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The Americans with Disabilities Act

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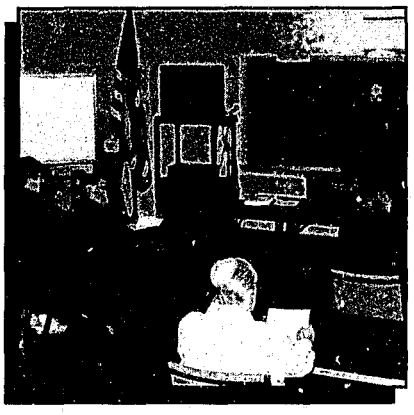

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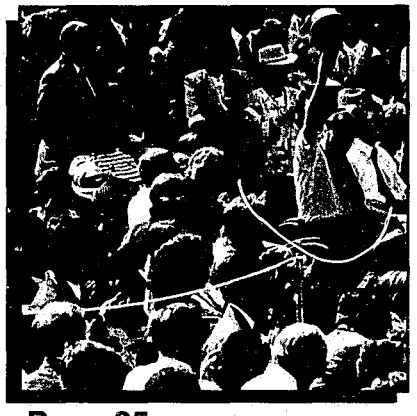

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The Americans with Disabilities Act

By
JEFFREY HIGGINBOTHAM, J.D.

The July 26, 1990, signing of the Americans with Disabilities Act.

On July 26, 1990, President Bush signed the Americans With Disabilities Act (ADA), which poses new challenges for law enforcement administrators. The ADA, which was enacted to eliminate discrimination against individuals with disabilities, provides protection against employment discrimination to individuals who are disabled but nonetheless able to work.[1] Though the ADA is not yet in effect, it will become effective for employers with at least 25 employees on July 26, 1992, and for employers with at least 15 employees on July 26, 1994.[2] Therefore, law enforcement administrators should begin planning now to ensure compliance with the act when it does become effective.

The purpose of this article is to discuss the requirements of the ADA. The article also brings to the attention of administrators certain problem areas involving important policy decisions that should be considered before the effective date of the act.[3]

PROHIBITION OF DISCRIMINATION

The ADA prohibits employers from discriminating "...against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions and privileges of employment."[4] The ADA also prohibits an employer from conducting a medical examination or making inquiries of a job applicant concerning the nature or severity of a disability, unless a conditional offer of employment has been made.[5]

However, these general prohibitions of discrimination against the

disabled have two important thresholds that must be met before a particular person is protected by the ADA. First, an applicant or employee must be *disabled* under the terms of the act. Second, in addition to that disability, the person must be *qualified* to perform the job, with or without reasonable accommodation by the employer. More importantly, the ADA does not automatically require that disabled persons be hired; rather, it demands equal employment opportunities, but only if those persons are capable of performing the essential functions of the job.

WHAT CONSTITUTES A DISABILITY UNDER THE ADA?

A person is defined by the ADA as disabled if that person has a physical or mental impairment that substantially limits one or more major life activities, has a record of such impairment, or is regarded as having such an impairment.[6] Generally, a person is disabled if that person has any physiological disorder, condition, disfigurement, anatomical loss, or mental or psychological disorder that makes that individual unable to perform such functions as caring for himself or herself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, or working to the same extent as an average person.[7]

However, the exclusion of a person from a particular job or position because of a physical or mental impairment is not necessarily illegal discrimination under the ADA if that individual is not "substantially limited" in a major life activity. "[A]n individual is not substantially limited in working just because he or she is unable to perform a particular job for one employer, or because he or she is unable to perform a specialized job or profession requiring extraordinary skill, prowess or talent."[8]

In deciding whether a particular person is substantially limited in the major life activity of working, it is instructive to examine court decisions interpreting the Federal Rehabilitation Act of 1973.[9] Courts have held that the protections against handicap discrimination in that act do not "...include working at the specific job of one's choice....Being declared unsuitable for the particular position of police officer is not a substantial limitation of a major life activity."[10] For example, some disabilities may be disqualifying for some jobs or professions. However, if these disabilities do not act as a complete bar to other employment opportunities, and the person is reasonably able to obtain employment despite the disability, then under the ADA there is no substantial limitation on the major life activity of working.

There are also certain conditions that the ADA expressly excludes from protection. These include current illegal drug use, homosexuality, bisexuality, transvestism, exhibitionism, voyeurism, gender identity disorder, sexual behavior disorder, compulsive gambling, kleptomania, pyromania, and psychoactive substance use disorders resulting from current illegal use of drugs.[11] Persons with these conditions are excluded from the act's definition of disabled persons.

The ADA's exclusion of *current* illegal drug users as protected disabled persons raises a potential concern for law enforcement employers. While current illegal drug

"The ADA...provides protection against employment discrimination to individuals who are disabled but nonetheless able to work."

Special Agent Higginbotham is a legal instructor at the FBI Academy in Quantico, Virginia.

users do not fall within the definition of a qualified disabled individual,[12] *former* drug users are arguably protected by a provision in the ADA, which provides that a protected disability includes a person who:

> "...1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use; [or] 2) is participating in a supervised rehabilitation program and is no longer engaging in such use."[13]

While there is no caselaw directly on point, it might be argued that despite the above-cited ADA provision, law enforcement employment can be denied to a former illegal drug user because that person's prior conduct evinces unacceptable character traits, lack of judgment, or failure to abide by the law, all of which are relevant to the hiring and employment of police officers.[14]

WHAT CONSTITUTES A "QUALIFIED" INDIVIDUAL UNDER THE ADA?

The determination that a physical or mental impairment substantially limits a major life activity and renders a person disabled under the ADA only completes the first threshold requirement for protection. The ADA also requires that disabled persons be nonetheless qualified to perform the work required.

The ADA defines a "qualified individual with a disability" as "...an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[15] A law enforcement administrator's judgment as to what functions are essential to a job and any written job description used during the application or hiring process are considered under the ADA to be evidence of a position's essential functions.[16]

> ***"...discrimination on the basis of a disability that affects only marginal or peripheral functions...is illegal."***

Also relevant to these essential functions determinations are the amount of time expended during the workday performing certain functions, the consequences if those tasks are not performed, and the work experience of current and past incumbents of the position.[17] Law enforcement administrators should carefully identify the essential functions of each particular job in their department, since the clear import of the ADA is that discrimination on the basis of a disability that affects only marginal or peripheral functions and not the performance of essential functions is illegal.[18]

Police administrators preparing for the full implementation of the ADA would be well-served to review each job classification within their agency thoroughly, paying particular attention to tasks that require special skills, talents, or abilities to perform the job's essential functions. The essential functions should be isolated so that informed judgments can be made as to the capability of disabled applicants or employees to hold those jobs successfully.

WHEN DO MEDICAL EXAMINATIONS AND INQUIRIES VIOLATE THE ADA?

The ADA contains specific prohibitions and requirements concerning medical examinations and inquiries about disabilities. The ADA provides that an employer can only "...conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability...after an offer of employment has been made to a job applicant...."[19]

The employer may, however, condition an offer of employment on the results of such an examination.[20] Where a medical examination is

required after a conditional offer of employment is made, the following three additional restrictions are contained in the statute:

1) All new employees must be subject to the medical examination;

2) The information obtained during the medical examination and the medical history of the applicant collected must be maintained "...on separate forms and in separate files and...treated as a confidential medical record...";[21] and

3) The results of the examination may be used only in accordance with the act.[22]

EFFECTS ON HIRING PRACTICES

The ADA's limitations on medical examinations and inquiries concerning disabilities may require several significant changes in police hiring practices. First, those law enforcement agencies that require applicants to undergo a complete medical examination early in the application process may be required to shift the medical examination to the later stages of the application process. This is because law enforcement agencies covered by the ADA will have to first determine that an applicant is eligible to be hired and make a conditional offer of employment before subjecting the applicant to a medical examination. Second, law enforcement executives will have to ensure the medical standards tested during the examination, which might be disqualifying, are related to the essential functions of the job before the offer of employment can be withdrawn.

A third likely change in police hiring practices concerns psychological testing. The use of psychological testing as an employment screening device appears to be a growing practice,[23] with some States requiring it as matter of law.[24] While the ADA does not ban the use of psychological testing, it may require such testing be postponed until after a conditional offer of employment is made because: 1) Psychological testing may be construed to be a form of medical examination; and 2) the ADA defines a disability to include a mental disorder or impairment that substantially limits a major life activity. To the extent that psychological testing for personnel screening identifies such conditions, the test would be subject to the ADA requirement that such medical examinations and inquiries about disabilities be done only after offers of employment are made.

> ***"...the ADA is designed to ensure that qualified disabled persons are given the same consideration for employment as non-disabled persons...."***

A fourth possible change to hiring practices concerns application forms that currently contain a section for medical information that requires applicants to list potentially disabling impairments. Because the ADA provides that such inquiries can only be made after an offer of employment, application forms provided to applicants as an initial step in the hiring process may have to be altered to remove medical and disability inquiries. Moreover, the ADA's prohibition on inquiries as to the nature or severity of disabilities may also affect interviews of police applicants by requiring that interviewers be familiar with the ADA and refrain from making any prohibited inquiries about an applicant's disability.

Finally, the ADA may require law enforcement agencies to rethink their physical ability hiring standards. Tests that measure overall levels of fitness or specific physical abilities as a condition of employment can now be challenged under the ADA as not being job-related or consistent with a business necessity. Law enforcement physical ability and agility tests have already spawned considerable litigation under Title VII of the Civil Rights Act, and the ADA provides an additional basis on which to raise legal challenges.[25]

PERMITTED EXAMINATIONS AND INQUIRIES

There are four instances where the ADA permits medical examinations or inquiries. First, employers can question applicants about their ability to perform job-related func-

tions,[26] but such questions should not be phrased in terms of the disability.[27] For example, police applicants could be asked about their ability to drive a car or run a given distance within an established time period as a job-related function, but should not be asked if there are physical limitations that prevent the applicant from driving or running.

Similarly, an employer is permitted to require fitness for duty examinations of current employees if required by State law or when there is a need to determine whether the employee is still able to perform the essential functions of the job. However, employers cannot require the fitness for duty examination if the employee's condition was not related to job performance.[28]

Second, it is permissible to conduct voluntary medical examinations and collect voluntary medical histories as part of an employee health program available to all employees at the work site.[29] Third, medical examinations of employees or inquiries about the nature or severity of a disability are permissible if shown to be "job-related and consistent with business necessity."[30] Fourth, the ADA specifically exempts drug testing from the medical examination prohibitions. Though it does not appear Congress intended to encourage drug testing by employers, those that choose to do so are not constrained by the ADA.[31]

DEFENSES TO CHARGES OF UNLAWFUL DISCRIMINATION

While the ADA is designed to ensure that qualified disabled persons are given the same consideration for employment as non-disabled persons, it also provides the following three defenses that can be raised by employers charged with unlawful discrimination:

> 1) The qualification standards, tests, or selection criteria are job-related and consistent with business necessity;
>
> 2) The disabled individual, if hired, would pose a direct threat to the health or safety of the individual or others; and
>
> 3) The employer is unable to reasonably accommodate the disability of the individual.[32]

The Job-related and Consistent with Business Necessity Defense

The concepts of job-relatedness and business necessity require that law enforcement administrators preparing for the implementation of the ADA conduct an analysis of jobs and tasks for the purpose of identifying the essential functions of each position. Then, administrators must devise standards and criteria that accurately reflect and measure those elements.[33] If this is done properly, employment decisions may be made, even if they adversely affect disabled persons.

This defense is also important where an employer withdraws an offer of employment based on the results of a medical examination. The job-relatedness and consistency with business necessity must be shown if the exclusionary criteria of a medical examination screens out disabled persons.[34]

The Direct Threat to Health or Safety Defense

Employers can lawfully refuse to hire a disabled person where the individual, if hired, would pose a direct threat to the health or safety of others in the workplace.[35] A direct threat is defined by the ADA as "...a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation."[36]

> ***"...the ADA...demands equal employment opportunities, but only if those persons are capable of performing the essential functions of the job."***

Such determinations should be made on a case-by-case basis, and employers should carefully base their decisions on sound medical knowledge and other objective factors, including the duration of the risk, the nature and severity of the potential harm, and the likelihood

that the potential harm would occur.[37] For example, a physical or mental condition that prevents an individual from safely operating a patrol car or discharging a firearm could constitute a lawful basis for terminating or refusing employment as a patrol officer, even though that person would be an otherwise "qualified disabled person" under the ADA.

> ***"The ADA's limitations on medical examinations and inquiries concerning disabilities may require several significant changes in police hiring practices."***

Police administrators should be circumspect in invoking this defense since generalized fears, remote possibilities, or only slightly enhanced threats to safety or health are insufficient reasons for denying employment to a qualified disabled person.[38] Employment decisions must be based on articulable and objective evidence.

The Inability to Reasonably Accommodate Defense

A third defense available to employers is an inability to reasonably accommodate the disability of an employee or applicant. The notion underlying the term "reasonable accommodation" is that an employer may be able to make certain adjustments to the workplace or to the conditions of employment so that a disabled person, who otherwise possesses the qualifications required for a particular position, is able to function as a productive employee.

The ADA expressly embodies the requirement for reasonable accommodation in its definition of a qualified individual with a disability.[39] An employer's failure to make reasonable accommodations to the known physical or mental limitations of otherwise qualified applicants or employees is proscribed by the act.[40]

While the duty to accommodate the disability of an employee or applicant reasonably is clear, the degree to which an employer is required to alter the conditions of employment is less clear. Some of the express requirements of reasonable accommodation include: 1) Making existing facilities readily accessible to and usable by disabled individuals; 2) job restructuring; 3) part-time or modified work schedules; 4) reassignment to a vacant position; 5) acquisition or modification of equipment; 6) modification of examinations, training and policies; and 7) the provision of qualified readers or interpreters.[41]

However, the ADA does not require that employers make all possible modifications to working conditions under the obligation of reasonable accommodation. For example, alterations that are primarily for the personal benefit of the individual or are not job-related do not fall within the obligation of reasonable accommodation.[42] The accommodation need not be the employee's or applicant's preference or even the "best" accommodation, so long as it is sufficient to meet the job-related needs of the disabled person.[43] Similarly, an employer is not required to restructure the essential functions of a position to fit the skills of the disabled person or create a new job that the disabled person can perform.[44]

In addition, an employer is not required to accommodate a disabled employee or applicant reasonably if it would create an undue hardship on the operation of the employer's business.[45] The ADA lists the following factors that should be considered in determining whether a particular act or modification would create an undue hardship: 1) The nature and cost of the accommodation; 2) the overall financial resources of the employer and the particular facility where the accommodation is needed; 3) the number of persons employed at such facilities and by the employer in general; and 4) the impact of the accommodation upon the operation of the facility.[46]

The Supreme Court has interpreted a similar reasonable accommodation requirement under the Federal Rehabilitation Act.[47] In *School Board of Nassau County* v.

Arline,[48] a school teacher with tuberculosis was removed from his classroom assignment. In addressing the school district's obligation to reasonably accommodate the handicapped employee, the Supreme Court stated:

> "Although [employers] are not required to find another job for an employee who is qualified for the job he or she was doing, they cannot deny an employee alternative employment opportunities reasonably available under the employer's existing policies."[49]

Similarly, in *Southeastern Community College* v. *Davis*,[50] the Court ruled that accommodation of an employee's handicap is not reasonable when it requires a fundamental change in the nature of an employer's program.

There is no indication that Congress intended the ADA's reference to job restructuring as a form of reasonable accommodation to undercut the Supreme Court's decisions in *Arline* and *Davis*. The ADA does not obligate employers to create new jobs or remove essential functions from the requirements of a particular position. However, where a vacant job exists which a disabled person could successfully perform, reassignment may be required as a form of reasonable accommodation. But, permanent assignment to light duty positions would not be required, unless permanent light duty positions are normally available.[51]

CONCLUSION

The ADA will require law enforcement administrators to analyze their personnel and hiring practices and to determine the essential functions of each position in the department. A department's application process may have to be restructured to ensure that medical and psychological tests are used only after a conditional offer of employment has been made, unless such tests can be shown to be job-related and consistent with business necessity. Law enforcement administrators should also determine whether changes in the workplace or conditions of employment or other reasonable accommodation can be made to permit an otherwise qualified disabled person to perform jobs successfully within the police agency.

> ***"The ADA does not obligate employers to create new jobs or remove essential functions from the requirements of a particular position."***

The ADA will pose new challenges for law enforcement administrators. However, with careful pre-planning and appropriate consultation with the Equal Employment Opportunity Commission, administrators can meet these challenges and ensure that their departmental policies and practices are legally defensible when the ADA becomes effective. LEB

Footnotes

[1] 42 U.S.C. 12101 (1990).

[2] The ADA becomes effective 24 months after the date of enactment. In addition, 42 U.S.C. 12111(5)(A) provides that employers with 25 or more employees are subject to the act as of that date, and that employers with 15 or more employees will be subject to the act 2 years after that date. Those employers with fewer than 15 employees are not subject to the ADA. The ADA is not applicable to the Executive Branch of the U.S. Government. However, a closely parallel statute, the Federal Rehabilitation Act, 29 U.S.C. 794, already imposes many of the same requirements on the Federal Government.

[3] In addition to other requirements discussed in this article, the ADA imposes an obligation on employers to "post notices in an accessible format to applicants, employees and members describing the applicable provisions of the Act." 42 U.S.C. 12115. It is recommended that in planning for implementation of the ADA, law enforcement administrators contact their local Equal Employment Opportunity Commission (EEOC) office to consult on the appropriate language to be contained in these notices and for guidance as to the number and location of the required notices.

[4] 42 U.S.C. 12112(a).

[5] 42 U.S.C. 12112(c). The ADA is patterned largely after Title VII of the Civil Rights Act of 1964, the statute that prohibits employment discrimination based on sex, race, religion, color, or national origin. The remedies available to an aggrieved qualified disabled person mirror the relief available under Title VII. *See*, 42 U.S.C. 12117. An employer who illegally discriminates against qualified disabled persons may be liable for lost wages, attorneys' fees, costs, and equitable relief.

[6] 42 U.S.C. 12102(2).

[7] *See*, proposed EEOC regulations, Sections 1630.2(h) and (i), 56 Fed. Reg. 8578 (1991) (to be codified at 29 C.F.R. 1630) (proposed February 28, 1991).

[8] *See*, proposed EEOC Interpretive Guidance on Title I of the Americans With Disabilities Act, Part 1630.2(j), 50 Fed. Reg. 8591 (1991) (proposed February 28, 1991).

[9] 29 U.S.C. 790. Cases decided under the Federal Rehabilitation Act are precedentially significant in interpreting the ADA because "Congress intended that the relevant caselaw developed under the Rehabilitation Act be generally applicable to the term 'disability' as used in the ADA." *See*, proposed EEOC Interpretive Guidance on Title I of the ADA, Part 1630.2(g), *supra*, note 8 and 42 U.S.C. 12201(a).

[10] *Daley* v. *Koch*, 892 F.2d 212, 215 (2d Cir. 1989). *See also*, *Forrissi* v. *Bowen*, 794 F.2d 931 (4th Cir. 1986) and *Padilla* v. *City of Topeka*, 708 P.2d 543 (Kan. 1985).

[11] 42 U.S.C. 12208 and 12211.

[12] 42 U.S.C. 12210(a).

[13] 42 U.S.C. 12210(b).

[14] *See, Johnson* v. *Smith*, 39 F.E.P. Cases 1106 (D. Minn. 1985). An analogous argument was successful in *Huff* v. *Israel*, 573 F.Supp. 107 (M.D. Ga. 1983), where a law enforcement employee was dismissed following three off-duty convictions for driving under the influence of alcohol. The employee sued, claiming protection of the Rehabilitation Act. The court ruled that the employee was not being dismissed because of his handicap (alcoholism), but because of his criminal convictions, which demonstrated his inability to carry out the duties of law enforcement when he personally could not comply with the law. *See also*, *Copeland* v. *Philadelphia Police Department*, 840 F.2d 1139 (3d Cir. 1988), *cert. denied*, 109 S.Ct. 1636 (1989) (termination of officer who used marijuana did not violate the Rehabilitation Act, since the officer was not otherwise qualified to perform the job). *Accord*, *AFGE* v. *Skinner*, 885 F.2d 884 (D.C. Cir. 1988), *cert. denied*, 110 S.Ct. 1960 (1990); *Herron* v. *McGuire*, 803 F.2d 67 (2d Cir. 1986); *Burka* v. *N.Y. Transit Authority*, 680 F.Supp. 590 (S.D.N.Y. 1988).

[15] 42 U.S.C. 12111(8).

[16] *Id.*

[17] *See*, proposed EEOC regulations, Sections 1630.2(n), *supra*, note 7.

[18] The following cases discuss various physical and mental conditions that have been litigated under the Federal Rehabilitation Act, *see*, *infra*, note 9, and may have precedential significance in interpreting the ADA: **Vision**—*Trembczynski* v. *City of Calumet City*, No. 87C 0961 (N.D. Ill. 1987) (not reported, text in Westlaw); *Padilla* v. *City of Topeka*, 708 P.2d 543 (Kansas 1985); *City of Belleville Police and Fire Commissioners* v. *Human Rights Commission*, 522 N.E.2d 268 (Ill. App. 5 Dist. 1988); *City of Columbus* v. *Ohio Civil Rights Commission*, 492 N.E.2d 482 (Ohio App. 1985); *State by Cooper* v. *Hennepin County*, 425 N.W.2d 278 (Minn. App. 1988), *aff'd*, 441 N.W.2d 106 (Minn. 1989). **Back or Shoulder Injury**—*Dancy* v. *Kline*, 44 F.E.P. Cases 380 (N.D. Ill. 1987); *Mullen* v. *Princess Anne Volunteer Fire Co., Inc.*, 853 F.2d 1130 (4th Cir. 1988); *Daniels* v. *Barry*, 659 F.Supp. 999 (D.D.C. 1987); *Mahoney* v. *Ortiz*, 645 F.Supp. 22 (S.D.N.Y. 1986). **Hypertension**—*Jurgella* v. *Danielson*, 764 P.2d 27 (Ariz. App. 1988). **Heart Condition**—*Cook* v. *Department of Labor*, 688 F.2d 669 (9th Cir. 1982), *cert. denied*, 464 U.S. 832 (1983); *Walker* v. *Attorney General of the United States*, 570 F.Supp. 100 (D.D.C. 1983). **Disease**—*School Board of Nassau County* v. *Arline*, 107 S.Ct. 1123 (1987); *Local 1812, AFGE* v. *Department of State*, 662 F.Supp. 50 (D.D.C. 1987); *Shelby Township Fire Dept.* v. *Shields*, 320 N.W.2d 306 (Mich. App. 1982). **Epilepsy**—*Pineiro* v. *Lehman*, 653 F.Supp. 483 (D.P.R. 1987); *Costner* v. *United States*, 720 F.2d 539 (8th Cir. 1983); *Duran* v. *City of Tampa*, 430 F.Supp. 75 (M.D. Fla. 1977). **Psychological Ailment**—*Desper* v. *Montgomery County*, 727 F.Supp. 959 (E.D. Pa. 1990); *Pickut* v. *Dept. of Air Force*, 24 MSPR 433 (M.S.P.B. 184); *Daley* v. *Koch*, 892 F.2d 212 (2d Cir. 1989). **Hearing Loss**—*Packard* v. *Gordon*, 537 A.2d 140 (Vt. 1987). **Alcohol**—*Huff* v. *Israel*, 573 F.Supp. 107 (M.D. Ga. 1983). **Allergies**—*Commonwealth of Pennsylvania* v. *Pennsylvania Human Relations Commission*, 457 A.2d 584 (Pa. Cmwlth. 1983). **Missing Organ**—*Pennsylvania State Police* v. *Commonwealth*, 483 A.2d 1039 (Pa. Cmwlth. 1984), *rev'd on other grounds*, 517 A.2d 1253 (Pa. 1985). **Weight**—*Tudyman* v. *United Airlines*, 608 F.Supp. 739 (C.D. Cal. 1984); *United Paramedics of Los Angeles* v. *City of Los Angeles*, No. 89-1182-R, C.D. Cal. 3/8/89; *Smith* v. *Folmar*, 534 So.2d 309 (Ala. Civ. App. 1988).

[19] 42 U.S.C. 12112 (c)(2)-(3).

[20] *Id.*

[21] *Id.*

[22] *Id.* The permitted uses of medical information include notification to supervisors and managers of duty or work restriction; notice to first aid, safety, or emergency personnel; and disclosure to government officials investigating compliance with the ADA.

[23] 36 *Law and Order* 66 (Feb. 1988) (55% of law enforcement agencies nationwide now use psychological testing for personnel screening).

[24] *See, e.g.*, Young, "Reviewing the Pre-Employment Psychological Test," *Journal of California Law Enforcement*, vol. 22, No. 47, 1988.

[25] For a discussion of some of these legal issues, *see*, Daniel L. Schofield, "Establishing Health and Fitness Standards: Legal Considerations," *FBI Law Enforcement Bulletin*, vol. 58, No. 6, June 1989.

[26] 42 U.S.C. 12112(c)(2)(B) and 12112 (c)(4).

[27] *See*, proposed EEOC Interpretive Guidance of Title I of the ADA, Part 1630.13(b), *supra*, note 8.

[28] *Id.*

[29] 42 U.S.C. 12112 (c)(4)(B).

[30] 42 U.S.C. 12112(c)(4)(A).

[31] 42 U.S.C. 12114(d).

[32] 42 U.S.C. 12113.

[33] Neither the ADA nor the proposed regulations provide a definition of "job-related" or "business necessity." However, both terms have been used in connection with Title VII litigation and caselaw under that statute would be instructive on their meaning in the ADA.

[34] *See*, proposed EEOC Interpretive Guidance on Title I of the Americans With Disabilities Act, Part 1630.14(b), *supra*, note 8.

[35] 42 U.S.C. 12113(b).

[36] 42 U.S.C. 12111(3). However, the proposed regulations and guidelines issued by the EEOC expand this to include direct threats to the health or safety of the applicant or employee personally, as well as to other persons. *See*, proposed EEOC regulations, Section 1630.2(r), *supra*, note 7; EEOC Interpretive Guidance on Title I of the Americans With Disabilities Act, Section 1630.2(r), *supra*, note 8.

[37] *See*, proposed EEOC regulations, Section 1630.2(r), *supra*, note 7.

[38] *See*, proposed EEOC Interpretive Guidance on Title I of the Americans with Disabilities Act, Section 1630.2(r), *supra*, note 8.

[39] 42 U.S.C. 12111(8).

[40] 42 U.S.C. 12112(b)(5)(A).

[41] 42 U.S.C. 12111(9)

[42] *See*, proposed EEOC Interpretive Guidance on Title I of the Americans With Disabilities Act, Part 1630.2(o), *supra*, note 8.

[43] *Id.*

[44] *Id.*

[45] 42 U.S.C. 12112(b)(5)(A).

[46] 42 U.S.C. 12111(10).

[47] 29 U.S.C. 794.

[48] 107 S.Ct. 1123 (1987).

[49] *Id.* at 1131, n.16.

[50] 442 U.S. 397 (1979).

[51] *See, Simon* v. *St. Louis County*, 735 F.2d 1082 (8th Cir. 1984); *Dancy* v. *Kline*, 44 F.E.P. Cases 380 (N.D. Ill, 1987); *Pineiro* v. *Lehman*, 653 F.Supp. 483 (D.P.R. 1987).

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