



ISSN 1935-0007

*Cite as:* 2015 (9) AELE Mo. L. J. 101  
Civil Liability Law Section – September 2015

## **Police Accommodation of Mentally Impaired Persons Under the Americans with Disabilities Act (ADA)**

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### **❖ Introduction**

In the course of their daily work, peace officers frequently encounter mentally impaired persons. In addition to all other legal and practical issues inherent in law enforcement activities, this may raise questions of disability discrimination and the need to “reasonably accommodate” disabled persons in the course of providing public services or programs.

This two-part article takes a brief look at the current state of the law on the subject, beginning with a presentation of what the Americans with Disabilities Act (ADA) requires in this regard, followed by discussion of a U.S. Supreme Court decision that briefly considered but ultimately did not resolve the issue. The possible grounds for liability under the ADA are then discussed, including the differing approaches between the federal appeals courts.

In Part Two of this article, we will discuss the use of force against mentally impaired persons, including both deadly force and Tasers, special concerns in the areas of suicide and drug use by mentally impaired persons, and issues that arise during the detentions of mentally impaired persons by officers for mental health evaluation and treatment purposes. The article concludes with some suggestions to consider and a listing of some relevant and useful resources and references.

### ❖ The ADA and Public Services

The [Americans with Disabilities Act of 1990](#) (ADA), 42 U.S.C. §12101 *et seq.*, prohibits discrimination and ensures equal opportunity for persons with disabilities in employment, state and local government services, public accommodations, commercial facilities, and transportation. Title II of the ADA, Part A, 42 U.S.C §12131-12134, prohibits disability discrimination in services provided by government agencies and entities, including any state or local government.

Those protected against discrimination are any qualified individual with a disability. The statute provides:

The term “qualified individual with a disability” means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

Sec. 12132. Discrimination, states that:

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

The ADA defines disability to include individuals with:

- (A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
- (B) a record of such an impairment; or
- (C) being regarded as having such an impairment

“Major Life Activities” are defined fairly broadly and “include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.”

The language of Title II generally tracks the language of Section 504 of the [Rehabilitation Act of 1973](#), 29 U.S.C. Sec. 701, and Congress' intent was that Title II extend the protections of the Rehabilitation Act, which applies to federal agencies and state and local agencies receiving federal funds, to cover all programs of state or local governments, regardless of the receipt of federal financial assistance and that it work in the same manner as Section 504.

In fact, the ADA statute specifically provides that “[t]he remedies, procedures and rights” available under Section 504 shall be the same as those available under Title II. Cases interpreting either statute are therefore applicable to both.

### ❖ **Supreme Court decision in Sheehan**

The U.S. Supreme Court has not, to date, clearly established a detailed framework for analyzing the issue of the duty, if any, of police to reasonably accommodate disabled mentally impaired persons in the course of carrying out law enforcement activities, including investigations, interrogations, searches, arrests, and detentions for mental health purposes. But in one recent case, they did briefly examine the issue, before declining to more thoroughly resolve the question. That case is therefore worthy of attention.

The case involved a woman living in a group home for the mentally ill who started to act erratically and threatened to kill her social worker. While she shared common areas of the building with others, she had a private room. She had stopped taking her medication, no longer spoke with her psychiatrist, and reportedly was no longer changing her clothes or eating.

While she initially was unresponsive to a social worker who used a key to enter her room to check on her, she ultimately told him to get out, and that she had a knife and “I’ll kill you if I have to.” Two officers were sent to the home to escort her to a facility for temporary evaluation and treatment.

When they entered her room, she grabbed a knife, threatening to kill them. They retreated and closed the door, but later reentered, concerned about what was going on within the room, and allegedly without considering if they could accommodate her disability. She again confronted them with the knife, threatening them, and saying that she was going to kill them, and after pepper spray failed to subdue her, they shot her five or six times.

She sued the city for alleged disability discrimination in arresting her without accommodating her disability, and the two officers for allegedly violating her Fourth Amendment rights. The Ninth Circuit ruled that the Americans with Disabilities Act applied to arrests and that the issue of whether the plaintiff's disability should have been accommodated should be decided by a jury.

It also held that the officers were not entitled to qualified immunity, since it was clearly established that, in the absence of a need for immediate entry, officers cannot forcibly enter the home of an armed, mentally ill person who has been acting irrationally and threatening everyone who entered. The appeals court held that there was a triable issue as to whether the officers failed to reasonably accommodate her disability when they forced their way into her room, arguably failing to take her mental illness into account or to utilize generally accepted law enforcement practices for peacefully resolving such a confrontation with a mentally ill person.

The appeals court held that because the ADA covers public "services, programs, or activities," §12132, the ADA's accommodation requirement should be read "to encompass 'anything a public entity does,'"

The Ninth Circuit agreed "that exigent circumstances inform the reasonableness analysis under the ADA," but concluded that it was for a jury to decide whether the officers should have accommodated the woman by, for instance, "respect[ing] her comfort zone, engag[ing] in nonthreatening communications and us[ing] the passage of time to defuse the situation rather than precipitating a deadly confrontation."

The officers were justified in the initial entry into the home under the emergency aid exception to the warrant requirement because they had an objectively reasonable belief that she was in need of assistance. There were, however, triable issues of fact as to whether the officers violated the Fourth Amendment in forcing a second entry and thereby allegedly provoking a near fatal confrontation, leading to an unnecessary use of deadly force that could have been avoided. [\*Sheehan v. City and County of San Francisco\*](#), #11-16401, 743 F.3d 1211 (9th Cir. 2014).

The U.S. Supreme Court granted review, but subsequently dismissed its review of the issue of whether 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" as "improvidently granted." A review of this issue was based on the assumption that the city would argue that the ADA does not apply when officers face an armed and dangerous person. Instead, the city argued that the plaintiff was not "qualified" for an accommodation because she posed a direct threat to others, a threat which could not "be eliminated by a

modification of policies, practices or procedures, or by the provision of auxiliary aids or services.”

The city, in its argument, focused on the statutory phrase “qualified individual,” §12132, and a regulation declaring that Title II “does not require a public entity to permit an individual to participate in or benefit from the services, programs, or activities of that public entity when that individual poses a direct threat to the health or safety of others.” 28 CFR §35.139(a) (2014).

Another regulation defines a “direct threat” as “a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices or procedures, or by the provision of auxiliary aids or services.” §35.104. Putting these authorities together, the city argued that “a person who poses a direct threat or significant risk to the safety of others is not qualified for accommodations under the ADA.”

Since the court below had not addressed the issues in that context, review by the U.S. Supreme Court was not proper. The Court also noted that the parties in the case had also failed to address the related question of whether a public entity such as the defendant city could be vicariously liable for damages under Title II of the ADA for an arrest made by its officers.

The Court did hold, however, that the two individual defendant officers were entitled to qualified immunity on the Fourth Amendment claims. They did not violate the plaintiff’s Fourth Amendment rights when they opened her door the first time, and could, without a doubt, also have opened her door the second time if she had not been disabled. Their use of force in response to her threats with the knife was reasonable.

So the only remaining question was whether they violated her Fourth Amendment rights when they opened her door the second time rather than attempting to accommodate her disability. As there was no clearly established law on that issue, they were entitled to qualified immunity. [\*City and County of San Francisco v. Sheehan\*](#), #13-1412, 135 S. Ct. 1765, 2015 U.S. Lexis 3200.

In a subsequently ruling after remand, the appeals court ordered further proceedings in the trial court on the ADA claim. [\*Sheehan v. City and County of San Francisco\*](#), #11-16401, 2015 U.S. App. Lexis 12096 (9th Cir.).

### ❖ **Basis for Liability under the ADA**

If the ADA applies to arrests and detentions, and imposes a duty of reasonable accommodation of disabilities, including those of mentally ill suspects, what would a plaintiff have to show to initially satisfy the requirements for liability?

In one case addressing this issue, a man was found in the basement of his home on the floor by his brother, apparently suffering from a seizure. While the brother made an emergency call, the subject regained consciousness and started acting erratically and urinating on himself. The brother, who was an Army medic, restrained the subject and removed his pants.

Two officers and two paramedics arrived, and the brother released the subject, who then swung his urine soaked pants towards him. The officers restrained the subject, handcuffed him, and placed him on his knees with his face in a chair. They were informed he was having a seizure, and he was visibly shaking and convulsing. More officers arrived and one pulled out a Taser. A paramedic assisted the officer.

While the brother yelled not to use the Taser on the subject, who he yelled was having a seizure, the Taser was applied “at least four times” in the stun mode. A paramedic injected the subject with Haldol and Ativan, which can have adverse respiratory effects. The lawsuit claimed that the subject then suffered respiratory and cardiac arrest. Efforts made to revive him caused him to regain a pulse and resume breathing, but he was unconscious and unresponsive; he died over two years later, with the cause of death “undetermined.”

Summary judgment was granted on claims against the city which employed the officers. The plaintiffs had not shown that they had admissible evidence that the decedent was behaving in a nonviolent manner and that the Taser was used against him after he was handcuffed and restrained.

The city did not dispute that the plaintiffs had standing to pursue a disability discrimination claim under the Americans with Disabilities Act (ADA), for allegedly denying the decedent the benefit of law enforcement services and by failing to properly train officers on how to restrain individuals in such circumstances. The court found, however, that whether or not the ADA applied to officers’ actions prior to an arrest, no violation occurred here.

To establish a *prima facie* ADA claim in these circumstances, a plaintiff must show that:

- (1) the plaintiffs’ decedent qualified as a person with a disability as defined in the statute;
- (2) (decedent) was excluded from receiving benefits, services, programs, or activities of a public entity; and
- (3) this exclusion was due to the disability.

In this case, the court found, the officers were not obligated to present ADA accommodations at the scene. While the officers were responding to a dispatch of a medical call, the situation “quickly escalated,” and presented exigent circumstances including the decedent’s “combative and unpredictable behavior.” The court stated that it

would not “second-guess” the officers’ actions and demand ADA compliance when they “were managing an unexpected scenario that continued to evolve and increase in intensity.” The plaintiffs failed to show that any alleged deficiency in training was due to deliberate indifference, so the inadequate training claim was also rejected. [\*Sheeley v. City of Austin\*](#), #12-2525, 2015 U.S. Dist. Lexis 72787 (D. Minn.).

At this point in time, the whole question of whether or not the ADA applies to arrests is still a matter of some disagreement among the federal appeals courts.

The Fifth Circuit, in a case involving a call to police to transport a suicidal man to a hospital for mental health treatment, 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.” [\*Hainze v. Richards\*](#), #99-50222, 207 F.3d 795 (5th Cir. 2000).

Explaining its reasoning, the court stated:

“Law enforcement personnel conducting in-the-field investigations already face the onerous task of frequently having to instantaneously identify, assess, and react to potentially life-threatening situations. To require the officers to factor in whether their actions are going to comply with the ADA, in the presence of exigent circumstances and prior to securing the safety of themselves, other officers, and any nearby civilians, would pose an unnecessary risk to innocents.

“While the purpose of the ADA is to prevent the discrimination of disabled individuals, we do not think Congress intended that the fulfillment of that objective be attained at the expense of the safety of the general public. Our decision today does not deprive disabled individuals, who suffer discriminatory treatment at the hands of law enforcement personnel, of all avenues of redress because Title II does not preempt other remedies available under the law. We simply hold that such a claim is not available under Title II under circumstances such as presented herein.”

Other circuits have declined to adopt the Fifth Circuit’s minority approach. In [\*Bircoll v. Miami-Dade County\*](#), # 06-11098, 480 F.3d 1072 (11th Cir. 2007), the Eleventh Circuit held that “the question is not so much one of the applicability of the ADA because Title II prohibits discrimination by a public entity by reason of [a person’s] disability.

The exigent circumstances presented by criminal activity and the already onerous tasks of police on the scene go more to the reasonableness of the requested ADA modification than whether the ADA applies in the first instance.” The implications of this approach will be



discussed in more detail in Part Two of this article, particularly in the section on the use of force.

Similarly, in [\*Gohier v. Enright\*](#), #98-1149, 186 F.3d 1216 (10th Cir. 1999), a case in which an officer encountered a mentally ill man acting erratically and armed with a knife, the Tenth Circuit held that “a broad rule categorically excluding arrests from the scope of Title II ... is not the law.”

In [\*Waller ex rel. Estate of Hunt v. City of Danville\*](#), #07-2099, 556 F.3d 171 (4th Cir. 2009), a case involving a police encounter with a mental patient who had been in and out of the hospital and was holding another person inside an apartment, the Fourth Circuit reserved judgment on the Fifth Circuit’s approach and then went on to consider a reasonable accommodation claim involving an arrest, ultimately rejecting it based on the facts of the case.

Like the Eleventh Circuit, *Waller* held that “exigency is one circumstance that bears materially on the inquiry into reasonableness under the ADA.” *Id.* See also [\*Tucker v. Tennessee\*](#), #06-6208, 539 F.3d 526 (6th Cir. 2008) (addressing a Title II reasonable accommodation claim in which the plaintiffs asserted that police officers “discriminated against them in violation of the ADA by failing to provide a qualified sign language interpreter or other such reasonable accommodation(s) during the domestic disturbance call that resulted in their arrest”).

The Ninth Circuit believes that Title II of the ADA applies to arrests, as well as broadly to police “services, programs, or activities.” It has interpreted these terms to encompass “anything a public entity does.” [\*Barden v. City of Sacramento\*](#), # 01-15744, 292 F.3d 1073 (9th Cir. 2002) (a case involving mobility barriers rather than arrests). The Ninth Circuit, with the Eleventh and Fourth Circuits, reasoned that exigent circumstances inform the reasonableness analysis under the ADA, just as they inform the distinct reasonableness analysis under the Fourth Amendment.

Courts have recognized at least two types of Title II claims applicable to arrests:

- (1) **wrongful arrest**, where police wrongly arrest someone with a disability because they misperceive the effects of that disability as criminal activity; and
- (2) **reasonable accommodation**, where, although police properly investigate and arrest a person with a disability for a crime unrelated to that disability, they fail to reasonably accommodate the person’s disability in the course of investigation or arrest, causing the person to suffer greater injury or indignity in that process than other arrestees.

In the discussion which follows in Part Two of this article, the main focus will be on the second type of such claims.



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## **AELE Monthly Law Journal**

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