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FITNESS FOR DUTY EXAMS: A SWORD AND A SHIELD IN ADA LITIGATION

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THE ADA

AMERICANS WITH DISABILITIES ACT OF 1990 & THE ADA AMENDMENTS ACT OF 2008



CONGRESSIONAL FINDINGS IN SUPPORT OF ADA

(a) Findings

The Congress finds that--

(1) physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination; others who have a record of a disability or are regarded as having a disability also have been subjected to discrimination;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

CONGRESSIONAL FINDINGS IN SUPPORT OF ADA

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(8) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

PURPOSE

"The ADA was enacted in 1990 to eliminate policies and procedures, as well as architectural barriers, that had continued discriminatory effect in the areas of employment, public accommodations and services operated by public and private entities . . . . [T]he purpose of the ADA is 'to provide a national mandate to eradicate discrimination, to provide standards for addressing discrimination, to ensure the Federal Government has a central role in enforcing said standards.'" S. Rep. No. 101-116, at 2 (1989).

Brief for International Municipal Lawyers Association, et al. as Amici Curiae Supporting Petitioners, *City and County of San Francisco v. Sheehan*, 743 F.3d 1211 (9th Cir. 2014), cert. granted, 135 S.Ct. 702 (U.S. Nov. 25, 2014) (No. 13-1412).

WHAT THE ADA COVERS

- Title I-Employment Regulations
- Title II- Public Services Regulations
- Title III- Private Sector Regulations
- Title IV- Telecommunication Services Requirements
- Title V-Miscellaneous Provisions

29 C.F.R. PART 1630

REGULATIONS TO IMPLEMENT THE EQUAL EMPLOYMENT PROVISIONS OF THE AMERICANS WITH DISABILITIES ACT

- Definitions
- Explanations
- Exceptions

http://eeoc.gov/laws/types/disability_regulations.cfm

OUTLINE

An employer's obligation to employees under Title I of the ADA

(1) Disability

- Actual Disability
- Regarded-as disabled

(2) Qualified Individual

(3) Discrimination

- Discrimination by requiring unjustified medical examinations

Fitness-for-Duty

(1) When a Fitness-for-Duty can be accomplished without being discriminatory

(2) The effect on the "regarded-as" disabled theory of liability

PART I: ADA-TITLE I OVERVIEW

- **Prohibits discrimination against a qualified individual on the basis of disability in the application, hiring, advancement, conditions of employment or termination process**



- Key Components:
  - "Qualified Individual"- who is a qualified individual?
  - "Disability"- what is a disability?
  - "Discrimination"- what actions are discriminatory?

ADA OVERVIEW CONT'D

The 5th Circuit has held that the elements for a prima facie case of discrimination under the ADA are that the plaintiff:

(1) had a disability;

(2) was qualified for the job; and

(3) was subject to an adverse employment action because of the disability.

EEOC v. LHC Group, Inc., 773 F.3d 688, 697 (5th Cir. 2014).

DISABILITY

DISABILITY=

A physical or mental *impairment* that *substantially limits* one or more of the *major life activities*.* 42 U.S.C. § 12102.

- The ADA Amendments Act (ADAAA) was Congress' response to the courts' interpretation of certain terms in the original statute, which had the effect of narrowing the coverage of the ADA
- In the ADAAA era, terms should be interpreted broadly

*** Also includes those who are not actually or actively disabled but who are regard as disabled or have a record of disability.**

DISABILITY CONT'D









DISABILITY CONT'D

Major life activities listed in 42 U.S.C. § 12102(2) and 29 C.F.R. §1630.2(i):

Major Life Activities		
Performing manual tasks	Caring for oneself	Speaking
Special sensitivity	Seeing	Breathing
Eating	Sleeping	Walking
Standing	Lifting	Bending
Hearing	Learning	Reading
Concentrating	Thinking	Sitting
Reaching	Interacting w/ others	

DISABILITY CONT'D

A Major Life Activity also encompasses the operation of Major Bodily Functions—except for transitory impairments—which include:

Bodily Functions		
Immune System	Normal cell growth	Digestion
Bowel & Bladder	Neuro & Brain	Respiratory functions
Circulatory system	Endocrine functions	Reproductive functions
Genitourinary system	Cardiovascular system	Hemic system
Lymphatic system	Musculoskeletal system	

DISABILITY CONT'D

Mitigating measures should not be factored into the determination of whether or not someone is disabled. 42 U.S.C. § 12102(E)(i) and 29 C.F.R. § 1630.2(j)(vi).

Example: A 10-year veteran of the police department develops diabetes. The officer's condition is controlled with insulin. Despite the insulin's mitigating effects, the officer may still have a disability under the ADA.

DISABILITY CONT'D



DISABILITY CONT'D

Disabilities after the ADAAA have included:

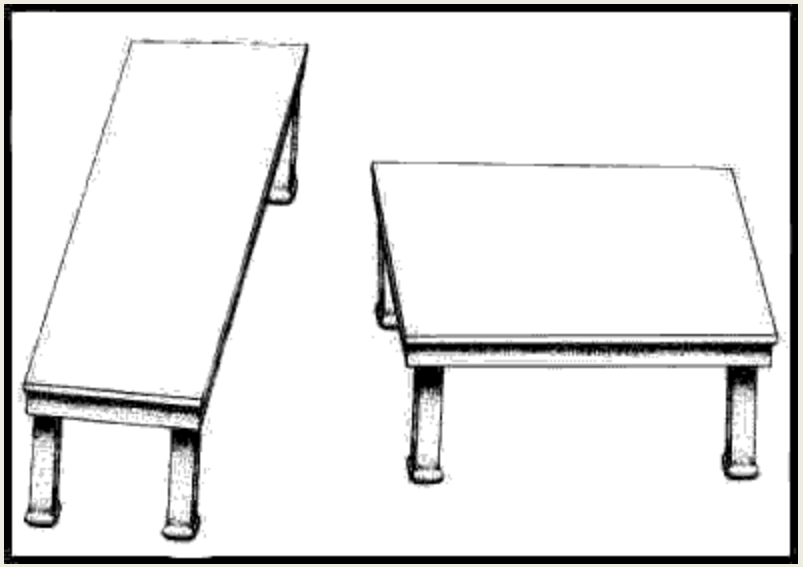
- **Renal Cancer**- *Norton v. Assisted Living Concepts, Inc.*, 786 F.Supp. 2d 1173 (E.D. Tex. 2011).
- **Chronic Fatigue Syndrome**- *Wirey v. Richland Cmty. Coll.*, 913 F.Supp.2d 633 (C.D. Ill. 2012).
- **Irritable Bowel Syndrome**- *Simmons v. N.Y.C. Transit Auth.*, 340 F.App'x 24 (2nd Cir. 2009).
- **Glaucoma**- *Bordonaro v. Johnston Cnty. Bd. Of Educ.*, 938 F.Supp.2d 573 (E.D. N.C. 2013).
- **High Blood Pressure-** *Bordonaro v. Johnston Cnty. Bd. Of Educ.*, 938 F.Supp.2d 573 (E.D. N.C. 2013).

DISABILITY CONT'D

- **Knee Injury**- *Price v. City of New York*, 797 F.Supp.2d 219 (E.D. N.Y. 2011).
- **Depression & Anxiety**- *Jones v. HCA*, 16 F.Supp.3d 622 (E.D. Va. 2014).
- **Dyslexia & Attention Deficit Disorder**- *Karlik v. Colvin*, 15 F.Supp.3d 700 (E.D. Mich. 2014).
- **Memory-related Disorder**- *Rawdin v. Am. Bd. Of Pediatrics*, 985 F.Supp.2d 636 (E.D. Pa. 2013).
- **Morbid Obesity**- *E.E.O.C. v. Res. for Human Dev., Inv.*, 827 F.Supp.2d 688 (E.D. La. 2011).

DISCRIMINATION CONT'D

Actual disability v. "regarded as" disabled--perception matters.



SUMMARY

The ADAAA caused a major expansion of what qualifies as a disability. Additionally, a plaintiff who is not actually disabled can still recover und the ADA on the basis that he or she was regarded as disabled by the employer.

Next:

If a plaintiff can show he suffered from a disability, he must then show that he was qualified for the job.

QUALIFIED INDIVIDUAL

Qualified Individual= A person who can perform his *essential job functions* with or without *reasonable accommodations*.

42 U.S.C. § 12111(8) and 29 C.F.R. § 1630.2(m).

QUALIFIED INDIVIDUAL CONT'D

First, what are the essential job functions of a police officer?





QUALIFIED INDIVIDUAL CONT'D

Are the essential job functions of a police officer those of a *commissioned officer* or are they *assignment- specific*, e.g. patrol officer, S.W.A.T. officer, or I.A. officer?

A Defendant-City will likely assert that the commissioned-officer standard is applicable—that is, a person must meet the requirements to become a commissioned officer in their state in order to be qualified for a job as a police officer. Licensing standards are generally set by a state's licensing agency, e.g. Texas Commission on Law Enforcement (TCOLE), and contain certain physical and psychological standards that must be met in order to gain a license as a peace officer.

QUALIFIED INDIVIDUAL CONT'D

But consider a potential disparate impact argument:

Gonzales v. City of New Braunfels, 176 F.3d 834, 839 (5th Cir. 1999).

- Officer Gonzales is diagnosed with insulin-dependent diabetes mellitus after two years with the Department
- His condition is controlled and he has no job-performance issues for 10 years
- 13 years after his initial hire date, he fails his firearms and driving requalification tests and is ordered by the Chief to undergo a fitness for duty exam
- Examining physician determines his disease has caused dexterity problems and numbness to the officer's hands and feet
- Officer Gonzales requests to be reassigned to the position of Evidence Technician (sworn position) and is denied
- He is forced to take early retirement and sues under the ADA

QUALIFIED INDIVIDUAL CONT'D

"The only way in which Gonzales might possibly have escaped this outcome would have been to challenge the legitimacy of the NBPD's commissioned officer qualification standard for evidence technician. Under the ADA, if a plaintiff can prove that his employer has imposed eligibility requirements that tend to screen out the disabled, that employer will be deemed to have "discriminated" unless it can demonstrate that the particular eligibility standard or criterion in question is 'job-related' and 'consistent with business necessity.'"

QUALIFIED INDIVIDUAL CONT'D

What are the essential job functions of a firefighter?





QUALIFIED INDIVIDUAL CONT'D

- Similar to a police officers, firefighters may have job duties outside of fighting fires and providing EMS support.
- A City-Defendant will likely assert that in case of a mass disaster/event all active firefighters, regardless of the divisions/bureaus they are assigned, must be able and ready to perform fire-suppression duties.
- Some courts have framed the analysis to focus on "…'the fundamental job duties *of the employment position the individual with the disability … desires,'* 29 C.F.R. § 1630.2(n)(1)(emphasis added), rather than solely on the title held by a person occupying that position or the other positions occupied by most persons holding that title." *Stone v. City of Mount Vernon,* 118 F.3d 92 (2nd Cir. 1997)

QUALIFIED INDIVIDUAL CONT'D

- Consider how the Fire Department's practices may impact the analysis of what are fundamental job duties of a position:

  Stone v. City of Mount Vernon, 118 F.3d 92 (2nd Cir. 1997)

- Firefighter Stone was injured in an off-duty accident which initially left him paralyzed from the waist down. After undergoing physical rehabilitation, he was able to walk for a few hours at a time, with the assistance of leg braces; negotiate curbs and ramps with a wheelchair; drive a car outfitted with special hand controls; and climb and descend stairs out of his wheelchair while pulling the chair along with him.
- He requested to be returned to active duty and assigned to a position in which his disability could be accommodated. He identified a position in the Fire Alarm Bureau.

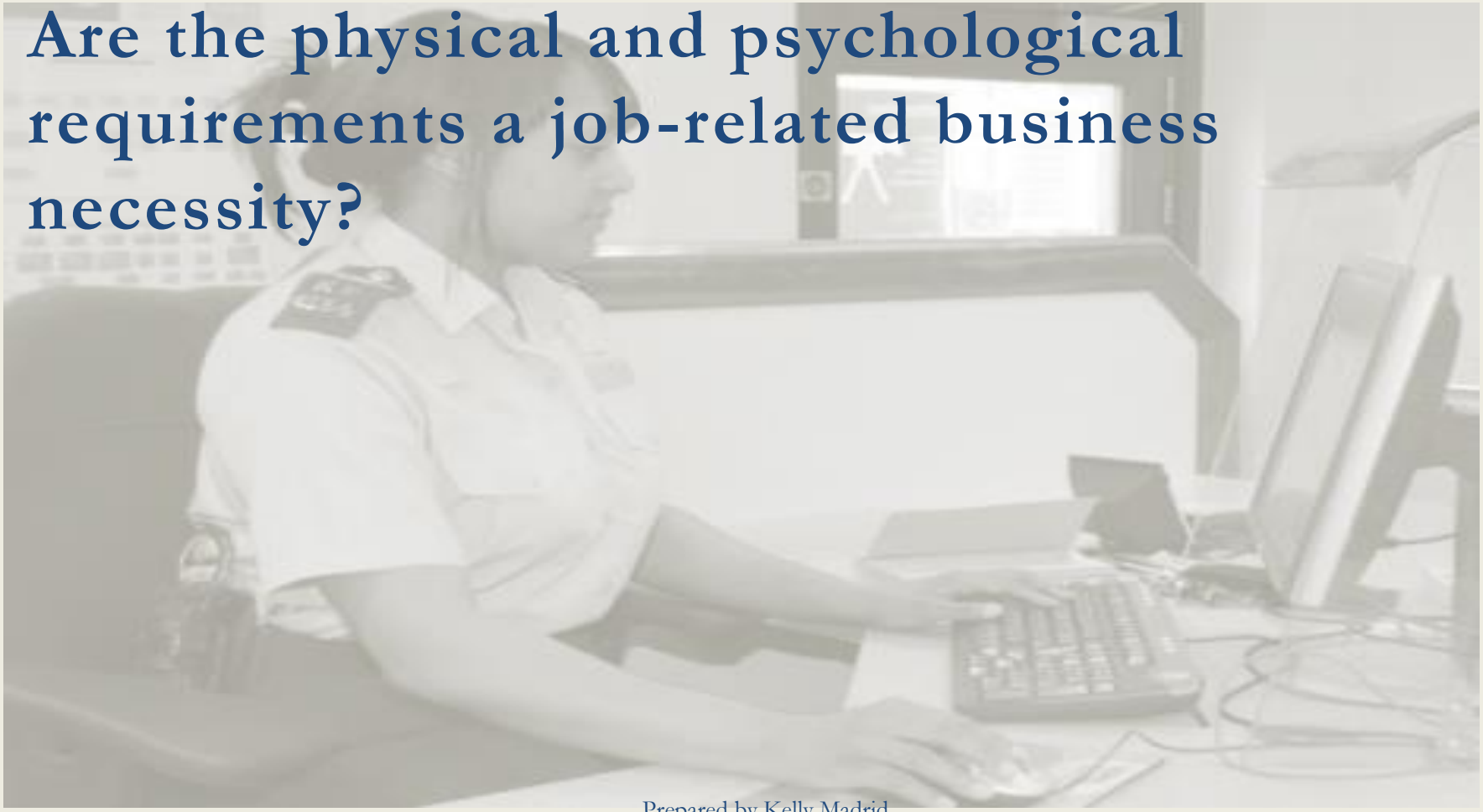
QUALIFIED INDIVIDUAL CONT'D

- Department required all active firefighters, regardless of assignment, must be available and ready to perform fire-suppression duties.
- Firefighters assigned to FAB fit in two categories:
  - Those who were unable to perform regular duties because of an on-duty injury and were statutorily entitled to receive full salary indefinitely, and who would therefore otherwise collect a salary without working; and
  - Those who had suffered disabling off-duty injuries that were temporary.
- Firefighter Stone did not fit either category of firefighters assigned to FAB.
- The Second Circuit vacated the district court's grant of summary judgement to the City based on its finding of genuine issues of fact as to whether fire-suppression is an essential function of duties for firefighters assigned to FAB.

QUALIFIED INDIVIDUAL CONT'D

- The Second Circuit's decision was based on the following:
  - The City never conducted or requested an examination to determine his physical abilities to perform in FAB.
  - Deposition testimony of two firefighters assigned to FAB in excess of 10 years who were never called upon to perform fire-suppression activities.
  - The assignment of the two firefighters, one for 10 years and the other for 20 years, to FAB suggested that career placement in FAB is not unprecedented.
  - There were no job descriptions and no collective bargaining agreement provisions that state FAB positions required fire-suppression activities.
  - The Department's standard practice was to call in mutual-aid fire companies, not require members assigned to FAB to suit up and suppress fire.

QUALIFIED INDIVIDUAL CONT'D



Are the physical and psychological requirements a job-related business necessity?

QUALIFIED INDIVIDUAL CONT'D

Second, a reasonable accommodation: what it is and what it is not.

"The ADA requires employers to make '[m]odifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position . . . .' However, '[t]he ADA does not require an employer to relieve an employee of any essential functions of his or her job, modify those duties, reassign existing employees to perform those jobs, or hire new employees to do so.'"
EEOC v. LHC Group, Inc., 773 F.3d 688, 698 (5th Cir. 2014).

QUALIFIED INDIVIDUAL CONT'D

Reasonable accommodations may include the following if they do not cause the employer an "undue hardship:"

- Making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
- Job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

42 U.S.C. § 12111(9) and 29 C.F.R. § 1630.2(o).

QUALIFIED INDIVIDUAL CONT'D

Reassignment to a *vacant* position is considered a reasonable accommodation. However, if a component of the essential job functions for all jobs in the Department is being a commissioned peace officer, then a reassignment will not accommodate the officer in the performance of his or her job.

What about Light-Duty positions?

1. Does the Department have light duty positions?
2. Are the light-duty positions temporary or permanent (this can be determined by evaluating policy and practice)?

★ If the Department has permanent light duty positions, arguably, an officer in such a position would never have to "spring into action" and the commissioned peace officer requirement may not be a job-related business necessity.

See, e.g., Cuillette v. City of Los Angeles, 194 Cal.App.4th 757 (2011) (analyzed under the California equivalent of the Texas Labor Code, which mirrors the ADA in its prohibition on disability discrimination).

QUALIFIED INDIVIDUAL CONT'D

The process for determining what a reasonable accommodation is for an individual officer is referred to as the **"interactive process."** It should consist of an informal dialogue between the officer and ADA coordinator (or a person in a similar role) to determine if and how a reasonable accommodation can be made.

29 C.F.R. § 1630.2(o)(3).

SUMMARY

Whether a person is qualified depends on how the job is defined at the time the person occupies the position or is anticipated to occupy the position. Determining what a reasonable accommodation is requires communication between the employee and employer to identify what could be provided to enable the employee to perform his or her job. Then the employer should evaluate whether the accommodation would present an undue hardship. A financial undue hardship is based on the overall resources of the entity, not a particular department.

Next:

If a plaintiff can show he had a disability and was a qualified individual, he must show that he was discriminated against because of his disability.

DISCRIMINATION

DISCRIMINATION= *Adversely affecting* employee's opportunities or failing to make a *reasonable accommodation*.

The statute also prohibits other conduct on the basis that it is discriminatory, ***including medical inquiries***. A narrow exception applies.

FAILURE TO PROVIDE REASONABLE ACCOMMODATIONS

Silva v. City of Hidalgo, 575 F.App'x 419 (5th Cir. 2014) (per curiam).

- SWAT officer breaks her leg and goes on medical leave
- She requests to return to a light-duty position
- Her request is denied and she is informed that if she does not return to her former position at the end of her leave, she will be considered as having resigned
- She exhausts all medical leave and is terminated
- She sues the City under the ADA, alleging that the City failed to engage her in an interactive process
- The district court grants the City's MSJ and Silva appeals
- The 5th Circuit affirms

FAILURE TO PROVIDE REASONABLE ACCOMMODATIONS

"Silva claims that the City violated the ADA by failing to engage her in an interactive process to find a reasonable accommodation for her disability, such as a desk duty or light duty position or an unpaid leave of absence. By [the Chief's] own admission, the City's practice was to allow an employee to take FMLA leave and then terminate her if she was unable to return to her former position when her leave expired. While this unbudging framework may in another circumstance violate the City's duty to participate in an interactive process, it did not do so in this case . . . .

FAILURE TO PROVIDE REASONABLE ACCOMMODATIONS

'[T]he regulation's direction to the parties to engage in an interactive process is not an end in itself—it is a means to the end of forging reasonable accommodations. . . .'

Silva's claims that the City was under an obligation to keep her position open for an unspecified amount of time . . . simply cannot be squared with the statute's entitlement to a "reasonable" accommodation. Accordingly, even if a genuine issue of material fact exists as to whether the City participated in the interactive process in good faith, its dereliction cannot be said to have led to a failure to reasonably accommodate Silva because there is no evidence that a reasonable accommodation was feasible."

SUMMARY

An employer violates the ADA by discriminating against a qualified individual based on their disability.

Discrimination can manifest in various ways, including obvious adverse employment actions, e.g., termination, as well as more subtle actions, e.g., medical inquiries.

Additionally, the theory of liability can be based on the employee actually having a disability or because the employee was regarded as disabled.

PART II: FITNESS FOR DUTY

- Fitness-for-Duty (FFD) exams are medical or psychological examinations used to determine whether a person is able to perform the job
- BUT medical inquiries are prohibited under the ADA, with a narrow exception, because a medical inquiry is considered a form of discrimination
- Even if the medical inquiry falls into the exception under the ADA, the inquiry itself may prove to be evidence used to support a "regarded-as" theory of liability for an ADA claim

WHEN ARE FFD EXAMS PERMISSIBLE?

- A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

§ 12112(d)(4)(A)

- "[A]n examination that is 'job related' and 'consistent with business necessity' must, at minimum, be limited to an evaluation of the employee's condition only to the extent necessary under the circumstances to establish the employee's fitness for the work at issue." *Franklin v. City of Slidell*, 936 F. Supp. 2d 691, 712 (E.D. La. 2013) (quoting *Tice v. Centre Area Transp. Auth.*, 247 F.3d 506, 515 (3d Cir. 2001)(quoting *Sullivan v. River Valley Sch. Dist.*, 197 F.3d 804, 811-12 (6th Cir. 1999))).

WHEN DOES A FFD EXAM TRIGER THE ADA?

- When the purpose is to determine whether an employee "is an individual with a disability or as to the nature or severity of the disability." *Conroy v. New York State Dep't of Corr. Servs.*, 333 F.3d 88, 95 (2nd Cir. 2003); *Yin v. State of Cal.*, 95 F.3d 864, 868 (9th Cir. 1996).

- Or, if the examination would tend to or is likely to reveal an employee's disability. *See id.* at 95-96.

EXAMPLES OF PERMISSIBLE FFD EXAMS

- The Ninth Circuit concluded that an employer's decision to place a police officer whose job performance was otherwise satisfactory on administrative leave and to order him to undergo a fitness for duty examination after the occurrence of four alarming incidents was justified by the business necessity exception. *Brownfield v. City of Yakima*, 612 F.3d 1140 (9th Cir. 2010)

- The Eleventh Circuit upheld an employer's decision to require a police officer, whose job performance was otherwise satisfactory, to undergo a fitness for duty examination after he displayed "unusually defensive and antagonistic behavior towards his co-workers and supervisors." *Watson v. City of Miami Beach*, 177 F.3d 932, 934-35 (11th Cir. 1999)

- In *Watson*, The Eleventh Circuit also enunciated a blanket rule that "[i]n any case where a police department reasonably perceives an officer to be even mildly paranoid, hostile, or oppositional, a fitness for duty examination is a job-related and consistent with business necessity."

EXAMPLE OF IMPERMISSIBLE FFD EXAMS

- Employer's policy of requiring employees to provide a medical certification, including a "general diagnosis" after an absence from work triggered Section 12112(d)(4)(A), because it could tend to reveal a disability and expose individuals with disabilities to employer stereotypes.

FFD USED AS EVIDENCE THAT THE EMPLOYEE WAS "REGARDED AS" DISABLED

- Former CIGNA employee alleged that Cigna's having sent her to a psychiatric exam because of her strange behavior, e.g. pouring salt around her cubicle to keep the evil away, was evidence that she was regarded-as disabled.

Cody v. CIGNA Healthcare, 139 F.3d 595 (8th Cir. 1998).

FFD USED AS EVIDENCE THAT THE EMPLOYEE WAS NOT A "QUALIFIED INDIVIDUAL" FOR ADA PURPOSES

- A failed FFD is evidence that can be used by the employer to show that the employee is not a "qualified individual" for the purposes of an ADA claim, foreclosing his or her ability to recover.

CONCLUSION

- The nature and results of FFD exams can have a direct impact on two elements of an ADA claim brought on the "regarded-as-disabled" theory of liability: the "regarded-as" disabled prong, and the discrimination prong.
- To avoid running afoul of the ADA's prohibition on general medical inquiries, FFD exams should only be administered for objective, job-related purposes and should be tailored for the specific job.