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Public Safety Employees and Disability Discrimination in Employment under the ADA: An Introduction and Overview

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❖ Specific Disabilities

Those protected by the ADA against employment discrimination have a wide variety of physical and mental impairments. Many fact-specific inquiries come up in the context of determining what is a protected disability, determining whether an individual is "otherwise" qualified to perform the "essential" functions of their job, and what constitutes a reasonable accommodation for an otherwise qualified person with that disability. In this third part of the article, we take a look at two specific conditions that have given rise to many ADA claims: diabetes and obesity.

-Diabetes

According to the American Diabetes Association, as of 2015, 30.3 million people in the U.S., or 9.4% of the population, had diabetes. Approximately 1.25 million have type 1 diabetes and are insulin dependent. The rest, with type 2 diabetes, may in many instances treat the disease with a combination of oral medication, diet, and exercise, but many also use various forms of insulin or other injected medication. Of the 30.3 million adults with diabetes, 23.1 million were diagnosed, and 7.2 million were undiagnosed.

At one time, it was a very common practice for employers, including many involved in law enforcement, corrections, and firefighting to completely bar all persons with diabetes from certain jobs or classes of employment solely because of the diagnosis of diabetes or the use of insulin, without regard to a person's abilities or circumstances. "Blanket bans" have been increasingly viewed as medically inappropriate and as ignoring the advancements in diabetes management that include the types of medications used and the tools used to administer them and to monitor blood glucose levels.

A number of court decisions, both by federal courts interpreting the ADA and state courts interpreting state law disability discrimination statutes, have mandated, rather than blanket bans, individual case-by-case screening and assessment of the ability of the person with diabetes to perform the essential functions of the job, and to assess any risk that the person may pose on the job to the safety of co-workers and members of the public.

Screening guidelines for evaluating individuals with diabetes in a variety of high risk jobs have been developed. These include the American College of Occupational and Environmental Medicine's National Consensus Guideline for the Medical Evaluation of Law Enforcement Officers, and the National Fire Protection Association's Standard on Comprehensive Occupational Medical Program for Fire Departments. ***Any such guidelines or protocols are not absolute criteria for employee suitability, but instead the framework for a thorough individualized assessment.***

Courts have looked very closely at public safety agencies' employment practices when it comes to employees with diabetes.

The U.S. Department of Justice pursued a complaint that the Illinois State Police was engaged in a pattern or practice of discrimination in maintaining a policy automatically excluding applicants for cadet job vacancies if they have either a hearing loss and were not permitted the use of hearing aids or other assistive devices at a medical screening, or diabetes mellitus which is controlled by the use of an insulin pump. The government took the position that these job qualifications were not shown to be job related and consistent with business necessity for the job of state trooper. In a settlement, the State Police, without agreeing that its policy constituted disability discrimination, agreed to drop the automatic exclusion of candidates with diabetes or hearing loss. It agreed to individually assess such applicants for eligibility for hiring. *Settlement agreement between the United States Government and Illinois State Police* (Nov. 30, 2011).

In *Coleman-Lee v. Government of D.C.*, #13-7123, 788 F.3d 296 (D.C. Cir. 2015), a D.C. correctional officer was fired for neglect of duty after falling asleep on the job. He sued his employer for disability discrimination, claiming that his disability of diabetes had not been reasonably accommodated. A jury returned a verdict for the defendant, finding that the plaintiff was not disabled within the meaning of the Americans with Disabilities Act.

Upholding this result, a federal appeals court noted that there had been evidence presented at trial that the plaintiff could control his diabetes by simply eating three meals a day plus snacks, along with taking his medication. There was also sufficient evidence to support a finding that the plaintiff was allowed to eat his regular meals and snacks, and therefore a conclusion that he did not have a disability for ADA purposes.

In *Branham v. Snow*, #03-3599, 392 F.3d 896, 16 AD Cases(BNA) 454 (7th Cir. 2004), a federal appeals court reinstated a suit brought by a Type I insulin-dependent diabetic who was denied employment as a criminal investigator. The applicant raised a genuine issue, the court found, as to whether he could perform the essential functions of the position without becoming a threat to the safety of himself or others. On the other hand, in *Siefken v. Vill. of Arlington Hts.*, #04-3408, 65 F.3d 664, 4 AD Cases (BNA) 1441 (7th Cir. 1995), a federal court upheld the termination of a diabetic police officer who suffered a hypoglycemic reaction. This occurred while he was on duty; worse yet, he had just entered his squad car. He erratically drove his

squad car at high speed through residential areas some forty miles outside his jurisdiction. He stopped only when pulled over by police officers. He remembers nothing of his trip. The potential for harm was enormous.

After the Mississippi Highway Patrol lost a motion to dismiss a Department of Justice lawsuit, filed on behalf of a cadet with diabetes who was fired, the agency agreed to pay damages and change its policies of accommodation. The suit alleged that the Patrol refused to allow a recruit a reasonable accommodation for his diabetes, and unlawfully terminated him due to that disability. The cadet made several requests for additional food at more frequent intervals in order to control his diabetes, in light of the strenuous exercise. His requests were denied and he suffered hypoglycemia, causing him to be confused and unable to report to training.

The Highway Patrol dismissed him from the academy. A federal court refused to grant a defense motion for summary judgment. Two months later, the state agreed to pay the ex-cadet $35,000 in damages. The Patrol also agreed to implement a reasonable accommodation policy, to educate its training officers on the policy and how to recognize diabetes and other disabilities. *U.S.A. v. Miss. Dept. of Pub. Safety*, #3:00-CV-377, 309 F. Supp. 2d 837, 15 AD Cases (BNA) 672 (S.D. Miss. 2004); settlement announced, DoJ Press Release CR-04-196.

-Obesity

Extreme obesity only qualifies as a disability under the ADA if it is caused by an underlying physiological disorder or condition. In *Richardson v. Chicago Transit Authority*, #18-2199, 926 F.3d 881 (7th Cir. 2019), a city bus driver weighed 350 pounds when he began his job, and a little over four years later weighed 566 pounds. Beside obesity, he suffered from hypertension and sleep apnea. He was absent from work on account of the flu, but the employer's medical provider stated that he could not return to work until his blood pressure was more under control. The employer transferred him to temporary medical disability.

When he was deemed physically fit to work, he had to be cleared for safety because the bus seats were not designed for drivers weighing over 400 pounds. Instructors conducting an assessment observed that he had his foot on the gas and brake at the same time, was unable to make hand-over-hand turns, that his leg rested close to the door handle, that he could not see the floor from his seat, that part of his body hung

off his seat, and that the seat deflated when he sat. He was also sweating heavily, needed to lean onto the bus for balance, and had a "hygiene problem." The employer proposed returning him to disability to work with doctors to lose weight if he would release his ability to bring various claims.

After he refused, he was fired, and sued for disability discrimination under the Americans with Disabilities Act (ADA), 42 U.S.C. 12101-12213. A federal appeals court upheld a judgment for the employer. Extreme obesity, the court ruled, only qualifies as a disability under the ADA if it is caused by an underlying physiological disorder or condition, but the plaintiff offered no such evidence of the cause of his obesity.

Similarly, in *EEOC v. Watkins*, #05-3218, 463 F.3d 436, 18 AD Cases (BNA) 641 (6th Cir. 2006), the EEOC failed to prove that an employee's morbid obesity (body weight more than 100% over the norm) was the result of a physiological condition; a physical characteristic must relate to a physiological disorder in order to qualify as an ADA impairment.

Being morbidly obese, of course, will not excuse employee misconduct. In *Valtierra v. Medtronic Inc.*, #17-15282, 2019 U.S. App. Lexis 24738, 2019 WL 3917531 (9th Cir.), an employee claimed that he had been fired based on a disability of morbid obesity, weighing 370 pounds. The trial court found that, whether or not he had been, morbid obesity was not a physical impairment under the relevant EEOC regulations and interpretive guidance. Upholding this result, a federal appeals court determined that it was unnecessary to decide whether morbid obesity itself was an impairment under the Americans with Disabilities Act (ADA), and affirmed the judgment for the employer on alternative grounds.

Even assuming that morbid obesity was impairment, or that the plaintiff suffered from a disabling knee condition that the trial court could have considered, he would have to show some causal relationship between these impairments and his firing. There was no basis in the record for concluding that he was terminated for any reason other than the stated ground that he falsified records to show he had completed work assignments that had not been finished. He could not show that he had been singled out for firing because of his extreme weight as there was no evidence that other employees had been accused of similar misconduct. While the case involved a private employer, the reasoning would also apply to a public

employee. Failing to do your work, and lying about it, is an adequate ground for termination.

While this article is focused on federal case law, it is worth noting that state courts that have considered the issue have largely arrived at a similar analysis of obesity as a disability. In *Cassista v. Community Foods, Inc.*, #SO28230, 5 Cal.4th 1050, 856 P.2d 1143, 22 Cal. Rptr.2d 287, 2 AD Cases (BNA) 1188 (Cal. 1993), for instance, the California Supreme Court recognized obesity as a handicap under state law only when the condition is caused by a "physiological disorder affecting one or more bodily systems."

In *Wilkerson v. Shinseki*, #09-8027, 606 F.3d 1256, 109 FEP Cases (BNA) 660, 23 A.D. Cases (BNA) 321 (10th Cir. 2010), a federal appeals court rejected a discrimination claim brought by a 338 lb. 6'3" federal worker. "Plaintiff was not discriminated against because of his weight. He simply failed to meet the minimum physical requirements of the position. ... The job requires an operator who might be able at all times to respond to an emergency with some degree of physical agility."

Plaintiffs in a disability discrimination lawsuit based on obesity, in order to recover damages, must show an objective adverse employment action, not just subjective embarrassment. In *Bunyon v. Henderson*, #01-242, 206 F. Supp. 2d 28 (D.D.C. 2002), a police officer for the Postal Service who weighed 410 pounds was ordered to undergo a Fitness for Duty examination. Management was concerned that the officer could not perform all of his duties because of his weight.

The officer was found fit for duty and returned to work. He then sued, claiming that he was humiliated and embarrassed by having to subject himself to the exam and that other employees who are not African-American were not sent for a FFDE. He alleged race discrimination, disability discrimination, a hostile work environment and unlawful retaliation.

The judge noted that "all four of plaintiff's claims require some showing that defendant took some action against him that was significant enough" to support a prima facie claim. Moreover, "the harm suffered may not be subjective, but must constitute an objectively tangible harm." The court specifically rejected the officer's claim that "the mere threat of disciplinary action constitutes an adverse employment action." The judge also dismissed as insignificant, a shouting incident with a superior, because no disciplinary action was taken.

❖ Remedies

The remedies available for employment discrimination under the ADA can include both money damages and equitable relief such as reinstatement, back or front pay, lost benefits, promotion, reasonable accommodation, and injunctive relief requiring the employer to stop any discriminatory practices and take steps to prevent discrimination in the future. The successful plaintiff employee or applicant also may be able to recover attorneys' fees, expert witness fees, and court costs.

Eleventh Amendment sovereign immunity may bar some lawsuits for damages under the ADA against states and their agencies, see *Board of Trustees of the University of Alabama v. Garrett*, #99-1240, 531 U.S. 356 (2001), but in *McCarthy v. Hawkins*, #03-50608, 381 F.3d 407 (5th Cir. 2004), a federal court ruled that state officials are not immune under the Eleventh Amendment from ADA litigation seeking only prospective (injunctive) relief. Additionally, some states or state agencies may have waived Eleventh Amendment immunity either explicitly or by accepting federal funds while participating in a variety of federal programs, some of which may impose such waivers as an explicit or implicit condition of participation.

❖ Resources

The following are some useful resources related to the subject of this article.

- Americans with Disabilities Act. Wikipedia article.
- Americans with Disabilities Act. U.S. Department of Labor.
- ADA Amendments Act of 2008. Wikipedia article.
- The Americans with Disabilities Act Amendments Act of 2008. EEOC.
- ADA Federal Regulations
- ADA.gov. Information and Technical Assistance on the ADA. U.S. Department of Justice.
- The ADA National Network Disability Law Handbook by Jacquie Brennan.
- ADA Resource Guide. National Center on State Courts.

- Disability Discrimination. EEOC.
- Handicap/ Abilities Discrimination. AELE Employment Case Summaries.
- Institute on Employment and Disability. Cornell University.
- Law Enforcement Officers and Diabetes Discrimination. American Diabetes Association.
- Your Job and Your Rights: Making Sure People with Diabetes are Treated Fairly at Work. American Diabetes Association.

❖ **Relevant Monthly Law Journal Articles**

- Analysis of the ADA as it Pertains to Medical Examinations of Police Officers Applying for Special Assignments, by Dave Corey, Ph.D., ABPP, 2007 (7) AELE Mo. L.J. 501.
- Public Safety Employees and Disability Discrimination in Employment under the ADA: An Introduction and Overview - Part 1 of 3, 2019 (8) AELE Mo. L. J. 201.
- Public Safety Employees and Disability Discrimination in Employment under the ADA: An Introduction and Overview - Part 2 of 3, 2019 (9) AELE Mo. L. J. 201.

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2. Mandatory Reassignment As a Reasonable Accommodation Under the Americans With Disabilities Act Turns "Nondiscrimination into Discrimination," by Christina M. Loguidice, 84 Brooklyn Law Review1059 (2019).
3. Analyzing Social Impairments Under Title I of the Americans with Disabilities Act, by Susan D. Carle, 50 Univ. of California, Davis Law Review 1109 (2017).

4. Accidentally on Purpose: Intent in Disability Discrimination Law, by Mark C. Weber, 56 Boston College Law Review Issue 4 1417 (2015).
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6. Employment Rights of People with Diabetes: Changing Technology and Changing Law, by John W. Griffin, Jr., 7 Journal of Diabetes Science and Technology (2): 345–349 (March 2013).
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12. Grooming and weight standards for law enforcement: the legal issues, 63 (7) FBI Law Enf. Bull. 27-32 (Jul. 1994).
13. The Duty to Accommodate: Will Title I of the Americans with Disabilities Act Emancipate Individuals with Disabilities Only to Disable Small Businesses, by Lisa A. Lavelle, 66 Notre Dame Law Review Issue 4 Article 12 1135 (1991).
14. Undue Hardship: Title I of the Americans with Disabilities Act, by Julie Brandfield, 59 Fordham Law Review Issue 1 Article 4 113 (1990).

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