

Amicus

The Intersection of the ADA and Arrests: More Questions than Answers

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Title II of the Americans with Disabilities Act (ADA) provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U. S. C. §12132. It is an open question whether Title II of the ADA applies to arrests and if so, whether reasonable accommodations must be provided for dangerous or violent suspects.

***City and County of San Francisco v. Sheehan* and the Resulting Split in Authority**

In 2015, the Supreme Court heard oral argument in *City and County of San Francisco v. Sheehan*, which presented the question of whether Title II of the ADA requires law enforcement officers to provide accommodations to an armed, violent, and mentally ill suspect in the course of bringing the suspect into custody. *See City and County of San Francisco v. Sheehan,* 135 S.Ct. 1765, 1772 (2015). Unfortunately, the Court did not answer the question, and the only thing that was clear after the Court's decision is that there are more questions than answers in this area of the law. The Court dismissed the question presented as improvidently granted, based on the fact that it believed the City had pivoted away from the main arguments it had pressed below in the Ninth Circuit.

The Court complained in its opinion that San Francisco, Sheehan, and the United States all agreed that § 12132 applies to arrests. *Id.* at 1773. San Francisco conceded that Title II applies to arrests, but that Sheehan was not a qualified individual because she presented a "direct threat" to the officers, as that term is defined under the ADA. *Id.* The Court appeared to want someone to argue that Title II simply does not apply to arrests, period, and without an adversarial brief on that issue, the Court dismissed the question presented. The Court also noted that the related question of "whether a public entity can be liable for damages under Title II for an arrest made by police officers" was also unaddressed by the parties in the case. Again, all the parties agreed that "an entity could be vicariously liable for money damages for the purposeful or deliberately indifferent conduct of its employees," but the Court explained that it had "never decided whether that is correct..." *Id.* at 1774-75.

Thus, after the *Sheehan* decision, many open questions remain. Does Title II of the ADA apply to arrests? If so, does it apply to arrests involving a violent and dangerous mentally ill suspect? How does the ADA's "direct threat" analysis come into play? If the ADA does apply, does vicarious liability apply to the entity for an officer's violation of the ADA?

To further complicate matters, the Circuits are split as to how to apply the reasonable accommodation analysis in these cases and offer varying approaches. As the parties explained in *Sheehan,* the lower courts all seem to agree that Title II applies to an arrest (though as noted, the Supreme Court has not decided that question), but there is a division "over whether Title II of the ADA applies at all to encounters with violent, mentally ill individuals." *See Adle v. Me. State Police Dep't,* 279 F. Supp. 3d 337, 363-64 (D. Me. 2017) (detailing circuit split and collecting cases). There are more or less three camps within this divide: (1) those that say Title II does not apply; (2) those that say it does apply, but that courts should take into account exigent circumstances in determining whether any accommodation was reasonable (or even possible); and (3) those that say it does apply, and that there is no added exigent circumstances analysis.

On one side of the split, the Fifth Circuit has firmly held that "Title II does not apply to an officer's on-the-street responses to reported disturbances or other similar incidents, whether or not those calls involve subjects with mental disabilities, prior to the officer's securing the scene and ensuring that there is no threat to human life." *See Hainze v. Richards*, 207 F.3d 795, 801 (5th Cir. 2000). The Fifth Circuit noted that to hold otherwise would "pose an unnecessary risk to innocents." *Id.*

The Fourth and Sixth Circuits meanwhile, appear to allow for the possibility that Title II of the ADA may apply to arrests of violent individuals, however they provide for an "exigent circumstances" analysis, which will often render accommodations of the mentally ill unreasonable under the ADA, depending on what those exigent circumstances are. *See e.g., Roell v. Hamilton Cty.,* 870 F.3d 471, 489 (6th Cir. 2017) (noting that neither the Supreme Court nor the Sixth Circuit "has squarely addressed whether Title II of the ADA applies in the context of an arrest," but that if it does, on the facts of the case, the accommodations proposed by the arrestee were not reasonable given the "exigent circumstances" that required them "to make a series or quick, on-the-spot judgments in a continuously evolving environment."); *Seremeth v. Bd. of Cty. Comm'rs,* 673 F.3d 333, 338 (4th Cir. 2012) (concluding that Title II of the ADA applies to police investigations, but that exigent circumstances in the case involving suspected domestic violence rendered the accommodations provided, which were not considered

"best practices," reasonable); *Waller ex rel. Estate of Hunt v. Danville, Va.*, 556 F.3d 171, 177 (4th Cir. 2009) (assuming "for the purposes of argument that a duty of reasonable accommodation existed" in the context of standoff with an armed and dangerous mentally ill individual and noting that an exigency is one factor in the totality of the circumstances that bears on the reasonableness of an accommodation under the ADA). Meanwhile, in the Third Circuit, the court seems to have concluded that the ADA does apply to arrests, but has held the question of "exigent circumstances" for another day. *Haberle v. Troxell*, 885 F.3d 171, 178, 181 n.11 (3d Cir. 2018) (noting that it is "debatable" as to whether the ADA applies to arrests, but that the "answer is generally yes" and further concluding that in a future case, the court may need to consider whether reasonable accommodations are necessary in exigent circumstances).

The Ninth Circuit, on the other side of the split, more firmly recognizes that Title II of the ADA applies to arrests and does not seem to take into account exigent circumstances. *See Sheehan v. City & Cty. of S.F.*, 743 F.3d 1211, 1231 (9th Cir. 2014); *Vos v. City of Newport Beach*, 892 F.3d 1024, 1036 (9th Cir. 2018) (discussed more fully below).

Against this legal backdrop, IMLA is filing two amicus briefs involving the ADA and police encounters. *City of Newport Beach v. Vos* is a petition stage Supreme Court case and will present the Supreme Court with an opportunity to revisit the issues presented in *Sheehan* and provide much needed clarity in this area of the law. *Gray v. Cummings* is a First Circuit case, where the issue of whether the ADA applies to arrests of violent and dangerous mentally ill individuals is an open question.

City of Newport Beach v. Vos

In *Vos,* Newport Beach City Police responded to a call that an individual later identified as Vos was behaving erratically with a pair of scissors at a 7-Eleven, including cutting an employee's hand who tried to disarm him. *Vos v. City of Newport Beach*, 892 F.3d 1024, 1028-29 (9th Cir. 2018). Over the course of approximately 20 minutes while Vos was alone inside of the store, the eight officers at the scene discussed non-lethal options for resolving the situation. *Id.* During this time a K-9 unit arrived, and one of the officers armed himself with a 40-millimeter less-lethal device. *Id.* at 1029. Also, during this time, the officers became aware that Vos was simulating having a gun, appeared angry and agitated, yelled "shoot me." *Id.* The officers did not know whether Vos was mentally unstable or under the influence of drugs, though one officer notified those at the scene that he believed Vos was under the influence of narcotics. *Id.*

Before the officers could cement their plan to apprehend Vos using less-lethal force, Vos charged the doorway with a metal object raised over his head. *Id.* The officers twice yelled over their bullhorn for Vos to drop the weapon, but he did not drop it and continued to charge the officers. *Id.* When one officer shouted, "shoot him," the officer with the 40-millimeter less-lethal device fired non-lethal rounds, and two officers fired lethal gun shots, causing his death. *Id.* at 1029-30.

According to an expert report submitted by the City, based on his rate of speed Vos would have traveled the 41.1 feet from the back of the store to the police officers' positions in 3.4 seconds. *Id.* at 1039-40 (Bea, J. dissenting). The video shows that the officers had approximately two seconds to decide to shoot Vos after having warned him to drop his weapon. *Id.*

Vos's parents brought suit against the City and three officers on twelve causes of action, including excessive force in violation of the Fourth Amendment and violation Title II of the ADA, based on Vos's schizophrenia. The district court granted summary judgment on all claims in favor of the City.

In a 2-1 decision, the Ninth Circuit found that summary judgment on the Fourth Amendment claim was not proper because the *Graham* factors did not weigh in favor of deadly force. *Vos,* 892 F.3d at 1031-34. The court also found that other factors beyond those identified in *Graham,* including "the availability of less intrusive force, whether proper warnings were given, and whether it should have been apparent to the officers that the subject of the force was mentally disturbed," diminished their interest in using deadly force. *Id.* at 1033-34. However, the court went on to find that the officers were entitled to qualified immunity because it was not "beyond debate" that the officers had acted unreasonably, particularly given another Ninth Circuit decision, *Lal v. California*, which had similar facts and where no Fourth Amendment violation was found. *Id.* at 1034-36.

Finally, on the ADA claim, the Ninth Circuit found that summary judgment was improper because the facts arguably show the officers could have provided further accommodation of Vos's disability. Specifically, the court held that the fact that the officers' actions were not reasonable under the Fourth Amendment undercuts the argument that "because Vos posed an immediate threat he was not entitled to accommodation." *Id.* at 1037. The court acknowledged that the officers did nothing to provoke Vos's behavior, but found that an officer's duty to accommodate is not limited to situations in which the officer provokes the individual's behavior; here, the officers arguably could have provided further accommodations to Vos like de-escalation, communication or specialized help. *Id.*

Judge Bea dissented, finding that the majority misapplied the *Graham* factors and ignored the undisputed fact that "the police were presented with a mere two seconds in which to decide to deploy deadly force." *Id.* at 1041. The dissent also found "the case should not turn on Vos's mental illness" because officers have no obligation "to put themselves in danger so long as the threatening person is mentally ill." *Id.* at 1042. Finally, the dissent found that the majority has in essence "create[d] two tracks of excessive force analysis, one for the mentally ill and one for serious criminals." *Id.*

Gray v. Cummings

In 2013, Judith Gray, who suffered from bipolar disorder and manic depression, suffered a manic episode and called the Athol, Massachussetts Police Department. The police brought Gray to the hospital, where she was civilly committed under Mass. Gen. Laws c. 123 §12 ("Section 12"). Under Section 12, a medical professional who "has reason to believe that failure to hospitalize such person would *create a likelihood of serious harm* by reason of mental illness may restrain or authorize the restraint of such person and apply for the hospitalization of such person for a 3-day period..." (emphasis added).

Later that morning, the hospital called

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the police department requesting the return of Gray, who had left the hospital despite the involuntary commitment. The hospital informed the police that Gray was a "Section 12 patient," which Officer Thomas Cummings later testified he understood to mean "the person is a danger to either themselves or others."

Officer Cummings located Gray and as soon as he stepped out of his cruiser, Gray began yelling obscenities at him. Cummings radioed for backup and told Gray that she needed to return to the hospital. Cummings continued to plead with Gray to talk to him and return to the hospital and Gray responded with more obscenities. Gray then abruptly stopped and turned to face Cummings approximately five feet away from him, with her fists, teeth, and body clenched. She shouted an expletive at Cummings and suddenly began to quickly approach him. Cummings assumed a defensive position and as Gray pushed closer to him, Cummings took Gray to the ground to gain control of the situation.

Once on the ground, Gray tucked her arms under her chest and flexed tightly. Officer Cummings ordered Gray to stop resisting and to place her hands behind her back. Gray responded by cursing at Cummings. Cummings gave another command to place her hands behind her back, which Gray ignored. At this point, Cummings warned Gray he would tase her if she did not place her hands behind her back. Gray responded by saying "f*cking do it!" After one more command to put her hands behind her back and Gray's continued refusal, officer Cummings placed his taser in drive stun mode and tased Gray for approximately five seconds, at which point she released her arms and placed them behind her back. Officer Cummings secured Gray in handcuffs and Gray was then taken back to the hospital in an ambulance.

Gray filed suit alleging excessive use of force and failure to train under 42 U.S.C. § 1983, violation of the ADA, and various state law claims based on Officer Cummings' use of the taser. The district court concluded that Officer Cummings did not violate Gray's Fourth Amendment rights under *Graham*. The court found that even if the Fourth Amendment had been violated, the officer was entitled to qualified immunity as the law was not clearly established that a single application of a taser constituted excessive force against a person who has assaulted a police officer and was actively resisted lawful arrest.

Regarding the ADA claim, the court noted that the First Circuit has not ruled on whether an officer may be liable under the ADA for failing to accommodate a person with disabilities in the process of an arrest or in the officer's use of force, but that nevertheless, even if such a claim could be brought, the plaintiff could not succeed on this theory of liability.

Gray filed an appeal to the First Circuit arguing the district court's grant of qualified immunity was erroneous, and that the ADA protects encounters between the police and those with disabilities, therefore the district court's dismissal of her ADA claim was erroneous. On the ADA claim, Gray argues that a reasonable jury could find that the officer violated the ADA by failing to accommodate Gray's disability by tasing her, and when Officer Cummings interpreted Gray's symptoms of her mental disorder as crimes.

Conclusion

Local governments need to carefully consider requirements under the ADA to avoid unintentional barriers for people with disabilities, but these considerations are best met at the policy and training level, while taking into account differing budgetary constraints and resources. Both the *Gray* and *Vos* cases underscore the challenges that police officers face in their encounters with the mentally ill where force is necessary to effectuate an arrest or to ensure the safety of the police officers or the public. The fact that the Circuits are split, and the Supreme Court has yet to weigh in on the numerous legal issues surrounding the application of the ADA to police arrests makes these situations even more challenging for police officers and local governments. Unless and until the Court takes up these issues, police officers will be left to wonder if their split-second decisions in tense and dangerous situations involving the mentally ill will be subject to liability under the ADA, potentially ensnaring them in litigation for years. As judge Bea pointed out in his dissent in *Vos*, "the danger to the officer is not lessened with the realization that the person who is trying to kill him is mentally ill." *Vos*, 892 F.3d at 1043. ML

