by the veterans administration; because of a disability of a mental nature and nothing else.

With regard to request for production of document number eleven, the damages that he has incurred as a result of his not being admitted as a student at Lee's Junior College will be substantiated by various expert witnesses which will be provided to you upon completion of the preparation of my case and as quickly as possible.

Hon. Kevin Murphy
Page 3

If you have any further questions, please advise.
Thanking you for your past courtesies;

Sincerely,


Paul D. Deaton

PDD/kee

cc: Connie Henderson
Jackson, Ky.

JOHN E. TARRANT
ROBERT L. SLOSS
BERT T. COMBS
THOMAS W. F.
C. KILMER C.
JOHN S. OSBORNE, JR.
ROBERT L. MADDOX
WILLIAM E. SCENT
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JOHN R. RHORER, JR.
VIRGINIA HAMILTON SNELL
SHARON CONYER SPIEGEL
JAY JAFFE
COLLEEN MCKINLEY
LYNN N. MEYER
ARTHUR A. ROUSE
GORDON B. WRIGHT
CYNTHIA W. YOUNG

WYATT, TARRANT & COMBS

CITIZENS PLAZA

LOUISVILLE, KENTUCKY 40202

AREA CODE 502

559-5235

TELEX: 213331

January 26, 1983

WILSON W. WYATT, SR.
STUART E. LAMPE
ARTHUR W. GRAFTON
THOMAS P. LEWIS
COUNSEL

LEXINGTON OFFICE
1100 KINCAID TOWERS
LEXINGTON, KENTUCKY 40507
AREA CODE 606 233-2012

Paul D. Deaton, Esq.
P.O. Box 448
Paintsville, Kentucky 41240

RE: Brown v. Lees

Dear Mr. Deaton:

Thank you for your letter of January 18, 1983
clarifying your answers to the interrogatories.

I would request that you file the additional
information with the Court, perhaps as a supplement to
your original answers.

Thank you.

Sincerely,

Kevin L. Murphy

Kevin L. Murphy

KLM/ht

JOHN E. ANTON
ROBERT L. COLE
BERT T. COLE
THOMAS W. COLE
C. KILMER COMBS
JOHN S. OSBORN, JR.
ROBERT L. MADDOX
WILLIAM E. SCENT
EDGAR A. ZINGMAN
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WYATT, TARRANT & COMBS

CITIZENS PLAZA

LOUISVILLE, KENTUCKY 40202

AREA CODE 502

589-5235

TELEX: 213331

WILSON W. WYATT, SR.
STUART E. LAMPE
ARTHUR W. GRAFTON
THOMAS P. LEWIS
COUNSEL

LEXINGTON OFFICE
1100 KINCAID TOWERS
LEXINGTON, KENTUCKY 40507
AREA CODE 606 233-2012

March 2, 1983

Paul D. Deaton, Esq.
P.O. Box 448
Paintsville, KY 41240

Re: Brown v. Lees Junior College

Dear Mr. Deaton:

On January 26, 1983, I requested that you file with the Court the additional information you supplied to me by letter dated January 13, 1983. If you recall, you supplemented your original Answers to our Interrogatories in that letter.

To date, I have no record that you have submitted these supplemental answers with the Court. At this time, I would renew my request that you do so.

Also, please find enclosed copies of our answers to your Request for Production of Documents and Request for Admissions.

Sincerely,

WYATT, TARRANT & COMBS

Kevin L. Murphy
Kevin L. Murphy

KLM/baj
Enclosures

EXHIBIT "3"

EX 6

Exhibit no. 3

THIS IS AN IMPORTANT RECORD
SAFEGUARD IT.

Q. No. 3 Q. No. 4 Q. No. 5

under Documente

PERSONAL DATA	1. LAST NAME-FIRST NAME-MIDDLE NAME BROWN, David Paul		2. SERVICE NUM 2211825		3. SOCIAL SECURITY NUMBER 401 64 3558		
	4. DEPARTMENT, COMPONENT AND BRANCH OR CLASS USMC		5a. GRADE, RATE OR RANK LCpl	5b. PAY GRADE E-3	6. DATE OF RANK 01 Apr 67	7. DATE OF BIRTH 01 Mar 48	
	7. U. S. CITIZEN ☒ YES ☐ NO		8. PLACE OF BIRTH (City and State or Country) Jackson, Kentucky		9. DATE OF BIRTH 01 Mar 48		
SELECTIVE SERVICE DATA	10. SELECTIVE SERVICE NUMBER N/A		11. SELECTIVE SERVICE LOCAL BOARD NUMBER, CITY, COUNTY, STATE AND ZIP CODE N/A			12. DATE INDUCTION N/A	
	13. TYPE OF TRANSFER OR DISCHARGE Honorable, Discharge		14. STATION OR INSTALLATION AT WHICH EFFECTED Camp Lejeune, N. C.		15. EFFECTIVE DATE 19 Apr 68		
TRANSFER OR DISCHARGE DATA	16. REASON AND AUTHORITY Unsuitability MCP 13265.1C		17. CHARACTER OF SERVICE HONORABLE		18. TYPE OF CERTIFICATE ISSUED DD256MC		
	19. LAST DUTY ASSIGNMENT AND MAJOR COMMAND CoC, 2d Engr Bn, 2d Mar Div, FMF, N. C.		20. DISTRICT, AREA COMMAND OR CORPS TO WHICH RESERVIST TRANSFERRED None		21. REENLISTMENT CODE RE-4		
	22. TERMINAL DATE OF RESERVE / UMT & OBLIGATION 19 Apr 68		23. CURRENT ACTIVE SERVICE OTHER THAN BY INDUCTION ☒ ENLISTED (First Enlistment) ☐ ENLISTED (Prior Service) ☐ OTHER		24. TERM OF SERVICE (Years) 6		
SERVICE DATA	25. LAST DUTY ASSIGNMENT AND MAJOR COMMAND None		26. GRADE, RATE OR RANK AT TIME OF ENTRY INTO ACTIVE SVC Private (E-1)		27. PLACE OF ENTRY INTO CURRENT ACTIVE SERVICE (City and State) Louisville, Kentucky		
	28. HOME OF RECORD AT TIME OF ENTRY INTO ACTIVE SERVICE (Street, RFD, City, County, State and ZIP Code) 1609 Lindy Lane Lexington, Kentucky		29. STATEMENT OF SERVICE a. CREDITABLE FOR BASIC PAY PURPOSES b. TOTAL ACTIVE SERVICE		30. YEARS MONTHS DAYS 02 01 16 00 00 00 02 01 16 02 01 16 00 00 00		
	31. SPECIALTY NUMBER & TITLE 1371 Combat Engineer		32. RELATED CIVILIAN OCCUPATION AND D.O.T. NUMBER 0.79.01 Construction Inspector		33. FOREIGN AND/OR SEA SERVICE 00 00 00		
	34. DECORATIONS, MEDALS, BADGES, COMMENDATIONS, CITATIONS, AND CAMPAIGN RIBBONS AWARDED OR AUTHORIZED National Defense Medal Rifle Expert Shooting Badge						
	35. EDUCATION AND TRAINING COMPLETED Marine Corps Engineer School High School 3 years						
VA AND END SERV DATA	36. NON-PAY PERIODS (Time Lost Preceding Two Years) None		37. PAY ALLOWED LEAVE PAID None		38. AMOUNT OF ACCUMULATED LEAVE \$ 2.00		
	39. VA CLAIM NUMBER N/A		40. LIFE INSURANCE IN FORCE (Type of Death Benefit) ☒ YES ☐ NO		41. DATE OF DEATH Apr		
REMARKS	42. REMARKS None						
	43. REMARKS None						
AUTHENTICATION	44. PERMANENT ADDRESS FOR MAILING PURPOSES AFTER TRANSFER OR DISCHARGE (Street, RFD, City, County, State and ZIP Code) P. O. Box 916 Lexington, Kentucky, 40501			45. SIGNATURE OF PERSON BEING TRANSFERRED OR DISCHARGED David P. Brown			
	46. TYPED NAME, GRADE AND TITLE OF AUTHORIZING OFFICER M. A. LITWIN JR., Commanding Officer			47. SIGNATURE OF OFFICER AUTHORIZED TO SIGN M. A. Litwin Jr.			

AUGUST 30, 1973

File Number

023588244 00

DEEROWN

VETERANS ADMINISTRATION

600 Federal Place
Louisville, Kentucky 40202

C-23

*Joint V.A. disability
for service award
for Vietnam era
Veteran.*

EX H

This is to certify that

EXHIBIT "6"

DAVID P BROWN
BOX 15
NOCTOR KY 41357

is awarded *Veterans Administration Benefits* as shown below.

Monthly Rate Beginning Date

\$ 0090.28
0114.96

02-22-73
04-16-73

It is most important that you note the
contents of any attachments. VA Form(s) 21-6896
Your representative VFW
appeared on your behalf.

Show veteran's full name and VA file number on all correspondence. If VA number is unknown, show service number.

DISABILITY PENSION AWARD

*Under Decision A. No. 7
A. No. 11 para. 13 of
Complaint*
C-23 588 244

Items checked below apply to case:

- ☒ 1. You have been awarded pension based on non-service connected disability. A check covering the initial amount due will be mailed within 15 days. Thereafter, checks will be issued at the end of each month. Payment will be made subject to the conditions explained on the back.
- ☐ 2. In order to accord you more favorable consideration, the income you receive prior to the effective date of this award has not been included. Your pension is based on income not to exceed \$ _____ on a yearly basis. from the effective date of this award to the end of the year, or \$ _____
- ☐ 3. Your veteran's pension includes an increase of:
 - ☐ a. \$44 monthly because the evidence now shows that you are entitled to the "housebound" rate.
 - ☐ b. \$110 monthly because the evidence now shows that you are in need of regular aid and attendance. If you are furnished hospital, domiciliary or nursing home care by the Veterans Administration, you are not entitled to the additional amount for aid and attendance from the first day of the second calendar month after such care began and your payments will be reduced to the housebound rate. The full amount may be resumed after treatment or care is terminated.

As a veteran entitled to "housebound" or aid and attendance benefits, you are also entitled to receive from the VA drugs and medicines prescribed by physicians for illnesses and injuries suffered by you. An application card for these benefits will be forwarded to you.
- ☐ 4. When Social Security or retirement benefits are awarded you, inform us immediately of the date of initial payment and the amounts of that payment and of your monthly payments, as they may affect your pension rate. Show the amounts payable in your own right separately from that which is payable for other members of your family. The enclosed statement in support of claim may be used for this purpose.
- ☐ 5. Service connection has not been established for:
- ☐ 6. You may not be paid pension in addition to the compensation to which you are entitled, but you may elect either benefit. Meanwhile, we have awarded you pension as the greater benefit.
- ☐ 7. The dependency evidence checked below should be submitted as soon as possible because it may affect your pension rate:
 - ☐ a. Marriage certificate.
 - ☐ b. Your certified statement showing the date, place and circumstances of the dissolution of your or your wife's prior marriages, if any.
 - ☐ c. Proof of birth of your minor child or children.
 - ☐ d. The enclosed Declaration of Marital Status, VA Form 21-686c, properly completed.
 - ☐ e. Other:
- ☐ 8. Your award of pension has been amended because:

If required, your account will include adjustment of previous payments.
- ☐ 9. VA Form 21-674, Request for Approval of School Attendance, must be completed and signed by yourself and a school official to claim the additional pension for (Name(s) of Student(s) _____, school child(ren) between the ages of 18 and 23.
- ☐ 10. VA Form 21-674b, School Attendance Report, must be completed by a school official and be returned to the VA within 30 days from the date (Name of Student) _____ begins the course. If it is not returned, benefits payable because of school attendance must be discontinued.
- ☒ 11. See attached sheet.

If you are paying premiums on Government life insurance (GI insurance) and are unable to work, you may be entitled to certain benefits as provided for in your policy. For complete information contact the Veterans Administration office where you pay premiums.

Any new evidence which you believe would justify a different decision should be sent to us promptly. If you have no further evidence but believe this decision is not correct, you may initiate an appeal to the Board of Veterans Appeals by filing a notice of disagreement at any time within one year from the date of this letter. A notice of disagreement is simply a written communication which makes clear your intention to initiate an appeal and the specific part of our decision with which you disagree. It should be sent to this office. In the absence of timely appeal, this decision will become final.

VA FORM 21-6896
JUN 1972

SUPERSEDES VA FORM 21-6896, JUL 1971
WHICH WILL NOT BE USED.

(See reverse)

Show veteran's full name and VA file number on all correspondence. If VA number is unknown, show service number.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT PIKEVILLE

[illegible]


Edwin S. Hopson

Counsel for Defendants,
Lees Junior College and
Troy Eslinger

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT PIKEVILLE

DAVID PAUL BROWN	)	
	)	
Plaintiff	)	
	)	
v.	)	CIVIL ACTION NO. 82-318
	)	
LEES JUNIOR COLLEGE, et al.	)	
	)	
Defendants	)	

MEMORANDUM IN SUPPORT OF
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants, Lees Junior College and Troy Eslinger, by counsel, pursuant to the Order of this Court, hereby submit the following Memorandum in Support of their Motion for Summary Judgment on Issues of Law.

STATEMENT OF FACTS

Plaintiff seeks damages and a permanent injunction against Lees Junior College and its President, Troy Eslinger, for failure to admit him to the College. Plaintiff alleges that he is a handicapped individual due to a "mental defect" and that his denial was based upon this defect. Plaintiff brings this action under Title 29 U.S.C. §794, which states that an otherwise qualified handicapped individual cannot be excluded solely by reason of a handicap from participation in programs or activities receiving federal financial assistance.

UNDISPUTED FACTS

Plaintiff applied for admission to Lees Junior College from 1974 through 1982. Plaintiff did not finish high school but received his G.E.D. from the military. Plaintiff was discharged from the United States Marine Corps for unsuitability on April 19, 1968. Plaintiff was convicted of two (2) counts of unlawful possession of narcotic drugs for his own use on March 8, 1972 in Fayette Circuit Court.

DISPUTED FACTS

Defendants, without benefit of discovery, continue to dispute that Plaintiff is a handicapped individual as defined by the Act and accompanying regulations. Although not alleged by the Plaintiff, Defendants would dispute any fact, express or implied, which would relate to a denial of admission solely on the basis of a handicap. Defendants submit that Plaintiff's denial was based on the fact that he was not otherwise qualified for admission based upon admission standards applicable to all applicants. Defendants also deny the factual allegation that Plaintiff's inability to gain admission was strictly personal in nature. Defendants further deny the basis for Plaintiff's punitive damage claim.

On March 28, 1983, the Court ordered all discovery stayed until both parties submitted motions for summary

judgment on issues of law only. The Court further ordered that each party would have thirty (30) days to submit a reply memorandum.

STATEMENT OF THE ISSUES

This Memorandum will address six issues of law:

- I. Whether Lees Junior College is covered by the Act
- II. Statute of Limitations
 - A. When does the statute begin to run?
 - B. If necessary, which state statute is most applicable?
 - C. Damages
- III. Exhaustion of Administrative Remedies
- IV. Private right of action
- V. The "otherwise qualified" standard as defined by the regulations and case law
- VI. The Due Process Claim

I. LEES JUNIOR COLLEGE DOES NOT COME UNDER THE ACT.

45 CFR Section 84 Appendix A (1982) states as follows:

28. PRIVATE EDUCATION. Section 84.39 sets forth the requirements applicable to recipients that operate private education programs and activities. The obligations of these recipients have been changed in two significant respects: first, private schools are subject to the evaluation and due process provisions of the subpart only if they operate special education programs....

Paragraph (a) of Section 84.39 intended to make clear that recipients that operate private education programs and activities are not required to provide appropriate education to handicapped students with special educational needs if the recipient does not offer programs designed to meet those needs. Thus, a private school that has no program for mentally retarded persons is neither required to admit such a person into its program nor to arrange or pay for the provision of the person's education in another program....

Lees Junior College does not have the necessary programs or facilities to care for students with the type of drug-induced mental and/or emotional problems that Plaintiff alleges he suffers from. Lees Junior College does not receive any money from the federal or state government for that purpose. Clearly, the regulations protect private schools from having to admit persons with severe emotional problems. As the court is aware, Plaintiff has had difficulty with aggression, which was exhibited in a confrontation on campus with a security officer. Plaintiff does not suffer from learning disabilities or other types of disorders that were envisioned by the Act to fall under "mental handicap"; rather, Plaintiff's difficulties are more attuned to the type of disability mentioned in Appendix (A) which would prevent him from obtaining admission to a private school that does not receive funds to help him.

Therefore, Lees Junior College does not come under the Act, and both Defendants respectfully submit that as a matter of law, their Motion for Summary Judgment should be sustained on this issue.

II. PLAINTIFF'S ACTION IS BARRED BY THE
STATUTE OF LIMITATIONS.

A. Plaintiff's Cause of Action Accrued
in 1974.

The Rehabilitation Act of 1973 does not contain any provision establishing a time limitation for the bringing of civil actions. Therefore, the forum state statute of limitations governing those acts that are most clearly analogous to the acts alleged by the Plaintiff in the Complaint will control. Hutchings v. Erie City and County, et al., 516 F. Supp. 1265 (W.D. Pa. 1981); Marin v. New York State Department of Labor, 512 F. Supp. 353 (S.D.N.Y. 1981).

It can be argued that any one of several statutes can be applicable in the case at bar, with the maximum giving the Plaintiff five (5) years. Even allowing the Plaintiff the benefit of five years, his action is still barred, since the cause of action accrued in 1974.

Statutes of limitations are designed to protect defendants, not only from incurring liability on stale claims because of lost evidence, but also from bearing the burden of defending against stale claims regardless of whether liability is eventually established; consequently, the operation of statutes of limitations is intended to be somewhat mechanical and is ordinarily unrelated to the merits of the litigation. Steele v. U.S., 599 F.2d 823 (7th Cir. 1979).

The threshold inquiry is when Plaintiff's cause of action accrued. As stated above, Plaintiff applied for admission eight (8) consecutive years and was denied admission on each and every application. It is important to note that every application mirrored the first one; that is, no new information or criteria was submitted on behalf of the Plaintiff in each ensuing application. If Plaintiff's allegations are true, which Defendants naturally deny, then he first sustained injury in 1974, when he first applied and was denied admission. The statute of limitations commenced to run from the date on which Plaintiff first sustained injury as a result of the alleged violations. See, 2361 State Corporation v. Sealy, Inc., 263 F. Supp. 845 (N.D. Ill. 1967). Plaintiff filed suit well beyond even the most liberal statute of limitation and his action is thereby barred.

The filing of subsequent applications after 1974 neither tolled the statute nor afforded the Plaintiff additional causes of action. A case on all fours which addresses these issues is Jolivet v. Elkins, 386 F. Supp. 261 (D. Md. 1974). In Jolivet the plaintiff brought a civil rights action, alleging racial discrimination stemming from his exclusion from law school and inability to gain readmission. At the end of his first year, plaintiff's average fell below minimum standards, and he was promptly notified of his ineligibility to continue. Subsequently, plaintiff

petitioned for readmission, which was granted. At the end of his second year, he again fell below the minimum average necessary to continue, was notified of ineligibility, and was once again successful in petitioning for readmission. During his third year, plaintiff again encountered academic difficulties, and he was not permitted to graduate with his class. He also received a letter informing him that he was being dropped from the school. He again filed for readmission, but was denied.

Acting on this denial, plaintiff Jolivet requested and was granted the opportunity to appear personally before the faculty council in support of his petition for readmission. Following his personal appearance, he was advised by letter dated November 25, 1970, that after careful consideration of his petition, the decision of the council remained the same. Plaintiff then engaged in writing a series of letters and requests spanning over seventeen (17) months, including correspondence to the Dean and to the Chancellor of the University. These inquiries and requests for readmission were all denied.

Plaintiff Jolivet initiated a civil action on June 12, 1974, over three (3) years after his initial denial notification. Plaintiff conceded that the Maryland three-year statute of limitations applied, but argued that his claims did not accrue until sometime after June 12, 1971, and that in any event, the running of the statute was tolled

until that date by the various actions which he took in seeking readmission to the law school.

The court first focused its attention on accrual, and held:

In West v. Board of Education of Prince George's County, 165 F. Supp. 382 (D.Md. 1958), this court, in dismissing a civil rights complaint as barred by limitations, concluded that the cause of action accrued when the essential act was committed and the injury sustained.

... If plaintiff was in fact denied due process by the Faculty Council or was refused readmission because of his race, these acts occurred in 1970 when his formal petition was denied....

Thus, by November 25, 1970, plaintiff had finally suffered the essential injuries of which he is here complaining.... The date when plaintiff's cause of action accrued was not extended by his later efforts to gain readmission, including his appeals to the Chancellor of the University at Baltimore and the further petitions he filed with the Dean. If his constitutional rights were infringed, such occurred when the Faculty Council, acting pursuant to its authority to readmit excluded students, denied plaintiff's petition for readmission and not when other officials of the university declined to change that result.

Id., at 269.

Here, as in Jolivet, every application mirrored the first one; that is, no additional information was submitted to the College for consideration in subsequent applications. Therefore, it is inconceivable that Plaintiff could believe that he had any chance for admission on the basis of the very same application which was denied in 1974.

In Jackson v. Alcan Sheet and Plate, 462 F. Supp. 82 (N.D. N.Y. 1978) the court held that a letter sent from company headquarters to an employee in response to the employee's inquiry, informing him as to why he was laid off and which was in a manner procedurally consistent with others similarly situated, was merely a refusal to remedy prior allegedly discriminatory practices and as such was not relevant to the accrual of an employee's cause of action against the employer. Here, Plaintiff's letters of denial clearly indicate that they were mere reaffirmations of the initial denial. Therefore, it is clear that Plaintiff's cause of action accrued in 1974, and is therefore barred.

The Jolivet court also addressed the tolling issue, and denied that plaintiff's subsequent action tolled the statute:

The actions taken by plaintiff after November 1970 could hardly be viewed as any continuation of any proper administrative procedures. Plaintiff retained several attorneys and met with the Dean of the law school on several occasions. He complained to and met with the Chancellor of the University at Baltimore, and he filed further unsuccessful petitions for readmission. None of these steps, initiated by the plaintiff himself, could have any tolling effects. If plaintiff could continue the tolling of the three-year statute of limitations merely by filing further petitions for readmission, he could effectively prevent for an indefinite period of time the application of any limitations to him. Such a result would put it in the power of the plaintiff to enlarge the time set by statute for commencing suit (emphasis supplied, citations omitted).

Further, Plaintiff waives any argument under the "continuing violation" doctrine, since he did not allege such in his Complaint. United Airlines, Inc. v. Evans, 431 U.S. 553, 577, n.8 (1977). Plaintiff has alleged no facts demonstrating a practice by the Defendants of actual discriminatory treatment of other applicants, which is necessary to go forward with this theory. Therefore, his subsequent applications cannot toll the statute.

Even if Plaintiff alleged a continuing violation, which he did not and thereby waived, this theory fails under the present fact situation. A "continuing conspiracy" such as will preclude the running of a statute of limitations does not occur when the conduct alleged as a violation is final or the actionable wrong is by its nature permanent. Fontana Aviation, Inc. v. Baldinelli, 418 F. Supp. 464 (W.D. Mich.) aff'd 575 F.2d 1194 (6th Cir. 1978). Though effects may continue to exist as a result of discriminatory action, if there is a reasonably ascertainable date on which a discriminatory act occurred, that is the date on which the statute of limitations begins to run, and the statute will not be extended on the theory that a continuing violation has occurred. Marshall v. American Motors Corporation, 475 F. Supp. 875 (E.D. Mich. 1979). Since Plaintiff does not allege a continuing violation, a discriminatory policy, or more than one discriminatory act, his action is barred.

The statute of limitations was designed to assure fairness to defendants and to promote justice by preventing surprises to the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded and witnesses have disappeared. Burnett v. New York Central Railroad Company, 380 U.S. 424 (1965). To allow a cause of action nine years after the alleged discrimination occurred would severely hamper Defendants in their defense of this lawsuit at trial.

For the above stated reasons, Defendants respectfully submit that Plaintiff's Complaint is barred by the statute of limitations.

B. KRS 413.140(1)(A) Is the Most Appropriate State Statute.

In Hines v. Board of Education of Covington, 492 F. Supp. 469 (E.D. Ky.), aff'd, 667 F.2d 564 (6th Cir. 1981), the Court held that District Courts cannot adopt, across the board, in federal civil rights cases, Kentucky's five-year statute of limitations on liability based upon statute. Rather, a more detailed analysis must be made in each case to determine if some other Kentucky statute of limitations is more analogous. Judge Bertelsman held that the two primary factors to be considered in attempting to analogize federal civil rights claims to state claims for the purpose of selecting the appropriate statute of

limitations are the interest which the plaintiff seeks to protect and the operative facts comprising the claim.

It is hard to pinpoint the appropriate statute of limitations based upon Plaintiff's lengthy, rambling complaint. Defendants submit that the one-year statute of limitations for injury to the person applies. See KRS 413.140(1)(a) and Craft v. Rice, Ky. App., _____ S.W.2d _____, 30 K.L.S. 6 (April 22, 1983).

At the very worst, the five-year statute of limitations for actions based on statute applies. KRS 413.120(2). In any case, as stated above, this action is barred since the cause of action accrued in 1974.

C. In the Alternative, Plaintiff's Damages Must Be Limited.

Defendants submit that a one-year statute of limitation applies in this case. If the Court does not find Plaintiff to be barred by the statute of limitations, Plaintiff's damages must be limited to the 1982 application only. See, Pao v. Holy Redeemer Hospital, 547 F. Supp. 484, 493, n.4 (E.D. Pa. 1982):

I note in passing, however, that the plaintiff's potential damages would be limited to the period subsequent to the cause of action he alleges accrued on April 25, 1979, and hence would not include those antecedent damages which might have been suffered as a result of the time-barred causes of action.

III. PLAINTIFF'S ACTION MUST BE DISMISSED FOR
FAILURE TO EXHAUST ADMINISTRATIVE
REMEDIES.

The legislative history of 29 U.S.C. §794, and an abundance of case law, including a recent Supreme Court decision, indicate that exhaustion of administrative remedies is required in order to maintain a private right of action in federal court. Senate Report No. 93-1297, found in 4 U.S. Code Cong. and Admin. News, pp. 6390-91 (1974) reflects the clear intent of Congress that administrative remedies must be exhausted before suit is filed. Portions of the legislative history read as follows:

Section 504 was patterned after, and is almost identical to, the anti-discrimination language of Section 601 of the Civil Rights Act of 1964, 42 U.S.C. 2000d-1 (relating to race, color or national origin), and Section 901 of the Education Amendments of 1972, 42 U.S.C. 1683 B (relating to sex). This section therefore constitutes the establishment of a broad government policy that programs receiving Federal financial assistance shall be operated without discrimination on the basis of handicap. It does not specifically require the issuance of regulations or expressly provide for enforcement procedures, but it is clearly mandatory in form, and such regulations and enforcement are intended (emphasis added).

The language of Section 504, in following the above cited Acts, further envisions the implementation of a compliance program which is similar to those Acts, including promulgation of regulations providing for investigation and review of recipients of Federal financial assistance, attempts to bring non-complying recipients into voluntary compliance through informal efforts such as negotiations, and the imposition of sanctions against recipients who continue to discriminate against otherwise qualified handicapped persons on the basis of handicap. Such sanctions would

include, where appropriate, the termination of Federal financial assistance to the recipient or other means otherwise authorized by law. Implementation of Section 504 would also include pre-grant analysis of recipients to insure that Federal funds are not initially provided to those who discriminate against handicapped individuals. Such analysis would include pre-grant review procedures and a requirement for assurances of compliance with Section 504. This approach to implementation of Section 504, which closely follows the models of the above-cited anti-discrimination provisions, would assure administrative due process (right to hearing, right to review), provide for administrative consistency with the Federal Government as well relative ease of implementation and permit a judicial remedy through a private action.

It is intended that Sections 503 and 504 be administered in such a manner that a consistent, uniform and effective Federal approach to discrimination against handicapped persons would result. Thus, Federal agencies and departments should cooperate in developing standards and policies so that there is a uniform, consistent Federal approach to these Sections.

Ibid.

As the Court is aware, regulations have been promulgated under this Section, including the enforcement procedure and time limitations found in Title VI. See, 45 CFR §84.61, which incorporates the compliance procedure of Title VI found in 80 CFR 6 through 10. 45 CFR 80.7, which is incorporated by 84.61, reads as follows:

(b) Complaints. Any person who believes himself or any specific class of individuals to be subjected to discrimination prohibited by this part may by himself or by a representative file with the responsible department official or his designee a written complaint. A complaint must be filed not later than 180 days from the date of the

alleged discrimination, unless the time for filing is extended by the responsible department official or his designee.

The legislative history and the regulations clearly indicate that Congress intended that administrative remedies be pursued before any action is taken in a court of law. Since Plaintiff has not done so, he is barred from recovery.

In February 1983 the Supreme Court in Community Television of Southern California v. Gottfried, et al., 103 S.Ct. 885 (1983) indicated that exhaustion is a prerequisite to suit. Respondent Gottfried filed a petition with the FCC requesting that it deny a renewal of a public television station's license because the station allegedly [1] had failed to discharge its obligation under the Communication Act of 1934 and [2] had violated Section 504 of the Rehabilitation Act. Focusing on Section 504 (29 U.S.C. §794), the Supreme Court held:

We are not persuaded, however, that Congress intended the Rehabilitation Act of 1973 to impose any new enforcement obligation on the Federal Communications Commission. As originally enacted, the Act did not expressly allocate enforcement responsibility. See, PUB. L. 93-112, Title V, Section 504, 87 STAT 394. Nevertheless, since Section 504 was patterned after Title VI of the Civil Rights Act of 1964, it was understood that responsibility for enforcing it, insofar as it regulated private recipients of federal funds, would lie with those agencies administering federal financial assistance programs [emphasis supplied]. See, S.Rep. No. 93-1297, TT. 39-40 (1974), U.S. Code Cong. & the Admin. News, 1974,

page 6373. When the Act was amended in 1978, that understanding was made explicit. See, TUP, 95-602 Title I, Section 119 92 Stat. 2982.

Therefore, the Supreme Court has held that enforcement of Section 504 first lies with the administrative agency. Since Plaintiff has failed to do so, he is barred from recovery for failure to exhaust his administrative remedies.

One of the initial cases to address this issue was Lloyd v. Regional Transportation Authority, 548 F.2d 1277 (7th Cir. 1977). The court gave a detailed background about the Act, its legislative history, and its parallel to Title VI. The Lloyd court noted that HEW was given the responsibility of establishing standards to determine "handicapped individuals" and for determining what are "discriminatory practices" as well as coordinating the implementation of Section 504 (29 U.S.C. 794) by all federal agencies.

At the time of the Lloyd decision, regulations were not yet completed. Therefore, the Lloyd court allowed the Complainant to go forward with a private cause of action without exhaustion. However, the court was quick to point out that the legislative history was clear that Section 504 contemplated judicial review of administrative proceedings only:

We expressively leave open as premature the question whether, after consolidated procedural enforcement regulations are issued to implement

Section 504, the judicial remedy available must be limited to post-administrative remedy judicial review. In any event, the private causes of action we imply today must continue at least in the form of judicial review of administrative action. And until effective enforcement regulations are promulgated, Section 504 in its present incarnation as an independent cause of action should not be subjected to the doctrine of exhaustion (citations omitted). But assuming a meaningful administrative enforcement mechanism, the private cause of action of the Section 504 should be limited to a posteriori judicial review.

Id., at 1286, n.29.

Many courts facing this issue of exhaustion under 29 U.S.C. §794 have followed the Lloyd rationale in limiting the district court to review of administrative proceedings. In Sherer v. Waier, 457 F. Supp. 1039 (W.D. Mo. 1977) the court reviewed the Lloyd decision and Crawford v. University of North Carolina, 440 F. Supp. 1047 (M.D.N.C. 1977), and held:

This court has carefully examined the case authority and the legislative history of Section 504 of the Rehabilitation Act of 1973. That study does lead to the conclusion urged by Plaintiff that handicapped individuals do possess a right created by Section 504. Important as that right may be, however, this court does not agree that Congress intended it to be enforced by a private individual through a private civil action in the United States District Court without resort to the administrative machinery established by the act and regulations. A private right of action should not be lightly implied under a statute where Congress has not specifically provided one especially where Congress provided for other means of enforcement. (citations omitted) The other means of enforcement under Section 504 is clear, and even the Seventh Circuit in Lloyd recognized that the legislative history of Section 504 indicates

that Congress clearly contemplated judicial review of administrative proceedings....

Id., at 1046.

In Boxall v. Sequoia Union High School District, 464 F. Supp. 1104 (N.D. Cal. 1979) the court noted that the Lloyd court, had procedures been established, would have required exhaustion prior to allowing the private action under the Rehabilitation Act of 1973. Following the reasoning of Lloyd, and further quoting from Crawford v. University of North Carolina, supra, the Boxall court held:

As these cases suggest, it is appropriate in the normal course of events to require the exhaustion of administrative remedies before pursuing a private action under Title VI of the Civil Rights Act of 1964 or its analogue involved here -- section 504 of the Rehabilitation Act of 1973.

Id., at 1110.

In Mitchell v. Walter, 538 F. Supp. 1111 (S.D. Ohio 1982), Judge Kineary faced a Rehabilitation Act claim and a claim under the Education for All Handicapped Children Act, 20 U.S.C. §1401, et seq. Judge Kineary noted that unlike the EAHCA, the Rehabilitation Act does not expressly create a private right of action in favor of handicapped individuals for violation of its provisions. The court noted that the Title VI enforcement procedure was incorporated, and that the plaintiff had to exhaust his

administrative remedies. In ruling on the exhaustion question, the court held:

It is clear that there is a substantial overlap between the substantive rights created by the EAHCA and the Rehabilitation Act insofar as the latter applies to educational programs receiving federal financial assistance. Regulations promulgated by the Department of Health and Human Services pursuant to the Rehabilitation Act directs recipients of federal funds who operate educational institutions to establish standards and procedures for the identification, evaluation, and placement of persons who, because of handicap, need special education and related services, and to establish procedural safeguards with respect to such identification, evaluation, and placement. 45 CFR Section 84.35 and .36 (1981). The applicability of the administrative remedies under the EAHCA to complaints brought under the Rehabilitation Act is expressly recognized by Section 84.36, which provides that "[c]ompliance with procedurals with Section 615 of the education of the handicap act is one means of meeting this requirement [for procedural safeguards].

Although the Rehabilitation Act does not explicitly require exhaustion of state administrative remedies, the prevailing authority holds that a plaintiff bringing claims under both the EAHCA and the Rehabilitation Act must exhaust remedies on both claims (emphasis supplied).

Id., at 1117.

Defendants also rely on Doe v. New York University, 442 F. Supp. 522 (S.D.N.Y. 1978). For the sake of brevity, Defendants respectfully request that the court refer to Defendants' Pre-trial Memorandum for a detailed discussion of Doe. In summary, Doe highlights the need for administrative review, and states that without it, Federal District Courts will be flooded with new litigation that

they are not in the best position to handle, as compared to administrative interpretation and guidance in the construction and application of the law. The administrative agency is better equipped to determine who is "otherwise qualified", and who is "handicapped" as defined under the Act. Other cases holding that exhaustion is a requirement under 29 U.S.C. §794 are Stubbs v. Kline, 463 F. Supp. 110, 117 (W.D. Pa. 1978); NAACP v. Wilmington Medical Center, 426 F. Supp. 919 (Del. 1977).

For the above-stated reasons, Defendants submit that Plaintiff did not file with the administrative agency within 180 days of the alleged discriminatory action, and is therefore barred for failure to exhaust his administrative remedies.

IV. PLAINTIFF DOES NOT HAVE PRIVATE RIGHT OF ACTION FOR DAMAGES UNDER 29 U.S.C §794.

From the above-mentioned legislative history, it is clear that Congress intended that one should have a judicial remedy only after exhaustion of administrative remedies. However, Congress did not mention nor intend that a plaintiff should be permitted to have a private right of action for damages.

The inquiry as to whether a private right of action for damages should be implied under 29 U.S.C. §794 is guided by the factors established in Cort v. Ash, 422 U.S. 66 (1975): [1] whether the statute was enacted for the

benefit of a special class of which plaintiff is a member, [2] whether there is any indication of legislative intent to create a private remedy, [3] whether implication of such a remedy is consistent with the legislative scheme, and [4] whether implying a federal remedy is inappropriate because the subject matter involves an area basically of concern to the states.

It is still questionable whether Plaintiff is handicapped as defined by the regulations. However, Plaintiff clearly fails to meet the second and third elements of the Ash test, in that the legislative history of the Rehabilitation Act clearly shows an intent that 29 U.S.C. 794 be enforced in the same manner as Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d-1. As stated above, the enforcement scheme gives a complainant 180 days to file a claim with the administrative body.

Damage suits are also inconsistent with the legislative intent and scheme. To hold otherwise would effectively eliminate the very intent of Congress; that is, to eradicate discrimination on the basis of handicap. If private individuals are allowed to pursue extensive damage suits for their own individual benefit, the actual effects upon a defendant like Lees Junior College would be devastating, both in terms of costs of defense and exposure to large damage awards.

Finally, the Court must consider that a grant of a private right of action for damages can frustrate those alternative practices that exist to resolve such disputes and, given the costs of federal litigation today, can dramatically alter the balance of interests struck by the individual piece of legislation. See, Santa Fe Industries v. Green, 430 U.S. 462, 478-479 (1977). This is especially true in this case.

When Congress chooses not to provide a private civil remedy, federal courts should not assume the legislative role of creating such a remedy and thereby enlarge their jurisdiction. Defendants respectfully submit that Plaintiff does not have a private cause of action, and Defendants' Motion for Summary Judgment should be sustained on this issue.

V. PLAINTIFF IS NOT "OTHERWISE QUALIFIED"
FOR ADMISSION TO LEES JUNIOR COLLEGE.

29 U.S.C. Section 794 reads:

No otherwise qualified handicapped individual in the United States ... shall, solely by reason of his handicap, be excluded

Therefore, Plaintiff must have been "otherwise qualified" in order to have gained admission to Lees Junior College. 45 CFR §84.4 defines a "qualified handicapped person" as:

(k)(3) With respect to post-secondary and vocational services, a handicapped person who meets the academic and technical standards requisite to

admission for participation in recipient's education program or activity.

Quite simply, Plaintiff's GED score of 43.6 fell below the minimum standards of Lees Junior College [see, Affidavit of Troy Eslinger, President]. Plaintiff's substandard score alone was sufficient reason for his denial. However, acting in good faith, the College did contact one of Plaintiff's references, and was given an unfavorable recommendation.

Colleges and universities are not normally subject to supervision or review by the courts in the uniform application of their academic standards. Lai v. Board of Trustees of East Carolina University, et al., 330 F. Supp. 904 (E.D.N.C. 1971). Generally, courts will not interfere with the operation of colleges and universities, and this avoidance is especially appropriate in actions challenging the institutions' regulation of the academic sphere of campus life, a domain in which the courts possess minimum expertise. Depperman v. University of Kentucky, et al., 371 F. Supp. 73 (E.D. Ky. 1974) (J. Swinford, Judge).

In Depperman, the court held that a determination by educational authorities of a student's academic or emotional fitness may be actionable only if the adverse determination complained of is motivated by bad faith. Plaintiff can make no showing whatsoever of any bad faith on the part of Lees Junior College and Troy Eslinger. As indicated by the Affidavit of Troy Eslinger, Plaintiff's

denial was based solely upon his below minimum standards and a poor recommendation from one of his references, and in no way was influenced by an alleged handicap.

University officials should have broad discretionary power to determine the fitness of a student. Only where there is a clear and convincing showing that an official acted in an arbitrary and capricious manner will federal courts interfere with the exercise of such discretionary power. Keys v. Sawyer, et al., 353 F. Supp. 936 (S.D. Tex. 1973), aff'd, 496 F.2d 876 (1974). Therefore, Defendants, Lees Junior College and Troy Eslinger respectfully submit that their Motion for Summary Judgment be sustained on the issue that Plaintiff, as a matter of law, was not otherwise qualified to attend Lees Junior College.

VI. PLAINTIFF'S DUE PROCESS CLAIM IS WITHOUT MERIT.

Plaintiff vaguely mentions a due process violation in that he was not afforded what amounts to a Goldberg type due process hearing after he was first denied admission.

In Dietz v. American Dental Association, 479 F. Supp. 554 (E.D. Mich. 1979), a dentist was denied diplomat status by a dental association. The court, in ruling on a summary judgment motion, held:

The present case does not involve a disciplinary proceeding: plaintiff was not rejected for failing to conform with rules and regulations.

Plaintiff was rejected because he allegedly was not qualified. Such an academic decision must be deferred to the Board unless the Board acted arbitrarily and capriciously. Thus, unless a genuine issue of fact exists that the Board acted arbitrarily, capriciously, or discriminatorily, defendant's motion for summary judgment must be granted.

Id., at 559.

In the case at bar, we do not have an expulsion situation, where arguably one could assert a property right protected by due process. Rather, this is a case of non-admission, and Plaintiff does not have a due process right to a hearing. If every university in the United States had to provide a full-blown Goldberg type due process hearing to every student who was denied admission, there would be no money nor time in which to provide an education to those students qualified for admission. Plaintiff does not have a due process right to a hearing, and thus this claim must fail.

CONCLUSION

Lees Junior College does not come under the Act, since it is a private school which does not have the facilities nor the programs to fit Plaintiff's needs. The regulations are specific in excluding Lees Junior College, a private institution, from this Act, especially since no federal or state money is earmarked for handicapped

students. Therefore, Defendants are entitled to Summary Judgment on this issue.

Plaintiff's cause of action accrued in 1974, nearly nine years ago. Even giving Plaintiff the benefit of the most liberal statute of limitation, his action was barred in September of 1979. Therefore, Defendants are entitled to Summary Judgment on this issue.

Plaintiff's action is also barred for failure to exhaust administrative remedies. The legislative intent is clear in the Senate Report cited above, which indicates that the regulations and the enforcement scheme were drafted specifically for a complainant to first file an administrative action before burdening the District Court. Plaintiff has not done so, and thus Defendants' are entitled to Summary Judgment on this issue.

As can be seen from the Affidavit of Troy Eslinger, Plaintiff was not otherwise qualified for admission, as stated by the statute and regulations.

Again, through the Senate Report which details the legislative intent of this section, Plaintiff does not have a private right of action for damages. For this reason, Defendants are also entitled to Summary Judgment.

Finally, Plaintiff's due process claim without merit.

For the above-stated reasons, Defendants respectfully submit that they are entitled to summary judgment.

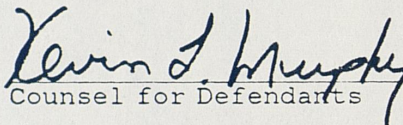


Edwin S. Hopson
Kevin L. Murphy
WYATT, TARRANT & COMBS
Citizens Plaza
Louisville, KY 40202
(502) 589-5235

Counsel for Defendants,
Lees Junior College and
Troy Eslinger

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Support of Defendants' Motion for Summary Judgment was mailed, postage prepaid, to Paul D. Deaton, Esq., P.O. Box 448, Paintsville, Kentucky 41240, counsel for Plaintiff, this 18 day of July, 1983.


Counsel for Defendants

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT PIKEVILLE

FILED JUL 19 1983

DAVID PAUL BROWN	)	
	)	
Plaintiff	)	
	)	
v.	)	CIVIL ACTION NO. 82-318
	)	
LEES JUNIOR COLLEGE and	)	
TROY ESLINGER	)	
	)	
Defendants	)	

AFFIDAVIT OF TROY ESLINGER

Comes the Affiant, Dr. Troy Eslinger, and after first being duly sworn, states as follows:

1. I am the President of Lees Junior College, a private two-year college located in Jackson, Kentucky.

2. Lees Junior College is a Presbyterian College and is not a Kentucky tax supported institution.

3. Lees Junior College does not have an open admissions policy, and each applicant must meet certain minimum requirements for admission.

4. In order to obtain admission into the College in 1974, an applicant who did not graduate from an accredited high school had to have a G.E.D. score of no less than 45, which is the figure required by the State of Kentucky. Plaintiff's G.E.D. score of 43.6 was below the minimum standards set by Lees Junior College for admission.

5. One of Plaintiff's references was contacted in 1974, and an unfavorable recommendation was given to the admissions

committee, detailing a history of drug abuse and a criminal record involving drugs. Due to the unfavorable recommendation, there was no reason to ignore the below standard G.E.D. score, and Plaintiff was denied admission on the basis of his G.E.D. score coupled with the unfavorable recommendation. Plaintiff's denial was in no way based upon any handicap Plaintiff may have had, and was not motivated by bad faith.

6. Lees Junior College does not have any program nor competent professionals to evaluate, care for or treat Plaintiff's alleged emotional, drug and behavioral problems. Lees Junior College does not receive any funds from the federal government nor from the State of Kentucky which are earmarked for teaching programs or any other program or grants specifically pointed toward handicapped individuals. Lees Junior College is not equipped to handle the problems Plaintiff alleges, and has exhibited in the past; namely, problems related to drug abuse, and aggressive behavior which he exhibited towards a Lees' security officer, which resulted in an altercation which required the presence of the Jackson Police Department.

7. After the 1974 application, Plaintiff continued to apply to Lees Junior College from 1975 through 1982. Plaintiff submitted the same information and application, and at no time gave the admissions committee additional information to consider. The only additional fact the committee did consider in subsequent years was the altercation which occurred on campus. (See attached copies of letters sent to Plaintiff in response to his applications for admission.)

Further, Affiant sayeth not.

Troy Eslinger
Troy Eslinger

STATE OF FLORIDA)
COUNTY OF Pinellas)

The foregoing affidavit was subscribed and sworn to
before me by Troy Eslinger, this 16 day of July, 1983.

My Commission expires: _____
Notary Public, State of Florida at Large
My Commission Expires April 20, 1987

Frank On Hansen
Notary Public

3

January 26, 1982

Mr. David Paul Brown
P. O. Box 55
Jackson, Kentucky 41339

Dear Mr. Brown:

The Admissions Committee has reviewed your application for admission to Lees Junior College for the Spring Semester 1982. After careful consideration, the Committee has decided not to admit you to the college.

This decision is based on the judgement of the Committee that there has been no change in the circumstances which led to earlier decisions of the Committee.

We believe we have made the best possible decision at this time for all concerned.

Sincerely,

Virgil Lykins
Director of Admissions

VL:eb

CC: Peggy Payne
Don Brashear
Peter Mitchell



Lees Junior College

JACKSON, KENTUCKY 41339

TELEPHONE 606 666-7521

September 17, 1981

Mr. David Paul Brown
Box 55
Jackson, Kentucky 41339

Dear Mr. Brown:

The Admissions Committee has reviewed your application for admission to Lees Junior College for fall semester 1981. After careful consideration, the committee has decided not to admit you to the college.

This decision is based on the judgement of the Committee that there has been no change in the circumstances which led to earlier decisions of the Committee.

We believe we have made the best possible decision at this time for all concerned.

Sincerely,

Virgil Lykins
Director of Admissions

VL:eb



Lees Junior College

JACKSON, KENTUCKY 41339

TELEPHONE 606 666-7521

September 8, 1978.

Mr. David Paul Brown
Box 15
Noctor, KY 41357

Dear David:

The Admissions Committee has reviewed your application for admission to Lees College for the fall semester of 1978. After careful consideration, the Committee has decided not to admit you to the College.

This decision is based on the judgement of the Committee that there has been no change in the circumstances which led to earlier decisions of the Committee.

We believe we have made the best possible decision at this time for all concerned.

Sincerely,

Virgil Lykins
Director of Admissions

VL:dm



Lees Junior College

JACKSON, KENTUCKY 41339

TELEPHONE 606 666-7521

January 26, 1979

Mr. David Paul Brown
Box 15
Noctor, KY 41357

Dear David:

The Admissions Committee has reviewed your application for admission to Lees College for the spring semester of 1979. After careful consideration, the Committee has decided not to admit you to the College.

This decision is based on the judgement of the Committee that there has been no change in the circumstances which led to the earlier decisions of the Committee.

We believe we have made the best possible decision at this time for all concerned.

Sincerely,

A handwritten signature in cursive script that reads "Virgil Lykins".

Virgil Lykins
Director of Admissions

VL:dm

September 3, 1980

Mr. David Paul Brown
P.O. Box 55
Jackson, Kentucky 41339

Dear David:

The Admissions Committee has reviewed your application for admission to Lees Junior College for the fall semester of 1980. After careful consideration, the Committee has decided not to admit you to the college.

This decision is based on the judgement of the Committee that there has been no change in the circumstances which led to earlier decisions of the Committee.

We believe we have made the best possible decision at this time for all concerned.

Sincerely,

Virgil Lykins
Director of Admissions

VL:db

9

September 4, 1979

Mr. David Paul Brown
P.O.Box 55
Jackson, Kentucky 41339

Dear David:

The Admissions Committee has reviewed your application for the admission to Lees College for the fall semester of 1979. After careful consideration, the Committee has decided not to admit you to the College.

This decision is based on the judgement of the Committee that there has been no change in the circumstances which led to the earlier decisions of the Committee.

We believe we have made the best possible decision at this time for all concerned.

Sincerely,

Virgil Lykins
Director of Admissions

VL:db

September 1, 1977

Mr. David Paul Brown
Box 15
Noctor, KY 41357

Dear David:

The Admissions Committee has reviewed your application for admission to Lees College for the fall semester of 1977. After careful consideration, the Committee has decided not to admit you to the College.

This decision is based on the judgement of the Committee that there has been no change in the circumstances which led to earlier decisions of the Committee.

We believe we have made the best possible decision at this time for all concerned.

Sincerely,

Robert Lovely
Director of Admissions

RL:bb

(14)

January 4, 1977

Mr. David Paul Brown
Box 15
Hector, KY 41357

Dear David:

The Admissions Committee has reviewed your application for admission to Lees College for the spring semester of 1977. After careful consideration, the Committee has decided not to admit you to the College.

This decision is based on the judgment of the Committee that there has been no change in the circumstances which led to earlier decisions of the Committee.

We believe we have made the best possible decision at this time for all concerned.

Sincerely,

Robert Lovely
Director of Admissions

RL:bb



Lees Junior College

JACKSON, KENTUCKY 41339

TELEPHONE 606 666-7521

August 24, 1976

Mr. David Paul Brown
Box 15
Noctor, KY 41357

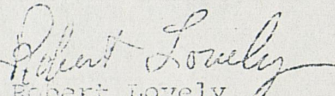
Dear David:

The Admissions Committee has reviewed your application for admission to Lees College for the fall semester of 1976. After careful consideration, the Committee has decided not to admit you to the College.

This decision is based on the judgment of the Committee that there has been no change in the circumstances which led to earlier decisions of the Committee.

We believe we have made the best possible decision at this time for all concerned.

Sincerely,


Robert Lovely
Director of Admissions

RL:bb

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September 5, 1975

Mr. David Paul Brown
Box 15
Noctor, Kentucky 41357

Dear David:

After review by the Admissions Committee, we have decided to deny you admission to Lees College for the Fall of 1975.

It was the feeling of the Committee that there has not been found a significant change in circumstances at this point in time to allow for a change in the Admission decision of 1974.

Sincerely,

Robert Lovely
Director of Admissions

RL:bb

cc: Dean Smith
Fred Landrum
Bill Noel
David Van Winkle

(19)

December 31, 1975

Mr. David Paul Brown
Box 15
Noctor, Kentucky 41357

Dear David:

The Admissions Committee has reviewed your application for admission to Lees College for the spring semester of 1976. After careful consideration, the Committee has decided not to admit you to the College.

This decision is based on the judgment of the Committee that there has been no change in the circumstances which led to earlier decisions of the Committee. In fact, incidents this fall concerning your relationship to the campus and to the Campus Security Officer have, in our minds, substantiated the wisdom of the previous decisions of the Committee.

We believe we have made the best possible decision at this time for all concerned.

Sincerely,

Robert Lovely
Director of Admissions

RL:bb

cc:Dean Smith
Fred Landrum
Bill Noel
David Van Winkle

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June 12, 1974

Mr. David Paul Brown
Box 15
Noctor, KY 41357

Dear David:

After careful review by the Admissions Committee, we have decided to deny you admission to Lees Junior College for the fall semester of 1974.

We evaluated recommendations from several sources and feel neither you nor the college would profit from your attendance at this time. If you feel your situation might change in the future, you are able to re-apply for admission no earlier than the second semester of the 1974-75 academic year.

Sincerely,

Peter T. Mitchell
Director of Admissions

cc: Dean Smith, Dean Landrum, Dean Noel

TO: Judge
FROM: Donald
DATE: 3-25-83
RE: 82-318

David Paul Brown v. Lee's Junior College & Troy Eslinger, Pres.

PC, Monday, 3-28-83, at 11:30 a.m.

Synopsis:

Plff brings this action alleging that this Court has jurisdiction under Title 29, U.S.C. §794 and the 14th Amendment.

Beginning in June of '74 and for the next 8 years, plff applied for and was denied admission to LJC. He brings this suit alleging that he is a handicapped individual deserving to be rehabilitated and that because LJC receives federal assistance in these rehabilitation programs, LJC had no right to refuse his admission.

Plff was seeking to use his veterans' benefits in going to college, but now having lost the right to use those benefits seeks compensatory damages of \$2 Million, \$500,000 in punitive damages and an injunction restraining LJC from refusing him admission.

Pending Motions:

1. #17 - Def. has moved for leave of Court to file its PC memo one day late. It was mailed on the 14th, the last date to file, per standing order. Atty's affidavit sets forth the reason it is late (#18).

Substantive Issues:

1. Whether plff is a handicapped individual as defined by statute?

Def. points out that nowhere in the complaint or discovery undertaken by def. has plff shown what his alleged mental defect is.

2. Whether plff is "otherwise qualified" for admission to LJC?

Unless plff meets LJC's admission standards, his mental defect notwithstanding, he has no basis for alleging that his rights have been violated and that LJC has discriminated against him. Def. points out in its PC memo that plff's GED score did not meet the standard set for all applicants at LJC.

Procedural Issues:

/plaintiff

77.

1. Whether has exhausted his administrative remedies?

Def. cites Doe v. NYU, 442 F.Supp. 522 (1978) for holding that administrative remedies were available for these type of complaints which must first be completed before coming to Court.

77.

2. Whether the action is barred by the Statute of Limitations?

Def. asserts that Ky.'s S/L is applicable and that regardless of whether you follow the strict one-year S/L or the more liberal 5-year S/L, the action is barred, since S/L began to run in '74.

77.

3. Whether a private citizen has a cause of action under 29 USC §794?

* Defendants' PC memo is VERY GOOD. It should be filed.

what distinguishes this case from Doe v. NYU

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE DIVISION

CIVIL ACTION NO. 82-318

DAVID PAUL BROWN,

PLAINTIFF,

VS.

MEMORANDUM OPINION AND ORDER

LEES JUNIOR COLLEGE and
TROY R. ESLINGER, PRESIDENT,

DEFENDANTS.

* * * *

Plaintiff brings this action pursuant to 29 U.S.C. 794 and seeks damages and a permanent injunction against defendants for denying his admission to the defendant institution, Lees Junior College. This matter is currently before the Court on cross-motions for summary judgment.

It is undisputed that plaintiff originally sought and was denied admission to Lees Junior College in 1974. Subsequently, for the past eight years, plaintiff has repeatedly applied for admission to said institution and has repeatedly been denied admission.

The record indicates that plaintiff was discharged from the United States Marine Corps on April 19, 1968, due to unsuitability. During the time plaintiff was in the Marine Corps, he obtained his high school equivalency degree (G.E.D.), and it seems plaintiff was attempting to take advantage of potential veterans' benefits to which he would have been entitled under Title 38, if he were attending an institution of higher education.

The affidavit of defendant Troy R. Eslinger, President of defendant Lees Junior College, sets forth the fact that Lees Junior College is a private, Presbyterian, two-year college, unsupported by Kentucky taxes. Being private in nature, the school does not have an open admissions policy; each applicant must meet certain minimum requirements for admission.

Dr. Eslinger's affidavit further advises the Court that in 1974, when plaintiff originally applied for admission, an applicant who did not graduate from an accredited high school (such as plaintiff) was required to have a minimum G.E.D. score of 45, the same score required by the Commonwealth of Kentucky. Plaintiff's G.E.D. score of 43.6 fell below the minimum standard for admission.

Furthermore, Dr. Eslinger stated that the admissions committee received an unfavorable recommendation from one of plaintiff's references; therefore, the admissions committee could find no good reason to apply less weight to the substandard G.E.D. score. Plaintiff was ultimately denied admission to the college based on his G.E.D. score along with the unfavorable recommendation.

After reviewing the record herein, the Court is convinced that this action could be disposed of by merely looking to the applicable statute of limitations; hence, the Court sees no need to address all of the issues raised by the parties. However, due to the frivolous nature of this action, rather than to dismiss this action based on the mechanistic statute of limitations, the

Court shall resolve this controversy by addressing the issue of the alleged discrimination from which plaintiff claims to have been subjected and harmed therefrom.

Plaintiff brought this action ostensibly under the authority of 29 U.S.C. 794, which provides that:

No otherwise qualified handicapped individual in the United States, as defined in section 7(7) (29 U.S.C. §706(7)), shall, solely by reason of his handicap, 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 or under any program or activity conducted by any Executive agency or by the United States Postal Service.

The Court has reservations as to whether the aforementioned statute is applicable to the defendant institution; nevertheless, assuming that the action is meritorious pursuant to the statute, the Court finds that the defendants have not violated this statute, since plaintiff is not "otherwise qualified." Even if the Court were to assume that plaintiff is a handicapped person, the cold, hard facts are that he is not otherwise qualified for admission to Lees Junior College because his G.E.D. score of 43.6 fell below the minimum G.E.D. score of 45, which the college required of all of its applicants who had not graduated from an accredited high school.

To summarize, the issue of whether plaintiff may be a handicapped person is irrelevant, since he failed to meet the other requirements for admission. Lees Junior College, being a

private institution, has no responsibility to admit the public at large and has the right to establish guidelines for selective admission under which all applicants must pass in order to be entitled to attend said institution.

The Court can in no way fathom that plaintiff was damaged or injured by his being denied admission to Lees Junior College. Plaintiff could have applied to an untold number of other institutions of higher learning upon being advised that he was not going to be admitted to Lees Junior College.

Plaintiff was only denied admission to one college, which in no way infringed upon any of his constitutional rights. One has no constitutional right to automatically be entitled to attend the college of one's choice. If one does not meet the particular college's admission criteria, he may be denied admission; he has not been harmed by such denial and has no grievance which this Court can entertain.

Before closing, to reiterate, the Court is also of the opinion that this action could turn on the statute of limitations. Plaintiff initially applied for and was denied admission to Lees Junior College in 1974; therefore, any possible damage which plaintiff may have sustained occurred in 1974.

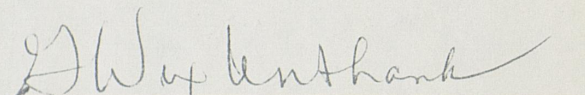
The Court finds merit in defendants' position that the one-year statute of limitations is applicable to this action. K.R.S. 413.140(1)(a). There seems to be some doubt as to whether a one-year or a five-year statute of limitations is applicable. However, it is immaterial whether the longer

or the shorter statute of limitations is deemed to apply because plaintiff's potential cause of action accrued in 1974, and there has been no tolling of the statute of limitations in the interim. Jolivet v. Elkins, 386 F. Supp. 261 (D. Md. 1974). Therefore, even if the longer statute (K.R.S. 413.120(2)) were applicable, this action has been barred since 1979.

Accordingly, in view of the foregoing memorandum opinion, IT IS HEREBY ORDERED, as follows:

1. Plaintiff's motion for summary judgment is DENIED.
2. Defendants' motion for summary judgment is SUSTAINED.
3. Costs are taxed to the plaintiff.
4. This action is now DISMISSED and STRICKEN from the docket.

This the 3/21 day of October, 1983.


G. WIX UNTHANK, JUDGE