

LAW ENFORCEMENT MANAGEMENT INSTITUTE

THE AMERICANS WITH DISABILITIES ACT
AS IT RELATES TO LAW ENFORCEMENT

A RESEARCH PAPER
SUBMITTED IN PARTIAL FULFILLMENT
OF THE REQUIREMENTS FOR
MODULE III

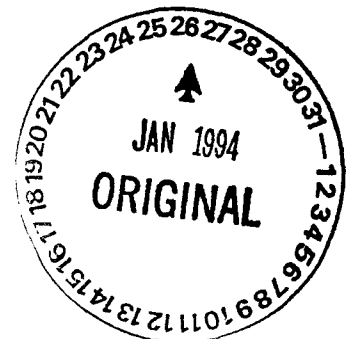
BY

NICKIE MATHISON

KAUFMAN POLICE DEPARTMENT

KAUFMAN, TEXAS

JANUARY, 1994



#139

TABLE OF CONTENTS

INTRODUCTION	1
HISTORICAL BACKGROUND	2
PROVISIONS OF THE ACT	3
DISABLED DEFINED	4
EXCLUSIONS	4
MEDICAL AND PSYCHOLOGICAL ISSUES	6
DEFENSES	9
REASONABLE ACCOMMODATIONS	12
MISCELLANEOUS PROVISIONS	13
ADA IMPACT ON PUBLIC	14
IMPACT ON POLICE AGENCY	15
FIRST LAW ENFORCEMENT RELATED CASE TRIED UNDER ADA ..	17
CONCLUSION	18
END NOTES	20
BIBLIOGRAPHY	22

THE AMERICANS WITH DISABILITIES ACT AS IT RELATES TO LAW ENFORCEMENT

INTRODUCTION

The Americans with Disabilities Act (ADA) was signed into law by President Bush on July 26, 1990. The purpose of this law was to provide qualified individuals with disabilities equal employment opportunities.¹

Employment and labor related issues of the ADA are found in Title I of the statute. Title II of the ADA prohibits discrimination under the Act by all public employers, including state and local law enforcement agencies. Federal law enforcement agencies are NOT covered under this act.²

Title III prohibits non-employment related discrimination with respect to services, facilities, and accommodations of any public place operated by a private entity. Public accommodations include restaurants, hotels, doctors' offices, pharmacies, grocery stores, shopping centers, etc. Title IV requires that telephone services offered to the public must include equal service to persons who use non-voice terminals, Telecommunication Devices for the Deaf (TDD) etc, because of a disability. Title V contains miscellaneous provisions concerning construction, the State shall not be immune from the ADA, a prohibition barring retaliation against persons who challenge discriminatory acts, and a provision concerning litigation expenses and costs.³

The effective date for all public and private employers, including law enforcement agencies, employing more than 25 employees was July 26, 1992. All employers of between 15 and 24 employees will be effected by the Act on July 26, 1994.⁴

The ADA is a lengthy and complicated piece of legislation, and may prove to be costly to law enforcement agencies who do not comply. Liability arising out of an ADA lawsuit could result in monetary damages, attorneys fees and costs, to a law enforcement agency found to be in violation of the Act.⁵ The major source for information and technical assistance is provided by the National Institute on Disability and Rehabilitation Research (NIDRR).

It is my desire to combine the research into an easy to read paper which would allow the law enforcement community to avoid the liability of not conforming to the Act. This paper will be written from the law enforcement point of view concerning ADA, found in Title I and Title II.

HISTORICAL BACKGROUND

In the early 1970s there were meetings in New York City between writers, producers, and disabled people.⁶ The handicapped, as they were called, thought they could get their cause before the people using the press. At the same time Britain, Japan, and Ireland were being pressured by the disabled for recognition. On December 9, 1975, the United Nations General

Assembly passed Resolution 3447 "Declaration on the Rights of Disabled Persons."⁷

By 1977, the cities of Seattle, Washington, and Berkeley, California had made buses accessible to wheelchair users. In a letter dated July 6, 1977, three American bus manufacturers, ROHR Industries of Washington, DC, General Motors, and AM General Corporation in Michigan, said that all buses built by them after September, 1979 should be accessible to the handicapped.

During the 1970s and 1980s the labor unions became involved with the cause of accessibility for the disabled. The unions believed that by supporting the disabled it would insure their members more employment in the building of equipment for the handicapped. This lip service helped to bring the needs of disabled persons to the attention of the politician.⁸ Vice President George Bush heard the cry for help from the disabled, and when he became President of the United States, the ADA was made a top priority in the White House. In July, 1990 the ADA became a law.

PROVISIONS OF THE ACT

The ADA prohibits employers from discriminating against qualified individuals with a disability, regarding the job application process, hiring, advancement or discharge of employees, employee compensation, job training, conditions of and privilege of employment.⁹ The ADA also prohibits an

employer from asking medical and disability questions or from conducting a medical examination before giving a conditional offer of employment.¹⁰

For a person to be protected by the ADA, he or she must be disabled and qualified to do the job, with or without reasonable accommodations. The ADA does not automatically require that disabled persons be hired but that they are given an equal employment opportunity.¹¹

DISABLED DEFINED

A person is defined as disabled by the ADA if the 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. A person is disabled that has any physiological disorder, condition, disfigurement, anatomical loss, or mental or psychological disorder that makes the individual unable to perform such functions as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, or working to the same extent as an average person.

EXCLUSIONS

There are also certain conditions that the ADA expressly excludes from protection. These include current illegal drug use, homosexuality, bisexuality, transvestism, exhibitionism, gender identity disorder, sexual behavior disorder,

compulsive gambling, kleptomania, pyromania, and psychoactive substance use disorders resulting from current illegal use of drugs.¹²

While current illegal drug users are not protected by ADA, persons who have successfully completed a supervised drug rehabilitation program and are no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in illegal use of drugs, are protected by the ADA. Or if the person is participating in a supervised rehabilitation program and is no longer engaging in the use of illegal drugs, that person is also protected by the ADA.¹³

For example, amphetamines can be legally prescribed by a physician. If a person takes amphetamines with a prescription he is a legal drug user. Amphetamines, by law, are a "controlled substance," so if a person takes amphetamines with out a prescription, he is an illegal drug user and not covered by the ADA.

If a person has completed a supervised rehabilitation program, or is participating in a program and is on a methadone maintenance treatment program, he cannot be discriminated against by an employer based upon the use of methadone. If a person has a disability, such as epilepsy, and is also an illegal drug user, he can not be discriminated against because of his epilepsy, but an employer may discharge for the illegal drug use.

Not only must a person be disabled, the person must also be qualified to perform the work required, with or without reasonable accommodation.¹⁴

Reasonable accommodation can be briefly defined as the employer making adjustments to the workplace or to the conditions of employment so that a disabled person, who is otherwise qualified for the position, is able to do the work that the position requires.¹⁵ A law enforcement administrator's judgment as to what functions are essential to a job should be decided in the written job description. This description should also include the amount of time present and past employees take to perform a certain task during the work day. Special skills, talents, or abilities to perform the job's essential functions, should be isolated so that informed judgments can be made as to the capability of a disabled applicant or employee. This job description is then used in the hiring process as evidence of a position's essential functions.¹⁶ For example, dispatchers or communication officers used to have to climb up on a four foot step ladder to retrieve arrest jackets from the filing shelf. Arrest files are now kept on a computer and there is no reason for them to have a step ladder, therefore, climbing a four foot step ladder should be removed from the job function.

MEDICAL AND PSYCHOLOGICAL ISSUES

The ADA contains specific prohibitions and requirements concerning medical examinations and inquiries about disabilities. An employer can require a medical examination or ask about the severity of a disability, after an offer of employment has been made to a job applicant.¹⁷ The employer can condition

an offer of employment on the results of the medical examination, but the employer must meet three additional restrictions 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 be treated as a confidential medical record;
- 3) the results of the examination may be used only in accordance with the act.¹⁸

The ADA limitations on medical examinations will make significant changes in the law enforcement selection process. The law enforcement agencies that require medical examination early in the application process will have to stage it later, after they have determined that an applicant is eligible, and after making a conditional offer of employment.¹⁹

Law enforcement administrators will have to make sure that the medical standards tested are related to the essential functions of the job. This will provide justification in case the offer of employment is withdrawn based upon the results of the medical exam.²⁰

Psychological testing, which is required by Texas law, will have to be postponed until after a conditional offer of employment. The ADA does not

ban the use of psychological testing, but defines a disability to include a mental disorder or impairment that substantially limits a major life activity.

Application forms which ask for medical information about disabilities will have to be changed to meet ADA standards. No medical history questions may be asked. Interviewers of law enforcement applicants should be required to know that the ADA prohibits them from asking medical or disability questions during the interview.²¹ While conducting a background investigation, the interviewer can not ask medical or disability questions unless an offer of employment has been made.

Law enforcement agencies should rethink and restructure the physical agility test. The tests which measure 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 inconsistent with a business necessity.

The ADA permits employers to ask job related questions, but the questions should not be phrased in terms of the disability. For example, a police applicant could be asked about his or her ability to drive a car or run a given distance within an established time as a job related function. The applicant should not be asked if there is any reason why he or she could not drive a car or run, because this is a violation of the ADA.²²

An employer is permitted to require fitness for duty examinations of current employees if required by State law or if it is related to an essential job function. But an employer cannot require a fitness for duty examination if the

employee's condition is not related to job performance.²³ For example, the Chief of Police cannot make a requirement that every employee must be tested every six months, and that they must run two miles in 15 minutes to pass the test. The jobs of dispatcher, parking control personnel, and desk officer do not relate to running, therefore, this requirement is not job related and this requirement could be challenged under ADA by a disabled employee.

It is permissible to conduct voluntary medical examinations and collect voluntary medical histories as a part of an employee health or wellness program available to all employees at the work site. 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.²⁴

The ADA specifically exempts drug testing. It does not appear that Congress intended to discourage drug testing by employers, therefore those employers that choose to test for drug use are not constrained by the ADA.²⁵

DEFENSES

The ADA was designed to ensure that qualified disabled persons were given the same consideration for employment as non-disabled persons. It also provides three defenses which an employer can use when he is 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;
- 3) the employer is unable to reasonably accommodate the disability of the individual.²⁶

Law enforcement administrators must conduct an analysis of jobs and tasks for the purpose of identifying the essential functions of each position. They then must devise standards and criteria that accurately reflect and measure those elements as job related and consistent with business necessity. If done properly, an administrator could make a decision to hire or not to hire, even if it adversely affected a disabled person. The job relatedness and consistency with business necessity must be shown if the exclusionary criteria of a medical examination screens out a disabled person.²⁷ To show this, the job description will ultimately show that the disabled person can not meet the demands of the job. The job description may also be used to determine the appropriateness of a withdrawal of an offer of employment based upon the results of a medical or psychological examination.

Employers can lawfully refuse to hire a disabled person where he or she, if hired, would pose a direct threat to the health or safety of the person or

others in the work place.²⁸ 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."²⁹

For example, a fully certified peace officer with epilepsy, who has lost consciousness during seizures within the past year, might seriously endanger his or her own life and the lives of others, if employed as a patrolman. This person, however, would not pose a severe threat of harm if hired as a records clerk.

An employer should make this determination on a case by case basis and use sound medical knowledge and objectives. Generalized fears, remote possibilities, and slightly enhanced threats to safety or health are insufficient reasons for denying employment to qualified disabled persons.³⁰

The third defense a law enforcement administrator may have available to him is an inability to reasonably accommodate the disability of an employee or applicant. The term "reasonable accommodations," means 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.³¹

While the duty to accommodate the disability of an employee or applicant is reasonably clear, the degree to which an employer is required to

alter the conditions of the workplace is less clear. Some of the expressed requirements of reasonable accommodation include:

- 1) making existing facilities readily accessible to and usable by disabled individuals,
- 2) job restructuring and part-time or modified work schedules for the disabled,
- 3) reassignment to a vacant position,
- 4) acquisition and modification of equipment,
- 5) modification of examinations, training and policies,
- 6) provision of qualified readers or interpreters.³²

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. 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. The employer is not required to create a new job that the disabled person can perform.³³

REASONABLE ACCOMMODATIONS

An employer is not required to provide reasonable accommodations to an employee or applicant if it would create an undue hardship on the operation

of the employer's business.³⁴ The ADA lists the following factors that should be considered in determining whether a particular act or modification would create an undue hardship:

- the nature and cost of the accommodation
- the overall financial resources of the employer
- the particular facility where the accommodation is needed
- the number of persons employed at such facilities and by the employer in general
- the impact of the accommodation upon the operation of the facility.³⁵

MISCELLANEOUS PROVISIONS

Employees with disabilities must be provided with equal opportunities to participate in training to improve job performance and advancement. Training cannot be denied because of the need to make reasonable accommodations, unless these accommodations would be an undue hardship for the employer.

An employee with a disability cannot be paid at a lower rate of pay, because of the elimination of a job function. For example, the position requires the person to climb a step ladder, which for some reason this person can't do, so climbing the ladder is assigned to other employees. Additionally, the

employer cannot decrease the pay of an employee because equipment had to be modified or special equipment was needed for that employee.

Employees with disabilities must have equal opportunity to attend any social function conducted or sponsored by the employer. Functions such as parties, picnics, and award ceremonies should be held in locations that are accessible to the disabled employee. In addition, the employer may be required to make whatever other accommodations are necessary and reasonable.

ADA IMPACT ON PUBLIC

The 1990 United States census revealed that there were approximately 250 million Americans living in the United States. Of this number, 43 million Americans had one or more physical or mental disabilities. This means that one out of six Americans has a disability. As the population ages, the number of disabled people will increase.³⁶

Society has tended to isolate and segregate individuals with disabilities, and despite some improvement, discrimination continues to be a problem. Discrimination in employment, housing, public accommodations, education, transportation, communication, recreation, health services, and access to public services still exist in many places.

Unlike people who have experienced discrimination based on race, color, sex or religion, individuals who have experienced discrimination based on

disability have often had no legal recourse. The ADA provides a clear national mandate for the elimination of discrimination against people with disabilities.³⁷

A Louis Harris poll has indicated that two-thirds of all disabled Americans between the ages of sixteen and sixty-four are not working. A large majority of those not working say that they want to work. Sixty-six percent of working age disabled people, who are not working, say that they would like to have a job. This means that about 8.2 million people with disabilities want to work but cannot find a job.³⁸ These people are being supported by the American taxpayer through social welfare programs. The ADA intended not only to end discrimination against individuals with disabilities but also to bring them into the economic and social mainstream of American life.³⁹

IMPACT ON POLICE AGENCY

Law enforcement administrators will have to take a good look at the personnel policies and hiring practice of their departments. Every position should be analyzed to determine the essential functions of each job within the department.

The department's application forms will have to be reprinted if there are medical or disability questions on them. Psychological and medical examinations will have to come after a conditional offer of employment. If the offer of employment is withdrawn due to the results of the medical or psychological examination, the department would have to show that it was job

related and consistent with business necessity. For example, a law enforcement agency might be able to refuse to hire an individual with a history of illegal drug use as a police officer, because his past conduct would undermine the credibility of the officer as a witness for the prosecution in a criminal case.

Physical agility tests need to be reexamined to make sure they are job related and consistent with business necessity, in case an otherwise qualified applicant or employee is screened out by the test. The employer will have to show that the test is job related and consistent with business necessity and can not be performed with reasonable accommodations.

Advancement or transfers within the department could fall under the ADA. For instance, a patrol officer breaks his leg, it heals, and he returns to work. There is an opening for a sharp shooter and a hostage negotiator on the SWAT team. The officer can run, climb, and crawl. In addition he has also attended a two week hostage negotiation school. The officer can not run the given distance in a given time to qualify for the SWAT team. If the officer applies for either or both positions and is denied because he can not run fast enough, he would be covered by the ADA.

Law enforcement buildings may have to be renovated to provide accessibility to disabled citizens, applicants and employees. Installing a ramp at the front door, removing raised thresholds, or rearranging office furniture and equipment may be needed to make the job site more accessible to the disabled.

FIRST LAW ENFORCEMENT RELATED CASE TRIED UNDER ADA

The first law enforcement related case filed under the ADA was brought by the Equal Employment Opportunity Commission (EEOC) against a Chicago firm, AIC Security Investigations Ltd. A jury awarded \$572,000 to the former director of the firm.

Executive Director Charles Wessel was fired from his job by AIC Security after being diagnosed as having terminal brain cancer. The EEOC alleged that Mr. Wessel was discharged because of company predictions of future health problems, not because of his inability to do his job.

The EEOC filed suit against AIC Security in November, 1992, and the trial began in March of 1993. The jury awarded Mr. Wessel \$572,000 even though the ADA cap is \$300,000. The award was broken down as follows:

- 1) \$500,000 in punitive damages,
- 2) \$50,000 in compensatory damages,
- 3) \$22,000 in back pay.

The jury was able to award \$500,000 in punitive damages, which is \$200,000 over the \$300,000 cap limited by the ADA, was by assessing separate awards of \$250,000 against the owner of the company, and against the employment agency used by the owner. This case illustrates that the \$300,000 cap should not be taken lightly.⁴⁰

CONCLUSION

The Americans with Disabilities Act is intended to provide employment and equal access opportunities for those that are disabled. All employers of more than 15 employees are required to conform with the provisions of that law. This includes virtually all municipal, county and state police agencies. Title I and Title II of the ADA concerns employment issues of the disabled. The purpose of this paper was to explain these issues as they relate to law enforcement and to give some guidelines for compliance.

The ADA is a complex piece of legislation and will be changed by the legislature and courts. The effectiveness of the ADA will be determined by the courts and the decisions that are handed down in the many lawsuits that are anticipated as a result of this legislation. Police departments must become familiar with the act and remain abreast of changes. Additionally, the agencies must begin to conform to the law in order to avoid liability. To do this will require diligent effort on the part of police managers. They must carefully read their application forms for the various positions to make sure the application conforms to the act and reprint the application if necessary. Police managers must continue to analyze and evaluate their personnel to determine the essential functions of each position in the department. They should also determine whether changes in the workplace or conditions of employment or other reasonable accommodation could be made to permit an otherwise qualified disabled person to perform the job. Additionally, police managers

must keep abreast of changes concerning the ADA, as cases alleging violations of the ADA are ruled upon by the courts.

END NOTES

1. Joseph E. Scuro, Jr., "The Americans With Disabilities Act" Texas Police Journal, June 1992, 10.
2. Ibid., 10-11
3. David A. Snyder, The Americans With Disabilities Act, (Portland, Oregon: The Labor Relations Information System, 1991).
4. Scuro, The Americans With Disabilities Act, 11.
5. Ibid.,
6. Peter Moore, Rebel On Wheels(Dublin, Ireland: Poolbeg Press, 1990).
7. Ibid., 109.
8. Ibid., 119-129.
9. 42 U.S.C. sec. 12112(a) (1990)
10. 42 U.S.C. sec. 12112(c) (1990)
11. Jeffrey Higginbotham, "The Americans with Disabilities Act," FBI Law Enforcement Bulletin, August 1991, 25-26.
12. 42 U.S.C. sec. 12208-12211 (1990)
13. 42 U.S.C. sec. 12210 (1990)
14. 42 U.S.C. sec. 12111 (1990)
15. Ibid.
16. Higginbotham, 1991, 27.
17. 42 U.S.C. sec. 12112 (1990)
18. Ibid.
19. Higginbotham, 1991, 28.
20. Ibid.

21. Ibid.
22. 42 U.S.C. sec. 12112
23. Ibid.
24. 42 U.S.C. sec. 12112
25. 42 U.S.C. sec. 12114 (1990)
26. 42 U.S.C. sec. 12113 (1990)
27. Higginbotham, 1991, 29.
28. 42 U.S.C. sec. 12113
29. 42 U.S.C sec. 12111
30. Higginbotham, 1991, 29.
31. 42 U.S.C. sec. 12111
32. U.S.C. sec. 12111
33. Higginbotham, 1991, 30.
34. 42 U.S.C. sec. 12112
35. 42 U.S.C. sec. 12111
36. Snyder, 1991, 11.
37. Snyder, 1991, 387-388.
38. Ibid., 11.
39. Ibid., 14.
40. "Update on the ADA," Employment Law Update, April 1993, 4.

BIBLIOGRAPHY

ARTICLES

- Boller, Harvey R., and Douglas Massengill. "Public Employers' Obligation to Reasonably Accommodate the Disabled Under the Rehabilitation and Americans with Disabilities Act." Public Personnel Management, Fall 1992, 273-300.
- Cordes, Renee. "Disabilities Act Already Spurring Corrective Results." Trial, June 1992, 94-95.
- Esposito, Michael D. "How is Your Company Complying with the ADA?" Management Accounting, November 1992, 30-32.
- Ferrera, Anna Pulido. "Information Access, ADA, Addressed at Policy Meeting." Nation's Cities Weekly, 22 June 1992, 4.
- Goldman, Charles D. "Learning to Comply with the Americans with Disabilities Act." Nation's Cities Weekly, 27 April 1992, 5.
- Goldman, Charles D. "Handicapped Parking Enforcement can fund ADA Compliance." Nation's Cities Weekly, 1 June 1992, 5.
- Goldman, Charles D. "Legal Issues: Employment Basics and the ADA." Nation's Cities Weekly, 29 June 1992, 4, 10.
- Goldman, Charles D. "ADA Compliance: Minimizing Employment Litigation." Nation's Cities Weekly, 3 August 1992, 5.
- Heylman, Paul Monroe, Robert L. Duston, and Scott Robins. "Employee Benefits and ADA: Nondiscrimination or Mandated Benefits?" Benefits Quarterly, Fourth Quarter 1992, 50-65.
- Higginbotham, Jeffrey D. "The Americans With Disabilities Act." FBI Law Enforcement Bulletin, August 1991, 25-32.
- Meng, G. Jonathan. "ADA May Force Employers to Rewrite Job Descriptions." Personnel, August 1991, 15.

Peteros, Karen H. "Countdown to July 1992: Nine Steps Toward ADA Compliance." Human Resources Professional, Winter 1992, 8-11.

Reddock, Angela. "Paying for ADA is Chief Issue for Municipalities." Nation's Cities Weekly, 27 July 1992, 9.

Scuro, Joseph E. Jr. "The Americans With Disabilities Act." Texas Police Journal, June 1992, 10-14.

"Update on the ADA." Employment Law Update, April 1993, 4.

Weintraub, Richard M. "How ADA Affects the Workplace." Sheriff, March-April 1992.

BOOKS

Moore, Peter. Rebel On Wheels. Dublin, Ireland: Poolbeg Press, 1990.

Snyder, David A. The Americans With Disabilities Act. Portland, OR: The Labor Relations Information System, 1991.

Texas Governor's Committee on People with Disabilities. The Americans with Disabilities Act: How is Texas doing? Austin, TX: The Committee, 1993.

U. S. Equal Employment Opportunity Commission. The Americans with Disabilities Act : questions and answer. Washington, DC: U. S. Dept. of Justice, Civil Rights Division, 1992.

Wehman, Paul, ed. The Ada mandate for social change. Baltimore, Md: P. H. Brookes Publishing Co., 1993.

STATUTES AND CODES

"The Americans With Disabilities Act" 42 U.S.C. 12101 (1990).

MANUALS

"Americans with Disabilities Act Handbook." EEOC, 1992.

"The Americans with Disabilities Act Title II Technical Assistance Manual." EEOC, 1992.

"A Technical Assistance Manual on the Employment Provisions (Title I) of the ADA." EEOC, 1992.