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PUBLIC SAFETY EMPLOYMENT PRACTICES: WALKING THE ADA TIGHTROPE

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PUBLIC SAFETY EMPLOYMENT PRACTICES: WALKING THE ADA TIGHTROPE

Enter any business and you are likely to be greeted by an employee of the company. Increasingly, the employees hired in these positions are often the elderly or confined to wheelchairs or walkers. Although disabled persons have much more to offer society than friendly greetings, the fact remains that not every person is suited for every job.

The American's with Disabilities Act (the "ADA") has permitted disabled persons to reap the full economic benefits of their participation by protecting access to employment opportunities. However, the brunt of establishing the national mandate has fallen upon the business community. Employers are left to balance legitimate job demands against a limited ability to perform them. For many employers, such as police and fire departments, the intricacies of ADA compliance remain a struggle between individual rights of disabled workers and practical business realities.

A. The American's with Disabilities Act

1. Background

The ADA was signed into law on July 26, 1990, by Republican President George Bush.[1] Its overall purpose is designed to make American Society more accessible to disabled persons. In 2008, the ADA Amendments Act (the "ADAAA") was passed.[2] The law was enacted to broaden the definition of the term "disability," which had been narrowed by U.S. Supreme Court decisions.[3] The ADA's protection only applies to individuals who meet the ADA's definition of "disability." An individual has a disability under the Act if they: (1) have a physical or mental impairment that substantially limits one or more major life activities; (2) have a history or record of such impairment; or (3) are perceived by others as having such impairment[4].

Under the ADA, to state a prima facie case for disability discrimination, a plaintiff must prove the following: (1) he suffers from a disability; (2) he is a qualified individual; and (3) he was subject to an adverse employment action because of his disability.[5] A "qualified individual" is defined as an employee or job applicant who meets legitimate skill, experience, education or other requirements of the employment position.[6] The person must be able to perform the essential functions of the position either with or without reasonable

[1] 29 C.F.R. § 1630.1 (2011).
[2] 29 C.F.R. § 1630.2 (2011).
[3] *Sutton v. United Airlines Inc*., 527 U.S. 471 (1999); *Toyota Motor Mfg. Ky. Inc. v. Williams*, 534 U.S. 184 (2002).
[4] 42 U.S.C.A. § 12102 (2009).
[5] *Chandler v. City of Dallas*, 2 F.3d 1385,1390 (5th Cir. 1993); *Holbrook v. City of Alpharetta*, 112 F.3d 1552 (11th Cir. 1997).
[6] 42 U.S.C.A. § 1211(8) (2009).

accommodation.[7] Once a prima facie case is established by an employee, an employer may overcome the inference of unlawful discrimination by articulating a legitimate, non-discriminatory reason for the challenged employment action.[8]

2. Relevant Case Law

a. "Qualified Individual"

Leverett v. City of Indianapolis, 51 F. Supp 2d 949 (S.D. Ind. 1999).

Applicant was rejected for a firefighter position based soley on his total and permanent hearing loss in his left ear. Localizing sound and discriminating amongst different sounds are necessary and undisputed essential functions of a firefighter. The court hed the applicant was not a qualified individual because he couldn't perform the essential functions of a firefighter with or without a reasonable accommodation.

Hummel v. County of Saginaw, 118 F.Supp.2d 811 (E.D.Mich. 2000).

Sheriff's deputy with lung cancer was found not qualified for her position even if additional leave time to recuperate had been given. Although the deputy desired to return to work, her pulmonary function test results indicated she could not perform strenuous tasks required for her position. The court held she could not establish a prima facie case because she was not a qualified individual.

Jackson v. City of Chicago, 414 F.3d 806 (7th Cir. 2005).

City police officer was unable to demonstrate her ability to handle a firearm which was an essential function of the position. The officer's physician testified it would be hazardous to the officer's health and the health of those around her if she carried a gun. As a result, the court held the officer was not a qualified individual with a disability.

Dargis v. Sheahan, 526 F.2d 981 (7th Cir. 2008).

Corrections officer was placed on leave without pay after he returned to work following a stroke and was later terminated. After his stroke, the officer's physician advised he could no longer have contact with inmates. The sheriff's department required all corrections officer must be able to perform essential duties which involved inmate contact. The court held because the officer could not perform the essential functions of the position, he could not establish a prima facie disability claim.

Martinsky v. City of Bridgeport, 814 F.Supp.2d 130 (D.Conn. 2011).

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[7] 42 U.S.C.A. § 1211(8)-(9) (2009).

[8] *Bielich v. Johnson & Johnson, Inc.*, 2:11-CV-01635 (W.D. Pa. 2014).; *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

Patrol duties were essential functions of a terminated police officer's employment as a member of the police department. The officer, who was psychologically incapable of working patrol, could not perform the essential functions of the job with or without accommodation. Thus, the court held he could not establish a prima facie case for disability discrimination.

Lewis v. New York City Police Depart., 908 F.Supp.2d 313 (E.D.N.Y. 2012), *aff'd*, 537 Fed. Appx. 11 (2nd Cir. 2013).

Police officer's excessive absenteeism was a legitimate non-discriminatory reason for her termination. The officer's absences negatively impacted her colleagues because she was not present to perform required work and it forced the department to use other employees to do the work she would have done if she were present.

b. Adverse Employment Action Required

Konieczny v. New York State Div. of Parole, 647 F.Supp.2d 256 (W.D.N.Y. 2009).

Employee had blood disorder and suffered from panic attacks. She voluntarily transferred to another position but her pay, benefits and duties remained the same. The court held that even if the employee were able to demonstrate she was disabled under the ADA, there was no evidence she was subjected to an adverse employment action by her employer.

c. Legitimate Non-Discriminatory Reason

Silk v. City of Chicago, 194 F.3d 788 (7th Cir. 1999).

City police officer suffered from sleep apnea and was placed on limited duty but worked a second job. Department rules prohibited all officers from working secondary employment inconsistent with their limited duty status. The officer was required to cease his secondary employment. The court held his action did not violate the ADA as the policy was applied uniformly to all employees.

Angell v. Fairmount Fire Protection Dist., 907 F.Supp.2d 1242 (D.Colo. 2012), *aff'd*, 550 Fed. Appx. 596 (10th Cir. 2013).

Fire chief diagnosed with cancer was terminated after he negotiated services without a written contract which eventually caused the fire district to incur losses of over Two Hundred Thousand Dollars ($200,000). The court held there was no direct evidence of disability discrimination. The incurred loss of Two Hundred Thousand Dollars ($200,000) was a legitimate, nondiscriminatory reason for his termination and was not a pretext for disability discrimination.

Trent v. Town of Brookhaven, 966 F.Supp.2d 196 (E.D.N.Y 2013).

An employee was injured on the job and later terminated for reasons of absenteeism and lateness. The court held the officer's mere speculation he was terminated due to his injuries was not sufficient to establish pretext for disability discrimination under the ADA.

Moates v. Hamilton County, 976 F.Supp.2d 984 (E.D.Tenn. 2013).

A county employee who suffered from rheumatoid arthritis and a rotator cuff injury was terminated. The county discharged the employee because she could not perform the essential functions of her job since she used all available FMLA leave and was unable to return to work without accommodations. The court held the county's proffered reason for termination was not legitimate and violated the ADA.

Corbin v. Town of Palm Beach, 2013 WL 272689 (S.D. Fla. 2014).

A diabetic firefighter was terminated for insubordination, deceit and violation of city policy which required employees to be at their residence when calling out sick unless they otherwise reported their whereabouts. The court held the Town's proffered reasons for termination were legitimate and non-discriminatory and the policy was not a pretext for disability discrimination.

B. Public Safety Medical Exams

Prior to the enactment of the ADA, employment applications and interviews requested information about applicant's physical or mental conditions. Many potential employees were denied jobs once employers discovered their disabilities. The ADA prohibits discrimination by limiting an employer's knowledge of an applicant's disability until later in the application process.

1. Pre-employment Medical Exams

A police or fire department may not ask disability related questions and may not conduct medical examinations until after it makes a conditional job offer to the applicant.[9] Although employers may not ask disability related questions or require medical examinations at the pre-offer stage, they may evaluate whether an applicant is qualified for the job.[10] An employer may ask whether an applicant is qualified to perform specific job functions. For example, a police department may state the physical requirements for a job and ask if the applicant can satisfy the requirements. An employer may inquire about non-medical qualifications and skills such as the applicant's education, work history, and required certifications

[9] 42 U.S.C.A § 12112(d)(2009).
[10] EEOC Technical Assistance Manual: ADA § 6.2 & 6.3 (2002).

and licenses.[11] An employer may also require an applicant to demonstrate how they would perform certain job tasks.[12]

Barnes v. Cochran, 944 F.Supp. 897 (S.D. Fla. 1996).

Police applicant was subjected to a pre-employment psychological evaluation which probed into areas that lead to disclosure of specific psychological disorders. The psychologist reviewed applicant's medical records, and performed a variety of personality tests. The court held the pre-employment evaluation constituted a prohibited medical examination under the ADA.

Downs v. Mass. Bay Transp. Auth., 13 F. Supp.2d 130 (D. Mass. 1998).

Employee was terminated for providing false responses to questions asked during a pre-employment medical examination. The court held the questions asked during the pre-employment medical examination were illegal disability related questions which violated the ADA.

Adeyemi v. Dist. of Columbia, 525 F.3d 1222 (D.C. Cir. 2008).

Deaf applicant brought action for unlawful employment discrimination after not being hired for a vacant position. The court held that it was permissible under the ADA for the interviewer to ask how he communicated in situations where no one knew sign language. The employer hired a different applicant who was better qualified. The court found the employer's reason for not hiring the applicant was not pretext for disability discrimination and did not violate the ADA.

2. Post-offer Medical Exams

Once a conditional offer is made, public safety departments may ask disability related questions and require medical examinations.[13] If an individual does not qualify for the position after receiving a medical exam, courts will closely scrutinize the rejection unless the employer can demonstrate the rejection was job-related and consistent with business necessity, or the individual posed a "direct threat."[14] An individual can be shown to be a direct threat if the individual poses a significant risk of substantial harm to himself or others and the risk cannot be reduced through reasonable accommodation.[15]

Ethridge v. State of Ala., 860 F.Supp. 808 (M.D. Ala. 1994).

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[11] EEOC Technical Assistance Manual: ADA § 6.2 & 6.3 (2002).

[12] A polygraph examination can be conducted before a conditional job offer is made. However, employers must exercise care not to ask any prohibited disability-related inquiries in administration of the pre-offer polygraph exam.

[13] EEOC Technical Assistance Manual: ADA § 6.4 (2002).

[14] Id.

[15] 29 C.F.R. pt. 1630 app. § 1630.2(r) (2011).

Provisional police officer claimed he was denied permanent employment in violation of the ADA because of his restricted use of his right arm and hand. The court held the officer was an "applicant" within meaning of the ADA and thus, the city owed him a duty of reasonable accommodation during police academy training. However, the ability of a police officer to shoot using a two-handed stance was an "essential function" within the meaning of the ADA. Thus, the city was not required to provide a reasonable accommodation when the officer's disability prevented him from completing the state mandated handgun qualification program. The court found he was not a qualified individual and his termination did not violate the ADA.

Siefken v. Vill. of Arlington Heights, 65 F.3d 664. (7th Cir. 1995).

Probationary police officer was discharged after experiencing severe diabetic reaction while on duty. The episode resulted in disorientation, memory loss, and erratic, high-speed driving through a residential area. The officer knew he was diabetic and did not request accommodation from employer. The court held the officer could not claim his employer violated the ADA when he failed to control his disability to allow himself to perform the duties of a patrol officer.

Burroughs v. City of Springfield, 63 F.3d 505 (8th Cir. 1998).

Former police recruit was removed from active duty after suffering two diabetic hypoglycemic episodes. The recruit knew he had a controllable disability and was capable of performing the job without accommodation, yet twice failed to control his disability and was rendered unable to function on the job. The court held the police recruit failed to state a claim against city for disability discrimination under the ADA.

3. Physical Agility Tests and Physical Fitness Tests

Public safety departments may require job applicants undergo tests to measure an applicant's ability to perform job-related tasks.[16] Tests measuring an applicant's ability to perform a task are not considered to be a medical examination. However, an applicant may be required to provide a certification from a doctor ensuring the applicant can safely perform the physical fitness test.[17]

Police and fire departments are able to disqualify unsatisfactory applicants at the hiring stage if the tests performed are job related and consistent with a job necessity.[18] If an applicant has a visually apparent disability that would appear to

[16] EEOC Technical Assistance Manual: ADA §4.4: Establishing Job Related Performance Standards § 5.5(f): Inquires Related to Ability to Perform Job Functions and Accommodations (2002).; 42 U.S.C.A. § 12113 (2009).
[17] Id.
[18] EEOC Technical Assistance Manual: ADA §4.4: Establishing Job Related Performance Standards § 5.5(f): Inquires Related to Ability to Perform Job Functions and Accommodations (2002).; 42 U.S.C.A. § 12113 (2009).

prevent the performance of job functions, the person may be asked to demonstrate how these functions will be performed.[19]

Gurley v. New York City Transit Auth., 2003 WL 22881565 (E.D.N.Y. 2003).

Applicant failed to meet medical requirements of an employer by not meeting the 20/40 visual acuity standard. When the applicant corrected his vision, it rendered his vision monocular. The employer determined that monocular vision in a bus operator posed a public safety risk. The employer's refusal to hire the applicant based on his vision impairment did not violate the ADA.

Siderbaum v. City of New York, 309 F.Supp.2d 618 (S.D.N.Y. 2004).

The ADA did not prevent the Transit Authority from devising hiring qualifications, including medical standards, which established physical criteria and favored certain physical attributes over others.

4. Applicant Pools

A department is allowed to re-rank the applicants in the hiring pool based on the results of the medical examination. When vacancies are filled, a police or fire department must comply with the ADA. It must notify an individual if his placement is in any way adversely affected by the results of a post-offer medical examination or disability-related question. The department must be able to demonstrate the basis for any adverse action was job-related and consistent with business necessity.

Peacock v. County of Marin, 953 F.Supp. 306 (N.D.Cal. 1997).

A police applicant with myopia was placed on the eligibility list for a potential vacant position. The applicant was not hired after the county's eligibility list expired. The court held the applicant's myopia, which was correctable by use of contact lenses, constituted a disability under the ADA and the applicant suffered adverse employment action. However, the applicant failed to establish he suffered adverse employment action because of his disability.

5. Fitness for Duty and Business Necessity Exception

Employers have the right to evaluate employees based on consistently applied standards of performance and conduct. Public safety employers must meet qualification standards that are job-related and consistent with business necessity.[20] Police officers and firefighters must be able to perform the essential functions of the job, with or without accommodation. As such, employers are

[19] EEOC Technical Assistance Manual: ADA §4.4: Establishing Job Related Performance Standards § 5.5(f): Inquires Related to Ability to Perform Job Functions and Accommodations (2002).; 42 U.S.C.A. § 12113 (2009).

[20] EEOC Technical Assistance Manual: ADA §4.3 (2002).; 42 U.S.C.A. § 12113 (2009).

permitted to use reasonable means to ascertain the cause of troubling behavior without exposing themselves to ADA claims. A fitness for duty exam is considered a reasonable means of making such determination.[21]

Krocka v. Bransfield, 969 F.Supp. 1073 (N.D. Ill. 1997).

A police department policy automatically required any officer taking psychotropic medication be placed in program due to safety concerns of a possible impairment. Even though the officer suffered no loss of pay or benefits, the court held the automatic placement was an adverse employment action in violation of the ADA. The City could not justify its actions by alleging a safety concern and thus the policy did not rise to the level of a business necessity.

Metzenbaum v. John Carrol University, 987 F.Supp. 610 (N.D. Ohio 1997).

Campus police officer voluntarily submitted to a fitness for duty exam, but refused to release the report to the University. After seven months of refusing, the officer was placed on unpaid leave until he signed the release. Eventually the officer signed the release. However, additional evidence of bizarre behavior caused the University to require the officer release additional medical records to determine whether he was fit for duty and did not pose a direct threat to the health and safety of the public. The court held these requirements did not violate the ADA and were consistent with business necessity.

Ruiz v. Mukasey, 594 F.Supp.2d 738 (S.D.Tex. 2008).

The United States Marshals Service terminated a federal court security officer due to his hearing disability. The court held the federal court security officer was qualified to perform the duties required of a court officer and he was regarded by his employer as having a disability. The court found the termination was not consistent with any business necessity and was in violation of the ADA.

Pa. State Troopers Ass'n v. Miller, 621 F.Supp.2d 246 (M.D. Pa. 2008).

The Pennsylvania State Troopers required police officers to disclose the nature of their illness when requesting sick leave. The court held the policy was broader than necessary to serve the business necessity of securing shift coverage and it violated the ADA.

Lyons v. Miami-Dade County, 791 F.Supp. 2d 1221 (S.D. Fla. 2011), *aff'd* 470 Fed. Appx. 801 (11th Cir. 2012).

County employee was terminated for insubordination. Employee refused to sign a release to allow access to her medical records for a fitness for duty exam. The court held the employee failed to establish a prima facie case of disability

[21] *Wisbey v. City of Lincoln*, 612 F.3d 667 (8th Cir. 2010); EEOC Technical Assistance Manual: ADA § 6.6: Employee Medical Exam's and Inquiries (2002).

discrimination in connection with the requirement she undergo a fitness-for-duty exam prior to her return to work.

Dengel v. Waukeska County, 2014 WL 1572919 (E.D. Wis. 2014).

County employee was responsible for ensuring the county's radios worked properly and thus, the employee worked in a very sensitive position. The employee's conduct became explosive and detached from reality, which included an intense conversation with his supervisor about a paper towel key he believed, was his personal property. As a result of his conduct, the county required he undergo a fitness for duty exam, and obtain a return to work authorization. The court held the county's requirement did not violate the ADA because it was job related and consistent with business necessity.

C. Substance Abuse

1. "Currently Engaging" Exception to ADA Protection

When the ADA broadened the definitions of "disability" and "qualified individual," it created exceptions. One exception provided these terms do not include a person currently engaged in the use of illegal drugs.[22] Employers may discharge or deny employment to persons who illegally use drugs on the basis of such use without fear of being held liable for discrimination.[23]

Interpretive guidance on Title I of the ADA clarifies the term "currently engaging," but does not create a bright line rule. The term is not intended to be limited to the use of drugs on the day of, or within a matter of weeks before, the adverse employment action.[24] Rather, the provision is intended to apply to the illegal use of drugs that has occurred recently enough to indicate the individual is actively engaged in such conduct.[25] Courts have also declined to adopt a bright line rule. As a result, whether an individual is "currently engaging" in illegal drug use is decided on a case by case basis.

a. Employee Not "Currently Engaging" in Illegal Drug Use

Teahan v. Metro-North Commuter R.R., 951 F.2d 511 (2d Cir. 1991).

[22] The ADA defines "drug" to mean any controlled substance defined in schedules I through IV of § 202 of the Controlled Substance Act (21 U.S.C § 812). The ADA further defines "illegal use of drugs" to mean the use of drugs in which the possession or distribution of is unlawful under the Controlled Substance Act as updated by the Food and Drug Administration. The term does not include the use of a drug taken under the supervision of a licensed heath care professional, or other uses authorized by the Controlled Substance Act or other provisions of Federal Law; 29 C.F.R. § 1630.3(a) (2011).; The EEOC has stated that "current" in the context of a drug user means "recently enough" to justify the employer's reasonable belief that drug use is an ongoing problem.
[23] 29 C.F.R. § 1630.16-Appendix to part 1630.3 (2011).
[24] 29 C.F.R. § 1630.3 (a)-(c) (2011).
[25] 29 C.F.R. § 1630.3 (a)-(c)(2011).

An individual with alcohol addiction filed a claim against his employer alleging he was dismissed solely by reason of his disability. The Second Circuit held the relevant time to assess the "current use" status was the time of termination. The question of whether the employee was a "current" user was remanded to the district court. On remand, the district court held the employee was not a current drug user as he had not consumed illegal drugs or alcohol for over three months prior to his discharge and had successfully completed a rehabilitation program.[26]

Montegue v. City of New Orleans, 22 A.D.D. 1150 (E.D. La. 1996).

Firefighter was terminated after he tested positive for cocaine and marijuana metabolites. After his termination, the employee successfully completed a drug rehabilitation treatment program. Pursuant to a civil service rule, the employee requested reemployment with the New Orleans Fire Department. The employee's request for reinstatement was denied without explanation. He alleged his denial of reemployment with the City violated the ADA on the basis of discrimination for his former drug addiction. In response, the Fire Department stated two legitimate, nondiscriminatory reasons for refusing to rehire him: (1) he committed two crimes when he tested positive for two different illegal drugs; and (2) he was not rehired due to the sensitive nature of the firefighter's job.

The City argued the refusal to rehire a former drug addict is permissible on the grounds it is job-related and consistent with business necessity.[27] The EEOC Technical assistance manual specifically provides an employer can terminate a person with a past history of illegal drug use in specific occupations such as law enforcement.[28] The City argued this justification should also apply to firefighters. However, the Court held the City failed to provide a legitimate, non-discriminatory reason to refuse to rehire the employee and the provision did not apply to firefighters.

D'Amico v. City of New York, 132 F.3d 145 (2d Cir. 1998).

At the time of his termination, issue of fact existed as to whether firefighter with a cocaine addiction was a current substance abuser within the meaning of the ADA. The employee testified he had not used cocaine for several months at the time of his termination and the Fire Department provided no evidence of his drug use other than his uncorroborated alleged admissions. Thus, an issue of fact existed as to whether his substance abuse problem was severe and recent enough so that his employer was justified in believing he could not perform the essential duties of his job.

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[26] *Teahan v. Metro-North Commuter R.R.*, 1994 WL 719720 (S.D.N.Y. 1994).

[27] 29 CFR § 1630.15 (2011).

[28] EEOC Technical Assistance Manual: ADA § 8.7 (2002).

b. Employee Found "Currently Engaging" in Illegal Drug Use

Baustian v. State of La., 910 F. Supp. 274 (E.D. La. 1996).

Prison employee was terminated seven weeks after he possessed an illegal drug while driving a state assigned vehicle. Despite enrollment in a drug treatment program, the court reasoned a seven week period between possession of drugs and termination was not a sufficient time to avoid being classified as a current drug user. Therefore, the court found the employee was not a qualified individual with a disability and was not entitled to the protections of the ADA.

Wood v. Indianapolis Power & Light Co., 210 F.3d 377 (7th Cir. 2000).

A meter reader employed by Indianapolis Power & Light Co. tested positive for cocaine and marijuana in three separate employee sponsored drug tests. The company terminated him pursuant to its three-strike policy. The court held that the employee was not a qualified individual as he was "currently engaging" in the use of illegal drugs.

Daniels v. City of Tampa, 2010 W.L. 1837796 (M.D. Fla. 2010).

Employee tested positive for drugs and alcohol during a random drug test at his place of employment. He subsequently enrolled in a Substance Abuse Program. Six years later, the employee was involved in a vehicle accident and was required to take a post-accident drug or alcohol test. The test was positive for cocaine. The court found the employee was currently engaged in the illegal use of drugs and therefore not protected under the provisions of the ADA.

2. Drug Use

Police and Fire officials may not exclude an applicant solely based upon a past history of drug use. While casual drug use is not a disability under the ADA, those individuals who have a history of addiction, or who are regarded as being addicted to illegal drugs may be considered disabled under the law.[29] In order for the applicant to be protected, the drug addiction would have to pose a substantial limitation of one or more major life activities and the applicant could not be currently using illegal drugs.[30]

While it is not a violation of the ADA to ask whether the applicant has ever used illegal drugs or been arrested for such use, a law enforcement agency may not ask at the pre-offer stage about the frequency of past illegal drug use or whether the applicant has ever been addicted to drugs or is undergoing treatment for addiction.[31] Department policies that screen out applicants because of a

[29] 29 C.F.R. § 1630.3(b)(2011).
[30] EEOC Technical Assistance Manual: ADA § 8.3: Illegal Use of Drugs (2002). ; 42 U.S.C.A. § 12114 (2011).
[31] Id. at § 8.8.

history of addiction or treatment for addiction must be carefully scrutinized to ensure that the policies are job-related and consistent with business necessity. If safety is asserted as a justification for such policy, the Department must be able to show that excluded applicants would pose a significant risk of substantial harm to the health or safety of themselves or others, and the risk can't be eliminated or reduced by reasonable accommodation.[32]

Dulaney v. Miami-Dade County, 785 F.Supp. 2d 1343 (S.D. Fla. 2011), *aff'd* 481 Fed. Appx. 486 (8th Cir. 1997).

Former firefighter established a prima facie case of disability discrimination under the ADA, but failed to demonstrate the county's proffered legitimate, nondiscriminatory reason for terminating his employment was pretext for discrimination. The county sent a letter declaring that he would be terminated for job abandonment if he did not return to work by the specified date. The court held there was no connection between county's actions and the firefighter's alleged drug use.

Christian v. Se. Pa. Transit Authority, 1997 WL 736867 (E.D. Pa. 1997).

A Southeastern Pennsylvania Transit Authority ("SPTA") employee was granted a two year emergency leave of absence to seek treatment for his drug addiction. The employee traveled to an inpatient rehabilitation center in Colorado, but was terminated two months later. The court held the employee was not a current drug user and was not excluded from the protections under the ADA.

3. Alcoholism under the ADA

In contrast to the exclusion of individuals who currently engage in the illegal use of drugs, current alcohol users are not automatically denied protection. Alcohol is not a controlled substance, so the use of it is not specifically addressed.[33] Courts generally have declined to consider alcoholism as a "per se" disability. However, EEOC regulations state individuals disabled by alcoholism are entitled to the same protections afforded other individuals with disabilities.[34] When alcoholism substantially limits one or more major life activities, alcohol has been considered a protected disability under the ADA.[35]

Under the ADA, employers are allowed to restrict the use of alcohol in the workplace. The text of the ADA provides an employer may adopt rules for the use of alcohol. An employer may: (1) prohibit the illegal use of alcohol at the workplace by all employees; (2) require that employees shall not be under the

[32] EEOC Technical Assistance Manual: ADA § 8.8 (2002). ; 42 U.S.C.A. § 12114 (2011).
[33] 29 C.F.R. § 1630.3 (2011).
[34] 29 C.F.R. § 1630.16(b) (2011).; Appendix to Part 1630-Interpretive Guidance on Title I of the ADA (2011).
[35] *Schmidt v. Safeway Inc*., 864 F. Supp. 991, 996 (D. Or. 1994).; *Mackey v. Cleveland State Univ.*, 837 F. Supp. 1396, 1411-12 (N.D. Ohio 1993).; 29 C.F.R. Pt. 1630 App. (interpretive regulations, §1640.16(b) (2011)).; EEOC Technical Assistance Manual § 8.4. (2011).

influence of alcohol at the workplace; (3) require that employees behave in conformance with the requirements established under the Drug-Free Workplace Act of 1988[36]; and (4) hold an employee who is an alcoholic to the same qualification standards for employment or job performance and behavior as other employees, even if the unsatisfactory performance or behavior is related to the alcoholism of such employee.[37]

a. "Qualified Individual"

Office of the Senate Sergeant at Arms v. Office of Senate Fair Employment Practices, 95 F.3d 1102 (Fed. Cir. 1996).

An alcoholic dispatcher employed by the United States Capitol Police alleged he was protected under the ADA. The Federal Circuit agreed. The employee's alcoholism clearly interfered with his ability to report for work and it substantially limited his performance in his job. The Court held his job was a major life activity and the employee was a qualified individual under the ADA.

b. Alcoholics Not Protected under ADA

Mandujano v. Geithner, 2011 WL 2550621 (N.D. Cal. 2011).

A U.S. Mint police officer was terminated for failing to maintain a driver's license and sustaining a conviction for driving under the influence of alcohol. The officer argued he never missed work as a result of drinking, did not report to work intoxicated, and never missed any important events for his children because of his drinking. The court granted summary judgment to the employer, and held the officer did not submit any evidence to establish his alcohol addiction substantially limited one or more major life activity. The court followed the Tenth and Eleventh Circuits and held that driving, by itself, does not constitute a major life activity.[38]

4. Drug-testing

Police and fire departments may conduct testing on current employees and may require job applicants undergo drug testing at any time during the application process.[39] If the applicant tests positive for illegal drug use, an employer may ask whether any prescription medications would have caused the positive result. Inquiries into the use of prescription medications are permitted in response to a

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[36] 41 U.S.C.A. §§ 701, *et seq*.
[37] 42 U.S.C.A. § 12114(c) (2009).; Burch v. Coca-Cola Co., 119 F.3d 305 (5th Cir. 1997).; Miners v. Cargill Commc'n Inc., 113 F.3d 820 (8th Cir. 1997).
[38] *Mandujano v. Geithner*, 2011 WL 255061, 5, citing *Kellogg v. Energy Safety Servs. Inc.*, 544 F.3d 1121, 1126 (10th Cir. 2008); *Chenoweth v. Hillsborough County*, 250 F. 3d 1328, 1329 (11th Cir. 2001).
[39] 29 C.F.R§ 1630.3(b) (2011).

positive drug test even though the answers may disclose information about a disability.[40]

Jones v. Corr. Corp. of America, 993 F.Supp.1384 (D. Kan. 1998).

Former corrections officer was terminated for testing positive for marijuana and refusing treatment. The court held the officer established a prima facie case of ADA discrimination as he established he was erroneously regarded as a drug addict. The officer established he was "disabled" because his employer demanded he enter drug treatment as a condition of continued employment after he tested positive for marijuana. The employee demonstrated the urine sample was mishandled and he subsequently produced a clean urine sample through his own physician.

Skinner v. City of Amsterdam, 824 F.Supp.2d 317 (N.D.N.Y. 2010).

Employee suffered from drug addiction. Employer asked employee to submit to a drug test but he was refused and was subsequently terminated. The court held even though he was disabled under the ADA, his termination was caused by his refusal to take a drug test, not his disability, and the action therefore did not violate the ADA.

Jones v. City of Boston, 752 F.3d 38 (1st Cir. 2014).

The Boston Police Department required officers and cadets to be annually drug tested using samples of hair. The hair samples were tested for the presence of chemicals indicating exposure to cocaine, marijuana, opiates, PCP, and amphetamines. If an employee tested positive and was not exonerated by a safety-net test, the department terminated the employee unless the officer agreed to seek rehabilitation for drug abuse and accept an unpaid suspension while undergoing treatment. Officers who were terminated under this policy claimed the department fired them on account of an erroneous perception that they were drug addicts. The court held the police department's decision to terminate the officers was not motivated by a perception that the officers were addicted to drugs. The department's drug test policy trained its efforts at directly identifying users, whether addicts or not, and did not accept any defense that the officer used illegal drugs only once.

D. Criminal Conduct

1. Convictions

An employer may disqualify applicants with criminal convictions even if a former drug addict with a drug conviction would be excluded.[41] As long as the

[40]EEOC Technical Assistance Manual: ADA §8.9: Drug Testing (2002); 42 U.S.C.A. § 12114 (2009).
[41] EEOC Technical Assistance Manual: ADA § 8 (2002); 42 U.S.C.A. § 12114 (2009).

department can show the exclusion was job-related and consistent with business necessity, the practice would not be in violation of the ADA.[42]

Carroll v. Illinois Dept. of Mental Health and Developmental Disabilities, 979 F.Supp.767 (C.D. Ill. 1997).

Employee pled guilty to charges of forgery and was terminated. The court held even though the conduct was allegedly caused by the employee's alcoholism, the employer did not violate the ADA for terminating him for conduct unbecoming of a state employee.

Houck v. City of Prairie Vill., 978 F.Supp. 1397 (D. Kan. 1997), *aff'd* 166 F.3d.367 (10th Cir. 1998).

Police officer was terminated for criminal conduct of domestic violence and battery on another law enforcement officer. The court held his termination did not violate the ADA even though his conducted stemmed from his mental illness.

Wolski v. City of Erie, 773 F.Supp.2d 577 (W.D. Pa. 2011).

A city firefighter intentionally set a fire in her father's home in an attempt to commit suicide and was subsequently terminated out of business necessity. The city terminated the firefighter because she posed an ongoing threat to the safety of the public, other firefighters and herself. The court held the city articulated a legitimate, non-discriminatory basis for terminating the firefighter and did not discriminate under the ADA even though the employee suffered from depression.

Maresca v. City of New York, 856 F.Supp.2d 474 (E.D.N.Y. 2012), *aff'd* 514 Fed. Appx. 37 (2nd Cir. 2013).

Firefighter with emphysema, depression and post-traumatic stress disorder was terminated after he tested positive for cocaine in a random drug test and was subsequently arrested for cocaine possession. The court held there was no evidence the firefighter's termination resulted from discrimination on the basis of his disability.

2. Background checks

A job offer is not considered "bona fide" under the ADA until an employer has reviewed all relevant non-medical information.[43] In certain circumstances, a police department may wait to conduct a background check on applicants until after the information from the medical exam has been reviewed and after a conditional offer has been made.[44] A law enforcement agency may be able to demonstrate a proper background check for law enforcement personnel

[42] Id.
[43] *O'Neal v. City of New Albany*, 293 F.3d 998 (7th Cir. 2002).
[44] EEOC Technical Assistance Manual: ADA § 5.5(g): Background Checks (2002).

could not be performed pre-offer because of the need to consult medical records and personnel as part of the security clearance process.[45]

Courts will closely review situations in which a police or fire department withdraws an offer after a post-offer background examination. The courts will determine whether the withdrawal was based on non-medical information in the background check or on information obtained through post-offer medical examinations and disability-related inquiries.[46] If the offer was withdrawn because of the applicant's disability, the police department must demonstrate the reasons for the withdrawal were job-related and consistent with business necessity.[47]

Wellner v. Town of Westport, 35 Fed. Appx. 14 (2nd Cir. 2002).

Police department conducted a background check on an applicant. The background investigation presented serious questions as to his fitness to serve as a police officer. Applicant was not hired and alleged the police department's refusal to hire him was in violation of the ADA. The court held even if the applicant had presented a prima facie case of disability sufficient for an ADA claim, the department provided overwhelming adverse evidence revealed by his background investigation that they would have rejected him as a police officer on the basis of the background investigation alone.

E. Reasonable Accommodations

The ADA imposes a duty upon employers to provide reasonable accommodations for known disabilities unless doing so would result in undue hardship to the employer.[48]

1. The hiring process

A law enforcement agency may ask applicants whether they will need a reasonable accommodation for the hiring process.[49] If the accommodation is not obvious, an employer may ask an applicant for reasonable documentation about his disability. At this point of the hiring process, the employer is entitled to know that the applicant has a covered disability and that an accommodation is needed.[50]

2. Pre-employment questions

A law enforcement agency may state its attendance requirements and ask whether an applicant can meet them.[51] An applicant's prior attendance record and

[45] Id.
[46] EEOC Technical Assistance Manual: ADA § 5.5(g): Background Checks (2002).
[47] Id.
[48] *Holbrook v. City of Alpharetta*, 112 F.3d 1522 (11th Cir. 1997).
[49] EEOC Technical Assistance Manual: ADA § 3: Reasonable Accommodation Obligation (2002).
[50] EEOC Technical Assistance Manual: ADA § 3.1: Overview (2002).
[51] EEOC Technical Assistance Manual: ADA § 3.3: What is Reasonable Accommodation? (2002).

whether an applicant may have abused allotted leave time are also able to be discussed without violating the ADA.[52] A law enforcement agency may also ask an applicant whether they intend to get a particular job-related certification or license, or why they do not have a certification or license.[53]

3. New Job positions

The ADA does not require an employer to create a new job for a person who has a disability.[54] However, the police or firefighter must be reassigned to a vacant position for which the individual is qualified, as long as it does not involve a promotion and it would not result in an undue hardship upon the department.[55] Further, a police department or fire department may create a specific class of light duty jobs that are limited to currently members of the department. If the police officer or firefighter can still perform the essential functions of their current position, with or without reasonable accommodation, they cannot be forced into a "light duty" position unless the department can show the employee is a direct threat to health and safety.[56]

Champ v. Baltimore County, 884 F. Supp. 991 (D. Md. 1995)

A police officer's disability prevented him from making forcible arrests. The court held the officer posed a threat to safety which could not be accommodated through assignment to a non-patrol position.

Conklin v. City of Englewood, 1996 U.S. App. Lexis 26173 (6th Cir. 1996)

Modification of a police officer's duties to those of a dispatcher was held not to be a reasonable accommodation.

Scheer v. City of Cedar Rapids, 956 F.Supp. 1496 (N.D. Iowa 1997).

An epileptic officer requested to be relieved of driving duties by transferring to another position. A different accommodation was offered to the officer but he rejected it. The court held this was not a reasonable accommodation as an essential function of the job was driving in solitude and being prepared to handle a wide variety of matters other than office work.

Querry v. Messar, 14 F. Supp. 2d 437 (S.D.N.Y. 1998).

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[52] Id.
[53] Id.
[54] *King v. Town of Wallkill*, 302 F.Supp. 2d 279 (S.D.N.Y. 2004). (holding that a police officer's proposed accommodation in the form of a light duty assignment was not reasonable, as those type of positions did not exist.
[55] Id.
[56] *King v. Town of Wallkill*, 302 F.Supp. 2d 279 (S.D.N.Y. 2004).

Police officer's request for a four-hour shift after he rejected the department's offer for a light-duty assignment was not a reasonable accommodation.

Gasser v. Ramsey, 125 F. Supp. 2d (D.C. 2000).

Police sergeant with blood thinning condition was involuntarily transferred to a desk job which rendered him ineligible for up to Twenty Thousand Dollars ($20,000) per year in overtime, and cost him a promotional opportunity. The court held this constituted an adverse employment action sufficient to support the officer's ADA compliant.

DuBerry v. District of Columbia, 582 F.Supp.2d 27 (D.D.C. 2008).

Diabetic corrections officer was transferred to the late shift. The officer requested an accommodation because the late shift would be incompatible with the diabetes treatment regimen prescribed by his physician. His request was denied. As a result, he used two hundred and eight (208) hours of sick leave in a three month time period to accommodate his diabetes treatment regimen. In response to numerous accommodation requests, the officer was eventually transferred back to his original shift. However, subsequently, he was scheduled to return to the third shift. The officer requested another accommodation but was denied. His position was then eliminated due to lay-offs. The court held the evidence showed the department discriminated and retaliated against employee and the departments' reasons for termination and refusal to rehire were pretextual.

Lors. v. Dean, 595 F.3d 831 (8th Cir. 2010).

Employee was a team leader. After his supervisor removed and reassigned him to a different position he filed suit claiming discrimination based on his diabetes. The employer showed the employee was removed from the team leader position because of his inability to maintain professional working relationships, not his diabetes. The court held he could therefore not establish a prima facie case of discrimination under the ADA.

St. Martin v. City of Saint Paul, 788 F. Supp. 2d 928 (D. Minn. 2011).

The ADA does not require a fire department to promote an employee as a reasonable accommodation.

Mattingly v. Univ. of South Fla. Bd. of Tr., 31 F.Supp.2d 1176 (M.D. Fla. 2013).

University police officer, who had medical complications with his eyes, was not subject to intolerable working conditions based on transfer to parking enforcement. The officer voluntarily accepted the transfer and worked parking enforcement for one month before taking medical leave. The officer did not

return and retired six months after taking leave. As such, the court held the officer was not retaliated against under the ADA.

CONCLUSION

Police and Fire Departments face unique challenges under the mandates of the ADA. Balancing disabled individuals rights with legitimate public safety concerns is a difficult and time-consuming task. When public safety employers are confronted with an employee who has a potential disability, the employer must carefully analyze the facts of each individual case. If not, public safety employers will fall off the ADA "tightrope" and look more like clowns, rather than the organized ringmaster in the continuous circus of employment concerns involving the ADA.